EASEMENTS IN TEXAS
TABLE OF CONTENTS

I. NATURE OF RIGHT .................................................................................................................. 1
   A. Definition...................................................................................................................................... 1
   B. Incorporeal Right;....................................................................................................................... 1
   C. Imposed on Real Property:......................................................................................................... 1
   D. No Right to Profits:.................................................................................................................... 1
   E. Benefits Real Property.............................................................................................................. 1
   F. Appurtenant or In Gross:.......................................................................................................... 1
   G. Dominant and Servient Estates:............................................................................................... 2
   H. Recordation................................................................................................................................. 2
   I. Licenses......................................................................................................................................... 2
   J. Alienation:..................................................................................................................................... 3
   K. Easement or Fee - Distinctions:............................................................................................... 3
   L. Maintenance:............................................................................................................................... 4
   M. Natural Servitude;...................................................................................................................... 4
   N. Negative Easement:................................................................................................................... 5

II. CREATION OF EASEMENTS................................................................................................. 5
   A. In General - Express Grant:........................................................................................................ 5
   B. Implication:................................................................................................................................... 6
   C. Way of Necessity:..................................................................................................................... 8
   D. Prescription or Limitations:....................................................................................................... 9
   E. Ancient Lights............................................................................................................................. 9
   F. Streets and Roads - Dedication and Prescription................................................................. 9
   G. Estoppel....................................................................................................................................... 9
   H. Novelty Easements:.................................................................................................................. 10
   I. Implied Dedication:.................................................................................................................. 11
   J. Custom:....................................................................................................................................... 13
   K. Public Lands:............................................................................................................................. 14
   L. Conservation Easements:.......................................................................................................... 14

III. NATURE AND EXTENT OF EASEMENTS - PURPOSES....................................................... 14
   A. Use of Easement.......................................................................................................................... 14
   B. No Additional Burden:.............................................................................................................. 14
   C. Expandable Easements - Multiple Line Grants:..................................................................... 15
   D. Location....................................................................................................................................... 15
   E. Width.......................................................................................................................................... 15
   F. Road and Alley Easements - Private or Public:................................................................... 15
   G. Purprestitures:............................................................................................................................ 16
   H. Fences.......................................................................................................................................... 16
   I. Exception in Title Policy............................................................................................................ 16
   J. Burdens on Easements............................................................................................................. 16

IV. TERMINATION OF EASEMENTS......................................................................................... 16
   A. By Operation of Law:................................................................................................................ 16
   B. Merger:....................................................................................................................................... 16
   C. Limitations:............................................................................................................................... 16
   D. Abandonment:........................................................................................................................... 17
   E. Expiration:.................................................................................................................................. 17
   F. Strips and Gores:...................................................................................................................... 17
   G. Easement - Abandonment - Title:........................................................................................... 18
   H. Roads and Streets - State Highway - Abandonment:........................................................... 18
   I. Roads and Streets - County - Abandonment:......................................................................... 18
   J. Vacation of Streets - Municipal Authorities:......................................................................... 18
Easements

K. Petition of Abutting Owners: 18
L. Parks and Squares: ........................................................................................................ 18
M. Replat - Rededication - Effect on Streets: .......................................................................... 18
N. Common-Law and Statutory Dedication: ............................................................................. 19
O. Tax Deeds: .......................................................................................................................... 19
P. Overburdening and Unreasonable Use: .............................................................................. 19
Q. Mortgages: .......................................................................................................................... 20
R. Municipal Vacation: ............................................................................................................ 20

V. DISCLOSURE OF EASEMENTS ..................................................................................... 20
A. Transportation Pipelines: .................................................................................................. 20
B. Notice of Construction Over Pipeline Easement: ............................................................ 20
EASEMENTS

I. NATURE OF RIGHT

A. Definition

An easement is the right in favor of one person to use the land of another person. Easements are of two types: "affirmative" and "negative" easements. Some characteristics of an affirmative easement are: it is an interest in land, covered by the statute of frauds; it is a right that attaches to the estate itself; it gives the owner thereof (dominant estate owner) the right to use the servient estate for some purpose.1

The Restatement defines an easement as follows:

"An easement is an interest in land in the possession of another which:

a. entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
b. entitles him to protection as against third persons from interference in such use or enjoyment;
c. is not subject to the will of the possessor of tile land;
d. is not a normal incident of the possession of any land possessed by the owner of the interest; and
e. is capable of creation by conveyance."2

B. Incorporeal Right:

An easement is termed an incorporeal hereditament or right3, as it does not have physical existence.

C. Imposed on Real Property:

An easement is imposed on corporeal or real property and not on the owner.4

D. No Right to Profits:

An easement carries with it no right to the profits from the land.5 A profit à prendre is a right of one person in the soil of another, accompanied with participation in the profits. A profit consists in the right to take soil, gravel, minerals, and the like from another's land.6 Examples of profits may include rights to remove items such as game, timber, or gravel. A profit holder, unlike the owner of an easement, has the right to remove a portion of the burdened property. Examples of profits include right of "turfary" (right to dig turf), right of "estovers" (right to cut timber or underbrush for fuel or bedding of animals, or to promote good husbandry7), right of "piscary" (right to take fish from another's land), right of pasture, right to take sand, right to cut ice from a pond, right to take seaweed, and right to gravel.

E. Benefits Real Property:

An appurtenant easement is imposed for the benefit of corporeal or real property.8

F. Appurtenant or In Gross:

An easement is a right attached to a greater right in land. The easement appurtenant does not exist apart from the land to which it is attached.9 Whether an easement is appurtenant or in gross is determined by an interpretation of the grant or reservation, aided, if necessary by the situation of the property and the surrounding circumstances. An easement appurtenant is conveyed with the land, regardless of whether it is described in the conveyance.10 An easement is never presumed to be in gross if it can fairly be construed to be appurtenant.11

An easement in gross is a mere personal right or interest to use of the land of another.12

An easement appurtenant passes with title to the dominant estate which it benefits; a separate conveyance is not necessary since the appurtenant easement cannot be separately conveyed.13 An easement is never presumed to be an easement in gross if it can be fairly construed to be an appurtenant easement.14

Easements in gross are personal easements not benefiting specific tract of land and are generally not assignable, but the parties may create an assignable

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1 Miller v. Babb, 263 S.W. 253 (Tax. Comm'n App. 1924, judgm't adopted)
2 Restatement of the Law of Property. Section 450 (1944)
4 Miller v. Babb, 263 S.W. 253 (Tax. Comm'n App. 1924, judgm't adopted)
5 F. J. Harrison & Co. v. Boring & Kennard, 44 Tex. 255 (1875); Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 270 S.W. 1014(1925)
6 Evans v. Roppe, 128 Tax. 75, 96 S.W.2d 973 (1936)
7 Hood v. Foster, 13 So.2d 652 (Miss.)
10 Walschshauer v. Hyde, 890 S.W. 2d 171 (Tex. App. - Ft Worth 1994, writ denied)
11 McDaniely v. Calvert, 875 S.W.2d 482 (Tex. App.-Ft. Worth 1994, no writ)
12 Alley v. Carleton, 29 Tex. 74 (1867)
13 McWhorter v. City of Jacksonville, 694 S.W.2d 182 (Tex. App.-Tyler 1985, no writ)
Easements

easement by an express provision to such effect. An easement in gross such as a pipeline easement allowing multiple lines may be partially assignable or divisible. An example of a statutorily created and recognized easement in gross is the "conservation" easement to restrict land to open space use or to preserve certain historical, cultural, architectural or archeological aspects of real estate.

G. Dominant and Servient Estates:

Easements appurtenant involve a dominant tenement or estate, to which the right belongs and a servient tenement or estate, upon which the obligation rests. The same parties do not have title to the dominant and servient estates, but there must be unity of title as to the easement and the dominant estate. The owner of the dominant estate must be the owner of the right to use the servient estate. In the case of an easement in gross, there is no dominant estate. An easement may be affirmative, one which restricts the owner of the servient tenement or estate, or some act upon the servient tenement, or it may be negative, one which restricts the owner of the servient tenement from interfering with the rights of the dominant estate owner.

H. Recordation:

Since an easement is an interest in land, an incorporeal hereditament; it is authorized to be recorded and, when recorded, gives constructive notice. An innocent purchaser of a servient estate may take title free of an unrecorded easement of which he or she has no actual notice or of an implied easement (other than a way of necessity) or of as easement by estoppel if he or she has no actual notice of same, and same is not revealed by the records or by an adequate inspection. No easement by estoppel may be imposed against a subsequent purchaser for value, who has not notice, actual or constructive, of the easement claimed.

It has been indicated in dictum that a bona fide purchaser can extinguish an implied easement of necessity if it is not open and visible use and if the bona fide purchaser does not know of the claim of easement. A bona fide purchaser cannot extinguish any prescriptive easement since there is no provision for recordation of this right.

I. Licenses:

A license is generally a personal, revocable and nonassignable privilege to do acts on the land of another without possessing an estate or interest in the land. It may be conferred in writing or by parol. An admission ticket (i.e., to a racetrack) is a revocable license because it conveys no right in property. A license, coupled with an interest, is not revocable at the will of the licensor; for example, if one sells someone farm equipment they may entitle onto the property to pick it up. A license is not subject to the Statute of Frauds. A license remains irrevocable only so long as necessary by its nature. An agreement to lease space, but not designating particular space, is a license, not a lease, and is revocable and not binding on a later owner.


