

Settling Boundary Disputes Using Utah's Boundary by Acquiescence Doctrine

by Elliot R. Lawrence

Not too long ago, I took a call from a property owner involved in a boundary dispute. A masonry wall had stood for several years, separating her parcel from a neighboring property. A new owner had recently purchased the neighboring property, and he discovered that the wall had been built about ten feet onto his parcel. He immediately demanded that it be removed, so he could install a swimming pool. The woman protested, but he hired a contractor, who began removing the wall and her flower bed. She was distraught, but at that point, she had no choice but to begin legal action against her neighbor. If the parties had understood the boundary by acquiescence theory, they could have settled the dispute and avoided litigation.

Boundary by Acquiescence is an equitable doctrine applied to resolve property line disputes based on recognition of long-established markers used to identify boundaries. "Its essence is that where there has been any type of a recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner." *Baum v. Defa*, 525 P.2d 725, 726 (Utah 1974). The boundary by acquiescence principle was recognized in Utah as early as 1887. See *Switzgable v. Worseldine*, 5 Utah 315, 15 P. 144 (Utah 1887).

Boundary by acquiescence is not found in the Utah Code but was developed over many years by Utah's appellate courts. It is intended to guide property owners, prevent inequity, and help avoid litigation. The doctrine thus promotes stability in property descriptions, contributing to the "peace and good order of society." *Babr v. Imus*, 2011 UT 19, ¶ 35, 250 P.3d 56.

The Equitable Underpinning of Boundary by Acquiescence

Boundary by acquiescence, like the similar doctrines of adverse possession or prescriptive easements, prevents inequity by recognizing long acceptance of property use or occupation.

The very reason for being of the doctrine of boundary by acquiescence... is that in the interest of preserving the peace and good order of society the quietly resting bones of the past, which no one seems to have been troubled or complained about for a long period of years, should not be unearthed for the purpose of stirring up controversy, but should be left in their repose.

Hobson v. Panguitch Lake Corp., 530 P.2d 792, 794 (Utah 1975). Altering property ownership is not to be taken lightly but may be necessary to prevent inequity and injustice and to recognize property rights arising from reliance on long-standing use. "It is not unjust in certain cases to require disputing owners to live with what they and their predecessors have acquiesced in for a long period of time." *Staker v. Ainsworth*, 785 P.2d 417, 422 (Utah 1990) (citation and internal quotation marks omitted).

Elements of Boundary by Acquiescence

A property owner must prove the following four elements in order to successfully establish a boundary by acquiescence: "(1) occupation up to a visible line marked by monuments, fences, or buildings, (2) mutual acquiescence in the line as a boundary, (3) for a long period of time, (4) by adjoining landowners." *Babr*, 2011 UT 19, ¶ 35. The person asserting a claim for boundary by acquiescence has the burden of proof. And, because application of the acquiescence doctrine alters an

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owner's interest in real property, all four elements must each be established by "clear and convincing" evidence. *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 22, 270 P.3d 430, 437. If any of the four elements are not proven, the claim fails. *Hales v. Frakes*, 600 P.2d 556, 559 (Utah 1979).

For a time, a fifth element – objective uncertainty as to the correct boundary line's location – was also required. However, in 1990, the Utah Supreme Court eliminated that requirement, holding that it made "boundary by acquiescence less practical," and that the extra element would lead to more litigation rather than less. *Staker*, 785 P.2d at 423.

Occupation Up to a Visible Line

The occupation element requires actual or constructive occupation and use of the area in question, not just a mere claim to the property. "The first element [of boundary by acquiescence] may be satisfied where land up to the visible, purported boundary line is farmed, occupied by homes or other structures, improved, irrigated, used to raise livestock, or put to similar use." *Babr v. Imus*, 2011 UT 19, ¶ 36, 250 P.3d 56. The occupation should be consistent with "a pattern of use that is normal and appropriate for the character and location of the land." *Dean v. Park*, 2012 UT App 349, ¶ 29, 293 P.3d 388 (internal citation omitted). An encroaching owner may not claim a new boundary if access and occupancy of a parcel up to the correct boundary by the neighboring property owner is impossible. *Carter v. Hanrath*, 925 P.2d 960, 962 (Utah 1996) (holding that inability to access and occupy all of parcel is not acquiescence in a new boundary).

