C.R.S. 43-2-201

COLORADO REVISED STATUTES

*** This document reflects changes current through all laws passed at the First Regular Session of the Sixty-Ninth General Assembly of the State of Colorado (2013) ***

TITLE 43. TRANSPORTATION
HIGHWAYS AND HIGHWAY SYSTEMS
ARTICLE 2.STATE, COUNTY, AND MUNICIPAL HIGHWAYS
PART 2. COUNTY AND OTHER PUBLIC HIGHWAYS

C.R.S. 43-2-201 (2013)

43-2-201. Public highways

(1) The following are declared to be public highways:

(a) All roads over private lands dedicated to the public use by deed to that effect, filed with the county clerk and recorder of the county in which such roads are situate, when such dedication has been accepted by the board of county commissioners. A certificate of the county clerk and recorder with whom such deed is filed, showing the date of the dedication and the lands so dedicated, shall be filed with the county assessor of the county in which such roads are situate.

(b) All roads over private or other lands dedicated to public uses by due process of law and not heretofore vacated by an order of the board of county commissioners duly entered of record in the proceedings of said board;

(c) All roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years;

(d) All toll roads or portions thereof which may be purchased by the board of county commissioners of any county from the incorporators or charter holders thereof and thrown open to the public;

(e) All roads over the public domain, whether agricultural or mineral.

HISTORY: Source: L. 1883: p. 251, § 1.G.S. § 2953.L. 1891: p. 302, § 1.L. 1893: p. 435, § 1.R.S. 08: § 5787.L. 21: p. 380, § 1.C.L. § 1243.CSA: C. 143, § 1.CRS 53: § 120-1-1. C.R.S. 1963: § 120-1-1.

Cross references: For toll roads, see part 3 of article 3 of this title.

ANNOTATION

I. General Consideration.
II. Dedication to Public Use.
III. Adverse Possession.
IV. Public Domain.

I.GENERAL CONSIDERATION.

Law reviews. For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952). For article, "One Year Review of Property", see 40 Den. L. Ctr. J. 181 (1963).

"**Highways" and "roads" may include foot paths,** depending on context in which terms appear. In applying the statute, the characteristics, conditions, and locations of the paths may be considered and, in doing so, the court held an eighteen-inch path in a populated, residential, urban area not to be a "road". Simon v. Pettit, 687 P.2d 1299 (Colo. 1984).

County commissioners have the sole right to authorize and control the use of a highway, including the borrow pit, whether the user be an abutting owner or otherwise. Lewis v. Lorenz, 144 Colo. 23, 354 P.2d 1008 (1960).

It is duty of county commissioners to establish and maintain roads. It devolves upon boards of county commissioners, and power to that end is granted by statute, to establish, maintain, and keep public roads open for travel. Leach v. Manhart, 96 Colo. 397, 43 P.2d 959 (1935).

A private party may bring a claim to declare the existence of a public road. Therefore, the county is not required to be joined. Staley v. U.S., 168 F. Supp. 2d 1209 (D. Colo. 2001).

County commissioners may intervene in injunction suit by landowner where character of road is in issue. In an action by a landowner to enjoin the use of a road across his property, a board of county commissioners -- claiming the road to be a public highway -- has a right to intervene to the end that the character of the road may be determined, and the dismissal of such a petition in intervention is error. Leach v. Manhart, 96 Colo. 397, 43 P.2d 959 (1935).

The declaration of a public road does not result in the acquisition of a property interest by any particular party but rather only makes available to the public a route through private land. Dept. of Natural Res. v. Cyphers, 74 P.3d 447 (Colo. App. 2003).

Vacation or alteration. The trial court having correctly held that a road as established and maintained is a public highway, neither the county commissioners nor the courts can require it to be vacated or altered except in the manner provided by law. Vade v. Sickler, 118 Colo. 236, 195 P.2d 390 (1948).

Applied in Williams v. Town of Estes Park, 43 Colo. App. 265, 608 P.2d 810 (1979).

II.DEDICATION TO PUBLIC USE.

Mere use without intent to dedicate is insufficient. Mere proof of the use of land of this character, for a long period of time, by individuals, or even by the public generally, for the purpose of travel, without objection from the owner and without evidence from which an intent to dedicate might be inferred, is not sufficient to give a route so taken the character of a public highway. Starr v. People, 17 Colo. 458, 30 P. 64 (1892); Friel v. People, 4 Colo. App. 259, 35 P. 676 (1894); Lieber v. People, 33 Colo. 493, 81 P. 270 (1905); People ex rel. Mayer v. San Luis Valley Land Cattle Co., 90 Colo. 23, 5 P.2d 873 (1931).