16 Orange County v. Citgo Pipeline Co., 934 S.W.2d 472 (Tex. App.-Beaumont 1996, writ denied) (such easement is partially assignable if the assignment does not overburden the easement, such as where it allows multiple lines for additional consideration)

17 Tex. Nat. Res. Code sec. 183.001


19 Forister v. Coleman, 418 S.W.2d 550 (Tex. Civ. App.-Austin 1967), writ ref'd n.r.e., 431 S.W.2d 2 (1968) (court of appeals held an easement appurtenant by estoppel for a park and according to the 1955 deed language, "waterfront privileges," an unrestricted right to use all of the property for ingress and egress to creek.) Coleman v. Forister, 497 S.W.2d 530 (Tex. Civ. App.-Austin 1973) rev'd on other grounds, 514 S.W.2d 899 (1974), aff'd on remand, 538 S.W. 2d 14 (Tex. Civ. App.-Austin 1976) (Supreme Court stated that an easement appurtenant by estoppel was created however the 1955 deed provided only a reasonable use of the servient tract for access and thus owners do not have an unrestricted right to use of all the property)

20 Forister v. Coleman, 418 S.W.2d 550 (Tex. Civ. App.-Austin 1967), writ ref'd n.r.e., 431 S.W.2d 2 (1968)

21 Miller v. Babb, 263 S.W. 253 (Commn'. App. 1924, judgm't. adopted); Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1962)

22 V.T.C.A. Property Code § 12.001

23 V.T.C.A. Property Code § 13.001


25 Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868 (Tex. App.-Austin 1988, writ denied)

26 Hoyak v. Ferguson, 225 S.W.2d 258 (Tex. Civ. App.-Fort Worth 1953, writ ref'd n.r.e.)


Easements

authorization to do acts on property of another, but is not an estate or interest in land. A license is generally a personal, revocable and nonassignable privilege created in parol or in writing. In some cases, licenses will not be revocable at will if expenditures have been made in reliance on the license.\(^{25}\)

J. Alienation:

Alienation of property is favored in Texas. The law recognizes creation of alienable easements in gross by contract. The common-law rule was that an easement in gross was not transferable.\(^{30}\) However, transferability is now clearly recognized where the interest is created in favor of a person and the heirs, successors or assigns of the person.\(^{31}\) The courts look with disapproval upon the sale of only part of a right-of-way easement.\(^{32}\)

K. Easement or Fee - Distinctions:

One should never accept the caption or designation of an instrument in the chain of title as final authority as to whether it conveys an easement or the fee simple title to a tract of land.

A deed purporting to "dedicate" rather than "grant" or "convey" may be considered as a conveyance of "fee simple."\(^{33}\) The rules of construction for determining whether a fee title is conveyed, or merely an easement, have long been clearly enunciated by the Texas Supreme Court. The Court, in Reiter v. Coastal States Gas Producing Co., 382 S.W.2d 243 (Tex. 1964) reiterated the rules as follows (quoting from earlier Texas Supreme Court authority):

'Generally stated, the rules announced by these decisions are: First, that, as in the Right of Way Oil Company case, a deed which by the terms of the granting clause grants, sells and conveys to the grantee a 'right of way' in or over a tract of land conveys only an easement; and second, that, as in the Calcasieu Lumber Company case and in the Brightwell case, a deed which in the granting clause grants, sells and conveys a tract or strip of land conveys the title in fee, even though in a subsequent clause or paragraph of the deed the land conveyed is referred to as a right of way.' (Emphasis added)

If the instrument conveys the land itself, as distinguished from the right-of-way over the land, it passes fee simple title, even though subsequent recitals in the instrument attempt to limit the use of the land for easement purposes.\(^{34}\) It is necessary to examine the granting clause to ascertain the nature of the conveyance. For example, a deed that conveys "a right-of-way in and over the following described property and premises" conveys only an easement.\(^{35}\)

A deed under which an irrigation district acquired its canals reading "also the canals, laterals, and flumes, and rights of way therefor, now existing and on the following lands, and also further rights of way that may be acquired, etc." conveyed an easement only as distinguished from fee title.\(^{36}\)

A deed with a granting clause conveying a "right-of-way" and describing three tracts with the second and third tract referring to "the following" described land, transfers an easement only over the three tracts and not the fee to the latter two tracts.\(^{37}\) A deed that conveys "the following described tract of land," and which is later referred to as a right-of-way conveys a fee title.\(^{38}\)

A conveyance of a "land forty feet wide" conveys the fee simple, not simply an easement.\(^{39}\) Where a railroad conveyed land by metes and bounds and reserves "the 100-foot right-of-way," the fee title was reserved. The court distinguished the previous authorities on the ground that the strip in question was owned in fee by the railroad at the time of the deed and the reservation of the right-of-way must be taken to refer to the land itself.\(^{40}\)


31 Alley v. Carleton, 29 Tex. 74 (1867)


33 Fort Worth & Railway Co. v. Jennings, 76 Tex. 373, 13 S.W. 270 (1890); Southwestern Bell Telephone Co. v. Texas & N.O.R. Co., 125 F.2d 699 (1942)

34 Texas Electric Railway Co. v. Neale, 151 Tex. 526, 252 S.W.2d 451 (1952)

35 Right of Way Oil Co. v. Gladys City Oil, Gas & Manufacturing Co., 106 Tex. 94, 157 S.W. 737 (1913)

36 Reiter v. Coastal States Gas Producing Co., 382 S.W.2d 243 (Tex. 1964)


38 Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S.W. 453 (1890)


However an instrument, which conveys land definitely described and then excepts from the conveyance a road right-of-way leaving the remaining acreage conveyed, passes the fee to the property which is subject to the easements. A deed conveying "a strip of 200 feet in width of land" over the tract referred to in the deed was held to convey a fee title. Later recitations in the deed characterized the strip as a right of way. A deed, which in the granting clause conveyed a "tract of land," referred to in the description clause as a right-of-way, conveyed fee simple title. Emphasis was laced on reference in the habendum and warranty clauses to the "Land," as well as to the rule that the granting clause controls over subsequent recitations.

L. Maintenance:
The easement holder must maintain the easement and the owner of the servient estate must not interfere with the dominant estate.

M. Natural Servitude:
While easements are created interests, natural servitude's or rights are inherently part of ownership. "Lateral Support" is the right to have soil in its natural state be supported by the land adjoining it. "Subsidence" is the falling, lowering, or downward shifting of soil.

Owners of property in its natural state (not burdened with structures) are entitled to lateral support from the adjacent owner's land. Liability may be imposed for interference with this right of lateral support regardless of any negligence on the part of the interfering owner. The right is one of property and attaches to and passes with the soil.

It is an absolute right and is not subordinate to other rights of the adjoining owner. An easement can be entitled to lateral support.

A landowner also has an absolute right to excavate on his or her property, but he or she must prevent the natural and unencumbered soil from sinking or falling away from his or her neighbor's land. Therefore, one who is contemplating making excavations near another's boundary has the duty to make some reasonable investigation as to the character of the soil to be excavated and the failure to make such investigation amounts to actionable negligence.

The absolute right of lateral support of adjoining land without regard to the question of due care of negligence is limited to the soil itself and does not apply to buildings.

No absolute right of lateral support for land exists where the natural condition has been altered through human's activities so as to create a need for lateral support where none previously existed in nature. To recover for injuries to a building or structure resulting from excavations on adjoining land, it is necessary to show negligence or other culpable conduct of the excavator. An adjoining landowner who knows or should have known of the potential loss of lateral support before he or she purchased the property has no cause of action.

A mineral owner generally has the right to damage the surface in pursuit of minerals provided no other means exist to extract those minerals. "When dealing with the rights of a mineral owner who has a fee title by a grant or reservation of an unnamed substance such as [uranium], liability of the mineral owner must include compensation for the surface owner for surface destruction." The general rules may be altered by a lease which specifies rights between a landowner and a mineral owner. In the absence of negligence, willful waste or intent to cause malicious injury, a landowner has the absolute right to withdraw all the water it can

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41 Haines v. McLean, 154 Tex. 272, 276 S.W.2d 777 (1955)
42 Brightwell v. International-Great Northern Railroad Co., 121 Tex. 338, 49 S.W.2d 437 (1932)
43 Hidalgo County v. Fate, 443 S.W.2d 80 (Tex. Civ. App. - Corpus Christi 1969, wrt ref'd n.r.e.)
44 Reginal v. Ayco Development Corp., 788 S.W.2d 772 (Tex. Civ. App.- Austin 1990, wrt denied)
45 Carpenter v. Ellis, 489 S.W.2d 388 (Tex. Civ. App.- Beaumont 1972, wrt ref'd n.r.e.)
46 Kenny v Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App.- Waco 1962, wrt ref'd.)
47 Williams v. Thompson, 152 Tex. 270, 256 S.W.2d 399 (1953); Whitehead v. Zeiller, 265 S.W.2d 689 (Tex. Civ.App.- Ft. Worth 1943, no wrt)
50 S. H. Kress and Co. v. Reaves, 85 F.2d 915 (5th Cir. 1937), cert. denied, 299 U.S. 616 (1937)
51 City of Amarillo v. Gray, 304 S.W.2d 742 (Tex. Civ. App.-Amarillo, 1957), rev'd on other grounds, 310 S.W.2d 737 (1957)
52 Carpenter v. Ellis, 489 S.W.2d 388 (Tex. Civ. App.- Beaumont 1972, wrt ref'd n.r.e.)
54 Williams v. Thompson, 152 Tex. 270, 256 S.W.2d 399 (1953)
56 Moser v. U. S. Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984)
57 Loan Star Steel Co. v. Reeder, 407 S.W.2d 28 (Tex. Civ. App.-Texarkana 1966, wrt ref'd n.r.e.)
produce from its land even though it causes the neighbor's land to subside. A landowner who negligently, wastefully, or maliciously withdraws underground water and causes subsidence is, however, not protected. 58

The general measure of damages in the case of permanent injury to land through loss of lateral support is the diminution of value of the land, unless the injury can be repaired at lower cost, in which case the measure of damages is the cost of repair. 59

Before a landowner may recover for loss of lateral support, it must show that it has been injured. 60

No person may divert or impound the natural flow of surface water so that another landowner is damaged by the overflow of water. 61 This right of water flow is a type of natural easement. 62

