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Property—Servitudes & Building Restrictions

*Lee Hargrave**

ROAD & STREET SERVITUDES

Last year's Developments¹ described the broad authority of local governments to terminate public use of roads and streets by formal action. Two court of appeal decisions in the current term demonstrate the difficulties involved in terminating the public's interest in roads and streets without such formal action by local government authorities.

In both *Winn v. Jefferson Davis Parish Police Jury*² and *IP Timberlands Operating Co. v. DeSoto Parish Police Jury*,³ the courts found that servitudes in favor of the public on seldom-used rural dirt roads had not been lost by prescription of non-use or by abandonment. In *Winn*, a landowner requested a declaration that a road running from a parish road along a boundary line, half the road on each property, to the plaintiff's home and to a neighbor's property, was no longer available for public use. In *IP Timberlands*, a hunting club with a lease on forest lands sought to prevent the public use of a one-lane dirt road that ran from a state highway to a small bayou.

In the formal revocation procedure, as provided by Louisiana Revised Statutes 48:701 and similar statutes, an ordinance or other legislative act of the governing authority ends the public's interest if the road is no longer needed. This procedure is the simplest means of returning to private interests lands that had been dedicated to public use. Under Louisiana Revised Statutes 48:701, the land that had been owned by the government entity is usually transferred to the contiguous landowners. Though it is not clearly stated in section 701, the courts have also allowed local governments to revoke the dedication of servitudes.⁴ If the public's interest is a servitude, the revocation terminates it, allowing the landowner to return to full enjoyment of the property without the limitations of that real right.

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1. Hargrave, *Developments in the Law, Property*, 50 La. L. Rev. 353 (1989).
2. 560 So. 2d 89 (La. App. 3d Cir. 1990).
3. 552 So. 2d 605 (La. App. 2d Cir. 1989).
4. Hargrave, *supra* note 1, at 358.

When no formal revocation is present, the governing principles have been borrowed from the laws applicable to predial servitudes.⁵ No specific legislation covers termination of public streets other than section 701,⁶ and the Louisiana Civil Code articles providing for termination by ten years non-use⁷ and by renunciation or abandonment⁸ are apparently applied by analogy. It is arguable that a more rational solution would be to adopt specific statutes for terminating such servitudes in favor of the public. Such public servitudes involve different policy concerns than those that come into play when dealing with servitudes that benefit only other estates.

Servitudes in favor of the public, for example, are usually more burdensome on the landowner. More people will have a right to use the passage, people who may not be known to the landowner. Additionally, in predial servitudes of passage between estates, for example, the Louisiana Civil Code makes clear that not all uses preserve the servitude; only uses "as appertaining to the dominant estate."⁹ That rule would provide for continuation of the servitude if the passage were used by current owners or their visitors; use by the general public for general transportation from point to point would not. On the other hand, if the servitude is in favor of the public, it would appear that any use by any member of the public for any reason would be sufficient. In such a case, the encumbrance that the servitude places on the land is much more difficult to terminate.

Indeed, it is problematic even to speak of a servitude of passage in favor of the general public. The code does not provide specifically for such servitudes in favor of the public.¹⁰ Not until the 1977 Louisiana Civil Code revision were such limited personal servitudes in favor of a

5. La. Civ. Code art. 646, "A predial servitude is a charge on a servient estate for the benefit of a dominant estate."

6. La. R.S. 48:711-719 (1984 and Supp. 1990), La. Const. art. VI, §§ 5(E), 9 (home rule charter provisions).

7. La. Civ. Code art. 753, "A predial servitude is extinguished by non-use for ten years."

8. La. Civ. Code art. 771, "A predial servitude is extinguished by an express and written renunciation by the owner of the dominate estate." Prior to 1977, the corresponding Civil Code provisions, Articles 816 and 817, provided that the renunciation could be tacit, with Article 819 adding, "The release of the servitude is tacit, when the owner of the estate to which it is due permits the owner of the estate charged with the servitude, to build on it such works as presuppose the annihilation of the right, because they prevent the exercise of it. . . ."

9. La. Civ. Code art. 757.

10. 1904 La. Acts No. 25 amended La. Civ. Code art. 765 to allow acquisitive prescription of servitudes of this type, using the language: "The public, represented by the various parishes in this state, may also in like manner acquire a servitude. . . ."

person, as distinguished from an estate, clearly authorized.¹¹ For some time, however, court decisions and general acceptance had resulted in these public road and street interests being treated as servitudes in favor of the public.¹² Moreover, the Louisiana Civil Code itself makes similar analogies for its natural servitudes (Articles 655-658) and legal servitudes (Articles 659-696). They are in favor of persons or the public generally and not in favor of an estate. However, the drafters did not borrow the provisions on prescription of non-use of such servitudes. Article 758 provides that prescription does not run as to natural servitudes and Article 696 provides that an enclosed estate's right of passage may not be lost by prescription.

This whole area is ripe for legislative action to accommodate with more precision the means for losing public rights by non-use, as opposed to loss of private rights.

