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Sorting Out Access Easement Rights In Shopping Centers

WRITTEN BY

Brian P. Watt | T. Matt Bailey

Among the litany of societal changes wrought by the COVID-19 pandemic, one of the least explored has been the enduring change in the general public's fast food consumption patterns.

When America became aware that the coronavirus spreads far more efficiently among large groups of people sharing small, indoor spaces, we abandoned fast food restaurant dining rooms and headed to the drive-thru en masse.

The upshot for us — litigators with a real estate practice focused on restaurants and other retail clients — has been a dramatic increase in claims against our clients premised on the volume of customer traffic to our clients' franchises.

We've seen these claims arise across the country, but the underlying fact patterns are usually surprisingly similar.

The setting is almost always a shopping center, in which a number of businesses share common accessways and parking areas. A third party — maybe the franchise's landlord, or an adjoining property owner or tenant — argues that customer queues surrounding the restaurant in question are too long, too enduring, too intense.

The restaurant, in other words, is impermissibly popular in the eyes of the third party, and that popularity has — invariably — grievously damaged the other party's business by converting the entire shopping center into one big traffic jam, perpetual rush hour gridlock sure to dissuade prospective tenants, diminish property values across the board, and eventually render the entire shopping center a derelict husk of its former self, paradoxically emptied of customers too afraid to brave the crowds.[1]

The harms alleged are, in other words, typically exaggerated, and take no account of the undeniable benefits that accrue to shopping centers when customer traffic increases.[2] Nonetheless, given the long list of claimants we have dealt with, we cannot help but conclude that heavy traffic can cause a certain amount of annoyance to businesses that don't see themselves as benefiting from this large customer base.[3]

Less clear, though, is whether a cognizable wrong has been committed. These shopping centers are almost

always subject to reciprocal easement agreements allowing all businesses therein shared use of the common accessways and parking areas. These easement agreements are often very broadly phrased. The typical access easement looks something like this:

The Declarant hereby grants and conveys to all Owners within the Shopping Center and their tenants, occupants, customers, employees, agents and business invitees thereof, for the benefit of all Parcels comprising the Shopping Center, a nonexclusive easement and right to use the roadways, driveways, aisles, walkways, and sidewalks located in the Shopping Center, for purposes of ingress, egress, passage and delivery, by vehicle and pedestrians.

The challenge for the would-be claimant: This language contains no stated limitations on the number of customers a business can invite to utilize the shared accessways.[4]

The first counterargument typically employed, usually in legal correspondence before any complaint has been filed, is obvious: “Our customers have an access easement, and they are accessing our restaurant by exercising the rights afforded them. No harm, no foul.”

But this is rarely the end of the matter. At this point, the complainant or its attorney usually brings up an important common law concept that can overrule the express language of the instrument and limit the use of an easement even where the grant is limitless: the concept of easement overburdening, or surcharge on the easement.[5]

As we will explore, this concept varies significantly from state to state, but at bottom, it is a judicially created doctrine that provides that an easement can be wrongfully utilized in such a way that it has been overburdened and must therefore be amended, abrogated or terminated entirely.

This argument supersedes the language of the easement-granting document: Sure, you have an access easement, says the hypothetical adversary, but the law of this state confines you to using it in a way that does not interfere with the rights of my customers.

The goal of this article is to discuss the state-specific boundaries of the overburden doctrine and to suggest best practices in crafting easement language, whether your goal is to maximize the rights of individual businesses, thereby weakening the ability of aggrieved parties to challenge heavy traffic, or to keep businesses’ easement rights proportional and balanced so that one’s popularity cannot impinge on another.[6]

First, the shared background: Every state appears to recognize the concept of easement overburdening in one form or another, though, frustratingly, some states do not use the specific term “overburden.” The basic concept of easement overburdening is that the beneficiary of an easement can take some action with respect to that easement that is beyond the pale, such that the easement must be abrogated, amended or terminated.

States vary significantly, though, in what sort of action is sufficient to constitute an overburden. The principal distinction seems to be between uses that are contemplated by the easement-granting document,[7] such as driving over an access easement, and new uses that were not expressly authorized, such as placing a farmers’ market in an access easement.

Broadly speaking, there are three groups of states.

First, some states have expressly held that only a change in the type of use to which an easement is put can constitute an overburden, where as an increase in a permitted use never can.

Second, some states have explicitly held the exact opposite: that even an increase in a permitted use of an easement may be an overburden, if sufficiently extreme.

Finally, the third, and regrettably the largest, group of states, either has declined to state a bright-line rule or has spoken incoherently on the subject.

