The Surveyor and the Law
by Jerry Broadus, PLS, Esq.
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Examine easements carefully.

Jerry R. Broadus,
LS, Esq.

Many surveyors assist property developers. In my experience it is in the planning and preparation of subdivision or commercial developments in which surveyors are most likely to be faced with uncertainties concerning prior real estate transactions. A client will approach a surveyor for help in planning a subdivision on a newly purchased parcel, or on a parcel the client is contemplating purchasing, and ask some broad question such as, "How many lots do you think I can get on this property?" Many surveyors are experts in answering such questions, but they should always remember that the issues affecting their answers might involve legal matters.

The following case involves an interesting mix of issues concerning an access easement to an undeveloped parcel. As you read the court's recitation of the facts, reflect on how you as a consultant would approach the "red flags" that appear in the chain of title to the parcel and, importantly, to its neighbor's chain of title.

Castanza v. Wagner[1]

There is an east-west running county road in King County, Wash., and a creek named Cherry Creek running east and west a certain distance south of the road. Castanza owned the property bounded on the north by the county road and on the south by the creek. Wagner owned the

property directly south of the Castanza land, bounded on its north by the creek. The dispute concerned the width and use of an easement crossing the Castanza parcel to access the Wagner property.

In 1943, a party named Faunce owned the land that was later divided into the Castanza and Wagner parcels. An H.L. Brown owned property south of the Faunce land. Brown entered into a written agreement with Faunce to build a logging road through Faunce's land to his own. This road became known as Brown Road.[2] Brown Road was maintained as a logging and access road with a width that varied from 12 to 16 feet and included a bridge across Cherry Creek.

Brown's land was then sold to Wright. In 1945, Faunce granted Wright a 99 year easement that stated it was "for the use for all purposes of a certain road heretofore constructed by H.L. Brown."[3] Faunce then conveyed his property to Holan, who in 1951 granted an easement to a Mr. Daley "over what is know as the Brown Road." (Daley's land lay to the southeast of Holan's.)[4]

Holan created the parcel that was to become the Castanza land through a real estate contract to Westman and Best, executed in 1955. That contract described the portion of the Holan land lying "south of the county road and north of Cherry Creek" and reserved an "easement of right of way for road purposes to property in same section lying south of the property sold."[5] Several weeks later Holan sold that portion of her land lying south of Cherry Creek (later to become the Wagner land) to McGovern and Copeland, also using a real estate contract. That contract described the portion of the Holan land "lying south of the center of Cherry Creek" and included the following easement description:

Right to use an existing bulldozed road over and across the following described property: Northwest quarter of .... extending from creek to county road, which right of way shall be sixty feet in width and whose use will be for access road and utility purposes.[6]

Then, in September of 1955, Westman and Best granted an easement to McGovern and Copeland for "the right, privilege and authority to construct, improve, repair and maintain use of a certain road, which is known as the Brown Road."[7] Of the two real estate contracts, the first fulfillment deed was issued by Holan, also in September of 1955, to McGovern and Copeland containing the same easement language as described in their contract. Holan then assigned her rights to the Westman and Best real estate contract to Osberg, who issued the

fulfillment deed to them in February of 1956 (containing the same easement language as in their contract). Consequently, the first real estate contract was completed at a later date than the second contract.

Wagner purchased the property lying south of Cherry Creek by a real estate contract executed in 1979. That contract included the easements from Holan and from Westman and Best to McGovern and Copeland, and was made subject to the easement from Faunce to Wright. Castanza purchased his property in 1979 by warranty deed, which showed the land to be subject to the Faunce to Wright easement, the Holan to Daley easement, the Holan to Westman and Best easement, and the easement granted by Westman and Best to McGovern and Copeland.

Then the following events occurred:

In the 1970s, the road was improved by cutting and resloping the bank above the road on a steep portion near Cherry Creek and planting ground cover to avoid silting the lake and harming the salmon run. These improvements were required by the state fisheries department before logging could commence.

In 1979, Wagner placed a prefabricated building on his property and began preparation for reforestation of the property. In the same year, he arranged for the installation of electrical and telephone service. In August of 1980, Wagner had a confrontation with the Castanzas as he was rebuilding the bridge over Cherry Creek. The Castanzas disputed Wagner's right to use Brown Road. Subsequently, Wagner had utility lines installed underground down the center of Brown Road.[8]

Castanza filed a lawsuit in 1982. He conceded that Wagner had an easement but disputed its width. Castanza originally requested the court order Wagner to remove his utilities, but later limited their claim to a request that Wagner not be allowed to install any further utilities.

The court held that Wagner's easement was limited to the rights reserved in the original contract between Holan and Westman and Best. Thus, the purported additional grant from Holan to McGovern and Copeland failed because it was junior:

In 1955, Holan sold the Castanza land to Westman and Best by a real estate contract that was recorded in King County on March 29, 1955. That contract reserved only an "easement of right of way for road

purposes to property in same section lying south of the property sold." Holan's attempted grant to McGovern and Copeland (Wagner's predecessors) in the real estate contract dated April 1, 1955, and recorded April 15, 1955, of an easement over the Castanza land 60 feet in width for access and utility purposes exceeded the ownership interest Holan had reserved in the real estate contract with Westman and Best. The existing Brown Road was no more than 16 feet wide at any point. There was no reference to an easement for utilities in the Westman-Best contract. In the contract with McGovern and Copeland, Holan tried to convey an ownership interest she no longer had. This effort proved to be a nullity because the Westman-Best contract was paid off and a fulfillment deed containing the same limited easement as the contract was ultimately issued and recorded.

