IN THE SUPREME COURT OF GUAM

RICARDO A. LIZAMA, and CLARE A.C. LIZAMA,
Plaintiffs-Appellees,

vs.

DEPARTMENT OF PUBLIC WORKS, Government of Guam,
Defendant,

and

FRANCIS X. PRESTO,
Intervening Defendant-Appellant,

vs.

THERESE SANTOS,
Cross-Defendant-Appellee.

Supreme Court Case No.: CVA04-012
Superior Court Case No.: CV2016-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 2, 2005
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice[1]; ROBERT J. TORRES, Associate Justice; and JOHN A. MANGLONA, *Justice Pro Tempore*.

TORRES, J.:

[1] Intervening Defendant-Appellant Francis X. Presto appeals from the trial court judgment declaring that Presto did not have an easement over the properties of Plaintiff-Appellees Ricardo A. and Clare A.C. Lizama and Cross-Defendant-Appellee Therese Santos, and enjoining Presto and Defendant Department of Public Works from further interfering with the Lizamas' and Santos' quiet use and enjoyment of their properties. We affirm.

I.

[2] Juan M. Mendiola was the owner of Basic Lot No. 7-REM-NEW-R ("Mendiola Tract"), located in Agana Heights (formerly Sinajana) which was later subdivided to create what ultimately became Lot 7-REM-3 ("Presto Property"), Lot 7-REM-NEW-B1 (" Lizama Property") and Lot 7-REM-NEW-A ("Santos Property").

[3] On May 23, 1957, Mendiola conveyed the Presto Property to Juanito and Leonisa M. Presto. Attached to the 1957 deed to the property is a Property Map depicting a "40' PROPOSED ROAD." The Presto Property was thereafter conveyed to Francis X. and Catherine Presto, who are the current owners of the Presto Property. Presto claims that the area designated in the map as a Proposed Road is an easement granted by Mendiola to the Prestos in 1957. Appellant's Excerpts of Record ("Appellant's ER"), Tab 13 (Property Map attached to Presto Deed of 1957).

[4] On June 15, 1959, Mendiola conveyed the Lizama property to his cousin, Veronica M. Villareal, by deed of gift, which describes the property as 1014.44 square meters. Villareal conveyed the Lizama property to Frances and David Camacho, her daughter and son-in-law, on December 9, 1963. The Camachos obtained permission from DPW to erect a concrete fence on the property,

[1] Associate Justice Tydingco-Gatewood, as the senior member of the panel, was designated as the Presiding Justice.

which was built in 1983. The fence is constructed partially on the area in which Presto claims an easement exists. In 1992, the Camachos conveyed the Lizama Property, described as 1014.44 square meters, to their daughter and son-in-law, Clare and Ricardo Lizama. The Lizamas are the current owners of the Lizama Property.

[5] Therese Carlos Santos is the current owner of the Santos Property. Santos also owns Lot 7-4-REM-NEW-REM-2NEW-R1 ("Santos Property No. 2"), which is not part of the Mendiola Tract.

[6] Twenty feet of the forty-foot-wide proposed road runs through, and along, the southern portion of the Lizama Property and Santos Property. The remaining twenty feet width of the Proposed Road runs along the northern portion of Santos Property No. 2. Appellant's ER (Plaintiff's Ex. PP, Attached to Superior Court Findings of Fact and Conclusions of Law).

[7] On December 27, 2000, the Department of Public Works ("DPW") ordered the Lizamas to demolish a portion of a concrete fence located on their property, claiming that the fence was partially built on an easement belonging to Presto.

[8] The Lizamas filed suit against DPW, seeking declaratory and injunctive relief. Specifically, the Lizamas requested that the court declare that no valid easement exists over their property, as claimed by DPW, and enjoin DPW from attempting to remove the concrete fence built on their property or from otherwise interfering with the Lizamas' quiet use and enjoyment of their property.

[9] Presto filed a motion to intervene as a defendant and to join Santos as an additional party. Presto thereafter filed a Counterclaim against the Lizamas and a Cross-claim against Santos. The Lizamas and Santos deny the existence of a valid easement.

