New York Easements

~and~

Rights of Way

Part I

Easements, Rights of Way and their Creation

~ ~ ~ ~ ~ ~

New York State Association

~ of ~

Professional Land Surveyors

Presented by

Gary R. Kent, PS

The Schneider Corporation

January 29, 2019

Biography of Gary R. Kent

Gary Kent is Integrated Services Director for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in North Carolina, Texas and Iowa. He is in his 36th year with the firm and his responsibilities include account and project management, safety, corporate culture, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a degree in Land Surveying; he is registered to practice as a professional surveyor in Indiana and Michigan. He has been chair of the committee on ALTA/NSPS Standards for NSPS since 1995 and is the liaison to NSPS for the American Land Title Association. He is also past-president of the American Congress on Surveying and Mapping and a twice past president the Indiana Society of Professional Land Surveyors.

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

Gary has served on the Indiana State Board of Registration for Professional Surveyors since 2004 and is a past chair and liaison to the Attorney General's Office. He is frequently called as an expert witness in cases involving boundaries, easements and land surveying practice. Gary regularly presents programs across the country on surveying and title topics, and he also writes a column for *The American Surveyor* magazine.

Contact Information

Gary R. Kent, PS
Integrated Services Director
8901 Otis Avenue
Indianapolis, IN 46216
Phone - 317.826.7134
gkent@schneidercorp.com

Agenda – New York Easements and Rights of Way

I. Part I – January 29th
   a. Definitions
      i. Dominant and Servient estates
      ii. Easement, License, Profit a Prendre
      iii. Rights of Way
      iv. R.S. 2477
      v. Appurtenant easements, Easements in Gross
      vi. Affirmative and Negative Easements
   b. Creating easements
      i. Written easements
         1. Express Grant
         2. Dedication
         3. Reservation
         4. Mortgage
         5. Condemnation
      ii. Recordation requirements
      iii. Unwritten easements
         1. Implied easements
         2. Easements by necessity
         3. Easements by estoppel
         4. Prescriptive easements
            a. Prescription vs. adverse possession
         5. Implied Dedication

II. Part II – January 30th
   a. Characteristics of Easements
      i. Scope
      ii. Duration
      iii. Exclusivity
      iv. Maintenance
      v. Scope of Unwritten easements
      vi. Overburdening/Expanding the Use of an Easement
      vii. Interfering with an Easement
      viii. Relocating an Easement
   b. Terminating easements
      i. Merger of title
      ii. Release
      iii. Vacation/Abandonment
      iv. Terms of the Document
      v. Condemnation
      vi. Termination by Unwritten Means
         1. Non-User/Abandonment
         2. Cessation of Purpose/Impossibility of Use
         3. Adverse Possession/Prescription
         4. Estoppel
   c. Reversionary rights
   d. Rails to Trails
   e. Describing Easements
   f. The surveyor's responsibility regarding easements
   g. Other types of easements – Air. Light, Avigation, Conservation, Wind and Solar easements and other encumbrances

“Don’t worry, it’s only an easement”

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

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

NOTE- The author of this paper and presentation is not an attorney. It is the author’s intent that neither this paper nor the presentation should be considered legal advice or a substitute for consultation with an attorney. Some cases cited are noted as unpublished and none should be cited as legal precedence without additional legal research.

Definition, Nature, Types, and Elements of Easements

The Dominant and Servient Estates (Tenements)

The land to which an easement is attached is called the dominant tenement or dominant estate. The land upon which a burden or servitude is placed is called the servient tenement or servient estate. In other words, the servient estate is the real property burdened by the easement - the property over which the easement runs - and the dominant estate is the property benefited by the easement - the property that is served by the easement.

> The `servient' estate is that burdened by the easement; the `dominant' estate is that benefitted by the easement. *Wild Oaks, LLC v. Beehan*, 2012 NY Slip Op 30601 - NY: Supreme Court 2012.
>
> The land benefiting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. BLACK'S LAW DICTIONARY (10th ed. 2014) (emphases omitted).
>
> The land benefitting from an easement is called the *dominant estate*; the land burdened by an easement is called the *servient estate.* *** It is essential to the existence of an easement, which is appurtenant to land, that there be two distinct estates or tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. . . . The term easement and the term servitude are often used indiscriminately; the one is usually applied to the right enjoyed, the other to the burden imposed. A right of way over the land of another is an easement in the dominant estate and a servitude upon the servient estate. *Cottrell v. Nurnberger,* 131 W.Va. 391, 397, 47 S.E.2d 454, 457 (1948). [Cited in *Newman v. Michel*, W Va: Supreme Court of Appeals, 2009]

Easements

"A limited non-possessory interest in the land of another."

> An easement proper is an incorporeal right which is appurtenant to the ownership of the dominant estate and which constitutes a charge upon the servient estate (see 17 NY Jur, Easements & Licenses, § 2). It is a right of property, a nonpossessory interest in land (25 Am Jur 2d, Easements & Licenses, § 2). *Rahabi v. Morrison*, 81 AD 2d 434 - NY: Appellate Div., 2nd Dept. 1981.

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

An easement may be created expressly by a written deed of grant conveying to another the right to use for a specific purpose a certain parcel of land. An easement may also be created when one sells his land to another but reserves for himself the right to future use

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

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

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

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

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

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

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

> An interest in land in and over which it is to be enjoyed, and is distinguishable from a "license" which merely confers personal privilege to do some act on the land. *Logan v. McGee, Miss, 320 S2d 792, 793.*" © Black's Law Dictionary, Fifth Edition

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

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

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

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

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

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

Black's Law Dictionary defines access easement, affirmative easement, appendent (or appurtenant) easement, discontinuing easement, easement by estoppel, easement by prescription, easement in gross, easement of access, easement of convenience, easement

of natural support, easement of necessity, equitable easements, implied easement, intermittent easement, negative easement, private or public easements, quasi easement, reciprocal negative easement, and secondary easement. The above terms are not mutually exclusive; one can have a private discontinuing reciprocal negative appurtenant access easement, for example.

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

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

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

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

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

There is a wide variety of the types of easements recognized under the law. For example, South Dakota statutes[1] recognize:

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

[1] South Dakota Codified Laws 43-13-2.

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

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

> Every easement carries with it the right sometimes called a secondary easement, of doing whatever is reasonably necessary for the full enjoyment of the easement itself. (28 C. J. S., Easements, § 76, subd. b, p. 754. *Brearton v. Fina*, 3 Misc. 2d 1 - NY: County Court 1956.
>
> "The owner of the dominant estate may do whatever is reasonably necessary to the enjoyment of the easement and to keep it in a proper state of repair, provided it is done without imposing unnecessary inconvenience on the owner of the fee * * * The right to repair includes a right of entry on the servient estate for the purpose of making repairs whenever such repairs are necessary, but at no other time and for no other purpose". *Tucci v. Salzhauer*, 69 Misc. 2d 226 - NY: Supreme Court, Nassau 1972.
>
> The right to enter the servient property to maintain and repair facilities located within an easement is sometimes called a "`secondary easement.'" 25 Am.Jur.2d Easements and Licenses § 86 (1966). *Cunningham v. Otero County Elec. Co-op.*, 845 P. 2d 833 - NM: Court of Appeals 1992.

> The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a secondary easement, a mere incident of the easement that passes by express or implied grant, or is acquired by prescription. . . This secondary easement can be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. 2 Thompson, *Real Property,* (Perm. Ed.), § 676, p. 343.
>
> By definition a secondary easement goes with an existing easement and consequently would not have to be separately acquired. It either exists or it does not exist as an incident to an easement.
>
> A secondary easement, then, is simply a legal device that permits the owner of an easement to fully enjoy all of the rights and benefits of that easement. Conversely, it is a legal device that prohibits an owner of a servient tenement from interfering with an easement owner's enjoyment of the full benefits and rights of an easement.
>
> However, a secondary easement does not necessarily exist in every case. For example, a highway department or railroad company would not have a right of ingress or egress over all adjacent land to its rights-of-way. It is not needed because access is inherent in such easements or rights-of-way. Nor would one exist where access to a right-of-way, such as that taken in this case, already exists.
>
> *Loyd v. Southwest Ark. Utilities Corp.*, 580 S.W. 2d 935 (1979)

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

License

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

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

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

> A license does not imply an interest in land, but is a mere personal privilege to commit some act or series of acts on the land of another without possession any estate therein. *Millbrook Hunt v. Smith,* 249 A.D.2d at 282, 670 N.Y.S.2d at 909.
>
> A license is a "privilege . . . to do one or more acts upon land without possessing any interest therein." It does not convey exclusive possession and control of premises, and it may be cancelled at will and without cause. *116 Madison St., LLC v. Seid*, 2009 NY Slip Op 51993 - NY: City Court, Civil Court 2009 [internal citations intentionally omitted].
>
> A license is a personal, revocable and non-assignable privilege to do one or more acts upon land without possessing any estate or interest therein. *1610 Realty, LLC v. Batts,* 2009 NY Slip Op 51928 - NY: City Court, Civil Court 2009.
>
> A license is revocable, even though a consideration has been paid therefore or money has been expended, on the faith of the license. *JEM Caterers of Woodbury, LTD v. Woodbury Jewish Ctr.*, 2012 NY Slip Op 50791. - NY: Supreme Court, Nassau County, 2012.
>
> It is a proposition hoary with age that a license is not an interest in land, but only a revocable privilege to go upon the land for a specified purpose. *Keck v. Scharf*, 400 NE 2d 503 - Ill: Appellate Court, 5th Dist. 1980.
>
> "[a] license is merely a permit or privilege to do what otherwise would be unlawful." *Lee v. North Dakota Park Service*, 262 N.W.2d 467, 470 (N.D. 1977).
>
> A [license is a] personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interests in the land. *DePugh v. Mead Corp.* (1992), 79 Ohio App.3d 503,511.
>
> "One who possesses a license … has the authority to enter the land in another's possession without being a trespasser." *Mosher v. Cook United, Inc.* (1980), 62 Ohio St.2d 316,317.

