

New Jersey Easements ~and~ Rights of Way

*New Jersey Society
~of~
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Presented by
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Biography of Gary R. Kent

Gary Kent is Integrated Services Director for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in Indiana, North Carolina and Iowa. He is in his 33rd year with the firm and his responsibilities include serving as project and account manager, safety, corporate culture, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a degree in Land Surveying; he is registered to practice as a professional surveyor in Indiana and Michigan. He has been chair of the committee on ALTA/NSPS Standards for ACSM/NSPS since and is the liaison to NSPS for the American Land Title Association. He is also past-president of the American Congress on Surveying and Mapping and a twice past president the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded “*Outstanding Associate Faculty*” and “*Excellence in Teaching*” awards for his efforts. Gary is on the faculty of GeoLearn (www.geo-learn.com), an online provider of continuing education and training for surveyors and other geospatial professionals. He is also an instructor for the International Right of Way Association.

Currently in his twelfth year on the Indiana State Board of Registration for Professional Surveyors, Gary is frequently called as a consultant and/or expert witness in cases involving boundaries, easements and land surveying practice. He regularly presents programs across the country on surveying and title topics, and he also writes a column for *The American Surveyor* magazine.

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“Don’t worry, it’s only an easement”

“This case is the culmination of a crusade by the sole member and manager of a limited liability company that operates for the purpose of holding title in a residential investment property in Sussex County. The member has fought valiantly against a deed restriction that governs the property. This crusade defies rationality from an economic perspective, and instead appears motivated by the member's genuinely and stridently held aversion to [the restriction]. Although that conviction may be understandable, her insistence that the holding company is not bound by the plain language of the publicly recorded deed restriction is not. As is often the unfortunate result of a moral crusade that is not properly grounded, this action has had outsized economic consequences to the crusader.”

HERON BAY PROPERTY OWNERS ASSOCIATION, INC. v. COOTERSUNRISE, LLC, Del: Court of Chancery 2013.

Definition, Nature, Types, and Elements of Easements

Easement

An easement is perhaps most simply defined as “*a limited non-possessory interest in the land of another.*”

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.

Black's Law Dictionary, Fifth Edition

An easement is an interest in land subject to the statute of frauds. cited in *Vander Heide v. Boke Ranch, Inc.*, 736 NW 2d 824 - SD: Supreme Court 2007. [internal citation omitted]

An easement is "defined as a nonpossessory incorporeal interest in another's possessory estate in land, entitling the holder of the easement to make some use of the other's property." *MAUTONE v. CAPPELLUTI*, NJ: Appellate Div. 2014. [internal citation omitted]

An easement is "an incorporeal right which is appurtenant to the ownership of the dominant estate," i.e., plaintiff's property, and "which constitutes a charge upon the servient estate," i.e., defendant's property (*Rahabi v Morrison*, 81 AD2d 434, 437-438 [1981]). "An easement is more than a personal privilege to use another's land, it is an actual interest in that land" (*Sutera v Go Jokir, Inc.*, 86 F3d 298, 301 [1996]; see *Rahabi*, 81 AD2d at 438). "In the case of an affirmative easement, the owner of the dominant tenement — the easement holder — acquires or is granted a right to use another person's land in a particular, though limited, way" (*Sutera*, 86 F3d at 302). *IRONWOOD, LLC v. JGB PROPS., LLC*, 99 AD 3d 1192 - NY: Appellate Div., 4th Dept. 2012.

Section 450 of the Restatement defines an easement as: 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 him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (e) is capable of creation by conveyance. FN 5 *Peterson v. Beck*, 537 NW 2d 375 - SD: Supreme Court 1995

An interest which one person has in the land of another. A primary characteristic of an easement is that its burden falls upon the possessor of land from which it issued and that characteristic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement. *Potter v. Northern Natural Gas Co.*, 201 Kan. 528, 441 P2d 802, 805.

An easement is “...a right, given in perpetuity, to do an act upon the land of another.” *Selvia v. Reitmeyer*, 156 Ind.Ct.App. 203, 208, 295 N.E.2d 869,873 (1973)

An easement may be defined as the right one person has to use the lands of another for a specific purpose and is a distinct estate from the ownership of the soil itself. *Kelly v. Rainelle Coal Co.*, 135 W.Va. 594, 604, 64 S.E.2d 606, 613 (1951). [Cited in *Newman v. Michel*, W. Va: Supreme Court of Appeals, 2009]

In Anglo-American property law, an easement is a right granted by one property owner to another to use a part of [the grantor's] land for a specific purpose.

Easement: "A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of a specific individual (easement in gross). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement." © 1994-2001 Encyclopedia Britannica, Inc.

An easement may be created expressly by a written deed of grant conveying to another the right to use for a specific purpose a certain parcel of land. An easement may also be created when one sells his land to another but reserves for himself the right to future use of a portion of that land. An easement may also be created by implication, when, for example, a term descriptive of an easement is incidentally included in a deed (such as "passageway"—a section of land to be used for passage). An easement by implication also arises when the owner of two or more adjacent parcels of land sells one lot; the buyer acquires an easement to that visible property of the seller necessary to the buyer's use and enjoyment of his lot, such as a roadway or drainage duct. When created in this manner the easement also arises as an easement of necessity.

In most of the United States and England, statutes permit the creation of an easement by prescription, which arises by virtue of a long, continuous usage of the property of another by a landowner, his ancestors, or prior owners. The length of time necessary for such continued use to ripen into an easement by prescription is specified by the applicable state statute.

When use of the easement is restricted to either one or a few individuals, it is a private easement. Use of a public easement, such as public highways or a portion of private land dedicated by a present or past owner as a public park (also known as a dedication) is not restricted.

An owner of an easement is referred to as the owner of the dominant tenement [or estate]. The owner on whose land the easement exists is the owner of the servient tenement [or estate].

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.

The ownership of real property often has been described as a “bundle of sticks”, with each stick being a right or privilege to enjoy the ownership thereof and dominion over all that the master of that property surveys (meaning “views”, not performs a land survey upon). The entire bundle of sticks would constitute fee simple absolute ownership of the realty. Ownership in fee of real estate generally carries with it all rights to do everything to and upon the land which is not proscribed by law, such as to operate a “common nuisance”, a hazardous waste landfill, or other limitation imposed by zoning, restrictive covenants, or development use standards.

An easement would transfer from the owner a general or a specific right to use the land without alienating, or selling, the land to the grantee. If general, the right would be granted to the general public and might be limited to ingress and egress. If specific, the easement would be granted to one or more specific individuals or entities, which may or may not be able to transfer or assign the easement to others depending upon the terms of the original grant. An easement also can “run with the land”, or be permanent or for a term certain, and will continue to burden the servient estate (tenement) despite the transfer of the benefited property or change in the individual(s) and/or entity or entities grantee(s). An easement is not an estate, *per se*, but is an interest in land.

Easements can arise by grant, by reservation, by will, by implication, by condemnation, by prescription, or by way of necessity. By grant—probably the most common manner in which an easement is created—the owner of the burdened land will expressly grant the easement. Ordinarily, third parties are not bound by the agreement unless it is recorded and “of record”, or “perfected”, thereby giving the world at large constructive notice of the easement agreement and its terms and conditions, its breadth and its limitations.

An easement by implication arises when an owner subdivides his land in such a way that the one(s) to which the land is conveyed has no convenient access other than across land retained by the conveyor. It then will be presumed that the conveyor also conveyed the right to reasonable access, a right-of-way, to and from the conveyed lands across the retained lands.

Conversely, when the conveying owner effectively creates a land-locked retained parcel, the owner will be presumed to have also retained the right to reasonable access to the retained parcel across the conveyed lands. The resultant easement is an easement by necessity. Some jurisdictions have codified (passed statutes legalizing) easements by necessity. Implication also arises where pipes or paths existed on the undivided parcel that suggested the parties involved in dividing the parcel intended to subject one parcel to an easement in favor of another.

Common law also provides for prescriptive easements – easements essentially established by long use.

Black's Law Dictionary defines access easement, affirmative easement, appendent (or appurtenant) easement, discontinuing easement, easement by estoppel, easement by prescription, easement in gross, easement of access, easement of convenience, easement of natural support, easement of necessity, equitable easements, implied easement, intermittent easement, negative easement, private or public easements, quasi easement, reciprocal negative easement, and secondary easement. The above terms are not mutually exclusive; one can have a private discontinuing reciprocal negative appurtenant access easement, for example.

In English property law, the right of a building or house owner to the light received from and through his windows was the "law of ancient lights". "Windows used for light by an owner for twenty years or more could not be obstructed by the erection of an edifice or by any other act by an adjacent landowner. This rule of law originated in England in 1663, based on the theory that a landowner acquired an easement to the light by virtue of his use of the windows for that purpose for the statutory length of time." [EBI] The doctrine has not gained wide acceptance by courts in the United States.

The converse of "easement" in English common law is "servitude," derived from Roman law and similar to easement except that while easement considered the benefit derived from the servitude, servitude related to the burden owed and the land "served" by the servitude constituted the dominant estate or tenement. Hence, the "servient tenement" or servient estate concept and terminology. The dominant tenement dominates or burdens the servitude.

Land servitudes are personal or real; personal servitudes being owed to a particular person and, when that person dies, the personal servitude is extinguished. Real servitudes are obligations or duties owed to the lands of another, having been created for the benefit of those lands. The servitude is a property right—one stick in the bundle of sticks—attached to the dominant tenement and generally passing with the land when it is conveyed or devised.

European civil law separates servitudes into rural and urban servitudes, with the nature of the obligation determining the type of servitude rather than its geographic location. Rural servitudes include rights-of-way of various types and purposes; urban servitudes include building rights such as rights of support, rights of view, and rights of drainage, sewers and sewerage, and utilities. Servitudes may be positive or negative.

A positive servitude obligates a landowner to permit or allow certain use of his property by another. A negative servitude obligates a landowner to refrain from making certain use(s) of his property, which will serve or offer some benefit to the owner of the dominant estate.

There is a wide variety of the types of easements recognized under the law. For example, South Dakota statutes recognize:

- (1) The right of pasturage;
- (2) The right of fishing;
- (3) The right of taking game;
- (4) The right of way;

- (5) The right of taking water, wood, minerals, and other things;
- (6) The right of transacting business upon land;
- (7) The right of conducting lawful sports upon land;
- (8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
- (9) The right of receiving water from or discharging the same upon land;
- (10) The right of flooding land
- (11) The right of having water flow without diminution or disturbance of any kind;
- (12) The right of using a wall as a party wall;
- (13) The right of receiving more than natural support from adjacent land or things affixed thereto;
- (14) The right of having the whole of a division fence maintained by a coterminous owner;
- (15) The right of having public conveyances stopped, or of stopping the same on land;
- (16) The right of burial;
- (17) The right of preserving land areas for public recreation, education, or scenic enjoyment;
- (18) The right of preserving historically important land area or structures;
- (19) The right of preserving natural environmental systems.¹

In some cases, a “**secondary easement**” exists in support of the primary express, implied or prescriptive easement.

The right to enter the servient property to maintain and repair facilities located within an easement is sometimes called a “secondary easement.” 25 Am.Jur.2d Easements and Licenses § 86 (1966). *Cunningham v. Otero County Elec. Co-op.*, 845 P. 2d 833 - NM: Court of Appeals 1992.

The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a secondary easement, a mere incident of the easement that passes by express or implied grant, or is acquired by prescription. . . This secondary easement can be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. 2 Thompson, *Real Property*, (Perm. Ed.), § 676, p. 343.

By definition a secondary easement goes with an existing easement and consequently would not have to be separately acquired. It either exists or it does not exist as an incident to an easement.

A secondary easement, then, is simply a legal device that permits the owner of an easement to fully enjoy all of the rights and benefits of that easement. Conversely, it is a legal device that prohibits an owner of a servient tenement from interfering with an easement owner's enjoyment of the full benefits and rights of an easement.

¹ South Dakota Codified Laws 43-13-2.

However, a secondary easement does not necessarily exist in every case. For example, a highway department or railroad company would not have a right of ingress or egress over all adjacent land to its rights-of-way. It is not needed because access is inherent in such easements or rights-of-way. Nor would one exist where access to a right-of-way, such as that taken in this case, already exists.

Loyd v. Southwest Ark. Utilities Corp., 580 S.W. 2d 935 (1979)

“When maintenance or repair are necessary in order for the dominant tenement owner to retain the enjoyment of his estate, he may enter upon the servient tenement to perform such maintenance and repair, while in the process doing no unnecessary injury to the servient estate. *Nixon v. Welch*, 238 Iowa 34, 24 N.W.2d 476, 481 (Iowa 1947) (holding that the dominant tenement owner had a right to enter onto the servient tenement to clear a drainage ditch where it had an easement that permitted it to drain surface water onto the servient tenement); *Laden v. Atkeson*, 112 Mont. 302, 116 P.2d 881, 885-86 (Mont 1941) (affirming an award to the dominant tenement owner of a ditch right of a designated route across the servient tenement and sufficient amount of land near the head of the ditch so as to accommodate necessary maintenance and that said route and land constituted a "secondary easement" implicit in the primary easement that established the ditch right); *Sullivan v. Donohoe*, 287 Mass. 265, 191 N.E. 364, 365 (Mass 1934) (holding that the defendant was entitled to take a sufficient amount of the plaintiff's property to conduct repairs and preserve an easement); compare *Guthrie v. Hardy*, 305 Mont. 367, 28 P.3d 467, 477 (Mont 2001) (affirming the order below enjoining the dominant tenement owner from using its easement for all but ingress and egress since maintenance was performed in a manner that imposed an undue burden upon servient estate).” *Vander Heide v. Boke Ranch, Inc.*, 736 NW 2d 824 - SD: Supreme Court 2007.

A power company ... does have the right, under a general right-of-way easement, to enter upon the land to maintain and repair its equipment to the extent necessary to the safe and effective operation of that equipment. A power company, however, in exercising that right of entry, may not inflict unnecessary damage on the land. Similarly, it has been held that a power company, in exercising its right to enter upon the land to maintain or repair its equipment, may not unreasonably increase the burden placed upon the servient tenement. It was decided very early that this right of entry included the right to enter upon the land to cut or trim trees or limbs which might be a danger to the power lines. (footnotes omitted). Footnote #4, *Larew v. Monongahela Power Co.*, 487 SE 2d 348 - W Va: Supreme Court of Appeals 1997. [internal citations from NE and ND omitted]

An affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do.*** In many cases, the use an owner of an affirmative easement is entitled to make enables him to intrude upon the land subject to the easement in ways which, were it not for the easement, would make him a trespasser upon the land. See Restatement of Property § 451, at 2911-12. *Quintain v. Columbia Natural Resources*, 556 SE 2d 95 - W Va: Supreme Court of Appeals 2001.

As society in general (other than the Supreme Court, apparently) has become more sensitive to private property rights, states have started adopting laws regulating the free use of secondary easements especially by utility companies.

New Jersey Permanent Statutes 48:3-17.10. Notice to landowner before entry

It shall be unlawful for any public utility to enter upon any lands in which it has acquired an easement or right-of-way, for the purpose of erecting, installing, moving, removing, altering or maintaining any structures or fixtures thereon, other than structures or fixtures owned by the public utility, or for the purpose of maintaining such easement or right-of-way by clearing, moving, cutting or destroying any trees, shrubs, plants or other growth thereon, unless and until not less than 5 days' notice of such entry shall be given to the owner of the lands subject to such easement or right-of-way personally or by certified or registered mail addressed to the owner at his address as shown by the assessment records of the municipality in which the land is situate, but nothing herein shall prohibit entry without notice in any case

- (a) Of an emergency, or
- (b) Where such notice is waived by the owner, or
- (c) Where the easement or right-of-way contains an express provision permitting entry without notice or upon notice of a lesser period of time, which is complied with, or
- (d) Where the owner consents to the entry of the public utility for such purposes, or
- (e) Where the structure, fixture, tree, shrub, plant or other growth, or portion thereof, to be dealt with as aforesaid, is located over, on, through or under any public street, road, highway or other public thoroughfare.

License

A license is different from an easement in that a license permits a specific use or permits certain specific acts to be done by the licensee on the licensor's lands.

A license confers a personal privilege, unassignable and terminable at will, to do something on another's land and which contains no [estate] interest in that land, and which is not required to be created by a conveyance. It does not pass to the heirs of the licensee, and does not give third parties a right to sue for interference with its use. An example is where an owner gives someone a right to park in the owner's front lawn to view a parade, or the Speedway City homeowner permits parking for the Indianapolis 500.

Licenses generally are revocable or for a specific time period. Black's Law Dictionary defines license as "the permission by competent authority to do an act which, without such permission, would be illegal a trespass, or a tort." "License with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property." Black's, citing *Timmons v. Cropper*, 40 Del Ch. 29, 172 A2d 757, 759.

[W]hen the use is permissive, it is by definition not adverse, but rather entails a revocable license. *LAMANNA v. Swan*, NJ: Appellate Div. 2012. [internal citation omitted]

A license does not imply an interest in land, but is a mere personal privilege to commit some act or series of acts on the land of another without possession any estate therein. *Millbrook Hunt v. Smith*, 249 A.D.2d at 282, 670 N.Y.S.2d at 909.

“Generally, a license is revocable at the will of the licensor. *Hector v. Metro Centers, Inc.*, 498 N.W.2d 113, 117 (N.D.1993); *Larson v. Amundson*, 414 N.W.2d 413, 418 (Minn.Ct.App.1987).” *Watertown v. DAKOTA, MN & EASTERN R. CO.*, 551 NW 2d 571 - SD: Supreme Court 1996.

"[A] license is not [generally] viewed as an interest in the land." Bruce, *supra*, § 11:1 & n.5 (listing cases). *Bolinger v. Neal*, 259 P. 3d 1259 - Colo: Court of Appeals, 4th Div. 2010.

[A] license is merely a permit or privilege to do what otherwise would be unlawful. *Lee v. North Dakota Park Service*, 262 N.W.2d 467, 470 (N.D. 1977).

"A license to occupy land is in the nature of a tenancy at will; but a license confers no title or interest in the land." 3 Thompson on Real Property § 1032 at 105. Cited in *Cutter Flying Serv. v. Property Tax Dept.*, 572 P. 2d 943 (1977), 91 N.M. 215

[A] license is a personal privilege to do some act or series of acts upon the land of another without possessing any estate in the land. A license may be created by parol and is generally revocable at the will of the owner of the land in which it is to be enjoyed, by the death of the licensor, by conveyance of the lands to another, or by whatever would deprive the licensee of doing the acts in question or giving permission to others to do them. *Stanolind Pipe Line Co. v. Ellis*, 142 Kan. at 105.

The Difference between a License and an Easement

Although there are similarities and, in some cases, one can have the characteristics of the other, the courts in the various states have outlined distinct differences between easements and licenses.

An interest in land in and over which it is to be enjoyed, and is distinguishable from a "license" which merely confers personal privilege to do some act on the land. *Lidell v. Mimosa Lakes Ass'n*, 6 NJ Tax 417 - NJ: Tax Court 1984

In contrast to either an easement or a profit, a license is simply the authority to enter the land of another and perform a specified act or series of acts without obtaining any permanent interest in the land. An important difference between a license and an easement or profit is that a license may be canceled or withdrawn at the option of the licensor. *Marshall Farms v. SNYDER CO.*, 189 Misc. 2d 784 - NY: Supreme Court, Madison 2001. [internal citations omitted]

An [easement is an] interest in land in and over which it is to be enjoyed, and is distinguishable from a "license" which merely confers personal privilege to do some act on the land. *Logan v. McGee*, Miss, 320 S2d 792, 793.

The Seventh District Court of Appeals analyzed the differences between an easement and a license in *Varjaski v. Pearch*, Mahoning App. No. 04MA235, 2006-Ohio-5268, 2006 WL 2846296, ¶ 11-12: "The basic definition of an easement is that it is the grant of a use on the land of another. * * * "When created by conveyance, the extent of the privilege of use to which the owner of an easement created by conveyance is entitled is dependent upon the provisions of the conveyance. The creation of an easement by conveyance consists in the creation of certain privileges of use. * * *"*Alban v. R.K. Co.* (1968), 15 Ohio St.2d 229, 231-32 [44 O.O.2d 198, 239 N.E.2d 22], quoting from 2 Casner, American Law of Property, Section 8.64. "Generally, the term "interest in land" means some portion of the title or right of possession, and does not include agreements which may simply affect the land. * * * Thus, easements are "interests in land" subject to the Statute of Frauds, but licenses are not.' *Ferguson v. Strader* (1994), 94 Ohio App.3d 622, 627 [641 N.E.2d 728] * * *. *Christiansen v. Schuhart*, 193 Ohio App. 3d 89 - Ohio: Court of Appeals, 5th Appellate Dist.

Yet, certain conditions associated with a license can change its nature from license to easement...

An irrevocable license is said to be an easement rather than a license. See *Kamenar RR. Salvage, Inc. v. Ohio Edison Co.* (1992), 79 Ohio App.3d 685, 691, 607 N.E.2d 1108, 1111-1112.; *American Law of Property, A Treatise on the Law of Property in the United States* (2 Ed.1974), Section 8.112.

[A]n executed license which becomes irrevocable is treated as an easement. *Industrial Disposal Corp of America v. City of East Chicago, Dept. of Water Works*, 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980).

Recordation of the document that creates an easements is just as important as recordation of any other conveyance of an interest in real property because parties who take title to the servient estate without notice – either constructive or actual – take title free of the easement. [See subsequent section in this handout on Recordation and Filing]

An unrecorded easement is a license and does not run with the land or bind subsequent purchasers without notice. *Continental Tele. Co. of the West v. Blazzard* 149 Ariz. 1, 5-6, 716 P.2d 62, 66-67 (App. 1986).

Profit (Profit à prendre)

A profit is a nonpossessory interest in land, similar to an easement, which gives the holder the right to take natural resources such as petroleum, minerals, timber, and wild game from the land of another. A profit à prendre, like an easement, can be appurtenant or in gross.

[A] profit a prendre is known in the law as a right to take something of value from the land of another. It is an incorporeal hereditament, since it is recognized as a right. Its name distinguishes it from such incorporeal hereditaments as the right to rents, franchises, and easements in that it denotes the special right to take something tangible from the land. Perhaps the most common illustrations of it are the right to take marl, loam, peat, sand, gravel, coal, and other minerals. *Moore v. Schultz*, 91 A. 2d 514 - NJ: Appellate Div. 1952.

This form of incorporeal hereditament may be, and sometimes is, owned in connection with and as an appurtenance to land regarded as a dominant estate, or it may be owned as a corporeal right in gross. Where a profit a prendre is in gross, it is true that it is in the nature of a personal privilege, but it is nevertheless a distinct, independent object of ownership which is also in its nature ordinarily alienable, assignable, and inheritable. *Moore v. Schultz*, 91 A. 2d 514 - NJ: Appellate Div. 1952.

[T]he grantor conveyed to the grantee a right, in common with other property owners, to use the lake and stream for "boating, bathing, fishing, etc." The grant of the right to bathe and boat is a pure easement; the right to fish is a profit a prendre held as an appurtenance to the land conveyed. *Mountain Springs Assn. v. Wilson*, 196 A. 2d 270 - NJ: Superior Court, Chancery Div. 1963.

[T]he nearest relation of a profit a prendre in the law is that which has been denominated an easement in gross. Indeed, any difference in their legal qualities is microscopic. *Moore v. Schultz*, 91 A. 2d 514 - NJ: Appellate Div. 1952.

A profit à prendre—in modern parlance, a profit—is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another." Restatement (Third) of Property: Servitudes § 1.2(2)(1998) [hereinafter Restatement]. Thus, a profit is a type of easement. *Lobato v. Taylor*, 71 P. 3d 938 - Colo: Supreme Court 2002.

"Profit a prendre" is defined as "[a] right exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof. A right to take a part of the soil or produce of the land." Black's Law Dictionary, 1376 (Rev. 4th Ed. 1968).

A "profit á prendre" is some right growing out of the soil. It is somewhat difficult to understand how, where one shoots a duck in the air while over the water, he is taking something from the soil, but undoubtedly the application of that term was made to this right, so that it would become in law an incorporeal hereditament, and thereby pass by grant and not become a mere license.

But, whatever inconsistencies appear, it is settled by all the authorities worth heeding that this right may be segregated from the fee of the land and conveyed in gross to one who has no interest and ownership in the fee, and when so conveyed in gross it is assignable and inheritable. *KRITZMAN DEVELOPMENT v. WALDEN PROPERTIES, LLC*, Mich: Court of Appeals 2008.

A profit is in the same nature as an easement but is distinguished by the fact that a profit may exist independently, without connection or appurtenance to other property, while an easement generally requires the existence of a dominant estate and a servient estate. (*Mathews Slate Co. v Advance Indus. Supply Co.*, 185 App Div 74 [3d Dept 1918].) [A] profit must be created by a grant in writing since the right conveyed by the profit constitutes the sale of an interest in land. (*Longo v Shaker Hgts. Dev.*, 11 Misc 2d 278 [Sup Ct, Albany County 1958], appeal dismissed 10 AD2d 784 [3d Dept 1960].) Thus, an important difference between an easement and a profit is that the beneficiary of a profit holds an interest in the land which may be assigned or inherited while an easement is personal and may only be conveyed with its appurtenant estate. (*Saratoga State Waters Corp. v Pratt*, supra at 443-445.) *Marshall Farms v. SNYDER CO.*, 189 Misc. 2d 784 - NY: Supreme Court, Madison 2001.

A profit differs from a mineral estate in that a mineral estate can be severed, and exist as a separate estate, from the rest of the real estate, whereas a profit is merely a non-possessory interest in the land.

Because of the necessity of allowing access to the land so that the resources may be gathered, every profit and mineral estate contains an implied easement for the owner of the profit to enter the other party's land for the purpose of collecting the resources permitted by the profit.

A profit must also operate as an easement in order to allow a person onto another's land for the purpose described in the grant... Therefore, it must satisfy the Statute of Frauds. *High v. Davis*, 283 Or. 315, 322, 584 P.2d 725 (1978).

The owner of a mineral estate may explore, develop, and produce oil and gas and, generally, use as much of the surface of the land as is reasonably necessary to exercise their rights. The owner of the mineral estate can also transfer these rights to another party. Such transfers are often accomplished by executing oil and gas leases.

Rights of Way

Originally the term "right of way" referred to a right of easement, i.e. an easement, specifically for passage purposes such as for a railroad, pipelines, pedestrians, vehicles, aqueducts, etc.

