

SCOTT B. UMSTEAD, P.A.

ATTORNEY AT LAW



Episode 10: An Inconvenient Easement

Call from the Agent: My new client just discovered there is a drainage easement at his residence right where he wanted to have an in-ground pool – is there anything he can do?

The Response: To better explain, this agent is representing a client who is looking for investment property. In the course of a conversation unrelated to the agent's task, the client complained he has a drainage easement in the backyard of his new residence – as luck would have it, it's right where he and his wife want to build a pool. He has been informed he cannot build a pool within the drainage easement area and both he and his wife are noticeably unhappy about it. In fact, the client is in the mood to sue "everyone" (the seller, both agents, the closing attorney and anyone else he can get his hands on).

After-the-fact situations such as this are oftentimes the best teachers of what could have and should have been done beforehand ...

If the client knew when he was buying the property that he wanted to have a pool, he should have told his agent and the agent could then have easily made the client's ability to have a pool a contract contingency. With such a contingency in place, the client could then have done some pre-closing due diligence such as:

- a. Review the Covenants and Restrictions – this would tell him if pools are allowed in the community and will probably identify some (but not all) easements and other areas of non-interference;*
- b. Examine any ARB/ARC guidelines – this would tell him of the applicable appearance and application requirements;*
- c. Order a survey – this would clearly show the existence of the drainage easement; and*
- d. If warranted, have a geotechnical engineer drill soil borings and provide data on soil properties.*

Though outside my purpose today, here's a short footnote about the couple's plight. Naturally, I completely sympathize with their disappointment, but the easement wasn't a secret – it was publicly recorded. Therefore, the notion of suing other contract participants for something the couple could have easily discovered themselves seems thin. They may wish to consult with the holder of the easement to determine whether the easement could possibly be waived or, failing that, whether the easement's purpose might be fulfilled in some other way (i.e. satisfactorily altering the drainage course).