Texas Supreme Court:
Necessity & Prior Use Easements
Texas Surveyors Association

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"…Ah, you can't always get what you want, no, no, baby
You can't always get what you want, you can't now, now
You can't always get what you want
But if you try sometimes you just might find
You just might find that you
*You get what you **need***, oh yeah
Ah yeah, do that"

Source: LyricFind
Songwriters: Keith Richards / Mick Jagger

I. Hamrick v. Ward 446 S.W.3d 377 (Tex. 2014):

a. Clarifies distinctions between Necessity Easements & Prior Use Easements

(both implied easements originating from unified ownership which is later severed)

i. Strict, continuing necessity required for Necessity Easements because they are substantial burdens.

ii. Reasonable necessity at severance required for Prior Use Easements because they are lesser burdens.

b. Tests

i. Necessity Easement

1. unity of ownership;

2. access is a necessity

a. not a convenience;

b. historical necessity (at severance of title) and

c. continuing, present necessity.

Automatically terminates when necessity ceases.

Rationale: facilitate continued productive use of landlocked parcels, rather than rigidly restrict access, therefore, provides access only so long as no other access exists.

Almost exclusively applied to access road situations.

ii. Prior Use Easement

1. unity of ownership;

2. use was open and apparent at severance, and at purchase by the current owner (ie., Bonafide Purchaser for Value without Notice status defeats);

3. use was continuous to severance of title; and

4. necessary to the use of the dominant estate:

a. strict necessity for reservations,

b. possibly only reasonable necessity for grants (not addressed by the Court).

Rationale: Implied intent of the parties. "*the law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration….There is a presumption that parties contracting for property do so "with a view to the condition of the property as it actually was at the time of the transaction," therefore, absent evidence to the contrary, such conditions which openly and visibly existed at the time are presumed to be included in the sale*."

Not applicable to access roads (only Necessity easements), but other "*lesser improvements*" such as "*an improvement constructed over, under, or upon one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both…[which is] open and usable and permanent in its character*."

Examples: utility facilities, use, light/air, and misplaced staircase.

c. Consolidation of other "Equitable" easements into Necessity or Prior Use Easements

The court clarified that most equitable (implied by the facts, not by granted by express easements) easements must now be either Necessity Easements or Prior Use Easements, including variously named easements from prior Supreme Court opinions:

Necessity Easements include:

- "implied easement by necessity" *Koonce v. J.E. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984)
- "easement of necessity" "way of necessity" "implied reservation of a right of way by necessity" *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 625—26 (Tex. 1950)
- "right of way by necessity" *Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397, 398 (Tex. 1944)
- "way of necessity" *Alley v. Carleton*, 29 Tex. 74, 78 (1867).

Prior Use Easements include

- "implied easement appurtenant" *Drye v. Eagle Rock Ranch, Inc*., 364 S.W.2d 196, 207 (Tex. 1962)
- "easement by implication" *Bickler v. Bickler*, 403 S.W.2d 354, 356 (Tex. 1966)
- "quasi-easement" *Ulbricht v. Friedsam*, 159 Tex. 607, 325 S.W.2d 669, 677 (Tex. 1959).

NOTE: In a later case (*Staley*, discussed below), the Supreme court listed the other types of easements:

- Express easements (written and recorded, which may be on a plat)
- Prescriptive easements (10 yrs open, adverse use)
- Easements by estoppel (affirmative representation by land owner, with user reliance)

II. Annotated Case Text: Hamrick v Ward

The best way to describe the reshuffling of Texas easement law is to read the Supreme Courts' clear language . The following are direct excerpts from the Hamrick decision:

JUSTICE GUZMAN….

This case presents the Court with an opportunity to provide clarity in an area of property law that has lacked clarity for some time: implied easements.

For over 125 years, we have distinguished between

implied easements by way of necessity

(which we refer to here as "**necessity easements**") and

implied easements by prior use

(which we refer to here as "**prior use easements**").

We created and have utilized the necessity easement for cases involving roadway access to previously unified, landlocked parcels. Roadways by nature are typically substantial encumbrances on property, and we accordingly ***require strict, continuing necessity to maintain necessity easements***. By contrast, we created and have primarily utilized the prior use easement doctrine for lesser improvements to the landlocked parcel, such as utility lines that traverse the adjoining tract. ***We have required, to some degree, a lesser burden of proof for prior use easements (reasonable necessity at severance rather than strict and necessity)*** because they generally impose a lesser encumbrance on the adjoining tract (*e.g.*, a power line compared to a roadway).

