

Video Renewal Course: Real Estate Matters™ Part II

firsttuesday
the California real estate educators



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Easements: Running or Personal

Rights in another's property

An **easement** is the right of one property owner to use the property of another.

"*Easement*" is an Anglo-Norman term coined in the late 14th century. It comes from the Old French word *aisement* meaning "comfort, convenience, use and enjoyment" and from *aisier* meaning "to ease." The current meaning of the word, which is the legal right of one property owner to use the property of another, was first used in the early 15th century.

The most common *easement* is used for **ingress and egress**. An easement for ingress and egress creates a right of way allowing one property owner to traverse a portion of another's land to access their property.

Consider a right-of-way easement which is maintained as a road over an owner's property. The easement provides **access** through the owner's property from a public street to an adjoining neighbor's property.

The owner builds a fence on their entire property line, blocking the neighbor's use of the road and access to the public street in the process.

The neighbor with the property benefitting from the easement claims their easement gives them the right to use the roadway across the owner's property, a use the owner may not interfere with by fencing the perimeter of their property and barring the neighbor's use of the easement.

The neighbor demands the unobstructed use of the road and seeks to recover money losses incurred due to the owner's obstruction.

Is the owner wrongfully blocking the neighbor's use of the road?


Yes! The neighbor in title to the adjacent property holds a valuable **property right** in the owner's property which entitles the neighbor to use the right-of-way easement, classified as an *appurtenance* to the neighbor's property and an encumbrance on the owner's title.

When an owner whose property is burdened by an easement interferes with the use of the easement by a neighbor whose property benefits from the easement, the neighbor is entitled to have the use of the easement reinstated, either by removal, relocation or modification of the interference.

Further, the neighbor who holds the easement is entitled to compensation for their money losses caused by the owner's obstruction of the neighbor's use of the easement. [**Moylan v. Dykes** (1986) 181 CA3d 561]

An easement creates a *tenement relationship* between two parcels of real estate since it:

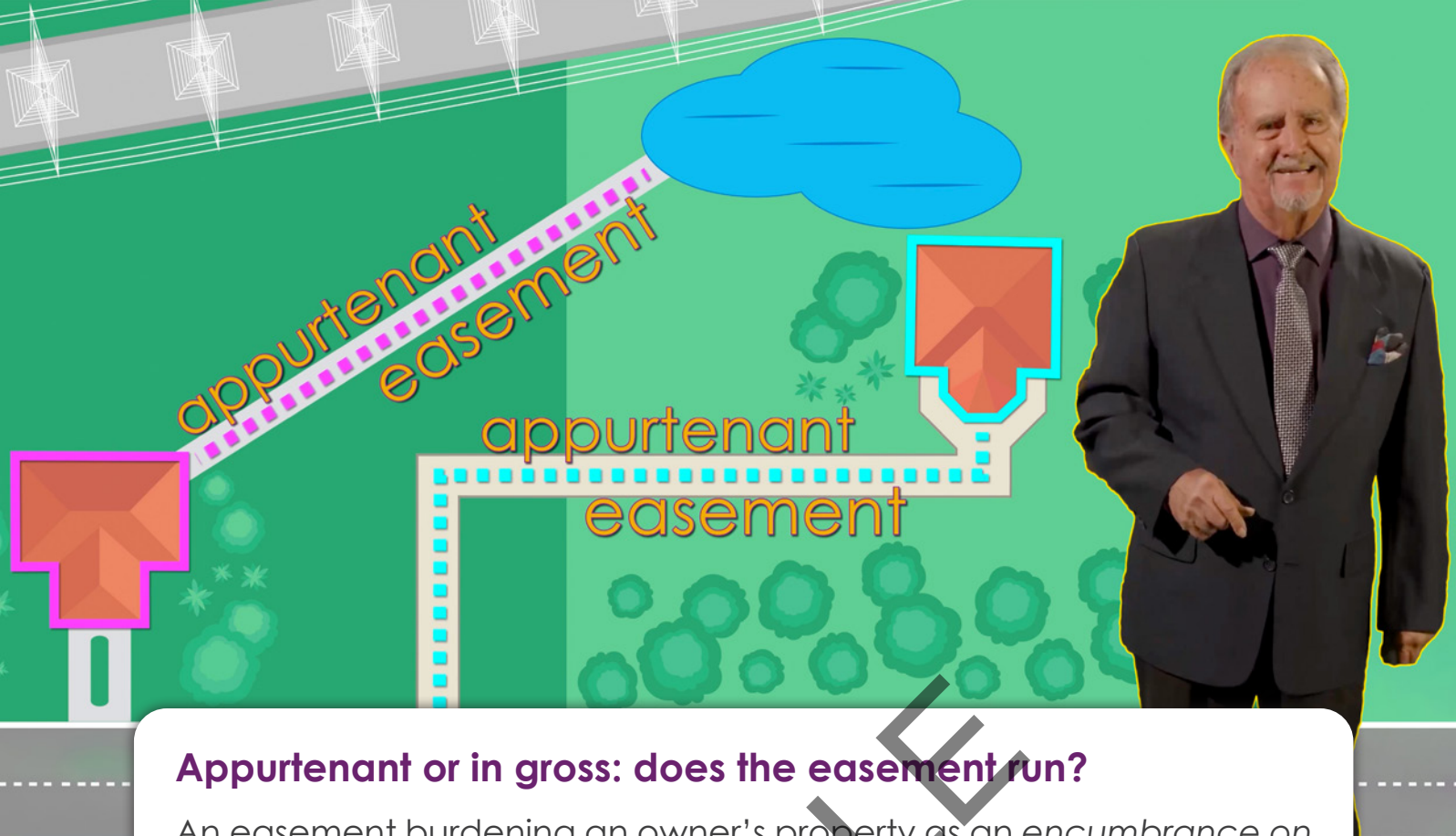
- *benefits* one property, referred to as the **dominant tenement**, whose owner is entitled to use the easement; and
- *burdens* another property, referred to as the **servient tenement**, the owner's use of their property being subject to the easement.



