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Dear Mr. Gonski:

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REAL ESTATE & TITLE INSURANCE

Implied and Nonconsensual Easements

The benefits and burdens of easements impact every real estate practice

By Dennis M. Gonski

Easements are ubiquitous. In a populous state such as New Jersey, nearly all land at one time will be directly or indirectly affected by an easement. The benefits and burdens of easements, as well as their creation and duration, are matters that regularly concern every real estate lawyer.

There is a strong public policy in New Jersey that land should not be rendered inaccessible or useless. It is therefore hardly a surprise that there are many New Jersey cases favoring the creation and enforcement of easements — especially in equitable situations where the court can infer the reasonable anticipation of affected landowners. Once created, however, easements remain as an encumbrance upon a real estate title, even after there has been a change in the original circumstances giving rise to the easement's creation; even after title to the affected lands has changed ownership;

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and notwithstanding that the easement may have become entirely forgotten in subsequent title instruments. Easements are said to run with the land because they will perpetually survive, until such time as they are properly terminated or extinguished in accordance with title law.

Title attorneys are quick to point out that it is sometimes easier to create an easement than to end one. This is because easements sometimes seemingly create themselves, whereas most easements do not spontaneously terminate. An easement that has been formally terminated by a written instrument will generally present little problem. However, in those other instances where there is no written agreement, only an actual site examination of the physical evidence of usage can provide reliable evidence as to whether an easement has been extinguished by legally acceptable nonconsensual means (i.e. abandonment, overburdening, adverse possession). The mere nonuse of an easement, by itself, will not suffice to effect a termination. An easement that is merely dormant can be reignited at any future time, with no need for obtaining the consent of the burdened landowner.

An easement is a durable entitlement whereby one person is permitted to make a particular use of another's land. In more technical terms, an easement is an "incorporeal hereditament," which simply means that it is a nonpossessory interest

in land, as opposed to a fee ownership. The attributes of an easement are:

- An entitlement to make a specific use or enjoyment of another's land;
- Durable protection against interference in the use and enjoyment of the interest;
- A use of the interest that is not subject to the will or the possessor of the land;
- A use that is not a normal incident of the possession of the land possessed by the owner of the interest; and
- A use that is capable of creation by conveyance.

It is the durability of an easement that most distinguishes it from other lesser property interests, such as a license (a revocable permission to use another's land for a particular purpose); a profit a pendre (a right to enter another's land and take away something of value from its soil); or even a common lease (i.e., a right of agreed use for a limited term).

Easements are created as "appurtenant" or "in gross." An appurtenant easement is created for the benefit of a particular tract of land and is an incident of ownership of that tract. In a typical appurtenant easement, there is a benefited parcel (the dominant estate) and a bur-

dened parcel (the servient estate). A conveyance of either the dominant estate or the servient estate will not disturb the continued right of enforcement of the easement, either as benefit or a burden.

An easement in gross on the other hand serves to benefit a purpose, a group or sometimes even the public at large. There is no benefited parcel of land per se, because there is no specified dominant estate; there is only a servient estate that continues to be burdened, even through successive conveyances of the title of the servient estate. Examples of an easement in gross are a pipeline right-of-way, utility easements or conservation easements.

Easements appurtenant or in gross can be created in any of three ways: by an express grant; by implication; or by prescription.

In those instances where the easement is created by express grant, the grant instrument must pass muster with the Statute of Frauds. N.J.S.A. 25:1-10, et seq. Easements by express grant are also bound by the provisions of the Recording Act. N.J.S.A. 46:21-1 and N.J.S.A. 46:22-1.

Not so, however, where the creation of an easement is not in writing. There is an exception found in the Statute of Frauds itself, which states, "This section shall not apply to the creation of easements by prescription or implication." (Emphasis supplied.) N.J.S.A. 25:1-11(d).

