Easements and Licenses:
What They Are, How They’re Created, and What (and Why) You Really Need to Know About Them

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Your eyes may be glazing over, head bobbing, and you’re probably thinking…do I really need to know about easements and licenses? If you’re at all involved in the management or governance of a community association, the answer is…yes, you do. It’s wise to start with the essentials, and believe me – they truly are more interesting than they are dreary. This article provides a concise summary of easement and license essentials. And if you think you already know enough about these issues to muddle through, there’s a good chance that this article will touch upon a new concept or one which has long been tucked away in the cobwebs of your memory. It will also provide food for thought, in the form of issues to consider when easements and/or licenses are involved, and a list of "musts" for prudent easement and license drafting.

Both easements and licenses involve one or more parties using the real property of another. In community associations, these parties may be the associations themselves, owners of lots or units within the association, utilities, municipalities and others. It is therefore important to appreciate the differences between easements and licenses, how they are created, how their terms are applied, and the legal implications of both.

Easement

An "easement" is an interest in land that gives the owner of the easement the right to use the land of another (or, in some instances, to prevent a certain use of the land by the other owner). Examples of easements are easements for ingress and egress over roads and right of way easements for utilities such as power lines and water mains. Documents creating easements are most often recorded and frequently labeled “Easement Grant Deed,” “Grant Deed,” or “Agreement Concerning Real Property.”

License

On the other hand, by a “license,” the owner of land gives permission to another (the “licensee”) to perform an act on the land. It makes lawful an act that would otherwise be a trespass. Examples of licenses are using the land for walking or driving, or for parking a vehicle, as in a parking lot. Documents creating licenses are sometimes recorded and frequently labeled “License” or “Agreement Concerning Real Property.”

Methods of Creation

Easements may be created by express grant or reservation. However, they may also be created by implied grant or reservation, by necessity, by prescription (adverse use), by CC&Rs, as well as other
means. Licenses are essentially a contract. They are often express but may be implied from past use, custom, or the parties’ relationship. When express, they may be created in writing or orally.

**Location**

The location of both easements and licenses may be made certain through a clear and accurate description. Frequently, this entails not only a metes and bounds description of the easement or license area but also the inclusion of a drawing depicting its shape and location. While a general description of the area or the location based upon an improvement (such as, “the graded road as it existed as of February 25, 1925”) may occasionally suffice, it is fraught with risk of disagreement, especially if the easement or license will exist for a number of years. The services of a licensed land surveyor or registered civil engineer are frequently employed to locate and describe the location.

**Term**

Easements are frequently perpetual. Often easements are “appurtenant” (attached to a piece of property for its benefit) and pass with the property upon its transfer regardless of whether it is mentioned in the deed. However, an easement need not be perpetual. An easement can be created for a defined period of time (such as five years) or until the occurrence of some event (such as the construction of an improvement, like a public road). On the other hand, licenses are usually limited in time, such as parking in a parking lot until the ticket expires, or limited to the life of the licensee. The privilege afforded to the licensee is generally personal and cannot be assigned, inherited, or transferred to another. Licenses can usually be terminated at will by the grantor of the license.

**Scope**

The concept of the “scope” encompasses the rights and obligations of the parties to use an easement or license. The scope will vary depending upon the express terms if it was created in writing or orally, the actual use made of the easement, any restrictions upon the property, the reasonable expectations of the parties, and statute and case law. Any rights in the land not held by the easement or license owner are retained for use by the land owner. The relative rights and obligations of the parties may include but are not limited to the following:

- Is the easement/license exclusive?
- Who else can use the easement/license (Family? Friends? Tenants?)
- What activities may the easement/license holder engage in (for instance, may a driveway easement be used for parking cars)?
- How frequently may the easement/license be used?
- During what hours may the easement/license be used?
- What activities are specifically prohibited?

**Other Terms**
Other terms are frequently included in the document creating the easement to protect the grantor, avoid misunderstandings, and avoid surprises. Such provisions include, but are not limited to, the following:

- What improvements may be constructed?
- Who will improve the easement/license area?
- Who must maintain the improvements?
- Who will pay to improve, repair, maintain, or reconstruct the easement/license area?
- May the easement/license area be fenced?
- Can the easement be gated and by whom? If so, how will the gate be controlled?
- What use is retained by the land owner?
- Provide that the easement/license does not alter the CC&Rs and other governing documents.
- Provide for the easement/license holder to comply with the CC&Rs, rules and regulations, and other governing documents.
- Provide for protection of the association from liability by requiring insurance or indemnification, or both.
- For terminable easements and licenses, provide the method and any requirements for termination. Provide for the survival of terms that should remain, at least for a time. Provide whether any improvements must remain or be removed and the property restored upon termination.
- Provide for the removal of mechanic’s and materialman’s liens.
- Provide for the use of licensed contractors and workers’ compensation insurance.
- Provide for the limitation of parties to lawsuits to exclude board members.
- Provide for attorneys’ fees and costs.
- Provide for mediation.
- Provide the venue where any lawsuit must be brought.

**Interpretation**

Both easements and licenses are interpreted in much the same way as contracts. The court will try to carry out the intention of the parties. When a clear intent is lacking, the court may interpret what the parties reasonably expected and what other courts have ruled in the past. To the extent a document
that creates or may create an easement or a license leaves out terms, it creates fertile ground for disagreement and litigation.

**Prudent Drafting “Musts”**

While no amount of careful drafting can completely avoid disagreements and litigation, the following points will go a long way toward that goal:

- Always reduce easements/licenses to writing.
- Always record easements.
- Nearly always record licenses. The exception might be some licenses for a very short term.
- Always include, as parties, all the owners of the property involved.
- Always use the full name of each owner as it appears on the deed to the property.
- Always clearly identify the benefitted property.
- Always clearly identify the easement/license area. This may require a metes and bounds description and a drawing illustrating its extent and location.
- Always address the scope of the use permitted.
- Always address improvements that may be made.
- Always address liability considerations.
- Always provide for the removal of liens if improvements will be made by the holder of the easement/license.

The above overview is not intended to address all possible issues relating to easements and licenses. It is also not meant to encourage drafting of easement and license documents without the advice of an association’s legal counsel. In fact, the complexities and nuances of both drafting and interpreting easements and licenses make it important to consider involving legal counsel as early in the process as possible—from drafting to interpretation, negotiation to dispute resolution and litigation, if necessary.

The information you’ve read today provides a helpful guide which should serve as a handy reference tool, and one which will assist you in spotting issues involving easements and licenses.