QUIZ

1. The most common easement is used for:
 - a. eminent domain.
 - b. ingress and egress.
 - c. profit a prendre.
2. The property which benefits from the easement and whose owner is entitled to use the easement is referred to as the:
 - a. dominant tenement.
 - b. servient tenement.
 - c. subtenant.

SAMPLE



Appurtenant or in gross: does the easement run?

An easement burdening an owner's property as an *encumbrance on title* to that property is classified as either:

- an **appurtenant easement**, since the use allowed belongs to and benefits an adjacent property and *runs with the land* as a property interest held in the burdened real estate; or
- an **easement in gross**, which belongs to an individual, not another parcel of real estate, as their *personal right* in the burdened real estate.

For example, a development company sells parcels in a subdivision, reserving a right-of-way easement over each of the parcels. The deed creating the easement does not state the easement is *appurtenant* to other parcels.

Later, the successor to the developer attempts to build a road on the easement. The owners of the burdened property claim the easement is *in gross*, a benefit held only by the original developer.

Is the easement in gross (personal) since the grant deed does not specify the easement is appurtenant?

No! When the document creating an easement does not indicate whether the easement is appurtenant or in gross, the easement is classified as *appurtenant* if it **benefits a property** other than the burdened property. [**Elliot v. McCombs** (1941) 17 C2d 23]

Runs with title to the benefitting property

An *appurtenant easement* is incidental to the title of the property which benefits from its use. However, an easement is not reflected as a recorded interest on the title to the parcel of real estate it benefits. Nor is it a personal right held by a particular individual who may now or have previously owned the parcel benefitting from the easement.

Conversely, an appurtenant easement benefitting one parcel is recorded as an **encumbrance** on title to the burdened property. The easement remains on the burdened property's title after a conveyance to new owners of either the benefitting or burdened property. To be enforceable by a new owner of the benefitting property, the easement does not need to be referenced in the grant deed conveying either property to new owners since it *runs with the land*. [**Moylan v. Dykes** (1986) 181 CA3d 561]

Conversely, an *easement in gross* benefits a particular person – not any real estate the person might own. An easement in gross is personally held only by the individual who may use the easement. No parcel of real estate may benefit from an easement in gross since only the individual holding the easement may benefit.

For example, an easement held by a public utility company is an easement in gross. The utility company has the right to enter onto a property to install and maintain its equipment (power lines, gas or water pipes, etc.). In no way does any real estate owned by the utility company benefit from the easement.

While an easement in gross is a **personal right** which is not transferred with the sale of any real estate owned by the holder of the easement, the right may be *transferred* by the easement holder to another person by a writing — unless the transfer of the easement in gross is prohibited by a provision in the document creating the easement.

[LeDeit v. Ehlert (1962) 205 CA2d 154]

Easements for light, air or view

A property owner has no automatic right, and may not acquire a prescriptive right, to air, light or an unaltered view over neighboring properties.

However, a property owner may enforce an easement created by a grant which restricts a neighbor's ability to erect or maintain any improvement which interferes with the owner's right to air, light or view. The easement might be the result of **covenants, conditions and restrictions (CC&Rs)** which blanket several properties with use restrictions, such as restrictions on the height of improvements.

