

Reviewing Accommodative Easements: Helping Your Client Do a Favor without Causing Harm (with Sample Inserts)

.....



Andy Jacobson

is a partner in the Real Estate Group at Maslon LLP in Minneapolis, Minnesota. His practice covers a broad range of commercial real estate issues, with particular focus on commercial and retail leasing, land use, telecommunications, as well as design and construction-related agreements. Andy is a frequent author and speaker on real estate subjects and teaches Real Estate Transactions at the University of St. Thomas School of Law. A graduate of Boalt Hall School of Law at the University of California, Berkeley, Andy is also a registered architect, having earned his Bachelors of Architecture from California Polytechnic State University, and practiced architecture prior to attending law school. Andy is a member of both the Minnesota and California bars and can be reached at andy.jacobson@maslon.com.

Andy Jacobson

CLIENTS (particularly clients with a large property portfolios) often ask for assistance in accommodating requests by third parties for easements. The third party might be a public entity, a utility company or a neighboring property owner or user. Often, the proposed easement either provides some direct or indirect benefit to the client/grantor or a relationship or business reason incentivizes the client/grantor to accommodate the grantee at little or no cost. For example, the easement could provide upgraded electrical service to the client/grantor’s property or it could involve the short term use of a portion of the client/grantor’s property to accommodate construction activities on a neighbor/grantee’s property. Usually, when the grantee is a public entity or utility, the grantee’s attorney has already prepared the proposed easement by the time the client/grantor involves an attorney. Because the easement in question is being granted as an accommodation, the client/grantor will desire to handle the matter in the most efficient and inexpensive manner possible (i.e., the old “can you give this a quick look over”). Even if the grantee has agreed to reimburse the client/grantor for attorneys’ fees, pressure to minimize the legal work on the matter often still exists. Thus, the challenge for the client/grantor’s attorney is to review the easement and protect the client/grantor in an effective but cost-efficient manner. Having off-the-shelf provisions that can be easily adapted and dropped into the grantee’s proposed easement form can be an effective solution. A grantee’s attorney should be receptive to this approach because the grantor is doing the grantee a favor by accommodating

the requested easement at little or no cost. This article contains a discussion of significant areas of concern for a grantor, along with some suggested potential inserts. While every client and situation is unique, the materials below aim to serve as a starting point for developing your own easement “cut-and-paste” resource.

Appropriate Approach

The first issue for grantor’s counsel to consider is whether an easement is the most appropriate mechanism for accomplishing the intent of the parties. For example, if the requested use is relatively short term in nature, it might be more efficient and appropriate to use a license agreement. In other situations (e.g., periodic use of a portion of a parking lot for overflow parking), a lease might be the more appropriate approach.

Nature of the Easement

Second, thought should be given to the nature of the requested easement.

In Gross or Appurtenant?

One should consider whether the easement should be either in gross or appurtenant to a specific adjacent parcel. Easements requested by utility companies and governmental entities will almost always be in gross in nature, meaning the benefit of the applicable easement applies to such utility company or government entity (or the public, where applicable) rather than being for the benefit of a particular parcel of land. In contrast, with respect to easements requested by adjacent property owners, further consideration is required to determine whether the easement should be in gross or appurtenant. While such easements will generally be appurtenant to the adjacent property and run with the land, in some situations it may be to the grantor’s benefit for the easement to be in gross (for the benefit of the then owner of the adjacent property). Specifically, the easement should be in gross

if the accommodative easement is being granted, in whole or in part, because of the relationship between the grantor and grantee. For example, the grantor might have no issue with allowing part of its property to be used by the current neighboring business, but might not want to open itself up to use by some unknown, future owner of the adjacent property. Alternatively, the easement could be made appurtenant to the adjacent property, with the term of the easement set to expire if the current owner sells or otherwise transfers the benefited property.

Duration

Typically, appurtenant easements requested by governmental entities and utility companies include language stating that the easement will be “perpetual.” While a perpetual easement is often appropriate (e.g., a widened road, sewer and water main extensions or electrical switching station), many instances exist in which a time-limited easement is more appropriate (e.g., construction related, sand and gravel extraction). While a perpetual easement can be abandoned, it is much easier to terminate an easement if a sunset provision is included in the initial easement document. For example, an easement could be drafted to exist only so long as a city maintains a communications tower on the easement area or during construction of the adjacent road, but also include a hard expiration date.

Scope of Use

In connection with an accommodative easement, the grantor should be cautious to specify an appropriately narrow scope of permitted uses for the easement. For example, a grantor which intends to provide a power company an easement for underground electrical lines will not appreciate discovering that an overly broad use provision in the easement document allows the utility company to construct surface improvements or allows the utility company to apportion its easement. Similarly, a

grantor that is allowing its parking lot to be used by a neighboring business for overflow parking might not want the easement to allow overnight parking or the storage of empty trailers on the easement area.

