

Easements Not Mentioned Deed Reference to a Subdivision Plat

by

Knud E. Hermansen† & A. Richard Vannozi ††
P.L.S., P.E., Ph.D., Esq. P.L.S., M.S.

The following is the first of four articles discussing implied easements. Readers are cautioned that they should investigate state cases dealing with the particular application of the law to determine how the law applies in their state. Many states have modified the common law that is presented in the article.

One major area of liability that surveyors face is the failure to identify and locate easements burdening or benefiting the property being surveyed. The identification and location of easements is often part of the surveyor's responsibilities. For example, in Massachusetts 250 CMR Section 6.01 (1)(a)(1) requires surveyors to "obtain copies of recorded documents affecting the survey". 250 CMR Section 6.04 (1)(c) (1) is even more explicit and require surveyors to "Reconnoiter the area, recover existing monumentation and note all physical evidence and encroachments affecting the site." Another example can be found in the, the 2011 Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys that requires the surveyor be given "any record easements benefiting the property."¹ The surveyor is further required to disclose "*the evidence, location and extent of potentially encroaching structural appurtenances and projections observed in the process of conducting the survey ... by or onto ... rights of way, [and] easements ... disclosed in Record Documents provided to the surveyor.*"² The surveyor is required to show "*evidence of any easements or servitudes burdening the surveyed property, disclosed in the Record Documents provided to the surveyor and observed in the process of conducting the survey...*" along with "*evidence of easements or servitudes not disclosed in the Record Documents provided to the surveyor, but observed in the process of conducting the survey...*"³ On the plan the surveyor is required to show easements, right of ways, and servitudes disclosed by the record documents.⁴ The optional survey responsibilities and specifications in Table A allow the client to contract with the surveyor to "*locate improvements within any offsite easements or servitudes benefitting the surveyed property that are disclosed in the Record Documents provided to the surveyor and that are observed in the process of conducting the survey....*"⁵

The difficulty arises for the surveyor when there are easements reflected in the records but the easements are not created and conveyed by a deed. This is one article of four that deal with easements that arise by implication.

¹ 2011 Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys §4

² 2011 Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys §5.C.iii

³ 2011 Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys §5.E.i & §5.E.ii

⁴ 2011 Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys §6.C

⁵ 2011 Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys Table A, Item 20a.

One source of an easement that arises by implication is an easement created by the description of a lot that references a subdivision plan.

As a general rule, where: 1) the deed conveys a lot in a subdivision, 2) the deed refers to the subdivision plan, and 3) the developer-grantor has title to the road, the lot being conveyed receives a private, appurtenant easement in streets, alleys, and open areas shown on the plan.⁶ The easement created is not dependent on whether the plat is recorded or the roads are dedicated for public use.

The creation of an easement that is appurtenant to the lot caused by the mere reference of the plan in the deed gives rise to an easement by implication under the equitable doctrine of estoppel. The courts reason that a grantor (developer) should not be allowed to use a subdivision plan to entice a buyer to purchase a lot without impliedly assuring the buyer that the buyer, their heirs, and assigns have free and perpetual use of all the roads and other proposed uses shown on the plan. This is true in many states regardless whether the buyer actually needs the road or other use to reasonably enjoy their lot.

There are some variations of this doctrine among states. For example, Pennsylvania would grant an appurtenant easement in the roads only if the roads were not public roads at the time the lot was first conveyed by the developer. (Where the road is a public easement, the grantee would have no reasonable basis to assume they have a private easement when at the time of purchase the road is a public easement.) In some states an appurtenant easement to the lot would extend to the roads, alleys, and open areas that a lot owner would reasonably believe would materially benefit the lot. In other words, the value of the lot would be adversely affected without the use of the road, alley, or common area.⁷

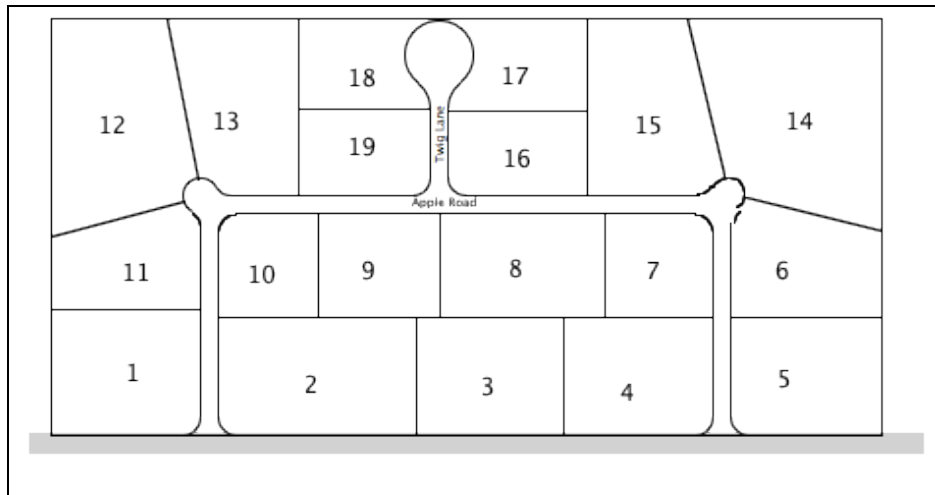
Vannozzi, Anthony 6/28/11 9:19 AM

Deleted: -

⁶ See 25 Am Jur 2d Easements and Licenses in Real Property § 21. See also 7 A.L.R.2d 597.

