# Implied Easements: The Complicated Cousin of the Express Easement

by Nathan G. Osborn

*This article provides an overview of implied easement theories in Colorado that can be useful when litigating a quiet title action or leveraging your position in pre-trial negotiation.*

An easement is a limited non-possessory right to use or enter onto the property of another that obligates the owner of the land to not interfere with the authorized uses of the easement.[1] An easement can be created expressly or by implication.

Express easements are, as the word "express" suggests, expressly granted, frequently in the form of an easement deed that is recorded with the county clerk and recorder. Implied easements are the express easement's more complicated cousin, an area of property law that is concerned with honoring the intentions of the parties to avoid injustice.[2] Unlike express easements, implied easements need not be memorialized in writing or recorded in the public record. Nevertheless, they give rise to permanent property rights based on the conduct and conveyances of the current parties or their historical predecessors. This article discusses implied easement theories in Colorado that may be useful in litigation.

## Definitions of Basic Terms

The law of implied easements sometimes reads like a foreign language. Indeed, the case law is full of confusing property law legalese that most practitioners have not encountered since law school. The following is meant to refresh your recollection and to assist with the translation process.

- "Servitude" means a property right that runs with the land to successive owners.
- "Tenement" means real property.
- "Dominant tenement (or estate)" means the property that benefits from the use of an easement over another person's property.[3]
- "Servient tenement (or estate)" means the property that the easement crosses.[4]
- An easement is "appurtenant" to property when the benefit or burden of the easement runs with an interest in property.[5]

## History

Implied easements have a long history in Colorado. One of the earliest opinions to address an implied easement is *Crystal Park Co. v. Morton*,[6] a 1915 case involving a landlocked property near Pikes Peak. The *Crystal Park* court defined the implied easement by necessity as "an easement founded upon an implied grant" and "an application of the principle that where one party conveys property, he also conveys whatever is necessary to the beneficial use of that property."[7]

Another early Colorado case involving implied easement rights is *Davis v. Randall*.[8] *Davis* dealt with a litigant attempting to restrain property owners from interfering with his right to transport water through ditches and laterals across an adjacent property owner's parcel. The Colorado Supreme Court adopted findings made by the Virginia Supreme Court, which had held that when the specific terms of a conveyance are not expressed, "the construction will be controlled by the use and condition of the property at the time of the sale, and certain implications and presumptions of law arising thereon."[9] Ultimately, the *Davis* Court found that the deed at issue expressly dealt with the relevant ditch rights and, therefore, there was no need to grant implied rights.[10]

## Implied Easement Theories

Litigants in Colorado have used several theories to imply easements, including: (1) the prescriptive easement, (2) the easement by necessity, (3) the easement by pre-existing use, (4) an implied servitude based on a map or boundary reference, (5) servitudes

### Coordinating Editor

Joseph E. Lubinski, Denver, of Ballard Spahr LLP—(303) 299-7359, lubinskij@ballardspahr.com

### About the Author

Nathan G. Osborn is a shareholder with Montgomery Little & Soran, PC. His primary areas of practice include real estate litigation, commercial litigation, general civil litigation, and real estate transactions—nosborn@montgomerylittle.com. He thanks Will Ross for editing this article.

Real Estate Law articles are sponsored by the CBA Real Estate Law Section.

implied from the general plan of development, and (6) an easement created by estoppel. These are discussed below.

### Creation by Prescriptive Use

Similar to the law of adverse possession, an easement can be created by historical prescriptive use. The prescriptive easement argument frequently appears in mountain road lawsuits where a person or community has been using a road for decades despite having no record right allowing such use. This theory is also often used in city alley cases where a person has been using an undedicated private alley, over the property of another, to access his or her home. A prescriptive easement case is distinguished from an adverse possession case insofar as a claimant must possess the land to win an adverse possession case; a prescriptive easement case only requires use of the easement. In *Lobato v. Taylor*,[11] the Colorado Supreme Court found that a prescriptive easement can be established when the prescriptive use is: (1) open or notorious; (2) continued without effective interruption for eighteen years; and (3) the use was either adverse or pursuant to an attempted but ineffective grant.[12]

