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§ 8.1  Generally—Definition and Characteristics

An easement is a “right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with general property in the owner.” The benefited estate is known as the dominant estate, the owner of the dominant estate being sometimes referred to as the easement holder; the burdened estate is the servient estate.1

Earlier decisions suggest that an easement be for an specific purpose,2 but a more recent decision uses the broader definition that an easement is “an interest in land which grants to one person the right to use or enjoy land owned by another …” It is “a right, which one proprietor has, to some profit, benefit, or beneficial use, out of, in or over the estate of another proprietor.”3

An easement is sometimes defined as a “nonpossessory” interest in land, i.e., the right to use, but not to exclusively possess, the land of another.4

And an easement, in the case of a road, may have the effect of

§ 8.1
4. Restatement of Property § 450 (1944).

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depriving the se.
Research Reference:
C.J.S. Easements §§ : West’s Key No. Digs

§ 8.2  General:

An easement of the easement way is perpetu expressly limited disappears.5 An perpetual, beca use it ends, such estate in the case.

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C.J.S. Easements § West’s Key No. Dige

§ 8.3  General:

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5. Boston Water
W.R. Corp., 33 Mas

1. Delconte v. §
143 N.E.2d 210 (19
unlimited as to dur
ghished “by grant,”
estoppel.”

2. Olson v. Arr
N.E.2d 145 (1952);
Mass. 446, 38 N.E.1
3. Cotting v. Ci
97, 87 N.E. 295 (19

4. Rowell v. Do
N.E. 182 (1887) citi
Mass. (14 Gray) 12

5. For a form o
easement see Volum
depriving the servient estate owner of all practical use of the land.  

Research References  
West’s Key No. Digests, Easements c=1.

§ 8.2 Generally—Perpetual or Temporary

An easement is perpetual unless its duration is qualified in the grant of the easements. An easement by estoppel based on a boundary on a way is perpetual. An easement for a particular purpose, while not expressly limited as to time, may prove to be temporary if that purpose disappears. An implied easement based on reasonable necessity is not perpetual, because it comes to an end when the necessity that gave rise to it ends, such as establishment of alternative access to the dominant estate in the case of an implied right of way.

Temporary easements are commonly found accompanying takings and layouts of highways and municipal public ways to assist in the construction of such ways.

Research References  
C.J.S. Easements § 116.  
West’s Key No. Digests, Easements c=25.

§ 8.3 Generally—Appurtenant or in Gross

Absent any language to the contrary, an easement is presumed to be appurtenant to another estate, and not personal to the grantee and it may be appurtenant to land even though the dominant and servient estates are not adjoining. An inheritable, assignable right may be

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§ 8.3 EASEMENTS

granted in gross, will exist independently of a particular parcel of land, and may be enjoyed by the grantee and the grantee’s heirs. An easement in gross may be useful in a phased development since the developer can preserve rights of access over land sold in the initial phase of the development for the benefit of later phases of the development.

Appurtenant easements belonging to the granted premises are included in the grant, whether or not they are mentioned or enumerated, unless the instrument states to the contrary.

An easement is appurtenant to every part of the dominant estate, and to each and every subdivision of the dominant estate.

Research References
C.J.S. Easements §§ 3, 8, 20.
West’s Key No. Digests, Easements $=-3.

§ 8.4 Generally—Exclusive or Non-exclusive

In the absence of any language or intent to the contrary, an easement is presumed to be non-exclusive. Accordingly when drafting an easement which is not to be exclusive the grant should be of a “non-exclusive easement” and the common users, such as the grantors and others to whom rights have been or may be granted, should be specified.


An easement over after-acquired property is valid if it is an easement in gross. McLaughlin v. Board of Selectmen of Amherst, 422 Mass. 359, 662 N.E.2d 687 (1996), citing this section.


See Crocker’s Notes on Common Forms § 857 (9th ed.2000) for numerous cases.

An easement granted by master deed to a condominium unit can be abandoned or released, but cannot be transferred separately from the unit. Schwartzman v. Schoening, 41 Mass.App.Ct. 220, 669 N.E.2d 228 (1996), citing this section.


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1. Butler v. Haley Greystone Corp., 352 Mass. 252, 224 N.E.2d 683 (1967). Where owners of land in the second section of a subdivision were fighting for the right to use a beach shown on the recorded plan as part of the first section of the subdivision, the court held that based on the recorded deeds and plans, only landowners in the first section had the right to use the beach. The court also referred to a footnote which acknowledged “cases stating that an easement which is to be exclusive must be clearly expressed to be so” citing authority other than Massachusetts law.
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On the other hand the drafter of an exclusive easement should specify whether

- others are prevented from acquiring an easement in same land, or,
- everyone except the servient estate holder is excluded from using the easement, or,
- everyone, including the servient estate holder can be excluded from using the easement.

Research References
West’s Key No. Digests, Easements 8-2, 8-5.

