Ohio Easements ~and~ Rights of Way

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Instructor
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Biography of Gary R. Kent

Gary Kent is a Professional Surveyor and Integrated Services Director for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in Indiana, North Carolina and Iowa. He is in his 31st year with the firm and his responsibilities include project and account management, corporate culture, safety, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a Bachelor of Science Degree in Land Surveying. He is registered to practice surveying in Indiana and Michigan. He is chair of the committee on ALTA/ACSM Standards for ACSM/NSPS and is the liaison to NSPS/ACSM for the American Land Title Association. He is a past-president of the American Congress on Surveying and Mapping and a twice-past president of the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded “Outstanding Associate Faculty” and “Excellence in Teaching” awards for his efforts. He is also a certified instructor for the International Right of Way Association.

Gary is in his eleventh year on the Indiana State Board of Registration for Professional Surveyors and is frequently called as an expert witness in cases involving boundaries, easements and land surveying practice. He regularly presents programs across the country on surveying-related topics, is on the faculty of GeoLearn, an on-line continuing education provider, and writes a column for The American Surveyor magazine.

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Ohio Easements, Rights of Way, and Other Encumbrances

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Easement

“A limited non-possessor interest in the land of another.”

An easement has been defined as "a right without profit, created by grant or prescription, which the owner of one estate [called the dominant estate] may exercise in or over the estate of another [called the servient estate] for the benefit of the former." Yeager v. Tuning, 79 Ohio St., 121, 124, 86 N. E, 657, 658.


Traditionally, an easement involves a grant of a right-of-way over the land of another or the right to use another's land for a specific purpose, consistent with the other's ownership. See generally Black's Law Dictionary 527 (7th ed. 1999); Black's Law Dictionary 457 (5th ed. 1986).

In Anglo-American property law, an easement is a right granted by one property owner to another to use a part of [the grantor's] land for a specific purpose.

Easement: “A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. 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). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement.” © 1994-2001 Encyclopedia Britannica, Inc.
An easement may be created expressly by a written deed of grant conveying to another the right to use for a specific purpose a certain parcel of land. An easement may also be created when one sells his land to another but reserves for himself the right to future use of a portion of that land. An easement may also be created by implication, when, for example, a term descriptive of an easement is incidentally included in a deed (such as “passageway” – a section of land to be used for passage). An easement by implication also arises when the owner of two or more adjacent parcels of land sells one lot; the buyer acquires an easement to that visible property of the seller necessary to the buyer’s use and enjoyment of his lot, such as a roadway or drainage duct. When created in this manner the easement also arises as an easement of necessity.

In most of the United States and England, statutes permit the creation of an easement by prescription, which arises by virtue of a long, continuous usage of the property of another by a landowner, his ancestors, or prior owners. The length of time necessary for such continued use to ripen into an easement by prescription is specified by the applicable state statute.

When use of the easement is restricted to either one or a few individuals, it is a private easement. Use of a public easement, such as public highways or a portion of private land dedicated by a present or past owner as a public park (also known as a dedication) is not restricted.

An owner of an easement is referred to as the owner of the dominant tenement [or estate]. The owner on whose land the easement exists is the owner of the servient tenement [or estate].

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner...

The ownership of real property often has been described as a “bundle of sticks”, with each stick being a right or privilege to enjoy the ownership thereof and dominion over all that the master of that property surveys (meaning “views”, not performs a land survey upon). The entire bundle of sticks would constitute fee simple absolute ownership of the realty. Ownership in fee of real estate generally carries with it all rights to do everything to and upon the land which is not proscribed by law, such as to operate a “common nuisance”, a hazardous waste landfill, or other limitation imposed by zoning, restrictive covenants, or development use standards.

An easement would transfer from the owner a general or a specific right to use the land without alienating, or selling, the land to the grantee. If general, the right would be granted to the general public and might be limited to ingress and egress. If specific, the easement would be granted to one or more specific individuals or entities, which may or may not be able to transfer or assign the easement to others depending upon the terms of the original grant. An easement also can “run with the land”, or be permanent or for a term certain, and will continue to burden the servient estate (tenement) despite the transfer of the benefited property or change in the individual(s) and/or entity or entities grantee(s). An easement is not an estate, per se, but is an interest in land.
Easements can arise by grant, by reservation, by will, by implication, by condemnation, by prescription, or by way of necessity. By grant—probably the most common manner in which an easement is created—the owner of the burdened land will expressly grant the easement. Ordinarily, third parties are not bound by the agreement unless it is recorded and “of record”, or “perfected”, thereby giving the world at large constructive notice of the easement agreement and its terms and conditions, its breadth and its limitations.

An easement by implication arises when an owner subdivides his land in such a way that the one(s) to which the land is conveyed has no convenient access other than across land retained by the conveyor. It then will be presumed that the conveyor also conveyed the right to reasonable access, a right-of-way, to and from the conveyed lands across the retained lands.

Conversely, when the conveying owner effectively creates a land-locked retained parcel, the owner will be presumed to have also retained the right to reasonable access to the retained parcel across the conveyed lands. The resultant easement is an easement by necessity. Some jurisdictions have codified (passed statutes legalizing) easements by necessity. Implication also arises where pipes or paths existed on the undivided parcel that suggested the parties involved in dividing the parcel intended to subject one parcel to an easement in favor of another.

Common law also provides for prescriptive easements – easements essentially established by long use.

Black’s Law Dictionary defines access easement, affirmative easement, appurtenant (or appurtenant) easement, discontinuing easement, easement by estoppel, easement by prescription, easement in gross, easement of access, easement of convenience, easement of natural support, easement of necessity, equitable easements, implied easement, intermittent easement, negative easement, private or public easements, quasi easement, reciprocal negative easement, and secondary easement. The above terms are not mutually exclusive; one can have a private discontinuing reciprocal negative appurtenant access easement, for example.

In English property law, the right of a building or house owner to the light received from and through his windows was the “law of ancient lights”. “Windows used for light by an owner for twenty years or more could not be obstructed by the erection of an edifice or by any other act by an adjacent landowner. This rule of law originated in England in 1663, based on the theory that a landowner acquired an easement to the light by virtue of his use of the windows for that purpose for the statutory length of time.”[EBI] The doctrine has not gained wide acceptance by courts in the United States.

The converse of “easement” in English common law is “servitude,” derived from Roman law and similar to easement except that while easement considered the benefit derived from the servitude, servitude related to the burden owed and the land “served” by the servitude constituted the dominant estate or tenement. Hence, the “servient tenement” or servient estate concept and
terminology. The dominant tenement dominates or burdens the servitude.

Land servitudes are personal or real; personal servitudes being owed to a particular person and, when that person dies, the personal servitude is extinguished. Real servitudes are obligations or duties owed to the lands of another, having been created for the benefit of those lands. The servitude is a property right—one stick in the bundle of sticks—attached to the dominant tenement and generally passing with the land when it is conveyed or devised.

European civil law separates servitudes into rural and urban servitudes, with the nature of the obligation determining the type of servitude rather than its geographic location. Rural servitudes include rights-of-way of various types and purposes; urban servitudes include building rights such as rights of support, rights of view, and rights of drainage, sewers and sewerage, and utilities. Servitudes may be positive or negative.

A positive servitude obligates a landowner to permit or allow certain use of his property by another. A negative servitude obligates a landowner to refrain from making certain use(s) of his property, which will serve or offer some benefit to the owner of the dominant estate.

In some cases, a “secondary easement” exists in support of the primary express, implied or prescriptive easement.


The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a secondary easement, a mere incident of the easement that passes by express or implied grant, or is acquired by prescription. . . This secondary easement can be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. 2 Thompson, Real Property, (Perm. Ed.), § 676, p. 343. Loyd v. Southwest Ark. Utilities Corp., 580 S.W. 2d 935 (1979)

By definition a secondary easement goes with an existing easement and consequently would not have to be separately acquired. It either exists or it does not exist as an incident to an easement.

A secondary easement, then, is simply a legal device that permits the owner of an easement to fully enjoy all of the rights and benefits of that easement. Conversely, it is a legal device that prohibits an owner of a servient tenement from interfering with an easement owner’s enjoyment of the full benefits and rights of an easement.
However, a secondary easement does not necessarily exist in every case. For example, a highway department or railroad company would not have a right of ingress or egress over all adjacent land to its rights-of-way. It is not needed because access is inherent in such easements or rights-of-way. Nor would one exist where access to a right-of-way, such as that taken in this case, already exists. *Loyd v. Southwest Ark. Utilities Corp.*, 580 S.W. 2d 935 (1979).

**License**

A license is different from an easement in that a license permits a specific use or permits certain specific acts to be done by the licensee on the licensor’s lands.

A license confers a personal privilege, unassignable and terminable at will, to do something on another’s land and which contains no [estate] interest in that land, and which is not required to be created by a conveyance. It does not pass to the heirs of the licensee, and does not give third parties a right to sue for interference with its use. An example is where an owner gives someone a right to park in the owner’s front lawn to view a parade, or the Speedway City homeowner permits parking for the Indianapolis 500.

Licenses generally are revocable or for a specific time period. Black’s Law Dictionary defines license as “the permission by competent authority to do an act which, without such permission, would be illegal a trespass, or a tort.” “License with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property.” Black’s, citing *Timmons v. Cropper*, 40 Del Ch. 29, 172 A2d 757, 759.

"[A] license is ‘a personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interests in the land.’ *DePugh v. Mead Corp.*, (1992), 79 Ohio App.3d 503, 511 [607 N.E.2d 867]. *Christiansen v. Schuhart* (2011), 193 Ohio App. 3d 89 - Ohio: Court of Appeals, 5th Appellate Dist.

[A]n authority to do a particular act or series of acts upon another’s land, without possessing any estate therein. … One who possesses a license thus has the authority to enter the land in another’s possession without being a trespasser. *Mosher v. Cook United, Inc.*, (1980), 62 Ohio St.2d 316,317.

"A license to occupy land is in the nature of a tenancy at will; but a license confers no title or interest in the land." 3 Thompson on Real Property § 1032 at 105. Cited in *Cutter Flying Serv. v. Property Tax Dept.*, 572 P. 2d 943 (1977), 91 N.M. 215

…a license is a personal privilege to do some act or series of acts upon the land of another without possessing any estate in the land. A license may be created by parol and is generally revocable at the will of the owner of the land in which it is to be enjoyed, by the death of the licensor, by conveyance of the lands to another, or by whatever would deprive the licensee of doing the acts in question or giving permission to others to do them. *Stanolind Pipe Line Co. v. Ellis*, 142 Kan. at 105.

A license does not imply an interest in land, but is a mere personal privilege to commit some act or series of acts on the land of another without possession any estate therein. *Millbrook Hunt v. Smith*, 249 A.D.2d at 282, 670 N.Y.S.2d at 909.

**The Difference between a License and an Easement**

Although there are similarities and, in some cases, one can have the characteristics of the other, the courts in the various states have outlined distinct differences between easements and licenses.

The Seventh District Court of Appeals analyzed the differences between an easement and a license in *Varjaski v. Pearch*, Mahoning App. No. 04MA235, 2006-Ohio-5268, 2006 WL 2846296, ¶ 11-12: "The basic definition of an easement is that it is the grant of a use on the land of another. **"When created by conveyance, the extent of the privilege of use to which the owner of an easement created by conveyance is entitled is dependent upon the provisions of the conveyance. The creation of an easement by conveyance consists in the creation of certain privileges of use. **"Alban v. R.K. Co. (1968), 15 Ohio St.2d 229, 231-32 [44 O.O.2d 198, 239 N.E.2d 22], quoting from 2 Casner, American Law of Property, Section 8.64. Generally, the term "interest in land" means some portion of the title or right of possession, and does not include agreements which may simply affect the land. **Thus, easements are "interests in land" subject to the Statute of Frauds, but licenses are not. ’Ferguson v. Strader (1994), 94 Ohio App.3d 622, 627 [641 N.E.2d 728] **. Christiansen v. Schuhart, 193 Ohio App. 3d 89 - Ohio: Court of Appeals, 5th Appellate Dist.


An unrecorded easement is a license and does not run with the land or bind subsequent purchasers without notice. *Continental Tele. Co. of the West v. Blazzard* 149 Ariz. 1, 5-6, 716 P.2d 62, 66-67 (App. 1986).

**Profit (Profit à prendre)**

A profit is a nonpossessory interest in land, similar to an easement, which gives the holder the right to take natural resources such as petroleum, minerals, timber, and wild game from the land of another.

The right to hunt or fish on property owned by another is given through a type of easement known as a profit a prendre. 1 Restatement of the Law 3d, Property (2000) 12, Section 1.2. "A profit a prendre is an easement that confers the right to enter and remove [such things as] timber, minerals, oil, gas, game, or other substances from land in the possession of another." Id. *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App. 3d 325 - Ohio: Court of Appeals, 7th District 2003.


A profit differs from a mineral estate in that a mineral estate can be severed, and exist as a separate estate, from the rest of the real estate, whereas a profit is merely a non-possessory interest in the land.

The owner of a mineral estate may explore, develop, and produce oil and gas and, generally, use as much of the surface of the land as is reasonably necessary to exercise their rights. The owner of the mineral estate can also transfer these rights to another party. Such transfers are often accomplished by executing oil and gas leases.

A profit also differs from a license because a license does not constitute an interest in real property, whereas a profit does.
Because of the necessity of allowing access to the land so that the resources may be gathered, every profit and mineral estate contains an implied easement for the owner of the profit to enter the other party's land for the purpose of collecting the resources permitted by the profit.

A profit must also operate as an easement in order to allow a person onto another’s land for the purpose described in the grant… Therefore, it must satisfy the Statute of Frauds. *High v. Davis*, 283 Or. 315, 322, 584 P.2d 725 (1978).

**Rights of Way**

Originally the term “right of way” referred to a right of easement, i.e. an easement, specifically for passage purposes such as for a railroad, pipelines, pedestrians, vehicles, aqueducts, etc.

Since then, the term has come to have another meaning which is the *land burdened by the easement* even if the land has been dedicated in fee. Hence in the common use of the term a “right of way” may be owned in fee, or something less.

A right-of-way is an easement and is usually the term used to describe the easement itself or the strip of land which is occupied for the easement. 25 Am. Jur. 2d Easements & Licenses, §§ 1 and 8.

The statute [R.C. 4511.01(UU)] defines the term in two different contexts. In one context, the term means "[t]he right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path". Alternatively, "right-of-way" is "a general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to for transportation purposes. When used in this context, right-of-way includes the roadway, shoulders, or berm, ditch, and slopes extending to the right-of-way limits under the control of state or local authority." *Akers v. Saulsbury*, 2010 Ohio 4965 - Ohio: Court of Appeals, 5th Appellate Dist. 2010. [emphasis added]

[a right of way is the] right to cross over the land of another, an easement. *Sanxay v. Hunger*, 42 Ind. 44, 48 (1873).

[A right of way is] [t]he strip of land upon which a road or railroad is constructed. See *Marion, Bluffton and Eastern Traction Co. v. Simmons*, 180 Ind. 289, 292, 102 N.E. 132, 133 (1913).

Whether a conveyance of a right of way conveys a fee or an easement is dependent on the words of the grant.
[When in the conveyance] the word "right of way" is used to establish the purpose of the grant [it] . . . presumptively conveys an easement interest. *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.*, 126 P. 3d 16 - Wash: Supreme Court (2006).

In Ohio, however, dedications of rights of way are, by statute, construed to be fee dedications – the fee of the dedicated street being vested in the municipality.

**ORC section 711.07**

Fee shall vest in municipal corporation.

Upon recording, as required by section 711.06 of the Revised Code, the plat shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate name in trust to and for the uses and purposes set forth in the instrument.

Effective Date: 10-01-1953

In the traditional sense, while the roadway is the actual portion of the public way over which vehicles actually pass, the ‘right-of-way’ is the entire expanse of land taken out of unrestricted private ownership–usually a set width with ample room for side ditches and walks, safety side slopes, embankments, noise suppression or retaining walls, and various other ancillary features such as traffic control devices and telegraph lines.

A right-of-way, granted or created in the absence of an express grant, establishes a privilege or license to pass over another’s land (or under in the case of a tunnel and over aerially in the case of a bridge overpass or skywalk). The benefit may extend to an individual, to a group or class of people, or generally to the public.


The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant. *Cox v. Campbell*, 135 Tex. 428, 143 S.W.2d 361, 362 (1940). [cited in *City of San Antonio v. City of Boerne*, 111 SW 3d 22 - Tex: Supreme Court, 2003]
There appears to be considerable conflict in the cases as to the construction of deeds purporting to convey land, where there is also a reference to a right of way. Some of the conflict may arise by virtue of the twofold meaning of the term "right of way," as referring both to land and to a right of passage. In some cases, particularly where the reference to right of way is in the granting clause, or where there are other relevant factors, the courts have held that an easement only was intended. In other cases, the deed is held to convey a fee simple estate in the land, the courts generally basing their holdings on the ground that the granting clause governs other clauses in the deed, that the reference to right of way did not make the deed ambiguous (therefore barring extrinsic evidence from consideration), or that the reference to right of way was to land and did not relate to the quality of the estate conveyed.