Because an easement created without the benefit of a written instrument obviously provides nothing capable of being recorded, a subsequent purchaser of servient lands encumbered by a non-consensual easement will find no solace in the protections provided by the Recording Act when notice of the easement is implicit in its use.

Examples of easements existing without the benefit of a writing (and which are also many times nonconsensual) are: those created by prescription and those created by implication. Easements that are created by implication are further divided into: those created by implied grant; those created by implied reservation; those created by estoppel; and those created by acquiescence.

Prescriptive easements are well

known; they are an extension of the law of adverse possession. Easements by prescription arise when a use is nonpossessory and the elements of adverse possession are established for the statutory period. As a result of recent case law, it is now well settled that a prescriptive easement requires a nonpossessory use that is uninterrupted by occupancy or otherwise for a minimum period of 30 years (N.J.S.A. 2A:14-30 and N.J.S.A. 2A:14-31).

Easements may also arise by implication, which means that they come into being by way of an application of the rules of equity. For example, where a landowner allows the use of one portion of his land to benefit another, an implication of an easement may arise where the equitable balance is tipped in favor of continuing such use, especially where there has been a corresponding reliance and detriment by the benefited party.

Implied easements are sometimes ascribed by the courts under the alternative theories of "implied grant" or "implied reservation." Although separate concepts, courts do not always distinguish between an implied grant (where a use is apparent and therefore presumed) and an implied reservation (where a use is not apparent but is necessary to the use and enjoyment of conveyed land), but rather combine the two theories to create an equitable easement sometimes known as implied by necessity, or as a quasi-easement.

The basic principle upon which all implied easements are founded is the inference that parties to a particular conveyance are presumed to have intended to act reasonably in light of visible and known conditions existing at the time of some earlier conveyance of title.

Commonly, courts use the term "necessity" when referring to the existence of implied easements. However, the term "necessity" is a term of art; it is not a literal term. Various factors come into play when creating a nonconsensual easement over the lands of a stranger. Legal "necessity" is only implied in those situations where there is a coalescence of three conditions: (1) title to the dominant and servient properties being once held by the same person, (2) the dominant property would become landlocked with-

out the creation of an easement, and (3) the easement is reasonably "necessary" (in the literal sense) to give the owner of the dominant property access to or use of his land (*Poulos v. Dover Boiler & Plate Fabricators*, 5 N.J. 580, 587).

A fourth condition is sometimes also required, depending upon the individual circumstances. At times a continued literal "necessity" for the easement may be deemed a condition precedent to a request for contemporary judicial enforcement (*Ghen v. Piasecki*, 172 N.J. Super. 35).

Other examples of nonconsensual implied easements are those created by estoppel and by acquiescence. Although truly implied easements, estoppel and acquiescence arise under much different circumstances than quasi-easements. Estoppel and acquiescence do not require a historical unity of title (as in the case of a quasi-easement), but rather arise under circumstances where there has once been an agreement that for whatever reason was insufficient to create a traditional easement.

The "doctrine of acquiescence" (as does the "doctrine of estoppel") contemplates a conscious choice having been historically made by contiguous property owners, who earlier came to an agreement that they both honored for a period of time before falling into a more recent dispute. Both acquiescence and estoppel (which are cooperative and contemplate mutual easement) are generally recognized as alternative remedies to "adverse possession" or "prescription" (which are adversarial in nature).

Unlike "adverse possession" and "prescription," which are governed by statutory law, "estoppel" and "acquiescence" are solely creations of equity, requiring four factual elements: an agreement having once been reached between landowners; an expectation of reliance upon the agreement; actual and reasonable reliance upon the agreement; and a degree of detriment.

Because the mutual assent necessary for easements by estoppel or acquiescence is rarely, if ever reduced to a writing, such an agreement must therefore be implied from the conduct of the parties over a period of time — the theory here being that where the parties have them-

selves come to a voluntary agreement which they have acted upon for a sufficient period of time, it should at some point become an equitable right.

