

EASEMENTS ACQUIRED BY USE OF PROPERTY

Someone can acquire an easement over another's land for a particular purpose if he uses the land hostilely, openly, and continuously for a set period of time. These terms are explained in "Requirements for Obtaining Land by Adverse Possession," above. The length of use required varies from state to state and is often the same--ten or twenty years--as that for adverse possession (acquiring ownership of land by occupying it). An easement acquired in this way is called a "prescriptive easement."

COMPARING PRESCRIPTIVE EASEMENTS AND ADVERSE POSSESSION

Depending on the circumstances and on state law, someone who uses another's property may eventually gain ownership of the property (by adverse possession) or gain the right to use part of the property for a particular purpose (prescriptive easement).

To gain ownership of someone else's land, a trespasser must occupy it hostilely, openly, exclusively and continuously for a certain period of time set by state law. Some states require that the trespasser also pay the property taxes on the land during the period.

The requirements are much the same for a prescriptive easement: For instance, if the trespasser abandons the use for several years and then goes back to it, the element of continuity is missing, and no easement will have been created. If a prescriptive easement is challenged in court, and one of the elements is missing, there is no easement.

But there are also important differences. First, payment of property taxes is never necessary for a successful prescriptive easement claim. In states that require the payment of property taxes to obtain ownership by a trespasser, courts will grant the trespasser a prescriptive easement, but not ownership, when all requirements have been met except paying the taxes.

Also, to acquire a prescriptive easement a trespasser does not need to be the only one using the land. A trespasser can gain the easement when others are also using the property--even the owner. It follows that more than one person can acquire a prescriptive easement in the same portion of land.

Example: One of the most common ways in which several neighbors gain a prescriptive easement is by using a driveway or road on another's land for many years without being challenged by the owner. This was the result in a Washington state case when neighbors treated a driveway as their own for 40 years, finally expanding it into a road. When the owner tried to reclaim the area, the court ruled in favor of the neighbors--they had established a legal right to the road by prescriptive easement.(9)

Courts sometimes appear more willing to grant a prescriptive easement than actual ownership (through adverse possession) to a trespasser. The results are far less drastic

for the owner. The easement does not take away the ownership of the property; it only requires the owner to allow the particular use of the property by somebody else.

ESTABLISHING A PRESCRIPTIVE EASEMENT

Typically, a prescriptive easement is created when someone uses land for access, such as a driveway or beach path or shortcut. But many times, a neighbor has simply begun using a part of the adjoining property. He may have farmed it or even have built on it. After the time requirement is met, the trespasser gains a legal right to use the property.

When the trespassing is done by the public, a public right to use property can be created. It is often called an "implied dedication" instead of a prescriptive easement. A public dedication is often created if an owner allows the city or county to make improvements or maintain a portion of his land.⁽¹⁰⁾ For example, the owner of beachfront property may let the county pave her private drive, which is used by many people for access to the beach. The public would then gain a right to use the drive.

When disputes over prescriptive easements find their way into court, judges vary on what kind of use of someone's property justifies creation of an easement. Some courts find that simply using a strip of land regularly for a shortcut is enough for a prescriptive easement. But some are very reluctant to grant rights on someone else's land and require the use to be substantial.

Example: In a lawsuit over a garage built partly on a neighbor's land in Indiana, a court gave the garage owner a prescriptive easement allowing him to use the three feet of garage on the neighbor's property. But it denied one for the grass and strip beside it, even though the trespasser had mowed it and treated it as his own for over forty years.⁽¹¹⁾ The building of a structure, in this case the garage, was a substantial enough use to create a prescriptive easement, but just mowing the strip of grass was not.

BLOCKING ACQUISITION OF A PRESCRIPTIVE EASEMENT

Methods of removing intruders from property are discussed above. But if you don't mind someone using part of your property, the simplest way to prevent a prescriptive easement is to grant the person permission to use the property.

Permission of the owner to use property cancels a trespasser's claim to a prescriptive easement. If your neighbor is parking his car on a small strip of your property and you give him permission to do so, he is no longer a trespasser, and he can't try to claim an easement by prescription. Giving permission to a current user also prevents neighbors who move in later from claiming they have inherited a prescriptive easement.

Sometimes, your permission can even be implied. For example, if you allow a neighbor to use your property because you are on friendly terms, your implied permission is called

"neighborly accommodation." This implied consent based on a friendly relationship is only between you and that neighbor--not anyone else, including later owners.

For example, a new owner of property in Washington, D.C. went to court and tried to claim an easement across a neighbor's yard because the former owner had been allowed to cross the property. The court ruled that he had no right to use the property because the friendship between the previous owner and the neighbor created a limited implied permission.(12)

Another court in Ohio found an implied permission from neighborly accommodation when the neighbor had used a private road for access for over 40 years. When the property was sold, the new owner had no right to the road.

Depending on implied permission, or even oral permission, however, is not a wise idea for protection in the future. You could still end up in court having to let a judge interpret your intentions.

The safest way to protect your property interest when you do give someone permission is to put the terms in writing. The sample agreement above can be used for easements. If several neighbors use a strip of your property, you should draw up an permission agreement for each one to sign.

When the public is using a private strip, you can post signs granting permission. In some states, such as California, posting these signs at every entrance and at certain intervals protects the owner from claims of a prescriptive easement.(13)

Depending on posted signs alone for protection, however, is always risky. If possible, take a further step, putting your permission for the public in writing, taking it down to the courthouse and recording it (filing a copy) in the county land records. California has a statute providing for this procedure;(14) check at your local courthouse to see it's allowed in your area. Recording it makes the permission part of the public record and available for anyone to check.

(7) *Norwood v. City of New York*, 95 Misc. 2d 55, 406 N.Y.S.2d 256 (1978).

(8) *McCann v. City of Los Angeles*, 79 Cal. 3d 112, 144 Cal. Rptr. 696 (1978).

(9) *Curtis v. Zuch*, 829 P.2d 187 (Wash. App. 1992).

(10) For examples of the public gaining a right to use private property, see *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970); *County of Los Angeles v. Berk*, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381, cert. denied, 101 S. Ct. 111, 449 U.S. 836, 66 L. Ed. 2d 43 (1980); *Brumbaugh v. Imperial County*, 134 Cal. 3d 556, 184 Cal. Rptr. 11 (1982).

(11) *McCarty v. Sheets*, 423 N.E.2d 297 (Ind. 1981).

(12) *Chaconas v. Meyers*, 465 A.2d 379 (D.C. App. 1983).

(13) *McCune v. Brandon*, 621 N.E.2d 434 (Ohio App. 1993).

(14) Cal. Civ. Code Section 813. The California statutes encourage owners of beach-front property to allow others access to the beach, without fear of claims of a prescriptive easement.

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