

# The Use of Negative Easements To Facilitate Construction Projects

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This paper discusses the use of negative easements to facilitate construction projects. Easements, which are interests in land, are commonly used with development and construction projects. Most of such easements are “affirmative” easements, such as easements for ingress and egress, parking, and utilities. Less common are “negative” easements, which restrict the rights of the owner of land burdened by the easement. This paper presents two examples in which negative easements were used to facilitate construction projects, resulting in substantial economic benefits and savings of time.

**Key Words:** Easements, Dominant Tenement, Servient Tenement

## Introduction

Easements have been long-recognized as a means of obtaining an interest in the land of another, which entitles the “owner” of the easement to a limited use or enjoyment of the other’s land. Such “affirmative” easements are commonly used in the development and construction field to create methods of ingress and egress over privately owned land, which methods are both legally protected and recognized by government agencies which require access to a public road as a condition of project approval. Easements are also commonly used in commercial projects (including malls and shopping centers) to provide not only common rights of ingress and egress, but also reciprocal parking rights. Utilities – both public and private – are installed (over the ground and under the ground) through the use of easements.

Less commonly known, and used, are “negative” easements, which are easements which restrict the right of a landowner to use the owner’s land. This paper presents two cases in which “negative” easements were created and used in connection with construction projects, resulting in substantial economic benefits and saving of time.

## Easements-Background

Legal issues involving real property are traditionally ones which are regulated by state law, and so it is with the law of easements, which are an “interest in land”. In California, the law controlling easements consists of the basic statutory framework and a multitude of appellate court decisions which, using principles which date back to the English “Common Law”, interpret and apply the statutory rules (the citations in this paper are to California law; the law of other states may be different). Easements are authorized in California by Civil Code Section 801 adopted in 1872 (all statutory references in this paper are to the Civil Code) which authorizes easements for eighteen (18) specific purposes, including these common uses:

4. The right of way,
5. The right of taking water, wood, minerals, and other things,
9. The right of receiving water from or discharging the same upon land, and
12. The right of using a wall as a party wall.

(less well known or used are purposes “16. The right of a seat in church” and “17. The right of burial”).

Easements may be “in gross” or “appurtenant”. An easement is “in gross” if it is granted by a landowner to a particular person but is not “attached to” other land; that is to say, the easement is not intended to benefit specific other lands. Most easements involving significant rights, including those described in Section 801, are “appurtenant” and are “attached to the land” benefited by the easement. The land to which the easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement (Section 803). An easement appurtenant is said to “run with the land” and, therefore, future owners of the dominant tenement are entitled to use of the easement, which is enforceable against future owners of the servient tenement.

Easements may be established for the benefit of a single dominant tenement. Such easements are said to be “exclusive”. On the other hand, an easement may benefit several parties or parcels (including the owner of the servient tenement); such easements are said to be “non-exclusive”.

An easement may be created by an express grant; for example, landowner “A” may grant adjoining landowner “B” the rights of ingress and egress over a described thirty (30) foot wide strip of “A’s” property. An easement may also be created by reservation; for example landowner “A”, who owns two adjoining parcels of land, may deed “Parcel One” to “B” and, in the deed, reserve to Parcel Two (as an easement appurtenant) the rights of ingress and egress over a described thirty (30) foot wide strip of Parcel One. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired (Section 806). And, concerning the interpretation of the creating document, the rule is:

In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired. (*Scrubby v. Vintage Grapevine, Inc.*, 37 Cal.App. 4th at page 703).

This means there exists a great deal of flexibility in the drafting of easements, and easements can be used to achieve a wide variety of purposes. This paper explains two instances in which negative easements were created and used to facilitate construction projects.

### **Case One**

In 2003, residential lots became available in an exclusive golf course development in a Northern California community. A developer and contractor (hereinafter referred to as “Owner”) acquired one of the lots (“Lot One”) for construction of Owner’s private residence. To protect Owner’s scenic (and valuable) view of the golf course from Lot One, Owner also purchased the adjoining “downhill” lot (“Lot Two”). The author, while consulting with Owner as to other legal and construction issues, learned that Owner had turned down substantial offers for the purchase of Lot Two so as to protect Owner’s view from Lot One. The author suggested to Owner that it would be possible – through the use of a negative easement – for Owner to sell Lot Two (at a substantial profit) and also protect the view from Lot One over Lot Two. Owner was, understandably, interested in this idea and authorized the author to prepare the necessary documents.

