GRANTING EASEMENTS: YOU MAY BE GIVING AWAY MORE THAN YOU THINK

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Property owners are frequently asked to grant utility servitudes, whether to serve their own properties or other properties in the area. Although an owner granting a utility easement may think that he or she is doing so for a particular purpose, that use may be expanded over time with changing technologies.

***CenterPoint* Case**

In a 2008 decision, the Texas Court of Appeals held that the manner, frequency, and intensity of an easement's use may change over time to accommodate technological advances and that some flexibility in determining easement holder's rights should be allowed as long as the changes respect the original purpose stated in the grant. This increase in flexibility stems from the "technological advancement doctrine", which states that an easement should encompass technological developments that are in line with the particular purpose for which the easement is granted. *CenterPoint Energy Houston Elec. LLC v. Bluebonnet Drive, Ltd.*, 264 S.W.3d 381 (Tex. App.-Houston [1 Dist.] 2008).

Houston Lighting & Power Co. ("HL&P"), the predecessor in interest to CenterPoint Energy Houston Electric LLC ("CenterPoint"), was granted an express utility easement in 1929. HL&P acquired the easement pursuant to the grant which stated, in relevant part:

> That the San Jacinto Trust Company … does by these presents GRANT, SELL AND CONVEY, unto the said Houston Lighting & Power Company . . . a rightofway or easement for electric transmission and distributing lines consisting of variable numbers of wires and all necessary and desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys) . . . .

Southwestern Bell Telephone ("SWB"), predecessor to AT&T, had been sharing the easement since 1970. There was no separate telephone easement on the site. AT&T mounted and strung land-line telephone lines on CenterPoint's poles.

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In early 1998, HL&P and SprintCom, Inc. ("Sprint") entered into an agreement to install wireless telecommunication equipment on existing electrical towers. HL&P installed the equipment on the easement in question for Sprint in the summer of 1998.

Bluebonnet Drive, Ltd. ("Bluebonnet") and Petro-Guard Co., Inc. ("Petro-Guard") purchased the property subject to the easement in 2004. Soon after the purchase, Bluebonnet and Petro-Guard sued CenterPoint and Sprint, claiming that the use of the tower exceeded the scope of CenterPoint's easement and constituted a trespass. The trial court found that CenterPoint's and Sprint's use of the easement did exceed the scope of the easement granted to HL&P and granted Bluebonnet's and Petro-Guard's motion for summary judgment.

On appeal, the Court first found that HP&L, and CenterPoint by succession, could assign the rights granted by the easement to a third party, but the assigned rights must conform to the rights that were originally conveyed to HP&L. The only rights that may pass are those that are "reasonably necessary" for the enjoyment of the easement. *CenterPoint Energy*, 264 S.W.3d at 389. The Court then held that an easement must be interpreted according to the basic principles of contact construction and interpretation. If the language in the easement is unambiguous, the Court must rely solely on the written terms of the grant. The Court stated that doubts about the parties' intent would be resolved against the servient estate in order to confer on the grantee the "greatest estate permissible under the instrument." *Id*.

In interpreting the language of the grant, the Court stated that the Texas Supreme Court has acknowledged that common law permits flexibility with regard to an easement holder's rights because the nature of the use of the easement may change over time to accommodate technological development. *Id*. at 389 (citing *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002)). Those changes have to fall within the purposes of the original easement, as determined by the written terms of the grant. *Id.* The easement "encompasses only those technological developments for which the easement was granted." *Id.*

The Court held that the plain terms of the easement agreement encompass the use of CenterPoint's easement for Sprint's cellular transmission lines. The grant conveyed an easement for "all necessary and desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys) . . . ." *Id.* at 390. The Court held that the plain meaning of those terms was that telephone and telegraph wires could be installed when necessary and desirable, and that while the technology of 1926 did not contemplate cellular equipment, under the technological advancement doctrine the installations set forth in CenterPoint's agreement with Sprint are permitted.

