

NOTICE
Decision filed 12/04/20. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2020 IL App (5th) 190543-U

NO. 5-19-0543

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

MARY JEAN FRANCIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Crawford County.
)	
v.)	No. 18-MR-36
)	
PAMELA J. IRVIN,)	
)	
Defendant)	
)	
(Pamela J. Irvin, Defendant and Third-Party Plaintiff-))	Honorable
Appellant; Francis Lee Zink and Gisela Zink,))	Christopher L. Weber,
Third-Party Defendants-Appellees).))	Judge, presiding.

PRESIDING JUSTICE BOIE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

- ¶ 1 *Held:* Real estate lots in a subdivision that bordered a man-made lake had implied appurtenant easements for use of the lake for recreational purposes.
- ¶ 2 The plaintiff, Mary Jean Francis, has leasehold interests in three subdivision lots that border the shoreline of a man-made lake. She filed suit against the defendant/third-party plaintiff, Pamela J. Irvin, who is the owner of the lake, seeking a judgment declaring Francis’s right to the use and enjoyment of the man-made lake. Irvin had purchased the lake from the third-party defendants, Francis Lee Zink (Lee Zink) and Gisela Zink

(collectively referred to as the Zinks). The Zinks also owned some of the subdivision lots that bordered the lake. Irvin filed a third-party complaint against the Zinks seeking a declaratory judgment establishing that Irvin owned the lake free and clear of any rights to use the lake for recreational purposes by Francis, the Zinks, or any other owner or leaseholder of the subdivision lots that border the lake. The circuit court entered a judgment in favor of Francis and the Zinks, holding that the subdivision lots that bordered the man-made lake had implied appurtenant easements to use the lake for recreational purposes. Irvin now appeals the circuit court's judgment. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4

A. The Creation of Emerald Lake Estates

¶ 5 On September 24, 1991, the Zinks acquired the 40-acre tract of land in Crawford County, Illinois, that is the subject matter of this dispute. When they acquired the property, it was an unimproved tract of land. Three years after they acquired the 40-acre tract, the Zinks began efforts to develop the tract into a residential subdivision that included a man-made lake. In 1994, the Zinks hired a contractor to construct the lake on the property.

¶ 6 The Zinks and their attorney devised a plan for the subdivision that called for the transfer of interests in subdivision lots by utilizing 99-year leases. Under this ownership structure, the Zinks were required to transfer their interest in the subdivision lots to a corporation, and the corporation, in turn, would lease the lots to leaseholders. Under this scheme, the terms of the leases would state that they were subject to the corporation's bylaws.

¶ 7 In June 1995, the Zinks formed an Illinois corporation, Emerald Lake Estates Corporation (the Corporation). The purpose of the Corporation, as stated in its articles of incorporation, was to “purchase lots and lease back lots of Emerald Lake Estates, and to manage, maintain, and regulate improvements and facilities at such Emerald Lake Estates.” The Corporation recorded its articles of incorporation in Crawford County on June 29, 1995.

¶ 8 A surveyor certified a subdivision plat on August 14, 1995, that was entitled “Emerald Lake Estates Corp. Subdivision.” The plat included the lake, 18 residential plots, and a larger subdivision tract labeled “Tract A.” All the subdivision tracts were laid out on land south of the lake. The northern boundaries of lots 10 through 18 of the subdivision extended to the lake’s waterline but did not include any portion of the lakebed. The subdivision plat identified Lee Zink as the subdivision developer, and the plat was recorded in Crawford County on November 6, 1995. Also, on that same day, the directors of the Corporation (the Zinks and Kirk R. Wirey) recorded the Corporation’s bylaws in Crawford County.

¶ 9 The Corporation’s bylaws defined the “membership” of the corporation as “those persons who own leases for lots on the land owned by the Corporation.” The Corporation’s bylaws gave the board of directors the power to “lease lots of Emerald Lake Estates for a period of 99 years, or such lesser time as may be determined by the Board.” The directors also had the power to make improvements on “said land with the view toward making the same a more desirable location for those who lease and for those who use the said premises for recreational purposes.”