The document used to create the negative easement was the Grant Deed by which Lot Two would be transferred to the buyer (hereinafter the “Buyer”). The form of the Grant Deed is attached hereto as Appendix A. The first paragraph of the Grant Deed effects the transfer from the “Grantor” (Owner) to the “Grantee” (Buyer) of Lot Two (the actual legal description of Lot Two was attached to the Grant Deed as Exhibit “A”); Lot Two is referred to in the second paragraph of the Grant Deed as the “Servient Tenement”. Lot One, benefited by the easement, is referred to as the “Dominant Tenement” (the actual legal description of Lot One was attached to the Grant Deed as Exhibit “B”).

The third paragraph of the Grant Deed creates – by reservation – (“for the benefit of Grantor, the Dominant Tenement, and Grantor’s successors and assigns”) a “perpetual easement – appurtenant to the Dominant Tenement – over the Servient Tenement – of the right to receive and enjoy light, air, and scenic and unobstructed view”, as more specifically delineated in the four (4) numbered paragraphs that follow. These provisions make reference to Exhibit “C” of the Grant Deed (the form of Exhibit “C” is attached hereto as Appendix B), which is a plat of Lot Two (the Servient Tenement). This plat depicts the “No Building Area” referenced in paragraph 1 of the Grant Deed. Within

this No Building Area, no residence, structure, and/or building of any kind is allowed, except as permitted under paragraph 2. This paragraph 2 of the Grant Deed establishes a “Limited Development Zone”, in which structures such as a pool, pool equipment, decks, and fencing which do not exceed ten feet in height above “Ground Level” are allowed. Paragraph 3 establishes, by reference to an elevation established by the Owner’s engineer, an absolute “Height Limit” for any physical object on the Servient Tenement. And paragraph 4 prohibits the removal of any tree which existed, on the date the Grant Deed was recorded, in the Limited Development Zone.

In California, the grant deed is usually signed only by the seller of land and not by the buyer. To indicate the Grantee’s approval of the terms of the Grant Deed, and to make the easement enforceable against the Grantee and subsequent owners of the Servient Tenement, the language below the Grantor’s signature was added. Sentences 1 and 2 establish the agreement of the Grantee to the terms of the Grant Deed. Sentence 3 authorizes the Grantor to seek injunctive relief in court to abate any violation of the terms. Sentence 4 authorizes Grantor to recover attorney’s fees in any action to enforce the terms of the Grant Deed. Sentence 6 provides that the terms of the Grant Deed shall be enforceable against all subsequent owners of the servient tenement (Lot Two). The Grantee’s notarized signature was required on the Grant Deed.

The form of the Grant Deed was prepared by the author and provided to the Owner together with an addendum, prepared by the author (the “Addendum”), to the purchase and sale agreement for Lot Two which had been prepared by the Owner’s real estate broker. The Addendum provided that the Owner and Buyer agreed – as part of the purchase and sale agreement – to the terms of the Grant Deed, which would be recorded at close of escrow. The sale was consummated and the Grant Deed was recorded. The Owner received substantial sales proceeds. The Buyer built a home on Lot Two (the recorded Grant Deed, including the terms of the easement, did not negatively affect Buyer’s ability to obtain a building permit or financing). And Owner’s view was preserved.

## **Case Two**

The author became involved in Case Two, in 2007, at the request of a real estate broker who was assisting an owner of two adjoining residential parcels. The owner (hereinafter “Owner”), a contractor, had purchased the two parcels with the plan of building a home on one parcel (“Parcel One”) and living in the home for two years to avoid income tax on the sale of the home. Upon sale of the home on Parcel One, Owner would then build a home to live in on Parcel Two. Attached as Appendix C is a plat which depicts Parcel One and Parcel Two. When the author was consulted, the Owner had built (and lived in for two years) the home on Parcel One and had listed Parcel One for sale. Owner’s broker had obtained a serious and qualified buyer for the purchase of Parcel One.

