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Of Servitude, Easement, and Usufruct

from the desk of David M. Touchstone

I often am asked: "What is an easement?" or "What is a servitude?" Sometimes the question is: "What is the difference between a servitude and an easement?" Let's answer the last question first. There really isn't much difference between an easement and a servitude. "Easement" is a common law term; "servitude" is a civil law term. Because Shreveport and Bossier are near to Texas and Arkansas, many of the professionals who work in our area have relocated here from these other states and have their professional roots in the common law. So it is not unusual, for example, for surveyors and civil engineers to prepare plats of survey using common law terminology like "easement". Lawyers (like me) who are trained in the civilian method prefer to keep our terminology straight and use the proper term: servitude. But sometimes we just have to work around things. However, generally speaking, an easement and a servitude perform the same function. Each of them create a right against a parcel of property that can be asserted by another person who is not the owner of the parcel.

Since we are in Louisiana (and since that is the law that I know), for the rest of this article, we will be confining our attention to "servitudes", because, after all, that is the type of law that will be applied here in Louisiana in the event there is a dispute regarding property rights.

While servitudes are created in a number of contexts and for a number of purposes, the type that I see the most frequently are those that are created on residential subdivision plats. When a developer plans a new development, one of the first steps in the process (after obtaining financing and purchasing the raw tract) is the creation of a subdivision plat. In this process, the developer will work with a surveyor or civil engineer to divide the land into lots, streets, and sometimes other parcels such as common area. The surveyor and engineer are constrained by law and local parish ordinances to follow certain rules in the process of platting the subdivision. Before the plat can be filed at the courthouse, it must obtain the required approval. Sometimes the approval is obtained from a metropolitan planning commission, sometimes from the police jury or parish commission. One of things that will be reviewed by the governmental body considering approval of the plat is whether the plat contains a proper dedication for utility servitudes. Usually, this is done along the rear portion of most lots, but it is not unusual to see utility servitudes run along the side of a lot. The beneficiaries of this servitude are typically the electric company, gas company, telephone company, and cable company. All of these companies have a legal right to enter upon any portion of any lot where there is a servitude and build their lines, as well as enter the property to maintain them from time to time. An objecting homeowner can be legally enjoined from interfering with these actions. Another type of servitude seen on most residential subdivisions is a building set back line; these are often established thirty feet behind the front lot line. Many residential subdivisions also establish sideline set back lines to prohibit construction too near the side line of

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the property. In nearly all cases, servitudes such as utility servitudes, building set back lines and side line set back lines can be ascertained from review of the subdivision plat itself. In certain contexts, courts may consider the types of property rights created by the filing of residential subdivision plats as a matter pertaining to "building restrictions" as opposed to traditional servitudes. For instance, a dispute between neighbors about the violation of a building set back line may be considered as a matter of "building restriction" law as opposed to being a matter of servitude law. The distinction is not merely academic. It takes a ten year violation of or obstruction of the use of a servitude before it is considered as terminated or at least considered to be terminated to the extent of the violation. On the other hand, if the matter falls within "building restriction" law, a violation need be merely "noticeable" for a period of two years, before the violated building restriction is considered terminated or reduced in its scope.

Building restrictions, while not servitudes in a strict sense, are, at least, their first cousins. The traditional civil law made no accommodation for building restrictions (often referred to in the trade as "subdivision restrictions" because in addition to creating limitations pertaining to construction they also set forth prohibited uses of the property). The first law case in Louisiana that recognized the right of a developer to bind lots with building restrictions arose right here in Shreveport; I am speaking of Queensborough Land Co. v. Cazeaux which was decided by the Louisiana Supreme Court in 1915. Not surprisingly, this case involved the Queensborough neighborhood. In this case, for the first time, the Louisiana Supreme Court recognized the right of a developer to bind the lots in a subdivision to a set of restrictions that would persist after the developer sold the lots and which could be enforced by any person owning a lot in the subdivision if that person's lot was bound by the same restriction. While this may seem unremarkable to you, it was a pretty big change in the law of this state. The Queensborough case gave rise to a number of later cases which gradually fleshed out the do's and don't's of building restrictions. In 1977, the rules of building restrictions worked out in the case law were given a more formal expression when the legislature enacted a series of "articles" (laws) that were inserted into the Louisiana Civil Code. This gave the area of law pertaining to building restrictions a dignity and structure that it did not previously enjoy.