§ 8.5 Generally—Affirmative or Negative (Private Restriction)

As noted above an easement establishes an affirmative right to use the land of another, while a restriction limits the use of another’s land without also establishing a right to use it. An affirmative easement is presumed to be perpetual; a negative easement may be a restrictive covenant and thus subject to the time limitations and enforcement problems that afflict private use restrictions.

Research References
C.J.S. Easements §§ 6, 21, 53, 59.
West’s Key No. Digests, Easements 8-2, 8-13.

§ 8.5

1. See § 8.1.

2. Labounty v. Vickers, 252 Mass. 337, 225 N.E.2d 333 (1967). “A restriction on the use of land is a right to compel the person entitled to possession of the land not to use it in specified ways. [Citations omitted.] The restriction may be imposed by a negative easement (citation omitted), by an equitable servitude or by a covenant running with the land. But the holder of such a restrictive right has no right to use the land on which he holds the restriction as he would if he held an affirmative easement. [Citations omitted.]”

3. See § 8.2.

The easement in Labounty v. Vickers, 252 Mass. 337, 225 N.E.2d 333 (1967), was found to be an affirmative easement and not subject to the provisions of M.G.L.A. c. 184 §§ 23, 26–30.

4. In Burritt v. Lilly, 40 Mass.App.Ct. 29, 661 N.E.2d 102 (1996), a deed reserved to the grantor “the right to pass and repass over said property, to fish from the rocks generally and to enjoy the benefits of said property in common with others” and the dicta in that case suggest that certain easements could be construed as “negative easements” and therefore subject to a 30-year life under M.G.L.A. c. 184 § 23.

In Myers v. Salin, 13 Mass.App.Ct. 127, 431 N.E.2d 233 (1982) a negative easement “to prevent building upon certain specified land retained by the grantors” was held to have expired. In Myers v. Salin, 13 Mass.App.Ct. 127, 431 N.E.2d 233 (1982) a negative easement “to prevent building upon certain specified land retained by the grantors” was held to have expired under the thirty year time limit imposed by M.G.L.A. c. 184, § 23, “The Legislature, by enacting G.L. c. 184, §§ 23 and 26–30, and predecessors of those sections, has shown a general intention that such restrictions, with certain carefully specified exceptions, be regulated in various ways, without apparent differentiation among the types of interest.
§ 8.6 EASEMENTS

§ 8.6 Generally—Private or Public

Any easement will be assumed to be for the benefit of the parties benefitted by it, i.e., the dominant estate holder or holders, and not for the benefit of the public. For example it has been held that that the public has no right to pass over any portion of a private subdivision road which has not been accepted as a public way. It is also clear that the holder of a private easement can not force the servient estate holder to open private way to the public. 2

Research References
West’s Key No. Digests, Easements §=2, 52.

§ 8.7 Generally—Compared to a Profit a Prendre

A profit a prendre differs from an easement in that it is a right to take part of the land (minerals, stones, sand, gravel) or things produced by or on the land (grass, crops, trees, fish game, seaweed). In all other respects, a profit a prendre is like an easement—it usually is appurtenant to a dominant estate, but may be in gross; it usually is perpetual; and it is not extinguished by nonuse, but it can be abandoned.

A profit a prendre that is unlimited as to duration and to quantity is deemed to be exclusive to the dominant estate. In the absence of an express limitation imposed by the grantor, there is no geographical limitation on its exercise. 3

thereby produced, the names given to them, or used in their creation.” The court stated in a footnote “With respect to negative easements as restrictions, the absence from §§ 23 and 26–30 of an express reference to easements such as that found in G.L. c. 184, § 25, does not seem to us of a significance in the face of the apparent general statutory use of the word ‘restrictions’ as applying to all types of land use restraints other than clearly affirmative easements. [Citation omitted.]”

§ 8.6


§ 8.7


Tiffany, Real Property (3d ed.) §§ 839, 840; Restatement of Property, § 450, special note, comments f and g. Jones, Easements, § 46.


Research
C.J.S. Easements
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4. Fu 373 Mas 5.

5. Gr N.E.2d 8

6. Fu 373 Mas citing By Mass. 25

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1. C Bridge N.E.2d

2. S 142 N.I

Mass.; (3d ed.)

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N.E.2d 10

See 246 N.

burn,
of business invitees, customers and general public to common areas.\textsuperscript{1} Aside from First Amendment issues, these bargained, and paid for, rights of tenants are not available to the general public unless being exercised to shop at a tenant's store.

Research References
C.J.S. Landlord and Tenant §§ 288–293, 297, 326.
West's Key No. Digests, Landlord and Tenant ⇒ 124.

