

# EASEMENTS

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## NOTES

## I. INTRODUCTION

Preparation of an easement is one of the more simple services an attorney can provide, or it can become a difficult and complicated project. Many times, a simple form with the bare necessities works for the client. However, there are hidden traps for the attorney who blindly chooses a simple “fill-in-the-blank” form for every transaction.

This article will primarily address issues involving express, implied and prescriptive easements and maintenance agreements. It will also touch briefly on the statutory way of necessity (ORS 376.150). It will conclude with a summary of recent easement cases and some basic easement forms which may be adapted for your own use.

## II. DEFINITIONS

### A. Dominant Estate

The property that uses and is benefitted by the easement.

### B. Servient Estate

The property that is encumbered with the easement or “serves” the dominant estate.  
The property through which the easement runs.

### C. Easement

An easement is an interest in the land of another that entitles the owner of the interest to a limited use of another’s land.

### D. Easement Appurtenant

An easement that directly benefits a dominant property and that runs with land. If not otherwise agreed by the parties, such an easement is transferred with the dominant property, even if not mentioned in the instrument of conveyance.

### E. Easement in Gross

An easement that directly benefits an individual or entity and is not tied to a specific beneficial tract. There is a servient estate but no dominant estate. Transfer is not automatic and in most cases limited to the original holder. Utility easements that run through another’s property without benefitting a specific dominant estate are an example of an Easement in Gross.

**F. Exclusive Easement**

An easement that benefits exclusively the dominant estate and no other.

**G. Nonexclusive Easement**

An easement that may benefit other properties. In other words, a servient property owner may use the easement or grant another party an easement over the same property.

**H. Affirmative Easement**

An easement that allows the owner of the easement to conduct certain activities on the servient estate.

**I. Negative Easement**

An easement that prevents the owner of the servient estate from using his or her property in a certain manner that is otherwise lawful, because that prohibited use will adversely affect the dominant estate. Scenic and solar easements that prohibit one tract of land from building in a certain place, or building a certain height fall into this category.

**J. Implied Easement**

Is an easement that is imposed by a court, as a matter of law, by inferring the parties to a real property transaction intended that an easement be created, although they did not express it in any of the transactional documents. The rights to the easement arise out of the existence of certain facts that can be implied from the transaction.

**K. License**

Permission that conveys a personal privilege to do some act on the land of another. Is distinguished from an easement in that it is not an interest in land, and has none of the benefits or rights of an easement.

**III. CREATING EXPRESS EASEMENTS**

**A. Reservation or Grant**

A property owner can create an express easement by grant or reservation. A “grant” of an easement occurs when a property owner gives an easement to a dominant estate. For example, if a common owner of two parcels sells the parcel away from the public road and retains the front parcel that has access, such owner would grant an easement for access to the buyer of the rear parcel.

Conversely, if the same owner was selling the front parcel and keeping the rear parcel, that owner would want to “reserve” an easement for himself or herself for access over the front parcel.

A grant or reservation can be by separate instrument or within a deed. Even if a sale of property occurs concurrently with granting of the easement, it is preferable to have the easement set forth by separate instrument rather than in the deed. There are three reasons to support this method. First, any discussion regarding the scope of use or other details does not fit neatly into the deed, and a practitioner is constrained in his or her ability to set forth the detail that may be necessary. Second, though acceptance of an easement by the dominant estate would imply acceptance of the terms in most cases, it is preferable to see both parties’ signatures actually on the document, and a deed is a one-party document. A separate document is particularly important when the dominant estate owner is making express promises such as maintenance requirements. Third, the easement is much less likely to be missed by a title examiner when it is a separate document clearly providing the names of both the grantor, grantee, and descriptions of the dominant estate, the servient estate, and the easement itself.

Another reason for separating a deed from an easement is to clarify the difference between the conveyance of fee ownership (the deed) versus a nonpossessory right of use (the easement). For example, the grant of a “right-of-way” may be ambiguous, even though in most cases it is almost universally held to be a grant of an easement rather than fee title. *Cappelli v. Justice*, 262 Or 120, 496 P2d 209 (1972). The language used should be clear as to what type of interest is being transferred.

## **B. Drafting Considerations**

Some situations do not require the use of a complex and detailed easement. If the situation involves an urban-sized lot that is being partitioned for residential use and the back portion of the lot needs an easement to get to the public street, it is possible that a simple form will be sufficient. This is particularly true if both the dominant and servient parcels are now so small that further partitioning is not possible and the likelihood that any type of change of use or frequency of use will occur is quite remote. A simple “ingress and egress” form may suffice.

It is not unusual for partitioning plats and subdivision plats to contain the easement rights directly on the face of the plat. Oftentimes this easement language is drafted by the surveyor or engineer who created the plat. Great care should be taken to review this language if you are involved in the platting process, and to provide drafting instructions, and to make sure that subsequent conveyances make reference to the existence of platted easements. Similarly, PUD Declarations, and subdivision CC&R’s might contain easement language, and care should be taken

in making sure that all the formalities of easement creation are followed even though the easement might be buried in a different document.

If the subject properties are large, nonresidential, or if there is any concern regarding subsequent use, then more inquiry by the attorney is critical. This is where “people” skills are important. Get the client to talk about what is actually happening. What kind of development is acquiring the easement? What does the dominant estate expect to use the easement for? If your client is the owner of the servient estate, find out what concerns he or she might have regarding the use. Does the servient client also wish to use the easement? Are there other parcels that may use the same easement in the future?

The best thing to do is to lay out some possible scenarios for the client to consider. Remind the client that the party he or she is presently dealing with may sell the property or die. The new owner may not be the reasonable, friendly person that he or she is dealing with now.

It is important to get the language right. If the dominant estate client wants restrictions on what the servient estate party can do, then those should be stated. In *Chevron Pipe Line Co. v. De Roest*, 122 Or App 440, 858 P2d 164 (1993), the plaintiff had a petroleum pipeline easement running through defendant’s property. Long after the easement was granted, the new servient owner required fill to make the property useful. Plaintiff objected to the fill, but defendant refused to remove it. The court stated: “As Plaintiff has noted, the reasonableness of a given use is controlled principally by the language of the instrument conveying the easement, for it is that language that defines the extent of the rights granted and reserved and determines what use each party may make of the property.” *Chevron Pipe Line Co.*, 122 Or App at 446. The court went on to find that there was no language allowing the pipeline company to restrict defendant with regard to fill over the easement.

Sometimes, it becomes important to determine the physical characteristics of the parcels. In *Tooker v. Feinstein*, 131 Or App 684, 886 P2d 1051 (1994), *modified* 133 Or App 107, *rev. denied* 321 Or 94 (1995), the two properties were on a steep hill. The servient estate brought suit because the neighboring dominant estate owner had constructed a retaining wall that, though within the boundaries of the easement, caused the servient estate some difficulties with parking. Since the retaining wall was within the legal description of the easement and was necessary for the reasonable use of the easement, the court allowed the retaining wall to remain.

In both *Chevron Pipe Line* and *Tooker*, the respective dominant and servient parties wanted something that could have been dealt with in the easement document itself. The pipeline company could have insisted that no fill ever be placed over the easement; the Tookers could have reviewed

the grade of the two parcels determined that there might be a problem with the retaining wall and dealt with it when the easement was granted.

It is particularly important to find out what the parties expect regarding future use of the dominant parcel. If the dominant parcel is currently a 10-acre hobby farm, find out if your servient estate client would like to live on the road to a future 40-house subdivision. This could possibly happen if the restrictive language is not in the document to protect him or her.

The easement is a form of contract, and general drafting techniques should be employed in addition to the special provisions required by easement law. An attorneys ethical obligations also must be considered, as more often than not, both parties to the easement will approach the attorney and ask for their agreement to be written up. In almost all situations, (like in divorce cases) the parties interested are different, and the attorney should represent only one side of the easement. The other side should be referred to another attorney to review the draft. In all cases, an attorney should be mindful of the potential for conflicts of interests in easement creation.

### **C. Elements of the Easement**

Though not necessary in all cases, you should consider including the following elements in the easement document:

**1. Recitals.** Begin the easement with full recitals to detail the situation and party's intent. The recitals can be valuable later should the parties or their successors have a dispute. Fully describe the servient and dominant estates and any particular circumstances that may exist with regard to the respective properties or the purpose of the easement.