There are, however, some exceptions to the ability of a license to be revoked.

> [T]he Supreme Court correctly determined that Seibt's 99-year agreement to use and occupy the barn adjacent to the subject property was valid since it constituted an irrevocable license based upon his expenditure of substantial funds to renovate the structure, and the fact that he changed his position in reliance on the agreement. *Miller v. Seibt*, 13 AD 3d 496 - NY: Appellate Div., 2nd Dept. 2004.
>
> There is a split among the jurisdictions as to whether a license may ever become irrevocable. Florida has sided with those jurisdictions which have allowed a license to become irrevocable to escape an inequitable situation which might be created by the requirements of the statute of frauds, or where money has been

spent in reliance on a license. *Tatum v. Dance*, 605 So. 2d 110 - Fla: Dist. Court of Appeals, 5th Dist. 1992. [internal citations intentionally omitted]

[W]hen a privilege having the characteristics of a license (or deficient in some manner to qualify as an easement) has been executed by the licensee through the expenditure of money or labor in reliance upon the license being perpetual, or when a license has been given for a valuable consideration paid, it cannot be revoked by the licensor unless he remunerates the licensee or restores him to *status quo. Hay v. Baumgartner*, 870 NE 2d 568 - Ind: Court of Appeals 2007

A potential distinction (which may be illusory) might exist in the determination that a license given for consideration may be revoked upon the licensee being restored to status quo or adequately compensated[.] See, e.g., *Sheeks v. Erwin* (1891), 130 Ind. 31, 29 N.E. 11.

The Difference Between a License and an Easement or Lease

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

The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. But there are certain fundamental principles underlying most cases which enable courts to distinguish an easement from a license when construed in the light of the surrounding circumstances.

A license is distinguished from an easement in that a license is merely a personal right to use the property of another for a specific purpose, is not an interest in land and, therefore, may not be assigned or conveyed.

Dotson v. Wolfe, 391 So. 2d 757 - Fla: Dist. Court of Appeals, 5th Dist. 1980

"Easements and licenses in real property are distinct in principle, though it is sometime difficult to distinguish them. An easement implies an interest in land ordinarily created by a grant and is permanent in nature." A license is a revocable privilege given to another to do one or more acts of a temporary nature upon the property without granting any interest in land itself. A license is a revocable and non-assignable privilege. To determine the true character of an interest, the Court must look at the nature of the right rather than the label used by the parties to describe the interest. *Orman v. Curtis*, 2017 NY Slip Op 50010 - NY: Supreme Court, Steuben 2017. [internal citations intentionally omitted.]

Yet, certain conditions associated with a license can change its nature from license to easement or vice versa in some states...

If the parties intend the agreement to be permanent in nature, the license is said to be coupled with an interest. [A] license coupled with an interest becomes irrevocable meaning it is no longer terminable at the will of the licensor and

constitutes a right to do the act rather than a mere privilege to do it. An irrevocable license is said to be an easement rather than a license. *Cambridge Vil. Condo. Assn. v. Cambridge Condominium Assn.*, 139 Ohio App. 3d 328 - Ohio: Court of Appeals, 11th Appellate Dist. 2000 [internal citations intentionally omitted]

When an infirmity prevents an instrument from granting a valid easement, but does not render the attempt void, a license results. See 3 Powell on Real Property ¶ 429 (1981) (rev. ed. 1981). *Crigger v. Florida Power Corp.*, 436 So. 2d 937 - Fla: Dist. Court of Appeals, 5th Dist. 1983.

[I]n at least two cases our courts have used the terms `irrevocable license' and `easement' interchangeably." *Industrial Disposal Corp of America v. City of East Chicago, Dept. of Water Works,* 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980).

"To distinguish the legal relationship `license' from the more substantial relationship `easement,' license should be limited to a revocable relationship. Under such a classification, an irrevocable relationship would constitute an easement . . ., no matter how created, because an irrevocable license in legal effect is no different than an easement." C. Smith & R. Boyer, Survey of the Law of Property 418 (2d Ed. 1971). *Industrial Disposal Corp of America v. City of East Chicago, Dept. of Water Works,* 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980).

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

Plaintiff's sublease was subject to the recording act because it exceeded three years in duration (Real Property Law, §§ 290, 291), and had it been recorded, defendants would be on constructive notice of its terms and liable for its breach (see *Stolts v Tuska*, 76 App Div 137, supra [lessee held liable for interference with an easement which had been created by a lease recorded by a previous lessee]; see, also, *Lent & Graff Co. v Satenstein*, 210 App Div 251). In the absence of recording, however, defendants would be subjected to liability if they had actual notice of plaintiff's claim of right. *487 ELMWOOD v. Hassett*, 83 AD 2d 409 - NY: Appellate Div., 4th Dept. 1981.

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

[T]he recordation of an instrument is constructive notice to creditors and subsequent purchasers not only of its own existence and contents, but also of such other facts concerned with the instrument as would have been ascertained from the record if it had been examined and if inquiries suggested by it had been prosecuted. *Leffler v. Smith*, 388 So. 2d 261 - Fla: Dist. Court of Appeals, 5th Dist. 1980.

Recordation … protects the easement holder from having a servitude extinguished by subsequent purchasers of lessors of the servient estate. *Burdine v. Sewell*, 92 Fla. 375, 109 So. 648 (1926).

[T]the plaintiff should be imputed with constructive knowledge of the unrecorded easement because he knew gas lines ran though his property, and he had visually observed other gas-related objects as well as marker lines on his property); (an unrecorded easement to place poles on the plaintiffs' property was valid as against the plaintiffs where the plaintiffs had, at least, constructive notice, based on the open and visible use of the property by the defendant). *Duresa v. Commonwealth Edison Co.*, 807 NE 2d 1054 - Ill: Appellate Court, 1st Dist., 2nd Div. 2004. [internal citations intentionally omitted]

Profit a Prendre

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

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

A profit is a right exercised by one person to take the benefits from the soil of another person, whether by cultivation of the soil or extraction of the soil itself and its contents. A profit is in the same nature as an easement but is distinguished by the fact that a profit may exist independently, without connection or appurtenance to other property, while an easement generally requires the existence of a dominant estate and a servient estate. Further differentiating the two is that while an easement may be created by a parol agreement, a profit must be created by a grant in writing since the right conveyed by the profit constitutes the sale of an interest in land. *Marshall Farms v. SNYDER CO.*, 189 Misc. 2d 784 - NY: Supreme Court, Madison 2001.

> A profit a prendre has been defined as a right exercised by one person in the soil of another, including the right to take a part of the soil or produce of the land. Examples are the right to take timber, gravel, coal or minerals generally, from the land of another; but it has been said that flowing water "is not considered a product of the soil [and] a right to take such water is not a right of profit a prendre, but rather is an easement" (25 Am. Jur. 2d, Easements and Licenses, § 4, pp. 419, 420-421; 17 N. Y. Jur., Easements and Licenses, § 4). *PAS. VAL. COUN. v. HARTWOOD*, 75 Misc. 2d 1018 - NY: Supreme Court, Sullivan 1973.
>
> "Profit a prendre" takes its name from the French, "meaning `profits to take,' the phrase `from land' being implied." 1 THOMPSON ON REAL PROPERTY §139, at 485 (1980) (footnote omitted). The cases frequently refer simply to a "profit," perhaps to avoid the antique stuffiness of the complete term. FN 1 *Figliuzzi v. CARCAJOU SHOOTING CLUB*, 502 NW 2d 876 - Wis: Court of Appeals 1993.
>
> The right of hunting on premises is an incorporeal right, growing out of real estate, which, by the common law, was conveyed by grant, inasmuch as livery of seisin could not be made of it. This right has been termed by law writers a grant of a "profit á prendre." A "profit á prendre" is some right growing out of the soil. It is somewhat difficult to understand how, where one shoots a duck in the air while over the water, he is taking something from the soil, but undoubtedly the application of that term was made to this right, so that it would become in law an incorporeal hereditament, and thereby pass by grant and not become a mere license. But, whatever inconsistencies appear, it is settled by all the authorities worth heeding that this right may be segregated from the fee of the land and conveyed in gross to one who has no interest and ownership in the fee, and when so conveyed in gross it is assignable and inheritable.
> *KRITZMAN DEVELOPMENT v. WALDEN PROPERTIES, LLC*, Mich: Court of Appeals 2008.

