

October 10, 2013
For Secretary

**St. Charles Parish Council Meeting
October 7, 2013**

**Excerpt regarding Legislative files
2003-0225, 2003-0226, 2003-0227
Prepared by: kba, llb, sh, bm, ctm**

01:45:47

MR. ROBIN DURANT: There was concern whether or not if you passed the B-2 zoning, whether or not we would file them at all. Well, we have filed them, so that should not be of concern anymore. The other concern that has been voiced is whether they're enforceable, and I can tell you all night that they're enforceable, and it really doesn't mean a whole lot, so we've asked an individual to come give you an opinion as to whether or not these restrictive servitudes are enforceable by both the residents of Hahnville and the Parish as well. This individual's name is Judge, uh, Appellate Judge Steven Plotkin. Judge Plotkin said that his curriculum vitae was approximately 50 pages long, so I was going to dispense with that and just mention a few things. Judge Plotkin was a Tulane professor for 29 years; he practiced law for 20 years; he was a District Court Judge for 10 years; an Appellate Court Judge for 15 years; he's published over 2,000 Opinions; he has written 100 legal articles which have been published; he has written the only book on Civil Procedure in Louisiana, which is a three-volume book; he's presently a full professor at U.N.O. teaching Business Law; he's a Harvard Law Adjunct Professor and has been for 30 years; and he was awarded the "Distinguished Judge" Award for both the State of Louisiana, Jefferson Parish, and Orleans. He is an expert on this subject, and I hope you'll let him explain whether or not these servitudes which have been filed are enforceable or not. Judge Plotkin . . .

MR. L. C. VIAL, III: (He made comments regarding his refusal to review documents.)

JUDGE PLOTKIN: My name is Steven Plotkin. I live at 232 Lake Marina Drive in New Orleans, Louisiana. I have been, and am currently, a law professor, and particularly I've taught at Tulane, civil law courses for many, many years, and I'm relatively familiar with the question of servitudes in Louisiana. I begin with a short statement that, as you all know, the highest source of law in Louisiana is Louisiana Civil Code, stemming from our French, and our articles within the code on servitude are very clear, are very simple, and the cases that have arisen since we've had servitude articles are consistent in their jurisprudence, so what I'm about to tell you, at least in my opinion, that is a, a very simple question of the validity of filed servitudes that run with the property. The articles that we're talking about really begins with Article 646 of the Civil Code which states that there is a charge on the servient estate, which is what the applicant has here in favor or and for benefit of the dominant state, which

are the surrounding landowners, and in this case, the Parish, which owns the underlying streets and facilities in which these dominant servitudes exist – nor do the servitudes have to be adjacent to each other. They can be separated, as in this case, from the levee to the landowners who are on the other side of the levee and who are the homeowners in that region. It suffices that the estates, or both estates are allowed some benefits, but a predial servitude runs on the immovables themselves; they're not personal to the individual. So we then to go servitude in Code No. 706, which is the case article you're interested in, and the article reads very plainly and very simply, "Affirmative servitudes are those that give the right to the owner of the dominant estate to do a certain thing on the serving estate – such are the servitudes of right-of-way, drainage, and support". This is what we call a negative servitude, and it is as follows – and this is the most important part. "Negative servitudes are those that impose on the owner of the serving estate", the applicant here, "the duty to abstain from doing something on his estate", and it gives examples after that. Thus, in this case, by filing the servitudes with the restrictions of the five activities that now are applied to this particular three parcels of land, the owner cannot perform those activities on that land, So then the question becomes who can enforce it. The code is very clear, by injunction, the dominant estate, whoever is the property owner, can file an injunction as well as the Parish. So if this applicant would perform those duties on that, his estate, they can be conjoined automatically because it is a covenant – or a restrictive covenant is exactly what it is on this particular property. It's valid and it's enforceable, and I have the cases, if you'd would like, the jurisprudence, as far as I can tell, every single case in interpreting what we call "predial servitudes" have said basically what I've explained to you. Do any questions about it, I'd be happy to answer.

COUNCILMAN HOGAN: Question was asked if property owner put the servitude in place can the property owner remove it.

JUDGE PLOTKIN: The property owner cannot remove the servitude except in (2) instances. Let's assume there was a violation. He built a generator which is prohibited, electrical generator. If no one opposed that within 10 years, there's a prescription, a statute of Limitation Period, he can then remove it because he's in violation for 10 years and he acquires prescriptive rights to do that – hardly likely, but that's a possibility. The other possibility is if the dominant and servient estates or collapsed into one, i.e., the applicant assumes all of the property belonging to the dominant estate, he could then, what we call confusion, fuse all of the landowners into one ownership and then he could do it, but he would have to acquire all of the dominant estate, which I don't know exactly – I understand there are many homeowners that live on the other side of the highway which would be affected by it. But that's the only 2 ways that it can be negated.

COUNCILMAN HOGAN: Question was asked if he can't go to the courthouse tomorrow to file papers to revoke what he just did today.

JUDGE PLOTKIN: He's hooked. If you pass this B-2 variance, B-1 to B-2, it runs with the immovables in perpetuity forever. It has nothing to do with personalities. His family or whoever owns this piece of property is stuck with these restrictive covenants forever. That's absolutely clear in the jurisprudence.

CHAIRMAN BENEDETTO: Does that go for if he sells it, too?

JUDGE PLOTKIN: I'm sorry? Even, even if it's sold—even if it's passed on in a valid transaction—the servitude runs—and even if the vendor doesn't just checks a little and the title doesn't have a listing of the servitude, it's immaterial. The servitude trumps title!! Clearly in the case, the Supreme Court case called McDuffy, exactly on that point where there was a sale by one vendor to a vendee; they didn't know about the servitude; claimed that it was null and void; and the Supreme Court upheld the servitude as binding because it goes to the immovable, not individuals.