[10] After a bench trial, the trial court granted judgment in favor of the Lizamas and Santos, holding that there was no valid easement granted to the Prestos in the 1957 Deed, and granting the declaratory and injunctive relief requested by the Lizamas. The trial court specifically found that there was no easement by express grant and no easement by implication under the reference-to-a-map rule. Presto appealed.

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II.

[11] This court has jurisdiction over this appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (West, WESTLAW through Pub. L. 109-20 (2005); Title 7 GCA §§ 3107, 3108(a) (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).

[12] "What constitutes an easement or a right thereto is a question of law, but whether the facts necessary to the existence of the right have been proved is a question of fact. . . ." *State v. Deal*, 233 P.2d 242, 251 (Or. 1951) (quoting 28 C.J.S. *Easements* § 71) (n.d.); 28A C.J.S. *Easements* § 142 (2004).

[13] We review a trial judge's findings of facts after a bench trial for clear error. *Yang v. Hong,* 1998 Guam 9, ¶ 4. A trial judge's conclusions of law, however, are reviewed *de novo*. *Craftworld Interior, Inc. v. King Ent.*, 2000 Guam 17, ¶ 6.

III.

[14] Presto argues on appeal that the trial court erred in finding that the Property Map attached to the 1957 Presto Deed did not constitute a grant of an easement, either express or implied. Presto further maintains that the trial court erred in failing to find, in the alternative, that an easement by necessity was created in his favor.

[15] The Lizamas and Santos insist that the trial court properly determined that the map attached to the Presto Deed, in itself, did not grant an easement, express or implied, to Presto. The Lizamas and Santos further contend that Presto cannot raise the issue of necessity for the first time on appeal.

A. Easements in General

[16] An easement is defined as "an interest in land created by grant or agreement, express or implied, which confers on its owners a right to some profit or benefit, dominion, or lawful use out of or over the estate of another." *Costa Mesa Union School Dist. v. Security First Nat. Bank,* 62 Cal. Rptr. 113, 118 (Ct. App. 1967). There are two estates involved in every easement: "the dominant, to which the right belongs, and the servient, upon which the obligation rests." *Childrens' Home, Inc. v. State Highway Bd.* 211 A.2d 257, 260 (Vt. 1965) (quoting *Payne v. Sheets*, 55 A. 656, 659 (Vt.

1963)); Title 21 GCA § 7103 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) (stating that "[t]he land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement."). Under the facts of the case *sub judice*, the Presto Property is the claimed dominant tenement, and the Lizama and Santos Properties are the claimed servient tenements.

[17] While an easement is an interest in land, it does not confer title to the servient land. *Jacobsen v. Inc. Vill. of Russell Gardens*, 201 N.Y.S.2d 183, 186-87 (Sup. Ct. 1960) (noting that an easement "is always distinct from the occupation and enjoyment of the land itself, and does not confer title to the land, or constitute a lien thereon, [although] an easement is property, and partakes of the nature of land.") (quoting 28 C.J.S. *Easements* § 1 (n.d.)).

[18] Moreover, an easement is either appurtenant or in gross. An easement is appurtenant "when it is attached to the *land* of the owner, which is the dominant tenement, and burdens the land of another, the servient tenement." *Cushman v. Davis*, 145 Cal. Rptr. 791, 793 (Ct. App. 1978) (emphasis added). Because an easement appurtenant runs with the land, subsequent owners of the lands equally enjoy or are burdened by the easement. *Id.* at 794. By contrast, an easement in gross belongs to a particular person, is not attached to the dominant land, and therefore does not pass with subsequent conveyances. *Id.* at 793. Every easement is presumed to be appurtenant unless proved otherwise by clear evidence. *Id.*; *see also Elliott v. McCombs*, 109 P.2d 329 (Cal. 1941).

