New Lawyers Sections Webinar on October 14, 2022

New Lawyers Tool Kit:
All About Easements

I. WHAT ARE EASEMENTS?

A. Non-Possessory Estate in Land of Another

"An affirmative easement 'creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.'" *Patterson v. Paul*, 448 Mass. 658, 663 (2007), quoting Restatement (Third) of Property (Servitudes) § 1.2(1) (2000).

"The benefit of an easement … is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. The holder of the easement … is entitled to make only the uses reasonably necessary for the specified purpose. The transferor of an easement … retains the right to make all uses of the land that do not unreasonably interfere with exercise of the rights granted by the servitude." *Martin v. Simmons Props., LLC*, 467 Mass. 1, 9 (2014), quoting the Restatement, *supra* at § 1.2 comment (d). For example, "[a] right of way", a specific type of easement, "provides rights of ingress, egress, and travel over the land subject to the easement." *Busalacchi v. McCabe*, 71 Mass. App. Ct. 493, 496 (2008). *See Kubic v. Audette*, 98 Mass. App. Ct. 289, 303 (2020).

B. Appurtenance Versus In Gross

- Easements can be personal, also known as in gross, or appurtenant, meaning that the easement attaches to, and is subsumed within, the title of the land to which the easement provides a benefit. *See Schwartzman v. Schoening*, 41 Mass. App. Ct. 220, 223-224 (1996).

- Presumption of Appurtenance. There is a strong presumption of appurtenance as a matter of Massachusetts law: "[a]n easement is not presumed to be personal unless it cannot be construed fairly as appurtenant to some estate." *Willets v. Langhaar*, 212 Mass. 573, 575 (1912).

- <u>Inability to Sever Appurtenant Easements from Dominant Estates</u>. Appurtenant easements run with the land and, by definition, are "'incapable of existence separate and apart from the particular land to which it is annexed.'" *Schwartzman*, 41 Mass. App. Ct. at 223, quoting Black's Law Dictionary 509 (6th ed. 1990) and citing *Goodrich* v. *Burbank,* 12 Allen 459, 462 (1866). An appurtenant easement "'cannot be severed and sold separate from the estate [to which it is annexed].'" *Schwartzman*, *supra* at 224, quoting *Phillips* v. *Rhodes,* 7 Met. 322, 324 (1843).

    - **Do Invitees Need to Be Accompanied by the Easement Holder?** In *Kubic v. Audette*, 29 LCR 41 (13 MISC 480929) (Feb. 11, 2021) (Roberts, J.), on remand from the Appeals Court, the Land Court had to determine whether proper, lawful "guests" of the defendant easement holder encompass only invitees who are accompanied by defendant or his household members, or whether his open-ended invitation to friends and family to use his easement without him was legally valid. Judge Roberts, holding that, under the circumstances, "guests" only grasp invitees with the defendant easement holder or his household members, relied upon a prior decision by Judge Piper, *Brown v. Ryan*, 16 LCR 29 (Misc. Case No. 307354) (Jan. 14, 2008) (Piper, J.). In doing so, Judge Roberts distinguished the circumstances of *Kubic* from the SJC's decisions in *Barker v. Wiksten*, 332 Mass. 577 (1955) & *Randall v. Grant*, 210 Mass. 302 (1911), both of which related solely to whether tradespeople and employees, respectively, might use rights of way to access the dominant estate, not, as in *Kubic*, access rights to a great pond, *i.e.*, an amenity for the dominant estate.

- <u>Appurtenant Easements Have Perpetual Existence</u>. Appurtenant easements run with the land in perpetuity, unless "extinguished . . . by grant, release, abandonment, estoppel or prescription[.]" *Delconte v. Salloum*, 336 Mass. 184, 188 (1957).

- <u>In Gross Easements Are Not Transferrable/Assignable</u>. Personal or in gross easements, on the other hand, are not assignable or transferrable from owner to owner, as appurtenant easements change hands by operation of law, unless the parties explicitly contract for assignability or transferability. *See Rogel v. Collinson*, 54 Mass. App. Ct. 304, 315 (2002).

