LandThink #2
October 16, 2008
What is an easement?

By Curtis Seltzer

Easements are commonly found in real estate. In general terms, an easement is an arrangement whereby a non-owner of a property has the legal right either to use that property or limit its use in some specified, special way.

The non-owner who holds the easement can be another parcel of land, public agency, utility, individual, business entity or a non-profit organization like a land trust.

A positive or affirmative easement would allow me to use a stream on my neighbor's property for watering my livestock at a certain spot. A negative or restrictive easement held by my neighbor would prevent me from erecting a line of wind turbines that would ruin his view.

Easements are legally binding agreements, but they may or may not be recorded.

A recorded easement will be found in the courthouse records, and it's often incorporated into the deed.

Sellers should inform buyers of any non-recorded easement. A buyer should include language in his purchase contract that requires the seller to disclose the existence of non-recorded easements and other non-recorded documents.

Country property often involves an access easement for ingress and egress. Property A is located 1,000 feet from a state-maintained road. Property A is sold to you with an access easement to cross Property B, which lies between your boundary and the road.

Property A is the "dominant tenement" because it has the right to use the land of another; Property B is the "servient tenement," because it is burdened with this use.

Sometimes these terms will be written as dominant and servient estates.

Access easements do not convey ownership. Property A doesn't own the land under its access road over B. Property A can't possess the road, just use it.

Property A would typically have the legal obligation to maintain its access road over B, though the two owners may decide to share the costs.

Five problems can arise with access easements.

The first comes up when the road on the ground doesn't follow the location of the road in the deed. Property B, the servient tenement where the road runs, may insist that A use the specified location. A may or may not have established the right to use the road where it is, which is likely to have been jiggered around over the years to avoid wet spots and steep slopes. State law and a court would have to make this call.

The second problem arises when the road is too narrow for Property A's needs.

A ten-foot-wide easement might have been fine for wagons, horses and even pickup trucks, but it is too narrow for big trucks used for logging, concrete and building supplies. Where a deed does not specific a width, a court would likely find the agreed-to width is that which was established when the easement came into existence. If that's not possible to estimate, the court would establish what a "reasonable width" might have been or, as a last option, what a "reasonable width" is today.

The third problem occurs when Property A uses its access easement in a way that B objects to. This often involves big trucks, lots of traffic and noise. Again, a court would have to determine the definition of "reasonable use" by A over B's property, but, generally speaking, courts would go along with these types of uses. Property A does not have a right to use B's property in a way that damages it.

I ran into a situation some years ago where Property A had an access easement over about a dozen other properties, none of which wanted A to run logging trucks over the road through their lands. While A had a perfect right to do so, the threat of a protracted legal squabble with a dozen well-heeled Bs was enough to discourage a buyer.

I own two wooded properties where I am the servient tenement (B) for an access road that dominant tenements (As) have a right to use. I've had no problem, but I know other Bs who find constant annoyance in this arrangement. I also know some As who have to squabble with their Bs, who do things like erect locked gates and excavate water bars that prohibit use. When a B (servient tenement) blocks legal access to A, he is committing trespass upon A's easement and can be sued.

A fourth problem that can come up with access is the use of a floating easement.

This document does not specify a fixed location for the road or limit the width of the right of way. The holder of a floater may be able to claim access anywhere and however he chooses.

The final problem arises when the dominant tenement (A) increases the burden of the access easement on the servient tenement (B) by dividing his property. State laws differ on this issue. Usually, the dominant tenement will be allowed to increase the burden some, say three or four lots instead of one, but not by, say, 20.

An easement -- with both a dominant and servient party that runs with the land -- is called an "easement appurtenant." It exists between adjacent parcels of land owned by different parties. The easement appurtenant is held by the dominant tenement and conveys with that deed forever. In addition to an access easement, other possible easements appurtenant in the country are ones that allow for a non-owner to cross a bridge, use surface water or other resources, or tap into a spring.

An easement appurtenant is not a lease. An easement gives its owner the right to use the land of another, but not to occupy it or possess it as a lease does. A lease has a termination date while easements tend not to have termination dates.

An easement also differs from a license. When I give permission to A to use my property (B), it's a license. I can end it any time. It does not run with the lands of either A or B. It is not perpetual. When either property is sold, the license ends. When either of the two parties who entered into the license dies, it ends. If someone is using your land under vague or disputed terms, you might start down the road to clarification by sending that party a letter granting them a license. It is then up to the other party to establish that they have an easement, not a license.

A personal covenant, which gives another party some right or denies some right in the land of another, is more of a contract than an easement when it doesn't run with the land of either party. If I agree to let you pick apples from my trees, it's a covenant, license or contract, not an easement or a lease.

An easement is not a reservation of profit in another's land or its resources.

A profit is a right to take something off the land, like oil.

An easement in gross provides for an individual right to use another's land. The right is held by a person or business entity, and does not attach to another parcel of land like an easement appurtenant. Utility and pipeline easements are easements in gross. They allow their holders to come onto the servient tenement to install and maintain their lines.
A landowner can agree to become a servient tenement by granting, donating or selling an easement to a dominant tenement. The easement granted, donated or sold allows the dominant tenement to use the servient tenement in some way, as in the case of an access easement.
With a negative or restrictive easement, the dominant tenement receives some property right in the servient tenement which the servient tenement can no longer use.
In a conservation easement, for example, the servient tenement may relinquish the right to develop residences on farmland to a land trust, which has the authority to prohibit the servient tenement from ever engaging in such development.
A grant is like a deed in that it will be described and conveyed. Most easements that are granted are written and recorded, but not all. Grants are agreed to by both the dominant and servient tenements.

