# Access Issues

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# I. Access Coverages

## A. Policies

- Covered Risk #4 of 1992 Owner's Policy insures against loss caused by a "lack of a right of access to and from the land, as of the date of the policy.

- Covered Risk #4 of the 2006 Owner's Policy indemnifies the insured if, as of the date of the policy, there was "[N]o right of access to and from land.

- The coverage is identical although worded slightly differently.

- Covered Risk #11 of the Homeowners Policy provides broader protection – it protects the insured in the event the insured does "not have both actual vehicular and pedestrian access to an from the land, based upon a legal right." It does not insure that access is over a public right of way or that the access is paved or publically maintained.

## B. Access Endorsements

### i. Access and Entry Endorsement (ALTA Form 17-06)

This endorsement insures that (a) the land abuts and has actual vehicular and pedestrian access to and from the designated street(s), (b) the designated street is physically open and publicly maintained and (c) the insured has the right to use existing curb cuts along that portion of the street abutting the property. In issuing this endorsement, care should be taken to note any restrictions or limitations that may exist with respect to the designated streets. *Commonwealth Land Title Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (D. Idaho 2015) (finding liability under endorsement because specifically referenced road was closed between December 1 and April 30 pursuant to BLM regulation).

**ii. Indirect Access and Entry (ALTA Form 17.1-06)**

This endorsement provides the same coverages as Form 17-06, except that it insures that access exists over a specified easement between the insured property and a public street instead of insuring direct access to that street.

### iii. Utility Access (ALTA Form 17.2-06)

This endorsement insures against loss resulting from the insured's lack of a right of access to the utilities specified in the endorsement over, under or upon easements or rights of way benefiting the land, but only if such lack of access is caused by (a) a gap or gore between the boundaries of the land and the easements or rights of way; (b) a gap between the boundaries of the land and the easements or rights of way; (c) a gap between the boundaries of the easements or rights of way; or (d) a termination by a grantor or its successor of the easements or rights of way.

## C. Insuring Easement as Separate Parcel

- If easement is insured as a separate parcel in Schedule A, the invalidity of that easement will give rise to a loss under the policy. *Old Republic Nat'l Title Ins. Co. v. Minnesota Office Plaza, LLC,* 2010 WL 155175 (Minn.App.2010). Further, if the policy described the insured land by reference to a recorded deed and the deed included an appurtenant easement, the policy was held to have insured the easement. *Clements v. Stewart Title Guar. Co.*, 537 S.W.2d 126 (Tex. App. 1976). However, the policy does not incorporate easements or other rights depicted on a plat simply by using the platted legal description. *Dishman v. Stewart Title Guar. Co., 2002 WL 491493* (Wash. App.2002); *Forbes v. Chicago Title Ins. Co.*, 2012 WL 541509 (Col. App.2012) (attachment of map to policy does not expand the rights insured by policy).

## II. Insuring That Access Exists

In determining whether access exists, the matters that should be considered in making that determination will depend on the source of the right pursuant to which access is to be obtained. Different considerations will apply depending on whether access is provided by a public street or by an easement.

## A. Determining Validity of Public Street

- Except for condemnation, the only ways a public right-of-way can be created in Arizona are as follows:

    1. Statutory dedication – requires the recordation of a map or plat that complies with statutory requirements. A.R.S. § 9-254 (applies to maps recorded against property located within or adjacent to a a city or town); A.R.S. § 11-806.01 (applies to *subdivisions* recorded in unincorporated areas of counties). Effectuation of a statutory dedication requires that the map or plat be signed by the owner of the property being subjected thereto. *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382 (1951). There is a presumption of dedication created by the recordation of a map or plat complying with the statutory requirements, but, if the map or plat does not contain dedicatory language, that presumption can be rebutted by the dedicator. *City of Flagstaff v. Babbitt*, 8 Ariz. App. 123 (1968)

2. Common Law Dedication – requires an offer by the owner of the land to dedicate and an acceptance of the dedication by the public. *Pleak v. Entrada Property Owners' Ass'n*, 207 Ariz. 418 (2004). Can be accomplished by the recordation of a map containing dedicatory language (which satisfies the first requirement) and sale of property with reference to the map (which satisfies the second requirement) *Id.* The map does *not* have to be a subdivision plat and the fact that the right of way serves only a limited segment of the public does not invalidate the dedication. *Hunt v. Richardson*, 216 Ariz. 114 (App. 2008). However, to constitute a sale of property with reference to the map, the deeds conveying the property must expressly refer to the map. *Lowe v. Pima County*, 217 Ariz. 642 (App. 2008). The map must contain language that shows the intent of the owner to dedicate – the dedication will not be presumed from the mere creation of a roadway easement. *Kadlec v. Dorsey*, 224 Ariz. 551 (2010).

