

CHERNOFF'S LAWYERS IN LIMINE

**Good Easements Make Good Neighbors but
Bad Neighbors Make Good Lawsuits:
An Advanced Look at the Power of Easements to
Unify Neighbors and Create Enemies**

Presented by Kathleen D. Fox



PRESENTED BY:

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OH, WAIT.....

**PATTY
COULDN'T
MAKE IT.**



Presented by Kathy Fox. Instead. Yay!



EASEMENTS: The Real World

True Story

To access their property, the Joneses had to traverse a long asphalt driveway running from their home, across the neighbor's property, to their public road. The Joneses held an access easement to use the driveway.

At some point, Mr. Smith bought the neighboring property and promptly began to dig up the driveway, saying he was going to put a fence on it. When the Joneses explained that they held an easement across his property to use the driveway, Mr. Smith became angry. He Smith refused to stop digging, telling the Joneses he owned the property. He threatened to charge them for the removal of the driveway.

After mulling things over for a bit, Mr. Smith became irate. . . .

- Mr. Smith began recording the Joneses' friends and calling them very bad words.
- The police suggested the Joneses install security cameras and obtain a restraining order, which they did.
- Mr. Smith then put up a sign facing the Joneses' home which said, "Kill Your Self." After he was served with the restraining order, Mr. Smith added the word "Please."



At least he said "please."

- Mr. Smith put a sign saying, “My Neighbor is a Karen.” He put a pentagram and grim reaper facing their property.



- While checking footage from his security camera one night, Mr. Jones saw Mr. Smith carrying one of the cameras around the property, talking to it. Mr. Smith broke the camera and said, “There. I fixed it.”

Sadly, the resolution of this dispute was not reported. At last word, the poor Joneses were still dealing with Mr. Smith.

EASEMENTS: Generally

Easement Defined:

- An easement is a right which one person holds to *use* the land of another for a specific purpose.
- An easement does not affect the owner's legal title to the land.
- The property benefitted by the easement is referred to as the dominant estate, and the property burdened by the easement is referred to as the servient estate.

Two Basic Types of Easements:

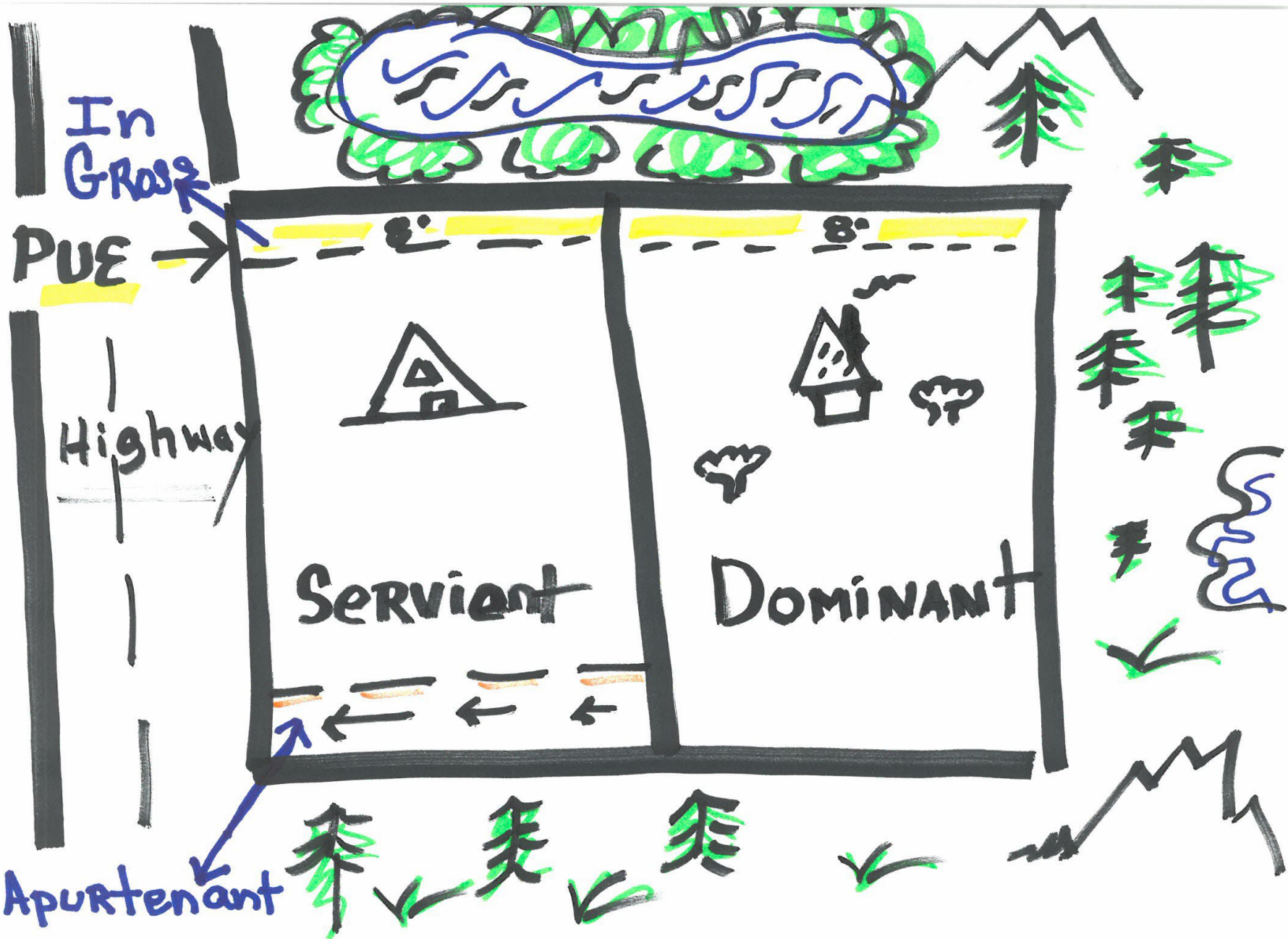
An easement can be either:

- **Appurtenant**, which means that it runs with the land and the rights or obligations of the easement are tied to the ownership or occupancy of a particular unit or parcel of land.

For example, an ingress/egress easement that permits one landowner to cross his neighbor's property to reach a public road benefits a particular parcel.

- **In Gross**, which means that the benefit of the easement is not tied to the ownership or occupancy of a particular unit or parcel of land.

For example, a utility easement benefits utility companies, not another parcel of land.



EASEMENTS: Who Can Do What.

The Owner of the Land Subject to the Easement.

- The owner of the land that is subject to the easement can use his property for any purpose not inconsistent with the purpose and character of the easement.

Examples: Gate for security?

Enclose private road?

Fence and landscaping over easement for underground utilities?

EASEMENTS: Who Can Do What.

The Easement Holder.

- An easement holder's rights in the land subject to the easement are defined and limited by the language and purpose of the easement.
- An easement holder is entitled to use it 'in a manner that is reasonably necessary for the convenient enjoyment' of the easement'. *Paxson v. Glovitz*, 203 Ariz. 63, 68-70, 50 P.3d 420, 425-27 (Ct. App. 2003) (citing *Restatement Third (Property) (Servitudes)* § 4.10).

EASEMENTS: Who Can Do What.

The Easement Holder. . .

- The “manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by the servitude.” Section 4.10 further explains that permissible uses of an easement are any uses which do not “cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.”

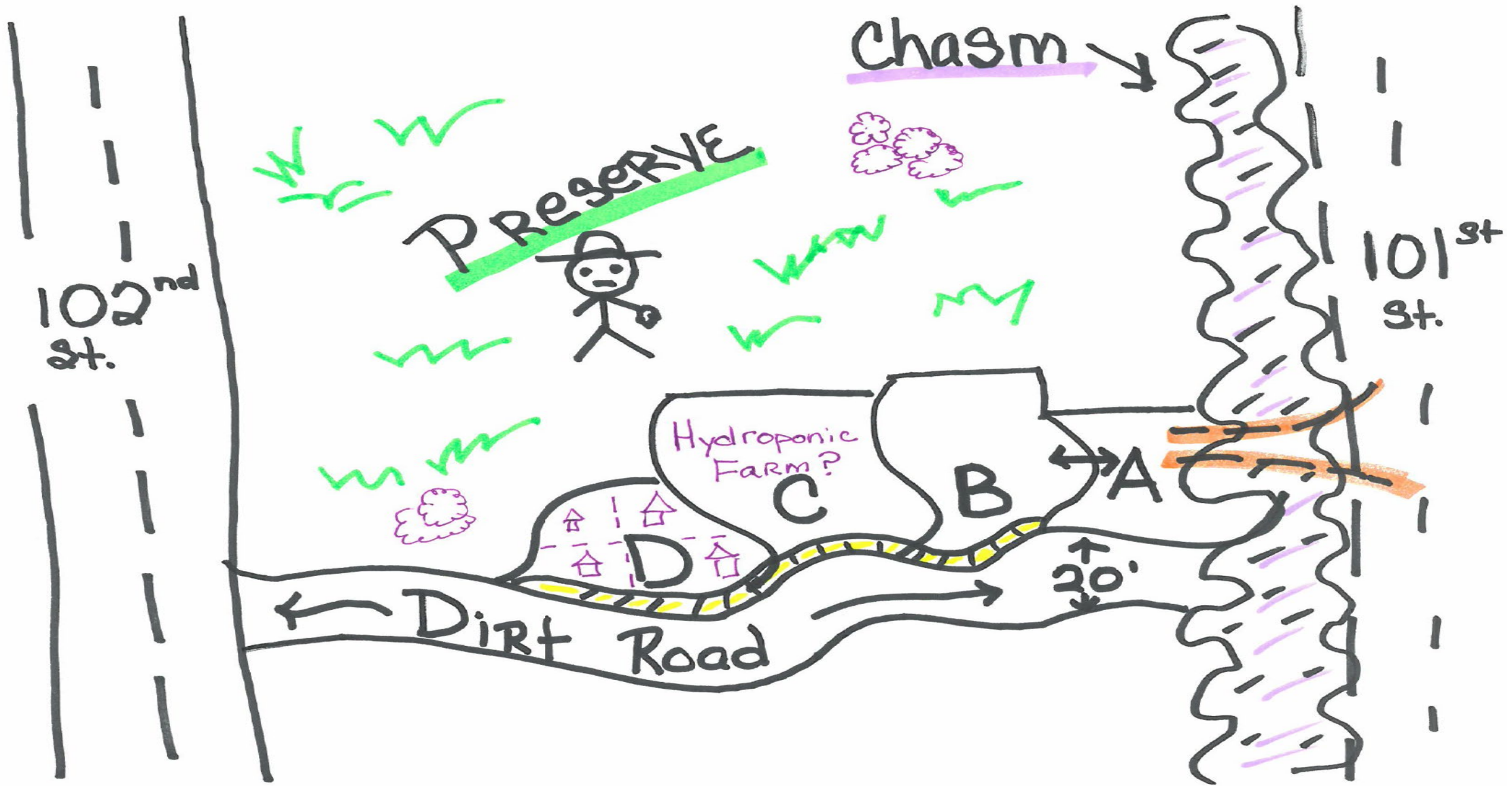
Id.

