| | |
|---|---|
| PARK COUNTY COMBINED COURT<br>PO BOX 190, 300 4TH ST., FAIRPLAY, CO 80440<br>(719)836-2940<br>_____<br><br>Plaintiffs: **ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado nonprofit corporation, et al**<br><br>v.<br><br>Defendants: **VERA B. DUNWODY and DRAYTON D. DUNWODY, et al** | Δ COURT USE ONLY Δ<br><br>Case Number: 10 CV 65 |

**SECOND AMENDED FINDINGS, CONCLUSIONS AND ORDERS**

This matter came before the Court for a trial to the Court held on January 30th, 31st, February 1st, 2nd and 7th, 2012. The Court has considered the testimony and evidence presented at trial, as well as the evidence received during the preliminary injunction hearing held on March 24, 2010, the deposition testimony of Ira Hardin and Wallace Williams, the stipulated facts set forth in the Trial Management Order, trial briefs and arguments of counsel, pertinent portions of the Court file, and the Court's observations of the disputed roads during a site visit conducted on February 5th at the request of the parties. After careful review of the foregoing, the Court hereby enters the following findings, conclusions, and orders.

## FACTS

The facts of this case are voluminous, encompassing nearly 100 years of local history. The central issue involves a dispute over the right to use portions of three (3) roads (the 'disputed roads') located in the eastern most portion of Park County, Colorado, immediately adjacent to Jefferson County. The area, commonly referred to as Elk Falls, is mountainous and has become well-known for its beauty and recreational opportunities, including fishing, hiking, picnicking, and horseback riding.

In April of 1922 all of the surrounding property was acquired by John Jensen. After he passed away later that year, his estate recorded a plat map of Elk Falls Park with the Jefferson

County Clerk and Recorder. This property was located on the western boundary of Jefferson County adjacent to the (then) Park County line. Mr. Jensen's property was inherited by his heirs, including one of Mr. Jensen's daughters, Alice (aka, Sally) Jensen Berg. She married Elmer Berg. In the mid 1930's, Elmer Berg acquired in his name the surrounding property located in Park County and Alice (Jensen) Berg acquired in her name the adjoining property located in Jefferson County.

Over the years several small lots (100 x 100 feet) in Elk Falls Park were sold to individuals and several cabins were built. The cabins were generally used seasonally for recreational, get-away purposes by metro area residents. Trails and rough roads were used to access the cabins by automobile and otherwise. The disputed roads in question in this case are located in approximately the same location as some of the historic cabin access routes.

During the 1940's and 1950's, Elmer and Alice Berg owned and operated Elk Falls Resort Ranch located on the Park County side. Around 1950, it became a private, member-only club offering fishing and other recreational opportunities for use by its members. The disputed roads provided access to the lodge and some cabins that were used by club members and guests. Property owners in Elk Falls Park also used the disputed roads for access to their property.

In early 1959, Elmer and Alice Berg retained the services of a professional land surveying company and Attorney Louis Hellerstein to assist in subdividing what later became Elk Falls Block 1. This property was located on the western boundary of Jefferson County adjacent to Park County and included the area covered by the 1922 Elk Falls Park plat. As part of the approval process, Jefferson County required that the 1922 Elk Falls Park plat be vacated. In order to accomplish this, existing land owners in Elk Falls Park agreed with Elmer Berg to exchange the appropriate deeds in order to accomplish the plat vacation and keep their cabins. Both Elmer and Alice Berg were intimately involved in the numerous deed exchanges to accomplish this task, as well as the rest of the platting process for Elk Falls Block 1.

During this same time, the parties became aware of a discrepancy as to the location of the boundary line between Park County and Jefferson County, which ran through the Elk Falls area. Subsequently, the two Counties agreed to a resolution, which moved the common boundary

almost 600 feet to the east (into the Jefferson County side).

In December of 1959, a portion of the subject Jefferson County property lying immediately adjacent to the Park County line was subdivided with the final plat being signed by Alice Berg. The Elk Falls Block 1 was platted with the approval of Jefferson County. The plat was recorded in the official records of Jefferson County but not in Park County.

