



Easements: Types, Methods of Creation, and Insurability Considerations

2018 Alabama Agent Seminar

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Introduction to Easements

An Overview

What is an easement?

- An easement is a property right and an interest in land¹
- An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement²
- An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose³

1. *Ex Parte Folsom*, 42 So. 3d 732 (Ala. 2009)

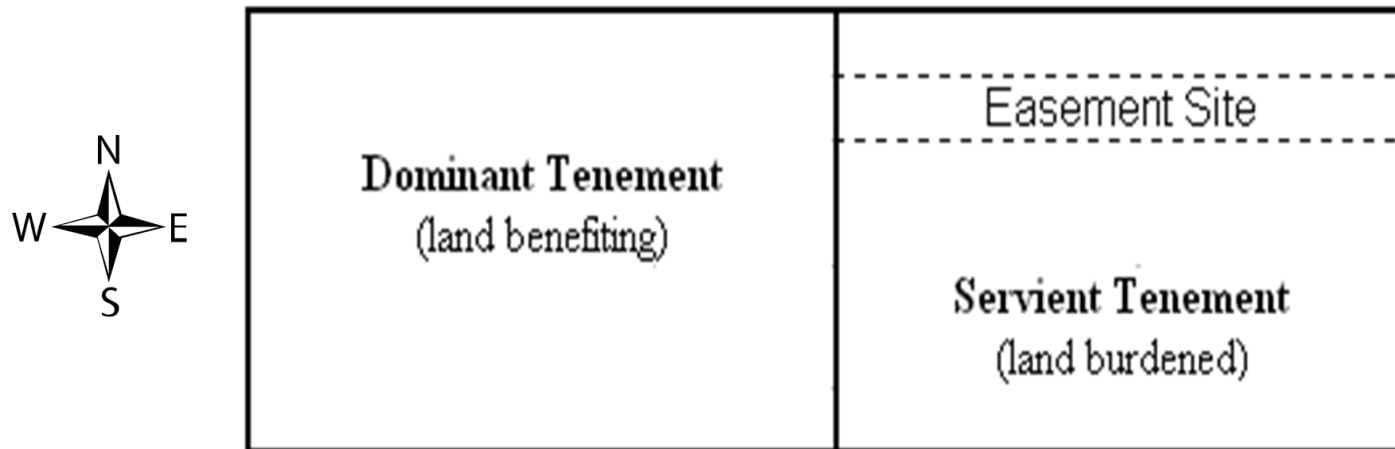
2. Restatement (Third) of Property: Servitudes § 1.2 (2000)

3. Black's Law Dictionary 585(9th ed. 2009)

Introduction to Easements

Definitions and Terminology

- Dominant Tenement or Benefited Estate is served by the easement
- Servient Tenement or Burdened Estate is burdened by the easement



Easement Types

Appurtenant Easement

- Created for the advantage of the dominant tenement
- Incapable of existence separate and apart from its dominant tenement and cannot be converted into an easement in gross
- Runs with the land or attaches to the dominant estate, though the conveyance may not expressly refer to the easement
- Language in conveyance expressly reserving right of ingress and egress over property retained by grantor operates to create an appurtenant easement

