

Rob has spent many many years as a real estate litigator, and his advice was “An ounce of prevention is worth a pound of cure”. Figure out potential issues up front and deal with them early, use title companies, lawyers, etc, to do your due diligence.

Real estate investors must be aware of several key issues when dealing with **easements**, as these legal rights can impact property use, value, and future development.

1. What is an easement?

A legal right to use someone else’s property without owning the property. Ex. A roadway, a driveway, a power line, a sewer line, a pathway.

You can know if your property is subject to, that is to say, burdened by an easement, by checking property records, title search by title company, and to physically inspect the property, walk it, and find out the history. Look for old roads and trails across the property. And read your title report when you get it! Pay close attention to the width of any easements.

2. **THRESHOLD ISSUE:** Is your parcel a landlocked parcel? Usually not an issue with subdivided property because access is typically a requirement . Arises more often in rural properties that have not been developed.

Story:

Purchased property, Flathead County, outside of Whitefish, wanted to develop the property for a “glamping” business, i.e., a couple of dozen luxury yurts with first-class amenities. Neat property, in the woods, cool place.

Buyer confirmed that it had legal access, reviewed the easement that provided access over the neighboring property. We’ve got access! And stopped there.

Was that good enough? No, as it turns out. The neighbor, whose property was subject to the easement, sued, arguing that the easement was intended to provide access for one single-family home – the home on the property. And that the easement was not intended to provide for commercial activities, like 20 rental yurts. Claiming that the easement was overburdened, another way of saying: what they were going to use the easement for was outside the “scope” of the easement.

The buyer lost that case. After two years of litigation and a nearly one-year appeal, it is now clear that according to the courts, they cannot use the easement in that fashion. That’s after they spent \$1M developing the property for yurts.

So, not only confirm access from a legal perspective, but also that the access that is provided is sufficient for what your development plans are.

That's an easement that benefitted a property, but just not in the way that the buyer thought it did.

So, easements as **burdens on your property**. More typical issues:

What if your property is burdened by an easement. How might that affect your property?

1. Restrictions on Property Use

- **Access Rights for Others:** If a public or private easement exists, the investor may not have full control over who can enter or use parts of the land.
- **Limited Development Potential:** Easements may prevent certain types of construction, landscaping, or modifications on the property. For example, utility, drainage, or conservation easements may prohibit construction on certain parts of the land. OR, For instance, you might not be able to build that outdoor deck or an in-ground swimming pool if there are pipes and cables in the way.

2. Property Value Impacts

- **Diminished Land Value / Depreciation:** Large or intrusive easements (e.g., power line easements) may reduce the property's worth. Easements can deter potential buyers or lenders if they significantly limit property use.
- **Marketability Issues:** Properties with extensive easements may be harder to sell or finance, as buyers may see them as a burden.

3. Shared Rights, Maintenance Responsibilities & Liability

- **Shared Easements.** Who can use and limitations on your use of easement or use of property subject to easements. **Shared Driveways are a common issue:** Investors should verify who is responsible for upkeep and whether access can be revoked or modified.
- **Obligation to Maintain:** Some easements require the property owner to maintain access roads, shared driveways, or utilities. Cost of upkeep.
- **Legal Liability:** If an easement holder (e.g., utility company or neighbor) is injured while using the easement, the owner may be liable.

4. Encroachment & Disputes

- **Boundary and Scope Conflicts:** If an easement is not properly defined, neighboring property owners might encroach on the land. Unclearly written easements: "Easement for access and utilities" is very common, particularly for

parcels conveyed a long time ago. But if the width is undefined, it could be expanded by the utility company in the future.

- **BLOCKED EASEMENT AND OTHER Legal Challenges:** If an investor unknowingly or knowingly interferes with an existing easement, they may face legal action or be required to restore access, or avoid limitations on access, or to define the scope of access. DECLARATORY JUDGMENT. Or easement enforcement.
 - Even an express easement can have difficulties. GRANT EASEMENT. Express 30-foot easement for a driveway to the parcel to the north. Fights about use of easement when neighbor built a second house. Southern owner erected a big fence. So big that it had braces on the easement side, which encroached into the easement area by about 3 feet. Still 27 feet. Is this blocking an easement? Standard is one of reasonableness. Did the southern owner unreasonably prevent the other owner from enjoying easement rights. Need a judge to determine. Ended up in litigation. Settled by abandoning those three feet of the easement, recorded in the property records. There was a lot more going on in that case, gunplay and a macing incident, and a graphing video of one owner peeing on the other owner's game camera after a very cold and drunken day at the ski hill. Fun stuff.
- Expanding the scope of the easement. Overburden. Excessive use. How much is too much? Judgment call. In the absence of specific language saying so, will be interpreted according to the intent at the time the easement was created, which might be a year ago, but it might be 100 years ago, and no one is around to testify about intent.