¶ 10 With respect to the lake, the Corporation's bylaws provided that the directors' duties included maintaining the lake and that the subdivision's leaseholders had "the *** right to fish, boat, or swim in Emerald Lake" and could use "electric trolling motors, not to exceed two horsepower." In addition, according to the bylaws, the leaseholders could invite guests to swim, boat, or fish on the lake when accompanied by a member of the leaseholder's family, and all guests were subject to the bylaws and to any regulations of the directors. The bylaws granted the leaseholders of lakeside lots the authority to build a boat dock that could extend a maximum of 20 feet onto the lake, provided that the dock did not interfere with reasonable lake activities and boat traffic. After forming the Corporation, the Zinks never transferred the property encompassing the lake to the Corporation.

¶ 11 B. Transactions Involving Lot 17

¶ 12 On August 16, 1995, the Zinks conveyed lot 17 of the subdivision to the Corporation, and the Corporation, in turn, leased lot 17 to Wirey for a term of 99 years. During Lee Zink's deposition, when he was asked about these transactions involving lot 17, he testified that he "didn't have a clue" how the transfers were accomplished, adding that he had hired lawyers to handle the transactions because he did not know how. The lease from the Corporation to Wirey stated that it was subject to the Corporation's bylaws and stated that Wirey expressly agreed that the Corporation's bylaws applied to the lease, without exception or reservation. Five days later, the lease was recorded in Crawford County.

¶ 13 Wirey then constructed a home on lot 17, but three years later, on August 15, 1998, Wirey conveyed his interest in lot 17 back to the Zinks. Wirey conveyed his interest in lot

17 by executing a “warranty deed,” which indicated that the conveyance was “subject to easements, rights of way, and restrictions of record or in place.”

¶ 14 The Zinks remained the leaseholders of lot 17 until 2004. In 2004, Francis and Michael Cook expressed interest in acquiring lot 17. After Francis and Michael Cook inspected the lot and reviewed the Corporation’s bylaws, they reached an agreement with the Zinks to acquire the leasehold interest in lot 17. On October 12, 2004, the Corporation executed a document entitled “Lease of Lake Site,” which conveyed to Francis the “remainder of the 99-year lease” of lot 17. Francis’s lease from the Corporation was recorded in Crawford County on October 12, 2004. The document states that the leasehold interest being conveyed by the Corporation was “now held” by the Zinks and that the conveyance of the leasehold in lot 17 to Francis was subject to the Corporation’s bylaws. The lease was signed by the Zinks as officers of the Corporation.

¶ 15 Francis and Michael Cook took immediate possession of lot 17, and they, along with their guests, began using the lake for recreational purposes, including fishing and boating activities. Michael Cook testified that he also periodically treated the lake for weed and algae control. He also testified at his deposition that, when Francis bought the leasehold interest in lot 17, Lee Zink told him that the lease included full rights to use the lake.

¶ 16 In a separate transaction, on April 8, 2011, the Zinks executed a document entitled “Easement Grant” that conveyed an easement to a neighboring landowner (B.A.T. Enterprises of Illinois) allowing the neighbor an easement to place and maintain sewer lines over portions of lots 16 and 17 of the subdivision. The warranty deed stated that the conveyance was by “Lee Zink and Gisela A. Zink, President and Secretary of Emerald

Lake Estates Corporation, Robinson, Illinois, Grantors, Fee Simple Owners” of lots 16 and 17.

¶ 17 C. Transactions Involving Lots 10 and 11

¶ 18 The record on appeal includes irregularities with respect to conveyances involving lots 10 and 11, which were unimproved lakeside lots. Some evidence in the record suggests that the Corporation leased lots 10 and 11 of the subdivision to Barbara and Stephen Cook on April 22, 2006, by executing a document entitled “Lease of Lake Site.” The record on appeal, however, does not include this lease agreement. The record on appeal does include a document entitled “Assignment of Lease of Lake Site,” which was dated August 24, 2009, in which Barbara Cook (surviving joint tenant of Stephen Cook) assigned her leasehold interest in lots 10 and 11 to Michael Cook. This Assignment of Lease of Lake Site stated that the April 22, 2006, lease from the Corporation was attached to the assignment, but the assignment included in the record on appeal does not have an April 22, 2006, lease attached to it.

