

# **The Law of Easements**

**Georgia Civil Engineering and Surveying Land Law**

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## I. INTRODUCTION

Property ownership and conflicting rights and authority to use land for construction projects can lead to disputes if proper measures are not taken up front to insure that the construction and design professionals have the right to use property for their needs. One of the most important rights that assist construction and design professionals in attaining such goals are easements. While there are many types of easements, and many uses for the easements, this paper will focus on what easements are and what types of pitfalls construction and design professionals can encounter if easements are not obtained before performing any work.

## II. EASEMENTS DEFINED

An easement is a property right provided to person for his or her use and benefit over the property rights of other property owners. It is an interest in land, which confers upon its owner, some right, benefit, dominion, or lawful use out of or over the estate of another. Examples would include easements for ingress and egress or for sewer, water or power lines and pipes. An easement will be used for a stated purpose and is usually granted for a specific portion of the real property. Since easements are considered interests in land, a grant of an easement should be drawn up in the same manner as real estate deeds and recorded on the real estate records of the county in which the two pieces of real property lie. A form example of an easement is included in the power point presentation.

### A. TYPES OF EASEMENTS

Under Georgia law, there are four principal ways in which to obtain an easement, by agreement, by prescription (adverse possession), by necessity, and by compulsory purchase. For construction and design professionals, obtaining an easement by agreement is preferable.

## AGREEMENT

Although a person, company or governmental entity gains certain rights by an easement agreement, an easement does not take away any rights to the property allocated in the easement from the fee simple owner. “Ownership in the soil and the right to an easement are independent.” Folk v. Meyerhardt Lodge No. 314, 218 Ga. 248, 127 S.E.2d 298 (1962). In Folk, the owner of the property granted an easement for the use of a stairway from the first to the third floor of the building. The grantee (the person who benefitted from the easement) argued that by granting the easement, the owner could not use the stairway. The Georgia Supreme Court held that that nothing passes as an incident to the grant of an easement but what is for its fair use. Notwithstanding such a grant, there remains in the grantor (the owner) the right of full dominion and use of the land, except so far as a limitation thereof is essential to the reasonable use of the easement granted. Id. The Supreme Court remanded the case back to the trial court to have a jury determine whether the stairway can be reasonably use by the grantee while allowing the owner use as well. While the parties had an agreement in writing, they did not explicitly identify the rights of each party. The result of this exclusion was the Courts decision to have a jury decide what was the reasonable expectation of use, essentially leaves the issue for complete strangers to resolve.

It is paramount that an agreement to use another’s land be in writing and filed on the real estate records. Unrecorded agreements are not sufficient to serve as grant of easement where there was no deed nor any agreement in form that could have been recorded with on deed records, where agreement did not use language of grant of easement, where it was conditional on occurrence of acts that never occurred, where it had no legal description to identify property or

easement, and where there was no exercise of any use of right of ingress or egress across claimed easement. See Central of Ga. R.R. v. DEC Assocs., 231 Ga. App. 787, 501 S.E.2d 6 (1998).

### BY PRESCRIPTION

An easement by prescription arises when one party uses the property of another, without permission, for a minimum of seven (7) years. If use of the land is by permission, no easement can be established. See Douglas v. Knox, 232 Ga. App. 551, 502 S.E.2d 490 (1998). By the fact that a property owner knows of and does not object to the use of his land by others, an easement by prescription cannot be established. See Id. (citing Weaver v. Henry, 222 Ga. App. 103, 473 S.E.2d 495 (1996)). When one uses the land of another, with permission, the parties have established, at best, a revocable license for its use. Id. In order to establish an easement by prescription, “it is necessary to show that the owner was given notice that the user intended to appropriate [the property] as his own.” Id. (citations omitted).

