Prescriptive Easements, Deed Restrictions, and the Marketable Record Title Act: The Facts Will Control Land Use

*by William E. Hosler**

This article is an overview of the establishing law and a general consideration of easements created by prescription, deed restrictions, and their interplay with Michigan's marketable record title act. Depending on the facts, either the legislature, the judiciary, and/or the contracting parties will determine how the land may be used.

I. Prescriptive Easements

An easement represents the right to use another's land for a specified purpose.[1] A prescriptive easement may be created in two ways: (1) by adverse use, or (2) by an imperfectly created servitude.

A. Created by adverse use

Just as ownership of land may be acquired through adverse possession, so too may an easement be acquired through prescription.[2]

An easement by prescription results from use of another's property that is actual, open, notorious, adverse (or hostile), and continuous for a period of fifteen years.[3] It is a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed.[4] The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner of the land to a cause of action against the intruder for trespassing.[5] Mere permissive use of another's property will not create a prescriptive easement.[6]

For nearly 100 years, the Michigan Supreme Court has supported the position that "[a]dverse user is defined as such a use of the property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right."[7]

There is overlap between adverse possession and a prescriptive easement. The elements of adverse possession are well established. A party claiming adverse possession must show clear and cogent proof of possession that is actual, continuous, open, notorious, *exclusive*, hostile, and uninterrupted for the relevant statutory period.[8] The elements necessary to give rise to a prescriptive right are the same as those of title by adverse possession, with the exception that the use *does not have to be exclusive*.[9]

However, there is a narrow type of exclusivity that a claimant must satisfy to establish a prescriptive easement claim. The claimant's use must be exclusive in the sense

1 See, e.g., *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997).

2 *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, 501 Mich 192, 202; 912 NW2d 161 (2018); *Outhwaite v Foote*, 240 Mich 327, 330-31; 215 NW 331 (1927).

3 MCL 600.5801(4); *Marlette Auto Wash,* 240 Mich 327*; Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000); Michigan Land Title Standards (6th Ed), Standard 14.10.

4 *Plymouth Canton Community Crier,* 242 Mich App at 684.

5 *Id.* at 681; *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995).

6 *Plymouth Canton Community Crier,* 242 Mich App at 679.

7 *Outhwaite*, 240 Mich at 329.

8 *Marlette Auto Wash,* 501 Mich at 202.

9 *Id.* at 202-03.

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that the right "does not depend on a like right in others."[10] Use of the property fails to qualify under this definition of exclusivity if the claimant uses the property pursuant to another's claim of right. "It cannot be said that, because other persons than this defendant used this stairway, his use was not exclusive. In [citation omitted], it was held that because other persons besides the claimant of a right of way used it, did not prevent the claimant's user from being exclusive, since exclusive means that his right does not depend on a like right in others."[11]

In Michigan since 2018, when the Michigan Supreme Court decided *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC,* a claimant seeking to prove the existence of a prescriptive easement may establish that the requisite elements were met by the claimant's predecessor in interest.[12] When a prescriptive easement vests with the claimant's predecessors in interest, the easement is appurtenant and transfers to subsequent owners in the property's chain of title without the need for the subsequent owner to establish privity of estate. In such circumstances, the easement passes by the deed of the dominant estate although not necessarily expressly mentioned in the instrument of transfer.

B. Created by intended use under an imperfect express easement

A prescriptive easement can also be established by a use that is made pursuant to the terms of an intended but imperfectly created servitude, when all the other requirements are met (*i.e.*, continuous, open, notorious, hostile and uninterrupted for 15 years). If "there is an ambiguity, or if the deeds fail to express the obvious intention of the parties, the courts will try to arrive at the intention of the parties…."[13] The fact that the text of an easement is unambiguous does not preclude the creation of a prescriptive easement. An action for a prescriptive easement is equitable in nature,[14] and the purpose of a prescriptive easement is to effectuate the intent of the parties.[15] When an express easement, or an oral grant, is treated as though it had been properly established for the prescriptive period, although it ultimately fails because of a defect, a prescriptive easement is established.[16]

C. Terminating a prescriptive easement

A prescriptive easement is extinguished after 15 years of continuous nonuse by the owner of the dominant estate.[17] This is so without the servient estate being required to prove that its possession was hostile or adverse.[18] The *Marlette Auto Wash* court also noted that a purchaser who did not know about the existence of a claim of title will be regarded as a bona fide purchaser without notice if the land is not adversely held by a party in possession at the time of purchase. This is so because a BFP "takes the property free from, and not subject to," the rights or interests of a third party.[19]

