

TITLE ISSUES

March/April 1998

Volume 7, Number 2

EASY DOES IT, WATCH YOUR STEP *An Overview of Easements*

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Title insurance is generally associated with insuring a purchaser's or lender's interest in a particular piece of real estate. The right to use an easement is often considered less important than unencumbered title of the insured parcel. An easement, however, can significantly affect the value of the insured parcel. Questions regarding the validity or use of an easement may result in a dispute among neighbors that may require protracted litigation to resolve.

In light of the potential for such unpleasantness, the practitioner is well advised to be aware of any easements related to the property to be insured. The following discussion is intended as a brief and general overview of some of the issues a practitioner will encounter when a title company is asked to insure an easement or a piece of real estate affected by an easement. Of course, each title order will have its own set of circumstances requiring individual attention by the title examiner. With these caveats in mind, let us proceed with the discussion of easements.

THE BASICS

An easement is a non-possessory right of the owner of one parcel of land to use the land of another. This right to use the other's land is limited to a particular purpose and may be further limited as to the form of usage.¹ An analysis of this definition raises some important points. An easement is an interest in land and not merely a contract right. The non-possessory feature of an easement differentiates it from fee title to land. An easement holder may not occupy and possess the land burdened by the easement; he or she may only use it for the purposes and in the manner established by the terms and conditions of the easement.²

The meaningful distinction between an easement and a fee simple estate is that the easement describes the right to the use of the land which is specific or restrictive in nature, while the title to the fee is the grant of title to the land itself.³ This difference is significant because a fee owner receives substantive and procedural rights unavailable to easement holders.

Easements are also distinguishable from leases. A lease is a right to exclusive possession of another's property for a specified period. The key difference here is between possession and use. In *Baseball Publishing Co. v. Bruton*, the Supreme Court of Massachusetts concluded that the "lease" of a wall for the purpose of maintaining a bill board was in fact an easement in gross because the wall was left in the possession of the owner, who still maintained the right to use the wall for any purpose not specifically granted or forbidden by the "lease."⁴

Easements are also distinguishable from licenses. Much of the litigation in this area, including *Baseball Publishing*, begins with one party arguing that the right in question is a lease—an irrevocable interest in land—and the other party asserting that the arrangement is a license—a revocable personal right—when in fact the interest might actually be an easement. As a result, essentially the same arrangement has been found to constitute a lease in some cases, a license in others, and in still other cases, an easement.⁵

CLASSIFICATION OF EASEMENTS

While the distinction between easements, leases, licenses, and fee estates may be somewhat murky, the differentiation among types of easements is little clearer. Easements are usually separated into easements appurtenant and easements in gross. An easement appurtenant is created to benefit the owner of another parcel, known as the dominant tenement. This easement will run over another tract called the servient tenement. The easement appurtenant therefore requires both a dominant and servient tenement. One owner's land must be burdened in favor of the estate of another. An easement appurtenant runs with the land. If the dominant tenement is sold, the easement will pass to the grantee, even though it is not specifically mentioned in the document of conveyance.⁶ Similarly, if the servient tenement is sold, the grantee takes subject to the easement.

An easement in gross does not require its holder to own or possess other land. There is a servient estate, but no dominant

one. For this reason, an easement in gross has been described as an irrevocable interest in the land of another. Whether an easement is appurtenant or in gross is determined by examining the grant of easement to detect the intention of the parties and the circumstances at the time of the conveyance. While the deed of conveyance need not include the word "appurtenant," the courts have often presumed that an easement is appurtenant rather than in gross. There is a constructional preference for easements appurtenant over easements in gross.⁷

This preference for easements appurtenant can be overcome by an examination of the land involved. If the easement does not benefit the owner of a particular piece of land, there is no dominant tract and the easement is in gross.⁸ Utility easements are usually held in gross. An easement appurtenant can not be converted into an easement in gross. The easement's classification will remain in effect throughout its usage.⁹

CREATION OF AN EASEMENT

Most easements are created by express grant contained in an easement agreement or deed or by reservation in a deed. An express grant, however, is not always necessary to create an easement.

An easement may be acquired by prescription and by implication as well as by express grant. Whether an easement by prescription is appurtenant or in gross is determined by the use of the servient estate. If the prescriptive use was for the benefit of the possessor of a particular piece of land, the easement is appurtenant. If it is not for such benefit, it is in gross. Implied easements may be deemed necessary for the use of the dominant estate. Clearly then, they are easements appurtenant to the dominant parcel.

TITLE INSURANCE ISSUES

A title insurer will be faced with two major concerns regarding easements: whether the easement can be insured for a dominant tract and whether an easement can be waived as an exception to the coverage provided by the title policy for a servient tract.

If the title company is requested to insure an easement for the first time, the following questions will be raised:

- a) Is the easement appurtenant?
- b) What land is benefited by the easement?
- c) Were the dominant and servient tenements owned by different parties at the time of the creation of the easements?
- d) Was the easement executed by or consented to by all of the lienholders of the servient tenement?

e) How was the easement created, and was the document creating it properly drafted, executed and acknowledged?

f) Does the document creating the easement state its purpose?

g) Does the document state consideration?

h) Is the easement described specifically as an easement appurtenant, binding on successors and assigns?

i) Does the easement document provide that it runs with the land?

j) Does the easement indicate a duration, or is it described as perpetual?

k) Is the easement an exclusive right or may other property owners use it as well?

l) Has an event occurred which may have terminated the easement?

