

# **EASEMENTS: A LAND SURVEYOR'S GUIDE**

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**"Where to Put a Pipe"- Common Land Use Law Considerations** [oil and gas pipelines]

*Landman [Publication of the American Association of Professional Landmen]* - May/June 2000

**Commercial Letters of Intent**

*Tierra Grande Journal of the Real Estate Center at Texas A&M University* - July 2003

**Broker Duties**

*Tierra Grande Journal of the Real Estate Center at Texas A&M University* - March/April 2004

**Collecting Commissions in Commercial Transactions**

*Tierra Grande Journal of the Real Estate Center at Texas A&M University* - Sept./October 2004

**Texas Subdivision Platting Law**

*Appendix to Texas Municipal Zoning Law*, Lexis Publishing (2004)

**Three Key Opinions on Immunity, Zoning & Platting**

*Texas Lawyer* - March 14, 2005

**Brokers: Protect Your Commission**

*Office & Commercial Real Estate Magazine* - Summer 2005

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**Texas Super Lawyers- 2003 - 2006**

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**Best Lawyers in America – 2004 - 2007**

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## I. INTRODUCTION

### A. Scope of Article

This article is an overview of Texas easement law for professional land surveyors. It addresses the types of easements and the various ways in which they are created and terminated. Also provided is a “plain English” easement form adapted from the State Bar of Texas easement form intended to familiarize the reader with the structure of an easement and assist in the identification of easement interests. The article distinguishes licenses and public dedications from easements. Finally, a summary of important Texas Supreme Court cases addressing various easement issues is included.

### B. Reference Materials

A clear and concise article on Texas easement law is Judon Fambrough’s Easements in Texas, published by the Real Estate Center at Texas A&M University, a copy of which is attached as Exhibit "A" and which can be found online at <http://recenter.tamu.edu/pdf/422.pdf>.

## II. ESSENCE OF AN EASEMENT

### A. Easement Defined

An easement is a non-possessory interest in land of another. This means that an easement is an interest in real property that does not constitute full ownership in the property.

### B. Easements vs. Licenses

Easements should not be confused with licenses. A license is where permission is given to an individual to do an act or acts on land of another, like a ticket to an entertainment event. In deciding whether an easement or license has been created, the most critical factor is the parties’ intent. The following elements show intent of a party:

- *Manner of creation of right* (oral or written). A written agreement is more likely to be an easement, particularly if detailed. However, the label that parties give the right does not dictate its legal effect.

- *Nature of right created.* The creation of a right on a particular portion of the servient estate indicates that an easement was intended. A more general use right is more likely a license. A personal right is more likely a license.
- *Duration of a right.* An express duration indicates an easement. A shorter term indicated a license.
- *Amount of consideration, if any, given for right.* The more consideration paid, the more likely an easement is intended.
- *Reservation of power to revoke right.* If there is an express reservation of power to revoke or terminate the grant was likely a license. A right that continues without any right for the servient estate to terminate is a strong indication of an easement.
- *Assignability.* A license is, generally, not assignable.

### **III. TYPES OF EASEMENTS**

There are generally two types of easements: easements in gross and easements appurtenant.

#### **A. Easements in Gross**

Generally, an easement in gross is a personal right that cannot be assigned or otherwise transmitted. An easement in gross is sometimes described as a personal right or interest because there is a servient estate, but no dominant estate. This means that an easement in gross terminates upon death of the individual owner or the cessation of a business. However, an easement in gross may be transferable where the easement is:

- writing; and
- Explicitly assignable.

Examples: Right to use a well or field granted to a specific person.

#### **B. Easements Appurtenant**

An appurtenant easement benefits the owner of a dominant estate and affects the physical use of the land. An easement appurtenant requires both a servient and a dominant estate. The owner of the dominant estate may use an easement on the servient estate. The servient estate is burdened by the easement. The easement and the dominant estate must be held by the same party for the easement to be appurtenant.

Appurtenant easements may be either affirmative or negative. An affirmative easement authorizes the holder to make active use of the servient estate in a manner that, without the easement, would constitute a trespass. An affirmative easement may permit the holder to intrude on the servient estate or use the holder's own land in a way that disturbs the enjoyment of the servient estate.

Examples of an affirmative easement:

- Access easement
- Utility easement
- Inundation easement

A negative easement enables the holder to prevent the owner of the servient estate from doing things the owner would otherwise be entitled to do. A negative easement does not permit the holder to enter or use the servient estate, but rather, it limits the right of the servient owner to use the servient owner's own land.

Examples of a negative easement:

- View easement
- Historic façade easement
- Conservation easement

**IV. RIGHTS AND DUTIES CREATED BY EASEMENTS**

Every easement contains a right to do such things as are reasonably necessary to fully enjoy the easement. The extent to which these rights may be exercised depends on the language in the grant and if such rights were limited by the servient owner. The easement holder's use should not seriously burden the servient owner, except for the specific easement purpose.

**A. Use of Express Easements**

The use in an express grant is determined by the terms of the grant in light of the surrounding circumstances. When an easement is granted for a specific purpose, the grantee is restricted to that purpose, *even when* other purposes are not restricted. The limits of the use in an express grant may not be enlarged beyond that grant. *See Marcus Cable Assoc., L.P. v. Krohn*, 90 S.W.3d 697, 699 (Tex. 2002) and *DeWitt County Electric Cooperative, Inc. v. Parks*, 1 S.W.3d 96, 99 (Tex. 1999).

Example:      Access over defined area  
                    Right to place utilities in defined area

**B. Use of General Easements**

When an express grant is made in general terms, uses of the easement must be reasonably necessary and convenient, but may burden the servient estate as little as possible. A reasonable use can be defined as a use that does not unreasonably prejudice the rights of others. Courts look to the local situation, public usage, and nature and condition of the servient estate in determining proper use. Where an express grant is made in general terms but both parties consent to a use, that use is fixed and is limited to the particular manner in which it is being enjoyed.



Example: Access over entire tract or from one point to another  
Blanket utility easement

**C. Rights and Duties of the Servient Owner**

The servient owner has the right of full dominion over the use of the land for the purpose of the easement purpose. The servient owner may use the land in a way that may interfere with the easement as long as the servient owner's use is not destructive of, or so burdensome as to destroy the rights of the easement owner. The servient owner is only required to abstain from interfering with easement or from hindering or obstructing the easement owner's use of the easement.

**D. Rights and Duties of the Easement Owner**

The easement owner has a duty to use ordinary care in order to avoid injury to the servient estate. However, it is difficult for the servient owner to recover damages resulting from use of an easement. The servient owner must show that the easement owner acted with willfulness or negligence in the use of the easement.

**V. CREATION OF AN EASEMENT**

Any person with a possessory interest in land may create an easement burdening that person's interest. However, the easement cannot last beyond the interest that the grantor held in the servient estate. An easement may be created both expressly or impliedly.

**A. Express Easement**

The most common method of creating an easement is by express grant. There is no exact language that is necessary for an effective conveyance of an easement. However, the State Bar of Texas has sample forms for granting easements. Attached as Appendix A is an example easement form. The critical elements for an easement are the following:

- Grantor/Grantee
- Description of the dominant estate's property
- Description of the easement area
- Purpose
- Consideration paid
- Duration
- Rights of Enforcement
- Signature of the parties

**B. Easement by Implication**

Easements are implied in certain circumstances. See *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 198 (Tex. 1963). An implied easement requires the prior existence and use of the easement. The prior use must have been:

- apparent
- permanent
- continuous
- necessary for the enjoyment of the property asserting the right.

A related easement is that created by estoppel. This easement requires a representation by the owner of the servient estate which is relied upon by the easement holder. The owner of the servient estate is then estopped to deny the existence of the easement. *See Vrazel v. Skrabanek*, 725 S.W.2d 709, 710 (Tex. 1987) and *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 198 (Tex. 1963)..

### C. Easement by Necessity

Easements by necessity are typically implied to give access to a landlocked parcel. The following elements are required:

- Prior common ownership of the dominant estate and the servient estate
- Transfer of one of the parcels (severance)
- Necessity for the easement at the time of severance
- Continuing necessity for the easement

### D. Easement by Prescription

Prescriptive easements are similar to adverse possession in that prescriptive easements arise when an individual uses another's property for 10 years without permission and the owner of the property fails to prevent such use. *See Vrazel v. Skrabanek*, 725 S.W.2d 709, 710 (Tex. 1987). The elements of a prescriptive easement are as follows:

- Adverse
- Exclusive
- Open and notorious
- Continuous and uninterrupted
- For 10 years

While the requirements are basically the same for adverse possession and prescriptive easements, adverse possession is a right to the *title of the land* whereas, prescriptive easements are a right to an *easement*.

## VI. LOCATION OF EASEMENTS

### A. Express Easement

1. In an express easement, the location of the easement is usually specified in the grant. The legal description is used to plot the easement on a survey.

2. If the grant does not specifically state the location, the servient owner may select the location of the easement as long as it is reasonable in regard to the dominant owner's rights. If the servient owner fails to designate a location for the easement, the dominant owner may choose the location. In any case, if a specific area has been historically used, the area used would define the location of the easement.

3. If neither the servient nor the dominant estate designates the location of an easement, as in a "blanket" easement, a judge can decide. Courts will focus on the intent of the parties when deciding location. But in all cases, the easement must be reasonable to both parties.

4. An easement may be relocated by action of the parties, such a mistaken construction of the easement with consent, resulting in a easement by estoppel when the improvements are actually located.

### **B. Implied/Prescriptive Easement**

1. When there is an implied or prescriptive easement, the location and dimensions are fixed by the actual use of the servient estate.

## **VII. TERMINATING EASEMENTS**

Some easements may last forever, while other easements may be temporary. Below are various ways in which easements may be terminated.

### **A. Defeasible Easements**

A defeasance clause contemplates an easement that may terminate upon the occurrence of a given event. These clauses contemplate forfeiture. A defeasible easement may either (1) end automatically upon the happening of a stated event or (2) terminate upon an affirmative act of the servient estate. An example is a temporary construction easement.

### **B. Easements for the Life of a Person**

An easement may be designated to terminate upon the life of a specified person. This person may be the servient owner, the easement owner, or a third party.

### **C. Easements for a Term**

An easement may be created for a specified term. These temporary easements sometimes have a provision for renewal.

### **D. Easement by Necessity**

An easement by necessity is one which has been implied by the circumstances. Thus, when there is no longer a necessity, the easement is terminated.

**E. Abandonment**

Easements may be terminated by abandonment. Abandonment occurs when use of the easement ends coupled with the clear intent to never use the easement again. Intent may be inferred by the circumstances. *See Logan v. Mullis*, 686 S.W.2d 605, 606 (Tex. 1985).

**F. Termination by Prescription**

Easements may be terminated by the servient owner's adverse use of the easement area for the period of prescription.

**G. Merger**

When one party acquires both the dominant and servient estates in fee simple, the easement might merge into the fee of the servient estate and terminate. The issue is the intent of the owner. When there are two or more dominant estates and the party acquires only one dominant estate, the easement terminates as to that dominant estate only.

**H. Sale of Servient Estate to Bona Fide Purchaser Without Notice**

An easement may also be terminated when the servient owner conveys the servient estate to a purchaser who has neither actual nor constructive notice of the easement's existence prior to the sale. Actual notice may be found by either (1) written or oral statements or (2) by physical evidence existing on the property at the time of conveyance. Constructive notice may be found when the easement has been recorded in the county land records.

**VIII. EASEMENT FORMS**

Exhibits "B-1" and "B-2" are easement forms. Exhibit "B-1" is a "plain English" form for both an access and utility easement adapted from the State Bar of Texas Forms Manual. Exhibit "B-2" is a Pipeline Company's form showing the negotiated changes by owner's counsel. Exhibit "B-3" is the City of Houston's form easement. These documents are intended to be used for instructional purposes only.

**IX. DEDICATIONS**

**A. Dedication Defined**

A dedication is defined as the granting of a real property right by a private person or entity to the government, typically for a street, utility, park or school site, as part of and a condition of a real estate development. Required dedications are called "Exactions" and are typically required as part of the subdivision platting process. A plat is an offer of dedication, which dedication must be accepted by the government to become effective. Acceptance is not implied by the signature to and approval of a plat. Instead, acceptance may be by written document or actual use.

**B. Express Dedication**

A common law express dedication requires intent to dedicate by the owner of the property and acceptance of the dedication by the public or a governmental unit. A dedication creates rights *only* in the general public. A misconception sometimes arises because the same set of instruments may dedicate public easements and *also* create private easements. For example, the recording of a plat with lots is the basis for an implied private right of access to a lot, which right may be enforced by the lot owner. This is not based upon dedication law, but is an implied easement.

The most common express dedication of easements is for streets or roads. This is usually accomplished by deed or other instrument of conveyance, but an offer to dedicate need not be in writing. The offer, however, must be for the benefit of the public at large, not for a specific group of individuals. Acceptance of such offer may be express or implied. Such implication may be based on municipal improvement or repair of the dedicated area or when the public purchases lots in a platted subdivision containing streets that have been offered to the city. However, this acceptance must occur within a general time period. Also, filing a plat designating streets, parks or schools for dedication constitutes an offer to dedicate.

**C. Implied Dedication**

Easements benefiting the general public may be created by implied dedication. The landowner would retain the fee to the land in question subject to the public easement. Express and implied dedications differ with respect to the manner in which the landowner's intent is manifested. Express dedication involves a written or, occasionally, an oral expression of intent to dedicate. Implied dedication is based on acts or circumstances that indicate that the landowner intended to donate the property to the public. *See Lindner v. Hill*, 691, S.W.2d 590, 591 (Tex. 1985). However, Section 281.003 of Texas Transportation Code requires dedications to counties with populations of 50,000 or less to be express and in writing.

**D. Dedications vs. Easements**

Dedications are similar to easements in many ways, but dedications are for public use only while easements are for private use.

**E. Dedication Forms**

Attached as Exhibits "C-1" and "C-2" are dedication forms. Exhibit "C-1" is a right of way dedication deed. Exhibit "C-2" is the City of Houston plat dedication form required for all plats approved by the City.

