Michigan Realtors®
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RAILS-TO-TRAILS PROGRAM IN MICHIGAN

A. INTRODUCTION

Over the last few decades, all levels of government have been increasingly interested in implementing so-called "rails-to-trails" programs, which seek to convert unused railroads to public recreation trails. Federal law requires a railroad to obtain the federal government's approval prior to abandoning a railroad line. This process includes steps specifically designed to give states and local governments as well as certain private charitable organizations an opportunity to use these abandoned railroad lines for recreational trails.

Many states and private organizations have enthusiastically embraced the rails-to-trails program. According to the Rails- to-Trails Conservancy, across the country today there are more than 13,150 miles of rail-trails and over 100 million users per year.

Not everyone has embraced the rails-to-trails idea, however. Across the country, many private property owners have challenged this use of former railroad rights-of-way. When a railroad stops using the land for railway purposes, these property owners argue, all rights in the former railway property should revert back to the adjoining property owner. Some property owners have sought to stop the trails from crossing

their land; others have sought compensation for what they believe is a private property

right that has been taken by the government.

The legal analysis pretty much starts and stops with the wording of the specific underlying document. Did the railroad hold fee title to the land or merely an easement? If the railroad

held only an easement, was the grant broad enough to permit the use of the land as a trail for pedestrians, bicycles and/or snowmobiles? Had the railroad previously abandoned its rights in the property?

The rules for interpreting the language in these old railway instruments are inexact at best. For example, courts have said that the term "right-of-way" when used in a railroad instrument does not necessarily mean that only an easement was intended. Apparently, the term "right-of-way" can simply mean a strip of land owned by a railroad upon which the track is laid. Moreover, courts have said that language in a document stating that an easement may be used only "for railway purposes" does not necessarily preclude the use of the easement for "general transportation purposes." According to many court decisions and legal commentators, this language could be nothing more than "a mere expression of the anticipated use by the grantee" and not an attempt to limit the future use of the easement. Finally, in some instances, even where the railroad was given fee title to the strip of land, language in the instrument may be deemed to require that title revert to the adjoining property owner if ever the land stops being used for a railroad.

This Spring, the Michigan Supreme Court held that a right-of-way originally conveyed for a railroad could not be converted to a snowmobile and recreation trail because such use was outside of the scope of the easement. Michigan Dep't of Nat Resources v Carmody-Lahti Real Estate, Inc, 472 Mich 359 (2005). The Supreme Court did not say that no unused railroad in this State can be used in the rails-to-trials program. The Court said only that because of the wording of the particular instrument involved in that case, that particular unused railroad easement could not be used in the rails-to-trails program. In order to better understand that decision, a brief discussion of the case law leading up to the Carmody decision may be helpful.

B. DISCUSSION

1. Michigan Case Law Involving Abandoned Railroad Easements

A 1931 Michigan case involved a warranty deed which conveyed to a railroad company "to be used for railroad purposes only . . . [a 100-foot strip of land] as located and established upon and across the lands of [the grantor] and all the estate, right, title, claim and demand whatsoever of the [grantor], both legal and equitable, in and to the said premises: to have and to hold the above granted premises to [the railroad] and successors and assigns forever for the uses above expressed." Quinn v Pere Marquette R Co, 256 Mich 143 (1931). The Court held, based on this language, that the railroad held fee title to the

100-foot strip of land, and therefore had the right to convey the underlying mineral rights. The reference to the property being used "for railroad purposes only" was deemed to be "merely an expression of the intention of the parties that the deed is for a lawful purpose."

A much later Michigan case involved a document entitled "Deed of Right of Way," which granted "a strip of land for a RIGHT OF WAY . . . on and across [the grantor's parcel of land] . . . to build, construct, and maintain a Railroad in and over said strip of land and at all times to pass and repass by themselves, their servants, agents and employees, with their engines, cars, horses, cattle, carts, wagons and other vehicles, and transport freight and passengers, and do all other things properly connected with or incident to the location, building, maintaining and running the said road and to use the earth and other materials within said strip of land for that purpose; to have and to hold the said easements and privileges . . . FOREVER." City of Boyne City v Crain, 179 Mich App 738 (1989). The Court concluded that the above-referenced deed conveyed easement rights only and that the easement was extinguished when, because of the conveyance of the neighboring parcel, it could no longer could be used for railway right-of-way purposes.

2. Rails-To-Trials Cases

In Cary Enterprises v CSX Transp, Inc, 1997 WL 33344891 (Mich App), property owners adjoining a railroad easement opposed the railroad's decision to sell the easement

to the Rails-to-Trails Conservancy, the primary national nonprofit rails-to-trails organization. In this unpublished decision, the Court of Appeals upheld the trial court's decision that the recreational trail use of the land was consistent with the original "public transportation purpose" of the easement. Thus, the Court ruled, the railroad easement did not "revert" to the adjoining property owners by operation of law. Interestingly, in this case the Court did not discuss the particular wording of the underlying railroad instrument – perhaps because the issue was not raised by the parties.

Elsewhere, in a number of cases, it has been argued that a railroad right-of-way does not terminate upon a change from one transportation use to "another transportation or recreation use. " (For example, Lawson v State of Washington, 730 P2d 1308 (Wash, 1986).) Often, these rails-to-trails proponents argue that the burden imposed by a recreational trail is a lesser burden than its original use for the operation of a railroad. This argument has been more successful in cases where the underlying instrument did not use the phrase "for railroad purposes." (For example, Chevy Chase Land Co v United States, 733 A2d 1055 (Md, 1999); Washington Wildlife Preservation, Inc v State, 329 NW2d 543 (Minn, 1983).)

