MODIFYING & TERMINATING EASEMENTS

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17TH ANNUAL ADVANCED
REAL ESTATE DRAFTING COURSE
March 9-10, 2006
Dallas

CHAPTER 14
SPECIALIZATION:

Board Certified, Texas Board of Legal Specialization:

- Residential Real Estate Law (since 1983)
- Commercial Real Estate Law (since 1983)

PROFESSIONAL ACTIVITIES (Selected):

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MODIFYING AND TERMINATING EASEMENTS

James Noble Johnson

I. INTRODUCTION

Easements can be created through several generally recognized means: (1) by express grant or reservation; (2) by dedication to the public (both express and implied); (3) implied grant; (4) implied reservation; (5) implied by necessity; (6) equitably imposed by estoppel; and (7) by prescription (adverse possession). While clarifying, modifying, and releasing written easements, is fairly straightforward, documenting ratifications of implied easements, or clarifying, modifying and obtaining releases from possible easement claims is less often discussed.

The purpose of these materials is to briefly discuss and present samples for clarifying, modifying, and terminating both express and implied easements.

II. CLARIFYING EASEMENTS

A. Definition of Easement Location

It is still fairly common to find a recorded easement or public utility right-of-way grant which contains only a legal description of the entire tract subjected to the right-of-way, and not describing specifically a fixed location for the right-of-way. For example, it was very common in the first half of the 20th century for electric utilities to acquire “blanket” easements across large rural tracts. The easement would simply state that the electric utility company was granted an easement to extend power lines across the property, describing the entire tract of land owned by the landowner. In reality of course, the electric utility line was installed in a specific location, utilizing only a relatively small part of the entire tract.

Leaving the exact location of the easement undescribed does not affect the validity of the easement if the land subjected to the easement is adequately described. Jones v. Fuller, 856 S.W.2d 597 (Tex. App.– Waco 1993, writ denied). Rather than void “blanket easements” for failure to specify with reasonably certainty a specific easement area, Texas law looks to the intention of the parties as demonstrated by their actions in fixing the location of the easement after the execution of the conveyance. Preston Del Norte Villas Association v. Peppermill Apartments, Ltd., 597 S.W.2d 267 (Tex. Civ. App.– Dallas 1979, writ ref’d n.r.e.).

To clarify the land records, the landowner of a tract which is subjected to a blanket easement may force the easement owner to establish the location of the easement in writing and release excess lands not necessary to fulfill its purpose. Cozy v. Armstrong, 205 S.W.2d 403 (Tex. Civ. App.– Fort Worth 1947, writ ref’d n.r.e.). This is accomplished by the execution by the easement holder of a “Definition of Easement.”

A “Definition” of an easement will have the characteristics of a conveyance in that it will identify the easement owner, provide an adequate legal description of both the entire tract of land subjected to the easement and the exact location of the easement. It should recite the consideration paid for the easement, should release all other portions of the larger tract not covered by the easement, and should be signed and acknowledged in the manner required for recording documents into the real property records. It is also preferable for the owner of the tract being crossed to sign the Definition of Easement to demonstrate consent. To clarify the public record, the document should also contain a description of the earlier easement grant, citing the volume and page in which it appears in the public records.

If the easement holder will not “define” the easement voluntarily, the landowner subjected to the easement can force a “definition” by the easement holder through a district court suit for a declaratory judgment to remove cloud on title. Dwyer v. Houston Pipe Line Co., 364 S.W.2d 736 (Tex. Civ. App.– Houston 1963, affirmed 374 S.W.2d 662). Involuntary “definition” of an easement is available only when a grant in general terms of an easement for the purpose of laying out a utility line across a tract is granted without specifying the place for laying or the size of the line. The utility line is defined and made certain by the acts of the easement holder in laying out the utility line with the acquiescence of the servient estate owner. Once in place, the grant which was before general and indefinite becomes fixed and certain, and the grantee cannot change the easement either by rebuilding it in another place or by increasing its size. Id., at 740. A forced definition of easement will not be imposed where the easement holder did not initially use its easement to extent of the rights granted, when the later actions of the easement holder merely upgrade improvements which do not increase the burden on the servient estate, or when the original grant provided for improvements, replacements, and additions. Id.

As a suit to remove cloud on title (the appearance of a much broader and unwarranted incumbrance on the entire servient tract), the servient estate owner need not plead or prove the loss of possession of the property. Katz v. Rodriguez, 563 S.W.2d 627 (Tex. Civ. App.– Corpus Christi 1977, writ ref’d n.r.e.). Defenses of limitation and laches may not be invoked, since the injury from a cloud on title is continuing. DeBorde v. Bryan, 253
B. Statutory “Definition” of Pipeline Easements

The Texas Natural Resources Code provides some statutory relief for servient estate owners whose lands have been burdened with “blanket easements” for pipelines. For certain pipelines laid prior to January 1, 1994, the Statute sets a presumption that the easement created extends only a width of 50 feet as to each pipeline laid. TEX. NAT. RES. CODE ANN. § 111.0194. The Statute excludes: (1) easements in which the written grant or the condemnation judgment expressly provide for another width; (2) easement rights otherwise prescriptively acquired through actual use of a greater width; (3) easements created for the benefit of a party other than a single common carrier pipeline; (4) easements held by common carrier pipelines which do not have the power of eminent domain; (5) easements of a common carrier granted under the terms of an oil and gas lease or oil, gas, and mineral lease, or to any easement which authorizes the construction of gathering lines.

The Statute does not limit any rights of ingress to or egress from easements if the rights exist under the original grant, through prescriptive rights, or by common law. Moreover, the presumption may be rebutted by evidence on behalf of the common carrier pipeline that a greater width is reasonably needed for purposes of operation, construction of additional lines under the grant or judgment, maintenance, repair, replacement, safety, surveillance, or as a buffer zone for protection of the safe operation of the common carrier pipeline.

C. Form for Definition of Easement Location

***************************************
DEFINITION OF EASEMENT LOCATION
***************************************

Date of this Instrument:

Effective Date for Definition of Easement Location:

ORIGINAL EASEMENT INSTRUMENT:

Dated:
Original Grantor:
Original Grantee:
Recorded in:
Original Easement Property (the “servient estate”): 1

Benefitted Property (the “dominant estate”): 2

Current Easement Holder:
Easement Holder’s Address:
(including county)

Current Owner of the Easement Property:
Grantee’s Address:
(including county)

Lienholder (or Tenant) in Easement Property:
Lienholder’s (or Tenant’s) Address:

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1 While it is possible to simply reference with legal description set out in the original instrument, it is a good “flag” to title examiners to state the legal description, at least in summary form, e.g. “The certain 106 acre tract out of the Noah Smithwick Survey No. 180, Navajo County, Texas, described as the “Easement Property” in the Original Easement Instrument.”

2 While it is possible to simply reference with legal description set out in the original instrument, it is a good “flag” to title examiners to state the legal description, at least in summary form, e.g. “The certain 4.5 acre tract out of the Noah Smithwick Survey No. 180, Navajo County, Texas, described as the “Dominant Estate” in the Original Easement Instrument.”
Easement Property (the “servient estate”):

Additional [Periodic] Easement Maintenance Area:

The Current Easement Holder, the Current Owner of the Easement Property, and the Lienholder and/or Tenant of the Easement Property hereby agree that:

1. The Original Easement Instrument was executed as a blanket easement, encumbering all of the Original Easement Property as described in the Original Easement Instrument for the purposes expressed in the Original Easement Instrument.

2. Easement improvements, if any, have been constructed upon the Easement Property, and the parties now wish to: (a) define more precisely the permanent easement location [and Additional Easement Maintenance Area] as set out herein; (b) release from the easement encumbrance all other portions of the Original Easement Property not described in the herein-defined Easement Property [and Additional Easement Maintenance Area]; and (c) to ratify all other provisions of the Original Easement Instrument.

In consideration of the mutual benefits of this agreement:

a. The Current Owner of the Easement Property hereby acknowledges the defined Easement Property [and the Additional Easement Maintenance Area] described herein and ratifies in all other respects the terms and conditions of the Original Easement Instrument.

b. The Current Easement Holder hereby releases from the Easement all portions of the Original Easement Property outside the bounds of the herein defined Easement Property [and the Additional Easement Maintenance Area] and ratifies in all other respects the terms and conditions of the Original Easement Instrument.

When the context requires, singular nouns and pronouns include the plural.

Grantor:  Grantee:

Acknowledgments:

LIEN HOLDER'S CONSENT

Lien Holder's Acknowledgment

AFTER RECORDING, RETURN TO:

********************************************************

D. Clarifying an Existing Easement

1. The Nature of an Easement

An “Easement” is a legal centaur, that creature of ancient Greek legend which had the torso, arms, and head of a man and the body and legs of a horse. The Easement is part real property conveyance and part contract. An easement is an interest in the land of another, entitling the owner of the easement to a limited use or enjoyment of the land and/or airspace in which the interest exists. Watson v. Wiseheart, 258 S.W.2d 350 (Tex. Civ. App.– Galveston 1953, writ ref’d n.r.e.). Because it is an interest in real property, easements are created and transferred subject to the rules governing real property conveyancing. Rutten v. Cazey, 734 S.W.2d 752 (Tex. App.– Waco 1987, writ denied). However, the easement does not convey the property itself. Lakeside

But an easement also bears a similarity to a performance contract because of the continuing relationship between the grantor and the grantee. Contract or lease-type provisions in an easement include maintenance and repair obligations, non-disturbance and exclusive uses provisions, financial-solvency assurances, ownership of improvements, provision for the payment of consequential damages, and similar provisions. Easement agreements are subject to the same rules of construction and interpretation as contracts. Dewitt County Elec. Coop., Inc. v. Parks, 1 S.W.3d 96, 100 (Tex. 1999).

2. Deciding What to Clarify
Each of the primary categories below may have multiple variables. I have given examples of specific variables in a couple of categories, just to provide the flavor:

- Current Servient Estate Owner, or clarifying that successors are also agree to the easement provisions.
- Current Easement Holder, or clarify that successors and assigns are included.
- Property Descriptions:
  - Description of the Easement Property, as actually constructed or as currently existing:
    - metes and bounds description
    - center-line description
    - Benefitted Property, as possibly modified by expansion or condemnation:
      - Lot and Block
      - by reference to Exhibit
      - by reference to one or more recorded documents
  - Consideration: if additional rights are being conveyed, include additional consideration.
  - Easement Purpose(s) as currently preferred
  - Reservations
  - Exceptions
  - Granting Language
  - Warranties
  - Terms and Conditions
  - Acknowledgments
- Lender’s Subordination Agreement or Consent

Beware of asking for too much, however. Have the client evaluate the other party, to take care that your solution to the perceived need of the parties does not generate more controversy than the client wants to risk by asking for too much or raising new issues likely to cause unnecessary conflict.

3. Documenting Existing, Non-Express Easements
There are many circumstances which can give rise to implied easements appurtenant, implied dedications of right-of-way to the public, prescriptive easements, and easements by necessity. In these circumstances, there is no written easement of record, but an easement claimant in fact has acquired easement rights as a matter of law. When documenting the easement, it may be satisfactory to the parties for a written easement to be created with no special reference to the pre-existing nature of the easement. In other circumstances, it may be important to a property owner or lender to document the pre-existing nature of the easement.

As an example for purposes of form and content discussion, this article will use an implied easement appurtenant based upon a prior transfer of land between the dominant estate and servient estate owners. The elements of an implied easement grant are: (1) unity of ownership existed between the dominant and servient estates; (2) the use of the easement was apparent at the time the dominant estate was granted; (3) use of the easement was continuous, so that the parties must have intended its use to pass by grant with the dominant estate; and (4) reasonable necessity of the easement to the use and enjoyment of the dominant estate. Bickler v. Bickler, 403 S.W.2d 354, 357 (Tex. 1966); Holden v. Weidenfeller, 929 S.W.2d 124, 128-29 (Tex. App.– San Antonio 1996, writ denied).

