

Western Regional Survey Conference

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A. Introduction

Easements are important in land ownership since they allow the owner to exercise some rights outside the parcel's boundaries. Likewise they allow external parties to enjoy some use of the property as well as provide services to the property. Without some form of easement, it would almost be impossible for an owner to fully enjoy their property¹.

Surveyors sometimes include new easements when parcels are created; they often must locate existing easements when resurveying a property. The former is generally easier than the latter. Researching easements that are not directly referenced in a property description can be a challenge. That's where Title Companies excel, since they specifically research public records to identify property encumbrances and breaks in the title chain. For an ALTA-NSPS survey, the client is responsible for providing the title search information², alleviating the surveyor of some of the more onerous research.

This session and paper are an overall general easements introduction covering terminology, types, creation, and termination. Surveyors normally are not involved in determining whether an easement has been terminated, nor even if one is valid. But understanding how they can end, or not end, completes the overview.

There are some easement concepts and characteristics that are uniform across jurisdictions. But there are others which differ so generalizations can be problematic. Court citations and statutory excerpts are included to show differences or emphasize particular concepts.

B. Basic Terminology

1. Characteristics

Definition³

easement

An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)...

Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land.

An easement is a right to limited use of another's land. It is a non-possessory interest because the easement holder does not own the land. The holder is limited to a specific use(s) and cannot realize profit from the use.

An easement has a *benefit* and a *burden*, Figure 1.

Benefit -The right(s) granted to easement holder. The benefit can be assigned to a property (dominant estate) or a person.

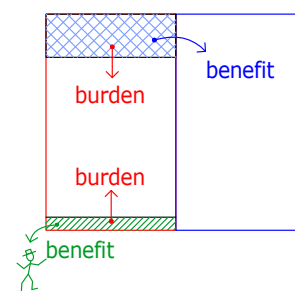


Figure 1: Benefit and Burden

¹Unless one decides to live off the grid.

²Although if they don't, that just means the surveyor has to do enough of it to properly execute the survey,

³Definitions are from *Black's Law Dictionary*, 9th Edition, West Publishing Company, 2009.

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Burden - The obligation imposed on the owner of the land subject to the easement. Usually in the form of a restriction or encumbrance on the land.

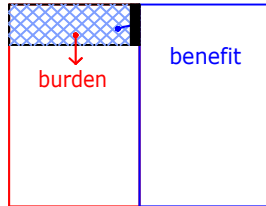


Figure 2: Interrupting Enjoyment

In general, the burdened party (servient estate) cannot do anything to interfere with the enjoyment of the easement. For instance, if an easement granted the dominant estate the right to drive over a certain portion of the burdened property, then a wall cannot be constructed to prevent the enjoyment of that right, Figure 2.

The servient estate cannot revoke an easement as long as terms of the easement are not violated.

An easement may be affirmative or negative.

An affirmative easement grants a right of use in a servient estate.

A negative easement prevents the servient estate owner from doing some act on his her land.

Most easements are affirmative. While not as numerous, negative easements include wind and solar access and conservation reserve easements.

2. License; Lease

An easement is similar to, but different from, licenses and leases.

license

1. A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit à prendre) that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game

lease

1. A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent. The lease term can be for life, for a fixed period, or for a period terminable at will.

A license is personal to the user and generally cannot be transferred to a third party. A license can be revoked by the granting party.

A lease grants a possessory interest in the land of another but for a fixed time period. The lessor may revoke the lease if the lessee violates its terms. A lease requires the lessee recompense the lessor.

C. Easement Classification

While there are many reasons for an easement and different types, they all fall into one of two classes based on whom is assigned the benefit.

1. Appurtenant easement

The benefit is assigned to, and runs with, a parcel of land. When the land is sold, the easement goes with it. The easement cannot be conveyed separately from the dominant estate.

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Benefit and burden are associated with properties not individuals, that is, dominant estate and servient estate.

Example

Parcels A and B share a common driveway over Parcel A, Figure 3.

benefited property - Parcel B is the dominant estate.

Burdened property - Parcel A is the servient estate

If Parcel B is conveyed, new owner has the right to enjoy the easement.

The benefit runs with the land.

If Parcel A is conveyed, new owner is subject to the burden of the easement.

Parcel B owner cannot convey his easement (by sale, gift, grant, or otherwise) separately to another party (eg, utility company).

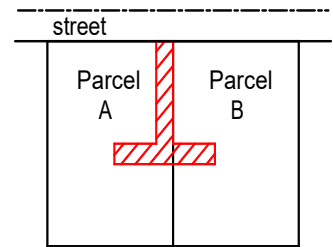


Figure 3: Shared driveway

2. Easement in gross

The benefit is assigned to an entity, not a property. There is no dominant estate but there still is a servient estate. Because the easement belongs to an entity, and not attached to land, it may be conveyed to a third party. The beneficiary may not even be a property owner, let alone have land adjacent to the burdened property.

Example:

Lot 12 is a waterfront property on a navigable lake. A friend of the lot owner is an avid kayaker. The lot owner gives his friend an easement across the northerly 10 feet of Lot 12 so the friend can carry his kayak to and from the Lake, Figure 4.

Lot 12 is a servient estate, but there is no dominant estate because the easement benefit is not assigned to a parcel.

The kayaker is free to convey his easement to another party; the servient estate cannot prevent the easement transfer as long as it is for the same purpose.

Because Lot 12 is the servient estate, subsequent owners are also subject to the easement.

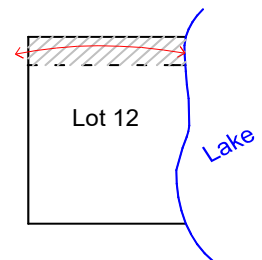


Figure 4: Easement in gross

3. Appurtenant or in Gross?

Whether an easement is appurtenant or in gross depends mainly on its nature and intent of the parties involved in its creation.

Because an appurtenant easement is attached to a dominant estate, the estate's description should either include an augmenting clause identifying the easement and its intended use, or be shown on the plat if part of a subdivision. If the servient estate is described by metes and bounds, the easement and its purpose should be included as a qualifying clause.

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Since an easement in gross belongs to an entity, it will not appear in a dominant estate's description. It may or may not appear in the servient estate's description depending how and when the easement was created. An example of this is a utility easement. The beneficiary is a utility company and is not attached to a dominant estate. The servient estate's description may or may not identify the easement. A utility company may acquire an easement corridor across a number of properties and record the corridor description, including identification of the burdened properties. But unless an affected property owner re-records their deed, there will be no mention of the easement in the servient estate's description¹.

"Easements are presumed appurtenant unless there is clear evidence to the contrary."

Cushman v. Davis, 80 Cal. App.3d 731, 145 Cal. Rptr. 791 (1978).

D. Easement Types

There are various methods by which easements can be created depending on use, beneficiary(ies), voluntary/involuntary burden, purpose, etc.

