

LAW LETTER

Easements

Landlocked Property

When buying property, the three most important items are location, location and location. A corollary to this rule is that once the prime location is found, the property must have access, access and access. It is possible to buy landlocked property in Texas—i.e., property having no routes of ingress and egress.

As land and land titles become more and more fractured, the issue of access has come to the forefront. In 1991, Procedural Rule P-37 was adopted by the Texas State Board of Insurance. All title policies issued after October 1, 1991, insure the right of access unless a specific exception is added. Neither the width of the access nor access to a public thoroughfare is insured, however.

If property does not touch (or is not contiguous to) a public roadway, access can be gained only by crossing another's land. Permission, if granted, will be in the form of a private right-of-way agreement, better known as an easement.

An easement is the right of a person to use the land of another for a specific purpose. Easements may be classified in several ways, but the two most common are easements in gross and appurtenant easements.

An easement in gross is granted to and vests in a person. It is the personal right to cross another's land. It cannot be presumed and is not favored by law. Generally, easements in gross are not transferable.

An appurtenant easement, on the other hand, attaches to a tract of land, not to a person. The right to use the easement passes with the title to the land.

An appurtenant easement requires two estates or tenements, a dominant and a servient. The dominant tenement is the benefited estate. The owner of the dominant estate has the right to cross the servient or burdened land. The servient estate is the one upon which the easement rests.

Purchasers of land served by an express easement should verify that the easement is appurtenant and not one in gross to the former owner. Also, the purchaser should check with the owner of the servient estate to make sure the easement has not terminated or is in dispute.

Texas Case Law

If a prospective tract has no express easement, Texas case law recognizes several types of easements that may avail the purchaser. These include easements created by prescription, estoppel, implication or necessity. A synopsis of each follows.

Prescription easements are easements that arise from the continuous use of another's property without consent. Prescription easements are created in much the same manner as title to land is acquired by adverse possession. The requirements are similar.

The major differences are that adverse possession requires continuous possession of the property while a prescriptive easement requires continuous use. Also, adverse possession matures into title, while the latter evolves into an easement.

Five basic requirements must be met to create a prescriptive easement. The absence of any is fatal.

The use of the easement must

- begin and continue without the consent of the landowner,
- be open, obvious and apparent,
- be exclusive,
- be in the same place or within definite lines and
- be continuous and uninterrupted for ten years.

Purchasers who buy land having only a prescriptive easement for access should make sure the circumstances giving rise to the easement are carefully documented and filed in the deed records. The purchaser may ask the seller to warrant the existence of the easement and indemnify the buyer in the event of its failure.

Easements by estoppel are created by the acts or expressions of a landowner indicating the existence or creation of a particular easement. If another person relies on the representations and purchases or improves property based on them, the landowner is estopped (or legally prevented) from denying the easement's existence.

Purchasers should never buy land based on an easement by estoppel. If a lawsuit is needed to prove such an easement, it could be expensive, time consuming and unsuccessful. Before purchasing, the buyer should demand an express appurtenant easement from

the landowner and not rely on oral expressions.

The third type of unexpressed easement is an implied easement. Depending on the circumstances, implied easements may be either granted or reserved. The basic premise for either is that the seller intended to grant or reserve the easement but, for some reason, overlooked it at closing.

A prerequisite for implied easements is that the dominant and servient tenements were united under the seller prior to the last conveyance. The owner sells one of the tracts and retains the other.

If the owner sells the tract needing the easement but fails to convey an easement across the retained tract, it is called an implied grant.

On the other hand, if the owner retains the tract needing the easement but fails to reserve an easement across the tract that was sold, it is called an implied reservation.

There is some authority that the courts will recognize an implied grant more readily than an implied reservation. The law implies an easement in favor of the grantee more readily than in favor of the grantor.

To create either type of implied easement, four conditions are required.

- The dominant and servient estates must have been under common ownership.
- The roadway serving as the needed easement was in existence and being used prior to the division of the estates.
- The use of the roadway was apparent, permanent, continuous and necessary for the enjoyment of the dominant estate before the estates were severed.
- The easement to the dominant tract is reasonably necessary after the conveyance.

Purchasers should not buy property relying on an implied grant or reservation of an easement. The rationale behind either type is that the parties intended to grant or reserve the easement but

overlooked it at closing. Purchasers should **not** overlook the inclusion of any easements at closing.

Easements by necessity are the last type of easement that may arise without formal expression. They represent the last hope many landowners have to avoid landlocked property. In some respects, easements by necessity are similar to implied easements. First, prior ownership of the dominant and servient estates is required. However, the unit of ownership may occur anytime in the chain of title and not necessarily prior to the last conveyance.