Other cases purporting to grant land contain language relating to the purpose for which the land conveyed is to be used. Some cases hold that such language is merely descriptive of the use to which the land is to be put and has no effect to limit or restrict the estate conveyed; in others, the position is taken that such language indicates an intention to convey an easement only and not a fee. Many cases appear to turn upon the nature of the reference to purpose, the location of the reference in the deed, and the presence of other factors and provisions bearing on the question of intent. Maberry v. Gueths, 777 P. 2d 1285 - Mont: Supreme Court 1989. [emphasis added]

Issues arise as to entitlement to royalties when municipalities wish to lease or grant rights for TV cable, fiber-optic phone and communication lines, etc., within the public right-of-way. Generally, if the right-of-way is dedicated and accepted into the public maintenance system in fee, the municipality is entitled to collect revenue for ancillary uses, whereas if the right-of-way is dedicated for limited purposes of ingress and egress (as opposed to “transportation”, which arguably could be more liberally construed), the servient tenement holder – generally the adjacent landowner – more likely would retain rights to lease revenue, or to sell the retained rights (of the “bundle of sticks”, including the “stick” involving such alienable rights).

Those owning property abutting a street or highway right of way enjoy certain private rights separate and distinct from those that the public enjoys.

Under Section 723.08, if a municipality vacates a street that has been dedicated to public use, the municipality's order does not impair "the right of way and easement" of other property owners. R.C. 723.08. In Butzer v. Johns, 67 Ohio App. 2d 41 (9th Dist. 1979), this Court explained that, "[i]f a street is vacated and the land reverts to the abutting lot owners, certain rights to an easement may inhere in property owners whose land abuts the vacated area, if access to their own property is affected by the vacation." Id. at 42-43. In Lord v. Wilson, 9th Dist. No. 1354, 1985 WL 10675 (Apr. 10, 1985), we clarified that, "in determining whether [an] abutting landowner retains an easement in a vacated street . . . [t]he issue [is] whether continued access through the vacated street was reasonably
necessary for [the lot owner] at the time the street was vacated." Id. at *2. *Sherck v. Bremke*, 2012 Ohio 3527 - Ohio: Court of Appeals, 9th Appellate Dist. 2012.

The Ohio Supreme Court has held that, if a municipality has a fee interest in a roadway, abutting land owners have an equitable easement to use the roadway. *Cal len v. Columbus Edison Elec. Light Co.*, 66 Ohio St. 166, 174-75 (1902).

The owner of property abutting upon a street has an easement in such street for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself. *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S. W. 2d 753; *Arkansas State Highway Commission v. McNeill*, 238 Ark. 244, 381 S. W. 2d 425; *Lincoln v. McGehee Hotel*, 181 Ark. 1117, 29 S. W. 2d 668. *Flake et al v. Thompson*, 460 S.W.2d 789 (1970).

The grantee receives a private easement at the time of conveyance in any streets referenced in the plat. *Carolina Land*, 265 S.C. at 105-106, 217 S.E.2d at 19; *Blue Ridge*, 247 S.C. at 119, 145 S.E.2d at 925; *Giles*, 304 S.C. at 73, 403 S.E.2d at 132.; see *Newington Plantation*, 318 S.C. at 365, 458 S.E.2d at 38 (“While dedication for public use is significant to the creation of a public easement, it is irrelevant to the determination whether a private easement exists.”).

When a public utility locates its facilities in a public right of way without benefit of its own easement separate from the right of way, generally it does so at its own risk…

When a vehicle collides with a utility pole located off the improved portion of the roadway but within the right-of-way, a public utility is not liable, as a matter of law, if the utility has obtained any necessary permission to install the pole and the pole does not interfere with the usual and ordinary course of travel. *Turner v. Ohio Bell*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158, at ¶ 21.

**O.R.C. 4931.03 Construction in unincorporated area of township.**

(A) A telephone company may do either of the following in the unincorporated area of the township:

(1) Construct telecommunications lines or facilities upon and along any of the public roads and highways and across any waters within that area by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of those lines or facilities. The lines and facilities shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

(2) Construct telecommunications lines and facilities in such a manner as to protect them beneath the surface of any of the public roads and highways and
beneath any waters within that area. Those lines and facilities shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

**4939.03 Prohibited conduct concerning public ways.**

* * *

(5) Except in the case of a public utility subject to the jurisdiction and recognized on the rolls of the public utilities commission or of a cable operator possessing a valid franchise awarded pursuant to the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 541, a municipal corporation, for good cause shown, may withhold, deny, or delay its consent to any person based upon the person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare.

(6) Initial consent for occupancy or use of a public way shall be conclusively presumed for all lines, poles, pipes, conduits, ducts, equipment, or other appurtenances, structures, or facilities of a public utility or cable operator that, on the effective date of this section, lawfully so occupy or use a public way. However, such presumed consent does not relieve the public utility or cable operator of compliance with any law related to the ongoing occupancy or use of a public way.


**U.S. Revised Statute 2477**

RS 2477 was an 1866 mining law intended to serve the purpose of granting the right to construct and use highways across public lands that were not otherwise reserved or set aside for other public uses. It stated simply:

"The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The statute was repealed in 1976, but a grandfather clause allowed that if it could be shown that a "highway" was "constructed" prior to 1976 over U.S.–owned land before it was set aside for other uses, an RS 2477 claim could be granted.
In 1980’s, various federal land management agencies started inventorying roadless lands to determine if they qualified for wilderness protection. As a result of the repeal of RS 2477 and the effort to set-aside large tracts of land for protection – which would have prevented subsequent RS 2477 claims, even under the grandfather clause - a very eclectic, albeit very loose, coalition arose. The coalition included development and off-road advocates and, in some cases, simple anti-government extremists. They filed what can only be described, in many cases, as bizarre RS 2477 claims to try to protect their perceived right to enter onto public (and in some cases, private) lands. “Highways” claimed by these groups included, in some cases, creeks, indiscernible walking paths and supposed “roads” that lead nowhere.

Environmentalists and private land rights groups generally lined up on the other side.

In response to the claims being made, the Department of the Interior developed a set of guidelines for use in evaluating RS 2477 claims. These guidelines, however, never made it into statute.

1. The highway must have been built while the public land was unreserved for some other specific public purpose.
2. The highway must have actually been constructed, not simply established by repeated use.
3. It must have actually been a public highway, meant to carry goods and people to an actual destination.

With the change of administrations, the Department of Interior in 2003 published a new rule making it easier for states and local jurisdictions to convert RS 2477 claims on public lands into new roads. H.R. 308, introduced January 5, 2007, but also, never making it into statute, included the following:

(5) The applicable laws of each State [shall] govern the resolution of issues relating to the validity and scope of R.S. 2477 rights-of-way, including—

(A) what constitutes a highway and its essential characteristics;
(B) what actions are required to establish a public highway;
(C) the length of time of public use, if any, necessary to establish a public highway and resulting R.S. 2477 right-of-way;
(D) the necessity of mechanical construction to establish a public highway and resulting R.S. 2477 right-of-way; and
(E) the sufficiency of public construction alone without proof of a certain number of years of continuous public use to establish a public highway and resulting R.S. 2477 right-of-way.

construction of highways over public lands, not reserved for public uses, is hereby granted.” “No question of implied dedication is involved.” Lovelace, 168 P.2d at 866 (emphasis in original).

**The Dominant and Servient Estates (Tenements)**

The land to which an easement is attached is called the dominant tenement or dominant estate. The land upon which a burden or servitude is placed is called the servient tenement or servient estate.

The servient estate is the real property burdened by the easement - the property over which the easement runs. The dominant estate is the property benefited by the easement - the property that is served by the easement.

“The owner of a fee in land that is subject to an appurtenant easement is the owner of the servient estate, the easement owner is the owner of the dominant estate.” Davidson v. Nicholson, 59 Ind. 411, 412 (1877).

"[A]n easement is the interest in the land of another, created by prescription or express or implied grant, that entitles the owners of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate.” (Citations omitted.) Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC (2000), 138 Ohio App.3d 57, 66, 740 N.E.2d 328. Slosar v. Homestead Creek Homeowners Assoc., Inc., 2011 Ohio 4420 - Ohio: Court of Appeals 8th District 2011.

Once an easement is created, the owner of the land is the servient tenant and the easement holder is the dominant tenant. Potter v. Northern Natural Gas Co., 201 Kan. 528, 530-31, 441 P.2d 802 (1968).


The land benefitting from an easement is called the **dominant estate**; the land burdened by an easement is called the **servient estate**. *** It is essential to the existence of an easement, which is appurtenant to land, that there be two distinct estates or tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. . . . The term easement and the term servitude are often used indiscriminately; the one is usually applied to the right enjoyed, the other to the burden imposed. A right of way over the land of another is an easement in the dominant estate and a servitude upon the servient estate. Cottrell v. Nurnberger, 131 W.Va. 391, 397, 47 S.E.2d 454, 457 (1948). [Cited in Newman v. Michel, W Va: Supreme Court of Appeals, 2009]
The benefited parcel is known as the dominant tenement or estate, and the burdened parcel is termed the servient tenement or estate. *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84. *Slauson v. MAROZZO PLUMBING AND HEATING*, 219 P. 3d 509 - Mont: Supreme Court 2009.

The owner of a fee in land that is subject to an appurtenant easement is the owner of the servient estate, the easement owner is the owner of the dominant estate. *Davidson v. Nicholson*, 59 Ind. 411, 412 (1877).

**Appurtenant Easements and Easements in Gross**

All easements are either appurtenant or in gross.

An easement—which is a nonpossessory interest in land that gives a person the right to use the land of another for a specific purpose—may be “appurtenant” or “in gross.” *Taylor v. Montana Power Co.*, 2002 MT 247, ¶ 11, 312 Mont. 134, 58 P.3d 162; *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84.


**Appurtenant easements** attach to a particular property for the benefit of an adjacent property. The burdened property is called the servient estate (or tenement) and the property that the easement benefits is the dominant estate (or tenement.) Appurtenant easements create both a dominant estate and a servient estate.

An easement appurtenant involves two different estates or tenements in land (a) the dominant estate, that to which the easement or right attaches or belongs; and, (b) the servient estate, that which is subject to the easement. 25 Am.Jur.2d Easements and Licenses 11 (1966).

An easement appurtenant is attached to the land that it benefits even if that land is not physically adjacent to the land subject to the easement; however, there must be two estates or distinct tenements: the dominant estate, to which the right belongs, and the servient estate, upon which the obligation rests. *Walbridge v. Carroll*, 172 Ohio App.3d
An easement appurtenant is one that benefits a particular parcel of land, i.e., it serves the owner of that land and passes with the title to that land. The benefited parcel is known as the dominant tenement or estate, and the burdened parcel is termed the servient tenement or estate. *Blazer v. Wall*, 2008 MT 145, ¶ 24.


Appurtenant easements are so tightly bound to the dominant estate that they transfer with the dominant estate even if they are not mentioned in the conveyance.

18 Ohio Jurisprudence (2d), 607, Section 71 [comments]: "An appurtenant easement * * * is an incident to an estate in land and passes upon a transfer of the land. It cannot be separated from, or transferred independently of, the land to which it inhere[s]. The right to an appurtenant easement cannot be transferred to a stranger to the dominant estate. The owner of an appurtenant easement of way cannot separate it from the dominant estate so as to convert it into an easement in gross." *State, ex rel. Lindemann v. Preston*, 171 Ohio St. 303 - Ohio: Supreme Court 1960.

Once an easement appurtenant was established, it attached to the dominant estate and passed with every conveyance of that estate. "[I]t is the established rule in this state that the appurtenances to property pass with it, upon its alienation, without the use of the term `privilege or appurtenance' in the conveyance." *Shields v. Titus* (1889), 46 Ohio St. 528, 540, citing *Morgan v. Mason* (1851), 20 Ohio 401. "[A] right of way or other easement appurtenant to the land[] passe[s] by a grant of the land without any mention being made of the easement, and though neither the term `appurtenance,' nor its equivalent, be employed." Id. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010.

An easement appurtenant, it is deemed to run with the land and is unassignable in the absence of a transfer of the dominant estate. *Kikta v. Hughes*, 108 N.M. 61, 766 P.2d 321 (Ct.App. 1988).

**Easements in Gross** burden the servient estate and attach to the easement owner, but are not created for the benefit of any land owned by the owner of the easement (dominant estate). Thus while all easements create a servient estate, with easements in gross, there is no associated dominant estate.

An easement in gross is an irrevocable personal interest in the land of another. Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* Sec.2.01(2) (1988).

An easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of ownership of estate in other land but is a mere personal interest in or right to use land of another. *Centel Cable Television Co. of Ohio v. Cook* (1991), 58 Ohio St.3d 8, 567 N.E.2d 1010, fn. 2. *Schumacher v. Apple*, 2010 Ohio 5372 - Ohio: Court of Appeals, 8th Appellate Dist. 2010.

In *Boatman v. Lasley* (1873), 23 Ohio St. 614, 618, the court emphasized that where a right of way is in gross and not attached to an interest in land, it cannot be converted into an appurtenant easement by using words of inheritance in the deed creating it. The court emphasized that a "mere naked right to pass and repass over the land of another" is of a personal nature and dies with the person. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010.


An easement in gross … is personal to the parties; it does not have a dominant tenement because it benefits a person or an entity, and not the land. *Wilson v. Brown*, 320 Ark. 240, 897 S.W.2d 546 (1995); *Merriman v. Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987).

An easement in gross … benefits the holder of the easement personally, i.e., not in connection with his or her ownership or use of a particular parcel of land. Thus, with an easement in gross, no dominant tenement exists and the easement right does not pass with the title to any land. *Blazer v. Wall*, 2008 MT 145, ¶ 24.

An easement in gross implies a right to use land owned by another, is distinct from the ownership of any lands or dominant tenement, and is not assignable or inheritable, but it personal to the grantee. *Saratoga State Waters Corp. v. Pratt*, 227 N.Y. 429, 443, 125 N.E. 834, 839 (1920).
Oftentimes there is a question as to whether a grant constituted an easement in gross or an easement appurtenant. This is important when the servient owner hopes to see an easement extinguished, which can happen with an easement in gross when the dominant estate owner dies or when he or she sells land that may be peripherally associated with the easement in gross.

In addition, in some states, an easement in gross can become an easement appurtenant under certain circumstances.

Easements in gross can become appurtenant easements where that result is consistent with the intent of the parties. The rule is stated in *Roggow v. Hagerty*, 27 Wn. App. 908, 911-12, 621 P.2d 195 (1980) as follows:

When an instrument purports to create an easement in favor of a grantee to facilitate some other parcel of land which the grantee does not presently own but subsequently acquires, the easement is an easement in gross until the land is acquired, at which time it becomes an easement appurtenant. 3 H. Tiffany, Real Property § 759 (3d ed. 1939 & Supp. 1980).


Pipeline or transmission line easements are normally good examples of easements in gross. An easement for ingress and egress over one property to reach another is an example of an appurtenant easement. (See [http://www.buyersresource.com/glossary/Easement_in_Gross.html](http://www.buyersresource.com/glossary/Easement_in_Gross.html))

In *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997), our Supreme Court explained the differences between easements in gross and appurtenant easements: The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. Id. at 325-26, 487 S.E.2d at 191 (citations omitted) (emphasis added).

In most states, if the easement created by a document is not expressly either appurtenant or in gross, it will generally be deemed appurtenant assuming it has the necessary elements.

Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. Juris. Easements § 3(c).
"An easement is seldom considered to be in gross when it can be fairly construed to be appurtenant to some estate." Ohio Jurisprudence 3d, Easements & Licenses, Section 12. Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska, 2005 Ohio 3398 - Ohio: Court of Appeals 11th.

If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intentions of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate. Jones v. Island Creek Coal Company, 79 W. Va. 532, 91 S.E. 391 (1917)

Easements are presumed appurtenant unless there is clear evidence to the contrary. Luevano v. Group One, 108 N.M. 774, 777, 779 P.2d 552, 555 (Ct.App. 1989).

"If the granting instrument does not specify whether the easement is appurtenant or in gross, the court decides from the surrounding circumstances, but generally begins with the presumption that it is appurtenant." E. Rabin, Fundamentals of Modern Real Property Law 434 (2d ed. 1982). See Restatement of Property § 453 (1944); 28 C.J.S. Easements § 4 (1941). Luevano v. Group One, 108 N.M. 774, 777, 779 P.2d 552, 555 (Ct.App. 1989).

[I]n the absence of a showing that the conveyance was a merely personal right, then the right created should be considered an easement appurtenant. Mays v. Hogue, 163 W. Va. 746, 260 S.E.2d 291 (1979).

However, there are exceptions...

Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. Juris. Easements § 3(c). Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. Windham II, 381 S.C. at 201-02, 672 S.E.2d at 583. Rhett v. Gray, SC: Court of Appeals 2012.

Personal Easements in Gross are not assignable. Commercial Easements in Gross are assignable.


Easements of a commercial nature similar to the right-of-way here [an easement for the installation of electric transmission lines] have long been considered an exception to the general rule that easements in gross are not transferable, and a long history of allowing
the transfers of such servitudes exists. See 3 Powell on Real Property § 34.16, pp. 34-220-222 (1996); Restatement of Property § 489 (1944).

The law at that time [1857] was that easements or rights of way in gross were not assignable or inheritable by any words in the deed by which they were granted. Boatman v. Lasley, 23 Ohio St. 614. It is now well settled in Ohio, and the general rule elsewhere, that a right of way or easement of the private commercial character herein involved is an easement in gross constituting an alienable property interest. 5 Restatement of the Law, Property, 3040, Section 489; Garlich v. Pittsburgh & Western Ry. Co., 67 Ohio St. 223; Geffine v. Thompson, 76 Ohio App. 64; 22 Michigan Law Review 521, Professor Lewis M. Simes, "The Assignability of Easements in Gross in American Law." Jolliff v. Hardin Cable Television Co., 22 Ohio App. 2d 49 - Ohio: Court of Appeals 1970.