North Carolina is perhaps the best place to be if you are hoping to crowd an easement area with hungry customers. While North Carolina, like essentially everywhere else, holds that a changed use beyond that authorized by the granting instrument is an impermissible overburden,[8] the North Carolina Court of Appeals has specifically rejected the argument that an increase in a permitted use can ever be a wrongful overburden in City of Charlotte v. BMJ of Charlotte LLC in 2009:

Defendants cite no cases, and we find none, wherein a mere increase in traffic volume over an easement results in misuse or overburdening . . . . In fact, our research showed just two scenarios recognized in North Carolina as misuse or overburdening of easements: (1) using the easement to access other properties not included in the easement; and (2) using the easement for a kind of use not contemplated in the easement.[9]

For defendants facing easement overburden claims, this is the gold standard. However, relatively few other states have followed suit.

Colorado courts have consistently held that an increase in a permitted use does not overburden an easement,[10] as have courts in Iowa,[11] Missouri[12] and Virginia,[13] but strict adherence to the easy distinction between changes in degree and kind is hard to come by.[14]

On the other end of the spectrum, several states have explicitly reserved the possibility that even an expressly permitted easement use can constitute an overburden.

Ohio is perhaps the clearest example of this phenomenon. Ohio case law forbids dominant estates from “engaging in a new and additional use of [an] easement,”[15] as do essentially all other states.

But, the Ohio Court of Appeals has also held, in J. T. Management v. Spencer in 2017, that “increased traffic on an access easement can result in an unreasonable enlargement and abuse of the easement.”[16]

In that case, the court went so far as to examine the factors that compel the conclusion that a party has used its access easement rights too often:

(1) the amount of increased traffic on the easement; 2) the time of day when vehicles used the easement; 3) the extent that traffic noise increased; and (4) whether vehicles using the easement travelled at excessive speeds.[17]

Delaware[18] and Illinois[19] also fall into this category.[20]

In the vast majority of states, though, judicial reasoning is less clear, and contradictory strains of authority can arise. For instance, the Supreme Court of Alabama flatly held in Weeks v. Wolf Creek Industries Inc. in 2006 held that “an increase in traffic over an easement in the process of normal development of the dominant estate, in and of itself, does not overburden a servient estate.”[21]

That sounds clear, but in that case, the court, in considering whether an action constituted an impermissible change in degree of use, considered “increased noise and traffic” as relevant to the analysis.[22] In other words, an increase in a permitted use is not wrongful in itself, but it forms a factor in judging whether the increase in use is wrongful. Much less clear.

California is similar.

An old California case that was never overturned, Gaither v. Gaither in California’s Second District Court of Appeal in 1958, holds that “[i]f the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected.”[23]

Yet, over time, California courts appear to have transitioned to a factual inquiry in determining overburden, pursuant to which increased traffic is a consideration.[24] Kansas[25] and Washington[26] are all also far from models of consistency, in that each state has cross-cutting authority without a clear bright-line rule on this issue.

So where does this morass of differing and contradictory state laws leave a would-be litigant seeking to challenge or defend heavy use of an easement area?

While those located in any of the above-referenced states can be slightly more or less comfortable with their position based on the leanings of their governing courts, ultimately the conclusion is the same everywhere: Be very specific in the easement rights you are granting or acquiring.

All states are united in looking first and foremost to the language of the granting instrument. According to the Appellate Court of Illinois, First District, in Duresa v. Commonwealth Edison Co. in 2004, “Where the language of an easement grant is clear and free from doubt, such language is not the subject of interpretation and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.”[27]

While you may be able to rely on arguing that an easement has been overburdened, the far safer route, if you’d like to make sure that restaurant franchises in your shopping center know that there is a ceiling on how successful they should try to be,[28] is to spell out, in detail, the nature of the limitation you wish to impose:

Every Owner shall enjoy access, ingress, and egress rights, except that no Owner may allow its customers to line up or “stack” outside the boundaries of its respective parcel.

Employing specific language spelling out both the limitation on any rights you wish to convey and the remedial steps an offending party must undertake should the customer queue become too long will give a reviewing court a far easier job to do.

It also, fundamentally, is a fairer way to conduct business than initially granting unlimited easement rights before reversing course when you find yourself frustrated with the consequences of the deal you made.[29]

On the other side of the coin, a franchisee looking to negotiate an easement agreement should beware of hidden limitations on his or her rights. This includes not only obvious limitations like the anti-stacking provision discussed above, but also terms that could later be distorted to imply a cap on traffic where none exists.[30]

In the end, our overall conclusion is not a counterintuitive one: The goal of contracting, including in the creation of real easements, covenants and restrictions, is to spell out ex ante the relationship of the parties and to separate permissible actions from those that are forbidden.

The doctrine of easement overburden can allow for an end run around this contractual certainty, such that one party can seek to limit the rights of another, irrespective of what was previously agreed to.

