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The Power of Easements.

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Like a magical garden of legal flora, easements come in all shapes, sizes and varieties. They can lurk underground, thrive on the soil, and even live in the air. They can quickly blossom only to fade after just a few months, or they can live forever. And they can be used for many purposes – some for good, some for evil.

In the real world, easements are a mix of positives and negatives: On the one hand, easements are anathema to some of the most basic rights of property ownership, such as the rights of possession, control and exclusion, but, on the other hand, they can be the catalyst for the productive use and development of real property. Prescriptive and implied easements can preserve one party's long-standing use of another's property, while concurrently derailing the other party's planned use of his land.

In Arizona, lawyers have many different types of easements in their quivers. Following is a discussion of the various types of available easements and their respective requirements.

A. Easements, Generally.

An easement is a right which one person holds to *use* the land of another for a specific purpose. *Scalia v. Green*, 229 Ariz. 100, 102, 271 P.3d 479, 481 (Ct. App. 2011) (citing *Etz v. Mamerow,* 72 Ariz. 228, 231, 233 P.2d 442, 444 (1951)); *Ammer v. Ariz. Water Co.,* 169 Ariz. 205, 208, 818 P.2d 190, 193 (Ct. App. 1991); *Laurence v. Kruckmeyer,* 124 Ariz. 488, 605 P.2d 466 (Ct. App. 1979). 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. An easement is a non-possessory interest which does not affect the owner's legal title to the land. *Clark v. New Magma Irrigation & Drainage Dist.*, 208 Ariz. 246, 249, 92 P.3d 876, 879 (Ct. App. 2004); *Siler v. Arizona Dep't of Real Est.,* 193 Ariz. 374, 383, 972 P.2d 1010, 1019 (Ct. App. 1998) (citing *Etz,* 72 Ariz. at 231, 233 P.2d at 444).

An express (or prescriptive) easement can be either appurtenant, *i.e.,* one that runs with the land, or in gross, *i.e.,* one in favor of a person or entity.

> (1) 'Appurtenant' means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land. The right to enjoyment of an easement . . . that can be held only by the owners or occupier of a particular unit or parcel, is an appurtenant benefit. . . .
>
> (2) 'In gross' means that the benefit . . . of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.

Restatement Third (Property) (Servitudes), § 1.5.

> [T]he fact that the benefit [of an easement] is primarily useful to the original beneficiary without regard to the beneficiary's ownership or occupancy of any particular interest in land strongly suggests that the benefit is in gross. If the benefit would be more valuable to the original beneficiary than to a successor to the land, the conclusion should be reached that the benefit is in gross.

Id. § 4.5 (Comment d). For example, utility easements are typically in gross because they benefit the holder – not as an owner of a particular piece of land – but in the discharge of some duty or purpose unrelated to the ownership of land. *Restatement Third (Property) (Servitudes),* §§ 1.5 and 2.6.

"The right to possess, to use and to enjoy land upon which an easement is claimed remains in the owner of the fee except in so far as the exercise of such right is inconsistent with the purpose and character of the easement." *Etz*, 72 Ariz. at 231, 233 P.2d at 444 (citing *Pinkerton v. Pritchard,* 71 Ariz. 117, 223 P.2d 933 (1950)).

An easement holder's rights in the land subject to the easement are "measured and defined by the purpose and character of the easement." *Pinkerton,* 71 Ariz. 117, 223 P.2d 933 (citing *Langazo v. San Joaquin Light & Power Corp.*, 32 Cal.App.2d 678, 90 P.2d 825 (D. Cal. 1939)). "The holder of an easement 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).

