Like the general in *Hamlet* who complained, “We go to gain a little patch of ground that hath in it no profit,” courts have, in several recent cases, shown a lack of sympathy to property owners who seek to win a bit of land that has little value to them. These reported opinions favor the encroacher when the encroacher has improved the land in such a way that it would cause that party relatively great injury if the court ordered the encroachment removed. In such cases, the trial courts are denying the landowner’s request for an injunction and permitting some of the encroachments to remain for a period of time. Although the California Supreme Court has not yet weighed in on this issue, the courts of appeal have consistently affirmed trial court decisions, while at the same time taking care to clarify that the remedy is not labeled a “prescriptive easement.”

Boundary disputes generally raise two issues: Where is the actual boundary line, and, when it is located, what should be done with the improvements lying on the wrong side? In the mid-1990s, the courts of appeal answered the first question by reference to the recorded line. Legal theories that attempted to trump the recorded line through adverse use, such as a prescriptive easement or agreed boundary, were broadly disapproved. Those opinions did not, however, resolve what to do with the improvements that lay on the wrong side of the recorded boundary line. This latter issue has now been considered by the courts of appeal in a series of opinions that, perhaps surprisingly, and undoubtedly to the frustration of title insurers, unanimously upheld the trial courts’ judgment in equity to allow some or all of the encroachments to remain.

These recent cases apply a nuanced approach to boundary dispute resolution. The adverse claimant who seeks a prescriptive right at law to a portion of a neighbor’s yard for softscape (no structures) landscaping based on the fence line is likely to lose, as held in *Silacci v.*

Mark L. Share has a real estate, business, and litigation practice at De Castro, West, Chodorow, Glickfeld & Nass, Inc., in Westwood.
Abramson, Mehdizadeh v. Mincer, and more recently, in Harrison v. Welch. However, a claimant who seeks an easement in equity to maintain a driveway or utility line will likely find more favor in the courts, as in Kapner v. Meadowlark Ranch Association or Harrison v. Welch (in a separate finding in that case) and Hirshfield v. Schwartz. A claimant who has actually built an expensive structure also will find that courts tend to award an equitable easement, as in Hirshfield, which permitted a neighbor to encroach upon a Bel Air property to maintain hardscape landscaping, including a sand trap and electrical equipment number or record title and do not assess easements. Prescriptive easements have the same requirements as adverse possession, except they do not require payment of taxes. Those requirements are: continuous, open, and notorious use of the land and hostile use (without permission) for five years under a claim of right. The prescriptive easement theory was, however, held to be inapplicable by Silacci and Mehdizadeh when it would grant exclusive use of the disputed property to the encroacher, such as by means of a fence.

Another theory that courts rejected was the agreed-boundary doctrine, which has for waterfalls and a swimming pool.

The recent cases also point to a solution for claimants who seek rights over publicly owned property. The law has been clear that one cannot acquire prescriptive rights at law to public land.7 Equitable principles, however, can be applied to government entities. Absent a strong countervailing public policy, estoppel and other equitable principles are “now applied freely against the state, its subdivisions, and other governmental agencies.”8 Therefore, governmental entities may have difficulty in some cases obtaining injunctions requiring the removal of encroachments and may suffer equitable easements over their land.

An adverse or prescriptive claimant has various legal arguments to retain possession.9 Adverse possession is the best known, but this claim requires the adverse claimant to have paid real estate taxes on the disputed land for the previous five years.10 Usually the claimant cannot establish payment of taxes because the county tax assessors send tax bills by lot been used by encroachers to argue that neighbors should treat any longstanding fence or wall as the legal boundary. But the doctrine no longer applies when a surveyor is able to locate the boundary from recorded documents.12

Encroachers can also claim permission to encroach. Oral permission can be enforced if relied upon. For instance, in Noronha v. Stewart, the court held that an encroaching wall would not be enjoined when the record owner of the land had given permission to build the wall and the encroaching neighbor had gone to considerable expense to build it.13 In another case, permission to drain rainwater onto a neighbor’s roof was implied when it was the most reasonable way to prevent water damage to both parties’ adjacent buildings.14

Equitable Easements
When the encroacher cannot prove that the record owner gave permission and legal doctrines of prescriptive easement and agreed-boundary appear unavailing, equity may provide relief through an equitable easement. Recent opinions provide guidance on how to persuade a court in equity to let the encroachments remain—or to order their removal. In reviving the equitable easement in 2001, the Hirshfield court drew on a long line of California case law and confirmed its ongoing applicability despite Silacci and Mehdizadeh.

