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Law of Easements: Legal Issues and Practical Considerations

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Law of Easements: Legal Issues and Practical Considerations in Oregon

Law of Easements: Legal Issues and Practical Considerations

A. Easements v. Other Property Interests

Easements are nonpossessory interests in land of another entitling the easement holder to limited use of the other's land. *Luckey v. Deatsman*, 217 Or 628, 634, 343 P2d 723 (1959).

1. Leases – Leases are possessory. An easement holder may construct something in an easement, thereby arguably possessing it, without the right losing its character as an easement.
2. Licenses –A license is a privilege personal to the holder. *See Brown v. Eoff*, 271 Or 7, 530 P2d 49 (1975). Licenses are permissive, and normally specify the beneficiary, the allowed use, and a time period. Although a license is usually revocable, a written license granted “for so long as” a stated condition exists may be assigned (if not expressly forbidden), so that the license can operate much like an easement. An easement can be created only by grant, implication, or prescription, whereas a license can be created by parol, or by the licensor's actions. According to PRINCIPLES OF OREGON REAL ESTATE LAW, §3.12 (Oregon CLE 1995), an attempt to create an easement that fails to comply with the statute of frauds may operate only to create a license.
3. Profits – A profit a prendre is a right to participate in the profits of the land, or a right to take a part of the produce of the land. An easement carries no right to participate in the profits of the soil charged with it. A profit a prendre cannot be created by parol, only grant. It may be either appurtenant to other land (if held by reason of ownership of another parcel) or held in gross. Examples: right to take timber, right to graze, and the right to fish or hunt on or over the land of another.
4. Covenants Running with the Land – Covenants restrict the use of land or the location or character of improvements thereon. They may be perpetual and therefore may have the effect of an easement. Because covenants normally do not specify a dominant estate, and because they are limitations on the manner in which one may use his or her own land, they are not true

easements. A common examples are the building and use restrictions in a subdivision's CC&R's ("covenants, conditions & restrictions").

B. Types of Easement

1. Rights of Way – The most common, it provides for access to the dominant estate over the servient estate.
2. Utility – Allows for wires, cable, or pipes to be strung over, placed upon, or buried under the servient estate. Utility easements held by commercial enterprises, which normally own no land benefited by the easement, are not appurtenant but are held in gross.
3. Other easements include (but are certainly not limited to) those providing for drainage, undisturbed slopes, wildlife corridors, view, condominium common-element easements (ORS 100.520), solar energy (ORS 105.880), and wind energy (ORS 105.900).

C. Nature of Easements

1. Affirmative Easements -- authorize the doing of certain acts that, if no easement existed, would give rise to a right of action.
2. Negative easements -- preclude the servient owner from the doing of an act which he or she would be entitled to do if no easement existed. These easements usually are created by covenant, agreement, CC&R declaration, e.g., a setback requirement.
3. Appurtenant easements – create a right to use the servient estate for the benefit of the dominant estate. They run with the land, irrespective of the identity of the owners of either estate. They cannot be conveyed apart from dominant estate, but they can be extinguished by execution of a written release to the owner of the servient estate, or by implication via abandonment. Easements created by implication and by necessity are by nature appurtenant. For an easement to be classified as appurtenant, it must bear some relation to the use of the dominant estate. Unless expressly limited, an appurtenant easement normally exists for the benefit of the entire dominant estate, not solely for any particular part thereof. Practice tip: When representing the servient owner, limit the scope of use to what is then contemplated by the parties (e.g., "ingress and egress for the benefit of not more than two residences located upon the dominant estate").

4. Easements in Gross – run in favor of person, natural or legal, rather than in favor of a dominant estate. If an easement in gross is merely personal, it normally cannot be assigned; however, commercial easements in gross are freely transferable. Whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed, considered in the light of surrounding circumstances. Because easements in gross generally are not favored in law, an easement will not be presumed as personal when it may fairly be construed as appurtenant to some other estate. Thus, if an easement is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the parties as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it will be deemed an easement appurtenant and not an easement in gross. *Menstell v. Johnson*, 125 Or 150, 266 P 891 (1928).
5. Exclusive/Non-exclusive easements -- Unless there is evidence of contrary intent, the grantee of an easement acquires a nonexclusive right and the grantor retains the right to use the property or permit others to use it in any manner not inconsistent with the grantee's rights. Any exclusive easement must be expressly stated in the instrument, otherwise it will be construed to be nonexclusive.

