

ANews

President's Message

Happy Holidays to all, and warmest wishes for a Healthy, Happy and Prosperous 2016!

Thank you for the honor and great privilege of serving as President of ACREL in 2015. It has been a very satisfying and gratifying year with substantial progress in a number of areas. Together, we have provided compelling, value-added programming and business opportunities to all of our Fellows. Our CLE is unsurpassed and the commitment to excellence exhibited by our speakers and authors working together with our Programs Committee and Publications Committee resulted in meaningful CLE content in a variety of formats (including, our Mid-Year (Scottsdale) and Annual (Baltimore) conferences, ACRELive webinar programming, ACREL-ALI programming, Bloomberg programming, the ACREL Papers and the Newsletter). Your commitment to the College's core values of collegiality and professionalism remain stronger than ever.

Looking back at the 2015 activities of the College, there have been many positive changes increasing our commitment to transparency and best practices for College governance. We have

grown to almost 1000 Fellows, and our annual budget approaches \$1,000,000. We completed a financial management and reporting manual memorializing our practices in those areas. Our Audit Committee and a Compensation Committee began life in 2013 and each is now an integral part of the College's DNA.

We've seen exemplary energy in our Substantive Committees. Newly elected Fellows are taking an active role in substantive committees and committee leadership, as well as speaking and

continued on p. 2

IN THIS ISSUE

2

Welcome Julie Burgess

3

ACREL Cares/ACREL Works
Baltimore Recap

4

Meetings Calendar

5

Setting the Law Straight on
Terminating Easements

8

ACRELades

9

Member Development Committee
Launches Small States Initiative

President's Message

continued from p. 1

writing opportunities for ACREL programming and within our Substantive Committees. Our Membership Committee performed a prodigious amount of work in reviewing candidates nominated for membership and the College welcomed forty-seven (47) new Fellows in 2015. Our Orientation and Integration Committee helped integrate our new Fellows and helped coordinate a number of city and regional meetings of the Fellows.

I am delighted to report that we have 51 nominations for admission to the College for 2016. Our Member Selection Committee is hard at work to recommend a slate of candidates for selection. Online voting for candidates begins December 7, 2015 and ends on January 13, 2016. During the balloting period, please go to Administrative/Online Voting in the blue navigation bar on the left on the ACREL website and vote for our 2016 ACREL Fellow candidates. New Fellows will be announced in the Spring, and we look forward to all of our new Fellows joining

us at our Annual Meeting in New York next October.

Please be sure to mark your calendar to join us in beautiful San Diego, California March 17-20, 2016. Our Mid-Year (Spring) meeting will be at the Fairmont Grand Del Mar (<http://www.fairmont.com/san-diego>). The hotel has (at this writing) a Tripadvisor rating of 5 stars and is ranked by Tripadvisor as first of 274 hotels in San Diego. We expect that registration materials for the San Diego meeting will be available in early January, and will send out an announcement to all when they are posted on the website.

I send each of you and your families my personal best wishes for the New Year and look forward to a great year for the College in 2016!



Welcome Julie Burgess!

Jill and Henri are delighted to share the news that **Julie Burgess** has joined ACREL as a new Executive Assistant. Julie comes to us from Management Solutions Plus, an association management company, where she was responsible for meeting arrangements for ACMA. She lives in Maryland with her husband, Stephen, and son, Griffin. She may be reached at jaburgess@acrel.org.

ACREL Cares/ACREL Works in Baltimore

ACREL Cares/ACREL Works volunteers spent an enjoyable and productive afternoon at Art with a Heart in Baltimore, MD during the 2015 Annual Meeting. Participants assembled a mosaic mural and centerpieces for future installation at a public site in Baltimore. The group's mission is "to enhance the lives of people in need through visual art." In support of this effort, it runs a variety of classes, community outreach programs, community service events and youth leadership programs.



STAFF BOX

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Editorial Committee
Charles L. Edwards, Chair
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Editor
Jill H. Pace
Executive Director

GET YOUR GEEK ON! TECH WIZARDS WANTED

ACREL's Tech Wizards
provide assistance to ACREL

Fellows and committees working with
ACRELSHares! We have a group of dedicated
Tech Wizards, but can always use more help.