By its nature, an implied easement is a negative easement. It prohibits the servient estate owner from interfering with the easement’s use. It does not require the servient estate owner to take any affirmative action. See Drye v. Eagle Rock Ranch, Inc., 159 Tex. 321, 364 S.W.2d 196, 212 (1962). When documenting an existing, implied easement, the easement claimant cannot compel the owner of the easement property to undertake affirmative obligations. Nevertheless, the parties may agree on additional terms which benefit both parties. The sample documentation of a pre-existing easement appurtenant does not place any affirmative duties on the owner of the property crossed by the easement.
Easement Appurtenant Agreement

Date of this Instrument:

Easement Effective Date: ³

Grantor: ⁴
Grantor’s Address:
(including county)

Grantee: ⁵ [Name], as owner of the Benefitted Property, and Grantee’s successor’s and assigns (including Tenants) of all or any part of the Benefitted Property.

Grantee’s Address:
(including county)

Lienholder ⁶, ⁷ (or Tenant ⁸) in Easement Property:
Lienholder’s (or Tenant’s) Address:

³ This date may be a date well in the past, when the actual easement rights were created by operation of law. For an implied grant of an easement appurtenant, it would be the date of the original deed conveying be benefitted property from the owner of the easement property to the original easement holder.

⁴ If the original easement property owner still owns the property over which the easement extends, this person will be the same. If a successor now owns the easement property, identify the current owner of the easement property here, and name the predecessor in title in a “Recital” of the history of the implied easement. The party granting or ratifying the easement must have a vested interest in the servient estate.


⁶ This will be the current Easement Holder. If a predecessor in title originally purchased the benefitted property out of the larger tract from the original seller, the original easement holder and the events of title succession should be set out in a “Recital” of the history of the implied easement.

⁷ A mortgagee is not an “owner” of the land and is not entitled to possession of the land simply by holding the security interest. Carroll v. Edmondson, 41 S.W.2d 64, 65 (Tex. Comm'n. App. 1931, judgm’t adopted). A lien is not any part of the title to the real property. Bankers Home Bldg. & Loan Ass’n v. Wyatt, 139 Tex. 173, 162 S.W.2d 694, 696 (1942). The lien is only the right of recourse to sell specific property in satisfaction of a debt and is not an estate in that property. Migura v. Dukes, 770 S.W.2d 568, 569 (Tex., per curium 1989).

⁸ The mortgagee retains the rights: (1) to institute foreclosure proceedings against the mortgagor and to make the easement holder a party to the proceedings, as being the entity in control of a portion of the land; and (2) if the easement holder's use has damaged the collateral's value to the harm of the mortgagee, to proceed against the easement holder for the impairment of its mortgage security. Aggs v. Shackelford County, 85 Tex. 145, 19 S.W. 1085, 1086 (1892). As to the latter remedy, note that the equitable doctrine of “marshaling of assets” may apply. The doctrine requires a mortgagee to proceed against parcels of mortgaged property in that order which minimizes harm to subsequent grantees or lien holders. Wynnewood Bank and Trust v. State, 767 S.W.2d 491, 498 (Tex. App.– Dallas 1989, no writ).

⁹ An existing leasehold estate has the capacity to avoid an easement burden imposed by the Lessor, at least for the duration of the lease. Unless the lease instrument reserves such rights in the Lessor, the conveyance of a lease transfers possession of the leased premises to the Lessee. Fred v. Moseley, 146 S.W. 343, 344 (Tex. Civ. App.– Dallas 1912, no writ). A tenant under a pre-existing leasehold estate may obtain injunctive relief and/or damages for trespass or for injury to the leasehold upon the Lessor’s and easement grantee’s construction or use of an easement in violation of an express or implied covenant of quiet enjoyment. Phillips Petroleum Co. v. Terrel, 404 S.W.2d 926, (Tex. Civ. App.– Amarillo 1966, no writ).
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Easement Property (the “servient estate”): 9, 10

350 EASEMENT PROPERTY - DESCRIBED BY EXHIBIT 11
A [width]-foot-wide strip of land more particularly described on Exhibit "B" attached hereto and incorporated herein for all purposes, containing approximately ____ acres/square feet of land, more or less; being a part of the __ Survey, Abstract __, and being a part of that certain real property owned by Grantor ("Grantor’s Property") described in that certain Deed recorded in Volume _____, Page _____ of the Real Property Records of [County] County, Texas.

353 EASEMENT PROPERTY - CENTER-LINE DESCRIPTION 12
A [width]-foot-wide strip of land, the center of which is located and described as follows: Beginning at a capped ½ inch iron rod set in the South Boundary line of the Benefitted Property, from which iron rod the Southern most Southeast corner of the Benefitted Property bears North 83° 56' 18" East 25.00 feet; Then South 4° 55' 32" East, parallel with the east boundary of the Grantor’s Property, 435.71 feet, to a capped ½ inch iron rod set at the point of termination in the north right-of-way line of State Highway 2150 at a point in the South Boundary line of the Grantor’s Property, from which termination point the Southeast corner of the Grantor's Property bears North 88° 52' 03" East 25.00 feet.

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9 As an interest in land, an express easement is subject to the Statute of Frauds. Anderson v. Tall Timbers Corp., 378 S.W.2d 16, 24 (Tex. 1964). Although the Statute of Frauds provides that all contracts for the sale of real estate must be in writing, no requirements for the writing, other than that it be signed by the grantor, are provided. Kmiec v. Reagan, 556 S.W.2d 567, 569 (Tex. 1977). Insofar as a description of the property to be conveyed is concerned, the writing must furnish within itself the means or data by which that particular land may be identified with reasonable certainty. Id.

However, Texas courts will go a long way to sustain the validity of an express easement grant. Vinson v. Brown, 80 S.W.3d 221 (Tex. App.– Austin, 2002, no pet.). The fact that an easement clause is vague, indefinite, or uncertain does not authorize a court to completely ignore the valuable right thereby granted. See Adams v. Norsworthy Ranch, 975 S.W.2d 424, 428 (Tex. App.– Austin 1998, no pet.). The purpose of a description in a written conveyance is not to identify the land, but to afford a means of identification. Jones v. Kelley, 614 S.W.2d 95, 99-100 (Tex. 1981). If enough appears in the description so that a person familiar with the area can locate the premises with reasonable certainty, it is sufficient to satisfy the Statute of Frauds. Gates v. Asher, 280 S.W.2d 247, 248-49 (Tex. 1955).

When an express easement is described in general terms without specifying its location, the right to select the location usually belongs to the grantor. Holmstrom v. Lee, 26 S.W.3d 526, 533 (Tex. App.– Austin 2000, no pet.). But this right must be exercised in a reasonable manner, and if the grantor of an easement fails to establish its location, the grantee may do so. Samuelson v. Alvarado, 847 S.W.2d 319, 323 (Tex. App.– El Paso 1993, no writ). The grantee’s use of the easement, with the consent or acquiescence of the grantor, is sufficient to establish the easement's location. See Adams, 975 S.W.2d at 428; Elliott v. Elliott, 597 S.W.2d 795, 802 (Tex. Civ. App.– Corpus Christi 1980, no writ).

The location of the easement may not be changed by either the easement owner or the owner of the subject tract without the consent of the other. Meridith v. Eddy, 616 S.W.2d 235 (Tex. Civ. App.– Houston [1st Dist] 1981, no writ). If the other party does not consent, the courts generally will not force a relocation of an easement. For example, if a roadway or utility easement becomes subject to periodic flooding, the easement owners only remedy is to restore the old easement instead of relocating it, even if restoration is difficult and relocation is more practical, convenient, and reasonable. Sisco v. Hereford, 694 S.W.2d 33 (Tex. App.– San Antonio, 1984, writ ref’d n.r.e.). On the other hand, implicit approval of a party to an easement relocation may be shown by acquiescence to the modification. Fort Quitman Land Co. v. Mier, 211 S.W.2d 340, 343 (Tex. Civ. App.– Eastland 1948, writ ref’d n.r.e.).

11 It is proper to attach to a conveyance instrument a map showing the property conveyed, and such map can be looked to in aid of a defective written description in the instrument. River Road Neighborhood v. South Texas Sports, 720 S.W.2d 551, 558 (Tex. App. - San Antonio 1986, writ dism.).

12 Center line descriptions should be written to describe the easement strip's total width and the location of the center line. An alternative is to describe the easement area as being “____ feet on each side of a line . . .” Do not use the phrase “____ feet on either side of a line . . .” since “either” means on one side or the other.
At common law, “ownership of the land extended to the periphery of the universe.” United States v. Causby, 328 U.S. 256, 260, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). Modern law, however, gives “exclusive sovereignty of airspace of the United States” to the federal government, and gives United States citizens “a public right of transit through navigable airspace.” 49 U.S.C.A. § 40103(a)(1), (2) (West 1997). As a result, today, airspace is part of the public domain. Causby, 328 U.S. at 266. “Navigable airspace” means “airspace above the minimum altitudes of flight” prescribed by federal regulations, including airspace needed to ensure safety in the takeoff and landing of aircraft. 49 U.S.C.A. § 40102(a)(30); see also 14 C.F.R. § 1.1. The Federal Aviation Administration (FAA) has established the minimum altitude of flight as heights of 500 feet above ground level for uncongested areas and 1000 feet for congested areas. 14 C.F.R. § 91.119 (1999). In addition, the FAA establishes a “glide slope” of navigable airspace under 500 feet needed to ensure safety in the takeoff and landing of aircraft utilizing a particular airport runway. See Persyn v. United States, 34 Fed. Cl. 187, 198 (1995), aff’d, 106 F.3d 424 (Fed. Cir.1996) (defining the term “glide slope”).

An easement over an entire servient tract is a “blanket easement.” Blanket easements have been commonly used in Texas history, particularly for long route utility projects such as pipelines and electric power lines. The purpose of a blanket easement is for the practical convenience of the easement holder to alter the exact location of the lines during construction. Problems with terrain (especially rock formations) may be difficult to determine precisely at the time the easements are acquired. The practicality of the project may depend upon the flexibility available to the easement holder in locating the lines. More recently, governmental regulations concerning wetlands preservation (33 U.S.C.A. § 1251 et seq.) and endangered species avoidance restrictions (16 U.S.C.A. § 1531 et seq.) have been additional topics when locating easement structures.

The flip side of the flexibility provided for a blanket easement is the loss of control of exclusive use which the landowner otherwise enjoys. A lender may require a first lien position free and clear of an adverse easement incumbrance before providing a mortgage loan over portions of the property. Therefore, it is advisable when granting any express easement over more land than will be necessary for its continued use and maintenance for the easement conveyance to include a provision which expressly requires the easement holder to “define” the easement area after installation of the easement improvements and to provide the servient estate owner with a release of the remaining lands.
That certain tract of land more particularly described on Exhibit "B" attached hereto and incorporated herein for all purposes, containing approximately ____ acres/square feet of land, more or less; being a part of the ___ Survey, Abstract __, and being owned by Grantor ("Grantor's Property") and described in that certain Deed recorded in Volume _____, Page _____ of the Real Property Records of [County] County, Texas.

367 EASEMENT PROPERTY - FLEXIBLE
All driveways, parking facilities (but not the parking spaces) and sidewalks as now or hereafter located or relocated from time to time within the Grantors’ Properties and other specific locations mutually agreeable to the owners of the Benefitted Properties and depicted in an amendment to this Easement Agreement executed by the owners of the Easement Properties and recorded in the Real Property Records of [County] County, Texas.

Additional [Temporary/Periodic] Easement Construction/Maintenance Area: 15

370 ADDITIONAL EASEMENT AREA - AMOUNT REASONABLY NECESSARY
As much of the surface of the Grantor’s Property that is adjacent to the Easement Property as may be reasonably necessary to install, maintain, repair, or replace the easement improvements within the Easement Property for the Easement purposes herein recited.

371 ADDITIONAL EASEMENT AREA - GENERAL RIGHT OF ACCESS TO EASEMENT PROPERTY
The remainder of Grantor’s Property as may be necessary for ingress and egress by Grantee, its employees, agents, and contractors to and from the Easement Property, to construct, install, operate, maintain, inspect, repair and replace the Facilities, ONLY to the extent that the Easement Property is not accessible by using existing rights-of-way, streets, roads, driveways, and parking areas to the maximum extent reasonably possible.

375 ADDITIONAL EASEMENT AREA - ONE SIDE
An additional ___-foot-wide strip of land on the [westerly] side of and abutting the Easement Property; being also a part of Grantor’s Property.

378 ADDITIONAL EASEMENT AREA - BOTH SIDES
An additional ___-foot-wide strip of land on each side of and abutting the Easement Property; being also a part of Grantor's Property.

