

Easements

Definition: An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner.

Generally two types of Easements

- Appurtenant
- In Gross

Appurtenant Easement

*A right to use a certain parcel (the Servient Estate), for the benefit of another parcel (the Dominant Estate)

*There must be at least two tracts of land for an appurtenant easement to exist.

*When created, it attaches to the real property and can be claimed by a successor in interest

**I.C. § 55-603 “A transfer of real property passes all easements attached thereto and creates in favor thereof an easement to use other real property of the person whose estate is transferred...”

Easement In Gross

*Easement that benefits the holder of the easement personally, without connection to the ownership or use of a specific parcel

*Does not attach to property

*When in doubt, Idaho courts will presume the easement is appurtenant

How Is An Easement Created?

1. Express Easement

2. Easement By Implication

3. Prescription

Express Easements Minimum Requirements

- A valid express easement must identify the land subject to the easement and express intent
- Specific words are not required to create an express easement, the writing must make clear the parties' intention to establish a servitude
- Because an express easement is an interest in real property, it may only be created by a written instrument

Grant, Reservation or Exception

Grant: Language expressing intent to give/transfer

Exception: created by withholding title to a portion of the conveyed property

*Sufficient if it exists in fact on the surface of the ground before the deed

Reservation: reserves to the grantor some new right in the property being conveyed

*When the effect of the words is to create in the grantor some easement not before existing, the result is a reservation

Subject To Language #1

SUBJECT TO: Easement of record, which allows joint useage [sic] of a road over and across the described property and adjacent property which runs with the land, for ingress and egress from the described property as recorded on November 6, 1970 in Book 154 of Miscellaneous Records, page 394, records of Benewah County, Idaho, being Document No. 119025. Easements for public highways, if any, as the same are now laid out or constructed over and across said lands.

Subject To Language #2

Subject to and including an ingress egress easement over this and adjoining property in said sections 21 and 22 owned by the grantor and including an ingress egress easement over portions of Section 21 heretofore granted to the grantors. Said easement shall be over existing roads until such time as all record owners shall agree to the relocation, improvement and/or abandonment of all or any portions of any roads. This easement is also over similar lands in Section 15

“Subject To” Does Not Create An Easement

this kind of language is “not evidence of a grantor's intent to reserve or except an easement,” but merely “an attempt to create an exception to the grantor's warranties of title and quiet enjoyment and thereby limit the grantor's potential liability.

Thus, language in a deed providing that the conveyance is “subject to” easements of record does not in itself reserve an easement

Machado v. Ryan, 153 Idaho 212, 219, 280 P.3d 715, 722 (2012);

Capstar Radio Operating Co. v. Lawrence, 143 Idaho 704, 708, 152 P.3d 575, 579 (2007)

Structures Places Within An Express Easement-- The Unreasonable “Per Se” Rule

Erection of a permanent structure within an easement of definite location and dimension is *per se* unreasonable

Johnson v. Highway 101 Investments, LLC, 156 Idaho 1, 319 P.3d 485, (2014)

Implied Easements

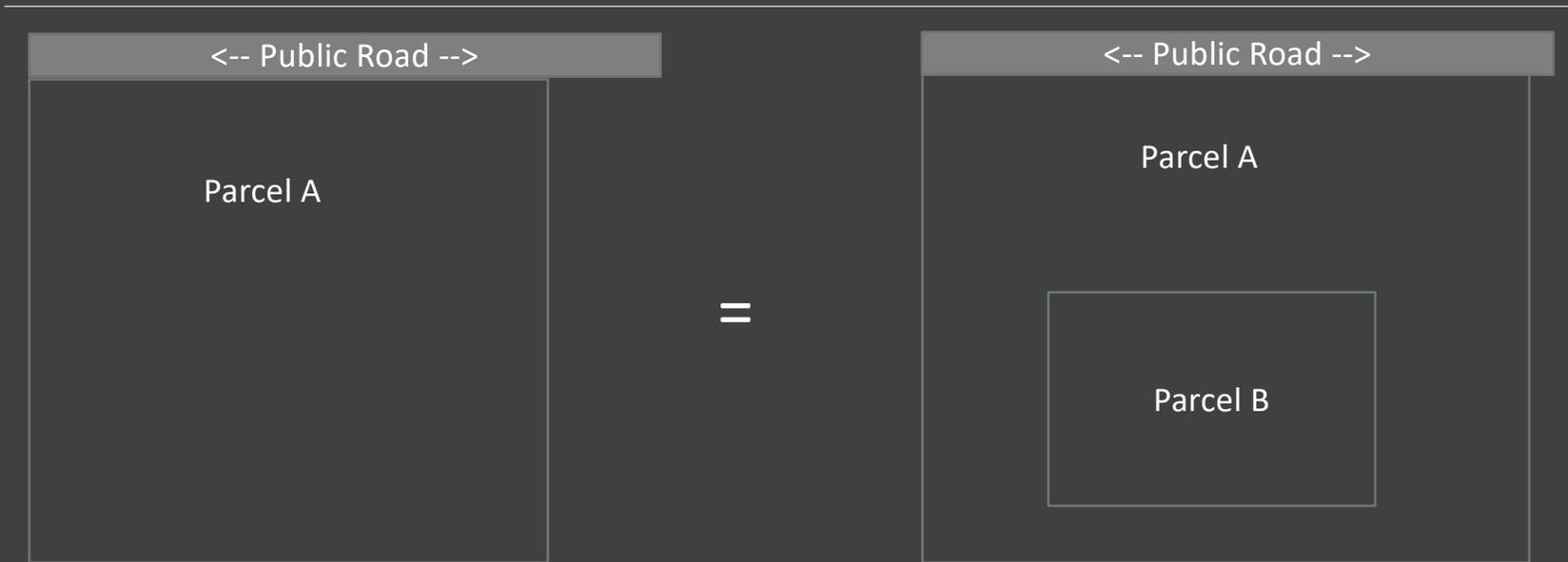
1. Easement By Necessity
2. Easement Implied By Prior Use