Citizens have a public right of freedom of transmit through the navigable airspace of the United States. 63 Applicable regulations establish standards for determining allowable obstructions to navigable airspace. For example, notice is required of construction or alteration of improvements more than 200 feet above the ground. 64

The United States has a navigational servitude in all navigable streams. 65

N. Negative Easement:

An affirmative easement grants to the owner of the dominant tenement the right to use the servient tenement or to do some act thereon. A negative easement (sometimes referred to as the doctrine of implied reciprocal negative easements) restricts the rights of the owner of the servient tenement in favor of the dominant tenement. 66 A restriction agreement between adjoining owners regarding use of their land is regarded as a negative easement. 67 Where the owner of a tract subdivides it and sells different parcels to different grantees, imposing restrictions upon the use in each deed pursuant to a general scheme or plan of development, such restrictions may be enforced against any grantee on the theory that there is a mutuality of covenants and consideration and on the theory that mutual negative equitable easements have been created. 68 However, the doctrine of implied reciprocal negative easements does not apply to a situation where there are differently and separately platted sections of a subdivision. 69

II. CREATION OF EASEMENTS

A. In General - Express Grant:

An easement by express grant is an interest in land which is subject to the Statute of Frauds. 70 It must follow the normal formalities of real estate instruments: it must be written, it must be properly subscribed by the party to be charged, it must manifest the grantor's intent, and, insofar as the property description is concerned, it must furnish within itself or by reference to other identified writings then in existence, the means or data by which the particular land to be conveyed may be identified with certainty. 71

Because an easement is an interest in land, the instrument creating the easement must be in writing, except where the easement arises by implication, estoppel, or prescription. The writings must meet the rules applicable to the conveyance of fee simple title. 72 A transfer of land that states that it "dedicates" the land does not, as a matter of law, convey the fee simple. 73 Because the description of an easement in a deed was held deficient in every respect, the Texas Supreme Court found it unnecessary to reach the issue of whether the words "we guarantee" in the deed were sufficient words of grant to convey an easement. However, the appellate court stated: "The term 'guarantee' is not a word of grant in the traditional sense of conveyance of interests in property." The grant must furnish, within itself or by reference to other identified writings then in existence, means or data by which servient estate may be identified with certainty. 74

In Preston Del Norte Villas Association v. Copper Mill Apartments Ltd., 579 S.W.2d 267 (Tex. Civ. App.-Dallas 1978, writ refd n.r.e.), the Declaration of the condominium project reserved an easement across its

58 Friendswood Dev. Co. v. Smith-Southwest Ind., Inc., 576 S.W.2d 21 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955); Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904)

59 B. A. Mortgage Co., Inc. v. McCullough, 590 S.W.2d 955 (Tex. Civ. App.-Fort Worth 1979, no writ)

60 Wingfield v. Bryant, 614 S.W.2d 643 (Tex. Civ. App.-Austin 1981, writ refd n.r.e.)

61 Tex. Water Code sec. 11.086

62 Miller v. Letzeich, 121 Tex. 248, 49 S.W.2d 404 (1932)

63 49 U.S.C. sec. 40103

64 14 C.F.R. sec. 77.13

65 U.S. Const. Art I, sec. 8, cl. 3


69 Evans v. Pollock, 796 S.W.2d 465 (Tex. 1990); Crump v. Ferryman, 193 S.W.2d 233, (Tex. Civ. App.-Dallas)

70 Anderson v. Tall Timbers Corp., 378 S.W.2d 16, 24 (Tex. 1964)

71 Pick v. Bartel, 659 S.W.2d 636 (Tex. 1983)


73 Russell v. City of Bryan, 797 S.W.2d 112 (Tex. App.-Houston [14th Dist.] 1990, writ denied)

development "regardless of whether [the undeveloped lands] become a part of the condominium project...or some other condominium project." When the land was used for an apartment project instead of a condominium project, the condominium association was unable to restrict access of the easement to the lessees of the apartment owner because the express reservation was read broadly to permit the successors-in-interest of the grantor to use the easement. This broad interpretation was based on the unreasonableness of supposing that the developer of the condo association intended to leave the land without access if the land were developed in another manner.

The creation of an easement contemplates a future use consistent with the grant, enabling the easement owner to carry out the object for which the easement was granted. This is true even under conditions different from those existing at the time of the conveyance. An easement may be granted or reserved in a deed of trust. All cotenants must join in creation of an easement; otherwise, the easement may not bind a successor who acquires full title. The grantor in a deed of the dominant estate reserves an easement unto himself or herself to access a contiguous parcel. For example, the owner of a tract of land may be willing to sell his frontage, but he or she will reserve and retain an easement across the parcel conveyed to access remaining property. A reservation in favor of a stranger to a conveyance is inoperative and cannot function as a conveyance to the stranger. A reservation cannot be made by the owner of both the dominant and servient tenement. An easement is expressly limited by the granting clause that creates the easement. For example, an electric utility operating companies could not use easements granted for "transmission of electricity" to install fiber optic cables to transmit third party communications.

B. Implication:
An easement may be vested in a grantee by implied grant or created in favor of a grantor by implied reservation. Generally, where one person owns an entire tract of land, there is no necessity for creation of an easement on one part of the land for the benefit of another part of the land during its ownership. However, there may be in existence roads or ways by which the land is traversed or other uses of the land in the nature of easements. Where an owner sells land with full covenants of warranty and the deed contains no express reservation, there will be no reservation by implication unless the use is necessary.

There must be no other reasonable means of enjoying the dominant tenement without the easement. However, when one conveys several parcels of land, there may be an implied grant or reservation of all apparent and continuous easements created or used by the vendor. There may be uses in the nature of easements imposed by an owner on parts of a tract for the benefit of other parts. Upon severance of title, the easement may imply arise by grant or reservation. To be recognized the use must be apparent at the time of the transfer, it must be continuous; it must be necessary for the dominant estate; and there must be unity of title of the dominant and servient estates at the time of the transfer.

If the use does not exist until after the transfer, an implied easement will not be recognized.

The elements of an implied easement appurtenant are: (1) original unity of ownership of the dominant and servient estate, (2) apparent use at the time of the grant, (3) utility of easement, (4) necessity of easement, (5) seeming easement, and (6) use at the time of transfer.

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75 Preston Del Norte Villas Assoc. v. Copper Mill Apts. Ltd., 579 S.W.2d 267, 269 (Tex. Civ. App.-Dallas 1978, writ ref'd n.r.e.)
76 Preston Del Norte Villas Assoc. v. Copper Mill Apts. Ltd., 579 S.W.2d 267, 269 (Tex. Civ. App.-Dallas 1978, writ ref'd n.r.e.)
77 Johnson v. Southwestern Public Service Co., 688 S.W.2d 653 (Tex. App.-Amarillo 1985, no writ)
78 see McWhorter v. City of Jacksonville, 694 S.W.2d 182 (Tex. App.-Tyler 1985, no writ)
79 MGJ Corp. v. City of Houston, 544 S.W.2d 171 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.)(The easement was granted to the named grantee and to "other purchasers and their tenants of property located within said community center")
80 Preston Del Norte Villas Assoc. v. Pepper Mill Apts., 579 S.W.2d 267 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e) (The condominium declarant provided for a reservation of an easement to the benefit of its adjoining property but its later conveyance of condominiums subject to the provisions of the declaration operated to reserve the easement)
Easements

(3) continuous use of the easement until the time of the grant (with conspicuousness indicating permanence), and (4) reasonable necessity or strict necessity of the easement for the fair and enjoyable use of the dominant estate. In order to be continuous, no act of human must be necessary to complete the easement (such as pumping of water at a well and conveying water by hand). In order for the use to be apparent, same does not have to be visible. It may be considered apparent as long as there are signs by a careful inspection to the person ordinarily conversant with subject. Such use would exist where sewer lines served the vendee's adjoining lot and there was no sewer in the street adjacent to the grantee at the time.

If the grantor held a fee interest in the dominant estate but only a life estate in the servient estate, she never had sufficient unity of title in order to create an implied easement that survived her life estate. In connection with a deed in lieu of foreclosure (and perhaps a trustee's deed), the test of whether the implied easement exists depends upon the circumstances at the time the title is conveyed, not the time the lien was created. An implied easement may be created by a partition between adjoining owners, provided the use is existent at the time of the partition.

An implied easement may be created by reservation even though the grantor's deed warrants that the servient estate is free of encumbrances. It appears that for the implied easement to be apparent, same does not have to be visible. It may be considered apparent as long as there are signs by a careful inspection to the person ordinarily conversant with subject. Such use would exist where sewer lines served the vendee's adjoining lot and there was no sewer in the street adjacent to the grantee at the time.


Howell v. Estes, 71 Tex. 690, 12 S.W. 62 91888 (easement of necessity was continuous where applicable to access by stairway to adjoining building)

Westbrook v. Wright, 477 S.W.2d 663 (Tex. Civ. App.-Houston [14th Dist.] 1972, no writ)


Neilon v. Texas Trust & Security Co., 147 S.W.2d 321 (Tex. Civ. App.-Austin 1940, writ dism'd judgm't cor.)

Zapata County v. Llanos, 239 S.W.2d 699 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.)

Mitchell v. Castellan, 151 Tex. 56, 246 S.W.2d 163 (1952)


Johnson v. Faulk, 470 S.W.2d 144 (Tex. Civ. App.-Tyler 1971, no writ)

Pokorny v. Yudin, 188 S.W.2d 185 (Tex. Civ. App.-El Paso 1945, no writ)

Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1962)

Mitchell v. Castellan, 151 Tex. 56, 246 S.W.2d 163 (1952)

Zapata County v. Llanos, 239 S.W.2d 699 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.)


Easements in party walls are sometimes explained on the theories of necessity or estoppel. A party wall is a wall that is located on or at the division line between adjoining parcels of land owned by different landowners and used or intended to be used by both owners in the construction or maintenance of improvements on their respective properties. In the absence of an agreement to the contrary, a party wall means a solid wall without windows. Either owner of a party wall has the right to raise the wall if it is strong enough and will not interfere with the other owner's rights.