- Public rights-of-way cannot be created by prescription. *State ex rel. Miller v. Dawson*, 175 Ariz. 610 (1993); *Gotland v. Town of Cave Creek*, 175 Ariz. 614 (1993).

Public streets can be abandoned by applicable jurisdiction. *Palmer v. City of Phoenix*, 242 Ariz. 158 (App. 2017). Upon abandonment, governmental entity can either sell the abandoned right-of-way by means of public auction, A.R.S. § 28-7204, by conveying right-of-way to abutting landowner, A.R.S. § 28-7205 or by conveying the right-of-way to a planned development owners association. A.R.S. § 28-7206. Abandonment must reserve easement for access to any property that would otherwise be left without legal access to an established public roadway. A.R.S. § 28-7215. Abandonment does not extinguish easements for utilities or canals, laterals or ditches that may be located within the right-of-way. A.R.S. § 28-7210.

**B. Determining Validity of Easement**

## i. Definition of Easement

"An easement is a right which one person has to use the land of another for a specific purpose." *Etz v. Mamerow* (1951) "[A] right in the owner of one parcel of land, by reason of his ownership, to use the land of another for a special purpose of his own, not inconsistent with the general property in the owner." *Korricks Dry Goods Co. v. Kendall* (1928)

## ii. Dominant/Servient Interest, Estate or Tenement

For an easement, there must be "two distinct tenements, a dominant, to which the right belongs, and a servient, upon which the obligation is imposed."

*Day v. Buckeye Water Conservation & Drainage Dist.* (1925)

## iii. Express Grant or Reservation of Easement

"An express grant of an easement defines the grantees rights." *Scalia v. Green* (App. 2011)

"A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument...."

RESTATEMENT: SERVITUDES § 4.1(1)

"A reservation, strictly speaking, is a clause in a deed creating or reserving something out of the thing granted that was not in existence before, while an exception is something existing before as a part of the thing granted, and which is excepted from the operation of the conveyance." *Wiltbank v. Lyman Water Co.* (1970)

"if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees."

*Phoenix Title & Trust Co. v. Smith* (1966)

## iv. Requirements for Valid Grant of Easement

- Must be in writing and signed by grantor in order to satisfy the Statute of Frauds. *State ex rel. Herman v. Schaffer*, 110 Ariz. 91 (1973) (easement may be created by agreement when sufficient in form)
- If easement is created by reservation, however, grantee's signature is not required, as acceptance of deed with reservation satisfies the Statute of Frauds
- Instrument must identify the servient estate with sufficient particularity that it can be identified-*Dunlop Investors, Ltd. v. Hagen*, 133 Ariz. 130 (1982) (easement void as to subsequent purchaser without notice because of vagueness)

**Requirements for Valid Grant of Easement (cont.)**

- Instrument must satisfy the requirements for a conveyance of land, must be acknowledged, etc. An example of ambiguous language is the use of the term "subject to" with respect to an easement. Use of this term is generally not to be sufficient to evidence an intent to grant an easement.

- Instrument need not describe dominant tenement to be valid, but the absence of such a description can be problematic, as it makes it more difficult to determine whether a particular property is actually benefitted by the easement. This is particularly important because of the rule that an easement appurtenant to one parcel may not be used for the benefit of another parcel to which the easement is not appurtenant. *DND Neffson Co. v. Galleria Partners*, 155 Ariz. 148 (App. 1987).

- An owner cannot create an easement in the Owner's own property. The Law of Easements and Licenses in Land, 3.11. By extension of this principle, the doctrine of merger will cause the extinguishment of a previously-existing easement if the dominant and servient tenements come into the same ownership, including if ownership of the properties is shared between different entities controlled by the same person. *Dabrowski v. Bartlett*, ___ P.3d ___, 2019 WL 2004052 (App. 2019). The easement does not spring back into existence if ownership of the dominant and servient tenements is subsequently severed *Id.*

## III. Curing a Lack of Access

### A. Statutory Grants of Easements

Rights of way granted under the 1875 Railroad Act (43 U.S.C. § 934 *et. seq.*) are easements. *Marvin M. Brandt Revocable Trust v. United States* (U.S. 2014) Rights of way for canals granted under the 1891 Canal Act are easements. *Rapp v. USA* (D. Ariz. 2014)

