

Welcome to the Easement Webinar

Call-In Number for audio:

1.866.422.4457

Conference Code:

2113365039

Easement Issues

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Easements 101 Outline

- What is an easement?
- Attributes.
- How to create.
- Who has authority to use?
- Scope of authority.
- How to terminate.
- Best Practices for Drafting & Interpreting.

Easement - What is it?

- An “easement” is an interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose.
 - Affirmative=right to do or use
 - Negative=prevent a use/action
- Versus license
 - A license is permission to use the property, but is revocable at any time for any reason
 - If permission is only oral, then you have a license
 - A license can never turn into a prescription easement

Easement Characteristics- Physical

- Should be in writing
 - Preferably recorded
- Temporary or permanent
 - Examples of temporary:
 - For 30 years...
 - Until a center pivot is installed...
- Must be clearly defined and precisely measured
 - Blanket easements are a problem: title insurance
 - Ex: section 6, T12N, R1W

Easement Characteristics- Legal

- Irrevocable
 - Grantor can't change their mind
- Consideration not needed
 - Payment calculation
- Transferrable / Assignable
 - Runs with the land

How to Create an Easement

- Express: Grantor → Grantee
 - In writing & signed by Grantor
 - Ex: A strip of land 10' in width for a distribution line
- Prescriptive: Adverse Possession Elements
- Easement by Implied by Necessity → Public right-of-way: Grant by government or statute
 - Plat
 - NDOR
 - Ch. 70

- Condemnation: Just compensation paid

Express Easements

- In writing & signed by both Parties
 - Ex: Husband and Wife (“Grantors”) hereby grant, sell, convey and release unto PPD (“Grantee”) its successor and assigns, a perpetual easement (“Easement”) in, over, and upon the real estate located in _____ County, Nebraska, more particularly described as [LEGAL] for the purpose of [distribution and transmission purposes]...
 - Must be notarized
- And recorded
- Common Problem: Wife didn’t sign

Why Record an Express Easement?

- 76-238.
- (1) all...instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force **from and after** the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice. **All such instruments are void** as to all creditors and subsequent purchasers **without notice whose deeds, mortgages, or other instruments are recorded prior to such instruments.** However, such instruments are valid between the parties to the instrument.

Rights-of-Way

- Implication by Necessity
 - Public ROW
 - NDOR
 - ▣ Title 410 Chapter 1-Utility Permits
 - ▣ The Department is granted authority in NEB. REV. STAT. § 39-102 to promulgate rules and regulations regulating the placement of pole lines or other utility facilities and private driveways, commercial approach roads, facilities, things or appurtenances upon State highway rights of way
 - 39-1702
 - ▣ The county board is hereby authorized to acquire, either temporarily or permanently, lands, real or personal property or any interest therein, or any easements deemed to be necessary
 - ▣ The right-of-way for such roads shall be of such width as is deemed necessary
 - Public policy requires a way of access
 - Landlocked property

NEB. REV. STAT. § 70-309

- Electrical transmission lines; state or federal highways; regulation by Department of Roads.

If the public road, along, upon, across, or under which the right to construct, operate, and maintain the electrical transmission line is granted, is a state or federal highway, then the location and installation of the electrical transmission facilities, insofar as they pertain to the present and future use of the rights-of-way for highway purposes, shall be subject to reasonable regulations and restrictions prescribed by the Department of Roads. If the future use of the state or federal highway requires the moving or relocating of the facilities, then such facilities shall be removed or relocated by the owner, at the owner's cost and expense, and as directed by the Department of Roads except as provided by section [39-1304.02](#).

Prescriptive Easement

- Prescription: adverse possession
 - Actual
 - Adverse—can't have permission
 - Open & notorious—underground uses are permissible if it could be discovered by a inspection of the area
 - Continuous & uninterrupted—doesn't have to be constant, seasonal uses are permitted
 - For the 10 year prescriptive period

Condemnation - Nebraska Constitution

Art. I, section 21

- “The property of no person shall be taken or damaged for public use without **just compensation** therefor.” If it may be said that the state Constitution controls, it would be necessary to conclude, even if it should be said that this type of damaging was not a taking, that there would be liability for the damage, it being effectually conceded that the damage flowed from a **public use**.
- Inverse condemnation claims
 - Board of appraisers; need an expert; long process & expensive

Condemnation Restrictions

- 76-710.03. Land devoted to agricultural purposes; acquisition to construct power transmission lines; route selected.
 - Whenever a condemner seeks to acquire lands or interest therein through eminent domain proceedings to construct power transmission lines through or over land devoted to agricultural purposes, such condemner shall be required to select a route along or following sections or one-half section lines unless such route cannot be followed without excessive and unreasonable costs to the condemner.

Payment

- Usually a formula based on # of poles, acres, etc.
- Should be FMV

Scope of the Easement

- How do we determine?
 - Look to the express language & the circumstances in which it was granted
 - Implied easements: the extent of the necessity
 - Prescription—limited to how the property was used for the 10 year period
 - We can't unilaterally change the scope of the easement
 - Common issue: too narrow

Who can use an easement?

- While easement may not be used by general public, it may be used by owner of easement, tenants, servants and guests, as well as by persons transacting business with him in absence of special agreement to contrary.
 - Employees
 - Contractors

Termination

- Alteration in use
- Not Necessary
 - § 70-303: “If any pole line or underground line constructed under section 70-301 be abandoned for a period of five years, the right-of-way or easement acquired for its construction shall revert to the owner of the property affected.”
- Destruction of servient estate
- Release

Common Mistakes

- Blanket easements
- Narrow scope— “a ten foot wide strip for a single phase line”
- Not recorded
- Not notarized
- Not knowing the ownership/regulations/rules of the Public right of way

Best Practices for new easements

- State the purpose of the easement—
 - the right to enter upon the lands of [x], the right to excavate for, install, construct and reconstruct, re-phase, repair, maintain, operate and inspect underground and/or overhead electric transmission lines and/or distribution lines, and pad mounted or pole-mounted transformers, electric service lines and installations, together with adequate protection therefore
- Precisely describe the easement area—
- Describe the easement rights for both grantor & grantee
- Express the duration of the easement
- Express whether the easement is exclusive or nonexclusive
- Sign & Record promptly!

Reminder: 11 or more parcels

- §25-2501: 11 or more separately owned tracts located ten or more feet outside the public ROW— however, there's no definition for calculating the ten or more feet.
- Procedure: give public notice (to each landowner) 45 days prior to negotiating with landowners. If greater than 34.5 V, then the route must be published 30 days before negotiating.

Questions and Answers

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