A seasonal stream flowed through Parcel One and Parcel Two; the boundary between the two parcels followed the stream for approximately the southern half of the boundary; the boundary then turned west and then north, with the result that approximately ten acres of Parcel One was on the west side of the stream (this area is described as the “Easement Area” on the plat attached hereto as Appendix C). Due to physical constraints, the preferred road access to Parcel Two was through the Easement Area. In addition, Owner wanted – for aesthetic and other reasons – to restrict the Buyer’s right to use the Easement Area. To accomplish these objectives, Owner intended to apply to the local planning agency for a boundary line modification, to make the streambed the boundary line between the two parcels (in so doing the Easement Area would become part of Parcel Two). The author was consulted when Owner learned that the boundary line modification would require in excess of \$10,000 in fees and approximately six (6) months to process. There was also the possibility the modification would not be granted, due to minimum parcel size requirements. Finally, and perhaps most importantly, the qualified Buyer was unwilling to wait until the boundary line modification was approved to buy Parcel One.

The author suggested that the objectives of the Owner - (1) to restrict the use of the Easement Area by the owner of Parcel One, (2) to obtain the use for Parcel Two of the Easement Area, and (3) to minimize the expenses and time required for the sale of Parcel One – could be achieved without a boundary line modification by the use of easements.

As with Case One, the document used to create the necessary easements was the Grant Deed by which Parcel One (the “Servient Tenement”) was to be transferred from Owner to Buyer. The form of the Grant Deed is attached as Appendix D. The first two paragraphs of the Grant Deed define the “Grantor” (Owner) and the “Grantee” (Buyer)

and describe the “Servient Tenement” and “Dominant Tenement” by reference to legal descriptions which were attached to the Grant Deed as Exhibit “A” and Exhibit “B”. The third paragraph of the Grant Deed creates by reservation six (6) easements over the Easement Area, which is generally described by the plat which is included as Appendix C. The precise legal description of the Easement Area was prepared by survey and was included as Exhibit “D” to the Grant Deed

Paragraph 1 of the Grant Deed is a “negative” easement (similar to the easement utilized in Case One) for the purpose of maintaining the scenic viewshed of the Dominant Tenement (Parcel Two) over the Servient Tenement (Parcel One). This paragraph provides that “no residence, structure, building, and/or improvement of any kind shall be constructed, allowed, and/or permitted to exist in the Easement Area”. To further restrict Buyer’s use of the Easement Area by authorizing Owner’s use of the Easement Area, the affirmative easements in paragraphs 2 through 6 were included. Each of these easements is “exclusive”, which precludes the use by the owner of the Servient Tenement (Buyer) for the purposes specified in paragraphs 2 (ingress and egress), 3 (utilities), 4 (discharging water), 5 (minerals), and 6 (pasture). Language was included in the Grant Deed to bind the Grantee and make the terms of the easement enforceable against the Buyer, the Servient Tenement, and subsequent owners of the Servient Tenement.

As with Case One, the form of the Grant Deed (Appendix D) was prepared by the author, together with an addendum which amended the purchase and sale agreement that the Owner’s broker had prepared for the purchase and sale of Parcel One; the form of the Grant Deed was included as an exhibit to the addendum. The Owner and Buyer signed the addendum and the parties proceeded through the normal escrow process. At the close of escrow, the original Grant Deed was recorded to (1) transfer Parcel One to Buyer and (2) create the easements over Parcel One (the “Servient Tenement”) in favor of Parcel Two (the “Dominant Tenement”). The parties were able to consummate the transaction without the expenses (over \$10,000) and time (at least six months) required for the boundary line modification.

## **Conclusion**

Easements provide a legally enforceable method to obtain an interest in land owned by another. Easements are commonly used, in development and construction projects, to obtain rights of ingress and egress, parking, and installation of utilities. In addition to such “affirmative” easements, the flexibility provided by the law of easements allows for the creation of “negative” easements, which restrict the use of the owner of the land burdened by the easement. Such “negative” easements can be used creatively to facilitate construction projects and save time and money.

## **References**

California Civil Code, Section 801

California Civil Code, Section 803

California Civil Code, Section 806

*Scruby v. Vintage Grapevine, Inc.*, 37 Cal. App. 4<sup>th</sup> 697 (1995)

## Appendix A

### Grant Deed

We, \_\_\_\_\_ (as the "Grantor") hereby grant to \_\_\_\_\_ (as the "Grantee") the real property located in the County of Butte, State of California, described on Exhibit "A" attached hereto and hereby incorporated by reference.