¶ 19 Also, the record on appeal includes a warranty deed dated August 3, 2010, purporting to be a warranty deed from the Zinks conveying a leasehold interest in lots 10 and 11 of the subdivision to Barbara and Stephen Cook for the “remainder term of an unexpired 99 year leasehold estate created by Lease from Emerald Lake Estates Corporation.” This warranty deed purporting to convey a leasehold interest in lots 10 and 11 to Barbara and Stephen Cook is dated after Barbara Cook had already assigned this leasehold interest in lots 10 and 11 to Michael Cook. The August 24, 2009, assignment of the leasehold interests from Barbara Cook to Michael Cook and the August 3, 2010,

warranty deed conveying the leasehold interest from the Zinks to Barbara and Stephen Cook were both recorded in Crawford County on April 22, 2011.

¶ 20 On December 22, 2016, Michael Cook assigned his leasehold interest in lots 10 and 11 to Francis, and the assignment was recorded in Crawford County the same day. Michael Cook's assignment to Francis stated that Michael Cook was assigning all his "right title and interest to the Lease of Lake Site dated April 22, 2006[,] between [the Corporation]." Again, the assignment states that a copy of the April 22, 2006, lease was attached to Michael Cook's assignment to Francis, but the record on appeal does not show any lease attached to this assignment. In addition, the record on appeal does not show any transfer of ownership of lots 10 and 11 from the Zinks to the Corporation prior to the Corporation leasing these lots.

¶ 21 In their answers to interrogatories, the Zinks stated that they were unsure whether lots 10 and 11 were first conveyed to the Corporation before they were leased. However, according to their interrogatory answers, they understood that their attorney "was to prepare the documents necessary to lease Lots 10 and 11" from the Corporation and subject to a 99-year lease. During Lee Zink's deposition, when asked by Irvin's attorney whether it was true that only lot 17 was ever transferred to the corporation, Lee Zink replied that he did not know and added, "if that's the case then it's your office^[1] messed up, because Lots

¹Attorney James W. Lane was the attorney that prepared the August 3, 2010, "Warranty Deed" that transferred the leasehold estate in lots 10 and 11 from the Zinks to Stephen and Barbara Cook, and at the time, Lane was a partner with the attorney representing Irvin in this lawsuit. The record on appeal does not establish the extent of Lane's involvement with setting up the Corporation and its bylaws or establishing the 99-year lease scheme for the subdivision lots.

10 and 11 were supposed to have been.” Despite the irregularities with respect the transfer documents pertaining to lots 10 and 11, the parties stipulated that, at the time of the lawsuit, Francis owned a leasehold interest in lots 10 and 11.²

¶ 22

D. Sale of the Lake

¶ 23 In answers to interrogatories, the Zinks stated that they individually owned lots 1 through 9, 12 through 16, and 18 of the subdivision. During Lee Zink’s deposition, when he was asked if he owned any lots in the subdivision, he responded that he thought he owned everything except lots 10, 11, and 17. He also testified that he believed that the lots he still owned were never transferred to the Corporation. When asked whether the lake was ever transferred to the Corporation, Lee Zink answered, “I assumed it was all—I don’t know what—I had [the attorney] do this paperwork for me. I just assumed everything was the way it ought to be.”

¶ 24 Irvin’s husband, Michael Irvin, fished and boated on the lake with Lee Zink on at least three different occasions when Michael Irvin and Lee Zink discussed the possible sale

²Although not relevant to our analysis below, we note, parenthetically, that in August 2019, the Zinks attempted to clean up these irregularities with respect to the transfers of lots 10 and 11 by recording an affidavit of correction. In this affidavit, the Zinks testified that the parties involved in the April 22, 2006, transaction intended for the Corporation to provide a 99-year lease of lots 10 and 11 to Barbara and Stephen Cook, but the lease was never recorded, and lots 10 and 11 were never transferred to the Corporation prior to the lease. The Zinks testified in the affidavit that they attempted to correct this error by executing the August 3, 2010, conveyance of the leasehold interest to Barbara and Stephen Cook, and that this document was incorrectly labeled as a warranty deed. Therefore, in August 2019, along with the affidavit of correction, the Zinks also recorded a quitclaim deed of lot 10 and 11 to the Corporation, effective April 22, 2006, as well as a “Corrected Lease of Lake Site” in which the Corporation leased lots 10 and 11 to Barbara and Stephen Cook as of April 22, 2006. The newly recorded quitclaim deed and “Corrected Lease of Lake Site” were executed and recorded in August 2019.