385 ADDITIONAL EASEMENT AREA - SEPARATE DESCRIPTION
That certain tract of land more particularly described in Exhibit "C" attached hereto and incorporated herein for all purposes, containing approximately ____ acres/square feet of land, more or less; and being also a part of Grantor's Property.

Recitals: 16, 17

15 In an easement which was originally implied by operation of law, an additional maintenance area is available as reasonably necessary to support the original purpose of the easement. Upon documenting the easement, a more specific description of a maintenance area can be agreed upon.

16 This format includes a statement of the easement purpose in the “Recitals” section. An easement may be created by express grant for any purpose, so long as it does not violate a state statute or is not against public policy. Such an attempted grant would be unenforceable. Carrithers v. Terramar Beach Community Imp. Assn., Inc., 645 S.W.2d 772 (Tex. 1983, cert. denied), 464 U.S. 981.

17 Where an easement is granted for a particular, designated purpose, the easement holder is restricted to the stated purpose. There is no necessity for the conveyance instrument to specifically negate other possible uses which could be made of the property. Kearney & Son v. Fancher, 401 S.W.2d 897, 905 (Tex. Civ. App.– Fort Worth 1966, writ ref. n.r.e.). When a use is not expressly limited to a particular volume or size, or to a particular number of lines or support structures, the easement holder may alter the specific use of the easement area if it is within the general description provided. So long as there is no change in the character of the easement use granted, the landowner's rights are not adversely affected. Perry v. City of Gainsville, 267 S.W.2d 270, 273 (Tex. Civ. App. 1954, writ ref'd n.r.e.). On the other hand, if the easement sets forth express limitations within the granting instrument, the
1. **PURPOSE OF THIS INSTRUMENT**

The Grantor and Grantee have entered into this instrument to memorialize into the Official Public Records of ___ County [being the county where the land is located and where the earlier title conveyance was recorded] the existence of an easement appurtenant to for the benefit of the Benefitted property as the result of the conveyance of the Benefitted Property out of a larger tract of land described as [legal description of the parent tract] by the owner of the Easement Property to the original purchaser of the Benefitted Tract. At the time of the conveyance of the Benefitted Property, the Easement Property described herein was in existence and used as a means of access to and from the Benefitted Property. The parties to the transaction understood and intended at the time of the transaction that the purchaser of the Benefitted Property would have access to and from the Benefitted Property over and across the Easement Property. The purchaser of the Benefitted Property relied upon such representation by the seller or seller’s agent and entered into the purchase transaction based, in part, upon that representation. However, an express conveyance of the easement across the Benefitted Property was not documented in the conveyance instrument at the time of the purchase of the Benefitted Property. Therefore the parties to this instrument wish to, and hereby, document and ratify the existence of the easement across the Easement Property for the benefit of the Benefitted Property for the purposes and subject to the other provisions set out herein.

420 **PURPOSE - VEHICULAR AND PEDESTRIAN ACCESS**

The purpose of the Easement is for providing pedestrian and car and light truck vehicular ingress and egress to and from the Benefitted Property, and portions thereof, to and from County Road [____], for the Benefitted Property's use as a [single family residence]. The easement does not include the right to lay water, wastewater, electrical, cable, or any other surface or sub-surface utility lines.

422 **PURPOSE - DRIVEWAY TURN-AROUND/ TEMPORARY CUL-DE-SAC**

The purpose of the Easement is for construction, maintenance, replacement, repair of an [existing] driveway turn-around for vehicular use, with an all-weather road surface material.

OR

The purpose of the Easement is for construction, maintenance, replacement, repair, and removal of a street cul-de-sac in, upon, and across the Easement Property.
425 PURPOSE - PUBLIC, PEDESTRIAN ACCESS 22
The purpose of the Easement is for public, pedestrian only, access across the Easement Property going to and from [name of park, lake, or street, or other public property] and adjoining [name of park, lake, or street, or other public property].

450 PURPOSE - PUBLIC UTILITIES 23, 24
The purpose of the Easement is for erecting, constructing, installing, replacing, repairing, operating, using, inspecting, reconstructing, modifying, removing and maintaining any and all public utilities (including water, wastewater, storm water detention, filtration, and drainage, electric, telephone, gas, cable television, and electronic data transmission services), together with all lines, pipes, conduits and other equipment, improvements and appurtenances used in the supply and provision of public utilities.

451 PURPOSE - WATER LINE
The purpose of the Easement is for placing, constructing, operating, repairing, relocating and removing a [public/private] waterline within the Easement Property, and for making connections therewith, and for no other purpose.

452 PURPOSE - WATER WELL AND SERVICE LINES
The purpose of the Easement is for access, ingress, egress and maintenance to, from and on the water well presently located on the Easement Property, together with any pipes and electrical conduit attached to the water well and necessary for the well’s operation (including any pump(s) and filtration system) and service of water to the Benefitted Property. Said water well presently serves both the Grantor's Property and the Benefitted Property.

OR
The purpose of the Easement is to drill, construct, install, operate, maintain, repair, and replace (a) a water well, casings, fittings, and pumping equipment at the water well location described on Exhibit "B" for the transportation of water from such well to the Benefitted Property.

453 PURPOSE - WASTEWATER LINE
The purpose of the Easement is for constructing, laying, maintaining, operating, repairing and replacing a public wastewater line and related facilities and equipment within the Easement Property, and for no other purpose.

454 PURPOSE - LIFT STATION
The purpose of the Easement is for construction, installation, operation, maintenance, inspection, repair and replacement of a wastewater lift station and associated facilities (the "Lift Station"), and for no other purpose.

455 PURPOSE - FORCE MAIN
The purpose of the Easement is for construction, installation, operation, maintenance, inspection, repair and replacement of a force main wastewater line and associated facilities (the "Force Main"), and for no other purpose.

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22 “Access” is the author’s preferred word, though “right-of-way” may be used. The use of the word “right-of-way” in conjunction with “easement” delineates the scope and purpose of the grant. The term “right-of-way” in this context is used to mean right-of-passage over and across all the land described in the instrument. Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868, 871 (Tex. App.– Austin 1988, writ denied).

23 Privately owned utility companies may be referred to as “public utilities,” and are provided statutory, quasi-governmental, condemnation powers, but they are privately owned companies, and their easements are private. Boyle v. Burk, 749 S.W.2d 264 (Tex. App.– Ft. Worth 1988, writ denied).

24 The common law does allow some flexibility in determining an easement holder’s rights. In particular, the manner, frequency, and intensity of an easement’s use may change over time to accommodate technological development. Restatement (Third) of Property (Servitudes) § 4.10. But such changes must fall within the purposes for which the easement was created, as determined by the grant's terms. See id. § 1.2 cmt. d (“The holder of the easement . . . is entitled to make only the uses reasonably necessary for the specified purpose.”); § 4.10 & cmt. a (noting that manner, frequency, and intensity of easement may change to take advantage of technological advances, but only for purposes for which easement was created).
456 PURPOSE - SEPTIC SYSTEM AREA
The purpose of the Easement is for Grantee to maintain, replace and repair the portion of the Benefitted Property’s septic system located on the Easement Property, including any components, equipment or mechanisms, and to take such other actions as may reasonably be necessary from time to time for facilitating the use and enjoyment of the Benefitted Property's septic system.

460 PURPOSE - ELECTRIC - DISTRIBUTION LINE
The purpose of the Easement is for construction and maintenance (including inspection) of electric distribution lines and systems (including one wood or metal pole of no more than ___ feet in height and no more than two guy wires) within the Easement Property.

461 PURPOSE - EXISTING GUY WIRE ANCHOR
The purpose of the Easement is for maintaining, inspecting, repairing and replacing an existing down-guy and anchor currently located within the Easement Property used to provide support for a utility tower now located within Grantee's easement area conveyed to Grantee by Deed recorded in Volume ___, Page ___ of the Real Property Records of [County] County, Texas.

463 PURPOSE - ELECTRIC - TRANSMISSION LINE
The purpose of the Easement is for electric transmission lines and electric distribution lines, each line to consist of a variable number of wires, and each such line with all necessary or desirable appurtenances (including towers and/or poles made of wood, metal or other materials, telephone and telegraph wire, props and guys) and all necessary appurtenances and structures (the "Facilities"), to permit electric, telephone, and telecommunications lines and systems to be installed, constructed and maintained, and to cut and trim trees and shrubbery and to remove obstructions from the Easement Property as necessary to keep them clear of the Facilities.

465 PURPOSE - NATURAL GAS LINES
The purpose of the Easement is to place, construct, operate, repair, maintain, inspect and replace underground natural gas lines and systems, consisting of a variable number of lines, and all necessary or desirable structures and appurtenances (the “Facilities”).

467 PURPOSE - PIPELINE
The purpose of the Easement is to lay, construct, maintain, inspect, operate, protect, repair, alter, replace, substitute and remove a ___-inch pipeline, and appurtenant facilities, including valves, fittings, meters and other equipment,

25 An electric “distribution line” is a power line operated below 60,000 volts, when measured phase to phase. 16 T.A.C. § 25.5 (18). Distribution lines are operated by a “retail electric utility.” Tex. Utilities Code, § 37.001.

26 An electric “transmission line” is a power line operated at 60,000 volts or above, when measured phase to phase. 16 T.A.C. § 25.5 (79).

27 The common law does allow some flexibility in determining an easement holder’s use rights. In particular, the manner, frequency, and intensity of an easement’s use may change over time to accommodate technological development. Restatement (Third) of Property (Servitudes) § 4.10. But such changes must fall within the purposes for which the easement was created, as determined by the grant's terms. See id. § 1.2 cmt. d (“The holder of the easement . . . is entitled to make only the uses reasonably necessary for the specified purpose.”); § 4.10 & cmt. a (noting that manner, frequency, and intensity of easement may change to take advantage of technological advances, but only for purposes for which easement was created); see, e.g., Lower Colo. River Auth. v. Ashby, 530 S.W.2d 628, 629, 632-33 (Tex. Civ. App.– Austin 1975, writ ref’d n.r.e.) (holding that, under the electric-transmission easement at issue, the easement holder could replace wooden towers with new steel towers and could increase the electricity-carrying capacity). On the other hand, an easement authorizing the use of electric transmission and/or distribution lines does not convey the right to use the property for purposes of transmitting communications. While cable television may utilize electrical impulses to transmit communications, television transmission is not a more technologically advanced method of delivering electricity. Marcus Cable Associates v. Krohn, 90 S.W.3d 697, 702-03 (Tex. 11/5/2002).

28 The expansability of an easement may also be vertical. The express right to reconstruct an electric transmission line and to relocate it has been held to be sufficiently broad to include the right to increase the height of poles and wires upon reconstruction. Central Power & Light Co. v. Holloway, 431 S.W.2d 436 (Tex. Civ. App.– Corpus Christi 1968, no writ).
from time to time deemed by Grantee to be necessary or desirable in connection with the use and convenient operation of said pipeline, for the transportation of oil, natural gas, petroleum or any of its products under, upon, and through the Easement Property.

470 PURPOSE - CRITICAL ENVIRONMENTAL FEATURE SETBACK AREA
The purpose of the Easement is for maintaining the Easement Property as a natural greenbelt and buffer area for purposes of protecting certain features located within the Easement Property that have been determined by Grantee to be of critical importance to the protection of one or more environmental resources, together with the right to enter upon the Easement Property for the purpose of inspecting and maintaining said Easement Property as a natural greenbelt and buffer area.

471 PURPOSE - WATER QUALITY CONTROLS
The purpose of the Easement is for the construction, inspection, operation, maintenance, monitoring, replacement, upgrade and repair of a water quality control facility.

475 PURPOSE - DRAINAGE AND/OR DETENTION POND
The purpose of the Easement is for the construction, installation, operation, maintenance, inspection, repair and replacement of a drainage and stormwater detention pond and associated facilities (the "Pond"), and for no other purpose.

OR
The purpose of the Easement is for use of the surface only of the Easement Property, to a depth of no more than ___ feet from its existing elevation, to construct, install, operate, maintain, inspect, reconstruct, and rebuild an open drainage channel.

OR
The purpose of the Easement is for the construction and maintenance of an underground, enclosed storm sewer line (the "Storm Sewer Line") in and across the Easement Property.

