M E M O R A N D U M

BARRON & STADFELD

To: KPS

From: RTM

Date: 2/18/10

Re: Whether sewer and water pipes crossing Miller's land are de minimis encroachments such that court can exercise equitable powers to allow Smith to continue using the pipes even in the absence of a prescriptive easement.

Issue:

Whether the sewer and water pipes crossing Miller's land are de minimis encroachments, such that the court can exercise its equitable powers to allow Smith to continue using the pipes, even in the absence of a prescriptive easement.

Answer:

The pipes are not de minimis encroachments and the court should rule that Smith has no right to continue using them.

Discussion:

In his motion for summary judgment, Smith argues that even if he does not have a prescriptive easement to continue using the water and sewer pipes crossing the Miller property, the court should allow the continued use as a mater of justice and equity because the pipes have been on the property since "time immemorial" and the costs which Smith would incur if the court

ordered removal of the pipes (or discontinuance of the use) would be disproportionate in comparison to the costs Miller would incur if the use were allowed to continue. The court should reject this argument.

Massachusetts courts have made clear that the general rule, to be applied in all but the most extraordinary circumstances, is that any unlawful encroachment on the property of another must be removed, even if the encroachment is small and even if it does little harm to the landowner and its removal would be costly. In Wilkins v. Pesek, 2008 WL 80217 (Mass. Land Ct. 1/9/08), the Land Court stated:

> Finally, the Wilkins assert that the encroachment is de minimis, and the court should not require the Wilkins to move or remove the New Fence because any encroachment was unintentional and too slight to justify its removal. Under Massachusetts law, it is rare-exceptional, really-for a party who is maintaining an encroachment upon the land of another not to be ordered to remove the encroachment. Indeed, a landowner is usually entitled to equitable relief to compel the removal of structures encroaching on his or her land, even if the encroachment is unintentional and the cost of removing the structure is substantial compared to the injury suffered by the lot owner. *Peters v. Archambault,* 361 Mass. 91, 92 (1972). It is well settled that the law disfavors disturbing or diminishing the record title to land, and favors compelling the removal of structures encroaching upon another's property. "Where the aid of courts of equity in this Commonwealth has been invoked by the owner of land to require the removal of buildings

> or structures unlawfully upon his land, they have been loath not to grant the relief sought, even though the plaintiff may have suffered little or no damage on account of the offending building or structure, or the costs of removing the encroachment is greatly disproportionate to the benefits to the plaintiff resulting from its removal." *Ottavia v. Savarese,* 338 Mass. 330, 335 (1959). The decisional law of the Commonwealth cautions about the error that a court can commit, and the attendant dilution of rights of property that follows, when the court fails to afford a landowner injunctive relief ordering the removal of encroachments, except in the most exceptional cases where proof of truly de minimis incursion is clear. *Goulding v. Cook,* 422 Mass. 276, 278 (1996).

Id. at *8. (Emphasis added). See also Peters v. Archambault, 361 Mass. 91, 92 (1972); Cormay v. Bain, 2005 WL 715706, *3 (Mass. Land Ct. 3/30/05); Russo v. Gulla, 2002 WL 1805420, *2 (Mass. Super. 8/6/02); Pave v. Mills, 1999 WL 791952, *7 (Mass. Super. 6/30/99).

Thus, in most cases, the fact that the encroachment has a minor impact on the landowner, but its removal would saddle the other party with considerable expense, is "without legal consequence" because the court would not exercise its equitable power to "violate a legal principle." Feinzig v. Ficksman, 42 Mass. App. Ct. 113 (1997). See also Calci v. Reitano, 66 Mass. App. Ct. 245 (2006).

In Goulding v. Cook, 422 Mass. 276 (1996), the Supreme Judicial Court explained that the rule requiring removal of even

small encroachments is necessary to protect private property rights.