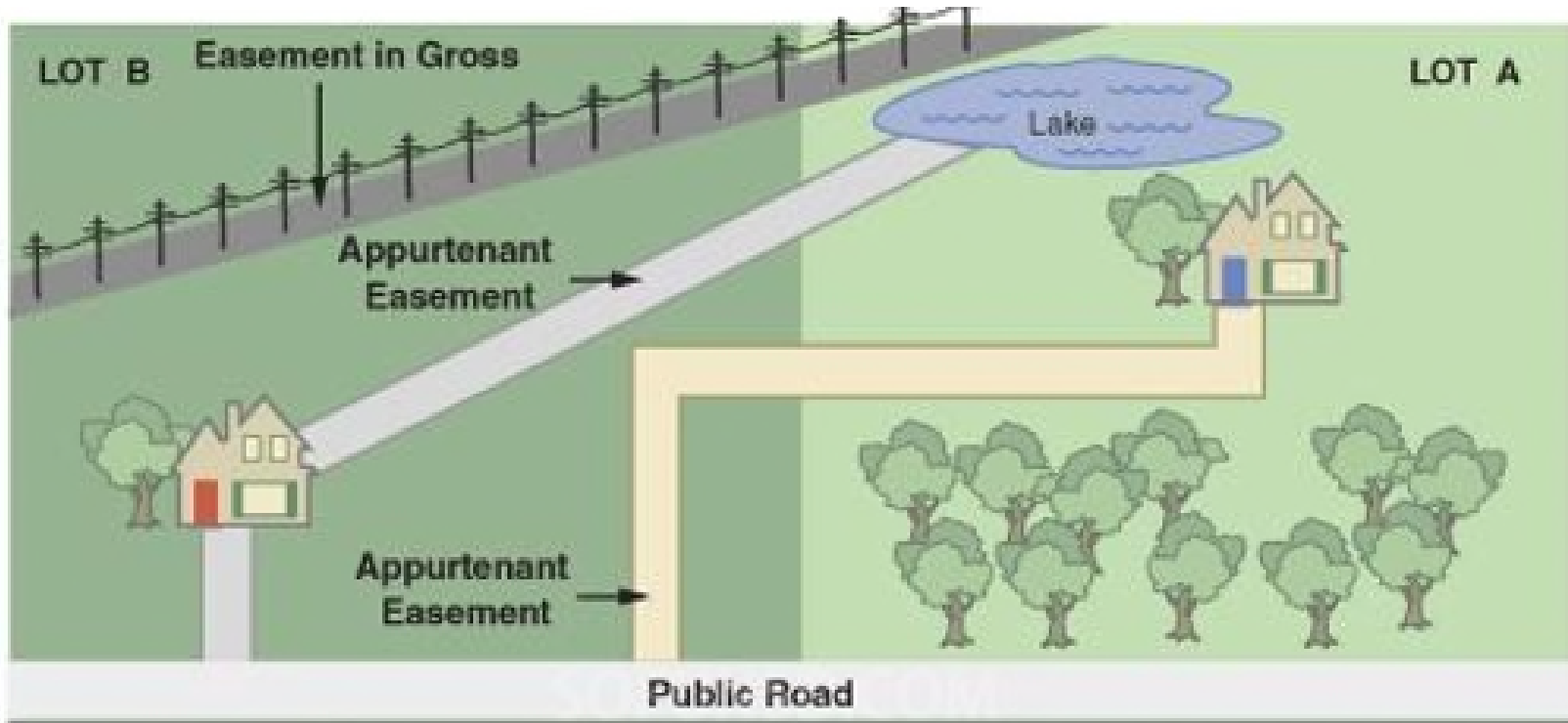
Easement Types

In Gross Easement

- Personal to the owner or entity to use the land of another
- No dominant tenement and does not serve a particular tract of land
- Right of utility company as owner of an in gross easement can construct and maintain facilities within, as long as it does not unreasonably interfere with the rights of the servient estate

Easement Types

Appurtenant and In Gross Easement Example



The owner of Lot B has an appurtenant easement across Lot A to gain access to the lake. The utility company has an easement in gross across both parcels of land for its power lines. Note that Lot A also has an appurtenant easement across Lot B for its driveway.

Easement Creation⁴

Methods – Helms v. Tullis, 398 So. 2d 253 (Ala. 1981)

- Express Conveyance
- Reservation or Exception
- Implication
- Necessity
- Prescription
- Contract
- Reference to Boundaries or Maps

4. Jesse P. Evans III, Alabama Property Rights and Remedies § 6.3 (5th ed. 2012) (CLE Alabama).

Easement Creation

Express Conveyance

- In writing and may be created in will, mortgage, or lease
- Requisite granting language
- Adequate legal description
- Properly executed, acknowledged and recorded
- Reservation to grantor or conveyance to the named grantee

Easement Creation

Implication

- Must have:
 - Original unity of ownership, and;
 - The use must be open, visible, continuous and reasonable necessary to the estate granted
- If use did not exist prior to the severance, it will not be implied
- The implication is that the parties implied such an easement because the grantee, having seen the use by the grantor, can reasonably expect a continuance of the former use
- Unwritten and unrecorded, but enforceable against subsequent purchasers because open and obvious on the land and sufficient notice as to the possibility of an easement

