EASEMENTS: A COMPREHENSIVE GUIDE

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An *easement* is a privilege to use certain property of another in a particular manner and for a particular purpose. An easement is sometimes referred to as a *right-of-way*, and the two terms are largely interchangeable.

Easements are *affirmative* when they convey privileges on a person or owner of land to use the land of another. Examples include the privilege to lay a sewer line or cross another's property to access a public road.

Easements are *negative* when they convey rights to demand that the owner of land refrain from certain otherwise permissible uses of his land.[1] In this sense, negative easements have been described as consisting solely of "a veto power."[2] Traditional negative easements have included those created to control the flow of air, light, and artificial streams of water, and to ensure the subjacent and lateral support of buildings or land. In 2005 the Virginia Supreme Court expanded this list to include negative easements for the purpose of land conservation and historic preservation.[3] Negative easements are also known as *servitudes*.

Appurtenant or In Gross

Easements, whether affirmative or negative, are classified as either *appurtenant* or *in gross*. An easement appurtenant, also known as a *pure easement*, has both a *dominant tract* and a *servient tract* and is capable of being transferred or inherited. The dominant tract benefits from the easement; the servient tract is burdened by the easement. It frequently is said that an easement appurtenant "runs with the land," which is to say that the benefit conveyed by or the duty owed under the easement passes with the ownership of the land to which it is appurtenant.[4]

In contrast, an easement in gross, sometimes called a *personal easement*, is an easement which is not appurtenant to any estate in land, but in which the servitude is imposed upon land with the benefit thereof running to an individual. There is no dominant tract, only a servient tract. Furthermore, easements in gross, running to an individual, do not "run with the land" as easements

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[1] *United States v. Blackman*, 270 Va. 68 (2005).
[2] *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 89, 515 S.E.2d 291, 299 (1999).
[3] *United States v. Blackman*, 270 Va. 68 (2005).
[4] *Greenan v. Solomon*, 252 Va. 50, 54, 472 S.E.2d 54, 57 (1996); *Lester Coal Corp. v. Lester*, 203 Va. 93, 97, 122 S.E.2d 901, 904 (1961); Va. Code § 55-50.

appurtenant. But saying that easements in gross do not "run with the land" is not the same as saying that they are not transferable. Easements in gross may be disposed of by deed or will.[5]

Easements in gross were strongly disfavored at common law because they were viewed as interfering with the free use of land. Thus, an easement is "never presumed to be in gross when it [can] fairly be construed to be appurtenant to land."[6] For an easement to be treated as being in gross, the deed or other instrument granting the easement must plainly manifest that the parties so intended.[7] In deducing that intent, if an easement benefits the land to which it relates and enhances its value, and there is nothing to show that the parties intended it to be a personal right, the easement is presumed to be appurtenant.[8] The mere fact that an easement is not conveyed to a grantee along with his or her "heirs and assigns" is not dispositive.[9]

To illustrate an easement in gross, consider the following:

> Virginia Power will . . . reserve unto itself and its successors the following:
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> The perpetual right, privilege and easement of right of way to lay, construct, operate and maintain one or more lines of poles, towers, structures, cables, conduits, pipes and mains, together with all wires, manholes, handholes, valves, regulators, meters, attachments, equipment, accessories and appurtenances desirable in connection therewith (hereinafter referred to as "facilities"), for the purpose of transmitting or distributing electric power, for the purpose of transporting natural gas, oil, petroleum pro[du]cts or any other liquids, gases or substances which can be transported through a pipe line, and for communication purposes, over, under, upon and across the lands hereby conveyed.[10]

This easement is an easement in gross because the easement does not mention real property that is, or could be, the dominant estate. This easement benefits a company, Virginia Power, not any real property owned by Virginia Power.

How are Appurtenant Easements Created?

