



EASEMENTS 101

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Easements may burden or benefit a parcel of real estate. In either event, easements may affect the value and use of the land. For this reason, it is important to consider whether the property is either burdened or benefitted by an easement. This article will discuss the different types of easements and the ways in which easements can be created and terminated; it will also discuss title company requirements for insuring easements.

An easement is a right acquired by a landowner to use the land of another for a special purpose. This right may be for such purposes as access, driveway, party wall, drainage, public utilities and other purposes. Easements are divided into 2 general categories: an appurtenant easement or an easement in gross.

An appurtenant easement operates for the benefit of one tract of land and burdens another, usually adjoining tract. Thus, there must be two tracts of land owned by different parties, that is, a separation of title. The benefitted parcel is referred to as the dominant estate (or dominant tenement), and the burdened parcel is referred to as the servient estate (or servient tenement). Because an appurtenant easement is regarded as being so closely connected to the dominant tenement, it is regarded as "running with the land". This means that once the easement has been properly created, the easement will pass upon a conveyance of the dominant tenement to the grantee of the deed, even if the deed does not mention it.

An easement in gross does not specifically benefit another parcel of land. It runs in favor of a party who does not own the property adjoining the easement. A utility easement given to a utility company such as the phone, gas, cable or electrical company is the most common type of easement in gross. Easements in gross may not be considered interests in real property; they are generally not insured by title companies.

Easements may be created by grant, by deed, on plat of subdivision, by declaration, by necessity, by implication, or by prescription. The most common way to create an easement is by a recorded instrument called a grant of easement. In a grant, the owner of a parcel of land grants an easement over a portion of his land to another party, usually an adjoining owner, for a specific purpose, such as ingress and egress.

A reciprocal easement agreement is a special type of grant. It is created by at least 2 owners of adjoining parcels, and it may create easements benefitting and burdening each parcel. It defines the specific purposes of each easement, such as parking and ingress and egress. Reciprocal easements are used often for shopping centers and office parks.

An easement may be created by deed. If a party owns 2 lots and conveys only 1 of them, the deed may specifically grant an easement over a portion of the lot retained by the owner to provide the said lot with an easement for access. An easement may also be reserved in a deed. In this scenario, the party owns 2 lots and conveys only 1 of them and reserves an easement over the sold lot for the benefit of the retained lot for a right of access.



Easements may also be included in a plat of subdivision that creates multiple lots. A developer of the entire tract of land may provide for utility and access easements, for the whole development by including grant language and depicting them on the plat of subdivision. The appurtenant easements such as easements for ingress and egress should then be added as separate parcels in the deeds by the developer to the individual lot purchasers. In this case, the easements are set forth in the recorded plat but are created by the separation of title at the time of the deed by the developer to the individual lot owner. The developer may also record a declaration of easements, covenants and restrictions in addition to the plat of subdivision. This declaration may provide for additional terms and conditions relating to the easements contained in the plat of subdivision.

Easements may be created by operation of law. There are easements by necessity, implication or prescription.

An easement by necessity can occur because there is a public policy that does not allow land to become useless because of lack of access. If a property becomes landlocked after a conveyance in which the owner of 2 lots conveys only 1 lot, a court may impose an easement of necessity even if the parties failed to provide for access rights in the conveyance.

An implied easement is created when a court determines that where an owner of 2 parcels uses one parcel to the benefit of the other, the purchaser of the benefitted parcel reasonably expected the benefit of the easement to be included in the sale.

An easement by prescription can occur when one party has adversely, continuously and openly used the land of another party for 20 years.

Easements may be extinguished by mutual agreement, by merger, by foreclosure of an interest that has priority over the easement and by abandonment.

An agreement for abrogation or termination of easement should be executed by the owners of the dominant and servient estates and placed of record.

The doctrine of merger states that if the ownership of the dominant and servient estates becomes vested in the same party, the easement merges into the fee title and is destroyed.

The owner of a preexisting lien, such as a preexisting mortgagee, can wipe out an easement upon foreclosure if the lienholder never joined in or consented to the easement.

Abandonment occurs when there is evidence that the holders of an easement intended to abandon the easement. A court must determine that the easement has been terminated on this basis and does not rely upon claims of non-use.

TITLE INSURANCE

In order for a title company to insure an easement appurtenant, the title company will require that:

- The easement must be in writing and recorded and must sufficiently describe the burdened and benefitted lands;
- The easement must contain the precise location and legal description of the easement area;
- The easement must recite the character and purpose of the easement;



- The easement must contain language that it runs with the land and is for the benefit of the grantee and the grantee's successors and assigns;
- The easement must be properly executed by all of the owners of the dominant and servient estates;
- The easement must contain consent by the lienholders of the servient estate;
- Taxes on the servient estate must be current at the time the easement is executed and recorded; and
- Confirmation that the dominant and servient parcels are contiguous and that the easement is open and in use (normally confirmed by way of a survey depicting both the dominant and servient parcels).

For questions about possibly insuring easements in gross or easements created by law, please contact your Chicago Title representative or underwriter. Also, to waive a title exception for an allegedly terminated easement (one no longer burdening the subject land), please consult a Chicago Title underwriter.

This article was written by Shari Gross, edited by Douglas M. Karlen and incorporates Chicago Title Insurance Company underwriting guidebooks and manuals and articles by Jeffrey Rezwin and Mary Schmittenmaer dated September, 1997 and an Easement Article by Richard F. Bales, dated May 2016.

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