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Taking away rights of way - Government cannot take your property and give it to someone else

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Suppose you own property next to a right of way such as a private road, alley or footpath - or maybe just a "paper" driveway that is described in deeds but not used. Suppose further that the prior owner who had divided the land and sold part of it was careful to use the "correct" words in the deed creating the right of way, so as to ensure that the part he kept, and that you now own, would keep title to the way. Do you own it now? Massachusetts trial courts are answering "no," relying on an obscure statute from 1972 - the Derelict Fee Statute. But these decisions are wrong, because the government cannot simply take your property and give it to someone else.

The Derelict Fee Statute was intended to settle title to strips of land where the original owner conveyed away land abutting a right of way but unknowingly failed to convey any interest he may have in land under the way or stream. Under the old common law rules that were applied for a century or more by judges, if the original owner used certain key words in the deed transferring the land to the new owner, he retained ownership of the way; if he failed to use those key words, there was a presumption that he intended to transfer ownership of the way, along with the rest of the land, to the new owner.

Along comes the Derelict Fee Statute, which applies retroactively to deeds written long ago under the common law rules. According to some state trial court decisions in lawsuits between neighbors who abut rights of way, the statute cancels out at least one of those long-established common law rules of deed interpretation having to do with key words used to describe property lines. The result is that parcels of land that were owned by the grantor or (whoever now owns the grantor's land) under the rules in force when the original deeds were written are now being awarded under the statute to the grantee (or whoever now owns the grantee's land).

You do not have to be a lawyer to recognize the constitutional problem here. The legislature cannot take a piece of property that, for decades or longer belonged to A, and simply announce that, without compensation, it now belongs to B.

The federal and state constitutions prohibit the taking of property without just compensation. The U.S. and Massachusetts supreme courts have held that a physical invasion or outright appropriation of your property by the government without compensation is a "per se violation" of these rights. This is so even if the government tries to physically occupy or take title to just one square inch of your land.

But the state trial courts, committing a series of errors, have failed to protect property owners from this obvious constitutional violation. Two courts mistakenly applied the "regulatory takings" test, a lenient standard allowing the state to regulate property uses, rather than the per se rule applicable to complete appropriation of property. Another said that subsequent owners lack standing to challenge a taking that was initially imposed years ago on a prior owner, even though the U.S.

Supreme Court has directly rejected this view of standing and held that a state cannot put "an expiration date on the Takings Clause."

Eventually the appellate courts in Massachusetts will have to resolve this issue. In the meantime, property owners whose land sits along a right of way - or even along a stream, rock wall, or other linear feature - are in for some unpleasant surprises about their ownership of the right of way that grandpa so carefully made sure to keep in the family when he subdivided the family land.

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