Handbook of Florida Fence and Property Law

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‘Good fences
make good
neighbors.’
—Robert Frost
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Preface

With approximately 19,000 livestock farms in the state, along with horse farms, orange groves, croplands of soybeans, sugarcane, cotton, peanuts, and many other agricultural and livestock facilities, livestock and farming operations have a significant impact on Florida’s economy. Florida’s agricultural economy has been required to co-exist with rapid population and commercial growth in the state over the last twenty-five years. Conflicts between these interests bring to prominence issues such as the rights and responsibilities of adjoining landowners, farmers, and property owners in general. Due to the added importance placed on these areas of real property, the legal aspects of fences in the state of Florida have taken on significant importance.

This handbook is designed to inform property owners of their rights and responsibilities in terms of their duty to fence. Discussed areas include a property owner’s responsibility to fence when livestock is kept on the property, the rights of adjoining landowners to fence, the placement of fences, encroachments, boundary lines, easements, contracts, nuisances, and a landowner’s responsibilities towards persons who enter his property.

This handbook is intended to provide a basic overview of the many rights and responsibilities that farmers and farmland owners have under Florida’s fencing and property law. Readers may value this handbook because it informs them about these rights and responsibilities. However, the reader should be aware that because the laws, administrative rulings, and court decisions on which this booklet is based are subject to constant revision, portions of this booklet could become outdated at any time. This handbook should not be viewed as a comprehensive guide to fencing and property laws. Additionally, many details of cited laws are left out due to space limitations. This handbook should not be seen as a statement of legal opinion or advice by the authors on any of the legal issues discussed within. This handbook is not a replacement for personal legal advice, but is only a guide to inform the public on issues relating to fencing and property laws in Florida. For these reasons, the use of these materials by any person constitutes an agreement to hold the authors, the Institute of Food and Agricultural Sciences, the Center for Agricultural and Natural Resources Law, and University of Florida harmless for any liability claims, damages, or expenses that may be incurred by any person as a result of reference to or reliance on the information contained in this booklet.

Readers wishing to find further information from the Florida Statutes may access those statutes online at http://www.leg.state.fl.us/STATUTES/.

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Introduction

Upon becoming a state, Florida adopted the traditional English common law rule requiring owners of livestock to keep their animals off neighboring unenclosed lands. The common law is based primarily on three rules: (1) a landowner is entitled to have land fenced or unfenced as the landowner pleases; (2) each person’s land, whether fenced or unfenced, is considered by the law as enclosed; and (3) livestock and animal owners are required to keep their animals on their own land (Florida Statutes section 588.15; Fisel v. Wynns, 667 So.2d 761 [Fla. 1996]; Rockow v. Hendry, 230 So.2d 717 [Fla. 2d DCA 1970]; Seaboard v. Maige, 109 Fla. 229, 147 So. 215 [1933]; Selby v. Bullock, 287 So.2d 18 [Fla. 1973]). Some areas of the common law that have been changed in Florida relate to a landowner’s duty to trespassers, and the duty to fence, which is imposed upon all owners of junkyards, private game preserves, and railroad companies, and upon pool owners in some municipalities.

Florida is now a “closed range” state and has adopted the rule of strict liability for trespassing livestock. Courts have awarded substantial damages for injury caused by livestock roaming on public roads (1–3 Agricultural Law section 3.13, Matthew Bender & Company, Inc., a member of the LexisNexis Group [2005]).
**What is a fence?**

A fence is generally defined as a visible, tangible obstruction that has been raised between two tracts of land so as to separate, protect, and enclose the land. In Florida, the legislature has provided for two types of fences: general and legal.

A general fence must be “substantially constructed,” or made from rails, logs, post and railing, iron, steel, or other such material, and be no less than five feet high. To the extent of two feet from the ground, the material used to construct the fence should not have gaps greater than four inches. If a general fence is constructed in a ditch that is at least four feet wide, the fence height can be measured as five feet from the bottom of the ditch to the top of the fence (Florida Statutes section 588.01). The statutory requirements of a general fence to prevent the intrusion of swine will constitute a legal fence in those remote instances where the running of swine is legal (Florida Statutes section 588.011). Currently, most counties in Florida prohibit the free running of swine.

A legal fence must be at least three feet high and made of barbed or other soft wire of no less than the same height, solidly secured on supports that are up to twenty feet apart or, when using battens, up to sixty feet apart for non-electric and one hundred and fifty feet for electric using high-tensile wire. Other materials may be used if the requirements are substantially met. A legal fence may include a gateway if it meets the standards required for a legal fence and is constructed with a livestock guard at least six feet wide extending to each end of the opening (Florida Statutes section 588.011).

**What are the requirements for legally enclosed land under Florida law?**

Land is legally enclosed, or posted, when a legal fence encloses it, and its boundaries display posted notice to the public. The law views any part of the land bounded by ocean, gulf, bay, river, creek, or lake as legally enclosed (Florida Statutes section 588.09). Owners of legally enclosed land must maintain the condition of the fence and the posted notice (Florida Statutes section 588.11; 27 Florida Jurisprudence 2d section 4).

**What are the requirements for posted notice on a fence to assure it is in compliance with Florida law?**

Posted notice on fences must prominently display, in letters of at least two inches in height, the word “posted” together with the name of the owner, lessee, or occupant of the land. The notices must be placed no less than five hundred feet apart, at every corner, and at any gate or opening of fence. Similar notice is required for land bounded by water (Florida Statutes section 588.10).
Does a legal fence protect me from liability?

Having a “legal fence” does not automatically relieve a landowner from all potential liability. In Florida Board of Education v. Andrews, 903 So.2d 1048 (Fla. 1st DCA 2005), the First District Court of Appeals (1st DCA) of Florida noted that a legal fence is not necessarily an “adequate fence” and compliance with Chapter 588 of the Florida Statutes did not resolve the question of liability. In that case, a bull broke through a fence and collided with a vehicle, resulting in the driver’s death (id.). The court reversed and remanded the case for a new trial to address the issue of negligence and to answer the question of whether the defendant had constructed an adequate fence to restrain the bull (id.).

Duty to Fence

As a livestock owner, do I have a duty to fence?

Florida law does not impose on the owners of livestock and animals the duty to fence, but, as discussed below, owners may be civilly or criminally liable for animals that stray onto public roads.

What if I do not have a fence and my livestock escape?

Owners who intentionally, knowingly, or negligently permit their animals or livestock to run at large or stray upon public roads are liable for any resulting injuries or property damage, and may even be guilty of a second-degree misdemeanor (Florida Statutes sections 588.15 and 588.24). Criminal penalties may include a term of imprisonment not exceeding sixty days and/or a fine of as much as $500.00 (Florida Statutes sections 775.082 and 772.083). Similar criminal penalties may apply to the owner of livestock carrying any contagious diseases who knowingly and without permission from another owner allows his livestock to run at large or come into contact with other animals (Florida Statutes section 828.16). Case law examples for civil liability include Hughes v. Landers, 215 So.2d 773 (Fla. 2d DCA 1968), and Prevatt v. Carter, 315 So.2d 503 (Fla. 2d DCA 1975). The law also gives officials the right to impound and sell off animals found running at large, regardless of the owner’s liability (Florida Statutes sections 588.16–588.25).

Is there any liability if a car strikes an animal that strays onto a public highway?

Whenever a car or truck collides with an animal that is at large on a public highway and the driver is killed by the resulting collision, the owner of the animal cannot sue the driver’s estate for damage to his animal (Florida Statutes section 768.12). If he is not negligent himself, the animal owner may bring suit for negligence against a driver who survives the collision and causes damage to the animal (Toole v. Dupuis, 735 So.2d 582 [Fla. 4th DCA 1999]). The driver or the driver’s estate may have a cause of action against the animal owner for injury to or death of the driver or any passengers if the complainant can prove both ownership of the animal, and that the owner at least allowed the animal(s) to stray (Florida Statutes section 588.15; Selby v. Bullock, 287 So.2d 18 [Fla. 1973]).