## X. THE TEXAS SUPREME COURT ON EASEMENTS AND DEDICATIONS

### A. Marcus Cable Assoc., L.P. v. Krohn (2002)- Scope of Easement Purpose

The Krohn's predecessors granted a gross easement to Hill County Electric Cooperative. *Marcus Cable Assoc., L.P. v. Krohn*, 90 S.W.3d 697, 699 (Tex. 2002). The easement was for the purpose of constructing and maintaining an "electric transmission or distribution line or system." *Id.* In 1991, Hill County Electric entered into a joint use agreement with a predecessor of Marcus Cable, a cable TV provider. *Id.* This agreement permitted Marcus Cable to "furnish television antenna service" to area residents, but provided that Marcus Cable "shall be responsible for obtaining its own easements and rights of way." *Id.* Marcus Cable used the easement to install TV cable. See Exhibit "D-1".

The Krohns sued Marcus Cable alleging that it did not have a valid easement and had "placed its wires over their property without their knowledge or consent." *Id.* The issue before the Court was whether the cooperative's easement permitted Marcus Cable to attach cable television lines to Hill County Electric's utility poles without the Krohn's consent. *Id.* 699-700.

The Court summarized the common law of easements with the following statements:

- "A property owner's right to exclude others from his or her property is recognized as 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 700, quoting *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
- "A landowner may choose to relinquish a portion of the right to exclude by granting an easement, but such a relinquishment is limited in nature." *Id.*
- "Unlike a possessory interest in land, an easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes." *Id.*, citing *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 1.2 cmt. d.
- "While the common law recognizes that certain easements may be assigned or apportioned to a third party, the third party's use cannot exceed the rights expressly conveyed to the original easement holder." *Id.*, citing *Cantu v. Cent. Power & Light Co.*, 38 S.W.2d 876, 877 (Tex. Civ. App.-San Antonio 1931, writ ref'd)

This is an express easement, therefore, the Court looked to the easement's terms to decide whether Marcus Cable could install cable television lines. *Id.* The Court summarized the rules of interpretation of express easements as follows:

- "We apply basic principles of contract construction and interpretation when considering an express easement's terms." *Id.* at 700.
- "An easement 'should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the

circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created.” *Id.* at 701.

- The terms of the grant “should be given their plain, ordinary, and generally accepted meaning.” *Id.* at 701.
- “Contracting parties’ intentions, as expressed in the grant, determine the scope of the conveyed interest.” *Id.* at 700-01. Thus, if a particular purpose is not provided for in the grant, a “that purpose is not allowed.” *Id.* at 701.
- “It is not necessary for [the easement grantor] to make any reservation to protect his interests in the land, for what he does not convey, he still retains.” *Id.* at 701.
- “The manner, frequency, and intensity of an easement’s use may change over time to accommodate technological development.”

The Court held that the easement “encompasses only those technological developments that further the particular purpose for which the easement was granted.” *Id.* at 702. The easement only provided for electricity in its express grant. *Id.* at 704. Therefore, the easement language did not permit cable television lines to be strung across the Krohn’s land without their consent. *Id.* at 706.

Whether or not the addition of cable television wires increased the burden on the servient estate was irrelevant. *Id.* at 700. The threshold inquiry is “whether the grant’s terms authorize the proposed use.” *Id.* at 702. If a use does not serve the easement’s “express purpose, it becomes an unauthorized presence” on the land “whether or not it results in any noticeable burden to the servient estate.” *Id.* at 703.

**B. *DeWitt County Electric Cooperative, Inc. v. Parks (1999)- Scope of Easement Purpose***

DeWitt provided electrical service to the Parks’ rural property and held an express electric utility easement by the Parks’ across that rural property. 1 S.W.3d 96, 99 (Tex. 1999). The easement gave DeWitt the following rights with regard to trees located on or near the easement:

[DeWitt] shall have the right to clear the right of way of all obstructions, to cut and trim trees within the right of way or chemically treat trees or shrubbery with herbicides and to cut down from time to time all dead, weak, leaning, or dangerous trees that are tall enough to strike the wires in falling.

DeWitt employees removed two oak trees, claiming the right to keep the easement clear of all obstructions. The Parks claimed that the employees did not cut the trees to facilitate the provision of electric service, but instead that their motive was to “obtain firewood for a barbeque DeWitt held for its linesman.” See Exhibit “D-2”.

Both parties agreed the easement was unambiguous, but disagreed on the right to cut down the trees. *Id.* at 100. The easement agreement did not define “obstructions.” The Court

noted that undefined terms “be given its plain, ordinary, and generally accepted meaning.” *Id.* Therefore, construing the easement in its entirety, the Court determined “obstructions” includes trees that were growing on the easement. *Id.* Therefore, the Court held that DeWitt had the right to cut and trim trees that were within the easement. *Id.*

**C. Vrazel v. Skrabanek (1987)- Prescriptive Easement/ Easement by Estoppel**

An express located access easement ran from a county road through the center of property to provide access to lot 28. *Vrazel v. Skrabanek*, 725 S.W.2d 709, 710 (Tex. 1987). Fief purchased lot 28 and graded a dirt road, which he believed to be on the dedicated easement, from the county road to his lot. However, a surveyor testified that the specified location of easement was several feet east of the road. The reason for the mis-location was obstructions in the proper easement location which make constructing a road there to be difficult and expensive. In 1972, Fief sold the lot to Lanik. In 1976, Lanik leased lot 28 to Vrazel. In 1978, Skrabanek, the owner of the servient estate, changed the lock on the gate that Vrazel used to get to lot 28 to grow crops. His 1978 summer crop was lost, due to his inability to farm his land or to get his equipment. See Exhibit "D-3".

Vrazel argued that an easement by prescription existed over the road due to the continuous use of the road for over 50 years. However, the Court held that use by express or implied permission or license, no matter how long, “cannot ripen into an easement by prescription.” *Id.* Since Skrabanek allowed access to the improved road until 1978, Vrazel, Lanik, and Fief did not hold the easement adverse to Skrabanek. *Id.*

The Court then looked to the doctrine of estoppel in pais. Estoppel in pais may be “invoked against a party only when he has failed to do that which he has a duty to do.” *Id.* Skrabanek knew Vrazel’s easement was not possible to use due to various obstructions created by Skrabanek. *Id.* Skrabanek consented to Vrazel’s use of the road for some period of time. *Id.* Therefore, the Court held that the location of the easement was changed with the consent of both Skrabanek and Vrazel. Once consent occurred, Skrabanek was estopped to claim the designated easement to be the true one. *Id.*

**D. Logan v. Mullis (1985)- Abandonment of Easement**

Logan owned landlocked land. *Logan v. Mullis*, 686 S.W.2d 605, 606 (Tex. 1985). He purchased an express access easement from the Ashfords, the owners of adjoining property. The easement crossed the Ashford’s property to a public road. Logan then constructed a gravel road over the easement. A creek intersected the easement, so Logan built a culvert. See Exhibit "D-4".

Mullis purchased some land from the Ashfords, subject to the access easement. Mullis used the easement road. Years later, Logan acquired other highway access by purchasing the remainder of the Ashford property. Logan then sent a letter to the Mullis attempted to revoke the right to use the road and then removed the culvert from the Mullis property, destroyed part of the fence along the roadway, and piled dirt across the road to make it impassible.



The Court held that since the culvert was permanently attached to the realty, it was a fixture. Logan had no right to remove a fixture on the easement property.

Logan could abandon the easement, but that right did not vest him with “authority to destroy the roadway” and thereby prevent others from taking “advantage of the benefits to which they were legally entitled,” both by the easement grant and by their rights as owners of the servient estate. *Id.* Therefore, the status of the culvert as a permanent addition to the real estate was not altered simply because Logan decided to abandon the easement. *Id.* Once the culvert was affixed in the manner that it was, it became part of the fee estate. *Id.* Logan was therefore liable for its removal. *Id.*

**E. Lindner v. Hill (1985)- Implied Dedication**

Lindner built a public school on his property. *Lindner v. Hill*, 691, S.W.2d 590, 591 (Tex. 1985). To provide access, he built Lindner Road and opened it to public use. From that point forward, the Lindner family allowed the public to use Lindner Road at will. Also, the county maintained Lindner Road during Herman Lindner’s lifetime. In 1982, Lindner’s grandson sought a declaratory judgment that Lindner Road was private. *Id.* The issue before the Court was whether the road was impliedly dedicated. See Exhibit "D-5".

The elements of an implied dedication are:

- The landowner induced the belief that the landowner intended to offer the road to the public for its use;
- The public used of the road; and
- The public will be served by the dedication.

*Id.* at 592.

The Court found that Lindner had implied dedicated Lindner Road to public use and that once a road is dedicated to public use, that road remains subject to that use unless it is abandoned. *Id.* There was no evidence of abandonment as the public had not stopped using Lindner Road and the county had maintained the road during the period of dedication. *Id.* Therefore, Lindner Road remained subject to public use. [Note: Section 281.003 of Texas Transportation Code would have changed the outcome of this case had it been in effect at that time. This statute requires dedications to counties with populations of 50,000 or less to be express and in writing.]

**F. Drye v. Eagle Rock Ranch, Inc. (1963)- Implied Easement/Easement by Estoppel**

Drye and others purchased lots in the subdivided Eagle Rock Ranch. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 198 (Tex. 1963). The deeds contained no reference to easements or rights for recreation in the overall ranch. When the lot owners and club members were told that the jointly used club facilities were to close, Drye sought a declaratory judgment that a 25 year easement for recreation existed across the entire ranch. The issue before the Court was the lot owner’s rights, specifically, whether they received rights for recreation in the entire ranch by

implied easements appurtenant or by estoppel. *Id.* at 198. See Exhibit "D-6".

Implied easements:

- extend “no further than to servitudes of a permanent nature well known or plainly apparent evidently necessary to the convenient enjoyment of the property to which they belong and not for the purpose of pleasure.”
- must have a dominant and a servient estate.
- attach to “the land of the dominant estate and not merely for the convenience of the owner thereof independent of the use of his land.”
- “subject [the servient estate] to the use of the dominant estate to the extent of the easement granted or reserved.”

*Id.* at 207

Implied easements must be:

- (1) apparent,
- (2) continuously used, and
- (3) necessary to the use of the dominant estate.

*Id.* at 207-208.

The Court found that there had been no continuous, apparent, obvious, or permanent use of the portion of the ranch for the necessary use of another portion thereof. *Id.* at 209. Therefore, there was no an implied easement appurtenant. *Id.*

The Court then looked to the doctrine of estoppel in pais.

Easements by estoppel:

- a land owner may be estopped to deny the existence of an “easement by making representations which have been acted upon by a purchaser to his detriment.” *Id.*
- apply if a seller allows a purchaser to expend money on the servient estate. *Id.* at 210. (none made here)
- apply to establish restrictions in subdivisions as to the type of structure to be built and its location on the land. *Id.* (Here, the lot owners want nothing to be done to land)

The Court noted that the rights sought here were indefinite. *Id.* at 211. The Court denied the easement by estoppel, holding that to impose indefinite servitudes “for...recreation on so large an area would tend to fetter estates, retard building and improvements thereon, and hinder the use of the land. *Id.* at 212.

**EXHIBIT "A"**

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# Easements in Texas

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Technical Report 422

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# Easements in Texas

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## Summary

Easements play a vital role in everyone's life. People daily traverse easements either granted, dedicated or condemned for public rights-of-way. Also, people constantly use energy transported along pipeline and utility easements. In rural areas, many tracts of land not served by public roadways would be rendered practically valueless if it were not for private easements crossing neighboring properties.

An easement is defined as a right, privilege or advantage in real property, existing distinct from the ownership of the land. In other words, easements consist of an interest (or estate) in real property that does not constitute full ownership. Most commonly, an easement entails the right of a person (or the public) to use the land of another in a certain manner.

Easements should not be confused with licenses. A license is merely permission given to an individual to do some act or acts on the land of another. It does not give rise to an interest in land as do easements. Licenses need not be in writing to be effective and generally are revocable at any time. Tickets to entertainment or sporting events serve as a good example of licenses.

This publication explains two broad categories of easements — private and public. Private easements are those in which the enjoyment and use are restricted to one or a few individuals. Public easements are those in which the rights of enjoyment and use are vested in the public generally or in an entire community.

The publication describes the various types of private and public easements, how they are created and how they are terminated.

## Private Easements in Texas

Mark and John had been farming and ranching in a particular community for more than 50 years. Several years ago Mark purchased some grazing land in a remote section of the county. There was no public access. However, John orally had permitted Mark to cross part of his property in order to reach the land. The agreement was never written nor recorded.

Recently, John died and his heirs sold the land to some people new to the area. The buyers were not told of the oral agreement and threatened to bring legal action to terminate Mark's passage over their land. Without the easement, Mark must curtail his cattle operations.

This is just one example of the importance of private easements. As will be demonstrated, unless the creation of a private easement is carefully documented and recorded, its legality is questionable.

### In Gross

Private easements may be divided into two groups depending on the possessing entity. If an individual or business owns the easement, it is said to be an easement *in gross*. Pipeline easements are in gross. As a general rule, an easement in gross is a personal right that cannot be assigned or otherwise transmitted. The easement thus

terminates upon death of the individual owner or the demise of the business. There is authority to the contrary where the easement in gross is (1) placed in writing and (2) explicitly made assignable by the instrument creating it.

The language making an easement in gross transferable generally reads: "The terms, conditions and provisions of this contract shall extend to and be binding upon the grantee, his heirs, successors and assigns."

### Appurtenant

The other type of private easement, known as an *appurtenant easement*, attaches to or is incident to a particular tract of land, not to a particular individual or business. Appurtenant easements require two different estates (or tenements) for their existence—a dominant estate and a servient estate. The owner of the dominant tenement has the right or privilege to use an easement across the land of the servient tenement. The servient tenement is burdened by the easement.

Appurtenant easements may be classified further as either affirmative or negative. An affirmative easement gives the dominant tenement the right to actively use the easement on the servient tenement's land. A negative easement restricts the use of the servient tenement's land in favor of the dominant tenement.

An example will clarify these two types of easements. Suppose landowner "A" wants to build a dam that will back water across landowner "B's" property. To keep "B" from suing, "A" seeks an affirmative easement from "B" allowing "A" to flood a portion of "B's" land. If "A" is successful, "A's" land will be the dominant tenement, and "B's" land will be the servient tenement. "B's" land will be burdened by the standing water.

