

2004

# Jamie Evans v. Board of County Commissioners of Utah County : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JAMIE EVANS,

Plaintiff/Appellee,

vs.

THE BOARD OF COUNTY  
COMMISSIONERS OF UTAH  
COUNTY,

Defendant/Appellant.

Supreme Court Case No.: 20040739- SC  
Court of Appeals Case No.: 20020689-CA

APPEAL ON CERTIORARI FROM AN OPINION AND ORDER ISSUED BY  
THE UTAH COURT OF APPEALS ON JULY 29, 2004

REPLY OF THE APPELLANT

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## **RESPONSE TO EVANS'S OBJECTION TO THE STANDARD OF REVIEW**

Plaintiff/appellee Jamie Evans disagrees with defendant/appellant the Board of County Commissioners of Utah County's ("County's") inclusion of language from *Carrier v. Lindquist*, 2001 UT 105, 37 P.3d 1112, recognizing "a measure of discretion," *id.* at ¶11, granted district court judges when deciding whether an easement exists. He asserts this "somewhat more deferential standard does not apply where, as here, the material facts are undisputed,...." (Aplee.'s Br. at 2.) Evans offers no support for this contention. The County agrees that the material facts are undisputed, but disagrees that their settled status precludes granting Judge Howard's application of the correct legal standard to the facts of this case "a broad measure of discretion." *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998).

## **RESPONSE TO EVANS'S STATEMENT OF THE CASE**

### *Nature of the Case*

Evans states that "[i]t is undisputed that the parties intended to create the Easement." (Aplee.'s Br. at 3 & 8-9.) As the County noted in its brief below, however, it disputes ever intending to create Evans's easement<sup>1</sup>, but assumed it was mutually approved for the limited purpose of its motion for summary judgment, and, consequently, Evans's appeal thereof. (Aplee.'s Br., Utah Ct. App. at 4 & 10 n.6.) The court of appeals addressed that assertion by stating that the County accepted the reservation when it accepted and recorded the deed conveying the Strip. *See Evans v. Board of County Comm'rs*, 2004 UT App 256,

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<sup>1</sup> The County herein continues using the same terminology it employed in its opening brief: "Evans's reservation" or "Evans's easement" refers to the exception and reservation included in Evans's predecessor's quitclaim deed to the County, and the "Strip" refers to the 120-foot-by-760-foot strip of property to the south of Pine Street. (Aplt.'s Br. at 2-6.)

¶¶10 & 12 n.5, 97 P.3d 697. To the extent the court of appeals’s decision means that a county’s mere ministerial recordation of a deed signifies acceptance, the County disputes the court’s conclusion. However, that issue is not presented here.

### ***The Course of Proceedings***

Evans lists several reasons the district court found his reservation invalid (Aplee.’s Br. at 4), yet the narrower issue presented here is whether his reservation was sufficiently specific (Aplt.’s Br. at 1). The County’s argument focuses on what it terms the second portion of the reservation, a right of way “over and across” (Aplt.’s Br. at 5) the Strip between Pine Street and Evans’s property. (Aplt.’s Br. at 6-7.) Thus, while Judge Howard’s conclusion that “there exists no physical improvement, fixture, or use of Pine Street occurring since the dedication of the Ironton Subdivision Plat 75 years ago” (Aplt.’s Br. at A42) has little bearing on this appeal, his finding that he was “unable to discern from the deed a location for an easement and [could not] reasonably discern a proper place to fix the location of the easement by virtue of existing fixtures” (Aplt.’s Br. at A42) is relevant to the lack of specificity of Evans’s reservation.

Further, the County disputes Evans’s claim that “[t]he question presented does not include the Court of Appeals’ rulings on the statute of frauds ....” (Aplee.’s Br. at 6.) The court of appeals’s statute of frauds analysis was based in part on the requirement in *Warburton v. Virginia Beach Fed. Sav. & Loan Ass’n*, 899 P.2d 779 (Utah Ct. App. 1995), that language granting an easement must be certain and definite. *See Evans*, 2004 UT App 256, ¶9, 97 P.3d 697. Since the issue presented here is, in part, whether Evans’s reservation of easement “was sufficiently specific to be enforceable” (Aplt.’s Br. at 1), it encompasses both the question of vagueness and the requirements of the statute of frauds.

### ***Statement of Facts***

Although Evans accepts the County’s recitation of facts material to this

appeal (Aplee.'s Br. at 7), he adds his interpretation of the language of his predecessor's quitclaim deed, including his conclusion that the reserved easement "runs across the 120-foot width of the Strip ..." (Aplee.'s Br. at 8). Because Evans later argues, based on this language, that the easement's length is 120 feet (Aplee.'s Br. at 29), the County must note that the reservation's actual language locates the easement "over and across" the Strip. (Aplt.'s Br. at 5.) Nothing in the reservation suggests a straight line was contemplated.

The County also takes exception to Evans's unwarranted accusation that the County's decision to vacate several platted but unopened streets in the Ironton Plat was "no doubt ... an effort to clean up the legalities of the situation ...." (Aplee.'s Br. at 9.) His citation to the Record provides no support for his statement, and his attack on the County's motivations obscures the narrow issue presented here.

## **ARGUMENT**

### **I. UNDER UTAH LAW, EVANS'S EXPRESS EASEMENT IS VOID BECAUSE IT FAILS TO SUFFICIENTLY SPECIFY ITS DIMENSIONS AND LOCATION.**

Although Evans concedes his reservation is "[i]nadequately [d]efined" (Aplee.'s Br. at 11), he contends, based primarily upon his reading of extrajurisdictional law<sup>2</sup>, that "the established rule in American law is that an express easement is valid even if the deed fails to specify its dimensions or location on the servient estate." (Aplee.'s Br. at 11.) Evans overstates his contention.

While it appears that some jurisdictions have adopted that relaxed approach, the opinions are hardly unanimous. More importantly, Evans offers no persuasive

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<sup>2</sup> Of the sixty-nine cases listed in Evans's Table of Authorities, only fourteen are from Utah. (Aplee.'s Br. at iii-vi.)

evidence that Utah courts apply the more lenient standard. In fact, an examination of Utah decisions, like *Potter v. Chadaz*, 1999 UT App 95, 977 P.2d 533, reveals that Utah courts require a reservation or grant of an express easement to sufficiently specify its dimensions and location. Therefore, because Evans's reservation of "a 56 foot wide right-of-way over and across [the Strip], from Pine Street to connect with the grantor's remaining property" (Aplt.'s Br. at 5) fails to meet this requirement, it is unenforceable.

***(a) The dimensions and location of an express easement are material terms.***

Evans does not dispute that Utah courts employ contract construction principles to interpret express easements, and labels the County's recitation that the absence of sufficiently specific essential terms renders a contract void "unremarkable." (Aplee.'s Br. at 27.) Though unclear, it appears Evans bases his opposition primarily on the idea that the dimensions and location of an express easement are not essential terms. He errs in that assessment.

The clearest Utah decision to identify the boundaries and location of an express easement as essential terms is *Potter*. There, the court of appeals held that a reservation for a road over the east sixty-six feet of the conveyed property was not sufficiently specific because it did not "specify the boundaries of the easement or its exact location." *Potter*, 1999 UT App 95, ¶11, 977 P.2d 533. Although he does not dispute the County's interpretation of *Potter*, Evans dismisses the holding as erroneous *dictum* because the decision goes on to address the concept of a "stranger to the deed," reaffirming that the doctrine precludes a reservation for the benefit of a third party. (Aplee.'s Br. at 24-26.) Evans's analysis is inverted: assuming either analysis constitutes *dictum* (the County suggests neither is, for reasons explained below), it is the "stranger to the deed" discussion, not the

analysis invalidating the easement as “not sufficiently detailed.” *Potter*, 1999 UT App 95, ¶11, 977 P.2d 533.

After the *Potter* court held that the reservation’s “vague language d[id] not constitute a definite and ascertainable description of the property,” *id.*, it continued: “[h]owever, even if we were to assume that this language were sufficient to create an express easement,” the stranger to the deed doctrine would preclude enforcement. *Id.* at ¶12 (emphasis added). Consequently, if one of these analyses constitutes a statement “concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand ....” *Black’s Law Dictionary* 454 (6th ed. 1990) (defining “*dictum*”), it is *Potter*’s ensuing stranger to the deed analysis, built upon the false assumption that the easement language was sufficient.

A more accurate way to view *Potter*, however, is stating alternative reasons for nullifying the easement at issue, meaning that neither the insufficient specificity nor the stranger to the deed analyses should be considered *dictum*.

Where the opinion accompanying a decision invoked as a precedent states several reasons for the decision, although a single reason would have been sufficient to support the holding reached, none of the reasons indicated is to be considered as a mere dictum; rather, each is to be treated as a precedent embraced by stare decisis.

20 Am. Jur. 2d *Courts* § 154 (2004) (footnote omitted).

Though less clear than *Potter*, both *Warburton v. Virginia Beach Fed. Sav. & Loan Ass’n*, 899 P.2d 779 (Utah Ct. App. 1995), and *Southland Corp. v. Potter*, 760 P.2d 320 (Utah Ct. App. 1988), also support the conclusion that the dimensions and location of an express easement are essential terms. Evans’s declaration that *Southland*’s relevance is “a mystery” since the attempted easement at issue there suffered from multiple deficiencies (Aplee.’s Br. at 28) ignores the

court's conclusion that the alleged easement-creating document's "range of meanings demonstrates that the writing lacks essential terms and provisions, ...." *Southland*, 760 P.2d at 322. While *Warburton* focused on the distinct question of whether the contract for country club membership at issue there sufficiently described an interest in real property to create an easement under the statute of frauds, that attention does not render the decision inapposite, as Evans suggests. (Aplee.'s Br. at 27-28.) Evans does not challenge the *Warburton* court's endorsement of the requirement that interests in property like express easements must sufficiently specify their boundaries. See *Warburton*, 899 P.2d at 781 n.4.

The County also cited several Utah decisions in its opening brief evaluating conveyances of fee interests in deed and nondeed contexts (which, Evans does not dispute, require sufficiently specific boundary descriptions to be valid) as analogous support for similarly requiring grants or reservations of express easements in Utah to likewise sufficiently specify their boundaries and locations. (Aplt.'s Br. at 13-16.) Evans appreciates no such similarity between the two, and attempts to distinguish those cases simply by noting what the County already had acknowledged: that they do not deal with easements. (Aplee.'s Br. at 27-28.) Yet, this analogy is not without precedent. See, e.g., *North Shore, Inc. v. Wakefield*, 530 N.W. 2d 297, 300 (N.D. 1995) ("[E]xceptions or reservations of property in a deed should be set forth with the same prominence as the property granted and should be so explicit as to leave no room for doubt."); *Vrabel v. Donahoe Creek Watershed Auth.*, 545 S.W. 2d 53, 54 (Tex. Cir. App. 1976) ("The rule relating to the sufficiency of descriptions of easements is the same as that required in conveyances of land."); *Chesapeake Corp. v. McCreery*, 216 S.E. 2d 22, 25 (Va. 1975) ("The same principle [as that applied to deeds] is applicable to the description excepting or reserving certain property from the operation of a conveyance.").

Indeed, the County's analysis matches that of the authoritative legal encyclopedia *American Jurisprudence*: "The grant [of an easement] should identify an easement's location with specificity. In other words, the description of the easement requires a certainty such that a surveyor can go on the land and locate the easement from such description."<sup>3</sup> 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 64 (2004) (footnotes omitted).<sup>4</sup>

Decisions in several states bolster this perspective. For example, in *Oliver v. Ernul*, 178 S.E. 2d 393 (N.C. 1971), the North Carolina Supreme Court held a right-of-way agreement between several parties void. The court concluded the writing (which described a twenty-foot right of way between a railway and a highway, located by the boundaries of several plats identified by owner) was insufficient. The court held that "the location of the '20-foot rightaway' on the ground is vague, indefinite and uncertain. The language of the instrument vaguely describes the intended easement in such a manner that nothing can be located on

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<sup>3</sup> Grants and reservations of express easements are treated equally under Utah law. See *Brown v. Christopher*, 247 P. 503, 504-05 (Utah 1926) ("A reservation of an easement in the deed by which the lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." (quoting *Wagner v. Hanna*, 38 Cal. 111)).

<sup>4</sup> Although Evans's passing reference to *American Jurisprudence* (Aplee.'s Br. at 11) appears contradictory, a closer examination reveals that he has modified the language he quotes. Without the modification, it is, at best, unclear whether it supports his assertion. The complete paragraph states: "The writing must contain a description of the land that is to be subjected to the easement with sufficient clarity to locate it with reasonable certainty. However, it is not necessary to designate with definiteness the part of the land to which the right attaches." 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 15 (2004) (footnotes omitted). In context, particularly with the specific language from the subsequent section quoted above, "the land that is to be subjected to the easement" likely means the servient estate, and the "land to which the right attaches" the dominant.

the ground. The description contains no beginning and no ending.” *Id.* at 597. Quoting extensively from a prior North Carolina case, the court explained that descriptions so vague and indefinite that they cannot be placed without resorting to circumstances not referred to in the writing itself suffer from patent ambiguities, and are void.

When an easement is created by deed, either by express grant or by reservation, “the description thereof must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty.... If the description is so vague and indefinite that effect cannot be given the instrument without writing new material language into it, then it is void and ineffectual either as a grant or as a reservation.”

*Id.* at 597 (quoting *Thompson v. Umberger*, 19 S.E. 2d 484, 485 (N.C. 1942)).

