Indiana Farm Bureau®

Landowner Toolkit

Legal Considerations for Right-of-Way Easements

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Indiana easement laws are derived from a combination of common law and statutory authority. Easement theories are complex and heavily dependent upon specific facts. Therefore, a landowner's rights are often initially unclear and require an intensive investigation into an easement's creation and intended purpose.

If a landowner's easement problems concern the rights and responsibilities of other neighboring landowners, the landowner should discuss the problem with his neighbor. Both parties may want to consult with attorneys to make sure their rights are adequately represented.

The purpose of this document is to provide a checklist of legal theories that you and your attorney may want to consider when creating easements or dealing with existing easement problems. Please share this information with your attorney, who will have access to the statutes and court cases listed herein.

1. Types of Easements - *Appurtenant & In Gross*

Easements may burden a specific property or simply exist as a land use agreement between two specific individuals or entities. Appurtenant rights are those which are inseparable from the burdened and benefited properties. Consolidation Coal Co. v. Mutchman, 565 N.E.2d 1074, 1083 (Ind. Ct. App. 1990). "[A] servient estate is burdened to the extent necessary to accomplish the end for which [a] dominant estate [is] created." Brown v. Heidersbach, 360 N.E.2d 614, 618 (Ind. Ct. App. 1977). A right-of-way easement across a parcel of land which gives ingress and egress to a landlocked parcel of land is the most common type of appurtenant easement.

"'An easement is in gross if it is a mere personal right which cannot be granted to another person or transmitted by descent.'" Larry Mayes Sales, Inc. v. HSI, LLC, 744 N.E.2d 970, 973 (Ind. Ct. App. 2001) (quoting Jeffers v. Toschlog, 383 N.E.2d 457, 458 (Ind. Ct. App. 1978)). Easements in gross are not supported by a dominant estate and only attach to an entity's personal interests. Road, railroad, and utility rights-of-way are common examples of easements in gross.

2. Rights-of-Way

A right-of-way is a type of easement. Rights-of-way create "[t]he right to pass through property owned by another." BLACK'S LAW DICTIONARY (8th ed. 2004). Rights-of-way may exist as private or public easements. Public rights-of-way grant the right of passage to the general public for the use of highways, roads or other thoroughfares. Private rights-of-

way give rights to a specific individual or entity. Private rights-of-way may be used for ingress and egress or for installation of utilities and services across another's property.

3. Easement Creation - *Grant or Reservation*

Easements may be created by express grant or reservation. A fee simple owner may directly convey an easement by grant. A fee owner may also expressly reserve an easement by conveying a fee estate to another while retaining an easement in the parcel sold. The grant or reservation of an easement is subject to the requirements for granting any property interest in land and must therefore be evidenced by written instrument and properly recorded. *See* Ind. Code § 32-21.

Care should be taken to limit the conveyance to the nature, extent and duration desired because "[t]he nature, extent and duration of an easement created by an express agreement or grant must be determined by the provisions of the instrument creating the easement." Larry Mayes Sales, Inc., 744 N.E.2d at 972 (quoting Erie-Haven, Inc. v. First Church of Christ, 292 N.E.2d 837, 841 (Ind. Ct. App. 1973)).

No particular words are necessary in creating the easement; any words that clearly show the intention to give an easement are sufficient. Tanton v. Grochow, 707 N.E.2d 1010, 1013 (Ind. Ct. App. 1999). The instrument, however, must include a description of the land conveyed so as to furnish a means by which the land can be identified. Stevens v. Flannagan, 30 N.E. 898, 899 (Ind. 1892). "Although Indiana law prefers that an instrument creating an express easement describe the dominant and servient [estates] with reasonable certainty, an easement may be valid even though it does not use the particular terms 'dominant' and 'servient' in referring to the relevant estates**."** Kopetsky v. Crews**,** 838 N.E.2d 1118, 1125 (Ind. Ct. App. 2005) (citing Larry Mayes Sales, 744 N.E.2d at 973).

4. Easement Creation – *Implication*

Easements may be implied by necessity or prior use. An implied easement will only arise at the time a conveyance severs a single parcel of land. Hysell v. Kimmel, 834 N.E.2d 1111, 1114 (Ind. Ct. App. 2005).

Easements of necessity are created when a conveyance of land requires an easement for the beneficial use and enjoyment of the land conveyed or retained. An easement of necessity will arise when a tract of land is severed in such a way as to leave one part without access to a public road. Cockrell v. Hawkins, 764 N.E.2d 289, 292 (Ind. Ct. App. 2002). Such an easement may arise "only at the time that the parcel is divided and only because of inaccessibility then existing." Id. at 293An easement of necessity "cannot arise

against the lands of a stranger." Id. (quoting Moore v. Ind. & Mich. Elec. Co., 95 N.E.2d 210, 212 (Ind. 1950)).