Easement Creation

Necessity

- A subspecies of an easement by implication
- Rationale is that public policy demands that land not be rendered useless because lack of access
- Burden is on the dominant owner to prove the easement is necessary for the enjoyment of the benefited estate
- Must have been a unity of ownership
- A way of necessity cannot be presumed to exist over the land of a stranger

Easement Creation

Necessity (continued)

- However, Ala. Code § 18-3-1 (1975) *et seq.* allows for the private condemnation of an easement for land-locked property
- Probate Court has exclusive jurisdiction over such actions, and procedure is same as ordinary condemnation action and compensation must be paid to owner of the lands which the easement is sought
- If a person has a way through own land, they cannot impose a way of necessity on neighbor based on convenience

Easement Creation

Prescription and Adverse Use

- Prescriptive easements can be public or private
- Typically for ingress and egress, drainage easement may be acquired by prescription⁵
- Arise when a claimant uses the land where easement is claimed for period of 20 years, adversely to the owner, under claim of right, exclusively, continuously and uninterruptedly, with actual or presumptive knowledge by the owner⁶
- Easement in light, air and a view cannot be created across adjacent lands by prescription

5. Mountain Brook v. Beatty, 292 295 So.2d 388 (Ala. 1974)

6. Melton v. Harbour Pointe, LLC, 57 So.3d 695 (Ala. 2010)

Easement Creation

Contract

- Must be in writing
- Could be promise to transfer an easement in the future, but also contracts found to manifest a present intent to create an easement.
- Typically reciprocal easements where landowners contract for the use of a common driveway or area
- A receipt evidencing the payment of money could constitute evidence of the required contract

Easement Creation

Reference to Boundaries or Maps

- Though recognized in Helms v. Tullis as method of creation for a private easement, there is little or no authority under Alabama law.
- The subdividing and platting of lots, and reference to any such easements, operates as a dedication to the public
- Generally, there can only be a dedication to the public for a public use and a private right of way cannot be created by dedication⁷

7. Stringer Realty Co. v. Gadsden, 53 So.2d 617 (Ala. 1951)

Easement Modification

By Terms of Agreement or Consent of Parties

- Once an easement granted in absolute form, property rights are created and cannot be unilaterally diminished or extinguished
- Generally not modifiable except through agreement by holders of the dominant and servient estates
- Easement agreement may contain provisions allowing for future relocation, modification, enlargement, etc.

Easement Termination

Conveyance, Purpose Ceases to Exist, Abandonment, and Merger

- Because an interest in land, easement can be terminated by a conveyance of the dominant estate owner to the servient estate owner
- Power of termination reserved by servient owner associated with an event such as acquisition of alternate access, or non-use
- If the easement contains a statement of purpose defining the scope of use and reason for creation, then easement granted of a particular purpose terminates when the purpose ceases to exist (ex. construction/slope easement for road project)

Easement Termination

Conveyance, Purpose Ceases to Exist, Abandonment, and Merger (continued)

- Termination can occur through abandonment by the dominant tenement
- Typically requires a cessation of the use, together with an intent to abandon
- Mere non-use of an express easement does constitute abandonment
- Question of fact and burden of proving abandonment rests with the party claiming the abandonment
- Merger of ownership of the dominant and servient tenements, ordinarily extinguishes an easement

Easement Considerations

Underwriting Issues

- Missed easement that burdens subject property
- Full search and examination of servient estate
- Mortgagee consent of easement across servient estate
- Easement does not extend from public road to subject property
- Easements granted by cotenants
 - Crommelin v. Fain, 403 So. 2d 177 (Ala. 1981)
- Overburdening of the servient estate
 - Weeks v. Wolf Creek Industries, Inc., 941 So. 2d 263 (Ala. 2006)
- Blanket easements in favor of utility company or highway department

EXHIBIT __

MORTGAGEE CONSENT

Mortgagee, as owner and holder of that certain Mortgage executed by **Mortgagor**, dated _____ and recorded _____ in the Office of the Judge of Probate of _____ County, Alabama in _____, hereby consents to the execution and delivery of the above Easement and hereby agrees that (i) the mortgage identified in the paragraph shall be junior to the above Easement and respective rights provided for therein, and (ii) the foreclosure of the mortgage identified in this paragraph shall not extinguish the above Easement and the respective rights provided for therein.

