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# Setting the Law Straight on Terminating Easements

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At the present time, finding real estate property to buy has been compared to finding the Loch Ness Monster or Bigfoot. Buyers of land have become more creative and aggressive than ever before in trying to develop property for an anxious public. This search has resulted in a demand to discover options to remove restrictions on property—including easements. This article examines the different means to extinguish an easement.

An easement is "an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles…protection… against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land and (d) is capable of creation by conveyance."1

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 license.2

Easements can be created in four ways: express grant in writing, implication from prior use, implication from necessity, and prescription. When the dominant estate is transferred, the easement passes to the subsequent owner through appurtenance clauses even if there is no specific mention of the easement in the deed.

There are eight ways to terminate an easement: abandonment, merger, end of necessity, demolition, recording act, condemnation, adverse possession, and release.

**Abandonment**

Although an easement can arise in a variety of ways, any easement can be extinguished by the easement's abandonment by the owner of the dominant estate. In order to prove abandonment, it is necessary to establish not only an intention by the dominant estate holder to abandon the rights to the easement, but also some overt act or failure to act, which carries the implication that the owner neither claims nor retains any interest in the easement. However, the act must unequivocally reference the intent to abandon the easement and clearly demonstrate that the dominant estate owner is permanently relinquishing all right to the easement and not merely deserting it for some temporary period.3 Mere nonuse is not enough to constitute abandonment, even if for a long period of time.

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**Merger**

An easement once granted may be ended by merger. Under the merger doctrine, an easement will terminate when the dominant and servient estates become vested in one person. To satisfy this, there must be a complete unity of the dominant and servient estates, meaning that one person or entity owns the entire plot of land. When only a portion of the servient or dominant estate is acquired, there is no complete unity of title. Therefore, the easement still stands.4 In other words, in order for such an abolition of the easement to take place, the entire burdened property and the entire dominant property must come under the ownership of the same entity.5

Many easements find their origins in situations where one owner owned the entirety of a piece of property that the owner subsequently decided to subdivide into various lots.6 The overall development plan may or may not have included the specific plan to burden some lots with the obligation to provide various easements for the benefit of other lots, such as the common easement of passage required for a landlocked inner lot. Just as such a grant in writing is only one means of creating an easement, merger—when various lots burdened by easements and benefiting from the easements come under common ownership—is one of the most important means for destroying an easement as it allows a developer a financial means to extinguish an easement as long as a willing seller is available.

**End of Necessity**

Easements created by necessity terminate when the necessity comes to an end.7 The most common example of easement by necessity will illustrate the difference. Imagine a landowner has a fairly substantial piece of acreage and decides to subdivide it into lots and one of the lots the owner creates is completely landlocked inside the other lots. As the owner sells off those lots, the sale creates an easement of access on those lots enabling the owner of the landlocked lot to access the highway. This is an easement of necessity. Even when no agreement exists as to the right of access, the owner requiring access has a right to it. But when a new means of access becomes available and the original necessity perishes, the landowner loses its right of access.

**Demolition**

An easement in a building or land will terminate when that burdened building or land is completely destroyed. This doctrine arises out of 357 East Seventy-Sixth St. Corp. v. Knickerbocker Ice,8 a case involving a party wall.

In Knickerbocker, parties were adjacent property owners. Plaintiff demolished the building on its property except for the party wall. Plaintiff intended to use the party wall for support of a garage. Before plaintiff built the garage, defendant demolished its building and the entire party wall. Consequently, plaintiff built an independent wall on its own premises, even though the party wall was suitable for continued use. The court found that when plaintiff demolished its building, it put an end to the necessity of support on its side of the wall. Defendant put a definitive end to the easement

when it demolished its entire building and put an end to the necessity of the support on its side of the wall. By demolishing his structure, he demolished his need for the easement and therefore, in effect, demolished the easement.