\textbf{§ 8.11 Creation—By Express Grant}

A grant of an easement must be in writing,\textsuperscript{1} and must be described with reasonable certainty;\textsuperscript{2} however, words of inheritance are no longer (since 1913) required.\textsuperscript{3} An easement can be created in a separate instrument, or it can be reserved by the grantor in the grant of the servient estate. A reservation of an easement to a stranger to the transaction may be void.\textsuperscript{4} Although the distinction between a reservation and an exception was extremely important before 1913 to insure survival of the easement on the grantee's death, it still is good practice not to create an easement by an exception.\textsuperscript{5}

Research References
C.J.S. Easements §§ 52–60.
West's Key No. Digests, Easements ⇒ 12, 14.

\textbf{§ 8.10}

1. Logan Valley Plaza, Inc. v. Amalgamated Food Employees, 425 Pa. 382, 227 A.2d 874 (1967), the Pennsylvania Supreme Court held that union picketers in parking lots and other common areas were trespassers and not within the class of business invites allowed on common areas which are on private property.

\textbf{§ 8.11}


An easement granted after a mortgage, which the mortgagor made "subject to a proposed right of way [as shown on an unrecorded plan]" permits the mortgagor to convey said right of way free from the lien of the mortgage, Barnside Realty Corp. v. Coughlin, 422 Mass. 238, 661 N.E.2d 929 (1990).


The Court in Burritt v. Lilly, 40 Mass. App.Ct. 29, 661 N.E.2d 102 (1996) had to construe an easement "generally to enjoy the benefits of said property in common with others."


5. Ashcroft v. Eastern R. Co., 126 Mass. 196 (1879): "The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him ... The provision that the grantee shall build and keep in repair the culvert is an essential part of the
§ 8.12 EASEMENTS

§ 8.12 Creation—By Prescription

A prescriptive easement may be obtained by uninterrupted, open, notorious, and adverse use for twenty or more years over another's land. Most of the rules of adverse possession applicable to gaining title in fee simple apply to prescriptive easements. But the area adversely used must be well-defined. A use, however, need not be exclusive, and a prescriptive easement for a particular use also can be acquired.

grant, and clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception."

M.G.L.A. c. 188 § 13.


Bigelow and Madden, Exception of Easements, 38 Harv.L.R. 180 (Dec.1924).

§ 8.12


Easements can arise on severance of a lot; mortgages to two different lenders constitute a severance. Goldstein v. Beal, 317 Mass. 760, 59 N.E.2d 712 (1949).


Interruption of the Adverse Enjoyment of Easements, 20 Harv.L.R. 317; Easements by Prescription, Open and Notorious Use, 3 A.S.M.L. 12; Rights of Way and Easements, 33 Mass.L.Q. No. 5 p. 42.

2. See Chapter 27 on Adverse Possession.


3. Although the failure to designate a specific location in a granted easement will be cured by the court's designation of the location, an easement by prescription can only be established over a well-defined, specific location. Stone v. Perkins, 59 Mass. App.Ct. 265, 795 N.E.2d 583 (2003).


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§ 8.14 EASEMENTS

§ 8.14 Creation—By Implication—By Necessity

It "is familiar law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remaining land over the part sold if he can reach it in no other way. This presumption prevails over the ordinary covenants of warranty deed."¹

A way must be reasonably necessary² so that, if the owner could at a reasonable cost construct a way over such owner's land, there is no way by necessity.³

In a recent case,⁴ the Supreme Judicial Court reversed the decisions of both the Land Court and Appeals Court, which had, in effect, given the defendants an "enforced easement" over the plaintiffs' land. At issue was the location of a septic system which could not be placed on the defendants' land and which was constructed partially on the plaintiffs' land. Rejecting private eminent domain, the Court found a lack of good faith when the defendants proceeded to install the septic system while litigation was pending, even though they had made efforts to locate the system on their own land.⁵

Research References
West's Key No. Digests, Easements ch. 18.

§ 8.14


5. But, nevertheless, an injunction may be refused in a case involving minimal encroachments made in good faith. Peters v. Archambault, 361 Mass. 91, 278 N.E.2d 729 (1972); Geragosian v. Union Realty Co., 289 Mass. 104, 198 N.E. 726 (1935). Although M.G.L.A. c. 185 prevents the acquisition of an easement over registered land, it is appropriate for a court to refuse to order removal of a minimal encroachment over

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§ 8.15 Creation—By Implication—Of Necessity or Quasi-Easements

Easements are implied in certain circumstances because courts are willing to grant an easement into a land transaction in order to do justice in a particular case. Although such decisions commonly focus on the inferred intent of the parties, a strong public policy favoring the productive use of land is also at work. The Statute of Frauds does not prohibit the creation of implied easements because such servitudes are considered to arise by operation of the law or to be part of a written conveyance between the parties.

Common-law implied easements traditionally fall into two categories: easements of necessity and easements implied from quasi-easements. Easements of necessity are typically implied to provide access to a landlocked parcel; easements implied from quasi-easements are based on a landowner’s prior use of part of the landowner’s property (the quasi-servient tenement) for the benefit of another portion of the property (the quasi-dominant tenement). Such use does not amount to a true easement because one cannot obtain an easement in one’s own land. Instead, it constitutes a quasi-easement that may ripen into an implied easement once either the quasi-servient tenement or the quasi-dominant tenement is transferred to a third party.

