New York Easements
~and~
Rights of Way

Part II

Characteristics, Termination and
Reversionary Rights

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New York State Association
~ of ~
Professional Land Surveyors

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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

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 because that is how the easement-holder's rights will be defined.

> The general rule concerning the scope of an easement is sometimes stated,
>
> > "where an easement is created by express grant and its sole purpose is to provide ingress and egress, but it is not specifically defined or bounded, the rule of construction is that the reservation refers to such right of way as is necessary and convenient for the purpose for which it was created, and includes any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant."
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> The limiting language set forth in the cases, "not specifically defined and bounded," refers not to a metes and bounds description of the easement as plaintiff claims, but to a limiting, or bounding, of the purpose of the easement. *DP LLC v. 269 N BEDFORD CORP*, 57 Misc. 3d 556 - NY: Supreme Court 2017 [internal citations intentionally omitted.].
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> "[A]bsent express language to the contrary... [t]he grant of a mere right-of-way for ingress and egress does not... include the right to install underground pipes or utility lines." ("Spiak v. Zeglen, 255 AD2d 754 [3d Dept. 1998], quoting U.S. Cablevision Corp. v. Theodoreu, 192 AD2d 835 [3d Dept. 1993]. *Saladino v. Martin*, 2011 NY Slip Op 30017 - NY: Supreme Court, Greene 2011.
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> An instrument creating an estate or interest in real property must be construed according to the intent of the parties, insofar as the intent can be gleaned from the instrument as a whole. A grantor of an easement may create an extensive or a limited easement. The extent of an easement claimed under a grant is generally determined by the language of the grant. Moreover, the terms of the grant are to be construed most strongly against the grantor in ascertaining the extent of the easement. *Mandia v. KING LBR. & PLYWOOD*, 179 AD 2d 150 - NY: Appellate Div., 2nd Dept. 1992. [internal citations intentionally omitted.]
>
> Generally, an instrument creating an easement is construed in accordance with the intention of the parties, which is ascertained from the words of the instrument and the circumstances contemporaneous to the transaction, including the state of the thing conveyed and the objective to be obtained. … An agreement signed by the parties thereto speaks for itself, and the intention with which it was executed must

> be determined from the language used in the agreement, without resort to extrinsic evidence. *RIVER'S EDGE HOMEOWNERS' v. Naperville*, 819 NE 2d 806 - Ill: Appellate Court, 2nd Dist. 2004. [internal citations intentionally 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 intentionally 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.

> The express grant, however, does not specify the width of the right-of-way and, in such case, its width is construed to be that which is necessary for the use for which the right-of-way was created. In determining the width of the easement, the interpretation placed on the grant by the parties is an important factor. *Oliphant v. McCarthy*, 208 AD 2d 1079 - NY: Appellate Div., 3rd Dept. 1994 [internal citations intentionally omitted.]

> [W]here the extent of a right-of-way is not specified, it is construed to be that which is necessary for the use for which it was created (Le Sawyer v Squillace, 14 AD2d 961, 962). *Town of Ulster v. Massa*, 144 AD 2d 726 - NY: Appellate Div., 3rd Dept. 1988.

> When a public road is established by user or prescription, "its width is determined by the width of the improvement" (*Schillawski v State of New York,* 9 NY2d 235, 238 [1961]). *Bond v. Turner,* 78 AD 3d 1490 - NY: Appellate Div., 4th Dept. 2010.

Even though a grant may ostensibly specific the width of an easement, care must be taken in interpreting the meaning of the words because the stated width may or may not apply to the width of the easement itself.

> Where a right of way is granted over a 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. *FAIRFIELD PROPS., INC. v. Pepe*, 56 AD 2d 883 - NY: Appellate Div., 2nd Dept. 1977.
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> [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 intentionally omitted]
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> "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.
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> In *Vallas*, we concluded that the width of an easement is confined to the dimensions which are reasonably necessary for the purposes for which it is created, as established by actual use. Therefore, where an easement granted by deed is undefined as to its location and width, the dimensions depend upon the intent of the parties, which can be shown by the extent of the actual use. Consequently, "when the character of the easement is once fixed, no material alterations can be made by either the servient or easement owner without the other's consent." *Peters v. Milks Grove Sp. Drainage Dist.*, 610 NE 2d 1385 - Ill: Appellate Court, 3rd Dist. 1993. [internal citations intentionally 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 intentionally 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 intentionally 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.

> The principle of *stare decisis* rests more lightly on the shoulders of judges and lawyers today than formerly. Justice HOLMES' aphorism that it is revolting to have no better reason for a rule than that so it was decided in the reign of George II needs to be regarded in context. Although he did not hesitate to alter precedent where the course of the industrial revolution had made departure necessary on account of matters of grave social consequence, he was too sound a jurist to undervalue the importance of promoting certainty, stability and predictability in the law (Hertz v. Woodman, 218 U. S. 205). *Heyert v. Orange & Rockland Utils*., 17 NY 2d 352 - NY: Court of Appeals 1966

In *Collopy v. United Railroads of San Francisco*, 67 Cal. App. 716, 228 P. 59, 61, the court approvingly cites Cater:

> "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. *Cater v. Northwestern, etc.*, 60 Minn. 539, 63 N.W. 111, 28 L.R.A. 310, 51 Am.St.Rep. 543. 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. Such in effect is the principle established in *Montgomery v. Santa Ana West Minister Railway Co.*, 104 Cal. 186, 37 P. 786, 25 L.R.A. 654, 43 Am.St.Rep. 89, and *Hayes v. Handley,* 182 Cal. 273, 187 P. 952. See, also, *Albany v. United States, etc.,* 38 Cal. App. 466, 176 P. 705. "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." (Emphasis supplied.)

Bolinger v. City of Bozeman, 493 P. 2d 1062 - Mont: Supreme Court 1972.

This court has previously construed an access easement created in 1907 where "teams and wagons" were authorized to travel the way in conducting their business. There, it was determined the easement was created for the purpose of permitting vehicles to pass through the driveway. *Brock v. B & M Moster Farms, Inc.,* 481 NE 2d 1106 - Ind: Court of Appeals, 1st Dist. 1985 [internal citations intentionally omitted]

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. *Lynam v. Clayville,* 128 A. 2d 316 - Del: Court of Chancery 1957 [internal citations intentionally omitted].

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 * * *". *Herold v. Hughes*, 90 SE 2d 451 - W Va: Supreme Court of Appeals 1955. [internal citations intentionally omitted]
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> 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. *Diemling v. Kimble*, 2012 Ohio 3323 - Ohio: Court of Appeals, 5th Appellate Dist. 2012. [internal citations intentionally omitted]

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.