- A servient estate, however, will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement. *Pinkerton*, 71 Ariz. 117, 223 P.2d 933; *Hunt v. Richardson*, 216 Ariz. 114, 163 P.3d 1064 (Ct. App. 2007).

EASEMENTS: Who Can Do What.

The Easement Holder.

- What is reasonable is a question of fact to be determined by the trier of fact based upon all of the surrounding circumstances. *Squaw Peak Community Covenant Church of Phoenix v. Anozira Development, Inc.*, 149 Ariz. 409, 719 P.2d 295 (Ct. App. 1986) (citations omitted.)
- “[A]n appurtenant easement ... may not be used for the benefit of property other than the dominant estate.” *Restatement (Third) of Property: Servitudes* § 4.11.



EASEMENTS: Abandonment

- Mere non-use of an easement, no matter how long, will not extinguish an easement.

Example: 50-year-old access easement.

- Acts indicating abandonment “must decisively, conclusively and unequivocally establish the holder’s clear intent to abandon the easement.”

Scalia v. Green, 229 Ariz. 100, 102, 103, 271 P.3d 479, 481.

EASEMENTS: Merger.

- When the same person or entity owns both the dominant and servient estates, an easement will be terminated because the easement no longer serves any purpose. Once extinguished, the easement cannot be resurrected.