A party wall also refers to a wall dividing two buildings, used equally as an exterior wall by the owners of each, without any exclusive use by either. It is not necessary that the wall stand equally on the adjoining parcels of land; it may rest wholly on one lot. A city council has the power to regulate and prescribe the manner of, and to order the building of parapet and party walls. The soil of each landowner, together with the wall belonging to each landowner, is subject to an easement in favor of the landowner for the continued support and maintenance of the party wall. When the

sewer pipes crossing grantor's land; the Supreme Court has refused to recognize implied easements for novelty, pleasure or recreation purposes such as studying nature, picnicking, hiking, riding horseback, and bird watching; (3) the Supreme Court refused to recognize a reservation of an implied easement where the watershed of a gas station of the grantor encroached onto the adjoining conveyed land since it could be easily altered; (4) under various circumstances, roads have been recognized as implied easements such as where crossing unfenced prairie lines or where furnishing substantially more direct access than the other access afforded the tract; (5) an implied easement was recognized for rear access to garages where the way was the only means of vehicular access to the garages and to the rear entrances.

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C. Way of Necessity:

This type of implied easement may extend to the grantee over the grantor's lands or to the grantor over the grantee's lands. If a grantor conveys a tract and retains lands surrounded partly by the land conveyed and the remainder by land of strangers, an implied reservation of the right-of-way by necessity over the land conveyed arises where and as long as there is no other means of ingress and egress. 112

A claimant must establish (1) unity of ownership of the dominant and servient estates before severance; (2) necessity of a roadway; and (3) necessity existed at time of severance. 113 The way of necessity to which the party is entitled is only a convenient way to give reasonable access. The easement will be recognized even though the party does not thereby secure direct access to a public right of way, but only to permissible access over a third party's land and thereby to a public right of way. 114 Although the easement must be necessary at the time of the conveyance and separation of ownership of adjoining tracts and will be recognized only so long as it continues to be necessary, the easement for access need not be in use at the time of such conveyance as must other easements by implication. 115 The way of necessity will be recognized only if the two parcels had been owned as a single tract and if lack of access existed at time of severance. 116 It appears that a way of necessity

A person buying a lot by reference to a plat or map showing an abutting easement acquires a private easement regardless of whether the way is opened or dedicated to the public or the plat is recorded. 107 The creation of private easements by sales by reference to unrecorded maps shown to the purchaser does not result in a public dedication of the streets. 108 The private easement acquired by a conveyance with reference to the map or plat survives a vacation or abandonment of the street. However, the party will not be entitled to damages by the street vacation if the closing only renders its use less convenient. 109

An implied easement appurtenant may be established by proof of a driveway as the only means of access to a tract used continuously for many years. The


105 Whittenburg v. J.C Penny Co., 139 Tex. 15, 161 S.W.2d 447 (1942)


108 Ward v. Rice, 239 S.W.2d 823 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.)

109 City of San Antonio v. Olivares, 505 S.W.2d 526 (Tex. 1974)

110 Bickley v. Bickler, 403 S.W.2d 354 (Tex. 1966)


113 Koonce v. Brite Estate, 663 S.W.451 (Tex. 1984)

114 Parshall v. Crabtree, 516 S.W.2d (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.)


116 Koonce v. J.E. Brite Estate, 663 S.W.2d 451 (Tex. 1984)
will not be granted where unity rests solely on ownership by the sovereign. 117

D. Prescription or Limitations:
The 10-year statute of limitations on land is the time required for prescriptive rights. 118 The elements of an easement by prescription are: (1) possession of the land, (2) use and enjoyment, (3) adverse or hostile claim, (4) dominion and appropriation for use, and (5) use for more than 10 years. 119 Hostile or adverse use will be lacking if the owner consented to the use, expressly or impliedly, or if the owner also used the way. 120 Prescriptive use may exist even though joint use exists if the claimant establishes that the owner was aware of its adverse claim. 121 The use must be without permission and exclusive. 122 The easement claimed must be defined. If the claim is made to a way over an open prairie with no well-defined lines, the prescriptive right will be denied, or if the use is made of unenclosed land solely for recreational and pleasure purposes and not for general travel, the easement will be denied. 123 However, an easement for flooding may be acquired by continuous use of a dam and consequent flooding. 124 Mere use alone is insufficient, such as when the claimed easement is also used by the owner of the land, since the use is not inconsistent with a license from the owner and is not adverse. 125 The right to an access easement by a prescription is not limited to the beaten path used, but will include sufficient land, where available, for drainage ditches, repairs, and convenience of the traveling public. 126

E. Ancient Lights:
The English rule of "ancient lights" is not recognized in Texas. 127 A landowner may erect a building, wall, fence, or other obstruction on the landowner's land as an incident of fee simple ownership in the absence of building restrictions, even though it obstructs an neighbor's light, air, and vision, or depreciates the value of a neighbor's property, or was constructed because of malice or ill will. 128

F. Streets and Roads - Dedication and Prescription:
Where one constructs a road on his or her land without the intention to dedicate it and merely permits others to use it while using it, no prescriptive right arises in favor of other parties using the road. The element of adverse claim is lacking since all use of the road is consistent with the owner's use of the road. 129

G. Estoppel:
In order to create an easement appurtenant by estoppel, three elements must occur: (1) a representation; (2) a belief in the representation; and (3) reliance on the representation. 130 In order to establish estoppel, expenditures by the owner of the dominant estate are not necessary to show reliance. 131 Estoppel by silence occurs when a person under a duty to another to speak leads the other to act in reliance or a mistaken understanding of the facts by refraining from speaking. 132

118 Ortiz v. Spann, 671 S.W.2d 909 (Tex. Civ. App.-Corpus Christi 1984, writ ref'd n.r.e.)
121 Scott v. Cannon, 959 S.W.2d 712 (Tex. App.-Austin 1998, rev. denied)
126 Allen v. Keeling, 613 S.W.2d 253 (Tex. 1981)
131 Payne v. Edmonson, 712 S.W.2d 793 (Tex. App.-Houston [14th Dist] 1986, writ ref'd n.r.e.)
132 Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868 (Tex. App.-Austin 1988, writ denied)
Generally, the doctrine of easement by estoppel or estoppel in pais holds that an owner of property may be estopped to deny the existence of an easement by making a representation that has been acted upon by a party to his or her detriment. The elements of an easement by estoppel are a representation communicated to the promisee, the communication is believed, and there is reliance upon the communication. Failure to speak constitutes a representation if there is a duty to speak and the failure leads another to believe in the existence of a state of facts and in reliance upon which a person acts to his prejudice. A verbal agreement for an easement together with payment of consideration and the making of permanent improvements will be sufficient to create a permanent easement by estoppel in pais. Estoppel in pais is not dependent upon dedication. It has been applied if the purchaser spends money on the servient tract and if the seller allows this expenditure. The courts are reluctant to recognize novelty easements as easements by estoppel since the easements for such enjoyment and use of the property are generally indefinite and difficult of enforcement (for example, due to issues of repair). However, although a novelty easement may not be recognized by estoppel, a more limited easement of access may be so recognized.

The representation may consist of exhibited maps or plats reflecting the streets and other easements. The purchaser buys believing the matters shown by the plat and in reliance thereon. The conveyance need not refer to the map or plat. The private easement created is not dependent upon public dedication of the easement and survives vacation or abandonment of the street or alley by the public authorities. Even though a street is abandoned, or the plat vacated, a subsequent reference to the plat may constitute a rededication of the easements shown. The representation may be words or conduct upon which the buyer relies.

### H. Novelty Easements:

If an owner owns a tract of land fronting on a creek and represents to purchasers of sites that there is a park area fronting on the creek and that site owners have the right to use such area for park, boat dock, and other recreation facilities, then the subdivision site is the dominant estate; the park area is the servient estate. Such rights are definite and enforceable and are the property subject of an easement appurtenant by estoppel. While easements by estoppel for recreation or park purposes (novelty easements) are received most unfavorable because of the difficulty of enforcement, upkeep, and location, such easements and consequent restriction on use may be recognized where there are representations in connection with a sale that the reserve or other land will be used for park or similar purposes, particularly if the land is platted as "park" or "common area" and is shown on the same recorded plat as the residential property. Easement by estoppel was not established by owners of a house backing up to a new golf course parking lot because the promotional material given to the owners approximately fifty years earlier showing a golf course did not promise the golf course in perpetuity on any area of the club's property. A permissive license given in writing and initially revocable at will by a trustee of the townhouse subdivision for residents to extend fences and patios beyond their lot boundary lines onto the common area did not become irrevocable because residents, in reliance, expended money and labor in extending the fence and patio areas, and resident was allowed to reassert its title and right of the association possession to the common areas and restore resident's fences and patios to their original location upon its payment for relocation to the lot lines.

Such easements are not the subject of recordation. An innocent purchaser for value without actual or constructive notice will not be bound by an easement by estoppel.