Four types of easements are not agreed to: easement by necessity, easement by implication, easement by prescription and easement by condemnation.
1. An easement by necessity prevents certain properties from being landlocked, that is, cut off from a public road. If I were to sell 50 acres at the back of my 100-acre tract and provided no access easement to the buyer, he could get a court to grant him an access easement for a road over me by necessity so that he could reach his 50 acres. The buyer in this example should be aware that the court may not award him the location for a right of way that he wants. Easement by necessity may also be used to gain access to a water source in certain circumstances.
To gain an easement by necessity, the landlocked party must prove that his parcel was once part of the parcel that he wants to cross. In Virginia, at least, property can be landlocked if this cannot be proved in court.
2. An easement by implication is the idea that the owner of a property has a right to a use on the property of another that was "reasonably necessary" for the use of the property when it was conveyed. To establish this type of easement over another's property, the use should have been continuous and obvious. This can be a slippery idea, and whether or not a court agrees depends on the facts in each case. An easement by implication might be granted to an owner who has used a river ford on another's land for many years as have his predecessors in title.
3. An easement by prescription, or prescriptive use, is a hostile take-over of a use. It is an implied easement that is established when the party seeking an easement over the property of another proves that he and/or previous owners of his property have used the other's property continuously for the minimum number of years specified under state law, openly and without the owner's permission. This claim to use the property of another must be adverse, that is, with his knowledge and acquiescence of a use that runs against his own rights in his property.
The party claiming a prescriptive use need not have paid property taxes on the land on which the use is asserted. Some states may require that a prescriptive use be exclusive,

that is, limited to one party; others permit more than one party to claim and benefit from a hostile easement.
If the party claiming prescriptive use was given permission to use the property, prescriptive easement will not be awarded. And a prescriptive easement will not be awarded if the servient tenement -- which would bear the easement -- has a mortgage.
The party claiming prescriptive use must meet every standard that state law has established. Prescriptive use amounts to a private taking of a right in another's property, but not a taking of ownership.
Access roads are often the subject of prescriptive-easement disputes. Another example occurs when one landowner fences in land that he doesn't own. This is called an encroachment. In certain circumstances, the encroachment may be awarded as a prescriptive easement to the party who did the encroaching.
In California, a landowner who has enjoyed a scenic view over another's property can establish his right to that view by prescription. In most states, scenic views cannot be established by prescription.
If you, a buyer, are told by a seller or his real-estate agent that he has a prescriptive easement to access his property, be aware that the seller may have no legal access at all. A prescriptive easement comes into existence only upon a court's ruling. The opinion of the seller and his agent amount to an opinion, nothing more.
4. Public authority (or a private organization with a statutory right) can acquire the use of private land against the owner's wishes through an easement by condemnation. A township can build a new road over private land by acquiring an easement through eminent domain. Electric utilities can do the same. Owners are supposed to be given fair compensation for their loss.

A conservation easement (CEs) is either donated or sold to a public agency or land-trust organization. Its purpose is to protect or conserve some statutorily recognized environmental value, such as habitat for endangered species, open space, wetlands or aesthetics. Most CEs are being used to limit or prohibit development on undeveloped land and farms.
A CE donor gets a wonderful package of local, state, federal and estate tax benefits for conveying a limitation on some right in his property in perpetuity. A CE's financial value is determined by appraisal.
A property burdened by a CE is worth less -- sometimes far less -- than it's worth free of the restriction. A CE, for example, might prohibit residential development on a 200-acre farm surrounded by suburban housing or prohibit timber cutting on land with valuable timber.

A seller should give a buyer notice that the seller's property carries an easement restricting its use. Recordation amounts to notice. With an unrecorded easement, a buyer who has no notice and could not have observed the use may be able to free the property of its easement, depending on what kind it is.
Easements can be ended. The holder of an easement can record a release, which gives up his right voluntarily. The dominant and servient tenements can negotiate a termination. An easement can end when the purpose for which it was established ends or the term of the easement expires.

An easement can also be abandoned by its holder or terminated by merger when the dominant tenement buys the servient tenement, or vice versa.
If the dominant tenement changes its usage of an easement beyond what was provided, the servient tenement may be able to have the easement voided altogether. If, for instance, A has an access easement to use a road over B and A decides to rezone his property from agriculture to commercial to allow for a 24-hour ATV racecourse, B should be able to terminate the access easement for A's new use.

Other kinds of easements that show up in the country include:
recreational easements, whereby a state gives property-tax breaks to owners who agree to allow use of their property by the public for activities such as hiking, horseback riding, hunting, fishing and biking.
solar easements, which prevent one landowner from blocking sunlight coming on to an adjacent landowner.
utility easements for electric-power and telephone lines, and fuel pipelines. These also involve the holder's right to maintain their lines.
access to beaches or surface waters
historic-preservation easement, which grants the right of preserving the interior and/or exterior of a historic building, usually in return for tax deductions. This easement prevents the owner of the property from changing the building's appearance.

It's the buyer's obligation to understand the nature of any easement that exists in relation to land being purchased. The seller may be the single source of information on non-recorded easements. A title search will turn up all recorded easements, but not unrecorded ones.
It's worth talking to a local real-estate lawyer about these matters before submitting a purchase offer.
Easements are a complicated and thorny area of the law. The facts of a specific case generally drive a court's decision. If you find yourself with an ambiguous or contentious easement, hire the best local real-estate lawyer you can afford.