An easement may also be implied by the use of a portion of land prior to severance. "Where, during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part and the servitude is in use when the parts are severed, the law will imply an easement for its continuance if the servitude is reasonably necessary for the fair enjoyment of the part benefited." Hysell, 834 N.E.2d at 1114. In this situation, "[t]he owner of the dominant estate does not need to show absolute necessity, but there still must be some necessity shown." Id. at 1115.

5. Easement Creation – *Prescription*

Prescriptive easements, created by adverse use, may be created by private or public use. Prescriptive easements generally "are not favored in the law." Carnahan v. Moriah Prop. Owners Ass'n., Inc., 716 N.E.2d 437, 441 (Ind. 1999). In Fraley v. Minger, the Indiana Supreme Court reformulated the elements for establishing adverse possession. 829 N.E.2d 476, 486 (Ind. 2005). Specifically, the Court held that the claimant in such circumstances must establish clear and convincing proof of (1) control, (2) intent, (3) notice, and (4) duration. Id. These reformulated elements apply to establishing prescriptive easements, except for the differences between fee interests and easements. Wilfong v. Cessna Corp., 838 N.E.2d 403, 406 (Ind. 2005). To establish the existence of a prescriptive easement, the claimant must show "'an actual, hostile, open, notorious, continuous, uninterrupted adverse use[.]'" Wilfong, 838 N.E.2d at 405 (quoting Carnahan v. Moriah Prop. Owners Ass'n., Inc., 716 N.E.2d 437, 441 (Ind. 1999)).

Ind. Code § 32-23-1-1 provides that an easement may not be acquired by adverse use unless the use is uninterrupted for at least twenty (20) years. The Indiana Court of Appeals has reasoned that the twenty-year period of adverse use will not begin to run against a title owner until the property is conveyed to the title owner. *See* Downing v. Owens, 809 N.E.2d 444, 450 (Ind. Ct. App. 2004). However, "[t]he continuous use of the easement by predecessors in title may be added to the use of the present claimant in order to satisfy the twenty-year requirement." Romine v. Gagle, 782 N.E.2d 369, 385 (Ind. Ct. App. 2003).

6. Easement Creation – *Condemnation*

The government or an authorized entity may create an easement using the power of eminent domain. State, county, and municipal governments may acquire easements in private property for public uses such as transportation and public works. Privately held utilities and other corporations authorized to deliver utility services may also acquire a right-of-way by condemning private property and appropriating an easement. Ind. Code § 32-24-4-2. Railroad companies are also authorized to condemn private property for the

use of operating a railroad right-of-way. Ind. Code § 8-4-1-15. A landowner will be due just compensation for any taking by the government or authorized entity.

7. Easement Location

Easements created by grant or reservation must include a description of the granted easement, which will control its location. Location of easements created by implication or prescription will be established by their prior use. If an implied easement's location has not been previously established, its location may be determined by the owner of the burdened estate. Shedd v. Am. Maize Prod. Co., 108 N.E. 610, 614 (Ind. Ct. App. 1915). So long as the location is reasonable, it may not be altered without the agreement of the servient and dominant estate holders. Ritchey v. Welsh, 48 N.E. 1031, 1033 (Ind. 1898).

8. Scope of Use – *Private Easement*

"Easements are limited to the purpose for which they are created." North Snow Bay, Inc. v. Hamilton, 657 N.E.2d 420, 423 (Ind. Ct. App. 1995) (citing Whitt v. Ferris, 596 N.E.2d 230, 233 (Ind. Ct. App. 1992)).

"The nature of an easement created by an express agreement or grant must be determined by the provisions of the instrument creating the easement." Adkins Inv., Inc. v. Jackson Cty. REMC, 731 N.E.2d 1024, 1033 (Ind. Ct. App. 2000) (citing Indiana Broad. Corp. v. Star Stations of Indiana, 388 N.E.2d 568, 571 (Ind. Ct. App. 1979)). Specific wording may limit the allowed use of an easement, but if the language is overly broad, the reservation of a way of necessity may be interpreted to grant all rights that are reasonable for the full enjoyment of the dominant estate, so long as no additional burden is cast upon the servient estate. New York Cent. R. Co. v. Yarian, 39 N.E.2d 604, 606 (Ind. 1942).

Easements created by implication are typically created for only those uses established prior to severance, or at the time of severance. However, if no additional burden will be added to the servient estate, rights-of-way may be extended so "the way may be used in any manner that is reasonably required for the complete and beneficial use of the dominant estate. . . ." Yarian, 39 N.E.2d at 606.

Because prescriptive easements are disfavored, they will not be extended beyond their original use. Prescriptive easements are limited to the use by which they were created and will not be extended by implication. Brown, 360 N.E.2d at 618.

