Easements & Rights of Way, Public and Private Roads

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Massachusetts Land Conservation Conference 2H, April 2, 2016

An introduction to easements. In ALL cases, the outcomes are dependent on individual details and current law. **Neither this document nor discussions at the MLCC are to be construed as legal advice.** Questions regarding individual easement rights and public and private ways can only be answered by a title examination, including surrounding and nearby properties, public and historic records, and applying the relevant law, requiring the services of an attorney versed in titles and easements.

Bolded words indicate legal terms or "terms of art". Underlined words are helpful ways to remember the legal terms or key points.

I. Easements

- An **easement** is a right to use someone else's property in the ways described in the easement.
  This can include a shared driveway, a private road, a right to convey water through pipes running under someone else's property, a right take something such as gravel or water from someone else's property, a right to flood someone else's property or to keep the vegetation cut to allow flying over the property.

- The property subject to the easement, or that has the easement over it, is called the **burdened** or **servient** property. The **fee** is another term used to denote the land that is burdened by the easement, as in "the abutters own the fee under the road". The servient owner has the right to use the land in any way that does not interfere with the easement or make its use more costly for the easement holder.

- A property that has attached to it the right to use someone else's property is called the **benefited** or **dominant** property.

- When an easement is "attached to" a property, it is called an **appurtenant** easement.
  The benefited parcel does not have to directly abut every burdened property; for instance, a private road may burden multiple parcels along its route. Each parcel that has the right to use the road is a benefited parcel; each parcel that has the road running across it would be a burdened parcel.

- When an easement is not attached to a particular property, it is called an **easement in gross**, or **personal** to the current benefited holder.
  The law disfavors easements in gross and will generally find that they expire when the person who holds the easement no longer benefits from it. For instance, someone may have the right to go across a property to get to the water to fish. When that person dies, or moves away so no longer has any practical use for the right, courts will find that the right has expired. **Public easements**, or those with a **public benefit** such as public ways, railroads, public (and private) utility and other service easements do not expire. They must be extinguished in the manner provided by law.

- A **negative easement**, or **restriction**, gives the benefited holder the legal right to prevent another property from being used in a way it could otherwise be used.
  Restrictions are disfavored in the law, because the law favors the full use of land. In an effort to extinguish restrictions, statutory provisions in Massachusetts General Laws chapter 184 sections 23, 26-33 were enacted to extinguish restrictions that are no longer of benefit, and provides a process for the continuation of those that are still of benefit.

- "**Perpetual restrictions**" which do not expire are no longer allowed except for governmental restrictions or those with a public benefit or those complying with c. 184 sec. 23, 26-33. Some restrictions must be

extended by filing a notice of extension in the Registry of Deeds in accordance with the requirements of the law, provided that the restriction is still of benefit.

- **Right of way** is a type of easement that allows only a limited right to pass and repass (but not park)

- **Benefited property owner** has the right to improve the easement and make it usable for its intended purpose(s). This includes paving, putting in sidewalks, utilities, lighting, removing obstructions, trees or stone walls, even if placed there by the burdened property owner. Use of an easement may change as the needs of the servient and dominant owner change. *Western Mass. Electric Co. v. Sambo's of Mass., Inc*., 8 Mass. App. Ct. 815, 822 (1944).

- **Burdened property owner** has the right to use the burdened property in any way which does not interfere with the benefited property owner's rights or that does not materially increase the costs to the benefited owner to improve or make use of the easement.

II. Private Easements and Ways

- Private ways may be private, but open to the public. This does not make them public ways for which the municipality has the burden of liability and maintenance. Use of words in the grant of an easement such as "for the purposes for which public ways in the town are now or may hereafter be used" does not make the easement public. *McLaughlin v. Board of Selectmen of Amherst*, 422 Mass. 359, 364-365 (1996).

- A municipality may plow and make minor repairs to private ways only if they are "open to the public" and if the municipality has adopted M.G.L. c. 40 sec. 6C, 6D and 6N. Allowing the public to use a private way does not make it public – that would require a layout according to statute and an acceptance by the municipality.

- Responsibility for maintenance and improvements on private ways belongs to those having the benefit of the way. One owner can improve the entirety of the easement, and does not need the permission of the burdened property owners to make the easement usable for the purpose it was granted. There is a statutory process for requiring other benefited property owners to contribute.[1]

III. Public Easements

A way becomes public by following the legal requirements of a layout by a public authority, or by a prescriptive easement, or prior to the St. of 1846, by dedication and acceptance. Discussion of the details of each of these is beyond the scope of this discussion. It is important to understand that public use alone, or labels on plans or words in deeds referring to a way as public, does not make the way public.