Easements for light, air and view can only be established by *written agreement* between neighboring owners, not by implication or prescription. [Petersen, supra]


Conservation easements

A **conservation easement** is a voluntary conveyance of the right to keep the land in its natural, scenic, historical, agricultural, forested or open-space condition. It is conveyed by an owner of real estate to a conservation organization or government agency. A *conservation*



easement is created in the form of an easement or CC&R, by use of a deed, will or other instrument to convey the easement. [CC §815.1]

Conservation easements are *perpetual* in duration and thus are binding on all successive owners of the property burdened by the conservation easement. [CC §§815.1, 815.2(b)]



QUIZ

1. An easement which belongs to an individual, not another parcel of real estate, as their personal right in the burdened real estate is referred to as a(n):
 - a. appurtenant easement.
 - b. easement in gross.
 - c. prescriptive easement.

SAMPLE



RESERVED

easement

Created by grant or reservation

The basic method for creating an easement is by a writing. Any document which may be used to convey a legal interest in real estate may be used to create an easement.

An easement is created between the *benefitting* and *burdened* properties in a(n):

- easement agreement;
- will;
- grant deed;
- easement deed;
- quitclaim deed;
- lease;
- order of the court; or
- *covenants, conditions and restrictions (CC&Rs)*.

An easement is created in a conveyance either by:

- **grant**; or
- **reservation**.

For example, the owner of adjacent parcels of real estate may sell one parcel to a buyer and further *grant* the buyer an easement on the parcel retained by the owner.

Alternatively, an owner of adjacent parcels may sell a parcel, and in the grant deed conveying the parcel to the buyer, *reserve* to themselves an easement on the sold parcel for the benefit of the parcel the owner retained.

Easement or fee title conveyed by deed

The terms “*reservation*” and “*exception*” in conveyances of real estate are used to distinguish whether the legally described reservation (easement) or exception (ownership) is:

- created as a burden on the property conveyed for the beneficial use of another property, such as an **easement by reservation**; or
- retained from the parcel conveyed as property of the seller, an *exception for land* which is not transferred on the conveyance of a portion of a larger parcel.

The terms “*reservation*” and “*exception*” are often mistakenly and thus improperly used interchangeably. However, their meanings and operative effects are very different.

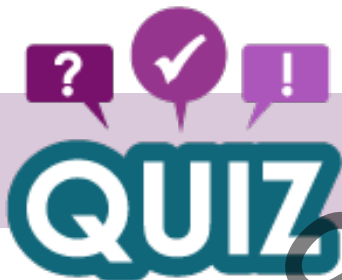
For example, when a grantor conveys one of two adjoining parcels they own, **reserving the right to use** a road on the property conveyed, the grantor has created an *easement by reservation*. Here, the entire parcel was conveyed while imposing a burden on that property in the nature of an easement.

In contrast, when the grantor conveys the parcel noting the description of the portion of the parcel where the road is located is excepted from the conveyance, they have not conveyed title and retains ownership to the portion of the parcel described as the road.

The difference between a reservation and an exception is apparent in the manner title insurance companies write a policy on the transfer of title.

When a parcel is conveyed *reserving* a road, the title insurance policy insures title to the entire parcel, then states the title is subject to — encumbered by — the easement created by the reservation.

Alternatively, when a parcel is conveyed *excepting* the legal description of the road, the portion of the parcel described as the location of the road is not part of the legally described property conveyed and covered by the title insurance policy. The excepted portion did not become the buyer's property. The road did not become an easement burdening the portion of the parcel conveyed since it is located on the property cut out of the parcel by the exception. The seller retains fee ownership of the described portion containing the road since it was an exception from the parcel conveyed.



SAMPLE

1. An easement is created in a conveyance either by:
 - a. dedication or restriction.
 - b. quitclaim or pledge.
 - c. grant or reservation.

IMPLIED EASEMENT DISPUTE

NEW OWNER

ORIGINAL OWNER



Conduct creates an implied easement

An easement can be created by conduct without any prior agreement between the owner and the user, called an **implied easement**.

Implied easements exist when the circumstances surrounding an owner's division of their property and sale of a portion of the property imply the owner (grantor) and the buyer (grantee) intended either:

- the grant of an easement on the portion retained by the owner; or
- the reservation of an easement by the owner on the portion sold. [Civil Code § 1104; **Palvutzian v. Terkanian** (1920) 47 CA 47]

The requirements for establishing an implied easement are:

- a *prior common ownership* of adjoining parcels;
- a *transfer of one of the adjoining parcels*;
- an obvious and apparent *prior use* of one parcel for the benefit of the other parcel during the period of common ownership; and
- a *reasonable necessity* for creating the easement. [**Greene Fickert** (1942) 49 CA2d 511]

Prior common ownership of parcels

A transfer of one of two or more adjoining parcels by a **common owner** is required to create an implied easement.

