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I. EASEMENTS

1. DEFINITIONS.

An easement constitutes a right to use the property of another for a particular purpose or purposes. The legal effect of a typical appurtenant easement is to subordinate the ownership of property underlying the easement (the "subordinate or servient estate") to the rights of the owner of the property served or benefited by the easement (the "dominant estate"). After an easement grant, the owner of the subordinate estate still owns his property in fee simple absolute, but the owner is restricted in the use of that portion of the property burdened by the easement. The servient estate owner cannot make any use of the burdened portion of his property which would be inconsistent with the superior easement rights granted to the owner of the dominant estate. Interference with an easement is a nuisance and it is a "trespass". It is subject to restriction by injunction or in proper circumstances, by an action for damages. An easement is an "interest in land" however, this interest is not an interest in the "title" to the real estate.

2. AS DISTINGUISHED FROM OTHER CONCEPTS

(a) Licenses

Licenses are private easements in gross because they are personal to the license holder and do not run with the land. Licenses can be distinguished from an easement in gross in that licenses can be created orally and are revocable; whereas, in general, easements must be created by a writing and are generally irrevocable.

Examples of Licenses:

1. Patrons of a motion picture theater;

2. Parking in a public garage;

3. Hunting on a specific farm.

Definition: A License in respect of real property is an authority or permission to do a particular act or series of acts upon the land of another without possessing any interest or estate in such land.

(b) **Profits á Prendre**

An easement holder generally does not contemplate profiting from the fruits of the land itself. A separate type of incorporeal hereditament, referred to as a profit or a profit *á prendre*, is an interest permitting the holder to take specific benefits from the land of another such as gravel, top soil, timber, crops, fish or minerals. A profit *á prendre* is similar to a lease which can be used to the same effect, except that the holder of a profit *á prendre* has no possession of the property which is subject to the profit.

(c) **Leases**

A Lease is the right of a given individual to possess land for a certain duration under certain terms and conditions.

3. CLASSIFICATIONS OF EASEMENTS

(a) **Appurtenant**

A typical easement is specifically designed to serve a particular tract and is known as an "appurtenant easement"; it is an "appurtenance" to the dominant estate or as it is often said "it runs with the land". When an interest "runs with the land", the benefit of the interest passes on transfer by deed or conveyance of title to each new owner of the land to which it is an appurtenance. If the owner of a dominant estate deeds his land to another without any mention of an appurtenant easement, his grantee, nonetheless obtains complete right to use the easement. The easement is buried long ago in an ancient recorded deed. The owner or seller who sells a dominant estate retains no further interest in such appurtenant easement after the sale and transfer of title. An appurtenant easement has no existence separate and apart from its dominant estate. It is not necessary that the dominant and servient estate adjoin one another. (If the dominant estate and the servient estate are merged, the easement is eliminated). Examples of appurtenant easements: private road; storm water easements; private utility easement serving particular tract; easement for encroachment; easement for light and air; joint driveway; party wall; easement for support.

The essential qualities of an appurtenant easement are:

1. It is incorporeal (having no physical existence);

2. It is imposed upon corporeal real property and not upon the owner of it;

3. It confers no right to a participation in the profits arising from such property;

4. It is imposed for the benefit of corporeal property;

5. There must be two distinct tenements, the dominant (the land benefited), to which the right belongs and the servient (the land burdened), upon which the obligation rests.

(b) **In Gross**

The salient feature of the easement in gross is that this interest belongs to the owner independently of his ownership or possession of other lands. The easement in gross lacks a dominant estate or tenement. An easement in gross is a mere personal interest in or right to use the land of another. Pipeline and utility easements are generally in gross and this permits an assignment and transfer independent of ownership of the land. Example: A landowner selling a favorite hunting tract to another might reserve to himself a blanket easement over the tract for the purpose of hunting on the property after the sale and transfer of title. The rights under this hunting easement would be personal to him and would not be transferable, absent and expression of contrary intent in the document.

(c) **Exclusive /Non-exclusive**

Easements are exclusive and, therefore, apportionable or they are "common and non-exclusive". Easements are exclusive where the possessor of the easement retains the entire or whole right to utilize the benefits of that easement, i.e. where the servient owner may not participate in that use. Utility easements are often exclusive and hence apportionable. As a result, if the easement is exclusive, the owner of that easement may license or authorize third persons to use that right of way for purposes not inconsistent with the principle use. If the servient owner retains the privilege of sharing the benefit conferred by the easement, that easement is common or non-exclusive, may not be apportioned by the owner of the easement, and is not subject to licensing.

(d) **Negative**

Negative easements are easements which preclude the owner of the land subject to the easement (servient) from doing an act which he or she otherwise would have been entitled to do so. Restrictive covenants in a subdivision are also generally considered to be negative or reciprocal negative easements. Examples: a restrictive covenant or restriction preventing subdivision lot owner from parking a tractor trailer rig inside of subdivision.

(e) **Apparent**

Apparent and non-apparent easements are important distinctions. An apparent easement is one susceptible of discovery upon a reasonable inspection i.e., a water discharge pipe above ground. A non-apparent easement is one where no usage would lead the ordinary person to inquire of or suspect the existence of an easement i.e., a below ground cable TV strand. The phrase "implied easement" is a term of classification, although in fact, it is a means of creation, i.e. that upon the severance of one tract, it is implied or obvious that one

portion must have the benefit of an easement over the other, such as drainage or the right to the use of a common roadway.

4. CREATION AND ACQUISITION

(a) Grant

The general rule is that an easement can only be created by written document signed by all of the record owners of the servient estate.

Practice tip: Have title company or attorney check title for correct ownership: Husband and wife; all partners in a general partnership; all general partners in a limited partnership; all members or managers in a Limited Liability Co., (LLC); president and secretary of a corporation.

The doctrine of easement by estoppel: A person who reasonably relies, to his substantial detriment upon an oral permission will be protected against the arbitrary revocation of this permission, if the person granting such permission caused the other to believe that it would not be so revoked.

The doctrine of partial performance may also be used to avoid the statute of frauds which applies to easements.

Practice tip: Record the written easement document so there will be constructive notice to all concerned.

(b) Reservation or Exception

Reservation and exception are generally considered to be the equivalent of an express grant.

An easement is "reserved" when by the terms of the grant, the grantor retains an easement i.e. "A to B in fee reserving to A a strip 20 foot in width for a driveway".

An easement is created by "exception" when the grantor excludes a right from the conveyance i.e. "A to B in fee except a 20 foot strip for a driveway".

(c) Implication

An implied easement is generally to be found only in connection with the conveyance of property and then only with the conveyance of property and then only with the severance of adjoining properties or the division of a single property.

It is not a device favored in the law.

An easement in favor the grantee will arise more easily than one in favor of the grantor.

An easement by implication depends upon the clear showing of the intent of the parties.

Generally, one must prove the existence of the implication by "clear, cogent and convincing evidence". This is a higher standard of proof than a mere "preponderance of the evidence".

It is generally said that an easement by implication arises only where there is an apparent, permanent and obvious servitude in use at the time of the severance and then only when continuation is necessary for the reasonable enjoyment of the severed estate.

Example: Farmer conveys off to a buyer the W 1/2 of a section. A roadway crosses the E 1/2 and connects to a county road. The W 1/2 is landlocked unless the road is allowed to service the W 1/2. Even though the deed is silent, the court creates an "implied easement".

(d) **Prescription**

An easement acquired by prescription is a right acquired by continued and uninterrupted use that is open and visible, hostile and under claim of right for a period of at least ten (10) years.

Prescription is equivalent to the doctrine of "adverse possession". If an easement by prescription is established by the trial court, the right acquired is based upon the use made by the successful owner of the dominant estate.

The primary problem with the creation of an easement by prescription is the defense of a pre-existing permissive use.

Permissive use cannot ripen into an easement absent an overt act giving notice of the change of the character of the use.

The burden of proof to show "permissive use" is on the defendant/owner of the servient estate.

Missouri acknowledges the existence of a "wild lands" exception. Essentially, access to an "unenclosed", open and rough land "is generally presumed to be permissive."

(e) **Private Condemnation -- Ways of Necessity – No "Landlocked" Land**

The procedure is set in statute and must be strictly followed.

A way of necessity is not strictly an easement but is a means of acquiring an easement by private condemnation.

The mandatory prerequisite is clearly "necessity" for mere convenience will not suffice.

5. TRANSFER, TERMINATION AND ABANDONMENT

An appurtenant easement may be transferred by deed, conveyance or descent.

Easements may terminate by expiration, terminable upon an occurrence of a proper condition subsequent that is clearly stated.

An easement may be extinguished by a release document such as a quit claim deed recordable in form.

Merger occurs when the ownership of a dominant estate resides in the same person who owns the servient estate. The easement is automatically extinguished (by operation of law) when the title to both servient and dominant tracts vested in the same owner.

The universal rule is that one cannot have an easement over his own property. When one person owns the servient and dominant tracks, the 2 tenements "merge" and the easement is extinguished by "operation of law".

Practice pointer: Use a straw party to separate ownership.

An easement is abandoned when the owner stops using it and manifests an intention to surrender the right to use it. Mere non-user alone is not sufficient.

Abandonment by operation of law results where the easement is impossible to use regardless of the intent of the parties.

An easement may be terminated by prescription based upon the same standard for creating such an easement.

An easement can be terminated by a mortgage foreclosure when the mortgage is a superior lien i.e. mortgage is recorded prior to creation of the easement.

Practice pointer: Always have holder of mortgage subordinate the lien to the easement holder.

6. SPECIFIC TYPES

(a) Joint Driveways

Preferably reciprocal easements for joint use should be created by express grant, or alternatively, by express reservation, in deeds to adjoining property. Joint driveway easements may also be created by agreement or by prescription.

(b) Utility Easements

Utilities, including telephone, cable TV, telegraph, electric, water, gas and gas pipelines companies may obtain easements in the normal manner, such as by purchase. Utilities companies may also obtain easements by condemnation, ie., eminent domain (See RSMo. §393.020, 393.410 and 523.010).

Similarly, acquisition by prescription can occur under the general rules.

Utility easements generally are considered to have greater flexibility, particularly in so far as use is concerned. Generally, as long as the same character of use is maintained and no substantial burdens are imposed, the owner of the servient estate may not complain.

(c) Railroad Rights-of-Way

Railroads can acquire fee simple title to property by General Warranty Deed without restriction where a valuable consideration was paid. However, if there is any hint or indication that the acquisition was for right-of-way, whether by condemnation, voluntary grant, or conveyance in fee, or that a valuable consideration was not paid, the railroad's interest will be limited to that of an easement.

A railroad right-of-way can be extinguished by abandonment. Land acquired for railroad purposes reverts to the then adjoining land owners when that railroad is abandoned. RSMo. §388.210.

(d) Platted Easements

There is little uniformity in the language used by developers in platting easements within subdivisions.

The threshold question is to determine whether or not a particular platted easement is a (1) public or (2) private easement.

If a developer files a plat indicating an intent that an easement be public, and if this dedication is accepted by official action or by public use, then the easement is generally open to the public. Everyone can use it for its stated purpose.