> 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*.
>
> "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 intentionally 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 intentionally omitted]

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) that gave rise to the claim in the first place.

> It is well settled that, "in the case of a prescriptive easement, the right acquired is measured by the extent of the use." *Dermody v. Tilton*, 85 AD 3d 1682 - NY: Appellate Div., 4th Dept. 2011.

> 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 intentionally omitted]

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

> 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.

Exclusivity

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]

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

> 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.

> New York courts have ruled that exclusive easements, which give the holder of an easement the right to exclude the landowner, are disfavored. An easement will be deemed non-exclusive unless the subject easement agreement demonstrates the clear intent of the parties to allow the easement holder to exclude both third-parties and the landowner. *AMLAK REALTY CORP. v. AHSA CORP.*, 2012 NY Slip Op 32134 - NY: Supreme Court 2012.

> [A]n `exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. [Citations.] No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention. *Gray v. McCormick*, 167 Cal. App. 4th 1019 - Cal: Court of Appeal, 4th Appellate Dist., 3rd Div. 2008.

> [W]e note that, generally, exclusivity should be clearly evidenced in the grant of the easement. Absent an affirmative restriction, the titleholder of the servient estate may make any use of the easement which would not materially impair or unreasonably interfere with the use of the easement by the dominant estate titleholder. *Brown v. Heidersbach*, 360 NE 2d 614 - Ind: Court of Appeals, 3rd Dist. 1977.

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 intentionally omitted]

In Illinois and a minority of other states, exclusivity is a required element of a prescriptive easement; applying even to the exclusion of the servient owner.

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.
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> 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).
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> 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 intentionally omitted]

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

> 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 intentionally omitted]
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> [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. *Barrett v. Kunz,* 604 A. 2d 1278 - Vt: Supreme Court 1992. [internal citation intentionally 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.

> 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.
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> [A]n implied easement by necessity is extinguished when the necessity ceases. *Fischer v. Liebman*, 137 AD 2d 485 - NY: Appellate Div., 2nd Dept. 1988.

> [A]n easement or way of necessity is based primarily on the policy favoring beneficial use of property. . . . an easement by necessity exists in favor of the dominant estate whether it is used or not, so long as it is necessary for access. *Curry v. Gaines*, Ky: Court of Appeals 2008 (unpublished).

> [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 intentionally 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.

While 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 intentionally 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 intentionally 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.

"[A]bsent agreement to the contrary, the burden to maintain an easement falls upon the owner(s) of the dominant estate." "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 citations intentionally omitted.]

We are cognizant of the rule that an owner of the servient estate has no duty to maintain or repair a right-of-way easement as long as the grant creating such an easement is silent as to any obligation of maintenance or repair on the part of such servient tenant. *Elzer v. Nassau County*, 111 AD 2d 212 - NY: Appellate Div., 2nd Dept. 1985.

[I]t [is] settled that ordinarily the owner of an easement is required to keep it in repair, but it is a monotonous truism that the parties may alter their legal obligations by contract. *Rose v. Peters* (1943) 59 Cal.App.2d 833, 835 [139 P.2d 983]

Parties to an express easement may provide for repair and maintenance, and the prudent drafter should follow this course. Absent an agreement to the contrary, the obligation to repair and maintain an easement is placed on the easement holder. In the case of sidewalk easements, statutes may alter the common-law obligation for maintenance by the easement holder.
. . .
Several courts have stressed that the holder of an easement has a duty as well as a right to keep the servitude in repair and have compelled dominant owners to pay the cost of maintenance. Likewise, a California statute requires the holder of a right-of-way to maintain the servitude. Action by the servient owner to prevent the easement holder from making repairs constitutes an unreasonable interference with the easement holder's rights.
. . . .
The maintenance duties of multiple easement holders in a private road pose the special problem of adjusting their burdens. It has been held that, absent an agreement to the contrary, each holder is responsible only for the maintenance of that portion of the road abutting that holder's own land. In this regard, an Arizona appellate court, applying the doctrine of equitable contribution, has required dominant owners to share in the costs necessary to maintain a common driveway. Ordinarily, the owner of a servient estate is under no obligation to repair or maintain an easement. Many courts, however, apportion the expense of maintaining a driveway or right-of-way between dominant and servient owners when both use the easement. Apportionment is commonly based on the relative extent of usage.
Baker v. Hines, 406 SW 3d 21 - Ky: Court of Appeals 2013 [internal citations intentionally omitted]

> 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 intentionally omitted]
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> [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 intentionally 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 intentionally 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 created for purposes of ingress and egress cannot be legally expanded to include a different use, like installing a pipeline, for example, or – for that matter - parking.

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.

When the location, width and use of an easement are definitively spelled out in the granting document, the easement holder must negotiate with the owner of the servient estate to expand or change them. Such changes generally cannot be made unilaterally by either party, although common law rules provide for some limited exception changes in location.

[T]he scope of an express easement for a stated purpose cannot be expanded to include any use merely because such use does not impose an added burden on the servient estate. ("[T]he use of an easement must be confined strictly to the purposes for which it was granted or reserved and it cannot be expanded by any change in the use or character of the dominant estate.") *City of Orlando v. MSD-MATTIE, LLC*, 895 So. 2d 1127 - Fla: Dist. Court of Appeals, 5th Dist. 2005. [internal citations intentionally omitted]

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 intentionally omitted]

[A]n easement holder "may neither change the easement's purpose nor expand the easement's dimensions," he or she "must not change the use for which the easement was created so as to increase the burden of the servient tract." *Newcomb v. County of Carteret*, 701 SE 2d 325 - NC: Court of Appeals 2010. [internal citations intentionally 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 intentionally 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]

Generally, 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 intentionally omitted]

> "The law is clear that an easement appurtenant to a parcel of land, the dominant parcel, may not be used to benefit another parcel of land to which the easement is not appurtenant even though the two parcels are adjacent under common ownership." The owner of the dominant parcel may not extend the easement to other land owned by him as such would increase the burden of the servient parcel. An easement is overburdened when it is improperly used to benefit property other than the dominant parcel. *Joynt v. Enders*, Ariz: Court of Appeals, 1st Div., Dept. D 2010

> The reason an easement typically is limited to the dominant tenement is to prevent an increase in the burden upon the servient estate. *SYLVESTER WINERY, INC. v. Feichtinger*, Cal: Court of Appeal, 2nd Appellate Dist., 6th Div. 2013

> 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.

> 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.

> [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.