The most intensely litigated element of the prescriptive easement theory is typically whether the use was prescriptive. Although adversity is necessary for adverse possession claims, it is not required for prescriptive easements.[13] In short, in certain situations, courts find prescriptive easements when the owner of the servient tenement allows use.[14] Indeed, a prescriptive use in Colorado can be either a use that is adverse to the owner of the land or the interest in land, or a use or enjoyment that is done pursuant to an intended but imperfectly created servitude.[15] Use of an easement for more than eighteen years entitles the claimant to a presumption that the use was adverse.[16] That said, this presumption can be rebutted by proving that the claimant's use was permissive.[17]

A use of an easement is not prescriptive if the use is permissive and not pursuant to an intended but ineffective grant. A recent case that dealt with permissive use is *Maralex Resources, Inc. v. Chamberlain*.[18] In *Maralex*, Maralex Resources, Inc. (Maralex) was the lessee under oil and gas leases issued by the United States. To access oil wells on federal property, Maralex and its predecessors used two roads located on adjacent property. After issues arose between Maralex and the neighboring property owner, Maralex filed an action seeking prescriptive access easements. The Colorado Court of Appeals held that Maralex was not entitled to a prescriptive easement because Maralex's use of the roads was permissive insofar as Maralex and its predecessors had been given keys by the adjacent property owner to locked gates on the adjacent property.

Whether a plaintiff's use was continuous may be an obstacle to establishing a prescriptive easement. A recent case that discusses interruption of the prescription period is *Trask v. Nozisko*.[19] *Trask* involved a hotly contested dispute between adjacent landowners over the use of a driveway in the mountains. The claimant began using the driveway in 1980. In 1984, the defendant property owner constructed a large dirt berm and trench across the driveway that prevented the claimant's use of the driveway. A week after construction of the berm, the claimant removed it and continued his use of the driveway for the remainder of the prescriptive period. The *Trask* court held that the claimant's use was not continuous because it was interrupted by installation of the berm.

The ineffective grant prong, first discussed in *Lobato*, is an interesting twist on the prescriptive easement theory that may be used in situations when a grantor attempts to convey an easement but, because of a legal technicality, ineffectively does so. In *Elk Falls Property Owners' Association v. Dunwody*,[20] the court of appeals, in an unpublished opinion, discussed the elements of a claim for a prescriptive easement based on an attempted but ineffective grant. The case involved the platting of a mountain subdivision. Several easements were shown on the subdivision plat: two were described as "50 Foot Right(s) of Way" and one was styled "Existing County Road – Proposed 60 Foot R/W." The three roads were extensions of subdivision roads, but were not within the metes and bounds description of the subdivision. As a result, the roads were not dedicated public roads. The primary problem with the subdivider's attempted easement grant was that she was not the record title owner of the land on which the easements sat—her husband was. The subdivider only came into title when her husband passed away years later. Here, the court of appeals affirmed the trial court's finding of an intended but ineffective easement on the rights-of-way, specifically holding that the term "right-of-way" "when used to described an ownership interest in real property, is traditionally construed to be an easement."[21]

### Creation by Necessity

Much like in the *Crystal Lake* case discussed above, the implied easement by necessity argument is used in cases involving a landlocked property. The theory is often used as an alternative argument in a prescriptive easement or preexisting use easement lawsuit.

An implied easement by necessity arises because the law assumes that no person intends to render their property inaccessible for the purpose for which it was granted or retained.[22] The implied easement emerges when a portion of a continuous piece of property is severed and conveyed and the only reasonable access for the severed property is across the remaining property.[23] The necessity of the easement must be "great," but it does not have to be the only access.[24] A court looks at the time the property was severed to determine whether the necessity of the easement is great.[25]

Almost 100 years after the *Crystal Lake* opinion, the court's holding remains astute and relevant: "an application of the principle that where one party conveys property, he also conveys whatever is necessary to the beneficial use of that property." The *Crystal Lake* court also concluded that the easement by necessity "arises only in favor of the grantee over land of his grantor, and not over the lands of a stranger."[26]

### Servitudes Implied From Prior or Preexisting Use

An easement by preexisting use is similar to the implied easement by necessity, insofar as the easement also relies on the rights and intentions of the parties at the time a property was severed. These two theories are often plead in the same lawsuit. The difference between the two is that a preexisting use easement contemplates use at the time of severance; an implied easement by necessity does not.