Small Tract Act rights-of-way reserved in patents are enforceable by private parties. *Bernal v. Loeks*, 196 Ariz. 363 (App. 2000). However, if access to a parcel that would otherwise be benefited by the right-of-way already exists, there is no right to utilize the Small Tract Act right-of-way. *Neal V. Brown*, 219 Ariz. 14 (App. 2008). Small Tract Act rights-of-way are floating easements that are fixed by the first use thereof. *City of Phx. v. Kennedy, 138 Ariz. 406 (App.1983*)

## B. Easements by Implication

### i. Necessity

Elements of an implied way of necessity are:

(1) unity of ownership of the dominant and servient estates;
(2) severance of the estates;
(3) no outlet for the dominant property; and
(4) showing that reasonable necessity for access existed at the time of severance

*Coll. Book Centers, Inc. v. Carefree Foothills HOA* (App. 2010)

i. **Necessity** (continued)

"applies also to a severance by judicial proceedings such as a sale by foreclosure under a mortgage." *Koestel v. Buena Vista Pub. Serv. Corp.* (App. 1984)

"the right to a way of necessity may lie dormant through several transfers of title and yet pass with each transfer as appurtenant to the dominant estate and be exercised at any time." *Bickel v. Hansen* (App. 1991)

"lasts as long as the necessity that gave rise to its creation continues." RESTATEMENT: SERVITUDES § 4.3(1)

**ii. Prior Use**

Same four elements for an implied way of necessity, plus one:

- prior use existing at time of severance

*Bickel v. Hansen* (App. 1991)

## c. Easements by Prescription

Elements:

"the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and the use was hostile to the title of the true owner."

*Harambasic v. Owens* (App. 1996)

# Tacking:

- Permits successive segments of use to be combined to establish the continuous ten-year period.

*Ammer v. Arizona Water Co*. (App. 1991)

# Burden:

"[O]nce the party claiming the easement has shown that his or her use during the statutory period was open, visible, continuous, and unmolested, Arizona law presumes that the use was under a claim of right and not permissive."

"The burden then shifts to the owner of the property to show that the use was indeed permissive."

*Spaulding v. Pouliot* (App. 2008)

# Family:

"[T]he mere occupation [or use] of the land that might be sufficient against other persons is not sufficient against a family member and that in such instance there must be acts so notorious and unequivocally hostile as to charge such family members with knowledge of an adverse claim."

*Chandler v. Jackson* (App. 1986)

Title:
"Prescriptive title is as good as that acquired by deed or otherwise and can be alienated only in the same way as such other title." *George v. Gist* (1928)

"Court action is not necessary to perfect title, but it is not a marketable title of record until there has been a judicial determination of such title."
*Babo v. Bookbinder Fin. Corp.* (1976)

Prescriptive easement may not be obtained against the government unless the prescriptive time period expired and the easement therefore came into existence prior to government ownership.
*Bunyard v. U.S. Dept of Ag.* (D. Ariz. 2004)

Prescriptive easement cannot be obtained over land by railroad company.
*Tumacacori Mission Land Development, Ltd. v. Union Pacific Railroad Co.*, 228 Ariz. 100 (App. 2011).

**d. Private Condemnation (Statutory Way of Necessity)**

A.R.S. § 12-1202(A): "when land is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity." *Siemsen v. Davis*, 196 Ariz. 411, 414 (App. 2000)

Just compensation required. *Cienega Cattle Co. v. Atkins* (1942)

Where an adequate alternative exists, "the statutory way of necessity does not exist because the purportedly landlocked land is not, in fact, hemmed in." *Bickel v. Hansen* (1991)

- Owner who has voluntarily landlocked property cannot obtain a private way of necessity under § 12-1202(A). *Gulotta v. Triano*, 125 Ariz. 144 (App. 1980)

# 5. Terminating Easements

a. Express Termination
b. Expiration
c. Abandonment
d. Merger
e. Relocation
f. Changed Circumstances
g. Foreclosure

## iv. Limitations on Access Coverage

- Policy does not insure that access right will continue in perpetuity or cannot be terminated after policy date. *Community Credit Union v. Ameritite & Abstract, Inc.*, 2012 WL 3930615 (Wiss.App. 2010)
- If policy insures two contiguous parcels, only one of which has a right of access, coverage is not triggered by a lack of a right-of access to the other parcel. *Havsted v. Fidelity Nat'l Title Ins. Co.*, 68 Cal. Rptr. 2d 487 (App. 1997). This is true even if the physical characteristics of the property may prevent access from the landlocked parcel to the public street. *Magine Enterprises, Inc. v. Fidelity Nat'l Title Ins. Co.*, 127 Cal. Rptr. 2d 681 (App. 2002)
- If the insured has more than one means of access, coverage is not invoked unless all rights fail. *Talley v. Baker*, 617 N.Y.S. 2d 80 (App. 1994) (when insured had access over three routes, insurer had no obligation to assert right to prescriptive easement on insured's behalf over fourth route)
- Insurer is not required to provide vehicular access in order to satisfy basic policy access coverage. *Riordan v. Lawyers Title Ins. Co.*, 393 F. Supp. 2d 1100(D.N.M. 2005); *Coles v. Lawyers Title Ins. Corp.*, 2006 WL 2640266 (Ohio App. 2006)