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

> A profit must also operate as an easement in order to allow a person onto another’s land for the purpose described in the grant… Therefore, it must satisfy the Statute of Frauds. *High v. Davis,* 283 Or. 315, 322, 584 P.2d 725 (1978).
>
> A profit à prendre—in modern parlance, a profit—"is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another." Restatement (Third) of Property: Servitudes § 1.2(2)(1998) [hereinafter Restatement]. Thus, a profit is a type of easement. *Lobato v. Taylor*, 71 P. 3d 938 - Colo: Supreme Court 2002.

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

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

A mineral lease differs from a Profit in that a lease grants possession.

> A profit a prendre is a right to make some use of the soil of another, such as the right to mine metals. Since Tanner was not the owner of the premises, but only had a leasehold interest, it is doubtful whether their arrangement could be considered a profit a prendre. However, if it were considered such an arrangement, then it would be closer to an easement and not a sublease. FN 3 *Tanner Companies v. Ariz. State Land Dept.* 688 P. 2d 1075, 142 Ariz. 183 - Ariz: Court of Appeals, 2nd Div., 1984. [internal citations intentionally omitted]

Dormant minerals acts or common law can act to extinguish a profit.

> An interest in coal, oil, gas or other minerals is extinguished in Indiana if unused for twenty years, and the mineral interests revert to the fee owner. Indiana Dormant Mineral Interest Act (IC 32-5-11-1); *Plymouth Fertilizer Co v. Balmer*, 488 N.E.2d 1129,1134 (Ind.Ct.App.1986, trans. denied).

Right of Way

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

> A right-of-way is a type of easement. *Hoffmann v. Delbeau*, 139 AD 3d 803 - NY: Appellate Div., 2nd Dept. 2016. [internal citation intentionally omitted].

> "The grant of a right of way is an easement.... The term `right-of-way' is merely descriptive of the easement rights." FN 1 *Mountain States Tel. & Tel. Co. v. Kennedy*, 711 P. 2d 653 - Ariz: Court of Appeals, 1st Div., Dept D (1985).

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

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

…Black's defines a "right-of-way" as the "right to pass through property *owned by another*," the "right to build and operate a railway line or a highway on land *belonging to another*," and the "strip of land subject to a nonowner's right to pass through." Black's Law Dictionary (9th ed. 2009) (emphasis added). *CLIPPER BAY INVESTMENTS, LLC v. STATE, DEPARTMENT OF TRANSPORTATION*, Fla: Dist. Court of Appeals, 1st Dist. 2013.

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

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

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

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

In one context, the term [‘right of way”] means "[t]he right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path". Alternatively, "right-of-way" is "a general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to for transportation purposes. When used in this context, right-of-way includes the roadway, shoulders, or berm, ditch, and slopes extending to the right-of-way limits under the control of state or

local authority." *Akers v. Saulsbury*, 2010 Ohio 4965 - Ohio: Court of Appeals, 5th Appellate Dist. 2010. [emphasis added]

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

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

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

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

> While both deeds contain recitations or clauses seeming to convey title to a strip of land, they also reference the land as the railroad company's "right of way." Such language evidences both conveyance in fee and creation of a right-of-way easement. When this situation is presented, we think the law requires an interpretation in favor of the latter. In *Sherman v. Petroleum Exploration*, 280 Ky. 105, 132 S.W.2d 768, 771 (1939), the Court, construing a railroad deed containing similar inconsistencies, stated:
>
> > We think it may be well said that an indefinite or ambiguous conveyance of land specifically for a railroad right of way is in its interpretation subject to the influence of a general knowledge that much railroad right of way is expressly or by operation of law limited to an easement, which has been usually found sufficient for the purposes desired.
>
> *Illinois Cent. R. Co. v. Roberts*, 928 SW 2d 822 - Ky: Court of Appeals 1996.

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

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

> Where a deed uses terminology which in the law of real property has come to have a definite legal meaning, that terminology will be given its legal effect. A deed conveying a definite "parcel" or "strip of land" without language limiting the estate granted shall be deemed to have granted a fee simple estate. Similarly, the use of the words "convey and warrant" are suggestive of an intention to convey a fee simple estate. However, where a deed purports to grant only a "right" in a parcel of land, the estate conveyed is limited to an easement. *Urbaitis v. Commonwealth Edison*, 575 NE 2d 548 - Ill: Supreme Court 1991. [internal citations intentionally omitted]
>
> Quoting from 16 Am.Jur. Deeds § 245, the Court went on to say:
>
> > "If, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does but imply a grant of the easement forever."
>
> *Illinois Cent. R. Co. v. Roberts*, 928 SW 2d 822 - Ky: Court of Appeals 1996.

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

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

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

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

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

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

The rights of utilities to locate facilities on public property and in public rights of way are governed by state law, although common law can also play a role. However, when a public utility locates its facilities in a public right of way without benefit of its own easement separate from the right of way, generally it does so at its own risk if the jurisdiction desires to, for example, widen the street or highway or if safety is a concern.

> It is established law that a utility company granted the privilege of maintaining its facilities in public streets must relocate them at its own expense "`whenever the public health, safety or convenience requires the change to be made'" It must do so because the privilege, authorized by statute (see Transportation Corporations Law, § 27; Village Law, § 4-412, subd 3, par [6]), grants the utility no property interest in the right of way, only a license to maintain its facilities there. If the relocation is not necessary to maintain or improve the street conditions, however,

the municipality must pay the cost. Stated another way, the municipality must not submit the utility to unnecessary and unreasonable expense when the legitimate exercise of the police power does not require it. *ROCHESTER TEL v. FAIRPORT*, 84 AD 2d 455 - NY: Appellate Div., 4th Dept. 1982.[2]

Public utilities have the right to place their facilities in public right-of-way without acquiring a separate easement for the utility use because utility's installation of its facilities within the public right-of-way is not considered to impose an additional burden on the servient estate. *Fox v. Ohio Valley Gas Corp.*, 250 Ind. 111, 117-19, 235 N.E.2d 168, 170-72 (1968) and *Deetz v. Northern Indiana Fuel and Light Co.*, 545 N.E.2d 1103, 1105 (Ind.App.1989).

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

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

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

---

[2] § 27. Construction of lines. Any such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this state, and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation can not agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the eminent domain procedure law. Any such corporation is authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this state, subject to all the provisions of law in reference to such companies not inconsistent with this section; provided that such corporation shall, before laying any such line in any city, village or town of this state, first obtain from the common council of cities, or other body having like jurisdiction therein, the trustees of villages, or the town superintendents of towns, permission to use the streets within such city, village or town for the purposes herein set forth. Nothing in this section shall limit, alter, or affect the provisions or powers relating or granted to telegraph corporations heretofore created by special act of the legislature of this state, except in so far as to confer on any such corporation the right to lay electrical conductors under ground.

