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Legal Access and How to Get There . . .

A. DEFINITIONS AND CLARIFICATIONS.

1. "Access Easements" and "Rights of Way".

These words relate to the right of a party to build or use a road in a given location, as opposed to the physical road, street, driveway, or alley which is which is traveled upon and lies within the easement or right of way.

a. "Access Easement"

An "easement" is the right of a party to enter, cross and use a portion of the property of another for a given purpose. An "access easement," or an easement for "ingress" and "egress", is an easement which allows a party to build, maintain and use a road over the property of another. But an easement is not a personal right that follows the individual (that would be a "license"); it is a right that "runs with the land" and is related to the ownership of a dominant parcel:

i. Dominant Parcel

A "dominant parcel" or "benefited parcel" is the property which is benefited by the easement; it is the ownership of the dominant parcel which permits a person to use the easement; and

ii. Servient Parcel

A "servient parcel" is the parcel over which the easement crosses and which serves the dominant parcel.

b. "Right of Way".

This term originally described a right to travel over another's property, and was often used for the types of access rights (sometimes these were easements, and sometimes they were licenses) that were given to or retained by the railroads. However, in modern day use the term implies a strip of land in which a state, county, city, town or similar jurisdiction holds the right to construct or expand a roadway. This is most often ground that has previously been dedicated to or condemned by the jurisdiction, but could include ground over which the jurisdiction has a right to condemn a roadway at no cost.

[This is what was intended in the "easements for right of way", commonly called "GLO easements" which were retained by the government in many original patent deeds -- the deeds where title to the property first passed into private ownership – discussed at part B 1 a below.]

2. "Roadways".

In using the term "roadway" we mean a road, street, alley or driveway or other physical improvements to the real estate which make it physically passable or driveable, as opposed to the right of the party to travel over that route by way of Easements, Dedications or Rights of Way (described above). Of these there are two general kinds, and one notable bastard child:

a. "Public Roadways".

These are the roads or portions thereof which have previously been dedicated to the local jurisdiction or condemned by it. It is a public road that is found within a right of way.

b. "Private Roadways".

These are the roads that only certain parties are permitted to use by virtue of easements which incorporate the road. The private road lies within an easement.

c. "Historic Roadways".

These are roads or stretches of roads (like much of Grapevine, Cahava Ranch and Fleming Springs Roads) which have:

i. never been dedicated to the local jurisdiction or condemned by it, but

ii. historically been openly used by the public for decades or longer, including property owners whose land is adjacent, nearby and beyond, and also the public at large.

3. Physical vs. Legal Access.

In nearly every jurisdiction, like the County and Cave Creek, to obtain a building permit you must prove that you have a route of legal access at a minimum width (normally 20 feet) from the network of dedicated public roads to your property line. However, in many of these jurisdictions your physical access (the roads you actually drive upon) need not actually match the route of legal access that is required for the building permit.

This was previously true for Cave Creek, but a highly questionable ordinance the council adopted in December of 2000 made a number of very restrictive revisions:

§ 154.056.B.2. strictly defines the physical route as the optimal environmental route without an objective standard to evaluate a route.

§ 154.056.C.3. requires the legal and physical route to match.

§ 154.056.C.8 creates a restriction allowing only 3 residential lots to be served by a private access easement.

§ 154.056.C.6. & § 154.057.A.1. treat private roadways and driveways as accessory uses that are not permitted before a building permit or zoning clearance is issued.

B. TYPES OF "LEGAL" ACCESS.

There are actually several different legal conditions that are or can be called "legal access", and they vary in quality and value and generally fall into one of two categories.

1. Express Legal Access.

"Express" legal access is access that can be found in recorded instruments. One need not make a trip through the courthouse to perfect or otherwise prove this type of access; since it is readily provable with recorded documents, and accepted by title companies and the jurisdictions as such.

a. Rights of Way (Public Roads). Perhaps best type of legal access is over public roads that lie within rights of way that have been dedicated to or condemned by the local jurisdiction. These are roads where the state, county or town owns the underlying ground, and keeps them maintained. While these types of roads are open to the public at large, the liabilities are carried by the jurisdiction. It is from the network of these dedicated public roads that one needs to prove access to his own property line to obtain a building permit.

