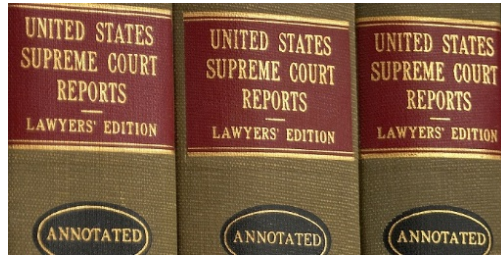




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EASEMENTS ON THE EAST END OF LONG ISLAND

FACULTY

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RICHARD E. WHALEN, ESQ.

Richard Whalen, the founder of the firm, is an attorney with more than 25 years' legal experience in zoning, land use, and real estate transactional work. His zoning and land use background includes serving as a Deputy Town Attorney for the Town of East Hampton for more than 14 years, from 1989 to 2003. In that capacity, he acted for many years as counsel to both the Zoning Board of Appeals and Planning Board.

In private practice Rick has represented hundreds of clients in all types of zoning matters, from subdivisions to zone change requests, wetland and natural resources special permit applications to site plan and variance requests. He has served on a variety of East Hampton Town committees since his departure from Town employment, including the Nature Preserve Committee. He is also a board member of the East Hampton Business Alliance.

In addition to his professional experience, he has been a long-time student of East Hampton's history and geography, interests that dovetail well with his legal work in local real estate and zoning.

An Amagansett resident and avid outdoorsman, Rick has led hundreds of hikes for the East Hampton Trails Preservation Society over the past thirty years. When not at work, he can usually be found running, hiking, mountain biking, skiing, or snow-shoeing on local trails.

Easements on the East End of Long Island

Tuesday, February 15, 2022

Richard E. Whalen, Esq.

Whalen Filer PLLC

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The Focus Of This Webinar

It is assumed that most attorneys, having attended law school and taken real property law, have at least a basic knowledge of easements. This Webinar will not discuss case law on easements – the law of real property changes very slowly if it changes at all. The focus here will be on practical, real-world aspects of easements and how they might affect you in your practice of law, particularly in the fields of zoning and land use, and in real estate practice generally.

What Are Easements?

A less-than-fee interest in property which is usually conveyed to, and therefore controlled by, another land owner. An easement is for a specific limited purpose. The property receiving the benefit of the easement is the *Dominant Estate* or *Dominant Property*. The property which is restricted or limited by the easement is the *Servient* or *Subordinate Estate* or *Property*.

SEE Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

Easement (**eez-mənt**) (14c) An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road).
• The land benefiting from an easement is called the *dominant estate*; the land burdened by an easement is called the *servient estate*. Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land. The primary recognized easements are (1) a right-of-way, (2) a right of entry for any purpose relating to the dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate. — Also termed *private right-of-way*; *easement agreement*. See SERVITUDE.

Characteristics Of Easements

(a) - Appurtenant or "In Gross" - Easements are commonly described as either "appurtenant" or "in gross." An appurtenant easement, as are all private easements, conveys a right or interest in real property for the benefit of another specific parcel (or multiple parcels) of real property. This is the classic form of easement, with a Servient Estate and a clearly identified Dominant Estate.

But municipal easements, which are most often Conservation Easements, run to the municipal authority, such as a Town or Village, generally and not to any specific parcel of municipally-owned land. These types of easements are not appurtenant to any particular Dominant Property. They are called easements "in gross."

(b) - Exclusive or Non-Exclusive - Easements are usually "non-exclusive," although they can be written to be exclusive. A non-exclusive driveway or access easement, for example, means that others may be able to use the same driveway or access way over the Servient Property besides the particular Dominant Estate being referred to.

Characteristics, cont'd.

(c) - Creation of Easements - Easements are usually created by a written document or agreement between the owners of the Dominant and Servient Estate. However, certain easements - especially easements of access - can arise by implication or through prescription. An Implied Easement of access can be created if a landowner divides property, leaving one property with road frontage and the other land-locked. Because the policy of the law in New York State strongly disfavors the creation or existence of land to which there is no legal access, in the above case it would be "implied" that the original owner of the subdivided property meant to give an access easement over the roadfront lot in favor of the landlocked parcel.