1. Express Grant (or Reservation)

Common method used in written descriptions. The easement is granted in writing by the owner of the servient estate. It can be granted to another or reserved out as part of a conveyance. Since it is part of a conveyance and a conveyance is subject to the Statute of Frauds, so is the creation of the easement.

2. Dedication

Similar to express grant except it is created by inclusion on a recorded plat, shown graphically with supportive text. This process can be used to grant easement to public, private parties, or corporations. May also include more restricted easements (as to who can enjoy) in the form of utility easements, drainage easements, sight easements, etc. Figure 5 is part of a subdivision plat with easement dedications.

A plat can show a mix of existing and newly created easements.

When a public dedication is made on a subdivision plat, some jurisdictions require a dedication certificate or statement signed by the owner indicating the intent. Likewise, a local government official must accept the dedication on behalf of the public as part of the plat approval process.

That's not universal. In Arizona:

ARS 11-822. Subdivision approval; platting regulations; violation; classification; easement vesting

C. Approval of a plat shall not be deemed to constitute or effect an acceptance by the county for designation of any street, highway, bicycle facility or other way or open space shown on the plat into the county maintenance system except for hiking and equestrian trails that are constructed and maintained by the county.

Acceptance must occur within one year of the dedications conforming to the plat and meeting the county board's written specifications.

¹These are some of the things a Title Insurance Company searches for in the public record.

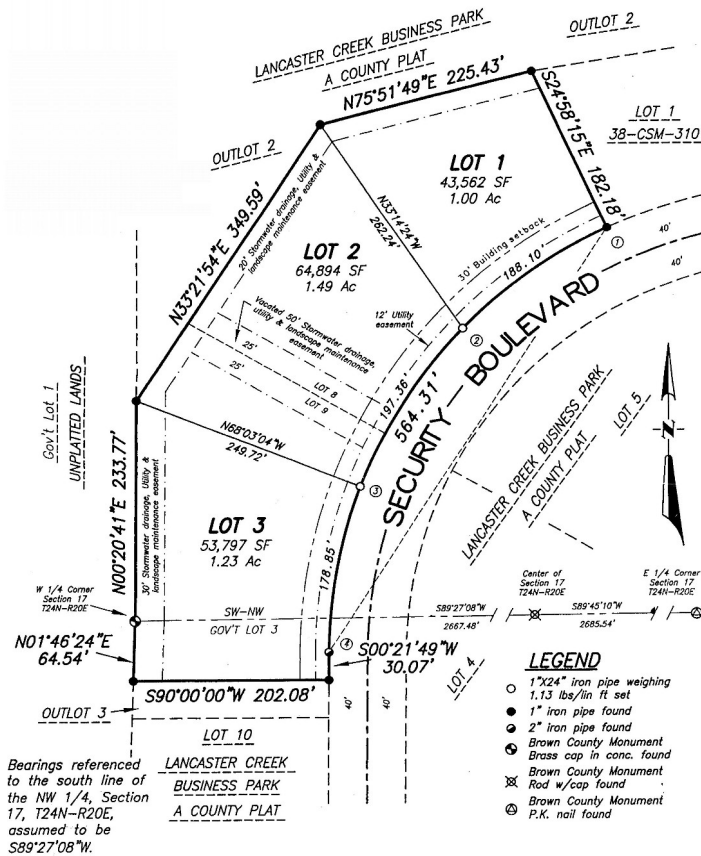


Figure 5: Plat Dedications

In most jurisdictions, platted street dedications convey limited rights to the public with the underlying fee belonging to the adjoining lots. Here again Arizona differs somewhat:

ARS 11-822. Subdivision approval; platting regulations; violation; classification; easement vesting

E. On recording of a plat, the fee of the streets, alleys, avenues, highways, easements, parks and other parcels of ground reserved to the use of the public vests in trust in the county for the uses and to the extent depicted on the plat, including ingress and egress easements depicted on the plat. On annexation by any city or town the fee automatically vests in the city or town.

A platted public dedication in Arizona passes fee simple to the public. Interesting that “easement” is included since an easement, by definition, only conveys limited rights.

In California, depending on the dedication type and purpose, it may pass as a fee or limited use. For either type, the owner’s Offer of Dedications must state whether the particular dedication is in fee or as an easement (Cal Gov’t Code § Sec6644(c)(1)).

The nature of a plat dedication, fee or easement, is defined in statute and, as shown here, can vary from state to state.

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3. By Necessity

Used primarily to alleviate land-locked parcels created by land divisions.

“Necessity for such easement arises from a presumption that, when a grantor conveys property, absent a clear indication to the contrary, the grantor is presumed to have intended to have reserved unto himself, or to have conveyed to his grantees, a means of access to the property in question, so that the land may be beneficially utilized.”

Herrera v. Roman Catholic Church, 819 P. 2d 264 - NM: Court of Appeals 1991

“Under the common law, where land is sold that has no outlet, the vendor by implication of the law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property.”

Bickel v. Hansen, 819 P. 2d 957 - Ariz: Court of Appeals, 2nd Div., Dept. B 1991

Example:

Adjacent Lots 1 and 2 are in the same subdivision, Figure 6.

Lot 2 is divided into two parcels: a new Parcel A, and the remainder, Parcel B. There is no written record of an access easement for Parcel A, Figure 7. Lot 1 has access onto Oak Street, Lot 2 onto Elm Street.

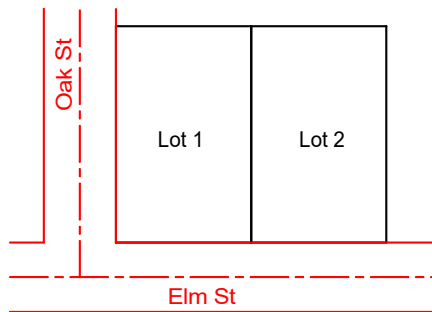


Figure 6: Two Adjacent Lots

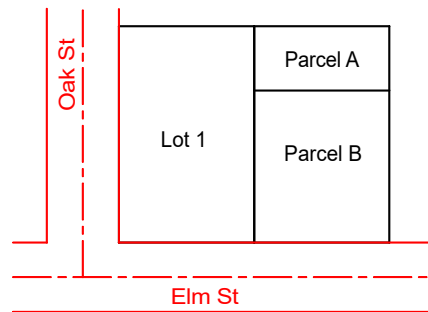


Figure 7: Landlocked Parcel

As a result of the subdivision Parcel A is land-locked without public street access.

Parcel A could gain an easement by necessity over Parcel B.

Why not an easement over Lot 1, particularly if access to Oak Street would be shorter or more conducive than one across Parcel B?

Because Lot 1 did not create the condition requiring an easement by necessity. The parent parcel must provide for the situation created so Parcel A would have the right to cross Parcel B for street access.