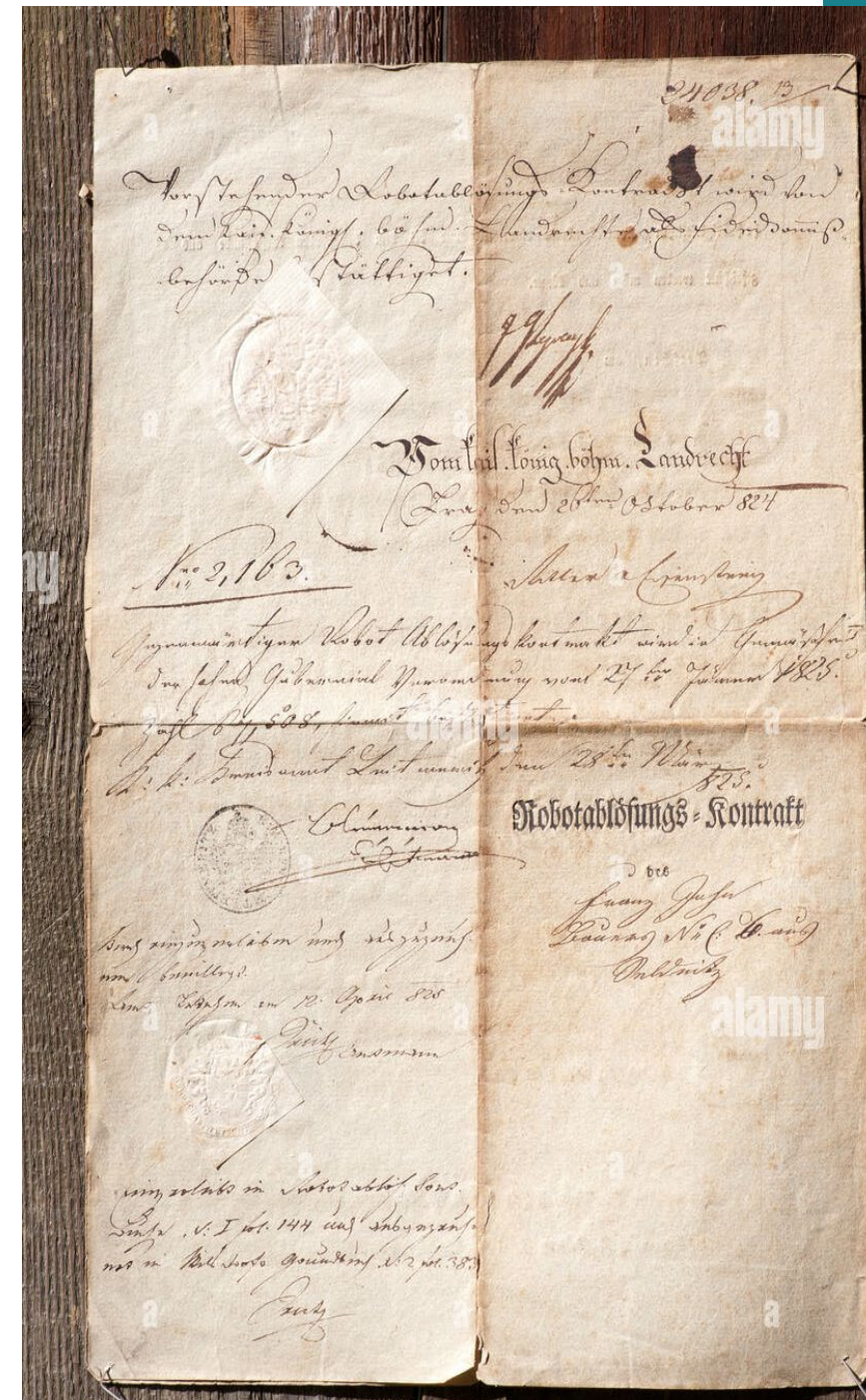


**Pretty
Interesting,
Right?**

EXPRESS EASEMENTS

EXPRESS EASEMENTS: What is Required.

- A recorded easement generally runs with the land and is a burden on the landowner's successors. *Siler*, 193 Ariz. 374, 972 P.2d 1010.
- 'While no particular words are necessary for the grant of an easement, the instrument must identify with reasonable certainty the easement created and the dominant and servient tenements.' *Dunlap Investors, Ltd. v. Hogan*, 133 Ariz. 130, 650 P.2d 432 (1982) (internal citations omitted).





The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description.” *Dunlap Investors, Ltd. v. Hogan*, 133 Ariz. 130, 650 P.2d 432 (1982) (internal citations omitted.)

EXPRESS EASEMENTS: Boundaries and Interpretation

- Where the location or dimensions of an easement are unclear from the instrument, the easement will be interpreted to give effect to the parties' intent based upon the language of the easement, the circumstances surrounding the creation of the easement, and the purpose of the easement. *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006).
- An express easement is a contract and will be interpreted according to ordinary contract principles.
- An express easement defines the grantee's rights. *Scalia*, 229 Ariz. 100, 271 P.3d 479.

EXPRESS EASEMENTS: Parameters.

- What if the easement grants an access easement across “the existing dirt path”?
- What if the private utilities easement describes the land subject to the access easement as “Lot 62.”
- The easement defines the easement area as the south 10’ of Lot 12, Book 127, Page 5.

PRESCRIPTIVE EASEMENTS

PRESCRIPTIVE EASEMENTS



PRESCRIPTIVE EASEMENTS: Basics

A.R.S. Sections 12-521 *et. seq.*

- In order to establish a prescriptive easement, a party must demonstrate that the land which is allegedly subject to the easement:
 - has been actually and visibly used,
 - for a specific purpose;
 - for 10 years; and
 - the use was commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

PRESCRIPTIVE EASEMENTS: Open and Notorious

- The claimant's use must be of a character that would indicate to the property owner that the land is in the exclusive possession and enjoyment of the claimant.
- There must be physical facts that openly show and give notice of the claimant's intent to hold the land hostile to the property owner's interests, and which would indicate to a prudent owner that an adverse claim is being asserted.
- Occasional or casual acts will not support the "open and obvious" element of a prescriptive easement claim.
- For example, paving a driveway and driving across it for more than 10 years is conspicuous.

PRESCRIPTIVE EASEMENTS: Hostile Use

- ● Burden of proof is initially on the claimant.
- ● Once basic elements of a prescriptive easement claim have been met, the use is *presumed* to be hostile.
- ● Use commenced with permission remains permissive unless claimant can prove later became hostile.
- ● Use of another's property by mistake is a hostile use.

