USE DESCRIPTIONS IN VIRGINIA EASEMENTS: *CAVEAT EMPTOR, CAVEAT VENDITORIS AND CAVEAT CONSILIARIUS*

by Charles M. Lollar*

GENESIS OF EASEMENTS

Easements are interests in real property that convey use, but not ownership, of a portion of an owner's property.[1] They can be temporary or permanent.[2] Although the origins and early growth of the English common law of easements is uncertain, these interests and rights have been recognized since the Norman conquest.[3]

Easements can be created by an express conveyance or by a reservation in a deed.[4] Easements, whether affirmative or negative, are classified as either "appurtenant" or "in gross." An easement appurtenant, also known as a pure easement, has both a dominant and a servient tract and is capable of being transferred or inherited. It frequently is said that an easement appurtenant "runs with the land," which is to say that the benefit conveyed by or the duty owed under the easement passes with the ownership of the land to which it is appurtenant.[5] The owner of the dominant estate in the easement acquires rights to use the property of the owner of the servient estate, burdened to a certain degree by the rights granted.[6] In early days, the use by the dominant owner was often for passage from a public road to and from that owner's nearby property.

The law of easements eventually evolved to include personal rights in gross, unconnected with a dominant tenement and originally incapable of assignment.[7] Many modern easements acquired by public entities grant rights to install "facilities" on, over and/or under strips crossing the property of the servient owner. Easements in gross are most commonly the type acquired by public utilities, different in that the utility owner does not typically own freehold interests in adjacent or nearby land, but instead acquires easement corridors in the lands of others, through which it runs its services. Because such easements were not connected to a dominant tenement, early courts refused to classify them as easements at all, but

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[1] Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 3rd ed. (1993); Appraisal Institute, *The Appraisal of Real Estate Appraisal*, 12th ed., at 85 (2001).

[2] Temporary easements exist only for a specified time period, such as a construction easement that terminates after improvements are constructed, at which time the realty becomes unencumbered. But in the world of easements, even so simple a concept as this can become complicated, as public entities seek to acquire temporary construction easements that permanently change the grade of the owner's property. In the words of Abe Lincoln, calling a dog's tail a leg doesn't make it one. Mr. Lincoln also observed that it is better to give your path to a dog than be bitten by him in contesting for the right, the dogma of many advocates of public progress.

[3] F. Peacock, *The Law Relating to Easements in British India*, Tagore Law Lectures (Thacker, Spink & Co. 1899), at 39.

[4] J. Bruce and J. Ely, *The Law of Easements and Licenses in Land*, Rev. ed. (1995), ¶¶ 3.04, 3.05, at 3-9, 3-13.

[5] *Greenan v. Solomon,* 252 Va. 50, 54 (1996); *Lester Coal Corp. v. Lester,* 203 Va. 93, 97 (1961).

[6] J. Eaton, Real Estate Valuation in Litigation, 2d ed. (1995).

[7] F. Peacock, *supra* note 3, at 11–12.

instead, labeled them *rights* in gross.[8] At common law, easements in gross were strongly disfavored because they were viewed as interfering with the free use of land, and the rule was that an easement is "never presumed to be in gross when it [can] fairly be construed to be appurtenant to land."[9] For an easement to be treated as being in gross, the instrument granting the easement must plainly reveal that the grantor/seller intended to convey that right.[10]

WARNINGS TO BUYERS, GRANTOR/SELLERS AND THEIR COUNSEL

Easements have steadily increased both in quantity and variety over time and have become the subject of much litigation and legislation.[11] As a result, the warning *caveat emptor* (buyer beware) must be expanded to include *caveat venditoris* (seller beware) and *caveat consiliarius* (counselor beware).[12] Not only must buyers of property encumbered by form easements with broad general language be careful to consider the impact of existing easements on the property being acquired, but also parties signing broad "standard form" easements should take heed of the far-reaching impact of the rights conveyed in those instruments. This is true notwithstanding, or in spite of, a Virginia statute that requires consistency in actual and contemplated uses.[13]

In the words of Phaedrus, "Things are not always what they seem; the first appearance deceives many; the intelligence of a few perceives what has been carefully hidden."[14]

In construing easements, as with other contracts, effect must be given to the intention of the parties.[15] When the meaning of language in a contract is clear and unambiguous, the contract needs no interpretation, and "[t]he intention of the parties must be determined from what they actually say and not

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[8] *Rangeley v. The Midland Railway Company*, L.R. 3 Ch. App. 306 (1868); id. at 11.

