

EASEMENTS 101

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CHAPTER 2

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EASEMENTS 101

I. INTRODUCTION TO EASEMENTS

A. Elementary Easement Concepts

1. Easements

An easement is a right to use the real property of another without possessing it.

2. Affirmative & Negative Easements

An affirmative easement is the right to use another's property for a specific purpose. An example of an affirmative easement is an easement to use a boat ramp.

A negative easement is the right to prevent another from performing an otherwise lawful activity on the property. An example of a negative easement is an agreement by a property owner not to allow the property to be rented on a daily basis (e.g. Airbnb).

The burdens placed upon real property by appurtenant easements and negative easements share common principles with real property covenants and equitable servitudes. Generally, there has been a merger of these concepts under the broad term "servitudes."

3. Appurtenant & In Gross Easements

An easement appurtenant is one that benefits Property A by burdening Property B. An appurtenant easement "runs with" (follows) the benefitted Property A and the burdened Property B, automatically when the properties are conveyed. An example of an easement appurtenant is a right-of-way road which runs through Property B, providing access (generally to access a public road) for the benefit of Property A.

An easement "in gross" benefits an individual or a legal entity, rather than real property. Easements in gross do not automatically "run with", or follow, the burdened property, although they will do so if the instrument so provides. Examples of an easement in gross are: (a) the right to use a boat ramp; or (b) a right held by A to build and maintain a pipeline on B's real property.

4. Dominant & Servient Estates

An appurtenant easement requires the existence of at least two properties. The property gaining the benefit of the easement is the "dominant estate" (sometimes called the dominant tenement), while the property suffering the burden is the "servient estate" (sometimes called the servient tenement). For example, when the owner of Property A holds an easement to use a driveway on Property B to drive across Property B, then Property A is the dominant estate receiving the benefit of the easement, while Property B is the servient estate suffering the burden of the easement.

5. Private & Public Easements

A private easement is held by private individuals or entities. An example of a private easement exists when the owner of Property A holds an easement to use a driveway on Property B to allow the owner of Property A to drive across Property B. The beneficiary of the easement is the private person or entity owning Property A.

A public easement grants an easement for a public use. An example of a public easement exists when the owner of Property B is burdened by a public road easement running across Property B, for the purpose of providing the public with vehicular access through Property B along the public road.

6. Express & Implied Easements

An easement may be express or implied.

An express easement may be "granted" or "reserved" in a deed or other legal instrument. Alternatively, it may be incorporated by reference to a subdivision plan by "dedication", or in a restrictive covenant in the agreement of an owners association. Generally, the doctrines of contract law are central to disputes regarding express easements while disputes regarding implied easements usually apply the principles of property law.

Implied easements are more complex and are created by the courts based on the use of a property and the intention of the original parties. Implied easements are not recorded or explicitly stated until a court decides in a manner which creates them. Implied easements tend to reflect the practices and customs for property, with reference to the intent of the

parties and the prior use of the property. Examples of implied easements include: (1) easements by necessity; and (2) easements by prior use. Easements may also be created by operation of law, under principles of estoppel and prescription.

B. Nature of Easements

An easement “is a nonpossessory interest that authorizes its holder to use the property for only particular purposes.” *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (citing Restatement (Third) of Property (Servitudes) § 1.2 cmt. d); *Lance v. Robinson*, 2018 WL 1440476 at page 10, 61 Tex. Sup. Ct. J. 547 (Tex. - March 23, 2018).

An easement confers on one person the right to use the land of another for a specific purpose [*Allen v. Allen*, 280 S.W.3d 366, 381 (Tex.Civ.App.-Amarillo, 2008, rev. denied); *Hubert v. Davis*, 170 S.W.3d 706, 710 (Tex.Civ.App.-Tyler 2005, no pet.)]. An easement is a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil [*Allen v. Allen*, 280 S.W.3d 366, 381 (Tex.Civ.App.-Amarillo, 2008, rev. denied); *Miller v. Babb*, 263 S.W. 253, 254 (Tex.Com.App.1924, judgm't adopted)]. An easement constitutes a burden on one estate, the servient estate, for the benefit of another, the dominant estate [*Allen v. Allen*, 280 S.W.3d 366, 381 (Tex.Civ.App.-Amarillo, 2008, rev. denied)].

An easement is referred to as an incorporeal hereditament or right, as it does not have physical existence [*Miller v. Babb*, 263 S.W. 253, 254 (Tex.Com.App. 1924, judgm't adopted)]. This incorporeal hereditament is imposed on corporeal or real property, rather than being imposed on the owner.

An easement is a nonpossessory right to use the real property of another [*Cecola v. Ruley*, 12 S.W.3d 848, 852 (Tex.Civ.App.-Texarkana 2000, no pet.)]. A person who holds the right to use another person's property under an easement has an interest in the real property [*Settegast v. Foley Bros. Dry Goods Co.*, 114 Tex. 452, 270 S.W. 1014, 1016 (1925); *Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex.Civ.App.-El Paso 1993, no writ)].

The statute of frauds generally requires a writing to establish an express easement [*Allen v. Allen*, 280 S.W.3d 366, 381 (Tex.Civ.App.-Amarillo, 2008, rev. denied); *Machala v. Weems*, 56 S.W.3d 748, 756 (Tex.Civ.App.-Texarkana 2001, no pet.)]. Thus, an express easement must be created by a grant, rather than by a parol agreement [*Allen v. Allen*, 280 S.W.3d 366, 381 (Tex.Civ.App.-Amarillo, 2008, rev. denied)].

C. Easements: Affirmative & Negative

An easement is said to be the right in favor of one person to use the land of another person. However, it can also limit an owner's use of his land. Easements which provide a positive right in someone else's land are called “affirmative easements”. Easements which deny rights in the land of an owner are called “negative easements”.

An “affirmative easement” is one which gives to the owner of the dominant land the right to use the servient land, or the right to do some act on the dominant land which would otherwise be unlawful. A “negative easement” is one in which the owner of the servient land (also called the “servient tenement” or “servient estate”) is subject to restricted use of his lands, to benefit the owner of the dominant land (also called the “dominant tenement” or “dominant estate”) [*Miller v. Babb*, 263 S.W. 253, 254 (Tex.Com.App. 1924, judgm't adopted)].

D. Easements: Dominant Estate & Servient Estate

The land to which the easement is appurtenant is designated the "dominant estate" and the subject land is the "servient estate" [*Pokorny v. Yudin*, 188 S.W.2d 185, 193 (Tex.Civ.App.-El Paso 1945, no writ); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207-208 (Tex. 1962)]. Easements generally take the form of a negative appurtenant easement in which the owner of the servient estate may not interfere with the right of the owner of the dominant estate to use the servient estate for the easement purpose [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962); *Pokorny v. Yudin*, 188 S.W.2d 185, 193 (Tex.Civ.App.-El Paso 1945, no writ)].

II. EASEMENTS & OTHER RIGHTS

A. Easement Appurtenant

An easement to use one property (the servient estate) for the benefit of another property (the dominant estate) is an easement “appurtenant,” meaning attached to and part of the land itself [*Miller v. Babb*, 263 S.W. 253, 254 (Tex.Com.App. 1924, jdgmt. adopted)]. An easement appurtenant transfers with the title to the dominant estate, and the burden of the easement passes with the transfer of title to the servient estate [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203, 207 (Tex. 1962); *McDaniel v. Calvert*, 875 S.W.2d 482, 484 (Tex.Civ.App.-Ft. Worth 1994, no writ)].

Transfer of an easement appurtenant cannot enlarge the rights afforded by the easement. Thus, an access easement granted to allow access to one tract could not be used to access another tract [*Jordan v. Rash*, 745 S.W.2d 549, 553 (Tex.Civ.App.-Waco 1988, no writ)].

B. Easement In Gross

An easement that is created to benefit a person or entity, rather than to benefit their use and enjoyment of real property, is called an easement “in gross” (for example, a pipeline easement).

As a general rule, unless the easement is specifically made transferable to others, the holder of an easement in gross cannot assign it to another person [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1962); *McDaniel v. Calvert*, 875 S.W.2d 482, 484 (Tex.Civ.App.-Ft. Worth 1994, no writ); *Farmer’s Marine Copper Works v. City of Galveston*, 757 S.W.2d 148, 151 (Tex.Civ.App.-Houston [1st Dist.] 1988, no writ)].

However, as an equitable exception, the transfer will be allowed and recognized when use of the easement by a transferee does not burden the servient estate beyond what was contemplated in the original easement grant [*Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538, 546-547 (Tex.Civ.App.-Houston [14th Dist.] 2007, pet. denied); *Orange County, Inc. v. Citgo Pipeline Co.*, 934 S.W.2d 472, 475 (Tex.Civ.App.-Beaumont 1996, writ denied); see Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 Vand. L. Rev. 109, 130-131 (1986)].

This equitable exception has been applied to pipeline easements [*Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538, 546-547 (Tex.Civ.App.-Houston [14th Dist.] 2007, pet. denied); *Orange County, Inc. v. Citgo Pipeline Co.*, 934 S.W.2d 472, 475 (Tex.Civ.App.-Beaumont 1996, writ denied); *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 191 (Tex. 2004) (“easement for a pipeline obtained by a common carrier in an eminent domain proceeding could, at a minimum, be transferred, sold, or conveyed to another common carrier to operate a pipeline as a common carrier without an explicit request for such a right in the condemnation petition”)].

An easement is not presumed to be in gross when it can be fairly construed to benefit the easement holder’s land and thus be deemed an easement appurtenant [*Shipp v. Stoker*, 923 S.W.2d 100, 103 (Tex.Civ.App.-Texarkana 1996, writ denied); *McWhorter v. City of Jacksonville*, 694 S.W.2d 182, 184 (Tex.Civ.App.-Tyler 1985, no writ)].

C. Profit a Prendre

A “profit a prendre,” or “profit,” is a right to take a part of the soil or produce from the land of another person [*Evans v. Ropte*, 128 Tex. 75, 96 S.W.2d 973 (1936)]. The right to take timber or coal from land or the right to fish or hunt on property of another are examples of profits a prendre [*Digby v. Hatley*, 574 S.W.2d 186, 190 (Tex.Civ.App.-San Antonio 1978, no writ) (hunting lease characterized as profit a prendre)]. A profit is considered an interest in land and as such must be evidenced by a writing [*Anderson v. Gipson*, 144 S.W.2d 948, 950 (Tex.Civ.App.-Galveston 1940, no writ)]. Moreover, the document granting a profit will be strictly construed and the rights exercised by the profit holder cannot extend beyond the terms of the grant [*Bland Lake Fishing & Hunting Club v. Fisher*, 311 S.W.2d 710, 715 (Tex.Civ.App.-Beaumont 1958, no writ); *Uzzell v. Hoggett*, 430 S.W.2d 846, 848 (Tex.Civ.App.-San Antonio 1968, writ ref’d n.r.e.)].

D. License

A “license” is a privilege or authority given to or retained by a party to do some act on the land of another person. A license is not an interest in the land itself [*Settegast v. Foley Bros. Dry Goods Co.*, 114 Tex. 452, 270 S.W. 1014, 1016 (1925); *Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex.Civ.App.-El Paso 1993, no writ)]. For example, allowing one to conduct a garage sale on another person’s property [*Arant v. Jaffe*, 436 S.W.2d 169, 178 (Tex.Civ.App.-Dallas 1968, no writ)]. Licenses are personal, unassignable, and, as a general rule, revocable privileges. They may be conferred in writing or by parol [*Joseph v. Sheriffs’ Ass’n*, 430 S.W.2d 700, 703 (Tex.Civ.App.-Austin 1968, no writ) (privilege of using driveway was revocable license, not easement)]. An exception to the rule allowing unfettered revocation of a license is that a license coupled with an interest in property is irrevocable [see Restatement of Property §?513]. Another exception requires revocation to be on a fair and equitable basis when the licensee has made valuable improvements or expenditures in reliance on the continued permission to act [*Joseph v. Sheriffs’ Ass’n*, 430 S.W.2d 700, 703 (Tex.Civ.App.-Austin 1968, no writ)].

III. PRIVATE VS PUBLIC EASEMENTS

An easement may be a public easement, a private easement, or both. A public easement gives to the public the right to use the land. A private easement gives to a private person or entity the right to use the land [*County of Real v. Sutton*, 6 S.W.3d 11, 15–17 (Tex.Civ.App.-San Antonio 1999, pet. denied)].

If the owner of a servient estate created or allowed the creation of a public easement on the property, this does not mean that the owner of a dominant property cannot acquire a private easement coexistent with the public's rights of usage. If a government entity having control of a public easement terminates or abandons it, that action cannot extinguish the private rights of others for whom continued use of the easement is necessary for the use and enjoyment of their own property [*City of San Antonio v. Olivares*, 505 S.W.2d 526, 529-530 (Tex. 1974); *City of Houston v. Fox*, 444 S.W.2d 591, 593 (Tex. 1969); *Dykes v. City of Houston*, 406 S.W.2d 176, 181 (Tex. 1966)]. A party's private right to use a road, for example, may arise when the road provides the only access to the party's property. The private right can exist whether or not the public easement was accepted or opened by the governmental entity [*Dykes v. City of Houston*, 406 S.W.2d 176, 181 (Tex. 1966)].

The owner of property on which a public easement is located cannot interfere with use of the easement by a party having a private right to do so. By establishing a private right in a public road, a party may be able to enjoin its closure by the governmental entity in charge of it or recover damages for inverse condemnation by a "taking" of the property interest without just compensation [Tex. Civ. Prac. & Rem. Code § 65.015—abutting landowner's right to enjoin street closure].

A private right in a public easement usually requires a showing that the use of the easement is necessary for the claimant's use of adjoining property [*Seelbach v. Clubb*, 7 S.W.3d 749, 758-759 (Tex.Civ.App.-Texarkana 1999, pet. denied)]. Private rights have also been recognized when the claimant purchased property in reliance on a map or plat showing the public easement [*Town of Palm Valley v. Johnson*, 17 S.W.3d 281, 288 (Tex.Civ.App.-Corpus Christi 2000), petition denied with per curiam opinion on separate procedural matter at 87 S.W.3d 110 (Tex. 2001)].

IV. EXPRESS EASEMENTS

A. Signed Writing for Conveyance of Express Easement

Because an easement is considered an interest in land, creation and transfer of that interest are subject to the statute of frauds [Tex. Bus. & Com. Code § 26.01] and the statute of conveyances [Tex. Prop. Code § 5.021]. Both statutes require that a grant or reservation of an easement must be in writing and signed by the grantor [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1962); *Thompson v. Clayton*, 346 S.W.3d 650, 656–657 (Tex.Civ.App.-El Paso 2009, no pet.) (when grantor signed letter agreement creating express easement, both statutes satisfied); *Murphy v. Long*, 170 S.W.3d 621, 624 (Tex.Civ.App.-El Paso 2005, pet. denied); *Vinson v. Brown*, 80 S.W.3d 221, 226 (Tex.Civ.App.-Austin 2002, no pet.)].

B. Description of Servient Property

A court-added requirement of the statute of frauds [Tex. Bus. & Com. Code § 26.01] is that the grant or conveyance of an interest in land must contain a sufficiently certain description of the interest involved [*Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972)]. Therefore, the document creating an express easement ordinarily must describe it with such certainty that a surveyor could go on the land and locate it [*Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983); *Compton v. Texas S.E. Gas Co.*, 315 S.W.2d 345, 348 (Tex.Civ.App.-Houston 1958, writ ref'd n.r.e.); *Vrabel v. Donahoe Creek Watershed Authority*, 545 S.W.2d 53, 54 (Tex.Civ.App.-Austin 1976, no writ) (“111.0 acres, more or less, out of a 250.5 acre tract” held insufficient)].

A conveyancing instrument that provides some key to or nucleus of the description does not lack the required degree of certainty if parol or extrinsic evidence is available to pinpoint the exact location of the easement [*Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex.Civ.App.-Corpus Christi 1980, no writ); *Kmiec v. Reagan*, 556 S.W.2d 567, 569 (Tex. 1977) (construing deed)]. In *Elliott*, the express grant was for a “right-of-way over other lands of grantor between this tract and State Highway N. 58, at S.E. corner.” The court of appeals recognized that the uncertainty of the conveyance could be resolved by parol evidence to establish the exact location of the right of way [*Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex.Civ.App.-Corpus Christi 1980, no writ)].

This requirement of sufficient certainty in description can also be met after the fact. For example, a document may create a valid easement in specified property for the purpose of laying a pipeline or similar structure without specifically locating the place for the line [*Armstrong v. Skelly Oil Co.*, 81 S.W.2d 735, 736 (Tex.Civ.App.-Amarillo 1935, writ ref'd)]. Likewise, a grant of a right-of-way easement in general terms not specifying an exact location can be made certain by the grantee's act in selecting the location [*Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex.Civ.App.-Corpus Christi 1980, no writ)]. In these cases, once the grantee selects the location of the easement, what was general becomes fixed and the easement is located and cannot be changed [*Adams v. Norsworthy Ranch, Ltd.*, 975 S.W.2d 424, 428 (Tex.Civ.App.-Austin 1998, no pet.) (grantee was bound by selection when writing granted “most convenient route”); *Jones v. Fuller*,

856 S.W.2d 597, 602-603 (Tex.Civ.App.-Waco 1993, writ denied) (grantee was not required to accept location different from that selected by traditional use)].

C. Description of Easement Rights

Because an express easement conveys only a right to use property and not a possessory interest in the property, any grant of an easement must also provide an adequate description of the grantee's rights in the property [*Cummins v. Travis County Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 51-52 (Tex.Civ.App.-Austin 2005, no pet.) (reservation of rights in grant provided only basic rights to access water, and did not constitute express easement permitting holder to construct boat dock; exercise of right of access had to be consistent with interests of other owners and public, and in accord with state regulation)].

The requirement of certainty also applies to an easement imposed by operation of law. A litigant seeking to establish the right to use the property of another must show the existence of a right with such a degree of definiteness as to be enforceable in court. A general right to "roam" over property for recreation, for example, is too indefinite for enforcement [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 211-212 (Tex. 1962) (claimed easement by estoppel)]. A judgment declaring an easement by operation of law must describe the easement with the same degree of certainty that would be required in a written conveyance or grant. Preferably, a metes and bounds description of the easement should be set out in the judgment [*Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 257 (Tex. 1984)]. The judgment's description may be made certain by attaching and referring to a map or drawing of the properties and the location of the easement [*Wallace v. McKinzie*, 869 S.W.2d 592, 597 (Tex.Civ.App.-Amarillo 1993, writ denied)].

D. Recording

Grants and conveyances of easements are governed by the recording statutes as other conveyances of interests in land [*Latimer v. Hess*, 183 S.W.2d 996, 997-998 (Tex.Civ.App.-Texarkana 1944, writ ref'd)]. The writing creating or transferring an easement can be recorded with the county clerk in the county where the servient estate is located if the instrument is acknowledged, sworn to with a proper jurat, or otherwise proved according to law [Tex. Prop. Code § 12.001(a)].

The failure to place an instrument on record as evidence of an easement does not affect its validity as between the parties to it and subsequent purchasers who either have notice of the existence of the easement or fail to give valuable consideration for the purchase [Tex. Prop. Code § 13.001(b); *Thompson v. Clayton*, 346 S.W.3d 650, 657 (Tex.Civ.App.-El Paso 2009, no pet.) (absence of recording of letter agreement creating easement inconsequential because successor in interest of grantor conceded knowledge)]. On the other hand, an unrecorded document granting or conveying an easement is void as to a subsequent purchaser of the servient property when the purchaser has given value and is otherwise without notice of the easement [Tex. Prop. Code § 13.001(a)].

When an easement is established by operation of law by a court's judgment, it is recommended that an attested copy of the court's judgment be recorded with the county clerk in the county's real property records [Tex. Prop. Code §§ 12.001(b), 12.003]. Although the court's record of the judgment establishing an easement affords notice to subsequent purchasers and creditors, having the judgment appear in the deed records makes it more likely that the existence of the easement actually will come to the attention of a title examiner and avoid future conflict.

E. Proof of Express Grant or Reservation

To establish an easement created by a written instrument, the litigant must produce evidence of that writing by a specific grant or conveyance of the easement [*Settegast v. Foley Bros. Dry Goods Co.*, 114 Tex. 452, 270 S.W. 1014, 1016 (1925)] or by an express reservation in a deed conveying title to the servient estate [*Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 165 (1952)]. The proof may be satisfied by introducing a copy of a recorded document authenticated by the records custodian of the county [Tex. R. Evid. 902(4)].

An exception or reservation in a deed in favor of a nonparty to the conveyance is inoperative, so an express easement may not be claimed by a party who was a complete stranger to the transaction [*United States Invention Corp. v. Betts*, 495 S.W.3d 20, 25 (Tex.Civ.App.-Waco 2016, pet. denied); *MGJ Corp. v. City of Houston*, 544 S.W.2d 171, 174-175 (Tex.Civ.App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.)]. Provided the easement claimant was a party to the transaction, the grant or reservation at issue need not use the word "easement" or any other particular words or forms, but its language must be sufficient to show the intent to convey or reserve an easement through recognition of the right to use the servient estate [*Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 166-167 (1952); *Seber v. Union Pac. R.R. Co.*, 350 S.W.3d 640, 646-647 (Tex.Civ.App.-Houston [14th Dist.] 2011, no pet.) (deed conveying tract and "appurtenances" was not express grant of easement to use existing private railroad crossing because deed did not show intent of grantor to permit use of crossing); *Bartel v. Pick*, 643 S.W.2d 224, 226 (Tex.Civ.App.-Ft. Worth 1982), aff'd on other grounds, 659

S.W.2d 636 (Tex. 1983) (“guarantee” of right of way in conveyance of land was not grant of easement under circumstances of case)].

Because the scope of the interest conveyed and the intent of the parties is determinative, an express grant can convey an easement even if the interest is given some other label by the granting instrument [*Thompson v. Clayton*, 346 S.W.3d 650, 656 (Tex.Civ.App.-El Paso 2009, no pet.) (letter agreement signed by parties “granting us permission to pass over your lands” at any time for specified purposes created easement, not revocable license); *Hubert v. Davis*, 170 S.W.3d 706, 710-713 (Tex.Civ.App.-Tyler 2005, no pet.) (though grant referred to interest as “covenant,” interest gave right to use property for specific purposes, and so conveyed easement); *Port Isabel v. Mo. Pac. R. R. Co.*, 729 S.W.2d 939, 944 (Tex.Civ.App.-Corpus Christi 1987, writ ref’d n.r.e.) (clause granting “right of way” for use by railroad conveyed easement, rather than fee simple, even though granting clause also indicated it conveyed “fee simple”)]. Similarly, if the deed or other instrument creating an express easement contains recitals or other materials extraneous to the granting clause, the latter controls the scope of the interest conveyed [*Brownlow v. State*, 319 S.W.3d 649, 653-656 (Tex. 2010) (though agreed judgment creating easement contained recital mentioning highway construction, actual granting clause limited use to “opening, constructing, and maintaining” mitigation pond, so state did not have right to remove soil from site for construction of highway embankment)].

V. EASEMENTS CREATED BY OPERATION OF LAW

The statutes requiring signed writings do not apply to an easement imposed by operation of law. A court may declare an easement as having been created by implication, estoppel, dedication, or prescription. The fact that there is no written or signed documentation of the easement is of no consequence in these instances [*Storms v. Tuck*, 579 S.W.2d 447, 451 (Tex. 1979); *Scott v. Cannon*, 959 S.W.2d 712, 720 (Tex.Civ.App.-Austin 1998, pet. denied)].

