The Road Not Taken
Land Use and Easement Rights

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Ms. Goldstein is a solo practitioner in Westlake Village, California. Now with over 38 years in practice, she represents her clients primarily in real property access issues including easements and boundaries rights, land use, and development matters, handling both their transaction and litigation needs.

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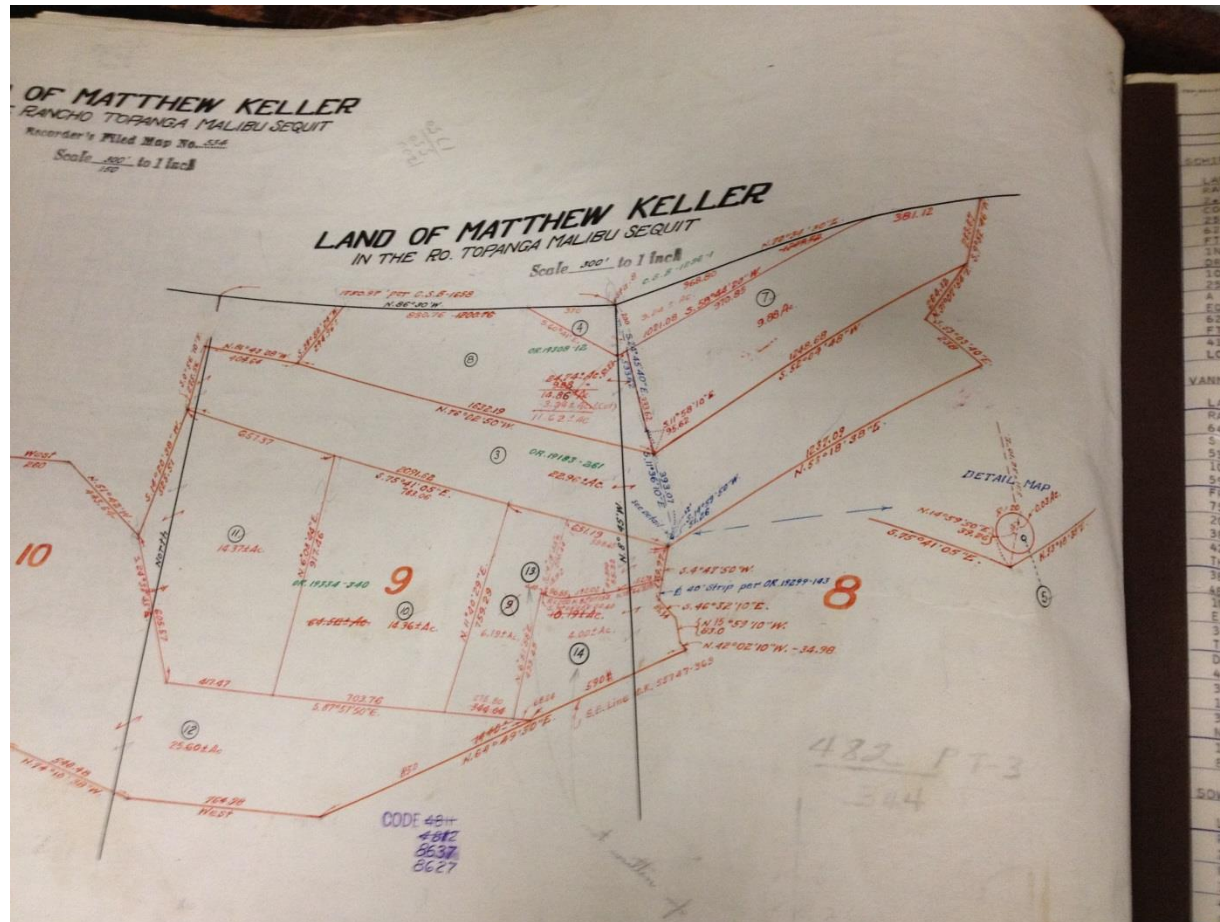
WHERE TO START?

An encroachment or boundary dispute may violate local building, zoning, and planning laws as well as any private conditions, covenants, and restrictions (referred to as CC&Rs) imposed on a property.

Easements - Creation

Easements can be created in many different ways, including by contract, conveyance, statute, or implication (prescription, necessity, equity).

