Easements: *Express, Implied and Prescriptive*

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EASEMENTS

An easement is an interest in land through which one individual has the right to use the land of another for a specific purpose. Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 531, 267 N.W.2d 442 (1990). An easement is a liberty, privilege or advantage in land without profit, existing distinct from ownership. Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982). Thus, an easement, having been created, leaves two distinct property interests in the property: the dominant estate and the servient estate. Atkinson v. Mentzel, 211 Wis. 2d 628, 566 N.W.2d 158 (Wis. Ct. App. 1997). The dominant estate enjoys the privileges the easement granted, while the servient estate permits the dominant estate to exercise those privileges. The grantor's property, which is subject to the easement, is often referred to as the "burdened parcel", while the property that benefits from the easement is referred to as the "benefited parcel." Thus, the prospective purchaser of land benefited by the easement will have a very different view from that of the prospective purchaser of land burdened by the easement: the former may seek assurance that the easement remains enforceable and, moreover, suitable to their intended use of the benefited land, but that latter may seek assurance that the easement is non-invasive or unenforceable altogether.

A. Express, Implied and Prescriptive

An easement can be acquired by grant, express or implied, by necessity or by prescription. Braaten v. Jarvi, 347 N.W.2d 279 (Minn. Ct. App. 1984). Requirements concerning the easement's validity and enforceability will vary accordingly.

1. Express easements

The extent of an easement created by conveyance or grant is fixed by the conveyance itself. Bors. v. McGowan, 159 Neb. 790, 68 N.W.2d 596 (1956). As a practical matter, the terms of easements by express grant will not necessarily be specific insofar as the respective rights and duties of the parties affected. It was held that in describing an easement all that is required is that the land that is the subject of the easement be identified and the intention of the parties must be expressed. Miller v. Snedeker, 257 Minn. 204, 101 N.W.2d 213 (1960). However, easements do not necessarily require for their validity a definite statement of their width, dimensions or exact location. Northwest Realty Co. v. Jacobs, 273 N.W.2d 141 (S.D. 1978). The skills of those who prepare and the patience of those who enter into, without first considering potential ramifications, easements by express grant are decidedly mixed. Thus, easements by express grant may yield themselves to eventual disagreement over the scope, uses, and adaptations to which property is to be devoted by the benefited party. In such instances, the instrument creating the easement must be construed, and the intention of the parties will ultimately control. Riverton Farms, Inc. v. Castle, 441 N.W. 2d 405 (Iowa 1994).

2. Implied easements

Where a conveyance does not indicate the grant of an easement in express terms but an easement is necessary for enjoyment of the estate conveyed, an implied grant is sometimes constructively implied. In re State Fire Marshal, 175 Neb. 66, 120 N.W.2d 549 (1963). However, the law does not favor unrecorded servitudes, and strict necessity for the implied easement may be required. Wauben Beach Ass'n v. Wilson, 274 Mich. 598, 265 N.W. 574 (1933). Each case where an easement by implication is claimed must depend on its particular facts. Wymer v. Dagnillo, 162 N.W.2d 514 (Iowa 1968).

3. Prescriptive easements

The title to an easement by prescriptive use is created by operation of law and is independent of any grant, and the law becomes operative solely by reason of the hostile user for the prescriptive period. Alstad v. Boyer, 228 Minn. 307, 37 N.W.2d 372 (1949). An easement by prescription requires adverse use hostile and inconsistent with exercise of the real estate owner's rights, which is visible, open and notorious, under open claim of right, and is continuous and uninterrupted for the period of time required by applicable statute. Ludke v. Egan, 87 Wis. 2d 221, 274 N.W.2d 641 (1979).

B. Utilities

1. Public utility easement descriptions of the land surface, airspace, affected

It has been the practice of some utilities to obtain easements that contain broad descriptions of the servient estate. Thus, the easement instrument may provide that the utility has a right to install and maintain service lines across a wide area, such as an entire quarter-quarter section of the government land survey, and the easement may not necessarily describe the precise perimeter dimensions of the surface or subsurface to which the land's use for electric, telephone or gas transmission may be devoted. At face value, easements of this kind suggest that the utility has a right to use a forty-acre tract of land, an area that is far in excess of that actually used by the utility for the construction of its transmission lines. In localities where easements of this type predominate, the titles of many tracts of land not occupied by transmission lines remain clouded by the recorded electric easement.

