Overview of Easements (Servitudes), Licenses and Restrictive Covenants Relating to Land

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I. Easements Defined

"'Easements correspond to the servitudes of the civil law, and consist (1) of privileges on the part of one person to use the land of another (the servient tract) in a particular manner and for a particular purpose, or (2) of rights to demand that the owner of the servient tract refrain from certain uses of his own land, the privileges or rights in either case not being inconsistent with a general property in the owner of the servient tract. The easement further involves the right of freedom in its exercise from interference by the owner of the servient tract or other persons. Examples of easements are rights of way, of drainage, or light and air, etc.' [Footnotes omitted] 1 MINOR ON REAL PROPERTY (2d Ed., Ribble), § 87.'" *Bunn v. Offutt*, 216 Va. 681, 684 (1976).

Because "an easement is not an ownership interest in land, it is axiomatic that an easement is not an estate. This conclusion is consistent with authorities from numerous jurisdictions." (citations omitted). *Burdette v. Brush Mt. Estates, LLC*, 278 Va. 286, 292 (2009).

[Note: An "estate" is the entitlement to the present protection of either the present or future possession of land. Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 24 (1966).]

"Permission to enter the real property of another does not rise to the level of an easement. An easement concerns the continuing use of real property." (Citing *Russakoff v. Scruggs*, 241 Va. 135 (1991).) *Station # 2, LLC v. Lynch*, 280 Va. 166, 176 (2020).

Practice Point:

While an easement is not an "estate" in land, it is an "interest in real estate," and therefore its attempted establishment in judicial proceedings allows the filing of a memorandum of *lis pendens* pursuant to §8.01-268 VA. CODE.

A. Affirmative and Negative Easements

"Easements are described as being "affirmative" easements when they convey privileges on the part of one person or owner of land (the "dominant tract") to use the land of another (the "servient tract") in a particular manner or for a particular purpose. Easements are described as being "negative" when they convey rights to demand that the owner of the servient tract refrain from certain otherwise permissible uses of his own land. *Bunn v. Offutt*, 216 Va. 681, 684 (1976)." *United States v. Blackman*, 270 Va. 68, 77-78 (2005).

Negative easements, also known as servitudes, do not bestow upon the owner of the dominant tract the right to travel physically upon the servient tract, which is the feature common to all affirmative easements, but only the legal right to object to a use of the servient tract by its owner inconsistent with the terms of the easement. In this sense, negative easements have been described as consisting solely of "a veto power.*" Prospect Dev. Co. v. Bershader*, 258 Va. 75, 89 (1999).” *United States v. Blackman*, 270 Va. 68, 77-78 (2005).

B. Easements Disfavored at Common Law

“At common law, an owner of land was not permitted at his pleasure to create easements of every novel character and annex them to the land so that the land would be burdened with the easement when the land was conveyed to subsequent grantees. Rather, the landowner was limited to the creation of easements permitted by the common law or by statute. See *Tardy*, 81 Va. (6 Hans.) at 557. The traditional negative easements recognized at common law were those created to protect the flow of air, light, and artificial streams of water, and to ensure the subjacent and lateral support of buildings or land. See Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 13 (1989); see also *Tardy*, 81 Va. (6 Hans.) at 557, 563.” *United States v. Blackman*, 270 Va. 68, 77-78 (2005).

II. Easements Appurtenant, in Gross and Quasi Easements:

Easements, whether affirmative or negative, are classified as either "appurtenant" or "in gross."

A. Easements Appurtenant to Land

“An easement is 'a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former.'"*Amstutz v. Everett Jones Lumber Corp*., 268 Va. 551, 559 (2004) (quoting *Stevenson v. Wallace*, 68 Va. (27 Gratt.) 77, 87 (1876).

“An easement appurtenant, also known as a pure easement, has both a dominant and a servient tract and is capable of being transferred or inherited. It frequently is said that an easement appurtenant "runs with the land," which is to say that the benefit conveyed by or the duty owed under the easement passes with the ownership of the land to which it is appurtenant. See *Greenan v. Solomon*, 252 Va. 50, 54 (1996); *Lester Coal Corp. v. Lester*, 203 Va. 93, 97 (1961). The four negative easements traditionally recognized at common law are, by their nature, easements appurtenant, as their intent is to benefit an adjoining or nearby parcel of land. See Federico Cheever, *Environmental Law: Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. Rev. 1077, 1081 (1996).” *United States v. Blackman*, 270 Va. 68, 77-78 (2005).

B. Easements in Gross

"An easement in gross is an 'easement with a servient estate but no dominant estate.'" *Va. Elec. & Power Co. v. N. Va. Reg'l Park Auth.*, 270 Va. 309, 316-17 (2005).

In *United States v. Blackman*, 270 Va. 68, 77-78 (2005), the Supreme Court discussed these easements as follows:

> [A] easement in gross, sometimes called a personal easement, is an easement "which is not appurtenant to any estate in land, but in which the servitude is imposed upon land with the benefit thereof running to an individual." *Lester Coal Corp. v. Lester*, 203 Va. 93, 97 (1961). At common law, easements in gross were strongly disfavored because they were viewed as interfering with the free use of land. Thus, the common law rule of long standing is that an easement is "never presumed to be in gross when it [can] fairly be construed to be appurtenant to land." *French v. Williams*, 82 Va. 462, 468 (1886). For an easement to be treated as being in gross, the deed or other instrument granting the easement must plainly manifest that the parties so intended. *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 90 (1999).
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> Because easements in gross were disfavored by the common law, they could neither be transferred by the original grantee nor pass by inheritance. *Lester Coal Corp*., 203 Va. at 97. By statute, however, Virginia long ago abrogated common law restrictions on the transfer of interests in land 'by declaring that any interest in or claim to real estate may be disposed of by deed or will.' *Carrington v. Goddin*, 54 Va. (13 Gratt.) 587, 599-600 (1857) (internal quotation marks omitted). Pursuant to this statutory change in the common law rule, currently embodied in Code § 55-6, we have recognized that an affirmative easement in gross is an interest in land that may be disposed of by deed or will. *City of Richmond v. Richmond Sand & Gravel Co.*, 123 Va. 1, 9 (1918). Following this Court's decision in *Lester Coal Corp*., which in dictum made reference to the common law rule that easements in gross remained non-transferable by deed or will, 203 Va. at 97, Code § 55-6 was amended "to make clear the transferability of easements in gross." 1962 VA. ACTS CH. 169. Since 1962, Code § 55-6, in pertinent part, has expressly provided that "any interest in or claim to real estate, including easements in gross, may be disposed of by deed or will." (Emphasis added). We subsequently acknowledged the intent of this statutory amendment in *Corbett v. Ruben*, 223 Va. 468, 472 n.2, (1982) and *Hise v. BARC Elec. Coop*., 254 Va. 341, 344 (1997).

III. Methods of their Creation

"Easements may be created by express grant or reservation, by implication, by estoppel or by prescription." *Bunn v. Offutt*, 216 Va. 681, 684 (1976).

A. Express Grant

"[T]here still must be an instrument of conveyance, though not necessarily a deed in the form prescribed by Code § 55-48, in order to grant an express easement. See *Corbett*, 223

Va. at 471, 290 S.E.2d at 849 (the phrase "hereby create and establish" signified an intent to grant an easement). Also, the instrument must contain operative words of conveyance sufficient to demonstrate the manifest intention to grant an easement… 'Neither statutory nor common law requires the grantor of an easement to employ any particular words of art so long as "the intention to grant" is so manifest on the face of the instrument that no other construction could be put upon it.' 'Thus, a provision in an instrument claimed to create an easement must be strictly construed, with any doubt being resolved against the establishment of the easement.'" *Burdette v. Brush Mt. Estates, LLC*, 278 Va. 286, 299 & 297 (2009). (Citations omitted.)[1]

"The use of a way must be confined to the terms and purposes of the grant." (Citing 1 LOMAX DIG. (2nd Ed.) 680 and *Clark* v. *Reynolds*, 125 Va. 626 (1919).) *Robertson v. Bertha Mineral Co.*, 128 Va. 93, 104 (1920).

"Merely identifying the location of an easement, or the burdened estate, is not sufficient to create an express easement. To create an express easement, the property which benefits from the easement must be identified in some manner." *Beach v. Turim*, 287 Va. 223, 230 (2014).

B. Reservation

"A reservation is 'the creation of a new right or interest . . . by and for the grantor, in real property being granted to another.' At common law, words of 'reservation' were not deemed to be words of 'grant.' Thus, a grantor's words of reservation could create a property interest in favor of the grantor but not in favor of a third person, or 'stranger,' to the deed." *Shirley, Shirley*, 259 Va. 513, 518 (2000).

C. Easements Created by Implication

"[A] grantor of property conveys everything that is necessary for the beneficial use and enjoyment of the property. From this principle is derived the concept of an implied easement from preexisting use." *Brown v. Haley*, 233 Va. 210, 218 (1987) (Citations omitted.)

"A way of necessity in an easement which arises from an implied grant or implied reservation. It is premised on the presumption that a grantor of real property conveys whatever is necessary for the beneficial use of that property and reserves whatever is necessary for the beneficial use of the property he retains." *Fones v. Fagan*, 214 Va. 87, 90 (1973). (Citation omitted.)

[1] Similarly, "a document purporting to convey title must contain operative words manifesting an intent to transfer the property." *Lim v. Choi*, 256 Va. 167, 171 (1998). (Citations omitted.)

The while the two theories of implied easement from preexisting use and necessity "are similar and both require a showing of necessity, they are analytically distinct." *Fones* at p. 89.

"[T]he question whether an easement or servitude will be created, or pass as an incident to or part of the property granted, is a matter of contract, and must, of course, depend on the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. *When not thus expressed, the construction will be controlled by the use and condition of the property at the time of the sale, and certain implications and presumptions of law arising thereon*." *Sanderlin v. Baxter*, 76 Va. 299, 305 (1882).

1. Easements Implied by Prior Use (Quasi Easements)

When a landowner conveys a portion of his land, he impliedly conveys an easement for any use that is continuous, apparent, reasonably necessary for the enjoyment of the property conveyed, and in existence at the time of the conveyance." *Brown* at pp. 218-19.

Although "one cannot have an easement in his own land… [an] owner of land may have been accustomed during his ownership to use one part of the land in order to confer a benefit upon another part, as by establishing a drain, an aqueduct, a road-way, etc. While this does not of itself constitute an easement, so long as the two tracts remain in the same hands, it may, under certain circumstances… create an easement when the two tracts come into the possession of separate parties. Meanwhile, and until such a separation of ownership takes place it is convenient to designate the relation between the two tracts as a *potential* or *quasi easement*, that is a connection that is liable to become a true easement upon the severance of the possession of the respective tracts." 1 MINOR ON REAL PROPERTY (2nd Ed. Ribble), § 90.

