

# INSURING APPURTENANT EASEMENT INTERESTS

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Presented by:

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# What is an easement?

- “A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose.”
- “The right to use the land of another for a specific purpose.”
  - WLTA Examiner’s Manual
- “A limited non-possessory interest in the land of another.”

# What are the elements of a properly created easement?

1. Grantor.
2. Grantee.
3. Granting clause describing the interest in the easement.
4. Consideration.
5. Legal description for land burdened by the easement.
6. Legal description of land benefitted by the easement.
7. Proper execution by the Grantor.
8. Proper notary acknowledgment for Grantor.

# Dominant and Servient Estates

- Land burdened by the easement:

“Servient Tenement Parcel”

- Land benefitting from the use of the easement:

“Dominant Tenement Parcel”

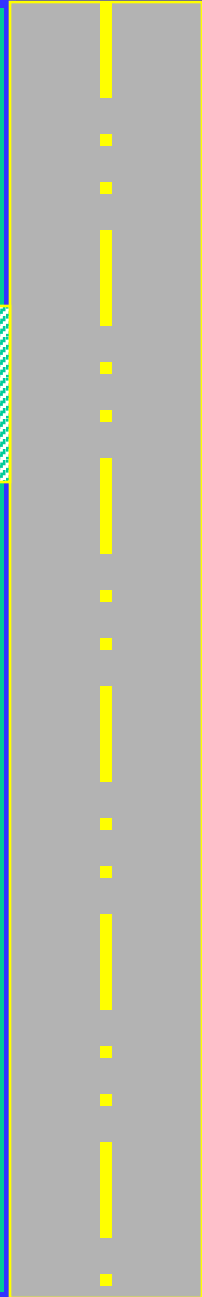
**A**

**B**

Easement

Dominant  
Tenement  
Parcel

Servient  
Tenement  
Parcel



# Appurtenant Easements vs. Easements in Gross

- Appurtenant Easement
  - An easement that is attached to and which passes with the dominant real property.
  - Easement should clearly identify the benefitted and burdened parcels.
  - A properly created appurtenant easement runs with the land, and is not terminated when ownership of the land is transferred.
- Easement in Gross
  - Not attached to a dominant parcel, is the personal right of a person or entity to use the land of another.

**A**

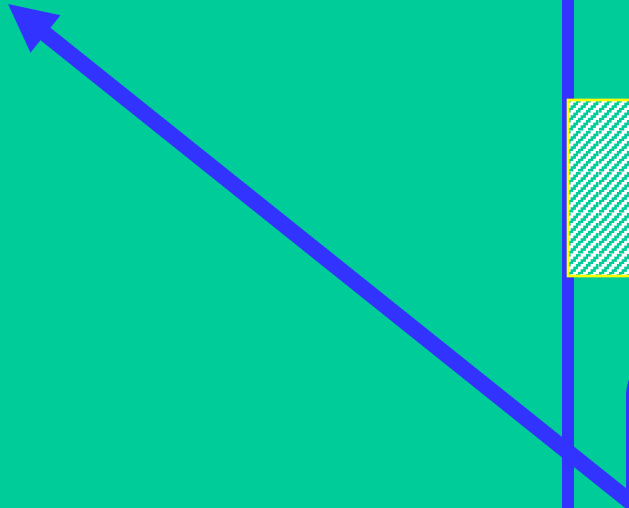
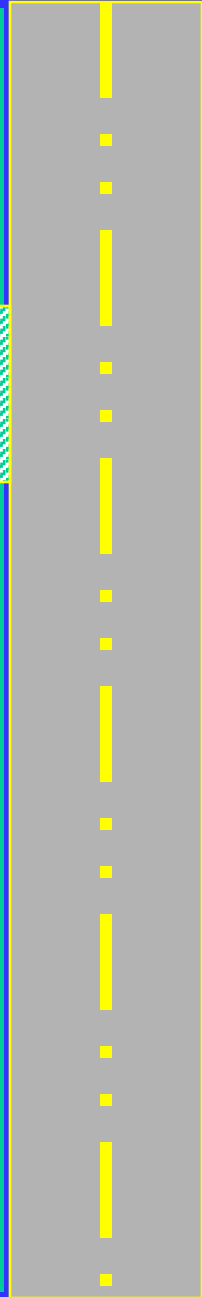
**B**

