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Easement and By-law Considerations When Considering Alternative Services

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Alternative Services Generally

“New technology has greatly changed the nature of electronic communication, and increased the uses that can be made of traditional telephone wires or wireless systems.”

Michael Seto & Cheryl Chasin, *General Survey of I.R.C. 501(c)(12) Cooperatives and Examination of Current Issues*, at 185 (2002).



Alternative Services Generally

However:

- *Easements*: The infrastructure of a Cooperative is often built on easements or rights-of-way over public and private land acquired over time. Such easements are generally granted for some limited purpose or use. Cooperatives therefore need to carefully examine their easements before assuming that their infrastructure can be used for alternative services.
- *Bylaws*: The Cooperatives organizational structure and documents are generally built around the provision of a core service and need to be changed to address the provision of alternative services.



Easements Generally

A nonpossessory right to use land of another for a particular purpose.

E.g., *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425, 430 (Mich. App. 1990).



Easements Generally

Two Types:

- Appurtenant: attaches to the land and is incapable of existence apart from the land to which it is annexed.
- In gross: benefits a particular person, not a particular piece of land.

See Heydone v. MediaOne, 739 N.W.2d 373, 377 (Mich. App. 2007).



Easements Generally

How Created:

- Express: easement in writing (can be created by reservation, grant, or agreement).
- Prescriptive: results from use of property of another that is open, notorious, adverse, and continuous for a statutory period of time and it is limited in scope by the manner in which it was acquired and the previous enjoyment.
- Other...



Easements Generally

How Interpreted:

- Express Easements are by contract interpretation

“give effect to the objective intention of the parties as expressed in the instrument.”

See Corley v. Entergy Corp., 246 F.Supp.2d 565, 573 (E.D. Tex. 2003).



Easements Generally

Steps:

- Plain Language
- Rules of Construction
- Parol Evidence

Generally no *implied* uses



Easements Generally

How Interpreted:

Prescriptive Easements (no express terms)

The “rights of the holder of an easement acquired by prescription are defined solely by the character and extent of the use made thereof during the prescriptive period.”

Ogg v. Mediacom, L.L.C., 142 S.W.3d 801, 809 (Mo. Ct. App. 2004).



Easements Generally

FACT QUESTION

- Expensive
- Look to what is reasonable under the circumstances to determine the scope of the easement.



Easements Generally

Does it unreasonably burden the servient estate?

- Example: adding one wire to an existing pole is not likely to be an unreasonable burden.
- But, putting a wire underground, or putting an underground wire on poles might either change the scope too much or increase the burden, depending.



Included in the Easement

Use is expressly stated in an express easement.

Corley v. Entergy Corp., 246 F.Supp.2d 565, 573
(E.D. Tex. 2003).

Cooperative acquired four types of easements of time and added fiber optic cable to the system for the transmission of *voice, data, and video...*



Included in the Easement

Type I (electricity only): “The right, privilege and easement to enter upon and to construct, maintain, operate, inspect, patrol, replace, repair, and remove two lines o structures, for one or more circuits each, composed of wood, metal, or other types of material with lines of wires, crossarms, guy wires, stubs, foundations, anchors and other usual fixtures *for the transmission of electricity*”



Included in the Easement

Type II (electricity and internal communications):

“the rights, privilege, and easement to enter upon and to erect, construct, maintain, operate, inspect, replace, repair, patrol, and remove one or more lines of wood or metal structures...with lines of wires, crossarms, guy wires, conduits, stubs, and other usual fixtures *for the transportation of electricity and grantees communications*”



Included in the Easement

Type III (electricity and telephone): “the perpetual right, privilege and easement to enter upon, to erect, construct, extend, maintain, inspect, operate, replace, remove, repair and patrol one or more lines of poles or towers . . . with lines of wires, cross-arms, guy wires, conduits, stubs and other usual fixtures, appliances and appurtenances used or adapted for the transmission of electricity, electric energy and power *for any and all purposes for which electricity, electric energy, and power is now or may hereafter be used, and for telephone or telegraph use . . .*”



Included in the Easement

Type IV (electricity and communications): “the right, privilege and easement to enter upon and to construct, maintain, operate, inspect, patrol, replace, repair, patrol and remove one or more lines of structures for one or more circuits . . . with lines of wires, crossarms, guy wires, stubs, foundations, anchors and other usual fixtures *for the transmission of electricity and communications . . .*”



Included in the Easement

- Could not transmit *third party* communications of any kind using Type I or II.
- Could transmit third party *voice and data* communications under Type III and IV
- Could transmit third party *video* communications under Type IV, *but not* under Type III.