of the lake. Prior to Irvin purchasing the lake,³ Michael Irvin knew of Francis's home located next to the lake, but, at his deposition, he did not recall whether he had heard about the subdivision prior to the purchase of the lake. On Michael Irvin and Lee Zink's third boat outing on the lake, they agreed on the sale price for the original 40-acre tract, including the lake, but excluding the lots in the subdivision.

¶ 25 On December 20, 2012, the Zinks executed a warranty deed that conveyed 31.74 acres of the original 40-acre tract to Irvin. The transaction included the sale of the lakebed and unimproved land north of the lake. The warranty deed included the legal description of the original 40-acre tract but excluded from the sale lots 1 through 18 and the larger tract "A" of the subdivision. The warranty deed referred to the excluded lots as "the Emerald Lake Estates Corporation Subdivision," referenced to the recorded plat of the subdivision, and stated that the transfer was "subject to all restrictions, covenants[,] and easements of record." The warranty deed referred to the county recorder's cabinet and slide where the plat is located. Although not noted on the warranty deed, the Corporation's bylaws were also recorded in the same cabinet and slide as the subdivision plat. After purchasing the property from the Zinks, the Irvins then began building a home on the unimproved land north of the lake.

¶ 26 E. Controversy Over Use of the Lake for Recreational Purposes

¶ 27 According to Michael Irvin, neither he nor his wife consulted with an attorney prior to their purchase of the lake. According to Michael Irvin, Lee Zink had an attorney prepare

³Michael Irvin testified in his deposition that he and his wife, Pamela Irvin, both purchased the lake, but they elected to put the lake in Pamela Irvin's name alone.

the warranty deed for the sale, and Irvin gave Lee Zink money for the sale in exchange for the warranty deed without obtaining any legal advice or researching the title history of the property. Michael Irvin testified that he, therefore, did not know about the Corporation's bylaws prior to Irvin purchasing the lake. Michael Irvin testified at his deposition that during his discussions with Lee Zink about buying the lake, Lee Zink represented to him that the lake was a "private lake" and never mentioned to him that other people would also have the right to use the lake. Michael Irvin also testified at his deposition that Lee Zink told him that, if he bought the lake, he would have full rights to the lake and could control who used the lake.

¶ 28 Michael Irvin admitted during his deposition that he was aware of Francis's house on the lake prior to purchasing the lake. Michael Irvin testified that he never asked Lee Zink whether Francis could or could not use the lake, but he added, "I figured they did since they lived there." Lee Zink testified in his deposition that, when discussing the possible purchase of the lake, Michael Irvin asked him whether Francis had lake rights. According to Lee Zink, he responded that she did and that nothing could be done about Francis's right to use the lake.

¶ 29 According to Michael Irvin, Lee Zink used the lake on several occasions after selling the lake to Irvin, and Lee Zink asked for his or Irvin's permission to use the lake after the sale. Lee Zink, however, testified in his deposition that he did not ask for permission to fish the lake after he sold the lake to Irvin. Lee Zink also testified during his deposition that after the sale to the lake to Irvin, he continued to care for the lake by putting chemicals in it. When asked by Irvin's attorney why he put chemicals in the lake if he no

longer owned it, he responded, “I had rights to it,” and referred to the Corporation’s bylaws as the source of his right to use the lake. When asked where in the bylaws was his rights to the lake established, Lee Zink responded, “I am an owner,” and he stated that he had “rights ever since day one.”

¶ 30 According to Michael Cook, after Irvin purchased the lake in 2012, he and Francis continued their uninterrupted use and enjoyment of the lake, which included boating and fishing and letting friends fish on the lake. Michael Cook testified at his deposition that neither he nor Francis sought permission from Irvin to continue to use the lake, and Irvin took no measures to prevent them and their guests from using the lake. However, things changed in 2018 when Francis listed lots 10 and 11 for sale through a local realtor. At that time, lots 10 and 11 remained unimproved lakeside lots, and the sales listing for the lots informed potential buyers that the sale included the use and enjoyment of the lake. In addition, the Zinks had also listed for sale the remaining unimproved lots of the subdivision that they still owned.