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133 Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868 (Tex. App.-Austin 1988, writ denied)

134 Carleton v. Dierks, 203 S.W.2d 552 (Tex. Civ. App.-Austin 1947, writ refd n.r.e.)

135 Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1962)


138 Hicks v. City of Houston, 524 S.W.2d 539 (Tex. Civ. App.-Houston [14th Dist.] 1975, writ refd n.r.e.)

139 Waterbury v. City of Katy, 541 S.W.2d 654 (Tex. Civ. App.-Eastland 1976, no writ)

140 Forister v. Coleman, 418 S.W.2d 550 (Tex. Civ. App.-Austin 1967, writ refd n.r.e., 431 S.W.2d 2 (1968))

141 See also, Coleman v. Forister, 514 S.W.2d at 899


143 McAshan v. River Oaks Country Club, 646 S.W.2d 516 (Tex. App.-Houston [14th Dist.] 1982, writ ref'd n.r.e.)

144 Ethan's Glen Community Association v. Kearney, 667 S.W.2d 287 (Tex. App.-Houston [14th Dist.] 1984, no writ)

145 Callan v. Walters, 190 S.W. 829 (Tex. Civ. App.-Austin 1916, no writ)
I. Implied Dedication:

A dedication does not constitute a conveyance of land and therefore, does not have to be in writing. The act of throwing open property to public use without any other formality is sufficient to establish the fact of a dedication to the public. The elements of implied dedication of a road are: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) the landowner was competent to dedicate the road; (3) the public relied on those acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication. Simply recording a map or plat showing streets or roadways does not, standing alone, constitute a dedication as a matter of law. A county may establish a public interest in a private road only in the event of purchase, condemnation, dedication, or adverse possession, and this interest must be recorded in the county commissioner's court. Texas Trans. Code secs. 281.001 through 281.004, which abolished the doctrine of common-law dedication as applied to private roads in counties with populations under 50,000 will not be applied retroactively.

To constitute a dedication by implication without a formal instrument evidencing same, there must be a clear and unequivocal act or declaration of the owner evidencing an intention to set aside the property for public use, and the public must act upon such manifestation of intention. The intention to dedicate must be shown by "something more" than an acquiescence or an omission on the part of the owner. The meaning of "something more" does not have to be an overt act or even an explicit declaration. For example, where a party paves a strip of land which would be a dedicated street if extended, and then erects a barricade after this completion, which prevents its use as a street, there is no dedication by implication. Intention to dedicate the easement for public use may be evidenced by conduct such as standing by for years and allowing the public to use the property. It is not necessary for implied dedication that the county designate the road as a public road or officially accept it as a public road. Public use is sufficient to constitute acceptance of the implied dedication.

Common law dedications involve express or implied offer and acceptance. Dedication must be shown by a declaration or act evidencing a clear intention to dedicate or set aside the land for public use. There must be some intent to devote the land to public use and must be clearly and unequivocally shown. The recording of a plat that showed a street and that contained no dedication language does not, by itself, constitute a dedication as a matter of law. However, to show an act of dedication, intent need not be shown by deed; it is sufficient if the intent is shown by some clear unequivocal act or declaration. Where the origin of use is shrouded in obscurity and there can be no proof adduced as to intent, the law presumes intent and acts as if it were present. One can infer intent to dedicate by long continued use and apparent acquiescence by the owner. Acceptance can be shown by others having acted in reliance on or reference to it; official recognition is not necessary.

There may not be a dedication of an easement to a limited number of people or a private dedication. No particular time is necessary for use in order to recognize such dedication. Maintenance of a fence across a road

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146 Mallett v. Houston Contracting Co., 388 S.W.2d 216 (Tex. Civ. App.-eumon 1965, writ ref'd n.r.e.); But see Tex. Transp. Code sec. 281.001 - 281.004 (County of 50,000 or less; oral dedication not sufficient prospectively)

147 Lindner v. Hill, 691 S.W.2d 590 (Tex. 1985); Las Vegas Pecan & Cattle Co. v. Zavala, City, 682 S.W.2d 254 (Tex. 1984)


150 Barstow v. State, 742 S.W.2d 495 (Tex. App.-Austin 1987, writ denied); Greenway Parks Home Owners Assoc v. City of Dallas, 159 Tex. 46, 313 S.W.2d 235 (1958)

151 City of Piano v. Reed, 392 S.W.2d 197 (Tex. Civ. App.-Tyler 1965, writ ref'd n.r.e.)


153 Medina Lake Protection Assoc v. Bexas-Medina-Atascosa Counties Water Control and Improvement Dist. No. 1, 656 S.W.2d 91 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.)

154 Wardy v. Rice, 239 S.W.2d 823 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.)

155 City of Brownsville v. West, 149 S.W.2d 1034 (Tex. Civ. App.-San Antonio 1941, writ dism'd judgm't cor.)


157 Dunn v. Deussen, 268 S.W.2d 266 (Tex. Civ. App.-Fort Worth 1954, writ ref'd n.r.e.)

158 Drey v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1962)

159 Villa Nova Resort, Inc. v. State, 11\ S.W.2d 120 (Tex. App.-Corpus Christi 1986, no writ)
is some evidence that owner had not dedicated the road to public use. \textsuperscript{166} An implied dedication is evidenced (1) an agreement with the county for a dedication of the road, (2) improvement and maintenance of the road by the county, (3) construction by the county of bridges, cattle guards, speed bumps, and traffic signs, and (4) a survey identifying the road as a county road. \textsuperscript{161}

Where a city street is dedicated but has never been actually opened, one purchasing property adjacent thereto acquires a private easement over the street. This right, however, is subject to the police power of the city and the exclusive right of the city to open the dedicated street. Within those limits, the adjacent owner has the right to use the area. \textsuperscript{162}

There can be no private dedication of an easement, or dedication to an isolated element of the public. \textsuperscript{163}

Section 2.002, Property Code, provides that an agreement between an owner, lessee, or occupant of land and a fire-fighting agency relating to connection of a dry fire hydrant to a source of water on the land or installation of the dry fire hydrant is not binding on a subsequent owner, lessee or occupant. A dry fire hydrant is a fire hydrant connected to a stock tank, pond, or similar source of water from which water is pumped in case of fire.

Sec. 23.006 of the Texas Property Code was added in 2001 to require the commissioners appointed to partition property, unless waived by the parties in an action to partition property, to grant a nonexclusive access easement on a tract of partitioned property for the purpose of providing reasonable ingress and egress from an adjoining partitioned tract that does not have a means of access through a public road or an existing easement appurtenant to the tract. \textsuperscript{161} The bill requires that the order granting the access easement contain a legal description of the easement.

Unless waived by the parties in writing in a private partition agreement, the property owner of a partitioned tract that has a means of access through a public road or an existing easement appurtenant to the tract is required to grant in the private partition agreement a nonexclusive access easement on the owner's partitioned tract for the purpose of providing reasonable ingress and egress from an adjoining partitioned tract that does not have a means of access through a public road or an existing easement appurtenant to the tract.

The bill prohibits the access easement from being greater than a width prescribed by a municipality or county for a right-of-way on a street or road. The bill provides that the access easement route must be the shortest route to the adjoining tract that causes the least amount of damage to the tract subject to the easement, and is located the greatest reasonable distance from the primary residence and related improvements located on the tract subject to the easement. The bill requires the adjoining tract owner who is granted an access easement to maintain the easement and keep the easement open for public use.

Section 251.059, Transportation Code, provides that the county commissioners may declare that an established county road continue to be a public road, provided that (1) the laying out of the road has been established by a jury of view, (2) the county road has been in continuous use for more than 30 years, and (3) public funds have been expended for upkeep and maintenance of the road for at least 10 of the last 20 years.

H.B. 1117, passed in the 2003 regular session of the Legislature, adds a new Section 258 to the Texas Transportation Code. Under this new section the commissioners' court of a county is authorized to adopt a proposed county road map and include in the map all roads in which the county claims a public interest. This bill requires a county claiming a road to provide notice to all affected landowners by publication in the newspaper, and by two separate mailings in the ad valorem tax notice the year before and the year after the county adopts the map. H.B. 1117 authorizes landowners to protest the county map in a public hearing or by mail. This bill also requires a jury of view to determine the validity of the county's claim. H.B. 1117 provides that after two years, if the landowner does not protest, the road becomes the responsibility of the county; if after that two-year period, the landowner decides to protest, the burden of proof shifts from the county to the landowner.

An easement established by dedication may shift to encompass whatever land is absolutely necessary to effectuate the purposes of the easement. Public beach easements may shift in response to the accretion or erosion of land along the waterway. This is known as a rolling easement. \textsuperscript{164}

Sale by reference to a recorded plat makes the dedication on such plat effective and irrevocable. \textsuperscript{165} Sale by reference to a plat previously vacated or by reference

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\textsuperscript{166} Allison v. Parks, 763 S.W.2d 606 (Tex. App.-Ft. Worth 1989, writ denied)

\textsuperscript{161} Gutierrez v. County of Zapata, 951 S.W.2d 831 (Tex. App.-San Antonio, 1997, no writ)

\textsuperscript{162} Dykes v. City of Houston, 406 S.W.2d 176 (Tex. 1966)

\textsuperscript{163} Coleman v. Forister, 514 S.W.2d 899 (Tex. 1974), affirmed on remand 538 S.W.2d 14 (Tex. Civ. App.-Austin 1976)

\textsuperscript{165} Feinman v. State, 717 S.W.2d 106 (Tex. App.-Houston [1st Dist] 1986, ref'd n.r.e.)

\textsuperscript{164} Feinman v. State, 717 S.W.2d 106 (Tex. App.-Houston [1st Dist] 1986, ref'd n.r.e.)
to a plat showing an easement subsequently abandoned may amount to a rededication of the easement.\textsuperscript{166}

The acceptance of a revised plat by a city planning commission does not estop such commission or other governing body to claim that a street shown on the prior plat (sections 212.013, 212.015, and 212.016, Tex. Local Gov't Code) has not been abandoned.\textsuperscript{167}

Tex. Local Gov't Code Chapter 212 sets forth the exclusive method by a municipality for withdrawing or revising a dedication on a recorded plat together with all regulations regarding development plats in lieu of a plat (section 212.045).\textsuperscript{168}

Tex. Local Gov't Code sec. 212.013 provides that subdivisions may be vacated by the owners before the sale of lots provided the approval of the appropriate governing body is obtained. If lots have been sold, the approval of all owners in the subdivision is required. If lots have been sold, the approval of all owners in the subdivision is required. The county clerk is directed to write "vacated" across such subdivisions.

Tex. Local Gov't Code sec. 212.014 provides that a replat of subdivision or a portion thereof, without vacating the preceding plat, is valid when approved, after public hearing, by the appropriate governing body when:

1. it has been signed and acknowledged by the owners of the property replatted;
2. it has been approved by the appropriate governing body after a public hearing; and
3. it does not attempt to amend or remove any covenants or restrictions.

