The Law Office of Laura E. Ayers, Esq.
434 Main Street, P.O. Box 237
Schoharie, NY 12157
(518) 456-6705
www.lauraayerslaw.com

Handout
for
Easement Law in New York
Presented for
the New York State Bar Association
May 14, 2014 Long Island
May 21, 2014 New York City
May 28, 2014 Albany

I. Introduction:

a. Definition: An Easement is an interest in real property. *Henry v. Malen*, 263 A.D.2d 698 (3rd Dept. 1999)

i. "…an easement presupposes two distinct tenements, one dominant, the other servient." *Loch Sheldrake Associates Inc. v. Evans*, 306 N.Y. 297 (1954)

ii. "An **easement** is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit or dominion, or lawful use out of or over the estate of another." *Huyck v. Andrews,* 113 N.Y. 81 (1889).

iii. There has to be a burdened parcel of real property and a benefited parcel of real property.

b. As compared to other rights and interests in Real Property

i. Licenses: not an interest in real property, personal to the holder, not assignable and are of limited duration. *Henry, Supra.*

1. "A license is a privilege, not a right, sometimes called an easement in gross." *Loch Sheldrake Asso. Inc., Supra*

2. A "Franchise" is a type of license. *New York Telephone Co., v. State,* 67 A.D.2d 745 (1979); *American Rapid Telegraph Co., v. Hess*, 125 N.Y. 641 (1891).

3. "Licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate, shall be by deed or in writing. **They amount to nothing more than an excuse for the act, which would otherwise be a trespass**. *Davis v. Townsend*, 10 Barb. 333 (1851). (emphasis mine).

ii. Covenants: an agreement or promise to do or not to do something. They can be personal or can run with the land (See *Haldeman v. Teicholz*, 197 A.D.2d 223 (3d Dept., 1994)

1. "Restrictive Covenants are commonly categorized as negative easements." *Witter v. Taggart*, 78 NY 2d 234 (1991) "They restrain landowners from making otherwise lawful uses of their property." *Id.*

2. Enforceable between:
   a. Grantor and Grantee,
   b. Grantee and Grantee where there was a Common Grantor who made identical covenants part of a plan or scheme of development, (exception to the Stranger to the Deed rule)
      i. "The long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called "stranger to the deed", does not create a valid interest in favor of that third party." *Estate of Thompson v. Wade*, 69 N.Y.2d 570 (1987)
   c. Adjacent landowners who have mutual covenants. *Haldeman, Supra.*

3. Examples:
   a. "(1) A covenant not to suffer any manufactory, business industries, or stores upon the premises, but to use them for residential purposes only; (2) a covenant not to suffer any saloon, restaurant, hotel, boarding house, or tenement house, with a repetition of the statement that the use shall be residential; (3) a covenant not at any time to sell or subdivide the premises in lots or plots having a less area than one-half acre…" *Bristol v. Woodward*, 251 NY 275 (1929).
   b. "no docks, buildings, or other structures [or trees or plants] shall be erected [or grown]" on the grantor's (Lawrance's) retained servient lands to the south "which shall obstruct or interfere with the outlook or view from the [dominant] premises" over the Winganhauppauge Creek. *Witter, Supra.*

c. "The deed conveying the parcels contained three restrictive covenants which, *inter alia*, restricted the use of the subject property to "residential purposes only" and was to be improved "only by a single family residential dwelling together with normal accessory structures" *Irish v. Besten*, 158 A.D.2d 867 (3d Dept 1990).

iii. Lateral Support:

1. "As between the proprietors of adjacent lands, neither proprietor may excavate his own soil, so as to cause that of his neighbor to loosen and fall into the excavation. **The right to lateral support is not so much an easement, as it is a right incident to the ownership of the respective lands.**" *Village of Haverstraw v. Eckerson*, 192 N.Y. 54 (1908).
2. "By the common law an owner of land contiguous to the land of another, upon which a building is erected, is not bound to protect the owner of the building against injuries which may result thereto from excavations on his own land, in the absence of any right by prescription or grant in the owner of the building to have it supported by the land of the person making the excavation. **The natural right of support, as between the owners of contiguous lands, exists in respect of lands only, and not in respect of buildings or erections thereon.**" *Dorrity v. Rapp*, 72 N.Y. 307 (1878).
3. "This being the state of the common law upon the subject, the Legislature, in1855, interposed to regulate the exercise by owners of land in the cities of New York and Brooklyn of the right of excavation, and to afford to owners of buildings a new protection against injuries from excavations on adjoining lands. By the act chapter six of the laws of that year, it is declared that whenever excavations on any lot in New York or Brooklyn "shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, **the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times from the commencement until the completion of such excavation, at his own expense, preserve the wall from injury**, and so support the same by a proper foundation that it shall remain as stable as before such excavation were commenced." Dorrity Supra.

4. Original 1855 Statute was re-enacted, then re-codified as a municipal ordinance which was later incorporated into the Administrative code for the City of NY.
    a. Now Codified at NYC Administrative Code SECTION BC 3309 Protection of Adjoining Property.
    b. Strict Liability Statute regardless of the fact it's a code rather than a State statute. See *Yenem Corp. v. 281 Broadway Holdings, LLC*, 18 N.Y.3d 481 (2012).
5. Lateral Support of Highways: Adjoining landowner owes duty not to under mind the highway's lateral support. See *Village of Haverstraw, Supra.*

iv. Air Space or Air Rights:

1. "An owner of real property possesses the right to utilize all of its **air** space." *1380 Madison Ave. v. 17 E. Owner's Corp*, 2003 NY Slip Op. 51309(U). [air conditioner case]
2. "…air rights … have historically been conceived as one of the bundle of rights associated with ownership of the land rather than with ownership of the structures erected on the land. Air rights are incident to the ownership of the surface property -- the right of one who owns land to utilize the space above it. This right has been recognized as an inherent attribute of the ownership of land since the earliest times as reflected in the maxim, *"[cujus] est solum, ejus est usque ad coelum et ad inferos*" ["to whomsoever the soil belongs, he owns also to the sky and to the depths"]." *Macmillan v. C.F. Lex Associates*, 56 N.Y.2d 386 (1982). [internal citations omitted]

v. Profit: the right to take a product from the land. *Loch Sheldrake Asso. Inc., Supra.*

1. "The right to profits, denominated *profit a prendre* , consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. It is, in its nature, corporeal, and is capable of livery, while easements are not, and may exist independently without connection with or being appendant to other property." *Pierce v. Keator*, 70 N.Y. 419 (1877).
2. Examples: to take water from a pond, to take lumber or trees from the land, to cultivate or mow a strip of land.

3. A profit may also constitute an appurtenant easement where there is a dominant and servient estate. *Loch Sheldrake Asso. Inc., Supra.*

vi. Mineral Estate or Mineral Rights: Inorganic Substances

1. The subsurface Mineral Estate is severable from the Estate in the surface or soil.
2. "The rule, as it stands upon the authority of the decisions of this court, is that a grant, or an exception, of "minerals," will include all inorganic substances, which can be taken from the land, and that to restrict the meaning of the term, there must be qualifying words, or language, evidencing that the parties contemplated something less general than all substances legally cognizable as minerals." *White v. Miller*, 200 N.Y. 29 (1910). [emphasis mine]
3. "It is axiomatic that a mineral estate in a tract of land carries with it **the right to such access over the surface that may be reasonably necessary to carry on mining activities**." *Allen v. Gouverneur Talc Co. Inc*., 247 A.D.2d 691 (3d Dept 1998).
4. "…Defendants met their initial burden by establishing that, when Joseph E. Uhl and Florence P. Uhl conveyed the property in question to defendants' predecessors in title, they reserved to themselves and their heirs title to all of the subsurface minerals, including oil and gas. That reservation of title constitutes a fee simple interest in the subsurface minerals, which includes both title to the minerals and the right to use any reasonable means to extract them." *Frank v. Fortuna Energy, Inc*., 49 A.D.3d 1294 (4th Dept 2008).

vii. Gas and Oil Leases: Organic Substances

1. General Construction Law § 39. Property, personal
The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

i. See Also *Backar v. Western States Producing Co* 547 F 2d 876 (5th Cir. 1977) and *Wiser v. Enervest Operating LLC*, 803 F. Supp. 2d 109 (NDNY 2011)[applying statute to Gas Leases as well as Oil Leases]