But courts in some states may also look at practical considerations in deciding if expanding the use beyond the initial dominant estate 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.

The mere subdivision of the dominant estate generally does not constitute an overburdening.

> [An easement appurtenant] is not extinguished by subdivision of the land to which it applies so long as no additional burden is imposed upon the servient estate. *SACASA v. Trust*, 2018 NY Slip Op 32369 - NY: Supreme Court 2018

There is not a universal position amongst the states as to the extent of physical changes to an easement that are allowable.

> [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 intentionally omitted]

If the dominant estate is partitioned, the rights associated with the easement must be apportioned 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.

Even when the use itself is not extended, expanding the _nature_ of that use can be considered an overburdening of the 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 or 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 intentionally 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 intentionally 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 intentionally omitted]

In Delaware, expanding the nature of the use from a few trips a day to 370 was not an overburdening…

> 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 <u>is</u> 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 intentionally 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.

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

The dominant estate has the right to enjoy his or her easement without interference by the servient estate.

> "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." Therefore, the owner of the servient estate may not "unreasonably interfer[e]" with the rights of the dominant estate owner to use and enjoy the easement. *IRONWOOD, LLC v. JGB PROPS., LLC*, 99 AD 3d 1192 - NY: Appellate Div., 4th Dept. 2012 [internal citation intentionally omitted.]

> It is well settled that the owner of a servient estate may be required to remove obstructions to an easement. Conversely, where, as here, the servient estate owner removes or destroys an improvement located within an easement, a court may require the servient estate owner to pay the cost of rebuilding the improvement and restoring the easement to its former condition. *IRONWOOD, LLC v. JGB PROPS., LLC*, 99 AD 3d 1192 - NY: Appellate Div., 4th Dept. 2012 [internal citations intentionally 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.

> 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 intentionally omitted]

What constitutes an actionable wrong is an issue that may need to be determined at trial.

> The owner of the dominant estate—the easement holder— acquires or is granted a right to use another person's land in a particular, though limited, way. The grant carries with it those rights necessary to effectuate the easement's exercise and enjoyment. The plaintiff alleges that he is being deprived of access to his easement despite the defendants' efforts. The issue of whether the parking of vehicles in the easement is an intrusion of a de minimis nature should be resolved at trial, as should the issue of what reasonable means, if any, are available to enforce the plaintiff's use of the easement if the intrusion is not de minimis. *Hoeffner v. John F. Frank, Inc.*, 302 AD 2d 428 - NY: Appellate Div., 2nd Dept. 2003.

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

> [W]here the intention of the grantor is to afford only a right of way. "it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder." Thus, an owner of land that is burdened by an easement of ingress and egress "may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired." SACASA v. Trust, 2018 NY Slip Op 32369 - NY: Supreme Court 2018 [internal citation intentionally omitted.]

> To insure certainty, parties who want to keep an easement free of gates or other obstacles can specifically express that intention in the document. However, failure to do so does not preclude the right to erect a gate so long as it does not interfere unreasonably with the right of way. We do not agree that the language Appellants rely on clearly expresses a prohibition on gates.[4] Further, the trial judge did not err in determining that the gate did not unreasonably interfere with Appellants' easement[5] and there was substantial, competent evidence to support that finding. We find no merit to Appellants' other issues. *Gilliand v. Heiderich*, 46 So. 3d 1186 - Fla: Dist. Court of Appeals, 5th Dist. 2010.

> 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 intentionally 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 SW 2d 839 - Ark: Supreme Court 1967*. [internal citations intentionally omitted]

Relocating an easement

Most states do not allow the relocation of an easement without the consent of both the dominant and servient estates.

> Where … the easement over the defendant's property is defined by metes and bounds, the defendants do not have the right to unilaterally restrict, relocate or alter the easement. *VENABLES v. ROVEGNO*, 2017 NY Slip Op 31655 - NY: Supreme Court 2017.

[4] "free and unencumbered access"

[5] The gate was activated by a remote control, keypad or manual override and the code was posted on the keypad.

Defendants … have a right-of-way over plaintiff's property but, inasmuch as it lacks a specific metes and bounds description or other expression to the contrary, plaintiff is free to unilaterally relocate it "so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way." *Anzalone v. Costantino*, 145 AD 3d 1236 - NY: Appellate Div., 3rd Dept. 2016.

As the Court of Appeals held in *Lewis v. Young* (92 NY2d 443, 452 [1998]) "a landowner, consonant with the beneficial use and development of its property, can move [the] right of way . . . so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way." Here, triable issues of fact exist as to whether the proposed relocation of the right-of-way easement did not significantly frustrate the original grantor's intent or object in creating the right-of-way, did not unreasonably interfere or increase the burden on the plaintiffs as the easement holders, or did not lessen the usefulness of the right-of-way. Rebentisch v. Donovan, 21 AD 3d 542 - NY: Appellate Div., 2nd Dept. 2005.

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 intentionally omitted]

Easements once granted and fixed are not subject to the whims of either the dominant or servient owners of the land and can only be changed by the mutual consent of the parties.

As stated in 17A, Am.Jur., Page 713, Section 103:

> "The general rule is that the location of an easement once selected cannot be changed by either the land owner or the easement owner without without (sic) the others consent. The reason for this rule is that treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged."

Florida Power Corporation v. Hicks, 156 So. 2d 408 - Fla: Dist. Court of Appeals, 2nd Dist. 1963.

[14] An easement may be relocated. If the relocation is consented to by the servient owner, all the rights of the original easement attach to the relocated easement.
[15] If the servient owner does not consent, the relocation then exists as a prescriptive easement. This is discussed in 17 California Jurisprudence 2d, Easements, section 17, page 117, where it is said: "... And the mere relocation by mutual consent of a right of way or other easement does not alter the rights of the owner of the easement. But if the change of location is not consented to, then the extent of the easement at the new location is determined entirely by the extent and character of the user for the prescriptive period."
[16] Once an easement is established, it is competent for the parties to change the location by mutual consent, and such consent may be implied from the acts and acquiescence of the parties. (*Johnstone v. Bettencourt*, 195 Cal.App.2d 538 [16 Cal.Rptr. 6].) *McCarty v. Walton*, 212 Cal. App. 2d 39 - Cal: Court of Appeal 1963.

When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate. But, if the owner of the land fail to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate. When the way is once selected, it cannot be changed by either party without the consent of the other. *Town of Ellettsville v. DeSpirito*, 78 NE 3d 666 - Ind: Court of Appeals 2017

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.

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, Tex: Court of Appeals, 1981.

