



Easements

©2009 eNotes.com, Inc. or its Licensors. Please see [copyright information](#) at the end of this document.

- [Background](#)
- [Types of Easements](#)
- [Creation of Easements](#)
- [Uses of Easements](#)
- [Transfer of Easements](#)
- [Termination of Easements](#)
- [Additional Resources](#)
- [Organizations](#)

Background

An [EASEMENT](#) is a property interest, which entitles the owner of the easement to the privilege of a specific and limited use of the land of another. A right of way is a form of an easement granted by the property owner that gives another the right to travel over and use the owner's land as long as it is not inconsistent with the owner's use and enjoyment of the land. These principles had their origins in traditional [COMMON LAW](#) which governed matters such as the free flow of water and which allowed neighboring landowners to traverse, often by horseback or on foot, an informal "road system." Early courts reasoned that while absolute ownership rights of property can be lessened by an easement, society as a whole benefits from the resulting freedom of movement.

Types of Easements

Affirmative Easements

An affirmative easement is a requirement to do something, such as allowing another access to or across a certain piece of property. Most easements fall into this category.

Negative Easements

A negative easement is a promise not to do something with a certain piece of property, such as not building a structure more than one story high or not blocking a mountain view by constructing a fence. There are not many negative residential easements in existence today as such architectural specifications are typically covered by rules and regulations promulgated by homeowners' associations. These documents are usually entitled *Codes, Covenants, and Restrictions*, often referred to as CC&Rs. A negative easement is sometimes referred to as an easement of light and air and in most states cannot be created by implication.

Creation of Easements

There are five ways to create an easement: by an express grant, by implication, by strict necessity, by

permission, and by prescription.

Express Easements

An express easement is created by a [DEED](#) or by a will. Thus, it must be in writing. An express easement can also be created when the owner of a certain piece of property conveys the land to another but saves or reserves an easement in it. This arrangement is known as an easement by reservation.

Implied Easements

To create an easement by implication, three requirements must be met:

- The easement must be at least reasonably necessary to the enjoyment of the original piece of property.
- The land must be divided (or "severed"), so that the owner of a parcel is either selling part and retaining part, or subdividing the property and selling pieces to different new owners.
- The use for which the implied easement is claimed must have existed prior to the severance or sale.

Necessity Easements

The courts will find an "easement by necessity" if two parcels are so situated that an easement over one is strictly necessary to the enjoyment of the other. The creation of this sort of easement requires that at one time, both parcels of land were either joined as one or were owned by the same owner. Prior use of the easement, however, is not required. The most common example of an easement by necessity is landlocked property, so that access to a public road can only be gained by having a right of way over an adjoining parcel of land. The legal theory is the landlocked parcel was accidentally created, and the owner forgot to include an easement appurtenant to reach the road.

Permissive Easements

A permissive easement is simply an allowance to use the land of another. It is essentially a license, which is fully revocable at any time by the property owner. In order to be completely certain that a permissive easement will not morph into a prescriptive easement, some landowners erect signs stating the grant of the permissive easement or license. Such signs, often found on private roadways, typically state: "This is a private roadway. Use of this road is permissive and may be revoked at any time by the owner."

Prescriptive Easements

Most litigated easements are those created without permission. An easement by prescription is one that is gained under principles of adverse possession. Prescriptive easements often arise on rural land when landowners fail to realize part of their land is being used, perhaps by an adjoining neighbor. Fences built in incorrect locations often result in the creation of prescriptive easements. If a person uses another's land for more than the [STATUTE OF LIMITATIONS](#) period prescribed by state law, that person may be able to derive an easement by prescription. The use of the land must be open, notorious, hostile, and continuous for a specified number of years as required by law in each state.

The time period for obtaining an easement by adverse possession does not begin to run until the one seeking adverse possession actually trespasses on the land. Thus, a negative easement cannot be acquired by prescription because no [TRESPASS](#) takes place. The use of the easement must truly be adverse to the rights of the landowner of the property through which the easement is sought and must be without the landowner's permission. If the use is with permission, it is not adverse. There must be a demonstration of continuous and uninterrupted use throughout the [STATUTE](#) of limitations period prescribed by state law. If the use is too

infrequent for a reasonable landowner to bother protesting, the continuity requirement will probably not be satisfied.

