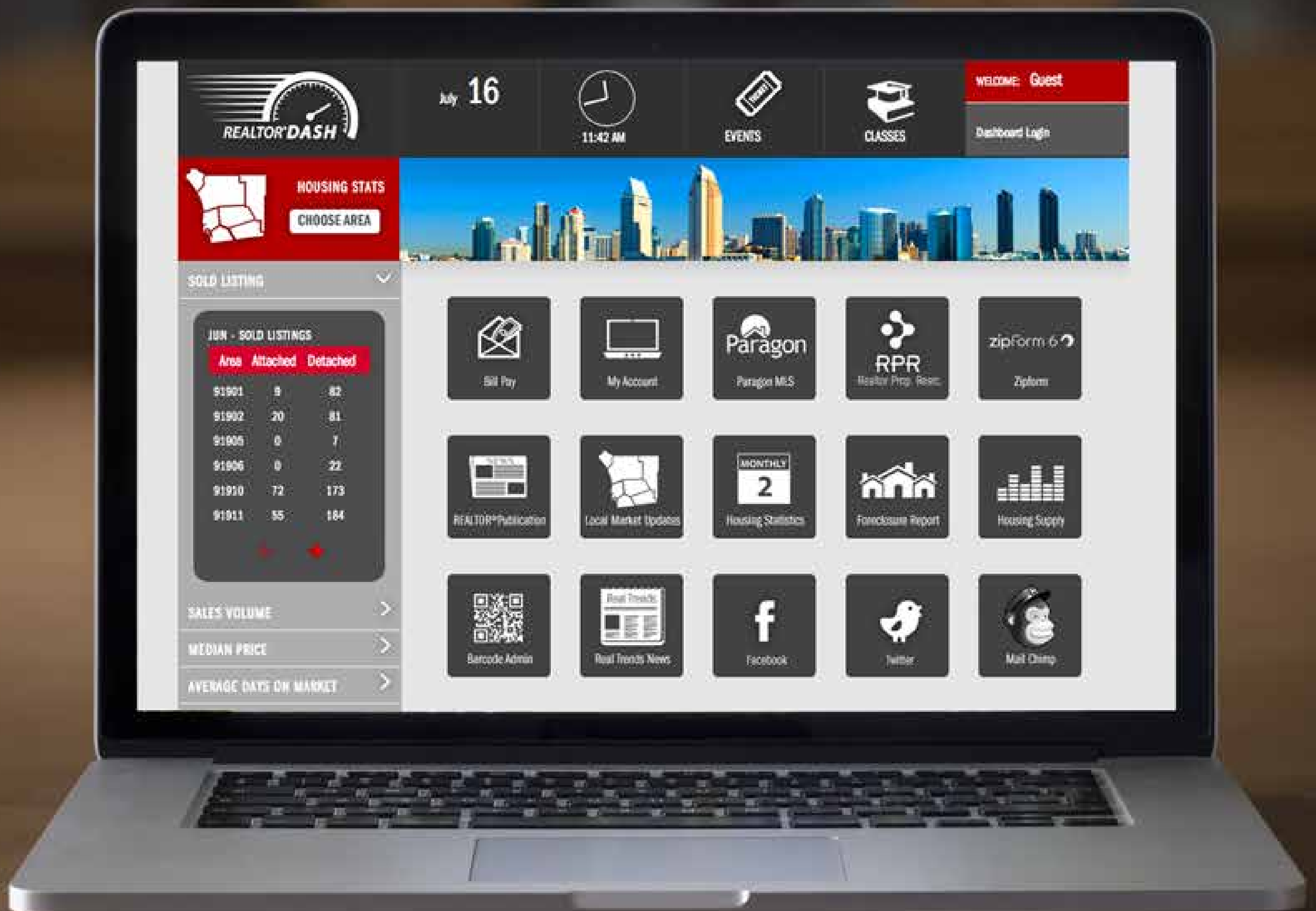
THE SAN DIEGO REALTOR®

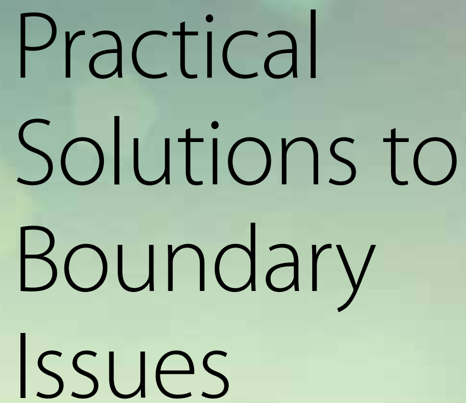
WWW.SDAR.COM

THE TRUSTED VOICE OF SAN DIEGO REAL ESTATE

Your Business Tools – Drive Them With REALTOR® Dash

FOR MORE INFORMATION GO TO PAGE 8





Practical Solutions to Boundary Issues

By Robert E. Muir

The Scenario: You represent the seller who owns a 25-year-old home. Your client tells you that the rear fence fell down seven years ago and that the adjoining property owner who moved in four years ago may be using a portion of the seller's land. When the buyer comes to look at the property, you explain to his or her agent that there is no fence in the back, but if one looks at side fences, the back boundary line can be ascertained.

What are your disclosure duties as an agent in this case? What should the seller disclose? Does the neighbor have an easement claim by using a portion of the seller's land?

WHAT DISCLOSURES SHOULD BE MADE

In this case, the seller should disclose that the neighbor may be using a portion of the seller's land. Although the Real Estate Transfer Disclosure Statement (TDS) Section C.3. asks if the seller is aware of "any encroachments, easements or similar matters that may affect your interest in the subject property," a seller may not realize that this question requires disclosing the neighbor's use of the property. A seller may think the question only asks about a recorded easement or permanent encroachment.

The C.A.R. form, Seller Property Questionnaire (SPQ), has a section on "Boundaries, Access, and Property Use by Others," which asks if the seller is aware of any "surveys, easements, encroachments or boundary disputes" and whether there is any use or access to the property by anyone other than the seller, with or without permission, for any purpose. The seller should disclose the encroachment situation here.

The SDAR form, Seller's Property Questionnaire Addendum (SPQA), which is a supplement to the SPQ, also has a section on "Boundaries, Access and Property Used by Others," asking the seller whether there are any fences, who built the fence, who maintains it, if the fence is on the property line, etc. The seller should complete this form and make a complete disclosure of this issue.