Dated as of the _____ day of _____, _____.

Mortgagee

By: _____

Name: _____

Its: _____

STATE OF ALABAMA }

COUNTY OF _____ }

I, _____, a Notary Public in and for said County in said State, hereby certify that _____, whose name as _____ of _____, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, (s)he, as such _____ and with full authority, executed the same voluntarily for and as the act of said bank on the day the same bears date.

Given under my hand this _____ day of _____, _____.

Notary Public

My Commission Expires: _____

915 Queen City Avenue
Post Office Box 1070
Tuscaloosa, Alabama 35403

Submitted via email



Subject: **Containment Letter – Distribution Easements for LOT 2 of the Bobby Park Subdivision**

Dear

Alabama Power Company has heretofore acquired and recorded the following easements in the Office of the Judge of Probate, Tuscaloosa County, Alabama:

That certain instrument from System Capital Real Property Coporation, a Delaware Coporation to Alabama Power Company, dated April 15, 2002 (Parcel #70100536) recorded in Deed Book 2002, Page 14852, in the office of the Judge of Probate, Tuscaloosa County, Alabama.

That certain instrument from Annie H. T. Hamner to Alabama Power Company, dated November 8, 1956 (Parcel #158474) recorded in Deed Book 390, Page 588, in the office of the Judge of Probate, Tuscaloosa County, Alabama.

That certain instrument known as Bobby Park Subdivision to Alabama Power Company as recorded in Plat Book 2002, Page 16, in the office of the Judge of Probate, Tuscaloosa County, Alabama.

The above easements were acquired to construct, operate and maintain Alabama Power Company (APC) electrical line facilities. APC does not claim the right to construct additional electrical lines in locations other than those that are currently in place on the lands described below, under the authority granted in the above mentioned easement. APC does retain all rights and privileges associated with the existing line facilities and rights-of-way that are specifically associated therewith, which are located on or adjacent to said property as of the date of this letter. APC does hereby contain its rights in the existing easement to remain substantially as presently constructed, with certain exceptions. APC agrees not to set additional poles or anchors at locations within the easement area, except for the safety and maintenance of the existing facilities. Should the need arise in the future for any power line facilities to be installed on the property described below, Alabama Power Company will acquire the necessary rights of way from the owner of record on that date.

Land Description: A parcel of land situated in the NE ¼ of the SE ¼ of Section 11, Township 22 South, Range 10 West and in the NW ¼ of the SW ¼ of Section 12, Township 22 South, Range 10 West in Tuscaloosa County, Alabama.

Please feel free to contact me if you have any additional questions and/or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Carlette L. Durham".

Carlette L. Durham
WESTERN DIVISION Team Leader – Land Acquisition & Services
Office: (205) 349-6886 | Email: cldurham@southernco.com

To Whom it may concern:

Re: APCo Right of Way Documents

Parcel Nos. 390639, 573531, 70081638, 192773, 443215, 304205.

All located in the E ½ of the SW ¼ of Section 12, Township 6 North, Range 7 East in Monroe County, Alabama.

Alabama Power Company has heretofore acquired and recorded the following easements in the Office of the Judge of Probate, Monroe County, Alabama:

Easements Recorded: Book 278, Pages 23ff; Book 446 pages 313-315; Book 689, Page 44-45; Book 197, Page 394; Book 310, Page 120-123; and Book 250, Pages 194-197.

The above referenced easements were acquired to construct, operate and maintain Alabama Power Company (APCo) electrical line facilities. APCo does not claim the right to construct additional electrical lines in locations other than those that are currently in place on the lands described below, under the authority granted in said easements. APCo does retain all rights and privileges associated with the existing line facilities and rights-of-way that are specifically associated therewith, which are located on or adjacent to said lands as of the date of this letter. APCo does hereby contain its rights in the existing easement to remain substantially as presently constructed, with certain exceptions. APCo agrees not to set additional poles or anchors at locations within the easement area, except for the safety and maintenance of the existing facilities. Should the need arise in the future for any power line facilities to be installed on said lands, Alabama Power Company will acquire the necessary rights of way from the owner of record on that date.

