

Easements and Their Retracement Understanding, Identification, & Retracement

Compiled
by

Knud E. Hermansen
P.L.S., P.E., Ph.D., Esq.

The failure of practitioners to identify, locate, and delineate easements is a major source of title problems, liability for the surveyor, and the cause of problems for clients. This seminar will cover the research, identification, allowable use, creation, extinguishment, location, and delineation of easements.

Knud E. Hermansen is an attorney, professional engineer, and professional land surveyor. His education includes a Ph.D. in Civil Engineering from the Pennsylvania State University and a J.D. (Doctorate in Law) from West Virginia University. Knud is a retired professor from the University of Maine, Surveying Engineering Technology program. He is a licensed surveyor, engineer, and attorney. He operates a consulting firm offering surveying, engineering, and legal services. He is an author or co-author of numerous books and articles that can be found at:

<https://umaine.edu/svt/faculty/hermansen-articles/>

Knud Hermansen
P.L.S., P.E., Ph.D., Esq.
8030 SE Shenandoah Drive
Hobe Sound, FL 33455
knudehermansen@gmail.com
207-631-1541

Definitions

Easement — A right to use the land of another. In the case of a negative easement (servitude), the easement prevents the use of land in a manner that would otherwise be lawful. An easement is often called a right-of-way but not all right-of-ways are easements.

- Easements are a non-possessory estate, they are an encumbrance on the fee simple title.
- Easements generally allow mutual use by both the dominant and servient tenement so long as the servient tenement does not interfere with the dominant tenement's use.
- Roads, for the most part, are easements devoted to access and travel, although not all roads are easements.
- Easements can be and frequently are co-located. For example, an utility easement could occupy the same location as a drainage easement.

Encroachment — An illegal intrusion or invasion onto the property or right of the owner causing a diminution in value.

Covenant — A promise between two or more persons respecting the use of land. A covenant may give rise to an easement but not all covenants are easements.

License — A personal privilege to do some act on the land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor and is not assignable.

Profit-a-Prendre (a.k.a. Right of Common) — A right to take or make use of the soil, profits of the soil, or produce of the land (e.g., logging, mining, drilling, etc.)

Servitude — A servitude is a burden upon an estate. Under the common law a "servitude" refers to a burden while an "easement" refers to a benefit or advantage.

Easement "Parts"

An easement is composed of a dominant tenement and servient tenement.

Dominant Tenement — The Dominant Tenement is the property (appurtenant easement) or person (easement-in-gross) entitled to enjoy or use the easement.

Servient Tenement — The Servient Tenement is the property that is burdened by the easement.

Correlative Rights

Every easement has correlative rights or rights that go with the easement. They may be expressed or implied. Implied rights include any acts or actions that are ordinary and reasonable for the enjoyment of the easement. For example, the right to enter upon property and dig in order to install, maintain, or remove pipe in a sewer easement.

- The right to install utilities in an access easement must be express after 1990.
- Correlative rights often depend upon the relationship of the parties (e.g., stranger, servient/dominant tenement, and co-users)

Classifications

Easements may be classified in to numerous categories. From a legal perspective there are three important classifications:

Affirmative v. Negative Easement — Almost all easements are affirmative easements. A negative easement is often classified as a servitude. However, not all servitudes are negative easements. This classification is important to determine rights and remedies.

Affirmative Easement — An easement allowing the use of the land by another.

Negative Easement — An easement that prevents the owner from using their land in a manner that would normally be lawful. A negative easement does not ordinarily give the right of entry to some other person.

Appurtenant v. Easement-in-gross — The determination whether an easement is an appurtenant easement or easement-in-gross is usually necessary to perform an overburdening analysis and to determine if the easement passes with the dominant tenement's title.

Appurtenant: An easement appurtenant is an incorporeal right which is attached to a superior right and passes as an incident thereto. It inheres in the land to which it is attached, is necessary to its enjoyment, cannot exist separate and apart therefrom, and passes to the heirs or assigns of the owner of the land. An easement is presumed to be appurtenant unless the contrary is apparent or clearly expressed.

- An appurtenant easement is incidental to the fee simple title and may be conveyed with the fee-title without mention.
- An appurtenant easement may only be used for purposes of the appurtenant parcel and not necessarily the parcels owned by the owner of the appurtenant parcel.

Easement-in-gross: An easement-in-gross is a mere personal interest in or right to use another's land, without being exercised in connection with the occupancy of the land.

- Ordinarily, an easement-in-gross is not assignable or inheritable.

Public v. Private — There are numerous differences in the law between public and private easements, especially as the law pertains to roads.

Public Easement — An easement that any or all members of the public may use at their pleasure. Most public easements exist as roads although there are public sewer easements, water easements, and many others. There are generally three types of public road easements:

- State
- County
- Municipal

Private Easement — An easement that may be used by one or more persons but less than the public at large.

† Note: A strip of land devoted to road may be burdened with both a public and private easement.

Recognized Methods of Creation

- Express — e.g., Grant, reservation, or covenant
- Estoppel
- Implied
 - Necessity
 - Quasi
 - Call as Boundary
 - Subdivision and Sale
- Common Law
 - Navigable Waters
 - Cemeteries - Right to access family plots
 - Lateral Support - Adjacent property cannot be excavated so as to cause collapse of support on surrounding property.
 - Drainage - Water in same quantity and quality
 - Covenants — In some cases, covenants may be construed as negative easements.
- Condemnation
- Dedication
- Prescription

Estoppel

- Acts, declarations, silence
- Induces another
- in reasonable reliance
- to act or not act in a reasonable manner
- reliant party's rights are jeopardized

Easement by Prescription

- Uninterrupted
- Open and notorious
- Actual
- Hostile, i.e. an invasion that continues without first having obtained permission or after permission is expressly repudiated
- Exclusive use
- Continuously as the user's convenience and business needs require
- Without physical interruption by the servient estate or their agent (s)
- Under a claim of right which may be inferred from knowledge of the record owner
- Statutory period, with or without tacking (privity, blood, or estate)
- Definite line of travel
- Substantially the same use and location
- Over lands of a private party and not government

- Not a way of necessity
- For a purpose not for light or air

Quasi Easement

- Existing at the time of the grant
- Apparent
- Continuous
- Necessary with strict necessity required for a reservation

Implied by Call in Description or Depiction on Plan

- Physically existing or covenanted
- Shown or described on deed, plan, or description
- Owned by grantor
- Not expressly repudiated

Easement by Necessity

- Reasonable necessity at time of severance
- Across land of the grantor (heirs and assigns)

