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Neighborhood Property Law

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BOOK REVIEWS

Neighborhood Property Law

Disputes Between Adjoining Landowners—Easements. By James H. Backman and David A. Thomas. New York: Matthew Bender & Co., Inc. 1989. Pp. iv., loose-leaf.

Neighboring Property Owners. By Jacqueline P. Hand and James Charles Smith. Colorado Springs: Shepard's McGraw-Hill, Inc. 1988. Pp. iv., 462.

*Reviewed by Corwin W. Johnson**

Two recently published books address the varied legal relations of adjoining and neighboring land owners. One, referred to here as *Adjoining*, is authored by Professors James H. Bachman and David A. Thomas, both of whom are members of the faculty of J. Reuben Clark Law School, Brigham Young University. The other, referred to here as *Neighboring*, is authored by Professor Jacqueline P. Hand, who is a member of the faculty of the University of Detroit Law School, and by Professor James Charles Smith, who is a member of the faculty of the University of Georgia School of Law.

Teachers and students of real property law have long been intrigued by the plethora of doctrines and principles courts have brought to bear upon various relationships of owners of adjoining or neighboring land. Consensual arrangements intended to burden and benefit subsequent owners have been categorized as easements, real covenants and equitable servitudes, rather than as a single concept. Similarly, courts have resolved conflicts of

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land uses not covered by consensual arrangements by resort to the doctrines of trespass, nuisance and judicially created interests such as rights to support of land and to drainage of surface water.

It is not surprising, then, that property law scholars would bring together for analysis the full range of law applicable to relations among neighboring landowners. What is surprising is that they have not done so earlier.

Aside from their recognition that the law of neighboring landowners is a useful focus, the authors of these two books have approached the subject with much different objectives. *Adjoining* is, as its title states, a practical guide for attorneys. For each topic addressed, *Adjoining* provides a brief summary and analysis of relevant law, followed by a section entitled "Practice Aids," consisting of a "checklist" for assistance in analysis of clients' problems and forms. Case citations in footnotes are listed by states in alphabetical order.

Neighboring is not avowedly directed toward any particular group of readers, but rather appears to be intended to provide information and understanding for any interested reader; law students and law teachers will find it helpful. They also may be assisted by *Adjoining*, despite its practical orientation.

Both books reveal substantially the same conception of the "field" of neighborhood land law, but there are some differences. Both address easements, real covenants, equitable servitudes, licenses, boundaries, adverse possession, nuisance, trespass and water rights. *Adjoining* also addresses mining, oil and gas, party walls and alternative dispute resolution. Curiously, although easements are singled out for inclusion in the title of *Adjoining*, they are not accorded exceptional treatment in the text. The title is also misleading in that, despite the reference to "Disputes" in the title of this book, it contains much material on consensual relations of landowners. Topics addressed by *Neighboring* that are not treated by *Adjoining* are airspace, private enforcement of zoning, environmental law, public trust, condominiums, cooperatives and timeshares. The emphasis of *Neighboring* is upon residential neighborhoods.

While the interest of scholars in focusing upon the legal relations of adjoining or neighboring landowners is readily perceived, the value of such a focus to practicing lawyers is not so clear. That focus is not a recognized specialization of law practice. It might be of interest to attorneys representing developers

of land. Would an attorney with a problem falling under one of the topics treated be assisted by inclusion in the same volume of treatment of other topics in *Adjoining*? Possibly, but this book does not call attention to insights that may be gained by reading sections on related topics.

An entire chapter of *Adjoining* is devoted to alternative dispute resolution. It amounts to a summary of the subject. For the most part, it is general in nature, without special reference to disputes among adjoining landowners. Only one section, Section 20.02[4]—"Adjoining Landowner Disputes Which May be Arbitrated"—undertakes to relate alternative dispute resolution to controversies among adjoining landowners. It consists of two short paragraphs, one sentence of which directly refers to adjoining landowners: "An arbitration award cannot actually convey title, or determine such issues as whether a river bank has been formed by accretion or avulsion, but it can settle a boundary dispute." It is unfortunate that these generalizations are not explained. One might infer that Professors Backman and Thomas are generally supportive of alternative dispute resolution but do not view disputes among adjoining landowners as peculiarly adapted to alternative dispute resolution. In their introductory comments for this chapter, however, they call attention to the large number of cases examined in their study in which "landowners have relied on the courts to resolve disputes even when the property values at issue were not large nor the legal issues complex." A greater effort by the authors to place alternative dispute resolution in the context of disputes between adjoining landowners might have been helpful.

Professor Hand and Smith do not address alternative dispute resolution, but their discussion provides some support for it. In their introductory overview, they stress that "the continuing nature of the relationship means that litigation is, and should be, the last resort in many of these cases." This is especially true, they assert, when neighbors have many relationships with each other. They should avoid risking a total breakdown of all of those relationships "because of a single bad transaction."¹

The stated purpose of *Neighboring* is "to explore the full range of legal principles that collectively operate to define the rights and obligations of neighboring landowners."² This is use-

1. J. HAND & J. SMITH, *NEIGHBORING PROPERTY OWNERS* 10 (1988).

2. *Id.* at v.

ful, its authors declare, "because it allows a coherent analysis" of this general field. Given this objective, one would expect to find frequent cross references to related topics and also a concluding chapter generalizing the field and revealing insights derived from comprehensive study. Unfortunately, both expectations are disappointed. Though the book's topics are well-researched and well-written, their interrelationships are not developed.

Although both of these books address the legal relations among neighbors, *Neighboring* goes beyond this individualistic framework by calling attention to the collective interests of residential neighborhoods, which they observe are gaining recognition. They cite the weighing of community interests in private nuisance litigation, enforcement by homeowners' associations of servitudes and environmental statutes, and the conferral by zoning ordinances of "some sort of collective right on neighbors to protect their community."³ The chapters on zoning and environmental protection emphasize private enforcement. They refer to a suggestion by another author that the time may have arrived to recognize in landowners a property right, capable of being transferred, to protect their residential neighborhoods. But that suggestion is not explored in this book.

A chapter in *Neighboring*, contributed by attorneys Mary Margaret Bolda and Adrienne C. Southgate, is devoted to condominiums, cooperatives and timesharing. It is a concise yet thorough and up-to-date survey of these increasingly used forms of residential ownership. This chapter is an excellent introduction to the subject, and may also be useful to readers already conversant with the field.

Neither book contains a final chapter consisting of a comprehensive analysis of the entire field of the law of adjoining or neighboring landowners. Such a chapter could be very useful. It might address the following and similar questions: Are all of the varied concepts and doctrines invoked to address different aspects of neighborhood relations really needed? Do inconsistencies among them produce undesirable results? Should one or a few comprehensive doctrines be substituted for the existing panoply? If so, what should be their contours? A 1982 symposium issue of the Southern California Law Review⁴ examined proposed unification of the law of consensual arrangements among

3. *Id.* at 5.

4. 55 S. Cal. L. Rev. 1177 (1982).

neighbors, but the subject of unification of nonconsensual doctrines of neighborhood land law remains to be explored. Perhaps influenced by that symposium, *Adjoining* devotes one chapter to unification of servitudes, which it supports. Considering the different objectives of these two books, it is surprising that *Adjoining*, rather than *Neighboring*, addresses unification of servitudes. This subject is of greater interest to scholars and reformers than to practitioners.

The focus of these two books upon legal relations of adjoining and neighboring landowners is a significant contribution to legal literature. It is hoped that these pioneering efforts will be followed by books or articles, by these or other authors, who undertake comprehensive rationalization of the entire field.