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Memorandum

To: General Manager, Plumas Eureka Community Services District
From: Best Best & Krieger LLP
Date: August 5, 2022
Re: Strategies for Managing Encroachments onto District Property

INTRODUCTION

The Plumas Eureka Community Services District ("District") recently completed a survey to identify property boundaries along the Feather River, and the survey indicated that there are numerous private properties which encroach over the actual property line and onto properties for which the District holds easements or other access or property rights. Some of these encroachments are minimal, but some are substantial enough to raise immediate concern (fences, patios, and even the structure of the home itself). To protect itself from potential liability related to these encroachments, the District has asked what options it might consider to manage these and any future encroachment issues.

SHORT ANSWER

The options the District may consider in managing encroachment-related issues are:

1. File a legal action to enjoin and/or seek damages for the encroachment.

2. Allow the encroachment to remain pursuant to negotiation of an encroachment agreement, which can provide for a license or other type of property interest that may be revoked if the District needs the land back to effectuate a public purpose (i.e., install a water line or perform other District functions).

3. Propose a lot line adjustment to reflect the "actual" boundaries of District land versus private property (but, note that this must be handled carefully to avoid raising any "gift of public property" concerns).

ANALYSIS

A. Legal Overview - Encroachments

An encroachment is the extension of any building or other structure beyond the boundaries of the property upon which it was constructed onto adjoining land, without consent of the landowner. (*Kafka v. Bozio* (1923) 191 Cal. 746, 750; *Iacovitti v. Fardin* (1954) 127 Cal.App.2d 348, 350-56.) Encroachments by a building or other structure onto an adjoining property owner's land is an actionable trespass. (*Rankin v. DeBare* (1928) 205 Cal. 639.) Because a number of property owners along the Feather River portion of the District's service area have fences, patios, and even homes that extend beyond the actual lot line, as determined by the recent survey, and onto the District's property, these property owners have impermissibly encroached upon District land. Encroachments are often especially concerning where they have existed without abatement for a long period of time, because they can result in the encroacher acquiring some kind of permanent property right in the encroached-upon area, as a prescriptive easement or by principles of adverse possession. However, this does not apply to the District. Under California law, private parties cannot acquire prescriptive rights (either a prescriptive easement or adverse possession) against a public entity. (Civil Code § 1007.)

In addition to the general laws governing encroachments, Plumas County further regulates encroachments that fall within a floodway. A swath of land adjacent to the Feather River (where the encroaching properties are located) is designated as a floodway (see map below for a general overview of the area in question)[1], and Plumas County Code section 7-17.303 expressly prohibits encroachments in a floodway unless a registered engineer or architect certifies that they will not result in "any increase in the base flood elevation during the occurrence of the base flood discharge." So, while the encroachments are unlawful and may be addressed under general state law, they also appear to be actionable under the Plumas County Code, meaning the District can (in addition to its other remedies) require the owners to provide the mandatory floodway certification set forth in section 7-17.303 of the Code.

B. Options for Addressing Current and Future Encroachments

In light of the above, the District has a number of options for addressing encroachments onto its property, ranging from legal action to a voluntary agreement with the property owners.

1. Legal Action

The remedy for a landowner whose property has been encroached upon by a neighbor is to seek judicial relief. A court may grant a mandatory injunction requiring the encroacher to remove the encroaching structure.[2] (*Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 857-

[1] An interactive version of this flood map is available at https://msc.fema.gov/nfhl.

[2] A landowner whose property is encroached upon may also seek injunctive relief via an action for ejectment, to quiet title, or to abate a trespass or nuisance. When an encroachment actually rests on the adjoining land (as opposed to airspace), it constitutes a permanent trespass. (See *Rankin v. DeBare* (1928) 205 Cal. 639, 641.) The encroachment constitutes a nuisance if it substantially interferes with the use and enjoyment of the property. (P*osey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1243.) A nuisance injury would require the District to demonstrate an actual

59; *Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1243.) However, the court is not required to grant an injunction. It has discretion based on its equitable powers to deny injunctive relief and merely award damages to the injured party for the losses sustained by the encroachment. (*Dolske v. Gormley* (1962) 58 Cal.2d 513, 520-21.)