II. HOW ARE EASEMENTS CREATED?

Broadly-speaking, easements are established in three ways: by (1) express grant/reservation; (2) implication; and (3) prescription. As to each of these theories, "[o]ne claiming the benefit of an easement bears the burden of proving the existence of that easement on the servient estate." *Hickey v. Pathways Ass'n, Inc.*, 472 Mass. 735, 753-754 (2015). This burden extends to the extent and scope of any use rights over the Right of Way. *Swensen v. Marino*, 306 Mass. 582, 583 (1940) (scope);

Hamouda v. Harris, 66 Mass. App. Ct. 22, 24 n. 1 (2006) (extent). Each theory of easement creation will be addressed in turn.

A. By Express Grant or Reservation

- Express Grant or Reservation. The simplest, most straight forward way in which easements are created is by express grant or reservation. Since an easement is a property right, a nonpossessory estate in land, it can be established through the express language of an instrument of conveyance, such as a deed. *See*, *e.g.*, *Marden v. Mallard Decoy Club, Inc.*, 361 Mass. 105 (1972). Such easements are referred to in the case law as "express easements." *See*, *e.g.*, *Chamberlain v. Badaoui*, 95 Mass. App. Ct. 670, 673-674 (2019).

- In terms of formal drafting requirements, "[a]n express easement can be created only by a writing signed by the party to be bound, and the writing 'must identify with reasonable certainty the easement created and the dominant and servient tenements.'" *Chamberlain*, 95 Mass. App. Ct. at 674, quoting *Parkinson* v. *Assessors of Medfield*, 395 Mass. 643, 645 (1985), *S.C.*, 398 Mass. 112 (1986).

- Grant v. Reservation

    - For affirmative grants of express easements, the typical, though not necessarily required, language used includes phrases such as "together with the right to . . ." or "with the benefit of . . ."

    - Reservations and exceptions refer to when a grantor uses express language in a deed to retain a use right over the land granted to the grantee. *See*, *e.g.*, *Claflin v. Boston & A. R. Co*., 157 Mass. 489, 492-494 (1892).

B. By Implication

Unlike express easements, the existence of which ordinarily poses a question of law, the question of whether the grant or reservation of an easement may be implied in a conveyance is a question of fact. "Each such 'intended easement' depends on the deed and the circumstances in which it was made." *Rahilly v. Addison*, 350 Mass. 660, 662 (1966).

1. Necessity.

    Necessity is demonstrated when there is a conveyance of land that renders the grantor's remaining land landlocked, thereby giving rise to an easement by necessity, based on the presumed intention of the grantor to retain access to his remaining land. *See Kitras v. Town of Aquinnah*, 474 Mass. 132 (2016).

2. Prior Use.

Prior use is demonstrated, where during the common ownership of a parcel of land an apparent and obvious use of one part of the parcel is made for the benefit of another part, and such use is being actually made up to the time of severance, and is reasonably necessary for the enjoyment of the other part of the parcel. *See Sorel v. Boisjolie*, 330 Mass. 513, 516 (1953). *See Bedford*, *supra* (describing the distinction between implied easements by necessity and implied easements by prior use); *Flax v. Smith*, 20 Mass. App. Ct. 149, 152 (1985).

3. Estoppel.

Easements by estoppel are created either by the reference (a) to a street or way as a lineal monument in a deed description, or (b) to a plan depicting the property conveyed as abutting a way depicted on the plan. *See Patel v. Planning Bd. of N. Andover*, 27 Mass. App. Ct. 477 (1989).