(d) - Implied Easement - The scenario leading to an Implied Easement of access could have occurred in the early 20th century or before, but due to modern subdivision regulations no landowner today would be able to create a landlocked parcel by subdivision. Municipal ordinances and local Planning Board review of subdivisions would prevent that.

Characteristics, cont'd.

(e) - Prescriptive Easement - An access easement can also be created by Prescription, which is a variant of Adverse Possession. If one person uses part of his or her neighbor's property for access to the first person's land, for a long enough period of time and while meeting certain legal requirements, a Prescribed Easement can arise. The statutory requirements mimic those for adverse possession:

- (1) the actual crossing of another's land for access to nearby or adjoining property must last for at least 10 years,
- (2) it must be continuous or repeated during that 10-year period,
- (3) it must be open and notorious, meaning that an observant owner of the servient property should have been able to see what was going on so he or she could attempt to prevent it, and
- (4) it must be hostile to the servient landowner's rights, meaning without their permission and clearly in violation of their property rights.

One requirement for Adverse Possession that is absent from that for a Prescriptive Easement is the element of "exclusivity." A prescriptive use of land for access need not be exclusive. This means that other people, even the true owner, could be using the driveway or other access way, at the same time as the unpermitted Prescriptive User is using the access.

Characteristics, cont'd.

(f) - Negative or Restrictive Easements versus Affirmative Easements - A Negative or Restrictive Easement limits what the servient landowner can do with their property. The most typical example of a Negative or Restrictive Easement is a Conservation Easement. An Affirmative Easement generally allows physical intrusion by the owner of the Dominant Estate into or over the Servient Estate, and allows the Dominant owner to do things on or to the Servient Property that they otherwise would not have a right to do.

Wide Variety In Types Or Kinds Of Easements

As stated above, the kinds of property interests that can be conveyed in an easement are almost innumerable, limited only by one's imagination. One can have the private equivalent of a conservation easement, for example, where one landowner grants an easement to another, limiting what the grantor can do on his or her own land. This might be a scenic viewshed easement to protect the view of the dominant land owner over all or part of the subordinate or servient land owner's property.

Common Types Of Easements

(a) - Non-Conservation Easements: Common Driveway Easements, Access Easements (including for access by vehicles), Pedestrian Access Easements, Water and/or Utility Easements, Road Widening Easements (required in many East Hampton Town Urban Renewal maps), & various kinds of affirmative easements. One can have easements for a wide range of rights or interests in real property, again, limited only by your imagination.

(b) - Conservation Easements: Scenic Easements (or Scenic & Conservation Easements), Agricultural Easements, Large Lot Easements, Scenic & Trail Easements, Historic Facade Easements.

Important Note For Water Line Easements

This often arises with Common Driveway Easements or Access Easements if those easements encompass the putting in of utilities to serve the Dominant Property. Be very aware of Suffolk County Health Department requirements. If a private water line is or may be laid in the easement, SCDHS wants very specific language. See Sample Language for Common Driveway. It is recommended that you have this language approved in advance by SCDHS.

Sample Language for Common Driveway Easement

4. The use of said Common Driveway shall be benefited by and/or subject to the following rights and restrictions:
- (a) The Lot Owners, as defined herein, shall have the joint, equal, and mutual right, for themselves, their heirs, distributees, successors, and assigns, and for the lessees, guests and invitees of any of those, to use the Common Driveway in perpetuity for the purpose of ingress and egress, both vehicular and pedestrian, to the lots shown on the Map and for the installation, placement, maintenance, repair, inspection, replacement, and access to utilities, including water mains or water service lines, to serve those lots.
 - (b) The Lot Owners shall have the right to place, install, maintain, inspect, repair, and replace a water main and/or individual water service lines within the Common Driveway, to service their individual lots, subject to the approval and oversight of the Suffolk County Department of Health Services. Except as set forth in ¶ 3 above, the cost of installation, maintenance, and repair of any water main or water service lines pursuant to this easement shall be borne solely by the party, their heirs, successors, and/or assigns who are the beneficiaries of this easement. Any and all installation or placement of water mains or water service lines within this easement shall conform to the approved plan(s) for such water main or water lines which is on file with the Suffolk County Department of Health Services.

