



## What are the Different Types of Easements?

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*Finance Real Estate & Bankruptcy News*

June 28, 2023

An easement is a non-possessory interest in another person's land. Most often, easements give the dominant estate (the parcel benefiting from the easement) the right to use the servient estate (the parcel burdened by the easement) for a specific purpose. This type of easement is called an affirmative easement. For example, an affirmative easement could be:

- A power company's right to place a power line on someone's property.
- A homeowner's right to connect to a neighbor's sewer system.
- A property owner's right to use a driveway to cross over another landowner's property.

Less common are negative easements, which prohibit someone from doing something that would ordinarily be permissible. Negative easements are generally disfavored and only allowed in certain situations. For example, if you have a negative easement for light over your neighbor's property, the easement prohibits your neighbor from building on his or her land in a way that would impede your property's access to light.

### **Easement Appurtenant or In-Gross**

Easements are further defined by whether one or more parcels are involved. To have an easement appurtenant there must be a dominant and servient estate. Suppose you own parcel A and have an easement from your neighbor, parcel B, allowing you to connect to parcel B's sewer system. You have an easement appurtenant. Notice that there is a dominant estate, parcel A which benefits from the easement, and a servient estate, parcel B which is burdened by the easement.

Easements appurtenant run with the land, meaning that if you sell parcel A, the easement still exists for the new owners. This transfer happens regardless of whether the easement was mentioned in the sale. The burden of the easement will also follow the servient estate, unless the new owner is a bona fide purchaser without notice of the easement. In general, easements are recorded by the Register of

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Deeds Office to provide notice to third parties of the easement's existence. The Register of Deeds Office has technical rules for the form of an easement for recording purposes.

An easement in gross involves only a servient estate and confers a personal or commercial benefit on its holder. Easements in gross could include the right to swim in your neighbor's pond, or a power company's right to place a power line on your property. This type of easement is not transferable, unless it is for commercial purposes. For example, if you sell your home, your right to swim in your neighbor's pond does not transfer to the new homeowners. However, a power company's utility line on your property would be transferable.

### **Express Easements**

Express easements are created by grant, meaning there has been an agreement between the owners of the dominant and servient estate. Because an easement is a property interest in land, it must satisfy the statute of frauds. This requires that the easement be in writing and endure for more than one year. The easement will describe the parcel of land burdened by the easement and the rights held by the easement holder. A negative easement must be created by grant because there is no automatic right to such an easement.

### **Prescriptive Easements**

Unlike an express easement, a prescriptive easement is not recorded or created by mutual agreement. Instead, a prescriptive easement is acquired through the open, notorious, adverse, and continuous use of another's property for a 15-year period. Suppose you own parcel A, which is on a lake, but does not have direct access to the water. Your neighbor owns parcel B and has a footpath that leads directly to the waterfront. For the last 15 years, you have regularly used this footpath to access the lake. You never obtained your neighbor's permission, but you use the path year-round, during various times of day, and even when you know your neighbor is at home. Under these circumstances, you may have a prescriptive easement.

While prescriptive easements have many of the same elements as adverse possession, there is no exclusivity requirement. That means you cannot obtain an ownership interest in the land; instead, you obtain the right to use the land you have been using. In the lake access example, this would mean that you can continue to use your neighbor's path to the water; however, you do not have any ownership interest in the footpath.

A prescriptive easement runs with the land, meaning that it is an easement appurtenant. Because a prescriptive easement runs with the land, a current landowner can "tack" on the use of a previous owner. Returning to the lake access example, let's say you have only owned parcel A (and used parcel B's footpath) for seven years, but the previous owner of parcel A used parcel B's footpath for the eight years they owned parcel A. You may be able to "tack" the previous owner's use of eight years to your seven years to meet the 15-year requirement.

### **Implied Easements: Prior Use or By Necessity**



An easement may be created by law in two ways. First, an easement may be implied by prior use. In some cases, courts will imply an easement from prior use when there is a particular use that should survive the division of a property if necessary for the enjoyment of the dominant estate. Suppose you own two parcels, A and B, and parcel A is connected to parcel B's sewer system. You sell parcel A, but there is no mention of parcel A being able to still use parcel B's sewer system. Do the new owners of parcel A have an easement implied by prior use? The answer is yes, *if* the use was (1) apparent at the time the parcels were divided and (2) the parties had the expectation that the use would survive the division.

Second, an easement can be implied by necessity. This type of easement occurs when a landowner divides a parcel but leaves one of the parcels landlocked. An easement by necessity can only arise over land that was once owned by the same person. A landowner cannot divide his or her property and then demand access over a neighbor's parcel. Additionally, an easement by necessity requires strict necessity. This means the landlocked owner must show that the only way to access the landlocked parcel is through the other parcel. If there is another way to access the parcel, even if less convenient, an easement by necessity will not arise.

If you have questions about the different types of easements and what they are typically used for, contact Scott Hogan at 616.726.2207 or at [shogan@fosterswift.com](mailto:shogan@fosterswift.com).