In summary, the encroacher must persuade the trial court on three issues: 1) that the encroachment was created innocently, 2) that the record owner will not suffer irreparable injury, and 3) that removal would cause the encroacher to suffer hardship that is greatly disproportionate to the hardship that the record owner would suffer if the encroachment remained.15 If the encroacher establishes these three elements, the encroachment may remain, despite the encroacher’s failure to establish adverse possession or a prescriptive easement.

The courts have made some general statements regarding how easy or hard it should be to obtain an injunction requiring removal of encroachments. For instance, some courts have agreed that the court should “start with the premise that defendant [encroacher] is a wrongdoer, and...thus doubtful cases should be decided in favor of plaintiff.”16 Encroachers can find comfort in a countervailing policy that the “remedy of injunction is a drastic one” that should not be granted when it would inequitably burden the encroacher and when the landowner can be “adequately compensated in damages.”17 The latter position is consistent with the maxim that equity abhors a forfeiture, which is essentially the result if an encroachment is enjoined.

The test of innocence, as opposed to negligence or bad intent, often will be satisfied, because encroachments generally result from ignorance of the location of the boundary line. For example, in Hirshfield, the court noted, “Both the Schwartzes and Hirshfields assumed that the chain link fence marked their property lines.”18 Encroachers are in an even stronger position to show innocence if they relied on statements by their sellers about the location of the boundary line.19 The element of innocence is subjective and requires that the encroacher believe that the legal owner consents to the encroachment or that the encroacher owns or has acquired a prescriptive right in the land. As stated by the California Supreme Court: “To be willful the defendant must not only know that he is building on the plaintiff’s land, but act without a good faith belief that he has a right to do so.”20

Even if the encroachment is negligent, a doctrine of comparative negligence applies. For instance in Christensen v. Tucker, the
encroacher was thought by the trial court to have been negligent in relying on his seller’s statements regarding the position of the boundary line. The court of appeal remanded for the trial court to consider, among other things, whether that negligence was the “sole proximate cause of the encroachment.”21 If the landowners’ conduct “also contributes to the situation” then the encroacher’s negligence does not bar the court from permitting the encroachment to remain after balancing hardships. In Christensen, the landowner complained that the encroacher had not obtained a survey before building an encroaching garage, wall, and badminton court, but then neither had the landowner until after the encroachments had been in place for several years. This scenario could satisfy the requirement of “innocence.”

The classic scenario involving bad intent is continuing to build the encroachment after receiving the neighbor’s complaint. For instance, in Morgan v. Veach,22 the encroacher disregarded complaints from the neighbors and a letter from one of their attorneys. (The encroachment actually occurred into the required setback area, not onto a neighbor’s land.) When there is bad intent, the courts must grant an injunction requiring removal of the improvements. The court in Morgan held that “relief by way of a mandatory injunction will not be denied on the ground that the loss caused by it will be disproportionate to the good accomplished, where it appears that the defendant acted with a full knowledge of the complainant’s rights and with an understanding of the consequences which might ensue.”23

Assuming that the encroacher is innocent, or at least not willful or solely negligent, the court proceeds to balance the hardships that would result from enjoining the encroachment against the hardships that would be engendered by denying the injunction and recognizing an equitable easement for the encroachment to remain upon some payment of compensation. The courts exercise this discretion to create the least amount of hardship. If the landowner would suffer more detriment from permitting the encroachment to remain than the encroacher could suffer if it were enjoined, then the encroachment must be removed.24

If evidence is introduced on the issue, the court must make findings regarding the balancing of hardships.25 Sometimes, courts take judicial notice in lieu of evidence. A court may, for instance, take judicial notice of the fact that removal of the porch pillar, gas pipes and meters, roof eaves, and other structures would involve considerable expense as well as disfigurement of a house.26 The encroacher can introduce evidence of the expense of moving the encroachments.27 The encroacher can also show that the loss of the encroachment—such as a driveway encroachment28 or sewer pipe29—would hinder the use of the property.

In recent cases courts have taken this tack. For example, in Hirshfield, while the cost of removing the encroachment was not introduced into evidence, the landowners presented no credible evidence of any imminent plans to develop the encroached-upon portion of the yard. Therefore, the court, in essence, took judicial notice that a sand trap and equipment for a waterfall and swimming pool would be expensive to relocate. In contrast, in Harrison, the court in effect took judicial notice that the cost of removal would be relatively low when it ordered the encroacher to remove her landscaping and woodshed, following the rule established by Silacci and Meh dizadeh. In Kapner, the encroacher did not present any evidence about the cost of his improvements, but the landowner stipulated that the encroachments could remain until the land was needed, and the court’s balancing did not extend beyond requiring the encroacher to accept the offer by the landowner of a terminable easement. Kapner does not state if or how the judgment would have differed had the landowner not offered an easement. The lesson here is that landowners may be clever to offer an easement that is less generous than what the court has power to award.

