

WHO IS ACQUIRING YOUR EASEMENTS AND RIGHTS OF WAY?

BY JERRY MORAN

What is the difference between an easement and a right of way? Many experts have given their opinion. The one I like the best is, "An easement is commonly defined as a non-possessory interest in the land of another."¹ A right of way is what you build your plant upon. Think of a railroad right of way.

For years, power companies and telcos got along with getting verbal permission from property owners to cross their land and place distribution power and telco facilities of every stripe. When they were erecting pole lines they cut across large tracts of farm and vacant land. The engineer would ask the owner if it was okay to put the pole line up. With a nod of the head, a shake of the hand, and sometimes a bottle of the owner's favorite beverage, the companies were off and running delivering top quality service to the masses.

Of course the wireless communications industry woke the public up regarding the value of their land when a leasing agent from a wireless carrier offers a large monthly check in exchange for the right to erect a monopole and a hut on an owner's property. When this happens the owner frequently eyes the local power company's or telco's pole line and asks him/herself, I wonder how they got here in the first place? Why aren't they paying me too!

Times have changed but has your company/co-op changed? My company receives calls weekly from former students who have attended our right of way seminars with questions about how to handle various trespass issues. Sometimes they are talking about facilities placed within the last few years including sectionalizers, large overhead transformers, telco cross connect boxes, remote terminals, etc.

VERBAL RIGHT OF WAY

Under the law of this country "any interest in real property can only be granted or transferred in writing."² That is called the statute of frauds and has its origin in England in 1677. Why does this

apply in the United States? United States laws are based on British common law, unless, you are in Louisiana, where Napoleonic law prevails.

So what does it mean when you get a verbal right of way? It means that you have a "license." And a license is revocable! A good example of a license is a ticket to a movie theater or a sporting event. You are given permission to occupy a certain seat for a specific time and date. If you do not comport yourself in accordance with the rules (i.e. loud and obnoxious behavior), the management has the right to revoke your license and remove you from the premises. If a property owner revokes your license, then your organization is faced with removing its facilities at its expense.

How much of your outside plant budget is spent on relocation due to right of way issues? A couple of years ago, we did an informal survey of about two-dozen companies to find out what that percentage was. We spoke with engineering, construction managers and directors.

The percentage of their budgets ranged from a low of 22 percent to a high of 38 percent. We tried keeping the figures to private property issues and not public right of way relocations. If you do some quick math and arbitrarily use 30 percent as the average, what was your total outside plant construction budget last year? The result is usually very surprising.

"BLANKET" EASEMENTS

Last year, we taught our one-week basic right of way course to a medium-sized company in the eastern United States that only used engineers to obtain easements. I asked to see one of their easement

what is an easement?

CONTRACT

CONTRACT

what is a right of way?

CONTRACT

what is the difference?



This utility enclosure had to be relocated at the owner's expense. A verbal right of way (a revocable license) was taken by the field engineer and constructed before the right of way agent could make contact with the owner to finalize the easement document. New owners were in possession of the property when the agent contacted them. They had different plans for this parcel and demanded its removal. Total cost of relocation: \$1.14 million.

documents. After reading it I determined that it was a "blanket" easement, which allows the easement holder to place their plant or facilities anywhere on the property they desire. Why do companies write blanket easements? Because almost anyone, even with no expertise can do it! There are two large problems with this kind of easement:

1. It is a terrible disservice to the landowner because the location of the easement holder's location is not defined. This can create difficulty for subsequent owners of the property in getting title insurance.
2. The courts have taken a very dim view of this "unreasonable burden" on the land. Picture yourself on the witness stand during an action against your organization. The property owner's attorney might ask you, "You work for a multimillion/billion

dollar organization. Don't they provide you with proper training before you go out and encumber someone's land?" How would you respond?

After I determined that the only document this company had was this blanket document, I asked the group "How do you get landowners to sign this?"

They slapped their knees and in unison responded, "We don't!"

"You have paid the landowner \$10,000 to place a large ground mounted facility and then taken a 'verbal' right of way," I grilled. "What happens to that facility when the next owner of the property moves in and tells your organization to move it at its expense because you have no recorded easement?"

The engineer then responded, "We'll be gone by then and it won't be our problem!"

One thing in favor of the company in this case is that the facility would probably be visible. This constitutes "actual notice" to the new owner, which means the facility may stay at its present location but no change in size or location is permitted. The company is only entitled to maintain its plant at its current location. Maybe. It depends on the courts if it goes that far.

The stories go on and on about right of way issues and how much it costs companies across the country. It is not limited to power companies and telcos. Gas, water and others have similar problems with their distribution network.

RECORDED EASEMENTS

You can obtain a written easement and it is valid as long as the grantor of the easement owns the property. For example, we get a properly written easement document and instead of recording – that is, recorded in the office of the county recorder/registrar of deeds/courthouse, etc. making it a matter of public record – we put it in a file in our office. Let's say that we are placing a conduit run that transits through the property. To keep it interesting, we will


not place any manholes on the property, that way there will be nothing visible on the property. Now, a new person buys the land, and gets title insurance. The title insurance covers only encumbrances that are of record. This new owner has no "notice" that your organization has any facilities on their land. Depending on your local court, you might be forced to relocate even with a written easement!

DON'T FEEL ALONE

By now you may be confused. Right of way is an extremely complex field. If you would like to e-mail me any questions, I will be happy to help. My e-mail address is nmi1@prodigy.net. I may be reached by telephone at (510) 530-9342. Visit the NMI Management & Training Services Web site at www.nmitraining.com. ♦

References

1. Burby, Handbook of the Law of Real Property § 23 (3d ed. 1965)
2. Statute of Frauds



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