



Easements, Restrictions & Condemnation

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Easements and Rights of Way (ROW)

Generally

1. Characteristics and Purpose

- A. Non-possessory rights in land which developed under common law principles
- B. Blacks Law definition
 - I. “An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)”. Right-of Way is defined as “The right to pass through property owned by another.”
- C. Some common purposes include access (ingress/egress), utility service (sewer/gas/electric), parking, and drainage. More exotic easements include aviation and solar easements.

Easements and Rights of Way (ROW)

Generally (*cont.*)

D. Easement vs. Licenses and profit-prendre (“profit”)

- A license or profit does not create an interest in land
 - A license provides for a personal and temporary privilege to use
 - A profit provides a personal right to extract natural resources from the land.
- Easements are subject to the statute of frauds -must be in writing
- licenses and profits are not subject to the statute of frauds-need not be in writing.
- licenses and profits are generally non-transferable, revocable at will by the grantor
- Licenses and profits terminate upon the death of the licensee.

Easements and Rights of Way (ROW)

Generally (*cont.*)

E. The Restatement of the Law of Property

- 1) Easement holder is entitled to limited use or enjoyment of the land in which the interest exists.
- 2) Easement holder is protected against third party interference with easement rights.
- 3) Easement rights are not subject to the will of the possessor of the land.
- 4) Easement rights are not a normal incident of the possession of any land possessed by the owner of the interest.
- 5) Easement rights are capable of creation through conveyance.

Easements and Rights of Way (ROW) Generally (*cont.*)

2. Appurtenant vs “in gross”

A. Appurtenant easements

- dominant and servient estate.
 - dominant estate benefits from the easement rights
 - servient burdened by such rights.

Example

if parcel A has been granted an easement over parcel B in order to access a public road, parcel A is the dominant estate and parcel B is the servient estate.

Easements and Rights of Way (ROW) Generally (*cont.*)

B. Easements in gross

- Do not benefit a particular parcel of land
- Have servient estates only.
- Easements in gross generally not transferable.
- New Jersey Courts have allowed transfer if clear intent of parties.

Example

Easement given to a railroad to lay tracks across the property.

Easements and Rights of Way (ROW)

Generally (*cont.*)

3. Creation of Easements

A. Grant or Reservation

- 1) Express grant or reservation in Deed or other written instruments
 - a) servient parcel grantor affirmatively provides easements rights to the dominant parcel grantee
 - b) grantor reserves easement rights in favor of a newly created dominant parcel upon conveying the remaining servient portion of land to the grantee
 - c) filed map which designates easements is a form of express grant or reservation

Easements and Rights of Way (ROW) Generally (cont.)

B. Implication (implied easement)

1) Judicial determination

a) quasi-easement

- apparent use
- continuous nature
- permanent character
- reasonable necessity

b) Necessity

- prior unity of ownership
- severance of the parcels
- necessity for an easement at the time of severance
- continuing necessity for an easement

Easements and Rights of Way (ROW) Generally (cont.)

C. Prescription (Adverse Use)

- 20 year period
- Adverse/Hostile
- Continuous/uninterrupted
- Visible/Notorious

D. Estoppel

- Equitable Remedy applied by courts
- Detrimental Reliance by dominant estate based on actions/representations by servient estate
- Revocation would be unjust
- Need not be in writing

Easements and Rights of Way (ROW) Generally (*cont.*)

A. Termination of Easements

- Written instrument
- Merger
- Abandonment
- Overuse

Easements and Rights of Way (ROW) Generally (*cont.*)

A. Additional Easement Characteristics

- Exclusive/Non-exclusive
- Specific/Blanket
- Affirmative/Negative (equitable servitude)
- Reciprocal Easements
- Burdens/Obligations

Easements and Title Insurance

1. Impact on title insurance

- Insuring beneficial parcel's easement rights over servient parcel
- Excepting servient parcels rights affecting dominant parcel being insured

Easements and Title Insurance *(cont.)*

A. Insuring beneficial Easements

- Appurtenant easements created by grant or reservation (Insurable)
 - Easements in gross, licenses, and profits (Generally not insurable)
 - Implication, necessity and prescription (Generally not insurable)
1. Underwriting criteria for insuring beneficial easements:
 - a) Validly created
 - b) Not been terminated
 - c) Can't be extinguished through foreclosure

Easements and Title Insurance (cont.)

2. How beneficial easements are insured in the policy

a) Include in Schedule A legal description

“Together with the beneficial rights as set forth in that certain easement agreement between _____ and _____, dated _____, and recorded in deed book _____, page _____.

And take exception for such obligations or burdens in Schedule B of the title policy

b) Take exception for obligations or burdens and insure the benefits in Schedule B of policy.

“Easement agreement between _____ and _____, dated _____, and recorded in deed book _____, page _____. Policy insures the benefit and excepts the burdens of same.”

Easements and Title Insurance *(cont.)*

B. Easements as Objection to Title

- 1) Insuring servient parcel
 - a) Exception in Schedule B
 - b) Require express written termination to omit
 - c) Will not omit based on theories of :
 - i. Merger
 - ii. Abandoned
 - iii. Overburdening

Note: Title company will sit as judge and jury. Will require a non-appealable court order

- d) May omit easements with automatic termination provisions if provisions clearly met (fact based)

Easements and Title Insurance (cont.)