Since then, the term has come to have another meaning which is the *land burdened by the easement* even if the land has been dedicated in fee. Hence in the common use of the term a "right of way" may be owned in fee, or something less.

A right-of-way is an easement and is usually the term used to describe the easement itself or the strip of land which is occupied for the easement. 25 Am. Jur. 2d Easements & Licenses, §§ 1 and 8. [emphasis added]

There appears to be considerable conflict in the cases as to the construction of deeds purporting to convey land, where there is also a reference to a right of way. Some of the conflict may arise by virtue of the twofold meaning of the term "right of way," as referring both to land and to a right of passage. In some cases, particularly where the reference to right of way is in the granting clause, or where there are other relevant factors, the courts have held that an easement only was intended. In other cases, the deed is held to convey a fee simple estate in the land, the courts generally basing their holdings on the ground that the granting clause governs other clauses in the deed, that the reference to right of way did not make the deed ambiguous (therefore barring extrinsic evidence from consideration), or that the reference to right of way was to land and did not relate to the quality of the estate conveyed.

Other cases purporting to grant land contain language relating to the purpose for which the land conveyed is to be used. Some cases hold that such language is merely descriptive of the use to which the land is to be put and has no effect to limit or restrict the estate conveyed; in others, the position is taken that such language indicates an intention to convey an easement only and not a fee. Many cases appear to turn upon the nature of the reference to purpose, the location of the reference in the deed, and the presence of other factors and provisions bearing on the question of intent. *Maberry v. Gueths*, 777 P. 2d 1285 - Mont: Supreme Court 1989. [emphasis added]

In one context, the term ["right of way"] means "[t]he right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path". Alternatively, "right-of-way" is "a general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to for transportation purposes. When used in this context, right-of-way includes the roadway, shoulders, or berm, ditch, and slopes extending to the right-of-way limits under the control of state or local authority." *Akers v. Saulsbury*, 2010 Ohio 4965 - Ohio: Court of Appeals, 5th Appellate Dist. 2010. [emphasis added]

On cursory inspection, it is apparent that the [Colorado] General Assembly has used the term "right-of-way" in a number of different ways. Most commonly, it is used to indicate precedence in traffic rather than as a reference to property interests at all. See, e.g., § 24-10-106(1)(d)(II), C.R.S. (2010) (waiving governmental immunity for dangerous conditions caused by the failure to realign a stop sign or yield sign that was turned "in a manner which reassigned the right-of-way upon intersecting public highways, roads, or streets"). See generally Black's Law Dictionary 1440 (9th ed. 2009). Even when the term is used in reference to property interests, however, its various nuances of meaning have long been recognized. See *Hutson v. Agric. Ditch & Reservoir Co.*, 723 P.2d 736, 739 (Colo.1986) (discussing *McCotter v. Barnes*, 247 N.C. 480, 101 S.E.2d 330, 334 (1958)); see also *Bouche v. Wagner*, 206 Or. 621, 293 P.2d 203, 209 (1956) (citing *Terr. of New Mexico. v. United States Trust Co. of New York*, 172 U.S. 171, 183, 19 S.Ct. 128, 43 L.Ed. 407 (1898)).

In the context of real property generally, the term "right-of-way" is perhaps most commonly used to describe a limited property right. See *Terr. of N.M.*, 172 U.S. at 182, 19 S.Ct. 128 ("It is sometimes used to describe a right belonging to a party, a right of passage over any tract" (quoting *Joy v. City of St. Louis*, 138 U.S. 1, 44, 11 S.Ct. 243, 34 L.Ed. 843 (1891))). See generally Black's Law Dictionary 1440 (9th ed. 2009). This limited property right may be a type of easement, see *Hutson*, 723 P.2d at 739 ("In the absence of additional descriptive language, 'right-of-way,' when used to describe an ownership interest in real property, is traditionally construed to be an easement."), but at times it has also been characterized as a limited fee interest, see e.g., *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 118, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957) (discussing "a line of decisions by the United States Supreme Court describing the rights-of-way under early railroad land grants as limited fees").

Especially in the context of railroads and highways, however, the term is also commonly used more broadly in reference to the strip of land on which the highway or railroad tracks will be constructed. See *Terr. of N.M.*, 172 U.S. at 182, 19 S.Ct. 128 ("[I]t is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.' That is, the land itself, not a right of passage over it." (quoting *Joy*, 138 U.S. at 44, 11 S.Ct. 243)). See generally Black's Law Dictionary 1440 (9th ed. 2009) ("The right to build and operate a railway line or a highway on land belonging to another, or the land so used The strip of land subject to a nonowner's right to pass through." (emphasis added)). In this sense, the term is merely descriptive of the purpose to which the land is being put, without reference to the quality of the estate or interest the railroad company or highway authority may have in the land. See *Hutson*, 723 P.2d at 739; *McCotter*, 101 S.E.2d at 334-35 ("It is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the 'right of way'....").

[Emphases added]

Dept. of Transp. v. Gypsum Ranch Co., LLC, 244 P. 3d 127 - Colo: Supreme Court 2010

[a right of way is the] right to cross over the land of another, an easement. *Sanxay v. Hunger*, 42 Ind. 44, 48 (1873).

[A right of way is] [t]he strip of land upon which a road or railroad is constructed. See *Marion, Bluffton and Eastern Traction Co. v. Simmons*, 180 Ind. 289, 292, 102 N.E. 132, 133 (1913).

New Jersey Permanent Statutes 48:3-17.9. Definitions

As used herein:

- (a) "Public utility" means any public utility defined in 48:2-13;
- (b) " Right-of-way " means the area devoted to passing over, on, through or under lands with utility plant facilities as part of a way for such purpose;
- (c) "Easement" means privileges essential or appurtenant to the enjoyment of a right-of-way; ...

Rights of way can be created in a number of ways and in fee or lesser interests, including by the exercise of eminent domain, which is sometimes limited statutorily to acquisition of an easement interest only. In some western states, statutes have established roads along all section lines.

Whether a conveyance of a right of way conveys a fee or an easement is dependent on the words of the grant and the laws of the state.

[When in the conveyance] the word "right of way" is used to establish the purpose of the grant [it] . . .presumptively conveys an easement interest. *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.*, 126 P. 3d 16 - Wash: Supreme Court (2006).

In some states, however, dedications of rights of way are, either by statute or by the wording of the dedication itself, construed to be fee dedications; the fee of the dedicated street being vested in the municipality. (See the subsequent section in this handout on Dedications)

In the traditional sense, while the roadway is the actual portion of the public way over which vehicles actually pass, the 'right-of-way' is the entire expanse of land taken out of unrestricted private ownership—usually a set width with ample room for side ditches and walks, safety side slopes, embankments, noise suppression or retaining walls, and various other ancillary features such as traffic control devices and telegraph lines.

Though the owner of a fee in an easement existing for public road purposes may technically have title to the surface of the way not useful or necessary in the construction or maintenance of the road, he can not utilize it in any manner that will interfere with the use by the public or with the control of the way by the State. 39 C.J.S., Highways, § 138; 25 Am.Jur., Highways, Section 135.

A right-of-way, granted or created in the absence of an express grant, establishes a privilege or license to pass over another's land (or under in the case of a tunnel and over aerially in the case of a bridge overpass or skywalk). The benefit may extend to an individual, to a group or class of people, or generally to the public. However, there are specific rules that guide the establishment of public roads across private property when there is no express grant.

Issues frequently arise as to whether or not a conveyance of real property abutting a road or railroad that exists by easement (i.e., the abutting owner holds the underlying fee title in all or part of the road) also conveys the underlying fee interest in that road. The weight of authority on this issue differs by state.

It is the recognized presumption of law in [New Jersey] that deeds sold from maps are construed as passing title to the center of the street, subject to such easement as may have been legitimately obtained. The rule adopted ... was that "nothing short of an intention expressed in *ipsis verbis*, to 'exclude' the soil of the highway, can exclude it." Chief Justice Beasley, writer of the opinion in the last-cited case, states the philosophy of the rule thus:

"In our practice, in the conveyance of lots bounded by streets, the prevailing belief is, that the street to its centre is conveyed with the lot. Among the mass of the people it is undoubtedly supposed that the street belongs, as an appurtenance, to the contiguous property, and that the title to the latter carries with it a title to the former. This belief is so natural that it would not be easily eradicated. As a general practice, it would seem preposterous to sever the ownership to these several particles of property. Under ordinary circumstances, the thread of land constituting the street is of great value to the contiguous lots, and it is of no value separated from them. It would rarely occur that the vendee of a city lot would be willing to take it separated in ownership from the street, and it would as rarely occur that a vendor would desire to make such severance. In my own experience, I have never known such an intention to exist, and it is safe to say that whenever it does exist, the conditions of the case are peculiar. And it is the very general notion that these two parcels of property are inseparably united, and pass as a whole by force of an ordinary conveyance, that accounts for the absence of any settled formula in general use for the description of city lots in a transfer of their title. Upon an examination of such conveyances, it would, I am satisfied, be disclosed that the utmost laxity in this respect prevails. The property conveyed is indiscriminately described as going to the street and running along it, or as going to one side of such street and thence running along such side. Such discriminations are not intentional, the purpose being to convey all the interest that the seller has in the property and in its belongings, and the mode of accomplishing this purpose is not the subject of attention, the street lot, as I have said, being regarded as a mere adjunct of the property sold, and worthless for any other use."

Wolff v. Veterans of Foreign Wars, Post 4715, 74 A. 2d 253 - NJ: Supreme Court 1950

The rights of utilities to locate facilities on public property and in public rights of way are governed by state law.

When a public utility locates its facilities in a public right of way without benefit of its own easement separate from the right of way, generally it does so at its own risk.

[U]nder the "long-established common law principle ... a utility forced to relocate from a public right-of-way must do so at its own expense." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 34, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983). [cited in *Southwestern Bell Telephone, LP v. Harris County Toll Road Authority*, 282 SW 3d 59, Supreme Court of Texas, 2009]

The rights of utilities to locate in railroad rights of way are controlled by the railroads to the extent that they have the right to grant licenses or easements. Utilities are generally allowed to cross railroad rights of way, although normally only a license will be granted for that purpose.

Issues also arise as to entitlement to royalties when municipalities wish to lease or grant rights for TV cable, fiber-optic phone and communication lines, etc., within the public right-of-way. Generally, if the right-of-way is dedicated and accepted into the public maintenance system in fee, the municipality is entitled to collect revenue for ancillary uses, whereas if the right-of-way is dedicated for limited purposes of ingress and egress (as opposed to "transportation", which arguably could be more liberally construed), the servient tenement holder – generally the adjacent landowner – more likely would retain rights to lease revenue, or to sell the retained rights (of the "bundle of sticks", including the "stick" involving such alienable rights).

Those owning property abutting a street or highway right of way enjoy certain private rights separate and distinct from those that the public enjoys. Such rights can even survive vacation of the street, although it may depend on the necessity of the use.

Although no map was filed by a developer nor formal action taken..., [the] sale, development, and subdivision of the lands at issue resulted in an equally effective dedication entitling adjoining landowners to access and creating a private interest in the right-of-way. *SOHO PROPERTIES, LLC v. CENTEX HOMES, LLC*, NJ: Appellate Div. 2013. [internal citations omitted]

In certain instances, a dedication also gives rise to private rights. When a developer plots a tract of land into building lots and prepares a map disclosing streets abutting such lots, if he conveys by reference to the map and the purchaser relies thereon, an intention to dedicate such streets may be assumed. In such case, even in the absence of an acceptance by the municipal authorities or in case of a vacation, the individual purchaser of a building lot abutting one of such streets in a development retains a private easement to the extent of a perpetual and indefeasible right of access to his lot over the dedicated street. At the least this amounts to a right of passage from his lot to the next adjoining public street on each side. *State v. Birch*, 280 A. 2d 210 - NJ: Appellate Div. 1971. [internal citations omitted]

The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access. See *Smith v. State Highway Comm'n*, 185 Kan. 445, 346 P.2d 259, 266 (1959); *City of Columbus*, 667 N.E.2d at 12. Although we have never detailed the specifics of these rights, our decisions have recognized them.

Under this doctrine, when a public road is opened adjacent to private property, the owner of the abutting property obtains a right to access the public road by operation of law, see *Southern Furniture Co. v. Department of Transp.*, 133 N.C.App. 400, 516 S.E.2d 383, 386 (1999), and when a public road is discontinued or abandoned, the abutting landowner retains the private right of access. See *Gillmor*, 850 P.2d at 437-38 (abandonment of public right-of-way has no effect on right of abutting landowner to use way). The right of access has two requirements: (1) the person claiming the right must own land that *abuts* the road, and (2) the road must be a *public* road. See *Spurling v. Kansas State Park & Resources Auth.*, 6 Kan.App.2d 803, 636 P.2d 182, 183 (1981).

Okemo Mountain, Inc. v. Town of Ludlow, 762 A. 2d 1219 - Vt: Supreme Court 2000 [internal citations omitted]

That claimant had record title to the southerly one half of the road is not disputed. In these circumstances as the successor in interest of the grantee of the original proprietor, she must be deemed to have acquired a private easement in the entire public highway lying in front of her appurtenant lands which survived its abandonment by the public authorities. (*Holloway v. Southmayd*, 139 N.Y. 390.) *Watkins v. State*, 15 AD 2d 987 - NY: Appellate Div., 3rd Dept. 1962.

The cases of *Reis v. City of New York* (188 N.Y. 58) and *Matter of Hoyt* (162 App. Div. 469, affd. 213 N.Y. 651) hold that a grantee of a lot sold with reference to a filed map has a private easement on a road shown on the map, and has rights which must be recognized if the road is closed. (FootNote #14, *MERRITT ESTATES v. VIL. OF ELMSFORD*, 30 Misc. 2d 935 - NY: Supreme Court 1961).

"[A] plat can give rise to an express easement or dedication for private or public use." *Bloomfield v. Weakland*, 224 Or.App. 433, 199 P.3d 318, 326-27 (2008); see *Gray v. Osborn*, 739 N.W.2d 855, 861 (Iowa 2007); *Barry Simon Dev., Inc. v. Hale*, 210 S.W.3d 312, 315 (Mo. Ct.App.2006). Thus, where "a developer sells lots according to a recorded plat, the grantees acquire an easement in any areas set apart for their use." *Walker v. Duncan*, 236 Ga. 331, 223 S.E.2d 675, 676 (1976); see *Immanuel Baptist Church v. Barnes*, 274 S.C. 125, 264 S.E.2d 142, 144 (1980) ("When the owner of a tract of land lays it out in streets and lots on a plat and sells those lots by deeds referring to the plat, normally the legal effect is the creation and conveyance of private easements in the streets to the grantees."); *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E.2d 452, 455-66 (App.2008) (similar); *Boucher v. Boyer*, 301 Md. 679, 484 A.2d 630, 636 (1984) (similar). *Bolinger v. Neal*, 259 P. 3d 1259 - Colo: Court of Appeals, 4th Div. 2010.

The owner of property abutting upon a street has an easement in such street for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself. *Flake et al v. Thompson*, 460 S.W.2d 789 (1970). [internal citations omitted]

Highway Holding addresses the issue of whether and when, even after streets are vacated, private rights to the streets continue to exist in adjoining land owners. The case stands for the proposition that lot owners who purchased did so in reliance on the filed maps, thereby acquiring a perpetual and indefeasible right of access to at least the adjoining street. The extent of the "implied grant of a private way in the street is confined to such use of the road or the street as is necessary for the beneficial enjoyment of the lot conveyed." *SOHO PROPERTIES, LLC v. CENTEX HOMES, LLC*, NJ: Appellate Div. 2013. [internal citations omitted]

[V]acation of the street does not in the least impair private rights. It is only a surrender or extinction of the public easement"; and that case was cited in *Downs v. Mayor, etc.*, of South Amboy, 116 N.J.L. 511 (E. & A. 1936), for the proposition that the mere vacation of a public street by a municipal body does not involve the infringement of a private right. It is only a surrender or extinction of a public easement.

Plaintiffs have an easement over the 50-foot right of way, shown on the map and referred to in the deeds. That easement continues despite the vacation of so much of Packanack Avenue as abuts the plaintiffs' property and despite the fact that the municipality reserved from the vacation ordinance a right of way for use as a foot path the center 20 feet in width of Packanack Avenue opposite plaintiffs' property.

"Where the street was subsequently vacated by public authority and the owner had made substantial improvements upon the abutting property, and the result of the vacation was that he was left without access to a public street, then such owner has a right constitutionally to recover for such damage based upon the assertion of his private right in the street as distinguished from the public right in the street." The court then went on to say that "since the private right of way is in the nature of an easement the circumstance of subsequent acceptance or non-acceptance by the municipality are immaterial considerations." It would therefore seem to the court that there having been no substantial improvements upon the abutting property and the plaintiffs having their private right in the street by virtue of the filing of the map and the reference thereto in the deed to them, that there was not a taking of the plaintiffs' property within the meaning of the eminent domain statute. *Rangelli v. Wayne Tp.*, 127 A. 2d 916 - NJ: Superior Court, Law Div. 1956. [internal citations omitted]

Under Section 723.08, if a municipality vacates a street that has been dedicated to public use, the municipality's order does not impair "the right of way and easement" of other property owners. R.C. 723.08. In *Butzer v. Johns*, 67 Ohio App. 2d 41 (9th Dist. 1979), this Court explained that, "[if] a street is vacated and the land reverts to the abutting lot owners, certain rights to an easement may inhere in property owners whose land abuts the vacated area, if access to their own property is affected by the vacation." *Id.* at 42-43. In *Lord v. Wilson*, 9th Dist. No. 1354, 1985 WL 10675 (Apr. 10, 1985), we clarified that, "in determining whether [an] abutting landowner retains an easement in a vacated street . . . [t]he issue [is] whether continued access through the vacated street was reasonably necessary for [the lot owner] at the time the street was vacated." *Id.* at *2. *Sherck v. Bremke*, 2012 Ohio 3527 - Ohio: Court of Appeals, 9th Appellate Dist. 2012.

It is well settled that when the owner of land lays it out into distinct lots, with intersecting streets or avenues, and sells the lots with reference to such streets, his grantees or successors cannot afterwards be deprived of the benefit of having such streets kept open. When, in such a case, a lot is sold bounded by a street, the purchaser and his grantees have an easement in the street for the purposes of access, which is a property right. (*Lord v. Atkins*, 138 N.Y. 184, 191.) *Hecht v. Launer*, 30 Misc. 2d 47 - NY: Supreme Court, Ulster 1961.

The grantee receives a private easement at the time of conveyance in any streets referenced in the plat. *Carolina Land*, 265 S.C. at 105-106, 217 S.E.2d at 19; *Blue Ridge*, 247 S.C. at 119, 145 S.E.2d at 925; *Giles*, 304 S.C. at 73, 403 S.E.2d at 132.; see *Newington Plantation*, 318 S.C. at 365, 458 S.E.2d at 38 (“While dedication for public use is significant to the creation of a public easement, it is irrelevant to the determination whether a private easement exists.”).

U.S. Revised Statute 2477

RS 2477 was an 1866 mining law intended to serve the purpose of granting the right to construct and use highways across public lands that were not otherwise reserved or set aside for other public uses. It stated simply:

“The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” [43 USCA § 932]

The statute was repealed in 1976, but a grandfather clause allowed that if it could be shown that a “highway” was “constructed” prior to 1976 over U.S.-owned land before it was set aside for other uses, an RS 2477 claim could be granted.

In 1980’s, various federal land management agencies started inventorying roadless lands to determine if they qualified for wilderness protection. As a result of the repeal of RS 2477 and the effort to set-aside large tracts of land for protection – which would have prevented subsequent RS 2477 claims, even under the grandfather clause - a very eclectic, albeit very loose, coalition arose. The coalition included development and off-road advocates and, in some cases, simple anti-government extremists. They filed what can only be described, in many cases, as bizarre RS 2477 claims to try to protect their perceived right to enter onto public (and in some cases, private) lands. “Highways” claimed by these groups included, in some cases, creeks, indiscernible walking paths and supposed “roads” that lead nowhere.

Environmentalists and private land rights groups generally lined up on the other side.

In response to the claims being made, the Department of the Interior developed a set of guidelines for use in evaluating RS 2477 claims. These guidelines, however, never made it into statute.

1. The highway must have been built while the public land was unreserved for some other specific public purpose.
2. The highway must have actually been constructed, not simply established by repeated use.
3. It must have actually been a public highway, meant to carry goods and people to an actual destination.

With the change of administrations, the Department of Interior in 2003 published a new rule making it easier for states and local jurisdictions to convert RS 2477 claims on public lands into new roads. H.R. 308, introduced January 5, 2007, but also, never making it into statute, included the following:

(5) The applicable laws of each State [shall] govern the resolution of issues relating to the validity and scope of R.S. 2477 rights-of-way, including—

- (A) what constitutes a highway and its essential characteristics;
- (B) what actions are required to establish a public highway;
- (C) the length of time of public use, if any, necessary to establish a public highway and resulting R.S. 2477 right-of-way;
- (D) the necessity of mechanical construction to establish a public highway and resulting R.S. 2477 right-of-way; and
- (E) the sufficiency of public construction alone without proof of a certain number of years of continuous public use to establish a public highway and resulting R.S. 2477 right-of-way.

The supreme court has held that R.S. 2477 was an express dedication of roads over public land where the roads were established by public use. The use necessary to establish the road can be very limited, and "if the use be by only one, still it suffices." *Leach v. Manhart*, 102 Colo. 129, 133, 77 P.2d 652, 653 (1938). However, the road must be established before the government land is withdrawn from the public domain. *Korf v. Itten*, 64 Colo. 3, 169 P. 148 (1917). *Lee v. Masner*, 45 P. 3d 794 - Colo: Court of Appeals, 5th Div. 2001.

The Dominant and Servient Estates (Tenements)

The land to which an easement is attached is called the dominant tenement or dominant estate. The land upon which a burden or servitude is placed is called the servient tenement or servient estate.

The servient estate is the real property burdened by the easement - the property over which the easement runs. The dominant estate is the property benefited by the easement - the property that is served by the easement.

An easement appurtenant is created when an owner of one parcel of property (the servient estate) gives rights regarding that property to the owner of an adjacent property (the dominant estate). It enhances the value of the dominant estate and cannot exist separate from the land itself." *Trustees of Llewellyn Park v. West Orange Tp.*, 540 A. 2d 868 - NJ: Appellate Div. 1988.

Once an [appurtenant] easement is created, the owner of the land is the servient tenant and the easement holder is the dominant tenant. *Potter v. Northern Natural Gas Co.*, 201 Kan. 528, 530-31, 441 P.2d 802 (1968).

The benefited parcel is known as the dominant tenement or estate, and the burdened parcel is termed the servient tenement or estate. *Blazer v. Wall*, 2008 MT 145, ¶ 24.

[A]n appurtenant easement runs with the land and serves a parcel of land known as the dominant tenement, while the parcel of land on which the easement is imposed is known as the servient tenement. *Wilson v. Johnston*, 66 Ark. App. 193 (1999). [internal citations omitted]

The land benefitting from an easement is called the *dominant estate*; the land burdened by an easement is called the *servient estate*. *** It is essential to the existence of an easement, which is appurtenant to land, that there be two distinct estates or tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. . . . The term easement and the term servitude are often used indiscriminately; the one is usually applied to the right enjoyed, the other to the burden imposed. A right of way over the land of another is an easement in the dominant estate and a servitude upon the servient estate. *Cottrell v. Nurnberger*, 131 W.Va. 391, 397, 47 S.E.2d 454, 457 (1948). [Cited in *Newman v. Michel*, W Va: Supreme Court of Appeals, 2009]

Appurtenant Easements and Easements in Gross

All easements are either appurtenant or in gross.

[T]he law recognizes two types of easements, easements appurtenant and easements in gross. *Rosen v. Keeler*, 986 A. 2d 731 - NJ: Appellate Div. 2010

There are two broad classes of easements: (1) easements appurtenant and (2) easements in gross *Olson v. Trippel*, 893 P. 2d 634 - Wash: Court of Appeals, 2nd Div. 1995.

Easements or servitudes are either personal or real, as, for instance, when a right of way is granted in favor of a particular person or persons, the sale of the estate will not carry with it the right which is confined to the persons; but where, by distinction, a right of way attaches to and in favor of a certain house, farm, ranch, or plantation, or a certain right of drainage exists in favor of the farm, or the use of a certain ditch and water for the irrigating of a farm, they will pass by the deed, even without the use of the word 'appurtenances;' for the acquisition of the easement or servitude was intended for the benefit of the estate, and by destination is to be considered as incidental to the use of and as a part and parcel of the realty. *Tucker v. Jones*, 8 Mont. 225, 19 P. 571, 573,

An easement may be appurtenant or in gross. *Ammer v. Arizona Water Co.*, 818 P. 2d 190 - Ariz: Court of Appeals, 1st Div., Dept. A 1991.

Appurtenant easements attach to a particular property for the benefit of an adjacent property. The burdened property is called the servient estate (or tenement) and the property that the easement benefits is the dominant estate (or tenement.) Appurtenant easements create both a dominant estate and a servient estate.

[An] "easement appurtenant is created when the owner of one parcel of property (the servient estate) grants rights regarding that property to the owner of an adjacent property (the dominant estate)." *CARIBBEAN HOUSE v. NORTH HUDSON*, 83 A. 3d 849 - NJ: Appellate Div. 2013. [internal citations omitted] [See *Schumacher v. Apple* below]

[A]n easement appurtenant requires a dominant tenement to which it is appurtenant. *Rosen v. Keeler*, 986 A. 2d 731 - NJ: Appellate Div. 2010.

An easement appurtenant involves two different estates or tenements in land (a) the dominant estate, that to which the easement or right attaches or belongs; and, (b) the servient estate, that which is subject to the easement. 25 Am.Jur.2d Easements and Licenses 11 (1966).

The main features of an easement appurtenant are that there must be both a dominant and servient estate; the holder of the easement must own the dominant estate; the benefits of the easement must be realized by the owner of the dominant estate; and these benefits must attach to possession of the dominant estate and inhere to and pass with the transfer of the title to the dominant estate. *Newman v. Michel*, W Va: Supreme Court of Appeals 2009.

An easement appurtenant is attached to the land that it benefits even if that land is not physically adjacent to the land subject to the easement; however, there must be two estates or distinct tenements: the dominant estate, to which the right belongs, and the servient estate, upon which the obligation rests. *Schumacher v. Apple*, 2010 Ohio 5372 - Ohio: Court of Appeals, 8th Appellate Dist. 2010. [internal citations omitted]

Appurtenant easements are so tightly bound to the dominant estate that they transfer with the dominant estate even if they are not mentioned in the conveyance.