Section 212.015 (additional requirements for replat) applies if any of the proposed area to be replatted was, within the preceding five years, limited by zoning or deed restrictions to not more than two residential units per lot.

Section 212.016 provides that the appropriate governing body is authorized to approve and issue an amending plat signed by the applicants only, and without the notice, hearing and approval of other lot owners, which is for one or more of the following purposes:

1. to correct an error in any course or distance
2. to add any course or distance that was omitted;
3. to correct an error in the description of the real property
4. to indicate monuments set after death, disability, or retirement of the surveyor,
5. to show the proper location or character of any monument which has been changed in location or shown incorrectly on a prior plat;
6. to correct any other type of scrivener or clerical error or omission;
7. to correct an error in course or distance between adjacent lots where both lot owners join in the application and neither lot is abolished, provided there is no attempt to remove recorded covenants or restrictions and there is no material adverse effect on the property rights of the other owners in the plat;
8. to relocate a lot line in order to cure an inadvertent encroachment of a building or improvement on a lot line or on an easement;
9. to relocate lot lines between adjacent lots if the owners join and the amendment does not remove restrictions or increase the number of lots;
10. to make changes to the plat to create six or fewer lots if the changes do not affect zoning or restrictions; or
11. to replat lots fronting on an existing street if all such owners join and amendment does not remove restrictions or increase lots.

Tex. Local Gov't Code sec. 212 applies to any type of land situated within the corporate limits or within five miles of the corporate limits of any city of the State of Texas.

Tex. Local Gov't Code sec. 212.006 to 212.009 requires approval of the city's governing body before recording a plat or replat. A replat without such permission is a nullity and a building permit may be properly denied where the replat does not comply with the applicable zoning ordinance.\textsuperscript{169}

Subdivision plats not within the city limits of an incorporated city or town or five miles thereof must be authorized solely by the commissioners court of the county where the land is located before recordation can occur.\textsuperscript{170} The county may define divisions subject to platting.\textsuperscript{171}

J. Custom:

An easement may be recognized by custom: the public use must be ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law. Custom is an ancient

\textsuperscript{166} Waterbury v. City of Katy, 541 S.W.2d 654 (Tex. Civ. App.-Eastland 1976, no writ)
\textsuperscript{167} McCraw v. City of Dallas, 420 S.W.2d at 793 (Tex. Civ. App.-Eastland 1976, no writ)
\textsuperscript{168} McCraw v. City of Dallas, 420 S.W.2d at 793 (Tex. Civ. App.-Eastland 1976, no writ)
\textsuperscript{169} Head v. City of Shoreacres, 401 S.W.2d 703 (Tex. Civ. App.-Wco 1966, writ refd n.r.e.)
\textsuperscript{170} Tex. Local Gov't Code sec. 242.001, 232.001
\textsuperscript{171} Tex. Local Gov't Code sec. 232.0015
common law doctrine. The doctrine of custom has been relied upon to recognize the open beaches easement.  

Pursuant to the Open Beaches Act, the public generally has an easement in and to areas along the beach.  The right of the public extends by dedication, prescription, estoppel or custom over land bordering the Gulf from the line of mean low tide to the line of vegetation. Local governments shall submit proposed beach access and use plans to the commissioner. The Commissioner shall promulgate rules concerning construction on land adjacent to public beaches and to within 1,000 feet of mean high tide or to the first public road that may affect public access to the beach.  If there is no clearly established marked line of vegetation, then the line will extend not more than 200 feet inland from the line of mean low tide.  A showing that the area is located in the area from mean low tide to the line of vegetation is prima facie evidence of the common law easement in favor of the public. However, such right will not extend to inaccessible areas. The Open Beaches Easement rolls with the line of the mean low tide and vegetation even if a change occurs by avulsive means (such as a hurricane).  

K. Public Lands:  
The Land Commissioner may grant easements over the Gulf of Mexico, state-owned riverbeds and beds of navigable streams for utilities and roads. The Board of Regional of the University of Texas, the Gulf of Mexico systems may execute right-of-way easements over land dedicated to the University of Texas System. The form of easement must be approved by the Attorney General. The tern of the easement by the commissioner may not exceed 10 years, but may be renewed. If the county (or other governmental unit) has a right-of-way easement it may not authorize a private individual to use the road for a pipeline, since such private use interferes with the fee owner’s retained interest.  

L. Conservation Easements:  
A conservation easement imposes limitations or affirmative obligation to retain natural or open space use or to preserve historical, architectural, archeological, or cultural aspects of land. The holder may be a governmental body empowered to hold real property or a charitable corporation, association or trust empowered to retain or protect such interests. The easement may authorize a third party entity that is entitled to be a holder to enforce the easement agreement. The easement is not enforceable before acceptance by the holder or third party and before the holder or third party records its acceptance. The easement may be unlimited in duration. If the land ceases to be subject to the easement, the land is subject to rollback taxes, not to exceed five years. The conservation easement is enforceable even though it is not appurtenant to other land.  

III. NATURE AND EXTENT OF EASEMENTS – PURPOSES  
A. Use of Easement:  
The general rule is that the easement owner is entitled to exclusive use of the easement for the purposes of the easement. An easement holder has such rights as are incidental or necessary to its reasonable enjoyment. The dominant tenant must not unreasonably interfere with the rights of the servient tenant. However, the reasonable enjoyment of the easement includes the right to prepare, maintain, and improve it to the extent reasonably calculated to promote the purposes for which it was created.  

B. No Additional Burden:  
No additional burden may be imposed on a granted easement Where the grant of the easement was to a pipeline company and expressly authorized telephone lines on the right-of-way, it was held that the erection of
telephone lines and the use by the power company was not an additional burden, so long as such lines were used in the maintenance and operation of the pipeline. 191

C. Expandable Easements - Multiple Line Grants:

An easement to lay a "pipeline or pipelines" creates what is called a multiple line grant. 192 A grant of a right to lay a pipeline or pipelines with provision for payment if additional lines are laid is a multiple line grant, with a right to lay such lines in the future. 193 The grant of a right to lay additional lines alongside the first line does not limit the easement holder to two additional lines (one on each side) as long as the lines are parallel to the first line. 194 However, the grant of a right to lay parallel lines without a grant of a right to lay additional lines or without an express provision for future lines or payment therefor will not allow the easement holder to lay additional lines forty years after the first lines are placed. 195 In determining whether the easement grants a right to lay additional pipelines, the courts will consider whether the easement provides future compensation and whether the granting clause allows future lines. 196 A pipeline easement granting a right to lay additional lines is a grant of a presently vested expandable easement and is not subject to the rule against perpetuities. 197

D. Location:

The general rule is that, if an easement is not located, the servient tenant can locate the easement if such location is reasonable. Lack of definite location will not make the easement description fatally defective under the statute of frauds, since it is possible to subsequently specifically locate same. 198 An established easement may be relocated only with consent of the parties. 199

E. Width:

The mere failure to mention the width of the right-of-way does not render an instrument ambiguous and justify introduction of parol evidence. In such case; the grantee is entitled to a reasonable width dependent upon all facts and circumstances. 200 If, however, a grant is for a roadway "as at the present located approximately 20 feet in width" and the road at such time as actually 14-1/2 feet, the width will be limited to that in use. 201

F. Road and Alley Easements - Private or Public:

Deeds reserving roadway easements must be carefully examined to determine whether or not the reservation is for the benefit of the public generally or is intended to be a reservation of a private road. The intention of the parties as derived from the instrument is controlling. 202 There may be a grant of a private way for the benefit of the grantee, its heirs, assigns, and tenants. 203 If one owner acquires a tract of land and no alley is in existence, and another party dedicates an alley which abuts the property of the first owner, the first owner has no cause of action to enjoin the closing of the alley. 204 Where the owner of the servient estate blocked the platted easement, allowed use of the road running parallel to the place where the easement lay and allowed persons using it to rely on its use whereby believing it to be the platted road, the location of the easement was changed. Once changed, the owner of the servient estate was estopped to claim the platted easement to be the true easement. 205 A grant of a road to a municipality includes laying sewers and gas and water pipelines. Tunneling under streets for electric lines is a use for a street. The

191 Cantor v. Central Power & Light Co., 38 S.W.2d 876 (Tex. Civ. App.-San Antonio 1931, writ ref'd)
192 Phillips Petroleum Co. v. Lovell, 392 S. W.2d 748 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.)
194 Wood v. Coastal States Crude Gathering Co., 482 S.W.2d 954 (Tex. Civ. App.-Corpus Christi 1972, writ ref'd n.r.e.)
196 Hall v. Lone Star Gas Co., 954 S.W.2d 174 (Tex. App.-Austin, 1997, rev. denied)
Elliot v. Elliot, 597 S.W.2d 795 (Tex. Civ. App.-Corpus Christi 1980, no writ)
199 Sisco v. Hereford, 694 S.W.2d 3 (Tex. Civ. App.-San Antonio 1984, writ ref'd n.r.e.)
201 Jackson v. Richards, 157 S.W.2d 982 (Tex. Civ. App.-El Paso 1941, writ ref'd)
202 Burns v. McDaniel, 158 S.W.2d 826 (Tex. Civ. App.-Eastland 1942, no writ);
203 Cousins v. Sperry, 139 S.W.2d 665 (Tex. Civ. App.-Beaumont 1940, no writ);
204 Cobb v. City of Dallas, 408 S.W.2d 292 (Tex. Civ. App.-Dallas 1966, no writ)
205 Vrazel v. Skrabanek, 725 S.W.2d 709 (Tex. 1987)
Easements

state highway easement includes the right to lay pipelines.206

G. Purprestitures:
A common-law purpresolve is an appropriation to
private use of that, or a portion of that, which belongs to
the public. A county's right and duty as trustee to the
public in an easement for road purposes extends below
the surface of the right-of-way. The acts of a single
county commissioner unauthorized by the Commissioners' Court does not estop the county.207