However, depending on the exact scenario and under some circumstances (e.g., the location was not definitively fixed in the original document), some states' courts will allow the unilateral relocation of an easement by the servient owner as long as it does not substantively interfere with the dominant estate's rights.

> A more modern and, we think, more equitable approach to easement relocation is found in Restatement (Third) of Property (Servitudes) § 4.8 (2000), which has been adopted or approved by several jurisdictions around the country. Section 4.8, entitled "Location, Relocation, and Dimensions of a Servitude," states,
>
>> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
>> (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
>> (2) The dimensions are those reasonably necessary for enjoyment of the servitude.
>> (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.
>
> …
>
> We find these observations persuasive and believe that our supreme court would also recognize the utility of adopting the Restatement's approach to easement relocation.[6] *Town of Ellettsville v. DeSpirito*, 78 NE 3d 666 - Ind: Court of Appeals 2017.

The treatment of the relocation of prescriptive easements varies by state.

> [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 v. Weisel, 687 A. 2d 839 - Pa: Superior Court 1997.

[6] In this case, the easement's width was specified on the original subdivision plat, but its location was only approximately shown.

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, condemnation, mortgage foreclosure, tax sale, and by unwritten means such as non-user/abandonment and adverse possession.

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.

> Once created, an easement appurtenant by grant passes with the land unless extinguished by abandonment, conveyance, condemnation or adverse possession. *SACASA v. DAVID TRUST*, 2018 NY Slip Op 51383 - NY: Supreme Court 2018.
>
> 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 intentionally omitted]
>
> An easement does not expire unless it is terminated by an act of the parties, or by operation of law. 25 Am. Jur. 2d, Easements and Licenses § 101, et seq. (1966). *MAJESTIC OAKS HOME OWNERS ASSOCIATIONS, INC. v. MAJESTIC OAKS FARMS, INC.*, Ky: Court of Appeals 2015 (unpublished).
>
> 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 intentionally omitted]
>
> 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).

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, for example, 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.

Conservation easements are sometimes not subject to the merger doctrine pursuant to statute.

> "It is fundamental that where the title in fee to both the dominant and servient tenements become vested in one person, an easement is extinguished [by merger]." *SEETARAM v. BARUKH*, 2008 NY Slip Op 33445 - NY: Supreme Court 2008.
>
> The merger doctrine proceeds from a recognition that a person cannot have an easement in his or her own land because all the uses of an easement are fully comprehended in the general right of ownership. Consequently, when the dominant and servient estates become vested in one person, the easement terminates. At that point, the easement no longer serves a purpose and the owner may freely use the servient estate as its owner (see, Restatement of Property § 497). *Will v. Gates*, 680 NE 2d 1197 - NY: Court of Appeals 1997 [internal citations intentionally omitted.]
>
> [O]ne cannot grant himself or herself an easement in land to which he or she has title. (…"a person may not have an interest in his or her own land because an easement merges with the title," and, "while both are under the same ownership the easement does not constitute a separate estate there can be no easement so long as there is unity of ownership of the properties involved") ("[T]he owner can not have an easement in land of which he has the title. The inferior right is merged in the higher title. By the common law it is said to be extinguished by the unity of title."). *Collins v. Metro Real Estate Services LLC*, 72 NE 3d 1007 - Ind: Court of Appeals 2017. [internal citations intentionally omitted]
>
> 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. *BRUSH CREEK AIRPORT v. AVION PARK*, 57 P. 3d 738 - Colo: Court of Appeals, 3rd Div. 2002. [internal citations intentionally omitted]

> [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.
>
> 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 Develoment 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.
>
> 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).

Some states allow a contract to avoid the application of the merger doctrine.

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.

Security interests in the form of mortgages can prevent the operation of merger, although the basis for such a rule seems to be that there is actually not a full merger of the interests.

> [I]t has been held that an easement is not terminated by merger when the dominant tenement is encumbered by a deed of trust or a mortgage at the time ownership of the servient and dominant tenement is united in the same party. Preventing merger in such case equitably preserves the mortgagee's security. (Ely & Bruce, The Law of Easements and Licenses in Land (2013) § 10:27, fn. omitted. *Hamilton Court, LLC v. East Olympic*, LP, 215 Cal. App. 4th 501 - Cal: Court of Appeal, 2nd Appellate (2013) [internal citations intentionally omitted]

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, which, in effect, creates a merger of title.

> 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.
>
> The plaintiffs, as owners of a dominant easement, certainly have the power to release their rights in such easement, and such release, when properly executed, probated and recorded, would be binding on a subsequent purchaser of the dominant estate. *Hine v. Blumenthal*, 80 SE 2d 458 - NC: Supreme Court 1954.

> [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.

An owner of an interest in an easement may, however, release only his or her interest. Such a release has no effect on the rights of others who may also have interests.

> [A] release as to one dominant tract does not thereby terminate the right as to other dominant tracts. *Beloit Foundry Co. v. Ryan*, 192 NE 2d 384 - Ill: Supreme Court 1963.
>
> Section 61, volume 28 of Corpus Juris Secundum, page 727, at page 728, states: "Thus, a release by the owner of only part of the dominant estate or estates will not effect a release of the rights of owners or other parts of such estate or estates; ..."
> In volume 3, Tiffany on Real Property (3d ed.), section 824, page 384, the matter is also discussed, and it reads: "One who has only a partial or limited interest in the dominant tenement can obviously extinguish the easement by release only as against himself."
> *Leggio v. Haggerty*, 231 Cal. App. 2d 873 - Cal: Court of Appeal 1965

Condemnation

An easement may be condemned and acquired by eminent domain, in which case it would also be extinguished. State statutes regulate the exercise of eminent domain.

Official Vacation/Abandonment

Usually a vacation is the action taken to terminate an easement or right of way when the easement was originally created by dedication. When a jurisdiction vacates an easement, it is releasing the public's interest in the easement.

> 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 intentionally omitted]

However, when platted, the private rights of each benefitting lot owner must be considered.

> 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.

> Once the easement that benefited each of the lot owners was platted, individual lot owners could not destroy the easement by vacating the easement associated with their lots. The easement could not be vacated without the consent of all the lot owners or a proper legal action. *ELLA v. VanHORNE PROPERTIES, LLC,* Ind: Court of Appeals 2017.

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 may vary from state-to-state or even across municipalities.

Easements may terminate by abandonment. This is most often the case when a public use is involved and, particularly, when the easement was initially acquired by condemnation.

A governmental agency or jurisdiction 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.

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 intentionally 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")

Where public utilities exist in a right of way to be vacated, laws may exist to protect to those rights.

