CHAPTER 22
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CHAPTER 22
STANDARD CLAUSES

22.01 GENERAL

Since it is not practical for each deed or easement to be reviewed by Legal Counsel, certain standard clauses are provided which, when approved, need not be further reviewed. Where there is a proposed revision in a standard clause, it shall be reviewed by Legal Counsel and the Right of Way Manager prior to adoption. Likewise, when an unusual situation is encountered Legal Counsel should be consulted for proper handling.

It is essential that easements be obtained for a specific stated purpose, accurately located on plans or plats, and carefully defined in their descriptions. This applies with particular emphasis where it is necessary to acquire easements by eminent domain. If the easement could revert under certain circumstances, the reverter clauses should specifically set out the conditions.

22.02 CLAUSES IN DEEDS

If the covenant is an obligation or reservation that will run with the land and continue to be a legal incident to title, it will be included in the deed.

22.03 CLAUSES NOT IN DEEDS

Agreements involving things to be done by either the grantor or the State, and which will be fulfilled and satisfied by performing the obligation, are not included in the deed. If payment is involved, the item will appear on the payment document. Payment is subject to the fulfillment of the agreement on the part of the grantor.

22.04 SLOPE EASEMENT

In rural areas it is generally desirable to acquire in fee areas required for slopes because of the continued need for maintenance of slopes and to provide for proper drainage. In many areas the extra cost of removing and replacing fence and providing temporary fence during construction in case of an easement lends additional support to a taking in fee in rural areas.

Occasionally in rural areas and often in urban areas it is advantageous to maintain a uniform width of right of way through subdivided areas or areas with prospects for early subdividing. In those circumstances it may be desirable to acquire permanent easements beyond the uniform width taking in fee to provide for slopes where a substantial saving can be made over a taking in fee. In cases where a permanent easement is acquired, a reversion clause may be included to terminate the easement in the event the owner agrees to change the level of the land in the easement to approximate the elevation of the highway grade.

Such a slope easement would:

".....grant unto the State of Nebraska, its successors and assigns, the right to construct, use, and maintain on the land herein described, such slopes as are necessary to retain and support ("the highway" for fill slopes) ("adjacent property" or cut backslopes); it being agreed by the parties hereto, however, that
at such time as the contour of the land over which this easement is granted, is changed so that the easement required for slopes is no longer necessary to retain, support, or protect highway construction within the area conveyed in fee simple, then this easement for slopes shall cease to exist”.

22.05 CHANNEL EASEMENT

In situations where the plans provide for a change in the location of a channel for drainage purposes, it may become necessary to reenter the area to maintain a clear channel to repair or provide bank protection devices, or to maintain associated dikes. In such cases, a permanent easement is desirable, however, circumstances may require a reversion clause. In any event it is necessary to clearly state the purpose of the easement and the limitations placed upon the continued use of the easement area by the grantor.

In such an easement, "the said party of the first part....in further consideration that the premises herein conveyed shall be for channel purposes only (and the abandonment of the herein conveyed premises for channel purposes shall render this conveyance void and cause said premises to revert to the grantor....heirs and assigns) hereby grants, conveys, remises, releases, and quitclaims unto the party of the second part and its successors and assigns the following described real estate situated in....county and the State of Nebraska."

The easement should then include a paragraph following the description of the area conveyed to describe further the purpose of the channel and the limitations of its use by the grantor. For example:

"The channel purposes above described shall mean that the grantee shall have the right to discharge drainage waters in the channel to be constructed by the grantee. It being expressly understood by and between the parties, that if the grantor,...successors, heirs, or assigns develop this area to some use other than one now existing, they shall have the right, subject to the approval of the grantee, to erect or construct a structure or structures of sufficient dimensions and capacity to handle said drainage waters, in order that they may effect a proper and an orderly development of said area, both for the flow of traffic and the scenic enhancement of said area. It being expressly understood by and between the parties that the location, size, and capacity of said structure or structures shall be approved by the grantee, before any such work is commenced, and that the grantee shall then relinquish said easement and grantor shall grant a new easement to the relocated drainage facilities, if the circumstances so require. The approval of the grantee shall not in any case be unreasonably withheld. Nothing contained herein shall prevent the grantor....successors, heirs, or assigns from using the land for roadway and parking purposes, so long as same does not interfere with the grantee’s easement for channel purposes, as above described."