Agents should also should note in their portion of the TDS, and in the C.A.R. form, Agent Visual Inspection Disclosure (AVID), the possible use by the neighbor and that there is no fence in the rear of

CONTINUED ON 12

CONTINUED FROM 10

the yard.

If a survey of the property has been done, this should be provided to the buyer. The buyer should be urged to investigate the location of the boundary line, the neighbor's use, and obtain legal advice on whether the neighbor has an easement claim. The title company should also be informed of the situation and be asked if the company can assist in clarifying where the boundary line is. The buyer should request an American Land Title Association (ALTA) homeowner's title policy, or equivalent, which provides greater protection than the California Land Title Association (CLTA) policy. Incidentally, if parties have knowledge of a title defect, and fail to inform the title company, this will usually preclude coverage on this issue.

Should the Agent Say Where He Believes the Boundary Line Exists?

Without a survey being performed (by a licensed surveyor), no one can say where the boundary line actually is but only where it appears to exist. Agents should avoid expressing an opinion on where the boundary is, since many buyers will assume that the agent's reference to where the boundary appears to be is accurate.

Should the Agent Give His Opinion on an Easement Claim?

A prescriptive easement for the permanent use of another's land can be obtained by someone who uses property (in California), without permission, for a continuous period of five years. The use by a previous owner (claiming an easement) may be tacked on to the use of the current owner to complete the five years. Therefore, the fact that the neighbor moved in only four years earlier would not bar a prescriptive easement claim. However, the analysis is not done.

