

What Do You Do When You Need an Easement Over a Portion of Your Neighbor's Property?

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I am often asked to draft easement agreements. It is not uncommon for a residential or commercial property owner to desire or need to enter into an agreement with the neighboring property owner concerning the use of one or both of the properties. However, what neighbors usually do not consider is that an easement is a grant of an interest in the land. The conveyance of an interest in land is significant and should be given the due diligence and discussion it deserves.

If you are the property owner being granted the right to use your neighbor's land, most likely there will be obligations imposed upon you in the agreement.

Shouldn't you thoroughly evaluate those obligations? For instance,

1. Are you responsible for performing maintenance of the easement area or does your neighbor maintain such?
2. Are you responsible for the cost of said maintenance?
3. Are you permitted to widen the size of the easement?
4. Are you permitted to expand your permitted use of the easement, should the need arise in the future?
5. When does the easement terminate?
6. Is there a sufficient legal description to identify and insure the easement (if desired)?
7. Are you required to maintain liability insurance concerning your use of the easement area?
8. If you subdivide your property, to what extent can each subdivided lot use the easement without being deemed overburdening of the easement?
9. Your obligations under the easement agreement pass to subsequent owners of the property. Will the grant of the easement to you be a hindrance to the future sale of your property?
10. What happens if the easement area is damaged or destroyed by an act of

God or fire? Is your neighbor required to rebuild the structure or does the easement terminate?

If you are the property owner granting your neighbor the right to use your land, some issues you may consider include:

1. Does the easement agreement state who is responsible for damage to the easement area?
2. Does the easement agreement state who is responsible for performing the maintenance of the easement area and who is responsible for the cost of maintenance?
3. Have you considered your liability if your neighbor or his guest or invitee are injured while using the easement area?
4. Does the easement agreement limit or restrict your use of the property?
5. As the burdened or servient estate, the easement or burden passes to subsequent owners of the property. Will the granting of the easement be a hindrance to the future sale of your property?
6. Do you want to specifically state the duration of the easement agreement?
7. Is the easement area sufficiently described to avoid any future disputes as to the location?
8. Can the party who is granted the use of the easement expand or relocate the easement area?
9. What happens if the easement area is damaged or destroyed by an act of God or fire. Are you responsible to rebuild the structure or does the easement terminate?

Because most parties do not take the time to discuss the above issues before entering into an easement agreement, many questions arise after an easement is created as to what use is permitted by the easement owner (the party who is permitted to use the easement, referred to as the dominant estate) or if the party who granted the easement (referred to as the servient estate) is permitted to use the easement area. When there is a written agreement, the court will look to the language in the document. The intent of the parties will also be considered. However, if litigation ensues because the parties failed to take the time to draft a proper easement agreement before entering into the easement, the cost of litigation will far exceed (multiple times, most likely) the attorney's fees that would have been incurred to discuss and properly draft an easement agreement.

When you are purchasing residential or commercial property, do you review the easement agreements referenced in the title commitment? Almost every property will have easement agreements that affect the property and it is important to review the easement document to determine, among other things: if the easement benefits or burdens the property, or both; the location of the easement; which party has maintenance obligations; if the easement can be terminated; what events are deemed a default and therefore may trigger legal ramifications to you.

I represented a client who purchased vacant land adjacent to their home. They wanted to build a workshop on the vacant land. Years after the purchase, they were ready to build but their building permit application was denied because of a drainage easement located in the middle of the property and the easement prohibited any structure being built within the easement area. Upon being denied approval to build on the vacant land, they hired me to resolve the matter.

Although we did ultimately resolve the matter and they eventually were able to construct their workshop, it was a lengthy and costly experience for my clients. The easement agreement for the drainage was clearly stated in their owner's title insurance policy but unfortunately, they did not read their title policy or the easement agreement prior to purchasing the vacant land.

If you do not have the knowledge to review the title work and easement documents, it is recommended that you hire an experienced real estate attorney to assist you.