480 PURPOSE - TELECOMMUNICATIONS SYSTEM
The purpose of the Easement is for the construction, installation, testing, operation, inspection, maintenance, repair, replacement, upgrade and expansion of an underground telecommunication system and associated infrastructure, consisting of conduit, fiberoptic cable, wires and other lines within the conduit, secured vaults, switches, routers and all necessary or desirable appurtenances or other improvements, as more particularly described in the plans and specifications attached hereto as Exhibit D and made a part hereof (the "Facilities") to provide for integrated voice, video and data communications, including dial tone local telephone service.

490 PURPOSE - TEMPORARY CONSTRUCTION/ TEMPORARY MAINTENANCE
The purpose of the Additional Easement Area is for Grantee's use, to the extent reasonably necessary and convenient, to construct and install the Facilities within the Easement Property.

OR

29 The common law does allow some flexibility in determining an easement holder’s rights. In particular, the manner, frequency, and intensity of an easement’s use may change over time to accommodate technological development. Restatement (Third) of Property (Servitudes) § 4.10. But such changes must fall within the purposes for which the easement was created, as determined by the grant’s terms. See id. § 1.2 cmt. d (“The holder of the easement . . . is entitled to make only the uses reasonably necessary for the specified purpose.”); § 4.10 & cmt. a (noting that manner, frequency, and intensity of easement may change to take advantage of technological advances, but only for purposes for which easement was created). Thus, an easement authorizing the use of electric transmission and/or distribution lines does not convey the right to use the property for purposes of transmitting communications. While cable television may utilize electrical impulses to transmit communications, television transmission is not a more technologically advanced method of delivering electricity. Marcus Cable Associates v. Krohn, 90 S.W.3d 697, 702-03 (Tex. 11/5/2002).

30 Maintenance easements may be temporary and periodic. For example, an easement instrument, in addition to granting the permanent easement, may also grant a temporary maintenance easement for one month each year to permit the easement owner to come in and do additional maintenance during that time. Such temporary maintenance easements are common in connection with party walls, zero lot line buildings, and boat docks.
The purpose of the Additional Easement Area is for use of Grantee and Grantee's employees, agents, contractors, and assistants for access to and maintenance, repair, or reconstruction of [Grantor's building improvements located within __ feet of the common boundary between the Benefitted Property and Grantor’s Property] or [the Facilities within the Easement Property].

Consideration: 31 $10.00 and other valuable consideration, the receipt and sufficiency of which Grantor acknowledges.

GRANT [RATIFICATION]: 32
Grantor, for the Consideration and subject to the Reservations from and Exceptions to Conveyance and Warranty, ratifies the grant and conveyance to Grantee of a [non-exclusive] [permanent/temporary] [other descriptive wording desired] easement over, upon and across the Easement Property for the Easement Purpose and for the benefit of the Benefitted Property, and portions thereof; together with any additional easement rights for the use of any Additional Easement Area identified above for the purposes thereof; to have and hold it to Grantee, Grantee's heirs, executors, administrators, successors, or assigns forever, subject to the terms hereof.

Warranty: 33

710 WARRANTY - GENERAL - EASEMENT APPURTENANT
Grantor binds Grantor and Grantor’s heirs, executors, administrators, and successors to warrant and forever defend all and singular the property interests herein conveyed to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty.

720 WARRANTY - SPECIAL - EASEMENT APPURTENANT
Grantor binds Grantor and Grantor’s heirs, executors, administrators, and successors to warrant and forever defend all and singular the property interests herein conveyed to Grantee and Grantee’s heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty, by, through, or under Grantor, but not otherwise.

740 NO WARRANTY - WARRANTY EXPRESSLY DENIED
This conveyance is made without express or implied warranty. All warranties which might arise by common law or by statute, including but not limited to § 5.023 of the Texas Property Code (or its successor) are excluded.

Reservations from and Exceptions to Conveyance and Warranty:

810 RESERVATION - SURFACE ESTATE ONLY
This instrument represents easement interests in the surface estate only of the Easement Property. Grantor hereby reserves to Grantor, and Grantor’s heirs, legal representatives, administrators, executors, successors and assigns, all mineral interests, whether metallic or nonmetallic, whether similar or dissimilar, whether known or unknown,

31 An express easement conveyance should always include a statement of at least nominal consideration and the acknowledgment of its receipt and sufficiency in order to eliminate any question about the enforceability of the conveyance.

32 So long as the instrument conveys an intention to grant an easement, no magic words are required. “[N]either words of inheritance nor other words of art are essential to the valid reservation of an appurtenant easement of even unlimited duration.” Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163 (1952). In fact, even an instrument which has fee simple title conveyance language, but which further contains more specific language expressing an intent of easement use only, will be interpreted in accordance with the grantor’s intent so as to convey an easement interest only. City of Port Isabel v. Missouri Pacific Railroad Co., 729 S.W.2d 939 (Tex. Civ. App.— Corpus Christi 1987, writ ref’d n.r.e.).

33 As with any other conveyance of a real property interest, there is no requirement for an easement to contain title warranties. TEX. PROP. CODE ANN. § 5.022(b). The use of the word “grant” or “convey” will imply warranties that (a) the grantor has not previously conveyed the estate or an inconsistent interest therein to any other person, and, (b) the estate is free from encumbrances that would prevent its execution at the time of the grant. TEX. PROP. CODE ANN. § 5.023.
currently owned by Grantor in, on, and under and that may be produced and saved from the Easement Property or acreage pooled or unitized therewith, and the full and exclusive executive rights to execute leases in connection therewith.

820 RESERVATION - VENDOR’S LIEN - SELLER
The vendor’s lien against and superior title to the easement interests in the Easement Property are retained until the Note and all other sums payable thereunder, shall have been paid in full in accordance with the terms thereof, when this deed shall become absolute.

830 RESERVATION - GRANTOR'S RIGHT TO CONVEY CONCURRENT USES TO OTHERS
Grantor, as owner of Grantor’s Property, reserves the right to convey to others the right to use all or part of the Easement Property in conjunction with Grantee, as long as such further conveyances are subject to the terms of this agreement and the other users agree to bear a proportionate part (by total number of easement holders) of the costs of improving and maintaining the Easement Property improvements.

831 RESERVATION - CONCURRENT USE OF THE EASEMENT PROPERTY
Grantor, as owner of Grantor’s Property, and for the benefit of previous and any subsequent grantees of Grantor, reserves the right to use all or part of the Easement Property in conjunction with Grantee, as long as such further uses and/or conveyances are subject to the terms of this agreement and any other users agree to bear a proportionate part (by total number of easement holders) of the costs of improving and maintaining the Easement Property improvements.

OR
Grantor, as owner of Grantor’s Property, and for the benefit of previous and any subsequent grantees of Grantor, reserves the right to place, construct, operate, repair, replace and maintain utility lines and facilities (including without limitation, water, wastewater, stormwater and drainage, gas, electric, telephone, and cable television lines and systems), public or private streets or roads, driveways, parking areas, fences and landscaping, in, over, under and across the Easement Property, and to grant public and/or private easements for such purposes, and to raise or lower the level of the surface of the Easement Property; PROVIDED that: (a) such use the Easement Property not unreasonably interfere with or prevent the use of the Easement Property or any Additional Easement Area by Grantee for the purposes for which the Easement is granted; (b) no permanent structures or improvements (other than the Facilities) shall be installed, placed or constructed on the surface of the Easement Property, nor shall any changes or modifications of the Facilities be made without first obtaining the prior consent of Grantee; and (c) any proposed improvements, easements or conflicting use of the Easement Property or any Additional Easement Area shall be subject to the prior approval of Grantee.

835 RESERVATION - GRANTOR'S CONTINUED USE OF SURFACE
Grantor, as owner of Grantor’s Property, reserves the right to continue to use and enjoy the surface of the Easement Property for all purposes that do not interfere with or interrupt the use or enjoyment of the easement by Grantee for the easement purposes stated herein.

905 EXCEPTIONS - GENERAL
This conveyance is made by Grantor and accepted by Grantee subject to any and all existing easements, covenants, rights-of-way, conditions, restrictions, outstanding mineral interests and royalty interests, if any, relating to the Easement Property, to the extent, and only to the extent, that the same may still be in force and effect, and either shown of record in the office of the County Clerk of the County in which any part of the Property is located, or that may be apparent on the Property.

34 Unless otherwise agreed by the parties, the easement holder’s rights to use the easement tract are exclusive only to the extent necessary to fulfill the purpose of the easement. The easement holder may not unreasonably disturb the servient estate owner’s use of the remainder of the servient estate. San Jacinto Sand Company, Inc. v. Southwestern Bell Telephone Company, 426 S.W.2d 338 (Tex. Civ. App.— Houston [14th Dist.] 1968, writ ref’d n.r.e., cert. denied 393 U.S. 1027); Magnolia Pipe Line Co. v. McCarter, 52 S.W.2d 663 (Tex. Civ. App.— Beaumont 1932, no writ). The owner of the servient estate retains the right to use the easement area in a manner which is not inconsistent with the rights of the easement holder. Id. The servient estate owner also retains the right to convey further easements which do not unreasonably interfere with the rights of the easement holder, unless the easement is expressly exclusive. Id.
 TERMS: The following terms apply to this Easement:  

1. Character of Easement.

1010 EXCLUSIVE
The easement rights of use granted herein are exclusive to Grantee.

1011 EXCLUSIVE - SUBSURFACE
The easement rights of use granted herein to the Easement Property below the surface are exclusive to Grantee. Grantor shall not permit any excavation or penetration of the surface of the Easement Property without Grantee's express, written consent.

1015 NON-EXCLUSIVE
The easement rights of use granted herein are nonexclusive.

1016 NON-EXCLUSIVE - SUBJECT TO GRANTEE'S CONSENT
The Easement is non-exclusive, provided that Grantor covenants that Grantor will not convey any other easement or conflicting rights within the Easement Property or the Additional Easement Area without the express written consent of Grantee, which consent shall not be unreasonably withheld.

1020 APPURTENANT
The Easement is appurtenant to and runs with all or any portion of the Benefitted Property, whether or not the Easement is referenced or described in any conveyance of all or any portion of the Benefitted Property. The Easement is for the benefit of Grantee as owner of the Benefitted Property, and Grantee’s successors, tenants, and assigns who at any time own or lease all or any part of the Benefitted Property.

2. Duration.

1110 DURATION - PERPETUAL
The duration of the Easement is perpetual and irrevocable.

OR
The duration of the Easement is perpetual, subject to the termination provisions in the Terms hereof.

1120 DURATION - DAYS/MONTHS/YEARS
The duration of the Easement is ___ [days] [months] [years] from the [Effective] Date hereof and automatically terminates upon the expiration of this Easement Duration, unless sooner terminated as otherwise provided in the Terms hereof.

1140 DURATION - ANNUAL MAINTENANCE PERIOD
The Maintenance Period is the ___-day period beginning on the annual anniversary of the [Effective] Date of this instrument. This Maintenance Period automatically expires upon completion by Grantor of the inspection and maintenance.

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35 These are the contract-type provisions of the easement agreement. When documenting an easement implied by law, the Easement Holder cannot force the Owner of the Easement Property to undertake affirmative obligations without his/her/its consent. The nature of an implied easement appurtenant is a negative easement, in which the servient estate owner is compelled only to not interfere with the easement. Drye v. Eagle Rock Ranch, Inc., 159 Tex. 321, 364 S.W.2d 196, 212 (1962). Once these provisions are established, the easement holder and the servient estate owner should exercise their respective rights and privileges in a spirit of mutual accommodation. San Jacinto Sand Company, Inc. v. Southwestern Bell Telephone Company, 426 S.W.2d 338 (Tex. Civ. App.– Houston [14th Dist.] 1968, writ ref'd n.r.e., cert. denied 393 U.S. 1027).

36 Maintenance easements may be temporary and periodic. For example, an easement instrument, in addition to granting the permanent easement, may also grant a temporary maintenance easement for one month each year to permit the easement owner to come in and do additional maintenance during that time. Such temporary maintenance easements are common in connection with party walls, zero lot line buildings, and boat docks.
37 Every easement carries with it the right to do whatever is reasonably necessary for the full enjoyment of the easement itself. 


An easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient estate. Coleman v. Forister, 514 S.W.2d 899, 903 (Tex. 1974). Included in the right to reasonable enjoyment is the right to improve the easement to an extent reasonably calculated to promote the purposes for which it was created. Baer v. Dallas Theater Center, 330 S.W.2d 214 (Tex. Civ. App.–Dallas 1959, writ ref’d n.r.e.). What constitutes a reasonable use is a subjective determination based upon the facts of each particular case. A reasonable use is one which does not unreasonably prejudice the rights of others. Gulf Pipe Line Co. v. Thomason, 299 S.W. 532, 533 (Tex. Civ. App.–El Paso 1927, writ dism’d). However, it has also been held that where a grant of an easement is general as to the extent of the burden to be imposed on the servient estate, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been employed. Bland Lake Fishing and Hunting Club v. Fisher, 311 S.W.2d 710, 716 (Tex. Civ. App.–Beaumont 1958, no writ).

38 As technology and conditions change, the easement holder may adapt the easement improvements and use different means to fulfill the same purpose for which the easement was granted. City Public Service Bd. of San Antonio v. Karp, 585 S.W.2d 838, 841 (Tex. Civ. App.–San Antonio 1979, no writ).

The easement holder will have the duty to make repairs even for damage done inadvertently by the servient estate owner if the damage was caused by the easement holder's failure to adequately maintain the improvements as required to be constructed. For example, if an easement holder is obligated under the conveyance instrument to have its pipeline buried 48 inches below the surface, and the servient estate owner ruptures the pipeline with a plow at a depth of 22 inches, the servient estate owner has the duty to maintain its easement and is responsible for damages to the easement improvements proximately caused by its failure to adequately maintain. Mapco, Inc. v. Ratliff, 528 S.W.2d 622 (Tex. Civ. App.–El Paso 1975, writ ref’d n.r.e.).
40 This sort of retained control over the Easement Facilities will not be legally effective in connection with governmental utilities functions. Developers negotiating an easement with the city for utilities frequently want to know when the utilities will be extended to their development area and available for hook-ups. They may also want a contractual provision for some control over the right to receive hook-ups to public utilities.

Similar to the principal that utility easements are normally easements in gross (not assignable, except by express provision) it is also true that governmental entities operating public utilities may not transfer the responsible of operating governmental functions to any private party or other entity. The operation of water purification and treatment plants, water line systems, and sewer services are “governmental functions” under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(11) and (32).

A municipality cannot contract away, surrender, or bargain away the exercise of a governmental function. Pittman v. City of Amarillo, 598 S.W.2d 941, 945 (Tex. Civ. App.– Amarillo 1980, writ ref’d n.r.e.); City of Farmers Branch v. City of Addison, 694 S.W.2d 94, 95 (Tex. App.– Dallas 1985, writ ref’d n.r.e.). As stated by the Supreme Court in Clear Lake City Water Authority v. Clear Lake Utilities Company, 549 S.W.2d 385 (Tex. 1977), a governmental unit “could not, by contract or otherwise, bind itself in such a way as to restrict its free exercise of these governmental powers, nor could it abdicate its governmental functions, even for a ‘reasonable time’.” Id. at 391.
emergency curative work to be performed, without the necessity of prior notice to any owner of the Benefitted Property. By performing the activities described in this paragraph, Grantor (or the then owners of any part of Grantor’s Property) shall assume no responsibility, liability, or obligation for those activities other than avoidable damage caused to the Easement Facilities by the gross negligence of its (or their) employees or agents. Each owner of any portion of the Benefitted Property shall be jointly and severally liable to Grantor (or the then owners of any part of Grantor's Property) for reimbursement of all costs incurred by Grantor, or the then owners, in performing the activities described in this paragraph, and for all consequential damages to Grantor’s Property caused by the flooding.

1240 IMPROVEMENTS - OWNERSHIP BY GRANTEE
All Easement Facilities or other improvements constructed within the Easement Property shall be and remain the property of Grantee. Upon termination of the Easement for any reason, Grantee shall remove the Easement Facilities and shall return the Easement Property to its original condition, to the extent reasonably practicable.

1241 IMPROVEMENTS - OWNERSHIP BY GRANTOR
All Easement Facilities or other improvements constructed within the Easement Property shall become the property of Grantor upon such construction, unless and to the extent Grantor may otherwise agree in writing; provided, the responsibility for the operation, maintenance, repair, upgrade or expansion of the Easement Facilities shall be and remain the obligation and responsibility of Grantee until the termination of this easement, as herein provided.

1251 IMPROVEMENTS - GRANTEE INDEMNITY FOR DESIGN AND/OR CONSTRUCTION DAMAGES
Grantee shall be solely responsible for the design and construction of the Easement Facilities constructed within the Easement Property, the operation, maintenance and repair thereof, and any damages resulting from the activities of Grantee hereunder or the use of the Easement Property or any other portion of Grantor's Property by Grantee, or Grantees employees, agents, contractors, customers, or invitees. Grantee shall indemnify Grantor, in accordance with law, against any loss and damage which shall be caused by the exercise of the rights granted under this agreement or by any wrongful or negligent act or omission of Grantee's agents, employees or contractors in the course of their employment. Nothing contained herein shall ever be construed to place upon Grantor any manner of liability for injury to or death of persons or for damage to or loss of property arising from or in any manner connected with the acts, conduct or negligence of Grantee, or its contractors, in the design, construction, or maintenance of the Easement Facilities.

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41 A primary conflict between individual property owners and public utilities is the concern of private property owners for damages to their property which may be caused by the public utility companies’ easement use across the landowner's property. As a result, some private property owners, in granting an easement for a public utility, require the public utility to indemnify the landowner against any damages that may be caused by the public utility’s use of the easement.

Public utility companies are liable for damages which they cause the property owner, and governmental entities may be liable for damages under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code Ann. §101.001, et seq. However, a governmental entity operating a public utility is in a different legal position. A governmental entity may not indemnify a private property owner against potential damages for operating a public utility unless corresponding taxing provisions are made to cover the debt obligation. The Texas Constitution, Article 11, § 7 states that no debt for any purpose shall ever be incurred in any manner by a city or county unless provision is made at the time of creating the debt for levying and collecting a sufficient tax to pay the interest on the debt and to provide at least a 2% sinking fund. Since an indemnification provision would not necessarily arise in the same year the indemnity is granted or in a specific amount so that it could be paid as an ordinary expenditure item by the governmental entity, it would have to meet the Constitutional limits in order to be valid. Stevenson v. Blake, 113 S.W.2d 525 (Tex. Comm’n App. 1938, opinion adopted).

Therefore, the Texas Constitution does not permit a governmental entity to indemnify a private party against a contingent liability because the parties making the contract could not at that time determine when the governmental entity would become obligated or the extent of the obligation. An indemnification provision in a contract or an easement document granted to a governmental entity is void because it violates the Constitution. T.& N.O.R.R. Co. v. Galveston County, 169 S.W.2d 713 (Tex. Comm’n App. 1943, opinion adopted).

This interpretation has been specifically applied to contracts with governmental entities attempting to indemnify landowners regarding completion of water and wastewater utility mains. Garth Company v. Jefferson County, 587 S.W.2d 64 (Tex. Civ. App.– Beaumont, 1979, no writ).
1252 IMPROVEMENTS - GOVERNMENTAL RESPONSIBILITY
To the extent allowed by the Constitution and the laws of the State of Texas, Grantee assumes the entire responsibility for the construction and maintenance of the Easement Facilities to be constructed in the Easement Property, and nothing contained herein shall ever be construed to place upon Grantor any manner of liability for injury to or death of persons or for damage to or loss of property arising from or in any manner connected with the acts, conduct, or negligence of Grantee in the construction and maintenance of the Easement Facilities.

1255 IMPROVEMENTS - CONSTRUCTION CONTRACT WITH INDEMNITY
Grantee agrees that any contract executed by Grantee after the [Effective] Date of this Easement for the construction of Easement Facilities shall contain a provision pursuant to which the contractor shall defend, indemnify, and hold Grantor harmless from and against any and all liability, cost, expense, cause of action or other claim whatsoever for injury to or death of persons or for damages to or loss of property arising from or in any manner connected with the construction of the Easement Facilities.

1257 IMPROVEMENTS - INSURANCE BY CONTRACTOR
Grantee agrees to name Grantor as additional insureds on all liability or other insurance policies to be provided to Grantee by its contractors for the construction of the Easement Facilities contemplated to be constructed in the Easement Property, and to furnish Grantor a copy of all such policies.

1260 IMPROVEMENTS - REQUIRED COMPLETION - LIEN TO SECURE 42
Grantee shall construct or cause to be constructed the Easement Facilities, at its sole cost and expense, in accordance with the applicable ordinances, rules, regulations and requirements of the City of __ and all federal and state laws and regulations. Grantee shall use its best, good faith and diligent efforts to obtain approval of engineering plans for the Easement Facilities as promptly as reasonably possible after the [Effective] Date of this Agreement. All costs, fees and expenses incurred in connection with the preparation and processing of such plans for approval shall be paid by Grantee.

Within ___ days after receipt of all necessary approvals of the plans for the Easement Facilities, Grantee shall commence construction of the Easement Facilities, and shall diligently and continuously proceed to cause the Easement Facilities to be completed as promptly as reasonably practicable thereafter, but in no event later than ___ months after the date of the commencement of the construction of the Easement Facilities; provided, such ___-month period shall be extended on a day-for-day basis for any delays due to strikes, riots, adverse weather, acts of God, shortages of labor or materials, national emergencies, acts or the public enemy, governmental restrictions, laws or regulations, or any other cause or causes, whether similar or dissimilar to those enumerated herein, beyond Grantee's reasonable control. The date the Easement Facilities shall be deemed to be completed shall be the earlier of: (a) the date that the City issues a final letter of acceptance or compliance, or (b) the date the City issues a conditional letter of acceptance or compliance or has otherwise released any engineering or administrative hold on the issuance of permits required for the construction and occupancy of buildings on lots within the Benefitted Property.

If the owner of the Benefitted Property fails to commence or complete construction of the Easement Facilities within the time periods therefor as set forth above, Grantor (or the then owner of any part of Grantor's Property) shall have the right to cause the construction of the Easement Facilities to be commenced and/or completed. If Grantor (or the then owner of any part of Grantor's Property) elects to complete the construction of the Easement Facilities, the owner of the Benefitted Property shall reimburse Grantor (or the then owner of any part of Grantor's Property) for the actual, out-of-pocket costs or expenses incurred in so constructing the Easement Facilities within ___ days after delivery to the owner of the Benefitted Property of a notice making demand therefor, which notice shall include the

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42 This sort of retained control over the Easement Facilities, even without the lien provision, will not be legally effective in connection with governmental utilities functions. A municipality cannot contract away, surrender, or bargain away the exercise of a governmental function. Pittman v. City of Amarillo, 598 S.W.2d 941, 945 (Tex. Civ. App.– Amarillo 1980, writ ref'd n.r.e.); City of Farmers Branch v. City of Addison, 694 S.W.2d 94, 95 (Tex. App.– Dallas 1985, writ ref'd n.r.e.). Any contract by which a party intends to impose its will on the operation and maintenance of a governmental function by a city or to embarrass or control the city’s legislative powers and duties regarding the same is void. Cibolo Creek Municipal Authority v. City of Universal City, 568 S.W.2d 699, 702-03 (Tex. Civ. App.– San Antonio 1978, writ ref’d n.r.e.).
The right to maintain easement improvements includes the right to rebuild lines or roadways in whatever manner is authorized by the easement. Lower Colorado River Authority v. Ashby, 530 S.W.2d 628 (Tex. Civ. App.– Austin 1975, writ ref'd n.r.e.). In the absence of language specifically negating it, the courts presume that the parties contemplated changes in the use of the servient estate by the normal development and the use of the dominate estate. City Public Service Bd. of San Antonio v. Karp, 585 S.W.2d 838, 841 (Tex. Civ. App.– San Antonio 1979, no writ).

As technology and conditions change, the easement holder may adapt the easement improvements and use different means to fulfill the same purpose for which the easement was granted. City Public Service Bd. of San Antonio v. Karp, 585 S.W.2d 838, 841 (Tex. Civ. App.– San Antonio 1979, no writ).