"When an easement has been granted by deed, acts indicating abandonment must decisively, conclusively and unequivocally establish the holder's clear intent to abandon the easement." *Scalia,* 229 Ariz. at 103, ¶ 10, 271 P.3d at 482. *See Smith v. Muellner,* 283 Conn. 510, 932 A.2d 382, 395 (2007); *Whipple v. Hatcher,* 283 Ga. 309, 658 S.E.2d 585, 586 (2008). Non-use of the easement, despite the length, is insufficient to prove intent to abandon an express easement. *Id*. (citing *Smith,* 932 A.2d at 394–95; *Mueller v. Bohannon,* 256 Neb. 286, 589 N.W.2d 852, 857–58 (1999); *Moyer v. Martin,* 101 W.Va. 19, 131 S.E. 859, 861 (1926) ("[I]t is universally held that mere nonuse of an easement by grant, however long, will not extinguish the right, unless otherwise provided by statute or by provision in the grant itself.")).

Through the doctrine of 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.

Dabrowski v. Bartlett, 246 Ariz. 504, 442 P.2d 811 (Ct. App. 2019). Merger can apply even if the dominant and servient estates are owned by technically distinct entities where there is, in effect, common ownership or control. *Id.*

B. <u>Express Easements</u>.

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.' *Oliver v. Emul,* 277 N.C. 591, 597, 178 S.E.2d 383, 396 (1971). *See also, Vrabel v. Donahoe Creek Watershed Authority,* 545 S.W.2d 53 (Tex.Ct.Civ.App. 1976).

Dunlap Investors, Ltd. v. Hogan, 133 Ariz. 130, 650 P.2d 432 (1982). Thus, to be valid, an express easement must sufficiently identify (a) the servient estate, (b) the dominant estate, and (c) the use for which the property may be used.

> 'The rule relating to the sufficiency of descriptions of easements is the same as that required in conveyances of land (citations omitted). The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description. ***' *Vrabel v. Donahoe Creek Watershed Authority,* 545 S.W.2d 53 (Tex.Ct.Civ.App. 1976); *Miller v. Snedeker,* 257 Minn. 204, 101 N.W.2d 213 (1960).

Id.

An express easement is a contract, and is to be read as a whole, giving meaning to each provision, and to be construed according to the parties' intent. *See, e.g., Squaw Peak Community Covenant Church of Phoenix v. Anozira Development, Inc.,* 149 Ariz. 409, 719 P.2d 295 (1986). An easement will be interpreted according to ordinary contract principles and itself defines the grantee's rights. *Scalia,* 229 Ariz. 100, 271 P.3d 479. Every word and clause of the easement is to be taken into consideration. *Pass v. Stephens,* 22 Ariz. 461, 466, 198 P. 712, 714 (1921) (addressing the interpretation of a deed). As with other contracts, an easement will be interpreted to give effect to the intention of the parties as ascertained from the language used in the instrument, or the circumstances surrounding creation of the easement, and to carry out the purpose for which it was created. *Smith v. Beesley,* 226 Ariz. 213, 247 P.3d 548 (Ct. App. 2011).

> In construing a deed, every attempt should be made to carry out the intent of the grantor, and substance rather than form should control. . . . When construing the language of a deed, the purpose and conditions at the time when the deed was made should be taken into account. . . . If a deed is subject to two interpretations, one which would invalidate it and one that would render it valid, the interpretation upholding the deed is favored and should be adopted.

Shulansky v. Michaels, 14 Ariz.App. 402, 405, 484 P.2d 14, 17 (Ct. App. 1971) (internal citations omitted).

"Where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument, the easement is specific and definite," and the easement holder is entitled to use the entire easement area for the purposes set forth in the easement. *See, e.g., Anozira Development, Inc.,* 149 Ariz. 409, 719 P.2d 295 (quoting *Aladdin Petroleum Corp. v. Gold Crown Properties,* 221 Kan. 579, 584, 561 P.2d 818, 822 (1977), and citing *Hoff v. Scott,* 453 So.2d 224 (Fla.App.1984)).

Where the parameters of an easement are ambiguous, however, the easement "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Powell v. Washburn,* 211 Ariz. 553, 125 P.3d 373 (2006) (adopting *Restatement (Third) of Property (Servitudes)* § 4.1(1)).

