

In a written and signed agreement, a woman, for a fee, granted her neighbor the right to access his property by way of a driveway he was to construct across her property. The neighbor, who could access his property via other reasonable means, had sought the access right because it was more convenient. The neighbor did not record the agreement. Due to financial concerns, the neighbor did not construct the driveway, but he intended to do so in the future.

Six months later, the woman sold her property to a buyer. The buyer did not record her deed from the woman. The buyer had no knowledge of the neighbor's right of access across the property she had purchased.

Yesterday, a year after the sale, the neighbor informed the buyer that he plans to construct the driveway next week.

The jurisdiction has a notice recording act.

If the buyer sues to prevent the neighbor from constructing the driveway, will the buyer be successful?

- A. No, because the buyer failed to record her deed from the woman.
- B. No, because the neighbor's agreement with the woman created an express easement, which cannot be terminated by mere nonuse.
- C. Yes, because the buyer lacked notice of the neighbor's right to construct a driveway on her property.
- D. Yes, because the neighbor failed to construct the driveway on the property before the woman sold the property.

Explanation:

Types of recording acts

Type	Effect	Statutory language
Race	Interest holder who records first will prevail	"First record"
Notice	Subsequent BFP without notice of earlier property interest will prevail	"Without notice," "In good faith"
Race-Notice	Subsequent BFP (1) without notice of earlier property interest (2) who records first will prevail	"Without notice, who shall first record"

BFP = Bona fide purchaser.

An **easement** is a nonpossessory interest in real property that gives the easement holder the right to use another's land for a specific, limited purpose—eg, the neighbor's right to construct a driveway across the woman's property. As real property interests, easements are subject to the jurisdiction's recording act. Under a **notice recording act** (as seen here), a real property interest **cannot be enforced against a subsequent purchaser** of a conflicting real property interest **who lacks notice** (actual, record, or inquiry) of the prior interest.

Here, the buyer had no knowledge of the neighbor's easement when she purchased the property (no actual notice). Additionally, the neighbor had neither recorded the agreement in which the woman granted him the easement (no record notice) nor constructed the driveway (no inquiry notice) at that time. Therefore, the neighbor cannot enforce his easement against the buyer, and she can prevent him from constructing a driveway across her property.

(Choice A) A purchaser who is protected by a recording act (eg, the buyer) does not have to record his/her property interest to enjoy the act's protection from a person who had previously acquired a conflicting interest in the same property (eg, the neighbor).

(Choice B) An easement is **terminated** by abandonment if the easement holder acts in an affirmative way that shows a clear intent to relinquish the easement right—mere nonuse is insufficient. Therefore, the neighbor's express easement was not terminated by his mere failure to construct the driveway. But that easement is unenforceable because the buyer is protected by the notice recording act.

(Choice D) The neighbor's failure to construct a driveway on the property before the woman sold it helps show that the buyer lacked inquiry notice of the neighbor's easement. But the buyer will only be successful because she also lacked actual and record notice.

Educational objective:

Under a notice recording act, a real property interest (eg, easement) cannot be enforced against a subsequent purchaser of a conflicting real property interest (eg, the land subject to the easement) who lacks notice of the prior interest.

References

Restatement (Third) of Property § 7.14 (Am. Law Inst. 2000) (extinguishment of servitude benefits under recording act).

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