

CITY ENGINEER'S STATEMENT OF POLICY

Public Utility Easements

Effective August 18, 2005

Background

Property owners, with increasing frequency, are seeking City permission to construct upon the City's public utility easements. Interference with an easement is a form of trespass. Consequently, an easement holder is entitled to equitable relief against a servient owner's unlawful interference with the easement holder's enjoyment of the servitude, particularly when the obstruction of an easement is of a permanent character. . At the same time, the City's easement rights are not without limitation – typically such rights are limited to the management, maintenance, repair and replacement of public utility lines and access to the easement. Intentional or innocent, the result of development within the scope of the City's easement rights can consume substantial City resources in the defense of public easement rights, and impair the City's ability to manage, maintain, replace and repair its public utility infrastructure.

Purpose

The purpose of this policy is:

- 1) To provide a basic understanding of easement law, definitions, limitations and application for public interest purposes
- 2) To identify sections of the Lake Oswego Code (LOC) and the Community Development Code (CDC) relevant to work that may be conducted within the City's public easements
- 3) To establish criteria for use in determining a reasonable physical "size" for public utility easements
- 4) To establish standards for the drafting of easements for public purposes
- 5) To establish minimum criteria with which staff will evaluate requests to develop within public utility easements

Applicability

This policy and its related standards and criteria shall apply to all development¹ activities occurring within the City's public utility easements. In applying this administrative policy, staff is advised to seek the advice of planning, engineering and building staff and counsel of the City Attorney's office. This policy is not intended to be directly applicable to encroachments within public rights-of-way (see LOC

¹ Development – "Any man-made change to improved or unimproved real property, including, but not limited to , construction, installation or alternation of a building or other structure, change of use, land division, establishment or termination of a right of access, storage on the land, grading, clearing, removal or placement of soil, paving, dredging, filling, excavation, drilling or removal of trees."

42.18) but the concepts may be appropriate in recommending to the City Manager whether an encroachment in the public right-of-way should be permitted.

Public Easements

Definitions

- A. "Easement" – An easement is a nonpossessory interest in the land of another that entitles the easement holder to limited use of another's land without interference. ORS 105.170(1).
- B. "Easement holder" – An easement holder is a person or entity with a legal right to use the easement for an intended purpose and may include the owner of the land across which the easement passes. ORS 105.170(2).
- C. "Servient estate" - Land affected or "burdened" by an easement is called a "servient estate."
- D. "Dominant estate" – The land or person benefited by the easement.
- E. "Servient Landowner" – The owner of the underlying real property upon which the easement exists.
- F. "Easement appurtenant" – Easements appurtenant are within the area of the servient estate. If the dominant estate is sold or otherwise transferred to another, the easement over the servient land is transferred with it.
- G. "Easement in Gross" – Easements in gross are unrelated to the easement holder's possession of a dominant estate and do not ordinarily transfer with title to an adjacent property.
- H. "Grantor" - The party who transfers title or an interest in real property (seller, giver) to another (buyer, recipient, donee, grantee) by grants in deed or quitclaim deed.
- I. "Grantee" – The party who receives title or an interest in real property (recipient, buyer, grantee) from another party (grantor, seller, giver) by grants in deed or quitclaim deed.

Creating Easements

There are numerous ways of creating easements. The purpose for which the easement is created will necessarily dictate the scope of the easement and the extent of the encumbrance on the underlying servient estate. In most instances, the City will seek a nonpossessory interest in real property for the express purpose of constructing, operating, maintaining, repairing and/or replacing a public utility. Easements for water, sanitary sewer and storm sewer pipes are typical examples of public encumbrances on public or private lands for an express purpose. Express easements can be created by additional grants in deeds, by reservations in deeds, grants or dedications in plats, or by separate easement documents. They must be properly acknowledged before a notary in order to be recorded. ORS 93.710 (1). Recording of the easement provides constructive notice to third parties that the easement exists. ORS 93.710 (1).