The law on prescriptive easements is complicated with many exceptions. One of these is when the buyer purchases a property with a good-faith belief that no easement exists and there is no apparent sign of such adverse usage. Some courts have also indicated that compensation is required when a party obtains a prescriptive easement, but ordinarily the easement claimant is not required to pay for the acquired easement.

Agents should avoid discussing easements in detail with your seller or buyer client, or offering an opinion, since this may be construed as giving legal advice. Until all of the facts are presented to a lawyer, the client cannot be sure of his legal rights. Also, until a party files suit with the court and obtains a judgment awarding him a permanent easement by prescription, the party only has a "claim" to an easement and not an actual easement.

OTHER POSSIBLE CLAIMS

In discussing encroachments, there are other legal doctrines that may apply. One is the "agreed upon boundary doctrine" in which there is uncertainty as to the true boundary line, and the parties accept this and act accordingly for five years, or one party detrimentally relies upon the supposed agreed upon boundary line. In this case, the court may determine the "agreed upon boundary" establishes the true boundary.

A party may also claim a permanent right to use a property by virtue of adverse possession but this requires not only the continuous use of the property for five years, without permission, but the payment of property taxes on the portion of land encroached upon. Because paying property taxes on another's parcel is unlikely, adverse possession is seldom used where only a portion of another's property is being utilized. To establish a prescriptive easement, on the other hand, the payment of property taxes is not required. In Adverse Posssession, the claimant gains "Title" to the property, vs, in the Prescriptive Easement, they are granted the "right to use".

ADJOINING FENCE OWNERS' RESPONSIBILITY

Effective January 1, 2014, California Civil Code Section 841 was rewritten to create a new law that now requires the following:

1. Adjoining landowners must share equally in the expense of erecting and maintaining boundaries and monuments between them;
2. If a landowner intends to spend money on a common fence, the owner must give the neighbor 30 days' written notice describing the problem, his intentions, the cost of construction and maintenance and the proposed solution;
3. Absent a written agreement to the contrary, the owners are presumed to be equally responsible for the costs of constructing, maintaining and replacing a common fence, but the statute identifies factors to overcome the presumption that the owners are equally responsible for such costs; and
4. A court shall determine if the presumption has been rebutted, and, if so, may order a contribution of less than half.

This statute may apply in our case, but we would need to know more facts, and a lawyer should be consulted to ensure compliance with the statute.

HOW BEST TO GRANT AN EASEMENT

When dealing with a seller who has an encroachment issue, agents should recommend that their client obtain legal advice on how best to resolve the issue. Occasionally, a seller will use a simple Quit Claim deed to grant or obtain an easement. This seemingly simple solution, however, can present a number of problems given what the deed is

CONTINUED ON 13

CONTINUED FROM 12

missing. Instead, the parties should use what I refer to as an "Easement Grant Deed and Agreement" that describes the easement area by using a legal description and drawing provided by a land surveyor; describes the type of use intended; whether the use is exclusive; the duration (usually in perpetuity); who will maintain the easement; whether one party will indemnify the other in case of injury to property or person; whether insurance is necessary, and other issues. Because a lender foreclosure on one of the properties would extinguish an easement recorded after the lender's deed of trust, the easement agreement should include a provision that a subordination agreement from the lender will be obtained.