Courts are inconsistent with categorizing how easements may be created, and some of the categories that have been suggested in relevant cases overlap.[11] While such categorization is not precise, we will take our cue from caselaw nevertheless and discuss four traditional methods to

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[5] Va. Code § 55-6.
[6] *French v. Williams*, 82 Va. 462, 468, 4 S.E. 591, 594 (1886).
[7] *Prospect Dev. Co. v. Bershader,* 258 Va. 75, 515 S.E.2d 291 (1999)
[8] *Id.*; *Russakoff v. Scruggs*, 241 Va. 135, 400 S.E.2d 529 (1991).
[9] *Corbett v. Ruben*, 223 Va. 468, 290 S.E.2d 847 (1982).
[10] *Virginia Elec. And Power Co. v. Northern Virginia Regional Park Authority,* 270 Va. 309 (2005).
[11] For example, often the courts will suggest at a minimum easement by express grant, easement by implication, and easement by prescription. But one may ask, if an easement is not express, shouldn't all other flavors of easements fall under the category of easements by implication? Essentially, an easement by prescription is implied if certain circumstances pertain.

create an easement: *express grant or reservation, implication by necessity, prescription,* and *estoppel*.

Easements by Express Grant or Reservation

By far, an easement created by express grant or reservation is preferred by title agents and insurers because it is more ascertainable than the other methods (and thus, less risky to insure). One need only look to the words of a deed or other instrument for the details of the easement. An express easement might look something like this:

> FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, B.A. Hall (Grantor), owner of Lot 26, hereby grants and conveys unto Susan Klotz (Grantee), owner of Lot 27, and to her successors and assigns, a 200 ft. long and 30 ft. wide permanent easement and right-of-way through and within Grantor's property, as depicted on Exhibit A, for the purpose of vehicular and pedestrian ingress and egress to and from Route 28.

Notice the various elements:

- The Grantor and Grantee are adequately identified
- The dominant and servient tracts are adequately identified
- The intent to create the easement is manifest by the language "grants and conveys" as well as "permanent easement"
- The easement is appurtenant because such an easement, granting access, benefits Lot 27 and not Susan personally
- The easement is appurtenant because it is granted to Susan's "successors and assigns" and thus "runs with the land"
- The scope of the easement is adequately identified, including the easement's physical dimensions ("200 ft. long and 30 ft. wide"), the easement's duration ("permanent"), and the easement's purpose ("vehicular and pedestrian ingress and egress to and from Route 28")

This is a clear example. But what if the language under consideration is not so clear or one of the various elements described above is absent? In general, language purporting to create an easement should be strictly construed, with any doubt being resolved against the establishment of an easement.[12] However, such language need not be as picture perfect as the example above. Consider the following:

> The Baker's hereby create and establish an easement for the off-street parking of seven (7) passenger automobiles on [parcel # 1] for the use and benefit of the owner and occupants of the apartments located on [parcel # 2], said easement [described by metes and bounds],

[12] *Town of Vinton v. City of Roanoke,* 195 Va. 881, 893, 80 S.E.2d 608, 615 (1954).

> the duration of this easement to be co-extensive with the life of the building constructed [on parcel # 2] and shall terminate when that structure no longer stands.[13]

Such language has been held by the Virginia Supreme Court to be an express easement. Looking again at the various elements, a few observations can be made.

With respect to the *identity of the grantee*, an express easement need not name a grantee with absolute clarity. Rather, courts acknowledge the "ancient maxim" that a grantee need not be specifically designated by name if such grantee can be sufficiently distinguished from all others. Applying this maxim, the Court held that the grant to the "owner and occupants of the apartments" was sufficient to establish an express easement.[14]

With respect to whether the easement is *appurtenant or in gross*, appurtenancy is presumed unless the instrument makes it clear that in gross is intended. Nor is it necessary to grant an easement to a grantee's "heirs or assigns" or make the easement permanent. "One of the tests of appurtenancy is whether the easement is a useful adjunct to the property"—in other words, does the easement benefit the dominant tract? In the example above, the parking lots located on the servient tract benefit the dominant tract, despite the language that that easement was granted for the benefit of the "owner and occupants of the apartments located on [parcel #2]." The fact that the purpose of the easement is terminable does not affect it appurtenancy.

