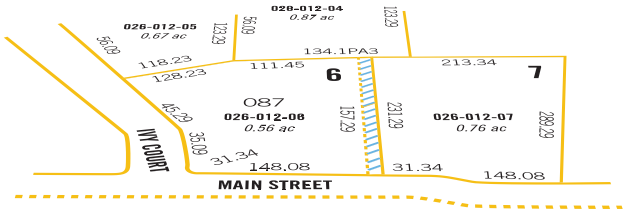
LAND USE

Easements by Estoppel

KENNETH R. BENNETT
Assistant City Attorney, City of Arlington, Texas



If you are a municipal attorney involved in the practice of real estate law, you are likely to spend time drafting and approving easement documents. If you do, that probably means you are assisting in the acquisition of right-of-way needed for new public infrastructure, or the replacement or reconstruction of the old. Either way, your goal is to secure the right-of-way with a well drafted legal document. But there are times you must sift through the detritus of history and try to fix mistakes, oversights, and poor planning from the good old days. There are times when you don't have the luxury of a written document. Sooner or later you will have to argue that there is, nevertheless, a public right-of-way.

That can be a tall order inasmuch as the Statute of Conveyances says that a conveyance of "…an estate for more than one year, in land and tenements, must be in writing…"[1] One way to get around the requirement of a writing, of course, is by a prescriptive easement. However, the focus of this article will be on easements by estoppel, which are generally of three types: implied dedication, implied easement appurtenant, or an easement by equitable estoppel (or, "in pais").[2] My emphasis will be on Texas law, but with a sampling from other states.

Prescriptive easements

First a brief word about prescriptive easements. To have one, you "…must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for the requisite period of time."[3] In Texas the required period of use is ten years, by analogy to the adverse possession statutes.[4] The requirements are similar in other states. New York requires a showing "…by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years."[5] In Florida the time period is longer, requiring a claimant to "…prove, by clear and positive proof, 1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; 2) that the use was related to a certain, limited and defined area of land; 3) that the use has been either with the actual knowledge of the owner, or so open, notorious, and visible that knowledge of the use must be imputed to the owner; and 4) that the use has been adverse to the owner -- that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner, and such that, for the entire period, the owner could have sued to prevent further use."[6] The elements can be rigorous and difficult to prove. Consider, for example, how "open and notorious" an underground pipe may be.

Implied dedication

In general, a dedication occurs when an owner sets land apart for public use, and the public actually or impliedly accepts that use.[7] A dedication can be accomplished by an express grant or by implication.[8] An express dedication is by words in a deed or other written document.[9]

The requirements of a dedication are: (1) the dedicator must have fee simple

As a general rule, the intention to dedicate must be shown by something more than an omission or failure to act or acquiesce on the part of the owner. There must be evidence of some additional factor that implies a donative intention when considered in light of the owner's acquiescence in the public's use of the facility.

title, (2) the dedicator must make either an express or implied offer, (3) it must serve a public purpose, and (4) the offer must be accepted.[10] An express dedication must contain dedicatory language and it must be accepted by the public authorities.[11]

An implied dedication relies on estoppel, the elements being: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the facility to public use; (2) he was competent to make the dedication; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.[12, 13]

As a general rule, the intention to dedicate must be shown by something more than an omission or failure to act or acquiesce on the part of the owner.[14] There must be evidence of some additional factor that implies a donative intention when considered in light of the owner's acquiescence in the public's use of the facility.[15] Direct evidence of an overt act or a specific declaration on the part of the landowner indicating an intention to dedicate land to public use is not required.[16] It is sufficient if the intent is properly inferable from the circumstances in evidence.[17]

In addition, evidence of long and continued use by the public can raise a presumption of dedication by the owner when the origin of the public use and the ownership of the land at the time it originated cannot be shown, one way or the other, due to the lapse of time.[18] For this rule to apply, the origin of the public use and the ownership at that time must be "shrouded in obscurity, and no proof can be adduced showing the intention of the owner in allowing the use."[19]

In Kansas, implied dedication requires a clear and unequivocal intention on the part of the landowner to provide the land for public use, as well as some action by the public body indicating acceptance beyond mere use. by the public.[20] Acceptance can be implied by (1) actual use by the unorganized public, (2) that the use has continued over a significant period of time, (3) that the use is not merely with the consent of the abutting owners, but by a claimed right of public travel, and (4) that the use justifies the conclusion that the way is of common convenience and necessity.[21]