Tracing Ownership



Easement by Reference to a Subdivision Map

<u>Danielson v. Sykes</u> (1910) 157 Cal. 686

Plaintiff and Defendants where “across the street” neighbors in a subdivision of the resort in Santa Barbara, California known as “Miramar”. This portion of Miramar was subdivided in 1893 by the recording of a map which showed an alley directly opposite to Plaintiff’s property and adjacent to Defendants’ property. Defendant built a fence across this alley and Plaintiff sued to enjoin this obstruction. The trial court denied this injunction and the California Supreme Court ordered that this denial be reversed. The Supreme Court held that Plaintiff had the right to use the alley based on the developer’s recordation of a map which showed the alley as part of the subdivision.

SCOPE OF EASEMENT CREATED IN SUBDIVISION MAP

"When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys it necessarily implies or expresses a design that such passageway shall be used in connection with the lots and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed and acknowledged by the owner is equivalent to a declaration that such right ***is attached to each lot*** as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot. Such we understand as the foundation for the rule first above stated." (Danielson v. Sykes, supra, 157 Cal. 686, 690.) [Emphasis added.] That holding means that even though the alley did not abut Plaintiff's lot, she had the right to use the alley:

"It is claimed on behalf of the defendants that this private right of way is limited to the use necessary for ingress and egress and that it embraces only the street which abuts upon the particular lot in question and such other streets as may lead therefrom to some public highway or public place. There are decisions in other states which place these limits upon the private easements, and in section 247 of Jones on Easements, the rule is so stated. The decisions in this state do not recognize such distinction, and we do not think it is founded in good reason." (Danielson v. Sykes, supra, 157 Cal. 686, 690.)

Appurtenant Easement Part of Purchase Price

"The controlling question of law is found in *Prescott v. Edwards,* 117 Cal. 298 [49 P.178, 59 Am.St.Rep. 186], where (p. 304) the Supreme Court said:

'The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the land but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but as appurtenant to it an easement in the streets and in the public grounds name, with an ample covenant that subsequent purchasers should be entitled to the same rights.'" (Day v. Robison, supra, 131 Cal.App.2d 622, 623-624)

EASEMENTS—Definition

An easement is a right to make limited use of property belonging to another.

Main St. Plaza v Cartwright & Main, LLC (2011) 194 CA4th 1044, 1053.