A. Easement by Prior Use

1. Circumstances for Application

Implied easements arise under two categories: (1) easements by necessity and (2) easements by prior use [*Hamrick v. Ward*, 446 S.W.3d 377, 381 (Tex. 2014)]. Either kind of easement may be implied by law when the owner of a single tract of land conveys part of the property without reserving or granting some easement that should have been included in the conveyance to reflect the true intention of the parties. The law will read into the conveyancing instrument terms that the circumstances show the parties must have intended if they had given the obvious facts proper consideration [*Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014); *Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 167-168 (1952)].

A party claiming an implied easement of a roadway to access landlocked, previously unified parcels must pursue that claim as an easement by necessity, not as an easement by prior use [*Hamrick v. Ward*, 446 S.W.3d 377, 385 (Tex. 2014) (remanding to permit plaintiff to replead claim as one for easement by necessity); *Union Pac. R.R. Co. v. Seber*, 477 S.W.3d 424, 433-434 (Tex.Civ.App.-Houston [14th Dist.] 2015, no pet.) (claim of access to railroad’s right of way was one for roadway, so rule of *Hamrick* limited claimant to easement by necessity, not from prior use)].

The typical situation for implying an easement by prior use arises when a property owner uses one part of the land for the benefit of another part of the land, such as for drainage, support, access, or water, then sells one of the parts without reserving or granting the right to continue that use. If it can be established that the owner’s previous use of the servient tract was apparent, continuous, and necessary to the use of the dominant land, it will be presumed that an easement to continue the use of the servient tract passed to the purchaser of the dominant tract or was reserved if the seller sold the servient tract and retained the dominant one [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962); *Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014) (absent contrary evidence, open and visible conditions existing at time of transaction are presumed to be included in sale)]. Similarly, an implied easement may also be established to justify an encroachment (an existing use) that resulted when a tract was divided so as to leave some physical object extending over the newly created boundary line [*Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 167-168 (1952) (encroaching building); *Ortiz v. Spann*, 671 S.W.2d 909, 913 (Tex.Civ.App.-Corpus Christi 1984, writ ref’d n.r.e.) (encroaching tree limbs)].

The elements to establish an implied easement from prior use are [*Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962); *Mack v. Landry*, 22 S.W.3d 524, 530 (Tex.Civ.App.-Houston [14th Dist.] 2000, no pet.)]: (1) A unity of ownership of the land until severed into the dominant and servient tracts; (2) The use of the claimed easement was open and apparent at the time of severance; (3) The use was continuous, so that the parties must have intended that it survive the severance; and (4) The use must be necessary to the use and enjoyment of the dominant estate.

2. Unity of Ownership

The first step in attempting to establish the grant or reservation of an easement from usage as an implied part of a conveyance is to prove that the servient estate and the dominant estate were once owned by the same party [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207-208 (Tex. 1962); *LaTaste Enters. v. City of Addison*, 115 S.W.3d 730, 737-739 (Tex.Civ.App.-Dallas 2003, pet. denied) (when all evidence showed that alleged use for which claimant sought implied easement did not occur until after severance of estates, unity of ownership requirement was not met and trial court properly granted summary judgment)]. It is that party's conveyance into which the terms granting or reserving an easement are to be inserted by implication [*Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (1950) (way of necessity case noting that implied easement cannot affect property of stranger to transaction severing estates)]. For this reason, the unity of ownership requirement is the same for an easement implied from an prior use as for an easement implied from necessity.

The required unity of ownership may be shown to exist even if the title was in separate legal entities by resorting to a theory such as alter ego or disregard of the corporate entity [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 202 (Tex. 1962)]. For example, a court found the required unity of ownership when separate joint ventures were under the control of the same parties who developed two properties using a common plan [*Houston Bellaire, Ltd. v. TCP LB Portfolio I, L.P.*, 981 S.W.2d 916, 921 (Tex.Civ.App.-Houston [1st Dist.] 1998, no pet.)]. Moreover, unity of ownership can exist even if the common party held title to the entire property as a cotenant with others at the time of a severance that gave that party sole title to part of the property. To clarify, if A and B are cotenants and partition the property into two parts, with A's part being landlocked and needing access across B's part, A and A's successors in title can establish the required unity of ownership of the two parts based on A's cotenancy of the whole tract with B [*Benedictine Sisters v. Ellison*, 956 S.W.2d 629, 631-632 (Tex.Civ.App.-San Antonio 1997, pet. denied); *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984) (no implied easement to benefit other property of cotenant not held in same cotenancy at time of severance)].

The unity of ownership requirement also means that the property owner held title to all of the land comprising what is to become the servient estate. If the easement must cross not only the grantor's property but other property belonging to a third party to afford the needed use, it cannot be established by implication [*Holden v. Weidenfeller*, 929 S.W.2d 124, 130 (Tex.Civ.App.-San Antonio 1996, writ denied) (at time of severance, property owner did not own all property between parcel severed and public road)].

The prior use for which the implied easement is sought must have been apparent, continuous, and in existence at the time of the severance of the servient and dominant estates [*Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207-208 (Tex. 1962); *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (1950)]. If the use at issue is roadway access to an otherwise landlocked tract, however, the claim to an implied easement must be pursued as an easement by necessity, not as an easement by prior use [*Hamrick v. Ward*, 446 S.W.3d 377, 384-385 (Tex. 2014); *Union Pac. R.R. Co. v. Seber*, 477 S.W.3d 424, 433-434 (Tex.Civ.App.-Houston [14th Dist.] 2015, no pet.)].

3. Apparent, Existing, and Continuing Use

Use is "apparent" if it would be noticed by a careful inspection of the property by a person familiar with the intended transaction. Although a party's use of a stairwell or drainage ditch are examples of obvious apparentness, the use of an underground sewer line has been held sufficiently apparent because anyone carefully inspecting the improved property would notice it [*Westbrook v. Wright*, 477 S.W.2d 663, 666 (Tex.Civ.App.-Houston [14th Dist.] 1972, no writ) (that subsurface installations might not be obvious to stranger to transaction on casual observation does not necessarily defeat requirement of apparentness)].

Use is "continuous" if no further act is necessary to its further exercise [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207-208 (Tex. 1962); *Bickler v. Bickler*, 403 S.W.2d 354, 357 (Tex. 1966)]. Included within the concept of continuous are the facts of conspicuousness and apparentness that indicate permanency. For example, the fact that the owner of the properties before severance used a driveway on a daily basis evidenced the element of continuity [*Payne v. Edmonson*, 712 S.W.2d 793, 796 (Tex.Civ.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.)].

Finally, the apparent, continuous use must have been in existence at the time of the grant that severed the unity of ownership between the servient and dominant estates. If the easement claimant cannot prove that the property owner was then making the use for which the easement is claimed, the court will not imply such an easement [*Mack v. Landry*, 22 S.W.3d 524, 530 (Tex.Civ.App.-Houston [14th Dist.] 2000, no pet.) (use must have existed at time of grant severing unity of ownership); *McClung v. Ayers*, 352 S.W.3d 723, 732 (Tex.Civ.App.-Texarkana 2011, no pet.) (easement by implication unavailable when claimant presented no evidence of use at severance); *Ingham v. O'Block*, 351 S.W.3d 96,

103 (Tex.Civ.App.-San Antonio 2011, pet. denied) (easement from prior use unavailable when claimant presented no evidence of use of road or even that road existed at time of severance); *Cummins v. Travis County Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 52-54 (Tex.Civ.App.-Austin 2005, no pet.) (although landowner might have established implied easement for basic right of access to water, when owner provided no evidence of previous construction of boat docks or other recreational uses of waterfront property, owner could not claim implied easement for dock construction)].

There is some conflict of authority on whether a bona fide purchase of the property cuts off an easement by implication from prior use [see dictum stating such a BFP does not cut off such an easement [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 212 (Tex. 1962) (later holding that the bona fide purchaser defense can be used to defeat an implied easement based on prior use); *Hamrick v. Ward*, 359 S.W.3d 770, 781-782 (Tex.Civ.App.-Houston [14th Dist.] 2011), rev'd on other grounds, 446 S.W.3d 377 (Tex. 2014)].

4. Necessity of Use

a. Degree of Necessity

For an easement to be implied from an existing use, the use of the servient estate must have been “necessary” to the use and enjoyment of the dominant estate [*Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962) (noting possible necessary uses such as water or sewer lines, drains, roads, or driveways, and access to light, air, or lateral support)]. However, the degree of necessity depends on whether the easement is one reserved by the grantor or one conveyed to the grantee [*Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207-208 (Tex. 1962); *Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 167-168 (1952)].

When the grantor is the party who prepared and signed the conveyance, an easement claimant relying on a reservation to benefit the grantor has a higher burden of proof. In such cases, it must be established that the use of the grantee’s property is “strictly necessary” to the use and enjoyment of the grantor’s property [*Hamrick v. Ward*, 446 S.W.3d 377, 383 (Tex. 2014); *Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 167-168 (1952); *Daniel v. Fox*, 917 S.W.2d 106, 110-111 (Tex.Civ.App.-San Antonio 1996, writ denied)]. Under this standard, the use of the claimed easement must be economically or physically necessary, not merely desirable [*Payne v. Edmonson*, 712 S.W.2d 793, 796 (Tex.Civ.App.-Houston [1st Dist.] 1986, writ ref’d n.r.e.)].

If the easement is sought by the grantee as an implied grant, however, a litigant seeking to establish the easement need only show that the use of the grantor’s servient property is “reasonably necessary” to the use and enjoyment of the dominant property conveyed to the grantee [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207-208 (Tex. 1962); *Seber v. Union Pac. R.R. Co.*, 350 S.W.3d 640, 649 (Tex.Civ.App.-Houston [14th Dist.] 2011, no pet.); *Daniel v. Fox*, 917 S.W.2d 106, 110-111 (Tex.Civ.App.-San Antonio 1996, writ denied)]. The determination of “reasonable necessity” is made as of the time the tracts were severed, and the easement claimant is not required to show that the necessity still exists [*Hamrick v. Ward*, 446 S.W.3d 377, 384-385 (Tex. 2014) (for prior use easements, continuing necessity is not required; instead, circumstances existing at time of severance are examined to determine whether parties intended continued use); *Seber v. Union Pac. R.R. Co.*, 350 S.W.3d 640, 649-650 (Tex.Civ.App.-Houston [14th Dist.] 2011, no pet.) (continued necessity not element of easement from prior use)]. For example, continuation of a subsurface sewer line across another person’s land was said to meet the reasonable necessity requirement because it was “necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made” [*Westbrook v. Wright*, 477 S.W.2d 663, 666 (Tex.Civ.App.-Houston [14th Dist.] 1972, no writ)].

Both the grantor and the grantee may need reciprocal easements over a common way, touching properties of both. A court of appeals, faced with determining the degree of necessity required for the implication of reciprocal easements, one by grant and the other by reservation, held that “reasonable” rather than “strict” necessity was the applicable standard, regardless of which of the parties was seeking to establish an easement [*Houston Bellaire Ltd. v. TCP LB Portfolio I, L.P.*, 981 S.W.2d 916, 922 (Tex.Civ.App.-Houston [1st Dist.] 1998, no pet.) (disagreeing with holding in *Ward v. Slavecek*, 466 S.W.2d 91, 92 (Tex.Civ.App.-Waco 1971, no writ)].

The “strict necessity” standard applies to all implied reservations of easements, whether they are easements of necessity or easements of prior use [*Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 168 (1952)].

When the use at issue is roadway access to an otherwise landlocked tract, the claim to an implied easement must be pursued as a easement of necessity, not as an easement of prior use [*Hamrick v. Ward*, 446 S.W.3d 377, 384-385 (Tex. 2014); *Union Pac. R.R. Co. v. Seber*, 477 S.W.3d 424, 433-434 (Tex.Civ.App.-Houston [14th Dist.] 2015, no pet.) (claim of access to railroad’s right of way was one for roadway, so rule of *Hamrick* limited claimant to easement of necessity,

not from prior use)]. The court was careful to note, however, that this holding did not change its previous approval of prior use easements for other access purposes other than a roadway [*Hamrick v. Ward*, 446 S.W.3d 377, 384-385 (Tex. 2014)]. The Hamrick court made a clarification, that roadways are especially significant intrusions on servient estates and therefore deserve the greater scrutiny of “strict and continuing necessity”, while other improvements such as water lines, sewer lines, and power lines, should continue to be subject only to be tested with the lower standard to “carefully examine the circumstances existing at the time of the severance to assess whether the parties intended for continued use of the improvement.” [*Hamrick v. Ward*, 446 S.W.3d 377, 384-385 (Tex. 2014)].

b. Effect of Alternatives Other Than Easement

To demonstrate necessity, a party claiming an implied easement from prior use must show that no other way exists to satisfy the claimant’s needs. The existence of some alternative solution may preclude the establishment of an implied easement, particularly when an implied reservation is sought and the “strictly necessary” standard applies. In a case decided on the strictly necessary standard, the trial court held that there could be no implied reservation of a driveway easement when the evidence showed that another driveway could be built, albeit at a high cost and much narrower and more dangerous than the existing drive [*Payne v. Edmonson*, 712 S.W.2d 793, 796 (Tex.Civ.App.-Houston [1st Dist.] 1986, writ ref’d n.r.e.)]. By contrast, in a case involving an implied grant and, thus, under the less onerous standard of “reasonable necessity,” the trial court allowed an implied easement because the only other option for the claimant was the expensive task of building a bridge over a large creek [*Daniel v. Fox*, 917 S.W.2d 106, 113 (Tex.Civ.App.-San Antonio 1996, writ denied) (claimant not only proved “reasonable necessity” but that “the necessity shown by them is more than for their mere convenience.”)]. A reasonable necessity for another route is insufficient when the easement claimant already held an express easement, even though the express easement route was longer, more circuitous, and in an inferior condition [*Adams v. Norsworthy Ranch, Ltd.*, 975 S.W.2d 424, 428-429 (Tex.Civ.App.-Austin 1998, no pet.) (“When one has access to a part of his tract of land by way of travel over his own property, this, as a matter of law, is a better and more direct route than one which burdens an adjacent landowner.... It does not matter that the route across one's own land is longer, more circuitous, or in an inferior condition physically.” citing *Sentell v. Williamson County*, 801 S.W.2d 220, 223 (Tex.App.—Austin 1990, no writ)); *Sisco v. Hereford*, 694 S.W.2d 3, 7-8 (Tex.Civ.App.-San Antonio 1984, writ ref’d n.r.e.) (easement is not subject to change merely because another route more practical, convenient, or reasonable)].

Only when there is no way through his own land can a grantee claim a right over that of a grantor. *Duff v. Matthews*, 158 Tex. 333, 311 S.W.2d 637, 640 (1958).

The existence of an alternative way to satisfy the easement claimant’s need will not bar the establishment of an implied easement if the only other option is an illegal one, such as by trespassing on other property. Similarly, a claimant is not prevented from having an implied easement merely because the claimant has another easement acquired to benefit other property of the claimant because the use of such other easement would be illegal if applied to benefit property other than for which is appurtenant [*Bickler v. Bickler*, 403 S.W.2d 354, 359 (Tex. 1966)].

B. Easements by Necessity

1. Circumstances for Application

The severance of a larger tract of land into two or more smaller tracts may trigger the need for a new use to be made of one tract to benefit the other. For example, if the severance creates a landlocked parcel from previously unified tracts, a method of access to that parcel is necessary because the owner would otherwise be unable to use the parcel at all. When no access easement is reserved or granted in the conveyance, the property owners cannot resort to the theory of an implied easement from a prior use because there was no such use in existence at the time the property was divided. To provide a remedy for the property owners’ dilemma, the law will imply that an easement was granted or reserved at the time of the severance based on necessity alone [*Staley Family Partnership v. Stiles*, 483 S.W.3d 545, 59 Tex. Sup. J. 322, 324-325 (Tex. 2016); *Hamrick v. Ward*, 446 S.W.3d 377, 382 (Tex. 2014); *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984); *Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397, 399 (1944); *Benedictine Sisters v. Ellison*, 956 S.W.2d 629, 632 (Tex.Civ.App.-San Antonio 1997, pet. denied)].

To establish an implied easement by necessity, the claimant must show [*Staley Family Partnership v. Stiles*, 483 S.W.3d 545, 59 Tex. Sup. J. 322, 325 (Tex. 2016); *Hamrick v. Ward*, 446 S.W.3d 377, 382 (Tex. 2014); *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984); *Duff v. Matthews*, 311 S.W.2d 637, 641 (1958)]: (1) A unity of ownership until severed into the dominant and servient tracts; (2) The claimed access is a necessity and not a mere convenience; and (3) The necessity existed at the time the properties were severed.

The claimant must also produce evidence to show the exact location of the easement on the servient tract [*Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex.Civ.App.-El Paso 1993, no writ)].

The two types of implied easements (prior use vs necessity) are sometimes confused or asserted as if they are the same [*Hamrick v. Ward*, 446 S.W.3d 377, 381 (Tex. 2014) (“unqualified use of the general term ‘implied easement’ has sown considerable confusion because both a necessity easement and a prior use easement are implied and both arise from the severance of a previously unified parcel of land”)]. They are different in at least two ways. First, for an easement by prior use, the use must have been ongoing at the time of severance. For an easement by necessity, however, the necessity must have been created by and at the time of the severance [*Hamrick v. Ward*, 446 S.W.3d 377, 382 (Tex. 2014); *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984)]. Second, if prior use is the basis for the claimed easement, then proof includes the exact site of that use and the location of the implied easement. However, because a prior existing use is not an element of proof for an easement implied from necessity, the location of the easement on the servient tract can become an issue to be decided by the court [*Hamrick v. Ward*, 446 S.W.3d 377, 384-385 (Tex. 2014); *Union Pac. R.R. Co. v. Seber*, 477 S.W.3d 424, 433-435 (Tex.Civ.App.-Houston [14th Dist.] 2015, no pet.) (claim of access to railroad’s right of way was one for roadway, so rule of Hamrick limited claimant to easement by necessity, not from prior use; though claimant in prior proceedings disclaimed intent to seek easement by necessity, court would remand in interest of justice to permit claimant renewed opportunity to assert claim to easement by necessity)].

In the context of either private partition agreements or judicial partition, unless the parties to the agreement or action expressly waive the requirement, an easement for access must be created if the failure to do so would cause one of the partitioned tracts to be without access to public roads [Tex. Prop. Code § 23.006(a)].

2. Unity of Ownership

It is essential to the establishment of any implied easement that the properties that contain all of the servient and dominant estates be shown to have been owned by the same party before being divided into separate parcels [*Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984)]. This requirement is based on the idea that additional terms from a conveyance to reflect the intention of the parties and cannot affect the property nor imply the intentions of a party who was a stranger to the transaction [*Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (1950)]. The unity of ownership element will not exist if the servient property for the easement to be established must include any part of a third party’s land [*Holden v. Weidenfeller*, 929 S.W.2d 124, 130 (Tex.Civ.App.-San Antonio 1996, writ denied)].

3. Necessity

a. Existence of Necessity

The key element in establishing an implied necessity easement is proof of the necessity itself. In the typical case involving necessary access to and from a property, it is said that the easement claimant’s burden is to show that the property is “landlocked,” meaning that there is no way to reach a public road without crossing the servient tract [*Benedictine Sisters v. Ellison*, 956 S.W.2d 629, 632 (Tex.Civ.App.-San Antonio 1997, pet. denied); *Samuelson v. Alvarado*, 847 S.W.2d 319, 322 (Tex.Civ.App.-El Paso 1993, no writ)]. If the evidence shows that another method of access exists without affecting the servient land, there is no element of necessity. This is true even if the alternate way is difficult but not impossible to traverse by vehicle, or if the alternate route is inconvenient to use or expensive to create or maintain [*Reyes v. Saenz*, 269 S.W.3d 675, 677-678 (Tex.Civ.App.-San Antonio 2008, no pet.) (allegation that desired easement was only “practicable” access to tract insufficient because necessity requires no other alternative routes); *Crone v. Brumley*, 219 S.W.3d 65, 68-70 (Tex.Civ.App.-San Antonio 2006, pet. denied) (when landlocked tract was created by severance from tracts both north and south and evidence showed that public road abutted north tract at time of severance, there was no necessity for easement across south tract, and fact that north access was difficult and required use of four-wheel-drive vehicle was irrelevant to necessity)]. The fact that the alternate route is sometimes flooded and impassable is irrelevant; a necessity for a limited period of time is not a sufficient necessity to impose a burden on the servient property [*Wilson v. McGuffin*, 749 S.W.2d 606, 611 (Tex.Civ.App.-Corpus Christi 1988, writ denied) (easement sought was mere convenience for certain times)].

Demonstrating that the property was landlocked at the time of severance is insufficient to obtain an implied roadway easement; instead, the claimant must also show that the easement is necessary to access a public roadway [*Staley Family Partnership v. Stiles*, 483 S.W.3d 545, 59 Tex. Sup. J. 322, 325-326 (Tex. 2016) (though claimant established that tract could be accessed only through neighbor’s property, failure to show that public road abutted neighbor’s property at severance precluded easement by necessity; “right of way that does not result in access to a public roadway is not ... necessary because it does not facilitate use of the landlocked property”)].

b. Degree of Necessity

For an easement by necessity, when the easement sought requires an implied reservation to benefit the grantor, the proof must establish a “strict” necessity for the easement. But if the easement requires an implied grant to benefit the grantee, proof of a “reasonable” necessity will suffice [*Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 167-168 (1952); *Duff v. Matthews*, 311 S.W.2d 637, 642-643 (1958); *Harrington v. Dawson-Conway Ranch, Ltd.*, 372 S.W.3d

711, 722-724 (Tex.Civ.App.-Eastland 2012, pet. denied) (strict necessity required regardless of whether implication is through reservation or grant)]. The Texas Supreme Court, reviewing the evidence under the strict necessity standard, refused to imply reservation of an easement by necessity, notwithstanding proof that the only other road available for the grantor's use in accessing the property retained was blocked by trees and underbrush and was possibly washed out to the extent that it was no longer passable [*Duff v. Matthews*, 311 S.W.2d 637, 643 (1958)].

c. Time of Existence of Necessity

An implied easement due to necessity is available only when the necessity existed at the time the servient and dominant estates were severed from common ownership [*Hamrick v. Ward*, 446 S.W.3d 377, 382 (Tex. 2014); *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984); *Jordan v. Rash*, 745 S.W.2d 549, 553 (Tex.Civ.App.-Waco 1988, no writ)]. Therefore, the easement claimant must present evidence that the necessity existed at the time of severance, and the failure to present such evidence requires that the easement be refused [*Tiller v. Lake Alexander Properties, Ltd.*, 96 S.W.3d 617, 623 (Tex.Civ.App.-Texarkana 2002, pet. denied) (because claimant presented no evidence that tract was landlocked and had no access to public road at time of severance, trial court improperly granted easement by necessity)].

