

# UNIVERSITY OF CALIFORNIA EASEMENT PRACTICE GUIDELINES

When the University is seeking an easement right in someone else's property, and particularly when granting an easement in University property, a thorough understanding of characteristics, valuation and proper documentation of an easement is essential. These Guidelines therefore present: (i) a description and overview of easements from the California Department of Real Estate Reference Book<sup>1</sup>, (ii) an introduction to valuing easements, and (iii) a generalized easement form for use when granting an easement across University property with explanatory notes. For a short discussion of when to employ an easement rather than a license or a lease, please see: <http://www.ucop.edu/facil/resg/leasing/documents/leaselicense.pdf>

## **I. EASEMENT DESCRIPTION AND OVERVIEW**

Easements are ordinarily rights to enter and use another person's land or a portion thereof within definable limits. Therefore, an easement is a right, privilege or interest limited to a specific purpose which one party has in the land of another.

Easement rights are often created for the benefit of the owner of adjoining land. The benefited land is called the "dominant tenement," and the land subject to the easement is described as the "servient tenement." Unless the easement is specifically described to be "exclusive," its creation does not prevent the owner of the land from using the land and the portion covered by the easement in a way which does not interfere with the use of the easement.

### **Appurtenant Easements**

Typically statutory easements (or land burdens or servitudes as they are also known) include: a right of ingress and egress (a right to go on the land and to exit from the land); the right to use a wall as a party wall; the right to receive more than natural support from adjacent land or things affixed thereto. These easements, when attached to a "dominant tenement," are considered "appurtenant" thereto, and pass automatically upon transfer of the dominant tenement without explicit mention in the instrument of transfer. "Appurtenant" means "belonging to." Civil Code Section 801 lists a variety of easements. Civil Code Section 801.5 provides for a solar easement.

### **Easements in Gross**

It is possible to have an easement which is not appurtenant to particular land. Thus A, who owns no land, may have a right-of-way over B's land. Public utilities frequently enjoy easements to erect poles and string wires over private lands, yet own no related dominant tenement. Such easements are technically known as easements in gross, and are personal rights attached to the

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<sup>1</sup> The text in the Easement Description and Overview section is reprinted from the California Department of Real Estate's (DRE) Reference Book; DRE's permission is gratefully acknowledged.

person of the easement holder and not attached to any specific land, yet in reality they encumber someone's land and in effect constitute an interest therein.

If the instrument creating an easement is unclear, the following factors are useful in determining whether the easement is appurtenant or in gross: (1) if the easement can fairly be construed as being attached to the land it will be so construed; (2) the intention of the parties and the right created are important considerations; and (3) outside evidence may be considered.

### **How Easements Are Created**

Easements may be created in various ways, such as by express grant, express reservation, implied grant or implied reservation, agreement, prescription, necessity, dedication, condemnation, and sale of land with reference to a plat, or estoppel.

Normally, easements arise in one of three ways. Either they are expressly set forth in some writing (such as a deed or a contract) or they arise by implication of laws or by virtue of long use. Those created by deed must comply with the usual requirements of any deed and may arise either by express grant to another or by express reservations to oneself.

While the most common method of creating an easement is by express grant or reservation in a grant deed, written agreements between adjoining landowners often are used. The only person who can grant a permanent easement is the fee owner of the servient tenement or a person with the power to dispose of the fee.

### **Easement by Implication of Law**

Civil code Section 1104 contains the rule for implied grants. Certain conditions must exist at the time a property is conveyed before an easement by implied grant will have effect. An easement by necessity is one example of an easement by implication, but an easement by necessity differs somewhat in its requirements from other easements by implication.

The "way of necessity" is generally recognized whenever a transfer occurs which truly results in a "landlocked" parcel and there is no method of access whatsoever, except over the servient tenement retained by the seller, or over the land of a stranger.

Another implied easement is recognized when land in one ownership is divided, and at the time of division one portion is being used for the benefit of the other portion, e.g., a sewer lateral.