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 a 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 intentionally omitted]
>
> An easement that terminates upon the happening of a particular event or contingency …[is] denominated a "determinable easement." Scott v. Walden, 140 Tex. 31, 165 S.W.2d 449 (1942); 154 A.L.R. 1, 33 (1945). FN 3 *Sentell v. Williamson County*, 801 SW 2d 220 - Tex: Court of Appeals, 3rd Dist. 1990.
>
> The easement ... was either a determinable easement, which terminated automatically when the express conditions were violated, or an easement subject to conditions subsequent, which terminated when the defendant re-entered and took possession of the easement after the conditions were violated… *Howell v. Clyde*, 493 SE 2d 323 - NC: Court of Appeals 1997.
>
> With respect to a conditional easement, it is deemed lost when it is clear that the condition has been violated. In *Hohman v Rochester Swiss Laundry Co.* (125 Misc 584 [Sup Ct, Monroe County 1925]), a grant of a right of way provided that it should terminate if the premises, then occupied as a stable for horses, should cease to be used for a general carting business. The property was subsequently conveyed to a company operating a laundry and thereafter no longer used as a stable and for the business of carting. Under such circumstances it was held that

> "the condition under which the grant of the right of way was made has been broken and the grant under its terms has ceased and become void." *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 PIPLINE, LTD. v. Payne*, Tex: Court of Appeals, 10th Dist. 2011. [internal citation nomitted]

> [L]anguage creating [a] fee simple determinable need not conform to any set formula; some language indicating the grantor's intent that estate shall terminate on cessation of a specified use is sufficient. Typical language creating fee simple determinable includes "while," "during," or "for so long as." *King Associates v. BECHTLER DEVELOPMENT*, 632 SE 2d 243 - NC: Court of Appeals 2006. [internal citations intentionally omitted]

In cases where a determinable 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.

> An easement which is held as a determinable fee will terminate upon the happening of the event upon which its existence is conditioned without any action by the grantor of the estate or his successors in interest. *Larry Mayes Sales, Inc. v. HSI, LLC*, 744 NE 2d 970 - Ind: Court of Appeals 2001.

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 intentionally 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 intentionally 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 intentionally omitted]

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.

> I conclude, therefore, that this easement created solely for access purposes from the Graham lands to the public highway is extinguished. The easement, being coextensive merely with the intent of the original parties and the facts affirmed in their transactions, has expired and is at an end. It is extinguished because all purpose for its existence has ended. *Holden v. Palitz*, 2 Misc. 2d 433 - NY: Supreme Court, Westchester 1956.
>
> 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 intentionally omitted]
>
> [A]s noted in 28A C.J.S. Easements § 160 (2009),
>
>> While an express easement generally does not terminate even when the … purpose of the easement ceases, an easement granted for a particular purpose may terminate as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment. An interest in the nature of an easement is not terminated where the purpose for which it is created is neither totally nor permanently impossible of enjoyment. The first step in analyzing the impossibility of a purpose, as grounds for modifying or terminating an easement, is to determine the purpose of the easement. *Poe v. Gaunce*, 371 SW 3d 769 - Ky: Court of Appeals 2011.
>
> 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.
>
> When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted, the easement is extinguished. Hence, if an easement is not granted for all purposes, but for a particular use only, the right continues while the dominant tenement is used for that purpose, and ceases when the specified use ceases. *FL AUSTIN FAMILY v. City of High Point*, 630 SE 2d 37 - NC: Court of Appeals 2006.

> 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 intentionally omitted]

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

> "[T]he existence of the dominant estate is ordinarily essential to the validity of the servitude granted, and the destruction of the dominant estate releases the servitude." *Stegall v. Housing Authority of City of Charlotte*, 178 SE 2d 824 - NC: Supreme Court 1971. [internal citations intentionally omitted]

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 implied easement by necessity is extinguished when the necessity ceases. *Fischer v. Liebman*, 137 AD 2d 485 - NY: Appellate Div., 2nd Dept. 1988.
>
> [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 intentionally 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 intentionally 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 intentionally omitted]

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 intentionally omitted]

Even prescriptive easements may terminate when their purpose ends.

> 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 (*Merriam v. 352 West 42nd St. Corp.*, 15 Misc 2d 1023 [Sup 1959]). *RIBELLINO v. 110 FIFTH ST. PRIVATE LLC*, 2012 NY Slip Op 51235 - NY: Supreme Court 2012.

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.

> Although an unconditional easement "created by grant may be lost by abandonment, an owner is under no obligation to make use of his property, and an abandonment does not result by nonuse alone * * * [but] results only when there is a nonuse accompanied by an intention to abandon on the part of the owner * * *
>
> "A party relying upon another's abandonment of an easement by grant must produce `clear and convincing proof of an intention to abandon it' * * * [and] [t]he acts relied upon must be unequivocal, and must clearly demonstrate the owner's intention to permanently relinquish all rights to the easement"
>
> *450 W 14TH ST. v. 40-56 TENTH*, 187 Misc. 2d 735 - NY: Supreme Court 2001.

> An easement created by grant or deed may be extinguished by abandonment. Abandonment depends upon intention and not lapse of time. Abandonment may be inferred from time, but such a conclusion will only be justified when it is accompanied by facts showing an intention to abandon the easement. *CASCELTA CO. LLC v. AJDA, LLC*, 2011 NY Slip Op 51488 - NY: Supreme Court 2011. [internal citations intentionally omitted.]
>
> Although it is true that an easement created by grant may be lost by abandonment, non-use alone does not result in an abandonment no matter how long it continues. (See *Consolidated Rail Corp. v. MASP Equip. Corp.*, 67 NY2d 35, 39 [1986]).
>
> 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]).
>
> An easement, whether acquired prescriptively by adverse use or expressly in writing, can be abandoned. A complete discontinuance of all use of an easement with the intention thereby wholly to abandon it, constitutes such a surrender as will terminate the easement. Id. The intent to abandon the easement and put an end to it is a necessary element of such abandonment. Thus, mere proof of non-use for a number of years is insufficient to show an intention to abandon. *Ashley v. SPAW*, Ind: Court of Appeals 2012 [internal citations intentionally omitted]
>
> 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.
>
> Mere nonuse "alone does not create an abandonment of an easement which has been acquired by grant . . . The cases are agreed that at least where a right of way or other easement is created by grant, deed, or reservation, no duty is thereby cast upon the owner of the dominant estate thus created to make use thereof or enjoy the same as a condition to the right to retain his interest therein; the mere nonuser of an easement will not extinguish it. In fact, it is held that even nonuser for the length of the prescriptive period does not operate to extinguish an easement created by grant, deed, or reservation. . . . Abandonment of an easement or right of way granted by deed requires clear evidence of intent to abandon, not merely nonuse.
> *McGlone v. Hardin*, Ky: Court of Appeals 2016 (unpublished).