Suppose further that "B" becomes dependent upon the supply of water provided by "A's" dam. "B" wants to invest in some livestock but needs the assurance of a permanent source of water. Here "B" will seek a negative easement from A. The negative easement would restrict A from destroying the dam or draining the water. These are rights "A" would have except for the negative easement.

The only duty an easement imposes on the owner of the servient estate is that of a negative nature. The servient owner may not interfere with the use and enjoyment of the dominant estate's easement across the land. Any repairs or works necessary to effectuate the use and enjoyment of the easement must be made by the dominant owner.

Appurtenant easements are easily transferable. A conveyance of the dominant tenement automatically includes the easement across the servient tenement's land. A transfer of the servient estate will include the easement burdening it if the purchaser has actual or constructive notice of the easement's existence. If the dominant tenement purchases the servient tenement's land, the easement terminates. One cannot own an easement across his or her property.

## Creation of Private Easements

An easement may be created by various means. Each has its own distinct requirements. Because easements represent interests in land, they generally require some written, tangible evidence prescribed by Section 5.021 of the Texas Property Code for their creation. The written requirements may be waived where the person claiming the easement has (1) paid consideration for the easement in money or services, (2) began using the easement and (3) made valuable and permanent improvements to the easement.

The written document creating an easement need not be recorded to be effective. However, to give constructive notice to subsequent purchasers as described in Section 13.002 of the Texas Property Code, easements normally are recorded.

An easement may be created in three ways *without a written document*. They are (1) by implication, (2) by estoppel and (3) by prescription. The party claiming such an easement may have to resort to a judicial process known as a declaratory judgment to claim it.

### Easements by Implication

Implied easements may be created one of three ways: (1) by reservation, (2) by grant or (3) by way of necessity. Each is distinctive.

**Easements by implied reservation or grant.** The creation of an implied easement by either reservation or grant requires the prior existence and use of the easement. Furthermore, the prior use must have been apparent, permanent, continuous and necessary for the enjoyment of the property granted. In each implied easement case, the court views the implied easement as merely an oversight on the part of the grantor and grantee at the time of the conveyance.

For instance, suppose "A" owns a 40-acre tract of land with a public road running along its southern boundary. "A's" house sits along the northern part of the 40-acre tract. It is served by a private road running north and south. A decides to sell the southern 20 acres to "B." However, A forgets to reserve a right-of-way easement across the 20 acres to access the home.

This is a classical example of when the court most likely would approve an *implied reservation* for "A." The easement must have been apparent, permanent and continuously used at the time of the grant. The only other requisite is that there are no other available access routes this route is necessary.

An *implied grant* of an easement can be illustrated by the same set of facts. Suppose "A" decided to sell the northern 20 acres. "A" retains title and possession to the southern 20 acres along the public roadway. If A does not grant an easement to "B" across the southern 20 acres when title is conveyed, the courts may approve an easement by *implied grant*.

The implied grant would require the same elements as the implied reservation. In other words, the easement must be apparent, permanent, continuous and necessary for "B's" use and enjoyment of the property.

There is some case authority that holds the courts will recognize an implied grant more readily than an implied reservation. The rule is based on the proposition that the law will imply an easement in favor of the grantee more readily than one in favor of the grantor. The proposition assumes that if the grantor intended to reserve any right over the property granted, he or she should have expressly done so in the deed. However, not all cases are uniform on this point.

**Easements by way of necessity.** Finally, an implied easement may arise by way of necessity. This easement differs primarily from the other two implied easements in that no prior existence or use of the easement is required. As the name implies, an easement of this nature arises only where routes of ingress and egress are completely nonexistent.

For an implied easement by way of necessity to arise, the following three conditions must be fulfilled. First, there must have been unity of ownership of the dominant and servient estates at the time of conveyance or at some prior time. Second, the easement must be absolutely necessary for the grantee to enter and leave the property. Third, the necessity for the easement existed at the time of the severance of the dominant and servient estates.

As to the issue of unity of ownership, case law requires that sometime in the chain of title after the land



was patented, the tract needing the easement and the tract preventing the easement must have been under common ownership. (A patent occurs when the sovereign conveys ownership to a private individual.) Common ownership of the two tracts by the sovereign does not meet the test.

Absolute necessity requires that no other passage-way to and from the conveyed property can exist. If the grantee can use another way either at the time of conveyance or thereafter, the right-of-way by necessity cannot be claimed. The mere showing that it would be more expensive or less convenient to obtain another access route is not sufficient to give rise to an implied easement by necessity.

The issue of what constitutes absolute necessity has raised some interesting modern-day issues. For instance, any piece of property is accessible by air via a helicopter or parachute. Thus, no tract of land is ever *absolutely* inaccessible. Yet no case has ever been found in which an easement was denied because of its accessibility solely by air.

Similarly, if a tract of land is accessible only by navigable water, is it absolutely landlocked? Only ten cases have denied an easement because of such accessibility. Of these, only two were decided after 1925; five were decided prior to 1900. Eight cases recognize an easement despite access by water. All but one of these cases were decided after 1927. Although none were Texas cases, the trend seems to be toward a more relaxed standard of necessity.

Just as the grantee can acquire an implied easement by way of necessity, so can the grantor. Should the grantor retain a tract with no access, the law allows the grantor to claim an implied easement by way of necessity. The servient estate in the hands of the grantee under the conveyance is charged with the burden.

Because an easement by necessity requires no prior use, the location of the easement may present problems. The case law holds that it should be placed in a "convenient way" across the surrounding land. If a particular route is used by common consent, that fixes the location. Thereafter, the location can not change, except with the consent of both parties.

If the location can not be derived by common consent, the selection belongs to the servient tenement (the one crossed), giving due regards to the dominant owner's rights. If the servient tenement does not select the route, the right rests with the dominant tenement. Again, once selected, the route can not change except with common consent.

### **Statutory Easement for Landlocked Property**

The law has not always been consistent regarding landlocked property in Texas. Prior to 1963, any person having land without an easement could statutorily condemn a private right-of-way to and from the property according to the Texas Revised Statutes Article 1377b(2). However, in 1963, the Texas Supreme Court held this statute contrary to Article 1, Section 17 of the Texas

Constitution because it lacked public purpose. (See *Estate of Waggoner v. Cleghorn*, 378 S.W. 2d 47.)

The second statutory attempt also failed (Texas Revised Statutes, Article 6711). It authorized the commissioners court to declare and open a public highway, at public expense, across lands of nonconsenting owners. The action could be taken upon the sworn application of one or more landlocked landowners.

This statute also lacked the necessary public purpose requirement. It was declared unconstitutional in 1962 by the Texas Supreme Court (*Maher v. Lasater*, 354 S.W. 2d 923.) The high court, in reversing a prior decision, wrote, "In deciding that question (case) we assumed, but did not hold, that it is of public importance that every person *residing on land* be provided access to and from his land so that he may enjoy the privileges and discharge the duties of a citizen." The court further stated, "The legislature may not authorize that which the constitution prohibits."

Effective Sept. 1, 1995, the Texas Legislature passed a new statute that mirrors the former Article 6711. The new law is found in Subchapter B, Chapter 251 of the Texas Transportation Code.

Again, on a sworn application, a landlocked property owner may request that a road be condemned by the commissioners court. The procedure is outlined in the statute. Only time will tell whether the new law can withstand the constitutional test.

For more information, see "Don't Fence Me In," publication 1130.

### **Easements by Estoppel**

Another way an easement may be created without written expression is by estoppel. Here the easement arises from the acts and/or oral expressions of the grantor that indicates the existence, creation or conveyance of an easement. Should the grantee rely on such demonstrations and accept the grantor's offer and be damaged thereby, the grantor will be estopped (or legally prevented) from denying the existence of the easement.

For example, suppose "A" wants to induce a buyer into purchasing a lot in an undeveloped subdivision. The prospect is shown a platted map with a roadway indicating a convenient access route to and from the lot. If the prospect should purchase the lot, "A" would be legally precluded from asserting the nonexistence of the easement.

However, an easement by estoppel based on silence can be established only when the landowner has a duty to speak. If a person (or family) has a revocable right (or permission) to cross another's land, the landowner has no duty to advise subsequent generations that the easement is revocable at will. Therefore, the user cannot complain when the easement is unilaterally revoked. A claim of an easement by estoppel by silence will not apply.

### **Easements by Prescription**

The last way an unexpressed easement may be created is by way of prescription—sometimes referred to

as by way of limitations. Prescriptive easements arise in much the same manner as title accrues by adverse possession. The requirements basically are the same. The only difference is that adverse possession ripens into title to the land, whereas a prescriptive right matures into an easement.

There are five basic requirements for a prescriptive easement. The absence of any one is fatal to the creation of the easement. First, the use of the land must be adverse to the owner of the land. In other words, the use must begin and continue without the actual or implied permission of the landowner.

Second, the use must be open and notorious. This means the use must be asserted in such a manner as to serve notice of the claim not only to the landowner but all persons in the immediate area. Secretive use is insufficient. A clear and positive use must be evident. An exception does exist for the latter requirement. The courts have substituted actual knowledge and acquiescence of the owner of the servient tenement in the place of open and notorious use. Acquiescence may be implied from the circumstances.

Third, the use must be exclusive. The use of an easement common with others or even with the owner is insufficient to create a prescriptive right. This rule, however, is a rule of evidence raising a rebuttable presumption that permission was given the claimant when both the owner and claimant use the easement concurrently. The rule does not apply where concurrent use by the owner and claimant occur after the prescriptive period has matured (i.e., the claimant has used the easement for ten years).

Fourth, the use must be in the same place and within definite lines. The practice of passing over land in different places does not establish a prescriptive right except where the divergences are only slight. Also, the travel over unenclosed and unimproved land will not entitle the traveler to a prescriptive right unless the way is definitely marked.

Fifth, the use must be continuous and uninterrupted. Thus, the assertion of the enjoyment of the land cannot mature into a prescriptive right based on occasional passage. Likewise, any time the adverse usage is interrupted, the running of the prescriptive period is annihilated and must begin anew. It has been held that placing a fence across a road for a week is a sufficient interruption.

In Texas, the three-, five-, ten- and 25-year statutes dealing with adverse possession have been held inapplicable to the creation of prescriptive easements. The courts, however, judicially have placed the required period of continuous, uninterrupted adverse use for prescriptive easements at ten years.

The courts have placed certain limitations and stipulations as to when the prescriptive period begins. For example, the period will not run if the owner of the servient estate is suffering under a legal disability such as infancy or insanity or is the ward of an estate when the adverse use begins. The period will run once the

disability is removed. An intervening disability occurring after the period has started will not suspend (or toll) the running of the prescriptive period.

The following example illustrates the rules. Assume "A" inherits land. "A" is 16 years of age. The same year "B" begins crossing the land without "A's" permission. Because "A" is a minor, the prescriptive period will not commence. However, once "A" reaches the legal age of 18, the prescriptive period will start to run.

In another example, suppose "A" inherits the land when "A" is 21 years of age, the same year "B" begins crossing the land without "A's" permission. Five years later "A" is adjudicated insane. Here the prescriptive period will continue to run. Intervening disabilities will not suspend the running of the ten-year period.

The courts have, in limited instances, applied the doctrine of tacking in cases involving appurtenant prescriptive easements. Tacking entails adding the periods of consecutive adverse users together in determining the necessary ten-year period. However, certain qualifications are necessary. (1) There must be no interruptions in the use between users. (2) The users must be successive owners of the dominant tenement. (3) The document conveying the dominant estate must contain the following language: "together with all and singular the rights and appurtenances thereto in anywise belonging to the said grantees."

## Termination of Private Easements

Private easements may be extinguished in as many, or more, ways than they can be created. In fact, the manner in which some easements arise determines directly the means by which they can be terminated. Without going into any great detail, the following is a brief synopsis of the various ways easements may be dissolved.

### Transfer of Servient Estate Without Notice to Buyer

Regardless of the method of creation, the most universal means of terminating an easement involves the conveyance of the servient estate to a purchaser who has neither actual nor constructive notice of the easement's existence prior to receipt of title.

Actual notice may be imparted in one of two ways: (1) by oral or written representations or (2) by physical evidence existing on the property at the time of conveyance. For instance, purchasers are charged with knowledge of an easement where a visible inspection would reveal sufficient evidence to cause a person to question the easement's existence. Where material objects and structures such as roads, wires, poles, substations and similar items are located on or connected to the property, the inference prevails that such notice has been imparted.

Constructive notice may be given by having the easement recorded in the county land records in compliance with the Texas Property Code, Section 13.002. If so, the purchaser is charged with such knowledge regardless

of whether or not the land records are examined. Thus, prospective purchasers should both visibly inspect the property and have the title examined to determine the existence of easements.

Effective Oct. 1, 1991, Procedural Rule P-37 was adopted by the Texas State Board of Insurance regarding guaranteeing the right of access in a title insurance policy. All title policies issued after Oct. 1, 1991, ensure the right of access unless a specific exception is added. Neither the width of the access nor access to a public thoroughfare is insured.

Easements arising without written expression have inherent problems whenever the servient estate is transferred. Because there is no written document to record, the only way knowledge can be given to the prospective buyer is by actual notice. Consequently, all easements should be placed in writing and recorded to preserve their existence.

For instance, consider the previous example involving Mark and John. Mark probably will lose the easement because it was never recorded. The new purchasers probably took title to the servient estate without actual or constructive knowledge of the easement. Even if the purchasers had actual knowledge, the easement could not survive Mark's death. Oral easements in gross are nontransferable as mentioned earlier.

## Operation of Law

Easements may be extinguished by operation of law. The foreclosure on delinquent promissory notes secured by a mortgage or deed of trust on real property will terminate all easements created subsequent to the mortgage being placed on the land. The first in time prevails in such an instance.

Likewise, condemnation will terminate all existing easements across the condemned land. The rights of the public in condemned property are paramount to an individual's right.

## Abandonment

Easements may be extinguished by abandonment. Abandonment takes place whenever cessation of use occurs accompanied by a clear intent never to use the easement again. Mere nonuse does not constitute abandonment. However, the intent may be inferred from the circumstances if such evidence is clear and definite.