### **Easement by Prescription**

Continuous and uninterrupted use for five years will create an easement by prescription where such use is hostile and adverse (i.e., without license or permission from the owner), open and notorious (i.e., the owner knows of the use or may be presumed to have notice of the use), exclusive (i.e., although use is not necessarily by one person only, it is such as to indicate to the landowner that a private right is being asserted), and under some claim of right. Also, if any ad

valorem or other relevant real property taxes or assessed separately against the easement, the easement claimant must pay these.

### **Termination of Easements**

Easements may be extinguished or terminated in several ways, including express release, legal proceedings, nonuse of a prescriptive easement for five years, abandonment, merger of the servient tenement and the easement in the same person, destruction of the servient tenement, and adverse possession by the owner of the servient tenement. An easement obtained by grant cannot be lost by nonuse.

## **II. EASEMENT VALUATION**

### **Introduction**

As noted above, there are a variety of types of easements. Many, if not most, of these easements are not bought and sold in the market, as are residences and commercial buildings. Rather, the buyer is typically a public entity or publicly traded company with the power of eminent domain. State and federal law and court decisions heavily influence the valuation of such easements, and right-of-way appraisal has developed into a specialized segment of valuation with techniques and terminology responding to such law and decisions as they evolve over time.

The following discussion is intended to (i) highlight easement valuation issues particularly important to the University; and (ii) provide a general description of easement valuation to assist in assessing whether the value of any given easement will be significant, and to assist in retaining and reviewing appraisals of easements. Because easement valuation is a complex undertaking and there are generally not directly comparable transactions to form a value opinion, experienced practitioners should be consulted in determining easement value.

### **Influences On Value**

#### **General**

The value of any given easement is heavily influenced by the portion of the bundle of rights transferred from the servient to the dominant estate. As such, the first step in valuing any easement is to determine the exact rights being conveyed in the easement document. It is impossible to value an easement without this understanding. The following discussion notes the rights typically conveyed in certain types of easements. However, no two easements are likely to be identical, and therefore each easement must be evaluated individually.

#### **Underground Utility Easements**

*General Considerations.* Underground utility easements are typically laid out as corridors, of sufficient width to give some latitude in locating the actual utility line, and to permit sufficient room for periodic inspection, repair and maintenance. If the location of the utility line does not

abut a point of public access, such as a street, the easement may also include the right to enter and cross the servient property at specified points to reach the location of the utility corridor.

Such underground utility easements typically prohibit the construction of building improvements, but may permit the construction of non-structural improvements, such as paved surface parking or landscaping. The location and size of the easement also affect its value. For example, if the easement is a narrow strip abutting a public road, in an area where a building would not normally be constructed, then the effect on value may be relatively modest. On the other hand, if the easement runs through the middle of a potential building site, seriously limiting where a building could be located, or reducing its size, or reducing the functional relationship of the building to its parking, access, or surrounding property, then the effect may be quite significant. In the extreme, it is possible for the location of such an easement to effectively make a building site undevelopable, seriously reducing the value of the entire site, even if the area of the easement itself is much smaller than the area of the building site. In such instance, the easement could have value well in excess of what the average price per square foot would otherwise indicate.

The value of an easement can also be affected by land use regulation. If the municipality regulating land use excludes lot areas encumbered by utility easements in the calculation of maximum floor area ratio or lot coverage, the effect on value is more significant than if areas encumbered by such easements are included in such calculations.

*University As Special Case.* Implicit in the above discussion are the definitions and concepts of otherwise-permitted development, and the building site. General valuation theory and practice presumes that the servient property is a privately owned, with well-defined boundaries, subject to conventional municipal land use controls. It is important to recognize that none of these conditions exist where an easement is sought across University-owned property. The University is exempt from conventional municipal land use controls, and owns the property. As such, there is unity of ownership and land use controls, and presumptions about typical municipal land use regulation of private property may not necessarily apply.