- Inholdings surrounded by parcels that are managed by BLM pose particularly tricky issues, because access is limited to licenses granted by BLM. It is an open question as to whether obtaining a license will owe an access issue under the policy, although at least one court has held that obtaining a 30-year revocable license over federal and satisfied the title insurer's duty udner the policy. *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209 (10th Cir. 2016).

- Caution must be exercised if access to the insured parcel is provided over a road crossing Native American reservation lands, because access over such roads could be limited to tribe members. *Kaufer v. Chicago Title Ins. Co.*, 2002 WL 1651341 (Cal. App. 2002).

- An easement granted or imposed by law (such as an easement by necessity) likely will not satisfy the "right of access" requirement, since court action may be required to establish the easement. *Stewart Title Guar. Co. v. West*, 676 A. 2d 953 (Md. App. 1996).

- Mere fact that insured's access over a ROW has not been interfered with may not be sufficient to satisfy the "right of access" requirement. *Guenther v. Old Republic Nat'l Title Ins. Co.*, 2013 WL 5424004 (D. Idaho 2013) ("right of access" not satisfied even though insured's use never interrupted without a showing of some grant of right to use the road).

- The policy insures only a “right” of access. Therefore, a claim will not be under the policy if the grade from the insured property is such that it is difficult or impossible to travel from the street to the insured parcel, *43 Park Owners Group, LLC v. Commonwealth Land Title Ins. Co.*, 995 N.Y.S. 2d 148 (N.Y. App. 2014) (no coverage when land abuts public street, but surface of insured parcel was between 4 and 30 feet below street level), or where the access is over harsh terrain that makes travel difficult or impossible. *Gates v. Chicago Title Ins. Co.*, 813 S.W. 2d 10 (Mo. App. 1991) (even though access route has a “good path” that did not give insured claim under policy.

- Absent affirmative coverage, the policy does not indemnify against any limitation on access rights resulting from ordinances or permit powers regulating the use of the street, or a private restriction on the use thereof (so long as restriction is disclosed in policy. *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 217 S.E. 2d 551 (N.C. 1975) (municipality's refusal to issue driveway permit not covered by policy) (*Lincoln Sav. & Loan Ass'n v. Title Ins. Co.,* 120 Cal. Rptr. 291 (App. 1975) (private restrictions that prevented insured from building a driveway to connect to street - not covered); *but see*, *Hulse v. First American Title Ins. Co.*, 33 P.3d 122 (Wyo. 2001) (restriction limiting right to travel over easement to "farming and ranching purposes" which was not disclosed in policy, could have given rise to coverage).

- When an access easement is an insured parcel, the policy does not insure that the insured is the only party entitled to use the easement. *Bailey v. State Farm Inc. Co.*, 810 F. Supp. 267 (N.D. Cal. 1992).

- Policy does not insure that the adjacent road is a public road. *J&S Building Co., v. Columbian Title & Trust Co.*, 563 P.2d 1086 (Kan. App. 1997).

- Policy also does not insure that the location of a private drive will be as depicted on land division map that created insured parcel. *James v. Chicago Title Ins. Co.*, 339 P.3d 420 (Mont. 2014).

- However, affirmative survey coverage can give rise to a claim if roadway is not as depicted on survey. *MacBean v. St. Paul Title Ins. Corp.*, 405 A. 2d 405 (N.J. Super. 1979) (survey showed streets as a public ROW abutting property when in fact it was a privately-owned lot later improved with a house).

- Access coverage also does not insure against the possibility that an abutting public street is not open, improved or is at a grade that will not permit construction of a driveway to connect thereto. *Green v. First American Title Ins. Co.*, 2005 WL 2249260 (Cal. App. 2005) (property fenced off and not at grade with adjoining street); *Title & Trust Co. of Florida v. Burrows*, 381 So. 2d 852 (Fla. App. 1976) (platted street was sandy beach which was covered by high tide in spring and fall); *Hocking v. Title Ins. & Trust Co.*, 234 P.2d 625 (Cal. 1951) (plat recorded but streets not constructed and entire subdivision was desert); *Hulse v. First American Title Ins. Co.*, 33 P.3d 122 (Wyo. 2001) (abutting public road not maintained).