Methods of Extinguishment

- Abandonment by Clear Manifestation — Clear manifestation of abandonment by acts or declarations of the servient tenement or dominant tenement. Abandonment of public easements may occur with long standing non-use and non-maintenance.
- Condemnation or appropriation – Where a public agency has taken the easement for the public good.
- Discontinued — Where the public agency has expressly terminated all or part of the public easement.
- Express — Release of the easement from the dominant estate to the servient estate.
- Express Condition — Where an easement has been created subject to condition and the condition has been met. The condition may be expressed in the document of creation or implied such as the case where an easement by necessity is terminated because an express easement is obtained.
- Foreclosure — The lender is able to sell the property in the same condition as the property existed at the time of the original mortgage.
- Forfeiture for Misuser — Misuse where the extinguishment is the appropriate remedy
- Non-Use Alone — This method is limited to paper streets and prescriptive easements.
- Obsolescence — The particular purpose of the easement ceases to exist or becomes impossible for accomplishment (e.g., booming rights).
- Part Destroyed — Where the servient tenement has been destroyed or the dominant tenement has been destroyed the easement is extinguished because there is nothing for the easement to act for or upon. This would be the case where the owner dies and had an easement-in-gross.
- Petition — Citizens may petition for the vacation of public roads.
- Reverse Prescription or Adverse Use — Alterations or obstructions by servient owner for a period, rendering the easement's use impossible.
- Statute of Limitation or Conditional Period -
- Unity of Title or Merger — Where there has been merger by unity of title between (sometimes said to be confusion of) the servient and dominant tenements.
- Vacation — Often associated with paper streets. Vacation occurs when the public agency rejects the offer of implied dedication.
- Abandonment — Where there is a clear and unmistakable action that suggests the easement will no longer be used. (Straightening a curve on a public road, pulling up the railroad tracks, the dominant estate permanently blocking their easements, etc.)

Easement Scenarios

Scenario 1:

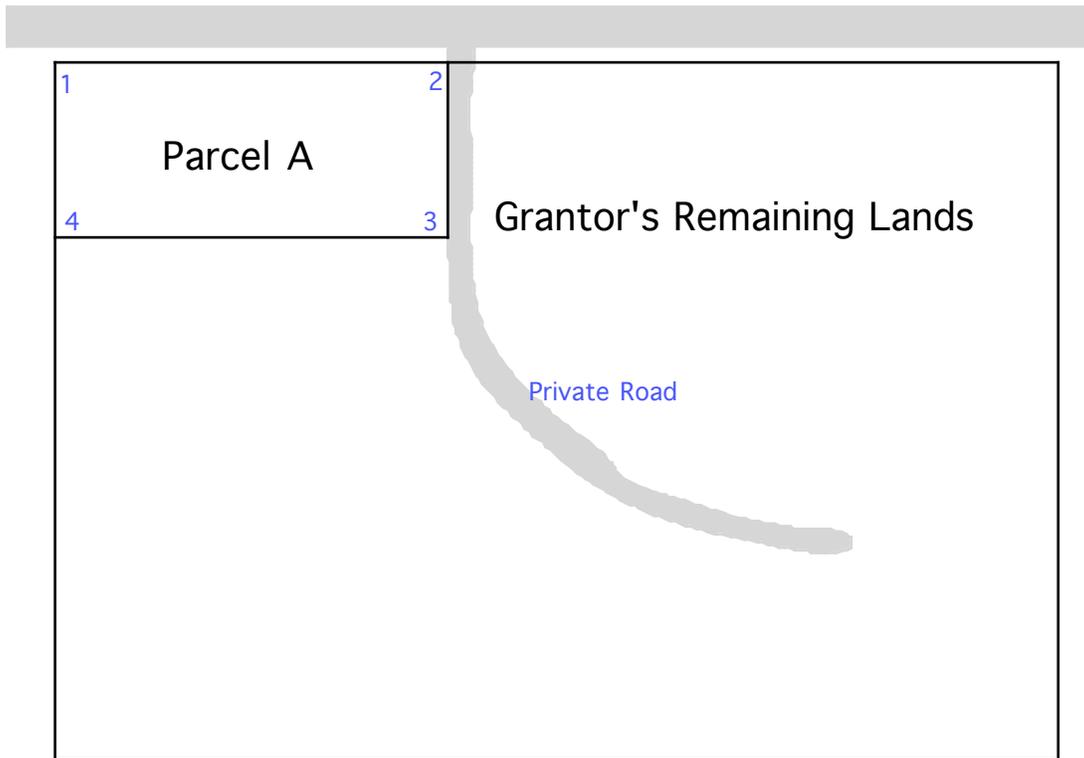


Background: Wonder Acres was created in 1910, the developer sold all the lots by 1912, the developer recorded the plan in 1913, and the municipality accepted the roads in 1914. In 1998, after many years of no maintenance, the city officially vacated Oak Street.

Questions:

1. Does the owner of Lot 18 have the right to use Oak Street after it was vacated?
2. Does the owner of Lot 4 have the right to use Oak Street after it was vacated?
3. What right did the City have in Oak Street (fee-simple title or an easement)?
4. Where should Lot 4's boundary be located after the City Vacated Oak Street?

Scenario 2:



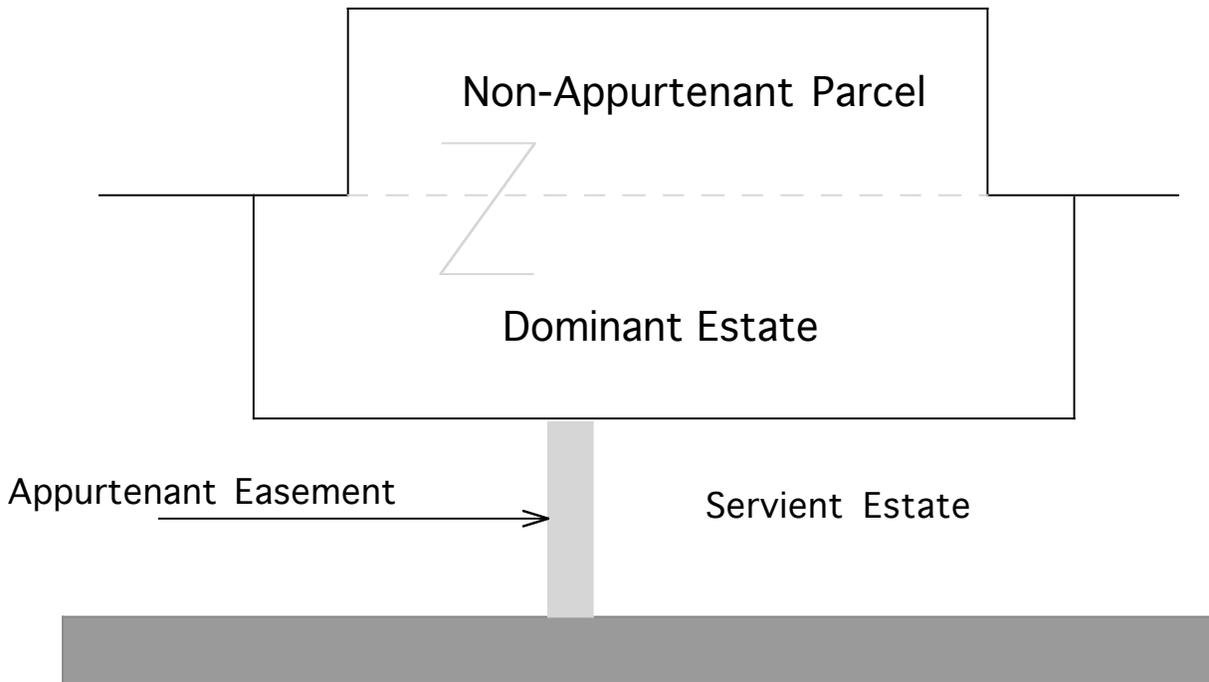
Background: Parcel A was sold to the present owner in 1976. The grantor owns the land surrounding two sides of Parcel A and has a private road going from the public road to the grantor's residence located on the remaining lands. The description for Parcel A is the following:

Beginning at a pin; thence $N89^{\circ}10'30''E$ 200 feet to a private road; thence along the aforesaid road 100 feet; thence $S89^{\circ}10'30''W$ 200 feet to a pin; thence $N00^{\circ}49'30''W$ 100 feet to the point of beginning. Containing 20,000 square feet.

Questions:

1. Does the owner of Parcel A have the right to use the private road located to the east of Parcel A?
2. Where is Parcel's A easterly boundary located?

Scenario 3:



Background: The predecessors in title to the servient estate sold a parcel and easement to the predecessors in title (Dominant Estate). Recently, the owner of the Dominant Estate bought another parcel (Non-Appurtenant Parcel) and plans to develop both parcels. The original grant of the easement had the following wording:

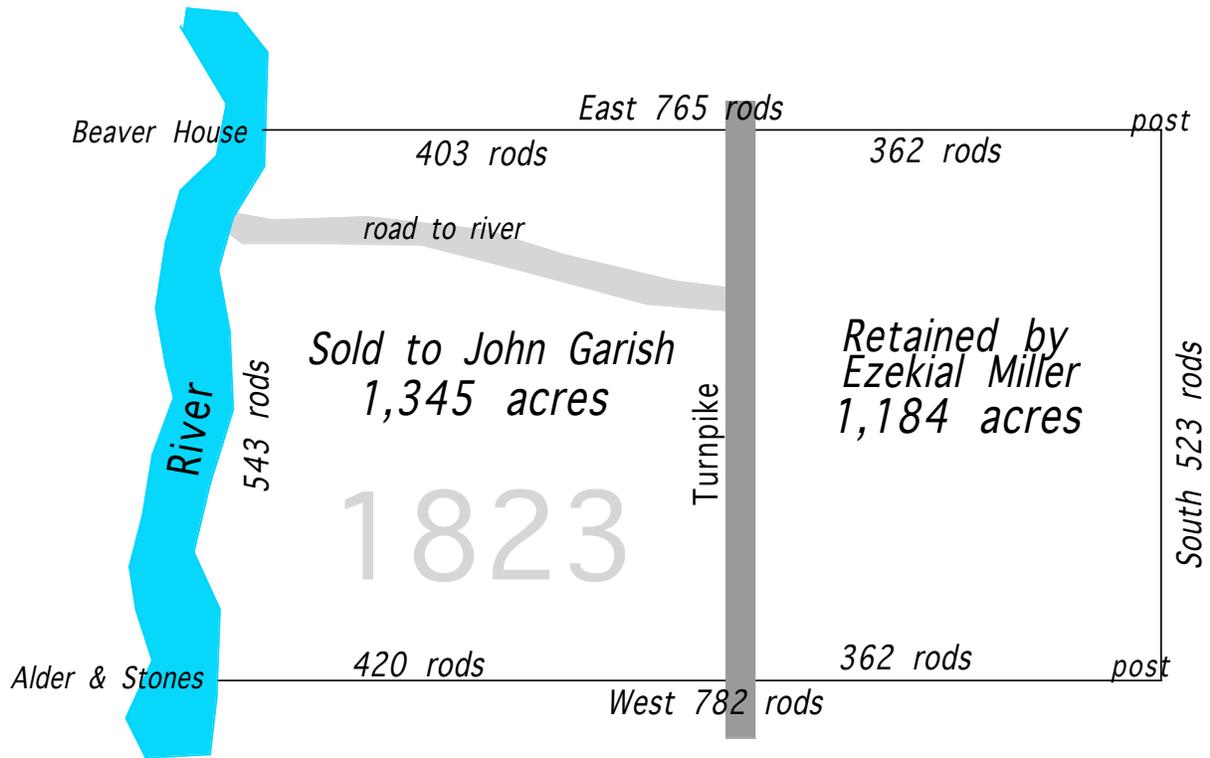
Together with a easement for access with a width sufficient to pass with wagon and team. Marston to Jones, 19 March 1897

Questions:

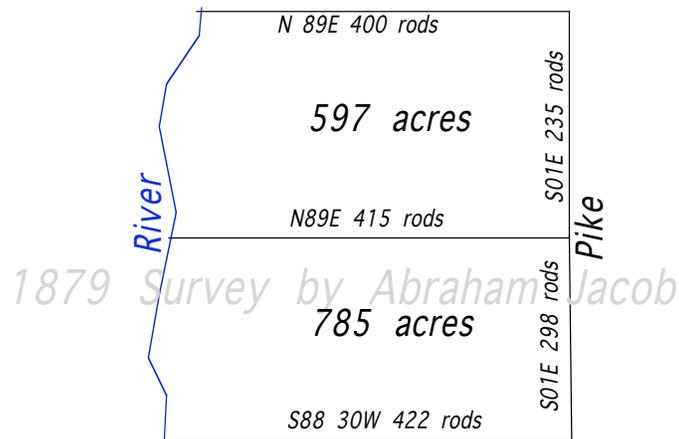
1. If both the Dominant Estate and Non-Appurtenant Parcel are owned by the same party, does the party have the right to use the easement to access the Non-Appurtenant Parcel?
2. Does the party have the right to use the easement to develop the Non-Appurtenant Parcel?
3. Does the party have the right to use the easement for a car or tractor trailer?
4. Does the party have the right to develop the Dominant Estate into a 20 lot subdivision where each person and their guest will use the easement?
5. Does the party have the right to put utility lines in the easement for houses that will be built on the Dominant Estate?
6. Would a party have any right to place utility lines in the easement if the easement were created in 1991 with the following wording:

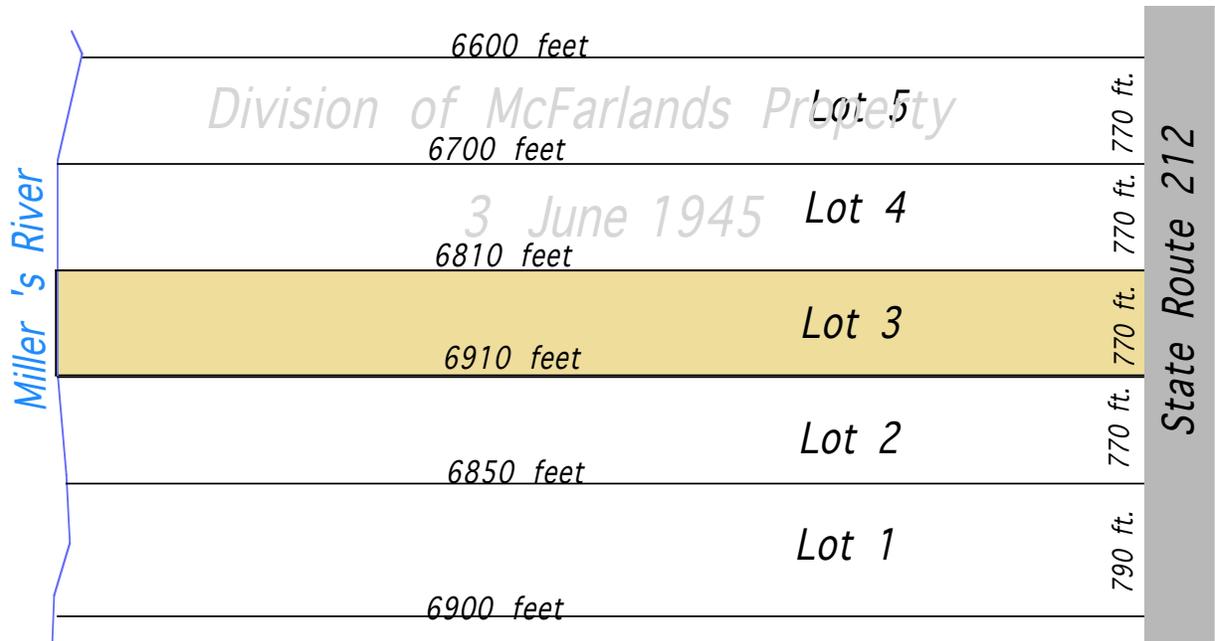
Together with a 20 foot wide easement for ingress and egress.

Scenario 4: There has been no mention of the easement in any documents from Ezekial Miller or John Millers' heirs and assigns. The past and present configuration of the property is the following:



The grantor, his heirs, assigns, tenants, leasees shall have the right to cross the lands of the grantee to access the river. Such right will be appurtenant to remaining lands of the grantor.



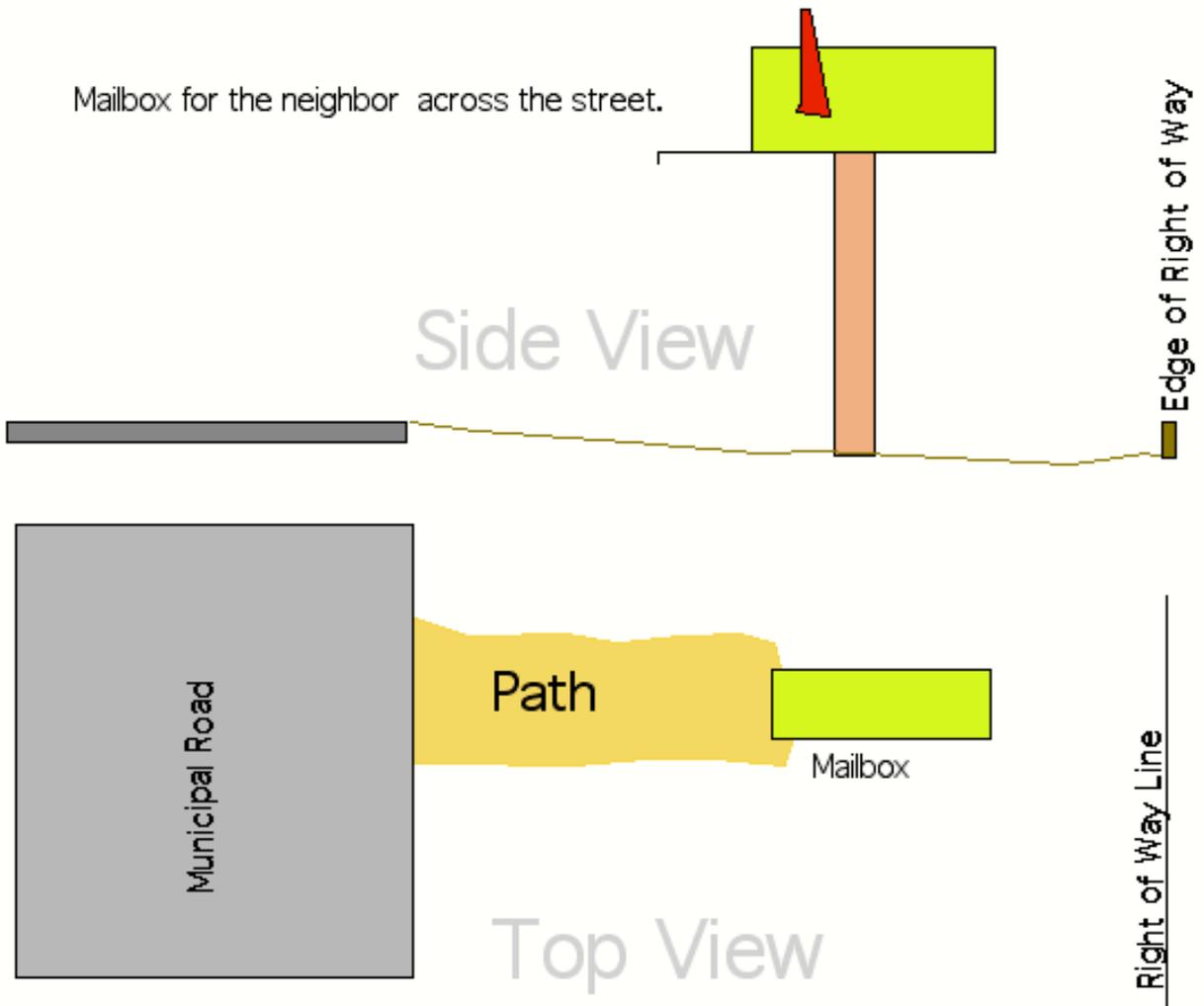


The client owns lot 3.

Questions:

1. If the easement is only shown in the original document, does the easement inure to the benefit of future heirs and assigns?
2. Is the attorney liable for not discovering the easement during a title search?
3. How would the surveyor locate the easement?
4. What would be the width of the easement?