4. Common Scheme.

Common Scheme is demonstrated when a planned subdivision is laid out on a plan of record, and materials surrounding the marketing of the lots clearly indicate an intention to provide access over ways or other amenity areas, usually to common areas such as beaches or parks, shown on the plan. *See Reagan v. Brissey*, 446 Mass. 452, 453-458 (2006)

C. By Prescription

This final way to create an easement depends on adverse use alone, and not conveyancing: "Acquiring an easement by prescription requires 'clear proof of a use of the land in a manner that has been (a) open, (b) notorious, (c) adverse to the owner, and (d) continuous or uninterrupted over a period of no less than twenty years.'" *Barnett v. Myerow*, 95 Mass. App. Ct. 730, 738 (2019), quoting *Smaland Beach Ass'n* v. *Genova*, 94 Mass. App. Ct. 106, 114 (2018), ultimately quoting *Boothroyd v. Bogartz*, 68 Mass. App. Ct. 40, 43-44 (2007).

III. WHAT ARE COMMONLY-DISPUTED ISSUES WITH EASEMENTS?

A. Overburdening

The term overburden describes any use that exceeds the scope of rights held under an easement. *See*, *e.g.*, *Southwick v. Planning Bd. of Plymouth*, 65 Mass. App. Ct. 315, 319 n. 12 (2005).

1. Overburdening (Use Not Sanctioned by Easement). *See Kubic*, 98 Mass. App. Ct. at 303-304

2. Overloading (Use Made by Non-Dominant Estate). *See Taylor v. Martha's Vineyard Land Bank Commission*, 475 Mass. 682 (2016).

3. Nuisance (Overly Intense or Obstructive Use). *See, e.g., Swenson v. Marino*, 306 Mass. 582, 585-587 (1940); *Michaelson v. Nemetz*, 4 Mass. App. Ct. 806, 807 (1976), citing Swenson, supra (overburdening claim based on frequency and intensity of use to be governed by what is "unreasonable as [a] matter of law[,]" "constitutes a nuisance or . . . result[s] in any actual obstruction of the plaintiff's right to use the way") (citation omitted).

B. Material Interference

Any easement "'obligates the land owner not to interfere with the uses authorized by the easement.'" *Patterson v. Paul*, 448 Mass. 658, 663 (2007), quoting Restatement (Third) of Property (Servitudes), § 1.2(1) (2000).

It is settled Massachusetts law that "'[t]he owner of the servient estate may not use the property subject to the easement in a way that would lead to a material increase in the cost or inconvenience to the easement holder's exercise of his rights.'" *Western Massachusetts Electric Co. v. Sambo's of Massachusetts, Inc*., 8 Mass. App. Ct. 815, 818 (1979), quoting *Texon, Inc. v. Holyoke Mach. Co*., 8 Mass. App. Ct. 363, 366 (1979).

A right of way "is not to be narrowed or obstructed by reason of [any] structure which . . . may [be] erect[ed] over it. *Tucker v. Howard*, 122 Mass. 529, 533 (1877). The dominant estate is "entitled to have [the way] unobstructed at all times." *O'Brien v. Goodrich*, 177 Mass. 32, 34 (1900) (dominant estate owner seeking injunction to prevent obstruction of right of way).

C. Unreasonable Interference

The obligation between those who hold separate or common easements over the same land is that they act reasonably in the exercise of their privileges so as not to interfere unreasonably with the rights of other easement holders. *See* Restatement (Third) of Property (Servitudes) § 4.12 comment b, at 626-627 (2000) ("[T]he holders of separate easements or profits in the same land must act reasonably to avoid unreasonably interfering with the enjoyment of other servitude holders, as well as with the servient estate"). "Their uses of the land are governed by equitable principles, namely, what is reasonable in the exercise of their respective privileges." *Shapiro v. Burton*, 23 Mass. App. Ct. 327, 334 (1987). This calls for a "balancing of their interests as holders of an easement in common." *Ibid*. *See Cannata v. Berkshire Natural Res. Council, Inc.*, 73 Mass. App. Ct. 789, 797 (2009).

D. *M.P.M. Builders/Martin* Claims

> 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.

Restatement (Third) of Property (Servitudes), § 4.8(3), adopted by SJC in *M.P.M. Builders & Martin*.

