Gonzales Law Group, APC
800 Wilshire Blvd., Suite 860 | Los Angeles, CA 90071
Telephone: 213.279.6965 | Fax: 213.402.2638
www.gonzaleslawgroup.com

Michael Gonzales
E-mail: mgonzales@gonzaleslawgroup.com

February 4, 2020

VIA EMAIL
Public Works and Gang Reduction Committee
Los Angeles City Council
Room 395, City Hall
200 North Spring Street
Los Angeles, CA 90012-4801

RE: Council File 15-0100/Tarzana 5, LLC Street Vacation Application

Dear Chairman Blumenfield:

This firm represents Tarzana 5 Properties, LLC ("Tarzana"), the owners of 6130 to 6230 Reseda Boulevard, in the neighborhood of Tarzana, Los Angeles (the "Tarzana Property"). On January 28, 2015, the Los Angeles City Council ("City Council") adopted a motion to initiate street vacation proceedings pursuant to Council File 15-0100. On October 17, 2018, City Council adopted a motion to extend the proceedings prior to their expiration. Tarzana has been unable to move forward with the vacation process for over 4 years because the city of Los Angeles's (the "City") Bureau of Engineering ("BOE") as a matter of policy, requires neighbor consent to the vacation (the "BOE Consent Policy").[1]

Tarzana acknowledges that the BOE Consent Policy is reasonable in the majority of street vacation cases, as neighboring property owners usually have a cognizable property interest in the street, including an implied easement for the purposes of ingress/egress to access the public street system. However, for the reasons set forth below, and as supported by the documents and legal authority attached hereto, the neighboring property owners in this case have no property interest whatsoever in the public street (i.e., the Alley – as defined below), which is the subject of the pending vacation request. As a consequence, and for the reasons discussed in detail below, it is clear that the BOE Consent Policy is not applicable to this vacation application. As a consequence, the City should not require Tarzana to obtain the consent of all of neighboring landowners to the Alley as a precondition to the City's processing of the vacation application.

[1] See BOE Land Development Manual, Part D (April 2007) – D700 Vacation of Public Rights-of-Way and Certain Other Rights, at paragraph D 754.3 - Consents (p. 23).

I. FACTUAL BACKGROUND

A. Formation and Ownership of the Relevant Properties

1. Creation of the Canby Subdivision in 1950

The Tarzana Property includes an alley that runs easterly of Reseda Boulevard between Erwin Street and Bessemer Street (the "Alley"). Immediately adjacent to the Alley's eastern boundary are a series of single-family lots that front onto and are accessed solely from Canby Avenue (the "Canby Parcels"). The Canby Parcels are improved with single-family homes. The Canby Parcels were created by Tract No.16690, recorded July 6, 1950 (the "Canby Subdivision Map"). Importantly, neither the Tarzana Property as a whole, nor the Alley specifically, were part of the Canby Subdivision Map. The Canby Subdivision Map is attached as Exhibit "A".

The Canby Subdivision Map clearly shows that the Alley: 1) did not exist at the time the Canby Subdivision Map was recorded; and 2) was not created by the Canby Subdivision Map. As shown on the Canby Subdivision Map, the Tarzana Property's easternmost boundary at that time immediately abutted the Canby Parcels' westernmost boundary. The Canby Subdivision Map reflects the setting of corner markers consisting of a 2-inch pipe at the northwest corner of lot 16 and a second 2-inch pipe at the southwest corner of lot 32. These corner markers reflect the western most extent of the Canby Parcels.

2. Creation of the Original Tarzana Subdivision in 1962

The Tarzana Property was originally subdivided by Tract Map No. 21537, recorded July 26, 1962, (the "Original Tarzana Map"), into 13 single-family parcels that fronted onto Reseda Boulevard. The Original Tarzana Map is attached hereto as Exhibit "B".

The Original Tarzana Map also dedicated 25 feet to the Reseda Boulevard right-of-way and, as reflected on the Owner's Certification on the face of the Original Tarzana Map, surrendered vehicular access from Reseda Boulevard to the Tarzana Property. An enlarged version of the Owner's Certificate is attached as Exhibit "C".

The landlocked Tarzana Property needed access to the public street system. Accordingly, the Original Tarzana Map created the Alley primarily to facilitate access to the 13 single-family parcels created by the Original Tarzana Map. As also shown on the Original Tarzana Map, the Canby Parcels were not a part of the Original Tarzana Map. In fact, the Original Tarzana Map reflects the aforementioned corner markers delineating the extent of the Canby Parcels. These two corner markers are not within the Alley. At the time of the Alley's creation, the Canby Parcels had full vehicular access to their properties via Canby Avenue, a designated local street.

3. Creation of the Current Tarzana Subdivision in 1963

Currently, the Tarzana Property is improved with 5 multi-family residential structures (the "Existing Structures"). The original 13 single-family parcels were merged into five lots by Tract Map No. 22807, recorded on January 4, 1963 (the "1963 Tarzana Map"), to facilitate construction of the Existing Structures. A copy of the 1963 Tarzana Map is attached as Exhibit "D". Like the Original Tarzana Map, the 1963 Tarzana Map surrenders vehicular access to Reseda Boulevard from the Tarzana Property. The 1963 Tarzana Map also shows the Alley's extent and the aforementioned corner markers delineating the Canby Parcels' extent. At the time of the Alley's creation, the Canby Parcels had access to their properties from Canby Avenue, a designated local street. Again, the Canby Parcels were not a part of and were not affected by the 1963 Tarzana Map.

4. Tarzana Constitutes the Fee Simple Owner of the Alley

As clearly shown in the above-referenced maps (Exhibits A – D), from the time of its original creation in 1962 the Alley has been part of the Tarzana Property only. First, the Canby Subdivision Map (Exhibit A) undisputedly confirms that the Alley was not created by nor was it included within the Canby Subdivision Map. Second, the Original Tarzana Map (Exhibit B) and the 1963 Tarzana Map (Exhibit D) similarly confirm that the Alley was primarily created to provide access to the residential structures located on the Tarzana Property, as the right for vehicular access to Reseda Blvd. was surrendered. Therefore, the owners of the Canby Parcel have no reversionary property interest whatsoever in any portion of the Alley.

Tarzana constitutes the sole owner of all five lots shown on the 1963 Tarzana Map. These five lots incorporate the entirety of the Alley. Therefore, the underlying fee interest for the Alley belongs to Tarzana. This fact is further confirmed by a Preliminary Title Report by First American Title Insurance Co., dated January 24, 2020 (the "Title Report"), which is attached as Exhibit "E". The Title Report sets forth the exact legal description for the Alley, and enumerates any and all known exceptions and exclusions that serve to limit Tarzana's fee ownership of the underlying real property. The Title Report confirms Tarzana's fee simple interest in the Alley, as it is unencumbered by any easement or other cognizable property interest of any other party (including, but not limited to, a property interest favoring or benefitting any of the Canby Parcel owners).

B. The Alley Does Not Serve a Present or Prospective Public Purpose.

The Alley no longer serves a present and prospective public purpose. The Alley has been declared a nuisance and closed by the Nuisance Alley Conversion Project. The closure was adopted on May 1, 2000 by the Board of Public Works as demonstrated in the Communication (defined below). Since that time the Alley – for almost 20 consecutive years - has been gated and allows no access to pedestrians or vehicles.

These rules are corollaries of the general rule that when a subdivider owns land on both sides of a dedicated easement, a vacation of the public street terminates the public easement and the surface property rights of use revert to the owner of the underlying fee. Thus, in a typical street vacation case, the abutting real property owners obtain a reversion of one-half of the vacated street. Miller and Starr, §15:81.

However, a clearly identified exception exists in situations where the fee is not in the chain of title of the abutting owners. The general rule "does not apply where the easement is along the border of the property and the subdivider does not own property on one side of the easement. When an owner grants an easement in a road or street to the public from the *margin* of the owner's land, the land reverts to the owner's successors on an abandonment of the street or road, and the owners of the other side of the alley have no interest in the land." Miller and Starr, §15:81 (Emphasis in the original); See Besneatte v. Gourdin, (1993) 16 Cal. App. 4th 1277 (Original subdivider created an alley from the margin of wholly owned tract, with a dedication to the County for public use. Fee title was retained by subdivider, and abutting owners of a separate subdivision were held to have no interest in the subject property as there was no evidence of common ownership or evidence that the grantor intended to reserve or convey any ownership other than the public easement.) (Attached as Exhibit "J").

Based on the history of our client's real property, as well as the history of the abutting subdivision, the above-articulated exception to the general rule applies here. As explained above, the Alley did not exist at the time that the Canby subdivision was created, and the Canby Parcel owners do not rely (and have never relied) on access to the public street system via the Alley. Rather, the Alley was created out of land at the margin of a completely different subdivision (owned by our client's predecessor). There is no evidence whatsoever of common ownership or that the grantor intended to reserve or convey any ownership other than the public easement. It is clear that the Canby Parcel owners have no reversionary fee interest in the Alley. As a result, the exception applies here, namely that upon a vacation of the Alley by the City all remaining property rights of the burdened real property revert to the original owner's successors, given that the owners on the other side of the Alley have no cognizable interest in that land.

B. Conditions Not Present to Establish Existence of an Implied Easement

Further, it is apparent that the well-established elements necessary to establish that an implied easement has been formed are not met here. An implied easement may arise only under certain specified circumstances, where the law can imply an intent on the part of the parties to create or transfer an easement when there is no written instrument indicating such an intent. An easement by implication will not be found to exist absent clear evidence that it was intended by the parties. An easement will be implied at the time of the conveyance of the property when: (1) the owner of a property conveys or transfers a portion of that property to another (i.e., sometimes referred to as a separation of title), (2) the owner's existing use of the property was of a nature that the parties must have intended or believed that the use would have continued (i.e., before the

separation of title, the use which gives rise to the easement must have so long continued and be so obvious as to show the parties' intention to be permanent), and (3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement. Mikels v. Rager, (1991) 232 Cal. App. 3d. 334, 357 (Attached as Exhibit "K"); Tusher v. Gabrielsen, (1998) 68 Cal. App. 4th 131, 141-2 (Attached as Exhibit "L").

While the first element necessary to find for formation of an implied easement is present, the second and third element are absent. Specifically, there is no evidence to support a potential claim by the Canby Parcel owners that their predecessors' use of their properties prior to the formation of the public easement was to an extent that the parties must have intended or believed that the use would have to continue. To the contrary, the evidence establishes that Canby Parcel owners never used the Alley for access, as all of their lots front onto Canby Ave. and they have no driveways or other features that even allow access to the Alley. Similarly, a private access easement to the Alley is not reasonably necessary to the use and benefit of the Canby Parcel owners, as they each have full and continuous access via Canby Ave.

C. Limitations on a Private Abutter's Easement Rights to Public Streets

Additionally, established limitations exist on a private abutter's easement rights to a public street. As a general rule, an abutting owner or occupant is not entitled access to his or her land at every point between it and the highway but only to reasonable and convenient access to the property and the improvements on it. Delta Rent-a-car Systems v. City of Beverly Hills, (1969) 1 Cal. App. 3d 781, 786 (Attached as Exhibit "M"). See generally, Miller and Starr, §15:69 (Attached as Exhibit "N"). Additionally, there is authority for the proposition that a private abutter is only entitled to one such access. Highland Development Co. v. City of Los Angeles, (1985) 170 Cal. App. 3d 169, 185 (disapproved on other grounds by Morehart v. County of Santa Barbara, (1994) Cal. 4th 725) (Attached as Exhibit "O").

III. Summary and Conclusion

As demonstrated above, the map history and the Title Report confirm that Tarzana constitutes the sole fee owner of the Tarzana Property, including the Alley. As a consequence, Tarzana constitutes the sole owner of the reversionary interest in the subdivision. Similarly, the owners of the Canby Parcels do not hold any reversionary fee property interest in the Alley, nor do they possess a private easement for the purpose of access to the Alley.

Further, the City's own communications confirm that the Alley is not necessary for a present or prospective purpose, and that the Canby Parcel owners continue to have convenient access to the Canby Parcels from Canby Avenue.

Lastly, pertinent legal authority makes clear that when the fee to the public street is not in the chain of title of the abutting owners, the land reverts to the fee owner's successors on an

abandonment of the street or road, and the owners of the other side of the street have no interest in the land. The present case is exactly on point with this authority.

Accordingly, it is clear that the City is not justified in applying the BOE Consent Policy to this matter. While the BOE Consent Policy may be appropriate in the majority of street vacation cases, as neighboring property owners usually have a cognizable property interest in the street, that is simply not the case here. Only Tarzana's consent is legally required, as it constitutes the sole fee owner of the Alley. Notwithstanding the BOE Consent Policy, requiring the consent of non-owners or even owners in an adjacent subdivision is not supportable in light of the operative facts and applicable law.

My client and I appreciate the City's careful evaluation of this information, in light of the entire record of the pending vacation application. We look forward to the City promptly resuming its processing of the application and anticipates its favorable resolution in the near future. In the meantime, please do not hesitate to contact me with any questions or comments.

Very truly yours,

Michael Gonzales
Gonzales Law Group, APC

Exhibits
CC: David Ryu, Vice-Chairman
Councilmember Joe Buscaino
Councilmember Nury Martinez
Councilmember Mitch O'Farrell
Michael Espinosa, Legislative Assistant
Elizabeth Ene, Senior Planning Deputy
Edmond Yew, PE Land Development & GIS Division

Exhibit A

TRACT Nº 16690

IN THE CITY OF LOS ANGELES

BEING A SUBDIVISION OF PORTIONS OF LOTS 148 TO 153 INCLUSIVE OF TRACT Nº 1875 AS PER MAP RECORDED IN BOOK 19, PAGE 38, OF MAPS, RECORDS OF LOS ANGELES COUNTY.

SCALE : 1"=100'

RECORDED
July 6-1950
4:2 4pm
IN BOOK 380
AT PAGE 45
M. Dillon
5.00

I, Harold M. Tegart, hereby certify that I am a Registered Civil Engineer of the State of California, and that this map, consisting of three sheets, correctly represents a survey made under my supervision in April, 1950, and that the survey is true and complete as shown, that the monuments shown hereon actually exist or will be in place not later than October 1, 1950, that their position and character are correctly shown and that said monuments are sufficient to enable the survey to be retraced.

Harold M. Tegart
R.C.E.

We hereby certify that we are the owners of or interested in the lands included within the subdivision shown on this map within the colored border lines and we consent to the preparation and recordation of said map and subdivision and we hereby dedicate to the public use all of the Avenues, Streets, Boulevard, Walks and Ways as shown on said map within said subdivision and hereby dedicate to the City of Los Angeles the easements for public utility and sanitary sewer purposes over those strips of land so designated on said map within said subdivision.

RESEDA PARK, a co-partnership
COMPOSED OF: WARREN CONSTRUCTION CO., INC., & RESEDA HOMES, INC.

WARREN CONSTRUCTION CO., INC., a partner

By Dave Appel President By Albert L. Appel Secretary

RESEDA HOMES, INC., a partner

By George Alexander President By Robert Alexander Secretary

TITLE INSURANCE AND TRUST COMPANY, a corporation, (Easement Holder) by deed recorded in Book 6950, Page 211 of Deeds and in Book 6547, Page 113 of Deeds.

By C. W. Gummerson Vice President

By H. L. Sheldon Asst. Secretary

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a corporation, (Trustee) under deed of trust recorded in Book 31739, Page 193 of Official Records.

By L. G. Brittingham Vice President

By O. E. Horstmann Asst. Secretary

State of California } ss.
County of Los Angeles }

On this 21st day of June 1950, before me Matthias Yanoff a Notary Public in and for said County and State, personally appeared Dave Appel, known to me to be the President and Albert L. Appel, known to me to be the Secretary of WARREN CONSTRUCTION CO., INC., the corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same as co-partner of RESEDA PARK, a co-partnership.

Matthias Yanoff
Notary Public
My Commission Expires Feb. 22, 1953

State of California } ss.
County of Los Angeles }

On this 21st day of June 1950, before me Matthias Yanoff a Notary Public in and for said County and State, personally appeared George Alexander, known to me to be the President and Robert Alexander, known to me to be the Secretary of RESEDA HOMES, INC., the corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same as co-partner of RESEDA PARK, a co-partnership.

Matthias Yanoff
Notary Public
My Commission Expires Feb. 22, 1950

State of California } ss.
County of Los Angeles }

On this 21st day of June 1950, before me J. J. Woodruff a Notary Public in and for said County and State, personally appeared C. W. Gummerson, known to me to be the Vice President and H. L. Sheldon, known to me to be the Asst. Secretary of the TITLE INSURANCE AND TRUST COMPANY, the corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

J. J. Woodruff
Notary Public
My Commission Expires Sept. 15, 1950.

State of California } ss.
County of Los Angeles }

On this 21st day of June 1950, before me Mary E. Dolan a Notary Public in and for said County and State, personally appeared L. G. Brittingham, known to me to be the Vice President and O. E. Horstmann, known to me to be the Asst. Secretary of the CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, the corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same as Trustee.

Mary E. Dolan
Notary Public
My Commission Expires May 26, 1952

June 30, 50 Lloyd Aldrich July 5 50 WALTER C PETERSON
W. M. Morris
Deputy

TITLE INSURANCE AND TRUST COMPANY
3242956 June 29, 1950

Reseda Park, a co-partnership.
Title Insurance and Trust Company
Citizens National Trust & Savings Bank of Los Angeles

June 30, 50 Lloyd Aldrich

June 28 50 C. K. STEELE

I hereby certify that a good and sufficient bond in the sum of $ 2100.00 has been approved by the Board of Supervisors of the County of Los Angeles, has been filed with said Board as security for the payment of taxes and special assessments collected as taxes on land shown on map of Tract TRACT Nº 16690 as required by law.
Harold J. Ostly, County Clerk and Ex-officio Clerk of the Board of Supervisors of the County of Los Angeles, State of California.
By M. Rotmann Deputy

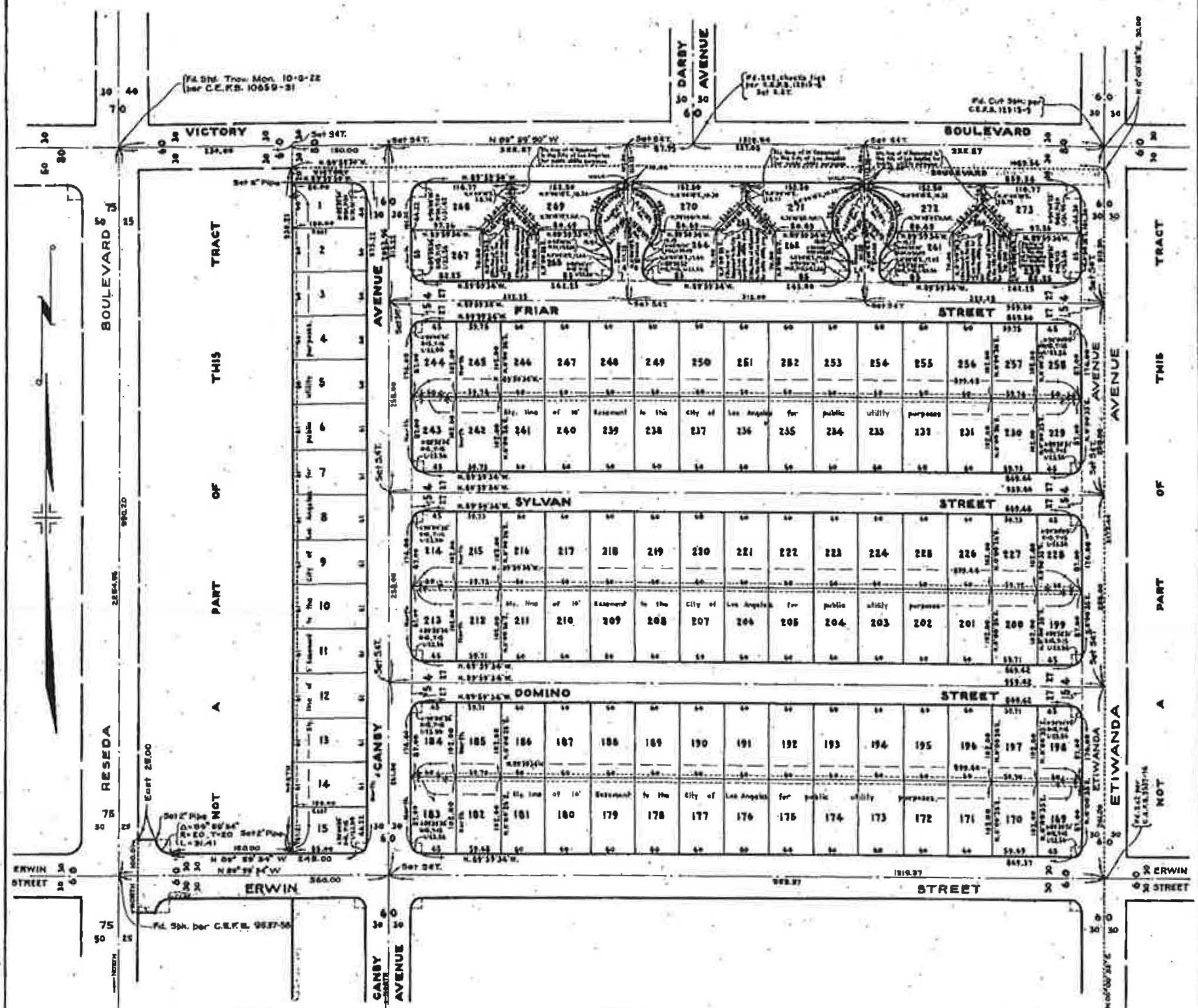
Approved July 6, 1950
C. E. ARNOLD, County Surveyor
By F. A. Overton
Deputy

TRACT Nº 16690

IN THE CITY OF LOS ANGELES

HAROLD M. TEGART REGISTERED CIVIL ENGINEER

SCALE : 1"=100'



SEE SHEET Nº 3

The bearing North of the East line of Reseda Boulevard (Reseda Avenue) as shown on the map of Tract Nº 1875 M.B. 19-38 was used as the Basis of Bearings on this Tract.

NOTE: All 2" Pipes and 2x2 Stakes are set 12" below the ground surface and marked with Disc R.E.2181.

380-47

SHEET 3 OF 3 SHEETS

TRACT Nº 16690

IN THE CITY OF LOS ANGELES

HAROLD M. TEGART — REGISTERED CIVIL ENGINEER

SCALE : 1"=100'

RECORDED
July 6, 1950
at 20 min. past 4 P.M.
IN BOOK 380
AT PAGE 47
OF MAPS
RECORDS
OF LOS ANGELES COUNTY, CALIF.
W. H. Taylor
County Clerk
Fee

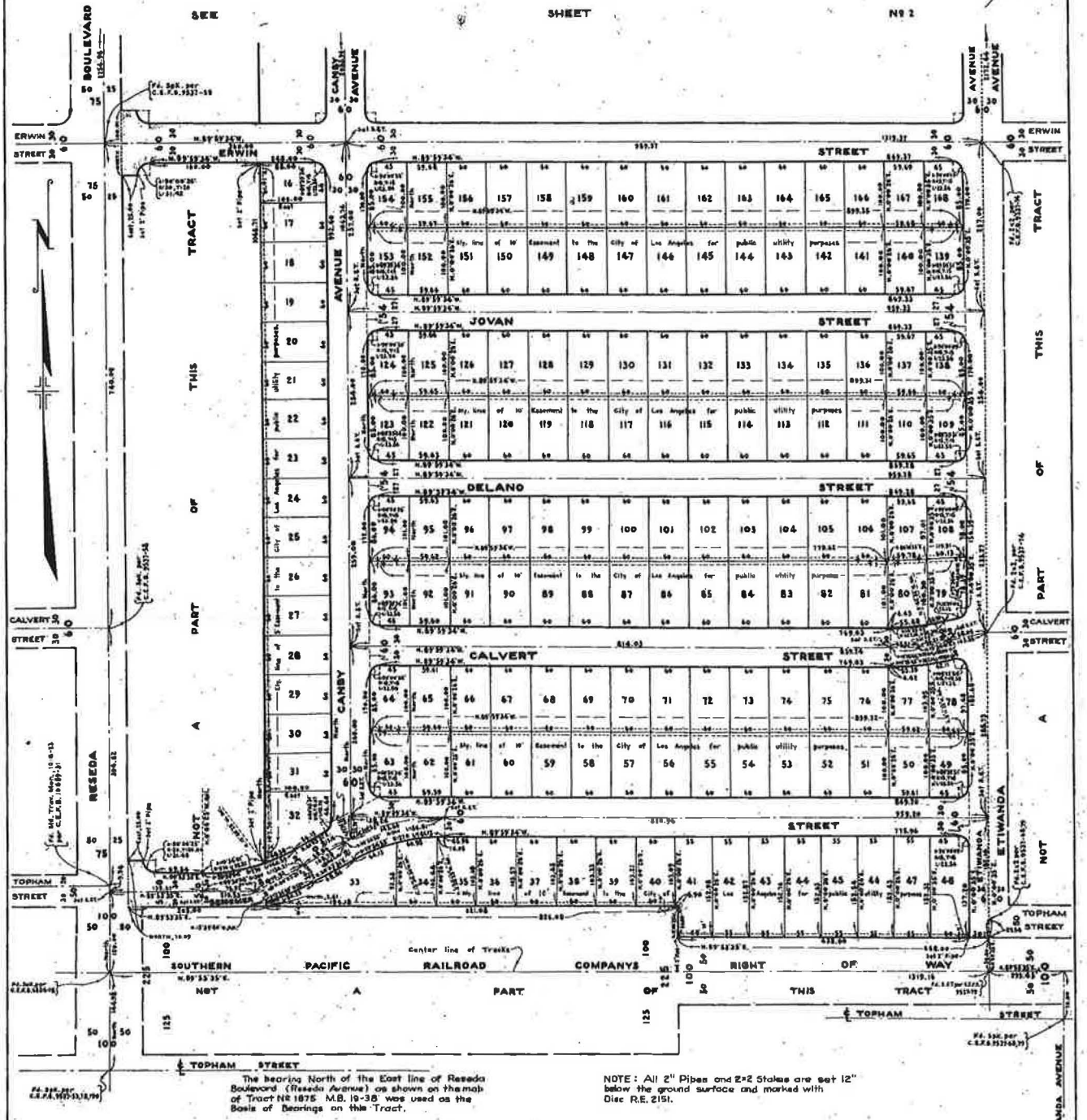


Exhibit B

SCALE: 1" - 100'

TRACT Nº 21537

IN THE CITY OF LOS ANGELES
STATE OF CALIFORNIA

BEING A SUBDIVISION OF PORTIONS OF LOTS 148 TO 150 INCLUSIVE, OF TRACT NO. 1875 AS PER MAP RECORDED IN BOOK 19, PAGE 38 OF MAPS, RECORDS OF LOS ANGELES COUNTY.

DELTA ENGINEERING & SURVEYING CORP.

RECORDED AT REQUEST OF OWNER JULY 26, 1962 53 MIN. 2 P.M. BOOK 689 PAGE 75 ... BY [signature] $7.00

I HEREBY CERTIFY THAT THE CITY COUNCIL OF THE CITY OF LOS ANGELES APPROVED THE ATTACHED MAP AND ACCEPTED ON BEHALF OF THE PUBLIC ALL THE STREETS, ROADS, ALLEYS, HIGHWAYS, EASEMENTS AND ABANDONMENT OF INGRESS AND EGRESS RIGHTS SHOWN ON SAID MAP AND THEREIN OFFERED FOR DEDICATION EXCEPT THOSE MARKED "FUTURE STREET" AND "FUTURE ALLEY" PROVIDED THAT NOTHING HEREIN CONTAINED SHALL BE CONSTRUED AS AN ACCEPTANCE OF ANY IMPROVEMENTS MADE IN OR UPON ANY STREET, ROAD, ALLEY, HIGHWAY OR EASEMENT SHOWN ON THIS MAP.

DATE July 11 1962
WALTER G. PETERSON, City Clerk
By Charles [signature] Deputy

BASIS OF BEARINGS
The Bearing of North of the center line of Reseda Boulevard shown on map of Tract 16690 recorded in Book 380 pages 45 to 47, inclusive, of Maps, Records of Los Angeles County, was taken as the Basis of Bearings shown on this map.

I HEREBY CERTIFY THAT I AM A REGISTERED CIVIL ENGINEER OF THE STATE OF CALIFORNIA; THAT THIS MAP, CONSISTING OF 2 SHEETS, CORRECTLY REPRESENTS A TRUE AND COMPLETE SURVEY MADE UNDER MY SUPERVISION Sept. 1958; THAT THE MONUMENTS OF THE CHARACTER AND LOCATIONS SHOWN HEREON WILL BE IN PLACE WITHIN TWELVE MONTHS FROM RECORDING DATE OF THIS MAP; THAT SAID MONUMENTS ARE SUFFICIENT TO ENABLE THE SURVEY TO BE READILY RETRACED AND THAT THE NOTES TO ALL CENTER LINE MONUMENTS SHOWN HEREON AS SET BY ME WILL BE ON FILE IN THE OFFICE OF THE CITY ENGINEER WITHIN TWELVE MONTHS FROM RECORDING DATE SHOWN HEREON.

[signature]
MARTIN D. SCHWEERS R.C.E. 8758

STATE OF CALIFORNIA } SS
COUNTY OF LOS ANGELES
ON THIS 23rd DAY OF February 1962 BEFORE ME Ruth Ellen McCormick NOTARY PUBLIC IN AND FOR SAID COUNTY PERSONALLY APPEARED Harriet M. Burns KNOWN TO ME TO BE THE PERSON WHOSE NAME is SUBSCRIBED TO THE WITHIN INSTRUMENT AND ACKNOWLEDGED TO ME THAT she EXECUTED THE SAME.
Ruth Ellen McCormick
Ruth Ellen McCormick
MY COMM EXPIRES: June 6-1964

We hereby certify that we are the owners of or are interested in the land included within the subdivision shown on the annexed map and we consent to the preparation and recordation of said map and subdivision as shown within the colored border lines. And we hereby dedicate to the public use the Boulevard and Alley shown on said map within said Subdivision. As a dedication to public use while all of Reseda Boulevard within this subdivision remains a public highway and for such time only, we hereby abandon all rights of vehicular ingress and egress from lots 2 to 14, inclusive, to the said Boulevard so that the owners of said lots 2 to 14, inclusive, abutting this highway during such time as said lots remain in a residential zone will have no right of vehicular access whatever to the highway as such except the general easement of travel which belongs to the whole public. If any change of alignment or width of such highway results in the vacation of any part thereof within this Subdivision, such vacation terminates the above dedication as to the part vacated.

26th February Ruth Ellen McCormick
Lloyd C. Staite
VOID
Ruth Ellen McCormick
Ruth Ellen McCormick
My Comm Expires June 6-1964

Harriet M. Burns [signature]
Harriet M. Burns

RALPH WEINER, owner and Successor Easement holder as granted by deed recorded in book D-939, page 567 Official Records

Ralph Weiner [signature]
RALPH WEINER

STATE OF CALIFORNIA } SS
COUNTY OF LOS ANGELES
ON THIS 24th DAY OF April 1962 BEFORE ME M. Liagre A NOTARY PUBLIC IN AND FOR SAID COUNTY PERSONALLY APPEARED Wallace E. Avery KNOWN TO ME TO BE THE VICE PRESIDENT AND Wayne Pauling KNOWN TO ME TO BE THE ASS'T. SECRETARY OF THE TEXACO INC. THE CORPORATION THAT EXECUTED THE WITHIN INSTRUMENT AND KNOWN TO ME TO BE THE PERSONS WHO EXECUTED THE WITHIN INSTRUMENT ON BEHALF OF THE CORPORATION THEREIN NAMED AND ACKNOWLEDGED TO ME THAT SAID CORPORATION EXECUTED THE SAME AS LESSEE.
M. LIAGRE [signature]
my comm. expires August 22 1963

a Delaware corporation
TEXACO INC. WHICH ACQUIRED TITLE UNDER ITS FORMER NAME THE TEXAS COMPANY, a Delaware Corporation, (Lesee) under lease recorded in Book 46546 page 409, Official Records.
By:
Wallace E. Avery [signature] VICE-PRESIDENT
[signature] ASSISTANT SECRETARY

STATE OF CALIFORNIA } SS
COUNTY OF LOS ANGELES
ON THIS 27th DAY OF April 1962 BEFORE ME the undersigned A NOTARY PUBLIC IN AND FOR SAID COUNTY PERSONALLY APPEARED Geo. R. McKeehen KNOWN TO ME TO BE THE Vice PRESIDENT AND Edna A. McGovern KNOWN TO ME TO BE THE Asst. SECRETARY OF THE MC KEEHAN ESCROW COMPANY THE CORPORATION THAT EXECUTED THE WITHIN INSTRUMENT AND KNOWN TO ME TO BE THE PERSONS WHO EXECUTED THE WITHIN INSTRUMENT ON BEHALF OF THE CORPORATION THEREIN NAMED AND ACKNOWLEDGED TO ME THAT SAID CORPORATION EXECUTED THE SAME AS TRUSTEE.
Patricia L. Jessup
NOTARY PUBLIC
MY COMMISSION EXPIRES May 9, 1964
Patricia L. Jessup

MC KEEHAN ESCROW COMPANY, a CORPORATION, (TRUSTEE) UNDER DEED OF TRUST RECORDED MARCH 2, 1962 IN BOOK T-2256 PAGE 66 OFFICIAL RECORDS

Geo. R. McKeehen
Vice-Pres.
Edna A. McGovern
Asst Secy

STATE OF CALIFORNIA } SS
COUNTY OF LOS ANGELES
ON THIS 30th DAY OF APRIL 1962 BEFORE ME PAULINE E. AMOND A NOTARY PUBLIC IN AND FOR SAID COUNTY PERSONALLY APPEARED RALPH WEINER KNOWN TO ME TO BE THE PERSON WHOSE NAME IS SUBSCRIBED TO THE WITHIN INSTRUMENT AND ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME, AS OWNER AND SUCCESSOR EASEMENT HOLDER.
[signature]
PAULINE E. AMOND NOTARY PUBLIC
MY COMMISSION EXPIRES JAN 31-1966

I hereby certify that a good and sufficient bond in the sum of $6,300.00 duly approved by the Board of Supervisors of the County of Los Angeles, has been filed with said Board as security for the payment of taxes and special assessments collected as taxes on land shown on map of Tract No. 21537 as required by law.
Gordon T. Nesvig, Clerk of the Board of Supervisors of the County of Los Angeles, State of California.
By [signature] Deputy

Approved July 26, 1962
JOHN A. LAMBIE, County Engineer
By [signature] Deputy

I HEREBY CERTIFY that I have examined this map and that the subdivision as shown hereon is substantially the same as it appeared on the tentative map and any approved alterations thereof; that all provisions of chapter 128, statutes of 1943 as amended State of California and of all local ordinances applicable and in effect at the time of the approval of the tentative map have been complied with and I am satisfied that this map is technically correct.
City Engineer [signature] LYALL A. PARDEE
Date JUNE 29, 1962

I HEREBY CERTIFY that there is on file in the office of the City Engineer of the City of Los Angeles, County of Los Angeles, State of California, a Certificate made by the Title Insurance and Trust Company of said city, Order No. 5018027 dated June 21, 1962, certifying that it appears from the records of said City and County that Harriet M. Burns; Ralph Weiner; McKeehan Escrow Company; Texaco, Inc.; (are) the only persons whose consent is required for the recording of this map by law.
City Engineer [signature] LYALL A. PARDEE
Date JUNE 29, 1962

I HEREBY CERTIFY that, according to the records of the offices of the Bureau of Assessments of the Department of Public Works and the Treasurer of the City of Los Angeles, none of the lines of lots or parcels of the subdivision shown on the attached subdivision map will divide any land subject to any special assessment or bond representing a special assessment which may be paid in full, except as follows: None

The amount necessary for the payment in full of such assessment and/or bond at this time is $ None

Date: 6-11, 1962
ROBERT C. MACY, Director of the Bureau of Assessment
By [signature]
L. V. McCARDLE, Treasurer of the City of Los Angeles
By

The signature of the Los Angeles County Flood Control District, holder of an easement as set forth in final decree of condemnation, Los Angeles County Superior Court case No. 777916, a certified copy thereof being recorded in Book D-1456, page 698 Official Records, and as granted by deed recorded in Book D-1492, page 47, Official Records of Los Angeles County has been omitted under the provisions of Section 11587, subsection (a) of the Subdivision Map Act, its interest is such that it cannot ripen into a fee title and said signature is not required by the Los Angeles City Council.

11U-601-16

BOOK 689 PAGE 76

SCALE: 1" = 100'

TRACT № 21537

IN THE CITY OF LOS ANGELES
STATE OF CALIFORNIA

DELTA ENGINEERING & SURVEYING CORP.

SHEET 2 OF 2 SHEETS
4825 Pg. 2

RECORDED
AT REQUEST OF OWNER
JULY 26, 1962
53 MIN PAST 2 P.M.
IN BOOK 689
AT PAGE 76
OF MAP RECORDS
LOS ANGELES COUNTY, CALIF.
RAY E. LEE
COUNTY RECORDER
BY [signature] Deputy

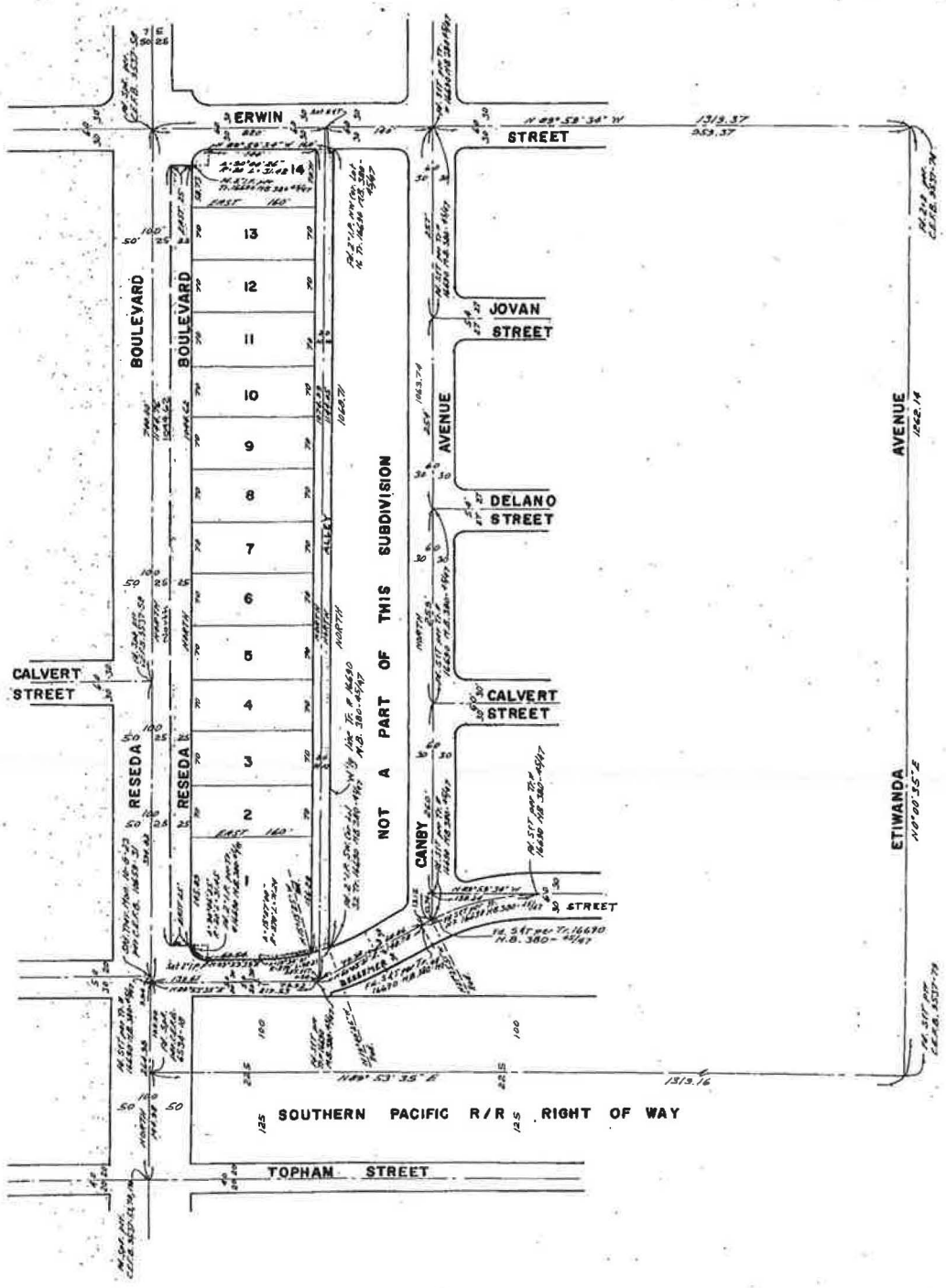


Exhibit C

We hereby certify that we are the owners of or are interested in the land included within the subdivision shown on the annexed map and we consent to the preparation and recordation of said map and subdivision as shown within the colored border lines. And we hereby dedicate to the public use the Boulevard and Alley shown on said map within said subdivision. As a dedication to public use while all of Reseda Boulevard within this subdivision remains a public highway, and for such time only, we hereby abandon all rights of vehicular ingress and egress from Lots 2 to 14, inclusive, to the said Boulevard, so that the owners of said lots 2 to 14, inclusive abutting this highway during such time as said Lots remain in a residential Zone will have no right of vehicular access whatever in this highway as such except the general easement of travel which belongs to the whole public. If any change of alignment or width of such highway results in the vacation of any part thereof within this subdivision, such vacation terminates the above dedication as to the part vacated.

