EASEMENTS IN THE INS AND OUTS OF PRIVATE ROAD CREATION AND USE

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EASEMENTS IN GENERAL

An easement is an interest or a right in land which benefits a tract of land or tenement, without regard as to who owns or possesses it. For example, in *Leasehold Estates, Inc. v. Fulboro Holding Company et al.,* 47 N.J. Super. 534; 136 A.2d 423 the court defined an easement as:

> *a legal interest in land, as distinguished from a restriction resulting from a restrictive covenant, which is a creature of equity arising out of contract. An easement can be created either by grant or by reservation unto the grantor in lands conveyed. Of most significance is the distinction between general grants of easements of way and limited grants, as where the limitation is with reference to the purposes for which the easement may be used. The grantee takes subject to any restriction imposed. Where no limitation is placed on the extent of the use of an easement of way, it is available as a general way for all purposes to which the dominant tract might be devoted. But where there is an express limitation in the grant or reservation of the use to or purpose for which a way is to be put it will be enforced notwithstanding it becomes necessary or convenient for use for other purposes of the dominant landowner not existing or contemplated when the easement is created.*[1]

Similarly, in *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096, the court establishes the requisite elements and characteristics of an easement by stating:

> *At common law an easement is defined as a nonpossessory incorporeal interest in another's possessory estate in land, entitling the holder of the easement to make some use of the other's property. Six factors are integral to this definition: (1) the fact that it is an interest in land which is in the possession of another; (2) the content of the interest as a "limited" use or enjoyment of the land in which the interest exists; (3) the availability of protection of the interest as against interference by third persons; (4) the absence of terminability at the will of the possessor of the land; (5) the fact that it is not a normal incident of a possessory land interest, and (6) the fact that it is capable of creation by conveyance.*[2]

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[1] *Leasehold Estates, Inc. v. Fulboro Holding Company et al.,* 47 N.J. Super. 534; 136 A.2d 423.
[2] *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096

Accordingly, an easement involves a dominant tenement which benefits from the existence of the easement and a servient tenement which is burdened by the existence of the easement. An easement will either be appurtenant or in gross. An appurtenant easement runs with the land, which means that upon any change in the ownership of either the dominant tenement or servient tenement, the successor owner automatically acquires either the benefits or burdens of the easement that were possessed by the predecessor in interest. However, an easement in gross benefits a person rather than a tract of land, and accordingly, the benefits and burdens associated with the easement terminate upon the death or termination of the of the entity benefiting from the existence of the easement unless the parties have established an intent to provide assignment rights which must be clearly contained in the conveyance of the easement rights. For example, in *Weber v. Dockray,* 2 N.J. Super. 492; 64 A.2d 631, the court stated:

> *The assignability of, or right to transfer an easement in gross, depends upon the intention of the parties as shown by the language of the grant; the definite and fixed nature of the burden upon the subservient tenement and the circumstances existing at the time the grant was made.*[3]

The method used to create an easement is dependent on the type of easement being established. Generally, the classification of easements include express easements, implied easements and prescriptive easements.

EXPRESS EASEMENTS

An express easement is created by the use of language and conveyed to the grantee by a form of writing which is typically found in an easement agreement, deed or will. Simply stated, where an owner of adjoing lots of land sells part of his or her property, that seller impliedly grants to the buyer all apparent and visible easements that are reasonably necessary for the use of the property granted. In order to bind a successor in interest of the servient tenement, the easement must be recorded to serve as evidence of constructive notice. In residential developments, it is common that the easement rights and obligations are contained in the deed. However, in commercial developments it is more appropriate to specify the rights, remedies and obligations in either a declaration of covenants conditions and restrictions for office and industrial developments or a reciprocal easement agreement for retail developments. Regardless of the legal instrument used to create the easement, a properly drafted document is essential in order to establish the benefits and obligations associated with the easement. Generally, if the legal instrument creating the easement is either vague or ambiguous, the courts will construe the language against the grantor. For example, in *Leasehold Estates, Inc. v. Fulboro Holding Company et al.,* 47 N.J. Super. 534; 136 A.2d 423, the court addressed the issue of a poorly drafted grant of easement by stating:

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[3] *Weber v. Dockray,* 2 N.J. Super. 492; 64 A.2d 631.

> *In case of ambiguity, a grant of easement is to be construed most strongly against the grantor. That rule, however, is only an aid to construction, and the primary guide is the enjoinder that the instrument granting a right of way must be read as a whole and so construed as to carry out the evident intent of the parties. When there is any ambiguity or uncertainty about an easement grant, the surrounding circumstances, including the physical conditions and character of the servient tenement, and the requirements of the grantee, play a significant role in the determination of the controlling intent, The servient tenement will not be burdened to a greater extent than is contemplated or intended at the time of the creation of the easement.*[4]

Accordingly, it is critical that the grant of easement be drafted in a manner which reflects the full intention of the parties with respect to all of the benefits and obligations created by the establishment of the easement.