C. Prescriptive Easements.

> 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 ten years and that the use was commenced and continued under a claim of right inconsistent with and hostile to the claim of another. *LaRue v. Kosich,* 66 Ariz. 299, 187 P.2d 642 (1947); A.R.S. §§ 12–521(A), –526(A).

Ammer, 169 Ariz. 205, 818 P.2d 190; *see also, Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.,* 228 Ariz. 100, 263 P.3d 649, 651 (Ct. App. 2011); *Harambasic v. Owens,* 186 Ariz. 159, 160, 920 P.2d 39, 40 (Ct. App. 1996). The prescriptive easement becomes a "vested property right" upon expiration of the ten-year period. *Curtis v. Southern Pac. Co.,* 39 Ariz. 570, 574 (1932). Court action is not necessary to perfect a prescriptive right. *Babo v. Bookfinder Financial Corp.,* 27 Ariz.App. 73, 74 (Ct. App. 1976).

Although prescriptive easement and adverse possession theories are not identical, the rules of law that govern the acquisition of title by adverse possession generally apply to the creation of easements by prescription. *Ammer,* 169 Ariz. 205, 818 P.2d 190 (citing *Lewis v. Farrah,* 65 Ariz. 320, 180 P.2d 578 (1947)).

1. Open and Notorious.

Under Arizona law, the "open and notorious" element of a prescriptive easement requires that (a) the claimant's alleged 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, and (b) 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. *In Re Jake's Granite Supplies, L.L.C.,* 442 B.R. 694 (D. Ariz. 2010); *LaRue v. Kosich*, 66 Ariz. 299, 303, 187 P.2d 642, 645 (1947). Occasional or casual acts will not support the "open and obvious" element of a prescriptive easement claim. *Gospel Echos Chapel, Inc. v. Wadsworth,* 19 Ariz. App. 382, 507 P.2d 994 (Ct. App. 1973).

For example, when a party laid a gravel driveway on another's land and drove and parked on the driveway for 10 years, the use was "conspicuous" warranting a prescriptive easement. *Inch v. McPherson,* 176 Ariz. 132, 135, 859 P.2d 755, 758 (Ct. App. 1992). Under these facts the "gravel area gave notice to the whole world that the party had taken the area of land for its own use." *Id.; see also, Brown v. Ware,* 129 Ariz. 249, 251, 630 P.2d 545, 547 (Ct. App. 1981) (reasoning that the unimpeded use of a gravel road for 24 years was "open, visible, and continuous").

Of note, the mere grazing of cattle on unenclosed lands is insufficient to create an open and obvious use of another's property, because Arizona public policy supports such grazing. *England v. Ally Ong Hing,* 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969). Cattle is after all one of the five "Cs" for which Arizona is known.

2. Hostile Use.

Notably, assuming the basic elements of a prescriptive easement claim are met, the prescriptive use is presumed to be hostile. A presumption exists "that an adverse use is under a claim of right and is not permissive." *Id.*

> The Arizona Courts place the burden of proof on the party claiming the right to use another's land. *LaRue,* 66 Ariz. at 303, 187 P.2d at 642. Once the *prima facie* elements of prescription are met, the law presumes the use to be under a claim of right and not permissive. *Gusheroski v. Lewis,* 64 Ariz. 192, 198, 167 P.2d 390, 393 (1946). The burden of proving permissive use then falls upon the landowner. *Brown v. Ware,* 129 Ariz. 249, 251, 630 P.2d 545, 547 (Ct. App. 1981).