Exhibit D

SCALE: 1" = 100'

TRACT Nº 22807

IN THE CITY OF LOS ANGELES
STATE OF CALIFORNIA

BEING A SUBDIVISION OF ALL OF LOTS 2 TO 14 INCLUSIVE OF TRACT NO. 21537, AS PER MAP RECORDED IN BOOK 689, PAGES 75 AND 76 OF MAPS, RECORDS OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

RECORDED
AT REQUEST OF OWNER
Jan. 14, 1963
4 MIN. PAST 2 P.M.
IN BOOK 696
AT PAGE 98
OF MAP RECORDS
LOS ANGELES COUNTY, CALIF
RAY E. LEE
COUNTY RECORDER
BY A. Riley Deputy

$7.00

DELTA ENGINEERING AND SURVEYING CORP.

I HEREBY CERTIFY THAT I AM A REGISTERED CIVIL ENGINEER OF THE STATE OF CALIFORNIA, THAT THIS MAP, CONSISTING OF TWO SHEETS, CORRECTLY REPRESENTS A TRUE AND COMPLETE SURVEY MADE UNDER MY SUPERVISION SEPTEMBER 1961, THAT THE MONUMENTS OF THE CHARACTER AND LOCATIONS SHOWN HEREON WILL BE IN PLACE WITHIN TWELVE MONTHS FROM RECORDING DATE OF THIS MAP, THAT SAID MONUMENTS ARE SUFFICIENT TO ENABLE THE SURVEY TO BE READILY RETRACED AND THAT TIE NOTES TO ALL CENTER LINE MONUMENTS SHOWN HEREON AS SET BY ME WILL BE ON FILE IN THE OFFICE OF THE CITY ENGINEER WITHIN TWELVE MONTHS FROM RECORDING DATE SHOWN HEREON

[signature]
R.C.E. 8758

BASIS OF BEARINGS

THE BEARING NORTH OF THE CENTER LINE OF RESEDA BOULEVARD AS SHOWN ON MAP OF TRACT NO. 21537 AS RECORDED IN BOOK 689 PAGES 75 AND 76 OF MAPS, RECORDS OF LOS ANGELES COUNTY WAS TAKEN AS THE BASIS OF BEARINGS ON THIS MAP.

WE HEREBY CERTIFY THAT WE ARE THE OWNERS OF OR ARE INTERESTED IN THE LAND INCLUDED WITHIN THE SUBDIVISION SHOWN ON THE ANNEXED MAP AND WE CONSENT TO THE PREPARATION AND RECORDATION OF SAID MAP AND SUBDIVISION AS SHOWN WITHIN THE COLORED BORDER LINES.
AS A DEDICATION TO PUBLIC USE, WHILE ALL OF RESEDA BOULEVARD ADJACENT TO THIS SUBDIVISION REMAINS A PUBLIC HIGHWAY, AND FOR SUCH TIME ONLY, WE HEREBY ABANDON ALL RIGHTS OF VEHICULAR INGRESS AND EGRESS FROM LOTS 1 TO [illegible] INCLUSIVE TO RESEDA BOULEVARD SO THAT THE OWNERS OF SAID LOTS 1 TO [illegible] INCLUSIVE, DURING SUCH TIME AS SAID LOTS REMAIN IN A RESIDENTIAL ZONE, WILL HAVE NO RIGHT OF VEHICULAR ACCESS WHATEVER IN THE HIGHWAY AS SUCH EXCEPT THE GENERAL EASEMENT OF TRAVEL WHICH BELONGS TO THE WHOLE PUBLIC. IF ANY CHANGE OF ALIGNMENT OR WIDTH OF SUCH HIGHWAY RESULTS IN THE VACATION OF ANY PART THEREOF ADJOINING THIS SUBDIVISION, SUCH VACATION TERMINATES THE ABOVE DEDICATION AS TO THE PART VACATED.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS

ON THIS 27th DAY OF NOVEMBER 1962 BEFORE ME PAULINE A. [illegible] NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE PERSONALLY APPEARED RALPH WEINER KNOWN TO ME TO BE THE PERSON WHOSE NAME IS SUBSCRIBED TO THE WITHIN INSTRUMENT AND ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

[signature]
PAULINE A. [illegible] NOTARY PUBLIC
MY COMMISSION EXPIRES JAN. 31 - 1966

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS

ON THIS 27TH DAY OF NOVEMBER 1962 BEFORE ME SUE GOULD A NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE PERSONALLY APPEARED GEO. R. McKEEHAN KNOWN TO ME TO BE THE VICE-PRESIDENT AND EDNA A. McGOVERN KNOWN TO ME TO BE THE ASST. SECRETARY OF THE McKEEHAN ESCROW COMPANY THE CORPORATION THAT EXECUTED THE WITHIN INSTRUMENT AND KNOWN TO ME TO BE THE PERSONS WHO EXECUTED THE WITHIN INSTRUMENT ON BEHALF OF THE CORPORATION THEREIN NAMED AND ACKNOWLEDGED TO ME THAT SAID CORPORATION EXECUTED THE SAME AS TRUSTEE

[signature]
SUE GOULD NOTARY PUBLIC
MY COMMISSION EXPIRES JULY 19TH, 1965

Ralph Weiner
RALPH WEINER (OWNER)

McKEEHAN ESCROW COMPANY, A CORPORATION, TRUSTEE UNDER DEED OF TRUST RECORDED IN BOOK T-2256, PAGE 66, OFFICIAL RECORDS.

Geo. R. McKeehan, VICE-PRES. Edna A. McGovern, ASST. SECY.

Approved January 14, 1963
JOHN A. LAMBIE, County Engineer
By Ralph [illegible] Deputy

I HEREBY CERTIFY THAT THE CITY COUNCIL OF THE CITY OF LOS ANGELES APPROVED THE ATTACHED MAP AND ACCEPTED ON BEHALF OF THE PUBLIC ALL THE STREETS, ROADS, ALLEYS, HIGHWAYS, EASEMENTS AND ABANDONMENT OF INGRESS AND EGRESS RIGHTS SHOWN ON SAID MAP AND THEREIN OFFERED FOR DEDICATION EXCEPT THOSE MARKED "FUTURE STREET" AND "FUTURE ALLEY" PROVIDED THAT NOTHING HEREIN CONTAINED SHALL BE CONSTRUED AS AN ACCEPTANCE OF ANY IMPROVEMENTS MADE IN OR UPON ANY STREET, ROAD, ALLEY, HIGHWAY OR EASEMENT SHOWN ON THIS MAP.

Date January 11, 1963
WALTER C. PETERSON, City Clerk
By Gilbert Onsatti
Deputy

I HEREBY CERTIFY that I have examined this map and that the subdivision as shown hereon is substantially the same as it appeared on the tentative map and any approved alterations thereof, that all provisions of chapter 128, statutes of 1943 as amended State of California and of all local ordinances applicable and in effect at the time of the approval of the tentative map have been complied with and I am satisfied that this map is technically correct.
Lyall A. Pardee
City Engineer Lyall A. Pardee
Date January 7, 1963

I HEREBY CERTIFY that there is on file in the office of the City Engineer of the City of Los Angeles, County of Los Angeles, State of California, a Certificate made by the Title Insurance and Trust Company of said city, Order No. 4860887 dated Aug. 7, 1962 certifying that it appears from the records of said City and County that Ralph Weiner; McKeehan Escrow Company;
(are) the only persons whose consent is required for the recording of this map by law.
Lyall A. Pardee
City Engineer Lyall A. Pardee
Date January 7, 1963

I HEREBY CERTIFY that, according to the records of the offices of the Bureau of Assessments of the Department of Public Works and the Treasurer of the City of Los Angeles, none of the lines of lots or parcels of the subdivision shown on the attached subdivision map will divide any land subject to any special assessment or bond representing a special assessment which may be paid in full, except as follows: None

The amount necessary for the payment in full of such assessment and/or bond at this time is $ None

Date: 12-18 1962
ROBERT C. MACY, Director of the Bureau of Assessment
By [signature]
L. V. [illegible], Treasurer of the City of Los Angeles
By [signature]

696 PAGE 44

SCALE: 1" = 100'

SHEET 2 OF 2 SHEETS

TRACT Nº 22807

IN THE CITY OF LOS ANGELES
STATE OF CALIFORNIA

DELTA ENGINEERING AND SURVEYING CORP.

Pg. 2
RECORDED
Jan. 14, 1963
4 P.M.
696
99
RAY C. LEE
a. Riley

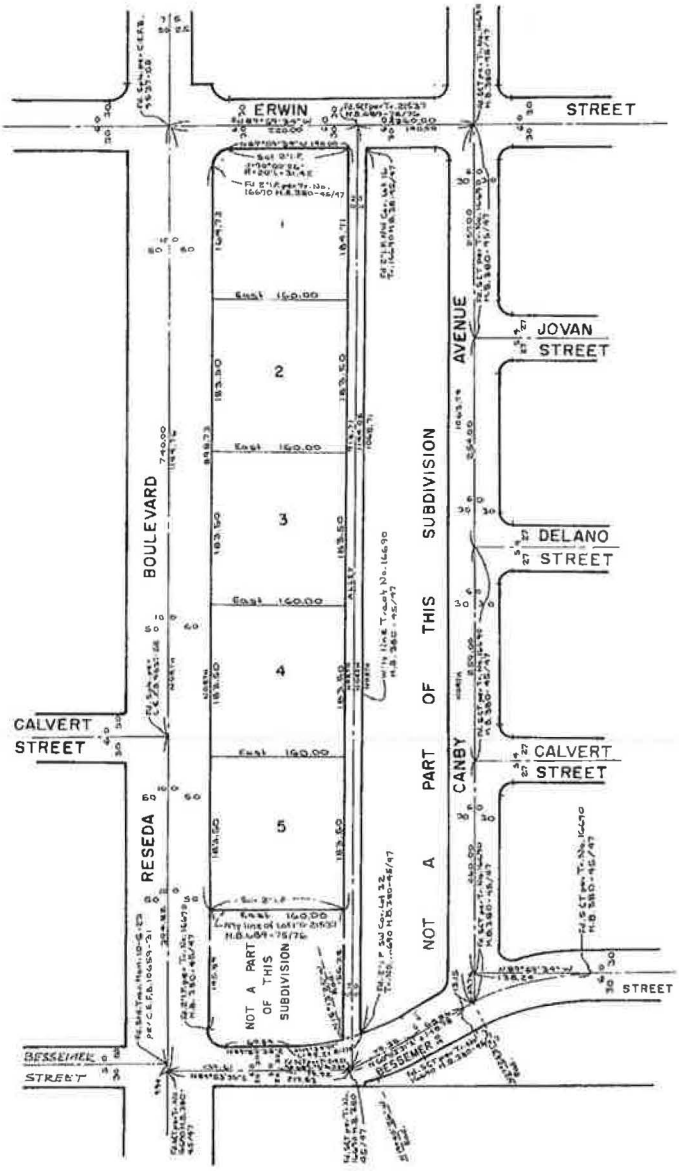


Exhibit E

First American Title Insurance Company
National Commercial Services
777 South Figueroa Street, Suite 400
Los Angeles, CA 90017

January 24, 2020

Jacob Yadegar
BELC-JYS
11677 San Vicente Blvd Ste 206
Los Angeles , CA 90049
Phone: (310)571-3672
Fax: (310)571-3681

Customer Reference:	Alley Search-Tarzana Five
Title Officer:	Edward Luque
Phone:	(213)271-1730
Fax No.:	
E-Mail:	eluque@firstam.com
Buyer:	
Owner:	Tarzana Five Properties LLC
Property:	Los Angeles County, CA, Tarzana, CA

PRELIMINARY REPORT

In response to the above referenced application for a policy of title insurance, this company hereby reports that it is prepared to issue, or cause to be issued, as of the date hereof, a Policy or Policies of Title Insurance describing the land and the estate or interest therein hereinafter set forth, insuring against loss which may be sustained by reason of any defect, lien or encumbrance not shown or referred to as an Exception below or not excluded from coverage pursuant to the printed Schedules, Conditions and Stipulations of said Policy forms.

The printed Exceptions and Exclusions from the coverage and Limitations on Covered Risks of said policy or policies are set forth in Exhibit A attached. *The policy to be issued may contain an arbitration clause. When the Amount of Insurance is less than that set forth in the arbitration clause, all arbitrable matters shall be arbitrated at the option of either the Company or the Insured as the exclusive remedy of the parties.* Limitations on Covered Risks applicable to the CLTA and ALTA Homeowner's Policies of Title Insurance which establish a Deductible Amount and a Maximum Dollar Limit of Liability for certain coverages are also set forth in Exhibit A. Copies of the policy forms should be read. They are available from the office which issued this report.

Please read the exceptions shown or referred to below and the exceptions and exclusions set forth in Exhibit A of this report carefully. The exceptions and exclusions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered.

It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land.

This report (and any supplements or amendments hereto) is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed hereby. If it is desired that liability be assumed prior to the issuance of a policy of title insurance, a Binder or Commitment should be requested.

Dated as of January 10, 2020 at 7:30 A.M.

The form of Policy of title insurance contemplated by this report is:

Prelim

A specific request should be made if another form or additional coverage is desired.

Title to said estate or interest at the date hereof is vested in:

Tarzana Five Properties LLC, a California limited liability company

The estate or interest in the land hereinafter described or referred to covered by this Report is:

Fee Simple

The Land referred to herein is described as follows:

(See attached Legal Description)

At the date hereof exceptions to coverage in addition to the printed Exceptions and Exclusions in said policy form would be as follows:

1. General and special taxes and assessments for the fiscal year 2020-2021, a lien not yet due or payable.

2. General and special taxes and assessments for the fiscal year 2019-2020 are exempt. If the exempt status is terminated an additional tax may be levied. A.P. No.: 2124-008.

3. The lien of supplemental taxes, if any, assessed pursuant to Chapter 3.5 commencing with Section 75 of the California Revenue and Taxation Code.

4. Water rights, claims or title to water, whether or not shown by the public records.

5. The following matters shown or disclosed by the the Tract Map No. 21537 recorded in Book 689 Pages 75 and 76 of Maps: We hereby dedicate to the public use the alley shown on said map within said subdivision.

6. The description shown in this report is not to be relied upon as a legal insurable parcel. This Company has provided said description only as an accommodation for the purpose of facilitating this report. A description approved by the appropriate governing agency pursuant to the Subdivision Map Act of the State of California must be submitted to this Company for review prior to closing.

7. Rights of parties in possession.

INFORMATIONAL NOTES

ALERT - CA Senate Bill 2 imposes an additional fee of $75 up to $225 at the time of recording on certain transactions effective January 1, 2018. Please contact your First American Title representative for more information on how this may affect your closing.

1. According to the latest available equalized assessment roll in the office of the county tax assessor, there is located on the land a(n) Alley known as Los Angeles County, CA, Tarzana, California.

2. According to the public records, there has been no conveyance of the land within a period of twenty-four months prior to the date of this report, except as follows:

   None

3. If this preliminary report/commitment was prepared based upon an application for a policy of title insurance that identified land by street address or assessor's parcel number only, it is the responsibility of the applicant to determine whether the land referred to herein is in fact the land that is to be described in the policy or policies to be issued.

4. We find no open deeds of trust. Escrow please confirm before closing.

5. Should this report be used to facilitate your transaction, we must be provided with the following prior to the issuance of the policy:

   A. WITH RESPECT TO A CORPORATION:
      1. A certificate of good standing of recent date issued by the Secretary of State of the corporation's state of domicile.
      2. A certificate copy of a resolution of the Board of Directors authorizing the contemplated transaction and designating which corporate officers shall have the power to execute on behalf of the corporation.
      3. A certificate of revivor and a certificate of relief from contract voidability issued by the Franchise Tax Board of the State of California.
      4. Requirements which the Company may impose following its review of the above material and other information which the Company may require.
   B. WITH RESPECT TO A CALIFORNIA LIMITED PARTNERSHIP:
      1. A certified copy of the certificate of limited partnership (form LP-1) and any amendments thereto (form LP-2) to be recorded in the public records;
      2. A full copy of the partnership agreement and any amendments;
      3. Satisfactory evidence of the consent of a majority in interest of the limited partners to the contemplated transaction;
      4. A certificate of revivor and a certificate of relief from contract voidability issued by the Franchise Tax Board of the State of California.
      5. Requirements which the Company may impose following its review of the above material and other information which the Company may require.
   C. WITH RESPECT TO A FOREIGN LIMITED PARTNERSHIP:
      1. A certified copy of the application for registration, foreign limited partnership (form LP-5) and any amendments thereto (form LP-6) to be recorded in the public records;
      2. A full copy of the partnership agreement and any amendment;
      3. Satisfactory evidence of the consent of a majority in interest of the limited partners to the contemplated transaction;

4. A certificate of revivor and a certificate of relief from contract voidability issued by the Franchise Tax Board of the State of California.
5. Requirements which the Company may impose following its review of the above material and other information which the Company may require.

D. WITH RESPECT TO A GENERAL PARTNERSHIP:

1. A certified copy of a statement of partnership authority pursuant to Section 16303 of the California Corporation Code (form GP-I), executed by at least two partners, and a certified copy of any amendments to such statement (form GP-7), to be recorded in the public records;
2. A full copy of the partnership agreement and any amendments;
3. Requirements which the Company may impose following its review of the above material required herein and other information which the Company may require.

E. WITH RESPECT TO A LIMITED LIABILITY COMPANY:

1. A copy of its operating agreement and any amendments thereto;
2. If it is a California limited liability company, a certified copy of its articles of organization (LLC-1) and any certificate of correction (LLC-11), certificate of amendment (LLC-2), or restatement of articles of organization (LLC-10) to be recorded in the public records;
3. If it is a foreign limited liability company, a certified copy of its application for registration (LLC-5) to be recorded in the public records;
4. With respect to any deed, deed of trust, lease, subordination agreement or other document or instrument executed by such limited liability company and presented for recordation by the Company or upon which the Company is asked to rely, such document or instrument must be executed in accordance with one of the following, as appropriate:
   (i) If the limited liability company properly operates through officers appointed or elected pursuant to the terms of a written operating agreement, such documents must be executed by at least two duly elected or appointed officers, as follows: the chairman of the board, the president or any vice president, and any secretary, assistant secretary, the chief financial officer or any assistant treasurer;
   (ii) If the limited liability company properly operates through a manager or managers identified in the articles of organization and/or duly elected pursuant to the terms of a written operating agreement, such document must be executed by at least two such managers or by one manager if the limited liability company properly operates with the existence of only one manager.
5. A certificate of revivor and a certificate of relief from contract voidability issued by the Franchise Tax Board of the State of California.
6. Requirements which the Company may impose following its review of the above material and other information which the Company may require.

F. WITH RESPECT TO A TRUST:

1. A certification pursuant to Section 18100.5 of the California Probate Code in a form satisfactory to the Company.
2. Copies of those excerpts from the original trust documents and amendments thereto which designate the trustee and confer upon the trustee the power to act in the pending transaction.
3. Other requirements which the Company may impose following its review of the material require herein and other information which the Company may require.

G. WITH RESPECT TO INDIVIDUALS:

1. A statement of information.

The map attached, if any, may or may not be a survey of the land depicted hereon. First American Title Insurance Company expressly disclaims any liability for loss or damage which may result from reliance on this map except to the extent coverage for such loss or damage is expressly provided by the terms and provisions of the title insurance policy, if any, to which this map is attached.

*****To obtain wire instructions for deposit of funds to your escrow file please contact your Escrow Officer.******

LEGAL DESCRIPTION

Real property in the City of Tarzana, County of Los Angeles, State of California, described as follows:

THAT CERTAIN ALLEY, 20 FEET WIDE, AS SHOWN ON THE MAP OF TRACT NO. 22807, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 696, PAGES 98 TO 99 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, BOUNDED AND DESCRIBED AS FOLLOWS:

BOUNDED ON THE NORTH BY THE EASTERLY PROLONGATION OF THE NORTHERLY LINE OF LOT OF SAID TRACT NO. 22807; BOUNDED ON THE SOUTH BY THE EASTERLY PROLONGATION OF THE SOUTHERLY LINE OF LOT 5 OF SAID TRACT NO. 22807; BOUNDED ON THE WEST BY THE EASTERLY LINE OF SAID TRACT NO. 22807 AND BOUNDED ON THE EAST BY THE WESTERLY LINE OF TRACT NO. 16690, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, AS PER MAP RECORDED IN BOOK 380, PAGES 45 TO 47 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

THIS DESCRIPTION IS NOT TO BE USED FOR INSURANCE PURPOSES NOR IS IT TO BE USED FOR THE PURPOSE OF SALE, LEASE OR FINANCING THAT MAY BE A VIOLATION OF THE STATE MAP ACT OR LOCAL ORDINANCES. SAID LEGAL DESCRIPTION WILL HAVE TO BE RE-WRITTEN BASED ON ACTUAL LAND SURVEY AND MATHEMATICAL CLOSURE OR/AND APPROVED BY THE LICENSED LAND SURVEYOR.

APN: 2124-008

The First American Corporation
First American Title Company
Privacy Policy

We Are Committed to Safeguarding Customer Information
In order to better serve your needs now and in the future, we may ask you to provide us with certain information. We understand that you may be concerned about what we will do with such information - particularly any personal or financial information. We agree that you have a right to know how we will utilize the personal information you provide to us. Therefore, together with our parent company, The First American Corporation, we have adopted this Privacy Policy to govern the use and handling of your personal information.

Applicability
This Privacy Policy governs our use of the information which you provide to us. It does not govern the manner in which we may use information we have obtained from any other source, such as information obtained from a public record or from another person or entity. First American has also adopted broader guidelines that govern our use of personal information regardless of its source. First American calls these guidelines its Fair Information Values, a copy of which can be found on our website at www.firstam.com.

Types of Information
Depending upon which of our services you are utilizing, the types of nonpublic personal information that we may collect include:

- Information we receive from you on applications, forms and in other communications to us, whether in writing, in person, by telephone or any other means;
- Information about your transactions with us, our affiliated companies, or others; and
- Information we receive from a consumer reporting agency.

Use of Information
We request information from you for our own legitimate business purposes and not for the benefit of any nonaffiliated party. Therefore, we will not release your information to nonaffiliated parties except: (1) as necessary for us to provide the product or service you have requested of us; or (2) as permitted by law. We may, however, store such information indefinitely, including the period after which any customer relationship has ceased. Such information may be used for any internal purpose, such as quality control efforts or customer analysis. We may also provide all of the types of nonpublic personal information listed above to one or more of our affiliated companies. Such affiliated companies include financial service providers, such as title insurers, property and casualty insurers, and trust and investment advisory companies, or companies involved in real estate services, such as appraisal companies, home warranty companies, and escrow companies. Furthermore, we may also provide all the information we collect, as described above, to companies that perform marketing services on our behalf, on behalf of our affiliated companies, or to other financial institutions with whom we or our affiliated companies have joint marketing agreements.

Former Customers
Even if you are no longer our customer, our Privacy Policy will continue to apply to you.

Confidentiality and Security
We will use our best efforts to ensure that no unauthorized parties have access to any of your information. We restrict access to nonpublic personal information about you to those individuals and entities who need to know that information to provide products or services to you. We will use our best efforts to train and oversee our employees and agents to ensure that your information will be handled responsibly and in accordance with this Privacy Policy and First American's Fair Information Values. We currently maintain physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

CLTA/ALTA HOMEOWNER'S POLICY OF TITLE INSURANCE (02-03-10)
EXCLUSIONS

In addition to the Exceptions in Schedule B, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning:
   (a) building; (d) improvements on the Land;
   (b) zoning; (e) land division; and
   (c) land use; (f) environmental protection.
   This Exclusion does not limit the coverage described in Covered Risk 8.a., 14, 15, 16, 18, 19, 20, 23 or 27.
2. The failure of Your existing structures, or any part of them, to be constructed in accordance with applicable building codes. This Exclusion does not limit the coverage described in Covered Risk 14 or 15.
3. The right to take the Land by condemning it. This Exclusion does not limit the coverage described in Covered Risk 17.
4. Risks:
   (a) that are created, allowed, or agreed to by You, whether or not they are recorded in the Public Records;
   (b) that are Known to You at the Policy Date, but not to Us, unless they are recorded in the Public Records at the Policy Date;
   (c) that result in no loss to You; or
   (d) that first occur after the Policy Date - this does not limit the coverage described in Covered Risk 7, 8.e., 25, 26, 27 or 28.
5. Failure to pay value for Your Title.
6. Lack of a right:
   (a) to any land outside the area specifically described and referred to in paragraph 3 of Schedule A; and
   (b) in streets, alleys, or waterways that touch the Land.
   This Exclusion does not limit the coverage described in Covered Risk 11 or 21.
7. The transfer of the Title to You is invalid as a preferential transfer or as a fraudulent transfer or conveyance under federal bankruptcy, state insolvency, or similar creditors' rights laws.

LIMITATIONS ON COVERED RISKS

Your insurance for the following Covered Risks is limited on the Owner's Coverage Statement as follows: For Covered Risk 16, 18, 19, and 21 Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

Your Deductible Amount	Our Maximum Dollar Limit of Liability
Covered Risk 16: 1% of Policy Amount or $2,500.00 (whichever is less)	$10,000.00
Covered Risk 18: 1% of Policy Amount or $5,000.00 (whichever is less)	$25,000.00
Covered Risk 19: 1% of Policy Amount or $5,000.00 (whichever is less)	$25,000.00
Covered Risk 21: 1% of Policy Amount or $2,500.00 (whichever is less)	$5,000.00

ALTA RESIDENTIAL TITLE INSURANCE POLICY (6-1-87)
EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
   (a) and use
   (b) improvements on the land
   (c) and division
   (d) environmental protection
   This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.
   This exclusion does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks.
2. The right to take the land by condemning it, unless:
   (a) a notice of exercising the right appears in the public records on the Policy Date
   (b) the taking happened prior to the Policy Date and is binding on you if you bought the land without knowing of the taking
3. Title Risks:
   (a) that are created, allowed, or agreed to by you
   (b) that are known to you, but not to us, on the Policy Date -- unless they appeared in the public records

(c) that result in no loss to you
(d) that first affect your title after the Policy Date -- this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks

4. Failure to pay value for your title.
5. Lack of a right:
   (a) to any land outside the area specifically described and referred to in Item 3 of Schedule A OR
   (b) in streets, alleys, or waterways that touch your land
   This exclusion does not limit the access coverage in Item 5 of Covered Title Risks.

2006 ALTA LOAN POLICY (06-17-06)
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

   i. the occupancy, use, or enjoyment of the Land;
   ii. the character, dimensions, or location of any improvement erected on the Land;
   iii. the subdivision of land; or
   iv. environmental protection;

   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

   b. Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   a. created, suffered, assumed, or agreed to by the Insured Claimant;
   b. not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   c. resulting in no loss or damage to the Insured Claimant;
   d. attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
   e. resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
   a. a fraudulent conveyance or fraudulent transfer, or
   b. a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of:

1. (a) Taxes or assessments that are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; (b) proceedings by a public agency that may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.
2. Any facts, rights, interests, or claims that are not shown by the Public Records but that could be ascertained by an inspection of the Land or that may be asserted by persons in possession of the Land.
3. Easements, liens or encumbrances, or claims thereof, not shown by the Public Records.
4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and not shown by the Public Records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the Public Records.

6. Any lien or right to a lien for services, labor or material not shown by the public records.

2006 ALTA OWNER'S POLICY (06-17-06)
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

   i. the occupancy, use, or enjoyment of the Land;
   ii. the character, dimensions, or location of any improvement erected on the Land;
   iii. the subdivision of land; or
   iv. environmental protection;
   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

   b.Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   a. created, suffered, assumed, or agreed to by the Insured Claimant;
   b. not Known to the Company, not recorded in the Public Records at Date of Policy, but known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   c. resulting in no loss or damage to the Insured Claimant;
   d. attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or
   e. resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.
4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is
   a. a fraudulent conveyance or fraudulent transfer; or
   b. a preferential transfer for any reason not stated in Covered Risk 9 of this policy.
5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of:

1. (a) Taxes or assessments that are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; (b) proceedings by a public agency that may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.
2. Any facts, rights, interests, or claims that are not shown by the Public Records but that could be ascertained by an inspection of the Land or that may be asserted by persons in possession of the Land.
3. Easements, liens or encumbrances, or claims thereof, not shown by the Public Records.
4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and not shown by the Public Records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the Public Records.
6. Any lien or right to a lien for services, labor or material not shown by the public records.

ALTA EXPANDED COVERAGE RESIDENTIAL LOAN POLICY (07-26-10)
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

   i. the occupancy, use, or enjoyment of the Land;
   ii. the character, dimensions, or location of any improvement erected on the Land;
   iii. the subdivision of land; or
   iv. environmental protection;

   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5, 6, 13(c), 13(d), 14 or 16.

   b. Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 5, 6, 13(c), 13(d), 14 or 16.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters

   a. created, suffered, assumed, or agreed to by the Insured Claimant;
   b. not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   c. resulting in no loss or damage to the Insured Claimant;
   d. attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27 or 28); or
   e. resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law. This Exclusion does not modify or limit the coverage provided in Covered Risk 26.
6. Any claim of invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage as to Advances or modifications made after the Insured has Knowledge that the vestee shown in Schedule A is no longer the owner of the estate or interest covered by this policy. This Exclusion does not modify or limit the coverage provided in Covered Risk 11.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching subsequent to Date of Policy. This Exclusion does not modify or limit the coverage provided in Covered Risk 11(b) or 25.
8. The failure of the residential structure, or any portion of it, to have been constructed before, on or after Date of Policy in accordance with applicable building codes. This Exclusion does not modify or limit the coverage provided in Covered Risk 5 or 6.
9. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
   a. a fraudulent conveyance or fraudulent transfer, or
   b. a preferential transfer for any reason not stated in Covered Risk 27(b) of this policy.

Exhibit F

Office of the City Engineer

Los Angeles, California

To the Public Works and Gang Reduction Committee

Of the Honorable Council

Of the City of Los Angeles

OCT 13 2016

Honorable Members:

C. D. No. 3

SUBJECT:

VACATION REQUEST - VAC- E1401262 - Council File No. 15-0100 – Alley Easterly of Reseda Boulevard from Erwin Street to approximately 153 feet Northerly of Bessemer Street.

RECOMMENDATIONS:

A. That street vacation proceedings pursuant to the Public Streets, Highways and Service Easements Vacation Law be instituted for the vacation of the public right-of-way indicated below and shown colored blue on the attached Exhibit " B":

The alley easterly of Reseda Boulevard from Erwin Street to approximately 153 feet northerly of Bessemer Street.

B. That the vacation of the area shown colored orange on Exhibit "B", be denied.

C. That the Council find that:

1) The vacation is exempt from the California Environmental Quality Act (CEQA) of 1970 , pursuant to Article III, Class 5(3) of the City's CEQA 2002, and

2) The minor sidewalk and street improvements are exempt under Class 1(3) of City's CEQA Guidelines (2002).

D. That the City Council find that there is a public benefit to this street vacation. Upon vacation of the street, the City is relieved of its ongoing obligation to maintain the street. In addition, the City is relieved of any potential liability that might result from continued ownership of the involved street easements.

E. That, in conformance with Section 556 of the City Charter, the Council make the

finding that the vacation is in substantial conformance with the purposes, intent and provisions of the General Plan.

F. That, in conformance with Section 892 of the California Streets and Highways Code, the Council determine that the vacation area is not necessary for non-motorized transportation facilities.

G. That, in conformance with Section 8324 of the California Streets and Highways Code, the Council determine that the vacation area is not necessary for present or prospective public use.

H. That the Council adopt the City Engineer's report with the conditions contained therein.

I. That the City Clerk schedule the vacation for public hearing at least 30 days after the Public Works and Gang Reduction Committee approval based on the Rule 16 motion adopted by City Council on February 3, 2015, so the City Clerk and Bureau of Engineering can process the Public Notification pursuant to Section 8324 of the California Streets and Highways Code.

FISCAL IMPACT STATEMENT:

The petitioner has paid a fee of $47,080.00 for the investigation of this request pursuant to Section 7.42 of the Administrative Code. Any deficit fee to recover the cost pursuant to Section 7.44 of the Administrative Code will be required of the petitioner.

Maintenance of the public easement by City forces will be eliminated.

NOTIFICATION:

That notification of the time and place of the Public Works Committee and the City Council meetings to consider this request be sent to:

1. Thomas Iacobellis
   Iacobellies & Associates Inc.
   11145 Tampa Av. #15B
   Northridge CA 91326

2. Tarzana Five Properties, LLC
   11677 San Vicente Bl., #206
   Los Angeles CA 90049

3. Arash Amini
   6241 Canby Av.
   Tarzana CA 91335

4. James and Amy Miao
   22222 Dardenne St
   Calabasas CA 91302

5. L and O Dreams LLC
   14301 Ventura Bl
   Sherman Oaks CA 91423

6. Joyce Layman Tr
   27505 Catala Av
   Saugus CA 91350

7. Manuel & Rosa Rangel
   6217 Canby Av
   Tarzana CA 91335

8. Susana Salgado
   6211 Canby Av
   Tarzana CA 91335

9. Bernard Davis Tr
   PO Box 16332
   Encino CA 91416

10. Ezat Mahmoudi
    6201 Canby Av
    Tarzana CA 91335

11. Christopher & Regina Cheramie
    6169 Canby Av
    Tarzana CA 91335

12. Linda Denninger
    6163 Canby Av
    Tarzana CA 91335

13. Sergey & Larisa Shelyakov
    6157 Canby Av
    Tarzana CA 91335

14. Alicia Alvarez
    6151 Canby Av
    Tarzana CA 91335

15. Wageeh & Magda L Siha
    6143 Canby Av
    Tarzana CA 91335

16. Miguel A. Garcia
    6137 Canby Av
    Tarzana CA 91335

17. Joni Greer Tr
    4925 Swinton Av
    Encino CA 91436

18. Hilda M. Mora
    6125 Canby Av
    Tarzana CA 91335

19. Reseda Square LLC
    416 S Via Montana
    Burbank CA 91501

20. Mozafar & Dalia Koshki Tr
    4341 Grimes Pl
    Encino CA 91316

CONDITIONS:

The Conditions specified in this report are established as the requirements to be complied with by the petitioner for this vacation. Vacation proceedings in which the conditions have not been completed within 2 years of the Council's action on the City Engineer's report shall be terminated, with no further Council action.

1. That any fee deficit under Work Order E1401262 be paid.

2. That a suitable map, approved by the Valley District Engineering office, delineating the limits, including bearings and distances, of the area to be vacated be submitted to the Land Development and GIS Division prior to the preparation of the Resolution to Vacate.

3. That a suitable legal description describing the area being vacated and all easements to be reserved, including copies of all necessary supporting documentation, be submitted to the Land Development and GIS Division of the Bureau of Engineering prior to preparation of the Resolution to Vacate.

4. That a title report indicating the vestee of the underlying fee title interest in the area to be vacated be submitted to the City Engineer.

5. That the following dedications be provided adjoining the petitioner's properties in a manner satisfactory to the City Engineer:

   a. Dedicate 5 feet along Reseda Boulevard as a public street to provide a 55-foot wide half right-of-way in accordance with the Boulevard II standard for Mobility Plan 2035, together with a 20-foot radius property line return at the intersection with Erwin Street.

   b. Dedicate 3 feet along Erwin Street as a public street to provide a 33-foot wide half right-of-way in accordance with the Collector Street standard for Mobility Plan 2035.

6. That the following improvements be constructed adjoining the petitioner's properties in a manner satisfactory to the City Engineer:

   a. Construct additional concrete sidewalk along Reseda Boulevard to provide a 15-foot wide sidewalk.

   b. Construct additional concrete sidewalk along Erwin Street to provide a 15-foot wide sidewalk.

   c. Close the alley intersection at Erwin Street with standard street improvements or with a standard driveway approach.

   d. Provide any necessary improvements to collect or divert any surface flows from impounding within the area to be vacated.

7. That arrangements be made with all utilities agencies maintaining facilities in the area, including but not limited to the Department of Water and Power and AT &T, for the removal of affected facilities or the providing of easements or rights for the protection of affected facilities to remain in place.

8. That consents to the vacation be secured from the owners of all properties adjoining the area to be vacated (Lots 16 through 31, inclusive, of Tract 16690), from the owner of Lot 1 of Tract 21537, and from the owner of Lot 32 of Tract 16690.

9. That through lot-tie or other means acceptable to the City Engineer, the petitioner provide sufficient evidence that Lots 2 through 5 of Tract 22807 will satisfy the "no vehicular access to Reseda Boulevard" clause of the recorded Tract Map upon vacation.

10. That upon the reviews of the title report identifying the underlying fee title interest of the vacation area, agreements be recorded satisfactory to the Bureau of Engineering to hold each adjoining parcel of land, and its adjoining portion of the area to be vacated under the same ownership, as one parcel to preclude the creation of substandard or landlocked parcels. This is to remain effective until

such time as a new subdivision map is recorded over said area, a parcel map exemption is permitted or until released by the authority of the City of Los Angeles.

11. That street lighting facilities be installed as required by the Bureau of Street Lighting.

12. That street trees be planted and tree wells to be installed as may be required by the Urban Forestry Division of the Bureau of Street Services.

TRANSMITTAL:

1) Application dated December 18, 2014, from Thomas Iacobellis.

2) Notice of Exemption filed with the City Clerk on April 11, 2016

DISCUSSION:

Request: The petitioner, Thomas Iacobellis & Associates, Inc., representing the owner of the property shown outlined in yellow on Exhibit "B", is requesting the vacation of the public alley area shown colored blue. The purpose of the vacation request is to completely close off the alley, which has been removed from public use.

This vacation procedure is being processed under procedures established by Council File No. 01-1459 adopted by the Los Angeles City Council on March 5, 2002.

Resolution to Vacate: The Resolution to Vacate will be recorded upon compliance with the conditions established for this vacation.

Previous Council Action: The City Council on February 3, 2015, under Council File No. 15-0100 adopted a Rule 16 Motion initiating street vacation proceedings.

Zoning and Land Use: The properties adjoining the area to be vacated to the west are zoned R3-1-RIO and are developed with multi-family residential buildings. The properties adjoining the area to be vacated to the east are zoned R1-1-RIO and are developed with single family residences.

Description of Area to be Vacated: The area sought to be vacated is the alley easterly of Reseda Boulevard from Erwin Street to approximately 153 feet northerly of Bessemer Street. The alley is dedicated 20 feet wide and improved. The alley as was closed by the Nuisance Alley Conversion Project and is gated at the intersection with Erwin Street and at the southerly boundary of the area proposed for vacation, approximately 153 northerly of Bessemer Street. The closure was adopted by the Board of Public Works on May 1, 2000.

Adjoining Streets: Reseda Boulevard is a Boulevard II dedicated 100 feet wide with a 80-foot wide roadway, curbs, gutters and 10-foot wide sidewalk. Erwin Street is a Collector Street dedicated 60 feet wide with a 36-foot wide roadway, curb, gutters and 5-foot wide sidewalk in a 12-foot wide border.

Surrounding Properties: The owners of lots adjoining the vacation area have been notified of the proposed vacation.

Effects of Vacation on Circulation and Access: The vacation of the alley easterly of Reseda Boulevard from Erwin Street to approximately 153 feet northerly of Bessemer Street should not have an adverse effect on circulation since the alley is currently closed to traffic.

