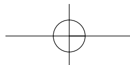

Property Law

THE EVOLVING LANDSCAPE OF EASEMENT RELOCATION AFTER *M.P.M. BUILDERS*

By Timothy C. Twardowski and E. Christopher Kehoe

In the landmark decision *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87 (2004), the Supreme Judicial Court decided that, subject to certain limitations, the owner of a servient estate may change the location of an easement without the consent of the owner of the dominant estate. The *M.P.M. Builders* decision adopted the American Law Institute's "modern rule" on the relocation of easements in the *Restatement (Third) of Property (Servitudes) § 4.8 (3) (2000)* and diverged from the majority of states that require mutual consent to change the location of an easement. This article provides a look back at the *M.P.M. Builders* decision and examines the evolving landscape of easement relocation in Massachusetts since the restatement approach was adopted nearly three years ago.

The *M.P.M. Builders* decision

The facts of the *M.P.M. Builders* case are relatively straightforward. The defendant, Dwyer, owned a parcel of land in Raynham abutting another parcel owned by the plaintiff, M.P.M. Builders. The 1941 deed to Dwyer's parcel specified that the land was conveyed together with a "right of way along the cartway to Pine Street" that crossed M.P.M. Builders' land. The deed described the location of the easement but included no provision for its possible relocation. In July 2002, M.P.M. Builders received approval from the Town of Raynham to subdivide its property into seven residential lots. Dwyer's right of way, however, cut across three of the lots and would have interfered with M.P.M. Builders' construction plans for each. M.P.M. Builders proposed to construct, at its own expense, two new access easements that would provide unrestricted access to Dwyer's property in the same general area of the existing cartway, but Dwyer refused. M.P.M. Builders then sought a declaratory judgment that it had the right to unilaterally relocate the Dwyer easement. The Land Court judge, however, entered summary judgment against M.P.M. Builders and dismissed the case.

On direct appellate review before the SJC, Dwyer argued that, under the existing common law, once the location of an easement has been fixed, it cannot be changed except by agreement of the parties. *See, e.g., Anderson v. DeVries*, 326 Mass. 127, 132 (1950); *Davis v. Sikes*, 254 Mass. 540, 546 (1926); *Bannon v. Angier*, 84 Mass. 128, 129 (1861). M.P.M. Builders countered that under *Lowell v. Piper*, 31 Mass. App. Ct. 225 (1991), the common law allows a servient estate owner to "relocate an easement as long as such relocation would not materially increase the cost of, or inconvenience to, the easement holder's use of the easement for its intended purpose." More importantly, M.P.M. Builders — as well as an amicus brief filed by the Real Estate Bar Association of Massachusetts and The Abstract Club — urged the SJC to adopt the approach taken by Section 4.8(c) of the *Restatement (Third) of Property (Servitudes)* as the law of the commonwealth. Section 4.8 (3) provides that:

> Unless expressly denied by the terms of an easement, as defined in § 1.2, the

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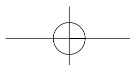

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> owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

The *M.P.M. Builders* decision observed that Section 4.8 (3) is "designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder." Moreover, Justice Judith A. Cowin, writing for a unanimous court, explained:

> We are persuaded that § 4.8 (3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights. The rule permits the servient owner to relocate the easement subject to the stated limitations as a "fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate."

Because an easement is, by definition, a nonpossessory interest in real estate, the SJC concluded that the restatement approach would "neither devalue easements nor place property interests in an uncertain status." And, in response to Dwyer's claim that the restatement approach would result in increased litigation over property rights, Cowin explained that the SJC "[does] not reject desirable developments in the law solely because such developments may result in disputes spurring litigation."

Although the preferred approach to relocating an existing easement remains for both parties to agree upon a plan that satisfies their respective interests, that will not always be possible. In those instances, *M.P.M. Builders* instructs that the owner of the servient estate "may not resort to self-help remedies" but should obtain a declaratory judgment that the proposed relocation meets the criteria set forth in Section 4.8(c) of the restatement as adopted by the SJC.

The aftermath of *M.P.M. Builders*

In the nearly three years since the *M.P.M. Builders* decision, the escalation of property rights litigation that some feared would result if the SJC adopted the restatement approach to relocating easements has not materialized. To date, more than three dozen published lower court decisions and a handful of Appeals Court opinions have cited the *M.P.M. Builders* case.

While that quantity of citing cases might suggest that *M.P.M. Builders* stimulated a flurry of property rights litigation, a closer examination reveals that the majority of those citations are unrelated to the issue of easement relocation. *See, e.g., Frishman v. Maginn*, 21 Mass. L. Rep. 41 (Mass. Super. Ct. 2006); *Abbott v. Arthur Mackenzie Prods.*, 21 Mass. L. Rep. 2 (Mass. Super. Ct. 2006) (breach of contract and commercial litigation cases respectively, quoting the SJC's discussion of summary judgment standards in *M.P.M. Builders*).