> It is commonplace today that property rights are not absolute, and that the law may condition their use and enjoyment so that the interests of the public in general or some smaller segment of the public, perhaps just immediate neighbors, are not unduly prejudiced…. But except in 'exceptional' cases, we draw the line at permanent physical occupation amounting to a transfer of a traditional estate in land…. [W]e are committed to maintaining [that line] because the concept of private property represents a moral and political commitment that a pervasive disposition to balance away could utterly destroy.

422 Mass. at 277-78. Citing Goulding, the Court in Pave held that "even if the defendants can show that their encroachment was made innocently and the cost of removal would be greatly disproportionate to the injury to the plaintiffs from its continuation, our law does not sanction this type of private eminent domain…. The fundamental aspect of ownership is that the owner of a thing has the right to prevent others from taking it from him, even if the takers are willing to pay damages." 1999 WL 791952, *8.

While the general rule requiring removal of encroachments is subject to very limited equitable exceptions, those exceptions do not apply in the present case. In Goulding, the Supreme Judicial Court said:

> "In rare cases, referred to in our decisions as 'exceptional' courts of equity have refused to grant a mandatory injunction and have left the plaintiff to his remedy of damages, 'where the unlawful encroachment has been made innocently, and the cost of removal by the defendant would be greatly disproportionate to the injury to the plaintiff from its continuation, or where the substantial rights of the owner may be protected without recourse to an injunction, or where an injunction would be oppressive and inequitable. But these are the exceptions.... What is just and equitable in cases of this sort depends very much on the particular facts and circumstances disclosed.' "

Goulding, 422 Mass. at 277 n. 3, quoting Peters, 361 Mass. at 93. (Emphasis added). The Goulding Court also stated:

> Like most propositions in the law the one we reaffirm now has some play at the margins. Accordingly, the Appeals Court is quite right that the courts will no enjoin truly minimal encroachments, especially when the burden on a defendant would be very great. The classic example is given in Restatement (Second) of Torts § 941 comment c, *supra* at 583:
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> "The defendant has recently completed a twenty-story office building on his lot. The work was done by reputable engineers and builders, and they and the defendant all acted in good faith and with reasonable care. It is, however, found that from the tenth floor upward the wall on the plaintiff's side bulges outward and extends over the line. The extent of the encroachment varies at different points, the maximum being four inches."
>
> Such accommodation recognizes the necessarily approximate nature of all legal lines and principles.

422 Mass. at 279-80.

Accordingly, an exception may apply when "the unlawful encroachment has been made innocently and the cost of removal by the defendant would be greatly disproportionate to the injury to the plaintiff from its continuation." (Emphasis added). Neither condition is satisfied in the present case. First, the encroachment was not made innocently in the sense that the party who installed the pipes did not know they encroached on the Miller property. The pipes cross the lot owned by Miller, a fact which the installer of the pipes could not have failed to notice. Further, when Smith purchased his property in 1978, the L-Shaped building already existed and was serviced by the pipes at issue. Smith must have known when he purchased that the pipes encroached on the Miller property. In Latka v. Nielsen, 2009 WL 4894356 (Mass. Super. 11/23/09), the Superior Court held that a party could not take advantage of the innocent encroachment exception, stating,

> Even if the defendants' predecessor-in-title had made an innocent mistake when she installed the septic system, the defendants in this case cannot claim the benefit of this very narrow exception when they admit that they knew of the encroachment before they purchased their home, and yet went forward with the closing despite having failed to negotiate an expansion of the easement with the plaintiffs. In essence, they bought their home with advance notice

> that they might also be inheriting a lawsuit.

Id. at *2 n.5.