Liability may be assessed or not assessed against the owner of an escaped animal based on the facts of the case. For example, in Hughes v. Landers, Hughes and his daughter collided with a horse while driving their automobile, resulting in the daughter’s death. The lawsuit against the animal’s owner provided evidence showing the general disrepair of the fence used to corral the horse (the fence was negligently maintained as shown by the facts that there were no hinges or locks on the cattle gap gate, the gate was secured only by two rotted and flimsy ropes, the bottom rope was untied, and a section of the fence had loose...
wire where two posts were leaning at a forty-five degree angle). Also, in *Prevatt v. Carter*, where a motorcyclist driving at night suffered injuries when he collided with a black cow, the court said that the motorcyclist could establish the owner’s negligence by showing that the fence surrounding the livestock was in disrepair and that the owner knew his livestock were escaping from the grazing area (the mere fact that the livestock are running at large on a public highway does not automatically mean that the owner intentionally or negligently permitted the animals to run at large). There must be proof of negligence. For example, there would be no negligence if a horse escaped from a closed gate that could only be opened by human hands (*Lee v. Hinson*, 160 So.2d 166 [Fla. 2d DCA 1964]), but negligence could exist if an animal could open the gate by slipping a chain off a bent nail (*James v. Skinner*, 464 So.2d 588 [Fla. 2d DCA 1985]). Courts have determined that an owner whose cows broke through three separate enclosures before reaching a public road was not careless or negligent (*Welch v. Baker*, 184 So.2d 188 [Fla. 1st DCA 1966]), but reasoned that negligence may exist when a properly maintained fence was not strong enough to contain a large bull (*Hanson v. Scharber*, 749 So.2d 563 [Fla. 2d DCA 2000]). An owner might escape liability if there is evidence, such as unknown tire tracks or a different knot used to tie a gate, that another person caused the animal’s release (*Gordon v. Sutherland*, 131 So.2d 520 [Fla. 3d DCA 1961]).

**If my fence is broken or damaged, can someone other than the owner of the property be held liable?**

A person who causes the destruction of part of someone else’s fence could be liable for any losses resulting from the fence being brought down (Florida Statutes section 810.115).

**Is there any liability if I do not own the animals that are kept on the land I own?**

Liability for damages resulting from an animal that is at large remains with the legal owner of the animal and not the person who is merely the legal owner of the land on which the animal is located (*Davidson v. Howard*, 438 So.2d 899, 902 [Fla. 4th DCA 1983]).

**Who is liable if only one family member is at fault and the entire family owns the animal?**

Under Florida law, a wife is not liable for her husband’s tort when she has no knowledge of his tortious conduct and does not authorize or participate in the act (*Boswell v. Russell*, 819 So.2d 925 at 927 [Fla. 5th DCA 2002]). Under the Warren Act, a wife’s ownership of a bull merely imposes a duty on her to not act negligently in allowing it to stray upon public roads. It does not impute her husband’s knowledge or negligence to her (*id.* at 928).

**Do any industries have a duty to fence in Florida?**

Several industries have a duty to fence under certain circumstances. Any company or individual not engaged in a bona fide mining operation must either fill in or fence any hole that is larger than two feet wide and two feet deep to prevent livestock or domestic animals from falling into any holes (Florida Statutes sections 768.10–11). Landfills, solid waste facilities, and construction and demolition debris disposal facilities must include fences to prevent unauthorized access or waste disposal (62 Fla. Admin. Code 701.500, 710, and 730). Operators of amusement rides must fence or otherwise restrict any areas where people may be endangered by the operation of the ride (Florida Statutes section 616.242).

Any junkyard within 1,000 feet of any interstate or federal-aid highway must be “screened by natural objects, plantings, fences, or other appropriate means” so that the junkyard cannot be seen from the road. The law also requires that the fence always be kept in a condition of good repair. Failure to do so may result in fines against the owner of the facility (Florida Statutes section 339.241).
Florida law no longer imposes a duty on railroads to erect fences to prevent livestock from getting on the tracks and causing collisions (Florida Statutes section 337.401). Case law, however, still exists that indicates that railroads passing through livestock farms have the duty to keep a fence in good repair to prevent livestock from getting onto the railroad tracks. The railroad could be liable for the death or injury of livestock resulting from the failure to maintain the fence (Seaboard Air Line Railway Company v. Maige, 109 Fla. 229, 147 So. 215 [1933], affirmed; Doral Country Club, Inc. v. Klatzkin, 433 So.2d. 57 [3d DCA 1983]).

**Do any individuals other than livestock owners have a duty to fence in Florida?**

Private game preserves or farms must fence the area to prevent the escape of domestic game and the entrance of wild game (Florida Statutes section 372.16). Special fencing requirements exist for anyone who keeps captive wildlife classified as a Class I or Class II carnivore (Fla. Admin. Code Ann. r. 68A–6.0022). Residential pool owners may opt to enclose their pools to meet the safety feature requirement and to pass the final pool inspection (Florida Statutes sections 515.27 and 515.29). Additionally, local ordinances may impose duties on swimming pool owners to erect and maintain a fence around pools.

**Do any prohibitions on fencing exist under Florida law?**

It is a first-degree misdemeanor for anyone to obstruct a public road or highway with a fence or other obstruction (Florida Statutes section 861.01). The confinement of animals without fresh water, food, regular exercise, and a change of air could result in a charge for a first-degree misdemeanor (Florida Statutes section 828.13). Until June 2000, it was illegal to fix or cause to be fixed on unfenced property any stakes or canes or anything that could kill or maim cattle or other livestock (previously Florida Statutes section 588.07).

**Summary**

Florida law requires waste disposal facilities, companies that dig open pits, and owners of junkyards to fence their property. Railroad companies may still be liable for any injuries to livestock resulting from their failure to keep their fence in good repair. For junkyards, the duty to fence arises from those junkyards which are within 1,000 feet of any interstate or federal-aid highway. Special fencing requirements also exist for private game preserves, swimming pools, and amusement rides. It is illegal for anyone to obstruct a public highway with a fence, or to confine animals without food and water.
Adjoining Landowners

How does the law define an adjoining landowner?

Adjoining landowners are legally defined as individuals whose lands are separated by a common boundary line (1 Florida Jurisprudence 2d Adjoining Landowners section 1).

As an adjoining landowner, when am I required to raise a fence? If I raise a fence, am I entitled to some contribution from the other landowner?

Generally, owners of adjoining land are under no legal responsibility to fence their land at the common boundary line. However, an owner who does decide to fence his land has no legal claim of contribution by the adjoining landowner unless there is an agreement to contribute or the adjoining landowner notifies the owner that he will pay his proportionate share. In the case where two adjoining landowners purchase land in which a fence already exists, the adjoining landowners are considered joint owners of the fence and have a joint obligation to repair and maintain the fence (1 Florida Jurisprudence 2d Adjoining Landowners section 60).

Summary

Owners of adjoining land are generally not required to raise a fence at a common boundary line. If an owner does decide to raise a fence, he does so at his own cost and is not entitled to any contribution from the adjoining landowner, unless they have an agreement that says otherwise.
Boundaries and Possession

What is the distinction between land ownership and possession?

A person who holds legal or equitable title to property owns that property, whereas a person who exercises control and dominion over property possesses it. The distinction is important in disputes over adverse possession, boundary by agreement, and boundary by acquiescence, as discussed later.

What are the ways to show land ownership?

The best and most important way to check ownership is to make sure the description of land on the deed matches the land you possess. This information can be obtained through the County’s Official Records or Property Appraiser’s Office. In certain cases, possession of land may show ownership by proof of certain acts, such as:

- Cultivates or improves the land or part of a single lot of land;
- Protects the land by a substantial enclosure, such as a fence;
- When, although not enclosed, the land has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant (Florida Statutes section 95.16).

What are the legal problems of adjoining landowners?

In dealing with land possession among adjoining owners, most of the legal problems center around two areas:

1. Encroachments
2. Overlaps or hiatus

What are encroachments?

An encroachment occurs when an individual occupies any portion of land above or below the surface beyond what is described in the deed. It is important to note that the individual who has encroached upon the other person’s land does so without either an easement or agreement to do so, or any written instrument, judgment, or decree giving title to the encroached land (1 Florida Jurisprudence 2d Adjoining Landowners section 13).

If my neighbor puts up a fence that encroaches on my land, how should I react? What are my legal rights?

Where there is no dispute or mistake regarding the true boundary line and someone
builds a fence that clearly encroaches upon your land, immediately notify that person of the encroachment in writing. In such cases, the encroaching person is required to remove the fence. If the individual refuses to remove the fence, you may bring an action to eject the individual from your property. The existence of a fence can constitute evidence of the required doubt or uncertainty as to the true boundary in a boundary by acquiescence dispute (Carroll v. Fordham, 781 So.2d 1156 [Fla. 1st DCA 2001]).

The more difficult types of encroachment problems are described by boundary by agreement and boundary by acquiescence.

