

# Real Estate/Municipal Law

## Boundary Line Issues In Residential Real Estate Transactions: Practical Solutions for a Real (Property) Problem

It is a situation that may exist for many years without your client's knowledge. A neighbor installed a fence, paved a driveway, planted trees or shrubs, or erected a shed or other improvement that was unintentionally placed on your client's side of the common property line. These types of issues are frequently uncovered when a client is under contract to sell his or her home and a title report or updated survey of the property reveals an encroachment over a shared property line with an adjacent neighbor. Now your office is informed that your client is actually "out of possession" of a portion of the property. Property is deemed "out of possession" when someone other than the deeded landowner is physically occupying a portion of the landowner's property (without their permission) and is using that land as though it were their own.

Your client now faces some potentially serious issues. First, there exists a defect in title for that portion of property that is out of possession, and a title company will not provide a title insurance policy until the encroachment is rectified. Worse yet, the trespassing neighbor may actually have a legal



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claim over that tract of land that is out of your client's possession through the doctrine of adverse possession. Adverse possession is a method of gaining legal title to real property when the true owners of the property fail to protect or guard their land against trespassers.

Under New York law, in order for an adverse possessor to gain legal title to another's land, they must prove that their possession was: (1) hostile or adverse to the true landowner's use of the land, and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the statutory period, which is

ten (10) years in New York.<sup>1</sup> If the true landowner gave the adverse possessor permission to use their land, the first element is defeated. In the seminal case of *Walling v. Przybylo*,<sup>2</sup> the Court of Appeals held actual knowledge that another person is the title owner does not, it and of itself, defeat an adverse possessor's "claim of right." In response to *Walling*, the New York State Legislature passed a 2008 amendment to Article 5 of the Real Property Actions and Proceedings Law (RPAPL) to ensure that claimants have a reasonable belief that they are actually occupying their own land before making a claim to it.<sup>3</sup> As the memorandum in support of the bill states, the legislation "is all about good faith."<sup>4</sup>

Aside from the good faith requirement, the 2008 RPAPL amendments are relevant in the context of boundary line disputes because they include a new § 543 titled "Adverse possession; how affected by acts across a boundary line."<sup>5</sup> This new section provides that the existence of "de minimis]s, non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, and non-struc-

tural walls, shall be deemed permissive and non-adverse."<sup>6</sup> The amendment further declares that acts of lawn moving or similar maintenance across the boundary line of adjoining property owners shall be deemed permissive and non-adverse. The purpose of including this section in the 2008 amendments was to prevent adverse possession claims from being brought based on minor, non-structural encroachments and customary property maintenance by deeming such uses "permissive and non-adverse."

It should be noted that courts have upheld claims that § 543 is unconstitutional when its application deprives a plaintiff of a vested property right.<sup>7</sup> Essentially, if a plaintiff's adverse possession of a piece of property ripened into legal title before the 2008 amendments took effect (which was on July 7, 2008), then that plaintiff has a vested property right that cannot be impaired by the legislature.<sup>8</sup>

Let us continue our more basic discussion on the simpler situations outlined at the onset of this article. If your client is lucky, and the stars align

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perfectly, he or she can simply knock on the neighbor's door, explain the situation and politely ask the neighbor to move the encroaching structure or improvement. Even when things are resolved amicably like this, it is always good practice, and often required by title companies, that you prepare a Boundary Line Agreement for your client and the neighbor to sign. A Boundary Line Agreement is a legal document that neighbors who share a common boundary line will sign to acknowledge the unintended encroachment(s) that exists along said common boundary line. The agreement should reference a survey depicting the common boundary line and the nature of the encroachment. The encroaching neighbor will acknowledge that the encroachment was made in error and agrees to waive any ownership claims he or she may have by virtue of the encroachment on to your client's

property (e.g., an adverse possession claim). Typically, the parties also agree that the encroaching structure(s) may remain in its present location, but that in the event the encroaching structure or improvement is demolished or destroyed it would be rebuilt entirely on the neighbor's side of the common boundary line. A Boundary Line Agreement provides that it shall run with the land and be binding upon the heirs, successors and assigns of the parties thereto.

Preparing a Boundary Line Agreement accomplishes several important things for your client: (1) it defeats any ownership claim, by adverse possession or otherwise, that your client's neighbor may have raised due to the continued use and enjoyment of your client's property in the past; (2) it will provide your client with clean, insurable title so he or she can sell the home, even if the encroachment continues after closing; (3) it will set forth how the parties will treat the encroaching structures going forward; and (4) it will (hopefully) keep peace between your client and his or her soon

to be former neighbor! The executed Boundary Line Agreement should be recorded against your client's property upon closing to give notice of the neighboring parties' property rights with respect to the encroachments, and to protect all future owners of your client's property.

If you are unlucky and your client's neighbor refuses to remove the encroaching structure and/or sign a Boundary Line agreement, then you may be forced to bring injunctive relief against the encroaching neighbor in the form of an ejectment action directing the removal of the encroaching structure(s) from your client's property.<sup>9</sup> If the ejectment action is successful, it will quiet title to your client's property and provide him or her with a court order requiring the neighbor to remove the encroaching structure(s) and (b) may even award your client monetary damages against the trespassing neighbor for withholding full possession of your client's property during the period of encroachment. This is obviously a more expensive and lengthier option compared to preparing

a simple Boundary Line Agreement, and can be particularly burdensome if your client is already under contract to sell his or her property.

More often than not, simple solutions to boundary line issues are out there. Hopefully this article provides practitioners that are unfamiliar with these matters a basic understanding of some of the more common boundary line issues that arise in the course of a residential real estate closing.

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1. Real Prop. Acts. Law §501

2. 7 N.Y.3d 228, 232 (2006).

3. L. 2008, Ch. 269, §9.

4. Bill No. S 7915C, 2007.

5. Real Prop. Acts. Law §543, *abrogated by Franza v. Olin*, 73 A.D.3d 44 (4th Dept. 2010).

6. Real Prop. Acts. Law §543(1).

7. *Franza v. Olin*, 73 A.D.3d 44 (4th Dept. 2010) (holding that "[w]ith respect to the merits, plaintiff contends that the amendments to article 5 of RPAPL are unconstitutional as applied to her because they deprive her of a vested property right. We agree.")

8. *Id.* at 46-47.

9. Real Prop. Acts. Law §871.