Fidelity National Title

Important Easement Information

We should always be concerned about encroachments; whether the seller's use of those five square feet of the neighbor's property for a garden is a problem? Can we expect that the neighbor will continue to permit it? It is a problem and we cannot expect the permissive user to continue.

The seller must establish the following:

- The use was visible, open, notorious (i.e. that the neighbor knows about it)
- There was never expressed permission
- The use was continuous for at least five years

If the seller cannot establish these elements the use may constitute an encroachment over the boundary line and a trespass.

Never assume that a neighbor will continue to allow the encroachment. Unless a prescriptive easement is legally confirmed, and recorded, the neighbor could always file a complaint, force the buyer to remove the encroachment and bar your client from crossing the actual property boundary line. Of course, subject to your client's consultation with an attorney, there are some options:

- Either the seller, if the issue is discovered prior to close of escrow, or the new buyer, if after close, could negotiate a settlement or title in return for compensation.
- Or, they could agree that an easement will never be granted, but that the neighbor will give revocable permissions (a "license") to use the property.

In any event, once the issue is raised, the parties must consult counsel and resolve it before the close of escrow.