



EASEMENTS AREN'T EASY: PRACTICAL EXPERIENCES AND LEGAL ESSENTIALS

ACWA CLE SERIES SEPTEMBER 25 (11:00 AM – NOON)



KNOW YOUR AUDIENCE – POLL TIME!

What role do you serve for your organization?

- a. In-House Counsel
- b. Outside Counsel
- c. Board Member
- d. Non-Attorney Staff Member



ADAPTING TO CHANGED CIRCUMSTANCES

RUSSELL FRINK



EXAMPLES OF MODERN EASEMENT CONFLICTS

- **Expanding use: limited review of expansions in use of Public Utility Easements (PUE)**
 - PG&E vegetation removal within PUE
 - Expansions in use of PUEs in existing subdivisions
- **Changing use: CEQA considerations when changes in use occur**
 - CEQA considerations for public agencies seeking to abandon easements
 - Converting agricultural lands with existing ditches to urban uses
- **Limiting future use: using Collaborative Land Use Easements (clues) to prevent future conflicts between land uses**
 - Creating easements to prevent conflicts between new residential uses and existing industrial uses

BASIC LEGAL PRINCIPLES

- An easement holder cannot change the character of the easement, or substantially increase the burden, as defined by the language of the easement and the circumstances at the time it was made, but their use of the easement can change to accommodate “demands created by ‘normal development.’” *Camp Meeker Water System, Inc. v. PUC* (1990) 51 Cal.3d 845, 866-868
- Conversely, the owner of the servient tenement can be liable for “unreasonably interfering” with an easement. *Inzana v. Turlock Irrig. Dist.* (2019) 35 Cal.App.5th 429

PG&E VEGETATION REMOVAL

- PG&E has expanded its vegetation removal program, leading to disputes
- If a valid electrical transmission easement exists, the CPUC has exclusive jurisdiction over the dispute. *Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 231
- However, the superior court has jurisdiction to determine whether an easement exists

EXPANSION IN USE OF PUBLIC UTILITY EASEMENTS IN EXISTING SUBDIVISIONS

- PUEs can be created by a final subdivision map. (Gov. Code section 66475; *County of Sacramento v. Pac. Gas & Elec. Co.* (1987) 193 Cal. App. 3d 300, 313.)
- The superior courts can determine whether a PUE exists, but the courts cannot interfere with CPUC regulations that govern how the PUE can be used. (*Koponen v. Pac. Gas & Elec. Co.* (2008) 165 Cal. App. 4th 345, 356–58.)

EASEMENT CONSIDERATIONS FOR UNDERGROUNDING WATER CONVEYANCE FACILITIES

- **Undergrounding for Water Conservation:** Because public agencies must comply with CEQA before approving a project to replace an open ditch with a pipeline, the agency must ensure that it has adequately addressed any environmental concerns associated with changes to how it used the easement. (See, e.g., *Save the El Dorado Canal v. El Dorado Irrigation District* (2022) 75 Cal. App. 5th 239.)
- **Undergrounding for Urban Development:** Before approving new urban development, the lead agency must evaluate potential impacts to agriculture under CEQA. Even if the easement holder agrees to the scope of the proposed changes (e.g., replacing open ditches with pipelines), the CEQA document must evaluate any potential impacts that altering those existing irrigation facilities will have on agriculture

USING CLUES TO PREVENT FUTURE CONFLICTS

- Easements for noise, dust, and odor to prevent future conflicts between an existing sawmill and newly developed homes (*Mondragon v. Meritage Homes of California, Inc.* (Cal. Ct. App., May 18, 2010, No. C061606) 2010 WL 1972284).
- Negative easements to retain open-space buffer areas between existing mining operations and newly proposed housing (e.g., Blue Springs Golf Course in Vallejo as buffer for Syar's adjacent mining operation)



FIELDING REQUESTS FOR COMMUNICATIONS FACILITY EASEMENTS, LEASES, AND ROW USES

BRITTANY WEIDNER



AGENDA

- State Authority for Communications Facilities to operate in Right of Way/Poles
- Negotiating Terms for Facility Easements, Leases, and ROW Use Agreements
- Analyzing Requests to Purchase Communications Facility Leases

COMMUNICATIONS FACILITIES: STATE AUTHORITY TO USE THE ROW

Wireless and Wireline Authority

- Cal. Public Utilities Code (PUC) Section 7901
 - Grants state franchise to telephone companies to use public rights-of-way, subject to limitations (may not “incommode the public use”)
 - Telephone companies can use public rights-of-way without payment of compensation to local governments who own or control the ROW, per this state statutory franchise
 - Applies to wireless companies and facilities