¶ 31 On June 14, 2018, Irvin’s attorney notified the realtor who had listed lots 10 and 11 for sale that any buyer of Francis’s property in the subdivision would have no right to use the lake. Through her attorney, Irvin maintained in the letter that the lake was never part of “Emerald Lake Estates” but was owned individually by the Zinks who never transferred the lake into the Emerald Lake Estates development. Therefore, according to Irvin, the Corporation’s bylaws were irrelevant to the use of the lake. In another letter, Irvin’s attorney also notified Francis’s attorney that any buyer of Francis’s properties in the subdivision would not have any rights to use the lake.

¶ 32 On August 16, 2018, Francis filed the present lawsuit seeking a declaratory judgment establishing her rights with respect to the use and enjoyment of the lake. Irvin then filed a third-party complaint against the Zinks seeking a declaratory judgment that Irvin’s interest in the lake was free and clear of any and all rights of others with respect to the use and enjoyment of the lake, including anyone owning an interest in the subdivision lots bordering the lake. Irvin filed a motion for summary judgment, and Francis and the Zinks filed a joint motion for summary judgment.

¶ 33 After considering arguments of counsel, the circuit court entered an order granting Francis and the Zinks’s joint motion for summary judgment and denying Irvin’s motion for summary judgment. The circuit court agreed with Irvin that, because the Zinks never conveyed their interest in the lake to the Corporation, the Corporation’s bylaws did not apply in defining the subdivision lot owners’ and leaseholders’ rights to use of the lake. However, the circuit court found that the lakeside lots of the subdivision enjoyed an implied appurtenant easement for the recreational use of the lake.

¶ 34 In finding an implied appurtenant easement, the circuit court noted that the Zinks originally owned the entire 40-acre tract and constructed the man-made lake specifically to benefit the land that surrounded the lake, in particular the subdivision’s lots. The circuit court found that the tracts that bordered the lake derived open and visible benefits from the recreational use of the lake, including swimming, fishing, and boating. The circuit court, therefore, concluded that the lots bordering the lake had an implied appurtenant easement to use the lake for recreational purposes and that the use was “non-exclusive and

concurrent” with Irvin’s right to use of lake. Irvin now appeals from the circuit court’s summary judgment in favor of Francis and the Zinks.

¶ 35

II. ANALYSIS

¶ 36 A summary judgment is appropriate when the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2018); *Morris v. Union Pacific R.R. Co.*, 2015 IL App (5th) 140622, ¶ 22. We review a circuit court’s summary judgment under a *de novo* standard of review. *Bituminous Casualty Corp. v. Iles*, 2013 IL App (5th) 120485, ¶ 19. Under the *de novo* standard of review, we perform the same analysis the circuit court would perform and give no deference to the circuit court’s conclusions or specific rationale. *Id.*

¶ 37 The basic issue before us in this appeal is whether the circuit court ruled correctly in finding that the owners or leaseholders of the subdivision lots that border the man-made lake have easement rights to use the lake for recreational purposes.⁴ As outlined above, the circuit court concluded that the Corporation’s bylaws, purporting to grant subdivision leaseholders the right to use the lake, could not apply to the lake because the Zinks never transferred the lake to the Corporation. The circuit court, however, also noted that this conclusion did not end its analysis because there were other legal concepts that could establish rights to use the man-made lake, including easements by implication. The circuit

⁴The Corporation’s bylaws originally provided that leaseholders of all the lots in the subdivision, and their guests, had the right to use the lake for recreational purposes. However, on May 4, 2014, the Corporation’s bylaws were amended to provide that only the leaseholders of the lakeside lots, and their guests, had the right to use the lake for recreational purposes.

court then granted summary judgment in favor of Francis and the Zinks based on the law of implied easements, finding the parties' dispute was controlled by *Roketa v. Hoyer*, 327 Ill. App. 3d 374 (2002). After a careful review of the record, based on the unique facts of this case, we believe that the circuit court properly applied the law relating to implied easements, including the holding in *Roketa*, and properly granted summary judgment in favor of Francis and the Zinks.

