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Obsolete Easements

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A recent California decision held that while a servient tenement might be able to modify the size of an easement of right of way across his land, because of nonuse by the dominant tenant, that was not the same as permitting him to terminate its existence. That distinction provoked the following column by me in our Real Property Law Reporter (January 2013).

REDRAWING AN OBSOLETE EASEMENT? YOU CAN DO IT, BUT CAN YOU LEGALIZE IT?

Introduction

Can a servient landowner unilaterally reduce an easement running over his land by showing that such an alteration will do him much good and will not cause any real harm to the neighboring dominant owner, even if the neighbor objects? The Restatement says yes, but most jurisdictions say no, and now California seems to have said both yes and no.

The Restatement (Restatement (Third) of the Law, Property (Servitudes), *Interpretation of Servitudes* §4.8(3) (2000)), took the position that the owner of the servient 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 burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

The Restatement adopted this view because it “permit[s] development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder.” Restatement, Illustration f. (Disclosure: I was one of those at the American Law Institute meeting who voted for that position.)

A majority of state courts, however, have held otherwise. They believe that the Restatement position overturns too much precedent and upsets too many settled expectations of property owners, or they fear that the rule would bring too much uncertainty to real estate markets and discourage development and depreciate values, or bestow unearned windfalls on servient owners, or generally violate the locational nature of property rights. (See, e.g., *AKG Real Estate, LLC v Kosterman* (Wisc 2006)-717 NW2d 835, 842. (Although I very much believe in property rights, I am not troubled by locational instability when those rights are usufructuary rather than possessory. I firmly endorse the notion that no one should be allowed to trespass over a property line if I possess the property on the other side of the line—whether I am inconvenienced by it or not—but at the same time I do not feel that way about a stranger walking over a path on which I have only a nonpossessory right of way.)