2. Confinement to a horizontal corridor

In the event that the location of a right of way was indefinitely described,

the conduct of the parties may determine where the exact location can be. For example, where a landowner has granted a utility company an easement for overhead wires 50 feet in width over a 40 acre tract, but uses as the legal description nothing more precise than the legal description of the entire 40 acre tract, the utility may then have installed the overhead wires at a location that has the farmer's tacit or explicit approval. The easement would therefore encumber an area 25 feet to either side of the wires as actually installed. If, at some future date, the farmer sought to develop the 40 acres as residential property, a question would arise whether the utility's easement clouded the title to the 40 acre tract. The better view is that the precise location of the easement will be determined by the location of the overhead wires as actually constructed. F. W. Woolworth Co. v. Vogelsang, 176 Wis. 366, 187 N.W. 179 (1922). In one case, it was held that the utility company could not relocate wires fifty feet north of their existing location without paying compensation to the landowner. Tennessee Pub. Serv. Co. v. Price, 16 Tenn. App. 58, 65 S.W.2d 879 (1932).

3. Confinement to an elevation

The same question relating to the utility's unilateral ability to move the overhead wires horizontally across the land's surface, can be raised regarding a right to raise or lower the overhead wires. Lowering overhead wires can raise servient estate holders' concerns about safety, and conversely, raising the wires can give rise to claims of unsightly interference with sights or scenic vistas in residential areas. In one case, it was held that where the landowner had acquiesced in the wires' maintenance for seventeen years, the utility had an absolute right to maintain the wires at that level, and the cost of raising the wires would be born by the landowner. Youngstown Steel Prod. Co. of California v. City of Los Angeles, 38 Cal. 2d 407, 240 P.2d 977 (1952). But cf. Westphal v. Kentucky Util. Co., 343 S.W.2d 367 (Mo.1961)

C. Access Easements

1. Changing use of private roads and drives

Easements containing indefinite or overly broad descriptions of the land they purport to encumber are not confined to utilities. Easements for vehicular access to use private roads are commonplace in certain localities. In areas where there is a preponderance of privately owned land not adjoining any public road which depends for access upon private roads or county logging roads, grants of easement or rights of way for ingress and egress, which trace or characterize the route of travel across the lands of others, are highly varied. It is not unusual when examining titles to land in rural areas to encounter easements having a description identifying

merely the quarter-quarter section of the government land survey through which the winding private road or way traverses, and not a perimeter metes and bounds description delineating the edge of the traveled way. The same rules of construction as pertain to utility easements discussed above would apply to easements for ingress and egress. However, instances in which the servient estate holder unilaterally moves the dominant estate holder's lightly traveled drives have occasionally occurred. Does the servient estate holder enjoy the right to unilaterally re-route or shorten a circuitous private way so that the user is confined to a less invasive portion of the real estate? A use by the easement holder of a path outside the calls of their original right of way on what the court determined was, though within a recorded subdivision plat, unenclosed, unimproved land was not prescriptive, and therefore was not a use to which the plaintiffs were entitled. New v. Stock, 49 Wis. 2d 469, 182 N.W.2d 276 (1971).

2. Interference: Is the easement's user entitled to remove encroaching improvements?

Buildings, structures and improvements of various kinds are occasionally constructed within the perimeter of an easement by express grant. (Exhibit 42) Reasons why the improvements were placed, at the risk of damage caused by their removal, by the servient estate holder in a location that encroaches upon the description of the recorded easement sometimes defy explanation. The improvements may have been placed under the mistaken impression that they were outside the perimeter of the easement, or that though within the perimeter, they would not interfere with the easement's use. Will the easement's user, the dominant estate holder, be prevented from enforcing the removal of the improvements? It was held that an unrestricted grant of an easement gives the grantee all rights that are incident or necessary to reasonable and proper enjoyment of the easement. Therefore, a two-rod easement over property for access, properly construed, gives the dominant estate holder a permanent interest in a two-rod parcel, including the right to fill wetlands located within the parcel. Hunter v. Keys, 229 Wis. 2d 710, 600 N.W.3d 269 (Wis. Ct. App. 1999).