¶ 38 Illinois courts recognize two types of implied easements: the easement by necessity and the easement implied from a preexisting use. *Granite Properties Ltd. Partnership v. Manns*, 117 Ill. 2d 425, 435 (1987). We agree with the circuit court that the facts of the present case establish an implied easement from preexisting use. The supreme court has held that this type of easement arises as follows:

“when an owner of an entire tract of land or of two or more adjoining parcels, after employing a part thereof so that one part of the tract or one parcel derives from another a benefit or advantage of an apparent, continuous, and permanent nature, conveys or transfers part of the property without mention being made of these incidental uses. In the absence of an expressed agreement to the contrary, the conveyance or transfer imparts a grant of property with all the benefits and burdens which existed at the time of the conveyance of the transfer, even though such grant is not reserved or specified in the deed.” *Id.* at 436.

¶ 39 Generally, three conditions must be present in order for a court to find an easement implied from a preexisting use: (1) common ownership of the claimed dominant and servient parcels and a subsequent conveyance separating that ownership; (2) before the

conveyance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent, obvious, continuous, and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed by the grantor. *Id.* at 437.

¶ 40 Easements by implication arise as an inference of the intention of the parties to a conveyance of land. *Id.* This inference is drawn from the circumstances of the conveyance alone and represents an attempt to ascribe an intention to parties who failed to express their intentions at the time of conveyance. *Id.*; *Katsoyannis v. Findlay*, 2016 IL App (1st) 150036, ¶ 28. Proof of the prior use is evidence that the parties likely intended an easement, on the presumption that the grantor and the grantee would have intended to continue an important or necessary use of the land known to them that was apparently continuous and permanent in its nature. *Manns*, 117 Ill. 2d at 438. The party claiming an easement bears the burden of proof to demonstrate facts necessary to create an implied easement, and such proof must be made by clear and convincing evidence. *Katsoyannis*, 2016 IL App (1st) 150036, ¶ 28.

¶ 41 Here, the evidence presented to the circuit court by way of affidavits, deposition testimony, and documents attached to the parties' respective motions for summary judgment established all the elements necessary for the circuit court to find, by clear and convincing evidence, the existence of an implied easement based on preexisting use. With respect to the first element, the Zinks initially owned the entire 40-acre tract. This fact clearly establishes the first element of common ownership, and this conclusion is not disputed. With respect to the second element, we believe that the facts of this case clearly

established that the Zinks constructed the lake on the property for the specific purpose of benefiting the subdivision lots along the lake's shoreline. This intent is plainly and openly established when the subdivision plat is considered in conjunction with the Corporation's bylaws, both of which were recorded at the same time in the Crawford County recorder's office. The Zinks expressly defined the recreational use of the lake in the Corporation's bylaws before they severed their interests in any of lots in the subdivision.

¶ 42 By recording the Corporation's bylaws, the Zinks publicly expressed their intent that owners and leaseholders of lakeside lots in the subdivision were to have use of the lake for recreational purposes. The Zinks, as the common owners, established this preexisting right to use the lake in a way that was plainly apparent, obvious, continuous, and intended it to be permanent, beginning when they recorded the plat and the Corporation's bylaws in 1995. Accordingly, we believe these facts clearly established the second element of an easement implied from preexisting use. Finally, with respect to the third element, we believe that the use of the lake is necessary and beneficial to the enjoyment of the lakeside lots in the subdivision. See *Roketa*, 327 Ill. App. 3d at 378. As noted above, the circuit concluded that *Roketa* was controlling authority in this case. We agree with the circuit court's application of the *Roketa* court's analysis to the facts of the present case.

¶ 43 Similar to the present case, *Roketa* involved a dispute over the right to use a man-made lake for recreational purposes. *Id.* at 375. The defendant in *Roketa* purchased a tract of land bordering the man-made lake. *Id.* The conveyance documents, however, did not include any portion of the lake and did not mention any "incidental right to use the lake." *Id.* at 378. The original owner of the lake and its surrounding land subsequently conveyed

the lake to a bank that, in turn, conveyed the property to the plaintiffs. *Id.* at 375. The plaintiffs then sought to prevent the defendant from using the lake for recreational purposes. *Id.* The *Roketa* court held that, even though the defendant’s conveyance documents did not mention the incidental right to use the lake, the defendant nonetheless had an appurtenant easement right to use the lake. *Id.* at 378.