PRESCRIPTIVE EASEMENTS: Use for the Prescriptive Period (Tacking)

- **10 years.** A.R.S. Section 12-526.
- **Tacking permits successive segments of use to be combined to establish the continuous 10-year period, but privity of estate is required.**

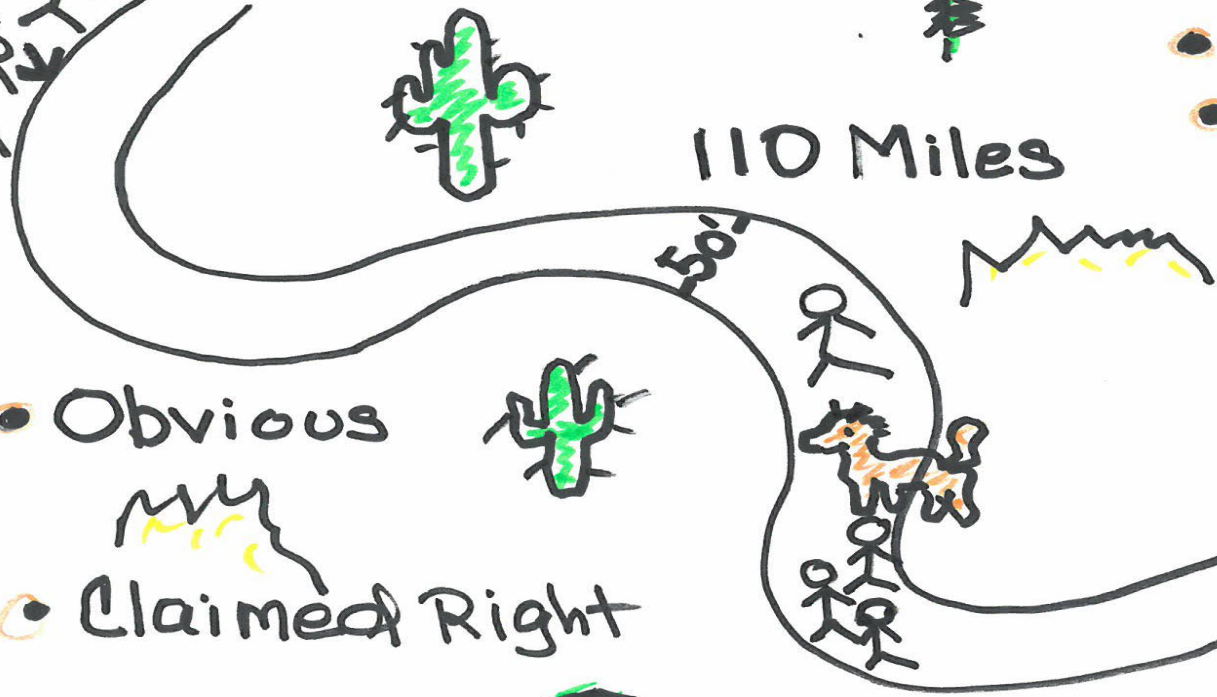
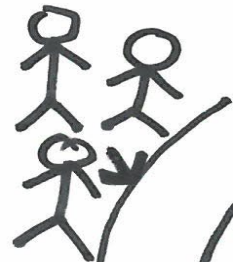
Examples:

- Prior owner or owners used the property for eight years.
- Prior owner or owners used the property for more than 10 years.
- Tenant used the property and terms of tenancy include continued adverse continue, can tack.

PRESCRIPTIVE EASEMENTS: Scope

- The scope of the prescriptive easement to which a claimant is entitled is defined by the use giving rise to the easement.
- *Zuni Tribe of New Mexico v. Platt*, 730 F.Supp. 318, 321 (1990).

Kohlu/wala:wa
Mountain Area
ARIZONA



- Every 4 years
- Since 1540 A.D.
- 40-60 People
- "Same" path
- Same time: Solstice
- On foot OR horses
- Cut down man-made impediments
- 50'