II. Types of Easements:

a. Public/Private
   i. Easement is acquired either for the benefit of the public or between private individuals/lands
b. Express/Implied
   i. Express Easement: one that is in writing
   ii. Implied Easement: one that is implied from the circumstances
c. Appurtenant/In Gross:
   i. Appurtenant means: a benefit attached to the property, including rights of way, power lines, waterways, pipes, any other element that benefits the property in some way.
   ii. An easement is not a personal right of the landowner but is an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement. *Will v. Gates*, 89 NY2d 778 (1997).
   iii. "An appurtenant easement attaches to and passes with the dominant estate. (internal citations omitted) There is no requirement that the dominant and servient estates be contiguous." *Reis v. Maynard*, 170 Ad2d 992 (4th Dept. 1991).
   iv. Example: "A non-exclusive easement for ingress, egress and regress, in common with others, over the right of way shown on said Filed Map No. 32 for all ordinary access by foot or by vehicle between the above described premises and Route 9D." *Will*, *Supra*.
   v. Runs with the Land, sometimes even says that it does.
   vi. Easements in Gross: are licenses, personal, non-assignable, non-inheritable, expire upon the death of the holder, sometimes called "Personal Easements".
      1. Examples:
      2. "This easement, however, retained by the Terrys must be in gross and, therefore, is neither assignable nor inheritable, since at the time of the transfer the Terrys

were no longer possessed of any dominant estate to which an easement appurtenant could attach." *Gross v. Cizausk*, 53 AD2d 969 (3d Dept 1976).

3. "the Santacroses were granted an easement over the strip 'for their personal individual use only', which was 'not to run with the land'." *Gross*, *Supra*

d. Purposes:

i. Rights of Ways: the right to pass over the land of another for a particular purpose, usually means physical access over land.

1. Ingress (a right to enter), Egress (a right to exit) and Regress (a right to re-enter).

2. Moreover, where an easement is created by express grant and its sole purpose is to provide ingress and egress, but it is not specifically defined or bounded, "the rule of construction is that the reservation refers to such right of way as is necessary and convenient for the purpose for which it was created" (internal citations omitted), and includes "any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant" (*citations omitted*). *Mandia v. King Lumber & Plywood Co.*, 179 A.D.2d 150 (2d Dept 1992).

ii. Highways/Streets:

1. "Public highways may be created in four ways: (1) By proceedings under the statute….. (2) By prescription…. (3) By dedication through offer and implied acceptance…. (4) By dedication through offer and actual acceptance... In the absence of an actual conveyance, the owner does not part with his title to the land, but only with the right to possession for the purpose of a highway." *City of Cohoes v. Delaware & H. Canal Co.*, 134 N.Y. 397 (1892).

2. "[i]n the absence of a statute expressly providing for the acquisition of a fee, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication or prescription, or by direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner" *Bashaw v. Clark*, 267 A.D.2d 681 (3d Dept 1999).

iii. Shared Driveways:

1. "A cross-easement or reciprocal easement over a driveway can be created by deed or agreement in which each owner of a portion of a driveway grants the other owner an easement over their respective portion so as to share the use of

the entire driveway." *Capersino v. Gordon*, 35 Misc. 3d 1222A (Sup. Ct. Suffolk Co. 2012).

iv. Water Rights:

1. Examples: To draw water, obtain water, lay pipes, or to access a body of water
2. "a right to take water from a distant source might, by other and appropriate kinds of verbiage, be so granted as to be appurtenant to specific lands separated from the source of supply." *Cady v. Springfield Water Works Co*., 134 N.Y. 118
3. "a true easement… to run a pipe through the Le Roy lands to carry the waters from the Divines' lake to the Divines' mill lot." *Loch, Sheldrake Asso., Inc. Supra.*

v. Utilities:

1. Storm Drains
2. Sewer Pipes
3. Electrical and transmission lines
4. Telephone/Cable
5. Gas Lines

vi. Light and Air:

1. An easement that permanently allows light and air to enter the windows of a building from an adjoining lot
2. Exist only by express grant or reservation
    a. "We think the law is clear in this State that "if one grants a house having windows looking out over vacant land, whether his own or otherwise, he does not grant therewith any easement of light and air, unless it be by express terms; it never passes by implication." *De Baun v. Moore*, 32 A.D.397 aff'd 167 N.Y. 598 (1901).
3. Cannot be impliedly granted from circumstances,
    a. Exceptions:
        i. "…plaintiff relies upon the familiar and well-established rule that a **description bounding property upon a street** or avenue or referring to a map upon which the street or avenue

is delineated amounts, as between the grantor and grantee, to a dedication by the grantor of the bed of the street or avenue for a street, if owned by him, and **confers upon the grantee the right to use it, and perpetual easements of light, air and access over it,** whether any portion of the bed of the street or avenue be conveyed to him, or whether the fee of the whole of it be reserved by the grantor." *Lewishon v. Lansing Co.*, 119 A.D. 393 (1st Dept 1907).

ii. "It would seem, therefore, that an easement of light and air may be implied if found to be **strictly necessary to the beneficial use of the premises** hired **and** if clearly **shown to be the intention of the parties**. Accordingly, "An easement will be implied and pass as an appurtenance only when necessary to a reasonable use and enjoyment of the estate conveyed. Mere convenience is not sufficient either to create or to convey such easement" *Harte v. Empire State Building Corp*., 30 Misc. 2d 665 (Sup. Ct. NY Co., 1961).

vii. Party Walls:

1. "The paramount object for which a party wall is constructed is the maintenance and support of the adjacent buildings. In this city it is also the custom in constructing such walls between dwelling houses to place therein flues for use in the adjoining buildings. But these are the only purposes, so far as our knowledge extends, to which such walls are devoted. The easement of the owner of either building extends only over so much of his neighbor's land as the party wall stands upon, and such easement consists merely in the right to the support of the wall and the presence of the flues which may be in it. It has been held that either of the owners may increase the height of the party wall, provided such increase can be made without detriment to the strength of the wall." *De Baun v. Moore*, 32 A.D. 397 aff'd 167 N.Y. 598 (1901).

viii. Aviation:

1. "...permanent easements for avigation purposes of the airspace over all of the respective subject properties' land areas. Basically, the taking maps defined planes above the properties and the said easements encompassed the airspace above the planes. These individual planes were part of a larger, general

avigation easement plane rising upward and outward from Republic's runway 14 at an angle of one foot up (vertical) for every 50 feet out (horizontal)." *Kupster Realty Corp. v. State of NY*, 93 Misc. 2d 843 (Ct of Claims, 1978). [Republic Airport and Republic Transportation Center, Farmingdale, Long Island-Town of Babylon, County of Suffolk, State of New York]

ix. Burial Plots:

1. "While the purchaser of a cemetery lot does not acquire a title thereto in fee simple, he becomes possessed of a property right therein which the law protects from invasion. He has an easement for burial purposes therein, in accordance with the usual custom prevailing in the locality, and this privilege carries with it the right to erect tombstones and monuments in memory of the deceased, and to protect them from injury and spoliation." *Oatka Cemetery Association Inc. v. Cazeau*, 242 AD 415 (4th Dept 1934).
2. "It has been decided many times, and frequently asserted by text writers, that the heirs of a decedent at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who without right, threatens to injure or remove it, and this though the title to the ground wherein the grave is, be not in the plaintiff but in another." *Mitchell v. Thorne*, 134 N.Y. 536 (1892).

x. Conservation Easements:

"Conservation easement" means an easement, covenant, restriction or other interest in real property, created under and subject to the provisions of this title which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property in a manner consistent with the public policy and purpose set forth in section 49-0301 of this title, provided that no such easement shall be acquired or held by the state which is subject to the provisions of article fourteen of the constitution." Environmental Conservation Law §49-0303 (1)

§ 49-0305. Conservation easements; certain common law rules not applicable

1. A conservation easement may be created or conveyed only by an instrument which complies with the requirements of *section 5-703 of the general obligations law* and which is subscribed by the grantee. It shall be of perpetual duration unless otherwise provided in such instrument.
…