¶ 44 In its reasoning, the *Roketa* court relied on the principle that:

“when the owner of a tract of land divides it into different parts, in such a manner that one part derives from another an advantage of a permanent, open, and physical character, and afterwards sells a part of the property, the purchaser takes the part sold with all the benefits and burdens that appear at the time of the sale.” *Id.* at 377 (citing *Gulick v. Hamilton*, 287 Ill. 367, 373 (1919)).

In applying this principle, the *Roketa* court explained that, in the case before it, one person originally owned the man-made lake and its surrounding real estate. *Id.* This person then divided the land surrounding the lake into separate tracts and sold the lakeside tract to the defendant. *Id.* The court further noted, importantly, that it was evident that the lake was created to benefit the land that surrounded it and that the original owner divided the surrounding land into tracts with the intent that the tracts benefit from recreational use of the lake. *Id.* In addition, this recreational use of the lake was established, open, and visible to anyone dealing with the properties. *Id.*

¶ 45 The *Roketa* court held that the recreational use of the lake was an essential benefit to the enjoyment of the tracts that surrounded the lake and that a purchase of a lakeside tract under those circumstances included the use of the lake as much as the land itself. *Id.*

The court emphasized that it is not required that the easement claimed be necessary for the enjoyment of the estate granted, but it is sufficient if it is highly convenient and beneficial to the estate granted. *Id.*

¶ 46 The *Roketa* court cited *Koubenec v. Moore*, 399 Ill. 620, 625 (1948), where our supreme court expressly stated that it had “repeatedly held that where the owner of an entire estate has arranged and adapted it so that one tenement or one portion of the estate derives a benefit or advantage from the other, of a permanent, open and visible character, and then sells the same, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it.” *Roketa*, 327 Ill. App. 3d at 378 (citing *Koubenec*). The *Koubenec* court also emphasized that “in such cases it is not necessary that the easement claimed by the grantee be really necessary for the enjoyment of the estate granted. It is merely sufficient if it is highly convenient and beneficial to the estate granted.” *Koubenec*, 399 Ill. at 625. The *Roketa* court, therefore, concluded that when the plaintiffs purchased the lake, it “was subject to an easement for the benefit of the [defendant’s] tract and that beneficial right to the use of the lake for recreational purposes passed with the conveyance of that tract to [the] defendant.” *Roketa*, 327 Ill. App. 3d at 378.

¶ 47 In applying these principles to the facts of the present case, we again note that the Zinks owned the entire 40-acre tract before the tract included any man-made lake. The Zinks built the lake on the property and, as we have explained above, their express intent was for the lake to benefit the land which surrounded it, and they divided the land immediately south of the lake into tracts with the specific and express intent that the tracts

benefit from recreational use of the lake. This intent is plainly and openly set forth in the Corporation's bylaws. The Zinks unquestionably intended for the man-made lake that they constructed to enhance the value and enjoyment of the subdivision lots bordering the lake.

¶ 48 In addition, similar to the tract at issue in *Roketa*, the subdivision lots in the present case derived open and visible benefits from the lake, providing lot owners and leaseholders recreational opportunities including fishing and boating for many years prior to Irvin purchasing the lake. Francis and Michael Cook utilized the lake for recreational purposes beginning in 2004, when Francis first acquired a leasehold interest in lot 17 and continuing unabated until this controversy arose nearly 14 years later.

¶ 49 The use of the lake by leaseholders of lakeside lots (Francis and the Cooks) and owners of the lakeside lots (the Zinks) was established and visible to anyone dealing with the property and, as the *Roketa* court explained, conferred a considerable and essential benefit to the use and enjoyment of the subdivision's lakeside lots. See *Roketa*, 327 Ill. App. 3d at 378. The fact that the Zinks never conveyed the lake to the Corporation at any time before Irvin purchased the lake does not defeat the implied appurtenant easements for the reasons we have explained above. See also *Stoney Creek Resort, Inc. v. Newman*, 397 S.E.2d 878, 881 (Va. 1990) (implied easement to use a man-made lake was established where the man-made lake was the focal point of a subdivision and the subdivision developer "intended that lot owners would have permanent access to the lake if they paid their fair share for maintenance of the lake").

