

MEMORANDUM

State of Alaska
Department of Law

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TO: Karen F. Tilton
ROW Engineer
Northern Region

DATE: December 16, 1998

TEL NO: 451-2811

Mason Damrau

FILE NO: 665-99-0069

FROM: Mason Damrau
Assistant Attorney General

SUBJECT: Airport Way Frontage Roads
Parcels 27 & 28
Ingress/Egress Easement

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

You have requested an opinion concerning the issue of whether a certain access easement over real property abutting the above referenced project has been extinguished under the doctrine of merger of title. I conclude that it has. The specific facts and reasoning follow.

FACTS

Most of the relevant facts are set forth in your 11/18/98 Memorandum, a copy of which is attached hereto as Appendix 1 for your easy reference. As you have indicated in your Memo, "a nonexclusive twenty (20) foot easement along the entire north boundary of Tract A-3 [for three specific enumerated purposes]" was created by virtue of a Quitclaim Deed executed on August 11, 1986. A copy of the 1986 Quitclaim Deed is attached hereto as Appendix 2. The easement benefited the contiguous Tract A-2-B-1 (the dominant tenement) and burdened Tract A-3 (the servient tenement).

On March 1, 1990, Tract A-2-B-1 was conveyed by Quitclaim Deed to Global

Finance & Investment Company, Inc. A copy of the 1990 Quitclaim Deed is attached hereto as Appendix 3. On June 5, 1992, Tract A-3 was likewise conveyed to Global Finance & Investment Company, Inc. A copy of the 1992 Warranty Deed for Tract A-3 is attached as Appendix 4. Thus, from June 5, 1992 until March 25, 1998 (when Tract A-3 was conveyed to Second and Cedar Associates, Inc.) both the dominant and servient tenements were owned by Global Finance. A copy of the 1998 Quitclaim Deed to Second and Cedar is attached hereto as Appendix 5. The 1998 deed conveying Tract A-3 to Second and Cedar does not include a reference to the easement created in the August 11, 1986 deed, or to any other easement.

ANALYSIS

The question that arises is whether the temporary unity of ownership by Global Finance & Investment Company, Inc. for the two tracts has any effect on the continued existence of the easement. The answer is that, under the doctrine of merger of title, such an easement will be deemed extinguished even when the unity of ownership is later terminated and one of the tracts is conveyed to a third party.

The Alaska Supreme Court has not had occasion to rule on this precise issue. However, in dicta from a 1963 case, the Court did state that, "a person cannot have an easement over his own land. . . ." Freightways Terminal Company v. Industrial and Commercial Construction, Inc., 381 P.2d 977, 983 (Alaska 1963). Several other persuasive authorities are

in full accord with this approach. In the Restatement (First) of Property, section 497, the rule is stated to be as follows:

An easement appurtenant is extinguished by unity of ownership of estates in the dominant and servient tenements to the extent to which the uses which could have been made prior to the unity by virtue of ownership of the estate in the dominant tenement can be made after the unity by virtue of ownership of the estate in the servient tenement.

This is a rather cumbersome way of saying simply that such an easement is legally extinguished, since a property owner no longer needs such an easement for the reason that she need not give herself permission to do something on her own property. It is important to note that the Alaska Supreme Court consistently relies on the Restatement of the Law series of authorities in the Court's opinions, and would likely follow the rule set forth in section 497, especially since there seems to be no inconsistent rule that's been adopted in any other state. Likewise consistent with the Restatement is "Survey of the Law of Property" by Ralph Boyer.

That treatise provides that,

The termination of an easement . . . takes place by extinguishment by operation of law when any of the following events happen: (a) When an easement appurtenant exists and both the dominant and servient tenements come under the ownership of the same person.

...

Id at 598. Boyer goes on to reiterate the sentiment of the Alaska Supreme Court in

Freightways Terminal when he states that, "One cannot have an easement in his own property."

Id at 599.

Cases from the highest courts in other states are also instructive. In Salazar v. Terry, 911 P.2d 1086, 1091 (Colo. 1996), the Colorado Supreme Court recently summarized holdings from other state appellate courts and held that,

When the dominant and servient estates come under common ownership, the need for the easement is destroyed. Specifically, if the owner of an easement in gross comes into ownership of an estate in the servient tenement, the easement terminates to the extent that the ownership of that estate permits the uses authorized by the easement. . . . When one party acquires present possessory fee simple title to both the servient and dominant tenements, the easement merges into the fee of the servient tenement and is terminated. . . . [I]f at any time the owner in fee of the dominant parcel acquires the fee in the servient parcel *not* subject to any other outstanding estate, the easement is then extinguished by merger.

(Citations and quotation marks omitted. Emphasis in original quotation.)