"'An easement from previous use comes into existence because "absent express restrictions imposed by the terms of the grant, a grantor of property conveys everything that is necessary for the beneficial use and enjoyment of the property' In *Russakoff v. Scruggs*, 241 Va. 135 (1991), we described how this easement arises:

> While one cannot have an easement on land he owns, if, before severance, one part of the land was used for the benefit of another part, a "quasi-easement" exists over the "quasi-servient" portion of the land. That easement is conveyed by implication when the dominant tract is severed; the grantee of the dominant tract obtains an easement over the servient tract, based on the previous use.
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> While the extent of the easement right is determined by the circumstances surrounding the conveyance which divides the single ownership, the existence of the easement is established on a showing that (1) the dominant and servient tracts originated from a common grantor, (2) the use was in existence at the time of the severance, and that (3) the use is apparent, continuous, and reasonably necessary for the enjoyment of the dominant tract."

> "As we noted in *Russakoff*, the determination that an easement from previous use is reasonably necessary to the use and enjoyment of the dominant tract "requires a showing of need which, by definition, may be less than that required for establishing an easement by necessity, but must be something more than simple convenience. We have recognized that whether this element is established 'generally will depend upon the circumstances of the particular case.'" Citations omitted.)

Carter v. County of Hanover, 255 Va. 160, 167, 169 (1998)

2. Easements by Necessity

"'A right of way by necessity arises from an implied grant or implied reservation of an easement based on the common law presumption that a grantor of property conveys whatever is necessary for the beneficial use of the land conveyed and retains whatever is necessary for the beneficial use of the property retained.' *Davis v. Henning*, 250 Va. 271, 276 (1995). 'To establish such a right, the alleged dominant and servient tracts must have belonged to the same person at some time in the past.' *Middleton v. Johnston*, 221 Va. 797, 802 (1981). The severance of this unity of title must be the event which gives rise to the need for the right of way. Note that "[p]lacing a deed of trust on property is a conveyance and the legal title to the property conveyed is vested in the trustee." Such a conveyance can destroy the unity of title which is necessary to create an easement by necessity. *American Small Business Invest. Co. v. Frenzel*, 238 Va. 453, 457 (1989).

There must be a showing by clear and convincing evidence that the way is reasonably necessary, not absolutely necessary, to the enjoyment of the dominant estate. *Id.* at 803. *Accord Davis*, 250 Va. at 276. But, a way of necessity will not be established if there is another way of access, although less convenient and which will involve some labor and expense to develop. *Middleton*, 221 Va. at 803." *Parker v. Putney*, 254 Va. 192, 195-96 (1997).

Where "a right-of-way has been created by necessity, but has not been located by use and acquiescence or other means…" the majority, if not unanimous, rule is that in such cases the owner of the servient tract can select the location of the easement, subject to the requirement of reasonableness. "*Easement of Way by Necessity – Location*," 36 ALR 4th 769, at § 4 (p. 775).

Courts have "the authority, as a matter of law, to grant a dominant landowner the right to widen an established easement by necessity without the servient landowner's consent… '[t]he prevailing view in this country is that a way of necessity is not limited to such use of the land as was actually made and contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time… In short, the "scope" of the easement by necessity "may increase to meet the increased necessities

of the property.'" [Citations omitted]. *Palmer v. R. A. Yancey Lumber Corp.*, 294 Va. 140, 151, 154-155, 803 S.E.2d 742, 748, 750-51 (2017).

"The granting of an easement by necessity is not predicated on whether or not a road can be built in the easement. Infeasibility of a particular aspect of a proposed path of an easement by necessity is not a basis for denying an easement altogether." *Eaton v. Baer.* Unpublished Order, Supreme Court of Va., October 11, 2018, p. 8.

3. Easements Implied from Description

"Where a grantor conveys land by deed describing it as bounded by a road or street, the fee of which is vested in the grantor, he implies that such way exists and that the grantee acquires the benefit of it. *Walters* v. *Smith*, 186 Va. 159, 169-70, 41 S.E.2d 617, 622 (1947); *Gish* v. *City of Roanoke*, 119 Va. 519, 531, 89 S.E. 970, 974 (1916)… [however a] landowner may lay off a private roadway along his property line without thereby entitling the adjoining landowner to use it." *Robertson v. Robertson*, 214 Va. 76, 79-80 (1973).

4. Easements Arising from Subdivision of Land

"When land is subdivided into lots, streets and alleys, and lots are sold and conveyed by reference to the plat, without reservation, the conveyances carry with them the right to the use of such streets and alleys as may be necessary to the enjoyment and value of said lots: (2) purchasers acquiring such lots are presumed to be interested in all streets and alleys shown on the plat on which their lots are located; (3) but this is a presumption of fact and may be rebutted by showing that the easement in the way in question is not necessary to the enjoyment and value of said lots." *Lindsay v. James*, 188 Va. 646, 656 (1949).

D. Estoppel

"'Easements are sometimes created by estoppel; for example, if the vendor of land actually or constructively makes representations as to the existence of an easement appurtenant to the land sold to be enjoyed in land which the vendor has not sold. Thus, where a vendor describes the land sold as bounded on a street described as running through the vendor's unsold land, the vendor is, as against his vendee, (though not necessarily as against the public, or third persons), estopped to deny the existence of such a street, the conveyance practically creating a private right of way over the vendor's land along the route described in favor of the grantee.' *Walters v. Smith,* 186 Va. 159, 172 (1947)." (Emphasis in the original.) *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 88 (1999).