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

> That claimant had record title to the southerly one half of the road is not disputed. In these circumstances as the successor in interest of the grantee of the original proprietor, she must be deemed to have acquired a private easement in the entire public highway lying in front of her appurtenant lands which survived its abandonment by the public authorities. (*Holloway v. Southmayd*, 139 N.Y. 390.) *Watkins v. State*, 15 AD 2d 987 - NY: Appellate Div., 3rd Dept. 1962.
>
> The dedication of Cortland Street to the City, which occurred after the easement of access had been created by the original grant of the subdivider, and the subsequent abandonment by the City had no effect on the private easement of access appurtenant to lot number 168, which was independent of the public easement created by the dedication. *Firsty v. De Thomasis*, 177 AD 2d 839 - NY: Appellate Div., 3rd Dept. 1991.
>
> The Court holds that by bounding a lot by an existing right of way creates an easement in the way. *229 QUIMBY LANE, LLC v. QUIMBY LANE ASSOCIATION*, 2018 NY Slip Op 51315 - NY: Supreme Court 2018.
>
> The rule has long been recognized and accepted that "The platting of land and the sale of lots pursuant thereto creates as between the grantor and the purchaser of the lots a private right to have the space marked upon the plat as streets, alleys, parks, etc., remain open for ingress and egress and the uses indicated by the designation," even though this only constitutes an offer of dedication so far as the public is concerned. Existing independently of any public rights growing out of a dedication, such private rights acquired by purchasers of lots under conveyances with reference to a plat showing streets and alleyways are said to be in the nature of implied easements. The purpose of this principle is not to create public rights but rather to secure to purchasers of lots under such circumstances those benefits the promise of which it is reasonable to infer has induced them to purchase portions of a tract of land laid out on the plan indicated. The right of a purchaser to such easement is a property right of which he cannot be deprived without due process of law. 28 C.J.S. Easements § 39, p. 702. *Spencer v. Wiegert*, 117 So. 2d 221 - Fla: Dist. Court of Appeals, 2nd Dist. 1959. [internal citations intentionally omitted]
>
> [V]acation of the street does not in the least impair private rights. It is only a surrender or extinction of the public easement"; and that case was cited in *Downs v. Mayor, etc.*, of South Amboy, 116 N.J.L. 511 (E. & A. 1936), for the proposition that the mere vacation of a public street by a municipal body does not involve the infringement of a private right. It is only a surrender or extinction of a public easement.

Plaintiffs have an easement over the 50-foot right of way, shown on the map and referred to in the deeds. That easement continues despite the vacation of so much of Packanack Avenue as abuts the plaintiffs' property and despite the fact that the municipality reserved from the vacation ordinance a right of way for use as a foot path the center 20 feet in width of Packanack Avenue opposite plaintiffs' property. "Where the street was subsequently vacated by public authority and the owner had made substantial improvements upon the abutting property, and the result of the vacation was that he was left without access to a public street, then such owner has a right constitutionally to recover for such damage based upon the assertion of his private right in the street as distinguished from the public right in the street." The court then went on to say that "since the private right of way is in the nature of an easement the circumstance of subsequent acceptance or non-acceptance by the municipality are immaterial considerations." It would therefore seem to the court that there having been no substantial improvements upon the abutting property and the plaintiffs having their private right in the street by virtue of the filing of the map and the reference thereto in the deed to them, that there was not a taking of the plaintiffs' property within the meaning of the eminent domain statute. *Rangelli v. Wayne Tp.,* 127 A. 2d 916 - NJ: Superior Court, Law Div. 1956. [internal citations intentionally omitted]

[The owner of property abutting a street] possesses not only the right to the use of the street in common with all other members of the public but also a private right or easement for the purposes of ingress and egress to and from her lot which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor. *McCandless v. City of Los Angeles* (1931) 214 Cal. 67, 71 [4 P.2d 139]

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

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

In addition to public rights which may be created by dedication and acceptance, conveyances in reference to a plat may also create private rights in the purchasers of subdivision lots to have the public places described in the plat maintained for their designated uses. In *McCorquodale v. Keyton*, 63 So.2d 906, 910 (Fla. 1953), the court stated the rule that when lots are sold with reference to a recorded subdivision plat, the purchasers acquire by implied covenant a private easement in lands of the grantors other than those specifically deeded, the purpose of the rule being "not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out in the plan indicated." Appellant Bonifay asserts such a private easement across the disputed property. A similar claim was asserted in *Bonifay v. Garner*, 445 So.2d 597, 603 (Fla. 1st DCA 1984), in which this court found that the evidence presented "would support a finding that appellant, and others similarly situated, have an implied easement of access to the waterfront property west of Bayou Boulevard, unless these private easements have been extinguished by adverse possession, abandonment, nonuser, estoppel, or some other basis." *Bonifay v. Dickson*, 459 So. 2d 1089 - Fla: Dist.

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

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

When conveying real property abutting a public street or road, whether the underlying interest in the public way is included in the conveyance is a state-specific matter.

> Where the owner of land has it surveyed, mapped, and platted, showing subdivisions thereof, with spaces for intervening streets or other highways between the subdivisions clearly indicated upon the map or plat, and conveyances in fee of the subdivisions are made with reference to such map or plat, the owner thereby evinces an intention to dedicate an easement in the streets or other highways to the public use as such, the title to the land under the street remaining in the owner or his grantees; and, where such conveyances are made with reference to the map or plat, the dedication of the easement for street purposes cannot be subsequently revoked as against the grantees, and the title of the grantees of subdivisions abutting on such streets, in the absence of a contrary showing, extends to the center of such highway, subject to the public easement. And, where the highway is lawfully surrendered, the then holder of the title to abutting property and to the center of the street has the property relieved of the public easement. *United States v. 16.33 Acres of Land in Cty. of Dade*, 342 So. 2d 476 - Fla: Supreme Court 1977.

Sometimes questions arise as to responsibility (and related liability) of the adjoining owner when that owner has retained underlying fee in the public road.

> 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.

U.S. Revised Statute 2477

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

> *"The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."*

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

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

claimed by these groups included, in some cases, creeks, indiscernible walking paths and supposed "roads" that lead nowhere.

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

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

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

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

> (5) The applicable laws of each State [shall] govern the resolution of issues relating to the validity and scope of R.S. 2477 rights-of-way, including--
>
> (A) what constitutes a highway and its essential characteristics;
>
> (B) what actions are required to establish a public highway;
>
> (C) the length of time of public use, if any, necessary to establish a public highway and resulting R.S. 2477 right-of-way;
>
> (D) the necessity of mechanical construction to establish a public highway and resulting R.S. 2477 right-of-way; and
>
> (E) the sufficiency of public construction alone without proof of a certain number of years of continuous public use to establish a public highway and resulting R.S. 2477 right-of-way.

Appurtenant Easements and Easements in Gross

> The two broad easement categories are (1) easements appurtenant, which provide an interest in the land, and (2) a license or easement in gross, which provides a personal right of use only. *Kampfer v. DaCorsi*, 126 AD 3d 1067 - NY: Appellate Div., 3rd Dept. 2015.

Pipeline and transmission line easements are normally good examples of easements in gross. An easement for ingress and egress over one property to reach another is typically an example of an appurtenant easement.[3]

[3] See http://www.buyersresource.com/glossary/Easement_in_Gross.html

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

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

> [A]n easement appurtenant is created when the easement is conveyed in a writing, subscribed by the creator of such easement, which burdens the servient estate for the benefit of the dominant estate. *SACASA v. Trust*, 2017 NY Slip Op 31056 - NY: Supreme Court 2017. [internal citations intentionally omitted]

> An easement appurtenant involves two different estates or tenements in land (a) the dominant estate, that to which the easement or right attaches or belongs; and, (b) the servient estate, that which is subject to the easement. 25 Am.Jur.2d Easements and Licenses 11 (1966).
> An easement appurtenant involves two parcels of land — the dominant tenement, to which the right of use belongs, and the servient tenement, which is subject to the use. … An easement appurtenant is created to benefit the owner of the dominant tenement in the use of his land. 3 R. Powell, J. Backman, *The Law Of Real Property* ¶ 405 (1991). *Ammer v. Arizona Water Co.*, 818 P. 2d 190 - Ariz: Court of Appeals, 1st Div., Dept. A 1991. [internal citations omitted]

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

An appurtenant easement is so tightly bound to the dominant estate that it transfers with the dominant estate even if it is not mentioned in the conveyance.

> When the dominant estate is transferred, the easement passes to the subsequent owner through appurtenance clauses, even if there is no specific mention of it in the deed. *Reilly v. ACHITOFF*, 2013 NY Slip Op 32711 - NY: Supreme Court 2013.

> Once created, an easement appurtenant passes with the dominant estate unless extinguished by abandonment, conveyance, condemnation or adverse possession. *SACASA v. Trust*, 2017 NY Slip Op 31056 - NY: Supreme Court 2017. [internal citations intentionally omitted]

> [T]he easement, once created in the 1923 deed, ran with the land regardless of whether it was mentioned in subsequent deeds. *SMOTHERGILL v. Hirschberg*, NJ: Appellate Div. 2010.
>
> Easements appurtenant run with the land, pass with the dominant estate to successors in interest, and transfer with the dominant property even if not mentioned in the documents transferring title. *See* ELY & BRUCE, *supra,* § 9:1. *Tubbs v. E&E Flood Farms, L.P.,* 13 A.2d at 768.
>
> Once an easement appurtenant was established, it attached to the dominant estate and passed with every conveyance of that estate. *** [A] right of way or other easement appurtenant to the land[] passe[s] by a grant of the land without any mention being made of the easement, and though neither the term `appurtenance,' nor its equivalent, be employed." *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010.