In determining whether to grant an injunction ordering removal of an encroachment, the court will apply a "relative hardship" doctrine focusing on three factors:

(1) Whether the encroachment was "innocent" (i.e., not willful).

(2) Unless the rights of the public would be harmed, the injunction should be granted if the plaintiff (District) would suffer "irreparable injury."

(3) The injunction should *not* be granted if the hardship to the defendant property owner would be "greatly disproportionate to the hardship caused to plaintiff by the continuance of the encroachment." The burden of proof shifts to the defendant on this point. The court may look at the expense and difficulty of removing the structure compared the damage caused by allowing it to stay, and whether the encroachment is so "trivial" that its removal should not be compelled.

(*Nellie Gail Ranch Owners Association v. McMillin* (2016) 4 Cal.App.5th 982, 1003; *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 758–759.)

In weighing the relative hardships, the court begins with the premise that the encroaching party is a wrongdoer, and doubtful cases must be decided in favor of the party who suffers the encroachment. (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1247-48.) However, the party seeking an injunction must present at least some evidence that the encroachment will cause actual damage, and that he or she is not merely seeking to "vindicate a technical and unsubstantial right." (*Farrington v. Dyke Water Co.* (1958) 50 Cal.2d 198, 200; *Nebel v. Guyer* (1950) 99 Cal.App.2d 30, 33.) The court will also evaluate whether the public interest supports the injunction.

Finally, the court may also consider whether the words, conduct, or inaction of the plaintiff (District) constituted either acquiescence to the encroachment or a bar to the claim because of the doctrine of laches or applicable statute of limitations. The doctrine of laches is an equitable defense in which the property owner would claim that the District is barred from its suit because it unreasonably delayed in pursuing it after it knew or should have known of the encroachment. This doctrine is unlikely to apply here, because the recent survey was the cause of the District's

injury resulting from the encroachment; a trespass action would not. The structures currently encroaching on District property constitute permanent trespasses, since they sit on District property, but are probably not nuisances since they don't appear to substantially interfere with the use of those properties for District purposes. A court's analysis of an injunction or damages under the umbrella of a trespass or nuisance lawsuit would still be subject to a similar balancing of hardships as outlined in this section.

discovery, and the District has not unreasonably delayed in addressing the issue to the detriment of the encroachers. As to the statute of limitations, a 2004 case clarified that the right of the holder of legal title (the District) to bring an action to recover the disputed property never expires, unless the encroacher's use of the property ripens into title by adverse possession or prescriptive easement. (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1096.) Because a private party cannot obtain title against a public entity by adverse possession or prescriptive easement, the encroaching property owners will not be able to raise a statute of limitations defense.

Whether a court were inclined to grant an injunction in this case would depend on the circumstances applicable to each individual encroacher. For instance, a court might be willing to grant an injunction to require removal of a fence, given the relative low cost and effort, but may not be as likely to require removal of an encroaching patio or foundation, unless the District could show significant hardship to itself and the public interest. If the District can demonstrate that there *are* significant risks to the public health and safety as a result of the encroachments (i.e., if the encroachment precludes the District from accessing certain crucial water or sewer facilities) the Court will be much more likely to issue an injunction, although the favored approach will always be to try to help the District and property owners reach a workable arrangement rather than requiring the owners to incur significant cost and hardship to tear up permanent or semi-permanent structures.

In addition, even if no injunction is granted, the District may be able to recover damages for the loss of the use of a portion of its property. Damages will be measured by the value of the use of the burdened property at the time of the lawsuit, without consideration of any prospective future use of the property. (*Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 860.) When an encroachment is permanent, all damages, past and prospective, are recoverable in one action. (*Rankin v. DeBare* (1928) 205 Cal. 639, 641; *Kafka v. Bozio* (1923) 191 Cal. 746, 750.)

