

Drafting Easement Agreements – Practical Considerations & Potential Pitfalls

Paul G. Carey

Dickenson, Peatman & Fogarty
1455 First Street, Suite 301
Napa, California 94559
(707) 252-7122
pcarey@dpf-law.com

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Practical Considerations (pg. 1)

- Who is really your client?
 - Who is on title (Parents; siblings; trust; TIC)
 - Fee agreement and designated agent

- What is your client trying to accomplish?
 - Grantor or grantee?
 - Settle a dispute
 - Develop property
 - Limit access

Practical Considerations (pg. 2)

□ Review of title

- Client sensitivity to cost
- New title report vs. existing title policy
- On line alternatives
- Do any third parties use the easement?
- Are there limitations on the right to grant the easement?

Practical Considerations (pg. 3)

- What type of easement is involved?
 - Access/right of way
 - Well or spring
 - Utilities
- Are the properties in one or more than one county?
 - Recording
- Is the easement already improved?
- Is the easement already described?
- Are the properties commercial, residential or mixed?

Drafting Issues

- Most of the matters in this section can be potential pitfalls if not considered and discussed with your client
- Descriptions (properties and easement)
 - servient and dominant tenements (metes and bounds vs. deed references)
 - easement routes and floating easements
- Grant language
- You don't need more to create a valid easement, but do you really want to leave it at that?

Drafting Considerations (pg. 1)

□ Maintenance

- Default: CC section 845 – proportionate to use
 - *"(a) The owner of any easement in the nature of a private right-of-way, or of any land to which any such easement is attached, shall maintain it in repair."*
 - *"(b) In the absence of an agreement, the cost shall be shared proportionately to the use made of the easement by each owner."*
 - Improvements vs. Maintenance and repair
 - ❖ No obligation to share in cost of improvements (Holland v. Braun (1956) 139 Cal.App.2d 626)
 - ❖ What about maintenance after one party unilaterally improves the easement?

Drafting Considerations (pg. 2)

□ Maintenance (cont'd)

➤ Custom

- pro rata
- proportionate
 - Fixed percentages
 - Adjustable percentages (after all, uses can and often do change over time)
 - ❖ Annual or other regular voting
 - ❖ One step voting to determine shares and work to be done
 - ❖ Two step voting – first to determine % shares and second to determine work to be done

Drafting Considerations (pg. 3)

- Scope of use – limited vs. unlimited
- Exclusive vs. non-exclusive
- Preserving underlying rights in the event of invalidation of agreement (important in settlements)
- Further cooperation and subordination

Drafting Considerations (pg. 4)

□ Further cooperation and subordination sample #1:

- Further Cooperation. Each party shall, on the demand of any other party, execute or deliver any instrument, furnish any information or perform any other act necessary to carry out the provisions and intent of this Agreement without undue delay or expense, including but not limited to any acts reasonably necessary to obtain the subordination of any senior liens or interests on any party's property existing as of the date of execution and recording of this Agreement. The cost of any subordination efforts shall be borne by the party seeking such subordination.

Drafting Considerations (pg. 5)

□ Further cooperation and subordination sample #2:

- **Further Cooperation and Subordination.** In addition to the actions specifically mentioned in this Agreement, each party agrees, on the demand of any other party, to execute and deliver any instrument, furnish any information or perform any other act reasonably necessary to carry out the provisions of this Agreement without undue delay, so long as the performance of such acts will not require the cooperating party to incur unreasonable costs and expenses. The obligations under this section include, but are not limited to, performance of such acts as might be reasonably necessary to facilitate the subordination of any liens on either party's property that are or might be senior to this Agreement, provided that the party requesting any such subordination bear the cost of securing the same. In the event this Agreement or any part hereof is extinguished as a result of the foreclosure of a senior non-subordinated lien on either party's property, then unless the successor in interest to the foreclosed property consents to be bound by this Agreement, the other party and their successors shall be entitled to raise any claim or defense available to them at the time of their execution of this Agreement with respect to the subject matter hereof, notwithstanding any contrary terms of this Agreement, and they shall not suffer any prejudice to such claims or defenses as a result of the passage of time since their execution of this Agreement, whether based on any statute of limitations or claim of laches.