The three disputed roads at issue in this case (parts of South Elk Creek Road, Jensen Road, and Juniper Road) were shown on the Elk Falls Block 1 plat as extensions of platted subdivision roads located in Jefferson County extending into Park County. The disputed roads were not included in the legal description of the property subdivided in the Elk Falls Block 1 plat. Two of the three disputed roads (Juniper Road and Jensen Road) were shown on the Elk Falls Block 1 plat as **"50 FOOT RIGHT OF WAY."** The third disputed road (South Elk Creek Road) was shown as **"EXISTING COUNTY ROAD – PROPOSED 60 FOOT R/W."** The disputed roads were in existence at least several decades prior to the recording of the Elk Falls Block 1 plat.

The Elk Falls Block 1 plat also identified the adjoining Park County property as being owned by **"MRS. ALICE BERG (UNSUBDIVIDED)."** Prior to plat approval, Jefferson County officials were informed by Alice Berg's representatives that she owned the adjoining Park County property when in fact the land was held in the name of her husband Elmer Berg. Jefferson County would not have approved the Elk Falls Block 1 subdivision plat without relying on this representation that the disputed roads shown in Park County were owned by Alice Berg and could be used by Elk Falls Block 1 property owners for access.

In 1962 Elmer Berg died leaving all of his property, including the Park County property adjoining Elk Falls Block 1 and the disputed road area, to his wife Alice Berg. In 1963, Alice Berg subdivided the portion of her Jefferson County property lying to the east and adjacent to Elk Falls Block 1. Elk Falls Block 2 was approved and recorded in Jefferson County. Platted roads in Elk Falls Block 2 were connected with platted roads in Elk Falls Block 1. The vicinity map in Elk Falls Block 2 showed the general location of the roads in Elk Falls Block 1 including the disputed roads located over the Jefferson County boundary into Park County. Elk Falls

Block 1 contains lots 1 through 47. Elk Falls Block 2 contains lots 48 through 120. In other words, the lots in the two subdivisions are consecutively numbered.

In 1966 Alice Berg sold her Jefferson County property and most of her Park County property to the Elk Falls Development Company (the 'Development Company'). The Development Company was formed by a group of Elk Falls property owners for the purpose of acquiring Alice Berg's property and continuing to operate the member-only club and use the club amenities surrounding the Elk Falls subdivisions.

In 1968 the Development Company subdivided Elk Falls Block 3 in order to raise money. The subdivision plat was approved by and recorded in Park County. A south easterly portion of the Park County property lying adjacent to Elk Falls Block 1 was listed as **"NOT SUBDIVIDED."** The lodge and cabins, as well as the disputed roads, are located in this 'not subdivided' area.

The Elk Falls Block 3 plat showed South Elk Creek Road as extending from Jefferson County into Elk Falls Block 3 as the only means of access to 17 of its 46 lots. [The Dunwodys have granted access easements for these 17 lots that were possibly landlocked previously.] The plat also showed a 125 foot portion of Juniper Road extending from Jefferson County into Park County (as the southerly boundary of lot 29). However, the remainder of Juniper Road and Jensen Road are not shown on the plat. Other platted roads in Elk Falls Block 1 were extended into and continued as part of the platted roads in Elk Falls Block 3.

In 1965 the Elk Falls Property Owners Association (the 'POA') was incorporated and began holding regular meetings. This was precipitated by the death of Elmer Berg in 1962 since previously he had taken care of maintenance of the roads in the Elk Falls subdivisions, including the disputed roads. The POA began collecting dues from lot owners, the primary purpose of which was to maintain and repair the Elk Falls subdivision roads, as well as the disputed roads. The POA continued to maintain all subdivision roads and the disputed roads until 2008.

However, Jefferson County has maintained (and paved) and continues to maintain the portion of South Elk Creek Road located in Jefferson County as well as several hundred feet that runs into Park County (pursuant to an agreement between Jefferson County and Park County).

This includes a portion of one of the disputed roads (South Elk Creek Road) up to the west gate [discussed below].

South Elk Creek Road connects with U.S. Highway 285 at Shaffers Crossing and has served as the only means of access to the entire area for over 100 years. For many years, Park County maps have shown the extension of South Elk Creek Road into Park County as "County Road 1184."

