



ac·ces·si·ble

/ək'sesəb(ə)l/

(of a place) able to be reached or entered.

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Whatever your expectations are in buying a piece of property, one expectation is that you can access it, of course. So what happens when a later survey reveals an 18-foot gap between your property and a public street, for example? Or a new neighbor places a gate blocking you from using the private driveway you've used for years?

Establishing legal access can be achieved through a number of avenues (pun intended) depending on the factual circumstances of the property and often times, the historical access used to access the property. Some approaches may be unavailable depending on the specific circumstances. Other methods of establishing access may be preferable depending on the objectives, beyond simply establishing legal access. Is the access you're looking to create public or private access? What's the scope of access? Who might raise objections? The following will provide a snapshot of potential solutions in Minnesota to consider when faced with an investment that is out of your reach, literally.

Prescriptive Easement. A prescriptive easement grants a right to use property of another based on prior, continuous use. A prescriptive easement is established in a manner similar to a claim of adverse possession, such that a landowner must prove that the use was

actual, open, hostile, continuous, and exclusive for 15 years. Establishing rights based on prescription are pursued through a legal action whereby all potentially impacted parties are named in a lawsuit seeking to establish a prescriptive easement. The purpose of prescriptive easements is “to encourage the prompt resolution of disputes before evidence is destroyed or relevant events pass out of memory and thereby stabilize long-continued property uses.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). While a prescriptive easement is available against abstract property, Minnesota Statute prohibits a claim of prescriptive easement against Torrens property.

To establish a prescriptive easement, the party seeking the right has the burden to prove by clear and convincing evidence that they used the driveway, for example, in an actual, open, exclusive, continuous and hostile manner for 15 years. Generally, if a claimant proves actual, open, continuous and exclusive use, then hostility of the use is presumed. Minnesota recognizes, however, that the general rule of



presumed hostility is modified in cases where family members own both the benefited parcel and the burdened parcel. In cases involving parcels owned by family members, the presence of a close familial relationship gives rise to the inference, if not the presumption, that the use is permissive. If use is permissive, it is not hostile and, therefore, this necessary element is missing from what is needed to prove a prescriptive easement.

It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in the aid of the general purpose for which the easement was acquired are permissible. *In re Application of Mahoney*, No. A16-0760, 2017 WL 164429, at *4 (Minn. Ct. App. Jan. 17, 2017), *review denied* (Apr. 18, 2017) (citing *Wash. Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 546 (Minn. 1983)).

Implied Easement by Necessity.

The elements of establishing an easement by necessity are:

- unity of title;
- a separation of title;

- the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and
- that the easement is necessary to the beneficial enjoyment of the land granted.

Except the necessity requirement, these factors are only aids in determining whether an implied easement existed. Courts use the terms “easement by implication” and “easement by necessity” interchangeably. *Wilderness Resort Villas, LLC v. Miller*, No. A07-0557, 2008 WL 2726953, at *1 (Minn. Ct. App. July 15, 2008).



“‘Necessary’ does not mean indispensable, but reasonably necessary or convenient to the beneficial use of the property.” *Romanchuk v. Plotkin*, 9 N.W.2d 421, 426 (Minn. 1943). To be “necessary,” an easement must be more than a mere convenience. *Id.* But “[t]he easement need not have been indispensable to be necessary; rather, a reasonable necessity at the time of severance is sufficient.” *Id.* (quoting *Clark v. Galaxy Apartments*, 427 N.W.2d 723, 727 (Minn. Ct. App. 1988).) “The party asserting the easement has the burden of proving necessity.” *Id.* at 726. Obstacles such as topography, houses, trees, zoning ordinances, or the need for extensive paving, may create conditions where an easement is necessary. The easement need not have been indispensable to be necessary; rather, a reasonable necessity at the time of severance is sufficient. The burden of proving necessity is on the party claiming the easement.

