

**New Jersey  
N2K Hour:**

**Easements and  
their Effect on  
Real Property**

**Webex Presentation:  
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# What is an easement?

- An easement is basically the right to use land that isn't yours for some purpose.
  - Examples: Driveway easement, beach access over private land, or a utility easement.
- An easement is a non-possessory interest.
  - The person/entity who benefits from the easement does not gain any ownership in the affected land – just a right to use it.
  - The owner of the land still has all their rights of ownership – now they are just subject to the terms of the easement.

# Easement Terms

- Dominant Estate – The land that is benefited by the easement.
- Servient Estate – The land burdened by the easement.
- Appurtenant Easement – Has a dominant/servient estate and runs with the land.
  - Keep in mind: an easement can run with the land without specific reference in subsequent conveyances of that land.
- Easement in gross – Only a servient estate. Best example is a utility easement (no parcel of land is being benefited).

## How to create an easement

- There are a couple items to consider when creating an easement by grant or reservation:
  - Subject to the Statute of Frauds (must be in writing with an adequate description of the land N.J.S.A. 25:1-5; - 11).
  - Must be executed by ALL owners of the burdened land (servient estate)
  - Watch out for mortgages recorded before the easement - a foreclosure can wipe it out.
  - An easement by grant can be included in a deed or a separate instrument.

## How to create an easement (continued)

- An easement by reservation is found in a deed where the grantor reserves the easement for themselves.
- Remember – an easement that runs with the land to the benefit of the grantee (and their heirs/successors/assigns) is perpetual.
  - An easement can be temporary – best example is a temporary construction easement.
- Pay close attention to a filed map when reviewing title, an easement can be created by showing it on the map (if there is also a separate written instrument)

## Easements by Implication (Necessity)

- Easements by Implication are an exception to the rule that an easement must be in writing.
- Example: A large piece of property abuts a public road. There is a building on the back half with a driveway that leads to the road. At this point, there is a “quasi-easement” benefitting the back half. Property is then subdivided later on without a written easement (by grant or reservation) and front portion is sold to a different owner. The quasi-easement is now an easement by implication.
- But! This isn’t automatically an insurable easement at this point.

## Easements by Necessity

- Easements by Necessity are a form of Easement by Implication.
- Must have four elements:
  - Prior common ownership of the dominant and servient estates.
  - Severance of one of the parcels.
  - Necessity for an easement at the time of severance.
  - Continuing necessity for an easement.
- Most common in landlocked properties after subdivision of a larger lot.

## Easements by Prescription

- Easements by Prescription are basically created by Adverse Possession.
  - Use of property must be (1) adverse, (2) hostile, (3) continuous, (4) uninterrupted, (5) visible and (6) notorious for a specific period of time.
  - At least 20 years (to defeat a legal challenge)
  - N.J.S.A. 2A:14-30 requires use to be for at least 30 years (60 years in the case of wooded/uncultivated tracts)
- Remember – we don't automatically insure this type of possessory interest – there must be a court order granting the easement by prescription.



# Termination of Easements

- Several ways to terminate an easement:
  - Written instrument – owner of the dominant estate can terminate the easement in writing (should be recorded)
  - Easements can also self-terminate pursuant to its own terms.
  - Merger – if the owner of the dominant estate acquires the servient estate as well, the easement no longer is necessary.
  - Abandonment – owner of the dominant estate no longer uses the easement for an extended time period AND owner of servient estate relies on the non-use to their detriment.

## Termination of Easements (continued)

- Termination by Overburdening
  - Occurs when the dominate estate uses the easement in a way that goes well beyond the original intended use.
  - Example: Person A gives an easement to Person B for a right of way to access their large farm from a public road. Traffic is consistent with the running of a farm. One day, Person B sells their farm to a developer who converts the farm into a 100 home neighborhood. Now the right of way is overburdened with residential traffic. The easement is most likely destroyed.

## Easements vs. Licenses

- An easement differs from a license in several ways:
  - Typically, licenses are temporary rights to use someone's land
  - Licenses do not have to be in writing
  - Licenses are usually revocable
  - Licenses are usually non-transferrable
- License examples: event tickets, a dock license from the State
- A property owner may grant a license allowing their property to be used for fishing by another individual.