Easement

Appurtenant to  
Parcel A

Dominant  
Tenement  
Parcel

Servient  
Tenement  
Parcel



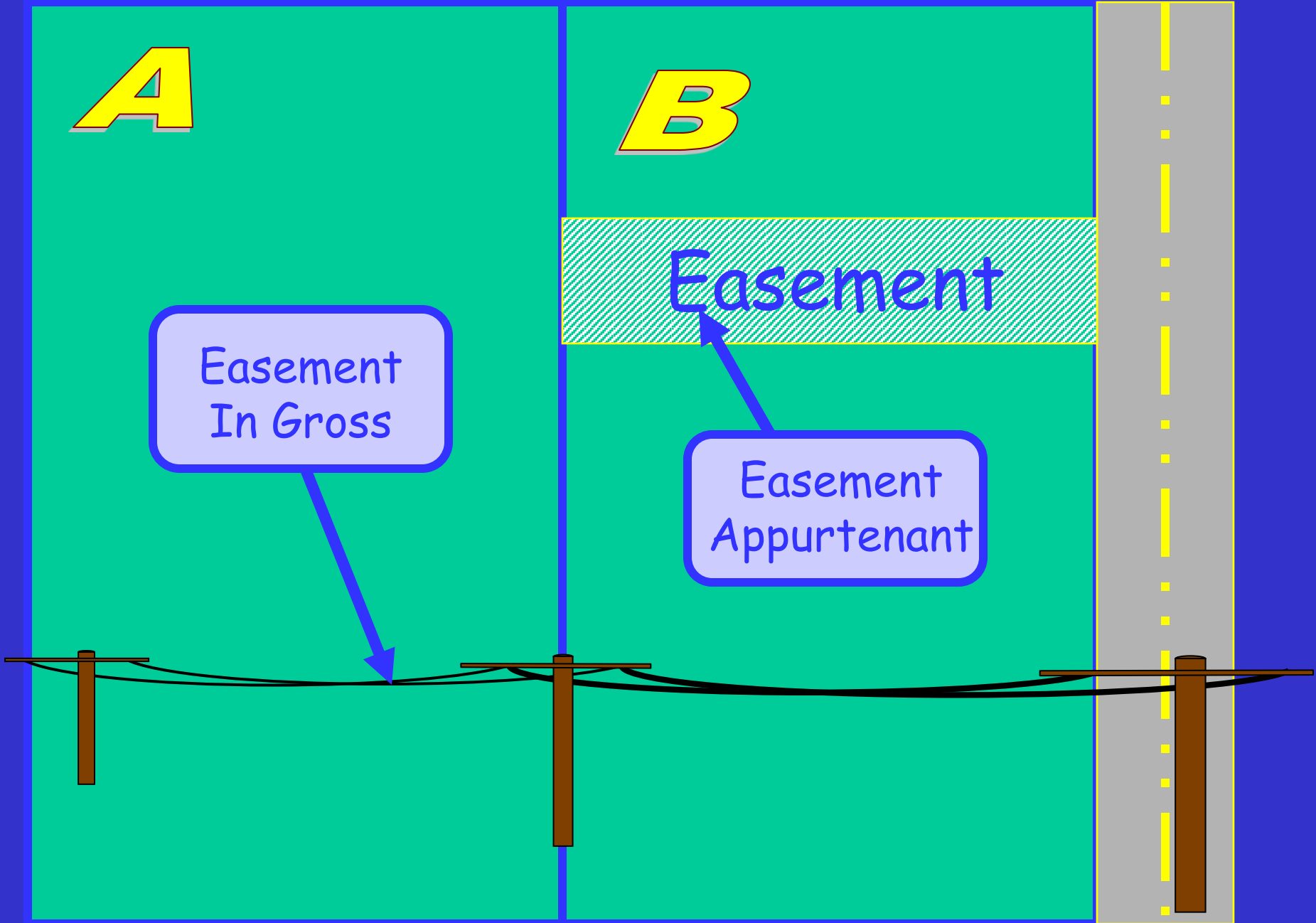
**A**

**B**

Easement  
In Gross

Easement

Easement  
Appurtenant





**A**

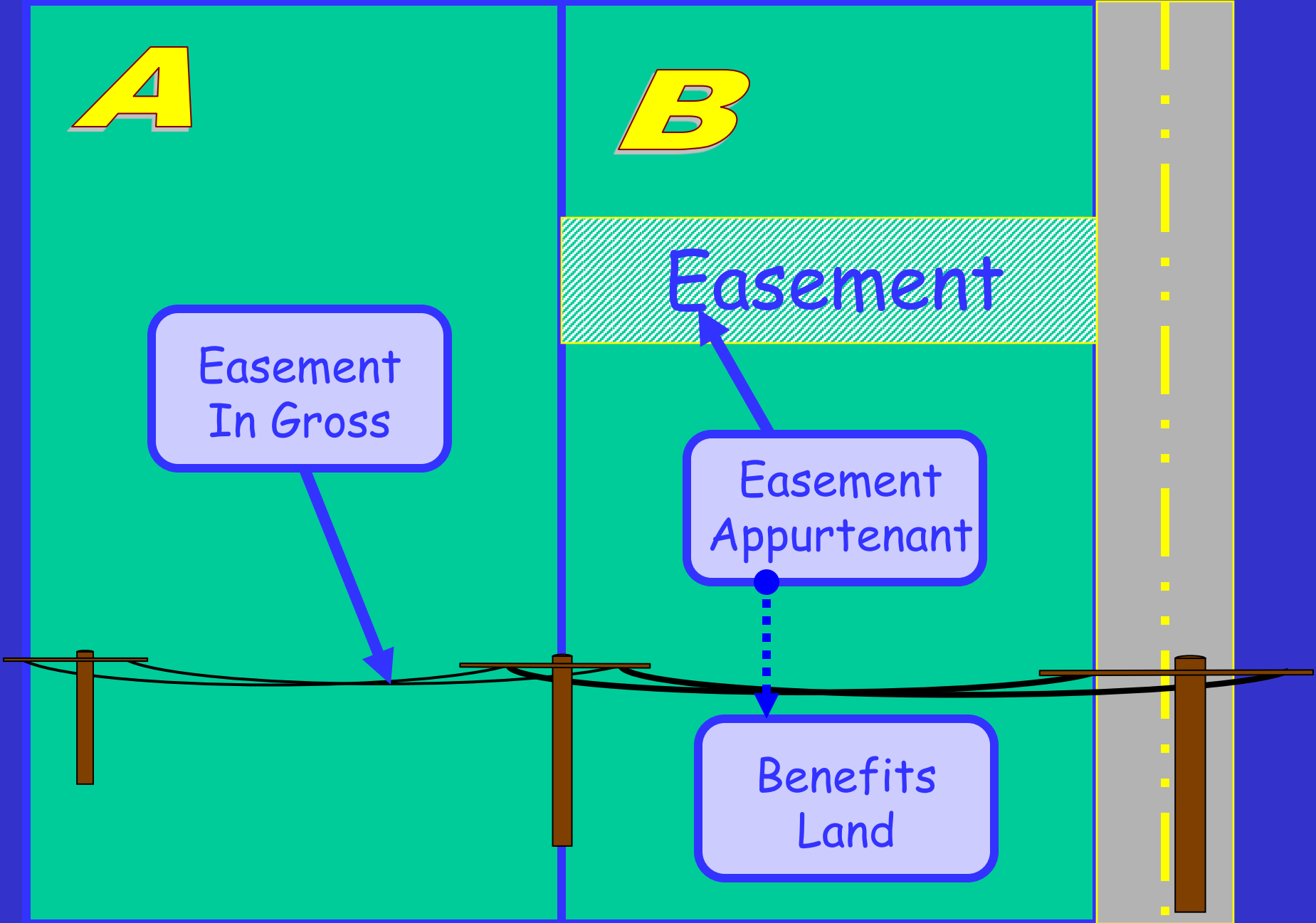
**B**

Easement  
In Gross

Easement

Easement  
Appurtenant

Benefits  
Land



**A**

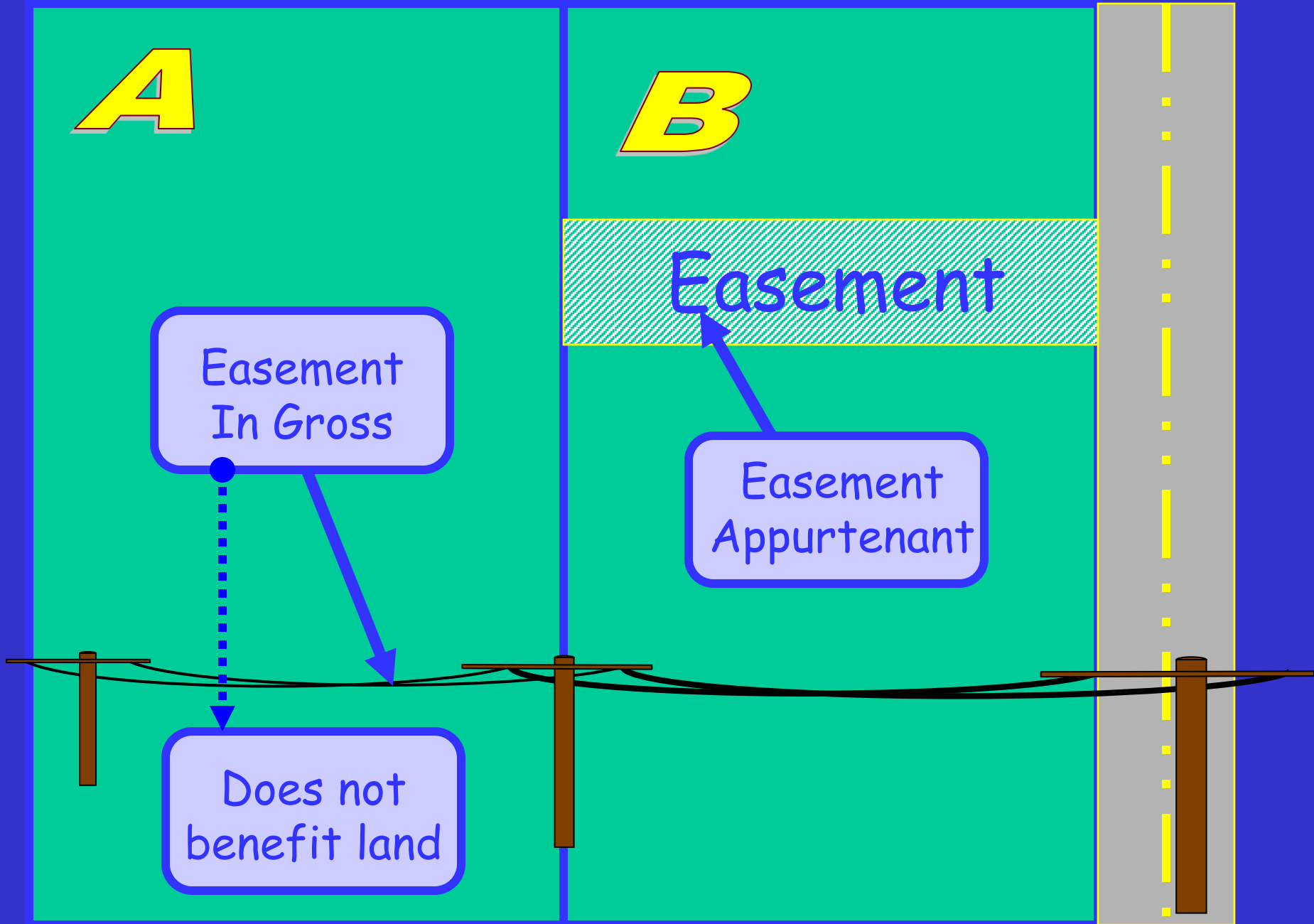
**B**

Easement  
In Gross

Easement

Easement  
Appurtenant

Does not  
benefit land



# How do we affirmatively insure appurtenant easements?

Examples:

- By using “together with” language in the legal description.
- By identifying them as a separate insured parcel in your legal description.
- What does it mean to “affirmatively insure” the easement interest?
