



STANDARD PROOF OF EASEMENT IS NOW LOWER (PREPONDERANCE OF EVIDENCE)

As an owner of real property, prescriptive easements are problems—they give rights to other (individuals, companies, utilities, etc.) and decrease the value of your property. In effect, someone else has a right to use your property — prescriptive easements are permanent after five (5) years of simple use of the easement without the permission of the owner of the land and the intruder does not have to pay property taxes; the landowner continues paying its property taxes. If the owner “snoozes”, the owner loses a portion of their property; the easement holder has rights for their use without any costs – **initially or ongoing**.

Our local appellate court just lowered the standard of proof to prove such as easement—it is now simply a preponderance of the evidence. The evaluation is based upon on:

- Open and notorious use (just being there);
- Continuous use (five years);
- Without owner consent;
- Claim of right.

It can just be a boundary line, a path, garbage shed, a building, etc.

So, protect your real property interests in all of them. Your sale price will decrease if such an easement exists. The owner now has a more difficult time to defend against the prescriptive easement and clear title. The standard is now a “preponderance of the evidence”, rather in the past “clear and convincing evidence.”

There are many ways to avoid your trespasser from gaining prescriptive rights— mainly by interrupting the use, granting the person permission, and posting the grant of possession as provided in Civil Code, Section 1008. You should protect your full interest in your land— no entries or use should occur, unless you permit them, and further outline the terms, including your ability to terminate at any time, and for the trespassing user to pay all costs of return of the land to its initial state. Have everything in writing, signed by all parties.

