

Easements . . . Ugh!

INSURING EASEMENTS AND COMMON ISSUES

MLTA 2021 Winter Education Series

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CHICAGO TITLE®



AGENDA

Easements Overview

Importance of Easements

Insuring Easements

Easements as shown on the Commitment

Terminating/Extinguishing Easements

Common Issues relating to Easements

Questions?

EASEMENTS

Simply put, an **easement** is an interest in real estate that gives one person the right to use another's land for a specified purpose.

Examples:

Private road

Shared driveway

Utility easement

Drainage easement

Walk/bike path

Beach access

Railroad

Spotting Easements:

Survey

GIS/Aerial Maps

Plat/Subdivision/Condo

Commitment/policy

Deed or Instrument

In person



EASEMENTS:

Importance of Easements

Owner's and Loan Policy insure that the property has **legal access**, therefore, in order to provide that coverage, we will review the title search and maps to determine if the property abuts a public road or that there is a recorded document establishing an easement for access.

2006 ALTA Owner's and 2006 ALTA Loan Policy:

Covered Risk No. 4: No right of access to and from the Land

These provisions refer to legal access, meaning, the Insured has the legal right to enter the Land.

Legal access does not mean that the Insured has actual physical access to the land (2013 Homeowner's Policy does extend coverage to actual access)

2013 ALTA Homeowner's Policy:

Covered Risk No. 11: You do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right.

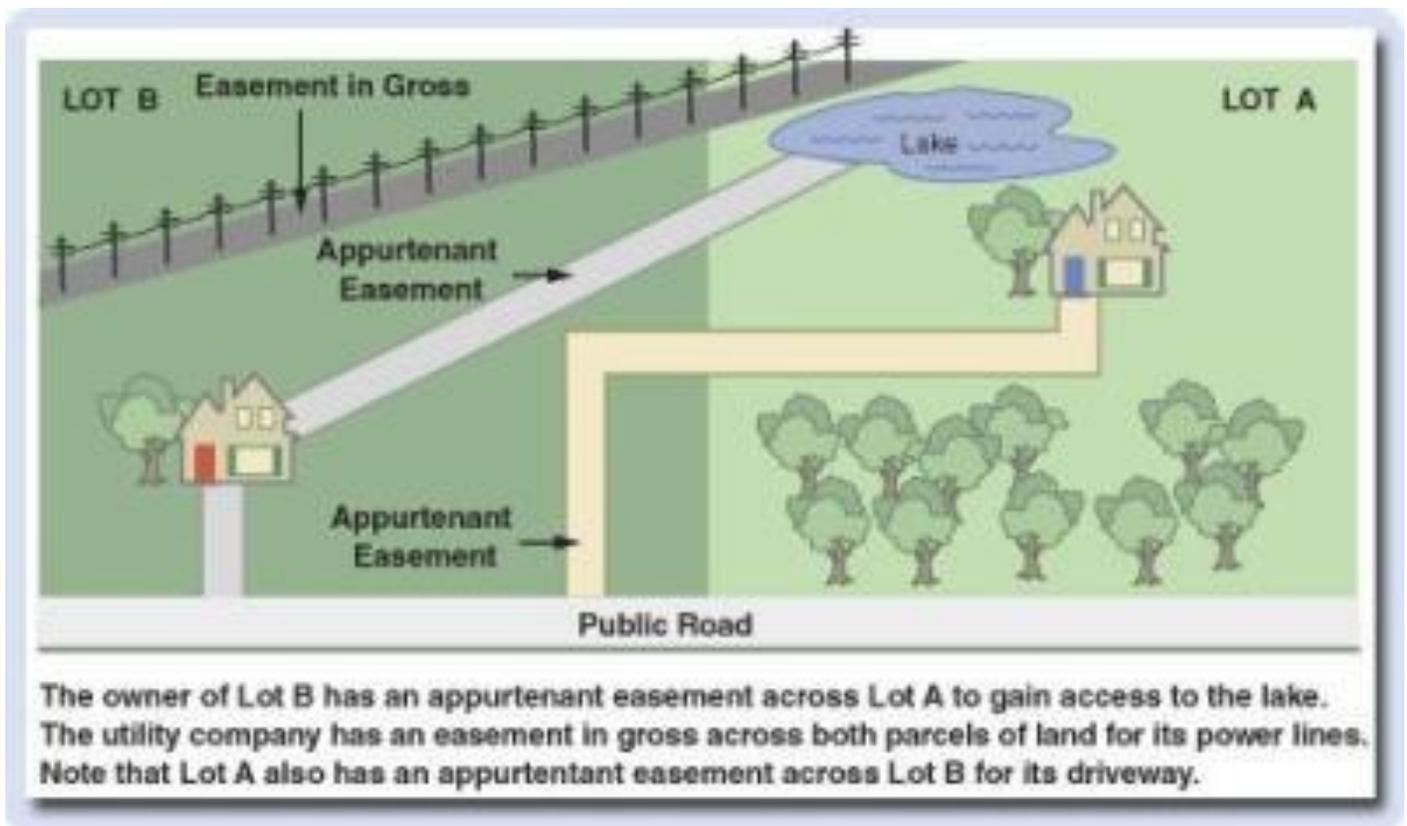
If the land abuts a public right of way, the Insured will have legal access; the fact that the public right of way has a guard rail running across the front of the property and the Insured cannot drive a car onto the land does not invalidate the Insured's right of legal access.