If the examiner is satisfied that a valid easement has been established, the next step is to verify the continuing physical existence of the easement. The examiner will review an inspection report or survey of the easement parcel to confirm that the easement is open and in use. In some areas, a title company may actually send out an employee to physically inspect the property. Upon receipt of the survey or inspection report, the examiner will want to verify that there are no barriers or obstructions which interfere with the purpose of the easements. A survey include the show the easement in its written legal description and in the depiction on the plat. If the easement has been recorded, the chain of title should cover the easement parcel.

The examiner will also decide whether any events have occurred since the creation of the easement which may have resulted in its termination. If the dominant tenement has been resubdivided, split into multiple parcels or undergone a change in use, the underwriter will review the situation to determine the easement's viability.

Tax Sales

If an existing easement has its own tax number separate from the servient tenement, a tax search should be ordered to verify that there are no delinquencies affecting the easement. If an existing easement lies within a tax parcel affecting the entire servient tenement, however, tax delinquencies will not affect the easement. For any easements to be created at a closing, however, all tax delinquencies on the servient tenement must be paid or redeemed prior to the closing. A tax deed shall not extinguish or affect any easement which was creat-

ed on or over that real property before the time of the tax sale, unless the entire sold tax parcel consisted of only the easement parcel itself (35 ILCS 200/22-70).

Merger

The most subtle way of destroying an easement is the application of the doctrine of merger. The risk that the title to the dominant and servient tenements has merged is a dangerous possibility that must be addressed by the examiner. The doctrine of merger states that if ownership of the dominant and servient tenements becomes vested in the same party, the easement over the servient tenement will merge into the fee title of the dominant tenement and thus be destroyed. As an example, A owns Lot 1 and has an easement over adjoining Lot 2 for ingress and egress. If A buys Lot 2, the easement over Lot 2 will merge into A's fee title and will be destroyed. A's fee ownership of Lot 2 gives A far greater right in the land than the ownership of the easement, therefore the smaller right merges into the larger one. If A later conveys Lot 2 to C, the easement must be recreated by a new grant.

The examiner will search the title of both the dominant and servient tenements to look for an incidence of common ownership of both tenements in one party. If such commonality of ownership is located, a new easement must be created, even if the common ownership had been separated later in the chain of title.

In the recent Illinois case, *Ellis v. McClung*, the appellate court stated that a merger occurs when a dominant estate and the servient estates are owned by the same person, thereby extinguishing an easement by virtue of unity of title and possession, given that one has no need of an easement over one's own property. Ownership of both the dominant and servient estates must be identical in duration, quality, and all other circumstances of right. In *Ellis*, the Illinois appellate court held that where the evidence failed to show that the benefited property and the property subject to the easements was all owned by the same parties under identical circumstances, the easements were not extinguished by the doctrine of merger. These circumstances included the duration and the quality of the title.¹⁰

Abandonment

An easement created by a grant, deed or reservation can be destroyed or lost by the owner's voluntary abandonment. There is no duty to use or enjoy an easement as a condition of the right to retain the easement. Therefore, to constitute an abandonment, there must be either an overt act which affirmatively and unequivocally shows an intent to abandon the easement, or a failure to act. This carries the implication that the owner neither claims nor retains any interest in the easement. The dominant owner must clearly relinquish possession or use of the easement. The abandonment is complete the moment the intent to abandon and the relinquishment of possession or use unite.¹¹

Destruction by Agreement: Abrogation

An easement may be terminated by an agreement between the owners of the dominant and servient estates. This agreement is often known as an abrogation agreement because it abrogates or ends the easement. If the examiner encounters an abrogation agreement in the chain of title which terminates the easement to be insured, the easement is uninsurable.

Waiver of an Easement

If a customer requests that an easement be waived as an exception on the title commitment for a servient tenement, the title company will usually require that a validly executed abrogation agreement be recorded. This agreement must be executed by all parties having an interest in the dominant tenement. In some cases, a necessary parties search should be ordered to determine the list of parties who will need to join in the abrogation agreement.

This article incorporates Chicago Title Insurance Company underwriting guidebooks and examining manuals, as well as a September 1997 article on easements by Jeffrey Rezwin and Mary Scmuttenmaer of Chicago Title Insurance Company. These materials are incorporated without specific citation.

¹W. Burby, *Handbook of the Law of Real Property*, S23 (3rd Edition, 1965).

²The Law of Easements and Licenses in Land, Bruce and Ely, p. 1-2 (1988).

³*Park County Rod and Gun Club v. Department of Highways*, 163 Montana 372,377; 517 P. 2d 353,355 (1973).

⁴*Baseball Publishing v. Bruton*, 302 Mass. 54, 56, 18 N. E. 2d 362,364 (1938).

⁵R. Powell, *The Law of Real Property*, P. 430 (1987).

⁶*Taylor v. Lanahan*, 73, Ill. App. 3d 829, 832; 399 NE 2d 425, 428 (1977).

⁷The Law of Easements and Licenses in Land, Bruce and Ely, p. 2-5.(1988).

⁸The Law of Easements and Licenses in Land, Bruce and Ely, p. 2-6 and 2-7 (1988).

⁹*Curtin v. Franchetti*, 156 Conn. 387, 389; 242 A. 2d 725, 727 (1968).

¹⁰*Ellis v. McClung*, 291 Ill. App. 3d 448, 459,460 (1997).

¹¹Illinois Real Property Service, *Sales and Transfers*, Section 30:48 (1988).