



First American Title™

NATIONAL COMMERCIAL SERVICES

PRESENTED AT

**56th Annual William W. Gibson, Jr
MORTGAGE LENDING INSTITUTE**

September 29, 2022
Austin, Texas

EASEMENTS APPURTENANT

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Easement may be created by express grant, condemnation, reservation, dedication, prescription, necessity and in a variety of other ways. This paper will focus on the narrow topic of express easements appurtenant. We will examine: (1) the definition and nature of easement rights; (2) how easements appurtenant are different from an easement in gross, license and profit a prendre; (3) requirements to create an easement appurtenant; (4) rights and duties of the parties to easements appurtenant; (5) how an easement appurtenant might be terminated; and (5) title insurance considerations.

I. NATURE OF EASEMENTS

Texas case law defines an easement as a non-possessory interest in another's land authorizing the owner of the easement to use of the land for a particular purpose. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). An easement does not convey the land or an estate in the land itself; instead, it entitles the owner of the easement to the right to use the land of another without interference. *Allen v. Allen*, 280 S.W.3d 366, 381 (Tex. Civ. App.-Amarillo, 2008, rev. denied); *Hubert v. Davis*, 170 S.W.3d 706, 710 (Tex. Civ. App.-Tyler 2005, no pet.); *Seber v. Union Pac. R. Co.*, 350 S.W.2d. 640, 647-47 (Tex. App. – Houston [14th Dist.] 2011, no pet).

II. EASEMENT APPURTENANT IN GENERAL

An easement appurtenant creates a right to use the servient tenement (also known as “servient estate”) for the benefit of the dominant tenement (also known as “dominant estate”). *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 870 (Tex. App.-Austin 1988, writ denied). It is considered an incorporeal hereditament or right, imposed on corporeal or real property, rather than being imposed on the owner. *Miller v. Babb*, 263 S.W. 253, 254 (Tex. 1924); *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925). Generally, it benefits the entire dominant estate unless expressly limited. An easement appurtenant attaches to and runs with the land regardless of the owners of either estate in land. *McWhorter v. City of Jacskonville*, 694 S.W.2d. 182, 184 (Tex App. – Tyler 1995, no writ). It cannot be conveyed apart from the dominant estate. *Id.* Once created and recorded, the easement automatically transfers with conveyance of the dominant estate whether the easement is referenced in subsequent deeds of conveyance. *McDaniel v. Calvert*, 875 S.W.2d 482 (Tex. App.- Fort Worth 1994, no writ). This means an easement appurtenant extends to the landowner's successors in interest.

Easements appurtenant may be either affirmative or negative. An “affirmative easement” authorizes the owner of the easement to make use of the land in a way that would be a trespass without the easement. An example is an access or utility easement. A “negative easement” is one in which the owner of the servient estate is prevented from doing something they would otherwise be allowed to do, and this benefits the owner of the dominant land. *Miller. Babb*, 263 S.W. 253, 254

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(Tex. Com. App. 1924, judgment adopted); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962); *Pokorny v. Yudin*, 188 S.W.2d 185, 193 (Tex. Civ. App.-El Paso 1945, no writ).

A. Difference Between Easement Appurtenant and Profit a Prendre

An appurtenant easement is an interest in land that carries no right to profits or participate in the profits from the land. *Magnolia Petroleum Co. v. Caswell*, 1 S.W.2d 597, 600 (Tex. Comm'n App. 1928); *Anderson v. Gipson*, 144 S.W.2d 948, 949-950 (Tex. Civ. App. – Galveston 1940, no writ); *Miller v. Babb*, 263 S.W. at 254. A profit a prendre is the right of one person to remove soil or gravel, oil, gas, minerals, timber, or other product from land owned by another. *Anderson v. Gipson*, 144 S.W.2d at 949-950; *Uzzell v. Hoggett*, 430 S.W.2d 846, 847 (Tex. Civ. App. - San Antonio 1968, writ ref'd n.r.e.)(Holding: hunting lease is a profit a prendre); *Evans v. Ropte*, 96 S.W.2d 973, 974-975 (Tex. 1936). The owner of the profit has the right to ingress and egress only to the extent it is required to exploit the holder's profit. *Anderson v. Gipson*, 144 S.W.2d 948 (Tex. Civ. App. - Galveston 1940, no writ); *Bland Lake Fishing & Hunting v. Fisher*, 311 S.W. 2d 710 (Tex. Civ. App.- Beaumont 1958, no writ). Timber deeds and gravel leases are examples of profits a prendre.

B. Difference Between Easement Appurtenant and License

An easement appurtenant is a nonpossessory interest in land that is not revocable at will. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700, 46 Tex. Sup. Ct. J. 167 (Tex. 2002); *Chicago R. I. & G. Ry. Co. v. Johnson*, 156 S.W. 253, (Tex. Civ. App.-Amarillo 1913, writ ref'd). Unlike an easement appurtenant, a license is a personal privilege or authority in the grantee to do some act on the land of another. *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925); *Walker v. Pointer*, 304 F. Supp. 56, 62 (N.D. Tex. 1969); *Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex. Civ. App. -El Paso 1993, no writ). It is only permission to use the land of another for a specific purpose and does not convey an interest or estate in the land. *Joseph v. Sheriff's Ass'n*, 430 S.W.2d 700 (Tex. App. – Austin 1968, no writ). It is not subject to the Statute of Frauds but may be given by parole or in writing. *Id.* at 703; *Parsons v. Hunt*, 84 S.W. 644, 646 (Tex. 1905). It typically terminates upon the death of the grantee and is not assignable without permission of the landowner licensor. *Id.*; *Chicago, R.I. & G. Ry. Co. v. Johnson*, 156 S.W. 253, 256 (Tex. Civ. App.- Amarillo 1913, writ ref'd).

Generally, a license in real estate may be revoked at any time or at the will of the landowner licensor. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1963); *Digby v. Hatley*, 574 S.W.2d 186 (Tex. Civ. App.- Austin 1978, no writ). However, a license may not be revocable at will if expenditures has made valuable improvements or in reliance on the license. *Joseph v. Sheriff's Ass'n*, 430 S.W.2d at 70; *Risien v. Brown*, 10 S.W. 661 (Tex. 1889); *Markley v. Christen*, 226 S.W. 150 (Tex. Civ. App. - San Antonio 1920, writ dism'd w.o.m.); *Ft. Worth & N.O. Ry. Co. v. Sweatt*, 50 S.W. 162 (Tex. App. – Dallas 1899, no writ); *Evans v. Gulf C. & S.F. Ry. Co.*, 28 S.W. 903 (Tex. Civ. App. – Fort Worth 1894, no writ). Texas Courts are inclined to hold a license does not become irrevocable where improvements are solely for benefit of licensee and there is no

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First appeared as part of the conference materials for the
56th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"Easement Appurtenant"