There must be acceptance of dedication. For the establishment of a public way by dedication, acceptance by the public is as essential as appropriation by the owner of the fee. Burlington C. R. R. v. Schweikart, 10 Colo. 178, 14 P. 329 (1887).

Dedication may be implied. Where a road runs through private lands, its dedication as a public highway may be implied: When it is satisfactorily proved that it was the owner's intention to set apart the land occupied as a road to the use of the public as a highway, and that there has been an acceptance by the public of the land for such use. The line of the road must be certain and definite; a general privilege or license by the owner to cross his lands, without reference to any special route, will not suffice; user of the road by the public for a considerable length of time without objection by the owner of the land may increase the weight of the evidence, if any there be, arising from acts or declarations of the owner indicating his intent to dedicate; but mere user, without such acts or declarations, unless for a period of time corresponding to the statutory limitation of real actions, cannot be held sufficient to vest the easement in the public, as by prescription. Starr v. People, 17 Colo. 458, 30 P. 64 (1892).

III.ADVERSE POSSESSION.

This section is a codification of the common-law method by which the public can obtain title by adverse use. Mahnke v. Coughenour, 170 Colo. 61, 458 P.2d 747 (1969).

Application of statute does not constitute a governmental taking for which compensation is required. Bd. of County Comm'rs v. Flickinger, 687 P.2d 975 (Colo. 1984).

Under this section all roads over private lands used adversely without interruption for 20 consecutive years are declared to be public highways. Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963).

Elements of adverse use of roads over private land. The uses, necessary to give a road the character of a public highway, under this section, must have been adverse, that is, under a claim of right; the line of road must have been reasonably definite and certain; there must have been an unqualified intention to set apart a line for the road, and the use must have been more than mere permissive use. Starr v. People, 17 Colo. 458, 30 P. 64 (1892); Lieber v. People, 33 Colo. 493, 81 P. 270 (1905); Olson v. People, 56 Colo. 199, 138 P. 21 (1913).

This section requires claimant to meet a three-part test for the establishment of a public road by prescription: (1) Members of the public must have used the road under a claim of right and in a manner adverse to the landowner's property interest; (2) the public must have used the road without interruption for the statutory period of 20 years; and (3) the landowner must have actual or implied knowledge of the public's use of the road and made no objection to such use. McIntyre v. Bd. of County Comm'rs, 86 P.3d 402 (Colo. 2004).

The legislative intent of this section is that the establishment of a public road by prescription is a narrow alternative to the other available means a public entity has for establishing a road. These include: (1) Express or implied dedication of the road to the public by the property owner; (2) purchase of a right-of-way by the public entity; or (3) condemnation and payment of just compensation for the property interest necessary for the road. The general assembly has encouraged landowners to allow public use of their land; in turn, it has guarded against landowners losing their property rights when allowing such use. McIntyre v. Bd. of County Comm'rs, 86 P.3d 402 (Colo. 2004).

To establish a public highway across private property a party must show that (1) the public used the road under claim of right and in a manner adverse to the landowner's property interests; (2) the public use was uninterrupted for 20 years; and (3) the landowner had actual or implied knowledge of the public's use and made no objection to such use. Bd. of County Comm'rs of

Morgan County v. Kobobel, 74 P.3d 401 (Colo. App. 2002).

Party claiming public road by adverse use under this section bears burden of proving by a preponderance of the evidence that (1) the public used the road under a claim of right; (2) the public used the road in a manner adverse to the landowner's property interest; (3) such use has been without interruption for the statutory period of 20 years; and (4) the landowner had actual or implied knowledge of the use and made no objection. Bockstiegel v. Bd. of County Comm'rs, 97 P.3d 324 (Colo. App. 2004).

Land must be used by public with owner's knowledge, adversely and continuously. A highway may exist by prescription, but to establish such a highway the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right -- not merely by the owner's permission -- and continuously and uninterruptedly for the period required to bar an action for the recovery of the possession of land or otherwise prescribed by statute. People ex rel. Mayer v. San Luis Valley Land Cattle Co., 90 Colo. 23, 5 P.2d 873 (1931).

In order to establish a public highway by means of adverse user, a road must have been adversely used in an uninterrupted fashion by the public under a claim of right for the applicable period of limitations with the actual or implied knowledge of the landowner across whose property the roadway runs. Bd. of County Comm'rs v. Ogburn, 38 Colo. App. 212, 554 P.2d 700 (1976); Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994).

The very essence of adverse possession is that the possession must be hostile, not only against the true owner, but against the world as well. Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963).

Adverse claim must be hostile at its inception, because, if the original entry is not openly hostile or adverse, it does not become so, and the statute does not begin to run as against a rightful owner until the adverse claimant disavows a holding by permission. Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963).

