NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1440

BOB WELCH & DANIEL HOOVER

VERSUS

EAST BATON ROUGE PARISH METROPOLITAN COUNCIL

Judgment rendered FEB 26 2014

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge Parish, Louisiana
Trial Court No. 563,619
Honorable Wilson Fields, Judge

* * * * * *

ALEXIS A. ST. AMANT, II BATON ROUGE, LA	ATTORNEY FOR PLAINTIFFS-APPELLANTS BOB WELCH & DANIEL HOOVER
LEA ANNE BATSON BATON ROUGE, LA	ATTORNEY FOR DEFENDANT-APPELLEE EAST BATON ROUGE PARISH METROPOLITAN COUNCIL
CHARLES W. BELSOM, JR. BATON ROUGE, LA	ATTORNEY FOR DEFENDANT-APPELLEE JAMES CALDWELL IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL
BRIAN L. MCCULLOUGH BATON ROUGE, LA	ATTORNEY FOR INTERVENOR-APPELLEE 2590 ASSOCIATES, L.L.C.

* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

JEK 1/30/14 Kuhn, J. Concurs and Assigns Reasons

PETTIGREW, J.

More than five years ago, the plaintiffs instituted this litigation, seeking a declaratory judgment that East Baton Rouge Parish City Ordinance 14280 (the ordinance) is invalid. That ordinance, adopted by the EBR Metropolitan Council on January 23, 2008, amended the Master Land Use and Development Plan applicable to the plaintiffs' property, and rezoned the surrounding 119 acres from A-1 residential to "traditional neighborhood development" (TND), allowing for the development of what is commonly known as "Rouzan." The matter has already been before this court on a supervisory writ and two prior devolutive appeals (that will be discussed later herein). It is now before us on appeal of the final judgment rendered in the matter, pursuant to which all of the plaintiffs' claims were dismissed. The plaintiffs have appealed.

FACTS AND PROCEDURAL HISTORY

At the time of her death on October 24, 2003, Mary Bordelon Ford owned approximately 124 acres at the corner of Perkins Road and Glasgow Avenue in Baton Rouge, Louisiana. All of the land was zoned "A-1 Single Family residential." In her will, she bequeathed to each plaintiff, Bob Welch and Daniel Hoover, a remunerative donation of a tract of land together with a house and, further, bequeathed to plaintiffs jointly a third tract of land with a barn situated on it. The total area of the three tracts of land bequeathed to the plaintiffs was slightly more than 5 acres, and the tracts were situated within the boundaries of the remaining 119 acres of Mrs. Ford's property. Because the tracts were so situated, Mrs. Ford also bequeathed to plaintiffs a private access servitude to Glasgow Avenue, which crossed a portion of the 119 acres and provided access to plaintiffs' property.

Mrs. Ford's succession subsequently sold the remaining 119 acres to a developer named 2590 Associates, LLC ("2590 Associates"), managed by Joseph T. Spinosa. With plans for a development named "Rouzan," which would consist of a combination of commercial, single family residential, and multifamily residential units, the developer applied to the East Baton Rouge Parish Metropolitan Council ("Council") to amend the Master Land Use and Development Plan to permit a use change from "Low Density

Residential" to "Planned Unit Development" and to rezone from "A-1 Single Family Residential" to a "Traditional Neighborhood Development" ("TND").

Following a hearing on January 23, 2008, the Council adopted the ordinance, which rezoned the property as a TND and changed the permitted use of the 119 acres to a "Planned Unit Development." Thereafter, on January 30, 2008, plaintiffs filed a petition for declaratory judgment against the Council, challenging the ordinance and alleging that the Council's actions were in violation of the Unified Development Code ("UDC") and an abuse of discretion. 2590 Associates intervened as the property owner.

Plaintiffs base their challenge of the rezoning ordinance on three alleged violations of the UDC, each of which they claim adversely affect their rights. The first alleged violation of the UDC relates to Section 8.218C(3)(b) of the UDC, which requires that all residents shall be within approximately 1/4 mile distance from existing or proposed commercial, civic, and open space areas. Plaintiffs alleged that the conceptual plan for Rouzan provides that all of the commercial development be on the edge of the TND on Perkins Road rather than mixed throughout the development, and that the distance between many of the residences and the commercial, civic, and open spaces is well in excess of 1/4 mile.

