

## 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.
  - 2. An easement in gross is intended to benefit a particular individual regardless of whether he owns any land. The land over which this individual has his 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 he uses in connection with his exercise of an easement right.
  - 3. Most of the easements 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.

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”.

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.
2. An easement is negative when it entitles the dominant tenant to prevent the servient tenant from using the property in a particular way.

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

II. 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 benefitted (dominant) estate (tenement), because an easement in gross is personal in nature, and is not tied to the benefitted party’s property ownership.

III. 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

IV. 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.