II. Deed Restrictions (Restrictive Covenants)

A. Created by a writing

A clear and unambiguous restrictive covenant is enforceable.[20] The interpretation and enforcement of a restrictive covenant is fact specific. Where no ambiguity is present, it is improper to enlarge or extend the meaning of a restrictive covenant by judicial interpretation.[21] Context is relevant. When interpreting a restrictive covenant, it should be construed in connection with the surrounding circumstances.[22] A deed restriction (or negative, restrictive covenant) represents a contract between the buyer and the seller of property.[23] Private restrictions are traditionally created in a deed or other instrument by which a grantor conveys land or an interest to a grantee who, for

10 *Outhwaite,* 240 Mich at 329.

11 *Plymouth Canton Community Crier,* 242 Mich App at 680 (citations omitted).

12 *Marlette Auto Wash,* 501 Mich at 212.

13 *Taylor v Taylor*, 310 Mich 541, 545; 17 NW2d 745 (1945) (citation omitted).

14 *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007).

15 *Outhwaite*, 240 Mich at 331-32.

16 *Plymouth Canton Community Crier,* 242 Mich App at 684-85.

17 *Marlette Auto Wash,* 501 Mich at 211; MCL 600.5801; Michigan Land Title Standards (6th Ed), Standard 14.4. See also Standards 14.3, 1.5 and 1.6.

18 *McDonald v Sargent*, 308 Mich 341, 344; 13 NW2d 843 (1944).

19 *Marlette Auto Wash,* 501 Mich at 211-12.

20 *Cooper v Kovan*, 349 Mich 520; 84 NW2d 859 (1957); Michigan Land Title Standards (6th Ed), Standard 30.1.

21 *Mazzola v Deeplands Devt Co, LLC*, 329 Mich App216; 942 NW2d 107 (2019.

22 *Webb v Smith (After Remand)*, 204 Mich App 564, 570; 516 NW2d 124 (1994); *Thiel v Goyings*, 504 Mich 484, 501; 939 NW2d 152 (2019).

23 *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670, 674 (2007); *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997).

appropriate consideration, accepts the property or interest subject to the restrictions. Such restrictions are commonly created by developers who impose covenants, conditions, and restrictions on lots in a platted subdivision. As part of the platting process, these covenants are typically recorded against all the lots in the project, the eventual owners of which will have a co-equal right of enforcement.[24]

Although "[i]t is a bedrock principle in our law that a landowner's bundle of rights includes the broad freedom to make legal use of her property,"[25] deed restrictions allow landowners to constrain that freedom, often to preserve the neighborhood's character.[26] A failure to enforce the deed restriction deprives the would-be enforcer of a valuable property right.[27] Because deed restrictions are property rights, courts will protect those rights if they are of value to the property owner asserting the right and if the owner is not estopped from seeking enforcement.[28] Non-uniform covenant amendments require the unanimous consent of the affected property owners.[29]

B. Terminating a deed restriction

Deed restrictions can terminate once the restrictive period has expired.[30] Under certain circumstances, there are exceptions to enforcing restrictive covenants by injunction.[31] An owner of property affected by a restriction desiring its elimination may do so by acquiring the rights of all parties who might be entitled to enforce the restriction. When a restriction benefits a plat, every party with a property interest in the plat may have to agree to release the restriction.[32]

III. Marketable Record Title Act

Under Michigan's marketable record title act (the "Act"),[33] to possess a marketable record title to an interest in land a person must have held an unbroken chain of title of record for 20 years for mineral interests, and 40 years for other interests.[34] The Act states that marketable title is held by a person and is taken by his successors in interest free and clear of any and all interests, claims, and charges that depend in whole or in part on any act, transaction, event, or omission that occurred *before* the 20-year period for mineral interests, or the 40-year period for other interests. All such interests, claims, and charges are "void and of no effect at law or in equity."[35]

The Act is intended to simplify and facilitate land title transactions by extinguishing or barring "all claims that affect or may affect the interest dealt with" and "any and all interests of any nature whatever, however denominated, and whether the claims are asserted by a person sui juris or under disability, whether the person is within or outside the state, and whether the person is natural or corporate, or private or governmental,"[36] unless preserved pursuant to the Act.