Rear access to those properties adjoining the alley would be eliminated through the vacation. Also the vehicular access for lots 2-5 of Tract 22807 would be eliminated by vacation of the alley, as those lots are prohibited from taking vehicular access from Reseda Boulevard per the conditions of the recorded Tract Map 22807. As a condition of the vacation, through lot-tie or other acceptable means, these lots would be required to satisfy the vehicular access requirements of the recorded tract upon vacation.

The alley is also not needed for the use of pedestrians, bicyclists or equestrians.

Objections to the vacation:

In a letter dated January 9, 2015, Joni Greer, owner of the property at 6131 Canby Avenue adjoining the vacation area strongly objected to the proposed vacation, citing existing crime issues and unauthorized access to the closed alley.

In a letter dated January 21, 2015, Bernard Davis, owner of the property located at 6205 Canby Avenue adjoining the vacation area opposed the proposed vacation stating that he wanted continuous access from the alley to the rear of his property.

Consent to the vacation from owners of all adjoining properties is recommended as a condition of the vacation.

Reversionary Interest: No determination of the underlying fee interest of the vacation area has been made as to title or reversionary interest.

Dedications and Improvements: It will be necessary that the petitioner provide for the dedications and improvements as outlined in the conditions of this report.

Sewers and Storm Drains: There are no existing sewer or storm drain facilities within the area proposed to be vacated.

Public Utilities: The Department of Water and Power and AT&T maintain facilities in the area proposed to be vacated.

Tract Map: Since the required dedications can be acquired by separate instruments and the necessary improvements can be constructed under separate permit processes, the requirement for the recordation of a new tract map could be waived. However, it will be necessary that the petitioner record agreements satisfactory to the Bureau of Engineering to hold each adjoining parcel of land under the same ownership and its adjoining portion of the area to be vacated, as one parcel to preclude the creation of substandard or landlocked parcels. This is to remain effective until such time as a new subdivision map is recorded over the area, a parcel map exemption is permitted or until released by authority of the City of Los Angeles.

City Department of Transportation: The Department of Transportation stated in its communication dated March 6, 2015 that it does not oppose the proposed vacation provided that all abutting property owners are in agreement with the proposed vacation and that provisions are made for: lot consolidation, driveway access and approval by DOT, and any additional dedication and improvements necessary to bring all adjacent streets into conformance with the City's Standard Street Dimensions.

City Fire Department: The Fire Department stated in its memo dated January 14, 2015 that it has no objection to the proposed street vacation.

Department of City Planning: The Department of City Planning did not respond to the Bureau of Engineering's referral letter dated December 31, 2014.

Conclusion: The vacation of the public alley area as shown colored blue and orange on attached Exhibit "B" could be conditionally approved based upon the following:

1. It is unnecessary for present or prospective public use.

2. It is not needed for vehicular circulation or access.

3. It is not needed for non-motorized transportation purposes.

The area shown colored orange should not be vacated because it is needed for public street purposes.

Report prepared by:

Respectfully submitted,

LAND DEVELOPMENT & GIS DIVISION

Edmond Yew, Manager
Land Development and GIS Division
Bureau of Engineering

Dale Williams
Civil Engineer
(213) 202-3491

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VAC E1401262 Report.doc

Exhibit G

6 Cal. Real Est. § 15:81 (4th ed.)

Miller and Starr California Real Estate 4th December 2019 Update
By Members of the Firm of Miller Starr Regalia

Chapter 15. Easements
Rewritten and updated by Kenneth R. Styles

F. Termination

§ 15:81. Abandonment of public easements—Effect on the rights of abutting property owners

Correlation Table

Adjacent owners own the fee under a public easement. When the public agency merely has an easement and does not hold the fee title to the land under a public street or road, absent a different intent, it is presumed that the conveyance of land bordered by a public street or highway transfers title to the center of the adjacent street or highway subject to the public easement. [1]

Two rights in public streets. When an easement is acquired by the public, there are two rights created in the street. The first is the right in the public to travel over the street. The second is the private right of way acquired by abutting owners to use the street as access to their property, which is separate from the easement to the public. [2]

General rule; surface rights revert to adjacent owners. As a general rule, when a road easement has been dedicated on private land and the owner subdivides the land on each side of the easement, the vacation or abandonment of a public street or highway terminates the public easement and the rights of the general public to use the right of way and the surface rights of use revert to the owner of the underlying fee. [3] The abandonment or vacation generally results in a reversion to the abutting property owners, one-half to the owner on each side, subject to any private easements that may have survived the termination of the public easements. [4]

Case Example:

A street had been dedicated but never improved or used by the public. An abutting property owner fenced and used the entire street area for his own purposes for the prescriptive period. Thereafter, the street was abandoned, and the abutting property on the other side of the street claimed title to the center of the street. The court held that the first owner's acts had established his title to the entire street subject only to the public easement, and when the street was abandoned his title was paramount to the claims of the other owner. [5]

Case Example:

A partition decree laid out certain "streets," and a plat map of the partitioned parcels and the streets was recorded. The county abandoned a portion of one street because it was never used, and the owner of the land on both sides of the street claimed title to the street. Owners of other lots claimed that their private easement survived. The court held that the partition decree created *public* easements and not private easements. When the public easements were abandoned, no private easements survived and the owner of the lots on each side was entitled to exclusive use of the former right of way. [6]

Exception; when the fee is not in the chain of title of the owners. The general rule does not apply where the easement is along the border of the property and the subdivider does not own property on one side of the easement. When an owner grants an easement in a road or street to the public from the *margin* of the owner's land, the land reverts to the grantor's successors on an abandonment of the street or road, and the owners on the other side of the alley have no interest in the land. [7]

Case Example:

The owner of parcels A and B dedicated a 20-foot easement to the county *within the boundaries of* and along the edge of his parcel A. This parcel was conveyed to a developer by a deed that described the property by metes and bounds as *bordering* the easement. Parcel B on the *other side* of the easement was conveyed to another developer. Both tracts were subdivided and the lots sold to purchasers. When the county abandoned the easement, the lot owners on both sides of the former easement claimed an interest in the 20-foot strip of land.

The court held that there was no evidence that the original grantor of parcel A intended to reserve the fee title to the 20-foot strip underlying the easement at the time he conveyed the property. The land under the easement was never in common ownership and *the owners of parcel B never acquired title* to the servient tenement because the easement was never included within their chain of title. Therefore, the fee title to the easement was necessarily conveyed to the lot owners of parcel A.

This conclusion is supported by the "doctrine of marginal streets" that the "grant of land adjoining a street or highway that has been wholly made from, and on the margin of, the grantor's land is deemed to comprehend the fee in the whole of the street." [8] In other words, when a property owner creates a street from and along the margin of his or her property, a deed conveying the land bounded by the street includes the title to the street, subject to the public easement, and it is not logical to assume that the grantor intended to retain the narrow strip of land on a conveyance. [9]

Private easement rights on abandonment. Generally, the private rights of an *abutting owner* are not terminated on the abandonment of a public easement. [10] When a street is abandoned or vacated pursuant to an agreement with the state in conjunction with the construction of a freeway, [11] the city ordinance or resolution may be recorded, but that act does not affect any private property right that exists in the described area. [12]

Any other private rights of use that may have been acquired in the public right of way by express grant, [13] necessity, [14] or by prescription, [15] survive the abandonment of the public easement. Also easements created by implication survive. [16]

However, when an easement has been acquired by implication as a result of a purchase of a lot by reference to a map, the easements created on the subdivider's land are terminated on the vacation of a street, except for the private easement of ingress or egress to the lot from the street, [17] unless the owner of the easement records a verified notice describing the easement within two years after the street is vacated. [18]

Case Example:

The grantor conveyed lots bordering on a street by a lot and block description that referred to a recorded subdivision map. The grantor informed the grantees that the conveyances did not include the street because she needed its use for access to other land. The street had been abandoned, and both the grantor and grantees acted in the following years as though the grantor was the owner of the abandoned street.

The court held that because there was no contrary intention expressed in the deed, the oral testimony of the parties' off-record understanding and intention was not admissible. As a matter of law, a deed by a lot and block description with reference to a recorded map conveys the land under the adjacent streets to the centerline, subject to the public easement in the street, and, when the street is abandoned, the title to the street, unfettered by the public easement, remains with the adjacent property owners. [19]

Case Example:

A subdivision map showed a dedicated street, but apparently the dedication was not accepted and the street was never used. It was formerly abandoned by the county. The court held that when a strip of land is set apart for a public right of way, but the dedication offer is not accepted, the street is never improved or used, and is formerly abandoned, the contiguous owner acquires the right of possession and occupancy of the strip of land. This right passes to the owners of the property adjacent to the street, to the centerline, even though one person owns the property on both sides. [20]

Preservation of the implied easement. The vacation of a street or highway extinguishes all implied private easements claimed in the public right of way created by the purchase of a lot with reference to a map or plat, other than a private easement of ingress and egress to the lot to or from the street or highway. The implied easement created by reason of the purchase with reference to a map or plat is not extinguished if the claimant records a verified notice within two years after the vacation that describes the public easement. [21]

Recorded notice. Any abutting owner or other private party who claims an easement in the former public right of way must record a verified notice that describes the public easement.[22] However, the owner of the underlying property may commence a quiet title action against any claim of a private easement.[23]

Private easement may be terminated. A private easement that survives the abandonment of the public easement is subject to termination by abandonment, adverse possession, waiver, and estoppel.[24]

Footnotes

1 Civ. Code, §§ 831, 1112.
See § 8:63 (deeds; property covered, in general), § 8:65 (road, street, or highway as property boundary).

2 See § 15:69 (private easement in a public street (abutter's rights)).

3 Sts. & Hy. Code, §§ 8309, 8315, 8351 to 8353. Inyo County v. Given, 183 Cal. 415, 421, 191 P. 688 (1920); Kachadoorian v. Calwa County Water Dist., 96 Cal. App. 3d 741, 746, 158 Cal. Rptr. 223 (5th Dist. 1979); Safwenberg v. Marquez, 50 Cal. App. 3d 301, 308, 123 Cal. Rptr. 405 (2d Dist. 1975); Pilkington v. Fausone, 11 Cal. App. 3d 349, 351, 90 Cal. Rptr. 38 (5th Dist. 1970); Palo Alto Inv. Co. v. Placer County, 269 Cal. App. 2d 363, 369, 74 Cal. Rptr. 831 (3d Dist. 1969); People v. Vallejos, 251 Cal. App. 2d 414, 419, 59 Cal. Rptr. 450 (1st Dist. 1967); Loma Vista Inv., Inc. v. Roman Catholic Archbishop of Los Angeles, 158 Cal. App. 2d 58, 63, 322 P.2d 35 (2d Dist. 1958); Ferriera v. Ware, 90 Cal. App. 2d 759, 762, 203 P.2d 797 (3d Dist. 1949); Swift v. Board of Sup'rs of Santa Barbara County, 16 Cal. App. 72, 76, 116 P. 317 (2d Dist. 1911) (disapproved of on other grounds by, Valenta v. Los Angeles County, 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964)) and (disapproved of by, People By and Through Dept. of Public Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (5th Dist. 1966)).

4 Machado v. Title Guarantee & Trust Co., 15 Cal. 2d 180, 185, 99 P.2d 245 (1940); Harman v. City and County of San Francisco, 7 Cal. 3d 150, 166, 101 Cal. Rptr. 880, 496 P.2d 1248 (1972); Baker v. Ramirez, 190 Cal. App. 3d 1123, 1132, 235 Cal. Rptr. 857 (5th Dist. 1987); Safwenberg v. Marquez, 50 Cal. App. 3d 301, 306–308, 123 Cal. Rptr. 405 (2d Dist. 1975); Pilkington v. Fausone, 11 Cal. App. 3d 349, 351, 90 Cal. Rptr. 38 (5th Dist. 1970).
See also Freeman v. Affiliated Property Craftsmen, 266 Cal. App. 2d 723, 729–734, 72 Cal. Rptr. 357 (2d Dist. 1968).
See § 8:58 (property covered, in general).
See also Who is entitled to land upon its abandonment for railroad purposes, where railroad's original interest or title was less than fee simple absolute, 136 A.L.R. 296; Reversion of title upon abandonment or vacation of public street or highway, 70 A.L.R. 564; Reversion of title upon abandonment or vacation of public street or highway, 18 A.L.R. 1008.

5 Abar v. Rogers, 23 Cal. App. 3d 506, 510–513, 100 Cal. Rptr. 344 (1st Dist. 1972).

6 Loma Vista Inv., Inc. v. Roman Catholic Archbishop of Los Angeles, 158 Cal. App. 2d 58, 63, 322 P.2d 35 (2d Dist. 1958).

7 Besneatte v. Gourdin, 16 Cal. App. 4th 1277, 21 Cal. Rptr. 2d 82 (4th Dist. 1993).

8 Everett v. Bosch, 241 Cal. App. 2d 648, 50 Cal. Rptr. 813 (2d Dist. 1966).

9 Besneatte v. Gourdin, 16 Cal. App. 4th 1277, 21 Cal. Rptr. 2d 82 (4th Dist. 1993).

10 Sts. & Hy. Code, §§ 8351, subd. (a), 8352, subds. (a), (b).
See § 15:69 (private easement in a public street (abutter's rights).

11 See § 15:80 (abandonment of public easements).

12 Sts. & Hy. Code, § 8352, subd. (a).

13 Neff v. Ernst, 48 Cal. 2d 628, 636, 311 P.2d 849 (1957); Swift v. Board of Sup'rs of Santa Barbara County, 16 Cal. App. 72, 77, 116 P. 317 (2d Dist. 1911) (disapproved of on other grounds by, Valenta v. Los Angeles County, 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964)) and (disapproved of by, People By and

Through Dept. of Public Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (5th Dist. 1966)).

See Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

14 Sts. & Hy. Code, § 8352.

15 Sts. & Hy. Code, § 8352. Severo v. Pacheco, 75 Cal. App. 2d 30, 34, 170 P.2d 40 (3d Dist. 1946); Swift v. Board of Sup'rs of Santa Barbara County, 16 Cal. App. 72, 77, 116 P. 317 (2d Dist. 1911) (disapproved of on other grounds by, Valenta v. Los Angeles County, 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964)) and (disapproved of by, People By and Through Dept. of Public Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (5th Dist. 1966)).

16 Sts. & Hy. Code, § 8352. Anderson v. Citizens' Savings & Trust Co., 185 Cal. 386, 397, 197 P. 113 (1921); Ratchford v. County of Sonoma, 22 Cal. App. 3d 1056, 1069, 99 Cal. Rptr. 887 (1st Dist. 1972); Norcross v. Adams, 263 Cal. App. 2d 362, 365, 69 Cal. Rptr. 429 (4th Dist. 1968); Metzger v. Bose, 183 Cal. App. 2d 13, 17, 6 Cal. Rptr. 337 (3d Dist. 1960) (disapproved of on other grounds by, Valenta v. Los Angeles County, 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964)) and (disapproved of on other grounds by, People By and Through Dept. of Public Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (5th Dist. 1966)); Severo v. Pacheco, 75 Cal. App. 2d 30, 34, 170 P.2d 40 (3d Dist. 1946).

See Private easement in way vacated, abandoned, or closed by public, 150 A.L.R. 644.

17 Kinney v. Overton, 153 Cal. App. 4th 482, 490–492, 63 Cal. Rptr. 3d 136 (4th Dist. 2007). Sts. & Hy. Code, § 8353, subd. (a). Tract Development Services, Inc. v. Kepler, 199 Cal. App. 3d 1374, 246 Cal. Rptr. 469 (4th Dist. 1988) (abandoned public street never used, but private implied easements survive).

18 Sts. & Hy. Code, § 8353, subd. (b).

The statute modifies the earlier decisions of Anderson v. Citizens' Savings & Trust Co., 185 Cal. 386, 397, 197 P. 113 (1921); Severo v. Pacheco, 75 Cal. App. 2d 30, 34, 170 P.2d 40 (3d Dist. 1946).

Sts. & Hy. Code, § 8353 (formerly Civ. Code, § 812) cannot be applied retroactively to deprive a person of an easement created by purchasing by reference to a map prior to the code's enactment in 1949. Neff v. Ernst, 48 Cal. 2d 628, 637, 311 P.2d 849 (1957).

19 Safwenberg v. Marquez, 50 Cal. App. 3d 301, 306, 123 Cal. Rptr. 405 (2d Dist. 1975).

20 Baker v. Ramirez, 190 Cal. App. 3d 1123, 1132, 235 Cal. Rptr. 857 (5th Dist. 1987).

21 Sts. & Hy. Code, § 8353.

22 Sts. & Hy. Code, § 8353, subd. (b).

23 Sts. & Hy. Code, § 8353, subd. (c).

24 Sts. & Hy. Code, §§ 8351, subd. (a), 8352, subds. (a), (b).

End of Document

Exhibit H

7 Cal.3d 150, 496 P.2d 1248, 101 Cal.Rptr. 880

JUNE HARMAN, Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents

S.F. No. 22859.
Supreme Court of California
May 15, 1972.

SUMMARY

Plaintiff, as a taxpayer, in an action against San Francisco and landowners to whom the city had deeded vacated city streets, sought a declaration that the city's method of obtaining appraised values for purposes of sale of such streets was illegal. Plaintiff also sought damages on behalf of the city based on the difference between the actual value and the price at which certain sales had been made. The trial court sustained a general demurrer without leave to amend and entered a judgment of dismissal. (Superior Court of the City and County of San Francisco, No. 612191, Robert W. Merrill, Judge.)

The Supreme Court reversed and remanded with directions. In addition to determining that plaintiff had "standing" to maintain an action such as she had brought, the court concluded that her complaint stated a cause of action, based on the city's violation of charter provisions requiring it to obtain 90 percent of a rationally determined market value in its sales. Relying on the facts alleged in the complaint, the court found a violation of that requirement in the city's practice of arbitrarily evaluating all easements of ingress and egress at 50 percent of the unencumbered fee value, rather than by comparing the market value of the dominant estates before and after termination of the easement.

In Bank. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Pleading § 91--General Demurrer to Complaint--Where Not Sustainable.
A complaint which states the essential and substantial facts to ***151** apprise defendant of the nature of the cause of action is not vulnerable to a general demurrer.

(2)
Pleading § 103(0.5)--Amendment After Demurrer to Complaint Sustained-- Amendment.
A general demurrer to a complaint should not be sustained without leave to amend, if the complaint raises the reasonable possibility that its defects can be cured by amendment.

(3)
Municipal Corporations § 469--Demurrer--Sustaining Without Leave to Amend.
In a taxpayer's action against a city and landowners to whom the city had deeded vacated streets, it was not proper to sustain a general demurrer, without leave to amend, to a complaint which alleged the essential and substantial facts to apprise defendants of the nature of the cause of action, resting on a claimed violation of the city charter in the city's practice, on its sale of vacated streets, of evaluating all easements of ingress and egress at 50 percent of the unencumbered fee value.

(4)
Parties § 12(0.7)--Who May or Must Be Parties Plaintiff--"Standing to Sue"--Challenge of Legislative and Executive Acts.
The propriety of a private person's judicial challenge to legislative or executive acts depends on the fitness of the person to raise an issue ("standing"), and the amenability of the issue raised to judicial redress ("justiciability").

(5)
Parties § 12(0.7)--Who May or Must Be Parties Plaintiff--Real Party in Interest--"Standing to Sue."
The fundamental aspect of "standing" to raise a justiciable issue in court is that it focuses on the party seeking to get his complaint before a court, and not in the issues he wishes to have adjudicated.

(6)
Parties § 12(0.7)--Who May or Must Be Parties Plaintiff--Real Party in Interest--"Standing to Sue."
A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes

the proportions necessary to ensure that he will vigorously present his case.

(7)
Municipal Corporations § 462--Taxpayer's Standing to Sue.
Plaintiff, as a municipal taxpayer seeking to avoid the waste of municipal assets, had standing to seek both equitable and legal relief with respect to defendant-city's alleged violation of the city's charter provision by its practice, on its sale of vacated streets, of evaluating all ***152** easements of ingress and egress at 50 percent of the unencumbered fee value.

(8)
Parties § 10--Suing on Behalf of All--Against Governmental Entity.
A taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined.

(9)
Parties § 11--Who May or Must Be Parties--Virtual Representation--Basis of Rule Permitting Action Against Governmental Entities.
The rule that a taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined ensures that the courts do not trespass into the domain of legislative or executive discretion and prevents the courts from hearing complaints which seek relief that they cannot effectively render.

(10)
Municipal Corporations § 469--Allegation of Justiciable Cause.
By asserting that defendant-city has violated charter provisions delineating the city's duties in its appraisal and disposition of vacated streets, plaintiff presented a justiciable complaint.

(11)
Municipal Corporations § 373(1)--Disposition of Vacated Streets as Governed by Charter.
The sale of public streets of San Francisco is governed by its charter and not by the Streets and Highways Code.

(12)
Municipal Corporations § 73--Charter as Constitution or Organic Law of Municipality.
The charter represents the supreme law of the City and County of San Francisco, subject to conflicting provisions in the United States and California Constitutions and to preemptive state law.

[See **Cal.Jur.2d,** Municipal Corporations, § 37.]

(13)
Highways, Streets, and Bridges § 42--Municipal Control--Vacated Streets--Sale.
The Legislature has reposed the regulation of the sale of vacated streets exclusively with the municipalities.

(14)
Highways, Streets, and Bridges § 18--Street Vacation Act--Legislative Intent as to Preemption.
In the Street Vacation Act of 1941 (Sts. & Hy. Code, § 8300 ***153** et seq.), the Legislature has manifested its intention to protect a statewide interest in public access to dedicated streets, but to repose in the cities the power to establish protections for their local economic and property interests in such streets.

(15)
Counties § 55--County Boards of Supervisors--Powers and Duties--Sale of Vacated Streets.
Since San Francisco comprises a county, as well as a city, Sts. & Hy. Code, § 960.4, relating to the sale of property no longer required for street purposes, empowers the Board of Supervisors of San Francisco to fix the terms and conditions of the sale of vacated streets.

(16)
Highways, Streets, and Bridges § 18--Vacation of Streets--Legislative Intent as to Preemption.
Sts. & Hy. Code, § 960.4, indicates no intention to occupy the field of alienating vacated public streets, but, instead, recognizes that the local interest prevails and that the disposition of street property is to be transacted in a manner approved by the county.

(17)
Municipal Corporations § 373(0.5)--Property--Disposition--Preemption of Local Authority.

Neither the wording of the statutes nor the nature of the field of regulation preempts local authority to regulate the sale of municipal streets.

(18)
Municipal Corporations § 373(1)--Property--Disposition--"Preliminary Appraisal"--Charter Requirement.
San Francisco City Charter, § 92, in requiring sales of city property at 90 percent of a "preliminary appraisal" value when the property is not sold at auction, enjoins the city from the waste of assets which have been obtained or maintained at public expense and is aimed at preventing the enrichment of individual private purchasers who, in a noncompetitive sale, would obtain city assets at less than fair value.

(19)
Municipal Corporations § 373(1)--"Preliminary Appraisal" Charter Requirement--As Requiring Rational Assessment.
In order to fulfill the purpose of avoiding sales that result in public waste, the preliminary appraisal," referred to in San Francisco City Charter, § 92, must represent a rational assessment of the property's market value.

(20)
Municipal Corporations § 373(1)--Vacated Streets--Sales Price.
San Francisco City Charter, § 92, requires the city, when selling vacated streets to abutting owners, to obtain, in exchange, at least 90 percent of a rational assessment of the market value. ***154**

(21)
Pleading § 84(5)--Demurrer to Complaint as Admission--Application of Rule on Appeal.
In evaluating the merits of plaintiff's cause of action after a demurrer to his complaint, without leave to amend, has been sustained, the appellate court will accept the factual allegations of the complaint as true.

(22)
Municipal Corporations § 373(1)--Sale of Vacated Streets--Charter Requirements.
Arbitrary sale of San Francisco's interest in its vacated streets at the fixed fraction of one-half the fee value does not fulfill charter requirements.

(23)
Municipal Corporations § 473.5--Actions--Appeal--From Dismissal on Sustaining Demurrer Without Leave to Amend--Issue of Fact.
On appeal from a judgment of dismissal after sustaining of a general demurrer, without leave to amend, to a complaint alleging that defendant-city's sales of vacated streets were made at prices violating charter requirements, the city could not contend that, in fact, the sales were made at prices that did not violate the charter, since such a contention would raise merely an issue of fact not cognizable on the appeal.

(24)
Highways, Streets, and Bridges § 32--Rights of Abutter Aside From Ownership of Fee--Easement of Ingress and Egress--Effect of Vacation.
A private easement of ingress and egress burdens all public streets in favor of the abutting parcels, and this easement continues even though the city by vacation, terminates the public right of access to the street.

(25)
Easements and Licenses in Real Property § 44--Valuation.
The value of an easement should be determined by comparing the market value of the dominant estates before and after the easement is terminated, and, therefore, an easement of ingress and egress cannot be appraised by treating its underlying fee as if it stood in a vacuum; the appraiser must look to the status of the surrounding parcels and determine the easement's value in the context of the abutting parcels' highest and best use.

(26)
Municipal Corporations § 373(1)--Sale of Vacated Streets--"Preliminary Appraisal" Requirements of Charter.
In making the "preliminary appraisal," called for by San Francisco City Charter, § 92, the director of property must recognize and compensate for the variation in easement values that results from the divergent "highest and best uses" of the parcels abutting the various streets which the city may sell. ***155**

(27)
Municipal Corporations § 469--Complaint--Sufficiency Against General Demurrer--Violation of Duties Under Charter on Sale of Vacated Streets.
A valid cause of action, good against a general demurrer, was stated by a taxpayer's complaint against a city and others, alleging that the city failed to fulfill its duty under its charter

to receive 90 percent of a rationally determined market value on its sale of vacated streets, as a result of the director of property's practice of appraising every easement of ingress and egress at 50 percent of the street's unencumbered fee value.

COUNSEL

John B. Harman for Plaintiff and Appellant.

Thomas M. O'Connor, City Attorney, Norman Sanford Wolff and Robert A. Kenealey, Deputy City Attorneys, Kopp & Goldstein, Quentin L. Kopp, Thomas M. DiFranco, Walter A. Dold, George S. Youngling, Thomas F. Stack, Hanson, Bridgett, Marcus & Jenkins, Williams J. Bush and Pierce N. Stein for Defendants and Respondents.

Sidney E. Roberts, James K. Haynes and Orrick, Herrington, Rowley & Sutcliffe as Amici Curiae on behalf of Defendants and Respondents.

TOBRINER, J.

In this taxpayer's suit we are asked to determine if San Francisco may properly sell its vacated streets, burdened with private easements of ingress and egress, for 50 percent of their unencumbered fee value. We hold that, because the value of such easements in all of the city's streets are not uniform, the city's arbitrary reduction of 50 percent of the value of the vacated street in fixing the sales price violates its charter duty to obtain 90 percent of the rationally determined market value of all public property offered for sale.

Pursuant to the authority granted in the Streets and Highways Code and its charter, the City and County of San Francisco may upon petition of abutting landowners vacate a public street and convey the city's interest in such street to the petitioning landowners. After the petition of the landowners ***156** to the board of supervisors describing the purposes for their request and the intended use of the street to be vacated, the city director of property determines the street's appraised value. Upon the landowners' tender of a sum equal to that value, the board of supervisors is authorized to find that the granting of the landowners' petition will serve public convenience and to order the vacation and sale of the street.

In obtaining the appraised value of streets proposed for vacation, the city director of property estimates the value of a fee interest of an area equal to that of the street to be vacated, and he then halves that value to compensate for the continuing private easement of ingress and egress held by an owner whose property abuts the vacated street.

Plaintiff sues as a San Francisco taxpayer to obtain a declaration that the property director's method of obtaining appraised values results in a "gift of public funds" contrary to "the laws, statutes, charters, and ordinances governing such sales and transactions." She alleges that in at least eight sales of former streets the private easements commanded no value, so that the city, in determining the price at which to sell, should not have discounted the value of the fee by 50 percent. Plaintiff also demands that the city receive as damages the differences between the actual value and sale price of the eight street segments conveyed.

Defendants, the city and landowners to whom the city has deeded vacated streets, demurred to plaintiff's complaint for failure to state a cause of action. The superior court, advising plaintiff that her complaint could not be cured by amendment, sustained defendants' demurrers without leave to amend. Plaintiff then prosecuted this appeal from a judgment of dismissal.

We hold that plaintiff has stated a valid cause of action, and that the judgment must be reversed with directions to overrule the demurrers. As we shall explain, plaintiff's status as a taxpayer qualifies her to raise the justiciable question of whether the city has violated a statutory duty in its alienation of formerly public streets. Resolving that question, we determine that a charter provision requires the city to obtain 90 percent of the market value of the street property that it sells. The city's practice of evaluating all easements of ingress and egress at 50 percent of the unencumbered fee value cannot stand, since each easement's value must necessarily vary according to the highest and best use of the dominant parcels that abut each street.

1. *Plaintiff's complaint states a cause of action.*

We meet at the outset defendant's contention that plaintiff's complaint does not state a cause of action and fails for lack of specificity. () We ***157** explain that a complaint is not vulnerable to a general demurrer if the complaint states the essential and substantial facts to apprise defendant of the nature of the cause of action.

We said in *Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 156-157 [157 P.2d 1] that "'[a]ll that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the *essential facts* of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of his cause of action'" (italics added). Similarly, in

Krug v. Meeham (1952) 109 Cal.App.2d 274, 277 [240 P.2d 732], the court suggested that averment of the "substantial facts" that constituted a cause of action would suffice to dispel a general demurrer.

Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 549 [99 Cal.Rptr. 745, 492 P.2d 1137] establishes the principle that no more is required than a showing that plaintiff is entitled to *some relief*, stating, "'If upon a consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated, ... or although the plaintiff may demand relief to which he is not entitled under the facts alleged.'" (See also *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639 [14 Cal.Rptr. 496]; *Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 438 [292 P. 474].)

()Indeed, a general demurrer to a complaint should not be sustained without leave to amend if the complaint raises the reasonable possibility that its defects can be cured by amendment. Thus the court in *Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 664 [297 P.2d 638], explains: "In the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment." (See also *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 739-740 [29 Cal.Rptr. 201, 8 A.L.R.3d 537].) In sum, if the pleadings contain "sufficient particularity and precision to acquaint the defendants with the nature, source and extent of his cause of action" the general demurrer should be overruled. (*Strozier v. Williams* (1960) 187 Cal.App.2d 528, 532 [9 Cal.Rptr. 683]; see *Smith v. Kern County Land Co.* (1959) 51 Cal.2d 205, 209 [331 P.2d 645].)

Plaintiff at the very least states the essential and substantial facts to apprise the defendants of the nature of her cause of action. Thus plaintiff alleges that the named eight defendants set forth in Exhibit A, the abutting ***158** owners of certain streets, petitioned defendant city to vacate the streets on which their property abutted. In accordance with the provisions of the Street Vacation Act of 1941, the defendant city published notice of intention to vacate these streets. Pursuant to the notices defendant board of supervisors held hearings and thereafter ordered the vacation of those streets. It directed the defendant Dolan, clerk of the board of supervisors, and the defendant Alioto, the mayor, "to execute a document transferring the interest of defendant City to the defendant herein petitioning for vacation and owning the abutting property." These defendants, the abutting owners, "have purchased or acquired or have a right to purchase or acquire from defendant City, and defendant City has sold or agreed to sell or transfer its fee title or other interest" in the described streets.

Turning to the value of the vacated streets, plaintiff alleges that the defendant city and the defendant director of property "have determined the value of each street or portion of a street" and after so doing "gave, granted, and allowed to each person acquiring title to such street or portion thereof from defendant City a sum equal to 50% of the true value thereof to said abutting owners as compensation for rights of ingress and egress over and upon the property vacated and ordered sold." Despite such allowances plaintiff alleges on information and belief "that said rights [o]f ingress and egress were and are of no value to the abutting owners and purchasers." Indeed, each abutting owner "asserted his or its intention to abandon said street or portion thereof as a street and to consolidate it with other properties owned by each of said defendants and abutting owners as a single property." The complaint states that it was the intention of the abutting owner "to exclude the public therefrom and to construct buildings over and upon said properties including said street or portion thereof."

As a result of these transactions, the complaint alleges, "[d]efendant City received no benefit or consideration from allowance of 50% of said value for alleged rights of ingress and egress, ... but was deprived of the true and reasonable value of such property so transferred ..." Finally, the complaint asserts that the aforementioned transactions were "all contrary to the best interests of defendant City, plaintiff, and each taxpayer of the City and County of San Francisco, constituting a gift of public funds, which is contrary to the Constitution of the State of California, the laws, statutes, charters, and ordinances governing such sales and transfers."

()These allegations contain the substance of plaintiff's purported cause of action that the city violated a statutory duty owed to its taxpayers. Although the complaint may not have been "artfully drawn," it nonetheless alleged the essential and substantial facts to apprise defendants of the nature ***159** of the cause of action. These allegations established the claimed violation of the city charter. On the basis of these allegations the defendants could prepare to, and did in fact, contest the

validity of plaintiff's claim. Accordingly, the superior court improperly sustained the demurrers without leave to amend.

We proceed to the central question: whether or not the specific facts alleged in plaintiff's complaint describe unlawful activity against which she is entitled to relief. We explain, first, that plaintiff may properly assert her standing to raise the stated justiciable issue in this court.

2. *Plaintiff presents a cognizable complaint in alleging violation of a statutory standard.*

()The propriety of a private person's judicial challenge to legislative or executive acts depends upon the fitness of the person to raise an issue ("standing") and the amenability of the issue raised to judicial redress ("justiciability"). (*Flast v. Cohen* (1968) 392 U.S. 83, 91-103 [20 L.Ed.2d 947, 956-964, 88 S.Ct. 1942]; Davis, *Standing to Challenge Governmental Actions* (1955) 39 Minn.L.Rev. 353, 391; Jaffe, *Standing to Secure Judicial Review: Private Actions* (1961) 75 Harv.L.Rev. 255, 304-305.)

Standing

()"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court, and not in the issues he wishes to have adjudicated." (*Flast v. Cohen, supra*, at p. 99 [20 L.E.2d at p. 961].) () A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case. (*Baker v. Carr* (1962) 369 U.S. 186, 204 [7 L.Ed.2d 663, 678, 82 S.Ct. 691].) As Professor Jaffe has stated, we must determine standing by a measure of the "intensity of the plaintiff's claim to justice." (Jaffe, *supra*, 75 Harv.L.Rev. at p. 304.)

()Plaintiff, as a municipal taxpayer seeking to avoid the waste of municipal assets, falls into the category of a type of claimant long recognized to possess a sufficiently intense interest in his claim to establish his " standing" to enter the courtroom. Because a successful attack on wrongful municipal spending or disposition of assets in all likelihood may reduce the municipal taxpayer's burden of meeting the expenses of government, courts do not doubt that a municipal taxpayer will effectively present his claim. " [T]axpayers have a sufficiently personal interest in the illegal expenditure of funds by [municipal] officials to become dedicated adversaries. " ***160** (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 270 [96 Cal.Rptr. 42, 486 P.2d 1242]; accord, *Flast v. Cohen, supra*, 392 U.S. at p. 93 [20 L.Ed.2d at pp. 957-958]; *Frothingham v. Mellon* (1923) 262 U.S. 447, 486-487 [67 L.Ed. 1078, 1084-1085, 43 S.Ct. 597]; *Midwest Employers Council, Inc. v. City of Omaha* (1964) 177 Neb. 877 [131 N.W.2d 609, 613]; see also 18 McQuillin, Municipal Corporations (3d ed. 1963) § 52.14, at p. 30; Jaffe, Judicial Control of Administrative Action (1965) pp. 483-484.)

In recognition of this interest, the Code of Civil Procedure provides that any taxpayer of one year's standing may bring an "action to obtain a judgment, *restraining and preventing* any illegal expenditure of, waste of, or injury to " the assets of his municipality. (Code Civ. Proc., § 526a (italics added).) If plaintiff in the instant case sought merely to obtain injunctive relief, this provision would suffice to establish her standing. Because plaintiff also seeks to obtain damages in behalf of the city, however, her interest in the outcome does not diminish. Accordingly, plaintiff's interest as a taxpayer in the outcome of the instant case establishes her standing to seek both equitable and legal relief against the city's allegedly wrongful disposition of its assets. [1]

Justiciability

Having determined that plaintiff's interest in her complaint suffices for her to present the issues it contains, we must then determine if those issues raise questions amenable to judicial redress.

()"A taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." (*Gogerty v. Coachella Valley Junior College Dist.* (1962) 57 Cal.2d 727, 730 [21 Cal.Rptr. 806, 371 P.2d 582].)[2] () This well-established rule ensures that the California courts, by entertaining only those taxpayers' suits that seek to measure governmental performance against a legalstandard, ***161** do not trespass into the domain of legislative or executive discretion. (*Amer. Distl. Co. v. City Council, Sausalito* (1950) 34 Cal.2d 660, 664-665 [212 P.2d 704, 18 A.L.R.2d 1247]; *Nickerson v. San Bernardino* (1918) 179 Cal. 518, 522-523 [177 P. 465]; accord, *Flast* v. *Cohen, supra*, 392 U.S. at pp. 102-106 [20 L.Ed.2d at pp. 963-965]; see Jaffe, Judicial Control of Administrative Actions, *supra*, at pp. 485-486.) This rule similarly serves to prevent the courts from hearing complaints which seek relief that the courts cannot effectively render; the courts cannot formulate decrees that involve the exercise of indefinable discretion; their decrees can only restrict conduct

that can be tested against legal standards. (*San Ysidro Irr. Dist. v. Superior Court* (1961) 56 Cal.2d 708, 719-720 [16 Cal.Rptr. 609, 365 P.2d 753]; Jaffe, Judicial Control of Administrative Action, *supra*, at p. 481; Jaffe, *supra*, 75 Harv.L.Rev. at p. 304.) Accordingly, we employ the *Gogerty* rule to determine justiciability of the plaintiff's complaint. (See *Flast* v. *Cohen, supra*, 392 U.S. at p. 95 [20 L.Ed.2d at p. 959].)

()Plaintiff alleges that the city has violated charter provisions delineating the city's duties in its appraisal and disposition of vacated streets. By asserting "a failure on the part of the governmental body to perform a duty specifically enjoined" (*Gogerty v. Coachella Valley Junior College Dist., supra*, 57 Cal.2d at p. 730), plaintiff presents a justiciable complaint. Accordingly, we now proceed to examine the statutory restrictions binding the city in its sales of vacated city streets.

3. *The city owed a statutory duty to its taxpayers to obtain at least 90 percent of a rationally determined market value of vacated streets conveyed to abutting landowners.*

()We shall point out that the sale of public streets of San Francisco is governed by its charter and not, as some defendants urge, by the Streets and Highways Code. Article XI, section 3, subdivision (a) of the State Constitution provides that upon the voters' ratification and the Legislature's approval of a city and county charter, the charter shall become effective and "supersede ... all laws inconsistent therewith." () Thus the charter represents the supreme law of the City and County of San Francisco, subject, of course, to conflicting provisions in the United States and California Constitutions, and to preemptive state law. (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598-599 [212 P.2d 894]; *People v. McGennis* (1966) 244 Cal.App.2d 527, 532-533 [53 Cal.Rptr. 215]; see *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 135 [98 Cal.Rptr. 281, 490 P.2d 793]; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63 [81 Cal.Rptr. 465, 460 P.2d 137].) ***162**

Certain defendants in the instant case, however, contend that specified sections of the Streets and Highways Code preempt the authority of the municipality pertaining to the sale of vacated streets. The relevant provisions in the Streets and Highways Code that these defendants invoke are section 8300 and those following it as well as section 960.4. () Reviewing the body of law concerned with vacated streets, we find that the Legislature with good reason has reposed the regulation of the *sale* of such streets exclusively with the municipalities. Under the first-mentioned sections (Sts. & Hy. Code, § 8300 et seq.) the Street Vacation Act of 1941, a city council may order vacation of a public street (§ 8320), provided that certain publication and hearing procedures are followed (§§ 8322, 8323) and that the city council finds that the street "is unnecessary for present or prospective public street purposes" [3] (§ 8323). The act contains no reference or requirements relating to the determination of the sales price of streets so vacated.

The act thus reveals no legislative intent to occupy the field of the fixing of the terms of sale of vacated streets, but rather creates a set of procedural safeguards to govern the city's vacation of its streets. () The Legislature thus manifests its intention to protect a statewide interest in public *access* to dedicated streets (*People* v. *City of Oakland* (1929) 96 Cal.App. 488, 496-497 [274 P. 438]), but to repose in the cities the power to establish protections for their local economic and property interests in such streets. (See *Armas v. City of Oakland* (1960) 183 Cal.App.2d 137, 139-140 [6 Cal.Rptr. 750].)