5. Utility & Infrastructure Considerations

- **Unexpected Utility Easements:** Water, gas, sewer, or electric easements can limit construction and development.
- **Future Infrastructure Expansion:** Governments or utility companies may have rights to expand existing easements, affecting future property use. An easement that uses 10 feet today might use 60 feet in the future, if the easement is sixty feet wide.

6. Duration & Termination Challenges

- **Permanent vs. Temporary Easements:** Some easements are perpetual, while others expire. Investors should verify the terms before purchasing. Some easements “run with the land”; others are personal to the particular parties. Easement “in gross” means a personal easement, does not run with land, and cannot be transferred from the person who owns it to a new owner; Easement “appurtenant” = runs with the land, permanent, transfers when the either the ownership of the dominant or servient estate is transferred.
- **Difficulty Removing Easements:** Even if an easement seems unnecessary, legal processes to remove it can be time-consuming and costly.

7. Zoning & Compliance Issues & Development Issue

- **Conflicts with Zoning Laws:** Some easements may restrict land use in ways that do not align with local zoning regulations, or development regulations. Example: you have a 30-foot express easement, but to subdivide the AHJ requires a 60-foot easement.

3. Historic or Conservation Easements Or Ag Easements: Some properties have easements that protect historical structures or green spaces, limiting investor options.

4. Just one moment to discuss public versus private easements:

The main difference between public and private easements is who benefits from the easement. In a private easement, only specific individuals gain rights to access a space. An owner can create and sell a private easement, making it a more exclusive form of property right. With a public easement, the general public gets access and rights to use an area—such as a street, sidewalk, or park.

Brief story:

Subdivision in Flathead County.

Has legal access from the south and a crappy, unimproved easement that exists to the property from a public ROW. But also appeared to have access from the north, and that roadway was a brand new, recently constructed internal subdivision road. To build out the road from the south costs \$1M. To use the road from the north is free. The developer wants to use that brand new, shiny road.

Litigated for access. Even though the easement to the north is specified as a “public access easement,” the district court determined (and the MSC recently affirmed, last week) that “public access” means everyone in the world, but not the developer of the property to the south. I’m oversimplifying, but the point is this: what appeared to be a recorded easement shown on a plat, and what appeared to provide cost-effective access did not. Again, lots of money sunk into this development when that was finally determined. Not all is lost, just need to spend more than hoped to spend.

10. Just one moment on even less typical easements: easements created by operation of law. HIDDEN EASEMENTS. ALSO CALLED IMPLIED EASEMENTS.

Typical easements: one owner grants an easement to the other, voluntarily, sometimes with payment therefor, and then the parties sign and notarize the easement instrument, and it's recorded in the property records for all to see, forever.

Easements created by operation of law:

Montana law recognizes two types of implied easements: easements by necessity and easements by existing use.

Easements by necessity are typically implied to provide access to a landlocked parcel, while easements by existing use are based on a landowner's prior use of part of his property (the quasi-servient tenement) for the benefit of another part of his property (the quasi-dominant tenement).

For an easement by necessity to arise, there must be unity of ownership, severance, and strict necessity (i.e., no practical access to a public road from the landlocked parcel except across the remaining land of the grantor). Also, the necessity must exist at the time the unified tracts are severed and at the time of exercise of the easement.

or an easement by existing use to arise, there must be unity of ownership, severance, and an apparent, continuous, and reasonably necessary use of the quasi-servient tenement for the beneficial use and enjoyment of the quasi-dominant tenement. Also, the parties must have intended the use to continue after the severance.

Why is this important:

1. If you do not have legal, insurable access because your property does not enjoy an express easement, and if you are unable to negotiate for an express easement, you may have a remedy in court to establish access under one of these theories.
2. The flipside is also true: your property may be subject to easement rights that do not appear in the property records, and as a consequence, do not appear in your chain of title or title commitment.
 - A. How do you know if your property is subject to an easement. First, property records, title work. But sometimes that's not enough.
 - Need to inspect property: look at the land. Is there a road or a path across the property.
 - Need to consider the history. Was there a roadway at some time?
 - Aerial maps, Google earth, historical view
 - Road records for the county – often do not show up on title search

A few stories:

A. STORY:

Owners purchased residential property 10 years ago, there's a road along the side of the property that accesses other property to the south, ultimately leads to yet another property to the west.