Prescription of Non-Use

The court in *Winn* continued a strict application of the non-use requirements, "which simply means that a full ten years must pass without any use of the road before the servitude is lost."¹³ The court found evidence of use by the public "on numerous occasions" and stated that the fact that the landowner may have often "run off" persons on the road without permission was irrelevant.

In *IP Timberlands*, the dirt road had become public by three-year maintenance by the police jury.¹⁴ In such a case, a former private road becomes public and the public acquires a servitude. In no statute, however, is it stated that lack of maintenance results in the road reverting to a private road. The court therefore concluded that even though the police jury had not maintained the road for almost twenty years, the public's interest was not extinguished on that account. Further it found that "the public, in the form of hunters, trappers, fisherman, nature lovers and adjacent landowners, continued their regular use of the road."¹⁵

In applying these rules of prescription, the two cases were decided on traditional grounds. They do illustrate, however, the difficulties in restoring property to the private domain when the public's use is not

11. A. Yiannopoulos, *Personal Servitudes* § 223, in 3 *Louisiana Civil Law Treatise* (3d ed. 1989).

12. E.g., Comment, *Dedication of Land to Public Use*, 16 *La. L. Rev.* 789 (1956).

13. *Winn v. Jefferson Davis Parish Police Jury*, 560 So. 2d 89, 91 (La. App. 3d Cir. 1990).

14. La. R.S. 48:491(B) (1984 and Supp. 1990), "All roads and streets in this state which have been or hereafter are kept up, maintained, or worked for a period of three years by authority of a parish governing authority . . . shall be public roads and streets."

15. *IP Timberlands Operating Co. v. DeSoto Parish Police Jury*, 552 So. 2d 605, 607 (La. App. 2d Cir. 1989).

frequent. Even though the burden of proving a use is on the dominant estate,¹⁶ presumably the member of the public seeking the right to use the road, the cases suggest that the burden is easily met by the testimony of one person using the road. The solution for the private landowner is the political one of obtaining a formal revocation from the local governing authority. Self help would be another possibility, through barricading¹⁷ the road or putting a gate on the road, or otherwise prohibiting use.¹⁸

Renunciation or Abandonment

One finds some loose language in opinions about roads "abandoned through ten years nonuse"¹⁹ and "abandonment through nonuse."²⁰ However, true abandonment of a real right, technically called a renunciation in several code articles,²¹ refers to an expression of intent to relinquish one's rights with respect to a thing. No time period is required to elapse for the renunciation to be effective. On the other hand, if true prescription of non-use is involved, non-use for ten years is all that need be proved. Intent is of no concern. It is true that a long period of non-use by the holder of a right could well support inferences of an intent to abandon, but such an intent would still be necessary to have a true renunciation.

Some courts, apparently applying predial servitude principles by analogy, have suggested that informal abandonment is a means of terminating a public use servitude. One might reject the analogy outright here, since the adoption of Louisiana Revised Statutes 48:701 is the more specific provision that directly governs termination by the body that represents the public. Indeed, in normal predial servitude renunciation cases, the focus would be on the mind of the owner of the dominant estate. That person's intent must be examined to determine if he or she desired to give up a right. Of course, that will usually involve inferences from conduct. With public rights, however, it is difficult to analyze the mental state or the intent of "the public." It is almost impossible for one to speak of looking to the minds of all the general public. Realistically, one would be making inferences from conduct and then dealing with a hypothetical or fictional intent. In a more practical approach, the suggestion in the cases is to deal with the intent or the mind of the governing authority and to ask whether the

16. La. Civ. Code art. 764.

17. *Stelly v. Vermillion Parish Police Jury*, 482 So. 2d 1052 (La. App. 3d Cir. 1986).

18. *Jackson v. Langsport*, 322 So. 2d 281 (La. App. 2d Cir. 1975).

19. *Stelly*, 482 So. 2d at 1055.

20. *Robinson v. Beauregard Parish Police Jury*, 351 So. 2d 113, 115 (La. 1977).

21. E.g., La. Civ. Code arts. 626, 737, 771, 1014.

police jury has abandoned or renounced the servitude. That approach, however, is an additional reason for rejecting the analogy to predial servitudes since Louisiana Revised Statutes 48:701 specifically provides for a means of abandonment by a police jury (as opposed to abandonment or renunciation by the general public).

Indeed, the 1977 revision of the Louisiana Civil Code added the requirement that renunciations of predial servitudes must be express and written.²² That was a change from the prior law, which permitted tacit renunciations. Even then, however, tacit renunciation was not presumed and there had to be some work of a "permanent and solid kind, such as an edifice or walls, and that they present an absolute obstacle to every kind of exercise of the servitude."²³

The argument for tacit renunciation appears in dictum in a few cases, but the support for applying the concept to public servitudes is weak. In 1946, in *Starnes v. Police Jury of Rapides Parish*,²⁴ Judge Hardy of the second circuit suggested that an informal abandonment was possible, "[b]y the clear and well-established proof of an intent on the part of the governing body to abandon." In that case, however, he easily found that such an intent on the part of the corporate police jury was not present even though one police juror, the member representing the area involved, may have had that intent. The result of the case was to continue the rights of the public to use the road.

