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ESTABLISHING OR DISCOVERING LEGAL ACCESS TO "LANDLOCKED" PROPERTY

All too often, a property owner will discover subsequent to purchasing land (perhaps not until months, or years later) that it apparently lacks legal access, or is "landlocked." If the owner is unable to obtain and record an easement over adjacent property to the nearest public road through the good graces of his neighbor or neighbors, he will have to take legal action to establish legal access. Often the owner will seek to invoke the private condemnation statute, discussed below. Depending on the circumstances, however, the owner may be entitled (and limited) to access through an alternative means, such as a prescriptive or implied easement, or perhaps even a "common-law dedication." Following is a discussion of the various legal theories by which access may be established or "discovered."

A. STATUTORY CONDEMNATION OF EASEMENT OF NECESSITY

Under A.R.S. § 12-1202, an owner or a person entitled to the beneficial use of land that is "landlocked" may bring an action to condemn and take neighboring lands to the extent necessary to construct and maintain a "private way of necessity." Thus, the statute vests an individual with a private right of condemnation to do what normally only a governmental entity would have the power to do. The justification for private condemnation is that landlocked land serves no purpose either for the owner or the public in general, and it is in the public interest to force a means of legal access. The plaintiff apparently gets to choose his route of access, and condemn so much land as is reasonably necessary to construct a proper road.

The private condemnation statute has its limits, however. The power of condemnation brings with it the obligation to pay. As would be the case with a government entity, an individual who condemns adjacent land for access must compensate the person or persons whose lands are taken. Add this expense to his attorney's fees and costs, and he ends up paying dearly for his legal access. His title insurance, if he has it, may not cover this expense.

The landowner, first of all, cannot utilize the statute to obtain access where the landowner himself created the lack of access in the first place. The Arizona Court of Appeals has held that a landowner may not acquire an easement by necessity to another's land "after he has voluntarily cut off an alternate means of access to his own property." Gulotta v. Triano, 125 Ariz. 144, 608 P.2d 81 (App. 1980) (one who has landlocked his property by voluntary alienation of a means of ingress and egress may not thereafter

acquire a private way of necessity over other land by condemnation). In Gulotta, landlocked owners owned a delicatessen and adjacent property and subsequently sold the delicatessen, taking an easement which expired after a few years. The Arizona Court of Appeals reversed the trial court's judgment awarding the landlocked owner the right to purchase the statutory private way of necessity. The other owner had argued the landlocked party should not be able to condemn its property because the landlocked property owner had voluntarily abandoned its access when it sold the adjacent property. The appellate court agreed and held that the landowner should not be able to acquire an easement by necessity when the landowner voluntarily land locks himself. Id., 125 Ariz. at 145, 608 P.2d at 83.

In addition, the landowner must demonstrate that the condemnation is necessary; in other words, that his land is truly landlocked and has no adequate alternative means of access to the route sought to be condemned. Arizona courts construe this requirement strictly. See Solana Land Co. v. Murphey, 69 Ariz. 117, 210 P.2d 59 (1949); Siemsen v. Davis, 196 Ariz. 411, 998 P.2d 1084 (App. 2000); Tobias v. Dailey, 196 Ariz. 418, 998 P.2d 1091 (App. 2000); Bickel v. Hansen, 169 Ariz. 371, 819 P.2d 957 (App. 1991). In Solana, the Arizona Supreme Court held that the private condemnation statute permits a party to bring an action to condemn the private way of necessity across the land of another only where the party has no "adequate and convenient" outlet, and can show reasonable necessity to condemn the lands in question. Solana, 69 Ariz. at 125, 210 P.2d at 598.

The necessity requirement will usually be the primary issue in dispute, and the plaintiff should presume that the defendant or defendants, unless they are happy to have their lands taken in return for compensation, will attempt to show that the plaintiff already has access to his property through some overlooked alternative route. Thus, the plaintiff should be careful to first educate himself as to the potential alternative routes of access to his property, and be prepared to either prove or disprove that such access is legally and physically adequate.

It may be that the plaintiff is aware of recorded legal access that is seen as physically inadequate. He should not presume that he will be entitled to condemn a more direct route, unless the facts are convincing that the alternative is far, far too burdensome. For example, in Bickel the court denied relief to a party seeking to condemn a direct route of access to his property where that party had an alternative outlet that was deemed to be adequate under the circumstances. That alternative, however, "was twice as long, was meandering, and would cost more." Bickel, 169 Ariz. at 374, 819 P.2d at 960.