## Easements v. Licenses (cont.)

- The individual has the right to enter the property and use it for the intended practice.
- However, the individual does not hold any interest in the real property and cannot transfer the right to use the property to another individual.
- An easement can be permanent, and typically attaches to the property where it binds or benefits all future owners of both the benefitting property and the property over which the easement is granted.

## Easements vs. Profits a Prendre

- Pronounced PAWNdrah
- Specific right to go on to someone's land and remove something (minerals, soil, timber, etc.).
- Key difference is that the person has a right to take something off the land.
- Other examples: Right to allow animals to graze on property, right to hunt or fish on property.
- These are similar to licensees in that they can be revocable and can have time limits.

# Conservation Easements

- A conservation easement is a voluntary, legal agreement that permanently limits uses of the land in order to achieve certain conservation purposes.
- It also restricts activities on the property that would have a negative effect on the natural characteristics of the property.
- The easement holder is usually a qualified private land conservation organization or government entity which constrains, as to a specified land area, the exercise of rights held by a landowner.

## Conservation Easements (cont.)

- In NJ, some programs that are available in establishing conservation easements include the Agricultural Conservation Easement Program (ACEP) and the NJ Green Acres Program.
- The Agricultural Conservation Easement Program (ACEP) provides funding to purchase conservation easements on eligible agricultural lands and wetlands.
- The Green Acres Program permits a local government or nonprofit organization to use Green Acres funding to acquire land that will be used for public outdoor recreation or conservation purposes.

## Driveway Easements

- A driveway easement gives the easement holder the right to use the property owner's driveway to access his land.
- Typically, a driveway easement may be used for purposes of construction or transportation from one property to another, and the fee owner of the servient estate cannot impede the easement holder's ability to use it, even though the easement is located on their land.
- If the easement runs with the land, it will transfer when land ownership changes.
- A driveway easement can be terminated by mutual agreement between the parties; a specific timeline set forth in the agreement; merger of title between the dominant and servient estate; or a quiet title action.



# Easements and Title Insurance Considerations

- When it comes to insuring easements, the only types generally accepted are by grant or reservation, be appurtenant, and perpetual.
- As previously discussed, easements by implication or prescription typically require a final court order to become finalized.
- Keep in mind – an easement is almost always going to be both a benefit and burden, even to the dominant estate.
  - In most cases, the party benefiting from the easement is also burdened with its upkeep and maintenance.
  - Therefore, even if the easement is to be insured, it also must be excepted for.

# Easements and Title Insurance Considerations

- If an easement is to be insured, you must also search the servient estate to confirm its valid creation and if any interested parties may destroy it.
- Take extra precaution when dealing with any sort of termination other than by written instrument (or the easement automatically terminating by its terms).
  - All factors must be carefully weighed to determine if in fact the easement has been terminated.

## Easements, Surveys, and Affirmative Coverage

- A survey is a great tool to learn a great deal about an easement.
- A survey (which shows the easement) is almost always necessary when contemplating affirmative insurance language.
  - Typical requests usually refer to encroachment or the use of the land
- A review of both survey and the easement are necessary to determine what, if any, affirmative coverage can be provided.
- As always, you must contact your Underwriter before including affirmative coverage for easements.

## Easements and Endorsements

- There are a number of NJ approved endorsements that relate to easements:
  - ALTA 9 Series (Covenants, Conditions, Restrictions)
  - ALTA 17 Series (Access)
  - ALTA 28 Series (Easements and Encroachments)
  - ALTA 36 Series (Solar Projects)
- Unless allowed by specific company practice, these endorsements require a survey to be provided.
  - Always refer to Virtual Underwriter to confirm specific guidelines for endorsements.

## ALTA 17/17.1 Endorsements

- ALTA 17 (Direct Access) and ALTA 17.1 (Indirect Access)
- Does our property abut a public road or have direct access to the public road?
- If there is no direct access, is there an easement which benefits our property for access to a public road (indirect access)?
- The ALTA 17 endorsement provides coverage that our property has both actual vehicular and pedestrian access to and from a public right of way.
- The property must have a driveway or curb cuts that allow a vehicle to enter and leave the property.