Methods of utilizing building restrictions evolved over time in terms of their content and where they are to be found in the public records. As to their content, the earliest restrictions were very basic and often did nothing more than to prohibit out door toilet facilities and certain farm animals from being placed on an affected lot. Nowadays, even lower end developments are often restricted by long and complex sets of restrictions. And don't get me started on homeowner associations and micromanagement architectural control committees. Restrictions on subdivisions from the time of the Queensborough case through the 1940's were often placed in the body of each of the first deeds coming out of the developer, and I occasionally see them still done this way (mostly in the rural parishes). Subdivisions that were created in the 1930's and 1940's frequently contained the building restrictions on the fact of the subdivision plat. Again, with respect to recent subdivisions, I still see them occasionally implemented in this fashion (again, usually in the rural parishes). Starting in the 1940's, developers began placing the restrictions in separate, free standing documents which bound the lots sold by the developer by reference. So, with respect to most modern residential developments, what one finds is the filing of the plat and a set of building restrictions recorded a short time thereafter in the conveyance records (and before the developer sells any of the lots). If you are working a deal for which you need to locate the restrictions, the only sure fire way to find them is to obtain a title examination of the lot from the time that the subdivision plat was filed. In Caddo Parish, there is a nice little shortcut that works most of the time. Way back when, the Caddo Clerk of Court started making a notation on the face of the subdivision plats of the book and page where restrictions, and amendments thereto, are to be found. If the property you are handling is in Caddo Parish and you are looking for the building restrictions and don't have much time, go to the plat, review it for the information that is to be found on the face of the plat, and then locate any book and page references that the clerk has noted on the face of the plat. The book and page notations will direct you to the place that the restrictions and amendments are recorded. Unfortunately, the other parish clerks of court have not implemented this useful practice.

Let's talk some more about plats. Oftentimes, there are servitudes affecting property in residential subdivisions that *preexist* the filing of the subdivision plat. Examples of these types of servitudes are high power

electrical transmission servitudes, high pressure pipeline servitudes, drainage servitudes, overflow (flowage) servitudes next to bayous and on lakefronts, and municipal water and sewer mains. There are others, but these are the types I see most often. Now, most of the time, if you are dealing with existing houses that have been on the ground for a while, these servitudes don't raise their ugly heads. The situation that requires extra attention is the sale of unimproved property. Consider a high power gas line running diagonally through your lot from corner to catty corner. Uhh, you can't build anything on a pipeline, and oftentimes, you can't even see these things from a visual inspection of the lot. I have even had situations in which a surveyor brought me a plat of survey of a particular lot in which the surveyor who was out there on the ground, all over the ground, failed to notice a pipeline that ran right through the property. They are, however, supposed to be depicted on the subdivision plat and a developer who files a plat on which the pipeline is not depicted is exposing himself to a lawsuit. What happens if your client decides to build his new home in the Cypress Black Bayou Water Conservation District lake front flowage servitude or decides to stick the master bedroom into SWEPCO's high power transmission servitude? Not good. And if your client told you that he intended to build his house or his master bedroom there and you failed to tell him what a bad idea that is…..you might have a problem. So, here's a bit of advice, whether you are representing the seller or the buyer, if undeveloped or unimproved property is involved, familiarize yourself with the servitudes that may affect the property, make sure you disclose same to the prospective buyer, and document your actions of disclosure.

Let's turn our attention to the type of servitude that I probably spend more of my time on than any other – the servitude of passage. As land has grown more and more expensive, people seek to unlock landlocked tracts. Here's a situation that comes up pretty often: a buyer gets a "real good deal" on a tract of rural or suburban property and goes to the bank for financing to build a house or tries to arrange financing for placement of a manufactured house. He gets turned down because there is no legal access, in that the tract neither abuts a public road nor is served by a servitude of passage. The buyer is as mad as a wet hen and complains that someone should have told him about the "bad title" situation. Well, in point of fact, there may not be a title problem at all. There is absolutely nothing wrong with selling property that has no road access (unless the buyer has told the seller prior to sale that he intends to use conventional financing in which case there may be a redhibition problem). So while landlocked property may very well have good title, it *will not qualify for issuance of a title insurance policy.* Conventional lenders (and by this term I mean GSE guaranteed loans, FHA loans, VA loans, and many bank loans) will not lend when the collateral property is landlocked and this type of loan always requires issuance of a title insurance policy that guarantees legal access.