()As we have pointed out, defendants refer secondly to Streets and Highways Code section 960.4. That section authorizes a county board of supervisors to sell property no longer required for street purposes "in the manner and upon the terms and conditions approved by the board..." Since San Francisco comprises a county as well as a city, this section empowers its board of supervisors to fix the terms and conditions of the sale of vacated streets. ***163**

()The Legislature thus indicates no intention in this section to occupy the field of alienating vacated public streets but instead recognizes that the local interest prevails and that the disposition of street property be transacted in a manner approved by the county. Hence the county charter provision prescribing such manner of disposition fixes the terms and conditions upon which streets may be vacated and sold. (Cal. Const., art. XI, § 3, subd. (a); *City of Grass Valley v. Walkinshaw, supra*, 34 Cal.2d at pp. 598-599; *City of Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 573 [42 Cal.Rptr. 72].) Furthermore, since the code also declares that "the authority conferred upon boards of supervisors by [section 960.4] shall be exercised subject to such limitations and restrictions as are prescribed by this division or by other provisions of law" (§ 900), the Legislature presumptively included local "*laws*," recognizing that in its disposition of street property the board of supervisors should exercise its authority in accordance with municipal legislation. [4]

Finally, we find no policy reasons to support a statewide preemption of the subject matter of the method of fixing the value and sales price of public streets previously vacated. Surely the Legislature recognized that citizens of the state in general shared an interest in the continued public access to city streets, and therefore that uniform requirements as to notices and hearings pertaining to the vacation of such streets should serve as basic statewide safeguards against arbitrary abandonment. No similar interest, however, compelled procedural uniformity with respect to the ***164** sales price of streets previously vacated. To the contrary, the interest in preventing fiscal waste in the disposition of municipal assets is obviously one of local concern.

()In sum, neither the wording of the statutes nor the nature of the field of regulation preempts local authority to regulate the sale of municipal streets. In consonance with the California statutes "other procedures may be adopted either independently or concurrently. Especially is this true where a statutory method of procedure is incomplete, or inadequate" to protect local interests. (11 McQuillan, Municipal Corporations (3d ed. 1964) § 30.196, at p. 144, citing *Armas* v. *City of Oakland, supra*, 183 Cal.App.2d 137.) Since the Legislature has relegated to the municipalities the responsibility to protect against improper terms of sale of public streets, we must look to the relevant municipal enactments for the standards governing the instant case.

Turning, then, to the supreme municipal law of San Francisco, the charter, we find the following provision relating to the sale of city property: "Section 92. Any real property owned by the city and county, excepting lands for parks and squares, may be sold on the recommendation of the officer, board or commission in charge of the department responsible for the administration of such property. When the board of supervisors, by ordinance, may authorize such sale and determine that the public interest or necessity demands, or will not be inconvenienced by such sale, the director of property shall make a preliminary appraisal of the value of such property. The director of property shall advertise by publication the time and place of such proposed sale. He shall forthwith report to the department head concerned and to the supervisors the amount of any and all tenders received by him. The supervisors may authorize the acceptance of the highest and best tender, or they may, by ordinance, direct that such property be sold at public auction, date of which shall be fixed in the ordinance. No sale other than a sale at public auction shall be authorized by the supervisors unless the sum offered shall be at least ninety percent of the preliminary appraisal of such property hereinbefore referred to."

()This section, requiring sales of city property at 90 percent of a " preliminary appraisal" value when the property is not sold at auction, serves a fundamental purpose: it enjoins the city from the waste of assets which have been obtained or maintained at public expense. By their ratification of this section the citizens of San Francisco obviously sought to prevent the enrichment of individual private purchasers who in a noncompetitive sale would obtain city assets at less than fair value.

()In order to fulfill the charter purpose of avoiding sales that result ***165** in public waste, the "preliminary appraisal" of property offered for a noncompetitive sale must represent a rational assessment of the property's market value. Otherwise, the director, by appraising the property at lower than market value, could sanction a sale of city assets at a price that subsidized the purchaser at public expense. Clearly the draftsman of section 92 did not intend to give the director of property a latitude that would destroy the protective armor of the section. [5]

"Market value" has consistently been defined as "'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adopted and for which it was capable'" (*Merced Irrigation Dist.* v. *Woolstenhulme* (1971) 4 Cal.3d 478, 488 [93 Cal.Rptr. 833, 481 P.2d 1]; *Sacramento etc. R.R.Co.* v. *Heilbron* (1909) 156 Cal. 408, 409 [104 P. 979]). () We conclude that section 92 requires the city, when selling vacated streets to abutting owners, to obtain in exchange at least 90 percent of a rational assessment of that value. [6]

4. *Plaintiff's complaint that the city violated its statutory duty to obtain at least 90 percent of a rationally determined market value of vacated streets conveyed to abutting landowners states a valid cause of action.*

We now proceed to evaluate the merits of plaintiff's cause of action. () Accepting the complaint's factual allegations as true, as we must for purposes of evaluating plaintiff's appeal from a sustained demurrer ***166** (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Daar* v. *Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732]), we note that the city "gave,

granted and allowed to each person acquiring title to such street or portions thereof from defendant city a sum equal to 50% of the true value thereof to said abutting owners as compensation for rights of ingress and egress over and upon the property vacated and ordered sold." In short, plaintiff complains that the city has appraised and sold the streets to abutting landowners at 50 percent of their true value.[7] Plaintiff further alleges that these sales are "contrary" to the city charter, an allegation which raises the issue of whether the streets were sold at a price at least equal to 90 percent of a rational assessment of market value.

In response, the city asserts that it owns the fee interest in the streets, that the abutting owners hold the easement of ingress and egress, and that these two interests mount an equal value. Hence, concludes the city, the abutting owners, upon purchase of the city's interest, should pay only one half of the street's unencumbered fee value.

()We shall point out that the arbitrary sale of the city's interest in its streets at the fixed fraction of one-half the fee value does not fulfill the charter requirement. This is not a case where cutting the value of the street in two, in some remote semblance of a Solomonic judgment of halving the disputed baby, will at all or invariably compensate the city for the streets it sells.

()Since this case comes to us after the sustaining of a demurrer, the city cannot now contend that *in fact* the questioned sales *did* take place at prices within 10 percent of market value; such a contention would raise merely an issue of fact not cognizable on this appeal. (*Ferraris v. Levy* (1963) 223 Cal.App.2d 408, 412 [36 Cal.Rptr. 30]; *County of San Mateo v. Bartole* (1960) 184 Cal.App.2d 422, 435 [7 Cal.Rptr. 569]; see Code Civ. Proc., § 589.) If the city is to prove that plaintiff has not stated a valid cause of action it must show that *as a matter of law* its system of appraisal yields *in all instances* sale prices in conformity with charter requirements; in other words, that *as a matter of law* all easements of ingress and egress to streets have the *same value*, and that in all such cases that value approximates *50 percent* of the value of an unencumbered fee interest in that street.[8] ***167** This proposition on its face cannot stand. An examination of established appraisal doctrine will illustrate its fallacy.

()Defendants correctly contend, of course, that a private easement of ingress and egress burdens all public streets in favor of the abutting parcels (*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663 [39 Cal.Rptr. 903, 394 P.2d 719]; *People v. Ricciardi* (1943) 23 Cal.2d 390, 397-398 [144 P.2d 799]), and that this easement continues even though the city by vacation terminates the public right of access to the street. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 636 [311 P.2d 849]; *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349-350 [144 P.2d 818]; *Ratchford v. County of Sonoma* (1972) 22 Cal.App.3d 1056, 1069 [99 Cal.Rptr. 887].) So long as the potential for the exercise of the easement remains viable, the easement has value (*Beals v. City of Los Angeles* (1943) 23 Cal.2d 381, 388 [144 P.2d 839]), and the servient estate's value will correspondingly decrease. *The diminution in value will not, however, equal half the fee value in every case.*

()Modern appraisal practice dictates that the value of an easement be determined by comparing the market value of the dominant estates before and after the easement is terminated. "The general rule is that the [value] of access rights is the difference in the market value of the [abutting] property before the taking of the access rights and its market value after the taking, considering its highest and best use... In some cases, 'highest and best use' has been qualified to mean the 'most likely use' over a period of years." (Crawford, *Appraisal of Rights of Way and Easements* in Encyclopedia of Real Estate Appraising (Friedman ed. 1968) pp. 724, 727; see *Symons v. San Francisco* (1897) 115 Cal. 555 [42 P. 913, 47 P. 453]; *People* v. *Al. G. Smith Co.* (1948) 86 Cal.App.2d 308, 311 [194 P.2d 750]; see also Hadley, *Legal Problems in Highway Acquisition* in Condemnation Appraisal Practice (Amer. Inst. of Real Estate Appraisers 1961) pp. 179, 191.) Hence an easement of ingress and egress cannot be appraised by treating its underlying fee as if it stood in a vacuum; the appraiser must look to the status of the surrounding parcels (see *Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills* (1969) 1 Cal.App.3d 781, 786 [82 Cal.Rptr. 318]; *People* v. *Murray* (1959) 172 Cal.App.2d 219, 225-227 [342 P.2d 485]), and determine the easement's value in the context of the abutting parcels' highest and best use.

Not all parcels that abut the city's vacated streets will have the same highest and best use. If the abutting lots are located in a residential area, ***168** their highest and best use will probably contemplate the development of one residence on each parcel. But the highest and best use of abutting lots in a commercial zone might be as a unified tract that permits construction of a large building covering all the lots and the vacated street as well.[9]

Given that the highest and best use of parcels abutting vacated streets *will vary* according to their neighborhoods,

the easements of ingress and egress will obviously *not have uniform value throughout the city*. In a residential neighborhood, the necessity of maintaining access to lots whose highest and best use demand separate development of each lot will require appraisal of the easement at a high percentage of the street's unencumbered fee value; without the access, or with a diminished access, the abutting parcels would suffer substantial loss in value, and the purchaser of the street could not block that access without correspondingly compensating the other abutting owners. In a commercial environment, however, development of the parcels as the site for a large building will obviate the need for access through the vacated street; access will be provided by other streets bordering the unified tract. Accordingly, in the case of the block-sized tract, the abutting owners' easement will have little or no value; such owners will derive maximum use of the land by combining their lots and the vacated street into a single holding.

()The director of property, then, in making a "preliminary appraisal" to determine the price at which the city may sell vacated streets, must recognize and compensate for the *variation in easement values* that result from the divergent "highest and best uses" of the parcels abutting the various streets which the city may sell. In sum, the city cannot as a matter of law establish that an automatic 50 percent allowance must be granted in each and every situation; the city must take cognizance of the variables which will destroy the monistic figure. In the inflexibility of the city's formula lies its indefensibility.

()Because the city cannot show as a matter of law that it received 90 percent of a rationally determined market value of the vacated streets described in plaintiff's complaint, plaintiff's allegations that the city failed ***169** to fulfill this statutory duty, due to the director of property's practice of appraising every easement of ingress and egress at 50 percent of the street's unencumbered fee value, states a valid cause of action. Accordingly, the superior court erred in sustaining defendants' demurrers without leave to amend.

The judgment is reversed and the cause remanded with directions to overrule the general demurrers and proceed in accordance with this opinion.

Wright, C. J., McComb, J., Peters, J., Mosk, J., Burke, J., and Sullivan, J., concurred. ***170**

Footnotes

1 This expansive interpretation of the taxpayer's standing described in Code of Civil Procedure section 526a supports that section's primary purpose to "'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.'" (*Blair* v. *Pitchess, supra*, 5 Cal.3d at pp. 267-268, quoting from Comment, *Taxpayers' Suits: A Survey and Summary* (1960) 69 Yale L.J. 895, 904.)

2 See also *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 24 [51 Cal.Rptr. 881, 415 P.2d 769]; *Wehrle v. Board of W. & P. Commrs.* (1930) 211 Cal. 70, 72-73 [293 P. 67]; but cf. *Silver v. City of Los Angeles* (1961) 57 Cal.2d 39 [17 Cal.Rptr. 379, 366 P.2d 651], certiorari denied (1962) 369 U.S. 873 [8 L.Ed.2d 276, 82 S.Ct. 1143] (holding municipality not bound by statutory duty of trustees in its administration of public trust).

3 In the instant case, plaintiff does not challenge the city's decision to *vacate* the streets pursuant to the Street Vacation Act of 1941. Hence we are not called upon under section 8323 to determine that the city properly found the streets "unnecessary for present or prospective public street purposes." Similarly, we are not called upon to examine the vacations for evidence of fraud or collusion, or to find whether the vacation was required by public interest or necessity and was not effected merely for the benefit of adjoining private owners. (See *Beals v. City of Los Angeles* (1943) 23 Cal.2d 381, 386 [144 P.2d 839]; *Ratchford v. County of Sonoma* (1972) 22 Cal.App.3d 1056, 1073-1077 [99 Cal.Rptr. 887]; *People v. Oakland* (1929) 96 Cal.App. 488 [274 P. 438]; cf. San Francisco City Charter, § 92.)

4 Moreover, San Francisco City Charter section 107 does not, as amicus suggests, require that Streets and Highways Code section 960.4 prevail over local law. Section 107 provides that "[w]here a procedure for the exercising of any rights and powers belong to a city, or a county, or a city and a county, relative to the ... *vacating*, ... or otherwise improving *streets and highways ... and the payment of damages, or levying of special assessment to defray the whole or part of the cost of such works or improvements is provided by statute of the State of California*, such procedure shall control and be followed, unless a different procedure is provided in or under authority of this charter ..." (Italics added.) Hence this section applies only to street vacations *whose costs have been provided by state legislation*, and only if another provision of the charter does not govern the meeting of such costs.

The instant case involves not the procedure of street vacations, but that of the sale of streets which have already been vacated. Section 107, concerned with the assessment of the *costs* of public works improvements, thus does not apply to the *sale* of such improvements. (See *Kennedy v. Ross* (1946) 28 Cal.2d 569, 580 [170 P.2d 904].) Moreover, we note that Streets and Highways Code sections 960.4 and 8300 and following, which amicus cites to demonstrate that the state had adopted an alternative street vacation procedure, do not provide for meeting the *costs* of street vacations. In the absence of costs provisions in the statutes dealing with street vacations, section 107 by its terms cannot preclude the application of other charter sections.

For these reasons, no doubt, the city itself has at no time contended that section 107 governs its sales of public streets.

5 The rationale of city charter section 91, requiring the director of property sought to perform "preliminary appraisal of [real] property sought to be condemned or otherwise acquired, and report thereon to the responsible officer," similarly demands that the "preliminary appraisal " conform to market value. Since the appraisal requirement obviously serves to facilitate the city's calculation of the costs of proposed municipal improvements, the appraisal must represent the director's best estimate of the *actual costs* of acquiring real property required by such improvements. Otherwise, if the director enjoyed discretion to provide an appraisal at other than market value, his function in the city's planning process would become at best meaningless and at worst disruptive.

6 Nonetheless, contends amicus, even if section 92 does pertain to this action, 90 percent of preliminary appraised value need not be realized when the city *exchanges* vacated streets for other property. This contention lacks merit. Although section 92 declares that "[t]he director of property may, in lieu of sale, arrange for the trading of any real property proposed to be sold for other property required by the department in charge thereof," that section's basic purpose of avoiding disposition of public streets for inadequate compensation permits no distinction in the value required to be realized in an exchange of property for cash and an exchange of property for property. The basic rule governing sales must also apply to exchanges; the market value of property received in exchange must equal at least 90 percent of the market value of the property disposed.

7 We note that plaintiff's allegation that the city invariably appraises and sells vacated streets at 50 percent of the street's fee value is not only presumed true for the purpose of ruling on defendants' demurrers, but has been admitted to be true by defendant city's answer to interrogatories.

8 Plaintiff alleges that in eight cases the easements have "no value." Her cause of action, however, does not depend on proving the easements' worthlessness, but only on showing that in some specific cases they have so little value that the city's 50 percent rule of thumb leads to sales prices for the encumbered fee of less than 90 percent of market value.

9 The determination of the highest and best use of parcels abutting a vacated street forms part of the appraiser's work, calling for a rational exercise of his judgment in each case. In making this determination, the appraiser may, as the above-quoted rule relating to access valuation indicates, base his finding on knowledge of the land's "most likely use." In the case of streets being sold by the city, the abutting owner who offers to buy will provide strong indications of the land's most likely use; as part of his petition for street vacation and sale, he must outline his intended use of the street so that the board of supervisors will have a rational basis on which to find that "the public interest or necessity demands, or will not be inconvenienced by such a sale." (San Francisco City Charter, § 92.)

End of Document

Exhibit I

61 Cal.2d 659, 394 P.2d 719, 39 Cal.Rptr. 903

GEORGE M. BREIDERT, as Executor, etc., et al., Plaintiffs and Appellants,
v.
SOUTHERN PACIFIC COMPANY et al., Defendants and Respondents.

L. A. No. 27222.
Supreme Court of California
Aug. 20, 1964.

HEADNOTES

(1)
Public Utilities § 22--Jurisdiction of Commission--Taking of Property.
Although the Public Utilities Commission has exclusive jurisdiction to order the closing of railroad grade crossings, the courts have jurisdiction to determine whether property owners have suffered a compensable invasion of their rights by a closing.

See **Cal.Jur.2d,** Public Utilities and Services, §§ 28, 37.

(2)
Eminent Domain § 194--Remedies for Unlawful Taking--Inverse Condemnation--Parties.
In a property owner's action in inverse condemnation for compensation for the closing of a railroad grade crossing, the railroad company that owned the tracks was a proper party defendant, where it was an active joint participant in the closing of the crossing.

See **Cal.Jur.2d,** Eminent Domain, § 374; **Am.Jur.,** Eminent Domain (1st ed §§ 380, 382.5).

(3)
Streets § 32--Rights of Abutter--Rights Aside From Ownership of Fee.
An urban landowner's easement of access in the street on which his land abuts consists of the right to get into the street on which his land abuts and from there, in a reasonable manner, to the general system of public streets.

(4)
Streets § 33--Rights of Abutter--Impairment of Access--Compensation.
A property owner is not entitled to compensation for every interference with his access to the street on which his property abuts, or for every impairment of access, as such, to the general system of public streets, but only for a substantial ***660** impairment of his right of access to the general system of public streets.

(5)
Streets § 33--Rights of Abutter--Impairment of Access--Compensation.
The determination of whether such substantial impairment of a property owner's right of access to the general system of public streets has been established as will entitle him to compensation must be reached as a matter of law, while the extent of such impairment must be fixed as a matter of fact.

(6)
Streets § 33--Rights of Abutter--Impairment of Access--Compensation.
In determining whether a landowner is entitled to compensation for impairment of his right of access to the general system of public streets, destruction of access to the next intersecting street in one direction constitutes a significant factor, but it alone cannot justify recovery in the absence of facts that disclose a substantial impairment of access.

(7)
Eminent Domain § 199--Remedies for Unlawful Taking--Inverse Condemnation--Complaint.
A complaint in inverse condemnation alleging that defendants closed a railroad crossing on the street abutting plaintiffs' property depriving them of access to the next intersecting street in one direction, and that loss of such access substantially lessened and seriously impaired the full use by plaintiffs of their property pleaded a loss sufficient to withstand defendants' general demurrer.

(8)
Eminent Domain § 194--Remedies for Unlawful Taking--Inverse Condemnation--Damages.
In an action for inverse condemnation based on the closing of a railroad crossing which deprived plaintiffs of their right of access to the next intersecting street in one direction, claims

of lost good will and inability to obtain employees, insofar as they related to loss of business rather than diminution of the value of plaintiffs' real property, did not constitute legitimate elements of damages.

(9)
Eminent Domain § 194--Remedies for Unlawful Taking--Inverse Condemnation--Damages.
In an action for inverse condemnation based on the closing of a railroad crossing which deprived plaintiffs of their right of access to the next intersecting street in one direction, claims that trucks servicing plaintiffs' property had to use a narrow residential street which was dangerous to the public, and that access to plaintiffs' property by fire, police and other public services would be greatly impaired and delayed, were not proper elements of damage, since injury to the public does not establish a compensable loss to a private landowner unless he is thereby specially injured, and possible impairment of fire and police service is too speculative.

SUMMARY

APPEAL from judgments of the Superior Court of Los Angeles County. Leon T. David, Judge. Reversed with directions. ***661**

Action in inverse condemnation for damages to private property resulting from impairment of easement of access to system of public streets following the closing of a railroad crossing. Judgments of dismissal after demurrers to amended complaint were sustained, reversed with directions.

COUNSEL
William Katz for Plaintiffs and Appellants.
Roger Arnebergh, City Attorney (Los Angeles), Bourke Jones and Ralph J. Eubank, Assistant City Attorneys, Charles W. Sullivan and Arthur Karma, Deputy City Attorneys, E. D. Yeomans and Walt A. Steiger for Defendants and Respondents.

TOBRINER, J.

In this case of inverse condemnation we must decide whether a property owner who loses the use of the next intersecting street which affords him access to the general system of public streets should be compensated. As we point out, although the bare allegation of a cul-de-sac does not in itself suffice to establish a compensable right, a showing of a substantial impairment of the property owner's right of access to the system of public streets does so. Since the complaint in this case alleges such substantial impairment, it withstands a general demurrer.

Plaintiffs are, respectively, the owners, lessors and lessee of a parcel of improved real property located in the City of Los Angeles. Fronting on Vaughn Street, which runs in an easterly and westerly direction, the property is situated at the southeast corner of Vaughn and the right-of-way of the Southern Pacific Railroad, which runs north and south. Immediately to the west of the right-of-way and parallel to it, lies San Fernando Road. The property has been improved by a one-story factory building used for the manufacture of air-conditioning equipment.

At the time the plaintiffs acquired the property in 1953, and until 1959, Vaughn Street crossed the Southern Pacific right-of-way and intersected San Fernando Road. Plaintiffs and the public used this Vaughn Street crossing as a means of access to and from San Fernando Road. In April 1959 defendants placed barricades across Vaughn Street along the easterly and westerly lines of the right-of-way and closed the crossing.

We take judicial notice of the following facts, not pleaded in plaintiffs' amended complaint, but set forth in *In re G. C.* ***662** *Breidert, Decision No. 61775* (1961) 58 Cal. P.U.C. 624 (unreported). By Decision Number 56398, March 25, 1958, the Public Utilities Commission authorized the City of Los Angeles to construct a grade crossing over the Southern Pacific right-of-way at Paxton Street, 1360 feet south of Vaughn Street, and ordered the Vaughn Street crossing closed. On November 17, 1959, the present plaintiffs requested the Public Utilities Commission to reopen the crossing, alleging that the closing resulted in hardship to the plaintiff company by depriving the company and its customers of access over the right- of-way at Vaughn Street.

After a hearing on plaintiffs' application the commission found that the Vaughn Street crossing ranked as 357th most hazardous of the approximately 4,500 crossings in Southern California. The commission concluded that "it is in the public interest, considering both safety factors and the needs of the [defendants] to have Vaughn Street closed and we now find that there is insufficient need for a crossing at Vaughn Street to justify the risk involved." On August 9, 1961, we denied plaintiffs' petition for writ of review of the Public Utilities Commission order. On March 30, 1962, plaintiffs initiated the present action for damages arising out of the closing of the crossing. The trial court sustained defendants'

general demurrer to plaintiffs' amended complaint and entered judgments of dismissal as to both defendants. Plaintiffs appeal these judgments.

() We initially dispose of two preliminary matters. First, defendants fail to sustain the contention that, since the Public Utilities Commission exercises exclusive jurisdiction to order the closing of railroad grade crossings, this court cannot adjudicate the present action. Plaintiffs do not seek an order to reopen the crossing; rather they demand damages for an invasion of a property right. The power to determine whether the plaintiffs have suffered a compensable invasion of their rights resides with the courts. (*S. H. Chase Lumber Co. v. Railroad Com.* (1931) 212 Cal. 691, 706 [300 P. 12]; *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349 [144 P.2d 818].)

() Second, defendant railroad erroneously urges that it is not a proper party defendant to the present action. Since defendant railroad was an active joint participant in closing the crossing, it is a proper party to the present litigation. (See *Talbott v. Turlock Irr. Dist.* (1933) 217 Cal. 504, 506 [19 P.2d 980]; *Eachus v. Los Angeles etc. Ry. Co.* (1894) 103 Cal. 614, 621 [37 P. 750, 42 Am.St.Rep. 149].) ***663**

The principal issue of the case resolves into whether the closing of the Vaughn Street crossing so impaired plaintiffs' right of access in that street as to constitute a taking or damaging of property entitling them to compensation. Plaintiffs' claim rests upon the provision of the California Constitution that private property may not be taken or damaged for public use without just compensation (Cal. Const., art. I, § 14). Plaintiffs thus purport to state a cause of action in inverse condemnation. [1]

() We have long recognized that the urban landowner enjoys property rights, additional to those which he exercises as a member of the public, in the street upon which his land abuts. Chief among these is an easement of access in such street. (*People* ex rel. *Dept. of Public Works v. Symons* (1960) 54 Cal.2d 855, 860 [9 Cal.Rptr. 363, 357 P.2d 451]; *People v. Russell* (1957) 48 Cal.2d 189, 195 [309 P.2d 10]; *Bacich v. Board of Control, supra,* 23 Cal.2d 343, 349-350; *People v. Ricciardi* (1943) 23 Cal.2d 390, 397 [144 P.2d 799]; *Rose v. State* (1942) 19 Cal.2d 713, 727-728 [123 P.2d 505]; *Eachus v. Los Angeles etc. Ry. Co., supra,* 103 Cal. 614, 617-618.) [2] This easement consists of the right to get into the street upon which the landowner's property abuts and from there, in a reasonable manner, to the general system of public streets. (See *Bacich v. Board of Control, supra,* 23 Cal.2d 343, 351, 355; *People* ex rel. *Dept. of Public Works v. Ayon* (1960) 54 Cal.2d 217, 223 [5 Cal.Rptr. 151, 352 P.2d 519]; *Wolff v. City of Los Angeles* (1920) 49 Cal.App. 400, 405 [193 P. 862]; *Warren v. Iowa State Highway Com.* (1958) 250 Iowa 473 [93 N.W.2d 60, 67]; *Wilson v. Kansas City* (Mo.1942) 162 S.W.2d 802, 804; *State v. Silva* (1963) 71 N.M. 350 [378 P.2d 595, 599]; see generally *Freeways and the Rights of Abutting Owners* (1951) 3 Stan.L.Rev. 298, 302.)

() To designate the right, however, is not to delineate its precise scope. Not every interference with the property owner's access to the street upon which his property abuts and ***664** not every impairment of access, as such, to the general system of public streets constitutes a taking which entitles him to compensation. Such compensation must rest upon the property owner's showing of a *substantial impairment* of his right of access to the general system of public streets.

() The determination of whether such substantial impairment has been established must be reached as a matter of law. The extent of such impairment must be fixed as a matter of fact. The cases have consistently held that the trial court must rule, as a matter of law, whether the interference with access constitutes a substantial or unreasonable impairment. [3] Thus in *People v. Ricciardi, supra,* 23 Cal.2d 390, 402-403, we said: "It was ... within the province of the trial court and not the jury to pass upon the question whether under the facts presented, the defendants' right of access will be substantially impaired. If it will be so impaired the extent of the impairment is for the jury to determine. This is but another way of saying that the trial court and not the jury must decide whether in the particular case there will be an actionable interference with the defendants' right of access." [4]

Substantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation. [5] "While certain general rules have been ***665** set forth in the various decisions which have considered the nature and scope of this right, each case must be considered upon its own facts." (*People v. Russell, supra,* 48 Cal.2d at p. 195.)

Plaintiffs contend, however, that *Bacich v. Board of Control, supra,* 23 Cal.2d 343, compels a holding that owners, such as plaintiffs in the instant case, whose access to the next intersecting street in one direction is severed, suffer substantial impairment as a matter of law. The holding in *Bacich* is not so broad. *Bacich* arose upon a demurrer to the plaintiff's complaint alleging that plaintiff should recover

damages because a street improvement deprived him of access to the next intersecting street in one direction. The court decided only that a complaint which alleges impairment of access to the next intersecting street in one direction does not succumb to a demurrer by reason of that allegation. The court recognized that although the right of access consists essentially of a right to get into the street upon which one's property abuts, and to travel in a reasonable manner from there to the general system of public streets (23 Cal.2d at pp. 351, 355), it *also includes* a "right to pass to the next intersecting streets." (*Id.* at p. 352.) The court declared, "It would seem clear that the reasonable modes of egress and ingress would embrace access to the next intersecting street in both directions." (*Id.* at p. 352.)

The recognition that the easement of access includes a right not only to reach the general system of public streets, but to do so over either of the next intersecting streets in two directions, does not mean that in every case an allegation of impaired access to the next intersecting street in one direction will establish a compensable right. It will not constitute an "unreasonable interference" in the words of *Rose v. State, supra,* 19 Cal.2d at page 727, with the general right of access to the system of public streets. Nor as to such access does it effect, as described in *People v. Ricciardi, supra,* 23 Cal.2d at page 398, a "substantial impairment" of that right. Loss of access to the next intersecting street will be a significant factor in finding an impairment of the general right; and, as *Bacich* held, obstruction of access to the next intersecting street serves as one element of such impairment.

The court's statement in *Bacich* that not every cul-de-sac case is compensable supports this analysis. Thus at page 355, we acknowledged that, "One might imagine many circumstances ... in which recovery should not be permitted or where the reasons for recovery in the cul-de-sac cases might ***666** not be logically applied, but we are here concerned with the particular facts of this case and do not purport to declare the law for all cases under all circumstances."

Moreover, the court's reliance in *Bacich* upon such cases as *Rose v. State, supra,* 19 Cal.2d 713, *Eachus v. Los Angeles etc. Ry. Co., supra,* 103 Cal. 614, *McCandless v. City of Los Angeles, supra,* 214 Cal. 67, and *Lane v. San Diego Elec. Ry. Co., supra,* 208 Cal. 29, all of which affirm the proposition that recovery depends upon a showing of substantial impairment of the general right of access, supports this reading of *Bacich.*

That loss of access to the next intersecting street does not necessarily create a cause of action for impairment of the general right of access is further recognized by our recent holding in *People* ex rel. *Dept. of Public Works v. Symons, supra,* 54 Cal.2d 855. In *Symons* defendant landowners appealed from a judgment limiting severance damages in an eminent domain proceeding involving the acquisition of a portion of defendants' residential property to convert the terminus of the street upon which it abutted into a cul-de-sac and thus provide a turn-around area. Creation of the cul-de-sac severed defendant's access to the next intersecting street in one direction. We affirmed the trial court's denial of damages for injury to defendants' remaining land on the ground that the improvement which caused the loss, that is the freeway itself, did not lie upon the property taken from plaintiff. (*People* ex rel. *Dept. of Public Works v. Symons, supra,* 54 Cal.2d at p. 861.)

We affirmed the exclusion of expert testimony regarding the decrease in value of defendants' property caused by "such factors, among others, as the change from a quiet residential area, loss of privacy, loss of view ... noise, fumes and dust from the freeway, *loss of access over the area now occupied by the freeway,* and misorientation of the house on its lot after the freeway construction." (*Id.* at p. 858; italics added.) We concluded that in the absence of a right to severance damages this testimony related to noncompensable items of damage. Thus we denied recovery because defendants' bare showing that their property was placed in a cul-de-sac did not of itself satisfy the requirement of substantial impairment of access. [6]

() In summary, the rule which emerges constitutes one ***667** of substantial impairment of the right of access. Although destruction of access to the next intersecting street in one direction constitutes a significant factor in determining whether the landowner is entitled to recovery, it alone cannot justify recovery in the absence of facts which disclose a substantial impairment of access.

() We turn next to the application of the test of substantial impairment to the facts of the present case. Plaintiffs claim that the closing of the Vaughn Street crossing substantially impaired their right of access. They allege that "Loss of access to San Fernando Road from Vaughn Street, and from San Fernando Road to Vaughn Street, has substantially lessened and seriously impaired the free and full use by plaintiffs of their property." Their complaint alleges the serious impact of this loss of access upon the plaintiff's real property. Thus

the complaint sufficiently pleads a loss sufficient to withstand defendants' general demurrer.

() We note, however, that certain of the complaint's allegations incorporate items of possible damage wholly immaterial to a cause of action for impairment of the easement of access. Thus plaintiffs' claims of lost good will and inability to obtain employees, insofar as they relate to loss of business rather than diminution of the value of plaintiffs' real property, do not constitute legitimate elements of damage. [7]

() Plaintiffs also complain that "the closing of Vaughn Street requires trucks servicing the property of plaintiffs, and other industries along Vaughn Street, to use Bradley ***668** Avenue to Paxton Street; said Bradley Avenue is a narrow, residential street and the use of the same by heavy trucks is dangerous and adverse to the best interests of the public using the same; if said Vaughn Street crossing is permitted to remain obstructed and closed, the access to the property of said plaintiffs by fire, police and other public services, in the event of emergencies, will be greatly impaired and delayed."

The first of these contentions relates to matters already considered fully by the Public Utilities Commission (*In re G. C. Breidert, Decision No. 61775, supra,* 58 Cal. P.U.C. 624 (unreported)), and in any event injury to the public does not establish a compensable loss to a private landowner unless he is thereby specially injured. (E.g., *Eachus v. Los Angeles etc. Ry. Co., supra,* 103 Cal. 614.) The second contention refers to matters too speculative to produce a compensable loss. [8] (See *Rose v. State, supra,* 19 Cal.2d 713, 738.)

At a time when the tremendous growth of population of this state compels rerouting and rearrangement of streets and highways, the claimed damages to property owners from loss of access to the next intersecting street and to the general system of streets must be more than formal. It must be a true loss; it must be substantial.

The judgments are reversed with instructions to overrule the general demurrers and to permit the parties to proceed in a manner consistent with this opinion.

Gibson, C. J., Schauer, J., McComb, J., Peters, J., and Peek, J., concurred.

TRAYNOR, J.,

Concurring.

Although I adhere to the views set forth in my dissenting opinion in *Bacich v. Board of Control,* 23 Cal.2d 343, 366-380 [144 P.2d 818], that case is the law of this state until it is overruled. I therefore concur in the judgment herein under the compulsion of the *Bacich* case. ***669**

Footnotes

1 An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action. (See *Rose v. State, supra,* 19 Cal.2d 713; *Bacich v. Board of Control, supra,* 23 Cal.2d 343.)

2 See also Streets and Highways Code, section 100.3 which provides that the construction of freeways "shall not affect private property rights of access, and any such rights taken or damaged within the meaning of article I, section 14, of the State Constitution for such freeway shall be acquired in a manner provided by law."

3 "Whether a substantial impairment of a property right exists is a question for the court to determine under all the facts of the case. Once this determination has been made, its extent is then determined by the jury." (Del Guercio, *Severance Damages and Valuation of Easements,* Cont. Ed. Bar, Condemnation Practice, ch. 4, p. 73.)

4 A similar analysis occurs in other leading right of access cases. In *Rose v. State, supra,* 19 Cal.2d 713, 729, in finding that substantial impairment of access in the narrowing of an abutting street resulted from construction of a subway, we said: "The issues before the trial court in the case at bar were, whether plaintiffs' right of access ... was *substantially and unreasonably impaired* ... and if so, the amount of damage suffered as the result of such interference ...." (Italics added.) More recently, in *People* ex rel. *Dept. of Public Works v. Russell, supra,* 48 Cal.2d 189, which also involved the narrowing of an abutting road, we noted that the duty rests with the trial court to determine as a question of law, whether the property owner had suffered substantial impairment of access. Only if it so finds may it submit the question of damages to the jury. (See also *Eachus v. Los Angeles etc. Ry. Co., supra,* 103 Cal. 614; *McCandless v. City of Los Angeles* (1931) 214 Cal. 67 [4 P.2d 139]; *Lane v. San Diego Elec. Ry. Co.* (1929) 208 Cal. 29 [280 P. 109].)

5 As Witkin, Summary of Cal. Law, p. 2051, states, "... it is easier to state these propositions than to apply them."

6 The implications of *Symons* have not gone unnoticed. In *Rosenthal v. City of Los Angeles* (1961) 193 Cal.App.2d 29 [13 Cal.Rptr. 824], the city rerouted Roscoe Boulevard, the street upon which plaintiff's property abutted, causing it to bypass plaintiff's premises, and leave them on a short street closed at both ends. Formerly plaintiff had access to his property over Roscoe Boulevard from the east and over two streets intersecting Roscoe from the north; after the improvements access was limited to the two intersecting streets. In denying plaintiff recovery for impairment of his right of access the court stated: "The clear command of [*Symons*] ... is that ... diminished value attributable to the diminished access due to a public improvement on neighboring property is not compensable. *It may be noted that in Symons there was even a loss of access to the next intersecting street."* (*Id.* at p. 33; italics added.)

7 *People v. Ricciardi, supra,* 23 Cal.2d 390, 396, states the rule as follows "... injury to the business of the owner or occupant of the property does not form an element of the compensating damages to be awarded [citation]. This is so because it is only the value of, and the damage to, the property itself, which may be considered. A particular business might be entirely destroyed and yet not diminish the actual value of the property for its highest and best use." (See *Holloway v. Purcell* (1950) 35 Cal.2d 220, 230 [217 P.2d 665]; *People v. Sayig* (1951) 101 Cal.App.2d 890 [226 P.2d 702]; *City of Los Angeles v. Geiger* (1949) 94 Cal.App.2d 180, 191 [210 P.2d 717]; *Wolff v. City of Los Angeles* (1920) 49 Cal.App. 400, 402 [193 P. 862]; *Oakland v. Pacific Coast Lumber etc. Co.* (1915) 171 Cal. 392, 399 [153 P. 705].)

8 Plaintiffs also claim damages for the taking of an easement over the Vaughn Street crossing and for maintenance of a nuisance. Plaintiffs have no property right in the public crossings (see *City of San Mateo v. Railroad Com.* (1937) 9 Cal.2d 1 [68 P.2d 713]) and plaintiffs state no cause of action for maintenance of a nuisance unless they show that they have been specially injured (see *Bigley v. Nunan* (1879) 53 Cal. 403).

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Exhibit J

16 Cal.App.4th 1277
Court of Appeal, Fourth District, Division 3, California.

Steven J. **BESNEATTE** et al., Plaintiffs and Appellants,
v.
Galo G. **GOURDIN** et al., Defendants and Respondents.

No. G012480.
|
May 26, 1993.
|
As Modified June 25, 1993.

Synopsis

Homeowners sued neighbors in adjoining tract to quiet title to abandoned alley separating properties. The Superior Court of Orange County, No. X–61–71–53, David C. Velasquez, J., entered summary judgment in favor of neighbors, and homeowners appealed. The Court of Appeal, Crosby, J., held that, as matter of law, fee title to alley was always in neighbors and others who were successors of original grantor that created alley and dedicated it to county for public use.

Affirmed.

West Headnotes (5)

[1] Boundaries
Public Ways

Statute establishing rebuttable presumption that owner of land bounded by road or street is presumed to own to center of way includes alleys. West's Ann.Cal.Civ.Code § 831; West's Ann.Cal.Str. & H.Code § 8304.

[2] Boundaries
Public Ways

Statute pursuant to which transfer of land bounded by highway passes title of person whose estate is transferred to soil of highway to center, unless different intent appears from grant, applies to alleys. West's Ann.Cal.Civ.Code § 1112.

1 Cases that cite this headnote

[3] Boundaries
Beginning Point on or Call for Side of Highway

Statutory presumption that owner of land bounded by road or street is presumed to own center of way and that transfer of land bounded by highway includes land to center of highway did not apply where grantor used metes and bounds description to convey property; however, metes and bounds description was not determinative of grantor's intent. West's Ann.Cal.Civ.Code §§ 831, 1112.

3 Cases that cite this headnote

[4] Boundaries
Effect of Location, Dedication, or Occupation

As matter of law, fee title to alley dedicated to county for public use but subsequently abandoned by county was always in successors of original grantor that created alley, and owners in other tract abutting alley did not acquire title when county abandoned its easement rights; although intervening conveyances did not specifically mention ownership of alley, nothing in chain of title to other tract suggested any ownership rights, and, under general common-law principles, dedication for public use involves nothing but easement, with title to underlying fee remaining in original owner and passing to successors in ownership.

2 Cases that cite this headnote

[5] Boundaries
Public Ways

Under "doctrine of marginal streets," if property owner creates street from and along margin of his property, deed conveying land bounded by road

carries fee title to entire parcel, subject to public easement.

