C-4

LOCAL GOVERNMENT LAW BULLETIN

No. 114 August 2007 David M. Lawrence, Editor

HOW CAN CITIES DEAL WITH UNRECORDED UTILITY LINES?

■ Evan Scott Simpson

When municipalities fail to properly acquire or record easements for utility lines, property owners may be unaware of a city's claims to water, sewer, electrical or communications lines, especially when those lines are buried beneath their property. If an owner's permit for new construction is denied because it conflicts with an unrecorded easement, the owner may choose to sue the municipality. An owner may also refuse to allow city maintenance personnel onto his or her property to repair an easement that does not appear on record.

Recording an easement on property gives the property's fee simple owner record notice of the existence of the utility lines, and gives the city a legal right to the use and maintenance of the easement. Though construction of unrecorded utility lines often occurs with the knowledge and approval of the original property owners, unrecorded easements are generally treated as legally invalid, especially against subsequent bona fide purchasers who did not have notice of the existence of the easement.[1] Without record notice, cities are forced to establish their legal rights and defend against the legal claims of property owners' in other ways.

This Bulletin details the legal issues raised for cities in North Carolina by unrecorded utility easements. First, if the utility lines have existed for more than twenty years, cities will want to establish a legal right to use and maintain them through a prescriptive easement. Second, if the utility lines have only recently been installed or maintained, cities must be prepared for inverse condemnation or trespass actions related to wrongful occupation or taking of land from a private property owner. Finally, municipal governments should be familiar with the range of legal options available to them during the statutory gap period, when an unrecorded easement is no longer subject to trespass or inverse condemnation claims but has not yet ripened into a prescriptive easement.

The author is a summer law clerk at the University of North Carolina School of Government and a law student at Harvard Law School.

[1] J. H. Crabb, Annotation, *Easement by Prescription in Artificial Drains, Pipes, or Sewers*, 55 A.L.R.2d 1144, 1167.

UNC SCHOOL OF GOVERNMENT

The University *of* North Carolina *at* Chapel Hill
Institute of Government
Master of Public Administration Program

Claiming Prescriptive Easements on Unrecorded Utility Lines

Having failed to properly record an easement initially, cities may instead apply the theory of prescriptive easement to gain legal right to a utility easement. Prescriptive easement is a form of adverse possession that establishes a city's legal right to use property, and operates by automatically granting property rights to the claimant after twenty years have elapsed. The easement is subsequently ratified by the court in a judicial proceeding. A city may assert prescriptive easement as a plaintiff or defendant in a legal action. After a prescriptive easement has been established, the owner retains legal title to the property (now referred to as the servient tenement), but subject to the utility easement.

North Carolina courts have established six rules under the common law for assessing prescriptive easement claims:

1. The burden of proof rests on the party claiming the easement.
2. The Court presumes that a use is permissive.
3. Use must be hostile, adverse, and under claim of right.
4. Use must be open and notorious.
5. The adverse use must be continuous and uninterrupted for a period of twenty years.
6. There must be substantial identity of the easement claimed.[2]

The "Open and Notorious Use" Requirement

As a general rule of property law, a city's legal claim to a utility line is valid and legally protected from interference when an easement for the lines was properly recorded. Because every property owner should be familiar with the deed to his or her property, recordation serves as a method of putting the owner on notice of a city's property interest in his or her land.

Record notice of an easement can be compared to the fourth requirement of prescriptive easement, that of an open and notorious use. The open and notorious use requirement for prescriptive easements is similarly designed to guarantee that owners have notice of an adverse claim to or use of their property. This notice gives owners an opportunity to assert their rights and protect their property in a legal action.[3]

The open and notorious requirement may be met in two distinct ways: actual notice and constructive notice. Only when a property owner is actually aware, or should be aware, of an encroachment, can a city use prescription to gain the legal right to use of private land. The twenty-year statute of limitations period does not begin to run until the property owner is actually or constructively aware of the adverse use.