COMMUNICATIONS FACILITIES: STATE AUTHORITY TO USE THE ROW

Role of CA local governments

- Local governments mainly regulate certain safety aspects of placement and aesthetics (within limits)
- *T-Mobile West LLC et al. v. City and County of San Francisco et al.*, 6 Cal. 5th 1107 (2019).
 - Existing 9th Circuit legal authority established that local review authority under PUC 7901 included aesthetic regulations *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716
 - Telecom providers filed in state court challenging whether that authority is discretionary, and whether can impose conditions on a permit to regulate aesthetics
 - Cal. Supreme Court upheld local regulation of aesthetics under PUC 7901

COMMUNICATIONS FACILITIES: STATE AUTHORITY TO USE PUBLICLY-OWNED POLES

- PUC Section 9510 et seq dictates access to local publicly owned electric utilities' poles and support structures by cable television corporations, video service providers, and telephone corporations
 - Including poles owned by irrigation districts and joint powers authority
- Includes timelines for reviewing pole attachment requests and a cost-based formula for establishing pole attachment rates
- Rates and terms must be adopted through public hearings

EASEMENTS, LEASES, AND ROW USE AGREEMENTS: NEGOTIATION BEST PRACTICES

Control the Drafting Process

- Select initial document
 - Carrier template agreements are incredibly one-sided
 - Revision to level the playing field is time intensive
- Wireless carriers can and will take advantage of property owners
- Developing and using a standard form saves time and helps avoid overlooking issues

EASEMENTS, LEASES, AND ROW USE AGREEMENTS: NEGOTIATION BEST PRACTICES

Negotiating Key Business Terms

■ Rent:

- New Macro Cell Sites: varies widely (just like other real estate – location matters)
- Renewals and Extensions: generally see increase from original base rent
- Annual Escalation greater of: CPI (Consumer Price Index) or 3%

■ Term:

- Carriers expect at least 10-20yrs of guaranteed occupancy

EASEMENTS, LEASES, AND ROW USE AGREEMENTS: NEGOTIATION BEST PRACTICES

Negotiating Key Business Terms

■ Revenue Share for Subsequent Collocations:

- Carefully define who and what is subject to the revenue share
- E.g. Greater of: 50% of rent of Flat Escalating Floor ~\$14,000/year

■ Termination Rights:

- Default – Carriers will limit landlord termination to uncured default only.
- Consider additional termination rights you may need in future

■ Holdover:

- Make sure to account for carrier staying in place after expiration of term and require increased rent

EASEMENTS, LEASES, AND ROW USE AGREEMENTS: NEGOTIATION BEST PRACTICES

Choose Your Management Role

- **Modifications:** Carriers will request free reign to modify, add to, and remove facilities
 - Consider requiring consent to modifications deviating from original approved plan
- **Access:** Carriers will request 24/7 access
 - Consider requiring advance notice before access or using other methods to track access
- **Assignments:** Carrier will request free transfer right to affiliates
 - Require consent to all other assignments
- **Subleases:** Landlords should request
 - Advance consent
 - Revenue share
 - Separate lease/license for expanded ground space

EASEMENTS, LEASES, AND ROW USE AGREEMENTS: NEGOTIATION BEST PRACTICES

Utilities

- Avoid Sub-Metering if possible
- Avoid liability for electrical service interruptions
- Require utility routes be depicted on site plan exhibit w/ no modifications unless prior approval
- Clearly identify scope of utility routes and maintenance responsibilities

EASEMENTS, LEASES, AND ROW USE AGREEMENTS: NEGOTIATION BEST PRACTICES

Special Issues – Deployment on Water Tanks/ Reservoirs

- Structural integrity
- Special access
- Consider magnetic mounts
- Require temporary relocation for water tank upgrades at tenant's cost
- Upcoming Capital Improvement Projects
- Conduit and utility line alignment

ANALYZING REQUESTS TO PURCHASE YOUR COMMUNICATIONS FACILITY LEASES

- Numerous tower operators seeking to buy landlord lease rights
 - Either permanently, or for a limited term via easement
- Typically offer a fraction of Net Present Value (NPV) of lease payments; lump sum payments
- Term requests of Perpetual or > 35 yrs
- Threat of nonrenewal + certainty of being paid
- May ask for amendments allowing unlimited collocations
- Make sure to follow your procurement rules – get competitive bids.
- You can reject OR counteroffer by utilizing best practices discussed



EVALUATING PRESCRIPTIVE EASEMENTS FOR EXISTING PIPELINES

ELIZABETH LEEPER



SCENARIO: PIPE IN THE GROUND BUT AGENCY CAN'T IDENTIFY A RECORDED EASEMENT

- This scenario is fairly common and manifests itself in a variety of ways, such as:
 - 1) Agency Replacement or Improvement Project: in preparing to replace or improve an existing pipeline, the agency discovers that there is no recorded easement associated with certain portions or sections of the pipeline
 - 2) Landowner Project: in performing excavation or preparing for a new use on the property, the landowner discovers that there is an underground pipe on their property but there is no associated easement listed on their title report
 - 3) Pipe Located Outside of Easement: there are also circumstances where the agency does have an easement right on the property but the agency discovers that the pipe was placed outside of the boundaries of the described easement

WHAT SHOULD THE AGENCY DO?