But, as usual, I'm getting the cart in front of the horse. I haven't even told you yet what a *servitude of passage* is. We lawyers sometimes say that a servitude of passage is a "predial" servitude. A predial servitude is distinguishable from a personal servitude. A personal servitude, such as a right of usufruct, is in favor of a *particular* person. On the other hand, a predial servitude is said to be in favor or another tract. Well, you might be asking yourself, how can a tract of property have a legal right? Tracts can't sign contracts or initiate lawsuits, because, well, they're just tracts. Only humans (or artificial persons such as corporations) can sign contracts and bring lawsuits. Although we say that predial servitudes are for the benefit of tracts, that is just a shorthand way of saying that the right exists for the benefit of *whichever owner of the moment* owns the benefitting tract. Example: If I own a tract that fronts on the public road, and your tract is landlocked and you have to cross my tract to get to the public road, and I grant a predial servitude of passage across my tract for the benefit of your tract, then not only you, but any future owners of your tract will have the benefit of the servitude. So, if you should decide to sell your property, and I don't like the guy to whom you sell and I wish to bar him from crossing my property, he will be able to get an injunction against me to prevent me from barring his access. Consider the same set of facts, but with this twist: the servitude of passage is properly recorded at the courthouse, you sell your property and I sell my property; your buyer will have the same rights against my buyer that you had against me because my tract (whoever owns it at the moment) owes your tract (whoever owns it at the moment) a right of access. Let's add another twist to the hypothetical: Let's say that at the time I grant you a servitude of passage across my tract that your tract is forty acres and that a few months after I grant passage to your tract you decide to subdivide your property into forty one acre lots. Do I have to let all forty of your buyers cross my land to get to their respective

lots. "Yup" is the answer; every person who acquires a portion of property that is within the tract that enjoyed the original right of passage will also have the right of passage. Let me throw another wrinkle at you. Imagine this scenario: my tract (Tract A) fronts on the public road and is 100 feet deep. Your tract (Tract B) which is also 100 feet deep is separated from the public road by my tract. You have a neighbor whose tract (Tract C) is separated from the public road by both my tract (Tract A) and your tract (Tract B). I have previously granted you a servitude of passage across my tract for the benefit of your tract (Tract B). You then grant a servitude of passage across your tract (Tract B) for the benefit of Tract C. Query: Does the owner of Tract C now have an absolute legal right of access all the way across the 200 feet that constitute my tract and your tract (Tract A and Tract B)? The answer is "No". Here's why; although I granted access to your tract and you granted access across your tract for the benefit of Tract C, *I didn't grant access across Tract A for the benefit of Tract C.* As you can see, servitude of passage questions can be, as Gollum liked to say, "tricksey".

What happens if someone buys or otherwise acquires a landlocked tract and none of his neighbors will voluntarily grant him a servitude of passage? Is he just out of luck? Well, maybe not. In most cases, he will be able to obtain a judgment in court (which, of course, presupposes that he files a lawsuit) forcing his neighbor(s) to grant him passage by the generally shortest route to the nearest public road. There are exceptions to this rule and you should never make the mistake of advising your client that he shouldn't worry that the tract he is about to purchase is landlocked because he can always force a right of passage in court. There are certain fact situations too complicated to discuss here that can defeat an action to force a servitude of passage. Also, even successful actions to force passage can take a long time, the route of passage may not end up just where the claimant wanted it to be, the claimant will have to pay the defendant landowner the fair cost of the value of the land taken for the servitude, not to mention that lawyers and appraisers are expensive. I would like to discuss one other point that sometimes comes up in the context of servitude of passage—maintenance agreements. I have worked a number of files in which I was told that the lender was requiring a "maintenance agreement". Now strictly speaking, a maintenance agreement is one in which two or more persons agree to a plan for the maintenance of a private road. That is a separate issue from the issue of legal access. However, many lenders, not being familiar with the terminology will make a requirement that there be a road maintenance agreement when all that they really want is to be assured that there is an absolute right of legal access to the property. On the other hand, occasionally they *do* want a road maintenance agreement, *in addition* to the servitude of passage. When they want a road maintenance agreement, that can be a deal killer, because oftentimes the other neighbors who use the private road are unwilling to bind themselves to a written maintenance contract.

There are many other types of predial servitudes: common wall (support), encroachment, drip, drain, light, view, drawing water, receiving water, watering animals, pasturage, etc. Space doesn't permit treatment of all these. In fact, an entire treatise cannot do justice to all of the different servitudes and all of the types of problems that arise in the servitude context. And that's just the predial servitudes. Next month we'll talk about an equally large and equally significant area of the law, personal servitudes such as the right of usufruct.