Though prescriptive easements may be established when the property owner has only constructive knowledge, it is a minimum condition that the *claimant* have actual knowledge of the easement's existence. When claiming a prescriptive easement, a city must be able to show that it was actually aware of the utility line's existence for at least twenty years. In cases where neither a property owner nor a city knew of the utility line, courts will almost certainly conclude that the use of the line was not open and notorious, and the city will fail to establish a prescriptive easement to the utility line.[4]

Applying the "Open and Notorious Use" Requirement to Buried Utility Lines

Because buried utility lines are generally invisible upon surface inspection of a property, the open and notorious use requirement poses special legal difficulties for buried utility lines. Buried utilities are unlike roads, ditches and utility poles, which by their very visible presence put property owners on notice of an adverse claim. As a result, it may be difficult for a city to demonstrate that the use of the claimed easement for an underground line was open and notorious enough to satisfy the legal requirements for prescription.

For instance, when a city uses and maintains a road that crosses private property, the city has given

[2] Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

[3] *See* Kaupp v. City of Hailey, 715 P.2d 1007, 1010 (Idaho Ct. App. 1986).

[4] *See, e.g.,* Sullivan v. Neam, 183 A.2d 834, 835 (D.C. App. 1962) (holding that the theory of a lost grant for an express easement was inapplicable where there was no knowledge of the existence of an easement); Powell v. Dawson, 469 N.E. 2d 1179, 1181 (Ind. Ct. App. 1984) (upholding a trial court's decision that a landowner had no prescriptive easement to a buried sewer pipeline because he or she did not previously know of its existence).

notice to the property owner of a hostile claim.[5] The road is easily visible to the property owner, and its use is clearly open and notorious. If the city's claim on the road runs uninterrupted for twenty years, a prescriptive easement is established: the owner knew of the claim and failed to take legal action.

North Carolina has never addressed the question of what makes the use of an underground easement open and notorious, so its courts will likely look to the arguments and decisions in other jurisdictions as a guideline. Courts in other states have found two factual categories under which a city is able to claim prescriptive easement against a bona fide purchaser who did not have actual or record notice of the existence of an easement:

1. Prescription ripened against a previous owner who had actual knowledge of the easement, or
2. The present owner had constructive knowledge of the easement.

Actual Knowledge of a Buried Utility by Previous Owner of the Property

If a prescriptive easement has ripened against an owner with actual knowledge of its existence, then title has already been acquired by the city. As such, the law of prescription allows a city to gain legal right to an easement even if the servient tenement has since been sold to a new owner who is unaware of the easement. Even a subsequent transfer of the servient estate does not operate to divest title to the easement from the city.[6] The subsequent owner's only claim for damages is against the previous owner: there is no cause of action against the city that holds the prescriptive easement.[7]

Ex 1.1 *City* builds an underground utility line beneath the land of *A*, but does not record it. *A* has actual knowledge of the utility line. Twenty-one years later, *A* sells to *B* without telling him about the easement. The court rules that the easement ripened before sale to *B*, and *City* gains a prescriptive easement.

Ex 1.2 *City* builds an underground utility line beneath the land of *A*, who has actual knowledge of the easement. The easement is not recorded. *A* sells to *B* after only 19 years. *B* has no actual or record notice of the easement. The court rules that *City* does not have a prescriptive easement, since the easement did not ripen against an owner with actual knowledge. The 20-year prescriptive period will reset and begin to run again only when *B* becomes aware of the easement.

Ex 1.3 *City* installs and operates a utility line on the property of *A*. *A* has actual knowledge, but the easement is not recorded. *A* subsequently sells to *B*, who has no record notice of the easement, but is told by *A* of its existence before purchase. Twenty-one years pass. Because *B* had actual knowledge of the easement, the use was open and notorious prescriptive easement. The court grants *City* a prescriptive easement.

Constructive Knowledge of a Buried Utility by the Present Owner

The second method available to a city for meeting the open and notorious use requirement for a prescriptive easement is constructive knowledge. The city must show that although the owner had no actual knowledge of the easement, he or she should have known about its existence, given the facts of the case. Constructive knowledge is a determination by a court that an individual should have been aware of a condition, and is justified by the general expectation in property law that an owner maintains a "reasonable degree of supervision over his property."[8]

The determination of whether a property owner had constructive knowledge of an easement is fact-intensive and specific to each case. The open and notorious use requirement is generally satisfied when the easement is "of such character as to raise a presumption of notice."[9] Though the rule itself is

[5] Town of Sparta v. Hamm, 97 N.C. App. 82, 86, 387 S.E.2d 173, 176 (1990).