The second alleged violation pertains to Section 8.218H, the UDC requirement that prior to the approval of the conceptual plan, 2590 Associates was required to request and attend a pre-application conference and provide a statement indicating it has financial responsibility sufficient to complete the public improvements shown on the conceptual plan. Plaintiffs contend that no such financial statement was provided by 2590 Associates at a pre-application conference.

The third alleged violation concerns Section 8.218F of the UDC, relating to the control of the land within the TND. Plaintiffs note that they own and reside on property completely surrounded by, and included within the boundaries of, Rouzan and that they have the benefit of one or more servitudes of passage over a portion of the Rouzan development that provides access to their property to and from Glasgow Avenue. Thus,

plaintiffs maintain that 2590 Associates cannot meet the UDC requirement that it have complete, unified, and legal control of all land included in the TND.

In September 2008, plaintiffs filed a motion for summary judgment on the first two violations, which was denied by the trial court in a judgment signed on December 10, 2008. An application to this court by plaintiffs for supervisory writs was subsequently denied. (On appeal, the plaintiffs now re-urge their challenge to that interlocutory ruling, denying their motion for summary judgment and refusing to invalidate the ordinance on the first two alleged UDC violations.[1])

On January 21, 2010, plaintiffs filed a supplemental petition for declaratory judgment. According to this supplemental petition, after adopting Ordinance 14280, the Council filed several amendments to the UDC, with the intent and effect of rendering valid the prior alleged invalidities. Plaintiffs allege that these amendments are "unconstitutional as they violate the substantive due process clauses of the Louisiana and United States Constitutions in their application to this lawsuit to the extent they seek to divest plaintiffs of their rights acquired prior to the amendments."

Thereafter, on February 2, 2010, 2590 Associates filed its own motion for partial summary judgment on the first two violations, arguing that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. The matter was scheduled for hearing; but before the hearing on its motion, 2590 Associates filed an exception to plaintiffs' supplemental petition raising the objection of no cause of action. 2590 Associates alleged that plaintiffs failed to plead, with sufficient specificity, a valid constitutional claim and cannot identify a constitutionally protected liberty or property interest sufficient to support a substantive due process claim.

---

[1] The denial of a motion for summary judgment, in whole or in part is an interlocutory judgment that is not appealable. **Ascension School Employees Credit Union v. Provost Salter Harper & Alford, L.L.C.**, 2006-0992, p. 2 (La. App. 1 Cir. 3/23/07), 960 So.2d 939, 940; La. Code Civ. P. arts. 968 and 2083(C). However, when an unrestricted appeal is taken from a final judgment, the appellants are entitled to seek review of all adverse interlocutory judgments prejudicial to them, in addition to the review of the final judgment. **Price v. Kids World**, 2008-1815, p. 3 (La. App. 1 Cir. 3/27/09), 9 So.3d 992, 994.

2590 Associates' motion for partial summary judgment proceeded to hearing on March 29, 2010. The minute entry from the hearing provides, in pertinent part, as follows: "This matter came on for hearing on a Motion for Summary Judgment filed on behalf of intervenors, the 2590 Associates. ... The matter was argued by counsel, documentary evidence was introduced and the matter was submitted to the Court." After considering the evidence, the court granted the motion, designating same as a final judgment. The trial court signed a judgment on April 15, 2010, decreeing as follows:

> Plaintiffs' claims that the actions of the ... Council in adopting Ordinance 14280 approving the [TND] violated the [UDC] because (a) each residence was not within 1/4 mile of each and every commercial, civic, and open space, and (b) a statement of financial responsibility was not submitted at the pre-application conference are **DISMISSED WITH PREJUDICE.**
>
> It is further **ORDERED, ADJUDGED AND DECREED** that there is no just reason for delaying any appeal of this matter because the legal interpretation of the [UDC] is determinative of the rights of the parties to this matter. Therefore, this Court's Judgment granting 2590 Associates and the ... Council's summary judgment is now designated a Final Judgment pursuant to La. [Code Civ. P.] art. 1915(B).

Plaintiffs subsequently requested that the trial court provide written findings of fact and reasons for judgment, but none were provided. Plaintiffs appealed, challenging the trial court's December 10, 2008 judgment, denying their motion for partial summary judgment, and the April 15, 2010 judgment, granting the motion for partial summary judgment in favor of 2590 Associates and the Council.

