



CHICAGO TITLE INSURANCE COMPANY

EASEMENTS,
Including Paper Streets

FALL, 2005

Question #1

RIGHTS OF EASEMENT HOLDERS

My client has an easement to “pass and re-pass” over certain property. The easement area is a dirt road. The easement is silent as to my client’s right to improve or pave the dirt road. May she pave over the dirt road?

- ✓ Ok, as long as it does not interfere with servient estate.
- ✓ Includes right to reasonably improve surface, *Stagman v. Kyhos*, 19 Mass.App.Ct. 590 (1985).
- ✓ Includes right to reasonably construct sidewalk and to grade, especially if necessary for enjoyment of the easement, *Gullet v. Livernois*, 297 Mass. 337 (1937).

Question #2

RIGHTS OF EASEMENT HOLDERS

My client is the holder of an old access easement, which provides that she may travel over a dirt road to gain access to a lake (beach)-front property from her property. The easement is silent as to whether she may park in the easement area. Is parking implied?

- ✓ Normally, the right to pass and re-pass does not imply the right to park. *Delconte v. Salloum*, 336 Mass. 184 (1957).
- ✓ May be a trespass.
- ✓ Where parking is necessary for the enjoyment of the right for which the purpose is granted (i.e. using the beach) parking may be implied. See *Harrington v. Lamarque*, 42 Mass.App.Ct. 371 (1997).

Question #3

RIGHTS OF BURDENED PROPERTY OWNERS

My client's property is subject to a 20 foot underground utility easement. He would like to pave over the easement so as to access a newly constructed garage on the property. The terms of the recorded easement do not address the issue. May he pave over the easement area?

- ✓ Ok, as long as the improvement does not “detrimentally interfere” with the appurtenant easement holder’s right.
- ✓ Detrimental interference is an action that results in a material increase in the cost or inconvenience to the easement holder.
- ✓ Cost and inconvenience of digging through pavement is not automatically deemed detrimental to easement holder. See *Western Massachusetts Electric Co. v. Sambo's of Massachusetts, Inc.*, 8 Mass.App.Ct. 815 (1979).

Question #4

EASEMENT BY GRANT

Lots C, D and E are in common ownership in 1900. The owner in 1910 then conveys out Lot D and Lot E to a third party, but reserves to himself in the deed an easement of travel over Lot D and Lot E. The reservation reads, "The grantor reserves to himself the right to pass and re-pass over the cart path on Lot D and Lot E." My client is the current owner of Lot D and Lot E and wants to know if the easement still encumbers his property since there is no evidence of the cart path on the ground. Does it?

Elements of Easement by Grant:

- ✓ Elements of Easement by grant: must be in writing; must be described with reasonable certainty; created by separate instrument or reserved; cannot reserve an easement to a third person.
- ✓ MGL Chapter 183, Section 13 (St. 1912, c. 502, § 19): In a conveyance or reservation of real estate the terms "heirs", "assigns" or other technical words of inheritance shall not be necessary to convey or reserve an estate in fee. A deed or reservation of real estate shall be construed to convey or reserve an estate in fee simple, unless a different intention clearly appears in the deed.
- ✓ Therefore, words of inheritance are no longer needed after 1913.
- ✓ Easements reserved prior to 1913, which do not contain words "heirs or assigns" apply only to the grantor for the grantor's life.

SEE SKETCH 4

Question #5

EASEMENT BY GRANT

My client is a developer who wishes to buy the remaining unimproved lots of a large subdivision. This unimproved portion contains several paper streets. The developer wishes to redraw and eliminate the lot lines essentially turning these unimproved lots into one larger lot in order to accommodate a large building and parking lot. In conveying out the previous lots the owner provided in her deeds that the transferees maintain a “right and easement, in common with others, to pass and re-pass with or without vehicles over the streets as shown” on the original subdivision plan. May the developer construct the building without affecting the rights of others in the subdivision?