Use of a right-of-way which begins as permissive will continue as such only until the user gives the landowner notice or explicit disclaimer that the user is claiming an exclusive legal right and is possessing in an adverse or hostile manner. Resolutions adopted by the board of county commissioners provided adequate notice of adverse possession. Bd. of County Comm'rs v. W.H.I., Inc., 992 F.2d 1061 (10th Cir. 1993).

To obtain a common law prescriptive easement over a parcel of property, it is unnecessary to establish exclusive possession of that property. Alexander v. McClellan, 56 P.3d 102 (Colo. App. 2002).

User must be confined to a definite and specific line. The public cannot acquire a prescriptive right to pass over a tract of land generally; in order to create a highway by prescription, the user must be confined to a definite and specific line or way. This is especially true where the locus in quo consists of wild or unenclosed lands. However, it is not indispensable that there shall be no deviation from a direct line of travel or that all vehicles that traverse the road shall follow exactly the same route or traverse the road in exactly the same rut. Slight variations in the line of travel are not fatal; it is sufficient that the travel has been confined to substantially the same line. Starr v. People, 17 Colo. 458, 30 P. 64 (1892); Lieber v. People, 33 Colo. 493, 81 P. 270 (1905); Sprague v. Stead, 56 Colo. 538, 139 P. 544 (1914); Shively v. Bd. of County Comm'rs, 159 Colo. 353, 411 P.2d 782 (1966).

Passageways by prescription, whether public or private, are confined to the extent of actual adverse usage. Bd. of County Comm'rs v. Ogburn, 38 Colo. App. 212, 554 P.2d 700 (1976).

Owner must intend to set apart land for public use. Among criteria to establish a public highway by prescription are acts by the owner which evidence an intent to set apart the land for public use as a road, or such conduct on his part as would estop him from denying such intention. Boulder Medical Arts, Inc. v. Waldron, 31 Colo. App. 215, 500 P.2d 170 (1972).

Where landowners' predecessors in interest acquiesced in placement of fenceline set back from property line, strip of land between fence and property line became a public highway pursuant to subsection (1)(c) as a result of its adverse use by the public for over 20 uninterrupted years. Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994).

"Permissive use" requires more than failure to interrupt or object. Failure to interrupt or object to public use of an alleyway for over 20 years cannot, without more, be equated to permissive use, since statute requires that the use be both adverse and without objection. Boulder Medical Arts, Inc. v. Waldron, 31 Colo. App. 215, 500 P.2d 170 (1972).

Evidence sufficient to support trial court's finding that use of road by public was permissive rather than adverse. Enerwest, Inc. v. Dyco Petroleum Corp., 716 P.2d 1130 (Colo. 1986).

Presumption of adverse use after prescribed period of time. When testing the sufficiency of the evidence to support a finding of title by prescription the party asserting the same is aided by a presumption that the character of the use is adverse where such use is shown to have been made for a prescribed period of time. The rule is no different with respect to presumptive rights gained by the public under this section. Shively v. Bd. of County Comm'rs, 159 Colo. 353, 411 P.2d 782 (1966); Boulder Medical Arts, Inc. v. Waldron, 31 Colo. App. 215, 500 P.2d 170 (1972).

On the claim of right issue, the claimant must provide evidence that a reasonably diligent landowner would have had notice of the public's claim of right to the road. The evidence must include some overt act on the part of the public entity responsible for roads in the jurisdiction that it considers the road a public road. This notification commences the prescriptive period; without it, the prescriptive period never begins. Here, the uncontested facts of record on summary judgment failed to demonstrate county's claim of right for a public road on the subject property that commenced the running of the 20-year prescriptive period; thus, the trial court erred in ruling that the prescriptive period had run against these property owners. McIntyre v. Bd. of County Comm'rs, 86 P.3d 402 (Colo. 2004).

An overt act sufficient to provide notice of the public claim of right could include any number of actions. Plowing the road for snow, including a road on a public road system map, using the road for mail delivery or school buses, expending public funds for the maintenance or improvement of the road, posting signage indicating a public road, or installing drainage systems for the road could

each be an act putting the landowner on notice of the public's claim of right to the road. As with other requirements for establishing a public road by prescription, the public entity has the burden of proof by a preponderance of the evidence to demonstrate that it considered the way across the private property a public road. McIntyre v. Bd. of County Comm'rs, 86 P.3d 402 (Colo. 2004).

Presumption of adverse use inapplicable where land vacant, unenclosed, and unoccupied. Where the land involved is vacant, unenclosed, and unoccupied, the presumption that the use is adverse where the use is shown to have been made for a prescribed period of time is not applicable. Simon v. Pettit, 651 P.2d 418 (Colo. App. 1982), aff'd on other grounds, 687 P.2d 1299 (Colo. 1984).