Nor is the cost to Smith of relocating the pipes grossly disproportionate to the injury Miller would suffer if the use of the pipes were to continue. By Smith's own estimate, the cost of the relocating the pipes would be about $300,000, a relatively small sum when compared to the annual income Smith derives from his property. Miller would suffer considerable damage if the pipes were to remain, due to the loss of his opportunity to develop the Miller property. Although Smith asserts that Miller can construct a building in such a way as not to damage the pipes (using sleeves), doing so would, no doubt, increase the construction costs. It may be advisable to obtain an expert opinion as to the value of Miller's right to develop the property and the additional costs he would incur if he were required to build around the pipes.

The second exception to the general rule applies when the encroachment is "truly minimal" and the "burden on [the] defendant would be very great." As noted above, the burden on Smith would not be excessive. Moreover, the encroachment in this case clearly is not de minimis. Massachusetts cases establish that in order to qualify for the de minimis exception to the general rule requiring removal of encroachments, the

encroachment must be extremely small. Encroachments far smaller that that in the present case have been enjoined pursuant to the general rule. In Feinzig, the Appeals Court gave examples of the types of encroachment which would be considered de minimis.

> What is truly minimal is not subject to a litmus test, but examples are: *Tramonte v. Colarusso,* 256 Mass. 299, 300, 152 N.E. 90 (1926) (bulge of a building over the line by one-eighth to one-quarter of an inch); *Loughlin v. Wright Machine Co.,* 273 Mass. 310, 315-316, 173 N.E. 534 (1930) (sewer pipes under six inch strip of land); *Triulzi v. Costa,* 296 Mass. 24, 28, 4 N.E.2d 617 (1936) (a few bricks imbedded in defendant's wall projected a few inches into plaintiff's wall); Restatement (Second) of Torts § 941 comment c, at 583-584 (1979) (bulge over the line to a maximum of four inches above tenth floor of a building).

42 Mass. App. Ct. at 117-18. The Feinzig Court held that an encroachment of up to seven feet in width which covered 195 square feet of the owner's side yard, was not de minimis. Id. See also Calci, 66 Mass. App. Ct. at 251-52 (encroachment of second story porch and utilities was not de minimis); Latka, 2009 WL 48943556, *3 (encroachment not de minimis where defendant's leach pits extended beyond the boundaries of an easement by feet, not inches); Wilkins, 2008 WL 80217, *8-9 (encroachment not de minimis where "we have an encroachment, in a densely settled city neighborhood, over a valuable 127 foot long strip of residential land, which is up to one foot in depth."); Cormay, 2005 WL 715706, *3 (encroachment of 2/10 foot

for a distance of 100 feet was not de minimis, noting that defendant had not shown that removal of the fence would be a hardship, that it was installed innocently, or that removal would be an oppressive result.); Russo, 2002 WL 1805420, *3 (well, located between 6" and 14.75" from property line, was significant, not de minimis encroachment. Court noted that removal would not be a great burden on the defendant and would not imperil any structure on the property); Pave, 1999 WL 791952, *8 (encroachment of 360 square feet, by wall which extended between 7.5" and 18" into plaintiff's property was not de minimis. Court noted that the encroachment equaled 7.5% of the net livable/sellable space). Cf. Capodilupo v. Vozzella, 46 Mass. App. Ct. 224 (1999) (encroachment held to be de minimis and allowed to remain where "two brick corner walls … encroached upon an 11,878 square foot parcel belonging to the plaintiff. The first wall, 23.77 feet long, encroached increasingly in taper from zero to 3.6 inches; the second, 8.38 feet long, consistently encroached 4.8 inches. The encroachments burdened a small open courtyard which the plaintiff uses to store trash. The plaintiff made no argument that the encroachment denied him in any way the beneficial use of his land. Further, the uncontroverted evidence at trial was that removal of these walls would render the defendant's building unsafe." Pave, 1999 WL 791952, *8, citing Capodilupo).

Conclusion:

In the present case, as Smith pints out in his summary judgment brief, installation of the pipes under the Miller property was a substantial construction project. The pipes do not merely encroach, but traverse the middle of the Miller property. They far exceed the very limited encroachments which the courts have found to be de minimis.