Issues Arising from Uncertainty over Basic Terminology (e.g., Calling the Document an Easement vs. a License)

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Susan F. French, Reporter to the Restatement Third of Servitudes, has called the mid-twentieth century law of servitudes "'an unspeakable quagmire' from which one never escaped unscathed."[1] Although commentators and practitioners have taken steps to clarify servitudes law, it remains, for many, an area difficult to navigate. Developers, attorneys, government officials and others involved in real estate development are nevertheless likely to find themselves in the former "quagmire" of servitudes law at some point, if not often. Because the modern law of servitudes is based on historic concepts of property rights, a basic understanding of the traditional categories of servitudes can be useful. This Article provides an overview of several types of servitudes and property interests and discusses a few recent trends in servitudes law.

A. Traditional Servitudes and Interests in Land

1. Easements

An easement is a right held by one person to use the real property of another for a particular purpose. An easement is a nonpossessory interest that gives its holder a right superior to the right of a fee owner of the land if the easement holder uses the land as prescribed by the easement.[2] Easements are frequently created by an express grant or reservation contained in a deed or an independent agreement, but easements can also be created by prescription, by implication, or by necessity.[3]

Easements are either appurtenant or in gross. An easement in gross is personal to the holder of the easement and does not provide a benefit to a particular parcel of land. An easement appurtenant, conversely, benefits the owner of a parcel of land in a way that cannot be separated from the owner's rights in the land.[4] Two distinct estates are involved in an easement appurtenant: a parcel benefited by the easement—the dominant estate—and a parcel burdened by the easement—the servient estate.[5] The benefit of an easement appurtenant passes with the title to the dominant estate.[6] Easements appurtenant are more common than easements in gross and are primarily the subject of the discussion of easements herein.

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[1] French, Susan F., "Highlights of the New Restatement (Third) of Property: Servitudes," Real Property, Probate and Trust Journal (Summer 2000) (quoting E. Rabin, Fundamentals of Modern Real Property Law 489 (1974)).

[2] Cunningham, Stoebuck & Whitman, The Law of Property § 8.1 (2d ed. 1984).

[3] American Jurisprudence 2d, Easements and Licenses in Real Property § 13 (West 2004).

[4] Cunningham, Stoebuck & Whitman, The Law of Property § 8.2 (2d ed. 1984).

[5] American Jurisprudence 2d, Easements and Licenses in Real Property § 8 (West 2004).

[6] Cunningham, Stoebuck & Whitman, The Law of Property § 8.2 (2d ed. 1984).

Easements can be exclusive—granting the holder the sole right to make use of the easement—or nonexclusive—allowing the grantor of the easement to give the same right to others.[7] They can also be public—for the benefit of a large group of persons or the general public—or private—granting a right to a determined set of persons.[8] Although the distinguishing terms of "affirmative" and "negative" easements were employed historically, modern scholars and the Restatement Third of Servitudes view an easement as necessarily affirmative, with the former negative easement now termed a restrictive covenant in the literature.[9] A familiar type of private, appurtenant (and affirmative) easement is a right-of-way that allows a property owner to access the property by a right of access and travel over the property of another.

Issues often arise regarding the scope of an easement, especially with respect to easements created by means other than granting words.[10] An easement is generally limited in scope and cannot be used for purposes other than were originally intended.[11] Changes in circumstances may operate to modify the scope of an easement, but they cannot be used to justify overburdening the easement.

2. Real Covenants and Equitable Servitudes

A covenant is a promise by one person to another to do a certain act or to refrain from doing a certain act on real property.[12] For a covenant to exist between persons other than the original parties, the following elements must be present: (1) it must have been created as a binding contract between the parties; (2) it must "touch and concern" the land;[13] (3) the parties creating the covenant must have intended to bind their respective successors to the covenant; and (4) there must exist "privity" between the parties; in other words, the person against whom the covenant is sought to be enforced must have succeeded to the estate of the original covenantor.[14] There often exists factual overlap in the elements of a covenant.

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[7] American Law Institute, Restatement (Third) of the Law on Property: Servitudes § 1.2, cmt. c (Am. Law Inst. Publishers 2000); Cunningham, Stoebuck & Whitman, The Law of Property § 8.11 (2d ed. 1984).

[8] American Jurisprudence 2d, Easements and Licenses in Real Property § 5 (West 2004).

[9] American Law Institute, Restatement (Third) of the Law on Property: Servitudes § 1.2, cmt. b (Am. Law Inst. Publishers 2000); Cunningham, Stoebuck & Whitman, The Law of Property § 8.1 (2d ed. 1984).

[10] Cunningham, Stoebuck & Whitman, The Law of Property § 8.9 (2d ed. 1984).

[11] American Jurisprudence 2d, Easements and Licenses in Real Property § 71 (West 2004).

[12] Cunningham, Stoebuck & Whitman, The Law of Property § 8.13 (2d ed. 1984).

