

1)



===== Start of Answer #1 (1315 words) =====

Consolidating

When an owner consolidates and then subdivides property, any easements or rights that were appurtenant to the original property are generally passed to the subdivided parcels. An easement is a non-possessory interest in another's land. An appurtenant easement is one in which a benefited (dominant) estate receives a benefit based on its relation to a servient estate. Here, all of the new parcels would acquire an implied easement for ingress and egress. Th

Zoning Policy

The 10th Amendment of the US Constitution grants to the states broad police powers which allow the states to enact laws and regulations for the benefit of the health, welfare, safety, and morals of their citizens. The states in turn have granted to cities and counties, through zoning enabling acts, the power to create zoning regulations that dictate the uses and development of the land under their domain. Any zoning ordinances must conform with a general or master plan, that incorporates a broad, long term vision for the city's development and growth. A more specific plan is then drawn up to institute the general plan on a more localized level, and finally zoning ordinances are passed. These zoning ordinances will dictate what kind of uses will be allowed in a specific area and what kind of structures may be built. Thus a zone may be designated industrial, commercial or residential. Industrial would be the least restrictive of the uses and residential would be the most restrictive. Generally, any more restricted use could be carried on in an area designated for a less restricted use. Thus, land could be put to residential use in an industrial zone but not the opposite.

Zoning decisions are generally made by a planning commission, which is appointed by a city council. The board comes up with zoning regulations and these are approved by a council. If subsequent to the enactment of zoning regulations, citizens

seek some sort of exception to rule, they can appeal for some sort of variance or special use permit to the adjustment board. The board will conduct an open hearing at which the applicant and any opposition will have an opportunity to be heard.

In addition to conforming with a general plan, any zoning ordinances, like all land use regulations, must not violate certain Constitutional protections. The Fifth Amendment extended to the Fourteenth Amendment provides that no citizen shall be denied life, liberty or *property* without the Due Process of the law. Thus any land use regulations must not violate substantive or procedural due process. Procedural due process requires that citizens be given proper notice and the opportunity to be heard regarding any restrictions on their use in land. In zoning situations this is accomplished by public hearings before the planning commission, city council, and adjustment board.

Substantive due process requires that land use regulations be aimed at and actually accomplish a substantial state interest, and that the regulation is finely tailored to addressing the problem without being any more restrictive than necessary. Zoning ordinances generally satisfy this requirement as they are a means of affecting the government's interest in developing municipalities in a manner beneficial to the well being of the citizens.

Procedure

When a developer seeks to subdivide a property, he will generally be required to create a general scheme and submit it to the planning board. The scheme will contain general plans and layout for the subdivision, including the location of roads, sewer and other utility lines. If approved, the general scheme will also be filed at the recorders office. The scheme may also contain CC&R (conditions, covenant and restrictions) that each of the parcels will be subject to. These are in the form of restrictive covenants.

Here, the proposed development is on land that is zoned R1 (as is my home) which requires lots of a two acre minimum. However, the owner seeks to divide his 15

acres into 8 lots, thus if the lots are evenly divided they will fall just shy of two acres. Because, the lots do not conform with the two acre requirement the general scheme will likely not be approved. When an owner seeks to do something which is not allowed by current zoning ordinances there are several steps he can take.

First, the owner may seek a zoning amendment, of which there are two kinds. First, a text change would change the actual wording of the zone ordinance, so as to allow all of the property within the zone to be put to use different than what was originally allowed. Second, a boundary amendment would change the boundaries of a zone, so that if an abutting zone allowed for a less restrictive use (in this case one acre lots) the boundary would be extended to incorporate the area containing the property owned by the person seeking the amendment. These are uncommon as they run the risk of being deemed as spot zoning, which is illegal. Spot zoning is found where a specific parcel is permitted a use which the surrounding parcels are not, and is likely violative of the Equal Protection Clause as well as the general plan