[T]he easement, once created in the 1923 deed, ran with the land regardless of whether it was mentioned in subsequent deeds. *SMOTHERGILL v. Hirschberg*, NJ: Appellate Div. 2010.

Easements appurtenant run with the land, pass with the dominant estate to successors in interest, and transfer with the dominant property even if not mentioned in the documents transferring title. See *ELY & BRUCE*, *supra*, § 9:1. *Tubbs v. E&E Flood Farms, L.P.*, 13 A.2d at 768.

Once an easement appurtenant was established, it attached to the dominant estate and passed with every conveyance of that estate. *** [A] right of way or other easement appurtenant to the land[] passe[s] by a grant of the land without any mention being made of the easement, and though neither the term 'appurtenance,' nor its equivalent, be employed." *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010.

When an easement is annexed as an appurtenance to land, whether by express or implied grant or reservation, or by prescription, it passes with a transfer of the land, even though it may not be specifically mentioned in the instrument of transfer. *Winningham v. Harris*, 64 Ark. App. 239 (1998). [internal citations omitted]

Additionally, an appurtenant easement cannot exist separately from the dominant estate.

The easement appurtenant "enhances the value of the dominant estate and cannot exist separate from the land itself." *Rosen v. Keeler*, 986 A. 2d 731 - NJ: Appellate Div. 2010

An appurtenant easement is incapable of an existence separate from the dominant estate, and any attempted severance from the dominant estate must fail.. *Kikta v. Hughes*, 766 P. 2d 321, 108 N.M. 61.

[A]n easement appurtenant, it is deemed to run with the land and is unassignable in the absence of a transfer of the dominant estate. *Kikta v. Hughes*, 108 N.M. 61, 766 P.2d 321 (Ct.App. 1988). [internal citations omitted]

18 Ohio Jurisprudence (2d), 607, Section 71 [comments]: "An appurtenant easement * * * is an incident to an estate in land and passes upon a transfer of the land. It cannot be separated from, or transferred independently of, the land to which it inheres. The right to an appurtenant easement cannot be transferred to a stranger to the dominant estate. The owner of an appurtenant easement of way cannot separate it from the dominant estate so as to convert it into an easement in gross." *State, ex rel. Lindemann v. Preston*, 171 Ohio St. 303 - Ohio: Supreme Court 1960.

An appurtenant easement is incapable of existence separate and apart from the particular land to which it is annexed. *Winningham v. Harris*, 64 Ark. App. 239 (1998). [internal citations omitted]

An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate. Essentially, an easement appurtenant serves the owner of the dominant estate in a way that cannot be separated from his rights in the land." "If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate."). *Newman v. Michel*, W Va: Supreme Court of Appeals 2009. [internal citations omitted]

Easements in Gross burden the servient estate and attach to the easement owner, but are not created for the benefit of any land owned by the owner of the easement (dominant estate). Thus while all easements create a servient estate, with easements in gross, there is no associated dominant estate.

[An easement in gross is] [a]n irrevocable personal interest in the land of another. Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* Sec.2.01(2) (1988).

"Easement in gross is not appurtenant to any estate in land (or not belonging to any person by virtue of his ownership of an estate in land) but a mere personal interest in, or right to use, the land of another." *Black's Law Dictionary*, Fourth Edition, page 600.

An easement in gross ... is not appurtenant to any estate in land and does not belong to any person by virtue of ownership of an estate in other land. It is a mere personal interest in or right to use land of another. *Village of Ridgewood v. Bolger Found.*, 6 NJ Tax 391 - NJ: Tax Court 1984.

[A]n easement in gross belongs to its owner independently of his ownership or possession of any specific land." *Rosen v. Keeler*, 986 A. 2d 731 - NJ: Appellate Div. 2010.

An easement in gross ... benefits the holder of the easement personally, i.e., not in connection with his or her ownership or use of a particular parcel of land. Thus, with an easement in gross, no dominant tenement exists and the easement right does not pass with the title to any land. *Blazer v. Wall*, 2008 MT 145, ¶ 24.

[A]n easement in gross, does not benefit a dominant estate but rather is personal to the easement holder. See ELY & BRUCE, *supra*, § 9:1. *Tubbs v. E&E Flood Farms, L.P.*, 13 A.2d at 768.

[A]n easement in gross involves only the servient tenement, which is burdened by the personal property interest of an easement holder. FN 40 *Tubbs v. E&E Flood Farms, L.P.*, 13 A.2d at 768. [internal citation omitted]

In *Boatman v. Lasley* (1873), 23 Ohio St. 614, 618, the court emphasized that where a right of way is in gross and not attached to an interest in land, it cannot be converted into an appurtenant easement by using words of inheritance in the deed creating it. The court emphasized that a "mere naked right to pass and repass over the land of another" is of a personal nature and dies with the person. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010.

An easement in gross ... is not appurtenant to any estate in land and does not belong to any person by virtue of his or her ownership in land. It is a mere personal interest in, or right to use, the land of another. Unlike an easement appurtenant, an easement in gross does not run with the land and creates no dominant or servient estates. *Lewitz*, supra, 36 P.3d at 122. *WRWC, LLC v. City of Arvada*, 107 P. 3d 1002 - Colo: Court of Appeals, 5th Div. 2004.

Oftentimes there is a question as to whether a grant constituted an easement in gross or an easement appurtenant. This is important when the servient owner hopes to see an easement extinguished, which can happen with an easement in gross when the dominant estate owner dies, when he or she sells land that may be peripherally associated with the easement in gross or when the purpose for the easement otherwise ceases.

The character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement. *Barrett v. Kunz*, 604 A. 2d 1278 - Vt: Supreme Court 1992. [internal citations omitted]

In *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997), our Supreme Court explained the differences between easements in gross and appurtenant easements: The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. *Id.* at 325-26, 487 S.E.2d at 191 (citations omitted) (emphasis added).

It has been widely held that the omission of such words as "heirs and assigns" ordinarily does not tend to show that a grant is personal rather than appurtenant. *Teachout v. Capital Lodge of I.O.O.F.*, 128 Iowa 380, 104 N.W. 440 (1905); *United States Pipeline Co. v. Delaware, L. & W. R. Co.*, 62 N.J.L. 254, 41 A. 759 (1898); See also, *Cleveland, C., C. & St. L. Ry. Co. v. Griswold*, 51 Ind.App. 497, 97 N.E. 1030 (1912). *Mays v. Hogue*, 260 SE 2d 291 - W Va: Supreme Court of Appeals 1979.

In some states, an easement in gross can become an easement appurtenant under certain circumstances.

Easements in gross can become appurtenant easements where that result is consistent with the intent of the parties. The rule is ... as follows:

When an instrument purports to create an easement in favor of a grantee to facilitate some other parcel of land which the grantee does not presently own but subsequently acquires, the easement is an easement in gross until the land is acquired, at which time it becomes an easement appurtenant. 3 H. Tiffany, *Real Property* § 759 (3d ed. 1939 & Supp. 1980).

Beebe v. Swerda, 793 P. 2d 442 - Wash: Court of Appeals, 1st Div. 1990. [internal citations omitted]

Pipeline or transmission line easements are good examples of easements in gross, whereas an easement for ingress and egress over one property to reach another is an example of an appurtenant easement. (See http://www.buyersresource.com/glossary/Easement_in_Gross.html)

The law generally favors easements appurtenant over easements in gross. In most states, if the easement created by a document is not expressly either appurtenant or in gross, it will generally be deemed appurtenant assuming it has the necessary elements.

When a grant appears to create rights connected to the grantee's ownership of a certain piece of property, there is a presumption favoring construction as an easement appurtenant. *Rosen v. Keeler*, 986 A. 2d 731 - NJ: Appellate Div. 2010.

It is a well-established principle of law that an easement in gross will not be presumed where it can fairly be construed to be appurtenant to land. *PAS. VAL. COUN. v. HARTWOOD*, 75 Misc. 2d 1018 - NY: Supreme Court, Sullivan 1973.

If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intentions of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate. *Jones v. Island Creek Coal Company*, 79 W. Va. 532, 91 S.E. 391 (1917)

An easement is seldom considered to be in gross when it can be fairly construed to be appurtenant to some estate. Ohio Jurisprudence 3d, Easements & Licenses, Section 12. *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 2005 Ohio 3398 - Ohio: Court of Appeals 11th.

If the granting instrument does not specify whether the easement is appurtenant or in gross, the court decides from the surrounding circumstances, but generally begins with the presumption that it is appurtenant. E. Rabin, *Fundamentals of Modern Real Property Law* 434 (2d ed. 1982). See Restatement of Property § 453 (1944); 28 C.J.S. *Easements* § 4 (1941). *Luevano v. Group One*, 108 N.M. 774, 777, 779 P.2d 552, 555 (Ct.App. 1989).

However, there are exceptions...

Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. Juris. Easements § 3(c). Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. *Windham II*, 381 S.C. at 201-02, 672 S.E.2d at 583. *Rhett v. Gray*, SC: Court of Appeals 2012.

Personal Easements in Gross are generally not assignable; Commercial Easements in Gross are assignable.

Easements of a commercial nature similar to the right-of-way here [an easement for the installation of electric transmission lines] have long been considered an exception to the general rule that easements in gross are not transferable, and a long history of allowing the transfers of such servitudes exists. See 3 Powell on Real Property § 34.16, pp. 34-220-222 (1996); Restatement of Property § 489 (1944).

An easement in gross ... is a right held by an individual, exists independent of any ownership of land, and is not transferrable to subsequent owners. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010. [internal citations omitted]

This easement was clearly commercial and not personal, and was an easement in gross. We know of no case in this jurisdiction which has held that easements authorizing the construction of telephone lines, electric lines or gas lines are inalienable. *Banach v. Home Gas Co.*, 12 AD 2d 373 - NY: Appellate Div., 3rd Dept. 1961.

The law at that time [1857] was that easements or rights of way in gross were not assignable or inheritable by any words in the deed by which they were granted. It is now well settled in Ohio, and the general rule elsewhere, that a right of way or easement of the private commercial character herein involved is an easement in gross constituting an alienable property interest. 5 Restatement of the Law, Property, 3040, Section 489. *Jolliff v. Hardin Cable Television Co.*, 22 Ohio App. 2d 49 - Ohio: Court of Appeals 1970. [some internal citations omitted]

The reservation in this case is in gross, and such a right personal merely, not assignable nor inheritable. "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable nor inheritable, nor can it be made so by any terms in the grant, any more than a collateral and independent covenant can be made to run with land." *Field v. Morris*, 88 Ark. 148 (1908). [internal citations omitted]

An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal and usually ends with death of grantee. *Newman v. Michel*, W Va: Supreme Court of Appeals 2009. [internal citations omitted]

Although New Jersey may be an exception (the following case, in making the citation, did not discern between commercial or personal easement in gross), viz.,

[T]he benefits of an easement in gross may be assigned to a third party. *Rosen v. Keeler*, 986 A. 2d 731 - NJ: Appellate Div. 2010.

Affirmative and Negative Easements

Just as all easements are either appurtenant or in gross, all easements are either affirmative or negative.

Easements may be classed as affirmative or negative. When the effect of the restriction sought is to preclude an owner of land from doing something he otherwise would be entitled to do, it is considered a negative easement. Negative restrictive easements are basically restrictive covenants which are equitably enforceable. *Bennett v. Charles Corp.*, 226 SE 2d 559 - W Va: Supreme Court of Appeals 1976. [footnotes and internal citations omitted]

An affirmative easement is one which grants the owner of the dominant estate the right to make active use of the servient estate or to do some act thereon or in respect thereto which, were it not for the easement, he would not be privileged to do or which would otherwise be unlawful. A negative easement, on the other hand, is a right in the owner of the dominant estate to restrict the owner of the servient estate in the exercise of the latter's general and natural rights of property. In other words, a negative easement does not entitle the owner of the dominant tenement to any use or enjoyment of the land subject to the easement to which he would not be entitled if the easement did not exist, but rather it permits him to limit or prohibit the owner of the servient estate from doing acts upon it which, were it not for the easement, the latter would be privileged to do (Restatement, Property, § 452). *Rahabi v. Morrison*, 81 AD 2d 434 - NY: Appellate Div., 2nd Dept. 1981. [internal citations omitted]

Negative easements do not permit a use by the dominant estate, but rather, prevent the servient estate from exercising what would otherwise have been their full rights.

The easement on the subject property is an easement in gross or, more properly, a negative easement in gross as the owner is prohibited from doing something otherwise lawful. Black's Law Dictionary (5 ed. 1979), at 458. *Village of Ridgewood v. Bolger Found.*, 6 NJ Tax 391 - NJ: Tax Court 1984.²

²The easement in question was a conservation easement that provided it was to be a perpetual easement. If the grantee cease to function, it was to be assigned to a similar nonprofit conservation organization. The essential provisions precluded removal of vegetation, except in a manner consistent with accepted conservation practices; precluded excavation or removal of topsoil, sand, gravel, etc., except as agreed to between the parties; precluded erection of buildings or structures except buildings necessary to construct a test-water well and such improvements as may be necessary to permit the operation of a water well by the Village of Ridgewood. It precluded dumping of soil or trash, and there was to be no activity detrimental to drainage or flood control.

We are concerned here with what is called (though technically not correctly) an equitable easement — often referred to as a "negative easement" — imposed by Westcott in the Putnam conveyance. *Auerbacher v. Smith*, 92 A. 2d 492 - NJ: Appellate Div. 1952.³

The best that can be said of the restrictive covenant in this case is that it is in the nature of a negative easement or equitable servitude. It is not a positive easement or right in the land itself which would permit of the physical use or occupation of the ... land.... *Smith v. Clifton Sanitation District*, 300 P. 2d 548 - Colo: Supreme Court 1956.

Under the English doctrine of ancient lights, a landowner could acquire an implied prescriptive easement in the light coming across his neighbor's property, and he could enjoin his neighbor from interfering with his continued access to such light. See 4 R. Powell, *Powell on Real Property* § 34.11[5], at 34-124 (2008). This doctrine was viewed as incompatible with conditions in the rapidly developing United States, and in 1860, this Court, like other courts around the country, repudiated it. See *Hubbard v. Town*, 33 Vt. 295, 300 (1860); see also 4 R. Powell, *Powell on Real Property* § 34.11[5], at 34-125 (doctrine of ancient lights has been disavowed repeatedly by American courts); 9 R. Powell, *Powell on Real Property* § 68.10, at 68-47[1] ("The overwhelming consensus is that in absence of a statute or negative easement or covenant, neighboring land possessors have no rights to view, air or light over another's land."). Courts feared that recognizing such implied rights would unfairly prevent landowners from developing their own property if, in so doing, it would affect the flow of air or the delivery of light. See *Wilson v. Handley*, 97 Cal. App.4th 1301, 119 Cal.Rptr.2d 263, 267 (2002) (explaining that doctrine of ancient lights was ill-suited to conditions in United States during period of rapid growth, and noting that society had significant interest in encouraging unrestricted land development, while access to light, in contrast, had little social importance beyond its value for aesthetic enjoyment or illumination). *Alberino v. Balch*, 969 A. 2d 61 - Vt: Supreme Court 2008.

An affirmative easement obligates a landowner to permit or allow certain use of his property by another, whereas a negative easement obligates a landowner to refrain from making certain use(s) of his property, which will serve or offer some benefit to the owner of the dominant estate.

³ The 1893 restriction stated, "It is expressly understood and agreed that this conveyance is made and is accepted upon the express condition that no part of said premises or any house or structure erected or to be erected thereon shall be used or occupied for *any business or trade whatsoever, nor for any other use than private dwellings* and structures appurtenant to such dwellings and the parties of the first part covenant that a restriction clause the same as that last above mentioned shall be inserted in all deeds hereafter executed by them on Essex Avenue or Highland Avenue aforesaid. And the party of the second part covenants that neither she nor her heirs, executors, administrators or assigns or any person deriving title to said premises through or under her or them shall use or occupy, or suffer to be used or occupied any part of said premises or any structure erected or to be erected thereon, contrary to said above condition and restriction." [emphasis added]

Examples of affirmative easements are ingress/egress, access or public utility easements. Solar, light and (usually) conservation easements are examples of negative easements.

One Texas court looked at the nature of the easement from the servient owner's standpoint, viz.,

An easement appurtenant generally takes the form of a negative easement: the owner of the servient estate may not interfere with the right of the owner of the dominant estate to use the servient estate for the purpose of the easement. See *Bickler*, 403 S.W.2d at 359; *Drye*, 364 S.W.2d at 207. *Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 SW 3d 657 - Tex: Court of Appeals (2005).

Creating Easements

Easements are created in numerable ways. Written easements can be created by express grant, reservation, dedication, in probate documents or by agreement. In some cases, easements can be obtained by eminent domain. But, they can only be created by the owner of the servient estate.

Easements come into being (1) by an express act of the parties, (2) by implication, or (3) by prescription. In the first category easements are created by an express conveyance in writing. Oral agreements run afoul of the Statute of Frauds, N.J.S.A. 25:1-1, and are considered revocable parol licenses. * * * Excepted from this rule of an express written conveyance are easements arising out of prescription. Easements by prescription arise when elements similar to those of adverse possession are shown to have existed for a 20-year period. *Mahony v. Danis*, 469 A. 2d 31 - NJ: Supreme Court 1983. [internal citation omitted]

An easement is created if the owner of the servient estate enters into a contract or makes a conveyance, which complies with the Statute of Frauds or an exception to the Statute of Frauds, with the intent to create a servitude. Restatement (Third) of Prop.: Servitudes § 2.1 (2000).

An easement may be created by express or implied grant, or by prescription, but it may not be created by parol because it is real property. See 25 Am.Jur.2d Easements and Licenses §17 (1966).

Unwritten easements are created by implication, necessity, prescription, common law dedication or even by estoppel. In states where title in real estate may be registered, such real estate is generally not subject to easements by prescription.

Servitudes that are not created by contract or conveyance include servitudes created by dedication, prescription, and estoppel. Those which are not created by express contract or conveyance are the implied servitudes, which may be based on prior use, map or boundary descriptions, necessity, or other circumstances surrounding the conveyance of other interests in land, which give rise to the inference that the parties intended to create a servitude. Restatement, *supra*, § 2.8 cmt. b).

There are four types of easements: (1) easement by necessity; (2) quasi-easement by implication; (3) express easement; and (4) easement by prescription. *Worts v. Dittmar*, NJ: Appellate Div. 2009.

Town of Paden City v. Felton, *supra*, 136 W.Va. at 136, 66 S.E.2d at 286. (with citations omitted) The general rule, subject to several exceptions, is that an easement can be created only by grant, express or implied, or by prescription, which presupposes a grant. An easement may, however, be created by agreement or covenant as well as by grant. Many authorities say that, as an exception to the general rule just stated, an easement may sometimes be created by estoppel. One eminent authority states that an easement may be created or acquired by six different methods: express grant, reservation or exception in a deed, implied grant, prescription, a statutory proceeding usually under the power of eminent domain, and estoppel.

Implied easements are an exception to, and need not comply with, the Statute of Frauds.

Creating Written Easements

Written easements can be created in a number of ways, but in any case these “express grants” are created by virtue of some instrument of conveyance or a mortgage. The conveyance may involve an actual deed or grant of easement, or the easement may be created by reservation. Express easements may also be created by agreement, dedication, condemnation, or even in probate documents such as a partition.

Express Grant

To create an easement by express grant, the owner of the servient estate grants an easement in that estate to another.

An easement can be created either by grant ... or by reservation unto the grantor in lands conveyed. *Leasehold Estates, Inc. v. Fulbro Holding Co.*, 136 A. 2d 423 - NJ: Appellate Div. 1957

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 a revocable license. (see *Willow Tex, v. Dimacopoulos*, 68 NY2d 963 [1986])

A finding of an express easement is proper if the deed "contain[s] plain and direct language evidencing the grantor's intent to create a right in the nature of the easement." [*Judge v. Rago*, 1989 WL 25802, at *5 (Del. Ch. Mar. 16, 1989), *aff'd Judge v. Rago*, 570 A.2d 253 (Del. 1990).] No specific words are required so long as the writing clearly reflects the grantor's intent to create a right in the nature of an easement.[*See* 25 AM. JUR. 2d. *Easements and Licenses* § 15 (2013).] *Black v. STAFFIERI*, Del: Supreme Court 2014.

If the conveyancing document is ambiguous, the courts have set out criteria for determining the intent, viz.,.

In order to convey an express easement, a writing must exist demonstrating that intent, signed by the grantor. An ambiguous writing may yet convey an easement where extrinsic evidence clearly demonstrates that such was the parties' intent. [*Alpha Builders Inc. v. Sullivan*, 2004 WL 2694917, at *4 (Del. Ch. Nov. 5, 2004)]. *Coker v. Walker*, Del: Court of Chancery 2013.

[A] court may find an express easement, where a writing which purportedly conveys an easement is ambiguous, based on extrinsic evidence to determine "the actual intention of the parties" and "to explain and give context to the language." *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1236-37 (Colo.1998). The *Lazy Dog Ranch* court identified the following circumstances relevant to interpreting an express easement:
the location and character of the properties burdened and benefited by the servitude, the use made of the properties before and after creation of the servitude, the character of the surrounding area, the existence and contours of any general plan of development for the area, and [the] consideration paid for the servitude.
Id. at 1237 (quoting Restatement, *supra*, § 4.1 cmt. d).
PRECIOUS OFFER. MINERAL EXCHANGE, INC. v. McLain, 194 P. 3d 455 - Colo: Court of Appeals, 5th Div.

Express grants generally cannot be created orally without violating the statute of frauds with some exceptions.

To comply with the statute of frauds, a conveyance creating an easement must contain either 1) a description of the land sufficient to locate the servient tenement or 2) a reference to another document which contains a description sufficient to locate the servient tenement. Although "a deed [of easement] is not required to establish the actual location of an easement, [it] is required to convey an easement' which encumbrances a specific servient estate. The servient estate must be sufficiently described." *DRD ENTERPRISES, LLC v. Flickema*, 791 NW 2d 180 - SD: Supreme Court 2010. [internal citations omitted]

[A]n oral grant of a license to use land can vest enforceable rights in the grantee if the court is convinced that the grant of use was reasonably relied upon and that the parties intended the grant to be permanent." FN 32 *Coker v. Walker*, Del: Court of Chancery 2013. [internal citations omitted]

An express easement is an interest in land to which the statute of frauds applies. See Tex. Bus. & Com. Code Ann. § 26.01 (West Supp. 2008); *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983) (easement is interest in land subject to statute of frauds); *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 264 (Tex. App.-Austin 2002, no pet.).

Reservation

The owner of a tract of land who sells a portion of her land and retains an easement in the portion sold has created an easement by reservation.

An easement can be created either by grant ... or by reservation unto the grantor in lands conveyed. *Leasehold Estates, Inc. v. Fulbro Holding Co.*, 136 A. 2d 423 - NJ: Appellate Div. 1957

A reservation ... occurs where the granting clause conveys the totality of the land described, but reserves to the grantor one or more of the rights that would comprise a fee simple absolute. *Hinojos v. Lohmann*, 182 P. 3d 692 - Colo: Court of Appeals, 1st Div. 2008. [internal citations omitted]

A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." *Id.* (quoting *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)).

A grantor may expressly reserve an easement over granted land in favor of retained land by using appropriate language in the instrument of conveyance. An easement may be expressly reserved by referring in the instrument of conveyance to a recorded plat or certificate of survey on which the easement is adequately described. *Id.* *Conway v. Miller*, 232 P. 3d 390 - Mont: Supreme Court 2010. [internal citation omitted]

Technically, a "reservation" is a newly created right, but "reservation" is frequently used interchangeably with "exception." The intention of the parties, not the words in the deed, is controlling. FN 3 *Shackford & Gooch v. B & B COASTAL ENTERPRISES*, 479 A. 2d 1312 - Me: Supreme Judicial Court of Maine. [internal citations omitted]

A "reservation" created a new right that did not exist at the time the grantor owned the property, while an "exception" involved the grantor merely retaining part of what he already owned. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010. [internal citations omitted]

Generally, but with some exceptions, a reservation in a deed cannot create an interest in favor of third parties (who were not a party to the deed.)

A reservation, moreover, cannot create an estate or interest in a stranger to the deed, but can operate only to the benefit of the grantor therein. An effective exception may be made in favor of a third person not a party to the deed, in recognition and confirmation of a right already existing in him." *First Nat. Bank of St. Johnsbury v. Laperle*, 86 A. 2d 635 - Vt: Supreme Court 1952.

Dedication

A dedication has been defined as the 'donation of land or the creation of an easement for public use.' *Black's Law Dictionary* 442 (8th ed. 2004). It requires both the dedication itself and an acceptance on the part of the public.

Dedication is an intentional appropriation or donation of land by its owner for public use, 23 Am.Jur.2d, *Dedication*, § 1.

Dedication is the "permanent devotion of private property to a use that concerns the public in its municipal character." *National Paving Co. v. Taxation Div. Director*, 3 NJ Tax 133 - NJ: Tax Court 1981. [internal citation omitted]

Dedication depends almost entirely upon common-law principles in New Jersey. Common-law dedications may be either express or implied. An express dedication is ordinarily effected by a deed of grant manifesting the grantor's intent to devote land therein described to public use, but it may arise from any written declaration of intent to devote land to public use, or even from an oral declaration of such intent.

In other states it seems generally to be held that the intent to dedicate land to public use must be clearly and unequivocally manifested. In New Jersey, however, the intent to dedicate has almost invariably been treated as a question of fact — or "mixed law and fact" — to be resolved in the same way as any other such question. *National Paving Co. v. Taxation Div. Director*, 3 NJ Tax 133 - NJ: Tax Court 1981

[W]hen a person dedicates a portion of land for public use, "the municipality [acquires] a continuing right to accept the dedication . . . by official municipal action"; but, the municipality holds "no interest in the land" until it accepts the dedication. [T]he dedicating party retains legal title "and continues to be liable for the payment of property taxes," although the tax assessment should "reflect [the] dedication . . . , which may result in an assessment for only a nominal amount." *Township of Middletown v. Simon*, 937 A. 2d 949 - NJ: Supreme Court 2008. [internal citations omitted]

"[T]he power of acceptance continues indefinitely in the public authorities until such time as they reject or vacate the dedicated lands by official municipal legislative action."
Township of Middletown v. Simon, 937 A. 2d 949 - NJ: Supreme Court 2008.