Sample Language for Common Driveway Easement, Cont'd.

(c) In the event said water main and/or water service lines are emplaced, installed, maintained, inspected, repaired, or replaced, in a manner which damages the surface or subsurface conditions of the Common Driveway or any water main and/or water service lines lying therein, the Lot Owner responsible for the emplacement, installation, maintenance, inspection, repair, or replacement causing said damage shall be responsible, at such Lot Owner's sole cost and expense, for repairing and restoring the Common Driveway and any water main and/or water service line(s) therein to their preexisting and fully functional condition.

(d) The emplacement or installation, as well as the inspection, maintenance, repair, or replacement of any water main and/or water service line within the Common Driveway shall be subject to and shall require the approval of the Suffolk County Department of Health Services, and shall conform to the approved plan which is on file with the Department.

Sample Language for Common Driveway Easement, Cont'd.

(e) Lots 1, 2, 3, and 4 as shown on the Map shall not be individually conveyed until and unless all water mains or water service lines described herein have been installed within the Common Driveway, in accordance with the approved plan on file with the Suffolk County Department of Health Services.

Authority For Conservation Easements

NY Conservation Law, Article 49, §§ 49-0301, et seq. Also, NY General Municipal Law § 247. The latter authority is more important for most municipal Conservation Easements.

Municipally Required Easements

These are usually Conservation Easements. Have to be accepted by the municipality which is the grantee. This typically requires a resolution of the Town Board or Village Board. Town or Village Board involvement is mandatory for Conservation Easements. General Municipal Law § 247 requires a public hearing prior to acceptance.

HISTORY OF CONSERVATION EASEMENTS

(East Hampton Town Only)

- The concept of obtaining so-called Scenic Easements over private property was first broached in East Hampton Town in 1965, as reported in the *East Hampton Star* in January 1965. The original conception was that some landowners would grant scenic easements over parts of their property for the tax reduction benefit.
- First Proposed Scenic Easement in East Hampton - The first land proposed to be encumbered by a scenic easement was a 10.8-acre parcel of mostly wetlands on the north side of Hand's Creek, running along the south side of Hand's Creek Road from the last bend in this road almost to the landing on Three Mile Harbor. This proposal was made in November 1965. This property was part of the Settler's Landing Subdivision in Northwest Woods. As it happened, this 10.8-acre property was simply deeded to the Town in fee simple, so no scenic easement was given.

HISTORY OF CONSERVATION EASEMENTS

(East Hampton Town Only)

- In March 1972 Raymond & Loretta Crowley proposed to grant the Town a scenic easement over 10 acres of tidal wetlands at the south end of Napeague Harbor, as part of a 16-acre subdivision which would create four building lots. A public hearing was held on the Town's acceptance of the scenic easement, but I am doubtful that this subdivision was actually created or that the scenic easement was given.
- First Actual Scenic Easement in East Hampton - It seems that the first scenic easements ever accepted by the Town Board in East Hampton Town were granted by the Miller family in March 1973, in connection with the reduced-density subdivision of the Miller Farm off Springs Fireplace Road in The Springs.

Increasing Use Of Conservation Easements In East Hampton Town

By the mid-1970s the Planning Board and Zoning Board of Appeals in East Hampton Town were making increasing use of conservation easements in the planning process. The Town Attorney at the time was Duane Whelan (no relation to the presenter of this webinar). Duane Whelan seems to have crafted the first scenic and conservation easements in the Town. Scenic easements, agricultural easements, and “large lot” easements (which prohibit further subdivision of an affected parcel of land) soon came into vogue and were routinely required as conditions of subdivision approval by the Planning Board or wetland permits by the Zoning Board. This practice continues today.

Proposal To Make It Easier To Amend Conservation Easements

In 1991 Town Supervisor Tony Bullock proposed to amend the Town Code chapter governing Conservation Easements (it was then Chapter 22 of the Town Code, not Chapter 16) in order to make it easier to amend or modify such easements. Supervisor Bullock's proposal was not adopted by the Town Board. At the time, Town Planning Director Lisa Liquori estimated that the Town already owned about 5,000 conservation easements over private land. That was almost certainly an over-estimate in 1991, but it is quite possible today that the Town of East Hampton owns thousands of conservation easements over private land.