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IMPLIED EASEMENTS

Generally, implied easements are easements that are created from judicial inference arising out of facts associated with the conveyance of an interest in real property and not from an agreement or express grant of an easement right. There are generally two forms of implied easements which include easements implied from prior use and easements by necessity. Generally, in order to create an implied easement from prior use, the court must find (1) the grantor conveys a portion of the grantor's land and not the entire parcel to the grantee; (2) prior to the conveyance, the land is used in a manner that is reasonably necessary as to benefit either the parcel conveyed to the grantee or retained by the grantor, and the grantee and grantor desire to continue the use after the conveyance; and (3) the use is apparent to both parties at the time the parcel is conveyed. For example, in *Engles v. Siderides,* 112 N.J. Eq. 431; 164 A. 397, the court outlined the elements associated with the creation of an implied easement as follows:

> *The conditions upon which the right to an implied easement for light and are in any given case must rest are: First, a separation of the title; second, that before the separation takes place, the use, which gives rise to the easement, shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.* [5]

Similarly, in *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096 the court provides an analysis of an implied easement by stating:

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[4] *Leasehold Estates, Inc. v. Fulboro Holding Company et al.,* 47 N.J. Super. 534; 136 A.2d 423
[5] *Engles v. Siderides,* 112 N.J. Eq. 431; 164 A. 397

> *An easement by implication may be ascribed to a grant or reservation implied by a conveyor subdividing the land. Implied easements operate on the principle that the parties to the conveyance are presumed to act with reference to the actual, visible and known condition of the properties at the time of the conveyance and intend that the benefits and burdens manifestly belonging respectively to each part of the entire tract shall remain unchanged.*[6]

Generally, an easement by necessity is a form of implied easement which arises upon (1) the grantor conveys a portion of the grantor's land and not the entire parcel to the grantee and (2) the necessity of one parcel to have access over the other parcel in order to reach a public street or highway. In other words, one parcel must be landlocked in order to establish the existence of an easement by necessity. For example, in *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096, the court outlines the requirements for an easement by necessity by stating:

> *An implied easement by necessity arises by operation of law where an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor. Such an easement is found only in relation to the boundary conditions existing at the time of the original subdivision severing common ownership. An easement implied by necessity is predicated upon the strong public policy that no land may be made inaccessible and useless. Thus, unless a contrary intent is inescapably manifested, the conveyee is found to have a right-of-way across the retained land of the conveyor for ingress to, and egress from, the landlocked parcel.*[7]

There is a distinction between an implied easement for prior use and an easement by necessity. First the permitted use of an implied easement for prior use is dependent upon the prior use or benefit of the dominant tenement prior to the separation in ownership of the parcels. However, the permitted use of an easement by necessity is for the sole purpose of accessing a public roadway. In distinguishing between and implied easement for prior use and an easement by necessity, the court in *Adams v. Cale*, 48 N.J. Super. 119; 137 A.2d 92 stated:

> *Easements of necessity are not dependent upon the previous existence of quasi easements, but are implied because otherwise the land could not be utilized. Although a way of necessity is sometimes confused with an easement arising, on severance of title, from a pre-existing use, there is a definite distinction between them, mainly because a way of necessity does not rest on the pre-existing use but on the need for a way across the granted or reserved premises. A way of necessity arises where there is a*

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[6] *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096
[7] *Id.*

> *conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers.*[8]

Similarly, the court in *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096 makes a comparison between an implied easement of prior use and an easement by necessity as follows:

> *Implied easements are generally of two types, easements by necessity and quasi-easements. An implied easement by necessity arises by operation of law where an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor. Such an easement is found only in relation to the boundary conditions existing at the time of the original subdivision severing common ownership. An easement implied by necessity is predicated upon the strong public policy that no land may be made inaccessible and useless. Thus, unless a contrary intent is inescapably manifested, the conveyee is found to have a right-of-way across the retained land of the conveyor for ingress to, and egress from, the landlocked parcel. In contrast, an implied quasi-easement rests upon an owner's use preexisting the conveyance.*

Generally, courts are reluctant to grant an easement by necessity unless the need of the easement is absolute. For example, in *Adams v. Cale*, 48 N.J. Super. 119; 137 A.2d 92 stated that *A way of necessity arises only in relation to the conditions existing at the time of severance of common ownership.*[9] Similarly, in Leach v. Anderl, 218 N.J. Super. 18; 526 A.2d 1096 the court held *the duration and extent of such easements are influenced by the fact that "necessity" is basic to their creation so that when "necessity" no longer exists the easement terminates.*[10]