COUNCILMAN HOGAN: One other question. Sunny, in terms of the legal aspects of what was just said, are you in agreement?

MR. L.C. VIAL, III: He agrees with the Judge's legal opinion.

CHAIRMAN BENEDETTO: Once these are filed and this happens, what are the steps if he violates it? Does someone have to get an attorney and then file suit or does Parish take it on?

JUDGE PLOTKIN: Any interested party within the range of the dominant estate – any land owner can hire their own attorney or Association can do – file for an injunction, as well as the Parish Council, because it affects the other interests the Parish Council has on the roadways that are within the dominant estate, so both parties have the right to hire and attain a lawyer to seek and injunctions are very simply obtained – simply the existence of the juridical act, which is the filing of the servitude, is sufficient to get an injunction to stop the, uh, prohibited activity, which are the 5 activities listed in the servitude.

COUNCILMAN WILSON: Thank you, Madam Chair. Could you repeat your name again?

JUDGE PLOTKIN: Mr. Plotkin – P-L-O-T-K-I-N.

COUNCILMAN WILSON: Representing District I, this has been a problem for a long time. I held a Town Hall meeting and about 69 people attended. People are still not comfortable with this issue. Don't know how this will work if the rules get broken and more money is spent on going back to court.

JUDGE PLOTKIN: Well, the way our system is created these, by filing these documents they have placed a restrictive covenant on the property prohibiting these activities. If someone objects, they have to file within the legal system a pleading requesting an injunction. Our system does not allow us to come into court to get a judgment in advance to day that these prohibited activities are invalid, per say. You have to wait until there is a cause of action, which would be in the event they did something positively or negative, and

so...but the thing I want to impress upon you is that the, law of servitude is that clearly by filing this juridical act, this notarial act, the applicant is absolutely prohibited – the word is prohibited – and must abstain from performing these activities. That's the language in the Code. If someone (was harmed by that, they just simply have to come into court with a picture of whatever it is or some evidence, and it's an automatic Grant of Relief – automatic; but we can't do it in advance to get a judicial order, uh, this is the only legal way that I know how it can be accomplished to satisfy your constituency, and it's a very strong and powerful method of doing that, by the way.

COUNCILMAN WILSON: I look at the experts our Planning Department. When it comes to enforcing – I can't enforce and P & Z can't enforce it. (As far as expansion with contemplated use – would put restrictions on property and who would enforce?)

JUDGE PLOTKIN: But you could, and the Parish – any resident or group of residents or association could – or any interested party can, can file this action to protect themselves. I mean it's not complicated. It's not, you know, genius or brain surgery kind of work. It's routine Legal Service. To enjoying a person who violates a personal servitude it's very common and routine. It's nothing very sophisticated. And the law, the thing, the thing to convey is the law is crystal clear on this. It's not even debatable that there's grey areas on this particular legal transaction, and it's enforceable, it's legal, and it's uh, what it is, is what it is, it's valid.

COUNCILMAN WILSON: Thank You.

CHAIRMAN BENEDETTO: Mr. St. Pierre

PARISH PRESIDENT ST. PIERRE: Yes. What Mr. Durant is trying to do tonight, to your knowledge, has it even ever been done before?

JUDGE PLOTKIN: People filing suit for violation of servitude?

PARISH PRESIDENT ST. PIERRE: For putting stipulations on a property.

JUDGE PLOTKIN: Sure. There's been, uh...oh, for placing servitudes? No, I mean the Code is very clear. We have 50 or 100 articles on servitudes, and the method of doing it is very simple, and, uh, there's no prohibition for doing this; it's perfectly normal and proper. We have all kind of servitudes in Louisiana. We have right-of-passage; we have light; we have injury to neighboring property; we have nuisance servitudes; we have 20 or 30 different types. If the, the biggest case I've ever held briefly was a land owner built a house blocking the sun light of his neighbor, and the servitude of right to light and air was great than the neighbor's right to prohibit that kind of torture so to speak. But it is really routine kind of stuff. It's not anything very difficult.

COUNCILWOMAN PERRIER: Clarification of P& Z having authority to enforce these stipulations.

JUDGE PLOTKIN: Why of course they could. They would have, they would have the authority of the Parish behind them as an entity of the parish to file, uh, as an entity of the parish, an injunction, absolutely. Any interested party, any interested party.

COUNCILWOMAN PERRIER: Clarification: Individuals, meaning residents, won't have the financial means of going up against a corporate body. Clarity: knowing there's a back-up plan: Is there a back-up plan?

JUDGE PLOTKIN: Absolutely. Any, the Parish, or any legal subsidy, subsidiary, of the parish, has the authority if it's properly titled in the petition to bring an action.

COUNCILWOMAN PERRIER: Properly titled?

JUDGE PLOTKIN: Well, (inaudible...What is the name of your committee? Permits and ?...) "Planning and Zoning, on behalf of the St. Charles Parish Council".

COUNCILWOMAN PERRIER: In the suit itself?

JUDGE PLOTKIN: Uh, yea. No question about it.

CHAIRMAN BENEDETTO: Mr. Hogan? And we are still in Public Hearing.

COUNCILMAN HOGAN: changes his mind; finish public hearing

CHAIRMAN BENEDETTO: Public Hearing 2003-0225, 2003-0226, 2003-0227

MS. CAROLYN TREGRE: Next constituent from audience addresses public hearing