Today, we clarify that the necessity easement is the legal doctrine applicable to claims of landowners asserting implied easements for roadway access to their landlocked, previously unified parcel.

Here, a party claims a road that was necessary for access to its landlocked, previously unified parcel is a prior use easement. The trial court and court of appeals agreed. We hold the necessity easement doctrine governs this claim. Because we clarify the law of easements, we reverse the court of appeals' judgment and remand to the trial court for the party to elect whether to pursue such a claim.

I. Background

In 1936, O. J. Bourgeois deeded 41.1 acres of his property in Harris County, Texas to his grandson, Paul Bourgeois. During Paul's ownership, *a dirt road was constructed on the eastern edge of the 41.1 acre tract, providing access from the remainder of the land to a public thoroughfare, Richardson Road*. In 1953, Paul deeded two landlocked acres of the tract to Alvin and Cora Bourgeois, severing the 41.1 acres into two separate parcels. Alvin and Cora *used the dirt road to access* their two acres. The two-acre tract was subsequently transferred to Henry and Bettie Bush in 1956, who sold the land to Henry Gomez in 1957. In 1967, Henry Gomez and his wife, Anna Bell, built a house on the two-acre tract with a listed address of 6630 Richardson Road. Anna Bell became the sole owner of the two-acre tract when Henry died in 1990.

In the late 1990s, developer *William Cook began construction of the Barrington Woods subdivision on the remaining acreage of Paul Bourgeois' property*. Cook planned to close the dirt road Anna Bell used to access her two acres and to construct a paved driveway for her to directly access her property from a newly added paved street. …

David and Maggie Hamrick, as well as Sue and Steve Bertram, (collectively "the Hamricks") purchased homes on Lots 3 and 4 in Barrington Woods—the property Anna Bell's access easement traversed to reach Richardson Road. The developer told the Hamricks initially and at closing that when Anna Bell sold her home, the property would be platted, her access to the main road would open, and the Hamricks would recover full use of the dirt road.

In February 2004, before the Hamricks closed on their home, Anna Bell sold her property to Tom and Betsey Ward (collectively "the Wards"), subject to a life tenancy. After purchasing the property, the Wards continued to use the dirt road. The Wards then reinforced the dirt road with gravel and made use of the road to construct a new home on the land. The *Hamricks sued to enjoin the Wards from using the dirt road*. The *trial court granted the Hamricks a temporary injunction* in April 2006, which prevented the Wards from using the easement for construction of their home. As a result, the Wards platted the property, the barrier and reserve were removed, and a *driveway was built to provide the Wards access to the paved road* and allow them to complete construction. Nonetheless, the *Wards pursued a counterclaim, arguing they had an implied, prior use easement to use the dirt road and requesting the trial court enter a judgment declaring an unrestricted twenty-five foot easement* connecting their property to Richardson Road.

The *trial court granted the Wards' motion for summary judgment*, finding they conclusively proved the existence of a prior use easement running from the Wards' property across the rear of the Hamricks' property to Richardson Road. The trial court did not specifically designate a width for the easement. The *trial court denied the Hamricks' motion for summary judgment*, which raised affirmative defenses of bona fide purchaser, estoppel, and waiver. Finally, the trial court awarded attorney's fees of $215,000 to the Wards and $200,000 to the Hamricks.

…The court unanimously held that the Wards were required to prove necessity at the time of

severance, *not a continuing necessity* as the Hamricks proposed. *Id*. at 777….

[Exhibit A- Site plan showing Barrington Woods around the Gomez/Bell (Ward) land

Exhibit B- Proposed residential subdivision expansion incorporating the land]

II.. . . .

A. Implied Easement

… we determine the applicable doctrine for roadway access to previously unified, landlocked parcels is the necessity easement.