3. The Michigan Supreme Court's Carmody Decision

The Carmody case was brought by the Michigan Department of Natural Resources ("MDNR") in an effort to stop a property owner from interfering with a snowmobile and

recreational trail on land the MDNR had purchased from the Soo Line railroad company in the late 1980s. Michigan Dep't of Nat Resources v Carmody-Lahti Real Estate, Inc, 472 Mich 359 (2005). Defendant Carmody-Lahti Real Estate ("Carmody"), who owned a parcel of property along the recreational tail, had constructed a fence to block the use of the trail in 1997. Carmody's position was that the railroad had only an easement which had been extinguished long before the sale to the MDNR back when the railroad had stopped using the land for railroad purposes. The instrument at the heart of this dispute was an 1873 right-of-way that provided:

> This indenture made this twentyfirst day of October in the Year of Our Lord [1873] between the Quincy Mining Company . . . and The Mineral Range Railroad Company . . . witnesseth that [Quincy Mining] for and in consideration of the sum of one dollar to it in hand paid by [Mineral Range], the receipt whereof is hereby . . . acknowledged has granted, bargained, sold, remised, aliened and confirmed and by these presents does grant, bargain, sell, remise, release, alien and confirm unto [Mineral Range] its successors and assigns forever a **right of way for the railroad** of [Mineral Range] as already surveyed and located by the engineer of [Mineral Range] and according to the survey thereof on file in the Office of the Registrar of Deeds for the County of Houghton, Michigan to consist of **a strip of land** one hundred feet in width being fifty feet on each side of said surveyed line **across** the following described tracts or parcels of land situated in said county of Houghton: [describe parcels/plats].

> Also a **right of way for said railroad** surveyed and located as aforesaid and according to the survey thereof on file as aforesaid to consist of a strip of land one hundred feet in width being twenty feet in width on the north side of said surveyed line and eighty feet in width on the south side of said surveyed line across the tract or parcel of land known . . . as [describe parcels/plats].
>
> Reserving to [Quincy Mining] and to its successors and assigns all ore and minerals on said strip of land and the right to mine the same from underneath the surface in such manner as not to interfere with the construction or operation of said railroad. Provided that [Quincy Mining] shall not in any case mine within fifteen feet of the surface of the [rock?] without the consent in writing of [Mineral Range] together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appearing to have and to hold the said strip of land with the appurtenances, **for the purpose and uses above stated** and subject to the reservations aforesaid unto [Mineral Range] its successors and assign forever In Witness Whereof [Quincy Range] has cause its corporate seal to be affixed and these presents to be executed by its President and Secretary the day and year first above written. Signed, sealed and delivered . . . .

In Carmody, the MDNR claimed that it could use the right-of-way as a public snowmobile and recreation trail for two alternative reasons: it owned the right-of-way in fee simple, or it held an easement allowing use of the right-of-way for ***any*** purpose. In support of its argument, the MDNR cited state and federal laws setting forth the public policy view that unused railroads should be converted to public recreation trails.

The Supreme Court began its opinion in Carmody by stating that its duty in the case was not to comment on the public policy of rails-to-trails programs. Its duty was to enforce the intent of the parties to the deed that granted the right-of-way by examining the deed's plain language.

The first issue was whether the conveyance of the "right-of-way" was an easement or a fee simple. The Court acknowledged that under existing case law, the use of the term "right-of-way" did not automatically preclude a finding that the railroad had given fee simple title to the strip of land. The Court found, however, that the use of this term created a presumption that only an easement was intended. Since in addition to the use of the term "right-of-way," the instrument had also stated that it was conveying a "use" for a stated "purpose," concerning a "strip of land . . . across" certain property, the Court concluded that only an easement had been granted in this instance.

Turning to the issue as to the purpose of the easement, the Supreme Court again focused on the language of the deed. The Court explained that the deed clearly provided in several places that the right-of-way was "for a railroad." Thus, the purpose of the easement was for use as a railroad, and nothing else. Because the purpose of the easement was found to be for a railroad only, the Court next considered whether the MDNR's predecessor, Soo Line, abandoned the easement as limited by its purpose. The Court found

that it was not enough to show that the Soo Line had stopped operating a railroad. In addition, it must be shown that Soo Line intended to abandon the underlying railroad easement. That intent was established, the Court found, by the fact that Soo Line had sought, obtained and acted upon the federal government's permission to abandon the railway in 1982.

As a result, Soo Line had no property interest to convey to the MDNR. The Court summed up the status of the right-of-way as follows: "Defendant [Carmody] has an unencumbered fee simple interest in the right-of-way and, as any property owner in Michigan may do with its property, may limit its use as it sees fit." Therefore, Carmody could continue to prohibit the snowmobile and recreation trail from crossing its land.

C. CONCLUSION

As one court summed it up, it does not much matter whether we believe that a property owner should prefer a recreational trail over a thundering train. The government simply cannot use an existing railroad easement for purposes not allowed by the terms of the grant of easement. Toews v United States, 376 F3d 1371 (2004). The issue is not the desireability of the recreation trail, but whether such use is consistent with the easement grant.

Prospective buyers should be made aware that forsaken rail lines may be taken over by public or private agencies and employed as snowmobile or recreation trails, depending on the type and scope of preexisting interests in the property. While of course REALTORS® should never opine as to the nature and extent of any easement, this is particularly true in a railway right-of-way. As can be seen from the discussion in this article, railway instruments are unique creatures in the law, subject to inexact rules of interpretation. Any REALTOR® (or lawyer) who provides definitive advice as to a property owner's rights in the face of a particular railroad instrument, does so at his or her own peril.