- Obvious
- Claimed Right

Zuni
Reservation
New Mexico

IMPLIED EASEMENTS

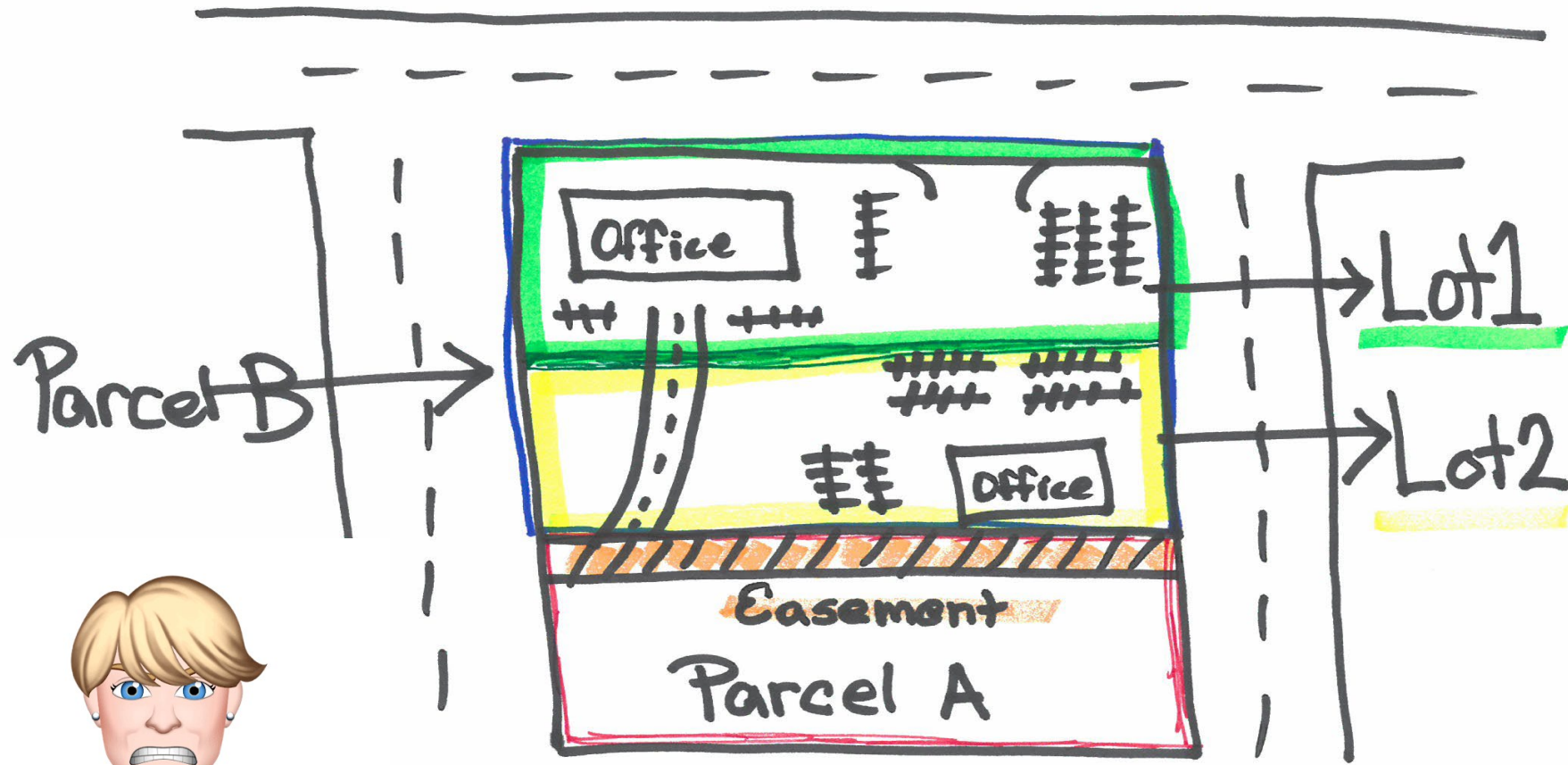
IMPLIED EASEMENT OF NECESSITY

An implied easement of necessity requires:

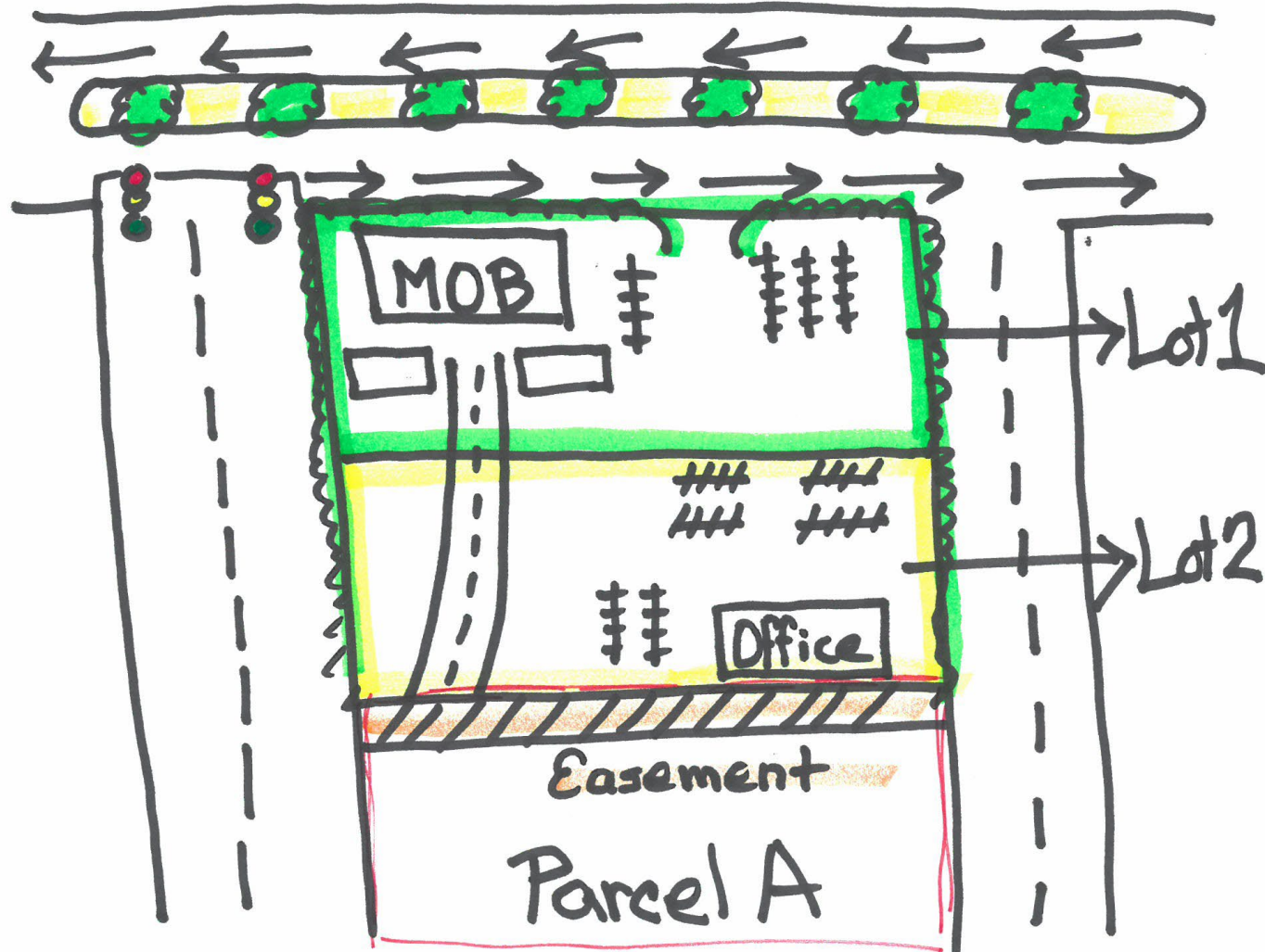
- (1) a single tract of land arranged in a manner where one portion of the land derives a benefit from the other;
- (2) unity of ownership;
- (3) severance of the land into two or more parcels;
- (4) long, continued, obvious use of the subservient land, to a degree which shows permanency—by the dominate land—prior to the severance; and
- (5) the use of the claimed easement must be essential to the beneficial enjoyment of the dominate land.