The easement claimant must also show that the necessity continues to exist at the time of the suit. An easement by necessity is inherently temporary because its existence depends on the necessity that created it, so that an easement by necessity terminates on the cessation of the necessity [*Hamrick v. Ward*, 446 S.W.3d 377, 382 (Tex. 2014); *Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397, 399 (Tex. 1944); *Union Pac. R.R. Co. v. Seber*, 477 S.W.3d 424, 433-434 (Tex.Civ.App.-Houston [14th Dist.] 2015, no pet.) (when claimant erroneously pursued roadway easement as one from prior use, whether necessity continued to exist had not been litigated, so judgment could not be rendered on alternative claim for easement by necessity); *Harrington v. Dawson Conway Ranch, Ltd.*, 372 S.W.3d 711, 724 (Tex.Civ.App.-Eastland 2012, pet. denied) (when easement claimant now had access to land from county road, any necessity was terminated and easement unavailable); *Miller v. Elliott*, 94 S.W.3d 38, 44 (Tex.Civ.App.-Tyler 2002, pet. denied) (easement by necessity was properly refused when claimant failed to present evidence of necessity at both time of severance and at present)]. As the Texas Supreme Court has put it, the claimant must prove both "historical" necessity, i.e., necessity at the time of severance, and a "continuing, present necessity" to claim an implied easement by necessity [*Hamrick v. Ward*, 446 S.W.3d 377, 382 (Tex. 2014); *Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397, 399 (Tex. 1944)].

4. Location of Easement

Cases involving an easement by necessity generally involve an owner using an exact location. Then, after a time, the owner of the servient estate blocks or interferes with the use of the easement [*Meredith v. Eddy*, 616 S.W.2d 235, 237 (Tex.Civ.App.-Houston [1st Dist.] 1981, no writ)]. It appears in these cases that the property owner seeking to establish the easement and enforce the right to use the servient estate for that purpose has the burden to prove its location and may show the previous use to satisfy that burden. Once selected, the selection is binding and cannot be changed without the consent of both parties [*Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex.Civ.App.-El Paso 1993, no writ); *Grobe v. Ottmers*, 224 S.W.2d 487, 489 (Tex.Civ.App.-San Antonio 1949, writ ref'd n.r.e.) (unsuccessful attempt to change location of way of necessity); *Cozby v. Armstrong*, 205 S.W.2d 403, 406-407 (Tex.Civ.App.-Ft. Worth 1947, writ ref'd n.r.e.) (owner of servient estate was allowed to change route of easement when change did not impair rights of easement holder)].

C. Easement by Reference to Drawing

A private easement may arise by operation of law when the parties to a conveyance have contracted with reference to a map or plat showing the layout of lots with streets, parks, or similar public areas but the conveyance fails to grant any right to use those areas or otherwise incorporate the map or plat [*City of San Antonio v. Olivares*, 505 S.W.2d 526, 529-530 (Tex. 1974); *City of Houston v. Fox*, 444 S.W.2d 591, 592 (Tex. 1969); *Dykes v. City of Houston*, 406 S.W.2d 176, 181 (Tex. 1966)]. Typically in these cases, the law affords property owners private easements over public streets for access to their properties in a platted subdivision [*Seelbach v. Clubb*, 7 S.W.3d 749, 758 (Tex.Civ.App.-Texarkana 1999, pet. denied); § 281.03[1][a][iv]]. This "easement from reference" may be imposed for the benefit of a party who purchases a lot in the subdivision shown on the map as well as for the benefit of one who acquires property outside the subdivision but that abuts property shown on the map [*Town of Palm Valley v. Johnson*, 17 S.W.3d 281, 288-289 (Tex.Civ.App.-Corpus Christi 2000), petition denied with per curiam opinion on separate procedural matter at 87 S.W.3d 110 (Tex. 2001); *Texas Co. v. Texarkana Mach. Shops*, 1 S.W.2d 928, 930 (Tex.Civ.App.-Texarkana 1928, no writ)].

It is not necessary to the imposition of an "easement from reference" that the map or plat be actually recorded or the servient properties actually dedicated to public use [*Dykes v. City of Houston*, 406 S.W.2d 176, 183 (Tex. 1966); *Horne v. Ross*, 777 S.W.2d 755, 756 (Tex.Civ.App.-San Antonio 1989, no writ)], as would be the case if an attempt to establish a public easement was made. The proof must only show that the purchaser relied on a map, plat, or plan exhibited at the time of the purchase [*Parshall v. Crabtree*, 516 S.W.2d 216, 218 (Tex.Civ.App.-San Antonio 1974, writ

ref'd n.r.e.)). Moreover, even if the easement was dedicated and accepted for public use, a private easement implied from the reference to a map cannot be terminated by the government's abandoning the easement [*City of San Antonio v. Olivares*, 505 S.W.2d 526, 529-530 (Tex. 1974); *City of Houston v. Fox*, 444 S.W.2d 591, 592-593 (Tex. 1969); *Dykes v. City of Houston*, 406 S.W.2d 176, 182 (Tex. 1966)].

Easements imposed from reference to a map, plat, or plan have been characterized as "implied easements" [*City of San Antonio v. Olivares*, 505 S.W.2d 526, 529-530 (Tex. 1974)] and "easements by estoppel" [*Barron v. Phillips*, 544 S.W.2d 752, 755 (Tex.Civ.App.-Texarkana 1976, no writ)]. The San Antonio Court of Appeals reviewed several cases characterizing such easements, concluding that the easement is created by the map reference, and it is irrelevant whether it is described in terms of estoppel or implication [*Horne v. Ross*, 777 S.W.2d 755, 756 (Tex.Civ.App.-San Antonio 1989, no writ); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 210 (Tex. 1962) (arguably suggesting characterization as implied easement when land was sold in reference to map or plat)].

D. Easements by Estoppel

1. Circumstances for Application

Property owners may be held to have created easements on their own property by oral agreements, representations, or conduct that is relied on by other persons whose property values would suffer if an easement did not exist [*Storms v. Tuck*, 579 S.W.2d 447, 451 (Tex. 1979); *Scott v. Cannon*, 959 S.W.2d 712, 720 (Tex.Civ.App.-Austin 1998, pet. denied); *Harrison v. Boring*, 44 Tex. 255, 267 (1875)]. In other words, an easement may be imposed by "estoppel" to prevent injustice and to protect persons who have been misled [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 209-210 (Tex. 1962) (also called "estoppel in pais")]. As observed by the Austin Court of Appeals, the doctrine of easement by estoppel has been applied in cases in which a property owner has allowed an adjoining owner to spend money in reliance on some right to an easement. These include cases involving dedications of streets, alleys, or squares, cases in which land was sold by reference to a map or plat, and other "rare and nebulous" cases [*Scott v. Cannon*, 959 S.W.2d 712, 720 (Tex.Civ.App.-Austin 1998, pet. denied)].

Texas courts have set out the elements for establishment of an easement by estoppel as [*Stallman v. Newman*, 9 S.W.3d 243, 246 (Tex.Civ.App.-Houston [14th Dist.] 1999, pet. denied); *Holden v. Weidenfeller*, 929 S.W.2d 124, 131 (Tex.Civ.App.-San Antonio 1996, writ denied); *Lakeside Launches v. Austin Yacht Club*, 750 S.W.2d 868, 872 (Tex.Civ.App.-Austin 1988, writ denied)]: (1) A representation that a right to use property exists; (2) The representation was communicated by words or conduct to a promisee; (3) The promisee believed the representation; and (4) The promisee relied on the representation to the promisee's detriment.

Under certain circumstances, an easement by estoppel may be awarded to benefit a property owner even though there was no unity of ownership of the dominant and servient estates, as required for the imposition of an easement implied from usage or an easement implied from necessity. An easement by estoppel also differs from the other implied easements because actual use and necessity of the claimed easement are not elements per se but are evidence of the claimant's reliance on the words or conduct of the other party.

2. Relationship Between Property Owners

An easement by estoppel can only be imposed based on the words or conduct of an owner of the servient estate. The property owner's words or conduct amounting to a representation that an easement in the estate exists must have been both communicated to and relied on by the owner of the dominant estate at the time of the representation. If the servient tract owner was also the seller of the dominant estate, the estoppel can be based on actual statements, affirmative acts on the seller's part, or the seller's silence or passive acquiescence in the buyer's subsequent use of the easement [*Holden v. Weidenfeller*, 929 S.W.2d 124, 132 (Tex.Civ.App.-San Antonio 1996, writ denied); *McAshan v. River Oaks Country Club*, 646 S.W.2d 516, 519-520 (Tex.Civ.App.-Houston [1st Dist.] 1982, writ ref'd n.r.e.)].

3. Representation That Easement Exists

An essential element of an easement by estoppel is that the party against whom it is claimed has previously made a representation of fact contrary to the party's present stance on the matter [*Machala v. Weems*, 56 S.W.3d 748, 757 (Tex.Civ.App.-Texarkana 2001, no pet.) (depiction and designation on map showing public road could not be attributed to grantor and so could not be representation forming basis of easement by estoppel); *Jordan v. Rash*, 745 S.W.2d 549, 554 (Tex.Civ.App.-Waco 1988, no writ) (no representation, so no easement by estoppel)]. For an easement by estoppel, the party's representation must consist of actual words or be evidenced by conduct leading the other person to believe that an easement exists for the other person's use of the party's land [*Holden v. Weidenfeller*, 929 S.W.2d 124, 132 (Tex.Civ.App.-San Antonio 1996, writ denied); *Wallace v. McKinzie*, 869 S.W.2d 592, 596 (Tex.Civ.App.-Amarillo 1993, writ denied) (no affirmative representation proved because there was no evidence to show actual words spoken)]. The representation may be in writing, but that is not required because an easement by estoppel is an exception to the

statute of frauds; therefore, an oral representation that an easement for a particular purpose exists or will be created is sufficient to support a claim for an easement by estoppel [*Murphy v. Long*, 170 S.W.3d 621, 624–627 (Tex.Civ.App.-El Paso 2005, pet. denied) (oral representation that easement would be granted for road supported claim for easement by estoppel, and written easement agreement was not required)].

4. Reliance on Representation

Regardless of how the existence of an easement was represented to the dominant estate owner, the representation cannot be the basis for imposing an easement by estoppel unless it was believed and relied on [*Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 209-210 (Tex. 1962)]. Reliance and belief may be evidenced by the fact that the dominant estate owner, after hearing the words or observing the conduct of the servient estate owner, did something that a reasonable person would have done only after securing an easement. Typically, the fact that the easement claimant made valuable improvements to either or both the dominant tract and the easement is sufficient evidence of reliance [*Holden v. Weidenfeller*, 929 S.W.2d 124, 132 (Tex.Civ.App.-San Antonio 1996, writ denied) (contributions to maintenance of roadway as well as improvements on dominant tract); *North Clear Lake Dev. Corp. v. Blackstock*, 450 S.W.2d 678, 680-683 (Tex.Civ.App.-Houston [14th Dist.] 1970, writ ref'd n.r.e.) (boat slips, boathouses, and roadways built on servient estate); *Exxon Corp. v. Schutzmaier*, 537 S.W.2d 282, 285-286 (Tex.Civ.App.-Beaumont 1976, no writ) (improvements on dominant estate relying on easement for ingress and egress)].

E. Easement by Prescriptive Use

1. Circumstances for Application

A “prescriptive easement” may come about when a person uses another person’s land for 10 years or more in a manner that is open, notorious, and adverse to the other’s title [*Scott v. Cannon*, 959 S.W.2d 712, 721 (Tex.Civ.App.-Austin 1998, pet. denied)].

Generally, the elements to be proved by the easement claimant, further discussed in [b]–[d], below, are that [*Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979) (citing and quoting from *Texas W. Ry. Co. v. Wilson*, 83 Tex. 153, 18 S.W. 325 (1892)]: (1) The claimant has been in open, notorious, and peaceable possession of the easement; (2) The claimant has continuously and exclusively used the easement for 10 or more years; and (3) The use was not only without the property owner’s permission, but also under a claim of right adverse to the rights of the true owner.

Note that in the absence of a building restriction or regulation, or the maintenance of a nuisance, there is no right in Texas to an easement for air, light, or a view [*Harrison v. Langlinsais*, 312 S.W.2d 286, 288 (Tex.Civ.App.-San Antonio 1958, no writ); *Scharlack v. Gulf Oil Corp.*, 368 S.W.2d 705, 706 (Tex.Civ.App.-San Antonio 1963, no writ)].

2. Open, Notorious, Peaceable Use of Property

One element for a prescriptive easement is that the claimant is using another person’s property “openly and notoriously” [*Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979)]. That means the claimant’s activities making use of the servient property are not conducted in secret or with effort to conceal the activity from the property owner. It means that the claimant’s use of the property is so visible that the property owner must be aware of it [*Jamail v. Gene Naumann Real Estate*, 680 S.W.2d 621, 626 (Tex.Civ.App.-Austin 1984, writ ref'd n.r.e.) (general adverse possession case); *Wilson v. McGuffin*, 749 S.W.2d 606, 610 (Tex.Civ.App.-Corpus Christi 1988, writ denied) (prescription is established in manner similar to adverse possession of land)].

The fact of an open, visible use of property can often be proved by the testimony of the easement claimant, neighbors, and, when available, photographs illustrating the use [*Johnson v. Dale*, 835 S.W.2d 216, 219 (Tex.Civ.App.-Waco 1992, no writ)].

3. Adverse, Hostile Claim of Right

To establish a prescriptive easement, the claimant’s use of another person’s property must be under an “adverse and hostile” claim of right. That means that the claimant’s assertion of a right to use the property is in opposition to the property owner’s right to control the use of that property and prevent interference with the owner’s peaceful possession, use, and enjoyment. This means that the claimant must intend to obtain a permanent right to do what the claimant is doing on the other person’s land, not merely to obtain permission to do so [*Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987); *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626–627 (1950)].

This element of adversity and hostility to the property owner’s rights ensures that the property owner has actual or constructive notice that another party is infringing on the owner’s rights, and affords the owner an opportunity to take preventive measures to avoid the imposition of a burden on the land [*Wiegand v. Riojas*, 547 S.W.2d 287, 289 (Tex.Civ.App.-Austin 1977, no writ)]. Consequently, an easement claimant must prove that the property owner knew

or should have known that the claimant was usurping the owner's rights. That is, that the owner had actual or constructive notice that there was an adverse and hostile claim against the property [*Scott v. Cannon*, 959 S.W.2d 712, 721 (Tex.Civ.App.-Austin 1998, pet. denied)].

4. Continuous Use for 10 or More Years

Although statutes of limitation are not expressly applicable to actions to establish easements by operation of law, Texas courts have adopted the statutory period of 10 years as the period required to establish a prescriptive easement [*Wiegand v. Riojas*, 547 S.W.2d 287, 289 (Tex.Civ.App.-Austin 1977, no writ); *Haas v. Choussard*, 17 Tex. 588, 591 (1856); *Baker v. Brown*, 55 Tex. 377, 381 (1881)]. The 10-year period does not begin to run until the owner of the servient estate or a predecessor in title has notice of an adversarial claim [*Scott v. Cannon*, 959 S.W.2d 712, 722 (Tex.Civ.App.-Austin 1998, pet. denied); *Wiegand v. Riojas*, 547 S.W.2d 287, 290 (Tex.Civ.App.-Austin 1977, no writ); *Suarez v. Jordan*, 35 S.W.3d 268, 272 (Tex.Civ.App.-Houston [14th Dist.] 2000, no pet.) (trial court improperly granted summary judgment as to prescriptive easement based on deemed admissions when admissions did not establish when owner of servient estate obtained knowledge, that claimant used property in open and adverse manner, or that use lasted for required 10-year period)].

To the extent a state statute of limitations is held applicable in determining the time period for a prescriptive easement, one cannot be certain that the tolling provisions of those statutes do not apply to prescriptive easements [Tex. Civ. Prac. & Rem. Code § 16.022 (legal disability)]. However, the Soldiers' and Sailors' Civil Relief Act has been held applicable to prescriptive easements [50 U.S.C. App. § 525 (“[t]he period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of an action or proceeding in any court ... by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action shall have accrued prior to or during the period of such service”)]. Under that Act, any period during which the present owner of the servient property or a predecessor in title was active in the military service must be deducted from the period of adverse use to determine if a 10-year span of continuous use exists [*Barstow v. State*, 742 S.W.2d 495, 501 (Tex.Civ.App.-Austin 1987, writ denied); *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S. Ct. 1562, 1564–1567, 123 L. Ed. 2d 229 (1993) (no showing of prejudice is needed to invoke Section 525 because statutory command is unequivocal)]. Therefore, when given the choice, the safer practice would be to apply the tolling statutes to ensure certainty that the prescriptive period has been attained.

It has been held that a military reservist's regular weekend duty does not qualify as active duty under the Soldiers' and Sailors' Civil Relief Act so that the time spent is to be subtracted from a limitation period. However, a reservist's annual training time does qualify as a period of active military service that must be deducted under the Act, even if it is only two weeks each year [*Min v. Avila*, 991 S.W.2d 495, 506-507 (Tex.Civ.App.-Houston [1st Dist.] 1999, no pet.)].

VI. PUBLIC EASEMENTS

A. Easements Created by Express Dedication

Landowners can dedicate their property for use by the public and thereby create a public easement [*Viscardi v. Pajestka*, 576 S.W.2d 16, 18 (Tex. 1978); *Shelton v. Kalbow*, 489 S.W.3d 32, 44 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied)]. In general, an express dedication is made by deed or other written document [*Shelton v. Kalbow*, 489 S.W.3d 32, 44 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied); *Stein v. Killough*, 53 S.W.3d 36, 42 (Tex.Civ.App.-San Antonio 2001, no pet.); *Broussard v. Jablecki*, 792 S.W.2d 535, 537 (Tex.Civ.App.-Houston [1st Dist.] 1990, no writ)]. It is not necessary for the instrument to state the particular public use for which the property is dedicated [*City of Fort Worth v. Burnett*, 131 Tex. 190, 114 S.W.2d 220, 223 (Tex. 1938) (when property is dedicated generally, “public has a free hand in applying the property to such uses as it may desire”); *Shelton v. Kalbow*, 489 S.W.3d 32, 46 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied) (that deed did not state that tract was to be used for county road did not prevent it from being express dedication)].

An action alleging that a road is a public road due to express dedication may be brought either by the government unit that owns the road due to acceptance of the dedication [*Brooks v. Jones*, 578 S.W.2d 669, 674 (Tex. 1979) (“A public dedication is enforceable by the public authorities of the state, county or municipality involved”)], or by a member of the public that alleges an injury to property rights [*Shelton v. Kalbow*, 489 S.W.3d 32, 40-41 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied) (allegation that public road was obstructed by fences and gates was sufficient to give neighboring property owner standing to enforce express dedication of road); *Brooks v. Jones*, 578 S.W.2d 669, 674 (Tex. 1979) (“Public dedications are enforceable by private landowners who have a property interest that will suffer if the publicly dedicated land is obstructed.”)]. In a suit by a member of the public, the government unit that owns the public road is not a necessary party and need not be joined in the action [*Shelton v. Kalbow*, 489 S.W.3d 32, 43 (Tex.Civ.App.-

Houston [14th Dist.] 2016, pet. denied) (because declaratory relief does not affect interest of any absentee, county need not be joined to suit seeking declaration that road is county road due to express dedication)].

To complete the creation of a public easement by an express dedication of property, there must be acceptance of the dedication by or on behalf of the public [*Maddox v. Maxwell*, 369 S.W.2d 343, 347 (Tex. 1963); *Gutierrez v. County of Zapata*, 951 S.W.2d 831, 838 (Tex.Civ.App.-San Antonio 1997, no writ)]. That a deed was filed and recorded is prima facie evidence of delivery by the grantor and acceptance by the grantee [*McAnally v. Tex. Co.*, 124 Tex. 196, 76 S.W.2d 997, 1000 (Tex. 1934); *Shelton v. Kalbow*, 489 S.W.3d 32, 47 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied); *Raymond v. Aquarius Condo. Owners Ass'n, Inc.*, 662 S.W.2d 82, 91 (Tex.Civ.App.-Corpus Christi 1983, no writ)]. Acceptance by the public may be either express or implied, and the fact that the owner's donative intent was included in an express grant does not require express acceptance [*Viscardi v. Pajestka*, 576 S.W.2d 16, 19 (Tex. 1978); *Lambright v. Trahan*, 322 S.W.3d 424, 432 (Tex.Civ.App.-Texarkana 2010, pet. denied)]. If a government unit accepts a dedicated public road, a later erroneous designation of the road as private in the unit's records does not undermine the prior acceptance or alter the character of the road [*Shelton v. Kalbow*, 489 S.W.3d 32, 47-48 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied); Tex. Transp. Code Ann. § 258.002(g) ("The failure to include on a county road map adopted under this section a road in which the county has previously acquired a public interest by ... dedication ... does not affect the status of the omitted road.")].

Acceptance is not shown merely by a government entity's approval of a subdivision plat; there must be evidence that the entity actually entered, used, or commenced improvements on the dedicated land [Tex. Local Gov't Code §§ 212.011, 212.048]. For example, a city's opening of a dedicated street for most of its length was considered an acceptance of the entire street as dedicated in the absence of a showing of a contrary intent. The fact that part of the dedicated street could not be traversed in a vehicle did not defeat acceptance [*Town of Palm Valley v. Johnson*, 17 S.W.3d 281, 288 (Tex.Civ.App.-Corpus Christi 2000), petition denied with per curiam opinion on separate procedural matter at 87 S.W.3d 110 (Tex. 2001)]. On the other hand, a government entity's disapproval of a subdivision plan will be considered a refusal of any dedications proposed by the plan [Tex. Local Gov't Code § 212.011; *Bowen v. Ingram*, 896 S.W.2d 331, 334-335 (Tex.Civ.App.-Amarillo 1995, no writ) (delay in formal acceptance did not defeat dedication)].

B. Easements Created by Implied Dedication

A property owner generally can be held to have dedicated property for a public use by implication from the owner's conduct [*Viscardi v. Pajestka*, 576 S.W.2d 16, 17 (Tex. 1978)]. An implied (or common-law) dedication can arise when a landowner's actions have induced the belief that the landowner intended to dedicate property to a public use (i.e., made the offer) and, in reliance on those actions, the public accepted the dedication by using the land to fulfill a public need [*Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 256-257 (Tex. 1984); *Graff v. Whittle*, 947 S.W.2d 629, 635 (Tex.Civ.App.-Texarkana 1997, writ denied)].

There are two facts to be established by a litigant claiming an implied dedication of a public easement [*Scott v. Cannon*, 959 S.W.2d 712, 718-719 (Tex.Civ.App.-Austin 1998, pet. denied); *Barstow v. State*, 742 S.W.2d 495, 499-501 (Tex.Civ.App.-Austin 1987, writ denied)]: (1) The property owner, having fee title to the land in question, intended to donate (i.e., dedicate or appropriate) the land for the public's use; and (2) The public accepted the land and will be served by using it.

An implied dedication may be difficult to prove. It is a disfavored concept because it results in the appropriation of private property for public use without any compensation to the landowner, contrary to the Texas Constitution [*Scott v. Cannon*, 959 S.W.2d 712, 718 (Tex.Civ.App.-Austin 1998, pet. denied); Tex. Const. art. 1 § 17]. Moreover, as discussed in [4], below, a statute abolishes the application of the doctrine of implied dedication of roads in counties with a population of 50,000 or less [Tex. Transp. Code § 281.001 et seq.], unless all the facts necessary to establish an implied dedication occurred before August 31, 1981 [*Lindner v. Hill*, 691 S.W.2d 590, 592 (Tex. 1985)].

Common-law abandonment of an easement, applicable to public as well as private easements, occurs when the use for which property is dedicated becomes impossible, or so highly improbable as to be practically impossible, or where the object of the use for which the property is dedicated wholly fails [*Viscardi v. Pajestka*, 576 S.W.2d 16, 19 (Tex. 1978); *Bowen v. Ingram*, 896 S.W.2d 331, 335 (Tex.Civ.App.-Amarillo 1995, no writ)].