What distinguishes an easement by "estoppel" from one of "acquiescence," is the amount of "time" required to coalesce the "right." For example, for estoppel, the time of period of reliance is inversely proportional to the amount of detriment. The greater the detriment, the lesser the time period of required reliance. For an acquiescence, however, there is little detriment and therefore much more time is required. The simple proposition of an acquiescence is that where something has been accepted for so long a time, it will itself become conclusive and enforceable.

Acquiescence must be continued for a "considerable time." See 11 C.J.S., Boundaries, §86. However, no minimum number of years has been laid down by those New Jersey cases applying this principle.

What constitutes the necessary time to create an acquiescence or an estoppel, so as to prevent future disturbance, is held to depend upon the situation presented. For example, in *Mulford v. Minch*, 11 N.J.Eq. 16 (Ch. 1855) a relatively short period (only one year) was held to be sufficient to create an "estoppel" where one of the parties constructed significant improvements upon the land in reliance upon the acquiescence. At the other extreme is *Smith v. State*, 23 N.J.L. 130 (1851), where the court (although failing to specify the minimum number of years required), ruled that 40 to 50 years of acquiescent use was sufficiently longstanding to prevent relocation of a boundary line — even back to its correct location.

N.J.S.A. 2A:14-30 and 14-31 today provides a statutory time limitation in those situations concerning the "possession"

of real property. It would therefore appear that the minimum period of time needed to constitute a "considerable length of time" under the doctrine of acquiescence (and in the absence of detrimental reliance as a ground for an estoppel), would be something more than the statutory 30 years, since the language of N.J.S.A. 2A:14-30 states "actual possession ... uninterruptedly continued by occupancy, descent, conveyance or otherwise...."

Because easements by "estoppel" or by "acquiescence" concern uses that are themselves obvious uses of land, notice of the existence of such easements is generally ascertainable through a reasonable inspection. The rule in New Jersey is longstanding that a purchaser of land is held to notice of all facts effecting the title which he/she would have learned by a reasonable inspection of the premises.

The rule stated by Vice-Chancellor Bird more than a century ago in *Green v. Morgan*, 21 A. 857 (Ch. 1891), is that notice includes all facts that a due and diligent inquiry would disclose — which is still good law today.

Where it is apparent that a third person other than the record owner is making use of a property, a prospective purchaser is by all means charged with inquiry notice to determine the basis of such apparent use. See *Cox v. Devinney*, 65 N.J.L. 389.

Express easements are governed by the Statute of Frauds and the Recording Act. Other than their location (which often times requires a professional survey) written easements pose little problems to title attorneys.

Prescriptive easements may occur only after many years of notorious use, and are today governed by the Statute of Limitations pertaining to the possession

of real property (N.J.S.A. 2A:14-30, et seq).

Nonconsensual easements, however — such as those based upon prescription, implication, estoppel and acquiescence — are outside the statutory law and therefore have much potential for mischief. The existence of nonconsensual easements are allusive. They may be implied, for example, from an earlier division of title, which may have occurred decades ago.

Estoppel and acquiescence are not regulated by any statute, and are based upon the application of equitable principles to particular circumstances. An estoppel or acquiescence may arise at any point in a chain-of-title. Estoppel generally occurs more quickly because it is based upon detrimental reliance; acquiescence, however, occurs only after a longstanding adherence to a particular situation for such a long period of time that the Court will be loathe to take corrective action — even to undo a mutual mistake.

Once created, easements continue through successive title conveyances, perpetually, until legally terminated or extinguished. This means that an easement that is today dormant may be reactivated tomorrow, without the need for any consent from the owner of the servient estate.

Title searches provide little protection against nonconsensual easements — mainly because there is no writing for a title searcher to find. A professional survey is useful in locating easements, but is not always conclusive as to intangible rights. Only a physical inspection of land made with reasonable recognition and regard to the surrounding circumstances can provide a meaningful clue as to the existence of the ubiquitous and sometimes elusive easement. ■