In California, a common law dedication, whether express or implied, requires both an offer of dedication and an acceptance of that offer by the public. The offer may be "implied in fact" if there is proof of the owner's actual consent to the dedication.[22] The owner's intent is the crucial factor. The circumstances must negate the idea that the use is under a license.[23]

At common law, California allowed a sort of prescriptive-lite approach, in which a claimant could prove a dedication by adverse use. An offer of dedication could be "implied by law" if the public openly and continuously made adverse use of the property for more than the prescriptive period.[24] Thus, an implied dedication could occur if the public used the land for a period of more than five years under circumstances raising a presumption of knowledge and acquiescence by the owner, while also negating the idea of a mere license.[25] In reaction, the California Legislature passed a law in 1971 providing that no use of property "…by the public after the effective date of this section shall ever ripen to confer upon the public … a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, … accepted by the county, city, or other public body to which the offer of dedication was made…"[26]

Implied easement appurtenant

An implied easement appurtenant involves the concepts of a dominant and a servient estate. The holder of an easement over another tract has the dominant estate. The servient estate is the land or estate upon which the easement is imposed, making the servient estate subject to the use of the easement. An easement appurtenant is one attached to, and needed to enjoy, a tract of land. This is in contrast to an easement in gross, which is merely a personal right of use.[27]

An implied easement appurtenant may be found where a right or privilege over a servient tract is necessary or essential to the proper enjoyment of another tract or estate. Mere convenience is not enough. The servient estate is subject to the use of the dominant estate to the extent of the easement granted or reserved. It is essentially a negative easement, in which the servient estate may not be used in a way that interferes with the right of the owner of the dominant estate to use the servient estate for the purpose of the easement.[28]

The concept of an implied easement appurtenant developed from situations where a landowner conveyed a part of his land, the proper use of which required the use of another part; for example, where use of the conveyed tract depended upon another tract for drainage, access, or water. From such beginnings, the concept developed three basic requirements: the use (1) must be apparent and in existence at the time of the grant, (2) must have been continuous, and (3) must be necessary to the use of the dominant estate.[29] In *Drye v. Eagle Rock Ranch, Inc.,* the Texas Supreme Court gave as an example the case of two adjacent buildings with a common wall and where the stairway for both was in one of the buildings. The single owner of both conveyed each to different persons. The one with the stairs tried to deny the stairway use by the other. This was found sufficient to establish an implied easement

Continued on page 18

Easements *cont'd from page 17*

in the stairs for the benefit of the building without stairs.[30] *Drye* involved a claim of a recreational easement over a large tract to the benefit of residential lots. The court found none of the elements of an implied easement, commenting that the claimed right to "wander about the land" was too vague to be necessary to the use of the residences.[31]

In Massachussetts, cases have examined claims for implied appurtenant easements for access routes to waterfront and the right to use beaches. Courts typically look to granting documents and plats for evidence of a right of access, and to evidence of actual usage of the beach for an easement on the waterfront.[32]

In California it is said that the purpose of the doctrine of implied easements is to "give effect to the intentions of the parties, as shown by all of the facts and circumstances of the case."[33] The cases typically construe a conveyance. An easement by implied grant requires "(1) A separation of the title; (2) before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and (3) the easement shall be reasonably necessary to the beneficial enjoyment of the land granted."[34] An implied appurtenant easement can also attach to a lease: As a general rule everything which belongs to the demised premises or is used with, and appurtenant to, them and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved. This rule, for example, applies to a lease of a part of a building.[35]

Easement by estoppel in pais[36]

An estoppel in pais is also known as an easement by equitable estoppel. It concerns a situation where a landowner is estopped to deny the existence of an easement by reason of having made representations which have been acted upon by another to his detriment.[37]