E. Prescription

"In order to establish a private right of way over the lands of another by prescription it must appear that the use of the roadway by the claimant was adverse, under claim of right, exclusive, continuous, uninterrupted, and with knowledge and acquiescence of the owner of the land over which it passes, and that such use has continued for a period of at least twenty years. [Citations

omitted]. We have said many times that 'Where there has been an open, visible, continuous and unmolested use of a road across the land of another for at least twenty years, the use will be presumed to be under claim of right, and places upon the owner of the servient estate the burden of rebutting this presumption by showing that the use was permissive, and not under a claim of right.' [Citations omitted]. *Craig* v. *Kennedy*, 202 Va. 654, 657-58, 119 S.E.2d 320, 322-23 (1961)." *Martin v. Proctor*, 227 Va. 61, 64-65 (1984).

> "[P]roof of adverse use included a requirement that the use of the land was open and notorious, or that the servient landowner had actual knowledge of the use or reasonably should have discovered it… As a general rule, when underground pipes have not been physically apparent throughout the prescriptive period and the servient landowner has not had notice of the existence of those pipes, courts have declined to recognize the establishment of a prescriptive easement." [Citations omitted]. *Hafner v. Hansen*, 279 Va. 558, 564, 691 S.E.2d 494, 497-98 (2010)

> "When… an easement by prescription has been established, the width of the way and the extent of the servitude is limited to the character of the use during the prescriptive period." (Citations omitted.) *Willis v. Magette*, 254 Va. 198, 204, 491 S.E.2d 735, 738 (1997).

Practice Point:

Adverse possession and easements by prescription are similar and share several, but not all, of the same elements. The running of the 15-year statute of limitations (§8.01-326 VA. CODE) for Ejectment is the basis for establishing title by adverse possession, while the legal fiction of an implied grant after 20 years of prescriptive use is the basis for establishing a prescriptive easement. Care should be taken in using adverse possession authorities in prescriptive easement cases, and *vice versa.* Note that the Supreme Court has been known to do so. *See, e.g., Quantannens v. Tyrrell*, 268 Va. 360, at 369 (2004).

IV. Use and Location of Easements Created by Conveyance and Reservation

> "As a general rule, when an easement is created by grant or reservation and the instrument creating the easement does not limit the use to be made of it, the easement may be used for 'any purpose to which the dominant estate may then, or in the future, reasonably be devoted.' *Cushman Corporation v. Barnes*, 204 Va. 245, 253 (1963). Stated differently, an easement created by a general grant or reservation, without words limiting it to any particular use of the dominant estate, is not affected by any reasonable change in the use of the dominant estate. *Savings Bank v. Raphael*, 201 Va. 718, 723, 113 S.E.2d 683, 687 (1960) (citing Ribble, 1 MINOR ON REAL PROPERTY § 107, at 146 n.2 (2d ed. 1928)). However, no use may be made of the easement which is different from that established at the time of its creation and which imposes an additional burden upon the servient estate. *Cushman Corporation*, 204 Va. at 253." *Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 259 (1992).

> "When a right of way is reserved over a tract of land without any designation of the location, if there be in fact at the time of the reservation a well-defined road over the land which is in actual use by the persons in whose favor the right is reserved, the way in use will be treated as the one which the parties contemplated. If there be no such road in existence at the time of the conveyance, the owner of the servient estate may fix the location, having due regard to the particular terms of the instrument." *Eureka Land Co. v. Watts*, 119 Va. 506, 509 (1916).

V. Secondary Easements

"'The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a 'secondary easement,' a mere incident of the easement that passes by express or implied grant, or is acquired by prescription. The owner of the dominant tenement may enter on the servient tenement, and there do anything necessary for the proper use of the easement. This secondary easement can be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement.'" (citing 2 Thompson, REAL PROPERTY (Perm. Ed.), § 676, p. 343.)" *Virginia Electric & Power Co. v. Webb*, 196 Va. 555, 562 (1954)

VI. Extinguishment of Easements

A. By Cessation of the Purposes for which Easement was Created

"[W]hen an easement is created for a particular purpose, it comes to an end upon a cessation of that purpose, which means, apparently, that an easement which is created to endure only so long as a particular purpose is subserved by its exercise, comes to an end when it can no longer subserve such purpose. The question then is, in each case, what is the particular purpose to be subserved by the easement, and this, in the case of an easement created by grant is a question of intention." *American Oil Co. v. Leaman*, 199 Va. 637, 652-53 (1958) (Because the easement's purpose was to provide access to a highway, the easement was extinguished when the highway was closed because the easement could no longer serve its purpose.)

"An easement's purpose depends upon the intent that can be determined from the deed granting the easement. When an easement is granted by a deed, unless it is ambiguous, 'the rights of the parties must be ascertained from the words of the deed.' *Old Dominion Boat Club v. Alexandria City Council*, 286 Va. 273, 284 (2013). (Because the deed granted a 30-foot easement across Wales Alley to provide "free use and passage of the several Streets and Alleys . . . for the more easy communication with the public main Streets and the river," the changing of Wales Alley to a public street did not result in the cessation of the purpose of the easement; it merely facilitated the easement in continuing to fulfill its ongoing purpose.)

Practice Points:

- "'By the great weight of authority an easement created by a general grant or reservation, without words limiting it to any particular use of the premises, is not

affected by any reasonable change in the use of the premises.' 1 MINOR ON REAL PROPERTY, 2d Ed., § 107, p. 146, note 2; *Idem,* § 110, p. 149.' *First Nat'l Trust & Savings Bank v. Raphael*, 201 Va. 718, 723 (1960).