**2. Description.** The description should always be a formal, legal description. Though a map can be helpful, it is preferred to have that as an *addition to* rather than *instead of* a legal description. Particularly with utility easements, an additional 20 to 25 feet over and above the area needed for the actual utility be provided for a "working" area. If there is a larger area needed on a temporary basis for construction of the use, it is preferable to provide for both the temporary and permanent easements to minimize the impact on the servient estate and to more closely fit the intent of the parties.

**3. Type and Purpose of Easement.** This section should state whether the easement is appurtenant to the dominant parcel. In some cases, the servient parcel owner may wish to limit the portions of the dominant parcel that are benefitted. The general rule is that an easement appurtenant will continue in perpetuity unless otherwise terminated. Thus, if the easement is not intended to continue in perpetuity, a specific expiration date should be included.

**4. Exclusive/Nonexclusive.** Specify whether the easement is exclusive or nonexclusive, not only in the text but also in the *title* of the document. It is important that the dominant estate client understands that nonexclusive means that “his easement” will or could be used by others through additional grants by the servient estate owner without the dominant estate owners consent or even knowledge in some instances.

In a rural residential situation, the dominant estate may wish to push for an exclusive easement to lessen the possibility that the servient estate will subdivide the property and ruin its rural character (of course, the servient estate may be able to find alternate access and go forward with subdividing the property anyway). Also, the servient estate may wish to include some specific restrictions on uses to limit development on the dominant estate.

The nonexclusive/exclusive argument is sometimes overdone. Unless there are a large number of users, the dominant estate probably has little real reason to object to a nonexclusive easement. After all, there will be more people to share the maintenance costs. Conversely, the servient estate owner should review the situation carefully on his or her own parcel and surrounding parcels to determine if it is likely that he or she will be granting an easement over the same strip to others.

**PRACTICE TIP:** Even if an exclusive easement is granted, the servient estate may wish to reserve the use of the easement to itself in order to access portions of the servient property.

**5. Use of the Easement.** This is an important section. Again, long-range vision is necessary, and both parties need to remember that someone other than the current party may become the owner of the servient or dominant estate. Such successor may want to change the type or frequency of the use. In the absence of limiting language, the dominant estate will be given unlimited reasonable use as inferred from the intent of the parties. *Verzeano v. Carpenter*, 108 Or App 258, 815 P2d 1275, (1991) (“When an easement is granted by written instrument and is written in general terms without limitations, unlimited reasonable use is allowed.”). Though a court might later limit excessive use, the attorney for the servient estate client should at least consider and raise the issue of limitations on the allowable use.

Consideration should be given to the size and number of vehicles, as well as to the fact that possibly only one dwelling should be benefitted and that no improvements may be constructed on the easement other than the roadway. May the easement be used for commercial purposes, or personal only? May the use type change as the uses of the dominant and servient tracts change? Exploration of these issues and proper drafting with save the parties considerable disputes from

arising at a later time. It must be remembered that easements that are in perpetuity and run with the land, encumber the property *ad infinitum*, and therefore extreme care must be used in drafting so that in the year 2144 your document will not be the subject of a land dispute.

Consideration should also be given to whether or not utility or other subsurface rights are to be included. If those rights are included, describe how and when the topsoil and landscaping must be restored by the dominant estate. Will the utilities be used by just one residence, or will unlimited use of the utilities be granted? If the latter, the servient estate has given up some control over development of the adjacent dominant parcel.

**6. Indemnification.** The parties may want to have language to indemnify one party for another party's negligence or damage to the easement. Similarly, the parties may want to consider reciprocal hold harmless agreements with respect to guests, invitees, licensees, etc., who may be injured while using the easement.

**7. Insurance.** The parties may want to discuss who will have liability or other insurance protecting against natural disasters, or public liability that might harm the roadway or its users.

**8. Property Tax.** Unless the amount is quite high, it is advised that the servient estate pay the property taxes on the easement, particularly if it is nonexclusive. If necessary, make the payment for taxes by the dominant estate a *reimbursement* to the servient owner. This insures that there will be no difficulty created for the servient estate by the refusal of the dominant estate to pay the taxes when due. If the dominant estate is to reimburse the servient for the taxes, there should also be a provision that the servient estate can recover its reasonable attorney fees and costs if it has to resort to the courts to obtain that reimbursement. Most easements are not given a separate tax identification number and calculation by the county, therefore some method of calculation of the pro-rated amount of the total tax will be assigned to the easement area. This is only important however where the dominant estate pays the taxes, otherwise the easement area is already included in the tax assessment for the servient estate.

**9. Title Matters.** The dominant estate is going to want to be certain that it has all of the servient estate owners' signatures on the easement that are required to give a valid interest in the property. A title report may be appropriate to determine who should sign. Ideally, the servient estate's mortgagee should subordinate to the easement. Where the property is held in trust or by a business entity, appropriate authorization documents (minutes, certificates, etc.) should be required to avoid any later claim of lack of capacity to enter into the easement.

**10. Attorney Fees.** The parties may wish to provide that in any dispute in which an attorney needs to be hired, the prevailing party will pay the other party's attorney fees. Some consideration should be given to arbitration, as the matters of dispute in easement cases normally do not involve a large sum of money and may be best resolved by informal and inexpensive binding arbitration. The attorney fees section should also be used to clarify the attorney/client relationship by designating that the attorney drafter is doing so on behalf of one party and that the other party has been advised to seek independent counsel.

**11. Maintenance.** Unless otherwise provided in the easement, the parties who are entitled to use the easement are also required to maintain it. Thus, the dominant estate with an exclusive easement would have sole responsibility for maintaining the easement. Problems in apportioning maintenance costs, and seeing those costs are paid, arise when there are multiple users of the easement. [See Section IV for further discussion of this issue.] Suffice it to say that the more specific and clear a drafter can be as to maintenance obligations the better. Most disputes in the easement area arise out of who gets to decide how and when to maintain the area, and who has to pay for it.

**12. Recording.** All easements should be recorded. Although recording is not required to give an easement legal effect, recording gives constructive notice of the easement to third parties and purchasers of the servient property. It also resolves questions as to priority when there have been multiple easements and/or amendments or modifications to easements granted by different owners of the respective properties. Although an easement appurtenant automatically follows a transfer of the dominant estate, it is still a good practice to reference the easement in any deed conveying the dominant estate in order to ensure title insurance will be available on the easement.

#### **D. Scope of the Easement**

While the scope of an express easement is set forth within its terms, questions may arise as to the exact meaning of those terms. This is particularly true in the case of subsequent owners of the respective estates, reviewing the terms and reading into them the meaning which best suits that particular owner's position. These disputes create, or allege ambiguities which require interpretation by the court.

As with traditional contract interpretations, to resolve easement ambiguities, the court will first examine the document itself. If the terms are clear, no further analysis is required. If the court finds that a true ambiguity exists, it will examine "relevant surrounding circumstances for evidence of the original parties' intent." *Watson v. Banducci*, 158 Or App 223, 230, 973 P2d 395 (1999). A reasonableness standard is applied, unless there is some greater restriction in the document or as

evidenced by extrinsic sources. *Id.* at 231. See also, *Kell v. Oppenlander*, 154 Or App 422, 961 P2d 861 (1998). In cases where the grantor has reserved an easement, the general rule is that ambiguities are construed in favor of the grantee. *Tipperman v. Tsiatsos*, 327 Or 539, 546, 964 P2d 1015 (1998).

#### IV. ROADWAY MAINTENANCE AGREEMENTS

Maintenance agreements typically are not necessary in an exclusive easement where the servient estate is not reserving use for itself. In that case, the document creating the easement should state that the dominant parcel is responsible for all maintenance and repairs. In situations where the easement is shared, it is usually a good practice to combine the maintenance agreement with the easement document. In that case it is also a good idea to make sure that the title of the document indicates it incorporates a maintenance agreement, e.g., “Nonexclusive Easement and Roadway Maintenance Agreement.”

Road Maintenance Agreements often come after the easement, either as a settlement to a dispute, as correction of omission in the easement, or to simply set forth the agreements of the current estate owners as to how they will deal with the easement. It must be remembered that most of the easements drafted before 1950 were very general in terms and sometimes need to be supplemented with a contract for maintenance obligations.