The purpose of the occupancy element is not the extent of the use or occupancy, but whether the owners have knowledge of conditions and activities which might alter the ownership rights in the property, so that there is opportunity to interrupt or alter those conditions or activities. See *Anderson v. Fautin*, 2014 UT App 151, ¶ 18, 330 P.3d 108, 113. "Constructive" occupation, even if intended plans are not carried out, may also satisfy the occupation requirement, if the owners have knowledge of the conditions prevailing on the property. See *Harding v. Allen*, 10 Utah 2d 370, 353 P.2d 911, 914–15 (Utah 1960).

The line claimed as the boundary "must be definite and certain, [with] physical properties such as visibility, permanence, stability, and a definite location." *Gillmor v. Cummings*, 904 P.2d 703, 707 (Utah Ct. App. 1995). The claimed boundary line "must be open to observation" and "must be definite, certain and not

speculative." *Fuoco v. Williams*, 421 P.2d 944, 946 (Utah 1966). In *Fuoco*, the court found that an unused irrigation ditch was not permanent, visible, or stable enough to mark a purported boundary. *Id.* at 946–47.

Ultimately, the measure of whether the occupation requirement has been satisfied is to establish that a claimant's occupation up to, but not over, the purported boundary "would place a reasonable party on notice that the given line was treated as the boundary between the properties." *Babr*, 2011 UT 19, ¶ 36. It follows, therefore, that occupation and use of property without regard to a fixed line would probably not be sufficient to establish a boundary by acquiescence.

Marked by Monuments, Fences, or Buildings

The purported boundary line must be clearly marked, again so that a reasonable person would realize that the line was being treated as the property boundary. "A *monument* must be some tangible landmark to indicate a boundary" *Englert v. Zane*, 848 P.2d 165, 169 (Utah Ct. App. 1993) (citation omitted). The monument, building, or fence may be replaced or even altered,

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but, as long as the same visible line is treated as the boundary, an acquiescence claim may still be successful. *See Orton v. Carter*, 970 P.2d 1254, 1257–58 (Utah 1998).

The purpose of the fence, building, or monument and whether it was installed to mark a property boundary is important. A structure or other marker erected as part of the normal use of the property, may identify a boundary only if the owners treated it as such. A temporary, moveable fence used to control livestock, but not intended to delineate a boundary, would not be sufficient to support a claim for a new boundary by acquiescence. *Pitt v. Taron*, 2009 UT App 113, ¶ 2, 210 P.3d 962.

Most of the cases addressing boundary by acquiescence have concerned an artificial marker, such as a fence or building. Natural features, however, may also serve to mark a purported boundary line, as long as the affected owners acquiesce in the feature as marking the boundary. *Englert*, 848 P.2d at 170 (treating a river as property boundary). The nature of the marker is not critical. “[T]he law merely requires ‘a recognizable physical boundary of *any character*, which has been acquiesced in as a boundary for a long period of time.’” *Orton*, 970 P.2d at 1257 (citations omitted).

Mutual Acquiescence in the Line as a Boundary

The “heart” of boundary by acquiescence is mutual recognition by adjoining property owners that a visible line marks the boundary between the properties. This element is satisfied “where neighboring owners recognize and treat an observable line, such as a fence, as the boundary dividing the owner’s property from the adjacent landowner’s property.” *Babr v. Imus*, 2011 UT 19, ¶ 37, 250 P.3d 56. Because it is based on the actions of the property owners, acquiescence is highly fact dependent. *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 26, 270 P.3d 430. What the owners intended regarding placement of the boundary is not a factor. “[A] party’s subjective intent has no bearing on the existence of mutual acquiescence.” *Id.* ¶ 27, 439. Since acquiescence may be implied or inferred by the owners’ actions, it is not necessary to show that the owners explicitly agreed that the line was the property boundary. *Wilkinson Family Farm, LLC v. Babcock*, 1999 UT App 366, ¶ 8, 993 P.2d 229.

“Mutual acquiescence in a line as a boundary has two requirements: that both parties recognize the specific line, and that both parties acknowledge the line as the demarcation between the properties.” *Id.* (citation omitted). Acquiescence

thus requires more than just the existence of some identifiable line. “[T]he mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary.” *Brown v. Jorgensen*, 2006 UT App 168, ¶ 16, 136 P.3d 1252, 1257 (citation omitted).