A purchaser under a real estate contract acquires a valid and subsisting interest in the property described in the contract and upon performance of the contract, has the right to have title to the property quieted in accordance with the terms of the contract.... The recording of the Westman-Best real estate contract gave notice to all subsequent purchasers, including Wagner, of the limited extent to which an easement could be granted over the property described in the contract.

The grant of easement in September 1955 from Westman and Best to McGovern does not contain language enlarging the easement. It did have the effect, however, of making it clear that the easement was confined to the existing Brown Road. The language in the real estate contract between Holan and Westman-Best did not confine the easement to Brown Road.

It is immaterial that the fulfillment deed to Wagner's predecessor was recorded prior to the fulfillment deed to the Castanzas' predecessor. This result follows from the fact that the rights of the Castanzas and their predecessors were fixed in the recorded real estate contract and constructive notice given of the subject matter of that contract to Wagner's predecessor.[9]

The result of this discussion was that Wagner was limited to an easement no wider than the maintained, traveled road. As to the issue of installing utilities, the court held as follows:

The language reserving an easement from the property sold to the

Castanzas' predecessor limited the easement to "road purposes." Use of the easement for placement of utilities is not mentioned and Wagner cites no authority, and we know of none, which would permit the interpretation that "road purposes" includes the right to place utilities.

The easement granted Wagner's predecessor by Westman Best, the Castanzas' predecessor, relates solely to the "use of a certain road, which is known as the Brown Road." There is no mention of a right to place utilities. These easements refer to a private road originally developed as a logging road and located in an undeveloped area. As previously stated herein, Wagner's rights can be no greater than the reservation from the contract with the Castanzas' predecessor and the easement from Westman-Best will permit.

Consultation with dictionaries and other references provides no basis for defining "road purposes" beyond a way established for travel of persons, animals and vehicles. Wagner did not have a legal right to place utilities along Brown Road.[10]

The court held that equitable principles would prevent the issuance of an injunction to force Wagner to remove the utilities he had already placed in Brown Road. Since Mr. Wagner's deed did appear to grant him a utility easement, he had proceeded in good faith, and an order to remove the utilities would afford little benefit to Castanza but would cause great harm to Wagner. Nevertheless, the court held that Wagner would have no further right to place utilities in the easement.

Conclusion

When the issues are laid out as the court does in this case, the determination of Wagner's rights seems straightforward. However, consider how difficult it might be to determine Wagner's rights from an investigation of the title records leading up to his contract. Wagner's chain of title included a grant of a 60-foot wide right of way for an access road and for utilities, and this easement was specifically included in his contract. Only by examining the title chain of the property the easement crosses could one discern that the easement was invalid. Even after reading the neighbor's title chain the examiner would probably have questions. First, understand that the seniority of a transaction that began with a recorded real estate contract and ended with a fulfillment deed would date back to the recording date of

the contract. Then you would notice that the common grantor executed the McGovern-Copeland contract only three days subsequent to the recording of the Westman-Best contract. This might lead you to wonder about Holan's intent. You would also wonder about the width and location of the road, which you could not discern without a field investigation and which might further require an inspection of historical aerial photographs to determine whether the road had been consistently maintained in its present location and configuration. Finally, you would have to know that a reservation of a private easement for road purposes normally does not include the right to lay utility lines.

The last principle concerning the utility lines can be especially difficult for surveyors accustomed to working with public easements. The court's conclusion follows the general common law for private easements. See, for example, section 8.7 in Brown's Boundary Control and Legal Principles, 4th Edition ("An easement for road purposes does not necessarily carry with it the right to place utility lines.")[11] and the final case discussed in section 27.10 of Clark on Surveying and Boundaries, 7th Edition.[12] The same cannot be said, in general, for public rights of way.

This case should be especially sobering to anyone undertaking some of the more rigorous surveys that lenders often require (assuming, of course, that you are being asked to survey the property before the court case described above ever took place). Possibly this situation would not be too problematic for someone signing a standard ALTA/ACSM land title survey certificate. But consider, for instance, a "long form" certificate written by the lender's attorney. Here is some typical language:

Utilities (water, gas, electric, telephone and sewer) are available and service the property. All utility lines enter the premises through adjoining public streets or through appurtenant easements which are shown on the survey.

Suppose you were asked to sign such a certificate for the Wagner parcel, and the case had not yet been filed. Of course, you would normally expect that the lender is, by this statement, requesting that you locate the utility lines and draw them on his or her map along with the easement lines, which you would take from the title report if possible. But what if it turns out the easement really doesn't exist because the grantor had no right to it in the first place? Consider also that most title reports, when considering a property such as the

Wagner parcel, would list the easement as an "exception" rather than an "appurtenance." Suppose the title commitment actually offered to insure a 60-foot access and utility easement to Wagner's lender. Would that absolve the surveyor of any further responsibility? I, for my own piece of mind, would rather not rely on assumptions about how extensively a court could read the responsibilities inherent in such a certificate. Cases such as this illustrate how much research, both factual and legal one might have to invest before satisfying the responsibilities one takes on.

Jerry Broadus, PLS, Esq.
jbroadus@seanet.com
Jerry R. Broadus is a member of the Washington Bar and is also a licensed land surveyor in Washington and Idaho. He is vice president of Geometrix Surveying Inc. of Putallup, Wash., offering consulting services to attorneys and to the general public in land development matters. He has published numerous articles on the legal questions that arise in land surveying.

References

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