With respect to *language sufficient to manifest intent to create the easement*, let's turn to another example. A good starting point is the Virginia Supreme Court's decision of *Burdette v. Brush Mountain Estates*, LLC.[15] In *Burdette* there were three apparently side-by-side lots shown on a plat depicting a 50-foot easement traversing the southern portion of two lots with a notation on the plat stating as follows:

> 50′ PRIVATE EASEMENT FOR INGRESS, EGRESS AND PUBLIC UTILITY FOR THE BENEFIT OF *11 TAX PARCEL 27(A)40 [Brush Mountain's real property], IS HEREBY CONVEYED.

Note that this was simply a plat, not a plat of subdivision, which is discussed below under "Easements by Estoppel." Subsequent deeds referenced this plat and contained usual boilerplate language that the conveyance was "made subject to all easements, reservations, restrictions and conditions of record affecting the hereinabove described property."

The *Burdette* Court held that the notation on the plat alone did not create an easement because there was no express conveyance of an easement in the operative instruments. The Court stated that when a deed incorporates a plat by reference, the plat is considered part of the deed itself but only for descriptive purposes to establish the metes and bounds of the property being conveyed.

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[13] *Corbett v. Ruben*, 223 Va. 468, 290 S.E.2d 847 (1982).
[14] *Id.*
[15] 278 Va. 286, 299, 682 S.E.2d 549, 556 (2009).

Consequently, subsequent deeds citing the plat showing the purported easement was not enough to create the easement.

However, *Burdette* has to be read in the context of its facts. There was no platted subdivision, no developer, no subdivision declaration, and no common prior owner creating lots with access rights-of-way shown on a comprehensive recorded plat of the division. Indeed, the Court in *Burdette* went out of its way to cite in footnote 2 that:

> The case before the court is not analogous to those instances when we held that purchasers of subdivision lots acquire private easements over the rights-of-way that are shown on the subdivision plats. * * * Our decision today should not be viewed as casting doubt on the holdings in such cases.

Another case worth mentioning along these lines is *Beach v. Turim*.[16] *Beach*, although it involved a plat of subdivision, was both pled and tried on the specific allegation that there was an express easement. The issue of whether an easement by estoppel or implication existed was not raised. Consequently, the analysis of *Beach* necessarily follows *Burdette* (an express easement case) not those cases involving easements by estoppel by plats of subdivision.

In summing up the relevant facts and holding of *Beach*, the Court stated:

> The deed in this case merely states "easements are hereby created as shown on the attached plat." This Court has held that "[w]hen a deed incorporates a plat by reference, the plat is considered part of the deed itself but only for descriptive purposes to establish the metes and bounds of the property being conveyed." *Burdette*, 278 Va. at 298, 682 S.E.2d at 555.
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> The deed in this case does not state to whom the easement is granted. Also, the purpose of the easement is, at best, ambiguous. The plat merely describes the location of the easement, on Lots 1–6, 507, 508 and 509 only. To constitute a grant, the instrument of conveyance must sufficiently describe the grantees "so as to be distinguished from all others." *Corbett v. Ruben*, 223 Va. 468, 472, 290 S.E.2d 847, 849 (1982) (internal quotation marks omitted). The deed in this case, including the plat, fails to identify to whom the easement is granted. Although it describes the location of the easement, there is nothing that states that the easement is granted to Lot 510.[17]

Distinguish *Burdette* and *Beach* from *Strickland v. Barnes*.[18] In *Strickland*, the relevant deed stated, "This deed is made subject to the easements and restrictions shown on the said plat." This was held to be sufficient to establish an easement. In *Strickland*, the "subject to" language was more indicative of intent as to the boilerplate "subject to" in *Burdette*. In *Strickland*, the dominant

[16] 287 Va. 223, 754 S.E.2d 295 (2014).
[17] *Beach*, 287 Va. at 229, 754 S.E.2d at 298 (2014).
[18] 209 Va. 438164 S.E.2d 768 (1968).

estates were identifiable on the subject plat; in *Burdette*, they were not so that one could not identify the burden on the servient estate.

