

**ACQUIRING EXPRESS RIGHTS-OF-WAY:
DRAFTING CONSIDERATIONS**

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Whether your right-of-way is appurtenant or in gross is determined primarily by the nature of the right and intention of the parties creating the easement. If the nature of the use is such that it is an appropriate and useful adjunct to the land benefitted by the easement, considering the grantee's intention regarding its use, and if the document creating the right-of-way contained nothing which would show that the parties intended the use only as a mere personal right, it will be viewed as an easement appurtenant to the land, not an easement in gross.⁴⁴ If your grant fails to specify whether the easement was intended to be appurtenant or in gross, a reviewing court will turn to the surrounding circumstances to determine the nature of the easement, but will, generally, begin with the assumption that the intent was to make it appurtenant. Further, including the phrase "heirs and assigns" in the granting clause when referring to the grantee generally creates an easement appurtenant.⁴⁵

B. Comparing Exclusive and Non-exclusive Easements--

The next set of factors to be decided in analyzing the nature of the easement to be acquired is whether the grant will be exclusive or non-exclusive. As discussed earlier, an easement creates only an interest in land, not an estate, and the grant of the easement does not operate to dispossess the owner of the land over which the right-of-way passes. That owner continues to enjoy all those rights and privileges of a landowner which are not inconsistent with the easement over his land. In the absence of language to the contrary, the grantor of the easement and his assigns may use the area of the easement in common with its grant, so long as they do not interfere with the easement.⁴⁶

Under general rules, a landowner who has already granted one easement across his land may also grant subsequent easements utilizing an identical area in the same land, so long as the subsequent easements are neither inconsistent with nor a burden upon the prior easement. Further, the owner of the servient estate as well as "each concurrent easement owner has the right to make reasonable repairs, alterations, and improvements to the easement so long as such do not injuriously affect his co-owner."⁴⁷

"Exclusive" easements are, however, just that. Only the owner of the easement may use it. All others are excluded, even the owner of the servient estate. An easement which

⁴⁴ Bors v. McGowan, 159 Neb. 790, 68 N.W.2d 596 (1955).

⁴⁵ Luevarro v. Group One, 77 P.2d 552, 555 (N.M. App. 1989).

⁴⁶ Skidmore v. First Bank of Minneapolis, 773 P.2d 587 (Colo. App. 1988); Bernard v. Gaumer, 146 Colo. 409, 361 P.2d 778 (1961).

⁴⁷ Ashland Pipeline Co. v. Indiana Bell Telephone Company, Inc., 505 N.E.2d 483, 487 (Ind. App. 1 Dist. 1987).

either expressly permits use of the land within the easement by others, not only by the holder of the right-of-way but also by the owner of the servient estate and even by other persons to whom like easements are given, or which is silent on the issue of exclusivity of use results in a non-exclusive easement.⁴⁸

If your intended use of the easement is such that all others must be excluded, the grant must specifically express that exclusion of all other rights. Only where the grant conveying the easement specifically characterizes the easement as “exclusive” does the grantor lose the right to use the easement in common with the grantee.⁴⁹

Language creating an exclusive easement may be found either in the granting clause or in the Habendum clause.

In the grant --

. . .do hereby grant unto _____ and its assigns, an exclusive easement for the existing road across the subject lands, for all lawful purposes by _____ and its assigns, including but not limited to contractors, licensees, permittees, or easement grantees . . .

In the Habendum clause --

TO HAVE AND TO HOLD the same unto the party of the second part, their successors, transferees or assigns, to their sole use and benefit *for the purpose aforesaid*, free from all claim of Homestead under the laws of this State . . . *forever*.⁵⁰

IV. THE ELEMENTS OF THE GRANT --

A. Formal Requirements --

At this stage a person drafting or proposing to acquire a right-of-way has made certain broad, threshold decisions regarding the nature of the grant and knows whether the

⁴⁸ Robert Jackson Real Estate Company, Inc. v. James, 755 S.W.2d 343, 346 (Mo. App. 1988).

⁴⁹ Barnard v. Gaumer, *supra*, note 46; Bergen Ditch & Reservoir Co. v. Barnes, 683 P.2d 365 (Colo. App.1984).

⁵⁰ Sowers v. Illinois Cent. Gulf R.R. Co., 152 Ill. App. 3d 163, 105 Ill. Dec. 76, 503 N.E.2d 1082 (Ill. App.5 Dist. 1987).