What Happens When a Landowner Encroaches Upon Public Property?

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At some point, a municipality and its leaders likely will be forced to grapple with the following question: Does a landowner have any rights if the landowner builds a home or other obstruction in a road right of way or other property dedicated to the public?

A good starting point in the analysis of this issue is the 2014 case of *Waisanen v Superior Township*, in which the Michigan Court of Appeals considered the rights of Superior Township and a landowner in connection with an alleged encroachment of the landowner's property into a public street. The landowner brought suit to quiet title.

The court began its analysis with a review of the then-current version of MCLA 600.5821, which provided:

> Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the period of limitations.

The court concluded that the statute prevents a landowner from acquiring property from a municipality by adverse possession only if the municipality first brings an action to recover the property. It does not preclude a landowner from suing first.

In other words, according to that decision, whether a landowner can assert rights comes down to a race to the courthouse. If the municipality sues first, the landowner is out of luck. But if the landowner takes action first, a claim for adverse possession can be asserted.

However, the Superior Township case may have been decided incorrectly. That's because the court did not take into account or address an additional relevant statute, MCLA 247.190, which provides:

> All public highways for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given or purchased, and no encroachments by fences, buildings or otherwise which may have been made since the purchase, dedication or gift nor any encroachments which were within the limits of such right of way at the time of such purchase, dedication or gift, and no encroachments which may hereafter be made, shall give the party or parties, firm or corporation so encroaching any title or right to the land so encroached upon.

This statute suggests than an encroachment into a public highway can never give rise to a claim of adverse possession or acquiescence by an encroacher and, thus, the Superior Township case seems incompatible with the statute.

In a recent unpublished opinion in the case of *Haynes v Village of Beulah,* the Michigan Court of Appeals considered similar issues involving a landowner who installed railroad ties into a street right of way. A rock wall, some trees and part of a driveway also encroached into the street. When the village decided it wanted to make some changes in the right of way, the plaintiff filed suit alleging ownership of the areas of encroachment.

The court relied on MCLA 247.190 and held that the landowner could not obtain title to the area of encroachment - which is at odds with the Superior Township case because the plaintiff filed suit first in the Village of Beulah case. The court held that the term "public highway" is not defined in the statute, and that courts have held that "public highway" is defined very broadly as a generic name for all kinds of public ways. The distinction in the decisions appears to be that the Superior Township defendant failed to assert a defense under MCLA 247.190. The question of adverse possession of other municipal property also remained an open question.

In response to this apparent conflict, the Michigan Legislature amended MCLA 600.5821(2), effective June 20, 2016, to provide as follows:

> In an action involving the recovery or the possession of land, including a public highway, street, alley, easement, or other public ground, a municipal corporation, a political subdivision of this state, or county road commission is not subject to any of the following:
>
> A) The periods of limitations under this act.
> B) Laches; when the process of making a claim is delayed profusely which can result in refusal.
> C) A claim for adverse possession, acquiescence for the statutory period, or a prescriptive easement.

What does all this mean to a municipality? In practical terms, the Legislature has eliminated the race to the courthouse to assert rights to protect public property. It no longer matters whether the municipality sues first or the landowner sues first. There is no statute of limitations applicable to claims to public land or rights of way, and adverse possession claims as to municipal lands are also barred.

If you have any questions about these issues, please contact Scott H. Hogan at **shogan@fosterswift.com** or 616.726.2207.