Land Description: Commencing at the southeast corner of the northeast quarter of the southwest quarter of section 12, township 6 north, range 7 east; thence west 264 feet to the point of beginning, lying on the west right of way of highway no. 11; thence north 9 degrees east 530 feet; thence west 719.4 feet; thence south 9 degrees west 917.4 feet; thence east 719.4 feet to the highway right of way; thence north 9 degrees east 387.4 feet along highway right of way to the point of beginning.

We hope this letter will be sufficient for your needs. If you do have additional questions, please do not hesitate to contact this office.

Signed the 14th day of March, 2017.

A handwritten signature in blue ink, appearing to read "Carlette L. Durham".
Team Leader
APCo- Corporate Real Estate

Easement Considerations

Underwriting Issues – Sample Clauses

- Schedule A under legal description
 - Together with an easement for (stated purpose of easement) as recorded in (Book/Page/Slide), subject to the terms, conditions and provisions thereof, and further described as follows:
- Schedule B Specific Exceptions
 - Terms and conditions of that certain easement recorded in _____.
 - Easements, notes and building lines as shown on plat map recorded in _____.
 - Utility, drainage, and cross easements for access and parking as shown on the survey by _____, dated _____, Project No. _____.

License

Not an Easement

- Not an insurable interest in land
- Nothing more than giving of one's consent
- Personal privilege that is not transferable, and is generally revocable by the licensor
- However, not all licenses are revocable, and an exception exists where a license is coupled with an interest in land. Camp v. Milam, 277 So.2d 95 (Ala. 1973)
- Example – permit to cross railroad tracts

Easement Considerations

Endorsements

- ALTA 9 Series – Comprehensive
- ALTA 17 Series – Access and Entry
- ALTA 25 Series – Same as Survey
- ALTA 28 Series – Easement
- ALTA 36 Series – Energy Projects

Easement Considerations

Endorsements – ALTA 9-06

Endorsement

RESTRICTIONS, ENCROACHMENTS, MINERALS – LOAN POLICY



Attached to Policy No. _____ *[Insert Policy Number]*

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement, and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
 - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
 - b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
 - a. A violation of a Covenant that:
 - i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
 - ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
 - iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the indebtedness;
 - b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
 - c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
 - d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. The Company insures against loss or damage sustained by reason of:
 - a. An encroachment of:
 - i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
 - ii. an Improvement located on adjoining land onto the Land at Date of Policy unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;
 - b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or
 - c. Damage to an Improvement located on the Land, at Date of Policy:
 - i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
 - ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

continued on back

Easement Considerations

Endorsements – ALTA 17.1-06 and ALTA 17.2-06

Endorsement INDIRECT ACCESS AND ENTRY



Attached to Policy No. _____ [Insert Policy Number]

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The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified in Schedule A (the "Easement") does not provide that portion of the Land identified in Schedule A both actual vehicular and pedestrian access to and from _____ [Insert Name of Street used to Access Property], (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

OR T Form 43.28
ALTA 17.1-06 Endorsement – Indirect Access and Entry 6/06

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Alabama 5/1/16

Endorsement UTILITY ACCESS



Attached to Policy Number _____ [Insert Policy Number]

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of the lack of a right of access to the following utilities or services:

[CHECK ALL THAT APPLY]

- | | | |
|---|--|---|
| <input type="checkbox"/> Water service | <input type="checkbox"/> Natural gas service | <input type="checkbox"/> Telephone service |
| <input type="checkbox"/> Electrical power service | <input type="checkbox"/> Sanitary sewer | <input type="checkbox"/> Storm water drainage |
| <input type="checkbox"/> _____ | <input type="checkbox"/> _____ | <input type="checkbox"/> _____ |

either over, under or upon rights-of-way or easements for the benefit of the Land because of:

- (1) a gap or gore between the boundaries of the Land and the rights-of-way or easements;
- (2) a gap between the boundaries of the rights-of-way or easements; or
- (3) a termination by a grantor, or its successor, of the rights-of-way or easements.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By  President
Attest  Secretary

SAMPLE

Authorized Officer or Agent

OR T Form 44.96
ALTA 17.2-06 10/1608

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OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By  President
Attest  Secretary

Easement Considerations

Endorsements – ALTA 25-06 and ALTA 25.1-06

Endorsement SAME AS SURVEY



Attached to Policy Number _____ [Insert Policy Number]

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by _____ [Insert Name of Surveyor] dated _____ [Insert Date of Survey], and designated Job No. _____ [Insert Survey Job Number].