Proof of an easement by estoppel must show that (1) a representation was communicated to the promisee; (2) the communication was believed; and (3) there has been reliance upon such communication.[38] The court in *Drye* commented that "The doctrine of estoppel in pais has been applied when the seller allows the purchaser to expend money on the "servient" tract, as for example a drainage ditch across the grantor's land, or a house or other structure which encroaches on the land of the "servient" estate … While estoppel cases are not limited to situations involving this type of expenditure, this group does form a large part of the cases affixing easements appurtenant by estoppel."[39] In that case, the claimant of the easement made noimprovements of any kind on the land upon which an easement was claimed. The *Drye* court pointed to the "…rather narrow band of cases in which the doctrine has been applied…" and found "…no Texas authority for an extension of the doctrine to the broad facts (i.e., a claimed right to unspecified recreational use of the land) here shown.[40] The *Lake Meredith Dev. Co. v. Fritch* case illustrates a successful claim of an equitable easement by a municipality. At the request and expense of the owners of a 59-acre tract adjacent to the City of Fritch, Texas, the City installed underground water and sewer pipelines across the tract to serve a residential subdivision. When the pipelines were installed, the subdivision and the 59 acres were under common ownership. No written easements were filed or recorded in the county deed records. Later, Lake Meredith Development Company acquired the 59 acre tract and sued the City seeking removal of the lines or damages.[41] The City claimed an easement by estoppel.[42] Lake Meredith conceded that a representation was communicated to the City and that the communication was believed. They asserted, however, that no evidence showed that the City expended any money in reliance on the representation because the prior owners paid for the installation of the pipelines.[43] Their position was that reliance by the City can be shown only by an expenditure. The Court disagreed, concluding that reliance includes "…detriment which may be determined from the surrounding circumstances, such as the effect on the user if the easement is revoked or removed."[44] Finding that the lines served residential areas inside and outside the City and that it would be extremely costly to move the lines, the Court found equitable easements for the lines because "…the reliance and resulting possible detriment to the [City] if the easement is revoked is well established…"[45]

Similarly, the courts in Connecticut find an easement by estoppel when a grantor "…voluntarily imposes an apparent servitude on his property and another person, acting reasonably, believes that such servitude is permanent and in reliance upon that belief either does something he would not otherwise have done or refrains from doing something that he would otherwise have done."[46]

In Massachusetts a grantor, and those claiming under him, are estopped to deny the existence of a street when (1) the grantor conveys land bounded by a street, and (2) the grantor conveys land with reference to a recorded plan that shows the street. Beyond that, the State does not recognize the creation of easements on general estoppel principles because they would encumber the unfettered right of an owner to use his land and detract from the integrity and reliability of land records.[47]

Conclusion

Older cities in America, and even relatively young areas like the DFW Metroplex in Texas, are full of subdivisions, neighborhoods and commercial areas from an earlier time when development standards may not have been as mature as in the present day. The filing of easement documents in the deed records may have been haphazard. Records may have been lost or destroyed. Plats may have been accepted without properly identified easements, at least by today's standards. We are now in a time when many of those older areas are being redeveloped and those buried

issues are resurfacing to become today's problems. When they do, fairly or not, the city government will be blamed. However, with careful investigation, it may sometimes be possible to salvage a bad situation by proving up an easement by estoppel. ML

