

# Handbook of Florida Fence and Property Law: Easements and Rights of Way<sup>1</sup>

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## Preface

With approximately 19,000 livestock farms in the state, along with horse farms; orange groves; croplands of soybeans, sugarcane, cotton, and peanuts; and many other agricultural and livestock facilities, livestock and farming have a significant impact on Florida's economy. Florida's agricultural economy has been required to co-exist with rapid population and commercial growth in the state over the last twenty-five years. Conflicts between these interests bring to prominence issues such as the rights and responsibilities of adjoining landowners, farmers, and property owners in general. Due to the added importance placed on these areas of real property, the legal aspects of fences in the state of Florida have taken on significant importance.

This handbook is designed to inform property owners of their rights and responsibilities in terms of their duty to fence. Discussed areas include a property owner's responsibility to fence when livestock is kept on the property, the rights of adjoining landowners to

fence, the placement of fences, encroachments, boundary lines, easements, contracts, nuisances, and a landowner's responsibilities towards persons who enter his property.

This handbook is intended to provide a basic overview of the many rights and responsibilities that farmers and farmland owners have under Florida's fencing and property law. Readers may value this handbook because it informs them about these rights and responsibilities. However, the reader should be aware that because the laws, administrative rulings, and court decisions on which this booklet is based are subject to constant revision, portions of this booklet could become outdated at any time. This handbook should not be viewed as a comprehensive guide to fencing and property laws. Additionally, many details of cited laws are left out due to space limitations. This handbook should not be seen as a statement of legal opinion or advice by the authors on any of the legal issues discussed within. This handbook is not a replacement for personal legal advice, but is only a guide to inform the public on issues relating to

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Readers wishing to find further information from the Florida Statutes may access those statutes online at <http://www.leg.state.fl.us/STATUTES/>.

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## Easements and Rights of Way

### ***What are easements and rights of way?***

An easement is a benefit based in land ownership, other than the sharing of profits, that gives someone the right of use or enjoyment of another person's land for a special purpose not inconsistent with the general property rights of the owner. An easement cannot exist between two pieces of land owned by the same person (*J. C. Vereen & Sons v. Houser*, 123 Fla. 641, 167 So. 45 [Fla. 1936]; 20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* section 1). A right-of-way, generally, is the right of a specific person or class of persons to use a route to travel over the land of another (*Wyatt v. Parker*, 128 So.2d 431 [Fla. 2d DCA 1961]; 20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* section 9). A common example of a right of way easement is one where a landowner cannot access a public road without crossing the property of another landowner. In these situations, courts will usually find a right of way by necessity. This allows a party to cross another's land at the closest point to a public highway. It is important to note, however, that where another route eventually emerges to the public highway, the common law right of way by necessity will be found to no longer exist. Furthermore, if a common law right of way ceases to exist, a statutory right of way may be found

where land used for either a dwelling or agricultural, timber, or stock purposes is shut off from access to a road (Florida Statutes section 704.01). In such cases, a court may determine whether compensation is due to the landowner (Florida Statutes section 704.04).

### ***How are easements usually created?***

Usually, the title-holding landowner expressly grants an easement by means of a written agreement, deed, or deed reservation (20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* sections 15–25). This contract must show the landowner's intention to create a permanent, not temporary, right in a specific piece of land. Limited types of easements may also be created by implication. Areas such as streets, alleys, or parks are usually found to be easements by implication (Florida Statutes 704.01[1]). Once created, the location of the easement cannot be changed without agreement. When an easement is blocked, the easement owner may pass over the adjoining land as far as is necessary to avoid the blockade.

### ***Who is responsible for maintaining an easement?***

Usually, the owner of the easement is responsible for maintenance (20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* section 48). The parties to an express easement may alter their responsibilities by agreement. The owner of an implied easement is responsible for its maintenance (*Morrill v. Recreational Development, Inc.*, 414 So.2d 590 [Fla. 1st DCA 1982]). If a statutory-implied easement is located on land used to enclose a farm, grove, or livestock, the user of the easement may be required to maintain a gate or cattle guard anywhere a fence is interrupted by the easement (Florida Statutes section 704.02).