In **Welch v. East Baton Rouge Parish Metropolitan Council**, 2010-1531 (La. App. 1 Cir. 3/25/11), 64 So.3d 244, this court dismissed the appeal, finding the trial court abused its discretion in certifying the partial summary judgment as final for purposes of appeal, finding that to allow an immediate appeal of that judgment, under the circumstances of the case, would only serve to encourage multiple appeals and piecemeal litigation that cause delay and judicial inefficiency. *Id.*, at p. 7, 64 So.3d at 249.

In the meantime, 2590 Associates filed a second motion for summary judgment as to plaintiffs' sole remaining claim, arguing that it was entitled to judgment as a matter of law because the land plaintiffs claimed to own was not within the boundaries of the TND. In an attempt to complete discovery prior to the hearing on this motion for summary

judgment, and within the discovery deadlines set by the court, plaintiffs notified 2590 Associates and the Council that they wished to take the depositions of Troy Bunch, director of the Planning Commission Staff, and Joseph T. Spinosa, manager of 2590 Associates. According to the record, Mr. Bunch's deposition was scheduled for and taken on the morning of April 23, 2010. 2590 Associates refused to make Mr. Spinosa available for deposition without a subpoena. A subpoena for Mr. Spinosa was subsequently issued, and, in response, 2590 Associates filed a multitude of motions including a motion to stay discovery and upset scheduling until after a ruling on the motion for summary judgment had been made. It also filed a motion to quash the subpoena. Plaintiffs countered with a motion to compel discovery and a motion to continue the motion for summary judgment, arguing that they could not effectively oppose the motion for summary judgment without the testimony of Mr. Spinosa. Plaintiffs argued that Mr. Spinosa had knowledge of and could identify documents to support their contention that the property they owned was made a part of the TND. According to the record, plaintiffs' motion to compel discovery and to continue the motion for summary judgment was summarily denied by the trial court on May 17, 2010, without a hearing.

The motion for summary judgment, as well as the motion to stay discovery and upset scheduling and motion to quash, were heard by the trial court on May 17, 2010. The May 17, 2010 minute entry provides as follows: "The matters were argued by counsel and submitted to the Court. Whereupon, the Court granted the Motion for Summary Judgment rendering the remaining motions moot." The trial court signed a judgment on May 27, 2010, granting summary judgment and dismissing plaintiffs' suit with prejudice. The plaintiffs appealed that judgment.

In **Welch v. East Baton Rouge Parish Metropolitan Council**, 2010-1532 (La. App. 1 Cir. 3/25/11), 64 So.3d 249, on the same date the other appeal was dismissed, this court reversed the judgment of the trial court granting 2590 Associates' summary judgment, and remanded the matter for further proceedings, finding that the trial court erred in considering the summary judgment without first setting the exception of no cause of action for hearing, and also, without first ruling on the plaintiffs' allegations that

the amendments to the UDC are unconstitutional. This court also agreed with the plaintiffs that there were still genuine issues of material fact as to whether the plaintiffs' property is within the boundaries of the TND, and also, that without being allowed to take Mr. Spinosa's testimony, plaintiffs were hindered in demonstrating 2590 Associates' intentions to include their property in the TND. Finding the trial court erred in proceeding and ruling on the summary judgment motion without first compelling the deposition of Mr. Spinosa, this court remanded the matter to the trial court for the taking of Mr. Spinosa's testimony as well as for a hearing to address the plaintiffs' constitutional challenge to the UDC and the defendants' exception of no cause of action to the plaintiffs' supplemental petition for declaratory judgment.

On remand, a hearing was held on August 29, 2011, on 2590 Associates' exception of no cause of action as to the plaintiffs' supplemental petition for declaratory judgment; and by judgment signed September 21, 2011, the exception was granted, and plaintiffs' supplemental petition, raising the unconstitutionality of the amendments to the UDC, was dismissed with prejudice.

On January 6, 2012, 2590 Associates filed another motion for summary judgment seeking dismissal of the plaintiffs' remaining claim – that the ordinance is invalid because the plaintiffs' property is surrounded by but not included in the TND.[2] Plaintiffs also filed another motion for summary judgment, on March 15, 2012, again asserting the same three bases upon which they claim the ordinance is invalid. Both motions were heard on April 23, 2012, and by judgment signed May 1, 2012, the trial court granted 2590 Associates' and the Council's motions for summary judgment, denied the plaintiffs' motion for summary judgment, and dismissed the plaintiffs' suit with prejudice. It is from this final judgment in this matter that the plaintiffs appeal.

[2] The record reveals that the defendant, East Baton Rouge Parish Metropolitan Council, filed a motion for summary judgment on April 16, 2012, specifically joining in the motion for summary judgment filed by 2590 Associates, and adopting its motion and memorandum in support as its own.