In analyzing a claim for an easement by implication, Courts consider the use giving rise to an easement by implication of necessity at the time of the severance. *Niehaus v. City of Litchfield*, 529 N.W.2d 410, 412 (Minn. Ct. App. 1995). Another factor is an apparent and long-continued use. The use must be apparent and long-continued as of the time of the separation of title. *Rosendahl v. Nelson*, 408 N.W.2d 609, 611 (Minn. Ct. App. 1987). This factor also requires that the long and apparent use must show the easement was intended to be permanent.

Easement by Estoppel. An easement by estoppel refers to an easement that can be created where the conduct of one landowner leads another to believe they have an interest in land and they act in accordance with that reasonable belief. For example, if a buyer purchases an otherwise landlocked property from a seller who represents that the buyer will have access over the seller's property, courts have found that the seller cannot later deny that right of access. In order to invoke the doctrine of estoppel by conduct, a person must show that they were led to rely on a certain position to their detriment.

An easement by estoppel "is created from a voluntary servitude after a person, mistakenly believing the servitude to be permanent, acted in reasonable reliance on the mistaken belief." *Black's Law Dictionary* 586 (9th ed. 2009). The Minnesota Supreme Court has adopted two descriptions of easement by estoppel: When a grantor conveys part of his land to a grantee with knowledge of the latter's intended use of the land so conveyed, and the use so intended necessarily involves some curtailment of the grantor's use of his retained land, an easement arises in favor of the grantee as against the grantor. The grantor is estopped to deny that the grantee acquired the necessary easement. Similarly, when a seller represents to a buyer that the land sold will be served by an easement over land retained by the seller, the seller may be estopped to later deny the existence of such easement although it is unmentioned in the deed. See *Highway 7 Embers, Inc. v. Nw. Nat'l Bank*, 256 N.W.2d 271, 277-78 (Minn. 1977).

Express Easement. Another means of establishing legal access is by way of an express grant which requires the willingness of all involved parties to enter into a written easement agreement. To create an easement, the land subject to the easement must be identified and an intention to create an easement must be expressed. *Miller v. Snedeker*, 101 N.W.2d 213, 222 (Minn. 1960).

An easement **appurtenant** to another lot, when created by conveyance, attaches to the possession of that other lot and "follows it into whosoever hands it may come." *Alvin v. Johnson*, 63 N.W.2d 22, 25 (Minn. 1954). An easement appurtenant is one that is granted for the benefit of the grantee's land. An easement **in gross** is the right to use another's property that is personal and revocable. *Block v. Sexton*, 577 N.W.2d 521, 525 (Minn. Ct. App. 1998). An easement in gross is essentially an irrevocable license. Whether an easement is appurtenant

or in gross is determined not by contiguity but by whether the easement was intended to benefit the grantee's land. *Block*, 577 N.W.2d at 525.

The preparation of an easement agreement often includes items such as obtaining a surveyed description of the easement location; defining the scope of the easement rights granted to the grantee and the rights, if any, retained by the grantor of the easement; defining other terms of the easement agreement, including exclusivity, maintenance, and indemnification. Once a finalized draft is executed by the parties, the easement is recorded in appropriate land records in the county where the property is located.

Statutory Dedication.

Minnesota Statute § 160.05, in part, provides: “When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.” Minn. Stat. Ann. § 160.05 (West).

The requirements of the statute are (1) use by the public and (2) maintenance at the expense of an appropriate agency of government (3) over a continuous period of at least six years. According to the Minnesota Supreme Court, the effect of Minn. Stat. § 160.05, subd. 1, is to “declare public those roads which have been used and kept in repair for a period of 6 years 1, is to “declare public those roads which have been used and kept in repair for a period of 6 years continuously.” *Leeper v. Hampton Hills, Inc.*, 187 N.W.2d 765, 767 (Minn. 1971). To satisfy the maintenance requirement, the maintenance must be of a quality and character appropriate to an already existing public road. It is not necessary that every part of a road be worked at government expense or that any particular part receive attention every year of the 6–year period. It has been established that to meet the statutory maintenance requirement, it is sufficient if maintenance is performed when necessary.