Neither the original developer nor any lot owner can lawfully prevent such use unless the easement is effectively vacated or abandoned.

On the other hand, an easement which is dedicated, but never accepted, can be withdrawn prior to acceptance by the dedicating party.

If the language of the plat so indicates, platted easements can be private easements instead of public. Private easements are only available for use by persons specifically authorized to use them. A private road created by a subdivision plat is simply a species of easement, subject to all the various particularities generally applicable to easements.

Practice pointer: It is not unusual for a developer who owns a large tract of land to subdivide part of it into residential lots while retaining the balance of the tract for later development. The developer may formally or informally divide the property into various phases. The developer must be sure that he does not cut off access to his remaining property when he subdivides the initial tract. All subdivision plats which creates easements and other restrictions on the use of property should be carefully considered before filing. The developer should give close consideration not only to his current intentions but also to his possible future needs.

7. RIGHTS AND OBLIGATIONS OF THE PARTIES

(a) Rules of Construction

General rules of contract construction apply in interpreting all types of easements created by written instruments.

The court tries to ascertain the intent of the parties from the written document itself, i.e., the 4 Corner Rule (examine only the writing contained within the 4 corners of the instrument). If ambiguous, all of the rules are available to resolve the ambiguity. There are special rules which are peculiarly applicable to easements.

Does the document create an easement or a license?

If an easement is an issue, is it appurtenant or in gross?

A personal right is created by license and easement in gross and whether the right "runs with the land" as in an appurtenant easement. A license which fails to expressly provide that it is irrevocable is generally terminable at any time.

An appurtenant easement which fails to expressly provide for expiration continues indefinitely until abandoned or released or until the purpose for which it was created no longer exists.

A general easement created by grant is not limited in use to that which it is first put.

Missouri allows "successive easement uses" i.e. vehicular access may later be used for electric lines to service a residence.

Where an easement is granted or reserved without limitation as to its use, it will not necessarily be confined to the purpose to which the land was used at the time the way or easement was created, but may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted. Case law also finds easements not always interpreted as generously. A case denied extending a joint driveway easement to connect two subdivisions for through access.

Easements which are created by recorded plats are construed most strongly against the party recording the plat.

(b) **Roving or Blanket Easements**

Parties to an easement transaction occasionally fail to describe the exact path of an easement across the burdened property, thereby creating a "roving easement". An easement, whether created by grant or reservation is not void for indefiniteness; the parties are required to fix its location at any reasonable, convenient location across the servient estate.

If the parties cannot agree upon the location, a court of equity will review and chart a reasonable course.

Roving easements can be “clouds” on title.

(c) **Use of Servient Estate**

An easement is a grant of the use of land, not a grant of its possession.

Simply stated, you can drive your vehicle over a roadway easement, however, you cannot park the vehicle on the roadway.

The owner of an easement has only such rights in the servient property as are expressed or implied at law in his easement. The easement holder has no entitlement to the profits to the burdened property. The holder cannot extract minerals nor harvest crops. The owner of a servient estate continues to possess the servient estate even after granting an easement to the property. The servient owner is entitled to use his entire property fully, except to the extent

his use of the easement area interferes with the use and enjoyment by the easement holder of the rights granted in his easement.

Construction of a permanent structure on an unused right of way is a prohibited act.

Owner of the servient estate can grant successive easements to different persons so long as the second easement does not contemplate any use which would be contrary to that granted to the first grantee.

If the original easement was not exclusive and the subsequent concurrent easement was not inconsistent or unreasonably burdensome, then the second easement is valid and entitles the grantee to whatever right is granted by the easement.

Practice Tip: If a grantor desires to use an easement in common with the grantee, grantor should provide that the easement is non-exclusive, even though such a provision is not strictly necessary to preserve the grantor's rights.

Practice pointer: Preferable to expressly provide in the grant of a concurrent easement that it is expressly subject to the first grant. This will shield the grantor from further liability to both the first and second grantees if the first grantee claims the use is repugnant.

Prescriptive easements are subject to different rules of use than normal easements. A prescriptive easement only provides the dominant estate owner with a quantum of use which is equivalent to the use proved during the prescriptive period.

The owner of a servient estate can prohibit any significantly increased use.

Example: Dominant Estate owner of a large tract cannot subdivide and increase traffic flow over easement roadway without chance of restriction or termination by a court.

(d) **Duty of Maintenance and Repair**

Absent special circumstances, grantee of an easement is required to construct whatever improvements are necessary for his use of the easement at the grantee's sole costs. (e.g. owner of a driveway easement is responsible for constructing the drive). The servient estate owner's sole duty in this regard is to not unduly interfere with the construction or use of the drive. The owner of the dominant estate is also generally responsible for maintenance and repair.

Practice pointer: An instrument creating an easement should provide some specifications as to maintenance.

Periodic maintenance for underground easements should provide for restoration of land to original condition.

Both the dominant and servient estate owners must share in the repair and maintenance expenses of a driveway which they both use.

(e) **Liability and Indemnity**

Easements are often created for the purpose of permitting activities which may be hazardous. (e.g. driveway easement contemplates automobile travel resulting in accidents and easement for electrical lines involves potential for electrocution. Construction activities can give rise to liability even though the ultimate activity permitted is not hazardous.)

The Grantee of an easement, his contractor, or a licensee of the grantee may negligently damage the grantor's property, his person or some third party.

In the absence of an agreement to the contrary, the owner of the dominant estate has the general duty to repair easement damage. Where breach of this duty can create a danger to a third person, the liability for that injury follows the duty to repair.

Practice Pointer: Incorporate indemnity language in the easement instrument.

8. VEHICULAR WAYS

(a) **Public Roads**

Public roads are rights of way available for use by the general public without discrimination and may be usable by public utilities. Such roads are not limited to use by landowners who hold land adjacent to the public road.

Public roads may be created by:

(1) Grant;

(2) Statute (including statutes authorizing condemnation);

(3) Prescription;

(4) Common law dedication.

It requires more than a simple deeding of an easement for public use to effectively create a public road by grant.

The grant must also be accepted by the appropriate governing body having authority to accept the grant.

The acceptance requirement can by met by an adoption of the deed by the County Court. If a grant is not accepted, it is ineffective to create a public road.

Granted easements can arise both through deeds and through subdivision plats.

A recorded subdivision plat which purports to dedicate marked streets to a public use constitutes a common law dedication once the streets are accepted by public use.

If there is any doubt as to the intent to dedicate as expressed in a plat because of any ambiguity in the plat, it will be construed against the party recording the plat.

CREATING NEW COUNTY ROADS

RSMo. §228.010-.180 provides a set of rules for establishment of public county roads upon private initiative.

The process is commenced by Petition addressed to the County Court signed by 12 freeholders of the townships through which the road will run. Three of the signing parties must in the immediate neighborhood of the road.

The Petition must state:

(1) The proposed beginning, course and termination of the road;

(2) The names of all persons owning land through which the road must pass;

(3) The amount of damages created by the taking to the extent it can be ascertained;

(4) Names of those willing to donate portions of the right-of-way;

All landowners in the vicinity must be advised of the application by posting of statutory notice per §228.030.

§228.050 provides a procedure whereby an objection to the petition can be filed and if prosecuted the County Court is authorized to hold a hearing to determine whether there is a need for the road.

The procedure for vacating roads is much the same as that for establishing same.

§228.190 provides an alternate method of creating roads on a *de facto* basis even though the ordinary requirements of the chapter heretofore discussed have not been met.

This section contemplates two situations under which a public road will be deemed legally established, despite non-compliance with statutory formalities. These are:

(1) All roads established by any Order of the County Court and used as public highways for a period of ten years or more; and

(2) All roads that have been used as such by the public for ten years continuously and upon which there shall have been expended public money or labor for such period.

Public roads can be created by prescription. However, if either set of circumstances required by §228.190 is met, the inquiry need proceed no further.

Another method of creating a public road arises out of the doctrine of common law dedication. Doctrine is predicated on the concept of *estoppel in pais*.

Common law dedication is a first cousin of prescription, however, it dilutes some of the more stringent prerequisites to prescription.

A public prescriptive easement will only arise in cases where the easement area sought to be established connects with another area of public access.

Expenditure of public funds can be sporadic, so long as the road is generally usable by those who wish to do so.

(b) **Private Roads**

Private roads can be established by any of the four (4) methods normally used to establish easements:

(1) By written grant or reservation;

(2) By oral grant which is relied upon;

(3) By prescription; and

(4) By the doctrine of visible easements.

In recognition of the importance of vehicular access, Missouri has a statutory "Easement of Necessity" per §228.340 which is commonly referred to as "Private Condemnation".

This doctrine of last resort is designed to prevent real estate from being "landlocked".

A landowner must file a verified Petition in Circuit Court requesting the establishment of a way of necessity and swearing to the truth of the following:

(1) That the Petitioner owns land in the county where the court is located or adjoining county;

(2) That no public road passes through or along side such land;

(3) The location of the desired private road;

(4) The width of the proposed road (not to exceed 40 feet);

(5) That the private road sought to be required is a "way of strict necessity."

The Statute provides a procedure for the appointment of three (3) commissioners to mark out the road and assess damages to the persons over whom the road will pass.

The standard of "strict necessity" has been stated that a party is entitled to a way of necessity unless he has a legally enforceable alternate access of a permanent nature. An action will not lie to establish a way of necessity merely because the current access is inconvenient or the terrain is rough.

The character and extent of the use of the road govern the character and extent of the prescriptive easement. The maximum potential width for easements by necessity under Missouri Statute is 40 feet. This width cannot be exceeded even to provide for drainage.

It is not necessary to establish a rural road easement created by prescription by a metes and bounds description where it is visible.

(c) **Termination of Public Ways**

Public ways cannot be terminated by private grant or surrender because the right inures to the public, not to any individual.

RSMo. §228.190 provides for vacation of public roads: Non use by the public for five (5) years continuously of any public road shall be deemed an abandonment and vacation of same.

Burden of Proof: Clear and cogent evidence; substantial reduction and usage is not sufficient; the entire public must concur in any such action; failure to use a portion of the width of a way is not an abandonment of any portion.

Roads created pursuant to RSMo. §228.010-.080 can be vacated per §228.110. The standard for vacation is that the road by use and repairing of same constitutes an unreasonable burden upon the district.

Other Special Vacation Statutes.

§71.240-.260 relating to vacation of streets and roads and cities and towns.

§71.270-.280 relating to vacation of subdivision streets outside incorporated towns, cities or villages.

§82.190 relating to vacation of streets by constitutional charter cities.

§88.673 relating to vacation of streets in fourth class cities.

§88.637 relating to vacation of streets in third class cities.

Private roads may be vacated as any other easement.

§228.440-.450 provides special procedure for vacating private roads established per §228.340-.480.

(d) **Ownership of Underlying Fee**

Once roads are created, the ownership of the underlying fee is of little concern until the road is vacated. Missouri rule: A conveyance of platted lots or blocks adjoining an existing street, without mentioning the street in the deed, carries to the Grantee the fee simple title to the center of the street (or to the far side if the original Grantor contributed all of the street to public use).

The presumption is that the grantor did not intend to withhold any interest in the street or highway.