ACCESS RIGHTS/EASEMENTS

EASEMENTS

Right to Use property of another – subject to terms of grant

Most easements run with the land

It is a non-possessory restricted right that is less than ownership

Easement holder (dominant tenement) cannot transfer easement to third party

NON-EXCLUSIVE USE

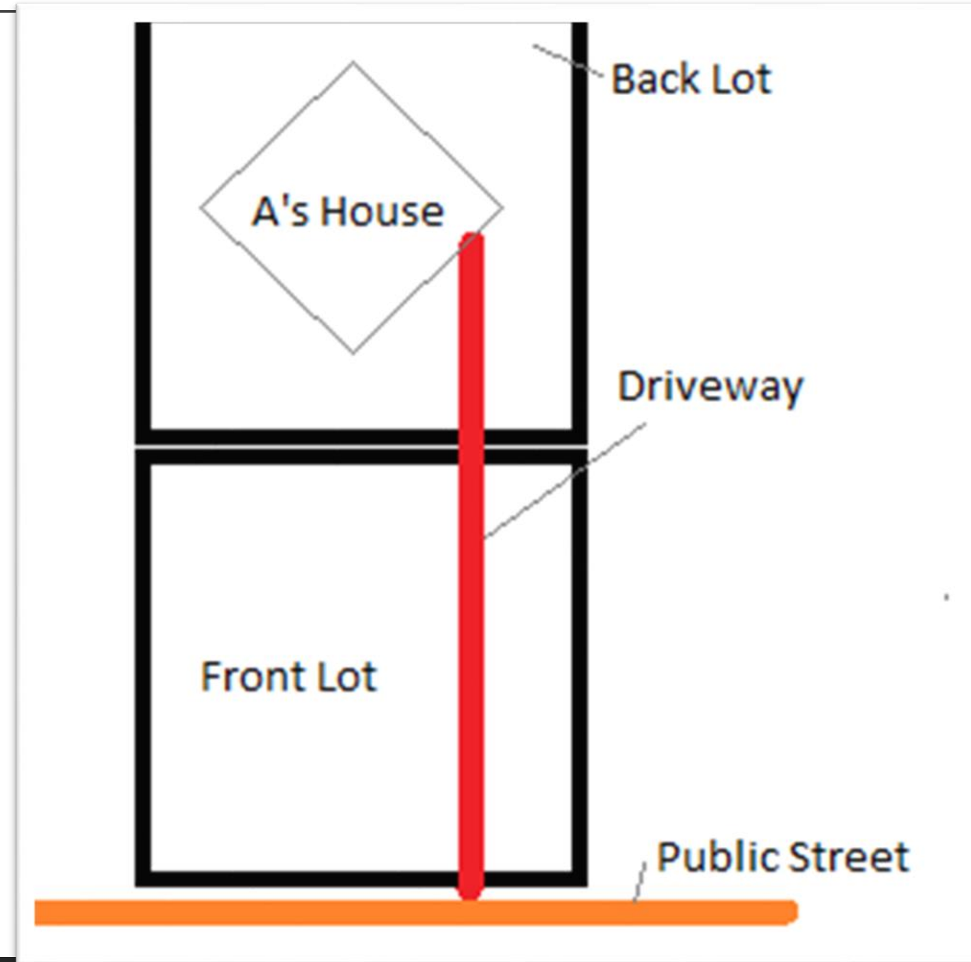
99% of easements are non-exclusive

Land owner (servient tenement) retains all rights not granted away

Land owner can continue to use the easement and can grant to others

Land owner cannot prevent use by easement holder

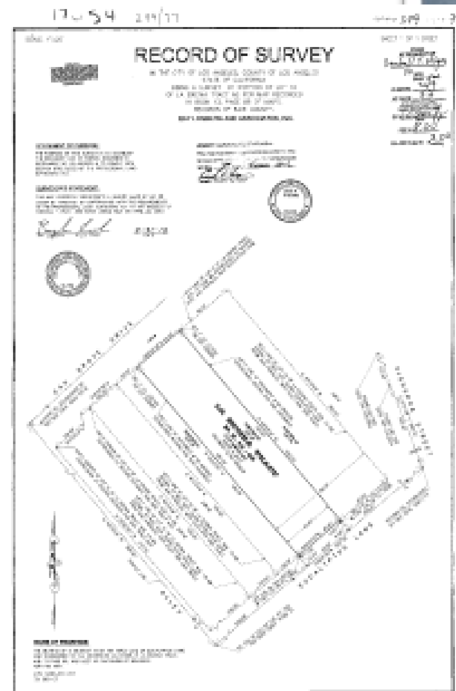
BOUNDARIES
WALLS, FENCES, DRIVEWAYS



BOUNDARIES—Joint Driveways

BOUNDARIES—Walls and Fences

Boundary and encroachment disputes often arise over fences, hedges, structures, walkways, driveways, walls, landscaping, and other improvements when they are placed at a location other than the true property boundary.


RECORD OF SURVEY

Sometimes no one is aware that an apparent boundary is incorrect until one property owner decides to replace or construct improvements near the perceived boundary.

Easements – Retained Rights

The fee owner retains the right to use the land for any and all purposes that do not prevent use of the easement for the uses granted in the easement.

Easement or Estate

In *Raab v. Casper* (1975) 51 Cal. App. 3d 866, the dominant tenant built a 25’ by 35’ cabin entirely on the servient tenant’s land and a family home on a third of the servient tenant’s land. The court reasoned: “In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface. (citations) 'If a conveyance purported to transfer to A an unlimited use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement.' (citation) ‘... defendants had built a 25- by 35-foot cabin entirely on plaintiffs' land, at its northwest corner near the northerly end of the common boundary; toward the southerly end of the common boundary, defendants had built a family home, approximately one-third of the premises being located on plaintiffs' land.’” (*Id* @ pp. 876-877)

Exclusive Use Not Normally Easement

In Kapner v. Meadowlark Ranch Ass'n (2004) 116 Cal. App. 4th 1182, the dominant tenant installed a fence, gate and driveway portions of each were on the servient tenant's land. The court reasoned: "When Kapner purchased his property, it was unimproved. By November of 1987, he had completed improvements including a house, driveway, and gate and perimeter fence. The county issued a certificate of occupancy on November 20, 1987. In 2001, the MRA retained a surveyor to survey the ranch's roadways. The survey showed that some of Kapner's improvements, including portions of his driveway, gate and perimeter fence, encroached onto the 60–foot wide roadway parcel. . . . But Kapner's use of the land was not in the nature of an easement. Instead, he enclosed and possessed the land in question." (*Id*. @ 1186)

By excluding servient tenant, dominant takes exclusive control which is contrary to nature of an easement.

