

Examining and Insuring Appurtenant Easements

Description

What is this interest called an appurtenant easement, and why do we care? Taking the questions in reverse order, we care, first, because our title insurance customers care (*20 acres of pristine wilderness in the middle of nowhere is a lot more valuable if the owner can get to the road to somewhere*), and, second, because our claims departments care when we get it wrong. An easement is defined^[1] as:

A right of use over the property of another. . . .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).

An appurtenance is defined^[2] as:

An accessory or adjunct that is attached and incidental to something that has greater importance or value. As applied to real property, an object attached to or a right to be used with land as an incidental benefit but which is necessary to the complete use and enjoyment of the property.

Put these two concepts together and you have an appurtenant easement. Every examiner has seen these. Most commonly they are found in a property description preceded by the words “together with.” The benefited land is called the “dominant estate” and the burdened land is called the “servient estate.”

Easements may be evidenced in various ways. For the purposes of title insurance, two are paramount. These two are by express written grant and by court order. A court order is necessary in some cases because it reduces a set of facts that proves an easement by implication, a prescriptive easement, an easement by estoppel or an easement of necessity into words, and once recorded in the land records, the order or decree expressly provides notice to the world of their existence.

There are also multiple ways to terminate an easement. For the purposes of title insurance, two are paramount. These two are by express release and by court order. A court order is necessary in some cases for the same reasons required above. The order or decree reduces a set of facts that proves the easement has been extinguished by cessation of purpose, abandonment, change in condition, merger of the dominant and servient estates, acts of the servient owner adverse to the easement or lack of notice to an owner of the servient estate into words that, when added to the land records by the recordation of the order or decree, provides notice to the world of the proper conclusion to draw from the existence of those facts.

A few caveats are useful here (directed as much to the underwriters as the examiners). Mere non-use will not amount to abandonment in the absences of acts or circumstances clearly manifesting an intention to abandon the right. *Lindsey v. Clark*, 193 Va. 522 (1952). Again, facts outside the land records are necessary to reach the conclusion, and examiners, underwriters and future purchasers will not have knowledge of those facts. A merger of title may be evident from the land records, but it must be remembered in cases involving multiple properties and multiple owners, a complete merger will not

occur until every parcel is back in common ownership. Another Virginia case makes clear that the reference to a conveyance “subject to” an easement after it was extinguished was a nullity, rather than a new express conveyance. *Davis v. Henning*, 250 Va. 271 (1995) The conveyance language must be read carefully when an easement is conveyed after facts suggesting its termination.

How is the examiner to find these easements during the examination? The most obvious clue will be the inclusion within the property description of a “together with” easement paragraph. If chained back to the creation of the easement, the examination will disclose the express grant. Running the owners in the chain of title in the grantee index, as well as the grantor index, will reveal an express easement not (or not yet) added to the property description. If the owner, or their predecessor in title is a party to a reciprocal easement agreement (however it may have been named at the time), the examiner should note the benefits, as well as the burdens. The appearance of an easement on a plat is a clue to the examiner to look for an express easement, but recent Supreme Court decisions^[3] have made it clear that depiction on a plat is not the equivalent of an express grant, even if the strip designated “easement” runs to the edge of the property being examined. Among the deeds discovered during the adversing process may be a statement that the conveyance is “subject to” an easement benefiting the property in question. These same decisions make clear that “subject to” is not granting language, but again, the examiner has a clue to go hunting for the express grant.

What are the title insurance concerns with easements? They are similar to those that arise in every fee simple interest insured. Did the right owner grant the interest? Are there liens against the interest with priority? Are there other users, and is their use exclusive or non-exclusive? In the example of a long standing express easement, did those uses arise before, at, or after the creation of the interest to be insured?

How does this affect the examiner? The most obvious answer is that if an appurtenant easement is discovered during the examination of a dominant parcel, another examination will be required regarding the servient parcel. If the examiner has a prior policy, and the easement does not appear on that prior policy, don’t assume it was searched. If a reciprocal easement agreement appears as an exception on that prior policy, don’t assume the easement area was searched. If the easement appears in Schedule A of the policy, the examiner might assume it was searched, as long as they remain aware of the risks of assuming. Don’t assume all exceptions for the easement area were reported on the prior policy. I have noted a variation in practices in the industry; some folks run the servient estate to the current date; others stop the examination of the servient parcel upon creation. Some customers may want to know if there are easements impacting their easement; others may inquire as to the status of the real estate taxes^[4] on the servient parcel; and others question everything. Not only should you be guided by your customer expectations BUT ALSO the insuring provisions of the policy^[5] which insures against loss from “any defect in or lien or encumbrance on the Title.”

[1] <http://legal-dictionary.thefreedictionary.com/easement>

[2] <http://legal-dictionary.thefreedictionary.com/appurtenance>

[3] See *Burdette v. Brush Mountain Estates*, 278 Va. 286 (2009) and *Beach v. Turim*, 287 Va. 223 (2014). These cases were discussed in an earlier issue of the Examiner. Sacks, *Nothing Easy About Insuring Easements*, VLTA EXAMINER, Vol. 21, No. 1, 12. As the author noted at that time “Don’t confuse standards for insuring easements with standards for taking exception to easements.” The bar is much lower when identifying matters which might give rise to a claim.

[4] Notwithstanding the language in Â§ 58.1-3967 that â??nothing herein shall be construed to affect any easement recorded prior to the date of sale;â?• the lien of real estate taxes is â??prior to any other lien or encumbrance,â?• Â§ 58.1-3340, and with service on the proper parties, a judicial sale may be made free and clear of those subordinate interests.

[5] Covered Risk 2 of the 2006 ownerâ??s policy form (emphasis added)



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Category

1. Uncategorized

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