[9] *French v. Williams*, 82 Va. 462, 468 (1886).

[10] Prospect Dev. Co., Inc. v. Bershader, 258 Va. 75, 90 (1999), quoting *Lester Coal Corp.* note 5, at 97. (1961).

[11] J. Bruce and J. Ely, *supra* note 4, at vii. The authors note that, in recent years, "attempts to achieve contemporary societal goals, such as public recreational access to beaches, utilization of solar energy, cable television access to multiple dwellings, and historic preservation" have turned to the vehicle of easements.

[12] In an article entitled *Secondary Easements* appearing in the November 2009 issue of THE FEE SIMPLE, the author warned of the breadth and uncertainty of form easements that are often acquired by public utilities under threat of condemnation, concluding with "Caveat emptor."

[13] *Code of Virginia* § 55–50.1, 1950, as amended:

> **Enjoyment of easement**. Unless otherwise provided for in the terms of an easement, the owner of a dominant estate shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and the owner of the servient estate shall not engage in an activity or cause to be present any objects either upon the burdened land or immediately adjacent thereto which unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate. The term "object" as contained in this section shall not include any fence, electric fence, cattle guard, gate, or division fence adjacent to such easement as those terms are defined in through . Any violation of this section may be deemed a private nuisance, provided, however, that the remedy for a violation of this section shall not in any manner impair the right to any other relief that may be applicable at law or in equity.

[14] Plato, *The Phaedrus* (circa 370 BC).

[15] *Foti v. Cook,* 220 Va. 800, 805 (1980).

from what it may be supposed they intended to say."[16] This might lead a party granting an easement (either to a party that owns nearby property intended as the dominant estate or to a party that benefits, such as a public utility transmitting electricity or gas) to conclude that the burden upon the servient estate will be limited to the scope and degree of use existing at the time of the grant. Similarly, a buyer who acquires a servient estate might conclude that an existing easement will not substantially change its characteristics from that of the time of purchase. Worse yet, an attorney representing either the seller or buyer might advise the client that the easement *is what it is* (and will not change from what it is). Unless there is specific language in the instrument permitting an expansion of the use or an increase of the easement's burden upon the servient estate, such conclusions seem logical and reasonable. This is especially true considering that grants of the fee must be *express* under English common law, and, but for statutory presumptions, may be silent as to whether the grant passes less than the fee.[17]

The presumption is otherwise when it pertains to easements. Generally, when an easement is created by grant or reservation and the instrument creating the easement does not limit its use, the easement may be used for "any purpose to which the dominant estate may then, or in the future, reasonably be devoted."[18] A party seeking to enjoin a particular change or increase in use of an easement has the burden of proving that the use is beyond the scope of the grant or is of such a degree of increase as to be unreasonably burdensome.[19] However, this general rule is subject to the qualification that no use may be made of the easement different from that established when the easement was created, which imposes an additional burden on the servient estate.[20]

The original intent of the grantor of an easement (as owner of the servient tenement or estate) can be compromised when the easement's scope and degree of use is not limited in the easement instrument. The scope and breadth of an easement is determined, when possible, from the four corners of that instrument; however, when the easement is silent as to either, the Supreme Court has interpreted the scope of easements to be unlimited as to uses specified in the instrument – unlike deeds, where parol evidence might be received to establish the intent of the parties.