The traditional requirements for the creation of either category of implied easement are similar in some respects, but strikingly different in others. The following table summarizes these elements:

<table>
<thead>
<tr>
<th>Easements of Necessity</th>
<th>Easements Implied From Quasi-Easements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Common ownership</td>
<td>1. Common ownership</td>
</tr>
<tr>
<td>2. Transfer part of the land (severance)</td>
<td>2. Common owner’s apparent and continuous use of the land to benefit another part (quasi-easement)</td>
</tr>
<tr>
<td>3. Necessity to severance for an easement to benefit either the parcel transferred or the parcel retained</td>
<td>3. Transfer of part of the land (severance)</td>
</tr>
<tr>
<td>4. Continuing necessity for an easement</td>
<td>4. Necessity at severance for the preexisting use to continue for the benefit of either the parcel transferred or the parcel retained</td>
</tr>
</tbody>
</table>

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"The owner of a parcel of land may lay out or install over or in a part of his land a way, water pipe, drain, sewer or other physical arrangement or structure for the benefit of another part of the land, and the use and enjoyment of this quasi easement while there is unity of possession and title in the entire parcel will not create any real or actual easement, but upon a severance of the title, in the absence of anything to the contrary in the instrument of conveyance, a conveyance of the dominant estate will carry with it an implied grant of the easement for the benefit of the land conveyed, and a conveyance of the servient estate will create the easement by an implied reservation for the benefit of the land retained, if the language of the instruments of conveyance read in the circumstances attending their execution, including the physical situation and characteristics of the land and the knowledge which the parties had or with which they were chargeable, leads to the conclusion that such an implied easement by grant or reservation, as the case may be, must have been within the presumed intention of the parties."

Research References

West's Key No. Digesta, Easements ©=15.1–17.

§ 8.16  Creation—By Estoppel—By Plan Reference

Where land is conveyed with a description or by reference to a plan that shows a boundary on a way, the land is entitled to an easement over the way as shown.\(^1\) This appurtenant right of way is not a way of necessity, but a way created by estoppel; it exists even if there are other ways, public or private, leading to the land.\(^2\) The grantor, and those claiming under the grantor, are estopped to deny that there is a street or way to the extent of the land so bounded on the way, and the grantee acquires by the deed the perpetual easement and right of passage on and over the way. This is a right that not only is coextensive with the land

censers in Land, Chapter 4.

2. Jasper v. Worcester Spinning & Finishing Co., 318 Mass. 752, 64 N.E.2d 89 (1945). See also Cummings v. Franco, 335 Mass. 639, 141 N.E.2d 514 (1957) (two houses on one lot with the water, electric and telephone lines coming from the street to the front house and then running from the front to the rear house. On this sale of the rear portion of the land containing the rear house to a third party, with no mention in deed to water, electric or telephone lines, a quasi-easement for such lines was created). See also Flax v. Smith, 20 Mass. App.Ct. 149, 479 N.E.2d 183 (1985).

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Conveyed, but also is for the entire distance of the way, as it is then actually laid out or clearly indicated and described. This rule is applicable even if a way is not yet in existence, as long as it is contemplated and sufficiently designated. The rule, that a grantee is entitled to an easement over a street adjoining the grantee's property where a conveyance is by reference to a plan, applies even though the street may be merely a cul-de-sac. A deed of this nature gives the grantee rights by estoppel not only in that part of the way that lies opposite the grantee's land, but also, by necessary implication, to the outlet or termination of the way that will make the way available for its intended purpose.

Research References

C.J.S. Easements §§ 13, 61-71, 75-79, 82, 87, 90, 106, 149.
West's Key No. Digests, Easements ≡17(4).

§ 8.17 Creation—By Implication—By Deed Reference

A deed which bounds conveyed property by a way creates an implied covenant that the grantee has an easement in the way only as far as the grantor owns or has the right to use this way.

Research References

C.J.S. Easements §§ 13, 61-71, 75-79, 82-84, 87, 105.
West's Key No. Digests, Easements ≡17(2).

§ 8.18 Creation—Equitable Easements

An express easement which lacks an essential element, such as an acknowledgement or a seal, may be enforceable as an equitable easement.


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1. “The whole extent of the doctrine, as established by these cases, is, that a grantor or land, describing the same by a boundary on a street or way, if be the owner or such adjacent land, is estopped from setting up any claim, or doing any acts inconsistent with the grantee's use of the street or way, and that such estoppel would also to his heirs, or those claiming under him. [italics added.]

This seems to be a reasonable and proper doctrine, and it is not to be extended to a grantor merely intending by the description to fix the boundaries, and having no interest further that he could convey.” Howe v. Alger, 86 Mass. 206 (1862).

