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Is it open season on easements?

By: Justin M. Perrotta and Michael Pill June 26, 2014

This month's column was prompted by questions about ambiguities in *Martin v Simmons Properties, LLC*, 19 Land Ct. Rptr. 214, 2011 WL 2046251 (2011) (Piper, J.), affirmed in part, vacated in part and remanded, 82 Mass. App. Ct. 403 (2012), affirmed, 467 Mass. 1 (2014).

A prior column prompted by the Appeals Court decision, entitled "David v. Goliath: When is an encroachment not an encroachment?" appeared in the Nov. 11, 2012, issue.

The Supreme Judicial Court decision overruling the Appeals Court and affirming the Land Court decision summarized its holding in these words at 467 Mass. at 2-3:

"In this case involving registered land, we consider, among other things, the effect of a reduction by the owner of the servient estate in the dimensions of an easement created for the purpose of permitting the easement holder access to a lot that otherwise has no direct access from a public way. We must determine whether the dimensions of such an easement, defined by reference to a Land Court plan, may be modified by the servient land holder so long as the purposes for which the easement was created are not frustrated, and the utility of the easement is not lessened. We conclude that there is no meaningful distinction for purposes of such an analysis between an easement on recorded land and an easement on registered land held pursuant to a Land Court certificate of title. Confirming and expounding upon our adoption of the Restatement (Third) of Property (Servitudes) § 4.8(3) (2000) (Restatement) in *M.P.M. Bldrs., LLC v. Dwyer*, 442 Mass. 87 (2004) (*M.P.M.Builders*), we affirm the decision of the Land Court judge that the width of the easement properly may be reduced as the defendant has done here, since the plaintiff does not dispute that at all times he has been able to use the remaining unobstructed portion of the easement for the purpose of travel to and from his parcel."

One issue of concern is the following section of the SJC decision concerning the lack of a specified width for plaintiff Martin's easement (467 Mass. at 16-17):

"Where the language of an easement requires that a way of a defined width be kept open, or that the full extent of the width described be usable, we have prohibited any encroachment into the way. [Discussion of citations omitted.]

"Martin's certificate of title, by contrast, does not contain any reference to the full width of the easement as drawn on the J-Plan, or any language restricting a change in its dimensions, prohibiting other uses, or requiring that the easement be kept open throughout its full extent. Rather, it references the deed reserving to lot 4A a 'right of way in common with lot 3A … over rights of way "A," "B," "C" and "E" as shown on' the J-Plan. Indeed, as the judge noted, Martin's certificate of title does not set forth an 'exact location' of any of the easements at issue, or describe in words the 'location and limits' of any one of them. [Discussion of citations omitted.] Moreover, the clear intent of

the parties, as the judge discussed in describing the series of shared ways established when the Textile Realty Company's parcel was divided into separate ownership, was that the easement over Way A be used for access to lot 3A, requiring only a 'convenient passage' over the easement area."

The lesson for a conveyancer drafting an easement is to:

(1) specify easement width, allowing sufficient space within the bounds of the easement for intended use (including drainage and possible future installation of utilities if the easement is a driveway or private road) and for maintenance/repair work in order to avoid any claim of trespass on the servient estate; and,

(2) state that "the full specified easement width shall be kept open, unobstructed, and usable."

Who has the burden of proof where there is an encroachment into an easement? The SJC in *Martin* recited the following traditional common law rule (467 Mass. at 10; citations omitted): "The party asserting the benefit of an easement has the burden of proving its existence, its nature and extent … ."

That may make sense where, as in the *Martin* case, "the clear intent of the parties … was that the easement over Way A be used for access to lot 3A, requiring only a 'convenient passage' over the easement area." 467 Mass. at 16-17.

But what about a travel easement of specified width, where the easement does not include language preventing alteration of the easement without the consent of the dominant estate, which is almost certainly the case for any easement drafted prior to *M.P.M. Bldrs.*? Can the servient estate owner trespass on such an easement largely with impunity, saying in effect "the easement holder must prove that it needs the part of the easement I am obstructing, otherwise the easement is extinguished to the extent of my encroachment"?

In other words, is the holder of an easement of specified width forced to prove a need for that entire width or suffer a private uncompensated taking of his property?