5. A conservation easement may be enforced in law or equity by its grantor, holder or by a public body or any not-for-profit conservation organization designated in the easement as having a third party enforcement right, and is enforceable against the owner of the burdened property. Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel or waiver. No general law of the state which operates to defeat the enforcement of any interest in real property shall operate to defeat the enforcement of any conservation easement unless such general law expressly states the intent to defeat the enforcement of such easement or provides for the exercise of the power of eminent domain. **It is not a defense in any action to enforce a conservation easement that**:
(a) **It is not appurtenant to an interest in real property;**
(b) It can be or has been assigned to another holder;
(c) It is not of a character that has been recognized traditionally at common law;
(d) It imposes a negative burden;
(e) It imposes affirmative obligations upon the owner of any interest in the burdened property, or upon the holder;
(f) The benefit does not touch or concern real property; or
(g) There is no privity of estate or of contract.

e. Affirmative and Negative Easements aka Affirmative and Negative Covenants

i. Negative Easement:

1. "A negative easement is one which restrains a landowner from making certain use of his land which he might otherwise have lawfully done but for that restriction *(Trustees of Columbia Coll. v Lynch, 70 NY 440*). …If established expressly, a negative easement must comply with the requisites of the Statute of Frauds." *Huggins v. Castle Estates, Inc.* 36 NY 2d 427 (1975).

a. Statute of Frauds: Basically a rule that says that a contract (lease, agreement, promise, undertaking) incapable of being fully preformed within one year of its creation must be in writing. Recognizes that verbal contracts are enforceable, if they are capable of being fully preformed within a year.

i. General Obligations Law §5-701 Agreements Required to be in writing.; and

ii. General Obligations Law §5-703 Conveyances and Contracts concerning Real Property **must be in writing.**

2. Examples:

a. Residential purposes only, *Huggins, Supra*

b. "The restrictive covenant at issue provides that "[a]ny dock, pier or land projection constructed in or over the lake shall be no closer than [15] feet from the adjoining property line, and no such structure shall be built with sides." *Ford v. Rifenburg*, 94 AD3d 1285 (3rd Dept., 2012)

ii. Affirmative Easement:

1. "It has long been the rule in this State, and it finds expression in the leading case of *Miller v. Clary (210 N.Y. 127*), that "a covenant to do an affirmative act, as distinguished from [one] merely negative in effect, does not run with the land so as to charge the burden of performance on a subsequent grantee." *Nicholson v. 300 Broadway Realty Corp*. 7 N.Y. 2d 240 (1959).
    a. Exceptions:
        i. "The burden of affirmative covenants may be enforced against subsequent holders of the originally burdened land whenever it appears that (1) the original covenantor and covenantee intended such a result, (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened and (3) the covenant touches or concerns the land to a substantial degree." *Nicholson, Supra.*
2. Examples:
    a. "Said party of the first part shall keep said wheel in said mill in good condition and operate the same economically and construct and maintain said shaft of proper dimensions to the west line of said lot, affording said party of the second part a good connection therewith at his west line." Miller v. Clary 210 N.Y. 127 (1913) the Court held: "In that view, the covenant to construct and maintain the shaft was the personal undertaking of the original grantor and does not run with the land or create an equitable liability on the part of the defendants." Id.
    b. "to furnish steam heat" to the building on his property and "to furnish and maintain all necessary steam pipes and return pipes for that purpose" *Nicholson Supra.* The Court held the covenant touched and concerned the land to a substantial degree and was enforceable. Id.

III. Creation and Existence of Easements:

a. **Express Easements**: "in writing." Express Easement means there is some writing/document/deed/agreement that states exactly what the easement or

understanding is between the parties. The interpretation of an express easement is a question of law.

i. Grantor and Grantee

1. Signed, Sealed and Delivered.
2. General Obligations Law § 5-703. Conveyances and contracts concerning real property required to be in writing

   1. **An estate or interest in real property**, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, **cannot be created**, granted, assigned, surrendered or declared, **unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating**, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing….

3. An example of "by operation of law" when there are joint tenants with a right of survivorship or tenants by the entirety and one of the tenants dies, the property/interest is conveyed by operation of law to the surviving tenant without the need for a separate deed.
4. "Subscribed by the person creating" = signed and acknowledged. In contracts the term "Signed by the party to be charged" is sometimes used instead.
5. Example: *McColgan v. Brewer,* 84 A.D. 3d 1573 (3d Dept 2011)

   "The right-of-way agreements provided, in relevant part, that the owner of the property "does hereby grant, release and convey unto [Klepeis] a perpetual and unobstructed right-of-way and easement 50 feet in width over said premises[,which] shall at all times hereafter be kept open and unobstructed as a highway for the use and benefit of the properties owned by the parties hereto, as well as other parties, and the owners and occupants thereof, as a means of ingress and egress, by foot or vehicle."

   Here, Klepeis is the only grantee in the agreements and Kelley's involvement is limited to that of a grantor of a right-of-way over her own property. As neither Kelley nor her successors in interest were grantees with respect to the right-of-way agreements with the other landowners, such agreements do not benefit the landlocked portion of plaintiff's property as a matter of law.

6. Document conveying an interest in real property must have:
   a. "a specific grantor,

b. a specific grantee,

c. a proper designation of the property,

d. a recital of the consideration, and….

e. operative words….

f. [be] acknowledged before delivery, and

g. its execution and delivery [must be] attested by a subscribing witness." *Cohen v. Cohen* 188 A.D. 933(2d Dept 1919).

ii. Written Instrument

1. Will
    a. In *Cohen v. Cohen, Supra,* a husband tried to convey property to his wife by a letter, the Court said not a proper conveyance because it lacked the elements above.
    b. "Every estate in property may be devised or bequeathed." Estates Powers and Trusts Law (EPTL) § 3-1.2 What property may be dispose of by will.
2. Agreement
    a. Easement Agreement →Temporary, Permanent, for a period of years.
3. Deed (grant or reservation)
    a. Grant: Easement rights can be granted by a Grantor to the Grantee within the deed
        i. "Together with an easement …."
    b. Reservation: Easement rights can be retained by the Grantor over lands conveyed
        i. "A reservation creates a new right out of the subject of the grant, and is originated by the conveyance." *Mitchell v. Thorne*, 134 N.Y. 536 (1892)
        ii. "subject to an easement reserved for the grantor…"

c. Exception: An Easement can be excluded from a conveyance.

   i. "By an exception some portion of the subject of the grant is excluded from the conveyance, and the title to the part so excepted remains in the grantor by virtue of his original title." *Mitchell*, *Supra.*

d. Cannot grant an easement to yourself over your own lands

   i. An individual cannot grant or have an easement over land they own "because all the uses of an easement are fully comprehended in the general right of ownership." *Will v. Gates*, 89 NY2d 778 (1997). There is no servient or dominant estate, they have merged by the unity of title in a common owner. *Id.* at 784.

e. Cannot create an easement over lands you do not own/Cannot reserve an easement over lands you no longer own.

   i. "…having already conveyed the annex parcel, he could not "reserve " in the deed to defendant's predecessor-in-interest an easement appurtenant to the annex parcel for the benefit of plaintiff's predecessor-in-interest." *Estate of Thomas v. Wade*, 69 N.Y.2d 570 (1987).

f. Cannot create an easement in favor of a third party, not a party to the deed.

   i. "A party cannot reserve an easement over another's property in favor of a third party who is not a party to the agreement." *McColgan*, *Supra.*

g. <u>The appurtenance clause in deeds</u>: "Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises…"

i. "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rëarrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." *Lampman v. Milks*, 21 N.Y. 505 (1860)

ii. "An easement appurtenant occurs when the easement (1) is conveyed in writing, (2) is subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate (*internal citations omitted).* The easement passes to subsequent owners of the dominant estate through appurtenance clauses, even if it is not specifically mentioned in the deed. (citations omitted)" *Djoganopolous v. Polkes,* 95 A.D.3d 933 (2d Dept 2012).

b. **Implied Easements:** Not created by a deed/document/writing but are implied from the circumstances. All types require there be a common grantor between the alleged dominant estate and alleged servient estate for an easement to be implied across the servient estate.

   i. Former public highway

      1. Common Grantor bounds property along the centerlines of a public street or otherwise uses Public Hwy in description
      2. Common Grantor owns the bed of the public road
      3. Common Grantor impliedly has granted his grantees a private easement of access underlying the public highway
      4. When or if the Public Highway is abandoned or discontinued, the private easements of access which were impliedly or expressly granted allow for the perpetual enjoyment of the road for the grantee and his successors.
         a. "private easement of access arises in order to insure that a grantee or his successors in title are not deprived of the use of the right of way existing at the time title (to the lot) was acquired." *Kent v. Dutton*, 122 AD2d 558 (4th Dept. 1986)
      5. "That private easements may be appurtenant to the property abutting upon a public highway must be conceded. These easements of the abutting landowner are in addition to such as he possesses as one of the public, to whose use the property has been subjected. They are independent of the public easement and, whether arising through express or implied grant, are as indestructible, in their nature, by the acts of the public authorities, or of the grantor of the premises, as is the estate, which is the subject of the grant." *Holloway v. Southmayd*. 139 N.Y. 390 (1893).

