

COLORADO REAL ESTATE JOURNAL

THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY

JULY 1-14, 2020

Law & Accounting

Court rules on how specific an easement needs to be

Just before COVID-19 took control of everything in the United States, the Seventh Division of the Colorado Court of Appeals, in a case of first impression, issued a ruling Feb. 20 in *Krosesen v. Shenandoah Homeowners Ass'n, et al.*, 2020 WL 826598 (Colo. App. 2020), regarding the level of specificity required in a recorded document to establish an enforceable easement in a common interest community. This case is a good refresher for developers, title companies and those of us who regularly draft and review recorded documents that create or transfer interests in real property.

■ **Background.** The situation is one we commonly encounter in land development where developers create subdivisions in phases. In this case, there are two adjacent subdivisions at issue that were created by the same developer ("Subdivision 1" and "Subdivision 2"). The developer recorded plats for Subdivision 1 in and around 1988 that depicted two roads in Subdivision 1 that run between Subdivision 1 and what-would-become-Subdivision 2. The developer later recorded an amended plat to the declaration for Subdivision 1 that created the easement at issue that would allow the future owners of property within the adjacent Subdivision 2 to access their respective properties over the roads in Subdivision 1. The easement was recorded in the chain of title for properties within Subdivision 1.

In creating the plat for Subdivi-



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sion 2 in and around 1994, the developer's plat of the property that would become the plaintiff's lot asserted that the roads would serve as normal access expressly for the plaintiff's lot. The lot is in Subdivision 2 and is adjacent to Subdivision 1 and abuts the roads. The easement over the roads is clearly depicted in the recorded plat to the lot. The homeowner's association for Subdivision 1 approved the easement in the plat for the lot in its minutes but did not ratify its actions or record a document to memorialize its approval of the easement that expressly identified the lot as the dominant estate in the easement, or the lot that benefits from the easement. The plat for the lot that expressly reserved the easement for the lot was only recorded in the chain of title for Subdivision 2. We would not be discussing this case had the HOA for Subdivision 1 recorded its approval of the easement in the chain of title for properties within Subdivision 1.

So, at this point, there is an easement filed in the chain of title in Subdivision 1 where the reference to the dominant estate includes "adjacent subdivisions" and there is an easement filed in the chain of title in Subdivision 2 where the dominant estate is specifically

described as the lot.

■ **Description of the easement – common law.** The court's analyzes whether the description of the easement in the amended plat to the declaration in Subdivision 1 was sufficient under Colorado common law and the Colorado Common Interest Ownership Act (the act) §§ 38-33.3-101 to -402, C.R.S. 2019. The tests for the common law and the act both apply to easements in common interest communities. See § 38-33.3-108, C.R.S. 2019 (stating that the law of real property supplements the provisions of the act except where inconsistent with the act); § 38-33.3-115, C.R.S. 2019 (explaining that the act applies to all common interest communities created within Colorado).

Under common law, no particular words are necessary to grant an easement as long as the instrument identifies with "reasonable certainty" the easement created and the dominant and servient tenements. *Hornsilver Circle, Ltd. v. Trope*, 904 P.2d 1353, 1356 (Colo. App. 1995)(tenements = estates). "When interpreting an easement, we must consider the language used in the instrument, the circumstances surrounding its creation, and the purpose for which it was created." *Lewitz v. Porath Family Tr.*, 36 P.3d 120, 122 (Colo. App. 2001).

The verbiage of the amendments to the declaration for Subdivision 1 referring to "general common elements" (these include "easements" per § 38-33.3-103(5)

(b), (25), C.R.S. 2019), noting that the purpose of the easement was for ingress and egress and creating the roads to serve such ingress and egress sufficiently describe the nature of the easement with reasonable certainty. The recorded plats also provide reasonable certainty as to the identity of the servient estate where the roads are located (Subdivision 1) and the identity of the dominant estate that benefits from the easement (adjacent subdivisions).

The court found "adjacent subdivisions" to be a sufficient description of the dominant estate, which in this case, was the adjacent Subdivision 2 along with the property therein that abuts the roads and Subdivision 1. At the time the developer filed the amendments to the declaration for Subdivision 1, the developer likely did not have specific details for Subdivision 2 to include in the easement to memorialize it with greater specificity. Under the circumstances surrounding the creation of the easement at that time, a more detailed description of the area of the dominant estate of the easement as it pertained to Subdivision 2 did not exist. Thus, using the rationale from *Lewitz*, the court sided with the district court's ruling that the language of the plats for Subdivision 1 was sufficient to place good faith purchasers of tracts in Subdivision 1 on notice of the easement.

■ **Description of the easement – the act.** In analyzing whether the easement was valid under the

act, the court used the same explanation as its analysis of whether the easement was valid under common law. Under § 38-33.3-209(2)(e) of the act, descriptions of easements only need to be "legally sufficient." The court found that § 38-33.3-209(2)(e) does not impose a more stringent requirement for descriptions of easements than those required under the common law. Since the court found that the developer adequately put the owners of lots in Subdivision 1 on notice that future owners of lots adjacent to Subdivision 1 would benefit from the easement over the roads, the court again sided with the district court and concluded that the developer satisfied the requirements for describing an easement set forth in the act.

Although the description of the dominant estate of the easement was fairly general, it still was accurate enough to be considered legal notice to future good faith purchasers. While it's always best practice to describe an easement, the servient estate and the dominant estate with as much detail as is available, it's helpful to understand the threshold of "reasonable certainty" in analyzing whether a description of an easement is legally sufficient. While this case seems to say that generalities may be sufficient to use in certain situations as long as they are specific enough, remember that it's always worth the extra time and effort in drafting a legal document to avoid the high cost of litigation down the road. ▲