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§ 8.21 Extent of Use—Express Easement

An easement by grant or reservation, unlimited in scope by its terms, is available "for every reasonable use to which the dominant estate may be devoted, and this use may vary from time to time with what is necessary to constitute full enjoyment" of an easement holder's premises. But the use of an easement which is stated to be for a particular purpose is limited to the purpose stated.

The corollary to the foregoing is that the owner of the servient estate may use the land for all purposes that are not inconsistent with the easement, but may not use the land "in a way that would lead to a material increase in the cost or inconvenience to the easement holder's exercise of his rights." A standard of reasonableness is applied by the courts to determine the extent of uses permitted under an easement that is general in nature. "The owner of the servient estate has the first right to locate an undefined way, subject to the requirement of reasonable convenience and suitability, and if he fails to do so the owner of the easement is entitled to fix its location."

Research References

West's Key No. Digests, Easements @=42, 50-55.

§ 8.22 Extent of Use—Prescriptive Easements

"The extent of an easement arising by prescription ... is fixed by the use through which it was created," but the "use made during the

§ 8.21


See also Deacy v. Berberian, 344 Mass. 321, 182 N.E.2d 514 (1962) (a "right of way on foot and with teams" was held by the Land Court to constitute "an easement for all purposes of ingress and egress common to a way.").

2. Delconte v. Salloum, 336 Mass. 184, 143 N.E.2d 210 (1957); Cornell-Andrews Smelting Co. v. Boston P.R. Corp. 215 Mass. 381, 102 N.E. 625 (1913) (Easement "for farming purposes" could be used "for farming purposes only; and the petitioner ... acquired no right to use it for any other than farm purposes.").


prescriptive period does not fix the scope of the easement eternally.1 However, changes in the use made of the dominant estate under a prescriptive easement may result in overloading the easement.2

Research References
C.J.S. Easements §§ 144, 146, 159–176.
West’s Key No. Digs., Easements 9=40, 50–55.

§ 8.23 Extent of Use—Private Ways

Although not free from exception, the general rule seems to be that the uses of a way are not limited to those in existence at the time of the creation of the easement, unless the uses are expressly limited in the grant of the easement.1 The classical illustrations are that (1) “an easement to pass on foot or with a team” can be used for all purposes of ingress and egress common to a way,2 but that (2) a way “with teams only” granted before automobiles came into existence cannot be used for automobiles, motor trucks or any other vehicles.3 Stated another way, an easement granted in general terms is not necessarily limited to the uses made of the dominant estate at the time of the creation of the easement, but is available for all reasonable uses to which the dominant estate may thereafter be devoted.4

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2. Carmel v. Baillargeon, 21 Mass.App.Ct. 426, 487 N.E.2d 887 (1986) (an easement by prescription was overloaded when the easement holder established first a campground, then a gravel pit. “The use may change over time through normal evolution to satisfy new needs, but the variations cannot be substantial; they must be consistent with the general pattern formed by the adverse use”).

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Language similar to the following should future problems as to the extent of the use:

The perpetual right and easement to use in common with the Grantor, and with others from time to time entitled to use it, that portion of land owned by the Grantor in Utopia, Nullulocus County, Massachusetts, lying within the area labelled “12 Easement” on a plan entitled “Easement Plan for Silver Brook Estates” dated January 31, 1986, by Turning and Running, Registered Land Surveyors, to be recorded herewith, which portion extends in a north-south di-
§ 8.23 EASEMENTS

If the width of a way is not specified in a grant, an easement holder will be entitled to use a convenient width that would be reasonable for the purposes at the time of the grant, but the actual width may be determined by the acts of the parties at the time of the grant. Speaking generally, if a right of way is created, and nothing more appears from the deed or the attendant circumstances, the owner of the servient tenement may build over the way, or do anything else so long as he does not interfere with or obstruct the right of passage over the soil.

Research References
West's Key No. Digests, Easements ⇔44–55.

§ 8.24 Extent of Use—Transmission Lines

Where it is not prohibited by the terms of a transmission line easement, an owner can (1) pave the area under the transmission line, except for a reasonable radius around poles in an above-ground easement, and (2) install other underground utilities in the easement area.

Research References
C.J.S. Electricity §§ 5, 11, 50.
West's Key No. Digests, Electricity ⇔9(1).

rection from Stone Bridge Road to the Grantee’s said land, for all purposes for which streets and ways are now or may hereafter be used in the Town of Utopia, including without limitation, sewers, drains, water mains, gas pipes, electric lines, telephone lines, and cable television lines therein and thereunder, all of which underground sewers, drains, water mains, gas pipes, electric light, power and telephone wires, and cable television lines shall remain the property of the persons installing them.


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§ 8.25 Extent of Use—Relocation

If an access easement (a right to pass on foot or in motor vehicles) is not described by metes and bounds or bearings and distances, or if it is susceptible of being located in more than one place, and the servient owner owns land on both sides of the easement, the servient owner can change the location of the easement, provided the relocation is not inconsistent with the rights of the dominant owner. The servient owner should consider reserving relocation rights in the grant of an easement.