## Failure of Condition

Noncompliance by the grantee with a condition of the grant is another way an easement may terminate. **However, the condition must be explicitly coupled with a right of forfeiture.** For example, an easement will terminate when it is conditioned on the use by the grantee within a stipulated period. Also, the failure of the grantee to pay half of the easement's upkeep is another example of a conditional easement.

## Merger

As mentioned earlier, the merger of the dominant and servient tenements under a common owner terminates all appurtenant easements between the two estates.

## Expiration of Designated Term

The expiration of the designated number of years in a grant will extinguish a term easement. For example, an easement granted for a term of 15 years expires automatically at the end of the designated 15-year period.

## Adverse Possession

Adverse possession of an easement by the servient tenement for ten continuous years will terminate an easement. For instance, suppose "A" grants "B" a right-of-way easement in 1950. The easement leads to some property recently acquired by "B." "B" intends to live on the property following retirement. In 1970, "B" retires. However, in the meantime, "A" erected a fence across the easement and also a barn and catch pens. Other portions of the easement were plowed and placed in cultivation.

In such an instance, the easement granted in 1950 may have terminated if it has been "actually and visibly appropriated, commenced and continued under a claim of right inconsistent with and hostile to the claim of 'B'," as described in the Texas Civil Practice and Remedies Code, Section 16.026. The character of the claim must indicate unmistakably an assertion of exclusive ownership by "A" for ten consecutive years.

## Expiration of Purposes

The removal of the purpose or reason for creating an easement will terminate it. For example, an easement granted explicitly for the construction of a reservoir will terminate when the reservoir is completed. An easement granted to serve a particular oil well will expire when the well ceases production.

## Misuse

The misuse of an easement generally will not cause the easement's termination. Also, the use of an easement for an unauthorized purpose or in an excessive manner is not sufficient to cause a forfeiture. However, such abuses do give rise to damages on the part of the servient tenement. Misuse can result in termination when the misuse creates an impossibility to use the easement for the purpose originally granted.

## Change of Condition

A change in condition also may extinguish certain easements. For example, an *implied easement by way of necessity* is only a temporary right. It continues only so long as the necessity exists. Should the necessity dissipate, so will the easement.

## Grant of Release

Lastly, an easement can terminate by a release being granted by the owner. However, the release should be placed in writing and recorded in the county land records. If not, serious title problems could result in the future.

In fact, the latter point cannot be overemphasized. Regardless of how an easement is extinguished, a carefully written release should be prepared, signed by the party granting the release and placed in the county land records. Otherwise, subsequent conflicts may arise disputing the easement's continued existence.

## Public Easements in Texas

The Philmores owned a residence approximately one block from an elementary school in a heavily populated district of a city. There were no sidewalks in the neighborhood. A heavy concentration of children traversed the area twice daily going to and coming from school.

To help relieve some of the danger of having the children travel on the side of the street, the Philmores constructed a sidewalk on their property. The children began using the sidewalk, but the Philmores failed to anticipate the adverse effects. The children caused the family dog to bark, the paper was generally missing each morning and minor acts of vandalism occurred on their property.

The Philmores finally decided to dismantle the sidewalk. However, they were served with a restraining order by the city attorney's office. The city contended that the Philmores had granted the public an irrevocable easement across the land.

Public easements, as mentioned earlier, are those easements to which the right of enjoyment and use are vested in the public generally or in an entire community. Aside from purchasing, there are three ways public easements may be created. Each method is unique and has different requirements. The three ways public easements may arise without purchasing are: (1) by dedication, (2) by prescription and (3) by condemnation.

Once created, the uses for which public right-of-way easements can be used have been construed broadly. An easement for city streets includes the right for the municipality to lay sewer, gas and water lines. *West Texas Utilities Co. v. City of Baird*, 286 S.W. 2d 185. An easement for a state highway includes the right for a municipality to lay a gas pipeline within it. *Grimes v. Corpus Christi Transmission Co.*, 829 S.W. 2d 335.

## Easements by Dedication

Dedication is perhaps the most common means by which public easements arise. Dedication is defined as a method of creating or transferring an interest in land, consisting of an easement only and not title. It is the act of devoting or giving property, or an interest therein, for some proper object. It is a voluntary transfer that does not require consideration.

There are two distinct types of dedication—statutory and common law. Both types require an intent on the part of the owner to dedicate (or set apart) the easement and a reciprocal acceptance of the easement by the public generally, by the governing body of a municipality or by the county.

## Statutory Dedication

Statutory dedication is the simpler of the two types of dedication to explain. As the name implies, statutory dedication must be carried out in compliance with all relevant statutes. Different procedures are required depending on the location of the land. If the land is located in a municipality or a municipality's extraterritorial jurisdiction, Chapter 212 of the Texas Local Government Code governs. If the land is located in a rural area, yet outside the extraterritorial jurisdiction of a municipality, Chapter 232 of the Texas Local Government code controls. Finally, if the dedication occurs in counties having a population of 50,000 or less, Section 281.001 *et seq.* of the Texas Transportation Code governs (and limits) the procedure.

*Note:* Both Chapters 212 and 232 deal with subdivision plats. The dedication of streets and alleys within the subdivisions is the context in which the statutes are addressed here.

**Chapter 212.** Section 212.001 *et seq.* of the Texas Government Code requires the following:

- The platted land must be situated within the limits or in the extraterritorial jurisdiction of a municipality.
- The owner of the land must intend to lay out a subdivision, an addition to the municipality, suburban lots, building lots or any lot, street, alley, park or some other portion for public use.
- The owner must accurately describe the proposed subdivision or addition by metes and bounds in a plat. The plat must contain precise dimensions of all the proposed streets, alleys, squares, parks or other portions intended to be dedicated to public use.
- The plat must be acknowledged by the owner and filed for approval with the municipal planning commission (if there is one) or with the governing body of the municipality. Section 212.007 of the Government Code describes the procedure for approving a plat of land lying in the extraterritorial jurisdiction of more than one municipality.
- The municipal authority responsible for approving plats must act within 30 days after filing, otherwise the plat shall be deemed approved by inaction. If the plat must be approved by the governing body of the municipality in addition to the planning commission, the governing body shall act on the plat within 30 days of its approval (by whatever means) by the planning commission.
- Once approved, the plat must be filed of record in the county in which the land lies.

The plat manifests the owner's intent to give appropriate easement to the public in the proposed streets, alleys

and public areas. The approval of the plat, however, does not indicate the municipality's acceptance of the easements. According to the Texas Local Government Code, Section 212.011, "The approval of a plat is not considered an acceptance of any proposed dedication and does not impose on the municipality any duty regarding the maintenance or improvement of any dedicated parts until the appropriate municipal authorities make an actual appropriation of the dedicated parts by entry, use, or improvement."

**Chapter 232.** Section 232.001 *et seq.* of the Texas Local Government Code applies to platted land located outside the limits of a municipality or a municipality's extraterritorial jurisdiction. Whenever the owner of such land divides the tract into two or more parts for a subdivision, a plat must be prepared and recorded. Before the plat can be recorded, it must:

- describe the subdivision by metes and bounds;
- locate the subdivision with respect to an original corner of the original survey of which it is a part;
- state the dimensions of the subdivision and of each lot, street, alley, square, park, or other part of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the street, alley, square, park, or other party;
- be acknowledged by the owner or the proprietor, or by the owner's or proprietor's agent; and
- be filed with the commissioners court of the county for approval by an order entered in the minutes.

Once approved, the plat must be filed with the county clerk for recording according to the Texas Property Code, Section 12.002.

*Note:* Before approving the plat, the commissioners court may:

- require a right-of-way on a street or road that functions as a main artery in a subdivision, of a width of not less than 50 feet or more than 100 feet;
- require a right-of-way on any other street or road in a subdivision of not less than 40 feet or more than 70 feet;
- require that the shoulder-to-shoulder width on collectors or main arteries within the right-of-way be not less than 32 feet or more than 56 feet, and that the shoulder-to-shoulder width on any other street or road be not less than 25 feet or more than 35 feet;
- adopt, based on the amount and kind of travel over each street or road in a subdivision, reasonable specifications relating to the construction of each street or road;
- adopt reasonable specifications to provide adequate drainage for each street or road in a subdivision in accordance with standard engineering practices;

- require that each purchase made between a subdivider and a purchaser of land in the subdivision contain a statement describing the extent to which water will be made available to the subdivision and, if it will be made available, how and when; and
- require that the owner of the tract to be subdivided execute a good and sufficient bond in the manner provided by law.

There is no provision regarding how soon the commissioners court must act on the plat after submission. Neither is there a provision providing acceptance of the plat by inaction.

**Section 281.001 et seq. of Transportation Code.**

Unlike Chapters 212 and 232, Chapter 281 of the Transportation Code requires no formal platting for the dedication of private roads. The chapter applies only to dedications occurring after 1980 in counties having a population of 50,000 or less.

Basically, the chapter restricts the ways these counties may acquire a public interest in private roads to:

- purchase,
- condemn,
- dedicate and
- a judgment of adverse possession (sometimes referred to as a prescriptive easement, discussed later.)

The chapter specifies how the dedication may and may not occur. The dedication must be an explicit voluntary grant of the private roadway for public purposes communicated to the commissioners court in writing in the county where the property is located. A dedication conveyed orally or by overt acts is invalid.

In turn, the commissioners court may accept the dedication and assert a public interest in the road by:

- entering a resolution in the commissioners court records recognizing the interest acquired in the roadway, the circumstances by which it was acquired, and the effective date of the acquisition; and
- giving written notice of the acceptance to the owner of the land from which the road was acquired in person or by registered mail.

Section 281.004 prohibits counties from acquiring a public interest in a private road in certain circumstances. It states that counties may never claim adverse possession of a private road when the county commissioners maintain a private road with:

- the owner's permission or
- public funds when the public has no recorded interest in the roadway.

### Common Law Dedication

All common law dedications require the following four elements: (1) a person competent to dedicate, (2) a public purpose served by the dedication, (3) an offer or tender of the dedication and (4) an acceptance of the

offer or tender.

As to the element of capacity, any person having the capacity to make a grant of land has the capacity to make a valid dedication. However, in addition to having the capacity to dedicate, the person also must own an unqualified and undivided fee title to the land. A co-tenant cannot make a valid dedication without the joinder of the other co-tenants.

As to the element of public purpose, the dedication must be for a use beneficial to the public and not prohibited by statute. If the easement is reserved for a specific group, then there is no public purpose involved and no dedication of a public easement can occur.

As to the element of the offer or tender, it must be based on a manifest desire of the landowner to devote the land to a public use. If there is no intent, there can be no offer.

The intent to dedicate must be based on a clear, unequivocal act or declaration of the landowner. A secret intent is insufficient. The courts will presume an intent in very limited situations.

The intent also must be unqualified. The intent must be such that the public has an irrevocable right to enjoy the property, independent of any whim of the landowner and beyond recall. The intent must be to divest the owner of the interest immediately and not at some future time. However, it is not necessary that the owner intend immediate use by the public.

The way the offer is communicated to the public determines whether or not it constitutes an express or implied common law dedication. Whichever way is used, both the manifestation and communication must be so clear and convincing that a reasonable person would be induced to act in reliance thereon.

### **Express Dedication**

If the dedication is expressed, it may be declared either orally or placed in writing. Perhaps the oral declaration is the weaker of the two. It has been held that oral declarations may be, in and of themselves, sufficient to constitute an offer of dedication. However, as a general rule, oral declarations serve only to explain the conduct of the owner.

For instance, in one case, a developer made casual comments about his intent to place streets and alleys at a certain place within a proposed subdivision. Later, when the developer began selling the lots, he did so by making references to a map where the suggested streets and alleys were omitted. Here the courts maintained the references to the map negated the prior casual comments.

Written expressions of intent to dedicate are more common than oral representations. Generally, the written expression of intent will appear either in a dedicatory deed or incorporated in a proposed plat. If the intent is embodied in a dedicatory deed, the deed may name either a city or the public generally as the grantee. The mere fact the deed does not meet the requirements of conveyance set forth in Sections 5.021 and 5.022 of

the Texas Property Code is irrelevant because a written dedication may be shown by a simple contract.

Plat designation is the most common form of a written dedication. It can occur when the owner lays out a town site or an addition to a town or city on a plat and delineates the proposed streets, parks or other public places. It also can occur when any part of a town site or addition is sold by reference to a plat containing designated public (not private) areas.

If the dedication takes the form of a map or plat, it generally is necessary to record or file the plat to establish effective communication of the offer to the public. If recorded, it constitutes an unequivocal offer of dedication.

*Note:* As long as the plat or map has not been recorded, a common law dedication is possible. If, however, the plat or map is recorded, it must be done in compliance with Chapters 212 or 232 of the Texas Local Government Code as mentioned earlier. Such recording constitutes a statutory dedication, not a common law one. Most dedications in Texas via a map or plat are statutory.

Effective communication can be established without recording by placing the plat in the possession of public authorities so that it is readily accessible to the general public. The exhibition of the plat to a few individuals may create a private easement by estoppel as mentioned earlier but not a public easement.

### **Implied Dedication**

Implied common law dedications may be communicated to the public in two ways. One is by the affirmative acts of the owner, the other by inactions or acquiescence on the owner's part.

If affirmative acts are the means of communication, the acts must amount to an invitation or encouragement to the public to use the land. For instance, opening property to public use or even fencing off part of the land and making repairs thereon convenient for the public's use have been held sufficient affirmative acts to give rise to an implied dedication.

Inactions or acquiescence sufficient to give rise to an implied dedication is more difficult to ascertain. However, by disregarding certain private interests for a considerable length of time, a landowner may have dedicated land for public use by implication. Allowing the public to use a strip of land without objections serves as a good example. The landowner may not deny the implications.

The duration of the owner's inactions or acquiescence is important only when the attitude or intent cannot be clearly ascertained. For example, where a landowner silently permits the public authorities to grade, repair or otherwise improve a private road, such inactions have been held sufficient evidence to establish an implied intent to dedicate but not in counties where Article 6812(h) applies.

When the attitude or intent cannot be established, the period of the use then becomes more important. The courts will presume an intent if the period of inactions

extends for several years. Generally a ten-year period is used, but 50-, 40-, 35-, 20-, eight- and six-year periods also have been adhered to by the courts.

Before indulging in any presumptions, the courts must examine the existing evidence as to the owner's attitude and the general character of the land used by the public. For instance, if permission was given to cross the land, the owner must have intended it to be permanent, not temporary, and it must have extended to the public generally and not to select individuals.