Justice Dixon in *Robinson v. Beauregard Parish Police Jury*²⁵ faced the problem of a parish's tort responsibility for a bridge under the theory that it was responsible for the condition of this public road. The defense argued that the road had been abandoned. Justice Dixon found that no informal abandonment had occurred, though he did rely on *Starnes* for the view that informal abandonment was a possibility.

When the second circuit had an opportunity to consider the issue again in *Fore v. Volentine*,²⁶ the court once more found no intent to abandon. Furthermore, in reference to *Starnes* and *Robinson*, Judge Hall wrote:

If these two cases stand for the proposition that the character of a road as a public road can be changed by abandonment by the police jury without compliance with statutory requirements for abandonment, without formal action by the police jury, and without ten years nonuse, they stand alone in Louisiana jurisprudence. Although the language of these cases supports the

22. La. Civ. Code art. 771.

23. La. Civ. Code art. 820 (1870).

24. 27 So. 2d 134 (La. App. 2d Cir. 1946).

25. 351 So. 2d 113 (La. 1977).

26. 385 So. 2d 860 (La. App. 2d Cir. 1980).

concept . . . , the context in which these holdings were made and the results in the two cases detract from the authority of the cases for that proposition.²⁷

More recently, the third circuit has seemed to approve of the concept of informal abandonment. In *Stelly v. Vermillion Parish Police Jury*,²⁸ the court held that the road in question had ceased to be public. The opinion then stated, somewhat cryptically, "[T]here was a clear and well-established intent by the police jury to abandon the road, and the public has not used the road for a period in excess of ten years."²⁹ If there was ten years non-use, the abandonment rationale was unnecessary. If the court was applying a true abandonment concept, the reference to ten years non-use was unnecessary. This uncertainty as to the rationale of *Stelly* was noted in the later opinion of the third circuit in *Winn*. The court, retreating from its position in *Stelly*, said:

We note that *Stelly*, *supra*, and *Robinson*, . . . suggest that a public road may be abandoned by a governing body without formal revocation, relocation, or non-use. However, in *Stelly*, the Police Jury's lack of maintenance or 'de facto' abandonment was combined with both relocation and ten years of non-use. In *Robinson*, the actions of the Police Jury were insufficient to constitute abandonment, especially considering there was no revocation, relocation, or non-use. We therefore believe *Stelly*, *Robinson* and an earlier Second Circuit case, *Starnes* . . . can be reconciled with the rules set forth in this opinion.³⁰

If the third circuit did not overrule its decision in *Stelly*, it certainly has limited its application. No case can be cited in which there has been a holding that an informal abandonment has taken place when there was no ten year period of non-use.

As suggested earlier, this result may well be the best solution. The implications of Louisiana Revised Statutes 48:701 are that a formal revocation is needed for the police jury to terminate a public use, without room for a court-developed rule of informal abandonment. The latest expression of the legislative will in a similar area is against informal revocations of servitudes, even between private persons; there the renunciations must be express.

27. *Id.* at 862.

28. 482 So. 2d 1052 (La. App. 3d Cir.), writ denied, 485 So. 2d 65 (1986).

29. *Id.* at 1056.

30. *Winn v. Jefferson Davis Parish Police Jury*, 560 So. 2d 89 (La. App. 3d Cir. 1989). See *Fore*, 385 So. 2d 860, for an opposing view of the *Robinson* and *Starnes* rationale.

Policy Concerns

An analysis of the policies in this area does not lead to a clearly obvious solution. On one hand, there is the general policy in favor of simplicity of title which forbids permanent division of the rights of ownership in property and encourages extinction of servitudes and return to full rights of ownership in one person. Freedom from servitudes serves the owner's and society's interests by making the property more developable and more susceptible of commercial transactions.

Title examination certainty and simplicity can also come into play. Often, public road servitudes will be established by three year maintenance or informal dedication, and thus will not be indicated by documents in the public records. Encouraging termination of such rights will foster the reliability of public records in such matters. It is also true that the public use of servitude is normally more burdensome than a predial servitude of passage which is in favor of a more limited group. Thus, the public servitude should be easier to terminate.

On the other hand is the concern with the general public's access to and use of roads and waterbodies in rural recreational areas, as in the *IP Timberlands* case. (In *Harris v. Adams*,³¹ the road was used once a year by the public during the Grand Isle Tarpon Rodeo.) Not involved, however, is a landowner's right to access to his property; the enclosed estate servitude protects that person's rights by providing a passage for him and for travelers to his property.³² Conflicting policies about public use may also be suggested in *Winn*, where the road was presumably used for the disfavored activity of dumping garbage as well as for the presumably favored activity of a teenagers' lovers lane.

STREETS & BUILDING RESTRICTIONS

The requirements for dedicating subdivision streets and terminating the public's interest in such streets are provided in detail in Louisiana Revised Statutes 33:5051 and 48:701. The requirements for establishing building and use restrictions on lots in subdivisions are stated in Louisiana Civil Code articles 775-783. These two legal institutions have generally been handled as separate regimes, presumably because they each have their own historical development and have different policy concerns behind them. The fourth circuit court of appeal in *Lake Terrace Property Owners Association v. City of New Orleans*³³ mixed the two institutions

31. 203 So. 2d 809 (La. App. 4th Cir. 1967).