   ii. Pre-existing use

      1. "Unity and subsequent separation of title,
      2. the claimed easement must have, prior to separation, been so long continued and obvious as to show it was intended to be permanent, and

3. the use must have been necessary to the beneficial enjoyment of the dominant estate at the time of the conveyance." *Four S. Realty Co. v. Dynko*, 210 A.D.2d 622 (3d Dept 1994).
    a. "The necessity required for an implied easement based upon preexisting use is only reasonable necessity, in contrast to the absolute necessity required to establish an implied easement by necessity." *Id.*

iii. Necessity

1. "….that there was a unity and subsequent separation of title, and
2. that at the time of severance an **easement** over defendant's property was **absolutely** necessary." *Stock v. Ostrander*, 233 A.D.2d 816 (3d Dept .1996).
3. "As to the second element, plaintiffs adduced proof that, upon severance, their parcel became landlocked by other properties with no access to a public highway due to the nature of the surrounding terrain, except via the dirt road across the lands owned by Ostrander, defendant's predecessor in title. Thus, the **easement** was **absolutely** necessary." *Stock, Supra*
4. "To establish an easement by necessity, plaintiff must, by clear and convincing evidence, show that its property was at one time titled under the same deed as defendants' and, when severed, plaintiff's parcel became landlocked." *Lew Beach co. v. Carlson*, 77 A.D.3d. 1127 (3d Dept., 2010).
5. "…access to their property by a navigable waterway would defeat their entitlement to easements by necessity." *Foti v. Noftseir*, 72 A.D.3d. 1605 (4th Dept., 2010).

iv. Paper Streets

1. "It is well settled that " 'when property is described in a conveyance with reference to a subdivision map showing streets abutting on the lot conveyed, easements in the private streets appurtenant to the lot generally pass with the grant' " (*citations omittied*). Nonetheless, whether an implied easement was in fact created depends on the intention of the parties at the time of the conveyance (*citations omitted*). This requires proof that the deed from the original subdividing grantor referred to the subdivision map or the abutting paper street (*citations omitted*). *DeRuscio v. Jackson*, 164 A.D.2d 684 (3d Dept., 1991).
2. Although the intention of the grantor is to be determined in light of all the circumstances, the most important indicators of the grantor's intent are the

appearance of the subdivision map and the language of the original deeds. *Fischer v. Liebman*, 137 A.D.2d 485 (2d Dept., 1988).

3. "The record demonstrates that the intent of the parties' common grantor was to provide a right of passage from the subject lots to the *east* (ultimately leading to a main road) with no intent, express or implied, to provide a right of passage along the paper road to the *west.* TO BE SURE, MAPS FROM 1900 and 1915 do clearly depict a right-of-way (i.e., the paper road) on the southern border of approximately 70 specifically enumerated "cottage lots," including the lots at issue here. The record reveals, however, that this paper road was never opened. Instead, the route entailing "the road to Onchiota" was used by owners of lot 108 and all lots to its east to gain access to the main road (*see* n. 2, *supra*). Indeed, as of 1900 and for the next 80 years, no public road even existed to the west. It was not until 1980 that a public road (Tebbutt Road) was opened to the west of these lots." *Busch v. Harrington*, 63 A.D.3d 1333 (3d Dept., 2009).
4. Subdivision maps have to be filed with the County Clerk. Town Law 279; Village Law §7-732; General Cities Law §34.

c. **Private Prescriptive Easements**:

i. Prescription is similar to adverse possession, it has the same common law elements, however prescription results in an easement rather than title to land. *1830 Madison Ave. LLC v. 17 East Owners Corp.*, 2003 NY Slip Op 51309(U) (Sup. Ct. NY Co., 2003).

ii. The statutory period is 10 years. Civil Practice Law and Rules (CPLR) §212(a) Possession necessary to recover real property .

Between 1959 and 1963 it was 15 years.

Prior to 1959 the statutory period was 20 years.

iii. "In other words, as 'the enjoyment of easements lies in use rather than in possession', the only physical conduct necessary for their acquisition by prescription is 'making use' of a portion of another's land, (citations omitted), and one claiming a right of way by

prescription is not required to prove that the way was enclosed, cultivated or improved. In short, the prescribed statutory manifestations of adverse possession as one court wrote about section 372 of the Code of Civil Procedure, the predecessor of section 40 can have 'no application to the case of an easement, as of passage. *DiLeo v. Pecksto Holding Corp.*, 304 N.Y.505 (1952).

iv. "However, not every use of another's land gives rise to an easement. It is also requisite that the use be adverse, open and notorious, continuous and uninterrupted for the prescriptive period." Id.

v. "…this court has consistently held, 'Under ordinary circumstances, an open, notorious, uninterrupted, and undisputed use of a right of way is presumed to be adverse under claim of right and casts the burden upon the owner of the servient tenement to show that the user was by license' *DiLeo Supra.*

vi. But where the use is not inconsistent with the rights of the owner and the general public, in the absence of some decisive act on the part of the claimants, indicating a use separate and exclusive from the general use, that presumption will not apply…. Common use negates the concept of a presumption in favor of an individual, and the use of a [right of way with members of the general public militates against the establishment of an easement by prescription, because the use is not adverse. *Hassinger v. Kline*, 110 Misc. 2d. 147 (Sup. Ct. Rockland Co., 1981).

vii. The law is that an easement for light and air cannot be acquired by prescription. *Cohan v Fleuroma, Inc*., 42 A.D.2d 741 (2d Dept 1973).

viii. "Seasonal use of the roadway will not prevent plaintiff from establishing a prescriptive easement, as long as such use was continuous and uninterrupted and commensurate with appropriate existing seasonal uses." *Miller v. Rau*, 193 A.D.2d. 868 (3d Dept., 1993).

ix. "…proof of an exclusive, continuous, uninterrupted, open and notorious user under a claim of right with the knowledge and acquiescence of the owners of the servient tenement for a period of upwards of twenty years, authorizes the presumption of a grant of the interest so exercised and enjoyed." *Nicholls v. Wentworth*, 100 N.Y. 455 (1885).

d. <u>Public Prescriptive Easements:</u>

i. Prescriptive or "User" Highways

1. N.Y. Highway Law § 189. Highways by use.

   "All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway…."

2. Section 189 and its predecessor statutes have been on the books since 1797.
3. "But the mere fact that a portion of the public travel over a road for twenty years [now ten years] cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The user must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. We think all this is implied in the words 'used as public highways.' *Speir v. Town of New Utrecht,* 121 NY 420(1890).
4. Public Use + Public Maintenance (for the Statutory Period) = Prescriptive or "User" Highway
5. Village Law §6-626 Streets by prescription
   All lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such.
6. No analogous statute in the City Law. See *City of New York v. Gounden*, 2013 N.Y. Misc. LEXIS 689 (Queens Co., Jan. 22, 2013)
7. "The general rule is that when the language of the statute will bear a construction which will leave the fee in the landowner, that construction will be preferred. If the title to land in the bed of a highway depends upon presumptions, the general rule seems applicable that only an easement was taken." *Mott v. Eno*, 181 NY 346 (1905).

ii. Prescriptive easement for other public purposes:
   1. usually allowed, usually acquired by the public authority when they can demonstrate the elements to acquire a private prescriptive easement. See *Zutt v. State of NY*, 50 A.D.3d 1133 (2d Dept, 2008). [whether State acquired a prescriptive easement in a drainage ditch]

iii. Limitation:
   1. Real Property Law §261 **Maintenance of telegraph or other electric wires raises no presumption of grant.**

      Whenever any wire or cable used for any telegraph, telephone, electric light or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall

extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to, such attachment or extension.

e. Equitable Easements:

i. —"…a grant of an easement by an instrument which is unacknowledged and unattested may nevertheless support equitable rights and interests in property which, when established by possession and improvements, are effective against a subsequent purchaser of the servient estate who takes with actual knowledge of the possession and improvements." *Kienz v. Niagara Mohawk Power Corp.*, 41 A.D.2d 431 (4th Dept 1973) See also*: Loughran v. Orange and Rockland Utilities, Inc.*, 209 A.D.2d 917 (3d Dept 1994)

f. Private Road Condemnation: Section 300 et seq. of the Highway Law

i. New York Highway Law § 300. Private road

An application for a private road shall be made in writing to the town superintendent of the town in which it is to be located, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which it is proposed to be laid out.