Included in the Easement

Incidental or Similar Uses:

- Degree versus Quality
- Physically Similar but a Different Purpose?
 - NO



Included in the Easement

Examples:

- Raising the height of the towers by 7 feet and increasing the power from 230 kv to 345 kv was not an increase in burden, but rather was simply an increase in the degree of use of the same general character.
- Replacing a 4-inch gas pipeline with a 10-inch gas pipeline.



Included in the Easement

Complementary Purpose: It will make effective the enjoyment of the easement.

- internal communications as a part of providing the electrical services
- fiber optic cable to replace copper wire as a part of improving internal communications
- HOWEVER, cannot use this same fiber optic system for *third party* communication transmission



Included in the Easement

Different Forms of Same Purpose

- “The right and easement to erect, maintain and operate in perpetuity a line of poles for the supporting of electric power, telephone and telegraph wires, and the transmission thereby of electrical energy, power, light, heat, or messages or anything, and for such further or other different uses and purposes or methods and needs as may hereafter prove practical.”
- “Communications” easement allows for voice, data, and video.



May be in the Easement

Ambiguity in an Express Easement

- Centel Cable Television v. Cook, 567 N.E.2d 1010, 1015 (Ohio 1991). Added coaxial cables to transmit video.
- “for the transmission and/or distribution of electric energy thereover, for any and all purposes for which electric energy is now, or may hereafter be used.”



May be in the Easement

“...for a line for the transmission and/or distribution of electric energy thereover, for any and all purposes for which electric energy is now, or may hereafter be used.”

- Does “for any and all purposes for which electric energy is now, or may hereafter be used” clarify/modify the transmission/distribution itself, or the result of the transmission/distribution?
- Let’s eat grandma. Let’s eat, grandma. Commas save lives...



May be in the Easement

“...for a line for the transmission and/or distribution of electric energy thereover, for any and all purposes for which electric energy is now, or may hereafter be used.”

- Court held that transmission of video over the coaxial cable was under the easement because it was a form of electrical energy – similar to transmitting electrical energy...
- Degree or Quality? What about fiber optic cables – light instead of electrical energy?



May be in the Easement

Prescriptive Easements

- Look at the context of original use, not the language (because there is none)
- Haydone (Mich.): Assigned easement to cable tv company that added coaxial cables. It was held reasonable under the circumstances.
- Ogg (Mo.): Added optical fiber to poles under electrical easement. Held that it exceeds the scope of the easement.



Exceeds the Easement

Not Express and Not Incidental

- Krohn (Tex.): “an electric transmission or distribution line or system.” Joint Use Agreement with cable tv company, held not within easement.
- Barfield (Mo.): electrical transmission line, installed fiber optic cables, not within the purpose so held exceeded scope.



Exceeds the Easement

Express and Prescriptive

- Cannot unreasonably burden the servient estate.
- Public policy to promote certainty in property rights.
- Promote the ability of purchasers to rely on the language of the easement.



Remedies

Trespass:

- The unauthorized entry by a person upon the land of another, regardless of the degree of force used, even if no damage is done, or the injury is slight.
- Either committed by unauthorized access or entry, or exceeding scope of license.
- Property owner's right to exclude one of the essential property rights.



Remedies

Negligence:

- Unreasonable conduct according to the objective person standard.

Inverse Condemnation

Declaratory Judgment



Remedies

Monetary

- Actual – proven harm in dollar figures
- Nominal – when unproven, like \$1
- Consequential – beyond the contract
- Punitive/Exemplary – punishment and deterrence



Remedies

Monetary Calculations

- Diminution in value
- Costs of restoration
- Loss of Use
- Physical injury
- Emotional distress, discomfort, or annoyance
- Fair market value – market rental rate



Remedies

Monetary

- Expenses and Costs – usually as of right to prevailing party
- Attorney Fees – not automatic, need authorization
 - Express grant in the easement
 - Statutory grant
 - Part of punitive or exemplary damages for especially egregious conduct (intentional, willful, wanton)



Remedies

Monetary

- In Barfield, the jury at the district court level awarded the landowners over \$79 million in damages, but the circuit court vacated the damages (damages were so high because the suit was a class action brought by the thousands on landowners who's land was affected by the easements)
- \$700 per month for rental in a trespass claim. Singleton v. Haywood Elec. Membership Corp., 565 S.E.2d 234 (N.C. App. 2003).



