M e m o r a n d u m

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From: K. King Burnett

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Easement Relocation Act, June 4, 2020 Draft

The purpose of this memorandum is to reexamine issues relating to the civil action and its parties as authorized in the draft act dated June 4, 2020. I thought it best to set out in basic form in numbered paragraphs some relevant legal and practical points (deliberately abbreviated and incomplete), and then move to some possible changes to the act that would simplify the act and avoid issues with lenders, lawyers, and title companies; in a word to hopefully make the act more adoptable and useful.

I have done no research on these issues to prepare this memorandum. It is based on my experience as an attorney in a modest sized community where, among many other matters, I represented lenders, borrowers, landlords, and tenants; handled litigation over title and other real property issues; handled real estate settlements; drafted deeds, easements, deeds of trust, and mortgages; and, as an agent of a title company, issued title insurance policies after reviewing title history and issues involved in crafting exceptions. While not an expert in all these aspects, I hope that this memorandum will encourage and inform the discussion scheduled for June 4.

Relevant legal and practical points

1. As concerns recordation in the land records, the order of filing is basic to the rights of different holders of interests. Thus, if a utility easement on a property is filed one day, and a deed of trust the next, the title held by the deed of trust is subject to the utility easement. It follows that upon foreclosure the buyer at the foreclosure sale takes title subject to the utility easement. If the filing dates are reversed, the foreclosure would wipe out the utility easement in the ordinary course. Since the lender would not want to wipe out the utility easement valuable to the property, the lender would normally essentially subordinate to the utility easement so the sale would not extinguish it.
2. The law relating to title to real estate interests is a bit different than title to non-real estate items. Through a long history and practice, title to real estate interests has to be "good and merchantable." A title insurance policy essentially insures that title to a real estate interest is "good and merchantable" to the insured, subject to listed exceptions. That phrase, as a general proposition, means that there is really no plausible argument that title can be questioned, except for the exceptions listed. So, generally speaking, title companies and their agents and attorneys insist that there be no litigable issues relating to what rights are

binding on the interests insured. Even a minor issue can have major repercussions on sale and security markets.

3. It is a basic legal and even constitutional principle that property rights of a person are not to be changed by a court unless that person was a party to the litigation.
4. Under rules of procedure common to the states, a person becomes a party to a litigation by being served with process in conformity with the rules. The "process" served consists of a copy of the complaint and a summons under seal of the court setting out the duty of the person served to appear or answer. Generally, the person served is designated as a defendant. Once served, the person must answer within a set time or that person is in default, and the rules provide a procedure for the case to go forward without that person's presence. The final court order will generally bind all who are parties (including those who were in default). There is no procedure for a person to be served and have it just considered as notice of a litigation in which they are not obligated to appear and not be bound by the result.
5. There is no rule or law that prohibits a private notification to a person not a party to a litigation, and such a notice could be required in set circumstances by statute. If it is required by statute, however, there is a real question as to the effect of a failure to give the notice, e.g., does it affect title or not.
6. Every competently prepared mortgage or deed of trust says essentially that the security is the described property together with all rights to which it is entitled. That includes all of a dominant estate's rights to the use of an easement on a neighboring servient estate. Thus, in every relocation case, the interests of security creditors on both the dominant and servient properties will be implicated.
7. Because of the title regime in effect, there is rather slavish examination of documentation relating to title and the nature of exceptions on title policies.
8. Security holders are particularly protective of the expansive rights benefiting them in mortgages and deeds of trust. These documents regularly contain provisions to the effect that if the security holder is brought into a suit or dispute about the property rights of its collateral, the debtor is obligated to pay the security holder's legal fees and costs. Except perhaps with residential mortgages, mortgages and deeds of trust will probably contain a clause that essentially says if the security holder feels insecure, it can demand additional collateral or declare a default if no satisfactory collateral is forthcoming. Security holders also want discretion to decide if a change adversely affects their security. Lenders are well represented in our state legislatures and can be expected to oppose an act that includes a provision whereby a court can overrule the lender's judgment that an easement relocation adversely affects its security. There also may be issues under state or federal constitutions as to the validity of a provision authorizing a court to override a security holder's discretion, as well as concerns about such a provision relating back to pre-existing recorded

documents. Bankers are also concerned about the precedent of such actions to other circumstances.