PRESCRIPTIVE EASEMENTS

A prescriptive easement arises from the persistent and uninterrupted trespass involving the elements associated with adverse possession. Specifically, the trespasser acquires a prescriptive easement by engaging in conduct that is likely to serve notice that the trespass is occurring. In order to determine whether a prescriptive easement has been acquired, the courts will examine whether the trespasser's use of the land is actual, notorious, hostile and continuous and uninterrupted during the statutory period under *N.J.S.A. 2A:14-30* and *N.J.S.A. 2A:14-31* which is thirty years and sixty years for

[8] *Adams v. Cale*, 48 N.J. Super. 119; 137 A.2d 92
[9] *Id.*
[10] *Leach v. Anderl*, 218 N.J. Super. 18; 526 A.2d 1096

woodlands respectively. The actual use established by the trespasser over the land sets forth the scope of the prescriptive easement. The trespasser's use must be open and notorious which means it must be visible to a passerby and known or knowable by the public. The trespasser's use of the land must be hostile or adverse to the owner's interest and must be without the owner's consent. Additionally, the trespasser's use must be continuous and uninterrupted within the scope of the use during the statutory period required. For example, in determining whether a prescriptive easement was acquired by a trespasser, the court in *Kruvant et al. v. 12-22 Woodland Avenue Corporation et al.,* 138 N.J. Super. 1; 350 A.2d 102 stated:

> *In determining whether title has been acquired by adverse possession, use must be a continuing, open, visible and exclusive user, hostile, showing intent to claim as against the true owner, and must be under a claim of right with such circumstances of notoriety as that the person against whom it is exercised may be so aware of the fact as to enable him to resist the acquisition of the right before the period of prescription has elapsed.*[11]

Once a prescriptive easement has been established, it is enforceable and runs with the land just as any other easement. For example, *Kruvant*, involves a case where a horse stable asserted that it acquired a prescriptive easement over an area used to cross horses unto South Mountain Reservation, the court held:

> *Traditionally, the establishment of the existence of a right to a prescriptive easement by adverse user has been a matter that had to be settled by the law courts. Once the existence of the legal right was established, the party holding such right could have it protected in equity.*

Accordingly, once a prescriptive easement has been established by the courts, the use of the easement by the dominant tenement over the servient tenement will be enforced as a matter of law.

TERMINATING EASEMENTS

Generally, an easement runs with the land in perpetuity unless it is terminated. An easement may be terminated by an agreement between the dominant tenement and the servient tenement. Also, an easement can be terminated if the dominant tenement agrees to discontinue the use of the use of the easement. Furthermore, in the case of an implied easement, the easement can be terminated if it can be established that the need for the easement, whether it is a reasonable need in the case of an implied easement from prior use or an absolute need in the case of an easement by necessity, no longer exist. For example, in addressing the issue regarding the termination of easements, the court in *Kruvant v. 12-22 Woodland Avenue Corporation,* 138 N.J. Super. 1; 350 A.2d 102, stated:

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[11] *Kruvant et al. v. 12-22 Woodland Avenue Corporation et al.,* 138 N.J. Super. 1; 350 A.2d 102.

> *Once an easement has been finally established it can only be altered by mutual agreement, injury to the servient tenement, or the changed needs of the dominant tenement, or owner of the easement. To do otherwise would affect the value of and prevent the improvement of the servient tenement and encourage litigation, and would amount to the taking of private property of one person by another.*[12]

Additionally, an easement may be terminated if it can be established that the easement has been abandoned by the dominant tenement. However, it should be noted that mere non-use is insufficient to constitute abandonment, but rather abandonment of the easement can only be established by clear and convincing evidence which indicates the intent of the easement holder to abandon the easement. For example, in *Leasehold Estates, Inc. v. Fulboro Holding Company et al.,* 47 N.J. Super. 534; 136 A.2d 423, the court held:

> *Mere non-user of an easement will not suffice to destroy the right and that what is required to establish abandonment is clear and convincing evidence of an intention on the part of the owner to abandon the easement.*[13]

Moreover, it should be noted that an easement will not be terminated in the event of a tax sale foreclosure. For example, in *Metropolitan Life Insurance Company v. McGuirk,* 15 N.J. Misc. 572*;* 193 A. 696, in determining whether an easement had been terminated during a tax foreclosure sale, the court held:

> *In New Jersey, the tax sale of the servient tenement is subject to the easement and the easement is not extinguished by the subsequent foreclosure of the tax lien. This conclusion also seems to be supported by the greater number of authorities gathered from the reports of other states.*[14]

Accordingly, unless there is an agreement to the contrary, the rights of the dominant tenement will survive a subsequent conveyance of the servient tenement absent clear and convincing evidence of an abandonment by the easement holder or a change in circumstances affecting the necessity of the use of the easement.