### ***What other forms of easement can be created or granted to a landowner or party using a piece of property?***

There are two other available forms of easements:

## 1. Prescriptive Easements

### 2. Conservation Easements

A *prescriptive easement*, similar to adverse possession, is designed to obtain rights less than full ownership to land based on long-term use or enjoyment rather than agreement or statutory methods. In order for a prescriptive easement to exist, a party must show all of the following:

- Actual, continuous and uninterrupted use (not possession) for twenty years
- Use, under a claim of right, in conflict with the landowner's use
- Knowledge of the landowner or use so open, notorious, visible, and uninterrupted that knowledge is imputed to the landowner (*Downing v. Bird*, 100 So.2d 57 [Fla. 1958]; 20 Florida Jurisprudence 2d *Adverse Possession* section 60)

A *conservation easement* is an express easement created to limit further development of property. Under Florida Statutes section 704.06, a conservation easement acts as a perpetual preservation effort of the land's natural state. This kind of easement also is created to maintain the existing uses of the land at the time of the easement such as agricultural, historical, cultural, or archeological purposes. Conservation easements are acquired by either a governmental body or a charitable corporation or trust in order to prevent activities such as construction, dumping, excavation, and/or tree removal at a designated property. Once such an easement is created on a piece of property, it cannot be changed to allow development (20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* section 10). Also, see Florida Statutes section 704.06(11) on not limiting rights to negotiate for sale for purpose of linear facilities.

#### ***If I grant an easement to my adjoining landowner, can that owner use the easement for any purpose?***

No. Courts settling disputes over use of easements look to the grant to find the parties' intention at the time of the easement's creation. Any use that was not intended by the parties at the time of

the easement's creation will not be allowed. If there is no clear intention, the courts usually will allow any use of the easement that is reasonably necessary for its full enjoyment as measured by the easement's purpose, the situation of the property, and any surrounding circumstances (*Seven Hills Inc. v. Bentley*, 848 So.2d 345 at 361 [Fla. 1st DCA 2003]). The court cites these rules to validate a trial court's award of damages for the misuse of a written easement by an electrical company. Likewise, an owner of an easement for drainage purposes cannot use the easement for activities not consistent with drainage (*Crutchfield v. F.A. Sebring Realty Co.*, 69 So.2d 328 [Fla. 1954]). The general rule is that the burden placed upon the landowner granting the easement must not be unnecessarily increased by uses that the parties did not intend (20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* sections 41, 43, and 46).

#### ***What are my rights if one of the parties violates the terms of the easement?***

Generally, a lawsuit may be brought to seek damages for injury to, or disturbance of, the easement; for breach of contract granting the easement; or for an injunction to stop the easement's obstruction (20 Florida Jurisprudence 2d *Easements and Licenses in Real Property* section 69).

#### ***What happens if someone builds a fence blocking an easement?***

When a fence is blocking an entrance or exit to another property under the consideration of constructive notice, the court will first determine if there is an easement. The court may order the fence be removed. In *Prime West, Inc. v. Camargo* (906 So.2d 1112 at 1113 [Fla. 3d DCA 2005]), the purchaser of a lot brought action against the owner of a private road, seeking the removal of the fence as relief. The courts determined that when an owner conveys part of his property, the owner impliedly grants all those easements which existed and which were used for the benefit of the land that was conveyed. Similarly, an implied easement is determined by the circumstances surrounding a conveyance and means that whenever a part of the property is obviously in use as an incident or as an appurtenance, it passes by implication when the land

is sold. The court held that the purchaser had an implied easement to use the road (*id.*).

### ***What is a statutory way of necessity?***

This is a kind of easement recently used when a person claims he must use a portion of another person's land to gain access to public or private roads. When a dwelling or agricultural enterprise is cut off from every practical route to public or private roads by land, fencing, or other improvements, the owner of that land may claim a desire to use a portion of neighboring land. The said portion of neighboring land may serve as an easement for persons, vehicles, stock, cable television service, utilities, and telephone service to the land that is surrounded or shut out from access to roads (Florida Statutes section 704.01).

### ***Can a landowner be compensated for the imposed statutory way of necessity?***

Yes. If someone is claiming a statutory way of necessity, you may file suit in a county circuit court to challenge the claim or to request the court to award compensation for the use of your land (Florida Statutes section 704.01).

## **Summary**

With an easement, a landowner, without sharing profits, has the right to use and enjoy another landowner's land. Easements are created either by a written contract or by implication in situations such as streets, parks, or alleyways. Their use is defined by the intention of the parties at the time of the easement's creation. If this intention is unclear, the courts will look to the easement's character, purpose, and surrounding circumstances in determining the easement's proper use. Rights of way give a specific person or persons a means of accessing a public road or highway through another's land. In the case of an easement through fenced agricultural lands, the user of the easement is generally responsible for maintaining gates or cattle guards any place the easement intersects a fence.

In the case where one of the parties violates the terms of the easement, it is always best to try to amicably resolve the situation by open discussion and negotiation. If this is not possible, the party may sue

for an injunction to stop the violation and/or for damages for breach of contract.

## **Further Information**

Circular 1242, Handbook of Florida Fence and Property Law

[http://edis.ifas.ufl.edu/TOPIC\\_BOOK\\_Florida\\_Fence\\_and\\_Property\\_Law](http://edis.ifas.ufl.edu/TOPIC_BOOK_Florida_Fence_and_Property_Law)