Subsequent parties in the same position to the land using the right of way adversely can add up the time to meet the required statute of limitations. This situation is known as tacking. Thus, a prescriptive easement need not be exclusive; it can be shared among several users.

Conservation Easements

A conservation easement, a type of express easement, is created by a voluntary legal agreement between a landowner and another party, usually the government, which restricts the development of a piece of land. Under certain specific conditions, conservation easements are recognized by the U. S. Internal Revenue Service (**IRS**). If IRS requirements are met, the landowner may qualify for certain tax incentives. The requirements for a conservation easement approved by the IRS are as follows:

- The easement must have a valid conservation purpose; that is, the easement holder must be satisfied that protection of the land or resources is justified for conservation reasons. Different land trusts and government entities have different requirements that must be satisfied. Generally, the IRS requires purposes such as the following:
 - Outdoor recreation by, or the education of, the general public
 - Protection of a relatively natural habitat of fish, wildlife, or plants
 - Preservation of open space
 - Preservation of historically important land area or buildings
- The agreement must be completely voluntary: no one can force a landowner to enter into a conservation easement agreement. A conservation easement may be either donated or sold by a landowner to an easement holder.
- The agreement must be legally binding. It is recorded as a Deed of Conservation Easement. The agreement is binding on both present and future owners of the property. Both the landowner and the qualified easement holder must be in a position to enforce the terms of the agreement. This requirement recognizes the easement holder's responsibility for periodic inspection of the property with the landowner.
- The agreement must be permanent and irrevocable. A conservation easement must be permanent in order to qualify for the income and estate tax benefits provided by the IRS. If a conservation easement is valid for a set period of time only, for instance, ten years, the landowner may be eligible for certain property tax benefits but is not eligible for federal and state income and estate tax benefits.
- The easement must be held by a qualified easement holder, i.e., a government entity or a land trust. While any government entity can hold an easement, those most likely to hold conservation easements include city and county governments and certain federal agencies, such as the U. S. Forest Service and the U. S. Fish and Wildlife Service. A land trust is a private, nonprofit corporation.
- The easement must restrict development of the land. Ownership of land includes a number of legally recognized rights, including the rights to subdivide, sell, farm, cut timber, and build. The goal of devising a conservation easement is the landowner's voluntary agreement to give up one or more of these rights in order to protect certain natural resources. Prohibitions could include such matters as limitations on roads, structures, drilling, or excavating. The landowner could retain certain rights as long as those rights did not interfere with the conservation goals of the easement. For example, the landowner could retain the right to use the land, to restrict public access, and even to construct additional structures on certain sites.

When a landowner donates a permanent conservation easement to a land trust, the landowner may deduct the value of the easement from federal and state income taxes. The value of an easement is the difference between the [FAIR MARKET VALUE](#) of the land without the restriction and the fair [MARKET VALUE](#) after the

restriction. If the value of the parcel exceeds \$5000.00, the value of the conservation easement must be computed by a certified [APPRAISER](#). The landowner can deduct up to 30 percent of the [ADJUSTED GROSS INCOME](#) over a period of six years until the value of the easement is exhausted, if the property has been held for investment purposes for more than twelve months.

The organization that holds the easement has the right to enter and inspect the property and is legally obligated to assure that the property is in compliance with the terms of the easement.

Preservation Easements

Similar to conservation easements, preservation easements protect against undesirable development or indirect deterioration. Preservation easements may provide the most effective legal tool for the protection of privately owned historic properties. Such easements are usually expressly created and incorporated into formal preservation easement deeds. Preservation easements can prohibit such actions as alteration of the structure's significant features, changes in the usage of the building and land, or subdivision and topographic changes to the property. The property continues on the tax rolls at its current use designation rather than its value if developed, thereby giving the property owner a certain tax benefits.

