Developers: Be Wary of Utility Company Easement Forms

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Gary M. Kaleita

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A utility company that provides service to an owner's property usually requests the owner to sign a standard form of easement. The form of easement allows the utility company to enter onto the owner's property to install and service its utility lines. While these forms vary from one utility company to the next, most contain a number of customary terms that many developers and builders do not bother to negotiate, even though some can be problematic.

Easement forms are often "blanket" in nature. Rather than describing a particular easement area where the utility lines are to be located, they allow the utility to place lines anywhere on the property. This may be fine if the property is being used for agricultural purposes. Many utility company easement forms were created with that scenario in mind.

For a property that is to be developed for commercial or residential purposes, a blanket easement presents problems. It gives the utility company the legal right to require the removal of any improvements on the property that would unreasonably interfere with the utility company's ability to place, access or maintain its lines. While the utility company may install its lines in locations that do not interfere with improvements, it need not do so.

Purchasers and mortgage lenders object to blanket easements because they may interfere with the ability of the owner to maintain improvements that have been built on the property. One way to avoid this problem is to negotiate a provision into the easement that the lines will be installed only at mutually agreeable locations, and limit the easement area to a specific width wherever the lines are installed (such as five feet on either side of the lines). However, this still does not specify where the lines will be. A better option is to create a specific sketch and legal description of the easement area. In both cases, the owner should make sure that the locations do not include any building footprints or other areas where vertical improvements are intended to be constructed.

Another “blanket” right often found in utility company easement forms is the utility company’s right to access its lines with vehicles and equipment. Utility company trucks, bobcats and backhoes may then drive across and around the owner’s property, potentially wrecking grass and landscaping. Accordingly, the easement should limit vehicular access to the drives, roads, and parking areas constructed on the property to the maximum extent practicable.

Many utility company easement forms prohibit the owner from installing any improvements whatsoever in the easement area. Others severely limit the types of improvements that an owner can install. If the easement is silent on this subject (which few are), an owner has the right to install any improvements that do not unreasonably interfere with the easement holder’s rights.

If the easement contains prohibitions on improvements, an owner should consider specifying what types of improvements it reserves the right to install in the easement area. This usually consists of so-called “horizontal” infrastructure improvements like pavement, curbing, sidewalks, landscaping and other improvements that do not unreasonably interfere with the utility company’s ability to access and service its lines. An easement granted after the property has been improved should specifically allow the continued existence of those improvements.

Even if the owner has the right to install improvements in the easement area, the utility company still has the right to access and service its lines, which means that the utility company can remove or disturb those improvements. Under Florida common law, the utility company will not have a legal obligation to restore them when it is done, unless the easement provides that it must do so. It is therefore important to negotiate a provision into the easement that requires the utility company to restore the surface of the easement area to as near as practicable the condition which existed prior to its activities that disturbed the easement area. Absent such a provision, the owner would have to do this and bear the cost.

Consideration also should be given to whether the utility company should be required to install its lines underground. Without such a requirement in the easement, it need not do so.

An owner should also consider limiting the types of lines a utility company can install. Electric and telephone company easements often provide that the utility company can install not only electric or phone lines, but also lines for cable television, internet access and telecommunications services. The utility company can then let other companies “piggyback” onto its easement rights (for a fee, of course) and use the easement area as an assignee of the utility company. To avoid this, the easement should specify that the lines can only be for the specific purpose initially intended by the utility company (such as electric or phone service).

An owner should always require that the utility company indemnify the owner against any liability for personal injuries, death, or property damage, and any other loss or damage (including the owner’s attorneys’ fees), which arise out of the utility company’s exercise of its easement rights, except for loss or damage which results from the willful or negligent acts of the owner or its agents, contractors or employees.

If utility service is being provided by a local government, the concept of “sovereign immunity” should be considered. Broadly speaking, this doctrine stands for the proposition that a government cannot be sued for the harm it causes when exercising governmental functions. There is an exception to this, however, which says that if the government commits a negligent or wrongful act (in the context of an operational level function, as opposed to a policy or planning function) which causes harm (called a tort), then sovereign immunity does not apply.

The Florida legislature codified this exception in Florida Statutes Section 768.28 by providing that in a tort claim sovereign immunity is waived, subject to the imposition of a cap on the government’s liability in the amount of $200,000 per claim (or $300,000 for multiple claims). However, an owner may be able to negotiate for the

government to maintain insurance for more coverage than the cap.

Local governments that engage in the provision of utility services (which are not really policy or planning functions) typically include in their easement forms a reference to the fact that their liability will not exceed that allowed by statute even if they agree to indemnify the owner against negligent or wrongful acts relating to their activities on an owner's property pursuant to utility easements.

Utility companies will usually negotiate in good faith to address an owner's reasonable concerns with their easement forms, and it is not unusual to get them to agree to these types or provisions in an addendum to the easement. Some lead time will be necessary since it will usually require the involvement of their legal department. The bottom line is that developers and builders who are presented with utility company easement forms should not just sign them, but think about the kinds of issues they can present. It is easier to negotiate these concessions up front before the lines go in, than to ask the utility company to amend its easement later.