ii. Does not require a metes and bounds survey, but a survey would satisfy this provision. *Satterly v. Winne,* 4. N.Y. 185 (1886) (Ulster Co., Town of Woodstock).

iii. § 301. Jury to determine necessity and assess damages
The town superintendent to whom the application shall be made shall appoint as early a day as the convenience of the parties interested will allow, when, at a place designated in the town, a jury will be selected for the purpose of determining upon the necessity of such road, and to assess the damages by reason of the opening thereof.

iv. § 302. Copy application and notice delivered to applicant
Such town superintendent shall deliver to the applicant a copy of the application, to which shall be added a notice of the time and place appointed for the selection of the jury, addressed to the owners and occupants of the land.

v. § 303. Copy and notice to be served
The applicant on receiving the copy and notice shall, on the same day, or the next day thereafter, excluding Sundays and holidays, cause such copy and notice to be served upon the persons to whom it is addressed, by delivering to each of them who reside in the same town a copy thereof, or in case of his absence, by leaving the same at his residence and upon such as reside elsewhere, by depositing in the postoffice a copy thereof to each, properly enclosed in an envelope, addressed to them respectively at their postoffice address, and paying the postage thereon, or, in case of infant owners, by like service upon their parent or guardian.

vi. §§304-306 Relate to selecting and paying the jurors.

vii. § 307. Their verdict
The jury shall view the premises, hear the allegations of the parties, and such witnesses as they may produce, and if they shall determine that the proposed road is necessary, they shall assess the damages to the person or persons through whose land it is to pass, and deliver their verdict in writing to the town superintendent.

viii. "The Legislature evidently considered this method of laying out private roads the work of laymen rather than lawyers." *In Re Bell*, 131 Misc. 734 (Sup. Ct. St. Lawrence Co., 1928)

ix. [A]n ancient and archaic provision of the Highway Law which is unique and rarely utilized. *Preserve Assoc. v. Nature Conservancy, Inc.* 934 N.Y.S.2d 678 (Sup. Ct. Franklin Co., 2011). November 28, 2011

x. Limitation:

1. Cannot be used to acquire an easement for utilities, it is strictly for ingress and egress. *Preserve Assoc., Supra.*
2. Cannot be used against Public Property held in a governmental capacity (for a public purpose). See *Leonard v. Masterson*, 70 A.D.3d 697 (2d Dept 2010).

IV. Location and Width of Easements:

a. Generally

i. By agreement/deed/other writing

1. "Where a right-of-way is granted over a stated width and does not state the express purpose for which it is given, the circumstances of the case will determine "whether the reference is to the width of the way or is merely descriptive of the property over which the grantee must have such a way as may be reasonably necessary" *Serbalik v. Gray*, 268 A.D.2d 926 (3d Dept. 2000).
2. "Plaintiff's property is landlocked by defendant's property resulting in both deeds specifying that plaintiff holds "a right of way two rods (33 feet) wide along the shore of the aforesaid swamp to the highway"…. Upon our review, we find that the presently constituted driveway, measuring 12 feet at its widest and 9 feet 8 inches at its narrowest point, has provided and continues to provide a reasonable and convenient means of ingress and egress, fulfilling the purpose for which it was created." *Serbalik Supra.*

3. In this case, the trial court properly concluded that the easement contained in the plaintiffs' deed, providing for "ingress and egress over a 30-foot right of way" over a portion of the defendant's property should be limited to the 12-foot paved roadway, since the plaintiffs failed to establish that roadway was inadequate for the expressly stated purpose intended by the grantee in creating the easement. *Minogue v. Kaufman*, 124 A.D. 2d 791 (2d Dept. 1986).
4. "Here, it is undisputed that defendants obtained an easement of ingress and egress by prescription. Contrary to plaintiff's argument, the judgment awarding that easement expressly defined it by reference to a survey map showing the precise path of the easement in detail, including exact distances and courses and with reference to monuments, adjacent properties, highwater lines and other landmarks." *Estate Court, LLC v. Schnell*, 49 A.D.3d 1076 (3d Dept., 2008).

ii. <u>Practical Location or existing way:</u>

1. "[o]nce an easement is definitively located, by grant or by use, its location cannot be changed by either party unilaterally" *Clayton v. Whitton*, 233 A.D.2d 828.
2. In *Lewis v. Young, supra*, the Court concluded that a deed conveyed to the easement holder containing the right to "the perpetual use, in common with others, of [the burdened landowner's] main driveway, running in a generally southwesterly direction"(*id.* at 446, 682 N.Y.S.2d 657, 705 N.E.2d 649 [emphasis omitted]) did not establish a fixed location, such as would be shown by, for example, a specific metes and bounds description (*see generally Green v. Blum*, 13 A.D.3d 1037, 1038, 786 N.Y.S.2d 839 [2004]). Instead, the Court held that the "provision manifests an intention to grant a right of passage over the driveway-wherever located-so long as it meets the general directional sweep of the existing driveway" *Chekijian v. Mans*, 34 AD3d 1029 (3d Dept 2006).
3. "The Russell's present day driveway is the only feasible route by which defendants can access the old road that runs through the southwestern part of the Russell's property to the remaining portion of the Schneider property…" Russell v. Adams v. Schneider, Index No. 10-1707; 11-0988 Supreme Court, Greene Co., April 22, 2013 Hon. Roger D. McDonough presiding.

iii. <u>Undefined Location:</u>

1. "The courts may exercise their equitable powers to locate an easement where the parties have failed to specifically designate the route." *Castle Associates v. Schwartz*, 63 A.D.2d 481 (2d Dept 1978).

iv. Width of Easement:

1. Width Stated: have to determine whether it was descriptive of the land over which the way is to be located or if the width is the width of the way.
2. No width stated = "
   a. Necessary and convenient for the purpose for which it was created." *Mandia Supra.*
   b. "Despite this preexisting use of the driveway, the deed creating the easement did not specify or narrow the width, supporting the conclusion that the deeded easement was intended to conform to the existing driveway. Under these circumstances, and giving due deference to Supreme Court's credibility determinations (see Eddyville Corp. v Relyea, 35 AD3d 1063, 1066, 827 NYS2d 315 [2006]) , we will not disturb that court's decision that the driveway easement is 26 feet wide." *Albright v. Davey*, 68 A.D.3d 1490 (3d Dept 2009).
3. Width used during the prescriptive period
   a. Prescriptive Highway→width is the traveled track, shoulders, and ditches to the outer upside of the ditch. *Van Allen v. Kinderhook*, 47 Misc 2d 955 (Sup. Ct. Columbia Co., 1965) The land necessary and incidental thereto for highway purposes. *Nikiel v. City of Buffalo*, 7 Misc. 2d 667 (Sup. Ct. Erie Co., 1957)
   b. Private Easement by Prescription: width that was used for the statutory period.
      i. "In the case of a prescriptive easement, "the right acquired is measured by the extent of the use" (Am. B. N. Co. v N. Y. El. R. R. Co., 129 NY 252, 266) . Thus, plaintiffs acquired an easement only equal in width to that portion of the land actually used during the prescriptive period. Here, although a survey map showing a 50-foot-wide "right-of-way" was admitted on stipulation, no evidence was offered concerning

the width of the parcel actually used. The issue, therefore, cannot be resolved on this record." *Reiss v. Maynard*, 170 A.D.2d 992 (4th Dept. 1991).