[19] Presto's assertions that the trial court should have determined an easement was created by express grant, by implication, or by necessity, will now be addressed.[2]

B. Easement by Express Grant

[20] Easements by express grant are "created by *express words* . . . usually by deed . . . ." *Cushman*, 145 Cal. Rptr. at 793 (emphasis added). An express grant of an easement "may be created by an instrument clearly evincing such intent provided the instrument complies with the formalities

[2] An easement may also arise by prescription, but an easement by prescription is not relevant to the facts of this case and is not discussed in this opinion.

necessary for the conveyance of an interest in land." 28A C.J.S. *Easements* § 53 (2004).[3] "There must be language in the writing manifesting a clear intent to create a servitude." *Forge v. Smith*, 580 N.W.2d 876, 880-81 (Mich. 1998). The writing must contain "plain and direct language evincing the grantor's intent to create a right in the nature of an easement . . ." 24 AM. JUR. 2d. *Easements* § 15 (2005). The intent as gleaned from the face of the writing must be "so manifest . . . . that no other construction can be placed on it." *Id.*

[21] In addition, while "no particular words" are required to create an express easement, the writing "must identify with reasonable certainty the easement created and the dominant and servient tenements." *Dunlap Investors, Ltd. v. Hogan,* 650 P.2d 432, 434 (Ariz. 1982) (quoting *Oliver v. Ernul,* 178 S.E.2d 383, 396 (N.C. 1971); *Parkinson v. Bd. of Assessors*, 481 N.E.2d 491, 493 (Mass. 1985); *Hynes v. Lakeland,* 451 So.2d 505, 511 (Fla. Dist. Ct. App. 1984) (observing that "no particular form and language are necessary to create an easement; rather, any words clearly showing the intention of the parties to create a servitude on a sufficiently identifiable estate is sufficient."); *see also* Title 21 GCA § 4102 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).[4] In other words, not only must the grantor's intent be clearly shown in the deed, the description must be certain to the extent that "a surveyor can go upon the land and locate the easement from such description." *Vrabel v. Donahoe Creek Watershed Auth.*, 545 S.W.2d 53, 54 (Tex. Civ. App. 1976).

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[3] With respect to the formalities required to convey an interest in land, Title 21 GCA § 4101 states: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." 21 GCA § 4101 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).

[4] Title 21 GCA § 4102 illustrates the proper form a grant of an estate in real property. It states:

> A grant of an estate in real property may be made in substance as follows:
> I, *A.B.*, grant to *C.D.*, all that real property situated in (insert location), bounded (or described) as follows:
>
> (Here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, *The Norris Ranch*.)
>
> Witness my hand this (insert day) day of (insert month and year.)
> *A.B.*

21 GCA § 4102.

If the instrument of conveyance does not describe the servient property sufficiently, so that the servient property is incapable of identification, "the conveyance is an absolute nugatory." *Parkinson,* 481 N.E.2d at 493 (quoting *McHale v. Treworgy*, 90 N.E.2d 908 (Mass. 1950)). *See Germany v. Murdock,* 662 P.2d 1346, 1348 (N.M. 1983) ("An [express] easement requires the same accuracy of description as other conveyances."); *but see* Title 21 § 31101 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).[5]

[22] The trial court determined that there was no express grant of an easement under the facts of this case. The court found that the Presto Deed does not contain any express words or language clearly evincing an intent to create an easement. Moreover, the deed does not identify the burdened property. The map attached to the Presto Deed does not sufficiently describe the burdened property so as to identify the easement. In fact, the length of the forty foot proposed road continues past the Mendiola Tract. We do not believe the trial court's findings were clearly erroneous. Accordingly, we therefore hold that the trial court properly found that no express grant of an easement exists in favor of Presto.

[23] We next address the trial court's ruling that no easement by implication was created in favor of Presto.

C. Easement by Implication

1. Easement by Reference to a Map

[24] An easement by implication may arise where a deed or instrument of conveyance makes reference to a map or plat which shows lots and streets, including the claimed easement. The long-standing rule is succinctly stated by a California court:

> When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys it necessarily implies or expresses a design that such passageway shall be used in connection with the lots and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed

[5] If the deed or grant conveys to a governmental agency an easement over real property for public purposes, Guam law further requires that the consent of the grantee be evidenced by its acceptance attached to the deed or grant in order to for such deed or grant to be recorded. 21 GCA § 31101.

> and acknowledged by the owner, . . . is equivalent to a declaration that such right is attached to each lot as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot.