A recent Supreme Judicial Court decision has held that if an easement does not expressly prohibit relocation, the servient or burdened estate holder "may relocate the easement if the proposed change in location does not significantly lessen the utility of the easement, increase the burdens on the dominant estate holder's use and enjoyment of the easement, or frustrate the purpose for which the easement was created" provided the servient estate holder pays the dominant estate holder all the costs of relocating the easement. The Court's main conclusion was that § 4.8(3) of the Restatement (Third) of Property (Servitudes) "best complies with present-day realities."

Since a prescriptive easement would be free of any relocation qualifications, the foregoing right of relocation should also be available to a servient estate holder of a prescriptive easement. Implied easements by necessity, quasi-easements and equitable easements may also be relocatable under the above standards.

Research References

West's Key No. Digests, Easements 48(6).

§ 8.26 Extent of Use—Overloading

Although not universally followed, the term "overloading" usually refers to the use of an appurtenant easement for access to, or for the benefit of, other land to which the easement is not appurtenant; "overburdening" (discussed in § 8.27) occurs when an easement is used for a different type of use than that for which the easement was intended; and

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2. For suggested language concerning relocation rights in a water line easement, see Volume 28A § 42.6.

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"nuisance" (discussed in § 8.28) refers to overly intensive use, e.g., frequency of use.

"A right of way appurtenant to the land conveyed cannot be used by the owner of the dominant tenement to pass to or from land adjacent to or beyond that to which the easement is not appurtenant."1 Moreover, an appurtenant easement cannot be used for access to, or for the benefit of, any land which is subsequently added to the dominant estate.2

However, if an easement is held in gross, it can be used for the benefit of any dominant estate.3

Overloading occurs in many successive subdivision developments, where the first subdivision has a private road with access to a public way and the next subdivision can gain access to the public way only by crossing the private road in the first division. In that situation, the second subdivision lot owners have no right to cross the private ways in the earlier development lying between their land and the nearest public way.4 Private subdivision roads are simply private easements appurtenant to lots within that subdivision. They are available only to those owners of land within the subdivision who can establish express or implied appurtenant easement rights. So long as such private subdivision roads are not accepted as public ways, they are not open to the general

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2. Pion v. Dwight, 11 Mass.App.Ct. 406, 410, 417 N.E.2d 20, 23 (1981) ("Normally at least, the easement would not be appurtenant to a parcel added to the dominant tenement after the conveyance creating the easement, without the consent of the owner of the servient tenement.").

3. McLaughlin v. Board of Selectmen of Amherst, 422 Mass. 359, 664 N.E.2d 786 (1996) ("After-acquired property can benefit from an easement in gross, a personal interest in or right to use land of another, or the owner of the after-acquired property receives the consent of the owner of the servient estate.").

4. Patel v. Planning Board of North Andover, 27 Mass.App.Ct. 477, 539 N.E.2d 544 (1989) (A proposed easement on a definitive subdivision plan did not convey an interest in land to anyone; "No written deed of an easement was ever given to the town or to the owner of the abutting property. The mere approval and recording of a subdivision plan which refers to a roadway does not convey an easement in favor of either of those owning property abutting the subdivision or the public generally. Nor did the deeds to the successive purchasers of lot six, each of which referred to the recorded plan, create any right of an easement on the part of abutters or the public generally, as such persons were strangers to the deed.").
§ 8.27 Extent of Use—Overburdening

As used herein, overburdening refers to a different type of use than that for which the easement was intended. For instance, an easement intended for private recreation cannot be used for commercial purposes. In another situation, a "concrete walk" could not be used for automobiles. An 18-foot wide foot passage easement has been held to prohibit passage on horseback or in carriages.

5. Murphy v. Donovan, 4 Mass.App.Ct. 519, 352 N.E.2d 210 (1976) ("The approval by the planning board of the 1951 subdivision plan showing the locus as part of Lantern Lane and the subsequent recording of that plan vested no interest in Lantern Lane in the public.").

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1. Van Buskirk v. Diamond, 316 Mass. 453, 55 N.E.2d 687 (1944). ([W]hat the uses are to which the land granted might be conveniently put depends on the various circumstances including what was in the minds of the plaintiff and her grantor when the conveyance was made.").

2. Hewitt v. Perry, 309 Mass. 100, 34 N.E.2d 489 (1941) ("The easement to use the beach 'for the purpose of boating, bathing, fishing and other recreation' was made appurtenant to lots evidently intended for summer residences. The extent of the easement is determined 'by the language of the grant, construed in the light of the attendant circumstances.' It is true that an easement granted in general and unrestricted terms is not limited to the uses made of the dominant estate at the time of its creation, but is available for the reasonable uses to which the dominant estate may be devoted. But we think that the maintenance on the triangular piece of sandy land bordering on the ocean of a substantial commercial business in letting boats to the general public surcharged the easement granted, and should be restrained by injunction ... ").