Title Issues

Third, grantee-oriented easement agreements often contain potentially problematic title representations and warranties from the grantor. Assuming that the easement is being granted as an accommodation, the grantor should not be burdened with the cost and effort of checking the current title status of its property. Ideally, the grantee should obtain a title commitment for the burdened property prior to execution of the easement in order to disclose any title issues (e.g., senior interests) that might need to be addressed in connection with the easement.

Sample Insert

Grantee acknowledges and agrees that Grantor has made no representations or warranties, express or implied, regarding the state of title of the Property or the Easement Area [Optional Concession: provided, however, that Grantor does expressly warrant and represent that Grantor is the owner of the fee interest in the Property on which the Easement Area is located]. Grantee acknowledges and agrees that this Easement Agreement is subject to all, if any, valid and existing mortgages, deeds of trust, ground leases, occupancy leases, oil, gas, sulfur, and mineral leases, unitization agreements, easements, restrictive covenants, mineral and royalty grants and reservations and other instruments now of record against the Property that affect or that are otherwise senior and superior in interest to this Easement Agreement.

A prudent grantor will not grant an accommodative easement that could inadvertently impair future uses of the grantor's property. The grantor should review the proposed permitted use of the easement to assure itself that the grantee is not obtaining overly broad use rights. Next, the grantor

should review the proposed easement to determine if the grantee is obtaining exclusive use rights as well as examine the appropriateness of any requests for exclusivity. In many instances, the grantee might request an exclusive easement for a certain use (e.g., fiber optic cable), but would be willing to accept a nonexclusive easement.

Sample Insert

Grantor retains the right to grant other easements, licenses and/or to lease portions of the Easement Area and the Property to third parties, provided that such additional use(s) do not unreasonably interfere with Grantee's use and enjoyment of this Easement.

Consents and Recognition Protection

Fourth, if the grantor's property is subject to any mortgage, deed of trust or lease that pertains to the portion of the property where the easement area is located, a prudent grantee will want to obtain consent, subordination and/or nondisturbance protection, as applicable, from the senior interest holder(s). However, obtaining such consents and agreements can be time consuming and costly for a grantor. As a result, the grantor should include language in the easement agreement that shifts the burden for obtaining any necessary third party consents and agreements to the grantee.

Sample Insert

To the extent that Grantor is required by or because of any existing mortgage, deed of trust or lease to obtain the consent of any mortgagee, beneficiary or tenant to grant the easement set forth in the Easement Agreement, the effectiveness of this Easement Agreement shall be conditioned upon such consent being obtained. Grantor shall cooperate with Grantee in seeking such required consent(s), but Grantor makes no representation or warranty to Grantee that any third party will grant the requested consent. Similarly, Grantee (at Grantee's cost and expense), shall be responsible for the costs and expense of

obtaining any recognition and nondisturbance agreements that Grantee desires from parties with superior encumbrances to this Easement Agreement, if any. Grantor shall reasonably cooperate with Grantee to obtain any such nondisturbance and recognition agreements; provided, however that Grantor makes no representations or warranties that any third party with an encumbrance senior to this Easement Agreement will enter into such recognition and nondisturbance agreements. Grantee acknowledges and agrees that Grantor shall not be required to incur any material costs or expenses in connection with Grantor's cooperation in assisting Grantee in obtaining any consent or recognition and nondisturbance protection.

Condition of the Property

Fifth, similar to the issues pertaining to the title condition of the property, in the context of an accommodation easement, the grantor should not be responsible for the then existing condition of its property, particularly with respect to title, hazardous materials or environmental concerns. If the grantee is concerned with incurring liability for any existing environmental problems with the property or easement area, the grantee should obtain a Phase I Environmental Study of the property and/or conduct other appropriate environmental investigations prior to obtaining the easement.

Sample Insert

Grantee acknowledges and agrees that Grantor has made no representations or warranties, express or implied, regarding: (i) the physical condition of the Easement Area (including but not limited to the presence of hazardous materials and substances or other environmental conditions on or about the larger property on which the Easement Area is located); or (ii) the suitability of the Easement for the allowed use(s) of the Easement. Grantee further acknowledges and agrees that: (a) Grantee is experienced in land acquisition and development;

(b) Grantee has conducted all necessary and appropriate inspections of the Easement Area; and (c) Grantee accepts the Easement Area and the surrounding real property in "AS-IS," "WHERE-IS," and "WITH ALL FAULTS" condition, and without any warranty, expressed or implied, of any sort from Grantor.

Indemnity

Sixth, if the grantee is other than a governmental entity that has sovereign immunity, a prudent grantor will include a basic indemnity provision in the easement to protect the grantor from claims and liabilities related to the easement. Note that many governmental entities have full or partial sovereign immunity from tort claims and thus will likely not agree to indemnify the grantor.

