



Handling Easements with Ease: Practical Considerations for Managing Easement Requests Over District Property

Presented by:
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Handling Easements with Ease

Practical Considerations for Managing Easement Requests Over District Property

Darryl W. Pruett, Shareholder



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Darryl W. Pruett

Shareholder

- 20+ years experience in construction and real estate law
- Extensive background reviewing, negotiating, and enforcing construction and real estate contracts, including by litigation if necessary



Construction Project Ongoing

- But what about the utilities?
 - Construction is not complete until the property is connected to the required utilities (water, wastewater, electric, and communications).

No Construction Ongoing

Even if you don't have a construction project going, you need to pay close attention to requests for utility easements over district property.

Handling Requests for Utility Easements

Is the grantee a governmental entity or another entity with the power of eminent domain?

Your bargaining power may be reduced.



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What is the use?

Is grantee amenable to a limited use?

If so, grant for a limited use AND specifically exclude any other uses.



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Example

- Grant of a water line easement
 - You should limit the easement to a particular number of waterlines (one or two, etc.)
 - You should state that “the scope of the easement shall not include any other utilities.”



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This is required because Texas law on interpreting easements is similar to contract interpretation.

- An express easement holder's rights are determined by the terms of the grant.
- If the terms are not specifically defined, the court will give the terms their plain, ordinary, and generally accepted meaning.
- The express terms of the easement delineate the purposes for which the holder may use the property.



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The common law does allow some flexibility in determining an easement holder's rights.

Manner

Frequency

Intensity

of an easement's use may change over time to accommodate technological development.

BUT

such changes must fall within the purposes for which the easement was created, as determined by the grant's terms.



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The strategy, then, is to use express language to limit:

- (a) the purpose of the easement;
 - (b) the number of wires or pipelines, etc.
and
 - (c) the location and/or visibility of any easement improvements.
and then
- use express language to exclude everything that you have not just expressly granted.

The grant of easement should be without warranty.

But you can use a special warranty
"by, through, or under grantor, but not otherwise."

Does the district want to limit any above-ground items?

- This might apply to electric easements.
- You already have this thing there.
Do you really want their cables and conduits to be visible?
- If you do want to limit above-ground items, specify that the easement is for placement “under the ground” of the easement property the pipeline, cables, etc.



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You have to avoid the temptation to just use a form that grants an easement “over, across, upon, along” etc.

Using these prepositions can lead a court to determine that the “express terms” of the easement provided for the wires, pipes, conduit, etc., to be above ground

or at least not LIMITED to below ground.



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Sometimes a utility company will not need ingress or egress or vehicular access.

Make sure to limit the easement to placement of a specified number of pipelines or cables or conduit and specifically exclude ingress, egress, and vehicular access.



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In a related matter

You might see utility companies requesting a narrow utility easement

(say 10' wide or so)

BUT

then stating that they can use your other property as necessary

(either "adjacent" to the easement or, sometimes, just "as much of the property as necessary" to do what they need to do).



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You have to ensure that use of adjacent property is limited.

How?

You should make the limitation both as to

- Area
- and
- Use



For example:

“The Easement herein granted shall be limited to that portion of Grantor’s land that is described in Exhibit A attached hereto”

and

“in addition to the strip of land as specified in this paragraph, Grantee shall have the right as part of the Easement to use at any time **the portion of the land of Grantor that is: (a) parallel to the Easement Property; (b) not exceeding fifteen (15) feet in width; and (c) immediately adjacent to and adjoins the Easement Property (the “Additional Property”)**”

but

only as may be reasonably necessary for Grantee to enjoy the benefits of the Easement and/or to exercise its rights with respect to the Easement.”



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Do not allow the determination of what may be necessary for Grantee to enjoy the benefits of the easement to be made in Grantee’s sole discretion.

Best thing is to just leave it as “whatever may be reasonably necessary. . .” and not put in any language answering the question “reasonably necessary according to who?”



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NEVER allow a determination to be made "in Grantee's sole discretion."

Temporary Easements

- Typically the temporary easement is needed to do construction within another (permanent) easement.
- Be sure to include a date that the easement will end or an objective way to determine when the easement ends.
- Grantee should be required, upon request, to file a termination.
 - "Upon request by Grantor, Grantee shall upon termination of the Easement file in the Public Records of _____ County, Texas a notice of such termination."