To provide the details regarding maintenance requirements and the responsibility for doing and paying for same, the practitioner may simply state that the statutory maintenance formula applies (ORS 105.170 et seq.) if that is agreeable to the parties. The statutory formula calls for the holders of an easement to share the expenses of the easement in proportion to the use by each holder. [Note: exactly how much use each holder is making of the easement, and the holder’s resultant liability for maintenance costs, is a frequent subject of dispute.] The statute indicates that the frequency of use and size and weight of the vehicles will be relevant factors. The statute has many more interesting points, including the right to bring a civil action for damages and a provision for attorney fees to the prevailing party. [Copies of ORS 105.175 (apportionment of costs, duty to repair) and ORS 105.180 (action for failure to comply, recovery of costs) are provided in the Appendix to this Article.]

If the parties choose a different procedure or formula, then the attorney should expressly state that the statutory procedure does not apply. In commercial properties with heavy use of the easement by several parties, a well-thought-out formula should be developed, particularly where a substantial road needs to be constructed initially. For a new roadway, the division of construction costs (including any overruns) should be set forth in detail.

While keeping the fairness doctrine of proportional payment according to use in mind, for a creative drafter the sky is the limit on the available options and how to implement them.

## **V. PRESCRIPTIVE AND IMPLIED EASEMENTS**

In addition to express easements, there are easements by estoppel, easements by deed, prescriptive easements, implied easements, and easements by necessity. Set forth below are examples of some of the more common easements.

### **A. Easement by Prescription.**

The requirements for an easement by prescription are similar to those for obtaining title by adverse possession. However, the claimant only obtains a right to use the land, not fee title. In order to establish a prescriptive easement, the claimant must show open and notorious use of the land, adverse to the rights of the owner, for a continuous and uninterrupted period of at least ten years. *See Baylink v. Rees*, 159 Or App 310, 977 P2d 1180 (1999) for a review of the elements.

Such easements are not favored by law, and the burden is on the claimant to prove his/her case by clear and convincing evidence. *Baylink*, 159 Or App at 315. The scope of the easement is based primarily on the use that gave rise to the easement. A claim to such an easement can be refuted if the owner can show the use was by permission. *See Tyska*, 163 Or App 219, 222, 988 P2d 392 (1999).

### **B. Implied Easements.**

An easement generally arises by implication, when “an interest in land is conveyed that does not contain an express creation of an easement but one is implied as an intended part of the transaction.” *Tyska v. Prest, supra*. A common example is when the grantor conveys a parcel containing a drainfield, which benefits the grantor’s retained property (other typical examples involve easements for party walls and lateral support). The easement can be created in favor of the grantor or the grantee. Again, the burden is on the claimant to prove its right to the easement. The following factors are considered, although no single factor is dispositive:

1. whether the claimant is the conveyor or the conveyee;
2. the terms of the conveyance;
3. the consideration given for it;
4. whether the claim is made against a simultaneous conveyee;
5. the extent of necessity of the easement to the claimant;

6. whether reciprocal benefits result to the conveyor and the conveyee;
7. the manner in which the land was used prior to its conveyance;
8. the extent to which the manner of prior use was or might have been known to the parties.

*Tyska*, 163 Or App at 225. A review of these factors also helps to determine the appropriate scope of the easement.

### **C. Easement of Necessity.**

The typical easement by necessity arises when there is no other means of access to the grantee's property other than across the grantor's land. Although Oregon courts have recognized such an easement under the common law, the more common way of establishing this type of easement is under ORS 376.150-200, which provides the method for a "statutory way of necessity." The statute applies in the context of roads for motor vehicle access or routes for utility service and requires a determination by the governing body of the county in which the land is located.

Several conditions must be met before the way of necessity can be established. See ORS 376.180. Most notably, the petitioner must show that he or she does not have existing enforceable access to a public road, and could not acquire an easement for access to a public road through some other legal action. See *Tyska*, 163 Or App at 223 for a discussion of these factors.

An easement by necessity is a difficult one to obtain. The drafter should make all attempts to create a workable easement through every potential neighboring property before attempting to obtain an easement by necessity, which by its very nature is a form of private eminent domain, forcing an easement upon an unwilling servient estate holder.

## **VI. TERMINATION**

### **A. Expiration/Agreement.**

Generally, once created, an easement exists in perpetuity unless some specific action is taken to terminate it. [Note: An easement may be terminated when the term stated in the written easement has expired. However, this only applies when the easement was created for a limited purpose or period of time, which has elapsed, or modified to include such an expiration provision.]

Alternatively, an easement may be terminated if the owner of the dominant estate releases his/her interest in the easement. Such a release should be in writing and recorded. In addition, it is recommended that any agreements to create, modify, amend or terminate an easement be memorialized in a writing sufficient to satisfy the statute of frauds.

For implied easements, the easement will end when the purpose for which the easement was created has ceased. For example, an implied easement for access will end when a public road is created on the other side of the property which would provide alternative access. A septic drainfield easement will end when the property hooks up to the public sewer system. Distinguish an agreement that terminates at the will of the grantor, which generally is considered to be a license, not an easement.

#### **B. Abandonment.**

An easement will cease if abandoned. However, whether an easement has been abandoned depends on the scope of the original easement. Lack of use by itself is not abandonment. In addition, there must be an intent on the grantor's part to relinquish the easement, and a manifestation of that intent by some affirmative conduct. An easement by prescription may be terminated, however, by reverse prescription - that is if the other party meets the requirements for his or her own easement by prescription, thereby retaking the right. Although such circumstances may seem unusual and even absurd, it must be remembered that most easements run in perpetuity, so that successive 10 year prescriptive periods over the course of a century are clearly possible.

#### **C. Merger.**

If the dominant owner obtains title to the servient estate, the easement will end through the doctrine of merger. The property owner, for purposes of flexibility in future land divisions or marketability of the land may desire to retain the easement, or grant a new or different easement with different terms and conditions unto themselves.

#### **D. Termination by Estoppel.**

If the owner of the servient estate acts to his or her detriment in reasonable reliance on actions of the grantee that indicate the grantee plans to make no further use of the property, then that party may seek a declaration that the easement is terminated. In support of that request, an allegation of the facts supporting both the reasonableness of the reliance and the resulting detriment would be made that would argue the grantee is estopped by their actions from claiming that the easement should continue.

#### **E. Sale of Servient Estate to Bona Fide Purchaser for Value, without Notice.**

As noted above, it is recommended that all documents creating, amending, modifying or terminating easements be recorded. Recordation will eliminate any claims that a subsequent purchaser of the servient estate was without notice of the existence of the easement and therefore should not be burdened by the usage of the dominant estate. Even in those cases where the

easement was not recorded, there may be sufficient evidence of use by the dominant estate that a purchaser may be on inquiry notice as to the existence of the easement. See *High v. Davis*, 283 Or 315, 332, 584 P2d 725 (1978), for a discussion of inquiry notice in a *profit a prendre* setting.

Be mindful of all recording requirements. Different counties now have different procedures and styles for the recording of documents. Be familiar with your county rules and regulations and include all formalities on the face of your easement to avoid extra recording fees, or the possibility of having your document rejected by the recording office.

## **VII. LAND USE EASEMENTS**

In the last 30 years, the use of easements in creative ways has been necessitated by, or in conjunction with the emergence of stricter land use controls. While common wall agreements and utility and access easements have been around for hundreds of years, solar easements, scenic view easements, septic tank repair field easements, and other similar innovations are relatively recent developments.

These new easements are necessitated by the ever more intense development of land for residential and commercial purposes. When a developer conveys lots in a subdivision by reference to a plat, the purchaser of a lot is a grantee and receives an implied easement over the streets and other common areas on the plat. This is different from a right created in the general public by dedication of the streets and parks to the public.

In addition to an easement to use the private streets and other common areas, the lot purchaser may find him/herself in the position of being a grantor as well as a grantee. This situation arises when mutual easements are granted for running of utility lines, sidewalks and walk ways, or to restrict development on one lot so as not to infringe upon the light, air, or view provided to another lot.