The foregoing would permit, subject to design approval by the Department, the construction of crossings of the easement area, or the construction of a storm sewer so long as such construction did not interfere with the free flow and discharge of drainage waters.

In some circumstances a simpler outline of governing conditions may suffice, such as:

"Use by the Grantor for purposes which will not interfere with the free flow of the proper discharge of drainage will be permitted. In the event the grantor..."
constructs a storm sewer in a manner satisfactory to the State, to replace the open channel constructed by the State, the easement shall terminate and be null and void.

22.06 CHANNEL CLEANOUT

When concrete box culverts or pipe culverts are constructed or extended it is frequently necessary to modify the channel or ditch leading to and from the culverts to conform to the culvert location and to improve the entrance and discharge of water to and from the culvert by "cleaning out" or enlarging and straightening the channel for short distances from the ends of the culvert.

A temporary easement is sufficient to provide the authority for the Department's employees or contractors to enter the land for the above purpose. A statement should be added to a temporary easement to the effect that the easement terminates upon the completion of the project or when mutually desirable, a definite date may be given for the termination of the easement.

22.07 RETAINING WALL

When the design requires a retaining wall and a part of the structure occupies an area beyond the fee taking or permanent right of way line, it is necessary to acquire a permanent easement for the area occupied by that part of the retaining wall. If condemnation is necessary, the condemnation petition shall also include a provision for a temporary easement to provide an area beyond the permanent easement as a working area for the construction of the wall.

The condemnation petition shall include a provision for "a permanent easement for the right to construct, use, and maintain a retaining wall in accordance with plans for Project No. __________ within an area described as...." (and if condemned) and a temporary easement beyond the permanent easement to provide a working area for the construction of the retaining wall and backfilling behind the wall. Upon completion of the highway project all rights to utilize the temporary easement area shall cease to exist.

If the total offer is acceptable to the owner, provision for the temporary easement may be incorporated in the contract for right of way.

22.08 CONSTRUCTION EASEMENT

Temporary easements to permit the use of property for a period not to exceed the duration of the project are generally applicable to items to be constructed outside of the permanent right of way for the use of the owner or the public, such as but not limited to the following:

A. Replacement of existing sidewalk.
B. Construction of new sidewalk.
C. Right to deposit or dump earth or materials on the property.
D. Replacement of existing driveway.
E. Constructing new driveway.
F. Right to construct temporary facilities to be used for the duration of the project such as shoo-fly or detour roads and culverts.

The temporary easements may be acquired by contract agreement for the duration of the project.

22.09 DRIVEWAY EASEMENT

A permanent easement is required when it is desired to provide access to two properties over one driveway during current construction or at some future time when plans will have been completed for development for one or both of the properties. It is necessary in this situation to obtain a driveway easement from each of the adjoining owners to provide free access to each owner.

Such an easement shall include a clause "....the premises herein conveyed shall be for (the purpose of providing unrestricted access to the highway at station....) or, in the case of two adjoining commercial or otherwise improved properties, (driveway purposes only) (and the abandonment of the herein conveyed premises for ....purposes shall render this conveyance void and cause said premises to revert to the grantor,.....heirs and assigns) hereby grant, convey, remise, release, and quitclaim unto the said second party and its successors and assigns the following described real estate...." 

22.10 PORTION OF STRUCTURE TO BE REMOVED (CONDEMNED)

When only a portion of a building is within the limits of the right of way to be acquired, the entire building is acquired unless the remainder is an economic remainder and a saving can be made by removing only a portion. The removal of the encroaching portion only would leave the interior exposed to the elements, and the remaining portion could be subject to considerable damage in the removal and provision would have to be made for protection of the remainder during removal and reconstruction operations.