“Thus, to establish an easement by necessity, the proponent must show: (1) unity of title, indicating that the dominant and servient estates were owned as a single unit prior to the separation of such tracts, *Brooks v. Tanner*, 101 N.M. 203, 680 P.2d 343 (1984); (2) that the dominant estate has been severed from the servient tract, thereby curtailing access of the owner of the dominant estate to and from a public roadway; and (3) that a reasonable necessity existed for such right of way at the time the

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dominant parcel was severed from the servient tract. *Amoco Prod. Co. v. Sims; Otero v. Pacheco*
Herrera v. Roman Catholic Church, 819 P. 2d 264 - NM: Court of Appeals 1991

An easement by necessity might not be permanent.

“[a] way of necessity will continue as long as the necessity exists and until another lawful way has been acquired.”

Niedfeldt v. Evans, 272 Wis. 362, 364, 75 N.W.2d 307 (1956).

4. Prescription

A prescriptive easement is created through long standing use of another's land without express permission. It's sorta kinda like adverse possession, except not quite. But it is just as confusing.

Simple example:

A parcel is bounded on the north by a public street and on the south by a navigable river.

Along the eastern edge of the property is an unimproved lane with a small beach on the river. For more than 20 years people, without the parcel owner's permission, have driven on the lane to the river to fish, swim, or skim stones, Figure 8.

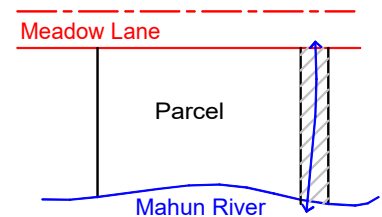


Figure 8: Prescriptive Easement

Prescription is related to adverse possession and shares many of the same requirements. Adverse possession time periods and specific conditions can vary considerably state-to-state which affects prescription. Time periods, right of entry requirement, payment of taxes, protected parties, etc, are statutorily defined in most states.

The primary difference between the two doctrines is that an adverse possession claim is for ownership while a prescription is only for use: the underlying fee still belongs to the servient estate..

Depending on jurisdiction, exclusivity may or may not be a requirement. In adverse possession, exclusive use means only a single party is exercising the use¹; it is not shared with anyone else. In the example of Figure 8, multiple entities can be using the access simultaneously.

Requirements differ:

“A right-of-way by prescription is established by open, notorious, adverse use thereof for a period of twenty years. Once the adverse use is established for the twenty-year period, the burden of showing that it was not adverse is upon the owner of the servient estate.

Richards v. Pines Ranch, Inc., 559 P. 2d 948 - Utah: Supreme Court 1977

“A party claiming an easement by prescription " must establish that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and [that] the use was hostile to the title of the true owner.””

Paxson v. Glovitz, 203 Ariz. 63, ¶ 22, 50 P.3d 420, 424 (App.2002)

In California, where tax payment is a condition of adverse possession:

¹The possessor can change during the required time period through tacking.

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“A prescriptive easement does not require payment of taxes; someone claiming a prescriptive easement must show payment of taxes only in the rare instance the easement has been separately assessed.”

Mehdizadeh v. Mincer, 46 Cal. App. 4th 1296 - Cal: Court of Appeal, 2nd Appellate Dist., 3rd Div. 1996

In addition, some states, like Wisconsin, define in statute:

“The mere use of a way over unenclosed land is presumed to be permissive and not adverse. ”

Wis Stat §893.28

A prescriptive easement *may* exist for the Figure 8 example, depending on which state it’s in.

5. Implied

An implied easement is not created by written document but from an action which leads to the belief that one was intended.

Example:

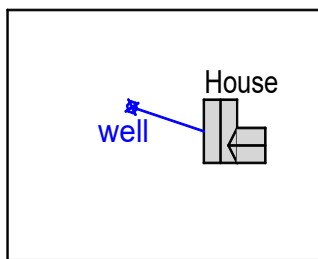


Figure 9: Before Division

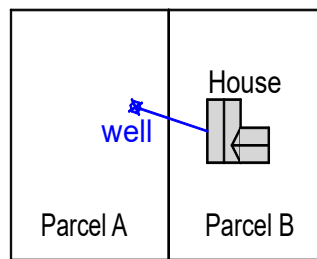


Figure 10: After Division

An owner has a parcel on which is a house and connected well, Figure 9. She creates and conveys a westerly portion, Parcel A, and retains the remainder. The house and well are on different parcels, Figure 10, and a reservation clause for well access was not included in Parcel A’s description.

Although an easement to use and maintain the well was not expressly created by deed, Parcel B may have an easement to it by implication. Because it is not written, a court would need to determine if the easement is necessary for the beneficial enjoyment of Parcel B. It would also consider if there were another economically viable alternative in which case an implied easement would not be awarded.

“Furthermore, an implied easement can only be made in connection with a conveyance; that is, an implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment.”

Koestel v. Buena Vista Public Service Corp., 676 P. 2d 6 - Ariz: Court of Appeals, 2nd Div. 1984

Not all state courts recognize easements created by implication:

Some states do recognize this theory, but Wisconsin has always followed the strict rule as to easements. Here it is held that easements in the land of another, with the exception of rights of way by necessity, can only be created by grant or prescription.

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Tarman v. Birchbauer, 257 Wis. 1 - Wis: Supreme Court 1950

Isn't an implied easement the same as an easement by necessity? That would seem to be the case for Parcel B in Figure 10.

"Although a way of necessity is sometimes confused with an easement arising, on severance of title, from a pre-existing use, there is a definite distinction between them, mainly because a way of necessity does not rest on a pre-existing use but on the need for a way across the granted or reserved premises. A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. ..."

17A American Jurisprudence, section 58, p. 668

With an implied easement, the use was already established; an easement by necessity creates the conditions for a new use, i.e. ingress and egress. See? That's why we leave it to the courts to decide.

6. Condemnation

Easements can be (forcibly) obtained by authorities having the power of condemnation. Governments have the power of *Eminent Domain* which is based on an authority acting on behalf and for the good of the public. While originally limited to government and its representative agencies, condemnation authorities have expanded to include (under specific conditions) public utility corporations, railroad corporations, housing authority, and more. Eminent domain is in State statutes describing the process and identifying quasi-public entities also having the power.

A typical example of an easement by condemnation is a public road which must cross land where the owner does not want to grant an easement. If it can be shown that the particular location is necessary then the needed easement can be acquired by the government.

Condemnation is not just taking some one's property or specific property rights. Eminent domain and protection of property rights is in Fifth Amendment of the US Constitution. State constitutions include similar language to Article I, Section 13, of Wisconsin's Constitution:

"The property of no person shall be taken for public use without just compensation."

The property owner must be provided something of value in return for his/her loss. What constitutes "just compensation" can be quite complex and involved and itself as controversial as the condemnation. Also muddying the waters lately is the definition of "public use" as condemnation has seen limited use for commercial purposes. The justification being an economic benefit for the public in way of additional jobs and income.

E. Formal Easement Creation

1. Elements

Whether written or appearing on a map, formal easement creation should clearly express purpose, location, and beneficiary.