For approximately 40 years until 2008, the Development Company, who had an on-site caretaker, and the POA worked together in complete cooperation. The POA was allowed to use the lodge and picnic area for social gatherings. During that time, the number of homes constructed in Elk Falls Blocks 1, 2, & 3 increased significantly, many becoming occupied year round. Also, during this time there was never any mention or issue concerning use of the disputed roads by Elk Falls property owners. At trial the Court heard consistent testimony from various property owners that they had always been under the impression that all Elk Falls property owners had the right to use the disputed roads to access their property.

Also, at trial Mr. Richard Gast, a board member and part owner of the Development Company and its acting attorney at the time of the sale to the Dunwodys, testified that the Development Company had always considered the disputed roads as public roads. In addition, Richard Gast is the son of a former Elk Falls Block 1 property owner, who also was one of the founding members of the Development Company.

In addition, during this 40+ year time period, a gate was maintained by the POA on South Elk Creek Road next to the lodge (in the disputed road area). The gate usually had an electric arm and required a card or key pad combination for entry. Next to this gate, a second swing gate was installed, which was never locked. All property owners were provided an access card/entry code for the electric gate. The electric gate was often not working and left open. The Development Company readily approved of the gate since its purpose, deterring the general public from entry, was consistent with its interest in protecting club facilities from use by outsiders without permission.

A large majority of Elk Falls Blocks 1, 2 & 3 property owners have freely used portions

of the disputed roads to access their property from around 1960 until 2008. These roads served as the primary access route into the Elk Falls subdivisions. There are other alternate access routes for use by Elk Falls property owners. However, these alternate routes are far less convenient to the majority of property owners and sometimes can be hazardous during winter months due to steep grades and ice and snow build-up, especially in the shaded and north-facing areas of the alternate routes.

In 2008 Defendants Vera and Drayton Dunwody (the 'Dunwodys') purchased the Development Company property surrounding Elk Falls, including the area of the disputed roads. The following year, disputes arose between the Dunwodys and the POA concerning the use and maintenance of the disputed roads. In 2010 the Dunwodys placed boulders and other barricades on a portion of the disputed roads, which resulted in the POA and several individual property owners commencing this action.

On March 24, 2010, the Court conducted a hearing on the POA's motion for a preliminary injunction prohibiting the Dunwodys from blocking the disputed roads until all issues could be tried. Following the hearing, the Court issued the requested preliminary injunction.

**THE PARTIES' CLAIMS AND THEORIES AT TRIAL**

Plaintiffs' second amended complaint includes two claims; one for trespass and one for quiet title and adjudication of rights pursuant to C.R.C.P. 105. The complaint requests a permanent injunction prohibiting the Dunwodys from interfering with Elk Creek property owners' use of the disputed roads. At trial, the Plaintiffs presented several theories in support of their position that all Elk Creek Falls (Blocks 1, 2, & 3) property owners had a legal right to use the disputed roads. These theories will be addressed below.

The Defendants responded with two counterclaims; one for civil conspiracy (to trespass) and one for injunctive relief. Defendants' counterclaims were dismissed with prejudice before trial pursuant to a Stipulation, the terms of which are set forth in the Court's Order For Dismissal dated September 16, 2011. At trial the Defendants argued that the disputed roads were never dedicated or granted by the then owner of the land over which the disputed roads traverse; that

use of the disputed roads was permissive, not adverse; and that the installation of the west gate effectively interrupted the use of the disputed roads such that prescriptive easements could never be established.

**DID THE DISPUTED ROADS BECOME PUBLIC ROADS?**

Colorado law provides for several ways that roads may become public roads. The most common method is by express dedication to a public entity by the landowner and an acceptance by that public entity. In this case, there was no evidence presented that the landowner, Elmer or Alice Berg, or their successors in interest, ever dedicated the disputed roads to Park County.

Roads may also become public by prescription. In that regard, C.R.S. 43-2-201(1)(c) sets forth the three elements the plaintiffs are required to prove in order to establish that the disputed roads have become public roads by prescription. The elements are (1) that members of the public have used the roads in a manner adverse to the landowner's interest and under claim of title; (2) that the public has used the roads continuously for a period of 20 years; and (3) the landowner had actual or implied knowledge of the public's use and made no objection to that use of the roads.