The presumption may be overcome by something stated in the deed which shows distinctly an intention to withhold an interest in the street.

The doctrine of "strips and gores" raises the presumption to avoid omitted strips of property after vacation of roads.

Vacated and abandoned railroad rights of way are subject to similar rules in that in the absence of any expression of contrary interest, the underlying fee to railroad rights of way is presumed to be in the abutting owners and the title of each extends to the center of the way.

Property burdened by a public street can also generally be used by a public telephone company for its cable even though the original dedication did not expressly mention such use, and the owner of the fee has no claim on the account thereof.

Missouri has substantial litigation on the subject of whether a particular railroad owned its roadway in fee so as to obviate the abandonment issue or as to whether the railroad acquired only a right of way to which the rule that an abandonment right of way reverts to adjoining property can apply.

In circumstances where a landowner dedicates a road on the edge of his property such that the entire width is cut from the tract (northern most 25 feet) the entire roadway upon abandonment reverts to the tract from which it was carved.

9. PARTY WALLS

(a) Definition

A "party wall" is commonly defined as a division wall between tenements belonging to different persons, with the wall being present for the mutual benefit of both parties -- generally for support.

Party walls generally take one of four primary forms:

1. A wall in which two adjoiners owners are tenants in common;

2. A wall divided into two strips, each strip belonging to an adjoining owner;

3. A wall which belongs entirely to one owner, subject to an easement in favor of the other owner, as dividing wall or for support; or

4. A wall divided between two properties, each property being subject to a cross-easement of support or division in favor of the other.

In Missouri, as a general proposition, the third and fourth types are generally held to be party walls.

Missouri courts have consistently favored the definition of a party wall as a longitudinally divided wall subject to cross easements.

Party walls are generally solid, but the existence of windows or other openings does not negate the existence of a party wall if they are not contemplated by agreement or prescription. A party wall does not necessarily have to rest on the dividing line, but may rest entirely upon the land of one or the other. A party wall is not necessarily divided by a straight line.

Party walls should be created by agreement, and the nature and rights relating thereto should depend on the terms of that agreement. Once a party wall exists and the agreement is such as to create an easement or crossing easements, all the normal rights and liabilities relating to easements control.

The controlling principle of law is that neither party may utilize the wall in such a manner as to interfere with the use of the wall by other. However, the parties are not prevented from utilizing the surface of the wall in any manner so long as its efficiency is not impaired.

(b) **Creation and Termination**

Party walls are usually created by written agreement in the form of contract, covenant or grant of easement. As in the case of general easements, severance of one estate into two estates with a dividing wall at the division line, can create a party wall by implication. Similarity, an implied easement may create a party wall.

A Missouri case holds that a division by the owner of a structure retaining title to one part and conveying an interest in the other part creates an interest as to one-half of the common wall and an easement for support in the other.

Rules of prescription may also allow an adjoining land owner to obtain an easement of support in a wall by prescription.

Party walls generally have their genesis in agreement. Often these agreements are oral, and thus within the statute of frauds. To avoid the statute of frauds, that oral agreement may be treated as a license.

A party wall exists as long as it is usable and needed for the purpose it was intended. The wall will lose its character when the agreement is rescinded or the purpose for which it was erected ceases to exist.

Generally, it is held that the accidental or casual destruction of a party wall operates to terminate the cross-easements and upon termination, the parties resume ownership of the portion of the premises previously covered by the wall. Rebuilding, however, will restore those rights exactly as if the wall had never been destroyed.

(c) **Rights and Liabilities of Owners**

The rights and liabilities of the adjoining owners depend on the terms of the agreement. Absent agreement, either own or may make repairs for maintenance without liability to the other as long as due care is used.

Excavation may take place as long as lateral support is maintenance and similarly, an owner may remove a building without liability as long as the wall is protected.

There is case law authority that ordinary maintenance is to be at mutual costs or at apportioned costs.

Obviously, either party has the full right to use the wall for whatever purposes chosen, subject to the limitation that the use does not infringe upon the right of the adjoining land owner or impair the value or support of the wall.

(d) **Rights and Liabilities of Purchasers**

In a true party wall, the benefit of the easement is appurtenant. Thus, the purchaser of the servient estate with notice, actual or constructive, take subject to the wall.

Actual notice can exists where the only notice to the purchaser is of the use being made of the wall.

It is generally accepted that both the benefit and burden of the easement attach to both estates and become appurtenant to the land itself.

(e) **Remedies**

Usual remedies at law and in equity are available for the protection and enforcement of rights with respect to party walls. Generally, civil actions are in the nature of suits on contracts, although mandatory injunctions may also be used.

10. MINERAL RIGHTS

The conditions and terms under which mining can occur or set forth in Chapter 444, RSMo.

A mineral right or an estate in mineral rights is generally defined as the right to enter and mine. It is an incorporeal hereditament.

Mineral rights are generally created by express grant or reservation.

Once a mineral right is granted or reserved, the estate is severed and two distinct estates result.

This severance creates two separate tracts with differing rights and obligations.

The estate separated from the mineral estate is the surface right. The surface right is defined as the area covering and enveloping the minerals and (at least theoretically) capable of agriculture.

To convey or reserve a "mineral right", the deed must adequately describe the estate, and the instrument itself must be sufficient to convey an interest in real estate.

It is further clear that once created, the mineral estate and the instrument creating that estate are subject to all of the ordinary rules of construction as pertained to real estate and to contracts respectively. But these ordinary rules are not universally applicable. A Missouri case states that the distinction between surface and mineral rights is significant. Adverse possession of the surface did not constitute adverse possession of the mineral rights where the mineral rights had been previously severed.

In the event that there is a subsequent joinder of the surface and mineral estate, there is an immediate merger of those estates and the two separate estates cease to exist.

Mineral rights may also be leased. The distinction between a lease and a grant of mineral rights is critical. The lease of minerals only gives the tenant/lessee the right to enter, convert the ore to personalty and then to dispose of it. Title to the ore does not pass.

It is important in the creation of a mineral interest to determine what mineral rights are intended to pass. For example, minerals are not generally considered to include oil and gas, which in turn must be separately stated. Limestone is not normally considered a mineral.

One can grant, sell, reserve or lease minerals, rights and minerals, rents, royalties from minerals or entire mineral interest.

PRACTICE NOTE:

11. TERMS AND CONDITIONS FOR EASEMENT AGREEMENT BETWEEN ADJOINERS

1. Terms:

    1. The dominant tract is owned by the Grantee and benefits from the easement way across the servient owner.

    2. The servient tract is owned by the Grantor and is burdened by the easement being granted.

3. The easement grant will be placed in writing and all terms and conditions will be set forth in the recorded document.

4. There will be three legal descriptions set forth in the Grant of Easement:

    1. The servient tract or the parcel crossed by the easement;
    2. The dominant tract which benefits from the easement; and
    3. The easement roadway which is legally described by a centerline with 10 feet on each side, etc. or by a complete legal that would have all of the full dimensions of the location of the easement.

2. Purpose of the Easement

    1. Ingress and egress (going in and out)
    2. Multiple utilities to be named, or leave generic
    3. Above/below ground installation of utility lines

3. Location of Roadway Easement on Ground

    1. Width of easement right of way; fixed by dimensions or "as is located on ground"
    2. Landscaping required for water conservation
    3. Culverts, ditches required
    4. Culvert pipes for drainage along easement way or under easement

4. Parties Involved

    1. Will easement be exclusive to one person or entity?
    2. Will easement benefit a certain parcel of land?
    3. Will the easement be non-exclusive and can be granted to other parties and used by servient owner?

5. Easement Maintenance

    1. Gravel or rock?
    2. Grading and blading?
    3. Snow removal?
    4. Permanent surface such as blacktop, concrete?
    5. Routine maintenance such as filling potholes?
    6. Will Grantee cover all expense of repair and maintenance
    7. If Grantor covers expense, Grantee will reimburse with interest

6. Fence

Is Grantor (owner of servient tract) or is Grantee allowed to construct a fence down one or both sides of the roadway easement?

What type of fence?

Installed by professional contractor?

7. Gates and Access
   1. Will gates be allowed at the start or end of the easement?
   2. Will gates be allowed along the right of way easement?
   3. Will the gates be swinging on hinges or electric with remote openers?
   4. Will gate be padlocked and chained?
   5. Will one lock be opened by all having keys or will chain have one lock for servient and one lock for dominant user?
   6. Will cattle guard be allowed?
   7. Can parties afford electric gate openers and expense of maintaining?

8. Use of Easement/Traffic

   1. How many owners of the dominant tract of real estate may use the roadway easement if the property is subdivided into numerous tracts with numerous owners?
   2. How can flow of traffic and speed of traffic be regulated? Speed bumps?

9. Relocation of Easement
   1. Can easement be widened or enlarged?
   2. Can easement be moved and relocated elsewhere?

10. Is dominant owner allowed to grant an easement across dominant tract to another third party adjoining parcel which will be allowed to use the roadway easement in question.

11. Will the easement be only allowed for living individuals (i.e. easement in gross) or will the easement be "appurtenant" in that the easement runs with the land and benefits all future owners of the dominant tract and burdens all future owners of the servient tract.

12. Breach of Covenants and Terms of Easement
    1. Time necessary to cure a violation
    2. If suit filed, prevailing party recovers all attorney's fees, litigation costs and court costs against the non-prevailing party

Form of Easement Agreement for Revising Original Easement is as follows:

Space Above for Recorder's Use Only

DOCUMENT COVER SHEET

TITLE OF DOCUMENT:	AMENDED AND RESTATED INGRESS AND EGRESS EASEMENT
DATE OF DOCUMENT:	_____, 2021
GRANTOR:	MANGAN PROPERTIES, INC.
Mailing Address:	2525 Pine St. Granite City, Illinois 62040
GRANTEE:	BLWP WILDERNESS RETREAT LLC
Mailing Address:	220 Bluff View Circle St. Louis, Missouri 63129
LEGAL DESCRIPTION:	SEE EXHIBITS A, B, C, D, E, and F
REFERENCE BOOK & PAGE:	Book 261, Page 428 Book 262, Page 692 Book 2013, Page 15914 Book _____, Page _____

AMENDED AND RESTATED INGRESS AND EGRESS EASEMENT

THIS AMENDED AND RESTATED INGRESS AND EGRESS EASEMENT (the "Agreement") is made and entered into to be effective as of the ____ day of _____, 2021 (the "Effective Date") by and between **MANGAN PROPERTIES, INC.**, a Missouri corporation, with a mailing address of 2525 Pine St., Granite City, Illinois 62040 ("Grantor"), and **BLWP WILDERNESS RETREAT LLC**, a Missouri limited liability company, with a mailing address of 220 Bluff View Circle, St. Louis, Missouri 63129 ("Grantee").

