



# The Law of Easements in Pennsylvania

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**A. Understanding the Legal Concept of Easement**

1. An easement is a nonpossessory interest in land differing from an estate in which the holder can possess and occupy the entire land. An easement holder may use the land within the scope of the easement only.
2. Easements are irrevocable as opposed to licenses which permit a licensee to use the land, but may be revoked at any time. While similar in nature and in drafting easements distinguish from licenses through nature of creation, duration of use, amount of consideration, and reservation of the power to revoke.
3. Leases grant the lessee a possessory interest in another's land for a period of time.
4. Easements create both dominant estates, which retain the right to use, and servient estates, which are subject to the use. Dominant estates need not abut servient estates such as in the case of access easements.
5. Affirmative easements provide the dominant estate the right to utilize the land for the purpose of the easement, preventing what would otherwise be trespass. Negative easements provide the dominant estate the right to prohibit use of the servient estate, such as a light and air easement. Negative easements cannot be acquired by prescription.
6. Rights of Way have been construed as easements or grants of interests in land depending upon drafting and intent. As a result, upon a termination of an easement, the benefit to the fee owner is extinguished. Upon termination of use of a grant of an interest in land, the grantor retains ownership. Depending upon the construction of the document or the enabling legislation, title to the land subject to the right of way varies.
7. An easement in gross is an irrevocable personal interest in the land of another creating a servient estate without a dominate estate. An easement appurtenant requires a servient estate and a dominate estate in land. Easements in gross are personal and may cease upon the death or dissolution of the holder. An example is a utility easement which encumbers land, the servient estate, but has no dominant estate.

**B. Various Types of Easements**

1. Roadway:

a. Defined: (i) construction, maintenance, repair, and replacement of the Proposed Access Road, and any and all improvements relating to the construction of the Proposed Access Road as depicted on the Access Easement Plan, including, but not limited to, the installation of the roadway, curbing, sidewalk, storm water improvements, lighting, landscaping, striping and signage, (the "Road Improvements"), and (ii) access, ingress, egress, and regress of pedestrian and vehicular traffic, to, from and between I-79 and the Proposed Project .

b. Considerations:

- (i) posting of municipal and highway bonds
- (ii) permitting
- (iii) running with the land
- (iv) dedication for municipal acceptance

2. Storm water/Sanitary Sewer

a. Defined: for the purpose of construction, maintenance, repair, and replacement of storm water discharge facilities (sanitary sewer facilities) as more particularly set forth on a Plan prepared by Engineer & Company, Inc., dated January 1, 2004, and in a legal description , both of which are attached hereto as Exhibit A.

b. Considerations:

- (i) posting of municipal and highway bonds
- (ii) permit
- (iii) running with the land
- (iv) dedication for municipal acceptance

3. Utility

a. Defined: for the purposes of: constructing, installing, maintaining, operating and replacing utility service lines, wires, cables, conduits, pipes and other facilities of any sort whatsoever to provide utility services of any type whatsoever (including, but not limited, to telephone, cable, sewer, water, electric, and gas service) (collectively the "Utility Services") to Parcel I (the "Utility Easement").

4. Scenic/Buffer

a. Defined: for the purposes of landscaping, planting, maintaining, replacing, and relocating of trees, shrubs, bushes, plants and other landscaping materials on the Buffer Easement (the "Plantings") along with an additional ten (10) feet surrounding the Buffer Easement for the purpose of installation of the Plantings.

b. Considerations:

- (i) termination upon change of use
- (ii) consent of servient estate

5. Scenic

6. Conservation

7. Light and Air

8. Slope

9. Bike Path/ Walking trail

10. Emergency Access

11. Encroachment

12. Support

### **C. Creating Easements**

1. Most easements are created by grant or reservation governed by the Statute of Frauds which requires a writing signed by the party granting or reserving the easement. Some oral easements have been found where there has been part performance, but this leads to issues of whether the grant was irrevocable or a mere license.
2. Only the owner of a possessory interest in land may grant an easement which may last for as long as the interest held by the grantor in land. So holders of life estates may grant easement that only last for the grantor's life.
3. Express easements are created by grants within writing.
4. Easements by implication or necessity are created when three elements are met:
  - a. Previous common ownership of both parcels of land subject to the easement.
  - b. Transfer or severance of part of the parcel commonly owned.
  - c. Necessity at severance for an easement to benefit either the parcel transferred or the parcel retained, with such necessity existing both at the time of severance and at the time of exercise of the easement.
5. Easements by Prescription are created when the following elements are proven by the claimant by a preponderance of evidence. If the elements are met the land owner may defeat an easement by prescription by proving acquiescence or permission for use.
  - a. Open and notorious use of another's land.
  - b. Use that is adverse to the actual owner's use of the land.
  - c. Use that is continuous and uninterrupted.
  - d. Use that is exclusive to the claimant.
  - e. Use that last for a period of twenty-one years.
6. An easement by estoppel is founded upon the estoppel theory which corrects injustices through situations where a landowner represents an easement exists and a person in reliance thereof improves the landowner's property.

### **D. Easement Drafting**

**Lawyer, n.** One skilled in the circumvention of the law.

**Lecturer, n.** One with his hand in your pocket, his tongue in your ear and his faith in your patience.

Ambrose Bierce, "The Devil's Dictionary"

## A. General Issues

1. Starting with the Basics: Who, What, Where, When, Why, and How
  - a. Who are the parties to the agreement? Who else maybe involved? Adjoining landowners, municipalities and their authorities, county, state, federal governments and their agencies? Is it assignable? Does your grantor have title or other power and/or authority to convey? Is a lender involved?
  - b. What is it that the document attempts to accomplish? What are the materials terms of the agreement? Supplemental terms? Legal terms? Is the grant sufficient to meet expectations of the parties? Has the servient estate unnecessarily restricted future use and enjoyment?
  - c. Where is the easement? Is it defined by plan, survey, legal description? Does it relate to monuments or stakes?
  - d. When does the estate commence? Is it temporary or perpetual? Is it specific to the land or to the proposed land use? Does it run with the land? Is there a power to terminate?
  - e. Why an easement? Would a license be sufficient? What about fee ownership with power of reentry or possibility of reverter upon failure of condition? Does the servient estate wish to retain title? Does the dominant estate truly occupy exclusively?
  - f. How is the estate created? Agreement, written or unwritten? Recorded or unrecorded? Is consideration exchanged?
2. The Basic Tools of the Trade
  - a. Words: `When *I* use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose it to mean--neither more nor less.' The question is,' said Alice, `whether you *can* make words mean so many different things.' The question is,' said Humpty Dumpty, `which is to be master-- that's all.' Alice in Wonderland
  - b. Spelling and Grammar
  - c. Simplicity, Brevity, and precision.
3. “**Parts is Parts**”: Creating the Easement through Written Agreement-

**Quill, n.** An implement of torture yielded by a goose and commonly wielded by an ass. This use of the quill is now obsolete, but its modern equivalent, the steel pen, is wielded by the same everlasting Presence.  
Ambrose Bierce, “The Devil’s Dictionary”

  - a. “**In the beginning...**”-The Title and Preamble-Each identify the nature of the instrument, the date of its creation, and the parties thereto, and is required for recording purposes.

