

Easement Access Maintenance And Use Agreement



by Attorney Lars Loberg

Many woodland owners own real property accessible by easement only. In prior columns, we have discussed what an easement is and the various types of easements recognized in Wisconsin. What has not been discussed is what happens after the easement is created. How is use restricted? Who can use the easement? Who is responsible for maintenance and what level of maintenance is necessary? Having a well written Access Maintenance and Use Agreement signed by the parties allocating responsibility for maintenance and defining the relationship between the “servient” and “dominant” estates is

critical and avoids ambiguity if there is a dispute between parties.

The property over which an easement lies is the servient estate, and the owner of the adjacent property whom the easement provides access to is the dominant estate. By way of review, “an easement is a right of the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property right of the owner,” according to Black’s Law Dictionary. The dominant estate is a term used to reference the property to which an easement is due. Conversely, the servient estate is a term used to reference the property burdened by the dominant estate.

Generally, an easement is created when adjoining property owners sign an easement deed. Typical terms of an easement are as follows: A non-exclusive, perpetual, appurtenant (attached to the property) easement for ingress and egress and underground utilities. The legal description of the easement then follows. The easement deed might also include a brief description of the purpose of the agreement. For example: The purpose of the easement is to give Grantee an ingress and egress easement to the Southeast Quarter of the Southwest

Quarter of Section 27. If the Grantor (the owner of the servient estate) does not intend to use the easement, the Grantee is solely responsible for any roadway improvements to the easement parcel and an Access Maintenance and Use Agreement is unnecessary.

In many situations both landowners will use the easement parcel for some purpose. In such cases, what are the rights and responsibilities of the owners of the dominant and servient estates if there is no written agreement which sets forth the terms of use and maintenance of the easement? In many cases, the owner of the servient estate and the owner of the dominant estate will give a different answer to this question if there is no written agreement.

An Access Maintenance and Use Agreement (hereinafter “Agreement”) can be signed at the time the easement is created or on some later date. In some cases, an Agreement is not signed until after there is a dispute between the parties. The purpose of an Agreement is to reduce to writing the agreement between parties with respect to use and maintenance of an access easement or driveway, or both. It is therefore contemplated that both the dominant and servient estates will use the easement and both will benefit from the Agreement.

First, the Agreement should include recitals and definitions identifying, among other things, the names of the parties and the subject properties. Within the recitals it is important to reference which party owns which property. A copy of the deed for each property should be attached as an exhibit to the Agreement. Reference should be made to when each deed was recorded and the document number assigned to each deed by the Register of Deeds where the deed was recorded.

After the recitals and definitions, the document should state the agreement of the parties. For example: The parties shall have joint use of said access easement for pedestrian, vehicular and utility ingress, egress and access to their respective parcels for recreational and residential purposes and to maintain the

How an Attorney Can Help

I encourage property owners to seek the advice of an attorney when drafting an Agreement and to remember that the purpose of an Agreement is to eliminate ambiguity and gray area in the event of a dispute. An attorney will help you identify and address issues. Cognizant of the emotions often involved in a property dispute, a competent attorney will help you focus on the law and achieve your desired use.

Property law requires that strict procedures and forms be utilized and an attorney familiar with this area of the law will know what process must be followed. Note that recently-enacted federal laws now require lenders to confirm that a written shared Agreement is in effect and recorded if a federally-backed loan is involved.

Perhaps the most important role of the attorney is to carefully draft the agreement so that there is a mechanism in place to address potential future conflicts. An attorney can review property records and current Agreements and draft future Agreements. If there is an existing dispute, the attorney can provide options for resolution, including seeing the matter through litigation.

Last, an attorney can save you money. Sound odd? It is not. A poorly written Agreement drafted by lay property owners can lead to costly, time-consuming, and stressful litigation. Investing in an enforceable agreement often saves you money in the long run.

easement. In addition to defining for what purpose and how the parties can use the easement, it is also important to state that no other use shall be permitted, including, but not limited to, any use which materially impairs the use of the easement for its intended purpose. Furthermore, the Agreement should include a provision that the easement shall not be used as a public road without first obtaining the consent in writing from each party.

Next, the Agreement must address maintenance of the easement. Generally, the expense associated with maintenance is prorated between the parties. For example: Maintenance and snow plowing of the driveway shall be shared equally between the parties only as to that portion of the driveway actually used by each. The Agreement should state that maintenance for the portion of the easement which extends beyond the intersection of the easement that is jointly used is the sole responsibility of the party using that portion, to maintain.

The Agreement will then allocate responsibility for reasonable improvements and repairs to the shared portion of the easement, including grading and the addition of crushed rock. It is very rare that parties share the cost of installation of an asphalt or concrete overlayment unless the parties agree. In the absence of an Agreement, the party desiring an overlayment is responsible for the entire cost and maintenance thereof.

To use and maintain the easement, it must be unobstructed. Parties should be prohibited from blocking the easement, thus preventing ingress and egress. A necessary part of the Agreement is a statement that neither party, including the guests or invitees of a party, park or store property on the easement and that the easement should remain free from obstructions, including trees, at all times. However, parties should reserve the right to install, use, maintain and repair utilities, which might result in temporary obstruction. The degree to which utility work or other construction obstructs unimpeded use of the easement, and for how long, should be stated and agreed upon in writing by the parties.

Many woodland owners need amenities, including electricity, natural gas, and telephone service. The Agreement



If both parties use the access granted by the easement, both are responsible for its maintenance and general upkeep.

must include language addressing utilities. I suggest a provision similar to this: "The parties shall have the right to install, use, maintain and repair utilities in, under, over or across the easement at such party's expense; provided that the utilities shall be installed, used, maintained, and repaired so as not to unreasonably interfere with the use and quiet enjoyment of the easement." Even if the dominant estate owner does not intend to use utilities, such a provision is likely to aid in marketability of the parcel at the time of sale.

Although privacy and security are important for secluded properties, parties should address whether gates or other barriers may be erected upon the easement. As a general rule, neither party may install any gate or other barrier at the ends of or in any other place in or upon the easement, or on any public right-of-way adjoining same, except either party may install a gate on the boundary of the easement where it intersects the private road extension from the easement to the party's premises. If a gate is installed it should be by written agreement of the parties.

The easement deed, as the example states above, generally will provide that the easement is perpetual in duration.

It stands to reason that if an easement is necessary to gain access, so too is it necessary for the property to be sold in the future: property without access has little or no value. Therefore, an Agreement must provide that the Agreement, like the easement, shall run with the land and shall be binding upon the heirs, successors, transferees and assigns of the parties. Again, the Agreement should reiterate that the easement is a perpetual, and appurtenant easement benefiting both parcels.

An Access Maintenance and Use Agreement is a vital part of most easements. An Agreement will help the parties avoid expensive and stressful disputes, maintain neighbor relations, and set expectations, eliminating assumptions between the parties. The provisions discussed here are a thumbnail overview of the types of provisions that should be included in an Agreement. In each case, the unique nature of the parcels impacted and the needs of the parties shape the terms of the Agreement.



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