Even more confounding, it may be that the land has access through an unrecorded route, such as an implied easement or prescriptive easement. Even the existence of unrecorded, "implied" easements providing access to the property will defeat a condemnation claim. See Siemsen, 196 Ariz. at 414, 998 P.2d at 1087; Tobias, 196 Ariz. at 420-21, 998 P.2d at 1093-94. Where there is even an **inference** of access by an implied easement, the plaintiff fails to meet his burden to show reasonable necessity and cannot obtain relief under A.R.S. § 12-1202. Thus, it is the plaintiff's *burden to disprove*

the existence of an implied easement. See Siemsen, 196 Ariz. at 414, 998 P.2d at 1087; Tobias, 196 Ariz. at 420-21, 998 P.2d at 1093-94.

Of course, it may be advantageous to the plaintiff to establish, rather than disprove, access through an implied or prescriptive easement theory, because he will not have to pay compensation as he would have to do under the statutory condemnation route. Either way, the plaintiff should consider all of the alternatives available.

B. PRESCRIPTIVE EASEMENT

The prescriptive easement, stated simply, is the adverse possession rule as applied to easements. The required elements, as set forth in LaRue v. Kosich, 66 Ariz. 299, 187 P.2d 642 (1947), are that the use has been actual, open and notorious, under a claim of right, and hostile to the owner's title. The use must also have been continuous for at least ten years. Id.; Paxson v. Glovitz, 203 Ariz. 63, 50 P.3d 420 (App. 2002), as amended (2003) (holding that continued use of a driveway by putative dominant estate owners, after an unrecorded easement created by an oral agreement, was a hostile use, as element for a prescriptive easement).

The prescriptive easement will typically be difficult to prove, because the law disfavors adverse possession rights. For example, any indication that the alleged "hostile" use was done with the permission of the owner will probably defeat the claim.

Furthermore, even to the extent the prescriptive easement can be established, the use and scope of the prescriptive easement is limited to that which led to the creation of the easement in the first place. For example, a prescriptive easement based upon prior use as a hiking or horse trail, or a mining road, may be too narrow, rocky, or steep to be of use to the homeowner who requires access for his SUV.

Lastly, prescriptive easements, like adverse possession, are not enforceable against the government. There will be an exception to this rule, however, where the prescriptive right was established prior to government ownership of the servient land. See Bunyard v. U.S. Dept. of Agriculture, Forest Service, 301 F.Supp.2d 1052 (D.Ariz. 2004) (If a prescriptive easement is established prior to the acquisition of land by the United States, then suit may be brought to quiet title to such an easement under the Quiet Title Act).

C. IMPLIED EASEMENT OR WAY OF NECESSITY

The implied easement or way of necessity is a creature of legal fiction. It is not a matter of record, so you won't see it in a title search. It is also not necessarily a matter of physical use or existence, so you won't necessarily see it by looking at the land. The general rule for common-law implied easements is set forth in Bickel:

> Under the common law, where land is sold that has no outlet, the vendor by implication of the law grants ingress and egress over the parcel to

> which he retains ownership, enabling the purchaser to have access to his property.

169 Ariz. at 374, 819 P.2d at 960. The court in Bickel further explained that "a way of necessity results from the application of the presumption that whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of the land he still possesses." Id. (citing Hellberg v. Coffin Sheep Company, 404 P.2d 770 (Wash. 1965)). The specific elements of an implied way of necessity are original unity of title, subsequent separation, and a necessity for access through the severed parcel at the time of the severance. Siemsen, 196 Ariz. at 415, 998 P.2d at 1088.

There is a variation on the implied way of necessity that has been recognized by division two of the Arizona court of appeals. E.g., Porter v. Griffith, 25 Ariz.App. 300, 543 P.2d 138 (1975). This variation, called an implied easement (or implied easement upon severance), is substantially the same as the implied way of necessity, with an additional requirement that the "easement" have been in long, continuous, and obvious use to a degree showing permanency at the time of severance. Porter, 25 Ariz.App. at 302, 543 P.2d at 140; compare Bickel, 169 Ariz. at 375, 819 P.2d at 961.

