Expanding On Existing Easements: Legal And Financial Considerations When Advising Clients

By Janaye G. Pieczynski, Esq., Ausley & McMullen, P.A., Tallahassee, Florida

From using an easement for motor vehicle traffic, when it was only intended for foot traffic, to expanding existing utility easements to support broadband services, there are legal and financial considerations that accompany such additional burdens on easements. Although some additional burdens on easements appear to be more of natural progressions in use or technology that should be covered under the terms of the easement, additional burdens on easements are disallowed without permission or supplementary consideration.

Generally, "an easement, like any other contract, when unambiguous, is to be construed in accordance with its plain meaning."[1] In *City of Orlando v. MSD-Mattie, L.L.C.*, the City of Orlando owned an easement for overhead electrical transmission lines and was denied permission to lease the additional capacity of the fiber optic cables it already ran along the easement for internal communications. The appellate court found that "the use therein of the phrase 'necessary communication' eliminates even a scintilla of doubt about what was intended here. Clearly, the use of the easement for the provision of general telecommunications is not contemplated under its plain language." The appellate court concluded that "[t]he scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor."

However, there is a carve out in the law that allows for minimal expansion of the dominant estate. The Florida Supreme Court has held that, "the burden of a right of way upon the servient estate must not be increased to any greater extent than reasonably necessary and contemplated at the time of initial acquisition."[2] This concept, often referred to as a secondary easement, allows the owner of the dominant estate to do, "what is reasonably necessary for the full enjoyment of the easement itself . . . [but] the right is limited and must be exercised in such reasonable manner as *not injuriously to increase the burden upon the servient tenement* . . ."[3] Essentially, "a dominant estate easement owner is entitled to prepare, improve, maintain, or repair the easement in order to facilitate its use."[4]

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Use of an easement for an excluded purpose, beyond a secondary easement, as previously discussed, can lead to costly repercussions, including class action lawsuits. Two such class action suits out of Florida are *Seven Hills, Inc. v. Bentley*[5] and *Devon-Aire Villas Homeowners Ass'n, No. 4, Inc. v. Americable Assocs., Ltd.*[6] In *Seven Hills, Inc.*, the appellate court affirmed the trial court's certification of class after various landowners of the servient estates brought action against the utility company for exceeding "the scope of its written easements . . . by installing fiber optic communications lines on its easements and by permitting other entities to use the communications capacity." In *Devon-Aire Villas Homeowners Ass'n*, the appellate court reversed the trial court's order granting summary judgment in favor of a cable television company's expansion of a "public utility" easement by adding lines for cable television. The district court found that cable television was not a "public utility," as contemplated by the original language of the easement and found that entry upon the appellant's land was a trespass.

For those practitioners who support clients who need to expand upon the dominant estate in a way that is not contemplated by the original language of the easement, it is imperative that clients are guided through the process of entering into formal agreements with the owner of the servient estate prior to expansion. The amended easement should explicitly allow for the additional burden on the easement. More likely than not, the agreement will need to be accompanied by additional consideration because the client is getting an added benefit from the easement that was not originally contemplated when the easement was created. With these considerations in mind, costly litigation can, hopefully, be avoided.

J. PIECZYNSKI

Janaye Garrett Pieczynski *is an associate with Ausley McMullen in Tallahassee, Florida, where she focuses her practice in real estate, land use, and trusts and estates. She received her Juris Doctor and Environmental Law Certificate from Florida State University College of Law and her B.S. from the University of Central Florida.*

Endnotes

1 *City of Orlando v. MSD-Mattie, L.L.C.*, 895 So.2d 1127, 1129 (Fla. 5th DCA Feb. 4, 2005) (citing *Walters v. McCall*, 450 So.2d 1139, 1142 (Fla. 1st DCA Apr. 18, 1984)).

2 *Crutchfield v. F.A. Sebring Realty Co.*, 69 So.2d 328, 330 (Fla. Jan. 8, 1954).

3 28 C.J.S., Easements, § 76(b), page 754 (Emphasis supplied).

4 *Lanier v. Jones*, 619 So.2d 387, 388 (Fla. 5th DCA May 28, 1993).

5 *Seven Hills, Inc. v. Bentley*, 848 So.2d 345 (Fla. 1st DCA Feb. 12, 2003).

6 *Devon-Aire Villas Homeowners Ass'n, No. 4, Inc. v. Americable Assocs., Ltd.*, 490 So.2d 60 (Fla. 3d DCA Dec. 17, 1985).