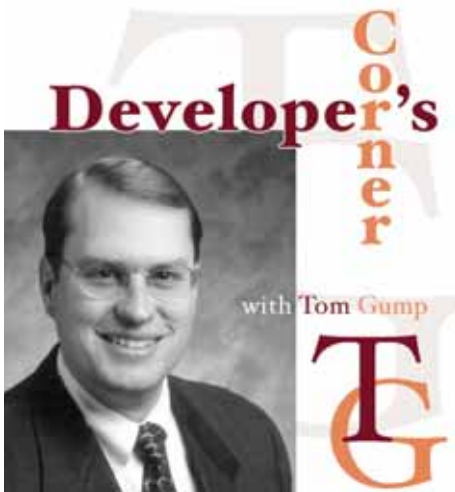




Easements made easy: Their benefits and burdens

Developers should examine implications



by **Thomas Gump and Laura Krenz**



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Laura Krenz

Easements are often disregarded or overlooked, but they are an important consideration in any real estate development. Easements are binding agreements impacting the use of land, and as a beneficial tool, easements help the developer connect the development project to public access routes and utility systems.

Easements can also be used by the developer to satisfy surface drainage

and ponding requirements, coordinate temporary construction activities, establish permanent retaining walls, entrances or signage monuments and provide for a variety of other rights. Prior to acquiring real estate for a project, it is important that the developer carefully examine title to determine whether there are any easements that limit or prevent the proposed development.

Easements in general

Easements are historic and well established interests in land. By definition, an easement is the right to use the land of another for a limited purpose.

There are different types of easements. One type of easement is an appurtenant easement. An appurtenant easement benefits a particular parcel(s) of land. For example, a driveway easement is an *appurtenant easement*. It allows the owner and all future owners of a particular parcel to access their property over a specific area of an adjoining property.

Another type of easement is an easement in gross. An easement in gross is personal to the holder and is not connected to a particular parcel. An example of an easement in gross is an electric utility line benefiting the power company.

Easements can be created by express agreement, implication or prescription. An express easement is established by the grant of a certain right or the reservation of that right in a conveyance. An express easement may be created by deed, plat or declaration and often is created by a separate easement

agreement.

Easements by implication and prescription are more complicated to establish, as they both require a court decision to be enforceable. An easement by implication requires a finding that an easement was intended to be created due to necessity, dedication or ambiguous language in a conveyance document. Creating an easement by prescription is akin to claiming a right through adverse possession.

The benefit of easements

Imagine you locate the perfect parcel(s) of real estate. The seller wants to sell only a portion of their land. The land available for purchase is not adjacent to a public street, does not have utilities and will require surface storm water drainage into a pond on adjoining property. For the development to be successful, you will need to find access, utility connections and gain the legal right to allow the drainage.

Assuming those rights are available from the seller, it may be as simple as negotiating easement terms in the purchase agreement. However, if they are not available, or if there are different or better routes, you may be required to deal with third parties. Those third parties typically require compensation and other considerations in granting you the right to use their property.

Therefore, it is important to build in contingencies in any purchase agreement to accommodate the resolution of those issues.

There are a variety of considerations in creating an easement. It can be perpetual and last indefinitely, or it can be temporary and expire after a certain

period of time. An easement can provide for either exclusive or non-exclusive use. Common considerations include assigning to the appropriate party the responsibility and expense for maintenance, repair and replacement for the current or future improvements located in the easement area. Indemnification and insurance provisions are common to address the potential liability arising from the use of land. Default and remedy provisions are also typically included in an easement.

Ideally, when acquiring an easement interest, the beneficiary should conduct the same type of due diligence in acquiring any real estate interest. At the very least, confirm the ownership and correct legal description of the easement area.

If there is an existing mortgage encumbering the easement area, the lender should provide its consent to the easement in a writing attached to the easement. This is necessary in order for the easement to be enforceable in the event of a foreclosure. Other considerations may include reviewing existing environmental conditions and determining whether the easement improvements will be subject to governmental approval or restrictions.

The burden of easements

Again, imagine you have located the perfect development parcel. In conducting an examination of title you discover that there is a blanket easement in favor of a utility company that prohibits the construction of any building or improvement on the property. Alternatively you discover there are multiple utility easements on the property and none match the area where the utility facilities are actually located. Typically, you will be able to work with the utility company to confine and restrict the easement to the areas conducive to the new development.

However, there are some easements that may not be so easy to address. For example, let's say you find that there is a natural gas pipeline in the middle

of your proposed building. You will need to either convince the pipeline owner to allow you to pay to have the pipeline relocated, or you will need to design the project to comply with the terms of the pipeline easement.

Another example of a difficult easement to resolve is a conservation easement. A conservation easement is typically conveyed to a non-profit conservation organization or governmental entity for the purposes of limiting the use of land (usually to promote environmental interests). Such an easement will typically restrict and often prohibit any development. Properties subject to a conservation easement are typically not amenable to development unless the duration of the easement is scheduled to expire or you have a valid situation for condemnation.

If there are publicly dedicated easements, such as streets, you will need to obtain governmental approvals to vacate such easements. Typically the approvals and necessary vacation resolution are obtained during the platting and site plan approval process.

If private easements are determined to interfere with a development, the developer will need to consider a variety of options. One approach is to negotiate a termination. If the easement is extremely old, it may be extinguished under the Marketable Title Act, but you will need to convince a title company to adopt this resolution in order to be able to provide title insurance to the lender and subsequent purchasers of the end product of the development.

Alternatively, the developer may expand the development to include the benefited parcel and terminate the easement under the doctrine of merger. Under certain circumstances, an easement may also be terminated by abandonment, which not only means non-use but also requires a court's factual determination that there was an intention to abandon the right. An easement may also be extinguished through a condemnation action under certain limited circumstances.

Easements at Stone's Throw

Like many developments, Stone's Throw in northwestern Hennepin County required a variety of road and utility easements. By working cooperatively with the city of Rogers and the neighboring property owners, the Stone's Throw developer was able to obtain easements that will allow a new road to eventually be built to meet the city's needs for better traffic flow. These easements also allow for the installation of utilities.

Stone's Throw also acquired an access easement that allows the city to construct a water tower on a portion of the development prior to the developer purchasing the parcel where the tower will be located.

Stone's Throw also addressed existing easements. For example, the developer had to design around a gas pipeline running diagonally through the northern part of the assemblage.

In summary

Easements are an important tool for the developer to use in piecing together the parts of the development puzzle. Rarely is a development perfectly situated to allow immediate development without satisfying some missing part.

Conversely, an existing easement may prevent or limit your ability to develop a project as you intend. It is important for the developer to understand and address existing easements and plan the development accordingly.

Tom Gump, an attorney and development principal with The Beard Group Inc., the developer of Stone's Throw, invites comments and questions about this column and the development. He can be reached via e-mail at tomg@beardgroupinc.com.

Laura Krenz is a partner at the Minneapolis law firm of Lindquist & Venum and is one of The Beard Group's counsel for the Stone's Throw project. She is certified by the MSBA as a real property law specialist and practices in the area of real estate development, financing, conveyancing and leasing.