32. La. Civ. Code art. 689. See *Bulliard v. Delahoussaye*, 481 So. 2d 747 (La. App. 3d Cir. 1985) (road formally abandoned; enclosed owner would have the right of access as an enclosed estate).

33. 556 So. 2d 111 (La. App. 4th Cir. 1990). After this manuscript was completed, the court of appeal decision was reversed by the Louisiana Supreme Court, 567 So. 2d 69 (La. 1990).

in an odd way. The decision in that case, because of its convoluted factual setting, is not likely to be important precedent, but it raises some important issues about the two institutions and reveals some misconceptions about the relationship between the two.

Lake Terrace involves what was described as "12 foot easements" for use by an electric utility and as "public walks." They apparently were dedicated to public use by the subdividers and were thus owned by the city. Under *Coliseum Square Ass'n v. City of New Orleans*,³⁴ it would appear that the city could terminate the public use if it was no longer needed for public use. In such a case, the property could return to adjacent landowners or could be sold. Aware of this fact, the court of appeal in *Lake Terrace*, the same court that was reversed by the supreme court in *Coliseum Square*, sought to find another means of prohibiting the proposed city action. However, the factual setting and the procedural posture of the case complicated the apparently simple solution. The plaintiffs had sought to enjoin the city, not from terminating the public use, but from selling the property on which the crosswalk was located. It was also determined "that all parties to the action acknowledge that the building restrictions must remain in force, unless the subdivision property owners vote to remove them, whether or not the disputed property is sold."³⁵

It thus appears that public use of the crosswalk would be protected even if the property was sold. Nonetheless, the court enjoined the sale, citing as its authority a principle that, "[i]f something is public it cannot be alienated or appropriated for private use."³⁶ That principle, and the case the court cited to support it, does apply to the beds of navigable waterbodies owned by the state, which are, by constitutional provision, inalienable.³⁷ But nothing in the constitution or the Louisiana Civil Code so provides with respect to streets. Indeed, Louisiana Revised Statutes 48:701 clearly allows municipalities to terminate the dedication of a street, a public thing, and alienate it. New Orleans' home rule charter provides similar authority. Further, the Louisiana Civil Code clearly provides that public things are subject to public use only "in accordance with applicable laws and regulations,"³⁸ recognizing the overriding public law aspect of the public's interest in streets. Indeed, in the absence of constitutional or statutory limitations on converting public things to private things, the question of the power of cities to do so is more a matter of local government law than basic property classification law.

34. 544 So. 2d 351 (La. 1989).

35. 556 So. 2d at 116.

36. *Id.* (citing *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974)).

37. La. Const. art. IX, § 3.

38. La. Civ. Code art. 452.

And in that area, statutes and home rule charters allow termination of the public's use of streets and roads. It would thus appear that the court is without authority in stating that the city cannot transfer ownership of a public walk to private owners simply because it is a public thing. In any event, given the posture of this case, even if the property were transferred to private owners, the public interest would remain protected since there would be allowable public use. This would be consistent with Louisiana Civil Code article 455 which indicates that private things may be subject to public use in accordance with law or by dedication.

The foregoing analysis would be the straightforward approach based on the law that developed with respect to dedicated streets, alleys and walkways. And since it goes off on another point, the court of appeal apparently recognizes the force of that analysis.

The innovation in the opinion is the court's analysis of the effect of the subdivision building restrictions on the public walkways. In the document containing building restrictions for the subdivision, there also appeared Section IX which stated that "12 foot easements" would be provided and there would be "public walks" and that these easements "are public property and will be dedicated to the City of New Orleans." The court concluded that the property was acquired by the city subject to the building restriction that this property be a public walk. The court then suggests that the only way to change this requirement would be by approval of the subdivision owners of a change in the restriction.³⁹ If taken to its logical conclusion, any revocation of a dedication of a street contained in a document entitled "Building Restrictions" could not be effective without also complying with the procedure for termination of building restrictions. That certainly has not been the practice and seems inconsistent with the text and policy behind Louisiana Revised Statutes 48:701.

In its analysis, the court does not discuss whether private building restrictions are binding on property once it is acquired by a governmental entity. Louisiana Civil Code article 7 provides that private agreements cannot "derogate from laws enacted for the protection of the public interest," and it is certainly arguable that the powers of cities to cease public use of streets are among the governmental powers protecting the public's interest that private individuals cannot affect by their private agreements. It would follow that restrictions cannot legally bind governments in such matters. In an analogous situation, it was held that a city, by its zoning regulations, could not prevent the state from using

39. *Lake Terrace Property Owners Ass'n v. City of New Orleans*, 556 So. 2d 111, 116 (La. App. 4th Cir. 1990).

its property in the city for housing prisoners.⁴⁰ The third circuit court of appeal apparently has taken the view that if the government acquires property by contract⁴¹ or expropriates property within a subdivision,⁴² the land is not bound by the restriction. In the latter situation, other subdivision landowners were not entitled to expropriation damages for the loss of the right to enforce restrictions.⁴³

If one takes a narrower textually-based approach, however, the matter can be decided simply, without having to leap into the broad public policy issues of private persons derogating from public rights. This approach would emphasize that privately adopted building restrictions are limited, in the words of Louisiana Civil Code article 775, to regulating "building standards, specific uses, and improvements." Historically, this has meant uses of lots within the subdivision, and not public areas. Even though the language of Section IX was within the document perhaps labeled building restrictions, they were not true restrictions. They were dedications governed by the more specific Louisiana Revised Statutes 33:5051, and it is that law that should apply.