Notes

1. Tex. Prop. Code § 5.021.
2. Drye v. Eagle Rock Ranch, Inc., 364 S.W. 2d 196, 203 (Tex. 1962).
3. Brooks v. Jones, 578 S.W.2d 669, 673 (Tex. 1979).
4. Barstow v. State, 742 S.W. 2d 495, 499 (Tex. App. —Austin 1987, writ denied).
5. Auswin Realty Corp. v. Klondike Ventures, Inc., 2018 NY Slip Op 04997, ¶ 2, 163 A.D.3d 1107, 1108, 81 N.Y.S.3d 278, 280 (App. Div.)
6. Stackman v. Pope, 28 So. 3d 131, 133 (Fla. App. 2010)
7. Ford v. Moren, 592 S.W.2d 385, 390 (Tex. Civ. App. —Texarkana 1979, writ ref'd, n.r.e.).
8. Viscardi v. Pajestka, 576 S.W.2d 16, 19 (Tex. 1978).
9. Broussard v. Jablecki, 792 S.W.2d 535, 537 (Tex. App.—Houston [1st Dist.] 1990, no writ); Copeland v. City of Dallas, 454 S.W.2d 279, 281-82 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.); Priolo v. City of Dallas, 257 S.W.2d 947, 952 (Tex. Civ. App. —Dallas 1953, writ ref'd n.r.e.).
10. Moody v. White, 593 S.W.2d 372, 378 (Tex. Civ. App. —Corpus Christi 1979, no writ).
11. Aransas County v. Reif, 532 S.W.2d 131, 134 (Tex. Civ. App. —Corpus Christi 1975, writ ref'd n.r.e.); *Broussard, supra* note 9. Copeland v. City of Dallas, 454 S.W.2d 279, 281-82 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.); *Priolo, supra* note 9.
12. Lindner v. Hill, 691 S.W.2d 590, 592 (Tex. 1985); Las Vegas Pecan & Cattle Co., Inc., 682 S.W.2d 254, 256 (Tex. 1984); Baker v. Peace, 172 S.W.3d 82, 87 (Tex. App. —El Paso 2005, pet. denied).
13. The author once tried to defeat a taking claim by asserting the lack of a property interest by reason of an implied dedication of the property. Drainage and sewer lines under a lot were installed by the developer of a subdivision in 1924 and were accepted and used by the public for over 80 years. There were plans of the lines in the city archives, but no easement was reserved on the plat or filed in the county records. Unfortunately, it did not work. The appellate court relied on the developer's unlawful attempt to reserve the lines to himself (which the author argued should be no evidence of anything), to find a negation of the intent to dedicate. City of Dallas v. Jones, No. 05-07-00831-CV, 2008 Tex. App. LEXIS 1619, at *10 n.1 (Tex. App.—Dallas Mar. 5, 2008, pet.denied). Three out of four ain't bad.
14. Greenway Parks Home Owners Ass'n v. City of Dallas, 312 S.W.2d 235, 241 (Tex. 1958).
15. Long Island Owner's Ass'n v. Davidson, 965 S.W.2d 674, 681 (Tex. App.—Corpus Christi 1998, pet. denied).
16. Gutierrez v. County of Zapata, 951 S.W.2d 831, 838 (Tex. App.—San Antonio 1997, no writ).
17. Owens v. Hockett, 151 Tex. 503, 505, 251 S.W.2d 957, 958 (1952); Baker v. Peace, 172 S.W. 3d 82, 88 (Tex. App. —El Paso 2005, pet. denied).
18. Graff v. Whittle, 947 S.W.2d 629, 637 (Tex. App.—Texarkana 1997, writ denied); Fazzino v. Guido, 836 S.W.2d 271, 274 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
19. *Baker*, 172 S.W. 3d at 88-89; *Fazzino*, 836 S.W.2d at 274.
20. Carlson v. Burkhart 27 P.3d 27, 32 (Kan. 2001).
21. *Carlson*, 27 P.3d at 33.
22. Scher v. Burke, 395 P.3d 680, 683 (Cal. 2017).
23. *Scher*, 395 P.3d at 683.
24. *Id.*
25. Gion v. Santa Cruz, 465 P.2d 50, 55-56 (Cal. 1970).
26. Cal. Civ. Code § *1009(b)*.
27. Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 207 (Tex. 1962).
28. *Drye*, 364 S.W.2d at 207.
29. *Id.*
30. *Id.*
31. *Id.* at 208.
32. See Hickey v. Pathways Ass'n, Inc., 37 N.E.3d 1003, 1019 (Mass. 2015); Labounty v. Vickers, 225 N.E.2d 333, 337 (Mass. 1967); Kane v. Stimson, 2016 Mass. LCR LEXIS 125, at *7 (Land Ct. 2016).
33. Piazza v. Schaefer, 255 Cal. App. 2d 328, 332-33, 63 Cal. Rptr. 246, 250 (1967).
34. *Piazza*, 255 Cal. App. 2d at 332-33, 63 Cal. Rptr. at 250.
35. Owsley v. Hamner, 227 P.2d 263, 267 (Cal. 1951).
36. The term "in pais," seeming to imply something done informally, originates from the Law French "in the country," and is defined as "Outside court or legal proceedings." Black's Law Dictionary 806 (8th ed. 2004).
37. *Drye, supra* at 209; Martin v. Cockrell, 335 S.W.3d 229, 237 (Tex. App.—Amarillo 2010, no pet.).
38. Lake Meredith Dev. Co. v. Fritch, 564 S.W.2d 427, 428 (Tex. Civ. App.—Amarillo 1978, no writ).
39. *Drye, supra* note *27* at 209
40. *Id.* at 210.
41. Lake Meredith also claimed to be an innocent purchaser for value without actual or constructive notice of the pipeline easements. Since the lines were shown on City maps, and manholes were evident on the surface, that claim was denied. *Lake Meredith*, 564 S.W.2d at 431.
42. *Id.* at *428*.
43. *Id.* at 429.
44. *Id.* at 428-29.
45. *Id.*
46. Foldeak v. Incerto, 274 A.2d 724, 727 (Ct. 1970).
47. Patel v. Planning Bd. of N. Andover, 539 N.E.2d 544, 547 (Mass. App. Ct. 1989); Blue View Constr., Inc. v. Town of Franklin, 874 N.E.2d 425, 433 (Mass. App. Ct. 2007).