  - If an appurtenant easement benefits the property but it is not affirmatively insured by the policy, that does not mean the easement doesn't exist. The easement still benefits the property, but the validity of the easement is not insured by the policy.

# Remember...

Just like a fee interest or a leasehold interest, an easement is an interest in real property. If you are going to insure this real property interest, you must examine that interest.

# Examining the easement interest

- Separately examine the servient parcel and take exception for any documents that hit the property on which the easement lies.
  - *i.e.* If there is a competing easement that burdens the same property the easement you are attempting to insure burdens, and it was recorded prior to our easement, you will want to take exception for the pre-existing easement.
- Confirm that the party who granted the easement owned the servient parcel as of the date of the creation of the easement.

# Lender/Lienholder Consent

- Confirm that existing lenders/lienholders consented to the easement.
  - If no consent, the easement could be foreclosed out by the lender/lienholder.
- If easement is being created as part of your insured transaction.
  - Confirm that all current lienholders have consented to the easement to prevent extinguishment by future foreclosure.
- Subordination to the easement interest is also an option.

# Additional Considerations

When examining an easement that has previously been insured:

- If it is a pre-existing easement review the easement to ensure that it has not expired or been terminated by its own terms.
- Don't forget to examine title to the servient parcel from the creation of the easement forward to ensure that there has been no modification or termination of the easement recorded.