With respect to the *scope of the easement*, such as its dimensions, purpose, and duration, not all elements need be present. A conveying instrument may create an easement without defining its dimensions.[19] If the purpose of the easement is not identified, the dimensions of the easement are inferred by the intent of the parties, evidenced by the circumstances pertaining to the parties and the land at the time of the grant.[20] If the purpose of the easement is stated, then the dimensions of the easement may be inferred "to be such as are reasonably sufficient for the accomplishment of that object."[21]

With respect to an easement's *purpose*, it is worth noting that the landowner of the servient tract retains the right to use his or her land in ways not inconsistent with the uses granted in the easement.[22] An easement can even be exclusive. But even so, there must be something "left over" for the owner of the servient tract. An exclusive easement "for all purposes" is considered a transfer of a fee simple interest and is not favored in Virginia.[23]

Necessity

In contrast to an *express* easement, an easement by necessity is *implied*. The elements of easement by necessity are as follows: (1) the dominant and servient estates were derived from a common title (in other words, at some time in the past, they belonged to the same person; (2) the easement is reasonably necessary to the enjoyment of the dominant estate; and (3) the dominant estate became landlocked at the time of the severance of the two estates and there is no means of ingress and egress other than over the servient estate.

In *Palmer v. R.A. Yancey Lumber Corporation*,[24] a case of first impression, the Virginia Supreme Court explained the rationale behind this rule as follows:

> A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses.[25]

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[19] *Waskey v. Lewis,* 224 Va. 206, 211, 294 S.E.2d 879, 881 (1982); *Cushman,* 204 Va. at 252, 129 S.E.2d at 639.
[20] *Id.*
[21] *Hamlin,* 197 Va. at 664, 90 S.E.2d at 834.
[22] *Walton v. Capital Land, Inc.,* 252 Va. 324, 477 S.E.2d 499, 501 (1996).
[23] *Walton,* 477 S.E.2d at 501.
[24] 294 Va. 140, 803 S.E.2d 742 (2017).
[25] *Palmer*, 294 Va. at 153, 803 S.E.2d at 750.

At issue in *Palmer* was the second element—whether the easement was reasonably necessary to the enjoyment of the dominant estate. In *Palmer*, a dominant estate owner (Yancey) had an easement by necessity over a servient landowner (Palmer) for ingress and egress. Yancey sought to widen the existing easement by necessity to accommodate larger vehicles for harvesting the timber on the Yancey property. In upholding Yancey's petition, the Court in *Palmer* discussed this element reasonableness at length:

> In establishing an easement by necessity, "[t]he fact of the necessity" thus becomes an issue of "great importance in determining whether an easement should be implied." Under Virginia law, it has long been the rule that the "necessity" is "not a physical or absolute necessity but a reasonable and practicable necessity." By adopting this rule, this Court aligned Virginia with the majority rule.
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> Under this majority rule, moreover, use of an easement by necessity is not limited to what was associated with the purposes for which the dominant estate was adapted at the time of the easement's creation—i.e., the time of severance from the servient estate. As we explained in *Keen*, "[t]he prevailing view in this country is that a way of necessity is not limited to such use of the land as was actually made and contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time." In short, the "scope" of the easement by necessity "may increase to meet the increased necessities of the property."
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> Such an increased necessity may require increasing the "sort of and quantity of traffic over" the easement, as occurred in *Keen* (discussed *infra*).
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> The increased necessity may also require widening the easement, as addressed by the Court of Special Appeals of Maryland in *Beck*. In most jurisdictions, the court explained, "a right-of-way of a specified width generally does not grow as the size of vehicles, etc., increases. The same is not true for implied ways of necessity." The court in *Beck* noted with approval that "[f]oreign jurisdictions generally agree that the scope of ways of necessity may be increased." Accordingly, the court there held that the scope of an easement by necessity, including its width, "may reasonably increase with the dominant estate's necessary and reasonable needs as those needs exist, present and future." Based on that holding, the court further held that the trial court's ruling approving an increase in the width of an existing easement by necessity was not error.
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> Applying the "reasonable necessity" rule in *Keen*, we affirmed the trial court's judgment in favor of the defendant/lessee coal mining company, holding that it had the right to haul coal over the road crossing plaintiff's property, the servient estate, under an easement by necessity. We determined that the record supported the trial court's finding that the removal and transportation of the coal was reasonably necessary for the beneficial use of the dominant estate on which the company was mining the coal. Significantly, this