- ✓ Elements of Easement by grant: must be in writing; must be described with reasonable certainty; created by separate instrument or reserved; and cannot reserve an easement to a third person.
- ✓ M. G. L. Chapter 41, Section 81W: Modifications cannot “affect” the rights of others in the subdivision.
- ✓ “Affect” includes modifications which deny access. *Patelle v. Planning Board of Woburn*, 20 Mass.App.Ct. 279 (1985).
- ✓ What could the developer do?
 - Get releases from lot owners, but good luck.
 - Prove abandonment: *Desotell v. Szczygiel*, 338 Mass. 153 (1958)

Question #6

EASEMENT BY ESTOPPEL

*My client is a developer who wishes to buy the remaining unimproved lots of a large subdivision. This unimproved portion contains several paper streets. The developer wishes to redraw and eliminate the lot lines essentially turning these unimproved lots into one larger lot in order to accommodate a large building and parking lot. In conveying out the previous lots the owner **failed** to provide in her deeds any express easement language and no reservation of the fee in the roadway. What are the rights of the other lot owners in the paper streets?*

- ✓ Elements of Easement by Estoppel: property description shown on plan or bounding on way; way laid out on plan; chain of title out of the same grantor; no reservation of fee by grantor; and *Casella v. Snierson*, 325 Mass. 85 (1949): "... when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such a street or way."
- ✓ The property description does show on plan and bounding on a way.
- ✓ Way is laid out on a plan.
- ✓ Chain of title is out of the same grantor.
- ✓ There is no reservation of fee by the grantor.
- ✓ Therefore, the other lot owners have rights to pass and re-pass in the paper streets, only limited by the extent necessary for enjoyment of the property.

Addendum to Question 6: Easement by Implication:

- ✓ A subcategory of easement by estoppel.
- ✓ "It is implied that if you have a lot on a plan which shows that you are abutting a way, you have the right to travel the length of the way."
- ✓ Elements of Easement by Implication: language of the instrument; physical condition of the premises; knowledge of the parties; reasonable necessity of the easement; use of street prior to conveyance; chain of title out of the same grantor; plan must show full length of the way; reference to plan does not give rise to use of all streets shown on plan. *Walter Kassuba Realty Corp. v. Keson*, 359 Mass. 725 (1971); and if there is other access, then no easement is generally created.

Question #7

EASEMENT BY PRESCRIPTION

The mortgage inspection plan of the property my client is purchasing shows a “traveled dirt drive” through the property, from the street to a large tract of land in the rear of the property. If my title examination doesn’t reveal any easement of record, does my client have to worry about the dirt drive?

- ✓ Beware of adverse possession for easements.
- ✓ Requirements: open, notorious, adverse, 20 years under M. G. L. Chapter 187 Section 2; a type of use such that a person in the neighborhood would acknowledge the person exercising control over the road has ownership rights therein: *Shaw v. Solari*, 8 Mass.App.Ct. 151 (1979); can be for particular use, such as hauling gravel: *Carson v. Brady*, 329 Mass. 36 (1952).
- ✓ Need judicial decree to establish the easement; cannot obtain an easement by prescription on Registered Land: *Lassell College v. Leonard*, 32 Mass.App.Ct. 383 (1992) and M. G. L. Chapter 185 Section 2; use does not have to be exclusive and can be on property that is burdened by other easements: *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542 (1911).

Question #8

ABUTTING SUBDIVISIONS

My client purchased Lot A consisting of 10 acres. He wishes to subdivide the property using a paper street through abutting Lot B to access a public way. Lot A does not derive out of the same chain of title as Lot B. The way is not shown on any plans for Lot A. However, the plan for Lot B shows the way running from the public street to the boundary line of Lot A. Previous owners of lot A have never made use of this paper street. May the owner of Lot A make use of the paper street on Lot B?

- ✓ Absent a specific grant, a subdivision plan showing a roadway touching an abutting piece of property does not give those in the subdivision a right of access over the abutting parcel of property.
- ✓ Same facts as *Patel v. Planning Board of North Andover*, 27 Mass.App.Ct. 477 (1989, citing *Uliasz v. Gillette*, 357 Mass. 96 (1970)).
- ✓ Easement by estoppel fails because Lot A and Lot B are not of the same chain of title.
- ✓ Easement by implication fails because the parcels are not of the same chain, other access is available and there is no prior use.
- ✓ Easement by prescription fails because there is no adverse use.
- ✓ Easement by necessity fails because there is alternative access.
- ✓ Query: Does M. G. L. Chapter 183 Section 58 give ownership rights since the property abuts the end of the way? No since it has to be along the length of the way, not the terminus. See *Barlow v. Chongris & Sons, Inc.*, 38 Mass.App.Ct. 297 (1995).

SEE SKETCH 8

Question #9

EASEMENT BY NECESSITY

Property fronting on a public way is subdivided into two parcels, Lot A and Lot B. Lot A has frontage along the public way. Lot B, landlocked, is in the rear of Lot A. What rights of access, if any, does my client obtain when purchasing Lot B? What if there is a dirt road crossing Lot A from the public road. Do any rights exist in that dirt road?

