

# LOCAL GOVERNMENT LAW BULLETIN

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## UNRECORDED UTILITY LINES – A SECOND LOOK

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Local Government Law Bulletin No. 114,<sup>2</sup> issued in August of this year, addresses a number of legal issues that arise when a local government has underground utility lines in place for which it has no recorded easements. Much of the bulletin discusses how a local government might meet the “open and notorious use” requirement for establishing a prescriptive easement for underground lines. The bulletin also discusses the landowner’s remedy of seeking inverse condemnation because of the installation of the lines and notes that the statute of limitations for such actions is two years.<sup>3</sup> The discussion of inverse condemnation assumes that if a fee owner neglects to bring an inverse condemnation action within the period of the statute of limitations, the local government still must wait the usual twenty years associated with prescriptive easements in order to achieve the full rights of ownership for any easement associated with the utility lines. During the period between the running of the inverse condemnation statute of limitations and the conclusion of the time necessary to acquire a prescriptive easement, the bulletin suggests that a local government might be susceptible to trespass actions whenever its employees or contractors entered a person’s property to maintain the underground utility lines.

After the bulletin was issued, a number of local government attorneys suggested a different understanding of the running of the statute of limitations for inverse condemnation—that once the statute had run, the local government had the same rights of ownership with respect to a utility easement as it would have once the twenty-year prescriptive period had run. Their argument was that when dealing with an entity with the power of eminent domain, the relevant statute of limitations was that for inverse condemnation actions and not that for prescriptive easements. For entities with the power of eminent domain, that is, the enactment of a statute of limitations for inverse condemnation actions has made the law of prescriptive easements irrelevant.

There is good basis for accepting these suggestions as correct, based on a 1986 decision of the North Carolina court of appeals.<sup>4</sup> Therefore, this bulletin is

being issued to supersede the earlier bulletin. That bulletin's discussion remains relevant for the owner of an underground utility line if the owner does not possess the power of eminent domain. But because local governments do possess the power of eminent domain with respect to all their public enterprises,<sup>5</sup> the discussion does not apply to local governments. Rather, local governments should look to the discussion in this bulletin if they are faced with proving ownership of the easements necessary for maintenance of existing underground utility lines.

The two-year statute of limitations for inverse condemnation actions, found in G.S. 40A-51, was enacted in 1981.<sup>6</sup> Before 1981 there was no generally applicable statute of limitations for such actions, although there was a three-year statute for trespass actions seeking compensation for a permanent trespass. The North Carolina Supreme Court had held, however, that the three-year limitation on such trespass actions did not apply to an owner seeking compensation for an appropriation of his property by an entity with the power of eminent domain. In *Land v. The Wilmington & Weldon Railroad Company*, the railroad had entered plaintiff's land in 1886 and constructed its tracks, but it had no conveyance from the plaintiff and had not "acquired any title by lapse of time."<sup>7</sup> The railroad's charter limited a property owner's remedies to seeking damages (rather than ejectment), and the railroad argued that any action for damages was subject to the three-year statute of limitations for trespass. The court would have none of it:

These extraordinary privileges which have been conferred upon the defendant ought to be sufficient, it would seem, to meet all the reasonable demands incident to the construction of its road. But it is insisted that, while it may occupy the owner's land and acquire title by an adverse possession of twenty years, the owner is powerless to prosecute his only remaining remedy, except within the first three years of that period.

We cannot believe that such an anomalous state of affairs was contemplated by the Legislature.

The defendant could have acquired title by instituting proceedings under its charter, but this it has failed to do, and it would be only following the dictates of common justice to allow the owner his compensation (not damages for the trespass) at any time before the possession of the defendant has ripened into an indefeasible title. In other words, so long as the defendant is content to occupy the land without

title, the owner should not be prevented from pursuing his single remedy.<sup>8</sup>

Thus, under *Land* it appears that a property owner could bring suit for compensation for an appropriation of his property at any time up to the running of the limitations period for adverse possession or a prescriptive easement.