A person can establish an easement by prescription in their favor by maintaining the property about which they plain to make a claim. In Georgia Pacific Corp v. Johns, 204 Ga. App. 594, 420 S.E.2d 39 (1992), Johns, a member of the general public, used roads owned by Georgia Pacific to access a river for hunting and fishing. During the time that he used the roads, he performed repair and maintenance work on the roads, including bridge repairs, removal of trees and bushes and filling in areas of washout. Johns never sought or received permission to either use or repair the roads from Georgia Pacific or its predecessor in title.

In ruling in Johns favor, the Georgia Court of Appeals held although Johns originally had permission to use the roads, by making repairs to the roads, he was giving the owner notice of a adverse claim of right. As the Court held, it was not so much that the repairs were actually made, but the fact that the owner was put on notice about the repairs. “[T]he crux of the

requirement for repairs lies not in the actual effectuation of repairs by the prescriber but in the notice of adverse use the performance of such repairs would give to the property owner. The importance of this ‘notice by repair’ requirement is best illustrated in situations where the initial use of the private way was permissive.” Id.

One can also obtain an easement by prescription by the uninterrupted use of real property, whether open and notorious or not, if the person was using the property for a period of twenty (20) years. O.C.G.A. § 44-9-1.

#### BY NECESSITY

Like the name implies, an easement by necessity is established when an owner of land conveys a portion of that land to another, and the only access from the new piece of property to a public road is over the portion of the property retained by the grantor, “an implication arises that the grantor intended to convey a means of access.” In this situation, the law recognizes the grantee’s rights to access the conveyed property through a right of way over the property retained by the grantor. See Eardley v. McGreevy, 279 Ga. 562, 615 S.E.2d 744 (2005). In establishing an easement by necessity, however, the grantee must show that the access is necessary because there is no other way to access his or her property. If there are other ways to enter the property, the easement by necessity will not be granted. It is not enough and the law will not allow an easement by necessity, if it is simply more convenient to travel across the grantor’s land, than to use the grantee’s own land. Id. Once access is no longer necessary, the easement will cease as a matter of law.

#### COMPULSORY PURCHASE

Georgia provides a statutory process for obtaining access to a land locked piece of property. O.C.G.A. § 44-9-40 et seq. The process can be described as a private condemnation.

Georgia superior courts are granted jurisdiction to grant private ways to individuals under such circumstances. O.C.G.A. § 44-9-40(a). Such private ways may not exceed twenty feet in width and the petitioners must keep them open and in repair. Id. A petition is required to obtain the easement and must describe the easement sought and include a plat showing the measurements and location of the proposed private way. O.C.G.A. § 44-9-41. That statute also contains various service and advertising requirements. The hearing proceeds in the same manner as provided under the Georgia eminent domain statute. The "condemnee" is entitled to a jury trial on the amount of compensation to be paid, the condemnor's actual right to a private way, and the location and width of the private way. O.C.G.A. § 44-9-46.

If the condemnor fails to pay the compensation fixed by the jury, the private way is deemed abandoned. O.C.G.A. § 44-9-47. Upon a motion and ten days notice, the court shall enter a judgment of abandonment and upon the entry of such order "no application for private way over the same land shall thereafter be filed by the same applicant or its successor in title." Id. If the parties agree, the court may enter a judgment that allows for terms of payment. O.C.G.A. § 44-9-48.

Notwithstanding the foregoing, an owner who sells land over which access existed and fails to reserve an easement may not condemn a private way. Mersac, Inc. v. National Hill Condominium Ass'n., 267 Ga. 493, 480 S.E.2d 16 (1997). "[N]ecessity cannot be created by one's own voluntary action in giving up reasonable access." Id. However, if the previously owned land does not provide reasonable access, the land locked owner would be entitled to seek to condemn a private way. Kellett v. Salter, 244 Ga. 601, 261 S.E.2d 597 (1979). The courts presume that access to navigable waters alone does not provide reasonable access, although the

presumption may be rebutted. International Paper Realty Corp. v. Miller, 255 Ga. 676, 341 S.E.2d 945 (1986).