Likewise, mere use by the public is not in and of itself sufficient to disclose an intent to dedicate. This fact is particularly true when the public use does not interfere with the owner's use of the property. Thus, the owner has no occasion to declare overtly his or her intentions in the matter. No intention to dedicate can be ascertained when the use is promiscuous, occasional or undefined. No public easement can arise when the use is confined to a particular class of persons as distinguished from the public generally.

Finally, to complete the dedication, the offer or tender of the use must be accepted by or on behalf of the public. Acceptance must take place within a reasonable time after the tender but before it is revoked.

Also, the offer may lapse by the expiration of a designated period imposed by the owner. Revocation also can occur by the owner's devoting the property to some inconsistent use or by vacating a filed plat in accordance with Chapters 212 or 232 of the Texas Local Government Code as will be discussed later.

Any public action that shows an unequivocal intent to appropriate the property to the purpose for which it was set aside is sufficient to constitute a binding acceptance. Once accepted, the dedication becomes immediately operative. The owner becomes divested of all rights in the property consistent with the purpose to which the easement was dedicated.

The acceptance may be either formal or informal. In most instances, an informal acceptance transpires. The following are examples of cases in which informal acceptance occurred: (1) establishing roads, streets and alleys by a city in conformity to the plat filed by the owner, (2) purchasing land by individuals relying on the existence of a valid dedication, (3) taking possession of, or assuming control over, the dedicated land and improving or repairing it, (4) failing to assess property taxes against the dedicated land and (5) using the dedicated land by the public.

The purchasing of land by individuals relying on the existence of a valid dedication (example number 2 above) needs further amplification as a result of its unique interpretation in Texas. Under Texas case law, it is possible for a private easement and a public easement to exist simultaneously on the same roadway or thoroughfare. Here is how it can happen.

As mentioned earlier under private easements, an easement by estoppel may arise when a purchaser relies on a map or plat for the placement of easements. If the same map or plat is filed in the county land

records, and if the city or county accepts the dedication, a public easement arises simultaneously along the same route. Each easement is independent of the other. Each easement has separately vested rights; each must terminate independently.

### **Easements by Prescription**

The second way public easements may be created is by prescription. There appears to be only one major difference between the requirements for creating a public prescriptive easement and a private prescriptive easement. The difference is that a private easement requires one or a few individuals to use the land continuously for ten years, while a public easement requires a similar use by the public generally.

All the other requirements remain the same. The use of the land must be hostile and adverse to the owner of the land. The use must be open and notorious. The use must be exclusive. Finally, the use must be continuous and uninterrupted for ten years.

There is a unique statutory twist dealing with public prescriptive easements. According to Sections 16.030 and 16.061 of the Texas Civil Practice and Remedies Code, ". . . no person may acquire by adverse possession any right or title to any part or portion of any road, street, alley, sidewalk or grounds which belong to any town, city or county or which have been donated or dedicated for public use. . . ." In other words, the public can gain a public prescriptive easement across private land, but a private individual or individuals cannot gain a private prescriptive easement across public land.

Two important rules regarding public prescriptive easements have been established by case law. First, a public prescriptive easement cannot arise where the use by the public is merely for pleasure and recreation. Such uses are not for general travel and do not impart sufficient notice to the landowner that the property is being used or claimed by the public.

The other proposition is that the use must be exclusive and not shared by the owner. If the enjoyment is consistent with the right of the owner, it confers no rights in opposition to such ownership.

There is a significant difference between acquiescence as used in association with implied dedications and prescriptive easements. The two major differences are: (1) acquiescence assumes the owner intended to dedicate the land by his or her inactions; prescriptive easements assume the owner at all times objected to the public use of the land and (2) acquiescence requires some public use during the period; prescriptive easements require *continuous* use for the entire ten years.

*Note.* As discussed earlier, acquiescence cannot constitute a dedication of a private road for public use in counties having populations of 50,000 or less.

### **Easements by Condemnation**

The third and last way for a public easement to arise is by way of condemnation. Condemnation is the procedure by which private land is taken for a public purpose.

The power is generally lodged in the federal and state governments. In Texas, the legislature has delegated the power to various agencies and subdivisions of the state such as counties, cities, towns and villages.

Certain legal restraints are placed on the condemnation process. For instance, (1) the taking must be to achieve some public purpose, (2) the condemnor cannot condemn more land than is necessary for the undertaking, (3) the landowner must be paid just or adequate compensation for the taking and finally (4) the process must be carried out in compliance with due process of the law. The precise procedure is contained in Sections 21.011 through 21.016 of the Texas Property Code.

Without going into any detail, the following chart contains a brief synopsis of the entities and accompanying empowering statutes permitting the condemnation of public easements in Texas. The list is not necessarily inclusive of all relevant entities and statutes.

| Entity                                   | Empowering Statute                                   |
|--|--|
| Texas Highway Department                 | Texas Transportation Code, Section 224.001 et seq.   |
| Incorporated cities and towns            | Texas Local Government Code, Section 251.001 et seq. |
| County Commissioners Court               | Texas Local Government Code, Section 261.001 et seq. |
| Home-Rule and General-Law Municipalities | Texas Transportation Code, Section 311.001 et seq.   |

The chart does not contain the statutes granting railroads, pipeline and utility companies the right to condemn easements. The purpose of the omission is twofold. First, the easements permitted under the pertinent statutes are not for public thoroughfares. Second, the subject is covered in depth in the Real Estate Center's technical report 394, entitled *Understanding the Condemnation Process in Texas*.

### Easements Created by County Road Map

Effective Sept. 1, 2003, through Sept. 1, 2009, Texas legislators approved a new means by which county commissioners may acquire a public interest in private roadways. The method, known as the County Road Map, is outlined in Sections 258.001 through 259.006 of the Texas Transportation Code. No payment is required for the acquisition.

Basically, the county commissioners may (not shall) propose a county road map indicating each road in which the county claims a public interest under Chapter 281 of the Texas Transportation Code (this Chapter was discussed earlier as it applies to counties having a population of 50,000 or less), under any other law of the State of Texas, or as a result of continuously maintaining a private road with public funds commencing before Sept. 1, 1981.

The term *continuous maintenance* is defined in the statute as grading or other routine road maintenance be-

ginning before Sept. 1, 1981, and continuing to the date the landowner files a protest (discussed later.)

After the county commissioners develop the county road map, they must conduct a public meeting where private landowners whose land is being taken may protest the county's claim.

Before the public meeting is held, the county commissioners must advertise the meeting at least once a week for four consecutive weeks in a local newspaper of general circulation. The notice must:

- advise the public that the commissioners court has proposed a county road map including each road in which the county claims a public interest,
- identify the location at the courthouse where the proposed map may be viewed by the public during regular business hours, and
- state the date and location of the forthcoming public meeting where landowners may file a protest.

The commissioners court must display the proposed map at the indicated location beginning at the time stated in the notice until the map is formally adopted by the commissioners court. The map must be legible and drafted on a scale where one inch represents no less than 2,000 feet.

In addition to filing a protest at the public meeting concerning the taking of their private road via the county road map, landowners may file a written protest with the county judge at any time prior to the public meeting.

If a protest is filed, the county commissioners must appoint a jury of five disinterested property owners, known as a jury of view, to hold a public hearing on the issue. The jury examines any county road maintenance records from before Sept. 1, 1981, and other information concerning the county's claim.

After examining the evidence, the jury determines the validity of the county's claim based on a majority vote of the five individuals. Evidently, the only issue the jury must resolve is whether the county has continuously maintained the property (roadway) starting before Sept. 1, 1981.

The determination by the jury is final, conclusive and binding on the commissioners court. The commissioners must revise the proposed county road map according to the jury's determination.

Within 90 days after the initial public meeting, the commissioners court may formally adopt the proposed county road map as revised after public comments and after the determination by the jury. The county clerk must maintain the county road map adopted by the commissioners court in a place accessible to the public. Failure to include in the county road map a roadway previously acquired by the county by purchase, condemnation, dedication or a court's final judgment of adverse possession does not affect the status of those roadways because of the omission.

While the determination by the jury is binding on the county commissioners, it is not binding on landowners.



A person who files a protest with the county commissioners at the public meeting or files a protest with the county judge prior to the meeting and loses the protest may file a suit in district court no later than two years after the date the county road map was formally adopted. The court will then proceed with the determination of the county's interest in the roadway. However, the county, not the landowner, has the burden of proving it has continuously maintained the road in question commencing before Sept. 1, 1981. Again, this appears to be the only issue to be resolved.

Unless contested, the county road map as formally adopted by the commissioners court is conclusive evidence that the public has access over the road, and the county has authority to spend public funds to maintain it.

Before the enactment of Chapter 258 of the Texas Transportation Code, the continuous maintenance of a private road by the county was a factor to be considered in establishing a public interest in a private roadway. Under the new statute, it appears that the continuous maintenance of a private road that began before Sept. 1, 1981, is conclusive proof of the fact.

Did the legislature intend to create a new method of acquiring a county road without having to compensate landowners? Does the statute violate Article I, Section 17, of the Texas Constitution that states, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . .?"

## Termination of Public Easements

The means by which public easements terminate are quite limited. In fact, the abandonment of the easement and the statutory vacating of a dedicated plat are the only two sure means of dissolving public easements.

### Abandonment

As with the abandonment of private easements, the party asserting the abandonment must show by clear and satisfactory evidence that (1) acts of relinquishment or cessation of use have transpired and (2) the intent to relinquish permanently the use is present. As before, the primary difficulty is ascertaining the intent of the public to permanently cease use. Mere disuse is insufficient. The county's failure to open up streets for 42 years after the dedication occurred has been held insufficient to establish abandonment. Likewise, the negligence of county officials to keep the right-of-way clear of advertising signs and other obstructions falls short of indicating an intent to abandon a portion of a right-of-way.

The courts have held an abandonment can occur in one of the following two situations: (1) when the use of the land becomes practically impossible or the purpose of the dedication wholly fails or (2) when some affirmative act or acts clearly indicate an intent to relinquish permanently the use to which the property was dedicated.

Perhaps some actual case examples can clarify these rules. As to the first rule, two cases stand clearly in

point. The first case arose in a proposed subdivision on the outskirts of Corpus Christi in 1890. A developer proposed to open a huge subdivision along the coast. The plans, maps and plats were drafted and filed of record. Streets and public areas were indicated on the plats. However, the project collapsed entirely after its inception. The land was turned back into agricultural uses. Later, certain persons in the subsequent chain of title wanted the proposed streets and public areas established.

Here the court held that the evidence, taken as a whole, discloses a complete abandonment of the proposed enterprise in all its essential features that amounted to a destruction of the general scheme and purpose. Given this, a condition exists in which "the object of the use for which the property was dedicated wholly fails."

The other case involved a dead-end road less than one mile long. The courts held an abandonment had occurred when the county undertook the following two projects at the road's intersection with the main highway. First, a culvert was placed under the main highway so that one end of the culvert opened directly in the center of the intersecting road. Next, bar ditches were dredged along the main highway, making it impossible to enter or leave the road in question. Here the courts held the use of the land had been rendered practically impossible for its intended use.

As to the second rule involving intent, again two cases serve as prime examples. The first case occurred in Travis County, Texas. It involved a public use project. The state dedicated certain land to the county as a site for a courthouse and jail. The courthouse and jail were erected and maintained on the site for several years. The buildings were then abandoned when a new courthouse and jail were built at another location. Such acts were held to show clearly an intent to abandon the site permanently.

The other case is more complicated. A developer filed in the county records a plat showing a main thoroughfare running through a proposed subdivision. As the subdivision developed, the primary thoroughfare emerged on a parallel street about a half mile away. The proposed thoroughfare was never opened. It was kept fenced without objections for 20 years and never used by the public. Here, evidence was sufficient to show an abandonment of the street by the county. Possibly, the courts could have ruled that the streets had never been accepted by the public generally or by the county.

In situations where it is possible for a private and public easement to co-exist along the same route, the courts noted that each easement must be terminated on its own merits. The courts stated in the above case that the controversy did not involve the rights of the purchasers who had bought property in the addition in reference to the recorded plat. The private rights were separate and distinct from the rights of the county and the general public. Thus, the private rights to an easement cannot be prejudiced by any abandonment or refusal to accept the dedication on the part of the county.

Again, referring to the example involving the Philmores' sidewalk, in all probability the restraining order would be upheld. The sidewalk could not be removed by the Philmores if the court found that a valid dedication and acceptance had occurred.

### **Vacating Plat**

Vacating a dedicated plat also can terminate public easements. The procedure required for the cancellation depends on whether or not the original plat was filed pursuant to Chapter 212 or Chapter 232 of the Texas Local Government Code.

If Chapter 212 was the enabling statute, the requirements vary depending on whether or not any lots have been sold. If no sales have transpired, the developer must obtain approval from the municipal planning commission or the governing body of the municipality for the proposed cancellation. If so, a written instrument declaring the cancellation of the plat or any part thereof shall be executed, acknowledged and recorded in the same office as the original plat.

If sales have already occurred, the procedure remains basically the same. The only difference is that the original petition to cancel all or a part of the plat must be filed by all the owners of the lots in the subdivision, not the developer. Otherwise, the procedure is the same.

If the original plat was filed pursuant to Chapter 232, then the entity owning the land must file an application to cancel all or any part of the subdivision with the commissioners court of the county where the land is located. The commissioners court must publish notice of the proposed cancellation in a county newspaper for three weeks preceding any action. The notice shall command any interested party desiring to protest the cancellation to appear at a specified time.

At the hearing, if no one protests, and if it can be shown that the cancellation will not interfere with the

established rights of any purchaser in the subdivision, then the commissioners shall give the owner permission to file the proposed cancellation in the land records. If the cancellation interferes with the established rights of purchasers, the cancellation may still be approved if the persons so adversely affected agree to the action.

Even if protest is raised, cancellation of the plat may be granted. However, those adversely affected may sue the developer for damages not to exceed the purchase price of the lot. The suit must be brought within one year after the commissioners grant the cancellation.

All delinquent property taxes on the subdivision must be paid before the cancellation.

### **Conclusion**

The importance of private and public easements cannot be overemphasized in today's society. Easements play a vital role in everyone's life.