V. Introduction to the Use of Easements:

a. Rights of the Parties

i. Owner of the Land: Servient Estate Holder

1. "A landowner owes a duty to another on his land to keep it in a reasonably safe condition, considering all of the circumstances including the purpose of the person's presence and the likelihood of injury." *Macey v. Truman*, 70 N.Y.2d 918 (1987).
2. "..the rule articulated in *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [1976]. There, abolishing the distinctions among trespassers, licensees and invitees, we held that New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition." *Tagle v. Jakob*, 97 NY2d 165 (2001).
3. The right: "to have the natural condition of the terrain preserved, as nearly as possible" (49 NY Jur 2d, Easements §128) and "to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change." *Lopez v. Adams*, 69 A.D.3d 1162 (3d Dept 2010).
4. Cannot interfere with the use of the easement by the easement holder
    a. "…as the owner of the land, has the right to use it in any way that he sees fit, provided he does not unreasonably interfere with the rights of the plaintiff. All that is required of him is that he shall not so contract the alley-way, either vertically or laterally, as to deprive the plaintiff of a reasonable and convenient use of the right of passing to and fro." *Grafton v. Moir*, 130 N.Y. 465 (1892).
    b. "Ordinarily, a servient owner has no duty to maintain an **easement** to which its property is subject. Indeed, a servient owner has a "passive" duty to *refrain* from interfering with the rights of the dominant owner." *Tagle v. Jakob*, 97 NY2d 165 (2001)
5. Landowner can:

a. "a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired." *Lewis v. Young*, 92 NY2d 443 (1998)

6. Landowner may:

a. "In the absence of a demonstrated intent to provide otherwise, a landowner, consonant with the beneficial use and development of its property, can move that right of way, so long as the landowner bears the expense of the relocation, and so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way". *Lewis Supra*

b. Unilateral relocation by landowner only when the easement is not fixed in location or in other words is undefined.

c. In *Lewis v. Young*, *supra*, the Court concluded that a deed conveyed to the easement holder containing the right to "the perpetual use, in common with others, of [the burdened landowner's] main driveway, running in a generally southwesterly direction"(*id.* at 446, 682 N.Y.S.2d 657, 705 N.E.2d 649 [emphasis omitted]) did not establish a fixed location, such as would be shown by, for example, a specific metes and bounds description (*see generally Green v. Blum*, 13 A.D.3d 1037, 1038, 786 N.Y.S.2d 839 [2004]). Instead, the Court held that the "provision manifests an intention to grant a right of passage over the driveway-wherever located-so long as it meets the general directional sweep of the existing driveway" *Chekijian v. Mans*, 34 AD3d 1029 (3d Dept 2006).

d. "speed bumps" may have "unlawfully interfered with the plaintiff's right to utilize the easement." *J.C. Tarr Q.P.R.T. v. Delsener*, 70 A.D.3d 774 (2d Dept., 2010).

ii. Owner of the Easement: Dominant Estate Holder

1. " 'A right of way along a private road belonging to another person does not give the [easement holder] a right that the road shall be in no respect altered or the

width decreased, for his right is merely a right to pass with the convenience to which he has been accustomed.' " *Grafton, Supra.*

2. "One does not possess or occupy an easement or any other incorporeal right. An easement derives from use, and its owner gains merely a limited use or enjoyment of the servient land." *Di Leo v Pecksto Holding Corp. 304 NY 505 (1952).*
3. Can maintain, but cannot improve the easement
    a. In light of the defendants' flagrant abuse of their rights under the easement, we find that the trial court did not err in requiring the defendants to restore the roadbed to its prior condition." *Mandia v. King Lumber Co.,* (Where the Lumber company had widened the ROW to 50 feet and paved it.)
4. Cannot overburden the easement
    a. Easement Holder is not permitted to: "materially increase the burden of the servient estate[s] or impose new and additional burdens on the servient estate[s]" *Solow v Liebman,* 175 AD2d 121 (2d Dept 1991).
    b. "However, the record further establishes, as the trial court found, that the plaintiffs impermissibly expanded the dimensions of the easement beyond the 10-foot width that existed in 2001 and erected a gate and a fence on the defendants' property. Therefore, the plaintiffs must remove the gate and the fence, and they must further restore the area beyond the 10-foot width of the easement to its original condition. *Vitiello v. Merwin*, 87 A.D.3d. 632 (2d Dept., 2011).
    c. However:
        i. "Where the nature and extent of the use of the easement is, as here, unrestricted, the use by the dominant tenement might, of course, be enlarged or changed." *McCullough v. Broad Exchange Co.*, 101 AD 566 (1st Dept., 1905)[easement for "the mutual advantage of all the property" partitioned and conveyed the open area "shall be forever left as an open space, and shall be unencumbered by any erections, except such walks as now cross the same, for the purpose of giving light and air and ingress and egress from all the premises herein

described; said open spaces as they now exist shall be maintained in good order and kept in good condition at the joint and equal expense of all the parties hereto."]

ii. The issue in McCollough was bringing in coal over the easement to use in a building that was partially on the dominant tenement and partially not.

d. Cannot install utilities, park vehicles or plant trees along a roadway in the easement area, if the easement is for ingress and egress.

i. "The easement here specifically granted plaintiffs the right of ingress and egress. While plaintiffs argue that the fence and landscaping on the western side of the driveway impede their ability to use the easement to the fullest extent because it prohibits parking along the side of the driveway, Supreme Court correctly determined that parking was not a proper use of the easement." *Sambrook v. Sierocki*, 53 AD3d 817 (3d Dept., 2008).

ii. "We further agree with the trial court that nothing in the language of the grant suggests that the plaintiffs had a broad right to use the entire 30-foot parcel for another purpose such as landscaping the strips of grass surrounding the roadway on either side." *Minogue v. Kaufman*, 124 AD2d 791 (2d Dept 1986)

5. Cannot use the Easement to benefit parcels other than the Dominant parcel. (no piggy-backing an easement)

a. "In any event, "the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is not appurtenant (*Williams v. James*, L.R. 2 C.P. 577)" *Hunt v. Pole Bridge Hunting Club, Inc.*, 219 A.D.2d 618 (2d Dept., 1995).

6. The dominant estate holder can use the easement as can his agents, servants, employees and invitees.

7. If the easement is "in common with others" then the easement is not exclusive and the holder must not impair the rights of the other easement holders or try to preclude other easement holders' use
    a. "A private individual, engaged in improving streets for the benefit or convenience of his own property, cannot cut down the grade of an existing street to the detriment of an abutting owner. If the cutting of the grade impairs the abutting owner's right of access to his property, his consent is necessary under such circumstances, as he may resist a projected improvement by his neighbor which he could not resist if undertaken by the public authorities. A party cannot impair his neighbor's easement in a street and force what he calls a benefit upon him against his will." *Cunningham v. Fitzgerald*, 138 N.Y.165 (1893).
    b. "A co-owner of an easement in common, including easements of way held in common, must not interfere with the reasonable use of the easement by his or her co-owners, or make alterations that will render the easement appreciably less convenient and useful to any one of the cotenants." *Butts v. Moreno*, 24 Misc.3d 1230(A) (Sup. Ct. Kings Co., 2009).

1. Liable for injuries that occur during maintenance of the easement.

8. "Here, the injury resulted not from any unsafe condition defendant [landowner] left uncorrected on his land, but as a direct result of the course plaintiff and his companions decided to pursue in attempting to dislodge the marked tree. Under these circumstances, the law imposed no duty on defendant as landowner to protect plaintiff from the unfortunate consequences of his own actions. Nor, in the absence of some showing that defendant's conduct in designating an area of his land for cutting and in marking the trees was causally related to the accident, can he be held liable to plaintiff on the theory that his conduct was negligent." *Macey v. Truman*, 70 N.Y.2d 918 (1987).

b. Maintenance, Repairs & Improvements
    i. <u>Maintenance and Repairs</u>

1. Servient Estate Holder has no duty to maintain the roadway/easement for the Dominant Estate Holder
2. "Supreme Court correctly found that defendants' right to use the road for access included the right to carry out work as necessary to reasonably permit the passage of vehicles and, in so doing, to "not only remove impediments but supply deficiencies in order to construct [or repair] a suitable road. (internal citations omitted) However, defendants' rights to make lawful and reasonable use of their easements were limited to those actions "necessary to effectuate the express purpose of its easement" *Lopez v. Adams*, 69 A.D.3d 1162 (3d Dept 2010).
3. "As the dominant owners, defendants are responsible for maintaining and repairing the roadway and, in the absence of an agreement to do so, plaintiffs are not obligated to make repairs or contribute to their cost." *Lopez Supra* citing to *Tagle v. Jakob*, 97 NY2d 165 (2001)

ii. Improvements

1. The servient landowner has the right: "to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change." *Lopez v. Adams*, 69 A.D.3d 1162 (3d Dept 2010).
2. Once the Easement is established, it cannot be improved beyond that condition.