Purpose defines what the easement is for along with limitations on both burden and benefit.

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Location identifies where on the servient estate the easement can be enjoyed.

Beneficiary is who has right of enjoyment, either an entity or a property.

If any are not defined then application and interpretation may be guided by common law or a court may ultimately render a decision.

In order to grant an easement as part of a conveyance, the grantor must either have the rights to give or the easement must already run with the parcel.

Written requirements do not apply to easements created by involuntary methods (implication, necessity, etc), or plats for public dedications. These are created by common law or statute. Regardless, easement creation must include what, where, and for whom.

a. Purpose

Defines what the beneficiary may do, as well as what the burden is. If the easement grants the use of a walking path then the beneficiary would not be able to drive a vehicle on it. They may, however, physically smooth a path to make walking access easier. An electrical utility may need to periodically clear vegetation and perform maintenance which requires vehicle access.

“We have long recognized that, implied in every easement, unless otherwise stated, is the right of the dominant estate to do what is reasonably necessary to enjoy the easement.”

Garza v. American Transmission Co., 2017 WI 35 (April 13, 2017)

The servient estate still owns the underlying fee so may erect a fence with a gate, landscape, etc, as long as it does not obstruct or impede the use.

A formal easement may also include a temporal attribute based on a date or condition such as a temporary variation for construction. If so, the condition or time limit must be clearly identified, Figure 11.

Also a temporary limited easement for building removal including for such purpose the right to operate necessary equipment thereon, the right of ingress and egress, as long as required for such public purpose, including the right to preserve, protect, remove or plant thereon any vegetation that the highway authorities may deem desirable to prevent erosion of the soil. This easement is to terminate upon completion of construction of Project I.D. 1204-0642.

Figure 11: Temporary Easement

b. Location and Extent

The location and extent of an easement is as important as what it is for. If the physical location and limits of the easement are not stated, or are ambiguous, it may require court intervention to resolve conflicts. A court will try to determine the easement location and extent so that it is as fair to all parties as possible.

A number of courts hold, where the location of an easement has not been defined, that the servient estate should designate the location of the easement in the first instance.

Powell On Real Property, Richard R. Powell & Patrick J. Rohan,, § 34.12[2] n.19

Considering how difficult that can be, location and extent should be described as accurately as possible.

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c. Beneficiary

The beneficiary of an express (written) easement should be identified in its wording. The beneficiary(ies) of an unwritten easement is a result of actions creating the situation. An easement created by a subdivision plat graphically depicts location and extent, and identifies the purpose.

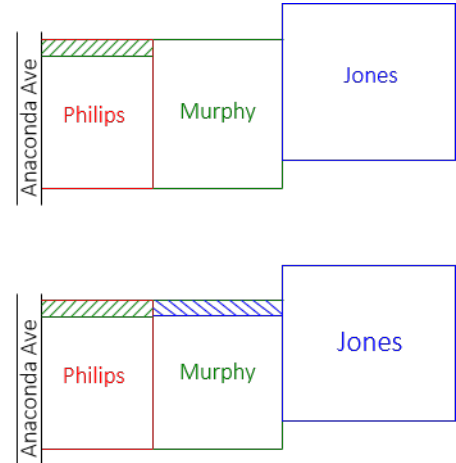
If the dominant estate is not included in the easement declaration, it could open the door to unintended consequences.

Phillips and Jones are adjoining owners.

In 2012, Phillips sells back part of his parcel to Murphy. Murphy's description includes "together with an ingress and egress easement across the northerly 50 feet" of Phillips land.

Phillips' attorney drafts and records an amended deed for Phillips which includes "...subject to an ingress and egress easement across the northerly 50 feet." without identifying Murphy's parcel.

In 2018 Jones subdivides his parcel and obtains an ingress and egress easement for the four lots from Murphy across Murphy's northerly 50 feet.



Does Jones have Anaconda Street access across Philip's northerly 50 ft?

2. Creation Instruments

There are a few instruments which can be used for easement creation and conveyance. In all cases, it should be clear:

- who are the burdened and benefited entities
- what rights (and limitations) are involved
- physical location and extent of those rights

Kind of sounds like deed requisites, doesn't it? Well, property rights are being conveyed from one party to another so the Statute of Frauds applies¹. Physical location and extent are the same as a description on a deed so it has the same interpretation issues and resolutions, warts and all.

Easement by dedication and express easement are both conveyed by legal written instrument. This ensures Statute of Frauds conformity and provides for constructive notice.

¹ For voluntary conveyances (or by condemnation). Unless ordered by a court, valid involuntary easements exist as unwritten rights, the highest element in the Rules of Construction.

Easements

a. Subdivision Plat

Locations can be depicted on a subdivision plat with the same level of accuracy and information as the parcel boundaries. Figure 12 shows two lots of a subdivision with a number of existing easements shown and some by reference to a record document. For example, along the west side of both lots is a “10' easement granted to Wisconsin Electric Power Company by CSM¹ #3144”.

A parcel’s description is with reference to the map on which the easements are shown so these become part of the parcel description as appropriate. For example, Lot 1 in Figure 12 a servient estate burdened by electric utility, stormwater ditch, and access easements shown on the map. Some of these are appurtenant easements while others are in gross. The lot is also a dominant estate as it has access rights on Tower Drive. The dominant estate(s) and their rights should be identified on the map or in related record(s).

Required public easement grants on a map, such as Tower Drive, are both appurtenant as they benefit and attach to parcels and in gross as they are dedicated to the government on behalf of the public.

b. Deed

Easements can be included as augmenting or qualifying clauses in a narrative (i.e., metes and bounds) description on a deed. An augmenting clause adds rights to a property. The property description in Figure 13 has an access easement added

Because it benefits the property, not an individual, this is an appurtenant easement. When the land is conveyed, the next owner can enjoy the access right.