In *Highway Properties v. Dollar Savings Bank*, 431 S.E. 2d 95 (W. Va. 1993), the West Virginia Supreme Court of Appeals found a purported reservation invalid. The language at issue deeded ““common parking and rights-of-way or easements in, to and across all parcels for ingress and egress from and to all other parcels.”” *Id.* at 97 (quoting deed). The court held this language “totally inadequate,” *id.* at 99, noting that “[n]one of the easement language identified the location or width of the easements on the land. The descriptions contained nothing that would serve to specify in the slightest degree any means of geographically locating the easements on the property,” *id.* at 100. Similarly, in *Vrabel v. Donahoe Creek Watershed Auth.*, 545 S.W. 2d 53 (Tex. Civ. App. 1976), the court found a grant of an easement of 111 acres out of a 250.5-acre tract void. The court reversed the trial court’s decision fixing the easement’s location, relying upon “the well established rule that for a contract to convey land to be sufficient, the description must be so definite and certain upon the face of the instrument itself, or, in some writing referred to, that the land can be identified with reasonable certainty.” *Id.* at 54. The court elaborated that “[t]he description



requires a certainty such that a surveyor can go upon the land and locate the easement from such description.” *Id.* Other jurisdictions have held likewise.<sup>5</sup>

Evans relies heavily on Bruce and Ely’s *The Law of Easements and Licenses in Land* (“*The Law of Easements*”) throughout his brief for the indefinite proposition that “‘failure to indicate the easement’s dimensions or its location on the servient property usually is not fatal to the contemplated servitude.’” (Aplee.’s Br. at 11 (quoting Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 7:2 (West 2005) (emphasis omitted))).<sup>6</sup> In fact, Evans’s footnote five and his assessment of *Berg v. Ting*, 850 P.2d 1349 (Wash. Ct. App. 1993), *overruled*, 886 P.2d 564 (Wash. 1995), are recited from the treatise, as modified by the supplement, virtually verbatim. (*Compare* Aplee.’s Br. at 11-12 & n.5 with Bruce & Ely, *supra*, § 7:2.) Yet, further examination reveals that the jurisdictions employing the “usual” approach apply rules of construction when interpreting easements distinct from those used in Utah.

After stating that failing to indicate its dimensions or location is not usually fatal to an easement, Bruce and Ely explain that “[t]he generally accepted view is that extrinsic evidence may be used to identify the location and dimensions of the

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<sup>5</sup> See *Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 903 (2d Cir. 1983) (“When a prospective purchaser seeks to acquire an easement, New York courts require that party to identify with specificity the location and intended use for the estate.”); *Parkinson v. Board of Assessors*, 481 N.E. 2d 491, 493 (Mass. 1985) (“[T]he instrument must be sufficiently precise that ‘a surveyor can go upon the land and locate the easement.’” (quoting *Vrabel*, 545 S.W. 2d at 54)); *Germany v. Murdock*, 662 P.2d 1346, 1348 (N.M. 1983) (“An easement requires the same accuracy of description as other conveyances. ‘The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description.’” (quoting *Vrabel*, 545 S.W. 2d at 54)).

<sup>6</sup> As a courtesy, the County includes a copy of pertinent portions of *The Law of Easements* in the Addendum hereto.

easement.” Bruce & Ely, *supra*, § 7:2 (footnote omitted). Evans does not dispute, however, that, under contract law, Utah courts resort to extrinsic evidence only when they find an ambiguity. (Aplt.’s Br. at 10-11.) As the County has shown, an omission of an express easement’s dimensions or location does not render it ambiguous, but rather unenforceable. Herein, then, lies the distinction between the cases Evans relies upon and Utah law: While the jurisdictions Evans cites apparently allow the admission of extrinsic evidence to determine an easement’s dimensions and location, Utah courts cannot consider such evidence absent finding an ambiguity in the conveyance language, and omission of material terms does not create an ambiguity.

Moreover, although Evans ignores it, Bruce and Ely expressly acknowledge several jurisdictions that reject the analysis he advocates. “North Carolina courts,” they note, “take a significantly more restrictive approach to the description issue, holding that an easement grant or reservation is void for uncertainty if it does not adequately describe the location of the easement.” Bruce & Ely, *supra*, § 7:6 (footnote omitted).<sup>7</sup> *The Law of Easements* also recognizes New Mexico, Texas, West Virginia, and Wyoming (which has enacted statutory requirements of sufficiency, *see* Wyo. Stat. Ann. § 34-1-141) as other jurisdictions employing a stricter standard for requiring descriptions of the dimensions and location of an express easement in the creating instrument. *See id.* Based upon the foregoing analysis, Utah squarely fits among these jurisdictions.

Evans repeatedly cites to *Thomas and Backman on Utah Real Property Law* (“*Utah Real Property Law*”) to support his argument that an express easement’s

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<sup>7</sup> Indeed, in some jurisdictions even an ambiguity will nullify the easement. *See* 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 18 (2004) (“[T]here is authority holding that a provision purporting to grant an easement must be strictly construed, with any doubt being resolved against establishment of the easement.” (footnotes omitted)).

failure to sufficiently specify its dimensions or location does not render it void. (Aplee.'s Br. at 1, 26, 30.) He relies on the work for the "general rule" that the owner of a servient estate has "the first opportunity to set the scope of an inadequately described easement." If the dominant estate owner disagrees, the treatise continues, she or he then may seek recourse from the courts.<sup>8</sup> David A. Thomas & James H. Backman, *Thomas and Backman on Utah Real Property Law* § 12.02(c) (LEXIS 1999) (footnote omitted)<sup>9</sup>; (Aplee.'s Br. at 1, 26, 30). Evans's reliance on this secondary source is unpersuasive for at least two reasons. First, this language from *Utah Real Property Law* cites to no authority other than another publication by the same authors. See Thomas & Backman, *supra*, § 12.02(c). Second, the text does not identify what it means by "an inadequately described easement." *Id.* This language appears subsequent to the unambiguous statement that, "[i]f based on an explicit grant, the extent of an easement is determined by the grant," *id.* (footnote omitted), and a discussion of ambiguous writings. Thus, the authors could be referring to ambiguous, rather than

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<sup>8</sup> Oddly, this approach differs from that suggested by Evans. Under Evans's proposal, a servient owner would have an unspecified amount of time to locate the easement; failing to do so, the dominant owner would then have an unspecified time to locate it; and, finally, upon disagreement or both parties' failure to locate it, a court would do so. (Aplee.'s Br. at 30-31.)

<sup>9</sup> Again, as a courtesy, the County includes a copy of pertinent portions of *Utah Real Property Law* in the Addendum hereto.

insufficiently specific, descriptions.<sup>10</sup>

***(b) Evans's reservation was not sufficiently specific.***

Although Evans contends “[t]he real question” posed on appeal is not whether his reserved easement was valid, but rather “how to properly define and locate” it (Aplee.’s Br. at 16), the County finds the issue formulated by this Court definitive: Was Evans’s reservation “sufficiently specific to be enforceable” (Order Granting Cert. Nov. 5, 2004)? Since Evans’s reservation cannot overcome this threshold hurdle, his recitation of various rules of construction gleaned from jurisdictions allowing the admission of extrinsic evidence to define an easement’s dimensions and location is surplusage.

Classifying this appeal as “an easy case,” Evans argues that his reservation is sufficiently specific because it identifies its purpose, the dominant and servient estates, the grantor’s intent to reserve<sup>11</sup>, the County’s acceptance, and the

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<sup>10</sup> In some respects, it appears that those jurisdictions upon which Evans relies to construct his rule allowing grantees the first opportunity to select the placement of the easement may be operating under a holdover from the common law canons of deed interpretation. “Although a number of early cases applied a common-law canon of construction under which, to overcome uncertainty as to the land conveyed, the grantee was allowed to select the land conveyed but not located, this rule of construction has been seldom cited in modern times.” 23 Am. Jur. 2d *Deeds* § 43 (2004) (footnote omitted).

<sup>11</sup> Throughout the briefing of this case, Evans has inferred a broad interpretation of the parties’ “intent” in creating Evans’s easement. (Aplee.’s Br. at 20, 21, 28-29; Resp’t’s Br., Pet. for Cert. at 3-4, 7; Aplt.’s Br., Utah Ct. App. at 4, 6, 8.) However, in the context of interpreting real property transactions in Utah, the term has a narrow meaning. In *Hartman v. Potter*, 596 P.2d 653 (Utah 1979), this Court explained that “the main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor, *from the language used.*” *Id.* at 656 (emphasis original) (footnote omitted). The Court continued: “[T]he term ‘intention,’ as applied to the construction of a deed, is to be distinguished from its usual connotation. When so applied, it is a *term of art* and signifies a meaning of the *writing.*” *Id.* (emphases original) (footnote omitted).

easement's width. (Aplee.'s Br. at 29.) However, the only item in this list that begins to identify the essential terms of the easement's dimensions and location is its width, and that is insufficient. The face of the deed reveals that it purports to reserve "a 56 foot wide right-of-way over and across the [Strip]," which measures 120 feet by 760 feet, for a total of 91,200 square feet, or a little more than two acres. (Aplt.'s Br. at 2.) Without more, it is impossible to locate or even define the extent of this attempted easement. All that is known is that Evans's predecessor attempted to reserve a fifty-six-foot-wide access between his and the County's properties that crosses more than two acres following an unknown path. The possible points of beginning and ending and paths the easement could follow approach innumerable.

It is exactly this sort of indefiniteness that prompted the *Potter* court to find the reservation in that case unenforceable. There, the court rejected an attempted reservation of a sixty-six-foot-wide road between an identified street and the seller's property over the eastern portion of an approximately one-and-a-half-acre parcel as insufficiently specific. *See Potter*, 1999 UT App 95, ¶¶10-11 & 14-15, 977 P.2d 533. The court of appeals's conclusion compels a similar finding here because Evans's description is even less definite. The *Potter* language identified the right of way's width, the servient and dominant estates, and even the general area on the servient estate where it should be located. Evans's attempted reservation provides no guidance where it should be located over an even larger area.

In an effort to escape the persuasive effect of *Potter*, Evans suggests his reservation is more specific, conjecturing a length of 120 feet, equal to the Strip's width. (Aplee.'s Br. at 26 n.14, 29.) Evans presents no evidence, however, that the parties intended a straight-line path over the Strip, that the plain meaning of the reservation requires a straight path, or even that such a path was feasible when

the easement was created. The easement language actually reserves a right of way “over and across” the Strip. (Aplt.’s Br. at 5.) This phrase could mean a diagonal line running from the northwest corner of the Strip to the southeast corner, or the reverse, or anything in between. It could begin anywhere along the northern boundary of the Strip and end anywhere along its southern boundary. Nothing in the reservation suggests a straight line, and any of these other paths would create an easement longer than the 120-foot width of the Strip.

Looking again to Utah courts’ application of contract principles in the analogous context of deeds for guidance, it is clear that this degree of vagueness renders such conveyances unenforceable. As with easements, Utah law requires the boundaries of conveyed parcels to be described with sufficient specificity. *See, e.g., Colman v. Butkovich*, 556 P.2d 503, 505 (Utah 1976) (“It is not to be questioned that in order to be valid, the deed must contain a sufficiently definite description to identify the property it conveys.” (footnote omitted)). “In the construction of boundaries, we ... find that the intention of the parties is the controlling consideration.” *Ault v. Holden*, 2002 UT 33, ¶28, 44 P.3d 781 (quoting *Losee v. Jones*, 235 P.2d 132, 137 (Utah 1951)). This Court “determine[s] the parties’ intent from the plain language of the four corners of the deed.” *Id.* at ¶38.

In *Ault*, this Court held a boundary description that failed to close sufficiently specific after finding that several surveyors had been able to establish the parcel’s boundaries based upon the deed’s legal description. *See id.* at ¶¶26-27, 30. Yet, in *Howard v. Howard*, 367 P.2d 193 (Utah 1962), this Court affirmed a district court’s nullification of a deed where the description of the parcel’s boundaries not only failed to close, but provided no indication that closure from the last described call was even intended. *See id.* at 194-95. Consequently, this

Court concluded that the only way to ascertain the grantor's intent was by conjecture, which could have led to "any number of areas." *Id.* at 195.

Evans's easement resembles the situation in *Howard*. His reservation's failure to identify its points of beginning and ending, length, and path leave far more unknown than, in a deed context, an erroneously short call manifestly intended to close a parcel's boundary description. By suggesting, without evidence, that the length of his easement is 120 feet, Evans effectually illustrates that he must resort to conjecture in order to locate it, a concept explicitly rejected in *Howard*.

## **II. EVANS'S INSUFFICIENT ATTEMPT TO RESERVE AN EXPRESS EASEMENT DID NOT CREATE A FLOATING OR ROVING EASEMENT.**

Evans argues that a reservation that fails to specify an easement's location or dimensions is an enforceable floating or roving easement. (Aplee.'s Br. at 14-15.) He presents no controlling authority, however, that permits such an exception to the rules of construction outlined above. Moreover, construing Evans's easement as floating or roving contradicts the parties' intent as manifested by the reservation's plain language.

### ***(a) Floating easements are not exempt from the specificity requirements of express easements.***

Because the location and dimensions of an express easement are essential terms, Evans's argument that reservations lacking these terms are enforceable in Utah as floating or roving easements implies an exempt status. He points to two Utah cases for support: *Wood v. Ashby*, 253 P.2d 351 (Utah 1952), and *Salt Lake City v. J.B. & R.E. Walker, Inc.* ("*Walker*"), 253 P.2d 365 (Utah 1953). (Aplee.'s Br. at 20-21.) Neither decision supports Evans's proposition.

