

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

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JUL 14 2003

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
3RD JUDICIAL DISTRICT
ANCHORAGE, ALASKA

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STATE OF ALASKA,
Plaintiff,

v.

SHAWN W. STEPHAN and UNITED
RENTALS,
Defendants.

Case No. 3AN-02-08186CI

ORDER

I. Introduction

Plaintiff State of Alaska ("the State") has moved this Court for summary judgment on its request for an injunction prohibiting defendants Shawn Stephan ("Stephan") and United Rentals, Inc. ("United Rentals") from maintaining encroachments in a right of way along the Old Seward Highway or, in the alternative, requiring defendants to obtain a permit before placing encroachments in the right of way. Stephan and United Rentals have opposed and have filed cross motions for summary judgment, requesting that this Court rule that the State's current permit and fee procedures are unconstitutional. After due consideration, this Court GRANTS the State's motion for summary judgment. This Court further GRANTS Stephan's ~~motion for summary judgment, and GRANTS United Rentals' motion for summary judgment.~~

II. Factual and Procedural Background

Stephan is the owner of a parcel of land adjacent to the Old Seward Highway. The ~~section of the highway running along Stephan's land consists of two southbound lanes, two~~

northbound lanes, and a center lane for turning traffic. There is also a combination

sidewalk/bike trail that runs alongside this stretch of highway. The parties all agree that the State has an easement for highway purposes that covers the area up to 100 feet from the center line of the highway. According to Stephan, the distance from the center line to the outer edge of the bike trail is approximately 47 feet, leaving 53 feet of easement that is not currently being used for transportation purposes.

Stephan has leased the parcel of land in question to United Rentals since 1999. United Rentals admits that it regularly parks vehicles and other kinds of equipment in the area west of the bike trail, and that a portion of this area has been paved and is used as customer parking. United Rentals further admits that it has placed two signs advertising its business in the area west of the bike trail. Both the signs and the equipment are maintained at least partially in the 53 feet of land that is subject to the State's easement.

The State has filed suit alleging that the signs and equipment that United Rentals has placed along the road constitute encroachments into the easement and that they are therefore prohibited by statute. The State has subsequently filed a motion for summary judgment on this issue, asking that this Court either require defendants to remove the signs or allow the State to remove them at defendants' expense. It further asks that this Court require defendants to either remove the rest of the equipment from the easement or apply for a permit to keep the equipment in its present location.

Stephan and United Rentals, represented by separate counsel, filed oppositions to the State's motion, claiming that the State does not have authority to prohibit them from placing objects within the easement. Each of the defendants also filed a cross-motion for summary judgment. Stephan's motion requests that this Court find that he is the owner, in fee simple, of the property to the center line of the highway, and that the State has no right to require that

he pay economic rent for the use of that property. United Rentals' motion requests that this Court find the State's requirement that landowners pay economic rent in exchange for an encroachment permit unconstitutional.

III. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and a party has shown that they are entitled to judgment as a matter of law. A.R.C.P. 56(f).

IV. Discussion

A. Land Ownership

As a threshold issue, this Court must determine who owns the land underlying the easement in question here. Under AS 09.45.015, there is a statutory presumption that Stephan, as the owner of the land adjoining the highway easement, is also the owner of the land underlying that easement. The State does not argue that Stephan is not the owner of the land underlying the easement, and both the State and the federal government (whom the State claimed might have an interest in the land) have acknowledged that they are not the owners of the land underlying the easement. Therefore, it seems appropriate for this Court to enter a ruling at this time that Stephan is the legal owner of the land underlying the easement. Stephan is entitled to summary judgment on this point.

B. The State's Authority to Regulate Encroachments

1. *Equipment*

In support of its assertion that Stephan and United Rentals are not entitled to keep equipment in the highway easement, the State points to AS 19.25.200(a), which bans encroachments along or across a highway without a permit. They also point to AS 19.45.001(9), which defines a highway as both the road and the "right-of-way thereof." They

argue that under these statutes, they have the right to require that Stephan and United Rentals obtain a permit in order to be allowed to keep their equipment on pieces of land within the easement.

In response, Stephan argues that the State's interpretation of the term "right-of-way thereof" is incorrect. He claims that the term "right-of-way thereof" does not encompass an entire easement, but rather an easement for highway purposes only. Stephan argues that guidance on this issue is provided by federal regulations that govern the use of roads which were built with federal assistance.¹ These regulations provide a much narrower definition for a right-of-way than for an easement. Specifically, 23 CFR 710.105(b) defines a right-of-way as "real property and rights therein used for the construction, operation, or maintenance of a transportation or related facility[.]" Stephan argues that the portion of the easement in question in this case is currently not being used for any of these purposes, and thus cannot be termed a right-of-way for purposes of the applicable statutes. He further argues that, because the land in question is subject only to an easement for highway purposes and not a right-of-way, the State does not have the authority to regulate any portions of it which are not being directly used for highway purposes.