In many cases where an easement by express grant was recorded, it may not be necessary as a practical matter for the dominant estate holder, at least initially, to use the entirety of the surface area described by the easement instrument. For example, when a private driveway easement has been granted over a 33-foot wide parcel of land, the dominant estate holder would not ordinarily place gravel upon the entire width, but leave a non-traveled portion in grass or vegetation. To do so could place an unwanted burden of development and maintenance on the dominant estate. Nevertheless, disputes over the portion of the description the dominant estate holder is entitled to use sometimes arise when ownership of both

parcels changes, even though there is no disagreement over the exact location of the metes and bounds description in the operative instrument.

A 30-foot wide easement granted in 1987 for the purpose of a driveway, water, and sewer mains, though only a portion was improved, could be widened in 1999 so that the improved portion after asphalt was replaced was 24 feet wide. A large maple tree growing within the easement area cared for by the servient estate holder could not be cut down, unless it wrongfully interfered with the privilege to which the easement holder was entitled. Eckendorf v. Austin, 239 Wis.2d 69, 2000 WI App 219, 619 N.W. 129 (Wis. Ct. App. 2000). Placement by the servient estate holder of wood pilings, flags, rock and a raised asphalt driveway at a different grade, creating a sort of speed bump, within the portion of the easement not traveled did not unreasonably interfere with the easement. Weynard v. Foster, Appeal No. 99-0976 (Wis. Ct. App. February 24, 2000) (unpublished). Construction by servient estate owner of a berm running 125 feet in length, 12 feet wide and between one and two feet high, and a six-foot-high fence within the perimeter of a 30-foot wide driveway easement shared by 3 easement holders, wrongfully obstructed the easement, and servient estate holder was ordered to remove these and place asphalt on a portion of the easement. Mueller v. Kearns, Appeal No. 00-2732 (Wis. Ct. App. October 16, 2001) (unpublished).

Both dominant and servient estate holders may openly concede the continuing existence of each other's shared rights, yet they may disagree on the extent of these co-existing rights within limited territorial bounds. In some cases, the improvement causing the obstruction was constructed recently. Where a septic system was constructed inadvertently within the 33-foot wide private drive easement of another, the septic system could remain so long as it was compatible with the road improvements. If not, the septic system's removal would be necessary. Hunter v. Keys, 229 Wis. 2d 710, 600 N.W.2d 269 (Wis. Ct. App. 1999). Conversely, the placement and maintenance of an underground vault below the surface of land did not give the occupant who acquired the right to interfere with the surface itself. Koenigs v. Jung, 73 Wis. 178, 40 N.W. 801 (1888).

3. Abandonment

Easements often contemplate the right of the easement holder to construct or maintain an improvement upon lands of another. There are many examples of such improvements: Retaining walls, party walls, wells, private roads, and encroaching buildings. In the event the improvement is removed, the question may arise whether its removal alone is sufficient to terminate the easement. Concerning land, it is clear that non-use alone is insufficient to terminate an easement. However, concerning a structure placed on the land, non-use may signify an intention on the part of the user

to abandon the easement. Therefore, after a millpond dam easement was acquired by prescription for the purpose of generating electricity and the dam washed out and went unused for more than thirty years, the user could not rebuild the dam and flood the land of the servient estate holder in order to create an artificial lake to beautify rather than electrify the community. Burkman v. City of New Lisbon, 246 Wis. 547, 19 N.W. 311 (1945). Similarly, the easement holder's removal of a staircase, a right to use that was granted by easement, amounted to a renunciation of the right to use the described area, and entitled the servient estate holder to terminate the easement. Stenz v. Mahoney, 114 Wis. 117, 80 N.W. 819 (1902).

4. Obstruction

Does a physical obstruction placed by the servient estate holder upon and across the land burdened by the easement coupled with the passage of time terminate the easement? By statute, a prescriptive use of land for the requisite statutory period can create easements. §897.28(1), Stats. Conversely, does an obstruction that involves prescriptive use by the servient estate holder for a requisite period of time terminate an easement? There is no reported Wisconsin decision in which a servient estate holder, solely by virtue of having erected an obstruction, unilaterally effectuated a termination of an easement. Where a theatre building was constructed across a private alley, but the expectation of the parties was that an unobstructed portion of the alley would continue to be used as it had always been used to secure ingress and egress, the easement was not terminated. To extinguish the easement, the obstruction would have had to be wholly incompatible with the nature and extent of the servitude. Wausau Theatres Co. v. Genrich, 251 Wis. 454, 29 N.W.2d 502 (1947). A partial obstruction by virtue of a building erected on a part of a 14-foot wide right of way, where the building changed the course of travel to veer off slightly, did not cause the easement to terminate. Luttropp v. Kilborn, 186 Wis. 217, 202 N.W. 368 (1925). However, where obstructions placed by both parties to a mutual easement in a part of a building straddling the common boundary line were constructed, the obstructions were effective to terminate the easement. Dillman v. Hoffman, 38 Wis. 559 (1875).

