



surveyors & law

What Is An Easement and How Can One Be Created?

By taking some liberties with the exact verbiage, the following portion of the Minimum Standard Detail Requirements for an ALTA/ACSM Land Title Survey (2011) require that the map or plat shall show:

The width and recording information of all plottable rights of way, easements and servitudes burdening and benefitting the property surveyed, as evidenced by Record Documents which have been provided to the surveyor; and that the field work shall include the location and character of all vehicular, pedestrian or other forms of access by others than the apparent occupants of the surveyed property to or across the surveyed property, including, but not limited to driveways, private roads and foot paths observed in the process of conducting the survey.

I will assume for the purpose of this article that most state minimum standard requirements for land surveys contain somewhat similar language.

In the last article I wrote for *The American Surveyor* (April, 2014) I discussed how surveyors should be cautious in determining who owns and has title to a parcel of real property. I now want to turn my attention to what a surveyor may need to know in order to determine what easement rights a person *may* have in a parcel of real property, in order to satisfy the various minimum standards of practice which are applicable in the jurisdiction of the property.

We first must understand the definition of an easement, sometimes referred to



“Gee... Is this an easement or a right-of-way?”

in normal parlance as a right-of-way. The well-recognized treatises on the law of easements are in agreement that an easement is an interest in land—it is the right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose; and that an easement is a restriction upon the property rights of the owner of the servient estate. In using the words “servient estate,” it must be recognized that for an easement to exist, there *usually* must be two tracts of land,

with each one owned by different persons, one of the tracts generally referred to as the “dominant estate,” which has the benefit of the easement, and the other tract, generally referred to as the “servient estate,” over which the easement runs and burdens.

Saying all of that, it also must be recognized that there are many ways in which an easement can be created. The most common ways of creation are by an express grant or by reservation. That is, an easement can be created in the same manner and mode as a conveyance of land by a deed, and which would then be duly recorded in the local land record system. It must be emphasized, however, that in addition to the land record system, **the establishment of an easement could also be found to have been so ordered in an adjudicated equity or law proceeding, and not be found in the land record system at all!**

What should be most important to the land surveyor is that easements can be created by other modes which are commonly referred to as “easements by implication.” This term means that an easement could be created without the necessity of a recorded document, but by the common law doctrine of prescription, the filing of plats, or by necessity.

As I said in my last article, a good and dependable title examination should, and *probably will*, reveal all of the recorded easements which a land surveyor needs to show on the survey, including those previously delineated on prior plats, which may show easements by implication. But one of the surveyor’s main responsibilities and duties is to locate “on the ground” *good evidence of apparent* prescriptive easements and easements by necessity. However, my stern warning is that just

because the surveyor has located an existing roadway, the surveyor cannot make an assumption that by the mere existence of the roadway it has somehow evolved into a legal easement by prescription or necessity. That determination is one for the courts to conclude, not for the land surveyor.

Generally (a word that should be used often), the law commentators have written that in order to establish an easement by prescription, it is necessary for the person claiming such a right to show adverse, exclusive, continuous and uninterrupted use of the way for a certain statutory period of years. And generally (again, that word), those commentators have written that easements by necessity are founded on a public policy which favors access from land to some public street. In order to establish such an easement, it must also be demonstrated that at some point in the past (maybe in the far distant past), the land for the benefit of the way was as claimed, and the land which it is claimed to be over belonged to the same person at the same time.

Expanding upon my homily on advice which should not be given, a land surveyor should never give an opinion (written or oral) as to whether there is in "existence" a prescriptive easement, or one by necessity, as this would be far beyond the scope of the surveyor's licensing laws. Just because there is a well-travelled roadway leading from a parcel of land to the public highway, that does not necessarily mean that the use has been "adverse," "exclusive," "continuous," and "uninterrupted" (for whatever each of those words really mean) for some definite long period of time, or that there is no other way to the public highway, and that both the servient and dominant parcels of land were owned by the same person at the same time.

Please understand that the complex laws pertaining to easements, both statutory and case law, cannot be fully explained in this short article, but I hope that I have given the readers of *The American Surveyor* something to ponder. ■

Jim Demma is a Maryland licensed professional land surveyor and has practiced law in both the State of Maryland and the District of Columbia for more than 30 years. His extensive practice has included land use & development, real estate contracts and titles, condominiums, easements, land patents, boundary disputes, and all matters that touch and concern the land.