3. Doody v. Spurr, 315 Mass. 129, 51 N.E.2d 981 (1943) ("The construction of the walk showed that it was intended for foot travel, and there is nothing to show that any portion of the walk was ever used for vehicular travel until the defendant used it as a driveway for automobile travel. The servient estate cannot be burdened to a greater extent than was contemplated or intended at the time of the grant, and the defendant would have no right to use the way for a purpose that was obviously inconsistent with the nature and condition of the premises over which she had a right of passage, and unwarranted by the terms of the grant, which was manifestly limited to the reasonable use of a right of way which then consisted of a fit walk ... as ... then constructed and located upon the servient estate. Whether the use of the walk for automobile traffic, in the absence of anything in the grant permitting such use, was in all the circumstances, a reasonable use of the walk was largely a question of fact.").

4. Rowell v. Doggett, 143 Mass. 483, 10 N.E. 182 (1887) ("A grant of way over one's premises, without limitation or restriction, is understood to be a general way for all purposes. But, in construing such a grant, reference is to be had to the nature and condition of the subject matter of the grant at the time of its execution, and the obvious purposes which the one's premises, without
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An implied easement of right-of-way normally does not include a right to park vehicles, but the circumstances may result in including this additional right.  

Research References
West’s Key No. Digests, Essements c=54.

§ 8.28 Extent of Use—Nuisance

If the use of an easement is overly intensive, it may constitute a nuisance.  For example, a subdivision developer was prevented from implementing a proposed 41-lot subdivision using a reserved way.  But the nighttime use of an easement to reach a cranberry bog has been held not to constitute a nuisance.

Research References
West’s Key No. Digests, Nuisance c=1-10.

§ 8.29 Extent of Use—Alterations

The holder of an access or road easement has the right to make reasonable repairs and improvements to the road, and to make whatever limitation or restriction, is understood to be a general way for all purposes. But, in construing such a grant, reference is to be had to the nature and condition of the subject matter of the grant at the time of its execution, and the obvious purposes which the parties had in view in making it. Where the words of a deed are ambiguous, and not explainable by the context, the construction given by the words themselves, as shown by the way and manner in which the parties exercised their respective rights, is legal evidence. If a passageway has been used in a certain mode, from the time of making the deed to the time of an alleged trespass, without any objection being made, this evidence is admissible in order to show what was intended by the reservation.

1. Swensen v. Marino, 306 Mass. 582, 29 N.E.2d 15 (1940) (Continuous use of an easement located near the servient estate owner’s house, by trucks hauling sand and gravel, held to constitute a nuisance; “thirty or forty truck loads passed out in a day, making from sixty to eighty trips out and in” which raised dust and created noise that “interfered with the comfortable enjoyment of the plaintiff’s premises.”).

2. Boudreau v. Coleman, 29 Mass.App.Ct. 621, 564 N.E.2d 1 (1990) (“With regard to the placement of an additional burden on the servient estate, effectuation of the defendant’s plan for a subdivision with forty-one house lots, without question, would increase the use of the ways. The trial judge in this case ruled, after taking a view, that such increased use made of the ways would be overburden of easement rights in the ways.”).

3. Brodeur v. Lamb, 22 Mass.App.Ct. 502, 495 N.E.2d 324 (1986) (“nighttime access to the bog is reasonably necessary to proper cranberry farming” and “there is nothing in the record that demonstrates that nighttime use of the easement has been or would be so substantial as to be unreasonable or to amount to a nuisance.”).

Where town constructs a drainage ditch through private property and fails to keep it clear of contaminated water, landowner is entitled to have the nuisance abated in an action against the town. Fortier v. Town of Essex, 52 Mass.App.Ct. 263, 752 N.E.2d 818 (2001).
er changes would reasonably adapt the road to the granted uses. However, any repairs, improvements or changes may not burden the servient estate beyond that contemplated at the time of the grant of the easement.

Research References
West's Key No. Digests, Easements 53, 54.

§ 8.30 Extent of Use—Persons Entitled to Use—Express Grant or Reservation

In the absence of restrictions, a grant of an easement is a grant of unlimited reasonable use in the grantee, and any other persons named in the grant. But even in the absence of a grant to others than the grantee, it is generally accepted that an easement extends to the grantee's family members, agents, servants and employees, and social guests. If the easement runs with the land, successors in title to the grantee have the benefits of easement.

The above applies equally to a reservation of an easement without restrictions giving the person reserving the easement the same rights as a grantee of an express unrestricted easement.

Research References
C.J.S. Easements §§ 164-167.
West's Key No. Digests, Easements 52.

§ 8.31 Types—Street and Ways—Public

Where an easement for a public street or highway is taken or otherwise acquired by a governmental body, the public acquires an

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1. Restatement of Property § 541.

Limitations or restrictions on the use of a right of way created by grant limit the use to those designated in the grant. See Nallin-Jennings Park Co. v. Sterling, 364 Pa. 611, 73 A.2d 390 (1950).