With reference to a county road [Tex. Transp. Code § 251.051(a)(2) (commissioners court of county must assume control of streets and alleys in municipality that does not have active de facto municipal government); *Chappell Hill Bank v. Smith*, 257 S.W.3d 320, 329-330 (Tex.Civ.App.-Houston [14th Dist.] 2008, no pet.) (when municipality does not have its own government, roads in municipality are automatically county roads, and county need not affirmatively exercise control over the roads, or even acknowledge that it has control)], a statute provides that the road is considered abandoned

when its use has become so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for at least 20 years [Tex. Transp. Code § 251.057(a)]. The statute expressly does not apply to a road to a cemetery or an access road that is reasonably necessary to reach adjoining real property [Tex. Transp. Code § 251.057(b)].

C. Easements Created by Prescriptive Use

Some courts have stated that the public may, through use of private property under a claim of right hostile and adverse to the property owner's claim, acquire by prescription a public easement across the owner's land [*Barstow v. State*, 742 S.W.2d 495, 499 (Tex.Civ.App.-Austin 1987, writ denied); *Haas v. Choussard*, 17 Tex. 588, 591 (1856); *Wiegand v. Riojas*, 547 S.W.2d 287, 289 (Tex.Civ.App.-Austin 1977, no writ)]. However, these general pronouncements of a public easement by prescription are subject to a requirement that in many cases is difficult, if not impossible, to meet. The requirement is that the property owner must have had actual or constructive notice that the public was claiming the right to use the property adversely to the rights of the owner [*O'Connor v. Gragg*, 339 S.W.2d 878, 880-881 (Tex. 1960)].

If the evidence is that the public was using the land contemporaneously with the owner, any notice imparted to the property owner is that the use is with the owner's permission, not adverse to the owner's unfettered rights of ownership [*O'Connor v. Gragg*, 339 S.W.2d 878, 880-883 (Tex. 1960)]. On the other hand, if the evidence shows use by the public coupled with a governmental entity's exercising dominion or control over the disputed easement, those facts may support a finding that the property owner was on constructive notice of an adverse and hostile claim of right [*Barstow v. State*, 742 S.W.2d 495, 499, 501-503 (Tex.Civ.App.-Austin 1987, writ denied) (no such fact was present) (same requirement for private easement by prescription)].

If the easement in question is a road in a county with a population of 50,000 or less, a prescriptive right cannot be established by proof of county maintenance unless the county recorded acquisition of the road and notified the landowner of that fact [Tex. Transp. Code §§ 281.001–281.006].

The time period during which the public's adverse claim must have existed continuously is 10 years [*Barstow v. State*, 742 S.W.2d 495, 499 (Tex.Civ.App.-Austin 1987, writ denied) (by analogy to Tex. Civ. Prac. & Rem. Code §§ 16.021, 16.026)]. As with the time element for a private easement by prescription, time spent by a servient tract owner on active military service must be deducted [*Barstow v. State*, 742 S.W.2d 495, 501 (Tex.Civ.App.-Austin 1987, writ denied) (applying federal Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq.)].

D. Easements Created by Statute

Some statutes appear to create and define a public easement for the use of property. For example, the Open Beaches Act provides that it is state policy to provide the public with a right of access to and enjoyment of public beaches along the Gulf of Mexico [Tex. Nat. Res. Code § 61.011(a); Tex. Const. art. I, § 33 (constitutional protection of public's right to use state-owned beaches)]. The Act defines public beach as [Tex. Nat. Res. Code § 61.001(8)]: “any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.”

On first reading, the Open Beaches Act appears to create an easement in favor of the public for access to and use of any and all public beaches on the Gulf of Mexico. Allowing the legislature to simply declare the existence of an easement, however, has constitutional implications to the extent it would burden private property that was previously unencumbered. Of course, the state owns the coastal waters of the Gulf of Mexico itself [Tex. Nat. Res. Code § 11.012(c)], and its ownership interest extends inland to the mean high tide line [*Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 192 (1958)]. Because the state owns this so-called “wet beach,” there is no doubt that the state may grant the public the right to use its own property [*Severance v. Patterson*, 370 S.W.3d 705, 55 Tex. Sup. Ct. J. 501, 509 (Tex. 2012)].

By contrast, the “dry beach” is the area from the mean high tide line to the line of vegetation, and this area is often owned by private parties. Because encumbering a dry beach with a public easement has constitutional implications, the Texas Supreme Court has narrowly construed the Open Beaches Act as a mechanism to define and enforce public beach easements that already exist, not as an independent source of creation of such an easement [*Severance v. Patterson*, 370 S.W.3d 705, 713-715, 719-720 (Tex. 2012)]. The Court noted that the public may have a preexisting easement for beach use through a variety of methods, including reservation by the state in an original land grant, prescriptive use by the public, or dedication or express grant by the owner. Absent such a preexisting easement, however, the Open Beaches Act

is inapplicable because it “does not create or diminish substantive property rights” [*Severance v. Patterson*, 370 S.W.3d 705, 719 (Tex. 2012)].

When the public has an easement for beach use, the precise location of the easement may move in conjunction with gradual and imperceptible changes to the boundaries of the easement, i.e., the mean high tide line and the vegetation line. On the other hand, if the mean high tide line moves significantly inland due to an avulsive event, an easement for public use of the beach is terminated and does not “roll” to affect previously unburdened property [*Severance v. Patterson*, 370 S.W.3d 705, 721-725 (Tex. 2012) (when beachfront property was significantly altered by hurricane, any easement that may have existed for public beach use was terminated, and state was obliged to obtain new easement); *Brannan v. State*, 390 S.W.3d 301, 302 (Tex. 2013) (per curiam) (remanding for reconsideration in light of *Severance* because lower courts permitted rolling beach easement)].

By statute, a cable television company has the power, in an unincorporated area, to install and maintain equipment in, among other places, an existing utility easement [Tex. Utilities Code § 181.102]. The Texas Supreme Court, however, has held that this statute only applies to general utility easements dedicated to the public’s use, and does not extend to private easements, such as ones negotiated between owners of private property and individual utility companies [*Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706-707 (Tex. 2002) (statute did not permit cable company to use private easement expressly limited to transmission or distribution of electricity)].

Another statute provides for a right of access to a cemetery or private burial ground for which there is no public access [Tex. Health & Safety Code § 711.041]. One court of appeals has determined that this statute is unconstitutional to the extent that it forces or compels an easement on private property without compensation [*Meek v. Smith*, 7 S.W.3d 297, 302-303 (Tex.Civ.App.-Beaumont 1999, no pet.)].

VII. RIGHTS AND DUTIES OF EASEMENT HOLDERS

A. Terms of Agreement Control

When a party acts under an easement created by an express grant or reservation, the party’s rights are controlled by the specific terms of the agreement, not by the common law [*Dewitt County Elec. Cooperative v. Parks*, 1 S.W.3d 96, 103 (Tex. 1999) (distinguishing extent of rights under implied easement); *Phillips Natural Gas Co. v. Cardiff*, 823 S.W.2d 314, 317 (Tex.Civ.App.-Houston [1st Dist.] 1991, writ denied)]. The terms of the agreement control the scope of permitted use, and that scope cannot be enlarged by prescriptive use [*McNally v. Guevara*, 989 S.W.2d 380, 383 (Tex.Civ.App.-Austin 1999, no pet.); *Kearney & Son v. Fancher*, 401 S.W.2d 897, 903 (Tex.Civ.App.-Ft. Worth 1966, writ ref’d n.r.e.)]. The stated provisions of the agreement alone will be considered to have expressed the intent of the parties; moreover, it is the objective intent that controls, not the subjective intent of the parties [*City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968)].

B. Unambiguous Terms Construed

In construing the terms of an express easement, the rules of contract construction and interpretation apply [*Canyon Reg’l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 51 Tex. Sup. Ct. J. 904, 906 (Tex. 2008); *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002); *Dewitt County Elec. Coop. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999)].

1. Procedure for Unambiguous Agreements

Under those rules, the first step requires that the court, not the jury, determine if the wording of the agreement is ambiguous. The language used in creating the easement is not considered ambiguous merely because of a lack of clarity. Similarly, ambiguity is not demonstrated merely because the parties offer different interpretations of the wording [*DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999)]. If a contract is worded so that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous, and the court must construe it as a matter of law [*Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 703 (Tex. 2002); *GTE Mobilnet v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 290-291 (Tex.Civ.App.-Houston [1st Dist.] 1997, writ denied); *Harris v. Phillips Pipe Line Co.*, 517 S.W.2d 361, 364 (Tex.Civ.App.-Austin 1974, writ ref’d n.r.e.); *MGJ Corp. v. City of Houston*, 544 S.W.2d 171, 174 (Tex.Civ.App.-Houston [1st Dist.] 1976, writ ref’d n.r.e.)].

If the court finds an easement agreement to be unambiguous, the court must then determine as a matter of law the parties’ intent as expressed within the four corners of the instrument [*Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991) (with reference to deed interpretation)]. The court must give the language of the agreement its plain, grammatical meaning. The court cannot consider extrinsic evidence as to what was meant or intended [*DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100-103 (Tex. 1999)].

2. Examples of Unambiguous Agreements

Many cases can be cited applying the principle that the unambiguous terms of an easement are to be applied literally to define and control the parties' intended rights, including the following examples:

- (1) An express easement for "opening, constructing, and maintaining" a mitigation pond to capture rainwater permitted excavation and use of soil incident to constructing the pond, but did not permit the removal of thousands of cubic meters of soil from the land for highway construction unrelated to building the facility [*Brownlow v. State*, 319 S.W.3d 649, 653-657 (Tex. 2010)].
- (2) An express easement permitting a water authority to construct an intake pipeline from a lake and creating a restricted access zone around the intake could not be construed to permit the water authority that had already exercised those rights to build a second such intake [*Canyon Reg'l Water Auth. v. Guadalupe Blanco River Auth.*, 258 S.W.3d 613, 616 (Tex. 2008)].
- (3) An express easement permitting use of the land only for transmission or distribution of electricity could not be used by a cable television company [*Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 703-706 (Tex. 2002) (express easement for delivery of electricity does not extend to cable television, as easement was limited to delivery of power and did not extend to communications utilities)], despite a statute authorizing such a company to install and maintain equipment in existing utility easements [Tex. Utilities Code § 181.102].
- (4) An express easement for a "right of way" does not permit the easement holder to install utility lines on, under, above, or in the easement [*Greenwood v. Lee*, 420 S.W.3d 106, 113-114 (Tex.Civ.App.-Amarillo 2012, pet. denied)]. The holder may, however, widen a preexisting road in the right of way to the full width of the easement granted [*Greenwood v. Lee*, 420 S.W.3d 106, 115-118 (Tex.Civ.App.-Amarillo 2012, pet. denied)].
- (5) An express easement permitting construction and operation of a drainage canal, as well as ingress and egress for any related purpose, did not permit the easement holder to require removal of a decorative covering from a bridge constructed by the holder over the canal because there was no evidence that the covering interfered in any way with operation, maintenance, or access to the drainage canal [*Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 309-312 (Tex.Civ.App.-Houston [1st Dist.] 2010, pet. denied)].
- (6) An express easement for "electric transmission and distributing lines ... and all necessary and desirable appurtenances (including ... telephone and telegraph wires)" was unambiguous in permitting use of the easement to install wireless cellular equipment, because the original agreement clearly permitted the installation of telephone equipment, and the wireless equipment at issue was simply more advanced technology that furthered the purpose for which the easement was granted [*CenterPoint Energy Houston Elec. L.L.C. v. Bluebonnet Drive, Ltd.*, 264 S.W.3d 381, 388-392 (Tex.Civ.App.-Houston [1st Dist.] 2008, pet. denied)].
- (7) An express easement was created for "driveway purposes." The court of appeals held that the easement meant exactly what it said; it did not authorize the easement holder to use the property for parking [*McNally v. Guevara*, 989 S.W.2d 380, 383 (Tex.Civ.App.-Austin 1999, no pet.); *Harris County Flood Control Dist. v. Shell*, 591 S.W.2d 798, 799 (Tex. 1979) (Texas Supreme Court gave broad interpretation to easement created for "street purposes," allowing installation of pipelines and water lines, but not creation of storm drainage ditch); *Nicol v. Gonzales*, 127 S.W.3d 390, 395-396 (Tex.Civ.App.-Dallas 2004, no pet.) (express easement for ingress and egress to "garage or out-building" did not terminate on destruction of garage, because toolshed remained on property and was "out-building" to which access was needed)].
- (8) An express easement agreement allowed an electric company to cut and trim trees "to the extent necessary to keep them clear of said electric line" and "to cut down ... all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling." The Texarkana Court of Appeals applied these terms literally, holding that the company's poisoning of stumps and cutting and trimming of trees that did not pose threats to the power line were unauthorized acts [*Murphy v. Fannin County Elec. Coop.*, 957 S.W.2d 900, 903-907 (Tex.Civ.App.-Texarkana 1997, no pet.)].
- (9) The Austin Court of Appeals sought to determine whether a gas company had the right to install an additional pipeline on an existing easement. By focusing on the granting clause and the compensation clause of the easement agreement, the court of appeals observed that although the granting clause used the plural "pipe lines," it did not expressly grant the right to lay additional lines. Also, a provision in the compensation clause calling for additional payment if lines were installed in the future, had been specifically deleted from the form contract by the parties. Accordingly, the court of appeals concluded that the gas company did not have the right to lay an additional line [*Hall v. Lone Star Gas Co.*, 954 S.W.2d 174, 176-179 (Tex.Civ.App.-Austin 1997, pet. denied); *Boland v. Natural Gas Pipeline Co.*, 816 S.W.2d 843, 845 (Tex.Civ.App.-Ft. Worth 1991, no writ) (easement expressly granted right of way for initial pipeline and "any additional pipeline")].
- (10) The easement terms defined "abandonment" as nonuse for 24 months or more. The court of appeals applied the definition literally, rather than applying common-law principles for determining abandonment, so that the easement holder's cessation of use for seven months did not result in termination of the easement [*Phillips Natural Gas Co. v. Cardiff*, 823 S.W.2d 314, 318 (Tex.Civ.App.-Houston [1st Dist.] 1991, writ denied)].

- (11) A grant of an “easement and right-of-way over and across” certain land was held to be unambiguous. The phrase’s plain meaning as the right of ingress and egress only was applied to prohibit the easement holder’s placement of a commercial boat dock on the easement [*Lakeside Launches v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex.Civ.App.-Austin 1988, writ denied)].
- (12) An express easement provided for construction of a pipeline “upon, over, under and through” the described land, and also provided that the grantee “agrees to bury” the pipeline so that the land could be cultivated. The court held that the grantee’s construction of a block valve assembly above the ground was permitted because the assembly was a necessary safety and operational feature of the pipeline, and was therefore naturally encompassed by the granting clause as necessary to the enjoyment of the easement [*Koelsch v. Industrial Gas Supply Corp.*, 132 S.W.3d 494, 498 (Tex.Civ.App.-Houston [1st Dist.] 2004, pet. denied)].

C. Ambiguous Terms Construed

A grant or reservation of an easement may set out a right or duty in general terms, such as the “right of ingress and egress” or the “right to maintain” the easement. In disputes over the extent of the right expressed in such general terms, courts often state that the agreement carries with it the implied right to carry on the stated usage in a manner that (1) is reasonably necessary to fulfill the purposes of the easement, (2) is convenient for the easement holder, and (3) puts as little burden as possible on the owner of the servient estate [*Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974); *Coleman v. Forister*, 538 S.W.2d 14, 15-17 (Tex.Civ.App.-Austin 1976, writ ref’d n.r.e.) (appeal of trial court’s determination, after remand, of extent and location of rights of ingress and egress not expressly described in written agreement); *Dail v. Couch*, 99 S.W.3d 390, 392 (Tex.Civ.App.-Corpus Christi 2003, no pet.) (when easement provided for access to lake shore in general terms, court was empowered to fix dimensions of easement, and appellant failed to show that five-foot width of easement would not afford access); *Sun Pipe Line Co. v. Kirkpatrick*, 514 S.W.2d 789, 792 (Tex.Civ.App.-Beaumont 1974, writ ref’d) (removal of overhanging limbs authorized in non-negligent manner)].

D. Procedure for Ambiguous Agreements

If the court decides that the doubts cannot be resolved and the language of the agreement is truly susceptible of more than one reasonable meaning, the agreement is considered ambiguous and its intended meaning becomes a fact question to litigate [*Dewitt County Elec. Cooperative v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999); *R & P Enterprises v. LaGuarta, Gavrel & Kirk*, 596 S.W.2d 517, 518 (Tex. 1980)]. If contractual ambiguity is pleaded and demonstrated to the court’s satisfaction (forms of answer asserting ambiguity), parol or extrinsic evidence outside the four corners of the agreement can be admitted to explain what the parties intended [*Trinity Universal Ins. Co. v. Ponsford Brothers*, 423 S.W.2d 571, 575 (Tex. 1968); *Wall v. Lower Colo. River Auth.*, 536 S.W.2d 688, 691 (Tex.Civ.App.-Austin 1976, writ ref’d n.r.e.)]. An ambiguity in the grant of an express easement does not invalidate the easement; instead, it should be interpreted so as to give effect to the expressed intent of the parties, and construed to prevent a forfeiture of the rights granted [*McKenna v. Caldwell*, 387 S.W.3d 830, 834-836 (Tex.Civ.App.-Eastland 2012, no pet.) (when express agreement provided for “free, uninterrupted and unobstructed easement for access,” whether agreement permitted installation of cattle guard was ambiguous and turned on fact question of parties’ intent, so summary judgment on issue was improper and case remanded for further proceedings); *Stephenson v. Vastar Resources, Inc.*, 89 S.W.3d 790, 794-795 (Tex.Civ.App.-Corpus Christi 2002, pet. struck) (easement agreement authorizing termination when easement not used for two years was ambiguous as to what constituted nonuse, and so would be interpreted to preserve easement rights)].

The easement holder’s conduct in the exercise of rights afforded by the easement must be carried out in a reasonable, non-negligent manner [*Phillips Pipe Line Co. v. Razo*, 420 S.W.2d 691, 693 (Tex. 1967); *Sun Pipe Line Co., Inc. v. Kirkpatrick*, 514 S.W.2d 789, 792 (Tex.Civ.App.-Beaumont 1974, writ ref’d n.r.e.)]. If the easement holder exercised the rights conferred by the easement with due care and without negligence, no damages can be recovered for resulting harm to the servient estate [*Sun Pipe Line Co., Inc. v. Kirkpatrick*, 514 S.W.2d 789, 792 (Tex.Civ.App.-Beaumont 1974, writ ref’d n.r.e.)].

Unless the easement agreement specifies otherwise, the easement holder usually has a duty to exercise reasonable care to maintain the easement [*Reyna v. Ayco Dev. Corp.*, 788 S.W.2d 722, 724 (Tex.Civ.App.-Austin 1990, writ denied)] and to avoid unreasonably interfering with the property rights of the owner of the servient estate [*Stout v. Christian*, 593 S.W.2d 146, 149-150 (Tex.Civ.App.-Austin 1980, no writ)].

It should be emphasized that the easement holder’s duty to use reasonable care applies to conduct undertaken in the exercise of rights actually afforded by the easement. If the conduct is not authorized by the easement, the easement holder can be liable for any harm resulting, the exercise of care notwithstanding [*Murphy v. Fannin County Elec. Cooperative, Inc.*, 957 S.W.2d 900 (Tex.Civ.App.-Texarkana 1997, no pet.) (poisoning trees not permitted under terms of easement so that liability for damage to trees resulted regardless of degree of care used); *Sun Pipe Line Co. v. Kirkpatrick*, 514

S.W.2d 789, 792 (Tex.Civ.App.-Beaumont 1974, writ ref'd n.r.e.) (under terms of agreement, easement holder could use chemicals to poison trees to prevent them from interfering with use of easement, but with reasonable care)].

E. Construing Easements Created by Operation of Law

An easement arising by operation of law, such as by implication, estoppel, or prescription, gives the holder the right to use the servient tract to carry out the purpose for which the easement is granted [*Ulbricht v. Friedsam*, 325 S.W.2d 669, 677 (1959)]. Determination of the precise nature and extent of that usage right requires a three-part examination of the circumstances, as follows:

First, the purpose for the which the easement was established must be defined. Saying only that the easement is for “ingress and egress,” for example, may not be sufficient to determine the exact nature of the use allowed. It may be necessary to further define the purpose; that is, to use this example, ingress and egress for a certain purpose. The court of appeals in *Shipp v. Stoker*, 923 S.W.2d 100, 103 (Tex.Civ.App.-Texarkana 1996, writ denied)], faced with a general access easement, reasoned that any easement imposed by law for ingress and egress, not restricted by a prior use or otherwise, should allow the holder access to the servient tract for either or both commercial or residential purposes. The Texas Supreme Court broadly interpreted a prescriptive dedication of land for a public road to allow the grantee government entity not only to build and maintain the road but also to install lines, sewers, and other devices for transportation of persons, property, and communication [*Hill Farm v. Hill County*, 436 S.W.2d 320, 322-324 (Tex. 1969)].

Second, the nature and extent of the usage of the property that gave rise to the establishment of the easement must be examined; a prior or intended use may define or limit the use authorized under the easement. The following examples illustrate the concept:

- (1) An easement implied from a prior existing use embodies the right to use the easement only in the way and to the extent it was used by the prior users. In *Ulbricht v. Friedsam*, 325 S.W.2d 669, 677 (1959)], the area comprising the easement had been used by the prior owner not only for access to a lake but also as a pasture for cattle to graze and to drink from the lake. The Texas Supreme Court held that the easement implied from that prior use carried with it the right of the easement holder to use the easement for the same purposes: access to the lake and pasture and water for the cattle [*Ulbricht v. Friedsam*, 325 S.W.2d 669, 677 (1959)].
- (2) An easement arising by prescription grants the right to use the land to the same extent and in the same manner as the ongoing adverse use on which the easement claim is based. If that use was to gain access to the user’s residence, for example, any subsequent use of the easement for a commercial activity or purpose would be unauthorized and outside the scope of the easement [*Scott v. Cannon*, 959 S.W.2d 712, 723 (Tex.Civ.App.-Austin 1998, pet. denied)].
- (3) An easement based on estoppel includes the right to make such use of the property as reasonably necessary to carry out the purpose of the easement as it was represented to be by the party against whom the estoppel is applied. For example, a party represented that a right-of-way easement was authorized for access to landlocked property. The party knew that the owner of the landlocked property resided and conducted a business there. Accordingly, the easement created by the representation was held to encompass the right to use the way for both residential and commercial purposes [*Shipp v. Stoker*, 923 S.W.2d 100, 103 (Tex.Civ.App.-Texarkana 1996, writ denied)].

Third, the rights asserted must be tested by a standard of reasonable necessity; that is, the usage in question is authorized only if it is reasonably necessary to fulfill the easement’s purpose with minimal intrusion on the servient property [*Lamar County Electric Cooperative Ass’n v. Bryant*, 770 S.W.2d 921, 923 (Tex.Civ.App.-Texarkana 1989, no writ)]. For example, in *Lamar County Electric*, the electric co-op proved the existence of a prescriptive easement for laying and servicing a power line. The court of appeals reasoned that to accomplish that purpose, the co-op would have the right to remove tree branches that interfered with its lines, a right reasonably necessary to ensure the transmission of power through the lines. But, for the co-op to cut the trees down completely would be to go beyond what was reasonably necessary to accomplish that purpose [*Lamar County Electric Cooperative Ass’n v. Bryant*, 770 S.W.2d 921, 923 (Tex.Civ.App.-Texarkana 1989, no writ)].