⁷ In Massachusetts this notion was articulated in *Downey et al. v. H.P. Hood & Sons*, (203 Mass. 4, 89 N.E. 24) and as further distinguished on the point of material benefit in *Gray v. Howell* (292 Mass. 400, 198 N.E. 516).

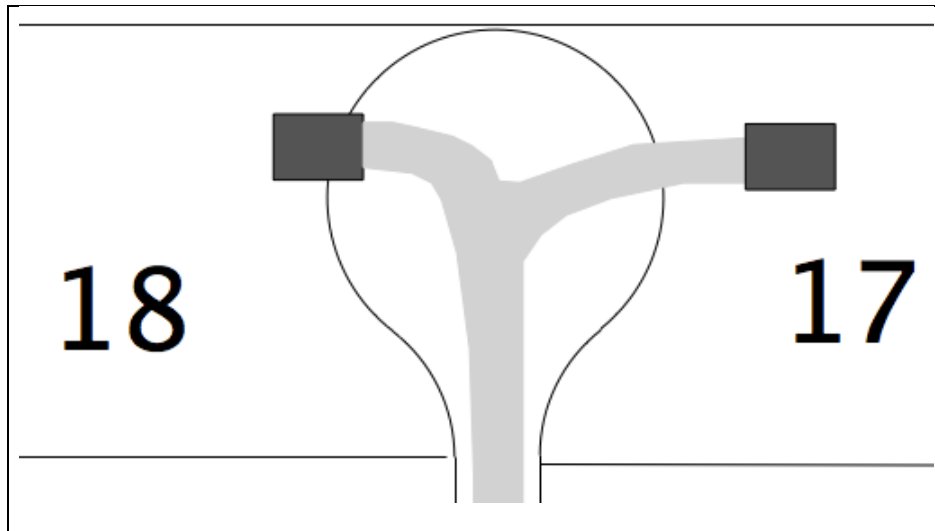
In addition, a 2004 Massachusetts Supreme Judicial Court (SJC) case, *M.P.M. Builders, LLC v. Dwyer* (442 Mass. 87, 809 N.E. 2nd 1053), which effect appurtenant easements generally and is worthy of mention as it affects implied easements as well as those created by express grant. This case went even further by providing a process whereby the owner of a servient estate can unilaterally move an easement under certain conditions. This case tackled the conflict land surveyors often see when a seemingly superfluous easement in a fixed location on the ground prohibits the servient estate owner from full use and enjoyment of their land. Not only are surveyors bound to understand the different types of easements that exist, and how such easements may have been created, but they are also expected to know how the law's treatment of them changes.



Consider the diagram of a subdivision plan that is cited in the 1946 deed for Lot 3 (e.g., “*Lot 3 as shown on the Sunset View Subdivision.*”) Even though Lot 3 does not require any of the subdivision roads for access, in many states Lot 3 has an appurtenant easement in Apple Road and Twig Road.

Once the appurtenant easement attaches to the lot at the time of the first conveyance, the easement does not have to be mentioned with the subsequent conveyance of the lot to remain appurtenant to the lot. Consequently, a 1964, 1982, and 2010 conveyance of Lot 3 in the previous example continues to include an easement in Apple and Twig roads even though there is no mention of the appurtenant easements in Apple and Twig roads.

Once the concept of the creation and the extent of the implied easement are understood, the ramifications involving the surveyor’s services are realized. Using the previous example, consider the situation where the owner of Lot 18 built their garage as shown in the following diagram:



If the surveyor has agreed to survey Lot 3, the surveyor may be obligated to show the possible encroachment of Lot 18's garage in the cul-de-sac as an encroachment on Lot 3's appurtenant easement. Unless the surveyor has agreed to limit their services or a state's common law has taken a narrow view of the implied easement, it could be argued that the surveyor is obligated to drive all the roads and other apparent easements in the subdivisions looking for an encroachment. The broad language in Massachusetts' 250 CMR Sections 6.01 (2)(a)(1) and 6.04 (1) (c) (1) is the sort of language that could create such burden on a surveyor.

Another common situation causing confusion leading to surveyor malpractice is for the government to discontinue the public easement in the subdivision road. Where this situation has occurred, lot owners would tend to believe that the portion of the road discontinued by the government is no longer burdened by an easement. However, as this article explains, even if the public road is discontinued a private easement will often remain in the former public road.

This situation is one of several easements that may be reflected in the records but not be found as a separate deed for the easement. Surveyors would be wise to research this particular implied easement in their state in order that they can understand the extent of the easement and properly provide the services they have contracted with the client.

† Knud E. Hermansen is a professor in the surveying engineering technology program at the University of Maine. He provides consulting services in the areas of boundary retracement, boundary litigation, roads, easements, property title, land development, and alternative dispute resolution.

†† A. Richard Vannoizzi is an assistant professor at the Thompson School of Applied Science at the University of New Hampshire. Richard has spent over 20 years in private practice where he focused on boundary, title and zoning dispute resolution and litigation before beginning his teaching career.