¶ 50 Irvin argues that *Roketa* is distinguishable because that case involved deeds that included express reservations of lake use. See *Roketa*, 327 Ill. App. 3d at 376-77. We

disagree. In *Roketa*, the applicable conveyance documents with respect to the defendant's lakeside tract did not include a reservation of the defendant's right to use the lake. Therefore, the *Roketa* court's holding was not based on an express reservation of the right in the defendant's chain of title. *Id.* at 378. Instead, like the present case, the easement rights were established by the open and obvious benefit that was established by the original owner of the property and in which the property derived benefits from being adjacent to the lake at the time of the sale. *Id.*

¶ 51 Irvin also argues that the record in the present case does not establish preexisting recreational use of the lake prior to the Zinks's conveyance of lot 17 to the Corporation or prior to their conveyance of leasehold interests in lots 10 and 11. We disagree with Irvin's analysis with respect to the "preexisting use" element under the unique facts of the present case. As we have explained, implied easements are recognized as an attempt to give effect to the intent of the parties at the time of the conveyance. *Manns*, 117 Ill. 2d at 437. Therefore, the determination of intent is based on the circumstances as they existed at the time of severance of title and represents an attempt to ascribe an intention to parties who failed to express their intentions at the time of conveyance. *Id.* Here, the Zinks created the man-made lake for the specific purpose of benefiting lakeside lots, and the right of lakeside lot owners to use the lake was openly established not only before the Zinks conveyed lot 17 to the Corporation, but also before the Zinks severed their interest in lots 10 and 11 and before the Zinks conveyed the lake to Irvin. We believe these facts sufficiently establish the required preexisting use.

¶ 52 In her brief, Irvin cites the law concerning riparian rights and argues that Francis and the Zinks do not have riparian rights to the lake because they do not own any of the lakebed. However, as our supreme court stated in *Alderson v. Fatlan*, 231 Ill. 2d 311 (2008), “rights to artificial bodies of water may arise by means other than riparian rights doctrine, such as grants, easements by prescription, or easements by implication.” *Id.* at 324 (citing *Roketa*). Accordingly, because the facts of this case establish an easement by implication, we need not analyze Irvin’s argument with respect to riparian rights.

¶ 53 “An implied easement arises when courts must infer the intention of the parties to a conveyance of land from the circumstances surrounding the conveyance because the parties did not put any such intention into words at the time of the conveyance.” *Dudley v. Neteler*, 392 Ill. App. 3d 140, 144 (2009). “The intention of the parties to the conveyance that severs title is the crucial consideration.” *Id.* As Lee Zink explained in his deposition, he relied on attorneys to properly convey the lots of the subdivision so that conveyances would be subject to 99-year leases from the Corporation as set out in the Corporation’s bylaws. The right to recreational use of the lake by subdivision lot leaseholders and owners was established by the Zinks before any of the transfers of lots or the lake, and importantly, these lake-use rights were open and visible to anyone dealing with the property by reviewing the Corporation’s bylaws that were recorded along with the subdivision plat. In addition, recreational use of the lake by lot owners and leaseholders was continuous and permanent when the Zinks severed their ownership of the lots from the lake. Therefore, under the unique facts of this case, finding that the subdivision lots have easements by implication properly gives effect to the Zinks’s intent in constructing the lake and

subdividing the 40-acre tract, despite the mistakes that were made in preparing the conveyance documents that failed to give effect to the parties' intentions, mistakes apparently made by the Zinks's real estate counsel. Accordingly, the circuit court ruled correctly in granting a summary judgment in favor of Francis and the Zinks and in denying Irvin's request for summary judgment in her favor.

¶ 54

III. CONCLUSION

¶ 55 For the foregoing reasons, we affirm the circuit court's summary judgment.

¶ 56 Affirmed.