# Potential Merger Issues

- If the dominant and servient parcels were under common ownership at the time the easement was created you may want to consider requiring that the easement be re-created prior to insuring.
- Doctrine of Merger – one cannot have an easement upon ones own land.



**A**

Owned by  
Smith

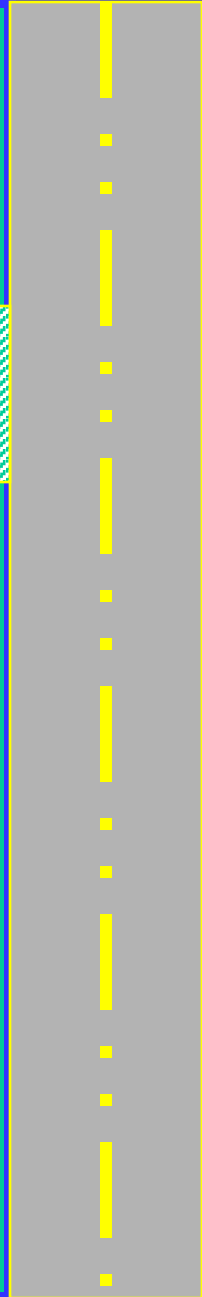
Dominant  
Tenement  
Parcel

**B**

Easement

Owned by  
Jones

Servient  
Tenement  
Parcel



**A**

Owned by  
Smith

The  
easement is  
good

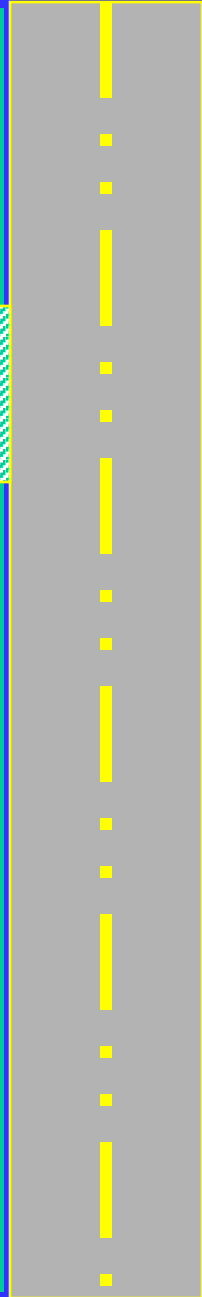
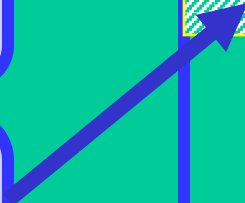
Dominant  
Tenement  
Parcel

**B**

Easement

Owned by  
Jones

Servient  
Tenement  
Parcel



**A**

**B**

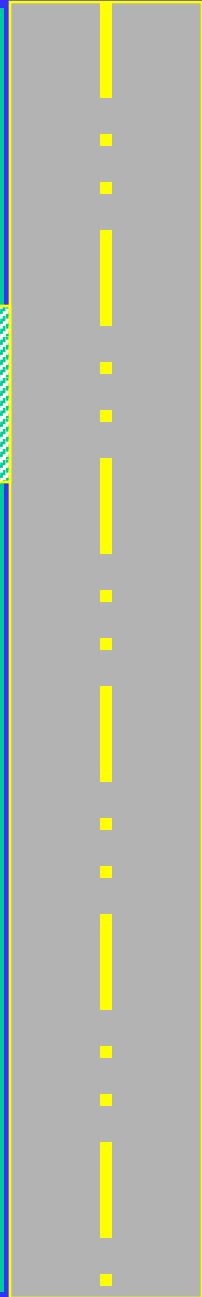
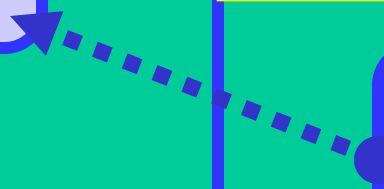
Owned by  
Smith