In *Cushman Virginia Corp. v. Barnes*, the instrument creating the easement did not contain any language limiting the easement's use.[21] When the easement was established, the dominant estate, a 126.67-acre tract, had two dwelling houses and was used as a farm. The owner of the dominant estate proposed to subdivide his land for a residential and commercial development that would include thirty-four residential lots. The Court reversed the chancellor's decree limiting the easement to its original uses, stating

> The fact that the dominant estate is divided and a portion or portions conveyed away does not, in and of itself, mean that an additional burden is imposed upon the servient estate. The result may be that the *degree of burden is increased*, but that is not sufficient to deny use of the right of way to an owner of a portion so conveyed.[22]

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[16] *Carter v. Carter*, 202 Va. 892, 896 (1961); *cf McCarthy Holdings, LLC v. Burgher*, 282 Va. 267 (2011), holding that an easement did not transfer fee simple interest to the dominant estate owner even though the agreement granted exclusive use of the easement area.

[17] Unless words expressly convey fee simple title, the common law provides that such title does not pass. The Virginia legislature changed the common law so that a grant of real estate without words of limitation shall be construed to pass the fee simple. *See Code of Virginia* § 55-11, 1950, as amended.

[18] *Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 259 (1992) (quoting *Cushman Virginia Corp. v. Barnes*, 204 Va. 245, 253 (1963)); *see also Collins v. Fuller*, 251 Va. 70, 72 (1996).

[19] *Shenandoah Acres, Inc. v. D.M. Conner, Inc.*, 256 Va. 337, 342 (1998).

[20] *Hayes*, *supra*, at 258-259.

[21] 204 Va. 245, 253 (1963).

[22] Id. at 253 (emphasis added).

Similarly, in *Hayes v. Aquia Marina, Inc.*,an operator of a marina on the dominant estate (a 2.58-acre tract) proposed to expand its marina facility from 84 to 280 boat slips.[23] The easement providing access to the marina was a private roadway about 1,120 feet long and 15 feet wide along its entire course. The agreement creating the easement did not restrict its use. The Court held that the proposed expansion would not unreasonably burden the servient estate, although the degree of burden would be increased. The Court noted that an expanded use of a dominant estate could be of such degree as to create an additional burden on a servient estate, but affirmed the finding of the lower court that the proposed marina expansion failed to establish such an additional burden.

In *Shooting Point, L.L.C. v. Wescoat*, the Court applied those same principles, holding that the subdivision of a 176-acre parcel into 18 residential lots was a purpose to which the dominant estate could reasonably be devoted, and that the proposed use of the easement would not impose an unreasonable burden on the servient estate.[24] It was noted that, although the number of vehicles using the easement would increase substantially as a result of the proposed use, that fact demonstrates only an increase in degree of burden on the servient estate, not an imposition of an additional burden. The Court failed to address the question of whether an increased degree of burden could be so great as to impose an additional burden on the servient estate.

The above cases involved access easements serving dominant adjacent tenements. Although distinctions can be drawn in cases involving expansion of the use and degree of the burden of easements in gross benefiting not other land but benefiting the holders of the easements, property owners (sellers or buyers) and their counsel should be careful to understand and appreciate the language in easement instruments describing the use by the dominant estate. In modern times, service easements are hard to avoid if property has access to electricity, gas, communications, public water, or sewer. The provider acquires a dominant estate to service the encumbered servient estate, which benefits both. Even instruments granting the right to providers to place lines, wires, or pipes over or under the land of the servient owner to service the property and constructed buildings routinely have much broader scope of use language than needed. Since the use is intended to be limited to the service of the servient owner's property, overbroad language describing scope might generate less concern.

Broad language in easement instruments, commonly found in what is described as "the standard form," can lead to subsequent uses and degrees of use that go far beyond what is understood and intended by the landowner. This is true in ingress or egress easements for access (pedestrian, vehicular, etc.) of nearby property to a public road, as in the cases cited above. However, broad form easements obtained by utilities may have far more impact on the future use and value of the property of the servient landowner,because courts have allowed the burden of the dominant easement estate to expand to any degree of reasonable use. The point of reference applied by the courts is not what is reasonable and contemplated for the needs of the dominant estate at the time the easement was acquired, but what is reasonable at the time the courts consider the issue of whether the holder of the easement has overburdened the servient estate.

