Condemnation of Easements

James L. Thompson

*The condemnation of easements creates unique definitional and valuation problems—but nothing a little preparation can’t overcome.*

The condemnation of easements presents special legal and appraisal problems. To understand these problems, you must first understand the nature of easements and the practices of the various acquiring agencies (the condemnors). The vast variety of easements that may be subject to condemnation is extraordinary. Some of the easements that may be the subject of condemnation include:

- Aqueduct easements;
- Avigation (air space) easements;
- Beach-front easements;
- Building height/view easements and negative covenants;
- Cable television easements;
- Canal easements;
- Clearance easements;
- Conservation easements;

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• Flowage easements;
• Light and air easements;
• Mass transit/street railway easements;
• Overflow rights easements;
• Pipeline easements;
• Power transmission line easements;
• Private street easements;
• Scenic easements;
• Slope easements;
• Temporary easements; and
• All manner of utility easements.


More recent cases demonstrate some of the complexity of these cases: Exxon Pipeline Co. v. Zwalir, 88 S.W.3d 623 (Tex. 2002) (pipeline easement/separate economic unit valuation precluded by project enhancement); Cordones v. Brevard County, 781 So. 2d 519 ( Fla. Dist. Ct. App. 2001) (temporary anti-erosion easements for 50 years regarding beach-front property).

**DEFINE AND CLASSIFY** • Defining easements and understanding how they work are critical first steps in representing property owners in easement condemnation cases. 2 Nichols on Eminent Domain, §5.07[2][a] (Matthew Bender, 3d ed. 2002), defines easements for condemnation purposes in a clear and succinct manner:

“An easement is a nonpossessory acquired interest in land of another. The purpose of an easement is to permit an individual, individuals, the public or other specified parties the right to use the land of another for a specific purpose, such as the laying of pipelines or cable under or over another’s land.

“Easements are interests in land and not contractual rights to land. An easement is to be distinguished from a lease, the latter of which is an exclusive right to possess another’s property for a fixed duration of time. Easements should also be distinguished from licenses, which are not interests in land. Generally, easements are also expressed in writing, while licenses are generally oral.

“Land subjected to the burden of an easement is the servient tenement or estate, while land that benefits from an easement is labeled the dominant tenement or estate. In the latter case, the easement is then referred to as appurtenant to the dominant estate.

“Easements are created expressly, implied, established by prescriptive use, or acquired by custom, public trust, estoppel, or condemnation.

“A private easement in real estate is property in the constitutional sense. It may be taken for valid public uses through the exercise of the power of eminent domain. When one parcel of land is subject to an easement in favor of another and the servient tenement is taken for, or devoted to, a public use that destroys or impairs enjoyment of the easement, the owner of the dominant tenement is entitled to compensation. Here, it makes no difference whether the serv-
ient tenement is taken by eminent domain and the owner of the easement is awarded a share in the compensation as one of the owners of the land. Nor does it make a difference that a corporation having the power of eminent domain and owning or controlling the servient tenement makes a use of his property destructive of the easement and the owner of the easement is the only person damaged. An easement is an interest in land, and it is taken in the constitutional sense when the land over which it is exercised is taken. But if it is only destroyed and ended, a destruction for public purposes may also be a taking as would be an appropriation for the same purpose.

"To entitle the holder to compensation, the easement must be an enforceable one and not a mere privilege enjoyed at the will of the owner of the servient tenement. In this case, there is no easement, only a license to use the property, and the license confers no interest that requires compensation.

"When the servient tenement is the subject of a condemnation proceeding that is judicial in character, the owner of the dominant tenement is a necessary party. When the taking of the servient tenement is for a purpose that will not interfere with the exercise of the easement, the owner of the dominant tenement need not be joined." (Footnotes omitted).

This summary is sufficient for our purposes. However, for an exhaustive examination of easements, see Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* (West Group 2001). This is an entire treatise on easements that covers the nature and classification of easements plus the creation of easements by express provision; by implication; by prescription; and by estoppel, custom, public trust, or condemnation. It also discusses the use and maintenance of easements, the transferability of easements, the termination of easements, licenses on land and, evolving and prospective issues.

These distinctions may be very important if you represent a property owner when, for example, the holder of the easement substantially increases the use of the easement over the servient tenement (e.g., the holder of an electric transmission easement installs fiber optic cable and additional transmission lines not contemplated in the scope of the original easement) or when the easement is really a license and not compensable.

