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REAL ESTATE E-BRIEF

Get Off My Property! How Encroachments Affect Your Ability to Sell or Finance Real Property

An “encroachment” is a legal term used to describe an intrusion on the real property or real property rights of adjacent land. An encroachment is often created by the erection of an outbuilding, fence, or other property improvement that physically encroaches on the boundary line with the neighboring property or roadway, or lies within the property’s setback areas. Typically, an encroachment is unintentionally caused by misjudging the true location of a property line or setback line. Encroachments are typically discovered when a survey is completed that visually depicts the proper boundaries and roadways in relation to the location of the improvements, such as in anticipation of the sale or re-financing of the property. An encroachment may involve one of your improvements overlapping onto the neighboring property, roadway or setback, or a neighbor’s improvement overlapping onto your property. Either way, an encroachment creates difficulties when trying to sell or finance your property.

Potential Resolutions

Generally, a property owner may attempt to resolve an encroachment onto neighboring property by obtaining an easement for the encroachment or a lease for the life of the improvement from the owner of the neighboring property. However, those options are only viable if the owner of the adjacent property or roadway is willing to cooperate and grant an easement or enter into a lease agreement.

Encroachments onto applicable setback requirements may be more complicated to resolve. Most local governments have setback rules regarding how close a structure can be

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built to a property line. Setbacks typically apply only to structures, and not to fences or private driveways. If the improvement existed prior to the implementation of the particular setback requirements, its location may be permitted (or “grandfathered”) so long as the location of the improvement complied with any setback requirements in place when constructed. If, however, the problematic improvement (or any addition to an existing improvement) was built after the implementation of setback requirements, the improvement is considered an encroachment on the neighboring property or roadway because it is built too close to the property line. You may request a variance from the local government permitting the encroachment. If a variance cannot be obtained, you may be required to remove or relocate an offending structure.

Adverse Possession

An encroachment which has been in place for a number of years may give rise to a claim of adverse possession. Adverse possession is the process by which one person gains the right to own or possess another’s property over time. Due to the potential cost and time involved in an adverse possession claim, it is often the final alternative pursued if the owner of the property or roadway upon which an improvement encroaches is unwilling to grant an easement or enter into a lease agreement for the life of the improvement.

In Nebraska, persons claiming to have acquired ownership through adverse possession must demonstrate to a court in a quiet title action that they have satisfied *all* of the following criteria:

1. **Actual Possession:** Occupying the property as the legal owner would.
2. **Continuous:** Possession is regular and uninterrupted.
3. **Exclusive:** Occupying the property to the exclusion of the legal owner and all other third parties.
4. **Open and Notorious:** Possession of the property is so visible and apparent that the legal owner knows or should know of the possessor’s claim.
5. **Hostile or Adverse:** Possession is contrary to the

rights of the legal owner and without permission of the legal owner.

6. **10 Years:** Each of the above criteria is independently satisfied at all times during a 10-year period.

Property owners should be aware of the rules regarding encroachments. Knowing exactly where your property line is and the applicable setback requirements when erecting improvements can help you avoid costly mistakes. Furthermore, any encroachments onto your property may affect your ability to sell or finance the property, and may give rise to claims of adverse possession.

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