EASEMENTS—Landlocked Parcels

Landlocked parcels may obtain an implied easement for access based on:

- Prior use (CC §1104; *Navarro v Paulley* (1944) 66 CA2d 827, 829);
- Reference to existing maps and boundaries (*Tract Dev. Servs., Inc. v Kepler* (1988) 199 CA3d 1374); or
- Necessity (*Hewitt v Meaney* (1986) 181 CA3d 361). Strict necessity required in California.

Easement in map does not require necessity

While common ownership when a property becomes landlocked is an element of a cause of action for an easement by necessity (*Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 700-702), it is not a requirement for an easement by reference to a subdivision map. Indeed, *Tract Development Services, Inc. v. John Kepler*, 199 Cal.App.3d 1374, 1382, specifically states that an easement by reference to a subdivision map is not lost . . . because the easement is not necessary for access to the dominant tenement." Necessity is not an element for an easement included in a subdivision map.

Easement by Balancing of Hardships

The courts have repeatedly quieted title to easements based on a balancing of the hardships. *See Christensen v. Tucker* (1952) 114 Cal.App.2d 554; *Miller v. Johnston* (1969) 270 Cal.App.2d 289,303-308; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 237-239; and *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749.

The courts have balanced the hardships to quiet title to easements and to create rights of way. *See Field-Escandon*, *supra*, 204 Cal.App.3d 228, 237, "The doctrine of balancing the relative hardships of the parties may be applied to grant an injunction or to quiet title to an easement," and *Miller v. Johnston, supra*, 270 Cal.App.2d 289, 306. This doctrine applies to roads as well as to structures.

The courts' balancing of the relative hardships has been guided by the following factors: the "good faith" use of the disputed area by the dominant tenant; the harm to the dominant tenant if the use is not allowed; and the relative hardship among the owners of the dominant and servient tenements. *See Field-Escandon*, *supra,* 204 Cal.App.3d 228, 237-239; and *Miller v. Johnston, supra*, 270 Cal.App.2d 289, 306.

HYPOTHETICAL 1: Rural Subdivision

In the 1940's and 50's, a subdivision was created with large, high-end lots, many with views of the Pacific Ocean.

The master developer recorded 50-ft wide easements providing for internal street access throughout the development and granted use to owners of the lots within the HOA.

HYPOTHETICAL 1: Rural Subdivision - continued

Many years passed as members of the HOA bought and sold houses and lots treating the paved 20-foot width of the internal streets as accurate and the edges of the streets as the property boundaries for the lots adjacent to the interior streets. Unbeknownst to them, the internal 20-foot streets were not built out to their maximum described width.

Over time, some property owners began building permanent improvements within the easement. HOA demands removal and owners claim right to keep improvements

What are the primary legal issues?

What alternatives for settlement are present?

