

A License to Use Land May Become Irrevocable

In the recent decision in *Shoen v. Zacarias*, the California Court of Appeal held that when a landowner grants someone permission to use her land, she generally retains the right to revoke that license at any time. The landowner may nevertheless be estopped from revoking that license—and the license will accordingly become irrevocable for “so long a time as the nature of it calls for”—if the person using the land has expended money or its equivalent in labor improving the land in the execution of the license.

Critically, however, the expenditure of money or labor can make a license irrevocable only if that expenditure is “substantial,” “considerable” or “great.”

The Appellate Court concluded that the trial court’s grant of an irrevocable license was an abuse of discretion because the court construed the “substantial expenditure” requirement too permissively, and used the wrong legal standard in declaring the license to be forever irrevocable.

Shoen and Zacarias are neighbors whose backyards consist primarily of steep upward hillsides. At the top of Zacarias’ hillside and midway up Shoen’s is a flat patch of ground. The property line zigzags through this flat patch. Of this patch, 490 square feet are on Shoen’s side of the line, and the remainder is on Zacarias’.

Before either Shoen or Zacarias bought their parcels, someone had leveled out the flat patch, poured three concrete “meditation pads,” and placed ornamental gravel on the patch. The prior owner of Zacarias’ parcel had also installed steps made of railroad ties leading all the way up to the flat patch, while the prior owner of Shoen’s parcel had installed railroad-tie steps leading two-thirds of the way to the flat patch but stopping about 20 to 30 feet shy of the patch.

When Zacarias bought her parcel in 2003, she mistakenly believed that the entire flat patch was on her land. Over the next two years, she

- (1) brought in contractors to grade the patch to make it flatter,
- (2) removed stacks of bamboo and cleared overgrown brush from the patch,
- (3) installed new ornamental gravel,
- (4) planted a low, 18-inch-tall hedge and built a foot-tall wooden fence around the perimeter of the patch,
- (5) populated the patch with a 10 foot-by-10 foot cloth cabana, a chaise lounge, a table and chairs, none of which is affixed to the ground and each of which remains movable,
- (6) installed underground electrical conduit from her house to the patch, and
- (7) installed sprinklers and then replaced them with a drip system in order to water the hedges on the patch. Each of these improvements was made in 2003, 2004 or the early part of 2005.

In 2006, when the Shoen family trust acquired the parcel now owned by Shoen, the prior owner disclosed Zacarias’s encroachment of the flat patch. Both Shoen and her father admitted knowing that the disputed area was on their land. From that time until April

2011, and in an effort to be a “good neighbor,” neither the trustees of the Shoen family trust nor Shoen (who was living on the property) told Zacarias to stop using the disputed area.

In May 2012, Zacarias was asked to vacate the disputed area because Shoen desired to landscape the area. Zacarias ignored the request. During the period between the Shoen family trust acquiring the disputed area and the request that Zacarias stop using that area, Zacarias spent time and money to keep the entire flat patch usable. In particular, she

- (1) kept the trees near the patch trimmed,
- (2) cleared the brush on her hillside every year,
- (3) replaced the plants comprising the low ficus hedge when it died,
- (4) watered the hedges,
- (5) sometimes used the cabana’s lighting or other electricity, and
- (6) re- upholstered the top of the cabana and the furniture.

Zacarias paid the gardener who trimmed the trees \$130 per month for the upkeep of her entire parcel of land. She paid laborers \$700 per year to clear the brush on all of her land. The new ficus hedge cost \$2,350 to replace. Zacarias’s average monthly electric and water bill for her house, swimming pool and entire yard was \$1,200.

In June 2012, Shoen sued Zacarias for damages, injunctive and declaratory relief on theories of (1) trespass, (2) nuisance, (3) ejectment, and (4) negligence. Zacarias answered and counter-sued for damages and injunctive relief on theories of (1) prescriptive easement, (2) equitable easement and (3) nuisance based on Shoen’s placement of two video cameras on Shoen’s property that overlooked the disputed area as well as portions of the flat patch on Zacarias’s property.