The reservation in this case is in gross, and such a right personal merely, not assignable nor inheritable. Washburn Easements, 4th Ed. pp. I I and 12, § § 8 and 9; Id. 13 § D Id. 45 § 29 ; Id. 17 §1; Id. 257 § § 161-162; Id. 35 § 2. ;. .. Professor Washburn says : "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable nor inheritable, nor can it be made so by any terms in the grant, any more than a collateral and independent covenant can be made to run with land." Boatman v. Lasley, 23 Ohio St. 614 ; Washburn on Easements (4th Ed.) pages I I and 12, § 8. Field v. Morris, 88 Ark. 148 (1908).

**Affirmative and Negative Easements**

A positive (affirmative) easement obligates a landowner to permit or allow certain use of his property by another, whereas a negative easement obligates a landowner to refrain from making certain use(s) of his property, which will serve or offer some benefit to the owner of the dominant estate.

Examples of positive easements are ingress/egress, access or public utility easements. Solar, light and (usually) conservation easements are examples of negative easements.

Easements may be classed as affirmative or negative. When the effect of the restriction sought is to preclude an owner of land from doing something he otherwise would be entitled to do, it is considered a negative easement. 25 Am. Jur.2d, Easements and Licenses, § 8, pp. 422-23.

Negative restrictive easements are basically restrictive covenants which are equitably enforceable. 2 G. Thompson, Real Property, § 382, p. 540 (1961); 25 Am.Jur.2d, Easements and Licenses, § 5, p. 421.
[A] negative easement is one which "curtails the owner of the servient tenement in the exercise of some of his rights in respect of his estate in favor of the owner of the dominant tenement or tenements." (Italics omitted.) Palzer, at 230 (quoting Annot., Easement or Servitude or Restrictive Covenant as Affected by Sale for Taxes, 168 A.L.R. 529, 536 (1947)). Along these same lines, the covenant in question qualifies as an affirmative easement, at least for purposes of RCW 84.64.460, because it creates additional obligations in respect of the estate of the owner of the servient tenement in favor of the owner of the dominant tenement or tenements. *Lake Arrowhead Community Club, Inc. v. Looney*, 770 P. 2d 1046 - Wash: Supreme Court 1989.

An affirmative easement is one which grants the owner of the dominant estate the right to make active use of the servient estate or to do some act thereon or in respect thereto which, were it not for the easement, he would not be privileged to do or which would otherwise be unlawful (Restatement, Property, § 451; 25 Am Jur 2d, Easements & Licenses, § 8; 28 CJS, Easements, § 3, subd d; 17 NY Jur, Easements & Licenses, § 11). A negative easement, on the other hand, is a right in the owner of the dominant estate to restrict the owner of the servient estate in the exercise of the latter's general and natural rights of property (*Uihlein v Matthews*, 172 N.Y. 154, 158). In other words, a negative easement does not entitle the owner of the dominant tenement to any use or enjoyment of the land subject to the easement to which he would not be entitled if the easement did not exist, but rather it permits him to limit or prohibit the owner of the servient estate from doing acts upon it which, were it not for the easement, the latter would be privileged to do (Restatement, Property, § 452). *Rahabi v. Morrison*, 81 AD 2d 434 - NY: Appellate Div., 2nd Dept. 1981

"Restrictive covenants on the use of property may be created in express terms or by implication. Where they arise by implication, the restrictions are said to create a reciprocal negative easement." *Bomar v. Echols*, 270 S.C. 676, 679, 244 S.E.2d 308, 310 (1978) (internal citations omitted). "For a reciprocal negative easement to arise by implication, the implication must be plain and unmistakable." *Shoney's, Inc. v. Cooke*, 291 S.C. 307, 313, 353 S.E.2d 300, 304 (Ct. App. 1987). Four elements must be established to show a reciprocal negative easement: (1) a common grantor, (2) a designation of the land or tract subject to restrictions, (3) a general plan or scheme of restriction in existence for the designated land or tract, and (4) restrictive covenants that run with the land. *Gambrell v. Schriver*, 312 S.C. 354, 358, 440 S.E.2d 393, 395 (Ct. App. 1994). *Misty Lake Association, Inc. v. Bridleridge Homeowners' Association, Inc.*, SC: Court of Appeals, 2013.

One Texas court looked at the nature of the easement from the servient owner’s standpoint, viz.,

An easement appurtenant generally takes the form of a negative easement: the owner of the servient estate may not interfere with the right of the owner of the dominant estate to use the servient estate for the purpose of the easement. See *Bickler*, 403 S.W.2d at 359;
Creating Easements

Easements are created in numerable ways. Written easements can be created by express grant, reservation, dedication, in probate documents or by agreement. In some cases, easements can be obtained by eminent domain.

Unwritten easements are created by implication, necessity, prescription, common law dedication or even by estoppel. In states where title in real estate may be registered, such real estate is generally not subject to easements by prescription.

Easements may be created by (1) express grant, (2) implied grant, (3) prescription, or (4) estoppel. McCumbers at id. *Sunshine Diversified Invests. III, LLC v. Chuck*, 2012 Ohio 492 - Ohio: Court of Appeals, 8th District 2012.

An easement may be acquired only by grant, express or implied, or by prescription. *Trattar v. Rausch*, 154 Ohio St. 286 - Ohio: Supreme Court 1950.

An easement may be created by express or implied grant, or by prescription, but it may not be created by parol because it is real property. See 25 Am.Jur.2d Easements and Licenses §17 (1966).

An easement is created if the owner of the servient estate enters into a contract or makes a conveyance, which complies with the Statute of Frauds or an exception to the Statute of Frauds, with the intent to create a servitude. Restatement (Third) of Prop.: *Servitudes* § 2.1 (2000).

Servitudes that are not created by contract or conveyance include servitudes created by dedication, prescription, and estoppel. Those which are not created by express contract or conveyance are the implied servitudes, which may be based on prior use, map or boundary descriptions, necessity, or other circumstances surrounding the conveyance of other interests in land, which give rise to the inference that the parties intended to create a servitude. Restatement, *supra*, § 2.8 cmt. b).

Creating Written Easements

Written easements can be created in a number of ways, but in any case these “express grants” are created by virtue of some instrument of conveyance or a mortgage. The conveyance may involve an actual deed or grant of easement, or the easement may be created by reservation. Express easements may also be created by agreement, dedication, condemnation, or even in
probate documents such as a partition.

**Express Grant**

To create an easement by express grant, the owner of the servient estate grants an easement in that estate to another.

Easements may be created by (1) express grant, (2) implied grant, (3) prescription, or (4) estoppel. *McCumbers v. Puckett*, 183 Ohio App.3d 762, 2009-Ohio-4465, 918 N.E.2d 1046, ¶ 14 (12th Dist.). *Sunshine Diversified Invests, III, LLC v. Chuck*, 2012 Ohio 492 - Ohio: Court of Appeals, 8th District 2012.


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 a revocable license. (see *Willow Tex, v. Dimacopoulos*, 68 NY2d 963 [1986])

If the conveyancing document is ambiguous, the courts have set out criteria for determining the intent, viz.,

[A] court may find an express easement, where a writing which purportedly conveys an easement is ambiguous, based on extrinsic evidence to determine "the actual intention of the parties" and "to explain and give context to the language." *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1236-37 (Colo.1998). The *Lazy Dog Ranch* court identified the following circumstances relevant to interpreting an express easement:

- the location and character of the properties burdened and benefited by the servitude,
- the use made of the properties before and after creation of the servitude,
- the character of the surrounding area,
- the existence and contours of any general plan of development for the area, and
- [the] consideration paid for the servitude.

*Id.* at 1237 (quoting Restatement, *supra*, § 4.1 cmt. d).

*PRECIOUS OFFER. MINERAL EXCHANGE, INC. v. McLain*, 194 P. 3d 455 - Colo: Court of Appeals, 5th Div.

**Reservation**

The owner of a tract of land who sells a portion of her land and retains an easement in the portion sold has created an easement by reservation.
A "reservation" created a new right that did not exist at the time the grantor owned the property, while an "exception" involved the grantor merely retaining part of what he already owned. See Gill v. Fletcher (1906), 74 Ohio St. 295, 303-304. Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry. Co., 2010 Ohio 1827 – Ohio Court of Appeals, 9th District 2010.

The express reservation of an easement in a deed has been defined as a "right without a profit * * * which the owner of one estate may exercise in or over the estate of another for the benefit of the former." Yeager v. Tuning (1908), 79 Ohio St. 121, 124. Langhorst v. Riethmiller, 52 Ohio App. 2d 137 - Ohio: Court of Appeals, 1st Appellate Dist. 1977.

A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." Id. (quoting Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)).


A grantor may expressly reserve an easement over granted land in favor of retained land by using appropriate language in the instrument of conveyance. Blazer, ¶ 27. An easement may be expressly reserved by referring in the instrument of conveyance to a recorded plat or certificate of survey on which the easement is adequately described. Id. Conway v. Miller, 232 P. 3d 390 - Mont: Supreme Court 2010.

A reservation … occurs where the granting clause conveys the totality of the land described, but reserves to the grantor one or more of the rights that would comprise a fee simple absolute. Hinajos v. Lohmann, 182 P. 3d 692 - Colo: Court of Appeals, 1st Div. 2008.

The rule is that where a right of way is established by reservation, the land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement. Cohoon v. CUNY, Wash: Court of Appeals, 2nd Div. 2010

Dedication

The dedication of an easement requires both the dedication and an acceptance – both of which can be either express or implied.

"A dedication is a voluntary and intentional gift or donation of land, or of an easement or interest therein for some public use, made by the owner of the land, and accepted for such
use, by or on behalf of the public. * * * Dedication can be of two kinds: statutory and common-law. A statutory dedication is one made in conformity with the provisions of those statutes providing for such dedication.” (Citations omitted.) Becker v. Cox (June 10, 1985), Butler App. No. CA84-04-044, unreported, at 6-7.

ORC section 711.07 - Fee shall vest in municipal corporation. Upon recording, as required by section 711.06 of the Revised Code, the plat shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate name in trust to and for the uses and purposes set forth in the instrument. Effective Date: 10-01-1953.

[A] municipality receives a fee interest in a street dedicated to public use as soon as a plat is recorded. R.C. 711.07. This may be long before the street satisfies the conditions for acceptance. See 711.09.1. Sherck v. Bremke, 2012 Ohio 3527 - Ohio: Court of Appeals, 9th Appellate Dist. 2012.


A dedication is a voluntary and intentional gift of land for some public use. Todd v. Pittsburgh, Fort Wayne & Chicago RR. Co. (1869), 19 Ohio St. 514. A dedication does not, however, require a deed or particular form of conveyance. Seegar v. Harrison (1874), 25 Ohio St. 14; Hicksville v. Lantz (1950), 153 Ohio St. 421, 41 O.O.424, 92 N.E.2d 270. The intention to dedicate property to public use may be expressed, as in the case where a deed is executed, or it may be implied or inferred from the circumstances. Sedlak v. City of Solon, 104 Ohio App. 3d 170 - Ohio: Court of Appeals, 8th Appellate Dist. 1995.

A dedication has been defined as the donation of land or the creation of an easement for public use. Black's Law Dictionary 442 (8th ed. 2004). A dedication may be accomplished by express written instrument, see 26 C.J.S. Dedication §15 (2001), or often by maps or plats. See 26 C.J.S. Dedication § 17 (2001); 23 Am. Jur. 2d Dedication § 26 (2d ed. 2002). Plats or instruments by which dedications are made are construed as any other writing to ascertain and give effect to the intention of the dedicator. See generally 26 C.J.S. Dedication §§ 66, 67 (2001). Plats should be construed fairly and reasonably, and unambiguous language should be given its manifest meaning. 26 C.J.S. Dedication § 67.
Recording and Filing Requirements

Easements are interests in real property and, as such, must be conveyed in writing in accordance with the State of Frauds.

Recordation, while not a legal necessity, is certainly highly recommended. An executed, but unrecorded easement subjects only the grantor and the grantee to the terms of the document. An unrecorded easement could be construed to have essentially the same nature as a license.

An unrecorded easement does not give notice therefore cannot affect third parties (e.g. subsequent buyers). An unrecorded easement is essentially the same as a license agreement between the two parties to the agreement.

There are cases in which a jurisdiction purchased on easement, but did not record it and did not actively use it (perhaps it was purchased in anticipation of some future use). When the servient estate was later conveyed, the grantee bought it unburdened by the easement since there was no public notice (by virtue of recordation). When the jurisdiction finally decided to actually put the easement to use, they found it had to be purchased again from the new owner.

A properly executed and recorded easement burdens the servient estate regardless of whether or not a subsequent conveyance mentions its existence.

A purchaser of land who has no notice either actual or constructive, of an easement in such land in favor of third persons is free from the burden of such easement. 19 C.J. page 939 and 940, Sections 146 and 147 under Easements. See, also, 28 C.J.S., Easements, §§ 49, 50.

The general rule is stated in 19 C.J. page 939 and 940, Sections 146 and 147 under Easements, as follows: "Notice of an easement may be imputed to the purchaser by a properly recorded instrument in which the easement is granted. And where the use of the easement is open and visible, the purchaser of the servient tenement will also be charged with notice, and that too although the easement was created by a grant which was never recorded."

"Recordation gives constructive notice to all persons dealing with the land of properly recorded instruments in the chain of title." Option One Mtge. Corp. v. Boyd (June 15, 2001), Montgomery App. No. 18715, citing Thames v. Asia's Janitorial Serv., Inc. (1992), 81 Ohio App.3d 579, 587, 611 N.E.2d 948. An unrecorded deed is unenforceable against a subsequent bona fide purchaser for value without actual knowledge of the prior unrecorded deed. See id; Tiller v. Hinton (1985), 19 Ohio St.3d 66, 69, 482 N.E.2d 946 (unrecorded easement is unenforceable against subsequent bona fide purchaser without notice of unrecorded easement). However, a bona fide purchaser is bound by the prior deed if he has actual knowledge of it. Montgomery Country [sic] Treasurer v. Gray, 2004 Ohio 2729 - Ohio: Court of Appeals, 2nd.
The purpose of the recording statute is to protect a subsequent buyer without notice; therefore, once recorded, deeds and easements are valid to subsequent purchasers without notice. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 233, 662 S.E.2d 452, 455 (Ct. App. 2008).

Both deeds and easements are valid to subsequent purchasers without notice when they are recorded.” *Frierson*, 371 S.C. at 67, 636 S.E.2d at 876 (citing S.C. Code Ann. § 30-7-10 (Supp. 2005)). “The purpose of the recording statute is to protect a subsequent buyer without notice.” *Frierson*, 371 S.C. at 67, 636 S.E.2d at 876 (emphasis omitted) (citing *Burnett v. Holliday Bros.*, 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983)).

**Recodation Statutes**

**Race statute**

Also known as the "Race to the courthouse." The rule that the document recorded first wins and will have priority over any later recordings.

- States that follow the Race statute: Delaware, Louisiana, and North Carolina. [One source found also included Maryland]

**Notice statute**

A later buyer who pays fair value for the property and does not have notice that there were any other earlier conflicting interests, wins and will have priority over any later recordings. If a prior interest records first, but not until after a subsequent purchaser paid fair value, that recordation has no effect.

- States that follow the Notice statute: Alabama, Arizona, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia.

**Race-Notice statute**

A later buyer who pays fair value, does not have notice of any other earlier conflicting interests, and records first, wins and will have priority over any later recordings.

- States that follow the Race-Notice statute: Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio (regarding mortgages, Ohio follows the Race statute), Oregon, Pennsylvania (regarding mortgages, PN follows Race), South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. [Note one source found stated that Maryland is a race state]
A purchaser of land who has no notice either actual or constructive, of an easement in such land in favor of third persons is free from the burden of such easement. 19 C.J. page 939 and 940, Sections 146 and 147 under Easements. See, also, 28 C.J.S., Easements, §§ 49, 50.

The general rule is stated in 19 C.J. page 939 and 940, Sections 146 and 147 under Easements, as follows: "Notice of an easement may be imputed to the purchaser by a properly recorded instrument in which the easement is granted. And where the use of the easement is open and visible, the purchaser of the servient tenement will also be charged with notice, and that too although the easement was created by a grant which was never recorded."

Ohio is a “race-notice” state with regard to deeds, although with regard to mortgages, one source states that Ohio is a race state.

5301.01 Acknowledgment of deed, mortgage, land contract, lease or memorandum of trust.

(b) The recording of the instrument in the office of the county recorder of the county in which the subject property is situated is constructive notice of the instrument to all persons, including without limitation, a subsequent purchaser in good faith or any other subsequent holder of an interest in the property, regardless of whether the instrument was recorded prior to, on, or after February 1, 2002.

Unwritten Easements

There are a number of ways that easements can arise by unwritten means.

Easements may be created by (1) express grant, (2) implied grant, (3) prescription, or (4) estoppel. McCumbers v. Puckett, 183 Ohio App.3d 762, 2009-Ohio-4465, 918 N.E.2d 1046, ¶ 14 (12th Dist.). Sunshine Diversified Invests, III, LLC v. Chuck, 2012 Ohio 492 - Ohio: Court of Appeals, 8th District 2012.

Easements may be created by express grant, by implication, by necessity, by estoppel, and by prescription. Machala v. Weems, 56 S.W.3d 748, 754-55 (Tex. App.-Texarkana 2001, no pet.).

