Jennings, Henry

From: Randlett, Mark

Sent: Thursday, October 03, 2002 1:15 PM

To: Jennings, Henry

Subject: Easements and Right of Ways

Henry

A few weeks ago you asked whether a property owner could apply herbicides along the sides of a private road providing access to his/her property. Your question presents some interesting issues for which, unfortunately, I do not have definite answers.

Private roads are right of ways and easements. There is a servient estate (which is the property subject to the easement) and one or more dominant estates (the property benefited by the easement). The owner of an easement possesses a property interest. A party asserting an easement has the burden of proving both the nature of the easement and also the scope of the easement. As a general principle, a person holding a right of way is entitled to maintain that right of way to the degree required for its granted use. However, the language creating the easement always controls, and the scope of the easement and the owner's right to maintain it, may be limited. So, in any particular case, it is important to begin with the easement language itself.

When there are several owners in common of an easement, such as a right of way, each owner may make reasonable repairs which do not injuriously affect his co-owners. *See, Hultzen v. Witham*, 78 A.2d 342, 345 (Me. 1951), and *25 Am. Jur. 2d Easements and Licenses in Real Property*, Section 94. The maintenance must be conducted only within the boundaries of the easement and must be limited to what is necessary. In other words, if the width of a private road created by easement is 18 feet, then the owner of the easement may not conduct any maintenance activity beyond that 18 foot width.

One West Virginia case, *Kell v. Appalachian Power Company*, 289 S.E.2d. 450, held that the **aerial** application of herbicides by a power company to maintain a line easement was unreasonable. Even though the company had a clear right to keep its lines clear of trees, branches and other obstructions, the court found that aerial application of herbicides (because of the risk of drift) inflicted unnecessary damage and unreasonably increased the burden on the servient estate. The court also found that the parties to the easement, originally granted in 1939, could not have intended to subject themselves to repeated pesticide exposures.

A Wisconsin court, in *Gallagher v. Grant-Lafayette Electric Cooperative*, 637 N.W. 2d. 80, was faced with the more direct question whether the easement allowed the application of herbicides at all. The property owner, Gallagher, filed a complaint with the court seeking an injunction to prevent Grant-Lafayette from using herbicides to maintain its lines. The court acknowledged the general principle that an easement carries with it the implied right to do what is reasonably necessary to maintain the easement for its intended uses. However, the court skirted the ultimate issue, finding that the question whether the application of herbicides by the defendant was reasonably necessary depends upon the particular facts and circumstances of the case, and remanded the case to the trial court to decide that factual issue.

The Maine case that came the closest was *S.D. Warren Company v. Vernon*, a 1996 Superior Court case. S.D. Warren held an easement by prescription (adverse possession) to pass over Vernon's property. S.D. Warren began trucking herbicides over the road for use in connection with logging operations on S.D. Warren's properties. However, Vernon objected and blocked the road. The court found that the use of herbicides was not essential to S.D. Warren's operations and opined that the parties could not have anticipated, when the right of way was originally created in the 1920's, that such operations would have included the passage of pesticides. The court went on to say that the "defendants and others could legitimately believe that the use of the right of way across defendant's property to transport herbicides and the possibility of accidents and spillage could pose significant risks different from other uses of the right of way...a use of a right of way that some, including the owner of the servient estate, believes may present a significant risk to health and safety must necessarily be evaluated cautiously if that use represents a change from uses of the right of way when it was created." Justice Alexander, who wrote the decision, is now a justice on the Maine Supreme Court, which may indicate how an issue like this might be decided if it ever makes its way to that court.

So, what does all this mean in response to your question? Well, first, you should look to the specific language creating the easement. From there, assuming that the language does not limit or broaden the rights of the holder to maintain the

easement by its own specific terms, then the general principle that an owner may do what is reasonably necessary to maintain that easement for its intended purposes would apply. The maintenance, such as herbicide applications, must be confined to the actual boundaries of the easement. What is or isn't reasonably necessary would likely depend on the particular facts and circumstances of the case and would take into account things such as the intent of the parties, the manner of application etc. In short, there is no specific answer that will apply in every case.

While I'm at it, I'll raise another related issue...are private roads (such as camp roads etc.) open to use by the public? After re-reading the Board's definition of custom application for probably to 25th time, I am of the opinion that they are not. The definition provides that a property is deemed to be open to use by the public where its owner operates, maintains or holds the property open or allows access for **routine use** by members of the public. The key term is routine use by members of the public, which I see as being different from the occasional visit to the owner's property by invitation or for commercial purposes. The definition lists, albeit in a non exclusive manner, the types of property that are considered as open to use by the public. Notably, public roads is included on the list indicating that a distinction from private roads may have been intended.

I hope this helps. I may have raised new issues for you. In any event, if you want to talk further about any of this let me know.