The Act was recently amended by 2018 PA 572, becoming effective on March 29, 2019.[37] This latest amendment provides that an interest, claim, or charge against land may be preserved by filing of record a written notice, verified by oath, following certain explicit requirements, setting forth the nature of the claim.[38] The filing of this written notice must currently be done by March 29, 2021.[39]

The Act expressly does not apply to certain interests. For example, it does not bar or extinguish an easement the use of which is open and obvious, and apparently regard-

24 See, e.g., Michigan's land division act (MCL 560.101, *et seq*).

25 *O'Connor v Resort Custom Builders, Inc.*, 459 Mich 335, 343; 591 NW2d 216 (1999).

26 *Thiel*, 504 Mich at 496.

27 *Id.* at 496, 497; *Bloomfield Estates Improvement Ass'n*, 497 Mich at 214.

28 *Rofe v Robinson*, 415 Mich 345, 349; 329 NW2d 704 (1982).

29 *Maatta v Dead River Campers, Inc*, 263 Mich App 604, 616; 689 NW2d 491 (2004). Note: Certain restrictions affecting property interests subject to the Michigan condominium act (MCL 559.101, *et seq*) may be amended without unanimous consent of the affected owners.

30 *Sampson v Kaufman*, 345 Mich 48; 75 NW2d 64 (1956).

31 *Cooper,* 349 Mich 520; Michigan Land Title Standards (6th Ed), Standard 30.2.

32 *Maatta*, 263 Mich App 604.

33 MCL 565.101, *et seq*,

34 MCL 565.101; Michigan Land Title Standards (6th Ed), Standard 1.3.

35 MCL 565.103(1).

36 MCL 565.106.

37 Another proposed amendment of the Act has been prepared and is being circulated for eventual consideration by the Michigan legislature. If passed it will, among other fixes, resolve much of the ambiguity over affected interests, the Act's relevance to subdivisions and property owners' associations, and provide needed guidance on who may file a notice preserving an interest and the recommended form.

38 MCL 565.101 – .105; Michigan Land Title Standards (6th Ed), Standard 1.6.

39 MCL 565.101.

less whether recorded or unrecorded.[40] The Act also does not bar or extinguish easements which are evidenced by improvements such as a pipe, conduit, road, cable, tower, pole, or other physical facility, and whether or not observable.[41] Other interests may also be protected if proposed additional amendments are enacted.[42]

Notably, as a basic proposition the Act provides: "*However, a person is not considered to have a marketable record title by reason of this act if the land in which the interest exists is in the hostile possession of another*."[43]

IV. Opinions Inconsistently Apply Prescriptive Easement Doctrine

Unsurprisingly, given their plenary power and equitable discretion, courts have used the prescriptive easement doctrine to expand the scope of express covenants, conditions, restrictions, or easements. Below are some unpublished examples from the Michigan Court of Appeals, all of which pre-date *Marlette*. Presumably, most post-*Marlette* cases considering claims of a prescriptive easement will focus on the sufficiency of evidence supporting the necessary elements for the required term.

In 2004, the court in *Czeryba v Marzolo*[44] considered express easement rights in deeds that provided back-lot owners "access" to Crystal Lake but did not grant any riparian rights, such as the right to maintain docks or moor boats. On appeal, the court found that because those owners used the easement "as if" they had those rights, and otherwise satisfied the elements for a prescriptive easement, the express terms of the easements were judicially expanded to grant such riparian rights to all back-lot owners.

In 2012, *O'Brien v Hicks*[45] also addressed disputes over lake access. In 1943, the developer of the Hazel Banks Plat provided access to Otsego Lake via "parkways" between lots 2 and 3, and lots 6 and 7, through a dedication that read in part, "and that the streets and alleys and parkways as shown on said plat are hereby dedicated to the use of the public." An earlier case vacated any rights in the public because the dedication was never accepted by any public authority. But in so doing, the trial court concluded that the plattors "clearly intended" that the back-lotters have access to the lake. On appeal, the court concluded that the back-lotters did not achieve full riparian rights because their use was permissive and therefore did not meet all the elements of a prescriptive easement.

Interestingly, in *dicta* the court stated: "One may not acquire a prescriptive easement to property already subject to an easement for the benefit of an entire subdivision and created through a private dedication simply because an owner 'overuses' the easement." In reaching this conclusion, the *O'Brien* court cited only to another unpublished opinion.[46]

In yet another case involving access to and use of a lake, in 2015 the court in *Guidobono v Jones*[47] considered the intent behind the phrase in a land contract whereby the plaintiff's predecessor granted defendant "an easement across their property, in order to give purchaser right of access to and use of Woodland Lake." The plaintiff interpreted that to mean access only, but the defendant sought full riparian rights. On appeal, the court agreed that the express terms of the easement did not grant riparian rights. However, due to the defendants' use over the years, the court concluded that all elements of the doctrine of prescriptive easement were met to create a new easement to the lake with riparian rights.