H. Fences:
Power companies have no statutory rights or
common-law right or duty to build fences along a right-
of-way or to erect gates across it.208 In some cases,
railroads have both the right and duty to fence their
rights-of-way.209 It is possible to acquire the right to
fence in a condemnation decree.210

I. Exception in Title Policy:
Where an easement is shown on a recorded plat of
a subdivision, it must be specifically excepted to in the
title policy in order notto be insured against. A reference
to the recorded plat, in the description of the property is
not sufficient.214

J. Burdens on Easements:
The extent of the burden imposed on the servient
tenement by the easement is limited to a use which is
reasonably necessary and convenient and as little
burdensome to the servient estate as possible.212 Every
easement carries with it the right of doing whatever is
reasonably necessary for the full enjoyment of the
easement. Unless negated by specific language, the
creation of an easement contemplates a future use
consistent with the grant under different conditions so
that the easement owner may carry out the object for
which the easement was granted.213

IV. TERMINATION OF EASEMENTS
A. By Operation of Law:
If there is a foreclosure under a deed of trust created
prior to the easement, the grantee at the trustee's sale
takes free of the easement.214 However, the mortgagee
may be estopped to deny or may be deemed to have
ratified the dedication of the public easement shown on
a plat by its knowledge of the sale of and partial releases
of platted lots. This may not be true though, particularly
where the subdivision is unimproved, if the lender simply
executes partial releases.215

B. Merger:
In order to constitute an easement, the dominant and
servient estates must be held by different owners. If the
owner of the easement acquires title to the servient estate,
there is a merger and extinguishment of the easement.216
A terminated easement is not revived by subsequent
separation of ownership of the former dominant and
servient estates.217

C. Limitations:
An easement may be extinguished by virtue of
adverse possession by another, but all elements must be
proved by the adverse possessor.218 An easement may be
lost by adverse possession of the servient estate for such
use as is inconsistent with the continued use of the
easement (such as where improvements, including stables
and fences and gardens, precluded use of the

204 Grimes v. Corpus Christi Transmission Co., 829 S.W.2d 335 (Tex. App.-Corpus Christi 1992, writ denied)
206 Aycock v. Houston Lighting & Power Co., 175 S.W.2d 710 (Tex. Civ.-Galveston 1943, writ ref'd w.o.m.)
208 Aycock v. Houston Lighting & Power Co., 175 S.W.2d at 710
209 San Jacinto Title Guaranty Co. v. Lemmon, 417 S.W.2d 429 (Tex. Civ. App.-Eastland 1967, writ ref'd n.r.e.)
213 Johnson v. Ferguson, 329 Mo. 363, 44 S.W.2d 650 (1931); Weills v. Vero Beach, 96 Fla. 818, 119 So. 330
214 Parker v. Bains, 194 S.W.2d 569 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.)
215 Long Island Owner's Assoc. v. Davidson, 965 S.W.2d 674 (Tex. App.-Corpus Christi 1998, petition for review
filed)
216 Jamail v. Gene Naumann Real Estate, 680 S.W.2d 621 (Tex. Civ. App.-Austin 1984, writ ref'd n.r.e.)
Easements

In the case of Robinson Water Co. v. Seay, 545 S.W.2d 253 (Civ. App.-- Waco 1976, no writ) the owners of a tract of land fenced and used a portion of the roadway easement adversely, openly, peaceably, and continuously against all for 12 years. The portion of the easement inside the fence was extinguished. A government right of action is not barred by limitation periods.

D. Abandonment:

If the purposes for which the easement was granted cease, the easement terminates. For example, under a deed conveying a building to the county and reserving a right to use the second floor in favor of certain lodges, such rights cease upon abandonment of the defined purpose of occupancy. An easement owner is ordinarily free to abandon the easement, but in doing so he or she cannot prevent others from taking advantage of the benefits to which they are legally entitled by the easement grant and by their rights as owners of the freehold estate.

In Logan v. Mullis, 686 S.W.2d 605 (Tex. 1985), the easement owner was liable to freeholders for removal of culvert he had permanently embedded in the land and for resulting destruction of roadway he had built over the easement. The private easement which a purchaser acquires by implication upon purchase with reference to a map showing an abutting street or alley survives vacation or abandonment of the street by a public authority.

The mere nonuse of an easement will not extinguish it. Intention to abandon an easement must be shown by clear and satisfactory evidence. There must be additional elements, such as the use becoming impossible of execution or failure of the object of the use or the substitution of new property for the old for a certain use. Intention to abandon an easement is not manifested by the condemnation of said easement by a public authority. The dominant owner has the duty to maintain, improve, or repair the easement at no expense to the servient owner.

It is extremely difficult to prove that a city or other public body has abandoned an easement or part thereof. In Roberts v. Bailey, 748 S.W.2d 577 (Tex. App-Beaumont 1988, no writ), the court did not apply the abandonment doctrine. In this case a deed granting a public easement of a street to the city was never accepted by the city council. At no time did the city maintain this thoroughfare. Therefore, the question of abandonment never arose. Whenever a county road has been enclosed under fence by the adjoining owner for more than twenty years, the road shall be deemed abandoned, provided same is not reasonably necessary to reach adjoining land.

E. Expiration:

If an easement is designed by its terms to last for a specified period, then it will terminate upon the happening of a designated event. An easement created for a particular purpose will terminate as soon as the purpose ceases to exist, when it is fulfilled, or rendered impossible to accomplish.

F. Strips and Gores:

The general rule is that as a matter of public policy, one conveying a tract of land adjoining by an easement strip is presumed to have conveyed to the center of the easement in the absence of specific reservation. This is commonly referred to as the doctrine of "strips and gores." An instrument which conveys land and then excepts to a road, railroad right of way, etc., that occupies a mere easement over the land, conveys fee to

220 City of Houston v. Williams, 69 Tex. 449, 6 S.W. 860 (1888) (in this case, the five-year statute was also applicable due to a conveyance); Walton v. Harigel, 183 S.W. 785 (Tex. Civ. App.-Galveston 1916, no writ); Chenowth Bros. v. Magnolia Petroleum Co., 129 S. W.2d 446 (Tex. Civ. App.-Dallas 1939, writ dism’djudgmt cor.) (Apparently, an implied easement such as a way of necessity could also be lost by adverse possession)


222 Woodmen of the World Camp No. 1772 v. Goodman, 193 S.W.2d 739 (Tex. Civ. App.-Dallas 1945, no writ)

223 Hicks v. City of Houston, 524 S.W.2d 539 (Tex. Civ. App.-Houston [1st Dist.] 1975, writ refd n.r.e.)

224 Griffith v. Allison, 128 Tex. 86, 96 S.W.2d 74 (1936); Adams v. Rowles, 149 Tex. 52, 228 S.W.2d 849 (1950)

225 City of San Antonio v. Ruble, 453 S.W.2d 280 (Tex. 1970)

226 Sisco v. Hereford, 694 S.W.2d 3, 7 (Tex. App.-San Antonio 1984, writ ref’d n.r.e.); Cozy v. Armstrong, 205 S.W.2d 403, 408 (Tex. Civ. App.-Fort Worth 1947, writ ref’d n.r.e.)


228 Powell on Real Property, Section 422

229 Shaw v. Williams, 332 S.W.2d 797 (Tex. Civ. App.-Eastland 1960, writ ref’d n.r.e.)

230 Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W.2d 1080 (1932); State v. Fuller, 407 S.W.2d 215 (Tex. 1966); Cantley v. Gulf Production Co., 135 Tex. 339, 143 S.W.2d 912 (1940)
the entire tract and the exception merely makes the conveyance subject to the easement.\textsuperscript{230} The presumption does not apply if the grantor owns land abutting both sides of the strip or if the strip is larger and more valuable than the conveyed tract.\textsuperscript{231}

G. Easement - Abandonment - Title:
Where land adjacent to a railroad right-of-way is conveyed, the deed, in the absence of express reservation, conveys the fee burdened by the easement to the adjacent one-half of the railroad. Upon abandonment of the right-of-way, full fee title to such adjacent strip is then vested in such adjacent owner.\textsuperscript{232}

H. Roads and Streets - State Highway - Abandonment:
The title to an abandoned State Highway may be divested out of the State upon the concurrence of four conditions, namely:

1. the Texas Transportation Commission must find the property no longer needed for highway purposes;
2. the Commission must so recommend to the Governor advising as to value; and
3. the Governor must execute a deed.\textsuperscript{233}

If the State conveys its interest, the conveyance is subject to continued right of any public utility or common carrier.\textsuperscript{234} The Attorney General must approve the transfer.\textsuperscript{235}

I. Roads and Streets - County - Abandonment:
The Commissioners Court may effect abandonment of a right-of-way by a resolution entered in the court minutes declaring the property abandoned and may then appoint a Commissioner to sell the property at public auction (or to an adjoining owner) after proper notice. The sales price for the right-of-way shall not be less than the fair market value as declared by appraisal, and shall be approved by the Commissioners Court.\textsuperscript{236} Title to the center of an abandoned road vests in each abutting landowner.\textsuperscript{237} Abandonment of a county road occurs when its use becomes so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for 20 years. A county road abandoned in this fashion may be reestablished as a public road only in the manner provided for establishing a new road.\textsuperscript{238}

J. Vacation of or Closing of Streets - Municipal Authorities:
A city may close a street only if closure is in the public interest; the city may not close a street over the objection of an abutting property owner with a coexisting private easement therein.\textsuperscript{239} A person must bring on actions within two years after the ordinance closes a street.\textsuperscript{240}

K. Petition of Abutting Owners:
Texas Transportation Code sec. 311.008 provides that general law cities, upon petition of all the owners of property abutting a street or alley may vacate and abandon and close any such street or alley by ordinance. The abutting owner, if it has a private easement by implication upon purchase of the land with reference to a plat showing the street, will retain such private easement after vacation or abandonment of the street by the public authorities.\textsuperscript{241} Its easement may not survive abandonment if it fronts the street in the same block but does not abut the portion of the street which was closed.\textsuperscript{242}

L. Parks and Squares:
Tex. Local Gov't Code sec. 253.001 provides that no public square or park shall be sold until the question of such sale or closing has been submitted to a vote of the qualified voters of such city or town and approved by a majority of the votes cast at such election.