Under Texas law, implied easements fall within two broad categories: necessity easements and prior use easements. *See Koonce v. J.E. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984) (necessity easement); *Bickler v. Bickler*, 403 S.W.2d 354, 357 (Tex. 1966) (prior use easement). But the unqualified use of the general term "implied easement" has sown considerable confusion because ***both a necessity easement and a prior use easement are implied and both arise from the severance of a previously unified parcel of land***.[1] *Seber v. Union Pac. R. Co*., 350 S.W.3d 640, 648 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Further contributing to this confusion, courts have used a variety of terms to describe both necessity easements[2] and prior use easements.[3]

Despite imprecise semantics, ***we have maintained separate and distinct doctrines for these two implied easements for well over a century***. Today, we clarify that ***a party claiming a roadway easement to a landlocked, previously unified parcel must pursue a necessity easement theory.***

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[11] The Restatement of Property may also have added to confusion in these cases. Originally, the Restatement did not differentiate between necessity easements and prior use easements, and instead merely listed a series of factors to be considered by courts to determine whether an easement ought to be implied. RESTATEMENT OF PROP. § 476 (1944). But the ***Restatement Third contains separate sections with separate definitions, one for "Servitudes Created by Necessity" and one for "Servitudes Implied from Prior Use."*** RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.12, 2.15 (2000).

[2] As one court of appeals has rightly observed: "It is apparent that whether an easement is denominated a 'way of necessity,' an 'easement by necessity,' an 'easement of necessity,' 'an implied easement by necessity,' an 'implied reservation of an easement by necessity,' or an 'implied grant of a way of necessity' the elements of each are identical." *Daniel v. Fox*, 917 S.W.2d 106, 111 (Tex. App.—San Antonio 1996, writ denied). This Court alone has used a wide variety of terms in reference to implied easements by way of necessity. *See, e.g., Koonce*, 663 S.W.2d at 452 ("implied easement by necessity"); *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 625—26 (Tex. 1950) ("easement of necessity," "way of necessity," and "implied reservation of a right of way by necessity"); *Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397, 398 (Tex. 1944) ("right of way by necessity"); *Alley v. Carleton*, 29 Tex. 74, 78 (1867) ("way of necessity").

[3] This Court alone has employed three terms to refer to a prior use easement: "implied easement appurtenant," *Drye v. Eagle Rock Ranch, Inc*., 364 S.W.2d 196, 207 (Tex. 1962), "easement by implication," *Bickler*, 403 S.W.2d at 356, and "quasi-easement," *Ulbricht v. Friedsam*, 159 Tex. 607, 325 S.W.2d 669, 677 (Tex. 1959).

1. Necessity Easements

"Anyone who grants a thing to someone is understood to grant that without which the thing cannot . . . exist." James W. Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571, 572 (1925). With similar emphasis on this ancient maxim, *we recognized in 1867 that a necessity easement results when a grantor, in conveying or retaining a parcel of land, fails to expressly provide for a means of accessing the land*. *Alley v. Carleton*, 29 Tex. 74, 78 (1867). When confronted with such a scenario, courts will imply a roadway easement to facilitate continued productive use of the landlocked parcel, rather than rigidly restrict access. *Id*.

To successfully assert a necessity easement, the party claiming the easement must demonstrate:

(1) unity of ownership of the alleged dominant and servient estates prior to severance;

(2) the claimed access is a necessity and not a mere convenience; and

(3) the necessity existed at the time the two estates were severed. Koonce, 663 S.W.2d at 452.

As this analysis makes clear, a party seeking a necessity easement must prove both

> ***a historical necessity (that the way was necessary at the time of severance) and***
>
> ***a continuing, present necessity for the way in question. Id.***

Once an easement by necessity arises, it continues until "the necessity terminates." Bains, 182 S.W.2d at 399 ("[A] way of necessity is a temporary right, which arises from the exigencies of the case and ceases when the necessity [**11] terminates."); see also Alley, 29 Tex. at 76 (providing "if the necessity for its use ceases, the right also ceases"). The temporary nature of a necessity easement is thus consistent with the underlying rationale; that is, providing a means of roadway access to land only so long as no other roadway access exists. *Alley*, 29 Tex. at 78 ("A way of necessity, however, must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own.").

Accordingly, it is no surprise that ***the balance of our jurisprudence on necessity easements focuses on roadway access to landlocked, previously unified parcels***. *See Koonce*, 663 S.W.2d at 452 (assessing a roadway easement by the standard of an easement by necessity); *Duff v. Matthews*, 158 Tex. 333, 311 S.W.2d 637, 641 (Tex. 1958) (same); *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (Tex. 1950) (same); *Bains*, 182 S.W.2d at 399 (same); *Alley*, 29 Tex. at 78 (same).