It is evidence of the lack of actual physical access.

EASEMENTS

There are two basic types of easements: (1) **Easement Appurtenant**, and (2) **Easement in Gross**

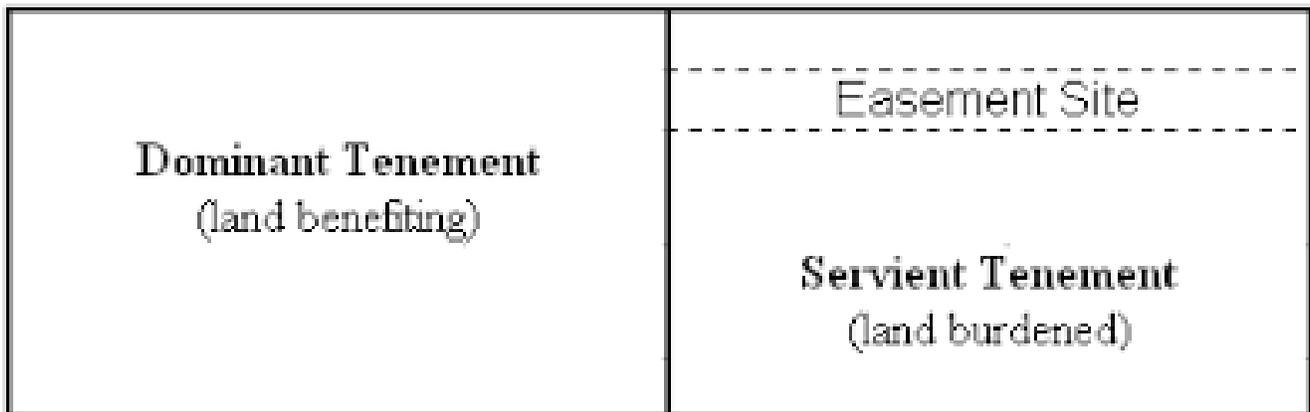
1. An **easement appurtenant** serves or benefits one parcel of land by passing over or burdening another.
2. An **easement in gross** is granted for the benefit of a particular person/entity.



EASEMENT APPURTENANT

The land served or benefitted by an easement appurtenant is called the “**dominant**” tenement.

The land burdened by an easement appurtenant is called the “**servient**” tenement.



An easement appurtenant that is validly created “runs with the land” meaning it passes with every subsequent conveyance of the dominant parcel.

Example of an easement appurtenant is a private driveway.

An easement appurtenant may be created by a separate instrument (i.e. an Easement Agreement) or be included in a deed transferring the dominant/benefitted parcel

EASEMENTS IN GROSS:

GOVERNMENT & UTILITY EASEMENTS

An **easement in gross** is personal in nature; it attaches a particular right to an individual or entity rather than to the property itself.

As opposed to easement appurtenant, there is no dominant parcel.

Most commonly associated with utility companies, municipalities, and railroads.

Could also be used to grant persons the right to use a path through the neighbor's property to reach lake, beach, or hunting area.

For example, an easement in gross would be used to grant a utility company the right to enter the property to run necessary cabling

- The utility company would have the right to access the property to maintain their equipment and easement area
- The property owner would be prohibited from blocking the easement area or building on that area

An easement in gross may be assignable if commercial in nature like an easement for pipelines, telephone lines, or railroads.

Michigan Land Title Standard 14.2

EASEMENTS:

Insuring Easements

As previously discuss, the policies provide a Covered Risk for “No right of access to and from the Land”.

Note the policy speaks in terms of a *right* of access

This does not have to be via a specific means, nor even the most convenient means.

The insured must only have SOME legal right of access, and to cure an access deficiency under the policy, we need only supply SOME legal right of access (i.e. confirm the property abuts a public road)

If the insured wants or needs specific access insured, affirmative insurance of a specific easement is required.

If you are relying upon an easement as a basis for insuring access, it must be “insurable”, even if you don’t specifically insure it on Schedule A

Let’s talk about how to insure an easement

EASEMENTS:

Insuring Easements

The ownership of an appurtenant easement (one which runs with the title to the land which it benefits) can be insured in a title policy that also insures the ownership of the land it benefits.

STEP ONE

Search/examine the chain of title of the servient tenement (burdened property) back to the time when the easement was created in order to confirm it was “validly” created.