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

> As to the claims under article 15 of the Real Property Proceedings and Action Law, "[a]n easement is not a personal right of a landowner but an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement." *SACASA v. DAVID TRUST*, 2018 NY Slip Op 51383 - NY: Supreme Court 2018.
>
> An appurtenant easement is incapable of an existence separate from the dominant estate, and any attempted severance from the dominant estate must fail.. *Kikta v. Hughes*, 766 P. 2d 321, 108 N.M. 61.
>
> 18 Ohio Jurisprudence (2d), 607, Section 71 [comments]: "An appurtenant easement * * * is an incident to an estate in land and passes upon a transfer of the land. It cannot be separated from, or transferred independently of, the land to which it inheres. The right to an appurtenant easement cannot be transferred to a stranger to the dominant estate. The owner of an appurtenant easement of way cannot separate it from the dominant estate so as to convert it into an easement in gross." *State, ex rel. Lindemann v. Preston*, 171 Ohio St. 303 - Ohio: Supreme Court 1960.
>
> An easement appurtenant is incapable of existence apart from the particular land to which it is annexed. *Shingleton v. State*, 133 SE 2d 183 - NC: Supreme Court 1963. [internal citations intentionally omitted]

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

> [A]n easement in gross is a "mere personal, nonassignable, noninheritable privilege or license." *Henry v. Malen*, 263 AD 2d 698 - NY: Appellate Div., 3rd Dept. 1999. [internal citations intentionally omitted.]
>
> An easement in gross implies a right to use land owned by another, is distinct from the ownership of any lands or dominant tenement, and is not assignable or inheritable, but it personal to the grantee. *Saratoga State Waters Corp. v. Pratt,* 227 N.Y. 429, 443, 125 N.E. 834, 839 (1920).
>
> [An easement in gross is] [a]n irrevocable personal interest in the land of another. Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land Sec.2.01(2) (1988).
>
> 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. *Ratino v. Hart*, 188 W.Va. 408, 411, 424 S.E.2d 753, 756 (1992).

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

As with other written conveyances, the intent of the parties is drawn from the four corners of the document.

> The character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement. *Barrett v. Kunz,* 604 A. 2d 1278 - Vt: Supreme Court 1992. [internal citations intentionally omitted]
>
> It has been widely held that the omission of such words as "heirs and assigns" ordinarily does not tend to show that a grant is personal rather than appurtenant. *Mays v. Hogue*, 260 SE 2d 291 - W Va: Supreme Court of Appeals 1979. [internal citations intentionally omitted]
>
> "If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intentions of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate." *Jones v. Island Creek Coal Company*, 79 W. Va. 532, 91 S.E. 391 (1917)

The law generally favors easements appurtenant over easements in gross. If the easement created by a document is not expressly either appurtenant or in gross, it will generally be deemed appurtenant.

> "Easements in gross are not favored by the courts, however, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate. If doubt exists as to its real nature, an easement is presumed to be appurtenant, and not in gross." (25 Am. Jur. 2d, Easements and Licenses, § 13, p. 427; *Wilson v. Ford*, 209 N.Y. 186, 196, mot. for rearg. den. 209 N.Y. 565, and authorities there cited.) *PAS. VAL. COUN. v. HARTWOOD*, 75 Misc. 2d 1018 - NY: Supreme Court, Sullivan 1973.
>
> It is a well-established principle of law that an easement in gross will not be presumed where it can fairly be construed to be appurtenant to land. *PAS. VAL. COUN. v. HARTWOOD*, 75 Misc. 2d 1018 - NY: Supreme Court, Sullivan 1973.
>
> In *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997), our Supreme Court explained the differences between easements in gross and appurtenant easements: The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. Id. at 325-26, 487 S.E.2d at 191 (citations omitted) (emphasis added).

However, there are exceptions…

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

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

Restatement of Property § 487, Comment b provides:

> Terms of transfer of dominant tenement. There is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferree of the dominant tenement. Such a provision contravenes no rule of law. If its purpose is to extinguish the easement it will have this effect. If the purpose of the provision is to change the easement appurtenant into an easement in gross, it will have this effect if, and only if, the manner or the terms of the creation of the easement permits such a change to be made. If they do not permit this to be done, the result will be either that the provision against transfer is ineffective or that the easement is extinguished. Which of these results will occur depends upon whether the provision against transfer is construed to be conditioned upon the effective accomplishment of the purpose to change the easement into one in gross.

FN 2, *Behm v. Saeli*, 560 So. 2d 431 - Fla: Dist. Court of Appeals, 5th Dist. 1990

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

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

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

Personal Easements in Gross are generally not assignable. Commercial Easements in Gross generally are assignable. Given this fact, the definition of a commercial easement in gross becomes critical.

> Easements of a commercial nature similar to the right-of-way here [an easement for the installation of electric transmission lines] have long been considered an exception to the general rule that easements in gross are not transferable, and a long history of allowing the transfers of such servitudes exists. See 3 Powell on Real Property § 34.16, pp. 34-220-222 (1996); Restatement of Property § 489 (1944).
>
> This easement was clearly commercial and not personal, and was an easement in gross. We know of no case in this jurisdiction which has held that easements authorizing the construction of telephone lines, electric lines or gas lines are inalienable. *Banach v. Home Gas Co.*, 12 AD 2d 373 - NY: Appellate Div., 3rd Dept. 1961.
>
> [A]n easement in gross or a license [is] nontransferable or transferable only by express assignment. *Frazier v. Schenck*, 503 So. 2d 444 - Fla: Dist. Court of Appeals, 2nd Dist. 1987.

> Easements in gross for railroads or for public utility purposes have been uniformly held to be alienable by modern American courts. (3 R. Powell, Real Property sec. 419 (1952).) The writers of the Restatement flatly state that commercial easements in gross are freely alienable. Restatement of Property sec. 489 (1944).
>
> 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]
>
> An easement in gross … is a right held by an individual, exists independent of any ownership of land, and is not transferrable to subsequent owners. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010. [internal citations intentionally omitted]
>
> The law at that time [1857] was that easements or rights of way in gross were not assignable or inheritable by any words in the deed by which they were granted. It is now well settled in Ohio, and the general rule elsewhere, that a right of way or easement of the private commercial character herein involved is an easement in gross constituting an alienable property interest. 5 Restatement of the Law, Property, 3040, Section 489. *Jolliff v. Hardin Cable Television Co.*, 22 Ohio App. 2d 49 - Ohio: Court of Appeals 1970. [some internal citations intentionally omitted]
>
> The reservation in this case is in gross, and such a right personal merely, not assignable nor inheritable. "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable nor inheritable, nor can it be made so by any terms in the grant, any more than a collateral and independent covenant can be made to run with land." *Field v. Morris*, 88 Ark. 148 (1908). [internal citations mitted]

Although some states like California and New Jersey may be exceptions (the following cases did not discern between commercial or personal easement in gross), viz.,

> [A]n easement in gross is both assignable and inheritable unless restricted by proper language to certain individuals. *LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 166
>
> Originally, under the common law, easements in gross were personal and not transferable, as set forth in *Eastman v. Piper*, 68 Cal.App. 554, 567 [229 P. 1002]. However, in *Collier v. Oelke*, 202 Cal.App.2d 843, 846-847 [21 Cal.Rptr. 140], this dictum was disapproved, and an easement in gross is property and can be transferred. *Leggio v. Haggerty*, 231 Cal. App. 2d 873 - Cal: Court of Appeal 1965

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

Affirmative and Negative Easements

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

An affirmative easement obligates a landowner to permit or allow certain use of his property by another. Examples of affirmative easements are ingress/egress, access or public utility easements.

> An affirmative easement is one which grants the owner of the dominant estate the right to make active use of the servient estate or to do some act thereon or in respect thereto which, were it not for the easement, he would not be privileged to do or which would otherwise be unlawful. (Restatement, Property, § 452). *Rahabi v. Morrison*, 81 AD 2d 434 - NY: Appellate Div., 2nd Dept. 1981. [internal citations intentionally omitted.]

> [The littoral rights to access and use are affirmative easements as they grant "rights to enter and use land in possession of another." *Walton County v. Stop Beach Renourishment*, 998 So. 2d 1102 - Fla: Supreme Court 2008. [internal citations omitted]

A negative easement obligates a landowner to refrain from making certain use(s) of his property, which will serve or offer some benefit to the owner of the dominant estate. Solar, light and (usually) conservation easements are examples of negative easements.

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

> A negative easement is one which restrains a landowner from making certain use of his land which he might otherwise have lawfully done but for that restriction. Such easements arise principally by express grant or by implication. If established expressly, a negative easement must comply with the requisites of the Statute of Frauds. *Huggins v. Castle Estates*, 36 NY 2d 427 - NY: Court of Appeals 1975. [internal citations intentionally omitted]

> A negative easement prohibits "the owner of a servient estate ... from doing something otherwise lawful upon his estate, because it will affect the dominant estate." A restrictive covenant is a servitude, commonly referred to as a negative easement[.]" *Pottle v. Link*, 654 SE 2d 64 - NC: Court of Appeals 2007. [internal citations intentionally omitted]

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

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

Creating Easements

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

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

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

> An easement may be created by (1) an express grant, (2) an express reservation, (3) an implied grant, (4) an implied reservation, (5) necessity, (6) prescription, (7) a recorded covenant, (8) dedication, (9) condemnation, (10) estoppel, or (11) a court decision … (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15:13, p. 15-61.)

