

## EASEMENTS - WHERE WANTS ARE NOT THE SAME AS NEEDS

By Judith I. Johannsen

A *servitude* is a burden on one piece of land for the benefit or advantage of another and is similar to an *easement*, which usually refers to a right of use of another's property. *Black's Law Dictionary*, Sixth Edition.

Servitudes or easements are commonplace and are typically found in the deeds of property owners over whose property an easement lies and owners who enjoy the right to use that easement. The land that is crossed or used is called the servient estate and the land that benefits from the easement is the dominant estate.

Easements typically seen state that an owner of real property has a right to use a piece of another's land for ingress and egress to his or her own property, or that someone who lives close to the beach or a lake has a right to walk across someone else's property to access that beach or lake. Probably the most common easements homeowners find in their deeds are for the electric, cable and/or telephone company to enter their property to access, lay and maintain a pole, wires and cables.

Sometimes, however, an easement can be the subject of a dispute, as seen in a June 2007 New Haven Superior Court case, *Kish v. Baron*, 43 Conn. L. Rptr. 595 (6/8/07), in which an easement permitting a septic system located on one property, the servient estate, serviced a residence on an adjoining lot, the dominant estate. The easement granted the right to the dominant estate to maintain, use, service, and, if necessary, replace the existing system. While the language of the easement seemed clear, there was a difference of opinion about what the phrases "replace the existing system" and "if necessary" meant.

Here's how the problem came about. The owners of a newly constructed four-bedroom home on a site previously occupied by a three-bedroom cottage wanted to install an enhanced, larger capacity septic system to accommodate the larger home. Their septic system was on the adjoining neighbor's property. The proposed larger system would allow the owners to satisfy the Department of Public Health's requirements for a four-bedroom residence, they could apply for a certificate of occupancy for their new home and then move in.

The neighbor on whose property the septic system was located would not allow the owner of the dominant estate onto his property to dig up the existing septic system and replace it with an enhanced system. His reasons were that 1) the easement only entitled the dominant estate owner to maintain the existing system or replace it with another system suitable for a three-bedroom home, 2) his own septic system was also on his property and his neighbor's proposed enlarged system could prevent him from seeking to expand the size of his home, and 3) expansion of the septic system's capacity violated the easement's intent.

The new four-bedroom house owner, living in a rental property during construction, filed an action with the court for temporary injunctive relief. When a court approves a temporary injunction it is to stop someone from doing something or to compel someone to do something, and in this case, the owner wanted the court to order the neighbor to stop preventing him from entering onto his property to install an enhanced septic system. As a temporary injunction's purpose is to preserve the status quo until the rights of the parties can be determined after a hearing on their merits, this Court expressed concerns that the dominant estate owner wanted to change the status quo before a hearing could take place.

The dominant estate owner's position was that the easement language allowed him to replace a system, so he wanted to install a technologically enhanced system that would accommodate the four bedrooms. Apart from that, his stated reason was that he needed the certificate of occupancy *now* because his lease would expire soon and if he couldn't have access to the neighbor's property to install the new septic system, he and his family would be homeless. The Court found that since the owner had paid two million dollars for the land and another two million dollars to build the home, the likelihood that his family would be homeless was slim.

Since the language of the easement was the written record intended to both bind and benefit these parties and any successors in title, the Court looked first to that language, but also to the dictionary for the meaning of "replace", to the common understanding of "if necessary", to the Third Restatement of the Law, Property, Servitudes, §4.1, and to case law to discern the parties' rights and responsibilities.

The dictionary provided that the word “replace” meant “to substitute” and “to provide an equivalent”. The Third Restatement of Law stated that “[t]he language should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it in the context of the parcels of land involved”. The Court found case law that stated, “[t]he meaning and effect of the reservation are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances”, *Kelly v. Ivler*, 187 Conn. 31 (1982). The dominant estate owner also provided case law that held that improved technology may be substituted for the original to accommodate normal development of the dominant estate benefited by the servitude (*Abington Ltd. Partnership v. Heublein*, 246 Conn. 815 (1998)), but the Court found this case unpersuasive as the surrounding circumstances differed.

In the end, this Court found in favor of the servient estate owner (the one on whose property the septic system was located), denying the temporary injunction requested by the dominant estate owner. It held that this easement’s language, while neither expressly allowing enlargement nor prohibiting expansion, did not give the dominant estate the right, absent a showing of necessity, to replace the existing septic system which was not worn, failing, or in need of replacement. Furthermore, because replacing the septic system was the result of the dominant estate owner’s unilateral decision to increase the size of the house, it did not satisfy the “if necessary” language and was deemed a “want” to accommodate his construction plans, not a “need”.

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