Colorado appellate courts consistently have held that the presence of any type of gate, whether locked or not, indicates that the use is not adverse to the landowner's interests. *Mayer v. San Luis Valley Land & Cattle Co.*, 90 Colo. 23, 5 P.2d 873 (1931); *Martino v. Fleenor*, 148 Colo. 136, 3654 P.2d 247 (1961); *Lang v. Jones*, 191 Colo. 313, 552 P.2d 497 (1976).

In this case, the west gate was constructed and maintained by the POA, not the property owner, between the 1960's and 2008. However, this was done with the consent and approval of the Development Company. The express purpose of the gate was to deter the general public from using the disputed roads to enter the area.

The Court finds and concludes that the gate, not only effectively negated any adverse use by the general public, but it also negated the requirement of 20 years of continuous use by the general public. The Court further finds and concludes that the disputed roads located west (and north) of the west gate are not public roads.

However, the Park County portion of South Elk Creek Road located east of the west gate

was freely used by the general public without interruption for well over 20 years. During this time, all of the landowners of this portion of the disputed road were aware of its use and never objected. This portion of the road was used for decades by both Park County and Jefferson County school buses to pick up and drop off children. Jefferson County maintained and paved this section of the road and continues to maintain it under an agreement with Park County.

Therefore, the Court finds and concludes that the Park County portion of South Elk Creek Road located east of the west gate is a public road.

**DID THE DISPUTED ROADS BECOME ACCESS EASEMENTS BY EXPRESS GRANT?**

Plaintiffs have argued several theories to establish that the disputed roads become access easements by express grant for the benefit of the Elk Falls property owners. These theories are summarized as follows: (1) by the Elk Falls Block 1 plat, and/or (2) by plat and after-acquired title.

(1) **EXPRESS GRANT BY THE ELK FALLS BLOCK 1 PLAT**

The evidence is uncontroverted that in 1959 when Elk Falls Block 1 was platted, title to the disputed road area (located in Park County) was held in the name of Elmer Berg, not Alice Berg. So, even if the plat could be interpreted as creating an express easement granting access rights across the disputed roads, Alice Berg lacked the technical authority to do so in 1959.

Therefore, the Court finds and concludes that the recording of the Elk Falls Block 1 plat did not create an express easement across the disputed roads in 1959.

(2) **EXPRESS GRANT BY PLAT AND AFTER-ACQUIRED TITLE**

Plaintiffs argue that Alice Berg intended to grant an express access easement across the disputed roads for the benefit of Elk Falls Block 1 property owners as shown on the plat approved by Jefferson County. They further argue that, since Alice Berg later acquired ownership of the property on which the disputed roads existed following Elmer Berg's death in 1962, the principle of after-acquired title effectively created an express grant of access easements across the disputed roads. On the other hand, the Defendants argue that C.R.S. 38-30-104, which codifies the common law rule, does not apply to easement grants.

C.R.S. 38-30-104 reads as follows:

**"If any person sells and conveys to another by deed or conveyance, purporting to convey an estate in fee simple absolute, any tract of land or real estate lying, and being in this state, not being possessed of the legal estate or interest therein at the time of the sale and conveyance and, after such sale and conveyance, the vendor becomes possessed of and confirmed in the legal estate of the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee, and said conveyance shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance."** (emphasis added.)

While the general principle served by the after-acquired doctrine would seem to apply in this case, the specific language of this statute, particularly the words '**purporting to convey an estate in fee simple absolute,'** does not support its application. The granting of an access easement conveys an interest in real estate, but it is not a grant '**in fee simple absolute,'** which is defined as 'the broadest property interest allowed by law.' Black's Law Dictionary, Ninth Edition, page 691.

Therefore, the Court finds and concludes that the disputed roads were not expressly granted by way of after-acquired title.

**DID THE DISPUTED ROADS BECOME IMPLIED ACCESS EASEMENTS?**

The Plaintiffs also argued several alternative theories that the disputed roads are implied access easements. Colorado law recognizes easements not created by express grant or conveyance as implied easements, which can be established through various theories. *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002). The theories relevant to this case are: (1) prescription and ineffective grant, (2) easement by estoppel, (3) easement by pre-existing use, and (4) implied grant from general development plan. Each will be addressed in order.