For example, an implied easement may arise when a **co-ownership** of a property is terminated and the property is divided and parceled out to the individuals who were the co-owners.

Additionally, an implied easement may arise on the distribution of property under a will or trust.

For example, a beneficiary receives a parcel of real estate which is accessible only by a road over an adjoining parcel conveyed to another beneficiary under a will or inter vivos (living) trust which does not provide for an easement.

In this scenario, a **right-of-way easement** is created by implication since the common ownership of the adjoining parcels is the estate or trust. [**Cheda v. Bodkin** (1916) 173 C 7]

Division by transfer

An owner of property who uses a portion of their property for the benefit of another portion of the same property does not create an easement on their own property.

An easement is a right to **use another's land** or **prevent another** from a particular use of the owner's land. Thus, an owner cannot hold an easement over their own land. [Calif. Civil Code §805]

Only the division of commonly owned parcels by the transfer of a parcel triggers the creation of an implied easement.

Beneficial use of commonly owned parcels

The prior use of one parcel for the benefit of an adjacent, commonly owned parcel needs to be *obvious* and *permanent* for the new owner on the transfer of one of the parcels to establish the right to an implied easement to use the other parcel.

To establish an implied easement, the **prior use** by the common owner needs to have been:

- either *known* to both the common owner (original grantor) and the buyer (grantee), or so obvious their knowledge may be presumed;
- *regularly used* during the common ownership before the transfer; and
- *intended* to be permanent.

The purpose for creating an implied easement is to establish the right to continue an existing use a buyer and seller intend to permanently maintain, but fail to mention.

Thus, an implied easement is not created when the common owner of adjacent parcels and the buyer of one parcel do not intend for an easement to exist on the adjoining parcels.

Reasonable necessity

For an implied easement to exist, the easement must be *reasonably necessary* for the beneficial use of the parcel whose owner is seeking to establish the easement.

Consider an owner who sells and conveys a parcel containing a driveway. The owner uses the driveway to access an adjoining parcel they own which is improved by their residence. The owner does not reserve an easement for use of the driveway in the conveyance to the buyer.

The owner's residence fronts on a public road. The driveway through the buyer's parcel is the only improved access to the owner's home. The cost of building a road for access to the public road is a reasonable amount for the value of the residence.

On closing, the buyer refuses to allow the owner to use the driveway over the parcel sold to the buyer.

The owner claims they are entitled to an *implied easement* over the parcel sold to the buyer since, prior to the sale, the driveway provided

access to the adjoining property they retained.

The buyer claims the owner is not entitled to an implied easement since they can build a new driveway to the public road.

Is the owner entitled to an implied easement to use the buyer's driveway?

No! An implied easement (by reservation) is not reasonably necessary to the owner's beneficial use of the adjacent property they retained since the owner can build a new driveway to the public road at a reasonable cost. [**Leonard v. Haydon** (1980) 110 CA3d 263]

Thus, an implied easement is created for the benefit of property only when a *reasonably convenient alternative* is not available to the property and a reasonable necessity for the easement exists.

Implied easement by reference to map

When a landowner records a subdivision map and offers to dedicate the roadways depicted on the map to a public use, a *public easement* is created on the **government's acceptance** of the rights of way legally described on the subdivision map. [Calif. Government Code §§66410 et seq.]


Similarly, when a recorded subdivision map lays out acreage into parcels and streets and sells the lots by reference to the subdivision map, the buyers of the lots have easements in the streets adjoining their lots. [**Danielson v. Sykes** (1910) 157 C 686]

An easement implied is another's appurtenance

Regardless of how an implied easement is created, it is always a burden on one parcel of land for the *benefit* of another parcel.

Thus, an implied easement is always an **appurtenance** allowing the owner of the property benefitting from the easement to use the property of another which is burdened by the easement.

Most disputes over implied easements occur after the property burdened by the easement has been deeded out to new owners.



QUIZ

1. Which of the following is NOT a requirement for establishing an implied easement?
 - a. A prior common ownership of adjoining parcels.
 - b. A signed writing documenting the burdened property owner's acquiescence to the implied easement for a period greater than five years.
 - c. An obvious and apparent prior use of one parcel for the benefit of the other parcel during the period of common ownership.

SAMPLE