F. Right to Change Location of Easement

As a general rule, once the location of an easement has been established, it cannot be changed unless the parties agree to the change. Mutual consent may be implied from the acts or acquiescence of the parties [*Severance v. Patterson*, 370 S.W.3d 705, 55 Tex. Sup. Ct. J. 501, 516 (Tex. 2012) (easement boundaries are static and attached to specific portion of property); *Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex.Civ.App.-Austin 2000, no pet.) (location or character of

established easement cannot be changed without consent of parties); *Dortch v. Sherman County*, 212 S.W.2d 1018, 1022 (Tex.Civ.App.-Amarillo 1948, no writ)].

The equitable doctrine of estoppel may be applied against a party to bar the party's insistence on restricting use to the original location. For example, in one case, the easement holder built a new road in a location different from the easement, the owner of the servient tract permitted use of the new road and blocked off the old road. The Texas Supreme Court agreed that the servient estate owner was estopped to insist that the original easement was the true and only easement [*Vrazel v. Skrabanek*, 725 S.W.2d 709, 711-712 (Tex. 1987)]. Moreover, the servient estate owner may be held to have ratified or agreed to a location change by accepting the benefits of the relocation [*Fort Quitman Land Co. v. Mier*, 211 S.W.2d 340, 343 (Tex.Civ.App.-Eastland 1948, writ ref'd n.r.e.)].

When the public has an easement for beach use, the boundaries of the easement are formed by the mean high tide line and the vegetation line. These lines, of course, are not static but move due to tides, weather, and other factors. Accordingly, the precise location of a public beach easement may move in conjunction with gradual and imperceptible changes to the shore. On the other hand, if the mean high tide line moves significantly inland due to an avulsive event, an easement for public use of the beach is terminated and does not "roll" to affect previously unburdened property [*Severance v. Patterson*, 370 S.W.3d 705, 55 Tex. Sup. Ct. J. 501, 515-519 (Tex. 2012) (when beachfront property was significantly altered by hurricane, any easement that may have existed for public beach use was terminated, and state was obliged to obtain new easement)].

VIII. EASEMENT HOLDER'S REMEDIES

A. Interference with Private Easement

1. Declaratory Judgment

A person claiming the right to use another person's property due to an easement may ask the court for a declaratory judgment confirming the existence of the easement and to clarify the rights of the parties embodied within it. Under the Declaratory Judgments Act, courts may declare the rights and legal relations of the parties to settle uncertainties [Tex. Civ. Prac. & Rem. Code §§ 37.002-37.004]. A dispute over the existence or extent of an easement is an example of the type of uncertainty contemplated by the DJA [*Mack v. Landry*, 22 S.W.3d 524, 526-527 (Tex.Civ.App.-Houston [14th Dist.] 2000, no pet.)].

When a court renders a declaratory judgment, it may also grant other relief [Tex. Civ. Prac. & Rem. Code § 37.011], including an injunction, a money judgment for damages, and an award of attorney's fees and costs [Tex. Civ. Prac. & Rem. Code § 37.009]. Because an easement holder has no ownership or possessory interest in the property, any alternative claim that depends on such an interest is unavailable to the easement holder in a declaratory judgment action [*Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 312-313 (Tex.Civ.App.-Houston [1st Dist.] 2010, pet. denied) (claim that property owner trespassed on drainage easement cannot be maintained by holder as alternative to declaratory action because trespass claim requires ownership or right to possess property)].

2. Injunctive Relief

When an easement holder's lawful use of the easement is blocked or otherwise hampered by another person, the holder may ask a court to declare the existence of the easement and restrain and enjoin interference with the holder's use of it [*N. Tex. Mun. Water Dist. v. Ball*, 466 S.W.3d 314, 323 (Tex.Civ.App.-Dallas 2015, no pet.); *Seelbach v. Clubb*, 7 S.W.3d 749, 752-754 (Tex.Civ.App.-Texarkana 1999, pet. denied); *County of Harris v. Southern Pacific Trans. Co.*, 457 S.W.2d 336, 340 (Tex.Civ.App.-Houston [1st Dist.] 1970, no writ); Tex. R. Civ. P. 680 et seq.]. Injunctive relief is available under the principles of equity and by statute [Tex. Civ. Prac. & Rem. Code § 65.011].

The statute authorizing injunctive relief contains two provisions pertinent to an easement holder's efforts to enforce usage rights. One of these provisions simply incorporates the principles of equity [Tex. Civ. Prac. & Rem. Code § 65.011(3)], including that an injunction is available only when the applicant shows the likelihood of irreparable harm for which there is no adequate remedy at law [*Hancock v. Bradshaw*, 350 S.W.2d 955, 957 (Tex.Civ.App.-Amarillo 1961, no writ)]. This means that the petitioner must demonstrate the irreparable nature of the harm flowing from the interference with the easement, such as the loss of use of the petitioner's own property. The petitioner must also show that the only remedy at law would be multiple and frequent suits for damages, clearly an inadequate remedy [*Garland Grain Co. v. D C Homeowners Improvement Ass'n*, 393 S.W.2d 635, 643 (Tex.Civ.App.-Tyler 1965, writ ref'd n.r.e.)].

Another provision of the general statute authorizes injunctive relief when "the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant" [Tex. Civ. Prac. & Rem. Code § 65.011(1)]. It may be that under this provision, the applicant need not show irreparable harm or

unavailability of an adequate remedy at law [*Hale County v. Davis*, 572 S.W.2d 63, 66 (Tex.Civ.App.-Amarillo 1978, writ ref'd n.r.e.) (servient tract owner was allowed injunction to prevent unauthorized use of public road for private purposes)]. In many cases, it will not be necessary to harmonize these separate grounds for injunctive relief, because the demonstrated inability of the holder to use the servient property to the full extent permitted by the easement will be equivalent to irreparable harm and justify injunctive relief [e.g., *N. Tex. Mun. Water Dist. v. Ball*, 466 S.W.3d 314, 323 (Tex.Civ.App.-Dallas 2015, no pet.) (trial court abused discretion in denying injunctive relief; because fence was permanent structure that violated easement, “we agree that no remedy but its removal will allow the District full and necessary access to its Easement”)].

A suit to enjoin interference with the use of an easement is rarely delayed after the easement is blocked or rendered unusable by the opposing party. However, it appears that such an action would not be barred by limitations until the opposing party established title to the area by adverse possession [*Jamail v. Gene Naumann Real Estate*, 680 S.W.2d 621, 625-626 (Tex.Civ.App.-Austin 1984, writ ref'd n.r.e.)].

3. Damages

When an easement holder's right to use the servient property is hindered or prevented, the easement holder may have suffered harm before being allowed to continue using the land. The harm suffered is compensable by an award of damages [*Seelbach v. Clubb*, 7 S.W.3d 749, 758-761 (Tex.Civ.App.-Texarkana 1999, pet. denied)]. If, for example, the owner of the servient estate interfered with the use of the easement and prevented the easement holder from accessing the holder's own property, the servient estate owner may be liable in damages for the holder's loss of use of the property, measured by the reasonable rental value of the dominant property for the time during which the property was inaccessible [*Hall v. Robbins*, 790 S.W.2d 417, 419 (Tex.Civ.App.-Houston [14th Dist.] 1990, no writ)]. If the owner of the servient estate built or allowed a permanent encroachment on the easement that interfered with the easement holder's rights, the easement holder may be entitled to damages measured by the cost to remove the encroachment or otherwise remedy the situation [*First American Title Ins. Co. v. Willard*, 949 S.W.2d 342, 345 (Tex.Civ.App.-Tyler 1997, writ denied) (cost to remove house built on easement)].

An action for damages caused by the servient estate owner's interference with the right to use the property pursuant to an easement is usually instituted shortly after the interference occurs. However, when the suit is delayed, the question of whether the suit is barred by limitations may arise. The lawsuit should be characterized as a suit for breach of contract (because an easement is a contract) insofar as the damages recovery is concerned, even though there may be no limitation period for establishing the existence of an easement other than the statutes barring recovery of a property interest due to another's adverse possession of that interest. As a general rule, an action for damages resulting from a breach of contract is barred if not instituted within four years from the day the cause of action accrued [Tex. Civ. Prac. & Rem. Code §§ 16.004(a), 16.051; *Samuelson v. Alvarado*, 847 S.W.2d 319, 322 (Tex.Civ.App.-El Paso 1993, no writ) (assuming without deciding that four-year limitation applied)].

The easement holder cannot recovery exemplary damages for the servient estates owner's breach of the easement contract by interference with its use, regardless of the property owner's intent or maliciousness [*Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981)]. However, if a separate tort can be proved by showing that the defendant breached a duty owed to the plaintiff other than the contractual duty imposed by the easement agreement, exemplary damages may be awarded if defendant's conduct was malicious and intended to harm the plaintiff [Tex. Civ. Prac. & Rem. Code § 41.001 et seq.; Ch. 20, Damages in Tort; *Gerstner v. Wilhelm*, 584 S.W.2d 955, 957 (Tex.Civ.App.-Austin 1979, writ dismiss'd) (overt acts and threats supported judgment for exemplary damages in easement interference case decided under common law rule before enactment of Chapter 41 of Civil Practice and Remedies Code)].

4. Attorney Fees

An easement holder's action for interference with the lawful use of an easement can be cast as an action for a declaratory judgment [Tex. Civ. Prac. & Rem. Code §§ 37.002–37.004]. Under the Declaratory Judgments Act, the court has the discretion to award reasonable and necessary attorney fees to either party to the litigation [Tex. Civ. Prac. & Rem. Code § 37.009]. Though an award in favor of an easement holder who obtains a declaratory judgment is relatively common [e.g., *Houston Bellaire v. TCP LB Portfolio I, L.P.*, 981 S.W.2d 916, 923 (Tex.Civ.App.-Houston [1st Dist.] 1998, no pet.) (award is in judge's discretion)], if the property owner defeats the holder's request for a declaratory judgment, an award of attorney fees to the owner and against the holder is available [*Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 313-314 (Tex.Civ.App.-Houston [1st Dist.] 2010, pet. filed) (prevailing property owner may obtain award by defeating claim for declaratory relief as to easement, and award is not conditioned on owner's assertion of rival claim for declaratory relief)]. Accordingly, awards of attorney fees in actions for easement interference will be upheld when supported by proper pleadings and proof [*Steel v. Wheeler*, 993 S.W.2d 376, 381

(Tex.Civ.App.-Tyler 1999, pet. denied); *Canales v. Zapatero*, 773 S.W.2d 659, 661 (Tex.Civ.App.-San Antonio 1989, writ denied)].

B. Public Easements

1. Governmental Action Affecting Public Use

The State of Texas, a city, or a county within whose jurisdiction a public easement has been created has the power to terminate the public's right to use the property and the public's rights will revert to the landowners whose property abuts the easement [*Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 257 (Tex. 1984); Tex. Local Gov't Code § 282.001—municipality's control over public grounds]. In other words, as a general rule, the government's right to control its properties supersedes citizens' rights to use public areas. The government must exercise that right consistently with any controlling statute [*Town of Palm Valley v. Johnson*, 17 S.W.3d 281, 286-288 (Tex.Civ.App.-Corpus Christi 2000) petition denied with per curiam opinion on separate procedural matter at 87 S.W.3d 110 (Tex. 2001)]. But, more importantly, a governmental entity cannot defeat any private, personal right to use the land without compensating the holder of that right.

2. Governmental Action Affecting Private Right in Public Road

a. Enforcement of Private Right by Injunction

When a governmental entity closes or attempts to close or abandon a public roadway, an owner (or, in the case of a city street, a lessee) of property abutting the part of the road or alley being closed or abandoned may sue to enjoin the effort [Tex. Civ. Prac. & Rem. Code § 65.015 (specific statute); Tex. Transp. Code § 251.058 (county roads); Tex. Civ. Prac. & Rem. Code § 65.011 (general statute)]. In the lawsuit, the petitioner must show that a public way exists. Then, if the public way in issue is a city street or alley, the petitioner must establish that harm has resulted from the city's conduct for which petitioner's damages have not been ascertained and paid or released in a condemnation suit [Tex. Civ. Prac. & Rem. Code § 65.015]. To prove that the petitioner has sustained damages, the petitioner must establish a private property right that has been materially and substantially harmed by the government's action]. If the road is a county road, the statute provides that the owner must show a private right to use the road: the petitioner must show that the road or the portion of it being closed abuts the owner's property or is the only ingress to or egress from the petitioner's property [Tex. Transp. Code § 251.058(a); Tex. Transp. Code § 251.058(c)—closure has no effect on landowner's right to compensation for impairment of access].

b. Compensation for Governmental Taking of Private Right

An owner of property abutting a public road who can establish a private right to use it for access to his or her property has a property right that cannot be taken by government action without just compensation [*State v. Heal*, 917 S.W.2d 6, 9-10 (Tex. 1996)]. A "taking" requiring payment by the government requires a material and substantial impairment of the property owner's access to the property [*Lethu, Inc. v. City of Houston*, 23 S.W.3d 482, 486-487 (Tex.Civ.App.-Houston [1st Dist.] 2000, pet. denied) (discussing cases denying recovery when closure caused only circuity of travel, inconvenience, or decrease in customer traffic); *City of Grapevine v. Grapevine Pool Rd. Joint Venture*, 804 S.W.2d 675, 678 (Tex.Civ.App.-Ft. Worth 1991, no writ) (mere circuity of travel is not taking when access to public way remains)].

3. Private Party's Interference With Use of Public Way

A private party may not block or otherwise interfere with the public's use of a street, road, or highway. Any attempt to do so is usually stopped by the government unit that owns the road. In some cases, however, the government unit has not assumed control over a property alleged to have been dedicated for public use, or is unsure of the status of the property. In this situation, an owner whose property is crossed by the roadway may attempt to block or otherwise obstruct the road for a variety of reasons, including a belief that no easement exists, or that the road has been abandoned. Other neighboring owners can seek an injunction to prevent interference with use of the public road by alleging an injury to their property rights [*Shelton v. Kalbow*, 489 S.W.3d 32, 40-41, 48 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied) (allegation that public road was obstructed by fences and gates and blocked access to neighboring owner's tract was sufficient to give owner standing to enforce express dedication of road; permanent injunction against obstruction of road was proper and narrowly tailored to redress defendant's conduct)].

IX. TERMINATION OF EASEMENTS

A. By Operation of Law

If there is a foreclosure under a deed of trust created prior to the easement, the grantee at the trustee's sale takes free of the easement [*Henderson v. Le Duke*, 218 S.W. 655 (Tex.Civ.App.-Texarkana 1920, writ dismissed); *Cousins v. Sperry*, 139 S.W.2d 665 (Tex.Civ.App.-Beaumont 1940, no writ)].

However, the mortgagee may be estopped to deny or may be deemed to have ratified the dedication of the public easement shown on a plat by its knowledge of the sale of and partial releases of platted lots. This may not be true though, particularly where the subdivision is unimproved, if the lender simply executes partial releases [*Johnson v. Ferguson*, 329 Mo. 363, 44 S.W.2d 650 (1931); *Weills v. Vero Beach*, 96 Fla. 818, 119 So. 330 (1928); *Pry v. Mankedick*, 172 Pa. 535, 34A. 46 (1896); 23 Am. Jr.2d Dedication sec. 12 (1983); *City of Fort Worth v. Cetti*, 38 Tex.Civ.App. 117, 85 S.W. 826 (1905, no writ); *Adouie & Lobit v. Town of La Porte*, 58 Tex.Civ.App. 206, 124 S.W. 134 (Tex.Civ.App. 1909, writ ref'd)].

B. Merger

In order to constitute an easement, the dominant and servient estates must be held by different owners. If the owner of the easement acquires title to the servient estate, there is a merger and extinguishment of the easement [*Parker v. Bains*, 194 S.W.2d 569 (Tex.Civ.App.-Galveston 1946, writ ref'd n.r.e.)].

A terminated easement is not revived by subsequent separation of ownership of the former dominant and servient estates [217 *Long Island Owner's Assoc. v. Davidson*, 965 S.W.2d 674, 687 (Tex.Civ.App.-Corpus Christi 1998, rev. denied); 28A C.J.S. Easements § 123 (1996)].

C. Limitations

An easement may be extinguished by virtue of adverse possession by another, but all elements must be proved by the adverse possessor [*Jamail v. Gene Naumann Real Estate*, 680 S.W.2d 621 (Tex.Civ.App.-Austin 1984, writ ref'd n.r.e.)].

An easement may be lost by adverse possession of the servient estate for such use as is inconsistent with the continued use of the easement (such as where improvements, including stables and fences and gardens, precluded use of the easement) [*City of Houston v. Williams*, 69 Tex. 449, 6 S.W. 860 (1888) (in this case, the five-year statute was also applicable due to a conveyance); *Walton v. Harigel*, 183 S.W. 785 (Tex.Civ.App.-Galveston 1916, no writ); *Chenoweth Bros. v. Magnolia Petroleum Co.*, 129 S.W.2d 446 (Tex.Civ.App.-Dallas 1939, writ dis'm'd judgment cor.) (Apparently, an implied easement such as a way of necessity could also be lost by adverse possession)].

In *Robinson Water Co. v. Seay*, 545 S.W.2d 253, 260 (Tex.Civ.App.-Waco 1976, no writ) the owners of a tract of land fenced and used a portion of the private roadway easement adversely, openly, peaceably, and continuously against all for 12 years. The portion of the private road easement inside the fence was extinguished, and a public easement was obtained by prescription (limitations).

A servient tenement owner may not adversely possess the easement of the dominant tenement owner unless it clearly appears the servient tenement owner has repudiated the title of the dominant tenement owner and is holding adversely to it (i.e. a "claim of right") [*Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc.*, 426 S.W.3d 800, 806-807 (Tex.Civ.App.-San Antonio 2014, rev. denied)]. While the Schuhardt court held the claimant had not asserted a "claim of right" by the building the fence obstructing the easement, and the claimant therefore failed to terminate the easement by adverse possession, the Schuhardt court cited the Restatement (Third) for the factual basis establishing the general rule using the ten year prescription period for terminating an easement by adverse possession:

"Blackacre is burdened by an easement appurtenant to Whiteacre for ingress and egress to a public road. Without permission from the owner of Whiteacre, O, the owner of Blackacre, constructed a fence along the boundary between Blackacre and Whiteacre. The fence completely blocked entrance to the easement. In the absence of other facts or circumstances, maintenance of the fence at its current location for the prescriptive period will terminate the easement. RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 7.7 cmt. b, illus. 1 (1998)"

The Schuhardt court clarified the validity of the principle that an easement may be terminated by adverse possession for ten years, when it stated: "In addition to the illustration in the Restatement, one Texas court has expressly recognized that a private easement 'is subject to being lost by the ten-year statute of limitation.' [*Robinson Water Co. v. Seay*, 545 S.W.2d 253, 259 (Tex.Civ.App.-Waco 1976, no writ)]. In that case, a portion of an easement expressly reserved by a grantor was extinguished by the placement of a fence across that portion of the easement. Id. Importantly, in that case, the grantees asserting adverse possession testified that they always claimed the area enclosed in the fence as their property. Id. Furthermore, an adjacent landowner similarly testified that they were aware that the grantees were claiming ownership of the property inside the fence and always considered the property to belong to the grantees. Id. Therefore, in that case, the undisputed evidence established that the grantees verbally asserted a claim of right."

It should be noted that one may not acquire, through adverse possession, any right or title to real property dedicated to public use [Tex. Civ. Prac. & Rem. Code §§ 16.030 & 16.061].

D. Abandonment

If the purposes for which the easement was granted cease, the easement terminates. For example, under a deed conveying a building to the county and reserving a right to use the second floor in favor of certain lodges, such rights cease upon abandonment of the defined purpose of occupancy [*Woodmen of the World Camp No. 1772 v. Goodman*, 193 S.W.2d 739 (Tex.Civ.App.-Dallas 1945, no writ)].

An easement owner is ordinarily free to abandon the easement, but in doing so he or she cannot prevent others from taking advantage of the benefits to which they are legally entitled by the easement grant and by their rights as owners of the freehold estate. In *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985), the easement owner was liable to freeholders for removal of culvert he had permanently embedded in the land and for resulting destruction of roadway he had built over the easement. The private easement which a purchaser acquires by implication upon purchase with reference to a map showing an abutting street or alley survives vacation or abandonment of the street by a public authority [*Hicks v. City of Houston*, 524 S.W.2d 539 (Tex.Civ.App.-Houston [1st Dist.] 1975, writ ref'd n.r.e.)].

The mere nonuse of an easement will not extinguish it. An intention to abandon an easement must be shown by clear and satisfactory evidence. There must be additional elements, such as the use becoming impossible of execution or failure of the object of the use or the substitution of new property for the old for a certain use [*Griffith v. Allison*, 128 Tex. 86, 96 S.W.2d 74 (1936); *Adams v. Rowles*, 149 Tex. 52, 228 S.W.2d 849 (1950)].

Intention to abandon an easement is not manifested by the condemnation of said easement by a public authority [*City of San Antonio v. Ruble*, 453 S.W.2d 280 (Tex. 1970)].

The dominant owner has the duty to maintain, improve, or repair the easement at no expense to the servient owner [*Sisco v. Hereford*, 694 S.W.2d 3, 7 (Tex.Civ.App.-San Antonio 1984, writ ref'd n.r.e.); *Cozby v. Armstrong*, 205 S.W.2d 403, 408 (Tex.Civ.App.-Ft. Worth 1947, writ ref'd n.r.e.)].

It is extremely difficult to prove that a city or other public body has abandoned an easement or part thereof. In *Roberts v. Bailey*, 748 S.W.2d 577 (Tex.Civ.App.-Beaumont 1988, no writ), the court did not apply the abandonment doctrine. In this case a deed, granting a public easement of a street to the city, was never accepted by the city council. At no time did the city maintain this thoroughfare. Therefore, the question of abandonment never arose. Whenever a county road has been enclosed under fence by the adjoining owner for more than twenty years, the road shall be deemed abandoned, provided same is not reasonably necessary to reach adjoining land [Tex. Transp. Code § 251.057; Op. Tex. Att'y Gen. No. H-111 (1975); *Aransas County v. Reif*, 532 S.W.2d 131 (Tex.Civ.App.-Corpus Christi 1975, writ ref'd n.r.e.); *County of Calhoun v. Wilson*, 425 S.W.2d 846 (Tex.Civ.App.-Corpus Christi 1968, writ ref'd n.r.e.)].

E. Expiration

If an easement is designed by its terms to last for a specified period, then it will terminate upon the happening of a designated event [Powell on Real Property, Section 422].

An easement created for a particular purpose will terminate as soon as the purpose ceases to exist, when it is fulfilled, or rendered impossible to accomplish [*Shaw v. Williams*, 332 S.W.2d 797 (Tex.Civ.App. -Eastland 1960, writ ref'd n.r.e.)].

F. Strips & Gores

The general rule is that as a matter of public policy, one conveying a tract of land adjoined by an easement strip is presumed to have conveyed to the center of the easement in the absence of specific reservation. This is commonly referred to as the doctrine of "strips and gores" [*Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080 (1932); *State v. Fuller*, 407 S.W.2d 215 (Tex. 1966); *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143 S.W.2d 912 (1940)].