For example, a campus' LRDP may or may not prescribe setbacks or exact building locations, consequently it may not be obvious whether the proposed location of a utility easement significantly affects development potential. The presumption of a parcel with well-defined boundaries is also often absent, as core campus land merges together into a single holding for practical, if not legal, purposes. Campus improvements are then typically planned and sited in clusters, which clusters may bear no relationship to legal parcel boundaries. Further, such clusters typically include non-structural improvements important to the campus experience if not integral to the function of the buildings. For these reasons, the location of an easement can affect a much wider area on a campus than might be considered in non-campus situations. It is therefore imperative that a campus LRDP and its subsidiary documents be reviewed in establishing the location of an easement. Given the University's constitutional status, it is not subject to eminent domain to establish easements and therefore can generally dictate the location consistent with its future campus plans.

## Conservation Easements

Conservation easements are typically intended to preserve the existing, natural state of property. The University may take title to property subject to the dominant interest in such easements in properties acquired for the Natural Reserves or grant a conservation easement on its property for mitigation purposes.

Conservation easements typically (i) limit the use or operation of the property in its existing state (i.e., prohibit timber harvesting, limit the use of pesticides, etc.), and (ii) prohibit or severely limit future development or improvement. Limitations on use or operation are unique to the physical characteristics and natural resources of the specific servient property, and often also reflect the characteristics and resources of adjoining University property intended to benefit from the easement. The effect on value of such limitations must be determined relative to the previous or possible use or operation of the property (i.e., previous harvesting, grazing, or farming or development potential).

Prohibitions on future development are more similar from easement to easement, but their effect on value can be significantly different depending upon whether or not the market value of the unencumbered servient property had significant development potential curtailed by the easement. Assessing development potential requires consideration of both local land use regulation (general plan, zoning, Williamson Act contract status, etc.) and physical characteristics (access; water rights; septic capacity, etc.). The inclusion of such an assessment in a careful and complete analysis of the highest and best use of the property is imperative in the valuation of conservation easements.

## Aviation Easements

While the University is rarely involved in aviation easements, such easements do illustrate certain influences on value that may be found in any other types of easements in which the University is more commonly involved. An aviation easement will often include some or all of the following: (i) prohibit construction on the servient property of any improvements extending upward into an imaginary plane, which begins at some specified distance above the ground and extends upward to infinity (i.e., prohibits buildings taller than 200 feet, say); (ii) prohibit the generation of any light, glare, radio transmission, etc., from anywhere on the servient property, that interferes with safe flight; (iii) permit the holder of the dominant interest to create noise impacting the servient property.

A prohibition on construction extending beyond some height may or may not pose any limitation on the rights of ownership, and hence on value. In the case of University property and the example of a 200-foot limitation, for example, if the campus LRDP does not permit buildings to be higher than 150 feet, say, then it is unlikely that the height limitation, itself, has any effect on value.

The prohibition on the generation of light, glare, and radio transmission, and the permission of the dominant interest to create noise, are illustrative of the nuisance issues that can arise with any easement (and may or may not be identified in the easement document itself). The effect on

value of such nuisance impacts can be difficult to quantify objectively, but should not be ignored. Further, the possibility of such nuisance impacts should be considered in deciding whether to grant an easement over University property at all, apart from the effect on value.

For example, in the case of the aviation easement, it may be possible to quantify the additional construction techniques and their costs necessary to block out noise from the interior of campus buildings, and capture such cost in the price paid the University for the easement. However, it would be difficult to quantify the effect of such noise on the campus' outdoor gathering spaces, and therefore the resulting impact on value. In such case, the effect of the noise may be unacceptable to the University regardless of the extent of compensation paid for the easement.

### **Valuation Techniques and Methods**

There are three methods for valuing easements (i.e., the dominant interest in the easement). These are:

- Direct Valuation
- Before-and-After Valuation
- Direct Discount of the Fee Simple Value

*Direct Valuation.* Does a valid market exist for the rights conveyed in the easement? If the answer is yes, then the easement itself (the dominant interest) may be valued by applying the conventional appraisal process, using any appropriate combination of the sales comparison, income capitalization, and cost approaches to value. As a practical matter, however, direct valuation is rarely if ever employed, for the following reasons:

- It is rare for the rights conveyed by easement to be of sufficiently broad attraction to create a market, and without a market the standard approaches to valuation cannot be applied.<sup>2</sup>
- As noted above, easements are not identical, and even if identical, their effect on the servient interest varies with property-specific conditions. Thus, even where a market exists, there are often insufficient transactions to adjust for such differences by direct comparison.