WITNESSETH:

WHEREAS, Grantor is the owner of certain real property located in Washington County, Missouri, such real property being more particularly described on **Exhibit A** attached hereto and incorporated herein by reference ("Grantor's Property"); and

WHEREAS, Grantee is the owner of certain real property located in Washington County, Missouri, such real property being more particularly described on **Exhibit B** attached hereto and incorporated herein by reference ("Grantee's Property"); and

WHEREAS, by Ingress and Egress Easement (Exclusive) dated August 16, 1996, and recorded August 22, 1996 at Book 261, Page 428 of the Washington County, Missouri records, such easement being re-recorded on October 2, 1996 at Book 262, Page 692 of the Washington County, Missouri records to correct a typographical error with respect to the date of the document, Grantor granted to Edgar J. McLaughlin the ingress and egress easement described therein for the benefit of Grantee's Property (the "McLaughlin Easement"); and

WHEREAS, by Ingress and Egress Easement dated October 28, 2013, and recorded October 30, 2013 at Book 2013, Page 15914 of the Washington County, Missouri records, Grantor granted to Glenda S. Zanders the ingress and egress easement described therein for the benefit of Grantee's Property (the "Zanders Easement"; together, with the McLaughlin Easement, collectively, the "Original Easement"); and

WHEREAS, Grantor and Grantee desire to enter into this Agreement to amend, restate, supersede and replace the Original Easement.

NOW, THEREFORE, in consideration of Ten Dollars paid by each party to the other, and for other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, Grantor and Grantee agree as follows.

1. **Recitals; Exhibits**. The foregoing recitals are true and correct and are incorporated herein by reference. All exhibits attached to this Agreement and referred to herein are incorporated herein by reference.

2. **Effect on Original Easement**. This Agreement amends, restates, replaces, and supersedes the Original Easement in its entirety.

3. **Certain Terms**. As used in this Agreement, (a) the term "Grantee Parties" means Grantee and Grantee's heirs, successors, and assigns, including all future owners of Grantee's Property or portions thereof, and all officers, members, managers, owners, employees, agents, contractors, invitees, guests, tenants, and licensees of Grantee and Grantee's heirs, successors, and assigns, and (b) the term "Grantor Parties" means Grantor and Grantor's heirs, successors, and assigns, including all future owners

of Grantor's Property or portions thereof, and all officers, members, managers, owners, employees, agents, contractors, invitees, guests, tenants, and licensees of Grantor and Grantor's successors and assigns.

4. **Ingress / Egress Easement**. Grantor does hereby grant and convey unto Grantee and the Grantee Parties, a permanent, exclusive easement over, upon, in, across and through those portions of Grantor's Property described on **Exhibit C** for the purpose of ingress and egress, including by vehicles, pedestrians, or otherwise (the "Ingress / Egress Easement"). Grantee shall have the right to remove trees, brush, and other obstructions from the area of the Ingress / Egress Easement and to construct, maintain, repair and reconstruct a road thereon, complete with culverts, bridges, and such other improvements and appurtenances as shall be reasonably necessary for the purpose of the Ingress / Egress Easement, including paving if desired by Grantee (the "Access Road"). The Ingress / Egress Easement is exclusive to Grantee and the Grantee Parties, and the only intended users of the same are Grantee and the Grantee Parties, except that Grantor reserves the right to use the Access Road as set forth below.

Grantor acknowledges that Grantor has other ways of accessing Grantor's Property, and therefore, Grantor agrees on its behalf, and on behalf of the Grantor Parties, to the following: Grantor and the Grantor Parties may only use the Access Road a limited number of times per calendar year, not to exceed 12 times per calendar year for a period of one day each time, provided, that, if, through no fault of Grantor (including Grantor's failure to perform proper maintenance or repair), Grantor's other ways of accessing Grantor's Property are impassable, Grantor and the Grantor Parties may use the Access Road for access to Grantor's Property until such time as access to Grantor's Property by Grantor's other routes is restored, and Grantor covenants and agrees to use its good faith efforts promptly to restore the same.

Additionally, Grantor and Grantee agree that Grantor may place parallel fencing on either side of the Access Road on Grantor's Property outside the Ingress / Egress Easement, provided, however, that such fencing does not interfere with the rights of Grantee or the Grantee Parties in and to the Permanent Bridge Easement, Construction & Maintenance Easement, or Lay Down Easement described below.

Additionally, Grantor and Grantee agree that Grantor may place cattle guards in the Access Road so long as such cattle guards are designed, installed, and maintained by Grantor or the Grantor Parties, and are designed, installed, and maintained to support heavy equipment necessary to construct or reconstruct the Bridge and any potential homes, structures, or other improvements on Grantee's Property. Any cattle guards installed in the Access Road shall be there at the sole risk of Grantor. Grantor shall coordinate any installation, maintenance, or repair of cattle guards with Grantee in order to minimize any inconvenience in the use of the Access Road by Grantee and the Grantee Parties, including, if necessary, providing Grantee and the Grantee Parties with an alternative route reasonably acceptable to Grantee and the Grantee Parties while such cattle guards are being installed, maintained or repaired.

5. **Permanent Bridge Easement**. Grantor does hereby grant and convey unto Grantee and the Grantee Parties, a permanent, exclusive easement over, upon, in, across and through that portion of Grantor's Property described on **Exhibit D** attached hereto for the purposes of constructing, maintaining, repairing, and reconstructing a bridge and all improvements and appurtenances thereto, and elements thereof, including wing walls and rip rap (the "Bridge") (the "Permanent Bridge Easement"). The Permanent Bridge Easement is exclusive to Grantee and the Grantee Parties and is intended for the sole use of the Grantee and the Grantee Parties. Grantee is planning to construct its new Bridge over Lost Creek after execution of this Agreement. Upon completion of the Bridge, Grantee, at Grantee's sole cost, shall remove the old bridge over Lost Creek and dispose of all debris and waste from the old bridge, not placing such debris or waste on Grantor's Property, excepting, however, that Grantor agrees that Grantee may place, recycle, or reuse portions of the old bridge material as rip rap in Lost Creek, including in conformance with Missouri Department of Transportation (MoDOT) specifications. Additionally, prior

to commencement of construction of the Bridge and during times of construction, maintenance, repair, or reconstruction when the Bridge may not reasonably be used to access Grantee's Property, Grantor agrees, that Grantee and the Grantee Parties shall have the right to cross through, over, and across Lost Creek from Grantor's Property at locations on either side of the Permanent Bridge Easement in order for Grantee and the Grantee Parties to have continuous access to Grantee's Property.

6. **Construction & Maintenance Easement**. Grantor does hereby grant and convey unto Grantee and the Grantee Parties, a permanent, non-exclusive easement over, upon, in, across and through that portion of Grantor's Property described on **Exhibit E** attached hereto for the purposes of constructing, maintaining, repairing, and reconstructing the Access Road and the Bridge, and all improvements and appurtenances thereto (the "Construction & Maintenance Easement").

7. **Laydown Easement**. Grantor does hereby grant and convey unto Grantee and the Grantee Parties, a permanent, non-exclusive easement over, upon, in, across and through that portion of Grantor's Property described on **Exhibit F** attached hereto for the purpose of use as a lay down area (i.e., storage of materials and equipment) and parking area during the initial construction, reconstruction, replacement, or repair of the Bridge (the "Lay Down Easement"). Grantee and the Grantee Parties shall only use the Lay Down Easement during such times of initial construction, reconstruction, replacement or repair of the Bridge and not otherwise. When Grantee's use of the Lay Down Easement is completed, Grantee, at Grantee's sole cost, will restore the area of the Lay Down Easement to its condition prior to Grantee's use.

8. **Maintenance and Repair of the Access Road and Bridge**. Subject to the other terms of this Agreement, Grantee acknowledges and agrees that Grantee or the Grantee Parties are solely responsible for maintaining, repairing, replacing, and reconstructing the Access Road and the Bridge. Without limiting the generality of the foregoing, Grantee or the Grantee Parties shall remove debris that accumulates at the Bridge from high water events. Grantor agrees not to dump logs, branches, or other debris in Lost Creek upstream of the Bridge. Grantor acknowledges and agrees that Grantee is waiting to make improvements to the Access Road until construction of the Bridge is complete.

9. **Indemnity**.

(a) To the maximum extent permitted by law, Grantee shall defend, indemnify and hold harmless Grantor from any and all judgments, actions, liens, losses, damages, liabilities and expenses (including reasonable attorneys' fees) and claims (i) in connection with any activity performed under by Grantee or the Grantee Parties under this Agreement, (ii) in connection with any claims for damage to persons or property asserted against Grantor arising out of the negligence or willful misconduct of Grantee or the Grantee Parties, or (iii) in connection with a breach of this Agreement by Grantee or of Grantee's obligations hereunder. In no event shall Grantee have an obligation to indemnify Grantor for Grantor's own negligence or willful misconduct.

(b) To the maximum extent permitted by law, Grantor will defend, indemnify and hold harmless Grantee from any and all judgments, actions, liens, losses, damages, liabilities and expenses (including reasonable attorneys' fees) and claims (i) in connection with any damage to the Access Road or the Bridge caused by Grantor or the Grantor Parties, (ii) in connection with any claims for damage to persons or property asserted against Grantee arising out of the negligence or willful misconduct of Grantor or the Grantor Parties, or (iii) in connection with a breach of this Agreement by Grantor or of Grantor's obligations hereunder. In no event shall Grantor have an obligation to indemnify Grantee for Grantee's own negligence or willful misconduct.

10. **Insurance**. While this Agreement is in effect, Grantee will carry general liability insurance with coverage of bodily injury and property damage with limits of at least $250,000.00 per occurrence, naming Grantor as an additional insured.

11. **Gate and Cables**.

(a) Presently, Grantee has a gate on the Access Road near where the Access Road adjoins Highway 32 (the "Existing Gate"), along with cables from such Existing Gate to trees to prevent persons from going around the Existing Gate. Grantor agrees that Grantee shall have the right to keep the Existing Gate and cables in place. Grantor and Grantee agree that Grantor shall have the right to put a lock on the Existing Gate (i.e., a dual lock chain) such that each of Grantor and Grantee will have separate locks on the Existing Gate permitting the opening of the Existing Gate by Grantor or Grantee without need for a key to the other party's lock. Grantor shall promptly close and lock the Existing Gate after opening it and traversing the area of the Existing Gate, and the failure to do so by Grantor shall be a breach of this Agreement by Grantor.

(b) Grantor agrees that Grantee may maintain cameras or other security and surveillance items on the Existing Gate and on the Bridge to monitor access to the Access Road and Grantor agrees not to interfere with the same.

(c) Grantor acknowledges and agrees that Grantee shall have the right to remove the Existing Gate at any time without replacing it, and specifically, that Grantee may temporarily remove the Existing Gate in connection with the construction of the Bridge. If Grantee removes the Existing Gate, whether in connection with the construction of the Bridge or otherwise, Grantee shall not be obligated to replace or reinstall the Existing Gate; provided, however, that Grantor may request that Grantee replace or reinstall the Existing Gate. If Grantee does not intend to replace or reinstall the Existing Gate, but Grantor requests Grantee to do so, Grantor shall pay to Grantee one-half of the costs to replace or reinstall the Existing Gate, with Grantor to pay in advance its share of the estimated costs of doing so, and the parties agree to reconcile the actual amount due from Grantor upon completion of the work. Reinstallation or replacement by Grantee under this paragraph will include reattachment of the cables; if Grantee removes the Existing Gate and does not replace or reinstall the same, Grantee shall remove the cables.