"[W]hen lands are sold with reference to a map upon which lots and streets are delineated, there is a dedication of such streets to the public, and such dedication continues and cannot be revoked except by consent of the municipality." "[T]he same rule of dedication applies where the filed map contains an area or lot marked 'park.'"
Township of Middletown v. Simon, 937 A. 2d 949 - NJ: Supreme Court 2008. [internal citations omitted]

[A] restriction in a deed to a public body limiting the use of the conveyed parcel to a specified public purpose constitutes a dedication, in the broad sense, which cannot be unilaterally abrogated by the public grantee at least so long as the property, as a practical and functional manner, is amenable to that use.

[T]he right of the public to the dedicated use is irrevocable, at least until there has been a formal vacation or abandonment by a duly constituted authority in the precise manner prescribed by law. *Springfield Tp. v. Board of Educ.*, 526 A. 2d 714 - NJ: Appellate Div. 1987.

This Court has defined the term "dedication" in property cases and accepted it as a legal term of art, as follows:

Dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner that manifests an intention that the property dedicated shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication.

Bergin v. Bistodeau, 645 NW 2d 252 - SD: Supreme Court 2002.

"Dedication is the setting apart of land for public use, either expressly or by implication of law. It may be shown by the owner's writings, affirmative acts, acquiescence in public use, or some combination thereof, so long as the owner's intent to dedicate clearly appears." *Town of Newfane v. Walker*, 637 A. 2d 1074 - Vt: Supreme Court 1993.
[internal citation omitted]

Both the dedication of an easement, and its acceptance, can be either express or implied.

A dedication is express when the intent is manifested by oral or written words.... [A] dedication is express where the appropriation is formally declared. "A statutory dedication is in the nature of a grant based on substantial compliance with the terms of the applicable statute...." *Bergin v. Bistodeau*, 645 NW 2d 252 - SD: Supreme Court 2002.

When the dedication is by a municipality, the acceptance may be implied.

"Reason suggests that when it is the municipality which is making the dedication, the element of acceptance is not required, or if the element of acceptance is to be insisted upon, it may be implied from the very act of dedication by the municipality." *Scureman v. Judge*, 626 A. 2d 5 - Del: Court of Chancery 1992. [internal citations omitted]

Condemnation

Easements acquired through the eminent domain process – which is statutorily regulated - obviously results in a written easement. In some states, right of way taken through condemnation can only be acquired as easement, not in fee. Eminent domain can generally be exercised only by qualified public utilities, railroads and governmental entities.

New Jersey Permanent Statutes 27:5-21. Acquisition of property by the State

17. The commissioner [of transportation] is authorized to acquire by gift, lease, purchase or, condemnation, real and personal property, or the right to maintain signs for the purpose of implementing this act. The cost of the acquisition shall be considered as a part of the cost of a highway right-of-way. All persons whose sign and property or interest in property is purchased or otherwise acquired, except by gift to the State, shall receive just compensation therefor.

New Jersey Permanent Statutes 27:7-22.6. Acquisition of uneconomic remnants of lands along right-of-way

In addition to the powers now vested in the Commissioner of Transportation for the acquisition of lands or rights therein by virtue of any statute, the commissioner may, in his discretion, acquire by gift, devise, purchase or condemnation, an entire lot, block or tract of land, if, by so doing, the interests of the public will be best served even though said entire lot, block or tract is not needed for the right-of-way proper but only if the portion outside the normal right-of-way is landlocked or is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land; provided, however, that the commissioner shall not have the power to acquire by the exercise of the right of eminent domain for any of the purposes of this act any property or property rights owned or used by any public utility as defined in section 48:2-13 of the Revised Statutes.

New Jersey Permanent Statutes 48:7-3.1. Power to condemn; designation of streets and highways; location of posts, towers, etc.

Every utility organized and existing for the purpose of supplying electricity for light, heat or power may exercise the power of eminent domain as provided in sections 48 and 49 hereof in taking or acquiring any land or interest therein which may be reasonably necessary for a right-of-way for the transmission and distribution of electricity to the public.

New Jersey Permanent Statutes 48:12-35.1 Authority and extent of condemnation.

60. Any railroad utility incorporated in this State or in any other state and operating in New Jersey may exercise the power of eminent domain as provided herein in taking: (a) any land and property required for the right-of-way of its main line and branches, not exceeding 200 feet in width, unless more shall be required for slopes of cuts or embankments or retaining walls; (b) all such other land and property adjoining such right-of-way as exigencies of business may demand for the erection or expansion of freight and passenger depots and all other railroad purposes, provided, however, that any railroad utility exercising condemnation for this purpose must demonstrate to the Department of Transportation that alternative property suitable for the specific proposed use of the property to be taken is unavailable, either through on-site accommodation or through voluntary sale of alternative, reasonably situated property, and that the interest in the property to be taken does not exceed what is necessary for the proposed use, and shall also demonstrate to the Department of Transportation at an informal hearing the specific use to be made of the land or other property or interest to be acquired and that such proposed use is necessary and consistent with the purposes enumerated for such railroad utility and with the extent of the land or other property or interest to be condemned; and (c) any land and property necessary to comply with any order, determination, rule or regulation of the Department of Transportation.

[U]nless the applicable statute authorizes acquisition of title in fee simple by the condemning authority, all the latter obtains by condemnation is an easement for the purpose required. Thus, an easement so granted, or an easement obtained by condemnation for the accomplishment of a particular purpose, expires by its own specific limitation when the street or public use is abandoned. *Eggleston v. Fox*, 232 A. 2d 670 - NJ: Appellate Div. 1967.

Other Statutory Easements

Typically, statutes and/or ordinances regulating condominium and “zero lot line” developments provide for easements when units inadvertently encroach on other interests because of construction anomalies.

Recording and Filing Requirements

Easements are interests in real property and, as such, must be conveyed in writing in accordance with the State of Frauds.

Recordation, while not a legal necessity, is certainly highly recommended. An executed, but unrecorded easement subjects *only* the grantor and the grantee to the terms of the document. An unrecorded easement does not give notice therefore cannot affect third parties (e.g. subsequent buyers). An unrecorded easement is essentially the same as a license agreement between the two parties to the agreement.

New Jersey Permanent Statutes 46:26A-12. Effect of recording.

- a. Any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents.
- b. A claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document.
- c. A deed or other conveyance of an interest in real property shall be of no effect against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded.

New Jersey Permanent Statutes 48:3-17.3. Recording of grants; effect as constructive notice

The recording of any grant of easement or right of way to any public utility, and any corporation operating pipeline facilities within or through the State shall not constitute constructive notice thereof beyond 1 year from the date of such grant unless

- (a) the principal facilities to be constructed on such right of way are to be located within the limits of any street, or
- (b) such grant contains a particular description of the location of the right of way so granted, ...

There are cases in which a jurisdiction purchased an easement, but did not record it and did not actively use it (perhaps it was purchased in anticipation of some future use). When the servient estate was later conveyed, the grantee bought it unburdened by the easement since there was no actual notice (by use) nor was there constructive notice (virtue of recordation). When the jurisdiction finally decided to actually put the easement to use, they found it had to be purchased again from the new owner.

A purchaser of land who has no notice either actual or constructive, of an easement in such land in favor of third persons is free from the burden of such easement. See 28 C.J.S., *Easements*, §§ 49, 50.

The general rule is stated in 19 C.J. page 939 and 940, Sections 146 and 147 under Easements, as follows: *"Notice of an easement may be imputed to the purchaser by a properly recorded instrument in which the easement is granted. And where the use of the easement is open and visible, the purchaser of the servient tenement will also be charged with notice, and that too although the easement was created by a grant which was never recorded."*

"Recordation gives constructive notice to all persons dealing with the land of properly recorded instruments in the chain of title." An unrecorded deed is unenforceable against a subsequent bona fide purchaser for value without actual knowledge of the prior unrecorded deed. See *id*; *Tiller v. Hinton* (1985), 19 Ohio St.3d 66, 69, 482 N.E.2d 946 (unrecorded easement is unenforceable against subsequent bona fide purchaser without notice of unrecorded easement). However, a bona fide purchaser is bound by the prior deed if he has actual knowledge of it. *Montgomery Country [sic] Treasurer v. Gray*, 2004 Ohio 2729 - Ohio: Court of Appeals, 2nd. [internal citations omitted]

The purpose of the recording statute is to protect a subsequent buyer without notice; therefore, once recorded, deeds and easements are valid to subsequent purchasers without notice. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 233, 662 S.E.2d 452, 455 (Ct. App. 2008).

A properly executed and recorded easement burdens the servient estate regardless of whether or not a subsequent conveyance mentions its existence.

Unwritten Easements

There are a number of ways that easements can arise by unwritten means.

Easements may be created by implication, express act or conveyance, or prescription. *MAUTONE v. CAPPELLUTI*, NJ: Appellate Div. 2014.

There seems to have been nine methods recognized under the [South Carolina] common law for the creation of an easement, namely, by grant, estoppel, way of a necessity, implication, dedication, prescription, ancient window doctrine, reservation, or condemnation.”) (citing *Davis v. Robinson*, 127 S.E. 697 (1925)).

Easements may be created by grant, reservation, prescription, estoppel, necessity or implication. *Wild Oaks, LLC v. Beehan*, 2012 NY Slip Op 30601 - NY: Supreme Court 2012.

Easements may be created by (1) express grant, (2) implied grant, (3) prescription, or (4) estoppel. *McCumbers v. Puckett*, 183 Ohio App.3d 762, 2009-Ohio-4465, 918 N.E.2d 1046, ¶ 14 (12th Dist.). *Sunshine Diversified Invests, III, LLC v. Chuck*, 2012 Ohio 492 - Ohio: Court of Appeals, 8th District 2012.

The owner of upstream property possesses a natural easement on land downstream for drainage of surface water flowing in its natural course. *Ambrosio v. Perl-Mack Construction Co.*, 143 Colo. 49, 351 P.2d 803. The law will protect this interest provided that the upstream owner does not change the natural flow of water in such a way as to do more harm than formerly to downstream properties. *Hankins v. Borland*, 163 Colo. 575, 431 P.2d 1007. *Howard v. Cactus Hill Ranch Company*, 529 P. 2d 660 - Colo: Court of Appeals, 1st Div. 1974.

When claiming an unwritten easement, the claimant has the burden of proof.

“The burden of proving an [unwritten] easement rests on the party claiming such right and must be by clear and convincing proof.” *Berkeley Development Corp. v. Hutzler*, 159 W. Va. 844, 229 S.E.2d 732 (1976) cited in the Supreme Court of Appeals of West Virginia January 2001 term, No. 28722 *Grist Lumber, Inc. v. Brown*.

In an easement action, the party claiming the easement bears the burden of proving the existence of the easement by clear and convincing evidence. *Fitzpatrick v. Palmer*, 186 Ohio App. 3d 80, 2009-Ohio-6008, 926 N.E. 2d 651 at paragraph 22. Clear and convincing evidence is evidence which produces in the mind of the fact finder a firm belief or conviction as to the facts sought to be established. *Id.* *Canton Asphalt Co. v. Fosnaught*, 2011 Ohio 5902 - Ohio: Court of Appeals, 5th Appellate.

Easements by Implication (generally)

It is presumed that a grantor will not advertently eliminate his own access by sale of real estate, and an easement by implication will be implied. Similarly, if a grantor transfers property without adequate access, it also will be implied that the necessary access is conveyed with the conveyance of the land.

Implied easements are generally of two types: easements by necessity and quasi-easements. *TRUNELL v. TRUST FOR HAZEL HARRISON*, NJ: Appellate Div. 2010.

The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am. Jur. 2d Easements and Licenses § 19 (2004); 28A C.J.S. § 62.

Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d Easements and Licenses §§ 20-22, 30 (describing the different types of implied easements).

The Restatement identifies four traditional types of implied easements — easements implied from prior use, easements implied from map or boundary reference, easements implied from a general plan, and easements created by necessity, Restatement, supra, §§ 2.12-2.15 — all requiring the severance of a single possessory interest. The Restatement also identifies two alternative methods to obtain an easement without the requisite express conveyance: an easement by estoppel and a prescriptive easement. Id. §§ 2.10, 2.16-2.17. *PRECIOUS OFFER. MINERAL EXCHANGE, INC. v. McLain*, 194 P. 3d 455 - Colo: Court of Appeals, 5th Div.

The rationale of the [implied easement] rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do. It is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use, or upon the filing or recording of the plat. *Ute Park Summer Homes Ass'n. v. Maxwell Land Grant Co.*, 427 P.2d 249, 253 (N.M. 1967). Cited in *Noble v. Kalanges*, 2005 VT 101 - Vt: Supreme Court 2005.

The situation must be such that retaining the easement over the burdened (servient) parcel is “necessary,” although the extent of necessity varies from state to state and on whether or not the easement being claimed is based on prior use or strictly on necessity. Some states require strict necessity, while others require necessity “reasonable” for the convenient use and enjoyment of the benefited parcel.

Implied Easement (by Prior Use)

There are several specific requirements associated with implied easements by prior use. First, the servient and dominant estates must have been one and the same previously – owned by the same person as one parcel. And second, during that time the owner must have been using a portion of the parcel in a way that benefited another portion of the parcel. In most states, there must only be a reasonable necessity, not a strict necessity.

For example, a driveway that ran across the front of the parcel to a building in the rear. This use must have been apparent so that it could have been observed, for example, by a potential purchaser. The owner of the overall parcel must then subsequently have conveyed a portion of the parcel to another party, and either retained the remainder or conveyed it to yet another party.

The situation must be such that retaining the easement over the burdened (servient) parcel is “reasonably necessary” for the convenient use and enjoyment of the benefited (dominant) parcel.

[T]he court recognized that in circumstances in which a landowner, during a period in which ownership was unified, utilized a part of the land for the benefit of another part, a quasi-easement was created. Upon conveyance of the benefited part, the grant of an implied easement would be found (1) if title were separated; (2) before separation took place the use that gave rise to the easement had been "so long continued and so obvious or manifest as to show that it was meant to be permanent;" and (3) that the easement was "necessary to the beneficial enjoyment of the land granted.

Significantly, the court held:

the necessity need not be absolute in the sense that there can be no enjoyment of the land whatsoever without the easement. Here, again, necessity or the reasonable necessity is not the basic factor that creates the implied easement, but it is one of the elements of consideration in ascertaining the real intention of the parties. In other words, the extreme desirability of the easement is a material consideration of gradational weight in support of the inference that the conveyance of the land was intended not only to embrace the land alone but of the land with the easement appurtenant thereto.

DePalma v. McGlone, NJ: Appellate Div. 2012. [internal citations omitted]

Although earlier cases required that an implied easement, to be "apparent," be readily visible, later decisions require merely that the prior use shall have been discoverable on a careful inspection of the premises by one conversant with the claimed use of the property. Notorious visibility is therefore no longer the gauge, but rather susceptibility of ascertainment on careful inspection by one ordinarily conversant with the subject. *Wolek v. Di Feo*, 159 A. 2d 127 - NJ: Appellate Div. 1960.

An easement implied from prior use is created when 1) the servient and dominant estates were once under common ownership, 2) the rights alleged were exercised prior to the severance of the estate, 3) the use was not merely temporary, 4) the continuation of this use was reasonably necessary to the enjoyment of the parcel, and 5) a contrary intention is neither expressed nor implied. Restatement, *supra*, § 2.12

The rule stated in this section is not based solely on the presumed actual intent of the parties. It furthers the policy of protecting reasonable expectations, as well as actual intent, of parties to land transactions. Restatement, *supra*, § 2.12 cmt. a.

An easement may be created by implication [by prior use] even where there is no express conveyance or the conveyance is not recorded because constructive notice is deemed to exist when an apparent servitude of one parcel in favor of another is obvious to anyone viewing the land. *Peterson v. Beck*, 537 NW 2d 375 - SD: Supreme Court 1995.

A quasi-easement exists when a single owner uses one of his properties to benefit another, and is a "quasi" easement in the sense that because easements merge with title, a common owner cannot own an actual easement in his own property. [See *Judge v. Rago*, 570 A.2d 253, 258 (Del. 1990) ("If a single party owns two parcels of property and uses one to benefit the other, no actual easement is created since only one owner is involved. Because this use resembles an easement, however, it is referred to as a 'quasi-easement.'").] FN 34 *SANDIE, LLC v. PLANTATIONS OWNERS ASSOCIATION, INC.*, Del: Court of Chancery 2012.

A quasi-easement generally becomes an enforceable, implied easement, based on the preexisting use when title to the dominant and servient tracts is severed. [See *Judge v. Rago*, 570 A.2d 253 at 258 (Del. 1990). ("If the property owner . . . conveys the 'quasi-servient tenement,' he may retain an actual easement appurtenant to the land he keeps, even if the conveyance is wholly silent on the question of easements and even if the easement is not absolutely necessary for the enjoyment of the retained property. . . . It is presumed that a grantor in this situation does not wish to abandon the preexisting land use; the grantee is put on notice by observing evidence of the preexisting use."); *Potter v. Gustafson*, 192 A.2d 453, 455 (Del. Ch. 1963) ("While the legal basis or rationale of the rule of implied easements from pre-existing use upon severance of title is often stated as an implied or presumed grant, the underlying basis of such rule is that unless the contrary is provided, all privileges and appurtenances which are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it was enjoyed by the grantor are included in the grant."). FN 35 *SANDIE, LLC v. PLANTATIONS OWNERS ASSOCIATION, INC.*, Del: Court of Chancery 2012.

(Implied) Easements by Necessity/ (Right of) Way of Necessity

Easements by necessity most commonly involve parcels that are essentially land locked. Again, the situation must involve what was previously a single parcel. Easements by necessity must, by their nature, involve an actual (or strict) need for the easement – again, access being the most common.

[A]n implied easement by necessity arises by operation of law where "an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor...." Such an easement is found only in relation to the boundary conditions existing at the time of the original subdivision severing common ownership.... An easement implied by necessity "is predicated upon the strong public policy that no land may be made inaccessible and useless." *DePalma v. McGlone*, NJ: Appellate Div. 2012. [internal citations omitted]

An implied easement [by necessity] arises so that the possessor of the landlocked parcel can access the street. *Reed v. BILLYBOB PARTNERS*, NJ: Appellate Div. 2010. [internal citations omitted]

"The duration and extent of [easements by necessity] are influenced by the fact that `necessity' is basic to their creation. . . . The necessity for the easement is determined as of the time the parcels are originally separated even though application for establishment of the easement is made by subsequent owners of the landlocked parcel." *Wiggins v. Dorsey*, NJ: Appellate Div. 2010.

Easements by necessity cannot be obtained across land that was not part of the initial unified parcel except by application of a "Private Way of Necessity" statute such as exists in some states like Colorado and Arizona.

In addition, at least in some states (Florida and South Dakota, in particular, and possibly others) the existence of a marketable title act essentially establishes a statute of limitations against a claim for an easement by necessity equal to the time set by the marketable title act (which varies among the approximately 22 states that have such an act).

The courts in some states (e.g., Maine) have held to the antiquated view that access to navigable waters defeats an otherwise valid claim to an easement by necessity. This is not the case in most states.

[O]ur case law has long made practical access to a public road the linchpin of the easement-by-necessity doctrine. This was the law at the time of the original conveyance in 1959, and it remains so today. Indeed, the navigable-water exception has been widely regarded by courts and commentators as archaic and unrealistic for many decades. See generally *Cale v. Wanamaker*, 121 N.J.Super. 142, 296 A.2d 329, 333 (Ch.Div.1972) ("Although some courts have held that access to a piece of property by navigable waters negates the `necessity' required for a way of necessity, the trend since the 1920's has been toward a more liberal attitude in allowing easements despite access by water. . . ."); Note, Property Law — Minnesota's Lakeshore Property Owners Without Road Access Find Themselves Up a Creek Without a Paddle — *In re Daniel for the Establishment of a Cartway*, 30 Wm. Mitchell L.Rev. 725, 751 ("Since 1966, the vast majority of cases addressing water access have similarly found water access to be unreasonable in light of current modes of transportation."); E. Kellett, Annotation, Easements: Way by Necessity Where Property is Accessible by Navigable Water, 9 A.L.R.3d 600, 603 (1966) ("The `trend,' if it may be so called, toward a more liberal attitude in allowing easements despite access by water, might therefore be explained as a tacit recognition of the fact that most people today think in terms of `driving,' rather than `rowing,' to work, home, or market."). *Berge v. State*, 915 A. 2d 189 - Vt: Supreme Court 2006.

(Implied) Easements by Estoppel

Implied easements by estoppel are recognized by the courts in some states.

The trial court also characterized its judgment in favor of plaintiffs as involving the doctrine of "easement by estoppel." Our courts previously may not have considered or applied a legal doctrine so identified or denominated. Nevertheless, it seems clear that general equitable considerations dominated the trial court's determination of the controversy. There is little doubt that the trial court reached its ultimate conclusion in this case by applying traditional, well-understood principles of equity. *Mahony v. Danis*, 469 A. 2d 31 - NJ: Supreme Court 1983. [concurring opinion]

A court can imply an easement created by estoppel when 1) the owner of the servient estate "permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked," 2) the user substantially changed position in reasonable reliance on that belief, and 3) injustice can be avoided only by establishment of a servitude. Whether reliance is justified depends upon the nature of the transaction, including the sophistication of the parties. The Restatement does not have a requirement of deception, neither does Colorado. An easement by estoppel is an equitable remedy. It recognizes that when a landowner induces another to change position in reliance upon his promise, he is estopped from then denying the existence of the rights simply because they did not meet the formal conveyance rules. The rule "is founded on the policy of preventing injustice." *Id.* § 2.10. *Lobato v. Taylor*, 71 P. 3d 938 - Colo: Supreme Court 2002. [internal citations omitted]

Implied (common-law) dedications are generally considered to be based on estoppel.

[A] common-law dedication is generally held to rest upon the doctrine of estoppel in pais. *Bergin v. Bistodeau*, 645 NW 2d 252 - SD: Supreme Court 2002

Implied ("Common Law") Dedication

Implied dedications are yet another form of implied easements.

Under common law, an owner of land can dedicate that land to a proper public use. Restatement (Third) of Property: Servitudes Sec. 2.19(1) (2000).

An implied dedication arises from conduct of the dedicator which falls short of any express statement of intent to dedicate but which nevertheless manifests an intent to dedicate land to public use.

Dedication of land may be effected, at common law, by any conduct of the dedicator which manifests his intent to devote the land to public use. The conduct may consist of written or oral declarations of intent, or of other conduct from which the intent to devote the land to public use can be inferred.

.....

It is often said that a common law dedication is not completed or consummated until it has been accepted by the public or by the public authorities empowered to act in its behalf. This is certainly true insofar as an acceptance is a prerequisite to the acquisition of any present right of use by the public and to the imposition of any duty upon the public authorities to maintain the area dedicated to public use. But in New Jersey, at least, the dedication is complete and irrevocable so far as the dedicator is concerned as soon as he has manifested his intent to devote the land to public use in praesenti. The dedication may never be accepted, but the power of acceptance continues indefinitely in the general public and in the authorities who represent the public.

National Paving Co. v. Taxation Div. Director, 3 NJ Tax 133 - NJ: Tax Court 1981

A dedication is ... implied when the intent must be gathered from the acts of the dedicator. Otherwise stated, a dedication is ... implied where it arises by operation of law from the owner's conduct and the facts and circumstances of the case. ... [A] common-law dedication is generally held to rest upon the doctrine of estoppel in pais." *Bergin v. Bistodeau*, 645 NW 2d 252 - SD: Supreme Court 2002.

Because dedication may be express or implied, the offer to dedicate need not come in the form of a writing or an affirmative act by the owner. *Druke*, 137 Vt. at 574, 409 A.2d at 995. For example,

[l]ong acquiescence in use[] by the public, if the attending circumstances clearly indicate an intent by the owner to devote the land to public use, is evidence upon which a dedication may be predicated. The allowance by the owners of repairs at public expense is one circumstance that strongly tends to show the intent to dedicate.

This follows because the "theory underlying dedication is that owner-permitted use of private property by the public creates . . . an expectation of continued use that estops the owner from preventing it." "[D]edication is actually a form of estoppel in pais, in which the offer by the owner is the representation, and the use by the public is the reliance that completes the estoppel.". Thus, in the context of an implied dedication, the public's use of the land or resource in question looms large.

* * *

A "common-law dedication... does not pass fee simple; rather, it passes an easement to use the property in a manner consistent with the dedication."

Town of South Hero v. Wood, 898 A. 2d 756 - Vt: Supreme Court 2006. [internal citations omitted]

Under common law, dedication of a public way by a private property owner is established by demonstrating (1) that the property owner unequivocally intended to make the dedication, and (2) that the dedication was accepted by the governmental authority. The governmental authority's acceptance of a dedication may be evidenced by legislative act, or by the public entity's possession, improvement, or use of the land as a public road. *Id. Bittle v. CAM-COLORADO, LLC*, Colo: Court of Appeals, 5th Div. 2012. [internal citations omitted]

[T]here is a distinction between common law dedications and statutory dedications. Common law dedications are controlled by common law principles while statutory dedications are governed by specific statutes. Another distinction between a statutory and common law dedication is that the former operates by way of grant and the latter by way of equitable estoppel. *Id.* The title or right acquired by the public in a statutory dedication depends upon the language of a jurisdiction's dedication statute. In many jurisdictions, a statutory dedication conveys a fee interest to the public. See *Gen. Auto Serv. Station v. Maniatis*, 328 Ill.App.3d 537, 262 Ill.Dec. 568, 765 N.E.2d 1176 (2002); *Nettleton Church of Christ v. Conwill*, 707 So.2d 1075 (Miss. 1997). However, in other jurisdictions a statutory dedication may confer no further right than a mere easement. See *Heyert v. Orange & Rockland Utils., Inc.*, 17 N.Y.2d 352, 218 N.E.2d 263, 271 N.Y.S.2d 201 (1966); *City of Bartlesville v. Ambler*, 1971 OK 154, 499 P.2d 433; *Lee v. Musselshell County*, 2004 MT 64, 320 Mont. 294, 87 P.3d 423; *Mallory v. Taggart*, 24 Utah 2d 267, 470 P.2d 254 (1970). *Kiely v. Graves*, 271 P. 3d 226 - Wash: Supreme Court 2012.