PRIVATE ROAD CREATION

[12] *Kruvant v. 12-22 Woodland Avenue Corporation,* 138 N.J. Super. 1; 350 A.2d 102.
[13] *Leasehold Estates, Inc. v. Fulboro Holding Company et al.,* 47 N.J. Super. 534; 136 A.2d 423.
[14] *Metropolitan Life Insurance Company v. McGuirk*, 15 N.J. Misc. 572; 193 A. 696

Generally, in New Jersey private roads are created by easements. In a residential development, easements creating the rights and use of private roads are commonly contained in the deeds of those properties which have been granted access to the private road within the development. However, in commercial developments, the rights and obligations associated with the use of private roads are commonly contained in the declaration of covenants conditions and restrictions for office and industrial developments and reciprocal easement agreements for retail developments. It is well established law that a private party has the right to create a private road in New Jersey. For example, in 1860 the court in *Stevens v. Allen*, 29 N.J.L. 68 recognized the rights of private parties to create a private road by stating:

> *The legislature of New Jersey recognizes three classes of ways; and they treat only of those three classes, to wit, public roads, private roads, and by-roads. The two former can be created by proceedings under legislative regulations, while the latter is assumed to have been created by grant, or in some other mode in which title to a private way is acquired. A by-road is defined to be an unfrequented path, an obscure road. There is no mode for their creation pointed out in the statute. In § 19 of the act concerning roads (New Jersey) it is provided that where a by-road, used as such by the inhabitants of the state, is shut up or rendered impassable, whereby the said inhabitants may be put to immediate inconvenience or difficulty, application may be made to three freeholders, who may lay out the same, and thereafter it shall remain as a private road until vacated or altered according to law. In proceedings had under § 19 the by-way is changed into a quasi private road, and is made subject to the regulations which govern the use of private roads; and the right to use it rests, from that time, precisely upon the same foundation as does the right to use a public highway or a private road, to wit, the law of the legislature and the action of the public functionaries authorized to lay it out.*[15]

However, notwithstanding the right of a private party to create a private road, the creation of the private road is subject to the subdivision and plat approval requirements contained in *N.J.S.A. 40:55D,* the Municipal Land Use Law and particularly pursuant to the powers contained Article 6. Subdivision and Site Plan Approval. These statutory provisions set forth the approval requirements including design, layout and other terms and conditions. Accordingly, these statutory provisions outline the approval process of private roads which requires the municipal approval of the private road by the municipal planning board. The courts both recognize and enforce the approval rights of a municipality regarding the creation of private roads. For example, in *Landy et al. v. Kahn,* 348 N.J. Super. 592; 792 A.2d 544, the court expressly acknowledges municipal approval requirements by holding:

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[15] *Stevens v. Allen*, 29 N.J.L. 68.

> *The requirements for plat approval in former N.J. Stat. Ann. §§ 40:55-1.14 to 40:55-1.29, provide the means and character of regulation. Those fall into two distinct categories, with different attributes. The first, which is mandatory, is broad and relates to layout, design, and other basic general terms and conditions. The second is permissive, involving specific tangible improvements, above and beyond the general terms and conditions, which the municipality may by ordinance compel a developer to install at his expense. With reference to the first classification, it is the obvious intent of the state subdivision regulation enabling act that, in matters requiring the approval of a planning board, it should have authority to impose those conditions which in the circumstances it believes are reasonably necessary for the protection of the public good and welfare. The intent of former N.J. Stat. Ann. § 40:55-1.20 to give wide and strong municipal authority is clear. The only precise limitations are found in former N.J. Stat. Ann. § 40:55-1.15, requiring that the ordinance contain standards for approving the design of subdivisions and of streets therein and that, where there is a local zoning ordinance, the standards in the subdivision ordinance with respect to minimum lot sizes and lot area requirements be identical with those of the zoning ordinance.*[16]

It should be noted that municipal approval is required in those situations where the private road has been created by an existing easement. For example, in *Landy*, the court address the issue of private roads created by preexisting easements by stating:

> *Where an easement is treated the same as a private street, marking the boundary between parcels of property, the creation of the easement is clearly subject to municipal subdivision regulation.*[17]

Accordingly, notwithstanding the courts recognition of the legal right to establish the private road created by the easement, it is well established that the legal use of the private road is subject to the approval of the municipal planning board.

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[16] *Landy et al. v. Kahn,* 348 N.J. Super. 592; 792 A.2d 544

[17] *Id.*