**Boundary by Agreement**

The three important aspects of this are:

1. Uncertainty or doubt as to the true boundary line;
2. An agreement that a certain line will be treated by the parties as the true line;
3. Subsequent occupation by the parties in accordance with agreement for a period of time sufficient to show a settled recognition of the line as a permanent boundary (Watrous v. Morrison, 332 Florida 261, 14 So. 805 [1894]; Campbell v. Noel, 490 So.2d 1014 [Fla. 1st DCA 1986]; 1 Florida Jurisprudence 2d Adjoining Landowners sections 47 and 48).

In *Campbell*, two adjoining landowners were uncertain of the true common boundary between the two tracts. One landowner, Pate (P), surveyed his land. At this time, P’s surveyor met with the adjoining landowner, Campbell (C), and C’s surveyor. Based on this survey, P erected a fence that ran the length of the agreed boundary between the adjoining tracts. The fence remained without dispute for five years during which time C patched and repaired P’s fence several times. After five years, C suspected an encroachment from another one of his neighbors and had his land surveyed. The survey revealed that P’s fence encroached C’s property by sixty feet over the actual boundary line. Six years later, C sued to eject P from the land. The court used boundary by agreement to allow P to maintain his fence. First, the court found that genuine uncertainty as to the true boundary line could exist even without open disagreement between the adjoining landowners. This uncertainty was shown by C’s testimony stating that he did not know where the boundary line was at the time P had the land surveyed. Second, the court found that C’s actions in maintaining the fence implied agreement to treat the fence as the boundary line. Third, the court found that the parties had recognized the boundary line by occupying the land for a sufficient amount of time. Concerning the time requirement, the court stated that boundaries by agreement have been found when parties occupied the land for as little as two years.

**Boundary by Acquiescence**

Two important elements of this are:

1. A dispute or uncertainty from which it can be implied that both parties are in doubt as to the true boundary line (meaning both landowners lack actual knowledge of the true boundary);
2. Continued occupation and acquiescence in a line other than the true boundary for the period of the statute of limitations, or more than seven years (King v. Carmen, 237 So.2d 26, at 28 [Fla. 1st DCA 1970]; McDonald v. Givens, 509 So.2d 992 [Fla. 1st DCA 1987]; 1 Florida Jurisprudence 2d Adjoining Landowners sections 47 and 48; Florida Statutes section 95.12).

In the absence of direct evidence of a dispute, all five district courts in Florida and the Florida Supreme Court agree that mere construction of a fence does not suffice to
establish the element of uncertainty in a boundary dispute case (Van Meier v. Kelsey, 91 So.2d 32 [Fla. 1956]). Boundary by agreement and boundary by acquiescence both involve a disputed boundary line (note that if existence of a boundary line in a particular location is without dispute, then the person who is encroaching upon the land cannot claim possession of the land), but boundary by acquiescence requires that the land must be encroached upon for at least seven years. In other words, action brought to recover property after seven years of encroachment will probably be denied.

In the case of McDonald v. Givens, the owner before McDonald (M) had erected a fence, which remained on the property for at least fifty years. Since the fence was erected, M and her predecessors, along with other individuals residing in the area, considered the fence to be the boundary between the two properties. Thirteen years after M had obtained title to her property, Givens (G) purchased property that shared a common boundary with M’s property. G’s survey disclosed that M’s fence was encroaching upon G’s property as described in their deeds and the true boundary line was eastward of the fence. The court found that while no direct evidence was available to show uncertainty over the boundary line at the time of the fence’s erection, without any other explanation for its specific location, the placement and duration of the fence itself is sufficient evidence to show doubt and establish for boundary by acquiescence (McDonald v. O’steen, 429 So.2d 407, 409 [Fla. 1st DCA 1983]). Furthermore, the court stated that while G protested the current fence, no evidence existed that any of the owners before G protested the fence’s existence as an encroachment. The fence was maintained for 30 years, without dispute, before G gained title to the property. This surpassed the necessary seven years needed under the statute of limitations. The court found a boundary by acquiescence (fulfilled by the two elements), so G’s protest was denied.

While the above two cases are representative of the different situations in which boundary by agreement and boundary by acquiescence apply, many other cases exist that also show their application. A list of a few additional cases is as follows:

- **Euse v. Gibbs**, 49 So.2d 843 (Fla. 1951), indicates that when adjoining landowners settle a boundary dispute by agreement and the agreed boundary is different than as described in the deed, the taxes paid on the property actually defined in the deed will act as a payment on the taxes of the disputed land.

- **Reil v. Myers**, 222 So.2d 42 (Fla. 4th DCA 1969), clarifies that a verbal agreement that a certain line is the boundary is legal because it merely defines boundaries and is not required to be in writing because title to the real estate is not passed.

- **McDonald v. O’Steen**, 429 So.2d 407 (Fla. 1st DCA 1983), provides a discussion of the application of boundary by acquiescence when there is little direct evidence of an actual dispute over the boundary.

- **Sanders v. Thomas**, 821 So.2d 1214 (Fla. 1st DCA 2002), refuses to apply the Givens rule for doubt or uncertainty in cases of boundary by acquiescence when surveys over the course of the encroachment showed the actual boundary line.

- **Jones v. Muldrow**, 921 So.2d 762 (Fla. 1st DCA 2006), the court affirmed that the elements of boundary by acquiescence are (1) uncertainty or dispute as to the location of the true boundary, (2) location of a boundary line by the parties, and (3) acquiescence in the location for the prescriptive period (Sembler Marine Partners, Ltd. v. Skidmore, 842 So.2d 1003, 1005 [Fla. 4th DCA 2003]).
Summary

If your title clearly describes your land and, according to your deed and your neighbor’s deed, your neighbor’s fence is clearly encroaching upon your land, you should immediately notify your neighbor in writing of the encroachment. Your neighbor is required to remove this encroachment.

If the location of the true boundary line is unclear from both your deed and your neighbor’s deed, avoid future dispute by notifying your neighbor of the ambiguity, calling a surveyor, and clarifying your boundary lines. In the case where you think boundary by agreement or boundary by acquiescence may apply to the dispute, think of the aspects of each and whether they actually apply to your case.

Remember the three aspects of boundary by agreement:

1. Uncertainty or doubt as to the true boundary line
2. Agreement that a certain line will be treated by the parties as the true boundary line
3. Subsequent occupation by the parties in accordance with the agreement for a period of time sufficient to show settled recognition of the line as a permanent boundary

Consider also the two aspects of boundary by acquiescence:

1. A dispute or uncertainty from which it can be implied that both parties are in doubt as to the true boundary line
2. Continued occupation and acquiescence in a line other than the true boundary for a period of more than seven years (as required by the statute of limitations)
Adverse Possession

What is adverse possession?

Unlike boundary by agreement and boundary by acquiescence, adverse possession not only applies to encroachments by adjoining landowners, but also to the ownership rights of any piece of land. Adverse possession occurs when a person loses title to his property because another person has occupied the land for at least seven years, resulting in overlapping legal descriptions. In addition to the seven-year requirement, in order for an individual to adversely possess another’s land, the individual must also possess the land in an open, notorious, and visible manner such that it conflicts with the owner’s right to the property. Thus, party A cannot adversely possess party B’s land if A has B’s permission to be on B’s land. Furthermore, A must possess the land continuously for a period of seven years and the possession must be exclusive to the use of others and the owner. It is important to note that since B has legal title to the land, A must clearly prove the requirements for adverse possession (Downing v. Bird, 100 So.2d 57 [Fla. 1958]; 2 Florida Jurisprudence 2d Adverse Possession sections 8–36). In addition to these basic requirements for adverse possession, Florida law requires that an adverse possessor occupy the land for at least seven years and meet either of the two following requirements: adverse possession under color of title, or adverse possession without color of title.

What is adverse possession under color of title (Florida Statutes section 95.16)?

An adverse possessor can claim property under color of title if he meets the following two conditions:

1. The adverse possessor must show that the claim of title to the land is based on a recorded written document (even if faulty). The adverse possessor must genuinely believe this document to be the correct claim of title (Bonifay v. Dickson, 459 So.2d 1089 [ Fla. 1st DCA 1984]; 2 Florida Jurisprudence 2d Adverse Possession section 10; Seton v. Swann, 650 So.2d 35 [ Fla. 1995])

2. The adverse possessor must show possession of the property by doing one of the following to the land for at least seven years:
   - Cultivating or making improvements
   - Protecting by a substantial enclosure (usually a fence)
   - If not enclosed, using the land for the supply of food or fencing timber for
husbandry or the ordinary use of the occupant

• Partly improving a portion of a recognized lot or single farm, making the unimproved part, if in the custom of the area, considered occupied

**What is adverse possession without color of title (Florida Statutes section 95.18)?**

When an individual continuously occupies a property for seven consecutive years, lacking any legal document to support a claim to the land’s title, he may establish adverse possession by filing a return with the county appraisers within one year of entry onto the property, and paying all taxes and liens assessed during possession of the property.