The purpose of the principle of common law dedication is to provide a mechanism for an intentional appropriation or donation of land by its owner for some proper public use. However, the owner's intent need not be express. "The owner's intention to dedicate land to the public may be manifested by his acquiescence in its use by the public, and dedication of the property may result from such acquiescence, provided the use is of the necessary character and duration."

The intent to dedicate may be shown by either acts or declarations so long as that "act or declaration on the part of the owner show[s] a present, fixed, unequivocal purpose to dedicate" Similarly, the acceptance of the offer by the public, requires "the same unequivocal and convincing proof necessary to prove an intent to dedicate" *Winston v. VILL. OF SCARSDALE*, 170 AD 2d 672 - NY: Appellate Div., 2nd Dept. 1991. [internal citations omitted]

As noted above, implied dedications are generally considered to be based on estoppel.

[A] common-law dedication is generally held to rest upon the doctrine of estoppel in pais. *Bergin v. Bistodeau*, 645 NW 2d 252 - SD: Supreme Court 2002

Prescriptive Easements (Easements by Prescription)

Prescription is the easement equivalent of adverse possession – the perfecting of an unwritten interest in real estate by a use adverse to the record owner of the fee.

In order to establish an easement by prescription, a litigant must prove elements similar to those associated with adverse possession. Thus, the proponent of an easement by prescription must prove an adverse use of land that is visible, open and notorious for at least thirty years. The proponent of the easement must establish the elements by the preponderance of the evidence. * * * "A use is adverse or hostile if a person uses the property of another under a claim of right, pursued with an intent to claim against the true owner in such circumstances of notoriety that the owner will be aware of the fact and thus alerted to resist the acquisition of the right by claimant before the period of adverse possession has elapsed." *HAWES REALTY, INC. v. Cupo*, NJ: Appellate Div. 2012. [internal citations omitted]

The Restatement (Third) of Property: Servitudes § 2.18 cmt. f (2002) recognizes that although, in general, the requirements for a public prescriptive easement are the same as those for a private easement, some states do require a governmental body to assert some claim of ownership through acts of maintenance or otherwise. As shown by our case law construing section 43-2-201(1)(c), Colorado is one of these states. *McIntyre v. BOARD OF COUNTY COM'RS*, 86 P. 3d 402 - Colo: Supreme Court 2004.

Prescriptive easements – in the same manner as adverse possession – cannot be gained when the servient estate is a governmental entity absent the rare statute that provides otherwise.

Prescriptive Easements versus Adverse Possession

While Adverse Possession matures into an *ownership* right, a prescriptive easement will result in the acquisition of a limited, non-possessory interest - not ownership - in the servient estate.

In some states the courts have essentially stated that the only difference between adverse possession and a prescriptive easement is the element of exclusivity.

To establish title by adverse possession, a possessor must prove by a preponderance of the evidence that her use of the true owner's property was exclusive, continuous, uninterrupted, open and notorious for the statutory period. *DiGiovanni v. Rodriguez*, NJ: Appellate Div. 2010. [internal citations omitted]

Although the burden of proving a prescriptive easement is the same as that for adverse possession, an easement is an "encumbrance" rather than an "encroachment." [An] "encumbrance" [is defined] as an interest in an estate in land and an "encroachment" as an invasion. *DiGiovanni v. Rodriguez*, NJ: Appellate Div. 2010. [internal citations omitted]

In other states, like Arizona, Indiana and New York, courts have taken the position, either implicitly or explicitly, that the same elements apply to prescriptive easements as to adverse possession except for the differences required by the differences between fee interests and easements.

Characteristics of Easements

Property interests in land have at least four major characteristics: (1) duration, (2) right to possession, (3) degree of beneficial enjoyment conferred on the owner, and (4) type of ownership. Richard R. Powell, *Powell on Real Property* vol. 1, § 11.01 (Michael Allan Wolf ed., Lexis 2007). *Libby Placer Min. Co. v. Noranda Min. Corp.*, 197 P. 3d 924 - Mont: Supreme Court 2008.

The Scope of an Easement

The document creating the easement needs to define the scope of the easement. An easement generally can be used only for the purpose expressly stated in the document that created it, thus the exact wording of the conveyance is critical.

When interpreting an agreement granting an easement, a court must discern and enforce the intent of the parties. Insofar as that intent is evident from the plain language of the agreement, the court need not consider extrinsic evidence. On the other hand, where that language is ambiguous, the court must interpret the agreement in light of "the surrounding circumstances, including the physical conditions and character of the servient tenement, and the requirements of the grantee. *DEBENEDETTE v. DELODZIA*, NJ: Appellate Div. 2009. [internal citations omitted]

A grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated. Therefore, nothing passes as an incident thereto which is not necessary to its fair enjoyment. What is necessary for such reasonable enjoyment depends upon the terms of the grant, the purposes for which it was made, the nature and situation of the property subject to the easement and the manner in which it has been used and occupied. There always remains with the servient estate the right of full dominion and use of the land except in so far as a limitation thereof is essential to the reasonable enjoyment of the easement. 17 Am.Jur. 994. *Walton v. Poplos*, 85 A. 2d 75 - Del: Court of Chancery 1951. [internal citation omitted]

"[N]o use may be made of [a] right of way, different from that established at the time of its creation, so as to burden the servient estate to a greater extent than was contemplated at the time of the grant." *Id.* (citation omitted). In the instant case, as discussed above, we agree with the trial court that the use of automobiles on the right-of-way would not burden the estate to a greater extent than was contemplated at the time of the grant. The purpose of the right-of-way was to provide access to the land that lay beyond it, and the use of automobiles to traverse the route is consistent with that purpose. *Rowe v. Lavanway*, 2006 VT 47 - Vt: Supreme Court 2006.

"[i]t is not difficult to describe an unlimited easement. A mere statement that a way is "for ingress and egress" ... or for "the purpose of passing and repassing" ... aptly describes an easement of way without restriction." "Where no limitation is placed on the extent of the use of an easement of way, it is available as a general way for all purposes to which the dominant tract might be devoted. *CARIBBEAN HOUSE v. NORTH HUDSON*, 83 A. 3d 849 - NJ: Appellate Div. 2013. [internal citations omitted]

[T]he actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance as to the estate servient to the easement unless those actions or inactions exceed the scope of the easement. ("Where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant."); ("No use may be made of a right-of-way different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated at the time of the grant."). *Quintain v. Columbia Natural Resources*, 556 SE 2d 95 - W Va: Supreme Court of Appeals 2001. [internal citations omitted]

If the geographic extent or location of an easement is specifically outlined in the creating document, the dominant estate generally, but with exceptions, has the right to unobstructed use (consistent with the purpose of the easement) of the entire area.

If ... the width, length, and location of an easement for ingress and egress have been specifically and definitely set forth in the grant, the expressed terms thereof are controlling, and what is reasonable or necessary is not decisive. *Pickens v. Kemper*, 847 P. 2d 648 - Colo: Court of Appeals, 1st Div. 1993. [internal citations (SC, AZ, KS) omitted]

The scope of an easement is measured by its nature and purpose. If the width, length, and location of an easement for ingress and egress are specifically set forth in the easement grant, its owner has the right to unobstructed passage over the entire area described in the grant. In addition, the owner may do whatever is reasonably necessary to permit its full use and enjoyment. *Story v. Bly*, 217 P. 3d 872 - Colo: Court of Appeals, 3rd Div. 2008. [internal citations omitted]

If the width and location are ambiguous in the document creating it, the easement is not void, but its width will be restricted to that width is reasonable or necessary for enjoyment of the easement. If not otherwise outlined in the document, typically the owner of the servient estate has the first right to designate its location.

"Where a way is granted over a piece of land of a certain stated width, it will depend upon the circumstances of the case whether the reference is to the width of the way, or is merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary." *DEBENEDETTE v. DELODZIA*, NJ: Appellate Div. 2009.

[T]he authorities we have been able to find without exception hold that "a grant or reservation of a right of way 'over' a particular area, strip or parcel of ground is not to be construed as providing for a way as broad as the ground referred to." "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed." Dissent in *Salmon v. Bradshaw*, 173 NW 2d 281 - SD: Supreme Court 1969. [internal citations omitted]

When a deed merely recites a general right-of-way over the servient estate, the owner of the easement is "entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own." More particularly, when the width of an easement is undetermined by the deed "the law says that it shall be of a reasonable width, considering the purpose for which it was intended." *Clearwater Realty Co. v. Bouchard*, 505 A. 2d 1189 - Vt: Supreme Court 1985. [internal citations omitted]

Thus, the ...use of the easement is limited by the general rule that the dominant estate's use of an ambiguous easement is constrained to that which is necessary or reasonable under the circumstances. *Neal v. Brown*, 191 P. 3d 1030 - Ariz: Court of Appeals, 1st Div., Dept. A 2008. [internal citations omitted] There is authority that the width of an easement for ingress and egress is not necessarily coextensive with the parcel or area over which the easement is granted. Some cases hold that a grant or reservation of a right-of-way "over" a particular area, strip or parcel is not ordinarily to be construed as providing for a way as broad as the ground referred to. See generally Annot., 28 A.L.R.2d 253 § 7 (1953). Without deciding whether Arizona would follow this line of authority, we conclude that the language at issue here unambiguously creates an easement that is 40 feet in width. Compare *Schaefer v. Burnstine*, 13 Ill.2d 464, 150 N.E.2d 113 (1958) ["right-of-way for ingress and egress over a strip of land 40 feet in width" held to be unambiguous]; *Hester v. Johnson*, 335 S.W.2d 574 (Ky. 1960) ["said right-of-way to be at least 30 feet in width" held to be unambiguous]; *Lindhorst v. Wright*, 616 P.2d 450 (Okla. App. 1980) ["a perpetual right of ingress and egress on and across 40 feet of the SW/4 of the SW/4" held to be unambiguous]. But see *Andersen v. Edwards*, id.; *Barton's Motel, Inc. v. Saymore Trophy Co.*, id.; *Hyland v. Fonda*, 44 N.J. Super. 180, 129 A.2d

899 (N.J.App.Div. 1957). *** It is well established that the owner of a right-of-way for ingress and egress has a right to use the full width of the area unhampered by obstructions placed thereon. We recognized in Syllabus Point 2 of *Rhodes Cemetery Ass'n v. Miller*, supra, that the practical use of the right-of-way by the parties would fix its location. See Annot., 28 A.L.R.2d 253, 263 (1953). In *Wiley v. Ball*, supra, we stated this rule in Syllabus Point 4: "The servient tenement can not be burdened with the occupancy of a greater width than is reasonably necessary for the uses for which a right of way thereover is reserved as an easement, where no width is defined in the reservation." *Hoffman v. Smith*, 310 SE 2d 216 - W Va: Supreme Court of Appeals 1983. [footnotes and some internal citations omitted]

[T]here is no basis in case law to support the proposition that a party who normally uses another's property in only one direction—in this case, away from Lot 7, across Lot 4 toward Savage Lane—may obtain only a one-way prescriptive easement. FN 62 *Savage v. Barreto*, Del: Court of Chancery 2013.

Nevertheless, courts have held developmental changes and inventions could entitle the owner of an easement to vary the use of the easement.

Changes in the use of land brought about by so-called progress necessarily result in changes in the uses made of unrestricted rights of way appurtenant to such land, at least where such easements are created by unlimited grant, *White v. Grand Hotel*, 1 Ch. [1913] 113; *Tong v. Feldman*, 152 Md. 398, 136 A. 822, 51 A.L.R. 1291; *Birdsey v. Kosienski*, 140 Conn. 403, 101 A.2d 274, Vol. 17, American Jurisprudence, Easements, § 96. *Lynam v. Clayville*, 128 A. 2d 316 - Del: Court of Chancery 1957.

The question ... is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the iter, the actus, and the via of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use * * *. *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 539, 63 N.W. 111, 112, 28 L.R.A. 310, 51 Am.St.Rep 543. *Herold v. Hughes*, 90 SE 2d 451 - W Va: Supreme Court of Appeals 1955.

In *Mark 10 Mining & Consulting, Inc. v. Rawson*, 7th District No. 91-C-77, 1992WL 356177 (November 25, 1992), the Court of Appeals for Columbiana County found that changes in the use of an easement are permitted to the extent the changes result from normal growth and development of the dominant land. *Id.* at 2, citing *Erie Railroad Company v. S. H. Kleinnman Realty Company*, 92 Ohio St. 96, 110 N.E. 527 (1915). See also *Crane Hollow*, *supra*. *Diemling v. Kimble*, 2012 Ohio 3323 - Ohio: Court of Appeals, 5th Appellate Dist. 2012.

Persons with future interests in the dominant estate have certain limited rights to use the easements attached to that estate.

The rights of the servient estate owner and the rights of the dominant estate owner must be carefully balanced.

"Unless the owner of the servient estate expressly agrees otherwise, the owner reserves the right to use the property in any manner or for any purpose, so long as the owner does not interfere with the use or enjoyment of the easement." *Block v. Drake*, 681 NW 2d 460 - SD: Supreme Court 2004. [internal citation omitted]

It is well settled that the owner of the servient tenement may use the land over which the way extends in any manner which does not [un]reasonably interfere with its use. *Aladdin Petroleum Corporation. v. Gold Crown Properties, Inc.*, 221 Kan. 579, 586, 561 P.2d 818 (1977). [internal citations omitted]

An easement, regardless of the manner of its creation, does not carry any title to the land over which it is exercised, nor does it serve to dispossess the landowner. The owner of the servient estate enjoys all the rights and benefits of proprietorship consistent with the burden of the easement; while the rights of the owner of the dominant estate are limited to those connected with use of the easement. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P. 2d 1229 - Colo: Supreme Court 1998. [internal citations omitted]

[T]he owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement. *Baker v. Pierce* (1950) 100 Cal.App. 2d 224.

[T]he owner of a servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted, *see Howard v. Cramlet*, 56 Ark. App. 171, 939 S.W.2d 858 (1997).

The servient estate owner is entitled to make any use of the servient estate that does not unreasonably interfere with the enjoyment of the servitude. Restatement (Third) of Property: Servitudes.

The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated." *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 96, 28 S.E.2d 545, 549 (1943).

If the easement does not detail the manner in which the easement is to be used, it is assumed the servient estate owner and parties with rights to use the easement will "exercise their respective rights and privileges in a spirit of mutual accommodation." Restatement (Third) of Property: *Servitudes*.

Those with rights to an easement have the right to ask a court to enforce that right.

The Scope of an Unwritten Easement

The scope of an unwritten easement is strictly defined by the need (as in easements by implication or necessity) or by the specific nature of the use (as in a prescriptive easement).

Unwritten easements involve reasonable and necessary use, such as ingress and egress. They will be limited to the spatial extent necessary for the intended use.

The scope of the right acquired by prescription 'will be commensurate with and measured by the use "that originally gave rise to the easement.' *Grist Lumber, Inc. v. Brown*, Supreme Court of Appeals of West Virginia January 2001 term, No. 28722. [internal citations omitted]

Frequency of use during the prescriptive period limits the frequency of future use. *Kelly*, ¶ 34. *BROWN & BROWN OF MT, INC. v. RATY*, 289 P. 3d 156 - Mont: Supreme Court 2012.

[T]he extent and scope of a prescriptive easement cannot be enlarged unless the increased use has occurred for the entire statutory period required by law. See *Gibbens v. Weisshaupt* (Idaho 1977) 570 P.2d 870, 876.

[T]he scope of an easement gained by prescription is constrained by--i.e., may not exceed--the character and extent of the use made of it during the prescriptive period. See *Warnack v. Coneen Family Trust* (1994), 266 Mont. 203, 217-18, 879 P.2d 715, 724; *Kelly v. Wallace*, 1998 MT 307, ¶ 31, 292 Mont. 129, ¶ 31, 972 P.2d 1117, ¶ 31, and cases cited therein; § 70-17-106, MCA.

Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest. *Soderberg*, 687 A.2d at 843 n.3

Exclusivity

Easements are considered non-exclusive unless otherwise clearly indicated in the creating document.

"Unless the owner of the servient estate expressly agrees otherwise, the owner reserves the right to use the property in any manner or for any purpose, so long as the owner does not interfere with the use or enjoyment of the easement." Knight, 2001 SD 120, ¶7, 634 NW2d at 543. *Picardi v. Zimmiond*, 2004 SD 125 - SD: Supreme Court 2004. [internal citation omitted]

The owner of the servient tenement retains the exclusive legal authority to regulate access by third parties to a non-exclusive private roadway easement. *Picardi v. Zimmiond*, 2004 SD 125 - SD: Supreme Court 2004. [internal citation omitted]

The concept of exclusivity as applied to easements encompasses two different issues.

[M]ost . . . types of easements, may be exclusive or nonexclusive. These are legal terms of art encompassing (1) the persons who may be excluded and (2) the uses or area from which those persons may be excluded. 1 Restatement of the Law 3d, Property (2000) 14, Section 1.2. *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App. 3d 325 - Ohio: Court of Appeals, 7th.

"At one extreme, the holder of the easement or profit has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude. For example[,] the holder of a private roadway easement in a public road has no right to exclude anyone from using the road. * * * At the other extreme, the holder of the easement or profit has the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries. In between are easements where the servitude holder can exclude anyone except the servient owner and others authorized by the servient owner (usually called 'nonexclusive easement') * * *." 1 Restatement of the Law 3d, Property (2000) 14, Section 1.2. *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App. 3d 325 - Ohio: Court of Appeals, 7th.

An exclusive easement in gross is one that gives the owner the sole privilege of making the uses authorized by it. Neither the owner of the servient estate nor any other person except the owner of the easement is entitled to make such a use. *Id.*, § 493. *Orange County, Inc. v. Citgo Pipeline Co.*, 934 SW 2d 472 - Tex: Court of Appeals, 9th Dist. 1996.

[A] nonexclusive easement in gross is "one which does not give, as against the owner of the servient tenement and others who may be privileged under him, the sole privilege of making the use authorized by the easement. In the case of such an easement the owner and possessor of the servient tenement has not only the privilege himself to make the use authorized by the easement, *but he retains the power to create like privilege in others.*" *Id.* *Orange County, Inc. v. Citgo Pipeline Co.*, 934 SW 2d 472 - Tex: Court of Appeals, 9th Dist. 1996. [emphasis added]

In construing the operation and effect of any easement, the rights of the grantees, in this case the plaintiffs, will be considered not to be exclusive unless the opposite intent unequivocally appears. (3 Powell, Real Property, Easements and Licenses, § 417.) *Jakobson v. Chestnut Hill*, 106 Misc. 2d 918 - NY: Supreme Court, Nassau 1981.

When an easement is "non-exclusive," the common users must accommodate each other. *Scrubby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App. 4th 697.

If an easement is not exclusive within the terms of the document creating it, then it will generally not be construed as exclusive in favor of the grantee.

Since a private right of way carries with it by implication only such incidents as are necessary to its reasonable enjoyment, the grant of such a right, which is not exclusive in its terms, and which can be reasonably enjoyed without being exclusive, leaves in the grantor the right of user in common with the grantee. *Reiver et al. v. Voshell et al.*, Del.Ch., 158 A. 366, 368 (1932). *Hackendorn v. Mahan*, Del.Ch., 8 A.2d 794, 797 (1939). *Burris v. Cross*, 583 A. 2d 1364 - Del: Superior Court 1990.

Exclusivity may be considered a compensable characteristic of an easement.

[T]he government took what had been an exclusive easement and converted it into a public road. The condemning authority insisted it was a non-compensable taking because the condemnee retained his original right of use. A majority of the court felt otherwise, holding that the condemnee had been deprived of the exclusivity which he had previously enjoyed — the right to exclude others. The court agreed with the landowner's contention that the government's action had converted his "quiet wooded sanctuary into just another 'house by the side of the road.'" *Van Ness v. Borough of Deal*, 393 A. 2d 571 - NJ: Supreme Court 1978. [internal citations omitted]

Duration–“running with the land” versus temporary or for a specified term

The conveyance of the servient estate is automatically subject to any easement, whether the conveyance notes it or not. If for no other reason, this is true because one cannot convey what one does not own – and the easement interest is, by definition, owned by another party.

Likewise, appurtenant easements continue to exist and are conveyed with the dominant estate regardless of whether the deed specifically references the appurtenant easement or not, although if the state has a marketable title act, the existence of an easement over time could be impacted if it is not exercised or otherwise referenced in conveyances.

The duration of an appurtenant easement is perpetual unless otherwise defined by the terms of the grant that created it.

The duration of a real property interest is denoted by "estate" and (1) may be infinite or perpetual, as in fee simple; (2) may last for a specified period, such as life or a term of years; or (3) may end at any time, as in sufferance. Powell, *Powell on Real Property* vol. 1 at § 11.01.

Where the parties have clearly manifested an intention to limit the duration of an easement, the courts will enforce the limitation. Where the parties have agreed that the easement shall continue until terminated in a certain manner, the easement ordinarily will continue until so terminated. 28 C.J.S. *Easements* § 138 (2008).

Absent a limitation set forth in the easement, either in years or contingent upon the happening of some event, an easement is permanent in nature unless abandoned by nonuse. *Tan Corp. v. Johnson*, 555 NW 2d 613 - SD: Supreme Court 1996. [internal citations omitted]

Easements in Gross, however, generally are inherently limited in duration.

[P]ersonal easements, or easements in gross, are intended to benefit only the holder. Usually, they are created for a limited purpose and a limited duration. Because a personal easement exists apart from a holder's ownership of land, there is no dominant tenement, and the easement expires when the property is conveyed unless specifically reserved. R. Cunningham, W. Stoebeck & D. Whitman, *supra*, at 440. *Barrett v. Kunz*, 604 A. 2d 1278 - Vt: Supreme Court 1992.

An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal and usually ends with death of grantee. *Newman v. Michel*, W Va: Supreme Court of Appeals 2009. [internal citations omitted]

The duration of some unwritten easements may be subject to limitations related to necessity; some states have different criteria for termination of unwritten easements.

The duration and extent of such easements are influenced by the fact that "necessity" is basic to their creation. When "necessity" no longer exists the easement terminates. *Ghen v. Piasecki*, 410 A. 2d 708 - NJ: Appellate Div. 1980. [internal citations omitted]

As a general proposition, a right to a way-of-necessity exists so long as the necessity from which it arose exists. When the necessity ceases, the easement ceases — as where the dominant and servient estates become rejoined under common ownership. *Pencader Associates, Inc. v. Glasgow Trust*, 446 A. 2d 1097 - Del: Supreme Court 1982. [internal citations omitted]

[A] way of necessity arises out of public policy concerns that land not be left inaccessible and unproductive. Therefore such a way exists only so long as the necessity which creates it: if, at some point in the future access to plaintiff's land over a public way becomes available, the way of necessity will thereupon cease. *Traders, Inc. v. Bartholomew*, 459 A. 2d 974 - Vt: Supreme Court 1983. [internal citations omitted]

[A]n easement implied by necessity will continue to exist only so long as the underlying necessity exists. An easement implied by a prior use of the land, however, is permanent and must only be proven necessary at the time of severance. *Cobb v. Daugherty*, 693 SE 2d 800 - W Va: Supreme Court of Appeals 2010.

An easement by prescription is not necessarily perpetual or of indefinite duration. The easement may terminate when the need for which the parties intended to create it ends. *RIBELLINO v. 110 FIFTH ST. PRIVATE LLC*, 2012 NY Slip Op 51235 - NY: Supreme Court 2012

In most states, an easement by necessity will terminate upon cessation of the need, but Colorado and Alaska seem to be exceptions, viz.,

An implied easement of necessity is of permanent duration. *Whinnery v. Thompson*, 868 P. 2d 1095 - Colo: Court of Appeals, 4th Div. 1993. [internal citation omitted]

Having once arisen, the implied easement is not extinguished merely because the reasonable necessity ceases to exist. *Williams v. Fagnani*, 175 P. 3d 38 - Alaska: Supreme Court 2007.

Duration of an easement can also be affected if the benefited estate ceases to exist. See the sections on “Terminating or Extinguishing Easements” for more information.

[A] number of courts have held that an easement burdening or benefitting *an estate less than a fee simple* ends when that estate expires. As such, it may be more precise to say that an easement runs with the *estate* in land to which it is appurtenant, or that it follows ownership of the estate *for as long as that estate exists*. *Leichtfuss v. Dabney*, No. 04-537 Supreme Court of Montana (2005 MT 271) [emphasis in original] [internal citation omitted].

Maintenance of an Easement

Maintenance obligations related to an easement are first defined by the terms of the conveyance that created it. If the conveyance does not outline responsibilities, the owner of the easement (dominant tenement) will generally be responsible, and if there are multiple tenements, the costs will be equitably assigned.

It is well established that, as a general rule and absent a contrary agreement, the holder of an easement has a duty to maintain and repair the property/facility on a servient tenement subject to the easement. * * * In addition, we have specifically found that a duty to inspect property subject to an easement exists as to the easement holder. *Poblette v. TOWNE OF SMITHVILLE*, 809 A. 2d 178 - NJ: Appellate Div. 2002. [internal citations omitted]

In general, the beneficiary of the easement, not the owner of the burdened property, is obligated to maintain the easement, unless otherwise required by the easement or other agreement, or unless the easement is jointly utilized, for the same purposes, by the property owner with the benefited parties. *Khalil v. Motwani*, 871 A. 2d 96 - NJ: Appellate Div. 2005. [internal citations omitted]

[T]he owner of an easement has not only the right but the duty to keep the easement in repair, and the owner of the servient tenement is under no duty to maintain or repair the easement in the absence of an agreement. *Guthrie v. Hardy*, 2001 MT 122, ¶ 59, 305 Mont. 367, ¶ 59, 28 P.3d 467, ¶ 59.