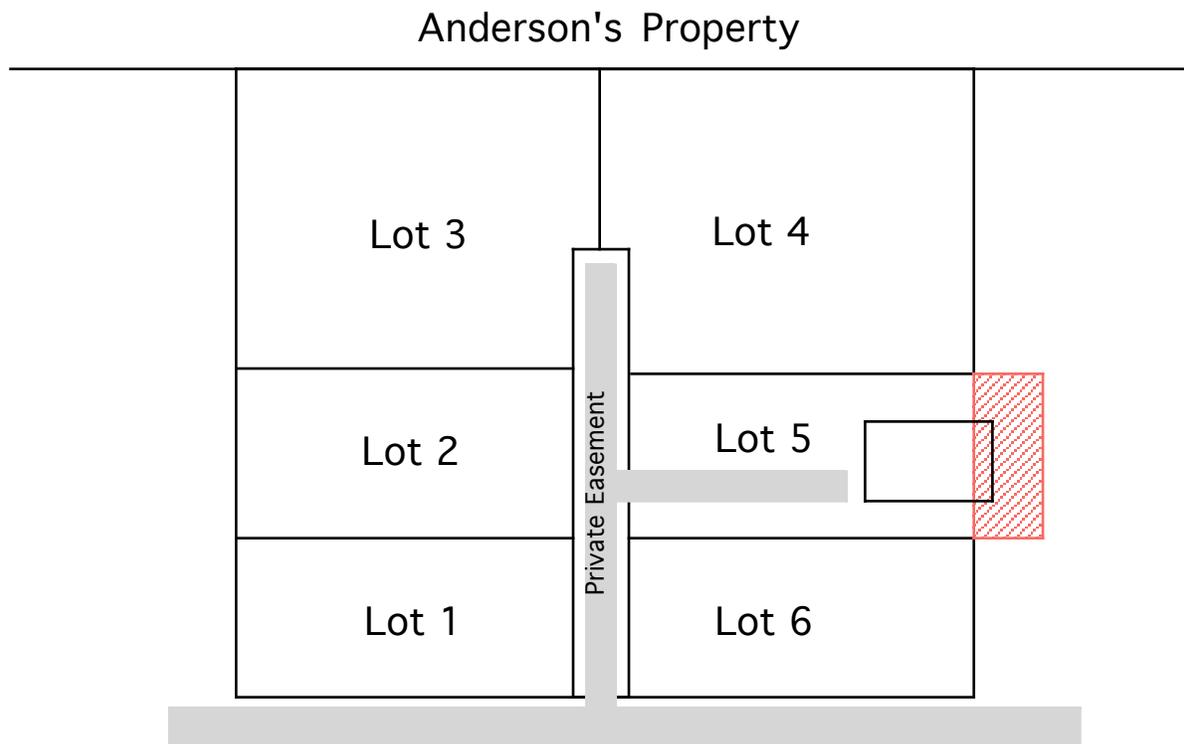
Scenario 5:



Questions:

1. Is the mailbox an encroachment?
2. If there is a paper box next to the mailbox, is the paperbox an encroachment?

Scenario 6:

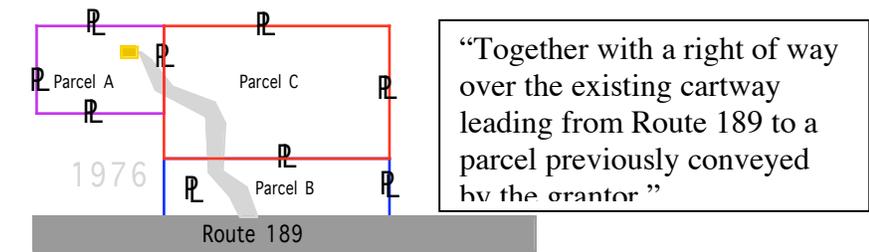
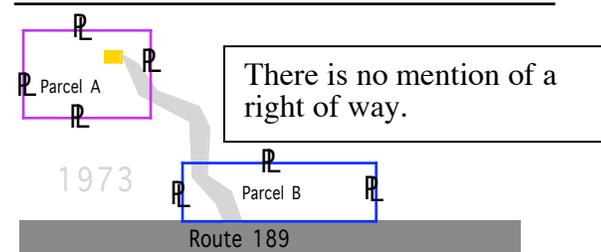
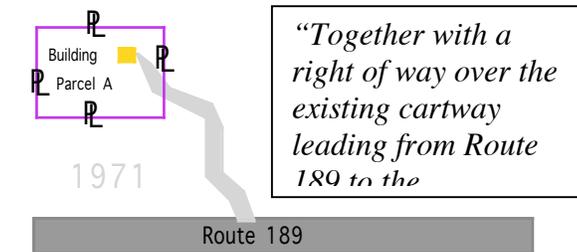
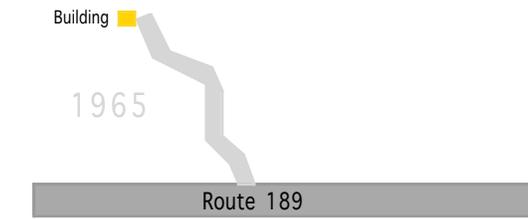


Your client builds their house across the boundary. In order to remove the house encroachment problem, you arrange for the purchase of a small lot from the neighbor.

Questions:

1. Does the purchase of the small red-hatched lot solve the title problems?
2. Can the owner of Lot 4 convey an easement from the private easement across her land to Anderson?