**Recording Act**

A good faith purchaser for value is not bound by an easement which is not properly recorded prior to a purchase of the encumbered property.9 The easement does not terminate notwithstanding a failure to record the easement if the good-faith purchaser had actual knowledge and notice of any facts which would lead a reasonably prudent purchaser to make inquiries.10

**Abuse**

Abusing the rights one has under an easement is not a ground for extinguishing the easement. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment which would extinguish the easement.11 That is not to say that the servient estate owner is without a remedy, but destruction of the easement is not that remedy.

**Condemnation**

A government can create an easement by way of condemnation. However, Strnad v. Brudnicki notes that a governmental agency can also abolish an easement by condemning it.12 This could take a number of forms, depending on the facts of the situation. One such set of facts would be when the government has condemned a plot of land, which plot is subject to an easement in favor of the adjoining property owner, and the government removes the easement by condemning it.

**Adverse Possession**

Adverse possession may extinguish an easement. For example, in Spiegel v. Ferraro,13 the Court of Appeals discussed a situation in which there was a particular driveway that was the subject of an easement. However, the burdened estate owner fenced off that driveway and patrolled it with guard dogs.14 The court found that after 10 years of that fencing in, the land was now free of the burden of the easement.

The July 2008 Amendments to Article 5 of the Real Property Actions and Proceedings Law (RPAPL), which made sweeping changes to the adverse possession law, made no mention of easements. This author personally believes this was a mere oversight; however, as a result, the new law does not apply at this time, making all adverse possession of easement cases subject to the old law.

**Release**

An easement once granted may be ended by a release in writing stating that the owner of the easement gives away all rights and remedies including the ability to sue under the easement.15

**Conclusion**

Because the termination of an easement is one of the most misunderstood areas of real estate law, the number of cases on the subject has spiked. With every inch of New York City and other parts of New York being sought for fertile building ground, easement problems have reached a new plateau and too many misinformed professionals and their clients have been taking actions without any basis in law. Thanks to the courts and the title industry's vast wisdom in advising the real estate industry, many potential problems have been prevented or litigated justly during the real estate boom. Many other easements have gone unprotected and lost. Either way, never before has our land provided real estate professionals with so much excitement.

ENDNOTES:

1. Restatement of Prop. §450 (1944).

2. 68 N.Y.2d 963, 965, 503 N.E.2d 99, 100, 510 N.Y.S.2d 543, 544 (1986).

3. Gerbig v. Zumpano, 7 N.Y.2d 327, 165 N.E.2d 178, 197 N.Y.S.2d 161 (1960).

4. Will v. Gates, 89 N.Y.2d 778, 784, 680 N.E.2d 1197, 1200, 685 N.Y.S.2d 900, 903 (1997).

5. Id.

6. Will v. Gates, 89 N.Y.2d 778, 680 N.E.2d 1197, 685 N.Y.S.2d 900 (1997).

7. The law requires that such an implied easement be actually necessary for the use and enjoyment of the property, not merely convenient to the owner of the dominant estate. Paine v. Chandler, 134 N. Y. 385 (1892).

8. 263 N.Y. 63, 188 N.E. 158 (1933).

9. Webster v. Ragona, 704 A.D.3d 850, 776 N.Y.S.2d 347 (2004).

10. As the Court of Appeals stated in Simone v. Heidelberg, an encumbrance must be "record[ed] in the servient chain [of title]…so as to impose notice on subsequent purchasers of the servient land." Simone v. Heidelberg, 9 N.Y.3d 177, 877 N.E.2d 1288, 847 N.Y.S.2d 511 (2007).

11. Gerbig v. Zumpano, 7 N.Y.2d 327, 165 N.E.2d 178, 197 N.Y.S.2d 161 (1960).

12. 200 A.D.2d 735, 606 N.Y.S. 913 (2009), accord Zutt v. State, 99 A.D.3d 85, 949 N.Y.S.2d 402 (2d Dept. 2012).

13. 73 N.Y.2d 622, 543 N.Y.S.2d 15 (1989).

14. Perhaps the most extreme example ever of satisfying the "hostility" requirement of adverse possession.

15. Andrews v. Cohen, 221 N.Y. 148, 116 N.E. 862 (1917).

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