But paying the taxes alone is insufficient to establish adverse possession or color of title (*Bentz v. McDaniel*, 872 So.2d 978 [Fla. 5th DCA 2004]). The property is considered possessed only if the individual does one of these:

1. Cultivates or improves the land
2. Protects the land by a substantial enclosure, which is usually a fence (*Mullins v. Culbert*, 898 So.2d 1149 [Fla. 2005])

**Summary**

The requirements for adverse possession are very strict: (1) the person claiming adverse possession must possess the land openly, notoriously, and in a visible manner such that it is in conflict with the owner’s right to the property; (2) this person must either have some sort of title on which to base claim of title or the person must have paid property taxes on the land claimed to be adversely possessed; and (3) this person must possess the land continuously and exclusively for a period of at least seven years. It is important to note that a prospective adverse possessor may be transformed into a trespasser if asked to leave the property by its rightful owner. The term “owner” refers to the original legal owner of a property rather than the adverse possessor of a property. If a person defies an order to leave the property (personally communicated by the owner of the property) or if the trespasser does anything to cause destruction to the property, then that trespasser is guilty of a misdemeanor of the first degree (Florida Statutes section 810.09). Furthermore, if the trespasser is armed with a firearm or other dangerous weapon during the trespass, then that person is guilty of a felony in the third degree.
Easements and Rights of Way

What are easements and rights of way?

An easement is a benefit based in land ownership, other than the sharing of profits, that gives someone the right of use or enjoyment of another person’s land for a special purpose not inconsistent with the general property rights of the owner. An easement cannot exist between two pieces of land owned by the same person (J.C. Vereen & Sons v. Houser, 123 Fla. 641, 167 So. 45 [Fla. 1936]; 20 Florida Jurisprudence 2d Easements and Licenses in Real Property section 1). A right of way, generally, is the right of a specific person or class of persons to use a route to travel over the land of another (Wyatt v. Parker, 128 So.2d 431 [Fla. 2d DCA 1961]; 20 Florida Jurisprudence 2d Easements and Licenses in Real Property section 9). A common example of a right of way easement is one where a landowner cannot access a public road without crossing the property of another landowner. In these situations, courts will usually find a right of way by necessity. This allows a party to cross another’s land at the closest point to a public highway. It is important to note, however, that where another route eventually emerges to the public highway, then the common law right of way by necessity will be found to no longer exist. Further, if a common law right of way ceases to exist, a statutory right of way may be found where land used for either a dwelling, or agricultural, timber, or stock purposes is shut off from access to a road (Florida Statutes section 704.01). In such cases, a court may determine whether compensation is due to the landowner (Florida Statutes section 704.04).

How are easements usually created?

Usually, the title-holding landowner expressly grants an easement by means of a written agreement, deed, or deed reservation (20 Florida Jurisprudence 2d Easements and Licenses in Real Property sections 15–25). This contract must show the landowner’s intention to create a permanent, not temporary, right in a specific piece of land. Limited types of easements may also be created by implication. Areas such as streets, alleys, or parks are usually found to be easements by implication (Florida Statutes section 704.01[1]). Once created, the location of the easement cannot be changed without agreement. When an easement is blocked, the easement owner may pass over the adjoining land as far as is necessary to avoid the blockade.

Who is responsible for maintaining an easement?

Usually, the owner of the easement is responsible for maintenance (20 Florida Jurisprudence 2d Easements and Licenses in Real Property section 48). The parties to an
express easement may alter their responsibilities by agreement. The owner of an implied easement is responsible for its maintenance (Morrill v. Recreational Development, Inc., 414 So.2d 590 [Fla. 1st DCA 1982]). If a statutory-implied easement is located on land used to enclose a farm, grove, or livestock, then the user of the easement may be required to maintain a gate or cattle guard anywhere a fence is interrupted by the easement (Florida Statutes section 704.02).

What other forms of easement can be created or granted to a landowner or party using a piece of property?

There are two other available forms of easements:

1. Prescriptive Easements
2. Conservation Easements

A prescriptive easement, similar to adverse possession, is designed to obtain rights less than full ownership to land based on long-term use or enjoyment rather than agreement or statutory methods. In order for a prescriptive easement to exist, a party must show all of the following:

- Actual, continuous, and uninterrupted use (not possession) for twenty years
- Use, under a claim of right, in conflict with the landowner's use
- Knowledge of the landowner or use so open, notorious, visible, and uninterrupted that knowledge is imputed to the landowner (Downing v. Bird, 100 So.2d 57 [Fla. 1958]; 2 Florida Jurisprudence 2d Adverse Possession section 60)

A conservation easement is an express easement created to limit further development of property. Under Florida Statutes section 704.06, a conservation easement acts as a perpetual preservation effort of the land's natural state. This kind of easement also is created to maintain the existing uses of the land at the time of the easement’s creation such as agricultural, historical, cultural, or archeological purposes. Conservation easements are acquired by either a governmental body, or a charitable corporation or trust in order to prevent activities such as construction, dumping, excavation, and/or tree removal at a designated property. Once such an easement is created on a piece of property, it cannot be changed to allow development (20 Florida Jurisprudence 2d Easements and Licenses in Real Property section 10). Also, see Florida Statutes section 704.06(11) on not limiting rights to negotiate for sale for purpose of linear facilities.

If I grant an easement to my adjoining landowner, can that owner use the easement for any purpose?

No. Courts settling disputes over the use of easements look to the grant to find the parties’ intention at the time of the easement’s creation. Any use that was not intended by the parties at the time of the easement’s creation will not be allowed. If there is no clear intention, then courts usually will allow any use of the easement that is reasonably necessary for its full enjoyment as measured by the easement’s purpose, the situation of the property, and any surrounding circumstances (Seven Hills, Inc. v. Bentley, 848 So.2d 345, at 361 [Fla. 1st DCA 2003]). The court cites these rules to validate a trial court’s award of damages for the misuse of a written easement by an electrical company. Likewise, an owner of an easement for drainage purposes cannot use the easement for activities not consistent with drainage (Crutchfield v. F.A. Sebring Realty Co., 69 So.2d 328 [Fla. 1954]). The general rule is that the burden placed upon the landowner granting the easement must not be unnecessarily increased by uses that the parties did not intend (20 Florida Jurisprudence 2d Easements and Licenses in Real Property sections 41, 43, and 46).
What are my rights if one of the parties violates the terms of the easement?

Generally, a lawsuit may be brought to seek damages for injury to, or disturbance of, the easement; for breach of contract granting the easement; or for an injunction to stop the easement’s obstruction (20 Florida Jurisprudence 2d Easements and Licenses in Real Property section 69).

What happens if someone builds a fence blocking an easement?

When a fence is blocking an entrance or exit to another property under the consideration of constructive notice, the court will first determine if there is an easement. The court may order the fence be removed. In *Prime West, Inc. v. Camargo*, (906 So.2d 1112 at 1113 [Fla. 3d DCA 2005]), the purchaser of a lot brought action against the owner of a private road, seeking the removal of the fence as relief. The courts determined that when an owner conveys part of his property, the owner impliedly grants all those easements which existed and which were used for the benefit of the land that was conveyed. Similarly, an implied easement is determined by the circumstances surrounding a conveyance and means that whenever a part of the property is obviously in use as an incident or as an appurtenance, it passes by implication when the land is sold. The court held that the purchaser had an implied easement to use the road (*id.*).

What is a statutory way of necessity?

This is a kind of easement recently used when a person claims he must use a portion of another person’s land to gain access to public or private roads. When a dwelling or agricultural enterprise is cut off from every practical route to public or private roads by land, fencing, or other improvements, the owner of that land may claim a desire to use a portion of neighboring land. The said portion of neighboring land may serve as an easement for persons, vehicles, stock, cable television service, utilities, and telephone service to land that is surrounded or shut out from access to roads (Florida Statutes section 704.01).

Can a landowner be compensated for the imposed statutory way of necessity?

Yes. If someone is claiming a statutory way of necessity, you may file suit in a county circuit court to challenge the claim, or to request the court to award compensation for the use of your land (Florida Statutes section 704.01).