Although the easement holder may hold the right to improve the easement area, unless the grant states otherwise, the easement holder has no obligation to improve the easement area. West v. Giesen, 242 S.W. 312 (Tex. Civ. App.– Austin 1922, writ ref’d). However, once improvements are installed, even though they are used jointly between the easement holder and the servient estate owner, the expenses of maintenance and repair will normally be the sole responsibility of the easement holder. Briones v. Solomon, 769 S.W.2d 312 (Tex. App.– San Antonio 1989, writ denied). The easement holder will have the duty to make repairs even for damage done inadvertently by the servient estate owner if the damage was caused by the easement holder's failure to adequately maintain the improvements. For example, if an easement holder is obligated under the conveyance instrument to have its pipeline buried 48 inches below the surface, and the servient estate owner ruptures the pipeline with a plow at a depth of 22 inches, the servient estate owner has the duty to maintain its easement and is responsible for damages to the easement improvements proximately caused by its failure to adequately maintain. Mapco, Inc. v. Ratliff, 528 S.W.2d 622 (Tex. Civ. App.– El Paso 1975, writ ref’d n.r.e.).
or repairs to be performed, completed or made at any time after the expiration of ____ days after written notice to the owner of the Benefitted Property of such failure. Notwithstanding the foregoing, at any time, in the event immediate maintenance or repairs are required from reasons creating a hazardous situation, are required for the use or occupancy of the any part of the Owner’s Property, or are required by the City or any other governmental authority with jurisdiction over the Easement Facilities or any part of Grantor’s Property, the owner of any part of Grantor’s Property shall have the right to cause the required emergency maintenance or repairs to be performed, completed or made without the necessity of prior notice to the owner of the Benefitted Property. By performing the activities described in this paragraph, Grantor (or the then owners of any part of Grantor’s Property) shall assume no responsibility, liability, or obligation for those activities other than avoidable damage caused to the Easement Facilities by the gross negligence of its (or their) employees or agents. Each owner of any portion of the Benefitted Property shall be jointly and severally liable to Grantor (or the then owners of any part of Grantor's Property) for reimbursement of all costs incurred by Grantor, or the then owners, in performing the activities described in this paragraph.

1316 MAINTENANCE - USE OF ADDITIONAL EASEMENT AREA
Grantee has the right to use the Additional Easement Area as may be reasonably necessary from time to time during work to construct, maintain, repair, repair, or remove the Easement Facilities within the Easement Property.

1318 MAINTENANCE - RECIPROCAL ACCESS EASEMENT
All access ways, driveways, and parking areas located on the Easement Properties must be maintained at a level of appearance and utility consistent with the highest industry standards then prevailing for similarly used properties in the market in which the Benefitted Properties are located. Each Grantor will be solely responsible for the costs of maintaining the access ways, driveways, and parking lots located on that Grantor's Property. If a Grantor does not perform the required maintenance, then any other owner or tenant of any Benefitted Property, after giving the nonperforming Grantor ___ days’ written notice, will have the right to perform the maintenance and receive reimbursement from the nonperforming Grantor. Reimbursement will be payable on demand and include the costs of the maintenance, plus interest at the highest rate permitted by law (or if no maximum rate is prescribed by law, at the rate of 18 percent per year).

1320 MAINTENANCE - RIGHT TO CLEAR VEGETATION
Grantee may, from time to time, trim, cut down, and clear away any and all trees and brush now or hereafter located within the Easement Property and may trim, cut down, and clear away any trees within ___ feet of either side of the Easement Property which now or hereafter, in the reasonable opinion of Grantee, may be a hazard to the Easement Facilities or which may otherwise interfere with the exercise of Grantee's rights hereunder; provided, however, that all trees which Grantee is hereby authorized to cut and remove, if valuable for timber or firewood, shall continue to be the property of Grantor, but all tops, lops, brush and refuse wood shall be removed by Grantee.

1330 MAINTENANCE - PRO-RATA SHARE
After completion of the construction of the Easement Facilities, each of the owners of any part of the Benefitted Property shall each be responsible for such owner’s Pro-rata Share (as hereinafter defined) of the costs incurred for the maintenance, operation, repair, and compliance with all laws, regulations and ordinances affecting the Easement Facilities, including all regular and routine maintenance and repairs as well as Emergency Maintenance and Repairs, as provided in this Agreement. For purposes of this Agreement, each Benefitted Property owner’s “Pro-rata Share” of the Maintenance Costs shall be a percentage of such maintenance costs, the numerator of which percentage is the number of acres contained with such owner's Lot and the denominator of which is the total number of acres contained within all of the Benefitted Property. Each owner of any part of the Benefitted Property shall pay such owner's Pro-rata Share of the maintenance costs within ____ days after receipt of notice of the total amount of the maintenance costs from the party incurring the maintenance costs as provided in this agreement, which notice shall include copies of invoices, statements, paid receipts or other evidence of the Maintenance Costs.

1350 MAINTENANCE - RESTORATION
Upon completion of any maintenance, repairs or other subsequent work within the Easement Property, Grantee shall promptly repair any material damage to the Easement Property, the Additional Easement Area, and/or any other portion of Grantor’s Property caused by such work so as to restore the Property to substantially the same condition it was in prior to commencement of such maintenance, repairs, or other work.
MAINTENANCE - LIEN TO SECURE

In addition to any other rights and remedies to which any party may be entitled, at law or in equity, Grantee hereby grants and imposes on and against the Benefitted Property a lien to secure payment of the maintenance costs under the terms of this agreement and for the payment of any costs incurred in enforcing the payment of such maintenance costs, including reasonable attorney’s fees. This lien shall be always subordinate to any purchase-money or improvements lien held by any third-party lender. A party entitled to reimbursement for the maintenance costs shall be authorized to enforce its lien through non-judicial foreclosure pursuant to Property Code, Chapter 51, as the same may be amended from time to time.

Grantee, on behalf of itself and the future owners of any part of the Benefitted Property, hereby expressly grants to the party actually incurring maintenance costs hereunder a power of sale, through a trustee designated in writing by the party entitled to receive reimbursement, in connection with any such liens. However, prior to any foreclosure under the terms of this agreement, the owner of any part of the Benefitted Property subject to foreclosure and any lienholder with a lien against such part of the Benefitted Property shall be entitled to 30 days written notice of intent to foreclose, sent to the owner of such part of the Benefitted Property in accordance with the notice provisions herein set forth. Any party receiving notice shall have the right to cure any such default during such 30-day notice period.

Grantee hereby covenants, and each purchaser of any part of the Benefitted Property, by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, shall be deemed to have covenanted and agreed to pay the Pro-rata Share of maintenance costs as provided herein and to have accepted such part of the Benefitted Property subject to the liens and obligations herein provided. Any party entitled to enforce said liens shall have the power to subordinate the aforesaid liens to any other lien. A party entitled to receive any payment secured by the liens hereby granted may prepare a written Notice of Lien setting forth the amount of the unpaid indebtedness, the name of the owner of the part of the Benefitted Property covered by such lien and a description of such part of the Benefitted Property. Such Notice of Lien may be recorded in the office of the County Clerk of [County] County, Texas, and such lien shall attach with the priority above set forth from the date that such indebtedness became delinquent.

Notwithstanding anything contained herein to the contrary, each owner of any part of Grantor’s Property or the Benefitted Property shall be solely responsible for the cost of repairing any damage to the Easement Facilities or to the Additional Easement Area caused by such owner or such owner’s contractors, tenants, employees or invitees; and each such owner shall defend, indemnify and hold harmless the other owners of land within Grantor’s Property and the Benefitted Property from and against any and all losses, claims, demands, and expenses incurred by or asserted against such other owners and such other owner’s land from and against any liens, as a result of any intentional act or any negligent act or omission on the part of the indemnifying owner or such owner’s contractors, tenants, employees, invitees or guests with respect to the Easement Facilities and the Easement Property.

5. Gates and Fences.

REMOVAL AND REPLACEMENT OF FENCES BY GRANTEE

For initial construction of the Easement Property improvements, Grantee has the right to open and/or relocate any fences currently within the Easement Property which would interfere with the Grantee's reasonable use of the Easement Property, in order to construct the road and related facilities or in order for the [road] to continue onto other lands or easements owned by Grantee and adjacent to the Easement Property. Each passage opened in a fence in order for the [road] to continue onto other lands will be replaced, at Grantee’s expense, with a steel gate and permanent supporting structures. Any fences removed or relocated by Grantee must be replaced by fencing of equal or better quality and type for the purposes for which the fences are used, at a place nearest to the prior location of the existing fence that does not interfere with the use of the Easement, at Grantee’s sole expense.

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46 Whether an easement holder has a right to a roadway free from gates and bars depends upon the terms of the grant, its purpose, the nature and situation of the property, and the manner in which it is used. Gerstner v. Wilhelm, 584 S.W.2d 955, 958 (Tex. Civ. App.– Austin 1979, writ dism’d). An easement granting “free and uninterrupted use, liberty, and easement of passing...” granted the right of passage free of gates and fences. Id. However, the reasonableness of a locked gate when the servient estate owner offers keys to the easement holder is an issue for the fact finder. Roberts v. Allison, 836 S.W.2d 185 (Tex. Civ. App.– Tyler 1992, writ denied).
1410 OBSERVANCE OF GATE COURTESIES
Grantee will be diligent in keeping all gates across the Easement Property closed.


1510 TERMINATION - UPON OPENING OF PUBLIC ROADWAY ACCESS
Upon the construction and opening of a public road that abuts any part of the Benefitted Property so as to permit reasonable access to the Benefitted Property from the public road, this easement shall terminate. Access is reasonable if it is not “materially and substantially denied,” as defined in the Texas laws of eminent domain.

1530 TERMINATION - OPTION OF REPURCHASE
In addition to, and without limiting the generality of, the foregoing, in the event the construction of the Easement Facilities on the Easement Property is not commenced within ___ years after the [Effective] Date of this agreement, and diligently and continuously pursued to completion as provided herein, Grantor shall have the option, and Grantee does hereby grant to Grantor an option, to repurchase the easement rights in the Easement Property for an amount equal to $____.00, to be paid in cash at closing. Grantee covenants and agrees that in the event Grantor exercises such option to repurchase the easement rights in the Easement Property, Grantor shall provide Grantee with a written Termination Agreement, within 30 days after written notice from Grantor of Grantor's exercise of such option. In the event this Easement agreement is terminated under the provisions hereof, it is expressly understood and agreed that the covenants, agreements and restrictions set forth herein shall automatically terminate and shall be of no further force and effect.

1550 ABANDONMENT - GENERAL
Notwithstanding the perpetual character of this Easement, if all or any portion of the [utility line] [drainage channel] [railroad spur] is abandoned, or shall cease to be used for a period of ___ consecutive years [months], this easement shall automatically cease and revert to, and re-vest in, Grantor or Grantor's successors or assigns, or the future owners of Grantor's Property, as fully and completely as if this document had not been executed and such portion shall thereafter be released of any easement, rights and privileges hereby granted.

1551 ABANDONMENT - ONE YEAR
Notwithstanding the perpetual character of this Easement, if the Easement Facilities are abandoned by Grantee, are ceased to be used for a period of one year, or are removed from the Easement Property by Grantee, then in any such event, the easement, rights and privileges granted hereby shall automatically cease, said easement and rights shall terminate, and the Easement Property shall be released of and from, and title to the Easement Property shall revert to and re-vest in Grantor or Grantor's successors or assigns, free and clear of the easement, rights and privileges granted hereby as fully and completely as if this easement had not been executed.

1554 ABANDONMENT - NOTICE OF TERMINATION
In the event the use of any portion of the Easement Property for the Easement Facilities is discontinued as the result of the relocation or removal of the Easement Facilities or otherwise, or in the event the use of any portion of the Easement Property for the Easement Facilities is not used by Grantee for a period of ___ [months] [years], the Easement shall automatically terminate as to such portion of the Easement Property. In the event of such termination, the filing in the Real Property Records of [County] County, Texas, of an Notice of Termination executed by Grantor shall constitute conclusive evidence of the termination of the Easement granted herein. Thereafter, such portion of the Easement Property shall be released of and from, and title to such portion of the Easement Property shall revert to and re-vest in Grantor or Grantor’s successors or assigns, or the then owners of the property in which such portion of the Easement Property is located []; provided, the foregoing shall not affect the right of Grantee thereafter to locate, relocate or re-establish the Easement Facilities within the Easement Property on and subject to the Terms hereof.