In either case, the implied easement or way of necessity is deemed to be appurtenant to the land, and any subsequent owner of the severed parcel is entitled to enjoy it in the future. Tobias, 196 Ariz. at 421, 998 P.2d at 1094; Bickel, 169 Ariz. at 375, 819 P.2d at 961. Thus, even where it does not presently exist (or never did) physically, it may still exist legally.

The existence of such an implied easement or way of necessity may be an unpleasant surprise to the plaintiff seeking to condemn a direct route of access where, as in Bickel and Siemsen, the implied route is either hard to travel or is much longer than the route sought to be condemned. On the other hand, an implied way or easement may be advantageous to the plaintiff for several reasons. First, as noted above, he will not have to pay compensation to condemn it. In addition, because the implied easement is a property right that may be established in a quiet title action, the plaintiff may be entitled to recover his attorney fees through first making demand pursuant to the provisions of A.R.S. § 12-1103.

Lastly, where the land is enclosed by government-owned land, the implied easement or way of necessity may be the only viable theory for access. While the statutory right of condemnation, as well as a prescriptive easement (subject to the exception noted above), cannot be used to get access through state or federal land, the implied easement or way of necessity **can**. In Tobias, for example, the court noted that the plaintiffs likely were entitled to acquire an implied easement over adjacent federal lands, where the federal government had been the original grantor of the parcel owned by the plaintiffs. Tobias, 196 Ariz. at 421, 998 P.2d at 1094 (citing Kinscherff v. United States, 586 F.2d 159, 161 (10th Cir. 1978)). See also United States v. Dun*n*, 478 F.2d 443 (9th Cir. 1973); Moores v. Walsh, 38 Cal. App. 4th 1046, 45 Cal.Rptr.2d 389 (1995);

Fitzgerald v. United States, 932 F.Supp. 1195 (D. Arizona 1996). Where most of our state consists of land that can be traced back to relatively recent federal ownership, one should always consider the possibility of establishing access to a landlocked parcel via an implied easement through adjacent lands that are either presently or previously under common ownership of the federal government.

The scope of the implied easement is not as limited as a prescriptive easement. In Tobias, supra, the Court adopted the Restatement formulation, holding that such an easement is "sufficient in scope to permit reasonable use and enjoyment of the land." It is measured "by such uses as the parties might reasonably have expected from future uses of the dominant tenement," which would include anything expected from a normal development of the property. Tobias, 196 Ariz. at 422, 998 P.2d at 1095 (citing the Restatement of Property § 484).

D. RIGHTS OF WAY RESERVED UNDER THE SMALL TRACT ACT

The federal Small Tract Act, 43 U.S.C. § 682a et seq., provided for the sale or lease of small tracts of federal land "for residence, recreation, business, or community site purposes." § 682a. It did not specifically provide for the reservation of rights-of-way in the land patents but simply permitted the Secretary of the Interior to reserve in the patents "such rules and regulations" as he or she deemed necessary. Id.

In Bernal v. Loeks, 196 Ariz. 363, 997 P.2d 1192 (App. 2000), the Arizona Court of Appeals held that owners of parcels originally granted by land patents pursuant to the Act, which provided that neighboring parcels were subject to a right-of-way for roadway purposes along three of those parcels' boundaries, could enforce the rights-of way for access purposes, even though a roadway had not been publicly built and maintained along the affected boundary. Bernal, 196 Ariz. at 364, 997 P.2d at 1193 (App. 2000) (citing 43 U.S.C. (1970 Ed.) § 682a et seq.; 43 C.F.R. § 2731.6-2 (Repealed)).

E. COMMON-LAW DEDICATION

Under the common law, an owner of land can dedicate that land to a proper public use. Restatement (Third) of Prop. Servitudes § 2.18(1) (2000). Arizona cases have long recognized and applied this common-law doctrine broadly, examples being dedications of public parks, e.g., Evans v. Blankenship, 4 Ariz. 307, 39 P. 812 (1895), and to roadway easements for public use. Thorpe v. Clanton, 10 Ariz. 94, 99-100, 85 P. 1061, 1062 (1906). The effect of a common-law dedication is that the public acquires an easement to use the property for the purposes specified, while the fee remains with the dedicator. Allied Am. Inv. Co. v. Pettit, 65 Ariz. 283, 290, 179 P.2d 437, 441 (1947); Moeur v. City of Tempe, 3 Ariz.App. 196, 199, 412 P.2d 878, 881 (1966).