Summary

With an easement, a landowner, without sharing profits, has the right to use and enjoy another landowner’s land. Easements are created either by a written contract or by implication in situations such as streets, parks, or alleyways. Their use is defined by the intention of the parties at the time of the easement’s creation. If this intention is unclear, courts will look to the easement’s character, purpose, and surrounding circumstances in determining the easement’s proper use. Rights of way give a specific person or persons a means of accessing a public road or highway through another’s land. In the case of an easement through fenced agricultural lands, the user of the easement is generally responsible for maintaining gates or cattle guards any place the easement intersects a fence.

In the case where one of the parties violates the terms of the easement, it is always best to try to amicably resolve the situation by open discussion and negotiation. If this is not possible, then the party may sue for an injunction to stop the violation and/or for damages for breach of contract.
Maintaining the Boundaries and Grounds

What is a nuisance?

Although as a general rule a property owner is free to reasonable use of that property, a property owner cannot use the property in a way that interferes with an adjoining landowner’s right to enjoy his property. If he does, then a nuisance may exist (38 Florida Jurisprudence 2d Nuisances section 1). Two major forms of nuisance exist: public and private. A private nuisance affects only private rights in property and harms only a limited number of individuals. A public nuisance causes damage to public rights, public order, or the general public (38 Florida Jurisprudence 2d Nuisances section 6). Nuisances can exist in a variety of examples ranging from operation of an illegal activity on the property, to noise pollution, or to the erection of a fence. Both public and private nuisance can involve criminal actions or lawsuits, which can be used to obtain damages or an injunction against the landowner. An injunction would result in a court order to force the offending landowner to stop using the land in any way that was interfering with the adjoining landowners’ uses (38 Florida Jurisprudence 2d Nuisances sections 79 and 87).

When do courts find a nuisance?

Not every use of property that inconveniences another person is automatically a nuisance. Such use may become a nuisance if the circumstances of the case show that the use is continued and causes substantial harm to legal rights. The motive or intention of the property owner causing the activity is immaterial to the finding of a nuisance (38 Florida Jurisprudence 2d Nuisances sections 14 and 20). Often, a statute may declare a certain use to be a nuisance. A court may decline to grant an injunction if it finds that the party seeking relief has an improper motive (38 Florida Jurisprudence 2d Nuisances section 93). Below are examples of when fences are and are not nuisances.

Fence is a nuisance

W builds two fences. Both fences hinder the use of a private road. The court found that when a fence hinders the use of a road, it is considered a nuisance (White Sands, Inc. v. Sea Club Condominium Association, Inc., 581 So.2d 589 [Fla. 2nd DCA 1990]).
Fence is not a nuisance

P complained that D, an adjoining landowner, had built a metal-slated, chain-link fence that was high enough to block the view of their neighborhood waterfront and make their neighborhood appear more like an institution. D claimed to have built his fence to prevent trespass by children and burglary as well as for privacy purposes. The court allowed the fence to remain because other similar fences had been built in the neighborhood without complaint and the fence did not completely cut off P’s beach view. Additionally, there was no spite or malice on D’s part (Walden v. Van Harlingen, 220 So.2d 670 [Fla. 1st DCA 1969]).

What other kinds of requirements exist in maintaining boundaries and grounds?

Property can possess numerous restrictions that greatly affect the use of the land. The method and purpose of ditches, the amount of water used on any given day, or the types of pesticides used to kill insects are all examples of regulated practices that impact boundaries and neighboring properties. These regulations come from federal, state, and local governments, as well as special districts such as water management districts. For example, under Florida’s new Citrus Health Plan, you may be required to remove certain vegetation—under Florida’s efforts to combat citrus canker, state law requires the removal of any infected or infested citrus, non-approved planted citrus, and citrus that has sprouted by natural means in regulated areas (Florida Statutes section 581.1843). However, certain individuals may qualify for compensation from the state for the loss of citrus trees (Florida Statutes section 581.1845). The State may issue an “Agricultural Warrant” if there is probable cause to believe any land, plant, or livestock is infested or infected with a pest or pathogen (Florida Statutes section 581.031).

What if pollution crosses from my property to another?

Pollution or toxins may migrate past the boundaries of neighboring properties. This may occur through watershed, wind, or soil. There are numerous federal, state, and local laws dictating the handling, removal, and disposal of contaminated land or materials. In Aramark Uniform and Career Apparel, Inc. v. Easton (894 So.2d 20 [Fla. 2004]), the court held that Florida Statutes section 376.313(3) provides an action for damages against an adjoining property owner with hazardous substances under strict liability (requiring no proof of causation). In that case, a business with toxins on site was found strictly liable for the discharge and contamination in a neighboring property (id.).

Summary

In managing a property, consideration should be given to the effect an action or structure may have on adjacent properties. When the use of a property causes substantial harm to the rights or condition of a neighboring property, the one affected by the use may bring a nuisance action. Federal, state, and local laws may require the removal of certain vegetation or anything that violates the rights of those using neighboring properties for private or public purposes. The law may require certain postings on the fences, depending on the use of the property. If pollution migrates over the boundary of one property to a neighboring site, the property owner originally storing the contaminant may be strictly liable for clean-up.
When entering into a fence contract or agreement, what do I need to consider so that I may avoid a future dispute?

For legal purposes as well as for clarity’s sake and ease of recording, it is always better to have a written contract than a verbal agreement. A written contract provides you and your neighbor a better understanding of the intentions of all parties involved in the contract. In addition, it is usually easier to bind someone to a written contract rather than a verbal agreement. Although the list below does not provide a full list of everything that should be included in a written contract, the following elements should be included in any valid, legally recognized contract:

- The names and signatures of the parties
- A clear description of the lands involved and the terms that each party has agreed upon (e.g., who is to contribute what, maintenance responsibilities, the exact location of the fence, etc.)
- The date of the contract’s execution
- At least two witnesses (preferably ones who have no interest in the contract and are not related to the parties) and a notary (identification of the signatories and attestation to the facts)
- The length of time that the contract will run or any ways it can be otherwise terminated
- Any methods for changing the terms of the contract in the future
- Damages and other remedies if one of the parties does not fulfill its agreed-upon obligations (Florida Statutes section 695.01)

Summary

Court actions are always expensive and time-consuming. To avoid going to court in a dispute, start with a written contract, ensure all vague terms are clearly defined, and verify that all parties have agreed upon the terms. While the above list is not completely inclusive, it should help provide some guidelines in drafting a contract. In the case where a dispute does arise, be reasonable and try to reach a compromise with the opposing party even if you think you are right. Compromise and settlement are usually much more efficient and less expensive than court costs.
Visitors and Responsibilities to Visitors

What are the types of people that might enter my property?

The legal duties owed by a landowner to a person entering his property depend upon the classification of the person who enters the property. Florida law classifies such people into three types. The first type, invitees, includes any individual who is invited onto the landowner’s property or is led to believe that an invitation was given. The second type, licensees, enters upon the owner’s property albeit without invitation, but rather with the assent of the owner for the individual’s own convenience, pleasure, or benefit. The third type, trespassers, enters upon the property of another without invitation, license, or other right to enter the property (Lukancich v. Tampa, 583 So.2d 1070 [Fla. 2d DCA 1991]; 41 Florida Jurisprudence 2d Premises Liability sections 10, 53, and 60).

Who is an invitee?

Invitees include those individuals on the owner’s property because they have been led to believe—either by direct invitation by the owner, or by other valid circumstances—that the owner’s property is open for their use. Invitation occurs when the property is open to members of the public or the individual enters the property for a business dealing with the owner of the property. Individuals in this category may include business customers, visitors to public places such as museums or historic homes, and employees (Post v. Lunney, 261 So.2d 146 [Fla. 1972]; 41 Florida Jurisprudence 2d Premises Liability section 16). A property owner also owes the same duty of care to anyone invited onto the property for social reasons (Wood v. Camp, 284 So.2d 691 [Fla. 1973]). In addition, Florida Statutes section 112.182 classifies a firefighter or law enforcement officer who enters a property to discharge a duty as an invitee.

To what extent am I, the property owner, responsible for invitees?

The property owner is responsible for any injuries to the invitee caused by the owner’s intentional actions, by a failure to warn the invitee of any dangers of which the owner is aware, or by a failure to keep the property in a reasonably safe condition (41 Florida Jurisprudence 2d Premises Liability section 20).