Allowing a trespass to narrow the width of a deeded travel easement having a specified width, with the burden of proof on the easement holder, can result in an uncompensated private eminent domain taking, which was rejected in *Goulding v. Cook*, 422 Mass. 276, 277-278 (1996), reversing, 38 Mass. App. Ct. 92 (1995), where the SJC stated as follows (citations omitted):

"It is commonplace today that property rights are not absolute, and that the law may condition their use and enjoyment so that the interests of the public in general or of some smaller segment of the public, perhaps even just immediate neighbors, are not unduly prejudiced. Restrictions from architectural approvals to zoning regulations are accepted features of the legal landscape. But, except in 'exceptional' cases, we draw the line at permanent physical occupations amounting to a transfer of a traditional estate in land. And certainly that line, because the interests on either side of it are themselves conventional and the creatures of the law, is often hard to draw. But we are committed to maintaining it, because the concept of private property represents a moral and political commitment that a pervasive disposition to balance away would utterly destroy. The commitment is enshrined in our Constitutions. Where the line is crossed and the commitment threatened, even in the interests of the general public, just compensation is required. And by implication, where the encroachment is not for a public use, the taking may not be justified at all. Although we deplore the disposition to turn every dispute into a Federal (constitutional) case and no constitutional claim was — or needed to be — made here, it is to these constitutional commitments that the dissent in the Appeals Court's decision referred when it observed that '[o]ur law simply does not sanction this type of private eminent domain.'"

What if an easement has not yet been used, which may mean an easement holder cannot predict exactly how much of the easement width will be needed? In *Martin*, the easement had been in use for years despite encroachments that did not interfere with its use.

The court stated (467 Mass. at 9) that, "Martin does not dispute that, as he testified at trial, he has at all times been able to pass over Way A to reach his lot, and Simmons has never suggested to him that he may not travel on Way A over its property."

The prior common law rule that an easement holder always had the right to utilize the full width of an easement of specified width was rigid. In *Delconte v. Salloum*, 336 Mass. 184, 185-186, 189, 190 (1957), the easement holder's right to prevent parking within even an otherwise impassable part of the easement was upheld on appeal.

Wherever an easement for a right of way was created by express grant or reservation, the easement holder was entitled to utilize the full width of the way. *Onorati v. O'Donnell*, 3 Mass. App. Ct. 739, 739 (1975).

Where a right of way "was shown as a street 35 feet wide on plans referred to in the deeds of the parties," the court held "[t]he defendant has a right of travel over its whole width." *Guillet v. Livernois*, 297 Mass. 337, 340 (1937), quoted in *LeBlanc v. Board of Appeals of Danvers*, 32 Mass. App. Ct. 760, 764 n. 7 (1992).

The SJC in *Martin*, continuing the trend started in *M.P.M. Bldrs.*, moved further away from rigid rules regarding easements in favor of a flexible approach, stating (467 Mass. at 13): "We consider the public policy favoring socially productive use of land, set forth in comment b to § 4.9 of the Restatement [(Third) of Property (Servitudes)], *supra*, to be a useful starting point in balancing the interests of the easement holder and the servient land owner."

But in replacing old common law with the Restatement, the SJC contradicted itself by dredging up the outdated common law rule (467 Mass. at 9, citations omitted) that "[r]estrictions on land 'are disfavored,' and doubts concerning the rights of use of an easement 'are to be resolved in favor of freedom of land from servitude.'" The rule was abandoned by Restatement (Third) of Property Servitudes, where Comment a. to §4.1 states:

"The rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes should be narrowly construed to favor the free use of land. It is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources. The rule is supported by modern case law. … The general principle that servitudes should be interpreted in favor of validity, in contrast to the old rule that favored construction in favor of free use of land, facilitates safeguarding the public interest in maintaining the social utility of land while minimizing legal disruption of private transactions."

Future cases will have to address these and perhaps other issues raised by the SJC decision in *Martin*; and lawyers representing both dominant and servient estates need to be aware of these issues when negotiating and drafting easements.

Terms augmenting or circumscribing the "flexible approach" to easements adopted in Massachusetts may be necessary to ensure that the intent of the parties is protected, especially as circumstances may change in the years after creation of the easement.

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