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

> Servitudes that are not created by contract or conveyance include servitudes created by dedication, prescription, and estoppel. Those which are not created by express contract or conveyance are the implied servitudes, which may be based on prior use, map or boundary descriptions, necessity, or other circumstances surrounding the conveyance of other interests in land, which give rise to the inference that the parties intended to create a servitude. Restatement, *supra,* § 2.8 cmt. b).
>
> *Town of Paden City v. Felton,* supra, 136 W.Va. at 136, 66 S.E.2d at 286. (with citations omitted) The general rule, subject to several exceptions, is that an easement can be created only by grant, express or implied, or by prescription, which presupposes a grant. An easement may, however, be created by agreement or covenant as well as by grant. Many authorities say that, as an exception to the general rule just stated, an easement may sometimes be created by estoppel. One eminent authority states that an easement may be created or acquired by six different methods: express grant, reservation or exception in a deed, implied grant, prescription, a statutory proceeding usually under the power of eminent domain, and estoppel.

Written Easements

Creating Written Easements

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

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

Express Grant

To create an easement by express grant, the owner of the servient estate grants an easement in that estate to another with specific wording as to scope.

> To create an easement by express grant there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a revocable license. (see *Willow Tex, v. Dimacopoulos*, 68 NY2d 963 [1986])

> Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant. Thus, the language of the easement is controlling, and if a grant is specific in its terms, it is decisive of the limits of the easement. *Gilliland v. Acquafredda, LLC*, 92 AD 3d 19 - NY: Appellate Div., 1st Dept. 2011. [internal citations intentionally omitted.]
>
> A written grant consistent with the formalities of a deed is necessary to create an express easement. *Loid v. Kell*, 844 SW 2d 428 - Ky: Court of Appeals 1992.
>
> An easement can be created either by grant … or by reservation unto the grantor in lands conveyed. *Leasehold Estates, Inc. v. Fulbro Holding Co.*, 136 A. 2d 423 - NJ: Appellate Div. 1957
>
> As an interest in land, an easement may be created by express grant contained in a deed or other written document. While "[t]here are no magical words that one must divine in order to create an express easement," the words granting the easement must show "the intention of the parties to create an easement on a sufficiently identifiable estate." *HAGELIN v. US FUNDING GROUP, LLC*, Fla: Dist. Court of Appeals, 2nd Dist. 2015. [internal citations intentionally omitted]

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

> "`[T]he construction of a deed, including any easements set forth therein, is generally a question of law for the court, with extrinsic evidence being considered only if there are ambiguities" *SILVERSTRIM v. LOONHAVEN REALTY*, LLC, 2018 NY Slip Op 51233 - NY: Supreme Court, Warren 2018.
>
> [A] court may find an express easement, where a writing which purportedly conveys an easement is ambiguous, based on extrinsic evidence to determine "the actual intention of the parties" and "to explain and give context to the language." *Lazy Dog Ranch v. Telluray Ranch Corp.,* 965 P.2d 1229, 1236-37 (Colo.1998). The *Lazy Dog Ranch* court identified the following circumstances relevant to interpreting an express easement:
>
> > the location and character of the properties burdened and benefited by the servitude, the use made of the properties before and after creation of the servitude, the character of the surrounding area, the existence and contours of any general plan of development for the area, and [the] consideration paid for the servitude.
>
> *Id.* at 1237 (quoting Restatement, *supra,* § 4.1 cmt. d).
>
> If the provisions [of a document creating an easement] are ambiguous, extrinsic evidence may be examined to determine the intent of the parties at the time the document establishing the easement was created. *American Quick Sign, Inc. v. Reinhardt*, 899 So. 2d 461 - Fla: Dist. Court of Appeals, 5th Dist. 2005. [Internal citations intentionally omitted]

> When construing an instrument granting an easement, the trial court must give effect to the intent of the instrument's creator. When the provision creating the easement is ambiguous, the trial court may consider the circumstances surrounding the property, the parties, and the creation of the instrument to determine intent. *Presser v. NORTH INDIANA ANNUAL CONFERENCE OF UNITED METHODIST CHURCH*, Ind: Court of Appeals 2015 [internal citations intentionally omitted]

Express grants generally cannot be created by parol without violating the statute of frauds.

> An express easement is an interest in land to which the statute of frauds applies. See Tex. Bus. & Com. Code Ann. § 26.01 (West Supp. 2008); *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983) (easement is interest in land subject to statute of frauds); *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 264 (Tex. App.-Austin 2002, no pet.).
>
> In *Canell v. Arcola Housing Corp.*, Fla. 1953, 65 So.2d 849, the Supreme Court was faced with a complaint alleging breach of an oral promise concerning an easement in land. It stated at page 851:
> * * * * * *
>> "* * * The plaintiffs are relying upon a mere oral promise to create the easement, which is clearly within the terms of the statute of frauds and thus cannot be enforced directly or indirectly. Section 725.01, Florida Statutes 1951, F.S.A. If the deeds to plaintiffs did not mention the easement in the description of lands and property rights conveyed, or refer to a plat reflecting same, compare *McCorquodale v. Keyton*, Fla., 63 So.2d 906, then to give any effect to oral promises in respect to other lands or rights therein would amount to an unauthorized reformation of the description in the deed. Browne, Statute of Frauds, 5th ed., sec. 441(c)."
> * * * * * *
>
> *Katcher v. Sans Souci Company*, 200 So. 2d 826 - Fla: Dist. Court of Appeals, 3rd Dist. 1967.

Reservation

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

> The defendant submitted to both courts a proposed conclusion of law that the right reserved was an "easement, by reservation, for the benefit of the Mill Lot" and conceded in her brief in the Appellate Division (p. 31) that it was "appurtenant" to the Mill Lot. The Appellate Division stated that the parties to the action agreed that the proper construction of the Greenspan deed was that an easement appurtenant to the Mill Lot was intended. That was the theory upon which the Appellate Division decided the case. *Loch Sheldrake Assocs. v. Evans*, 306 NY 297 - NY: Court of Appeals 1954.

> A reservation … occurs where the granting clause conveys the totality of the land described, but reserves to the grantor one or more of the rights that would comprise a fee simple absolute. *Hinojos v. Lohmann*, 182 P. 3d 692 - Colo: Court of Appeals, 1st Div. 2008. [internal citations intentionally omitted]
>
> The ancient function of a reservation was to create in favor of the grantor "some new thing * * * out of what he had before granted, as `rendering therefore yearly the sum of ten shillings, or a pepper corn, or two days' plowing, or the like.'" Blackstone, Book II, Ch. XX, p. 299; Sheppard's Touchstone, Vol. 1, p. 80. "`A reservation is never of any part of the estate itself, but of something issuing out of it; some easement or right to be exercised in relation to the estate, as a right to use or occupy, or to take away timber therefrom.'" *Combs v. Hounshell*, 347 SW 2d 550 - Ky: Court of Appeals 1961. [internal citations intentionally omitted]
>
> A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." Id. (quoting *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)).
>
> A grantor may expressly reserve an easement over granted land in favor of retained land by using appropriate language in the instrument of conveyance. An easement may be expressly reserved by referring in the instrument of conveyance to a recorded plat or certificate of survey on which the easement is adequately described. *Conway v. Miller,* 232 P. 3d 390 - Mont: Supreme Court 2010. [internal citation intentionally omitted]
>
> Technically, a "reservation" is a newly created right, but "reservation" is frequently used interchangeably with "exception." The intention of the parties, not the words in the deed, is controlling. FN 3 *Shackford & Gooch v. B & B COASTAL ENTERPRISES*, 479 A. 2d 1312 - Me: Supreme Judicial Court of Maine. [internal citations intentionally omitted]

If a reservation is intended, the wording must be clear and unambiguous.