c. Alteration and Relocation of the Easement

i. "In the absence of a demonstrated intent to provide otherwise, a landowner, consonant with the beneficial use and development of its property, can move that right of way, so long as the landowner bears the expense of the relocation, and so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way". *Lewis Supra*

ii. As noted in *Lewis v. Young*, *supra*, relocation is not appropriate for even an undefined easement when it frustrates the purpose of the easement's creation, increases the easement holder's burden or "significantly lessen[s] the utility of the right of way"(*id.* at 452, 682 N.Y.S.2d 657, 705 N.E.2d 649). *Chekijian v. Mans*, 34 AD3d 1029 (3d Dept 2006).

iii. " Indeed, Vilardo's construction on lot 15 appears to preclude relocation of the right-of-way to any other part of lot 15, and Vilardo does not seek to relocate the right-of-way over lot 15 but, rather, to eliminate it altogether. The Moores have demonstrated that they and plaintiffs were granted a right-of-way for passage to their lots over lot 15 and that, consistent with the intent of the common grantors, it be located without obstructions where it existed in 1985." *Judd v. Vilardo*, 57 A.D.3d 1127 (3d Dept 2008)

iv. "Where, as here, there is merely a general reference to an existing road, without more, an intent for a fixed location of the easement is not inferred." *Sullivan v. Woods*, 2010 WL 653096 (3d Dept 2010).

v. "a fixed location, such as would be shown by, for example, a specific metes and bounds description." *Chekijian Supra*

VI. **Interference with Easements:**

a. Obstructions and Encroachments

i. "…and even where a right of way was granted over certain roads marked on a plan, and one was described there as forty feet wide, it was held that the grantee was entitled to only a reasonable enjoyment of a right of way, and that such reasonable enjoyment was not interfered with by the erection of a portico, which extended a short distance into the road, so as to reduce it at that point to somewhat less than forty feet.' *Grafton v. Moir,* 130 N.Y. 465 (1892) Citing Clifford v. Hoare, L. R. 9 C. P. 362; Hutton v. Hamboro, 2 Fost. & F. 218

b. Gates and Fences

i. "The only kind of gate which can fail to interfere with defendant's right [to the **free and unobstructed use** of the said private road or lane from the said Boston Road or Main Street to the shore of Long Island Sound, aforesaid, for passage of horses and vehicles of every kind and for all other lawful purposes] is one which not only remains unlocked but which is perpetually kept open. Such a gate is useless for any purpose." *Missionary Society of Salesian Congregation v. Evrotas*, 256 N.Y.86 (1931)

ii. "The plight of these plaintiffs, confronted by gates which must be opened and closed upon entering or leaving Peekskill Hollow Road, together with the additional burden of walking or driving through the lot populated by defendant's animals, with the responsibility of preventing the straying of those animals on to a heavily travelled public highway when the gates are opened, is readily seen." *Sprogis v. Silleck*, 223 N.Y.S. 2d 979 (Sup. Ct. Putnam Co., 1961).

iii. "The plaintiff's right of passage must be enforced, but it must also be enforced in such manner as will give him a reasonably full enjoyment of his right and at the same time cause no undue burden upon the defendant in the beneficial use of his land. It appears in the testimony, and was found by the trial court, that many trespassers had used this passage from time to time, and that it ran through woodland in which at times cattle were turned out. It likewise appears that at various times, since 1842, gates were maintained over this passage, although in the course of years some of these gates had fallen into decay. Although the plaintiff had owned his land since 1902, he seems not to have been aware that he had any right of passage over the defendant's land until some time in 1911. I am of opinion that the disposition of this question by the trial court was reasonable and within its discretion, and I do not recommend any interference with it." (permitting defendant to lock the gates). *Blydenburgh v. Ely* 161 A.D.91 (2d Dept 1914).

VII. Transfer of Easements:

a. Easements in Gross
   i. Are not transferable, assignable or inheritable.
   ii. Extinguish upon death of holder.

b. Appurtenant Easements
   i. Transfer of Dominant Estate
      1. "New York adheres to the majority rule that a grantor cannot create an easement benefiting land not owned by the grantor (*see Matter of Estate of Thomson v Wade, 69 NY2d 570, 573)*. For an easement by grant to be effective, the dominant and servient properties must have a common grantor (*see Lechtenstein v P.E.F. Enters., 189 AD2d 858, 859)*. If the common grantor conveys both the dominant and servient properties, the easement must be provided for in the deed to the dominant property and in the deed conveying the servient property (*see Matter of Estate of Thomson v Wade*, *supra*). Here, the common grantor did just that, on the same day. Accordingly, the easement by grant was properly created." *Sam Development LLC v. Dean* 292 AD2d 585 (2nd Dept, 2002).
      2. "The easement passes to subsequent owners of the dominant estate through appurtenance clauses, even if it is not specifically mentioned in the deed." *Djoganopolous v. Polkes*, 95 A.D.3d 933 (2d Dept., 2012).
   ii. Division of Dominant Estate

1. "The easement is not extinguished by subdivision for any portion of the land to which it applies so long as no additional burden is imposed upon the servient estate by such use, even if the resulting dominant and servient estates are not contiguous." *Djoganopolous, Supra*

iii. Reserved Easements

1. Reserved easements in gross for the grantor
2. Reserved easements create a dominant parcel in those lands retained by the Common Grantor over the lands conveyed to the grantee (servient parcel).
    a. "Thus, an existing easement appurtenant will pass to the grantee of a dominant estate even if the deed does not expressly refer to the easement." *Will v. Gates*, 89 N.Y.2d 778 (1997).
3. Owners of a servient estate are bound by constructive or inquiry notice of easements which appear in deeds or other instruments of conveyance in their property's direct chain of title. *Djoganopolous, Supra* citing to *Witter v. Taggart* 78 N.Y.2d 234 (1991).

c. Transfers subject to Easements

i. <u>Record Notice:</u>

1. There is an easement or restriction recorded in the direct chain of title to the property.
    a. The guiding principle for determining the ultimate binding effect of a restrictive covenant is that "[i]n the absence of actual notice before or at the time of * * *purchase or of other exceptional circumstances, an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to [that owner] or [that owner's] direct predecessors in title." *Witter v. Taggart* 78 N.Y.2d 234 (1991).
    b. "…the owner of the servient estate will be bound by the subject encumbrance only if it is recorded in his or her chain of title." *Terwilliger v. VanSteenburg*, 33 A.D.3d 1111 (3d Dept 2006).
    c. "a deed conveyed by a common grantor to a dominant landowner does *not* form part of the chain of title to the servient land retained by the common grantor" *Witter v. Taggart*, *supra* at 239,

ii. Constructive or Inquiry Notice:

1. Something in the Record exists to tip off a potential purchaser that there may be an easement or restriction on the property
    a. "Subject to easements of record"
    b. Recorded map showing an easement or restriction on the land to be purchased.
    c. "The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniment of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained." *The Cambridge Valley Bank v. Delano*, 48 N.Y. 326 (1872) [regarding a mortgage]

iii. Actual Notice:

1. Something the potential purchaser sees on the property tips them off that there may be an easement or restriction on the property, for example, personally observing power lines, a roadway etc.
2. Potential purchaser knows there is an easement or restriction on the property via some other means, for example, is shown a map by the grantor prior to purchase. *Graham v. Beermunder*, 93 A.D.2d 254 (2d Dept 1983).[where grantor gave the potential purchasers a map of the development which was not filed in the county clerk's office]

iv. Common Plan or Scheme of Development:

1. "However, equity may provide plaintiffs a remedy provided they show: (1) that their parcels and the parcel owned by defendants are part of a general scheme or plan of development (*Korn v. Campbell*, *supra*); and (2) that, at the time defendants purchased the property, they had notice, actual or constructive, of the common scheme or plan (*Steinmann v. Silverman*, *supra*). Upon such proof "the

covenant is enforceable by any grantee as against any other upon the theory that there is a mutuality of covenant and consideration which binds each, and gives to each the appropriate remedy. Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefore lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract" (*Korn v. Campbell, supra,* 192 N.Y. p. 495, 85 N.E. 687)." *Graham v. Beermunder,* 93 A.D.2d 254 (2d Dept 1983).