Danielson v. Sykes, 109 P. 87, 88 (Cal. 1910); *Tract Dev. Serv., Inc. v. Kepler*, 246 Cal. Rptr. 469, 474 (Ct. App. 1988). Stated more simply with respect to the facts of the case at bar, "[w]here land is conveyed with reference to a map or plat showing streets, there is an implied grant of easements with respect to such streets." 28A C.J.S. *Easements* § 82 (2004). The reference to a map rule has been recognized in a majority of jurisdictions as a method of creating an easement by implication. *See, e.g., Boucher v. Boyer*, 484 A.2d 630, 636 (Md. 1984); *Day v. Robison,* 281 P.2d 13, 13-14 (Cal. Dist. Ct. App. 1955); *Stankiewicz v. Miami Beach Ass'n,* 464 A.2d 26, 28-29 (Conn. 1983); *Bonifay v. Garner,* 445 So. 2d 597, 603 (Fla. Dist. Ct. App. 1984); *Smith v. Clay,* 236 S.E.2d 346, 346 (Ga. 1977); *Monaco v. Bennion,* 585 P.2d 608, 612 (Idaho 1978); *Reiman v. Kale,* 403 N.E.2d 1275, 1278-79 (Ill. App. Ct. 1980); *Callahan v. Ganneston Park Dev. Corp.,* 245 A.2d 274, 278 (Me. 1968); *Gagnon v. Moreau,* 225 A.2d 924, 925-26 (N.H. 1967); *Stupnicki v. Southern N.Y. Fish & Game Ass'n,* 244 N.Y.S.2d 558, 563 (Sup. Ct. 1962), *aff'd.*, 245 N.Y.S.2d 333 (1963); *Strickland v. Shew,* 134 S.E.2d 137, 139 (N.C. 1964); *Immanuel Baptist Church v. Barnes,* 264 S.E.2d 142, 144 (S.C. 1980); *Knierim v. Leatherwood,* 542 S.W.2d 806, 811 (Tenn.1976); *Barron v. Phillips,* 544 S.W.2d 752, 755 (Tex. Civ. App. 1976); *Reger v. Wiest,* 310 S.E.2d 499, 502-03 (W.Va. 1983). Once an easement is created by an *initial* reference to the subdivision map, the easement is appurtenant, and passes with subsequent conveyances, even if the subsequent conveyances do not similarly reference the map. Title 21 GCA § 4201 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005));[6] *Kepler*, 246 Cal. Rptr. at 475.

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[6] Title 21 GCA § 4201 states:

> A transfer of real property transfers all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

21 GCA § 4201.

[25] An easement by implication gives effect to the presumed intent of the parties. More specifically, "[t]he method of creating an easement by implication by reference to a plat or map presupposes an intent on the part of the original grantor, by depicting a street on a map and by referring to the map in the deed, to create an easement." 28A C.J.S. *Easements* § 82 (2004). Such rule is therefore "based on an inference as to the intention of the parties . . . at the time of the conveyance." *Id.* (footnote omitted). In particular, "[t]he ultimate determination of whether an easement by implication is created depends on the intention of the parties at the time of the conveyance with the most important indicators of the grantor's intent being the appearance of the subdivision map and the language of the original deeds." *Firsty v. De Thomasis*, 576 N.Y.S.2d 454, 456 (App. Div. 1991) (quoting *Coccio v. Parisi*, 542 N.Y.S.2d 405, 407 (N.Y. App. Div. 1989)).

[26] In the case before us, the Presto Deed itself does not, by words, reference any map or plan, recorded or unrecorded. However, *attached* to the Presto Deed is a "Property Map." The Property Map depicts a "40' PROPOSED ROAD" which intersects with a 20' Right of Way abutting the Presto Property. The Property Map is signed by Mendiola and Presto's predecessors in interest. Both the Presto Deed and attached Property Map have been filed at the Department of Land Management under the same document number.

[27] Under the facts of most cases which discuss the reference to a map rule, an implied easement is found where the deed *expressly references* the map, and under the general rule discussed above, the map and the easements that are depicted therein, become a part of the deed. We have found scant case law on the issue of what constitutes an adequate reference for purposes of the above rule. *See generally* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS & LICENSES IN LAND § 4:32 *found at* Westlaw, LELL § 4:32 (2004).