In response, the State makes several arguments. First, it cites PLO 1613, which explicitly provides that land within an easement may not be used, without a permit, for any uses other than highways, telephone lines and pipelines. The State points out that the federal government's rights under PLO 1613 transferred to the State at statehood. *Simon v. State*, 996 P.2d 1211 (Alaska 2000). Second, the state cites to the case of *State v. Alaska Land Title*, 667 P.2d 714 (Alaska 1983), in which the court used the term "right of way" in a way that

¹ Stephan notes that the Old Seward Highway was built with federal assistance.
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suggested it viewed that term as being synonymous with a PLO highway easement. Third, the State claims that the legislature, when enacting the permit authority, intended it to be used where an encroachment does not interfere with construction, maintenance, or use of a highway. It argues that Stephan's attempt to limit permit authority to only cases in which the encroachment interferes with highway use conflicts with the intentions of the legislature and would render the permit authority meaningless. Finally, the State argues that Stephan's citation to the federal regulations is unimportant, because such regulations do not trump a state statute that has been passed to regulate encroachments in rights of way.

This Court believes that the State's assessment of its authority is correct. PLO 1613 clearly establishes that objects cannot be placed within an easement without a permit. These rights transferred to the State upon statehood. Furthermore, a common-sense interpretation of AS 19.25.200 is that the statute extends permit authority to the State even in situations where the State is not currently using the easement for highway purposes. There would be no need for permit authority if it were only to be used in situations where the State was using an easement for highway purposes, because the State would already have the authority to regulate use of the easement in those circumstances. The pertinent law supports a finding that the State has the authority to require that Stephan and United Rentals obtain a permit before placing objects within the highway easement. Therefore, the State is entitled to summary judgment on this point.

2. *Signs*

The State also contends that it is legally entitled to regulate the placement of signs within the highway easement. It cites to AS 19.25.105(d), which prohibits outdoor advertising within a highway right of way. The term right-of-way for purposes of this statute

are defined in 17 AAC 15.901(37) as “a highway easement, airport easement, section-line easement, any material or borrow pit leased or owned by the state, and any land leased or owned by the state and occupied by a public facility[.]” Because nobody disputes that the State has a valid highway easement over the land in question, this statute clearly gives the State the authority to regulate advertisements placed on that land.²

United Rentals does argue briefly that there are issues of fact regarding the State’s enforcement of the sign statute. Specifically, it claims that some businesses along the same stretch of road have been allowed to place advertisements within the easements while others have not. As support for this assertion, it attaches three affidavits from people who own businesses in the area. It then argues that this selective enforcement may violate the equal protection standards delineated in the state constitution.

As the State points out in its reply, however, United Rentals has not provided the proper support for an equal protection challenge. In *Barber v. Municipality of Anchorage*, 776 P.2d 1035 (Alaska 1989), the court held that selective enforcement of a statute only raises equal protection concerns when it is part of “a deliberate and intentional plan to discriminate based on an arbitrary and unjustifiable classification.” The court went on to hold that the party alleging the equal protection violation has the burden of providing evidence supporting a claim that the State was motivated by discriminatory intent. In this case, United Rentals has provided no such evidence. Therefore, the State is entitled to summary judgment on this point.

² Indeed, as the State points out, it has the authority to regulate advertising even on purely private land. *See*

C. Economic Rent

The State argues that the easement granted by PLO 1613 is an “exclusive use” easement, granting the State the exclusive right to use the easement or to give others permission to use the easement. As such, the State argues, it may charge economic rent for the use of land within the easement without violating any Constitutional protections. This argument is unpersuasive.

As was discussed above, PLO 1613 and AS 19.25.200 provide that a landowner must obtain a permit from the State before being entitled to place encroachments within an easement. They do not include any language stating that the easements are to be used exclusively by the State or that the State has the authority to condition the granting of a permit on the payment of economic rent. Indeed, a close reading of all of the language in PLO 1613 makes clear that the purpose of providing the state with permit authority is not to grant it use rights equivalent to or exceeding those of the land’s owner, but instead to allow it to prohibit any uses that are inconsistent with future highway use. The State has a valid easement over the land for highway purposes. As such, it is entitled to require an encroachment permit in order to ensure that the land be maintained in a fashion that does not make use of the land for highway purposes impossible or impractical.³ That is the extent of the State’s rights under PLO 1613 and AS 19.25.200.

As this Court has already held in this order, Stephan is the fee simple owner of the land underlying the easement. Allowing the State to require him to pay economic rent as a condition of obtaining an encroachment permit would be tantamount to requiring him to pay to

Barber v. Municipality of Anchorage, 776 P.2d 1035 (Alaska 1989).

³ The State may also require that permit applicants pay a reasonable fee to offset the administrative costs of processing permit applications.

use land that he already owns. This would be a clear violation of Stephan's property rights under the federal and state constitutions. He is entitled to summary judgment on this point.

V. Conclusion

The State's motion for summary judgment is GRANTED. The State is permitted to require that landowners obtain a permit before placing items in the easement. The State is also permitted to require that Stephan and United Rentals remove their signs from the easement.

Stephan and United Rentals' cross-motions for summary judgment are also GRANTED. Stephan is held to be the owner of the land underlying the easement. Stephan and United Rentals may not be required to pay economic rent for the use of this land.

It is so ORDERED.

Signed this 14th day of July, 2007 at Anchorage, Alaska.



John Reese

Superior Court Judge

I certify that on 7/15/03 a copy
of the above was mailed to each of the following at
their addresses of record:

AG (Carter) / Orskov / Berkman

[Signature]
Administrative Assistant