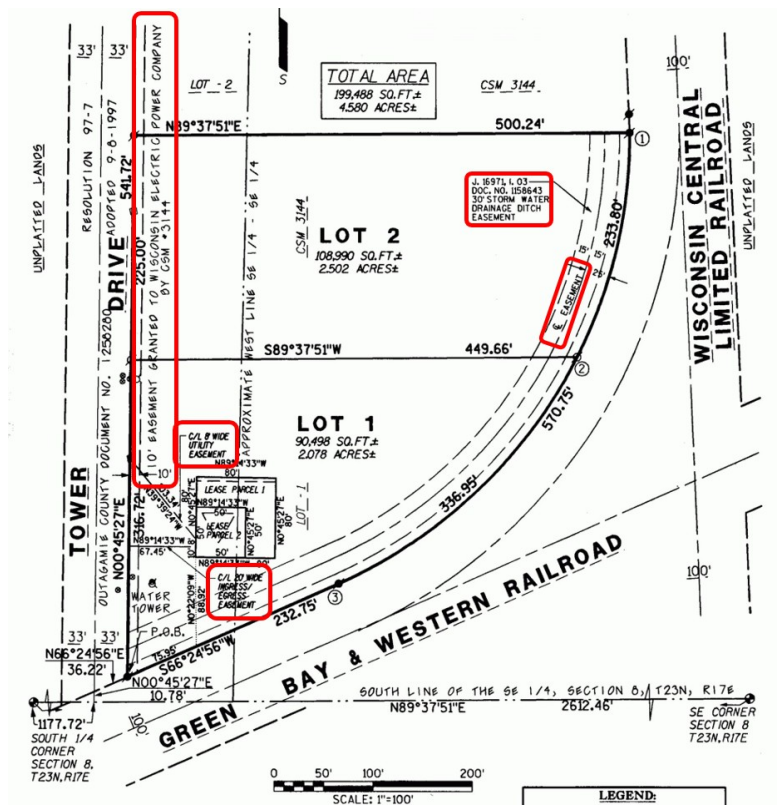


Figure 12: Subdivision with Easements

¹A CSM in Wisconsin is a *Certified Survey Map* which is similar to a minor subdivision in some jurisdictions.

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**The East 100 acres of the East 3/4ths of S1/2,
Section 22.**

All in Township 9 North, Range 10 East.

**Together with an easement over the West 2 rods of the W1/2 W1/2 NW1/4 of Section 26, and over
the South 2 rods of the West 2 rods of the SW1/4 SW1/4 of Section 23, Township 9 North, Range
10 East, for ingress and egress in and from the above described premises.**

Figure 13: Easement in Augmenting Clause

A qualifying clause removes rights from a property or otherwise restricts them. Words like “Subject to” or “reserving” are generally used to identify the easement either by description or reference to another document:

Subject to a 50 foot wide electric line easement as described in Vol 338 page 29, Badger County Register of Deeds.

An augmenting clause would be included in a dominant estate’s description; a qualifying clause in the servient estate’s.

c. Easement Document

An easement document is a deed that describes the easement location and its use. The grantee is the beneficiary, the grantor the servient estate. The grantor’s deed may or may not be identified (it should be) and the grantor’s deed may or may not identify the easement document.

The easement document must comply with the Statute of Frauds and meet a State’s deed requirements.

Due to the nature of easements, the easement document can be a bit more involved to correctly compose than a narrative property description. Depending on the easement purpose the document may include a lengthy list of conditions and restrictions. Figure 14 is an easement document for Wisconsin Power and Light. Note the allowed uses and the servient estate restrictions.

Being independent of a deed, when property is conveyed, the easement document is not modified to identify the new owners.

d. Strip Description

The description used on the deed in Figure 14 is a strip description. This is common with long narrow easements, such as utilities. It uses a narrative description of a reference line and extent is given as a width on each side of the reference line. The reference line does not have to be centrally located in the strip, and the extend on either side can change.

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Grantor(s) Robert J. Zimmerman and Helen Zimmerman, his wife

in consideration of One Dollar (\$1.00) and other good and valuable consideration to them paid by WISCONSIN POWER AND LIGHT COMPANY, a Wisconsin corporation, grantee, receipt of which is hereby acknowledged, does hereby grant, convey, and warrant unto said WISCONSIN POWER AND LIGHT COMPANY, its successors and assigns, the perpetual right and easement to erect and maintain a line of single pole structures and wires, including other appurtenances for the transmission of electrical current, and to permit the attachment thereto of electric or telephone wires owned by others, upon, over and across land owned by the grantor in the Town of Prairie du Chien, County of Crawford, State of Wisconsin, said easement to be 28 feet in width, lying 3 feet west of and 25 feet east of the reference line described as follows:

Commencing at a point in the north line of the NW 1/4 of the NW 1/4 of Section 15, T 7 N, R 6 W, 773 feet east of the northwest corner thereof; thence S 3° 34' E 35 feet; thence S 4° 17' E 1,799 feet; thence S 7° 51' W 50 feet to a point, said point being the point of beginning; thence continuing S 7° 51' W 434 feet to the grantors south property line and being through part of the SW 1/4 of the NW 1/4 of Section 15, T 7 N, R 6 W as recorded in the office of the Register of Deeds for Crawford County, Wisconsin, in Volume 178 of Deeds, page 317.

This easement supplements that certain easement recorded in the office of the Register of Deeds for Crawford County, Wisconsin, in Volume 158 of Easements, page 548.

TOGETHER with the right to enter upon said premises for the purpose of erecting such structures and stringing said wires, inspecting, and repairing or removing the same. The grantor agrees that no hay or grain stacks, buildings, mobile homes, trees, tanks, antennas, windmills or other structures shall be placed within above described easement strip; and that the grantee has the right to trim or remove such trees as may be located within above distances from the reference line, and other trees which, in the judgment of the grantee, may interfere with or endanger said electric line, and chemically treat from time to time the area within the boundaries of said easement for the purpose of controlling the growth of trees and shrubs growing within said boundaries, without additional compensation. The grantor further agrees that the elevation of the existing ground surface located within said easement strip will not in any way be altered more than one (1) foot without the prior written consent of the grantee. Said grantee, however, expressly agrees that it will pay a reasonable sum for damage to other property, including crops, that may be caused by its employees in building and repairing said structures and wires.

Said grantee shall not have the right to erect any fence or building on such land other than said line structures and wires, and the right is hereby expressly reserved to said grantor, his heirs or assigns, of every use and enjoyment of said land not inconsistent with the maintenance, operation, repair, and removal of such structures and wires, and the trimming and removal of such trees as aforesaid.

This agreement is binding upon heirs, successors, and assigns of the parties hereto.

WITNESS the hand S and seal S of the grantor S this 18th day of May, A.D. 1978.

In presence of:

Figure 14: Utility Easement Document

A strip description is actually a form of metes and bounds description. It can have the same ambiguous situations and interpretation issues as a metes and bounds description. The Rules of Construction, controlling/informative terms, and extrinsic evidence are used to help resolve conflicting terms. A major difference between a metes and bounds property description and an easement strip description is the former closes back on itself while the latter does not, Figure 15 and Figure 16

Closing back provides a mathematical check on distances and directions since error presence and overall effect can be determined.

With a long linear description, error effects are magnified as the description continues beyond the errors. Figure 17 shows the effect of slightly incorrect data for the first curve. The gray strip represents the correct location. Notice how the positions get progressively worse the further along the easement from the error.

Considering the length of some utility corridors, it is imperative the description writer include sufficient data for each course including appropriate control terms. An

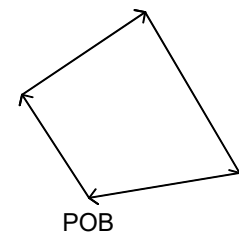


Figure 15: Property

Easements

easement constitutes an encumbrance on the servient estate so it is a good idea to know where on the estate it is. The error at the end of Figure 17 can be a pretty substantial position shift on a small parcel.

