

ATTORNEY WRITES

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What are Easements?

An easement is a concept that arises frequently regarding waterfront properties. However, many issues relating to easements remain somewhat of a mystery to most riparian property owners.

An easement is the permanent right to use a portion of the property of another for a specific use or purpose. Easements are typically created (or reserved) by an express document, whether it be a deed, land contract, dedication in a plat, a deed restriction document, or a specific easement agreement. In order to be valid, “run with the land,” and bind and benefit future property owners, easements must be in writing and recorded with the county register of deeds. One exception to this rule is a prescriptive easement.

Real estate attorneys often refer to a landowner having various rights similar to a bundle of sticks. Where the landowner owns full and unencumbered title to a property, he or she owns the entire bundle. However, for example, if the oil and gas rights have been severed from the property (and are owned by someone other than the owner of the surface of the land), one “stick” in the “bundle” is gone. Similarly, if there is a recorded permanent easement in favor of someone else, then another “stick” in the “bundle” is missing. The larger number of property rights that are owned, leased or held by someone else, the fewer sticks in the bundle that are owned by the landowner and the greater the encumbrances on the land.

Most easements are rights of travel across the property of another. These can include easements for private roads, walkways, stairs, alleys, and similar items. In fact, most public road rights-of-way are glorified easements. Although most easements are for travel purposes, easements do exist for many other uses. Non-travel uses that can be authorized by an easement include parking, utilities, dockage and boat moorage, septic drain fields, drainage, wells, and storage. However, the common land preservation device referred to as a “conservation easement” is actually a misnomer; a conservation easement is really a deed restriction or restrictive covenant (preventing development and certain other uses), not a true easement.

A prospective purchaser of a property should be aware that there may be both easements benefiting that property as well as burdening the property. Some of the easements that can benefit a particular property (often referred to as an easement “appurtenant,” which means that it benefits the property and is “attached to” that property¹) include private road and private utility easements across the adjoining or nearby properties of others. Easements that can potentially

¹ Other easements do not benefit a particular property and are called “easements in gross” (for example, public road easements and public utility easements).

burden a property to be purchased (easements that are often for the benefit of other properties) also include private road easements, utility easements, walkway easements, drainage easements, and well or septic easements.

All other matters being equal, it is best not to purchase a property that has one or more easements running across (and binding) that property.² Why? Easements are encumbrances. Easements across a property can often “cloud title.” Having easements located on one’s property can cause the landowner to lose control of significant aspects of the property. That is particularly true of access or private road easements for other properties (and that do not benefit the property across which the easement is located) that can make a property owner whose land is subject to such an easement feel like he or she does not own a chunk of their own property.

Some easements are “dormant.” That is, they still legally exist, but have not been used or developed (or at least not for many years). Unfortunately, some purchasers of property bound by dormant easements assume that over a period of time, the easement will become invalid by abandonment or that the easement will never be utilized for the purpose for which it is granted. Both assumptions can prove frustratingly wrong. Almost never can an easement be extinguished or lost by abandonment or mere nonuse. Likewise, an easement that has lain dormant for decades (or longer) can suddenly be developed by the beneficiary or beneficiaries of the easement for the purposes allowed. All of a sudden, that unused private road easement on your property that serves another parcel, an unused and undeveloped stairway easement across your land to the beach, or an unused drainage easement on your property may be improved and utilized. Quite often, an easement benefits not only one property but several or many adjoining or nearby properties.

For lakefront property owners, among the most frustrating easements can be easements in the form of plat dedications (or the equivalent) located between the shore and the lakefront property or along the edge of a lakefront property (going to the body of water) for use as a park, private or public road, alley, walkway, or beach for others.

Of course, some easements are really no big deal. For example, most properties have a utility easement located along the non-waterfront edge of the property. Every property that borders a public road right-of-way has a significant portion of the undeveloped unplatted portion of the road right-of-way extending 10, 20, 30, or even more feet into the property. Quite often, drainage easements on one’s land are not a problem (although in some case, they can be trouble).

Easements are items not to be trifled with.

² There are, of course, exceptions to this. Private road easements that also benefit the lot or parcel involved and utility easements that do not interfere with the property’s use are examples of generally acceptable easements on one’s land.