

# Easements in California

## *Creating, Extinguishing, & Litigating Easements*

Simon Offord, Esq. | Law Offices of Peter N. Brewer

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1. How Are Easements Created?
  - a. Express/grant, judicially created
2. Types of Easements
  - a. Express
    - i. An express easement is created by specifically granting or reserving an easement to another by way of a deed or other legal instrument. The express easement must be in writing.
    - ii. An express easement should be contained in a Preliminary Report for the property, as the easement generally must be recorded in order to be valid. The new trend for many title companies is to embed links into the Preliminary Report that will provide direct access to the specific document creating the easement. This allows one to easily view the document creating the easement to make sure they understand the rights and responsibilities arising from the easement.
    - iii. Interpreting Express Easements
      1. Recent cases have further described how ambiguously drafted easements should be defined. This is a very fact sensitive inquiry.
        - (1) Example – “right of ingress and egress for public road purposes” – the court noted a distinction between an easement for public vs. private road purposes, most notably public road purposes should be considered to include rights to place sewers, drains, utilities etc., whereas private right is limited to only use of the surface
        - (2) Where an express easement describes the easement only in general terms, without specifying or limiting the extent of use, the permissible use is determined by the intent of the parties, which can be inferred from the actual historical use of the easement



b. Prescriptive

- i. An easement by prescription is created when someone who is not the owner of record may acquire a right to use the land based on the time and nature of his or her use. This typically happens between neighbors of adjoining parcels.
- ii. In order to have an easement by prescription, it must be shown that:
  1. the land was used continually for a period of five years,
  2. possessed in a manner that was open, notorious and clearly visible to the owner of the burdened land,
  3. hostile and adverse to the true owner, and
  4. under a claim of right.
- iii. A prescriptive easement only entitles the encroacher a right to continue to use the land for some limited purpose, namely the historical use.
- iv. California courts have determined that there is no such thing as an “exclusive” prescriptive easement. Therefore, one may not obtain an easement by prescription that prevents the rightful owner of the land from using and enjoying their own property.
  1. For example, fencing would be an attempt to exclude the true owner. Thus, even when a party may have the right to use an easement, they may not have a right to fence it off. Therefore, if the area in dispute is fenced-in, the encroacher will need to seek to obtain rights via adverse possession or equitable easement theories.
- v. This type of easement is not automatically created, and thus will require litigation and a court order
- vi. Case Analysis
  1. Blackmore v. Powell (2007) 150 Cal. App. 4th 1593
  2. Harrison v. Welch (2004) 116 Cal.App.4th 1084

c. Easement by Necessity

- i. An easement by necessity is exactly what it sounds like – an easement necessary for the owner to gain access to his or property because the parcel is “landlocked.”
- ii. How does such a situation arise? An easement by necessity is created when the two parcels of land were in common ownership at some point in time, and as a result of a conveyance by the common owner, one parcel became completely landlocked and inaccessible other than over the other property.



- iii. This situation is more common in rural areas or when an owner subdivides and sells off a parcel, but overlooks or neglects to consider access to the remaining parcel.
  - iv. An easement by necessity is not automatically created, and thus unless the property owners are able to agree on the terms of an express easement, obtaining an easement will require litigation and a court order.
- d. Equitable Easements
- i. When the user cannot assert grounds for an easement by way of prescription or necessity, and does not have an express easement, the court may exercise its equitable jurisdiction to issue a permanent injunction against interference with future use when:
    - 1. a party has used and improved an easement for a long period of time with an innocent belief that they have the right to use the land,
    - 2. there would be irreparable harm if they could not continue to use the easement, and
    - 3. the affected property owner would suffer little harm from the continued use.
  - ii. Obtaining such an easement will require litigation and convincing proof satisfying each of the above elements. Equitable easements are essentially in the discretion of the Court, and thus can entail significant and lengthy litigation with little guarantee of what the result may be.
    - 1. Cases have generally required some sort of hardscaping and extensive improvements. Examples include an actual physical structure, koi ponds, and driveways.
    - 2. This is a developing area of law, but the most oft-cited case limited the equitable easement to use by the then-owner (therefore the easement was not transferable).
    - 3. Oftentimes, specific restrictions are included, such as that the use by the encroacher cannot be expanded
  - iii. New trend to allow “equitable access” easements
    - 1. Radical extension from mere easement for minor encroachments, oftentimes granted for what appears to be unlimited duration (the judgments fails to address what is to happen upon change in ownership).



2. These cases have disregarded the long existing elements required for easements by necessity or prescriptive easements, and in some situations will allow the encroaching user to get around shortcomings in their prescriptive or easement by necessity claims.
3. This change is dangerous because it greatly limits predictability.
4. Also raises questions as to how far the Courts may extend the equitable easement theory. For example, will we see people seek equitable easements to install utilities?

(1) Case Analysis

- i. *Hirshfield v. Schwartz* (2001) 91 Cal. App. 4th 749
- ii. *Harrison v. Welch* (2004) 116 Cal.App.4th 1084
- iii. *Christensen v. Tucker* (1952) 114 Cal.App.2d 554
- iv. *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003
- v. *Shoen v. Zacarias* (2015) 237 Cal.App.4th 16

3. Role of Experts

a. Surveyor

- i. We often need to hire surveyors as expert witnesses for trial. It is very helpful for the surveyor to prepare drawings and overlays that can be blown up and shown the trier of fact
- ii. The expert will also testify as to the size of the encroachment, how he/she determined the property boundary lines or easement location
- iii. Experts must be “qualified” by the Court. Therefore, the more experience the surveyor has, whether they have been qualified as an expert witness before, what certifications they have, what organizations they belong to, etc., are all important

b. Appraiser

- i. Valuation of easements and damages can be critical in equitable easement cases
- ii. The Court will consider the value of the equitable easement being granted and payments of said value as a condition of the grant of easement

- (1) Depends. Nothing in contract, so need to determine if this was something that should have been disclosed. Usually a battle.

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