D. Creation of Private Easements

1. Express grant -- A grant of an easement should be drawn and executed with the same formalities as a deed to real estate. An easement is created if the owner of the servient estate either enters into a contract or makes a grant intended to create a servitude that complies with the Statute of Frauds or falls within an exception to the Statute of Frauds. The intent to grant an easement must be plain enough so that no other construction can be placed on it. An acknowledgment in a deed of the existence of an easement is not equivalent to an intent to create an easement. Language stating that a conveyance is subject to an existing easement, indicating that the grantor wishes to exclude the easement from warranties of title, does not create an easement.
2. Express reservation -- e.g., "I hereby convey Blackacre to A, reserving to myself and my successors a perpetual right-of-way easement over Blackacre for the benefit of Whiteacre . . .")

Reservation is probably the most common method of easement creation but it needs to be done carefully. A conveyance of a strip of land that does not limit the use or in some way qualify the interest conveyed may be construed as a conveyance of the fee. See *Bouche v. Wagner*, 206 Or 621, 293 P2d 203 (1956). See also ORS 93.120: "Any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant."

3. ***Beware the Doctrine of Merger!*** Just because a document is identified and recorded as an easement does not mean that an effective grant of rights has occurred. For instance, it is not uncommon for a lay landowner contemplating sale to draft and record a document ahead of time that purports to create access over one part of his land for the benefit of another part. Because he owns the fee of the entirety, he has not created an effective easement. Yet the document's recordation can create a false sense of authority when it has no such effect. This problem can arise another way: Because an easement is an interest in the land of another, once the easement owner acquires an interest in the servient estate, which includes the right to make the same use of the land as permitted under the easement, a merger occurs and the easement is extinguished. *Witt v. Reavis*, 284 Or 503, 587 P2d 1005 (1978). The easement can survive, however, if ownership of the two interests is in the same person but in different capacities, if the interest is merely a security interest, or if the interest acquired is temporary (merger could cause suspension of interest rather than extinguishment). The principles discussed below might also provide ways to preserve easement rights in the face of a finding that an "express easement" never came into existence or has been lost via the doctrine of merger.
4. Easements by implication –An easement by implication is not expressed by the parties in writing, but arises from the existence of facts surrounding the transaction (e.g., where the land over which the easement is sought to be implied was once part of the same parcel that is now landlocked). An easement may be created by implication in favor of a grantor or a grantee of the fee, but it can only arise in connection with a conveyance. It is based on the theory that whenever someone conveys property, he or she intends to include in the conveyance whatever

is necessary for its beneficial use and enjoyment and to retain whatever is necessary for the use and enjoyment of the land retained. An implied intent may be rebutted by evidence of an agreement or understanding, at or prior to the conveyance, that the easement was not to pass. In Oregon, implied easements are disfavored, *Cheney v. Mueller*, 259 Or 108, 118-119, 485 P2d 1218 (1971), and are established only in accordance with a seven-factor test.

5. Easement by necessity – ORS 376.150-376.200 govern easements by necessity. The statutory scheme may be used only if the claimant is unable to gain access to the property. ORS 376.180(9). The process requires a petition listing certain information (ORS 376.155), service of the petition on the landowners and a report to the county (ORS 376.160), the right of the landowner to answer (ORS 376.170), an order granting or denying the petition and the landowner's right to appeal (ORS 376.175), and certain conditions that any established way of necessity shall meet (ORS 376.180). Note that ORS 376.175(2)(e) requires the court to “[d]irect the petitioner to pay costs and reasonable attorney fees incurred by each owner of land whose land was subject to the petitioner’s action for a way of necessity under ORS 376.150 to 376.200.”
6. Easement by prescription -- A prescriptive easement requires that the claimant establish by clear and convincing evidence that his use was: 1) for the prescriptive period (10 years under ORS 12.050); 2) open, notorious, and adverse to the rights of the servient owner; and 3) continuous and uninterrupted according to the nature of the use. *Thompson v. Scott*, 270 Or 542, 546, 528 P2d 509 (1974). By showing open, continuous and uninterrupted use, a claimant may give rise to a presumption that the use was adverse to the servient owner, who may then disprove the adversity by showing the use to be permissive. *Doyle Miling v. Georgia Pacific*, 256 Or 271, 278, 473 P2d 135 (1970). As to the elements of open and notorious use, see *Beers v. Brown*, 204 Or App 395, 129 P3d 756 (2006). There, defendants tried to assert prescriptive easement as a defense against nuisance, trespass, and negligence claims arising from golf balls hit from their driving range landing on plaintiff’s real property. Because golf balls only occasionally landed on plaintiff’s property, the court held that defendants failed to meet the open or notorious requirements over the statutory period.

