

ROAD AND ACCESS PITFALLS WHEN HANDLING REAL ESTATE
TRANSACTIONS

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When representing developers and other clients in the purchase and development of vacant or under improved land, road and access issues must be properly identified and handled to avoid perils and pitfalls. Generally, legal access to real property can be determined by deed only if the legal description clearly establishes that the real property abuts a public road. However, reliance solely upon a deed to determine access to a public road may be ill-placed in the case of real property abutting a limited access public road, such as a highway. In such event, there may not be any legal access to the public road notwithstanding that the fact that the property abuts the highwayⁱ. If the real property does not abut to a public road, an appurtenant access easement from which legal access to a public road from the dominant estate (beneficiary) over the servient estate (grantor)ⁱⁱ must be established through an existing appurtenant access easement or an access easement negotiated with the abutting property owner contemporaneously with the land transaction or through curative measures.

During the due diligence period granted under most purchase and sale agreement, the title commitment and survey are essential elements of the purchaser's due diligence review. The title insurance commitment will identify those limitations affecting the right of access which have been recorded in the public records. The survey will identify any physical impediments to access that are not reflected in the recorded public record but will only be revealed by a detailed inspection of the records and physical survey of the property.ⁱⁱⁱ A thorough review of the title and survey will determine the existence of physical access to a public road, whether legal and physical access is adequate for the intended use of the real property, whether any limitations to access exist, and what alternatives to access are available in the event that the existing legal access becomes unavailable in the future. Once these access issues are properly identified, they can be resolved through either negotiation, curative work or the exercise of termination rights.^{iv}

If legal and physical access to the real property are adequate, special issues arise when access to the public road is established pursuant to an easement. If the easement provides the only legal and physical access to the real property, the title commitment must include an examination of the title associated with both the dominate estate and the servient estate since the easement is subject to any title matters affecting the servient estate. In addition, the title commitment must include the easement as an insured parcel. The terms of the easement must

carefully identify any matters affecting title to the servient estate including concerns that limit or adversely impact the legal right of access granted by the easement, such as restrictions on the number and weight of vehicles permitted to use the easement, maintenance obligations, and the rights of the owner of the servient estate to relocate the easement. All issues affecting the easement rights must be addressed and resolved by the purchaser prior to waiving any contingencies contained in the purchase agreement, including the right to terminate the agreement in the event of title matters that prohibit the purchaser from using the property for its intended purpose.

Generally, all title insurance policies insure against losses arising from the inability to access the real property and title insurance policies will provide an enforceable right of *legal* access to the real property but will not insure *physical* access to the real property or that the legal right of access is physically suitable for the intended use of the real property. Because of these limitations, purchasers of real property and their lenders desire more affirmative insurance coverage of physical access and usually will require affirmative assurances that the access exists at a specific location, to a specifically named road, and that the road is an opened public road. This coverage is provided in the ALTA 17 (for real property with direct access) and ALTA 17.1 (for real property with access via easement) endorsements. A survey illustrating these points of access is normally required to obtain these endorsements.

ⁱ See, N.J.S.A. 27:7-66 (providing means by which the state may prevent development within proposed highway rights); N.J.S.A. 27:7-89 et seq. (Highway Access Management Act – provides standards for determining the reasonableness of access to the general highway system).

ⁱⁱ A dominant estate is the parcel of real property that has an easement over another piece of property called the servient estate.

ⁱⁱⁱ It should be noted that certain legal limitations on access are not always of public record such as zoning or other ordinances and governmental regulations that may limit or restrict access.

^{iv} (See High Horizons Dev. Co. v. State, Dept of Transp., 120 N.J. 40 (1990) holding that in regulation of proposed access, DOT may not render decision while relying in part on adverse information received from others but withheld from owner).