In the present circumstance, the ownership of Tract A-3 has now been conveyed to another party, which raises the question whether the easement is automatically revived upon such a conveyance. (You have informed me that the grantee of Tract A-3 in fact shares some level of ownership with the grantor, and may even be a mere subsidiary or sibling corporation. This would tend to indicate less, rather than more, of a reason for the easement to be revived since the user likely remains the same or at least similar.) The Salazar opinion spoke directly

to this when the Colorado Court held that, "the easement will not revive if the estates are separated once again 'without the same type of action required to bring an easement into existence in the first place.' " Id at 1091. The Nevada Supreme Court has gone so far as to hold, in a case where the deed for the dominant estate specifically refers to an easement which (although unknown to the parties) had already been extinguished by prior merger of title, that "the mere reference to an extinguished easement in a deed is insufficient, as a matter of law, to revive the easement." Breliant v. Preferred Equities Corporation, 918 P.2d 314, ~~315~~ (Nev. 1996). Of course, neither the most recent deed to Tract A-3, nor the deed to Tract A-2-B-1, in the present matter refer to any easement at all.

The only basis that I can think of for an argument that the easement remains in existence is the possible assertion that, as between the current owners of the tracts, there was a mutual mistake, whereby each of the two owners believed at the time of the conveyances that the easement remained in existence at that time. Of course, such an argument would only work as between the two current owners, and not with regard to anyone else. However, if the two current owners both agreed and desired for the easement to remain (or be revived), then there is absolutely nothing preventing them from simply creating a new easement agreement, signing it, and recording it. In the meantime, I believe that you should assume that, under these facts and applicable common law, the easement has been extinguished by virtue of the doctrine of

Karen F. Tilton
ROW Engineer, Northern Region
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merger of title, and remains extinguished even though one of the tracts has now been conveyed to a third party.

As always, if you have any questions, or wish to discuss this matter further, please do not hesitate to call me.

Damrau/mics/Frontage

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

**ATTORNEY GENERAL
TRANSPORTATION SECTION**

TO: John Athens
Assistant Attorney General
Northern Region


DATE: 11/18/1998

FILE NO:

NOV 20 1998

TELEPHONE NO: 451-5421

**FOURTH JUDICIAL DISTRICT
STATE OF ALASKA**

FROM: Karen F. Tilton, PLS
ROW Engineer
Northern Region 

SUBJECT: Airport Way Frontage Roads
Parcels 27 & 28
Ingress/Egress Easement

In reviewing the title reports for the above referenced parcels, we have encountered a title issue which requires your review. An easement was created 12 years ago on one of these parcels for the benefit of the other. Years later, both parcels were owned by the same corporation and title of the easement and the fee estate may have merged. Your opinion is requested as to whether the easement has been extinguished by merger of title or whether it still exists.

History

Tracts A-~~2~~²-B-1 and A-3, Executive Park Subdivision were created during a series of replats of Tract A of Executive Park. At one point in title, both parcels were owned by J&R Properties, an Alaskan partnership of Ronald D. Rockstad and Jerald Briske.

In 1986, the General Partners of J&R Properties quitclaimed their interest in the two tracts to each other, separating the ownership to themselves as individuals. In Rockstad's deed to Jerald Briske at Book 491, Page 603, he quitclaims his interest in Tract A-3, but includes an easement reservation as follows:

"a nonexclusive twenty (20) foot easement along the entire north boundary of Tract A-3 for the following three purposes: (1) ingress and egress to the following described real property; (2) construction and maintenance of a loading dock for Unit Q (Mark's Prime Beef) which unit is located on the following described real property, and (3) any existing poles for lighting which are presently located (on) the above described real property. The property being benefited by this easement is described as follows:

Tract A-2-B-1, Executive Park Subdivision . . ."

Briske subsequently quitclaims his interest in Tract A-2-B-1 to Rockstad.

Shortly thereafter, both tracts were foreclosed upon. Two separate banks gained ownership of the parcels and have since conveyed the parcels without any reference to the easement described above. From June, 1992 to March, 1998, both tracts were held by Global Finance and Investment Company. Global Finance and Investment Company conveyed Tract A-3 in March of this year without any reference to the easement.

Appendix 1
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I have visited the site and it appears that a portion of the easement area is being used for parking by the mall. There are headbolt heaters installed along an existing fence which you can see on the plans enclosed. (See sheets 6 and 17).

Our understanding of this situation would indicate that the interests of the fee owner and easement holder were one and the same, and that title has merged, thus extinguishing the easement.

Please review the attached material and let me know if you need any additional information to formulate your opinion. Please charge your time to LC 30701622.

Attached: Half size ROW plans DRAFT dated 11/18/98
Plats, Tracts A-3 and A.2.B.1
Title Reports, Parcels 27 and 28, Airport Frontage Roads Project