

create a lien against real property and the real property can be sold to satisfy the remaining debts.

## C. PRIVATE ENCUMBRANCES WHICH AFFECT THE USE OF THE PROPERTY

The use of privately owned real estate may be limited or restricted by the rights of other people. Private encumbrances which affect the use of property may be easements, deed restrictions, or encroachments.

### 1. EASEMENTS.

An **easement** is a non-possessory, intangible (incorporeal) right one person has to use another person's land in a specified manner and for a specified purpose. The holder of the easement does not own or possess the land but has only an interest, a right of use. Because an easement is an actual interest in the land, the statute of frauds applies and an easement which is freely given must be in writing. The easement is irrevocable and an encumbrance on the grantor of that right. Easements are either **appurtenant** or **in gross**.

#### a. Easement appurtenant.

To create an appurtenant easement, there must be two separate properties usually, but not necessarily, adjacent to one another. They must have different owners. The owner granting the easement, and therefore burdened by it, is known as the **servient estate**. The owner that benefits from receiving this right is the **dominant estate**.

The appurtenant easement is said to "**run with the land**." In other words it is not just a contract between two owners but a relationship between the two parcels of land. When ownership of either parcel is transferred the easement automatically goes with it, whether or not mentioned in the deed.

Examples of this type of easement include common driveways (See FIGURE 2-5.), a right to use another person's land for ingress or egress, a right to use water from another landowner's well, or a **party wall**. A party wall, often found both in commercial buildings and in townhouses, is a wall that straddles the boundary line between two adjoining properties and is a part of the improvement on both lots. Typically, each owner owns the half of the wall that is on his/her side of the line and has an easement right to the other half. Neither can tear the party wall down.



Figure 2-5 • Servient & Dominant Estates of Easement

An appurtenant easement can also be created to benefit the dominant property by requiring the servient landowner to avoid doing certain things on the property. For example, a view easement will preserve a dominant owner's panoramic view by prohibiting the servient landowner from building improvements or fences above a certain height on certain parts of the lot.

Easements are generally bought and paid for because they have value. The existence of the easement increases the value of the dominant parcel and also decreases the value of the servient parcel. An appraisal can be used to estimate the values involved.

#### b. Easements in gross.

An easement in gross involves only one tract of land, the servient estate. It benefits a person rather than another parcel of land. It is a personal right to use the land of another and does not necessarily run with the land.

When the easement is granted to an individual, it's a **personal easement in gross**. A personal easement in gross is irrevocable during the lifetime of the person to whom the easement was granted. It is not transferable and will terminate with the death of the person to whom the easement is granted or upon the transfer of title to the property. An example of this is the right to use someone's lake for fishing.

**Commercial easements in gross**, such as utility easements, railroad rights-of-way and rights to erect billboards, are more valuable interests and are freely transferable and inheritable. (See FIGURE 2-6.)



Figure 2-6 • Commercial Easements

**c. Creation of easements.**

An easement is created in any of the following ways:

**i. Grant.**

Easements may be created by a deed in which an owner grants a specific right for another person to use the grantor's land.

**ii. Reservation.**

An owner might sell some land but reserve an easement in the deed. For example, the owner of 100 acres sells 75 acres but reserves the right to use a driveway to get to the remaining 25 acres.

**iii. Agreement.**

The parties may express their intent to create an easement in a written contract. For instance, certain water rights or a common driveway might be created by agreement.

**iv. Necessity.**

An easement arises out of necessity when an owner sells land in such a way that deprives the buyer of reasonable access. No written document is required. The buyer has a right of ingress and egress to the landlocked property.

**v. Prescription.**

An easement by prescription is acquired through continuous use of another person's property for a period of time prescribed by state law, usually ten to twenty years. The use must be open, visible and notorious, and without permission from the owner. For example, a person using a corner of a neighbor's lot as a shortcut to the highway for the statutory period of time might be able to acquire an easement by prescription.

**vi. Implication.**

An implied easement is one created by operation of law. For example, if mineral rights are sold without granting the purchaser the right to enter the property and extract the substances, the law would assume an implied easement of reasonable access for the purpose of extraction.

**vii. Condemnation.**

Under its right of eminent domain, the government can acquire an easement over privately owned land for a public purpose through condemnation. The right can also be delegated to quasi-public corporations such as utility companies and railroads. Since easements do have value, the landowner must be paid just compensation.

**d. Termination of easements.**

An easement can be terminated in any one of the following ways:

**i. Release.**

An easement can be terminated by a written release from the owner of the dominant estate to the owner of the servient estate.

**ii. Merger.**

If both properties come under one ownership, the easement no longer exists.

**iii. Expiration of purpose.**

If an easement was granted for a specific purpose and the purpose no longer exists, the easement ends. For example, an easement granted for access to a construction site might end when the work is complete.

**iv. Abandonment.**

An easement can end when it has been abandoned but non-use is not necessarily abandonment. There must be a positive action that shows the holder of the easement no longer intends to use it.

**v. Prescription.**

A prescriptive easement is terminated when the holder of the servient estate openly and continuously prevents the easement holder from using it for the statutory period of time, usually the same time period as is required to create the easement.