Anytime an easement is created for a public purpose, it is essential to define the exact location and scope of the allowable uses in the document creating the easement. ***When creating an easement for public purposes, the following guidelines and standards should be followed:***

- A. Define the Easement Purpose – As noted above, the purpose of the easement will dictate the scope of the easement and the extent of the encumbrance on the underlying real property. If the purpose of the easement is to allow locating a public utility across public or private property, consider the following:
1. Easement location – Be specific in the description of the easement. Specify dimensions and location relative to property monuments found or established by a professional land surveyor. Easements created over, alongside or under water bodies require special care in locating and describing relative to fixed survey monuments located on terra firma.
 - a. For utility easements encumbering private or public lands or waterways, ensure the extent of the easement is sufficient to allow legal access to the utility from existing public rights of way or other access easements over any intervening real property.
 - b. Locate such easements along property boundaries to minimize the burden of the easement on the servient landowner.
 2. Easement dimensions – When an easement is created as a result of a proposed development and compliance with the City’s zoning and development standards, CDC Chapter 50.64, provides that easement widths for subsurface pipelines “...shall be a minimum of 10 feet (5 feet on each side)...” “...when not located adjacent to a street right of way.” In almost all instances this width is insufficient to allow adequate access for maintenance, repair or replacement of such facilities. Even today’s modern, compact excavation equipment cannot work within a ten-foot wide space without technically exceeding the easement limits. Easements created over or under water, should be especially generous in their physical dimension. While each purpose for which an easement is created may differ, the standards below should be considered as minimum, except when a lesser width is approved by the City Engineer:
 - a. For easements created over undeveloped real property and located outside public or private waterways or rights of way, the minimum easement width should be 15-feet with 7.5 feet on each side of the easement centerline.
 - b. For easements created over real property and located within or adjacent to public or private waterways, minimum easement widths should be determined considering the following:
 - i. Method of utility construction - If a subsurface utility is constructed using conventional “open-cut” methods, the width of the easement should be sufficient to allow future access for repair or replacement without trespass onto the servient landowner’s property. Easement width should accommodate the future installation of shoring or cofferdamming for dewatering purposes and provide adequate room for workmen and equipment to effect maintenance, repair or replacement without risk of injury to personnel or damage to private property. Utilities installed by “trenchless techniques” may require less easement width, as long as means of access to the utility are provided at each end of water crossings.
 - ii. Ordinary depth of water over the constructed utility - Utilities installed on or under lake bottoms or below streams and rivers where ordinary depths exceed three feet, may require extraordinary construction means and methods such as caissons, sheet-pile walls, barge mounted equipment and large cranes for installation, repair or

replacement. Easements for the purpose of constructing public utilities on or under lakebeds or under streams and rivers should be generously sized with sufficient dimensions to allow access by extraordinary equipment preferably from public lands abutting the servient estate.

iii. Type of equipment used for utility construction, maintenance, repair or replacement – The variety and types of equipment that may be mobilized for construction, repair or replacement of utilities will vary depending upon the location of the utility. Subsurface utilities located on land can, in most cases, be accessed using conventional equipment available to most public works departments or contractors. Utilities located under water will, by necessity, involve the use of specialized equipment not ordinarily owned by public works agencies. As such, easement widths and extent must allow for such equipment to be mobilized to the site of the work and allow reasonable clearances, above, below or adjacent to the utility for such specialized equipment to be staged and operate without risk of damage to the servient landowner’s estate or injury or damage to City personnel or equipment. (Typically, an easement extends “to the sky above”, but is necessarily limited to its functional requirements - how high a utility easement extends above a surface depends on the reasonable means and equipment necessary to install, repair, or reconstruct.)

c. The scope of any easement whether over land or water should include equitable restrictions on both the easement holder and servient landowner. The scope of utility easements must provide protections against interference by the servient landowner and third parties. The scope of the easement must also consider that interference can occur on the land underlying the easement or be aerial in nature e.g., a deck, dock, bridge or building overhang that interferes with the easement holders ability to maintain, repair or replace the utility must be considered when drafting easement language. If it is foreseeable that the landowner may desire to develop at some height over the easement, a description of the likely methods of repair or replacement should be included in the instrument creating the easement, in order to give the landowner constructive notice of the extent of access required to be left available in the easement area – in other words, what clear space above the easement is necessary for the City’s right to enjoy the easement without unreasonable interference from the landowner.