[28] In a California case, the plaintiff's deed did not expressly reference a map or a plat. *Prescott v. Edwards*, 49 P. 178, 179 (Cal. 1897). However, prior to the sale of the plaintiff's property, the original grantor brought the plaintiff to the land and physically pointed out, by reference to stakes in the ground, a right of way which would be appurtenant to the land. *Id.* The court, affirming the

trial court judgment finding an easement by implication, stated:

> Again, by the deeds the lands were described by metes and bounds, and no reference is found therein to any street, but at the time of sale the defendant pointed out these strips of land as streets, and the land sold bordered on such strips. The purchaser's condition was thus the same as if the land had been sold by a recorded or unrecorded plat. Under the circumstances we have depicted, it would be a gross injustice for the owner to deprive a purchaser of the privilege of using such strips of land as streets, and an injustice which the law does not countenance. While the case, in its facts, is out of the ordinary, upon principle it is analogous, as we have shown, to all those cases where plats have been used in the making of sales; and we know of no case of that kind where relief has been refused when sought in courts of justice. While courts may not all have agreed upon the legal principle to be invoked in administering relief, yet the result has always been the same,--relief has always been granted.

Id.

[29] By contrast, in *Pyper v. Whitman*, 80 A. 6, 7 (R.I. 1911), the plaintiffs similarly claimed that an implied easement existed because a map of the subdivision, depicting the claimed easement, was shown to them at the time of the sale by the original grantor. There, the court found that because the map was not expressly referenced *in the deed* to the plaintiff, there could be *no easement* arising by implication.[7] *Id.*; *see also Stankiewicz v. Miami Beach Ass'n, Inc.*, 464 A.2d 26, 29 (Conn. 1983) ("An implied easement in such roadways may exist only, if it exists at all, when the grantor owns the fee to the roadways and makes reference *in the grantee's deed* to a map which depicts the roadways.") (emphasis added).[8]

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[7] The Rhode Island court, while finding no easement, stated that an action for damages would likely apply under the facts of the case. The court stated:

> [I]f the plan should be merely exhibited at a sale of land, and there should be no reference to it in the conveyance, it is difficult to see by what precise means the purchaser could become entitled to a right. It scarcely seems there could be any grant implied; for to imply such a grant would be like adding a term to a written contract by parol evidence. Nor is it likely that there could be any right by estoppel; for there is nothing in the deed whereby the vendor could be estopped. The probability is, therefore, that the purchaser would acquire no right to a way at all; but possibly he could sue the vendor for damages.

Pyper v. Whitman, 80 A. 6, 8 (R.I. 1911) (quoting Goddard's Law of Easements (Bennett's Ed.)).

[8] Although the court in *Pyper* found no easement despite the fact that the plaintiffs were shown the map at the time of sale, in dicta, the court also stated: "if a plan showing streets *be shown and annexed to a deed*, or referred to in a deed, the vendor would probably be estopped from denying an easement. . . ." *Pyper*, 80 A. at 8 (quoting Goddard/s Law of Easements (Bennett's Ed.)).

[30] Also adhering to a restrictive view of the term "reference," a Massachusetts court has held that even where the original grantor's subdivision plan is duly recorded before the plaintiff's land was conveyed, and such plan depicts the claimed easement, the easement does *not* exist where the deed does not expressly reference the plan. *Leuci v. Sterman*, 138 N.E. 399, 400 (Mass. 1923) ("Even if we assume that all the land shown on the plan, including that of the defendant and of the plaintiff, was owned by the same common grantor when the plan was recorded, the plaintiff has not shown that the deed of her land made any reference to the plan, and no right of way over [the claimed easement] was appurtenant to her lot").

[31] Similarly, a Florida court summarized the distinction between the express reference to a recorded map in the deed, and other less adequate methods of references:

> In *McCorquodale v. Keyton*, 63 So. 2d 906 (Fla. 1953), our Supreme Court upheld the right of subdivision property owners to enjoin the obstruction of an area labeled "Sunnyside Park" on a recorded plat. The question in the case at bar is whether the *McCorquodale* rule can be extended to create private easement rights based upon pictorial representations appearing in the developer's advertising material and general layout maps but *not referenced in the conveying instrument itself or in a recorded plat referred to in the conveying instrument*. . . . In *Brooks-Garrison Hotel Corp. v. Sarah Investment Company*, 61 So. 2d 913 (Fla. 1953), the Court held that an implied easement did not result from an unfiled and unrecorded plat which reflected that a strip of land was dedicated to the public for a street. Thus, the traditional theory of an implied easement is not available . . . .