Land use type easements may be affirmative (a repair field on the adjoining lot) or negative (restriction on building height to maintain an adjoining view). In some instances such easements may actually be required by a local government as part of a land use application. Three types of land use easements (repair field, conservation, and air/light) are included with the forms section of this article

## **VIII. RECENT CASE STUDIES**

*Peterson v. Crook County*, 172 Or App 44 (2001) - Peppermint Lane was a 15' gravel road that crossed over Peterson's property, and was used by him to gain access to his dwelling. The roadway lies within a 30' wide easement that was created in 1962 by written instrument properly

recorded. Peppermint Lane is a part of the rural road system in the Prineville area, and was used by residents in the area and by the public at large. A local developer in the area improved a part of the road adjacent to where the road crosses Peterson's land in an effort to obtain a subdivision approval. The road improvements attracted more use, and Peterson filed suit to stop it. The county counter sued to establish prescriptive rights in the public to use Peppermint Lane across Peterson's land.

The Court held that the County had not established a prescriptive easement in the public. While a little was said about the previous action of the county in declining to accept Peppermint Lane as a county road during the subdivision process, the determining factors were: the road was used in common by everyone; county did not construct the road or maintain it; the use by the public did not interfere with the Peterson's rights (that is he brought his claim before the 10 year period had run on the increased traffic)

*Foster Auto Parts, Inc. v. City of Portland*, \_\_ Or App \_\_ (12/6/00) - for 30 years plaintiff used a driveway across an adjacent property to reach Foster Road. Although it had paved and striped the driveway, plaintiff never obtained a permit for the driveway to access that public road. The property eventually came into possession of defendant who closed off the driveway. Plaintiff brought an action for damages based upon loss of its prescriptive easement. City denied, claiming that without permits, the driveway was a public nuisance, and as such could not qualify for a prescriptive easement. The trial court concluded plaintiff had established its prescriptive easement before City acquired the property and that lack of a permit did not necessarily prove that the driveway constituted a nuisance. However, in a footnote, the court left open the question of whether lack of permits to access the public road meant plaintiff had no right of access to that road.

*Hoffman v. Freeman Land and Timber, LLC*, 329 Or 554 (1999) - This case, which actually is an adverse possession case, is notable for the Court's clarification on the difference between the burden of proof in such cases versus easement by prescription cases. The Court of Appeals decided that since the defendants had used the land openly and continuously for the requisite 10 years, they were entitled to a presumption that their use was hostile. The Supreme Court said that while this might be true in prescriptive easement cases, it was not so in adverse possession cases.

In other words, the burden of proof did not shift in adverse possession cases and the defendants were required to prove hostility by clear and convincing proof. The Court reviewed the facts and determined there was not sufficient evidence to prove hostility in this case.

*Tyska v. Prest*, 163 Or App 219 (1999) - Hurd owned 4 acres. Hurd sold 1 acre adjacent to a road to Bingham and the other three to Prest, whose property became a landlocked parcel. Tyska owned the property south of Bingham's. Prest used Tyska's driveway for 22 years to access the road until Tyska prohibited further use. For the next few years, Prest reached her property by

traveling across the McAllister property, which she had been leasing from her sister. There was no road across the McAllister property.

Prest filed an action to obtain a prescriptive easement in 1992. The trial court ruled that she had used the driveway with the owner's permission and therefore did not meet the required elements. Prest then applied for a statutory way of necessity, which was granted in 1995. The trial court affirmed that decision.

The Court of Appeals cited ORS 376.180(8) and (9), which require that before a way of necessity can be established, it must be shown that the landlocked property does not have existing enforceable access to a public road and the owner of the landlocked parcel could not acquire an easement for access to a public road through other legal action. The Court agreed that Prest's property did not abut a public road and she did not have existing enforceable access.

However, the Court said that Prest did not meet the burden of showing she could not obtain an easement through other legal action. The Court suggested Prest might have an implied easement over the Bingham property. Since Prest did not prove she could not obtain an implied easement over the Bingham property, ORS 376.180(9) precluded "the granting of a way of necessity." *Id.* at 226.

*State ex rel. Dept. of Transportation v. Hanson*, 162 Or App 38 (1999) - In this case the Grubbs sold a 200 foot wide strip of property parallel to the highway to the state, reserving an easement for access to the highway. The Grubbs used the easement until they sold the property to Hanson in 1990. Hanson also used the easement until 1992, when the state condemned a portion of Hanson's property to widen the highway. Hanson applied for a permit to access the highway at the easement location, which the state denied. Hanson then brought two counterclaims in the condemnation action, one for breach of contract and the other for inverse condemnation and prevailed before a jury.

The state argued the law did not require it to compensate owners for loss of access to a public highway. Hanson responded that they did not just lose access, they lost their "right to a particular route of access." *Id.* at 43. The Court agreed, stating that the "state's denial of plaintiff's application for a permit to use their easement effectively renders the easement valueless." *Id.* Thus, it constituted a "taking" under the Fifth Amendment.

The court noted the difference between a common-law right to access at an unspecified location versus an easement to access at a specific location.

*Baylink v. Rees*, 159 Or App 310 (1999) - This case involved prescriptive easements. The trial court had awarded Rees and Tipton-Dominquez easements for access over a 30-foot-wide strip of land owned by Baylink, based on "historic use" of the roadway. On appeal, Baylink argued that

defendants had failed to meet the elements of an easement by prescription. The Court reviewed the elements. It found that even though Rees' use was not constant, it was consistent with the "character of the property and the manner in which the average person would use it." *Id.* at 317, *citing Arrien v. Levanger*, 263 Or 363, 369 (1972). Baylink was also aware Rees was using the road. Rees further testified that he had never asked for permission to use the road, and the Baylinks' testimony showed they considered the use of the road to be adverse. Thus, Rees met the requirements for a prescriptive easement.

However, the Tiptons and Dominquezes did not meet those requirements, because the court found they and their predecessors in interest had only used the road adversely for nine years. The Court therefore reversed the trial court's decision in regard to the Tipton-Dominguez easement. The Court noted that there was no claim before it that the road was a way of necessity.

*Watson v. Banducci*, 158 Or App 223 (1999) - Watson had an express easement permitting access to his property over a roadway on Banducci's land. The easement had been granted several years before and required that the dominant owner (Watson's predecessors) "maintain suitable cattle-guards wherever the road crosses through any line fence of the grantors" (servient owners). If not, the property would revert to the owner of the servient estate. Prior to the dispute, the easement had gates only at the front and rear of Banducci's land. In 1992 Banducci built another gate between those two, which he kept locked. He later added a second "inner" gate.

In 1993 Watson filed suit for relief from harm resulting from the construction of the gates and the resulting limited access. The trial court dismissed those claims and allowed the two inner gates to remain. The Court of Appeals said the basic issue was whether Banducci's acts of erecting, closing and locking the inner gates violated the easement. It first construed the express terms of the easement, noting that "in giving effect to an easement's purpose, general principles of reasonableness control." *Id.* at 231. It noted that the purpose of the easement was clear, i.e., for access. There was such access. This was not changed by the reverter clause, which did not expand Watsons' rights but merely defined his obligations.

The Court said that given its interpretation of the easement's purpose as allowing internal gates, the next question was whether the use and locking of those gates was reasonable. Banducci argued it was necessary for livestock management and had presented testimony to that effect. The Court agreed that such actions were contemplated by the easement. Having to stop, unlock and open the gates was contemplated in the scope of the easement, and was not an unreasonable interference.

Finally, the court said dismissal of most of Watson's claims for interference was correct, because no actual interference was shown. However, Watson had alleged that Banducci refused to

give a key to a realtor, and the Court said that claim should not have been dismissed in that a jury could find that constituted substantial interference.

## **IX. CONCLUSION**

As in all matters, a full understanding of the facts and your client's goals are critical to drafting a document that is complete and comprehensive. Talk with the client in detail and make him or her understand the importance of finding out all that you can. Separate what is really important from those elements that can be negotiated away. Take all the facts and all of your client's goals into consideration when crafting the easement and maintenance agreements.

## **X. FORMS**

The forms in Appendix A are designed to give the practitioner some ideas in preparing an express easement, one incorporating a maintenance agreement, and some other commonly seen non-roadway easements. These are intended to be a general guideline to assist you in crafting your own documents. They should not be used blindly, and the author makes neither expressed or implied warranties with regard to their use. Each practitioner must depend on his or her own knowledge of law and expertise in the use of these forms.