[6] *See, e.g.,* Riddock v. City of Helena, 687 P.2d 1386, 1389 (Mont. 1984) (holding that a city had established a prescriptive easement to an underground water supply line); O'Connor v. Brodie, 454 P.2d. 920, 926 (Mont. 1969) (concluding that actual notice by present owner is unnecessary where a prescriptive easement ripened against previous owner); McKeon v. Brammer, 238 Iowa 1113, 1128 (Iowa 1947) (holding that sale to a bona fide purchaser without actual or constructive knowledge of underground water line does not extinguish an easement after it has ripened).

[7] *Riddock,* 687 P.2d at 1389.

[8] *Kaupp,* 715 P.2d at 1010.

[9] Taylor v. Montana Power Company, 58 P.3d 162, 164 (Mont. 2002) (holding that a prescriptive easement was

unclear as to what types of facts would raise such a presumption, case law from other jurisdictions provides three classes of examples.

First, courts will be more likely to find that a property owner had constructive notice of an easement when he or she also owned the property when the utilitylines were installed. Though a property owner would generally have actual knowledge of utility lines buried when he or she was resident, evidence that the present owner was a resident at the time of construction bolsters the case for constructive knowledge if the owner claims ignorance of the easement.

When faced with this scenario, the Montana Supreme Court concluded that when plaintiffs were both owners and residents of the property when electrical transformers and underground power lines were constructed, they had constructive knowledge of the easement.[10] There was a sufficient opportunity for the landowners to inquire about the existence of an easement, and the court concluded that the owners' constructive knowledge met the requirement for open and notorious use.[11] However, a court may be less likely to find that constructive knowledge of an easement existed if owners did not live at the property at the time, it was a vacation home, it was being rented to someone else, etc. Though helpful to a city's case, the fact that an individual also owned the property in question at the time was easement was built may not be dispositive in establishing constructive knowledge.

> Ex. 2.1 *City* builds an underground utility line beneath the property of *A*. Though *A* does not have actual knowledge of the utility line, *A* did occupy and own the property in question when *City* dug a trench and laid the utility lines. Twenty-one years later, *A* finds out about the easement, and sues *City* for damages. The court grants a prescriptive easement, determining that the facts of the case show that the easement was open and notorious. Because *A* was a resident and owner of the property, *A* as a prudent property owner should have known about its existence.

> Ex. 2.2 *City* builds an underground utility line beneath the property of *A*, who does not have actual knowledge. The property is *A*'s summer beach house, and is occupied only a few weeks every year. *City* constructed the easement in the winter, when *A* was not present. The court decides that *A* should not reasonably be expected to know about the utility lines and refuses to grant a prescriptive easement.

Second, there is often documentation aside from title records that may be available to the public. As part of the public record, these additional documents serve as constructive notice of an easement, and show that its use was open and notorious. In a 1997 case regarding an underground sewer line, the court found that an easement was open and notorious since public records showed the existence of the sewer line for more than the required twenty years.[12] The court pointed to a 1912 sewer map, a 1920 transit map, a 1921 field survey report and a 1930 property appraisal as creating a public record of the easement.[13] Because cities almost always have publicly available maps of utility lines, cities will likely be able to prove constructive knowledge on these grounds.

> Ex. 3.1 *City* builds an underground utility line beneath the property of *A*. *A* later sells to *B*. Neither has actual knowledge of the utility lines. After 21 years, *B* finds out about the easement. Though it did not appear in a title search, its existence was plainly apparent from planning records, sanitation records, and an appraisal of the land. The court rules that *A* and *B* should have known about the easement from these widely available public records. Constructive knowledge satisfies the open and notorious use requirement, and the court grants a prescriptive easement to *City*.