2. Prior Use Easements

Two decades ***after we established the necessity easement doctrine for roadways in Alley, we found that framework to be ill suited for other improvements that nonetheless are properly construed as implied easements***. In *Howell v. Estes*, we addressed use of a stairwell to access two buildings. 71 Tex. 690, 12 S.W. 62, 62 (Tex. 1888). In *Howell*, a father had constructed adjoining two-story buildings that jointly used a stairwell in one building. *Id*. When he died, he left one building to his son and the other to his daughter. *Id*. In the wake of a familial dispute, the sibling who owned the building with the stairwell denied use of it to the other sibling. *Id*.

Our preexisting doctrine for necessity easements could not adequately address such a situation. The party seeking the easement likely could not claim strict necessity, as he was still able to access his land and the bottom floor of his building.[4] *Id*. But recognizing that the law should afford a remedy, we established ***an alternate doctrine for assessing whether to recognize implied easements for improvements across previously unified adjoining property as follows:***

> ***[I]f an improvement constructed over, under, or upon one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both be open and usable and permanent in its character . . . the use of such improvement will pass as an easement, although it may not be absolutely necessary to the enjoyment of the estate conveyed.***

Id. at 63. Unlike necessity easements, which are implied out of the desire to avoid the proliferation of landlocked—and therefore, unproductive—parcels of land, the ***rationale underlying the implication of an easement based on prior use is not sheer necessity. Rather, as this Court has expressly recognized, "[t]he basis of the doctrine [of prior use easements] is that the law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration."*** *Mitchell v. Castellaw*, 151 Tex. 56, 246 S.W.2d 163, 167 (Tex. 1952). There is a presumption that parties contracting for property do so "with a view to the condition of the property as it actually was at the time of the transaction," and therefore, ***absent evidence to the contrary, such conditions which openly and visibly existed at the time are presumed to be included in the sale***. *Miles v. Bodenheim*, 193 S.W. 693, 696-97 (Tex. Civ. App.—Texarkana 1917, writ ref'd).

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[4] We recognized that he could access his second floor by building a stairwell for the then considerable sum of $50. *Howell*, 12 S.W. at 62.

…the party claiming a prior use easement must prove:

(1) unity of ownership of the alleged dominant and servient estates prior to severance;

(2) the use of the claimed easement was open and apparent at the time of severance;

(3) the use was continuous, so the parties must have intended that its use pass by grant; and

(4) the use must be necessary to the use of the dominant estate.

Drye v. Eagle Rock Ranch, 364 S.W.2d 196, 207- 08 (Tex. 1962).

Because the ***actual intent of the parties at the time of severance is often elusive, these factors effectively serve as a proxy for the contracting parties' intent***.

It is worth noting that ***we have elevated the proof of necessity for a subset of prior use easement cases***.

> A prior use easement may arise either by ***reservation*** (where the grantor of the previously unified parcel retains the landlocked parcel) or by **grant** (where the grantor conveys the landlocked parcel).
>
> We have expressly held that ***to establish a prior use easement implied by reservation, a party must demonstrate strict necessity*** with respect to the easement claimed. *Mitchell*, 246 S.W.2d at 168.
>
> But, ***with respect to a prior use easement implied by grant, some ambiguity remains as to whether a party must demonstrate strict necessity or reasonable necessity for a party to succeed***. *See Drye*, 364 S.W.2d at 208-09. Because we hold below that the Wards must pursue an implied easement by way of necessity theory, we need not reach this question.

The factual circumstances in which we have discussed the prior use easement *illuminate its purpose*. We have used the prior use easement doctrine to assess situations such as

> use of a stairwell in an adjacent building,[5]
>
> grazing cattle,[6] and
>
> recreational use of adjoining property.[7]
>
> …"a part[ition] wall,"
>
> "a drain or aqueduct,"
>
> "a water [gas] or sewer line into the granted estate,"

[5] *Howell*, 12 S.W. at 62.
[6] *Ulbricht*, 325 S.W.2d at 677.
[7] *Drye*, 364 S.W.2d at 208.

"a drain from the land,"

"light and air,"

"lateral support," and

"water." *Drye*, 364 S.W.2d at 207- 08.

