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Land owners: How to deal with an encroachment from an abutting property

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An enduring problem for any land owner is how to deal with an encroachment from an abutting property. This problem arises in many different contexts and takes several different shapes. The facts vary and often seem innocuous, but the consequences are almost always quite serious. A few recent examples from my practice illustrate this point (the names and some of the facts have been changed).

Case #1: Amy and Joe have lived next to each other for several years. Joe builds a garage near the property line. Although the garage is entirely on Joe's property, the property line was not well marked and part of the driveway to the garage ends up on Amy's property. Amy and Joe now both have a problem. So long as Amy discovers the encroachment in a timely manner, she likely will be able to legally require Joe to remove the driveway. Joe will either need to comply or reach an agreement with Amy for an easement or lot line adjustment. In either case, the parties will probably need a surveyor to locate the property line and lawyers to document any agreement.

If they are unable to reach agreement and Amy doesn't take any action to force Joe to remove the driveway, then she will have to disclose the situation to her realtor and any prospective buyer in the event she sells her property. The same is true for Joe. He will have to disclose to any buyer of his property that Amy could demand the driveway be relocated at any time. This will compromise both Joe's and Amy's ability to sell their respective properties.

In addition, in New Hampshire, if Joe continues to use Amy's land for over 20 years without her permission, then title to that area of land may vest in Joe under the doctrine of adverse possession.

In the residential context like this one, these issues tend to get worked out as long as the neighbors are on good terms. That, of course, is not always the case. Maybe Joe has some trees on his property that blocks Amy's otherwise spectacular view of the White Mountains. She may want to use the encroachment to compel Joe to cut down the trees.

In the commercial context, the problems arising from a boundary encroachment multiply. Say Amy is refinancing her commercial property. The lender may want a survey, which will reveal Joe's encroachment. Although the encroachment may not interfere with Amy's use of her property, the lender may refuse to make the loan unless Amy takes a more aggressive position with Joe. At the very least, the lender will probably want special title insurance coverage to cover the risk of the encroachment on its collateral, which will increase the cost of refinancing.

Case #2: Bob owns a couple hundred acres of undeveloped land, a portion of which is zoned commercial, with the rest being a mix of wetlands and forest land. Big Box Retailer wants to build a store on Bob's commercial land and obtains the approvals to do so. As a condition of its approvals,

the Town requires Bob to grant a conservation easement on most of the wetlands and forest land. Although the local conservation trust is willing to accept the easement, a survey shows that several abutters have been using some of the backland for additional lawn and garden areas for years, probably longer than the 20 year period for adverse possession, and the conservation trust insists that these issues be resolved before it takes the easement.

As a result, Bob will need to notify the abutters of the encroachment and try to negotiate a resolution with them. Unfortunately, the abutters have all the leverage. If they are not cooperative, then Bob has a big problem. The problem will become even worse for Bob if any of the abutters are opposed to Big Box Retailer's project.

In each of these cases, there are several possible outcomes, mostly bad. For the property owner, diligence is the key to avoiding these consequences. The owner needs to have a fairly precise understanding of his or her property's boundaries and should dutifully monitor the activity near the property lines for possible encroachments. The owner then must be willing to act promptly to respond to any issues and take the appropriate action to minimize the problem.

Frost was right: Good fences make good neighbors. What he did not tell us is that you should always make sure that the fence is put along the boundary correctly. If not, from a real estate perspective, neither neighbor is going to be very happy.

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