Finally, courts have also looked to extrinsic evidence of an underground utility line when assessing constructive knowledge. This evidence may be physical objects visible to the landowner, such as manhole covers, line markers, stakes, above-ground fixtures or controls, or partially exposed lines.[14] If there is sufficient evidence to show that an owner had

---

created when a prudent property owner would have discovered the existence of underground power lines).

[10] *Id.*

[11] *Id.* at 166.

[12] Katz v. Metropolitan Sewer District, 690 N.E.2d 1357, 1358 (Ohio Ct. App. 1997) (holding that the defendant sewer district's prescriptive easement barred a property owner from forcing removal of an underground line). *But see* Field-Escandon v. DeMann, 204 Cal. App. 3d 228, 235 (Cal. Ct. App. 1988) (refusing to find that a single unrecorded sewer permit constituted constructive notice).

[13] *Katz*, 690 N.E.2d at 1358.

[14] *See* Kaupp v. City of Hailey, 715 P.2d 1007, 1011 (Idaho Ct. App. 1986).

constructive knowledge of the existence of an unrecorded buried utility line, the court will find that use of the easement was open and notorious. Such physical evidence of an easement need not be located on the property owner's land. When visible items are located outside the property but tend to show the probable course and location of a buried line, a vigilant property owner is expected to inquire about the existence of an easement.[15] A city's or utility provider's own actions might also support a finding of constructive notice, where regular maintenance or inspection would have given a reasonably prudent property owner notice of the existence of an easement.[16]

> Ex. 4.1 *City* builds an underground utility line beneath the property of *A*, who later sells to *B*. Twenty-one years pass. Though the utility line itself is buried, there are three access boxes making a straight line across the surface of the property. The court determines that the facts of the case show that a reasonably prudent owner should have known of the easement from observable physical characteristics of the property. Constructive knowledge satisfies the open and notorious use requirement, and the court grants *City* a prescriptive easement.

These three approaches to constructive knowledge of a buried utility line are not mutually exclusive. Because the court applies a reasonable owner standard in assessing when a use is open and notorious, a city is more likely to establish a prescriptive easement when it can show facts supporting all three categories of constructive knowledge.

Assessing Inverse Condemnation and Trespass Claims

If an easement for a utility line is unrecorded, municipalities can face legal action by private owners for use of the property. The typical legal approach to interrupting unauthorized possession of property is an action in ejectment, authorized by N.C. Gen. Stat. 1-40, which sets the statute of limitations for ejectment actions at twenty years.[17] However, North Carolina courts have held that ejectment cannot be used against a municipality, which has the power of eminent domain.[18]

Recordation of an easement for a utility line would normally prevent a property owner from claiming trespass or wrongful taking by a municipality. But in the case of unrecorded easements, property owners are then left with two other potential causes of action: inverse condemnation and trespass. In either case, the more specific trespass and inverse condemnation statutes will preempt the twenty-year statute of limitations for adverse possession actions.[19] Inverse condemnation and trespass statutes are therefore applicable to different subsets of takings, depending on the facts of the case. Severe interferences may rise to the level of a taking of private property, for which a land owner can sue for compensation in an inverse condemnation action. Minor interference, such as routine maintenance, may give rise to trespass claims.

There has occasionally been uncertainty over when to apply the different statutes of limitations for right-of-way compensation[20] and inverse condemnation.[21] A North Carolina Federal District

---

[15] Jones v. Harmon, 175 Cal. App. 2d 869, 878 (Cal. Ct. App. 1959) (concluding that a use was open and notorious when "immediately adjacent to appellant's land there were certain visible installations characteristic of an irrigation system which were located in such alignment in relation to appellant's land as to indicate the probable course of the conduit thereunder.")

[16] O'Connor v. Brodie, 454 P.2d 920, 922 (Mont. 1969) (recognizing a prescriptive easement where claimants laid, repaired, and inspected a water line, and cleared debris from intake units).

[17] *See, e.g.*, Baldwin v. Hinton, 243 N.C. 113, 90 S.E.2d 316 (1955) (holding that ejectment is the proper claim where plaintiffs seek to recover possession of property); Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 290 338 S.E.2d 817, 819 (1990) (explaining that ejectment was proper when land was being physically occupied by the adverse party or its property).