V. Future Shock: The Unintended Consequences of Converging Principles Affecting Land Use

The old adage that "actions speak louder than words" is an apt cautionary message for drafting, interpreting, and enforcing covenants, conditions, restrictions, and easements.

There is ample judicial and statutory guidance on what is required to effectively create certain restrictions on land use. But the realities of how the land is actually used will most assuredly drive the desired continuation of such

40 MCL 565.104(1)(c).

41 MCL 565.104(1)(d).

42 Such as, for example, conservation easements or remainderman interests from expired life estates or trusts.

43 MCL 565.101.

44 Unpublished *per curiam* opinion of the Michigan Court of Appeals, issued Nov 2, 2004 (Docket No. 246955).

45 Unpublished *per curiam* opinion of the Michigan Court of Appeals, issued Nov 20, 2012 (Docket No. 307332).

46 *O'Brien v Hicks* was distinguished by *Prince v Wedemeir,* an unpublished *per curiam* opinion of the Michigan Court of Appeals, issued Oct 15, 2013 (Docket No. 312376), in a nuanced footnote which disregards the basis of the holding in *O'Brien* (that the prescriptive easement failed because the permissive use could not establish the necessary element of adversity) and instead correctly notes that the only *express* easement (dating to the original plat) was in favor of the "use of the public" which had already been vacated in a previous lawsuit.

47 Unpublished *per curiam* opinion of the Michigan Court of Appeals, issued Oct 20, 2015 (Docket No 322253).

restriction, and the analysis of a court obliged to resolve a dispute.

Given Michigan's abundance of waterfront properties, it is no wonder that access to and use of such land predominates the reported cases considering prescriptive easements. Ironically, the facts of the now-seminal case on prescriptive easements in Michigan (*Marlette Auto Wash*) do not involve water. But, as the post-*Marlette* cases start working their way through the system, what will be the broader effect of proving the existence of a prescriptive easement over land without the requirement of privity to the current owner? For example, what if a vesting deed contains rights or restrictions that are later significantly affected by a prescriptive easement deemed created years earlier? How easy will it be for a surprised property owner to avoid the easement as a BFP?

In a platted subdivision, all lot owners are entitled to enforce all recorded deed restrictions anywhere throughout the subdivision as a part of the valuable property interests they have as an owner. In an older, large project it is easy to inadvertently overlook common interests that have been taken up by neighbors or others. What happens when an out-lot for access to a lake, or for use as a park, or for some other right or privilege reserved in common to the entire subdivision is successfully challenged by a prescriptive claim? While sufficient evidence will certainly still be required, trial courts will now have yet another discretionary, equitable challenge involving claims of prescriptive use going back years. The courts must constantly balance the equities of enforcing the deed restrictions with the equities of granting a prescriptive easement (sometimes by an imperfectly created servitude).

And what of the marketable record title act? As noted above, a person is not considered to have a marketable record title by reason of the Act if the land in which the interest exists is in the hostile possession of another. A necessary element of a prescriptive easement is of course a hostile possession. Seemingly, prescriptive easements are preserved under the Act. But applying *Marlette*, a court might find that an easement by prescription was created years earlier and in the meantime the property may have been sold many times, with title insurance insuring rights under an owner's policy, or under a loan policy, that would potentially be invalidated. Do the terms of the applicable title insurance policy anticipate such risk? In a recorded mortgage, would the judicial imposition of a prescriptive easement under *Marlette* be deemed an event of default?

Certain deed restrictions will be lost under the amended marketable record title act unless they are effectively preserved. Presently, subdivision restrictions recorded before March 29, 1979 could be automatically terminated if ignored. Proposed amendments to the Act would put at risk subdivision restrictions created before January 1, 1950. Under the current Act it is not clear who has standing to file an affidavit or other notice seeking to preserve such covenants, conditions and restrictions but the proposed amendments add clarity.

Despite any fixes to the current version of the Act, legislation will not fully protect all historical interests in land, nor anticipate how a prescriptive easement may influence a contracted restrictive covenant affecting land use in light of *Marlette Auto Wash*. If Alvin Toffler[48] were a real estate lawyer in Michigan, he might wonder if there was "too much change in too short a period of time."

48 Author, *Future Shock* (Random House, 1970).