

Prescriptive Easements in Colorado

Legal Viewpoint

By Jeffrey Kelley, Esq.

In follow-up to last week's article on the laws of adverse possession, it seemed logical to discuss prescriptive easements - a legal cousin of adverse possession, how and why such easements are created, and how they differ from other easements. Basically, an easement is a non-possessory right to use or enter onto the property of another. Some are of record and conveyed out right to the user, and some are implied, or created over time, based on the on the conduct of the parties. The latter, creates an easement by prescription. A prescriptive easement is an easement that is earned by regular use - it is not something that is negotiated, purchased, or granted. A prescriptive easement is simply a right to use property; the user does not gain title to the land. The existence of an implied or prescriptive easement, as compared to an express easement, can surprise current or subsequent owners of property, such that a careful inspection of property should be done to determine if any potential exists for prescriptive rights to "spring up" that are not of record.

How is a Prescriptive Easement Created and Why?

To establish an implied or prescriptive easement, the Colorado Supreme has held that the prescriptive use must be acquired by open and notorious, continuous and adverse use of the land for eighteen years (as in adverse possession). To be "open and notorious", the use of the easement must be sufficiently obvious to the owner of the land, although actual knowledge by the owner is unnecessary. A 2014 Colorado Court of Appeals case held that a plaintiff's use of roads on adjacent property was "permissive" and not "adverse" because they had been given keys by the adjacent property owner to locked gates on the adjacent property. The claimant's use can be interrupted and still be "continuous," but such use must be as frequently as he desires. In another case, the question of "continuous" use arose from the use of an adjacent land owner's mountain driveway. During the prescriptive period, the property owner constructed a large dirt berm and trench across the driveway that prevented use of the "easement." A week later, the claimant removed the obstruction and continued his use. The Court held that the claimant's use was adequately interrupted by installation of the berm, holding the land owner was not required to "battle successfully for his rights," and it was sufficient to show "an overt act" to prevent the use. In short, a lawfully established prescriptive easement provides for the continued "burdened" use of property for the benefit of others. A property owner must be diligent to prevent the use of his or her property by others to avoid having an easement involuntarily imposed upon the land.

Can a Prescriptive Easement be Lost?

A prescriptive easement can be lost or extinguished under certain circumstances and the right to use such property may cease or be abandoned. When deciding whether an easement has been extinguished also "by prescription," courts must pay special attention to the element of adversity and not infer adversity from acts that merely demonstrate the land owner's control over his or her own property. A prescriptive easement may also be vacated by consent from those who have a right to use the easement. The agreement to vacate would be reduced to writing and recorded for notice to others that such easement no longer exists. Another interesting (and equi-

table) feature of a prescriptive easement is that owner of the land may still use the land burdened by the easement, so long as the owner does not interfere with the prescriptive use of the property.

As a practical matter, a claimant of a prescriptive easement would be wise to reach out to witnesses early and often and to conduct a thorough historical research of the property and its use. In general, a witnesses' memory first refreshed about the historical facts may provide more reliable and possibly favorable testimony at trial. Based on the facts and which side you are on, a prescriptive easement can either be good or bad news, something that should be considered carefully before "owning" the problem.

Do you have a legal question? Send your question to attorney Jeff Kelley (Jeff@klfpc.com). Appointments for in person legal counsel are available in both Black Hawk and Denver offices.

Note: While every effort has been made to ensure the accuracy of this information, it is not intended to provide legal advice as individual situations will differ and require full analysis by an attorney.