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Explanation of the Terms of the Easement

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Statute of Frauds

Explanation: the statute of frauds requires that all land be in writing with enough description to know 1) the identities of the parties, 2) an adequate description of the land, and 3) a the amount for purchase. Also, the "person to be charged," meaning the person who would be a defendant in a lawsuit, must have signed the writing. Without meeting these requirements, the granted express easement would not satisfy the statute of frauds.

In the formal document we need to be sure to include: Parties, land description (preferably a survey of the easement by a licensed surveyor if not prohibitively expensive), and the price for granting of the easement.

Scope of the easement

Explanation: the easement should have limitations regarding its scope. The scope of the easement is not determined by the way the land is used but by the needs the easement is addressing.

The easement should include the intent of the parties for the use of the easement, strictly for ingress and egress as a driveway into your neighbor's property.

Maintenance and Repair

The requirements for when the easement needs maintenance and repair (who will maintain the road, who will pay to maintain the road, and the same for repair) need to be addressed. We can negotiate with your neighbor about how this will come about, reality check it and make sure it is fair to both sides. If your neighbor will be coming onto the land for the purpose of repair, for example, there should be specified limits to this access. If you decide to hire someone to do this, you should agree on who to hire and how you will apportion payment.

Overburdening the Easement

We also want to make sure that the easement is not overburdened. If your neighbor were to set up business as a bed and breakfast, for example, you would want to have a say in the traffic on the road. If you want to have speed bumps to slow down drivers who may kick up dust, or have a gate for security reasons, you should include this in the negotiations.

Duration

Although appurtenant easements do not have to have a fixed duration, many do. The easement should specify if there is any time in which the easement will terminate. If, for example, there is a change in conditions and there is another access point for your neighbor, would you want the easement to terminate? Easements can also terminate by abandonment (not just an expressed desire to abandon the easement but a physical barrier would indicate this), also if your neighbor were to tell you she no longer wanted the easement and you were to justifiably rely on this to your detriment, it would be

termination by estoppel. So you can see that figuring out termination ahead of time is a wise thing to do.

Formal Document: The scope, use, intent, duration, and maintenance/repair will be expressly laid out in the easement document.

Type of Easement

Explanation: An easement is a nonpossessory use of land of another. It is either in gross or appurtenant.

Easement in gross or appurtenant

In gross is a nonpossessor right to use the land that is conferred on an individual. An easement appurtenant is an easement where one landowner's land is burdened (the servient tenement) by the other landowner (who owns the dominant tenement).

Easements that are appurtenant run with the land or more accurately the benefit and burden continue with the properties and affect subsequent owners. In contrast, if you granted your neighbor a license it would be revocable at will by you. But if your neighbor builds the driveway and suffers economic hardship as a result of the license you could be estopped from revoking the license (similarly to what happened in a well known case called *Rachinbaw*). Given the permanency of a driveway, you should definitely have an easement.

Your easement would be an easement appurtenant which are typically easements for right-of-way (ingress/egress) as yours is. Easements can also be negative easements where the dominant tenement requires the servient tenement to refrain from doing something (light and air easements, for example). Give some thought to whether you would have a need for this from your neighbor while we're negotiating the driveway. Neighbors can often build in such a way or maintain trees that block the view and sunlight from the adjoining properties.

In the formal document: The easement for the driveway is an appurtenant affirmative granted easement.

It is important that you follow through on the granting of the easement and have it memorialized, motorized, and recorded with the county recorder's office as soon as possible. If your neighbor has no other way in and out of her property, she could claim that as a landlocked parcel she has an easement by necessity. An easement by necessity is created when two parcels are owned by the same landowner who sells one of the parcels leaving one without access. If she has absolutely know other way to get onto her property she could claim an easement by necessity and force you to allow her access.

Luckily, you are negotiating with her and have orally agreed to grant her an easement. At this point she could not claim a prescriptive easement. If she had been traveling over your land for a number of years and had an open/notorious (claiming she had a right), hostile to your interests (you opposed her use of the right of way), continuous, and for a statutory period (5-10 years depending on the state) then she could have claimed a prescriptive easement. Since you have orally agreed to an easement, she can no longer claim this.

The following is an example of what the formal easement could look like (with details to be filled in):

Whereas,
Blaze, owner of _____ (APN 111-11-111) commonly known as (address) (Blaze Property--dominant tenement) (legal description attached as Exhibit A hereto and made a part hereof) is desirous of a right of way to and from her property over the property of AEO, said property APN 000-00-000, commonly known as (address) (AEO property--servient tenement) (legal description attached as Exhibit B hereto, and made a part hereof)

And Whereas,
Blaze, given valuable consideration of \$ _____ (\$ _____).

