REAL PROPERTY

Efforts to Overburden an Easement Appurtenant Are Futile

Like trying to squeeze an elephant into a mouse hole

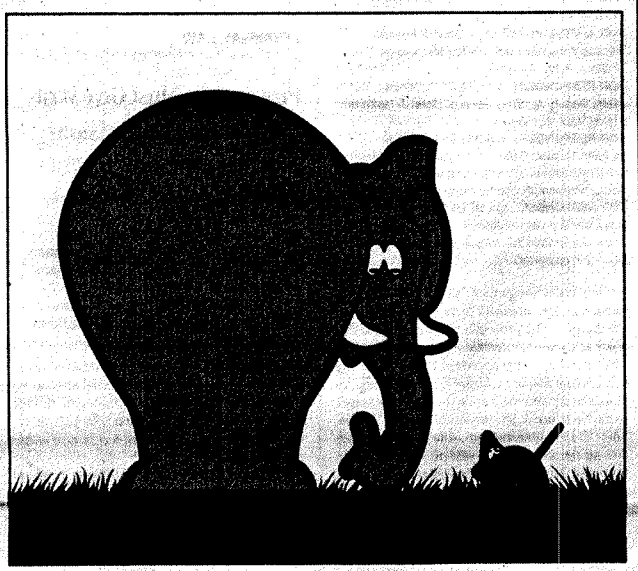
By Douglas S. Brierley

Can access by easement to property benefitting a one-acre parcel with, say, 20 vehicles parked on it also serve to benefit a distinct adjoining 10-acre parcel subsequently acquired by the same owner that contains 800 vehicles? Unless both the one-acre and 10-acre parcels are beneficiaries of the same easement, New Jersey and most other states would likely disallow overburdening the easement by a change in either character or intensity of usage.

Unlike an easement in gross, which is usable without regard to ownership or occupancy of any particular parcel, an easement appurtenant requires a dominant tenement or estate to which it is connected and that it benefits. Restatement (3d) of Property: Servitudes §4.11 cmt. b (2000). An agreement creating an easement appurtenant grants an owner of the dominant estate the right to use another's land, known as the servient estate. See *Rosen v. Keeler*, 411 N.J. Super. 439, 450 (App. Div. 2010). The rights to use that easement are defined by the intent of the creator and the surrounding circumstances. Id. 411 N.J. Super. at 451; Restatement: Servitudes §4.1 cmt. d (ascertaining intent from easement's language in light of relevant circumstances, inclusive of location and character of the properties burdened and benefitted by use). The primacy accorded to a creator's intent underscores the principle that an appurtenant easement may not be used to benefit property other than the dominant estate: to conclude otherwise would disregard the very intent of the creating party who set the outer limit on both the potential use and users of the easement itself. See Bruce & Ely, "The Law of Easements & Licenses and Land," §8.14 (2014).

As to the use of an appurtenant easement, an easement holder may have the right to use the easement, but remains confined to use it in a reasonable manner for the announced purpose to avoid unduly or unnecessarily increasing the burden on the servient landowner. *Lidgerwood Estates v. Public Service Elec. & Gas Co.*, 113 N.J. Eq. 403, 406-07 (Ch. 1933), cited in *Tide-Water Pipe Co. v. Blair Holding Co.*, 42 N.J. 591, 604 (1964). As expressed in Justice Hall's opinion in *Tide-Water Pipe Co.*, full enjoyment of the easement by the easement holder does not sanction unreasonable interference with or injury to use of the land by the servient landowner. 42 N.J. at 609. See also 3 Tiffany on Real Property §803 (3d. ed. 2013) (use by the dominant tenement may not interfere unreasonably with the servient owner's rights and must be reasonably necessary and convenient for the easement's purpose).

The same conceptual framework applies to users of an appurtenant easement. New Jersey courts have determined "[a] right of way appurtenant to a lot cannot be used for the purposes and benefit of another lot to which no such right is attached, even though some other lot be adjoining and within the same enclosure with that to which the easement belongs." *Diocese of Trenton v. Toman*, 74 N.J. Eq. 702, 709 (Ch. 1908). Were the law different, reasoned the court, "the owner of the close to which the right is appurtenant might purchase an indefinite number of adjoining acres and annex the right to them," thereby depriving the servient estate of the benefit of its own land. Id.