The same standards are used as in conservation easements to determine the qualified tax [DEDUCTION](#). The [DONOR](#) is entitled to a charitable contribution deduction in the amount of the fair market value of the donated interest. However, an easement to preserve a historic structure must protect a structure or area listed in the National Register or located in a National Register district and certified by the Secretary of the Interior as being of historic significance to the district. The donation of an easement over an historically important land area includes land that is either independently significant and meets National Register criteria for evaluation or is adjacent to a property listed individually in the National Register of Historic Places in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.

The definition of a historically important land area includes structures or land area within a registered historic district, except buildings that cannot reasonably be considered as contributing to the significance of the district. To qualify as a preservation easement the donation must be protected in perpetuity. Because of this point, rights of mortgagors must be carefully set out in the easement to avoid loss of the easement in the event of [FORECLOSURE](#).

Uses of Easements

Once an easement is created, the owner of the easement has the right and the duty to maintain the easement for its purpose unless otherwise agreed between the owner of the easement and the owner of the underlying property. The owner of the easement can make repairs and improvements to the easement, provided that those repairs or improvements do not interfere in the use and enjoyment of the easement by the owner of the property through which the easement exists.

Transfer of Easements

Easement Appurtenant

When the title is transferred, the easement typically remains with the property. This case is known as an easement appurtenant. This type of easement "runs with the land"; which means that if the property

Encyclopedia of Everyday Law: Easements

is bought or sold, it is bought or sold with the easement in place. The easement essentially becomes part of the legal description.

If a parcel of property with an easement across it is sub-divided into smaller lots and sold to different people, and the geography is such that each of the smaller lots can benefit from the easement, then each will usually be permitted to use the easement.

Easement in Gross

Traditionally, easements in gross were easements that could not be transferred and were not tied to a particular piece of land. A person could grant an easement across a residence to a neighbor, but this type of easement would not continue with the new neighbor if the neighbor holding the easement sold the property. Today, courts typically refer to these types of easements as "personal" easements. Nevertheless, an easement that began as personal may be transferable, particularly if it is a commercial easement, such as a utility easement.

Termination of Easements

Unlike other types of interests in land, easements may be terminated by [ABANDONMENT](#) under certain circumstances. Simply stating a desire to abandon the easement is not enough. Words alone are legally insufficient to constitute abandonment. However, if the easement holder intends to abandon an easement and also takes actions which manifest that intent, that is sufficient to show abandonment of the easement, and it can be terminated. One action that qualifies as manifesting intent is non-use of the easement for an extended period of time, despite the holder of the easement's having had an extended period of access to the easement.

Additional Resources

Holding Our Ground: Protecting America's Farms and Farmland. T. Daniels and D. Bowers, Island Press, 1997.

Pennsylvania Land Trust Handbook. Thomas A. Coughlin, Chesapeake Bay Foundation, 1991.

Preserving Family Lands: Essential Tax Strategies for the Landowner. S. J. Small, Landowner Planning Center, 1992.

Property. Jesse Dukeminier and James E. Krier, [no publisher given], 1998.

Saving the Forests for the Trees and Other Values. Laurie A. Wayburn, The Newsletter of Land Conservation Law. Vol. 4, No. 5, 1994.

The Conservation Easement Handbook. J. Diehl and T. Barnett, eds., Land Trust Alliance and Trust For Public Land, 1988.

Organizations

American Farmland Trust
1920 N Street NW, Suite 400

Encyclopedia of Everyday Law: Easements

Washington, DC 20036 USA
Phone: (202) 659-5170

Land Trust Alliance

1319 F St. NW, Suite 501
Washington, DC 20004 USA
Phone: (202) 638-4725

Trust for Public Land

116 New Montgomery St., 4th Floor
San Francisco, CA 94105 USA
Phone: (415) 495-4014

Copyright Notice

©2009 eNotes.com, Inc.

ALL RIGHTS RESERVED.

No part of this work covered by the copyright hereon may be reproduced or used in any form or by any means graphic, electronic, or mechanical, including photocopying, recording, taping, Web distribution or information storage retrieval systems without the written permission of the publisher.

For complete copyright information, please see the online version of this work:
<http://www.enotes.com/everyday-law-encyclopedia>