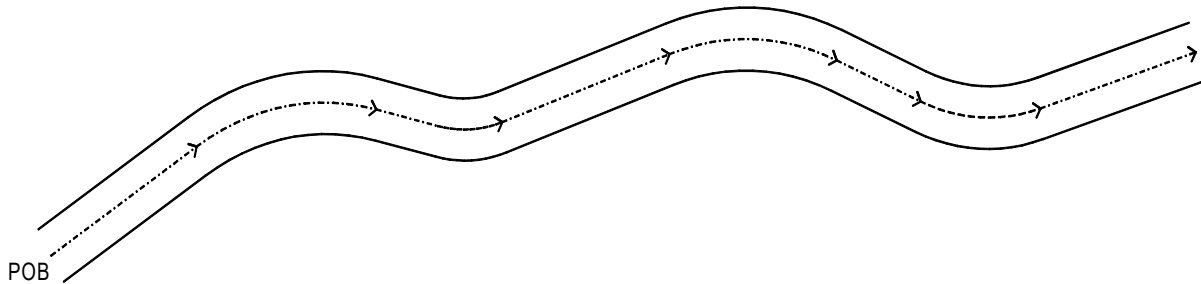


Figure 16: Strip

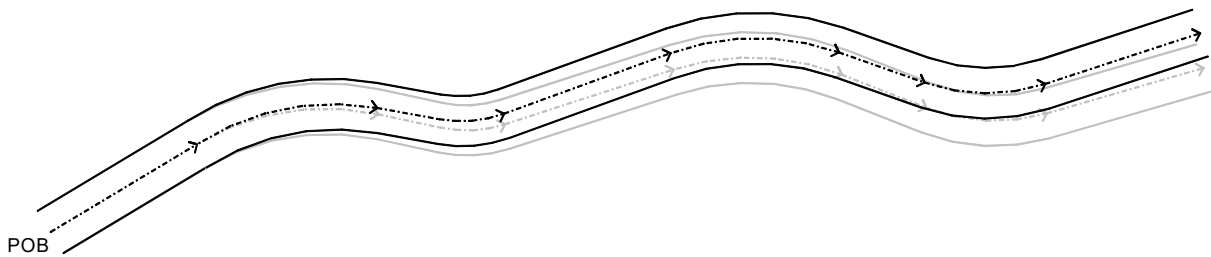


Figure 17: Description Error

F. Rights and Restrictions

1. Right of Enjoyment

Depending on the wording used to create the easement, its use may or may not be limited to the beneficiary. Problems arise when ambiguous terms are used to define rights:

“Subject to a 30 ft wide access easement along the westerly side...”

While intent may have been to allow movement in and out, the word “access” opens the scope of use. A number of court decisions opined that access includes those things which allow the beneficiary reasonable enjoyment; things like electricity, water, telephone, etc.

An appurtenant easement is attached to a dominant estate and cannot be separately conveyed to a different entity. It cannot be shared with a third party outside the dominant-servient estates relationship. Children of the dominant estate can inherit use of the easement as long as the additional dominant estates do not overburden the easement.

An easement in gross can be transferred by the beneficiary to another entity. Can the beneficiary share the easement with another? Inasmuch as it represents normal enjoyment, that should not be an issue. But can a

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half interest in the easement be sold to another? That's a good question, and may have to go back to the original wording.

Right of enjoyment cuts both ways: the servient estate cannot be prevented from using the underlying fee by unreasonable beneficiary use. Neither use can interfere with the other.

2. Non-Obstruction

The servient estate cannot interfere with beneficiary's easement use.

Example

Parcel A is a 30 acre farmette. The owner of Parcel A creates and conveys 5 acre Parcel B at the northeast corner of the farmette. The conveyance includes an access easement along the easterly edge of the farm, Figure 18(a).

Five years after the conveyance the farmette owner decides to raise a few horses. So he fences his property perimeter, including across both ends of the access easement, Figure 18(b).

This obstructs Parcel B's access since it is blocked.

After a lawsuit threat, Parcel A owner installs gates at both ends of the access. Is the obstruction removed? What if the gates have locks?

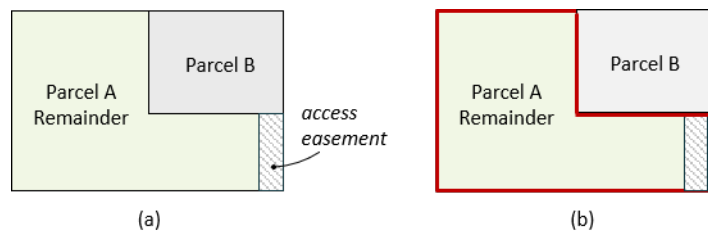


Figure 18: Obstruction Example

3. Overburdening

An easement is overburdened when use exceeds that expressed in the granting instrument or exceeds use reasonably anticipated by the parties at the time of creation.

Example 1

Residential Parcels A and B were created from the same parent. Parcel B was given an appurtenant easement for ingress/egress along the westerly side of Parcel A, Figure 19.

After a few years, the owner of Parcel B decided to turn his a home woodworking hobby into a business. As his business grew, obtaining material and shipping products required large truck access to his property. Eventually additional employees were hired and they used the easement to drive to and from work.

The original easement was to provide access for a residential lot and commercial use was probably not a reasonable anticipation. Supporting increased and heavier traffic for a commercial enterprise goes beyond the easement's intent and constitutes an overburden.

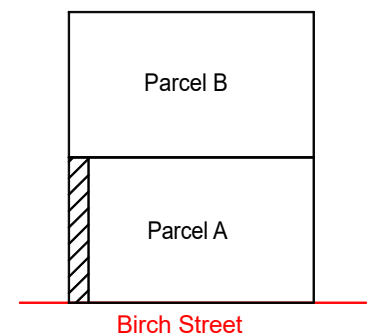


Figure 19: Overburden Ex 1

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Example 2

What if instead Parcel B owner decided to subdivide his parcel, Figure 20, creating a street which connects to the easement to provide Lot owners access to Birch Street? Since more parties would be using the easement, would that constitute an overburden?

Generally not. In most cases a parcel can be subdivided into smaller parts (if not in violation of other laws and ordinances) and that is a reasonable foreseen possibility when the appurtenant easement is created. Additional parties using the easement for residential access does not overburden it as long as the original easement were wide enough for the necessary road.

However, should the subdivider petition for and receive a land use change so the new parcels are commercial, then the use character of the easement may have changed and this could now constitute an overburden. It depends...

One could argue that if the Parcel B has been subdivided and sold off, it no longer exists and since it is gone, so is its appurtenant easement. Technically, that's not correct, since Parcel B lives on in its children. Just as a child parcel inherits its parent's senior-junior standing, each child inherits an interest in the parent's easement. As long as the use does not change.