In light of the history and the purpose behind these two types of implied easements, we clarify when parties should pursue each type of easement…

3. Roadway Easements to Landlocked, Previously Unified Parcels Must Be Tried as Implied Easements by Way of Necessity

…We clarify that courts adjudicating implied easements for roadway access for previously unified, landlocked parcels must assess such cases under the necessity easement doctrine.[8]

…We note that the court of appeals held *the bona fide purchaser defense is an appropriate defense to prior use easements. 359 S.W.3d at 782. It did not address whether the bona fide purchaser defense applies to a claim the Wards had not yet raised. Accordingly, that issue remains unresolved* and is before the trial court on remand….

[8] There exist other types of easements, such as prescriptive easements, easements by estoppel, and express easements. *Drye*, 364 S.W.2d at 204. The Wards also pleaded a prescriptive easement claim, which will be within the scope of our remand to the trial court.

III. *Staley Family Partnership, Ltd. v. Stiles*, 483 S.W.3d 545 (Tex. 2016)

Supreme Court follows up on *Hamrick, and holds that* "Necessity" depends on the easement's being necessary at time of severance to provide access *to a public road*, and ceases to exist if the easement cannot provide such access.

- Follows Hamrick and applies its test to an access situation.
- Focused on requirement of proof at severance that the necessity arose for an easement across the servient estate to provide the dominant estate with access *to a public road*. *Staley*, 483 S.W.3d at 549. The requested easement would not, in itself, give access to a public road. The party requesting the easement would still need to negotiate an access right over other property to reach a public road. "But a right of way that does no result in access to a public roadway is not, under long-standing precedent, necessary because it does not facilitate use of the landlocked property." Id. at 549.
- This case turns on the time of severance, which the Trial Court held to be 1876, but the Court of Appeals and Supreme Court held to be 1866.
- Discussed rationale for necessity easements to facilitate the productive use of landlocked property, and in this case the claimed easement did not do so since it did not provide access to the public road.
- The court distinguished its decision in *Bains v. Parker*, 182 S.W.2d 397 (Tex. 1944) where a necessity easement was granted despite the fact that the easement only reached to a 3rd party tract where the easement holder only had permissive right to access to a public road. In *Bains*, the court held that the necessity easement would terminate if that 3rd party permissive right was withdrawn, as the necessity would then terminate as the easement would no longer provide access to a public road. *Bains* permits a landlocked landowner to obtain a necessity easement *if* the easement completes the link needed for public road access.
- The necessity must exist at the time of severance which caused the landlocked status, not a later separation.
- Easement denied.

Question- Does *Staley* mean that necessity easements may apply ONLY to access situations (See, *Redburn, supra),* or does *Staley* apply only when necessity easements are sought to provide roadway access to landlocked tracts (See, *Lester [electrical power]* and *Pisarski [parking]*, supra, which deal with other types of access)?

IV. Current Caselaw- Court of Appeals Cases citing *Hamrick or Staley* on Necessity Easements

Jentsch v. Lake Road Welding Co., 450 S.W.3d 597 (Tex. App.—El Paso 2014, no pet.)

- Focused on necessity when challenged as merely convenient.
- Existence of terminable license at time of trial did not eliminate necessity for permanent, non-terminable legal access.
- Easement granted.

Union Pac. R.R. Co., v. Seber, 477 S.W.3d 424 (Tex. App.—Houston [14th Dist.] 2015, no pet.)
.

- Addressed alleged Prior Use Easement to use an existing railroad crossing.
- UPRR asserted that the crossing was not an "improvement" to which Prior Use Easements apply, but was access, to which only Necessity Easements apply. The court agreed.
- Plaintiffs were given the right to replead as Necessity Easement.

Lester v. Conway, 2016 WL 7234053 (Tex. App.—San Antonio 2016, no pet.)

- Necessity Easement expanded to provide electric power easement.
- Easement was necessary to make the severed land productive, consistent with the rationale for Necessity Easements.
- Appears to be a situation where the neighbors had a falling out.
- Easement granted.

Redburn v. City of Victoria, 898 F.3d 486 (5th Cir. 2018)

- Applied *Hamrick* and *Staley* to a necessity easement.
- City sought a drainage easement by necessity, prior use and estoppel.
- The 5th Circuit read *Staley* to limit necessity easements to access to a public road, and reversed summary judgement in favor of the City.

Clearpoint Crossing Property Owners' Association v. Chambers, 569 S.W.3d 195 (Tex. App. – Houston [1st Dist.] 2018, pet. denied).