(1) **IMPLIED ACCESS EASEMENT BY PRESCRIPTION AND INEFFECTIVE GRANT**

Colorado recognizes two forms of implied prescriptive easements. The elements are as

follows: (1) open or notorious use, (2) continued without interruption for 18 consecutive years, and (3) the use was either adverse or pursuant to an attempted but ineffective grant. *Lobato v. Taylor*, 71 P.3d 938, 953, 954 (Colo. 2002). A finding of adverse use is required unless the trial court finds there was an intended grant of easement which failed because the grant was not fully articulated or because the formal requirements were not met. *Lobato v. Taylor*, 71 P.3d 938, 954 (Colo. 2002).

In this case, use of the disputed roads was clearly open. And, although the POA maintained the west gate for over 40 years in order to deter entry by the general public, all Elk Falls property owners freely passed through this gate to access their property. There is no evidence that Elmer Berg or the Development Company ever objected or blocked any Elk Falls property owner from use of the disputed roads. So, the Court finds and concludes that the Elk Falls property owners have continuously used the disputed roads without interruption for more than 40 years.

The Court has already held that the Elk Falls Block 1 plat did not constitute an express grant of access easements across the disputed roads. Then, the final issue becomes whether Elmer and/or Alice Berg intended to grant access easements across the disputed roads. When a plat, grant, or similar instrument of conveyance is not clear on its face, a trial court may look to extrinsic evidence to aid in its interpretation. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235 (Colo. 1998). In this case, the Court must look to all of the facts surrounding the platting of Elk Falls to determine what was intended.

First, Elmer and Alice Berg acted in concert when they initially undertook the platting of Elk Falls Block 1. They jointly hired a professional land surveying company to survey the land, prepare the plat, and process its approval with Jefferson County. They also jointly retained Attorney Louis Hellerstein to perform all of the associated legal work including signing the final plat. Both Elmer and Alice Berg actively participated in the parcel swaps that were needed to accomplish the vacation of the 1922 Elk Falls Park plat as required prior to obtaining final approval for Elk Falls Block 1. Both Elmer and Alice Berg were copied on virtually all correspondence to and from their hired representatives, which included copies of drafts of the

Elk Falls Block 1 plats. The plats not only clearly showed the disputed roads as right of ways, but also showed that the area surrounding the disputed roads was owned by Alice Berg, not Elmer Berg. And, it is uncontroverted that Elmer & Alice Berg's representatives confirmed Alice Berg's ownership of the disputed road area to Jefferson County officials and that without this representation and assurance of the existence of these disputed roads as access routes, Jefferson County would not have approved Elk Falls Block 1. In summary, Elmer and Alice Berg acted in unison in all respects and effectively treated all of the subject property as being jointly owned.

Second, after the death of her husband in 1962, Alice Berg inherited ownership of the disputed road area removing the technical flaw of ownership of that property. And, in 1963 she used the same professionals to survey, plat, and obtain Jefferson County approval of Elk Falls Block 2. The approved plat for Elk Falls Block 2 contained a vicinity map which showed the disputed roads as part of Elk Falls Block 1. Elk Falls Block 2 was clearly a continuation of a common development plan. The lots in each of the two Blocks were consecutively numbered and the roads of both Block 1 and Block 2 were shown as connecting into one development. And, more importantly, Alice Berg owned the disputed road area when Elk Falls Block 2 was approved and recorded.

Based on the foregoing, the Court finds and concludes that both Elmer and Alice Berg, acting together, intended that the lot owners in Elk Falls Blocks 1 & 2 had a 'right of way' to use the disputed roads to access their lots. In other words, they intended to grant to the Elk Falls Block 1 & 2 property owners a right of way as depicted on the plats to use the disputed roads. The Court further finds and concludes that the Plaintiffs have an implied access easement by prescription and ineffective grant across the disputed roads as shown on these plats.