> The words "subject to" in a deed or contract generally create an ambiguous deed or contract. *Procacci v. Zacco*, 324 So.2d 180, 182 (Fla. 4th DCA 1975); see also *Robertia v. Pine Tree Water Control Dist.*, 516 So.2d 1012, 1013 (Fla. 4th DCA 1987); *Orthopedic Specialists v. Allstate Ins. Co.*, 177 So.3d 19, 24-25 (Fla. 4th DCA 2015), rev. granted SC15-2298, 2016 WL 282060 (Fla. Jan. 20, 2016) (the court determining that the words "shall be subject to" in an insurance policy resulted in an ambiguity). The words "subject to" "are generally words of qualification, rather than of contract." *Robertia*, 516 So.2d at 1013; see also *Am. Quick Sign*, 899 So.2d at 468 (concluding that "subject to" referred to a pre-existing easement and was not intended to create an entirely new easement). In some circumstances however, the "facts and circumstances" of a case may show the grantor intended to use the words "subject to" to create an easement. See *Procacci*, 324 So.2d at 182; *Behm v. Saeli*, 560 So.2d 431, 432 (Fla. 5th DCA 1990) (finding the words "subject to" established an easement where the extrinsic evidence of intent showed the grantor intended to "create and reserve" an easement). *Hastie v. Ekholm*, 199 So. 3d 461 - Fla: Dist. Court of Appeals, 4th Dist. 2016.

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

> "[t]he long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called `stranger to the deed', does not create a valid interest in favor of that third party" [A] prior owner could not create an easement benefitting land which he did not own. That owner, having already conveyed an adjoining parcel, could not "reserve" in the deed, upon the sale of the remaining parcel, an express easement appurtenant over the previously conveyed adjoining parcel for the benefit of the grantee of the remaining parcel. *Peters v. Smolian*, 49 Misc. 3d 408 - NY: Supreme Court 2015.

> The basis for the trial court's judgment, and the theory on which the appellees rest their brief, is that rights cannot be vested in a stranger to a deed by exception or reservation. *Combs v. Hounshell*, 347 SW 2d 550 - Ky: Court of Appeals 1961.

By Reference

When a deed references a survey or plat that shows an easement, that easement is incorporated into the deed by reference.

Generally, the quasi-public nature of a plat map delineation gives rise to an easement by implication. Thus, where a party conveys realty by reference in the deed to a filed map which designates areas such as streets, parks or beaches, a negative easement has been consistently recognized (see, generally, Conveyance with Reference to Plat, Ann., 7 ALR2d 607). This principle was utilized in *Weil v Atlantic Beach Holding Corp.*, (1 N.Y.2d 20) where we held that an easement by implication existed in favor of property owners whose deeds referred to certain maps which depicted an area marked "Boardwalk" abutting the beach and the ocean. *Huggins v. Castle Estates*, 36 NY 2d 427 - NY: Court of Appeals 1975

Moreover, the trial court is correct that a valid and enforceable easement can be created by a plat. And this easement was marked on the original plat of the subdivision, which was referenced by the deed conveying the parcel to Fricke.[2] Cf. *Smith v. Second Church of Christ, Scientist, Phx.*, 87 Ariz. 400, 416-17, 351 P.2d 1104, 1115 (1960) (restrictions on property described on plat incorporated in deed by reference to plat). Therefore, this easement is enforceable as to Fricke's parcel. *Fricke v. Bristol*, Ariz: Court of Appeals, 2nd Div., Dept. B 2012.

Dedication

A dedication has been defined as the 'donation of land or the creation of an easement for public use.' *Black's Law Dictionary* 442 (8th ed. 2004). Only the owner of the property can effect a valid dedication. Statutory dedications are generally controlled by state law, but not in all states.

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

Inasmuch as dedication of property for a street is in the nature of a gift, a town acquires a fee to a highway by dedication when there has been a complete surrender to public use of the land by the owners, acceptance by the town, and some formal act on the part of the relevant public authorities adopting the highway, or use by the public coupled with a showing that the road was "`kept in repair or taken in charge' by public authorities." *Perlmutter v. FOUR STAR DEVELOPMENT ASSOCIATES*, 38 AD 3d 1139 - NY: Appellate Div., 3rd Department, 2007.

"Title to real property may be acquired by a municipality by dedication and acceptance." "Dedication of a street ... `is essentially of the nature of a gift' by a private owner to the public and it becomes effective when the gift is accepted by the public.. Once established, the dedication is irrevocable.
"`The test of the validity of a dedication, like the test of the validity of other gift or transfer, is, primarily, whether there has been complete relinquishment on the one side and acceptance on the other'." Further, in addition to an offer and acceptance, there must be "some formal act on the part of the relevant public

> authorities adopting the highway." "[T]he burden of proof lies on the party asserting that the land has been dedicated." *Romanoff v. Village of Scarsdale*, 50 AD 3d 763 - NY: Appellate Div., 2nd Dept. 2008. [internal citations intentionally omitted.]
>
> This Court has defined the term "dedication" in property cases and accepted it as a legal term of art, as follows:
>
> > Dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner that manifests an intention that the property dedicated shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication.
>
> *Bergin v. Bistodeau*, 645 NW 2d 252 - SD: Supreme Court 2002.

Dedications require *both* the dedication itself and an *acceptance* on the part of the public, although the acceptance may be implied.

> It is settled that "[t]he essential elements necessary to establish a dedication are an offer by an owner, either express or implied, to appropriate land or some interest or easement therein to public use and an acceptance of such offer, either express or implied, when acceptance is required, by the public" The intent to dedicate may be shown by either acts or declarations so long as that "act or declaration on the part of the owner show[s] a present, fixed, unequivocal purpose to dedicate". Similarly, the acceptance of the offer by the public, requires "the same unequivocal and convincing proof necessary to prove an intent to dedicate". *Winston v. Vill. of Scarsdale*, 170 AD 2d 672 - NY: Appellate Div., 2nd Dept. 1991. [internal citations intentionally omitted.]
>
> Like a contract, a dedication consists of an offer and acceptance, and is not binding until unequivocal acceptance has been established. *Coppinger v. Rawlins*, 239 Cal. App. 4th 608 - Cal: Court of Appeal, 4th Appellate Dist., 2nd Div. 2015 [internal citations intentionally omitted]

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

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

Depending on the state, the effect of a statutory dedication may be a grant of easement or a grant of the fee interest, in which case there may be <u>private</u> easement rights created as mentioned earlier in this handout.

"`[W]hen an owner of property sells a lot with reference to a map, and the map shows that the lot abuts upon a street, the conveyance presumptively conveys fee ownership to the center of the street on which the lot abuts, subject to the rights of other lot owners and their invitees to use the entire area of the street for highway purposes'"

"The presumption is not, however, inflexible and will yield to a showing in the deed of a contrary intent to exclude from the grant the bed of the street" Indeed, the presumption can be rebutted "`by determining the intent of the parties gathered from the description of the premises [conveyed] read in connection with the other parts of the deed, and by reference to the situation of the lands and the condition and relation of the parties to those lands and other lands in the vicinity'" Thus, the presumption can be rebutted by a showing in the deed of a contrary intent to exclude from the grant the bed of the street. *STANLEY ACKER FAMILY LIMITED PARTNERSHIP v. DePAULIS ENTERPRISES V, LTD*., 132 AD 3d 657 - NY: Appellate Div., 2nd Dept. 2015.

Condemnation

Easements may be acquired through the statutory eminent domain process and the process obviously result in a written easement. In some states, right of way taken through condemnation can only be acquired as easement, not in fee. Eminent domain can generally be exercised only by qualified public utilities, railroads and governmental entities.

Other Statutory Easements

Typically, ordinances regulating “zero lot line” developments provide for easements when units inadvertently encroach on other interests because of construction anomalies. Towards the end of this handout are a number of statutes relating to other types of easements such as solar and conservation.

Recording and Filing Requirements

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

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

> [T]he Parrys are not bound by the unrecorded easement agreement, of which they had no actual or constructive knowledge despite undertaking a reasonable inquiry into any possible encumbrances…. [I]n the absence of actual notice before or at the time of ... purchase or of other exceptional circumstances, an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to [that owner] or [that owner's] direct predecessors in title.'" *Parry v. Murphy*, 79 AD 3d 713 - NY: Appellate Div., 2nd Dept. 2010.

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

> A purchaser of land who has no notice either actual or constructive, of an easement in such land in favor of third persons is free from the burden of such easement. See 28 C.J.S., *Easements*, §§ 49, 50.
>
> The general rule is stated in 19 C.J. page 939 and 940, Sections 146 and 147 under Easements, as follows: *"Notice of an easement may be imputed to the purchaser by a properly recorded instrument in which the easement is granted. And where the use of the easement is open and visible, the purchaser of the servient tenement will also be charged with notice, and that too although the easement was created by a grant which was never recorded."*
>
> "Recordation gives constructive notice to all persons dealing with the land of properly recorded instruments in the chain of title." An unrecorded deed is unenforceable against a subsequent bona fide purchaser for value without actual knowledge of the prior unrecorded deed. See id; *Tiller v. Hinton* (1985), 19 Ohio St.3d 66, 69, 482 N.E.2d 946 (unrecorded easement is unenforceable against subsequent bona fide purchaser without notice of unrecorded easement). However, a bona fide purchaser is bound by the prior deed if he has actual knowledge of it. *Montgomery Country* [sic] *Treasurer v. Gray*, 2004 Ohio 2729 - Ohio: Court of Appeals, 2nd. [internal citations intentionally omitted]

The exact effect of recordation depends on the individual state's recordation statute – whether race, notice, or race notice.

