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Dear Mr. Gonski:

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REAL ESTATE & TITLE INSURANCE

Abandonment of Easement Tough To Prove

Although a well-established concept of easement law, a remedy for abandonment is difficult to obtain

By Dennis M. Gonski

Abandonment is a well-established concept of easement law. A societal interest is clearly served by removing old and unused easements that have become needless encumbrances. Whenever an easement is abandoned by its beneficial holder, the servient lands should be freed from any needless burden. However, whether an easement is abandoned — or its use merely suspended — is often a difficult matter to ascertain. Title law has additionally developed a concept that estates in land are to be generally upheld. The notion of “abandonment” is therefore an exception to established title law.

What appears as a simple rule of law, in reality presents many thorny issues. Of the many reported court decisions discussing the law of abandonment, precious few instances are found in New Jersey where an abandonment has actually been held to exist.

Use of an Easement

Private easements by definition typically involve two competing estates: a benefited parcel which the easement

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favors (the dominant estate) and a burdened parcel (the servient estate) upon which the easement acts as an encumbrance.

Because an easement is a benefit to the dominant estate, it is the easement holder who traditionally enjoys control as to “when” to exercise the permitted right of use. This right to decide “when” to use an easement however, also brings with it the right to decide not to use the easement. There is no obligation upon an easement owner to compel affirmative use of an easement. Indeed, the choice as to whether to exercise a permitted use lies exclusively at the whim of the easement holder. The easement holder can elect to use or not use the easement at his sole pleasure (unless of course the easement exists, by a written instrument that states otherwise). Thus, nonuse of an easement, even for lengthy periods of time, may well be an election by the easement holder to suspend use of the easement. Nonuse is a choice; so long as the easement exists the easement holder has the right to suspended use of the easement, resuming affirmative enjoyment at some future time.

For this reason, the mere nonuse of an easement is given little weight by most courts in abandonment cases. There must be more — much more — than mere nonuse to give rise to a finding of abandonment.

Proof of Abandonment

An “abandonment” occurs when the beneficiary of a servitude intentionally and permanently relinquishes all rights of future use. (See, Restatement 3d Property, Servitudes, § 7.4). Abandonment can occur at any point in the chain-of-title; there is no minimum or maximum time period associated with an abandonment. Nonuse of an easement, even for seven decades or more, will not alone give rise to an abandonment. There also must be, in addition to any cessation of use — an accompanying intention by the easement holder to abandon his right, forever.

The elements of abandonment, therefore, are: an act tantamount to relinquishment of all rights of use; and a clear intention to do so permanently.

The proofs in abandonment cases are not at all easy to establish. Most proofs begin with evidence that, for whatever reason, the easement is no longer in use. Although nonuse of an easement is to some extent a relevant fact, it is also the least probative. To succeed in proving abandonment, one must prove not only that an easement is unused, but that such nonuse is with the actual and knowing intention by the easement holder to permanently abandon all rights to future use. Intention is the prime issue — and one’s intention is almost always a factually sensitive matter. Direct proof of an easement

holder's "state of mind" is no simple task. Indeed, once litigation has commenced, direct proof of the easement holder's state of mind is nearly impossible.

Recognizing the difficulty in proving a "state of mind," the courts generally analyze the offered proofs by applying an objective standard. The gauge for the easement holder's state of mind is that of a hypothetical "reasonable person" under similar circumstances. Proof of intent can be offered in the form of conduct by the easement holder that suggests the resignation of the servitude. However, such evidence always must be evaluated in light of the actual circumstances present in each case. An easement holder's conduct may be capable of different explanations, and may be interpreted differently under different facts. Intentions are like chameleons in that they are colored by the special considerations arising at that particular point in time. It is entirely possible that even a prolonged period of nonuse of an easement is explainable by the easement holder. Doubts are generally decided in favor of the easement owner, even in situations where explanation of nonuse tends to be weak. See, *Rossi v. Sierchio*, 28 N.J. Super. 351 (1953).

Notwithstanding even the application of a liberal objective standard to an easement holder's manifestations of intent, few claimants have been able to reap success in meeting their burden of proof in abandonment cases. It should therefore not be surprising that very few easements contested in New Jersey Courts have been extinguished by an application of the doctrine of abandonment.

Abandonment cases tend to be contested matters. An easement beneficiary, who is willing to divest his servitude, will most likely also be willing to give a release of his easement. On the other hand, an easement holder who refuses to release the easement, will generally oppose the abandonment as being an attempt to obtain a forfeiture. In all contested abandonment cases there is the potential for creating a windfall to the owner of the servient estate, at the expense of an unintended loss of a valuable right to the beneficiary of the easement.

The burden of proof in abandonment

cases is therefore similar to that required in forfeiture cases. Proof must be by clear and convincing evidence, and the burden is placed upon the person claiming the abandonment. The easement owner, in his defense, need only come forward with a plausible explanation for his nonuse of the easement, and that alone is usually sufficient to tip the balance and defeat most abandonment claims.

Unlike most title related issues — where the proofs are measured only by a "preponderance" standard — an abandonment requires "clear and convincing proof" of an intent by the easement holder to abandon all future uses.

Servitudes Only

A unique feature of abandonment is that it only applies to servitudes (easements, licenses and profits), and then only against the beneficiary of the servitude (the easement holder). Abandonment does not apply to real property titles and hence can not be made effective against the fee owner of the encumbered land.