## ALTA 17/17.1 Endorsements (cont.)

- On-street parking is not considered actual vehicular access.
- NJ is also a filed form state, so this endorsement cannot be amended if our property does not have actual vehicular access.
- The ALTA 17.1 endorsement can only be issued if the property has indirect access via an easement to and from a public right of way.
- The insured easement must provide access to and from a named street or public right of way.

# Insuring an Appurtenant Easement

- If we are insuring an easement for ingress and egress as part of our legal description, the easement must benefit our parcel.
- An appurtenant easement benefits a specific parcel of land, known as the dominant estate.
- An appurtenant easement also attaches to the ownership of the dominant estate.
- If the dominant estate is sold, the appurtenant easement will pass to the new owner, and if the servient estate is sold, it will remain subject to the easement.

## Insuring an Appurtenant Easement (cont.)

- An appurtenant easement search must also be done on the servient estate to confirm ownership and any existing mortgages.
- If any mortgages are on record, the owner and all existing mortgagees must consent to the easement.
- The mortgagees must also agree to subordinate their mortgages to the easement agreement, so the easement cannot later be extinguished if there should be a foreclosure.



## Insuring an Appurtenant Easement (cont.)

- Please note that an appurtenant easement search can take just as long as a standard title search, so we need to know as soon as possible if there is a request by the parties to have us insure an appurtenant easement.
- When reviewing a recorded easement, the easement agreement should clearly define the specific purpose of the easement.
- If the easement agreement is not clear in its terms or provisions, please contact your underwriter for further guidance.

# Utility Easements and the ALTA 17.2 Endorsement

- Public utility easements provide public utilities (e.g., gas, electric, telephone, etc.) or any company operating pipeline facilities with the right to run lines or pipes over, across or under your property.
- These easements also generally provide third parties with the right to enter upon your property to install, maintain, inspect, operate or repair the utility lines or pipelines.
- The ALTA 17.2 endorsement insures against loss if there is a lack of a right of access to specific utilities or services over, under or upon rights-of-way or easements owing to a gap or gore.

## Easement Coverage – ALTA 28 Endorsement

- ALTA 28 (Easement Damage or Enforced Removal).
- Provides affirmative coverage for any loss resulting from damage to an existing building from an easement.
- This damage includes the removal or alteration of an existing building located on the Land at the date of Policy.
- This endorsement, along with the ALTA 28.1 and 28.2, may be issued on Loan Policies covering 1-4 family residential properties or on Loan Policies relating to commercial transactions of up to \$25,000,000 per site without a survey, but you must include specific exceptions for matters (such as specific encroachments) actually known by you.

## VU Requirements for ALTA 28 Endorsement

- If a survey is provided, please confirm that the existing buildings are not impacted by the easement.
- If the surveyor includes a note that an easement is blanket in nature, we can include the easement on the ALTA 28 endorsement.
- However, if an easement is not plottable, then further review is required before providing ALTA 28 coverage.
- An issue may arise if an easement runs underneath an existing building or encroaches upon an existing improvement.

## VU Requirements for ALTA 28 Endorsement (cont.)

- We must analyze the risk before issuing the endorsement for the specific easement, and the risk analysis also varies between a residential or commercial property.
- Some of the risk factors include if the easement has been abandoned, or if the easement holder has consented to offset any damage from the exercise of their easement rights on the property.
- Please always consult your underwriter for further assistance if such an issue should arise on your transaction.

## Wrap-Up and Review

- An easement is a non-possessory interest, and a right to cross or otherwise use someone else's land for a specified purpose.
- Easements and licenses differ in several ways, and a license is only temporary and revocable.
- Easements can be terminated by written instrument; self-termination by its own terms; mutual agreement; merger of title; abandonment; or a quiet title action.
- If we are insuring an appurtenant easement, the easement must benefit our parcel, and an appurtenant easement search must be done on the servient estate as well.

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Please mark your calendars for our:

## February N2K HOUR

Tuesday

February 9th

11:00AM