Most controversies associated with easements focus on when the easements arise and when they terminate. Both the statutory and case law in Texas contain extensive information on the subject. This publication explains these laws. However, it is not a substitute for competent legal counsel.

The following chart summarizes the requirements necessary for public easements.

Most of the chart depicts the requirements for easements arising by dedication. Under any form of dedication, the owner must intend to dedicate the easement followed by a reciprocal acceptance of the easement by the public generally, by the governing body of a municipality or by a county. Thus, the first part of the chart is devoted to the ways offers are tendered followed by the ways they may be accepted.

## Appendix A

### Synopsis of Private Easements

The following chart summarizes the minimum requirements necessary for the various private easements except the new statutory easement for landlocked property.

Each of the private easements will be either an easement in gross or an appurtenant easement. An easement

in gross is one owned by a private individual or business entity. An appurtenant easement is one that attaches to a certain piece of property and not to any individual or business entity.

#### Types of Private Easements

| Minimum Requirements           | Implied Reservation | Implied Grant | By Way of Necessity | By Estoppel | By Prescription |
|--------------------------------|---------------------|---------------|---------------------|-------------|-----------------|
| Prior existence                | X                   | X             |                     |             |                 |
| Prior use                      | X                   | X             |                     |             |                 |
| Apparent                       | X                   | X             |                     |             | X               |
| Permanent                      | X                   | X             |                     |             | X               |
| Continuous                     | X                   | X             |                     |             | X               |
| Necessary                      | X                   | X             | X                   |             |                 |
| Prior unity                    |                     |               |                     |             |                 |
| of ownership                   |                     |               | X                   |             |                 |
| Open and hostile               |                     |               |                     |             | X               |
| Without permission             |                     |               |                     |             | X               |
| Exclusive                      |                     |               |                     |             | X               |
| Uninterrupted<br>for ten years |                     |               |                     |             | X               |
| Reliance<br>by purchasing      |                     |               |                     |             | X               |

## Appendix B

### Synopsis of Public Easements

#### Types of Public Easements

| Express<br>Minimum<br>Requirements   | Statutory<br>Dedication | Common Law<br>Dedication | Common Law<br>Dedication | Prescriptive<br>Easement | Easement<br>Condemnation |
|--------------------------------------|-------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| OFFERS:                              |                         |                          | X                        |                          |                          |
| Oral                                 |                         |                          | X                        |                          |                          |
| Written                              |                         |                          | X                        |                          |                          |
| Plat                                 | X                       |                          | X                        |                          |                          |
| Affirmative acts                     |                         | X                        |                          |                          |                          |
| ACCEPTANCES:                         |                         |                          |                          |                          |                          |
| Some public use                      | X                       | X                        | X                        |                          |                          |
| Reliance by purchasing               |                         | X                        | X                        |                          |                          |
| Establish roads,<br>streets, etc.    | X                       | X                        | X                        |                          |                          |
| Improve roads,<br>streets, etc.      | X                       | X                        | X                        |                          |                          |
| Failure to assess<br>property taxes  | X                       | X                        | X                        |                          |                          |
| Compliance<br>with relevant statutes | X                       |                          |                          |                          | X                        |
| Continuous public use<br>(ten years) |                         |                          |                          | X                        |                          |
| Open and hostile<br>public use       |                         |                          |                          | X                        |                          |
| Adverse public use                   |                         |                          |                          | X                        |                          |
| Exclusive public use                 |                         |                          |                          | X                        |                          |
| Public purpose                       | X                       | X                        | X                        |                          | X                        |
| Public necessity                     |                         |                          |                          |                          | X                        |
| Just compensation                    |                         |                          |                          |                          | X                        |

## Glossary

### **Accrue**

Vested; acquired; accumulated.

### **Acknowledgment**

The formal declaration before an authorized official (generally a notary public) by the person who executed an instrument stating that the act or deed was done freely.

### **Acquiescence**

Conduct recognizing the existence of a transaction and giving implied consent to it.

### **Adjudicate**

To settle a dispute in the exercise of judicial authority, usually in a court of law.

### **Adverse possession**

A method of acquiring title to land by possession for a statutory period under certain conditions.

### **Appropriation of land**

The act of selecting, devoting or setting apart land for a particular use or purpose.

### **Appurtenant**

Belonging to or incidental to land as opposed to belonging to a person or individual.

### **Assign**

To transfer an interest or title in land.

### **Chain of title**

Successive conveyances affecting a particular parcel of land, arranged consecutively, beginning with the government or original source of title to the present.

### **Concurrent**

Running together; acting in conjunction.

### **Condemnation**

The process by which private property is taken for public use upon the award and payment of just compensation.

### **Consideration**

The price bargained for and paid for a promise. Generally, it is the money offered to induce another to enter a contract.

### **Constructive notice**

Circumstances established by law that imply knowledge of certain facts to purchasers of real property.

### **Corporate**

A municipality.

### **Cotenancy**

Any joint ownership or common interest in property.

### **Dedicator deed**

A deed, executed without consideration, giving property for a public purpose.

### **Delegated**

Granted; given.

### **Estoppel**

A bar or impediment precluding one from alleging or denying certain facts that are inconsistent with a previous position.

### **Fee title or fee simple**

A term applied to an estate in land which connotes the largest possible estate (or title) therein. Complete ownership, subject only to eminent domain.

### **Forfeit**

The loss of an estate or right by the act of law or as a consequence of error, fault, offense or crime.

### **Grantee**

The person who receives a conveyance of property.

### **Grantor**

The person who makes a conveyance of property.

### **Heirs**

The persons who inherit property, whether real or personal, by rules of descent and distribution whenever someone dies without a will.

### **Hostile and adverse**

Having the character of an enemy; in resistance or opposition to a claim having opposite interests.

### **Implication**

An inference of something not directly declared but arising from what is admitted or expressed.

### **Landlocked**

A tract of land having no legal way (access) to enter and leave.

### **Mortgage**

A document pledging property as security for a debt.

### **Necessary**

Indispensable or an absolute physical necessity.

### **Plat**

A map or representation on paper of a piece of land subdivided into lots with streets, alleys or similar features, usually drawn to scale.

**Prescription**

A means of acquiring an easement by open, continuous, exclusive use under the claim of right for a statutory period.

**Promissory note**

A written promise to pay a specific sum of money at a certain time.

**Rebuttable presumption**

A legal presumption that holds until disproved.

**Recorded**

A document that has been filed in the public land records.

**Revocable**

An agreement that can be canceled or repealed by the granting party.

**Stranger to title**

Someone not in the chain of title to a piece of property.

**Successive**

Following one after another in a line or series.

**Successors**

The person who follows another in the ownership of property.

**Tacking**

The adding or combining of successive periods of adverse possession to achieve the necessary statutory time to claim title.

**Tenement**

An interest in land or in any permanent solid object affixed thereto such as a house or dwelling.

**Term easement**

An easement given for a certain period of time after which it terminates.

**Unequivocal**

Clear; plain; free from uncertainty or doubt.

**Unity of ownership**

A designation of land that at one time was under a common or the same owner.

**Vacate**

To annul; to cancel or rescind; to render an act void.

**Vested**

An interest that is absolute or incapable of being defeated.



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**EXHIBIT B-1**  
**Plain English Easement Form**  
**(Adapted from State Bar of Texas Easement Form)**

**NOTE:** This form provides a standard form for either access or utilities. Language that is particular to access easements will be preceded by “[A:]”. Language that is particular to utility easements will be preceded by “[U:]”.

**Date:**

**Grantor:**

**Grantor’s Mailing Address:** [include county]

**Grantee:**

**Grantee’s Mailing Address:** [include county]

**[Grantor’s Lienholder:]**

**[Grantor’s Lienholder’s Mailing Address:** [include county]]

**Dominant Estate Property:** [Describe by metes and bounds or plat reference the real property being benefited by the easement]

**Easement Property:** [Describe by metes and bounds the location of the easement, and include a drawing of the easement as an exhibit, if available.]

**Easement Purpose:**

[A:] For providing free and uninterrupted pedestrian and vehicular ingress to and egress from the Dominant Estate Property, to and from [**describe public thoroughfare**].

**or**

[U:] For the installation, construction, operation, maintenance, replacement, repair, upgrade, and removal of [**specify**] and related facilities (collectively, the “Facilities”).

**Consideration:** The sum of TEN AND NO/100 DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Grantor.

**Reservations from Conveyance:** [Describe here or in an attached exhibit any reservations from the conveyance in this instrument.]

**Exceptions to Warranty:** [Describe here or in an attached exhibit any exceptions to the warranties in this instrument.]

**Grant of Easement:** Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, *grants, sells, and conveys* to Grantee and Grantee’s heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property, together with all and



singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and to hold the Easement to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part of the Easement, except as to the Reservations from Conveyance and Exceptions to Warranty.

**Terms and Conditions:** The following terms and conditions apply to the Easement granted by this agreement:

1. *Appurtenant Easement.* The Easement is appurtenant to, runs with, and inures to the benefit of all or any portion of the Dominant Estate Property, whether or not the Easement is referenced or described in any conveyance of all or such portion of the Dominant Estate Property. The Easement is nonexclusive and irrevocable. The Easement is for the benefit of Grantee and Grantee's heirs, successors, and assigns who at any time own the Dominant Estate Property or any interest in the Dominant Estate Property (as applicable, the "Holder").

2. *Duration.* The duration of the Easement is perpetual.

3. *Reserved Rights.*

[U:] Holder's right to use the Easement Property is nonexclusive, and

Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to use all or part of the Easement Property in conjunction with Holder as long as such use by Grantor and Grantor's heirs, successors, and assigns does not interfere with the use of the Easement Property by Holder for the Easement Purpose. Grantor reserves for Grantor and Grantor's heirs, successors, and assigns

[A:] Grantor reserves the right to use all or part of the Easement in conjunction with Holder, and the right to convey to others the right to use all or part of the Easement Property in conjunction with Holder, as long as such further conveyance is subject to the terms of this agreement

[A: OPTIONAL] and the other users agree to bear a proportionate part of the costs of improving and maintaining the Easement.

4. *Construction Easement.* Holder has the right (the "Secondary Easement") to use as much of the surface of the property that is adjacent to the Easement Property ("Adjacent Property") as may be reasonably necessary to install and maintain improvements reasonably suited for the Easement Purpose within the Easement Property. However, Holder must promptly restore the Adjacent Property to its previous physical condition if changed by use of the rights granted by this Secondary Easement.

5. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property and any improvements installed by Holder will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove

[A:] a road with all culverts, bridges, drainage ditches, sewer facilities, and similar or related utilities and facilities (collectively, the "Road Improvements").

[U:] the Facilities

under or across any portion of the Easement Property.

All matters concerning the configuration, construction, installation, maintenance, replacement, and removal of the

[A:] Road Improvements

[U:] Facilities

are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the

[A:] Road Improvements or for the road to continue onto other lands or easements owned by Holder and adjacent to the Easement Property

[U:] Facilities,

subject to replacement of the fences to their original condition on the completion of the work.

[A:] On written request by Holder, the owners of the Easement Property will execute or join in the execution of public easements for sewer, drainage, or utility facilities under or across the Easement Property.

6. *Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

7. *Attorney's Fees.* If a party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

8. *Binding Effect.* This agreement binds and inures to the benefit of the parties and their respective heirs, successors, and permitted assigns.

9. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

10. *Counterparts.* This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

11. *Waiver of Default.* It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

12. *Further Assurances.* Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

13. *Indemnity.* Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.

14. *Integration.* This agreement contains the complete agreement of the parties and cannot be varied except by written agreement of the parties. The parties agree that there are no oral agreements, representations, or warranties that are not expressly set forth in this agreement.

15. *Legal Construction.* If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

16. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.

17. *Recitals.* Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

18. *Time.* Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

---

[Name of grantor]

---

[Name of grantee]

**Consent and Subordination by Lienholder**

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

---

[Name of lienholder]

**[NOTARIZE ALL SIGNATURES]**

**EXHIBIT B-2**

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER

**RIGHT OF WAY AND EASEMENT**

(Pipeline Company easement form (gross) showing owner negotiated changes)

STATE OF TEXAS           §  
  §           **KNOW ALL MEN BY THESE PRESENTS:**  
COUNTY OF HARRIS       §

THAT the undersigned, whose address is \_\_\_\_\_ (hereinafter referred to as "**Grantor**", whether one or more), for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other valuable consideration in hand paid to it by \_\_\_\_\_, a \_\_\_\_\_, whose address is \_\_\_\_\_ (hereinafter referred to as "**Grantee**"), the receipt of which is hereby acknowledged, does hereby grant unto the said Grantee, its successors and assigns, a right-of-way and easement ~~thirty~~ten (10') feet in width for the purpose of laying, constructing, maintaining, operating, repairing, inspecting, replacing, ~~change the size of,~~ abandoning in place (subject to the requirements in Section 12 below), protecting, altering and removing one (1) twelve inch (12") underground pipeline including, cathodic protection, ~~above-ground-and-below-ground~~ valve settings, and any and all other below-ground devices, equipment and structures (and only such above-ground devices, equipment and structures required by law) which may from time to time be deemed by Grantee to be necessary or desirable in connection with the use and convenient operation of said pipeline for the transportation of ~~oil, gas, water, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline~~natural gas liquids (the "Easement") across the following-described lands in Harris County, Texas, ~~to wit~~to-wit:

SEE EXHIBIT "A-1" and EXHIBIT "B-1"  
Attached hereto and made a part hereof.

Together with the rights of ingress and egress to the ~~above-described right-of-way and easement~~Easement herein granted across the adjacent property of Grantor. The location of the Easement is depicted on Exhibit "A-2" and Exhibit "B-2" attached hereto and made a part hereof.

**TO HAVE AND TO HOLD** said ~~pipeline right-of-way and easement~~Easement unto Grantee, its successors and assigns, for the purposes stated above, subject to the following terms and conditions:

1.     ~~1.~~—That in the exercise of its rights hereunder, Grantee shall: (a) bury all ~~pipeline~~the pipeline to provide a minimum cover of ~~thirty-six~~sixty inches (~~36~~60"), (b)

restore the ground surface as nearly as practicable to the original contour which existed immediately prior to the commencement of any work; (c) provide suitable ditch cross-overs during construction as are reasonably required by Grantor; (d) properly support each side of a contemplated fence opening by suitable post and braces before a fence is cut, and, where required, to provide a temporary gate; (e) repair in a good and workmanlike manner any and all fences, parking surfaces, and drainage and irrigation and other utility systems which are cut or damaged by Grantee; and (f) restore or pay Grantor for any damages caused by Grantee to Grantor's growing crops, landscaping, grasses, trees, shrubbery, fences, buildings, drives, parking surfaces or livestock (including the personal property of any tenant, invitee or permittee) as a result of the construction and operation of Grantee's facilities.

