

Encroachment

Permitting Continued Use Without Risking Loss of Ownership



What should you do if a neighboring landowner encroaches on your organization's property (e.g., builds a shed or extends their lawn) or otherwise uses the land without permission? Sometimes immediately booting them is the best answer; sometimes arriving at some accommodation that provides them with at least temporary permission makes more sense. Doing nothing invites trouble.

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Control or Risk Losing

People who use property they don't own are trespassers¹ unless either:

- They have permission; or
- They have acquired over time (usually 21 years) rights of ownership (called ownership by adverse possession) or rights of use (called a prescriptive easement). An exploration of these rights is outside the scope of this guide; however, the important point is this: *if you don't exercise control of your land, you may lose it to the person who is using it without your consent.*

You can exercise control—and thus guard against a trespasser gaining rights—in either of two ways:

1. Oust the trespassers, whether with the assistance of the police, court action, or otherwise; or
2. Give permission for the use. If the use is permissive, it's no longer a trespass and the time counting towards ownership or easement by adverse possession ends.

If the owner is willing to consider allowing the use to continue, there are three legal relationships to consider for providing permission: license, lease, and easement. This guide reviews briefly the characteristics of each.

License: Permissive Use Revocable at Any Time

A grant of a license to use real property provides the licensee the right to enter or occupy certain property for a specific purpose but only for so long as the owner has no objection. In other words, the owner may withdraw permission at any time for any (or no) reason.

Documentation

Give Permission in Writing

No formal agreement is needed to establish a license; a simple letter from the owner to the licensee will suffice. Not putting the license in writing is risky, because an encroacher might claim that the owner provided the encroacher with an oral lease—a permission not immediately revocable—rather than a license, which is revocable at any time. In Pennsylvania, a successful claim of oral lease may result in the unwanted use continuing for up to three years. Also, without evidence that the owner has exercised control, there is still risk of a claim of adverse possession.

Examples of Licenses in Model Documents

Permission for Encroachment

The [Model Permission for Encroachment](#) is a license agreement. It allows an encroachment to continue until the owner withdraws permission. The model document also features owner protections from claims pertaining to injury or property damage, a requirement that the encroacher comply with the law, and the termination of any rights the encroacher may have to claim adverse possession.²

Model Trail Easement Agreement

The [Model Trail Easement Agreement](#) provides, in addition to the grant of an easement for public access for trail use, a list of other activities that may be available to the public if—and only for so long as—the owner consents. The commentary to the model provides instructions for providing a license for these activities.

Characteristics of a License

The following characteristics of a license are the interpretation that Pennsylvania law will provide *unless the parties provide otherwise in their documentation*:

- **Property interest.** The license is not an interest in real property and, thus, not an encumbrance on title.
- **Exclusivity.** A license is not exclusive. The owner can use the licensed area too.
- **Revocability.** A license is revocable at any time.
- **Transferability.** A license is not transferable. This includes both transfers to other persons by assignment and transfers to subsequent owners of a benefited property. For example, if a neighbor is given permission to maintain an encroaching fence on your property, the benefit of that license doesn't accrue to a subsequent owner of the neighboring land.

Lease: Permissive Use for a Time

If the owner is willing to give the encroacher permission to use the land for a specified minimum period of time (and particularly if the encroacher will compensate the owner for this permission), they are looking at entering a lease (rather than license) relationship. The encroacher becomes a tenant.

Documentation

A writing signed by both parties is highly desirable to establish, at the very least, the area being leased, the length of the lease, and the compensation to be paid to the owner. Consider including other items typically addressed in lease forms such as responsibility for the condition of the leased premises and the safety of persons and property. A prohibition on the tenant being able to assign the lease to another party without the owner's consent and a right for the owner to terminate

the lease if the tenant defaults are also important to include because, as outlined below, the owner may not want to rely on the interpretation provided by the law.

Characteristics of a Lease

The following characteristics of a lease are the interpretation that Pennsylvania law will provide *unless the parties provide otherwise in their documentation*:

- **Property interest.** The lease is an interest in real property and, thus, is an encumbrance on title. This means that if the owner transfers the property to another, the lease will still be in effect.
- **Exclusivity.** The rights to occupy the leased premises are exclusive to the tenant. The owner has no right to enter or use the premises.
- **Revocability.** The lease is irrevocable for the term.
- **Transferability.** The lease is transferable. The tenant's rights can be assigned to anyone without the owner's permission.

Easement: Permanent Use

The use rights granted by an easement are permanent, which is the key distinguishing feature from a license or a lease.

Documentation

The grant of an easement is documented with the same formality as a deed and, to be enforceable against third parties, must be recorded in the public records just like a deed.

Characteristics of an Easement

The following characteristics of an easement are the interpretation that Pennsylvania law will provide *unless the parties provide otherwise in their documentation*:

- **Property interest.** An easement is a property interest and, thus, creates an encumbrance on the land ownership interest.
- **Exclusivity.** An easement is not exclusive. The owner can continue using the eased area so long as the use does not interfere with the exercise of the easement holder's rights under the easement.
- **Revocability.** The easement is not revocable. It is permanent and neither time-limited or subject to termination by the owner.

- **Transferability.** The easement is a freely transferable property right.
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The most recent version of this guide and related resources can be found online at <https://conservationtools.org/guides/165>

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¹ Property of another on someone else's land (called an encroachment) is a trespass just like human activity on the land.

² The protections afforded the owner in the [Model Permission for Encroachment](#) are similar to those included in the [Model Release Agreement](#). These risk-shifting tools are available at [ConservationTools.org](#) as are several guides addressing the topic of reducing and managing risk.