Zuni Tribe of New Mexico v. Platt, 730 F.Supp. 318, 321 (1990). In other words, once a claimant makes a *prima facie* showing of open, visible, and continuous use of the property of another for more than 10 years, the use is presumed to be hostile. *Spaulding v. Pouliot,* 218 Ariz. 196, 181 P.3d 243, 248 (Ct. App. 2008).[1]

Use of another's property pursuant to an invalid easement will not render the use permissive: An easement by prescription may be created by a use that is made pursuant to the terms of an intended but imperfectly created easement. *Paxson,* 203 Ariz. at 67-70, 50 P.3d at 424-26 (citing *Restatement (Third) of Property (Servitudes)*, §2.16). In other words, the use of land pursuant to an unenforceable conveyance does not render the use permissive; rather, the use is deemed hostile. *Id.*

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[1] In *Spaulding,* the Court of Appeals further held that a use, once commenced with the landowner's permission, is presumed to remain permissive. The party claiming the prescriptive easement bears the burden of overcoming the presumption by proving that, despite the initial permissive use, the use subsequently became hostile. 218 Ariz. 196, 181 P.3d at 248.

3. Use for the Prescriptive Period.

A party claiming a prescriptive easement need not prove that the use was made by the same person for the entire 10 years. Rather, the doctrine of tacking permits successive segments of use to be combined to establish the continuous ten-year period. *Ammer,* 169 Ariz. 205, 818 P.2d 190 (citing *Cheatham v. Vanderwey,* 18 Ariz.App. 35, 499 P.2d 986 (1972).

> However, tacking is only allowed when there is privity of estate between the successive users. A.R.S. § 12–521(B). In the prescription context, privity of estate is created by a conveyance, agreement, or understanding that refers the successive adverse use to the original adverse use and is accompanied by a transfer of the use. *See Santos v. Simon,* 60 Ariz. 426, 138 P.2d 896 (1943).

Ammer, 169 Ariz. at 209, 818 P.2d at 194.

For example, in the case of a tenant, "[w]hen a tenant's adverse use is within the terms of his tenancy, it inures to the benefit of his landlord." *Ammer,* 169 Ariz. at 209, 818 P.2d at 194 (citing *Olsen v. Noble,* 209 Ga. 899, 76 S.E.2d 775 (1953)). "If a tenant whose adverse use is within the terms of his tenancy subsequently purchases the leased property, he will be permitted to tack the periods of his adverse use as a tenant to the periods of his adverse use as holder of fee title to establish a prescriptive right." *Ammer,* 169 Ariz. at 209, 818 P.2d at 194 (internal citations omitted).

D. <u>Easement by Implied Way of Necessity (Access)</u>.

> '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.' *Bickel v. Hansen,* 169 Ariz. 371, 374 (App. 1991). The doctrine derives from the presumption that when a party conveys the property, it 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.*

Dabrowski, 246 Ariz. 504, 442 P.2d 811.

To obtain an easement by implied way of necessity, a 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,* 246 Ariz. 504, 442 P.2d 811; *see also, Underwood v. Wilczynski,* 252 Ariz. 405, 504 P.3d 277, 280 (Ct. App. 2021); *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n,* 225 Ariz. 533, 541, 241 P.3d 897 (Ct. App. 2010); *Bickel v. Hansen,* 169 Ariz. 371, 374, 819 P.2d 957 (Ct. App. 1991).

"[A]n implied easement can only be made in connection with a conveyance; that is, an implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment." *Koestel v. Buena Vista Pub. Serv. Corp.,* 138 Ariz. 578, 580, 676 P.2d 6, 8 (Ct. App. 1984). "The creation of easements by implication is an attempt to infer the intention of the parties to a conveyance of land and the 'inference drawn represents an attempt to ascribe an intention to parties who had not thought of or had not bothered to put the intention into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves.'" *Id.* (citing *Restatement of Property*, § 476, Comment a, at 2978 (1944)). "In a conveyance that would otherwise deprive the owner of access to the property, access rights will always be implied, unless the parties clearly indicate they intended a contrary result." *Restatement (Third) of Property (Servitudes)* § 2.15 (Comment b); *see also, Koestel,* 138 Ariz. at 581, 676 P.2d at 9.