47 The use of the phrases “continuous use” or “discontinuous use” are not recommended, without special definition, which is more easily avoided. A use is “continuous” if no further act of the grantor is necessary to its continuous exercise; i.e., neither the grantor nor anyone acting on the grantor’s behalf will have to perform any act in order that the grantee may obtain the benefit of the alleged easement. Drye v. Eagle Rock Ranch, Inc. 159 Tex. 321, 364 S.W.2d 196 (1962). A “discontinuous” use is one which requires some human action to complete. Howell v. Estes, 71 Tex. 690, 12 S.W. 62 (1888).
7. Rights of Enforcement.

1610 ENFORCEMENT - EQUITABLE REMEDIES
If there is any breach or threatened breach of this Easement by any party or their successors or assigns, and the default or threat continues after the claiming party gives the defaulting party notice of the claim of default and a reasonable opportunity to cure the default (if the default is capable of being cured), then the claiming party may enforce the terms of this Easement by restraining order and by temporary and permanent injunction, prohibiting such breach and commanding the offending party to comply with all of the terms of the Easement. Restraining orders and injunctions will be obtainable upon proof of the existence of any breach or threatened breach, and without the necessity of proof of inadequacy of legal remedies or irreparable harm, and shall be obtainable only by the parties hereto or those benefitted hereby; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

1620 ENFORCEMENT - BY OWNERS OF GRANTOR’S REMAINING PROPERTY
The obligations of Grantee under the Terms of this agreement are covenants running with the land of the Benefitted Property, and shall inure to the benefit of, and be enforceable by, Grantor and Grantor's successors and assigns; the owners of all or any part of Grantor’s Property.

1621 ENFORCEMENT - BY GRANTOR AND SUCCESSORS WITH EXPRESS ASSIGNMENT
The obligations of Grantee under the Terms of this agreement are covenants running with the land of the Benefitted Property, and shall inure to the benefit of, and be enforceable by, Grantor personally, and Grantor’s successors and assigns, but shall not be for the benefit of, or be enforceable by, any subsequent owners of all or any part of Grantor's Property unless a written assignment of such enforcement rights is executed by Grantor and filed for record in the Office of the County Clerk of [County] County, Texas.

1630 ENFORCEMENT - REVERSION
In the event of and upon any violation or non-observance of the Terms and conditions set out in Section ___ hereof, this conveyance shall be null and void. All right, title and interest of Grantee in the Easement Property shall automatically terminate and be of no further force and effect, and title to the Easement Property shall then and there wholly and absolutely and automatically revert and be vested in Grantor or its successors and assigns without the necessity of re-entry or suit. By its acceptance hereof, Grantee agrees upon such termination and reversion to convey any interest it may have in the Easement Property to Grantor, or its successors and assigns, by written instrument in recordable form; provided that such an instrument shall not be required for the termination of all of Grantee's interest in the Easement Property and the automatic reversion of title to Grantor, or its successors and assigns; and provided further, that the recording of an affidavit executed by Grantor, or its successors and assigns, stating that such termination and reversion has occurred (and the reason for such termination and reversion) shall be sufficient to confirm reversion of title to the Easement Property in Grantor, or its successors and assigns.

8. Attorney’s Fees.

1640 ENFORCEMENT - ATTORNEY’S FEES - LOSER PAYS
Any party who is the prevailing party in any legal proceeding against any other party brought under or in connection with this Agreement or the subject matter hereof, is additionally entitled to recover reasonable attorney’s fees, expert fees, and all other litigation expenses.

9. Effect of Waiver or Consent.

1670 ENFORCEMENT - NO EXTENDED WAIVER OR CONSENT
No waiver or consent, express or implied, by any party to this Easement agreement of any breach by any party in the performance by such party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach in the performance by such party of the same or any other obligations of such party hereunder. Failure on the part of a party to complain of any act of any party or to declare any party in default, irrespective of how long such failure continues, shall not constitute a waiver by such party of its rights hereunder until the applicable statute of limitation period has run.

1710  GENERAL PROVISIONS - BINDING EFFECT - EASEMENT APPURTE NANT
This agreement binds and inures to the benefit of the parties and their respective heirs, successors, and permitted assigns.

1730  GENERAL PROVISIONS - EXECUTED COUNTERPARTS
This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

1735  GENERAL PROVISIONS - FURTHER ASSURANCES
Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

1740  GENERAL PROVISIONS - CHOICE OF LAWS
This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

1745  GENERAL PROVISIONS - LEGAL CONSTRUCTION
If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

1750  GENERAL PROVISIONS - RECITALS
Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

1760  GENERAL PROVISIONS - TIME
Time is of the essence. Unless otherwise specified, all references to “days” mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

1770  GENERAL PROVISIONS - NOTICES
Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.

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48 Most Easement documents are no more than two pages long, plus exhibits for legal descriptions. However, easements, by their nature, can contain extensive contract-type provisions. If a particular easement agreement involves extensive continuing obligation provisions, it may be useful to add contract, boilerplate, general provisions.
1790 GENERAL PROVISIONS - AMENDMENT

This Easement agreement may be amended, modified or terminated, in whole or in part, only by the written agreement of the owners of all parts of the Easement Property and all parts of the Benefitted Property.

Grantor: ___________________________  Grantee: ___________________________

Parties’ Acknowledgments:

1910 TENANT’S CONSENT AND SUBORDINATION

The Tenant, being the holder of a leasehold interest in the Grantor’s Property or a portion thereof affected by the easement use of the Easement Property, does hereby consent to this Easement Agreement, its contents, and to the recording of same. The Lien Holder subordinates its leasehold rights of exclusive possession and use of the Lease Premises, and defined in the Lease Agreement to the easement rights and interests of the Grantee, and Grantee’s successors and assigns.

This consent shall not be construed or operate as a release or modification of the terms of the Lease Agreement, or any part thereof, except as to Tenant's consent to the conveyance of the easement interests.

Executed this _____ day of ___________, 200__.

LIEN HOLDER:

By: _______________________________

Its: _____________________________

1920 LIEN HOLDER’S CONSENT AND SUBORDINATION

The undersigned, ____________________, being the owner and holder of an existing Deed of Trust and/or Vendor's Lien upon and against the Easement Property described herein above, such Deed of Trust being recorded in Volume ___, Page ___ of the Real Property Records of [County] County, Texas, mortgagee and lien holder does hereby consent to this Easement Agreement, its contents, and to the recording of same. The Lien Holder subordinates its lien(s) to the rights and interests of the Grantee, and Grantee's successors and assigns, such that a foreclosure of the lien(s) shall not extinguish the easement rights and interests.

This consent shall not be construed or operate as a release of said Deed of Trust or Liens owned and held by the undersigned, or any part thereof, as to the Grantor's Property described in the Deed of Trust.

Executed this _____ day of ___________, 200__.

LIEN HOLDER:

By: _______________________________

Its: _____________________________

49 If either party to the easement needs to increase or restrict the current permitted uses, it may not be done unilaterally. Both parties must consent, either explicitly or implicitly. *Austin Lake Estates Recreation Club, Inc. v. Gilliam*, 493 S.W.2d 343 (Tex. Civ. App.– Austin 1973, writ ref’d n.r.e.).
III. MODIFYING PRIOR WRITTEN EASEMENTS

Many written easement forms focus on the title conveyance nature of an easement and give little regard to the ongoing relationship between the Easement Holder and the Owner of the underlying easement area. As time goes by, and the practicalities of easement operation come to the consciousness of the parties, it is often helpful to clarify the ongoing relationship between the parties by express agreement. Usually, one issue brings the matter to an attorney's office for drafting, but while you are working with your client, look at the other issues that might be amended in the same modifying document. Consider all of the issues that might need an express understanding of the relationship, based upon a comprehensive review of possible issues.

A. Altering Permitted Uses

If the easement or right-of-way granting instrument states only a general use, the easement owner may make any reasonable use of the easement area within the terms of the broad grant. This even means that from time to time the easement holder may expand the degree of use within the easement area, so long as the use is still within the general purpose stated. For example, a company acquiring a pipeline easement may install a larger pipeline within the easement area without violating the terms of the original grant. Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 601 (Tex. Civ. App.– El Paso 1959, writ ref’d n.r.e.).

When a use is not expressly limited to a particular volume or size, or to a particular number of lines or support structures, the easement holder may alter the specific use of the easement area if it is within the general description provided. So long as there is no change in the character of the easement use granted, the landowner’s rights are not adversely affected. Perry v. City of Gainsville, 267 S.W.2d 270, 273 (Tex. Civ. App.– Fort Worth 1954, writ ref’d n.r.e.).

On the other hand, if the easement sets forth express limitations within the granting instrument, the easement holder is bound by those limitations. Kothe v. Harris County Flood Control District, 306 S.W.2d 390 (Tex. Civ. App.– Houston 1957, no writ).

If the permitted uses are expressly limited, a government authority or an entity with eminent domain authority can expand its use only through a purchase of additional use rights, either through voluntary purchase or through eminent domain. Phillips Natural Gas Co. v. Cardiff, 823 S.W.2d 314, 318 (Tex. App.– Houston [1st Dist] 1991, writ denied).

If either party to the easement needs to increase or restrict the current permitted uses, it may not be done unilaterally. Both parties must consent, either explicitly or implicitly. Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343 (Tex. Civ. App.– Austin 1973, writ ref’d n.r.e.). Implicit approval of a party to an easement may be shown by a pattern of conduct acquiescing to the modification. Fort Quitman Land Co. v. Mier, 211 S.W.2d 340, 343 (Tex. Civ. App.– Eastland 1948, writ ref’d n.r.e.).

Of course, the better practice is to memorialize the modification agreement in writing and file the agreement into the land records. The modification of easement agreement should state the names and addresses of the servient estate owner, the easement holder, and any lien holders who might foreclose on either the servient estate or the easement interest. All of these parties should consent to the modification in writing to insure its enforceability in perpetuity. The agreement should also state valuable consideration to all parties to insure its enforceability. The original easement agreement or circumstances giving rise to the easement should be referenced and the intended use modification set out specifically. Finally, the parties may wish to ratify the unmodified portions of the easement agreement.

B. Altering Legal Status

When examining land surveys of developed real estate, it is fairly common to find used ways of access or existing utility lines which are not memorialized by written easements. Similarly, in developing land or obtaining improvement loans, existing easement agreements may be found to be inferior in the chain of title and subject to being cut-off by foreclosure of pre-existing liens. In these situations, it is obviously important to the easement holder to insulate the easement rights from being cut-off. It is amazing how many public utility companies acquire easements and install substantial improvements without accounting for pre-existing liens on the servient estate.

Counsel for any prospective easement holder or for the easement holder’s mortgagee should insure that pre-existing liens on the servient estate are subordinated to the easement rights. If a non-subordinated lien is foreclosed, the easement holder will be left with only possible, tenuous claims of easement by quasi-estoppel.
C. Altering Location

There are many reasons why parties may wish to modify an existing easement or right-of-way. The landowner may wish to move the easement in order to construct buildings or other improvements on the part of the property now occupied by the easement. The easement holder may want to relocate utility lines or roadway to a more convenient location.

The location of the easement may not be changed by either the easement owner or the owner of the subject tract without the consent of the other. Meridith v. Eddy, 616 S.W.2d 235 (Tex. Civ. App.– Houston [1st Dist] 1981, no writ). If the other party does not consent, the courts generally will not force a relocation of an easement. For example, if a roadway or utility easement becomes subject to periodic flooding, the easement owners only remedy is to restore the old easement instead of relocating it, even if restoration is difficult and relocation is more practical, convenient, and reasonable. Sisco v. Hereford, 694 S.W.2d 3 (Tex. App.– San Antonio, 1984, writ ref’d n.r.e.). On the other hand, implicit approval of a party to an easement relocation may be shown by acquiescence to the modification. Fort Quitman Land Co. v. Mier, 211 S.W.2d 340, 343 (Tex. Civ. App.– Eastland 1948, writ ref’d n.r.e.).