To be adverse, the use should be part of a pattern of general public use and not sporadic in nature; however, in prescriptive easement cases, intermittent use on a long-term basis has satisfied requirement of adverse use. Here, there is evidence to support trial court's conclusion that relevant land was not vacant, unenclosed, and unoccupied, and so the trial court properly applied the presumption of adverse use. There was also evidence in the record supporting trial court's conclusion that the public used the subject road during the prescriptive period from the 1870s through the 1920s as part of a pattern of general public use and not merely sporadic or intermittent use. Accordingly, evidence supported trial court's findings and conclusions that public's use of subject road was adverse. Bockstiegel v. Bd. of County Comm'rs, 97 P.3d 324 (Colo. App. 2004).

The trial court must set forth in its decree a definite and certain description of the prescriptive way so that there can be no possible doubt as to its location and width. Bd. of County Comm'rs v. Ogburn, 38 Colo. App. 212, 554 P.2d 700 (1976).

Once a road has been declared to be "public", all uses that are permissible to the public under the laws of this state are permissible uses. Lovvorn v. Salisbury, 701 P.2d 142 (Colo. App. 1985).

Width of a highway acquired by adverse use is not limited to the actual beaten path but extends to the width reasonably necessary for the established public use. Goluba v. Griffith, 830 P.2d 1090 (Colo. App. 1991).

The width of a highway acquired by adverse use is a question of fact for the jury based on the character and extent of the use. Depending on the evidence, the width could be greater or less than the statutory width of a public highway. Goluba v. Griffith, 830 P.2d 1090 (Colo. App. 1991).

The width of a public highway acquired by prescription must be limited in the decree to that established by public use. Goluba v. Griffith, 830 P.2d 1090 (Colo. App. 1991).

Obstruction as prevention of acquisition of public highway by prescription. Where section line road between plaintiff's land and highway was obstructed by wire gates, obliging persons using the roadway to open and close them, such gates prevented the acquiring or establishing of a public highway by prescription. Martino v. Fleenor, 148 Colo. 136, 365 P.2d 247 (1961).

Where a gate which blocked a road, which was sought to be declared a public road by adverse use, was close to defendants' property and there are no intervening properties between it and plaintiffs' land asserting the prescriptive right, the existence of the gate was properly considered as evidence that the road was blocked and that the prescriptive time was interrupted. Lang v. Jones, 36 Colo. App. 29, 535 P.2d 242 (1975), aff'd, 191 Colo. 313, 552 P.2d 497 (1976).

The use of a road is not adverse where free travel along the road is obstructed by gates across the road, even though they are not locked. The use of a road under such conditions is permissive. Lang v. Jones, 191 Colo. 313, 552 P.2d 497 (1976).

The mere existence of gates across roadways during the prescriptive period was not conclusive that the public's use was of a permissive nature or that it lacked the necessary continuity. Bd. of County Comm'rs v. Ogburn, 38 Colo. App. 212, 554 P.2d 700 (1976); Bd. of County Comm'rs v. Flickinger, 687 P.2d 975 (Colo. 1984).

The board of county commissioners in relying upon adverse use of private lands for road purposes has the burden of proving such usage by clear and convincing testimony. Bd. of County Comm'rs v. Masden, 153 Colo. 247, 385 P.2d 601 (1963).

Where evidence discloses that a roadway across lands has been used by a plaintiff as a public roadway for more than 40 years, a finding and judgment under this section that a public road has been established is not erroneous. Brown v. Jolley, 153 Colo. 530, 387 P.2d 278 (1963).

Issuance of tax deeds does not negate adverse use prior to issuance. Where the adverse use of a public highway by a town continued uninterrupted for more than the required period of time to establish a prescriptive right therein, the issuance of tax deeds based upon tax sales prior to beginning of the public use does not wipe out prescriptive right of public based upon adverse use of land prior to issuance of tax deeds. Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963).

Consent to adverse use by nonowner does not negate such use. Where real property is sold for taxes and a certificate is issued to a county and thereafter a town establishes and maintains a public highway over part thereof and the county consents to such use, such consent does not negate adverse use since the holder of the tax certificate is not the "owner" of the property. Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963).

This section does not require that a landowner have actual or constructive notice in order for a public road through adverse use to be effective against a future owner of the underlying land. Because subject road became a public road by adverse use and not by purchase, dedication, grant, or reservation, it is axiomatic that there would be no record notice and none is required. Trial court properly concluded no public notice was required either for the establishment of the road or to provide notice to subsequent purchasers. Bockstiegel v. Bd. of County Comm'rs, 97 P.3d 324 (Colo. App. 2004).

Trial court properly concluded that subject road had not been abandoned. Even after the construction of the railroad and highway, the public continued to use the subject road. Bockstiegel v. Bd. of County Comm'rs, 97 P.3d 324 (Colo. App. 2004).