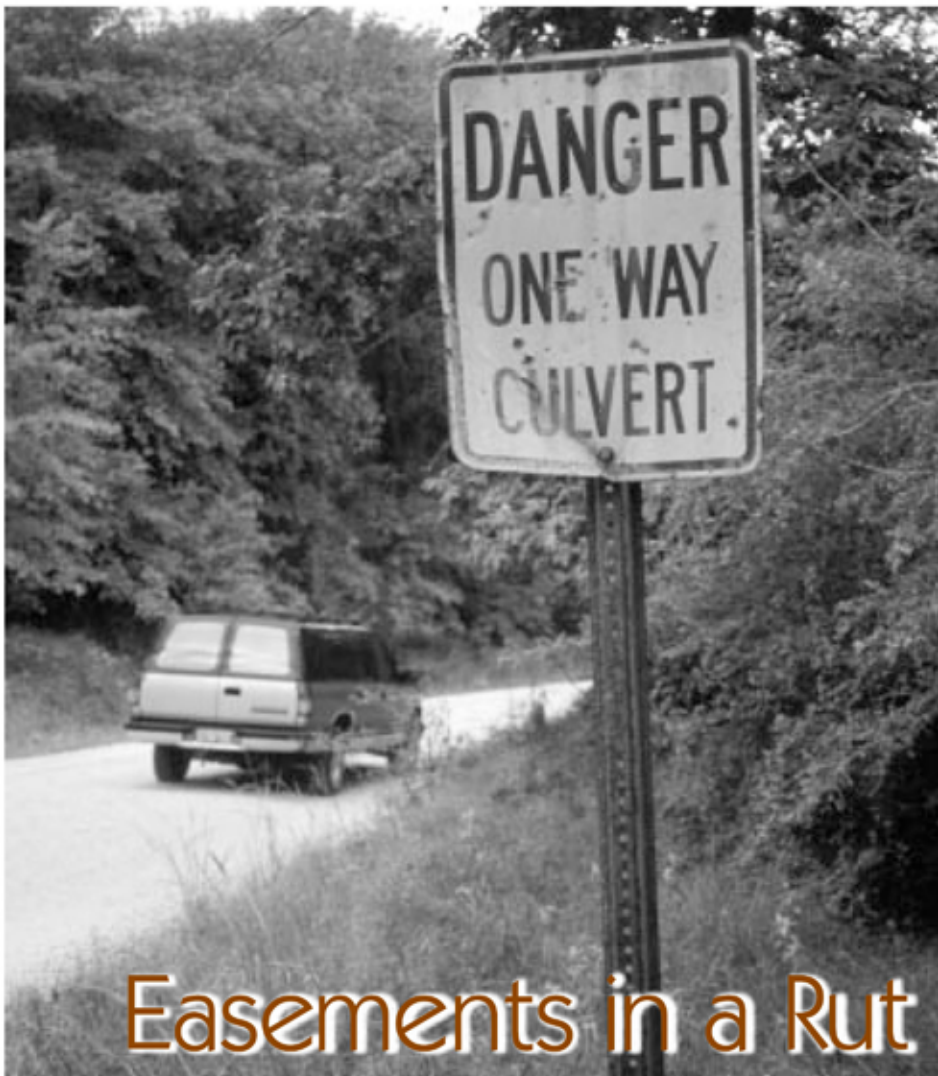


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## Easements in a Rut

By Judon Fambrough

**M**isusing private easements is a problem associated with the population growth in rural areas. The owners of the tracts being crossed (servient tenants) may encounter increased traffic as large tracts served by the easements are subdivided. What recourse, if any, is available to the servient tenants?

The following scenario illustrates some of the potential problems. Art purchases a moderate-sized tract in a rural area served by a newly opened county road. The owner of a neighboring ranch, presently served by a private easement across another landowner, asks for an easement. The new county road provides a more convenient access. Art, being a good neighbor, grants the easement.

Because the easement is prone to flooding, the rancher installs several culverts in the worst depressions. Over time, the stones and gravel covering the culverts wash away. Travel diverts around the culverts and outside the boundaries of the easement.

The rancher dies, leaving heirs who do not want to continue ranching but see a profit in subdividing. Now the easement serves not one but more than 50 families. No one maintains it. Trash and litter are constantly discarded on Art's property.

What legal recourse, if any, does Art have to relieve the problems?

First, Art contacts the local county commissioners court. According to Texas Local Government Code, counties may regulate subdivisions situated outside the corporate city limits. Art hopes the commissioners court will regulate the access route.