The basic theory of building restrictions is that they are real rights like servitudes; they bind each lot and are in favor of the other lots in the subdivision. Under this view, rights of passage in favor of the general public do not qualify as such restrictions. This type of passage, of course, was what was established in *Lake Terrace* by dedication of the former owner of the property. This simpler approach would simply not apply building restrictions law to public use of roads, streets, and alleys. In that view, the court would have had to analyze, in the type of analysis pursued in *Coliseum Square*, whether the alley was or was not needed for public use. If not, the passage could have been terminated.

USE OF DRAINAGE CANAL SERVITUDES

The Louisiana Civil Code classifies as public things and grants to the public the right to use "natural navigable water bodies."⁴⁴ Man-

40. *City of New Orleans v. State of Louisiana*, 364 So. 2d 1020 (La. 1978).

41. *Gremillion v. Rapides Parish School Board*, 134 So. 2d 700 (La. App. 3d Cir. 1961). Justice Tate wrote, "The state's constitutional duty to provide adequate educational facilities and its constitutional right as sovereign to acquire land for such public purposes cannot be restricted or hampered by the provisions of a private contract to which the state is not a party." *Id.* at 703. *Gremillion* was reversed by the supreme court on other grounds. The issue was whether the proffered title to the property was suggestive of litigation. 242 La. 967, 140 So. 2d 377 (1962).

42. *Hospital Serv. Dist. No. 2 of St. Landry Parish v. Dean*, 345 So. 2d 234 (La. App. 3d Cir.), writ denied, 346 So. 2d 1106 (1977).

43. The result with respect to the lack of compensation was criticized in Yiannopoulos, *Work of the Appellate Courts 1976-1977*, 38 La. L. Rev. 341 (1978). See also Hargrave, *Developments in the Law 1983-84, Louisiana Constitutional Law*, 45 La. L. Rev. 397, 415 (1984).

44. La. Civ. Code arts. 450, 452.

made canals are excluded from the classification and from public use. The reference to "natural" navigability was added to the code for the first time in the 1978 revision, but this addition codified existing jurisprudence.⁴⁵ In applying these provisions, it should make no difference if the canal was dug with public funds by a public body. One must look elsewhere to find some legislation or some dedication by the landowner providing for such public use of a man-made navigable stream.

In *Brown v. Rougon*,⁴⁶ fishermen sought a right to use a canal that was arguably navigable in fact, but had been dug by a police jury and the state through private lands pursuant to a servitude agreement. Under the agreement, the private landowner granted a "drainage" right of way and the right to construct "drainage" facilities. The drainage ran from False River to Bayou Grosse Tete and was accomplished by digging a canal approximately 15-20' in depth and 65-100' wide.

The court of appeal, first circuit, held that the public had no right to use the canal under the Louisiana Civil Code provisions discussed above which limit use to navigable water bodies.

The fishermen had also argued a right to use the canal because the water itself is owned by the state under Louisiana Revised Statutes 9:1101. That provision, however, has never been the basis for public use of streams for transportation. It provides only there shall be no charge for the use of the state's waters "for municipal, industrial, agricultural or domestic purposes." In theory, the state owns only the water, and to use a stream for navigation involves using more than the water itself; the support of the bed is also involved.⁴⁷ In a more practical sense, the construction of Section 1101 urged by the plaintiffs would be inconsistent with the text of the code provisions that clearly indicate that non-navigable streams are not subject to public use even though they contain the state's waters. The private landowners had not shown an intent to dedicate the stream to public use, for the owners had regularly enlisted the assistance of law enforcement agencies to prohibit use of the stream. It was also clear that the contract with the state and police jury provided for drainage uses and not for transportation.

The plaintiffs also urged the seemingly equitable argument that since public funds were used to dig the canal, it should be available for public use. However, no provision of law makes such an expenditure the basis of public use. Indeed, the Louisiana Civil Code itself points out that public things are subject to public use only in accordance with law and

45. *Vermillion Corp. v. Vaughn*, 397 So. 2d 490 (La. 1981); *National Audubon Society v. White*, 302 So. 2d 660 (La. App. 3d Cir. 1974), writ denied, 305 So. 2d 542 (1975).

46. 552 So. 2d 1052 (La. App. 1st Cir. 1989).