3. Duration – Typically, and unless expressly limited in time, an easement continues in perpetuity until terminated by abandonment, conveyance by the easement holder relinquishing his or her interest in the servient estate, merger of the dominant estate with the servient estate or other means provided by law. The duration of an easement created for a “lifeline facility” (see A.4.a. below), shall be perpetual and should clearly describe the types of conditions that would constitute abandonment.
4. Permitted Uses - Unless the instrument creating an easement expressly creates an exclusive easement, the rights of the easement holder are non-exclusive i.e., the servient landowner may make any use of the land that is consistent with and does not

unreasonably interfere² with the rights of the easement holder. The servient landowner can also authorize others to use the land subject to the easement if there is no interference with the rights of the easement holder. For utility easements created on private or public lands or waterways, consider the following in determining the extent of the encumbrance necessary to protect the public's interests in the use of the easement:

- a. Is the easement being created for the purpose of a "lifeline facility"? In this context, examples of lifeline facilities include large sewer interceptors or trunk lines, large water transmission mains, major storm drainage outfalls, culverts, bridges, pump stations, reservoirs or treatment facilities. Easements created for such facilities whether located on land or under water, should expressly create an exclusive easement to prevent third parties from using the easement in a way that would unreasonably interfere with the rights of the easement holder.
 - b. As noted in A.2.b.(ii)(iii) above, an instrument creating an easement for utilities located within or under waterways, whether lifeline facilities or not, should be generously sized. Where available space or an unwilling grantee precludes a large easement area or width, include an exclusive use clause in the instrument or include prohibitions to the Grantor from making particular uses of his or her land.
5. Easement to Run with the Land. - Utility easements as a rule should always be inseparable from the land in subsequent transfers. Accordingly, a statement should be included in the easement to the effect that it is intended that the easement "run with the land".

Encroachments

General

Encroachments can occur intentionally or inadvertently on existing public easements. A poorly drafted easement can create significant legal challenges when the needs of the servient landowner and easement holder are in conflict. For the purposes of this policy memorandum, when encroachments do occur, the City's presumption is that the public's interest in the use of the easement is diminished. Determining whether or not such diminishment is "unreasonable interference" with the City's easement rights is never easy and solutions are more often than not, determined by courts of law, taking into consideration the engineering requirements for access to the public utility in the easement and action consistent with the City's easement rights, i.e., installation, repair, and replacement / reconstruction. This administrative policy provides guidance regarding engineering requirements for access to the public utility in the easement and action consistent with the City's easement rights, i.e., installation, repair, and replacement / reconstruction.

Encroachments on Public Utility Easements

- It is the policy of this Department to discourage interference with the City's utility easement rights, except as may be expressly allowed by language in the instrument creating the easement. As noted above, absent "exclusive use" clauses or the drafting of a "negative easement", the servient landowner and potentially third parties can also enjoy use of the easement as long as such

² See section headed "Encroachments" for standards of "reasonable use."

use does not “unreasonably” interfere with the easement holder’s ability to use the easement for its intended purpose.