There seems to have been nine methods recognized under the [South Carolina] common law for the creation of an easement, namely, by grant, estoppel, way of a necessity,
implication, dedication, prescription, ancient window doctrine, reservation, or condemnation.”) (citing Davis v. Robinson, 127 S.E. 697 (1925)).

When claiming an unwritten easement, the claimant has the burden of proof.

In an easement action, the party claiming the easement bears the burden of proving the existence of the easement by clear and convincing evidence. Fitzpatrick v. Palmer, 186 Ohio App. 3d 80, 2009-Ohio-6008, 926 N.E. 2d 651 at paragraph 22. Clear and convincing evidence is evidence which produces in the mind of the fact finder a firm belief or conviction as to the facts sought to be established. Id. Canton Asphalt Co. v. Fosnaught, 2011 Ohio 5902 - Ohio: Court of Appeals, 5th Appellate.

**Easements by Implication - Generally**

It is presumed that a grantor will not advertently eliminate his own access by sale of real estate, and an easement by implication will be implied. Similarly, if a grantor transfers property without adequate access, it also will be implied that the necessary access is conveyed with the conveyance of the land.

The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am. Jur. 2d Easements and Licenses § 19 (2004); 28A C.J.S. § 62.


The situation must be such that retaining the easement over the burdened (servient) parcel is “necessary,” although the extent of necessity varies from state to state. Some states require strict necessity, while others require necessity “reasonable” for the convenient use and enjoyment of the benefited parcel.

**Implied Easement (by Prior Use)**

There are several specific requirements associated with implied easements. The servient and dominant estates must have been one and the same previously – owned by the same person as one parcel. During that time, the owner must have been using a portion of the parcel in a way that benefited another portion of the parcel.
For example, a water line or driveway that ran across the front of the parcel to a building in the rear. This use must have been apparent so that it could have been observed, for example, by a potential purchaser. The owner of the overall parcel must then subsequently have conveyed a portion of the parcel to another party, and either retained the remainder or conveyed it to yet another party.

The situation must be such that retaining the easement over the burdened (servient) parcel is “reasonably necessary” for the convenient use and enjoyment of the benefited (dominant) parcel.

Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d Easements and Licenses §§ 20-22, 30 (describing the different types of implied easements).

The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am. Jur. 2d Easements and Licenses § 19 (2004); 28A C.J.S. § 62.

The Supreme Court of Ohio has established the following four elements of an easement implied from prior use:
"(1) A severance of the unity of ownership in an estate;
"(2) that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent;
"(3) that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained;
"(4) that the servitude shall be continuous as distinguished from a temporary or occasional use only."

"An implied easement must be `apparent, continually used, and reasonably necessary to the use and enjoyment of the land.' Baker v. Rice (1897), 56 Ohio St. 463, 47 N.E. 653, syllabus. It is necessary for the advocate to prove that his client's property is `visibly dependent' upon the alleged easement. Natl. Exchange Bank v. Cunningham (1889), 46 Ohio St. 575, 22 N.E. 924, paragraph one of the syllabus. Finally, the use which serves as the basis for an implied easement upon the severance of ownership must be `continuous, apparent, permanent and necessary.' Trattar, supra, [v. Rausch (1950), 154 Ohio St. 286] at paragraph five of the syllabus." Campbell v. Great Miami Aerie No. 2309, Fraternal Order of Eagles (1984), 15 Ohio St.3d 79, 80-81. Roubanes v. Brown, 2012 Ohio 1933 - Ohio: Court of Appeals, 5th Appellate Dist. 2012.

**Easements by Necessity/ (Right of) Way of Necessity**

Easements by necessity most commonly involve parcels that are essentially land locked. As with implied easements by prior use, the situation must involve what was previously a single parcel that was severed and, upon that severance, the necessity occurred. Easements by necessity must, by their nature, involve an actual (or strict) need for the easement – again, access being the most common.


To establish an easement by necessity, the plaintiff must present clear and convincing evidence on each of the following elements: "(1) that there is a severance of the unity of ownership in an estate, (2) that before the separation takes place, the use that gives rise to the easement must have been so long continued and obvious or manifest as to show that it was meant to be permanent, (3) that the easement is [strictly] necessary to the beneficial enjoyment of the land granted or retained, and (4) that the servitude is continuous as distinguished from a temporary or occasional use only." *Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008-Ohio-4166, 896 N.E.2d 748, at ¶ 15, citing *Campbell v. Great Miami Aerie No. 2309, Fraternal Order of Eagles*, 15 Ohio St.3d 79, 15 OBR 182, 472 N.E.2d 711, citing *Ciski*; see also *Tiller* at 69, 482 N.E.2d 946; *Trattar* at paragraph eight of the syllabus. *Fitzpatrick v. Palmer*, 186 Ohio App. 3d 80 - Ohio: Court of Appeals, 4th Appellate Dist. 2009.

"A way of necessity will not be implied, where there is another or other outlets available to a public thoroughfare, even though such other outlets are less convenient and would necessitate the expenditure of a considerable sum of money to render them serviceable. 15 Ohio Jurisprudence 62, Section 44. *Fitzpatrick v. Palmer*, 186 Ohio App. 3d 80 - Ohio: Court of Appeals, 4th Appellate Dist. 2009.

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"[B]ecause easements of necessity are implied by law to provide a right of way over land which could have been effectuated by an express grant but was not, one may not simultaneously have an easement over another's land both by express grant and an easement implied of necessity." (Emphasis omitted.) Tiller, supra, 19 Ohio St.3d at 69, 19 OBR 63, 482 N.E.2d 946. Yowonske v. MDB Constr. Co., 2010 Ohio 4185 - Ohio: Court of Appeals, 7th Appellate Dist.

"An implied easement or way of necessity is based upon the theory that without it the grantor or grantee, as the case may be, can not make use of his land. It has been stated that `necessity does not of itself create a right of way, but is said to furnish evidence of the grantor's intention to convey a right of way and, therefore, raises an implication of grant.' 17 American Jurisprudence 961, Section 48." Trattar v. Rausch (1950), 154 Ohio St. 286, 293, 43 O.O. 186, 95 N.E.2d 685. Fitzpatrick v. Palmer, 186 Ohio App. 3d 80 - Ohio: Court of Appeals, 4th Appellate Dist. 2009.

Easements by necessity cannot be obtained across land that was not part of the initial unified parcel except by application of a “Private Way of Necessity” or “Private Condemnation Rights” statute such as exists in some states like Washington, Colorado, Arizona and Indiana. Such a statute generally negates the need for a common law remedy of easement by necessity.

**Prescriptive Easements** (Easements by Prescription)

Prescriptive easements – in the same manner as adverse possession – cannot be gained when the servient estate is a governmental entity.

From Rising v. Litchfield Bd. Of Twp. Trustees, 2012 Ohio 2239 - Ohio: Court of Appeals, 9th:

"A prescriptive easement occurs when one can prove that he has used the land of another (a) openly, (b) notoriously, (c) adversely to the property owner's rights, (d) continuously, and (e) for at least twenty-one years." Wood v. Kipton, 160 Ohio App.3d 591, 2005-Ohio-1816, ¶ 13 (9th Dist.). A landowner does not have to use the property himself for the full twenty-one years. Under certain circumstances the landowner may add on, or "tack," the number of years the land was adversely used by a predecessor in title.

In order to tack adverse uses, it must be established that (a) the party and her predecessor are in privity, (b) the property was sequentially and continuously used, (c) the property was used in the same or similar manner, and (d) that the use was open, notorious, and adverse to the title holder's interest.
An easement by prescription arises because and when the statute of limitations bars an action against the one asserting such an easement. Thereafter, the owner of the servient parcel has no cause of action to interfere with such easement, and he can convey no right to assert such a cause of action to anyone, unless a right to do so may in effect arise by reason of recording acts or of some other statute. Renner v. Johnson, 2 Ohio St.2d 195, 198 (1965).

Possession is not adverse if it is done with the owner's permission (or license). Mosesson v. Rach (Mar. 28, 2001), 7th Dist. No. 99CA321; Willett v. Felger (Mar. 29, 1999), 7th Dist. No. 96CO40; Coleman v. Pendello (1997), 123 Ohio App.3d 125, 130 (7th Dist.). See, also, Pavey v. Vance (1897), 56 Ohio St. 162, ¶1 of syllabus (use without permission is adverse even if the use is known to the owner). In Grace, the Supreme Court held that where the claimant previously had permission to mow the neighbor's strip, his adverse possession claim cannot be based on such act of mowing. Grace, 81 Ohio St.3d at 582. Eckman v. Ramunno, 2010 Ohio 4316 - Ohio: Court of Appeals, 7th Appellate Dist. 2010.

The Seventh District affirmed the trial court, holding that "a use does not necessarily become permissive simply because the property owner does nothing to prevent it out of indifference, laziness, acquiescence, or neighborly accommodation." Id. at ¶ 17, quoting Shell Oil Co. v. Deval Co., 1st Dist. Nos. C-980783 and C-980809, 1999 WL 741814 (Sept. 24, 1999). Sunshine Diversified Invests, III, LLC v. Chuck, 2012 Ohio 492 - Ohio: Court of Appeals, 8th District 2012.

It has been stated that if the occupying claimant has set forth a prima facie case that the use is adverse, then the landowner has the burden of showing by a preponderance of the evidence that such a grant of permission was actually made. See Goldberger v. Bexley Props. (1983), 5 Ohio St.2d 83, 84; Pavey v. Vance (1897), 56 Ohio St. 162, 174 (placing the burden on the landowner to prove permission on the grounds that the burden is rarely placed on the party holding the negative in civil suits); Gulas v. Tirone, 184 Ohio App.3d 143, 2009-Ohio-5076, ¶23; Willett, 7th Dist. No. 96CO46 (all dealing with prescriptive easements). Eckman v. Ramunno, 2010 Ohio 4316 - Ohio: Court of Appeals, 7th Appellate Dist. 2010.

The occupier can meet his initial burden on the adversity element by merely showing that a permanent structure was built on his neighbor's land. See, e.g., Board of Edn. v. Nichol (1942), 70 Ohio App. 467, 473 (7th Dist.) (stating that in the absence of a license, the building of a permanent structure on another's land shows adversity or hostility). Eckman v. Ramunno, 2010 Ohio 4316 - Ohio: Court of Appeals, 7th Appellate Dist. 2010.
Prescriptive easements – in the same manner as adverse possession – cannot be gained when the servient estate is a governmental entity.

**Prescriptive Easements versus Adverse Possession**

While Adverse Possession matures into an *ownership* right, a prescriptive easement will result in the acquisition of a limited, non-possessory interest - not ownership - in the servient estate.

In some states the courts have stated that the only difference between adverse possession and a prescriptive easement is the element of exclusivity. In other states, like Arizona, New York and Indiana, courts have stated that the same elements apply to prescriptive easements as to adverse possession “…except for those differences required by the differences between fee interests and easements.”


**Easement by Estoppel**

…the doctrine of easement by estoppel is recognized in Ohio under the following conditions: 1) it is apparent and not hidden to a third party purchaser…; 2) it would be reasonably foreseeable that the user of land under certain circumstances would substantially change his position…; 3) the person seeking to establish the easement expends some proof of improving the property which is subject to the easement…; and 4) there has been a representation by the servient estate that an easement exists. *Roubanes v. Brown*, 2012 Ohio 1933 - Ohio: Court of Appeals, 5th Appellate Dist. 2012.

"Where an owner of land without objection allows another to spend money in reliance on a supposed easement, when in justice and equity the land owner ought to have disclaimed his conflicting rights, the owner is estopped to deny the existence of the easement. *Monroe Bowling Lanes v. Woodsfield Livestock Sales* (1969)), 17 Ohio App.2d [146], at syllabus 2. An easement by estoppel may not be claimed by one who has not been misled or caused to change his position to his prejudice. Id., at 149. *Roubanes v. Brown*, 2012 Ohio 1933 - Ohio: Court of Appeals, 5th Appellate Dist. 2012.
Implied Easement by Map Reference or General Plan

Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use. *Town of Kingstree v. Chapman*, SC: Court of Appeals 2013.

Implied (“Common Law”) Dedication

Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d *Easements and Licenses* §§ 20-22, 30 (describing the different types of implied easements).

Under common law, an owner of land can dedicate that land to a proper public use. Restatement (Third) of Property: Servitudes Sec. 2.19(1) (2000).

[A] common-law dedication can be proven by showing (1) the existence of an intention on the part of the owner to make a dedication, (2) an actual offer on the part of the owner, and (3) acceptance of the offer by or on behalf of the public. *Hoskinson v. Lambert*, 2011 Ohio 4616 - Ohio: Court of Appeals, 5th Appellate Dist. 2011.

[T]he elements of common-law dedication [are]: (1) the existence of an intention on the part of the owner to make such a dedication; (2) an actual offer on the part of the owner, evidenced by some unequivocal act to make a dedication; and (3) the acceptance of the offer by or on behalf of the public, see, e.g., *Bolen v. City of Parma*, Cuyahoga App. No. 81183, 2003-Ohio-294 at paragraph 20 and 21, citations deleted. *City of Westerville v. Subject Property, etc.*, 2008 Ohio 4521 - Ohio: Court of Appeals, 5th District 2008.

The purpose of the principle of common law dedication is to provide a mechanism for an intentional appropriation or donation of land by its owner for some proper public use. See 23 Am.Jur.2d Dedication § 1 (1983). However, the owner's intent need not be express. "The owner's intention to dedicate land to the public may be manifested by his acquiescence in its use by the public, and dedication of the property may result from such acquiescence, provided the use is of the necessary character and duration." *Id.* at § 34.

A dedication is a voluntary and intentional gift of land for some public use. *Todd v. Pittsburgh, Fort Wayne & Chicago RR. Co.* (1869), 19 Ohio St. 514. An intention on the part of an owner of property to dedicate it to a public use is an essential element of a common-law dedication. *Longworth v. Cincinnati* (1891), 48 Ohio St. 637, 29 N.E. 274. A dedication does not, however, require a deed or particular form of conveyance. *Seegar v. Harrison* (1874), 25 Ohio St. 14; *Hicksville v. Lantz* (1950), 153 Ohio St. 421, 41
The intention to dedicate property to public use may be expressed, as in the case where a deed is executed, or it may be implied or inferred from the circumstances. *Sedlak v. City of Solon*, 104 Ohio App. 3d 170 - Ohio: Court of Appeals, 8th Appellate Dist. 1995.

[T]here is a distinction between common law dedications and statutory dedications. Common law dedications are controlled by common law principles while statutory dedications are governed by specific statutes. See *Karb*, 61 Wash.2d at 218-19, 377 P.2d 984. Another distinction between a statutory and common law dedication is that the former operates by way of grant and the latter by way of equitable estoppel. Id. The title or right acquired by the public in a statutory dedication depends upon the language of a jurisdiction's dedication statute. *Deskbook*, supra, at § 91.9(2). In many jurisdictions, a statutory dedication conveys a fee interest to the public. See *Gen. Auto Serv. Station v. Maniatis*, 328 Ill.App.3d 537, 262 Ill.Dec. 568, 765 N.E.2d 1176 (2002); *Netleton Church of Christ v. Conwill*, 707 So.2d 1075 (Miss. 1997). However, in other jurisdictions a statutory dedication may confer no further right than a mere easement. See *Heyert v. Orange & Rockland Utils., Inc.*, 17 N.Y.2d 352, 218 N.E.2d 263, 271 N.Y.S.2d 201 (1966); *City of Bartlesville v. Ambler*, 1971 OK 154, 499 P.2d 433; *Lee v. Musselshell County*, 2004 MT 64, 320 Mont. 294, 87 P.3d 423; *Mallory v. Taggart*, 24 Utah 2d 267, 470 P.2d 254 (1970). *Kiely v. Graves*, 271 P. 3d 226 - Wash: Supreme Court 2012.

**Characteristics of Easements**


**The Scope of an Easement**

The document creating the easement needs to define the scope of the easement. An easement generally can be used only for the purpose expressly stated in the document that created it. If the geographic extent or location of an easement is not described in the document creating it, the owner of the servient estate has the first right to designate its location.

If the question is the scope of an easement, the court must look to the language of the easement to determine the extent. If there is no specific delineation of the easement, or if the document is ambiguous, then the court must look to the surrounding circumstances in order to determine the intent of the parties. *Murray v. Lyon*, 95 Ohio App. 3d 215, 219, 642 N.E. 2d 41 (1994). The language of the easement, coupled with the surrounding

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When an easement is created by an express grant … the extent and limitations upon the dominant estate's use of the land depend upon the language in the grant. See *Alban* at 232, 239 N.E.2d at 24; *Columbia Gas Transm. Corp. v. Bennett* (1990), 71 Ohio App.3d 307, 318, 594 N.E.2d 1, 7-8. When the terms in an easement are clear and unambiguous, a court cannot create a new agreement by finding an intent not expressed in the clear language employed by the parties. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 374 N.E.2d 146, 150.

Additionally, if the width of an easement is ambiguous, it will be restricted to that which is reasonable or necessary.

Thus, the …use of the easement is limited by the general rule that the dominant estate's use of an ambiguous easement is constrained to that which is necessary or reasonable under the circumstances. Id. at 412, 719 P.2d at 298 (citing *Aladdin Petroleum Corp. v. Gold Crown Props.*, 221 Kan. 579, 561 P.2d 818, 822 (1977)). *Neal v. Brown*, 191 P. 3d 1030 - Ariz: Court of Appeals, 1st Div., Dept. A 2008.

If the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress. See *Andersen v. Edwards*, 625 P. 2d 282 - Alaska: Supreme Court 1981.