Dabrowski v. Bartlett, 246 Ariz. 504, 442 P.2d 811 (Ct. App. 2019) (citing *Porter v. Griffith*, 25 Ariz. App. 300, 302 (1975)).

2020-Lot Split



2022-Lawsuit



IMPLIED WAY OF NECESSITY

- To obtain an easement by implied way of necessity, claimant must prove:

“(1) both properties were under common ownership;

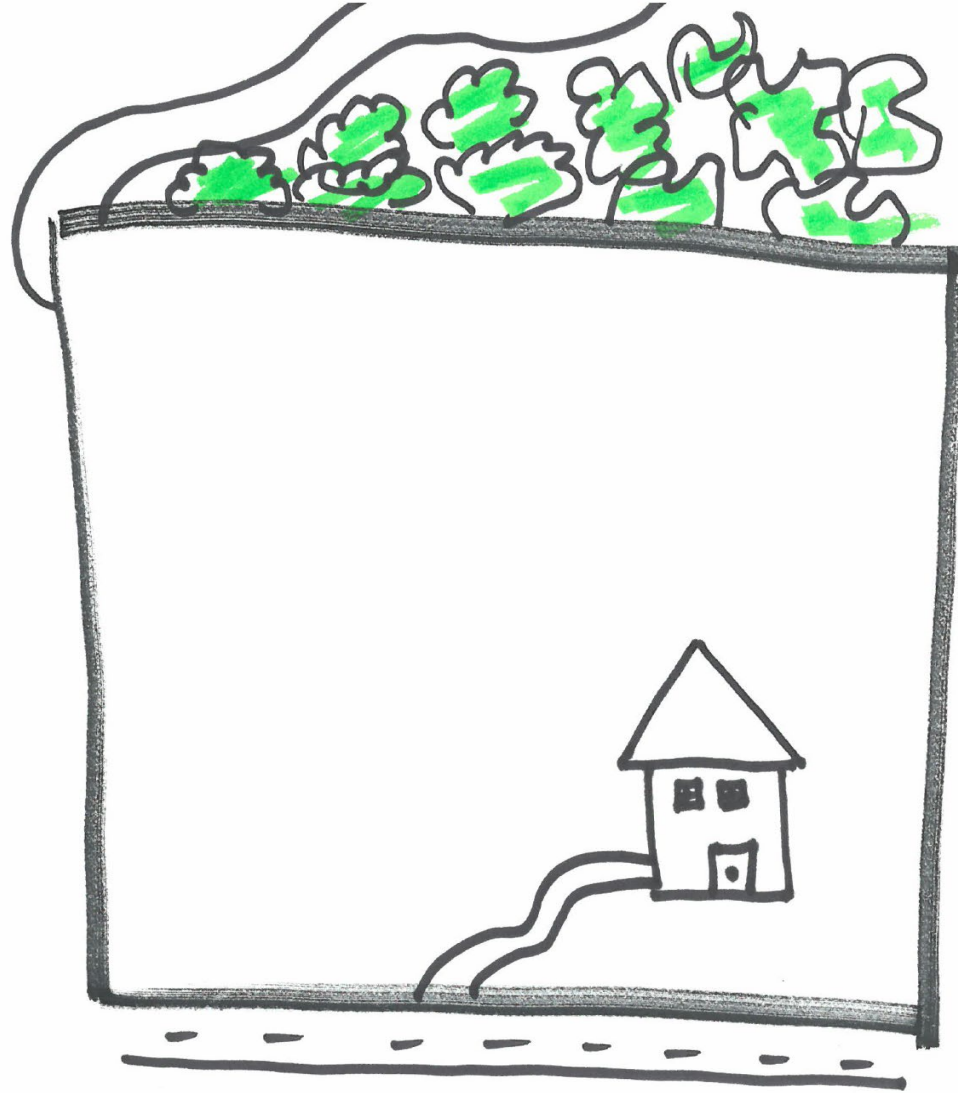
(2) the properties were then severed;