- **Improvements** in public ways are the responsibility of the municipality or government owner. *Sturdy v. Planning Bd of Hingham*, 32 Mass. App. Ct. 72, 76 (1992). Private individuals generally may not make major repairs on a public road without authority, but may petition to have paper or inadequate public ways constructed or upgraded, and the municipality may contract with abutters to do so. Cf. *Perry v. Planning Board of Nantucket,* 15 Mass. App. Ct. 144, 157-159 (1983). (see M.G.L. c. 82 sec. 8).

- "[M]embers of the public, [] as landowners abutting a public way…have a right to traverse the **unimproved portion** … for such purposes as are "reasonably necessary and convenient" for access to their property. See

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[2] *Anderson v. Healy*, 36 Mass. App. Ct. 131, 135 (1994) (Abutter found to have illegally built a driveway and improved an unimproved portion of a cul de sac on a public way but did have the legal right to use the unimproved public way.) Use of the public easement to get to your land "does not constitute trespass…[and you] cannot be prevented from entering from [your] land upon a way which the public has

Western Mass. Elec. Co. v. Sambo's, Inc., 8 Mass. App. Ct. 815, 824 (1979)."[2] Later cases apply a rule that prohibits abutters from improving a portion of a layout only where the municipality owns the fee.[3] The ruling in *Anderson v. Healy*, 36 Mass. App. Ct. 131, 135 (1994) that "it was improper for the defendants to construct a driveway, and that the paved portion of the driveway should be removed" is troubling. Layouts are rarely improved to their fullest extent, and many extend well into abutting properties. Driveways that provide access to a public way are almost always built across the unbuilt portion of layouts.

- **Eminent domain**, or **condemnation**, ("taking") is a taking by the government of the property rights described in the taking document, accomplished according to applicable laws. A taking requires an accurate description. The taking document must be examined to determine what was taken and what, if anything, remains. A taking of land that is subject to an easement extinguishes the easement if the taking is of the fee or all interests, with no exception for the easement.[4] The taking authority must pay "just compensation" for rights taken. If a property is burdened by an easement, the easement holder at the time of the taking is entitled to damages. When examining title for a property that has the benefit of an easement, always check to ensure that the easement has not been extinguished by eminent domain or otherwise.

- **Abandonment** of a public way. See G.L. c. 82, sections 12, 21, & 32A and *Mahan v. Rockport*, 287 Mass. 34, 37 (1934); *Coombs v. Selectmen of Deerfield*, 26 Mass. App. Ct. 379 (1988).

- **Discontinuance** of a public way is when the government gives up the rights it acquired by eminent domain. If the taking was of an easement, the fee reverts to the original owners, or their successors, unburdened by the public easement for travel and generally they regain the full ownership that they had prior to the taking. *Nylander v. Potter*, 423 Mass. 158, 246 (1996). If the taking was of the entirety of the property, or "the fee", it creates an entirely new title, and "when the public use is discontinued, the fee remains in the taker, discharged from the easement. *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 512, and authorities cited." *Commonwealth v. Boston Terminal Co*., 185 Mass. 281, 286, (Mass. 1904). If the taking excepted out easement or other rights, those rights would continue, as before. If all rights were taken, an abutter does not obtain an "abutters easement" or "public access private way" upon discontinuance of the road. *Nylander.* If the two properties do not have a common title, there can be no easement by necessity, estoppel or implication. In short, if you own property along the former public way and did not claim damages for the extinguishment of the public way, you will not get damages nor, absent certain circumstances, an easement to get to and from your property via the former public way. There would be no easement by prescription for use during the time the way was a public way, as public use is permissive and does not have the characteristic of adverse to the owner's interest required for a prescriptive easement.

IV. "Other" Easements & Ways

- An **easement by implication** may be established when a parcel is conveyed and there was prior (usually open and obvious) use of an access and an intention by the grantor to include that access, even if the parcel has other legal access. *Dale v. Bedal*, 305 Mass. 102, 103; *Joyce v. Devaney*, 322 Mass. 544, 459; *Mt. Holyoke Realty Corp. v. Holyoke Realty Corp*. 284 Mass. 100, 106.

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[2] *Anderson v. Healy*, 36 Mass. App. Ct. 131, 135 (1994) (Abutter found to have illegally built a driveway and improved an unimproved portion of a cul de sac on a public way but did have the legal right to use the unimproved public way.) Use of the public easement to get to your land "does not constitute trespass…[and you] cannot be prevented from entering from [your] land upon a way which the public has a right to use…Access to a public way is one of the incidents of ownership of land bounding thereon and this right is appurtenant to the land and exists when the fee of the way is in the municipality as well as when it is in private ownership." *Anzalone v. Metropolitan District Commission*, 257 Mass. 32, 36 (1926).

