

WHEN TO USE A LEASE, LICENSE, EASEMENT

In spite of the differences between a lease of real property, a license and an easement, it is sometimes difficult to determine which one to use in a specific situation. An understanding of the characteristics of each makes the determination easier.

CHARACTERISTICS

LEASE. A lease is an agreement in which the landlord agrees to give the tenant the exclusive right to occupy real property, usually for a specific term and, in exchange, the tenant agrees to give the landlord some sort of consideration. A lease transfers to the tenant a leasehold interest in the real property and, unless otherwise provided in the lease, a lease is transferable and irrevocable.

LICENSE. A license gives the permission of the owner to an individual or an entity to use real property for a specific purpose. Unlike a lease, it does not transfer an interest in the real property. It is personal to the licensee and any attempt to transfer the license terminates it. It is (usually) revocable and can be either exclusive or non-exclusive.

A facility use agreement (FUA) is a short form license for very limited use of a facility.

Licenses are sometimes buried in other agreements, e.g. a memorandum of understanding. It is highly recommended that a separate license be created whenever a right to use another party's space, usually for a shorter term, is part of a larger relationship. The separate license should be attached as an exhibit to the more general agreement.

EASEMENT. An easement, like a license, gives the permission of the owner to use or prevent the use of the owner's real property. However, unlike a license, it transfers to the easement holder an interest in the real property that encumbers the record title. Easements are classified as either appurtenant (benefiting and transferable with a specific piece of real property) or in gross (personal to the grantee). An easement can be transferred. Unless otherwise specified, an easement is presumed to be permanent and non-exclusive.

To summarize:

| Characteristics: | LEASE | LICENSE | EASEMENT |
|--------------------------------------|--------------|----------------|-----------------|
| Agreement between 2 parties | Yes | No * | No * |
| Conveys an interest in real property | Yes | No | Yes |
| Revocable | No (usually) | Yes (usually) | No |
| Transferable | Yes | No | Yes |
| Exclusive right | Yes | Optional | Optional |

* Although both a license and an easement only require the unilateral permission of the licensor (license) or the grant of the grantor (easement), the University's licenses and easements (when

the University is the grantor) are usually structured as agreements between the licensor/grantor and the licensee/grantee because the University requires the party receiving the permission to agree to other terms limiting or structuring the use, e.g. maintenance, indemnification and insurance coverage.

SELECTING THE APPROPRIATE FORM.

- ◆ If the right to use the property will belong exclusively to the user during the term, even as against the property owner, a LEASE will accomplish that goal.
- ◆ If the use/occupancy of the property will be shared with others during the term, then a LICENSE or an EASEMENT is the proper tool. NOTE: For a LICENSE or EASEMENT to convey the right to exclusive use, it must be specified in the document.
- ◆ If the use is to be long term (like the underground installation of fiber optic cable), an EASEMENT is the appropriate form. If the use is to be short term (like a construction lay down area or a film shoot) or for only part of the time during the term, (like use of a classroom Tuesdays and Thursdays, from 9 – 10 am, for a semester), a LICENSE is most appropriate. If the use is intermittent, the FUA would be appropriate in the latter example.
- ◆ If an owner wants an agreement that his/her view not be blocked by the use of another parcel, such an agreement should be documented with an EASEMENT.

STANDARD FORMS. The Standard Form Lease Agreement, The Regents as Landlord (#L-100) and The Regents as Tenant (#L-101) and the Facility Use Agreement (FUA) are approved for use as a standard form (without review by OGC) when the only changes are business terms.

MINIMUM FORMS

LICENSES. Because licenses are used in such a wide variety of situations and require the addition of specialized language to tailor the license to each individual use, it is difficult to create a form that will not require OGC review. We have prepared the Minimum License, The Regents as Licensor (#Lic-200) and The Regents as Licensee (#Lic-201). Contact RESG for guidance concerning the need for OGC review except for licenses, which employ the minimum form without significant modification for the following uses: construction, construction laydown areas and access over existing streets. RESG has good examples of specialized licenses for various purposes.

EASEMENTS. Easements frequently convey a permanent interest in Regents' property and frequently involve substantial capital investment by the grantee. The Minimum Easement, The Regents as Grantor (#Ease-300) provides a basic form. OGC review is required for all easements except those using the minimum form, without substantial modification, for utilities to serve a campus and access over existing streets.