A special case is the "GLO Easements", rights of way that were reserved by the federal government in patents for parcels of land sold to veterans at low prices under the "Small Tract Development Act". Under first an internal BLM memo, and in 2000 under an Arizona case, *Bernal v. Loeks*, 196 Ariz. 363, 997 P.2d 1192 (App. 2000), they are recognized as public access easements. This is consistent with the title companies and counties which have recognized them as common law public access easements. However, in 2008, in *Neal v. Brown*, 219 Ariz. 14; 191 P.3d 1030 (Ariz. App. 2008), the Court of Appeals severely limited the holding of *Bernal v. Loeks*, so it should also be considered, when dealing with GLO Easements created under the Small Tract Development Act.

b. Express Private Easements (Private Roads). Express Private Easements are the easements which most people think of when they hear the words "access easements" and "private roads." They are sometimes further divided into:

i. True "private easements" -- easements where the dominant parcel(s) are a limited number of nearby properties, and

ii. "public easements", which are, depending on your point of view, either: licenses given to the public at large, or easements given to benefit the remainder of the planet.

2. Non-Express Legal Access.

Where no express access easement exists, there are four sticks of legal "dynamite" that a party may be able to use legally "blast" his way out and create express legal access to a dedicated road. In fact, they are three legal theories upon which a claim for an express easement can be based, but, if the party who owns the land over which passage is demanded contests the claim, then the claimant must go to court to perfect or otherwise prove the relevant claim(s).

a. Easement by Implication. An easement by implication is based upon, or implied from, the history of how the property became "landlocked" and the intent of the parties involved, and is readily granted when it is requested over the parcel from which the parcel in need was previously severed. This type of claim is specifically based upon a planned or existing roadway at the time of the severance that would or did provide actual physical access to the upstream property. In this case, the court then implies an easement over that roadway. It is based on necessity existing at the time of the severance, and is evaluated at that time. Arizona case law also recognizes a reasonable development, if not expansion, of the easement in harmony with the uses the parties might reasonably have expected at the time of its creation. *Tobias v. Dailey*, 196 Ariz. 418, 998 P.2d 1091 (App. 2000).

b. Implied Way of Necessity. An implied way of necessity is strongly recognized by the Arizona courts, and is very similar to an easement by implication (discussed above) except that there was simply no roadway in place at the time of the severance of the two parcels from one another. Instead, the court applies the rationale behind a statutory/private way of necessity (discussed below) and again makes the downstream sister provide her upstream sister an easement over a route that is chosen at the time of the demand (perhaps during the lawsuit), but the right to that roadway is treated as being created back at the time of the severance of the parcels from one another, even if the parties did not intend to do so! So, like an easement by implication, an implied way of necessity is based on necessity evalutated at the time of the severance, and the case law recognizes its reasonable development or expansion in harmony with reasonably anticipated uses (e.g. residential).

c. Easement by Prescription.

Where a party proves continuous, adverse, notorious and open use of another party's property for 10 or more years (a 10 year statute of limitations applies), it is entitled to an "easement by prescription." This theory which is similar to adverse possession except that it results in an easement not title to the underlying property. [As a mnemonic for adverse possession, law students memorize the acronym "canoe" for continuous, adverse, notorious, open and exclusive. For prescription they simply drop the "e."] The inverse is also true; the continuous, adverse, notorious and open blocking of a prescriptive easement for 2 years, or an express easement for 10 years, can destroy it.

d. Statutory/Private Way of Necessity.

Because of the public policy against landlocked property, a party who is landlocked may also be able to obtain an easement of necessity under A.R.S. §§ 12-1201 thru 1203, a statute which essentially allows a private party to condemn a non-exclusive private access easement where he shows a reasonable necessity for the easement and pays for the fair market value of that easement (just as a jurisdiction pays to condemn title to property for a right of way). Obviously, reasonable necessity is a fact question, and it will often interplay with some of the considerations which are evaluated for an easement by prescription or an easement by implication.

3. Two Common Considerations for Non-Express Easements.

Two considerations are common to any claims for non-express easements.

a. Conversion to Express Easement. With the first three types non-express easement claims, (by implication and prescription), the court finds that an easement already exists and formally recognizes it in the judgment. With the fourth type of claim, *statutory/private way of necessity*, the court does not find that an easement already exists, but recognizes that an easement is necessary for public policy purposes, and then grants one to the claimant in the judgment. In all four cases, the actual recording of the easement then makes it an express easement.

b. Statutory Demand. As a precursor to a suit to establish an easement by one of the first three types of non-express easements, (by implication and prescription), a party can invoke the provisions of A.R.S. § 12-1103 B, the quiet title statute, whereby he request/demands that the landowner within 20 days execute, notarize and return or record an enclosed grant of easement, in exchange for a $5.00 check enclosed therewith. The document, if so processed and recorded provides the requested express easement. But, if the recipient fails to satisfy this demand, and the sender is thereafter successful in a lawsuit to quiet title to his interest in the land, i.e. his easement, the recipient will be required to reimburse the sender for his attorneys fees and court costs in that suit.

Sincerely,

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