9. Despite Section 10(a)(4) of the act, which says a relocation "does not affect the priority of the easement," there is still an issue as to whether relocation would affect the easement's priority in the chain of title. Certainly, the substance of the easement being relocated is essentially changed as it is moved, perhaps enlarged, with other provisions potentially affected. The present draft, in Section 10(a)(1) states that a relocation "is not a new transfer or a new grant of an interest in the servient estate or the dominant estate." I take that to mean that a relocation is intended to be an amendment to the original easement. That statement may assist as to due-on-sale clauses, but due-on-sale clauses are different from the priority issue. Title companies may take exception as to priority in the absence of subordinations from outstanding security-interest holders and lessees. I do know that if my client were involved in a consensual agreement to relocate an easement, I would advise that the subordination of security-interest holders and tenants potentially affected should be obtained. I would give the same advice to one obtaining a relocation under a statute that did not require subordination as a condition to its final order.
10. Previously, the committee considered the impairment of the obligation of contracts issue under the U.S. Constitution as concerns priorities with other easements and liens. Holders of security interests who are not voluntarily subordinating to the relocation could object to the court's authority under the act to in essence decree their subordination. Another concern is the constitutionality of retroactive application of the act to existing recorded instruments. The Comments to Section 14 (see p, 25, draft for June 4 meeting) cite only two state court cases which support constitutionality based on the facts. This issue has to be considered as still open as to whether title companies will take an exception from coverage for these issues in title policies on the property going forward, and if they do whether lenders or purchasers will care.

Conclusions and Recommendations

In the proposed uniform act we do not want to require service of process on those who we do not want to be bound by the result. Where the scope provisions provide that the act does not apply to certain easements (Section 3(b)(1) and (2)) but there is a provision in the act that says that the holders of such easements are to be served with process and thus become a party, there is an important potential internal conflict creating a situation where title may not be "good and merchantable" and the holders of such easements would be in uncertain territory at best. Therefore the act should not require that holders of public-utility easements, conservation easements, and negative easements be served a summons and complaint (see Section 5(b)(2)). To facilitate title assurance and title policy issuance without necessity (and prevent possible error or oversite), a provision should be included in the final order required under Section 6 to the effect that those specific holders of

easements are excluded from the effect of the order since the act excludes them from its scope and they were not parties. We and they will want the record to be absolutely clear and title insurance clearly available.

As set out in my joint memorandum with Professor McLaughlin, notice (as opposed to service of process) to holders of public-utility easements, conservation easements, and negative easements could be required in the act, and the act could provide that failure to give notice does not affect the validity of the proceeding or title to any such property interest.

As concerns security holders, most will readily subordinate if their debtor requests it. That is particularly true of the security holders as to the servient estate since their debtor can readily evidence how the relocation will enhance its value. The security holders as to the dominant owner may be more interested, particularly if physical changes are needed on the dominant estate to hook up to the relocated easement. Given all the issues as noted above, it may be wise to provide in the act that both security holders need to consent/subordinate in a form that must be recorded with the filing of the court order.

Should the court be given authority under some standard to subject a recorded leasehold to a relocated easement? A tenant on the servient property might be deprived of the use of the existing location and affected by the relocation. Consideration should be given to requiring every tenant on the servient estate using access to either the old or relocated easement, or where either touches on the land leased, to be a co-plaintiff in the litigation or consent/subordinate to the proposed new location. Recorded leases on the dominant estate would only be affected if the proposed relocation would necessitate construction or changes on its leasehold, i.e., when the end location at the dominant estate is to be changed. The nature and location of those changes may not be known when the suit is filed. These potential complications should be discussed since relocation should not take place if satisfactory new accesses on the dominant property cannot be provided.

Unrecorded leases are another issue. Where recording charges for leases are high, and the law provides that one is deemed to be on notice of a leasehold that is evident upon visiting the property (e.g., a McDonalds on land titled to someone else), there may be no recording. Resolution of this issue deserves discussion.

Lastly, there is the issue of easements other than those excluded from the act. As Jack Burton noted in his memo for the November meeting, there are all manner of such easements. We don't want to authorize easement relocations where they interfere with other easements. Conceivably, another easement might need to be relocated to accommodate the requested relocation. Discussion should be had as to whether easement holders potentially affected have to consent/subordinate or whether they are joined in the suit and their consent obtained by court order.

Another approach to the priority situation is to limit the required parties to the civil action to the dominant and servient estate owners and provide that for the case to proceed

the servient owner plaintiff must satisfy the court that it has obtained the subordination of all other recorded interests to the proposed relocation on its property, excepting of course the scope excluded easements. That would still leave open the subordination issues on the dominant estate.

Perhaps we could even limit the required parties to the two owners and leave all the issues about subordination, etc., for the parties to address or not address outside the statute. As a practical matter it is unlikely that any relocation ordered by the court would really result in a notice of default and foreclosure by a secured holder. While its priority is perhaps not affected, once the relocation takes place, the secured party, to enhance the sale price, has to accede to the facts on the ground to sell in the market. If a tenant is not a party and has not consented to the relocation that adversely affects his rights under a lease, it has a cause of action for breach of lease and can request damages or rescission. This is at least a discussion point!