If a zoning amendment is not allowed, and it most likely would not be here, then the owner may seek a variance. Variances can either be bulk or use. A bulk variance is one where the user seeks to build in a way that doesn't conform with the zoning. A use variance is one where the owner seeks to put the property to use which is not permitted within the zone. Here, the owner would be seeking a bulk variance, because he is attempting to build in a manner that doesn't conform with the zoning restriction of two acre lots. To be granted a variance, the applicant must show that his is a special situation, not of his own creation, that subjects him to undue or unnecessary hardship. Here, it may be hard to show that he has a special circumstance not of his own creation, as he decided to subdivide into eight parcels. Nor is allowing him to only create 7 lots instead of 8 likely to be an undue hardship. However, he will argue that the lots are just shy of two acres and there would be no appreciable affect not in conformity with the zoning regulation by allowing the lots to be slightly smaller than required. As mentioned earlier, a public hearing will be held on his request, and neighbors may complain that the extra lot would increase traffic. However, because the

overall affect of allowing the variance would be minimal or non-existent, the adjustment board may grant it absent a vigorous opposition.

Another method of allowing a use that doesn't conform with the ordinance would be to apply for a special or conditional use permit if the zone so allowed. In certain schemes a certain use may be allowed but require that a special use permit be applied for and acquired first. The facts here don't indicate that this is such a zone.

If the owner of the subdivision is unable to find relief through the zoning flexibility measures he may want to challenge the ordinance on constitutional grounds. As discussed earlier, the ordinance must satisfy the Fourteenth Amendment Due Process requirements. It must also not violate the 14th Amend's Equal Protection clause, that provides that all citizens should have the law equally applied. Zoning ordinances, particularly ones that are restrictive as to lot size have been challenged, because they are likely to exclude any one of less economic means. As a secondary product, they may also exclude those of other races, because they are less likely to be able to afford a home with a larger lot. Here, however, it is unlikely that the owner will have much luck as he can hardly that it would be more inclusive to allow lots slightly less than two acres.

2)



===== Start of Answer #2 (1538 words) =====

Dear Client,

Thank you for contacting me regarding your new property. I hope you have been able to get out to the property. We should probably go out there soon together in order to access the area as well as your neighbors.

Ultimately we will get you access to your property. That can be accomplished in multiple ways however. We could attempt to use the upper neighbors well maintained road in order to access the property, or we could argue that we should be able to use the access trail that now is through the vineyard. Both options have pros and cons. If we end up suing for access, that might lead to bad blood and political fail out, so we should proceed cautiously.

First, we should approach both property owners in an attempt to get a license or a covenant. A license would be asking the party with the road if we may have a limited purpose of ingress and egress. This could be as simple as a verbal agreement or possibly a contract where you pay some sort of monthly or yearly access fee. This is more likely to occur on the road side, but we could potentially ask the vineyard for a license to travel up the trail as well. We could also ask for a covenant, which is a promise. This would be similar to a license, however, a license may be revoked at any time. A covenant would allow us greatly legal protection if either party promised to allow us access through their property. We would want to get the covenant in writing, to satisfy the statute of frauds. This would allow the option of the covenant passing with the land if certain aspects are protected. If you want to explore this option, we can attempt to get a meeting with either owner (or both) and draw up some paperwork.

The license or covenant possibility is preferred. This would allow you access without going through the expense of suing for access. I must caution you however, that litigation will likely be costly.

^{Best}
The ~~more drastic~~ legal solution to get to your property is known as an easement. This is simple using someone else's land for a limited purpose, in this case, coming and going. This would be a specific kind of easement, where your property would be considered the dominant parcel, and whichever property you are accessing your property through would be considered the servient easement.

There are multiple types of easements, and require specific elements in order to qualify. We will need to do further research in order to determine what is possible, but I will give you an overview of the types and what we must prove for each.

