

An Introduction To Easements

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You may be one of the many Tennessee landowners who have granted easements. Perhaps you will be asked for an easement in the future for a pipeline, power line or water line to cross your property. This publication outlines some of the things a landowner should consider in negotiating an easement.

Some of these points should also be considered in dealing with other kinds of requests for using your property. Examples include negotiating leases for mineral exploration or reaching an agreement with a conservation group to improve wildlife habitat on your land.

What is An Easement?

An easement is a right of an individual, company or agency to use the property of another person for a specific purpose.

When buying land, the purchaser usually buys the entire bundle of rights to the parcel. These rights can be separated and one or more may be acquired as an easement. The landowner may keep all the remaining rights or may further divide them.

The owner of an easement is entitled to protection against other persons who might interfere with his or her use. The easement holder is also not subject to the wishes of the landowner as long as the easement is reasonably used according to its intended purpose.

The landowner still owns the land and can use it as he or she wishes as long as this use does not interfere with the easement rights which have been granted. Generally, for example, the owner could not construct a building, excavate a pond or build some other obstruction within a vehicle right-of-way granted in an easement.

Kinds of Easements

Many technical words and phrases are used in talking about easements. A brief outline of a few terms may help you understand these discussions.

You are probably most familiar with the kind of easement that allows the holder to do something on the property like string power lines or lay pipelines. This is called an *affirmative easement*.

A *negative easement* on the other hand prevents the landowner from doing certain things on the property. Negative easements, for instance, could prevent a person from constructing a building on his or her land that would block a neighboring landowner's view or access to sunlight or intrude into an airport's landing approach.

Many parcels of land in Tennessee have an *appurtenant easement* attached to them. An appurtenant easement benefits another property. A common example is the right to cross another landowner's holdings to get to your own property. The land that is benefited by the easement is called

the *dominant tenement* and the land that has the easement is called the *servient tenement*.

If the easement does not benefit a specific dominant parcel, it is called an *easement in gross*. Common examples are easements for power lines, telephone cables and public roads.

How Are Easements Acquired?

The most common method of acquiring an easement is, perhaps, through private negotiation and *purchase*. Easements can be created in other ways.

A land owner, for example, may grant an easement as a *gift* to another party. The value of the gift may qualify as an income tax deduction in some cases.

When selling property, the seller may keep some rights through a *deed reservation*. The seller may, for instance, keep the right to cross the property to reach other holdings. The rights that are kept or "reserved" are stated in the deed.

An easement can also be created by *implication* or *reasonable necessity*. Imagine that you own property with a road along one side. If you divide the land and sell the parcel without road access, an easement would be implied if the only way to get from the road to the parcel you sold is over the portion you retained. Note that an easement is not created unless both parcels were owned by the same person at one time. A person cannot buy land without road access and then demand right-of-way over an adjacent parcel by reasonable necessity if the two parcels were never under common ownership.

An easement may also be implied if one part of a property is used to benefit another part. Imagine, for example, that you normally move machinery over a farm road to a portion of your farm. If you sell that portion, a court might rule that an easement over your farm road has been created by implication if alternative ways for the new owner to move machinery to the parcel are inconvenient.

Adverse use can create an easement over time. If, for example, a person continually crosses your land without your permission but you allow it to continue over an extended period of time, a court might rule that an easement has been created.

A land owner can avoid an easement through adverse use by recording a document stating that he or she approves of the person temporarily making use of the property. The owner can also prevent an adverse use easement by granting temporary license or lease to the other party.

Finally, an easement can be created through *condemnation*. Under the right of *eminent domain* the government can take or authorize the taking of private property for public benefit. An easement cannot be acquired without paying just compensation to the landowner. Factors which might be considered in determining the value of the easement include property appraisals, the amounts of compensation the agency has paid in the past and the value of comparable easements determined through private negotiation. The landowner can go to court if he or she believes the amount offered is too low. The original offer will be placed in escrow and earn interest during the suit.

How Are Easements Ended?

An easement can be ended in several ways. The agreement itself may include the terms for its termination. It may be limited to a specified number of years or the life of one of the parties for example. An easement created for a specific purpose would end when the purpose is completed; for instance, a right-of-way until the timber is harvested from a specific tract.

Easements without a termination date may be ended through sale or formal release of the easement right. A government body may also end an easement through condemnation of the right in the property. The reason for the easement may end. A right-of-way across one property to reach another would end if the two properties are merged under a single owner for example.