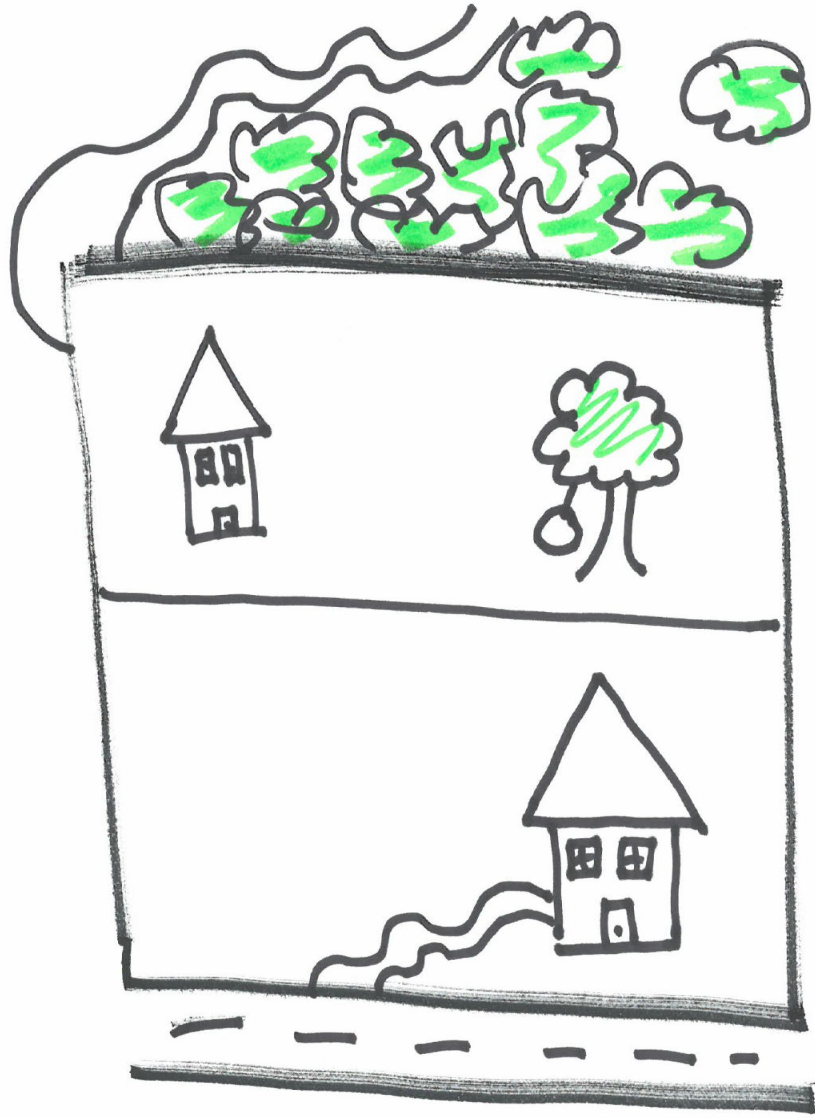
(3) there is no reasonable or adequate outlet for one of the properties; and

(4) the need for reasonable access through the severed property existed at the time of severance.”

Dabrowski v. Bartlett, 246 Ariz. 504, 442 P.2d 811 (Ct. App. 2019).

- If an implied way of necessity exists, it may survive through multiple conveyances and is not affected by use or the lack thereof.







How am I
doing on time?

PRIVATE CONDEMNATION

PRIVATE CONDEMNATION – A.R.S. Section 12-1202

- “Arizona law permits a landowner to engage in private condemnation when land ‘is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a way of necessity.’”

Siemsen, 196 Ariz. at 414, 998 P.2d at 1088 (quoting A.R.S. § 12-1202(A)).

- “A landowner seeking to condemn a private way of necessity over the lands of another must show a ‘reasonable necessity’ for the taking.” *Id.*

PRIVATE CONDEMNATION – A.R.S. Section 12-1202

- • Condemner makes the initial selection of the access route and, so long as there is no bad faith, oppression or abuse of power in its selection, the court will uphold the selection.
- • The condemner does not need to show that he has no outlet. He merely needs to show that he has no adequate and convenient access.



THANK YOU!