■ Step 1: Conduct your due diligence

1) Review relevant parcel maps and subdivision maps

- Is the pipeline within an existing ROW such as a road or a designated PUE?
- Does the subdivision map designate ROWs or PUEs for utility purposes?

2) Obtain a title report for the subject parcel

- Do the listed title exceptions include any easements for the agency or the agency's predecessor?

WHAT SHOULD THE AGENCY DO?

- **Step 2: Attempt to negotiate an easement with the landowner**
 - Obtain a grant of easement from the landowner
 - Cost of appraisal may exceed actual value of the easement but it provides a fair market valuation (i.e. no gift of public funds and provides just compensation)
 - Cost of survey for legal description of the easement area will be borne by agency
 - If landowner is unwilling to grant an easement, proceed to Step 3
- **Step 3: Evaluate whether the agency has a prescriptive easement**

DOES THE AGENCY HAVE A PRESCRIPTIVE EASEMENT?

To establish a prescriptive easement, the agency must satisfy the following legal elements:

- 1) **Open and Notorious Use:** The use of the property must be visible and apparent, such that it would give notice to a reasonable property owner (*McBride v. Smith*, (2018) 18 Cal.App.5th 1160)
- 2) **Continuous and Uninterrupted Use:** The use must be continuous and without significant interruption for a statutory period of five years. (Civ.Code, § 1007; Code Civ.Proc., § 321)
- 3) **Hostile Use:** The use must be without the true owner's permission, effectively against the owner's interest in the property (*McBride v. Smith*, (2018) 18 Cal.App.5th 1160)
- 4) **Claim of Right:** The user must treat the property as their own, under a claim of right, regardless of the actual legal entitlement (*Hansen v. Sandridge Partners, L.P.*, (2018) 22 Cal.App.5th 1020)

DOES THE AGENCY HAVE A PRESCRIPTIVE EASEMENT?

- An easement for a pipe or other similar enclosed conduit may be acquired by prescription. (*Reinsch v. City of Los Angeles* (1966) 243 Cal.App.2d 737, 745.)
- An actual, open, and notorious use of an underground conduit, hostile and adverse to the title of the person against whom the claim is made, under claim of right, continuous and uninterrupted for the statutory period of five years (Civ.Code § 1007) will ripen into an easement by prescription. (*Jones v. Harmon* (1959) 175 Cal.App.2d 869, 875.)

OPEN AND NOTORIOUS?

- The reason for the requirement of visible use is “to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement.” (*Field-Escandon v. Demann*, (1998) 204 Cal. App. 3d 228, 235)
- A prescriptive easement to use an underground pipe across the servient tenement may be acquired where the physical evidence of the pipe's existence would be adequate to put a reasonably prudent person on notice. (See, e.g., *Reinsch v. City of Los Angeles*, (1966) 243 Cal. App. 2d 737, 746)
- For underground conduits, where physical visibility might be limited, the presence of surface indicators or other evidence demonstrating the use of the underground facility is crucial

ARE THERE ABOVE-GROUND FEATURES?

Meter Boxes



Air Release Valve



Blow Off Valve



OPEN AND NOTORIOUS?

- Standpipes, a depression in the ground, or other similar features may be sufficient to imply that the owner of the burdened property had notice that the pipe crossed his or her property
- “mere fact that the pipeline may have been completely underground would not compel a finding that the appellant should not reasonably have discovered the existence of the waterway when she purchased her lots” (*Jones v. Harmon* (1959) 175 Cal.App.2d 869, 879)
- “even though the pipes themselves were not apparent, there were accessory installations on the surface which were plainly apparent” (*Jones v. Harmon* (1959) 175 Cal.App.2d 869, 879)

WE (MIGHT) HAVE A PRESCRIPTIVE EASEMENT – NOW WHAT?

- **Step 1:** Write a letter describing basis of prescriptive easement and ask for grant of easement to clarify nature of easement for both parties (i.e. it is in our mutual interest to have clear description)
 - If that fails, proceed to Step 2
- **Step 2:** Consider litigation (e.g. quiet title action)

QUESTIONS ?