Grantor is the owner of the real property located in the County of Butte, State of California, described on Exhibit "B" attached hereto and hereby incorporated by reference; said property is hereinafter referred to as the "Dominant Tenement." The property described on Exhibit "A" is hereinafter referred to as the "Servient Tenement". Grantor hereby reserves (for the benefit of Grantor, the Dominant Tenement, and Grantor's successors and assigns) from the grant of the Servient Tenement to Grantee a perpetual easement – appurtenant to the Dominant Tenement – over the Servient Tenement – of the right to receive and enjoy light, air, and scenic and unobstructed view as follows:

1. No residence, structure, and/or building of any kind shall (except as allowed under paragraph 2 below) be constructed, allowed, and/or permitted to exist in the portion of the Servient Tenement that lies within One Hundred Forty (140) feet from the west boundary of the Servient Tenement, which portion of the Servient Tenement is described on Exhibit "C" attached hereto and hereby incorporated by reference and is hereinafter referred to as the "No Building Area."
2. Subject to the limitations and provisions of paragraph 3 below, the easterly Twenty-Five (25) feet of the No Building Area (which portion of the No Building Area is hereinafter referred to as the "Limited Development Zone") may be used for structures (such as a pool, pool equipment, decks, and fencing) which do not exceed ten (10) feet in height above "Ground Level" (which is hereby defined as the surface level of the (a) concrete patio or (b) decking around a pool constructed in the Limited Development Zone).
3. No residence, structure, tree, shrub, improvement and/or other physical object of any kind (natural or man-made) shall be constructed, allowed, and/or permitted to exist on the Servient Tenement above a horizontal plane which is 443.95 feet above mean sea level (this horizontal plane is hereinafter referred to as the "Height Limit").
4. The Grantee further agrees that, in order to maintain the scenic viewshed from the Dominant Tenement over and across the Servient Tenement, no tree which exists in the Limited Development Zone on the date that this Grant Deed is recorded may be removed from the No Building Area.

Any unauthorized structure located in the No Building Area and/or any obstruction of view above the Height Limit shall be considered a material and unauthorized interference with the Grantor's right and easement reserved by this Grant Deed and shall be removed upon demand at the sole expense of the Grantee, and Grantee's successors and assigns.

Grantor

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

The undersigned Grantee hereby agrees:

1. To accept the grant of the Servient Tenement subject to the terms of this Grant Deed;
2. To comply with the terms of this Grant Deed;
3. That in the event of any violation of the terms of this Grant Deed the Grantor – in addition to any other remedies – shall have the right to enjoin and abate the violation;
4. The Grantor shall be entitled to recover reasonable attorneys' fees in connection with any legal proceeding to enforce the terms of this Grant Deed.
5. That in the event any part of this Grant Deed is determined to be unenforceable, the remainder of the terms of the Grant Deed will nevertheless remain valid and enforceable.
6. The terms of this Grant Deed shall be enforceable against all subsequent owners of the Servient Tenement.