Along with maintenance, the Minn. Stat. § 160.05 requires a showing of use by the public over a continuous period of at least six years. Public use is established if the road was open to members of the public for use. Use may be by a comparatively small number of persons and still be “public use.” It is the right of travel by all the world, and not the exercise of the right, which constitutes a road a public highway,

and the user by the public is sufficient if those members of the public—even though they be limited in number and even if some are accommodated more than others—who would naturally be expected to enjoy it do, or have done so, at their pleasure and convenience. *Anderson v. Birkeland*, 38 N.W.2d 215, 219 (Minn. 1949).

Common Law Dedication. A road for public use may be established by common-law dedication which provides for dedication of land to the public if two showings are made: The demonstration of the landowner's intent, express or implied, to have his land appropriated and devoted to a public use and acceptance of that use by the public. Under a common-law dedication, a public road is established when a landowner intends, either expressly or impliedly, to have his land appropriated and devoted to public use and the public accepts the land for that use. *Bengtson v. Village of Marine on St. Croix*, 246 N.W.2d 582, 584 (Minn. 1976). Public acceptance may be shown by public travel on the road or by the acts of public officials in improving and maintaining the road.

Once the roadway is accepted by the public, the common law dedication is effective immediately. Where the purpose for which the dedication is made is restricted, the dedicated property must be used for the purpose for which it was dedicated. And the width of the right-of-way will be the width of the historically travelled road.

Among the differences between statutory and common-law dedication, however, is that no specific time period of public use and maintenance is required for a common-law dedication. All that is required is that intent and acceptance coincide, and thus dedication may be made instantly. *Wojahn v. Johnson*, 297 N.W.2d 298, 306-07 n.4 (Minn. 1980).

Cartway. One means of establishing access to landlocked property is by way of a cartway. A cartway is a form of condemnation whereby a governmental entity takes privately owned property and converts it to public use. A landowner cannot seek a cartway for a private road.

Minnesota Statute § 164.08, subdivision 2 obligates a county to establish a cartway to provide access to an owner of a tract of land who has no access to his or her land from a public road except over the land of others. *In re Hutchinson*, No. A12-2335, 2013 WL 4711202, at



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*2 (Minn. Ct. App. Sept. 3, 2013). Minnesota Statute § 164.08 authorizes the establishment of cartways under certain circumstances where a parcel 5 acres or more is without access, except over water or other another's land. A cartway may be created either by petition to the town board or dedication by private landowners. Minn. Stat. §§ 164.08, .11. A landowner who has an express easement is not entitled to a cartway. *Roemer v. Bd. of Supervisors of Elysian Twp.*, 283 Minn. 288, 291, 167 N.W.2d 497, 499 (Minn. 1969). The statute provides that a county board must establish a cartway if the petitioner meets the criteria, but that the selection of a route is a decision allocated by statute to the county board to make in its discretion. *In re Hutchinson*, No. A12-2335, 2013 WL 4711202, at *3 (Minn. Ct. App. Sept. 3, 2013).

A township by resolution can establish a cartway at least 2 rods, i.e., 33 feet, in width. A town board can select an alternative route if another is less disruptive. The county board "may select an alternative route other than that petitioned for if the alternative is deemed by the board to be less disruptive and damaging to the affected landowners and in the public's best interest." Minn. Stat. § 164.08, subd. 2 (a).

Damages are paid by the petitioner seeking the cartway to the town before a cartway is opened. Damages include the compensation, if any, awarded to the owner of the affected land, together with the cost of professional services, hearing costs, administrative costs, and other expenses incurred by a town to establish a cartway. Where a cartway isn't maintained by the town, it is maintained by the landowners sharing those expenses. The town board may determine the maintenance costs to be apportioned to each private property owner if the owners cannot agree on the division of the costs.

End of the Road. These are just a few matters to consider when faced with a literal road block. There are a number of other issues to consider in establishing legal access to real estate in Minnesota. And while sometimes it's about the journey, when it comes to real estate, it's about reaching the destination.



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