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<sup>2</sup> A valid market can be claimed for certain other types of divided partial interests, i.e., transferable development rights, and in those cases direct valuation is possible (i.e., via sales comparison).

*Before-and-After Valuation.* In this technique the value of the easement is estimated by comparing the values of the servient property before and after the easement is created. Specifically:

- First, the value of the property before creation of the easement is estimated, at its highest and best use.
- Second, the value of the property (the servient interest) is estimated after creation of the easement, at its highest and best in the “after” condition.
- Third, the value of the easement (the dominant interest) is calculated by taking the difference between the above two values, the “before” value and the “after” value.

The value of the property “before” and “after” is determined by applying the conventional appraisal process, using the sales comparison, income capitalization and/or cost approaches as appropriate. In applying this technique, the following issues should be noted:

- As discussed above, in the campus setting “the property” (servient property) to be appraised may not be obvious, and should be carefully considered and explicitly identified.
- In the campus setting, the highest and best use of the property “before” and “after” is heavily influenced by the campus LRDP and subsidiary documents, as discussed above. Transactions of non-University real estate used in the valuation may not have involved the same highest and best use as the subject campus property, and those differences must be considered in both valuations.
- Whether on- or off-campus, the servient property may be subject to other easements or private restrictions other than the easement being valued. Any such easements or restrictions must be taken into account in the determination of highest and best use, both “before” and “after.”

*Direct Discount of the Fee Simple Value.* In this technique the value of the easement is estimated by applying a percentage discount to the “before” value of the servient property. Specifically:

- First, the value of the property before creation of the easement (fee simple value) is estimated, at its highest and best use, as described above.
- Second, a percentage discount to the “before” value is estimated, representing an appropriate measure of the effect of the easement limitations on the “before” value.
- Third, the percentage determined in the second step is applied to the value determined in the first step to arrive at the value of the easement.

All of the issues noted above in Before-and-After Valuation for the “before” valuation apply equally in this technique. In addition, the following issues should be noted:

- Ideally, the percentage discount is derived by a careful analysis of other transaction sequences where a given property was sold in its “before” condition, an easement was created involving comparable rights and effect on the servient interest comparable to the subject easement, and the property then sold in its “after” condition. As noted above, easements are rarely if ever identical in the rights transacted and the effect on the servient interest, consequently considerable judgement is involved in applying the percentages indicated by such transaction sequences to other property.
- More frequently, the percentage discount represents a “rule-of-thumb” for a particular type of easement or a particular industry. The rule-of-thumb may have originated at some point from an analysis of actual transactions, but is likely outdated and in any event is unlikely to adequately reflect the specific provisions of the easement being valued.
- Finally, as noted in General Considerations to the Utility Easement discussion above, there may be an effect on the value of surrounding property due the impact of the easement location on that property’s development potential and in such cases this technique can severely understate the value of the easement from the point of view of the servient interest.

*Rule of Thumb Ratios.* While rule of thumb ratios are inadequate for the proper valuation of an easement of any size or significance, such ratios can be useful in estimating the scale of value, which might be involved in a prospective easement transaction.

In the case of underground utility easements, for a single utility line, a commonly used ratio is 50% of “before” unit land value (i.e., value per square foot of land). This presumes an easement that prohibits construction of building improvements but permits installation of paved parking or landscaping, without additional rights of access beyond the utility easement area, with the dominant party required to return the area to its preexisting state if it excavates its easement or otherwise damages the servient property. The ratio would increase if the effect of the easement was to reduce the property’s developable floor area or coverage ratios; the easement could not be paved; other portions of the property were compromised; etc.

In some situations, multiple utility providers will seek to use the same right-of-way (“layered” easements), raising the issue of the valuation of the subsequent “layers” of easements. One rule-of-thumb for such situations is to value the first such subsequent layer at 85% of the first easement, the second such subsequent layer at 15%, and subsequent layers at 0% (i.e., if the initial easement ratio was 50% of before value; the second easement would be valued on the order of 42% of before value; the third would be on the order of 7%; and subsequent layers would have no value).