It is hereby granted:
An affirmative express easement appurtenant as a right of way over AEO property--servient tenement is conveyed to the owner, and all subsequent owners of Blaze Property--dominant tenement.

The location of the easement is detailed in the Easement Survey attached as Exhibit C and made a part hereof.

This easement shall not be a floating easement but shall stay within the parameters of the survey. If the area of the easement becomes unusable for its stated purpose of a driveway, then the easement will terminate, and not move to another area of the servient estate unless another easement agreement is formally drawn up, agreed to by both parties, and recorded with the county recorder's office.

Duration of the easement shall be continuous unless the conditions of the properties and surrounding properties make another route of ingress/egress more convenient for the owner of the dominant tenement. In this case, the easement shall cease and the dominant tenement shall gain access to the Blaze Property through other means.

The Easement shall be maintained by a professional contractor who will be chosen by the owner of the servient tenement. The cost of repair and maintenance of the easement shall be split equally between the landowners. The timing of the repair and maintenance shall be at the discretion of the owner of the servient tenement who shall be immediately notified if any repairs or maintenance is needed or will take place.

Dated: _____

Signed:

Signed:

Notary language

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Sponsors' Statement

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The purpose of this bill is to restrict the use of eminent domain when used for economic development of a town.

History & Background of Area of Law.

Police power is general power of state to pass laws for benefit of public which is granted 10th Amendment. States delegate to local government via enabling acts, however the govt power to regulate real property is not unlimited. The 14 Amendment (Due Process Clause) provides that one cannot be deprived life, liberty or property without due process of law.

The 5th Amendment provides for regularity takings - Eminent Domain (condemnation) provides that the government can't take property without just compensation.

In 1987 the Supreme Court held in *Luthern Church* that just compensation must be paid (Government cannot find a way around it) Typically just compensation is calculated by what is the fair market value of the property on date taken. Just Compensation, may include profits of a business which is forced to relocate and/or shut down.

In *Kelo* the Supreme court expanded the term "public purpose" to promote economic development. A large pharmaceutical (RX) company wanted to come into an area of Michigan which was in considerable financial distress after the downturn of the economy and the closing of many automobile manufacturing plants. The area of town in which the condemnation took place was considered blighted and distressed, with many homes and buildings unoccupied, and run down. The RX Company wished to open up a campus in the area for their drug company, that would revive the area economically, and bring employment back locally, as well as create new jobs (and taxes) for the local government. Long term, if the plan had been successful, it may have turned the area around, and improve values of property, and the general economic situation. However, after considerable litigation of *Kelo*, the RX company failed to move build their campus and the area continues over ten years later to be empty, run down, and economically disadvantaged.

In light of the recent decision and upholding of the ruling by the Newgarth Supreme Cou Collinsport, we the legislature would like to propose the following restrictions when cond property for the purpose of economic development.

note To simplify, the use of the term GOV, below refers to any government agency, be county, city or municipal unless expressly stated otherwise.

The following items under proposed Bill 1234

- 1) No power to take property under an eminent domain (ED) action may be assigned to government entity. All takings must be administered by the entity proposing the condemn through contracts supervised by GOV.
 - 2) The Government will be required to calculate and pay the Private party pays 'just compensation' The rate will be the fair market value as of the date of taking. The Govern be required to ascertain that number by using an average of no less than three independ sources, who do not have any other interest in the project to be performed on the land a ED.
 - 3) The Government will review prior to condemning any real property that nor more is t necessary for public use.
 - 4) Any acts condemning real property for economic development will not be commence credible study on the effects, and a plan to ensure harmonious integration of the plan wi current GOV community development plan.
 - 5) Contracts with 3rd party businesses to perform the work may be made following the s GOV procedures. Under no circumstances will a non government entity control the majo project on land acquired by ED.
 - 6) Any private entity who is estimated to financially profit by receiving more than 5% of th gross revenue of the project in any 12 month calendar year will be considered a primary beneficiary of the condemnation act, As a primary beneficiary they entity must publicly d financing plan including any major assets used as collateral for financing and /or how the sourced for the project and ultimately a plan of what their business objective in how it rel condemnation act.
~use similar wording along lines of the Williams Act, which controls corporate mergers a disclosures of major stock holders, resource of capital to purchase securities, and intent be controlling shareholder and merger.
 - 7) No condemnation act may violate fair housing /affordable act. If condemnation was o income or affordable house, and redevelopment plan is to include housing, the same nu units which qualified for subsidizing must be included in the future plan. Further, on any over 3,000 housing units, any low income or subsidized housing unit quantities must be from prior quantity.
 - 8) All takings must be consistent with the City or Counties general 20 year plan. Any tak considered for an upcoming revision to a general plan, must be approved by vote of the as a bill on an upcoming election.
 - 9) A bright line rule must be implemented as to a definition of blight or distress. Building residential neighborhoods which were built prior to 1925, qualify for preservation as histo
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landmarks (HL), unless the area falls under the need for eminent domain for environmental protection, all qualified HL buildings, must not be torn down as part of the redevelopment. Buildings to be restored as close to their original condition, or their earliest condition that can be historically traced to preserve the character of the area. Further, any area over 1sq. mile that has more than 50% HL buildings, any new developments within each individual 1sq mile, must follow an aesthetic scheme to maintain the character of that micro area.