Finally, an easement may be ended through abandonment. A difference exists between abandonment and nonuse however. Not using an easement does not terminate it or, stated differently, using the right is not necessary to maintain it. A power line easement, for example, may be held for a number of years as part of a power company's long range growth plans with no construction or other activity.

Negotiating An Easement

If you are asked for an easement, what should you do? Should you take what is offered or negotiate with the party requesting the easement?

Most easement agreements are prepared by the party wishing to acquire the easement. The agreement may be fair and trouble free but this is not always true. A prudent landowner will examine the agreement and clarify any questions or uncertainties before signing. One authority* offers these suggestions. Some may apply to your specific case.

1. Employ a competent attorney, experienced in easements, to advise you on the agreement before you sign.
2. Keep written records of everything that happens. For example, a diary of conversations between yourself and the parties wishing to acquire the easement, notes and pictures of construction progress, the day and hour the crew first entered your property and the work performed, before and after pictures of the area, dates and hours of any work you performed to get the land back into shape, a log of the equipment and labor involved, records of yields on the easement and the remainder of the property.
3. Make written provisions for crop losses or differences in yield on disturbed land versus the rest of the farm for at least three years.
4. Make provisions for the surface to be restored to its original state or to your specifications for at least three years (land tends to sink and become uneven after a disturbance).
5. State that the ditch for a pipeline easement is to be double cut (top soil on one side of the ditch and the subsoil on the other, the subsoil on the other, the subsoil to be filled in first).

*Marshall Douglas. "Considerations in Negotiating an Easement." *Journal of the American Society of Farm Managers and Rural Appraisers*. Volume 38-1, April 1974.

6. State the exact size of the pipeline, road, telephone or electric line.
7. State the exact surveyed location of the easement in width and length.
8. State that only one utility can be constructed within the easement (for example one pipeline) if you do not wish to grant a multiple use easement.
9. State the product or products that will be transferred through a pipeline easement. State maximum voltage for electric transmission lines.
10. State if the line can be repaired, altered or removed without liability for crop or surface damage on each future occasion of repair, alteration, or removal.
11. State if the easement can be farmed or grazed and if it is to be fenced.
12. State if trees and undergrowth can be cleared and their disposition.
13. State a minimum depth for a pipeline to be buried.
14. State who is responsible for removing construction debris.
15. State if grassland is to be reseeded, by whom and at who's expense.
16. State areas of entry and exit to and from your property.
17. Talk to other landowners and compare the prices being offered.
18. Have the company pay for all survey fees, filing fees, penalties for mortgage prepayments and any other costs associated with the easement. The easement is usually not for your benefit and you should not have to bear any uncompensated expenses.
19. Hire a competent rural land appraiser.

The following don'ts are also suggested:

1. Don't threaten the construction crew. They are only employees of the company.
2. Don't attempt to keep company appraisers off your land.
3. Don't guess at anything. Measure, weigh, keep written records and photographs.
4. Don't withdraw the money deposited in escrow in a condemnation suit. This may be interpreted as consent to the easement on the terms of the condemnor.

Other Considerations

Specifying a time when the easement rights would revert back to you after discontinuing use of the easement should be considered. You may also want to set a time limit to remove any structures or facilities upon discontinuation of use to avoid the problem of their abandonment.

Other considerations enter the negotiations if the land is farmed by a tenant. A tenant has legal rights under a lease agreement which must be considered. That party seeking the easement may be willing to make a separate settlement with the tenant. Some parties prefer making a single payment for crop and land damages; the owner is then responsible for reaching an agreement with the tenant.

Under a cash lease, the tenant may expect to at least be reimbursed for the value of the crop and the rent on the land if the crop is destroyed. Under a share lease, payments for crop damages or loss of land use may be divided in the same proportion as the crop is shared.

Some reduction in future rents may be in order if yields decline because of land disturbances. Compensating the tenant for unnecessary inconvenience may also be in order.

Finally, your tax advisor should be consulted. The compensation received for selling an easement constitutes the proceeds from a sale of an interest in the property and reduces the cost or other basis of the land. Also, special tax considerations apply if you grant the easement under threat of condemnation through eminent domain or give an easement to certain non-profit or charitable groups.

The purpose of this publication is to provide some basic information on property easements. It cannot substitute for competent legal assistance. Persons interested in more information or persons having property problems should consult an attorney. Persons negotiating an easement should also consider consulting a qualified land appraiser.

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