A landowner may not complain of a relocation of a right-of-way if the landowner is responsible for forcing the relocation. For example, if the landowner obstructs the use of the roadway easement, and the easement owner is forced to use an altered route across the

D. Effectively Executing the Amending Instrument

If at the time of the modification, a servient estate is owned by co-owners in common, it is critical to obtain the consent of all of the co-owners. The well-settled general rule is that each owner in a co-tenancy acts for him/herself alone, and no one is agent for the others or has any authority to bind other co-tenants merely because of the co-tenancy relationship. Elliott v. Elliott, 597 S.W.2d 795 (Tex. Civ. App.– Corpus Christi 1980, no writ); Willson v. Superior Oil Company, 274 S.W.2d 947 (Tex. Civ. App.– Texarkana 1954, writ ref’d n. r. e.); Little v. Williams, 272 S.W.2d 409, 413 (Tex. Civ. App.– Austin 1954, writ ref’d n.r.e.). Absent consent or subsequent ratification by the other co-tenants, the general rule is that one co-tenant cannot impose an easement upon the common property in favor of third persons. See Lee v. Phillips Petroleum Co., 329 F. Supp. 579 (S.D. Tex.1971).

E. Form Modification and Ratification of Easement

[CORRECTION] MODIFICATION and RATIFICATION OF EASEMENT

Date of this Instrument:

Effective Date:

ORIGINAL EASEMENT INSTRUMENT:

Dated:

Original Grantor:

Original Grantee:

Recorded in: That Certain “Easement Agreement” dated __, Vol. __, Page ___, Official Public Records of __ County, Texas

Original Easement Property (the “servient estate”): 50

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50 While it is possible to simply reference with legal description set out in the original instrument, it is a good “flag” to title examiners to state the legal description, at least in summary form, e.g. “The certain 106 acre tract out of the Noah Smithwick Survey No. 180, Navajo County, Texas, described as the “Easement Property” in the Original Easement Instrument.”
While it is possible to simply reference with legal description set out in the original instrument, it is a good “flag” to title examiners to state the legal description, at least in summary form, e.g. “The certain 4.5 acre tract out of the Noah Smithwick Survey No. 180, Navajo County, Texas, described as the “Dominant Estate” in the Original Easement Instrument.”

Benefitted Property (the “dominant estate”): 51

Current Easement Holder:
Easement Holder’s Address:
(including county)

Current Owner of the Easement Property:
Grantee's Address:
(including county)

Lienholder (or Tenant) in Easement Property:
Lienholder's (or Tenant’s) Address:

Easement Property (the “servient estate”):

Terms of Modification and Ratification of the Original Easement Instrument:

[List all changes, addition, and deletions.]

The Easement Holder, its successors and assigns, and the Owner of the Easement Property, its successors and assigns agree to continue the Easement according to the terms of modification and ratify the Original Easement except as modified hereby.

When the context requires, singular nouns and pronouns include the plural.

[Name], Easement Holder

[Name], Easement Holder

[Name], Owner of the Easement Property

[Name], Owner of the Easement Property

Acknowledgments

AFTER RECORDING, RETURN TO:

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IV. TERMINATING EASEMENTS
A. Release of Easement

The most straightforward manner for terminating an easement is for the easement owner to sign and file for recording a Release. Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343 (Tex. Civ. App.–Austin 1973, writ ref’d. n.r.e.).

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RELEASE OF EASEMENT

DATE:

51 While it is possible to simply reference with legal description set out in the original instrument, it is a good “flag” to title examiners to state the legal description, at least in summary form, e.g. “The certain 4.5 acre tract out of the Noah Smithwick Survey No. 180, Navajo County, Texas, described as the “Dominant Estate” in the Original Easement Instrument.”
While it is very common for an Easement Holder to provide a written release of an easement, if the easement agreement imposed significant obligations upon the Easement Holder for repair, maintenance, ad valorem taxes, or insurance, the Easement Holder should also seek a release from the Owner of the servient estate of the Easement Holder’s past or future obligations under the terms of the Easement Agreement.

EASEMENT: [Describe by purpose and the Benefitted Property (dominant estate)]

The Easement is described in the following documents, recorded in: [Volume and Page or Document No. as recorded in the Official Public Records of the County where the prior instrument was recorded.]

Easement Holder:
Mailing Address:
(including County)

Property Subject to the Easement: [Describe the easement area either by reference to the previously recorded easement documents or by reference to all rights of the Benefitted Property in the use of any portion of the servient estate].

The Easement Holder hereby releases the Property Subject to the Easement from the easement agreement and all other rights which the Easement Holder or the Benefitted Property may have in the Property Subject to the Easement.

Further, the Easement Property Owner, being the current Owner of the Property Subject to the Easement, hereby acknowledges the termination of the Easement Agreement and releases the Easement Holder and its officers, agents, successors and assigns from any past, present, or further obligations for maintenance, repair, insurance, or any other obligations which the Easement Holder has had under the terms of the Easement Agreement. 52

When the context requires, singular nouns and pronouns include the plural.

[Name], Easement Holder [Name], Easement Holder

[Name], Easement Property Owner [Name], Easement Property Owner

Acknowledgments

AFTER RECORDING, RETURN TO:

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B. Affidavit of Interests in Real Property Title
1. When an Affidavit may be Necessary
   Private easements may be terminated by several means other than formal release by the Easement Holder:

   • Operation of law under certain circumstances, such as:
     a. Foreclosure cuts off an intervening easement. If a deed of trust lien attached to property prior to the conveyance of an easement, the foreclosure of the deed of trust lien cuts off the later easement conveyance. The purchaser at the Trustee’s sale, buys the property free of the easement. Motel Enterprises, Inc. v. Nobani,

52 While it is very common for an Easement Holder to provide a written release of an easement, if the easement agreement imposed significant obligations upon the Easement Holder for repair, maintenance, ad valorem taxes, or insurance, the Easement Holder should also seek a release from the Owner of the servient estate of the Easement Holder’s past or future obligations under the terms of the Easement Agreement.
b. Easements “in gross” are personal to the easement holder, unless expressly provided otherwise. If the easement holder dies, the easement automatically terminates, because easements in gross are not transferable. *Drye v. Eagle Rock Ranch, Inc.*, 159 Tex. 321, 364 S.W.2d 196 (Tex. 1962).

c. Merger of title terminates an easement appurtenant. When the landowner purchases the easement rights or the easement holder purchases the land which the easement crosses, the legal interests are said to “merge.” Unless there is a clear expression of an intention to the contrary, the easement terminates upon merger of the property rights. *Parker v. Bains*, 194 S.W.2d 569 (Tex. Civ. App.– Galveston 1943, writ ref’d n.r.e.).

d. Impossibility of the Easement Purpose terminates the easement. An easement will terminate when the original purpose for which it was granted becomes physically impossible. *Kearney & Son v. Fancher*, 401 S.W.2d 897, 907 (Tex. Civ. App.– Fort Worth 1966, writ ref. n.r.e.). For example, an easement to use a switch track to gain access to railroad cars using a particular rail line terminates when it becomes physically impossible for railroad cars to come to the switch track.

e. Loss of Necessity terminates an implied easement by necessity. An easement of access by necessity is created when a landowner sells part of his or her land and the part sold has no road access other than across the remaining parcel owned by the seller. When the purchaser of the landlocked tract acquires an alternate roadway access, the easement of necessity implied by law terminates automatically. *Sentell v. Williamson County*, 801 S.W.2d 220, 223 (Tex. Civ. App.– Austin, 1990, no writ).

- Abandonment: An easement holder may abandon an easement by non-use of the easement if the easement holder has an actual intention to abandon it. The easement holder's intention to abandon the easement must be clear from the evidence. Mere non-use of an easement will not extinguish it. *San Jacinto Sand Co., Inc. v. Southwestern Bell Tel. Co.*, 426 S.W.2d 338 (Tex. Civ. App.– Houston [14th Dist.] 1968, writ ref'd n.r.e., cert. denied 393 U.S. 1027). While it has been held that extended non-use raises a presumption of abandonment [*Dallas County v. Miller*, 252 S.W.2d 470 (Tex. Civ. App.– El Paso, 1952, writ ref'd)], there should be additional circumstances demonstrating an intention of abandonment, such as the easement becoming impossible or extremely difficult to use or the substitution of new property for the old for the specific intended use. *Adams v. Rowls*, 228 S.W.2d 849 (Tex. 1950).

- Adverse Possession: An easement may be created by adverse possession. It may also be terminated by adverse possession by the servient estate owner. *Walton v. Harigel*, 183 S.W. 785 (Tex. Civ. App.– Galveston 1916, no writ).

In these circumstances, the former Easement Holder may not be locatable or may be non-responsive to requests for a signed Release of the easement. The formal means for removing the easement’s encumbrance upon the title to the former servient estate is a suit to quiet title. *James J. Hartnett, P.C. v. City of Dallas*, 5 S.W.3d 384, 385-386 (Tex. App.– Fort Worth 1999, pet. dism’d). As a preliminary step, and to have an instrument on record for constructive notice to any interested party, it is appropriate for the servient estate owner to assert the owner’s claim to title clear of the former easement by means of an Affidavit filed in the real property records of the county in which any part of the property is located.

**Caution:** The filing of an Affidavit claiming the termination of an easement is not a substitute for obtaining a Release or prosecuting a suit to quiet title. In fact, the filing of the Affidavit represents a claim in the land title records that the real property interest which the easement represents, as held by the benefitted property, has terminated. As a result, a hostile benefitted property (“dominant estate”) holder may file suit for a declaratory judgment, confirming the validity of the easement and may also claim damages for slander of title in the easement (although slander of title requires an element of malice. *A.H. Belo Corp. v. Sanders*, 632 S.W.2d 145, 146 (Tex. 1982); *Williams v. Jennings*, 755 S.W.2d 874, 879 (Tex. App.– Houston [1st Dist.] 1998, pet. denied). It is important for the servient estate owner who believes the easement to be terminated to not simply rely on the Affidavit but to prosecute a suit to quiet title and be the party claiming attorney’s fees and damages, as applicable.

2. Form Affidavit of Easement Termination
Affidavit of Easement Termination

Date:

ORIGINAL EASEMENT INSTRUMENT:

Dated:
Original Grantor:
Original Grantee:
Recorded in:
Easement Property (the “servient estate”): 53

Benefitted Property (the “dominant estate”): 54

Easement Owner (to the best of Affiant’s knowledge):
Easement Owner’s Last Known Address:
(including county)

Current Owner of the Easement Property:
Owner’s Address:
(including county)

Lienholder (or Tenant) in Easement Property:
Lienholder’s (or Tenant’s) Address:

BEFORE ME, the undersigned authority, on this day personally appeared [Name of Affiant] (the “Affiant”), who, being by me first duly sworn, upon his/her oath, deposed that the following facts are within his/her personal knowledge and are true and correct:

1. “My name is [Name of Affiant]. I am the [ownership interest, representative capacity, or source of personal knowledge] of the Current Owner of the Easement Property, described above.

2. “The Current Owner of the Easement Property acquired the Easement Property as a portion of the real property acquired by means of that one certain Special Warranty Deed dated __ and recorded in Volume __, Page __, of the Real Property Records of __ County, Texas.

3. “After a thorough search of the records of the Current Owner of the Easement Property and of the public records of the Texas Secretary of State and the Official Public Records of __ County, Texas, it appears that the previous Easement Holder no longer exists and the last known Easement Holder is as stated above.

4. “The purpose of the Easement, as stated in the Original Easement Instrument was to provide a railroad spur access from the then-existing line of the Louisiana-Texas Railroad east of the Easement Property to the Benefitted Property.

5. “In 1997, the railroad line east of the Easement Property was abandoned by the Louisiana-Texas Railroad, and the rails and supporting base were substantially removed. Moreover, according to the Official Public Records of __

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54 While it is possible to simply reference with legal description set out in the original instrument, it is a good “flag” to title examiners to state the legal description, at least in summary form, e.g. “The certain 4.5 acre tract out of the Noah Smithwick Survey No. 180, Navajo County, Texas, described as the “Dominant Estate” in the Original Easement Instrument.”
County, the Louisiana-Texas Railroad sold and conveyed to property owners on each side of its right-of-way, most if not all of the real property formerly used for the railroad line.

6. “The railroad spur improvements previously existing in within the Easement Property have not been used at least since 1986. All of the rails are gone and the spur is no longer usable for any purpose.

7. “It is the position of the Current Owner of the Easement Property that the purpose of the Easement being now impossible, the Easement has terminated as a matter of law in 1997.

8. After diligent efforts, the Current Owner of the Easement Property has been unable to obtain a Release of the Easement for recording in the public records.”

Affiant says nothing further.

___________________________________
[Name of Affiant]

Jurat

SUBSCRIBED AND SWORN TO before me on _________________________ by [name of affiant].

___________________________________
Notary Public, State of Texas

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