Grantee

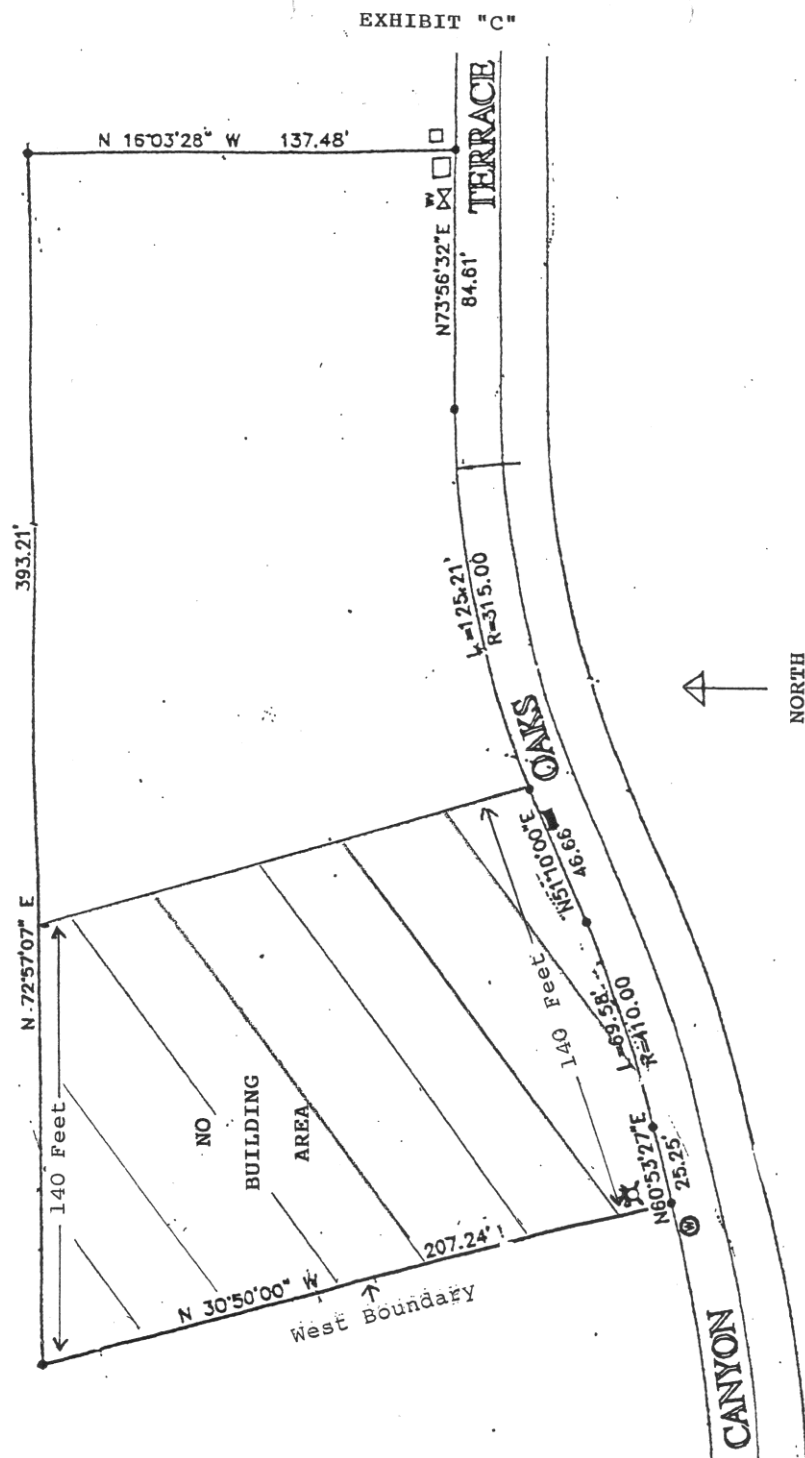
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Dated: \_\_\_\_\_

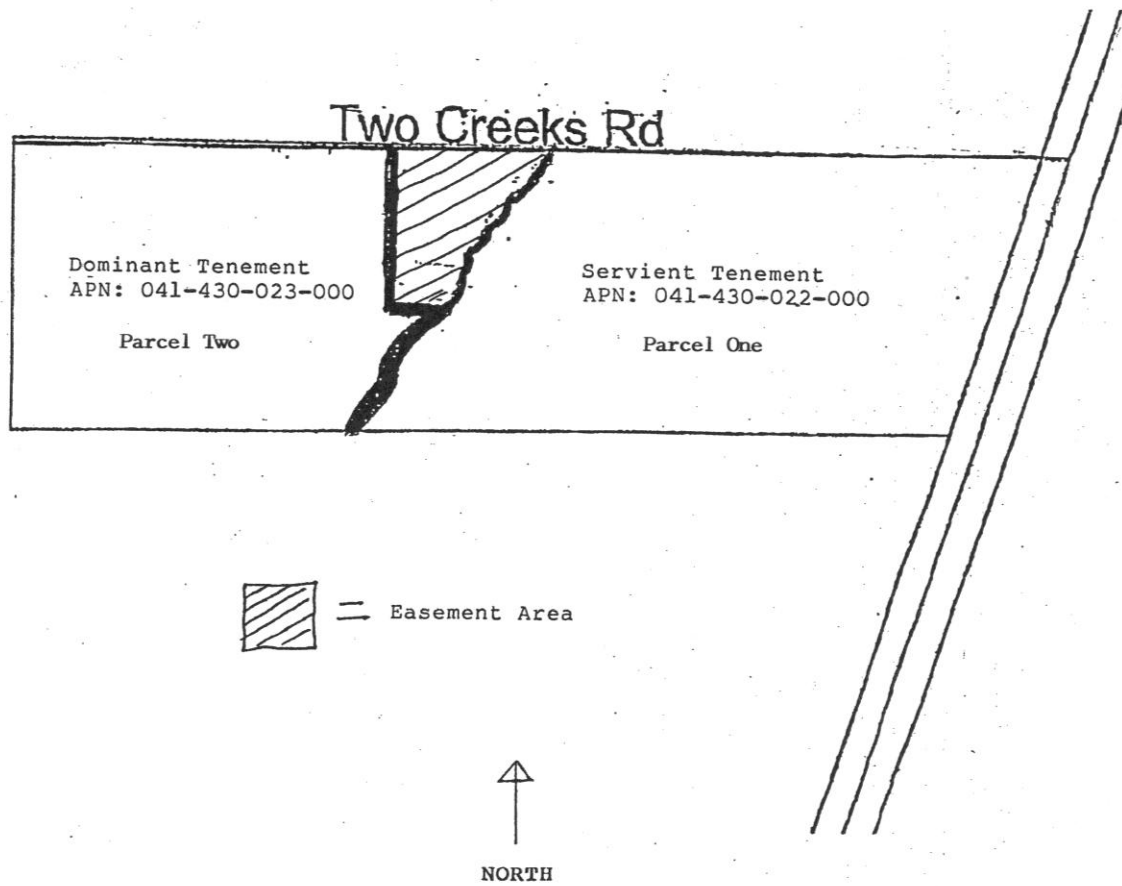
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## Appendix B