Limits on Equitable Easements

When the court grants an equitable easement, the encroacher pays compensation. (By contrast, persons who obtain prescriptive easements need not pay any compensation.) Generally, the payment ordered by the trial courts in the reported opinions is modest, reflecting the speculative nature of valuing a small portion of a larger lot. As one court stated, the judgment permitting the encroachment to remain upon “payment of $1,000, apparently was an act of grace toward the defendants.”30 Some courts, like the Hirshfield court, have relied on appraisals of the severed portions of land. It appears that the appraisals probably cost as much as or more than the appraised value of the land.31

The equitable easement granted to the encroacher is generally for a terminable period, differentiating it from a fee interest. The courts have not, however, set forth a rule regarding when the easement should terminate. Several cases hold that the easement extends for the life of the building.32 Or it may terminate upon abandonment by the encroacher.33 Or the easement may terminate when the landowner needs the land back.34

Or, as in Hirshfield, it may terminate when the encroacher transfers the property, a result that probably applies best to the facts in that case in which the encroachments were pri-
marily aesthetic luxury items that were not necessary to the property.35

The courts still need to reach a consensus on the issue of whether the statute of limitations ever bars a landowner from recovering property subject to a substantial encroachment. There are two inconsistent statutes of limitation that arguably apply. One view, espoused in Field-Escandon v. DeMann and a recent unpublished opinion, is that if the encroachment is a “permanent” trespass or nuisance, such as a building or other substantial structure, then a plaintiff must file an action for damages or injunctive relief within three years after the structure is completed.36 The opposing view, applied in Harrison, is that the statute of limitations for the recovery of real property never expires unless and until the encroacher can establish a prescriptive easement or adverse possession.37 There are statutes and reported opinions supporting both positions, so the two cannot be reconciled. If the three-year statute of limitations applies, many more encroachments will be permitted to remain, and the issue of equitable balancing will not be reached in those cases. If the unlimited statute of limitations applies, then equitable balancing will need to be considered. What is clear is that the judgments rendered in Hirshfield, Kapner, and Harrison modified the bright-line rule that the landowner wins and the encroacher loses. The problem with that simple test was that it led to some landowners threatening their neighbors with forced removal of minor encroachments at great expense or other burden. Typically, these discrepancies between record title and the location of improvements are not even discovered until a survey is commissioned, such as in connection with a home remodel. While many courts will continue to summarily order the removal of encroaching fences and ordinary landscaping, it appears that more vital improvements, like utilities and driveways, and more expensive improvements, like swimming pools and perhaps even privacy hedges, will be permitted to remain for a time on payment of some, usually modest, compensation. These decisions evidencing the court’s effort to devise a compromise, as opposed to a winner-takes-all outcome, should also serve to encourage neighbors to achieve a reasonable resolution between themselves.

1 WILLIAM SHAKESPEARE, HAMLET act 4, sc. 4.
3 Id.
5 But see Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 546, 575 (1984) (approving trial court’s judgment granting 25-by-650-foot prescriptive easement for access along adjacent edge of landowner’s lot).
regarding deck extension at condominium).
26 Dolske v. Gormley, 58 Cal. 2d 513, 519 (1962).
31 Oertel v. Copley, 152 Cal. App. 2d 287, 290 (1957) (“The report of the appraiser filed herein was that the market value of the portion of Lot A enclosed by defendant’s fence, on October 15, 1954, was the sum of $30; that the severance or consequential damage by reason of the severance or separation of said portion of Lot A from the remainder of Lot A would be nil.”).
32 Dolske, 58 Cal. 2d at 521; D’Andrea, 243 Cal. App. 2d at 691-92; Baglione, 160 Cal. App. 2d at 735.
33 Christensen v. Tucker, 114 Cal. App. 2d 554, 563 (1952) (disapproving trial court’s grant of fee interest).
34 Kapner v. Meadowlark Ranch Ass’n, 116 Cal. App. 4th 1182, 1186 (2004) (requiring encroacher to sign an agreement permitting the encroachments to remain, subject to their removal should the need arise).
40 Baglione, 160 Cal. App. 2d at 735.
41 Brown Derby Hollywood Corp. v. Hatton, 61 Cal. 2d 835, 859 (1964) (remanding for trial court to determine, based on conflicting evidence, whether tenant’s encroachment into other tenant’s parking lot was innocent).
44 Id. at 690 (citations omitted); see also Agnar v. Solomon, 87 Cal. App. 127, 142 (1927) (affirming injunction to move small apartment building approximately four inches at cost of $1,500 to $2,000 upheld where reasonable person would have known that new building encroached).
46 Posey v. Leavitt, 229 Cal. App. 3d 1236, 1249 (1991) (remanding to trial court to make findings