

EASEMENTS

I. INTRODUCTION

- A. An easement is a non-possessory right in the holder of an easement to make some use of land. In other words, an easement is a “lesser” interest in the fee estate that allows the party benefiting from the easement to make some use of the property, such as using it for access, installation of utility lines, etc.
- B. Dominant vs. Servient:
 - 1. The “holder” of an easement right, or the party that is benefiting from the easement, is referred to as the “dominant tenant”. Likewise, the property benefiting from an easement is referred to as the “dominant estate” or “dominant tenement”.
 - 2. The party “burdened” by the easement is referred to as the “servient tenant”. Likewise, the property burdened by the easement is the “servient estate” or “servient tenement”.
- C. Exclusive vs. non-exclusive easements
 - 1. Because an easement right is non-possessory, it generally does not allow the party benefited by the easement to exclude others or to stop them from also enjoying the property. In other words, easements are generally non-exclusive.
 - 2. However, easements can be specifically granted as exclusive easements, allowing the holder of the easement right the ability to exclude others.

II. TYPES OF EASEMENTS AND CREATION

- A. Appurtenant easements vs. easements in gross
 - 1. An appurtenant easement is an easement that is intended to benefit a particular piece of land (dominant estate/tenement) rather than a particular individual. In this case, there is also a servient estate/tenement—the land over which the dominant estate has its easement rights.
 - a. Example: An easement is granted to a shopping mall parcel for access across the neighboring property owner’s private road in order to allow shopping mall customers to get from the shopping mall parking lot to the street. This is an easement appurtenant to the shopping mall parcel, which is the dominant estate. The neighbor who has granted the easement owns the servient estate.

2. An easement in gross is intended to benefit a particular individual regardless of whether she owns any land. The land over which this individual has her easement rights is the servient estate/tenement. In the case of an easement in gross, there may be no dominant estate/tenement. The intent is to benefit the holder of the easement right, but the holder's right to use may well enhance the value of the property she uses in connection with her exercise of an easement right.
 - a. EXAMPLE: Jim grants Sally an easement to fish in his pond, which is located on his privately owned property. As part of this easement right Sally is also granted an easement to enter onto Jim's property to go to and from the pond. While Sally may live next door, she may move miles away, and the easement follows her; NOT her property. This is an easement in gross; Sally is the dominant tenant; Jim is the servient tenant; Jim owns the servient estate (with the pond on it). There is NO dominant estate.
3. Most of the easements you will come across in commercial real estate transactions are appurtenant easements.

B. Easement by implication, or quasi-easement

1. Narrow circumstances; court would be implying the easement as a matter of law—requires a court finding that the parties had intended to create an easement but simply failed to do so expressly
2. An implied easement can be created only when the grantor conveys a portion of the real estate he owns or when he divides a larger tract among separate grantees. In either case, a *severance of parcels* occurs, which is a necessary prerequisite to an implied easement.
3. An easement can be implied at the time of severance ONLY if the “easement” use existed prior to the severance. Susie owns 2 lots, one of which fronts on a street and one of which is landlocked. Susie's driveway crosses both lots. Susie decides to keep the landlocked parcel and sell off the frontage parcel. Susie forgets to reserve a driveway easement for ingress and egress to her parcel. In order for Susie to establish that an implied easement should be created, one of the prerequisites Susie must prove is that she used the driveway located on the frontage property to access her property PRIOR to the conveyance of the frontage property; i.e., PRIOR to the severance.

C. Easement by necessity

1. When property is divided in a way that leaves a part of the property without access to a road (i.e., landlocked), an easement of ingress and egress (“way by necessity”) is implied across the other part(s).
2. An easement by necessity exists only as long as the need exists. In other words, if the landlocked property later has direct access to another public road, the prior implied easement by necessity would go away.

D. Easement by prescription

1. Analogous to adverse possession—complicated concept but the bottom line is this—an easement by prescription essentially follows the line of thought that “it has been used for so many years for this purpose, an easement, though not expressly created, was created by prescription”. Example: Joe’s property is located between Sally’s home and the park. Every day Sally walks across Joe’s property with her dog to get to the park. Every day Sally walks back from the park across Joe’s property back home. Sally has been doing this for 30 years (very old dog). Sally’s argument that she has an easement by prescription would flow from this type of fact pattern.

E. Affirmative and negative easements

1. An easement is affirmative when it entitles the dominant tenant to use the servient tenement for a particular purpose, such as Sally’s right to use Jim’s fishing pond.
2. An easement is negative when it entitles the dominant tenant to prevent the servient tenant from using the property in a particular way. For example, if Ralph gave Carol an easement for a view corridor across Ralph’s property such that Carol’s view of the lake would never get blocked, Ralph could not build a tall structure, wall or other obstruction, or allow an obstruction (such as a tree), to hinder Carol’s rights under her view corridor easement. This is referred to as a negative easement; Carol’s view corridor rights allow her to compel Ralph to NOT do something.

F. How are easements created?

1. By express language, or grant. This is the most common method of granting an easement: by a deed or written conveyance. “I grant you a non-exclusive perpetual easement right to cross the westernmost 10 feet of my property.”

2. By reservation. In conveying land by deed, if the grantor wants to reserve certain easement rights, another way to create that easement is by reservation: “I convey fee interest in Lot 1 to you, Grantee, but I, Grantor, reserve a non-exclusive easement for ingress and egress over the driveway located on Lot 1.” This is a less common, but perfectly acceptable, manner of creating easements.