There is authority that the width of an easement for ingress and egress is not necessarily coextensive with the parcel or area over which the easement is granted. Some cases hold that a grant or reservation of a right-of-way "over" a particular area, strip or parcel is not ordinarily to be construed as providing for a way as broad as the ground referred to. See generally Annot., 28 A.L.R.2d 253 § 7 (1953). Without deciding whether Arizona would follow this line of authority, we conclude that the language at issue here unambiguously creates an easement that is 40 feet in width. Compare *Schaefer v. Burnstine*, 13 Ill.2d

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1 The easement was described as: PARCEL NO. 2: An easement for ingress and egress 40 feet in width, lying 20 feet on either side of a line which extends from the North right-of-way line of East Campbell Avenue North to the South line of Parcel No. 1, and which line lies 170 feet East of and parallel to the West line of the East half of the Southwest quarter of the Northwest quarter of Section Twenty-four (24), Township Two (2) North, Range Three (3)

Nevertheless, courts have held developmental changes and inventions could entitle the owner of an easement to vary the use of the easement.

In *Mark 10 Mining & Consulting, Inc. v. Rawson*, 7th District No. 91-C-77, 1992WL 356177 (November 25, 1992), the Court of Appeals for Columbiana County found that changes in the use of an easement are permitted to the extent the changes result from normal growth and development of the dominant land. Id. at 2, citing *Erie Railroad Company v. S. H. Kleinman Realty Company*, 92 Ohio St. 96, 110 N.E. 527 (1915). See also *Crane Hollow*, supra. *Diemling v. Kimble*, 2012 Ohio 3323 - Ohio: Court of Appeals, 5th Appellate Dist. 2012.

The question … is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the iter, the actus, and the via of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use ***. *Cater v.*

East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.
The rights of the servient estate owner and the rights of the dominant estate owner must be carefully balanced.

The owner of the servient estate has the right to use the land, but in a manner that is consistent with the easement. Rueckel v. Texas Eastern Transmission Corp., 3 Ohio App.3d 153, 159 (5th Dist.1981). Geiger v. Ayersville Water & Sewer Dist., 2012 Ohio 2689 - Ohio: Court of Appeals, 3rd District 2012.

The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. Hill v. Carolina Power & Light Co., 204 S.C. 83, 96, 28 S.E.2d 545, 549 (1943). In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated." Id.

The owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement. Baker v. Pierce (1950) 100 Cal.App. 2d 224.

The owner of a servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted, see Howard v. Cramlet, 56 Ark. App. 171, 939 S.W.2d 858 (1997).

The servient estate owner is entitled to make any use of the servient estate that does not unreasonably interfere with the enjoyment of the servitude. Restatement (Third) of Property: Servitudes.

If the easement does not detail the manner in which the easement is to be used, it is assumed the servient estate owner and parties with rights to use the easement will "exercise their respective rights and privileges in a spirit of mutual accommodation.” Restatement (Third) of Property: Servitudes.

The Scope of an Unwritten Easement

The scope of an unwritten easement is strictly defined by the need (as in easements by implication or necessity) or by the specific nature of the use (as in a prescriptive easement).
Unwritten easements involve reasonable and necessary use, such as ingress and egress. They will be limited to the spatial extent necessary for the intended use.


[T]he scope of an easement gained by prescription is constrained by—i.e., may not exceed—the character and extent of the use made of it during the prescriptive period. See *Warnack v. Coneen Family Trust* (1994), 266 Mont. 203, 217-18, 879 P.2d 715, 724; *Kelly v. Wallace*, 1998 MT 307, ¶ 31, 292 Mont. 129, ¶ 31, 972 P.2d 1117, ¶ 31, and cases cited therein; § 70-17-106, MCA.


Frequency of use during the prescriptive period limits the frequency of future use. *Kelly*, ¶ 34. *BROWN & BROWN OF MT, INC. v. RATY*, 289 P. 3d 156 - Mont: Supreme Court 2012.

Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest. *Soderberg*, 687 A.2d at 843 n.3

**Exclusivity**

The concept of exclusivity as applied to easements construes two different issues.

[M]ost … types of easements, may be exclusive or nonexclusive. These are legal terms of art encompassing (1) the persons who may be excluded and (2) the uses or area from which those persons may be excluded. 1 Restatement of the Law 3d, Property (2000) 14, Section 1.2. *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App. 3d 325 - Ohio: Court of Appeals, 7th.

"At one extreme, the holder of the easement or profit has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude. For example[,] the holder of a private roadway easement in a public road has no right to exclude anyone from using the road. * * * At the other extreme, the holder of the easement or profit has the right to exclude everyone, including the servient owner,
from making any use of the land within the easement boundaries. In between are easements where the servitude holder can exclude anyone except the servient owner and others authorized by the servient owner (usually called `nonexclusive easement') * * *.


An exclusive easement in gross is one that gives the owner the sole privilege of making the uses authorized by it. Neither the owner of the servient estate nor any other person except the owner of the easement is entitled to make such a use. Id., § 493. Orange County, Inc. v. Citgo Pipeline Co., 934 SW 2d 472 - Tex: Court of Appeals, 9th Dist. 1996.

[A] nonexclusive easement in gross is "one which does not give, as against the owner of the servient tenement and others who may be privileged under him, the sole privilege of making the use authorized by the easement. In the case of such an easement the owner and possessor of the servient tenement has not only the privilege himself to make the use authorized by the easement, but he retains the power to create like privilege in others." Id. Orange County, Inc. v. Citgo Pipeline Co., 934 SW 2d 472 - Tex: Court of Appeals, 9th Dist. 1996. [emphasis added]


**Duration--“running with the land” versus temporary or for a specified term**

The conveyance of the servient estate is automatically subject to any easement, whether the conveyance notes it or not. If for no other reason, this is true because one cannot convey what one does not own – and the easement interest is, by definition, owned by another party.

Likewise, appurtenant easements continue to exist and are conveyed with the dominant estate regardless of whether the deed specifically references the appurtenant easement or not, although if the state has a marketable title act, the existence of an easement over time could be impacted if it is not exercised or otherwise referenced in conveyances.

The duration of an easement is perpetual unless otherwise defined by the terms of the grant that created it.

Ohio case law long has held that a covenant, involving the perpetual obligation of a grantor or grantee and his heirs and assigns, which relates solely to a servitude of one estate to another, runs with the land and attaches to the ownership of the respective estates. Peto v. Korach, 17 Ohio App. 2d 20 - Ohio: Court of Appeals 1969.
The duration of a real property interest is denoted by "estate" and (1) may be infinite or perpetual, as in fee simple; (2) may last for a specified period, such as life or a term of years; or (3) may end at any time, as in sufferance. Powell, *Powell on Real Property* vol. 1 at § 11.01.

Where the parties have clearly manifested an intention to limit the duration of an easement, the courts will enforce the limitation. Where the parties have agreed that the easement shall continue until terminated in a certain manner, the easement ordinarily will continue until so terminated. 28 C.J.S. *Easements* § 138 (2008).

The duration of some unwritten easements may be subject to limitations related to necessity.

[A]n easement implied by necessity will continue to exist only so long as the underlying necessity exists. An easement implied by a prior use of the land, however, is permanent and must only be proven necessary at the time of severance. *Cobb v. Daugherty*, 693 SE 2d 800 - W Va: Supreme Court of Appeals 2010.

An easement by prescription is not necessarily perpetual or of indefinite duration. The easement may terminate when the need for which the parties intended to create it ends. *RIBELLINO v. 110 FIFTH ST. PRIVATE LLC*, 2012 NY Slip Op 51235 - NY: Supreme Court 2012

However, some states have different criteria for termination of unwritten easements. As noted above, most will terminate an easement by necessity upon cessation of the need, but Colorado, for example, and to some extent, Alaska, are exceptions, viz.,


Having once arisen, the implied easement is not extinguished merely because the reasonable necessity ceases to exist. *Williams v. Fagnani*, 175 P. 3d 38 - Alaska: Supreme Court 2007.

Duration of an easement can also be affected if the benefited estate ceases to exist. See the sections on “Terminating or Extinguishing Easements” for more information.

If the state has a marketable title act, that could extinguish some easements over time if they are not used or referenced in conveyances. State courts have also outlined other reasons to extinguish easements, viz.,

[A] number of courts have held that an easement burdening or benefitting *an estate less than a fee simple* ends when that estate expires. *See* Jon W. Bruce & James W. Ely, Jr.,
The Law of Easements and Licenses in Land, § 10:15, at 10-28 (2001), and cases cited therein. As such, it may be more precise to say that an easement runs with the estate in land to which it is appurtenant, or that it follows ownership of the estate for as long as that estate exists. Leichtfuss v. Dabney, No. 04-537 Supreme Court of Montana (2005 MT 271) [emphasis in original].

Maintenance of an Easement

Maintenance obligations related to an easement are first defined by the terms of the conveyance that created it. If, however, the conveyance does not outline responsibilities, the owner of the easement (dominant tenement) will generally be responsible, and if there are multiple tenements, the costs will be equitably assigned.

[The owner of the dominant estate, is responsible for preparation, maintenance, improvements and repair of the way "in a manner and to an extent reasonably calculated to promote the purposes for which it was created . . . causing neither an undue burden upon the servient estate nor an unwarranted interference with the rights of common owners . . . ." Barraclough v. AP&L Co., 268 Ark. 1026, 1030, 597 S.W.2d 861, 863 (Ark. App. 1980) (citations omitted). [The owner of the dominant estate], in addition, “has the right to do everything necessary to preserve the easement, and the right to repair a way is fully established . . . The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each particular case, and depends on the extent and character of the lawful use of the easement.” Craig v. O'Bryan, 227 Ark. 681, 686, 301 S.W.2d 18, 21 (1957) (citing Doan v. Allgood, 141 N.E. 779 (Ill. 1923)).


We conclude that the proper rule is, absent language in a deed to the contrary, "[j]oint use by the servient owner and the servitude beneficiary . . . of the servient estate for the purpose authorized by the easement . . . gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate . . . used in common." 1 Restatement (Third), Property, Servitudes § 4.13(3), pp. 631-32 (2000). BUCK MOUNTAIN OWNERS'ASSOCIATION v. Prestwich, Wash: Court of Appeals, 1st Div. 2013.

Easement beneficiaries generally have the duty to "maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiaries' control, to . . . prevent unreasonable interference with the enjoyment of the servient estate." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.13 (1994); Prince v. Eastham, 254 P.3d 1121, 1129-30 (Alaska 2011)

[T]he owner of an easement has not only the right but the duty to keep the easement in repair, and the owner of the servient tenement is under no duty to maintain or repair the easement in the absence of an agreement. Guthrie v. Hardy, 2001 MT 122, ¶ 59, 305


"When an easement is created for the benefit of multiple ... tenements, all owners are mutually burdened with the construction, maintenance, and repairs of the subject property" (Raskin v. Crown-Kingston Realty Assoc., 254 AD2d 472, 473 [1998]). GUZZONE v. BRANDARIZ, 2007 NY Slip Op 51521 - NY: Supreme Court 2007.

**Overburdening or Expanding the use of an easement**

The concept of overburdening an easement can come in two senses – overburdening the use of the easement or overburdening the nature of its use.

The easement holder must negotiate with the owner of the servient estate to purchase additional rights if the geographic scope or nature of the use of an easement is to be expanded. Such changes generally cannot be made unilaterally by either party, although common law rules provide for some limited exception changes in location.

Expanding the use or the nature of the use of an easement beyond that expressed in the record document that created it is considered “overburdening” the easement. An easement specifically and exclusively created for purposes of ingress and egress cannot be legally expanded to include a pipeline, for example.

When an easement is created by an express grant, as in this case, the extent and limitations upon the dominant estate's use of the land depend upon the language in the grant. See Alban at 232, 239 N.E.2d at 24; Columbia Gas Transm. Corp. v. Bennett (1990), 71 Ohio App.3d 307, 318, 594 N.E.2d 1, 7-8. When the terms in an easement are clear and unambiguous, a court cannot create a new agreement by finding an intent not expressed in the clear language employed by the parties. Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, 246, 374 N.E.2d 146, 150. The language of the easement, considered in light of the surrounding circumstances, is the best indication of the extent and limitations of the easement. Lakewood Homes, Inc. v. BP Oil, Inc., 3rd Dist. No. 5-

The holder of an easement is entitled to a use that is reasonably necessary and consistent with the purposes for which the easement was granted, and must impose the least possible burden upon the property. Thompson on Real Property, Easements § 426. The holder of the fee may do anything not inconsistent with the enjoyment of the easement, Langhorst v. Riethmiller (1977), 52 Ohio App.2d 137. The holder of an easement may use it for any normal use which is not forbidden by law or unreasonably interfering with the rights of the landowner. Thompson, supra, § 427. *** As the easement at issue was for ingress and egress only, Appellees landscaping of property owned by Appellants was not a use reasonably necessary nor consistent with the purpose of the easement. Archer v. Engstrom, 2009 Ohio 2479 - Ohio: Court of Appeals, 5th Appellate Dist. 2009.

Courts have held developmental changes and inventions could entitle the owner of an easement to vary the use of the easement. For example, in Mark 10 Mining & Consulting, Inc. v. Rawson, 7th District No. 91-C-77, 1992WL 356177 (November 25, 1992), the Court of Appeals for Columbiana County found that changes in the use of an easement are permitted to the extent the changes result from normal growth and development of the dominant land. Id. at 2, citing Erie Railroad Company v. S. H. Kleinnman Realty Company, 92 Ohio St. 96, 110 N.E. 527 (1915). See also Crane Hollow, supra. Diemling v. Kimble, 2012 Ohio 3323 - Ohio: Court of Appeals, 5th Appellate Dist. 2012

"The construction and maintenance underground of a water pipeline, for public purposes, in real property outside a municipal corporation which is subject to an easement for highway purposes, is not an added burden on such property for which compensation must be awarded." Ziegler v. Ohio Water Service Co. (1969), 18 Ohio St. 2d 103. Jolliff v. Hardin Cable Television Co., 26 Ohio St. 2d 103 - Ohio: Supreme Court 1971.

Even when the use itself is not extended, expanding the nature of that use can be considered an overburdening of the easement. For example, an ingress and egress easement originally granted across a tract to provide access to an adjoining 160 acre farm would most likely not be construed to allow that same access for 200 individual lots created when the 160 acres was subdivided. The owner of the easement would have to purchase an additional interest from the servient estate in order to expand his access rights from what was essentially benefiting 1 person, to benefit what are now essentially 200 persons.

An easement cannot be extended as a matter of right, by the owner of the dominant estate, to other lands owned by him. Dorsey v. Dorsey, 109 W. Va. 111, 153 S.E. 146 (1930), cited in Ratcliff v. Cyrus, Supreme Court of Appeals of West Virginia, No.
If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement. Brown, 105 Wn.2d at 371-72. RANDALL INGOLD TRUST v. Armour, Wash: Court of Appeals, 2nd Div. 2012.

Unless the terms of the servitude . . . provide otherwise, an . . . easement may not be used for the benefit of property other than the dominant estate. HP Ltd. Partnership v. KENAI RIVER AIRPARK, 270 P. 3d 719 - Alaska: Supreme Court 2012.

Easements appurtenant are readily apportionable upon a subdivision of the original dominant tenement. This means that each part of the dominant tenement is entitled to claim the benefit of the easement for the service of his special segment. Some increase in burden can result from the increase in the number of users, but such increase in burden is kept within limits by the fact that any easement appurtenant has its total extent defined by the needs of the dominant estate. Williams v. Fagnani, 175 P. 3d 38 - Alaska: Supreme Court 2007.

…the owner of an easement may not materially increase the burden upon the servient estate. Dennis v. French, 135 Vt. 77, 79 (1977).

[T]he extent and scope of a prescriptive easement cannot be enlarged unless the increased use has occurred for the entire statutory period required by law. See Gibbens v. Weissaupt (Idaho 1977) 570 P.2d 870, 876.

[A]n unlimited easement carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use. Coastal Indus. Water Auth. v. Celanese Corp. of Am., 592 S.W.2d 597, 601 (Tex.1979). But the rights reasonably necessary for full enjoyment of an easement are limited. They do not encompass rights foreign to the purpose for which the easement is granted. The servient estate holder retains these rights. See Brunson, 418 S.W.2d at 506. State v. Brownlow, 319 SW 3d 649 - Tex: Supreme Court 2010.


[T]he rights of the servient landowner to reasonably use the land must be considered along with the right of the easement holder to reasonably use the easement. Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, ¶ 40, 298 Mont. 176, 994 P.2d 1114.
We recognize that there may be times where snowmachiners coming from different directions will need to get off the trail to allow one another to pass. A minor diversion off the trail for this purpose fits within the principle that "the holder of an easement . . . is entitled to make any use of the servient estate that is reasonable for enjoyment of the servitude." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.13 cmt. b (2000). Temporarily veering from the trail to allow another snowmachine to pass and establishing a two-snowmachine-wide easement are different things: the latter is a significant change in purpose that would require factual findings, the former is not. Price v. Eastham, 254 P. 3d 1121 - Alaska: Supreme Court 2011.

However, courts look carefully at social trends and technological changes that may lead them to decide that a particular use of an easement, ostensibly contrary to the stated purpose of the easement, is not overburdening.

