

A Reprint from *Tierra Grande*, the Real Estate Center Journal

By Judon Fambrough

Texas' growing population has increased the demand for smaller tracts of land. As land is divided and subdivided, access to the individual parcels becomes a problem. Purchasers may find it difficult, if not impossible, to access their land.

The 74<sup>th</sup> Texas Legislature addressed this issue. County commissioners are now authorized to condemn easements for landlocked property owners in rural areas (Texas Transportation Code, Chapter 251).

Various ways both private and public easements arise and how they terminate are covered in the Real Estate Center's report, *Easements in Texas*. Knowledge of the rules is important, but knowing how they apply and interact in real life situations is critical.

For instance, the difference between an *easement in gross* and one that is *appurtenant* confuses many. An easement in gross is a **personal right** to cross another's land. The right can not be assigned nor otherwise transferred. It resembles a license in many respects because ordinarily it can be unilaterally revoked by the grantor, especially if granted orally.

# Primer

An appurtenant easement, on the other hand, attaches to a tract of land. Whoever owns a particular tract has the right to cross another's land for access. The tract being crossed is known as the *servient estate*. The tract being served is known as the *dominant estate*.

Because easements are an interest in land, the statute of frauds requires the agreement or transfer to be in writing. Even so, easements may arise by implication, prescription, estoppel or public dedication without being in writing.

# Easement

However, the party claiming an easement by one of the exceptions may have to resort to a judicial process known as a *declaratory judgment* to claim it.

Before buying Texas land, purchasers should make sure the property is served by a valid, enforceable easement. The sellers' use of an access route for the past 50 years does not necessarily indicate a valid easement.

Many people mistakenly believe that the use of an access for ten continuous years creates a *prescriptive easement*. Prescriptive easements are created in much the same way as title to land is acquired by adverse possession. The use (or access) must begin and continue without actual or implied permission from the servient estate owner. Many

the easement several years ago. Because of the blockage, Brad granted Art oral permission to construct an easement at an alternate location.

Twelve years later Brad sells the tract to Charles. Charles wants to terminate the easement to Art because it is in gross. It is not prescriptive because it began with Brad's consent. If Charles can terminate the easement, Art's tract will be landlocked because the garage blocking the appurtenant easement terminated that easement after ten years.

Art may not be without recourse, though. Texas recognizes an implied easement created when the property blocking Art's entrance was, at one time, under common ownership. Also, under the circumstances, Art may be able to claim an easement by estoppel, regardless of the possibility of an implied easement.

An easement by estoppel is created when the:

- acts or expressions of the grantor (servient tenant) indicate the existence, creation or conveyance of an easement and
- grantees (dominant tenant) rely on the acts or expressions to their detriment—i.e., expend time and money constructing an easement or purchase land assuming the easement exists.

Under these conditions, the law legally prevents (estops) the servient tenant from denying the existence of the easement. Easements by estoppel across another's land may be acquired verbally, assuming the two conditions mentioned previously are met.

Finally, purchasers must realize that not all appurtenant easements of record are enforceable. Two good examples are easements crossing foreclosed property and easements granted by one cotenant.

According to Texas case law, a foreclosing lienholder gets title as it existed when the lien was executed. For this

reason, an easement granted across the servient estate **after a lien was created** terminates with foreclosure. The only exceptions are when the lienholder consents or ratifies the easement.

One cotenant's granting an easement does not bind the other cotenants according to Texas case law. Without consent or subsequent ratification, one

cotenant can not impose an easement upon co-owned property in favor of a third party.

Consequently, purchasers need to check ownership of the servient estate for both liens and cotenancies when the appurtenant easement was granted. If either existed, further inquiry may be dictated.

For more information, obtain copies of Center publications: "Don't Fence Me In" and *Easements in Texas*.

This article is for information only. For specific legal advice, consult an attorney. ☐

---

*Fambrough is an attorney, member of the State Bar of Texas and senior lecturer with the Real Estate Center at Texas A&M University.*

---

## ☐ REAL ESTATE CENTER

©1997, Real Estate Center. All rights reserved.

**Director**, Dr. R. Malcolm Richards; **Associate Director**, Gary Maler; **Chief Economist**, Dr. Ted C. Jones; **Senior Editor**, David S. Jones; **Associate Editor**, Dr. Shirley E. Bovey; **Assistant Editor**, Kammy Senter; **Art Director**, Robert P. Beals II; **Circulation Manager**, Gary Earle; **Typography**, Real Estate Center; **Lithography**, Wetmore & Company, Houston.

**Advisory Committee**: John P. Schneider, Jr., Austin, chairman; Gloria Van Zandt, Arlington, vice chairman; Michael M. Beal, College Station; Conrad Bering, Jr., Houston; Melissa C. Cigarroa, Laredo; Dr. Donald S. Longworth, Lubbock; Carlos Madrid, Jr., San Antonio; Andrea Lopes Moore, Houston; Kay Moore, Big Spring; and Pete Cantu, Sr., San Antonio, ex-officio representing the Texas Real Estate Commission.

**Tierra Grande** (ISSN 1070-0234), formerly *Real Estate Center Journal*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115.

**Subscriptions** are free to Texas real estate licensees who provide their name, address, telephone and license numbers to Department JS at the address given. Other subscribers, \$30 per year.

**Views expressed** are those of the authors and do not imply endorsement by the Real Estate Center, the Lowry Mays College & Graduate School of Business or Texas A&M University.