[13] Historic interpretation of the "touch and concern" requirement has resulted in wide-ranging application and much discussion. *See* Cunningham, Stoebuck & Whitman, The Law of Property § 8.15 (2d ed. 1984); *see also* American Law Institute, Restatement (Third) of the Law on Property: Servitudes § 3.1, cmts. a, b (Am. Law Inst. Publishers 2000). Such discussion is beyond the scope of this Article.

[14] Cunningham, Stoebuck & Whitman, The Law of Property §§ 8.13 – 8.18 (2d ed. 1984).

Real covenants are similar to easements appurtenant in that there is a burdened parcel (or servient estate) and a benefited parcel (or dominant estate). The traditional difference between easements and covenants is that while an easement holder can enter the servient estate for a particular purpose, the beneficiary of the covenant is not entitled to enter the burdened land, but may only require the owner of that land to engage in or refrain from engaging in a particular activity.[15] As discussed above, due to the similarities of restrictive covenants with historic negative easements, the terms have been used interchangeably, although restrictive covenants is the preferred term today.[16]

Real covenants that have basis in equity are called equitable servitudes or equitable restrictions. Equitable servitudes are similar to covenants and are generally governed by the elements discussed above. The major traditional distinction between the two was the equitable requirement that the party against whom the covenant was being enforced have notice of the covenant. Modern recording acts, and the constructive notice that comes with public recordation, have effectively eliminated this distinction.[17]

3. Profits

A profit à prendre (generally shortened simply to "profit") is similar to an easement in that it creates a right to enter and use property possessed by another. A profit also includes, however, the right to remove something from the land, such as lumber, animals, minerals, or other natural resources. The rules governing creation and interpretation of profits are similar to the rules governing easements, but certain additional rules govern profits.[18]

The first Restatement of Servitudes discontinued the traditional distinctions between easement and profits and referred to both as "easements." The term "profit" was readopted by the Restatement and is employed in the current Restatement Third of Servitudes as a specific subset of easements to allow for the removal of materials from the land.[19] Nevertheless, the term remains used much less frequently in practice than the more general "easement."

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[15] Cunningham, Stoebuck & Whitman, The Law of Property §§ 8.13 – 8.18 (2d ed. 1984).

[16] American Law Institute, Restatement (Third) of the Law on Property: Servitudes § 1.2, cmt. b (Am. Law Inst. Publishers 2000); Cunningham, Stoebuck & Whitman, The Law of Property § 8.1 (2d ed. 1984).

[17] Cunningham, Stoebuck & Whitman, The Law of Property §§ 8.22 – 8.26 (2d ed. 1984).

[18] American Law Institute, Restatement (Third) of the Law on Property: Servitudes § 1.2 (Am. Law Inst. Publishers 2000); Cunningham, Stoebuck & Whitman, The Law of Property § 8.1 (2d ed. 1984).

[19] American Law Institute, Restatement (Third) of the Law on Property: Servitudes § 1.2, cmt. e (Am. Law Inst. Publishers 2000).

4. Licenses

A license in real property is the permission to conduct certain acts on the land of another for a specific period of time without possessing an interest in that land.[20] Traditionally, a license is personal, revocable, unassignable and does not pass with transfer of title to the property. Because a license is an impermanent interest, it does not constitute an interest in land.[21]

There are no formal words or concepts that must be used to create a license; the only element needed for the existence is the intent between the parties to create the license. Termination of a license generally can be effected simply by the election of the granting party. The granting party's right to revoke the license is the primary difference between an easement and a license to enter and use property.[22]

5. Leases

A lease is a right to exclusive possession of another's property, typically for a specified period of time. A leasehold estate is an interest in land that is carved out of a larger interest in the land. As a result, during the existence of the lease, there are (at least) two estates in the property—the possessory interest of the tenant and the future interest of the landlord. This future interest may be a life estate, a lease on the land (in the case of a sublease), or other interest less than fee title to the property.[23]

A leasehold interest is generally both a conveyance and a contract: a conveyance because a real interest in the land is conveyed to the tenant, and a contract because such a mechanism creates the interest and often establishes covenants or other rules between the parties.[24] The major distinction between leases and easements, licenses and profits is that leases provide for possession or occupation of the property, whereas easements, licenses and profits traditionally only provide a right to use the property for a particular purpose. As a result, the landlord of a lease generally retains no right to use the leased property, while the grantor of an easement, license or profit retain full rights of use and possession of the underlying property, subject only to the limited rights granted.[25] Although a lease is similar to an exclusive easement in that the grantees of both can exclude third parties, an exclusive easement still permits the grantor to possess and use the property, subject to

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[20] American Jurisprudence 2d, Easements and Licenses in Real Property §§ 2, 117 (West 2004).

[21] Cunningham, Stoebuck & Whitman, The Law of Property § 8.1 (2d ed. 1984); American Jurisprudence 2d, Easements and Licenses in Real Property §§ 2, 117 (West 2004).

[22] American Jurisprudence 2d, Easements and Licenses in Real Property §§ 117, 118 (West 2004).