However, as pointed out in the recent case of *Elgin Bank v. Travis County*, the ability of the county to regulate subdivisions is limited to:

- tracts divided into two or more parts for a subdivision and
- streets, alleys, squares and parks or all other parts of the subdivision dedicated to public use.

The commissioners court informs Art that it is powerless to regulate the access route because no public dedications occurred.

Next, Art explores terminating the easement because of the misuse (overburdening). Texas case law allows a remedy in this situation. However, the relief is limited to an injunction, not termination. As pointed out in a 1996 case, *Seastrunk v. Walker*, "If the appellee does abuse the easement established by the court, appellant's remedy is not forfeiture (termination) of the easement but an injunction against the improper or unauthorized use thereof."

Further insight was added in *Hoak v. Ferguson*, "... even though there was a **substantial change** in the use of the easement granted, such change would not entitle appellees to a cancellation of the grant. . . . only to have an improper or unauthorized use enjoined" [emphasis added]. The case was remanded, in part, to have the words *substantially changed* defined.

In Art's case, it is unclear how an injunction works. Most of the case law involves placing too many lines in a utility easement. Would the courts limit this easement to one family?

Art next enlists an attorney to research the *Dominant-Estate Doctrine* as pronounced by the Texas Supreme Court. Art wants to know what, if any, effect the doctrine has in this instance.

As explained in 1966 and reiterated by the high court in 1979, the doctrine limits the use of an easement to the dominant tract described in the grant. It can not be extended to the other land or be converted into a public way without the consent of the owner of the servient estate.

The application of the doctrine to Art's situation depends on the wording of the easement. If the grant benefited the entire ranch, not just the location of the homesite, then any subsequent owner of **any part** of the ranch would have the right to use the easement, assuming it is not overburdened. If part of the subdivision is on the ranch and part of it is on adjacent land, however,

the owners of the tracts on the adjacent land can not use the easement according to the doctrine.

**A**rt investigates the legality of the families detouring around the culverts. First, whose duty is it to maintain the culverts? Second, can Art stop the detouring by confining the traffic to the easement?

Generally, the owner of the easement (originally the rancher) has the duty to prepare and maintain the easement. Any work necessary for the proper use and enjoyment of the easement falls on that person.

The only duty imposed on the servient estate (Art) is a negative one. The servient tenant can not interfere with the dominant tenant's use and enjoyment of the easement.

In this instance, subdivision owners who use the easement must repair the culverts if the washouts were caused naturally. Art, by the same token, can not interfere with the use of the easement by purposely dismantling the culverts or undermining the roadway. The owner of the easement is entitled to necessary support to use the easement.

No case law discusses diverting around culverts. The case of *Americans Cement and Plaster Co. v. ACME Cement and Plaster Co.* held that, if the servient tenant obstructs the way, the dominant

owner is justified in going over another part of the land. However, in *Parker v. Baine*, the court ruled that if the owner of the easement moves from the established way without justification, he or she is a trespasser.

In *Parker*, the dominant owner veered outside the easement to avoid deep ruts where the soil washed. The court ruled, "It is impossible to say what temporary condition would justify plaintiff's moving around a temporary obstruction, or what change by the elements would justify a permanent variation in the course of the easement. If, for instance, a tree should fall across the roadways, plaintiffs could go around it until they had a reasonable time to remove it."

According to these cases, it appears that the travelers are justified in diverting around the culverts until repairs can be made. After that, the users become trespassers.

Art must be careful to ensure that the trespassing does not continue too long. A prescriptive easement may arise if the travelers divert (trespass) around the culverts for ten continuous years.

Finally, as to the trash and debris littering Art's land, Art may be able to get a judgment for clean-up costs. The owners of the easement have a duty to use ordinary care to avoid injury to the servient estate. To recover damages, the

servient tenant must show that the easement owners were guilty of willfulness or negligence in the use of the easement.

If all else fails, Art, with the consent of the owners in the subdivision, may be able to convince the commission's court to improve and maintain the easement. According to the Texas Transportation Code, if the commission's court determines that the improvement of an access road to a subdivision is necessary for the public health, safety or welfare of the residents of the county, the commission's court may improve the road to comply with county standards and assess all or a part of the costs pro rata against the subdivision owners.

To implement the procedure, the commission's court must first publish notice of the proposal at least twice in a newspaper generally circulated in the county, then hold a public hearing. After the hearing, the majority of the owners in the subdivision must approve the proposal with a mail-in ballot.

To ensure payment, a special lien is placed on the owner of each tract, even though the owner is personally liable for his or her share. As with all legal issues, consult an attorney for specific advice. ☐

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