Evans decrees that "*Wood* refutes the County's position that an easement is

void because its location is not specified in the deed” (Aplee.’s Br. at 22), yet he concedes that “[t]he issue in *Wood* was whether the easement should be assigned a reasonable location and boundaries or whether it was a general and unrestricted right of way covering the entire strip”<sup>12</sup> (Aplee.’s Br. at 21). In other words, Evans agrees that the threshold issue of whether the reservation was void was not before the Court in *Wood*. Nothing in *Wood* hints that the issue was ever raised. In fact, the decision makes clear that the question was prompted by the defendants’ use of part of the easement property for farming, not a dispute over whether it existed. *See Wood*, 253 P.2d at 353. Moreover, given the passage of at least thirty years from the original reservation to the initiation of the action, *see id.* at 352 (dating the original reservation sometime prior to 1917 and the suit sometime after 1947), it is entirely possible that the parties and the Court considered the question within the context of a prescriptive, rather than express, easement.<sup>13</sup> *See Potter*, 1999 UT App 95, ¶17, 977 P.2d 533.

To resolve the question of whether the reservation was unrestricted, the Court resorted to the doctrine of practical construction, *see Wood*, 253 P.2d at 353-54, a tool of contract interpretation employed in Utah only after a court determines that an ambiguity exists. *See, e.g., Webbank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶19, 54 P.3d 1139 (“If a contract is ambiguous, the court may consider the parties’ actions and performance as evidence of the parties’ true intention.”). That analysis is inapposite here, where the focus instead is on an

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<sup>12</sup> Though the meaning appears similar, the County prefers the Court’s statement of the issue: “The issue is whether [the] deed reserved to the grantor a general and unrestricted right of way over strip A.” *Wood*, 253 P.2d at 353.

<sup>13</sup> There exist many other reasons why the issue might not have been raised. It might have been in the parties’ mutual interest to agree that the easement existed. It could also have been oversight. Regardless, the point remains that the easement’s existence was not questioned.



initial assessment of the reservation's enforceability.

The incongruity between Evans's reliance on *Wood* and his criticism of the County's reliance on *Potter* further emphasizes his argument's weakness. While taking issue with the County's reliance on what he characterizes as *Potter's dictum* expressly holding a reservation void for failing to specify its location and dimensions (Aplee.'s Br. at 25-26), he simultaneously construes *Wood's* omission of "any suggestion that the easement might be void for lack of specificity" as supporting his conclusion that the lack of those terms does not render an easement unenforceable (Aplee.'s Br. at 21). Evans offers no explanation why *Wood's* silence should outweigh *Potter's* express holding.

Although Evans correctly notes that the grant of easement at issue in *Walker* did not specifically fix its location or width (Aplee.'s Br. at 22), he misinterprets the County's argument by concluding that the County would consider the easement void. (Aplee.'s Br. at 23.) The Court in *Walker* did not, as Evans suggests, uphold "a floating easement with inadequately defined terms." (Aplee.'s Br. at 22.) The easement at issue in *Walker* was instead a sufficiently specific floating easement. It granted "'a right of way and easement for all ... conduits ... to be constructed by the City wherever these may be located now or hereafter within lands owned by' the grantor." *Walker*, 253 P.2d at 238 (quoting grant) (emphases omitted). It therefore sufficiently specified a method by which the parties were to determine the dimensions and location of the granted easement, an acceptable construction under Utah contract law. (Appl.'s Br. at 12-13.)

As specified in the grant, the city subsequently chose a location for the water conduit, constructed it, and began operation in 1906. *See Walker*, 253 P.2d at 368. Thus, the existence of the easement was not at issue. In fact, as with *Wood*, there is no indication that the parties made any argument that the easement itself was void. Rather, the question raised was the extent of the implied

secondary easement for operation, repair, and maintenance of the conduit that the city claimed was threatened by the defendant's excavation activities years later.<sup>14</sup> *See id.* at 366-68. It is this secondary easement that the Court interprets as "of such width as is reasonably necessary for full enjoyment of the easement granted." *Walker*, 253 P.2d at 369. *See also Conley v. Whittlesey*, 985 P.2d 1127, 1133 n.1 (Idaho 1999) ("The term 'secondary easement' is applied to the right to enter and repair and do those things necessary to the full enjoyment of the easement existing."). Thus, *Walker*'s determination of the extent of this incidental easement does not suggest Evans's conclusion that Utah courts recognize and locate failed attempts to create fixed easements.

Because neither *Wood* nor *Walker* excuse floating or roving easements from the requirement imposed by Utah contract law that the dimensions and location of express easements be sufficiently specified, the failure of Evans's reservation to sufficiently specify these essential terms renders it void, regardless whether it otherwise would be considered a floating or roving easement.

***(b) Floating easements are created when intended by the parties.***

Assuming, *arguendo*, that Evans's reservation sufficiently specified its dimensions and location, it still would not constitute a floating or roving easement because it is clear from its language that the parties did not intend to create one. Evans correctly notes that "[t]he paramount rule of construction of deeds is to give effect to the intent of the parties as expressed in the deed as a whole, ...." *Hancock v. Planned Dev. Corp.*, 791 P.2d 183, 185 (Utah 1990); (Aplee.'s Br. at 20). Yet, he abandons that well-established precept by labeling the County's

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<sup>14</sup> "The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a 'secondary easement,' a mere incident of the easement that passes by express or implied grant, or is acquired by prescription." *Virginia Elec. & Power Co. v. Webb*, 84 S.E. 2d 735, 739 (Va. 1954) (quoting 2 Thompson, *Real Property* (Perm. Ed.), § 676, p.343).

argument that floating easements are created only when intended as “novel” (Aplee.’s Br. at 13), and asserting that all that is required to create a floating easement is “that the location and/or dimensions of the easement be inadequately defined” (Aplee.’s Br. at 14). This inconsistency results from Evans’s overbroad definition of floating easements.

Evans criticizes the County’s reliance on *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989), to support its argument that a floating easement is created when the parties intend then-unpredictable circumstances to fix the easement’s dimensions and location by dismissing the decision’s language as tangential *dictum* strictly limited to the facts of the case. (Aplee.’s Br. at 23-24.) Regardless its status, *Flying Diamond*’s description of the easements at issue in that case as floating, and explaining that they were defined by unpredictable circumstances, *see Flying Diamond*, 776 P.2d at 626, offers persuasive support for the County’s interpretation. Moreover, the similarity tying together the floating easements at issue in *Flying Diamond* and *Walker* is the parties’ clear intent to allow the unpredictable circumstances specified in the creating instruments to set the easements’ boundaries and locations. In *Walker*, it was the city’s subsequent location and construction of a water conduit. *See Walker*, 253 P.2d at 368. In *Flying Diamond*, it was the location of wells, roads, and other facilities to locate, remove, and transport oil or gas. *See Flying Diamond*, 776 P.2d at 626. Hence, in both *Walker* and *Flying Diamond* the parties intended the dimensions and location of the easements to remain undefined until they were fixed by the mechanisms identified in the creating instruments.

In contrast, Evans’s easement clearly demonstrates the parties’ intent to reserve a fixed, not floating, easement. The reservation language does not tie the location or dimensions of the contemplated easement to the eventual location of any structures, the discovery of mineral deposits, or anything similar. Rather, the

language clearly indicates an intent to reserve “a 56 foot wide right-of-way over and across” the Strip. (Aplt.’s Br. at 5.) Therefore, giving effect to the parties’ intent as manifested in the reservation militates against a finding of a floating easement here.

The impossibility of using any of the four *Walker* factors the court of appeals instructed the district court to employ on remand to set Evans’s easement’s dimensions and location, *see Evans*, 2004 UT App 256, ¶22, 97 P.3d 697, also illustrates that it is not a floating easement. *Walker* outlined four methods to fix floating easements: (1) agreement of the parties; (2) acquiescent use; (3) right of selection as specified in the grant; or (4) necessity. *See Walker*, 253 P.2d at 368. First, the parties do not agree where the easement should be located. *See Evans*, 2004 UT App 256, ¶6, 97 P.3d 697 (noting the end of unfruitful settlement discussions). Second, there has been no acquiescent use. (Aplt.’s Br. at 2-3.) Third, the reservation does not vest a right of selection in either party. It requires the County to build a road over it, but does not give it the right to locate it. (Aplt.’s Br. at 5.) Finally, Evans has never claimed that the easement must be located in a particular place “because any other place would annul, ruin, or militate against the grant.” *Walker*, 253 P.2d at 368. Indeed, Evans’s statement that he “has no objection to the County selecting a reasonable location on the Strip for placement of the Easement” (Aplee.’s Br. at 30) would contradict such an assertion.

Additionally, none of the four *Walker* methods for fixing a floating easement’s location fit within “the course [Evans contends] this Court should mandate on remand.” (Aplee.’s Br. at 31.) According to Evans, this Court should order the district court to allow the County to select a location for the easement within a reasonable time. Failing that, Evans would get to choose his easement’s location. Finally, if the parties could not agree, the district court would locate the

easement using the standard for the extent of secondary easements. (Aplee.'s Br. at 30-31.) This approach, however, does not rely on agreement by the parties, acquiescent use, a right of selection vested by the grant, or the requirement of necessity as defined in *Walker*. Thus, Evans's proposition actually diverges from the instructions of the court of appeals. Because Evans has filed no cross-appeal, his request is improper.

Evans's references to *The Law of Easements*, *Corpus Juris Secundum*, and *Black's Law Dictionary* for definitions of floating easements are inapposite. (Aplee.'s Br. at 12.) Summarized, they all state that undesignated grants of rights of way may be termed floating easements. These definitions fit both Evans's and the County's interpretations. Moreover, a review of the case law upon which Evans relies tends to support the County's interpretation.

In *Los Angeles v. Howard*, 53 Cal. Rptr. 274 (Cal. 2d Dist. Ct. App. 1966), and the cases listed in footnote six of Evans's brief (most of which also appear in a footnote in *The Law of Easements*, see Bruce & Ely, *supra*, § 7:4 n.1), the term was used the same way the County argues it has been used in Utah case law: The parties intended to create an easement, the dimensions and location of which were to be determined by a prescribed method, usually subject to unpredictable circumstances. See *Howard*, 53 Cal. Rptr. 274, 276 (discussing a reservation granting the city an easement ““for the purpose of operating, maintaining, repairing and renewing [p]ower lines for the conveyance of electricity”” (quoting instrument)); *Sunnyside Valley Irrigation Dist. v. Dickie*, 73 P.3d 369, 370 (Wash. 2003) (regarding a grant of right of way to maintain irrigation laterals); *Coughlin v. Anderson*, 853 A.2d 460, 464 (Conn. 2004) (addressing an exception and grant “to install water, sewerage, gas and electrical conduits” over the property); *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 853 (Wyo. 1996) (analyzing an easement for constructing, operating, and maintaining electric

lines)<sup>15</sup>; *New Orleans & Northeastern R.R. v. Morrison*, 35 So. 2d 68, 69 (Miss. 1948) (reserving the use of land and timber on either side of the road “to be constructed by” the railroad company); *Scherger v. Northern Natural Gas Co.*, 575 N.W. 2d 578, 579 (Minn. 1998) (involving an easement over the property with rights of ingress and egress to construct and maintain gas pipelines); *Missouri Pub. Serv. Co. v. Argenbright*, 457 S.W. 2d 777, 780 (Mo. 1970) (addressing an easement sought by eminent domain to locate, construct, operate, and maintain electric transmission wires).

In the only case Evans cites that presents a situation arguably similar to one where the parties simply failed to specify an intended fixed easement, the court found that the floating easement was valid because, unlike Evans’s reservation, it set forth one of the *Walker* methods for determining its location. *See Umberger v. Department of Game, Fish and Parks*, 248 N.W. 2d 359, 397 (S.D. 1976) (“The easement itself anticipated mutual agreement in establishing a more exact route, ....” (emphasis added)).

In *Village of Wagon Mound v. Mora Trust*, 62 P.3d 1255 (N.M. Ct. App. 2002), cited by Evans (Aplee.’s Br. at 13 n.6), the New Mexico Court of Appeals endorsed a narrow definition of a floating easement similar to that used by this Court in *Walker* and *Flying Diamond*. In *Wagon Mound*, the grant provided an easement for waterworks across particularly described land ““as said works, water intake and pipe line may be located by the engineers”” of the village. *Wagon Mound*, 62 P.3d at 1265 (quoting indenture). After locating the pipeline, the grant provided that the grantor would execute and deliver another deed conveying the rights of way by definite description. However, although the pipeline was built, the deed with definite descriptions was never delivered. *See id.* at 1265.

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<sup>15</sup> The court concluded, in part, that “the parties intended a floating easement at the time the easement was executed.” *Id.* at 855 (emphasis added).

Concluding that the parties' intent was "undisputed," the court found "no conflict with prior case law or New Mexico policy in recognizing the validity of an undescribed, or 'floating' easement in these circumstances." *Id.* at 1266. "[T]hese circumstances" being the creation of an easement to be located by one of the parties via its construction a water pipeline, much as in the case of *Walker*. In other words, the parties' clear intent to create a floating easement, and the inclusion of a method for fixing it in the creating instrument, allowed the court to recognize an enforceable floating easement.

Moreover, Bruce and Ely's treatise also notes that floating easements "burden the entire servient estate and therefore tend to hamper development, limit financing possibilities, and impede alienation of the property." Bruce & Ely, *supra*, § 7:7 (footnote omitted). Since, in Utah, "[t]he accepted rule is that ... the easement conveyed should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant," *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963) (footnote omitted), the presumption should be that the parties did not intend to create such a burden.

