

# Drafting Easements

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## Drafting Easements

### I. Stated Purpose of the easement:

The stated purpose in the easement is a very important in the drafting of an easement document. It is the purpose and limitations that are expressed in the easement that determine the property rights being given up by the record owner and the rights of use being received by the grantee. Without a clear statement of the purpose and conditions of the easement litigation may certainly arise as time goes on. Additionally, the statement of the purpose and conditions of the easement have bearing on how the unencumbered property value may be affected.

Examples of situations highlighting the wisdom of clearly stating the purpose and conditions of the easement:

- A person purchases property by which access may only be gained across another's land. Is the easement obtained broad enough in purpose to include the right to install utilities in the easement or is it only for purposes of ingress and egress?
- An easement for electric lines is obtained. What of the future need for communications wires as well?
- An easement for a water line or pipeline is obtained. What of the future need for additional lines?
- An easement is obtained for installation of "Utilities". Is it limited to underground or above ground and what kind of utilities can go in it?
- Can the easement holder fence off the easement?

### The owner is in control:

What does it mean to own property? OKLA. STAT. Tit. 60 §1 states: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."

In the negotiation of an easement the owner is giving up and bargaining away part of his/her rights of exclusive use of property owned in favor of rights of another to use the property for certain purposes. The rights conveyed in the easement become ownership of those rights in the other person.

Given the transaction that is occurring it is therefore very important to clearly and expressly set forth the easement's purpose and conditions. Without that clear and definitive statement the owner, bargaining away his rights in the property, opens himself up to the necessity of judicial interpretation of the rights conveyed by him to a third party. Without the clear and definitive statement the grantee of the easement invites the future need for judicial interpretation when issues arise of his/her use sought to be made of the property.

The easement document is a contract and is therefore to be interpreted in the same manner as contracts. If the document is clear and unambiguous then the terms of the contract govern and speak

for themselves. If an ambiguity exists, then rules of construction and interpretation of intent come into play which is a judicial function. Just as the express language of the grant controls the extent of the easement (size/shape/location), it also controls the scope (uses to be made) of the easement. Lindhorst v. Wright, 616 P.2d 450.

## **II. Description of the easement:**

The description of the property embracing the easement should be of great importance to both the grantor and the grantee and care should be taken in getting it right. The failure to do so invites litigation.

Examples of situations highlighting the wisdom of clearly and definitively describing the boundaries of the easement:

- A person needs means of ingress and egress across neighboring land. An easement is drafted that does not define the location and boundaries of the easement that just grants "reasonable right of ingress and egress" across the land. Where is it? Who gets to decide where it is? How big is it?
- The grant of right to build a power line across a 40 acre tract with no specification of where it is or how big it is. The "Blanket Easement". Creates an encumbrance on the entire property. Invites problems and potential litigation later after a line is constructed as to what property may be released from the easement. What if it says "lines" - how many could be constructed all over the property?

Perhaps the most common situation that occurs is the failure to describe the ingress and egress easement and resultant disputes over its width and location. The landowner wants it to be 12 foot wide and run down a fencerow. The easement holder wants it to be 40 feet wide and run down the most level area, which may be in the middle of the other person's property. Many people don't think this through and won't spend the \$750.00 to survey the easement inviting spending thousands later to fight about it.

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## **SCOPE/FUNCTION**

In cases involving the size and location of the easement the statement of the "purpose" of the easement raises its head once again. Where there is an ambiguous or open description of the easement the Court's look to the purpose of the easement in making decisions as to its size and location. On this point see the following:

If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

Lindhorst v. Wright, 1980 OK CIV APP 42, 616 P.2d 450, 453

### **III. Is the easement binding on subsequent owners/ how long does it last:**

Examples of situations highlighting the wisdom of clearly and definitively specifying the life of the easement:

- X has a lake lot that is on a bluff and impractical to build a dock. Obtains lake access easement from neighbor y to install a dock affixed to y's property. X later sells his property to Z. Was the easement appurtenant or was it "in gross" and personal.
- X leases his property to rock mining company for mining of rock. Current easement road into X's property across y is not sufficient for equipment. X gets easement from Y for ingress and egress with Y understanding that it is only temporary but not spelled out in agreement. After mining finished y wants to terminate the easement but x wants to keep it in place since the mining company built a nice road into the property.
- Pipeline company has easement on land for pipeline. Line was taken out of service 30 years ago and removed. In past 10 years landowner built a barn and corrals on the area. Does the easement still exist such that the 7th pipeline company to whom the easement has been assigned can force removal of the structures?