2. ~~2.~~—That Grantor shall have the right to use and enjoy the surface of the right-of-way for ~~agricultural, pasturage, or other similar~~ any purposes which will not interfere with the use of the ~~right-of-way~~ Easement by the Grantee for any of the purposes herein above granted, it being understood, however, that no building, ~~structure, improvement, or similar permanent~~ obstruction shall be placed within or upon the ~~right-of-way~~ Easement, and that there shall be no material alteration of the ground surface or grade of the ~~right-of-way~~ Easement without the express written consent of the Grantee, and, to the extent that written permission has not been given, Grantee shall have the right to clear and keep cleared from within the ~~right-of-way~~ Easement all trees, brush, undergrowth, buildings, ~~structures, improvements, or other obstructions~~, though Grantee has no obligation to do so, and, after said pipeline has been installed, Grantee shall not be liable for damages caused on the ~~right-of-way~~ Easement by keeping the ~~right-of-way~~ Easement clear of such unauthorized trees, brush, undergrowth, buildings, ~~structure, improvements, and other obstructions~~ in the exercise of its rights hereunder. Grantee acknowledges that Grantor intends to pave over the Easement for driveways and parking, and Grantee agrees to be responsible for the installation of sufficient support, casing or other devices during the construction of the Easement to insure that such uses of the surface by Grantor do not damage the pipeline. Notwithstanding anything to the contrary set forth in this agreement, Grantor does not need to obtain Grantee's consent for such uses; however, Grantor must provide written or telephonic notice to Grantee at least three (3) days prior to the commencement of any such construction over the Easement.

3. Grantor, as owner of Grantor's property, reserves the right to convey to others the right to use all or part of the Easement property in conjunction with Grantee, as long as such further conveyances are subject to the terms of this agreement. Grantee acknowledges that the minimum depth of Grantee's pipeline was negotiated and established so that Grantor can convey additional underground easements for utility purposes.

4. ~~3.~~—That Grantee shall have the right, at its option, to install gates in fences crossing said pipeline right-of-way.

5. ~~4.~~—That this instrument may be executed in counterparts, but which together shall constitute one and the same instrument.

6. 5.—It is understood and agreed that this grant is not a conveyance of the lands described herein or of any interest in the oil, gas and other minerals in, on or under said lands, but is a grant solely of the easement granted herein. This grant is made subject to ~~an~~ applicable laws, ordinances, easements, leases, restrictions, reservations or covenants, either of record or evidenced by improvements upon the ground and to the extent same are in force.
7. 6.—All fixtures, equipment, and improvements placed on or fixed to the premises by Grantee shall remain the property of Grantee and Grantee shall have the right to remove any or all of its property from the Easement.
8. 7.— ~~That during~~During the initial construction, installation, clean-up, and restoration; ~~maintenance and repair operations of said pipeline or appurtenances, Grantee may utilize such portions~~an additional thirty foot (30') wide strip of land on the southerly side of and abutting the Easement, being also part of Grantor's property as may be reasonably necessary. However, after the completion of such operations, Grantee shall have no further right to such temporary working space. During any subsequent construction, clean-up, restoration, maintenance and repair operations of said pipeline or appurtenances, Grantee may utilize a thirty foot (30') wide strip of land on the northerly side of and abutting the Easement, being also part of Grantor's property. Upon completion of any maintenance, repairs or other work within the Easement property, Grantee shall promptly repair any damage to the Easement property, the temporary construction area, and/or any other portion of Grantor's property caused by such work so as to restore Grantor's property to substantially the same condition it was in prior to commencement of such maintenance, repairs or other work.
9. 8.—Grantee shall make application for and secure from any and all federal, state and local governmental authorities having jurisdiction, and during the term of this Agreement shall maintain in effect and comply with all permits, licenses and other authorizations required for this Agreement. Grantee shall pay for all such permits, licenses and other authorizations and for all renewals. Grantee hereby covenants and agrees that, in conducting its operations on Grantor's property, Grantee shall strictly comply with all laws, statutes, rules and regulations pertaining to environmental matters, including, without limitation, the terms, conditions and provisions of the Comprehensive Environmental Response Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C.A. §9606 et seq. In the event, however, that any such contamination should occur on Grantor's property as the result of Grantee's operations, Grantee shall clean-up such contamination and remediate Grantor's property to as nearly its original condition as possible.
10. BY ITS ACCEPTANCE OF THIS EASEMENT CONVEYANCE, AND AS A MATERIAL PART OF THE CONSIDERATION, GRANTEE FURTHER EXPRESSLY ACKNOWLEDGES AND AGREES THAT (i) ANY INFORMATION PROVIDED TO GRANTEE PERTAINING TO THE EASEMENT PROPERTY BY GRANTOR HAS NOT BEEN INDEPENDENTLY INVESTIGATED OR VERIFIED BY GRANTOR. (ii)

GRANTOR IS NOT MAKING, AND HAS NOT MADE, ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION, AND (iii) GRANTOR IS NOT, AND SHALL NOT BE, LIABLE OR BOUND IN ANY MANNER WHATSOEVER BY ANY WRITTEN OR VERBAL STATEMENT, REPRESENTATION, REPORT, SURVEY OR INFORMATION FURNISHED TO GRANTEE, OR MADE, BY ANY PARTY WITH RESPECT TO THE EASEMENT PROPERTY OR THE EASEMENT INTERESTS HEREBY CONVEYED. GRANTEE SPECIFICALLY AGREES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO CONDUCT SUCH TESTS, STUDIES AND INVESTIGATIONS AS GRANTEE DEEMS NECESSARY AND APPROPRIATE, GRANTEE IS RELYING SOLELY UPON GRANTEE'S OWN INVESTIGATION OF THE EASEMENT PROPERTY AND NO ON ANY INFORMATION PROVIDED BY GRANTOR. GRANTEE FURTHER AGREES THAT GRANTEE HAS PURCHASED AND ACCEPTED THE EASEMENT INTERESTS IN THE EASEMENT PROPERTY IN ITS CURRENT, "AS IS," WITH ALL FAULTS CONDITION, AND TO HAVE ASSUMED THE RISK OF ANY MATTER OR CONDITION WHICH IS LATENT OR PATENT OR THAT COULD HAVE BEEN REVEALED BY ITS INVESTIGATIONS. GRANTOR HAS NOT MADE (AND GRANTOR HEREBY EXPRESSLY DISCLAIMS, AND GRANTOR IS SELLING THE PROPERTY WITHOUT) ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, WHATSOEVER AS TO THE VALUE, CONDITION, NATURE, CHARACTER, SUITABILITY, HABITABILITY OR FITNESS OF THE EASEMENT PROPERTY, THE PRESENCE OR ABSENCE OF ANY HAZARDOUS MATERIAL OR OTHER ENVIRONMENTAL CONDITION OR COMPLIANCE OF THE LAND WITH, OR VIOLATION OF, ANY LAW, STATUTE, ORDINANCE, RULE OR REGULATION, AND ANY OF SUCH REPRESENTATIONS AND WARRANTIES, AND ANY CLAIMS OR CAUSES OF ACTION AGAINST GRANTOR BASED IN WHOLE OR IN PART ON ANY VIOLATION OF, OR ARISING WITH RESPECT TO, ANY FEDERAL, STATE OR LOCAL STATUTE, ORDINANCE, RULE OR REGULATION ARE HEREBY EXPRESSLY WAIVED AND RELEASED BY GRANTEE.

11. Grantee shall be solely responsible for the design and construction of the Easement facilities constructed within the Easement property, the operation, maintenance and repair thereof, and any damages resulting from the activities of Grantee hereunder or the use of the Easement property or any other portion of Grantor's property by Grantee, or Grantee's employees, agents, or contractors. Grantee shall defend and indemnify Grantor, in accordance with law, against any loss and damage which shall be caused by the exercise of the rights granted under this agreement or by any wrongful or negligent act or omission of Grantee's agents, employees or contractors in the course of their work or employment. Nothing contained herein shall ever be construed to place upon Grantor any manner of liability for injury to or death of persons or for damage to or loss of property arising from or in any manner connected with the acts, conduct or negligence of Grantee, or its contractors, in the design, construction, maintenance or operation of the Easement facilities.



12. In the event that Grantee ceases its use of the pipeline for the transportation of natural gas liquids and Grantee elects to abandon the pipeline in place, Grantee agrees to perform such procedures that are standard to the industry in order to prevent corrosion of the pipeline and/or the escape of any hazardous material from the pipeline. Grantee represents that such standard procedures include, without limitation, cleaning the pipeline, verification that no hydrocarbons remain in the pipeline, and ensuring that the pipeline remains moisture free in order to reduce the possibility of corrosion.
13. 9.—It is agreed that this grant covers all the agreements between the parties and no representations or statements, verbal or written, have been made, modifying, adding to, or changing the terms of this agreement. It is understood and agreed that this easement and all rights, privileges, and obligations created herein shall run with the land and shall inure to the benefit of and be binding upon the legal representatives, heirs, executors, administrators, successors, and assigns of the parties hereto.
14. Any notices to the parties to this agreement shall be deemed delivered when the same has been placed in the U. S. Mail in a properly stamped envelope or other appropriate mail container, addressed to the addresses shown above, bearing the adequate amount of postage to result in delivery of same to the address shown thereon, and sent by certified mail to the party to whom such notice is given. In the alternative, either party may give such notice by United Parcel Service (UPS), Federal Express, or other similar expedited mail service guaranteeing not later than two (2) day delivery of any such letter or notice to the addresses provided for herein.

[SIGNATURE PAGES ATTACHED]

EXECUTED AND EFFECTIVE this \_\_\_\_\_ day of \_\_\_\_\_ 2006.

**GRANTOR:**

\_\_\_\_\_

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Tax I.D. No.: \_\_\_\_\_

THE STATE OF \_\_\_\_\_ §

COUNTY OF \_\_\_\_\_ §

**BEFORE ME**, the undersigned authority, on this day personally appeared \_\_\_\_\_, \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of said \_\_\_\_\_.

**GIVEN UNDER MY HAND AND SEAL OF OFFICE** this the \_\_\_\_\_ day of \_\_\_\_\_, 2006.

{ Seal }

Commission Expires: \_\_\_\_\_ Notary Public in and for  
The State of \_\_\_\_\_

**GRANTEE:**

STATE OF TEXAS COUNTY OF HARRIS \_\_\_\_\_ §  
\_\_\_\_\_  
COUNTY OF \_\_\_\_\_ §

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_ of \_\_\_\_\_, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of said limited partnership.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the \_\_\_\_\_ day of \_\_\_\_\_, 2006.

{ Seal }

Commission Expires: \_\_\_\_\_ Notary Public in and for  
\_\_\_\_\_ The State of \_\_\_\_\_

Exhibits:

- A-1
- A-2
- B-1
- B-2

**EXHIBIT "B-3"**

**EASEMENT**  
(City of Houston form)

**THE STATE OF TEXAS**

§  
§  
§

**COUNTY OF \_\_\_\_\_**

**GRANTOR(S):** \_\_\_\_\_  
(Exact legal name of person or entity that is the recorded property owner)

**GRANTEE:** The City of Houston, a Municipal Corporation situated in Harris, Fort Bend and Montgomery Counties, Texas

**GRANTEE'S MAILING ADDRESS:** P.O. Box 1562, Houston, TX 77251

**PROPERTY:** The tract or parcel of land described on EXHIBIT "A", noted as Parcel No. \_\_\_\_\_ and Job No. \_\_\_\_\_, consisting of \_\_\_\_ pages, attached hereto and made a part hereof ("Property").

Grantor(s) being the owner(s) in fee simple of the hereinafter described property located in Houston, Harris County, Texas, do in consideration of the sum of One Dollar (\$1.00) to Grantor(s) in hand paid by the City of Houston, the receipt of which is hereby acknowledged, grant, sell, transfer, release and forever quit-claim unto said City of Houston, a municipal corporation situated in Harris County, Montgomery County and Fort Bend County, Texas, its successors and assigns, an easement for \_\_\_\_\_ purposes, and said easement being in, upon, under, over, across and along the Property.

Grantor(s) do hereby agree, bind, and obligate Grantor(s) and Grantors' heirs or assigns, that no fences, buildings or other improvements other than parking, driveways and landscaping shall be placed in, on or along said easement, and further, that the City shall be and is hereby released from any and all liability from any damages occasioned by and in the reasonable exercise of its rights granted.

TO HAVE AND TO HOLD the Property and easement for said purposes, together with all rights and appurtenances belonging in any way or manner to said City of Houston, its successors and assigns forever. However, it is expressly provided, that if said easement or any part thereof is ever discontinued for said purposes, the title thereto (or to the part so discontinued) shall revert to the then owners of the Property. The right and privilege being reserved to the City of Houston, its successors, assigns or agents, to go upon said premises at any time for the purpose of removing, repairing, or replacing any city improvements installed thereon or thereunder.

EXECUTED this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

**GRANTOR(S):**

Approve as to form:

\_\_\_\_\_

\_\_\_\_\_  
Assistant City Attorney

STATE OF TEXAS

§  
§  
§

COUNTY OF \_\_\_\_\_

This instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by  
\_\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for  
The State of Texas

EXHIBIT "C-1"

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

DEDICATION DEED

\_\_\_\_\_ (the "Grantor") for and in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other valuable consideration paid by the Grantee herein named, the receipt and adequacy of which is hereby acknowledged, has DEDICATED, and by these presents does DEDICATE to the public and the City of \_\_\_\_\_, Texas, (the "Grantee") the real property described on Exhibit "A" attached hereto and made a part hereof (the "Property") for use as a public street and right-of-way, and for such other uses as public streets may be used.