(d) Grantor shall have no right to place any gates or fences on or across the Access Road or elsewhere on the Ingress / Egress Easement.

12. **Damage by Grantor or the Grantor Parties; Failure to Comply with Obligations of Grantor relating to Access Road and Cattle Guards**. Notwithstanding anything in this Agreement to the contrary, in the event that Grantor or the Grantor Parties (a) negligently or willfully damage the Access Road or the Bridge, or (b) install cattle guards in the Access Road and such cattle guards fail or Grantor fails to maintain or repair the same, then, Grantee shall have the right to repair any damage to the Access Road or the Bridge caused by Grantor or the Grantor Parties, or remove the cattle guards and restore the Access Road to its condition prior to installation of the cattle guards, all at the sole cost of Grantor, and Grantor shall be solely responsible for all costs incurred by Grantee in repairing such damage or removing such cattle guards and restoring the Access Road. Grantee shall send Grantor an invoice specifying the amount incurred by Grantee in repairing damage or removing cattle guards and restoring the Access Road, as applicable, including reasonable supporting costs such as invoices for material and labor (the "Invoice"). Grantor shall pay such Invoice within 30 days of its receipt of the same. If Grantor does not pay the Invoice within 30 days, Grantee shall send a second notice to Grantor containing the Invoice (the "Second Notice"). If the Invoice remains unpaid by Grantor for more than 30 days after the date the Second Notice is sent, then, Grantor agrees that such unpaid Invoice shall be a lien

against Grantor's Property until paid, accruing interest at the rate of 9% per annum, and that Grantee shall be entitled to record a notice of such lien against the Grantor's Property in the Washington County, Missouri Records. Grantee shall have the right to enforce its lien by suit against Grantor and Grantor's Property. Examples of negligent or willful damage to the Access Road or Bridge include, but are not limited to, the following: ruts in the Access Road caused by overloaded vehicles; use during extremely wet conditions or weather producing ruts in the Access Road; damage to the Access Road caused by ATVs or dirt bikes; and use .f tracked vehicles on the Access Road. Additionally, if Grantee is forced to remove the cattle guards as described hereunder, Grantor shall have no right to install future cattle guards in the Access Road.

13. **Notices**. All notices, consents, waivers, and other communications under this Agreement must be in writing and will be deemed to have been duly given (i) on the date given if delivered personally, or (ii) on the date received if mailed by registered or certified mail (return receipt requested) or by nationally recognized overnight delivery service (receipt requested), to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

To Grantor:	MANGAN PROPERTIES, INC. 2525 Pine St. Granite City, Illinois 62040 Attn: Bryan Mangan
To Grantee:	BLWP WILDERNESS RETREAT LLC 220 Bluff View Circle St. Louis, Missouri 63129 Attn: Lynn Hargiss

14. **Successors and Assigns**. This Agreement is binding on and inures to the benefit of each of Grantee and Grantor and each one's respective successors and assigns. The easements and covenants of this Agreement run with the land, and are binding on future owners of the Grantor's Property and Grantee's Property.

15. **Miscellaneous**. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original and all of which, when taken together, will be deemed to constitute one and the same Agreement. This Agreement shall be governed by the internal laws of the State of Missouri with regard to conflicts of law principles. Any modification or amendment of this Agreement must be in a signed writing. In the case of any legal or equitable action taken by either party to enforce this Agreement or on account of a party's breach of this Agreement, the prevailing party shall be entitled to recover from the other party all costs and reasonable attorneys' fees incurred in connection therewith. This Agreement contains the entire agreement of the parties hereto with respect to the matters set forth in this Agreement and supersedes any prior or contemporaneous agreements or understandings of the parties.

[The remainder of this page is intentionally blank—signature pages follow.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the Effective Date.

GRANTOR:

MANGAN PROPERTIES, INC.,
a Missouri corporation

By:_____
Bryan Mangan, President

STATE OF _____)
)
COUNTY OF _____)

On this ____ day of _____, 2021, before me appeared Bryan Mangan, President of MANGAN PROPERTIES, INC., a Missouri corporation, to me personally known, who, being by me duly sworn, did say that he is the President of MANGAN PROPERTIES, INC., and that said instrument was signed in behalf of said corporation, by authority of its board of directors, and said Bryan Mangan, President of MANGAN PROPERTIES, INC. acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid on the day and year above written.

_____
Notary Public
Printed Name:_____

My Commission Expires:

_____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the Effective Date.

GRANTEE:

BLWP WILDERNESS RETREAT LLC,
a Missouri limited liability company

By:_____
Lynn Hargiss, Trustee of the Lynn Marie Hargiss Revocable Living Trust U/A/D 3/6/2008, Manager

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

On this ____ day of _____ in the year 2021 before me, _____, a Notary Public in and for said state, personally appeared Lynn Hargiss, Trustee of the Lynn Marie Hargiss Revocable Living Trust U/A/D 3/6/2008, the Manager of BLWP WILDERNESS RETREAT LLC, a Missouri limited liability company, known to me to be the person who executed the within instrument in behalf of said trust as the Manager of said limited liability company and acknowledged to me that he or she executed the same for the purposes therein stated.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid on the day and year above written.

_____
Notary Public
Printed Name:_____

My Commission Expires:

_____

II. TRANSFERS AND CONVEYANCING INSTRUMENTS

Four types of deeds are commonly used in Missouri:

1. The General Warranty Deed
2. The Special Warranty Deed
3. The Quit Claim Deed
4. Beneficiary Deed (delayed transfer of title and ownership)

Assuming that the Grantor has good merchantable title the property to be conveyed by Deed at the time of the transfer, any of the three general forms of deed will convey good title to the Grantee.

The principal distinction between the various forms lies in (1) the warranties of the Grantor and (2) the fact that not all forms will carry "after-acquired title" with the Grant.

GENERAL WARRANTY DEEDS

The General Warranty Deed carries with it after-acquired title. RSMo. §442.430. The words of grant for General Warranty Deeds – grant, bargain and sell – carry with them the warranties and covenants of title set forth in statute unless "restrained by expressed terms contained in such conveyances".

A Missouri General Warranty Deed contains the following warranties and covenants:

1. That the Grantor has an indefeasible fee simple estate and can convey the same;

2. That there are no encumbrances on the property except as expressly set forth in the deed;

3. That the Grantee will immediately receive any after-acquired title to the property which may inure to the Grantor;

4. Of quiet enjoyment;

5. That the Grantor will make further assurances of good title, and

6. That the Grantor will warrant and defend the Grantee's title against any breaches of these warranties and covenants. See Sharpton v. Lofton, 721 S.W.2d. 770 (Mo. App. 1986).

If the property is to be conveyed subject to the lien of a deed of trust (mortgage), to some interest outstanding in a third party or reserved by the Grantor, or to any other exception or reservation, these exceptions or reservations or both, should be expressed in the deed and noted as exceptions to the last two covenants and warranties listed above. This is accomplished by adding to each such covenant the simple phrase "except as stated above."

From the Grantee's or purchaser's standpoint, the General Warranty Deed form is the strongest and best form of deed.

HOW TO ENFORCE BREACH OF A COVENANT IN A "WARRANTY" DEED

Scenario: Buyer buys 160 acres from Seller

Buyer later learns that:

1, Real estate taxes are not paid
2. There is an unpaid child support lien
3. There is a judgment lien for credit card debt
4. There is an old deed of trust/mortgage lien
5. There is a recorded hunting lease for 10 years

Buyer sends demand to Seller to remove liens and title defects. Seller cannot financially remove all defects.

Buyer is then sued by a judgment lien creditor. Seller contacts his "chainsaw' attorney and demands that Seller "indemnify and hold Buyer harmless" and defend the lawsuit. Under common law, Seller has a duty to defend and protect Buyer.

Seller hires Basement Barney lawyer to defend! Buyer is uncertain as to protection and will the suit be dismissed or resolved. Buyer cannot select the attorney for Seller.

SPECIAL WARRANTY DEEDS

The Special Warranty Deed carries with it after-acquired title that not the same warranties or covenants of title as the General Warranty Deed. The typical words of grant avoid the use of the word "grant" and thus avoid the statutory covenants and warranties normally incident to General Warranty Deeds.

The covenants and warranties under a Special Warranty Deed are:

1. A covenant that the premises are free and clear from any encumbrance done or suffered by the Grantor; and

2. A covenant to warrant and defend the title against the lawful claims and demands of all persons claiming under the Grantor.

In the case of the Special Warranty Deed, Grantors do not warrant that they have or can convey good title. Grantors merely warrant that they are passing onto the Grantee "whatever" title they acquired and that they have not encumbered it since their acquisition.

Again, if property is to be conveyed by Special Warranty Deed subject to some lien, exception, or reservation created after the Grantor acquired title, the lien, exception or reservation should be expressed in the deed and noted as an exception to the covenants and warranties of the Grantor by adding to each covenant the simple phrase "except as stated above."

QUIT CLAIM DEEDS

The Quit Claim Deed is the lowest and least desirable form of Deed. It does not carry with it any after-acquired title. The words of grant for a quit claim deed imply no covenants or warranties of title.

Stated simply, the quit claim deed conveys whatever title the Grantor may have at the time of the delivery of the deed without implying that the Grantor has good title or any title at all.

The quit claim deed is seldom used for any purpose other than to correct technical defects in record title.

A Grantee of a quit claim deed is deemed to have notice of defects in title because the Grantor's refusal to make full and complete assurance of title is enough to arouse suspicion and put the Grantee on notice.

BENEFICIARY DEEDS (Transfer of Death)

The Beneficiary Deed transfers real estate automatically and free of probate on the death of the last Grantor to die. In contrast to most other deeds, a Beneficiary Deed must be recorded in order to be legally valid and effective to pass title.

A Beneficiary Deed can be revoked at any time prior to the death of the last Grantor to die.

The Beneficiary Deed is tax beneficial because the Grantee/Beneficiaries in a Beneficiary Deed receive a stepped up basis in the real estate and the Grantee/Beneficiaries can sell at any time without paying any income tax based upon the basis in the Grantors compared to the fair market value at the time both Grantors die.

You should not "customize" or "modify" the Beneficiary Deed format for it tracts a statute and any modified Beneficiary Deed may be void.

It is very easy for a Grantor to revoke a Beneficiary Deed for all you need to do is record a new Deed with a new disposition. It is good practice to mention in the new instrument that you are recording the new instrument and specifically you are revoking the past Beneficiary Deed dated _____, recorded in Book _____ at Page _____ of the Land Records of _____ County, Missouri.

Please keep in mind the Beneficiary/Grantees named in the Beneficiary Deed have no vested rights until all of the Grantors have died.

Further, creditors of the Grantee/Beneficiaries have nothing to attach and, therefore, the Grantee/Beneficiaries are safe until the Grantors die.

Title passes by what is called "operation of law" and it is immediate upon the death of the last Grantor to die.

DEEDS OF FIDUCIARIES

Deeds given by executors, personal representatives, administrators, guardians and trustees are customarily special warranty deeds or, on occasion, quit claim deeds. Rarely are general warranty deeds given because the fiduciary's personal interest in the transfer of title does not justify acceptance of the risks of liability on the covenants and warranties of a general warranty deed.