ASSIGNMENTS OF ERROR

In addition to the judgment of May 1, 2012, the plaintiffs also appeal the following interlocutory judgments: the December 10, 2008 judgment, which denied the plaintiffs' motion for summary judgment on the first two alleged violations of the ordinance; the April 15, 2010 judgment that granted 2590 Associates' motion for summary judgment on those same two violations; and the September 21, 2011 judgment, granting 2590 Associates' exception of no cause of action regarding the plaintiffs' supplemental petition. Thus, the following assignments of error, and all related issues, are now before this court:

1. The trial court erred in finding there were no genuine issues of material fact in 2590 Associates' April 23, 2012 motion for summary judgment and that 2590 Associates are entitled to judgment as a matter of law;
2. The trial court erred in not finding that plaintiffs were entitled to summary judgment as a matter of law;
3. The trial court erred in failing to grant the plaintiffs' September 19, 2008 motion for partial summary judgment;
4. The trial court erred in granting 2590 Associates' April 15, 2010 motion for summary judgment; and
5. The trial court erred in granting the exception of no cause of action to the plaintiffs' supplemental petition.

ISSUES PRESENTED

The foregoing assignments of error place before this court essentially all of the issues raised to-date in this litigation:

1. Whether the TND plan violates a mandatory provision of the UDC that requires all residents to be within ¼ mile distance of existing or proposed commercial, civic, and open space areas;
2. Whether the TND plan violates a mandatory provision of the UDC that requires the developer to provide a statement indicating it has the financial responsibility sufficient to complete the public improvements shown on the conceptual plan;
3. Whether the TND plan violates a mandatory provision of the UDC that requires the developer to have complete ownership and control over all the property within the boundaries of the TND;
4. Whether 2590 Associates has the complete ownership and control of all property within the boundaries of the TND; and
5. Whether the amendments to the UDC passed by the EBRP Metro Council intended to annul the violation of the ¼ mile requirement of the TND plan are unconstitutional as applied to the rights acquired by the plaintiffs.

APPLICABLE LAW/DISCUSSION/ANALYSIS

Summary Judgment

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo,* using the same criteria that govern the trial court's consideration of

whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2); **George S. May Int'l Co. v. Arrowpoint Capital Corp.**, 2011-1865 (La. App. 1 Cir. 8/10/12), 97 So.3d 1167, 1171. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in the light of the substantive law applicable to the case. **Gaspard v. Graves**, 05-1042 (La. App. 1 Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 06-0882 and 06-0958 (La. 6/16/06), 929 So.2d 1286 and 1289.

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2). A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case; however, a summary judgment shall be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. LSA-C.C.P. art. 966.

Issues Three and Four[3]

The issue before the trial court in the motions for summary judgment decided by the May 1, 2012 judgment concerned Section 8:218(F) of the UDC, requiring that the owner of the TND have complete ownership and control of all the property within the boundaries of the TND, which we must resolve in light of the plaintiffs' allegation that this requirement was not met.

In pertinent part, Section 8:218(F) of the UDC provides that "[a]ll land included in any TND District *shall be under the complete, unified and legal control of the applicant.*" (Emphasis added.) That provision also provides that upon request of the Parish, the applicant "shall furnish the Parish sufficient evidence to the satisfaction of the Parish that the applicant is in the complete, legal and unified control of the entire area of the proposed" TND. For the following reasons, we find the trial court erred in finding 2590 Associates met the requirement that it have the complete, unified, and legal control of all land included in the Rouzan development.

Are Lots A, B, and C Included in the TND District?

The evidence in the record conclusively establishes that the five acres bequeathed to the plaintiffs in Mrs. Ford's will were located in the middle of the 124 acres that comprised her property. Those five acres were divided into three lots, that sit in the middle of the surrounding 119 acres that were subsequently sold to 2590 Associates' predecessor and became the TND Rouzan. 2590 Associates claims that, although completely surrounded by the TND district, the plaintiffs' five acres are not included within the property rezoned as the TND district, and therefore, the ordinance is valid in compliance with the UDC requirement. They support this claim with the testimony of Troy Bunch, the director of the staff of the planning commission, that in his opinion, the plaintiffs' five acres are not part of the TND and were not rezoned TND; therefore, the requirement does not apply to those lots. The plaintiffs contend that

[3] We first address issues three and four as they form the bases upon which we find the trial court erred in finding no violation had occurred and because they were the issues before the court on the final motion for summary judgment that was granted and led to this appeal.