- In cases of implied easements such as easements by necessity, "… the circumstances from which the implication arises, are to be looked to in order to ascertain the scope and extent of the easement… It has generally been laid down that rights of way by *necessity* terminate as soon as the necessity which has called them into existence ceases, as when the user thereof acquires another mode of access." 1 MINOR ON REAL PROPERTY (2nd Ed.), § 107.

B. By Express Release

"If the owner of the dominant estate *expressly releases* to the servient owner the outstanding right to use the latter's land for the purposes of the easement, it is obvious that this should *extinguish* the easement. 1 MINOR ON REAL PROPERTY (2nd Ed. Ribble), § 108.

C. By Abandonment

A **"**litigant claiming abandonment of an easement must establish such abandonment by clear and convincing evidence. *Hudson v. Pillow*, 261 Va. 296, 302, (2001); *Pizzarelle v. Dempsey*, 259 Va. 521, 528 (2000); *Robertson v. Robertson*, 214 Va. 76, 82, (1973). 'Nonuse of an easement coupled with acts which evidence an intent to abandon or which evidence adverse use by the owner of the servient estate, acquiesced in by the owner of the dominant estate, constitutes abandonment.' *Robertson*, 214 Va. at 81-82; *accord Hudson*, 261 Va. at 302; *Pizzarelle*, 259 Va. at 528. If the litigant asserting abandonment relies upon the non-use of the easement coupled with an adverse use by the owner of the servient estate, that adverse use must continue for a period of time sufficient to establish a prescriptive right. *Hudson*, 261 Va. at 302; *Lindsey v. Clark*, 193 Va. 522 (1952). Mere non-use is not sufficient to establish an abandonment. *Hudson*, 261 Va. at 302; *Lindsey*, 193 Va. at 525." *Helms v. Manspile*, 277 Va. 1, 9-10 (2009).

D. By Acts of the Servient Owner Adverse to Enjoyment of the Easement

"[I]f the servient owner should by *adverse acts lasting through the prescriptive period* [20 years] obstruct the dominant owner's enjoyment, *intending to deprive* him of the easement, he may *by prescription* acquire the right to use his own land free from the easement, and thus *extinguish* it, provided his adverse acts constitute a *legal interference* with the other's right and would give rise to a right of action by him." 1 MINOR ON REAL PROPERTY (2nd Ed.), § 112.

E. By Union of the Dominant and Servient Estates

"'Easements are also extinguished by operation of law if the *seisin* of the dominant and servient tenements becomes united in one and the same person. This has been an established principle of the English law from very early times and was distinctly recognized in the case of *Sury v. Pigot* (Popham's Rep. 166), already noticed, in which the difference between easements and

natural rights in this respect was pointed out. The true reason why union of *seisin* has the effect of extinguishing easements is very apparent on consideration of the nature of those rights and their origin. Easements are, by their nature, rights possessed by the owner of one piece of land in another piece of land belonging to a different person; if, therefore, the *seisin* of the two pieces is united in one owner the right must necessarily cease to be an easement, for it becomes one of the rights of property to which all owners of land are entitled. The right is not merely suspended on union of seisin so as to revive again on severance of the properties, for easements have their origin in grant, and on severance of the original dominant and servient tenements the original easements cannot revive without a fresh grant, and then, indeed, the rights granted are not the original but new easements.'" *Read v. Jones*, 152 Va. 226, 231-32 (1929), quoting GODDARD ON EASEMENTS at page 457.

A specifically granted easement was held to be "extinguished by merger when [the same person] acquired ownership of both the dominant and servient tracts." *Davis v. Henning*, 250 Va. 271, 275 (1995). (It should be noted that while the easement that had been previously granted was extinguished by merger, that an easement by necessity was found to exist.)

VII. Relocation of Easements

A. Consent of the Owners of the Dominant and Servient Estates

Once a right of "'way is once located it cannot be changed by either party without the consent of the other.'" (citing *Eureka Land Co. v. Watts*, 119 Va. 506, 509 (1916)). *Fairfax County Park Auth. v. Atkisson, 248* Va. 142, 148 (1994).

"The owner of land which is subject to an easement for the purpose of ingress and egress may relocate the easement, on the servient estate, by recording in the office of the clerk of the circuit court of the county or city wherein the easement or any part thereof is located, a written agreement evidencing the consent of all affected persons and setting forth the new location of the easement." §55.1-304 VA. CODE.

B. Judicial Action

"In the absence of such written agreement, the owner of the land which is subject to such easement may seek relocation of the easement on the servient estate upon petition to the circuit court and notice to all parties in interest. The petition shall be granted if, after a hearing held, the court finds that (i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than ten years." §55.1-304 VA. CODE.

VIII. Enjoyment of Easements

A. Use of Easement by Owner of Dominant Estate Must be Consistent With Uses Contemplated in Grant, and Owner of Servient Estate Must Not Interfere with Use of Easement

"Unless otherwise provided for in the terms of an easement, the owner of a dominant estate shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and the owner of the servient estate shall not engage in an activity or cause to be present any objects either upon the burdened land or immediately adjacent thereto which unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate. The term "object" as contained in this section shall not include any fence, electric fence, cattle guard, gate, or division fence adjacent to such easement as those terms are defined in §§ 55.1-2800 through 55.1-2826. Any violation of this section may be deemed a private nuisance, provided, however, that the remedy for a violation of this section shall not in any manner impair the right to any other relief that may be applicable at law or in equity." § 55.1-305 VA. CODE.