E. Factors in Drafting Easements. For a comprehensive checklist for use in drafting easements, see PRINCIPLES OF OREGON REAL ESTATE LAW, §3.45 et seq. (Oregon CLE 1995).

1. Scope of easement – The intended purpose of the easement determines its scope, so clarity in describing the purposes in the granting instrument is essential. If ambiguous, the dominant owner’s use will be limited to what is reasonably necessary to accomplish the intended purpose (as determined by the fact-finder), and the servient owner remains free to use the burdened property in ways that do not unreasonably interfere with dominant owner’s use. See, e.g., *D’Abbracci v. Shaw-Bastian*, 201 Or App 108, 120-22, 117 P3d 1032 (2005) (servient owner able to relocate road within 60-foot easement and to place encroachments elsewhere within easement because dominant owners’ access to their properties not thereby substantially affected); *Ericsson v. Braukman*, 111 Or App 57, 62-63, 824 P2d 1174 (1993) (servient owner may place gate across easement if necessary to preserve his reasonable use of the property).
Practice Tip: Use recitals to describe the historical, economic and other pertinent factual contexts, to describe the purposes of the easement with particularity, to provide legal descriptions for the dominant and servient estates, and for the easement. If the dominant estate will, or might be, subdivided, state how the easement is to be apportioned. See example following outline as to many of the foregoing and following principles.
2. Location of easement – Again, clarity is essential. The employment of a surveyor is recommended (as is the attachment of the resulting map as an exhibit to the granting instrument). Without clarity and without an actual location of the easement on the ground, the servient estate may be subject to “blanket easement,” which can cloud the title to that estate, and may fail to provide the dominant estate with insurable access. See generally PRINCIPLES OF OREGON REAL ESTATE LAW, §3.30 (Oregon CLE 1995).
3. Exclusivity – Clarify who may use the easement (dominant owner plus invitees? Owners of lots resulting from partition or subdivision of the dominant estate?). Specify the rights retained by the servient owner to use or make additional grants. Consider providing for dispute resolution mechanisms for conflicts among users.

4. Consideration/Reciprocity – Because the extent of consideration given for an easement (including reciprocal rights granted by the claimant) can affect whether the easement will be given a broad or narrow construction, it is wise to state the consideration with particularity. *See, e.g., Cheney v. Mueller, supra.*
5. Succession – Specification of whether the easement is appurtenant (“runs with the land”) or is in gross is of course essential.
6. Construction, maintenance and repair – Again, the parties are well-served if the drafter thinks through these issues and provides as clear, comprehensive, flexible, fair, and self-initiating mechanisms as can be afforded. In the absence of repair and maintenance terms in the granting document, the parties are remitted to the statutory scheme found at ORS 105.170-- .185.
7. Tort liability (indemnity, insurance, and taxes) – These topics should be provided for with the same level of care as they are in a lease, keeping in mind that additional flexibility might be required if it is likely that others not yet identified may use a non-exclusive easement and be made subject to the granting document’s terms.
8. Termination – If you represent the servient owner, consider whether the easement really needs to be perpetual. If not, an express time limitation is the easiest way to extinguish an obsolete easement. Consider also whether to include easement-termination as a remedy for a dominant owner’s misuse of the easement or material breach of the easement agreement. (Although a servient owner’s non-judicial exercise of the remedy would not remove the easement from the record, its expression in the granting document would increase the likelihood that a court would impose it in egregious cases.).

