



Easements & Access from Title Insurer's Perspective

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EASEMENTS

What is an Easement?

- The right to use land owned by another.
- An incorporeal, nonpossessory interest in land which concerns the use of the land of another. It is not an estate in land and does not convey title to land or dispossess the owner of the land subject to the easement. It only grants the right to use the property for some particular purpose(s).
- A limited interest in land, it runs with the servient estate, and often times is permanent in nature.

Creation of Easements

- By Express Grant
- By Implication
- By Prescription

Elements of an Express Grant of Easement

Written Instrument

Signed by the Grantor

Two subscribing witnesses

Description of the easement area

Appurtenant easement will describe the dominant estate and preferably the servient estate

(Requires notarization in order to be recorded in the public records)

Easement by Implication

Implied Grant of Way of Necessity (Fla.Stat. § 704.01(1))

- Arises by operation of law
- Unity of Title (other than original grant from the state or U.S.)
- No means of access to and from a public road (i.e. the dominant land is landlocked)
- Access is absolutely necessary for the beneficial use or enjoyment of the dominant land

Easement by Implication

- Statutory Way of Necessity (Fla.Stat. § 704.01(2))
 - Based on Public Policy
 - Land is being used for a dwelling or dwellings or for agriculture, timber raising or cutting or stock raising purposes
 - No practicable means of access to and from a public road
 - Easement for persons, vehicles, stock, franchised cable service, and utility service
 - Easement used only in an orderly and proper manner

Easement by Implication (cont'd)

- Elements to Establish Easement by Implication
 - Unity of Title
 - Owner of unified property caused one of the properties as divided to become landlocked
 - At time property was divided, it had access to a public road
 - Only reasonable and practicable access to the public road is across the servient parcel

Easement by Implication (cont'd)

- Circumstances in which an easement will be implied:
 - Written instrument that is ambiguous but otherwise valid
 - Factual situation requires easement as a matter of public policy

Note: Absolute necessity is required, not just reasonable necessity

Easement by Prescription

- User has made a particular and actual use of lands owned by another
- Continuous and uninterrupted use for 20 years
- Use was with the actual knowledge of the owner; or open, notorious, and visible such that owner should have known of the adverse use
 - Use was without permission of the owner and under some claim of right other than permission from the owner
 - Use is exclusive of the owner or inconsistent with the rights of the owner's use and enjoyment
 - Use has been such that the owner had a cause of action against the user

Statute of Frauds

- Easement is a real property interest governed by the statute of frauds and requires a written instrument
- Promissory estoppel is not an exception to the statute of frauds and therefore cannot be relied upon to create an easement

Categories of Easements

- In Gross
- Appurtenant
- Affirmative
- Negative

Duration of an Easement

- Express easement is generally perpetual unless stated otherwise
- May terminate upon the following:
 - Happening of an event, condition, or contingency
 - Mutual agreement
 - Termination of necessity
 - Unity of title
 - Abandonment
 - Condemnation
 - Marketable Record Title Act
 - Tax sale

Scope of Easement

The burden of the easement cannot be increased beyond the scope reasonably contemplated by the parties at the time of creation

Exclusive vs. Nonexclusive

Generally an easement is nonexclusive unless stated otherwise

Transfer of Easements

- Appurtenant easements run with the land (both dominant and servient estates)
- Easements in gross are personal to the holder and generally not assignable unless stated otherwise in the easement agreement

Lienholder Consent and Subordination

Holders of preexisting liens must consent to the easement and subordinate their rights to the easement otherwise a foreclosure of the lien may extinguish the easement

Easements vs Licenses

- Easement
 - Interest in land
 - Statute of frauds
 - Runs with the land
 - Generally perpetual
- License
 - Not an interest in land
 - Personal to the license holder
 - Generally revocable

ACCESS AND INSURABILITY OF EASEMENTS

Access Easement

An affirmative easement authorizing the easement holder to do something that he or she would not otherwise be entitled to do – accessing the property of another.

Insuring Access Easement

- Covered Risk 4 - lack of access to and from the insured land
- Consider the following:
 - Whether road is a public road
 - Use of the access easement
 - Easement is appurtenant to the insured fee simple parcel
 - Title to the easement parcel
 - Survey of the easement parcel
 - Proper execution of the easement agreement
 - Terms of the easement agreement
 - Exceptions applicable to the easement parcel

Preparing the Title Insurance Commitment

Schedule A of Title Commitment

- Identify the insured Fee Simple Parcel
- Identify the insured Easement Interest Parcel
- Examples:

The estate or interest in the land described on attached Exhibit “A” is fee simple as to Parcel 1 and an easement interest as to Parcel 2

The estate or interest in the land described on attached Exhibit “A” is fee simple as to Parcel 1 (“Fee Simple Parcel”) and an easement interest as to Parcel 2 (“Easement Interest Parcel”)

- Identify the title owner of the Fee Simple Parcel and the title owner of the Easement Interest Parcel
- Separately describe the Fee Simple Parcel and the Easement Interest Parcel

Parcel 1 (Fee Simple Parcel): [Insert legal description]

Parcel 2 (Easement Interest Parcel): [Insert legal description]

Schedule B-I of the Title Commitment

- Modify Schedule B-I to include any requirements relating to the easement parcel
- Examples:
 - Execution and recordation of an appurtenant easement agreement
 - Authority requirements of the Grantor
 - Consent and subordination of the lienholder

Schedule B-II of the Title Commitment

- Exceptions that are applicable to the Easement Interest Parcel must be included in Schedule B-II (including standard exceptions and specific exceptions)
- Exceptions applicable to the Fee Simple Parcel created by the easement agreement must be included in schedule B-II (e.g. maintenance obligations, insurance obligations, etc.)

Schedule B-II of the Title Commitment

Certain Survey Considerations:

- When reviewing the survey, be sure to include exceptions for rights of others that may be depicted on the survey even if there is no easement of record. Example: survey shows a curb inlet immediately adjacent to the property line and an underground pipe that runs to a retention pond located within the boundary of the insured Fee Simple Parcel.
- When reviewing the survey, confirm that the access easement area is free of physical obstacles or impediments (such as fencing, curbing, etc.). If there is a physical impediment, then there is legal access (which is what is required for insuring access), but not physical access and a specific exception should be included in Schedule B-II of the Title Commitment and Schedule B of the Title Policy describing the physical impediment as shown on the particularly described survey. (*The easement holder may then have to sue under the easement agreement to enforce its rights of access*).

Drafting the Access Easement Agreement

- Identify the Grantor and Grantee
- Include legal descriptions of both the dominant and servient parcels
- Identify the location and boundary of the easement area
- State the purpose of the easement (e.g. access, ingress and egress over, through and across the easement area for the benefit of the Grantee, the dominant parcel, and the Grantee's successors and assigns)
- Specify if easement is perpetual or temporary
- Include other applicable provisions (e.g. maintenance, indemnification, insurance, etc.)



Thank You!
for attending