If you can send an e-mail, open and save a file in
Word, or electronically file a pleading in federal
court, you are Tech Wizard material.

If you are interested in finding out more about
becoming a Tech Wizard, please contact Trev
Peterson at tpeterson@knudsenlaw.com or call
Trev at 402-475-7011.

No prior wizardry experience
required.



Meetings Calendar

2016 Mid-Year Meeting
March 17-20, 2016
The Grand Del Mar
San Diego, CA

2016 Annual Meeting
October 6-9, 2016
Waldorf Astoria
New York, NY

2017 Mid-Year Meeting
March 30-April 2, 2017
The Four Seasons Hotel
Austin, TX

ACREL Gatherings!

Please consider holding an
ACREL event in your city.

Fellows who have attended these gatherings have been pleased with the opportunity to
connect with their ACREL colleagues.

The event can be whatever you want it to be! You can have a speaker, discuss
prospective members or just have lunch or a cocktail party.

Options range from brown bags at a law firm to cocktails at a local hotel.

If you are interested in holding a session, please contact **Angela Christy** at
angela.christy@faegrebd.com, (612) 766-6833, or **Cathy Gale** at cgale@bhfs.com,
(303) 223-1139.

Setting the Law Straight on Terminating Easements

by Adam Leitman Bailey*

The American College of Real Estate Lawyers has improved my ability to practice law on so many levels. Besides the great minds from almost every state in the Union coming together to improve real estate law and to teach their trade, by learning about how other states handle the similar real estate issues, I have been able to expand my thinking and my idea and problem solving capacity. The below article covers terminating easements in New York State. Hopefully the below will assist practitioners in New York and other states handle their easement termination issues. Right now in New York City, finding real estate property to buy has been compared to finding the Loch Ness Monster or Bigfoot. Buyers of land have become more creative and aggressive than ever before in trying to develop property for an anxious public. This search has resulted in a demand to discover options to remove restrictions on property—including easements. This article examines the different means to extinguish an easement.

An easement is “an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles...protection... against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land and (d) is capable of creation by conveyance.”¹

To create an easement by express grant there must be a writing containing plain and direct language evincing the grantor’s intent to create a right in the nature of an easement rather than license.²

Easements can be created in four ways: express grant in writing, implication from prior use,

implication from necessity, and prescription. When the dominant estate is transferred, the easement passes to the subsequent owner through appurtenance clauses even if there is no specific mention of the easement in the deed.

There are eight ways to terminate an easement: abandonment, merger, end of necessity, demolition, recording act, condemnation, adverse possession, and release.

Abandonment

Although an easement can arise in a variety of ways, any easement can be extinguished by the easement’s abandonment by the owner of the dominant estate. In order to prove abandonment, it is necessary to establish not only an intention by the dominant estate holder to abandon the rights to the easement, but also some overt act or failure to act, which carries the implication that the owner neither claims nor retains any interest in the easement. However, the act must unequivocally reference the intent to abandon the easement and clearly demonstrate that the dominant estate owner is permanently relinquishing all right to the easement and not merely deserting it for some temporary period.³ Mere nonuse is not enough to constitute abandonment, even if for a long period of time.

Merger

An easement once granted may be ended by merger. Under the merger doctrine, an easement will terminate when the dominant and servient estates become vested in one person. To satisfy this, there must be a complete unity of the dominant and servient

* Adam Leitman Bailey is the founding partner of Adam Leitman Bailey, PC. Kelly T. Monassebian, a law student and extern at the firm assisted in the preparation of this article.

¹ Restatement of Prop. §450 (1944).

² 68 N.Y.2d 963, 965, 503 N.E.2d 99, 100, 510 N.Y.S.2d 543, 544 (1986).