> determination was not altered by the fact that at the time of severance the properties comprising the dominant and servient estates were "in a state of nature, and there was no roadway in actual use" over the plaintiff/servient landowner's property. We ultimately concluded that the trial court, in balancing the interests of the separate estates, correctly found that the company's use of the easement over plaintiff's property "did not go beyond what was reasonably necessary" for transporting the coal.
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> The balancing of the interests of the dominant and servient estates provides the limiting principle for making the reasonable necessity determination. This limiting principle, which was implicit in *Keen* but not expressly stated, has been articulated in its application in numerous jurisdictions as follows: an easement by necessity is "coextensive with the reasonable needs, present and future, of the dominant estate," and "varies with the necessity, insofar as may be consistent with the full reasonable enjoyment of the servient estate." This limitation is cogently expressed by the Michigan Court of Appeals in *Schumacher* as follows: "The inference that the grantor intended to allow for modification of the easement as technology develops is consistent with the essence of easements by necessity—allowing individuals to make reasonable use of their property, so long as it does not unduly burden the servient estate."[26]

Prescription

Establishing an easement by prescription is similar to obtaining title to property by adverse possession. A claimant must prove that his or her use of the roadway was adverse, under claim of right, exclusive, continuous, uninterrupted, and with knowledge and acquiescence of the owner of the land over which it passes, and that such use has continued for a period of at least twenty years.[27]

Usually, an easement by prescription is established over land wholly owned by another. But that is not always the case—sometimes, a prescriptive easement can be established over land that is jointly owned, such as a common driveway that straddles the property line of two adjacent properties.[28]

Estoppel

Rooted in ideas of fairness, "estoppel" is a principle that precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. Applying that principle to easements, an easement by estoppel may be created by a seller who actually or constructively makes representations as to the existence of an easement that purportedly runs through his own land for the benefit of the land he is selling to a buyer. Once that sale is made,

[26] Id.
[27] *Craig v. Kennedy*, 202 Va. 654, 657, 119 S.E.2d 320, 322, 323 (1961).
[28] *Causey v. Lanigan*, 208 Va. 587159 S.E.2d 655 (1968).

the seller cannot thereafter deny the existence of such an easement. He is "estopped" from doing so out of fundamental fairness to the buyer.[29]

For example, in *Prospect Development Co., Inc. v. Bershader*,[30] purchasers paid $500,000 for a lot based on the developer's representation that Outlot B would remain as "preserved land" without construction, thus preserving purchasers' view and privacy. Because purchasers relied on such representations in effecting their purchase, the developer was estopped from subsequently building on Outlot B. Or, to put it another way, purchasers obtained an implied negative easement by estoppel over Outlot B.

Perhaps the most common application of easement by estoppel arises in the context access easements within subdivisions. In short, access easements may be created by reference to a plat denoting the same. In *Fugate v. Carter*,[31] the Virginia Supreme Court articulated the law like this:

> When lands are laid off into lots, streets and alleys and a map or plat thereof is made and recorded, all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of said lots.[32]

Later, the Court more fully analyzed relevant case law in *Lindsay v. James*.[33] In *Lindsay*, there was a subdivision called Ubermeer that had blocks numbered 1 through 16 (inclusive) with 475 lots altogether (with certain areas laid out on the plat as "streets", "alleys," and "ways"). The suit was brought to compel the removal of buildings and other obstructions across and wholly blocking a "20-foot way." The Court in *Lindsay*, reviewing the facts in *Fugate* and other relevant cases, reiterated the rule as follows:

> The owner of a lot, as shown by a recorded plat, acquires the right to the use of such streets and alleys as are necessary to the enjoyment and value of said lots. This is settled law in Virginia.[34]

The Court explained that the reason for the rule is based in estoppel:

> There are many cases which hold that a lot owner who purchases under a recorded plat takes as appurtenant to his lot the right to the use of all of the streets and alleys there shown. * * * In the proper application of this rule the principles upon which it rests must be

[29] *Sullivan v. Brown*, 51 Va. Cir. 271, 2000 WL 145341 (2000).
[30] 258 Va. 75515 S.E.2d 291 (1999).
[31] 151 Va. 108, 144 S.E. 483 (1928).
[32] *Fugate*, 151 Va. at 112, 144 S.E. at 484.
[33] 188 Va. 646, 653, 51 S.E.2d 326, 329 (1949).
[34] *Lindsay*, 188 Va. at 655, 51 S.E.2d at 330.

> constantly remembered. They are based upon no covenants, but grow out of the doctrine of estoppel, and so are written by equity into each contract of sale.[35]

In affirming the rights of the property owners to use the "20-foot way," the Court in *Lindsay* stated as follows:

> The principles established by the Virginia decisions may be summarized as follows: (1) When land is subdivided into lots, streets and alleys, and lots are sold and conveyed by reference to the plat, without reservation, the conveyances carry with them the right to the use of such streets and alleys as may be necessary to the enjoyment and value of said lots; (2) purchasers acquiring such lots are presumed to be interested in all streets and alleys shown on the plat on which their lots are located; (3) but this is a presumption of fact and may be rebutted by showing that the easement in the way in question is not necessary to the enjoyment and value of said lots.[36]

In *Ryder v. Petrea*,[37] there was a 24-lot subdivision, the plat of which showed a right-of-way extending in a northern direction from Route 620 that abutted the lot in issue on a side apparently opposite from Route 620. Other land owners objected to the use of the right-of-way by the lot owner of the lot fronting on Route 620 because the lot owner, "Ryder," had no easement over the right-of-way since his lot fronted on Route 620. The *Ryder* Court, relying on *Lindsay*, held as follows:

> We note that Townes' plat shows the easement as a right-of-way and not a street or alley. In our opinion, that makes no difference. A "street" is a "way," and a "way," in a technical sense, is a right of passage over land. A "right of way" is a term used to describe a right belonging to a party to pass overland of another. Accordingly, purchasers of subdivision lots may acquire the same private easements of passage over "rights of way" that are shown on a subdivision plat as they would acquire over streets and alleys that are shown on such a plat.
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> In *Lindsay*, after indicating that there were conflicting views "as to the extent of the easement in the streets and alleys created by grant with reference to a map or plat," we said that [the view] adopted in this jurisdiction, limits the extent of easements of this nature to such streets and alleys shown on the plat as are reasonably beneficial to the grantee, and a deprivation of which would reduce the value of his lot. *In any event, such grantee is entitled to an easement in streets and alleys adjoining his lot.*[38]

Note once again how the Court in *Ryder* articulated the principals of estoppel as a justification for the easement in question. In addition to estoppel, sometimes the easements created by a map or

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[35] *Id.*

[36] *Lindsay*, 188 Va. at 656, 51 S.E.2d at 331.

[37] 243 Va. 421, 416 S.E.2d 686, 8 Va. Law Rep. 2761 (1992)

[38] *Ryder*, 243 Va. at 423-424, 416 S.E.2d at 688 (emphasis added) (citations omitted).

plat are referred to as easements implied by map or boundary reference. Dean Gerald Korngold has written that:

> Easements can also be implied by map reference. Where a grantee receives a deed referring to a map or plat which designates a common area such as a street or park, the grantee will have an easement in the common area as shown on the map. This is an implied easement based only upon a reference to the map and without language of grant, distinct from the creation of an express easement by statements in a plat. Moreover, these are private easements held by individuals as opposed to rights held by the general public through dedication.[39]

How are Easements Terminated?

Even if an easement is created to be perpetual, it can still come to an end. There are five methods to terminate an easement worth discussing: *express termination*, *abandonment*, *cessation of necessity giving rise to easement by necessity*, *cessation of the easement's purpose* and *merger of dominant and servient estates.*

Express Termination

"The grantor giveth, and the grantee taketh away." In other words, if the grantor of an easement can by express language create an easement for the benefit of a grantee, the grantee by similar express language can terminate the easement. And again, express termination is preferred by title agents because it is more ascertainable than the other methods of termination (and thus, less risky to insure).