If a picture is worth a thousand words, the before and after pictures in Exhibit "A" are worth thousands of warnings to prospective purchasers of properties burdened by electric transmission line easements and to property owners from whom utilities seek to acquire such easements, whether voluntarily or under the threat of condemnation. Likewise, they should generate concern by attorneys called upon to offer counsel in the negotiation process with either a seller or a buyer. The left picture shows the electric facilities, including wires and tower, described in an application for certificate of convenience and necessity and in a condemnation petition. The property owner fought the condemnation for years. Following his death, his widow, to avoid having to go to trial, settled by signing a broad form

[23] 243 Va. 255 (1992).

[24] 265 Va. 256 (2003).

utility easement with the language shown below the pictures. There is nothing in the recorded easement suggesting that the widow was represented by counsel at the time the easement was signed, although the owners were represented during the pendency of the condemnation proceeding. The State Corporation Commission application provided that the easement was being acquired for a 500,000 volt electric circuit, and both it and the condemnation petition limited towers to a height of 150 feet.

Approximately thirty years later, when the then owner rejected a monetary offer by the utility to acquire additional easement width, the lattice towers and wires were replaced with the monopoles (some higher than 150 feet) and wires shown in the other picture, with two 500,000 volt circuits, totaling *one million volts of electricity*, all erected in the pre-existing easement area, with no additional compensation paid to the property owner. The scope and degree of use was expanded from the original project pursuant to rights acquired under the previous form easement, with no specific limit as to any increase in the degree of use.

Many property owners who are asked to sign easements may not be represented by counsel. They would not likely understand or appreciate the far-reaching consequences of broad language in the instrument, and rely instead upon their understanding of how their property is presently intended to be used. Some might ask for explanations regarding the easement language. Attorneys representing the party seeking to obtain the easement are required to advise an unrepresented owner to seek independent counsel.[25] However, most owners whose properties are to be burdened by public utility easements are approached by agents or contractors not subject to the ethical rules placed upon licensed attorneys.

In 2001, the Virginia legislature, in its wisdom, passed a statute requiring the following warning to appear in easements to public service corporations:

> **Instruments conveying easements to public service corporations.**
> No instrument executed by a landowner after January 1, 2002, by which an easement of right of way in land is conveyed to a public service corporation shall be accepted for recordation in any Clerk's office that maintains property records unless it bears the following provision:
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> > **"NOTICE TO LANDOWNER: You are conveying rights to a public service corporation. A public service corporation may have the right to obtain some or all of these rights through exercise of eminent domain. To the extent that any of the rights being conveyed are not subject to eminent domain, you have the right to choose not to convey those rights and you could not be compelled to do so. You have the right to negotiate compensation for any rights that you are voluntarily conveying."**
>
> If such an instrument does not bear such a notice provision but is accepted for recordation in any Clerk's office, the absence of such notice provision shall not affect the validity or enforceability of such instrument.[26]

The problem with this warning is quite apparent: It falls short of alerting a property owner of the potential future unexpected impact of a change/increase in use of the easement due to the broad unlimited use language that generally appear in utility right of way easements. Even if the recording clerks who by

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[25] Rule 4.3 (b) of Virginia Rules of Professional Conduct: A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

[26] *Code of* Virginia § 56–259.1, 1950, as amended.

default are tasked with policing this accept for recordation an easement absent the notice, there is no consequence to its validity.

This *degree of use* analysis is subjective, and the holder of the servient estate must prove that the dominant estate has increased the burden of the easement to such a degree that it has become unreasonable. The reported Virginia cases provide guidance only as to what increases in use by the holder of the easement have been determined *not* to be an unreasonable overburdening of the servient owner's property.