An instrument which conveys land and then excepts to a road, railroad right of way, etc., that occupies a mere easement over the land, conveys fee to the entire tract and the exception merely makes the conveyance subject to the easement [*Haines v. McLean*, 154 Tex. 272, 276 S.W.2d 777 (1955)].

The presumption does not apply if the grantor owns land abutting both sides of the strip or if the strip is larger and more valuable than the conveyed tract [*Krenek v. Texstar North America, Inc.*, 787 S.W.2d 566 (Tex.Civ.App.-Corpus Christi 1990, writ denied)].

G. Easement - Abandonment - Title

Where land adjacent to a railroad right-of-way is conveyed, the deed, in the absence of express reservation, conveys the fee burdened by the easement to the adjacent one-half of the railroad. Upon abandonment of the right-of-way, full fee title to such adjacent strip is then vested in such adjacent owner [*State v. Fuller*, 407 S.W.2d 215 (Tex. 1966)].

H. Roads & Streets - State Highway Abandonment

The title to an abandoned State Highway may be divested out of the State upon the concurrence of four conditions, namely:

1. The Texas Transportation Commission must find the property no longer needed for highway purposes;
2. The Commission must so recommend to the Governor advising as to value; and
3. The Governor must execute a deed. Tex. Transp. Code §§ 202.021 & 202.030.

If the State conveys its interest, the conveyance is subject to continued right of any public utility or common carrier [Tex. Transp. Code § 202.029]. The Attorney General must approve the transfer [Tex. Transp. Code § 202.030].

I. Roads & Streets - County Abandonment

The Commissioners Court may reflect abandonment of a right-of-way by a resolution entered in the court minutes declaring the property abandoned and may then appoint a Commissioner to sell the property at public auction (or to an adjoining owner) after proper notice. The sales price for the right-of-way shall not be less than the fair market value as declared by appraisal, and shall be approved by the Commissioners Court [Tex. Local Gov't Code § 263.002; Tex. Atty Gen. No. M-339 (1969)]. Title to the center of an abandoned road vests in each abutting landowner [Tex. Transp. Code § 251.058].

Abandonment of a county road occurs when its use becomes so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for 20 years. A county road abandoned in this fashion may be reestablished as a public road only in the manner provided for establishing a new road [Tex. Transp. Code § 251.057].

J. Vacation of or Closing of Streets - Municipal Authorities

A city may close a street only if closure is in the public interest; the city may not close a street over the objection of an abutting property owner with a coexisting private easement therein [*City of Mission v. Popplewell*, 156 Tex. 269, 294 S.W.2d 712 (1956); *Gambrell v. Chalk Hill Theatre Co.*, 205 S.W.2d 126 (Tex.Civ.App.-Austin 1947, writ ref'd n.r.e.); Tex. Transp. Code Section 311.007-311.008; *Caldwell v. City of Denton*, 556 S.W.2d 107 (Tex.Civ.App.-Ft. Worth 1977, writ ref'd n.r.e.)]. A person must bring on actions within two years after the ordinance closes a street [Tex. Civ. Prac. & Rem Code sec. 16.005].

K. Petition of Abutting Owners

Texas Transportation Code sec. 311.008 provides that general law cities, upon petition of all the owners of property abutting a street or alley may vacate and abandon and close any such street or alley by ordinance. The abutting owner, if it has a private easement by implication upon purchase of the land with reference to a plat showing the street, will retain such private easement after vacation or abandonment of the street by the public authorities [*Hicks v. City of Houston*, 524 S.W.2d 539 (Tex.Civ.App.-Houston [1st Dist.] 1975, writ ref'd n.r.e.)]. Its easement may not survive abandonment if it fronts the street in the same block but does not abut the portion of the street which was closed [*City of San Antonio v. Olivares*, 505 S.W.2d 526 (Tex. 1974)].

L. Parks & Squares

Tex. Local Gov't Code § 253.001 provides that no public square or park shall be sold until the question of such sale or closing has been submitted to a vote of the qualified voters of such city or town and approved by a majority of the votes cast at such election.

M. Replat - Rededication - Effect on Streets

Sections 212.011 and 212.012 Tex. Local Govt. Code provides that approval of a plat does not constitute acceptance of a dedication. Actual appropriation is required. However, disapproval of a plat implies refusal of dedication. Utilities cannot be connected in the absence of approval.

N. Common-Law and Statutory Dedication

Prior to the enactment of Tex. Local Govt. Code Chapter 212 an executory offer could be withdrawn until an offer of dedication was accepted in one of the three recognized methods: (1) By the municipality through proper authorities, (2) By estoppel created by sale of lots to persons relying on such plat dedicating streets, or (3) By actual public user. This was the rule with reference to a common-law offer of dedication and must be distinguished from the rule applicable to

a statutory dedication. Tex. Local Govt. Code Chapter 212 establishes a statutory dedication in Texas and changes the common law rule with reference to withdrawal of the dedication [*Priolo v. City of Dallas*, 257 S.W.2d 947 (Tex.Civ.App.-Dallas 1953, writ ref'd n.r.e.); *McGraw v. City of Dallas*, 420 S.W.2d 793 (Tex.Civ.App.-Dallas 1967, writ ref'd n.r.e.)]. A statutory dedication may now be terminated only in the following manner: (1) prior to acceptance by the city and before any lot is sold, the owner may file a written instrument declaring the dedication to be vacated (approval of the city planning commission must be obtained); (2) after the sale of lots in a platted subdivision, the vacation is accomplished on application of all those to whom lots have been sold, plus approval of the city planning commission; and (3) after the city accepts the dedication, consent of the city through its governing body would seem necessary. Such consent should be evidenced by an ordinance abandoning the dedication.

O. Tax Deeds

An ad valorem tax lien is subordinate to restrictive covenants or easements recorded before January 1 of the year the tax lien arose [Tex. Tax Code § 32.05]. The tax deed shall be subject to those easements and restrictive covenants recorded before January 1 of the year the tax lien arose [Tex. Tax Code § 34.01].

P. Overburdening & Unreasonable Use

Use of an easement to benefit land other than the dominant estate is an improper overburden of the servient estate [*Jordan v. Rush*, 745 S.W.2d 549 (Tex.Civ.App.-Waco 1988, no writ)]. Unless the easement provides otherwise, the easement is apportionable among the owners of a subdivided dominant estate. The modern view of commercial (in gross) easements is that an easement is partially assignable if it does not burden the underlying land beyond the contemplation of the original easement grant [*Orange County v. Citgo Pipeline Co.*, 934 S.W.2d 472 (Tex.Civ.App.-Beaumont 1996, writ denied)].

The ownership of an easement carries the right to use it in a manner which is reasonably necessary for the full enjoyment of the easement [*Knox v. Pioneer Natural Gas Co.*, 321 S.W.2d 596 (Tex.Civ.App.- El Paso 1959, writ ref'd n.r.e.)]. However, the owner of the dominant estate must use the easement so as not to interfere unreasonably with the servient tenement's ability to use the land [*Lamar County Electric Co-op v. Bryant*, 770 S.W.2d 921 (Tex.Civ.App.-Texarkana 1989, no writ) (cutting of trees was unnecessary where trimming would have been sufficient to prevent interference with power lines)].

A grant of an easement gives no exclusive easement over the land unnecessary to the use of the easement [*Stout v. Christian*, 593 S.W.2d 146 (Tex.Civ.App.-Austin 1980, no writ) (court allowed locking of gates)]. Where the grant of the easement is general as to the burden, the exercise and the acquiescence of the parties in a particular manner fixes the rights and limits it to a particular course [*Pioneer Natural Gas Co. v. Russell*, 453 S.W.2d 882 (Tex.Civ.App.-Amarillo 1970, writ ref'd n.r.e.) (court narrowly construed a grant of right to parallel pipelines since there were no parallel lines laid initially and distinguish the Knox case which allowed by express provision the laying of additional lines in the future)]. However, where the grant of the easement does not state the width of the right-of-way, the grantee is entitled to suitable and convenient way sufficient to afford ingress and egress [*Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868 (Tex.Civ.App.-Austin 1988, writ denied)].

The court will not restrict a pipeline right-of-way to a 30 foot width where there is no width specified and there is an express right granted to lay future additional lines [*Lone Star Gas Co. v. Childress*, 187 S.W.2d 936 (Tex.Civ.App.-Waco 1945, no writ)]. The grant of a right-of-way to at any time lay and maintain additional pipelines along the initial line is not a mere optional right to acquire in the future but is an expansible easement which is not affected by the rule against perpetuities [*Strauch v. Coastal States Crude Gathering Co.*, 424 S.W.2d 677 (Tex.Civ.App.-Corpus Christi 1968, writ dismissed)].

Where an easement has been granted without definite location, the right to locate the easement belongs to the servient tenement but must be exercised in a reasonable manner. If there already is a way in existence, it will be held to be the location of the easement [*Cozby v. Armstrong*, 205 S.W.2d 403 (Tex.Civ.App.-Ft. Worth 1947, writ ref'd n.r.e.); *Elliott v. Elliott*, 591 S.W.2d 795 (Tex.Civ.App.-Corpus Christi 1980, no writ) (selection by grantee); *Grobe v. Ottmers*, 224 S.W.2d 487 (Tex.Civ.App.-San Antonio 1949, writ ref'd n.r.e.) (way of necessity could be located by the servient tenement)].

A location of an easement generally cannot be changed without the consent of both parties even if the way becomes detrimental to the servient tenement [*Cozby v. Armstrong*, 205 S.W.2d 403 (Tex.Civ.App.-Ft. Worth 1947 writ ref'd n.r.e.)]. However, it can be changed by mutual consent or by judgment of the court in equity where justice and equity require that the right be changed [*Sisco v. Hereford*, 694 S.W.2d 3 (Tex.Civ.App.-San Antonio 1984, writ ref'd n.r.e.)].

Misuse of an easement will not justify termination of the easement unless the use for which the easement was granted becomes impossible of execution [*Perry v. City of Gainesville*, 267 S.W.2d 270 (Tex.Civ.App.-Ft. Worth 1954, writ ref'd n.r.e.); *Reynolds v. City of Alice*, 150 S.W.2d 455 (Tex.Civ.App.-El Paso 1940, no writ)].

No intent to create an exclusive easement will be imputed in the absence of a clear indication of such intent. The servient tenement may transfer his right to use the land if it will not interfere unreasonably with the easement previously granted; he can thereby grant a second easement subject to the initial grant [*City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 110 P.2d 983 (1941)].

The current owner can use a roadway easement in a manner not inconsistent with the dominant owner's reasonable enjoyment of the easement [*City of Corsicana v. Herod*, 768 S.W.2d 805 (Tex.Civ.App.-Waco 1989, no writ)]. If an exclusive easement is granted, then the grantee is entitled to free and undisturbed use of the land [*MGJ Corp. v. City of Houston*, 544 S.W.2d 171 (Tex.Civ.App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.)]. The holder of an easement appurtenant to a specific tract of land cannot use that way to reach another tract of land owned by the owner of the easement for which the way is not appurtenant [*Jordan v. Rush*, 145 S.W.2d 549 (Tex.Civ.App.-Waco 1988, no writ)].

Q. Mortgages

The foreclosure of a mortgage that was created before the easement will extinguish the subsequent easement [*Cousins v. Sperry*, 139 S.W.2d 665 (Tex.Civ.App.-Beaumont 1940, no writ)].

R. Municipal Vacation

A city may close or vacate a street in connection with urban renewal [Tex. Local Gov't Code § 374.015].

A home rule municipality may abandon or close a street or alley [Tex. Transp. Code § 311.007].

A general law municipality may abandon or close a street or alley if all abutting owners submit a petition [Tex. Transp. Code § 311.008].

A municipality may sell an abandoned street or alley pursuant to an ordinance [Tex. Local Gov't Code § 253.001].

A local government may sell narrow stripes of land, streets, or alleys for the fair market value (determined by appraisal or public bidding of a municipality) [Tex. Local Gov't Code § 272.001].

X. SERVIENT PROPERTY OWNER'S REMEDIES

A. Trespass Without Valid Easement

1. Injunctive Relief and Damages

The right of a landowner to be left in undisturbed possession of the land can be protected by an injunction [*Hale County v. Davis*, 572 S.W.2d 63, 66 (Tex.Civ.App.-Amarillo 1978, writ ref'd n.r.e.) (holding that proof of irreparable harm and inadequate legal remedy are not required in these circumstances); Tex. Civ. Prac. & Rem. Code § 65.011(1)]. Accordingly, if one person uses another person's land under a claim of easement rights, the landowner can take the position that (1) no easement exists, (2) the easement failed or was abandoned, or (3) the easement has been lost by the landowner's adverse possession of the area. With appropriate pleading and proof of any of those contentions, the landowner can enjoin the unauthorized use as a trespass and recover damages for any harm caused by it [*Bobbitt v. Cantu*, 992 S.W.2d 709, 712 (Tex.Civ.App.-Austin 1999, no pet.) (trespass claimed due to failure of easement's purpose); *Holden v. Weidenfeller*, 929 S.W.2d 124 (Tex.Civ.App.-San Antonio 1996, writ denied) (servient tract owner's attempt to enjoin use of property was defeated by dominant tract owner's establishing easement by estoppel); *Robinson Water Co. v. Seay*, 545 S.W.2d 253, 259 (Tex.Civ.App.-Waco 1976, no writ) (adverse possession by landowner)]. A form of petition for injunctive relief and recovery of damages is set out in § 281.110[2], with drafting guides for its preparation in §§ 281.60, 281.61.

2. Statutes of Limitation

In general, a landowner's action to prevent an unauthorized use of the property is not barred by lapse of time except when a long delay could result in a loss of the landowner's rights. One set of circumstances is that the party using the land is and has been doing so under an adverse claim of fee title to the land. The statutes setting time limitations on actions to recover title to real estate—the adverse possession statutes—apply in those circumstances. Unless the user was claiming the land under a title by deed or color of title, the landowner ordinarily would have to sue within at least 10 years after the adverse use commenced [Tex. Civ. Prac. & Rem. Code § 16.026]. However, if the party using the land was merely claiming an easement, the adverse possession statutes do not apply [*Barstow v. State*, 742 S.W.2d 495, 499

(Tex.Civ.App.-Austin 1987, writ denied)]. But a 10-year delay in suing to stop the use could give the user grounds to establish an easement by prescriptive use [*Barstow v. State*, 742 S.W.2d 495, 499 (Tex.Civ.App.-Austin 1987, writ denied) (easement by prescriptive use for 10 or more years)].

A landowner's action for recovery of damages for trespass is a different matter. A delay in litigating the unauthorized use can result in limiting the landowner's recovery to damages that accrued during the two-year period before the suit was filed. This is so because an action for trespass or injury to property is subject to a two-year statute of limitations [Tex. Civ. Prac. & Rem. Code § 16.003(a); *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 623 (Tex. 2011) (per curiam) (claim that easement for "electric transmission or distribution" did not permit placement of cable television and internet lines was trespass claim that was barred by Tex. Civ. Prac. & Rem. Code § 16.003(a) when plaintiff did not bring suit until more than two years after learning of placement of equipment not permitted by easement); *Hudson v. Arkansas Louisiana Gas Co.*, 626 S.W.2d 561, 563 (Tex.Civ.App.-Texarkana 1981, writ ref'd n.r.e.); *W.W. Laubach Trust v. Georgetown Corp.*, 80 S.W.3d 149, 159-160 (Tex.Civ.App.-Austin 2002, pet. denied) (though trespass claim usually subject to two-year limitations period, placement of billboards on property could be considered continuing tort rather than permanent injury to property, so defendant had not established limitations defense as matter of law)].

3. Recovery of Attorney Fees

An action to enjoin a trespass to real property and to recover damages is not the type of judicial declaration of the parties' rights contemplated by the Declaratory Judgments Act [Tex. Civ. Prac. & Rem. Code § 37.001 et seq.]. When the alleged trespasser claims an easement, however, one or both parties usually ask the court to determine the existence and validity of the easement and the resulting rights, status, and legal relationships of the parties. Such a request does appear to bring the action within the scope of the DJA [Tex. Civ. Prac. & Rem. Code § 37.002(b)], setting the stage for the court's discretionary award of attorney fees [Tex. Civ. Prac. & Rem. Code § 37.009] to either party, assuming proper pleadings and proof [*Shelton v. Kalbow*, 489 S.W.3d 32, 55-57 (Tex.Civ.App.-Houston [14th Dist.] 2016, pet. denied) (whether deed was sufficient to dedicate road to county was properly addressed by declaratory judgment and accompanying award of attorney fees because dispute was confined to nonpossessory interest and did not affect title to property, so trespass to try title was not exclusive remedy); *Roberson v. City of Austin*, 157 S.W.3d 130, 135-137 (Tex.Civ.App.-Austin 2005, pet. denied) (because easement dispute does not raise any issue of propriety of possession or deprive record owner of title, declaratory judgment is proper vehicle for determining validity of easement, so trial court erred in determination that it had no power to award attorney's fees to landowner); *Spiller v. Spiller*, 901 S.W.2d 553, 560 (Tex.Civ.App.-San Antonio 1995, writ denied)].

B. Easement Abuse by Unauthorized Conduct

1. Injunction and Damages

If the activities of a party using land pursuant to an easement exceed what is authorized by the express or implied terms of the easement, the owner of the property on which the easement is located may seek an injunction to stop the unauthorized use [*Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871-873 (Tex.Civ.App.-Austin 1988, writ denied) (no authority to operate commercial boat dock on easement)]. Moreover, the property owner is entitled to damages for any harm naturally and directly resulting from the unauthorized use [*Murphy v. Fannin County Elec. Coop.*, 957 S.W.2d 900, 903, 907 (Tex.Civ.App.-Texarkana 1997, no pet.) (poisoning trees was not authorized by express easement and cutting other trees down was beyond authority reasonably necessary to keep easement free of obstructions); *Lamar County Elec. Coop. Assn. v. Bryant*, 770 S.W.2d 921, 923 (Tex.Civ.App.-Texarkana 1989, no writ) (unauthorized cutting down of trees)].

Although the usual case of an unauthorized act involves the easement holder's affirmative use of the servient estate, an actionable unauthorized act was found to have occurred when an easement holder abandoned the easement. In *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985), the easement holder lawfully built a bridge on a right-of-way easement in the servient tract. Later, the easement holder abandoned the easement and removed the bridge, rendering the right-of-way unusable. The property owner was allowed to recover damages for the resulting harm to the property because the bridge was so permanently installed that it became a fixture and part of the realty [*Logan v. Mullis*, 686 S.W.2d 605, 607-608 (Tex. 1985)].

2. Statute of Limitation

A servient tract owner's lawsuit for easement abuse is essentially an action for breach of the easement contract; it is a contention that the easement holder's activity is not within the scope of conduct authorized by the express or implied terms of the easement. Accordingly, the four-year statute of limitation provides the time frame within which the action must be brought [Tex. Civ. Prac. & Rem. Code § 16.004(a)]. The Texas Supreme Court recognized this type of suit as in contract rather than tort and reiterated its earlier holding that when a defendant's conduct is actionable only because it breaches an agreement with the plaintiff, the plaintiff's claim is a contract claim and not a tort claim, in which liability

arises independently from the existence of the parties' contract [*Dewitt County Elec. Coop. v. Parks*, 1 S.W.3d 96, 103-105 (Tex. 1999) (servient property owner's suit claiming unauthorized tree cutting); *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)].

3. Attorney Fees

By characterizing the servient property owner's lawsuit for easement abuse as an action to enforce an oral or written easement agreement or to declare the parties' rights embodied within the easement agreement, the property owner should be entitled to recover attorney's fees for the prosecution of the action on proper pleading and proof, subject to the trial court's discretion. Attorney fees are recoverable in an action on an oral or written contract, if certain prerequisites are met [Tex. Civ. Prac. & Rem. Code § 38.001 et seq.]. A court rendering a declaratory judgment settling the rights, status, or other legal relationships of the litigants may award reasonable attorney's fees to either party [Tex. Civ. Prac. & Rem. Code § 37.009].

C. **Easement Abuse by Negligent Exercise of Right to Use**

When the servient estate is harmed by the conduct of the easement holder while engaging in an authorized use of the easement, the owner of the servient property may recover damages for that harm by filing a tort action. The property owner must plead and prove that the easement holder failed to exercise ordinary care in using the easement [*Watson v. Brazos Elec. Power Coop.*, 918 S.W.2d 639 (Tex.Civ.App.-Waco 1996, writ denied) (when power line started fire damaging owner's property, owner charged easement holder with negligent failure to inspect and maintain poles carrying lines across easement)—easement holder's duty of care in exercise of rights and duties under easement; *Phillips Pipe Line Co. v. Razo*, 420 S.W.2d 691, 693 (Tex. 1967)].

The damages recoverable in an action for negligence are to compensate the plaintiff for the harm proximately caused by the defendant's negligent conduct. Absent a dispute over the terms of the easement (the typical situation when an easement holder is charged with the negligent exercise of a permitted right), the action is a tort action in which there is no basis for the recovery of attorney fees. As in most tort actions, the property owner's suit must be brought within two years after the cause of action accrued [Tex. Civ. Prac. & Rem. Code § 16.003].

XI. SPECIAL LAWS RELATING TO EASEMENTS

A. **Pipeline Easements**

Unless expressly provided otherwise, pipeline easements created by grant or power of eminent domain for the benefit of a single common carrier pipeline for which the power of eminent domain is available are presumed to create an easement in favor of the common carrier pipeline that extends a width of fifty feet as to each pipeline laid under the easement before January 1, 1994. Tex. Nat. Res. Code § 111.0194. The presumption is rebuttable. Persons who acquire pipeline easements and rights-of way for others must be registered, licensed, or exempt from licensing by the Real Estate License Act. A notice promulgated by the Texas Real Estate Commission must be delivered to the grantor of the easement before the easement is granted. Tex. Occ. Code § 1101.653.

Section 5.013, Property Code, relates to disclosure of subsurface pipelines. The seller of unimproved land (including a developer who sells to others for resale) to be used for residential purposes must provide a written notice disclosing the location of transportation pipelines; including natural gas, natural gas liquids, synthetic gas, liquefied petroleum gas, petroleum or petroleum products, or hazardous substances. The notice must state the information to the best of the seller's belief and knowledge at the date the notice is completed and signed; if the seller does not know the information, the seller must indicate that fact in the notice. The notice must be delivered on or before the effective date of the contract. If the seller does not provide the notice when the contract is entered, the buyer may terminate the contract for any reason no later than seven days after the effective date of the contract. The seller is not required to provide the notice if the seller is obligated under an earnest money contract to furnish a title insurance commitment to the buyer before closing and the buyer may terminate the contract if the buyer's objections to title as allowed in the contract are not cured by the seller before the closing.

Notice of Construction Over Pipeline Easement: Tex. Health & Safety Code, Sec. 756.103 prohibits a person from building, repairing, replacing, or maintaining a construction on, across, over, or under the easement or right-of-way for a pipeline facility unless notice of the construction is given the operator of the pipeline facility and other circumstances apply.

B. Access Easement on Partition

Partition of real property is permitted under Tex. Prop. Code ch. 23 and Tex. R. Civ. P. 756–771. Unless waived by the parties, a nonexclusive access easement shall be granted on partition of property under chapter 23. Tex. Prop. Code § 23.006.

C. Groundwater

Groundwater districts and water rights are subject to the Texas Water Code. As a condition of service, a water district may require a service applicant or developer to grant permanent recorded easements for the construction and maintenance of the facilities necessary for service. Tex. Water Code § 49.218.