### **Question: Is it appurtenant or "in gross"**

Two categories of easements are generally recognized: easements appurtenant and easements in gross. An easement appurtenant involves two tracts of land: the dominant tenement to which the benefit or advantage of the easement pertains and the servient tenement, which bears the burden or obligation of the easement. *Il Giardino, LLC v. Belle Haven Land Co.*, 254 Conn. 502, 757 A.2d 1103, 1111 (2000); *State ex rel. Comm'r of Transp. v. Dikert*, 319 N.J.Super. 310, 725 A.2d 119, 122 (1999); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo.1998). An easement in gross involves only a single tract of land-the servient tenement-which is burdened by the right of the owner or holder of the easement to use the servient tenement for a purpose unrelated to his (or her) ownership or occupancy of a separate tract of land.

Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377, 386

The essential facts are not in controversy. Plaintiffs, Edward Beattie and Walter Bailey, Jr., purchased property from the United States of America in 1996. The U.S. conveyed the property to Plaintiffs by a quitclaim deed. The property conveyed was burdened by five utility easements

that the U.S. had granted to the Defendant, Grand River Dam Authority (GRDA), at various points from 1960 through 1979. Four of the easements were for a limited fifty year term and were given at no cost to GRDA. The fifth, a perpetual easement, was given for nominal consideration. Each of the five easements contained a provision which gave the U.S. the right to require relocation or removal of GRDA's facilities should the property occupied by the facilities be "needed by the United States, or in the event the existence of said facilities shall be considered detrimental to governmental activities[.]"<sup>1</sup>

Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377, 379

After Plaintiffs acquired the property, they began making plans to develop the tract as a waterfront subdivision. Plaintiffs asked GRDA to relocate its facilities underground or remove them from the newly purchased property. In support of their request, Plaintiffs referenced the provision contained in each of the easements which granted the U.S. the right to demand relocation or removal should the U.S. need the property. Plaintiffs contended the relocation or removal rights were transferred or assigned to them by the U.S. through the quitclaim deed.

Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377, 380

Plaintiffs acquired the real property burdened by GRDA's easements from the U.S. by quitclaim deed. A quitclaim deed executed in a form prescribed by statute conveys all right, title and interest of the grantor of the land. 16 O.S.1991 18; *Bonebrake v. McNeill*, 1971 OK 146, 491 P.2d 269. Accordingly, Plaintiffs acquired every interest of the U.S. in the real property that was not reserved in the quitclaim deed, unless that interest was not freely assignable. GRDA contends the relocation and removal rights held by the U.S. in connection with the utility easements were not assignable and therefore did not pass to Plaintiffs when they received the quitclaim deed. ¶ 8 The relocation and removal rights held by the U.S. were created in paragraph 11 of the easement grants between the U.S. and GRDA. When interests in or rights to property are created by deed, the deed should be interpreted and meaning of the parties thereto ascertained in the same manner as govern other written contracts. *Jennings v. Amerada Petroleum Corp.*, 1937 OK 228, 179 Okla. 561, 66 P.2d 1069, 1071. In determining whether the rights under a contract are assignable the Court must look at the construction of the contract itself and "every case must turn at last upon the intention \*381 of the parties."

Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377, 380-81

GRDA argues that the relocation and removal rights created in the easements are too personal in character to permit them to be assigned. Specifically, GRDA asserts that it expected the U.S., and no one else, to exercise the relocation and removal rights. GRDA argues that it would never have made substantial improvements to the property otherwise.

Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377, 382

paragraph 11 contains some language which might be construed in such a fashion to warrant the conclusion that the relocation and removal rights are so personal that they may not be freely assigned. For example, paragraph 11 conditions the exercise of the relocation and removal rights on the land occupied by the facilities being “needed by the United States” or the existence of the facilities being “detrimental to governmental activities [.]” The easements also provide that relocation or removal of facilities may only be required at the direction of the “*officer* having immediate jurisdiction over the property.”

Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377, 382

#### **Bottom line:**

Think about what might happen in the future. Draft it clearly. If it is perpetual, say so. If it is for a period of time, clearly state that time. If it is meant to be appurtenant, state that it is appurtenant and binding upon successors and assigns. To do otherwise invites litigation.

#### **iv. Future damages and restoration clauses**

Examples of situations highlighting the wisdom of clearly and definitively specifying the restoration/future damages provisions of the easement:

- Neighbor gets easement to put in underground utilities. He digs the ditch, puts in the utilities, back fills and levels. Owner wants his grass reestablished. What happens now?
- Owner grants easement to neighbor to install underground utilities. Years later owner constructs a paved driveway across the underground utilities. Utilities have to be dug up and replaced due to age and condition. What happens with respect to the paving that was dug up?

Easements are contracts. If the easement provides for these situations then the document speaks for itself. If the easement does not provide for these situations, then it's up to the court's to decide. It's going to cost a lot to litigate.

The repairs required are those that are necessary and reasonable so as not to unduly burden the servient tenants. Center Drive-In Theatre, Inc. v. City of Derby, 166 Conn. 460, 464, 352 A.2d 304, 307 (1974).

Lindhorst v. Wright, 1980 OK CIV APP 42, 616 P.2d 450, 454

In the absence of provision in the contract, if the owner of land makes improvements or does other things on the easement that must be disturbed by the easement holder's use of the easement to make use thereof, he has done so at his peril.

#### **iv. What is an easement worth?**

Absent the exercise of public or private rights of eminent domain or easements by implication or prescription principals an owner may bargain for whatever he wants for the easement.

Easements by implication or prescription don't result in any compensation to the owner.

Compensation for easements by condemnation, whether public or private, is comprised of the market value of the easement plus damages in value to the remaining land. See the OUII instructions concerning the valuation of an easement.

instruction No. 25.4

#### **JUST COMPENSATION- EASEMENT**

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This is a case in which [Condemnor] is taking a kind of property called an "easement," which is a right to control and use the property of another for specific purposes. The easement being taken by [Condemnor] is an easement for [describe purpose of easement], and it will continue [(until \_\_\_\_\_)]/(until [Condemnor] has no further use for it)/forever]. During the existence of the easement [Owner] will have no use, control or possession of the property within the easement that is inconsistent with [describe the easement].

In a taking of an easement case, the term "just compensation" means the payment to [Owner] for the taking of the easement by [Condemnor] of an amount of money that will make [Owner] whole. In this case this is the fair market value of the easement plus any injury to the property left remaining after the taking. The property includes the land, any buildings or other things that are attached to the land, and any other interests connected with the use of the land, such as access to roads.

In determining the injury to the remaining property, you may subtract any increase in its value that will result from any features of the easement that will benefit the remaining property. However, the increase in value to the remaining property can never exceed the damage to it. In other words, you may offset an increase in the value of the remaining property against any injury to the remaining property, but you may not offset an increase in the value of the remaining property against the value of the easement.

#### ***Notes on Use***

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This Instruction should be used in cases involving the acquisition of an easement. It should be given along with Instruction No. 25.5, entitled "Fair Market Value- Definition,"



Instruction No. 25.5  
FAIR MARKET VALUE- DEFINITION

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The fair market value of a property is the amount of money which a buyer, who is willing but does not have to buy, would pay an owner, who is willing but does not have to sell, to buy the property. [The fair market value of a property should be determined according to the highest and best use for which it is suitable, regardless of what it may have been used for in the past or what future use [Owner] may have intended for it].

The most difficult task is the determination of the "market value" of the easement. In order to determine the market value of something you generally look to "comparable sales" of that same or similar thing. There is not a ready market in which easements are bought and sold. Unlike valuing a 5 acre tract of land in fee simple where a multitude of other 5 acres sales have occurred, it is next to impossible, if not impossible to find arms length transactions of other easements.