2. "In sum, we find that the evidence clearly and definitely shows that Guernsey Hill, Section II, is a common scheme or plan of development. We are persuaded of this by the following set of circumstances: (1) when Guernsey subdivided his property, naming it "Guernsey Hill, Section II", he had a map prepared and filed with the Town Planning Board; (2) the presence in almost all the deeds of the same nine restrictions, designed to insure a uniformity of appearance in an estate-like atmosphere; (3) the inclusion in the deed to the last grantee, defendants, of the covenants despite the fact that the grantor no longer retained an interest in any of the property; (4) the use of the phrase "running with the land", indicating that the covenant at issue was not personal to the grantor and, under the circumstances, implying that the other vendees were to have a right of enforcement; and (5) the fact that when defendants purchased the property, Guernsey gave them a copy of the map and informed them that all the parcels depicted were subject to the same restrictions. This latter aspect also serves to satisfy the notice to defendants which must be proven to allow plaintiffs' equitable relief. Defendants have not offered any evidence which would cast sufficient doubt on the issue so as to require a trial, and, therefore, summary judgment is warranted." *Graham, Supra.*

3. Home Owners Associations have standing to enforce restrictive covenants:

    a. "In sum, it is reasonable to conclude that the corporate plaintiff Westmoreland Association was formed as a convenient instrument by which the property owners could advance their common interests and that it has a substantial identification with the real property owners in Westmoreland. Given all of the aforementioned factors, the Westmoreland Association qualified as a bona fide representative of the residents and property owners in the subject locale and, consequently,

had standing to bring this action, irrespective of the fact that it may not have met the technical requirements of privity of estate." *Westmoreland Association, Inc. v. West Cutter Estates, Ltd.*, 174 A.D.2d 144 (2d Dept, 1992).

VIII. Extinguishment of Easements:

a. Rule:

i. An easement acquired by grant "remains as inviolate as the fee favored by the grant, unless conveyed, abandoned, condemned or lost through prescription" *Gerbig v. Zumpano*, 7 N.Y.2d 327 (1960).

b. Adverse Possession:

i. "As with any adverse possession claim, the party seeking to extinguish the easement must establish that the use of the easement has been adverse to the owner of the easement, under a claim of right, open and notorious, exclusive and continuous for a period of 10 years." *Spiegel v. Ferraro*, 73 N.Y.2d 622 (1989)

ii. "Thus "an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for [the prescriptive period]" *Spiegel Supra.*

iii. "While plaintiff and her family used the easement to hike, take nature walks and cross-country ski, and while they also planted and mowed near it, such uses were not inconsistent with the easement itself or adverse to Majkut (defendant's predecessor in interest during the relevant 10-year time period). In other words, these uses did not constitute a use of the easement to the exclusion of all others nor did they in any way interfere with Majkut's use and enjoyment of the easement. Moreover, plaintiff did not submit proof that she installed some type of physical barrier or obstruction to prevent others, particularly Majkut, from using the easement during the entire prescriptive period." *Gold v. DiCerbo*, 41 A.D.3d 1051 (3d Dept. 2007).

iv. Exception: Paper Streets and unlocated "paper" easements

1. "A narrow exception to this general rule has evolved with regard to the extinguishment of easements that have not been definitively located through use. In *Smyles v Hastings* (22 NY 217, 224), we held that an easement that was not so definitively located through use and which lead to a "wild and unoccupied" parcel, was not extinguished by adverse possession because the owner of the easement had had no occasion to assert the right of way during part of the

prescriptive period. Relying on *Smyles*, the Appellate Division has held that such "paper" easements may not be extinguished by adverse possession absent a demand by the owner that the easement be opened and a refusal by the party in adverse possession. *Spiegel Supra.*

c. Abandonment

i. Public Highway Easement

1. Nonuse by the pubic and non-maintenance by the public authorities for 6 years. NY Highway Law §205
2. Filing of a certificate of abandonment by the Town Highway Superintendent is a discretionary duty, not mandatory and therefore whether or not one has been filed is not determinative of whether abandonment of the public easement for highway purposes occurred. See *Daetsch v. Taber*, 149 A.D.2d 864 (3d Dept., 1989)

ii. Private Easement

1. Nonuse alone does not extinguish a private easement
2. Must be an intent to abandon and an overt act in furtherance of the intention to abandon the easement.

a. "[N]onuser alone, no matter how long continued, can never in and of itself extinguish an easement created by grant ... In order to prove an abandonment it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement ... [A]cts evincing an intention to abandon must be unequivocal." *Gerbig v. Zumpano*, 7 N.Y.2d 327 (1960).

b. The "burden to show abandonment of an easement by grant is a heavy one." *Chapman v. Vondorpp*, 256 A.D.2d 297 (2d Dept 1998).

c. EXAMPLES OF INTENT TO ABANDON:

i. "The easement in question was for many years prior to plaintiffs' acquiring title blocked at one end by the use of a garden, and, indeed, plaintiffs' own title survey noted specifically that it apparently was not in use. Accordingly,

plaintiffs were on notice that the twenty-foot easement was of questionable validity, notwithstanding a declaration of easement filed prior to their acquiring the property and the recitation of the easement in their deed. It is also pertinent that plaintiffs have ingress and egress to the main street via another easement." *DeCaesare v. Feldmeier*, 184 N.Y.220 (1st Dept 1992)

ii. "The use of an alternate route of access while permitting the unimpeded growth of trees to obstruct the right-of-way for several decades may be indicative of an intent to abandon the easement." *Chapman v. Vondorpp*, 256 A.D.2d 297 (2d Dept., 1998).

d. Conveyance

i. Merger of Title

1. When the Servient and Dominant Estates are united in ownership, the easement across the servient portion is extinguished

a. "The merger doctrine proceeds from a recognition that a person cannot have an easement in his or her own land because all the uses of an easement are fully comprehended in the general right of ownership (internal citations omitted). Consequently, when the dominant and servient estates become vested in one person, the easement terminates. At that point, the easement no longer serves a purpose and the owner may freely use the servient estate as its owner." *Will v. Gates*, 89 N.Y.2d 778 (1997).

b. "Where, however, only a portion of the dominant or servient estate is acquired, there is no complete unity of title and there remain other dominant owners whose rights are inviolate. The easement rights of these owners cannot be extinguished by a conveyance to which they are not a party. An easement ceases to exist by virtue of a merger only when there is a unity of title of all the dominant and servient estates." *Will, Supra.*

ii. Agreement of all parties benefited by the easement - Release of Easement

1. Agreements relating to real property have to be in writing and recorded to constitute an effective extinguishment of an easement.
2. Has to include every dominant estate holder

iii. Conveyance to a Bona Fide Purchaser for Value who has no actual or constructive notice of the easement.

1. "A grantor may effectively extinguish or terminate a covenant when, as here, the grantor conveys retained servient land to a bona fide purchaser who takes title without actual or constructive notice of the covenant because the grantor and dominant owner failed to record the covenant in the servient land's chain of title." *Witter Supra.*
2. "Although we share the concern expressed in the dissent that this rule is contrary to the purpose of the recording act in that it essentially permits a common grantor to convey more title than he or she has retained, we are constrained by the detailed analysis in *Witter v. Taggart*,*supra*, which we find to be controlling." *Terwilliger v. VanSteenburg Supra.*
3. Exception:
    a. "..a narrow exception to this rule has been carved out in counties where a "block and lot" indexing system is used." *Terwilliger, Supra.*

e. <u>Eminent Domain</u>

i. Extinguishes all rights in and to the property condemned, including any easements

1. "When defendant (New York State) takes property through eminent domain, it takes in fee simple absolute and extinguishes all easements." *Thomas Gang Inc. v. State*, 19 A.D.3d. 861 (3d Dept 2005).
2. Tax foreclosure and subsequent sales do not extinguish easements

a. "The private easement which we have hereinbefore found to have been granted by implication was not affected by said tax sales for it has been held that a tax sale of land burdened by easements lawfully acquired prior to the levying of the tax for which the sale was made does notextinguish the easement. (Tax Lien Co. v. Schultze, 213 N. Y. 9, 12.)" *Thyhsen v. Brodsky*, 51 Misc. 2d 1023 (Sup. Ct. Monroe Co., 1966)

b. "When Absolute acquired title at the tax sale, a description of the property was limited to its tax grid number….. In order to determine the boundaries of its holdings, Absolute should have searched the County Clerk's property records until it found the subdivision plat that created its parcel. Had Absolute examined the plat, it would have discovered the open space restriction." *O'Mara v. Wappinger*, 9 N.Y.3d 303 (2007)[open space restriction]

f. <u>The End:</u>

i. "Once extinguished, an easement is gone forever and cannot be revived" *Sam Development LLC v. Dean* 292 AD2d 585 (2nd Dept, 2002) quoting (*Stilbell Realty Corp. v Cullen, 43 AD2d 966, 967)*.