Attorneys and Law Firms

***1278** ****82** Joseph Gelber and Ronald E. Darling, Newport Beach, for plaintiffs and appellants.

Warren & Conway, Michael A. Warren, Rosemead, Stockdale, Peckham & Werner, Donald A. Diebold and Peter B. Zell, Cummings & Kemp, Scott A. Whitcomb, Cassidy, Warner, Brown, Combs & Thurber, Glen A. Stebens, Beam & Brobeck, Beam, Brobeck & West, Santa Ana, Horvitz & Levy, David S. Ettinger, Encino, Kirk H. Nakamura, Long Beach, and Jennifer J. Miller, Nyman, Johnson & Maguire, C. William Nyman, Thomas G. Ocsterreich, Santa Ana, and George Schiavelli, Encino, for defendants and respondents.

***1279** OPINION

CROSBY, Associate Justice.

Steven and Sherry **Besneatte** sued homeowners in an adjoining tract to quiet title to ****83** an abandoned alleyway separating their properties. The trial court denied the **Besneattes'** motion for summary adjudication of issues and entered summary judgment in favor of defendants. We affirm.

I

An abandoned alley, approximately 650 feet long and 20 feet wide, separates El Toro tracts 9808 and 10009. Twenty-two residential lots run the length of the alley, eleven in each tract. The chain of title dates back to 1917. In April of that year, the Whiting Company created the alley from the margin of tract 10009, then known as "Block F," dedicating it to the county for public use. Fee title to the alley, subject to the public easement, was retained by the Whiting Company.

Twenty-eight years later, Whiting conveyed Block F to Warren and Rosie Gray. That deed contained a metes and bounds description of the property: "to the Northeasterly line of that certain 20 foot alley shown on said Map; thence North ... West along the Northeasterly line of said alley, 650 feet to its intersection with the Northeasterly extension of the Southeasterly line of Cherry Avenue...." Every subsequent transfer included this language. The J.M. Peters Company purchased Block F, subdivided the land, and sold lots to the homeowners in tract 10009. Because the county still held its easement rights, the rear property walls were constructed along the edge of the alley.

The William Lyon Company eventually acquired tract 9808. As a prerequisite for development, it was required to pursue a vacation of the county's easement in the strip. On August 17, 1982, the board of supervisors adopted a resolution to that effect. Purchasers were informed they had no interest in the alley, and rear fences for their lots were built along the edge of it. Defendants paid the property taxes due on the strip for the seven years preceding the filing of this lawsuit.

Tempers flared when tract 10009 homeowners constructed improvements extending into the alley. The **Besneattes** refused to acknowledge defendants' claim and filed suit to quiet title, arguing the owners of all 22 abutting lots held title to the alley as tenants in common. Toward that end, they obtained a deed from Los Alisos Citrus Ranch–West and the First American Trust Company quitclaiming any interest in the strip to the 22 property owners whose lots abut the alley.

***1280** In the early stages of the litigation, the **Besneattes** moved for summary adjudication on stipulated facts.[1] Defendants ****84** countered with a motion for summary adjudication of issues pursuant to Orange County Superior Court Rule 518.1. The court took the matter under submission and ruled for the defense: "The Quitclaim Deed recorded June 22, 1990 as instrument No. 90–332908 was ineffective to pass any purported interest in the 20 foot wide vacated alleyway Los Alisos Citrus Ranch–West and First American Trust Company claimed to have had therein. Neither ... possessed any interest in the subject property at the time of the attempted conveyance."

The court also found the use of a metes and bounds description was not determinative "of the intent of the parties to the deed or conveyance, but rather, such description constitutes evidence of the intent ... which may also be proved by other evidence." The court added, "Civil Code [s]ection 1112 is inapplicable to the facts of the instant case in that the subject property was not conveyed by an instrument containing a property description defined as bounded by a street or alleyway. [¶] [ ] The Court recognizes when a parcel of land described by metes and bounds abuts a street which is ***1281** later vacated or abandoned, it may be rebuttably presumed that the adjacent owners own to the center of such street. [Citations.] [¶] However, in the instant case, it does

not appear reasonable that the Whiting Company intended to retain fee title to the strip of land beneath the subject alleyway. It seems more reasonable that the drafter of the conveyance which carved out Lot 10009 from the larger parcel intended to convey only such land which was believed, erroneously, he or she had a right to convey, and thus, the dedicated alleyway was omitted. [¶] [ ] The Court ought to avoid the retention of fee title to strips and gores."

II

[1] **[2]** Absent evidence of contrary intent, California law sets forth certain presumptions regarding the construction of deeds. Civil Code section 831 establishes a rebuttable presumption that "[a]n owner of land bounded by a road or street is presumed to own to the center of the way...." Section 1112 provides that "[a] transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." The word "street," as used in section 831, includes an alley. (Former Sts. & Hy.Code, § 8304.) The courts have held section 1112 also applies to an alley. (See *Pilkington v. Fausone* (1970) 11 Cal.App.3d 349, 351, 90 Cal.Rptr. 38; *Los Angeles etc. School Dist. v. Swensen* (1964) 226 Cal.App.2d 574, 579, 38 Cal.Rptr. 214.)

[3] **[4]** In this case the legal presumptions are at odds with one another. Because the grantor used a metes and bounds description to convey the property, the Civil Code section 831 and 1112 presumptions do not apply. On the other hand, the use of metes and bounds is not determinative of the grantor's intent. Nothing in the chain of title to the lots in tract 9808 suggests any ownership rights in the alley. The parties stipulated, "The property on which the alleyway was created and the property on which tract No. 9808 was created *were never under common ownership.*" (Italics added.) Similarly, no evidence suggests the Whiting Company intended to reserve any ownership interest in the alleyway strip. The defendants are the successors in interest by intermediate conveyances, all of which use substantially the same metes and bounds description. None of the deeds specifically mentions ownership of the alley.

Citing the state policy against the creation of strips and gores, the trial court concluded the Whiting Company did not intend to reserve the fee title to the alley. (See ***1282** *Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 306, 123 Cal.Rptr. 405.) It is well settled "under the principles of common-law dedication the public takes nothing ****85** but an easement for a public use, the title to the underlying fee remaining in the original owner and passing to the successors in ownership of the abutting land. [Citation.] Under that principle of law all that the county [ ] obtained by the dedication and acceptance was an easement for road and street purposes. The underlying fee remained in the original owner and passed to his successors." (*Id.* at p. 307, 123 Cal.Rptr. 405, internal quotation marks omitted.)[2] Accordingly, we conclude the trial court correctly determined the abutting owners in tract 9808 did not acquire title when the county abandoned its easement rights in the alleyway. As a matter of law, the fee title to the alley was always in the tract 10009 owners.

[5] The "doctrine of marginal streets" also supports the trial court's ruling. The rule is this: "The grant of land adjoining a street or highway which has been wholly made from, and upon the margin of, the grantor's land is deemed to comprehend the fee in the whole of the street." (*Everett v. Bosch* (1966) 241 Cal.App.2d 648, 655, fn. 3, 50 Cal.Rptr. 813, internal quotation marks omitted.) Put another way, if a property owner creates a street from and along the margin of his property, a deed conveying the land bounded by the road carries fee title to the entire parcel, subject to the public easement. In such cases it would be illogical to presume the grantor intended to retain a narrow sliver of land "which, when separated from the adjoining land, would be of little or no use to him." (*Id.* at p. 654, 50 Cal.Rptr. 813; but see *City of Redlands v. Nickerson* (1961) 188 Cal.App.2d 118, 128, 10 Cal.Rptr. 431.)

The Whiting Company dedicated the alley to the county for easement purposes in April 1917. The alley was created entirely from the margin of Block F, property held by the grantor. The grantor did not specifically except or reserve any interest in the strip when it conveyed the property. (See *Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1383, 246 Cal.Rptr. 469 [when easement for a right-of-way is created by initial reference to a subdivision map, it passes without subsequent reference unless specifically excepted].) In the statement of stipulated facts, the **Besneattes** concede fee title to the 20–foot alley, subject to the public easement, "was [ ] vested in the owner of the adjacent Block 'F' " and the "property on which the alleyway was created and the property on which tract No. 9808 was created were never under common ownership." There are no grounds for reversal.

***1283** Judgment affirmed.

Respondents are entitled to costs.

All Citations

16 Cal.App.4th 1277, 21 Cal.Rptr.2d 82

SILLS, P.J., and WALLIN, J., concur.

Footnotes

1 The parties stipulated the following factual matters were not in dispute: "1. The subject property described in [p]laintiff's first amended complaint is a vacated alleyway 20 feet in width bounded Northeasterly by tract No. 10009 and Southwesterly by tract No. 9808.... [¶] 2. The subject property was dedicated to the County of Orange as a public alleyway on the map of tract No. 70 recorded in Miscellaneous Maps in April, 1917.... As a marginal dedicated right-of-way, the underlying fee title (i.e. fee title subject to the public easement) of the entire 20 foot wide alley was then vested in the owner of the adjacent Block 'F'. On August 17, 1982, the Orange County Board of Supervisors vacated its interest in the alleyway by way of Resolution Number 82–1242. [¶] 3. Title to the portion of Block F adjoining the alleyway on the Northeast was conveyed to Home Savings and Loan Association by a deed recorded February 10, 1977.... [¶] 4. The map of tract No. 10009 was recorded January 20, 1978.... The exterior boundary of tract No. 10009 ... was drawn to the dedicated rights-of-way within Cherry Avenue and to the 20 foot wide alleyway. [¶] 5. The map of tract No. 9808 was recorded August 17, 1981.... The Northeasterly boundary of said tract is coincident with the Southwesterly line of the 20 foot wide alleyway. The exterior boundary of tract No. 9808 was drawn to include portions of dedicated rights-of-way within Cherry Avenue and Trabuco Road and to the 20 foot wide alleyway.... [¶] 6. The property on which the alleyway was created and the property on which tract No. 9808 was created were never under common ownership. [¶] 7. By a Quitclaim Deed recorded June 22, 1990 as instrument No. 90–332908, Los Alisos Citrus Ranch–West and First American Trust Company quitclaimed their interests, if any, in the fee title to the 20 foot wide vacated alleyway to the then owners of Lots 56 through 66, inclusive of tract No. 10009, and the then owners of Lots 9 through 19, of tract No. 9808.... [¶] 8. The fee title to the subject property was alternatively: (i) conveyed to Home Savings and Loan Association through mesne conveyances of record, and thence to the owners of Lots 56 through 66, inclusive of tract 10009; or [¶] (ii) conveyed to Los Alisos Citrus Ranch–West and First American Trust Company through mesne conveyances of record, and thence to the then owners of Lots 56 through 66, inclusive, of tract No.10009 and the then owners of lots 9 through 19, inclusive, of tract No. 9808, all as tenants in common. The validity of the quitclaim deed is not conceded at this time. However, through the motion for summary judgment the court will determine its effect."

2 Former Streets and Highways Code section 8324 provides in pertinent part, "Upon the making of such order of vacation the public easement in the street or part thereof vacated ceases *and the title to the land previously subject thereto reverts to the respective owners thereof* free from the public easement for street purposes." (Italics added.)

End of Document

Exhibit K

Rehearing Denied and Opinion Modified August 13, 1991
232 Cal.App.3d 334, 284 Cal.Rptr. 87

JON D. MIKELS et al., Plaintiffs and Appellants,
v.
JOHN RAGER et al., Defendants and Respondents.

No. E007828.
Court of Appeal, Fourth District, Division 2, California.
July 16, 1991.

[Opinion certified for partial publication. *]

SUMMARY

Landowners sued their neighbors after the neighbors, who previously owned the property and sold it to the current owners' grantors, cut a chain on a gate crossing a roadway on which the neighbors claimed an easement and used the roadway to cross the property. The neighbors cross-complained, seeking to establish that they never transferred to the current owners' grantors title to that portion of the property, that they were the legal owners of an easement by implication, or that the current owners' ownership was subject to the use of the general public because of an offer of dedication on a parcel map that was accepted subject to improvements that were never made. The parcel map did not make reference to any private roadway easement over the land. The deeds to both the current owners and their grantors referred to the parcel map. The neighbors moved for summary judgment, which the trial court granted, concluding that the neighbors had both a private appurtenant easement across the property as owners of the remainder parcel and the right to use a public easement across the property. (Superior Court of San Bernardino County, No. SCV 240907, Carl E. Davis, Judge.)

The Court of Appeal reversed. The court held that, as a matter of law, the offer of dedication accepted on the condition of improvements that were never made did not result in a completed dedication. The court also held that the trial court erred in finding a private easement by implication, since the neighbors did not present as undisputed fact that the current owners had the requisite knowledge or notice of either preexisting use of the disputed ***335** roadway through observation or because of reference to the parcel map in their deed. (Opinion by Timlin, J., with Dabney, Acting P. J., and McDaniel, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Appellate Review § 39--Presenting and Preserving Questions in Trial Court--Evidence--Objections--Burden to Obtain Ruling--Waiver of Objections.
Normally it is up to the party making evidentiary objections to exhibits attached to moving papers to obtain a ruling on the objections. If the objecting party fails to do so, the objections will be deemed to have been waived.

(2)
Easements and Licenses in Real Property § 11--Easements--Summary Judgment--Easement in Favor of General Public--Requirements.
To be entitled to summary judgment that property was subject to an easement in favor of a general public, the moving party was required to establish undisputed facts sufficient to establish as a matter of law each element necessary for the existence of such an easement. To preclude the granting of the judgment, the opposing party needed only to show that the moving party failed to establish that there were no triable issues of material fact as to any one element. In other words, to defeat the motion, the opposing party needed only to show that the moving party's evidence in support of any one element was contradicted by other competent evidence, and that therefore there was a factual dispute as to such element.

(3a, 3b)
Easements and Licenses in Real Property § 3--Easements--Creation--Public Roadway Easement--Offer of Dedication Accepted Subject to Improvements.
The trial court erred in granting a motion for summary judgment based on its adjudication that as a matter of law a public roadway easement existed on property, where the city's qualified acceptance of an offer of dedication of the roadway, subject to improvements which were never made, did not result in a completed dedication of a public easement.

(4)

Dedication § 1--Application of General Contract Law Principles-- Statutory Offers and Acceptances--Acceptance Conditioned on *336 Required Improvements.
General contract law principles apply to statutory offers of dedication and acceptance. The Subdivision Map Act uses the language of basic contract law. The purpose of the Subdivision Map Act (Gov. Code, § 66410 et seq.) is to give the legislative bodies of local agencies the power to regulate and control the design and improvement of subdivisions, with consideration for the location and size of required easements and rights of way for access for the use of the lot owners and local neighborhood traffic and the design of street alignments, grades and widths. This purpose is not defeated and is best effectuated by applying basic contract principles to the interpretation of Gov. Code, § 66477.1, resulting in a judicial holding that a local agency has not agreed that title to a proposed easement for a public right of way shall pass to the public until the required improvements have been made to the satisfaction of the agency.

(5)
Statutes § 29--Construction--Legislative Intent.
The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, the court must first look to the words of the statute.

(6)
Contracts § 1--Acceptance of Offer--Qualified Acceptance.
Under basic principles of contract law, a valid acceptance of an offer must be absolute and unqualified in order to create a binding contract. While normally a qualified acceptance constitutes a rejection which terminates the offer, this rule may be modified by statute.

(7)
Dedication § 8--Mode and Sufficiency of Dedication--Qualified Acceptance Subject to Improvement of Proffered Property--Contract Principles-- Completed Dedication.
The Subdivision Map Act (Gov. Code, § 66410 et seq.) specifically modifies the basic contract principle-that a qualified acceptance constitutes a rejection which terminates the offer-by making offers to dedicate real property for public easements in connection with the filing of parcel and subdivision maps irrevocable and/or terminable by following a statutory procedure or abandoned only after a given period of time has passed. Under basic principles of contract law, an offer of dedication accepted on condition that the proffered property be improved does not result in completed dedication. A qualified acceptance results in an outstanding offer of dedication, which has not been revoked by operation of law and which the public entity may accept upon its conditions of *337 acceptance being met. Until the offer of dedication is unconditionally accepted, no public interest is created.

[See 26 **Cal.Jur.3d,** Dedication, § 44; 4 **Witkin,** Summary of Cal. Law (9th ed. 1987) Real Property, § 127.]

(8)
Easements and Licenses in Real Property § 3--Subsets of Easements Created by Grant.
Easements may be created by grant or by prescription. The set of easements created by grant falls into two subsets: easements created by express grant, and easements created by implied grant. An easement created by grant must be either express or implied.

(9)
Easements and Licenses in Real Property § 11--Easements--Summary Judgment--Private Appurtenant Easement by Implication--Requirements.
To be entitled to summary judgment that property was subject to a private appurtenant easement by implication, the moving party was required to establish undisputed facts sufficient to establish as a matter of law each element necessary for the existence of such an easement. To preclude the granting of the judgment, the opposing party needed only to show that the moving party failed to establish that there were no triable issues of material fact as to any one element. In other words, to defeat the motion, the opposing party needed only to show that the moving party's evidence in support of any one element was contradicted by other competent evidence, and that therefore there was a factual dispute as to such element.

(10a, 10b, 10c, 10d)
Easements and Licenses in Real Property § 5-- Easements--Sale by Reference to Map or Plat--Easement by Implication--Establishment as Matter of Law.
Facts set forth by neighbors claiming a private appurtenant easement by implication to use a roadway on property they formerly owned were not sufficient to establish the easement as a matter of law, so that the trial court erred by granting summary judgment on the issue. The neighbors sold the property to the current owners' grantors and the grantors sold the property to the current owners by deeds referring to prior recordation of a parcel map. The neighbors did not submit

as undisputed fact that the current owners had the requisite knowledge or notice of alleged preexisting use of the disputed roadway through actual observation or because of reference to the parcel map in their deed. Conditional acceptance by the city of an offer of dedication in the parcel map subject to improvements that were never made did not create a public easement, and the neighbors did not contend that the map made any representations as to a private roadway easement. ***338**

(11)
Easements and Licenses in Real Property § 3--Creation--Implied Easements.
An implied easement may arise when, under certain specific circumstances, the law implies an intent on the part of the parties to a property transaction to create or transfer an easement even though there is no written document indicating such an intent. An implied easement may be created under several different factual scenarios, but in all cases requires the existence of three elements: (1) a separation of title; (2) before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and (3) the easement shall be reasonably necessary to the beneficial enjoyment of the land granted.

(12)
Easements and Licenses in Real Property § 5--Easements--Creation--Sale by Reference to Map or Plat--Creation of Appurtenant Right.
When a lot conveyed by a deed is described by reference to a map, the 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 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.

(13)
Easements and Licenses in Real Property § 5--Easements--Creation--Sale by Reference to Map or Plat--Implied Easement--Presuppositions.
The reference-to-a-map method of creating an easement by implication presupposes two things. First, it presupposes ownership of the street in question by the one who recorded the tract map. Where the abutting street is not a part of the recorded subdivision, the doctrine of implied grant can have no application. Second, it presupposes an intent on the part of the original grantor, by depicting the road on the map and by referring to the map in the deed, to create an easement, as opposed to depicting the road and referring to the map for purposes of description only or as an aid in identification, this intent being unambiguously shown by the creation and depiction on the map of new streets, as opposed to the depiction on the map of a street already depicted on earlier recorded documents.

(14)
Easements and Licenses in Real Property § 3--Easements--Creation-- Reservation or Grant to Self.
One cannot grant an easement ***339** to oneself; one can only reserve such an interest in the land granted to another.

(15)
Easements and Licenses in Real Property § 3--Easement by Implication Benefiting Grantor--Requirements--Grantee's Knowledge.
Because a grant is to be construed in favor of the grantee and against the grantor whenever possible, the courts hesitate to contradict an unqualified grant by implying an easement that burdens the grantee's property and derogates from the grant. To imply a reservation of an easement to benefit the grantor, all of the general requirements of implication must be present. However, the courts require that the grantee have knowledge of the existing use or that it is so obvious and permanent that the grantee's knowledge of its use can be implied. If the grantee of the quasi-servient tenement does not have adequate notice of the preexisting use, he or she receives title to the servient tenement as a bona fide purchaser without the burden of the unknown easement.

COUNSEL
Marjorie M. Mikels for Plaintiffs and Appellants.
Pamela King, Jeffrey King, Rager & Winstead and John Rager for Defendants and Respondents.

TIMLIN, J.

I Introduction

This case involves a purported roadway easement (easement) which the King family alleges exists in favor of the King family over land owned by the Mikels family in the City of Rancho Cucamonga. The Mikelses bought the land in

question (Parcel No. 1) from Richwood Development Inc., which had apparently acquired it from the Desimones, who had purchased it from the Kings. John Rager (Rager), a King family member, allegedly acted as the ***340** Desimones' agent in connection with the sale to the Mikelses. According to the Mikelses, Rager never told them that the Kings claimed that the property was subject to such an easement in favor of the Kings, a claim based in part on an unrecorded agreement between the Kings and the Desimones. Therefore, when, after the sale of the property by the Desimones to the Mikelses, Rager allegedly cut the chain on their gate which crossed the claimed easement area and the King family began to use that area to cross their property, Jon and Marjorie Mikels (the Mikelses) sued John Rager, Jennifer King Rager, Jeffrey King, Pamela King, and Gertrude King Hartmann individually, and Gertrude King Hartmann, Jennifer Rager and Stanley Mussell, Jr., as Trustees under the trust created by the Will of John Lewis King, deceased (collectively the Kings) for declaratory relief, trespass and injunction.

The Kings cross-complained for declaratory relief, quiet title, and injunction, seeking to establish alternatively that they never transferred to the Desimones title to that portion of the property depicted as the location of "Almond Street," or that they are the legal owners of an easement by implication over it, and/or that the Mikelses' ownership of the roadway is subject to the use of the Kings and/or the general public because of the offer of dedication on Parcel Map No. 4013.

As part of the allegations of their second amended cross-complaint, the Kings alleged that before Parcel Map No. 4013 was recorded, they entered into a written agreement with the Desimones to sell Parcel No. 1 to the Desimones, and that this agreement (the Desimone Agreement) provided that the buyer (the Desimones) "hereby grants to or creates in the Seller a non-exclusive easement on Almond Road," which is the location of the purported easement. In their second cause of action for an easement by implication, the Kings alleged that "By virtue of the Desimone Agreement, the requirements of the County of San Bernardino for approval of Parcel Map No. 4013 and the actual use of the Disputed Roadway by [the Kings] and those other persons given permission for use by [the Kings], [the Kings] are entitled to, and are the owners of legal title to, an easement by implication across the entirety of the Disputed Roadway for purpose of traversing between Carnelian Street and the improved portion of Almond Street to the west of Parcel 4013." They also claimed, in their second amended cross-complaint, that at all times prior to purchasing the subject property the Mikelses were aware of these facts, including the terms of the Desimone Agreement. The Desimone Agreement, which was attached as exhibit "B" to the Kings' cross- complaint does not indicate that it was ever recorded, nor did the Kings allege that it had been recorded.

The Kings filed a notice of pending action about two months after filing their second amended cross-complaint. ***341**

The Mikelses answered the cross-complaint and also cross-complained against John Rager, Dr. Patsy Desimone (Dr. Desimone) and the Kings for quiet title, fraud via intentional failure to disclose material fact concerning real property, negligent misrepresentation, breach of implied covenant of good faith and fair dealing, breach of contract and attorney fees.

The Kings moved for summary judgment on the "action," which we assume means on the combined issues raised by the Mikelses' complaint, the Kings' second amended cross-complaint, and the Mikelses' cross-complaint, to the extent the Mikelses' cross-complaint contained a cause of action related to the existence or nonexistence of an interest in real property, i.e., the first cause of action for quiet title. The Kings also moved for judgment on the pleadings regarding the Mikelses' cross-complaint against Rager, the Desimones, and the Kings as to the Mikelses' second and third causes of action for intentional failure to disclose a material fact and negligent misrepresentation.

The Kings' motion for summary judgment was based on eight facts which they alleged to be undisputed and which facts are set forth in detail in the discussion section related to the motion for summary judgment. The facts fall into two categories: those which the Kings used to support an argument that the city's acceptance of the offer of dedication, as shown in Parcel Map No. 4013, subject to improvements of the roadway, created a public easement, and those which the Kings used to support an argument that by referencing Parcel Map No. 4013 in their deed to the Desimones, which map showed Almond Street, they had created a private appurtenant easement over Parcel No. 1 in favor of the remainder parcel.

The Mikelses opposed the Kings' motion for summary judgment. Specifically, they contended that the acceptance of the offer of dedication subject to improvements did not create, as a matter of law, a public easement, and that the undisputed facts of the instant case did not come within the doctrine of the

creation of implied easements by reference to a subdivision map.

The trial court concluded that the Kings had both a private appurtenant easement across the property as owners of the "remainder parcel," and the right to use a public easement across the property as members of the public. It therefore granted the Kings summary judgment as to the existence of both types of easement, and as to their right to quiet title to the private easement. [1] ***342**

In response to the Kings' motion for judgment on the pleadings as to the Mikelses' cross-complaint, it granted, with leave to amend, the motion as to the second cause of action for fraud and deceit by concealment and failure to disclose, and as to the third cause of action for fraud and deceit based on negligent misrepresentation.

The Mikelses failed to amend their cross-complaint, and an order was entered dismissing the second and third causes of action. The summary judgment disposed of the first cause of action in the Kings' cross-complaint and the first cause of action in the Mikelses' cross-complaint (both for quiet title). The fourth and fifth causes of action in the Mikelses' cross- complaint for breach of an implied covenant and breach of the real property purchase contract being stated against Dr. Desimone, and not the Kings, the sixth cause of action being "for attorney fees" based on the Mikelses' contract with Dr. Desimone, and the first cause of action of the Mikelses' complaint for trespass were resolved by the final judgment's language: "Plaintiffs and Cross-Complainants, Jon Mikels and Marjorie Mikels, take nothing by way of this Complaint and Cross-Complaint." Consequently, the final judgment concluded all causes of action between the Mikelses and the Kings.

II Issues on Appeal

The Mikelses have appealed from that judgment, and contend that it must be reversed for the following reasons:

(1) mere recording of a parcel map and conveying a parcel by reference to the parcel map on which an offer of dedication and acceptance "subject to improvements" is depicted cannot create a public or private easement in the absence of either the unconditional acceptance of the offer of dedication by the appropriate governmental entity after the improvements are completed, or proof of public use of the offered easement in the manner for which the dedication was made;

(2) mere filing of a map containing an "offer of dedication" and acceptance of the offer subject to improvements, creates no rights in the "public," or in the Kings, until such time as the improvements are made and the city accepts the property into its road system; such offer remains subject to termination under the clear provisions of Code of Civil Procedure section 771.010; ***343**

(3) the Kings failed to show "legal title" necessary to meet the statutory requirements of a "quiet title action";

(4) the Kings failed to show clear and convincing evidence necessary to overcome certain Evidence Code presumptions;

(5) the Kings' claims cannot withstand the equitable defenses of laches and unclean hands;

(6) the Kings failed to prove "irreparable damage," or "wrongful conduct" necessary to establish a claim for injunction;

(7) the judgment failed to specify the purpose, use and extent of the easement, and failed to allocate liabilities between the parties;

(8) the trial court failed to consider important constitutional issues and public policies in making its determination to give the Kings an easement;

(9) the trial court erred by concluding that the Mikelses' cross-complaint failed to state sufficient facts to constitute causes of action against John Rager and the Desimones; and

(10) disputed issues of fact remain to be determined at trial.

We conclude, as to the judgment on the Mikelses' complaint and the Kings' cross-complaint, that the judgment must be reversed because (1) the Kings failed to establish that a public easement was created as a matter of law by the offer on Parcel Map No. 4013 to dedicate an easement which was conditionally accepted by the City of Rancho Cucamonga; and (2) the Kings failed to establish sufficient undisputed facts to show that a private appurtenant easement by implication existed in their favor over the Mikelses' property.

Respecting the Mikelses' cross-complaint, we conclude that the Kings' motion for judgment on the pleadings should not have been granted as to the Mikels' second cause of action

for intentional failure to disclose against John Rager, and as to their third cause of action for negligent misrepresentation against the Kings (including Rager).

III Facts

By a deed recorded on December 12, 1952, John Ingalls, Ruth Lewis Ingalls Brown and John Lewis King granted to John Lewis King and ***344** Gertrude King title to "Lot 3, Block 13, Map of the Tract of Land of Cucamonga Homestead Association, as per plat recorded in Book 6 of Maps, page 46, records of said County, and of Government Lots 1 and 2 of Section 21, [etc., as described by metes and bounds]" and to "Lot 9, Block 17, Map of the Tract of Land of Cucamonga Homestead Association, as per plat recorded in Book 6 of Maps, page 46, records of said County." The Map of the Tract of Land of the Cucamonga Homestead Association, attached hereto as appendix A, and attached to the Kings' moving papers as exhibit "B," shows the tract's "subdivision into 20 acre tracts, and building lots," and notes that "[t]he Streets running North and South between the building lots are 80 ft. wide[,] Orange Street is 48 ft. [,] Almond Street is 33 ft. and all the other Streets are 66 feet wide."

Lot 3, Block 13 and Lot 9, Block 17, are bordered to the north by Almond Street. Government Lots 1 and 2 of section 21 both lie to the north of Almond Street, and apparently were not part of the subdivision in which Lot 3 and Lot 9 were located. (See appen. A.)

By a deed recorded on December 30, 1977, Gertrude King Hartmann, who acquired title as Gertrude King, and Gertrude King Hartmann, Jennifer Rager and Stanley Mussell, Jr., as Trustees under the will of John Lewis King, Deceased, granted to Dr. Patsy and Betsy S. Desimone (the Desimones) "Parcel No. 1 of Parcel Map No. 4013, in the County of San Bernardino, State of California, as per map thereof recorded in Book 37 of Parcel Maps, Pages 32 & 33, records of said County." The grant deed stated that it was subject to "Covenants, conditions, restrictions, reservations, rights, rights of way and easements of record."

Parcel Map No. 4013, to which the grant deed referred, showed that this grant concerned the division into Parcel No. 1 and a remainder parcel of Government Lot 2 of Section 21, which, as noted earlier, lies north of Almond Street and was not part of the subdivision bounded to the north by Almond.

Parcel No. 1, deeded to the Desimones, is carved out of the Kings' remaining property (the remainder parcel) like the door in a child's drawing of a house. (See appen. B.) Parcel No. 1 is bordered on the south by Almond Street. On Parcel Map No. 4013, Parcel No. 1 is outlined by a solid line drawn so as to indicate that the Parcel includes the entire width of that street, which is described as "vacated Almond St. per 3648 [undecipherable] O R." (See appen. B.) This reference was to a resolution of the Board of Supervisors of San Bernardino County, which states that upon petition of certain freeholders, "Almond Street from its intersection with Beryl Avenue westerly to a point 600 feet west of its intersection with Carnelian Avenue" "is ***345** hereby vacated, discontinued and abandoned as unnecessary for present or prospective use," and that "the public easement heretofore existing shall hereinafter cease and determine, and the title to the land previously subject thereto shall revert to the respective owners thereof, free from such public easement; ..." Beryl Avenue's location can be ascertained by reference to appendix A; it lies to the east of Carnelian. The vacation of the public easement by resolution thus covers Almond Street to a width of 33 feet, which is south of the Kings' remainder parcel and to the south of Parcel No. 1 in its entirety. (See appen. B.)

The width of Almond is shown on Parcel Map No. 4013 as being 66 feet wide to the west of Carnelian, but only 33 feet wide from east of Carnelian to the edge of property depicted on the map. As noted above, The Map of the Tract of Land of Cucamonga Homestead Association showed Almond as a 33 feet wide street. The 66 feet wide designation to the west of Carnelian is apparently due to the Kings' offer of dedication in connection with the filing of Parcel Map No. 4013: sheet one of Parcel Map No. 4013 contains an owner's certificate, signed by the Kings, stating "we hereby offer to dedicate to the City of Rancho Cucamonga for public use Almond Avenue [*sic*] ..." and the notes on the map itself show an offer of dedication over the street's 66-foot width. (See appen. B.) The county surveyor's approval and acceptance certificate, also found on sheet one, states that the surveyor, on behalf of the city council of Rancho Cucamonga, "hereby approves the annexed map and accepts, subject to their improvement in accordance with the county standards, the foregoing offers of dedication as shown on the annexed map."

Sometime after the Kings-to-Desimones conveyance of Parcel No. 1, Parcel No. 1 was transferred to Richwood Development Company, Inc., which in turn, by corporation grant deed recorded February 22, 1985, transferred to the Mikelses "Parcel No. 1 of Parcel Map No. 4013, as per map

thereof recorded in Book 37 of Parcel Maps, pages 32 and 33, records of said county."

After the Mikelses took title to Parcel No. 1, the Kings allegedly broke the lock and sawed off the chain securing a gate across the claimed easement, and also graded a lane across that area, so that customers could cross the Mikelses' land to reach the Kings' Christmas tree farm.

As a result of this incident, the above-described litigation ensued, culminating in the Kings' motion for summary judgment and their motion for judgment on the pleadings. This in turn resulted in the final judgment and order of dismissal. ***346**

The Kings' motion for summary judgment was based on the following facts which they alleged to be undisputed:

(1) "Parcel Map No. 4013 was signed by the owners of the land depicted thereon and recorded on December 29, 1977, (see Exhibit 'M')."

(2) "Almond Avenue[*sic*] was dedicated to the City of Rancho Cucamonga for public use pursuant to Parcel Map No. 4013, (see Exhibit 'M')."

(3) "The dedication of Almond Avenue[*sic*] was accepted subject to improvement by a duly authorized officer on behalf of the City of Rancho Cucamonga, (see Exhibit 'M')."

(4) "Parcel Map No. 4013 exhibits Almond Street as a sixty-six foot, east-west roadway, running along the southerly border of Parcel One, (see Exhibit 'M')."

(5) "Parcel One was conveyed by a deed, recorded on December 30, 1977, which described the conveyance by reference to Parcel Map No. 4013, (see Exhibit 'M')."

(6) "Since Parcel Map No. 4013 was filed and recorded, on December 29, 1977, no deed in either the Mikels' or the Kings' chain of title specifically excepts appurtenant easements over Almond Street, or Avenue, (see Exhibits, 'O', 'Q', 'R', and 'T')."

(7) "Parcel Map No. 5671, being a division of the Remainder Parcel of Parcel Map No. 4013, was filed and recorded on March 14, 1980, (see Exhibit 'P')."

(8) "Kings are owners of land depicted on Parcel Map No. 4013, (see Exhibits 'A', 'K' and 'T')."

The Kings relied on the cases of *Danielson v. Sykes* (1910) 157 Cal. 686 [109 P. 87] and *Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374 [246 Cal.Rptr. 469] for the proposition that "once a portion of the property depicted on a map is conveyed by deed, described by reference to the map, private easements arise appurtenant to the property depicted on the map over the roadways indicated thereon." They argued: "Therefore, when Parcel One was conveyed to the Desimones by deed, recorded December 30, 1977, referencing Parcel Map No. 4013, a private easement over Almond Street attached to each lot on the map, as an appurtenance. Thus, Desimones, as owners of Parcel One, had an appurtenant easement over that portion of Almond Street running along the southerly ***347** border of the Remainder Parcel of Parcel Map No. 4013. And, Kings, as owner of the Remainder Parcel, retained an interest constituting an appurtenant easement over that portion of Almond Street on the southerly border of Parcel No. One."

The Mikelses opposed the Kings' motion for summary judgment. Specifically, they responded to the Kings' statement of undisputed facts as follows:

(1) "No dispute; Parcel Map No. 4013 speaks for itself ..."

(2) "Dispute; *Almond Avenue*[*sic*] *has not, since it was vacated in 1955, been dedicated*; as seen clearly on the Parcel Map, there is an *offer* of dedication *only* on the property and Defendants have failed to produce any resolution of the City of Rancho Cucamonga accepting Almond into its system of streets and roads. Further, the offer is 'subject to improvements in accordance with the county standards.' No such improvements were ever made. There has thus been *no* dedication. (Defendants' Exhibit 'M'.)"

(3) "Dispute; again Defendants misstate the clear language on the map. The *offer* of dedication (not dedication) was accepted-subject to improvements. (Defendants' Exhibit 'M'.)"

(4) "Dispute; Parcel Map No. 4013 shows a 66-foot wide *offer of dedication*; the only actual 'street' shown is 33-foot wide 'Vacated Almond Street,' per 3648 official records. That official record is the San Bernardino County Board of Supervisors' May 18, 1955, resolution *vacating* Almond Street wherein the Board 'vacated, discontinued and abandoned' the road (at the request of defendants) from Beryl

Avenue westerly to a point 600 feet west of Carnelian (all the subject property) and further ordered:

" 'that the public easement heretofore existing shall hereinafter cease and determine, and the title to the land previously subject thereto shall revert to the respective owners thereof, free from such public easement ....'

(Defendants' Exhibits 'M' and 'C'.)"

(5) "Undisputed, except that this fact is demonstrated not in Exhibit 'M' as alleged by Defendants but in their Exhibit 'O'."

(6) "Clarification and Objection; while this assertion of fact may be true, objections are made on the grounds of relevance. The only property in dispute or relevant to this lawsuit is *Parcel No. 1* of Parcel Map 4013. Defendants have no easements shown on Parcel Map No. 4013 in their favor. ***348** The only easements are for utilities and drainage as are clearly depicted on Exhibit 'M'. Exhibit 'T' is immaterial and has no relevance to these proceedings whatsoever. It is a conveyance of an interest in Parcel Map 5671, which includes none of Parcel 1 of Parcel Map No. 4013. This map is attached as Exhibit 'P' of Defendants' papers. As can be seen on that map, Parcel 1 of Parcel Map 4013 is 'N.A.P.' i.e., a 'non-affected parcel.' At the time Parcel Map 5671 was recorded (1980), Parcel 1 of Parcel Map 4013 was already conveyed to a third party. Parcel Map 5671 (Defendants' Exhibit 'P' and Exhibit 'T') has nothing to do with plaintiff Mikels' claim of title."

(7) "No dispute; the document speaks for itself but *objection* on the grounds of relevance. At the time this Map No. 5671 was recorded (i.e., 1980), Parcel No. 1 of Parcel Map No. 4013 was already sold to the Desimones. (See Defendants' Exhibit 'O' showing transfer in December 1977.) No where [*sic*] on Parcel Map No. 5671 can be found the signatures of Dr. and Mrs. Desimone (Exhibit 'P'). Without the owner's signature and approval, nothing on Parcel Map No. 5671, filed after the Desimones acquired title, could affect the rights or title of Desimones from whom Mikelses acquired their title. Parcel Map No. 3671 [*sic*] is irrelevant to these proceedings."

(8) "Dispute; the Kings are the owners of *only* the portion of land on Parcel Map No. 4013 directly north and west of Parcel No. 1. Objections are made to the reference to *Exhibit 'A'*. Exhibit 'A' conveys no land whatsoever included in Parcel Map No. 4013, as can be clearly seen in Exhibit 'B', the map to which Exhibit 'A' refers. All of the land shown in that subdivision map lies south of the subject property. Exhibit 'A' conveyed only two small parcels, i.e., Lot 3 of Block 13 and Lot 9 of Block 17, to the Kings, neither of which have relevance to Plaintiffs' land which is north of Almond and is not even shown on this Exhibit 'B' subdivision map.

"Plaintiffs believe this Exhibit is included for the sole purpose of deceiving the court since it shows 'Almond Street' at the northern limits. But this map was recorded in 1885 and, as can be seen in Defendants' Exhibit 'C', [Almond] was *vacated* by Defendants' own request in 1955."

The Mikelses, in addition to responding to the Kings' separate statement of undisputed facts as set out above, also listed three separate facts in opposition to the Kings' motion for summary judgment and summary adjudication:

(1) "As a *condition* of approval of Parcel Map No. 4013, the county required a private road easement to be recorded for ingress and egress along ***349** the 66 feet on the south property line of Parcel Map No. 4013. The county specifically said:

" 'All private easements are to be recorded by separate instrument. If this cannot be accomplished by the time final approval is granted, the private easements as shown on the approved land division map *must* be recorded at the time of transfer of title to the property.' (Emphasis added; see Plaintiffs' Exhibit '1' attached hereto and incorporated herein by reference.)

"As can be seen by Defendants' Exhibit 'O', the Deed to the Desimones *failed* to reserve a private easement to the Kings or anyone else. The conveyance was subject to only easements *of record*. The court's attention is drawn to Parcel Map No. 4013 (Defendants' Exhibit 'M'), where no 'private easement' is depicted. And the court is requested to note the absence in this court record of any 'separate instrument' giving or reserving to the Kings an easement."