Jonita, Inc. v. Lewis, 368 So. 2d 114, 116 (Fla. Dist. Ct. App. 1979).

[32] In this case, it must be emphasized that Presto presented no evidence as to the intent of any of the parties to the original deed. While we recognize the difficulty in presenting such evidence, given that the original parties to the 1957 Presto Deed are deceased, "[t]he person who asserts an easement has the burden of proving the existence of the easement." *Riffle v. Worthen*, 939 S.W.2d 294, 298 (Ark. 1997). Here, the sole evidence presented to support Presto's claim is the Property Map attached to the Presto Deed and filed under the same document number. Under the above cited cases which discuss the grantor's exhibition of the subdivision map or the burdened property at the time of sale, and unlike in the case before us, there is at least some evidence as to the intent of the parties to purchase the land as displayed, with the easements, in the map. *See Prescott*, 49 P. 178 at 179 (finding that the purchasers relied on the grantor's representation of an easement upon visit to

the claimed servient property and holding that even in the absence of an express reference to a map, such representation is just as good, or better than the situation where the grantor exhibits the subdivision map at the time of sale).

[33] Furthermore, there is no evidence that Mendiola *himself* created the "40' PROPOSED ROAD," depicted in the Property Map attached to the Presto Deed. *Cf. Danielson v. Sykes*, 109 P. at 89 ("The *making* and filing of such a plat duly signed and acknowledged by the owner, . . . is equivalent to a declaration that such right is attached to each lot as an appurtenance.") (emphasis added). In fact, the evidence provided substantiates the opposite conclusion reached by the trial court – that maps showing the 40' Proposed Road existed prior to 1957 and found its source in old Navy maps. The evidence included a deed executed by Mendiola in 1959, wherein Mendiola conveyed one of the lots in the Mendiola Tract to Ramon P. Calvo. The Calvo Deed expressly grants an easement to Calvo and like the Presto Deed, attached a map. The map attached to the Calvo Deed depicts the easement – 20' R/W – granted to Calvo in the deed. Interestingly, the map also depicts the 40' Proposed Road, despite the fact that there is *no reference* to such road found in the deed. This later conveyance to Calvo supports the trial court's conclusion that the 40' Proposed Road existed prior to 1957, and was probably copied by the surveyor onto the Property Map attached to the Presto Deed (and the Calvo Deed), without any intent to create an easement in the area so labeled.

[34] We are further persuaded by the trial court's finding that the Property Map attached to the Presto Deed indicates that the claimed easement would run beyond Mendiola's Tract (both width and length). Clearly, an implied easement by reference to a map cannot be created unless the grantor is the owner of the servient property. Title 21 GCA § 7104 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) ("A servitude can be created only by one who has a vested estate in the servient tenement."); *Stankiewicz*, 464 A.2d at 29 ("When a conveyance describes the conveyed property by reference to a map on which streets are shown, an implied easement over the streets exists by law, if it exists at all, only if the conveyor in fact owns the streets").

[35] Finally, the Subdivision Map for the Mendiola Tract was not presented at trial. *Cf. Firsty*, 576 N.Y.S.2d at 456 ("[T]he most important indicators of the grantor's intent being the appearance of the subdivision map and the language of the original deeds.").

[36] Under the deferential clearly erroneous standard of review, we are not left with a definite and firm conviction that the trial court committed a mistake. We therefore conclude, under the facts of this case, that the reference to a map rule does not apply to create an easement by implication. There is no evidence as to the circumstances surrounding the conveyance by Mendiola to Presto's predecessors in interest. There is no subdivision map in evidence. The deed itself does not reference the map attached to the Presto Deed. There is simply no evidence of intent. Accordingly, we affirm the trial court's holding that no easement in favor of Presto was created by implication under the widely recognized reference to a map rule.

[37] We turn finally to Presto's claim that an easement exists by necessity.