If the District is interested in filing legal action to enjoin any or all of the current encroachments, we are happy to help develop the necessary factual and legal support for such an action, and advise of the likelihood of success and measure of possible damages as to each specific encroachment.

2. Negotiate an Encroachment Agreement

Alternatively, if the encroachments do not pose an immediate threat to the District's facilities or access rights, the District might consider requiring property owners to negotiate encroachment agreements in order to avoid legal action by the District. An encroachment agreement is an agreement by which the owner of real property allows an adjoining property owner, by way of a structure or personal access, to cross over or occupy the boundary or area of an easement, adjoining land, or airspace. An encroachment agreement can take any number of legal forms, such as a license, a covenant, an easement, or a combination of these. The type of agreement required can be determined based upon the type and severity of the encroachment in

each case. For instance, a license is a right to go onto the land of another without being considered a trespasser, but the right is personal to the holder of the license and cannot be exercised by any other person, and is not assignable by the holder. (*Covina Manor, Inc. v. Hatch* (1955) 133 Cal.App.2d 790, 793; *Beckett v. City of Paris Dry Goods Co.* (1939) 14 Cal.2d 633, 637.) A license is likely the best option for the District here, because it ensures the neighboring property owner does not gain any permanent property interest in the encroached-upon land, and is freely revocable by the District.

In any type of encroachment agreement, District can include terms requiring the owners to keep the area in good condition and ensure the District's continued access to its facilities, and can provide for revocation in certain circumstances. Even if revoked, however, the District would then be required to seek a judicial remedy to actually enjoin the encroachment, as described in the previous section. Our office is happy to assist in preparing drafts of encroachment agreements with the neighboring landowners at the District's request.

3. Lot Line Adjustment

Finally, the District might consider undertaking a lot line adjustment ("LLA"), pursuant to any applicable County regulations, so that the property boundaries are shifted to reflect the current status of the area in question. An LLA is a voluntary realignment of boundary lines between two to four contiguous parcels of real property, in which a portion of the land is taken from one parcel and is added to an adjoining parcel, when the owners of the adjacent parcels desire to change the shape, size, or dimensions of their parcels. (Gov. Code § 66412(d).) To establish a boundary using the LLA process, an application must be submitted to, and approved by, the local designated agency or advisory agency, which in this instance is the Planning Department for Plumas County. In reviewing the application, the Planning Department must determine whether the newly configured parcels that will result from the contemplated LLA will conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances. (Gov. Code § 66412(d); Plumas County Code, Article 12-8.) Once approved, the lot line adjustment must be documented in a new deed that is properly executed and recorded.

However, because the District is a public body, any LLA must comply with the rules pertaining to gifts of public agency funds. An appropriation benefitting a private party (including a grant of property pursuant to an LLA) is an impermissible gift of public funds if the public entity receives no adequate consideration (i.e., money or an in-kind land swap) in exchange for the expenditure, or if it is not in fulfillment of a public purpose. (Cal. Const. art. XVI, § 6*; Allen v. Hussey* (1950) 101 Cal.App.2d 457, 473; *County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281.) Accordingly, the District will have to either (1) negotiate with the encroaching landowners to obtain consideration for the LLA (this can include financial compensation, or a swap of some other portion of the neighbor's parcel for the encroached-upon portion), or (2) determine that there is a public purpose supporting the transfer of the District's interest in the property to the neighboring owners.

CONCLUSION

The District has several options for addressing encroachments onto District property, ranging from litigation to a negotiated agreement with the landowners that ensures the District maintains access to its facilities. We recommend, as a first step, reaching out to each encroaching landowner and making them aware of the encroachment (and providing a copy of the survey showing the correct property boundaries), and advising that the District is considering its options and will be in touch regarding next steps. Please reach out if you have any additional questions, or would like our office to draft a template license agreement, discuss the pros and cons of litigating each encroachment, or advise as to options for conducting a lot line adjustment without creating a gift of public funds concern.

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