In any event, an easement created by deed is not extinguished by nonuser alone, no matter how long continued. 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. [internal citations intentionally 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 intentionally omitted]

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 intentionally omitted]

Impossibility of Use

Easements may extinguished 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.

The acts claimed to constitute an abandonment must show a destruction of the easement, impossibility of its legitimate use resulting from some act of the easement owner or other unequivocal conduct revealing the intention permanently to abandon and surrender the easements. Abandonment results where there is non-use accompanied by an intention to abandon on the part of the easement owner and some overt act or failure to act which carries the implication that the easement owner neither claims nor retains any interest in the easement. Abandonment will be presumed where the owner of the right performs, or acquiesces in the performance of, acts inconsistent with its future enjoyment or renders its legitimate use impossible. *CASCELTA CO. LLC v. AJDA, LLC*, 2011 NY Slip Op 51488 - NY: Supreme Court 2011 [internal citations intentionally omitted.]

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.

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].

An interest in the nature of an easement is not terminated where the purpose for which it is created is neither totally nor permanently impossible of enjoyment. *Poe v. Gaunce*, 371 SW 3d 769 - Ky: Court of Appeals 2011.

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 intentionally omitted]

Adverse Possession/Prescription

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

> We have long recognized that an easement created by grant may be extinguished by adverse possession. As with any adverse possession claim, the party seeking to extinguish the easement must establish that the use of the easement has been adverse to the owner of the easement, under a claim of right, open and notorious, exclusive and continuous for a period of 10 years [citations omitted] ... Thus "an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for [the prescriptive period]." *Braunstein v. Hodges*, 2016 NY Slip Op 50249 - NY: Supreme Court 2016 [internal citations intentionally omitted.].

> 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. … 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.

Extinguished by Estoppel

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

> 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.

> "Equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another. The elements of estoppel are, with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (Airco Alloys Division. Airco Inc. v Buffalo Color Corporation, supra). *WILD OAKS, LLC v. BEEHAN*, 2012 NY Slip Op 30601 - NY: Supreme Court 2012.

> 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.
>
> 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 intentionally omitted]

Extinguishment by Tax Sale/Deed

Easements in some states can, under some conditions, be extinguished by a tax sale and deed.

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 National Trails Act authorizes the ICC/STB "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." Under the Act, a state, political subdivision, or private entity may, in certain circumstances, acquire a rail right-of-way, on terms established by the ICC/STB, for interim trail use, subject to future reactivation of rail service over the line. *See* 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29. FN 6 *Baros v. Texas Mexican Ry. Co*., 400 F. 3d 228 - Court of Appeals, 5th Circuit 2005 [internal citations intentionally omitted.]

Abandonment of a railroad is a two-step process. First, an application must be filed with the Surface Transportation Board requesting approval to abandon.

> A rail carrier intending to abandon any part of its railroad lines must file an application with the STB. *See* 49 U.S.C. § 10903(a)(1)(A). The STB has the authority to exempt a rail carrier seeking to abandon a rail line from the ordinary procedures applicable to rail abandonments if the carrier certifies that no local traffic has moved over the line for at least two years; that any traffic on the line can be rerouted over other lines; and that no formal complaints regarding cessation of rail service on the line are pending or have been decided within the previous two years. *See* 49 C.F.R. § 1152.50(b). If the STB agrees that a proposed abandonment is exempt, it is required to consider whether the railway to be abandoned is appropriate for use for public purposes. *See* 49 U.S.C. § 10905; 49 C.F.R. § 1152.28(a)(1). If the agency determines that the property is appropriate for public use, it is authorized to impose conditions on the abandonment of the line by the rail carrier, including a prohibition on disposing of the property for 180 days unless the property is first offered for sale on reasonable terms for public purposes. *See* 49 U.S.C. § 10905. FN 3 *Baros v. Texas Mexican Ry. Co*., 400 F. 3d 228 - Court of Appeals, 5th Circuit 2005.

Approval of the application, however, does not in and of itself effect an abandonment.

> "an effective certificate of abandonment confers permissive authority on the railroad; until the railroad actually consummates an abandonment, none occurs… *Baros v. Texas Mexican Ry. Co*., 400 F. 3d 228 - Court of Appeals, 5th Circuit 2005.

The National Trails System Act requires that transfer into a rail bank occur *prior* to abandonment. If a right of way easement acquired for railroad purposes is 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 can be of paramount importance.

> In the instant case, the granting clause refers to a "right". As in the case last cited, the granting clause is not the only limiting clause in the conveyance. In the last paragraph of the instrument it is stated:
>
>> "Said grantee, its successors and assigns further promise and agree that they will build their tracks over and upon the above described right of way, a line between the City of Noblesville and the City of Indianapolis, Indiana, and have the same in operation on or before the first day of January, 1905, and if said line is not constructed, or if constructed is not operated for a period of sixty (60) days (except in case of strikes) all rights granted herein to said grantee, its successors and assigns, shall revert to

> the grantors, and said grantee, its successors and assigns, shall remove its tracks from said right of way."

The rule relating to construction of conveyances is well stated in Tiffany on Real Property, Vol. 4, Third Edition, § 980, p. 65, as follows:

"... The habendum and subsequent covenants may modify, limit and explain the grant, but they cannot defeat it when it is expressed in clear and unambiguous language."

In 44 Am. Jur. at p. 285 et. seq., is found another note on the subject, "Railroad Property and Rights of Way". We quote the general rule for construction of conveyances on such subjects there given:

> "The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to right of way in such a conveyance generally leads to its construction as conveying only an easement."

Thus we have supplied in a single sentence a general rule for determining whether a fee or an easement is conveyed. While there are occasional variances such rule appears to be the one generally followed in a majority of the cases.

In construing instruments creating easements, it is the duty of the court to ascertain and give effect to the intention of the parties. The intention of the parties is determined by a proper construction of the language of the instrument. Where the language is unambiguous other matters may not be considered. 28 C.J.S., § 26, p. 680.

Generally where a particular or special right or easement in land is conveyed, which may well co-exist and be engaged and used by the grantee consistently with the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed.

Our own cases generally hold that a deed conveying a right of way to a railroad company conveys an easement only.