B. The Owner of the Dominant Estate Must use the Established Entrance

"'Under ordinary circumstances the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been accustomed to pass from the field to the way, and to make a new passage at a fresh place. This is not, however, the rule in cases of public ways, and the distinction was pointed out by Chambre, J., in the case of *Woodyer v. Hadden* (5 Taunt. 132), when he said: "A public road differs from a private road in this; you may make an opening in your fence and go into it at any part of the length of the public road, or at the end; but in a private road you must go in at the usual and accustomed part." The reason for this rule seems to be that a private right of way must have its origin in a grant, and though a grantor may not object to a person entering his land from the way at one particular spot, for that may not cause him any inconvenience, yet it may be very much against his inclination that he should enter it at any other place. If a grant of the way has to be presumed, as in cases of prescriptive claims, it cannot be presumed that the grantor gave a right of access to the way at any other than the accustomed spot of entry...'" *Read v. Jones*, 152 Va. 226, 234-35 (1929), quoting GODDARD ON EASEMENTS, at page 320.

C. Owner of the Dominant Estate Has Duty to Maintain Easement

"…the owner of a dominant estate has a duty to maintain an easement. *Pettus v. Keeling,* 232 Va. 483, 490 (1987); *Oney v. West Buena Vista Land Co.*, 104 Va. 580, 585 (1905). The owner of the dominant estate may fulfill this obligation by conducting the maintenance himself, or by voluntarily contributing to the maintenance costs of the owner of the servient estate." *Anderson v. Lake Arrowhead Civic Ass'n,* 253 Va. 264, 273 (1997)

D. Access Easements as Boundaries

"It is an established rule in Virginia that a conveyance of land bounded by or along a way carries title to the center of the way, unless a contrary intent is shown." (Citations omitted.) *Ettinger v. Oyster Bay II Comm. Property Owners Assn.*, 296 Va.280 (2018).

IX. Licenses

"A license has been described as 'a right, given by some competent authority to do an act which without such authority would be illegal, a tort, or a trespass.' 12 M.J., *License to Real Property*, § 2, p. 148. A license is personal between the licensor and the licensee and cannot be assigned. *Hodgson v. Perkins, et als*., 84 Va. 706 (1888). And a grant which creates any interest or estate in land is not a license. Such a grant creates an easement. *Buckles v. Kennedy C. Corp*., 134 Va. 1 (1922)." *Bunn v. Offutt*, 216 Va. 681, 683 (1976).

X. Restrictive Covenants Relating to Land

Restrictive covenants relating to land are stipulations by either party to a deed requiring one or both to perform, or refrain from performing, certain acts. See 1 MINOR ON REAL PROPERTY (2nd Ed. Ribble), § 87.

A. Two Types of Restrictive Covenants

"We have recognized two separate and distinct types of restrictive covenants: the common law doctrine of covenants running with the land and restrictive covenants in equity known as equitable easements and equitable servitudes. *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 140 (1976); *Duvall v. Ford Leasing*, 220 Va. 36, 43 (1979); *Renn v. Whitehurst*, 181 Va. 360, 366-67 (1943*); Springer v. Gaddy*, 172 Va. 533, 541 (1939)." *Sloan v. Johnson*, 254 Va. 271, 274-75 (1997).

B. Common Law Covenants Running with the Land

"'. . . [A] covenant [running with the land] creates two different bases of liability in the covenantor. Firstly, he is in privity of contract with the covenantee, and this relationship creates in the covenantor a contract duty which is unassignable. Secondly, he is in privity of estate with the covenantee, and this relationship is the basis upon which the courts treat a contractual burden as attaching to the covenantor's land and running to a subsequent assignee. Thus, when the covenantor assigns his entire estate in the land, he ceases to be liable as to the future upon this contractual burden because he is no longer in privity of estate with the covenantee; but his liability upon the nonassignable contract duty under privity of contract remains in him.' (Citing 2 AMERICAN LAW OF PROPERTY, § 9.18 (388) (1952).)" *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*, 215 Va. 658, 667 n.5 (1975).

C. Equitable Servitudes or Easements

"By definition, an equitable servitude can only arise when a common grantor imposes a common restriction upon land developed for sale in lots. *Forster v. Hall*, 265 Va. 293, 3006 (2003) (citing *Duvall v. Ford Leasing Development Corp*., 220 Va. 36, 41, (1979)). The burden is on the party claiming the benefit of the equitable servitude to show that a common restriction was intended. *Minner v. City of Lynchburg*, 204 Va. 180, 188 (1963)." *Barner v. Chappell*, 266 Va. 277, 285-86 (2003).

"An implied reciprocal negative easement arises 'when a common grantor develops land for sale in lots and pursues a course of conduct which indicates an intention to follow a general scheme of development for the benefit of himself and his purchasers and, in numerous conveyances of the lots, imposes substantially uniform restrictions, conditions, and covenants relating to use of the property.' *Duvall v. Ford Leasing Development Corp.*, 220 Va. 36, 41 (1979). If such a scheme of development is proved, 'the grantees acquire by implication an equitable right . . . to enforce similar restrictions against that part of the tract retained by the grantor or subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants.' *Minner v. City of Lynchburg*, 204 Va. 180, 188 (1963). (Emphasis added.)" *Forster v. Hall*, 265 Va. 293, 300 (2003).