(2) "The disputed lane on the Mikels' property has *never* been improved to county or city standards (see photos attached to initial papers and declarations filed by Plaintiffs in October 1986 depicting the rutted, weed-filled, gated dirt lane)."

(3) "The disputed lane has never been open to the public but has remained gated and locked since long before Mikels acquired the property. ()**(See fn. 2.)** (See Declaration of Jon

D. Mikels dated October 9, 1986, attached hereto as Plaintiffs' Exhibit '2'.)" [2]

The Kings replied to the Mikelses' opposition, and responded to the Mikelses' separate statement of the three undisputed facts noted above, generally commenting that such facts were irrelevant. The Mikelses then filed a "rebuttal" to the Kings' reply and an "Additional Statements of Undisputed Facts ...." These additional facts are set out in the following paragraph. The Kings then filed further documents but did not, however, contend that the "additional" undisputed facts asserted by the Mikelses were, in fact, disputed.

The "additional" undisputed facts asserted by the Mikelses were that: ***350**

(1) After Parcel Map No. 4013 was filed, no recorded document of any kind has granted or reserved an easement over the disputed way in favor of the Kings or the public;

(2) After the offer of dedication was depicted on the filed parcel map, neither the city nor county has accepted by resolution the disputed way into its system of streets;

(3) Parcel Map 4013 is not a subdivision map but is merely a parcel map dividing certain property into the two parcels, Parcel No. 1 and the remainder parcel, each of which has its own separate access to city streets, without the use of Almond;

(4) "The easement Kings conveyed to Acro in the 1950's and thereafter given to the Bella Vista property owners (all south of the subject property) seen on Kings' exhibits D, E, F, G, H, I and J contain *only* an easement on vacated Almond for *restricted* purposes, i.e., 'for purpose of constructing, laying, operating, and maintaining and repairing water lines to provide water service *to said Lot 9,* Block 17, and ingress and egress from said Lot 9.' *The Kings own no property in Lot 9.* None of the easements were for 'road' purposes *in contrast* to the clear *road easements* granted to those same property owners in a paved street that runs through that subdivision commonly known as Bella Vista (described on the deeds as the north 60 feet of the south 298.64 feet of the east 826.88 feet of said Lot 9, et. seq.) If Almond was to be a *road* the deeds would have said so as they clearly did for Bella Vista Street."

As noted above, the trial court, by granting Kings' motion for summary judgment, has determined that there was a public easement and a private appurtenant easement in favor of the Kings over the Mikelses' property, and that therefore the quiet title, declaratory relief, injunction and trespass issues raised by the complaint and the Kings' and Mikelses' cross-complaints were resolved. Accordingly, a final judgment was entered stating that a public easement was created, and presently exists, over the Mikelses' property within the 66 foot-wide Almond Street, "offered for dedication and accepted subject to improvement"; and that a private appurtenant easement, also 66 feet wide, existed over the property in favor of Jeffrey King, Jennifer Rager, Gertrude Hartmann, and the John Lewis King Trust for roadway purposes. ***351**

IV DiscussionA. *The Motion for Summary Judgment*1. *The Public Easement*

() To be entitled to a summary judgment that the Mikelses' property was subject to an easement in favor of the general public, including the Kings, the Kings were required to establish on their cross-complaint undisputed facts sufficient to establish as a matter of law each element necessary for the existence of such an easement. To preclude the granting of such a judgment, the Mikelses needed only to show that the Kings failed to establish that there were no triable issues of material fact as to any one element. In other words, to defeat the Kings' motion for summary judgment, the Mikelses needed only to show that the Kings' evidence in support of any one element was contradicted by other competent evidence, and that therefore there was a factual dispute as to such element.

The Kings' claim to a public easement was based on the following allegedly undisputed facts:

(1) "Parcel Map No. 4013 was signed by the owners of the land depicted thereon and recorded on December 29, 1977, (see Exhibit 'M')."

(2) "Almond Avenue[*sic*] was dedicated to the City of Rancho Cucamonga for public use pursuant to Parcel Map No. 4013, (see Exhibit 'M')."

(3) "The dedication of Almond Avenue[*sic*] was accepted subject to improvement by a duly authorized officer on behalf of the City of Rancho Cucamonga, (see Exhibit 'M')."

The Kings assert that the "dedication" of Almond Street, pursuant to Parcel Map No. 4013, and the acceptance of that dedication "subject to their improvement in accordance with the county standards," created a public easement over

Almond Street. According to the Kings, because Government Code section 66477.3 provides that the acceptance of an offer of dedication on a final map is effective when the map is filed in the office of the county recorder or when a resolution of acceptance by the appropriate legislative body is filed in such office, the offer of dedication contained in Parcel Map No. 4013 and its acceptance subject to improvements became effective and complete, and not subject to termination or abandonment, on December 29, 1977 when Map No. 4013 was filed and recorded. ***352**

They further contend that because a property interest in dedicated property passes upon recordation of the final map (despite the fact that the governing authority does not become responsible for maintenance of the dedicated streets until they have been improved by the subdivider and accepted into the street system by such authority) such property "has become a public roadway" upon such dedication and a property interest inures to the public. The Kings apparently conclude from these contentions and the asserted undisputed facts that a public roadway easement exists on Mikelses' property and is presently available for use by any member of the public, including them. They cite no direct authority for this particular proposition but quote 61 Ops.Cal.Atty.Gen. 467-469 (1978), which states "The significance of accepting an offer of dedication is that the property is thereafter held in trust for public use; the property is no longer subject to private control. [Citation.] It does not follow, however, that property open to public use must be maintained by the governing body that accepted the offer of public dedication. ..."

The Mikelses responded to the above-noted portions of the Kings' statement of undisputed facts as follows:

(1) "No dispute; Parcel Map No. 4013 speaks for itself. ..."

(2) "Dispute; *Almond Avenue has not, since it was vacated in 1955, been dedicated*; as seen clearly on the Parcel Map, there is an *offer* of dedication *only* on the property and Defendants have failed to produce any resolution of the City of Rancho Cucamonga accepting Almond into its system of streets and roads. Further, the offer is 'subject to improvements in accordance with the county standards.' No such improvements were ever made. There has thus been *no* dedication. (Defendants' Exhibit 'M'.)"

(3) "Dispute; again Defendants misstate the clear language on the map. The *offer* of dedication (not dedication) was accepted-subject to improvements. (Defendants' Exhibit 'M'.)"

It is apparent that the parties do not disagree as to the language contained in Parcel Map No. 4013 related to the offer of dedication and the city's acceptance thereof. They simply disagree as to the effect of the language. Thus, the issue presented by this portion of the motion for summary judgment is not one of fact. Rather, it is a question of law, i.e., does an offer of dedication of a roadway easement followed by the public entity's acceptance of it have the legal effect of creating a public roadway easement? Helpful in this analysis are references to pertinent provisions of the Subdivision Map Act. (Gov. Code, § 66410 et seq.) ***353**

A governing authority may, at the time it approves a parcel map, "accept, accept subject to improvement, or reject any offer of dedication." (Gov. Code, §§ 66477.1, subd. (a), 66463.) Offers of dedication for streets which are imposed by local ordinance are irrevocable. (Gov. Code, § 66475.) Any road "for which an offer of dedication has been accepted or accepted subject to improvements" "*may* [be] accept[ed] into the county road system, pursuant to Section 941 of the Streets and Highways Code, ..." (Gov. Code, § 66477.1, subd. (b), italics added.)

() The Kings contend that the property in question is now subject to a "public" road easement because the offer of dedication was "accepted." They claim it must be opened to the public even though it has not been accepted into the public road system. We disagree, not because we believe acceptance into the public road system is dispositive, but because the city's qualified acceptance of the offer of dedication did not result in a completed dedication of a public easement.

(,)**(See fn. 3.),** () In reaching this conclusion, we apply basic principles of contract law.[3] A valid acceptance of an offer must be absolute and ***354** unqualified in order to create a binding contract. (Civ. Code, § 1585; *Converse v. Fong* (1984) 159 Cal.App.3d 86, 91 [205 Cal.Rptr. 242].) While normally a qualified acceptance constitutes a rejection which terminates the offer (*ibid.*), this rule may be modified by statute. (See, e.g., Cal. U. Com. Code, § 2207.) () The Subdivision Map Act (Gov. Code, § 66410 et seq.) specifically modifies this particular principle by making offers to dedicate real property for public easements in connection with the filing of parcel and subdivision maps irrevocable and/or terminable by following a statutory procedure, or abandoned only after

a given period of time has passed. (Gov. Code, §§ 66475, 66477.2, 66463.)

Thus, under basic principles of contract law, an offer of dedication which is accepted on the condition that the proffered property be improved does not result in a completed dedication, no more than does a conditional acceptance of an offer create a valid contract. A public entity's interest in streets and easements offered by dedication is necessarily limited by the conditional nature of its acceptance thereof, which depends for finality upon a subsequent acceptance after satisfactory completion of the street improvements. (*County of Yuba v. Central Valley Nat. Bank, Inc.* (1971) 20 Cal.App.3d 109, 113 [97 Cal.Rptr. 369].) A qualified acceptance results in an outstanding offer of dedication, which has not been revoked by operation of law and which the public entity may accept upon its conditions of acceptance being met. Until the offer of dedication is unconditionally accepted, no public interest is created.

() Based on the foregoing, we conclude that the trial court erred by granting the Kings' motion for summary judgment based on its adjudication that as a matter of law a public roadway easement exists on the Mikelses' property. The judgment based thereon must be reversed.

2. *The Private Appurtenant Easement by Implication*

Before we review the correctness of the trial court's granting of the Kings' motion for summary judgment as to the existence of a private appurtenant ***355** easement in their favor, we must first discuss a discrepancy between the Kings' theory below as to how such an easement was created and their theory on appeal.

The Kings' second amended cross-complaint specifically alleged, in the first cause of action, that:

"18 A. [The Kings] contend that they have a right of use of the Disputed Roadway either because (1) the Disputed Roadway was not conveyed to the Desimones as part of Parcel 1, or (2) even if it was conveyed, the Disputed Roadway is an easement *by implication* in favor of [the Kings], and those permitted to use the easement by them, or (3), the Disputed Roadway is a public road, available to use by all as a result of the offer of dedication as contained on Parcel Map No. 4013." (Italics added.)

The second cause of action in their cross-complaint specifically alleged:

"21. By virtue of the Desimone Agreement, the requirements of the County of San Bernardino for approval of Parcel Map No. 4013 and the actual use of the Disputed Roadway by [the Kings] and those other persons given permission for use by [the Kings] are entitled to, and are the owners of legal title to, an easement *by implication* across the entirety of the Disputed Roadway ..." (Italics added.)

The only type of easement prayed for by the Kings was an easement "*by implication.*"

In their motion for summary judgment, although they did not specifically argue that they were entitled to an easement by implication, the cases they cited, e.g., *Danielson, Petitpierre,* and *Tract Development Services, Inc.*, and the thrust of their arguments, all presupposed that they were in fact, as indicated by their cross-complaint, seeking to establish that their private easement was one created by implication.

However, on appeal, in response to the Mikelses' appellate arguments related to this theory, the Kings now contend that the trial court found an easement "created by grant" rather than an implied easement, and that therefore the Mikelses' authorities related to implied easements are inapplicable to their "easement created by grant."

The basic problem with this new-adopted position is that it assumes that an "easement created by grant" and an implied easement are entirely separate subsets within the set of easements. This is not the case. () Easements may be created by grant or by prescription. (*Elliott v. McCombs* (1941) 17 Cal.2d 23, 30 [109 P.2d 329].) The set of easements created by grant fall into two subsets: easements ***356** created by express grant, and easements created by implied grant. (*Ibid.*) In other words, "an easement created by grant" must be either express or implied. The Kings' "easement created by grant," therefore, must be either express or implied. The Kings do not argue that they have an easement created by an express grant, undoubtedly because there is nothing in the record thus far which remotely resembles an express grant. Thus, they are left, by default, with the implicit argument, which they expressly disclaim, that the easement in question is an easement by implication.

Because of the confusion created by this disclaimer, or perhaps in spite of it, we do not believe we can reverse the judgment simply on the basis that the Kings now have given up their right to an easement by implication, the only kind

of private easement to which they would be entitled, given the state of their pleadings. (*Dorado v. Knudsen Corp.* (1980) 103 Cal. App.3d 605, 611 [163 Cal.Rptr. 477] (a motion for summary judgment must be directed at the theory of recovery as it is pleaded).) We therefore review the record below to determine whether the trial court properly granted the Kings' motion for summary judgment as to their right to a private appurtenant easement by implication.

() To be entitled to a summary judgment that they were the owners of a private appurtenant easement by implication, the Kings were required to establish on their cross-complaint undisputed facts sufficient to establish as a matter of law each element necessary for the existence of such an easement. To preclude the granting of such a judgment, the Mikelses needed only to show that the Kings failed to establish that there were no triable issues of material fact as to any one element. In other words, to defeat the Kings' motion for summary judgment, the Mikelses needed only to show that the Kings' competent evidence in support of any one element was contradicted by other competent evidence, and, therefore, that there was a factual dispute as to such element.

The Kings alleged as undisputed facts the following matters which, in their opinion, were relevant to the creation of an easement by implication:

(4) "Parcel Map No. 4013 exhibits Almond Street as a sixty-six foot, east-west roadway, running along the southerly border of Parcel One, (see Exhibit 'M')."

(5) "Parcel One was conveyed by a deed, recorded on December 30, 1977, which described the conveyance by reference to Parcel Map No. 4013, (see Exhibit 'M')."" ***357**

(6) "Since Parcel Map No. 4013 was filed and recorded, on December 29, 1977, no deed in either the Mikels' or the Kings' chain of title specifically excepts appurtenant easements over Almond Street, or Avenue, (see Exhibits, 'O', 'Q', 'R', and 'T')."

(7) "Parcel Map No. 5671, being a division of the Remainder Parcel of Parcel Map No. 4013, was filed and recorded on March 14, 1980, (see Exhibit 'P')."

(8) "Kings are owners of land depicted on Parcel Map No. 4013, (see Exhibits 'A', 'K' and 'T')."

() We need not consider whether the Mikelses' opposition and response to the above-noted separate statement of facts created a triable issue of fact as to the existence of an easement by implication, if we determine that the facts as set forth by the Kings (and assumed to be undisputed) are not sufficient to establish the existence of such an easement as a matter of law. (*LaRosa v. Superior Court* (1981) 122 Cal.App.3d 741, 744-745 [176 Cal.Rptr. 224].) They are not.

() An implied easement may arise when, under certain specific circumstances, the law implies an intent on the part of the parties to a property transaction to create or transfer an easement even though there is no written document indicating such an intent. (Miller & Starr, Cal. Real Estate (2d ed. 1989) § 15:19, pp. 448-450.) An implied easement may be created under several different factual scenarios (see, e.g., Miller & Starr, *supra,* §§ 15:20, 15:21, 15:24, 15:25, pp. 450-456, 460-462), but in all cases requires the existence of three elements:

" '(1) A separation of title;

" '(2) [B]efore the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and

" '(3) [T]he easement shall be reasonably necessary to the beneficial enjoyment of the land granted.' " (*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 266 [167 Cal.Rptr. 789], quoting *Fischer v. Hendler* (1942) 49 Cal.App.2d 319, 322 [121 P.2d 792].)

The particular factual scenario relied upon by the Kings as establishing an implied easement is that of a sale by reference to a map. As stated in *Danielson v. Sykes, supra,* 157 Cal. 686, 690: ***358**

() "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 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."

This scenario fulfills the three elements required for an implied easement to arise in that (1) when the owner of

the property being subdivided draws up a map dividing the property into lots divided and encumbered by roads, and then sells lots with reference to such map, the roadways are obvious (on the map) and by their very nature and the fact of the sales of lots clearly intended to be permanent, (2) the sale of lots creates the necessary separation of title, and (3) the easements are reasonably necessary to the lot owners' beneficial enjoyment of their land, in that they enable the owners to move freely among and between the various lots within the subdivision as well as onto the adjoining city streets.

() The Kings apparently believe that this method of creating and easement by implication applies to their recordation of Parcel Map No. 4013. However, all the cases in which an implied easement appurtenant was found to exist based on reference to a map involved the drawing up, by the unsubdivided property's original owner, of a subdivision tract map, with a network of roads as part of the map, and the subsequent reference to the map, and hence to such newly created and depicted roadways, in the deeds *by the owner,* as *grantor,* to the purchasers of the lots as grantees. (See, e.g., *Danielson v. Sykes, supra,* 157 Cal. 686; *Petitpierre v. Maguire* (1909) 155 Cal. 242 [100 P. 690]; *Tract Development Services, Inc. v. Kepler, supra,* 199 Cal.App.3d 1374; *Norcross v. Adams* (1968) 263 Cal.App.2d 362 [69 Cal.Rptr. 429].)

() This distinction is determinative because the reference-to-a- map method of creating an easement by implication presupposes two things:

First, it "presupposes ownership of the street [in question] by the one who recorded the tract map. [Citations.] Where the abutting street is not a part of the recorded subdivision, the doctrine of implied grant can have no application. [Citations.]" (*Norcross v. Adams, supra,* 263 Cal.App.2d 362, 365; see also *Petitpierre v. Maguire, supra,* 155 Cal. 242: "The general rule ... 'rests upon the fact that the grantor, by describing the land as bounded by a way, ***359** *when he is the owner of the soil under the way,* intends thereby to confer upon the grantee, as appurtenant to the granted premises, the right to use such way, ...' " (*Id.* at p. 248, italics added.) Thus, in *Norcross,* when the evidence showed that the road over which the plaintiffs claimed a private easement was never part of the tract in which their lot was situated, but had been created by the dedication of a right of way by the lot owners of an adjoining tract, the doctrine of implied easement by sale with reference to a subdivision map did not apply. (263 Cal.App.2d at pp. 364-366.)

Second, it presupposes an intent on the part of the original grantor, by depicting the road on the map and by referring to the map in the deed, to create an easement, as opposed to depicting the road and referring to the map for purposes of description only or as an aid in identification, this intent being unambiguously shown by the creation and depiction on the map of new streets, as opposed to the depiction on the map of a street already depicted on earlier recorded documents. (See *Petitpierre v. Maguire, supra,* 155 Cal. at p. 248.) It is this element of intent which the Kings have failed to establish by any of their asserted undisputed facts.

Before we discuss the Kings' failure to establish the necessary intent, we must also point out that the Kings are wrong to the extent they contend that the easement in their favor was created by way of the implied grant of an easement. () One cannot grant an easement to oneself; one can only *reserve* such an interest in the land granted to another. That is exactly what is going on in this case: the Kings are not interested in a declaration that their *grantee* has an easement; instead, they are trying to establish that they, as grantors, reserved by implication an easement in their favor as a burden over the property conveyed to the Desimones and thence to the Mikelses by conveying Parcel 1 to the Desimones through a deed description referring to Parcel Map 4013.

As noted at the beginning of this section, the Kings' contentions as to the legal theory of how the easement in question was created are rather confused. Although they never expressly rely on the theory that the easement in their favor was created by express or implied reservation (as opposed to grant), such a theory seems to be hovering about the edges of their arguments. However, of course, they never pleaded such a theory as the basis of their cross-complaint. () Furthermore, the facts proposed as undisputed are not sufficient to support a judgment, as a matter of law, on the theory of an implied reservation, as is apparent from the relevant law:

() "[S]ince a grant is to be construed in favor of the grantee and against the grantor whenever possible, the courts hesitate to contradict an unqualified grant by implying an easement that burdens the grantee's ***360** property and derogates from the grant. For this reason a court may refuse to find an implied easement in favor of the grantor even though the circumstances surrounding the conveyance would be

sufficient to justify an implied grant had the grantor conveyed the dominant tenement.

"To imply a reservation of an easement to benefit the grantor, all of the general requirements of implication must be present. However, the courts require that the grantee have knowledge of the existing use or that it is so obvious and permanent that the grantee's knowledge of its use can be implied. If the grantee of the quasi-servient tenement does not have adequate notice of the preexisting use, he receives title to the servient tenement as a bona fide purchaser without the burden of the unknown easement." (Miller & Starr, *supra,* § 15:24 at p. 461, fns. omitted.)

() The Kings did not submit as an undisputed fact that the Mikelses had the requisite knowledge or notice of the alleged preexisting use of the disputed roadway through actual observation of the roadway's use by the Kings and those persons permitted by the Kings to use the roadway. Furthermore, the Kings did not present as an undisputed fact that the Mikelses had the requisite knowledge or notice because of the reference to Parcel Map No. 4013 in their deed. Although the deeds to the Desimones and the Mikelses referred to the parcel map, which showed the offer of dedication and conditional acceptance of "Almond Street," the conditional acceptance did not create a public easement (as discussed above in section (1)(a)), nor did the Kings contend that the map made any representations as to a *private* roadway easement over any portion of Parcel 1, including "Almond Street."

The undisputed presence of an unambiguous representation on the map that there was a private easement in favor of the remainder parcel over "Almond Street," combined with a deed to the Desimones of Parcel No. 1 which referred to the map, could have supplied the necessary intent on the part of the Kings as grantors to reserve an easement in favor of the remainder parcel to support a conclusion as a matter of law that there had been an implied reservation of an easement. However, the Kings did not establish as a fact that there was such an unambiguous representation of a private easement. See, for example, *Metzger v. Bose* (1960) 183 Cal.App.2d 13 [6 Cal.Rptr. 337], overruled on another ground, *Valenta v. County of Los Angeles* (1964) 61 Cal.2d 669, 672 [39 Cal.Rptr. 909, 394 P.2d 725], in which the plaintiff conveyed land to the defendants, without expressly reserving an easement in an existing county road. After the county abandoned the road, the plaintiff claimed that because he had described the property granted to defendants by reference to a recorded land survey, which survey showed the county road, he had reserved an easement by implication. The court held that the survey was not a subdivision map, and did not ***361** purport to make any representation as to private easements, there being "no reason to suppose, in the absence of anything else, that the reference to a public road carried any implications as to rights over the public road or in the land occupied thereby beyond the rights belonging to the public in general." (183 Cal.App.3d at p. 19.) Therefore, the court concluded, plaintiff was not entitled to an easement under the theory of implied reservation.

In sum, we conclude that in this case there are no undisputed facts sufficient to establish that the Kings had reserved an easement by implication, even assuming they had pleaded such a theory.

We conclude that the trial court erred by granting the Kings' motion for summary judgment based on its adjudication that as a matter of law a private easement exists in their favor on the Mikelses' property. We therefore reverse the judgment on this basis.

B. *The Motion for Judgment on the Pleadings* *

.....V Disposition

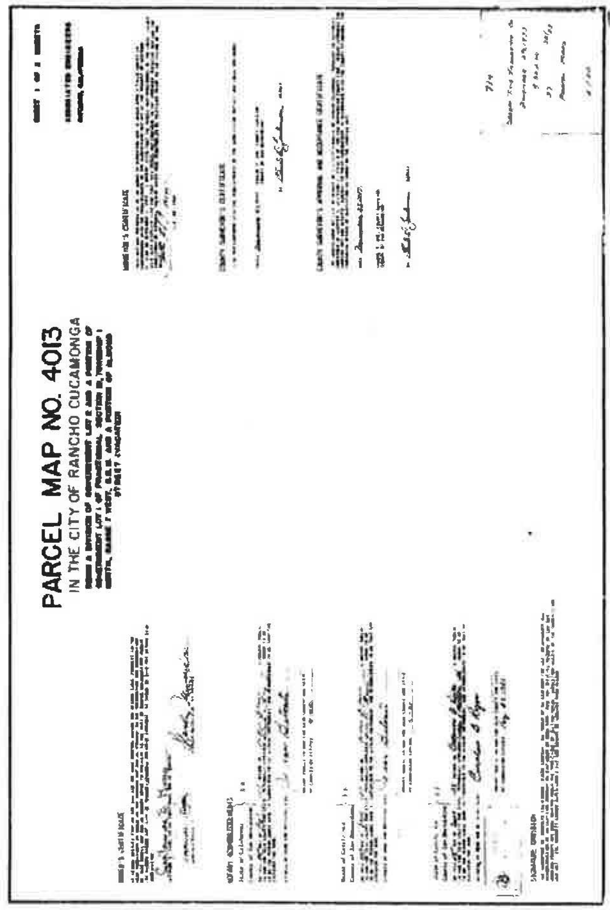
The final judgment and the order of dismissal of the Mikelses' cross-complaint as to the second cause of action against Rager and the third cause of action against the Kings, including Rager, are reversed.

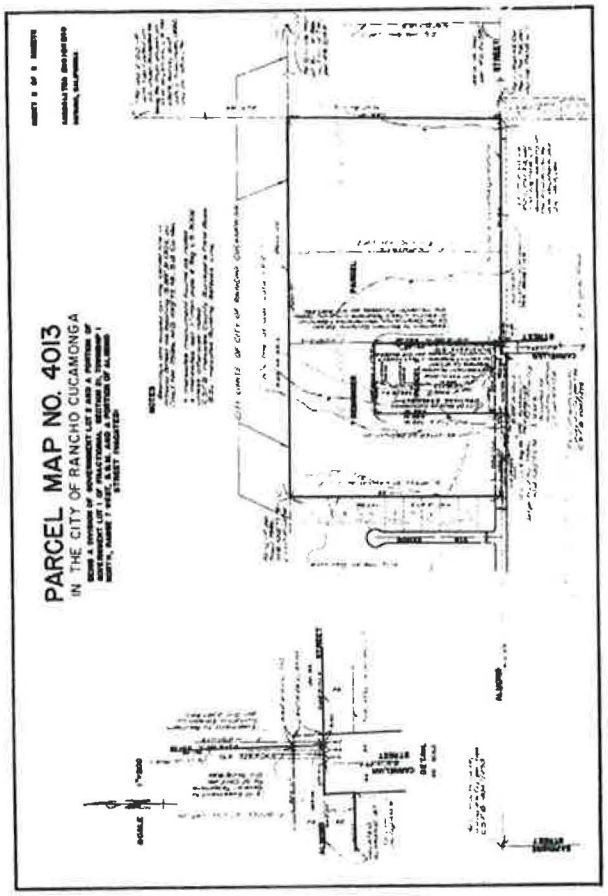
Dabney, Acting P. J., and McDaniel, J., † concurred.

A petition for a rehearing was denied August 13, 1991, and respondents' petition for review by the Supreme Court was denied October 17, 1991. ***362**

***363 *364 *365**


T. 1 S. R. 7 W
MAP
Cucamonga Homestead Association


PARCEL MAP NO. 4013
IN THE CITY OF RANCHO CUCAMONGA



Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of section IV, subsection B.

* Retired Associate Justice of the Court of Appeal, Fourth District, sitting under assignment by the Chairperson of the Judicial Council.

1 Although the Kings did not make a motion for summary judgment on their cross-complaint for quiet title as to the easement, the trial court entered judgment for them on that cause of action when it entered summary judgment in their favor on the Mikelses' complaint, alleging that such easements did not exist.

2 The Mikelses also made evidentiary objections based on relevance and immateriality to numerous exhibits attached to the Kings' moving papers, but these objections were never ruled upon by the court. (The Kings also, in their reply to the Mikelses' opposition, made evidentiary objections which were never ruled upon.) Normally it is up to the objecting party to obtain a ruling on such objections, and if they fail to do so, the objection will be deemed to have been waived. (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 2030, pp. 1192-1193 and cases cited therein.)

3 We see no reason that general contract law principles should not apply to statutory offers of dedication and acceptances thereof.

" 'The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations].' [Citations.] In determining such intent, the court must first look to the words of the statute." (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 277 [204 Cal.Rptr. 143, 682 P.2d 338].) The Subdivision Map Act (Gov. Code, § 66410 et seq.) uses the language of basic contract law: "offer," "accept," "accept subject to [conditions]," "reject," "termination," "abandonment," etc.

Of course, if application of general principles of contract law conflicts with the statutory scheme or defeats its purpose, such principles should not be applied. (*T.M. Cobb Co., supra,* 36 Cal.3d at p. 280.) The purpose of the Subdivision Map Act is to give the legislative bodies of local agencies the power to regulate and control the design and improvement of subdivisions (Gov. Code, § 66411), with consideration for, among other matters, the location and size of required

easements and rights of way for access for the use of the lot owners and local neighborhood traffic (Gov. Code, §§ 66418, 66419) and the design of street alignments, grades and widths. (Gov. Code, § 66418.) This purpose is not defeated, and in fact is best effectuated, by applying basic contract principles to the interpretation of Government Code section 66477.1, which results in a judicial holding that a local agency has not agreed that title to a proposed easement for a public right of way shall pass to the public until the the required improvements have been made to the satisfaction of the agency.

In their petition for rehearing, the Kings cite *Tischauser v. City of Newport Beach* (1964) 225 Cal.App.2d 138 [37 Cal.Rptr. 141] for the proposition that, as to statutory dedications (contrasted to common law dedications), "Dedication is not governed by the ordinary rules applicable to the law of contracts." (*Id.* at p. 143.) We think this bold statement, which has never been cited in subsequent published opinions, is too broad, because the court in *Tischauser* was not presented with any issue, which required resolution of the question as to whether the rules of the law of contracts can ever apply to statutory offers and acceptances of dedication. Instead, the issue before that court was simply whether, when the Orange County Board of Supervisors approved and accepted a subdivision map " 'as the official plotting of said tract but not as regards county roads,' " the board thereby " 'did not accept' " the offer of dedication of the roads, thus terminating the offer of dedication. (*Id.* at pp. 142-143.)

Notably, in concluding that the board's action did not terminate the offer, the reviewing court did not rely on statutory provisions related to the termination or withdrawals of offers of dedication, but instead (1) interpreted the board's words as not constituting a rejection of the offer of dedication (225 Cal.App.2d. at p. 144), and (2) considered the parties' behavior which occurred before the plaintiff decided to assert that the streets were not public property. (*Id.* at pp. 141-142, 144-145.) The court's interpretation of the language said to constitute rejection or acceptance of an offer and its consideration of the parties' course of conduct under an agreement before a dispute arises as to the agreement's existence or terms, involved applications of the rules of contract law. Thus, although the court in *Tischauser* commented that such rules do not govern the law of dedication, it nevertheless implicitly applied such rules in arriving at its decision.

* See footnote, *ante*, page 334.

† Retired Associate Justice of the Court of Appeal, Fourth District, sitting under assignment by the Chairperson of the Judicial Council.

End of Document

Exhibit L

68 Cal.App.4th 131, 80 Cal.Rptr.2d 126, 98 Cal. Daily Op. Serv. 8769, 98 Daily Journal D.A.R. 12,200

THOMAS TUSHER et al., Plaintiffs and Appellants,
v.
DONLON GABRIELSEN et al.,
Defendants and Respondents.

Nos. A077708, A081291.
Court of Appeal, First District, Division 3, California.
Nov. 30, 1998.

SUMMARY

The trial court dissolved plaintiff landowners' preliminary injunction that had prohibited the neighboring landowner defendants from destroying a pond located principally on defendants' property, and granted defendants' motion for judgment pursuant to Code Civ. Proc., § 631.8. The trial court also found, with respect to plaintiffs' allegation that defendants had breached the parties' agreement providing plaintiffs with a revocable license to use the pond in exchange for plaintiffs' agreement to repair and maintain it, that defendants did not breach the contract. (Superior Court of Marin County, No. 168121, Lynn Duryee, Judge.†)

The Court of Appeal affirmed. The court initially held that no statement of decision was timely requested as required by Code Civ. Proc., §§ 631.8 and 632, and it was therefore waived. Even if the document entitled "statement of decision," which consisted of a verbatim transcript of the trial court's comments in ruling on the motion for judgment, was considered valid and timely, plaintiffs waived the right to assert any alleged deficiencies by failing to raise any objections to the statement. The court also held that the trial court properly concluded there was no implied easement in the pond. An easement cannot be implied absent clear evidence that one was intended by the parties, and the record contained substantial evidence from which the trial court could conclude that defendants did not intend to create an easement. The court further held that plaintiffs were not entitled to have the burden of proof shifted to defendants to prove that defendants did not intend to create an easement once plaintiffs made out a prima facie case. The court held that nothing in the record indicated that the trial court imposed a "clear and convincing evidence" standard of proof upon plaintiffs, rather than the proper "preponderance of the evidence" standard (Evid. Code, § 115), and the court therefore assumed that the trial court applied the proper standard. The court also held that substantial evidence supported the trial court's finding that the pond was not a natural watercourse and that plaintiffs had no ***132** claim to riparian and littoral rights. The court further held that the trial court properly found that defendants did not breach the parties' agreement providing plaintiffs with a revocable license to use the pond in exchange for plaintiffs' agreement to repair and maintain it. (Opinion by Walker, J., with Phelan, P. J., and Corrigan, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Appellate Review § 48--Presenting and Preserving Questions in Trial Court--Findings--Alleged Deficiencies in Statement of Decision--Waiver.
In proceedings in which the trial court dissolved plaintiff landowners' preliminary injunction that had prohibited the neighboring landowner defendants from destroying a pond located principally on defendants' property, and granted defendants' motion for judgment under Code Civ. Proc., § 631.8, a statement of decision was not timely requested as required by Code Civ. Proc., §§ 631.8 and 632, and was therefore waived. Thus, the appellate court was required to assume the trial court made whatever findings were necessary to sustain the judgment and the appellate court indulged all presumptions in favor of the order. Even if the document entitled "statement of decision," which consisted of a verbatim transcript of the trial court's comments in ruling on the motion for judgment, was considered valid and timely, plaintiffs waived the right to assert any alleged deficiencies. Under Code Civ. Proc., § 634, a party must raise any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. Even if the judge had specifically directed the preparation of the document with which plaintiffs found fault, they were required to inform the court of their objections. Finally, even if the statement of decision were accepted as valid and proper, and were used to understand the trial court's reasoning in resolving the disputed issues, it supported the order dissolving the preliminary injunction.

(2)
Easements and Licenses in Real Property § 3--Easements--Creation-- Implied Easements.
An easement will be implied when, at the time of conveyance of property, the following conditions exist: (1) the owner of property conveys or transfers a portion of that property to another; (2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue, meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and ***133** apparently permanent that the parties should have known of the use; and (3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement. The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances. An easement by implication will not be found absent clear evidence that it was intended by the parties.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 452 et seq.]

(3a, 3b)
Easements and Licenses in Real Property § 12--Easements-- Actions--Evidence--Implied Easements--Landowners' Conduct as Indicative of Intent:Waters § 57--Easements--Actions.
In proceedings in which the trial court dissolved plaintiff landowners' preliminary injunction that had prohibited the neighboring landowner defendants from destroying a pond located principally on defendants' property, and granted defendants' motion for judgment (Code Civ. Proc., § 631.8), the trial court properly concluded there was no implied easement in the pond. The statement of decision did not suggest that the judge relied on defendants' testimony regarding some secret, subjective intent regarding the pond. Rather, the court considered defendants' conduct when they reconfigured the pond so it would be entirely on their own property, as indicative of their intent to retain full possession and control of the pond. An easement cannot be implied absent clear evidence that one was intended by the parties, and the record contained substantial evidence from which the trial court could conclude that defendants did not intend to create an easement. Nor did plaintiffs acquire an implied easement by virtue of subdivision maps prepared by defendants and allegedly given to plaintiffs' predecessors in interest. Every map referred to by plaintiffs showed the pond in its state prior to being reconfigured, with a sizable odd-shaped portion resting on the property being sold. It was undisputed, however, that before plaintiffs' predecessors in interest bought the property, the pond had been reconfigured, virtually completely removing it from the property being sold.

(4)
Easements and Licenses in Real Property § 5--Easements--Creation-- Implied Easements--Reference to Map.
In certain cases, purchasers of subdivided property have been granted implied easements in streets or other common areas depicted on a subdivision map. The rule allowing for such an easement is based on the implied intent of the grantor and upon an estoppel resulting from the buyer's reliance on the map showing the streets or other common areas at the time of ***134** purchase. Therefore, an easement will not be implied in favor of the buyer if other facts and circumstances surrounding the transaction indicate that the grantor did not intend to create an easement, or if there is no reference to a map, or if there is no reliance by the purchaser upon the map.

(5)
Easements and Licenses in Real Property § 12--Easements--Actions-- Evidence--Implied Easements--Burden of Proof.
In proceedings in which the trial court dissolved plaintiff landowners' preliminary injunction that had prohibited the neighboring landowner defendants from destroying a pond located principally on defendants' property, and granted defendants' motion for judgment (Code Civ. Proc., § 631.8), plaintiffs were not entitled to have the burden of proof shifted to defendants to prove that defendants did not intend to create an easement once plaintiffs made out a prima facie case. Evid. Code, § 500, states: "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Once this initial burden is met, the opposing party will be charged with producing its own evidence as to the matters established. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact (Evid. Code, § 550). "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue " (Evid. Code, § 110). Thus, if a plaintiff presents evidence to establish each element of its case, the defendant has the burden of going forward with its own evidence as to those issues. This does not alter the ultimate burden of proof, which rests with the plaintiff to prove each of the relevant facts supporting its cause of action. In the present case, both sides presented evidence on the

easement issue, and there was no error in placing on plaintiffs the burden of proving their causes of action.

(6)
Easements and Licenses in Real Property § 12--Easements--Actions-- Evidence--Implied Easements--Standard of Proof.
On appeal from proceedings in which the trial court dissolved plaintiff landowners' preliminary injunction that had prohibited the neighboring landowner defendants from destroying a pond located principally on defendants' property, and granted defendants' motion for judgment (Code Civ. Proc., § 631.8), nothing in the record indicated that the trial court imposed a "clear and convincing evidence" standard of proof upon plaintiffs, rather than the proper "preponderance of the evidence" standard (Evid. Code, § 115), and the appellate court therefore assumed that the trial court applied the proper standard. Although the trial judge ***135** commented that, in order for an easement to be shown, it has to be shown "clearly," it could not be inferred from her comments that she applied a clear and convincing standard when weighing the evidence presented to her. Given her frequent use of the words " clear" and "clearly," it appeared more likely to be a habit of speech than an expression of a legal conclusion. Furthermore, if the use of "clear" and " clearly" have some legal significance, it was obvious that the trial judge was referring to the quality of the evidence she thought was necessary to prove intent, rather than to the quantity or weight of that evidence. The judge merely sought clear evidence of the intent of the parties that she found, in considering the facts and circumstances existing at the time, the property was conveyed to plaintiffs' predecessors in interest.

(7a, 7b, 7c)
Waters § 8--Riparian Rights--Littoral Rights--Waters to Which Rights Attach--Artificial Pond.
In proceedings in which the trial court dissolved plaintiff landowners' preliminary injunction that had prohibited the neighboring landowner defendants from destroying an artificial pond located principally on defendants' property, and granted defendants' motion for judgment (Code Civ. Proc., § 631.8), substantial evidence supported the trial court's finding that the pond was not a natural watercourse and that plaintiffs had no claim to riparian and littoral rights. The question of the existence of a watercourse is often one of fact to be determined by a jury or the court, and if the evidence is conflicting, the determination of the trial court will not be disturbed on appeal. The trial court was presented with such conflicting evidence: Defendants' hydrology expert testified that the water flowed downhill predominantly in sheets of water, which was "basically a wide band of runoff, no well-defined channel, " while plaintiffs presented a different interpretation of the facts. The trial court, as fact finder, found in favor of defendants, and as there was substantial evidence to support the finding, it was binding on appeal.

(8)
Waters § 8--Riparian Rights--Littoral Rights--Nature of Rights.
A riparian water right provides an owner of property abutting a natural watercourse the right to the reasonable and beneficial use of the water. A littoral right is a right attaching to land abutting a natural lake or pond, and accords that land the same status as a riparian right.

(9)
Waters § 88--Surface and Flood Waters--Definitions and Distinctions-- Natural Watercourse:Words, Phrases, and Maxims--Natural Watercourse.
A natural watercourse is a channel with defined beds and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times ***136** when the streams in the region are accustomed to flow. A canyon or ravine through which surface water runoff customarily flows in rainy seasons is a natural watercourse. Alterations to a natural watercourse, such as the construction of conduits or other improvements in the bed of the stream, do not affect its status as a natural watercourse. A natural watercourse includes all channels through which, in the existing condition of the country, the water naturally flows, and may include new channels created in the course of urban development through which waters presently flow. Once surface waters have become part of a stream in a watercourse, they are no longer recognized as surface waters.