M. Replat - Rededication - Effect on Streets:
Sections 212.011 and 212.012 Tex. Local Gov't Code provides that approval of a plat does not constitute acceptance of a dedication. Actual appropriation is required. However, disapproval of a plat implies refusal of dedication. Utilities cannot be connected in the absence of approval.

\textsuperscript{230}Haines v. McLean, 154 Tex. 272, 276 S.W.2d 777 (1955)
\textsuperscript{231}Krenek v. Texstar North America, Inc., 787 S.W.2d 566 (Tex. App.-Corpus Christi 1990, writ denied)
\textsuperscript{232}State v. Fuller, 407 S.W.2d 215 (Tex. 1966)
\textsuperscript{234}Tex. Transp. Code sec. 202.029
\textsuperscript{237}Tex. Transp. Code § 251.058
\textsuperscript{238}Tex. Transp. Code § 251.057
\textsuperscript{239}City of Mission v. Popplewell, 156 Tex. 269, 294 S.W.2d 712 (1956); See Gambrell v. Chalk Hill Theatre Co., 205 S.W.2d 126 (Tex. Civ. App.-Austin 1947, writ ref'd n.r.e.); Tex. Transp. Code Sec. 311.007, 311.008; Caldwell v. City of Denton, 556 S.W.2d 107 (Tex. Civ. App.-Fort Worth 1977, writ ref'd n.r.e.)
\textsuperscript{240} Tex. Civ. Prac. & Rem Code sec. 16.005
\textsuperscript{241}Hicks v. City of Houston, 524 S.W.2d 539 (Tex. Civ. App.-Houston [1st Dist] 1975, writ ref'd dn.r.e.)
\textsuperscript{242}City of San Antonio v. Olivares, 505 S.W.2d 526 (Tex. 1974)
N. Common-Law and Statutory Dedication:

Prior to the enactment of Tex. Local Govt. Code Chapter 212 an executory offer could be withdrawn until an offer of dedication was accepted in one of the three recognized methods:

1. By the municipality through proper authorities,
2. By estoppel created by sale of lots to persons relying on such plat dedicating streets, or
3. By actual public user.

This was the rule with reference to a common-law offer of dedication and must be distinguished from the rule applicable to a statutory dedication.

Tex. Local Govt. Code Chapter 212 establishes a statutory dedication in Texas and changes the common-law rule with reference to withdrawal of the dedication. A statutory dedication may now be terminated only in the following manner:

1. Prior to acceptance by the city and before any lot is sold, the owner may file a written instrument declaring the dedication to be vacated. Approval of the city planning commission must be obtained
2. After the sale of lots in a platted subdivision; the vacation is accomplished on application of all those to whom lots have been sold, plus approval of the city planning commission.
3. After the city accepts the dedication, consent of the city through its governing body would seem necessary. Such consent should be evidenced by an ordinance abandoning the dedication.

O. Tax Deeds:

An ad valorem tax lien is subordinate to restrictive covenants or easements recorded before January 1 of the year the tax lien arose. The tax deed shall be subject to those easements and restrictive covenants recorded before January 1 of the year the tax lien arose.

P. Overburdening and Unreasonable Use:

Use of an easement to benefit land other than the dominant estate is an improper overburden of the servient estate. Unless the easement provides otherwise, the easement is apportionable among the owners of a

subdivided dominant estate. The modern view of commercial (in gross) easements is that an easement is partially assignable if it does not burden the underlying land beyond the contemplation of the original easement grant.

The ownership of an easement carries the right to use it in a manner which is reasonably necessary for the full enjoyment of the easement. However, the owner of the dominant estate must use the easement so as not to interfere unreasonably with the servient tenement’s ability to use the land. A grant of an easement gives no exclusive easement over the land unnecessary to the use of the easement. Where the grant of the easement is general as to the burden, the owner can exercise it in a manner which is reasonably necessary for the use of the land. The court will not restrict a pipeline right-of-way to a 30 foot width where there is no width specified and there is an express right granted to lay future additional lines. The grant of a right-of-way to maintain the initial line is not a mere option to acquire in the future but is an expandable easement which is not affected by the rule against perpetuities. Where an easement has been granted without definite location, the right to locate the easement belongs to the servient tenement but must be exercised in a reasonable manner.
If there already is a way in existence, it will be held to be the location of the easement.\textsuperscript{255}

A location of an easement generally cannot be changed without the consent of both parties even if the way becomes detrimental to the servient tenement.\textsuperscript{256} However, it can be changed by mutual consent or by judgment of the court in equity where justice and equity require that the right be changed.\textsuperscript{257} Misuse of an easement will not justify termination of the easement unless the use for which the easement was granted becomes impossible of execution.\textsuperscript{258}

No intent to create an exclusive easement will be imputed in the absence of a clear indication of such intent. The servient tenement may transfer his right to use the land if it will not interfere unreasonably with the easement previously granted; he can thereby grant a second easement subject to the initial grant.\textsuperscript{259} The current owner can use a roadway easement in a manner not inconsistent with the dominant owner's reasonable enjoyment of the easement.\textsuperscript{260} If an exclusive easement is granted, then the grantee is entitled to free and undisturbed use of the land.\textsuperscript{261}

The holder of an easement appurtenant to a specific tract of land cannot use that way to reach another tract of land owned by the owner of the easement for which the way is not appurtenant.\textsuperscript{262}

**Q. Mortgages:**

The foreclosure of a mortgage that was created before the easement will extinguish the subsequent easement.\textsuperscript{263}

**R. Municipal Vacation:**

A city may close or vacate a street in connection with urban renewal.\textsuperscript{264} A home rule municipality may abandon or close a street or alley.\textsuperscript{265} A general law municipality may abandon or close a street or alley if all abutting owners submit a petition.\textsuperscript{266} A municipality may sell an abandoned street or alley pursuant to an ordinance.\textsuperscript{267} A local government may sell narrow strips of land, streets, or alleys for the fair market value (determined by appraisal or public bidding of a municipality).\textsuperscript{268}

**V. DISCLOSURE OF EASEMENTS**

**A. Transportation Pipelines:**

Section 5.013, Property Code, relates to disclosure of subsurface pipelines. The seller of unimproved land (including a developer who sells to others for resale) to be used for residential purposes must provide a written notice disclosing the location of transportation pipelines; including natural gas, natural gas liquids, synthetic gas, liquefied petroleum gas, petroleum or petroleum products, or hazardous substances. The notice must state the information to the best of the seller's belief and knowledge at the date the notice is completed and signed; if the seller does not know the information, the seller must indicate that fact in the notice. The notice must be delivered on or before the effective date of the contract. If the seller does not provide the notice when the contract is entered, the buyer may terminate the contract for any reason no later than seven days after the effective date of the contract. The seller is not required to provide the notice if the seller is obligated under an earnest money contract to furnish a title insurance commitment to the buyer before closing and the buyer may terminate the contract if the buyer's objections to title as allowed in the contract are not cured by the seller before the closing.

**B. Notice of Construction Over Pipeline Easement:**

HB 1931,b passed in the 2003 regular session of the Legislature, prohibits a person from building, repairing, replacing, or maintaining a construction on, across, over, or under the easement or right-of-way for a pipeline facility unless notice of the construction is given the operator of the pipeline facility and other circumstances apply.\textsuperscript{269}

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\textsuperscript{255} Cozby v. Armstrong, 205 S.W.2d 403 (Tex. Civ. App.-Ft. Worth 1947, writ ref'd n.r.e.); Elliott v. Ottmers, 224 S.W.2d 487 (Tex. Civ. App.-San Antonio 1949, writ ref'd n.r.e.) (way of necessity could be located by the servient tenement)

\textsuperscript{256} Cozby v. Armstrong, 205 S.W.2d 403 (Tex. Civ. App.—Fort Worth 1947 writ ref'd n.r.e.)

\textsuperscript{257} Sisco v. Hereford, 694 S.W.2d 3 (Tex. App.-San Antonio 1984, writ ref'd n.r.e.)

\textsuperscript{258} Perry v. City of Gainesville, 267 S.W. 2d 270 (Tex. Civ. App.—Ft. Worth 1954, writ ref'd n.r.e.); Reynolds v. City of Alice, 150 S.W.2d 455 (Tex. Civ. App.—El Paso 1940, no writ)

\textsuperscript{259} City of Pasadena v. California-Michigan Land & Water Co., 17 Cal.2d 576, 110 P.2d 983 (1941)

\textsuperscript{260} City of Corsicana v. Herod, 768 S.W.2d 805 (Tex. App.—Waco 1989, no writ)

\textsuperscript{261} MGJ Corp. v. City of Houston, 544 S.W.2d 171 (Tex. Civ. App.—Houston [1st Dist] 1976, writ ref'd n.r.e.)

\textsuperscript{262} Jordan v Rush, 145 S.W.2d 549 (Tex. App.—Waco 1940, no writ)

\textsuperscript{263} Cousins v. Spero, 139 S.W.2d 665 (Tex. Civ. App.—Beaumont 1940, no writ)

\textsuperscript{264} Tex. Local Gov't Code sec. 374.015

\textsuperscript{265} Tex. Transp. Code sec. 311.007

\textsuperscript{266} Tex. Transp. Code sec. 311.008

\textsuperscript{267} Tex. Local Gov't Code sec. 253.001

\textsuperscript{268} Tex. Local Gov't Code sec. 272.001

\textsuperscript{269} Tex. Health & Safety Code, Sec. 756.103