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CAN I UNILATERALLY RELOCATE THAT EASEMENT?

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An experienced developer, identified a tract of land for development as a retail center. The likelihood of rezoning, subdivision, access to the adjoining highway and extensions of utilities is almost a certainty. Fortunately, very early in the predevelopment activities and even before a contract of sale was signed, Chicago Title was requested to issue a title commitment and promptly did so (parenthetically why purchasers agree to accept title that is good and marketable without first reviewing a title commitment including the exceptions is a mystery). The title commitment revealed an easement crossing through the middle of the property for access to an adjoining property. The easement was specifically described as shown on a recorded plat. The easement was rarely, if ever used except for access of farming machinery from the highway to the adjoining parcel. Left in its current location the property could not be developed for its intended uses.

Now for the $6,400,000 (the price for the property) question. Can the developer unilaterally relocate the easement to another location on the property which will provide not only access but access over a wider paved road in lieu of the dirt path that now exists on the easement area?

As is recently noted in the American Bar Association Quarterly Report (Vol. 2, No. 1 Spring 2009) this situation is certainly not unique. In the case cited in the Report, A. Perrin Development Co., LLC vs. TY-PAR Realty, Inc., 667 S.E. 2nd 324 (N.C. App. 2008), the facts were simple and undisputed. The defendant was the owner of an express recorded easement over land which the plaintiffs intended to acquire. The plaintiff moved to extinguish or to "purge" the easement or in the alternative to relocate the easement to a more convenient area.

In the Perrin case, the trial court dismissed the complaint to permit relocation of the easement and the North Carolina Court of Appeals affirmed the trial court's dismissal, holding that North Carolina common law does not permit unilateral relocation. The North Carolina Court refused to follow the rule adopted in MPM Builders, LLC v. Dwyer, 442 Mass. 87, 809 N.E. 2nd 1053 (2004) in which the Massachusetts Court permitted such a relocation. In a similar case, Ann Catherine Murray vs. Betsy Bruce, et al., (Sixth Division Appellate Court of Illinois), the plaintiff sought to relocate a driveway which was causing her basement to flood, the Court adopted a standard which looked to "the substantiality of the change" to determine whether a relocation was permissible.

Central to the decision in the Massachusetts case and relied upon in the Illinois case was the Restatements of Property, Restatement Third: Servitudes, Section 4.8 which specifically advocates unilateral relocation.

The Restatement provides that unless expressly denied by the terms of an easement, "… the owner of the servient's estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burden on the owner of the easement in its use or enjoyment, or (c) frustrate the purpose for which the easement was created."

Professor John V. Orth of the University of North Carolina strongly takes issue with the Restatement in his article, "Relocating Easements: A Response to Professor French" who was the Reporter for the Restatement, Vol. 38 Real Property Probate & Trust Journal; page 643 (2003 – 2004). Professor French had concluded "what's not to like about a rule that makes the landowner better off and doesn't hurt the use rights of the easement holders". That approach is wrong according to Professor Orth. Professor Orth concludes that the Restatement is based on "a radical, if unacknowledged, reconceptualization of the nature of an easement" and "it denies the easement owner the right to determine the easement's utility and is unfair." He further concludes that by changing the rule the Restatement as applied to existing easements is likely "to defeat the parties' original intentions."

One might take the view that permitting such relocations so as not to unduly burden the development of undeveloped parcels is a correct view so as to enhance development. The more traditional position would, of course, be that an encumbrance is an encumbrance and it cannot be changed without the benefitted party's consent. A slightly more cynical view might be that every such easement can be relocated at a cost, whether or not it is exorbitant, and that the issue in each case is simply about money.

The views of Professors Orth and French are far more than academic. Leaving aside the increasing difficulty of assembling parcels for sensible uses, these cases are surely a precursor to other cases which will follow concerning the effect of easements and other rights under reciprocal easement agreements governing shopping centers where there is a certainty that many of the old centers will have to be repositioned and redeveloped. Thus, the relocation issue is merely a harbinger of other cases yet to come.