Easement

Jones sells  
to Smith

Dominant  
Tenement  
Parcel

Servient  
Tenement  
Parcel



**A**

Owned by  
Smith

The  
easement is  
*not* good

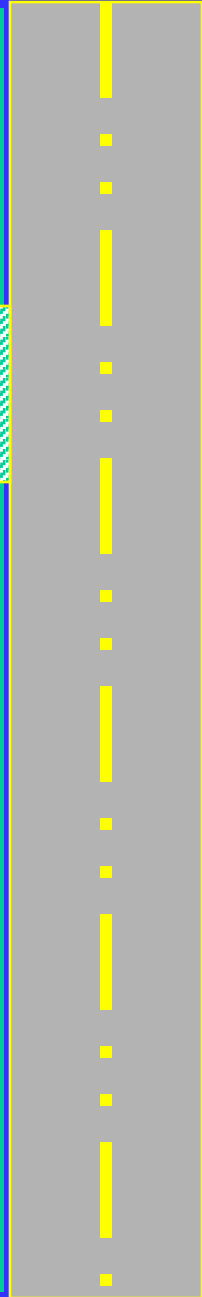
Dominant  
Tenement  
Parcel

**B**

~~Easement~~

Owned by  
Smith

Servient  
Tenement  
Parcel



**A**

**B**

Owned by  
Smith

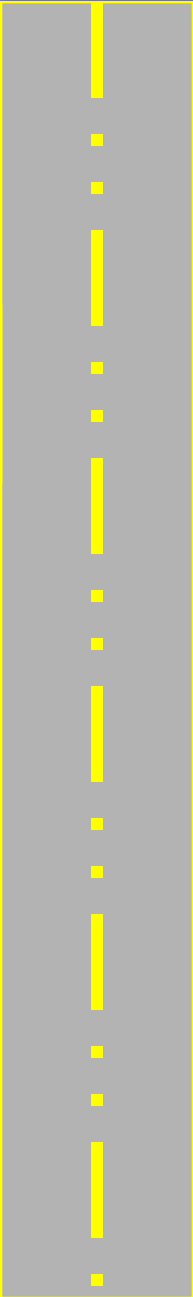
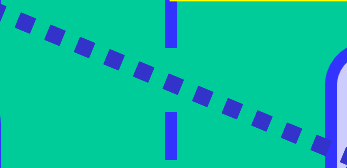
The  
easement is  
*not* good

Dominant  
Tenement  
Parcel

~~Easement~~

Owned by  
Smith

Servient  
Tenement  
Parcel



# Terms and Conditions of Easement

- There should be a special exception for the terms and conditions of the easement in the title insurance policy.
- The policy insures that the easement was validly created and remains valid as of the date of the policy.
- The policy should not insure that the parties are in compliance with the contractual terms created within the easement (i.e. road maintenance) as these are not title matters.

# Location of easement area

- If you determine that the easement was validly created, but there is ambiguity as to the exact location of the easement, you may include a special exception in Schedule B for any inability to locate the exact boundary lines of the easement.
- Example:  
“...easement for existing roadway as disclosed on attached sketch...” *may not be locatable*  
vs.  
“easement for roadway across the east 10 feet of Lot A”.  
*locatable*

# Sample exception for inability to locate

Any inability to locate the exact boundary lines of the area of land burdened by the easement (the “Servient Tenement Estate”) upon which the roadway sits, resulting from insufficiency or ambiguity in the legal description contained in the documents creating or establishing the easement, including, but not limited to the document recorded \_\_\_\_\_, 2014 in King County as instrument number \_\_\_\_\_ which is referred to in Paragraph \_\_\_\_\_ of Schedule A.



# Describing the easement using “Together with” language

Lot 1, Block 2, Anywhere Subdivision, Some County, WA.

Together with an easement for access across the south 5 feet of Lot 3, Block 2, Anywhere Subdivision, Some County, WA.

- This may be an acceptable method of affirmatively insuring an easement as long as the first version of the easement met all of the requirements for creating a proper easement.

# Describing the easement using an Additional Parcel

Parcel 1: Lot 1, Block 2, Anywhere Subdivision, Some County, WA.

- Schedule A should identify “fee interest” in Parcel 1

Parcel 2: The south 5 feet of Lot 3, Block 2, Anywhere Subdivision, Some County, WA.

- Schedule A should identify “easement interest as created by that document recorded...” in Parcel 2

Some people also like to include the words “an easement interest in the following described property” in front of Parcel 2.

# Affirmatively insuring an access easement

- Policy insures against lack of right of access to and from the land.
  - Covered Risk #4 on both 2006 ALTA Loan Policy and 2006 ALTA Owner's Policy.
- Without affirmatively insuring a specific access route, if there is a claim due to lack of access the claims handler can obtain legal access for the insured any way possible.
- Affirmatively insuring a specific access route, whether issuing an ALTA 17.1-06 that identifies a specific easement or issuing an ALTA 17-06 that identifies a specific roadway, requires the claims handler to secure access through that specific route.
- Can result in a full policy loss.