Moreover, nearly all of the Superior Court and Land Court decisions citing *M.P.M. Builders* do little more than recognize the restatement approach as the law of the comonwealth and order a trial to determine whether the easement relocation criteria have been satisfied. *See, e.g., Sacco v. Chilton Realty Trust*, 14 LCR 332 (2006) (ruling that the parties "must be given an opportunity to show how the easement relocation meets (or fails to meet) the M.P.M. criteria, and that can only come at trial"); *Sova v. Randazza*, 13 LCR 425, 428 (2005) (noting that the issue of easement relocation under *M.P.M. Builders* raises factual issues that must be addressed at trial).

Massachusetts appellate courts have not weighed in on the *M.P.M. Builders* criteria. However, in a 2004 quiet title action concerning the extent of certain easement rights across land owned by the Town of Bedford, the Appeals Court clarified that *M.P.M. Builders* does not allow a dominant estate owner to relocate an easement without the consent of the servient estate. *See Town of Bedford v. Cerasuolo*, 62 Mass. App. Ct. 73, 80 (2004). The Appeals Court has also cited to *M.P.M. Builders* in support of the principle that the same type of flexibility reflected in the restatement approach should also be applied in the context of locating an easement by necessity. *See Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285, 296-97 (2005).

As of the date of this writing, only one published opinion has examined whether the Section 4.8 (3) criteria were met by a proposal to relocate an existing easement by the owner of a servient estate. *See Moses et al v. Cohen et al*, 2007 WL 197110 (Mass. Land Ct. Jan. 12, 2007). While a lower court decision does not establish precedent, Justice Charles W. Twombly's opinion in *Moses v. Cohen* merits discussion as the first examination of the *M.P.M. Builders* criteria by a Massachusetts court.

Moses v. Cohen

Briefly summarized, the *Moses* case involved a proposal to relocate an easement that provided pedestrian access to a Chilmark beach across property owned by defendant Cohen. In 2001, Cohen demolished an existing cottage on the servient estate and commenced construction of a larger house to the east of where the cottage formerly stood. Plaintiff Carlin Property (Carlin) filed suit to enjoin construction on the grounds that the new house would block the existing easement.

The injunction was granted and then lifted when Cohen agreed that further construction would be done at Cohen's risk. In February 2006, after Cohen had completed construction, the Land Court ruled that Carlin had a deeded easement over Cohen's property located partly within the footprint of Cohen's newly constructed home. To avoid a court order to demolish the offending portion of the home, Cohen proposed to relocate Carlin's easement in accordance with the *M.P.M. Builders* decision.

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The *Moses* decision observes that "because the restatement has not been adopted in the majority of states, there are very few cases examining the three requirements the servient estate owner must meet before the court will permit relocation of an easement." The court therefore looked to the comments and illustrations that accompany Restatement Section 4.8(c) for guidance. First, Twombly noted that the purpose of the criteria is to "protect the easement owner's legitimate interests," including the *length* and *topography* of the easement. The restatement provides an illustration in which the servient owner proposed to relocate an easement roadway across his property that provides access to the dominant estate from a public road. The proposed path, however, was longer than the original easement and passed through swampy ground prone to flooding. According to the restatement, "the court should deny the relocation because the new location would lessen the utility of the easement and increase the burdens on the dominant owner for maintenance and repair." On the other hand, the restatement found that the criteria were met where a servient estate owner proposed to replace an existing road with a new one that also provided direct access to the dominant estate and was shorter than the original.

Turning to the instant case, Twombly first addressed several common issues raised by both parties at trial and then examined each of the proposed easement alternatives under the *M.P.M. Builders* criteria. Below is a summary of his analysis.

At trial, Carlin argued that none of the proposed easements (Cohen submitted several alternative configurations for the court's consideration) could satisfy the *M.P.M. Builders* criteria "because the *value* of any of the replacement paths would not be equivalent to the original easement." Carlin contended that "the value of [the] easement is based not on its capacity to provide Carlin with beach access, but rather on its capacity to prevent Cohen from utilizing his property." The court disagreed, finding that the value of Carlin's easement should be based solely upon its ability to provide access to the beach.

The court also rejected Carlin's contention that none of the proposed easement alternatives could meet the *M.P.M. Builders* requirements because they did not provide as good an ocean view as the original easement. Twombly observed that Carlin "does not have a view easement" and specifically concluded that "view or lack thereof, is also not a factor in whether or not Carlin's 'use and enjoyment' are burdened by a proposed easement." Instead, Carlin's use and enjoyment of the proposed easements would "be evaluated looking at whether or not she is able to employ the easement for the purpose for which it was created, namely, walking to the parking lot, without any increased burdens." Under the *M.P.M. Builders* decision, those burdens could include "length or conditions of the land" but not ocean views.