An implied easement by preexisting use arises when, before a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another.[27] Such use implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the prior use would not terminate on conveyance.[28] Factors that tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the prior use include: (1) the prior use was not merely temporary or

casual; (2) continuance of the prior use was reasonably necessary to enjoy the parcel, estate, or interest previously benefited by the use; and (3) existence of the prior use was apparent or known to the parties.[29]

Unlike the implied easement of necessity, this implied easement is permanent and does not terminate on cessation of reasonable necessity.[30] In Colorado, the elements necessary to prove an implied easement by preexisting use are: (1) unity and subsequent separation of title; (2) obvious benefit to the dominant and burden to the servient tenement existing at the time of the conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity of the easement.[31]

*Lee v. School Dist. No. R-1*[32] discussed the implied easement by preexisting use theory and the easement's interplay with the implied easement by necessity. *Lee* involved the owner of a large tract of Jefferson County property. The property owner divided her land among her children and their respective spouses. Parcels 77 and 84 were conveyed to one child and her spouse. That couple then conveyed parcel 84 to the school district. Parcel 84 abutted a public avenue; parcel 77 did not. The deeds to the school district were silent about any right of way or easement. Plaintiffs, the owners of parcel 77, sought an easement by necessity and preexisting use to access the public road that abutted parcel 84. The trial court found a limited easement by preexisting use, but did not grant the more extensive easement by necessity that the plaintiffs were seeking. The Supreme Court affirmed and specifically found that the preexisting road prevented the plaintiffs from being landlocked; therefore, the denial of a way of necessity was not erroneous. The *Restatement of Property* also provides an excellent illustration to help explain this complicated property right:

> 0, the owner of Blackacre and Whiteacre, which are adjacent parcels, conveys Whiteacre to A. Prior to the conveyance, 0 used a road across Blackacre for access to the house on Whiteacre. Whiteacre abuts a public highway but, because of the terrain, it would be very expensive to build a road out to the highway from the house located on Whiteacre. The conclusion is justified that use of the road across Blackacre is reasonably necessary to the use and enjoyment of Whiteacre. In the absence of facts indicating that 0 and A did not intend to create an easement to continue the prior use, the conclusion would be justified that the conveyance of Whiteacre created an implied servitude to continue prior use.[33]

### Servitudes Implied From Map or Boundary Reference

An implied servitude based on a map or boundary reference can be employed when a dispute relates to easement rights on property within a subdivision. A typical fact pattern for this theory involves a purchaser who has obtained a deed for a property, and the deed references a plat that depicts roads and other common areas. Indeed, when a developer conveys lots in a subdivision by reference to a plat map or boundary, each grantee receives an implied easement over the streets and other common areas delineated on the map.[34]

The *Restatement* provides that this easement arises when a deed refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit. A conveyance deed containing this reference implies creation of a servitude restricting use of the land shown on the map to the indicated uses.[35] Similarly, a description of the land in the plat or map that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way.[36]

*South Creek Associates v. Bixby & Associates, Inc.*[37] discussed the implied easement by map or boundary reference. In *South Creek*, a school and store were both built on property subject to a planned unit development. The planned unit development document set forth that the parking lot between the school and store was for mutual use, but there was no easement described in the deed that the store was given when it bought the property. That said, there was a mention of the recorded planned unit development in the store's deed. The court ultimately held that the mutual use parking restrictions described in the planned unit development were binding on the parties.[38]

A case from Wyoming, *Ruby Drilling Co., Inc. v. Billingsly*,[39] also granted a public easement to use certain roads because: (1) the roadway was established at the time of the subdivision; (2) the owners bought their lots with reference to the recorded subdivision plats; and (3) nothing on the subdivision plats suggested an intent that the road was designated as a private right of way.