## Appendix C

EXHIBIT "C"



## Appendix D

### Grant Deed

We, \_\_\_\_\_ (as the "Grantor") hereby grant to \_\_\_\_\_ (as the "Grantee") the real property located in the County of Butte, State of California, described on Exhibit "A" attached hereto and hereby incorporated by reference.

Grantor is the owner of the real property located in the County of Butte, State of California, described on Exhibit "B" attached hereto and hereby incorporated by reference; said property is hereinafter referred to as the "Dominant Tenement." The property described on Exhibit "A" is hereinafter referred to as the "Servient Tenement."

Grantor hereby reserves (for the benefit of Grantor, the Dominant Tenement, and Grantor's successors and assigns) from the grant of the Servient Tenement to Grantee a perpetual easement – appurtenant to the Dominant Tenement – over the Servient Tenement as follows:

1. In order to maintain the scenic viewshed from the Dominant Tenement over and across the Servient Tenement, no residence, structure, building and/or improvement of any kind shall be constructed, allowed, and/or permitted to exist in the portion of the Servient Tenement which is depicted on Exhibit "C" attached hereto and hereby incorporated by reference and which is hereinafter referred to as the "Easement Area"; the legal description of the Easement Area is attached hereto as Exhibit "D" and is hereby incorporated by reference. The provisions of this paragraph 1 shall not be construed or interpreted to prevent the exercise by the Grantor of any of the rights specified in paragraphs 2 through 6, inclusive, below.
2. Grantor shall have the exclusive right to utilize the entirety of the Easement Area for ingress and egress, including but not limited to vehicular and roadway purposes.
3. Grantor shall have the exclusive right to utilize the entirety of the Easement Area for utilities, including but not limited to the installation of underground utilities.
4. Grantor shall have the exclusive right to the entirety of the Easement Area for receiving and discharging water, including the right to flood the land.
5. Grantor shall have the exclusive right to all minerals on and under the entirety of the Easement Area.
6. Grantor shall have the exclusive right to use the entirety of the Easement Area for pasture.

Any unauthorized structure, building, and/or improvement located in the Easement Area and/or any obstruction of view in the Easement Area shall be considered a material and unauthorized interference with the Grantor's rights reserved by this Grant Deed and shall be removed upon demand at the sole expense of the Grantee, and/or Grantee's successors and assigns.

Grantor

Dated: \_\_\_\_\_

The undersigned Grantee hereby agrees:

1. To accept the grant of the Servient Tenement subject to the terms of this Grant Deed;
2. To comply with the terms of this Grant Deed;
3. That in the event of any violation of the terms of this Grant Deed the Grantor – in addition to any other remedies – shall have the right to enjoin and abate the violation;
4. The Grantor shall be entitled to recover reasonable attorneys' fees in connection with any legal proceeding to enforce the terms of this Grant Deed.
5. That in the event any part of this Grant Deed is determined to be unenforceable, the remainder of the terms of the Grant Deed will nevertheless remain valid and enforceable.
6. The terms of this Grant Deed shall be enforceable against all subsequent owners of the Servient Tenement.

Grantee

Dated: \_\_\_\_\_