### **III. MAINTAINING A CONSISTENT APPROACH TO INTERPRETING CONVEYANCES AND A STRICT DEFINITION OF FLOATING OR ROVING EASEMENTS PROMOTES CLARITY AND JUDICIAL ECONOMY.**

Evans argues that his suggestion for placing the easement in question (which, as noted above, contradicts the court of appeals's order) "is the only course that makes sense and does not lead to serious inequities" because he "purchased his property with the reasonable expectation that the Easement was valid, and his development plans have long depended on that expectation." He further asserts that "[v]oiding the Easement, as the County now advocates, would impose an economic hardship on [him]." (Aplee.'s Br. at 31.) Evans offers no

support from the record for these claims of detrimental effect or reliance, which seem at least questionable given that the original conveyance from his predecessor made no mention of the reservation until the corrected quitclaim deed was filed over five years later. (R. at 300-298, 411-10.)

The prejudice to the courts and the parties to such insufficiently described easements that would result from adopting Evans's proposed rules of interpretation is clear and well established. Both *The Law of Easements* and *Utah Real Property Law* direct their readers to define carefully the dimensions and locations of express easements. See Bruce & Ely, *supra*, § 7:1 ("When an easement is created by express provision, the drafters should take care to specify precisely the location and dimensions of the easement." (footnote omitted)); Thomas & Backman, *supra*, § 12.02(b)(1) ("To avoid future litigation the draftsman must use great care to identify *clearly* and *specifically*: ... the limits, permitted uses and duration of the easement." (footnote omitted)). The advice is given to avoid what both authorities describe as frequent litigation on these matters. Evans also acknowledges this problem and its drain on judicial resources, noting that "[h]ow to fix the location or dimensions of an inadequately described easement is a recurring question that often 'taxes the best resources of judicial ingenuity.'" (Aplee.'s Br. at 16 (quoting *Daniel v. Clarkson*, 338 S.W. 2d 691, 692 (Ky. 1960)).) See also Bruce & Ely, *supra*, § 7:6.

Nevertheless, apart from personal benefit, Evans offers no explanation why Utah's courts should discard the requirement that the creation of an express easement requires a sufficiently specific description of its dimensions and location, or depart from a limited definition of floating easements. In the absence of a compelling rationale for diverging from Utah precedent by endorsing ambiguity and thereby increasing judicial involvement in these matters, the Court should maintain these clear guidelines.

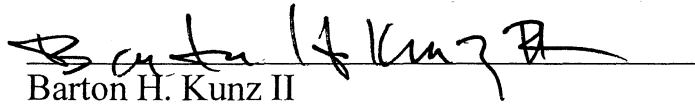


### CONCLUSION

For the foregoing reasons, Evans's express easement is not sufficiently specific to be enforceable, nor would it constitute a floating or roving easement if it were. Consequently, Evans's reservation is void, and the decision of the court of appeals should be reversed.

DATED this 13th day of April, 2005.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read "Barton H. Kunz II", written over a horizontal line.

Barton H. Kunz II

Craig V. Wentz

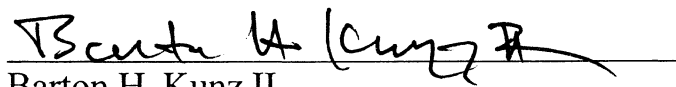
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of April, 2005, two true and correct copies of the foregoing **REPLY OF THE APPELLANT** were sent via postage prepaid, first class U.S. mail to:

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# THE LAW OF EASEMENTS AND LICENSES IN LAND

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## Chapter 7

# Location and Dimensions of Easements

### Research References

#### *West's Digest References*

Boundaries ⚡37; Easements ⚡4, 15, 46, 48(2), 54, 61

#### *Annotation References*

A.L.R. Digest: Easements §§ 42, 46

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#### *Forms References*

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#### *Trial Strategy References*

Extent of Easement over Servient Estate, 33 Am. Jur. Proof of Facts 2d 669

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<sup>c</sup> West Group, 10/2001

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## § 7:1 Introduction

### Research References

West's Key Number Digest, Easements ⇨46

Once an easement has been created, difficulties often arise with respect to its location and dimensions. The mode of creation bears on the resolution of these issues.<sup>1</sup> For example, if the easement was expressly created by grant or reservation, implied from a plat, or formally condemned, the parties and the courts may look to a written easement description for guidance.<sup>2</sup> If, however, the easement arose by implication from a quasi-easement or by prescription, no writing exists, but prior use serves as a starting point for analysis.<sup>3</sup> Furthermore, if the easement is one of necessity, neither a written document nor, typically, prior use exists to facilitate interpreting the scope of the easement.<sup>4</sup>

When an easement is created by express provision, the drafters should take care to specify precisely the location and dimensions of the easement.<sup>5</sup> Too frequently, easement drafters fail to cover one or more of these matters, or they treat location and dimension issues in an incomplete or ambiguous fashion.<sup>6</sup>

## § 7:2 Location and dimensions of express easements

### Research References

West's Key Number Digest, Easements ⇨46

Drafters of express easements should include a legal descrip-

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#### [Section 7:1]

<sup>1</sup>See *Wright v. Horse Creek Ranches*, 697 P.2d 384, 388 (Colo. 1985); 3 R. Powell, *Powell on Real Property* § 34.12 (1994).

<sup>2</sup>See 3 R. Powell, *Powell on Real Property* § 34.12 (1994) For treatment of the specialized problem of condemning land on which to locate electric power lines, see *Eminent Domain: Review of Electric Power Company's Location of Transmission Line For Which Condemnation is Sought*, 19 A.L.R. 4th 1026.

<sup>3</sup>See 3 R. Powell, *Powell on Real Property* §§ 34.12, 34.13 (1994).

<sup>4</sup>See *id.* at § 34.13.

<sup>5</sup>Cunningham, Stoebeuck, and Whitman, *The Law of Property* (2d ed.) § 8.9; see generally Kratovil, *Easement Draftsmanship and Conveyancing*, 38 Cal. L. Rev. 426 (1950), *Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms*, 3 A.L.R. 3d 1256 (making drafting suggestions). For a "Model Easement Grant," see Kratovil and Werner, *Real Estate Law* 24–25 (9th ed.)

<sup>6</sup>Cunningham, Stoebeuck, and Whitman, *The Law of Property* (2d ed.) § 8.9.



tion of both the servient tenement and the precise portion of that tract over which the easement runs.<sup>1</sup> Although the instrument must identify the servient estate, failure to indicate the easement's dimensions or its location on the servient property usually is not fatal to the contemplated servitude.<sup>2</sup> The generally accepted view is that extrinsic evidence may be used to identify the location and dimensions of the easement.<sup>3</sup> The easement dimension that causes the most difficulty is width, but controversy as to height or depth frequently arises indirectly in connection with what constitutes reasonable use of a general right-of-way.<sup>4</sup>

[Section 7:2]

<sup>1</sup>Hazen, *Easements From the Viewpoint of the Title Insurer*, 15 Cal. St. B.J. 28, 31 (1940). For a "Model Easement Grant," see Kratovil and Werner, *Real Estate Law* 24-25 (9th ed.). See generally § 3:1 (discussing requirements of Statute of Frauds and noting that document creating easement must identify servient tenement).

<sup>2</sup>*Harvey v. Bell*, 292 Ark. 657, 660, 732 S.W.2d 138, 140 (1987); *Howard v. Cramlet*, 56 Ark. App. 171, 174-175, 939 S.W.2d 858, 859-860 (1997); *Colvin v. Southern Cal. Edison Co.*, 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142, 146 (2d Dist. 1987) (abrogated on other grounds, by *Ornelas v. Randolph*, 4 Cal. 4th 1095, 17 Cal. Rptr. 2d 594, 847 P.2d 560 (1993)); *Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. Dist. Ct. App. 2d Dist. 1984); *Murdock v. Ward*, 267 Ga. 303, 303-304, 477 S.E.2d 835, 836 (1996); *Joseph Giddan & Sons v. Northbrook Trust & Sav. Bank*, 151 Ill. App. 3d 537, 541, 103 Ill. Dec. 440, 501 N.E.2d 757, 760 (1st Dist. 1986); *Cheever v. Graves*, 32 Mass. App. Ct. 601, 605, 592 N.E.2d 758, 761 (1992); *Hall v. Allen*, 771 S.W.2d 50, 53 (Mo. 1989); *Hoelscher v. Simmerrock*, 921 S.W.2d 676, 679 (Mo. Ct. App. W.D. 1996); *Clements v. Schultz*, 200 A.D.2d 11, 13-14, 612 N.Y.S.2d 726, 727-728 (4th Dep't 1994); *Jones v. Fuller*, 856 S.W.2d 597, 602 (Tex. App. Waco 1993); *Wilhelm v. Beyersdorf*, 100 Wash. App. 836, 844, 999 P.2d 54, 59 (Div. 3 2000); *Berg v. Ting*, 68 Wash. App. 721, 727-730, 850 P.2d 1349, 1353-1355 (Div. 1 1993), rev'd on other grounds, 125 Wash. 2d 544, 886 P.2d 564 (1995) ("[T]he location of an *easement*, which need not be precisely described, is to be distinguished from the location of the *servient estate*, which must be accurately described" (emphasis in original)); see also § 3:1 (discussing application of Statute of Frauds to creation of express easements). But see *Mueller v. Hoblyn*, 887 P.2d 500, 505, 62 A.L.R.5th 847 (Wyo. 1994) ("Presently, Wyoming law requires specific descriptions for easements recorded after May 20, 1981."); Wyo. Stat. § 34-1-141 (easement created without specific location is void unless description of location is recorded within one year of execution of easement).

<sup>3</sup>See sources cited in § 7:6, note 3.

<sup>4</sup>See § 8:4 (discussing propriety of placing utility poles or underground utilities on general right-of-way); see also Wright & Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries*, 27 *Ecology LQ* 351, 414, 415 (2000) (citing this treatise in connection with discussion of scope of railroad easements).

### § 7:3 —Easements not subject to precise location

#### Research References

West's Key Number Digest, Easements ⇨46

Certain servitudes cannot be located with precision. Easements or profits for hunting and fishing or for other recreational purposes often entitle the holder to use the entire servient estate and thus defy pinpoint description.<sup>1</sup> Such relatively indefinite servitudes are regularly enforced,<sup>2</sup> apparently on the ground that the parties' clear intent should be given effect. In such cases, the owner of the servient estate is protected by the general principle that an easement holder cannot utilize the easement in an unreasonable manner.<sup>3</sup>

### § 7:4 —Location or dimensions omitted or inadequately described

#### Research References

West's Key Number Digest, Easements ⇨46

Express easements that omit or inadequately describe the location or dimensions of the easement are commonplace. For example, the instrument creating the easement may provide for the following:

1. "A right of way fifteen feet wide over X's farm";

#### [Section 7:3]

<sup>1</sup>Bachman v. Hecht, 659 F. Supp. 308, 316–317 (D.V.I. 1986) (beach easement over entire parcels), judgment aff'd, 849 F.2d 599 (3d Cir. 1988) and judgment aff'd, 849 F.2d 601 (3d Cir. 1988); Cunningham, Stoebeck, and Whitman, *The Law of Property* (2d ed.) § 8.1; see also Bruce v. Garges, 259 Ga. 268, 270–272, 379 S.E.2d 783, 785 (1989) (recreational easement to dry sand area of beach); Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 211–212 (Tex. 1962).

Hunting and fishing rights frequently are considered profits and enforced as such. E.g., Hanson v. Fergus Falls Nat. Bank, 242 Minn. 498, 501–510, 65 N.W.2d 857, 860–865, 49 A.L.R.2d 1379 (1954); High v. Davis, 283 Or. 315, 322, 584 P.2d 725, 730 (1978); Fairbrother v. Adams, 135 Vt. 428, 430–431, 378 A.2d 102, 104 (1977). See generally § 1:12 (discussing hunting and fishing profits).

<sup>2</sup>E.g., U.S. v. 126.24 Acres of Land, More or Less, Situate in St. Clair County, State of Mo., 572 F. Supp. 832, 834 (W.D. Mo. 1983); Bachman v. Hecht, 659 F. Supp. 308, 316–317 (D.V.I. 1986), judgment aff'd, 849 F.2d 599 (3d Cir. 1988) and judgment aff'd, 849 F.2d 601 (3d Cir. 1988); see also Mikesh v. Peters, 284 N.W.2d 215, 217–219 (Iowa 1979); Cunningham, Stoebeck, and Whitman, *The Law of Property* (2d ed.) § 8.1.

<sup>3</sup>See § 8:10 (analyzing limitations on holder's use of easement); see also Note, Property Owners Beware: The Minnesota Supreme Court Has Twice "Misconstrued" Express Easements, 25 Wm. Mitchell L. Rev. 1545, 1572 n.225, 1573 n.230 (1999) (citing and quoting this treatise).

2. "A sewer line along the northern boundary of Lot 17"; or
3. "A pipeline easement across Y's ranch."

Questions then arise as to the location of the easement (example 1), its dimensions (example 2), or both its location and dimensions (example 3). Unlocated easements (examples 1 and 3) are often called floating easements.<sup>1</sup>

The Supreme Court of Arkansas has identified an unusual type of floating easement.<sup>2</sup> The court concluded that a "mail patron has a floating easement for the placement of a mailbox in the right-of-way dedicated for 'public use.'"<sup>3</sup> A mail patron, however, cannot put a mailbox wherever the patron wishes on the servient estate.<sup>4</sup>

### § 7:5 — —Designation by parties

#### Research References

West's Key Number Digest, Easements ⇨46, 48(2)

Sometimes the easement instrument expressly provides that one of the parties has the right to select the location and dimen-

#### [Section 7:4]

<sup>1</sup>"A 'floating easement' . . . is an easement . . . which, when created, is not limited to any specific area on the servient tenement . . .". City of Los Angeles v. Howard, 244 Cal. App. 2d 538, 541 n.1, 53 Cal. Rptr. 274, 276 n.1 (2d Dist. 1966). See also Norris v. State ex rel. Dept. of Public Works, 261 Cal. App. 2d 41, 48 n.4, 67 Cal. Rptr. 595, 599 n.4 (3d Dist. 1968); Umberger v. State ex rel. Dept. of Game, Fish and Parks, 248 N.W.2d 395, 397 (S.D. 1976); R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 587 (Wyo. 1999) (citing this treatise); Edgcomb v. Lower Valley Power and Light, Inc., 922 P.2d 850, 855 (Wyo. 1996) ("An express easement not stating the location and dimensions is called a floating easement. . . ."); Hazen, Easements From the Viewpoint of the Title Insurer, 15 Cal. St. B.J. 28, 32 (1940); Note, Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values, 37 Okla. L. Rev. 180, 180 (1984).