Zacarias asserted that she had an irrevocable license to use the disputed area based on Shoen’s acquiescence to her use of the disputed area. During the trial, Zacarias estimated that from 2003 onward she spent at least \$15,000 to \$25,000 to improve and maintain the disputed area. This amount included \$8,638.55 for the cabana and other portable furniture on the flat patch. It also included a portion of her monthly gardening, electrical and water bills that Zacarias calculated by dividing the square footage of her entire property (6,928) by the square footage of the disputed area (490).

The trial court ruled that Zacarias should be awarded an exclusive irrevocable license to use the disputed area and that this license would last forever, even after Zacarias sold the property. Although acknowledging that “some significant portion of” Zacarias’s estimate of the \$15,000 to \$25,000 “was spent *before*” Shoen acquiesced to Zacarias’s use of the disputed area, the court nonetheless concluded that Zacarias had “spent substantial sums and physical labor” landscaping, maintenance and care of the disputed area during the six and possibly seven years that Zacarias had used it with Shoen’s acquiescence.

The court further ruled that the equities favored granting the license not only to Zacarias but also in perpetuity to her successors-in-interest because the disputed area was accessible from the Zacarias property. The property but did not appear to provide any

benefit to the Shoen property because it was not viably accessible from that property. The court lastly ruled that this permanent license would also be exclusive due to the physical layout of the parcels and the parties' bad relationship.

When a landowner allows someone else to use her land, the owner is granting a license. A license may be created by express permission or by acquiescence; that is, by tacitly permitting another to repeatedly do acts upon the land with full knowledge of the facts and without objecting.

Although a license may generally be revoked at any time at the pleasure of the licensor, a court may declare the license to be irrevocable for so long a time as the nature of it calls for if the licensee has expended money, or its equivalent in labor while reasonably relying on the existence of the license.

Critically, courts may exercise their power to declare a license irrevocable only if the expenditures in reliance on the license are "substantial," "considerable" or "great," and "trivial" expenditures will not suffice.

This particular requirement exists for two reasons. First, it mirrors a similar requirement in the doctrine of equitable estoppel, the doctrine that forms the principal rationale for the California Supreme Court's recognition of a judicial power to declare licenses irrevocable. Second, the requirement of significant expenditures ensures that courts use their power to create irrevocable licenses sparingly. This is critical because such licenses are functionally indistinguishable from easements and because courts are rightly reluctant to exercise what is, in effect, the right of eminent domain by permitting the licensee to occupy property owned by another.

Nearly every case where a license has been declared irrevocable has involved the licensee's permanent alteration of the land and the ensuing upkeep, whether by building, altering or upgrading a roadway. Examples are constructing a ditch, canal or levee to transport water, building a canal or levee, erecting a wall, or raising living quarters such as cabins.

The Appellate Court found that the trial court abused its discretion in making an irrevocable license perpetual in duration for two reasons. First, the trial court used the wrong legal standard. Rather than look to when Zacarias would obtain the return on the investment of her upkeep occurring after she obtained a license, the court engaged in a wholly separate inquiry into who would make better use of the disputed area by balancing the greater value and utility of the disputed area to Zacarias due to her ready access to the area, against the lesser value and utility of the area to Shoen (due to her less-than-ready access to the area).

Second, the proper analysis could not have yielded an irrevocable license that is perpetual in duration. This is not a case where Zacarias was seeking to obtain a license for long enough to obtain a return on her major investments in improving the flat patch because she made all of those improvements before any license was granted. The only investment

to be recovered was Zacarias's annual investment in upkeep. The licensee's annual cost of upkeep, without more, does not warrant a perpetual license to recover the investment in upkeep; if it did, every irrevocable license would be perpetual.

LESSONS:

1. Granting a license may create a situation whereby the licensee can expend substantial money or labor in reliance on the license, and thereby make the license irrevocable.
2. When granting a license for use of land, do so in writing, and reserve the right to revoke the license for any reason at any time, and regardless of how much money or labor the licensee invests in the land.