G. Easements distinguished from licenses.

1. Easements and licenses are similar property interests, but there are some important distinctions:
 - a. An easement is generally a perpetual, non-revocable right, while a license is often revocable and is typically limited in duration.
 - b. An easement is insurable from a title insurance standpoint, while a license is not typically insurable.
 - c. An easement is typically recorded; a license is not typically recorded
 - d. Generally speaking, an easement is a more powerful property interest than a license.
2. Requirements for creating an easement (generally the same as deed formalities); when these formalities are not complied with, the grantee has merely a license:
 - a. A written instrument
 - b. signed by the grantor and
 - c. delivered to the grantee
 - d. Easements are also typically recorded, which provides notice to third parties

H. Examples of certain types of easements:

1. Short form utility easement
2. Easement for ingress and egress over someone’s property
3. Cross-access or reciprocal easement and maintenance agreement
 - a. Shared driveway
 - b. Shopping center parking area

4. Construction easement
5. Conservation easement
6. Easement for light and/or air
 - a. No common law right to light or view—learn how to grow mushrooms
 - b. Air rights use
7. Condominium/Townhome Declarations
8. Declaration of Covenants, Conditions, Restrictions and Easements
 - a. Shopping mall REAs
 - b. Mixed Use High-Rise Declaration of CC&Rs

II. EXISTING EASEMENTS

- I. One of the most important jobs a real estate lawyer has during the title and survey review period during contract due diligence is to identify all existing easements, both benefiting and burdening the property that the purchaser is acquiring.
 1. Identify whether easement benefits or burdens the property, or both
 - a. If it benefits the property, make sure the easement is added as an insured parcel under the title policy. If it is not insured, and the purchaser is somehow deprived from its use of the easement, the purchaser will have NO recourse against the title company. VERY IMPORTANT.
 - b. If it burdens the property, determine to what extent, location, etc.
 2. Identify the type/nature of the easement
 - a. Is it a utility easement? Access easement?
 - b. Is the easement critical to the use of the property?
 - c. You need to get a full understanding of the purpose of the easement, its function, who is benefited, whether it is necessary, etc.
 3. Ascertain the location of the easement

- a. This is one of the CRITICAL elements of the title and survey review. If the easement is, say, a sewer line maintenance easement, make SURE it is not located under any improvements. If it is located under existing improvements, you must look to the language in the easement to determine whether that is a problem (typically anytime an easement runs under improvements that IS a problem).
4. Identify which party has maintenance obligations, if any
 - a. If the easement is a cross-access easement for a driveway, someone needs to maintain the driveway, repave it, plow it, etc. Typically a cross easement will obligate one of the parties to perform the maintenance and the other party will share in the maintenance costs.
5. Identify whether there are any costs/payment obligations associated with the easement
 - a. Same example regarding cross-access easement for driveway
6. Does easement provide for the right to obtain an estoppel from the other party/parties to the easement?
 - a. Sometimes easements, particularly if they are complex enough, contain rights to obtain an estoppel from the other party/parties to the easement to verify that all fees are current, all maintenance has been performed, there are no disputes, no pending litigation, etc.
7. Is there any way to get rid of a burdensome easement or somehow obtain title company relief?
8. Termination
 - a. Unity of ownership/merger—operation of law
 - b. Valid written release
 - c. Abandonment
 - d. Lapse of time for easements limited in duration (such as a temporary construction easement)
 - e. End of necessity
 - f. By default

- g. Invalidity
- h. In the case of an easement by prescription, failure by the dominant tenant (benefited party—Sally walking her 30 year old dog) to object to unreasonable interference with the easement by the servient tenant (Joe erects a fence across the easement area) or a third party; if the dominant tenant (Sally) fails to enforce that right, the easement will go away.

III. EASEMENTS THAT RUN WITH THE LAND

- A. “Running with the land” is a phrase that means that, no matter who owns the real estate, the easement (or other covenant) benefits or burdens the successor owner of the property. In other words, a beneficial easement that runs with the land will benefit future owners, while a burdensome easement that runs with the land will burden future owners. In the discussion of appurtenant easements and easements in gross, an appurtenant easement runs with the land of both the benefitted (dominant) and burdened (servient) estates (tenements). An easement in gross will run with the land as far as the burdened (servient) estate (tenement) is concerned, but it will not run with the land of the benefited (dominant) estate (tenement), because an easement in gross is personal in nature, and is not tied to the benefited party’s property ownership.

IV. PERSONAL EASEMENTS--These are easements in gross, as discussed above. They follow the person, not the real estate. They do NOT run with the land

V. ENFORCEMENT

- A. An easement is a property right, and the benefited party has the right to enforce it just as they would have the right to enforce a deed conveyance or another type of land grant.
- B. If the nature of the enforcement is such that the benefited estate/party is trying to compel the burdened estate/party to honor the rights granted by the easement, the best avenue of protection is making a title claim contemporaneously with a demand from the other party to the easement. A necessary precursor to making the title claim is that the easement was insured under the title policy.
- C. If the nature of the enforcement is such that the burdened party is trying to compel the benefited party to comply with the terms of the easement (such as paying necessary share of maintenance costs), you would seek compliance like you would in any other contractual dispute.
- D. Some easements provide for arbitration as an alternative dispute resolution mechanism.