- Focus on the "strict necessity" standard, which requires the party seeking the easement to bear the burden of proving there is no other method of accessing the property aside from the easement by necessity. If the proof establishes that the claimant has other means of accessing the parcel, a necessity easement cannot exist as a matter of law.
- Courts reject claims based on i) alternative methods are impassible due to condition (because the claimant's remedy is to repair the access point), or ii) convenience or practicality considerations (such as difficult terrain) as basis for imposing a necessary

easement. See *Duff v. Matthews*, 311 S.W.2nd 637 (Tex. 1957) which denied a necessity easement in such situation.

- A court may not enforce an express easement for access and give a secondary ruling of easement by necessity. Existing access through other available means defeats the showing of present necessity required for an implied easement as a matter of law. The fact that the express easement required a circuitous route was irrelevant.
- Easement denied.

Pisarski v. Hong Bui, 2018 WL 4057385 (Tex. App.—Amarillo 2018, no pet.)

- Necessity Easement applied to curb cut/driveway which facilitated access to the only available parking spaces.
- The parking was necessary for use.
- The necessity element for an easement by necessity means that the use of the easement must be economically or physically necessary for the use of the land and not merely desirable. *Pisarski*, 2018 WL 4057385 at *2.
- The owner of the servient state challenged the size of the easement granted by the trial court. Its scope and extent should equate to the amount that is reasonably necessary to the use and enjoyment of the property as it existed at the time the dominant and servient estates were severed. *Id.*
- Easement size upheld.

Federal National Mortgage Association v. Moore, 2019 WL 12598993 (W. D. Tex. 2019)

- Federal court applied Hamrick to an access easement to a landlocked tract.
- Easement granted.

Trujillo Enterprises, Ltd. v. Davies, 573 S.W.3d 297 (Tex. App.—El Paso 2019, no pet.)

- Merely showing that it would be expensive to obtain another means of access to a parcel is not generally sufficient to establish a necessity easement. *Trujillo Enterprises, Ltd.,* 573 S.W.3d at 305.
- Necessity may not be created by the owner's use.
- Discussed and distinguished *Daniel v. Fox*, 917 S.W. 2d 106 (Tex. App. – San Antonio 1996, write den.) which case held an exception to the expense rule if the cost to build the alternative access was prohibitively expenses (such as exceeding the value of the landlocked land). In this case, the owner made conclusory statements as to cost, without cost estimates. Also, the court notes that *Daniel* applied a reasonably necessity standard, whereas Hamrick only applies that standard to Prior Use Easements. Id. fn. 6.
- Easement denied.

Gordon v. Demmon, 2019 WL 1782013 (Tex. App.—Amarillo 2019, no pet.).

- Owners receiving necessity easement challenged its size, because they desired to redevelop their land as a subdivision and need a 60' area of a new public road. The trial court limited the easement "no wider than reasonably necessary to afford …ingress and egress…."
- Courts may establish the size of the easement to accommodate a claimant's reasonable needs for ingress and egress.
- Strict necessity is the standard.
- Wider easement denied.

Townsend v. Hindes, 619 S.W.3d 763 (Tex. App.—San Antonio 2020, no pet.)

- Necessity easement is a question of law, but underlying fact issues may be resolved by a jury.
- Primary issue was whether the access was necessary or a mere convenience, but to the existence of another access.
- The party seeking the easement has the burden of proof to show that any alternative access is not "legal", as in that it is in dispute and could terminate.
- The fact that alternative access sometimes floods and becomes impassable is irrelevant, as "Nearly every road can be impassable at one time or another…." Quoting from *Wilson v. McGuffin*, 749 S. W.2d 606, 609 (Tex. App. – Corpus Christi 1988 writ den.).
- A property owner seeking to challenge the creation of a necessity easement may conclusively negate the necessity element by establishing that another means of accessing the dominant estate exists. *Townsend*, 619 S.W.3d at 773 (citing *Hamrick*, 446 S.W.3d at 382). Once the alternate access became available, the necessity to use the disputed road ceased. *Id.*

Couch v. Avila Aguilar, 631 S.W.3d 898 (Tex. App. –Fort Worth 2021, no pet)

- Focus on necessity at severance, where multiple lots were created, but the developer retained several lots.
- A property owner's legal right to cross the servient estate (here, the developer's right to cross various lots he created and retained) does not defeat the historical necessity element because possession of a right does not diminish the possessor's need to exercise it.
- The existence of permissive access at severance does not defeat necessity, and many necessity cases arise when the permission is withdrawn.
- "[T]he easement need not be for continuous use but may lay dormant through successive grantees to be used at any time by a subsequent titleholder." Id. at 905.
- This result is supported by the rationales for necessity easements: i) to facilitate continued productive use of a landlocked parcel, and ii) to give effect to the implied intent of the grantor who separated the land.
- Easement granted.

