



You Shall Not Pass – Understanding Legal Access

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Imagine you just closed on your dream home, you grab the keys from your realtor and excitedly get in the U-Haul you rented to start unloading your belongings. As you approach the property, you are greeted by a chain spanning across the road with a “No Trespassing” sign affixed to the center of the chain. Puzzled, you get out of the U-Haul, give your spouse in the car behind you a confused look as you approach your new neighbor’s door to see what is going on.

Your neighbor informs you that the property you just purchased does not have legal access over the portion of the road that is located on his property. He explains that he had a verbal agreement with the prior owner, but now that the property sold, he does not want you trespassing on his land. He does generously offer to grant you an access easement for the low-low price of \$40,000.00.

What is Legal Access?

Legal access is a fairly straightforward concept, it simply means that the owner of a piece of real property is legally entitled to access their property from the nearest public right of way. A public right of way is a road that is maintained by either the state or local government and is open to the general public as a roadway. In Florida, the county where the property is located is able to provide the location of the nearest public right of way. If your driveway connects your property to a public street, then you have legal access. If your property does not connect to a public right of way, then a more detailed analysis is needed to determine if the property is legally entitled to use a private road or adjacent property to access a public street.

How do you determine if a property has legal access?

The easiest way to determine if a property has access is through a title search or a title commitment. Attorneys are able to perform this same analysis by reviewing the public records, however the title search is often the most economical option.

In preparing the title work on a property, the examiner reviews the public records and property history to locate a document or instrument that establishes the legal right of access to the property. These can take a variety of forms, whether it's a roadway dedication contained in a plat, an express easement agreement between property owners, or a roadway reservation contained in a prior deed, the examiner needs to locate some document in the public records that grants the owner of the property the right to utilize a private road or adjacent property to access a public street. On the surface, this is a fairly simple concept, however in many cases, a roadway may already exist, neighboring or prior owners may have accessed the property without issue for years, or you may even be able to use the road without any objections from adjacent owners, yet without a legal right entitling a property owner to access their property, they may be prevented from accessing their home despite the existence of a road.

How do you determine if a property has legal access?

Once it is determined that a property lacks legal access, the next step is to determine how to obtain access. There are a variety of means by which a property owner can obtain legal access that generally fall in one of two categories: express easements or implied easements. An express easement requires that the owner of the property and the neighboring landowners enter into a written agreement granting the property access, which for our hypothetical buyer, means paying the neighbor \$40,000 and signing an easement. The advantage of this path is that access is guaranteed and the price is certain. The downside with this path is that you may need to enter into easements with multiple property owners if there are multiple lots that you need to cross in order to get from your property to the public road. This can cause problems as many property owners are weary about giving up their property rights, so the more properties involved the more difficult and costly it can potentially be. The situation can be further complicated if any of the properties are subject to a mortgage. In that case, the mortgage holder will need to sign off on the easement or the easement may be terminated through the foreclosure process.

An express grant of easement is not the only way a property can obtain legal access under Florida law. A property can obtain access absent an express grant through an implied easement, such as a prescriptive easement, implied easement by necessity, and statutory easement by necessity. Each of these easements requires going to court to definitively establish legal access, which means that results are not guaranteed and various factors can impact a property owner's ability to obtain a favorable judgment. This poses a risk as the property owner bringing the action may spend significant time and money litigating the case with no guaranteed outcome. The advantage of an implied easement is that it avoids needing to obtain an easement from an adjacent owner, which can be beneficial if the neighbor is unwilling to grant an easement, access is required over multiple properties with multiple owners, or if there is a high price tag on obtaining an easement (see the friendly neighbor above). In those cases, going to court might be the best option.

Stepping back into our hypothetical, our buyer is, unfortunately, in a difficult situation. Instead of enjoying their dream home, they are now faced with the decision of whether to pay the neighbor for the easement or hire an attorney to try to find a viable means of access. Situations like our hypothetical can be avoided through proper due diligence when purchasing a property.