### III. CREATING AN EASEMENT

As stated above, an easement must be in writing to be effective. An easement must be in writing in order to comply with the Statute of Frauds, which requires that all transfers of interest in real property be in writing. O.C.G.A. § 13-5-30(4). It must also be filed in accordance with the deed requirements of Georgia law. The terms and provisions of the easement must contain specific language to be able to identify with reasonable certainty the real property that is subject to the easement and the rights granted. The person granting the easement must sign the document for it to be effective. It is imperative that the easement be recorded. If it is not recorded, it will be considered unknown to third-parties. Accordingly, the third-parties will not be bound by the easement. Thus, the easement will only be contract between those who are parties to the easement and called a private easement.

### IV. SCOPE OF EASEMENTS

An easement implicitly includes the authority to do those things reasonably necessary for the use of the easement. Jakobsen v. Colonial Pipeline Co., 260 Ga. 565, 397 S.E.2d 435 (1990). This right of use extends to trimming trees that extend over the easement. Id. The scope of use of the easement also contemplates a change in the “manner, frequency and intensity of use” of the easement within the physical boundaries of existing easement so long as the use does not unreasonably interfere with the grantor’s use. Parris Properties, LLC v. Nichols, 2010 WL 3386792 (Ga. App. 2010)(Court holding that the replacement of 4” sewer line with 8” sewer line was not outside scope of easement grant). For easements for ingress and egress, reasonable use

includes grading, placing gravel, culverts, and maintenance of roadway. Lanier v. Burnette, 245 Ga. App. 566, 538 S.E.2d 476 (2000).

## V. TERMINATING EASEMENTS

As stated above, pursuant to O.C.G.A. § 44-9-5, an easement by necessity will cease once the easement is no longer necessary. Further, pursuant to O.C.G.A. § 44-9-6, easements will be lost if they abandoned or forfeited by nonuse. In order for an easement to be deemed abandoned, the nonuse must continue for a term sufficient to raise the presumption of release or abandonment. Abandonment is usually a question left for a jury to decide. Easements can always be terminated by agreement of the parties and through the courts.

## VI. CONSERVATION EASEMENTS

In order to preserve lands for future generations, Georgia joined in with other states and enacted the Uniform Conservation Easement Act in 1992, codified at O.C.G.A. § 44-10-1 et seq. Otherwise known as an Historic Preservation Easement, this type of easement is used to preserve scenic, natural, historical or other values that land may provide. In conjunction with local governmental agencies and the Georgia Department of Natural Resources, Conservation Easements are a valuable tool to preserve land for future generations. Like other easements, Conservation Easements run with the land, therefore requiring future landowners to abide by the agreement.

Georgia law defines a Conservation Easements as follows:

“[a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.”

O.C.G.A. § 44-10-2.

A Conservation Easement can be established through the ways listed above, but it cannot be established through the government's taking power of eminent domain. O.C.G.A. § 44-10-3. One of the benefits of a Conservation Easement for the owner of the property, other than that they have given to the public at large, is the fact that there can be significant tax incentives for doing so. The IRS may allow for a tax deduction as a charitable contribution and Georgia law specifically contemplates that property taxes would be lower once a Conservation Easement is granted. See O.C.G.A. § 44-10-8.

## VII. CONCLUSION

If someone improperly enters or uses property of another without permission, they could be liable to the injured party (owner) for trespassing on the property or for conversion (civil theft). Depending on how egregious the act is, one can be subject to compensatory and punitive damages.

It is a best practice to make sure when designing a project that the proper easements are in place before commencing any work. If the engineer cannot obtain the easements necessary to design a sewer system, roadway, etc., that the property owner could be subject to substantial cost overruns because of construction and maintenance issues and delays. Additionally, the planned work could interfere with another person's easement. If things are not done properly, the owner will look to anyone it can to recoup any monies lost because the proper easements were not obtained.