Abandonment is at once a significant exception to the general rule of title law that estates in real property can not be lost to abandonment. There is strong public policy in New Jersey (as well as a Recording Act) that requires land titles to be ascertainable beyond peradventure. It is not possible to create a loss of fee title through abandonment, because to allow such a result would introduce uncertainty in fee title ownership, through "voids" or "gaps" in title.

Easements however, being servitudes, present no "uncertainty" to the fee title. Being merely an encumbrance upon the title to land, fee title is never put in doubt. The certainty of land ownership is not threatened by the doctrine of abandonment. Titles to land remain certain beyond peradventure. The doctrine of abandonment merely "quiets" the fee title by removing old and unpursued encumbrances, that for whatever reason, have not been formally released by their beneficial owners. Until removed from a title, the servitude continues on as a cloud upon title to the land, even if it no longer pertains.

An easement, being permanent in

nature, must be removed or extinguished. The doctrine of abandonment therefore provides a true title "cleansing" function.

Contrasted with Estoppel

As an alternative to abandonment, easements may also be extinguished through estoppel or prescription.

While an abandonment requires that the easement holder intends to abandon the easement, estoppel does not. An "estoppel" arises when conduct by the easement holder inspires some detrimental activity by the owner of the servient estate. The focus of an estoppel is not upon the easement holder per se, but is upon the owner of the servient estate having been induced by the easement holder to commit an act that is:

- a) inconsistent with the continued existence of the easement;
- b) in reliance upon the conduct of the easement holder; and
- c) would result in serious damage to the servient owner by restoration of the easement.

To succeed under an abandonment theory, one must prove (by clear and convincing proof) the intention by the easement holder to forever relinquish the easement. Not so with estoppel. An estoppel requires no proof of intent on the part of the easement holder, although such intent may well exist. An estoppel requires proof (under the preponderance standard) of reasonable and detrimental reliance by the owner of the servient land.

Frequently, easement termination will involve both estoppel and abandonment, requiring court decisions that combine both concepts. For example, both abandonment and estoppel may arise in situations where there has been an obstruction constructed in the easement right-of-way. Such cases usually involve a blockage to the easement right-of-way by the property owner but may also involve improvements constructed by the easement holder. The ultimate resolution of estoppel matters will generally depend upon the degree and the permanence of the obstruction to the easement. In those situations where the obstruction of the easement is only "partial" and/or readily

removable — termination of the easement will rarely be found. However, in those situations where the obstruction is total and of a more permanent nature, a greater likelihood exists that the easement will be extinguished. Because the right of an easement can not be abandoned by mere nonuse alone, it is generally necessary in cases involving a total and permanent obstruction, for the court to also make a determination that the easement holder sat "idly by" allowing such construction to take place in the face of a duty to object — a classic estoppel argument.

Contrasted with Prescription

Another method used to extinguish easements, is by prescription. Under abandonment law, the duration of nonuse is probative only to the extent that it may serve as a possible indication of the easement holder's intent to abandon — and then much depends upon the individual surrounding circumstances of each case. However, under the law of prescription, a minimum period of nonuse (now 30 years) is a most necessary element for easement termination.

Prescription involves an affirmative act taken by the owner of the servient estate, putting the easement holder to defensive action to protect the easement.

As a practical matter, both the easement holder and the owner of the servient estate have the independent right to use of the easement area, to the extent that such use does not unreasonably interfere with the other's use. Consequently, even a significant occupation of the easement area by the owner of the land may not alone be sufficiently "adverse" to the easement holder so as to give rise to a loss of the easement through prescription. This is particularly true when there has been a period of inactivity of use by the easement holder, thereby allowing the servient property owner a growing latitude in his use of all parts of his own land. In order to effect the loss of an easement by prescription, the servient owner must engage in a much more permanent and extensive interruption of the easement than might otherwise be necessary to establish the requisite "adversity" needed to obtain an easement by prescriptive means.

Even in situations where the servient owner has created a long-standing blockage of the easement area, adversity will not automatically be implied. The rule concerning the prescriptive effect resulting from the blockage of an easement is aptly stated in *Castle Associates v. Schwartz*, 63 A.D.2d 481, a New York case wherein an easement had fallen to

nonuse and the owner of the servient land improved his land in a manner inconsistent with the continuation of the easement. The New York Court held that the blockage of the right-of-way would not be deemed adverse to the existence of the easement until such time as (1) the need for the right-of-way arises, (2) a demand is made by the owner of the dominant estate that the easement be re-opened and (3) the owner of the servient tenement refuses to do so.

This result, in the author's opinion, likely would occur also in New Jersey. See *Arlington Realty Co. v. Kellar*, 105 N.J. Eq. 196, a case where a New Jersey Court determined that an ordinary fence could be removed to accommodate the easement when need be, and therefore the continued right of use under the easement was upheld, and relief was respectively denied under both the theory of an abandonment and under the theory of a prescription. Once again, it was made clear that easements enjoy a favored enforcement and that an easement holder is under no duty to make use of his right in order to retain his interest in the easement.

Abandonment may be a well established concept of New Jersey easement law — but as a remedy, it is exceedingly difficult to obtain. ■