**A FEW DIFFERENT APPROACHES:**

The following illustrate some of the approaches to valuation of easements which this writer has experienced:

- **PERCENT OF FEE VALUE APPROACH:** Many people automatically default to a "percent of fee value" approach in attempting to place a value on the easement. Under this rational a person evaluates the "scope" of the easement (ie..what use is going to be made of it?) Having determined the scope of the easement, that scope is evaluated in terms of how the owner of the property may still utilize the underlying fee of the property. Then based on the relative uses of the property a percentage of the fee value is applied to the easement. In cases where all, or substantially all of the use of the easement is deprived from the owner the allocation may be as much as 100% of the fee value. Some of the weakness with this approach are: It does not adequately taken into consideration the fact that the landowner continues to pay taxes on the land from now on, that the liabilities associated with owning the land continue from now on, that the activity performed on the easement land will continue to be apparent and have an effect on the value of the remainder from now on.
- **COMPARABLE SALES APPROACH:** Under this technique a person finds sales of other easements that are similar to the easement being valued which have sold in a reasonable period of time to the date of valuation and makes proper adjustments for differences in order to estimate the value. Some of the weaknesses with this approach are: If the sale price was influenced by the fact that the entity acquiring the easement had the power to take the easement against the owner's will or other factors affecting bargaining were present the sale price may have been influenced by those factors, They are hard to find and verify prices since documentary stamps are not required on easements, easements vary in size and shape and use

and conditions of restoration and duration greatly. These are some of the factors that make it difficult to use the comparable sales approach.

- **INCOME APPROACH:** Perhaps the most similar scenario to that of an easement is a lease/rental. The similarity is that the owner of property gives up the use of property to another in exchange for a payment while still retaining ownership of the property. It is a possessory transaction rather than an ownership transaction, like an easement situation. Under this approach rental rates are evaluated for the property and through an income capitalization and discount methodology a value is determined for the easement.

The taking of private property involves not only our state constitutional rights but also federal constitutional rights. The U.S. Supreme Court has held that "market value" as the standard is unconstitutional in some situations. See the following on this point.

[T]his Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate. As we held in *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950):

“[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?”

United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Counties, Pa., 441 U.S. 506, 512, 99 S. Ct. 1854, 1858, 60 L. Ed. 2d 435 (1979)

#### **i. Has there been a devaluation of the remainder?**

One of the most contested issues in the valuation of an easement is whether or not the remainder property, not encumbered by the easement, has suffered a damage because of the imposition of the easement upon the property.

Impacts on the remainder property may result from such things as:

- View of the easement area. If the easement is for overhead power lines for example the view of the power lines may negatively impact the value of the remainder property.
- Noise from the activities on the easement. Temporary construction activities that result in noise and continued noise from traffic may be factors that impact the value of the remaining property
- Danger arising from the easement. If the use of the easement area creates a situation where dangers are increased such as the risk of pipeline explosions, lightning strikes, falling towers, and the like, then the remainder value may be impacted.

The valuation of the damages to the remainder is constitutionally guaranteed but difficult to perform.

**PAIRED SALES APPROACH:** The appraisal technique often applied by appraisers to measure this damage is what is known as a "paired sales analysis". The paired sales analysis is a technique whereby an appraiser identifies properties that have sold that do not have a given feature or characteristic. They then find property that have sold that do possess the feature or characteristic that they are trying to value. The differences between the sales prices of the two properties are compared in order to arrive at a dollar value or percentage that can be applied to the feature or characteristic they are attempting to value. The plainest example of this would be if you are trying to determine what a swimming pool adds or detracts from the value of a home, you would find sales of homes with pools and sales of homes without pools and attribute the difference in sales prices to the pool.

The "paired sales technique" has many weaknesses:

- Not two properties are identical so there are differences beyond the one thing you are trying to measure that likewise can affect value.
- No two properties are in the same location. Location influences value. So, even though two properties may be very similar they are in different locations.
- The unique nature of easements and properties means that you can never find two sales that are the same, or that are the same as the one you are trying to value.

**INCOME APPROACH:** If the imposition of the easement impacts the use of the remainder for income purposes the damages may be measured through use of the income approach. An example of this would be that a restaurant loses all of its parking to the taking of an easement. Without parking the use of the property is only suitable for storage. The impact on the value of the remainder would be the damages attributable to this change in the highest and best use of the property which can be measured based on income differences.

**INCREASED COSTS OF OPERATION:** If the imposition of the easement alters the use of the remainder such that the costs of operation of a business enterprise on the remainder is increased then the income approach can be utilized to measure the damages due to increased costs of operation.

**IT'S UP TO THE JURY:** The landowner is constitutionally entitled to the damages to the remainder caused by the imposition of an easement on his land. Often times the best that can be done is to lay before the jury all the various considerations of damage items and let them make their decision.