In *Lake Erie & Western Railroad Company v. Ziebarth*, supra, the conveyance to a railroad company in consideration of one dollar, which "conveys and warrants" to the grantee "its successors and assigns", the right of way for the construction and operation of said company's "railroad", being a strip of land 100 feet in width "through and over the following described land," and which contained the further provision: "The estate granted hereby is upon condition that the strip of land shall be used for said railroad purposes only, and when the same shall, after the road is constructed, cease to be used for such purposes, then the same shall revert to the party of the first part (grantor), his heirs and assigns." It was held that the deed does not purport to convey a fee, conditional or otherwise, that the language of the deed clearly imports an intention to convey an easement to the grantee for a particular purpose, the construction and operation of a railroad thereon, and that the theory of forfeiture was not applicable to the case.

In *Ingalls v. Byers, Administrator, et al.*, supra, it was held that a conveyance to a railroad company of the right of way for the use of said railway over and across the east half of the northwest quarter ... "to have and to hold said rights and privileges to the use of the said company so long as it shall be required for the uses and purposes of said railway company," does not purport to convey a fee; on the contrary its language clearly imports an intention to convey an easement to the grantee for a particular purpose.

In *Douglass v. Thomas*, supra, our Supreme Court held that a deed conveying to a railroad company "the right of way" of an undefined width, over certain real estate, such deed containing a stipulation that such company was "to have and hold the said rights and privileges to the use of the company so long as the same shall be required for the uses and purposes of said road," conveys nothing more than an easement in or right of way over the land and not the fee simple.

In *Cincinnati, Indianapolis, St. Louis and Chicago Ry. Co. v. Geisel*, supra, the Court held that a deed releasing and quitclaiming to a railroad company "the right of way for so much of said railroad, being eighty feet wide, as may pass through the following described land", conveys merely an easement, the fee remaining in the grantor.

The other Indiana cases above cited are to the same effect.

> In 132 A.L.R., at p. 172, under subtitle, "III. Deed Conveying `right' rather than `land'," the author cites the foregoing Indiana cases in support of the principle: "that a deed to a railroad company which conveys a `right' rather than a strip, piece, parcel, or tract of `land' ... must be construed as conveying an easement rather than a fee...." Citing a large number of cases from other jurisdictions holding to the same effect.

In *Graham v. St. Louis, I.M. & S.R. Co.* (1901), 69 Ark. 562, 65 S.W. 1048, the Court, after setting forth the terms of the conveyance, conveying to the railroad "the right of way and depot grounds" to have and to hold the same to the said party of the second part so long as said lands are used for the purposes of a railroad, and no longer, the court held:

> "Giving force and meaning to every word and clause in the deed, the most reasonable construction is that deeds of the kind under consideration convey a perpetual easement in the land, or an easement in the nature of a fee. Neither the intention nor the effect of such instruments could be the conveyance of an estate in fee, but only an incorporeal hereditament — an easement."

The following leading cases from other jurisdictions are here cited as containing questions analogous to those involved in the instant case, in each of which it is held that the interest conveyed is an easement and not a fee.

In *Sherman v. Petroleum Exploration, supra*, a conveyance of land stated in the granting clause to be "for railroad right of way", conveys only an easement, although the habendum clause states that the land is conveyed to the railroad "and its successors and assigns forever, with covenant of general warranty of title".

[I]n interpreting the deed, we do not consider the cover and title of the instrument where the granting language is clear and unambiguous. See *Brown v. State*, 130

Wash.2d 430, 924 P.2d 908, 915 (1996) (concluding that deed, which followed statutory language of fee simple and was void of limiting language, conveyed fee simple title regardless of the caption "Right of Way Deed"), recons. denied. Thus, while the title may provide additional evidence of intent where the language of the deed is unclear, it is not dispositive of the nature of the conveyance. Likewise, words such as "over, across, and through" may provide evidence of a party's intent to convey an easement where the words describe the use of the land. *Tazian*, 686 N.E.2d at 99.

The mere presence of the term "right of way" does not, in and of itself, indicate an intent to convey an easement. Rather, when appearing outside of the granting clause, the term is of limited value because it has two meanings. Right of way refers to 1) a right to cross over the land of another, an easement, and 2) the strip of land upon which a railroad is constructed. see also IND.CODE § 32-5-12-4 (providing that "`right-of-way' means a strip or parcel of real property in which a railroad has acquired an interest for use as a part of the railroad's transportation corridor"); BLACK'S LAW DICTIONARY 191 (5th ed.1979) (stating that the "[t]erm `right of way' sometimes is used to describe a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it").

Deeds generally contain three important clauses: the granting clause, the habendum clause, and the descriptive clause. We initially examine the granting clause to determine the object of the conveyance. *Tazian*, 686 N.E.2d at 98. As our supreme court stated in Brown:

> A deed that conveys a right generally conveys only an easement. The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such a conveyance generally leads to its construction as conveying only an easement.

510 N.E.2d at 644 (citations omitted). The habendum clause may modify or limit the grant, but it does not defeat a clear, unambiguous grant. It is generally held that if there are any inconsistencies between the granting clause and the habendum clause, the granting clause will prevail because the granting clause is "the most dependable expression of the grantor's intention" and "is considered to be the very essence of the deed." The descriptive clause provides a means for identification of the land but is not intended to identify the land.

Additionally, in construing a deed, the court considers the instrument relative to the statutes in effect at the time of the conveyance. The property statute in effect at the time of conveyance provides that any conveyance worded: "`A.B. conveys and warrants to C.D.' (here describe the premises) `for the sum of' (here insert the consideration,) ... shall be deemed and held to be a conveyance in fee simple to the grantee...." Ind. Rev. Stats. 1852, ch. 23, § 12; IND.CODE § 32-1-2-12.

The consideration paid by the railroad may be further evidence of the parties' intent. However, lack of consideration or nominal consideration alone is not sufficient cause for setting aside a deed. "It is a well-known fact that often a conveyance recites a nominal consideration whereas the true consideration is not nominal. It is therefore never certain that the recited consideration is the true consideration." We conclude that nominal monetary consideration, alone, does not make the instrument ambiguous, nor does it create an easement. *Elton Schmidt & Sons Farm Co. v. Kneib*, 2 Neb.App. 12, 19, 507 N.W.2d 305, 308-09 (1993) (holding that recited consideration of one dollar does not render deed ambiguous as "other good and valuable consideration" may have been given). See also *Coleman v. Missouri Pac. R.R.*, 294 Ark. 633, 638, 745 S.W.2d 622, 625 (1988) (stating that deed which recited consideration consisting "of the benefits to accrue to the [grantors] from the building of the railway company" did not create an ambiguity in a deed conveying fee simple as such consideration "could well have been most valuable"); *Kingsland v. Godbold*, 456 So.2d 501, 502 (Fla.App.1984) ("Even a nominal consideration will support a deed. The sufficiency of consideration is not a relevant basis upon which to void a deed."); *Fuchs v. Reorganized School Dist. No. 2, Gasconade County*, 251 S.W.2d 677, 679-80 (Mo. 1952) (stating that nominal consideration "might, in connection with language lacking in preciseness or in connection with other circumstances surrounding the conveyance," aid in determining the nature of the conveyance, but "the fact of nominal consideration, standing alone, is not sufficient from which to find an intention to convey other than an unlimited fee").