- ✓ “[t]he law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right to access to the remainder over the part sold if he can reach it in no other way.” *Davis v. Sikes*, 254 Mass. 540, 544-546 (1926); citing *New York & New England Railroad v. Railroad Commissioners*, 162 Mass. 81, 83 (1894).
- ✓ Elements of Easement by Necessity: public policy; property must be out of the same chain of title; property must be landlocked; and there can be no other access to the property.
- ✓ However, if the way is undefined, then the servient owner can locate it, *McKenney v. McKenney*, 216 Mass. 248 (1913); if existing way adequately services the landlocked property, then courts will locate on the way; and this easement applies even if a warranty deed is given.

SEE SKETCH 9

Question #10

M. G. L. Chapter 183, Section 58

A three-lot subdivision plan shows a paper street entitled "future roadway" between Lot 1 and Lot 2. The Smith property to the rear is for sale. My client wishes to buy the Smith land and the future roadway for access. Lot 1 sold in 1995. Lot 2 sold in 1996. Both deeds contained a bounding description along the way. The developer did not reserve any fee in the future roadway in either deed. Who owns the roadway?

- ✓ In *Tattan v. Kurland*, 32 Mass.App.Ct. 239,243 (1992) the Appeals Court of Massachusetts stated that M. G. L. Chapter 183, Section 58 "mandates that every deed of real estate abutting a way includes the fee interest of the other grantor in the way- to the centerline if the grantor retains property on the other side of the way or for the full width if he does not- unless the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line."
- ✓ **M. G. L. Chapter 183, Section 58** *Real estate abutting a way, watercourse, wall, fence, or other monument:* Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.
- ✓ Lot 1 and Lot 2 have bounding descriptions with no reservation of the fee in the roadway by the owner, so as a result of the conveyances and the statute, the owner of Lot 1 and the owner of Lot 2 each own halfway into the roadway. Therefore, the developer has no remaining title to the property.

SEE SKETCH 10

Question #11

M. G. L. Chapter 183, Section 58

Owner has a large single parcel of property. A town way was placed through the middle of the property in 1890. The instrument of taking for the way did not specify what was taken by the Town – the fee or only an easement. The property was subdivided into subsequent Lots: A, B, C, D & E. The town way was “discontinued” in 1940. My client wishes to purchase Lot A and Lot B. However, the owner of Lot C has recently erected a fence on the westerly side of the discontinued road, so as to obtain complete control of the discontinued road. What rights does my client have in the discontinued road?

- ✓ Between fee and easement, the presumption is easement rights in the town. *Inhabitants of Town of Lexington v. Suburban Land Co.*, 235 Mass. 108 (1920), *Opinion of Justices*, 208 Mass. 603 (1911).
- ✓ Discontinuance is dealt with under **M. G. L. Chapter 82 Section 21**: The selectmen or road commissioners of a town or city council of a city may lay out, relocate or alter town ways, for the use of the town or city, and private ways for the use of one or more of the inhabitants thereof; or they may order specific repairs to be made upon such ways; and a town, at a meeting, or the city council of a city, may discontinue a town way or a private way.
- ✓ Since the town discontinued its easement, apply **M. G. L. Chapter 183, Section 58** (see *Question 10*) to the facts.

SEE SKETCH 11/12

Question #12

M. G. L. Chapter 183, Section 58

Same facts as *Question 11*, but the fee in the roadway was taken. What is the effect of a discontinuance?

- ✓ If discontinued, then the fee does not revert to the owner. Therefore, the property owners need an abandonment.
- ✓ Any claim of ownership to the fee subject to M. G. L. 183, Section 58 interest in the other Lot owners. Is this an orphan fee?

SEE SKETCH 11/12

Question #13

TERMINATION OF EASEMENT

My client wishes to purchase Lot D and Lot E. Old plans show a cart path beginning in Lot C and continuing through Lot D and Lot E with a reference to the recorded deed with a reservation. The deed reservation states that the cart path is for “use by teams of horses and oxen for watering the same at the pond” on Lot E. Therefore, the easement is appurtenant to Lot C. My client wants to build a swimming pool over the cart path on Lot D. Lot C is now a single family home. Your survey shows there is no pond on Lot E. What is the status of the easement?

- ✓ Frustration of Purpose.
- ✓ The purpose for which the easement was created is no longer applicable.
- ✓ The easement is gone.

SEE SKETCH 13

Question #14

TERMINATION OF EASEMENT

My client owns Lot A, Lot B and Lot C. The easement for the cart path is for general travel over Lot A and Lot B in order to reach Lot C. Is the easement still valid? If my client conveys Lot C, does the easement apply?