Termination Abandonment

Unlike *express termination*, which relies upon words, termination of an easement by *abandonment* relies upon actions. As explained by the Virginia Supreme Court in *Hudson v. Pillow*, 261 Va. 296, 541 S.E.2d 556 (2001), the party claiming abandonment of an easement has the burden to establish such abandonment by clear and unequivocal evidence. There must be nonuse of an easement coupled with certain acts. Such acts must prove one of two things: (1) an intent to abandon the easement, or (2) adverse use by the owner of the servient estate and acquiesced in by the owner of the dominant estate. If the party asserting abandonment relies upon the second option, that adverse use must continue for a period sufficient to establish a prescriptive right. Mere nonuse will not suffice to establish an abandonment.

In *Hudson*, the Court held an easement was terminated by abandonment when the nonuse of the easement was demonstrated by the overgrowth of brush and large trees. Adverse use by the owner of the servient estate was demonstrated by the fact that he locked the gates to the entry point of the

[39] Gerald Korngold et al., *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes*, § 3.21 (2d Ed. Juris Publishing 2004) at 84-85.

easement and demanded permission of the dominant estate owners to use the easement. Acquiescence of the owner of the dominant estate was demonstrated by the fact that they agreed to ask for such permission before using the easement.

Cessation of Necessity Giving Rise to Easement by Necessity

If an easement is created by necessity, the easement ceases when the necessity ceases. Recall in the discussion above regarding creation of easements by necessity, the example given in *Palmer v. R.A. Yancey Lumber Corporation*: a dominant estate owner (Yancey) had an easement by necessity over a servient landowner (Palmer) for ingress and egress. Yancey sought to widen the existing easement by necessity to accommodate larger vehicles for harvesting the timber on the Yancey property. Suppose, however, that after this court decision, a public highway was developed that abutted the dominant estate in this case. The easement for ingress and egress over the servient estate would cease.

Cessation of the Easement's Purpose

When an easement has been created for a specific purpose, it comes to an end upon the cessation of that purpose, not the mere fulfillment of that purpose.

For example, in *American Oil Co. v. Leaman*,[40] the deed stated that an "easement of right of way" had been granted "to be used . . . as a means of ingress and egress . . . out to the public highway known as Goodwyn's Neck Road." The public highway the easement was created to reach was later permanently closed by the county. Another new highway was opened, but the new highway did not connect with the easement, turning the easement into a cul-de-sac. Because the easement's purpose was to provide access to a highway, the easement was extinguished when the highway was closed because the easement could no longer serve its purpose.

In *Pyramid Development v. D & J Associates*,[41] a deed the granted an easement "to use in common . . . spur tracks and sidings, and so much of the property . . . abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed . . . free and convenient access to and use of the said spur tracks and sidings."[42] When the rail service was discontinued, the purpose of the easement ceased to exist and was extinguished.

Distinguish these examples from *Old Dominion Boat Club v. Alexandria City Council*[43] in which a deed provided for an easement across Wales Alley to provide more easy communication with the public main streets. Wales Alley then changed to a public street. The Court held that this did

[40] 199 Va. 637, 101 S.E.2d 540 (1958)
[41] 262 Va. 750, 553 S.E.2d 725 (2001)
[42] *Id.* at 755, 553 S.E.2d at 728.
[43] 286 Va. 273749 S.E.2d 321 (2013)

not result in a cessation of the purpose of the easement; it merely facilitated the easement in continuing to fulfill its ongoing purpose.

Merger of Dominant and Servient Estates

As stated at the beginning, the fundamental feature of an appurtenant easement is a dominant tract, which benefits from the easement, and a servient tract, which is burdened by the easement. When both tracts are owned by the same owner, having the same estate in each, the easement is extinguished.[44]

[44] *Read v. Jones*, 152 Va. 226, 146 S.E. 263 (1929).