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[4] *New England Continental Media, Inc. v. Town of Milton*, 32 Mass. App. Ct 274 (1992).

- An **easement by necessit**y is when a parcel has no access ("backland") and a party to the deed has abutting land at the time of the grant that can provide access. The law favors the use of land, and so the law will generally find if there is no other way to legally access the backland, that access over the party's abutting land is a necessity for the use of the backland.

- A **prescriptive easement** is acquired by adverse use continuously for the prescriptive period (in MA, 20 years). Unlike adverse possession, on which prescription is based, it need not be exclusive. So you could use the easement for 20 years and others, including the owner of the land or the owner of land benefited by the easement, and still acquire the right to continue to use the easement in the manner that you used it for the 20 year period.

- **Profit a prendre**, often called "mineral rights" or "gravel rights" is the right to take something, usually minerals, from the land.

- **Doctrine of Emblements**, or the right to harvest crops planted when they mature.

- **Plans showing easements**. "A plan [if] referred to in a deed becomes a part of the contract so far as may be necessary … to determine the rights intended to be conveyed. " *Murphy v. Mart Realty of Brockton, Inc.,* 348 Mass. 675 (1965).

- **Paper Streets** are ways "shown on a recorded plan but never built on the ground." *Shapiro v. Burton*, 23 Mass.App.Ct. 327, 328 (1987). All those with rights in a paper street have the right to improve it. Elimination of a paper street should be accomplished by recordable releases from all those having rights in the way, *Anderson v. Devries*, 326 Mass. 127, 132 (1950), or a court action extinguishing the rights. Filing plan under c. 41 sec. 81W does not eliminate rights in the paper street, and a petitioner is not entitled to the planning board's endorsement if it will affect the rights of others. "Affect" has been interpreted as impairing rights or marketability of other people's property. *Patelle v. Planning Board of Woburn*, 20 Mass.App. Ct. 279 (1985).

- "Where land is conveyed with reference to a plan, an easement other than an easement of necessity is created only if clearly so intended by the parties to the deed. *Regan* v. *Boston Gas Light Co.* 137 Mass. 37, 43. *Prentiss* v. *Gloucester,* 236 Mass. 36, 52. *Bacon* v. *Onset Bay Grove Assn.* 241 Mass. 417, 423. RAHILLY v. ADDISON 350 Mass. 660, **662** (Mass. 1966).

- Each such "intended easement" depends on the deed and the circumstances in which it was made. *Bacon* v. *Onset Bay Grove Assn.* 241 Mass. 417, 423. *Wellwood* v. *Havrah Mishna Anshi Sphard Cemetery Corp.* 254 Mass. 350, 354-355. *Mt. Holyoke Realty Corp.* v. *Holyoke Realty Corp.* 284 Mass. 100, 104. See *Goldstein* v. *Beal,* 317 Mass. 750, 755.

- **Common Scheme**. "However, "[t]he existence of . . . a building scheme . . . [may] show an intention that the restrictions imposed upon the several lots shall be appurtenant to every other lot in the tract included in the scheme." *Snow* v. *Van Dam,* 291 Mass. 477, 481, and cases cited. The chronology of the conveyances of the several lots out of the subdivision in the present case was no obstacle to the finding of the judge for there was evidence sufficient to support a scheme on the part of the common grantor. A finding of a scheme was amply warranted in this case where language occurred in each of the original deeds from Tewksbury giving the respective grantees an easement over Sargent Street and making reference to the 1877 plan. The burden has been upon the respondents to show the existence of the scheme. *American Unitarian Assn.* v. *Minot,* 185 Mass. 589, 595. The judge was warranted in concluding that the respondents had done so." *Rahilly v. Addison,* 350 Mass. 660, **663** (Mass. 1966).

Statutory Public Ways are ways laid out and accepted by town officials "for the use of one or more of the inhabitants…" G.L. c. 82 ss. 21, 23, and is quasi-public. The municipality may make repairs, provided the applicant reimburses the town. The public generally has the right to use a statutory public way.

Some other laws that may apply

This is not an exhaustive list, but provides information on some common legal issues related to easements.

- Massachusetts General Law Chapter 183, §58 provides a **legal presumption** that fee ownership of abutters to ways "runs to the center line of the way …. and carries with it the right to use the way along its entire length." *Brennan v. DeCosta*, 24 Mass.App.Ct. 968 (1987) (emphasis added). This legal presumption can be overcome when a legal way is imposed entirely within the boundaries of a parcel. In those cases, the abutters do not "get" extra land added to the center of the way, nor do they get the right to use the way, absent a grant of the right to do so.