The doctrine has been substantially developed in two cases during the 2000s, specifically on the issue of easements and rights-of-way: One issued by the Arizona Supreme Court in 2004, and one issued by the Arizona Court of Appeals in 2008.

Together these holdings clarify the requirements for establishing the necessary elements of (1) "dedication" to public use; and (2) "acceptance" by the public of the dedication.

Pleak v. Entrada Property Owners' Association

Earlier this decade in 2004, the Arizona Supreme Court affirmed the continuing viability of the common-law dedication doctrine, in Pleak v. Entrada Property Owners' Ass'n, 207 Ariz. 418, 421, 87 P.3d 831, 834 (2004). In Pleak, a title company had recorded a "Record of Survey" for the Entrada development in rural Pima County. The survey covered three adjacent sections of real property and divided each section into sixteen forty-acre parcels. The survey depicted an easement along the eastern seventy-five foot edge of Entrada. The survey also contained a "Grant of Roadway and Utility Easement" stating that "the owner of record of the property included in the easements shown hereon[,] hereby dedicate[s] these easements to the public for the use as such."

Years later, the Entrada property owners' association improved the road. In 1997, Pima County named the road Kolb Road, but in doing so expressly disavowed any responsibility for the road, and never performed any improvement or maintenance on it. As the surrounding area developed, other nearby landowners in addition to the Entrada association landowners began using the road. The Entrada association objected to the use of the road by the other landowners.

The other landowners brought a lawsuit seeking to have the court declare that, under the common-law dedication doctrine, the easements and road had been dedicated to the public. The defendant, the Entrada association, argued that the common-law dedication concept had been abrogated in the 1901 Territorial Code, and that since 1901, dedications of roadway easements for public use could only be made pursuant to a specific authorizing statute. As a result, the defendant argued, a dedication could only be effective where it was properly dedicated and accepted by the applicable government entity pursuant to its statutory authority.

The Arizona Supreme Court disagreed, holding that the 1901 Territorial Code did not abrogate the common law of roadway dedication to public use, and that the dedication of a roadway easement on a private road to the public by a prior owner of the servient land was enforceable as a common-law dedication, even absent compliance with the statutory requirements for dedication.

The Court set forth the elements as follows: "An effective dedication of private land to a public use has two general components--an offer by the owner of land to dedicate and acceptance by the general public. No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice." Pleak, 207 Ariz. at 424, 87 P.3d at 837 (citing Allied Am. Inv. Co., 65 Ariz. at 287, 179 P.2d at 439; Restatement (Third) of Prop.: Servitudes § 2.18(1). The Court adopted the rule applicable to dedication of public parks as set forth in Drane v. Avery, 72 Ariz. 100, 102, 231 P.2d 444, 445 (1951), in which the court held that the recordation of a plat containing a dedication of streets,

coupled with sale of lots, constitutes a 'dedication,' and use by lot purchasers and the general public constituted sufficient acceptance of the dedication. The Court in Pleak was further careful to hold, however, that the "acceptance" element does not require a showing of actual use by the public. Pleak, 207 Ariz. at 425, 87 P.3d at 838.

Thus, Pleak established that a landowner may have the right to utilize an easement or roadway that appears in a prior recorded document(s) purporting to dedicate an easement or right-of-way to the public, or to a governmental entity for public use. This will also be the case for a recorded plat or survey that sets forth an easement or easements for public use, even if the subject property was never developed (or a road built) in accordance with the plat or survey, and even if the plat or dedication was never approved or accepted by the governing authority in accordance with statutory requirements. Assuming there is some indication that the easement or roadway was subsequently used (and therefore "accepted"), a "common-law dedication" has likely occurred. The nature of "use" necessary to establish acceptance, however, or the question of whether use by itself could constitute acceptance, was left unresolved in Pleak.

Lowe v. City of Tucson

In 2008, the Arizona Court of Appeals decided Lowe v. Pima County, 177 P.3d 1213 (App. 2008). Lowe involved a dispute between a couple, the Lowes, and Pima County, concerning an alleged zoning violation by the Lowes arising out of their installing a fence within what the County claimed was a public right of way, resulting from a dedication recorded decades earlier. The Lowes defended the case on the grounds that (1) the area in question had never been accepted as a dedication, and (2) the Lowes were entitled to maintain the fence as a result of their adverse possession of the "dedicated" area.