Sample Insert

To the fullest extent permitted by law, Grantee shall indemnify, protect, defend (with attorneys reasonably acceptable to Grantor) and hold harmless Grantor (including Grantor's directors, officers, partners, members, employees, agents, contractors, affiliates, representatives, successors and/or assigns) from and against any and all liabilities, losses, damages, costs, judgments, fines, demands, claims (including, but not limited to, reasonable attorneys' fees, disbursements and court costs and all other professional or consultant's expenses), whether foreseeable or unforeseeable, arising directly or indirectly out of or related to: (a) the use of the Easement Area or the Property on which the Easement Area is located by Grantee and/or Grantee's agents, representatives, employees, contractors and/or invitees; (b) the design, construction and maintenance of any improvements installed by or behalf of Grantee on the Easement Area or the Property on which the Easement Area is located, and (c) the negligent acts or omissions of Grantee or Grantee's employees, agents, representatives, contractors and/or invitees.

Insurance

Seventh, depending on the nature and intended use of the easement, the grantor should consider

whether or not to require the grantee to carry insurance.

Sample Insert

Prior to commencing any entry upon, use of or activities on the Easement Area or the Property on which the Easement Area is located, Grantee (or any contractor or consultant of Grantee) shall, at its sole cost and expense, obtain and thereafter at all times maintain a policy or policies of commercial general liability insurance covering Grantee's use of the Easement Area pursuant to this agreement, which (a) contain commercially reasonable and prudent policy limits, (b) name Grantor and any other parties reasonably designated by Grantor as additional insureds, and (c) include contractual liability coverage.

If the grantee will be constructing any significant insurable improvements on the easement area, the grantor should consider whether to expressly require the grantee to carry property insurance on those improvements and address waiver of subrogation issues.

Sample Insert

Grantee shall obtain and keep in force a "special form" property policy (or other than customary form of property insurance coverage) in the amount of the full replacement cost of any improvements to the Easement Area and any personal property of Grantee stored or maintained on the Easement Area. Grantee hereby waives all rights of recovery against the Grantor and Grantor's representatives, employees and contractors on account of loss and damage occasioned to Grantee that is or would be covered by the property insurance required of Grantee under this Easement Agreement or any other policy of property insurance actually carried by Grantee. Grantee shall give notice to the applicable insurance carrier(s) of this waiver of subrogation rights.

To the extent that the easement agreement expressly requires the grantee to maintain insurance coverage, the grantee should also include a reasonable mechanism for the grantor to verify that the required coverage is actually in place.

Sample Insert

Upon request by Grantor, Grantee shall provide Grantor with reasonable evidence of any insurance required of Grantee by this Easement Agreement.

Construction, Repair, Maintenance, and Operation

Eighth, If the grantee intends to install, maintain or operate any improvements on the easement, the grantor should address basic issues related to those improvements such as compliance with laws, mechanics' liens and, if the easement is not perpetual, what happens with the improvements upon the expiration of the easement.

Sample Insert

Grantee shall be solely responsible for the design, construction, operation, repair and maintenance of any facilities or improvements constructed, operated and/or maintained by Grantee on the Easement Area. Grantee shall construct, install, operate and maintain any facilities and/or improvements it constructs, maintains or operates on the Easement Area in compliance with all applicable laws and regulations.

Sample Insert

Grantee shall at all times keep the Easement Area and the Property on which the Easement Area is located free and clear of any and all claims for mechanic's and/or materialman's liens and any and all other liens or encumbrances arising out of any use, work or improvement to the Easement Area conducted by or on behalf of Grantee.

Sample Insert

Grantee, at Grantee's sole cost and expense, shall be responsible for removing any and all improvements to the Easement Area installed by or on behalf of Grantee, prior to the expiration date of this Easement. [Alternatively: Grantee acknowledges and agrees that upon the expiration of the Easement Agreement, any improvements located on the Easement Area will be deemed to be the property of the Grantor.]

Recording the Easement

Finally, the grantor needs to consider whether the easement should be recorded. In situations where the easement has a limited duration (e.g., temporary construction access, short term overflow parking), the best approach may be to not record the easement, unless the easement includes a clear expiration date.

Sample Insert

Grantee agrees that this Easement Agreement shall not be recorded.

If the easement is or will likely be recorded, then the grantor should ensure the obligation of and costs for recording are grantee's responsibility.

Sample Insert

Grantee, at Grantee's sole cost and expense, shall be responsible for having a fully-executed and acknowledged original of agreement recorded in the Official Records of _____ County, _____. Upon such recordation, Grantee shall promptly provide Grantor with a true and correct copy of the recorded Easement Agreement.

**To purchase the online version of this article,
go to www.ali-cle.org and click on "Publications."**