(10)
Waters § 69--Contracts Pertaining to Water Rights--License Agreement to Use Neighbors Pond--Breach of Contract Claim--Cooperation Clause.
In proceedings arising from a dispute over whether plaintiff landowners could prohibit the neighboring landowner defendants from destroying an artificial pond located principally on defendants' property, in which plaintiffs alleged that defendants had breached the parties' agreement providing plaintiffs with a revocable license to use the pond in exchange

for plaintiffs' agreement to repair and maintain it, the trial court properly found that defendants did not breach the contract. After the first three years of the agreement's 15-year term, the agreement gave defendants the absolute right to terminate the agreement and revoke plaintiffs' license to use the pond at any time and for any reason. Although the contract's cooperation clause would have applied during the agreement's existence, it did not come into play for the agreement's actual termination or thereafter. Terms of a contract must be construed so as to give meaning to every provision. To read into the agreement a requirement for cooperation in termination would have rendered meaningless the specific and unambiguous provision allowing defendants the absolute right to terminate unilaterally and at their discretion.

COUNSEL

Hoffman, Finney & Klinedinst, William P. Hoffman, Jr., Malcolm E. McLorg, Legal Strategies Group and Robert J. Vizas for Plaintiffs and Appellants.

Ephraim Margolin and Arthur Brunwasser for Defendants and Respondents. ***137**

WALKER, J.

In these consolidated appeals we review the trial court's order dissolving a preliminary injunction which had prohibited respondents Donlon and Agnes Gabrielsen (the Gabrielsens) from destroying a pond located principally on their property, to which appellants Thomas and Pauline Tusher (the Tushers) unsuccessfully claimed an implied view easement and littoral or riparian rights (appeal No. A077708, the first appeal). We also review the trial court's judgment in favor of the Gabrielsens on the Tushers' breach of contract claim (appeal No. A081291, the second appeal). We affirm.

Facts and Procedural History [1]

The Gabrielsens and the Tushers own adjoining properties in the Town of Ross. Both parcels were at one time owned by the Gabrielsens who, in 1963, divided the property into two parcels. The Gabrielsens retained one parcel with a house on it for themselves and built a "spec" house on the second parcel. In conjunction with construction of the house on the second parcel, the Gabrielsens reconfigured an irregularly shaped man-made pond that straddled both parcels by changing its shape to an oval and reducing its size, intending that it would be located only on their property. [2] In 1963, the Gabrielsens sold the second parcel with the newly built spec house to James and Lola Gosline which the Tushers, in turn, purchased in 1976.

When the Goslines purchased the property the house's interior was not completed and the grounds had not been landscaped. At the time the Tushers purchased the property, it had been fully landscaped by the Goslines who had oriented the view from the house toward the pond. During the years the Gabrielsens owned their property the pond held varying amounts of water, sometimes being full, other times almost empty. [3] In 1980 when the pond was no longer able to hold water, the Tushers asked the Gabrielsens whether they intended to repair it. The Gabrielsens responded that they did not and also turned down the Tushers' request to purchase the pond. The Tushers then asked whether they could repair and maintain the pond. The Gabrielsens agreed, and the neighbors entered into an "Agreement Between Neighbors" ***138** (the pond agreement) detailing a revocable license in the Tushers to repair, maintain and use the pond for 15 years.

In July 1996, six months before the end of the fifteen-year term, the Gabrielsens terminated the pond agreement in accordance with its terms and took steps to obtain approval from the Town of Ross to fill in the pond and provide for an alternate drainage plan. The Tushers responded by filing this action seeking a temporary restraining order and preliminary and permanent injunctions to bar the Gabrielsens from removing the rubber liner installed by the Tushers or otherwise altering the pond's physical characteristics. On July 26, 1996, the trial court issued the Tushers' requested temporary restraining order and an order to show cause regarding preliminary injunction. At the Gabrielsens' request, the temporary restraining order was made mutual on August 14, 1996. After hearing on August 16, 1996, the court granted the Tushers' motion for preliminary injunction, fixing bond at $35,000. [4]

Thereafter, during February 1997, the Tushers' amended complaint for injunction, declaratory relief and breach of contract was tried by the court sitting without a jury. The Tushers called their own witnesses and presented evidence, including a visit to the site by the court. The Tushers also called the Gabrielsens as adverse witnesses pursuant to Evidence Code section 776. In addition, the Gabrielsens called several witnesses out of order, during the Tushers' presentation of their evidence. Upon the conclusion of the Tushers' case, counsel for the Gabrielsens made a motion for judgment pursuant to Code of Civil Procedure [5] section

631.8.[6] The court entertained argument by both sides and granted the motion as to all causes of action. One week later, on February 27, 1997, the court dissolved its previously issued temporary restraining order and order granting preliminary injunction.[7] The order lifting the injunction was stayed to allow the Tushers time to appeal. They ***139** filed their first appeal from the order dissolving the temporary restraining order and order granting preliminary injunction, which they followed with a petition for writ of supersedeas to preserve the injunction pending determination of the appeal. We granted the petition on April 30, 1997, staying the court's order of February 27, 1997. Judgment was not entered until October 14, 1997, after the completion of the trial on the Gabrielsens' cross-complaint for breach of contract.[8] The Tushers' second appeal is from the entry of judgment on the entire action.

Discussion A. *Contentions on First Appeal*

In the first appeal the Tushers contend: 1) that the trial court improperly relied upon "incompetent and irrelevant" evidence of the Gabrielsens' intent with regard to the pond's status. They insist that cleansed of this assertedly erroneous finding of intent, the court's statement of decision compels the conclusion that they possess an implied easement in the pond; 2) that the trial court imposed an elevated burden of proof upon them, and did not, upon the Tushers' prima facie showing, shift the burden of proof to the Gabrielsens as they claim is required by law; 3) that the trial court failed to rule on the claim that they possessed an implied easement because the pond was identified on subdivision maps recorded by the Gabrielsens in 1963; 4) that the trial court's denial of their claim to riparian and littoral water rights in the pond was not supported by substantial evidence and was erroneous as a matter of law; 5) and that the denial of an easement was not supported by substantial evidence.

1) *Statement of Decision and Standard of Review*

We first address the parties' procedural arguments regarding the propriety and validity of the trial court's statement of decision, because these questions virtually permeate (and in many cases obfuscate) the remaining issues briefed. We are called upon to decide what weight, if any, to give to the statement. () Appellants contend that the statement of decision, which consists of the verbatim transcript of the court's comments when ruling on the Gabrielsens' motion for judgment, is valid as a statement of decision and we must consider it as indicative of the trial court's reasoning, which they urge is flawed. The Gabrielsens, for their part, claim that the document is not a statement of decision, and that we must presume the correctness of the trial ***140** court's decision without according the comments in the purported statement of decision any elevated significance.[9]

For several distinct reasons, we conclude that the document entitled " statement of decision" is of no particular help to the Tushers. We hold, first, that a statement of decision was not timely requested as required by sections 631.8[10] and 632 and was therefore waived.[11] (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 793-794 [218 Cal.Rptr. 39, 705 P.2d 362].) Accordingly, we must assume that the trial court made whatever findings are necessary to sustain the judgment and we indulge all presumptions in favor of the order. (*Ibid.*; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [275 Cal.Rptr. 797, 800 P.2d 1227] (*Arceneaux*).) As we discuss presently, the record does not overcome these presumptions; rather, it supports them with substantial evidence.

Second, even if the statement of decision is considered valid and timely, we deem the Tushers to have waived the right to assert the alleged deficiencies. Under section 634, a party must raise any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. (*Arceneaux, supra,* 51 Cal.3d at p. 1134.) The Tushers insist this rule does not apply because they prepared the statement of decision to the trial judge's exact specifications, so that objecting would have been futile. The record belies the claim. In response to the Tushers' untimely request for a statement of decision, the trial judge stated: "In terms of your request for a statement of decision, the court made extensive findings at the time of issuing its decision, and, should either party desire a written statement of decision, I suggest that one be prepared consistent with the findings made in open court." The Tushers then prepared the document they now complain about, which merely incorporated the verbatim transcript of the court's decision. ***141** We disagree that the judge's instructions mandated this form. Rather, she left the parties to prepare a *proper* statement of decision consistent with her findings and consistent with section 632. Moreover, even if the judge had specifically directed the preparation of the document with which the Tushers now find fault, they were required to inform the court of their objections. " [I]t would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial...." (51 Cal.3d at p. 1138.)

Finally, even if we accept the statement of decision as valid and proper, and use it to understand the trial court's reasoning in resolving the disputed issues, we hold that it supports the order dissolving the preliminary injunction. The principal controverted issues to be decided by the trial court were whether the Tushers possessed an easement or littoral or riparian rights in the pond. As we discuss in more detail below, the trial court made findings which support its conclusion and ruling in favor of the Gabrielsens, and which are supported by substantial evidence in the record.

2) *The Easementa) Findings and Evidence*

() An easement will be implied when, at the time of conveyance of property, the following conditions exist: 1) the owner of property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement. [12] (5 Miller & Starr, Cal. Real Estate (2d ed. 1989) §§ 15:21-15:23, pp. 455-459.) "The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances." (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8 [215 P.2d 729].) An easement by implication will not be found absent clear ***142** evidence that it was intended by the parties. (*Walters v. Marler* (1978) 83 Cal.App.3d 1, 21 [147 Cal.Rptr. 655].) [13]

() In her comments to the parties when granting the Gabrielsens' motion for judgment, which were later transformed into the statement of decision, the trial judge concluded that there was no implied easement in the pond. The Tushers take exception to the conclusion, claiming that the court's factual findings do not support it. Specifically, they contend that although the court found in their favor on each implied easement component, it concluded, nonetheless, that the Gabrielsens had not intended one to be created. They assert that the trial court's decision improperly rested upon testimony concerning the Gabrielsens' "subjective" intent not to create an easement, rather than on their intent as gleaned from the surrounding facts and circumstances. We read the findings differently.

The statement of decision [14] makes the following relevant easement findings in support of the ruling: "[F]rom the Gabrielsens' standpoint, their position is, has been quite clear, this is our property. We own it. We have the right to do what we want to with it." "[Q]uite clearly, the pond is on the Gabrielsens' property. And they did not think of the pond as an amenity. *Quite clearly intended to move the pond, that used to be on that part of the parcel, all on to their property in 1963.* And it looked to me like *their intent was to clearly make the pond on their property and so there wouldn't be any ambiguity* with the-with a huge body of water that would have spanned two properties. [¶] And according ... to the Gabrielsens, they did not consider the pond an amenity, they both considered it to be an eyesore." (Italics added.)

The judge also commented on the loveliness of the pond, and how, as asserted by the Tushers, it appeared to be a part of the Tushers' property, and added value to the property. But she concluded that these appearances did not overcome the evidence of the Gabrielsens' intent *not* to create an easement. Contrary to the Tushers' contention, the statement of decision does not suggest that the judge relied on the Gabrielsens' testimony regarding some secret, never disclosed, "subjective" intent regarding the pond. Rather, she considered the Gabrielsens' *conduct* in 1963 when they reconfigured the pond so it would be entirely on their own property, as indicative ***143** of their intent to retain full possession and control of the pond. The judge took into account the facts and circumstances at the time the property was divided and sold to the Goslines, and from these determined the Gabrielsens' intent.

We reiterate that an easement cannot be implied absent clear evidence that one was intended by the parties. (*Walters v. Marler*, *supra*, 83 Cal.App.3d at p. 21.) The record contains substantial evidence from which the trial court could conclude the Gabrielsens did not intend to create an easement. In asserting that the record does not contain substantial evidence, the Tushers do nothing more than reargue their case by citing to evidence in support of their position. It is elementary that we will not engage in a reweighing of the evidence. Furthermore, the bulk of the evidence relied upon by the Tushers is irrelevant to the only pertinent question-based upon the facts and circumstances at the time of the original transfer of the property to the Goslines, what did the Gabrielsens intend? How the Gabrielsens truly felt about the pond thereafter, whether they maintained it, whether they had a grudge against the Tushers, are all completely irrelevant to this crucial issue. [15]

Finally, we address appellants' contention that the trial court failed to consider whether they acquired an implied easement by virtue of subdivision maps prepared by the Gabrielsens and allegedly given to the Goslines. [16] They claim that because the trial court did not specifically address their claim in its statement of decision, we must reverse and remand. As we have explained, the purported statement of decision was not valid and we presume that the trial court made the factual findings necessary to support its ruling, including a finding on the subdivision map issue. [17] (See *Michael U. v. Jamie B., supra,* 39 Cal.3d at pp. 792-793.) We uphold the ruling if it is supported by substantial evidence. (*Ibid.*)

() In certain cases, purchasers of subdivided property have been granted implied easements in streets or other common areas depicted on a subdivision map. The rule allowing for such an easement is based on the implied intent of the grantor and upon an estoppel resulting from the buyer's reliance on the map showing the streets or other common areas at the time of purchase. (*Metzger v. Bose* (1960) 183 Cal.App.2d 13, 18 [6 Cal.Rptr. 337].) ***144** Therefore, an easement will not be implied in favor of the buyer if other facts and circumstances surrounding the transaction indicate that the grantor did not intend to create an easement, or if there is no reference to a map, or if there is no reliance by the purchaser upon the map. (*Ibid.*; see *Phipps v. Western Pacific Dev. Co.* (1922) 60 Cal.App. 171 [212 P. 407].)

() The trial judge found that the Tushers did not possess an implied easement in the pond. She reached this conclusion by considering all of the facts and circumstances as presented by the parties. The evidence before her included the maps and plans which the Tushers claim showed the pond as an improvement inuring to the subdivided property's benefit. These documents did not sway her opinion as to the parties' intent. Nor should they have. Every single map referred to by appellants showed the pond in its state prior to being reconfigured, with a sizable odd-shaped portion resting on the property being sold. It is undisputed, however, that before the Goslines bought the property the pond had been reconfigured into a neat oval, virtually completely removing it from the property being sold by the Gabrielsens. [18] Thus, even if we accept the Tushers' claim that the Goslines saw the maps (a claim based purely upon surmise) it is unreasonable to infer that they believed they were getting an easement in the pond, or that the Gabrielsens had the intent to give them one. The more rational inference is that the Goslines saw that a pond that had once been a part of their property had been removed, leaving them with no legitimate claim in it and no reasonable basis to rely on its future use. Any impression that the pond was a "public" amenity which the Goslines would have the right to view in perpetuity would have been entirely illogical given all of the facts and circumstances. [19]

b) *Burden of Proof*

() Appellants assert that, contrary to settled law placing the burden of proof on a party asserting a claim, the burden of proof in this case should have been shifted to the Gabrielsens to prove that they did not intend to create an easement once the Tushers made out a prima facie case. Appellants misapprehend the evidentiary process. As provided by Evidence Code section 500: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to ***145** the claim for relief or defense that he is asserting." Once this initial burden is met, the opposing party will be charged with producing its own evidence as to the matters established. "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. [¶] (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." (Evid. Code, § 550.) " 'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) Thus, if a plaintiff presents evidence to establish each element of its case, the defendant has the burden of *going forward* with its own evidence as to those issues. This does not alter the ultimate burden of proof, which rests with the plaintiff to prove each of the relevant facts supporting its cause of action. In the present case, both sides presented evidence on the easement issue. The court was left to weigh the evidence, and found for the Gabrielsens. There was no error in placing on the Tushers the burden of proving their causes of action.

c) *Standard of Proof*

() The Tushers next contend that the trial court's decision was based upon the imposition of an erroneously elevated standard of proof. They claim that the court required them to prove the existence of an implied easement by "clear and convincing" evidence, rather than by the ordinary "preponderance" of the evidence standard imposed on civil complainants. The Gabrielsens do not dispute that the court imposed the elevated standard. They claim that the Tushers were required to prove their case with clear and convincing evidence, and that they failed to do so. We agree with the

Tushers that the proper standard of proof to establish an implied easement is by a preponderance of the evidence. (See Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].) Nothing in the record indicates the trial court imposed the higher standard; we therefore assume that it applied the proper standard. (*Williams v. Williams* (1970) 12 Cal.App.3d 172 [90 Cal.Rptr. 457] [until the contrary is established the appellate court must assume the trial court followed the appropriate rule regarding burden of proof].)

In support of their assertion that the trial court imposed an improper standard, appellants point to the judge's use of the word "clear" in describing the evidence required to establish the Gabrielsens' intent. In her comments and statement of decision, the judge stated: "The law requires that for an easement to be shown it has to be shown clearly." And "[b]ut it has not been proven to me, it has not been proven to me by the standard that is required, that there is an easement. To create an easement it has to be clear." ***146** Appellants ask us to infer, from these comments, that the judge applied a clear and convincing standard when weighing the evidence presented to her. We cannot make that inference based upon this record. First, we note the court's recurrent use of "clear" and "clearly" throughout her comments; the words are repeated nine times in the span of seven and a half pages of transcript. Given the frequent use of the words, it appears more likely to be a habit of speech than an expression of a legal conclusion.

Furthermore, if the use of "clear" and "clearly" do have some legal significance, it is obvious to us from the context of the usage that the trial judge was referring to the *quality* of the evidence she thought was necessary to prove intent, rather than to the quantity or weight of that evidence. Her comments reflect her conclusion that the historical evidence showing the Gabrielsens never intended to create an easement in the pond was clear. She stated: "[F]rom the Gabrielsens' standpoint, their position is, has been quite *clear*, this is our property. We own it. We have the right to do what we want to with it." "[Q]uite *clearly*, the pond is on the Gabrielsens' property. And they did not think of the pond as an amenity. Quite *clearly* intended to move the pond, that used to be on that part of the parcel, all on to their property in 1963. And it looked to me like their intent was to *clearly* make the pond on their property and so there wouldn't be any ambiguity with the-with a huge body of water that would have spanned two properties. [¶] And according ... to the Gabrielsens, they did not consider the pond an amenity, they both considered it to be an eyesore." (Italics added.)

Thus, if the Tushers were going to tip the scales in their favor, they were going to have to present evidence that *clearly* showed a contrary intent; nothing wishy-washy or uncertain would do. We see nothing in the record to suggest that the trial court applied the "clear and convincing" burden of proof standard. She sought clear evidence of the intent of the parties, which she found in considering the facts and circumstances existing at the time the property was conveyed to the Goslines. (See *Orr v. Kirk* (1950) 100 Cal.App.2d 678, 681 [224 P.2d 71], and *Walters v. Marler, supra,* 83 Cal.App.3d at p. 21.)

3) *Substantial Evidence to Support Riparian/Littoral Rights Ruling*

() Appellants contended in their amended complaint that the Gabrielsens' conduct, if not enjoined, would interfere with their riparian rights in the pond. () A riparian water right provides an owner of property abutting a natural watercourse the right to the reasonable and beneficial use of the water. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307 [162 Cal.Rptr. 30, 605 P.2d 859].) A littoral right is a right attaching to land ***147** abutting a natural lake or pond, and accords that land the same status as a riparian right. (See, generally, *City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [52 P.2d 585] and *Crum v. Mt. Shasta Power Corp.* (1934) 220 Cal. 295 [30 P.2d 30].)

() The trial court found that the pond was not a natural watercourse and denied the Tushers' claim to riparian/littoral rights. It stated: "What we know is that-uncontroverted-is that the pond is artificial. We know that the water level has fluctuated over time. Of course there was less water before 1963, because the pond used to be twice as big. That explains some of the differences in the testimony we had in those years before 1963. It did ... fluctuate with rainfall and rain- and drainage. But it is a manmade pond. It is serviced by a drain pipe. And I cannot find that there is any natural water course. [¶] The way that I see it, there are no riparian rights in this artificial pond. The plaintiffs, understandably, want the pond for its beauty, not for its utility."

Appellants contend that the denial of their riparian and littoral rights is not supported by substantial evidence and is based on erroneous legal conclusions. Primarily, they argue that the watercourse feeding the admittedly manmade pond is not artificial, notwithstanding the undisputed fact that the watercourse consists of three small drain pipes. Ordinarily, riparian rights attach only to a natural watercourse, and not to an artificial channel such as a canal which is used to carry

water from a stream. However, under specific circumstances an artificial watercourse may originate in such manner as to give rise to riparian rights; such as where an existing stream is diverted into a new channel, and the artificial channel is permanently substituted for the natural one. (See *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 18 [25 P.2d 435].)

() Our Supreme Court has described a natural watercourse this way: "A natural watercourse 'is a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow....' [Citation.] A canyon or ravine through which surface water runoff customarily flows in rainy seasons is a natural watercourse. Alterations to a natural watercourse, such as the construction of conduits or other improvements in the bed of the stream, do not affect its status as a 'natural' watercourse. [Citations.] A natural watercourse includes 'all channels through which, in the existing condition of the country, the water naturally flows,' and may include new channels created in the course of urban development through which waters presently flow. [Citation.] Once surface waters have become part of a stream in a watercourse, they are no longer recognized as surface waters. [Citation.]" (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 345 [27 Cal.Rptr.2d 613, 867 P.2d 724].) ***148**

() Not surprisingly, each side relies upon the above-quoted language to support its position. The reason is clear: the question is factual in nature. " The question of the existence of a watercourse is often one of fact to be determined by a jury or the court. If the evidence in that regard is conflicting, the determination of the trial court will not be disturbed on appeal." (*Costello v. Bowen* (1947) 80 Cal.App.2d 621, 627 [182 P.2d 615].) The trial court was presented with just such evidence. The Gabrielsens presented evidence to show that the pond serves as a detention basin which collects water from three drain pipes measuring eight, twelve and eighteen inches, respectively. The drain pipes are fed from drainage originating in the hills above the Tusher property, from service water and roof water which collects in the Tushers' yard and driveway and are then discharged into the pond, and from water flowing down from streets above the property. Much of this water flows over land and downhill with no well-defined route until it reaches an area adjacent to the Tusher property. According to the Gabrielsens' hydrology expert, the water flows downhill predominantly in sheets of water which is "basically a wide band of runoff, no well-defined channel." The Tushers, to use their own term, "place a different slant" on the facts. And therein lies their problem. The trial court, as fact finder, placed the slant in the Gabrielsens' favor. As there is substantial evidence to support the finding, we do not disturb it.

B. *Contentions on Second Appeal*

() In their second appeal the Tushers contend that 1) the trial court's judgment in favor of the Gabrielsens on their breach of contract claim is not supported by substantial evidence, and is incorrect in its conclusion that the cooperation clause in the contract is unenforceable; and 2) we must reverse the judgment because of deficiencies in the statement of decision. We have already fully addressed the arguments regarding the statement of decision and therefore only address those claims relating to the alleged breach of the pond agreement.

On September 15, 1981, the Tushers and the Gabrielsens entered into an " Agreement Between Neighbors" for the purpose of "provid[ing] for repair and maintenance of the pond by Tusher in return for a revocable license to use the pond." The agreement was for a 15-year term, but allowed the Gabrielsens, after the first 3 years, to terminate it at any time in exchange for pro rata repayment to the Tushers of their repair costs. The agreement also contained the following paragraph, entitled "Cooperation": "The parties are cognizant that, because they are neighbors and because disputes between neighbors can be most harmful and bitter, it is extremely important that they ***149** cooperate and try to work out both construction and the continuing exercise and ultimate termination of the use rights. *Both parties agree to cooperate with the other to accomplish this*." (Italics added.)

In their amended complaint, the Tushers alleged that the cooperation provision required the parties to cooperate "with respect to the termination of the agreement" and that the Gabrielsens had breached this requirement "by failing and refusing to consult with Plaintiffs respecting their plans to drain and fill the Pond, by failing to address with Plaintiffs the means of facilitating the change in drainage necessitated by the planned demolition of the Pond, and by failing to so deal with the termination of the agreement as to minimize damage to the Plaintiffs."

In granting the Gabrielsens' motion for judgment, the trial court found against the Tushers on this cause of action. In its comments on granting the motion, which became the statement of decision, the court stated: "[I]n terms of the pond agreement, what it looks like to me is that *both sides were*

acting in good faith to try to resolve it in the way that they thought was the best. [¶] And one side would bristle at a proposal from the other side, but I can't say that there was a breach of the pond agreement." (Italics added.)

The Tushers contend that the ruling is unsupported by the evidence. In a dramatically entitled "The Attack on the Pond" section, they detail the many horrors visited upon the pond by the Gabrielsens *after* they had terminated the pond agreement on July 15, 1996. The Tushers claim that these actions somehow violated the cooperation clause in the pond agreement. They seem to suggest that the clause required the Gabrielsens to provide them with advance notice of their intention to give the required notice to terminate the agreement, and to obtain suggestions from the Tushers on how to terminate the agreement to everyone's satisfaction. The very statement of the claim points up its absurdity. It is undisputed that after the first three years, the pond agreement gave the Gabrielsens the absolute right to terminate the agreement and revoke the Tushers' license to use the pond at any time and for any reason. The Gabrielsens wanted to terminate the agreement; the Tushers did not want them to. What sort of cooperation could have come into play under these circumstances?[20] We can certainly envision ways in which the cooperation clause would have come into play during the agreement's existence, but not for its actual termination or thereafter. Under well-established rules of construction, we must construe the terms of a contract so as to give meaning to every provision. To read into the agreement a requirement for cooperation in termination would render meaningless ***150** the specific and unambiguous provision allowing the Gabrielsens the absolute right to terminate unilaterally and at their discretion. We affirm the trial court's finding that there was no breach.

C. *Motion for Sanctions*

The Gabrielsens ask us to impose sanctions against the Tushers for filing a frivolous or dilatory appeal. (§ 907; Cal. Rules of Court, rule 26(a).) While, as already noted, we believe both sides have filed ridiculously long and confusing briefs, we find no basis for awarding sanctions. The motion is denied.

Disposition

The judgment is affirmed. Respondents' motion for sanctions is denied. Respondents to recover their costs on both appeals.

Phelan, P. J., and Corrigan, J., concurred. ***151**

Footnotes

† Judge of the Municipal Court for the Marin Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 This section provides an overview of the facts and history of the case. We provide additional detail as relevant in our specific discussion of the issues.

2 Several years later the Gabrielsens discovered that less than 1 percent of the pond actually lay on the Tushers' property.

3 As we explain more fully later, the many details dwelled upon by the parties regarding when the pond held water and when it did not, whether the Gabrielsens tried to fix the pond or not, and whether the Gabrielsens liked the pond or not, are not relevant to the issues on appeal. Accordingly, we do not repeat them here.

4 It appears from the record that no preliminary injunction order was ever presented to the court for signature, though a cash undertaking was posted. The parties proceeded to trial on the permanent injunction, apparently unaware that a preliminary injunction had never been signed.

5 Unless otherwise specified, all further statutory references will be to the Code of Civil Procedure.

6 Section 631.8 provides in part as follows: "(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence."

7 These did not terminate by operation of law because a judgment could not be entered until trial on the Gabrielsens' cross-complaint for breach of contract.

8 The trial court found for the Tushers on the cross-complaint. That portion of the judgment is not a subject of this appeal.

9 The parties' positions on the statement of decision are both "moving targets." The positions as we restate them hold true throughout most of the briefing, but sometimes switch to the other side.

10 Appellants claim that a statement of decision is required after the trial court grants a motion for judgment under section 631.8. It is clear, however, that no statement is required unless timely requested by a party. (§ 632; *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 304 [131 Cal.Rptr. 547]; *Elzey v. Metropolitan Builders, Inc.* (1971) 16 Cal.App.3d 71, 73 [92 Cal.Rptr. 461].)

11 By written order, a court may extend any time provided by California Rules of Court, rule 232, and may, at any time prior to the entry of judgment, excuse noncompliance with any time limit, "for good cause shown and on such terms as may be just." (Cal. Rules of Court, rule 232(g).) Here, although the trial judge signed a document entitled statement of decision several months after granting the Gabrielsens' section 631.8 motion, she never entered a written order extending the time to request a statement of decision, nor considered good cause or just terms.

12 These elements have been codified in Civil Code section 1104 which provides: "A transfer of real property passes 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."

13 As we discuss below, the need for "clear" evidence of intent does not create a "clear and convincing" standard of proof.

14 This was obviously a very emotional case for the parties. In an apparent attempt to soften her ruling against the Tushers, the trial judge issued, essentially, an apologia for her decision. This has ultimately served as grist for the appeal, and has confused the issues presented. While we are sympathetic to the difficulty of deciding some cases, we urge trial courts to do so clearly. Attempting to soften the blow with extra verbiage only blurs the reasons for the decision.

15 We feel compelled to comment on the outrageous excess indulged in by both sides in briefing this case. It behooves attorneys to rise above their clients' emotional rancor so as to clearly brief relevant issues, rather than inundate the court with reams of irrelevant materials.

16 The Gabrielsens object that this argument is raised for the first time on appeal. Although they never argued the issue to the trial judge, the Tushers did include the assertion in their trial brief. We consider it.

17 See footnote 19, *post*.

18 See footnote 2, *ante*.

19 The result is no different if we look to the statement of decision to determine the trial court's reasoning in ruling against the Tushers. The recordation or presentation of a subdivision map is but one additional fact or circumstance tending to establish a grantor's intent to create an easement in the public area indicated on the map. The trial court was not required to list each fact and circumstance considered in deciding that the Gabrielsens did not intend to convey an easement.

20 The trial court seems to have recognized the absurdity of requiring cooperation in the termination of the agreement when it found that both parties had acted in good faith.

Exhibit M

1 Cal.App.3d 781
Court of Appeal, Second
District, Division 5, California.

DELTA RENT-A-CAR SYSTEMS, INC., a California corporation, and Ruth Nagel Jones, Petitioners and Appellants,
v.
CITY OF BEVERLY HILLS, and A. Fredric Leopold, Mayor and Councilman, George Slaff, Vice Mayor and Councilman, Leroy H. Watson, Councilman, Frank Clapp, Councilman, and J. M. Stuchen, Councilman, in their capacities as City Council of the City of Beverly Hills and Edward E. Tufte, in his capacity as Public Works Director, City Engineer of the City of Beverly Hills, Defendants and Respondents.

Civ. 33105.
|
Nov. 18, 1969.
|
Hearing Denied Jan. 14, 1970.

Synopsis
Suit by lessor and the lessee of lot for writ of mandate to compel city to grant them a driveway access through frontage of lot to public street. The Superior Court, Los Angeles County, Ralph H. Nutter, J., denied writ and plaintiffs appealed. The Court of Appeal, Chantry, J., held that city had authority to deny driveway access, that procedure followed by city council and director of public works was not denial of due process and that denial of driveway access where lot already had access to street from lot at other end of block was neither an abuse of discretion nor arbitrary or capricious.

Judgment affirmed.

West Headnotes (11)

[1] **Public Employment**
Duties

Any conduct of an officer or tribunal under a duty to perform signifying unequivocal intention not to do so amounts to a refusal.

[2] **Administrative Law and Procedure**
Procedural rights and requirements in general

Administrative Law and Procedure
Review for arbitrariness, capriciousness, unreasonableness, or illegality

Administrative Law and Procedure
Questions of fact and findings; evidence

Judicial review of quasi-legislative acts of administrative agencies is limited to an examination of proceedings before agency to determine whether its action has been arbitrary, capricious or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give notices required by law.

1 Cases that cite this headnote

[3] **Mandamus**
Existence and Adequacy of Other Remedy in General

Mere statement by lessor and the lessee of lot seeking driveway access to public street that money damage would be inadequate or no remedy did not show that they did not have a plain, speedy and adequate remedy available to them even if denial of a driveway access were found to be compensable taking, and did not, without more, entitle them to a writ of mandate. West's Ann.Code Civ.Proc. § 1086.

[4] **Highways**
Right of access

Generally, an abutting owner or occupant is not entitled to access to his land at every point between it and highway, but only to reasonable and convenient access to his property and the improvements on it.

1 Cases that cite this headnote

[5] **Municipal Corporations**
Access to and use of roadway

Considering location of lot and traffic conditions, city had authority to deny a driveway access to public road to lessor and the lessee of lot where they already had access through a lot at other end of block.

1 Cases that cite this headnote

[6] **Highways**
Right of access

Considering location of lot and traffic conditions, lessor and the lessee of lot had reasonable and convenient access to their property where such access was through lot at other end of block.

1 Cases that cite this headnote

[7] **Constitutional Law**
Creation, alteration, and regulation

Applicants for driveway access to their lot were not denied due process by failure of director of public works to take further action after city council rejected applicants' request for permit filed with director where applicants treated such action as an adverse ruling by director and appealed directly to city council.

[8] **Administrative Law and Procedure**
Wisdom, judgment, or opinion in general

A court may not substitute its judgment for that of an administrative board, and if reasonable minds may disagree as to wisdom of board's action, its determination must be upheld.

[9] **Administrative Law and Procedure**
Substantial evidence

Where challenge to action of an administrative board rests on claimed insufficiency of evidence, court's power of review is conditioned on determining that findings are not supported by substantial evidence in light of whole record before board.

1 Cases that cite this headnote

[10] **Administrative Law and Procedure**
Weight of evidence

Upon review of action of administrative board, reviewing court does not have right to judge the intrinsic value of the evidence or to weigh it.

1 Cases that cite this headnote

[11] **Municipal Corporations**
Access to and use of roadway

There was substantial evidence to support both a finding that granting of permit for driveway access to public street would create a serious traffic hazard to detriment of public safety and city's resulting decision to deny permit.

Attorneys and Law Firms

****319** ***783** Leonard Horwin, Beverly Hills, for petitioners and appellants.

Allen Grimes, City Atty. for City of Beverly Hills and Colin Lennard, Asst. City Atty. for City of Beverly Hills, for defendants and respondents.

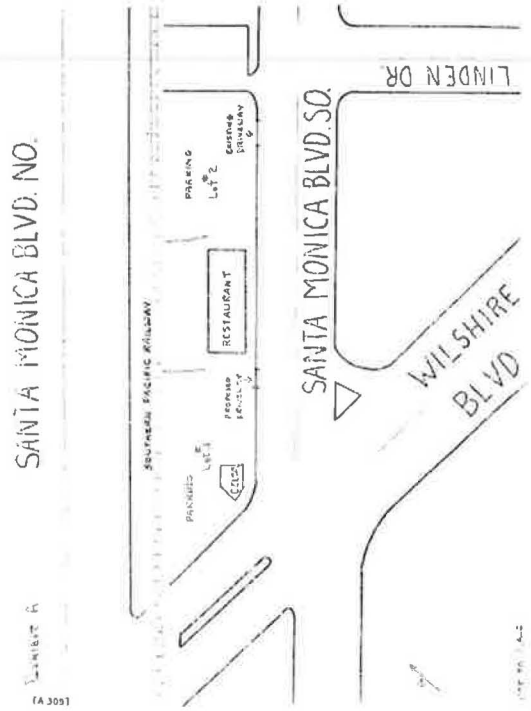
Opinion

CHANTRY, Associate Justice. *

Appellants Delta Rent-A-Car Systems, Inc., a California corporation, (Delta) and Ruth Nagel Jones (Jones) appeal from a judgment of the Los Angeles Superior Court denying them a writ of mandate to compel the City of Beverly Hills (City) to grant them a driveway access through the frontage of the lot occupied by Delta to South Santa Monica Boulevard. The lot occupied by Delta is one of four lots in the block between Wilshire ***784** Boulevard on the west to Linden Drive on the east in the City of Beverly Hills. The most westerly of these four lots constitutes the northeast corner of Wilshire and South Santa Monica Boulevard. This corner is owned by Jones and leased to Delta. Jones also owns the most easterly lot in this block, which may be described as the northwest corner of Linden Drive and South Santa Monica Boulevard. These two corner lots are separated by two lots owned by third parties and occupied by business buildings.

We shall refer to the lot leased to Delta as lot 1 and the Linden corner as lot 2. Lot 2 is leased to West Coast Auto Park. There is no present driveway through any of the frontage of the four lots except a driveway into lot 2. There are approximately 60 feet between the rear of the four lots comprising the previously described block and the south curb of North Santa Monica Boulevard. All of this area belongs to the Pacific Electric Railway. Jones leases a 40 foot portion of the railway property contiguous to the rear of the four lots in this particular block. This 40 foot strip connects lots 1 and 2 and also provides access through lot 2 to the area leased by Delta. Driveway access to Delta's lot is limited to an entrance on the other side of a restaurant through lot 2 (West Coast Auto Park) approximately 350 feet from Delta's office building on lot 1. The existing driveway also serves as an entrance to the West Coast parking lot. The use of the West Coast Driveway by customers of Delta and West Coast results in a certain amount of traffic congestion which causes inconvenience to the 40 per cent of Delta's customers who arrive by automobile and use that driveway.

****320** Appellants are unhappy with this arrangement and seek by this action to obtain a driveway directly from lot 1 to South Santa Monica Boulevard. A map depicting the block and properties in question is shown (Exhibit A) as a visual aid to the written description.



ADMINISTRATIVE ACTION

[1] Delta contemplated opening a new driveway access only 100 feet from its small office building on lot 1. Delta applied to the Director of Public Works (Director) of the City. The Director tentatively determined upon approval of Delta's driveway request and referred the ****321** matter to the Beverly Hills City Council (Council). Notwithstanding the Director's indication for approval, the Council decided that the application should be rejected. The Director took no further action. This action was treated by Delta as a refusal by the Director to grant the driveway permit. "Any conduct on the part of an officer or tribunal under a duty to perform signifying unequivocal intention not to do so amounts to a refusal.' (55 C.J.S. Mandamus s 33, page 66.)' (Palmer v. Fox, 118 Cal.App.2d 453, 456, 258 P.2d 30, 32.) Delta thereafter filed directly with the Council an application for a driveway permit. This for all practical purposes constituted an appeal from the Director's denial ***785** of the permit. The Council referred the matter to the City Traffic Commission. The Traffic Commission recommended approval with certain restrictions. Thereafter the Council denied the driveway access on the grounds that 'the granting of the permit would create a serious traffic hazard to the detriment of the public safety and the general welfare,' thus affirming the Director's rejection.

SUPERIOR COURT ACTION

After the Council's action, Delta and Jones filed a petition for writ of mandamus to compel the City, its Council and the Director of Public Works to grant them a driveway through the frontage of their lot to South Santa Monica Boulevard. The petition alleged that both Delta and Jones are beneficially interested in the petition; that lack of a driveway is highly prejudicial to Delta's business; that all administrative remedies have been exhausted; that the Director of Public Works and the Council have violated their statutory duties; that petitioners have a right to access to the highway on which their property abuts; that they have no adequate remedy at law, and that therefore a writ should issue to the City to grant the driveway access. A demurrer to the petition by the City was overruled. The City answered the complaint generally and alleged affirmatively that administrative mandamus was not the proper remedy and that the writ would compel a hazardous and illegal act. The Superior Court denied the writ, concluding that the Council proceeded within its jurisdiction and gave a fair and lawful hearing; that the Council's decision is supported by the evidence, and that the Council did not

abuse its discretion nor act unreasonably or capriciously in denying the driveway access.

ISSUES

[2] As to the quasi-legislative acts of administrative agencies, judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary, capricious or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give notices required by law. (Pitts v. Perluss (1962) 58 Cal.2d 824, 27 Cal.Rptr. 19, 377 P.2d 83.) The issues in this case are set forth in these questions:

1. Does the City have the authority to deny a driveway access?

2. Was the procedure followed by the Council and Director of Public Works a denial of due process of law?

3. Was the denial of a driveway access an abuse of discretion?

4. Was the denial of a driveway access arbitrary or capricious?

*786 AUTHORITY TO DENY DRIVEWAY

Appellants and respondents argue extensively whether driveway access is a property right which must be compensated for if taken, or if the City may deny it without compensation pursuant to its police power. This issue is important to appellants, for they argue that the City has taken their property without compensation; that since 'money damage would be inadequate or no remedy,' they are thereby deprived of their remedy at law, and therefore the only alternative remedy for them is a writ of mandate to compel the City to grant them a driveway access.

[3] Section 1086 of the Code of Civil Procedure provides: 'The writ must be issued **322 in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' But appellants' mere statement that 'money damage would be inadequate or no remedy' does not, without more, entitle them to a writ of mandate. Even if denial of a driveway access were found to be a compensable taking, appellants have not adequately shown that they do not have a plain, speedy and adequate remedy available to them. Appellants must seek other grounds to support their petition for writ.

[4] **[5]** **[6]** Therefore, we find it necessary only to determine that the City does have the authority to deny a driveway access in the circumstances here. The general rule is that an abutting owner or occupant is not entitled to access to his land at every point between it and the highway but only to reasonable and convenient access to his property and the improvements on it. (39 Am.Jur.2d 553, Highways, Streets, and Bridges, section 178; Genazzi v. County of Marin (1928) 88 Cal.App. 545, 547, 263 P. 825; People ex rel. Department of Public Works v. Murray (1959) 172 Cal.App.2d 219, 225, 342 P.2d 485.) Even appellants' attorney at trial stated 'that Beverly Hills is a bottleneck of traffic.' Considering the location and traffic conditions, appellants now have reasonable and convenient access to their property.