RECITALS IN FIDUCIARY DEEDS

Because fiduciaries ordinarily have no power to give away property entrusted to their care and have only such powers of sale as may be conferred upon them by Last Will and Testament, *Inter Vivos* Trust, or the orders of a court of competent jurisdiction, it is customary in all fiduciary deeds to recite the full and actual consideration pay and to include such recitals of fact as may be necessary to establish the fiduciary's power and authority to convey.

DEEDS OF EXECUTORS (NOW PERSONAL REPRESENTATIVES) UNDER TESTAMENTARY POWER OF SALE

The following recitation should follow the legal description of the property conveyed and preceding the *habendum* clause of the deed:

1. A statement that the deed is given in accordance with the power of sale contained in a specified article or section of the Last Will and Testament of the deceased;

2. A statement as to the Decedent's date of death and place of residence at the time of death;

3. A statement as to where and on what date the Last Will and Testament was admitted to probate;

4. A statement as to date on which Letters Testamentary, presently in full force and effect, were issued to the Executor (now Personal Representative) by the probate court; and

5. A statement as to where and when the Will of the deceased was recorded in the Office of the Recorder of Deeds for the county in which the real estate conveyed is located.

DEEDS OF TRUSTEES UNDER TESTAMENTARY POWER OF SALE

The following recitals are necessary:

1. A statement that the real estate to be conveyed is an asset of the Trust Estate devised to the Trustee under the Will of the Decedent;

2. A statement as to the Decedent's date of death and the place of residence at the time of death;

3. A statement as to where and on what date the Will was admitted to probate;

4. A statement as to when and where the Will was recorded in the Office of the Recorder of Deeds for the county in which the real estate conveyed is located;

5. A statement directing attention to the provision of the Will giving the Trustee power to sell and noting that the deed Is given in the exercise of that power;

6. A statement of such facts as may be required to show that the Trust created under the Will is in full force and effect and has not been terminated, and that the Trustee is presently the duly appointed qualified and acting Trustee.

DEEDS OF TRUSTEES UNDER *INTER VIVOS* POWER OF SALE

The following recitals should include:

1. A statement of such facts as may be required to show that the real estate to be conveyed is a part of the assets of the Trust Estate created by the *Inter Vivos* Trust Agreement and held by the Trustee;

2. A statement as to when and where the Trust Agreement was recorded in the Office of the Recorder of Deeds for the county where the real estate is located;

3. A statement directing attention to the provision of the Trust Agreement giving the Trustee power of sale and declaring that the deed is given in the exercise of such power; and

4. A statement of such facts as may be required to show that the Trust is in full force and effect and has not been terminated and has not terminated, and that the Trustee is the duly appointed, qualified and acting Trustee.

SHERIFF'S AND COMMISSIONER'S DEEDS

Sheriff's Deeds, as such, are given in connection with execution on a judgment or partition sales of real estate. The deed given by a Sheriff as the Trustee or Successor Trustee under a Deed of Trust in foreclosure of the lien is a Trustee's Deed and not a Sheriff's Deed in the strict sense.

SHERIFF'S DEED AND EXECUTION SALES

A Sheriff's Deed given in connection with execution sales on a judgment must contain the recitals prescribed by RSMo. §513.275 and must be acknowledged in open court before a Judge in conformity with RSMo. §513.280 and §513.285.

SHERIFF'S DEED IN PARTITION SALES

Missouri Statute does not prescribe what recitals should be contained in a partition sale deed by a Sheriff.

The following recitals should be inserted:

1. The Order of Sale;
2. The advertisement of sale;
3. The sale itself; and
4. Approval of the sale by court.

The Deed given by the Sheriff in connection with the sale of real estate in partition proceedings must be acknowledged in the same manner as conveyances made by the Sheriff of land sold under execution pursuant to a Judgment. RSMo. §528.400.

COMMISSIONER'S DEEDS

A Commissioner may be appointed in a partition suit to effect the sale of real estate in place of the Sheriff. A Commissioner who is so appointed has the same duties and is governed by the same rules that apply to Sheriffs in like cases.

Accordingly, when the sale of real estate is made by a Commissioner, the Commissioner's Deed should contain the same recitals as would appear in a Sheriff's Deed in like cases and the Deed must be acknowledged by the Commissioner in open court in conformity with RSMo. §513.280 and §513.285.

AFTER ACQUIRED TITLE

Deeds given by Sheriffs, as such, or Commissioners cover only the existing title and do not pass after-acquired title.

COLLECTOR'S DEED AND TAX SALES

Chapter 140 RSMo. provides for the annual sale by the County Collector each August, of real property on which property tax payments have been delinquent. The statute provides for successive tax sale offerings.

At the first offering, if no one bids a sum equal to the delinquent taxes thereon with interest, penalty, and costs, the County Collector conducts a second offering the following August.

If no one submits an adequate bid at the second offering, a third offering is made the following August. At that offering, the property is sold to the highest bidder.

The landowner's right to redeem his property sold at a tax sale differs depending on whether it was a first, second or third offering tax sale.

REDEMPTION

A first or second offering tax sale is followed by a one-year (1) redemption period during which the owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same by paying the County Collector the purchase price plus cost of the sale and interest.

The purchaser at a first or second offering tax sale acquires a Certificate of Purchase.

Legal title does not vest in the purchaser until the period of redemption has lapsed and the purchaser consummates the sale by exercising the right to have legal title transferred. If no one redeems the property during the one-year statutory redemption period, at the expiration thereof, and on production of Certificate of Purchase, the county collector is required to execute to the purchaser a Collector's Deed to the property, which vests in the Grantee an absolute estate in fee simple.

The legislature has treated third offering tax sales differently from first and second offering tax sales.

In 1984, the General Assembly enacted RSMo. §140.405, which required the purchaser of property at any tax sale offering to conduct a title examiner and, if the search revealed lien holders, to mail notice of the lien holders of their right to redeem the property.

In 1987, the General Assembly amended RSMo. §140.405 to exempt purchasers at third offerings from its requirements.

RSMO. §140.340 - LAND OWNER'S STATUTORY RIGHT TO REDEEM PROPERTY

RSMo. §140.340, entitled "Redemption, When - Manner", sets forth the land owner's right to redeem his property that is sold at a tax sale. RSMo. §140.340 states that:

The owner or occupant of any land or lot sold for taxes or any other persons having an interest therein, may redeem the same at any time during the one-year next ensuing, ***

Thus, the land owner has one year from the date of the tax sale to redeem his property, the land owner's period of redemption for first and second offering sales is one year and the one year redemption period begins on the date of the tax sale.

NOTICE

SECTION §140.405 – PURCHASER'S STATUTORY DUTY TO NOTIFY LANDOWNER OF RIGHT TO REDEEM PROPERTY

The purchaser shall obtain a title search report from a licensed attorney or licensed title company detailing the ownership and encumbrances on the property.

Such title search report shall be declared invalid if the effective date is more than 120 days from the date the purchaser applies for a Collector's Deed under §140.250 or §140.420.

At least 90 days prior to the date when a purchaser is authorized to acquire the deed, the purchaser shall notify the owner of record and any person who holds a publicly recorded unreleased deed of trust, mortgage, lease, lien, judgment, or any other publicly recorded claim upon that real estate of such person's right to redeem the property.

Notice shall be sent by both first class mail and certified mail, return receipt requested to such person's last known available address.

If the certified mail return receipt is returned signed, the first class mail notice is not returned, the first class mail notice is refused where noted by the US Postal Service, or any combination thereof, notice shall be presumed received by the recipient.

At the conclusion of the applicable redemption period, the purchaser shall make an Affidavit in accordance with Subsection 4 of this section.

Failure of the purchaser to comply with this section shall result in such purchaser's loss of all interest in the real estate.

The tax sale purchaser must send the notice at least ninety (90) days before it is authorized to acquire the deed to the property i.e., at least 90 days before the expiration of the one-year redemption period.

In a first or second offering tax sale, the tax sale purchaser's notice must inform the recipient that he has one year from the date of the tax sale to redeem the property or be forever barred from doing so.

The required RSMo. §140.405 notice by a tax sale purchaser of the landowner's right to redeem the property must contain the time component of the land owner's right of redemption as defined and set forth in RSMo. §140.340.

TIME OF NOTICE

The statutory notice must be sent at least 90 days before the purchaser is authorized to acquire the deed to the property from the collector i.e. at least 90 days before the expiration of the one-year redemption period.

If notice is untimely and deficient as to content under RSMo. §140.405, a Collector's Deed becomes void and invalid.

CONTENT OF NOTICE

In a first and second offering, it must state the property owner has one year from the date of the tax sale to redeem the property or be forever barred.

The 90 day language of §140.405 is only applicable in the case of a third offering tax sale and not first and second offering tax sales.

In a third offering, the notice must inform the recipient that he/she has 90 days from the date the purchaser files the affidavit with the county collector in which to redeem the property, or be forever barred from doing so.

The tax sale purchaser must also notify any publicly recorded lien holder in the same fashion in order to terminate the lien.

QUIET TITLE ACTION

Thereafter, the successful purchaser, who has received a Collector's Deed must file a Petition for Quiet Title and serve all parties with an interest in the property and thus obtain a Judgment of the Court in order to have insurable title. If the parties who lost their property for non-payment of taxes are personally served by Summons and Petition, the title company will insure title 30 days after the judgment is rendered. In contrast, if the parties cannot be located and personally served and the Plaintiff seeks to notify the parties and all successors by publication in the newspaper, the title company will not insure title for one (1) year since the parties have one (1) year to attack the judgment.

(Space above reserved for Recorder)

GENERAL WARRANTY DEED

THIS DEED, made and entered into this _____ day of _____, 2021, by and between

_____, husband and wife,
(Mailing Address: _____)

of the County of _____ and State of Missouri; Parties of the First Part (**Grantor**), and

_____, husband and wife,
(Mailing Address: _____)

of the County of _____ and State of Missouri, Parties of the Second Part (**Grantee**).

WITNESSETH, that the said Parties of the First Part, for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration paid by the Parties of the Second Part, the receipt of which is hereby acknowledged, do by these presents, **Grant, Bargain and Sell, Convey and Confirm** unto the said Parties of the Second Part, the following described Real Estate, situated in the County of _____ and State of Missouri, to-wit:

(Legal Description)

SUBJECT TO ALL easements, conditions, restrictions and right-of-ways of record and those not of record.

(Legal Description Furnished by Grantor)

TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said Parties of the Second Part and to their heirs, successors and assigns forever.

The said Parties of the First Part hereby covenanting that they and their heirs, personal representatives, executors and administrators, shall **Warrant and Defend** the title to the premises unto the said Parties of the Second Part, and to their successors and assigns forever against the lawful claims of all persons whomsoever, excepting, however, the general taxes for the calendar year 201__ and thereafter, and the special taxes becoming a lien after the date of this deed.

IN WITNESS WHEREOF, the said Parties of the First Part have executed these presents the day and year first above written.

_____
_____ (Print Name)

_____
_____ (Print Name)

STATE OF MISSOURI,)
) SS.
COUNTY OF _____.)