While that end run is useful, it is also uncertain, of limited applicability and of vastly differing utility depending on the forum state. Far better, easier and fairer, is to fix your easement rights with certainty in advance, and make sure to only agree to that which you can abide over the long term.

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[1] Our adversaries are presumably concerned that their customers will channel Yankees great Yogi Berra: “Nobody goes there anymore, it’s too crowded.”

[2] It is no great insight to conclude that, all else being equal, more people equate to more money spent. We have never completely understood why the neighbors suing to reduce customer traffic in a shared commercial space don’t instead direct their efforts toward monetizing that increased traffic.

[3] It also bears noting that, when examining why your business is failing, it is only human nature to focus on the alleged causes that could result in a payday. You can’t sue COVID-19 for rendering your (for instance) gym or movie theater a dubious proposition, but you can certainly sue your still-successful fast-food neighbor.

[4] And even if such limitations did exist, how would they be enforced? We invite you to come try our delicious burgers—but only the first 500 of you, and only about 100 per hour. No reasonable profit-maximizing business would agree to this limitation, and the hungry customer hurrying over during her lunch hour is unlikely to read the fine print. This is another reason why shared easements in a commercial shopping center are a minefield for litigation: the easement documents purport to control third parties who are not bound to these agreements, while the businesses that are bound have no practical ability to control their customers.

[5] There are also clever textual arguments Plaintiff’s counsel can employ. The easement agreements we run into often prohibit any party from “obstructing” or “blocking” shared accessways. Adjoining property owners, then, can argue that this obstruction prohibition, which intuitively seems to contemplate the placement of physical barriers, cones, or other stationary objects, also should be read to prevent a party from allowing customer traffic to accrue at such levels that the slow-moving mass of hungry customers effectively prevents others from passing over the accessways. This is a textual argument rooted in the easement-granting document: our restaurant may think it

enjoys carte blanche to welcome the teeming masses yearning to eat chicken strips, but only so long as no "obstruction" (whatever that is) occurs.

[6] Though we naturally approach this issue from the perspective of defense counsel—since we have for the most part represented businesses accused of overutilizing access easements—this article is meant to be helpful in analyzing these issues whether your clients will be asserting these claims or defending against them.

[7] Our research has primarily been confined to express easements that exist by virtue of a granting document. Easements that arise without a granting document—for instance, easements by necessity, by prescription, or implied easements—are typically treated differently. Because the scope of an implied easement is not captured in a written instrument, courts typically rely on the expectation of the parties or the degree of necessity in declaring the scope of the dominant estate's easement rights. See *Tobias v. Dailey*, 196 Ariz. 418, 422 (Ariz. Ct. App. 2000); *Tiller v. Lackey,* 6 Wash. App. 2d 470, 504-05 (Wash. Ct. App. 2018). For this reason, the question of overburden is often collapsed into the initial judicial determination of the scope of an implied easement, rather than being treated as a separate issue. E.g., *DeBey v. Schlaefli*, 56 Kan. App. 2d 813, 813-14 (Kan. Ct. App. 2019); *Baldwin v. Boston & M.R.R.*, 181 Mass. 166, 170 (1902).

[8] *Swaim v. Simpson*, 463 S.E.2d 785, 787 (N.C. Ct. App. 1995).

[9] *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 20 (2009).

[10] *Westland Nursing Home, Inc. v. Benson*, 517 P.2d 862, 867 (Colo. App. 1974); *Cielo Vista Ranch I, LLC v. Alire*, 433 P.3d 596, 621 (Colo. App. 2018).

[11] *113th Ave. Rd. Fund Ass'n v. I & R Props.*, 808 N.W.2d 754 (Iowa Ct. App. 2011); *Stew-Mc Dev., Inc. v. Fischer*, 770 N.W.2d 839, 847 (Iowa 2009).

[12] *Hill-Creek Acres Ass'n, Inc. v. Tomerlin,* 99 S.W.3d 521, 526 (Mo. Ct. App. 2003); *Karches v. Adolph Inv. Corp.*, 429 S.W.2d 788 (Mo. Ct. App. 1968)

[13] *Shooting Point, L.L.C. v. Wescoat*, 265 Va. 256, 267 (2003).