³ *Gerbig v. Zumpano*, 7 N.Y.2d 327, 165 N.E.2d 178, 197 N.Y.S.2d 161 (1960).

continued on p. 6

Terminating Easements...

continued from p. 5

estates, meaning that one person or entity owns the entire plot of land. When only a portion of the servient or dominant estate is acquired, there is no complete unity of title. Therefore, the easement still stands.⁴ In other words, in order for such an abolition of the easement to take place, the entire burdened property and the entire dominant property must come under the ownership of the same entity.⁵

Many easements find their origins in situations where one owner owned the entirety of a piece of property that the owner subsequently decided to subdivide into various lots.⁶ The overall development plan may or may not have included the specific plan to burden some lots with the obligation to provide various easements for the benefit of other lots, such as the common easement of passage required for a landlocked inner lot. Just as such a grant in writing is only one means of creating an easement, merger—when various lots burdened by easements and benefiting from the easements come under common ownership—is one of the most important means for destroying an easement as it allows a developer a financial means to extinguish an easement as long as a willing seller is available.

End of Necessity

Easements created by necessity terminate when the necessity comes to an end.⁷ The most common example of easement by necessity will illustrate the difference. Imagine a landowner has a fairly substantial piece of acreage and decides to subdivide it into lots and one of the lots the owner creates is completely landlocked inside the other lots. As the owner sells off those lots, the sale creates an easement of access

on those lots enabling the owner of the landlocked lot to access the highway. This is an easement of necessity. Even when no agreement exists as to the right of access, the owner requiring access has a right to it. But when a new means of access becomes available and the original necessity perishes, the landowner loses its right of access.

Demolition

An easement in a building or land will terminate when that burdened building or land is completely destroyed. This doctrine arises out of *357 East Seventy-Sixth St. Corp. v. Knickerbocker Ice*,⁸ a case involving a party wall.

In *Knickerbocker*, parties were adjacent property owners. Plaintiff demolished the building on its property except for the party wall. Plaintiff intended to use the party wall for support of a garage. Before plaintiff built the garage, defendant demolished its building and the entire party wall. Consequently, plaintiff built an independent wall on its own premises, even though the party wall was suitable for continued use. The court found that when plaintiff demolished its building, it put an end to the necessity of support on its side of the wall. Defendant *put a definitive end* to the easement when it demolished its entire building and put an end to the necessity of the support on its side of the wall. By demolishing his structure, he demolished his need for the easement and therefore, in effect, demolished the easement.

Recording Act

A good faith purchaser for value is not bound by an easement which is not properly recorded prior to

⁴ *Will v. Gates*, 89 N.Y.2d 778, 784, 680 N.E.2d 1197, 1200, 685 N.Y.S.2d 900, 903 (1997).

⁵ *Id.*

⁶ *Will v. Gates*, 89 N.Y.2d 778, 680 N.E.2d 1197, 685 N.Y.S.2d 900 (1997).

⁷ The law requires that such an implied easement be actually necessary for the use and enjoyment of the property, not merely convenient to the owner of the dominant estate. *Paine v. Chandler*, 134 N. Y. 385 (1892).

⁸ 263 N.Y. 63, 188 N.E. 158 (1933).

continued on p. 7

Terminating Easements...

continued from p. 6

a purchase of the encumbered property.⁹ The easement does not terminate notwithstanding a failure to record the easement if the good-faith purchaser had actual knowledge and notice of any facts which would lead a reasonably prudent purchaser to make inquiries.¹⁰

Abuse

Abusing the rights one has under an easement is not a ground for extinguishing the easement. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment which would extinguish the easement.¹¹ That is not to say that the servient estate owner is without a remedy, but destruction of the easement is not that remedy.

Condemnation

A government can create an easement by way of condemnation. However, *Strnad v. Brudnicki* notes that a governmental agency can also abolish an easement by condemning it.¹² This could take a number of forms, depending on the facts of the situation. One such set of facts would be when the government has condemned a plot of land, which plot is subject to an easement in favor of the adjoining property owner, and the government removes the easement by condemning it.

Adverse Possession

Adverse possession may extinguish an easement. For example, in *Spiegel v. Ferraro*,¹³ the Court of Appeals discussed a situation in which there was a particular driveway that was the subject of an ease-

ment. However, the burdened estate owner fenced off that driveway and patrolled it with guard dogs.¹⁴ The court found that after 10 years of that fencing in, the land was now free of the burden of the easement.

The July 2008 Amendments to Article 5 of the Real Property Actions and Proceedings Law (RPAPL), which made sweeping changes to the adverse possession law, made no mention of easements. This author personally believes this was a mere oversight; however, as a result, the new law does not apply at this time, making all adverse possession of easement cases subject to the old law.