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

Unwritten Easements

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

> Easements may be created by grant, reservation, prescription, estoppel, necessity or implication. *Wild Oaks, LLC v. Beehan*, 2012 NY Slip Op 30601 - NY: Supreme Court 2012.
>
> There seems to have been nine methods recognized under the [South Carolina] common law for the creation of an easement, namely, by grant, estoppel, way of a necessity, implication, dedication, prescription, ancient window doctrine, reservation, or condemnation.") (citing *Davis v. Robinson*, 127 S.E. 697 (1925)).

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

> "Implied easements are not favored in the law and the burden of proof rests with the party asserting the existence of the facts necessary to create an easement by implication to prove such entitlement by clear and convincing evidence" *85 S. MAIN ST., LLC v. CANNARILI*, 2008 NY Slip Op 51259 - NY: Supreme Court 2008. [internal citations intentionally omitted.]
>
> Acquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted. Any doubts as to the creation of the right must be resolved in favor of the owner. *Trepanier v. County of Volusia*, Fla: Dist. Court of Appeals, 5th Dist. 2007.[internal citations intentionally omitted]

Easements by Implication (generally)

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

> The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am. Jur. 2d Easements and Licenses § 19 (2004); 28A C.J.S. § 62.
>
> Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d Easements and Licenses §§ 20-22, 30 (describing the different types of implied easements).

> The Restatement identifies four traditional types of implied easements — easements implied from prior use, easements implied from map or boundary reference, easements implied from a general plan, and easements created by necessity, Restatement, supra, §§ 2.12-2.15 — all requiring the severance of a single possessory interest. The Restatement also identifies two alternative methods to obtain an easement without the requisite express conveyance: an easement by estoppel and a prescriptive easement. Id. §§ 2. 10, 2.16-2.17. *PRECIOUS OFFER. MINERAL EXCHANGE, INC. v. McLain*, 194 P. 3d 455 - Colo: Court of Appeals, 5th Div.
>
> Easements by implication are recognized in the law (see 3 Tiffany Real Prop. § 779 [3d ed.]; Jon W. Bruce et al.,The Law of Easements & Licenses in Land § 4:30). Courts are instructed to ascertain the intention of the parties, and particularly, the intention of the grantor. In 1858, the Court of Appeals established that principal in *Huttemeier v Albro*, 18 NY 48 (1858).
>
> > "It is a general rule that, upon a conveyance of land, whatever is in use for it, as an incident or appurtenance, passes with it. Whether a right of way or other easement is embraced in an deed, is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance. The intention of the parties is to be learned from those facts."
>
> *229 QUIMBY LANE, LLC v. QUIMBY LANE ASSOCIATION*, 2018 NY Slip Op 51315 - NY: Supreme Court 2018.

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

In addition, the necessity for the implied easement must be created by the conveyance, not by some subsequently changed condition.

Implied Easement (by Prior Use)

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

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

The situation must be such that retaining the easement over the burdened (servient) parcel is “essential to the beneficial enjoyment of” or “reasonably necessary to” the benefited (dominant) parcel. This differs from strict necessity which is the requirement for a common law easement by necessity.

> "Generally, an implied easement arises upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate". In order to establish an easement by implication from pre-existing use upon severance of title, three elements must be present: (1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land retained. *85 S. MAIN ST., LLC v. CANNARILI*, 2008 NY Slip Op 51259 - NY: Supreme Court 2008 [internal citation intentionally omitted]
>
> A quasi-easement exists when a single owner uses one of his properties to benefit another, and is a "quasi" easement in the sense that because easements merge with title, a common owner cannot own an actual easement in his own property. ("If a single party owns two parcels of property and uses one to benefit the other, no actual easement is created since only one owner is involved. Because this use resembles an easement, however, it is referred to as a `quasi-easement.'").] FN 34 *SANDIE, LLC v. PLANTATIONS OWNERS ASSOCIATION, INC*., Del: Court of Chancery 2012.

[Implied] Easement by Necessity/ (Right of) Way of Necessity

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

> "The party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence that there was a unity and subsequent separation of title, and that at the time of severance an easement over the servient estate's property was absolutely necessary" … [internal quotation marks, brackets, emphasis and citations omitted]). An easement by necessity "rests not on a preexisting use, but on the need for the way for the beneficial use of the property after conveyance" … [internal quotation marks and citation omitted]). Significantly, "the necessity must exist in fact and not as a mere convenience" … and "must be indispensable to the reasonable use for the adjacent property" *Kheel v. Molinari*, 2018 NY Slip Op 7228 - NY: Appellate Div., 3rd Dept. 2018 [internal citations intentionally omitted.]

Easements by necessity cannot be obtained across land that was not part of the initial unified parcel except by application of a “Private Way of Necessity” statute such as exists in some states. Florida and Indiana have such statutes, as do a number of other states.

Common Law (Implied) Dedication

Dedications can be implied under common law.

> A party seeking to establish such an implied dedication … must show that (1) "[t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication" and (2) that the public has accepted the land as dedicated to a public use ["The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use."] *MATTER OF GLICK v. Harvey*, 25 NY 3d 1175 - NY: Court of Appeals 2015 [internal citations intentionally omitted.]

The effect of a common law dedication may be different in states where statutory dedications are construed to be dedications of the fee.

> [A] common law dedication does not result in fee ownership. *City of Chandler v. ARIZ. DEPT. OF TRANSP.*, 231 P. 3d 932 - Ariz: Court of Appeals, 2010.

[Implied] Easement by Estoppel

Implied easements by estoppel are recognized by the courts and are based on the principle of equity.

> An easement by estoppel may arise if an owner of land, through specific representations, leads another to reasonably believe a permanent, alienable interest in real property has been created, and if in reliance on such representations, the other makes permanent or valuable improvements on the land. To invoke the doctrine of estoppel, it must be shown that it would be inequitable to allow the owner to interrupt the enjoyment of the easement. *MJK BLDG. CORP. v. FAYLAND REALTY INC.*, 2016 NY Slip Op 32741 - NY: Supreme Court 2016.
>
> [B]ecause the parties purchased with the knowledge and expectation of an easement, an easement by estoppel was created. *Garson v. TARMY*, 2016 NY Slip Op 32248 - NY: Supreme Court 2016.
>
> An easement by estoppel is based upon the principles of equitable estoppel. The essential elements of equitable estoppel are:
>
> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are

> otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.
> *Gosney v. Glenn*, 163 SW 3d 894 - Ky: Court of Appeals 2005 [Internal citations intentionally omitted]

In California, what might otherwise be considered easements by estoppel are called equitable easements.

> To justify the creation of an equitable easement, three factors must be present: First, the easement seeker must use and improve property innocently—" `[t]hat is, his or her encroachment must not be willful or negligent.'" (Id. at p. 1009.) A court "`should consider the parties' conduct to determine who is responsible for the dispute.'" (Ibid.) Second, the easement opponent will not suffer irreparable harm by its creation. Third, the hardship of denying the easement "`"must be greatly disproportionate to the hardship"' "of allowing it. (Ibid.) *White v. PIMLOTT*, Cal: Court of Appeal, 1st Appellate Dist., 1st Div. 2015.

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

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

Prescriptive Easements (Easements by Prescription)

> To establish a prescriptive easement, plaintiffs must establish by clear and convincing evidence that the use of the turnaround was "`adverse, open and notorious, continuous and uninterrupted for the prescriptive period'" of 10 years. … To establish an easement by prescription, plaintiffs must establish by clear and convincing evidence possession that was hostile and under a claim of right; actual; open and notorious; and continuous for the required period. *Mau v. Schusler*, 124 AD 3d 1292 - NY: Appellate Div., 4th Dept. 2015 [internal citations intentionally omitted.]

A prescriptive easement is the easement equivalent adverse possession. Prescriptive easements – in the same manner as adverse possession – cannot be gained when the servient estate is a governmental entity.

Prescriptive Easements versus Adverse Possession

While Adverse Possession matures into an *ownership* right after the statutory period of open, notorious, exclusive, adverse and continuous possession of the real estate of

another, a prescriptive easement will result in the acquisition of a limited, non-possessory interest, not ownership, in the servient estate.

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

> The elements of a claim for an easement by prescription are similar to those of a claim for adverse possession, except that demonstration of exclusivity is not essential to a claim for easement by prescription. *Mau v. Schusler*, 124 AD 3d 1292 - NY: Appellate Div., 4th Dept. 2015.

The Indiana Supreme Court stated that the same elements apply to prescriptive easements as to adverse possession "…*except for those differences required by the differences between fee interests and easements."*