XII. SPECIAL ADVISORIES**A. Title Insurance - Easements as Exceptions or as Part of Insured Estate**

All easement exceptions should be listed specifically and carefully reviewed to determine if and how they affect the buyer's intended use of the property.

Where an easement is shown on a recorded plat of a subdivision, it must be specifically excepted to in the title policy in order not to be insured against. A reference to the recorded plat. in the description of the property is not sufficient [*San Jacinto Title Guaranty Co. v. Lemmon*, 417 S.W.2d429 (Tex.Civ.App.-Eastland 1967, writ ref'd n.r.e.)].

When an appurtenant easement in another persons land benefits the owner's fee title land, the owner should, as a general rule, obtain title insurance on both the fee simple estate of his fee title land as "Tract I" of the insured estate, AND obtain title insurance on the easement estate as "Tract II" of the insured estate, by adding the easement estate to Schedule A.2. ("The estate or interest in the Land that is insured by this policy is:") of the title insurance policy.

The introduction to Schedule B of the Owner Policy of Title Insurance (Form T-1) and the Loan Policy of Title Insurance (Form T-2) states as follows: "EXCEPTIONS FROM COVERAGE" - "This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of the terms and conditions of the leases and easements, if any, shown in Schedule A, and the following matters:" (underlining added for emphasis). Therefore, generally, the easement which is being insured as part of the insured estate, should not be listed in Schedule B of the title insurance policy, because Schedule B is for those matters which are not insured (called "EXCEPTIONS FROM COVERAGE").

Furthermore, when a title exception upon your property could prevent construction upon the land (for example, a drainage easement, or a pipeline easement), it is recommended to request the title company to delete it. Generally, a title company will not delete an easement when they do not know whether the easement affects your land. In such a case, it is recommended a survey be engaged to determine the location of the easement which constitutes the exception. If it is determined that the easement affects the tract, the owner might need to seek a release or termination of the easement; otherwise, the value of the land is diminished by the risk of building on what could be an easement with enforcement rights to prevent construction on the land.

B. Title Insurance Commitments

All easement exceptions should be listed specifically and carefully reviewed to determine if and how they affect the buyer's intended use of the property.

C. Surveys

When reviewing a survey for the buyer, all easements appearing in the title commitment should be located and noted on the survey with the appropriate recording data. Conversely, the survey should be examined for any easements not appearing in the title commitment.

D. Impact on Property Value

Should a purchase price be adjusted by reason of the existence of an easement. It depends ... does the easement benefit or burden the property. If it burdens it, how much is the burden? The seller may want more money for an easement which benefits the property.

E. Easements in Letters of Intent

The buyer's counsel should consider including a provision in a letter of intent that title will be conveyed free and clear of all defects, liens, encumbrances, and easements, except as approved by Buyer during the title review period specified in the contract.

TAR Seller's Disclosure Notice (TAR-1406) 02-01-18

Section 3. Are you (Seller) aware of any of the following conditions?

Write Yes (Y) if you are aware; write No (N) if you are not aware.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

Unplatted Easements* Y/N

Unrecorded Easements** Y/N

*Required by Tex. Prop. Code § 5.008(b)

** Not Required by Tex. Prop. Code § 5.008(b)

Caveat: When representing a seller, counsel should consider using the minimal form at Tex. Prop. Code § 5.008(b) to avoid having the seller make any statements concerning the property condition, other than those which are required by Texas law.

F. Cotenants

As a general rule a cotenant cannot grant an easement over an undivided cotenancy [*Elliott v. Elliott*, 597 S.W.2d 795, 802-803 (Tex.Civ.App.-Corpus Christi 1980, no writ)]. Cotenants ordinarily act for their own interests, not as agents for each other [*Willson v. Superior Oil Company*, 274 S.W.2d 947 (Tex.Civ.App.-Texarkana 1954, writ ref'd n.r.e.)]. However, a cotenant's conveyance of an easement may be effective to burden the entire servient estate if it is proved that the other cotenants consented to or subsequently ratified the transaction. The interest of the other cotenants may become burdened by the easement through the easement claimant's subsequent, adverse use of the servient estate under the terms of the grant [*Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex.Civ.App.-Corpus Christi 1980, no writ)].

G. Subsequent Purchasers

Use of the property by a stranger to the title may provide constructive notice to the purchaser that an easement might be claimed, destroying any "bona fide purchaser" defense to the imposition of the easement [*Lakeside Launches v. Austin Yacht Club*, 750 S.W.2d 868, 873 (Tex.Civ.App.-Austin 1988, writ denied) (no evidence of easement by estoppel); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 212 (Tex. 1962) (easement by implication passes with land and is not cut off by subsequent purchaser)]. Even if a document creating the easement is not recorded, there may be reference to it in the recorded chain of title that will impart constructive notice to subsequent purchasers [*Holden v. Weidenfeller*, 929 S.W.2d 124, 132 (Tex.Civ.App.-San Antonio 1996, writ denied)].

H. Lienholder Consent & Subordination

When an easement is granted over property securing a loan, counsel should consider using the following consent and subordination by the lienholder:

Lienholder(s), as the holders of liens on the Properties, consent to the above grants of Easements, including the terms and conditions of the grants, and Lienholder(s) subordinate their liens to the rights and interests of Holders, so that a foreclosure of the liens will not extinguish the rights and interests of Holders.

DECLARATION OF RECIPROCAL EASEMENTS

[Relating to (SHOPPING CENTER & FUTURE FUEL/CONVENIENCE STORE GROUND TENANT)]

This Declaration of Reciprocal Easements ("**Declaration**") is made effective the date first filed for record in the Real Property Records, _____ County, Texas, by _____ ("**Declarant**").

RECITALS:

WHEREAS, Declarant is the fee simple owner of that certain real property situated in _____ County, Texas, described as follows (the "First Property"):

WHEREAS, Declarant is also the fee simple owner of that certain real property situated in _____ County, Texas, described as follows (the "Second Property") which is adjacent to the First Property:

WHEREAS, in order to facilitate the development of both the Second Property and the First Property, and to provide reciprocal pedestrian and motor vehicle access between the Properties, the Declarant has determined it necessary to dedicate certain perpetual, non-exclusive easements over the Properties, subject to terms hereinafter set forth.

NOW, THEREFORE, for and in consideration of the benefits to each of the Properties, the receipt and sufficiency of which is hereby acknowledged and stipulated, Declarant hereby declares and imposes the easements upon the Properties according to the following terms and conditions:

1. Definitions. Unless otherwise stated herein, capitalized terms used in this Declaration shall have the following meanings:

- (a) "**Owner**" or "**Owners**" shall mean, singularly and collectively, the parties that own fee simple title to each, all or any portion of the Properties and the holders of the easements granted by this Declaration, and their respective successors and assigns.
- (b) "**Permitted Parties**" shall mean the Owners and their respective tenants occupying the Properties, and their respective contractors, employees, agents, customers, licensees and invitees.
- (c) "**Restricted Fuel Truck Access Areas**" shall mean: (1) the two (2) driveway areas of approximately ___' and ___' in width, respectively, situated on the Shopping Center; (2) running along the perimeter of the Fueling Station as shown on the Fueling Station Site Plan; (3) available for general access as part of the Access Areas; and (4) to which the Fuel Trucks are restricted when traveling on the Shopping Center, thus being the only areas within the Shopping Center on which the Fuel Trucks may travel.
- (d) "**Fueling Station Site Plan**" shall mean the site plan attached hereto as **Exhibit " "**, depicting the planned design for the Fueling Station, the Shared Parking Spaces, and the Restricted Fuel Truck Access Areas situated on the Shopping Center along the common boundary with the Fueling Station.
- (e) "**Property**" or "**Properties**" shall mean, singularly and collectively, the First Property and the Second Property, as the context may require.
- (f) "**Site Plan**" shall mean, the site plan attached hereto as **Exhibit " "**, depicting the configuration of the improvements, parking, driveways, curb cuts, entrances and exits now located on the First Property and the Second Property at the time this Declaration is being executed.

2. Access Easements.

- (a) Access Easement. Declarant hereby grants and dedicates, for the benefit of the Properties a nonexclusive, private and perpetual access easement (the "**Access Easement**") over the paved driveways, curb cuts, entrances and exits now or hereafter located on the Properties (the "**Access Areas**") to provide for

and furnish ingress and egress between and among the Properties along the Access Areas. The Access Easements granted hereunder may be used and enjoyed by the Owners and their Permitted Parties in accordance with the terms and conditions of this Declaration.

(b) Limitations on Use of Access Easement. Use of the Access Easements shall be without payment of any fee or other charge. Except to the extent expressly provided in this subsection, no barriers, fences or other obstructions shall be erected so as to impede or interfere in any way with the free flow of vehicular and pedestrian traffic over the Access Easements, except that access may be temporarily restricted as reasonably required for the purpose of performing construction, maintenance or repairs on a Property; provided, that: (i) such closure does not materially adversely affect or interfere with business operations on a Property, including without limitation, the ability of fuel trucks to access the fuel storage tanks, other delivery trucks to access their normal delivery routes within the Properties; and (ii) all work is performed as expeditiously as reasonably possible to minimize disruptions in traffic flow across the Properties. All fuel trucks accessing the Fueling Station shall be prohibited from traveling across the Shopping Center except through the Restricted Fuel Truck Access Areas. Any party proposing to close any portion of the Access Areas shall give the Owners and the tenant of the Second Property not less than seven (7) days' prior written notice of the proposed closure; provided, however, that any proposed closure of the Restricted Fuel Truck Access Areas shall require not less than thirty (30) days' prior written notice. In the event of an emergency, only notice that is reasonable under the circumstances shall be required. Notwithstanding any provision of this Declaration to the contrary, during the initial reasonable development of the Second Property (in any event not to exceed 180 days from the date construction is commenced, subject to a day-for-day extension caused by force majeure delays), the Access Easements within the Second Property and surrounding the perimeter of the Second Property may be closed by construction fencing within the limits of the construction fence shown on the Second Property Site Plan, except that ingress and egress between the First Property and the exits and entrances to the public streets will not be impaired.

3. Access Area Modifications. Subject to the special terms applicable to the Restricted Fuel Truck Access Areas, each Owner may modify or relocate the Access Easement located on its Property from time to time without the consent of the other Owners, so long as such modification or relocation provides substantially similar access to the other Owner and its Permitted Parties and otherwise does not materially adversely affect or interfere with business operations on the other Property. The Restricted Fuel Truck Areas shall not be closed, modified or relocated without the prior written consent of all Owners and the tenant of the Fueling Station, which consent may not be unreasonably withheld, conditioned or delayed.

4. Access Area Maintenance. Each Owner shall be responsible, at such Owner's sole cost and expense, for performing all work necessary to maintain the Access Areas located on its Property in good condition and repair, ordinary wear and tear excepted. An Owner may delegate its maintenance obligations to a tenant of the Property pursuant to a lease or other separate agreement.

5. Parking. Declarant hereby grants and dedicates, for the benefit of the First Property, a nonexclusive, private and perpetual parking easement (the "Parking Easement"), for use by the Permitted Parties of the First Property and the Second Property, to park passenger vehicles within the _____ (___) parking spaces identified as the "Shared Parking Spaces" on the Fueling Station Site Plan. The foregoing easement shall become effective upon the completion of initial development on the Second Property. Except for the Shared Parking Spaces, no other cross-parking is permitted between the Properties. The Owner of the Fueling Station shall be responsible for the construction of the Shared Parking Spaces at its sole cost and expense. Once constructed, the Owner of the Fueling Station shall, at its own expense, perform all work necessary to maintain the Shared Parking Spaces in good condition and repair, ordinary wear and tear excepted, including striping and marking.

6. Maintenance and Construction Easements. Declarant hereby grants and dedicates, for the benefit of the Properties, a nonexclusive, private and perpetual maintenance easement together with rights of vehicular and pedestrian access, over the Properties, for the Owners and their respective Permitted Parties to perform (or causing to be performed) the maintenance work required under Sections 4 and 5 above. Declarant hereby further grants and dedicates, for the benefit of the Fueling Station, a nonexclusive, private and temporary construction easement (the "TCE") together with rights of vehicular and pedestrian access, over the First Property within the limits of the construction fence depicted on the Fueling Station Site Plan, for the Owner of the Fueling Station and its Permitted

Parties to perform (or causing to be performed) the construction and development work necessary to develop the Fueling Station in substantial accordance with the Fueling Station Site Plan. The actual location of the TCE shall be substantially in the locations depicted on the Fueling Station Site Plan, but may be adjusted from time to time as conditions in the field dictate; provided, however, that any such adjustments shall not materially adversely affect or interfere with business operations on the First Property, or access thereto. The TCE shall expire upon completion of the initial development of the Fueling Station.

7. No Public Dedication. The easements granted in this Declaration are not intended and will not be construed as a dedication of the Properties, or portions thereof, for public use, and the Owners, as the owners of the Properties, will not take any action which would cause such a dedication and shall take whatever steps may be necessary to avoid any such dedication, except as may be agreed upon in writing by the Owners.

8. Insurance. Each Owner shall procure and maintain in full force and effect throughout the term of this Declaration, with respect to such Owner's Property, commercial general liability insurance and property damage insurance against claims for personal or bodily injury, death or property damage. Such insurance shall afford protection to the limit of not less than \$1,000,000.00 for injury or death of a single person, and to the limit of not less than \$2,000,000.00 for any one occurrence, and to the limit of not less than \$2,000,000.00 for property damage. The Owner of each Property shall provide the other Owner(s) with certificates of such insurance and policies from time to time upon written request to evidence that such insurance is in force. Such insurance may be written by additional premises endorsement on any master policy of insurance carried by the Owner, which may cover the other Property in addition to the Property covered by this Declaration. Such insurance shall provide that the insurer will endeavor to give notice of cancellation to the other Owner 30 days prior to such cancellation. The policies of insurance maintained hereunder shall name the other Owner as an additional insured.

9. Indemnification. Each Owner hereby indemnifies and saves the other Owner and its Permitted Parties harmless from any and all liability, damages, expenses, liens, causes of action, suits, claims or judgments (including reasonable attorney fees) arising from personal or bodily injury, death, or property damage (i) occurring on or from its own Property, except if such occurrence is a result of the other Owner's, or the other Owner's Permitted Parties', use of an easement granted herein; or (ii) arising from the indemnifying Owner's, or indemnifying Owner's Permitted Parties', use of the easements granted herein on the other Owner's Property. Notwithstanding anything to the contrary contained in this Section, no Owner or its Permitted Parties shall be indemnified for its own intentional act or negligence or the intentional act or negligence of its Permitted Parties.

10. Release from Liability. Any person acquiring fee or leasehold title to any Property shall be bound by this Declaration only during the period such person is the fee or leasehold owner of such Property (or portion thereof), except as to obligations, liabilities or responsibilities that accrue during said period. Although persons may be released under this section, the easements in this Declaration shall continue to run with the land.

11. Rights of Successors. The easements, herein are intended to be, and shall be construed as, appurtenant to and running with the land, and the burdens and benefits shall run with the title to the Properties, and shall bind and inure to the benefit of the Declarant and its successors and assigns. In the event of any subdivision of a Property, the resulting lots shall each become a separate Property and shall be subject to those provisions contained herein applicable to the parent Property.

12. Miscellaneous. This Declaration shall be construed in accordance with the laws of the State of Texas. This Declaration constitutes the entire agreement with respect to the subject matter of this Declaration and the same may not be amended or modified orally. Any amendment or modification of this Declaration shall be in writing and shall be duly executed by all record Owners of the Properties, and shall require the consent of the tenant of the Fueling Station for any amendment or modification affecting the Fueling Station or Restricted Fuel Truck Access Areas, which consent shall not be unreasonably withheld, conditioned or delayed. All pronouns and any variation thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of a party or its successors and assigns may require. The headings herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this document nor in any way affect the terms and provisions hereof. Each Owner agrees to give further assurances to each other Owner, by way of executing such other and further instruments and documents as may be reasonably necessary to effectuate and carry out the intents and purposes of this Declaration and the agreements contained herein. If any provision of this

Declaration, or the application thereof to any person or circumstances, shall for any reason and to any extent be invalid or unenforceable, the remainder of this Declaration and the application of such provision to other persons or circumstances shall not be affected thereby but rather shall be enforced to the greatest extent permitted by law.

13. Fueling Station. The notice, approval and consent rights granted herein to the tenant of the Fueling Station shall cease, and no further approval or consent from such tenant shall be required hereunder, upon the expiration or earlier termination of that certain Ground Lease between Declarant and _____ ("Tenant") dated _____ for the Fueling Station. For so long as Tenant is a tenant on the Fueling Station and not in default under said Ground Lease beyond all applicable notice and cure periods, any consent by the Owner of the Fueling Station in connection with this Declaration, to be effective, shall also require the consent of Tenant, such consent of Tenant not to be unreasonably withheld, conditioned or delayed.

IN WITNESS WHEREOF, Declarant has executed this Declaration as of the day and year first above written.

DECLARANT:

Printed Name:

[ACKNOWLEDGMENT]

Consent and Subordination by Lienholder (IF APPLICABLE)

Lienholder, as the holder of liens on the Properties, consents to the above grants of Easements, including the terms and conditions of the grants, and Lienholder subordinates its liens to the rights and interests of the holders of such rights and interests, so that a foreclosure of the liens will not extinguish the rights and interests of such holders.

LIENHOLDER:

Printed Name:

[ACKNOWLEDGMENT]

NOTICE OF CONFIDENTIALITY RIGHTS: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number. [Note: Must be 12-point boldfaced type or 12-point uppercase letters SEE Prop Code § 11.008(c)]

WARRANTY DEED

[Including Grant of Access Easement to Grantee]

DATE: _____, 20_____

GRANTOR (including address): _____

GRANTEE (including address): _____

CONSIDERATION: Cash and other valuable consideration.

PROPERTY (including any improvements):

DESCRIBE PROPERTY BEING CONVEYED TO GRANTEE

EASEMENT PROPERTY: [Describe by metes and bounds the property serving as the easement, and include a drawing as an exhibit, if available]

EASEMENT PURPOSE: For providing free and uninterrupted pedestrian and vehicular ingress and egress to and from the Property, and portions thereof, to and from [describe public thoroughfare].

RESERVATIONS FROM CONVEYANCE:

[state NONE, or include appropriate clauses here to create reservations of title]

EXCEPTIONS TO CONVEYANCE AND WARRANTY:

All easements, rights-of-way and prescriptive rights whether of record or not, pertaining to any portion(s) of the property; all presently recorded and valid oil, gas and/or other mineral exceptions, rights of development or leases, royalty reservations and/or other instruments constituting oil, gas or other mineral interest severances of any kind; all presently recorded restrictive covenants, terms, conditions, contracts, provisions, zoning ordinances and other items, but only to the extent that same are still in effect; all presently recorded instruments (other than encumbrances and conveyances by, through or under Grantor) that affect the property; standby fees and taxes for the current year and subsequent years, the payment of which Grantee assumes; and subsequent assessments for this and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes; and any conditions that would be revealed by a physical inspection and survey of the property.

GRANT OF PROPERTY:

Grantor, for the Consideration and subject to the Reservations From Conveyance and the Exceptions to Conveyance and Warranty, GRANTS, SELLS AND CONVEYS to Grantee the Property, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's successors and assigns forever. Grantor binds Grantor and Grantor's successors to warrant and forever defend all and singular the Property to Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof, except as to the Reservations From Conveyance and the Exceptions to Conveyance and Warranty.

GRANT OF EASEMENT:

Grantor, for the Consideration and subject to the Reservations From Conveyance and the Exceptions to Conveyance and Warranty, GRANTS, SELLS AND CONVEYS to Grantee an easement over, upon and across the Easement Property for the Easement Purpose and for the benefit of the Property, and portions thereof, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's successors and assigns forever. Grantor binds Grantor and Grantor's successors to warrant and forever defend all and singular the easement to Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof, except as to the Reservations From Conveyance and the Exceptions to Conveyance and Warranty.

The following terms and conditions apply to the easement:

1. Character of Easement. The easement granted is appurtenant to, and will run with, the Property, and all portions thereof, whether or not such easement is referenced in any conveyance of the Property or any portion thereof. The easement binds and inures to the benefit of Grantor and Grantee and their respective heirs, successors and assigns.

2. Duration of Easement. The easement is [perpetual or describe limited duration].

3. Exclusiveness of Easement. The easement is nonexclusive, so long as the land benefitting from access rights over the Easement Property is limited to the land currently shown by the Plat of the Property.

4. Construction & Maintenance.

A. Shared Expenses. Construction, repair, and maintenance of the Easement Property will be at the shared expense of the landowners with the right to use the Easement Property for access to the public thoroughfare (collectively called the "Benefitting Owners"), in proportion to the number of separately owned tracts with such access rights.

B. Right to Construct Improvements. The Benefitting Owners have the right to construct a road together with any and all culverts, bridges, drainage ditches, sewer facilities and other similar utilities and facilities relating thereto over or under all or any portion of the Easement Property, all matters concerning or relating to said road and related facilities, their configuration and the construction thereof to be at the sole discretion of the Benefitting Owners. In connection with any such road and related facilities and the construction thereof, upon the written request by any of the Benefitting Owners, the owner(s) of the fee of the Easement Property will execute or join in the execution of, easements for sewer, drainage and other utility facilities over or under the Easement Property.

C. Expense Reimbursement.

(1) Payment & Reimbursement. To obtain reimbursement for the cost of road construction, repair, or maintenance, the working Party ("Working Party") must give written notice ("Notice of Proposed Work") to the other Benefitting Parties ("Other Parties") from whom reimbursement will be requested, including a specific description of the work performed and the costs itemized, thirty (30) days prior to commencement of the work. Unless written objection is made by the Other Parties within twenty-one (21) days from such Notice of Proposed Work, the Other Parties must fully reimburse the Working Party the amount of such party's allocated portion of the cost for the Work within thirty (30) days of a notice of completion of work and payment made. Unless so paid, the reimbursement is delinquent and the Paying Party may declare the Other Party in default under this Agreement.

(2) Appeal of Other Parties. One or more of the Other Parties may appeal the Notice of Proposed Work by obtaining two (2) estimates from persons experienced in road construction and maintenance. If the average ("Average Cost") of the two (2) estimates is not less than the cost proposed by the Working Party by more than ten percent (10%) of the proposed cost of the work, then the Other Parties must reimburse the Working Party the full amount of the cost of the work for which the notice was given. However, if the Average Cost of the two (2) estimates is less than the proposed cost of work by more than ten percent (10%), then the Other Parties must reimburse the Working Party only the Average Cost, which is deemed full reimbursement. In the event of an appeal, notice of the Average Cost and the reimbursement must be made to the Working Party within sixty (60) days of the notice requesting reimbursement.

5. Notices. Any notice required or permitted hereunder will be deemed to be delivered, whether actually received or not, when deposited in the United States mail, postage fully prepaid, registered or certified mail (or a generally recognized alternative which requests receipt and provides evidence thereof), and addressed to the intended recipient at the address shown herein, and if not so shown, then at the last known address according to the records of the party delivering the notice. Notice given in any other manner will be effective only if and when received by the addressee. Any address for notice may be changed by written notice delivered as provided herein.

6. Remedies & Indemnity.

A. Indemnity. Any Benefitting Owner who causes liability or loss to others will indemnify, defend, and hold harmless the other Benefitting Owners, and their heirs, successors and assigns and any lender which holds a lien covering any property benefitting from the access rights, from and against all liability, damages, suits, actions, costs and expenses of whatsoever nature (including reasonable attorney fees) to persons or property caused by or arising out of any operation, construction, maintenance and alteration of the Easement Property, or the failure of such person to comply at all times with all applicable laws, rules, regulations and safety standards in connection with the operation, construction, maintenance and alteration of the Easement Property.