In the case of conservation easements, one study of conservation easements in California concluded that the value of most conservation easements ranges from 40% to 60% of “before”



value.<sup>3</sup> As with utility easements, the more restrictive the easement is, the higher will be its percentage of “before” value.

Periodically, research into easement valuation ratios such as noted here for conservation easements is published in valuation journals. RESG may be able to determine whether any recent research exists indicating an appropriate rule-of-thumb ratio for a particular type of easement.

### **Special Circumstances**

The preceding discussion considers the estimation of the fair market valuation of easements. In most circumstances the University will seek to obtain market value for an easement across University property. There are other circumstances, however, where the University will seek compensation for easements that does not necessarily represent market value.

### **Value In Use or Convenience**

Under some circumstances a party seeking to obtain an easement across University property may have no practical alternative. This is particularly true for utility transmission easements, where any alternative right-of-way may involve a much more circuitous route, and/or the time delay involved in dealing with multiple owners. In such a case the easement across the University property may be more valuable to that party than would be indicated by the valuation techniques summarized above. This factor is referred to in right-of-way appraisal as the “enhancement factor”. Properly supported, the inclusion of an enhancement factor has been allowed in court awards. In such situations the University should attempt to determine what the total cost associated with the next best alternative route might be, and negotiate a price based upon that alternative cost rather than upon the market value of the easement.

### **Consideration of Processing Expense**

In the sale and ground leasing of University real estate the University typically considers the time and expense of its staff to be a cost of doing business, and does not attempt to recoup such expense separately. It is expected that this will also be the case in the granting of significant easements over University property, where the University is paid commensurately for the rights granted.

In some situations however, the easement may be estimated to have little if any value, either because the “before” value of the property is minimal or the diminution in value due to the easement is minimal. In such situations, however, significant amounts of University staff time may still be involved in negotiating the terms of the easement, field review, campus-OP coordination, and drafting and reviewing the easement document itself. In those situations it is the policy of the University that the holder of the dominant interest compensate the University for the expense of its staff time. (See “Accommodation Policy”).

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<sup>3</sup> “Valuing Agricultural Conservation Easements”, Janis A. Lassner, The Appraisal Journal, April 1998.

## **Conclusion**

The valuation of easements involves special issues and techniques beyond the standard approaches to valuation. The preceding discussion has summarized several such issues and techniques. In some situations it will be necessary to employ an outside appraiser to determine the value of an easement. In other situations a formal appraisal may not be necessary but considerable experience in judging easement effects on value is necessary. The preceding discussion is intended to be useful in determining whether an outside appraisal is necessary and, if so, help frame the instructions for the assignment, and the review of the resulting appraisal. In all situations RESG is available to consult with campuses when easement issues first arise.

## **III. MINIMUM EASEMENT FORM**

Because easements frequently convey a permanent interest in Regents' property and frequently involve substantial capital investment by the grantee, the Minimum Easement, The Regents as Grantor (#Ease-300) provides a basic form appropriate to conveying these interests in Regents' property. Office of General Counsel (OGC) review is required for all easements except those using the minimum form without substantial modification for utilities to serve a campus and access over existing streets. The minimum easement form is found at:

[http://www.ucop.edu/facil/resg/leasing/documents/Ease\\_300.doc](http://www.ucop.edu/facil/resg/leasing/documents/Ease_300.doc)

While the campus is responsible to negotiate all easements, any significant easement that is not either providing utility service to the campus exclusively or which the University may terminate on 120-days notice requires approval and execution by the Office of the President (which is coordinated by RESG). For detailed information on authority to approve easements and other types of transactions see: [http://www.ucop.edu/facil/resg/documents/authority\\_real\\_estate.pdf](http://www.ucop.edu/facil/resg/documents/authority_real_estate.pdf) . Regardless of authority, RESG is available to consult with the campus on any easement matter before or during the negotiation phase.

Key features of the Minimum Easement form include sections specifying (and limiting) the use and access rights; an explicit right for the University to relocate the easement; indemnity and insurance provisions to address risk management issues; and conditions of termination of the easement interest. A description of the issues in these and other sections of the Minimum Easement form are presented at the beginning of the form link.