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Extinguishing right of way by adverse possession: Court OKs

One of the issues that landowners and developers may face when subdividing land involves easements, or rights of ways. Various questions may arise – how to effectively retain a right of way, what is the scope of use of the right of way, what rights are retained by the landowner in using the right of way, to name a few.

Early last year, the Colorado Court of Appeals added another twist to the possible queries – whether a landowner can extinguish an easement holder's right of way through adverse use. Just as a right of way may be obtained by adverse possession, the court in *Matoush v. Lovingood* determined that a right of way also may be extinguished by adverse possession.

■ **Background.** The case involved a right of way that was expressly granted by a warranty deed held by Matoush to cross the Lovingoods' property for access to an alley. The right of way was granted in 1901 to Matoush's predecessors. No evidence was presented at trial regarding use of the right of way by Matoush's predecessors between 1901 and 1969. Since 1969, the evidence was undisputed that neither Matoush nor his predecessors used the right of way. Prior to 1969, the Lovingoods' predecessors built fences to enclose the right of way for use as a backyard. Then, in 2003, Matoush demanded the ability to use the right of way as a driveway and litigation ensued.

The court used Colorado statute to analyze whether the Lovingoods' adverse actions of enclosing the easement area



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with fences extinguished Matoush's right of way. C.R.S. § 38-41-101(1) provides that an action to establish a right of way may be brought after 18 years of adverse use. The reverse is also true – a party who has used a right of way adversely to the rights of the easement holder also may bring an action to extinguish the easement holder's rights. Extinguishing a right of way by adversity is the opposite of establishing a right of way: 1) adverse use of the right of way; 2) open and notoriously; and 3) continuously without effective interruption for 18 years.

The court implied that Matoush's demand in 2003 to use the right of way first started the 18-year adversity clock. The Lovingoods' enclosure of the right of way with fences was not adverse to Matoush's desired use of the right of way due to Matoush's nonuse and the fact that the easement was expressly created for Matoush and her predecessors. In the end, the court decided that the Lovingoods had not extinguished Matoush's right of way by adversity. The holding from the case provides that if an easement is expressly created, but not used by the easement holder, then the landowner's use of the easement does not start the 18-year adversity clock until the

easement holder demands to use the easement.

While the facts of the Matoush case involve a residential right of way, termination of a right of way by adverse possession has been the law in commercial settings throughout the nation.

■ **Stronger adversity element for extinguishing a right of way.** The difficult part for landowners who desire to extinguish a right of way comes with the heightened requirement of adversity. While it is fairly straightforward to conceive how to adversely use another's property to gain a right of way in the first place – driving or walking on the easement – it is not as easy to imagine how a landowner would use her own property in an adverse way to oust an easement holder from his ability to use the right of way. A landowner cannot merely make a showing that the right of way was used by the landowner for the statutory period because the right to use the right of way is already a privilege of the landowner. The showing of adversity must demonstrate a level of interference that is significant enough to alert the easement holder that the right of way may be extinguished.

The nonuse of a right of way by an easement holder, as in the Matoush case, adds further confusion for a landowner when trying to establish adversity. An easement holder that has not used an expressly created easement is not deterred by barriers such as fences, locked gates or trees crossing the right of way because the easement holder technically has not been denied access. When an easement hold-

er has not used a right of way, the 18-year adversity clock only begins to run when an easement holder demands to use it and is denied that right by the landowner. The termination of a right of way in the case of a nonuser is much more difficult because the landowner must wait for the easement holder to act. Consequently, the easement holder receives much more protection from adverse possession of the easement.

■ **Abandonment can lead to the termination of a right of way.** A right of way also may be extinguished by abandonment, but it is difficult to establish. The focus in a claim to terminate an easement by abandonment is different than in a claim to terminate an easement by adverse possession. In the case of a claim to terminate an easement by abandonment, the focus is on the conduct of the easement holder, not on the nature of the use of the easement. A landowner cannot merely argue that an easement holder has not used a right of way in a number of years to extinguish the right of way. It must be established that the easement holder has intentionally abandoned the right of way.

The recent court case has helped to clarify the process for extinguishing a right of way in situations that involve expressly granted easements and nonuse by the easement holder. It also helps to clarify the rights of the easement holder and responsibilities of the landowner in cases of adverse possession of a right of way. ▲