47. A. Yiannopoulos, *Things* §§ 41-42, in 2 *Louisiana Civil Law Treatise* (3d ed. 1980).

regulations.⁴⁸ The canal here was not public property; the governing bodies had a right of servitude on private property. To make the property subject to public use simply because public funds were used to dig the canal, the court indicated, "would allow the taking of private ownership rights without the consent of the owner and without just compensation in violation of our State and the United States constitutions."⁴⁹

SERVITUDES OF PASSAGE FOR ENCLOSED ESTATES

Pursuing the predial servitude metaphor, it is an enclosed estate that is entitled to a servitude of passage. It would seem to follow, since the right is not personal to an individual, that various individuals somehow representing the estate could be entitled to pursue the claim for the advantage of the estate. Even though Article 689 states that the "owner" may claim the passage, the person claiming to be owner cannot be required to prove good title. A possessor under a just title has been held to have that right.⁵⁰ It would seem that a true possessor without title, who is presumed to be the owner, should be able to make the claim representing the estate, inasmuch as Louisiana Civil Code article 786 provides that a possessor is entitled to demand the fixing of a boundary with another tract of land. Prof. A. N. Yiannopoulos, citing the French authorities to the predecessor provisions in the Louisiana Civil Code, suggests that Article 689 "ought to be interpreted broadly to include anyone who has a real right on the enclosed estate."⁵¹ Real right holders would include usufructuaries, holders of limited personal servitudes, and owners of timber estates. Mineral lessees would qualify, but not predial lessees.

*Salvex, Inc. v. Lewis*⁵² relied on the foregoing analysis to hold that a mineral lessee was entitled to a servitude of passage as the "owner" of an enclosed estate. The court also adhered to its prior decision in *Cobb v. McCart*⁵³ which held that a simple lessee of a tract of land was not entitled to claim such a servitude of passage.

LIMITATIONS ON BUILDING RESTRICTIONS

The Louisiana Civil Code contains few limits on the substantive content of building and use restrictions that private owners may impose

48. La. Civ. Code art. 452.

49. 552 So. 2d at 1060.

50. *Martini v. Cowart*, 23 So. 2d 655 (La. App. 2d Cir. 1945) (Plaintiffs introduced and filed in evidence the title deed whereby they acquired their land and are in possession thereof as owners under said deed. This is sufficient for them to maintain the present action.).

51. A. Yiannopoulos, *Predial Servitudes* § 95, in 4 Louisiana Civil Law Treatise (1983).

52. 546 So. 2d 1309 (La. App. 3d Cir. 1989).

53. 478 So. 2d 204 (La. App. 3d Cir. 1985).

upon their property. The courts, however, continue an ad hoc process of developing such limitations on these private land use controls. In *Prien Oaks Homeowners Association v. Mocklin*,⁵⁴ the third circuit confronted a fence height limitation that was adopted, ostensibly as an amendment to the restrictions, after the defendants bought their lot and after they built their high fence. The court held the amendment did not apply to the defendants. This decision is consistent with the trend displayed in recent cases which found improper building restrictions that prohibited government subsidized housing,⁵⁵ and which construed restrictions in a strained manner to allow yard signs protesting a developers inaction in not improving the subdivision's water supply.⁵⁶

An initial issue in *Prien Oaks* was a restriction on waterfront lots that specified that no fences be placed within forty feet of the "waterfront line." The boundary of the lot in question was some twenty feet from the water line, and an initial issue was which line applied, the waterline or the boundary line. The trial court applied the more restrictive construction and limited the fence to forty feet from the boundary; the appellate court reversed, relying on Louisiana Civil Code article 783, which provides that in cases of doubt, restrictions are to be construed in favor of free use of property. That provision, of course, is one procedural device which is often used to support conclusions in favor of free use of property.

The more difficult substantive issue was whether restrictions that are not applicable when a lot is purchased can be applied to the lot, and whether restrictions that are not applicable when a construction is built can be applied if adopted later. In *Prien Oaks*, the trial judge had not actually applied the restriction which limited fences to six feet. Rather the judge had ordered the fence reduced to eight feet "on the basis of reasonableness, finding that the fence was out of character and out of keeping with the spirit and/or general plan or scheme of this subdivision."⁵⁷ The trial court apparently relied on *Oakbrook Civic Association v. Sonnier*,⁵⁸ in which the supreme court allowed architectural standards committee action in denying approval of buildings, but only if it acts reasonably and in good faith. In this regard, the third circuit distinguished *Oakbrook*, finding that reasonableness was not at issue here, since no restriction required prior approval of a fence by an architectural committee. It is only when there is a restriction requiring

54. 560 So. 2d 115 (La. App. 3d Cir. 1990).

55. *Roy v. Ducote*, 399 So. 2d 737 (La. App. 3d Cir. 1981).

56. *Cashio v. Sheriak*, 481 So. 2d 1013 (La. 1986). See also Hargrave, *Developments in the Law, Property*, 48 La. L. Rev. 457, 471 (1987).

57. 560 So. 2d at 117.

58. 481 So. 2d 1008 (La. 1986).

prior approval of construction that a subdivision architectural committee can judge on the appropriateness of the construction.