Acquiescence may be established by the direct actions of the property owners regarding the purported boundary. It may also “be tacit and inferred from evidence, i.e., the landowner’s actions with respect to a particular line may evidence that the landowner impliedly consents, or acquiesces, in that line as the demarcation between the properties.” *Ault v. Holden*, 2002 UT 33, ¶ 19, 44 P.3d 781. Even silence and inaction may be evidence of acquiescence. *See Anderson v. Fautin*, 2014 UT App 151, ¶ 21, 330 P.3d 108, 114.

Any person familiar with the situation could offer relevant testimony concerning whether the property owners considered a particular line as the property boundary. *See RHN Corp. v. Veibell*, 2004 UT 60, ¶ 27, 96 P.3d 935; *Martin v. Lauder*, 2010 UT App 216, ¶ 6 n.4, 239 P.3d 519.

In order for the acquiescence to be mutual, “both parties must have knowledge of the existence of a line as [the] boundary line.” *Wilkinson Family Farm*, 1999 UT App 366, ¶ 8 (citations omitted). Since acquiescence is determined by the owners’ objective actions and not their mental state or intent, a party’s actual knowledge of the correct boundary is relevant to determine acquiescence, but it is not necessarily fatal to the claim. *Id.* ¶ 13. In like manner, while a deed provides constructive notice of the correct boundaries, a deed description by itself is insufficient to negate an acquiescence claim. *RHN Corp.*, 2004 UT 60, ¶ 28. Finally, a party’s subjective belief concerning the location of the boundary could also be relevant to a boundary by acquiescence action. *Id.* ¶ 26.

A claim of mutual acquiescence may be countered by actions indicating that either property owner did not recognize or treat the purported line as marking the property boundary. *Ault*, 2002 UT 33, ¶ 20. Objections to the use or occupancy of the property are sufficient. “[M]ere conversations between the parties evidencing either an ongoing dispute . . . or an unwillingness . . . to accept the line as the boundary refute any allegation that the parties have mutually acquiesced . . .” *Id.* ¶ 21. In addition, evidence that the boundary had already been settled in an earlier dispute may defeat a new claim for boundary by acquiescence. *See Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990).

For a Long Period of Time

Utah's courts have firmly established that twenty continuous years is the minimum period of time required for a successful boundary by acquiescence claim. *Jacobs v. Hafén*, 917 P.2d 1078, 1080-81 (Utah 1996). Any interruption in that period, however brief, "restarts the clock for determining boundary by acquiescence." *Orton v. Carter*, 970 P.2d 1254, 1258 (Utah 1998) (citing a Colorado case where a two-week period of common ownership disrupted the acquiescence period).

When a twenty-year period of mutual acquiescence is proven, the new boundary is delineated, even if actions taken after the twenty-year period would otherwise defeat a claim. "Once adjacent landowners have acquiesced in a boundary for a long period of time, the operation of the doctrine of boundary by acquiescence is not vitiated by a subsequent discovery of the true record boundary by one of the parties." *RHN Corp.*, 2004 UT 60, ¶ 31.

Finally, "once adjacent landowners have acquiesced to a visible boundary other than the recorded property line for the requisite

twenty years, the encroaching landowner's possession ripens into legal title by operation of law, extinguishing the other landowner's legal title to any part of the disputed land." *Q-2, LLC v. Hughes*, 2014 UT App 19, ¶ 11, 319 P.3d 732 (citation omitted). In other words, title to the disputed property is transferred when all of the elements of boundary by acquiescence are established, even if some time has passed, and regardless of when it is confirmed that the elements have been satisfied. When all elements are satisfied, the new boundary would be established from that point and could impact subsequent events pertaining to the property. *Id.*, ¶¶ 14–18, (holding that there was sufficient evidence to establish a subsequent adverse possession claim).

By Adjoining Landowners

Although it seems a bit obvious, a new boundary may only be established when adjoining property owners mutually acquiesce in a purported boundary. See *Brown v. Milliner*, 232 P.2d 202 (Utah 1951) (noting unsuccessful cases that did not involve adjoining owners). Boundary by acquiescence may not be invoked

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Clyde Snow & Sessions is pleased to welcome attorney Victoria Bunch as an associate in their Salt Lake City office. Ms. Bunch will be focusing her practice on civil and business litigation, and in particular, medical malpractice defense, contract claims, and employment claims. She received a J.D. from the University of Utah S.J. Quinney College of Law graduating with honors, and a B.A. in government from University of Texas, graduating *cum laude*.