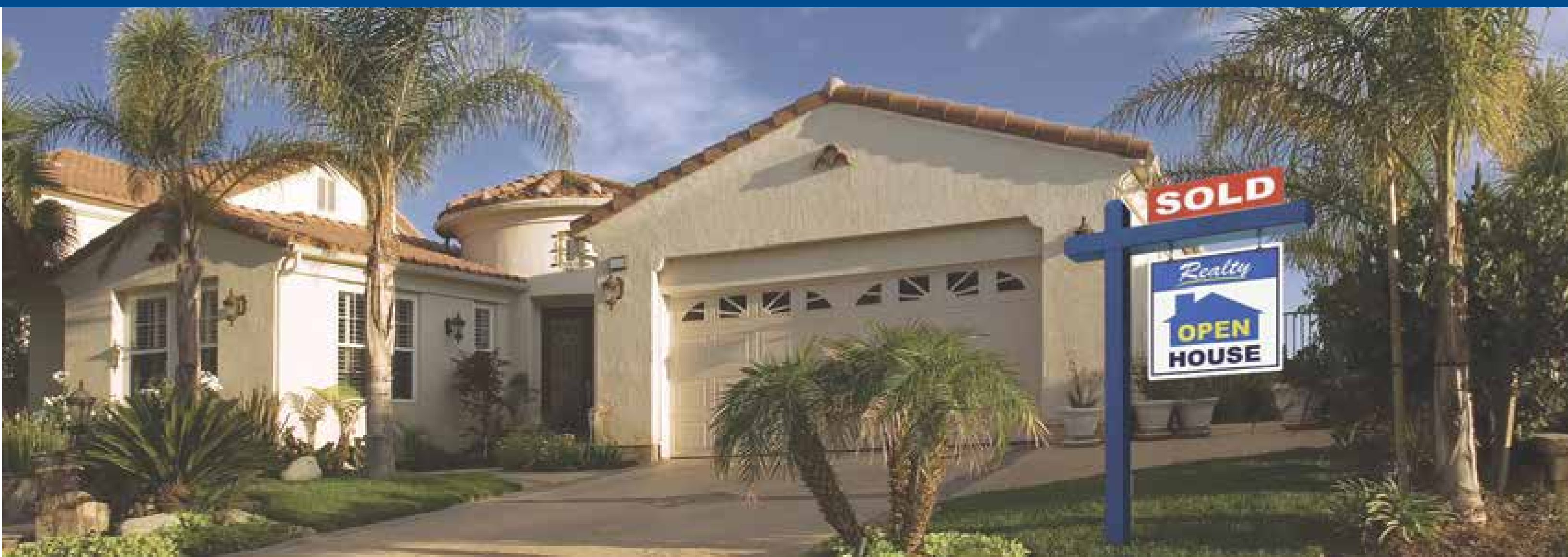
Another way to deal with an encroachment is by the granting of a recorded "license" to use another's property. However, in contrast to an easement, a license is for a limited period of time, say for the term a party owns the land, and for a limited type of use. In determining the best practical solution, the parties' objectives and future eventualities should be addressed.

CONCLUSION

Easements and encroachments are a technical part of some transactions. It is best to make a complete disclosure, perform a diligent inspection, and urge your buyer or seller client to further investigate and obtain legal advice from a qualified attorney. To offer an opinion, or try a simple fix, is unwise and can subject the agent to liability.

(Robert Muir is a real estate attorney and longtime Affiliate Member of SDAR, including a member of the Risk Management Committee. His firm's website is www.muirlaw.com and he can be reached at rm@muirlaw.com.)

We Specialize in Smooth Transactions



All Phases of Termite Treatment and Repairs

$49.00 Inspection Fees
Low Price Guarantee
FREE Second Opinion Inspections

In Every Transaction there are Challenges and a Solution!

Your **Solution** to **Quality Inspections**, **Repairs** and **Treatments**. We Understand the importance of **Reliability**, **Quality** and **On time service - Everytime!**

Our services include:

- Water Damage Repair Experts.
- Variety of treatments.
- Wood Decks, Patio Covers, Doors, Windows, Flooring, Siding, Fencing. We do it all.

Richard La Plante
Senior Inspector
Direct Line
619-921-3816

Dave Daniels
Operator
Direct Line
760-535-7707

The Termite Repair & Treatment Experts
Call: 1-877-317-WOOD • Fax: 760-630-9668
www.r-solutiontermite.com
email: rsolutiontc@sbcglobal.net