In addition, the third circuit in effect concluded that the restriction was not applicable, the court stating, "However, a subdivision property owner may not enforce a building restriction, effective subsequent to the alleged violation, relying upon the contention that the action is out of harmony with the general plan."⁵⁹

Perhaps the simplest approach to deciding such an issue would be to rely on the text of Article 766, which provides that building restrictions can be established only by an expression of consent by the owner of an immovable or by "all the owners of the affected immovables." In the case of an established subdivision, no new limitation could be imposed without the consent of the owners of the lots at the time of adoption. This would be the case whether the new limitation is denominated a new restriction called an amendment, as it was in this case. This approach is consistent with basic real rights theory—that imposing a real right on property is an alienation that can be made only with the consent of the landowner at the time of the contract. In *Prien Oaks*, all that would be necessary would be to state that the new limitation on fence height did not apply because of failure to comply with Article 766.

A slight problem arises in the possibly conflicting language of Article 780. Though the title of that article is limited to a reference to "termination" of restrictions, and though the predecessor provision referred only to restrictions being "terminated,"⁶⁰ the text of the article states:

[B]uilding restrictions may be *amended* or *terminated* . . . by agreement of owners representing more than one-half of the land area affected by the restrictions . . . if the restrictions have been in effect for at least fifteen years, or by agreement of both owners representing two-thirds of the land area affected and two-thirds of the owners of the land affected . . . if the restrictions have been in effect for more than ten years. (emphasis added).

To construe that reference to amendments as empowering the burdening of all lots in a subdivision with new restrictions upon approval of the owners of only a simple majority of the land area affected would be to make a major change in the law on scant authority. There would

59. *Prien Oaks Homeowner's Ass'n v. Mocklin*, 560 So. 2d 115, 118 (La. App. 3d Cir. 1990).

60. La. R.S. 9:5622, derived from 1938 La. Acts No. 326 and 1960 La. Acts No. 448, was repealed by 1977 La. Acts No. 170, § 8, as part of the Civil Code revision of the provisions on building restrictions. Comment (a) to Article 780 states the article "does not change the law."

seem to be little policy reason to move in that direction, policy being more generally toward free use of property and limiting private land use controls. It would be more consistent with that history and policy to construe Article 780 to refer only to amendments that lessen the restrictions on property.⁶¹ The court's opinion, though it does not explicitly state this as the basis for its judgment, is consistent with this view.

If one were to allow new limitations by the amendment route, one would face further constitutional issues. Enforcement of private restrictions is considered state action that comes within constitutional limitations.⁶² Louisiana Constitution Article I, Section 4 would then come into play, with its provision that one's right to use and enjoy private property is subject to "reasonable statutory restrictions and the reasonable exercise of the police power." That inquiry would then lead to one similar to the *Oakbrook* inquiry—whether a particular restriction imposed on a landowner without consent is a reasonable one. That inquiry would then have to balance the extent of the deprivation of enjoyment with the reasons supporting the government interest in enforcing the limitation in favor of the neighbors. That latter inquiry would no doubt focus further on the reasonableness of the reasons the neighbors seek to impose the added restriction. The uncertainty and unpredictability of that approach would suggest that it ought not to be lightly undertaken. It would suggest that it is preferable to apply the statutory solution discussed above. If change is to be made, the legislature would be the more appropriate body to adopt the standards to apply. Due to the lack of standards, and if the courts are to enter this area, *Prien Oaks* suggests it would not normally be reasonable to apply new regulations retroactively.

ENCROACHING BUILDING SERVITUDES

Louisiana Civil Code article 670, a new provision adopted in 1977, provides a flexible, equitable remedy to the landowner who constructs a building partly on the land of another. If the encroacher is (1) in good faith, and (2a) the other owner does not complain within a reasonable time after he knew or should have known of the encroachment, or (2b) in any event complains only after construction is subsequently completed, (3) the court *may* allow the building to remain. If the building remains, a servitude in its favor is established and the encroacher must compensate the other owner for the value of that servitude.

61. "For modification of the plan which makes it more restrictive, however, it arguably is necessary to obtain the consent of all the owners. . . ." Comment, *Some Observations on Building Restrictions*, 41 La. L. Rev. 1201, 1205 (1981).

62. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948); *Roy v. Ducote*, 399 So. 2d 737 (La. App. 3d Cir. 1981).

In *Pruitt v. Barry*,⁶³ the first circuit court of appeal, by a 3-2 decision reversed a trial judge, gave a narrow reading of article 670 and denied a servitude. The majority focused on the fact that the neighbors, the Hills, objected within nine days of the start of construction. The dissenters and the trial judge focused on the fact that the metal building involved was substantially complete at that time.