GRANT OF EASEMENT AND MAINTENANCE AGREEMENT

Parties:

Seller/Grantee

-and-

Buyer/Grantor

Recitals:

- A. Seller/Grantee owns real property in Lane County, Oregon, part of which is being purchased by Buyer/Grantor contemporaneously with the execution of this Agreement. Seller/Grantee will continue to own the real properties described in Exhibits "C" and "D" attached hereto and incorporated herein (collectively referred to as "Seller/Grantee's property").
- B. Attached hereto and incorporated herein as Exhibit "A" is the description of real property Buyer/Grantor is purchasing from Seller/Grantee ("Buyer/Grantor's property").
- C. There exists upon Buyer/Grantor's property a private roadway ("the roadway"), which is located within an easement created by that certain Grant of Easement and Maintenance Agreement, dated *, and recorded * as Instrument No. * in the Lane County Real Property Records, in Lane County, Oregon, which easement is more particularly described on Exhibit "B" attached hereto and incorporated herein.
- D. By this Agreement, Buyer/Grantor desires to grant to Seller/Grantee an easement over and upon Buyer/Grantor's property as specified herein, and the parties desire to set forth their rights and duties with respect thereto. For and in consideration of the mutual covenants and conditions set forth herein, the parties now enter into the following

Agreement:

1. The foregoing recitals are incorporated into and made a part of this Agreement.
2. Buyer/Grantor grants, transfers and conveys to Seller/Grantee a perpetual, nonexclusive easement over and across Buyer/Grantor's property, which easement is described on Exhibit "B" attached hereto and incorporated herein, for the benefit of Seller/Grantee's property. This easement is appurtenant to each and every part of Seller/Grantee's property.
3. The foregoing grant is made on the following terms and conditions:
 - 3.1. The grantee may use the easement, including the roadway and bridge over Lost Creek, as a means of ingress and egress to and from Seller/Grantee's property, or any portion thereof. The grantee may also use the easement for the installation and maintenance of public utilities as might be needed to serve its property as hereinbefore described, or any portion thereof.
 - 3.2. The parties and all other persons having the legal right to use the easement (collectively referred to as "users") shall at all times hereafter jointly maintain the roadway in a condition as good as its present graveled condition or in any other improved condition mutually agreed upon by the parties. For the purpose of this Agreement, the obligation to maintain shall include the cost of repair or replacement of the bridge over Lost Creek and any other conditions or facilities hereafter mutually agreed upon by the parties.

- 3.3. The cost of maintenance shall be paid by the users on a pro rata basis proportionate to the extent of travel (distance), nature of use (trucks or automobiles) and extent of use (frequency) by the users. All users shall pay their respective shares of the cost of maintenance upon the written demand of any user. In the case of disagreement regarding cost or shares, the matter shall be submitted to binding arbitration before a single arbitrator in Eugene, Oregon, all expenses of which shall be borne equally by the users.
- 3.4. Buyer/Grantor shall pay real property taxes on the Exhibit "B" easement.
- 3.5. The parties shall operate all vehicles on the roadway at speeds low enough to suppress airborne dust, and shall insure that its invitees do the same. If airborne dust persists due to vehicular travel, then the periodic watering or oiling of the roadway shall be included as a maintenance cost under Section 3.2 above.
- 3.6. The easement granted by this Agreement runs with the land hereinbefore described and shall bind and benefit the parties, and their respective heirs, successors and assigns.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 197.352. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 197.352.

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 197.352. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 197.352.

This Agreement is executed by the parties on the dates set forth below, and in the case of the corporate signatory, with the authority of its board of directors.

SELLER/GRANTEE

BUYER/GRANTOR:

STATE OF OREGON)
) ss
County of _____)

This instrument was acknowledged before me this ____ day of _____, 200_ by Seller/Grantee.

Notary Public for Oregon

STATE OF OREGON)
) ss
County of _____)

This instrument was acknowledged before me this ____ day of _____, 200_ by Buyer/Grantor.

Notary Public for Oregon