"[A] way of necessity can be implied only when the necessity existed at the time of the original severance of the estates." *Bickel,* 169 Ariz. at 374, 819 P.2d at 960; *see also, Underwood,* 252 Ariz. 405, 504 P.3d 277, 280. A party who had other legal access at the time of the conveyance cannot obtain an implied way of necessity as a matter of law. *Bickel,* 169 Ariz. at 374, 819 P.2d at 960; *Restatement (Third) of Property (Servitudes)* § 2.15. Thus, where an owner's property had access prior to the severance of the property, but that access is destroyed by another event after the severance – such as condemnation – the party is not entitled to an easement by implied way of necessity. *Bickel,* 169 Ariz. at 374, 819 P.2d at 960; *Underwood,* 252 Ariz. 405, 504 P.3d at 280; *Coll. Book Ctrs., Inc.,* 225 Ariz. at 541, 241 P.3d 897.

Reasonable necessity has been defined by Arizona courts. In *Siemsen v. Davis,* 196 Ariz. 411, 417, 998 P.2d 1084, 1090 (Ct. App. 2000), the Arizona Court of Appeals defined "reasonable necessity" as follows:

> There is a difference between necessity and mere convenience. A man having a present right of way may find a more convenient way over the land of another, but he may not take it under a claim that it its necessary to the property use and enjoyment of his land or to save expense, unless there is no other passable way or the expense would be prohibitive.

Siemsen, 196 Ariz. at 417, 998 P.2d at 1090 (citing with approval *State ex. Rel. Carlson v. Superior Court,* 107 Wash. 228, 181 P. 689 (1919)). The Court of Appeals further explained:

> In *Bickel* the party resisting condemnation prevailed because the party seeking condemnation had an alternative outlet that was found to be adequate under the circumstances, even though the alternative 'was twice as long, was meandering, and would cost more.' *Bickel,* 169 Ariz. at 374, 819 P.2d at 960. *Bickel* thus demonstrates, as Defendants contend, that convenience is not decisive; it takes

> more than mere convenience to justify condemning a private pathway over another's land. *Id.* 196 Ariz. at 416, 997 P.2d at 1089.

Id.; see also Restatement (Third) of Property (Servitudes) § 2.15 (Comment d). "Courts have denied easements of necessity where there was reasonable access to the property even in situations where denial of the easement caused considerable hardship." *Chandler Flyers, Inc. v. Stellar Dev. Corp.,* 121 Ariz. 553, 554, 592 P.2d 387, 388 (Ct. App. 1979).

That said, "[a]bsolute necessity is not required" to establish an implied way of necessity. *Id.* "The owner need not show that without the [implied] easement there is no access whatsoever to the property." *Id.* Rather, the issue is whether there was "adequate" and "reasonable" alternative access that could be used. *Dabrowski,* 246 Ariz. 504, 442 P.2d 811.

If an implied way of necessity exists, it may survive through multiple conveyances and is not affected by use or the lack thereof. *Dabrowski,* 246 Ariz. at 514, 442 P.2d at 821.

E. <u>Implied Easement of Necessity (Long-standing Use)</u>.

Although similar to an easement by implied way of necessity in that the claim arises from the severance of a single tract of land, an implied easement by necessity is not limited to access issues and is predicated upon long-standing use of the servient estate prior to the severance.

> 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 dominant land—prior to the severance; and (5) the use of the claimed easement must be essential to the beneficial enjoyment of the dominant land. *See Porter v. Griffith,* 25 Ariz. App. 300, 302 (1975).

Dabrowski, 246 Ariz. 504, 442 P.2d 811.

As with an easement by implied way of necessity, an implied easement of necessity "can only be made in connection with a conveyance; that is, an implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment." *Koestel,* 138 Ariz. at 580, 676 P.2d at 8; *see also, Porter v. Griffith,* 25 Ariz.App. 300, 543 P.2d 138 (Ct. App. 1975) (quoting *Boyd v. McDonald,* 81 Nev. 642, 408 P.2d 717 (1965)).

