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Public use of easements.

- Try to research the original easement, and follow it forward to discover any changes in the easement.

- Examine the language of the easement, and determine what land is *burdened* and what land is *benefited* (*dominant* parcel) by the easement. This type of easement is called *appurtenant*; it legally goes with or is "attached" to 2 or more parcels. Is the easement restricted to certain uses, or is it very broad?

- If the easement language is unrestricted[1], allows for general use or all usual purposes[2] or suggests public use, such as "an easement in favor of the grantee and all others who have or may be given rights, and the public", "for all purposes for which public ways and roads may be lawfully used in common with others lawfully entitled thereto" or is attached to large open spaces that naturally lend themselves to open space uses[3], courts have been more willing to find that public use does not overload the easement and is not a

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[1] In the absence of express limitations, a general right of way obtained by grant may be used for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant. [Note 1] Parsons v. New York, N. H. & H. R.R. 216 Mass. 269, 273. Mahon v. Tully, 245 Mass. 571, 577. Davis v. Sikes, 254 Mass. 540,

[2] The Stigmatine Deed "granted as appurtenant to [Elm Bank] a right of way for all usual purposes over the [then] existing driveway." Stigmatine Deed at 1-2. Such a grant for "[a]ll usual purposes" generally allows "every reasonable use to which the dominant estate may be devoted, [which] may vary from time to time with what is necessary to constitute full enjoyment of the premises." Mahon v. Tully, 245 Mass. 571, 577 (1923); see also Tehan v. Security Nat'l Bank of Springfield, 340 Mass. 176, 182 (1959); Doody v. Spurr, 315 Mass. 129, 133 (1943); Swenson, 306 Mass. at 586; Brodeur v. Lamb, 22 Mass. App. Ct. 502, 504 (1986). "And what the uses are to which the land granted might be conveniently put depends on the various circumstances including what was in the minds of the plaintiff and her grantor when the conveyance was made." VanBuskirk v. Diamond, 316 Mass. 453, 460 (1944); see also Patterson v. Paul, 448 Mass. 658, 665 (2007); Commercial Wharf E. Condominium v. Waterfront Parking, 407 Mass. 123, 131, 138 (1990); Doody, 315 Mass. at 133; Sheftel v. Lebel, 44 Mass. App. Ct. 175, 179 (1998). "The 'attending circumstances' may include relevant uses made of the servient tenement at the time of, or prior to, the instrument creating the easement. Subsequent use of the easement also may be relevant, at least if ambiguity exists. Subsequent use, however, at most is only one relevant factor and the presence or absence of evidence of such later use (where admissible) is not decisive. At least where some ambiguity requires explanation, there is no violation of the parol evidence rule in receiving extrinsic evidence." Pion v. Dwight, 11 Mass. App. Ct. 406 , 412 (1981) (citations omitted). *O'Day v. Trustees of the Stigmatine Fathers, Inc*.

[3] At the time of the grant, Elm Bank was a large, open parcel with relatively little development on it. It is eminently reasonable to presume that such wide-open spaces would be used as a park, particularly in light of the historic nature of Elm Bank. [Note 47] It is similarly reasonable for DCR and MassHort to use it for recreation and education because the Stigmatines used Elm Bank for those purposes immediately after the grant. It also is reasonable for DCR and MassHort to use the easement to access Elm Bank for most of the types of events that were described at trial. These events include educational programs and recreational events (e.g., soccer games, horticultural events, workshops) that are similar in nature to events and programs held by the Stigmatines (e.g., small sporting events, dog shows, mass, summer camps). It is not reasonable, however, for DCR, MassHort, and their invitees to use the easement to access Elm Bank for circuses, movie productions, wedding receptions, business conferences, or events of similar nature. Such activities are of such an intensity and commercial nature that they could not reasonably have been anticipated by the parties to the deed. [Note 48] … Finally, DCR and MassHort may maintain and repair the easement. Glenn v. Poole, 12 Mass. App. Ct. 292, 296 (1981). To the extent that it can lawfully do so given the presence of wetlands in the area, such maintenance and repair can include paving the easement area, which, as noted above, is fifteen feet wide. [Note 49] Id. As DCR argues in its post-trial brief, it does not need to seek the plaintiffs' permission to do so since this is allowed pursuant to its deeded easement rights. However, it is reasonable for DCR to provide the plaintiffs with advance notice in writing if and when it chooses to exercise this right.

Some limitations on the volume of traffic are reasonable, however, based upon the facts of this case. Michaelson, 4 Mass.

nuisance. "To be used as a public way" or "dedicated to the public" all would indicate an intent that the public could use the way. But language that says "private way to be used by the abutters until the town accepts the road as a public way" contemplates public use *only after* the way becomes a public way. *Parker v. Town of Carlisle Planning Board and Brendon Properties, LLC, and Brendon Homes, Inc.*, MISC 14-488513 August 26, 2016.

- If the easement clearly expresses that it is private, or limited to those who live along it, then it becomes very difficult to allow the public to use the easement, because public use is "different in kind" then private use.

- When government imposes public access over private land, it is a taking that requires just compensation. "[W]here government action results in '[a] permanent physical occupation' of the property, by the government itself or by others . . .'our cases uniformly have found a taking…without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner' . . . [A] 'permanent physical occupation' has occurred, for purposes of that rule…where individuals are given a permanent and continuous right to pass to and fro." *Nollan v. California Coastal Commn*., 483 U.S. 825, 831-832, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

- If the benefited and burdened land come into the same ownership, the unity of the title can extinguish the easement. Because you do not need an easement to go anywhere you want on your own property, the easement merges into the title. It does not "spring" back when you convey the land again – an entirely new easement must be created and granted or reserved.

- If a grantor owns multiple parcels that are burdened and benefited by an easement and grants one of the parcels to someone, the deed out needs to reserve the easement in favor of the grantor's remaining land. Failure to do so is likely to result in the grantor no longer having a right to pass over the portion of the easement that is on the grantee's land.

- Dedication requires an offer from the donor and an acceptance by the public, both of which may be either express or implied from the actions of the parties. See Public Ownership of Land Through Dedication, 75 Harv. L. Rev. 1406 (1962). Public use can constitute an acceptance. Cincinnati v. White, 31 US (6 Pet) 431, 440 (1832); AG v. Abbott, 154 Mass. 323, 328 (1891). The public use need not continue for any particular length of time. "[I]t is plain that acceptance by express vote of the town (pg 524)...is not necessary...And as the use is in the public at large, it is hard to see how an acceptance by the town can be declared necessary." (pg 525) Abbott v. Cottage City, 143 Mass. 521, 526 (1887). With dedication, title to the property remains in the owner, but the public receives an easement from which the owner cannot free the land. AG v. Abbott, 154 Mass. 323, 328-29 (1891). Because the public gives no consideration for this property right, some courts have analogized dedication to a gift. Longley v. Worcester, 304 Mass. 580, 588 (1939);.

App. Ct. at 807 ("Although it is open to inference that the way will be used by an increased number of persons," the frequency and timing of usage may be unreasonable as matters of law depending on the facts of the case). *Rendell v. DCR*, MISC 05-308443 December 2, 2009