While it is highly desirable to reach an agreement with the owner for compensation for the owner for removing a portion of a building, it may be necessary on rare occasions to acquire a portion of the building only, through eminent domain. If condemnation is to be filed, the following clause should be added to the notice:

"....to include fee title to those portions of any and all buildings and appurtenance now or hereafter located within the limits of the above described tract, and for the right of ingress and egress by official representatives of the State or its agents on such areas of land adjoining and within said buildings and appurtenances as may be necessary for the purpose of removing the portions acquired and to provide temporary lateral and vertical support for the remaining portions of the building."

22.11 ENTIRE BUILDING ACQUIRED-STRADDLING RIGHT OF WAY LINE

Whenever a portion of a structure is located within the limits of the right of way tract to be acquired but for economical reasons the entire building is acquired, the following clause shall be added to the deed, particularly to provide for the right of ingress and egress on abutting land for removal operations.
"The herein named consideration includes full compensation for any and all buildings, fixtures and appurtenances, and contents remaining upon surrender of occupancy, which are now or hereafter located partially or wholly within the lands herein described, and for the right of ingress and egress on the lands adjoining and underneath said buildings for the purpose of viewing, selling, and removing said buildings, fixtures, appurtenances, and contents. Said right of ingress and egress is to expire within...after the property is acquired".

22.12 RESTRICTIONS IN CONVEYANCES OF EXCESS LANDS

Careful review is necessary whenever excess land is disposed of for assurance that the desired restrictions or conditions are incorporated in the conveyances of such lands in order that their use will be consistent with the use of neighboring tracts adjacent to the highway.

Conditions and restrictions which should be considered for incorporating in the deed include but are not limited to the following:

"It is expressly intended and agreed by and between the parties hereto that:

A. There shall be no ingress or egress between the above described lands and the highway currently designated ....except at previously authorized points of access.

B. No advertising signs or billboards of any type shall be erected, located, or maintained on the above described lands.

C. The above described lands shall not be used for the accumulation or storage of junked automobiles or parts thereof, or other salvage materials.

D. Lands sold to any public agency shall carry the non-discrimination clause listed below:

(1) The grantee, (its or his/her) heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree as a covenant running with the land that in the event facilities are constructed, maintained, or otherwise operated on the said property described in this deed for a purpose for which a Department of Transportation program or activity is extended or for another purpose involving the provision of similar services or benefits, the grantee shall maintain and operate such facilities and services in compliance with all other requirements imposed pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 2l, Nondiscrimination in Federally-assisted programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.
(2) The grantee, (its or his/her) heirs, personal representatives, successors in interest and assigns, as a part of the consideration hereof, does hereby covenant and agree as a covenant running with the land that (1) no person, on the basis of race, color, religion, sex, national origin, or any physical handicap, shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over or under such land and the furnishing of services thereon, no person, on the basis of race, color, religion, sex, national origin, age, or any physical handicap, shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the grantee shall use the premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally-assisted programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act of 1964, and as said regulations may be amended.

E. Lands leased to any public agency and individuals shall carry nondiscrimination clause listed below:

The Lessee, as a part of the consideration hereof, does hereby covenant and agree that (1) no person, on the basis of race, color, religion, sex, national origin, age, or any physical handicap, shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over or under such land and the furnishing of services thereon, no person, on the basis of race, color, religion, sex, national origin, age, or any physical handicap, shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the Lessee shall use the premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally-assisted programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

These covenants, burdens, and restrictions shall run with the land and shall forever bind the grantees, their heirs, successors, and assigns."

For future protection of highway facilities and operations, it may be necessary to include in a deed other conditions or restrictions such as those relating to drainage, maintenance, line of sight, etc.