An example of liability to an invitee is when L tripped and was injured on a piece...
of vinyl after he paid an admission fee to tour P’s home. The court ruled that when property is open to the public and the property owner invites the public inside, the visitor is considered an invitee (Post v. Lunney, 261 So.2d 146 [Fla. 1972]). The owner is responsible for the visitor if the visitor is injured due to a condition of which the owner knew or should have been aware. Under this rule, a storeowner would be responsible for injuries to a customer as well as for injuries to a friend or child accompanying a customer into the store (Burdines Inc. v. McConnell, 146 Fla. 512, 1 So.2d 462 [1941]).

**Who is a licensee?**

Licensees are individuals who enter upon the property of another for their own convenience, pleasure, or benefit (Stewart v. Texas Co., 67 So.2d 653 [Fla. 1953]; 41 Florida Jurisprudence 2d Premises Liability section 53). This includes uninvited licensees whose presence is tolerated or permitted by the owner of the property (Boca Raton v. Mattee, 91 So.2d 644 [Fla. 1956]). This category also includes discovered trespassers and trespassers who have done so for a substantial period of time with the owner’s knowledge (41 Florida Jurisprudence 2d Premises Liability section 53).

**To what extent am I, the property owner, responsible for licensees?**

For visitors classified as licensees, the property owner is responsible in cases where the owner willfully injures that person or that person is injured due to the owner’s wanton negligence. Additionally, the property owner has a responsibility to warn the licensee of any known dangers that someone would not readily notice (Emerine v. Scaglione, 751 So.2d 73 [Fla. 2d DCA 1999]; 41 Florida Jurisprudence 2d Premises Liability section 55). An example of a licensee is the case where P entered a store to get change and was injured after slipping on a greasy floor. P sued the owners, claiming they failed to warn him of the greasy floor. Because P only entered the store to get change and not to shop, the court found P to be a licensee rather than an invitee. The court said that licensees, upon entering property, assume whatever risk of injury that might exist due to conditions of the property unless those conditions are hidden (Stewart v. Texas Co., 67 So.2d 653 [Fla. 1953]). It is important to remember, however, that where conditions show a willful or gross disregard for safety, the property owner will be held responsible to injuries caused to licensees from such conditions.

**Who is a trespasser?**

A trespasser is a person who intrudes upon another person’s property for his own reasons without invitation or license and without any purpose other than self-interest (Lukancich v. Tampa, 583 So.2d 1070 [Fla. 2d DCA 1991]; 41 Florida Jurisprudence 2d Premises Liability section 60). An action against trespassers may recover both compensatory and punitive damages (Wishman v. Foster & Curry Industries Inc., 145 So.2d 278 [Fla. 3d DCA 1962]).

**What notice must be provided to a trespasser?**

As previously mentioned, under Florida Statutes section 588.10, a property owner must provide proper notice to all parties that may enter the property. All gates, fence corners, and all boundaries that lay along waterways must have posted notice of proper size and composition. The postings can be no more than 500 feet apart. If no notice of trespassing is posted on a piece of property and the party cannot know who owns the land, the party may not be able to be assumed to be a trespasser. This may change the party’s status in liability for damages for harm that may befall that individual. Certain facilities require different wording in the posted notices, and a different penalty for the person caught trespassing.

For example, if someone is caught trespassing on a property that manufactures agricultural chemicals, the offender commits a felony of the third degree. However,
the facility owner must have posted, prior to the offense, notices that included the following phrases throughout the property: “THIS AREA IS A DESIGNATED AGRICULTURAL CHEMICALS MANUFACTURING FACILITY, AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMITS A FELONY” (Florida Statutes section 810.09[2][h]).

**To what extent am I, the property owner, responsible for trespassers?**

The property owner’s duty to such persons is to not intentionally injure the trespasser. However, if the property owner knows or has reason to know of trespassers on the land, then the property owner must warn the trespasser of dangerous conditions that are not open or obvious to the trespasser (Dyals v. Hodges, 659 So.2d 482 [Fla. 1st DCA 1995]; 41 Florida Jurisprudence 2d Premises Liability section 61). Although there are few cases dealing with liability for the conduct of trespassers and others acting without the possessor’s knowledge or consent, it is clear that there is no liability until the possessor knows or should know of the likelihood of trespassers and has had a reasonable opportunity to exercise the proper care to prevent injury to others (Fisel v. Wynns, 650 So.2d 46 at 49 [Fla. 1994]).

For example, if P sneaks into the property owner’s pool without the property owner’s knowledge and then drowns, the property owner is not liable because the owner is only responsible for not intentionally harming the trespasser (Pedone v. Fontainebleau Corp., 322 So.2d 79 [Fla. 1975]).

As stated in the above paragraph, the property owner does have the responsibility of warning the trespasser of known dangers not ordinarily visible if the owner knows or has reason to know that the trespasser is present on his property. This area has been the subject of much controversy and many court cases. Below are examples of when property owners are and are not responsible for trespassers.

**Property owner is not responsible for injuries to trespasser**

In the first case, R, a cement plant and sand quarry owner, had a problem of trespassers entering his property to ride ATVs on sand hills. In response to these trespassers, the owner placed “No Trespassing” signs and erected a fence around his property’s perimeter. In addition, he implemented a permanent, 24-hour security guard service on his property to expel trespassers. Despite these measures, G entered R’s land as a trespasser to ride the sand hills. G was aware that the hills on R’s land were often dug away, resulting in sheer cliffs, but on the day of his accident, G did not look to see if the hill had been dug away. As a result, G fell down the sheer cliff and died after landing under his ATV. The court found R was not liable because R had taken precautionary measures to keep trespassers off of his land. Most importantly, the court found that because the dangerous condition of the cliff was open to ordinary view, R could not be held responsible for G’s failure to see the dangerous cliff. When a danger is open to ordinary view, the trespasser has a responsibility to avoid such dangers and the property owner will generally not be responsible for a trespasser’s injuries (Johnson v. Rinker Materials, Inc., 520 So.2d 684 [Fla. 3d DCA 1988]). In the second case, H, a neighbor to N, planted vegetation that had needle-like points on his property. Trying to recover her dog from underneath the needle-like plants, B (N’s daughter) injured her eye, causing a partial loss of vision. The court found that H was not responsible for warning B because B’s parents had already warned B concerning the harm that might be caused by those plants (Nolan v. Roberts, 383 So.2d 945 [Fla. 4th DCA 1980]).

**Property owner is responsible for injuries to the trespasser**

In the first case, X, while driving on a county road, failed to stop at a stop sign, crashed into H’s fence, and struck a large pile of brush and stumps. The accident resulted in the
death of a passenger in X's car. H, a farm owner, had erected the fence to keep his cattle inside. Having had several occasions where cars collided and damaged his fence so that the cattle could escape, H created a large pile of bush and tree stumps behind the fence. His reasons for creating this pile were not completely clear. H claimed it was to prevent his cattle from escaping when an individual collided and damaged his fence. H’s neighbors, however, testified that H claimed to have created the pile for the wrongful motive of injuring those who damaged his fence with their motor vehicles. The court in this case found that because H knew from previous damage to his fence that vehicles often collided with it, H’s decision to build the pile could be seen as acting in reckless disregard for the safety of others. The court also found that the pile was not very visible at night, therefore making it difficult for the driver to see it and discover the danger (Dyals v. Hodges, 659 So.2d 482 [1st DCA 1995]). In the second case (decided by the Supreme Court of Arizona, and cited and followed by the Florida courts), C, a trespassing horseback rider, was riding his horse in the evening and ran into an unmarked barbed wired fence that W had put across her property line. Previous experience showed that the location of the barbed wire fence was often traveled on horseback. The court said that because W knew that the area in which she put up the fence was one that was frequently traveled and that the fence was difficult to see after dark, she was held responsible for C’s injuries (Webster v. Culbertson, 761 P.2d 1063 [Ariz. 1988]).

To what extent am I, the property owner, responsible for child trespassers?

The final area of concern for landowners occurs when the trespasser is a child. In general, the same standard of care applies to child trespassers: landowners are not liable for injuries not caused by willful or wanton actions of the property owner. A special type of liability may be imposed, however, when the property owner did not guard against a dangerous condition that attracted the child onto the property (Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 [1925]; 41 Florida Jurisprudence 2d Premises Liability section 69). Courts consider whether the child was attracted onto the property by an instrumentality (usually a machine, appliance, or other such item which may be natural or man-made) that is dangerous to them, but because of their tender age, they are unable to understand the danger of the nuisance. This doctrine is known as attractive nuisance (Cockerham v. Vaughan, 82 So.2d 890 [Fla. 1955]).

In addition, Florida Statutes section 823.08 specifies that any abandoned icebox, refrigerator, clothes washer or dryer, deep-freeze locker, or other airtight unit, the doors of which have not been removed, is an attractive nuisance to children.