It should not be thought from the *Land* court's rhetoric that the courts at that time were opposed to a short statute of limitations for actions for permanent damages. It was quite common for nineteenth century railroad charters to provide that any action against a railroad for an appropriation of land for railroad purposes be brought within two years; if no action was brought, these charters specifically provided that the landowner was conclusively presumed to have granted the property to the railroad.<sup>9</sup> The North Carolina Supreme Court applied and approved of these provisions in a number of cases.<sup>10</sup>

It is clear from these early cases that a local government or other entity with condemnation power that had entered property and appropriated it, say for a street, did not have ownership rights in the property until it had paid compensation.<sup>11</sup> Until that step was taken, the local government was no more than an interloper and retained that status until it had possessed the property long enough to qualify for adverse possession or prescription. Perhaps the strongest statement of this state of affairs is found in *Phillips v. Postal Telegraph-Cable Company*, decided in 1902. The plaintiff owned farmland that was crossed by a railroad operating within a properly-acquired railroad easement. The railroad then permitted the telegraph company to construct telegraph poles and lines within the railroad easement, and plaintiff brought suit for compensation for the appropriation of his rights. The court agreed with plaintiff that the telegraph facilities were an additional burden on the fee and characterized the telegraph company as a "trespasser." The court went on then to write:

If, in addition to [sporadic trespasses to maintain the lines], the trespasser seeks to acquire the right to remain [on the property], he can do so only by the consent of the owner or under the principle of eminent domain. This is not the perpetration of a wrong, but the lawful acquisition of a right, and the damages incident thereto must be paid to the owner from whom the right is acquired. Aside from this action, the defendant has acquired no easement whatever as against the plaintiff, and if it takes that easement now, it must pay the man from whom it takes it. To say that one may acquire an easement in the

land simply by an unlawful entry is an attempted extension of the doctrine of Squatter Sovereignty to an extreme which we feel entirely unable to concede.<sup>12</sup>

This then was the state of the law when G.S. 40A-51 was enacted in 1981, part of the comprehensive revision of eminent domain statutes enacted that year and effective January 1, 1982. *Smith v. City of Charlotte* was one of a number of cases brought against the city because of alleged noise associated with a new runway opened at the city's airport in June 1979. *Smith* itself was brought in November 1983, alleging two causes of action: first, an action in inverse condemnation for the taking associated with the opening of the runway; and second, an action in inverse condemnation for any taking associated with increased aircraft overflights during the two years immediately preceding the filing of the action. Both actions were dismissed by the trial court. As to the first cause of action, the court of appeals held that the five months or so of grace period given plaintiffs between the passage and effective date of Chapter 40A was constitutionally sufficient. Therefore the first cause of action was barred by the two-year statute in GS 40A-51.

The court next turned to the cause involving additional burdens on the fee—from increased overflights—in the two years immediately before the bringing of the action. In beginning its discussion of this issue, the court wrote several sentences that go to the heart of the issue addressed in this bulletin. The court said:

Defendant raises the threat of recurring litigation if claims for such 'additional takings' are allowed. It is true that once an easement is taken, the condemner ordinarily enjoys the right to use it without incurring further liability to the landowners and successors. *Lea Co. v. N.C. Bd. of Trans.*, supra. That insulation from further liability extends only to the 'defined portion' of property actually taken, however. *Id.*, at 625, 304 S.E. 2d at 179. We have recognized that once a flight easement has been established, further compensable takings may occur 'upon increases in operations or introduction of new aircraft within the easements acquired with consequent decreases in land values significantly beyond the diminutions resulting from the initial takings.' *Cochran v. City of Charlotte*, supra, 53 N.C. App. at 396, 281 S.E.2d at 185.<sup>13</sup>

The remaining issue, said the court, was whether the plaintiffs had made a sufficient allegation of additional takings to withstand a motion to dismiss. It is clear, however, that the court believed that once the inverse condemnation statute of limitations had run, the government possessed an easement. It had succeeded to the full rights of ownership of that easement.