[14] In Florida, Michigan and Utah, we have not located any case that explicitly states that an increase in degree of use can never constitute an overburden. However, cases decided in those jurisdictions appear to operate on the basis of such a rule, never finding an overburden where only the degree of use has increased. *Crutchfield v. F. A. Sebring Realty Co.*, 69 So.2d 328, 330 (Fla. 1954); *Avery Dev. Corp. v. Village by the Sea Condo. Apts., Inc.*, 567 So.2d 447, 449 (Fla. Ct. App. 1990); *Terrill v. Coe,* 1 So.3d 223, 225 (Fla. Ct. App. 2008); see *Fla. Power Corp. v. Silver Lake Homeowners Ass'n*, 727 So.2d 1149, 1150 (Fla. Ct. App. 1999); *Unverzagt v. Miller*, 306 Mich. 260, 265, 10 N.W.2d 849 (1943); *Henkle v. Goldenson*, 263 Mich. 140, 143, 248 N.W. 574 (1933); Lutheran High Sch. Ass'n of the Greater Salt Lake Area v. Woodlands III Holdings, LLC, 81 P.3d 792 (Utah Ct. App. 2003); *Wood v. Ashby*, 253 P.2d 351, 354 (1952).

[15] *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 67 (Ohio Ct. App. 2000).

[16] *J.T. Management v. Spencer,* Nos. 2016-T-0018 & 2016-T-0021, 2017 WL 971921, at *3 (Ohio Ct. App. Mar. 13, 2017)

[17] Id. (citing *Solt v. Walker,* No. 95–CA–64, 1996 WL 363438 (Ohio Ct. App. May 3, 1996)).

[18] *Green v. Templin,* N. CIV.A. 5202-VCP, 2010 WL 2734147, at *9 (Del. Ch. July 2, 2010), aff'd, 30 A.3d 782 (Del. 2011) (applying a reasonableness test to determine "the extent to which an increase in traffic across an easement is permissible").

[19] *Koplin v. Hinsdale Hosp.,* 207 Ill. App. 3d 219, 233 (1990); see also *Brownlie v. Hardinge,* 214 Ill. App. 99, 103 (1919) ("An unlawful or excessive use of an easement may be enjoined . . . .").

[20] Arguably, so does Vermont, though we have not located a Vermont case specifically stating that an increase in permitted use can constitute an overburden. See *Roy v. Woodstock Cmty. Tr., Inc.*, 195 Vt. 427, 457 (2014).

[21] *Weeks v. Wolf Creek Indus., Inc.,* 941 So. 2d 263, 272 (Ala. 2006).

[22] Id. at 272.

[23] *Gaither v. Gaither*, 165 Cal. App. 2d 782, 785 (1958) (considering driveway subject to ingress/egress easement over which traffic had been increased as a result of the construction of rental housing, and holding, "[a]s to the increased burden in connection with the rental units, such use appears to be one in degree only and not a change in the physical objects passing over the driveway").

[24] See *Pac. Coast Homeowners v. J. Paul Getty Trust,* Nos. B146155, B146223, B149687, 2002 WL 31358807, at *6-7 (Cal. Ct. App. 2002) (unreported/unciteable) ("No substantial evidence supports trial court's factual finding that traffic generated by the proposed theater will overburden the easement; the evidence establishes traffic will remain stable and may even decrease.").

[25] Compare *City of Arkansas City v. Bruton*, 36 Kan. App. 2d 42, 50 (2006), with *Garn v. Higgins*, 435 P.3d 59, *3 (Kan. Ct. App. 2019).

[26] Compare Nw. Props. Brokers Network, Inc. v. Early Dawn Ests. Homeowner's Ass'n, 295 P.3d 314, 327 (Wash. App. 2013), with Logan v. Brodrick, 631 P.2d 429, 431-32 (Wash. App. 1981).

[27] *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 101 (2004); see, e.g., *Grygiel v. Monches Fish & Game Club Inc.*, 787 N.W.2d 6, 16 (Wis. 2010); *Luker v. Sykes*, 357 P.3d 1191, 1198 (Ak. 2015); *Jordan v. Guinn & Etheridge*, 485 S.W.2d 715, 720 (Ark. 1972); *Westland Nursing Home, Inc. v. Benson*, 517 P.2d 862, 867 (Colo. App. 1974).

[28] You should expect some pushback on this. In cabining tenants to a certain level of success, you are essentially asking them to ignore the central tenet of a successful business: profit maximization.

[29] Unfortunately, there are perverse incentives at play here. Early in the life of a shopping center, the commercial

developer is eager to fill his parcels with successful, hungry businesses, and is therefore unlikely to be scrupulous in accounting for disputes that may later arise. Only once the development has experienced initial success is it even in a position to worry that the businesses that were attracted with the highly favorable easement terms offered have made too effective a use of those terms.

[30] This goes back to the "obstruction" language we discussed earlier, under which litigants have argued that a ban on "obstructions" (typically, stationary physical impediments to travel) includes slow-moving traffic. Entrants to shared commercial spaces must scrutinize easement agreements carefully to determine whether those agreements include any trap language that could later be used against them. When such language is found, again, clarity is the name of the game. Far better to take the time to negotiate a detailed explanation of what "obstruction" means than to be embroiled in costly litigation years later because you've gotten too good at attracting the masses.

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