[T]he owner of the dominant estate, is responsible for preparation, maintenance, improvements and repair of the way "in a manner and to an extent reasonably calculated to promote the purposes for which it was created . . . causing neither an undue burden upon the servient estate nor an unwarranted interference with the rights of common owners" [The owner of the dominant estate], in addition, "has the right to do everything necessary to preserve the easement, and the right to repair a way is fully established . . . The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each particular case, and depends on the extent and character of the lawful use of the easement." *Wilson v. Johnston*, 66 Ark. App. 193 (1999). [internal citations omitted]

In equity, those entitled to use land subject to an easement jointly have obligations for maintenance proportional to their use. *SANDIE, LLC v. PLANTATIONS OWNERS ASSOCIATION, INC.*, Del: Court of Chancery 2012. [internal citation omitted]

"When an easement is created for the benefit of multiple ... tenements, all owners are mutually burdened with the construction, maintenance, and repairs of the subject property" *GUZZONE v. BRANDARIZ*, 2007 NY Slip Op 51521 - NY: Supreme Court 2007. [internal citation omitted]

[W]e conclude that, absent the creation of a duty expressly in the conveyance document or by other contract, the doctrine of equitable contribution should be extended to permit one dominant tenant to require another dominant tenant to contribute to the necessary repair and maintenance of an easement if both tenants are using the easement. *** Our decision does not, however, mandate an equal or "fifty/fifty" sharing agreement. Instead, each party's contribution should be based on an equitable apportionment determined after consideration of various relevant factors, which may include but are not limited to each party's proportionate use of the easement, including the amount and intensity of actual use, and the benefits derived therefrom... *Freeman v. Sorchych*, 245 P. 3d 927 - Ariz: Court of Appeals, 1st Div., Dept. D 2011.

We conclude that the proper rule is, absent language in a deed to the contrary, "[j]oint use by the servient owner and the servitude beneficiary . . . of the servient estate for the purpose authorized by the easement . . . gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate . . . used in common." 1 Restatement (Third), Property, Servitudes § 4.13(3), pp. 631-32 (2000). *BUCK MOUNTAIN OWNERS' ASSOCIATION v. Prestwich*, Wash: Court of Appeals, 1st Div. 2013.

When the easement is actually a public right of way, the servient owner generally has little liability related to maintenance.

"[t]here is no duty on the commercial land owner to maintain a safe passageway to patrons outside of their property lines, other than the case of *Stewart v. 104 Wallace Street, Inc.* [87 N.J. 146, 432 A.2d 881 (1981)], ... which imposed the duty to maintain abutting sidewalks." We agree.

The proprietor of business premises owes a duty of care to its invitees to provide a "reasonably safe place to do that which is within the scope of the invitation." This duty extends to the premises' parking lot, as well as to means of egress and ingress.

However, with a carefully defined exception carved out in *Stewart*, the common-law rule in New Jersey is that a property owner, who is otherwise without fault, owes no duty to pedestrians who are injured on an abutting highway or sidewalk which is part of the public domain. The Supreme Court in *Yanhko* held that an abutting property owner is not liable for the condition of a sidewalk caused by the wear and tear incident to public use. The Court found that the duty to maintain and repair the public way rested solely upon the responsible public entity, reasoning:

The judicial imposition of a tort duty of care and maintenance of a portion of the public domain upon a property owner for no better reason than that his property is proximate to it would seem to be an arbitrary determination. The unrestrictable right of passage on the highway belongs to the public. In principle, therefore, a remedy for injury to a pedestrian caused by improper maintenance thereof should be subsumed under the heading of public liability.

MacGrath v. Levin Properties, 606 A. 2d 1108 - NJ: Appellate Div. 1992. [internal citations omitted]

Overburdening or Expanding the use of an easement

Expanding the use or the nature of the use of an easement beyond that expressed in the record document that created it is considered “overburdening” the easement.

An easement specifically and exclusively created for purposes of ingress and egress cannot be legally expanded to include a pipeline, for example. Likewise, an easement for ingress-egress to a 40 acre farm field may be overburdened if the 40 acres is subdivided into 100 residential lots; the use remains the same, but the nature has drastically changed.

The easement holder must negotiate with the owner of the servient estate to purchase additional rights if the geographic scope or nature of the use of an easement is to be expanded. Such changes generally cannot be made unilaterally by either party, although common law rules provide for some limited exception changes in location.

Where [an] easement comes into being by way of an agreement, . . . the "universally accepted principle" is that "the landowner may not, without the consent of the easement holder, unreasonably interfere with the latter's rights or change the character of the easement so as to make the use thereof significantly more difficult or burdensome."

[I]t is the exclusive right of the owner of the dominant tenement to say whether or not the servient owner shall be permitted to change the character and place of the servitude suffering the burden of an easement . . . regardless of any consideration of convenience of the owner of the servient tenement.

This "unequivocal language" was tempered by our decision in *Kline*, in which we held that "relocation of an easement without the mutual consent of the parties is an extraordinary remedy and should be grounded in a strong showing of necessity." *Kline*, supra, 267 N.J. Super. at 479-80. We further held that "a court may compel relocation of

an easement to advance the interests of justice where the modification is minor and the parties' essential rights are fully preserved." *MAUTONE v. CAPPELLUTI*, NJ: Appellate Div. 2014. [some internal citations omitted]

[T]he easement may not substantially be altered physically without the consent of the owner of the fee. This does not mean, however, that all changes are prohibited.

"So long as the use of an easement is confined to the purposes under which it was acquired and created without increasing the burden on the servient estate, the owner of the easement * * * may make changes that do not impair or affect its substance." *Hyland v. Fonda*, 129 A. 2d 899 - NJ: Appellate Div. 1957. [internal citations omitted]

The holder of an easement is entitled to a use that is reasonably necessary and consistent with the purposes for which the easement was granted, and must impose the least possible burden upon the property. The holder of the fee may do anything not inconsistent with the enjoyment of the easement. The holder of an easement may use it for any normal use which is not forbidden by law or unreasonably interfering with the rights of the landowner. As the easement at issue was for ingress and egress only, Appellees landscaping of property owned by Appellants was not a use reasonably necessary nor consistent with the purpose of the easement. *Archer v. Engstrom*, 2009 Ohio 2479 - Ohio: Court of Appeals, 5th Appellate Dist. 2009. [internal citations omitted]

[A]n unlimited easement carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use. But the rights reasonably necessary for full enjoyment of an easement are limited. They do not encompass rights foreign to the purpose for which the easement is granted. The servient estate holder retains these rights. *State v. Brownlow*, 319 SW 3d 649 - Tex: Supreme Court 2010. [internal citations omitted]

[T]he actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance as to the estate servient to the easement unless those actions or inactions exceed the scope of the easement. Where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant. No use may be made of a right-of-way different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated at the time of the grant." *Quintain v. Columbia Natural Resources*, 556 SE 2d 95 - W Va: Supreme Court of Appeals 2001. [internal citations and quotation marks omitted]

If the dominant estate is partitioned, the rights associated with the easement must be accorded equitably to the resulting dominant parties, yet with the servient owner's rights in mind.

Easements appurtenant are readily apportionable upon a subdivision of the original dominant tenement. This means that each part of the dominant tenement is entitled to claim the benefit of the easement for the service of his special segment. Some increase in burden can result from the increase in the number of users, but such increase in burden is kept within limits by the fact that any easement appurtenant has its total extent defined by the needs of the dominant estate. *Williams v. Fagnani*, 175 P. 3d 38 - Alaska: Supreme Court 2007.

Notwithstanding the above, and as noted above under “Scope of an Easement” courts look carefully at social trends and technological changes that may lead them to decide that a particular use of an easement, ostensibly contrary to the stated purpose of the easement, is not overburdening.

The construction and maintenance underground of a water pipeline, for public purposes, in real property outside a municipal corporation which is subject to an easement for highway purposes, is not an added burden on such property for which compensation must be awarded. *Jolliff v. Hardin Cable Television Co.*, 26 Ohio St. 2d 103 - Ohio: Supreme Court 1971. [internal citation omitted]

[C]ourts have held developmental changes and inventions could entitle the owner of an easement to vary the use of the easement. For example ... changes in the use of an easement are permitted to the extent the changes result from normal growth and development of the dominant land. *Diemling v. Kimble*, 2012 Ohio 3323 - Ohio: Court of Appeals, 5th Appellate Dist. 2012. [internal citations omitted]

As civilization advances and new and improved methods of transportation are developed, these are in aid of and within the general purposes for which highways are designed. An abutting owner, therefore, is not entitled to be compensated anew for every improvement in street or vehicle, or with every change made imperative by such improvement, and especially so where he has made a conveyance in full contemplation and knowledge of such change. Where land is conveyed for a public highway the implication must be that it will be used as the convenience and welfare of the public may demand, although that demand may be augmented by the increase of population. The benefits which an owner of the servient estate receives from the increase in population and consequent building up of the community usually far more than compensate him for the increased burden he may claim to have suffered. *Bolinger v. City of Bozeman*, 493 P. 2d 1062 - Mont: Supreme Court 1972. [internal citations omitted]

Even when the use itself is not extended, expanding the nature of that use can be considered an overburdening of the easement.

In Delaware, expanding the nature of the use from a few trips a day to 370 is not an overburden...

The parties' primary dispute over the Easement involves whether it can be used as the primary access to the 49 unit Independence Towns Project, a use which, if allowed, would increase traffic across the Easement from a few trips per day to approximately 370 trips per day. The Templins contend that this use is permissible because the language creating the Easement contains no restrictions on the Easement's scope. The Greens, on the other hand, assert that because the Easement has been used solely as a driveway to the Owensby House for the past thirty years, it cannot now be used for any other purpose. According to the Greens, therefore, the Templins cannot expand the Easement's use to provide access to the Independence Towns Project.

The parties have not cited, and the Court has not found, any Delaware case that squarely deals with the issue presented here, namely, the extent to which an increase in traffic across an easement is permissible. In an analogous situation, however, the Delaware Supreme Court recently looked to the Restatement (Third) of Property: Servitudes (the "Restatement"), and specifically § 4.9, for guidance in dealing with an issue involving easements comparable to the issue presented in this case. Accordingly, I look to the relevant section of the Restatement, § 4.10, for guidance in resolving the present dispute. Section 4.10 states:

Except as limited by the terms of the servitude . . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

Thus, in order for the Templins' proposed use of the Easement to be permissible, I must find that: (1) the proposed use is reasonably necessary for the convenient enjoyment of the PA Lands; (2) the creation of the Independence Towns Project is a normal development of the PA Lands; and (3) the Templins' expansion of the Easement's use will not cause unreasonable damage to or interfere unreasonably with the enjoyment of the Greens' Property.

In Delaware, whether the use of an easement is reasonably necessary for the convenient enjoyment of the dominant estate is determined according to a four-factor test that considers: (1) the terms of the easement; (2) the purposes for which the easement was created; (3) the nature and situation of the property subject to the easement; and (4) the manner in which the easement has been used.

...

In *Wolf Creek*, the court found that a mere increase in the volume of traffic over an easement serving a 50 unit condominium development did not overburden the easement such that its use could be enjoined.^[87] In making its ruling, the court relied on Restatement § 4.10 and observed that "as a general rule, an increase in traffic over an easement in the process of normal development of the dominant estate, in and of itself, does not overburden a servient estate."^[88] The court further noted that *evidence tending to support a finding that an easement is being overburdened includes: "(1) decreased*

property value; (2) increased noise and traffic or interference with the servient owner's peace and enjoyment of the land; and (3) physical damage to the servient estate."

...

For the foregoing reasons, I find that ... the Templins' proposed use of the Easement as the primary access to the Independence Towns Project is permissible.

Green v. Templin, Del: Court of Chancery 2010. [emphasis added; footnotes omitted]

But in Montana, going from 2 or 3 houses to 174 is an overburdening ...

[I]f a "dominant tenement is transferred in separate parcels to different persons, each grantee acquires a right to use easements appurtenant to the dominant estate, provided the easements can be enjoyed as to the separate parcels without any additional burden on the servient tenement." [U]nder Montana easement law, "[a]n easement attaches to property when the dominant tenement is partitioned or subdivided. The easement is apportioned according to the division of the dominant tenement, as long as it does not increase the burden on the servient tenement." "Subdivision and conveying away of portions of a dominant estate does not, in and of itself, mean that an additional burden is imposed upon the servient estate." "Unless restricted by the terms or manner of its creation, the right to use an easement appurtenant extends to each subdivided portion of the dominant estate."

[Notwithstanding the above], a landowner had divided its property (the dominant tenement) into 174 individual parcels with the intent of developing and selling the smaller parcels. With respect to the landowner's plan to access these 174 parcels via easements (granted to one of the landowner's predecessors in interest) that historically had been used to access only two or three homesteads, we affirmed the District Court's conclusion that such use would constitute an improper burdening of the easements. *Leichtfuss v. Dabney*, 2005 MT 271 - Mont: Supreme Court 2005. [internal citations omitted]

Defendants cite no cases, and we find none, wherein a mere increase in traffic volume over an easement results in misuse or overburdening. If the change of a use is a normal development from conditions existing at the time of the grant, such as an increased volume of traffic, the enlargement of a use is not considered to burden unreasonably the servient estate. FN 92 *Green v. Templin*, Del: Court of Chancery 2010. [internal quotation marks and citations omitted]

[W]e can conceive of situations in which increased use of an easement, even when the type of use is the same as its original use, could be so far above what was originally contemplated that it could be "[in]consistent with the use contemplated at the time of its creation" or could "materially increase[] the burden on the servient estate," *Rowe*, 2006 VT 47, ¶ 22, *Roy v. Woodstock Community Trust, Inc.*, 2013 VT 100 - Vt: Supreme Court 2013.

Where ... a new use is consistent with the general nature of an existing easement, the burdened estate may nevertheless be entitled to compensation if it is more onerous than

originally contemplated. See, e.g., *Minot v. United States*, 212 Ct.Cl. 154, 546 F.2d 378, 381 (1976) (recognizing that, where local power agency installed higher and wider transmission towers in place of existing line within easement owned by United States, power agency could be "held to account for an inverse condemnation" in overburdening plaintiffs' property, although there was no basis for holding United States liable); *Grimes v. Va. Elec. & Power Co.*, 245 N.C. 583, 96 S.E.2d 713, 714 (1957) (holding that placement of additional lines and cross-arms on existing power poles by second power company imposed additional burden on easement entitling landowner to compensation); *City of Sweetwater v. McEntyre*, 232 S.W.2d 434, 437 (Tex.Civ.App. 1950) (holding that, although landowner was previously compensated for street construction, "[t]he lowering of the [street] grade imposed an additional burden upon [landowner's] property from that contemplated when the street was dedicated for which she is entitled to compensation"); see generally 3 J. Sackman, *Nichols on Eminent Domain* § 9.04[2][f], at 9-91 (2006) ("If the use is more onerous, the owner is entitled to recover compensation for the increase in the burden only.") and § 9.02[11][c], at 9-45 — 9-46 (noting distinction between cases involving uses that impose additional servitude and those "requiring compensation for damage to property, when the damage claimed arises out of a new or increased use of an existing easement"). *Farrell v. VERMONT ELEC. POWER CO., INC.*, 68 A. 3d 1111 - Vt: Supreme Court 2012.

We recognize that there may be times where snowmachiners coming from different directions will need to get off the trail to allow one another to pass. A minor diversion off the trail for this purpose fits within the principle that "the holder of an easement . . . is entitled to make any use of the servient estate that is reasonable for enjoyment of the servitude." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.13 cmt. b (2000). Temporarily veering from the trail to allow another snowmachine to pass and establishing a two-snowmachine-wide easement are different things: the latter is a significant change in purpose that would require factual findings, the former is not. *Price v. Eastham*, 254 P. 3d 1121 - Alaska: Supreme Court 2011.

Generally, however, an attempt to extend the use of an easement to parcels other than those identified in the document as the dominant estate is not allowed.

"An easement can be used only in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire, unless so provided in the instrument by which the easement is created." *CARIBBEAN HOUSE v. NORTH HUDSON*, 83 A. 3d 849 - NJ: Appellate Div. 2013. [internal citations omitted]

Unless the terms of the servitude provide otherwise, an appurtenant easement may not be used to benefit property other than the dominant estate. *Lazy Dog Ranch*, supra, 965 P.2d at 1238; Restatement (Third) of Property § 4.11 (2000). And unless otherwise intended by the parties, the easement may not be used to serve property that is subsequently acquired. Restatement, supra, § 4.11 cmt. b. *WRWC, LLC v. City of Arvada*, 107 P. 3d 1002 - Colo: Court of Appeals, 5th Div. 2004.

If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement. *Brown*, 105 Wn.2d at 371-72. *RANDALL INGOLD TRUST v. Armour*, Wash: Court of Appeals, 2nd Div. 2012.

[A]n easement cannot be extended as a matter of right, by the owner of the dominant estate, to other lands owned by him. *Dorsey v. Dorsey*, 109 W. Va. 111, 153 S.E. 146 (1930), cited in *Ratcliff v. Cyrus*, Supreme Court of Appeals of West Virginia, No. 28395, 2001.

Unless the terms of the servitude . . . provide otherwise, an . . . easement may not be used for the benefit of property other than the dominant estate. *HP Ltd. Partnership v. KENAI RIVER AIRPARK*, 270 P. 3d 719 - Alaska: Supreme Court 2012.

But courts may also look at practical considerations in deciding if an expanded use constitutes overburdening.

"[W]hen no significant change has occurred in the use of the easement from that contemplated when it was created, . . . the mere addition of other land to the dominant estate does not constitute an overburden or misuse of the easement." *Carbone v. Vigliotti*, 610 A.2d 565, 569 (Conn. 1992). *Rhett v. Gray*, SC: Court of Appeals 2012.

Interfering with an easement (*see also* "*The Scope of an Easement*" above)

Where [an] easement comes into being by way of an agreement, . . . the "universally accepted principle" is that "the landowner may not, without the consent of the easement holder, unreasonably interfere with the latter's rights or change the character of the easement so as to make the use thereof significantly more difficult or burdensome." *MAUTONE v. CAPPELLUTI*, NJ: Appellate Div. 2014. [internal citations omitted]

[T]he expansion of an easement beyond the terms of the grant is an undue interference with the reserved rights of the grantor. *Vander Heide v. Boke Ranch, Inc.*, 736 NW 2d 824 - SD: Supreme Court 2007.

It is well established under Colorado law that servient estate owners . . . may use their property in any way not inconsistent with the easement holder's interest. *Matoush v. Lovingood*, 177 P. 3d 1262 - Colo: Supreme Court 2008. [internal citations omitted]

[W]here an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so. 63 A.D.2d 481, 407 N.Y.S.2d 717 (1978) Cited in *Vandeleigh Industries v. STORAGE PARTNERS*, 901 A. 2d 91 - Del: Supreme Court 2006.

[T]he owner of the servient estate may not interfere with the dominant estate's use and enjoyment of the easement. *Ohio Power Co. v. Ogle*, 2011 Ohio 3903 - Ohio: Court of Appeals, 4th Appellate Dist. 2011. [internal citations omitted]

While the owner of a servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted, , he can do nothing tending to diminish the easement's use or make it more inconvenient or create hazardous conditions. *Campbell v. Carter*, 93 Ark. App. 341 (2005). [internal citations omitted]

Placing a locked gate or other obstructions across an easement presents the courts with the opportunity to decide what constitutes an interference.

Cases previously cited from other jurisdictions objected to a *locked* gate as an unreasonable obstruction across an easement. The owner of the servient estate may erect a gate across an easement if it is located, maintained and constructed so as not unreasonably to interfere with the right of passage. Accordingly, we hold that maintenance of the gate without the lock would not result in an unreasonable interference with use and enjoyment of the [prescriptive] easement. The gate itself, particularly if posted as private, would serve to notify the general public that the roadway was not for public use without imposing an undue burden on use of the easement by the interested landowners. *Hall v. Clayton*, 270 Ark. 626 (Ark. App. 1980). [internal citations omitted]

Generally, an obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before. To constitute an actionable wrong it must, however, be of a material character such as will interfere with the reasonable enjoyment of the easement. *Southern Star Central Gas Pipeline, Inc. v. Cunning, et al*, Kansas Court of Appeals, No. 96,103.

"While the authorities are at variance as to the right of an owner of land burdened with a right- of-way acquired by prescription to erect gates across the way, the weight of authority is in accord with the holding that such a right exists in the case of agricultural land. *Massee v. Schiller*, 420 S. W. 2d 839 (1967). [internal citations omitted]

Relocating an easement

Although generally not, depending on the exact scenario and under some circumstances (e.g., the location was not definitively fixed in the original document), some states' courts have allowed the unilateral relocation of an easement by the servient owner as long as it does not substantively interfere with the dominant estate's rights. The issue but as related to unwritten easements has also been the subject of litigation.

The standard to relocate an express easement is high; such relocation generally calls for the consent of both parties. It is the exclusive right of the owner of the dominant tenement to say whether or not the servient owner shall be permitted to change the character and place of the servitude suffering the burden of an easement localized and defined. Even if another location would be just as convenient, the holder of the dominant tenant must consent to the relocation. As a general rule, in the absence of statutes to the contrary, the location of an easement cannot be changed by either party without the other's consent, after it has been once established either by the express terms of the grant or by the acts of the parties, except under the authority of an express or implied grant or reservation to this effect. *Reed v. BILLYBOB PARTNERS*, NJ: Appellate Div. 2010. [footnotes, quotation marks and internal citations omitted]

[T]he easement may not substantially be altered physically without the consent of the owner of the fee. This does not mean, however, that all changes are prohibited.

"So long as the use of an easement is confined to the purposes under which it was acquired and created without increasing the burden on the servient estate, the owner of the easement * * * may make changes that do not impair or affect its substance." *Hyland v. Fonda*, 129 A. 2d 899 - NJ: Appellate Div. 1957. [internal citations omitted]

The Restatement (Third) Property (Servitudes) § 4.8 (2000) provides:

Except where the location and dimensions are determined by instrument or circumstances surrounding creation of a servitude, they are determined as follows:

...

(3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

- (a) significantly lessen the utility of the easement;
- (b) increase the burdens on the owner of the easement in its use and enjoyment; or
- (c) frustrate the purpose for which the easement was created.

Under certain circumstances, even express easement boundaries may be altered to maintain the purpose of the easement. See *Kothmann v. Rothwell*, 280 S.W.3d 877, 880 (Tex. App.-Amarillo 2009, no pet.) (recognizing movement of drainage tracts to maintain easement's purpose despite the expansion of original easement location). *Severance v. Patterson*, Tex: Supreme Court 2012.

Once an easement by necessity is established by use, it may not be relocated without consent of the holder of the dominant estate. *Meredith v. Eddy*, 616 S.W.2d at 240-41.

[P]rescriptive easements cannot be relocated by verbal or tacit consent. *Glenn v. Grosfield*, 274 Mont. 192, 196, 906 P.2d 201, 204 (1995).

Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest. *Soderberg*, 687 A.2d at 843.

Terminating or Extinguishing Easements

Easements can be terminated or extinguished by many means such as merger of title, release, abandonment, vacation, by the terms of the document, termination of the need, condemnation, mortgage foreclosure, tax sale, and by unwritten means such as non-user/abandonment and adverse possession.

It has been well established that "an easement created by grant, express or implied, can only be extinguished by abandonment, conveyance, condemnation, or adverse possession." *McIntyre v. Estate of Keller*, 15 Misc. 3d 234 - NY: Supreme Court 2007 [internal citation omitted]

An easement can terminate either by expiring in accordance with the intent of the parties manifested in the creating transaction, or by being extinguished by the course of events subsequent to its creation. Termination by extinguishment includes a wide variety of methods, some resting primarily upon conduct of the dominant owner, as for example, release and abandonment; some resting primarily upon conduct of the servient owner, as for example, prescription and conveyance to a third person having no actual or constructive notice of the easement's existence; some resting upon conduct in which both parties must participate, as for example, merger and estoppel; and some resting upon the conduct of outside entities, as for example, mortgage foreclosures, eminent domain and tax sales. Under any of these methods, the easement can be terminated in whole permanently, in whole for a time, in part permanently, or in part for a time. *Sluyter v. Hale Fireworks P'Ship*, 370 Ark. 511 (2007). [internal citations omitted]

An easement is not revocable at will. See *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex.2002).

In the instant case, HFP argues, in essence, that because the contracting parties' original intent and purpose has been frustrated, the easements should be terminated. We disagree.
...

The Oregon Court of Appeals has similarly so held. See *Cotsifas v. Conrad*, 137 Or. App. 468, 905 P.2d 851 (1995). In *Cotsifas*, the appellate court cited to Oregon case law holding that an express easement may be extinguished only by consent, prescription, abandonment, or merger. In addition, the court pointed out, only an easement by necessity terminates when the necessity ceases. See *id.* See also *Emery v. Crowley*, 371 Mass. 489, 359 N.E.2d 1256 (1976) (holding that an express easement can be extinguished only by grant, release, abandonment, estoppel, or prescription). *Sluyter v. Hale Fireworks P'Ship*, 370 Ark. 511 (2007).

Use of an easement for an unauthorized purpose, or the excessive use or misuse of it, is not sufficient to cause a forfeiture of the easement, unless the misuse of the easement is willful and substantial and not merely minor or technical. 25 Am. Jur. 2d *Easements & Licenses* § 99 (2007). *Sluyter v. Hale Fireworks P'Ship*, 370 Ark. 511 (2007).

Rather than terminating an easement due to changed conditions, a court might simply order it modified...

(1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude. (2) If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude. (3) The rules stated in § 7.11 govern modification or termination of conservation servitudes held by public bodies and conservation organizations, which are not subject to this section. *Restatement (Third) of Property (Servitudes)* § 7.10 (2000).

As easements can be acquired by unwritten means, they can also be extinguished by unwritten means such as adverse possession, estoppel and prescription. See subsequent sections of this handout. Normally, this involves, in essence, the inverse of the acquisition. For example, with prescription, the use of the easement is *interfered* with for the statutory period of time and (upon meeting all of the other requirements for prescription) the servient estate holder may thereby re-acquire the easement interest.

Extinguishment of an easement – being an interest in real estate – is not looked upon favorably by the courts.

Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible.” *Reichardt et al., v. Hoffman* (1997) 52 Cal. App. 4th 754.

Having once been granted to him, he cannot lose it by mere non-user... He may lose it by adverse possession... or by abandonment, not by mere non-user, but by proofs of an intention to abandon; or, of course, by deed or other instrument in writing.” *Moyer v. Martin*, 101 W. Va. 19, 24, 131 S.E. 859, 861 (1926).

Easements on one’s own land – Merger of Title

Since an easement is, by definition, an interest in the land of another, if the owners of the servient and dominant estates become one and the same, the easement is automatically extinguished. Thus easements can be terminated by “merger of title.”

This would happen when the owner of one of the estates (dominant or servient) purchases the other estate. It could also happen if the owner of the servient estate simply purchased the easement interest itself from the owner of the dominant estate. In either case, the owner of the servient estate also becomes the owner of the easement and when this occurs, title is merged and the easement interest is extinguished.