The servient estate holder's placement and maintenance of an obstruction will over time work an abandonment of the easement. Construction of a garage, a poured concrete patio, stone barbecue, and raised concrete block retaining wall placed over ingress egress easement at various times between 1958 to 1991 together with easement holder's failure to object, terminated the easement. Hickerson v. Bender, 500 N.W.2d 169 (Minn. Ct. App. 1993). The digging of a cellar and building a house on a 20–foot wide vehicular easement by express grant terminated the easement. Timney v. Worden, 138 Vt. 444, 417 A.2d 923 (1980). Construction and

maintenance of a metal garage for nearly thirty years extinguished an easement. McCurdy v. Wheeler, 235 F.2d 22 (D.C. Cir. 1956). Construction of buildings on a right of way for more than 40 years terminated the right of way. Brooks v. West Boston Gas Co., 260 Mass. 407, 157 N.E. 362 (1927). Maintenance for over 35 years of an orchard having low-hanging branches that overhung an easement obstructing its use by vehicles terminated the easement. Simpson v. Fowles, 272 Or. 342, 536 P.2d 499 (1975).

D. Licenses Distinguished

Licenses and easements must be distinguished. The key element of a license is that it is revocable by the grantor or licensor, and is not transferable. Thus, a license is not an estate but is a permission given the licensee a personal legal privilege enjoyable on the land of another. Minnesota Valley Gun Club v. Northline Corp. 207 Minn. 126, 290 N.W. 222 (1940). The title of the instrument is not controlling whether it is a license. Lee v. North Dakota Park Service, 262 N.W.2d 467 (N.D. 1977).

E. Role of Statutes That Bar Enforcement

The statutes of the jurisdiction must be carefully reviewed before determining whether easements are enforceable or transferable, or alternatively, have become time-barred by statute. Actions to enforce express easements, if criteria of the applicable statute are met, may become time-barred. In one state, certain easements by express grant are barred by sixty (60) years after their recordation. §893.33(6), Wis. Stats. Express easements recorded more than thirty (30) years are also barred if the servient estate owner has no actual notice of the easement. §706.09(1)(k), Wis. Stats. Turner v. Taylor, 2003 WI App 256, 268 Wis. 2d 628, 673 N.W.2d 716 (2003). Prescriptive easements are also subject to the statute. Schauer v. Baker, 2004 WI App 41, 270 Wis. 2d 714, 678 N.W.2d 258 (Wis. Ct. App. 2004).

F. Title Insurance Coverage

Depending upon the facts and circumstances of the situation, the title insurer may agree to provide coverage to the servient estate holder against loss occasioned by the easement's enforcement. One example of an endorsement is ALTA Endorsement 9.2 (Exhibit 43). Coverage would be unlikely, however, unless the owner first provided the title insurer with an up-to-date survey that shows the land, the dimensions of the improvements, and the extent of the encroachment, so that the severity of the encroachment could be determined, and the title insurer agreed that the loss would be minimal. (Exhibit 44)