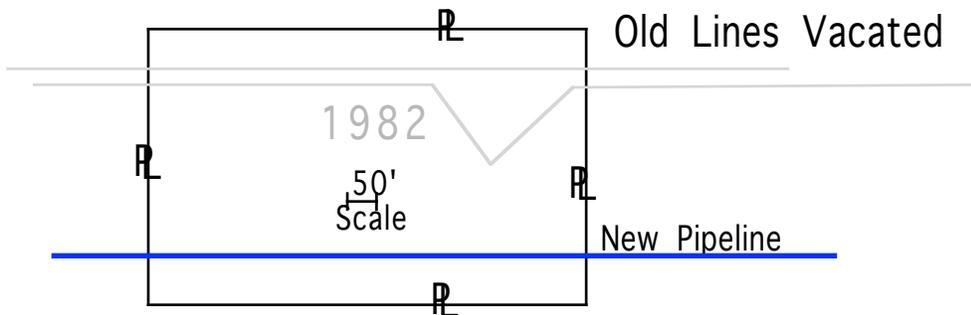
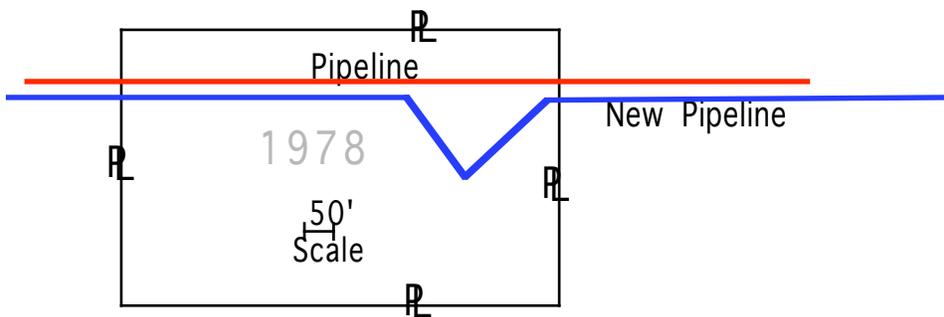
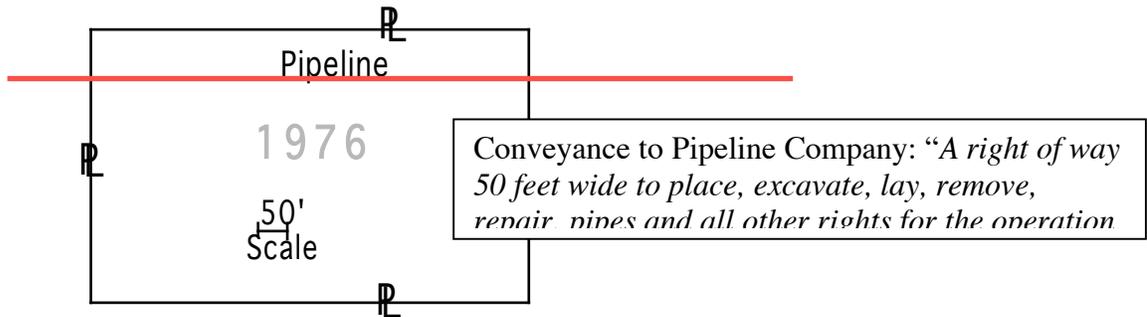
Scenario 7:



Questions:

1. Is there an encroachment across Parcel B?
2. Which parcel is encroaching on Parcel B?

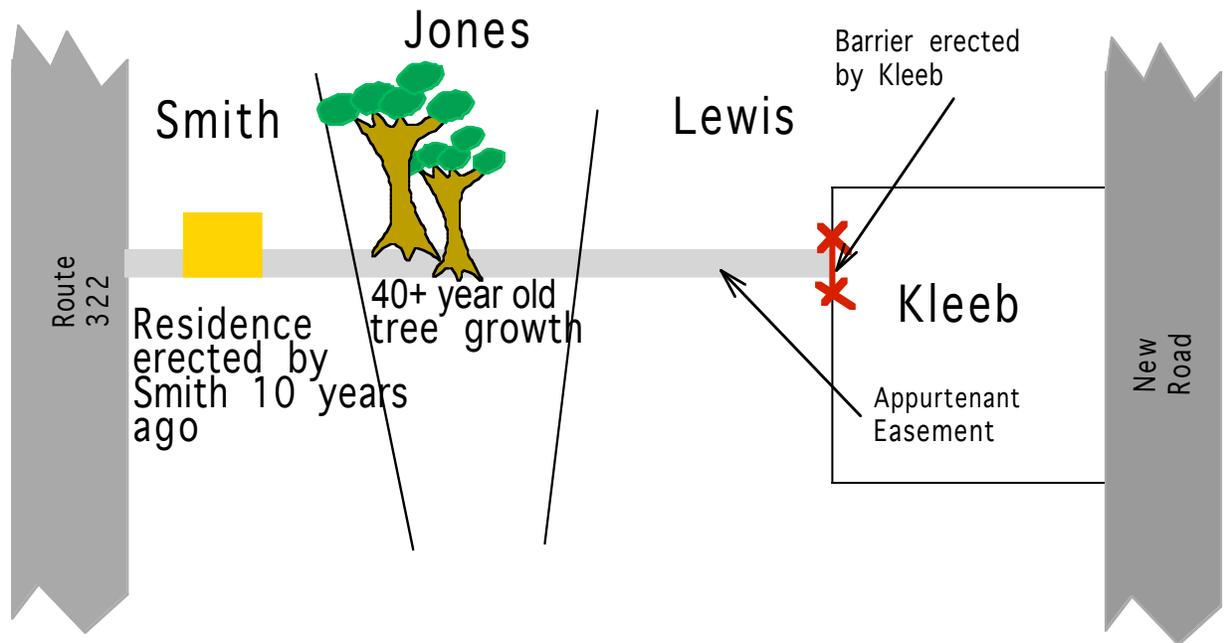
Scenario 8:



Questions:

1. Where is the center of the easement in 1976?
2. Where are the right of way boundaries located in 1976?
3. If no width were mentioned, what would the width be in 1976?
4. Have any subsequent improvements or additions changed the location of the easement?
5. Have any subsequent improvements or additions changed the location of the right of way boundaries?

Scenario 9:

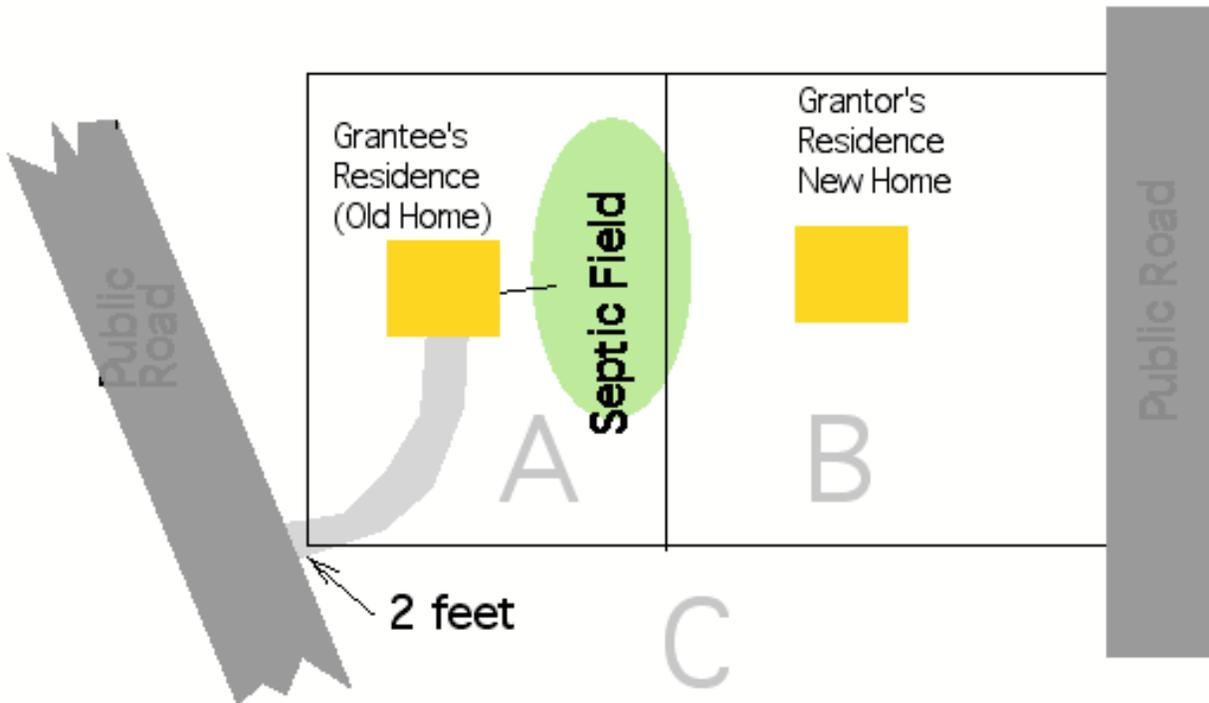


Background: Kleeb and her predecessors in title have used the appurtenant easement from 1921 to 1952 to access their property. The easement and property were created by express grant. In 1952 the new road was constructed along Kleeb's property. Since 1952 no one has used the easement including Kleeb.

Questions:

1. Would the construction of the new road have extinguished the easement?
2. Would the failure to use the easement for 40 years alone have extinguished the easement?
3. Would the growth of trees blocking use of the easement for 40 years alone have extinguished the easement?
4. Would the erection of a residence astride the easement five years ago by Smith alone have extinguished the easement?
5. Would the erection of the barrier across the easement by Kleeb alone have extinguished the easement (if the barrier was a movable gate or permanent boulders)?

Scenario 10:

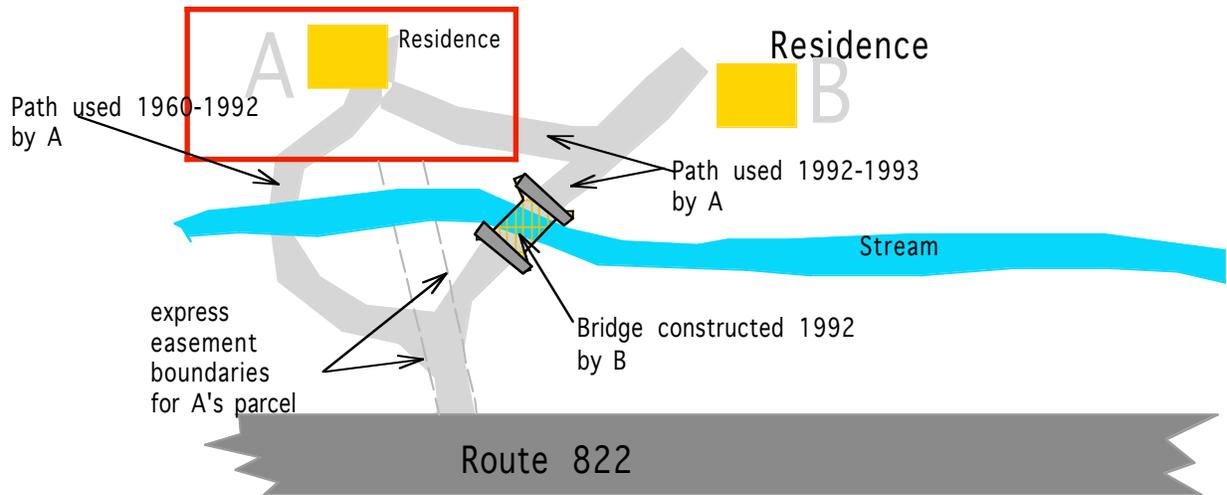


Background: In 1991 a parcel was divided with the home and lot sold (Parcel A). The grantor kept a parcel fronting on the public road and built a new residence. Parcel C is owned by the National Park Service.

Questions:

1. Is there an easement for the grantee (Parcel A) to continue using that part of the septic field located on Parcel B?
2. Can the grantee use the existing access road between the public road and their residence if there is no express easement to cross the 2 foot strip?
3. Does the grantee have an easement across lands of the grantor (Parcel B)?
4. If the grantee has an easement across parcel B, where is it located?

Scenario 11:

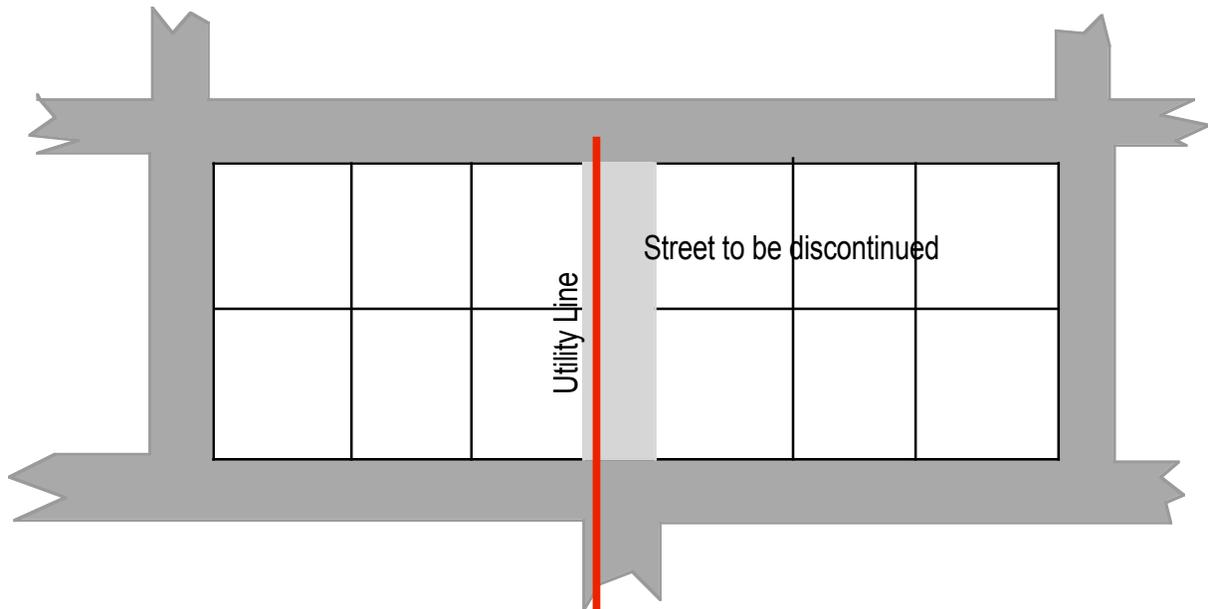


Background: In 1963 Parcel A was subdivided from Parcel B with an express easement indicated by the dashed lines. The land within the easement by the stream was marshy so the owner of Parcel A forded the stream to the west of the easement boundaries. In 1992 the owner of Parcel B asked the owner of Parcel A if they could pool their efforts and money and erect a bridge across the stream. The owner of Parcel A helped build and paid for half the cost of the bridge.