"We have, on numerous occasions, thoroughly discussed the doctrine of restrictive covenants in equity. For example, in *Mid-State Equipment Company*, 217 Va. 133, 140 (1976) we stated: 'the doctrine of restrictive covenants in equity, distinct from the common law doctrine of covenants running with the land, establishes rights and obligations known as equitable easements and equitable servitudes.' *Accord*, *Minner v. City of Lynchburg*, 204 Va. 180, 187 (1963); *Cheatham v. Taylor*, 148 Va. 26, 37 (1927). The doctrine is that 'when, on a transfer of land, there is a covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity, at the suit of the party or parties intended to be benefited thereby, against any subsequent owner of the land except a purchaser for value without notice of the agreement. The principal purposes of such agreements are to regulate the style and costs of buildings to be erected on a tract that is being sold in parcels for building lots, to restrict their location to certain distances from the street, and to prevent buildings in a locality from being put up or used for any other than residential purposes. . . The equity which is enforced prevents a third person, who has actual or constructive notice, from violating the equitable rights of another.'

. . . .

And where a common grantor develops land for sale in lots and pursues a course of conduct which indicates an intention to execute a general scheme or plan of improvement for the benefit of himself and the purchasers of the various lots, and by numerous conveyances incorporates in the deeds substantially uniform restrictions, conditions and covenants against the use of the property, the grantees acquire by implication the equitable right, sometimes referred to as an implied reciprocal negative easement, to enforce similar restrictions against the residential lot or lots retained by the grantor or subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants." *Mid-State Equipment Co.*, 217 Va. at 140-41 (citations omitted); *accord Woodward v. Morgan*, 252 Va. 135, 138 (1996); *Burns v. Winchester Hospital*, 225 Va. 545, 548-49 (1983)." *Sloan v. Johnson*, 254 Va. 271, 274-76 (1997).

D. Contrasted with Personal Covenants

"'A covenant personal to one is terminated by his death or by his ceasing to have an interest in the property, his use of which is benefited by the restriction. *Allison v. Greear*, 188 Va. 64, 67 (1948) (citing 14 AM. JUR. Covenants, ¶ 205). In this case, the intent of the developer… is relevant to determine whether the covenant in question runs with the land or is personal in nature. The language of the deed, which here recites that the restrictions are to run with the land, is evidence of intent but may not be dispositive of the question."

E. Restrictive Covenants Disfavored

The Supreme Court recently noted in *Sainani v. Belmont Glen Homeowners Ass'n*, 297 Va. 714, 723 (2019) that "in keeping with our common-law traditions, Virginia courts have consistently applied the principle of strict construction to restrictive covenants." *Tvardek v. Powhatan Village Homeowners Ass'n*, 291 Va. 269, 275 & n.2 (2016) (collecting cases). Underlying this principle of strict construction is the common-law premise that the 'absolute right' to property 'consists in the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land.' 1 William Blackstone, COMMENTARIES 138; see *Hamm v. Hazelwood*, 292 Va. 153, 157-58 (2016)."

Consequently, it is a well-established principle that restrictive covenants on land are not favored and must be strictly construed. *Anderson v. Lake Arrowhead Civic Association*, 253 Va. 264, 269 (1997). "Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property." *Id*. at 269-70. However, when the terms of a restrictive covenant "are clear and unambiguous, the language used will be taken in its ordinary signification, and the plain meaning will be ascribed to it." *Marriott Corp. v. Combined Properties, L. P.*, 239 Va. 506, 512 (1990); *see also Foods First, Inc. v. Gables Associates*, 244 Va. 180, 182 (1992). Generally, a restrictive covenant cannot be modified or terminated except by agreement of all the parties entitled to enforce the covenant. However, the covenant may provide for a mechanism by which the parties, or some number of them, may modify or terminate the restriction. *Hening v. Maynard*, 227 Va. 113, 117 (1984); *see Minner v. City of Lynchburg*, 204 Va. 180, 188-90 (1963)(applying same standard to implied restrictive covenant). These principles guide our initial considerations in the present case." *Barris v. Keswick Homes, L.L.C.*, 268 Va. 67, 71 (2004).

F. Enforcement of Restrictive Covenants

When parties have a dispute over an alleged violation of a restrictive covenant, the plaintiff, or covenantee, may file suit in the court for equitable enforcement of the restrictive covenant. A restrictive covenant may be enforced by injunctive relief or through specific performance. The party seeking enforcement of the restrictive covenant bears the burden of proving the validity and meaning of the covenant. *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 140 (1976); *Sonoma Development, Inc. v. Miller*, 258 Va. 163, 167-69 (1999). The party seeking enforcement must also establish that the restrictive covenant has been

violated by the acts of the defendant, *Hening v. Maynard*, 227 Va. 113, 117 (1984); *Forbes v. Schaefer*, 226 Va. 391, 400 (1983), and request a remedy." *Perel v. Brannan*, 267 Va. 691, 699-700 (2004).

G. Requirements for Enforcement

"A restrictive covenant is enforceable if a landowner establishes: (1) horizontal privity; (2) vertical privity; (3) intent for the restriction to run with the land; (4) that the restriction touches and concerns the land; and (5) that the covenant is in writing. *Waynesboro Village, L.L.C. v. BMC Properties*, 255 Va. 75, 81 (1998); *Sloan v. Johnson*, 254 Va. 271, 276 (1997)." *Barner v. Chappell*, 266 Va. 277, 284 (2003).

1. Horizontal Privity

"'In order to establish horizontal privity, the party seeking to enforce the real covenant must prove that "the original covenanting parties [made] their covenant in connection with the conveyance of an estate in land from one of the parties to the other.' *Runyon v. Paley*, 416 S.E.2d 177, 184 (N.C. 1992); *accord* 7 THOMPSON ON REAL PROPERTY § 61.04(a)(2). THE RESTATEMENT OF PROPERTY § 534(a) (1944), provides that horizontal privity is satisfied when "the transaction of which the promise is a part includes a transfer of an interest either in the land benefited by or in the land burdened by the performance of the promise." 4 In other words, the covenant must be part of a transaction that also includes the transfer of an interest in land that is either benefited or burdened by the covenant. *Johnson v. Myers*, 172 S.E.2d 421, 423 (Ga. 1970); *Moseley v. Bishop*, 470 N.E.2d 773, 778 (Ind. Ct. App. 1984); *Runyon*, 416 S.E.2d at 184-85*; Bremmeyer Excavating, Inc. v. McKenna*, 721 P.2d 567, 569 (Wash. Ct. App. 1986).