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The facts in the *Diocese of Trenton* case further illustrate the rationale. In that case, the plaintiff granted an access easement to an adjoining parcel owner who permitted the use of an alley way that ran between the two parcels. The defendants subsequently purchased both the rear portion of the dominant estate and another parcel adjoining the rear portion. The defendants built a two-story parking garage on that part of the dominant estate they owned and on part of an adjoining parcel that was not part of the dominant estate. The plaintiff sued to enjoin the use of the alley way as an ingress and egress route for the benefit of the entire garage building located both on the dominant estate and off of it. The *Diocese of Trenton* court decided that extension of the right-of-way to a lot not "either in whole or in part" appurtenant to it abuses the servient estate. Id. at 710-11. Vehicles seeking access to the garage could use the right-of-way to access only that part of the garage—and no other—that was part of the dominant estate. Vehicles were not permitted to travel beyond the dominant estate to access the part of the garage located on the nondominant adjoining parcel. Id. at 720-21.

Recent New Jersey case law confirms the *Diocese of Trenton* rationale barring an increase in the burden beyond the limits that a servient estate should bear. See *Rosen*, 411 N.J. Super. at 452-453 (prohibiting assignment of access easement from dominant estate owner to neighbors across the street); cf. *Caribbean House v. North Hudson Yacht Club*, 434 N.J. Super. 220, 227– 29 (App. Div. 2013) (adopting a similar view in dispute by servient tract owner seeking to enjoin easement holder from allowing cars from a nearby restaurant to use an easement to access the dominant estate; the owner of the dominant tenement may not subject the servient tenement to use in connection with other premises not appurtenant to the easement).

Illustrations from the Restatement: Servitudes §4.11 & cmt. b, demonstrate the overburden issue pertaining to both use and user:

> (1) Hotel Corporation, the owner of a five-acre parcel on which it operated a hotel, purchased a lot in Greenacres, the adjacent subdivision. An easement appurtenant to the Greenacres lot granted rights to use the Greenacres community beach and recreational facilities. In the absence of other facts or circumstances, Hotel Corporation is not entitled to use Greenacres beach or recreational facilities for the benefit of its hotel operation.
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> (2) Able assembled a parcel of land from Whiteacre and Brownacre, two adjoining parcels acquired from two different sellers. Whiteacre included the benefit of an appurtenant access easement over Blackacre, the adjacent property to the south. Able then built a house straddling the old boundary between Whiteacre and Brownacre. In the absence of other facts or circumstances, Able is not entitled to use the easement for access to that part of the house located on Brownacre.

That is, easements created to benefit one parcel of what had been the grantor's land may not be used as access for additional lands. See *Boudreau v. Coleman*, 564 N.E.2d 1, 7-8 (Mass. App. 1990).

Is there a juncture at which a contemplated use of the easement appurtenant by the dominant estate increases to such a degree as to become an overburden to the servient estate? Consider a subdivision of the dominant estate. The right to use an easement appurtenant extends to the entire dominant parcel and is apportionable among the subsequent owners if the dominant estate is divided. See *Krause v. Taylor*, 135 N.J. Super. 481, 485-86 (App. Div. 1975); Bruce & Ely §8.15. Ordinarily, it is not merely an increase in use, but an unforeseen change in use that gives rise to a viable claim of overburdening. Yet, at some point along the spectrum reasonably known or knowable to the owners of the dominant and servient estates, intensified or increased use of the easement appurtenant becomes a "change in use" or impermissible overburden. *Krause*, 135 N.J. Super. at 486-87 (emphasizing that subdivision entailing materially increased burden would be barred); *Ricelli v. Atkinson*, 132 N.E.2d 123, 128 (Ohio 6th Dist. 1955) (observing that division of dominant tenement into many parts may render unreasonable use and enjoyment of the dominant tenement by each such part).

As a practical matter, this last discussion returns us to the issue presented at the outset of the article: may a one-acre dominant estate with parking available for 20 cars serve as a portal or entranceway for a later-acquired adjacent parcel not part of the dominant estate that is 10 times larger and serves 40 times the number of vehicles? Does common ownership of the two parcels spread the dominant-estate status of the smaller one to the other?

The answer to both questions is no. Although the one-acre and 10-acre parcels serve the same function as parking lots that vehicles enter and exit, only the smaller parcel is part of the dominant estate as the original easement conveyance intended. Furthermore, the one-acre lot should not serve as the "mouse hole" entrance to or exit from the easement for the larger adjoining 10-acre lot that serves an "elephantine" volume of vehicles. The enormity of the increase in traffic from a nondominant parcel would effectively change the use intended at the easement's creation such that New Jersey courts and the Restatement would deem the change an impermissible overburden. ■

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