### Servitudes Implied From General Plan of Development

This easement is similar to the servitude arising from a map or boundary reference. The theory is useful when there are easement issues involving property that is part of a major land development project. Unless the facts or circumstances indicate a contrary intent, conveyance of land pursuant to a general plan of development implies the creation of a servitude as follows: (1) each lot included in the general plan is the implied beneficiary of all express and implied servitudes imposed to carry out the general plan; and (2) a conveyance by a developer that imposes a servitude on the land conveyed to implement a general plan creates an implied reciprocal servitude burdening all the developer's remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude.[40]

In *Allen v. Nickerson*,[41] the court of appeals found that a developer can create a servitude when he manifests the intent to effectuate the development plan and subject all property in the development to the terms of the declaration.[42] The *Allen* court ultimately held:

> Whether a developer creates a servitude by recording a declaration depends upon the developer's intent. Ordinarily, the intent to convey a lot or unit subject to the declaration is expressed in the deed, but the intent may also be inferred from the circumstances. If the declaration has been recorded, a conveyance of a lot or unit to a consumer purchaser sufficiently manifests the intent to effectuate the development plan and subject all property in the development to the terms of the declaration.[43]

### Creation by Estoppel

This theory is often applied in situations when a property owner acquiesces to the use of an easement for a period of time, and then later changes his or her mind. While not technically an implied easement, easements that are created by the equitable doctrine of estoppel are similar. If injustice can be avoided only by the establishment of a servitude, the owner of the servient estate is estopped to deny the existence of a servitude when the owner permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the

user did substantially change his or her position in light of his reasonable reliance.[44] In short, this theory is founded on the premise that when a landowner induces another to change position in reliance on a promise, the landowner is estopped from denying the existence of the property rights just because the rights were not formally conveyed.[45]

A hurdle in estoppel cases is often whether the reliance by the claimant was reasonably justified. The *Lobato* case held that the reasonableness of the reliance "depends upon the nature of the transaction, including the sophistication of the parties."[46] Another obstacle is determining whether injustice can be avoided only by the establishment of a servitude.

*Bolinger v. Neal*[47] dealt with this nebulous concept. *Bolinger* concerned a path easement within a planned unit development. The development consisted of Lot A and Lot B. Lot B was to be subdivided as a planned unit development that included approximately 100 acres of open space. The open space became "Lot 10." Property in Lot A was sold with a promise that the owners would have access to Lot 10. Eventually, a deed of conservation easement on Lot 10 was given to Colorado Open Lands. Later, the developer recorded an amended plat and an amended planned unit development regarding Lot B. The amended plat and the planned unit development depicted trails to and across Lot 10. The court found that the plat created easements for the Lot B owners.

That said, the two plaintiffs who owned property in Lot A, and who were not beneficiaries of the plat easements, contended that they were still entitled to an easement by estoppel. The *Bolinger* court affirmed the trial court's ruling that the Lot A plaintiffs were not entitled to an easement, noting that the record did not contain any evidence that, at the time of the conveyance of the conservation easement, Colorado Open Lands had any notice that the Lot A plaintiffs had been promised access to Lot 10.

The court of appeals also affirmed the trial court's finding of a license for the Lot A plaintiffs, holding that the trial court's finding of license rights precluded it from "finding the type of injustice which would warrant disregarding usual conveyancing and recording principles."[48] The court also noted that its denial of easement rights was especially important insofar as the *Restatement* cautions that easements by estoppel "undercut policies encouraging the use of written documents for land transactions."[49] The *Restatement* also provides a good example, similar to the facts in *Bolinger*, of when an easement by estoppel can arise:

> D, the developer of a residential subdivision, which included a lake, represented to purchasers of lots that Parcel 10 was reserved for common use as a park and for access to the lake. On a map of the subdivision, located in the sales office, Parcel 10 was labeled as a park. Later D began to build a residence on Parcel 10 and the lot owners sued to enjoin construction. The conclusion is justified that D is estopped to deny the existence of a servitude burdening Parcel 10 for the benefit of the lot owners.[50]

## Conclusion

Most implied easement cases are complex disputes that turn on the historical conduct, documents, and conveyances of the parties. An understanding of the theories discussed in this article can be useful when litigating a quiet title action or leveraging your position in pre-trial negotiation. When used correctly, these theories may be a valuable tool to help obtain an optimum result for the client.