- For the purposes of this policy “reasonable” uses are defined below taking into account the specific location of the easement:

Utility Easements over lands below water – Public utility easements acquired for the purpose of constructing, operating, maintaining, repairing or replacing pipes, culverts, manholes or similar structures for the conveyance of water, sanitary sewerage, or storm water where such structures are under water are particularly sensitive to interference by encroachments on or above the surface of the water (see ¶ 2(b) & 4(a) above). To ensure adequate access to these structures, it is paramount that any use of the easement by the servient landowner or third party be limited to the extent “reasonable.” Such “reasonable” uses include:

1. **Decks, docks, piers, gangways or boat ramps** – These types of structures shall be designed and constructed to include removable accessways of sufficient dimension to allow workers using typical equipment (generally available to City maintenance personnel in a dispatched utility vehicle), unconstrained access to such in-water or underwater utility pipes or structures. Removable accessways must be fabricated from lightweight materials that allow removal by hand using no more than two persons. In addition, to preserve the ability to “install, replace, or reconstruct” the utility line or structure, the deck, dock, piers, gangway or boat ramp should provide a means for relatively easy removal of the structure from the easement area so that the utility line may be removed and replaced expeditiously and without damage by City personnel or contractors retained to repair, replace, or reconstruct the utility line. No portion of any support elements for such accessways shall encroach into the easement and where feasible, should be located no closer than 7.5 feet to the outside edge of any utility structure.
2. **Bridges** –Bridges present particular problems in assuring access to the utility line for repair, replacement, or reconstruction because of the limited ability to place the utility line on the bridge without interfering with its access function, and the height and overhang of the travel surface if the utility line is suspended on the side or below the bridge. When feasible, the location and design of public bridges should result in a perpendicular crossing of the utility easement and facilitate access to the utility for maintenance, repair or replacement purposes. Bridges constructed for access to private property and which cross public utility easements should be located to avoid crossing the easement. If no practicable alternate location exists, the bridge must cross the easement at right angles and provide not less than 7 feet of clearance between the bridge soffit and normal water surface elevation, unless otherwise approved by the City Engineer.
3. **Residential or Commercial Structures** – No portion of residential or commercial buildings or appurtenant structures attached thereto may encroach into a public utility easement - either at the surface or “to the sky above”, except as otherwise approved by the City Engineer. In determining whether structures may encroach into a public utility easement, the City Engineer shall take into consideration the reasonably foreseeable events which could necessitate access to the utility line, the methods and equipment that could be required to replace or reconstruct the line, the difficulty in rapidly removing any structure or portions of structures over the easement area as necessary to replace or reconstruct the line, and the expected range of time available to accomplish the replacement or reconstruction of the line.

Utility Easements on Land – Encroachments on public utility easements located on land are to be avoided whenever possible by the exercise of due diligence in reviewing development plans,

effective and timely communication with the development community and other City Departments. When encroachments are discovered, they are to be removed if the interference with the City's easement rights "unreasonably" diminishes the City's use of the easement. If a finding is made that the encroachment does not substantially impair the City's easement interests, such encroachments are to be acknowledged and legitimized by letter to the landowner. Examples of encroachments that unreasonably diminish the City's public utility easement interests within or above the easement area include:

- Excessive fills of soil or rock
- Reinforced concrete foundations or slabs
- Trees or large shrubs
- Fences, retaining walls, pools, patios or decks and driveways
- Sport courts

Encroachment Mitigation Alternatives

From time to time and absent an exclusive use clause, a servient landowner's use of the land underlying an easement will intentionally or innocently interfere with the City's use of the easement. In these instances, several alternatives may be proposed by the servient landowner as mitigation for the interference, to be reviewed and accepted by the City Engineer. They include:

- Relocating the utility, securing the grant of a new public easement over the utility and vacating the abandoned easement. ORS 368.326 to 368.366.
- "Hardening" the utility as determined necessary by the City Engineer. The intent of this mitigation alternative is to minimize the risk of damage to the utility by the encroachment and maximize the design life of the utility, thereby reducing the frequency of replacement.

Absent the servient landowner's agreement to these mitigation alternatives, the City may seek legal recourse to abate the interference e.g., Quiet Title action, Declaratory and Injunctive relief. .

This policy is not all inclusive of the myriad situations that may occur resulting in encroachments on the City's public easements and thus it is incumbent on staff to exercise sound judgment in resolving such issues. Always seek the advice of the City Attorney's office and others in creating or preserving the City's public easement rights.