Release

An easement once granted may be ended by a release in writing stating that the owner of the easement gives away all rights and remedies including the ability to sue under the easement.¹⁵

Conclusion

Because the termination of an easement is one of the most misunderstood areas of real estate law, the number of cases on the subject has spiked. With every inch of New York City and other parts of New York being sought for fertile building ground, easement problems have reached a new plateau and too many misinformed professionals and their clients have been taking actions without any basis in law. Thanks to the courts and the title industry's vast wisdom in advising the real estate industry, many potential problems have been prevented or litigated justly during the real estate boom. Many other easements have gone unprotected and lost. Either way, never before has our land provided real estate professionals with so much excitement. ■

⁹ *Webster v. Ragona*, 704 A.D.3d 850, 776 N.Y.S.2d 347 (2004).

¹⁰ As the Court of Appeals stated in *Simone v. Heidelberg*, an encumbrance must be "record[ed] in the servient chain [of title]... so as to impose notice on subsequent purchasers of the servient land." *Simone v. Heidelberg*, 9 N.Y.3d 177, 877 N.E.2d 1288, 847 N.Y.S.2d 511 (2007).

¹¹ *Gerbig v. Zumpano*, 7 N.Y.2d 327, 165 N.E.2d 178, 197 N.Y.S.2d 161 (1960).

¹² 200 A.D.2d 735, 606 N.Y.S. 913 (2009), accord *Zutt v. State*, 99 A.D.3d 85, 949 N.Y.S.2d 402 (2d Dept. 2012).

¹³ 73 N.Y.2d 622, 543 N.Y.S.2d 15 (1989).

¹⁴ Perhaps the most extreme example ever of satisfying the "hostility" requirement of adverse possession.

¹⁵ *Andrews v. Cohen*, 221 N.Y. 148, 116 N.E. 862 (1917).

ACRELades

Congratulations to **Harris Friedus** and **Tony Natsis**, both named 2015 *Law360* MVPs in Real Estate. Overall, the 2015 class of *Law360* MVPs included 189 attorneys from 86 firms and covered 31 practice areas.

David S. Gordon has been inducted into the NAIOP New Jersey Chapter Hall of Fame in recognition of his distinguished record of service to the Commercial Real Estate Development Association over many years. David is also congratulated for his appointment as Co-Chair of Georgetown University Law Center's Advanced Commercial Leasing Institute for the 2015 and 2016 programs.

Texas Foreclosure Manual, 3rd ed, edited by **William H. Locke, Jr.**, along with Ralph Martin Novak, Jr. and G. Tommy Bastian, has been released by Texas Bar Books.

Send us your news for future issues!

Got Programs?

If you'd like to volunteer,
or communicate ideas for
Plenary Sessions,
Roundtables,
or Internal Webinars,
contact
programideas@acrel.org

Member Development Committee Launches Small States Initiative

ACREL's Member Development Committee ("MDC") identifies and encourages the nomination of qualified candidates who meet the Bylaws and Guidelines criteria for College membership. Each MDC member works directly with numerous Fellows in several states to vet the qualifications and credentials of potential nominees. During the upcoming year, besides our usual activities, we will implement our Small States Initiative which is specifically designed to promote nominations in the 26 states where there are 10 or less ACREL Fellows. A recent review of the College's demographic distribution reveals that among the 26 referenced "small states" there are only 102 Fellows below the age of 70. Among these states, there are 12 states with less than 6 active Fellows in each jurisdiction.

In order to revitalize and grow the membership in the small states, we need the assistance and participation of the entire College to identify qualified candidates both in your state and in other jurisdictions. Consider reviewing your local counsel referral lists, as well as sharing your direct knowledge of distinguished practitioners in other jurisdictions. Among these individuals, there may very well be qualified ACREL candidates. By so doing, you are meaningfully providing leads for development of qualified potential nominees.

As we move forward in 2016, you may be contacted by email or phone call from an MDC member. Please take the time to respond as we collectively seek to further strengthen the College's future by developing the highest quality of nominees in all states. Feel free to contact me if you have any questions or suggestions.

Thanks and Regards,

Bill Sklar
MDC Chair (2016)