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Collocation and assignment issues in use of pre-existing right of way

Utilities may seek to utilize what is believed to be an existing easement — one that may have been granted previously to the utility or another entity — as a way to avoid the often timely and costly process of acquiring a virgin easement. While this approach may appear transactionally efficient, careful analysis must be undertaken to determine if utilization of a previously established easement is a viable option.

Legal concepts may entitle the servient estate to declare that the established easement has since been abandoned or subject to a claim of adverse possession. In addition, the user must also determine if the existing easement confers rights, which may be assigned to the user, and if so, what the scope is for those rights.

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Assignability and Scope of Existing Easements

The prospective user of a previously established easement must investigate the language in the granting instrument of the easement, as well as statutory and case law treatment of the language. A review should determine not only the extent and duration (which could be limited by time or disuse) of the easement grant, but also any special limitations on the assignability.

Some easements limit assignability and may even define a change of control as a prohibited assignment. In addition, the granting language of the instrument should be considered in light of state court decisions. Courts have interpreted instruments granting a right of way as the conveyance of an easement, limited to the purposes set forth as opposed to a fee simple grant with much broader usage rights (*See DNR. v. Carmody-Lahti Real Estate, Inc.*, 699 N.W. 2d 272 (Mich. 2005)). Whether a particular grant conveys an easement or a fee simple estate could also be evidenced by a review of the county assessor's records, since the creation of an estate in fee simple would have the effect of creating a subdivision of land, and a separate tax parcel identification number would have likely been assigned to the land in question. However, the presence of a



separate assessment alone should not be relied upon as definitive of a fee simple estate since some taxing jurisdictions assess easements as personal property separately from the servient estate (See Michigan General Property Tax Act, § 8, 183 PA 206, § 8, MCL 211.8).

Attention should also be given to the nature of the entity utilizing the right of way. Many users rely on encroachment permits to run service lines within existing public right of way. Since the interest held by the utility in such circumstances is merely a permit and not an interest that runs with the land, vacation of public right of way may jeopardize the right of the existing utility to continue using the current alignment (See *Pettis v. General Telephone Co.*, 54 Cal. Rptr. 476 (Cal. App. 1966)). Any user intending to take assignment of, or collocate along an alignment that was once within a public right of way should confirm if the current or previous user was given the opportunity to upgrade its interest from a mere permit to an easement prior to vacation by the public entity.

In addition, when seeking to collocate within or take assignment of an existing alignment within public right of way, the proposed user should consider whether the public right of way was acquired in fee simple, as would be indicated on any recorded transfer instrument, or whether the public entity acquired its right of way via the condemnation process. Certain public entities are granted limited rights, such as an easement for surface rights only, when right of way is acquired via the condemnation process (See Kansas Statutes Annotated § 26-201). The determination of the scope of existing public right of way can also be determined by a state's characterization of the environment in which the right of way exists, with a more extensive scope granted in urbanized areas and a less extensive scope in rural areas (See *Riverside Cnty. Transp. Comm'n. v. S. Cal. Gas Co.*, 54 Cal. App. 5th 823 (Cal. App. 2020)).

Abandonment

In addition to considering the assignability and scope of any existing easement, users seeking to collocate or assume rights should examine the actions of the existing or previous user to determine if there is evidence of an abandonment. In order for the owner of a servient estate to argue that an easement is abandoned under common law, it is not enough to show lack of use; it must be

shown that the previous user took affirmative acts consistent with an intent to abandon the easement (See *Southern Ry. Co. v. Board of Comm'rs of Vanderburgh Cnty.*, 426 N.E.2d 445, 448 (Ind. Ct. App. 1981)). Intent to abandon can be evidenced in the form of a written expression or a physical act inconsistent with continued use of the easement.

While simple discontinuance of fluid flow in an underground pipeline would likely not be enough to show any evidence of intent to abandon, removal of the pipeline and the subsequent landowner's justifiable reliance upon such removal would provide strong evidence of an intent to abandon not just the physical pipeline but also the easement in which it was located (See *Guzzetta v. Texas Pipe Line Co.*, 485 So.2d 508 (La. 1986)). In addition to court treatment, potential users of previously established easements should also consult statutory authority. A state statute may classify pipeline easements as abandoned after a period of nonuse, even if no additional affirmative acts of intent to abandon are shown (See Kansas Statutes Annotated § 58-2271).

Adverse Possession

While cases of adverse possession are normally associated with fee ownership of property, the doctrine applies equally to easements. The time frame for a claim of adverse possession to ripen varies widely by state, but there are common elements to the claim recognized in most all jurisdictions, namely nonpermissive use or occupation of an easement in such a manner as to deprive the easement holder of the benefits intended.

Unlike with claims of abandonment, the easement holder does not need to take any action to forfeit interest, rather, it is a lack of response to the actions of the adverse user of the easement that gives rise to a claim of adverse possession (See *Borough of Edgworth v. Lilly*, 565 A.2d 852 (Pa. Commw. Ct. 1990)). While the adverse use of the easement must be continual, it need not be constant, as might be the case where the adverse use is that of a parking lot (See *Masin v. La Marche*, 136 Cal. App.3d 687 (Cal. App. 1982)). Because potential claims of adverse possession will not be revealed via an examination of the public records nor a title report, the party seeking to assume or collocate on an existing easement should physically examine the easement to check that there are no activities or impediments that might give rise to a claim of adverse possession.

Issues discussed in this paper are likely to arise only after a party has commenced usage of a previously established easement. Any prospective user should consider the potential effect of issues through a due diligence process. 📌



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