Mr. Bunch's opinion belies the evidentiary proof provided by a map of the property, showing the lots, albeit, not rezoned, are completely surrounded by and are included within the boundaries of the TND district. In any event, the plaintiffs maintain there is a genuine issue of material fact precluding summary judgment on the factual issue of whether their lots are included within the TND such that the UDC requirement is applicable thereto.

After reviewing the documentary evidence in the record, we agree with the plaintiffs that their three lots are "included within the TND district," such that the UDC requirements are applicable. Furthermore, for the following reasons, we find the existent servitude of passage prevents 2590 Associates from having the complete, unified, and legal control necessary for compliance with the UDC.

Servitude of Passage

The remunerative donations left to the plaintiffs through Mrs. Ford's last will and testament included approximately five acres, located in the middle of the 124 acres she owned, and was divided into three lots. Lot A was left to Bob Welch and included her home. Lot B was left to Daniel Hoover and included a home. Lot C, which included a barn, was left jointly to the plaintiffs. Those three lots had no direct access to a public road, and Mrs. Ford's will provided that the remainder of the property surrounding the five acres be left to other legatees. Thus, in connection with making those legacies, Mrs. Ford had a survey and map made dedicating a servitude of passage. The map was prepared, attached to, and made a part of the will. That map contains the following handwritten notation at the bottom left, and was signed and dated by Mrs. Ford:

> DEDICATION: The "30' Private Access Servitude" shown hereon is hereby dedicated as a private means of access to Tracts A, B, & C. No trees, shrubs, or plants may be planted, nor shall any buildings, fences or other improvements be constructed within or over said servitude so as to prevent or unreasonably interfere with the purpose for which the servitude is granted.
> The City-Parish has no responsibility for the maintenance of this servitude.

The servitude of passage provided access to Lots A, B, and C to and from Glasgow Avenue. Part of this servitude of passage was located on Lots A, B, and C; and part of

the servitude of passage was located on property surrounding Lots A, B, and C. (The exact location and dimensions of the servitude of passage was provided for on the map.) The servitude was apparent, and consisted, in part, of two gates, two bridges, and a gravel road.

Shortly after the death of Mrs. Ford, the legatees of the surrounding property sold their interest in the property to 2590 Associates.[4] The plaintiffs contend that all land included in the TND District is not within the complete, unified, and legal control of the applicant – 2590 Associates – because the servitude of passage crosses 2590 Associates' property. Because the servitude is a burden on the Rouzan property, plaintiffs maintain that it prevents 2590 Associates from having the full ownership and control of all of the property included in the TND. Plaintiffs also contend that because their property is within the boundaries of the development, the UDC required their consent to the zoning -- and that requirement was violated, as the plaintiffs never consented. Based on the following reasons and applicable statutes, we agree with the plaintiffs.

Applicable Law

A predial servitude is a charge on a servient estate for the benefit of a dominant estate. La. C.C. art. 646. In this matter, Lots A, B, and C are the dominant estates, for which the benefit of the right of passage is granted. The servient estate consists of whichever 2590 Associates-owned properties are subject to the right of passage by the owners of Lots A, B, and C. (See La. C.C. art. 724, providing that a predial servitude may be established on several estates for the benefit of one estate.) The owner of the servient estate is not required to do anything. His *obligation* is to abstain from doing something on his estate or to permit something to be done on it. He may be required by convention or by law to keep his estate in suitable condition for the exercise of the servitude due to the dominant estate. La. C.C. art. 651. Also, pursuant to La. C.C. art.

[4] In the purchase agreement, the legatees are identified by the entity formed to sell the property, Belle Meade Ranch, L.L.C., and the buyer is JTS Realty Services, L.L.C. (predecessor to 2590 Associates), represented by Joseph T. Spinosa, as manager.

706, the right of passage herein is an affirmative servitude, giving the plaintiffs, as owners of the dominant estates, *the right* to do certain things on certain Rouzan property, comprising the servient estate.

Predial servitudes, also, may be natural, legal, and voluntary or conventional. Natural servitudes arise from the nature of the situation of estates; legal servitudes are imposed by law; and voluntary or conventional servitudes are established by juridical act, prescription, or destination of the owner. La. C.C. art. 654. In this matter, inasmuch as the servitude of passage was "dedicated" by way of Mrs. Ford's last will and testament, a juridical act, it is a conventional servitude; although a right of passage may also be a legal servitude. See La. C.C. art. 689. (The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road.)