9. Scope of Use - *Public Easement*

Public easements were originally created for the passage of the general public on highways, roads, and other thoroughfares. Since that time, courts have extended the use

of public ways to allow for the installation of utilities upon and under these rights-of-way. Such a use is not viewed as an additional burden upon the servient estate, and no additional compensation is due for such use. Louisville & Indiana R.R. Co. v. Indiana Gas Co. Inc., 829 N.E.2d 7, 11 (Ind. 2005) (quoting Fox v. Ohio Valley Gas Corp., 235 N.E.2d 168, 172-73 (Ind. 1968)).

Additionally, statute permits public and municipal utilities to install amenities, "upon, along, under, and across any of the public roads, highways, and waters outside of municipalities. . . ." Ind. Code § 8-20-1-28. Common law states that no compensation will be due for installation under and upon public ways, but it remains unclear to what extent compensation will be due for installation "along" public ways.

10. Scope of Use - *Railroad Easement*

Historically, railroad easements were interpreted to only include the right to operate trains and conduct business consistent with such operations. Railroad rights-of-way, however, may now be expanded to allow for installation of utilities. Indiana Code and Indiana common law indicate that a railroad possessing an easement may grant a license to a public utility for installation of amenities along its right-of-way. Calumet Nat'l Bank v. AT&T, 682 N.E.2d 785, 791 (Ind. 1997). Further, the Indiana Court of Appeals has found that a railroad granting such a license to a public utility creates no additional burden to the fee holder, and therefore, no compensation is due. *See* Ritz v. Indiana & Ohio R.R. Inc., 632 N.E.2d 769, 775-76 (Ind. Ct. App. 1994) (citing Fox, 235 N.E.2d at 172-73).

11. Maintenance

Right-of-way maintenance responsibilities may be specified in the express creation of an easement. When not specified, the responsibility is generally upon the easement holder and the owner of the servient estate has no obligations. "[T]he owner of an easement possesses all rights necessarily incident to the enjoyment of the easement, and . . . he may make such repairs, improvements, or alterations as are reasonably necessary to make the grant of the easement effectual." Litzelswope v. Mitchell**,** 451 N.E.2d 366, 369 (Ind. Ct. App. 1983). "[W]here there are several owners in common of an easement, each owner has a right to make reasonable repairs, alterations, and improvements to the easement so long as such do not injuriously affect his co-owner." Id.

Reece v. Tyson Fresh Meats provides a bright-line rule for who owes a duty for maintenance on a road right-of-way. 173 N.E.3d 1031 (Ind. 2021). "A landowner owes a duty to passing motorists on an adjacent highway to not create 'hazardous conditions' that visit themselves upon the roadway." Id. at 1041 (citing Sheley v. Cross, 680 N.E.2d 10 (Ind. Ct. App. 1997)). However, where a visual obstruction remains completely on the landowner's property, the landowner owes no duty to the traveling public. Id. This duty of care may change, as the Indiana Supreme Court heard oral arguments on Martinez v.

Smith, et al., 249 N.E.3d 1096 (Ind. Ct. App. 2024), in early June 2025. A decision from the Indiana Supreme Court is expected on whether a private property owner or county official has the duty of care for visual obstructions at rural intersections.

12. Abandonment

Under Indiana common law, an easement acquired by either actual grant or prescription may not be extinguished by mere nonuse. *See* Consol. Rail Corp., Inc. v. Lewellen, 682 N.E.2d 779, 783 (Ind. 1997).

Extinguishing an express or prescriptive easement requires nonuse plus an act indicating intent to abandon. Id. "An easement of necessity ceases to exist, however, when the necessity out of which the easement arose ceases to exist." Zakutansky v. Kanzler, 634 N.E.2d 75, 84 (Ind. Ct. App. 1994). Railroad right-of-way abandonment was formerly dictated by Indiana common law but is now controlled by statute. *See* Ind. Code § 32-23-11-6.

13. Alternative to Easements for Roadways and Roadsides

A license may exist in instances where an easement does not. Unlike an easement, a license grants a personal privilege to do some act or acts on land and does not convey an estate in the land. Contel of Indiana, Inc. v. Coulson, 659 N.E.2d 224, 228 (Ind. Ct. App. 1995). Further, a license cannot ripen into an easement, regardless the duration of the use, and cannot be inherited or assigned. Greenco, Inc. v. May, 506 N.E.2d 42, 46 (Ind. Ct. App. 1987). A license is often present when a highway right-of-way is established by public use rather than a properly recorded conveyance. A right-of-way is granted for the traveled portion of the road, and a license exists with respect to the property adjacent to the roadway allowing for the maintenance of these areas. Contel, 659 N.E.2d at 228.