Floating easements are also sometimes termed "blanket easements" or "roving easements." See Scherger v. Northern Natural Gas Co., 575 N.W.2d 578, 579 (Minn. 1998) ("blanket easement"); Missouri Public Service Co. v. Argenbright, 457 S.W.2d 777, 780-783 (Mo. 1970) ("blanket easement"); Salt Lake City v. J.B. & R.E. Walker, Inc., 123 Utah 1, 8, 253 P.2d 365, 368 (1953) ("roving easement"); Note, Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values, 37 Okla. L. Rev. 180, 180 (1984) (mentioning alternative term "blanket easement").

<sup>2</sup>Lawson v. Sipple, 319 Ark. 543, 551-554, 893 S.W.2d 757, 761-762 (1995).

<sup>3</sup>Id. at 552, 893 S.W.2d at 761-762.

<sup>4</sup>Id. at 552-554, 893 S.W.2d at 761-762. See § 7:5 (discussing designation by parties of location of floating easement).

sions of an undescribed easement.<sup>1</sup> In such cases, the party holding the right to select must act reasonably, taking into consideration the needs of the easement holder or the burden imposed on the servient estate, as the case may be.<sup>2</sup> The selection of the easement's location and dimensions need not be in writing; it may be accomplished orally or by use.<sup>3</sup> Notwithstanding this general principle, one court, citing public policy considerations, such as safety, required a natural gas pipeline easement holder to record notice of the location it selected pursuant to the easement instrument.<sup>4</sup>

More commonly, the instrument is silent regarding the manner by which the location and dimensions of an undescribed easement should be determined. Many jurisdictions take a practical approach to this problem. In these states, the owner of the servient estate is entitled to designate a reasonable location for the easement.<sup>5</sup> If the servient estate owner fails to make such a designation within a reasonable period, the easement holder may

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**[Section 7:5]**

<sup>1</sup>E.g., *Sorrell v. Tennessee Gas Transmission Co.*, 314 S.W.2d 193, 194 (Ky. 1958) (easement holder had right to select routes for gas pipelines); *Larson v. Amundson*, 414 N.W.2d 413, 415–417 (Minn. Ct. App. 1987) (easement over “road to be laid out” by servient estate owner); *Marlow v. Marlow*, 284 S.C. 155, 160, 325 S.E.2d 703, 706 (Ct. App. 1984) (discretion in servient estate owner to designate location and width of access road) (disapproved of on other grounds, by *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987)); *Smith v. King*, 27 Wash. App. 869, 870–871, 620 P.2d 542, 543, 24 A.L.R.4th 1049 (Div. 1 1980) (right in easement holder to select location of road); *Clearwater Realty Co. v. Bouchard*, 146 Vt. 359, 361–362, 505 A.2d 1189, 1190–1191 (1985) (owner of servient estate had right to designate width and location of way).

<sup>2</sup>See *Texas Eastern Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958) (selection of location by easement holder); *Marlow v. Marlow*, 284 S.C. 155, 160, 325 S.E.2d 703, 706 (Ct. App. 1984) (selection of location by servient estate owner) (disapproved of on other grounds, by *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987)).

<sup>3</sup>*Smith v. King*, 27 Wash. App. 869, 871, 620 P.2d 542, 543, 24 A.L.R.4th 1049 (Div. 1 1980) (“A deed is not required to *establish the actual location* of an easement, but is required to *convey* an easement . . . ” (emphasis in original)); see also *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R. 4th 1053, 1064–1065.

<sup>4</sup>*McArthur v. East Tennessee Natural Gas Co.*, 813 S.W.2d 417, 420 (Tenn. 1991).

<sup>5</sup>*Arkansas Val. Elec. Co-op. Corp. v. Brinks*, 240 Ark. 381, 383, 400 S.W.2d 278, 279 (1966); *Howard v. Cramlet*, 56 Ark. App. 171, 174–175, 939 S.W.2d 858, 859–860 (1997); *Ballard v. Titus*, 157 Cal. 673, 683, 110 P. 118, 122 (1910); *Daniel v. Clarkson*, 338 S.W.2d 691, 692–693 (Ky. 1960); *Bethel v. Van Stone*, 120 Idaho 522, 527–528, 817 P.2d 188, 193–194 (Ct. App. 1991); *Larson v. Amundson*, 414 N.W.2d 413, 417 (Minn. Ct. App. 1987); *Graves v. Gerber*, 208 Neb. 209, 214, 302 N.W.2d 717, 720 (1981); *Sussex Rural Elec. Co-op. v. Want-*

select a reasonable route.<sup>6</sup> If the parties are unable to reach an agreement, a court may specify a location for the easement.<sup>7</sup>

## § 7:6 — —Designation by court

### Research References

West's Key Number Digest, Easements ⇨46, 61

Parties frequently disagree over the location and dimensions of an express easement. Consequently, the description issue is often litigated. The initial point of inquiry is to determine whether the instrument creating the easement adequately locates the easement and describes its dimensions.<sup>1</sup> When interpreting express easements, courts usually start with the proposition that the

age Tp., 217 N.J. Super. 481, 490, 526 A.2d 259, 263–264 (App. Div. 1987); *Pomygalski v. Eagle Lake Farms, Inc.*, 192 A.D.2d 810, 811, 596 N.Y.S.2d 535, 537 (3d Dep't 1993); *Abdalla v. State Highway Commission*, 261 N.C. 114, 119, 134 S.E.2d 81, 85 (1964); *McConnell v. Golden*, 104 R.I. 657, 663, 247 A.2d 909, 912 (1968); *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 469, 441 S.E.2d 331, 337 (Ct. App. 1994); *Patch v. Baird*, 140 Vt. 60, 66, 435 A.2d 690, 691–692 (1981); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999) (citing this treatise); *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R. 4th 1053. See also *Lawson v. Sipple*, 319 Ark. 543, 553–554, 893 S.W.2d 757, 762 (1995) (location of floating easement for mailbox must be reasonable and is subject to servient estate owner's "right to delimit"). But see *Colvin v. Southern Cal. Edison Co.*, 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142, 146 (2d Dist. 1987) (easement holder has right to select reasonable location on servient estate for unlocated easement) (abrogated on other grounds, by *Ornelas v. Randolph*, 4 Cal. 4th 1095, 17 Cal. Rptr. 2d 594, 847 P.2d 560 (1993)).

<sup>6</sup>See sources cited *supra* note 5.

<sup>7</sup>*Bethel v. Van Stone*, 120 Idaho 522, 527–528, 817 P.2d 188, 193–194 (Ct. App. 1991); *Maddox v. Katzman*, 332 N.W.2d 347, 352 (Iowa Ct. App. 1982); *Daniel v. Clarkson*, 338 S.W.2d 691, 693 (Ky. 1960); *Graves v. Gerber*, 208 Neb. 209, 214, 302 N.W.2d 717, 720 (1981).

### [Section 7:6]

<sup>1</sup>For cases in which the express easement description was found adequate, see *Consolidated Amusement Co., Ltd. v. Waikiki Business Plaza, Inc.*, 6 Haw. App. 312, 317, 719 P.2d 1119, 1123 (1986); *Lindhorst v. Wright*, 1980 OK CIV APP 42, 616 P.2d 450, 454 (Okla. Ct. App. Div. 1 1980) ("The language in the deed is clear. It granted 'a perpetual right of ingress and egress on and across the easterly 40 feet of the SW/4 of . . . Section 14.' . . . *This description is definite and admits of no ambiguity.*" (emphasis in original)); *Salmon v. Bradshaw*, 84 S.D. 500, 505, 173 N.W.2d 281, 284 (1969); *Semler v. Hartley*, 184 W. Va. 24, 399 S.E.2d 54, 56–57 (1990) (finding no ambiguity in grant regarding width of easement and reversing judgment based on extrinsic evidence). See generally *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 854–855 (Wyo. 1996) (quoting extensively from this section of this treatise).

terms of the written instrument control.<sup>2</sup> If the terms of description are inadequate or nonexistent, then extrinsic evidence generally may be considered to ascertain the intent of the parties as to the location and dimensions of the easement.<sup>3</sup> The parties are presumed to have intended an easement that is reasonably convenient or necessary under the circumstances.<sup>4</sup> As the Supreme

<sup>2</sup>*Andersen v. Edwards*, 625 P.2d 282, 286 (Alaska 1981); *Kotick v. Durrant*, 143 Fla. 386, 392, 196 So. 802, 805 (1940); *Consolidated Amusement Co., Ltd. v. Waikiki Business Plaza, Inc.*, 6 Haw. App. 312, 317, 719 P.2d 1119, 1123 (1986); *Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.*, 221 Kan. 579, 584, 561 P.2d 818, 822–823 (1977); *Munchmeyer v. Burfield*, 1996 WL 142579, at \*3 (Ohio Ct. App. 4th Dist. Washington County 1996) (citing this treatise); *Lindhorst v. Wright*, 1980 OK CIV APP 42, 616 P.2d 450, 453 (Okla. Ct. App. Div. 1 1980); *Salmon v. Bradshaw*, 84 S.D. 500, 505–506, 173 N.W.2d 281, 284 (1969).

<sup>3</sup>See *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235–1237 (Colo. 1998); *Wulf v. Tibaldo*, 680 P.2d 1348, 1350 (Colo. Ct. App. 1984); *Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. Dist. Ct. App. 2d Dist. 1984); *Valas v. Johnson*, 72 Ill. App. 3d 281, 284, 28 Ill. Dec. 580, 390 N.E.2d 939, 942 (3d Dist. 1979); *Anchors v. Manter*, 1998 ME 152, 714 A.2d 134, 140 (Me. 1998); *Highway 7 Embers, Inc. v. Northwestern Nat. Bank*, 256 N.W.2d 271, 277 (Minn. 1977); *Hoelscher v. Simmerrock*, 921 S.W.2d 676, 679 (Mo. Ct. App. W.D. 1996); *Tanner v. Dream Island, Inc.*, 275 Mont. 414, 422, 913 P.2d 641, 646 (1996) (circumstantial evidence used to identify roads noted in 1932 deeds); *Barton's Motel, Inc. v. Saymore Trophy Co., Inc.*, 113 N.H. 333, 335, 306 A.2d 774, 775–776 (1973); *Briggs v. Di Donna*, 176 A.D.2d 1105, 1106–1107, 575 N.Y. S.2d 407, 408–409 (3d Dep't 1991); *Tipperman v. Tsiatsos*, 140 Or. App. 282, 286, 915 P.2d 446, 449 (1996), review allowed, 324 Or. 176, 922 P.2d 669 (1996) and decision aff'd in part and modified on other grounds, 327 Or. 539, 964 P.2d 1015 (1998); *Sacco v. Narragansett Elec. Co.*, 505 A.2d 1153, 1155–1156 (R.I. 1986) (“The easement created was described only as ‘a certain way or drive along the Easterly line of [the grantees’] tract.’ Therefore, the court properly considered extrinsic evidence in order to ascertain the parties’ intention.”); *Moore v. Reynolds*, 285 S.C. 574, 578–579, 330 S.E.2d 542, 545 (Ct. App. 1985); *Morse v. Murphy*, 157 Vt. 410, 411–412, 599 A.2d 1367, 1367–1368 (1991) (concluding ambiguity debatable and finding extrinsic evidence properly considered); *Waskey v. Lewis*, 224 Va. 206, 211, 294 S.E.2d 879, 881 (1982); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 586 (Wyo. 1999) (citing this treatise); *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R. 4th 1053. But see *Mueller v. Hoblyn*, 887 P.2d 500, 505, 62 A.L.R.5th 847 (Wyo. 1994) (“Presently, Wyoming law requires specific descriptions for easements recorded after May 20, 1981.”); Wyo. Stat. § 34-1-141 (easement created without specific location is void unless description of location is recorded within one year of execution of easement).