### **FORMS**

- 1. Easement for Roadway Purposes**
- 2. (Non Exclusive/Exclusive) Access Easement and Road Maintenance Agreement**
- 3. Utility Easement**
- 4. Easement for Drainfield**
- 5. Conservation Easement**
- 6. Personal Easement (Light, Air and View)**

**APPENDIX - FORMS**

**EASEMENT FOR ROADWAY PURPOSES**

THIS EASEMENT AGREEMENT is made this \_\_\_\_ day of \_\_\_\_\_, 200 \_\_, by and between \_\_\_\_\_, hereinafter referred to as the Grantor, and \_\_\_\_\_, hereinafter referred to as the Grantee, for the purpose of establishing easements for access purposes within the private roadways of \_\_\_\_\_ a rural subdivision within \_\_\_\_\_ County, Oregon.

**\* \* \* W I T N E S S E T H \* \* \***

**WHEREAS** Grantor is the owner of the following described real property, which is located in Marion County, Oregon, to wit:

\*\*\*

Which land has direct access onto the county road known as \_\_\_\_\_; and

**WHEREAS** Grantee is the owner of the following described real property, which is located in \_\_\_\_\_ County, Oregon, to wit:

\*\*\*

Which parcels do not have access onto any public right of way, road or street; and

**WHEREAS** Grantor has the unrestricted right to grant easements over and across \_\_\_\_\_, and intends hereby to so grant an easement for residential ingress and egress over the roadway portion of Lot \_\_\_\_; now

**FOR AND IN CONSIDERATION OF** the mutual promises, covenants and agreements contained herein, the parties do hereby agree as follows:

After Recording Return to:

\*\*

1. Grantor does hereby grant, assign and set over unto the Grantee an easement, for residential ingress and egress purposes only, over and across:

\*\*\*

2. Grantee shall pay to Grantor the sum of \_\_\_\_ dollars (\$\_\_\_\_), receipt of which is hereby acknowledged.

3. Grantee shall have all rights of ingress and egress over and across said property necessary for Grantee's residential use, operation and maintenance of the easement hereby granted and all rights and privileges incident thereto.

4. Except as specifically granted herein, Grantor shall retain full use and control of the easement area.

5. The parties hereto acknowledge that each of the parcels subject to this easement agreement are subject to a duly adopted Declaration of Covenants, Conditions and Restrictions of \_\_\_\_\_ recorded in the \_\_\_\_\_ County Deed Records at Reel \_\_\_\_\_, Page \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, 200\_\_, which Declaration provides for assessments for construction and maintenance of a roadway across the above described portion of \_\_\_\_\_.

6. Grantee, their assigns and successors shall hold and save Grantor harmless from any and all claims of third parties arising from Grantee's use of the easement rights granted herein.

7. This easement shall continue for perpetuity, or until such time as the then owners of all subject property agree to terminate the easement.

8. This easement agreement shall bind and inure to the benefit of, as the circumstances may require, not only the immediate parties hereto but also their respective heirs, executors, administrators and successors in interest as well.

9. In the event of a dispute over this easement agreement, the prevailing party shall be entitled to reimbursement of all reasonable attorney fees, costs and disbursements incurred in the dispute before litigation, at trial and on appeal, if any.

10. In construing this agreement and where the context so requires, words in the singular include the plural; the masculine includes the feminine and the neuter; and generally, all changes shall be made or implied so that this instrument shall apply both to individuals and to corporations.

GRANTOR

GRANTEE

\_\_\_\_\_

\_\_\_\_\_

\*\*

\*\*

\_\_\_\_\_

\_\_\_\_\_

\*\*

\*\*

STATE OF OREGON     )  
                                  ) ss.  
County of \_\_\_\_\_ )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by \_\_\_\_\_,  
and acknowledged by them to be their voluntary deed and act.

\_\_\_\_\_  
Notary Public for Oregon

**[NONEXCLUSIVE] [EXCLUSIVE] ACCESS EASEMENT  
AND ROAD MAINTENANCE AGREEMENT**

**PARTIES:**

\_\_\_\_\_ (hereinafter "Servient")

\_\_\_\_\_ (hereinafter "Dominant")

**RECITALS:**

A. Servient owns real property described in Exhibit "A" attached and by this reference incorporated herein (hereinafter "Servient Property").

B. Dominant owns real property described in Exhibit "B" attached and by this reference incorporated herein (hereinafter "Dominant Property").

C. Dominant desires to acquire [a nonexclusive] [an exclusive] access [and utility] easement over the Servient Property for the benefit of the Dominant Property.

D. [Insert other details regarding the situation or relationship between the parties.]

**AGREEMENT:**

1. Servient, for valuable consideration, the receipt of which is hereby acknowledged, does forever grant, bargain, sell and convey unto Dominant [a nonexclusive] [an exclusive] access [and utility] easement over and along the full width and length of the premises described below:

[Insert exact legal description of the easement and any necessary working easement and describe the details of how and when the Dominant estate can use the working easement.]

AFTER RECORDING, RETURN TO:

UNTIL FURTHER NOTICE, SEND ALL TAX  
NOTICES TO:  
NO CHANGE

**NOTE:** The language granting the easement is of a "Bargain and Sale" type to indicate that there is no warranty of title with this easement. If the Dominant Property owner successfully bargains for covenants of title, then such covenants need to be clearly set forth.  
This Easement shall run with the land and is binding upon Servient's and Dominant's successors, assigns, administrators, representatives, and heirs.

2. The Easement granted herein is appurtenant to the Dominant Property.

3. The Easement is for the benefit of all or any portion of the Dominant Property and all owners or lawful users of all or any portion of the Dominant Property, including, without limitation, Dominant, its employees, independent contractors, guests and invitees, except as otherwise provided in this document.

4. This Easement may not be transferred to, nor used by any party other than the owner or lawful occupant of the Dominant Property, and shall not benefit any property other than the Dominant Property, it being the intent of the parties that Dominant not be allowed to extend the use of the Easement to properties other than the Dominant Property.

**NOTE:** Be careful that Dominant does not have any vision of acquiring additional adjacent property if this clause is used.

5. This Easement may be used to provide pedestrian[,] [and] vehicular [and utility] access for the benefit of the Dominant Property over, under, across, and through the Servient Property, subject only to such restrictions as may be specified herein.

6. [This Easement is for the exclusive benefit of the Dominant Property, except as otherwise provided in this document.] [This easement is for the nonexclusive benefit of the Dominant Property, and Servient expressly reserves: (A) the right to use the Easement for all lawful purposes jointly and in common with Dominant for the benefit of all or any portion of the Servient Property, and (B) the right to confer access rights over the Servient Property (including the Easement) in favor of any other person or property, whether or not adjacent to the Servient Property.]

7. Under no circumstances may the Easement be used for any other purposes other than regular residential purposes for one (1) single family residence. Except for the initial construction of the contemplated dwelling on the Dominant Property, no vehicles in excess of one (1) ton shall be allowed to use the Easement.

8. The Easement may be relocated at Servient's [Dominant's] request only under the following circumstances:

**NOTE:** Allowing possible relocation of the easement by either party opens up a big can of worms. Unless there is some likelihood that one or the other parties may need to relocate, I would avoid using this clause.

[9. The Easement shall be perpetual and may be terminated only by Servient expressly in writing. The Easement shall not be terminated by failure of purpose, change of circumstances, abandonment, or misuse except as and to the extent otherwise provided in this document.]

10. Dominant shall be solely responsible for repairing and maintaining the roadway and any other improvements at all times and shall bear the entire expense of all repair and maintenance. [The cost of maintenance and repair of the Easement shall be shared equally by any users of the Easement, except as otherwise provided in ORS 105.170 to 105.185 in case of damage caused by one or more of them.]

[11. Alternative maintenance formula.]

12. Servient agrees to defend, indemnify, and hold harmless Dominant from and against any loss, claim, or liability arising out of Servient's interference with Dominant's use and enjoyment of the Easement, whether by act or omission.

13. Servient shall add Dominant as an additional named insured under the liability insurance policy which Servient maintains on the Servient Property.