Easements also need to be classified to see how they affect the property and the valuation process in condemnation. Messrs. Bruce and Ely provide excellent guidance in defining "easements appurtenant" and "easements in gross" in sections 2.01, 2:1, & 2:2 of their treatise.

"The most important classification of easements differentiates between easements appurtenant and easements in gross. Profits may also be appurtenant or in gross. In order to be deemed appurtenant, an easement must be created to benefit the owner of a dominant estate and must in fact help the owner with respect to physical use of the land. An easement appurtenant requires both a servient and a dominant tenement. One owner’s land must be burdened in favor of the estate of another.…

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"An easement in gross benefits its holder whether or not the holder owns or possesses other land. There is a servient estate, but no dominant estate. Hence, an easement in gross may be described as an irrevocable personal interest in the land of another.

"Courts sometimes characterize an easement in gross as a ‘mere personal right’ or ‘mere personal interest.’ This could obfuscate the nature of an easement in gross. The term personal may be employed simply to heighten the contrast between rights in gross and rights appurtenant to a dominant estate. On the other hand, to the extent that the term personal suggests that an
easement in gross ceases on the death of the grantee, it is potentially misleading. Today, many easements in gross are held by corporations or are deemed transferable. It is more accurate to view an easement in gross as personal ‘in the sense that it was not an incident of possession of a dominant tenement.’

‘Although easements in gross are recognized throughout the United States, they evolved in a climate of judicial distrust. Anxious to avoid undue or novel burdens on land, English law has long required that easements without a profit be linked with two parcels of land. ‘An easement cannot exist in gross,’ two English commentators declared, ‘but only as appurtenant to a defined area of land.’ A consequence of this heritage is that courts in the United States traditionally have viewed easements in gross as unassignable and noninheritable. These rules have been eased in many jurisdictions, but it remains necessary to classify easements as either appurtenant or in gross for the purposes of assessing transferability and determining the rights of successors in interest.’” (Footnotes omitted). Law of Easements and Licenses, Classification of Easements, §2:1 & 2:2 at 2-2 to 2-5.

Negative Easements
Finally, the definition of easement ought to be broad enough to include restrictive covenants that run with the land. Often, restrictive covenants or negative easements become involved in the condemnation process. See, Washington Suburban Sanitary Comm’n v. Frankel, 470 A.2d 813 (Md. Ct. Spec. App. 1984) (vacated on other grounds). This was a case of first impression in Maryland, which recognized that restrictive covenants or negative easements are property rights which, if taken, result in compensation to the holder. Here, WSSC had condemned 151 acres of a 385-acre industrial park for a dump for sewer sludge without joining the dominant estates. The court permitted adjacent owners in the industrial park (and the adjoining property owners outside the park itself) to enforce the prohibition about using the land as a dump against WSSC, in a separate action. If WSSC wanted to remove these negative easements, it would need to file a second condemnation suit to acquire them naming all of the dominant tenements. This case, which is a scholarly opinion well worth reading, discusses the majority rule, minority rule, and the law generally and then observes, at page 820:

“It is no doubt true that at one time property was conceived of as tangible. But in the latter part of the 19th century, the Hohfeldian notion of property as a bundle of rights, some tangible and some intangible, began to gain currency. Kanner, 1976 Institute of Planning, Zoning and Eminent Domain at 239-41. The constitutional concept of property for eminent domain purposes now addresses itself to every sort of interest the citizen may possess. United States v. General Motors Corp., 323 U.S. at 378, 65 S. Ct. at 359; Bureau of Mines v. Georges Creek Coal and Land Co., 321 A.2d 748 (Md. 1974). This concept has long been recognized in Maryland. The term property ‘extends to easements and other incorporeal hereditaments which, though without tangible or physical existence, may become the subject of private ownership.’” De Lauder v. Baltimore Co., 50 A. 427 [428] (1901).

CONDEMNATION TO CREATE PUBLIC EASEMENTS • Condemnation to create public easements is different from other sorts of condemnation. Among the differences are the measure of just compensation for acquiring a public easement and the special defenses that can be effectively raised in easement cases that make the acquisition process more difficult for the condemnor.

Compensation May Be Modest
Also, consider the economic limitations here before getting into one of these cases. Ordinar-