No record of an easement in the property records.

Now the southwest property has built a home, actually duplex designed for short-term rentals. But that developer does not have legal access.

So, the new owner/developer sued our clients to establish legal, record access over our client's property. Our evaluation was that the new owner likely could establish an easement as a matter of law. Questionable as to express easement, but probably easement by prior existing use: that roadway had existed at the time the three parcels in question were divided, and there was an intention for there to be an easement. How do we know? Because the parties that divided the property (they were family, father and two kids) are still around to talk about it. Sworn statements indicating that intent.

That's not always the case: sometimes the history is so old that you have no live witnesses, and have to divine intent by circumstances and history.

B. Subdivision story, Valley County Montana

Went through subdivision approval for this 68 lot subdivision in rural Montana. Bare land, grazing land, but that happens to have great views of the Missouri River valley.

Obtained final subdivision review, and when it was time to start selling lots, the title company said: wait a minute, there's a public right of way for a road that goes through the middle of this subdivision.

Was not picked up on survey work, at any stage.

Would have impacted internal roadways, as well as would have severely limited building on several lots due to water, sanitation, and just the area available to build structures. So, what to do? We're at the tail end of this process and the owner wants to sell lots yesterday because he's got a million -plus invested already.

We had to seek a formal abandonment of the road through the County. This was not controversial for this road because nobody had used it since at least since 1940s. That was easy for us to establish because the written description of the road said that the road ended at the rural post office in a tiny town called "Lismas, Montana" Well, fast forward today, and anytime after the 1940s, and Lismas Montana is underwater. By under water, I mean literally under water. In the 1940s, built Fort Peck Dam, which flooded that roadway and the post office. That road had no utility, and had had no utility for 80 years. So, not controversial, and because we had a good partner, the local county commissioners, it took less than a month to get the abandonment approved, and off to the races.

C. Finally one more example:

Buyers purchased property, large lot, current house and septic located on southern part of property. Big bench connected to public road on northern side: buyers think, this is ideal for subdivision, we can divide property and sell the northern portion on the open market.

Not so fast. Turns out, there is a buried water line for irrigation that runs through that property. There is an easement for one water line, but turns out there are two water lines, and nobody knows where they are located. Sure looks like an implied easement because the water lines were put into place when one owner owned all the properties around, but the problem is: where is it? What is it's scope? Can we re-locate it to develop the property? These are all issues confronted by this "hidden easement." I don't know how this is going to turn out.

- D. **Another example:** Mend Properties in Dillon, MT. Commercial building, but there's a doorway in that building that leads to the upstairs of the next door building, which are apartments. No easement reflected in the property records. So, owner said: stop using the doorway. (There's another door to the apartments on the other side of the building.) The apartment owners said: not so fast, we have an easement. We said, no you don't. They dug up a 100-year old court case that said that they did. This exact issue had been litigated for these buildings, but 100 years ago. And the result, the judgment, was never recorded. But it certainly existed. We had to back off on our position, and negotiated a voluntary easement that benefitted both properties because no, for the first time in 100 years, everyone knew their property rights, and restrictions, and it was recorded for all subsequent owners to see and rely upon.

How to Protect Yourself as an Investor:

- ✓ **Conduct a Title Search & Survey** – Identify any existing easements before purchasing. Title work, but also inspections and investigation.
- ✓ **Consult a Real Estate Attorney** – Ensure you fully understand the easement's impact on property value and usage.
- ✓ **Negotiate Terms** – If possible, negotiate to modify or remove problematic easements. Would you like help evaluating a specific property's easements? Title company, maybe surveyor, maybe lawyer.

If you are creating a new easement, be as specific as circumstances call for. Specify the use. Specify the scope: width and use and restrictions on use. Specify the timing: seasonal, or always. Who maintains? Is there an indemnification? Lots of things to consider. Clearly define easement terms.

How much to pay for an easement? Depends. Could be related to loss of property value. A before and after analysis by an appraiser or real estate professional. But sometimes having what someone wants, exclusively, sets the market. For example, the Flathead Lake easement did not affect property value much, if at all, because the roadway had always existed. It looks like an easement and has been used as an easement for years, ever since our clients purchased it. But it would cost a lot to establish that in court, and the negotiated price reflected that. That person has exclusively what you want or need, and they can set the price, sometimes.