F. <u>Private Condemnation; A.R.S. § 12-1202</u>.

"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.*

A.R.S. § 12-1201 defines a "private way of necessity" as follows:

> 'Private way of necessity' as used in this article means right of way on, over, across, or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, overhead transmission lines, pole lines, power lines, canals, ditches, flumes, shafts, tunnels, pipe lines, drains, including, but not limited to, embankments, diversion dams, dikes, ditches, canals, flumes and levees for the purpose of removing water from land or preventing accumulation of water on land, and tramways, including, but not limited to, aerial tramways and industrial railroads, for mining, milling, lumbering, agricultural, domestic or sanitary purpose.

A.R.S. § 12-1202(A) provides as follows:

> A. An owner of or a person entitled to the beneficial use of land, mines or mining claims and structures thereon, which 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 private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity.

"Only a party owning or having a beneficial sue in land that is 'land-locked' may bring an action to condemn a private way of necessity across the land of another." *Solana Land Co. v. Murphey,* 69 Ariz. 117, 122-25, 210 P.2d 593, 596-99 (1949). In determining whether private condemnation is necessary under the statute, prospective use of the property may be considered. *Id.*

> On the matter of selection of the route to be condemned the condemnor makes the initial selection and in the absence of bad faith, oppression or abuse of power its selection of route will be upheld by the courts. *State ex rel. Polson Logging Co. v. Superior Court for Grays Harbor et al.*, 11 Wash.2d 545, 562, 119 P.2d 694, 702.
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> Furthermore, for a landowner to condemn a right-of-way across intervening land to a public road, he need not show that he has no outlet, but only that he has no adequate and convenient one. *Brady v. Correll,* 20 Tenn.App. 224, 97 S.W.2d 448. In other words the condemnor need not show an absolute necessity for the taking, a reasonable necessity being sufficient. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 P. 855; *Johnson v. Consolidated Gas, Electric Light & Power Co.*, 187 Md. 454, 50 A.2d 918, 170 A.L.R. 709.

Id.

G. Easements by Dedication.

> Under the common law, an owner can dedicate real property to a proper public use. *Pleak v. Entrada Property Owners' Ass'n,* 207 Ariz. 418, 421, ¶ 8, 87 P.3d 831, 834 (2004) (citing *Restatement (Third) of Property: Servitudes* ("Restatement") § 2.18(1) (2000)). The dedication allows the public to acquire an easement to use the property for specified purposes while fee title remains with the party making the dedication. *Pleak,* 207 Ariz. at 421, ¶ 8, 87 P.3d at 834. It is well settled that roadway easements for public use may be created by common law dedication. *Id.* at 421, ¶ 9, 87 P.3d at 834.

Hunt, 216 Ariz. at 119, 163 P.3d 1064.

"An effective dedication of private land to a public use has two general components – an offer by the owner of the land to dedicate and acceptance by the general public." *Pleak,* 207 Ariz. at 423-24, 87 P.3d at 834. "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." *Id.*

Proof of acceptance by dedication may occur by use of the easement. *Pleak v. Entrada Property Owners' Ass'n,* 207 Ariz. 418, 421, ¶ 8, 87 P.3d 831, 834 (2004) (citing *County of Yuma v. Leidendeker*, 81 Ariz.208, 213, 303 P.2d 531, 535 (1956)); *Hunt,* 216 Ariz. at 120, 163 P.3d 1064 ("it was enough that some members of the public, including those residing nearby, used the road"). "It is unnecessary for a government entity to formally accept such a dedication in order to validate it." *Id.*

The "mere act of surveying land into lots, streets, and squares by the owner, and the recordation of such plat [constitutes] an offer to dedicate and [is] subject to revocation by the dedicator until it [is] accepted." *County of Yuma v. Leidendeker*, 81 Ariz.208, 213, 303 P.2d 531, 535 (1956). However, "sale of lots referencing a recorded plat containing the dedication [of a public easement] constitutes an 'immediate and irrevocable' dedication." *Pleak,* 207 Ariz. at 421, 87 P.3d at 834 (citing *County of Yuma,* 81 Ariz. at 213, 303 P.2d at 535).