# ALTA 17-06 and ALTA 17.1-06

## Public Road

American Land Title Association                      Endorsement 17-06 (Access and Entry)  
Adopted 6-17-06

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### ENDORSEMENT

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

## Private Access Easement

American Land Title Association                      Endorsement 17.1-06 (Indirect Access and Entry)  
Adopted 6-17-06

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### ENDORSEMENT

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified [as Parcel \_\_\_\_\_] in Schedule A (the "Easement") does not provide that portion of the Land identified [as Parcel \_\_\_\_\_] in Schedule A both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

# ALTA Homeowners Policy

- Covered Risk 11 insures “actual vehicular and pedestrian access to and from the Land, based upon a legal right”.
- If asked to insure an access easement with Homeowners Policy form and roadway is not improved, consider adding a special exception in Schedule B for inability to access the property by vehicle or consider issuing a 2006 ALTA Owner’s Policy as an alternative.

# Improved roadway but no easement?

- Prescriptive easement right may be established. However, if the title insurer insures access based on a prescriptive easement right, they are accepting the exposure for litigation costs for establishing the prescriptive easement.
  - Whether or not the insurer is comfortable accepting this risk usually comes down to the likelihood of a challenge to the prescriptive easement rights.
- A “road” is not an easement, and an “easement” is not a road.
- An easement is the right to use the physical thing that is called a road.
- We insure the easement right, not the roadway.

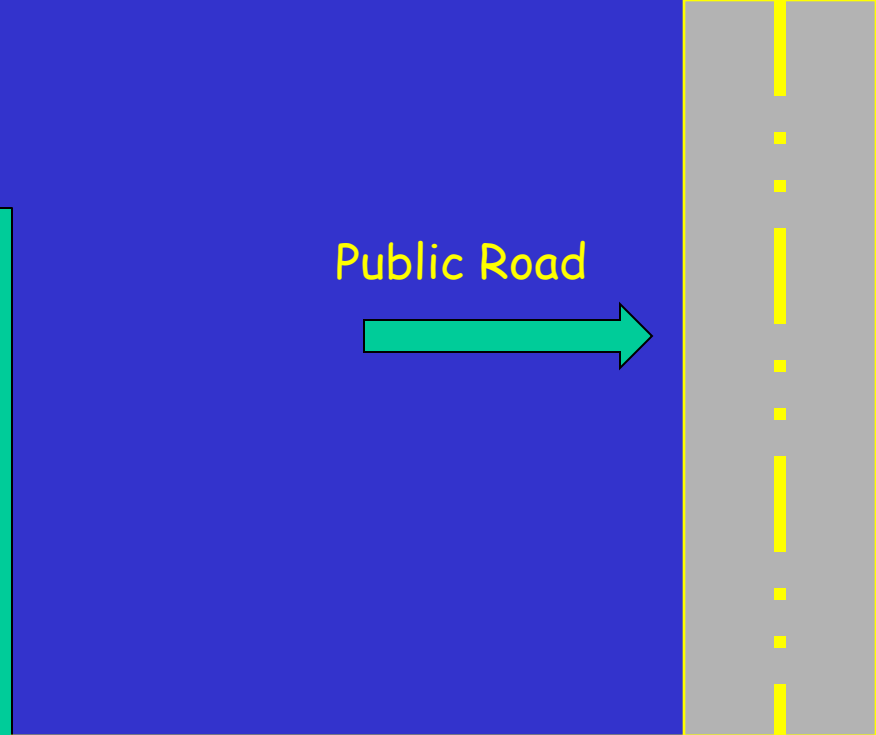
# Easements in Gross

- Not frequently insured, but it can happen.
- If asked to insure an easement in gross visit with your underwriter.
- Conservation Easement - Example of an easement in gross that may be insurable.

# Overburdening

- An easement that benefitted Parcel X when it was created serviced that parcel in it's condition at the time the easement was created.
- An attempt by the easement holder to subdivide Parcel X and rely upon that easement to benefit all of the lots that were originally part of Parcel X could be challenged by the owner of the servient parcel as an “overburdening” of the easement”.
- One may argue that “intent” is not a title matter but any challenge to the validity of the easement could create a question of coverage and result in defense costs.





Appurtenant easement for access rights across Parcel A given to Parcel X in 1995.

We insure fee and easement interests.



PARCEL X

Dominant Estate



Public Road



Easement

PARCEL A

Servient Estate



In 2005 the owner of Parcel X decides to subdivide and build multiple homes, relying on this easement for access.

Do we want to affirmatively insure this access easement again in 2005?

Is this a "title" issue?