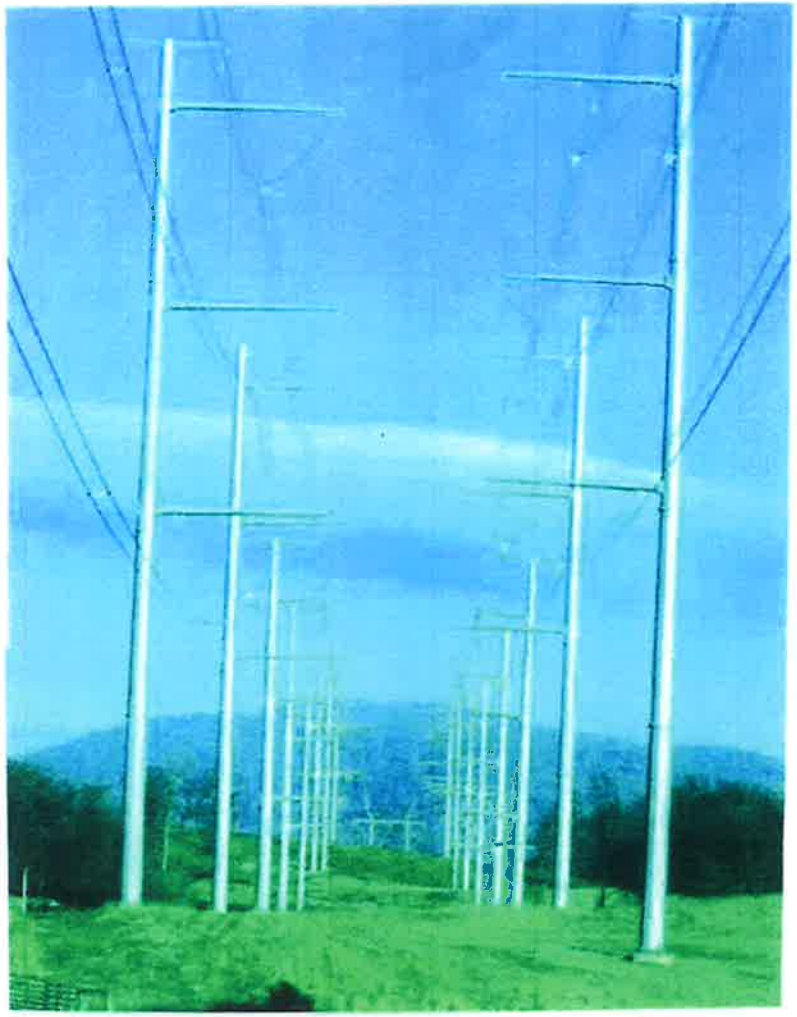
When acquiring property subject to patent easements (roads, driveways, multi-purpose paths, hiking/walking or "green" trails, electric, water, gas, cable, communication or other utility easements), buyers should be aware of, and beware of, broad language in the easement instrument describing the scope of use by the owner of the dominant estate benefitting from the easement. This is equally true when new easements are being acquired through negotiation of purchase price or by condemnation for public use by an entity with the power of eminent domain. In the former, it is easy to assume that the degree of use of the easement is limited to the existing use, because no greater use is specified. As noted, the Virginia Supreme Court has construed broad easement language to allow much greater degrees of use than the use described and intended at the time the easement is acquired, so long as the expansion of the easement use does not unreasonably burden the servient owner's property. The problem is that the Court has yet to report a case where the increase in the use was of such a degree to unreasonably burden the remaining property. Not even the sky is the limit as to expansion of degree of use.[27]

[27] J. Bruce and J. Ely, *supra* note 4, at 5–64. Prescriptive aviation easements in airspaces over private properties opposite airport runways has given rise to considerable litigation, as described in ¶ 6.04[2].

A

Towers, wires, etc. for 500kV project described in petition to condemn powerline easement

Changes in towers, wires, etc. adding 2nd 500kV line in easement pursuant to broad language (below) in form right of way agreement signed by owner to settle condemnation proceeding



GRANTOR grants and conveys unto UTILITY ... the perpetual and exclusive rights, privileges and easements of right-of-way ... to lay, construct, bury, operate and maintain one or more lines of poles, towers, and structures, and one or more lines of cables and conduits, together with all wires, manholes, handholes, meters, attachments, equipment, accessories and appurtenances now or hereafter desirable in connection therewith... for the purposes of transmitting and/or distributing electric power and for communication purposes relating to the transmission and/or distribution of electricity. UTILITY shall have the rights to inspect, rebuild, remove, repair, maintain, improve, alter, modify, replace and relocate the facilities or any part thereof, and make such changes, replacements, alterations, substitutions, additions to or extensions of the facilities as UTILITY may from time to time deem advisable, in its sole and absolute discretion.