Remedies

Injunctive

- Equitable remedy – regarding conduct
- Factors – balance of equities (harms), monetary damages insufficient
- Discretion of the Court, last resort



Remedies

Injunctive

- Usually focuses on balance of the harms and therefore not often granted in Cooperative easement cases.
- Most often, the harm to the landowner is not serious enough.
- However, with the right facts, it can be granted.



Initial Considerations for Bylaws

Corporate Structure

- Shareholders/Members
- Board of Directors
- Officers/Executives



Initial Considerations for Bylaws

Corporate Structure

- Articles of Incorporation – the owners bargain
- Bylaws – the governance process for the Board
- Articles preempt Bylaws, Bylaws can limit, but they cannot expand



Initial Considerations for Bylaws

Bylaws as Contract

- Intent – plain language, what did the parties intend
- Notice – cannot intend that about which a party had no notice



Authorization

Articles of Incorporation

- Are the alternative services authorized in the Articles – what did the owner/members set out to do?



Authorization

Articles Specific to Core Services?

- “all other services or products necessary or incidental thereto”
- Likely limited to the core services
- Unless the activities are a variation or enabling (not really alternative)
 - Like installing phone lines for telecommunications, construction projects.
 - Creating phone lines to communicate within the network, or truck transportation within the network.



Authorization

Articles with Blanket Statements?

- “any other goods or services”
- May work if:
 - Intent is clear that going beyond core services
 - May be a question of notice during adoption



Authorization

Example:

Long list of core service activities followed by “to sell or provide other forms of electricity, goods and services to its members and non-members”

- Is this? (1) “other forms” of the core goods/services, (2) other goods, and (3) other services?
- Or modification of “other forms of electricity”?
- Notice and Intent...



Authorization

Best Practice:

- Clear and express inclusion of alternative services.
- “To provide and sell any other goods or services other than/in addition to [the core good/service] such as/including, but (not limited to), [unrelated services...]”
- “to engage in any and all business activities/purposes” potentially with the inclusion of “including specifically, [the core service/good].”



Authorization

Bylaws

- Need not state the specific purpose if in the Articles
- Can narrow the purpose in the Articles (if still faithful to the Articles), but cannot expand
- If the Bylaws specify only core services or only authorize how core services are to be provided, they need to be altered to include the alternative services



Non-Cooperative Basis

State Statutes

- Statutory authorizations and processes must be considered
- Are there limits for non-cooperative activities?

Tax Law

- 501(c)(12) limitations – 85% of income related to exempt purpose?

Bylaws

- Do the Bylaws provide for how to engage in non-cooperative activities?



Cooperative Basis

Membership

- Bylaws address membership addition and removal – usually for the core service alone
- PLR 200504035



Cooperative Basis

PLR 200504035: Only guidance, not for general reliance

- Electrical Cooperative seeks to engage in internet service
- Amended its Bylaws to allow subscribers of internet service to be members
- Existing members would remain members if subscribed to internet
- One membership for either service, or both
- Met the requirements



Cooperative Basis

Voting

- The Bylaws also address voting by members
- PLR 200504035 – each member had one vote regardless of # of subscriptions



Cooperative Basis

Patronage and Dividends

- Bylaws have to address, or be amended to address
- PLR 200504035 – membership and voting was joint, but the allocations had to be accounted for separately; necessary for providing the services on a cooperative basis
- See Rev. Rul. 72-36, 1972-1 C.B. 151 which spells out IRS requirements for maintaining the income from the members for the sole purpose of meeting future losses and expenses, or returning such funds to the members
- Also need to check state requirements
- For profit cooperatives may need to consult Treas. Reg. 1.1388-1 and address in their Bylaws



Cooperative Basis

Other Structures beyond PLR 200504035?

- Cooperative basis maintained - patronage
- Differences in membership or voting? Get your own PLR?
- Still have to reflect the structure in the Bylaws



Bylaws Summary

- Check the Articles of Incorporation
- Review current Bylaw and procedural requirements for changes
- Engage in process to amend Bylaws; Do the Bylaws require Member approval?
- Follow Bylaw procedures to authorize alternative services
- Authorize appropriations and structural changes (new division or subsidiary?)
- Resolution(s) authorizing and directing the above





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Questions?



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