# Abandonment

- Do not assume that an easement is terminated because it is not in use.
- Abandoning the easement doesn't necessarily remove it from title, unless the terms of the easement itself terminate it after a certain period of time.
  - Even in this scenario be cautious – it is extremely difficult in most situations for a title insurer to determine the historical use of the easement.

# Conservation Easements

- Places restrictions on the servient parcel. They are “negative” easements because they restrict the owner of the servient estate from uses that would otherwise be natural rights appurtenant to ownership.
- WA statute identifies this as a real property interest, making it less challenging to insure than some other states where this is not as clear.
- ***RCW 64.04.130*** *A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, federally recognized Indian tribe, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation. Any such right or interest constitutes and is classified as real property. All instruments for the conveyance thereof must be substantially in the form required by law for the conveyance of any land or other real property.*

# Permits & Licenses

- These are not easements. They are a “personal privilege or permission to use the land of another without creating an interest in the land”.
- Do not create an insurable real property interest.
- Typically can be withdrawn or terminated at any time.
- Given to a person or entity, similar to an easement in gross.
- Revocable at will, neither assignable or inheritable.
- Example – a permit to cross railroad tracks.

# Exclusive Easements

- A “non-exclusive” easement allows a land owner to grant the same easement right to more than one person.
- An easement is assumed to be non-exclusive unless it explicitly states otherwise.
- If an easement states that it is “exclusive” you should review the context carefully prior to insuring – it can only be granted once.
- You do not want to insure an easement for your property that was granted exclusively for a neighboring property.

# A

Easement is assumed to be *non-exclusive* unless it states otherwise

# B

Easement

So - Owner of Servient Tenement Parcel can grant it to others

**A**

**B**

... AND can connect here

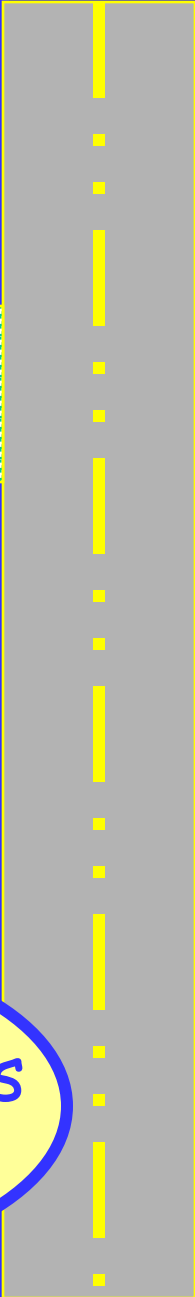
Easement 1

If: Dominant Tenement Parcel has *non-exclusive* use

Servient Tenement owner ...

Easement 2

... can grant this easement ...





**A**

If it is  
*exclusive...*

**B**

Easement

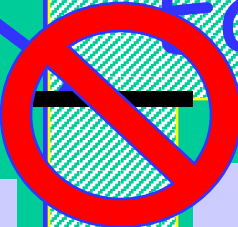
Owner of  
Servient  
Tenement  
*cannot*  
grant it to  
others

**A**

**B**

... but cannot connect here

Easement 1

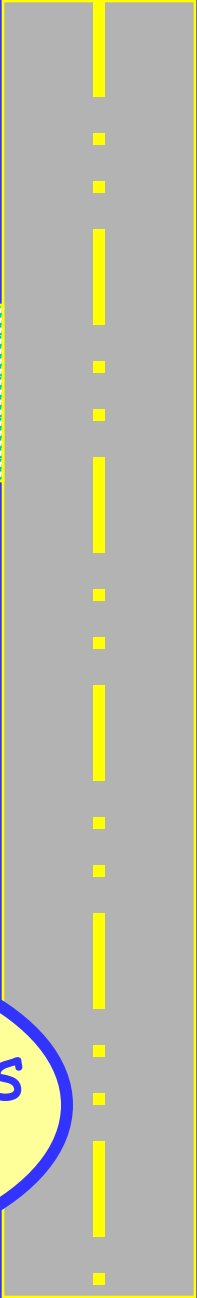


If:  
Dominant  
Tenement  
Parcel has  
*exclusive* use

Servient  
Tenement  
owner ...

Easement 2

... can grant this  
easement ...



# Summary

- Key points to remember when attempting to insure an easement interest:
- Make sure the easement is a properly created appurtenant easement.
- You must examine the easement.
- Review the easement to determine if it is exclusive.
- Take exception for inability to locate the exact boundaries of the easement, if necessary.
- Take exception for the terms and conditions of the easement.
- Consider what kind of policy or endorsement you are issuing.

# Questions?

- Feel free to contact me with additional questions or for a copy of this presentation.

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