[18] Costner v. City of Greensboro, 37 N.C. App. 563, 568-69, 246 S.E.2d 552, 555-56 (1978).

[19] Curtis v. Norfolk Southern Ry. Co., 2002 U.S. Dist. LEXIS 26196 (D.N.C. 2002).

[20] N.C. Gen. Stat. § 1-52(17) (prohibiting claims "[a]gainst a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service has been constructed . . .")

[21] N.C. Gen. Stat. § 40A-51 (providing that "[i]f property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint

Court attempted to allay this confusion, clarifying that the two-year statute of limitations in the inverse condemnation statute applied to all entities with eminent domain powers enumerated in the statute, while the generic three-year statute of limitations applied to all other takings.[22] Because cities have eminent domain powers, the inverse condemnation statute probably preempts all other potential claims for takings by a city, including those for unauthorized utility lines. Though the District Court decision is not binding on North Carolina courts, such an interpretation of statutory law may be persuasive when North Carolina courts are called upon to resolve similar statutory conflicts in the future.

If the inverse condemnation statute preempts, it is expected that courts would generally require property owners to argue under a theory of inverse condemnation rather than trespass for the presence of utility lines. Under these circumstances, inverse condemnation is a property owner's exclusive remedy for an unauthorized utility line. Additionally, allowing a trespass claim or an injunction barring the city's use of an easement would give private land owners the power to defeat a city's eminent domain authority. Consistent with these principles, North Carolina courts have held that property owners have no common law right to bring a trespass action against a city.[23]

Inverse Condemnation

Inverse condemnation actions are authorized by North Carolina statute in order for property owners to receive fair compensation for a property taking.[24] Essentially, inverse condemnation forces a city to exercise its power of condemnation when it has in fact taken property for its own use.[25] Property owners have a two-year statute of limitations for inverse condemnation claims, measured from either the date of the taking or the completion of the city project, whichever occurs later.[26]

North Carolina also adopts the majority position on inverse condemnation actions in requiring that a taking cause a "substantial interference with the use and enjoyment of the land, not merely incidental damage."[27] Though case law establishes no bright line for assessing whether actions rise to the level of a significant interference in use, construction of additional utility lines on an existing easement will generally be regarded a taking.[28] More minor attempts to enlarge, enhance, or otherwise change the nature and scope of an existing unrecorded utility easement may similarly retoll the statute of limitations for inverse condemnation actions.[29] For example, dicta in one decision suggested that installation of an additional underground fiber-optic line would constitute a new property taking and give rise to a new inverse condemnation action.[30] In any case, it seems clear that building a utility line where no easement exists would qualify as a substantial interference with the land, and therefore qualify for an inverse condemnation action.

---

containing a declaration of taking has been filed, the owner of the property may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever occurs later). N.C. Gen. Stat. §40A-3 is the Eminent Domain statute,

[22] *Curtis*, 2002 U.S. Dist. LEXIS at 26196.

[23] McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988); Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

[24] N.C. Gen. Stat. § 40A-51 (2007).

[25] *Smith*, 79 N.C. at 521, 339 S.E.2d at 844.

[26] N.C. Gen. Stat. § 40A-51 (a) (2007). *See also* Wilcox v. North Carolina State Highway Com., 279 N.C. 185, 188, 181 S.E.2d 435, 437 (1971) (holding that the statute of limitations was a complete defense to a taking claim).

[27] Long v. City of Charlotte, 306 N.C. 187, 200-01, 293 S.E.2d 101, 110 (1982) (considering aircraft overflights of private property as a taking for inverse condemnation purposes).

[28] *See* Teeter v. Postal Telegraph-Cable Company, 172 N.C. 783, 783, 90 S.E. 941 (1916) (affirming a trespass judgment against a telegraph company that had replaced an old line with new wires and new poles); Houston Pipe Line Company v. Powell, 374 S.W.2d 662, 666 (Tex. 1964) (determining that replacement of an 18-inch with a 30-inch gas line exceeded the scope of the easement); Krieger v. Pacific Gas an Electric Company, 199 Cal. App. 3d 137, 146 (Cal. Ct. App. 1981) (where rebuilding earthen walls for a drainage ditch with concrete changed the character and method of use of the easement). *But see* Abington Limited Partnership v. Talcott Mountain Science Center, 657 A.2d 732, 734 (Conn. 1994) (holding new power transmission lines and utility poles were not a significant change to the easement).