Drafting Considerations (pg. 6)

- ❑ Rights to relocate road (by grantor or grantee)
- ❑ Width of easement vs width of road and necessary improvements
 - drainage; hillside cut, fill and support (implied vs. express rights)
 - Right of easement owner to use full width of a deeded easement that specifies a width is not absolute (Miller and Starr, California Real Estate, 3rd Edition, §15:59; Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697.)
 - Bottom line: if it is important to your client to permit or prohibit anything about the easement, draft it to say so.
- ❑ Indemnity and insurance

Drafting Considerations (pg. 7)

- Blockage/impediments – gates, speed bumps, guardrails etc.
 - Dominant tenement owner: – For easements created by express grant, the extent of use is controlled by terms of the grant, and the burden of proof is on the grantee to prove the scope of rights granted, subject to normal rules of construction applicable to contracts in general. Rights not specified in the grant may be permitted if reasonably necessary and reasonable for enjoyment of the easement and consistent with the purpose of the grant, provided the rights are exercised in a way that does not materially increase the burden on the servient tenement. (Miller and Starr, California Real Estate, 3rd Edition, §15:56 and §15:66.)
 - Bottom line: If you really want the right, draft the easement to include it.

Drafting Considerations (pg. 8)

- Blockage/impediments – gates, speed bumps, guardrails etc.
 - Servient tenement owner: Van Klompengurg v. Berghold (2005) 126 Cal.App.4th 345 - *We recognize that "[u]nless it is expressly stipulated that the way shall be an open one, or it appears from the terms of the grant or the circumstances that such was the intention, the owner of the servient estate may erect gates across the way, if they are constructed so as not unreasonably to interfere with the right of passage."* (Citation omitted.) However, "[w]here an easement under a grant is specific in its terms, '[i]t is decisive of the limits of the easement' [citations]." (Citation omitted.)
 - Bottom line: If you really want the right, draft the easement to reserve it.

Pitfalls (pg. 1)

- Multiple properties and reciprocal grants
 - What if everyone doesn't sign?
 - Should the grant be fully reciprocal; i.e., should everyone get a right to use the full length of road?

Pitfalls (pg. 2)

- ❑ Scope of use – risk of not describing
- ❑ Exclusive easements
 - As against third party grants only
 - As against third party grants and grantor use

Pitfalls (pg. 3)

- Senior liens and subordination
 - Title search
 - Subordinate now or later
 - Insurance

Pitfalls (pg. 4)

- Anticipated lot line adjustments or subdivision
 - Subdivision – “[T]he burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden on the servient tenement.” (Civil Code §807)
 - Lot line adjustments – “An appurtenant easement attaches only to the land of the easement holder, and it cannot be extended to benefit additional property that was not a part of the dominant tenement at the time the easement was created.” (Miller & Starr, California Real Estate, Third Ed., §15:60 and cases cited therein.)
 - Potential loss of easement if expanded use not susceptible to enforceable injunction (Crimmins v. Gould (1957) 149 Cal.App.2d 383)
 - Bottom line: If subdivision and/or LLA are potential future events, draft the easement to address that contingency

Easement Outline (pg. 1)

- Recitals
 - Identify parties
 - Identify servient and dominant tenements
- Operative provisions
 - Describe character of easement - appurtenant or in gross
 - Grant language
 - Easement description
 - Scope of use
 - Non-exclusive (presumed) or exclusive

Easement Outline (pg. 2)

- Operative provisions (cont'd)
 - Other terms and conditions
 - Subdivision/LLA
 - Relocation rights
 - Limits on widening
 - Width of road vs. width of necessary improvements (e.g., hillside cut, fill and support, drainage)
 - Blockage/impediments – speed bumps, gates, guardrails etc.
 - Maintenance
 - Indemnity and insurance
 - Subordination and effect of foreclosure of senior non-subordinated lien
 - Reciprocal grants
 - Scope of rights granted (whole road or only part)
 - Partial execution

Easement Outline (pg. 3)

- General (boilerplate) provisions
 - Integration clause
 - Construction clause
 - Warranty of authority
 - Further cooperation
 - Attorney's fees
 - Severability

- Client review and approval

- Title company review and approval

CONCLUSION

- Most disputes over deeded easements involve interpretation and determination of the parties' correlative rights
- The power of the pen is not to be underestimated
- Discuss all issues and concerns with your client before starting to draft
 - Consider a client questionnaire
- Draft with as much specificity about rights granted and retained, if at all possible
- Work with a title company before anything is executed or recorded