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when one of the properties is in the public domain. *Carter v. Hanrath*, 925 P.2d 960, 962 (Utah 1996). In addition, the dispute must involve a common boundary. For example, in *Switzgable v. Worseldine*, 15 P. 144 (Utah 1887), the dispute concerned the correct placement of other property lines, but not the common boundary between the parties' parcels. *Id.* at 144–45.

The actions of previous owners may establish a boundary by acquiescence, which would bind subsequent purchasers, even if those purchasers acted in good faith and identified the correct boundary. See *Q-2*, 2014 UT App 19, ¶ 13, 319 P.3d 732. Boundary by acquiescence, however, cannot derive from actions of non-owners regarding the boundary, even if they are familiar with the property and even if they have an interest in the placement of the boundary. “[A]cquiescence between [non-owners] was impossible because they could not permissibly settle their dispute by adjusting the boundary on property neither of them owned.” *Argyle v. Jones*, 2005 UT App 346, ¶ 12, 118 P.3d 301.

Several boundary by acquiescence cases have involved properties owned by corporate entities rather than individuals. However, none of these cases have directly addressed the question of how a corporate entity's actions could be construed as mutual acquiescence. It stands to reason that only the actions of the individuals responsible for the corporate entity could establish that a purported line was recognized and treated as the property boundary. See *Judd Family Ltd. P'ship v. Hutchings*, 797 P.2d 1088, 1090 (Utah 1990). It also follows that actions by individuals who are not in a position of responsibility, i.e., employees, could not establish acquiescence of a corporate entity through their actions.

Conclusion

As the old adage goes, “[g]ood fences make good neighbors.” Obviously, it is better to avoid potential boundary disputes through correct measurement and placement of fences or other boundary markers. Unfortunately, most property boundaries are not reviewed on a regular basis, so mistakes can be perpetuated for several years and later cause heated disputes between neighbors. Many years ago, the Utah Supreme Court acknowledged this fact of life, with a small dose of cynicism:

It is significant that in most cases, a physical, visible means of marking the boundary was effected at a

time when it was cheaper to risk the mistake of a few feet rather than to argue about it, go to court, or indulge the luxury of a survey, pursuance of any of which motives may have proved more costly than the possible but most expedient sacrifice of a small land area. The rub comes when, after many years, land value appreciation tempts a test of the vulnerability of a claimed ancient boundary. The struggle usually involves economics. Nothing is wrong in the urge to acquire or retain. But neither is there anything wrong in the law's espousal of a doctrine that says that with the passage of a long time, accompanied by an ancient visible line marked by monuments with other pertinent and particular facts, and with a do-nothing history on the part of the parties concerned, can result in putting to rest titles to property and prevent protracted and often belligerent litigation usually attended by dusty memory, departure of witnesses, unavailability of trustworthy testimony, irritation with neighbors and the like. This idea is based on the concept that we must live together in a spirit justifying repose or fixation of titles where there has been a disposition on the part of neighbors to leave an ancient boundary as is without taking some affirmative action to assert rights inconsistent with evidence of a visible, long-standing boundary. In the vernacular, the doctrine might be paraphrased to enunciate that boundaries might be established by an “I don't give a hoot” attitude on the part of neighbors.

King v. Fronk, 14 Utah 2d 135, 378 P.2d 893, 896 (Utah 1963).

In a successful boundary by acquiescence action, there will be a winner and a loser. One owner will forfeit property, and another may gain a significant amount of land. See *LPM Corp. v. Smith*, 2006 UT App 258, ¶12, 139 P.3d 292 (holding that ownership of entire parcel may be transferred through boundary by acquiescence). Since the stated purpose of the boundary by acquiescence doctrine is to avoid litigation, attorneys who counsel property owners facing boundary disputes should become familiar with the doctrine, and apply it to resolve matters outside of court. While litigation may sometimes be necessary, understanding the boundary by acquiescence doctrine may lead to settlement through negotiation or through alternate dispute resolution.