The original owners of the "dedicated area" (along with the adjacent properties) had decades earlier recorded a "Deed of Dedication," in which they "CONVEY[ed] unto THE PUBLIC, for road and utility purposes," a sixty-foot strip of land running between what later became the Lowes' parcel and a parcel to the north. Both parcels, as well as two other adjoining parcels to the east, all adjoin the dedicated property area.

Pima County never expressly accepted the dedication. A road apparently had existed over the dedicated area, and the county maintained the road for a period of time, though it later discontinued that maintenance.

The Lowe court noted that the deeds of the lots subsequently sold following the dedication did not reference the dedication; they simply excluded the dedicated property from the legal descriptions. Likewise, when the Lowes bought their parcel, it was described by aliquot description ("The North half of the West half of the West half," etc.), concluding with the provision "EXCEPT the North 30 feet thereof" (which was a portion of the dedicated area). The court held that the reference by exception was not sufficient to constitute a reference to the dedication. For these reasons, the court concluded that the recorded documents did not establish an "acceptance" in contrast to

the facts in Pleak, where the conveyance deeds specifically reference the plat that contained the dedication.[1]

The court then turned to the issue of whether acceptance of the dedication could be established by public use of the dedicated area. In the Pleak case, the court had not clearly stated whether public use by itself could be deemed to be a valid acceptance in the absence of references in the conveying deeds. However, the court in Lowe noted that various comments from the Pleak case along with the citations therein (including the Restatement of Property) indicated that acceptance may be established by public use alone.

This leads to the question, of course, of "how much" use is necessary to establish public acceptance. The facts in Lowe indicated that a road apparently had existed over the dedicated area, and the county maintained the road for a period of time, though it later discontinued that maintenance. The county argued that the dedicated area was being used as a road back when the dedication was recorded, and that the area had also been used for utility purposes, evidenced by a utility pole. The county also obtained an affidavit from a long-time resident stating that since the dedication in the late 1950's, the road had been in the same location "and was in continuous use without interruption."

On the other hand, the court noted that two drawings included in the trial record, showing the "dedicated area," made it unclear whether the road in question actually continued into the area that the Lowes claimed as their property. Separate statements from a surveyor indicated discrepancies between the physical location of the road and the "dedicated area." Ms. Lowe also had averred that the roadway area did not come anywhere within the "dedicated" area in question adjacent to the Lowes' parcel.

With this assortment of facts, the Lowe court concluded, "Although acceptance may be established by use, in this case *disputes of fact* remain as to whether the property covered by the . . . deed of dedication has actually been used in such a way as to constitute an acceptance by the general public." (italics added). As a result, the case was remanded (sent back) to the trial court to proceed to trial on the issue of whether acceptance by public use did in fact occur.

Summary

Pleak and Lowe together establish that the common-law dedication doctrine may be applied broadly to establish a "public" right-of-way wherever a landowner records an instrument indicating the intent to dedicate the property in question for public purposes, regardless of whether a government entity ever accepts the dedication.

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[1] Notably, here the conveyance deeds (or the Lowe's deed) included any of the area within the "dedicated" portion, the result would be different. In such case, the grantee would take title to a portion of property subject to the dedication, because the dedication instrument would be a matter of record against the property being conveyed. An imperfect analogy would be the difference between taking title to a parcel of land situated within a development against which CC&Rs were previously recorded, as opposed to taking title to a parcel of land adjacent to (and outside) the affected development.

To indicate acceptance by the public, such acceptance may clearly be established without showing any public use so long as subsequent deeds to adjacent properties contain a reference to the dedication or the dedication instrument. The most effective example of this would be as in Pleak, where the dedication appears on a plat or survey along with the adjacent properties, and as a matter of course future conveyances will contain via their legal descriptions a reference back to the plat or survey. Where a dedication is done via a "stand-alone" instrument, as in Lowe, subsequent conveyances of the adjacent parcels will probably not contain any reference to the adjacent dedication; in which case acceptance will not be established.

The alternative method of proving acceptance, by public use, leads us into a grey area that will typically involve factual disputes - fodder for trials on the merits before a judge or jury. The Lowe case provides an example of the various bits of evidence and factual issues that may be argued for and against acceptance of the "dedicated area" by public use.