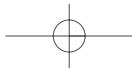
The court also specifically addressed the issue of whether a proposed easement that required additional maintenance by the owner of the dominant estate would increase the burden on Carlin's use and enjoyment of the property. Carlin claimed that she never had to perform any maintenance on the original easement because it was primarily sand and clay underfoot and generally devoid of vegetation. The court, however, noted that "[a]s a matter of law, absent an agreement to the contrary, the owner of the dominant estate has the duty to maintain an easement." *See, e.g., Texon, Inc. v. Holyoke Mach. Co.*, 8 Mass. App 363 (1979); *Prescott v. White*, 38 Mass, 341, 343 (1838). Therefore, the court determined that an analysis of Carlin's actual maintenance was irrelevant. Twombly explained the distinction between a dominant estate holder's duty to maintain and actual maintenance as follows:

> Whether or not Carlin did, in fact, maintain the original easement is immaterial. What is relevant is the fact that the burden was on Carlin to maintain the original easement. If this court approves the relocation of Carlin's easement, Carlin would continue to bear the same burden to maintain the replacement path. Any difference in the frequency of Carlin making repairs or routine maintenance on the new path, compared to the original path, has no bearing on Carlin's burden to do so. In other words, Carlin assumed a burden to maintain the path when she purchased the land in 1980, and has carried that burden until the present. She would continue to bear that same burden if her easement were relocated. The court finds, therefore, that Carlin's burden to enjoy or use her easement will not change regardless of which replacement path the court might choose because Carlin has had the burden of maintenance all along.

The court then examined each of the proposed easement alternatives under the *M.P.M. Builders* criteria. Twombly's discussion of the alternatives focused primarily on the location, length and topography of the proposed alternatives. Additional consideration was given to the question whether erosion was likely to occur sooner on a proposed easement than the original, in part because both parties acknowledged that erosion was a legitimate concern on the properties at issue. Below we summarize the court's analysis of those factors under the *M.P.M. Builders* criteria.

Length of the proposed easement and other dimensional considerations

The *Moses* case suggests that the length of a proposed easement, compared to the length of the original easement, is a significant factor in determining whether a proposal lessens the utility of the easement and whether it increa-ses the burdens on the owner of the dominant estate. More importantly, an examination of length should focus more on its practical effect on the easement holder, and less on its statistical magnitude. For example, the court considered two proposals that increased the length of Carlin's easement from approximately 250 feet to approximately 350 feet. From a purely statistical perspective, a 40 percent increase in length could reasonably be considered substantial. The court, however, concluded that "an increased length of 100 feet is *relatively minimal*, and would not be enough of a reason *on*



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its own to deny relocating the original easement." In reaching that conclusion, Twombly was persuaded by evidence that showed that "a person can comfortably walk 100 feet in about 15 seconds." Therefore, the additional length did not lessen the utility of the easement and did not increase the burden on Carlin's use and enjoyment.

It is important to note that, when considering the length of the proposed easements, the court expressly declined to consider any additional distance that Carlin would have to travel *on her own property* to reach the beginning of the proposed easement on Cohen's property. In fact, the court declared that its analysis would not incorporate "any other elements" of Carlin's property into its decision, stating that "the *M.P.M.* criteria only involve comparing the original easement to the proposed relocated easement, and not differences involving travel over the dominant estate."

In addition to the length of the proposed easements, the court also looked favorably upon proposed easements that maintained the same width as the original easement.

Physical condition of the proposed easements

The court also considered the physical condition of the proposed easements, examining whether the topography was sloped or flat and whether it provided a suitable surface for persons walking to and from the beach. In addition, the court gave substantial weight to the issue of erosion, rejecting two proposed easements on the grounds that their location closer to the mean high tide water line increased the likelihood of erosion as compared to the original easement. The court noted that such erosion "would certainly frustrate the purpose for which the easement was created," namely to provide walkable access from the Carlin lot to the beach.

Privacy

The court also rejected a proposal that would have relocated the easement closer to the Cohen house, explaining that it was "so close to Cohen's house that it would burden the enjoyment of [Carlin's] easement and lessen its utility because of a total loss of privacy as compared to the original easement." Twombly found that that path "would be onerous for Carlin to traverse in light of the high likelihood of encountering a stranger on her way to the beach." In addition, because it was so close to the house, the path "[brought] with it an inherent loss of privacy for both parties, and it is axiomatic that Carlin's use and enjoyment of the easement would be burdened due to such close quarters."

Easement drafting after *M.P.M. Builders*

Nearly three years after the Supreme Judicial Court adopted the restatement approach to easement relocation, Massachusetts courts are just beginning to wrestle with the *M.P.M. Builders* criteria. Although the law of easement relocation is clearly an evolving area, the *Moses* decision offers some important lessons for attorneys drafting easement language after *M.P.M. Builders*.

First, an express prohibition against relocation without the consent of the dominant estate holder negates the servient estate owner's ability to relocate the easement under *M.P.M. Builders*.

Additionally, the full extent of a client's interests in the easement should be clearly reflected in the instrument. Is the client merely interested in reserving a right of way across the servient estate, or did she choose a particular path because it provides a spectacular view of the beach? While the restatement suggests that the length and topography of an easement should be considered under any *M.P.M. Builders* analysis, the *Moses* decision suggests that Massachusetts courts will not consider any interests that are not reflected in the language of the easement.