Given that the servitude of passage in this matter is conventional, the use and extent of such servitudes are regulated by the title by which they were created (i.e., Mrs. Ford's will and dedication), and in the absence of such regulation, by the following code articles. La. C.C. art. 697.

Pursuant to La. C.C. art. 705, addressing the conventional right of passage, the servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, utilities, or vehicles are permitted to pass through the servient estate. Unless the title provides otherwise, the extent of the right and the mode of its exercise shall be suitable for the kind of traffic or utility necessary for the reasonable use of the dominant estate. Pursuant to La. C.C. art. 748, the owner of the servient estate may do nothing tending to diminish or make more inconvenient the use of the servitude. If the original location has become more burdensome for the owner of the servient estate, or if it prevents him from making useful improvements on his estate, he may provide another equally convenient location for the exercise of the servitude which the owner of the dominant estate is bound to accept. However, all expenses of relocation are borne by the owner of the servient estate.

Discussion/Analysis

Based on the foregoing, it is indisputable that 2590 Associates does not have the complete, unified, and legal control of all land included in the TND district, as a portion of the land comprising the TND also comprises the servient estate charged with the obligations and duties imposed on the servient estate over which a right of passage exists for the benefit of the plaintiffs. The owner of the servient estate's obligation is to abstain from doing something on his estate or to permit something to be done on it. He may be required to keep his estate in suitable condition for the exercise of the servitude due to the dominant estate. **Dupont v. Hebert**, 2006-2334 (La. App. 1 Cir. 2/20/08), 984 So.2d 800, writ denied, 2008-0640 (La. 5/9/08), 980 So.2d 695. The statutory duties and obligations on 2590 Associates, as owner of the servient estate, impose legal limits and affirmative duties on it as owner, form restraints on the free disposal and use of the property, and leave it as the owner with less than the complete, unified, and legal control of the property. See **Thibco Investments, L.L.C. v. Thibodeaux**, 2012-427 (La. App. 3 Cir. 11/7/12), 102 So.3d 1043.

We also note that La. C.C. art. 708 provides that the establishment of a predial servitude by title is *an alienation of a part of the property to which the laws governing alienation of immovables apply.* Thus, the predial servitude of passage at issue herein not only affects the lack of complete control over those properties implicated by the servitude, but "ownership" issues are implicated as well, lending further support to our finding that the section requiring the owner of the TND to have the complete, unified, and legal control of the property therein has not been met, and as such, renders the ordinance invalid.

Thus, to this extent, no genuine issues of material fact remain; the UDC requirement that the applicant have the complete, unified, and legal control of all land included in the TND was clearly not met, and renders the ordinance invalid. Thus, the trial court erred as a matter of law in granting summary judgment in favor of 2590 Associates, LLC and East Baton Rouge Parish Metropolitan Council, and in denying the motion for summary judgment on the same issue filed by the plaintiffs.

Having found the ordinance was violated in this regard, warranting declaratory judgment in favor of the plaintiffs, we pretermit as unnecessary the remaining issues raised by the plaintiffs.

CONCLUSION

Accordingly, the judgment of May 1, 2012, is hereby reversed; and we render a declaratory judgment in favor of Bob Welch and Daniel Hoover and against East Baton Rouge Parish Metropolitan Council and intervenor, 2590 Associates, LLC, finding that Ordinance 14280 is invalid as the UDC requirement that 2590 Associates have the complete control of all the land included in the TND has not been met.

The judgment of April 15, 2010, is hereby vacated.

The judgment of September 21, 2011, is hereby vacated.

The matter is hereby remanded to the trial court for further proceedings consistent with our finding. The East Baton Rouge Parish Metropolitan Council and, intervenor, 2590 Associates, LLC, shall bear all court costs of the trial court proceeding and the costs of this appeal.

JUDGMENT OF MAY 1, 2012, REVERSED AND RENDERED. JUDGMENT OF APRIL 15, 2010, VACATED. JUDGMENT OF SEPTEMBER 21, 2011, VACATED. REMANDED.

BOB WELCH AND DANIEL HOOVER

VERSUS

EAST BATON ROUGE PARISH METROPOLITAN COUNCIL

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2012 CA 1440

KUHN, J., concurring.

The result of vacating the judgment is correct. The dismissal of the suit is inappropriate in this suit which seeks declaratory relief.