Where a deed is ambiguous as to the character of the interest conveyed and the railroad was responsible for the form of the deed, we will construe the language of the deed in favor of the grantor and against the railroad. Thus, in the absence of language conveying the strip of land in fee simple, we will construe such deed as conveying an easement. Furthermore, public policy dictates that we construe any ambiguity in favor of the original grantors. As our supreme court has stated:

> Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes; either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of the property involved. Therefore, where there is ambiguity as to the character of the interest or title conveyed such ambiguity will generally be construed in favor of the original grantors, their heirs or assigns.

Clark v. CSX Transp., Inc., 737 NE 2d 752 - Ind: Court of Appeals 2000.

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." State laws dictating the disposition of reversionary rights differ.

> The present case arises from the claims of a group of owners of land abutting the railroad corridor who claim that conveyances to the railroad by their predecessors in title granted only easements for a railroad right-of-way and did not convey fee simple title; that the abandonment of the railroad right-of-way gave them the right to claim the land free of the easements; and that the conversion of the land to a public recreational trail constitutes a taking for which they are entitled to compensation. "[A] Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." *Rogers v. US*, 184 So. 3d 1087 - Fla: Supreme Court 2015.

> 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." [From Samuel H. Morgan, Esq. Rails to Trails Magazine, September/October 1994.]

Indiana's Supreme Court recently ruled on the effect of reversionary rights vis-à-vis railroad abandonments decided that that rail-banking, for trails originally acquired as easements for railways, is not allowed under Indiana law, 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 adoiners 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 intentionally 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.

If the street was acquired in fee, statutes or ordinances may dictate the disposition of the land.

Assuming that the easement was not acquired in fee, 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. The owner then is the owner of that property or his/her successors in title.

> In the absence of proof that claimants' predecessors in title reserved the right of reversion upon abandonment, title to the center of the highway reverts to the abutting owners. (See *Stupnicki v. Southern N. Y. Fish & Game Assn*., 41 Misc 2d 266, 271, affd. 19 A D 2d 921; *Van Epps v. State of New York,* 19 A D 2d 854, 855; *Watkins v. State of New York,* 15 A D 2d 987.) *Hallenbeck v. State of NY*, 59 Misc. 2d 475 - NY: Court of Claims 1969.

> When a street is vacated, whether by vacation of the entire plat or by specific vacation of the street alone, ownership of the street does not change – the burden of the street easement has merely been lifted. Prior to vacation the underlying ownership in the street really did not matter much because of the pervasive nature of the right of way easement. Upon vacation, however, the easement is eliminated and the true fee owner has full rights in the real estate – which may be of considerable value. Thus, upon vacation, the exact apportionment of the adjacent street can be quite important. Indiana Land Title Association Real Estate Handbook, Volume I (2012), p. 154.

> It is frequently stated that when an easement is extinguished through abandonment, the land "reverts" to the grantors or their successors. We are not wholly convinced of the appropriateness of the term "reverts" in such circumstances. … Regardless of the terminology utilized, the effect of a right-of-way easement's abandonment is the same: such easement no longer burdens the servient tenement. Thus, the servient owner of the strip of land constituting the right of way is entitled to enjoyment free of burden. This is the same rule applied upon the discontinuance of county or state maintained roads. KRS 178.116. *Illinois Cent. R. Co. v. Roberts*, 928 SW 2d 822 - Ky: Court of Appeals 1996.

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.

> The Town maintains that Highway Law § 115-b confers upon it a right of reversion to the County's Brew Road right-of-way. While the Highway Law may confer such an interest, this provision is not applicable here. Since the County does not intend to remove Brew Road from its highway system, but merely realign it to the east pursuant to Highway Law §§ 131-b, 118 and 102, the road does not revert to the Town under Highway Law § 115-b. Clearly, once the County implements its plan to realign and improve Brew Road, it will have altered, not abandoned, this County highway. This is not tantamount to an abandonment of the right-of-way such that it reverts to the Town. *Town of Riga v. Monroe County*, 166 AD 2d 39 - NY: Appellate Div., 4th Dept. 1991.

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 intentionally 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 intentionally 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).

> [I]t is a widely accepted principle of construction that punctuation in a deed is ineffective to control its construction as against the plain meaning of the language used in the instrument. See 19 Fla.Jur.2d Deeds § 118 (1980); 23 Am.Jur.2d Deeds § 231 (1983). *McIlvaine v. Florida East Coast Ry. Co.*, 568 So. 2d 462 - Fla: Dist. Court of Appeals, 1st Dist. 1990.

Professional 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.[7]

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/NSPS Land Title Surveys

When conducting a 2016 ALTA/NSPS 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 2016 Minimum Standard Detail Requirements for ALTA/NSPS 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 easement documents.

ALTA and NSPS recognize that the responsibility for records research lies with the title company, not the Surveyor. Pursuant to Section 4, the standards state that any recorded easements benefitting the property and any recorded easements, servitudes, or covenants burdening the property are to be provided to the surveyor. If they are not, the surveyor must conduct only that research required pursuant to the jurisdictional requirements of the regulatory body where the property is located.

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[7] *Washington State Common Law of Surveys and Property Boundaries*, Jerry R. Broadas, Land Surveyors' Association of Washington, 2009. P. 162.

Presuming that easement documents are in fact provided, the Surveyor's responsibility is outlined under Sections 5.E. and 6.C. of the 2016 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.

In addition, as noted above, the *2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys* require that certain notes be placed on the face of the plat or map when certain conditions exist as to easements.

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/NSPS standards assure the title company that if there was evidence of unrecorded or unwritten easements observed that 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 2016 ALTA/NSPS Standards outline several times when notes about easements should be placed on the plat/map in Section 6.C.ii. including when the location … cannot be determined from the record document.

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

Every state has adopted a state or statutes relating to the formation of conservation easements.

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 of wind can reach turbines.

Avigation Easements

An avigation easement is an easement of right to navigation in airspace over designated land. They may be created by express grant or, as noted below, by inverse condemnation.

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.