<sup>4</sup>*Columbia Gas Transmission Corp. v. Savage*, 863 F. Supp. 198, 201–202, 131 O.G.R. 365 (M.D. Pa. 1994) (fifty-foot width found reasonable under circumstances); *Barton's Motel, Inc. v. Saymore Trophy Co., Inc.*, 113 N.H. 333, 335, 306 A.2d 774, 776 (1973); *Oliphant v. McCarthy*, 208 A.D.2d 1079, 1080, 617 N.Y.S.2d 555, 557 (3d Dep't 1994) (“The express grant, however, does not specify the width of the right-of-way and, in such case, its width is construed to be that which is necessary for the use for which the right-of-way was created. . . .”);

Court of Kansas stated in an oft-quoted opinion

The law appears to be settled that 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. The expressed terms of the grant or reservation are controlling in such case and considerations of what may be necessary or reasonable to a present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.<sup>5</sup>

North Carolina courts, however, take a significantly more restrictive approach to the description issue, holding that an easement grant or reservation is void for uncertainty if it does not adequately describe the location of the easement.<sup>6</sup> The Supreme Court of Appeals of West Virginia also has adopted the approach

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*Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 66 71, 740 N.E.2d 328, 334 338 (4th Dist. Hocking County 2000), *Munchmeyer v. Burfield*, 1996 WL 142579, at 3 (Ohio Ct. App. 4th Dist. Washington County 1996) (citing this treatise), *Patterson v. Duke Power Co.*, 256 S.C. 479, 486, 183 S.E.2d 122, 125 (1971), *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 467 468, 441 S.E.2d 331, 336 (Ct. App. 1994), *Atkinson v. Mentzel*, 211 Wis. 2d 628, 642, 566 N.W.2d 158, 164 (Ct. App. 1997) (“[T]he reasonable convenience of both parties is of prime importance”), *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 587 (Wyo. 1999) (quoting this treatise), 3 Tiffany, *Law of Real Property* (3d ed.) § 804, *Width of Way Created by Express Grant, Reservation, or Exception Not Specifying Width*, 28 A.L.R. 2d 253. See also *Mugar v. Massachusetts Bay Transp. Authority*, 28 Mass. App. Ct. 443, 445, 552 N.E.2d 121, 123–124 (1990) (noting general rule, but concluding that it is “inapplicable to eminent domain proceedings”), *Hall v. Allen*, 771 S.W.2d 50, 53 (Mo. 1989) (“If the location is not precisely fixed when the easement is first created, the grantee is entitled to a convenient, reasonable, and accessible use”), *Giles v. Parker*, 304 S.C. 69, 72–73, 403 S.E.2d 130, 132 (Ct. App. 1991) (discussing width).

<sup>5</sup>*Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.*, 221 Kan. 579, 584, 561 P.2d 818, 822 (1977). The rule set forth in *Aladdin* has been quoted with approval in several cases. See *Andersen v. Edwards*, 625 P.2d 282, 286 (Alaska 1981), *Squaw Peak Community Covenant Church of Phoenix v. Anozira Development, Inc.*, 149 Ariz. 409, 412, 719 P.2d 295, 298 (Ct. App. Div. 1 1986), *Consolidated Amusement Co., Ltd. v. Waikiki Business Plaza, Inc.*, 6 Haw. App. 312, 317, 719 P.2d 1119, 1123 (1986), *Lindhorst v. Wright*, 1980 OK CIV APP 42, 616 P.2d 450, 453 (Okla. Ct. App. Div. 1 1980).

In *Aladdin*, the “easement itself was limited to the specific area between two rows of trees, which amounted to a practical location of the right-of-way.” 221 Kan. 579, 585, 561 P.2d 818, 823 (1977).

<sup>6</sup>See *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 271 (1984) (adhering to view that vague and uncertain description renders easement void, but concluding that extrinsic evidence may be employed to cure latent ambigu-

that an easement is void if it is not adequately described in the instrument seeking to create it.<sup>7</sup> Moreover, a few other courts have expressed a comparatively strict standard regarding the designation of an easement's location, requiring that the easement description meet the general conveyancing standard for identifying a parcel of land.<sup>8</sup>

Once a court concludes that the location or the dimensions of the easement are not adequately described in the instrument, it generally examines the surrounding circumstances to determine the intent of the parties in this regard.<sup>9</sup> The parties may have fixed the location and dimensions of the easement by oral or collateral written agreement.<sup>10</sup> If not, the courts look to various fac-

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ity in grant or reservation), amount of judgment modified on reh'g, 311 N.C. 745, 321 S.E.2d 125 (1984); *Thompson v. Umberger*, 221 N.C. 178, 19 S.E.2d 484 (1942); *Parrish v. Hayworth*, 138 N.C. App. 637, 638-642, 532 S.E.2d 202, 204-206 (2000) (easement not adequately described on plat or by considering extrinsic evidence, but subsequent use established location); *Wiggins v. Short*, 122 N.C. App. 322, 326-328, 469 S.E.2d 571, 575-576 (1996) (express easement failed because its location could not be determined); *Williams v. Skinner*, 93 N.C. App. 665, 671-672, 379 S.E.2d 59, 63-64 (1989) (applying North Carolina rule that latent ambiguity in description of easement may be made certain by use of parol evidence, whereas patent ambiguity renders easement void for uncertainty); *Adams v. Severt*, 40 N.C. App. 247, 249, 252 S.E.2d 276, 278 (1979) ("The deed gives no beginning point and furnishes no means by which the location of the proposed way may be ascertained. The ambiguity is a patent one. Hence the attempted conveyance or reservation is void for uncertainty.").

<sup>7</sup>*Highway Properties v. Dollar Sav. Bank*, 189 W. Va. 301, 431 S.E.2d 95, 98-100 (1993) (quoting *Allen v. Duvall* with approval).

<sup>8</sup>See, e.g., *Germany v. Murdock*, 99 N.M. 679, 681, 662 P.2d 1346, 1348 (1983) (requiring a description from which a surveyor can locate the easement on the servient estate, but noting that "the easement can be ascertained from the recorded documents and in fact was located by two registered surveyors"); *Vrabel v. Donahoe Creek Watershed Authority*, 545 S.W.2d 53, 54 (Tex. Civ. App. Austin 1976) ("The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description."). See also *Mueller v. Hoblyn*, 887 P.2d 500, 505, 62 A.L.R.5th 847 (Wyo. 1994) ("Presently, Wyoming law requires specific descriptions for easements recorded after May 20, 1981."); Wyo. Stat. § 34-1-141 (easement created without specific location is void unless description of location is recorded within one year of execution of easement).

<sup>9</sup>See cases cited *supra* note 3. See generally *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R. 4th 1053 (discussing various factors courts consider in ascertaining location that parties intended); *Width of Way Created by Express Grant, Reservation, or Exception Not Specifying Width*, 28 A.L.R. 2d 253 (analyzing matters courts examine in determining width parties intended).

<sup>10</sup>See *Tipperman v. Tsiatsos*, 140 Or. App. 282, 286, 915 P.2d 446, 449 (1996) ("The location of the easement . . . may be determined . . . by subsequent



tors to establish a reasonable description of the easement.<sup>11</sup> As noted by the highest court of Kentucky, this process “taxes the best resources of judicial ingenuity.”<sup>12</sup> One factor is the purpose of the easement,<sup>13</sup> which is particularly important with respect to ascertaining the dimensions of an inadequately described easement.<sup>14</sup> Other factors include the geographic relationship between the dominant and the servient estates,<sup>15</sup> the use of each of

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agreement.”), review allowed, 324 Or. 176, 922 P.2d 669 (1996) and decision aff’d in part and modified on other grounds, 327 Or. 539, 964 P.2d 1015 (1998); *Smith v. King*, 27 Wash. App. 869, 871, 620 P.2d 542, 543, 24 A.L.R.4th 1049 (Div. 1 1980) (location can be established by oral agreement); see also *Barton v. Gammell*, 143 Ga. App. 291, 295–296, 238 S.E.2d 445, 448 (1977) (location of unlocated easements for use of lake, garden, and pasture found “never . . . in dispute” because “[t]he lake has been constructed and is shown on a plat of the property also showing the dominant and servient tenements, and . . . the pasture and garden areas have been set apart and defined . . . and . . . plaintiffs have been using those areas with defendants’ active participation and assistance”); *Umberger v. State ex rel. Dept. of Game, Fish and Parks*, 248 N.W.2d 395, 397 (S.D. 1976) (easement instrument specifically provided for mutual agreement as to route).

<sup>11</sup>See sources cited *infra* notes 13–18; *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 587 (Wyo. 1999) (citing this treatise).

<sup>12</sup>*Daniel v. Clarkson*, 338 S.W.2d 691, 692 (Ky. 1960).

<sup>13</sup>*Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. Dist. Ct. App. 2d Dist. 1984); *State ex rel. Hillhouse v. Hunter Raffety Elevator, Inc.*, 636 S.W.2d 400, 402 (Mo. Ct. App. S.D. 1982).

<sup>14</sup>See *Carnemella v. Sadowy*, 147 A.D.2d 874, 876, 538 N.Y.S.2d 96, 98 (3d Dep’t 1989) (“The width is not described but [the] Supreme Court has most appropriately stated that the width should be that ordinarily and reasonably required for a utility line as contemplated herein.”); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 66–71, 740 N.E.2d 328, 334–338 (4th Dist. Hocking County 2000) (ascertaining width of pipeline easement); *Tipperman v. Tsiatsos*, 140 Or. App. 282, 286–289, 915 P.2d 446, 449–451 (1996), review allowed, 324 Or. 176, 922 P.2d 669 (1996) and decision aff’d in part and modified on other grounds, 327 Or. 539, 964 P.2d 1015 (1998); *Florek v. Com., Dept. of Transp.*, 89 Pa. Commw. 483, 490, 493 A.2d 133, 137 (1985) (“[W]e cannot say that placing this [drainage] pipe in the same location, albeit at different depth, was inconsistent with the original purpose of the easement.”); *Patterson v. Duke Power Co.*, 256 S.C. 479, 486, 183 S.E.2d 122, 124 (1971) (“Where a deed or other instrument grants the right-of-way but does not specify the width of such way, the determination of the width becomes basically a matter of the construction of the instrument with strong consideration being given to what is reasonably convenient and necessary to accomplish the purpose for which the way was created.”); *Moore v. Reynolds*, 285 S.C. 574, 579, 330 S.E.2d 542, 545 (Ct. App. 1985); *Clearwater Realty Co. v. Bouchard*, 146 Vt. 359, 361–362, 505 A.2d 1189, 1190–1191 (1985).

<sup>15</sup>*Perkins v. Perkins*, 158 Me. 345, 350, 184 A.2d 678, 681 (1962); *Barton’s Motel, Inc. v. Saymore Trophy Co., Inc.*, 113 N.H. 333, 335, 306 A.2d 774, 776 (1973).

the estates,<sup>16</sup> the benefit to the easement holder compared to the burden on the servient estate owner,<sup>17</sup> and admissions of the parties.<sup>18</sup> But the factor that the courts most frequently rely on is use of the servient estate for the purpose for which the easement was created.<sup>19</sup>

Use existing at the time of the easement's creation is considered strong evidence of the intended location and dimensions of the easement.<sup>20</sup> This is particularly true if the instrument creating the easement makes some reference to an existing way.<sup>21</sup> Use

<sup>16</sup>*Barton's Motel, Inc v Saymore Trophy Co, Inc*, 113 N H 333, 335, 306 A 2d 774, 776 (1973)

<sup>17</sup>*Perkins v Perkins*, 158 Me 345, 350, 184 A 2d 678, 681 (1962), *State ex rel Hillhouse v Hunter Raffety Elevator, Inc*, 636 S W 2d 400, 402 (Mo Ct App S D 1982), *Barton's Motel, Inc v Saymore Trophy Co, Inc*, 113 N H 333, 335, 306 A 2d 774, 776 (1973), see also *Tipperman v Tsiatsos*, 140 Or App 282, 289, 915 P 2d 446, 451 (1996), review allowed, 324 Or 176, 922 P 2d 669 (1996) and decision aff'd in part and modified on other grounds, 327 Or 539, 964 P 2d 1015 (1998), *Clearwater Realty Co v Bouchard*, 146 Vt 359, 361–362, 505 A 2d 1189, 1191 (1985) (approving trial court's balancing “reasonable, convenient, and accessible right-of way” for owner of dominant estate against potential inconvenience or interference with servient estate owner's use of servient land)

<sup>18</sup>*Kotick v Durrant*, 143 Fla 386, 392, 196 So 802, 805 (1940), *Hynes v City of Lakeland*, 451 So 2d 505, 511 (Fla Dist Ct App 2d Dist 1984)

<sup>19</sup>See *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A L R 4th 1053, 1058, 1065 1084, and cases cited therein

<sup>20</sup>See *Wilson v DeGenaro*, 36 Conn Supp 200, 201–209, 415 A 2d 1334, 1335–1339 (Super Ct 1979), adopted, 181 Conn 480, 435 A 2d 1021 (1980) (location and width of right of way), *Conley v Whittlesey*, 133 Idaho 265, 269–270, 985 P 2d 1127, 1131–1132 (1999) (width of road), *Vallas v Johnson*, 72 Ill App 3d 281, 282–284, 28 Ill Dec 580, 390 N E 2d 939, 941–942 (3d Dist 1979) (width of easement of ingress and egress) *Larson v Amundson*, 414 N W 2d 413, 417–418 (Minn Ct App 1987) (recognizing principle, but finding that original road did not become location of unlocated roadway easement because servient owner had reserved right to fix location of new road), *Mosher v Hart*, 157 A D 2d 931, 931–932, 550 N Y S 2d 187, 188 (3d Dep't 1990) (location of right of way), *Sacco v Narragansett Elec Co*, 505 A 2d 1153, 1155–1156 (R I 1986) (location of right of way), *Moore v Reynolds*, 285 S C 574, 578 579, 330 S E 2d 542, 545 (Ct App 1985) (width of road), *Cleveland v Tinaglia*, 1998 SD 91, 582 N W 2d 720, 723 725 (S D 1998) (width of access easements), *Jones v Fuller*, 856 S W 2d 597, 602 (Tex App Waco 1993) (existing roadway established location), *R C R, Inc v Rainbow Canyon, Inc*, 978 P 2d 581, 587–588 (Wyo 1999) (quoting this treatise and concluding that “the intent of the parties in this case is that the easement was defined by the access road in existence at the time the easement was created”)

<sup>21</sup>See *Wilson v DeGenaro*, 36 Conn Supp 200, 200–204, 415 A 2d 1334, 1335–1338 (Super Ct 1979) (instrument referred to “the driftway *as now laid out*” (emphasis in original)), adopted, 181 Conn 480, 435 A 2d 1021 (1980), *Cleveland v Tinaglia*, 1998 SD 91, 582 N W 2d 720, 723–725 (S D 1998) (deeds referred to “existing trails and roadways”), *Travis v Madden*, 493 N W 2d 717,

commenced after the execution of the easement and to which the servient estate owner acquiesces is also persuasive.<sup>22</sup> However, the courts must be careful to determine the location and dimensions of the easement on the basis of the circumstances at the time the easement was created.<sup>23</sup> Once an inadequately described easement is fixed by use and acquiescence, the holder cannot successfully claim that a different width or route is reasonably convenient or necessary.<sup>24</sup>

719–720 (S.D. 1992) (grant referred to “roadway presently existing”); *Waskey v. Lewis*, 224 Va. 206, 211, 294 S.E.2d 879, 881 (1982) (“When an instrument refers to and grants a right of way over an already existing road, the right of way is limited to the width of the road as it existed at the time of the grant.”); *Width of Way Created by Express Grant, Reservation, or Exception Not Specifying Width*, 28 A.L.R. 2d 253.