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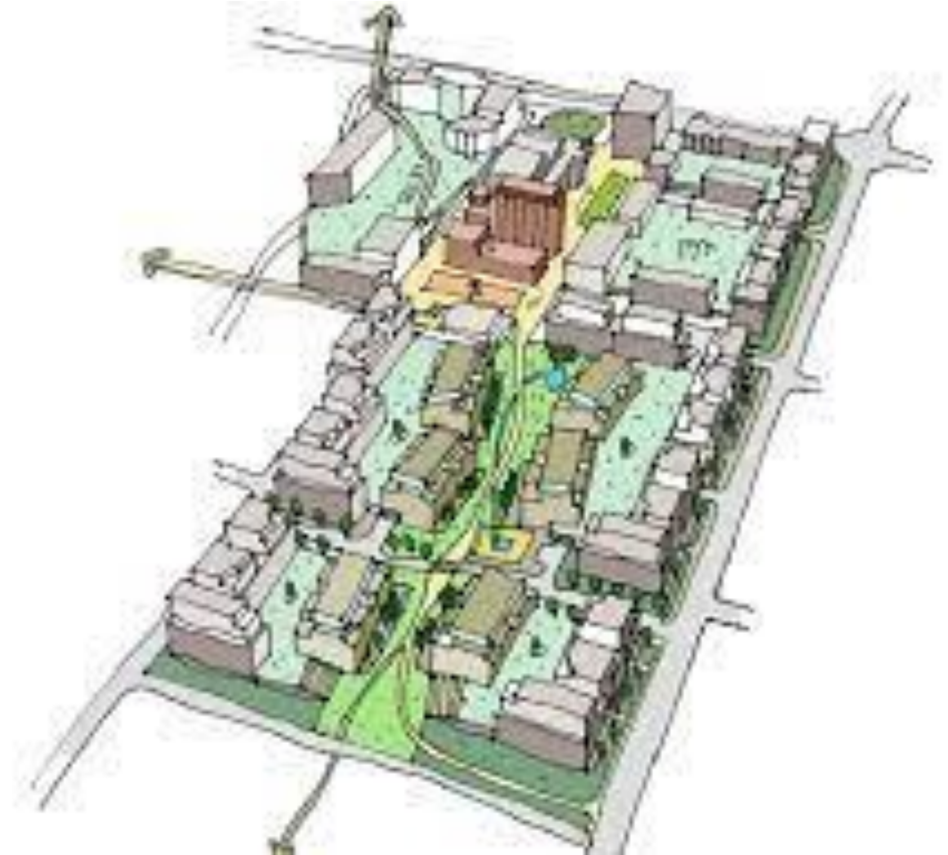
HYPOTHETICAL 2: Suburban In-fill Subdivision

As urban sprawl continued its path eastward towards the heart of the Inland Empire, agricultural lands in one town were developed in a sporadic manner and converted into various uses, including a private golf course, neighborhood retail commercial and light industrial. The area is also a major equestrian center with two-acre residential lots for equestrian uses. Numerous riding trails traverse the undeveloped land.



HYPOTHETICAL 2: Suburban In-fill Subdivision – cont.

The town wishes to upgrade its image and amends its zoning to permit a residential subdivision near the golf course and the equestrian areas. The owners of the private golf course and the equestrian home owners mounted a scorched earth campaign to defeat the zoning change, employing arguments grounded in CEQA, the Subdivision Map Act, the Government Code and the Water Code. After a fierce approval process, the city council voted to approve the change in zoning. Soon thereafter, a developer purchases several large parcels of agricultural land to construct a high-end residential community.

Not done with their fight, numerous special interest groups opposed to urban sprawl file suit to block development of the residential subdivision. Some of the causes of action involve claims of pre-existing easement rights based on their open use of property owned by others for horse trails, hiking and other forms of recreation. The owners of the agricultural land live in another part of the state and rarely visit their land holdings.

What facts and legal theories do the developer and the opponents each need to prevail at trial?

SURCHARGE

Easement owner cannot ***surcharge*** the servient tenement. When exercising the rights to use an easement, the owner of the easement must give due regard to the rights of the owner of the servient estate. The owner must use the easement in the manner that imposes the least burden on the servient tenement. *See* 6 Miller & Starr, *Cal. Real Est.* § 15:66 (4th ed.)

"Furthermore, if the scope of the servitude is exceeded, that is, ***surcharged***, the lower neighbor will have a claim against the upper owner." *See Locklin v. City of Lafayette* (1994) 7 Cal. 4th 327, 349 (emphasis added).

An easement created by express grant or reservation is subject to the general rules applicable to all easements that restrict the nature of their use and prohibit ***surcharges*** of the servient tenements. *See* 6 Miller & Starr, *Cal. Real Est*. § 15:56 (4th ed.)

" Once the extent of an easement's use has been established, the easement owner cannot subsequently enlarge its character so as to materially increase the burden on the servient tenement.' (citation)". *See Rye v. Tahoe Truckee Sierra Disposal Co., Inc.* (2014) 222 Cal. App. 4th 84, 91-92.

Hypothetical 3

Easement

v.

