



THE NUTS AND BOLTS OF DRAFTING EASEMENTS

Writing easements that can withstand the rigors of eminent domain

BY MISCHA BOARDMAN

Proper drafting of easements is a painstaking process. It takes knowledge about the applicable law, fine attention to detail and the ability to think critically and spot issues. Failure to draft an appropriate easement can result in failed acquisitions, time delays and undue expense. Fortunately, there are some ways you can avoid the potential pitfalls of a poorly-written easement document.

Begin With the End in Mind

During the acquisition phase, we often see previously unidentified issues surface only to cause delays and add costs. That's because when easements are being drafted,

the thought of a condemnation is not usually top of mind. Most easements overlook this area, and as a result, even a small oversight can bubble up into major problems later on and potentially stall your project altogether.

Early in the easement drafting process, the goal is to obtain properties on a voluntary basis. However, in the final stages of the acquisition process—when eminent domain becomes the last remaining option—oversights in the easement can throw up roadblocks to bringing the project in on time and on budget. To minimize the most common issues that utilities and other condemning agencies face, it's critical to prepare for a potential condemnation.

The Pre-Litigation Phase

In any eminent domain lawsuit, there are two main types of challenges that a property owner can bring. A “necessity” challenge goes to the authority to condemn. While necessity challenges can take on many forms, at the most basic level, the argument is that the condemning agency does not need the property, either because the project itself is not needed or because the individual property is not necessary for the overall project. Losing a necessity challenge could mean that the utility company may not condemn the subject property at all. This type of ruling could compromise the viability of the project as a whole. When a necessity challenge is used to successfully contest specific provisions of an easement, the utility company may be forced to re-draft its easement and restart the condemnation process. Depending on a project’s tolerance for delay, losing months or years on a land acquisition or construction timeline could be catastrophic.

The second type of challenge is to the “just compensation.” This is the amount that the condemnor is required to pay for the property rights being sought. Property owners are constitutionally entitled to receive full and fair compensation for their property, and they have the right to challenge the condemning agency’s valuation if they believe it is too low. Typically, just compensation challenges are not project killers, but they can certainly negatively affect a project’s bottom line.

Because necessity and just compensation challenges may significantly affect a project and its budget, it is essential to draft easements and other project documents assuming that eminent domain will be utilized to condemn the remaining properties required to complete the project. Favorable outcomes are possible at every stage of a project, whether it be voluntary acquisition or later at a trial on necessity or just compensation. However, this requires careful planning during what is frequently thought of as the “pre-litigation” phase of the project.



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Learn the Rules

Nobody would start playing a game without first learning the rules. Land acquisition is no different. It is essential to know the eminent domain law in the region/state where your project is located. Simply knowing the federal rules is not enough. Each state will likely have a unique set of written statutes and case law that could affect not only the health of a project, but also the manner in which property owners may challenge it. Some states are much more property owner friendly than others.

For example, Michigan has codified its eminent domain processes and procedures in the Uniform Condemnation Procedures Act. The act was drafted with many property owner protections in place and imposes responsibilities and liabilities upon a condemnor far in excess of the federal law and what’s imposed in most other states. A condemning agency’s violation of these responsibilities can have grim consequences on its ability to condemn. To begin a project before fully understanding all the specific state laws is incredibly risky. To minimize that risk, be sure to learn about the laws before you start.

Avoid Using Standard Easement Templates

When beginning a new project, it is critical to ensure that you are using an easement document that is customized for that particular project and/or state. That means fighting the natural tendency to simply recycle a standard easement. Instead, specifically and carefully review the language of the easement document and think critically about whether specific provisions are appropriate for the current project. Many times we see utility companies come into Michigan and rely on their template easement documents without making modifications required by geography, law and/or the design of the new route. This can often lead to damaging consequences.

Recently, a national utility company constructed a crude oil pipeline through several states, including Michigan. The utility chose to use its template easement document across all of the states, instead of separately analyzing whether adjustments to the language would be needed. The template easement document was fairly broad and granted the company the right to transport crude oil “...or any material or substance ...”

Unfortunately, the regulatory approval received by the utility company in Michigan limited the company's authority to transport crude oil only. When the company sought to condemn the final 80 easements for the new transmission line, dozens of Michigan property owners challenged the necessity of the taking, arguing that the company's easement sought to condemn a right that they did not actually need—the right to transport substances other than crude oil. The court ruled in favor of the property owners, dismissing the condemnation lawsuits and requiring the company to start the condemnation process from the beginning. This caused a lengthy delay, and of course, added significant expense to the land acquisition budget.

These timing and cost setbacks could have been avoided altogether if the company had spent the time and resources in the planning stage to appropriately modify the easement language to fit the taking in Michigan.

Acquire Rights to Only What's Needed

When drafting an easement, limit the rights to only what is needed. Do not try to acquire the right to do something that will never be done. The first and most important reason is illustrated in the previous crude oil example. A condemnation case can easily be derailed by a necessity challenge if a condemning agency attempts to take more than what is needed for the project.

Another compelling reason to limit the rights being acquired is to limit how much must be paid for the easement. Every individual easement right that is acquired

will be valued by the property owner's real estate appraiser—and the condemning agency will be required to pay for it, whether it is used or not. Some states require that easements being condemned be valued as if the condemning agency will use every easement right to the fullest extent possible—even if the condemnor does not intend to fully utilize its rights.

A good example is vegetation management rights. Oftentimes, utility easements provide very broad removal rights like “the right to cut, trim, remove, destroy or otherwise control any trees, bushes and brush.” Essentially, this type of language would allow the easement holder to remove all vegetation within the easement area and by any means it chooses. And this is how the easement will be appraised. This is true even if the utility only intends to remove trees that are in excess of 25 feet tall. Because the company has taken the right to full removal, it will be required to pay for that right even if it does not intend to actually use it.

To help avoid paying for rights that may never be used, consider whether it might be appropriate to limit the rights being acquired. Some limitations include:

- Voltage in electric easements
- Number of lines (oil, gas or electric) that can be constructed
- Vegetation removal rights
- Ability to assign rights to other utilities in the future
- Area within the easement where facilities may be constructed

Before finalizing an acquisition easement document, review it carefully to ensure that only those rights that are needed and will be used are being acquired. This will help to avoid paying extra for rights that may never be used.

In Summary

It is important to think strategically when drafting acquisition easement documents. While this can be a lengthy and meticulous process, it can help you avoid potential valuation or necessity issues later in the acquisition process.

Achieving a successful outcome involves customizing your easement documents to the specific project and its location. It also requires knowledge about the applicable laws, fine attention to detail, and the ability to think critically and keep an eye out for potential issues. By following some of the suggestions provided, you can help avoid failed acquisitions, time delays and undue expenses. ★



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