

Dealing with Encroachments (7/5/11) (dcm)

An encroachment is defined as an illegal or unpermitted use of another's property. It may be in the form of a fence, a road or path, powerline, pipeline, well, garbage dump, house or other building, etc. It may involve project improvements that extend onto neighboring property, or the neighbor's improvements extending onto the project's property. It may also consist of improvements being constructed in a setback area, or it may consist of awnings, cornices, flagpoles, etc. projecting over a right-of-way. We expect that encroachments will be identified on the project survey as well as in the Surveyor's Report. The danger in allowing an encroachment to persist is that the user may acquire title to the property by adverse possession, or may acquire an interminable right to continue the use by prescription. We do not want the neighbor to acquire title to project property this way. Conversely, an unpermitted use is subject to termination at will, so long as it has not matured into title by adverse possession or an easement by prescription. We do not want the neighbor to have this power over protruding project property.

The cure for an encroachment onto property in which HUD has an interest is to either:

- obtain title insurance covering the encroachment
- require removal of any improvements and termination of the use
- convert the encroachment into a permit, or
- disregard trivial encroachments that do not interfere with the operation of, nor are required for the operation of, the project.

No closing will occur where neither cure has been applied. In the case of minor intrusions of fences and utility hardware, title insurance alone will usually be satisfactory. And, to be honest, sometimes no cure is to be found and if the encroachment is trivial, it can just be ignored.

In the case of the intrusion of more substantial improvements--buildings and roads, removal or a permit is more appropriate. The benefit of the permit is that it defines what can be done on the property in question, and establishes criteria for terminating the use. The permit may last for the life of the improvement, or the grantor may reserve the right to terminate the permit with some reasonable notice. While the permit is in effect, the permittee will be required to hold the grantor harmless from any liability resulting from the permitted use.

The use must be such as to support a determination by HUD that it does not interfere with the marketability of the project.

The cure for an encroachment which benefits the property in which HUD has an interest, is likewise to either remove the encroachment (i.e. move the fence back onto the project property), or obtain a permit allowing the improvement to remain on the site for its useful lifetime. Again, if it is an insubstantial improvement, title insurance alone may be sufficient. The permits must have legal descriptions of the property served, the property encumbered, and the specific area being used, and must be recordable. They must be signed by the owners of both properties. They must disclaim any interest in title by adverse possession or easement rights by prescription.

The documents should be reviewed by HUD prior to execution and recording. The documents should be recorded early enough in the process to allow the references to encroachments to be deleted from the survey and surveyor's report prior to closing.