Courts have held developmental changes and inventions could entitle the owner of an easement to vary the use of the easement. For example, in Mark 10 Mining & Consulting, Inc. v. Rawson, 7th District No. 91-C-77, 1992WL 356177 (November 25, 1992), the Court of Appeals for Columbiana County found that changes in the use of an easement are permitted to the extent the changes result from normal growth and development of the dominant land. Id. at 2, citing Erie Railroad Company v. S. H. Kleinnman Realty Company, 92 Ohio St. 96, 110 N.E. 527 (1915). See also Crane Hollow, supra. Diemling v. Kimble, 2012 Ohio 3323 - Ohio: Court of Appeals, 5th Appellate Dist. 2012

The construction and maintenance underground of a water pipeline, for public purposes, in real property outside a municipal corporation which is subject to an easement for highway purposes, is not an added burden on such property for which compensation must be awarded. Ziegler v. Ohio Water Service Co. (1969), 18 Ohio St. 2d 101. Jolliff v. Hardin Cable Television Co., 26 Ohio St. 2d 103 - Ohio: Supreme Court 1971.

In Collopy v. United Railroads of San Francisco, 67 Cal. App. 716, 228 P. 59, 61, the court approvingly cites Cater:

"As civilization advances and new and improved methods of transportation are developed, these are in aid of and within the general purposes for which highways are designed. Cater v. Northwestern, etc., 60 Minn. 539, 63 N.W. 111, 28 L.R.A. 310, 51 Am.St.Rep. 543. An abutting owner, therefore, is not entitled to be compensated anew for every improvement in street or vehicle, or with every change made imperative by such improvement, and especially so where he has made a conveyance in full contemplation and knowledge of such change. Such in effect is the principle established in Montgomery v. Santa Ana West Minister Railway Co., 104 Cal. 186, 37 P. 786, 25 L.R.A. 654, 43 Am.St.Rep. 89, and Hayes v. Handley, 182 Cal. 273, 187 P. 952. See, also, Albany v. United States, etc., 38 Cal. App. 466, 176 P. 705. "Where land is conveyed for a public highway the implication must be that it will be used as the convenience and welfare of the
public may demand, although that demand may be augmented by the increase of population. The benefits which an owner of the servient estate receives from the increase in population and consequent building up of the community usually far more than compensate him for the increased burden he may claim to have suffered." (Emphasis supplied.)


[T]he actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance as to the estate servient to the easement unless those actions or inactions exceed the scope of the easement. Cf Syl. pt. 1, *Hoffman v. Smith*, 172 W.Va. 698, 310 S.E.2d 216 (1983) ("Where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant."); Syl. pt. 2, *Lowe v. Guyan Eagle Coals, Inc.*, 166 W.Va. 265, 273 S.E.2d 91 (1980) ("No use may be made of a right-of-way different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated at the time of the grant."). *Quintain v. Columbia Natural Resources*, 556 SE 2d 95 - W Va: Supreme Court of Appeals 2001.

Courts may also look at practical considerations in considering if an expanded use constitutes overburdening.

"[W]hen no significant change has occurred in the use of the easement from that contemplated when it was created, . . . the mere addition of other land to the dominant estate does not constitute an overburden or misuse of the easement." *Carbone v. Vigliotti*, 610 A.2d 565, 569 (Conn. 1992). *Rhett v. Gray*, SC: Court of Appeals 2012.

**Interfering with an easement (see also “The Scope of an Easement” above)**


Generally, an obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before. To constitute an actionable wrong it must, however, be of a material character such as will interfere with the reasonable enjoyment
of the easement. Southern Star Central Gas Pipeline, Inc. v. Cunning, et al, Kansas Court of Appeals, No. 96,103.

In Chesson v. Jordon, 224 N. C. 289, 29 S. E. 2d 906, we find the following language: "While the authorities are at variance as to the right of an owner of land burdened with a right-of-way acquired by prescription to erect gates across the way, the weight of authority is in accord with the holding that such a right exists in the case of agricultural land. 17 Am. Jur., 1012, sec. 122; 28 C.J.S., Easements, § 91, P. 770; Annotation 73 A.L.R. 788. See also Alexander v. Autens Auto Hire, 175 N. C. 720, 95 S. E. 850; Jacobs v. Jennings, 221 N. C. 24, 18 S. E. 2d 715. Massee v. Schiller, 420 S. W. 2d 839 (1967).

While the owner of a servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted, see Howard v. Cramlet, 56 Ark. App. 171, 939 S.W.2d 858 (1997), he can do nothing tending to diminish the easement's use or make it more inconvenient or create hazardous conditions. See Hatfield v. Ark. W. Gas Co., 5 Ark. App. 26, 632 S.W.2d 238 (1982). Campbell v. Carter, 93 Ark. App. 341 (2005).

Cases previously cited from other jurisdictions objected to a locked gate as an unreasonable obstruction across an easement. The owner of the servient estate may erect a gate across an easement if it is located, maintained and constructed so as not unreasonably to interfere with the right of passage. Jordan v. Guinn and Etheridge, 253 Ark. 315, 485 S.W. 2d 715 (1972); Massee v. Schiller, 243 Ark. 572, 420 S.W. 2d 839 (1967). Accordingly, we hold that maintenance of the gate without the lock would not result in an unreasonable interference with use and enjoyment of the [prescriptive] easement. The gate itself, particularly if posted as private, would serve to notify the general public that the roadway was not for public use without imposing an undue burden on use of the easement by the interested landowners. Hall v. Clayton, 270 Ark. 626 (Ark. App. 1980).

ReLocating an easement

Although generally not, depending on the exact scenario and under some circumstances, some states’ courts have allowed the unilateral relocation of an easement by the servient owner as long as it does not substantively interfere with the dominant estate’s rights.

As a general rule, in the absence of statutes to the contrary, the location of an easement cannot be changed by either party without the other’s consent, after it has been once established either by the express terms of the grant or by the acts of the parties, except under the authority of an express or implied grant or reservation to this effect. (footnotes omitted); F.M. English, Annotation, Relocation of Easements, 80 A.L.R. 2d 743 § 4 (1961). [Cited in South Carolina Court of Appeals - Troy K. Goodwin and Fonda E.
Under certain circumstances, even express easement boundaries may be altered to maintain the purpose of the easement. See *Kothmann v. Rothwell*, 280 S.W.3d 877, 880 (Tex. App.-Amarillo 2009, no pet.) (recognizing movement of drainage tracts to maintain easement's purpose despite the expansion of original easement location). *Severance v. Patterson*, Tex: Supreme Court 2012.

Traditionally, the location of an easement, once selected or fixed, cannot be changed by the owner of the servient estate without the express or implied consent of the owner of the dominant estate. *Goodwin v. Johnson*, 357 S.C. 49, 53, 591 S.E.2d 34, 36 (Ct.App.2003). The Restatement, however, provides, in pertinent part:

- Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows .... [u]nless expressly denied by the terms of an easement ... the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

*Sheppard v. Justin Enterprises*, 646 SE 2d 177 - SC: Court of Appeals 2007

Depending on the exact scenario and under some circumstances, however, some states’ courts have allowed the unilateral relocation of an easement by the servient owner as long as it does not substantively interfere with the dominant estate’s rights.

[U]nder certain circumstances and `in the absence of a demonstrated intent to provide otherwise,' a landowner may relocate a right-of-way traversing his or her property without the consent of the easement holder (*Chekijian v Mans*, 34 AD3d 1029, 1031 [2006], lv denied 8 NY3d 806 [2007], quoting *Lewis v Young*, 92 NY2d at 449; see *Estate Ct., LLC v Schnall*, 49 AD3d 1076, 1077 [2008]). *MacKinnon v. Croyle*, 72 AD 3d 1356 - NY: Appellate Div., 3rd Dept. 2010.

Under certain circumstances, even express easement boundaries may be altered to maintain the purpose of the easement. See *Kothmann v. Rothwell*, 280 S.W.3d 877, 880 (Tex. App.-Amarillo 2009, no pet.) (recognizing movement of drainage tracts to maintain easement's purpose despite the expansion of original easement location). *Severance v. Patterson*, Tex: Supreme Court 2012.
Once an easement by necessity is established by use, it may not be relocated without consent of the holder of the dominant estate. *Meredith v. Eddy*, 616 S.W.2d at 240-41.

Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest. *Soderberg*, 687 A.2d at 843 n.3

**Terminating or Extinguishing Easements**

Easements can be terminated or extinguished by many means such as merger of title, release, abandonment, vacation, by the terms of the document, termination of the need, condemnation, mortgage foreclosure, tax sale, and by unwritten means such as non-user/abandonment and adverse possession.

An easement is not revocable at will. See *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex.2002).

An easement can terminate either by expiring in accordance with the intent of the parties manifested in the creating transaction, or by being extinguished by the course of events subsequent to its creation. Termination by extinguishment includes a wide variety of methods, some resting primarily upon conduct of the dominant owner, as for example, release and abandonment; some resting primarily upon conduct of the servient owner, as for example, prescription and conveyance to a third person having no actual or constructive notice of the easement's existence; some resting upon conduct in which both parties must participate, as for example, merger and estoppel; and some resting upon the conduct of outside entities, as for example, mortgage foreclosures, eminent domain and tax sales. Under any of these methods, the easement can be terminated in whole permanently, in whole for a time, in part permanently, or in part for a time. 4-34 Richard W. Powell, *Powell on Real Property* § 34.18 (2005) (footnotes omitted). *Sluyter v. Hale Fireworks P'Ship*, 370 Ark. 511 (2007).

In the instant case, HFP argues, in essence, that because the contracting parties' original intent and purpose has been frustrated, the easements should be terminated. We disagree. . . .

The Oregon Court of Appeals has similarly so held. See *Cotsifas v. Conrad*, 137 Or. App. 468, 905 P.2d 851 (1995). In *Cotsifas*, the appellate court cited to Oregon case law holding that an express easement may be extinguished only by consent, prescription, abandonment, or merger. In addition, the court pointed out, only an easement by necessity terminates when the necessity ceases. See id. See also *Emery v. Crowley*, 371 Mass. 489, 359 N.E.2d 1256 (1976) (holding that an express easement can be

"Use of an easement for an unauthorized purpose, or the excessive use or misuse of it, is not sufficient to cause a forfeiture of the easement, unless the misuse of the easement is willful and substantial and not merely minor or technical." 25 Am. Jur. 2d Easements & Licenses § 99 (2007). Sluyter v. Hale Fireworks P'Ship, 370 Ark. 511 (2007).

Rather than terminating an easement due to changed conditions, a court might simply order it modified…

(1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude. (2) If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude. (3) The rules stated in § 7.11 govern modification or termination of conservation servitudes held by public bodies and conservation organizations, which are not subject to this section. Restatement (Third) of Property (Servitudes) § 7.10 (2000).

Easements on one’s own land – Merger of Title

Since an easement is, by definition, an interest in the land of another, if the owners of the servient and dominant estates become one and the same, the easement is automatically extinguished. Thus easements can be terminated by “merger of title.”

This would happen when the owner of one of the estates (dominant or servient) purchases the other estate. It could also happen if the owner of the servient estate simply purchased the easement interest itself from the owner of the dominant estate. In either case, the owner of the servient estate also becomes the owner of the easement and when this occurs, title is merged and the easement interest is extinguished.

The trial court was correct to the extent that it determined that the doctrine of merger extinguished the driveway easement at the time that the Shahs owned both 8025 and 8027 Beech Ave.—there is no reason for an owner to hold an easement against himself. *Shah v. Smith*, 2009 Ohio 743 - Ohio: Court of Appeals, 1st Appellate Dist. 2009.

An easement appurtenant is extinguished when unity of title is effected because a landowner cannot have an easement in his own land. *Bryer v. Woodlands Land Development Company, LP*, Tex: Court of Appeals, 9th Dist. 2010.

An easement is defined as "a right of use over the property of another." (Emphasis added.) *Black’s Law Dictionary* 527 (7th ed.1999). Under the merger doctrine, if an easement exists and then the owner of that easement acquires a greater estate, the two estates merge into the greater of the two and the lesser is extinguished. *Id.* at 1002. One who owns fee simple title no longer needs an easement across his own property, since the fee simple gives him the right to use all of the property. The merger doctrine has been accepted by Texas courts. See *Tirado v. Tirado*, 357 S.W.2d 468, 474 (Tex.Civ.App.-Texarkana 1962, writ dism’d). As stated by the Texas Supreme Court, "The principle is elementary that, to constitute an easement, the dominant and the servient estates must be held by different owners; and when the owner of an estate enjoys an easement over another, and acquires title to the latter, the easement is thereby extinguished." *Howell v. Estes*, 71 Tex. 690, 12 S.W. 62 (1888). *Cecola v. Ruley*, 12 SW 3d 848 - Tex: Court of Appeals, 6th Dist. 2000.

"A servitude is terminated when all the benefits and burdens come into a single ownership." Restatement (Third) of Property, Servitudes, § 7.5. The rationale for this doctrine is that when the benefits and burdens are united in a single person, or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates. *Id.* at cmt. a. *Doug’s Elec. Serv., Inc. v. Miller*, 79 Ark. App. 28 (2002).

One cannot have an easement on one's own property, see N.D.C.C. § 47-05-06…. *Lutz v. Krauter*, 553 N.W.2d 749, 752 (N.D. 1996)

It is undisputed that the easement was extinguished when the parcels came under common ownership (see *Will v Gates*, 89 NY2d 778, 784 [1997]).

[T]he easement was extinguished by merger when the subject properties came under common ownership. 27 AD3d 639, 640.

Where right-of-way is extinguished [by merger], it can only be recreated by a proper new grant or reservation. *Capital Candy*, 135 Vt. at 16, 369 A.2d at 1365.
Once a right-of-way has been extinguished by merger, it cannot be re-created by the mere subsequent separation of the parcels. *Capital Candy*, 135 Vt. at 16, 369 A.2d at 1365.

While an easement by dedication may be described in a plat prepared prior to conveyance of subdivided property, no easement legally exists until the seller conveys ownership of a part of that property to a buyer. *Inlet Harbour*, 377 S.C. at 92, 659 S.E.2d at 154.

**Termination by Release**

Most commonly, private easements that are no longer needed are simply “released.” In a release, the holder of the dominant estate “releases” its interest back to the servient estate, although there could be terms in the creating document that prevent release except as pursuant to certain conditions.


**Termination by Vacation/Abandonment**

A governmental agency may officially abandon an easement. This is most often the case when a public use is involved and, particularly, when the easement was initially acquired by condemnation.

Jurisdictions may also vacate an easement. When a jurisdiction vacates an easement, it is releasing the public’s interest in the easement, but this action cannot, by itself, have any effect on any private interests that might exist.

It is rational for a municipality to be able to vacate its interest in a street even though it has not accepted responsibility to maintain the street. As explained earlier, a municipality receives a fee interest in a street dedicated to public use as soon as a plat is recorded. R.C. 711.07. This may be long before the street satisfies the conditions for acceptance. See 711.09.1. Allowing a municipality to vacate its fee in a street before the street is accepted relieves the municipality of the possibility that it will in the future become responsible for the care, supervision, and control of the street. See id. *Sherck v. Bremke*, 2012 Ohio 3527
A highway may be extinguished by direct action through governmental agencies, in which case it is said to be discontinued; or by nonuser by the public for a long period of time with the intention to abandon, in which case it is said to be abandoned.” (citation omitted));  Ord v. Fugate, 152 S.E.2d 54, 59 (Va. 1967) (noting that discontinuance of public road should not carry the same effect as abandonment and stating “under the present statutes the discontinuance of a secondary road means merely that it is removed from the state secondary road system.

Discontinuance of a road is a determination only that it no longer serves public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use”); see also Wilson v. Greenville County, 110 S.C. 321, 325, 96 S.E. 301, 302 (1918) (recognizing that discontinuance of a public highway and abandonment are two acts which are “separate and distinct in fact and in law”)

**Termination by the Terms of the Document; Conditional, Determinable or Defeasible Easements**

An easement is defeasible when it terminates upon the occurrence of a certain event. There are two types of defeasible easements and the difference between the two is very fine. Generally a determinable easement automatically reverts to the fee owner upon the occurrence of a specified event. Alternatively an easement subject to conditions subsequent allows the servient owner to essentially retake the easement right upon the happening of the stated event. Frequently, the event is simply the passage of a specified period of time.

In cases where an easement was created for a certain period of time, it will expire upon the running of the defined term. In some states, conditional easements can be terminated if the conditions of the easement have been violated. Temporary construction easements are an excellent example of such a term.

[E]asements do not necessarily run in perpetuity. A determinable easement may be created that will terminate on the happening of a particular event.”) (citing Sentell v. Williamson County, 801 S.W.2d 220, 222 (Tex. App.-Austin 1990, no writ)). *ETC TEXAS PIPELINE, LTD.* v. *Payne*, Tex: Court of Appeals, 10th Dist. 2011.

An easement that terminates upon the happening of a particular event or contingency is a "determinable easement." Hubert, 170 S.W.3d at 712. Thompson v. Clayton, 346 SW 3d 650 - Tex: Court of Appeals, 8th Dist. 2009.

[E]asements do not necessarily run in perpetuity. A determinable easement may be created that will terminate on the happening of a particular event." (citing Sentell v. Williamson County, 801 S.W.2d 220, 222 (Tex. App.-Austin 1990, no writ)). ETC TEXAS PIPLINE, LTD. v. Payne, Tex: Court of Appeals, 10th Dist. 2011.

More than a half century ago, our Supreme Court explained, "[t]he almost universal rule that, in order to make an estate conditional, the words used in the deed must clearly indicate such an intent, either by express terms or by necessary implication from the language used." King County v. Hanson Inv. Co., 34 Wn.2d 112, 119, 208 P.2d 113 (1949). Johnson v. WAHKIAKUM COUNTY, Wash: Court of Appeals, 2nd Div. 2010.