Where does an attractive nuisance apply?

The court looks for the following criteria to determine the full applicability of the Attractive Nuisance Doctrine:

- Whether the dangerous instrumentality was located in a place where the property owner knew or should have known that children are likely to trespass
- That the danger must have attracted the child onto the property
- That the property owner knew or should have known that the property poses an unreasonable risk of death or serious bodily harm to children
- That the children, because of their age, did not realize the danger of the dangerous instrumentality
- That the dangerous instrumentality’s benefit to the property owner is small compared to the risk to young children
- That the property owner did not take reasonable steps to remove the danger or protect the child (Martinello v. B&P USA, Inc., 566 So.2d 761 [Fla. 1990];
In evaluating this doctrine, courts have said that a properly fenced area will usually protect the property owner from liability resulting from the Attractive Nuisance Doctrine (Biltmore v. Kegan, 130 So.2d 631 [Fla. 3d DCA 1961]).

In applying the Attractive Nuisance Doctrine, courts do look to see whether or not the child realized the nuisance’s danger. Although no specific age limit exists, courts look to each child’s ability to appreciate the danger by considering factors such as age, intelligence, knowledge, and experience. The age and capacity of the child is also considered in determining whether a property owner must warn the child verbally or in writing (Larnel v. Martin, 110 So.2d 649 [Fla. 1959]; Idzi v. Hobbs, 186 So.2d 20 [Fla. 1966]; Nunnally v. Miami Herald, 266 So.2d 76 [Fla. 3d DCA 1972]).

Additionally, courts will look to whether the attractive nuisance is what actually attracted the child onto the property. If the child is attracted onto the property for some reason other than the attractive nuisance, then the Attractive Nuisance Doctrine will not apply unless there is a hidden danger contained within the reason the child was attracted onto the property (Martinello v. B&P USA, Inc., 566 So.2d 761 [Fla. 1990]). Below are examples of when property owners are and are not liable for child trespasser injuries.

**Property owner is liable for child trespasser injuries**

In this case, D, a contractor, began excavations of land close to a housing development and a school ground where small children played. The excavation site had a large pile of loose sand and gravel that concealed a large, ten-foot deep pond. P, a minor child, went to play on the pile and, while climbing the pile, fell and drowned in the pond. The court found that large mountain-like masses of sand, gravel, rock, coal, or other similar substances are an attraction for children (Larnel Builders, Inc. v. Martin, 105 So.2d 580 [Fla. 3d DCA 1958]).

**Property owner is not liable for child trespasser injuries**

In the first case, P, a minor, and a friend entered onto an excavation site to dig a tunnel. When digging the tunnel, the ground collapsed, trapping and killing P. The court pointed to two factors in ruling against P. First, while excavations are themselves dangerous, the property owner could not have anticipated P’s tunneling activity. Second, the court looked to testimony by P’s friend, which showed that P realized the risk involved in the activity (Sparks v. Casselberry Gardens, Inc., 227 So.2d 686 [1969]). In the second case, two boys, H and J, trespassing through farm property as a short-cut, came across an irrigation pump. While H was viewing the pump, his shirt caught in the pump’s rotating shaft and, as a result, H suffered severe injuries. The court did not apply the attractive nuisance doctrine to this case because the irrigation pump did not attract the boys onto the property (Johnson v. Bathey, 350 So.2d 545 [1st DCA 1977]).

**To what extent am I, the property owner, responsible for child trespassers drowning?**

Florida courts have generally not recognized drowning in artificial lakes, fishponds, millponds, gin ponds, or other pools, streams, and similar bodies of water as actionable negligence by trespassers. However, if the court finds a drowning resulted from an unusual element of danger or trap around the body of water, then it will find the landowner liable for the drowning (Allen v. William P. McDonald Corp., 42 So.2d 706 [1949]; Newby v. West Palm Beach Water Co., 47 So.2d 527 [1950]; 41 Florida Jurisprudence 2d Premises Liability section 89). Below are examples of when landowners are and are not responsible for trespasser drowning accidents.
Landowner is not responsible for the drowning

In the first case, P’s three-year-old son drowned in D’s private swimming pool. The pool was unfenced, and without a guardrail or any other protective safety devices. Nonetheless, the court did not find the landowner liable. The court said that …under Florida law, the general rule is that the owner of an artificial body of water is not guilty of actionable negligence for drowning unless it is so constructed as to constitute a trap or unless there is some unusual element of danger around it that does not exist in ponds generally” (Banks v. Mason, 132 So.2d 219 [Fla. 2d DCA 1961]).

In the second case, P’s two-year-old son drowned in an artificial pond. This pond’s water, however, was dark and murky, which created a false impression of shallowness. Furthermore, the pond had an island at its center with ducks, shade trees, shrubs, and flowers, and then further, a decorative fire truck with a bell on the opposite shore. The court found these characteristics insufficient for creating an unnatural, unusual element of danger and found an attractive nuisance did not exist (Hendershot v. Kapok Tree Inn, Inc., 203 So.2d 628 [Fla. 2d DCA 1967]).

Landowner is responsible for the drowning

In the first case, C, a minor, drowned while swimming in a pond when he was held under by a suction hose. The court held that the attractive nuisance doctrine applied because the nuisance that brought the child onto the property, the pond, had a concealed trap, the hose, which led to the child’s injury. The test to be applied in these situations is whether a reasonably prudent person should have anticipated the presence of children or other persons at the place where the landowner created a condition that a jury could find was an ‘inherently dangerous condition’ (In re Estate of Starling, 451 So.2d 516 [Fla. 5th DCA 1984]). In the second case, the defendant excavated the land to create an artificial lake and left the area unfenced without any barrier or obstruction. A child entered the area of steep, white sand, ending in his death by drowning. The court held that a sandy slope adjacent to an artificial lake may constitute an alluring trap (attractive nuisance) for a young child (Allen v. William P. McDonald Corp., 42 So.2d 706 [Fla. 1949]).

To what extent am I, the property owner, responsible for recreational visitors?

Florida Statutes section 375.251 covers the limitation on liability of persons making available to the public certain areas for recreational purposes without charge. If a landowner makes a property available to the public for outdoor recreational purposes free of charge, the landowner is not responsible for keeping that park area or land safe for entry or use by others, or for giving warning of any hazardous conditions, structures, or activities on the property to persons entering or going on that park area or land. This limitation on liability will not apply if any commercial or other profitable activity is derived from the general public’s patronage on the property. Also, any person remains liable for deliberate, willful, or malicious injuries.

Summary

There are three types of individuals who may enter upon your property. The first type is an invitee (a person who enters onto your property either by direct or implied invitation). For these persons, the property owner is responsible for keeping his property in a reasonably safe condition and warning the invitee of any dangerous conditions.

The second type is a licensee (an individual who enters upon the property of another for personal convenience, pleasure, or benefit). For these persons, it is the property owner’s responsibility to avoid dangerous conditions due to gross negligence, to not willfully harm such a person, and to warn the licensee of any dangerous conditions that are not readily
noticeable.

The third type of person is a trespasser. For these persons, the landowner must not intentionally cause them harm, and if aware of the trespasser’s presence, the landowner must warn the trespasser of any dangerous conditions that are not readily noticeable.

Courts look to the following five aspects in determining whether the attractive nuisance doctrine applies:

1. The property owner knows, or should know, that children are likely to trespass where a dangerous instrumentality is located on the property.
2. The property owner knows, or should know, that children are likely to trespass.
3. The danger actually attracted the children onto the property.
4. The children, because of their age, do not realize the danger of the attractive nuisance.
5. The dangerous instrumentality’s benefit to the property owner is small compared to the risk to young children.

Additionally, where owners think that a condition exists, such as a mound of sand, hay, tractors, etc., which may be considered an attractive nuisance, they should take preventative measures to avoid liability in case of an injury to a child. These preventative measures include enclosing the attractive nuisance, posting signs warning children of the dangerous instrumentality, and verbally warning neighbors of the dangerous instrumentality. While these measures are not a guarantee against liability, they help reduce the possibility of injury and provide evidence showing that the owner was not negligent.
What is eminent domain?

The Fifth Amendment to the United States Constitution allows the government to take private property if the taking is for a public use and the owner is “justly compensated” (usually, paid fair market value) for his loss. A public use is virtually anything that is sanctioned by a federal or state legislative body, but such uses may include roads, parks, reservoirs, schools, hospitals, or other public buildings. This procedure is sometimes called condemnation, a taking, or expropriation. For example, the proceedings to take land under eminent domain are typically referred to as “condemnation” proceedings.