The Pruitts owned a small tract of land located in a corner of a larger shopping center; their tract was surrounded by the shopping center's large parking lot. Before building, the Pruitts had the lot surveyed and then started building on the surveyed line, even though the survey showed that the parking lot encroached on their property. They began work on an aluminum commercial building on September 16. On September 19, the Hills sent a field crew to survey the shopping center property and "on or about" September 24, notified the Pruitts and their civil engineer that the building encroached 12' on shopping center property. Construction ceased, and the plaintiffs sued their civil engineer. The Hills intervened, and the matter proceeded to trial on the Article 670 issue. The trial judge found good faith and substantial completion and granted the servitude. Conflicting expert testimony indicated the structure was between 48.5% and 70% complete. The judge admitted that the Hills had complained within a reasonable time, but exercised his discretion not to force destruction of a building that was 48% complete "when it only encroaches on a parking lot."⁶⁴

Discretion

An initial difficulty with Article 670 is that a literal interpretation suggests that even if all the requirements exist, "the court may allow the building to remain." The court, apparently, is not required to do so, presumably for equitable reasons. At the least, it would seem that this language choice suggests a flexible and equitable approach to these matters, rather than a strict, rule-oriented approach. *Pruitt* whittles down some of that apparent discretion, concluding without much explanation or reasoning that it can reverse the trial court when it finds "a clear abuse of discretion."⁶⁵ This was done by a 3-2 vote of a 5 member court panel. The earlier decision of the third circuit in *Bushnell v. Artis*,⁶⁶ suggested giving greater ambit to the lower court's discretion. There, the appeals court upheld the trial judge's unusual grant of a servitude covering not only the area where the encroaching house was located, but also three feet beyond (to tend the building and keep noxious

63. 551 So. 2d 726 (La. App. 1st Cir.), writ denied, 553 So. 2d 465 (1989).

64. *Id.* at 731.

65. *Id.*

66. 445 So. 2d 152 (La. App. 3d Cir. 1984).

weeds from the house) and making that boundary a straight line from the front to the rear of the lot ("to eventually lessen their differences").⁶⁷ A fence with right angle turns would be a constant reminder of the neighbors' dispute.

Good Faith

The lower court found the Pruitts were in good faith. Even though they had been aware of possibilities of uncertain boundary lines, they hired a professional surveyor and built in accord with his survey. The court of appeal stated it did not address the issue of good faith, but hinted in dictum that it disagreed with the lower court, by stating, "The Pruitts were aware of a potential problem with the boundary between their property and the Hills' shopping center prior to construction and failed to make further inquiry." This suggestion fails to give proper regard to the presumption of good faith established by the Louisiana Civil Code.⁶⁸ That quoted reference to the necessity of making an inquiry reverts to the older rules of subjective versus objective good faith under which a person in moral good faith was considered in bad faith if that person failed to inquire further about ownership issues. That line of reasoning has been repudiated by the Louisiana Civil Code revision and its abolition of the distinction between errors of fact and errors of law.⁶⁹ More consistent with the objective of the provision was the approach of the third circuit in *Antis v. Miller*,⁷⁰ where the court found in good faith an encroacher who kept mowing the grass to a line of trees just as his predecessor had done. He was in good faith as to that being the boundary even without a survey having been made. It would seem that inasmuch as a title letter from a reputable attorney would be the epitome of information that would put one in good faith, the same should be true as to the survey of a reputable civil engineer.

Complaint Within a Reasonable Time

The majority would appear on solid ground when it stated that the Hills acted reasonably. Their field crew was sent three days after construction began, and the complaint, upon learning the results of that survey, was made within nine days of the start of construction. In that regard, the trial judge agreed and Judge LeBlanc also agreed in dissent.

Complaint Before Substantial Completion

The unique problem in *Pruitt* results from the fact that the building being constructed was a type of prefabricated, aluminum structure de-

67. Id. at 155.

68. La. Civ. Code art. 3481

69. Id.

70. 524 So. 2d 71 (La. App. 3d Cir.), writ denied, 531 So. 2d 271 (1988).

signed to be completed quickly. The facts indicated it was between 48 and 70% complete after only nine days of work. Even so, the majority focused on the equities in favor of the Hills, since they acted reasonably in making their complaints. Nonetheless, the majority necessarily concluded either (1) that the building was not substantially complete; or (2) even if it was, and thus all the requirements are met, it was not required to grant a servitude but "may" do so or not, depending on other equities. In either approach, the considerations would focus on the costs of tearing the building down and the other alternative involved. In favor of the Pruitts was the fact that substantial costs would be involved and the fact that the encroached area was part of a large shopping center parking lot, where little damage would be suffered by the Hills in their use of their property. On the other hand, in this case, the building parts would not be destroyed and presumably could be relocated and used again in constructing the building in a proper location. The majority seems to place more importance, in this kind of balance, on the rights of ownership and less on the equitable side of the encroaching parties. It may well be that the majority was also influenced by the fact that the Pruitts had an additional monetary claim against the surveyor because of the mistake; the Pruitts were awarded \$330,000 in damages against numerous parties as a result of the erroneous survey.⁷¹

In any event, Article 670, by virtue of its flexibility and/or vagueness, fails to provide bright line rules and requires the kind of close weighing of facts and policy concerns involved in this case. The first circuit seems to lean on the side of protecting the interest of owners, whereas the third circuit seems more inclined toward the equities in favor of the good faith encroachers. The supreme court has yet to speak authoritatively in this area, denying writs in *Pruitt* and in *Antis*.

71. *Pruitt v. Barry*, 551 So. 2d 726, 729 (La. App. 1st Cir.), writ denied, 553 So. 2d 465 (1989).