The term "transaction" is defined as "an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered." (Citations omitted.) *Sonoma Dev., Inc. v. Miller*, 258 Va. 163, 168-70 (1999)

2. Vertical Privity

"Vertical privity exists when there is privity between the original parties and their successors-in-interest. Id. More precisely, vertical privity requires that the benefit of a restrictive covenant extend only to "one who succeeds to some interest of the beneficiary in the land respecting the use of which the promise was made." *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co*., 215 Va. 658, 663 (1975) (citing RESTATEMENT OF PROPERTY § 547 (1944))." *Barner v. Chappell*, 266 Va. 277, 284 (2003).

H. Entitlement to Equitable Relief

"Once the plaintiff satisfies proof requirements, he or she is entitled to the remedy requested unless the defendant can establish one of several defenses or the court

finds enforcement unusually difficult. See *Bond v. Crawford*, 193 Va. 437, 444 (1952) ('Generally, where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it, as it is for a court of law to give damages for a breach of it.'); *Spilling v. Hutcheson*, 111 Va. 179, 183 (1910) ('The injunction in this case is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial.')." *Perel v. Brannan*, 267 Va. 691, 700 (2004).

1. Hardship

"A defendant may avoid imposition of the remedy requested if such a remedy would create a hardship or injustice that is out of proportion to the relief sought, if performance by the defendant would be impossible, or if the enforcement of the decree would be unusually difficult for the court. However, on the questions of hardship, injustice, or impossibility, the defendant bears the burden of proving the elements of the defense. See *Harper v. Virginian Ry*. 86 S.E. 919, 922 (W. Va. 1915) (" In suits to enforce specific performance of a contract like the one involved here it is for the defendant to show by way of defense that it is no longer able to perform the covenant consistently with its duty to the public in general, or that performance thereof will be burdensome and oppressive or otherwise inequitable."). (Footnotes omitted.)

In order to establish the hardship defense, a defendant must show that specific performance would create a hardship or injustice that is out of proportion to the relief sought. *Springer v. Gaddy*, 172 Va. 533, 541 (1939); *Cheatham v. Taylor*, 148 Va. 26, 39 (1927). The defendant must prove a level of hardship beyond "inconvenience." *Spilling*, 111 Va. at 182. It is not enough for the defendant to show merely that the loss to the defendant will be disproportionate to the benefit to the plaintiff, where the defendant's violation of a restrictive covenant "was made with full knowledge and understanding of the consequences" of his or her actions. *Sonoma*, 258 Va. 169-70. Where an assignee of the covenantor does not have actual or constructive notice of the covenant, a lesser showing of hardship may be acceptable. *See Springer*, 172 Va. at 541; *Sonoma*, 258 Va. 169-70." *Perel*, 267 Va. at 700-01.

2. Impossibility

"Impossibility is also a defense to specific performance or injunctive relief requested. *Fishburne v. Ferguson*, 85 Va. 321, 328 (1888). It may be a defense even when the defendant "intentionally rendered himself unable to perform the contract." *Jones v. Tunis*, 99 Va. 220, 222 (1901). Similarly, a requested remedy may be denied if it is impossible for the court to precisely define the specific actions to be performed or if the decree would necessarily be of the type whose enforcement

would "unreasonably tax the time, attention and resources of the court." John Norton Pomeroy, POMEROY ON SPECIFIC PERFORMANCE OF CONTRACTS § 307, at 393 (2d ed. 1897). See also *Flint v. Brandon*, 32 Eng. Rep. 314 (1803) (dismissing a bill seeking specific performance of a covenant to fill a pit formerly used for digging gravel partly out of concern that "if a specific performance is decreed, a question may arise, whether the work is sufficiently performed.")." *Perel*, 267 Va. 701.

Practice Point:

These cases are fact specific and counsel should present every fact which enhances the client's position. Attention is directed to *Perel* where the Court remanded the case for further evidentiary hearings as to the whether an injunction would issue to require removal of improvements offending a "no-build" area. However, in *Sonoma*, decided five years earlier, and cited in *Perel*, the Court ruled that improvements which offended a "no-build" area had to be removed stating that "we find no reason why the circuit court needed to hear additional evidence on this issue." *Sonoma*, 258 Va. at 170.

I. Changed Circumstances Nullifying the Restrictive Covenant

If changed conditions have defeated the purpose of the restrictive covenant, it will be rendered null and void. "The determination of the degree of change necessary to have this effect is inherently a fact-specific analysis in each case. However, we have previously made it clear that such a change 'must be so radical as practically to destroy the essential objects and purposes of the [covenant].' *Booker v. Old Dominion Land Co*., 188 Va. 143, 148 (1948)." *Chesterfield Meadows Shopping Ctr. Assocs., L.P. v. Smith*, 264 Va. 350, 356 (2002) (This case involved a covenant that restricted the use of one piece of property to protect a historic home located on other property across the road. Later, the historic home was moved to a different location and, in the meantime, the surrounding area had been transformed into a thriving commercial area. The Court affirmed the trial court's nullification of the covenant, holding that such a radical change satisfied the standard.)