2. Tiffany, Real Property 3rd Ed. § 803.

3. Restatement of Property § 542. But the intention of the parties to the grant of easement will govern the extent to which it runs with the land. Restatement of Property § 544.
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enforceable by the supposed dominant estate holder.\(^1\)

Research References

West's Key No. Digests, Covenants ⇔ 49–52.

§ 8.48 Termination—By Grant or Release

It seems axiomatic that an easement created by a grant or a reservation can be terminated in the same manner, i.e., by a recorded or registered instrument clearly setting forth that the easement is extinguished.\(^1\) It seems equally obvious that an easement created by prescription, implication, necessity, or by statute perhaps, can be extinguished by a recorded release or termination.

Once terminated, an easement cannot be revived merely by severing the dominant and the servient estates.\(^2\)

Research References

C.J.S. Easements § 127.
West's Key No. Digests, Easements ⇔ 28, 29.

§ 8.49 Termination—By Abandonment

An easement may be terminated by abandonment, if the intent to abandon can be shown by acts inconsistent with the continued existence of the easement.\(^3\) However, non-use for 20 or more years does not in and

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1. In Burritt v. Lilly, 40 Mass.App.Ct. 29, 661 N.E.2d 102 (1996) a deed reserved to the grantor “the right to pass and repass over said property, to fish from the rocks and generally to enjoy the benefits of said property in common with others” and the Court in remanding the case for a determination of the grantor’s intent said “what the plaintiffs seek in these proceedings is similar to a negative easement, that is, it resembles a covenant by [the grantor who reserved it] that the locus will not be built upon and will be kept in its natural state. Such restrictions on use are not favored; they are limited in time to thirty years from the date of the deed. See G.L. c. 184 § 23.” In Myers v. Salin, 13 Mass.App.Ct. 127, 431 N.E.2d 233 (1982) a negative easement “to prevent building upon certain specified land retained by the grantors” was held to have expired under the thirty year time limit imposed by M.G.L.A. c. 184 § 23 and the Court stated “the Legislature, by enacting G.L. c. 184 §§ 23 and 26–30, and predecessors of those sections, has shown a general intention that such ‘restrictions,’ with certain carefully specified exceptions, be regulated in various ways, without apparent differentiation among the types of interest thereby produced, the names given to them, or the methods used in their creation.”

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§ 8.50 Termination—By Merger

Absent intervening rights or interests, a combining of the dominant and servient estates extinguishes the easement, unless the combining document clearly indicates an intention not to so extinguish.¹

Research References
C.J.S. Easements § 122.
West's Key No. Digests, Easements ≈ 55.

§ 8.51 Termination—By Prescription

Adverse use by a servient owner inconsistent with the existence of an easement for 20 or more years will extinguish the easement.²

Research References
C.J.S. Easements § 129.
West's Key No. Digests, Easements ≈ 56.


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§ 8.52  Termination—By Decree

A decree in a Land Court registration or confirmation proceeding, or in a court proceeding to establish and quiet title, can eliminate an easement. M.G.L.A. c. 185 § 1(e), c. 240 § 11.

Research References
C.J.S. Quieting Title § 86.
West's Key No. Digests, Quieting Title ≈49.

§ 8.53  Termination—By Frustration of Purpose

When an easement can no longer be exercised for the purposes for which it was created, it is considered to be extinguished.¹

Research References
West's Key No. Digests, Easements ≈26.

§ 8.54  Discontinuance of Public Way

When a public road is discontinued the public easement to travel over the road is discontinued, but abutters to the public way have a private easement of travel for access to their property. However, these abutters do not have the right to install utility lines pursuant to M.G.L.A. c. 187 § 5 because the access right they have is not a “deeded” one.¹

Research References
West's Key No. Digests, Highways ≈79.1–79.7; Municipal Corporations ≈657.

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"... Abutting owners to a public way share with all other citizens an easement of travel over the public way. See 39A C.J.S. Highways § 141 (1976). However, in addition to their public easement of travel, abutters by virtue of their ownership of property that abuts a public way have a private easement of travel in order to have access to their property. Access to a public way is one of the incidents of ownership of land bounding thereon, and this right is appurtenant to the land...." Wenton v. Commonwealth, 335 Mass. 78, 80, 138 N.E.2d 609, 611 (1956), quoting from Anzalone v. Metropolitan District Commission, 257 Mass. 32, 36, 153 N.E. 325, 327 (1926). Both these cases "involved abutting landowners' rights in a public road that remained public." Nylander v. Potter, 423 Mass. 158, 163, 667 N.E.2d 244, 248 (1996).

But see also MacLean v. Parkwood, Inc., 354 F.2d 770, 773 (1st Cir.1966) (an easement of access is the right which an abutting owner has of ingress and egress to his property).

M.G.L.A. c. 79 § 10 and M.G.L.A. c. 82 § 24 provide for damages for the action of

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