**(2) <u>IMPLIED EASEMENT BY ESTOPPEL</u>**

Access easements may also be created by estoppel. Its elements are **"(1) the owner of the servient estate permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, (2) the user changed position in reasonable reliance on**

**that belief, and (3) injustice can only be avoided by establishment of a servitude. . . . An easement by estoppel is an equitable remedy. It recognizes that when a landowner induces another to change position in reliance upon his promise, he is estopped from then denying the existence of the rights simply because they did not meet the formal conveyance rules. The rule is founded on preventing injustice."** *Lobato v. Taylor*, 71 P.3d 938, 950-951 (Colo. 2002).

In this case, the plat of Elk Falls Block 1 showed the disputed roads as '50 FOOT RIGHT OF WAY' and 'EXISTING COUNTY ROAD – PROPOSED 60 FOOT R/W' to be used for access to Elk Falls Block 1 properties. These roads had been in existence for quite some time and were currently being used for access to the area. The plat also showed Alice Berg as the owner of the area surrounding the disputed roads. And the representatives of Elmer and Alice Berg assured Jefferson County officials (whose approval is for the express purpose of protecting future purchasers of the subdivision lots) of the accuracy of these representations. Jefferson County relied on these representations and would not have approved the plat but for these representations. And it is reasonable for any purchaser of Elk Falls Block 1 lots to view the approved plat and the roads as they existed as evidence of the right to use the disputed roads to access the property, which they did without question for over 40 years.

Clearly Elmer and Alice Berg, as well as the Development Company, permitted the use of the disputed roads to access Elk Falls Blocks 1, 2 & 3 lots for over 40 years. And, the many purchasers of these lots bought their property in reliance on this belief and used the disputed roads as the primary access to their property. So, the Court finds and concludes that the first two elements for easement by estoppel have been established by more than a preponderance of the evidence.

For the final element, the Court must find that an injustice would result without the permitted use. In this case, there was substantial evidence presented to establish that, although alternate access routes exist, these alternate routes are far less convenient to the majority of property owners and sometimes can be hazardous during winter months due to steep grades and ice and snow build-up, especially in the shaded and north-facing areas of the alternate routes.

Furthermore, looking at the three plats (Elk Falls Blocks 1, 2 & 3) together, the disputed roads are located at the central entrance area for all of Elk Falls. The Court finds and concludes that a substantial hardship and injustice would result without the establishment of these historic access rights.

Therefore, the Court finds and concludes that the Elk Falls property owners have easements by estoppel to use the disputed roads to access their property.

**(3) IMPLIED ACCESS EASEMENT BY PRIOR USE**

In order to establish an implied access easement by prior use over the disputed roads, the Plaintiffs must prove all of the required elements by a preponderance of the evidence. These elements are as follows: (1) that the servient and dominant estates were once under common ownership, (2) the rights alleged were exercised prior to the severance of the estate, (3) the use was not merely temporary, (4) the continuation of this use was reasonably necessary to the enjoyment of the parcel, and (5) a contrary intention is neither expressed nor implied. *Lobato v. Taylor*, 71 P.3d 938, 951 (Colo. 2002). Also, see Restatement (Third) of Property: Servitudes, Section 2.12.

The common ownership requirement set forth in the first element refers to the time when the use began. In other words, were the disputed roads being used when the severance occurred. The disputed roads in question in this case were in existence and being used to access the lots identified and sold in the Elk Falls Park, which was platted by the Estate of John Jensen in 1922. Today, the disputed roads are located in approximately the same location as the historic cabin access routes. After the death of John Jensen, ownership of the area (including the area of the disputed roads) passed to his heirs. And Elmer Berg acquired the disputed road area in the mid 1930's. However, the Court is not clear who owned the subject property or if there was common ownership from1922 to the 1930's when the disputed roads began to be used. Because the Plaintiffs have the burden of proof to establish the existence of each element by a preponderance of the evidence, the Court finds and concludes that the Plaintiffs have not met their burden to proof establish that they have an implied easement by prior use across the disputed roads.

(4) **IMPLIED GRANT FROM COMMON DEVELOPMENT PLAN**

Easements may also be created by implication in a common development plan. The owner of the property to be burdened must convey lots as part of a common development plan. The plan or plat of the development plan must set forth the servitudes or access easements sufficient to imply to a reasonable purchaser that he/she has a right to use the servitude. *Bolinger v. Neal*, 259 P.3d 1259 (Colo. App. 2010). Restatement (Third) of Property: Servitudes, Section 2.1.