Additional Caselaw

The Texas Supreme Court acknowledged that common law permits flexibility with regard to an easement holder's rights because the nature of the use of the easement may change over time to accommodate technological development. It found, however, that allowing a cable company to set up equipment on an easement granted solely for electric transmissions was not within the scope of the original grant. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002). Here, Hill Country Electric Cooperative ("Hill Country") was granted an easement in 1939 that allowed Hill Country to "use their property for the purpose of constructing and

maintaining 'an electric transmission or distribution line or system.'" *Id.* at 699. Marcus Cable Assocs. ("Marcus Cable") presented several cases from other jurisdictions that allowed cable companies to add their equipment to existing easements. Although the Court expressed no opinion on whether those cases were decided correctly, the Court distinguished those cases because all of the grants allowed for electricity *and* telephone equipment.

In 1985, the California Court of Appeals held that where an easement permitted its holder to maintain both electric and telephone wires, cable television lines were within the easement's scope because cable television service is "part of the natural evolution of communications technology." *Salvaty v. Falcon Cable Television*, 212 Cal.Rptr 31, 34 (1985). According to the Court, the primary issue is whether the use is consistent with the primary object of the original grant. In this case, the installation of the equipment was consistent with the goal of providing for "wire transmission of power and communication." *Id.* at 35. *See also Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825, 828-29 (Mo. Ct. App. 1985); *Crowley v. New York Telephone Co.* , 363 N.Y.S.2d 292, 294 (1975) ("Just as we must accept scientific advances, we must translate the rights of parties to an agreement in the light of such developments.")

In 1994, the Fourth Circuit held that an easement that permitted its holder to maintain pole lines for electricity and telephone services was broad enough to encompass cable television equipment. *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 105 (4th Cir. 1994) (applying West Virginia law). In so holding, the Court relied on the similarity between the communicative aspects of both telephone services and cable television. The Court held that under West Virginia law, the two part test for determining whether a use should be permitted is, first, to determine whether the proposed use is "substantially compatible" with the original grant and, second, to determine whether it "substantially burdens" the servient estate. *Id.* at 108. *See also Jolliff v. Hardin Cable Television Co.*, 269 N.E.2d 588, 591(Ohio 1971).

In contrast, in 2005, the Florida Court of Appeal held that an easement permitting the holder to establish electric transmission lines did not allow the grantee to lease the excess capacity of communications lines to a telecommunication company because the easement was limited to electric transmission and only necessary internal communication lines fell within the scope of the easement. *Orlando v. MSD-MATTIE, L.L.C.*, 895 So.2d 1127, 1129-30 (Fla. Dist. Ct. App. 2005). The court held that the fiber optic cable is not an "electric transmission line" and therefore is only permitted to the extent that it is a necessary ancillary to the permitted use of the easement. *Id.*

Another line of cases examines technological advancement in relation to easements granted for highways. Washington and Florida courts have held that technological advancement allows for the use of highway easements for electric and telephone lines, but other courts have held that permission to establish public utility lines is not granted by highway easements. In 1931, the Washington Supreme Court held that a utility could construct a power line on a highway easement. The reasoning behind this decision was that electric and telephone lines supply communication and power that had previously been provided through messengers and freight wagons traveling on public highways. According to the Court, "a highway easement includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a

highway." *McCullough v. Interstate Power & Light Co.*, 300 P. 165, 166 (Wash. 1931). *See also Nerbonne, N.V. v. Florida Power Corp.*, 692 So.2d 928, (Fla. Dist. Ct. App. 1997). Iowa, Louisiana and Arkansas hold that permission to establish public utility lines is not granted by highway easements. In 2000, the Iowa Supreme Court held that a highway easement did not include the right to install utility poles and lines. *Keokuk Junction Railway Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 360-61 (Iowa 2000) (disagreeing with the reasoning in *McCullough* and *Nerbonne*.). *See also Cathey v. Arkansas Power and Light Co.*, 97 S.W.2d 624, 626 (Ark. 1936); *Louisiana Power & Light Co. v. Dileo*, 79 So.2d 150, 155 (La. Ct. App. 1955).

These cases illustrate, that, when granting utility easements, a property owner should take care only to cover what is intended. Otherwise, that owner may lose the opportunity to dictate future uses of its property and to preserve the property's future value.