COA Opinion: Landlocked property owners with a prescriptive easement across state wetlands still need a permit to use it.

7. April 2010

On April 6, 2010, the Michigan Court of Appeals published a per curiam opinion in *Matthews v. Department of Natural Resources*, No 288040, affirming the ruling that plaintiffs had a prescriptive easement across state land, but reversing the ruling that they could fill the wetlands on that easement without obtaining a permit. The court of appeals concluded that plaintiffs had properly tacked onto the possessory periods of their predecessors without a parol statement of conveyance because it was the only access they knew of and had used before the transfer of ownership. However, their prescriptive easement did not excuse them from complying with environmental laws that required a permit before filling the wetland with pallets to use the easement.

Since the 1960s, the plaintiffs and their predecessors would visit their landlocked parcel during the hunting season and for family retreats by crossing a state owned parcel of land which was partially wetland. Plaintiffs would use an old two-track logging road and then cross 1200 feet of wetland to reach their property. Eventually, they began filling in the wetland with pallets to make it more passable. When a Department of Natural Resources employee noticed the trail, he obtained permission to gate the two-track logging road. At a meeting with the landowners, the department offered a one-year permit to cross the state land and requested asistance in removing the pallets, proposing they replace the pallets with proper walkways. The owners declined and litigation ensued.

A prescriptive easement results from open, notorious, adverse and continuous use of another's property for a period of 15 years. At that point, the statute of limtiations for recovery or possession of land has run. However, on March 1, 1988, this statute of limitations became no longer applicable against the state. Still, the statue could not abrogate a vested right. So the plaintiffs had a prescriptive easement if they could show open, notorious adverse and continuous use the property since March 1, 1973. Because they had not purchased the property until 1984, the plaintiffs had to show privity of estate by "tacking" onto the previous possessory period. Privity is generally shown by including a description in the deed or an actual transfer or conveyance of possession of the acreage by parol statements made at the time of the conveyance.

There was no dispute that the evidence showed a continuous fifteen-year period of open, notorious, adverse and continuous use of the path by the predecessor owners across state land before 1988. Title in the plaintiffs by adverse possession therefore turned on whether there was privity. Relying on a decision of the Michigan Supreme Court from 1948, the court of appeals held that there was, even though there was no description in the deed and noparol statement. Under the circumstances, the parties must have understood there was an easement because it

was the only access they knew of and had ever used. It was therefore clearly the parties' intention to transfer the rights to the easement to the plaintiffs. Plaintiffs therefore had a prescriptive easement across the state land.

However, the Court of Appeals held that the trial court erred in permitting the plaintiffs to maintain their pallet pathway without a permit. The trial court created an exception to the permitting scheme for the plaintiffs in this case that does not exist in the statute and was therefore invalid. It is the province of the DNR, not the trial court, to assess the circumstances and devise a plan to afford plaintiffs reasonable use of their land while preserving and protecting the wetlands.