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The Appurtenant Easement – A Valuable Property Right

Does your business or residential property share a common driveway or parking area with the property next door? Do you use the adjoining property for access to your property? Does your property connect to a stormwater drainage system located on the adjoining property? If the answer is yes to any of these questions, then your property may be benefited by an appurtenant easement.

An easement is the right to use someone else's land. Easements are either "appurtenant" or "in gross." An appurtenant easement benefits a specific parcel of land, known as the dominant estate. The parcel over which the easement runs is called the servient estate. An appurtenant easement attaches to the ownership of the dominant estate. If the dominant estate is sold, the appurtenant easement will pass to the new owner, and if the servient estate is sold, it will remain subject to the easement. By contrast, an easement in gross is a mere personal right and generally does not pass on. Utility easements are usually easements in gross.

Why are Appurtenant Easements Valuable?

Appurtenant easements often provide a cost-effective means for developing or enhancing the use of the dominant estate. For example, in new construction, the natural topography of the land may cause stormwater runoff to drain from the dominant estate to the servient estate. It may cost significantly less to hook up to the existing stormwater drainage system located on the servient estate than to construct an independent storm sewer connection from the dominant estate into the municipality's storm sewer lines. The owner of the servient estate may be willing to grant an easement to mitigate the rate of release of excess stormwater runoff from the dominant estate onto the servient estate which otherwise occurs naturally.

Appurtenant easements can also be valuable to a developer of real estate to split its operation of multiple parcels like apartment complexes which are operated as one large project. In this case, the developer creates the necessary appurtenant easements on the applicable parcels for access, drainage, signage, landscaping, etc., which then enables it to sell the parcels separately.

Creating an Appurtenant Easement.

Appurtenant easements are created in an easement agreement, deed or recorded declaration affecting large residential and commercial subdivisions. Some basic considerations in drafting an easement agreement are:

Title Search. A title search should be run on the servient estate to confirm ownership and any existing mortgages. The owner and all existing mortgagees must consent to the easement. The mortgagees must agree to subordinate their mortgages to the easement agreement so the easement cannot later be extinguished if there should be a foreclosure.

Purpose. The easement agreement should clearly define the specific purpose of the easement.

Term. Will the easement be perpetual or for a specified time limit?

Consideration. The agreement should identify the monetary payment or other consideration for the easement grant.

Nature. Will the easement be exclusive or non-exclusive to the grantee? Will the easement be revocable or irrevocable?

Construction/Maintenance. If the easement will require construction work such as a roadway, storm sewer and/or drainage pipes, the agreement should specify who will perform the work and at what cost allocation between the parties. Maintenance obligations should be clearly spelled out in the agreement with cure rights in favor of the other party if the obligated party fails to perform.

Indemnification/Insurance. The grantee should indemnify the grantor for any claims, losses and expenses attributable to physical damage or personal injury associated with grantee's use of the easement area. If the grantee will perform any work on the servient estate, the grantee should be required to have appropriate insurance insuring the grantor as an additional insured.

Costs. The agreement should specify any fees to be paid by the grantee such as a portion of real estate taxes or maintenance costs.

Estoppel Certificates. The easement agreement should provide for an agreed form of estoppel certificate and require each party to provide such a document when requested by the other. The easement agreement should state that if the estoppel certificate is not provided then the party is deemed to have agreed that the easement agreement is in full force and effect and that the other

party is in full compliance with all of its obligations. A potential buyer or mortgage lender will often require an estoppel certificate from the grantor of an appurtenant easement confirming its validity.

Title Insurance. The grantee of an appurtenant easement should be certain that his owner's title insurance policy, which insures his ownership of the dominant estate, also insures the grantee's rights in the appurtenant easement as an easement for the benefit of the dominant estate