[A] conditional easement must be created by express terms or clear implication. OFFSHORE SYSTEMS-KENAI v. State, 282 P. 3d 348 - Alaska: Supreme Court 2012.

With respect to a conditional easement, it is deemed lost when it is clear that the condition has been violated. 450 W 14TH ST. v. 40-56 TENTH, 187 Misc. 2d 735 - NY: Supreme Court 2001.

As easements can be acquired by unwritten means, they can also be extinguished by unwritten means such as adverse possession, estoppel and prescription. Normally, this involves, in essence, the inverse of the acquisition. For example, with prescription, the use of the easement is interfered with for the statutory period of time and (upon meeting all of the other requirements for prescription) the servient estate holder may thereby re-acquire the easement interest. Extinction of an easement – being an interest in real estate – is not looked upon favorably by the courts.

Extinction of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible.” Reichardt et al., v. Hoffman (1997) 52 Cal. App. 4th 754.

Having once been granted to him, he cannot lose it by mere non-user… He may lose it by adverse possession… or by abandonment, not by mere non-user, but by proofs of an intention to abandon; or, of course, by deed or other instrument in writing.” Moyer v. Martin, 101 W. Va. 19, 24, 131 S.E. 859, 861 (1926).

However, some state courts have identified certain actions on the part of the dominant estate holder that could result in termination.
Ohio cases recognize that termination of an easement may be an appropriate remedy when the owner of the easement abuses or misuses easement rights. [citations removed] Walbridge v. Carroll, 184 Ohio App. 3d 355 - Ohio: Court of Appeals, 6th Appellate Dist. 2009.


**Termination by Condemnation**

An easement could be condemned and acquired by eminent domain, in which case it would also be extinguished.

**Termination by Unwritten Means**

As easements can be acquired by unwritten means, they can also be extinguished by unwritten means such as adverse possession, estoppel and prescription. Normally, this involves, in essence, the inverse of the acquisition. For example, with prescription, the use of the easement is interfered with for the statutory period of time and (upon meeting all of the other requirements for prescription) the servient estate holder may thereby re-acquire the easement interest. Extinguishment of an easement – being an interest in real estate – is not looked upon favorably by the courts.

Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible.” Reichardt et al., v. Hoffman (1997) 52 Cal. App. 4th 754.

Having once been granted to him, he cannot lose it by mere non-user... He may lose it by adverse possession... or by abandonment, not by mere non-user, but by proofs of an intention to abandon; or, of course, by deed or other instrument in writing.” Moyer v. Martin, 101 W. Va. 19, 24, 131 S.E. 859, 861 (1926).

However, some state courts have identified certain actions on the part of the dominant estate holder that could result in termination.

Ohio cases recognize that termination of an easement may be an appropriate remedy when the owner of the easement abuses or misuses easement rights. Cleveland v. Clifford, 9th Dist. No. 02CA008071, 2003-Ohio-1290, 2003 WL 1339142, ¶ 11; Hiener v. Kelley (July 23, 1999), 4th Dist. No. 98CA7, 1999 WL 595363; Solt v. Walker (May 13, 1996),
Cessation of Purpose (Termination of the Purpose or Need)

An easement created for a specific purpose will expire when the purpose no longer exists. This could be the case when a railroad company originally purchased the right to operate a railroad. Upon abandonment, the easement may well cease to exist since the purpose is no longer being served.

Easements are not terminated by mere non-use but they can be terminated by the acts of the parties or “by the completion of the purpose or necessity for which the easement was created, or a change in the character or use of the property.” Siferd v. Stambor (1966), 5 Ohio App.2d 79, 87

Appurtenant easements may also be extinguished when the servient estate no longer exists. This most often occurs when the easement is associated with some improvement; for example, an easement to use an elevator in a building that is subsequently demolished.

Certain easements by their nature are inherently limited in duration. An easement that is created to serve a particular purpose terminates when the underlying purpose for the easement no longer exists. Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land ¶ 9.03 (1988). This principle, known as the cessation of purpose doctrine, is based upon the assumption that the parties intended the easement to terminate upon cessation of its purpose, and it serves to eliminate meaningless burdens on land. Olson v. H & B Properties, Inc, 882 P. 2d 536 (1994), 118 N.M. 495.

In the case of an easement by necessity, if the need contemplated by the easement no longer exists, the easement will terminate in most, but not all, states (see the previous section on Duration).


Easements by necessity terminate upon the cessation of the necessity. Id.; Sassman, 115 S.W. 337; Crone, 219 S.W.3d at 69; Miller, 94 S.W.3d 38. Harrington v. DAWSON-CONWAY RANCH, LTD., Tex: Court of Appeals, 11th Dist. 2012

[E]asements created by necessity have the implied purpose to make possible the use of the dominant land, and therefore will terminate when the necessity for their existence disappears. Fox Investments v. Thomas, 431 So.2d 1021, 1022 (Fla. 2d DCA 1983). For example, a common law way of necessity will expire when the owner of the dominant estate acquires adjoining property which provides access to a public or private road. Id. Parham v. Reddick, 537 So. 2d 132 - Fla: Dist. Court of Appeals, 1st Dist. 1988 (Cited in Bickel v. Hansen, 819 P. 2d 957 - Ariz: Court of Appeals, 2nd Div., Dept. B 1991).

But that is not the case in some states like Alaska and Colorado.

Having once arisen, the implied easement is not extinguished merely because the reasonable necessity ceases to exist. "Williams v. Fagnani, 175 P. 3d 38 - Alaska: Supreme Court 2007.


Alaska even has a statutory process by which previously established rights of way or easements may, under certain circumstances, be terminated:

[AS 38.05.035(e)] permits certain disposals of interests in land prior to classification, including "the granting of a right-of-way or easement for a use that has been determined in the finding required by AS 38.05.035(e) to have a minor or insignificant effect on the land and resources; such uses might include ... (ii) a telephone, electric, or other utility line less than 1,500 feet in length." 11 AAC 55.040(i)(6). NORTHERN ALASKA ENVIRONMENTAL CENT. v. DNR, 2 P. 3d 629 - Alaska: Supreme Court 2000.2

With an appurtenant easement, if the dominant estate ceases to exist, the easement may likewise be terminated.

2 AS 38.05.035(e) states “Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them. In approving a contract under this subsection, the director need only prepare a single written finding. In addition to the conditions and limitations imposed by law, the director may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will best serve the interests of the state.”
[A] number of courts have held that an easement burdening or benefitting an estate less than a fee simple ends when that estate expires. See Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land, § 10:15, at 10-28 (2001), and cases cited therein.

**Termination by Non-User/Abandonment**

Termination by non-user/abandonment is not as readily achieved as one might think. They are generally not terminated or extinguished by simple non-use except as may be specifically allowed under state law.

An easement may be terminated by abandonment, which is effective when there is a "relinquishment of possession with an intent to terminate the easement." *W. Park Shopping Ctr., Inc. v. Masheter* (1966), 6 Ohio St.2d 142, 144, 35 O.O.2d 216, 217, 216 N.E.2d 761, 762-763. *Cambridge Vil. Condo. Assn. v. Cambridge Condominium Assn.*, 139 Ohio App. 3d 3d 328 (2000).

In order to demonstrate that a dominant estate has abandoned its easement, the servient estate must establish both nonuse of the easement and an intent to abandon the easement. *Crane at 72, citing Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 443, 457. *Harvest Land Co-op, Inc. v. Sandlin*, 2006-Ohio-4207.

The owner of the servient estate must “prove both non-use and an affirmative intent to abandon the easement on the part of the dominant estate.” *Harvest Land Co-op, Inc. v. Sandlin*, 2006-Ohio-4207 citing *Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 443, 457.


An easement may be lost by abandonment. *Bank of Fayetteville v. Matilda's, Inc.*, 304 Ark. 518, 803 S.W2d 549 (1991); *Drainage Dist. No. 16 v. Holly*, 213 Ark. 889, 214 S.W2d 224 (1948). Abandonment will be established where the owner of the easement does or permits to be done any act inconsistent with its future enjoyment. *Goodwin v. Lofton*, 10 Ark. App. 205, 662 S.W2d 215 (1984). Mere non-use does not constitute abandonment. *Id.* Rather, the easement owner must relinquish or give up his rights with the intent of never resuming or claiming his right or interest. *Bank of Fayetteville v. Matilda's, Inc.*, supra. To abandon means to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in. *Id.* *Johnson v. Ramsey*, 76 Ark. App. 485 (2002).
The owner of the dominant property may abandon the right to an easement. See Posey v. Dove, 57 N.M. 200, 211, 257 P.2d 541, 548 (1953). In order to abandon such an easement, the owner must evince a clear and unequivocal intention to do so. See id. The owner's "intention may be evidenced by acts as well as words[,] but where an act is relied on as the proof, it must unequivocally indicate such intention." Id. Sitterly v. Matthews, 2 P. 3d 871 (2000), 129 N.M. 134, 2000-NMCA-037.

Having once been granted to him, he cannot lose it by mere non-user... He may lose it by adverse possession... or by abandonment, not by mere non-user, but by proofs of an intention to abandon; or, of course, by deed or other instrument in writing. Moyer v. Martin, 101 W. Va. 19, 24, 131 S.E. 859, 861 (1926)

“… if the owner of a dominant estate do[es] acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize[s] the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it.” Lux v. Haggin (1886) 69 Cal. 255.

Abandonment is a question of intention and may be proved by a cessation of use coupled with circumstances clearly showing an intention to abandon the right. 6B Michie's Jurisprudence, Easements § 18 at 166-67 (1985) cited by The Supreme Court of Appeals of West Virginia, January 1995 Term, No. 22099, Strahin v. Lantz

Section 504 (Easements) of the Restatement of Property states the majority rule that abandonment must be shown by evidence of intent to discontinue the use and that evidence of nonuse, without more, is insufficient to extinguish the right. Cited by The Supreme Court of Appeals of West Virginia, January 1995 Term, No. 22099, Strahin v. Lantz

Although it is true that an easement created by grant may be lost by abandonment, non-use alone does not result in an abandonment no matter how long it continues. (See Consolidated Rail Corp. v. MASP Equip. Corp., 67 NY2d 35, 39 [1986]).

A party relying upon another’s abandonment of an easement must produce clear and convincing proof of an intention to abandon it. (See Consolidated Rail Corp. v. MASP Equip. Corp., 67 NY2d 35, 39 [1986] quoting Hennessey v. Murdock, 137 NY 317, 326 [1893]).

Generally, where an easement is created by express written contract, lapse of time and occupation will not extinguish it unless there is ‘an absolute denial of the right to the easement, and the occupation was so adverse and hostile that the owner of the easement could have maintained an action for obstructing his enjoyment of it.’” Seymour Water
Termination by Impossibility of Use

Easements may terminate when the purpose the easement was created for becomes impossible to achieve. This could be related to the extinguishment of one of the estates or the impossibility of use of the easement due to physical conditions.

An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.' 23 Am.Jur.(2d) 57, Dedication, Sec. 66. City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E.2d 290, 295-96 (1973). K & A ACQUISITION GROUP v. ISLAND POINTE, 682 SE 2d 252 - SC: Supreme Court 2009. [emphasis added]

Even if an easement is not intentionally abandoned it may still terminate when the purposes for which it was granted become impossible. [T]he right-of-way in the present case has been extinguished by impossibility of use because the sale and condemnation of portions of the right-of-way prevents . . . future use for railroad purposes. [Indiana Railroad Abandonment case]

Termination by Adverse Possession/Prescription

[A] prescriptive easement can be extinguished by the title owner's obstruction of the easement in an open, notorious, adverse, continuous manner for at least twenty-one years. See Restatement of Property, supra, Section 506, Comment b; cf. Kougl v. Curry (1950), 73 S.D. 427, 44 N.W. 2d 114, 118. In other words, an easement can be created by another's sufficient adverse use, and it can be destroyed by the title owner's sufficient adverse restriction on such use. J.F. Gioia, Inc. v. Cardinal American Corp. (1985), 23 Ohio App.3d 33, 40, 491 N.E.2d 325.

We assume, for sake of our analysis, that adverse possession can, in fact, extinguish an express easement. Appellees argue in their brief that it cannot, but we have found nothing in our research one way or the other. Although it is intuitively logical that adverse possession could extinguish an express easement, as it can extinguish any other interest in property, the only case law we have found on the subject deals with adverse possession extinguishing an easement by prescription. See e.g. J.F. Gioia, Inc. v. Cardinal American Corp. (1985), 23 Ohio App.3d 33, 40, 491 N.E.2d 325. Fortunately, however, we need not address this issue because, as we note above, the issue of adverse possession was raised in the course of the summary judgment motion. Penn v. Esham, 2008 Ohio 3695 -

This Court has indicated that a private easement may be extinguished by adverse possession wholly inconsistent with the use of the easement. Bower Enterprises, Inc. v. City of Elkins, 173 W. Va. 438, 317 S.E.2d 798 (1984); Higgins v. Suburban Improvement Company, 108 W. Va. 531, 151 S.E. 842 (1930); Rudolph v. Glendale Improvement Company, 103 W. Va. 81, 137 S.E. 349 (1927).

Termination by Estoppel


Equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another. The elements of estoppel are, with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position (Airco Alloys Division. Airco Inc. v Buffalo Color Corporation, supra). WILD OAKS, LLC v. BEEHAN, 2012 NY Slip Op 30601 - NY: Supreme Court 2012.

To succeed on an equitable estoppel claim, a party must establish the following six elements: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. Johnson Farms, Inc. v. Halland, 2012 MT 215, ¶ 28, 366 Mont. 299, 291 P.3d 1096; Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, ¶ 67, 322 Mont. 133, 95 P.3d 671. TERRY L. BELL GENERATIONS TRUST v. FLATHEAD BANK OF BIGFORK, 2013 MT 152 – Mont: Supreme Court, 2013.
Reversionary Rights

With regard to rights of way that are abandoned, vacated or otherwise extinguished, questions often arise with regard to reversionary rights. Basically, the underlying title to the land over which a grant right of way or easement exists vests with whatever property the right of way was initially derived from.

The Ohio Supreme Court has held that, if a municipality has a fee interest in a roadway, abutting land owners have an equitable easement to use the roadway. Callen v. Columbus Edison Elec. Light Co., 66 Ohio St. 166, 174-75 (1902). Those abutting owners also have a reversionary interest in the land should the city ever abandon it. State, ex rel. Bedard v. Village of Lockbourne, 69 Ohio App. 3d 452, 457 (10th Dist. 1990); Grabnic v. Doskocil, 11th Dist. No. 2002-P-0116, 2005-Ohio-2887, ¶19. "The rule is well established in Ohio that upon the vacation of a street the fee thereto does not revert to the original dedicator but accretes to the abutting-lot owners, subject only to such rights as other such owners may have in the street as a necessary means of access to their property." Greenberg v. L. I. Snodgrass Co., 161 Ohio St. 351, 357 (1954); R.C. 723.08.

In cases where a right of way is owned in fee by the jurisdiction, statutes or municipal codes often dictate the disposal of such real estate after the right of way use is extinguished.

When reversionary rights exist in the abutting property, those rights are generally attached as an appurtenance to the abutting real estate. As such they will automatically pass with the conveyance of the abutting property. That may not be the case, however, when the street has been vacated.

The dedicator, as the original owner of the land, or his successor possesses the fee in both the street and the abutting lot. Upon vacation of the road, he can treat these two estates as separate and distinct parcels of land, Hagen v. Bolcom Mills, 74 Wash. 462, 471, 133 P. 1000, 134 P. 1051 (1913); however, unless the dedicator reserves the fee, a conveyance of land abutting upon a public highway carries with it the fee to the center of the highway. Bradley v. Spokane & I.E.R.R., 79 Wash. 455, 140 P. 688 (1914); Adams v. Skagit Cy., 18 Wn. App. 146, 566 P.2d 982 (1977), review denied, 90 Wn.2d 1007 (1978); RCW 35.79.040, 58.11.030.

Hagen noted that if the original owner of the land abutting the street still owns the land upon vacation of the street, then he may transfer the whole tract or any part of it. What had been a street would be mere land with exactly the same status as any other land which had not been impressed with a public easement. Hagen v. Bolcom Mills, supra at 468-69 (quoting White v. Jefferson, 110 Minn. 276, 124 N.W. 373, 125 N.W. 262 (1910)). In Hagen, the owner of land abutting on both sides of a street that was later vacated determined the future status of the street when he conveyed the street as a distinct
parcel. The court held subsequent conveyances of the abutting lots did not include the fee to the middle of the former street, noting:

"That land is never appurtenant to land;" ... a fee may carry an easement or a lesser estate as an incident or an accretion, but the conveyance of the fee simple title to one piece of land will not carry as an incident or an accretion a fee of equal or greater degree and quality.


We see no reason to treat fee ownership in public and private roads differently. We join the majority of jurisdictions in holding the better rule is that if there is nothing in the deed or surrounding circumstances to show a contrary intention, a conveyance of land bounded by a private road carries title to the center of the road. Accord, In re *Buchanan*, 6 Ill. App.3d 694, 286 N.E.2d 580 (1972); *State Roads Comm'n v. Teets*, 210 Md. 213, 123 A.2d 309 (1956); *Brassard v. Flynn*, 352 Mass. 185, 224 N.E.2d 221 (1967); *Sawtelle v. Tatone*, 105 N.H. 398, 201 A.2d 111 (1964); *Walker v. Tanner*, 38 Tenn. App. 437, 275 S.W.2d 958 (1954); *MacCorkle v. Charleston*, 105 W. Va. 395, 142 S.E. 841, 58 A.L.R. 231 (1928); 6 G. Thompson, *Real Property* § 3068, at 673-74 (1962); 11 C.J.S. *Boundaries* § 43, at 593 (1938).