2) Affirmative Insurance

- a) Not proper simply to omit
 - i. Merger
 - ii. Abandoned
 - iii. Overburdening

Example: *“Policy insures against loss resulting from a final non-appealable judgment from a court of competent jurisdiction determining the above easement to be a valid encumbrance against the insured Land.”*

- b) Fact sensitive-determined case by case.
- c) Lender requests-typically addressed through endorsements (ALTA 9/Alta 28 series)
 - 1) Non preferred affirmative insurance

Example: *Policy insures that the easement does not materially affect the beneficial use of the insured Land as a [insert existing use].”*

Rights of Way

1. Form of easement allowing ingress and egress

A. Can be public or private

B. All title policies insure some form access

- “legal Right of Access” (simply abuts a public ROW)
- Enhanced coverage policies (Vehicular and Pedestrian access)
- ALTA 17 and 17.1 Endorsements (Vehicular and Pedestrian access)
- State and federal highways

“Rights of the State of New Jersey [United States] to limit future access to New Jersey State [US] Highway No. _____”

Rights of Way (cont.)

C. Creation of Public Right of ways

- Express grant or dedication
- Condemnation
- Depiction on a filed map
- 20 years continuous use
- Pursuant to statute (i.e. “Road Acts”)
- Pursuant to the public trust doctrine.

D. Evidence a public ROW has been accepted

- a subdivision resolution
- depiction on a tax map
- letter from the municipal engineer or attorney
- proof that the municipality is maintaining the right of way

Rights of Way (cont.)

2. Public ROW as an Objection to Title

A. Insured Legal Description contains ROW area

Title Company required to take proper exception

“No portion of the land lying within the bed of _____ Street is insured hereunder”

or,

“Rights, public or private to that part of the Land lying within the bed of _____ Street.”

Rights of Way (cont.)

B. Vacated Public Right of Way

- 1) Done by municipal ordinance
- 2) Private Rights remain (e.g. rights of utility companies)
- 3) Fee Title vs “Naked Fee”
 - a. grant, depiction on a filed map, or continuous use (“Naked Fee”)
 - b. condemnation or pursuant to statute (Fee Title)
 - c. When “naked fee” vacated adjoiners vested in fee title to centerline of ROW and title company will take following exception:

“Private rights, including the easement rights of any utility companies lying within the former bed of _____ Street are hereby excepted.”

Restrictive Covenants

A. Owners wishes to prohibit certain uses

- 1) Real/Negative covenants (run with land)-Personal/Positive covenants (do not)
 - a. Real/Negative prohibit a particular use or action (e.g. single family homes only)
 - b. Personal/Positive require an affirmative action (i.e. build a fence)

2) Common Negative Restrictions:

- a. Nuisance restrictions
 - i. intoxicating liquors, or the existence of offensive manufacturing uses
- b. Development Restrictions
 - i. Type, Size and location of structures
 - ii. Environmental restrictions-Deed Notice
- c. Planned Communities
 - i. Declaration of Covenants and Restrictions

NOTE: Restrictions based on Race, Religion, Color, Nationality, Ancestry, Marital Status, Sexual Orientation or Disability are void as a matter of law and not enforceable

Restrictive Covenants (*cont.*)

When a Negative Restrictive covenant affects the property the title company will take the proper exception:

“Covenants, conditions, restrictions, and easements found in Deed Book _____, page _____.”

If the restriction contains a reverter clause, the exception should read as follows:

“Covenants, conditions, and restrictions, containing a right of reversion, found in Deed Book _____, page _____.”

Restrictions (cont.)

B. Releasing Restrictions

- Release from the party imposing the restrictions.
- Abandonment or change in condition of the neighborhood when part of a “Neighborhood Scheme”
- An action to quiet title or an action to determine the validity of restrictive covenants.
- Release from all parties entitled to enforce the restrictions. (“Neighborhood Scheme may have numerous parties with the ability to enforce)
- Merger of ownership of all lots.
- By the terms of the original instrument.

Restrictions (cont.)

C. Affirmative Insurance for Restrictions

- ALTA 9 series
- ALTA 4.1 (Condos)
- ALTA 5.1 (PUDs)

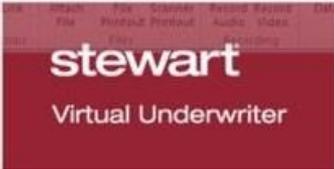
Condemnation

A. N.J.S.A. 20:3-1 (Eminent Domain Act of 1971)

- Allows government to take private property for public use.
- Must pay just compensation
- Must negotiate in good faith prior to suit
 - If successful (deed in lieu)-Liens remain
 - If not (action in superior court)
- Condemnor files LP-subsequent interests
- Procedural options
 - Appointment of commissioners (just compensation)
 - No appeal-report serves as final judgment
 - Declaration of Taking
 - Deposit estimated funds with the court

Condemnation (*cont.*)

- Notice Requirements
 - All interested parties
- Easements and restrictions remain



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