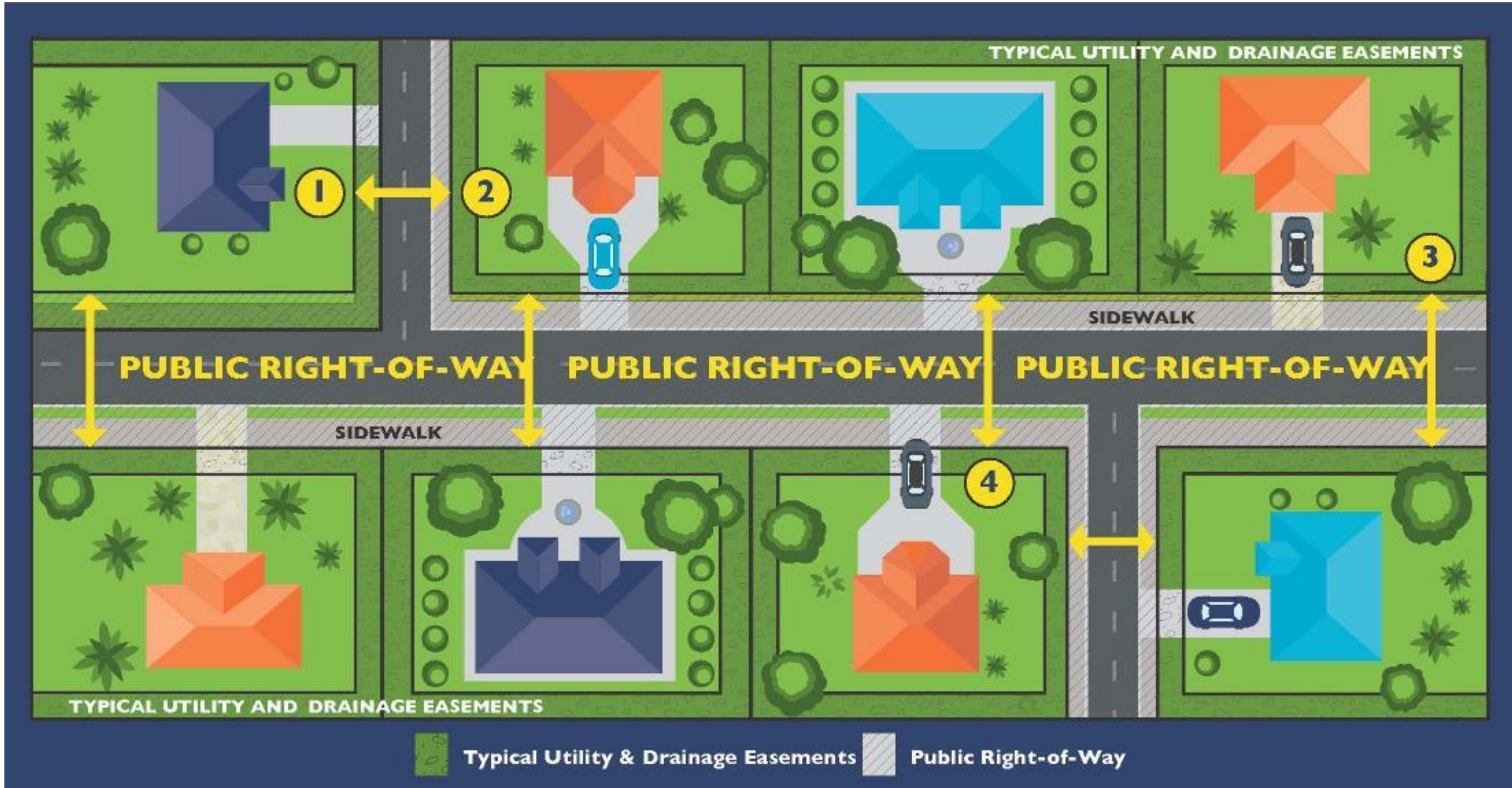
Right of Way

An owner of several contiguous agricultural lots, totaling 1000 acres, wants to grant a right to use a small portion of the property for religious events to a charity; the owner records an agreement for that use specifying a 5-acre portion adjoining a public road. Use is limited to 100 persons in attendance,

The owner had previously granted an easement to an adjacent owner for secondary access over the same property. The property is sold. The new neighbor then starts using the property for regular events to which many hundreds of people are invited. Can the charity stop this increased use?

Is the answer different if the previous grant was to a public entity?

Surcharge?


TYPICAL UTILITY AND DRAINAGE EASEMENTS
1
2
3
SIDEWALK
PUBLIC RIGHT-OF-WAY
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SIDEWALK
4
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