A lack of specificity in describing the location of a servitude generally will not invalidate the servitude. Its location may be determined by its location on the ground and the conduct of the parties. *Stevens v. Mannix*, 77 P.3d 931, 932 (Colo. App. 2002); *Isenberg v. Woitchek*, 144 Colo. 394, 400, 356 P.2d 904, 907 (1960).

In this case, when Alice Berg signed the Elk Falls Block 1 plat in 1959, title to the area of the disputed roads was not in her name. So, she was not the 'owner' of the Park County property purportedly burdened by the Elk Falls Block 1 plat. However, Alice Berg became the owner when she inherited that property from Elmer Berg when he died in 1962. In 1963 when she recorded the Elk Falls Block 2 plat, she did own the Park County property burdened by the disputed roads.

Based on the facts and reasoning set forth above [See Implied Easement by Ineffective Grant and Implied Easement by Estoppel], the Court finds and concludes that the platting of Elk Falls Block 1 and Elk Falls Block 2 was definitely a common development plan jointly undertaken by Elmer and Alice Berg. The Court further finds and concludes that there was an abundance of evidence to support the conclusion that the platting of Elk Falls Block 3 in 1968 was a continuation of this common development plan by the Development Company; and that this is made obvious by simply viewing the three (3) plats together (See Plaintiffs Exhibit 1) as well as considering the common plat names (Elk Falls Blocks 1, 2 & 3).

Therefore, the Court finds and concludes that the Elk Falls property owners have an implied easement from the common development plan to use the disputed roads to access their property.

**DO THE COLORADO RECORDING STATUTES AND SHELTER RULE EFFECTIVELY MAKE THE DUNWODYS BONA FIDE PURCHASERS**

**TAKING FREE AND CLEAR OF ANY RIGHTS OF OTHERS TO USE THE DISPUTED ROADS?**

The Dunwodys argue that since the Elk Falls Block 1 plat was never recorded in Park County, they and their predecessor in interest, the Development Company, were not on constructive or record notice of the existence of the disputed roads being created as right of ways. The Dunwodys do not dispute that, at the time of their purchase, they had actual notice of the existence of the disputed roads being used by Elk Falls property owners to access their property. There was ample testimony to establish they purchased with actual knowledge. However, they argue that the plaintiffs have not met their burden of proof to establish that the Development Company had constructive or actual notice; and that under the 'shelter rule,' the Dunwodys become bona fide purchasers without notice by 'stepping into the shoes' of the Development Company. [Note that the Dunwodys filed their trial brief after evidentiary proceedings had been concluded and immediately before closing arguments by their counsel. Prior to that, the Court is not aware of the 'shelter rule' being raised by the Dunwodys as part of their defense. Therefore, the Court has considered the supplemental trial briefs filed by both parties and will proceed to address the issue.]

The Development Company was formed by a group of Elk Falls property owners in the mid 1960's. Their purpose was to acquire Alice Berg's property (after the death of Elmer Berg) and to continue to operate the member-only club and use the club amenities, which surrounded the Elk Falls subdivisions. They purchased the property from Alice Berg in 1966. In 1968 the Development Company platted Elk Falls Block 3.

As property owners in Elk Falls Blocks 1 & 2 located in Jefferson County, the owners of the development Company were on notice of the recorded plats and disputed roads contained therein. In addition, in 1968 Robert Gast, who owned lots in Elk Falls Block 1, was one of the founding shareholders and directors of the Development Company. He signed the Elk Falls Block 3 plat as attorney and director for the Development Company. In that regard, the Court also found persuasive the testimony of

Robert Gast's son, Richard Gast, who was a director and acting attorney for the Development Company at the time of the sale to the Dunwodys.

The Court finds and concludes that the record contains an abundance of evidence to establish that the Development Company had constructive (record) notice, inquiry notice, as well as actual notice of the existence of the disputed roads as right of ways. The Court further finds and concludes that the Dunwodys are not bona fide purchasers pursuant to the shelter rule.