It can get real messy real fast. What if the original appurtenant easement across Parcel A consisted of an unimproved lane just wide enough for a single vehicle to pass? Will that adequately support the four lots or can improvements be made to upgrade the access (eg, grading & paving) within the context of the original purpose? What about fire truck access? Is the new street in subdivided Parcel B limited to being a private street since there is no public access onto Birch Street?

Overburdening can also occur when a different use is added to the easement by the dominant estate. For example, if the owner of Parcel B wanted a telephone line installed, the telephone company could not run the line in through the existing appurtenant easement if it were strictly for ingress/egress. In this situation, it is similar to trespass (see next section).

Had the original easement purpose been stated as "for access purposes", then running in utility lines would not constitute an overburden. Just as in a property description, the word choice and their arrangement can alter the later interpretation of the intent. While the easement purpose can expressly detail allowable future uses to avoid these type of situations, trying to address them all isn't generally realistic.

4. Misuse/Trespass

Misuse or trespass is similar to overburdening in that the easement is used for a non-granted purpose. Misusing an easement can result in trespass - entry without permission. The actual distinction is best left to a court.

Example:

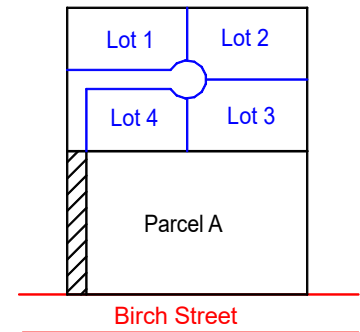


Figure 20: Overburden Ex 2

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Jones provided an appurtenant access easement to the Badger Gun Club (BGC), Figure 21. This was to allow BGC members to access the site for meetings and shooting events.

Abutting Jones and the BGC to the north is a large wooded parcel owned by Hart. Hart gave BGC members permission to hunt on his land during deer gun season. The members used the easement across Jones' land to the BGC parcel where they would park their cars, then go hunting on Hart's land.

Jones takes BGC to court contending that the members are using easement for an unintended purpose. BGC claims that once members are on its land, they can go hunting on Hart's land.

Is this an allowed use?

By its express terms, this easement unambiguously limits the Club's use of the easement such that it may be used only to access or to leave the Club's property. As such, use of the easement to access any other property is outside the grant of this easement.

Grygiel v. Monches Fish & Game Club, Inc., 787 NW 2d 6 - Wis: Supreme Court 2010

Misuse of an easement may be a legal basis for its discontinuance although courts tend to disfavor it. A common perspective in most misuse cases is:

"The courts appear to be in accord in considering that the mere use of an easement for an unauthorized purpose, or the misuse or excessive use thereof, is not sufficient to constitute an abandonment or forfeiture, the view being that an injunction is the proper and adequate remedy."
16 A.L.R (2d)

The judicial tendency is to resolve the situations by barring the misuse rather than terminating the easement.

5. Break in Chain of Title

What if an appurtenant easement, explicitly created by a written conveyance, is accidentally left off the deed of a later conveyance of the same property? Does the easement cease to exist because it is no longer in the public record (and no longer in the chain of title)?

It still exists because an easement runs with the servient estate and would require a legitimate termination action. Likewise an appurtenant easement is attached to and runs with a dominant estate. A defect in the public record would not cause an easement to automatically cease. A title insurer scours the public record to determine, among other things, if there are any unresolved easements that have dropped off the public record. Any such situations are identified and excluded from title insurance coverage.

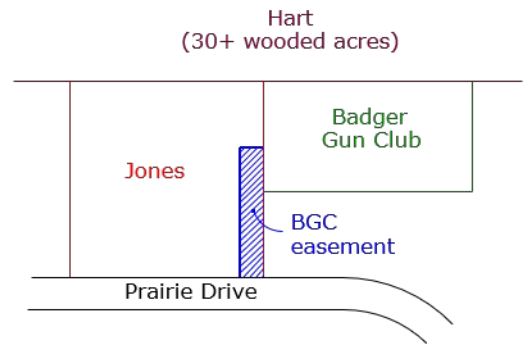


Figure 21: Misuse Example

6. Who is the Beneficiary?

Although it's one of the three elements for easement definition, it's not always apparent who the beneficiary is. Figure 22 is an example of a subdivision plat portion showing drainage easements along the lot lines¹. Besides the lines on the map, there is no other explanation or dedication certificate on the map.

Location, purpose, and servient estates are identified but who benefits? Are the easements appurtenant or in gross? What does "drainage" consist of? Without this information it's uncertain how the easements can be utilized or terminated.

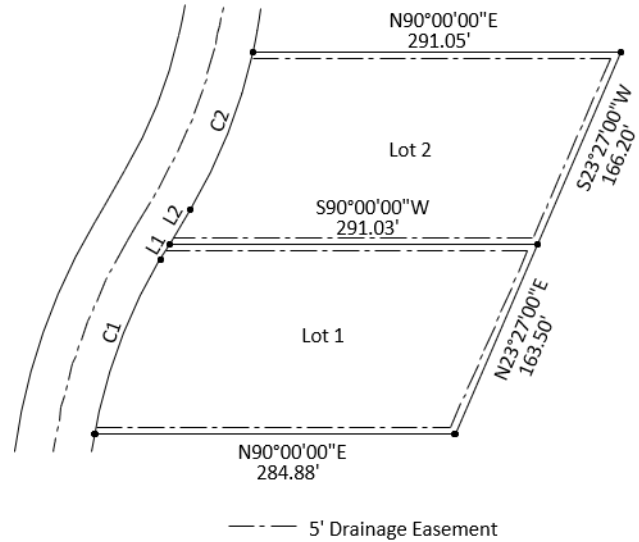


Figure 22: Subdivision Dedications

G. Easement Termination

Removing an easement can be more complex than creating it depending quite a bit on how or why the easement was created and if it is in gross or appurtenant.

The beneficiary may formally terminate an easement; the servient estate does not have the power to do so. Under some circumstances, the servient estate can initiate legal action to terminate an easement or sue for damages caused by the benefited party acting outside the easement's purpose or location. Sometimes it's not clear who the beneficiary is, either from the original creation or subsequent parcel divisions.

The remainder of this section summarizes the major termination processes and additional considerations for some.

1. Release

Generally, the beneficiary can release the easement. Figuring out who all the beneficiaries are may be a challenge. Who benefits from "...to a utility easement..."? What about all the Lot owners in a subdivision which uses a parent's appurtenant easement? All having any type of legal interest in an easement must release it for termination.

2. Necessity Cessation

An easement by necessity would terminate should the necessity cease to exist (this is not always as obvious to determine as it seems).

The easement by necessity only continues while the necessity exists.

Lichty v. Sickels, 149 Cal. App. 3d 696 - Cal: Court of Appeal, 4th Appellate Dist., 1st Div. 1983

Because it is no longer needed, it no longer exists.

¹This was a common practice in some areas of Wisconsin. Sometimes they were also labeled as *utility easements* although no specific utility was identified.