[14. Dominant shall defend, indemnify and hold harmless Servient from and against any loss, claim or liability arising out of or attributable to use of the Easement by Dominant or any other party, or to the condition of the Easement or of the roadway or the Servient Property, including any such loss, claim or liability that may be caused or contributed to in whole or in part by Servient's own negligence or failure to effect any repair or maintenance required of Servient by this document;

and Servient shall have no liability to Dominant or any third party for any injury, loss, or damage caused by third parties or for any condition of the Easement or the Servient Property.]

[15. Dominant shall procure and at all times maintain in full force and effect, at Dominant's sole expense, a policy of comprehensive general liability insurance in a responsible company with limits of \$\_\_\_\_\_ for injury to one person, \$\_\_\_\_\_ for injury to two or more person in one occurrence, and \$\_\_\_\_\_ for damage to property. Such insurance shall cover all risks arising directly or indirectly out of Dominant's activities on or any condition of the Servient Property (including, without limitation, the Easement and the roadway), whether or not related to an occurrence caused or contributed to by Servient's negligence. Such insurance shall protect Servient against the claims of Dominant on account of any obligations of Servient contained in this document and shall name Servient as an additional insured. Certificates evidencing such insurance, and bearing endorsements requiring ten (10) days' written notice to Servient prior to any change or cancellation shall be furnished to Servient prior to \_\_\_\_\_.]

[16. If appropriate, add provisions regarding title insurance and/or covenants by Servient. Also, provide for possible subordination by all of Servient's lienholders.]

[17. Provide for who will pay the property taxes on the Easement.]

18. In the event action is instituted to enforce any term of this Easement, the prevailing party shall recover from the losing party reasonable attorney fees incurred in such action as set by the trial court and, in the event of an appeal, as set by the appellate courts.

SERVIENT:

\_\_\_\_\_

DATE: \_\_\_\_\_

DOMINANT:

\_\_\_\_\_

DATE: \_\_\_\_\_



**UTILITY EASEMENT**

*(Permanent Non-exclusive)*

**THIS EASEMENT AGREEMENT** is made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between \_\_\_\_\_, hereinafter referred to as the Grantor, and \_\_\_\_\_, hereinafter referred to as the Grantee, for the purpose of establishing an easement for utility lines across the Grantor's property to serve the Grantee's property.

**WHEREAS** Grantor is the owner of the following described real property, which is located in \_\_\_\_\_ County, Oregon, to wit:

*Insert Legal here*

**WHEREAS** Grantee is the owner of the following described real property, which is located in \_\_\_\_\_ County, Oregon, to wit:

*Insert Legal here*

**WHEREAS** Grantor has the unrestricted right to grant easements over and across the above described real property, and intends hereby to so grant an easement for utility lines, including sanitary sewer, domestic water, natural gas, telephone, electric and cable television lines and services over said property to serve the Grantee's property; and

**WHEREAS** the parties hereto do hereby desire to set out the terms and conditions upon which an easement will be granted; now

AFTER RECORDING, RETURN TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

UNTIL FURTHER NOTICE, SEND ALL TAX NOTICES TO:  
NO CHANGE

\* \* \* W I T N E S S E T H \* \* \*

**FOR AND IN CONSIDERATION OF** the mutual promises, covenants and agreements contained herein, the parties do hereby agree as follows:

1. Grantor does hereby grant, assign and set over unto the Grantee a permanent, nonexclusive, appurtenant easement for utility purposes, along, over and across the following described portion of Grantor's real property:

*Insert Legal here*

2. Grantee does hereby agree to the following conditions of this easement:
  - a) \_\_\_\_\_; and
  - b) \_\_\_\_\_; and
  - c) \_\_\_\_\_; and
  - d) \_\_\_\_\_; and
3. This easement shall be permanent and shall include the right, privilege, and authority allowing Grantee's, their agents, employees and representatives to excavate for, and to construct, install, lay, operate, maintain and remove utility pipes and lines, whether below or above ground, with all appurtenances incident thereto or necessary therewith, for the purpose of providing all utilities necessary for residential or commercial purposes,, and for similar uses in, under and across said Easement Area, together with the right to place, install, maintain, inspect, add to the number of and relocate lines and pipes and necessary appurtenances, and make excavations therefore from time to time, in, under and through the above described Easement Area, and to cut and remove from said Easement Area any trees and other obstructions which may endanger the safety or interfere with the use of said pipelines, or appurtenances attached to or connected therewith, and the right of ingress and egress to and over said Easement Area at any and all

times for the purpose of patrolling the lines or pipes or repairing, renewing, or adding to the number of lines or pipes and appurtenances, and for doing anything necessary, useful or convenient for the enjoyment of the easement hereby granted.

4. Grantees, upon the initial construction, and upon each and every occasion that the same is repaired, renewed, added to or removed, shall restore the premises of Grantor and any improvements disturbed, to as good condition as they were prior to any such work, including the restoration of any topsoil, lawn or pavement.
5. This easement shall continue in perpetuity, or until such time as the then owners of all subject properties agree to terminate the easement.
6. This easement agreement shall bind and inure to the benefit of, as the circumstances may require, not only the immediate parties hereto but also their respective heirs, executors, administrators, assigns and successors in interest as well.
7. In the event of a dispute over this easement agreement, the prevailing party shall be entitled to reimbursement of all reasonable attorney fees, costs and disbursements incurred in the dispute before litigation, at trial and on appeal, if any.
8. Grantee, its heirs, executors, administrators, assigns and successors shall hold and save Grantor harmless from any and all claims of third parties arising from Grantee's use of the easement rights granted herein.
9. In construing this agreement and where the context so requires, words in the singular include the plural; the masculine includes the feminine and the neuter; and generally, all changes shall be made or implied so that this instrument shall apply both to individuals and to corporations.
10. Except as specifically granted herein, Grantor shall retain full use and control of the easement area.

GRANTOR

GRANTEE

\_\_\_\_\_  
  
\_\_\_\_\_

\_\_\_\_\_  
  
\_\_\_\_\_

STATE OF OREGON    )  
                                  ) ss.  
County of \_\_\_\_\_ )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by  
\_\_\_\_\_, and acknowledged by him/her to be his/her voluntary deed and act.

\_\_\_\_\_  
Notary Public for Oregon

STATE OF OREGON    )  
                                  ) ss.  
County of \_\_\_\_\_ )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by  
\_\_\_\_\_, and acknowledged by him/her to be his/her voluntary deed and act.

\_\_\_\_\_  
Notary Public for Oregon

# EASEMENT FOR DRAINFIELD REPAIR AREA

THIS EASEMENT IS ENTERED INTO this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between \_\_\_\_\_, hereinafter Grantor, and \_\_\_\_\_, hereinafter Grantee.

**WHEREAS** Grantee is the purchaser from \_\_\_\_\_ of Lot \_\_, Block \_\_, \_\_\_\_\_, \_\_\_\_\_ County, Oregon, which property is otherwise identified as Tax Lot \_\_\_\_\_, and which is a currently undeveloped subdivision lot; and

**WHEREAS** Grantor is the owner of a large parcel lying immediately to the east of Grantee's above described property, which Grantor property is identified as Tax Lot \_\_\_\_\_, and is otherwise legally described in Exhibit A hereto; and

**WHEREAS** Grantee's predecessor in interest obtained a permit (No.\_\_\_\_) from \_\_\_\_\_ County and the State DEQ to construct a septic tank on Grantee's above described real property on \_\_\_\_\_, 200\_\_, which permit allowed placement of the repair field on Grantor's above described property. A copy of this permit is attached hereto as Exhibit "B"; and

**WHEREAS** Grantor's above described property is large enough to contain many areas satisfactory for a repair area at such time in the future as one may be needed, if ever; and

**WHEREAS** the parties hereto do hereby desire to set out the terms and conditions upon which an easement will be granted for the repair area; now

AFTER RECORDING, RETURN TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

UNTIL FURTHER NOTICE, SEND ALL TAX NOTICES TO:  
NO CHANGE

**\* \* \* W I T N E S S E T H \* \* \***

FOR AND IN CONSIDERATION OF the mutual promises and covenants contained herein, the parties hereto do hereby agree as follows:

1. Grantor hereby conveys to the Grantee, its successors and assigns, a perpetual, non-exclusive; appurtenant easement in, upon, and running with the property described in Exhibit "A" hereto allowing Grantees, its agents, employees and representatives to construct and maintain a repair septic drainfield.
2. The repair area shall be large enough to accommodate up to 1,200 lineal feet of drain tile, and shall be located on the subject property at such place as is approved by Grantee's sanitarian, and by all applicable government agencies. The repair area designated herein shall only be used at such time as the primary drainfield located on Grantee's property should fail, and use of the repair area is mandated by either \_\_\_\_\_ County or the DEQ.
3. The location of the repair area shall be selected at such time as it is needed, and Grantee shall notify Grantor of the site selection at least 10 days before construction is to begin. An as-built plan of the completed drainfield shall be placed on a map, drawn to scale, a copy of which shall be provided to Grantor, and shall be recorded in the \_\_\_\_\_ County Deed Records.
4. Grantor does hereby grant to Grantee, its successors and assigns, agents and representatives a right of entry unto Grantor's above described property for purposes of investigation and testing of areas adequate for placement of the repair drainfield. Grantee shall provide Grantor with at least 3 days advance notice of entry.
5. The site location selected shall not interfere with any buildings or structures then located on Grantor's property.
6. In the event the repair drainfield is necessary, it shall be constructed at the sole and exclusive expense of Grantee, who shall hold Grantor harmless from any such expense.