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Endorsement SAME AS PORTION OF SURVEY



Attached to Policy Number _____ [Insert Policy Number]

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified as _____ [Insert the Parcel or Tract Number] on the survey made by _____ [Insert Name of Surveyor] dated _____ [Insert Date of Survey], and designated Job No. _____ [Insert Survey Job Number].

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

SAMPLE

Authorized Officer or Agent

ORT Form 4459
ALTA 25-06 10/16/03

By




President

Attest

Secretary

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Alabama 5/1/16



SAMPLE

Authorized Officer or Agent

ORT Form 4459
ALTA 25.1-06 10/17/03

By




President

Attest

Secretary

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Easement Considerations

Endorsements – ALTA 28-06 and ALTA 28.1-06

Endorsement

EASEMENT-DAMAGE OR ENFORCED REMOVAL



Attached to Policy Number _____ *[Insert Policy Number]*

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) _____ *[Insert the Item Number from Schedule B that describe the Easement]* of Schedule B results in:

- (1) damage to an existing building located on the Land, or
- (2) enforced removal or alteration of an existing building located on the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Endorsement

ENCROACHMENTS – BOUNDARIES AND EASEMENTS



Attached to Policy No. _____ *[Insert Policy Number]*

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
 - a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
 - b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
 - c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
 - d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions _____ *[Insert the Item Number(s) from Schedule B that describe the Encroachment(s) which are NOT insured against by this Endorsement, or Insert "None"]* of Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By  President
Attest  Secretary

SAMPLE

Authorized Officer or Agent

ORT Form 4561
ALTA 28.1-06 Endorsement - Encroachments - Boundaries and Easements
Adopted 04-02-12

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400 Second Avenue South, Minneapolis, Minnesota 55401
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By  President
Attest  Secretary

SAMPLE

Authorized Officer or Agent

ORT Form 4462
ALTA 28-06 Revised 2-3-10

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Easement Considerations

Endorsements – ALTA 28.2-06 and ALTA 28.3-06

Endorsement

ENCROACHMENTS – BOUNDARIES AND EASEMENTS – DESCRIBED IMPROVEMENTS



Attached to Policy No. _____ [Insert Policy Number]

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

- The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
- For purposes of this endorsement only, "Improvement" means each improvement on the Land or adjoining land at Date of Policy, itemized below:
_____ [Insert all structures which are to be included within the definition of "Improvements"]
- The Company insures against loss or damage sustained by the Insured by reason of:
 - An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
 - An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
 - Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
 - Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
- Sections 3.c. and 3.d. of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: _____ [Insert the Item Number(s) from Schedule B that describe the Encroachment(s) which will not have the coverage provided by Section 3.c. or Section 3.d., or insert "None"]

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

SAMPLE

Authorized Officer or Agent

ORT Form 4964
ALTA Endorsement 28.2-06 (Encroachments – Boundaries and Easements – Described Improvements) Adopted 04-02-13

By  President
Attest  Secretary

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Alabama 5/1/16

Endorsement

ENCROACHMENTS – BOUNDARIES AND EASEMENTS – DESCRIBED IMPROVEMENTS AND LAND UNDER DEVELOPMENT



Attached to Policy No. _____ [Insert Policy Number]