“Validly” created: all the owners of record of the servient tenement executed the instrument that created the easement (the deed, grant of easement, or easement agreement)

Also determine what outstanding interests, if any, could be superior to the easement (i.e., liens, such as mortgages or taxes, and other parties whose interests could impact on the ability of the easement holder to use the easement area).

Make sure the easement was not released or terminated by merger (discussed more later on).

STEP TWO

Examine the instrument itself; check to see if the parties as disclosed by the search have effectively bound their interests, and that the instrument expresses sufficient intent to render the easement appurtenant to the dominant tenement (vague or non-locatable easements give rise to much litigation). Check if the easement is exclusive or non-exclusive.

EASEMENTS:

Insuring Easements

STEP THREE

All real estate taxes, special assessments, mortgages or other encumbrances that are liens on the servient estate **at the date of the recording of the easement** should be shown as exceptions, if not previously released

Include the easement description in the Insured Legal Description on Schedule A

Show an exception for the terms and conditions of the document that created the Insured Easement

Show an exception for the rights of others in that easement; unless stated otherwise, an easement is presumed to be nonexclusive

INSURING A NEWLY CREATED EASEMENT

Determine who needs to grant the easement and execute the instrument, and include a requirement to record an instrument creating the easement

The easement could be created in the deed to a purchaser as a reservation or a grant of easement; it may also be created by an easement agreement between the parties

If there is an open mortgage on the burdened parcel, require that the mortgagee consents to the easement; important in case of a foreclosure

Review taxes and assessments to make sure no tax forfeiture

EASEMENTS:

Showing Easements on Commitment

Raise an exception for any easement which burdens the land, that is found in the Public Records (i.e. recorded document), depicted on a survey, or shown on a plat map.

Ex. “Right(s) of Way and/or Easement(s) and rights incidental thereto, as granted to Consumers Energy in a document recorded as recording no. Liber 1, Page 1.”

If an easement benefits the land, and it is “insurable”, then it may included in the Legal Description on Schedule A – *“together with an easement . . .”*

However, Schedule B must include (1) an exception for the terms and conditions of the creating instrument, and (2) an exception for the rights of others in the easement described in Schedule A

Ex. “Terms, conditions and provisions of a certain easement agreement recorded in Liber 1, Page 1.”

Ex. “Rights of others in and to the use of the easement(s) as described in Schedule A.”

EASEMENTS:

Ways to Terminate

Mutual Agreement: Between all parties that benefit from the easement at the time of release

Expiration of Term/Purpose: If an easement states an expiration date, or contains a provision that it will terminate upon the occurrence of a future event or when the purpose ends

Merger: When title to dominant estate and servient estate become held by same party (even if the property is split again, easement is extinguished)

Foreclosure: Foreclosure of an interest that has priority over the easement (i.e., mortgage, lien, land contract, etc.). Interests recorded before the easement

Abandonment: Lack of use is NOT enough. Intent of parties must be proven. Do not rely upon claims of abandonment to remove an easement exception. Contact your underwriter; they typically require a court order

EASEMENTS:

Common Issues

Landlocked: After reviewing the chain of title, survey, maps/GIS, the property does not abut or public road or does not have a means of access

Raise a requirement to establish and record an easement

Insuring a split: If you are insuring a land division, make sure the land split does not result in a landlocked parcel, or if it does, make sure there will be an easement established

Customer/Agent states there is access, but no easement is found: (1) an easement was not validly created, or (2) it is an implied easement

(1) Not an insurable easement: the easement was not “validly” created, meaning, the correct parties did not convey/grant an easement, did not sign the easement document, or one was never recorded

(2) Implied easement: there is no recorded document establishing an easement, but the agent/customer states there is a road or other means of access

An implied easement may be created by operation of law, however, a court order is required to insure these:

Easement by necessity (landlocked parcel)

Easement by prescription (15 years)

EASEMENTS:

Common Issues

Merger of Title: the access easement was extinguished when an owner of the benefitted parcel became fee title owner of the burdened parcel; one cannot hold an easement over his/her own property

Easement could be revived with a subsequent transfer and grant of easement or reservation

Easement missing in the chain of title: When the chain of title shows an access easement but then it is left off some other deeds in the chain; as long as it was validly created, it may be insurable so long there is no evidence it was terminated/released

MLTS 14.1: An easement appurtenant is included in the conveyance of the dominant estate [benefitted parcel] in the absence of express language to the contrary

Insuring Homeowner's Policy: When purporting to issue the Homeowner's Policy, keep in mind the additional coverage and make sure the property has actual vehicular and pedestrian access to and from it

Overburdening Easements: The concept of overburdening an easement relates to the overuse of a specific grant of easement; the scope of an easement encompasses only those burdens on the servient estate that were contemplated by the parties at the time the easement was created

Keep this in mind when insuring an easement and the transaction involves construction or new development; could give rise to future dispute or litigation



THANK YOU! QUESTIONS?

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