B. Equitable Rights of Enforcement. In the event of any interference or threatened interference with the easement, such easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting such interference and commanding compliance hereof, which restraining orders and injunctions will be obtainable upon proof of the existence of such interference or threatened interference, and without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the Benefitting Owners; provided, however, nothing herein will be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

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

GRANTOR:

[Printed Name]

[ACKNOWLEDGMENT]

ACCEPTED BY GRANTEE:

[Printed Name]

[ACKNOWLEDGMENT]

[ADD CONSENT AND SUBORDINATION BY LIENHOLDER, WITH ACKNOWLEDGMENT, IF APPLICABLE]

NOTICE OF CONFIDENTIALITY RIGHTS: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number. [Note: Must be 12-point boldfaced type or 12-point uppercase letters SEE Prop Code § 11.008(c)]

WARRANTY DEED

[Including Reservation of Access Easement through the Conveyed Property for the benefit of the Dominant Estate Property owned by Grantor]

DATE: _____, 20_____

GRANTOR (including address): _____

GRANTEE (including address): _____

CONSIDERATION: Cash and other valuable consideration.

PROPERTY (including any improvements):

DESCRIBE PROPERTY BEING CONVEYED TO GRANTEE

DOMINANT ESTATE PROPERTY (including any improvements):

DESCRIBE PROPERTY BEING RETAINED BY GRANTOR AND WHICH WILL BENEFIT FROM THE EASEMENT

EASEMENT PROPERTY: [Describe by metes and bounds the property serving as the easement, and include a drawing as an exhibit, if available]

EASEMENT PURPOSE: For providing free and uninterrupted pedestrian and vehicular ingress and egress to and from the Dominant Estate Property, and portions thereof, to and from **[describe public thoroughfare]**.

RESERVATIONS FROM CONVEYANCE:

For Grantor and Grantor's heirs, successors and assigns, in common with Grantee and Grantee's heirs, successors and assigns, a reservation of an easement over, upon and across the Easement Property for the Easement Purpose, and for the benefit of the Dominant Estate Property, and portions thereof, together with all and singular the rights and appurtenances thereto, in accordance with the terms and conditions set forth below.

EXCEPTIONS TO CONVEYANCE AND WARRANTY:

All easements, rights-of-way and prescriptive rights whether of record or not, pertaining to any portion(s) of the property; all presently recorded and valid oil, gas and/or other mineral exceptions, rights of development or leases, royalty reservations and/or other instruments constituting oil, gas or other mineral interest severances of any kind; all presently recorded restrictive covenants, terms, conditions, contracts, provisions, zoning ordinances and other items, but only to the extent that same are still in effect; all presently recorded instruments (other than encumbrances and conveyances by, through or under Grantor) that affect the property; standby fees and taxes for the current year and subsequent years, the payment of which Grantee assumes; and subsequent assessments for this and prior years due to change(s) in land usage, ownership, or both, the payment of which Grantee assumes; and any conditions that would be revealed by a physical inspection and survey of the property.

GRANT OF PROPERTY:

Grantor for the Consideration and subject to the Reservations From Conveyance and the Exceptions to Conveyance and Warranty, GRANTS, SELLS AND CONVEYS to Grantee the Property, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's successors and assigns forever. Grantor binds Grantor and Grantor's successors to warrant and forever defend all and singular the Property to Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof, except as to the Reservations From Conveyance and the Exceptions to Conveyance and Warranty.

The following terms and conditions apply to the easement:

- 1. Character of Easement. The easement granted is appurtenant to, and will run with, the Dominant Estate Property, and all portions thereof, whether or not such easement is referenced in any conveyance of the Dominant Estate Property or any portion thereof. The easement binds and inures to the benefit of Grantor and Grantee and their respective heirs, successors and assigns.
- 2. Duration of Easement. The easement is [perpetual or state limited duration of easement].
- 3. Exclusiveness of Easement. The easement is nonexclusive, and Grantor reserves for Grantor and Grantor's heirs, successors and assigns the right to convey the easement or other rights or easements to others.
- 4. Secondary Easement. In addition, the holder of the easement has the right to use as much of the surface of the property adjacent to the Easement Property as may be reasonably necessary to construct and maintain a road reasonably suited for the Easement Purpose. However, the holder must promptly restore any adjacent property to its previous physical condition if changed by the use of the rights granted by this secondary easement.
- 5. Maintenance. Improvement and maintenance of the Easement Property will be at the sole expense of the holder of the easement. The holder has the right to eliminate any encroachments into the Easement Property. The holder of the easement will maintain the Easement Property in a neat and clean condition.
- 6. Grantee's Rights. Grantee and Grantee's heirs, successors and assigns, have the right to use and enjoy the surface of the Easement Property for all purposes that do not unreasonably interfere with or interrupt the use or enjoyment of the easement.
- 7. Indemnity by Easement Holder. The holder of the easement agrees to indemnify, defend and hold Grantee and Grantee's successors in interest harmless from any and loss, attorney fees, court and other costs, expenses, or claims attributable to breach or default of any provision of this easement by the holder.

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

GRANTOR:

[Printed Name]

[ACKNOWLEDGMENT]

ACCEPTED BY GRANTEE:

[Printed Name]

[ACKNOWLEDGMENT]

NOTICE OF CONFIDENTIALITY RIGHTS: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number. [Note: Must be 12-point boldfaced type or 12-point uppercase letters SEE Prop Code § 11.008(c)]

EASEMENT AGREEMENT FOR ACCESS

DATE: _____, 20_____

GRANTOR (including address): _____

GRANTEE (including address): _____

[GRANTOR'S LIENHOLDER (including address)]: _____

DOMINANT ESTATE PROPERTY: [describe by metes and bounds or plat reference the real property benefitted by the easement], and portions thereof.

EASEMENT PROPERTY: [describe by metes and bounds the location of the easement and include a drawing as an exhibit, if available]

EASEMENT PURPOSE: For providing free and uninterrupted pedestrian and vehicular ingress to and egress from the Dominant Estate Property to and from [describe public thoroughfare].

CONSIDERATION: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Grantor.

RESERVATIONS FROM CONVEYANCE: [state: NONE or describe here or in an attached exhibit any reservations from the conveyance in this instrument]

EXCEPTIONS TO WARRANTY: [describe here or in an attached exhibit any exceptions to the warranties in this instrument]

GRANT OF EASEMENT:

Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee's heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and to hold the Easement to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [include if applicable: , to the extent that such claim arises by, through, or under Grantor but not otherwise (special warranty)].

TERMS AND CONDITIONS:

The following terms and conditions apply to the Easement granted by this agreement:

1. Character of Easement. The Easement is appurtenant to and runs with all or any portion of the Dominant Estate Property, whether or not the Easement is referenced or described in any conveyance of all or such portion of the Dominant Estate Property. The Easement is nonexclusive and irrevocable. The Easement is for the benefit of Grantee and Grantee's heirs, successors, and assigns who at any time own the Dominant Estate Property or any interest in the Dominant Estate Property (as applicable, the "Holder").

2. Duration of Easement. The duration of the Easement is [perpetual or state the limited duration]

3. Reservation of Rights. Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to continue to use and enjoy the surface of the Easement Property for all purposes that do not interfere with or interrupt the use or enjoyment of the Easement by Holder for the Easement Purposes. Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to use all or part of the Easement in conjunction with Holder and the right to convey to others the right to use all or part of the Easement in conjunction with Holder, as long as such further conveyance is subject to the terms of this agreement and the other users agree to bear a proportionate part of the costs of improving and maintaining the Easement.

4. Secondary Easement. Holder has the right (the "Secondary Easement") to use as much of the surface of the property that is adjacent to the Easement Property ("Adjacent Property") as may be reasonably necessary to install and maintain a road reasonably suited for the Easement Purpose within the Easement Property. However, Holder must promptly restore the Adjacent Property to its previous physical condition if changed by use of the rights granted by this Secondary Easement.

5. Improvement and Maintenance of Easement Property. Improvement and maintenance of the Easement Property will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove a road with all culverts, bridges, drainage ditches, sewer facilities, and similar or related utilities and facilities under or across any portion of the Easement Property (collectively, the "Road Improvements"). All matters concerning the configuration, construction, installation, maintenance, replacement, and removal of the Road Improvements are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Road Improvements or for the road to continue onto other lands or easements owned by Holder and adjacent to the Easement Property, subject to replacement of the fences to their original condition on the completion of the work. On written request by Holder, the owners of the Easement Property will execute or join in the execution of easements for sewer, drainage, or other utility facilities under or across the Easement Property.

6. Equitable Rights of Enforcement. This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefitted by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

7. Attorney's Fees. If any party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney fees and court and other costs.

8. Binding Effect. This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

9. Choice of Law. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

10. Counterparts. This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

11. Waiver of Default. A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

12. Further Assurances. Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

13. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

14. Survival. The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

15. Entire Agreement. This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not in this agreement and any exhibits.

16. Legal Construction. If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

17. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested (or a generally recognized alternative which requests receipt and provides evidence thereof), and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

GRANTOR:

[Printed Name]

[ACKNOWLEDGMENT]

ACCEPTED BY GRANTEE:

[Printed Name]

[ACKNOWLEDGMENT]

Consent and Subordination by Lienholder (IF APPLICABLE)

Lienholders, as the holders of liens on the Properties, consent to the above grants of Easements, including the terms and conditions of the grants, and Lienholders subordinate their liens to the rights and interests of Holders, so that a foreclosure of the liens will not extinguish the rights and interests of Holders.

LIENHOLDER:

Printed Name:

[ACKNOWLEDGMENT]

NOTICE OF CONFIDENTIALITY RIGHTS: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number. [Note: Must be 12-point boldfaced type or 12-point uppercase letters SEE Prop Code § 11.008(c)]

EASEMENT AGREEMENT FOR RECIPROCAL ACCESS

DATE: _____, 20_____

FIRST PARTY (including address): _____

SECOND PARTY (including address): _____

[FIRST PARTY'S LIENHOLDER (including address)]: _____

[SECOND PARTY'S LIENHOLDER (including address)]: _____

FIRST PARTY'S PROPERTY: [describe by metes and bounds or plat reference the real property benefitted by the easement], and portions thereof.

SECOND PARTY'S PROPERTY: [describe by metes and bounds or plat reference the real property benefitted by the easement], and portions thereof.

EASEMENT PURPOSE: For providing free and uninterrupted pedestrian and vehicular ingress to and egress from the Dominant Estate Property to and from **[describe public thoroughfare]**.

CONSIDERATION: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties.

RESERVATIONS FROM CONVEYANCE OF FIRST PARTY'S PROPERTY: [state: NONE or describe here or in an attached exhibit any reservations from the conveyance of the first party's property in this instrument.]

EXCEPTIONS TO WARRANTY OF FIRST PARTY'S PROPERTY: [describe here or in an attached exhibit any exceptions to the warranties of the first party's property in this instrument.]

RESERVATIONS FROM CONVEYANCE OF SECOND PARTY'S PROPERTY: [**state:** NONE or describe here or in an attached exhibit any reservations from the conveyance of the second party's property in this instrument.]

EXCEPTIONS TO WARRANTY OF SECOND PARTY'S PROPERTY: [describe here or in an attached exhibit any exceptions to the warranties of the second party's property in this instrument.]

GRANTS OF EASEMENT:

First Party, for the Consideration and subject to the Reservations from Conveyance of First Party's Property and Exceptions to Warranty of First Party's Property, grants, sells, and conveys to Second Party and Second Party's heirs, successors, and assigns an easement to, over, and across First Party's Property for the Easement Purpose and for the benefit of all or any portion of Second Party's Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold the easement, rights, and appurtenances to Second Party and Second Party's heirs, successors, and assigns forever. First Party binds First Party and First Party's heirs, successors, and assigns to warrant and forever defend the title to the easement, rights, and appurtenances in Second Party and Second Party's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the easement, rights, or appurtenances, or any part thereof, except as to the Reservations from Conveyance of First Party's Property and Exceptions to Warranty of First Party's Property [include if applicable: , to the extent that such claim arises by, through, or under First Party but not otherwise].

Second Party, for the Consideration and subject to the Reservations from Conveyance of Second Party's Property and Exceptions to Warranty of Second Party's Property, grants, sells, and conveys to First Party and First Party's heirs, successors, and assigns an easement to, over, and across Second Party's Property for the Easement Purpose and for the benefit of all or any portion of First Party's Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold the easement, rights, and appurtenances to First Party and First Party's heirs, successors, and assigns forever. Second Party binds Second Party and Second Party's heirs, successors, and assigns to warrant and forever defend the title to the easement, rights, and appurtenances in First Party and First Party's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the easement, rights, or appurtenances, or any part thereof, except as to the Reservations from Conveyance of Second Party's Property and Exceptions to Warranty of Second Party's Property [include if applicable: , to the extent that such claim arises by, through, or under Second Party but not otherwise].

The easements, rights, and appurtenances hereby granted by and between First Party and Second Party are referred to herein as the "Easements." First Party's Property and Second Party's Property are sometimes referred to herein collectively as the "Properties." First Party and Second Party are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

TERMS AND CONDITIONS:

The following terms and conditions apply to the Easement granted by this agreement:

1. Character of Easement. The Easements are appurtenant to and run with the Properties, and portions thereof, whether or not the Easements are referenced or described in any conveyance of the Properties, or any portion thereof. The Easements are for the benefit of the Parties and the heirs, successors, and assigns of the Parties who at any time own the Properties or any interest therein (as applicable, the "Holders").

2. Duration of Easement. The duration of the Easement is [**perpetual./ for (number) years beginning (date).**]

3. Nonexclusiveness of Easements. The Easements are nonexclusive, and each of the Parties reserves for itself and its heirs, successors, and assigns the right to use all or part of the Easements in conjunction with any other Holder and the right to convey to others the right to use all or part of the Easements in conjunction with the Holders, as long as such further conveyance is subject to the terms of this agreement.

4. Use and Location of Easements. The Parties and other Holders will be entitled to exercise direct access to and between the Properties without interference except as set forth in this agreement and to use all access areas, driveways, and parking lots located on any portion of the Properties in exercising the Easements. A Holder may erect curbs or other barriers to traffic between the Properties owned by that Holder and adjacent portions of the Properties, including but not limited to differences in grade levels, only to the extent that such curbs or other barriers will not unreasonably interfere with or restrict direct access to and between the Properties by the Holders of other portions of the Properties and their employees, customers, and other invitees. A Holder may erect buildings and other improvements on the portion of the Properties owned by that Holder only to the extent that the buildings and other improvements will not unreasonably interfere with the use of and access to the access areas, driveways, and parking lots on such portion of the Properties by

the other Holders and their employees, customers, and other invitees. A Holder's employees, customers, and other invitees will not be entitled to park on the other Holder's Properties but will be permitted to walk or drive across and otherwise traverse the Properties to obtain ingress to or egress from the other Properties.

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

6. Rights Reserved. Each Party reserves for that Party and that Party's heirs, successors, and assigns the right to continue to use and enjoy the surface of the Properties for all purposes that do not unreasonably interfere with or interrupt the use or enjoyment of the Easements.

7. Equitable Rights of Enforcement. These Easements may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the Parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

8. Attorney Fees. If any Party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

9. Binding Effect. This agreement binds, benefits, and may be enforced by the Parties and their respective heirs, successors, and permitted assigns.

10. Choice of Law. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any other jurisdiction. Venue is in the county or counties in which the Properties are located.

11. Counterparts. This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

12. Waiver of Default. A default is not waived if the nondefaulting Party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

13. Further Assurances. Each signatory Party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement

14. Indemnity. Each Party agrees to indemnify, defend, and hold harmless the other Party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying Party. The obligations of the Parties under this provision will survive termination of this agreement.

15. Survival. The obligations of the Parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

16. Entire Agreement. This agreement and any exhibits are the entire agreement of the Parties concerning their respective Properties and the reciprocal Easements granted by the Parties. There are no representations, agreements, warranties, or promises, and neither Party is relying on any statements or representations of the other Party or any agent of the other Party, that are not in this agreement and its exhibits.

17. Legal Construction. If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the Parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the Parties by reason of authorship or origin of language.

18. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested (or a generally recognized alternative which requests receipt and provides evidence thereof), and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

FIRST PARTY:

SECOND PARTY:

Printed Name:

Printed Name:

[ACKNOWLEDGMENTS FOR EACH PARTY]

Consent and Subordination by Lienholder (IF APPLICABLE)

Lienholders, as the holders of liens on the Properties, consent to the above grants of Easements, including the terms and conditions of the grants, and Lienholders subordinate their liens to the rights and interests of Holders, so that a foreclosure of the liens will not extinguish the rights and interests of Holders.

FIRST PARTY LIENHOLDER:

SECOND PARTY LIENHOLDER:

Printed Name:

Printed Name:

[ACKNOWLEDGMENTS FOR EACH LIENHOLDER]

**LICENSE TO [name of pipeline company to use entry], FOR
RIGHT OF ENTRY TO PERFORM SURVEY WORK
DURING PRELIMINARY DISCUSSIONS WITH PIPELINE COMPANY**

EFFECTIVE DATE: The Date Licensor Signed Below

PARTIES:

LICENSOR: [landowner with cell phone number and email]

LICENSEE: [the pipeline company, with person to contact, address, phone, and email]

PROPERTY: [Describe Land generally in area of proposed pipeline
e.g. Northern 1/4 mile of the Licensor's Ranch between the ___ ranch
road on the east end and the ____ ranch road on the west end]

SURVEY ACTIVITIES: Activities relating to the inspection and surveying of the Property for
the purpose of determining the location and land conditions relating
to Licensee's prospect for an underground pipeline for petroleum
products.

OTHER DEFINED TERMS: Reference to a party includes, binds, and benefits that party's
representatives, agents, employees, contractors, and successors in
interest.

COMMENCEMENT DATE: The Effective Date of this License

TERMINATION DATE: [e.g. 90] days after the Commencement Date

RECITALS:

First. Licensee is considering building an underground pipeline for the transmission of petroleum products, and in that connection, wishes to perform certain inspection and survey work on the Property.

Second. No binding agreement currently exists between the Parties except relating to the terms of this license for the survey work preliminary to any easement negotiations; however, Licensee has requested permission to enter the Property to conduct the Survey Activities.

Third. Licensor is willing to allow Licensee to have limited access to the Property according to the terms of this License, but only for the Survey Activities.

NOW, THEREFORE, in consideration of the mutual agreements, the receipt and sufficiency of which is stipulated by the parties, Licensor and Licensee agree to the following:

1. License. The Licensor hereby grants to the Licensee a nonexclusive license ("License") to enter on the Property solely in order to perform the Survey Activities, commencing on the Commencement Date, and ending on the Termination Date or any earlier date if Licensor terminates this License by communication to the Licensee.

2. Advance Notice of Entry. Licensee will provide Licensor with more than 48 hours prior emailed notice of the approximate time and duration entry is expected, with the names of the persons who are expected to enter the Property under this License, and the make/model/license plate of any vehicle(s) entering the Property. On actually entering the Property, Licensee agrees to text Licensor on Licensor's cell phone (_____) with a message providing (1) the name(s) of the person(s) entering the Property; (2) a general description of the make, model, color and license plate information of the vehicle used; (3) the time of entry; and (4) the expected time to be spent on the Property. On exiting the Property, Licensee agrees to text Licensor and leave a message advising Licensor of the time of exiting the Property.

3. Restoration & Damages. On termination of the License, all of the Survey Activities must cease. All equipment and materials placed on the Property by the Licensee and the Contractors must be removed before the Termination Deadline save centerline or boundary stakes. Within seven (7) days after the Termination Deadline, the Licensee must restore the Property substantially to its original condition and in a manner that is satisfactory to the Licensor. Licensee is responsible for paying any damages resulting from the Survey Activities.

4. Disposition of Waste. The Licensee and the Licensee's Contractors are responsible for the legal removal from the Property and legal disposition of any and all wastes, samples, extractions, injections, and byproducts derived from the Survey Activities. The Licensee is responsible for any contamination of the Property.

5. Compliance With Law. Any activities conducted on the Property by the Licensee or the Contractors under this License must be conducted in compliance with the law. The Licensee and the Contractors must keep the Property and contiguous property free and clear of all mechanic's, materialman's, and other liens resulting from any work or activity performed by the Licensee or the Contractors.

6. Restrictions. Any persons entering the Property pursuant to this License are restricted and prohibited from: (a) bringing firearms or any sporting equipment onto the Property; (b) bringing any pets onto the Property; (c) removing anything from the Property; (d) entering without first notifying Licensor's Agent by cell phone texting; (e) exiting without immediately notifying Licensor's Agent by cell phone texting; (f) conducting any activity not related to the Survey Activities; (g) cutting any trees larger than 4" diameter or limbs larger than 3" diameter; (h) placing any lien on the Property resulting from the Survey Activities; (i) entering without providing Licensor with the name of each person entering the Property, and providing the license plate state and number, model, make and color of each vehicle entering the Property; (j) conducting any unlawful activity; (k) placing flags or ribbons of any kind within the Property without Licensor's consent; (l) access, except between 10am and 2pm, during the deer hunting season at the Property; and (m) no one is allowed on the Property before sunrise or after sunset.

7. Indemnification and Defense of the Licensor. **Licensee agrees to indemnify, defend, protect, and hold Licensor harmless from any and all claims, demands, costs (including but not limited to attorney fees), expenses, damages, losses, and causes of action or suits for damages arising out of injury to persons (including death) and injury or damage to or loss of any property or improvements (collectively called "Covered Claims") caused by Licensee, Licensee's agents, employees, servants, contractors, invitees, licensees, or any person acting under Licensee's direction or control on the Property (collectively called "Licensee's Agents"). Insofar as the rights of Licensor are concerned, any independent contractor of Licensee entering upon the Property for any purpose of Licensee's and any servant or employee or other person entering with the permission of such independent contractor is deemed to be an agent of Licensee. Licensee assumes full responsibility and liability for the acts and omissions of all of Licensee's Agents acting on behalf of Licensee in connection with the rights herein granted and the activities conducted by Licensee on the Property. Licensee's obligation to indemnify and defend Licensor from Covered Claims caused by Licensee or Licensee's Agents**

under this Indemnity paragraph applies whether or not Licensor may be guilty of negligence or gross negligence, which results in or contributes to the Covered Claim against which Licensee is obligated to indemnify, defend, protect, and hold Licensor harmless, and whether or not Licensor's liability is imposed by any statutory or common law theory of strict liability; however, this provision does not protect the Licensor from Licensor's own intentional malicious acts.

8. Defined Terms. Defined terms provided at the beginning of this License, where terms with the first letter of key words are capitalized and referenced by quotes within a parenthesis, and where terms are otherwise stated in such a way as to reasonably indicate an intention to serve as a defined term, all constitute the definitions of those same terms when used herein.

9. Changes & Binding Effect. This License may be changed only by a writing signed by Licensor and delivered to Licensee. All changes of this License are binding on the Licensor and the Licensee without any additional legal consideration. This License may not be assigned by Licensee. This License binds and benefits the Licensor and the Licensee's Agents.

10. Execution. By Licensee's entry onto the Property without written objection to this License, Licensee accepts and agrees to the terms of this License. Fax, email, or other form of electronic signatures for the Licensor are intended to have the same force and effect as the use of a manual original signature.

LICENSOR:

Printed Name: _____
Date: _____