Upon reflection, this is not a surprising conclusion. Adverse possession and prescription both transfer the rights of ownership through the running of the appropriate statute of limitations,<sup>14</sup> and that is the apparent effect of the running of the statute for inverse condemnation. The North Carolina Supreme Court pointed out the parallel more than a century ago in one of the cases involving a railroad charter's two-year statute of limitations for compensation from the railroad (using the "lost grant" terminology common to early adverse possession cases):

When the defendant showed its actual occupancy of the land for two years in the manner and for the purposes to which it was appropriated, in the absence of any deed or written contract or proceeding for condemnation, the statutory presumption arose with the effect upon the rights of the parties declared by the statute. If one is sued by the State for land and shows a possession, either by himself or others, for thirty years, under the law as it existed prior to 1868, then arose a presumption of a grant as against the State, and a similar possession of twenty-one years presumed a deed as against an individual. The charter simply defines the kind, character, and purpose of the possession and raises the presumption of a grant of an easement of fixed limitations at the end of two years. Charters containing these provisions have been granted in this State since 1833. No serious question has ever been raised as to their validity.<sup>15</sup>

Thus, in conclusion, if a local government has installed underground utility lines without a recorded easement for the lines, and if the lines have been installed for more than two years, the owner's right to seek compensation in inverse condemnation is barred by the statute of limitations of G.S. 40A-51, and *as a consequence*, the local government now enjoys the rights of ownership of an easement for the lines, regardless of the lack of any recorded easement.

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2. Evan Scott Simpson, *How Can Cities Deal with Unrecorded Utility Lines?*, LOCAL GOVERNMENT LAW BULLETIN NO. 114, (School of Government, August 2007).

3. N.C. Gen. Stat. § 40A-51 (hereafter G.S.).

4. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

5. G.S. 40A-3(b)(2).

6. 1981 N.C. Sess. Laws 1382, 1397. The first two sentences of G.S. 40A-51(a) read as follows:

If property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property, [sic] 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 shall occur later.

7. 107 N.C. 72, 73, 12 S.E. 125, 125 (1890).

8. *Id.* at 74, 12 S.E. at 125.

9. An early example of such a charter provision, used as a model in many later charters, was included in the charter of the North Carolina Railroad, issued in 1849. Section 29 of the railroad's charter read as follows:

That in the absence of any contract or contracts with said company, in relation to lands through which the said road or its branches may pass, signed by the owner thereof or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the centre of the said road, has been granted to the said company, by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used for the purposes of said road and no longer, unless the person or persons owning the said land at the time that part of the said road which may be on the said land, was finished, or those claiming under him, her or them, shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road, which may be on the said land, was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she or they shall be forever barred from recovering said land or having any assessment or compensation thereof.

Ch. 82, § 29, North Carolina Laws of 1848-49, p. 138, 151.

10. *E.g.*, *Carolina Central R.R. Co. v. McCaskill*, 94 N.C. 746 (1886). In ruling for the railroad in its action to oust the fee holder from the confines of its claimed easement, the court commented:

The presumption of the conveyance arises from the company's act in taking possession and building the railway, when in the absence of a contract, the owner fails to take steps, for two years after it has been completed, for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title and estate. Thus vesting, it remains in the company as long as the road is operated.

*Id.* at 753.

11. *E.g.*, *White v. Northwestern N. C. R.R. Co.*, 113 N.C. 611, 18 S.E. 330 (1893); *Mason v. Durham County*, 175 N.C. 638, 96 S.E. 110 (1918). In *White* the plaintiff sued the railroad for damages suffered when the railroad, under license from the city, installed tracks in the street passing by plaintiff's home. The court held that the railroad was an additional burden on the fee and commented that "the plaintiff may maintain a common law action for damages, to be assessed up to the time of the trial, or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and *by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street.*" *White*, 113 N.C. at 623, 18 S.E. at 334 (emphasis supplied). In *Mason* the plaintiff sued the county for appropriating a strip of his property in order to widen a street. In upholding a jury verdict for plaintiff, the court summarized the law as follows: "it is regarded as correct doctrine that, where a defendant has entered, constructed its work and the right to occupy the property and to exercise the privilege is or may be protected by statutory right of eminent domain or by the existence of a superior right in the public; then, at the election of either [the plaintiff or defendant], an action lies for permanent damages, *and on payment of same an easement passes.*" *Mason*, 175 N.C. at 641-42, 96 S.E. at 111 (emphasis supplied).

12. *Phillips v. Postal Telegraph-Cable Company*, 130 N.C. 513, 526, 41 S.E. 1022, 1026 (1902).

13. *Smith v. City of Charlotte*, 79 N.C. App. 517, 527, 339 S.E.2d 844, 850 (1986).

14. G.S. 1-40.

15. *Barker v. R.R.*, 137 N.C. 214, 222-23, 49 S.E. 115, 118 (1904).

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