Procedure For Conservation Easements

Derives from General Municipal Law § 247 - Public Hearing of Town or Village Board is required.

§ 247. Acquisition of open spaces and areas.

1. Definitions. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) natural scenic beauty or, (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources. For purposes of this section natural resources shall include but not be limited to agricultural lands defined as open lands actually used in bona fide agricultural production.
2. The acquisition of interests or rights in real property for the preservation of open spaces and areas shall constitute a public purpose for which public funds may be expended or advanced, and any county, city, town or village after due notice and a public hearing may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant, or other contractual right necessary to achieve the purposes of this chapter, to land within such municipality. In the case of a village the cost of such acquisition of interests or rights may be incurred wholly at the expense of the village, at the expense of the owners of the lands benefited thereby, or partly at the expense of such owners and partly at the expense of the village at large as a local improvement in the manner provided by article twenty-two in the village law entitled local improvements.
3. After acquisition of any such interest pursuant to this act the valuation placed on such an open space or area for purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land.
4. For purposes of this section, any interest acquired pursuant to this section is hereby enforceable by and against the original parties and the successors in interest, heirs and assigns of the original parties, provided that a record of such acquisition is filed in the manner provided by section two hundred ninety-one of the real property law. Such enforceability shall not be defeated because of any subsequent adverse possession, laches, estoppel, waiver, change in character of the surrounding neighborhood or any rule of common law. No general law of the state which operates to defeat the enforcement of any interest in real property shall operate to defeat the enforcement of any acquisition pursuant to this section, unless such general law expressly states the intent to defeat the enforcement of any acquisition pursuant to this section.

Amendment, Modification, Or Termination Of Conservation Easements

East Hampton Town - Chapter 16 of the Town Code governs the acceptance and termination of conservation easements. Under the East Hampton Town Code it is very difficult to alienate, modify, or terminate a duly accepted Conservation Easement - East Hampton Town requires a public referendum to do this. See Town Code § 16-5:

“The Town Board of the Town of East Hampton may not modify, alienate or terminate any easement granted to the Town of East Hampton, whether pursuant to this chapter or under the provisions of § 247 of the General Municipal Law or Title 3 of the Environmental Conservation Law, unless a proposition to do so has been approved by the electors of the Town of East Hampton at a special or biennial Town election.”

This has never been done.

In certain factual circumstances, one might have the possible of “reforming” the easement - modifying it if it can be shown that the easement did not accurately carry out the intentions of the parties - i.e., mistake or error at the inception - This is the principle of *void ab initio*.

Amendment, Modification, Or Termination Of Conservation Easements

East Hampton Village - Has no Code provisions that I know of specifically governing the acceptance, modification, or revocation of Conservation Easements. In my one experience with this in East Hampton Village, the Village Trustees simply modified a previously granted Conservation Easement by resolution.

Southampton Town - Conservation Easements are ruled by Article III of Chapter 247. Southampton Town Code § 247-19, in conjunction with § 247-14, allows the Southampton Town Board to alienate any interest in Town open space, including a conservation easement, by adoption of a Local Law by a majority plus one vote of the Town Board, subject to *mandatory referendum* by the electors of Southampton Town. This is very similar to East Hampton Town, in that the electorate must vote to approve the alienation - meaning termination - of a conservation easement.

Southampton's Code does allow a Conservation Easement to be modified "or extinguished" pursuant to the provisions of ECL § 49-0307. This Environmental Conservation Law section has limited provision for the extinguishment of conservation easements, including in an action pursuant to NY Real Property Actions & Proceedings Law § 1951 or for major public utility projects in defined circumstances. The provisions of ECL § 49-0307 would seem to apply to all conservation easements held by public bodies in the State, including those accepted under § 247 of the General Municipal Law.

Tax Considerations

Conservation Easements have the potential to reduce the taxable or assessed value of land; can reduce the grantor's property taxes.



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