Exhibit 42

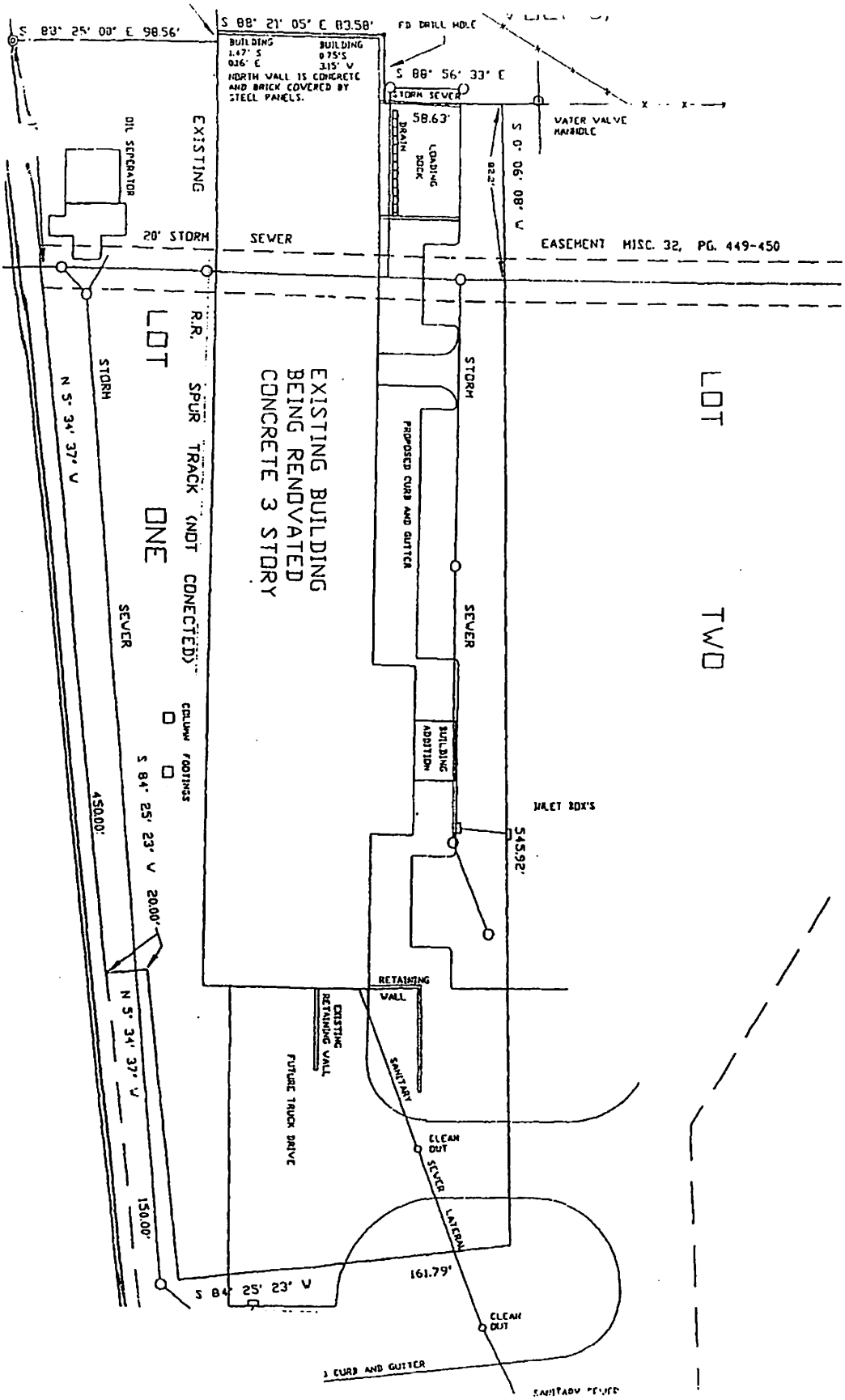

S 88° 21' 05" E 83.58'
FD DRILL HOLE
S 88° 56' 33" E
STORM SEWER
WATER VALVE MANHOLE
BUILDING 1.47' S 0.16' E
BUILDING 0.75'S 3.15' W
NORTH WALL IS CONCRETE AND BRICK COVERED BY STEEL PANELS.
58.63'
DRAIN
LOADING DOCK
82.23'
S 0° 06' 08" W
OIL SEPARATOR
EXISTING
20' STORM
SEWER
EASEMENT MISC. 32, PG. 449-450
EXISTING BUILDING BEING RENOVATED CONCRETE 3 STORY
R.R. SPUR TRACK (NOT CONECTED)
LOT ONE
LOT TWO
STORM
SEWER
PROPOSED CURB AND GUTTER
BUILDING ADDITION
COLUMN FOOTINGS
INLET BOX'S
545.92'
N 5° 34' 37" W
450.00'
S 84° 25' 23" W 20.00'
N 5° 34' 37" W
150.00'
RETAINING WALL
EXISTING RETAINING WALL
FUTURE TRUCK DRIVE
SANITARY
CLEAN OUT
SEWER LATERAL
161.79'
S 84° 25' 23" W
CLEAN OUT
1 CURB AND GUTTER
SANITARY SEWER