The merger of title to both the dominant and servient estates ... extinguished the easements and rights granted by the deed. The easement ceased to exist, and since no question of easement by necessity is involved, it was not revived by the later severance of the united titles into the former dominant and former servient tenements. *Camp Clearwater, Inc. v. Plock*, 146 A. 2d 527 - NJ: Superior Court, Chancery Div. 1958.

The doctrine of merger operates when the same person becomes owner of both the benefited and the burdened land. 5 R. Powell, *The Law of Real Property* ¶ 683, at 224. *Albright v. Fish*, 394 A. 2d 1117 - Vt: Supreme Court 1978.

Merger extinguishes an easement when the servient and dominant estates are joined in unity of ownership and possession. *Capital Candy v. Savard*, 135 Vt. 14, 15-16, 369 A.2d 1363, 1365 (1976). *Wells v. Rouleau*, 2008 VT 57 - Vt: Supreme Court 2008.

It is undisputed that the easement was extinguished when the parcels came under common ownership (see *Will v Gates*, 89 NY2d 778, 784 [1997]).

[W]hile a landowner "cannot have an easement in his own land," an owner can create an easement intended to arise and benefit his land at such time as the land is subdivided and transferred. *SMOTHERGILL v. Hirschberg*, NJ: Appellate Div. 2010

As it pertains to easements, the doctrine of merger provides that when the land burdened by the easement and the land benefited by the easement come into common ownership, the need for the easement is destroyed and the easement is extinguished. See *Salazar v. Terry*, 911 P.2d 1086 (Colo. 1996). *BRUSH CREEK AIRPORT v. AVION PARK*, 57 P. 3d 738 - Colo: Court of Appeals, 3rd Div. 2002.

While an easement by dedication may be described in a plat prepared prior to conveyance of subdivided property, no easement legally exists until the seller conveys ownership of a part of that property to a buyer. *Inlet Harbour*, 377 S.C. at 92, 659 S.E.2d at 154.

The Restatement (Third) of Property provides, "A servitude is created . . . if the owner of the property to be burdened . . . conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community. . . ." 1 Restatement (Third) of Prop.: Servitudes § 2.1(1)(b) (2000). It also notes:

Recording a declaration or plat setting out servitudes does not, by itself, create servitudes. So long as all the property covered by the declaration is in a single ownership, no servitude can arise. Only when the developer conveys a parcel subject to the declaration do the servitudes become effective.

Allen v. Nickerson, 155 P. 3d 595 - Colo: Court of Appeals, 2nd Div. 2006

An easement appurtenant is extinguished when unity of title is effected because a landowner cannot have an easement in his own land. *Bryer v. Woodlands Land Development Company, LP*, Tex: Court of Appeals, 9th Dist. 2010.

One cannot have an easement on one's own property, see N.D.C.C. § 47-05-06.... *Lutz v. Krauter*, 553 N.W.2d 749, 752 (N.D. 1996)

The trial court was correct to the extent that it determined that the doctrine of merger extinguished the driveway easement at the time that the Shahs owned both 8025 and 8027 Beech Ave.—there is no reason for an owner to hold an easement against himself. *Shah v. Smith*, 2009 Ohio 743 - Ohio: Court of Appeals, 1st Appellate Dist. 2009.

"The principle is elementary that, to constitute an easement, the dominant and the servient estates must be held by different owners; and when the owner of an estate enjoys an easement over another, and acquires title to the latter, the easement is thereby extinguished." *Howell v. Estes*, 71 Tex. 690, 12 S.W. 62 (1888). *Cecola v. Ruley*, 12 SW 3d 848 - Tex: Court of Appeals, 6th Dist. 2000.

A servitude is terminated when all the benefits and burdens come into a single ownership." Restatement (Third) of Property, *Servitudes*, § 7.5. The rationale for this doctrine is that when the benefits and burdens are united in a single person, or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates. *Id.* at cmt. a. *Doug's Elec. Serv., Inc. v. Miller*, 79 Ark. App. 28 (2002).

Easements extinguished by merger must be recreated unless a contrary intention can be shown.

The merger of title to both the dominant and servient estates ... extinguished the easements and rights granted by the deed. The easement ceased to exist, and since no question of easement by necessity is involved, it was not revived by the later severance of the united titles into the former dominant and former servient tenements. *Camp Clearwater, Inc. v. Plock*, 146 A. 2d 527 - NJ: Superior Court, Chancery Div. 1958.

Where right-of-way is extinguished [by merger], it can only be recreated by a proper new grant or reservation. *Capital Candy*, 135 Vt. at 16, 369 A.2d at 1365

Once a right-of-way has been extinguished by merger, it [can]not be re-created by the mere subsequent separation of the parcels. *Capital Candy*, 135 Vt. at 16, 369 A.2d at 1365.

Termination by Release

Most commonly, private easements that are no longer needed are simply “released.” In a release, the holder of the dominant estate “releases” its interest back to the servient estate.

An easement may be extinguished by an express written release of the servient estate. *Adams v. Hodgkins*, 109 Me. 361, 84 A. 530, 42 L.R.A.,N.S., 741 (1912); *Di Leo v. Pecksto Holding Corp.*, 304 N.Y. 505, 109 N.E.2d 600 (1952). *Sedillo Title Guaranty, Inc. v. Wagner*, 457 P. 2d 361 (1969), 80 N.M. 429.

If "the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment." *Garlick v. Pittsburgh & Western R.R.* (1902), 67 Ohio St. 223, 235. See, also, *McCarley v. O.O. McIntyre Park Dist.* (Feb. 11, 2000), 4th Dist. No. 99 CA 07. *Ganon v. Klockenga*, 2006 Ohio 2972 - Ohio: Court of Appeals, 9th Appellate Dist. 2006.

[T]he question of whether a particular writing "operates to release a servitude is a matter of the parties' intent." In effect, such an agreement "is a conveyance from the servitude beneficiary to the servient owner that normally leaves no question as to the parties' intent and often is an element of a transaction that provides some benefit to the servitude beneficiary." *THE CHILDREN'S CENTER OF MONMOUTH COUNTY, INC., v. FIRST ENERGY CORPORATION*, NJ Superior Court of New Jersey, Appellate Div. 2012.

Termination by Condemnation

An easement may be condemned and acquired by eminent domain, in which case it would also be extinguished.

Termination by Official Vacation/Abandonment

A governmental agency may officially vacate or abandon a dedicated public right of way although if there are other parties with interests in the right of way, such an action will not, in and of itself, extinguish those interests.

A jurisdiction may also vacate an easement. This is generally the action taken to terminate an easement when the easement was originally created by dedication. When a jurisdiction vacates an easement, it is releasing the public's interest in the easement.

New Jersey Permanent Statutes 27:16-28. Vacation or discontinuance of county road

Any road or portion thereof owned by any county or under the control of any county governing body may be (a) discontinued as a county road and returned to the jurisdiction and control of the municipality wherein the same is situated; or (b) vacated and abandoned as a public highway, in manner following:

a. Any road or portion thereof owned by any county or under the control of any county governing body may be discontinued as a county road by an ordinance or resolution, as appropriate, passed by the affirmative vote of a majority of all of the members of the governing body, which ordinance or resolution shall describe the road or portion thereof so sought to be discontinued as a county road sufficiently to clearly identify the same, and shall declare that the road or portion of road therein described shall be discontinued as a county road, and that the county shall and does relinquish all jurisdiction over and responsibility for the construction, reconstruction, repair and maintenance thereof. The clerk of the board of chosen freeholders, upon the passage of such an ordinance or resolution shall prepare a certified copy thereof, and shall cause such certified copy to be served upon the municipal clerk of each municipality in which the road or portion thereof sought to be discontinued as a county road shall lie. Such certified copy shall be served within 10 days from the date of passage. The municipality may adopt an ordinance stating its acceptance of jurisdiction for the road or portion of the road. At the expiration of the period of 10 days from the final adoption of the municipal ordinance the road or portion of road therein described shall cease to be a county road, and from thenceforward jurisdiction over the road or portion of road shall vest in and the responsibility for the construction, reconstruction, repair and maintenance of the road, or portion of road, shall devolve upon the governing body, as the case may be, of the municipality wherein the road or portion of road shall lie. The clerk of the board shall forthwith file a certified copy of the county ordinance or resolution in the office of the county clerk and the latter shall record and index the same in the road records of his office.

b. Any road or portion thereof owned by any county or under the control of any county governing body may be vacated and abandoned as a public highway by any county governing body, in the manner following: The governing body of any county, by the affirmative vote of the majority of all the members thereof, may pass an ordinance or resolution, as appropriate, describing the road or portion thereof, intended to be vacated and abandoned, sufficiently to clearly identify and locate the same, and declaring it to be

the intention of the county to vacate and abandon the road or portion thereof as a public highway, and fixing the time and place not less than three weeks nor more than six weeks thereafter, when and where the board shall meet for final consideration and action upon the ordinance or resolution, and when and where all persons interested therein may appear and be given an opportunity to be heard. Within three days of passage, the clerk of the board of freeholders shall cause said ordinance or resolution to be advertised verbatim in a newspaper published and circulating within the limits of the county, which publication shall be inserted once in each week for three weeks consecutively before the day of the meeting. And if, after the public hearing held at the time and place specified in the ordinance or resolution, the county governing body, by a vote of the majority of all of the members thereof, shall again adopt such ordinance or resolution, the road or portion thereof shall from thenceforth be deemed to be vacated and abandoned, and shall cease to be a public road or highway, and title to the land which theretofore was lying within the area of the side lines or legal right of way of the road, shall revert to and vest in the respective owners of the legal title thereto, free and clear of any easement or right of way thereover or thereupon in favor of the public. The clerk of the board shall forthwith file a certified copy of the ordinance or resolution in the office of the county clerk and the latter shall record and index the same in the road records of his office. [emphasis added]

New Jersey Permanent Statutes 40:67-1. Municipal ordinances

The governing body of every municipality may make, amend, repeal and enforce ordinances to:

...

b. Establish, change the grade of or vacate any public street, highway, lane or alley, or any part thereof, including the vacation of any portion of any public street, highway, lane or alley measured from a horizontal plane a specified distance above or below its surface and continuing upward or downward, as the case may be; vacate any street, highway, lane, alley, square, place or park, or any part thereof, dedicated to public use but not accepted by the municipality, whether or not the same, or any part, has been actually opened or improved; accept any street, highway, lane, alley, square, beach, park or other place, or any part thereof, dedicated to public use, and thereafter, improve and maintain the same. The word "vacate" shall be construed for all purposes of this article to include the release of all public rights resulting from any dedication of lands not accepted by the municipality. Any vacation ordinance adopted pursuant to this subsection shall expressly reserve and except from vacation all rights and privileges then possessed by public utilities, as defined in R.S. 48:2-13, and by any cable television company, as defined in the "Cable Television Act," P.L. 1972, c. 186 (C. 48:5A-1 et seq.), to maintain, repair and replace their existing facilities in, adjacent to, over or under the street, highway, lane, alley, square, place or park, or any part thereof, to be vacated...

Once an owner of land makes an offer of dedication, that offer is "complete and irrevocable so far as the dedicator is concerned." The offer remains in place until the municipality accepts or rejects it, "no matter how long delayed, and these public rights can only be destroyed by proper municipal action, usually by vacation." *Township of*

Middletown v. Simon, 937 A. 2d 949 - NJ: Supreme Court 2008.

A dedication can be extinguished only if the public abandons it. *Town of Newfane v. Walker*, 637 A. 2d 1074 - Vt: Supreme Court 1993. [internal citations omitted]

The question sometime arises whether a replat automatically vacates rights of way that appeared on the original plat or that existed otherwise. This issue is governed by state statute or common law and varies from state-to-state.

There is, however, a difference between a vacation or abandonment and mere discontinuance of maintenance.

When purporting to discontinue or reclassify a highway, a town must substantially comply with the statutory method for discontinuance or the resultant change will be void. In *re Town Hwy. No. 20 of Town of Georgia*, 834 A. 2d 17 - Vt: Supreme Court 2003. [internal citation omitted]

A highway may be extinguished by direct action through governmental agencies, in which case it is said to be discontinued; or by nonuser by the public for a long period of time with the intention to abandon, in which case it is said to be abandoned.” (citation omitted)); *Ord v. Fugate*, 152 S.E.2d 54, 59 (Va. 1967) (noting that discontinuance of public road should not carry the same effect as abandonment and stating “under the present statutes the discontinuance of a secondary road means merely that it is removed from the state secondary road system.

Discontinuance of a road is a determination only that it no longer serves public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use”); see also *Wilson v. Greenville County*, 110 S.C. 321, 325, 96 S.E. 301, 302 (1918) (recognizing that discontinuance of a public highway and abandonment are two acts which are “separate and distinct in fact and in law”)

Termination by the Terms of the Document; Defeasible (Conditional, Determinable) Easements

An easement is defeasible when it terminates in relation to a certain event. There are two types of defeasible easements and the difference between the two is fine. Generally a determinable easement automatically reverts to the fee owner upon the occurrence of a specified event. Alternatively an easement subject to conditions subsequent allows the servient owner to essentially retake the easement right upon the happening of the stated event. Frequently, the event is simply the passage of a specified period of time.

Generally, easements determinable upon condition are of two types: (1) those that end upon the happening of a condition and (2) those that can be ended if the grantee fails to comply with conditions subsequent." *Cadwallader v. Scovanner*, 178 Ohio App. 3d 26 - Ohio: Court of Appeals, 12th Appellate Dist. 2008. [internal citations omitted]

An easement that terminates upon the happening of a particular event or contingency is a "determinable easement." *Thompson v. Clayton*, 346 SW 3d 650 - Tex: Court of Appeals, 8th Dist. 2009. [internal citation omitted]

In cases where an easement was created for a certain period of time, it will expire upon the running of the defined term. Temporary construction easements are an excellent example of such a term.

Determinable/conditional easements are not generally favored under the law and there must be a clear intent to that effect.

[S]ince such conditions contain the potential to destroy estates, they are disfavored by law and must be strictly construed, for enforcement of the right of re-entry effects a forfeiture. Thus, a grant is strictly construed against interpretation as subject to conditions subsequent. *Jelen and Son v. Kaiser Steel*, 807 P. 2d 1241 - Colo: Court of Appeals, 1st Div. 1991. [internal citations omitted]

[A] conditional easement must be created by express terms or clear implication. *OFFSHORE SYSTEMS-KENAI v. State*, 282 P. 3d 348 - Alaska: Supreme Court 2012.

More than a half century ago, our Supreme Court explained, "[i]t is the almost universal rule that, in order to make an estate conditional, the words used in the deed must clearly indicate such an intent, either by express terms or by necessary implication from the language used." *Johnson v. WAHKIAKUM COUNTY*, Wash: Court of Appeals, 2nd Div. 2010. [internal citation omitted]

In some states and under some circumstances, easements can be terminated if the conditions of the easement have been violated.

With respect to a conditional easement, it is deemed lost when it is clear that the condition has been violated. *450 W 14TH ST. v. 40-56 TENTH*, 187 Misc. 2d 735 - NY: Supreme Court 2001.

[E]asements do not necessarily run in perpetuity. A determinable easement may be created that will terminate on the happening of a particular event." *ETC TEXAS PIPELINE, LTD. v. Payne*, Tex: Court of Appeals, 10th Dist. 2011. [internal citation omitted]

A fee simple subject to a condition subsequent is a fee simple estate which is subject to divestment upon a right of re-entry exercised because of the failure or nonperformance of a condition subsequent to the vesting of the fee, and is a recognized estate in Colorado. *Jelen and Son v. Kaiser Steel*, 807 P. 2d 1241 - Colo: Court of Appeals, 1st Div. 1991. [internal citations omitted]

The conditions that result in an easement being conditional must be clearly spelled out in the grant.

A fee simple subject to a condition subsequent is a fee simple estate which is subject to divestment upon a right of re-entry exercised because of the failure or nonperformance of a condition subsequent to the vesting of the fee, and is a recognized estate in Colorado. See *School District No. 6 v. Russell*, 156 Colo. 75, 396 P.2d 929 (1964). [internal citation omitted]

Termination by Unwritten Means

As easements can be acquired by unwritten means, they can also be extinguished by unwritten means such as adverse possession, estoppel and prescription. Normally, this involves, in essence, the inverse of the acquisition. For example, with prescription, the use of the easement is *interfered* with for the statutory period of time and (upon meeting all of the other requirements for prescription) the servient estate holder may thereby re-acquire the easement interest.

Extinguishment of an easement - being an interest in real estate – particularly by unwritten means, is not looked upon favorably by the courts.

Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible.” *Reichardt et al., v. Hoffman* (1997) 52 Cal. App. 4th 754.

Having once been granted to him, he cannot lose it by mere non-user... He may lose it by adverse possession... or by abandonment, not by mere non-user, but by proofs of an intention to abandon; or, of course, by deed or other instrument in writing.” *Moyer v. Martin*, 101 W. Va. 19, 24, 131 S.E. 859, 861 (1926).

As a general rule, ejectment is not a proper remedy for the disturbance of an easement, which is a mere incorporeal right. FN 13 *Burris v. Cross*, 583 A. 2d 1364 - Del: Superior Court 1990.

However, some state courts have identified that misuse of an easement on the part of the dominant estate holder could result in termination.

Ohio cases recognize that termination of an easement may be an appropriate remedy when the owner of the easement abuses or misuses easement rights. *Walbridge v. Carroll*, 184 Ohio App. 3d 355 - Ohio: Court of Appeals, 6th Appellate Dist. 2009.

Cessation of Purpose or Need

An easement created for a specific purpose will expire when the purpose no longer exists. This could be the case when a railroad company originally purchased the right to operate a railroad. Upon abandonment, the easement may well cease to exist since the purpose is no longer being served.

An easement may be extinguished when the purpose for which it originally was created no longer exists and there is no reason for its continued existence. *Edgell v. Divver*, 402 A.2d 395, 397 (Del. Ch. 1979). *Green v. Templin*, Del: Court of Chancery 2010.

In general, we think that the rule regarding extinguishment by cessation of purpose should be applied only where easements are qualified by express limitations. *Barrett v. Kunz*, 604 A. 2d 1278 - Vt: Supreme Court 1992. [internal citations omitted]

Easements are not terminated by mere non-use but they can be terminated by the acts of the parties or “by the completion of the purpose or necessity for which the easement was created, or a change in the character or use of the property.” *Siferd v. Stambor* (1966), 5 Ohio App.2d 79, 87.

Certain easements by their nature are inherently limited in duration. An easement that is created to serve a particular purpose terminates when the underlying purpose for the easement no longer exists. This principle, known as the cessation of purpose doctrine, is based upon the assumption that the parties intended the easement to terminate upon cessation of its purpose, and it serves to eliminate meaningless burdens on land. *Olson v. H & B Properties, Inc*, 882 P. 2d 536 (1994), 118 N.M. 495. [internal citations omitted]

An easement by prescription is not necessarily perpetual or of indefinite duration. The easement may terminate when the need for which the parties intended to create it ends *RIBELLINO v. 110 FIFTH ST. PRIVATE LLC*, 2012 NY Slip Op 51235 - NY: Supreme Court 2012. [internal citations omitted]

Appurtenant easements may also be extinguished when the dominant or servient estate no longer exists; no purpose for the easement thus remains.

[A] number of courts have held that an easement burdening or benefitting *an estate less than a fee simple* ends when that estate expires. See Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, § 10:15, at 10-28 (2001), and cases cited therein. As such, it may be more precise to say that an easement runs with the *estate* in land to which it is appurtenant, or that it follows ownership of the estate *for as long as that estate exists*. *Leichtfuss v. Dabney*, No. 04-537 Supreme Court of Montana (2005 MT 271) [emphasis in original].

Also, when an easement is associated with some improvement; for example, an easement to use an elevator in a building. If one or both of the buildings is subsequently demolished, the easement may terminate since it no longer serves any purpose.

In the case of an easement by necessity, in most states if the need contemplated by the easement no longer exists, the easement will terminate, otherwise it remains in place.

[A]n easement of necessity lasts only as long as the necessity continues. 25 Am.Jur.2d *Easements and Licenses* § 108 (1996).

An implied easement [by necessity] arises so that the possessor of the landlocked parcel can access the street. Such an implied easement will end when the necessity ends. *Reed v. BILLYBOB PARTNERS*, NJ: Appellate Div. 2010. [internal citations omitted]

We regard the distinction between the two types of easements to be significant, because an easement by necessity can be extinguished as soon as the underlying necessity is obviated. In contrast, an easement by implication is extinguishable only under the following circumstances:

1. By release
2. By merger of the dominant and servient estates
3. By abandonment by the dominant tenant
4. By estoppel
5. By expiration of a stated term of easement.

DePalma v. McGlone, NJ: Appellate Div. 2012 [internal citations omitted]

Easements by necessity terminate upon the cessation of the necessity. *Harrington v. DAWSON-CONWAY RANCH, LTD.*, Tex: Court of Appeals, 11th Dist. 2012. [internal citation omitted]

[A]n easement by necessity, became a nullity when the Trust obtained another means of ingress and egress. “[A]n easement of necessity lasts only as long as the necessity continues.”. *Sitterly v. Matthews*, 2 P. 3d 871 (2000), 129 N.M. 134, 2000-NMCA-037. [internal citation omitted]

[E]asements created by necessity have the implied purpose to make possible the use of the dominant land, and therefore will terminate when the necessity for their existence disappears. *Fox Investments v. Thomas*, 431 So.2d 1021, 1022 (Fla. 2d DCA 1983). For example, a common law way of necessity will expire when the owner of the dominant estate acquires adjoining property which provides access to a public or private road. *Id.* *Parham v. Reddick*, 537 So. 2d 132 - Fla: Dist. Court of Appeals, 1st Dist. 1988 (Cited in *Bickel v. Hansen*, 819 P. 2d 957 - Ariz: Court of Appeals, 2nd Div., Dept. B 1991).

But that is not necessarily the case in Colorado and perhaps other states.

An implied easement of necessity is of permanent duration. *Whinnery v. Thompson*, 868 P. 2d 1095 - Colo: Court of Appeals, 4th Div. 1993. [internal citation omitted]

Termination by Non-User/Abandonment

Termination by non-user/abandonment is not as readily achieved as one might think. They are generally not terminated or extinguished by simple non-use except as may be specifically allowed under state law.

Mere discontinuance, or the passing of time, is not sufficient to constitute an abandonment, although it has been noted in other jurisdictions that the period of time of nonuse may be of some evidentiary value, "especially in connection with facts showing an intent to discontinue use". *Borough of Saddle River v. Bobinski*, 259 A. 2d 727 - NJ: Superior Court, Chancery Div. 1969. [internal citations omitted]

Nonuse, alone, does not constitute abandonment; the party asserting abandonment must show an intention to abandon the easement, as demonstrated by an overt act or failure to act that implies that the owner does not claim any interest in the easement *Dutcher v. HOCKIN ALLEN*, 93 AD 3d 1101 - NY: Appellate Div., 3rd Dept. 2012. [internal citations omitted]

In any event, an easement created by deed is not extinguished by nonuser alone, no matter how long continued. *Scott v. Leonard*, 119 Vt. 86, 99, 119 A.2d 691; *County of Addison v. Blackmer*, 101 Vt. 384, 390-391, 143 A. 700; *Percival v. Williams*, 82 Vt. 531, 538, 74 A. 321; *Mason v. Horton*, 67 Vt. 266, 271, 31 A. 291. To effect abandonment, non-use by the dominant owner must be accompanied by a conclusive and unequivocal present intent to relinquish ownership.

This Court held in *Mason v. Horton*, 67 Vt. 266, 271, 31 A. 291 that the mere non-use of an easement created by grant will not destroy or extinguish it no matter how long continued. In that case the court stated the rule thus:

"In order to extinguish it by nonuse there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the nonuse must be the result of it, and must continue for 15 years; or, to produce this effect the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted." (Emphasis ours).

Massucco v. Vermont College Corporation, 247 A. 2d 63 - Vt: Supreme Court 1968

The owner of the servient estate must "prove both non-use and an affirmative intent to abandon the easement on the part of the dominant estate." *Harvest Land Co-op, Inc. v. Sandlin*, 2006-Ohio-4207 citing *Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 443, 457.

Abandonment is a question of intention and may be proved by a cessation of use coupled with circumstances clearly showing an intention to abandon the right. The Supreme Court of Appeals of West Virginia, January 1995 Term, No. 22099, *Strahin v. Lantz*. [internal citations omitted]

[I]f the owner of a dominant estate do[es] acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize[s] the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it. *Lux v. Haggin* (1886) 69 Cal. 255.

An easement may be lost by abandonment. Abandonment will be established where the owner of the easement does or permits to be done any act inconsistent with its future enjoyment. Mere non-use does not constitute abandonment. Rather, the easement owner must relinquish or give up his rights with the intent of never resuming or claiming his right or interest. To abandon means to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in. *Id. Johnson v. Ramsey*, 76 Ark. App. 485 (2002). [internal citations omitted]

An easement may be terminated by abandonment, which is effective when there is a "relinquishment of possession with an intent to terminate the easement." *Cambridge Vil. Condo. Assn. v. Cambridge Condominium Assn.*, 139 Ohio App. 3d 328 (2000). [internal citations omitted]

A party relying upon another's abandonment of an easement must produce clear and convincing proof of an intention to abandon it. (See *Consolidated Rail Corp. v. MASP Equip. Corp.*, 67 NY2d 35, 39 [1986] quoting *Hennessey v. Murdock*, 137 NY 317, 326 [1893]).

Likewise, a prescriptive easement may be abandoned through non-use and intent to abandon.

The test for abandonment of a prescriptive easement is that "there must be, in addition to [nonuse], acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence." *Schonbek v. Chase*, 14 A. 3d 948 - Vt: Supreme Court 2 [internal citation omitted]

Termination by Impossibility of Use

Easements may be terminated when the purpose the easement was created for becomes impossible to achieve. This could be related to the extinguishment of one of the estates or the impossibility of use of the easement due to physical conditions.

An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.' *K & A ACQUISITION GROUP v. ISLAND POINTE*, 682 SE 2d 252 - SC: Supreme Court 2009. [internal citations omitted] [emphasis added]

Even if an easement is not intentionally abandoned it may still terminate when the purposes for which it was granted become impossible. [T]he right-of-way in the present case has been extinguished by impossibility of use because the sale and condemnation of portions of the right-of-way prevents . . . future use for railroad purposes. [Indiana Railroad Abandonment case].

Termination by Adverse Possession/Prescription

Just as easements can be created by unwritten adverse means like prescription, they can likewise be terminated by adverse possession.