On this _____ day of _____, 2021, before me personally appeared _____, husband and wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

_____
_____ - Notary Public
_____ County, Missouri
My commission expires:_____

This instrument was prepared by Harris & Harris, P.C., from information furnished exclusively by Grantor. Eric C. Harris has not examined any public record with respect to the property described in this instrument or with respect to the parties thereto, therefore, Eric C. Harris makes no representation or warranty regarding title to the described property, accuracy of the legal description, the existence of any encumbrance, nor the true identity or legal capacity of any party.

(Space above reserved for Recorder)

SPECIAL WARRANTY DEED

THIS DEED, made and entered into this ____ day of _____, 2021, by and between

_____, a Missouri banking corporation,
(Mailing Address: _____)

of the County of _____ and State of Missouri, **Grantor**, and

_____
(Mailing Address: _____)

of the County of _____ and State of Missouri, **Grantee**.

WITNESSETH, that the said Grantor, for and in consideration of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00) to it paid by the Grantee, the receipt of which is hereby acknowledged, does by these presents, **Sell and Convey** unto the said Grantee, the following described Real Estate, situated in the County of _____ and State of Missouri, to-wit:

(Legal Description)

SUBJECT TO other terms, conditions, reservations and restrictions of record, if any.

(Legal description furnished by Grantor)

TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said parties of the second part, and to their heirs, successors and assigns forever.

The said party of the first part hereby covenanting that it shall and will **Warrant and Defend** the title to said premises unto the said parties of the second part, and to their heirs, successors and assigns forever against the lawful claims of all persons claiming by, through or under Party of the First Part, excepting, however, the general taxes for the calendar year 201__ and thereafter, and the special taxes becoming a lien after the date of this deed, and excepting the terms, conditions, restrictions, covenants and reservations of record.

IN WITNESS WHEREOF, the said Grantor has caused these presents to be signed by its President and attested by its Secretary and its corporate seal to be hereto affixed the day and year first above written.

_____,
A Missouri Banking Corporation,

ATTEST:

By_____
_____ President

_____
Secretary

STATE OF MISSOURI,)
) SS.
COUNTY OF _____.)

On this ____ day of _____, 2021, before me appeared _____ to me personally known, who, being my me duly sworn, did say that _he is the _____ President of _____, A Banking Corporation of the State of Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said _____ acknowledged said instrument to be the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

_____
_____, Notary Public
_____ County, Missouri
My commission expires: _____

This instrument was prepared by Harris & Harris, P.C., from information furnished exclusively by Grantor. Eric C. Harris has not examined any public record with respect to the property described in this instrument or with respect to the parties thereto, therefore, Eric C. Harris makes no representation or warranty regarding title to the described property, accuracy of the legal description, the existence of any encumbrance, nor the true identity or legal capacity of any party.

(Above space reserved for Recorder)

QUIT CLAIM DEED

THIS DEED, made and entered into this _____ day of _____, 2021, by and between

_____, husband and wife,
(Mailing address: _____)

of the County of _____ and State of Missouri, Parties of the First Part **(Grantor)**, and

_____
(Mailing address: _____)

of the County of _____ and State of Missouri, Party of the Second Part **(Grantee)**.

WITNESSETH, that the said parties of the first part, for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration paid by the party of the second part, the receipt of which is hereby acknowledged, do by these presents, **Remise, Release and Forever Quit Claim** unto the said party of the second part, the following described Real Estate, situated in the County of _____ and State of Missouri, to-wit:

(Legal Description)

(Legal Description Furnished by Grantors)

TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said party of the second part and to her heirs and assigns forever. So that neither the said parties of the first part, nor their heirs, nor any other person or persons for them or in their names or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall, by these presents, be excluded and forever barred.

IN WITNESS WHEREOF, the said parties of the first part have executed these presents the day and year first above written.

_____

_____

_____

_____

STATE OF MISSOURI,)
) SS.
COUNTY OF _____.)

On this ____ day of _____, 2021, before me personally appeared _____ _____ and _____, husband and wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

_____
_____, Notary Public
_____ County, Missouri
My commission expires: _____

This instrument was prepared by Harris & Harris, P.C., from information furnished exclusively by Grantor. Eric C. Harris has not examined any public record with respect to the property described in this instrument or with respect to the parties thereto, therefore, Eric C. Harris makes no representation or warranty regarding title to the described property, accuracy of the legal description, the existence of any encumbrance, nor the true identity or legal capacity of any party.

(Above space reserved for Recorder)

BENEFICIARY DEED

THIS BENEFICIARY DEED, made this _____ day of _____, 2021, wherein GRANTORS/OWNERS:

_____, husband and wife,
(Mailing Address: _____)

of the County of _____ and State of Missouri, as a gift and without consideration DO by these presents GRANT AND ASSIGN, CONVEY AND CONFIRM unto GRANTEE BENEFICIARIES named as follows:

_____, husband and wife,
(Mailing Address: _____)

as tenants by the entireties, the following described Real Estate situated in the County of _____ and State of Missouri, to-wit:

SUBJECT TO terms and conditions, restrictions and reservations of record, if any.

(_____ died on _____)

(Legal Description taken from _____)

TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said Grantee Beneficiary, his heirs, successors and assigns FOREVER.

THIS BENEFICIARY DEED is executed pursuant to Section 461.025, R.S.Mo. Supplement 1989. It is not effective to convey title to the above described real estate until Grantor/Owners' death. This deed will not become effective unless recorded before Grantor/Owners' death or the death of the last to die of two or more joint Grantors/Owners; and it is subject to revocation and change in the manner provided by law.

IN WITNESS WHEREOF, Grantors/Owners execute this beneficiary deed on the day and year first above written.

_____
@

_____
@

STATE OF MISSOURI,)
) SS.
COUNTY OF _____.)

On this ___ day of _____, 2021, before me personally appeared _____, husband and wife, to me known to be the persons described in and who executed the foregoing Beneficiary Deed as Grantors/Owners, and acknowledged to me that they executed the same as their free act and deed for the purposes therein stated.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

My commission expires:

_____

_____
_____ - Notary Public
_____ County, Missouri

This instrument was prepared by Harris & Harris, P.C., from information furnished exclusively by Grantor. Eric C. Harris has not examined any public record with respect to the property described in this instrument or with respect to the parties thereto, therefore, Eric C. Harris makes no representation or warranty regarding title to the described property, accuracy of the legal description, the existence of any encumbrance, nor the true identity or legal capacity of any party.

(Above Space Reserved for Recorder)

BENEFICIARY DEED

THIS BENEFICIARY DEED, made this ____ day of _____, 2021, wherein **GRANTOR**:

_____, husband and wife,
(Mailing Address: _____)

of the County of _____ and State of Missouri, as a gift and without consideration DO by these presents GRANT AND ASSIGN, CONVEY AND CONFIRM unto **GRANTEE/BENEFICIARIES** named as follows:

_____, _____ and _____,
(Mailing Address: _____)

all as joint tenants with right of survivorship and not as tenants in common, the following described Real Estate situated in the County of _____ and State of Missouri, to-wit:

SUBJECT to reservations, restrictions, right-of-way easements and conditions of record and those not of record.

(Legal Description Furnished by Grantor _____)
_____ died on _____.

Grantor _____ joins in this Beneficiary Deed to convey and relinquish any and all marital rights she may have in said real estate and this Beneficiary Deed does not establish nor expand such marital rights, if any.

Further, Grantor _____ waives all of her rights in the above described real estate, including, but not by way of limitation, any rights pursuant to R.S.Mo. Section 474.150 relating to the rights of a surviving spouse and to homestead rights.

Upon the death of Grantor _____, who owned the above described real estate in his exclusive name prior to this Deed, all interest in said real estate shall pass to the beneficiaries designated herein for Grantor _____ has no right to revoke this Beneficiary Deed.

TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said Grantee Beneficiaries, their heirs successors and assigns FOREVER.

THIS BENEFICIARY DEED is executed pursuant to Section 461.025, R.S.Mo. Supplement 1989. It is not effective to convey title to the above described real estate until _____**'s** death. This deed will not become effective unless recorded before Grantor's death; and it is subject to revocation and change only by Grantor _____.

IN WITNESS WHEREOF, Grantors execute this beneficiary deed on the day and year first above written.

_____
@

_____
@

STATE OF MISSOURI,)
) SS.
COUNTY OF ST. FRANCOIS.)

On this ____ day of _____, 2021, before me personally appeared _____ and _____, husband and wife, to me known to be the persons described in and who executed the foregoing Beneficiary Deed as Grantors, and acknowledged to me that they executed the same as their free act and deed for the purposes therein stated.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

My commission expires:
_____

_____
_____ - Notary Public
_____ County, Missouri

This instrument was prepared by Harris & Harris, P.C., from information furnished exclusively by Grantor. Eric C. Harris has not examined any public record with respect to the property described in this instrument or with respect to the parties thereto, therefore, Eric C. Harris makes no representation or warranty regarding title to the described property, accuracy of the legal description, the existence of any encumbrance, nor the true identity or legal capacity of any party.

III. WHO MAY LEGALLY PREPARE A LEGAL DESCRIPTION – THE UNAUTHORIZED PRACTICE OF SURVEYING OR LAW

To create a new legal description and legally "charge a fee" for the work the only following parties shall be licensed:

1. Licensed surveyor and engineers
2. Licensed lawyers
3. Certified licensed title company examiners

It is "legal" for any individual to prepare his or her own personal legal description provided the preparer is not receiving consideration for the work.

No person, including any duly elected county surveyor, shall practice as a professional land surveyor in Missouri as defined in Section 327.272 unless and until there is issued to such person a License or a Certificate of Authority certifying that such person has been duly licensed as a professional land surveyor in Missouri, and unless such License or Certificate has been renewed as provided in Section 327.351.

The practice of a professional land surveyor is defined in RSMo. §327.272.

1. A professional land surveyor shall include any person who practices in Missouri as a professional land surveyor who uses the title of "surveyor" alone or in combination with any other word or words including, but not limited to "registered", "professional" or "land" indicating or implying that the person is or holds himself or herself out to be a professional land surveyor, who by word or words, letters, figures, degrees, titles or other descriptions indicates or implies that the person is a professional land surveyor or is willing or able to practice professional land surveying or who renders or offers to render, or holds himself or herself out as willing or able to render, or perform any service or work, the adequate performance of which involves the special knowledge and application of the principles of land surveying, mathematics, the related physical and applied sciences, and the relevant requirements of law, all of which are acquired by education, training, experience and examination, that affect real property rights on, under or above the land and which service or work involves:

    1. The determination, location, relocation, establishment, reestablishment, layout, or retracing of land boundaries and positions of the United States Public Land Survey System;

    2. The monumentation of land boundaries, land boundary corners and corners of the United States Public Land Survey System;

    3. The subdivision of land into smaller tracts and preparation of property descriptions;

4. The survey and location of rights-of-way and easements;

5. Creating, preparing or modifying electronic or computerized data relative to the performance of the activities in subdivisions (1) to (4) of this subsection;

6. Consultation, investigation, design surveys, evaluation, planning, design and execution of surveys;

7. The preparation of any drawings showing the shape, location, dimensions or area of tracts of land;

8. Monumentation of geodetic control and the determination of their horizontal and vertical positions;

9. Establishment of state plane coordinates;

10. Topographic surveys and the determination of the horizontal and vertical location of any physical features on, under or above the land;

11. The preparation of plats, maps or other drawings showing elevations and the locations of improvements and the measurement and preparation of drawings showing existing improvements after construction;

12. Layout of proposed improvements;

13. The determination of azimuths by astronomic observations.

2. None of these specific duties listed in subdivisions (4) to (13) of subsection 1 of this section are exclusive to professional land surveyors unless they affect real property rights. For the purposes of this section, the term "real property rights" means a recordable interest in real estate as it affects the location of land boundary lines.