Exhibit A
Site plan showing Barrington Woods around the Gomez/Bell (Ward) land

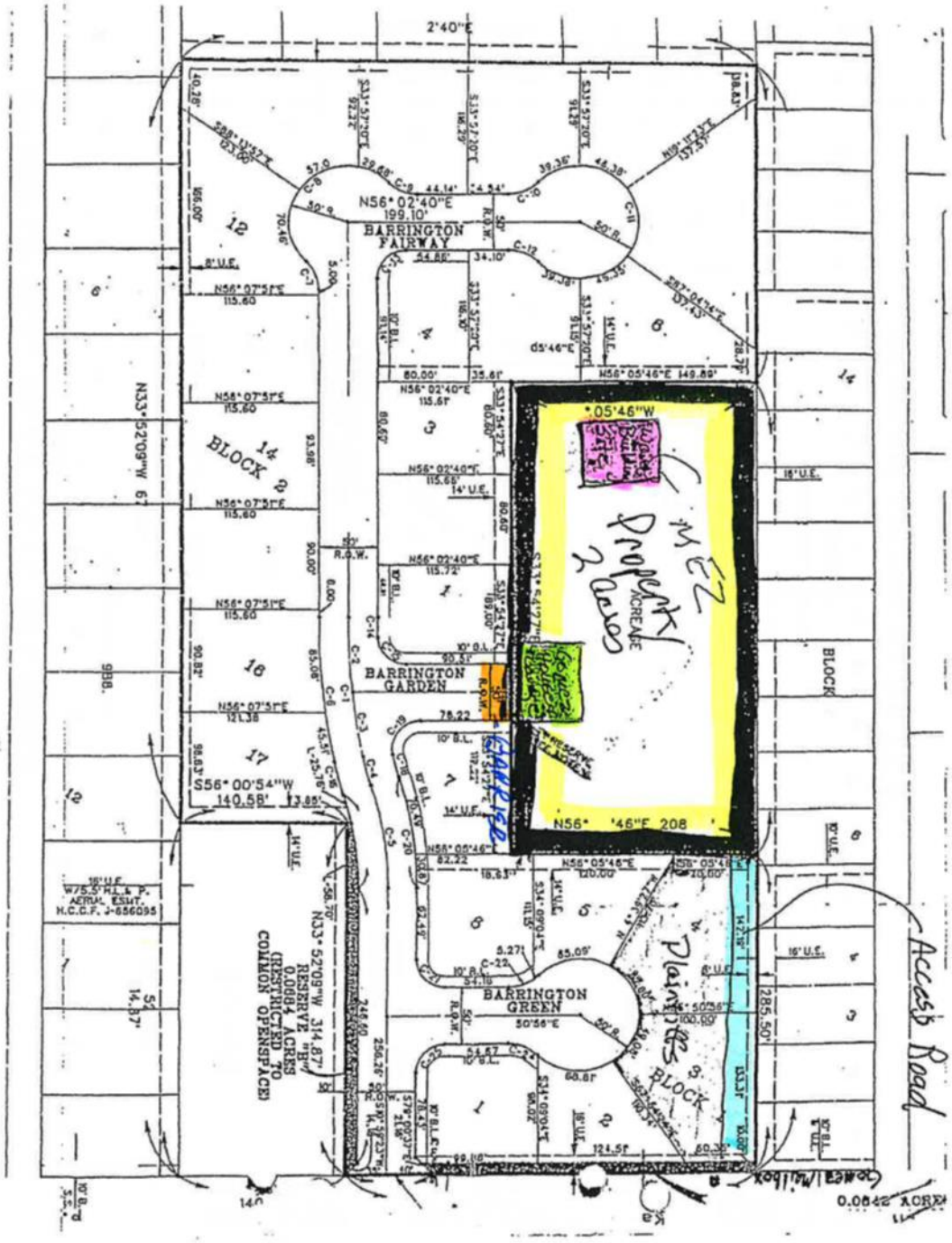

Exhibit B
Proposed residential subdivision expansion incorporating the land