IV. HOW ARE EASEMENTS TERMINATED?

A. Release (By Instrument)

An easement can be extinguished by a written release, releasing a party's "right, title and interest in an easement". *B&N Lands, LLC v. Chicoine*, 19 LCR 247, 248 n. 2 (May 4, 2011) (06 MISC 333456) (Sands, J.).

B. Abandonment

An easement may be abandoned by (1) a long period of nonuse and (2) an affirmative act evincing the intent to relinquish the servitude. *See Sindler v. William M. Bailey Co.*, 348 Mass.589, 593 (1965) ("for a period of over thirty-five years, the respondent has permitted the occurrence of events and relatively permanent changes in the disputed area, all of which combine to warrant an inference that it has abandoned its rights to the easement in question"); *Dubinsky v. Cama*, 261 Mass. 47, 27 (1927); *Desotell v. Szczygiel*, 338 Mass. 153, 159 (1958); *Lasell College v. Leonard*, 32 Mass. App. Ct. 383, 390-391 (1992).

C. Adverse Use

To extinguish an easement by adverse use, claimants are "required to show . . . that they or their predecessors had used [the servient estate] in a manner adverse to the easement, meaning, at a minimum, 'irreconcilable with the rights' of the easement holder." *Benvenuto v. 204 Hanover, LLC*, 97 Mass. App. Ct. 140, 143 (2020), quoting *Patterson v. Simonds*, 324 Mass. 344, 352 (1949). *See Yagjian v. O'Brien*, 19 Mass. App. Ct. 733, 736-737 (1985), quoting the Restatement of Property § 506 (1944) ("'an easement is extinguished by a use of the servient tenement by the possessor of it which would be privileged if, and only if, the easement did not exist, provided (a) the use is adverse as to the owner of the easement and (b) the adverse use is, for the period of prescription, continuous and uninterrupted'"); *Lemieux v. Rex Leather Finishing Corp*., 7 Mass. App. Ct. 417, 422 (1979)

D. Estoppel

"'A servitude is modified or terminated when the person holding the benefit of the servitude communicates to the party burdened by the servitude, by conduct, words, *or silence,* an intention to modify or terminate the servitude, under circumstances in which it is reasonable to foresee that the burdened party will substantially change position on the basis of that communication, and the burdened party does substantially and detrimentally change position in reasonable reliance on that communication' . . ." *Cater v. Bednarek*, 462 Mass. 523, 531, 532 (2012), quoting the Restatement (Third) of Property (Servitudes) § 7.6, at comment a (2000) (emphasis in decision) (citations omitted).

E. Frustration of Purpose/Impossibility

"When a right in the nature of an easement is incapable of being exercised for the purpose for which it is created the right is considered to be extinguished." *Comeau v. Manzelli*, 344 Mass. 375, 381 (1962), quoting *Delconte v. Salloum*, 336 Mass. 184, 190 (1957) (quotations omitted). *See Trustees of Beechwood Village Trust*, 100 Mass. App. Ct. at 198; *Melrose Fish and Game Club, Inc. v. Tennessee Gas Pipeline Co., LLC*, 89 Mass. App. Ct. 594, 600 (2016), quoting *Comeau*, *supra*, and citing *Central Wharf & Wet Dock Corp. v. Proprietors of India Wharf*, 123 Mass. 567, 569-570 (1878).

F. Merger

"Massachusetts courts have recognized the doctrine of merger at least since the mid-nineteenth century." *Busalacchi*, 71 Mass. App. Ct. at 497 and cases cited. "The doctrine requires that a servitude terminates 'when all the benefits and burdens come into a single ownership.'" *Id.*, quoting the Restatement (Third) of Property (Servitudes) § 7.5 (2000). "A 'servitude is a right, which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor.'" *Busalacchi*, *supra* at 497-498, quoting *Ritger v. Parker,* 8 Cush. 145, 147 (1851). "When the dominant and servient estates come into common ownership there is no practical need for the servitude's continued existence, as the owner already has 'the full and unlimited right and power to make any and every possible use of the land.'" *Busalacchi*, *supra* at 498, quoting *Ritger v. Parker*, *supra.*