The Property is conveyed by Grantor and accepted by Grantee subject to all easements, covenants, conditions, mineral reservations and leases, and other matters disclosed by the real property records of Harris County, Texas, including without limitation those matters listed on Exhibit "B" attached hereto and made a part hereof for all purposes ("Exceptions");

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto in anywise belonging unto Grantee, Grantee's successors and assigns forever; and Grantor does hereby bind Grantor, Grantor's successors and assigns to WARRANT AND FOREVER DEFEND all and singular the Property unto Grantee, Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through or under Grantor, but not otherwise, subject to the Exceptions and ad valorem taxes for the current year, such Exceptions being agreed to by Grantee and such taxes being assumed by Grantee by acceptance of this Deed.

EXECUTED this the \_\_\_\_\_ day of \_\_\_\_\_, 2006.

GRANTOR:

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF \_\_\_\_\_ §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_,  
2006, by \_\_\_\_\_.

\_\_\_\_\_

Notary Public in and for  
The State of \_\_\_\_\_

**EXHIBIT "C-2"**

[See attached]



**CITY OF HOUSTON  
PLANNING AND DEVELOPMENT DEPARTMENT**

**SUBDIVISION PLATTING  
RECORDATION DEDICATORY ACKNOWLEDGEMENTS AND  
CERTIFICATIONS**

**STATE OF TEXAS**

**COUNTY OF** (name of county in which plat is located)

**1**

We, (name of owner or owners) acting by and through (name and title of officer) being officers of (name of company or corporation), owner (or owners) hereinafter referred to as Owners (whether one or more) of the (number of acres) tract described in the above and foregoing map of (name of subdivision or development), do hereby make and establish said subdivision and development plat of said property according to all lines, dedications, restrictions and notations on said maps or plat and hereby dedicate to the use of the public forever, all streets (except those streets designated as private streets, or permanent access easements), alleys, parks, water courses, drains, easements and public places shown thereon for the purposes and considerations therein expressed; and do hereby bind ourselves, our heirs, successors and assigns to warrant and forever defend the title to the land so dedicated.

**FURTHER**, Owners have dedicated and by these presents do dedicate to the use of the public for public utility purposes forever unobstructed aerial easements. The aerial easements shall extend horizontally an additional eleven feet, six inches (11' 6") for ten feet (10' 0") perimeter ground easements or seven feet, six inches (7' 6") for fourteen feet (14' 0") perimeter ground easements or five feet, six inches (5' 6") for sixteen feet (16' 0") perimeter ground easements, from a plane sixteen feet (16' 0") above ground level upward, located adjacent to and adjoining said public utility easements that are designated with aerial easements (U.E. and A.E.) as indicated and depicted, hereon, whereby each aerial easement totals twenty one feet, six inches (21' 6") in width.

**FURTHER**, Owners have dedicated and by these presents do dedicate to the use of the public for public utility purposes forever unobstructed aerial easements. The aerial easements shall extend horizontally an additional ten feet (10' 0") for ten feet (10' 0") back-to-back ground easements, or eight feet (8' 0") for fourteen feet (14' 0") back-to-back ground easements or seven feet (7' 0") for

sixteen feet (16' 0") back-to-back ground easements, from a plane sixteen feet (16' 0") above ground level upward, located adjacent to both sides and adjoining said public utility easements that are designated with aerial easements (U.E. and A.E.) as indicated and depicted hereon, whereby each aerial easement totals thirty feet (30' 0") in width.

**FURTHER**, Owners do hereby declare that all parcels of land designated as lots on this plat are originally intended for the construction of single family residential dwelling units thereon (or the placement of mobile home subdivision) and shall be restricted for same under the terms and conditions of such restrictions filed separately.

**FURTHER**, Owners do hereby covenant and agree that all of the property within the boundaries of this plat shall be restricted to prevent the drainage of any septic tanks into any public or private street, permanent access easement, road or alley or any drainage ditch, either directly or indirectly.

**2**

**APPLICABLE IF STREETS WITHIN THE PLAT ARE TO BE DEVELOPED WITHOUT CONCRETE PAVEMENT, GUTTER AND STORM SEWERS:**

**FURTHER**, Owners do hereby covenant and agree that all of the property within the boundaries of this plat is hereby restricted to provide that drainage structures under private driveways shall have a net drainage opening area of sufficient size to permit the free flow of water without backwater and in no instance, have a drainage opening of less than one and three quarters (1-3/4) square feet (18" diameter) with culverts or bridges to be provided for all private driveways or walkways crossing such drainage facilities.

**3**

**APPLICABLE IF PLAT IS WITHIN HARRIS COUNTY:**

**FURTHER**, Owners do hereby dedicate to the public a strip of land fifteen fifth teen feet (15'0") wide on each side of the center line of any and all bayous, creeks, gullies, ravines, draws, sloughs, or other natural drainage courses located in said plat, as easements for drainage purposes, giving the City of Houston, Harris County, or any other governmental agency, the right to enter upon said easement at any times for the purpose of construction and maintenance of drainage facilities and structures.

**FURTHER**, Owners do hereby covenant and agree that all of the property within the boundaries of this plat and adjacent to any drainage easement, ditch, gully, creek or natural drainage way is hereby restricted to keep such drainage ways and easements clear of fences, buildings, planting and other obstructions to the operations and maintenance of the drainage facility and that such abutting property shall not be permitted to drain directly into this easement except by means of an approved drainage structure.

**4** APPLICABLE IF PRIVATE STREET OR PERMANENT ACCESS EASEMENTS ARE ESTABLISHED WITHIN THE PLAT:

FURTHER, Owners do hereby covenant and agree that those streets located within the boundaries of this plat specifically noted as private streets or permanent access easements, shall be hereby established and maintained as private streets or permanent access easements by the owners, heirs, successors and assigns to property located within the boundaries of this plat and always available for the general use of said owners and to the public for firefighters, fire fighting equipment, police and emergency vehicles of whatever nature at all times and do hereby bind ourselves, our heirs, successors and established as private streets or permanent access easements.

**5** APPLICABLE IF THE PLAT IS OUTSIDE THE CITY OF HOUSTON, BUT WITHIN HARRIS COUNTY

FURTHER, Owners certify and covenant that they have complied with or will comply with the existing Harris County Road Law, Section 31-C as amended by Chapter 614, Acts of 1973, 63<sup>rd</sup> Legislature and all other regulations heretofore on file with the Harris County Engineer and adopted by the Commissioners' Court of Harris County.

**6** APPLICABLE IF THE PLAT IS A REPLAT UNDER THE PROVISIONS OF § 212.014, LOCAL GOVERNMENT CODE: (replat not requiring a public hearing with notification)

FURTHER, Owners hereby certify that this replat does not attempt to alter, amend, or remove any covenants or restrictions; we further certify that no portion of the preceding plat was limited by deed restriction to residential use for not more than two (2) residential units per lot.

**7** APPLICABLE IF THE PLAT IS A REPLAT UNDER THE PROVISIONS OF § 212.015 OR AN AMENDING PLAT UNDER THE PROVISIONS OF § 212.016, LOCAL GOVERNMENT CODE: (replat requiring a public hearing with notification and amending plats)

FURTHER, Owners hereby certify that this replat does not attempt to alter, amend, or remove any covenants or restrictions.

**EXHIBIT "D-1"**

**Marcus Cable Assoc., L.P. v. Krohn (2002)- Scope of Easement Purpose**

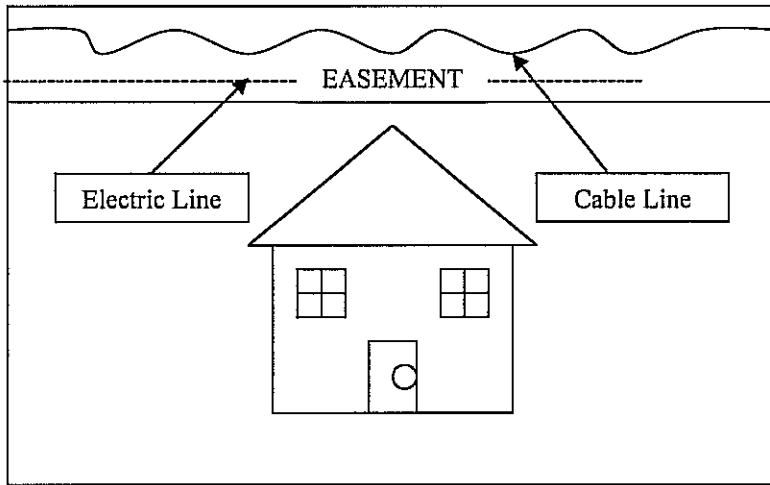


EXHIBIT "D-2"

DeWitt County Electric Cooperative, Inc. v. Parks (1999)- Scope of Easement Purpose

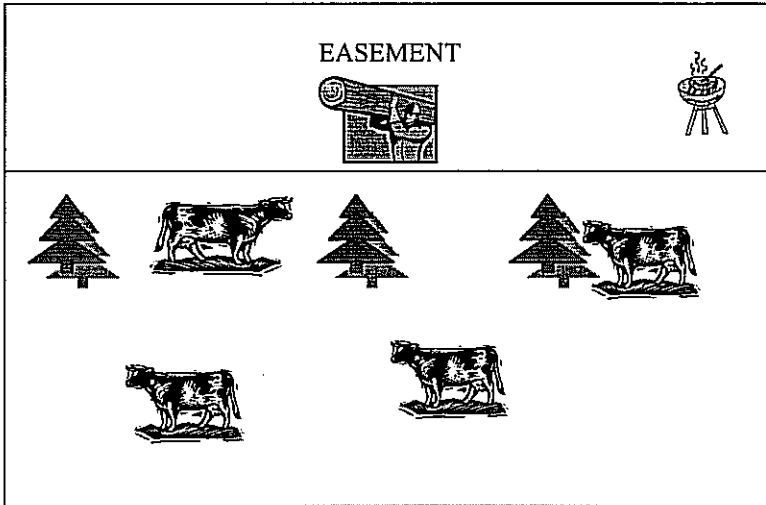
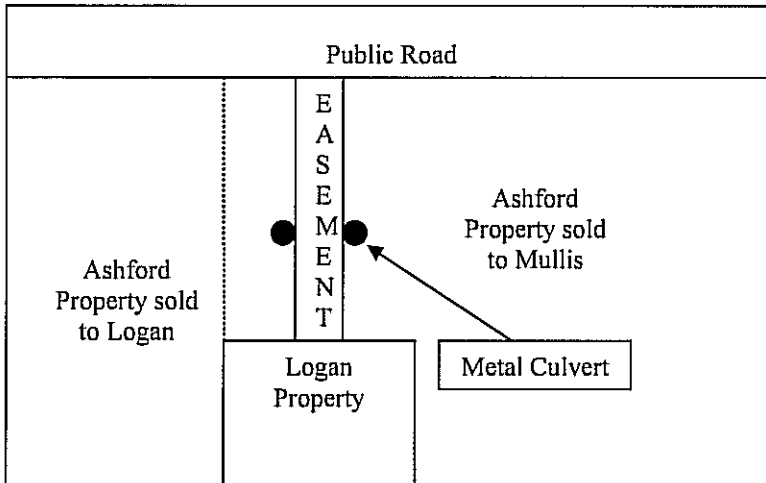


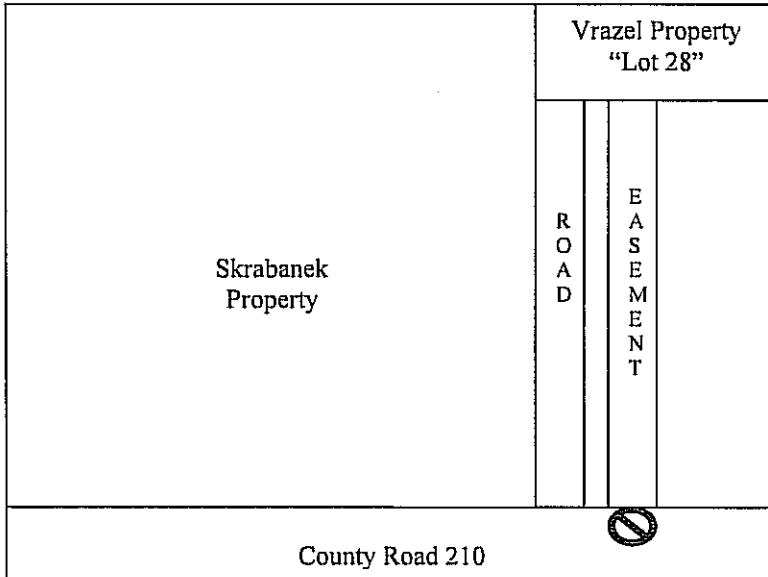
EXHIBIT "D-3"

Logan v. Mullis (1985)- Abandonment of Easement



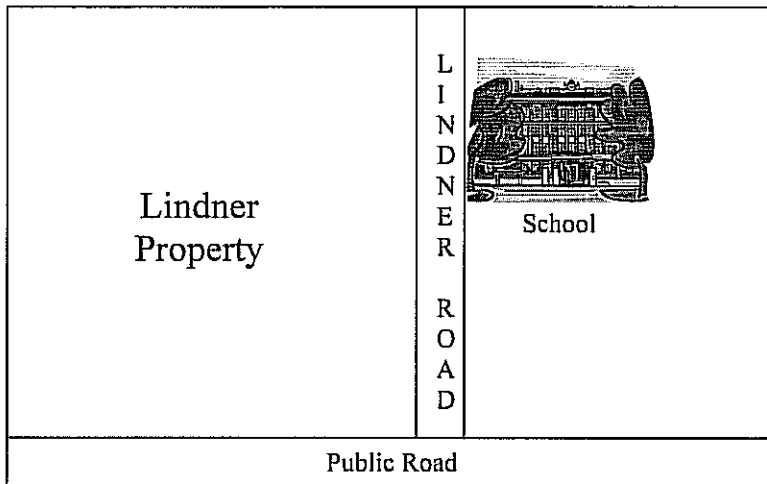
**EXHIBIT "D-4"**

**Vrazel v. Skrabanek (1987)- Prescriptive Easement/ Easement by Estoppel**



**EXHIBIT "D-5"**

**Lindner v. Hill (1985)- Implied Dedication**





**EXHIBIT "D-6"**

**Drye v. Eagle Rock Ranch, Inc. (1963)- Implied Easement/Easement by Estoppel**