**WIDTH AND LOCATON OF THE DISPUTED ROADS**

Consistent with and as a logical consequence of the findings and conclusions set forth above, the Court should now address the issue of the width and location of the disputed roads. In regards to width, the Court finds and concludes that the intent of Alice and Elmer Berg was clearly set forth in the plat of Elk Falls Block 1. This plat specifies the width of the right of ways as 50 feet for Jensen and Juniper Roads and 60 feet for South Elk Creek Road. This conclusion is further supported by the testimony of representatives of the Development Company at trial.

Regarding the location of the right of ways, there is no precise metes and bounds legal description contained in the Elk Falls Block 1 plat or anywhere else. However, the Elk Falls Block 1 plat does indicate approximately the intended location of these roads. Therefore, the Court finds and concludes that it is reasonable to have a professional land surveyor prepare a metes and bounds description using the location of the existing roadways to define the location of the right of ways. The Court further finds and concludes that the legal description prepared for the Plaintiffs after trial by surveyor Robert Feroldi accomplishes this end, constitutes a fair and reasonable legal description for the purposes of resolving any uncertainty or ambiguity, and shall be used for recording purposes in the Final Judgment, Decree, and Permanent Injunction resulting from these findings, conclusions, and orders.

In addition, prior to the Dunwody's acquisition of their property, there existed several encroachments, which lie within the newly created legal descriptions of the right

of ways. In the interests of fairness and justice, the Court finds and concludes that the owners of property on which said encroachments exist shall not be required to remove any of said encroachments; and the injunctive relief granted by this Court shall not apply to said encroachments. This also shall be reflected in the Final Judgment, Decree, and Permanent Injunction resulting from these findings, conclusions, and orders.

**ATTORNEY FEES PURSUANT TO C.R.S. 38-33.3-123(1)(c)**

Plaintiffs, as the prevailing party, have filed a post trial motion requesting an award of attorney fees pursuant to C.R.S. 38-33.3-123(1)(c). This code section reads as follows: **"In any civil action to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award reasonable attorney fees, costs, and costs of collection to the prevailing party."** Plaintiffs correctly point out that the word 'declaration' includes a recorded plat, such as the recorded plat for Elk Falls Block 1 where the disputed roads were described. Their motion cites *Cody Park Owners' Ass'n v. Harden*, 251 P.3d 1 (Colo. App. 2009) as the "controlling case" in support of their motion. Plaintiffs further argue that, since the Defendants' pleadings, as well as their pre-trial filings relative to motions, asserted their right to recover attorney fees pursuant to C.S.R. 38-33.3-123(1)(c), the Defendants should be estopped from now arguing that the statute does not apply.

Defendants, however, argue that C.S.R. 38-33.3-123(1)(c) does not apply since the disputed road area is located outside of the property platted in the Elk Falls subdivision and the Defendants are not Elk Falls lot owners. The Defendants also argue that they never admitted or conceded that the prevailing party would be entitled to recover attorney fees pursuant to C.R.S. 38-33.3-123(1)(c).

The central issue revolves around the interpretation of this statute. Was the subject litigation for the purpose of enforcing provisions of a recorded plat? In this instance, Plaintiffs did file suit to enforce their perceived rights to use the disputed roads depicted in the Elk Falls Block 1 plat. However, the disputed road area is located outside the area platted by Elk Falls Block 1. And this Court has found that the Plaintiffs' right to use the

disputed roads arose, not by express grant, but by implication. So the Court finds and concludes that C.R.S. 38-33.3-123(1)(c) does not apply to the facts of this case.

Therefore, the Plaintiffs' request for an award of attorney fees is denied.

**CONCLUSION**

Based on the foregoing, the Court finds in favor of the plaintiffs and against the Defendants as to all of their respective claims. The preliminary injunction issued by this Court is made permanent. Plaintiffs shall have 15 days from the date of this order to submit a bill of costs (which has already occurred). Defendants shall have 10 days thereafter to submit any objections (which also has already occurred). The Court declines to award any attorney fees pursuant to C.R.S. 13-17-102 and finds that both parties have proceeded in good faith in pursuing their respective legal positions.

Dated this 8th day of May 2012.

BY THE COURT:

Stephen A. Groome

Stephen A. Groome
District Court Judge