<sup>22</sup>See *Isenberg v. Woitchek*, 144 Colo. 394, 399–400, 356 P.2d 904, 907 (1960) (location and width of right-of-way); *Gjovig v. Spino*, 701 P.2d 1267, 1268 (Colo. Ct. App. 1985) (location and dimensions of easement of ingress and egress); *Peters v. Milks Grove Special Drainage Dist. No. 1 of Iroquois County*, 243 Ill. App. 3d 14, 18–19, 183 Ill. Dec. 141, 610 N.E.2d 1385, 1389 (3d Dist. 1993) (location and width of drainage easement); *Hall v. Allen*, 771 S.W.2d 50, 53 (Mo. 1989) (location of access easement); *Area Real Estate Associates, Inc. v. City of Raymore*, 699 S.W.2d 461, 463–464 (Mo. Ct. App. W.D. 1985) (location of sewer line); *Green v. Mann*, 237 A.D.2d 566, 567, 655 N.Y.S.2d 627, 629 (2d Dep’t 1997) (holding that “longtime use, without objection by the servient tenement, establishes the location of the easement”); *Parrish v. Hayworth*, 138 N.C. App. 637, 642, 532 S.E.2d 202, 204, 206 (2000) (easement not adequately described on plat or by considering extrinsic evidence, but subsequent use established location); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 67–69, 740 N.E.2d 328, 335–336 (4th Dist. Hocking County 2000) (citing this treatise); *Flaherty v. DeHaven*, 302 Pa. Super. 412, 416–417, 448 A.2d 1108, 1111 (1982) (location of right-of-way); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 587 (Wyo. 1999) (quoting this treatise); *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 854–855 (Wyo. 1996) (holding that “current location of the transmission line is the one the parties intended” and quoting this treatise).

<sup>23</sup>See *Wilson v. DeGenaro*, 36 Conn. Supp. 200, 209, 415 A.2d 1334, 1339 (Super. Ct. 1979), adopted, 181 Conn. 480, 435 A.2d 1021 (1980); *Vallas v. Johnson*, 72 Ill. App. 3d 281, 282, 28 Ill. Dec. 580, 390 N.E.2d 939, 941 (3d Dist. 1979); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 587 (Wyo. 1999) (citing this treatise).

<sup>24</sup>*City of Los Angeles v. Howard*, 244 Cal. App. 2d 538, 541 n. 1, 53 Cal. Rptr. 274, 276 n.1 (2d Dist. 1966) (“A ‘floating easement’ [power line in this case] . . . becomes ‘fixed’ by the first usage thereof and, unless the right to change or expand the usage is expressly granted or reserved, the usage may not thereafter be modified, either in location or in degree beyond that originally established.”); *Wilson v. DeGenaro*, 36 Conn. Supp. 200, 209, 415 A.2d 1334, 1338–1339 (Super. Ct. 1979), adopted, 181 Conn. 480, 435 A.2d 1021 (1980) (right-of-way); *Peters v. Milks Grove Special Drainage Dist. No. 1 of Iroquois County*, 243 Ill. App. 3d 14, 18–19, 183 Ill. Dec. 141, 610 N.E.2d 1385, 1389 (3d

## § 7:7 —Practical impact of floating easements

### Research References

West's Key Number Digest, Easements ⇨46

Floating easements, as unlocated easements are commonly called,<sup>1</sup> have a significant practical impact on the servient tenement. These easements burden the entire servient estate and therefore tend to hamper development, limit financing possibilities, and impede alienation of the property.<sup>2</sup> Hence, when an easement is intentionally drafted as a floating servitude, the owner of the servient tenement should seek to include provisions that limit the easement to a certain portion of the servient estate and that require the holder to designate its precise location within a set period. In addition, the servient owner should seek to include a provision in the easement requiring the easement holder to execute a recordable instrument describing the selected location. In at least one jurisdiction, the easement holder may

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Dist. 1993) (drainage ditch); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 67-68, 740 N.E.2d 328, 335 (4th Dist. Hocking County 2000) (citing this treatise); *Munchmeyer v. Burfield*, 1996 WL 142579, at \*3 (Ohio Ct. App. 4th Dist. Washington County 1996) (citing this treatise); *Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 666 (Tex. 1964) (gas pipeline); *Mielke v. Yellowstone Pipeline Co.*, 73 Wash. App. 621, 624, 870 P.2d 1005, 1006 (Div. 3 1994) ("Where the grant of an easement does not specify its location, Washington courts have long held the initial selection of a location fixes the location of the easement."); *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 854-855 (Wyo. 1996) (quoting this treatise). See generally §§ 7:13 to 7:16 (discussing relocation), § 7:17 (analyzing change in dimensions). But see *Zettlemoyer v. Transcontinental Gas Pipeline Corp.*, 540 Pa. 337, 657 A.2d 920, 926 (1995) (finding that "clearing of 30 additional feet beyond the 100 foot wide right of way established in 1958 was 'reasonable and necessary' to effectuate the purposes of the grant" and stating: "We do not agree that 'subsequent agreement, use, and acquiescence' of an easement establishes its width as a matter of law when the written agreement is ambiguous."); see generally Recent Decision, Eminent Domain—De Facto Taking—Easements, 34 Duq. L. Rev. 739 (1996) (discussing *Zettlemoyer*).

### [Section 7:7]

<sup>1</sup>See § 7:4, note 1 and accompanying text (defining and giving illustrations of floating easements).

<sup>2</sup>*Missouri Public Service Co. v. Argenbright*, 457 S.W.2d 777, 780-783 (Mo. 1970); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 587 (Wyo. 1999) (citing this treatise); *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 854-855 (Wyo. 1996) (citing this treatise); Hazen, *Easements From the Viewpoint of the Title Insurer*, 15 Cal. St. B.J. 28, 32 (1940); Note, *Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values*, 37 Okla. L. Rev. 180, 181-186 (1984); see also *McArthur v. East Tennessee Natural Gas Co.*, 813 S.W.2d 417, 419 (Tenn. 1991).

have certain duties in this regard even when the easement instrument is silent on the subject. Citing public policy considerations, such as safety, the Supreme Court of Tennessee required the holder of a floating natural gas pipeline easement to record notice of the location it selected for the easement.<sup>3</sup> It is unclear, however, whether this decision applies to natural gas pipeline easements only, utility easements in general, or all floating easements.

One who holds title to land already burdened by a floating easement may minimize the burden of the easement by entering into an agreement with the easement holder regarding the easement's location.<sup>4</sup> This agreement may take the form of the holder's release of the easement from all but a specified portion of the servient estate.<sup>5</sup> If the parties cannot reach an agreement on the subject, the servient owner should consider seeking a court decree fixing a reasonable location.<sup>6</sup>

### § 7:8 —Grants of multiple floating easements

#### Research References

West's Key Number Digest, Easements ☞46

Some express grants, particularly those involving pipelines, provide that the servient estate is burdened by any easement of a

<sup>3</sup>McArthur v. East Tennessee Natural Gas Co., 813 S.W.2d 417, 419 (Tenn. 1991); see also Scherger v. Northern Natural Gas Co., 575 N.W.2d 578, 581 (Minn. 1998) (discussing, but finding inapplicable, Minn. Stat. § 300.045 which requires "public service corporations, including pipeline companies," to "definitely and specifically describe" easements they obtain).

<sup>4</sup>Kratovil and Werner, Real Estate Law § 4.06(a) (9th ed.) (discussing floating pipeline easements); Note, Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values, 37 Okla. L. Rev. 180, 188–192 (1984). See also Scherger v. Northern Natural Gas Co., 575 N.W.2d 578, 581 (Minn. 1998) (discussing, but finding inapplicable, Minn. Stat. § 300.045 which requires "public service corporations, including pipeline companies," holding recorded easements that do "not include a definite and specific description," to, "upon written request by the specific property owner, produce and record . . . a definite and specific description").

<sup>5</sup>Kratovil and Werner, Real Estate Law § 4.06(a) (9th ed.); Note, Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values, 37 Okla. L. Rev. 180, 188–189 (1984). For a sample "Partial Release of Rights of Way Grants" used with floating pipeline easements, see id. at 193–194.

<sup>6</sup>Note, Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values, 37 Okla. L. Rev. 180, 188–192 (1984).

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# THE LAW OF EASEMENTS AND LICENSES IN LAND

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## Chapter 7

# Location and Dimensions of Easements

### Table of New and Retitled Sections

§ 7:16.1 Relocation—Restatement (Third) of Property’s approach to relocation *[New]*

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

### § 7:1 Introduction

#### *n. 5.*

*Amend citation to Kratovil and Werner in second sentence of note 5 by deleting “24-25 (9th ed.)” and substituting therefor “26-27 (10th ed.).”*

*Add to “see generally” material in note 5:*

; Werner, Real Estate Law 21-22 (11th ed.) (offering guidelines for drafting easements)

### § 7:2 Location and dimensions of express easements

#### *n. 1.*

*Add after Hazen, Easements From the Viewpoint of the Title Insurer citation in note 1:*

; Mitchell v. Chance, 2004 WL 792067, \*4 (Tenn. Ct. App. 2004) (citing this treatise)

#### *n. 2.*

Stevens v. Mannix, 77 P.3d 931, 932–933 (Colo. Ct. App. 2003);

Village of Wagon Mound v. Mora Trust, 2003 -NMCA- 035, 133 N.M. 373, 383–384, 62 P.3d 1255, 1265-1266 (Ct. App. 2002), cert. denied, 133 N.M. 413, 63 P.3d 516 (2003);

Mitchell v. Chance, 2004 WL 792067, \*4 (Tenn. Ct. App. 2004) (citing this treatise);

Vinson v. Brown, 80 S.W.3d 221, 227 (Tex. App. Austin 2002);

### § 7:4 Location and dimensions of express easements— Location or dimensions omitted or inadequately described

#### *n. 1.*

*Add to “See also” material in first paragraph of note 1:*

Coughlin v. Anderson, 270 Conn. 487, 494 n.7, 853 A.2d 460, 466 n.7 (2004) (citing this treatise);

Village of Wagon Mound v. Mora Trust, 2003 -NMCA- 035, 133 N.M. 373, 383–

384, 62 P.3d 1255, 1265-1266 (Ct. App. 2002), cert. denied, 133 N.M. 413, 63 P.3d 516 (2003);

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wash. 2d 873, 880, 73 P.3d 369, 372 (2003) (“An easement defined in general terms, without a definite location or description is called a floating or roving easement . . .”);

*Add to “See” material in second paragraph of note 1:*

Evans v. Board of County Com’rs of Utah County, 2004 UT App 256, 97 P.3d 697, 700 (Utah Ct. App. 2004) (“roving easement”);

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wash. 2d 873, 880, 73 P.3d 369, 372 (2003) (“roving easement”);

### **§ 7:5 Location and dimensions of express easements— Location or dimensions omitted or inadequately described—Designation by parties**

#### **n. 1.**

*Add to “E.g.” cases in note 1:*

Vinson v. Brown, 80 S.W.3d 221, 228 (Tex. App. Austin 2002) (grantor did not exercise “expressly reserved . . . right to mark and establish boundaries of the park”);

*Add at end of note 1:*

See also Village of Wagon Mound v. Mora Trust, 2003 -NMCA- 035, 133 N.M. 373, 384, 62 P.3d 1255, 1266 (Ct. App. 2002), cert. denied, 133 N.M. 413, 63 P.3d 516 (2003) (“[I]t is not unusual for a deed creating a floating easement to give the easement holder the right to later locate and fix the easement upon the ground.”).

#### **n. 5.**

*Add to “But See” case in note 5:*

Vinson v. Brown, 80 S.W.3d 221, 228 (Tex. App. Austin 2002);  
; Sunnyside Valley Irr. Dist. v. Dickie, 111 Wash. App. 209, 215, 43 P.3d 1277, 1281 (Div. 3 2002), review granted, 147 Wash. 2d 1020, 60 P.3d 93 (2002), aff’d on other grounds, 149 Wash. 2d 873, 73 P.3d 369 (2003) (lower court noting: “When the description of an easement is not specified with the grant, the location is established and fixed when the grantee selects the location of the easement.”)