3. Condition Met

Easements may also be extinguished, or changed, based on meeting a condition (much like a conditional fee). This can be the case with temporary easements for construction purposes. During road construction, an easement may need to be larger to accommodate construction activities (stock piling, haul roads, etc) in addition to the road itself. Once construction is completed (condition met) then the easement would "shrink down" to the final form needed for the road.

There may be specific terms in the easement wording which release an easement based on meeting specific conditions.

4. Vacation

Vacation is a legal action on the part of the public to extinguish a public dedication. Vacation can originate with a request by affected owners who petition the public to release an easement. The public can elect to vacate a street that has not been improved or used. If a platted area is to be re-platted, usually the first public action is to vacate all public dedications in the area. Vacation does not affect non-public easements.

5. Abandonment

Abandonment involves, but is not solely defined by, non-use:

"The court determined that despite the fact the alternative route was more convenient, the owner of the dominant estate retained the right to use and enjoy an easement giving him access to another route. *Id.* The court reiterated that abandonment would only be found when there is an expression of an intent to abandon the easement. *Id.*"

Mueller v. Hoblyn, 887 P. 2d 500 - Wyo: Supreme Court 1994

Most courts refer to this definition of abandonment:

"As a general rule, an easement acquired by grant or reservation cannot be lost by mere nonuser for any length of time, no matter how great. The nonuser must be accompanied by an express or implied intention to abandon."

25 Am. Jur. Easements and Licenses, § 105, p. 509.

Generally, non-use of an easement does not constitute its abandonment. There must be some action on the part of the easement holder demonstrating unmistakable intent to abandon. The tendency is to hold private easements valid unless formally terminated by the benefited party while publicly held road easements can be terminated, under certain circumstances, by abandonment. If so, these conditions will be statutorily defined.

6. Single Owner of Servient & Dominant Estates

What if the same person owns the dominant and servient estates?

"(3) Civil Code section 811[6] provides that a servitude is extinguished "[b]y the vesting of the right to the servitude and the right to the servient tenement in the same person." [7] Section 805 provides: "A servitude thereon cannot be held by the owner of the servient tenement."

Zanelli v. McGrath, 166 Cal. App. 4th 615 - Cal: Court of Appeal, 1st Appellate Dist., 1st Div. 2008

In some jurisdictions, unless the lands were legally consolidated (ie, the two parcels become one) the easement persists, in dormancy, since either parcel could be conveyed separately from the other.

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“There once having been a unity of title, the right to a way of necessity may lie dormant through several transfers of title and yet pass with each transfer as appurtenant to the dominant estate and be exercised at any time.”

Bickel v. Hansen, 819 P. 2d 957 - Ariz: Court of Appeals, 2nd Div., Dept. B 1991

7. Reversion Rights

When an easement is terminated, the rights associated with it revert back to the servient estate. In most cases the servient estate is easy to identify if the easement was originally created by written document.

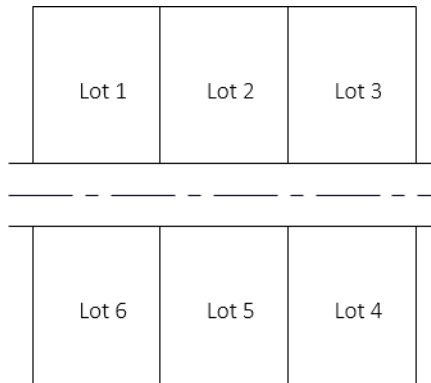


Figure 23: Subdivision With Street Dedication

Figure 23 shows subdivision with a street dedication as an easement. The dedication was accepted and plat recorded.

Over time each lot was sold by using the lot number and subdivision name in its description.

A few decades later after alternative access has been created for each lot, the city decides to vacate the street as it's no longer needed.

Who has reversion rights in the street?

Since it is an easement and less than a full fee, the underlying land and

interests were not conveyed to the public. The burden is removed from the servient estate.

The servient estate is not the original subdivision owner. State statutes and case law decisions hold that a Lot conveyance in a subdivision that abuts a street dedication also includes underlying interests to the street center line¹. If the street is vacated, then each abutting owner has reversionary rights to the center line, Figure 24.

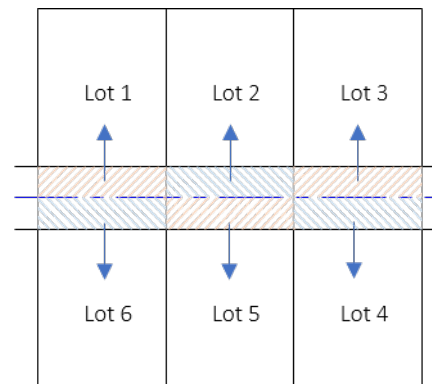


Figure 24: Reversionary Rights

H. Wrapping Up

1. Statute of Frauds

Creating an easement affects an owner's property rights, either limiting or adding to them - it's a form of rights exchange. The Statute of Frauds requires transfer of rights be by written document. Voluntary easement creation can be done with one of three written instruments:

- Plat
- Augmenting/qualifying deed clauses
- Easement document

¹*Neff v. Ernst*, 48 Cal. 2d 628 - Cal: Supreme Court 1957; *Town of Moorcroft v. Lang*, 779 P. 2d 1180 - Wyo: Supreme Court 1989

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Formal document must conform to State platting and or deed requirements.

2. Rules of Construction

An easement description is the same as a property description because they do the same thing: define the location and extent of rights conveyed. They both define boundaries so we use the same procedures to locate easements as we do locating property lines.

Written evidence is used together with physical evidence and parol and the Rules of Construction principles:

- Unwritten rights
- Senior rights
- Written intention
 - Survey
 - Monument
 - Distance and direction
 - Coordinates
 - Area

Just as there are unwritten rights in ownership, there are unwritten means of easement creation. These are generally the result of specific actions that create an easement or an easement need: prescription, necessity, and implication.

There are a few ways senior rights can affect easements, An easement description that overlaps a senior adjoiner cannot make it a dominant or servient estate. Overlapping easements that have contradictory uses may have to be sorted out by seniority, not just for the beneficiaries, but also for the servient estate.

Written intent should identify use, location, and beneficiary. The surveyor's primary concern the easement location, and he uses the same evidence collection and evaluation process as a property survey. There really isn't anything new here.

When surveying a property, the surveyor can only be responsible for re-establishing lines of documented easements. A surveyor can witness and map evidence of undocumented easements, but their validity, extent, and impact on the property are determined by a court.

3. And so...

The presentation and paper are not intended to be a definitive treatment of easements. The intent was to examine generally what easements are, estates involved, rights and restrictions, creation and termination. Statutes and court decisions were included to reinforce the principles and also to make the surveyor aware that there are differences across jurisdictions,

An excellent text that goes into greater detail and nuances is *Easements Relating to Land Surveying and Title Examination*, by Donald Wilson, John Wiley & Sons. Although it cites court decisions from many States It does not go into depth for each.