7. Grantee shall place the land back in its original condition, to the extent possible, after any construction, including replacement of groundcover, shrubs or trees that may have been removed during construction of the line and drainfield.
8. Grantee shall hold Grantor harmless from any liability that may arise from the location and operation of the drainfield.
9. This easement shall terminate 60 days from such time as a community sewer system is available to the edge of the Grantee's above described property. Grantee agrees to connect to said community sewer system, and to disconnect the primary line between the septic tank located on Grantee's property and the repair drainfield located on Grantor's property as specified herein.
10. Once the repair area is selected pursuant to this agreement, Grantor may not construct any improvements thereon, but may otherwise use the area for any other purpose.
11. The consideration for this easement is the sum of \$\_\_\_\_\_ per month, which shall be paid from the date the repair area begins to be utilized as the primary active drainfield.
12. In the event of any dispute with regard to this easement, the prevailing party in any action hereunder shall be entitled to reimbursement from the losing party all reasonable attorney fees, costs and disbursements incurred before litigation is instituted, at trial and on appeal if necessary.

**IN WITNESS WHEREOF**, the parties have executed this easement to be effective on the date first above written.

GRANTOR

GRANTEE

---

STATE OF OREGON     )  
                                          ) ss  
County of \_\_\_\_\_ )

Personally appeared the above-named \_\_\_\_\_ and acknowledged the foregoing instrument to be his/her voluntary deed and act.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON

STATE OF OREGON     )  
                                          ) ss  
County of \_\_\_\_\_ )

Personally appeared the above-named \_\_\_\_\_ and acknowledged the foregoing instrument to be his/her voluntary deed and act.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON

**CONSERVATION EASEMENT**

\_\_\_\_\_ and \_\_\_\_\_, husband and wife, hereinafter referred to as Grantor, convey to \_\_\_\_\_ County, a political subdivision of the State of Oregon, (hereinafter referred to as "Grantee"), a Conservation Easement over, across, through and above real property, zoned and designated Rural Residential, described as: a strip of land, ten (10) feet in width, measured landward at right angles from the ordinary high water mark of the \_\_\_\_\_ River, being a portion of the real property described in that \_\_\_\_\_ Deed, recorded in Volume \_\_\_\_\_, Page \_\_\_\_\_, of the \_\_\_\_\_ County Book of Records, described in Exhibit "A", attached hereto, and by this reference incorporated herein and depicted on the map marked Exhibit "B", attached hereto and by this reference incorporated herein.

1. This Conservation Easement is a non-possessory interest of Grantee imposing limitations and affirmative obligations as set out herein. Nothing herein shall be construed as granting a public access easement.
2. Grantor shall retain and protect the natural scenic and open space values of the easement area. Any uses within the Conservation Easement shall protect natural resources, maintain or enhance air and water quality, and preserve any historical, architectural, archaeological, or cultural aspects of the real property.
3. Grantor agrees to clean up any trash, debris, garbage, or other unsightly or offensive material which may be found within the easement area.
4. Grantee may enter upon the easement for the following purposes:
  - A. To inspect for violations and to administer the easement.

AFTER RECORDING, RETURN TO:

UNTIL FURTHER NOTICE, SEND ALL TAX NOTICES TO:

\_\_\_\_\_

\_\_\_\_\_

- B. To implement erosion prevention measures.
  - C. To plant trees or perform restoration work as deemed necessary to protect, restore, or enhance the scenic view.
  - D. To protect and restore historic or archaeological sites which may exist within the easement area.
  - E. To take all measures deemed necessary to prevent or suppress forest fires.
  - F. To implement disease prevention measures to protect the scenic quality of the river setting.
  - G. To selectively cut or prune brush.
  - H. To mark, prune, cut, remove, or otherwise dispose of all dead, dying, diseased, or insect-infested live or other trees which, in the judgment of Grantee, endanger the public safety or detract from the aesthetics of the above-described areas.
5. Nothing herein shall be construed as creating any duty on the part of the Grantee to undertake any of the above-enumerated activities.
6. Restrictions on use of land by Grantor:
- A. No structure of any kind, including house trailers or mobile homes, shall be placed, used, erected, or maintained upon the easement area.
  - B. Grantor shall not use or occupy any portion of the easement area in a manner which would degrade or diminish the natural, scenic, and open space values of the real property.
  - C. Grantor shall protect the natural resources value, maintain and enhance air and water quality, and preserve historic, architectural, archaeological, and cultural aspects of the easement area.

- D. The construction, placement, or exterior alteration of any structure or facility may be undertaken only after obtaining prior written approval of architectural and site plans from Grantee.
- E. There is specifically retained by the Grantor the right to perform ordinary maintenance on all existing buildings and structures, together with the right to replace, rebuild, or substitute any building or structure now existing with a similar building or structure in substantially the same location; however, the replacement, rebuilding, or substitution of any building or structure may be undertaken only after obtaining prior written approval of architectural and site plans from Grantee.
- F. Except as provided herein, no other new structure of any kind shall be placed on or erected upon the easement area.
- G. No tents, travel trailers or camping facilities of any kind shall be placed or erected upon the easement area except as approved in writing by Grantee.
- H. No new installation of above-ground utilities, structures, or lines shall be made upon or within the easement area without prior written approval of Grantee.
- I. No changes in the general topography or land surface (including excavation, road construction, and the quarrying or removing of rocks, sand, dirt, gravel, or other material) are permitted within the easement area unless authorized in writing by Grantee.
- J. No dumping of trash, debris, garbage, or other unsightly or offensive material shall be allowed upon the easement area.
- K. Grantor shall retain title to all trees, standing or downed, within the easement area; provided, however, that the cutting or removal of vegetation shall be limited to that needed to maintain an orderly appearance around the structures.

- L. No water pumping facilities shall be placed within the easement area without prior written approval of Grantee. Approval of such facility shall be contingent upon the proposed location, pumping facility design, and the inclusion of adequate visual and sound reducing screening for the protection of natural qualities in and along the river.
  - M. Grantor shall take all necessary precautions to avoid damage to fish habitat and exercise every reasonable precaution to prevent muddying or silting of the river or stream.
  - N. Grantor shall not allow oil or greasy substances originating from construction operations to enter or be placed where they may later enter the river or stream.
7. This Conservation Easement may be enforced by Grantee and any third-party governmental body, charitable corporation, or charitable trust, which, although eligible to be a holder of this Conservation Easement, is not a holder.
  8. The covenants, conditions and terms of this Agreement shall extend to and be binding upon and inure to the benefit of the heirs, administrators, executors, successors and assigns of the parties hereto.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
 Grantor  
 \_\_\_\_\_ County board of Commissioners

\_\_\_\_\_  
 Grantor

By: \_\_\_\_\_

STATE OF OREGON    )

County of \_\_\_\_\_ ) ss.  
County of \_\_\_\_\_ )

Personally appeared \_\_\_\_\_, Grantor, and acknowledged the foregoing instrument to be his/her voluntary act. This \_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public for Oregon

STATE OF OREGON )  
County of \_\_\_\_\_ ) ss.  
County of \_\_\_\_\_ )

Personally appeared \_\_\_\_\_ the above-named Board of Commissioners of \_\_\_\_\_ County and acknowledged the foregoing instrument on behalf of \_\_\_\_\_ County, Oregon, this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public for Oregon

**PERSONAL EASEMENT**  
(Light, Air and View)

THIS EASEMENT is made this \_\_\_ day of \_\_\_, 200\_\_\_, by and between \*, hereinafter "Grantor", and \*\*, hereinafter "Grantee" for the purpose of granting a personal easement for scenic purposes in favor of land Grantee is purchasing from Grantor, over adjoining land retained by Grantor.