*MacCorkle*, at page 401, explains the reason for the rule:

The seller of land can ordinarily have no object in retaining a narrow strip along a line of his grant, particularly a strip subject to the rights of others. The strip is of no value when separated from adjoining property. The grantor's use of and concern for it ends with his conveyance, unless some fortuitous circumstance later makes it worth while. The retention of the strip may seriously retard the improvement and further alienation of the adjoining property, especially if the strip is on a private way. Its proximity to his purchase makes the strip of direct and substantial value to the grantee.

In order to rebut this presumption, the intention of the grantor to retain the strip should be clearly shown. 11 C.J.S. *Boundaries* § 104, at 696 (1938).


Due to the nature of the uses allowed by a jurisdiction within a right of way; however, the reversionary rights themselves do not always have a significant appraised value.

[I]t [i]s immaterial whether the owners of adjoining lots owned the fee or not. Their reason for this opinion was, that though the fee of the street be in the owners of adjoining lots, yet as the town or city has a right to the use of the ground as a highway, and for various other purposes consistent therewith, such as the making of sewers and the laying of gas or water pipes and other purposes, for which a street may be legitimately used, which right to use the street is practically an exclusion of the owner of the fee in the street, so long as it is used by the town without obstructing the surface of the ground, and
as this right of user on the part of the city or town is permanent, and may and in all probability will last forever, the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value or to be regarded as property, which under the Constitution is required to be paid for when its use is appropriated by the public. As countenancing this view, see *Tuckahoe Canal Company* v. *Tuckahoe [and James River] Rail Road Company*, 11 Leigh [42 Va.] 78; *Barney v. [City of] Keokuk*, 94 U.S. [324], 340 [24 L.Ed. 224]; *The People v. Kerr*, 27 N.Y. [188], 211. "*Spencer v. Point Pleasant & Ohio R. Co.*, 23 W.Va. 406. *Herold v. Hughes*, 90 SE 2d 451 - W Va: Supreme Court of Appeals 1955.

**Describing Easements**

An easement requires the same accuracy of description as other conveyances. "The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description." *Vrabel v. Donahue Creek Watershed Authority*, 545 S.W.2d 53, 54 (Tex.Civ.App. 1976). *Germany v. Murdock*, 662 P. 2d 1346 (Supreme Court of New Mexico, 1983).

Land surveyors are the only profession specifically educated and trained in the preparation of land descriptions. A good land description is concise, clear and complete – thereby describing one unique, identifiable location on the surface of the earth. The weight of authority has outlined that if a description can be located on the ground as a unique parcel by a competent surveyor, it is considered sufficient.

Easement descriptions can take as many forms as there are types of descriptions. Some easements are platted, dedicated and recorded as part of a larger subdivision. Such a description might be “Block B in Bridlewood Subdivision per plat thereof recorded in Plat Book 12, Page 13 in the Office of the Recorder of Boone County, Indiana.” The easement in this case is legally defined, identified and located based on the manner in which “Block B” is depicted on the record plat.

More frequently, easements are described in separate documents executed and recorded specifically for purposes of creating the easement. The descriptions included in easement documents most typically take the form of a metes and bounds description.

Frequently, however, easements can be very adequately described using a more concise “strip description” which is much easier to prepare, less prone to the introduction of scriveners’ errors and more easily plotted. Strip easements usually are described with respect to a centerline, such as: “A strip of land 50 feet wide, the centerline of which is described as follows: [H.I. (description of centerline)].” Unfortunately, strip descriptions are not frequently used even though they have these advantages.
A strip of land either identified by easement or acquired in fee, and limited to certain rights to accommodate a particular use constitutes a strip easement. This type of easement may be for pipelines or power transmission lines and, as such, it is critical that they be continuous and not have any gaps. Gaps, however, are the ever-present hazard and bane in creating strip easements.

There are many easements created for purposes of acquiring interests in tracts of land acquired for highways, railroads, pipelines, electric lines, or any other linear transportation or utility route.” Many such acquisitions in the past were based on plans and surveys, which over time have become extremely expensive if not impossible to accurately retrace. The acquisition parcels were often inadequately described and difficult to locate on the ground with an acceptable degree of confidence. It is important that agencies and land surveyors follow procedures which provide a greater assurance of the ability to retrace easement lines and descriptions in the future.

Jerry R. Broadas, Esq., L.S., suggests that those preparing descriptions for easements in the State of Washington using the centerline/strip method, avoid the phrase “A strip of land X feet in width the centerline of which his described as follows….“ [emphasis added]. The reasoning is that the phrase “a strip of land” will leave an ambiguity as to the nature of the estate being created – easement or fee. 3

However, in its 1996 decision in Brown v. State, 924 P. 2d 908, the Washington Supreme Court said “[W]here there is no language in the deed relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, the deed will be construed to convey fee simple title. Swan, 37 Wash.2d at 536, 225 P.2d 199; 65 Am.Jur.2d Railroads § 76 (1972); see, e.g., Urbaitis v. Commonwealth Edison, 143 Ill.2d 458, 159 Ill.Dec. 50, 54, 575 N.E.2d 548, 552 (1991). The implication of this decision may be that if a conveyance contains careful wording as to the purpose that the strip is to be put to (i.e., an easement), can overcome the ambiguity of the use of the term “strip of land.”

Wording as to purpose of an easement should fall in the purview of the attorney, not the surveyor.

The Surveyor’s Responsibilities with Regard to Easements

Nothing was found in the Rules of the Ohio Engineers and Surveyors Board indicating a responsibility for surveyors to conduct their own easement research. A surveyor could, however, be bound contractually if such work was included in the terms of the contract.

ALTA/ACSM Land Title Surveys

When conducting a 2011 ALTA/ACSM Land Title Survey, the professional surveyor has significant responsibilities with respect to written easements. These responsibilities override the lack of any requirements under a state’s laws if the land surveyor is to represent that he or she, in fact, made the survey in accordance with the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys. In any case, it should be emphasized that addressing written easements in a Land Title Survey is clearly dependent on the client providing the supporting easement documents.

The current set of Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys was adopted by the American Congress on Surveying and Mapping (ACSM), the American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS) in 2011 and effective February 23, 2011.

Under paragraph Section 4, these standards state “Complete copies of the most recent title commitment, the current record description of the property to be surveyed (or, in the case of an original survey, the parent parcel), the current record descriptions of adjoiners, any record easements benefiting the property, the record easements or servitudes and covenants burdening the property (all hereinafter referred to collectively as "Record Documents"), documents of record referred to in the Record Documents, documents necessary to ascertain, if possible, the junior/senior relationship pursuant to Section 6.B.vii. below, and any other documents containing desired appropriate information affecting the property being surveyed, and to which the ALTA/ACSM Land Title Survey shall make reference, shall be provided to the surveyor for use in conducting the survey.” [emphasis added]

ACSM, ALTA and NSPS recognize that the responsibility for records research lies with the title company, not the Surveyor.

Presuming that easement documents are in fact provided, the Surveyor’s responsibility is outlined under Sections 5.E. and 6.C. of the 2011 Standards. These requirements address both when the surveyor has been provided copies of express easements and when there may actually be no written easement, but there is evidence on the ground of a potential unwritten easement.

Section 5. Field Work - The Survey shall be performed on the ground … and the field work shall include the following:

Section 5.E. Easements and Servitudes

i. Evidence of any easements or servitudes burdening the surveyed property, disclosed in the Record Documents provided to the surveyor and observed in the process of conducting the survey.

ii. Evidence of easements or servitudes not disclosed in the Record Documents
provided to the surveyor, but observed in the process of conducting the survey, such as those created by roads; rights of way; water courses; ditches; drains; telephone, fiber optic lines, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property.

**iii.** Surface indications of underground easements or servitudes on or across the surveyed property observed in the process of conducting the survey.

**iv.** Evidence of use of the surveyed property by other than the apparent occupants observed in the process of conducting the survey.

In addition, as noted above, the *2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys* require that certain notes be placed on the face of the plat or map when certain conditions exist as to easements:

**Section 6: Plat or Map** - A plat or map of an ALTA/ACSM Land Title Survey shall show the following information:

1. The width and recording information of all plottable rights of way, easements and servitudes burdening and benefitting the property surveyed, as evidenced by Record Documents which have been provided to the surveyor.

2. A note regarding any right of way, easement or servitude evidenced by a Record Document which has been provided to the surveyor (a) the location of which cannot be determined from the record document..., or (b) of which there was no observed evidence at the time of the survey, or (c) that is a blanket easement, or (d) that is not on, or does not touch, the surveyed property, or (e) that limits access to an otherwise abutting right of way, or (f) in cases where the surveyed property is composed of multiple parcels, which of such parcels the various rights of way, easements, and servitudes cross.

A surveyor cannot know that “all recorded easements” have been found by the title examiner and therefore should state only that the specific easements listed in the title commitment or otherwise provided, were shown on the Plan.

The ALTA/ACSM standards assure the title company that if there is visible evidence of unrecorded or unwritten easements those conditions will be revealed. There will then be the opportunity to evaluate the evidence and its potential effect as related to title insurance. Most frequently, potential unwritten rights will eventually appear as Schedule B2 exceptions to the title policy.
What if the described easement cannot be located on the ground?

There are a variety of reasons that easement documents frequently contain descriptions that cannot be specifically located on the ground and, therefore, shown on the plat of survey. Sometimes it cannot even be determined if the easement has any impact on the subject property.

Older utility easements (especially for gas, oil and transmission lines) were frequently purchased as “blanket” easements, which means they burdened the entirety of the owner’s real estate described in the document. In rural areas, blanket easements are still sometimes used even in contemporary easements.

While a blanket easement technically burdens an entire tract of land, the courts have generally held that once a utility company installs the infrastructure contemplated in the original easement, the construction of any further lines or otherwise expanding its physical extent may overburden the easement. In that case, an additional interest may need to be purchased from the owner.

The location of a blanket easement cannot be specifically depicted on a plat of survey and certainly the Surveyor cannot assign a width. The location of the related utility company infrastructure may; however, be an important indication of the extent of the interest that a court might assign to a blanket easement.

Another form of blanket easement oftentimes employed in older documents is reference to an easement being purchased from an owner by name only without any reference to a description of the burdened property not to mention the easement itself.

Another situation that can result in the exact location of an easement being unidentifiable is reference in the document to an exhibit that purports to show the easement. It is not unusual for the document to refer to lines of a certain color on the exhibit which, of course, are not identifiable as such in the recorded document. In addition, attached exhibits are frequently copies of 24 by 36-inch drawings reduced to legal size (or smaller) thereby rendering them illegible. Infrequently the referenced exhibit has been inadvertently left completely out of the recorded document. In all of these cases, the ability of the surveyor to locate the easement on the ground and depict it on the plat of survey is severely inhibited if not rendered impossible.

In any of these cases or for any other reason, when an easement cannot be specifically located or identified, a note to that effect should be placed on the plat of survey.

The 2011 ALTA/ACSM Standards outline several times when notes about easements should be placed on the plat/map in Section 6.C.ii.

_A note regarding any right of way, easement or servitude evidenced by a Record Document which has been provided to the surveyor (a) the location of which cannot_
be determined from the record document, or (b) of which there was no observed
evidence at the time of the survey, or (c) that is a blanket easement, or (d) that is not
on, or does not touch, the surveyed property, or (e) that limits access to an otherwise
abutting right of way, or (f) in cases where the surveyed property is composed of
multiple parcels, which of such parcels the various rights of way, easements, and
servitudes cross.

**Railroads and Rails to Trails**

The National Trails System Act ("Trails Act"), 16 U.S.C. § 1247 provided a means by which a
railroad right of way could be shifted to a temporary use as a trail by its transfer to a qualified entity
in order to preserve that right of way for future reactivation.

State laws, however, dictate the disposition of reversionary rights and different states may deal with
this issue differently. Indiana Supreme Court ruled in March 2012:

Because the rail lines are no longer in use, the railroad, pursuant to federal law, 49 U.S.C. §
10903, sought authorization from the Surface Transportation Board ("STB") to abandon the
easements. The STB authorized the railroad to negotiate transfer of the railroad corridor to
the Indiana Trails Fund for use as a public trail ("interim trail use") in accordance with the
National Trails System Act ("Trails Act"), 16 U.S.C. § 1247. The Trails Act authorizes the
STB to facilitate such transactions in order to "preserve established railroad rights-of-way for
future reactivation," *Id.* § 1247(d), a process frequently called "railbanking." *** The Court
of Federal Claims certified this question to us in accordance with Preseault v. I.C.C., which
upheld the constitutionality of the Trails Act but noted that "[s]tate law generally governs the
disposition of reversionary interests" and that, "[b]y deeming interim trail use to be like
discontinuance rather than abandonment, Congress prevented property interests from
reverting under state law." 494 U.S. 1, 8, 110 S. Ct. 914, 920, 108 L. Ed. 2d 1, 11 (1990).

We hold that a public trail is not within the scope of easements acquired for the purpose of
operating a line of railway. The original interest obtained as against the landowners'
predecessors in title was no greater than the purpose for which the easement was used at that
time. *Yarian*, 219 Ind. at 482–83, 39 N.E.2d at 606. That purpose was the transportation of
goods through the operation of a railroad line. The easement cannot now be recast for use as
a public recreational trail without exceeding the scope of the easement and in-fringing
the rights of the landowners. *** We hold that, under Indiana law, railbanking and interim trail
use pursuant to the federal Trails Act are not within the scope of railroad easements and that
railbanking and interim trail use do not constitute a permissible shifting public use. *Howard
v. United States*, Indiana Supreme Court, No. 94S00-1106-CQ-333, March 20, 2012.

The statute requires that the transfer occur prior to abandonment. If the right of way associated
with a rail corridor was abandoned prior to transfer to a qualified entity, then any part of that
right of way not held in fee by the railroad was extinguished and the right of way easement rights
reverted to the adjoining owner(s). However, any right of way that was, in fact, held in fee by
the railroad is obviously still owned by the railroad.
Sometimes adjoining owners are concerned about liability associated with the trail when those adjoiners have retained fee.

If the [rails-to-trails] trail section in question is owned in fee by abutting property owners and the operator of the trail has only the railroad’s travel easement, the liability will ordinarily be no more than that to which the property owner was exposed when the railroad had exclusive use of the right-of-way. This liability is usually nonexistent. ***

Suppose, however, that the sections of the right-of-way sought for recreational trail use have reverted and that the landowner will grant only a recreational easement or license. In that situation, a crucial element for securing the easement or for protecting the fee owner may be a strong state recreational use statute that limits the owner’s liability to willful or malicious misconduct or maintenance of an attractive nuisance. For example, the Minnesota legislature recently amended its recreational use statute to limit landowner liability to conduct intended to cause injury in the case of recreational trail use. Samuel H. Morgan, Esq. Rails to Trails Magazine, September/October 1994.

The question of when a railroad has been abandoned for the purpose of exercising reversionary rights has been addressed in a number of states.

The Supreme Court of Kansas has extended the rule such that it is "immaterial whether the railway company acquired ... [the property] by virtue of an easement, by condemnation, right-of-way deed, or other conveyance." Harvest Queen Mill & Elevator Co. v. Sanders, 189 Kan. 536, 542, 370 P.2d 419, 423 (1962). "If or when it ceases to be used for railway purposes, the land concerned returns to its prior status as an integral part of the freehold to which it belonged prior to its subjection to use for railway purposes." Id; see also Gauger v. State, 249 Kan. 86, 815 P.2d 501 (1991); Pratt v. Griese, 196 Kan. 182, 409 P.2d 777 (1966); Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905). Wheeling Stamping v. Warwood Land, 412 SE 2d 253 - W Va: Supreme Court of Appeals 1991.

**Other Types of Easements, Restrictions, Covenants and Encumbrances**

By the same means an easement for ingress and egress can be granted or acquired, easements for various other purposes such as air, light, historical preservation or redevelopment, aesthetic purposes, or conservation of land and/or improvements can be established. Generally, however, such specialized easements cannot be obtained through prescription.

No prescriptive right to the use of light and air over the property of an adjoining landowner can be acquired. State ex rel. Schiederer v. Preston (1960), 170 Ohio St. 542, 546, 11 O.O.2d 369, 371, 166 N.E.2d 748, 751; Letts v. Kessler (1896), 54 Ohio St. 73, 82, 42 N.E. 765, 766-767. There is no private right to a view without an express
easement, and the Cincinnati Zoning Code does not confer one. See Preston, supra, at 544-545, 11 O.O.2d at 370-371, 166 N.E.2d at 750; Jaeger v. Topper (1921), 103 Ohio St. 350, 357-358, 133 N.E. 82, 84. Cash v. Cincinnati Bd. of Zoning Appeals, 117 Ohio App. 3d 319 - Ohio: Court of Appeals, 1st District.

**Land Use (Agricultural/Conservation) Easements**

See Ohio Conservation Easements – O.R.C.A. § 5301.67 et seq.

**Solar Rights Easements**

Many states have passed statutes defining and outlining the requirements of solar or sunlight easements which a property owner may acquire to protect rights to sunlight for purposes of, for example, assuring that sunlight can power solar voltaic panels.

**Avigation Easements**

An avigation easement is an easement of right to navigation in airspace over designated land.