Questions:

1. Has the express easement been extinguished?
2. Is there an easement for Parcel A along the path used from 1960 to 1992?
3. What if the path used from 1960 to 1992 varied by as much as 50 feet over the years?
4. Is there an easement for Parcel A along the path used since 1992?
5. Does Parcel A have a right to claim an easement by necessity?

Scenario 12:



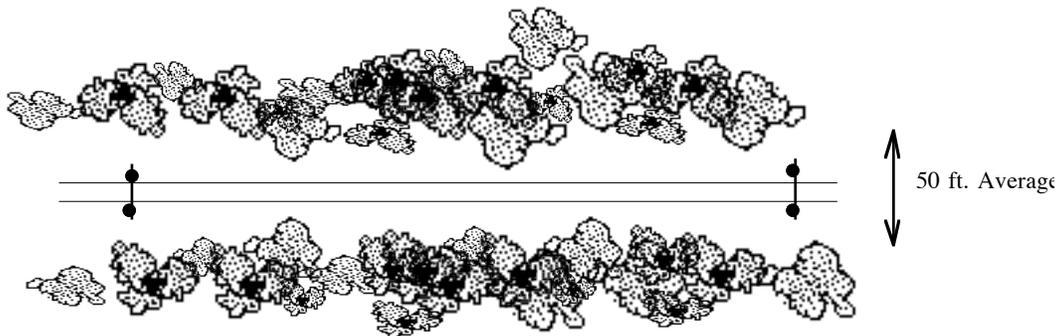
Background:

1. In 1945 the subdivision was prepared and lots sold. The city accepted the streets sometime later and a utility line installed.
2. In 1990 the municipality discontinued the road.

Questions:

1. May the utility continue to keep its line in the discontinued road?
2. Would the answer be any different if the utility only served the lots within the subdivision?

Scenario 13:

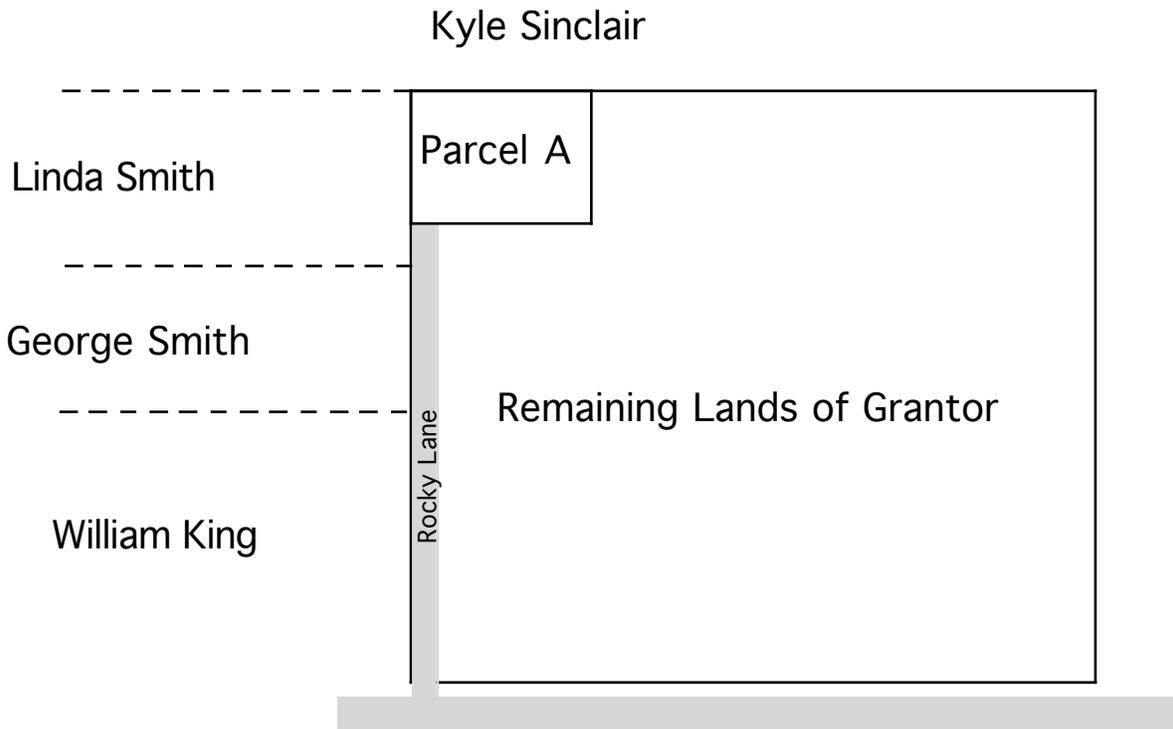


Background: A previous owner (servient tenement) sold an easement to a power and electric company. The conveyance document described the easement as “*an easement across lands described in deed book 345, page 18.*” The line was constructed shortly thereafter. Over the intervening years the trees and growth were trimmed back twenty-five feet on each side of the lines’ center. Twenty years later the “corridor” looks like the above.

Questions:

1. Where is the legal location of the easement?
2. What is the legal width of the easement?
3. May the utility place more transmission lines within the corridor?
4. May the utility move the lines or trim the vegetation back farther from the lines?
5. May the landowner use the road centered under the utility line?
6. May a hunter use the road centered under the utility line?
7. May the landowner plant and harvest crops under the line?
8. If a house was constructed within the corridor and maintained for 21 years, could the utility have it removed?

Scenario 14:



Background: The land of Linda Smith, George Smith, and William King comprise settler's lot 21. The land of Linda Smith has no historical legal access to the public road. Parcel A and the remaining lands of the grantor comprise settler's lot 22. The deed to the owner of Parcel A contains the following language...

Together with a right of way to Linda Smith and the lot conveyed herein. The grantor herein and her heirs reserve the right to convey the easement for other lands.

Two years after conveying Parcel A, the grantor sells all the remaining lands to Allen Weld. Twenty-five years later, the grantor's surviving heir (daughter) conveys an easement in Rocky Lane to Kimberly Smith (George's heir).

Questions:

1. Is the conveyance of an easement to Linda Smith valid?
2. Is the conveyance to Kimberly Smith valid?

Scenario 15:

Background: The client has the following description:

Beginning at a stone at the shore of the pond; thence northerly along the pond 23 rods; thence S88° 15'W 30 rods to a pin; thence S1°W 25 rods to a pin at the stream; thence easterly along the stream, 25 rods to a marked stone on the bank; thence northeasterly, crossing a bog, 18 rods to the point of beginning.

Questions:

1. How many servitudes are present?
2. Is there legal access to the lot?