Easement By Necessity

Elements of Proof

- Unity of title
- Subsequent separation of the servient and dominant estate
- necessity at the time of severance
- great present necessity

Easement By Necessity (contd)



Easement By Prior Use

Elements of Proof

- Unity of title
- Subsequent separation of the servient and dominant estate
- Apparent and continuous access
- Reasonable necessity
- *Presumes that if access was in use at time of severance such use was meant to continue

Easement By Prior Use (contd)



Easement By Prescription

Open and notorious

Continuous and uninterrupted

Adverse and under a claim of right

With actual or imputed knowledge of the owner

For the statutory period – 5 or 20 twenty years?

- I.C. 5-203 (2016)

Prescription Continued

- *Right gained by prescription is confined only the portion of property (i.e. the width and length) that was adversely possessed for the statutory period
- *Prescriptive easement cannot impose a substantial increase or burden on servient tenement
- *Once all perquisites prescriptive easement is met, the right automatically springs into being; no further action is needed to perfect the interest

Relocating An Easement

Ditch/Canal Easement

I.C. 18-4308: ...the owner of a ditch, canal, lateral, drain or buried irrigation conduit shall have no right to relocate it on the property of another without permission, a ditch, canal, lateral or drain owner shall have the right to place it in a buried conduit within the easement or right-of-way on the property of another

Compare Roadway Easement

I.C. 55-313: Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.

Relocating An Easement Cont.

...we hold that the clear implication of I.C. § 55–313 is to allow for the relocation of an access road where such relocation does not injure interested parties—even where that road takes the form of an express easement—without the consent of the dominant estate holder(s).

Statewide Const., Inc. v. Pietri, 150 Idaho 423, 429, 247 P.3d 650, 656 (2011)

Losing an Easement

*Merger

*Termination according to the terms of the easement

- Presumption easement is perpetual

*Adverse possession

*Abandonment

Easements In CC&Rs

“Every member of the Association shall have a right and nonexclusive easement of enjoyment in and to the Common Area and nonexclusive easement for ingress and egress over and through the Private Driveways, and such easements shall be appurtenant to and shall pass with title to every Lot, subject to the following provisions”

Did that create an express easement?

Easements In CC&Rs (contd)

“Covenants clearly describe easements for the benefit of the Lot Owners in the Common Area and the Private Driveways. However, these easements necessarily provide for the Common Area to be owned and regulated by the homeowners' association. Perhaps the greatest indication of this is the very definition of the “Common Area,” which defines this property in terms of the homeowners' association's ownership. Because the homeowners' association was never formed, the Common Area as described was never created, and the Lot Owners' alleged express easement rights clearly fail.”

Sun Valley Land & Mins., Inc. v. Hawkes, 138 Idaho 543, 548, 66 P.3d 798, 803 (2003)

Public ROW

I.C. 40-117 “Public right-of-way” means a right-of-way open to the public and under the jurisdiction of a public highway agency, where the public highway agency has no obligation to construct or maintain, but may expend funds for the maintenance of, said public right-of-way or post traffic signs for vehicular traffic on said public right-of-way. In addition, a public right-of-way includes a right-of-way which was originally intended for development as a highway and was accepted on behalf of the public by deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203, Idaho Code, but shall not include federal land rights-of-way, as provided in section 40-204A, Idaho Code, that resulted from the creation of a facility for the transmission of water. Public rights-of-way shall not be considered improved highways for the apportionment of funds from the highway distribution account

Maintenance and Repairs

In the absence of an agreement the dominant estate is responsible for maintenance and repairs

License vs. Easement

A *revocable* right to use the real property of another

Temporary

A license does not pass with the title to the property but is only binding between the parties expiring upon the death of either party