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Even after 'Taylor,' difficult litigation will persist

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In *Taylor v. Martha's Vineyard Land Bank Commission*, 475 Mass. 682 (2016), the Supreme Judicial Court reaffirmed the commonwealth's nearly 180-year prohibition on the use of appurtenant easements to benefit after-acquired property absent the servient owner's consent.

The SJC preserved this so-called "overloading" doctrine on the basis that the benefits of keeping this longstanding bright-line rule outweighed any costs associated with its rigidity.

Even though *Taylor* presented extremely sympathetic facts for a deviation from the traditional per se ban on overloading, the SJC nonetheless opted not to change existing law.

While the case affirms what we already knew about flagrant violations, it still leaves unanswered questions for closer calls that will inevitably lead to litigation over the use of easements to benefit after-acquired property.

A brief recap of *Taylor* will help set the context for discussing unanswered questions left in the decision's wake. The Martha's Vineyard Land Bank Commission owned four parcels on the western edge of Martha's Vineyard atop the Gay Head Cliffs — commonly known as the Aquinnah Headlands Preserve. The Land Bank sought to connect two of its hiking trails to create a single loop for visitors.

The problem, however, was that the Land Bank's parcels did not have direct access onto the closest public way, but instead benefitted from two separate easements over an abutting property owned by the Taylor Realty Trust, which contained a small seven-room hotel and had direct access to a public way.

Neither of the Land Bank's easements, which were both created before the Land Bank took title, was appurtenant to all four of its parcels. One easement — referred to as the Disputed Way — benefitted three of the four parcels, and the other easement — referred to as the Twenty-Foot Way — benefitted only the fourth parcel. That fourth parcel was referred to as Diem Lot 5.

Appealing a permanent injunction issued against connecting the two trails, the Land Bank's opening brief to the SJC compellingly highlighted the rigidity of the outcome and the overloading doctrine:

"[A]lthough two people using the two permitted trails could embrace or shake hands across the line dividing Diem Lot 5 and [the other parcels], neither would be permitted to cross to the other lot, and the two trails, although they might come within a fraction of an inch of each other, may not connect over the invisible boundary line. ... Ironically, the effect of the Land Court judgment is that pedestrians can walk from the public street over the Taylors' Property and go in either direction — over the Disputed Way or the Twenty-Foot Way — to arrive at the same point, i.e., the southwesterly corner of Diem Lot 5, but cannot cross that invisible boundary but must instead turn around, retrace their steps to the Taylors' Property and go up the alternate route to reach the same destination and fully enjoy all trails on the North Head Preserve, creating more burden on the servient estate." Brief of Appellant Martha's Vineyard Land Bank Commission at 7-8.

Essentially, the Land Bank argued that a fact-focused, overburdening-type analysis should apply instead of the traditional per se rule against overloading.

Although many practical arguments for more flexibility could be made under these circumstances, especially for this type of defendant, the SJC decided that the traditional ban remained the better rule for a number of interesting reasons.

The court noted its general skepticism against altering longstanding rules of property (or contract) law, where default rules often influence individual action. They rationalized that the per se ban avoids the difficult, fact-intensive litigation of these issues as is common in overburdening disputes.

The SJC also expressed concern that a fact-focused analysis could lead to less predictable outcomes and "might not be affordable to owners of small servient parcels who are litigating against defendants with the financial means to acquire and develop multiple parcels of land." *Taylor*, 475 Mass. at 689.

Following *Taylor*, servient landowners will continue to have the potent weaponry of a permanent injunction for an obvious violation. For instance, consider the following example set in a sleepy, residential suburb:

The Smiths own a residential property known as Lot 1, which is burdened by a right-of-way for the benefit of a neighboring parcel known as Lot 2. If the Jones family then acquires Lot 2 and an abutting parcel (Lot 3) that does not benefit from the right-of-way, and seeks to build a new house straddling the boundary line between Lot 2 and Lot 3, *Taylor* certainly indicates that any use of the right-of-way should be enjoined. Use of that easement would inherently violate the overloading doctrine because it will always benefit the after-acquired Lot 3.

Yet, it is inevitable that fact-intensive issues will persist despite the overloading doctrine's continued rigidity. For example, if the Jones family builds their home solely on Lot 2 instead of straddling the boundary line between their two parcels, what, if any, uses can that family make of Lot 3? Is a permanent injunction still appropriate if Lot 3 is only a swimming pool for the kids to use during the summer? How about a workshop for dad's furniture-making hobby that he enjoys every few weekends? What about the 25 apple trees that mom planted on Lot 3 and prunes twice per year?

When the owners of dominant estates are savvy enough to limit their primary use of combined parcels to the portion that benefits from the easement only, real estate litigators will still be arguing over whether injunctive relief is appropriate in all of these circumstances. The focus is likely to be on the uniformity of the uses made of the dominant and after-acquired parcels and whether that level of uniformity is sufficient to make injunctive relief appropriate. These situations will involve fact-intensive overloading litigation even after the SJC's reassuring, and correct, decision in *Taylor*.

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