What is the process of eminent domain?

The legal procedures surrounding eminent domain law vary significantly between jurisdictions. Usually, when a unit of government wishes to acquire privately held land, the following steps are followed:

- The government attempts to negotiate the purchase of the property for fair value.
- If the owner does not wish to sell, the government files a court action to use eminent domain, and gives notice of the hearing as required by law.
- At the hearing, the government must show that it tried in good faith to negotiate a purchase of the property, but that no agreement was reached. The government must also show that the taking of the property is for a public use, as defined by law.
- The property owner is given the opportunity to respond to the government’s claims.
- If the government wins the hearing, another proceeding is held to establish the fair market value of the property. The government’s payment first goes to satisfy any mortgages, liens, and encumbrances on the property, with any remaining balance paid to the owner.

What is a taking?

There are numerous types of takings which can occur through eminent domain:

- Partial Taking. If the taking is part of a piece of property, such as the condemnation of a strip of land to expand a road, the owner should be compensated for both the value of the strip of land, and any effect the
condemnation of that strip has on the value of the owner’s remaining property.

• **Temporary Taking.** Part or all of the property is appropriated for a limited period of time. The property owner retains title, is compensated for any losses associated with the taking, and regains complete possession of the property at the conclusion of the taking. For example, a temporary taking may be used to place a large sign or setback on a neighboring property for a highway project.

• **Easements and Rights of Way.** Eminent domain actions are sometimes used to get an easement or right-of-way. For example, a utility company may obtain an easement over private land to install and maintain power lines.

• **Complete Taking.** In a complete taking, all of the property at issue changes use, control, and/or accessibility.

**How is fair value determined?**

Fair value is the highest price somebody would pay for the property (referred to as fair market value), given that a willing seller is present. The time upon which the value is assessed varies, depending upon the governing law.

**How does the Kelo decision affect eminent domain law?**

Several criticisms and concerns regarding the use of eminent domain by units of government point to abuses in discretion and self-serving private interests. A recent U.S. Supreme Court decision ruled that local governments have broad power to confiscate private property in the name of economic development (Kelo v. City of New London, 125 S. Ct. 2655, 2664 [U.S. 2005]). Homeowners claimed that the city was trying to illegally force them to sell their property. The city wanted the land to make way for hotels, office buildings, and other privately funded facilities. A 5–4 ruling found in favor of the local government in New London. Due to public outcry, this decision resulted in many reactions by state legislatures to clearly define the limits and purposes of eminent domain, public purpose, and public use. Most recently, Florida passed several comprehensive changes to its own eminent domain laws. Florida Statutes section 70.001, also known as the Bert J. Harris, Jr. Private Property Rights Protection Act, provides a separate cause of action when a new law, rule, regulation, or ordinance of the state “unfairly” affects real property. An action is considered to be unfair if it “inordinately burdens” an existing use or a vested right to an existing use of the property. In order to qualify as an “inordinate burden” the law, rule, regulation, or ordinance must restrict or limit the use of real property “such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the property,” or such that the property owner is left with uses that are unreasonable because the property owner now shoulders a disproportionate burden for the good of the public as a whole.

**What are Florida’s laws on eminent domain?**

In 2006, the Florida Legislature enacted Florida Statutes section 73.013 to limit the claims by a “natural person or private entity” for eminent domain. Additionally, under Florida Statutes section 73.014, the use of eminent domain to prevent or eliminate slums, blight, or public nuisance is no longer considered a valid public purpose (Florida Constitution Article X Section 6[a]). In reaction to the Kelo decision, Florida voters passed a constitutional referendum (amendment 8) prohibiting the use of eminent domain to transfer private property to a natural person or private entity. To receive an exception to this rule requires a 3/5 majority vote from both the Florida House and Senate. The specific language of Florida’s eminent domain laws can be found in Florida Constitution Article X section 6; Florida Statutes sections 73.021–73.161; and Florida Statutes Chapters 127 and 163.
Summary

The power of eminent domain allows a unit of government (federal, state, local, or special district) to force the sale of a property for a public purpose in exchange for just compensation. This process entails a series of negotiations, followed by hearings to determine whether the exercise of eminent domain is justified. After determining whether the taking is for a public purpose, a determination is made as to the fair value of the property. Court decisions, such as *Kelo v. City of New London*, clarified the Florida Supreme Court’s stance on what constitutes a defensible use of eminent domain power for economic development. However, the Florida Legislature has restricted the use of eminent domain when it is used to reallocate the land to a natural person or private entity.
**Glossary**

**Disclaimer:** The following definitions are not legal standards or opinions. They are generic summaries to assist the reader in understanding this document’s contents. For further questions regarding any of the topics contained herein, please seek the expertise of a licensed attorney.

- **acquiescence.** Conduct that implies agreement or consent; often an acceptance through silence; may also occur when an agreement may be inferred.

- **adjoining landowners.** Individuals whose lands are separated by a common boundary line.

- **adverse possession.** Acquiring title to land against the record owner through uninterrupted possession of the land for at least seven years. For possession to be adverse against the record owner, it must be actual, visible, open, notorious, hostile, definite, and exclusive.

- **attractive nuisance doctrine.** A person whose property has a dangerous instrumentality, machinery, etc. that is likely to attract children has a duty to protect those children from the danger.

- **boundary by acquiescence.** Occurs when there is (1) a dispute from which it can be implied that both parties are in doubt as to the true boundary, and (2) continued occupation and acquiescence in line other than the true boundary for a period of more than seven years (as required by the statute of limitations).

- **boundary by agreement.** Occurs when there is (1) uncertainty or doubt as to the true boundary line, (2) agreement that a certain line will be treated by the parties as the true boundary line, and (3) subsequent occupation by the parties in accordance with agreement for a period of time sufficient to show settled recognition of the line as a permanent boundary.

- **color of title.** A claim founded on a written instrument, such as a deed, will, judgment, or decree, which is usually faulty and unknown.

- **common law.** Law determined by the courts or custom as opposed to statutory law or legislative made law.

- **conservation easement.** Express easement to keep a piece of property from further development; limits liability of owner to visitors admitted free of charge for recreational purposes.

- **dangerous instrumentality.** Appliances, machinery, or things, natural or man-made, which are dangerous by nature.
**deed.** A written instrument used to transfer or convey land ownership that describes the land conveyed.

**easements.** The right to use the land of another for a purpose that does not interfere with the landowner and does not involve the sharing of profits from the land. See also conservation easement, prescriptive easement, and eminent domain.

**eminent domain.** The power of government to take private property for public use with just compensation.

**encroachments.** An individual who occupies a portion of land beyond what is described in the deed.

**fence.** Structure erected to enclose property. See also general fence and legal fence.

**general fence.** Enclosure constructed with rails, logs, post and railing, iron, steel, or other material, and not less than five feet high.

**injunction.** A court order preventing or restraining a person from doing a certain act which is injurious and unfair to the person seeking the injunction.

**invitee.** One who comes upon the land of another by invitation.

**junkyard.** A scrap metal processing facility; or, a place to keep scrapped, wrecked, ruined, or dismantled machinery, motor vehicles, or other such items.

**legal fence.** At least three feet high and made of barbed or other wire consisting of not less than three strands of wire stretched securely on posts, trees, or other supports which are not more than twenty feet apart.

**licensee.** A person who is not a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises, and who enters upon the property of another for the person’s own convenience, benefit, or gratification.

**livestock.** Animals of the equine, bovine, or swine class, including goats, sheep, mules, horses, hogs, cattle, ostriches, and other grazing animals.

**misdemeanor.** A class of criminal offenses which are less serious than a felony and therefore have less serious penalties.

**negligence.** Lack of care; the failure to perform an established duty or the failure to show the degree of care required by the situation, which results in injury. Also, the failure to do something that a reasonably prudent person would have done in a similar situation.

**nuisance.** Anything that annoys or disturbs the free use or enjoyment of one’s property, or that renders its ordinary physical occupation uncomfortable.

**prescriptive easement.** Rights less than full ownership to land based on long-term use or enjoyment rather than agreement or statutory methods.

**recreational land.** When a person opens his land to the public, free of charge, for hunting, fishing, swimming, etc.

**right of way.** A right of passage established by usage, contract, or necessity; the right of one or more persons to pass over the land of another.

**survey.** A written description measuring the exact dimensions of a piece of land, including the location of its exact boundaries.

**trespasser.** A person who enters upon the property of another without the owner’s permission.
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