Blanket Easements

- If you can avoid blanket easements, do so.
- Make sure the route is set out and the easement only covers the property along the route.
- If granting a blanket easement is absolutely necessary, then include a provision which:
 - (a) expressly limits, automatically, the easement to a certain area once the easement improvements are installed;
 - and/or
 - (b) expressly requires the easement holder to:
 - define the easement area after installation of the easement improvements;
 - and
 - provide the servient estate owner (the district) with a release of the remaining lands.

Ingress and Egress (or “Access”)

- This is an area fraught with difficulty. ALWAYS consult your attorney before granting any type of access easement

WHY?

WHAT IS THE PROBLEM?

State law

Property Code Section 5.020

(c) An instrument granting an access easement may not restrict or prohibit an easement holder or an easement holder's guest from possessing, carrying, or transporting a firearm or an alcoholic beverage over the servient estate while using the easement for the easement's purpose

(d) The owner of a servient estate may not enforce a restrictive covenant in an instrument granting an access easement over the servient estate that restricts or prohibits the easement holder or the easement holder's guest from possessing, carrying, or transporting a firearm or an alcoholic beverage over the servient estate while using the easement for the easement's purpose


How does a district comply with this and the federal Gun-Free School Zones Act of 1995?

"It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."

The answer is probably that the restriction only applies to the easement document itself and not necessarily a board policy.

BUT ALWAYS CONSULT YOUR COUNSEL ON ACCESS EASEMENTS!

Checklist

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EASEMENT CHECKLIST

- Is the entity requesting the easement a governmental entity or other entity with the power of eminent domain?**
 - If "Yes," then understand that your negotiating power may be limited.
- Has the district had any experience with this entity?**
 - Many times the parties will agree to the same terms as prior easements.
- What is the purpose of the easement?**
 - **Water Line**
 - What is the required size for the amount of water being transported?
 - Does any portion of the line or appurtenances need to be above ground?
 - If not, negotiate for lines and facilities to be solely under the ground
 - **Wastewater Line**
 - Are appurtenances and/or other facilities required in this area (grinder pumps, etc.)?
 - If not, negotiate for only a pipeline, and make sure the easement is titled a "pipeline easement".
 - **Electric Lines**
 - Maximum power to be carried by the lines
 - Maximum number of lines, towers, guy lines, etc.
 - Consider setting out exactly how the guy lines will run.
 - **Access Easement**
 - What is the time period during which access is needed?
 - If it is relatively short, use a license agreement.
 - If it is a temporary easement, be sure to require the grantee, after the easement has terminated, to file a document in the real property records acknowledging that the easement is terminated.
- What is the fair value to the district of allowing this easement?**
 - Be sure to get paid for the easement!
- Ingress and Egress (or "Access")**
 - This is an area fraught with difficulty. ALWAYS consult your attorney before granting any type of access easement

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Is the entity requesting the easement a governmental entity or other entity with the power of eminent domain?

- ▶ If "Yes," then understand that your negotiating power may be limited.

Has the district had any experience with this entity?

- ▶ Many times the parties will agree to the same terms as prior easements.



What is the purpose of the easement?



Water Line

- ▶ What is the required size for the amount of water being transported?
- ▶ Does any portion of the line or appurtenances need to be above ground?
 - ▶ If not, negotiate for lines and facilities to be solely under the ground



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Wastewater Line

- ▶ Are appurtenances and/or other facilities required in this area (grinder pumps, etc.)?
 - ▶ If not, negotiate for only a pipeline, and make sure the easement is titled a "pipeline easement".



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Electric Lines

- ▶ Maximum power to be carried by the lines
- ▶ Maximum number of lines, towers, guy lines, etc.
- ▶ Consider setting out exactly how the guy lines will run.



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For any type of access easement, what is the time period during which access is needed?

- ▶ If it is relatively short, use a license agreement.
- ▶ If it is a temporary easement, be sure to require the grantee, after the easement has terminated, to file a document in the real property records acknowledging that the easement is terminated.



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- ▶ To and from what property?
- ▶ Can it be temporary rather than permanent?
- ▶ Can you do a license rather than an easement?
- ▶ Who will maintain? What does that look like (mowing grass, etc.)?
- ▶ Can you require the Grantee to follow Board Policies while on district property?

What is the fair value to the district of allowing this easement?

- ▶ Be sure to get paid for the easement!

The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.



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