- ✓ Termination by Merger.
- ✓ Merger of the dominant and servient estate will extinguish the easement.
- ✓ If the property is re-subdivided, then the easement is not reconstituted.
- ✓ There must be another grant of easement.

SEE SKETCH 14

Question #15

TERMINATION OF EASEMENT

The town wishes to take by eminent domain Lot D and Lot E for a public purpose other than for travel. The easement on the cart path is for general travel. Is the easement wiped out by the taking?

- ✓ Termination by Eminent Domain
- ✓ If the town takes the servient estate for a purpose which conflicts with the purpose of the easement, then the easement is extinguished.

SEE SKETCH 15

Question #16

TERMINATION OF EASEMENT

Lot A is mortgaged to a bank. A general travel easement is granted to Lot B for travel through Lot A after the grant of the mortgage. When the bank forecloses its mortgage on Lot A, does the easement survive?

- ✓ Termination by Foreclosure
- ✓ Foreclosure on servient estate wipes out subordinate encumbrances, including easement, but was notice given to the holder of the easement?

SEE SKETCH 16

Question #17

RELOCATION OF EASEMENT

My client wishes to buy Lot D and Lot E and the survey shows a cart path. There is no recorded easement and no layout of any way of record, other than the cart path on the plan. May my client safely build over the easement?

- ✓ Prescription easements.
- ✓ With no layout of way or easement of record, there is a statute of frauds problem, however, there may be an indication of adverse use.
- ✓ Your title insurance underwriter will handle this fact situation on a case by case basis.
- ✓ Case Summary: *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87 (2004):

This case forges new law in Massachusetts. An easement cut across and interfered with the construction on three of the lots. M.P.M. offered to build two new access ways for the defendant, who refused to accept the right of ways preferring to maintain the original right of way. The question posed to the Supreme Judicial Court was whether an owner of land burdened by an easement may relocate such easement without the consent of the easement holder.

The Court upheld the common law principle in Massachusetts that the owner of a servient estate in Massachusetts may not unilaterally alter or move a dominant owner's easement once the location of the easement has been fixed on the ground by accepting the modern rule as proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) §4.8 (3) (2000):

"Unless expressly denied by the terms of an easement, as defined in §1.2, 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."

Since the easement in this matter did not prohibit its relocation, the Court held that the servient party may relocate the easement at its own expense if the requirements of the Restatement are met. It appears that this case is retroactive in its application and would apply to all easements which do not contain language preventing their relocation.

SEE SKETCH 17

Question #18

INSTALLATION OF UTILITIES

Owner has a large single parcel of property. A private way was placed through the middle of the property in 1890. The property was subsequently subdivided into Lots: A, B, C, D & E with rights of ingress and egress over the private way. My client owns Lot B and now wants to place utilities in the private way to service her new home. May she?

- ✓ Chapter 187, Section 5 Installation of public utility services for abutting owners on private ways authorized: Section 5. The owner or owners of real estate abutting on a private way who have by deed existing rights of ingress and egress upon such way or other private ways shall have the right by implication to place, install or construct in, on, along, under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer service, provided such facilities do not unreasonably obstruct said private way or other private ways, and provided that such use of the private way or other private ways does not interfere with or be inconsistent with the existing use by others of such way or other private ways; and, provided further, that such placement, installation, or construction is done in accordance with regulations, plans and practices of the utility company which is to provide the gas, electricity, or telephone service, and the appropriate cities, towns, districts, or water companies which provide the water service. Said agencies, which provide such service, shall comply with the rules and regulations of the division of water supply and the department of telecommunications and energy. Any such owner or owners may grant permission to a public utility company or water company to enter upon said way or other private ways to place, install, repair, or relocate pipes, conduits, manholes, and other necessary appurtenances for the transmission of gas, electricity, telephone or water service in accordance with such company or companies regulations, practices and tariffs filed with the department of telecommunications and energy or the division of water supply; provided, however, that no charge or added assessment shall be levied by such public utility company or companies against any such owner or owners not connected to such service or services. Neither the person installing or repairing public utility facilities, nor such facilities, nor the gas, electricity, telephone or water service transmitted shall be deemed to constitute a trespass upon said way or ways.
- ✓ Owner of real estate with property abutting a private way by deed granting existing rights on ingress and egress along the way, may place utilities in the way.
- ✓ The installation of such utilities must not unreasonable obstruct or interfere with the way.

SEE SKETCH 18