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

- The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
- For purposes of this endorsement only:
 - "Improvement" means a building, structure, or paved area, including any road, walkway, parking area, driveway, or curb located on the surface of the Land or the surface of adjoining land at Date of Policy that by law constitutes real property.
 - "Future Improvement" means any of the following to be constructed on the Land after Date of Policy in the location according to the Plans and that by law constitutes real property:
 - a building;
 - a structure; or
 - a paved area, including any road, walkway, parking area, driveway, or curb.
 - "Plans" mean the survey, site and elevation plans, or other depictions or drawings prepared by _____ [Insert name of architect or engineer] dated _____ [Insert Date of Plans], last revised _____ [Insert Date of Last Revision], designated as _____ [Insert name of project] consisting of _____ [Insert number of pages of Plans] sheets.
- The Company insures against loss or damage sustained by the Insured by reason of:
 - An encroachment of any Improvement or Future Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
 - An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
 - Enforced removal of any Improvement or Future Improvement located on the Land as a result of an encroachment by the Improvement or Future Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement or Future Improvement; or
 - Enforced removal of any Improvement or Future Improvement located on the Land that encroaches onto adjoining land.
- Sections 3(c) and 3(d) of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: _____ [Insert the Item Number(s) from Schedule B that describe the Encroachment(s) which will not have the coverage provided by Section 3.c. or Section 3.d., or insert "None"]

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance to the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

SAMPLE

Authorized Officer or Agent

ORT Form 4960
ALTA Endorsement 28.3-06 (Encroachments – Boundaries and Easements – Described Improvements and Land Under Development) Adopted 04-02-13

By  President
Attest  Secretary

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Alabama 5/1/16

Easement Considerations

Endorsements – ALTA 36-06 Leasehold/Easement – Owner’s

Endorsement

ENERGY PROJECT – LEASEHOLD/EASEMENT – OWNER’S



Attached to Policy No. _____ [Insert Policy Number]

Issued By OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 6 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
 - a. "Constituent Parcel" means one of the parcels of Land described in Schedule A that together constitute one integrated project.
 - b. "Easement" means each easement described in Schedule A.
 - c. "Easement Interest" means the right of use granted in the Easement for the Easement Term.
 - d. "Easement Term" means the duration of the Easement Interest, as set forth in the Easement, including any renewal or extended term if a valid option to renew or extend is contained in the Easement.
 - e. "Electricity Facility" means an electricity generating facility which may include one or more of the following: a substation; a transmission, distribution or collector line; an interconnection, inverter, transformer, generator, turbine, array, solar panel, or module; a circuit breaker, footing, tower, pole, cross-arm, guy line, anchor, wire, control system, communications or radio relay system, safety protection facility, road, and other building, structure, fixture, machinery, equipment, appliance and item associated with or incidental to the generation, conversion, storage, switching, metering, step-up, step-down, inversion, transmission, conducting, wheeling, sale or other use or conveyance of electricity, on the Land at Date of Policy or to be built or constructed on the Land in the locations according to the Plans, that by law constitutes real property.
 - f. "Evicted" or "Eviction" means (a) the lawful deprivation, in whole or in part, of the right of possession or use insured by this policy, contrary to the terms of any Lease or Easement or (b) the lawful prevention of the use of the Land or any Electricity Facility or Severable Improvement for the purposes permitted by the Lease or the Easement, as applicable, in either case as a result of a matter covered by this policy.
 - g. "Lease" means each lease described in Schedule A.
 - h. "Leasehold Estate" means the right of possession granted in the Lease for the Lease Term.
 - i. "Lease Term" means the duration of the Leasehold Estate, as set forth in the Lease, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.
 - j. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by _____ [Insert name of architect or engineer] dated _____ [Insert date of Plans], last revised _____ [Insert date of last revision], designed as _____ [Insert name of project or project number] consisting of _____ [Insert number of pages] sheets.
 - k. "Remaining Term" means the portion of the Easement Term or the Lease Term remaining after the Insured has been Evicted.
 - l. "Severable Improvement" means property affixed to the Land at Date of Policy or to be affixed in the locations according to the Plans, that would constitute an Electricity Facility but for its characterization as personal property, and that by law does not constitute real property because (a) of its character and manner of attachment to the Land and (b) the property can be severed from the Land without causing material damage to the property or to the Land.