3. Professional land surveyors shall be in responsible charge of all drawings, maps, surveys and other work product that can affect the health, safety and welfare of the public within their scope of practice.

4. Nothing in this section shall be construed to preclude the practice of architecture or professional engineering or professional landscape architecture as provided in Sections 327.091, 327.181 and 327.600.

5. Nothing in this section shall be construed to preclude the practice of title insurance business or the business of title insurance as provided in Chapter 381, or to preclude the practice of law or law business as governed by the Missouri Supreme Court and as provided for in Chapter 484.

IV. MECHANIC'S LIEN CHECKLIST FOR SURVEYOR

1. Before commencing survey work:

   (A) Update *all* contracts and invoices to include "Notice to Owner" language as follows:

NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, R.S.Mo. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

   (B) Obtain *signed* contract from owner of real estate, general contractor or subcontractor. This is a statutory requirement that the surveyor must have in order to file a valid mechanic's lien.

   (C) If the construction project is a residential rehab project, the surveyor as a subcontractor should make certain that the general contractor has obtained a "Consent of Owner" form signed by the owner as follows:

CONSENT OF OWNER

CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF THEY ARE NOT PAID.

WARNING:

   (D) **Make certain all statutory notices are in printed 10-point bold dark print; if not correct format, lien can fail.**

2. During early construction and survey work:

   (A) Keep accurate and itemized *time records*, including job performed by all individuals and rate per hour.

(B) Keep accurate and itemized, *material records*, including description (no abbreviations), quantity, and unit price; equipment that has been rented for this particular survey project is also lienable.

(C) Keep track of all profit and overhead expenses related to this particular project.

(D) All invoices sent should contain "Notice to Owner" language as above mentioned.

3. After completion of survey work:

(A) Keep track of the last date of significant work (e.g., original contract work, not call backs or reworking of defective work).

(B) If your survey account is not paid in full within 60 to 90 days, send a certified demand letter to all responsive parties, including general contractor, architect, engineer, mortgage lender, etc..

(C) After 90 days, compile all time and material records.

(D) Begin lien process as follows:

(1) Get the complete legal description of the property involved off a deed, deed of trust, survey plat or otherwise;

(2) Obtain a "letter report" from a title insurance company in the area identifying the real estate owner at the time you started your survey work, at the time of the completion of your work, and current owner.

(3) Obtain copies of all pertinent copies of documents pertaining to the title of the real estate such as construction mortgage deed of trust, permanent financing mortgage/deed of trust, options, recorded lease documents, etc.

(4) Determine if survey work was done for a lessee/tenant.

(5) Determine whether or not surveyor or survey company was original contractor or a subcontractor; general rule is that if you are dealing directly and exclusively with the owner of the real estate then you are a general contractor; if you are dealing with a general contractor or other subcontractor then the surveyor or surveying company is a subcontractor or sub-subcontractor, etc.

(6) Prepare the Mechanic's Lien statement for general contractor or subcontractor.

(7) If surveyor/surveying company is a subcontractor, then subcontractor is mandated by law to personally serve a special subcontractor's notice to the owner at least 10 days prior to filing of your mechanic's lien in the Circuit Court Clerk's Office of the county where the land is located.

(8) Warning: If the person or entity cannot be served with the Notice of Intent to File Lien, then record it with the Recorder of Deeds, for that serves as alternative service. Have your process server keep records of efforts to serve the person or entity.

(9) After 10 days have passed from the time that the notice of intent to file mechanic's lien is personally or properly served, then file the mechanic's lien with the appropriate Circuit Court Clerk (not the Recorder of Deeds).

4. Special Reminders:

(A) Do not allow more than 120 days (4 months) to pass before starting the mechanic's lien process.

(B) Note that subcontractors or sub-subcontractors (those surveyors who have not contracted directly with the owner of the real estate) really have less than 6 months to file their mechanic's lien from the last date of significant work because of the 10-day advance notice to owner requirement that must be served on the appropriate parties prior to filing the mechanic's lien with the Circuit Clerk's Office.

(C) Issue only conditional lien waivers if there is a balance due the surveyor, no final lien waiver is given if there is still an unpaid account.

(D) Remember that joint checks payable to you and another contractor may waive lien rights; pay special attention to any checks or drafts issued to surveyor to make certain is no restrictive endorsement or release language on the face of the check or on the back of the check.

5. Lawsuit to enforce the surveyor's mechanic's lien:

(A) Lawsuit to enforce the lien must be filed in court within 6 months after the mechanic's lien is filed, otherwise your suit is time barred by the 6 month statute of limitations.

(B) Determine all necessary parties by checking with title insurance company and the recorder of deeds office, in addition to the circuit clerk's office, for any other mechanic's liens or other judgment liens filed.

(C) Construction mortgage or permanent mortgage? If a mortgage is involved, furnish:

(a) Type of mortgage: _____
(b) Name and address of lender;
(c) Name and address of trustee;
(d) Copy of recorded note and deed of trust(s) executed by landowners. If the mortgage is not a new or construction mortgage, your lien will not have priority over the mortgage

(D) Owners: Please provide the complete names, addresses and phone numbers of the following Owners with regard to the real estate that held legal title:

1. Owner at the time the General Contractor entered into the prime contract with owner;
2. Owner at the time your Subcontract was made;
3. Owner at the time the Subcontractor/Lien Claimant commenced work on the project;
4. Owner at the time the Mechanic's Lien is to be filed if different from the time the work was started.

II. DOCUMENTS TO FURNISH TO YOUR ATTORNEY

1. Contract, Agreement, Letter of Understanding with client, signed document or invoice by client confirming terms, etc.

2. Copies of deed from Recorder showing who owned the real estate at the following times:

(A) Owner at the time the general contractor entered into the prime contract;

(B) Owner at the time your contract was entered into with your client;

(C) Owner at the time surveyor started work on the project;

(D) Owner at the time your mechanic's lien will be filed.

3. Copies of all deeds of trusts, mortgages, documents recorded against the title to the real estate.

4. Any documents to confirm the mortgage or lien involved is a construction mortgage or a permanent mortgage.

5. Letter report from a title company pertaining to the real estate involved.

6. Commitment for title insurance from any lender having its mortgage/deed of trust insured.

7. Copies of all of your billings and invoices in chronological order.

8. Obtain copies of any other mechanic's liens filed by other lien-claimants from the Circuit Court Clerk (not the Recorder)

9. Plat map or diagram evidencing boundaries of property involved.

10. Written proof of when your work first started (to-wit ledger, calendar, etc.)

11. Written proof of the LAST day worked, which is the most critical date.

12. Detailed and itemized statement of account (even if surveyor provided a bid contract), including, but without limitation, the following:

    A. Each day on a calendar when work was involved;

    B. Roster or payroll records of each employee confirming the name of the employee that worked, the number of hours per day, and the rate of pay;

    C. Summary of out-of-pocket expenses, such as copying documents, preparing plats, etc.;

    D. Costs for any hardware, such as pins, corner monumentation, etc.

13. If you are a general contractor in that you dealt directly with the landowner then you must bring proof that you provided the owner with the "NOTICE TO OWNER" and the "CONSENT OF OWNER", all of said notices to be in 10-point bold print on your first invoice, or contract.

14. Name, address, phone number and e-mail address of all individuals involved and who may serve as witnesses to prove your survey work.

III. TRIAL CHECKLIST FOR SUBCONTRACTOR/MECHANIC'S LIEN

1. Subcontractor must prove there was a prime contract between general contractor and owner.

2. Certified copy of deed of owner from recorder of deeds admissible in evidence without foundation.

3. If you have a lump sum or fixed price bid contract with the General Contractor, include the bid contract in Notice and Mechanic's Lien Statement. If you are a subcontractor, you still must itemize your time and materials even if your contract provides for a fixed sum.

4. Construction mortgage priority status; if work or labor for any given subcontractor entered property prior to recording date of mortgage then all mechanic's lien claimants have priority over construction mortgage.

5. Last day worked/last day materials incorporated into property; do not use repair work, warranty work, or punch list completion list; utilize documentary proof from wage records, ledger of account for materials, delivery ticket signed off by general contractor or testimony from an employee working the premises, etc.

6. 10-day Notice of Intent to File Lien; if husband and wife involved, then each should be personally served with Notice of Intent to File Lien; if Deputy Sheriff used then return of service is *prima facie* evidence of service; if Special Process Server or other person is used, then there must be an affidavit for return of service and verification before a notary public; one spouse may be served at the residence for another spouse, provided two copies are left. If spouses cannot be located because of concealment then verify with Process Server of efforts to locate and then you may record the Notice of Intent to File with the Recorder of Deeds per statute.

7. Determine when General Contractor terminated construction contract with owner to make certain Subcontractors did not turn or convert themselves into General Contractors since only the owners were left behind to complete the project.

8. If owner paid General Contractor in full and General Contractor failed to pay all Subcontractors, then Subcontractors do not have unjust enrichment claim based upon *quantum meruit* against owners of property.

9. Subcontractor's 10-day Notice. 10-day Notice must be served 10 days prior to the Mechanic's Lien being filed in the Circuit Clerk's Office; Notice of Intent to File on January 1 is valid lien action if Mechanic's Lien is filed on January 11th per case law.

10. 10-day Notice does not need to be served on Deed of Trust holder.

11. Once lien has been filed it cannot be modified or supplemented to provide additional information to establish "just and true" account.

12. Even though Subcontractor gave lump sum bid to General Contractor, the just and true account can only be proven from itemized account of all labor and materials and the prices charged for each item; cover day worked, name of worker, the hourly rate and what was done on each particular occasion.

13. There is no requirement that the lien claimant provide itemized prices for furnished materials even though that is the better practice; simply providing total amount due for materials has been held sufficient by case law.

14. The mechanic's lien statement filed with the Circuit Clerk should also reference any deeds of trust or mortgages over which the lien claimant intends to assert priority.

15. A copy of the 10-day Notice with the Affidavit of Service should be attached to the Mechanic's Lien when filed with the Circuit Clerk.

16. A lien claimant may not be able to recover for unsigned change orders unless it can prove that there were orally approved by the owner or the original contractor.

III. FORMS (AVAILABLE FROM HARRIS & HARRIS, P.C.)

1. Notice of Intent to File Mechanic's Lien (served on owners of real estate)

2. Mechanic's Lien Statement (filed with Circuit Clerk's office)

3. Petition to Enforce Mechanic's Lien (filed in Circuit Court)