Exhibit 43

ENDORSEMENT

Attached to Policy No. _____

Issued by

BLANK TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only,
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. "Improvement" means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
   b. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
   c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
   c. except as provided in Section 3.c., any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

AMERICAN LAND TITLE ASSOCIATION

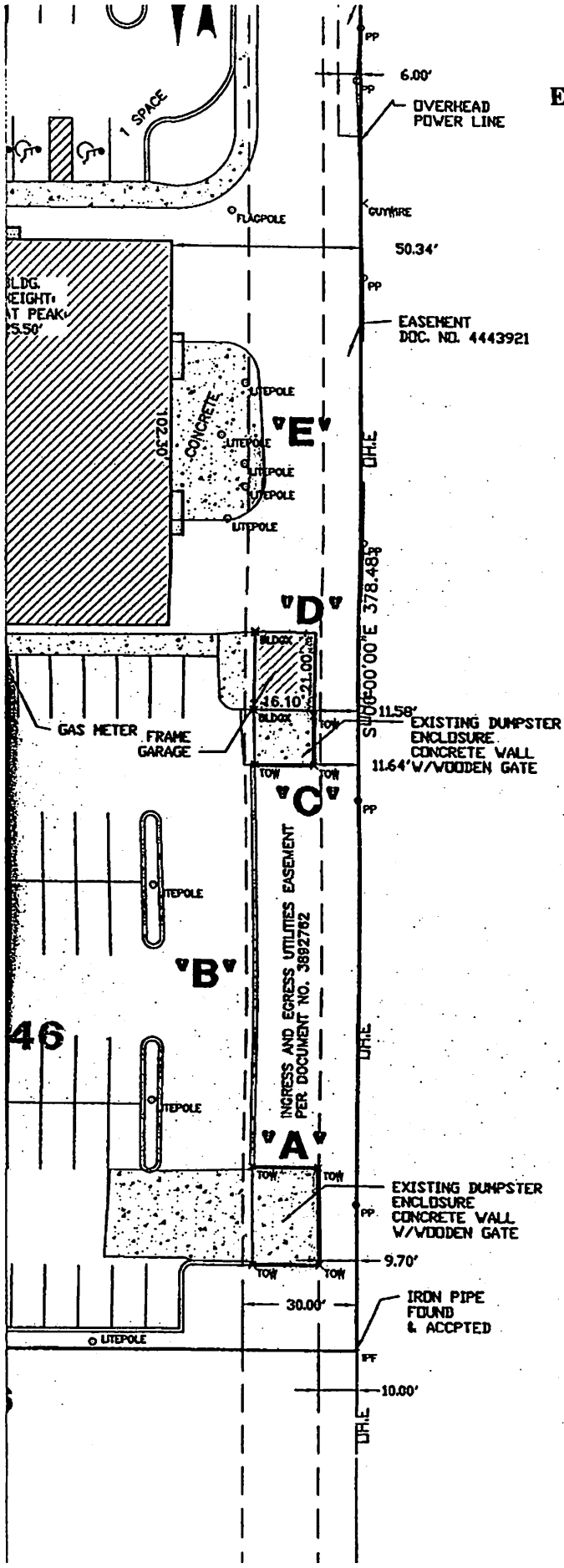
This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

Exhibit 44


1 SPACE
FLAGPOLE
GUYWIRE
6.00'
OVERHEAD POWER LINE
50.34'
EASEMENT DOC. NO. 4443921
BLDG. HEIGHT AT PEAK 25.50'
102.30'
CONCRETE
UTEPOLE
"E"
"D"
BLDGX
21.00'
16.10'
TOW
11.58'
EXISTING DUMPSTER ENCLOSURE CONCRETE WALL 11.64' W/WOODEN GATE
GAS METER
FRAME GARAGE
"C"
"B"
"A"
INGRESS AND EGRESS UTILITIES EASEMENT PER DOCUMENT NO. 3892762
46
S00°00'00"E 378.48'
DRIVE
PP
EXISTING DUMPSTER ENCLOSURE CONCRETE WALL W/WOODEN GATE
9.70'
30.00'
IRON PIPE FOUND & ACCPTED
10.00'