10) An economic study detailing the tax revenue to the GOV and the annual household income and gross revenues of any businesses in an area to be condemned by ED must show in detail the break down of each factor. Further, the general plan of the GOV must be consistent with the economic development of the area to ensure that within 2 years of redevelopment that the area is at minimum on par with the prior economic details (Taxes, income and revenues) and within 5 years of redevelopment the area must be at double it's prior economic level.

While we recognize that there are many useful, and good purposes which may require the government taking of private property, because the fundamental right own property is so important in our constitution, we feel that narrowing the scope of takings for economic development is necessary under the equal protections clause.

This bill if approved shall be applied retroactively to review all takings in last 5 years, to ensure that compensation was properly provided to residents and business owners in condemnation in the state of Newgarth.

Potential Questions and Answer of other Legislative Members

Q1. How will this affect the plan of Big Guy Development Company in it's development in the area of Collinsport?

A1. In review of the facts provided to the court, the committee has concerns regarding whether the residents and Business owners were justly compensated the Fair Market Value as calculated by a consultant retained by an interested party. If the compensation is found not just, BGDV will be required to pay the difference to the plaintiffs.

Q2. Was all of the property taken in Collinsport necessary for public use?

A2. Here approximately 500 acres was taken, which is a little over .75 square miles (or roughly 10 city blocks in each direction). A concern of the committee is to ensure that excessive property is not taken. Given the plan of a football stadium, it's parking, a hotel, businesses condominiums, etc. This seems reasonable for the required footprint.

Q3. Was there an economic study done prior to the taking of the land, regarding taxes currently being paid to the city from the area, vs. the projected tax revenue of the area?

Q3. Yes, and the projected revenue is almost 30 times the amount that was taken in last year by the city for the 'Little Paradise' (LP) area. Because many of the homes in the area are older and fall under 'Prop 13 of Newgarth' which limits the property tax assessment on homes longer than 20 years by an owner, and allows for properties that pass from parent to child or grand parent to child to be exempt from reassessment, many of the residential homes do not generate more than \$100/year in property taxes. Further, because many of the buildings which are local businesses fall under the 'local 1st tax incentive' Property taxes on the buildings were

house the businesses are capped at \$500/year. The Sales and Use tax is also capped at 1% for small businesses in the city limits.

Under the proposed plan, the taxes from projected ticket sales alone are nearly quadruple the hotel occupancy tax is also nearly 6 times last years tax revenue for the area.

Q4. Is the project consistent with the City/County general plan?

Q4. After reviewing last years budget the city planned to launch a campaign to bring new businesses to the area. PHOC optical will be building a factory just outside the "Little Paradise" district which will generate 850 new jobs. Further the renovation of LP and the new businesses development plan (stadium, hotel, etc) will generate approximately 2000 new jobs. Businesses displaced by condemnation will have an opportunity to move into the redevelopment with a stepped down tax basis to encourage small local businesses to remain in the area. Further this incentives for small businesses is hoped to allow LP to maintain it's rich cultural heritage

Q5. What about low income housing?

Q5. Currently the area of LP was comprised of modest -single family homes. As such they do not qualify as low income housing under the current law, and therefore no low income housing is required to be included in the area. The plan to maintain as many local businesses and with the increase of new residents in the area due to PHOC and the luxury condos, the hope is that the business will generate considerable revenue which will allow residents to purchase a home in the near by neighborhood of "almost paradise" which is comprised of moderate single-family homes with a large quantity listed for sale presently.

END OF EXAM