When you inherited the property, you should have received a deed to the property. Your deed will include language that describes the property, as well as any easements or other encumbrances upon the property. If one of the two options, the road or the trail, are mentioned in the deed as an easement, you would have an express easement in order to access your property. We will need to research both your deed, and both of your neighbors deeds to determine if they contain how you access your property. This may require us to dig into the historical research as to the lineage of all the deeds. It may be that it was contained in a previous deed and dropped subsequently. This would produce another avenue to explore, and legal research as to exactly how to proceed.

If there is no such language in the deeds that expressly grants you access, there may be an implied easement. Implied easements here would come in the form of an easement by prior use. We have no indication that the road from your neighbor was ever used to access your property, so the road will likely fail as an implied easement. However, if you have evidence, eyewitness accounts, or the neighbor said, "yea, i had to stop those people from going across my yard to their property with a fence", this will give us the possibility of arguing this. The fact that there is now a fence across it causes another problem which will come up later.

The trail is the perfect example of what we could argue is an easement by prior use.

We do have some difficulties however, since we will have to show that in order to access your property, the trail was used continuously, it was apparent that that was its purpose, and that it is necessary for the use and enjoyment of your land. Continuous does not mean always, but the fact that a winery and a vineyard have been built across it may hurt us. We will need to investigate if people at the winery every saw people walking up the trail after the vineyard was put in. Further, we will need to investigate how long the winery has been there and when the vines were planted. All of this is very important to establish a prior use easement, obviously the more recently all of these things occurred the better. Also the more reports that the trail was used, and how recently it was used the better.

We may also have a claim that the trail constitutes an easement by prescription.

~~Prescriptive easements are easement which are taken through adverse possession.~~

We would need to show that for a period of 5 years, the trail was used openly, hostility (not aggressively, just against the owners interest) and continuously. We will need to investigate this in order to determine if we have any evidence in order to substantiate this claim. This research will be similar, if not exactly the same as needed for the prior use easement claim.

Lastly, we may argue that we need to use the trail, because we need to access the property. This is known as an easement by necessity. Necessity requires that at some point there was a common grantor between our property and the property with the trail. If we didn't have the trail, we could argue that we should have access to the private road, however, since the trail leads directly to the public road, our necessity is regarding the trail. We will have to show that the access is apparent and reasonably necessary. We must show that it is necessary, just not a hardship to go around. The fact that the road is private works in our favor here. We are granted access by necessity to a public highway. The fact that we could go around, and use a private road does not come into play with the we could go around analysis for our easement by necessity.

If we are granted an easement by necessity, please realize that you may not be given

the exact trail where it originally was. There may be accommodations made, such as going around the vines, or any other reasonable needs. But you will get some sort of access to your property.

Each of these easements, other than by necessity, may have been extinguished, or destroyed. If during research, or you hear that people always used to use the road or the trail, that's a good sign, but it might not be the end of the story. Both the properties could have had easements across them at some point, but they may have been taken back, through a similar process that your property got access, by prescription, estoppel, end date, etc. If you haven't used those options in over 5 years, they have reclaimed and extinguished the easement. If you were granted an express easement, it could have been for a term of years, which might have expired. The properties could have been merged at some point, which would end the easement as well.

Again, I assure you, we will get you access to the property, but there are many angles and avenues which need to be explored. This will all take time. For the meantime you could begin to attempt to start the clock on a new prescriptive easement, but be aware, you will be considered a trespasser. They will only recover nominal damages though if you're caught and prosecuted.

If any of these easements is granted, you will need to reasonably upkeep the easement. We can discuss options and your duties regarding this later however.

Again, in considering what options to take, please bear in mind that litigation may be costly. The research and preparing the case, may well be in excess of how much the property is worth. It may also be well in access whatever the party with the road would charge for its use. It very well may make more sense to pursue a remedy outside of court, but if we end up going to court, please be aware that the litigation costs may be sizable.

If you have further questions, or wish for me to put together a proposal in regard to any

of the options above, please contact me. I will come to you or arranging a meeting place, as my home office has recently been rezoned G, and creates a bit of a hazard currently.

Thanks,
Attorney at Law

=====
END OF EXAM