2. Easement By Necessity

[38] An implied easement may also arise by way of necessity. The term has been defined by the United States Supreme Court:

> Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as "easements by necessity."

Leo Sheep Co. v. United States, 440 U.S. 668, 679, 99 S. Ct. 1403, 1409 (1979). Or more simply stated, "[a] way of necessity typically arises where an owner severs a landlocked portion of his property by conveying such parcel to another." *Ludke v. Egan*, 274 N.W.2d 641, 645 (Wis. 1979).

[39] To determine whether an easement by necessity exists, a court must "examin[e] the circumstances existing at the time the landlocked parcel is severed from the parcel with access. On the other hand, since easements by necessity have the implied purpose to make possible utilization of the dominant land, such easements expire as soon as necessity no longer exists." 25 AM. JUR. 2D *Easements and Licenses* § 30 (2005) (footnote omitted).

[40] The record on appeal reveals that at trial, Presto did not proceed with the theory of an easement by way of necessity, and in fact, relied completely on the map attached to the Presto Deed as evidence of the grant of an easement. Transcript of Proceedings vol. VI, p. 75 (Closing Arguments, May 8, 2002) (Attorney for Presto stating that "it's not about necessities . . . [i]t's created by a map."). Presto raises the argument for the first time on appeal and asserts that the trial court erred in not finding an easement by necessity under the facts of the case. Lizama suggests that it is improper for this court to review the easement by necessity issue because we can only decide the merits of any given case by the record that is preserved and presented on appeal. In this case, the relief requested on appeal was not requested at the lower court level, and therefore there is no denial of relief before for us to review.

[41] The argument that an easement by necessity should be implied is presented by Presto for the first time on appeal. In *Dumaliang v. Silan*, 2000 Guam 24, ¶ 12, we stated as a general rule that "this court will not address arguments raised for the first time on appeal." However, we also recognized the discretionary nature of this rule, and stated that under the following circumstances, an argument may be raised and heard by this court: "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Id.* n.1. Although not elucidated in *Dumaliang*, we made clear in *Taniguchi-Ruth + Associates v. MDI Guam Corp. dba Leo Palace Resort*, 2005 Guam 7, that "the exceptions enumerated are in the disjunctive. Thus, '[i]f one of the exceptions is applicable, we have discretion to address the issue.'" *Id.* at ¶ 80 (quoting *Bolker v. Comm'r,* 760 F.2d 1039, 1042 (9th Cir. 1985)).

[42] The *Dumaliang* exceptions do not apply under the procedural facts of this case. There has been no change in law raising a new issue while the appeal is pending and the issue is not purely one of law.[9] Although we may exercise our discretion to review the issue in the event that there was a

[9] Indeed, there appears to be insufficient evidence presented at trial for the trial court to find that the Presto Property was landlocked at the time of conveyance and remains landlocked to this day. This is likely because counsel for Presto proceeded on a different theory at trial.

miscarriage of justice, courts have generally precluded appellants from raising the issue of an easement by necessity for the first time on appeal. *See id.*; *see also Carter v. County of Hanover*, 496 S.E.2d 42, 44 n.4 (Va. 1998) (where the plaintiff proceeded on the theory of implied easement by prior use in the lower court, and attempted to raise the issue of the easement by necessity on appeal, the court found that "the issue of an easement by necessity was not properly before the [trial court] and cannot be raised for the first time on appeal."); *Gibbons v. Martin*, 534 P.2d 915, 916 (Nev. 1975) ("The record reveals no findings made by the trial court with reference to the theor[y] of necessity . . . The respondent, who has had no opportunity to address these new theor[y], would be prejudiced if they are to be given consideration by us. We will not consider the validity of appellant's theor[y] of . . . easement by necessity.").

[43] We therefore decline to entertain a novel proposition that was not advanced in the earlier stages of the litigation, especially where, as here, there are no circumstances which justify the exercise of our discretion to deviate from the general rule that arguments raised for the first time on appeal will not be addressed.

IV.

[44] We hold that the trial court properly found that the Property Map attached to the 1957 Presto Deed did not create an easement, express or implied, in favor of Presto. We further hold that Presto is barred from raising the issue of the easement by necessity for the first time on appeal. Accordingly, we **AFFIRM**.