3. Valuation of Title as an Integrated Project:
 - a. If in computing loss or damage it becomes necessary to value the Title, or any portion of it, as the result of an Eviction, then, as to that portion of the Land from which the Insured is Evicted, that value shall consist of (i) the value of (A) the Leasehold Estate or the Easement Interest for the Remaining Term, as applicable, (B) any Electricity Facility existing on the date of the Eviction, and, if applicable, (ii) any reduction in value of another insured Lease or Easement as computed in Section 3(b) below.
 - b. A computation of loss or damage resulting from an Eviction affecting any Constituent Parcel shall include loss or damage to the integrated project caused by the covered matter affecting the Constituent Parcel from which the Insured is evicted.
 - c. The Insured Claimant shall have the right to have the Leasehold Estate, the Easement Interest, and any Electricity Facility affected by a defect insured against by this policy valued either as a whole or separately. In either event, this determination of value shall take into account any rent or use payments no longer required to be paid for the Remaining Term.
 - d. The provisions of this Section 3 shall not diminish the Insured's rights under any other endorsement to the policy; however, the calculation of loss or damage pursuant to this endorsement shall not allow duplication of recovery for loss or damage calculated pursuant to Section 8 of the Conditions or any other endorsement to the policy.
4. Valuation of Severable Improvements:
 - a. In the event of an Eviction, the calculation of the loss shall include (but not to the extent that these items of loss are included in the valuation of the Title determined pursuant to Section 8 of the Conditions or any other provision of this or any other endorsement) the diminution in value of the Insured's interest in any Severable Improvement resulting from the Eviction, reduced by the salvage value of the Severable Improvement.
 - b. The policy does not insure against loss or damage (and the Company will not pay any costs, attorneys' fees or expenses) relating to:
 - i. the attachment, perfection or priority of any security interest in any Severable Improvement;
 - ii. the vesting or ownership of title to or rights in any Severable Improvement;
 - iii. any defect in or lien or encumbrance on the title to any Severable Improvement; or
 - iv. the determination of whether any specific property is real or personal in nature.
5. Additional items of loss covered by this endorsement:

If the Insured is Evicted, the following items of loss, if applicable to that portion of the Land from which the Insured is Evicted, shall be included, without duplication, in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title determined pursuant to Section 3 of this endorsement, the valuation of Severable Improvements pursuant to Section 4 of this endorsement, or Section 8(a)(ii) of the Conditions.

 - a. The reasonable cost of: (i) disassembling, removing, relocating and reassembling any Severable Improvement that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, to the extent necessary to restore and make functional the integrated project; (ii) transportation of that Severable Improvement for the initial one hundred miles incurred in connection with the restoration or relocation; and (iii) restoring the Land to the extent damaged as a result of the disassembly, removal and relocation of the Severable Improvement and required of the Insured solely because of the Eviction.
 - b. Rent, easement payments or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate or the Easement Interest, as applicable, may be obligated to pay to any person having paramount title to that of the lessor in the Lease or the grantor in the Easement, as applicable.
 - c. The amount of rent, easement payments or damages that, by the terms of the Lease or the Easement, as applicable, the Insured must continue to pay to the lessor or grantor after Eviction with respect to the portion of the Leasehold Estate or Easement Interest, as applicable, from which the Insured has been Evicted.
 - d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease, sublease or easement specifically permitted by the Lease or Easement, as applicable, and made by the Insured as lessor or grantor of all or part of the Leasehold Estate or Easement Interest, as applicable.
 - e. Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees or easement or subeasement grantees on account of the breach of any lease or sublease or easement or subeasement specifically permitted by the Lease or the Easement, as applicable, and made by the Insured as lessor or grantor of all or part of the Leasehold Estate or Easement Interest, as applicable.
 - f. The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate or a replacement easement reasonably equivalent to the Easement Interest, as applicable.
 - g. If any Electricity Facility is not substantially completed at the time of Eviction, the actual cost incurred by the Insured up to the time of Eviction, less the salvage value, for the Electricity Facility located on that portion of the Land from which the Insured is Evicted. Those costs include costs incurred to construct and fabricate the Electricity Facility, obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping, and cancellation fees related to the foregoing.

Easement Considerations

Summary

- An interest in land
- Distinctions between easements appurtenant and easements in gross
- For express easements, must meet all conveyancing requirements
- Must search title to the servient tenement
- Take exception to the terms and conditions of the easement
- What type of policy or endorsements will be issued

Discussion and Questions

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