[29] *Teeter*, 172 N.C. at 786, 90 S.E. at 941.

[30] Kirkman v. Norfolk S. Ry. Co., 2006 U.S. Dist. LEXIS 10534 (D.N.C. 2006) (denying plaintiff discovery on installation of underground cables within the statute of limitations for trespass only because there was no affidavit filed with the request).

Unfortunately for cities, if the two-year statute of limitations for inverse condemnation actions has not run, and the court determines that the utility lines have caused a substantial interference, a city will be forced to pay compensation for the taking. On the other hand, when compensation is paid pursuant to a court judgment, it establishes the legitimacy of the easement, and the city now has the legal right to its use and maintenance.

Cities always have the option of waiting for property owners to bring an inverse condemnation action rather than filing their own claims. If it becomes apparent that an easement is unrecorded, the city can lay the burden of initiating litigation on the property owner, without exposing the city to additional liability. Because compensation for a taking is measured from the time of the original utility installation, the "plaintiff cannot, by deferring the institution of his action for inverse condemnation, select a later date for the determination of the compensation to which he is entitled."[31] A city therefore does not face the risk of increased payment simply because it did not attempt to condemn property used for utility lines. The property owner may even choose not to file an action, and expiration of the two-year statute of limitations absolves a city of any duty to compensate under inverse condemnation.

If a property owner appears to have a cause of action for inverse condemnation, then a city may respond by (1) paying court-ordered compensation in an inverse condemnation action, (2) abandoning and removing the offending utility lines, (3) condemning the land through eminent domain proceedings and providing compensation to the property owner, or (4) contracting for an express easement. Choosing the best option will require city policymakers to assess the importance of the continued use of the easement, the compensation required in an eminent domain proceeding, the owner's willingness to agree to an easement, etc.

Trespass

North Carolina separates trespasses into two distinct legal categories: permanent trespasses and continuing (sometimes called renewing) trespasses. Trespass claims resulting from the actual presence of an unrecorded utility line are treated as permanent trespasses under North Carolina law.[32] This categorization should also apply to buried utility lines for the purpose of permanent trespass actions.

Assuming that any claim is not preempted by the inverse condemnation statute, private property owners in North Carolina have three years to file a trespass claim.[33] After the statute of limitations has passed for a trespass claim, damages will not be awarded for permanent trespasses, and Federal courts in the Fourth Circuit and North Carolina have repeatedly dismissed trespass claims for underground easements when the statute of limitations has run.[34]

> Ex. 5.1 *City* builds a utility line on the property of *A*. *A* files a trespass suit two years later for loss of value of the property as a result of the underground utility line. Because the statute of limitations has not yet run for the permanent trespass, the court awards damages to *A*.
>
> Ex. 5.2 *City* builds a utility line on the property of *A*. *A* files a trespass suit four years later for loss of value of the property as a result of the underground utility line. Because the statute of limitations has run for the permanent trespass, the court dismisses the claim.

If a property owner has a valid permanent trespass claim, then a city may respond by (1) abandoning and removing the offending utility lines, (2) condemning the land through eminent domain

---

[31] Hoyle v. City of Charlotte, 276 N.C. 292, 307, 172 S.E.2d 1, 11 (1970) (adjudicating measure of damages for an overflight easement).

[32] *See* Ridley v. Seaboard & Roanoke Railroad Company, 118 N.C. 996, 999, 24 S.E. 730, 731 (1896) (where construction of a railroad track was treated as a trespass causing permanent injury for which only a single recovery for damages could occur); *Teeter*, 172 N.C. at 786, 90 S.E. at 941 (holding that construction of a utility line was a permanent trespass with a three year statute of limitations from completion of the project). *See also* Field-Escandon v. DeMann, 204 Cal.App. 3d 228, 233 (Cal. Ct. App. 1988) (treating sewer pipes as a permanent trespass with the statute of limitations measures from the end of the construction project); *Spar v. Pacific Bell*, 235 Cal. App. 3d 1480, 1487 (Cal. Ct. App. 1991) (holding that buried electrical lines were a permanent trespass).