H. Easement by Estoppel.

Pursuant to *Restatement (Third) of Property (Servitudes)*, §2.10, where the only way to avoid an injustice is to establish an easement, the easement may be created by estoppel. Although no *published* Arizona decision has adopted *Restatement* §2.10, the Arizona Court of Appeals recently considered and analyzed a claim for easement by estoppel in *New Sundance Limited Partnership, LLP v. Cutler,* 2023 WL 7040228 (October 26, 2023), an unpublished decision which sets no precedent. However, "[i]n the absence of contrary precedent, Arizona courts look to the Restatement." *Paxon,* 203 Ariz. at 68-70, 50 P.3d at 425-27. *Restatement* §2.10 provides as follows:

> If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
>
> > (1) the owner or occupier 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 position in reasonable reliance on that belief; or
> >
> > (2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.

For a "plaintiff to invoke an equitable estoppel, it must clearly show that there was reliance upon the conduct and conversations of the defendants." *Vantex Land & Dev. Co. v. Schnepf*, 82 Ariz. 54, 57 (1957).

By way of illustration, *Restatement* §2.10 (Illustration 1), states as follows:

> 1. O, the owner of Blackacre, gave permission to Canal Company to construct a large irrigation canal across Blackacre. The parties did not characterize the permission as an easement and nothing was said about duration or revocability. Canal Company constructed the ditch at considerable expense. Three years later, O revokes the permission to use Blackacre for the canal. Canal Company has not recouped the costs of building the canal and relocating the canal would not be economically feasible. Establishment of a servitude would be justified on the ground that O should reasonably have foreseen that Canal Company would substantially change position in reliance on the belief that the permission would not be revoked. Whether Canal Company's reliance on its belief that the permission would not be revoked was reasonable would depend on the relationship of the parties and custom in the area.

I. <u>Boundary by Acquiescence.</u>

In a very recent case, *Beck v. Neville*, 256 Ariz. 361, 540 P.3d 906 (2024), the Supreme Court of Arizona affirmed that Arizona recognizes a cause of action for boundary by acquiescence, noting that the cause of action has been recognized in Arizona for decades. When the true boundary between adjacent properties is unknown, the doctrine of boundary by acquiescence "permits adjacent landowners to 'mutually recognize a boundary and act as if it were the true property line.'" *Id. at* 361, ¶ 12, 540 P.3d at 910 (internal quotations omitted) (internal citation omitted).

While boundary by acquiescence is not an easement, you can expect this claim to be asserted as an alternative basis for relief and prescriptive easement (and adverse possession) claims.

The party asserting a boundary by acquiescence claim bears the burden of proving, by clear and convincing evidence, "(1) occupation or possession of property up to a clearly defined line; (2) mutual acquiescence by the adjoining landowners in that line as the dividing line between their properties; (3) continued acquiescence for ten years; and, for the reasons stated above, (4) uncertainty or dispute as to the true boundary." *Id*. at 361, ¶ 21, 540 P.3d at 913. In addition, the claimant "must occupy his or her property ... in such a manner as to place the nonclaimant on notice that he or she claims the property so occupied." *Id. at* 361, ¶ 31, 540 P.3d at 910 (quoting *Anderson v. Fautin*, 379 P.3d 1186, 1193–94 ¶ 26 (Utah 2016)).

Where the true boundaries of adjacent lots can easily be determined, a claim for boundary by acquiescence will fail as a matter of law. *Id*. at 361, ¶ 20, 540 P.3d at 911.