The Restatement explains that an easement will be terminated by adverse possession if adverse use of the easement area continues for the statutorily-mandated period of time: "To the extent that a use of property violates a servitude burdening the property and the use is maintained adversely to a person entitled to enforce the servitude for the prescriptive period, that person's beneficial interest in the servitude is modified or extinguished." Restatement § 7.7. The Restatement further explains that the elements of a claim to terminate an easement by adverse possession mirror the elements of a claim to create an easement by adverse possession. Id. § 7.7 cmt. b; see also Richard R. Powell, *Powell on Real Property* § 34.21[1] (2007) ("As in the case of the creation of an easement by prescription, the uses must be adverse, continuous, uninterrupted, and for the prescriptive period.") (internal cross-reference omitted).

Under the Restatement, an easement is created by adverse possession if the adverse use is: "(1) open or notorious, and (2) continued without effective interruption for the prescriptive period." Restatement § 2.17.

The law is clear that "an easement may be extinguished by adverse possession" by the owner of the servient estate, and that "the adverse possession which will extinguish an easement must be of the same character and for the period required to give title to real estate by adverse possession." Thus, to claim adverse possession of an easement a plaintiff must show that he has openly, exclusively, notoriously, continuously, and adversely possessed the easement for a period of twenty years.^[46] If the use is permissive, it is not adverse. *Vandeleigh Industries v. STORAGE PARTNERS*, 901 A. 2d 91 - Del: Supreme Court 2006. [footnotes omitted]

Termination by Estoppel

Just as easements can be created by estoppel, they can be extinguished by estoppel.

An easement may be terminated by estoppel resulting from conduct of the owner of the easement. Whenever action is taken by the owner of the servient estate inconsistent with the continued existence of the easement and if such action is taken in reasonable reliance upon the conduct of the owner of the dominant estate, and the servient owner may be damaged by the restoration of the easement an estoppel exists. *Picconi v. Carlin*, 123 A. 2d 87 - NJ: Superior Court, Law Div. 1956.

An easement is also subject to extinction by estoppel. V *Restatement of Property* § 505. Cited in *Luevano v. Maestas et al*, 874 P.2d 788 (1994), 117 N.M. 580.

Estoppel, such as where the grantee knowingly permits actions by the grantor inconsistent with the grantee's rights, can extinguish a way-of-necessity. *Pencader Associates, Inc. v. Glasgow Trust*, 446 A. 2d 1097 - Del: Supreme Court 1982. [internal citations omitted]

To establish equitable estoppel, [the claimant] must demonstrate that it "lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; relied on the conduct of the party against whom estoppel is claimed; and suffered a prejudicial change of position as a result of [its] reliance."^[34] *IN RE JENZABAR, INC. DERIVATIVE LITIG.*, Del: Court of Chancery 2014.

Railroads and Rails to Trails

The National Trails System Act ("Trails Act"), 16 U.S.C. § 1247 provided a means by which a railroad right of way could be shifted to a temporary use as a trail by its transfer to a qualified entity in order to preserve that right of way for future reactivation.

The statute requires that the transfer occur *prior* to abandonment. If the right of way associated with a rail corridor was abandoned *prior* to transfer to a qualified entity, then any part of that right of way not held in fee by the railroad was extinguished and the right of way easement rights reverted to the adjoining owner(s). Thus when, or if, abandonment actually took place can be contentious.

Any right of way that was, in fact, held in fee by the railroad is obviously still owned by the railroad. Thus, the issue of what interest the railroad originally acquired is often of paramount importance.

According to an annotation appearing in 155 A.L.R. 381 et seq., the prevailing view in the 19th century was that a railroad right of way was normally only an easement. Thus, a presumption existed that a taking for railroad purposes did not deprive the private owner of fee simple title unless the language used in the taking clearly and expressly showed that the fee was being taken. Therefore, an authorization to condemn land for a specified purpose was limited to the acquisition of the interest necessary to accomplish the purpose stated, and even if the statute conferred the power to acquire fee simple title the condemnation proceeding must expressly show an intention to acquire all of the title interests. *State ex rel. Dept. of Transp. v. Penn Central*, 445 A. 2d 939 - Del: Superior Court 1982. [internal citations omitted]

Many acquisitions by Railroad were obtained through agreements. Plaintiff and Penn Central are agreed that the agreements between the owners and Railroad gave Railroad the same rights which Railroad would have acquired by its exercise of eminent domain since the agreements were reached under threat of condemnation by the Railroad. *State ex rel. Dept. of Transp. v. Penn Central*, 445 A. 2d 939 - Del: Superior Court 1982. [internal citations omitted]

State laws dictate the disposition of reversionary rights and different states may deal with this issue differently. Indiana's Supreme Court recently ruled on the effect of reversionary rights vis-à-vis railroad abandonments pointing out that the Federal rail-banking statute was upheld a number of years ago, but under *Presault v. I.C.C.*, "[s]tate law generally governs the disposition of reversionary interests." It then proceeded to decide that that rail-banking, for trails originally acquired as easements for railways, is not allowed under Indiana law because a recreational use is outside the original scope of the easement, and not a permissible shifting public use, viz.,

Because the rail lines are no longer in use, the railroad, pursuant to federal law, 49 U.S.C. § 10903, sought authorization from the Surface Transportation Board ("STB") to abandon the easements. The STB authorized the railroad to negotiate transfer of the railroad corridor to the Indiana Trails Fund for use as a public trail ("interim trail use") in accordance with the National Trails System Act ("Trails Act"), 16 U.S.C. § 1247. The Trails Act authorizes the STB to facilitate such transactions in order to "preserve established railroad rights-of-way for future reactivation," *Id.* § 1247(d), a process frequently called "railbanking." *** The Court of Federal Claims certified this question to us in accordance with *Preseault v. I.C.C.*, which upheld the constitutionality of the

Trails Act but noted that "[s]tate law generally governs the disposition of reversionary interests" and that, "[b]y deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law." 494 U.S. 1, 8, 110 S. Ct. 914, 920, 108 L. Ed. 2d 1, 11 (1990). [W]e hold that a public trail is not within the scope of easements acquired for the purpose of operating a line of railway. The original interest obtained as against the landowners' predecessors in title was no greater than the purpose for which the easement was used at that time. *Yarian*, 219 Ind. at 482–83, 39 N.E.2d at 606. That purpose was the transportation of goods through the operation of a railroad line. The easement cannot now be recast for use as a public recreational trail without exceeding the scope of the easement and in-fringing the rights of the landowners. *** We hold that, under Indiana law, railbanking and interim trail use pursuant to the federal Trails Act are not within the scope of railroad easements and that railbanking and interim trail use do not constitute a permissible shifting public use. *Howard v. United States*, Indiana Supreme Court, No. 94S00-1106-CQ-333, March 20, 2012.

Sometimes adjoining owners are concerned about liability associated with the trail when those adjoiners have retained fee.

If the [rails-to-trails] trail section in question is owned in fee by abutting property owners and the operator of the trail has only the railroad's travel easement, the liability will ordinarily be no more than that to which the property owner was exposed when the railroad had exclusive use of the right-of-way. This liability is usually nonexistent. *** Suppose, however, that the sections of the right-of-way sought for recreational trail use have reverted and that the landowner will grant only a recreational easement or license. In that situation, a crucial element for securing the easement or for protecting the fee owner may be a strong state recreational use statute that limits the owner's liability to willful or malicious misconduct or maintenance of an attractive nuisance. For example, the Minnesota legislature recently amended its recreational use statute to limit landowner liability to conduct *intended* to cause injury in the case of recreational trail use. Samuel H. Morgan, Esq. *Rails to Trails Magazine*, September/October 1994.

The question of *when* a railroad has been abandoned for the purpose of exercising reversionary rights has been addressed in a number of states.

The Supreme Court of Kansas has extended the rule such that it is "immaterial whether the railway company acquired ... [the property] by virtue of an easement, by condemnation, right-of-way deed, or other conveyance." "If or when it ceases to be used for railway purposes, the land concerned returns to its prior status as an integral part of the freehold to which it belonged prior to its subjection to use for railway purposes." *Wheeling Stamping v. Warwood Land*, 412 SE 2d 253 - W Va: Supreme Court of Appeals 1991. [internal citations omitted]

Reversionary Rights

With regard to easements and rights of way that are abandoned, vacated or otherwise extinguished, questions often arise with regard to reversionary rights. Basically, the underlying title to the land over which a grant of right of way or easement exists, vests (and has always been vested) with whatever property the right of way was initially derived from.

New Jersey Permanent Statutes 27:12-2. Disposition of slopes or easements

The commissioner may also, when he shall determine that certain slope, drainage or easement rights or any or all of them, or parts thereof, are no longer required or necessary for the use of the state highway with which they are connected, convey, grant, bargain, sell and release to the owners of the fee, any slope, drainage or easement rights, or any or all of them, or parts thereof, including without limitation those easement rights or parts thereof which give the state the right to enter upon lands adjoining any state highway for the purpose of cleaning, straightening, widening, deepening and maintaining existing ditches and streams and the right to discharge water and maintain a flow of water over such lands adjoining the right of way of a state highway. [emphasis added]

New Jersey Permanent Statutes 27:16-28. Vacation or discontinuance of county road

Any road or portion thereof owned by any county or under the control of any county governing body may be (a) discontinued as a county road and returned to the jurisdiction and control of the municipality wherein the same is situated; or (b) vacated and abandoned as a public highway, in manner following:

...
b. Any road or portion thereof owned by any county or under the control of any county governing body may be vacated and abandoned as a public highway by any county governing body, in the manner following: The governing body of any county, by the affirmative vote of the majority of all the members thereof, may pass an ordinance or resolution, as appropriate, describing the road or portion thereof, intended to be vacated and abandoned, sufficiently to clearly identify and locate the same, and declaring it to be the intention of the county to vacate and abandon the road or portion thereof as a public highway, and fixing the time and place not less than three weeks nor more than six weeks thereafter, when and where the board shall meet for final consideration and action upon the ordinance or resolution, and when and where all persons interested therein may appear and be given an opportunity to be heard. Within three days of passage, the clerk of the board of freeholders shall cause said ordinance or resolution to be advertised verbatim in a newspaper published and circulating within the limits of the county, which publication shall be inserted once in each week for three weeks consecutively before the day of the meeting. And if, after the public hearing held at the time and place specified in the ordinance or resolution, the county governing body, by a vote of the majority of all of the members thereof, shall again adopt such ordinance or resolution, the road or portion thereof shall from thenceforth be deemed to be vacated and abandoned, and shall cease to be a public road or highway, and title to the land

which theretofore was lying within the area of the side lines or legal right of way of the road, shall revert to and vest in the respective owners of the legal title thereto, free and clear of any easement or right of way thereover or thereupon in favor of the public. The clerk of the board shall forthwith file a certified copy of the ordinance or resolution in the office of the county clerk and the latter shall record and index the same in the road records of his office. [emphasis added]

In cases where a right of way is owned in fee by the jurisdiction, statutes or municipal codes will likely dictate the disposal of such real estate after the right of way use is extinguished.

When reversionary rights exist in the abutting property, those rights are generally attached as an appurtenance to the abutting real estate. As such, they will automatically pass with the conveyance of the abutting property, but that may not be the case when the street has been vacated.

Upon vacation of a public easement, the affected street or alley is considered a separate tract of land, regardless of whether the dedication had created a public easement or a fee simple interest. *Alexander v. McClellan*, 39 P. 3d 1265 - Colo: Court of Appeals, 5th Div. [internal citation omitted]

Due to the nature of the uses allowed by a jurisdiction within a right of way; however, the reversionary rights do not always have a significant appraised value.

[I]t [i]s immaterial whether the owners of adjoining lots owned the fee or not. Their reason for this opinion was, that though the fee of the street be in the owners of adjoining lots, yet as the town or city has a right to the use of the ground as a highway, and for various other purposes consistent therewith, such as the making of sewers and the laying of gas or water pipes and other purposes, for which a street may be legitimately used, which right to use the street is practically an exclusion of the owner of the fee in the street, so long as it is used by the town without obstructing the surface of the ground, and as this right of user on the part of the city or town is permanent, and may and in all probability will last forever, the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value or to be regarded as property, which under the Constitution is required to be paid for when its use is appropriated by the public. *Herold v. Hughes*, 90 SE 2d 451 - W Va: Supreme Court of Appeals 1955. [internal citations omitted]

Even when a right of way exists as an easement and is not held in fee by the jurisdiction, abutting owners may or may not be able to convey their abutting lands without including their underlying interest in the right of way (essentially severing their reversionary rights from the abutting lands). In some states, this can be readily done, and in other states it is generally not allowed.

Describing Easements

An easement requires the same accuracy of description as other conveyances. "The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description." *Vrabel v. Donahue Creek Watershed Authority*, 545 S.W.2d 53, 54 (Tex.Civ.App. 1976). *Germany v. Murdock*, 662 P. 2d 1346 (Supreme Court of New Mexico, 1983).

Land surveyors are the only profession specifically educated and trained in the preparation of land descriptions. A good land description is concise, clear and complete – thereby describing one unique, identifiable location on the surface of the earth. The weight of authority has outlined that if a description can be located on the ground as a unique parcel by a competent surveyor, it is considered sufficient.

Easement descriptions can take as many forms as there are types of descriptions. Some easements are platted, dedicated and recorded as part of a larger subdivision. Such a description might be "Block B in Bridlewood Subdivision per plat thereof recorded in Plat Book 12, Page 13 in the Office of the Recorder of Boone County, Indiana." The easement in this case is legally defined, identified and located based on the manner in which "Block B" is depicted on the record plat.

More frequently, easements are described in separate documents executed and recorded specifically for purposes of creating the easement. The descriptions included in easement documents most typically take the form of a metes and bounds description.

Frequently; however, easements can be very adequately described using a more concise "strip description" which is much easier to prepare, less prone to the introduction of scriveners' errors and more easily plotted. Strip easements usually are described with respect to a centerline, such as: "A strip of land 50 feet wide, the centerline of which is described as follows: [H.I. (description of centerline)]." Unfortunately, strip descriptions are not frequently used even though they have these advantages.

A strip of land either identified by easement or acquired in fee, and limited to certain rights to accommodate a particular use constitutes a strip easement. This type of easement may be for pipelines or power transmission lines and, as such, it is critical that they be continuous and not have any gaps. Gaps, however, are the ever-present hazard and bane in creating strip easements.

There are many easements created for purposes of acquiring interests in tracts of land acquired for highways, railroads, pipelines, electric lines, or any other linear transportation or utility route.” Many such acquisitions in the past were based on plans and surveys, which over time have become extremely expensive if not impossible to accurately retrace. The acquisition parcels were often inadequately described and difficult to locate on the ground with an acceptable degree of confidence. It is important that agencies and land surveyors follow procedures which provide a greater assurance of the ability to retrace easement lines and descriptions in the future.

Jerry R. Broadas, Esq., L.S., suggests that those preparing descriptions for easements in the State of Washington using the centerline/strip method, avoid the phrase “*A strip of land X feet in width the centerline of which his described as follows....*” [emphasis added]. The reasoning is that the phrase “a strip of land” will leave an ambiguity as to the nature of the estate being created – easement or fee.⁴

However, in its 1996 decision in *Brown v. State*, 924 P. 2d 908, the Washington Supreme Court said “[W]here there is no language in the deed relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, the deed will be construed to convey fee simple title. *Swan*, 37 Wash.2d at 536, 225 P.2d 199; 65 Am.Jur.2d *Railroads* § 76 (1972); see, e.g., *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 159 Ill.Dec. 50, 54, 575 N.E.2d 548, 552 (1991). The implication of this decision may be that if a conveyance contains careful wording as to the purpose that the strip is to be put to (i.e., an easement), can overcome the ambiguity of the use of the term “strip of land.”

Wording as to purpose of an easement should fall in the purview of the attorney, not the surveyor.

The Surveyor’s Responsibilities with Regard to Easements

Except in parts of New England, surveyors generally do not have a responsibility to conduct their own easement research either pursuant to administration laws or statutes, or the normal standard of care. A surveyor could, however, be bound contractually if such work was included in the terms of the contract.

ALTA/ACSM Land Title Surveys

When conducting a 2011 ALTA/ACSM Land Title Survey, the professional surveyor has significant responsibilities with respect to written easements. These responsibilities override the lack of any requirements under a state’s laws if the land surveyor is to represent that he or she, in fact, made the survey in accordance with the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys. In any case, it should be emphasized that addressing written easements in a Land Title Survey is clearly dependent on the client providing the supporting

⁴ *Washington State Common Law of Surveys and Property Boundaries*, Jerry R. Broadas, Land Surveyors’ Association of Washington, 2009. P. 162.

easement documents.

The current set of Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys was adopted by the American Congress on Surveying and Mapping (ACSM), the American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS) in 2011 and effective February 23, 2011.

ALTA and NSPS recognize that the responsibility for records research lies with the title company, not the Surveyor.

Pursuant to Section 4, these standards state *“Complete copies of the most recent title commitment, the current record description of the property to be surveyed (or, in the case of an original survey, the parent parcel), the current record descriptions of adjoiners, any record easements benefiting the property, the record easements or servitudes and covenants burdening the property (all hereinafter referred to collectively as "Record Documents"), documents of record referred to in the Record Documents, documents necessary to ascertain, if possible, the junior/senior relationship pursuant to Section 6.B.vii. below, and any other documents containing desired appropriate information affecting the property being surveyed, and to which the ALTA/ACSM Land Title Survey shall make reference, shall be provided to the surveyor for use in conducting the survey.”* [emphasis added]

Presuming that easement documents are in fact provided, the Surveyor’s responsibility is outlined under Sections 5.E. and 6.C. of the 2011 Standards. These requirements address both when the surveyor has been provided copies of express easements and when there may actually be no written easement, but there is evidence on the ground of a potential unwritten easement.

Section 5. Field Work - The Survey shall be performed on the ground ... and the field work shall include the following:

Section 5.E. Easements and Servitudes

- i. Evidence of any easements or servitudes burdening the surveyed property, disclosed in the Record Documents provided to the surveyor and observed in the process of conducting the survey.
- ii. Evidence of easements or servitudes not disclosed in the Record Documents provided to the surveyor, but observed in the process of conducting the survey, such as those created by roads; rights of way; water courses; ditches; drains; telephone, fiber optic lines, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property.
- iii. Surface indications of underground easements or servitudes on or across the surveyed property observed in the process of conducting the survey.
- iv. Evidence of use of the surveyed property by other than the apparent occupants observed in the process of conducting the survey.

In addition, as noted above, the *2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys* require that certain notes be placed on the face of the plat or map when certain conditions exist as to easements:

Section 6: Plat or Map - A plat or map of an ALTA/ACSM Land Title Survey shall show the following information:

- i. The width and recording information of all plottable rights of way, easements and servitudes burdening and benefitting the property surveyed, as evidenced by Record Documents which have been provided to the surveyor.
- ii. A note regarding any right of way, easement or servitude evidenced by a Record Document which has been provided to the surveyor (a) the location of which cannot be determined from the record document..., or (b) of which there was no observed evidence at the time of the survey, or (c) that is a blanket easement, or (d) that is not on, or does not touch, the surveyed property, or (e) that limits access to an otherwise abutting right of way, or (f) in cases where the surveyed property is composed of multiple parcels, which of such parcels the various rights of way, easements, and servitudes cross.

A surveyor cannot know that “all recorded easements” have been found by the title examiner and therefore should state only that the specific easements listed in the title commitment or otherwise provided, were shown on the Plan.

The ALTA/ACSM standards assure the title company that if there is visible evidence of unrecorded or unwritten easements those conditions will be revealed. There will then be the opportunity to evaluate the evidence and its potential effect as related to title insurance. Most frequently, potential unwritten rights will eventually appear as Schedule B2 exceptions to the title policy.

What if the described easement cannot be located on the ground?

There are a variety of reasons that easement documents frequently contain descriptions that cannot be specifically located on the ground and, therefore, shown on the plat of survey. Sometimes it cannot even be determined if the easement has any impact on the subject property.

Older utility easements (especially for gas, oil and transmission lines) were frequently purchased as “blanket” easements, which means they burdened the entirety of the owner’s real estate described in the document. In rural areas, blanket easements are still sometimes used even in contemporary easements.

While a blanket easement technically burdens an entire tract of land, the courts have generally held that once a utility company installs the infrastructure contemplated in the original easement, the construction of any further lines or otherwise expanding its physical extent may overburden the easement. In that case, an additional interest may need to be purchased from the owner.

The location of a blanket easement cannot be specifically depicted on a plat of survey and certainly the Surveyor cannot assign a width. The location of the related utility company infrastructure may; however, be an important indication of the extent of the interest that a court might assign to a blanket easement.

Another form of blanket easement oftentimes employed in older documents is reference to an easement being purchased from an owner by name only without any reference to a description of the burdened property not to mention the easement itself.

Another situation that can result in the exact location of an easement being unidentifiable is reference in the document to an exhibit that purports to show the easement. It is not unusual for the document to refer to lines of a certain color on the exhibit which, of course, are not identifiable as such in the recorded document. In addition, attached exhibits are frequently copies of 24 by 36-inch drawings reduced to legal size (or smaller) thereby rendering them illegible. Infrequently the referenced exhibit has been inadvertently left completely out of the recorded document. In all of these cases, the ability of the surveyor to locate the easement on the ground and depict it on the plat of survey is severely inhibited if not rendered impossible.

In any of these cases or for any other reason, when an easement cannot be specifically located or identified, a note to that effect should be placed on the plat of survey.

The 2011 ALTA/ACSM Standards outline several times when notes about easements should be placed on the plat/map in Section 6.C.ii.

A note regarding any right of way, easement or servitude evidenced by a Record Document which has been provided to the surveyor (a) the location of which cannot be determined from the record document, or (b) of which there was no observed evidence at the time of the survey, or (c) that is a blanket easement, or (d) that is not on, or does not touch, the surveyed property, or (e) that limits access to an otherwise abutting right of way, or (f) in cases where the surveyed property is composed of multiple parcels, which of such parcels the various rights of way, easements, and servitudes cross.

Other Types of Easements, Restrictions, Covenants and Encumbrances

By the same means an easement for ingress and egress can be granted or acquired, easements for various other purposes such as air, light, historical preservation or redevelopment, aesthetic purposes, or conservation of land and/or improvements can be established. Generally, however, such specialized easements cannot be obtained through prescription.

Land Use (Agricultural/Conservation/Scenic) Easements

New Jersey Permanent Statutes 4:1B-4. Definitions

As used in this act:

a. "Agricultural preserve" means a significant mass of reasonably contiguous prime agricultural lands created through the State purchase of development easements to such lands;

...

d. "Development easement" means an interest in land, less than fee simple absolute title thereto, which interest represents the right to develop such lands for all nonagricultural purposes as determined by the provisions of this act and any relevant rules or regulations promulgated pursuant hereto; ...

New Jersey Permanent Statutes 13:8-32. Definitions

As used in this act, unless the context clearly indicates otherwise:

...

c. "Scenic easement" means a perpetual easement in land which (1) is held for the benefit of the public (2) is specifically enforceable by its holder or beneficiary, and (3) limits or obligates the holder of the servient estate, his heirs, and assigns with respect to their use and management of activities conducted thereon, the object of such limitations and obligations being the maintenance or enhancement of the natural beauty of the land in question or of areas affected by it.

New Jersey Permanent Statutes 13:8B-2. Definitions

As used in this act:

a. "Charitable conservancy" means a corporation or trust whose purposes include the acquisition and preservation of land or water areas or of a particular land or water area, or either thereof, in a natural, scenic or open condition, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which has received tax exemption under section 501(c) of the 1954 Internal Revenue Code;

b. "Conservation restriction" means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, to forbid or limit any or all:

(1) Construction or placing of buildings, roads, signs, billboards or other advertising, or other structures on or above the ground;

(2) Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials;

(3) Removal or destruction of trees, shrubs or other vegetation;

(4) Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance;

(5) Surface use except for purposes permitting the land or water area to remain predominantly in its natural condition;

(6) Activities detrimental to drainage, flood control, water conservation, erosion control or

soil conservation, or fish and wildlife habitat preservation;

(7) Other acts or uses detrimental to the retention of land or water areas according to the purposes of this act.

Water Rights

Particularly in the western states, rights and access to water can be contentious. Many states have extensive laws related to these issues.

Solar Rights/Wind Easements

Many states have passed statutes defining and outlining the requirements of solar or sunlight and wind easements which a property owner may acquire to protect rights to sunlight or wind for purposes of, for example, assuring that sunlight can power solar voltaic panels or wind can reach turbines.

Avigation Easements

An avigation easement is an easement of right to navigation in airspace over designated land.

New Jersey Permanent Statutes 6:1-88. Acquisition of interest in property or nonconforming structure

In any case in which it is desired to remove, lower, or otherwise terminate a nonconforming use; or in which the necessary protection from an airport hazard cannot, because of constitutional limitations, be provided by zoning regulations; or if it appears advisable that the necessary protection from an airport hazard be provided by acquisition of property rights rather than by zoning regulations, the commissioner may acquire by purchase, grant, condemnation, or otherwise in the manner provided by law, such air right, easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this act, including acquisition of a fee simple estate.

An avigation easement is an easement of right to navigation in airspace over designated land. An avigation or flight easement is somewhat different from a clearance or obstruction easement. *United States v. Brondum*, 272 F.2d 642 (5th Cir. 1959); 4A Words and Phrases, "Avigation Easement" (1969). *Sticklen v. Kittle*, 287 SE 2d 148 - W Va: Supreme Court of Appeals 1981.

Very few jurisdictions in the United States have considered the question of prescriptive avigation easements.[5] The Authority cites *Classen v. State*, Department of Highways, 621 P.2d 15 (Alaska 1980) and *Highline School District No. 401, King County v. Port of Seattle*, 87 Wash.2d 6, 548 P.2d 1085 (1976), in support of its assertion that a prescriptive easement in airspace can be obtained by continuous overflights. *Sticklen v. Kittle*, 287 SE 2d 148 - W Va: Supreme Court of Appeals 1981.

Property in close proximity to airports may be subjected to zoning restrictions which essentially take the form of negative easements.

Transfer of Development Rights

“TDRs” are a way of directing development into areas specified by a jurisdiction. In some states, they may include a conservation easement, which is normally a negative easement, but even if they don’t, they still can be viewed as a negative servitude.

Lateral and Subjacent Support Rights

Owners of real property have what amounts to a negative easement on adjoining lands for purposes of providing support for his or her land from adjoining properties.