## Notes

1. *Matoush v. Lovingood*, 177 P.3d 1262, 1265 (Colo. 2008).
2. *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002).
3. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo. 1998).
4. *Id.*
5. *Id.*
6. *Crystal Park Co. v. Morton*, 27 Colo.App. 74, 146 P. 566 (1915).
7. *Id.* at 569.
8. *Davis v. Randall*, 99 P. 322 (Colo. 1908).
9. *Id.* at 324.
10. *Id.* at 325.
11. *Lobato*, 71 P.3d 938.
12. *Id. at* 950; CRS § 38-41-101.
13. *Lobato*, 71 P.3d at 953-54.
14. *Id.*
15. *Id.* at 954.
16. *Weisiger v. Harbour*, 62 P.3d 1069, 1072 (Colo.App. 2002).
17. *Id.*
18. *Maralex Resources, Inc. v. Chamberlain*, 320 P.3d 399 (Colo.App. 2014).
19. *Trask v. Nozisko*, 134 P.3d 544 (Colo.App. 2006).
20. *Elk Falls Prop. Owners' Ass'n v. Dunwody*, 12CA0653 (Colo.App. May 2, 2013).
21. *See also Hutson v. Agric. Ditch & Reservoir Co.*, 723 P.2d 736, 739 (Colo. 1986); *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 182 n.14 (Colo. 1991).
22. *Thompson v. Whinnery*, 895 P.2d 537, 540 (Colo.App. 1995).
23. *Collins v. Ketter*, 719 P.2d 731, 733 (Colo.App. 1986); *Thompson*, 895 P.2d at 540.
24. *Wagner v. Fairlamb*, 379 P.2d 165, 168 (Colo. 1963).
25. *Proper v. Greager*, 827 P.2d 591 (Colo.App. 1992).
26. *Crystal Park Co.*, 27 Colo.App. at 79.
27. *Restatement (Third) of Property (Servitudes)* (*Restatement*) § 2.12, Servitudes Implied From Prior Use (2000).
28. *Id.*
29. *Id.*
30. *Bromley v. Lambert & Son, Inc.*, 752 P.2d 595, 596 (Colo.App. 1988).
31. *Lobato*, 71 P.3d at 951.
32. *Lee v. School Dist. No. R-1*, 435 P.2d 232 (Colo. 1967).
33. *Restatement* § 2.12, Illustration No. 5.
34. Bruce and Ely, *The Law of Easements and Licenses in Land*, §§ 4:31 and 4:34, Easements Implied From Reference to a Plat (2009); *Restatement* § 2.13, Servitudes Implied From Map or Boundary Reference.
35. *Restatement* § 2.13 Servitudes Implied from Map or Boundary Reference.
36. *Id.*
37. *South Creek Assocs. v. Bixby & Assocs., Inc.*, 753 P.2d 785 (Colo.App. 1987).
38. *Id.* at 787.
39. *Ruby Drilling Co., Inc. v. Billingsly*, 660 P.2d 377, 380-81 (Wyo. 1983).
40. *Restatement* § 2.14, Servitudes Implied from General Plan.
41. *Allen v. Nickerson*, 155 P.3d 595, 598 (Colo.App. 2006).
42. *Id.*; *Restatement* § 2.14, Servitudes Implied from General Plan.
43. *Allen*, 155 P.3d at 600.
44. *Lobato*, 71 P.3d at 950-51 (reciting elements); *Restatement* § 2.10, Servitudes Created by Estoppel.
45. *Lobato*, 71 P.3d at 951.
46. *Id.*
47. *Bolinger v. Neal*, 259 P.3d 1259 (Colo.App. 2010).
48. *Id.* at 1268.
49. *Id.*
50. *Restatement* § 2.10, Illustration No. 10, Servitudes Created by Estoppel. ■