[23] Cunningham, Stoebuck & Whitman, The Law of Property §§ 6.2 (2d ed. 1984); American Jurisprudence 2d, Landlord and Tenant §§ 18-20 (West 2004).

[24] Cunningham, Stoebuck & Whitman, The Law of Property §§ 6.10 (2d ed. 1984); American Jurisprudence 2d, Landlord and Tenant § 19 (West 2004).

[25] Cunningham, Stoebuck & Whitman, The Law of Property §§ 6.2 (2d ed. 1984); American Jurisprudence 2d, Landlord and Tenant § 20 (West 2004).

the easement, while the landlord's possessory rights are entirely terminated during the lease term.

B. Current Trends

1. Departure from Formalistic Distinctions

During the latter part of the 20th century, commentators and practitioners recognized the similarities between different servitudes and acknowledged the difficulty of applying the traditional rules to the various servitudes and other interests in property. Since that time, the distinctions between the servitudes and interests discussed above have become blurred.

For example, the Restatement Third of Servitudes departed from the traditional rules and eliminated the formalistic distinctions between easements, covenants and equitable servitudes. Instead, under the Restatement Third, all are servitudes that are governed by the same set of rules. As a result, in practice, when one rule can appropriately control more than one different traditional category, the Restatement Third directs that only one rule be stated, even if the traditional categories provided for multiple applicable rules ultimately leading to the same conclusion.[26]

Moreover, when different types of servitudes require application of different rules, the Restatement Third indicates that the approach to those rules should nevertheless be stated as part of the framework of a single body of law.[27] Consequently, the Restatement eliminates the traditional first step in considering servitudes—determining whether the servitude falls in the category of easement, covenant, profit, license, or other (although such analysis may be warranted)—and instead streamlines the analysis toward the substantive application of the rules, regardless of nomenclature.

2. Movement Toward Principles of Contract Construction

Longstanding legal canons held that public policy favored the free use of real property and disfavored restrictions on land. Consequently, courts historically construed the terms of restrictive covenants narrowly and against the restriction. Recent years have seen a shift away from such constructions and toward a view of covenants similar to that of a contract. The Arizona Supreme Court recently made such a shift.

In *Powell v. Washburn*, the court considered a declaration of covenants, conditions and restrictions ("CC&Rs") for an aviation-related planned community in La Paz County, Arizona after a dispute arose over the type of residential uses that were permitted under the CC&Rs. The court expressly rejected the argument that the CC&Rs

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[26] Susan F. French, "Highlights of the New Restatement (Third) of Property: Servitudes," Real Property, Probate and Trust Journal (Summer 2000).

[27] Susan F. French, "Highlights of the New Restatement (Third) of Property: Servitudes," Real Property, Probate and Trust Journal (Summer 2000).

should be construed strictly and in favor of the free use of land, and the court adopted the Restatement's recommendation that servitudes be interpreted with a view to the effectuating the intention of the parties. In adopting a contract interpretation approach to the issue, the court noted the contemporary judicial trend to acknowledge that restrictive covenants can be beneficial and therefore need not be disfavored as a matter of public policy and judicial application.[28]

3. Real World Focus on Substance

Perhaps the most significant factor in the blurring of traditional servitude boundaries has been the tendency of businesspersons, attorneys and government officials simply to seek the structure that they deem to fit the facts at hand, regardless of the traditional categories. For example, parties today may agree to make a license irrevocable or revocable upon the occurrence of a condition only within the grantee's control, even though such a license is indistinguishable from an easement. Conversely, if an easement gives the grantor a right to revoke at will, such easement is traditionally a license. Property owners routinely impose obligations and requirements on the use of their land in the form of CC&Rs, but, as a matter of practice, such documents generally do not purport to determine whether a particular requirement is a covenant, a condition or a restriction.

Cities and towns have also taken liberties with the traditional categories of servitudes in recent years. Plats are frequently recorded with language such as "vehicular non-access easement" and "historic preservation easement," which arguably are closer to restrictive covenants than easements. Additionally, there exist "view corridor easements," "scenic corridor easements," "natural area open space easements," and other similar "easements" that may or may not be in favor of a specific person or for the benefit of certain property but are nonetheless called easements. The granting of such nontraditional easements gives rise to new and complicated issues, such as who has the right to enforce an easement, who has the right to terminate or modify an easement, and how those rights square with the municipality that participated in the process. Thus, increased flexibility in the creation of property rights has facilitated development in a more personal and customizable fashion than existed in times past, but this flexibility raises questions that have yet to be answered fully.

The need for facts adaptable to changing situations in business, coupled with the natural focus of negotiating parties and municipalities on substance, rather than form, has bolstered the movement away from archaic legal presumptions and formalistic distinctions in servitudes and interests in property in favor of more straightforward and generally applicable rules forming a unified body of law.

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[28] *Powell v. Washburn*, 125 P.3d 373 (Ariz. 2006).