- **Merger** is when the benefited and burdened property become united in title, or, owned by the same person or entity. For an easement to exist it must give someone the right to use property not owned by the easement holder. Once the titles are united in the same person or entity, the easement is extinguished, because there is no longer a burdened and benefited property – one person owns it all so can use it without need of an easement. When one of the parcels is granted to someone else, the easement does not reappear, or spring back into existence. An entirely new easement must be granted. This also applies to gravel rights and the right to harvest trees, for instance.

- **Overburdening of an easement** occurs when someone attempts to extend the easement beyond the land that has the legal benefit of the easement, to other land. This usually occurs when an owner of land acquires additional land ("after-acquired property"[5]) and attempts to use the easement for access to the additional land. "It is the long-established rule in the Commonwealth, as elsewhere, that after-acquired property….may not be added to the dominant estate…without the express consent of the owner of the servient estate…absent such consent, the use of the an easement to benefit property located beyond the dominant estate constitutes an overburdening of the easement." (Citations omitted) *McLaughlin v. Selectmen of Amherst*, 38 Mass. App. Ct. 162, 169 (1995).

- **Abandonment** is an intention by the easement holder, by a release, or "acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence." *Dubinsky v. Cama*, 261 Mass. 47 (1927). A clear intention never to make use of the easement again must be shown. *Sindler v. Bailey*, 348 Mass. 589, 592 (1965). Nonuse or failure to keep the easement clear alone will not result in the abandonment of an easement. In *Desotell v. Szczygiel*, 338 Mass. 153, 159-160 (1958), an easement covered with trees and brush and a garbage dump was not enough to prove the easement had been abandoned. See also *Brennan v. Decosta*, 24 Mass.App.Ct. 968 (1987).

- **Frustration of the purpose of the easement** is when an easement is extinguished when the purpose for which the easement was created is no longer applicable. "When a right in the nature of an easement is incapable of being exercised for the purpose for which it is created the right is considered extinguished." *Makepeace Bros. v. Town of Barnstable*, 292 Mass. 518 (1935)(an eighteenth century easement for whaling was extinguished because whaling is no longer done.). It is more common today when easement connections to a common well, or septic system, is no longer necessary because the properties are connected to municipal water and sewer, or where the easement was to allow cattle to cross to get to grazing fields which have been converted to subdivisions.

- Massachusetts General Laws Chapter 187, §5 provides a **right to install utilities**: "The owner or owners of real estate abutting on a private way who have by deed existing rights of ingress and egress upon such way

[5] *McLaughlin v. Board of Selectmen of Amherst*, 422 Mass. 359, 364 (1996) (After acquired property can benefit from an easement such as this one only if the easement is an easement in gross, a personal interest in or right to use the land of another, or the owner of the after-acquired property receives the consent of owner of the servient estate."

or other private ways shall have the right by implication to place, install or construct in, on, along, under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer...". For this statute to apply, (1) the rights of ingress and egress must be created "by deed" (and includes a reservation of an easement); (2) the way must be a "private way"; and (3) the property must be "abutting" the private way, which includes a driveway easement. *Barlow v. Chongris*, 38 Mass.App.Ct. 297, 299 (1995).

- An extensive treatment of **zoning** is beyond the scope of this presentation. However, the courts have found that an abutter's ownership interest in a paper street required that the owner be joined in a subdivision application, so rights in a paper street will need to be determined prior to submitting a subidivision plan. *Silva v. Planning Board of Somerset*, 34 Mass.App.Ct. 339 (1993). This does not apply to ANR plans.

Other resources:

http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-subj/about/roads.html

Preserving Historic Rights of Way to the Sea, 2nd edition, 1999
http://www.mass.gov/eea/docs/czm/access/rights-to-sea-handbook.pdf

Discontinuing Town and County Roads by Lynn Rubenstein 1990
http://www.douglasma.org/cdd/pb/reports/RoadDiscontinuance.pdf

Discontinuing Town and County Roads by Lynn Rubenstein 1990, updated 2003 by Alexandra D. Dawson
http://www.thetrustees.org/assets/documents/highland-communities-initiative/Discontinuing-Town-County-Roads.pdf

Massachusetts Streets and Ways for Surveyors, 2011, by F. Sydney Smithers
http://www.nattleboro.com/sites/nattleboroma/files/u64/streets-ways-may-2011.pdf