### **§ 7:6 Location and dimensions of express easements— Location or dimensions omitted or inadequately described—Designation by court**

#### **n. 3.**

*Add to “See” cases in note 3:*

Illig v. U.S., 58 Fed. Cl. 619, 626 (2003) (citing this treatise);  
Mitchell v. Chance, 2004 WL 792067, \*4 (Tenn. Ct. App. 2004) (citing this treatise);

#### **n. 4.**

*Add to “See also” cases in note 4:*

Walker v. Boozer, 140 Idaho 451, 95 P.3d 69, 72-73 (2004) (establishing width);  
Intermount Distribution, Inc. v. Public Service Co. of North Carolina, Inc., 150 N.C. App. 539, 542-544, 563 S.E.2d 626, 629-630 (2002) (considering width of easement for natural gas pipeline);

#### **n. 6.**

*Add to “See” cases in note 6:*



King v. King, 146 N.C. App. 442, 444-445, 552 S.E.2d 262, 264-265 (2001) (distinguishing between patent ambiguity in description which is fatal to easement and latent ambiguity which may be made certain by reference to extrinsic evidence, and determining that ambiguity in consent judgement's description of easement location was latent);

**n. 11.**

*Add before R.C.R., Inc. v. Rainbow Canyon, Inc. citation in note 11:*  
Mitchell v. Chance, 2004 WL 792067, \*4 (Tenn. Ct. App. 2004) (citing this treatise);

**n. 13.**

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wash. 2d 873, 878-887, 73 P.3d 369, 372-375 (2003).

**n. 14.**

; Intermount Distribution, Inc. v. Public Service Co. of North Carolina, Inc., 150 N.C. App. 539, 542-544, 563 S.E.2d 626, 629-630 (2002) (considering width of easement for natural gas pipeline)

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wash. 2d 873, 880, 73 P.3d 369, 372 (2003) (“Under the doctrine of reasonable enjoyment, the width is restricted to that which is reasonably necessary and convenient to effectuate the original purpose for granting the easement.”).

**n. 20.**

*Add to “See” cases in note 20:*  
Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 Mont. 82, 86-88, 53 P.3d 381, 384-386 (2002) (citing this treatise);

**n. 21.**

*Add “, 267-271” at end of 28 A.L.R. 2d 253 citation in note 21.*

**n. 22.**

*Add to “See” cases in note 22:*  
Village of Wagon Mound v. Mora Trust, 2003 -NMCA- 035, 133 N.M. 373, 384, 62 P.3d 1255, 1266 (N.M. Ct. App. 2002), cert. denied, 133 N.M. 413, 63 P.3d 516 (2003);  
Vinson v. Brown, 80 S.W.3d 221, 228 (Tex. App. Austin 2002);

**§ 7:7 Location and dimensions of express easements—  
Practical impact of floating easements**

**n. 2.**

*Add to “see also” case in note 2:*  
Coughlin v. Anderson, 270 Conn. 487, 494 n.7, 853 A.2d 460, 466 n.7 (2004) (citing this treatise);

**§ 7:9 Location and dimensions of express easements—  
Designation of area for easement does not  
necessarily represent easement boundaries**

**n. 1.**

*Add to “see” cases in note 1:*  
Sand Lake Shoppes Family Ltd. Partnership v. Sand Lake Courtyards, L.C., 816 So. 2d 143, 145-146 (Fla. Dist. Ct. App. 5th Dist. 2002);

*Amend sentence accompanying note 9 by deleting “neither party can” and substituting therefor “the easement holder cannot.”*

**THOMAS AND BACKMAN**  
**ON**  
**UTAH REAL PROPERTY LAW**

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**DAVID A. THOMAS**

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other non-crop substances. Generally, profits à prendre are treated the same way as easements.<sup>16</sup>

### § 12.02(b). Creation.

#### § 12.02(b)(1). Express Easements.

An easement may be created by express words of either a formal grant or of a reservation or exception in a conveyance of land. A grant creates an easement in the grantee, while a reservation may result in creating an easement for the grantor in the land being conveyed. Easements may also be created as a covenant or through a conveyance referring either to a plat depicting easements or to a recorded declaration of easements.<sup>17</sup> The same formalities apply to creation of easements as in any other conveyance. As an easement is a property interest, the creating instrument must satisfy the statute of frauds.<sup>18</sup> The document should also be recorded in order to provide constructive notice to any subsequent purchaser. Otherwise someone might purchase the property free of the easement under the doctrine protecting a subsequent bona fide purchaser without notice.<sup>19</sup>

Questions of interpretation often arise regarding: (1) the extent of the easement and (2) whether it is appurtenant or in gross.<sup>20</sup> To avoid future litigation the draftsman must use great care to identify *clearly* and *specifically*: (1) the parties, (2) the properties involved, (3) the kind of easement created (appurtenant or in gross), and (4) the limits, permitted uses and duration of the easement.<sup>21</sup>

A recital of consideration should be included if the grant of easement is not incorporated in the conveyance of the underlying fee.<sup>22</sup>

#### § 12.02(b)(2). Implied Easements.

Implied easements are three specific types — implied easements based on a prior use, easements by necessity and easements implied from a subdivision plat. While express easements are created by written expressions of intent, implied easements arise from the circumstances of a transaction or the circumstances

16. See BACKMAN & THOMAS, *supra* note 5, at § 1.01[2][e], RESTATEMENT OF PROPERTY § 399, comment b.

17. Robert Kratovil, *Easement Draftsmanship and Conveyancing*, 38 CAL. L. REV. 426, 437-38 (1950).

18. Warburton v. Virginia Beach Federal Sav. & Loan Ass'n, 899 P.2d 779, 781-782 (Utah 1995).

19. See 4 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 34.21 (Matthew Bender 1998), BACKMAN & THOMAS, *supra* note 5, at § 1.02[1].

20. Weggeland v. Ujifusa, 384 P.2d 590 (Utah 1963).

21. A model form for the creation of an easement is included in ROBERT KRATOVIL, REAL ESTATE LAW 32-33 (Prentice-Hall 8th ed. 1979). See Warburton v. Virginia Beach Fed. Sav. & Loan Ass'n, 899 P.2d 779, 782 (Utah 1995). See also Potter v. Chadaz, 977 P.2d 533 (Utah Ct. App. 1999). Cannot create an easement in favor of a third party who is a stranger to the transaction.

22. See Green v. Stansfield, 886 P.2d 117 (Utah Ct. App. 1994).

interruptions will suffice to prevent the prescriptive period from accruing.<sup>48</sup> The claimant would then have to start over in counting the required prescriptive period.

The same rules apply to both prescriptive easements and adverse possession with regard to disabilities and the concept of tacking.<sup>49</sup> Thus, as with adverse possession cases, any incompetence based on infancy or mental condition of the landowner at the beginning of the prescriptive time prevents the running of the statute of limitations. Only possessory ownership is subject to interests arising through prescriptive easements. Thus, remaindermen or other non-possessory future interests are not affected until those interests become possessory. If the claimant and his predecessors in interest have all met the requirements of prescription, their successive periods of adverse use may be joined to meet the twenty-year requirement. The successive adverse users must be in privity with one another, which is commonly established by the documents of sale of the dominant estate.

Conveyance of the servient estate during the prescriptive period does not interrupt the running of the period, but it may become important in determining whether the servient owners knew or should have known of the use during the entire period.<sup>50</sup>

Finally, government entities are not subject to the doctrine of prescriptive easements. As the sovereign, the statute of limitations underlying the concept of adverse possession or prescriptive easements is not applicable.<sup>51</sup>

### § 12.02(c). Rights and Duties of Parties.

Both the easement owner and the owner of the servient estate must exercise their rights so as not to interfere unreasonably with each other.<sup>52</sup> If based on an explicit grant, the extent of an easement is determined by the grant.<sup>53</sup>

Interpretation is often required to determine the extent or scope of the easement. Disputes occur regarding the easement's precise location or its boundaries, its duration and what kinds of uses are permitted. Factors to be considered in determining the easement's extent include (1) the express language of the creating instrument, (2) the behavior of the parties at the time of the easement's creation and their actions in arriving at their own interpretation of the easement, and (3) the foreseeability of any challenged changes.<sup>54</sup> The most crucial starting point is the language of the written instrument. The parties, for instance, can alter the normally applicable doctrines by their specific language.<sup>55</sup>

48. *Wasatch Irr Co v Fulton*, 65 P 205 (Utah 1901)

49. *See* 4 POWELL & ROHAN, *supra* note 19, at § 34 10.

50. *Zollinger v Frank*, 175 P.2d 714, 718 (Utah 1946).

51. *See* BACKMAN & THOMAS, *supra* note 5, at § 2 02[4][c]

52. *Big Cottonwood Tanner Ditch Co v Moyle*, 174 P 2d 148 (Utah 1946).

53. *Weggleland v Ujifusa*, 384 P 2d 590 (Utah 1963)

54. *See* 4 POWELL & ROHAN, *supra* note 19, at § 34 12[2]

55. *Labrum v Rickenbach*, 711 P 2d 225, 226 (Utah 1985), *Wykoff v. Barton*, 646 P 2d 756, 758 (Utah 1982).

For example, the parties can specify that the easement holder can benefit property presently owned as well as adjacent property purchased by the easement holder in the future. Normally, the rule limits the use of the easement to the benefit of those parcels owned by the easement holder at the time the easement is created.<sup>56</sup>

If the writing is ambiguous, however, the court must determine intent by considering the surrounding circumstances.<sup>57</sup> In the case of implied or prescriptive easements, where no underlying language governs, the circumstances connected with the establishment of the easement are most significant. In either case, the court is attempting to determine the intent of the parties as to the scope of the easement.

To determine whether a particular use is permissible when an easement has been created by prescription, a comparison must be made between that use and the use by which the easement was created.<sup>58</sup> An easement is limited to the use for which it was acquired. A non-commercial easement in gross is also limited to the person who acquired it.<sup>59</sup> The parties involved may change the location of an established easement by mutual consent, which may be implied by the acts and acquiescence of the parties.<sup>60</sup> The owner of a dominant estate has the right to enter the servient estate to make repairs which are necessary for the reasonable and convenient use of an easement, so long as there is no unnecessary injury to the servient estate.<sup>61</sup> An owner of the servient parcel, however, may not force the easement holder to make repairs nor can the servient owner seek contribution from a non-consenting easement holder for maintenance expenditures.<sup>62</sup> Nonetheless, the two parties are well advised to cooperate with each other regarding protective maintenance of an easement. Both the easement holder and the owner of the burdened land face tort liability for injuries arising because of neglected repairs.<sup>63</sup>

As a general rule, the party burdened by the easement is given the first opportunity to set the scope of an inadequately described easement.<sup>64</sup> Thus, if the location of the easement is not defined, the burdened property owner may choose any reasonable location, subject to the right of the unsatisfied dominant easement holder to seek protection from the courts. Similarly, a landowner is generally able to construct a gate across a dirt access road if the gate is reasonably necessary to protect the servient landowner's use of the property. The landowner's need is balanced against the easement holder's right to be free from undue interference with uses permitted under the easement.<sup>65</sup>

56. See BACKMAN & THOMAS, *supra* note 5, at § 1.02[1].

57. See 4 POWELL & ROHAN, *supra* note 19, at § 34.12[2].

58. Nielson v. Sandberg, 141 P.2d 696 (Utah 1943); Crane v. Crane, 683 P.2d 1062, 1069 (Utah 1984).

59. Crane v. Crane, 683 P.2d 1062, 1067 (Utah 1984).

60. Lyman Grazing Ass'n v. Smith, 473 P.2d 905 (Utah 1970).

61. Nephi Irr. Co. v. Bailey, 181 P.2d 215 (Utah 1947).

62. Coleman Co., Inc. v. Southwest Field Irr. Co., 584 P.2d 883, 884 (Utah 1978).

63. See BACKMAN & THOMAS, *supra* note 5, at § 1.03[2].

64. See *id.* at § 1.03[1][b].

65. See *id.* at § 1.02[1].

Another scope issue is the extent of permissible change because of passage of time and normal evolution of the affected properties.<sup>66</sup> Usually, the language creating the easement has not anticipated the kinds of alterations or modifications sought by the easement holder. As a general rule, courts permit changes if they are reasonably foreseeable.<sup>67</sup> If the changes are caused by advances in technology, the easement use is generally allowed to keep pace with normal developments. For example, old easements permitting a right of way for horse drawn carts will typically be able to become a paved road for any kind of motorized vehicles.

The most difficult questions have involved the subdivision of the dominant property<sup>68</sup> or the construction of a multi-family dwelling to replace the original single-family residence.<sup>69</sup> Usually these changes are permitted even though the intensity of use is increased. The key is whether the new uses were reasonably foreseeable so the court is justified in determining that the expansion is in harmony with the original intent of the parties and the purposes they established for the easement. The courts will limit the extent of the change, however, if the alterations or expansions impose an unreasonable burden on the servient property owner.

Public policy and the needs of society favor changes and improvements in an easement for the benefit of the dominant estate, as long as the manifest intent of the original parties was not to disallow changes and the burden on the servient estate is not unreasonably increased.<sup>70</sup> When there are several owners of an easement in common, no one of them may make alterations in the easement which will render it less convenient and useful to any one of the others.<sup>71</sup>

#### § 12.02(d). Transfer of Easements.

Once an easement is created, it becomes part of the burdened property. The obligation to recognize the easement holder's rights automatically passes to successors unless they are freed from the burden of the easement as bona fide purchasers without notice. In modern subdivisions, each property owner is on constructive notice of all easements indicated on the original subdivision plat or in a Declaration of Restrictions (including easements, real covenants and servitudes) provided the plat or declaration are properly recorded in a jurisdiction's land records.<sup>72</sup>

Even if an easement is not part of the public records, the transfer of the burden applies to subsequent owners of the servient property who have notice of the

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66. See 4 POWELL & ROHAN, *supra* note 19, at § 34.12[2].

67. *Id.*

68. *Id.* at § 34.15.

69. *Id.* at § 34.21.

70. *Huble v. Cache County Drainage Dist. No. 3*, 259 P.2d 893 (Utah 1953).

71. *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148 (Utah 1946).

72. See BACKMAN & THOMAS, *supra* note 5, at § 1.04[1].