[33] N.C. Gen. Stat. § 1-52 (3) (2007).

[34] *See Kirkman*, 2006 U.S. Dist. LEXIS at 10534 (granting summary judgment for defendant utility company on the grounds that three years had passed since unauthorized installation of fiber-optic lines); Curtis v. Norfolk Southern Ry. Co., 2002 U.S. Dist. LEXIS 26196 (D.N.C. 2002) (granting summary judgment for defendant in a trespass suit for unauthorized installation of telecommunications equipment); Gasperson v. Sprint Communs. Co. L.P., 1997 U.S. App. LEXIS 35286 (4th Cir. 1997) (dismissing a trespass claim for unauthorized installation of fiber-optic cables in a recorded easement).

proceedings and providing compensation to the property owner, or (3) contracting for an express easement. Choosing the best option will again require city policymakers to assess the importance of the continued use of the easement, the compensation required in an eminent domain proceeding, and the owner's willingness to agree to an easement.

Cities also have a strong interest in continuing to maintain unrecorded easements, since property owners may sue in tort for a city's negligence in maintaining an easement. For instance, a municipality's failure to maintain a storm drain on an unrecorded easement exposed it to liability for sinkhole damage to other areas of the property, and the statute of limitations for property damage began to run only when the damage itself became apparent to the property owner.[35] Maintenance of properly recorded utility lines does not generally give rise to continuing trespass actions, since a city's legal right to use of an easement also includes a subsidiary right to any entry for maintenance reasonably required for the continued efficacy of the easement.[36] This principle bars trespass claims for maintenance activities on recorded easements.

But without a recorded utility easement, a city's maintenance of an existing utility line may trigger a new action for damages under continuing trespass.[37] Causes of action for continuing trespass may arise even when the statute of limitations for the original construction of the permanent trespass has passed.[38] North Carolina courts appear to adopt the position that an additional trespass by a city will be compensable, as there are cases in which damages have been awarded for continuing trespass after the three-year statute of limitations had passed. However, these holdings were narrowly restricted to emphasize that the damages claimed were not the result of a permanent trespass as contemplated in the statute of limitations.[39] The North Carolina Supreme Court further limited recovery only to the decline in value within three years of the commencement of the action.[40] This measure of damages strongly favors the city, since the value of the property as a whole is not likely to substantially decrease as the result of a short maintenance visit.[41] Presumably, injunctive remedies would be similarly time-limited, though there are no cases specifically denying a request for injunction because the statute of limitations had run.

> Ex 6.1 *City* builds a utility line on the property of *A*. *City* enters for routine maintenance two years later. *A* files a trespass suit two years after that for both permanent trespass and continuing trespass. Because the statute of limitations has run for the permanent trespass, the court dismisses that claim. Because the three-year statute of limitations for continuing trespass for has not run, the court awards damages to *A* for the maintenance activities.

> Ex 6.2 *City* builds a utility line on the property of *A*. *City* enters for routine maintenance four years later. *A* files a trespass suit two years after that for continuing trespass. Because the three-year statute of limitations has not run for the continuing trespass, the court awards damages to *A* for the maintenance activities.

> Ex 6.3 *City* builds a utility line on the property of *A*. *City* enters for routine maintenance three years later. *A* immediately sues for damages and an injunction. Because the statute of limitations has run for the permanent trespass, the court dismisses the injunction claim. Because the three-year statute of limitations for continuing

---

[35] Howell v. City of Lumberton, 144 N.C. App. 695, 701, 548 S.E.2d 835, 837 (2001).

[36] *See* Restatement (Second), Property § 480 (1994) (stating that "one who has an easement created by prescription has the privilege to do such acts as are necessary to make effective the enjoyment thereof.").