**vi. Necessity.**

An easement created by necessity will last only as long as the necessity lasts. For instance, if a landlocked owner acquires access to the property by buying an adjoining tract, the easement is no longer needed.

**e. License.**

A license grants personal permission to use the land of another without creating an estate for the user. It is not a right but a personal privilege and does not encumber the ownership of the land being used. It is usually a short-term privilege and is not transferable or inheritable. Unlike an easement, a license can be terminated by the land owner at any time and may be granted either orally or in writing. A license will automatically terminate upon the death of either party or on conveyance of the property. Typical examples of a license include permission to park in a public parking lot, permission to enter a public park or permission to attend a football game.

**2. PRIVATE RESTRICTIONS.**

Private restrictions are limitations on the use of one's property in order to protect the rights of others. An owner can specify how a property can or cannot be used, either through contractual **covenants** or through **conditions** in a deed. However, restrictions that violate public policy, such as restrictions that promote illegal discrimination, are unlawful. It is generally felt that any restrictions on an owner's right to sell or otherwise convey the property are also unenforceable.

Sometimes private restrictions conflict with zoning laws. For example, zoning might specify 50-foot setbacks and the private covenant specify 100 foot setbacks. In this case the stricter requirement always prevails and the structure would have to be built 100 feet from the street.

**a. Covenants.**

A covenant is a promise made in a sales contract, lease or deed that specifies the property will or will not be used in a certain manner. The purpose is to preserve property values by establishing standards with which each owner must comply.

The declaration of restrictions that is recorded with the plat of a new subdivision provides a good example. Typical subdivision restrictions involve architectural approval, type of construction, style of architecture, number of structures on each lot, set-back lines, square footage minimums, mobile home usage, building heights, signs usage, fences, antennae and lawn maintenance.

Subdivision restrictions usually have an effective time limit and details outlining how the restrictions can be removed, altered or

extended. As a rule, any changes require unanimous agreement of all those having an interest in the property.

Court action is required to enforce a restrictive covenant. Either the grantor or other parties to the covenant must promptly seek an ***injunction*** to stop the prohibited use or must sue for damages. The court might not act if the agreed upon time limit for the restriction has expired or if neighbors have obviously disregarded the restriction. Loss can also occur because of undue delay in taking proper legal action, a principle of law called ***laches***. This is based on the principle that, if one has a right, it should be exercised. Waiting too long might cause loss of the right.

**b. Conditions.**

Conditions are found in deeds. For example, the grantor might specify in a deed that the property is to be used only for a hospital or that it may not be used for a chicken farm. Conditions differ from covenants because they usually do not have any time limits but “run with the land” indefinitely, unless removed by a court.

A deed containing a condition might also specify what is to happen if the condition is not being met. Unlike the covenant, this is not limited to an injunction or a suit for damages. It could result in the ownership reverting to the original grantor, or provide a basis for that grantor’s heirs to sue for possession.

**3. ENCROACHMENTS.**

An ***encroachment*** arises when an improvement, building, or other attachment illegally extends beyond the boundaries of its owner’s land, onto adjoining land or into adjoining air space. (See FIGURE 2-7.) Most encroachments are unintentional, but can be an encumbrance on the property encroached upon. They do not show up in a title search and although they may be observable they are usually revealed by a professional survey.

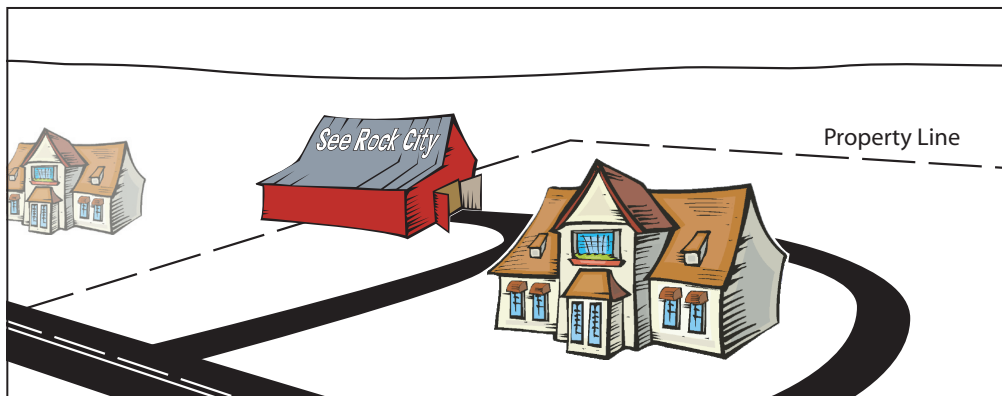


Figure 2-7 • Encroachments

The fence or building that extends onto a neighbor's land is basically trespassing. A tree that overhangs the neighbor's yard is a nuisance. In either case the neighbor can seek court action to either remove the encroachment or collect damages. Known encroachments should be acknowledged and accepted in a sales contract.

Failure to have an encroachment removed could, in due time, result in a prescriptive easement. The best solution for most encroachments is for the two owners to agree to legalize the encroachment either by a license or a formal easement agreement. This might involve payment for the easement.