Second, the rationale for both types of easements is the same. The courts presume the parties intended the easement but overlooked it for some reason. Because of this rationale and because prior unity of title is required, an easement by necessity may be claimed by either the grantee or grantor depending upon which party needs it.

Finally, both types of easements require some degree of necessity. In other words, both require some inconvenience in accessing the property. Generally, implied easements insure the same convenience and comfort for the enjoyment of the dominant estate that existed prior to the severance of the two tracts. However, an easement by necessity requires the tract to be absolutely landlocked.

For an implied easement by necessity to arise, three conditions must be met.

- There was, at one time, unity of ownership (or common ownership) of the dominant and servient estates. The common ownership, however, must have occurred after the land was patented, i.e., conveyed from the sovereign to private ownership.
- The easement must be absolutely necessary for the owner to enter and leave the property. No other routes of ingress and egress exist.
- The necessity for the easement existed when the dominant and servient estates were divided.

Without privity of ownership, the mere fact that a person's land

is completely surrounded by others is not sufficient to create an easement by necessity.

Purchasers who buy land relying on the presence of an easement by necessity should research the chain of title carefully to insure a right of access. Supporting affidavits should be filed of record to insure preservation of evidence. An indemnity agreement from the seller assuring the purchaser of the easement is recommended.

The necessity of an easement to access property cannot be over-emphasized. Its importance ranks with the location of property. Independent research and assurances should be conducted and acquired prior to purchasing questionable property. The mere assurance of access in a title policy is insufficient for two reasons. First, the type of access is not being insured. Second, the recovery under the title policy for inaccessibility will not adequately compensate the buyer for the loss.

Texas Statutory Law

Prior to September 1, 1995, Texas legislators attempted twice unsuccessfully to interject statutory remedies for landlocked property. The following is a quick review of the two attempts along with the most recent effort passed September 1, 1995.

The first attempt, Texas Revised Statutes, Article 1377b(2), passed in 1925. It permitted owners of landlocked property to condemn, without compensation, an access to their land. However, the statute did not meet the constitutional requirement of having a public use as pronounced in Article 1, Section 17 of the Texas Constitution. (See *Estate of Waggoner v. Gleghorn*, 378 S.W. 2d 47 [1964]).

The second statutory attempt, Texas Revised Statutes, Article 6711, authorized the commissioners court (CC) to declare and open a public highway, at public expense, across lands of nonconsenting owners. The action could be taken upon the sworn application of one or more landlocked landowners.

This statute also lacked the necessary public purpose requirement. It was declared unconstitutional

by the Texas Supreme Court in *Maheer v. Lasater*, 354 S.W. 2d 923 (1962). In reversing a prior decision where the statute was ruled constitutional, the high court wrote, "In deciding that question (the previous case) we assumed, but did not hold, that it is of public importance that every person residing on land be provided access to and from his land so that he may enjoy the privileges and discharge the duties of a citizen."

The latest statutory attempt appears to mirror Article 6711 as declared unconstitutional in *Maheer*. The following is a synopsis of the new statute found in Subchapter B, Chapter 251, Texas Transportation Code, but only as it addresses accessing landlocked property.

According to Section 251.053(b), entitled "Neighborhood Roads," a person who owns real property having no public access may request by application that an access road be established connecting the person's real property to the county public road system.

After the application is filed, the county clerk issues notice to the sheriff or constable commanding

that each property owner affected by the application to be summoned. Property owners wishing to contest the application must appear at the next regular term of the CC.

At the meeting, if the court determines that the applicant is landlocked, the court may issue an order declaring the lines (routes) designated in the application, or other lines determined by the CC, to be a public road. Each affected property owner will be served with the order. Also, a copy of the order will be filed in the deed records of the county clerk's office.

The CC is not required to maintain the road using county employees. However, the court shall make the road initially suitable for use as an access public road.

Affected property owners receive compensation from public funds after the amount is determined by a process called "jury of view." The process is described in Section 251.054.

An affected property owner may appeal the assessment of damages in the same manner as an appeal from a justice court. The appeal,

though, shall be limited to the issue of damages. It may not prevent the opening of the road.

In instances where an affected property owner refuses to open their property for 12 months after receiving notice of the CC's order, a fine may be imposed where the amount of landlocked property is 1,280 acres or more. The fine may not exceed \$20 per month.

As yet, no challenges to the new statute have reached the appellate courts. The similarity between the former Article 6711 and newly passed Subchapter B, Chapter 251 of the Texas Transportation Code are striking. Perhaps after 30 years, the Legislature feels that the Texas courts, when again presented with the question, may find a constitutional public use by affording members of the community a way to and from their lands and residences.

For more information on the creation and termination of both private and public easements, order technical report 422 entitled *Easements in Texas* (\$3 in Texas, \$4.50 out of state).

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