[37] *See, e.g.,* Duval v. Atlantic Coast Line R.R. Co., 161 N.C. 448, 451, 77 S.E. 311, 311 (1913) (ruling that damage caused by a flooding culvert was a renewing trespass rather than a permanent injury); *Howell*, 161 N.C. at 449, 548 S.E.2d at 839 (noting that plaintiff's damage claim was for specific damage to a home due to an underground pipe rather than general loss of property value from a permanent trespass); Teeter v. Postal Telegraph-Cable Company, 172 N.C. 783, 785, 90 S.E. 941, 942 (N.C. 1916) (characterizing construction of a new utility line on an existing rail easement as a new permanent trespass).

[38] *Teeter*, 172 N.C. at 786, 90 S.E. at 941.

[39] *See* Roberts v. Baldwin, 151 N.C. 407, 409, 66 S.E. 346, 346 (1909) (holding that recovery under a theory of trespass could only be had for continuing flood damage caused by an unrecorded easement, not for the loss of value in the land for the presence of the easement itself).

[40] *Id. See also* Wilson v. McLeod Oil Co., 327 N.C. 491, 511, 398 S.E.2d 586, 596 (1990) (limiting plaintiff's recovery to damage suffered in the three years immediately proceeding the filing of the action).

[41] *See* Freeman v. City of Charlotte, 273 N.C. 113, 115, 159 S.E.2d 327, 328 (1968) (holding that the proper measure of damages for a trespass event is "the difference in the value of the land immediately before and immediately after the trespass.").

trespass for has not run, the court awards damages to *A* caused by the maintenance activities.

Statutory Gaps in Easement Law

Because prescriptive easement takes twenty years to pass title to a city, and the statutes of limitations are three years and two years for trespass and inverse condemnation, respectively, there is a substantial temporal gap in laws regarding unrecorded easements. Property owners will be similarly unable to file a suit for compensation under any statutory provision. However, during this period, the city similarly has no legally recognized property interest in the land. Since there is a statutory remedy for takings by municipalities, property owners are left with no further legal redress if they have failed to exercise their statutory right to compensation within the two-year statute of limitations period for inverse condemnation or three-year period for trespass.

There are no examples of North Carolina courts awarding permanent damages for the presence of unauthorized utility lines after the statute of limitations for permanent trespass has run. Indeed, an award of permanent damages seems inappropriate for utility easements. If the statute of limitations has run, then there can been no additional decline in the value of the property during the statutory period, and therefore no measure of damages for a trespass or inverse condemnation claim.

Unfortunately, no North Carolina court decisions provide any further guidance on the rights of parties for situations where both statutes of limitations have run. This lacuna in legal remedies offers cities several approaches to dealing with unrecorded easements during the statutory gap period.

First, a city can wait until twenty years have elapsed from the completion of the project, and attempt at that time to secure title through a prescriptive easement. North Carolina municipalities will likely be able to gain legal title to unrecorded utility easements through prescriptive easement when it can be shown that either (1) prescription ripened against a previous owner who had actual knowledge or (2) a property owner had constructive knowledge of the existence of the easement.

In the interim, however, it is possible that property owners could take matters into their own hands with respect to removal of the easements. The city, having no valid property interest or easement in the land, would be legally ill-equipped to stop such self-help. If the city continues to maintain the utility lines during this waiting period, it runs the risk of trespass actions each time, though damages for trespass will be measured by the decline in value of the property and are not likely to be substantial. However, as long as a city refrains from substantially changing the nature of the easement, a property owner would remain unable to claim compensation for the lost value of the property as a result of the easement.

The alternative is that a city, having discovered that an easement is unrecorded, can establish a legal interest in the property immediately. Such a legal interest can be created by (1) an express easement from the property owner, or (2) use of eminent domain authority to obtain a right to the easement. These actions would both require compensation to the property holder, but would give the city the legal right to maintain the lines and prevent interference in the easement by the property owner. It also eliminates any risk that a prescriptive easement claim fails to obtain a legal interest for the city after twenty years because the easement was insufficiently notorious.

It does seem clear that the courts will be unlikely to let cities have their cake and eat it too with respect to compensation. If the statute of limitations has run, then cities have obtained free use of an easement for that period. But protecting unrecorded utility lines prospectively requires gaining legal protection through prescriptive easement, contract, or eminent domain. Easements for utility lines remain best protected when they are promptly and correctly recorded at the time of creation.