**WHEREAS** Grantee is purchasing \_\_\_\_\_, \_\_\_\_\_ County dated the \_\_\_ day of \_\_\_\_\_, 200\_\_\_; and

**WHEREAS** Grantor owns property adjoining \*\*\*, which property is legally described in Exhibit "A" hereto; and

**WHEREAS** Grantor and Grantee agree that development and/or growth of trees on the property described in Exhibit "A" could potentially detract from or inhibit Grantee's view from \*\*\*, and that as partial consideration and inducement for Grantee purchasing this lot from Grantor, that some protection from view encroachment be extended to Grantee; now

\* \* \* W I T N E S S E T H \* \* \*

FOR AND IN CONSIDERATION OF the contemporaneous sale herewith of \*\*\*, together with the sum of \_\_\_ dollars (\$\_\_\_), receipt of which is hereby acknowledged, Grantor does hereby :

1. Grant unto Grantee personally, a scenic easement for light, air and view purposes in, over and across the property legally described in Exhibit "A" hereto.
2. Said easement shall constitute a servitude upon said real property, which servitude will result from the restrictions hereby imposed upon the use of Grantor's said property. Grantor's covenant on behalf of themselves, their heirs, successors, personal representatives and assigns, with the said Grantee personally, to do and to refrain from doing the various acts on Grantor's land which are hereinafter set out, and that such acts or restraint from action is and will be for the benefit of Grantee personally.
3. Grantee shall have the right, with the consent of the \*\*\*\* Architectural Review Board, to trim, cut, remove, fell or otherwise destroy any tree, shrub, brush or vegetation which impinges upon or affects the scenic view from the Grantee's living space on \*\*\* over and across the property described in Exhibit "A".

After Recording Return to:

Mail Tax Statements To:

\*\*

\*\*

4. During the life of this agreement, no improvement shall be erected upon the property of the Grantors described in Exhibit "A" hereto, which will materially impinge upon or alter the scenic view from the Grantee's living space on \*\*\* over and across the property described in Exhibit "A".
5. The easement granted herein is personal to Grantee, and shall continue for as long as Grantee is the owner of \*\*\*. It is not intended that this easement run with the land or extend beyond the life of Grantee, or his transfer of ownership of said lot. In either event, this easement shall automatically terminate and be of no further force and effect.

\_\_\_\_\_

\*

\_\_\_\_\_

\*

STATE OF OREGON     )  
                                           ) ss.  
 County of \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, personally appeared the above-named \* and acknowledged the foregoing instrument to be his voluntary act and deed.

\_\_\_\_\_  
 Notary Public for Oregon

STATE OF OREGON     )  
                                           ) ss.  
 County of \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, personally appeared the above named \*, and acknowledged the foregoing instrument to be her voluntary act and deed.

\_\_\_\_\_  
 Notary Public for Oregon

## **STATUTES**

- 1. ORS § 105.170**
- 2. ORS § 105.175**
- 3. ORS § 105.180**
- 4. ORS § 105.185**

**1998 OREGON REVISED STATUTES  
TITLE 10. PROPERTY RIGHTS AND TRANSACTIONS  
CHAPTER 105. PROPERTY RIGHTS  
EASEMENT OWNER OBLIGATIONS**

Current through End of 1997 Reg. Sess. and 1998 Cumulative Supp.

**105.170.** Definitions for ORS 105.170 to 105.185.

For purposes of ORS 105.170 to > 105.185:

(1) "Easement" means a non-possessory interest in the land of another which entitles the holders of an interest in the easement to a private right of way, embodying the right to pass across another's land.

(2) "Holders of an interest in an easement" means those with a legal right to use the easement, including the owner of the land across which the easement passes if the owner of the land has the legal right to use the easement.

(1989 c. 660 § 1; 1991 c. 49 § 1)

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CHAPTER 105. PROPERTY RIGHTS  
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**105.175.** Easement to be kept in repair; sharing costs; agreements.

(1) The holders of an interest in any easement shall maintain the easement in repair.

(2) The cost of maintaining the easement in repair shall be shared by each holder of an interest in the easement, pursuant to the terms of any agreement entered into by the parties for that purpose or any recorded instrument creating the easement. Any such agreement, or a memorandum thereof, shall be recorded in the real property records of the county in which the easement is located. Failure to record the agreement shall not affect the enforceability of the agreement among the parties to the agreement and any other person with actual notice of the agreement.

(3) The cost of maintaining the easement in repair in the absence of an agreement and in the absence of maintenance provisions in a recorded instrument creating the easement shall be shared by each holder of an interest in the easement in proportion to the use made of the easement by each holder of an interest in the easement.

(4) Unless inconsistent with an agreement between the holders of an interest in an easement or a recorded instrument creating the easement, in determining proportionate use and settling conflicts the following guidelines apply:

(a) The frequency of use and the size and weight of vehicles used by the respective parties are relevant factors.

(b) Unless inappropriate, based on the factors contained in paragraph (a) of this subsection or other relevant factors, costs for normal and usual maintenance of the easement and costs of repair of the easement damaged by natural disasters or other events for which all holders of an interest in the easement are blameless may be shared on the basis of percentages resulting from dividing the distance of total normal usage of all holders of an interest in the easement into the normal usage distance of each holder of an interest in the easement.

(c) Those holders of an interest in the easement that are responsible for damage to the easement because of negligence or abnormal use shall repair the damage at their sole expense.

(1989 c. 660 §§ 2,3,4; 1991 c. 49 § 2)

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CHAPTER 105. PROPERTY RIGHTS  
EASEMENT OWNER OBLIGATIONS**

Current through End of 1997 Reg. Sess. and 1998 Cumulative Supp.

**105.180.** Action for failure to comply with duty of holder; recovery of costs; arbitration.

(1) If any holder of an interest in an easement fails to maintain the easement contrary to an agreement or contrary to the maintenance provisions of a recorded instrument creating the easement or, in the absence of an agreement or recorded instrument imposing maintenance obligations, fails after demand in writing to pay the holder's proportion of the cost as indicated in > ORS 105.175 (3) and (4), a civil action for money damages or specific performance or contribution may be brought against that person in a court of competent jurisdiction by one or more of the other holders of an interest in the easement, either jointly or severally. In any such civil action, the court may order such equitable relief as may be just in the circumstances. Nothing in > ORS 105.170 to > 105.185 shall impose a maintenance obligation on the holder of an interest in an easement based on the maintenance provisions in an instrument creating the easement if such holder is not a party to such instrument, whether the instrument is recorded or not, after such holder ceases to use the easement.

(2) The prevailing party shall recover all court costs, arbitration fees and attorney fees.

(3) Any holder of an interest in the easement may apply to the court of competent jurisdiction where the easement is located and that has jurisdiction over the amount in controversy for the appointment of an impartial arbitrator to apportion the cost, and the matter may be arbitrated in accordance with > ORS 36.300 to > 36.365. The application may be made before, during or after performance of the maintenance work.

(1989 c. 660 § 5; 1991 c. 49 § 3)

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CHAPTER 105. PROPERTY RIGHTS  
EASEMENT OWNER OBLIGATIONS**

Current through End of 1997 Reg. Sess. and 1998 Cumulative Supp.

**105.185.** Application of ORS 105.170 to 105.185.

The provisions of > ORS 105.170 to 105.185:

(1) Apply to all easements existing on or created after January 1, 1992; and

(2) Do not apply to rights of way held or used by providers of public services including, but not limited to, railroad common carriers, pipeline companies, public utilities, electric cooperatives, people's utility districts, water utility districts, municipally owned utilities and telecommunications utilities, when used for the sole purpose of provision of service or maintaining or repairing facilities for the provision or distribution of service.

(1989 c. 660 § 6; 1991 c. 49 § 4)

## NOTES