PERMIT PROCEDURE UNDER MUNICIPAL CODE

Beverly Hills Municipal Code section 7—3.05, pertaining to permits for driveway access, provides in pertinent part: 'The Director of Public Works shall have the authority to grant or refuse such permits as in his judgment the public interest or convenience may require. When the decision of the Director of Public Works is adverse, the applicant may appeal to the Council.'

[7] Appellants contend they were denied due process by the Director of Public Works, because the Director did not exercise the authority invested in him but rather relied on the Council to do it for him. We see no merit to this contention under the facts heretofore recited. As we have *787 mentioned previously, the appellants' request for a driveway permit filed with the Director and rejected by the Council was treated by appellants as an adverse ruling by the Director. If the appellants, at the time of the first action on their application, were of the opinion which they now assert, that the Director did not exercise the authority vested in him, a writ to force the Director to perform his statutory duty was available to them. (Hollman v. Warren (1948) 32 Cal.2d 351, 355, 196 P.2d 562.)

ABUSE OF DISCRETION

[8] **[9]** **[10]** In determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the administrative board. (Pitts v. Perluss (1962) 58 Cal.2d 824, 27 Cal.Rptr. 19, 377 P.2d 83.) If reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld. (Manjares v. Newton (1966) 64 Cal.2d 365, 49 Cal.Rptr. 805, 411 P.2d 901.) Where the challenge rests on claimed insufficiency of the evidence, the court's power of review is conditioned on determining that the

findings are not supported by substantial evidence in the light of the whole record before the board. Upon such review, the court does not have the right to judge the intrinsic value of the evidence or to weigh it. (Siller v. Board of Supervisors (1962) 58 Cal.2d 479, 25 Cal.Rptr. 73, 375 P.2d 41.)

[11] Appellants contend there is no evidence in the record to support the City's decision. We find that there is substantial evidence in the record to support the City's decision. The transcript of the informal hearing before the Council reveals that the councilmen were familiar with the land area, the existing traffic problems and the particular intersections involved in this action.

Siller v. Board of Supervisors, supra, was a zoning variance case with circumstances ****323** similar to this case. There the court said: '* * * (T)he planning commission members either viewed the site or were personally familiar therewith and by their own knowledge were aware of the physical condition of the site and of the neighborhood characteristics. Such view and knowledge constitute independent evidence which must be deemed by the reviewing court to have been considered by the commission members in reaching their decision.' In Flagstad v. City of San Mateo (1957) 156 Cal.App.2d 138, 318 P.2d 825, the court found that a planning commission's decision on a zoning variance could rest on evidence gathered by the commissioners' personal observation 'such as * * * the fact that traffic at the intersection is heavy.'

Appellants' reliance on Broadway, Laguna, Vallejo Assn. v. Board of Permit Appeals (1967) 66 Cal.2d 767, 59 Cal.Rptr. 146, 427 P.2d 810 ***788** is misplaced. That case did not change Siller. It merely said that the rule of Siller does not apply to agencies which must expressly state their findings and must set forth the relevant supportive facts. Siller still applies in this case.

In addition to the councilmen's personal knowledge of the intersection and its traffic problems, as demonstrated by the record, the councilmen had before them appellants' application, exhibits and their own testimony as to the amount of use the proposed driveway would receive. Together these provide substantial evidence to support a finding that the granting of the permit would create a serious traffic hazard to the detriment of the public safety and the general welfare.

ARBITRARY AND CAPRICIOUS

Appellants contend that the City has a uniform policy of granting every lot in the city a driveway through its frontage to the abutting highway and that a denial of a driveway to Delta would be arbitrary and capricious.

There is no evidence in the record to support appellants' assertions about City policy other than their own attorney's statements to that effect. Appellants suggest that if we take judicial notice, it will be apparent at once that in Beverly Hills improved lots have driveway access through the public highway or public alley on which they front. Respondents suggest that one need only drive down any street in Beverly Hills to notice that most lots do not have front driveways. Judicial notice one way or the other concerning the number of driveways in Beverly Hills will not establish whether the City now has a uniform policy concerning driveway permits. The appellants presently have egress and ingress to lot 1 via lot 2. We can find no basis for holding that the City has been arbitrary, capricious or discriminatory in denying this particular driveway. [1]

The judgment is affirmed.

STEPHENS, Acting P.J., and REPPY, J., concur.

All Citations

1 Cal.App.3d 781, 82 Cal.Rptr. 318

Footnotes

* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

1 The denial of a driveway permit does not affect any other remedy available to the appellants, whether by inverse condemnation or some other remedy.

End of Document

Exhibit N

6 Cal. Real Est. § 15:69 (4th ed.)

Miller and Starr California Real Estate 4th December 2019 Update
By Members of the Firm of Miller Starr Regalia

Chapter 15. Easements
Rewritten and updated by Kenneth R. Styles

E. Rights and Duties of the Parties

§ 15:69. Private easement in a public street (abutter's rights)

Correlation Table

Nonabutting owner has no special rights in public street. An owner of property that does not abut on a public street or road has the same right of use as any member of the public in general, but he or she has no other rights in the public street. [1]

An abutting owner has special rights in public streets. An owner of property that abuts a public street has two kinds of rights in the public thoroughfare. The owner has the same rights as the public in general for unobstructed passage over the public street and also has certain private rights as an owner of abutting property, including a right-of-way easement for access to the general system of public streets. [2] The general rule is that an abutting owner or occupant is not entitled access to his or her land at every point between it and the highway but only to reasonable and convenient access to the property and the improvements on it. [3] He or she is only entitled to one such access. [4]

The two rights are distinct, and the abutting property owner's private easement in the public street remains after the street is vacated or abandoned. [5]

The owner is only entitled to cross the property boundary. The easement of an owner of property abutting a public street includes only the right to use the street and to cross the boundary between the street and the adjacent private property; it does not include any right to use the abutting land itself. [6]

Case Example:

A lender foreclosed a deed of trust encumbering a homesite lot, together with a second strip of land that abutted on the public street and provided access to the first lot. The title insurer had insured the lender's "ordinary rights of abutting owners." Earlier litigation determined that the lender's easement rights across the second strip of land violated recorded restrictions, and the lender brought an action against the title insurer for damages. The court held that "ordinary rights of abutting owners" do not include the right to use the second strip of land as an easement for access but only the right to use the public street and to cross the common boundary line, and this right was not affected by the prior judgment. [7]

Abutter's rights include view and light. A property owner's abutter's rights include the rights of view, access, light, and air in and from the public street. [8] A right to a view is the right to maintain a view that can be seen by travelers on the highway. [9]

The owner can recover damages if abutter's rights are impaired. Any substantial deprivation of abutters rights entitles the owner to damages. [10]

Footnotes

1 See § 15:80 (abandonment of public easements).

2 Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 663, 39 Cal. Rptr. 903, 394 P.2d 719 (1964); People v. Ricciardi, 23 Cal. 2d 390, 397, 144 P.2d 799 (1943); Rose v. State, 19 Cal. 2d 713, 727, 123 P.2d 505 (1942); McCandless v. City of Los Angeles, 214 Cal. 67, 71, 4 P.2d 139 (1931); Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 33, 280 P. 109 (1929); Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 122, 92 P. 70 (1907); Eachus v. Los Angeles Consolidated Elec. Ry. Co., 103 Cal. 614, 617, 37 P. 750 (1894); Schaufele v. Doyle, 86 Cal. 107, 109, 24 P. 834 (1890); Stevenson v. City of Downey, 205 Cal. App. 2d 585, 590, 23 Cal. Rptr. 127 (2d Dist. 1962); McKinney v. Ruderman, 203 Cal. App. 2d 109, 119, 21 Cal. Rptr. 263 (4th Dist. 1962); Strehlow v. Mothorn, 100 Cal. App. 692, 698, 280 P. 1021 (1st Dist. 1929).
See Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R.2d 461.

3 Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills, 1 Cal. App. 3d 781, 786, 82 Cal. Rptr. 318 (2d Dist. 1969) (access easement denied); People By and Through Department of Public Works v. Murray, 172 Cal. App. 2d 219, 225, 342 P.2d 485 (1st Dist. 1959); Genazzi v. Marin County, 88 Cal. App. 545, 547, 263 P. 825 (1st Dist. 1928).

4 Highland Development Co. v. City of Los Angeles, 170 Cal. App. 3d 169, 185, 215 Cal. Rptr. 881 (2d Dist. 1985) (disapproved of by, Morehart v. County of Santa Barbara, 7 Cal. 4th 725, 29 Cal. Rptr. 2d 804, 872 P.2d 143 (1994)).

5 See § 15:80 (abandonment of public easements).

6 Lincoln Sav. & Loan Assn. v. Title Ins. & Trust Co., 46 Cal. App. 3d 493, 497, 120 Cal. Rptr. 219 (2d Dist. 1975) (citing text).

7 Lincoln Sav. & Loan Assn. v. Title Ins. & Trust Co., 46 Cal. App. 3d 493, 497, 120 Cal. Rptr. 219 (2d Dist. 1975) (citing text).
See § 7:47 (property insured), § 7:120 (description of the insured property; endorsements), § 7:121 (access rights; endorsements), § 7:122 (loss of freeway access by conveyance or condemnation; endorsements).

8 Williams v. Los Angeles Ry. Co., 150 Cal. 592, 89 P. 330 (1907); People ex rel. Dept. of Transportation v. Wilson, 25 Cal. App. 4th 977, 31 Cal. Rptr. 2d 52 (4th Dist. 1994).

9 People ex rel. Dept. of Transportation v. Wilson, 25 Cal. App. 4th 977, 31 Cal. Rptr. 2d 52 (4th Dist. 1994); People ex rel. Department of Public Works v. Lipari, 213 Cal. App. 2d 485, 28 Cal. Rptr. 808 (4th Dist. 1963).

10 See § 23:10 (inverse condemnation; interference with access rights).

End of Document

Exhibit O

KeyCite Red Flag - Severe Negative Treatment
Disapproved of by Morehart v. County of Santa Barbara, Cal., May 12, 1994

170 Cal.App.3d 169
Court of Appeal, Second District, Division 1, California.

HIGHLAND DEVELOPMENT COMPANY,
Plaintiff, Cross-Defendant and Appellant,
v.
CITY OF LOS ANGELES et al.,
Defendants and Respondents;
Whitley Heights Civic Association
et al., Interveners and Respondents.

B006679.
|
July 17, 1985.
|
Review Denied Oct. 3, 1985.

Synopsis

Developer brought action against city and certain of its officers and departments seeking, inter alia, a writ of mandate requiring city to set aside its revocation of developer's driveway permit. The Superior Court, Los Angeles County, Bruce R. Geernaert, J., denied developer's petition for writ of mandate and developer's application for a preliminary injunction and granted request of intervenor for a preliminary injunction barring developer from utilizing its driveway and requiring developer to block it from vehicular traverse, and developer appealed. The Court of Appeal, Lucas, J., held that: (1) city council lacked jurisdiction to overrule decision of board of public works to grant driveway permit to developer, and (2) developer possessed a vested right to its driveway permit by virtue of having taken substantial construction expenditures in reliance thereon; thus, revocation of permit would be permissible only if developer's driveway constituted a menace to the public safety.

Order denying developer preliminary injunction affirmed; order granting intervenors preliminary injunction reversed and judgment denying petition for writ of mandate reversed and remanded with directions.

West Headnotes (12)

[1] Appeal and Error
Injunction

Orders respectively granting and denying applications for preliminary injunction were appealable. West's Ann.Cal.C.C.P. § 904.1(f).

[2] Appeal and Error
Rulings relating to injunctions

Order allowing intervention could be reviewed in connection with appealable order granting intervenor an injunction, given that the former order intimately affected the issuance of the latter. West's Ann.Cal.C.C.P. § 906.

2 Cases that cite this headnote

[3] Appeal and Error
Determination of part of controversy

Trial court's separate consideration of the full merits of cause of action for writ of mandate, and court's expression of determination to treat that claim independently of other causes of action remaining to be tried indicated at least a de facto severance and therefore judgment denying writ of mandate was appealable.

11 Cases that cite this headnote

[4] Action
Nature and Grounds of Action in General

Petition for writ of mandate may properly be joined with causes of action for declaratory and injunctive relief. West's Ann.Cal.C.C.P. § 427.10(a).

2 Cases that cite this headnote

[5] Appeal and Error
Determination of part of controversy

Separate appealable judgments may be rendered on counts that present separate claims for relief where trial court has severed such causes of action from those remaining to be tried.

8 Cases that cite this headnote

[6] Common Interest Communities

Parties

Parties

Persons Entitled to Intervene

Association of homeowners who resided in a historic district directly abutting upon developer's project, which was petitioning party before city council and instituted and led administrative challenge to developer's permit, was properly permitted to intervene in developer's action against city seeking to require city to set aside revocation of its driveway permit for reasons that the contiguous neighborhood relationship of association's members and developer's property brought the association directly within ambit of statutory provisions for permissive intervention and that the association was entitled to be named as a real party in interest in developer's petition for writ of mandate and in fact occupied status of an "indispensable party" to the mandate proceeding; furthermore, trial court did not abuse its discretion in allowing association's president to intervene where he alleged that he resided within the historic district and had personally appeared in administrative proceedings in opposition to developer's permit. West's Ann.Cal.C.C.P. §§ 387(a), 389.

2 Cases that cite this headnote

[7] **Municipal Corporations**

Permits

City council lacked jurisdiction to overrule decision of board of public works to grant driveway permit to developer and therefore city acted unlawfully in revoking developer's permit.

1 Cases that cite this headnote

[8] **Municipal Corporations**

Access to and use of roadway

A property owner's rights include entitlement to no more or no less than reasonable and convenient access between the property and a street.

[9] **Municipal Corporations**

Permits

Doctrine of vested rights provides that where a permittee in good faith has undertaken substantial construction and incurred substantial liabilities in reliance upon a permit, its right to the permit and to use authorized thereby become immunized from impairment or revocation by subsequent governmental regulations; however, foregoing rule is subject to the qualification that such a vested right, while immune from divestment through ordinary police power regulations, may be impaired or revoked if the use authorized or conducted thereunder constitutes a menace to the public health and safety or a public nuisance.

2 Cases that cite this headnote

[10] **Municipal Corporations**

Permits

Only construction and expenditures undertaken in reliance upon driveway permit were worthy of consideration in assessing whether a vested right of driveway permit had arisen by virtue of developer having undertaken construction expenditures in reliance thereon; thus, trial court correctly rejected developer's arguments about approvals and expenditures made before the issuance of driveway permit.

1 Cases that cite this headnote

[11] **Municipal Corporations**

Permits

Developer's expenditure of $1,000 in constructing driveway approach, even if small in absolute terms, could constitute substantial reliance in driveway permit sufficient to create a vested right in the driveway permit.

[12] **Municipal Corporations**

Permits

Developer possessed a vested right to its driveway permit by virtue of having taken substantial construction expenditures in reliance thereon; thus, revocation of permit would be permissible only if developer's driveway constituted a menace to the public safety.

Attorneys and Law Firms

****882** ***173** Glickman & Glickman and David R. Glickman, Beverly Hills, for plaintiff, cross-defendant and appellant.

Gary R. Netzer, City Atty., Thomas C. Bonaventura, Sr. Asst. City Atty., John F. Haggerty, Asst. City Atty., for defendants and respondents.

Wyman, Bautzer, Rothman, Kuchel & Silbert and Karen S. Newman, Los Angeles, for interveners and respondents.

Opinion

LUCAS, Associate Justice.

Highland Development Company (Highland) appeals from three orders partially determining cross-actions concerning its right to a permit for construction and use of a driveway providing access to an apartment project Highland is constructing in the Hollywood Hills. By these orders, the superior court (1) denied Highland's petition for writ of mandate to compel the City of Los Angeles (City) to reinstate the permit, which had been granted by the City's board of public works but was later revoked ****883** by the city council; (2) denied Highland's application for a preliminary injunction against the City's interfering with Highland's right of ingress via the driveway constructed pursuant to the permit; and (3) granted the request of intervener Whitley Heights Civic Association (WHCA) for a preliminary injunction barring Highland from utilizing the driveway and requiring Highland to block it from vehicular traverse. We have determined that the City acted unlawfully in revoking Highland's permit, because the city council lacked jurisdiction to overrule the board of public works' permit decision. Accordingly, we reverse the trial court's grant of injunctive relief against Highland and direct the issuance of a writ of mandate requiring the City to set aside its revocation of the driveway permit. In light of this disposition, ***174** Highland's request for a preliminary injunction against City interference with its access rights becomes moot.

FACTS

Highland, a partnership consisting of a trust and two individuals, is in the process of constructing an 81-unit, multi-story apartment building in the Hollywood Hills, [1] adjacent to Whitley Heights, a single-family residential neighborhood which has been designated an historic district by the U.S. Department of the Interior. Highland's project is bounded on the west by Highland Avenue and on the east by Las Palmas Avenue. Highland Avenue is a busy north-south thoroughfare, while Las Palmas is a narrower, two-lane street unabutted by sidewalks. Before commencing its apartment project, Highland originally had intended to construct a condominium project on the site; it abandoned that goal following a determination by the city planning department's advisory agency that Highland could not install a vehicular entrance to its project on the Las Palmas side. Highland's present project is funded in part by low- and middle-income housing bonds issued by the City.

In May of 1983 the City's department of engineering issued Highland a permit authorizing it to construct a driveway from Las Palmas Avenue providing access to and from the building's subterranean garage. A similar driveway also was authorized for the Highland Avenue side. The day after the Las Palmas permit was issued, the City's board of public works (Board) directed the city engineer to hold that permit in abeyance due to problems of congestion on Las Palmas. Thereafter the Board, to which the City's Municipal Code entrusts the function of issuing permits for construction of driveways over City streets (L.A.Mun.Code, § 62.105), held a public hearing to consider the advisability of the permit.

At the hearing, representatives of various City departments presented contrasting views on this subject: the department of transportation favored Las Palmas access but the police department opposed it. In addition, numerous spokesmen for elected officials and civic groups, including WHCA, testified in opposition to the permit. On July 1, 1983, the Board by a 3–2 vote adopted a compromise resolution instructing the city engineer to re-issue Highland a driveway permit for Las Palmas access, limited however to entering traffic only. This permit was formally issued on July 26, 1983. Immediately thereafter Highland poured and completed the concrete driveway, at a cost later estimated by a City inspector at $1,000.

***175** On July 8, 1983 WHCA, by letter from its attorneys, filed an "appeal" of the Board's decision with the city council. The matter first was considered by the council's public works

committee, on August 15. At the outset of the hearing the city engineer's office informed the committee that the driveway had already been installed, and a representative of the city attorney's office advised the council members that in his opinion the council lacked jurisdiction to ****884** revoke a driveway permit issued by the city engineer. The committee chair responded that even if this were so the committee intended to listen to presentations by the numerous citizens who had appeared at the hearing. After extensive testimony pro and con, the committee chair (Councilwoman Picus) commended WHCA's representatives and stated that she "refuse[d] to accept" the city attorney's advice that the council lacked jurisdiction, "because I will not sit here as a member of the governing body of the City of Los Angeles and allow what is an absolutely unreasonable decision to be made because I'm told that I haven't any power to do anything about it." The committee then adopted a report recommending to the council that Highland's permit be "rescinded and revoked" on the ground that the driveway location was unsafe, in that it posed danger to traffic and threatened to hamper access of City emergency vehicles to the site.

The city council considered this recommendation at a hearing held on August 30, 1983. During this hearing, two members of the city attorney's office again advised the council that in their opinion the council lacked jurisdiction to revoke the permit. Each stated, however, that in his view the issue was "arguable in a court of law." In response, various council members expressed differing legal-political views of the propriety of treading into this area in light of the legal advice given. Councilwoman Picus reiterated her previous "unwilling[ness] to accept the fact that as the governing body of the City" the council could not rectify what she perceived as a dangerous decision. In this resolve she was joined by Councilwoman Stevenson, the representative of the locale in which Highland's project and Whitley Heights are situated; she stated that "it is our duty to not sacrifice logic and understanding by holding onto some technical and literal interpretation of a Code when that is in conflict with the safety and the well-being of the citizens of our City...." On the other side of the issue, Councilman Snyder vigorously expressed his conviction that Highland possessed a vested right in its permit and his concern that the council could subject the City to potential liability by taking an action that would be not only illegal but also, in his opinion, unsafe, given the possibility of accidents arising from uncontrolled left turns by autos forced to enter the garage from the southbound lanes of Highland Avenue. Councilman Yaroslavsky forthrightly explained that he intended to vote in accordance with the district member's (Stevenson's) ***176** opposition to the permit, notwithstanding that council action thus taken might be illegal. He viewed such a vote as "a symbolic gesture hoping, wishing that the permit will be revoked even though we don't [have] the authority to do that and perhaps it's a signal to the Board of Public Works to do something along these lines if they cho[o]se to do so...."[2] The council then voted, 8–4, to adopt the report of the public works committee, rescinding and revoking the permit.

The following day a report of the council's action was transmitted to the Board, with the request that it "reconside[r] its position" concerning the permit, "consistent with the Public Works Committee report...." Upon receipt of this communication, ****885** the Board met and its chair opined that in light of the council's action the Board had three options: "(A) To move for reconsideration of [its] prior action; (B) [t]o instruct the City Engineer to comply with the Council instructions; and (C) [t]o request advice from the City Attorney regarding the legality of the Council action." After discussion of these options, the Board by a 4–1 vote decided "that the said [Council] communication be referred to the City Engineer for compliance pursuant to the order of the City Council." The city engineer thereupon notified Highland of the council's revocation of its driveway permit, and instructed Highland to restore the driveway approach, street, curb and gutter to their former condition within 21 days, absent which action the City would initiate legal proceedings to compel removal of the driveway.

In response to this notice Highland instituted the present action, against the City and certain of its officers and departments. Highland sought declaratory relief concerning the parties' rights in re the driveway permit; a writ of mandate requiring the City to set aside its revocation of the permit; and injunctive relief against the City's revoking the permit, interfering with Highland's right of ingress over the driveway, interfering with completion ***177** of the apartment project, or "unreasonably withholding consent and approval of plaintiff's construction project to its eventual completion." Highland predicated its action on contentions that the City lacked authority to revoke the permit because Highland had achieved a vested right thereto and that in any event the city council had not been legally empowered to rescind or revoke the Board's grant of the permit.

Over Highland's objection, WHCA and its president, Brian Moore, were allowed to intervene in the case. They filed a complaint in intervention against Highland, alleging that its construction, maintenance and use of the driveway

constituted an unfair business practice (Bus. & Prof.Code, §§ 17200 et seq.) and involved unlawful expenditures of public funds (Code Civ.Proc., § 526a). WHCA and Moore prayed for declaratory and injunctive relief enjoining Highland from maintaining the driveway and requiring that it be dismantled. WHCA also disputed Highland's claim of a vested right to its driveway construction on grounds the driveway had been unlawful *ab initio*.

On December 12, 1983, the superior court heard and determined Highland's petition for writ of mandate and application for a preliminary injunction against the City, together with WHCA's like application for relief against Highland. On the question of vested rights, the parties presented conflicting evidence concerning the nature and extent of Highland's construction activities before and after issuance of its permit in July; the court then ruled that the extent of expenditures and construction activity undertaken in reliance upon the driveway permit was insufficient to establish a vested right. The court further rejected Highland's contention as to the absence of city council authority to revoke the permit, stating that "the City Council is the ultimate authority of the City [and] [i]f the administrative agency of the City had the authority, certainly the City Council has the authority." Holding finally that the City had not abused its discretion in revoking Highland's permit, the court entered judgment denying the petition for writ of mandate, and made a separate order simultaneously denying Highland's application for preliminary injunction and granting WHCA an injunction requiring that, pending trial of the action, Highland refrain from utilizing or allowing use of the Las Palmas driveway and take affirmative action to block it by installation of a locked chain. Highland then filed this appeal.

DISCUSSION

Although Highland has adduced a host of factual and legal contentions in ostensible support of its claimed right to restoration of its driveway permit ***178** and the access authorized thereby, we need treat only a few. After initially addressing jurisdictional questions concerning the amenability of ****886** this appeal, we hold that, contrary to Highland's assertions, WHCA and its president properly were allowed to intervene in the action. We further find correct Highland's contention, foreshadowed by the city attorney's advice to the city council below, that the council lacked authority to revoke the driveway permit, because the City's municipal code empowers only the Board, not the council, to determine whether permits of the variety here involved shall issue. Finally, while we reject Highland's generalized claim that it possesses an inherent right to access to its property through the driveway in question, we also disapprove the premises of the trial court's determination—and the City's and WHCA's arguments—that Highland could not have achieved a constitutional vested right to the driveway permit, thus framing guidance on that question should the Board contemplate further reconsideration of the permit.

1. *Jurisdiction Over the Appeal.*

Preliminarily, we address certain questions concerning the jurisdictional amenability of Highland's appeal which have arisen from WHCA's contentions and our review of the record.

[1] **[2]** The trial court's orders respectively granting and denying WHCA's and Highland's applications for preliminary injunction are clearly appealable. (Code Civ.Proc., § 904.1, subd. (f).) WHCA's contention that the propriety of the order granting it intervention may not be reviewed in advance of final judgment is consequently unsound: although an order allowing intervention is an intermediate disposition which is not independently appealable, in this case it may be reviewed in connection with the appealable order granting WHCA an injunction, given that the former order intimately affected the issuance of the latter. (Code Civ.Proc., § 906; *Taylor v. Western States L. & M. Co.* (1944) 63 Cal.App.2d 401, 403, 147 P.2d 36.)

[3] A more serious question of appellate jurisdiction is presented by the trial court's separate judgment denying Highland's petition for writ of mandate. The court entered this judgment as "a separate and final judgment regarding the Petition for Writ of Mandate, included as part of plaintiffs' [*sic*] Complaint filed in this action"; it did so on the expressed premise that "[t]hese really are separate types of causes of action and probably should not have been incorporated within the same action." Since a final judgment fully determining Highland's causes of action for declaratory and injunctive relief has not yet been rendered—indeed, those matters have not yet been tried—the separate judgment on the mandate cause of action at first blush ***179** appears premature and not subject to review, by virtue of the one final judgment rule. (See generally 6 Witkin, Cal. Procedure (2d ed. 1971), Appeal, § 47, pp. 4060–4062.)

[4] **[5]** The trial court's belief that a petition for writ of mandate may not properly be joined with causes of action

for declaratory and injunctive relief was technically incorrect (Code Civ.Proc., § 427.10, subd. (a); see, e.g., *State of California v. Superior Court* (1974) 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281), and did not furnish a sufficient basis for interlocutory rendition of a separate judgment on the former claim for relief. However, in recent years "the number of existing exceptions" to the one final judgment rule has been augmented so that "separate appealable judgments may be rendered on counts that present separate claims for relief," where the trial court has severed such causes of action from those remaining to be tried. (*Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 418, 123 Cal.Rptr. 669.) In the present case, the trial court's separate consideration of the full merits of the cause of action for writ of mandate, and the court's expression of determination to treat that claim independently of the other causes of action remaining to be tried, together indicate at least a de facto severance, much as was perceived in the *Schonfeld* case. (See *id.*, at p. 416, fn. 14, 123 Cal.Rptr. 669.) Accordingly, the judgment ****887** denying a writ of mandate is appealable. (*Id.*, at p. 419, 123 Cal.Rptr. 669.)

2. *Propriety of Intervention.*

[6] Highland mounts an initial, procedural challenge to the trial court's grant of injunctive relief in favor of WHCA and its president, Moore, alleging that those parties should not have been granted leave to intervene in Highland's suit against the City. Highland contends that interveners' interest in the subject matter of the litigation was too remote to give them standing to intervene, and that allowing their intervention has improperly wrested control of the lawsuit from Highland, the original plaintiff. We disagree.

With respect to WHCA, we perceive two independently sufficient bases on which the grant of leave to intervene was entirely proper. First, the facts of record demonstrate that WHCA is an association of homeowners who reside in an historic district directly abutting upon Highland's project and who share continuous usage of north Las Palmas Avenue. The contiguous neighborhood relationship of WHCA's members and Highland's property, which is subject to a land use permit to which they object, brings WHCA directly within the ambit of Code of Civil Procedure section 387, subdivision (a)'s provisions for permissive intervention. (*Weiner v. City of Los Angeles* (1968) 68 Cal.2d 697, 706, 68 Cal.Rptr. 733, 441 P.2d 293.)

***180** Second, WHCA was the petitioning party before the city council who instituted and led the administrative challenge to Highland's permit which this litigation contests. As such, WHCA was entitled to be named as a real party in interest in Highland's petition for writ of mandate, and in fact occupied the status of an "indispensable party" to the mandate proceeding under Code of Civil Procedure section 389. (*Ursino v. Superior Court* (1974) 39 Cal.App.3d 611, 616–617, 114 Cal.Rptr. 404; see also *Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 501–502, 157 Cal.Rptr. 190.) WHCA qualified as such a party under section 389, subdivision (a)'s provision for compulsory joinder of a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest...." (*Ursino v. Superior Court, supra,* 39 Cal.App.3d at pp. 616–617, 114 Cal.Rptr. 404.) It would be strange indeed if a party that section 389 thus *requires* be joined in a lawsuit were to lack standing to intervene therein. And in fact quite the opposite is true: subdivision (b) of section 387 makes a grant of intervention to a party described in the quoted portion of section 389 mandatory, upon timely application (unless the party's interest is already adequately represented). Accordingly, far from being improper, WHCA's intervention was legally compelled.

The entitlement of WHCA's president Moore to intervene below is not as distinctly clear. Moore sought to prosecute one cause of action of the complaint in intervention solely, as a taxpayer complaining of a waste of City funds under Code of Civil Procedure section 526a.[3] This qualification for Moore's independent cause of action did not by itself entitle him to assert that claim by intervening in Highland's action. However, Moore also alleged in his complaint that he resided within Whitley Heights, had personally appeared before the Board and the city council in opposition to Highland's permit, and was bringing the complaint in intervention under authorization of WHCA. These facts—particularly the former two—sufficed to bring Moore within the ambit of the trial court's discretion (see *People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 660, 195 Cal.Rptr. 186) to allow him intervention.

3. *Administrative Authority Over Driveway Permits.*

[7] As recited above, throughout the proceedings before the city council and its ****888** public works committee the city attorney's office advised the members of the council that they did not have legal authority to overrule the Board's grant

of a driveway permit to Highland. Apparently expecting a judicial ***181** challenge, the council nonetheless overrode this advice and proceeded to vote to revoke the permit. The trial court ultimately agreed with the position of the council majority that as "the ultimate authority of the City" the council was empowered to overturn the Board's grant of a permit to construct a driveway over city rights of way.

The City and WHCA have cited to us numerous provisions of both City and state law which they contend confirm the trial court's decision and validate the council's questioned exercise of jurisdiction. We find, however, that none of these provisions carries the import thus ascribed to it. Rather, careful scrutiny of the City's charter and ordinances reveals that authority to grant or deny a permit of the type involved in this case has been confided exclusively to the Board, and that no provision of law authorizes the council to act as an appellate body reviewing and overruling the Board's issuance of such a permit. Accordingly, we conclude—as did the City's lawyers in the first instance—that the council's decision revoking Highland's permit was made without jurisdiction, and it therefore must be set aside.

We consider first the City's charter, the organic law which establishes both the city council (L.A. City Charter, §§ 5, 20) and the Board (*id.*, § 230). Two provisions set forth the functions of each body in connection with the improvement of City streets. Section 37 of the charter grants the council "the power to provide for any or all of the following improvements, to-wit: The establishing ... of streets ...; the construction or reconstruction or improvement or reimprovement or repairing ... of streets ...; and the construction or reconstruction or repair in, under, over or through any street...." On the other hand, section 234 provides (in part) that "[t]he Board of Public Works shall have charge, superintendence and control, except as otherwise specifically provided in this charter ... [o]f the construction and maintenance of all streets and other places and property enumerated in Subdivision 1 of Section 233 of this charter [which include "avenues, alleys, lanes, boulevards, crossings, ... and ... rights-of-way and property belonging to the city"]; [and] [o]f all work and improvement in, on, over or under all such streets, places and property; ... provided, that nothing in this section shall be construed to abridge the power of the Council to order any work or improvements and to provide the manner of paying therefor, such work or improvement, however, to be done under the superintendence and control of the Board of Public Works."

We do not discern in these charter provisions a clear, preemptive restriction of the power to grant or issue permits for private construction of driveways across City rights of way to either body. On the one hand, it could be contended that under section 37 such construction constitutes "construction ***182** ... over ... [a] street," and thus is subject to the council's power to provide (or not to provide) therefor. On the other hand, the Board's plenary "charge, superintendence and control ... [o]f all work and improvement ... on [or] over ... all ... streets," under section 234, could be asserted to comprehend that permit function.[4] In short, as the parties acknowledged at oral argument, the charter is facially ambiguous and inconclusive concerning the respective powers of the city council and board of public works over permits such as that at issue here.

However, the council itself has clarified this ambiguity by more precise legislation. Los Angeles Municipal Code section 62.105, subdivision (a) places the function of granting permits for private driveway construction ****889** squarely with the Board. The ordinance provides:

> "No person shall lay, construct, reconstruct or repair in any street or in, over or through any property or right of way owned by or under the control of the City, any curb, sidewalk, gutter, *driveway,* approach, roadway surface, pavement, sanitary sewer, sewage works, storm drain, culvert, stairway, retaining wall or similar structure, building or improvement, or perform any grading or filling, or subject any sewer or storm drain to excessive live or dead loading without first obtaining written *permit therefor from the Board* and without first obtaining approval of plans and specifications and the lines and grades therefor from the City Engineer." (Italics added.)

Thus, the authority to grant and issue driveway permits is confided to the Board, with a correlative function of approving plans and specifications vested in the city engineer, an officer in the department of public works (L.A. City Charter, § 232).

Nowhere in section 62.105 or the Municipal Code at large is there any provision for appellate review of the Board's decisions concerning such permits by the city council. By contrast, where the council has deemed it expedient to allow such review of administrative decisions it has so provided unequivocally. For example, Municipal Code section 12.37, subdivision I specifies a procedure for appeal to the council from the city engineer's determinations concerning street improvements required to be made when certain structures

are erected. Under this state of the City's law, the council simply is not empowered to sit, as it did here, as an appellate administrative tribunal for purposes of reviewing and reversing the Board's decisions granting driveway permits. [5]

***183** The City's and WHCA's attempts to justify the council's ad hoc deviation from the legislative scheme it enacted are unconvincing. WHCA first cites *In re Montgomery* (1912) 163 Cal. 457, 125 P. 1070, for the proposition that a city charter may not limit a city in the exercise of its police power. *Montgomery,* however, explicitly distinguishes this general truism about restricting the scope of the police power from the equally established proposition that a charter (or other valid city law) *may* "lodg[e]" a particular municipal function in one department or agency, to the exclusion of others. (*Id.,* at pp. 459–460, 125 P. 1070.) Similarly, the leading case WHCA cites concerning unlawful delegation of legislative power—which is not here present [6]—itself proclaims that "[w]hen the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization." (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24, 132 Cal.Rptr. 668, 553 P.2d 1140.) And, contrary to WHCA's claim, this rule may operate to disqualify not only a subordinate agency but also a local legislative body from interference with functions elsewhere vested. (See, e.g., *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923–924, 120 Cal.Rptr. 707, 534 P.2d 403.)

WHCA and the City also point to provisions of the City's charter expounding the ****890** City's broad power over municipal health, safety, and welfare, and to section 35 of the charter, which states that "[e]xcept as otherwise in this charter specifically provided, the Council shall have full power to pass ordinances upon any subject of municipal control, or to carry into effect any of the powers of the city." However, this plenary power has already been exercised, in the case of driveway permits, by enactment of section 62.105. Having thereby entrusted the function of granting such permits to the Board, the city council is not free to deviate from this legislative scheme and purport to exercise "supreme authority" willy-nilly. To allow otherwise would make a travesty of the rule that governmental entities must abide by the law.

In short, while the Los Angeles City Charter does grant the council broad powers, including "[a]ll legislative power of the city" (L.A. City Charter, ***184** § 21), that power must be "exercised by ordinance" (*ibid.*) and in accordance with duly enacted procedural restraints. Assuming such constitutional restrictions as the vested rights doctrine did not require otherwise, the council in the exercise of its legislative power might have chosen to enact regulations, in response to a perceived traffic problem on Las Palmas Avenue, that would interdict construction or operation of a driveway such as Highland's. But here the council did not so act. Instead, it purported to sit as a quasi-adjudicative appellate body, reviewing a particular Board decision to grant and issue a driveway permit. With section 62.105 of the Municipal Code in force as presently written, the council was unauthorized to assume that function. [7]

Relying upon the previously quoted proviso of charter section 234 to the effect that nothing in that section's reservation of power to the Board "shall be construed to abridge the power of the Council to order any work or improvements and to provide the manner of paying therefor," the City suggests—with appropriate caution—that "[t]he [instant] revocation of [Highland's] driveway permit, and the restoration of the street, curb, and gutter, as a result thereof, as was [*sic*] required by the City Engineer ... would arguably be the exercise by the Council of the power to order a work or improvement of public property." We disagree. The council clearly undertook its revocation of Highland's permit as an exercise of the police power to withdraw a license, not a directive for public improvement of the subject driveway area. Moreover, the council ordered only the permit revocation, not the restoration of the street.

In a final, fall-back argument, the City argues that "even if jurisdiction was solely in the Board of Public Works the Board exercised that power on September 2, 1983, when it instructed the City Engineer to comply with the order of the Council." This assertion mischaracterizes the Board's ultimate action. It will be recalled that on September 2 the Board reconvened to consider Councilwoman Stevenson's transmittal of the council's determination and her request that the Board "reconsider" its grant of the permit ***185** in accordance therewith. At that point the chair of the Board suggested that it had three options: to reconsider the permit itself, to direct the city engineer to comply with the council's directive, or to solicit the city attorney's advice as to the council's jurisdiction over ****891** the matter. The Board chose the second option, and the notice of revocation of Highland's permit that the city

engineer thereafter issued directly implemented the council's unauthorized action, without any intervening independent redetermination by the Board. Thus, the exercise of city power of which Highland complains emanated directly from the council. Because the council was not authorized to revoke the permit, the revocation must be set aside, and the trial court should have granted Highland's petition for a writ of mandate so requiring. [8]

4. *Vested Rights.*

In addition to its claim that the council lacked jurisdiction to revoke the permit—which we have just sustained—Highland has contended throughout this litigation that it possesses a vested right to its permit by virtue of having undertaken substantial construction expenditures in reliance thereon. We address certain aspects of this vested rights question, in order to guide the parties and the trial court against the possibility that the Board might consider independent revocation of its permit decision, either in response to the city council's "message" in *its* decision of revocation or upon renewed petition by WHCA. As we will explain, the trial court's rejection of Highland's vested rights contention involved a mistaken application of the governing legal principles to the facts of this case. Moreover, WHCA's contention that Highland is foreclosed from vested rights because it did not show good faith reliance on a valid permit is infirm. Although the posture of this case does not require or allow our sustaining the vested rights claim on appeal as a matter of law, there appears substantial support for Highland's assertion that it possesses a vested right to its permit, which would preclude the Board from now revoking it.

[8] Initially, we observe that Highland cannot properly claim an inherent property right to access to Las Palmas Avenue. As explained in ***186** *Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills* (1969) 1 Cal.App.3d 781, 786, 82 Cal.Rptr. 318, a property owner's rights include entitlement to no more or less than reasonable and convenient access between the property and the highway. The City's allowance of an ingress-egress route between Highland's property and Highland Avenue satisfied that requirement. Indeed, Highland does not go so far as to complain about the Board's limitation of Las Palmas access to ingress only, which imposes a genuine restriction of access *to* that street.

[9] Insofar as this right of way for ingress allowed by the Board's driveway permit is concerned, Highland presents a more serious claim of entitlement based upon the doctrine of vested rights. That doctrine, legally grounded in the constitutional protection of property from deprivation without due process of law or just compensation, and functionally defined by elements akin to those of estoppel, provides that where a permittee in good faith has undertaken substantial construction and incurred substantial liabilities in reliance upon a permit, its right to the permit and to the use authorized thereby becomes immunized from impairment or revocation by subsequent governmental regulations. (E.g., ****892** *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791, 132 Cal.Rptr. 386, 553 P.2d 546; *Griffin v. County of Marin* (1958) 157 Cal.App.2d 507, 511–513, 321 P.2d 148.) This rule is subject, however, to the qualification that such a vested right, while immune from divestment through ordinary police power regulations, may be impaired or revoked if the use authorized or conducted thereunder constitutes a menace to the public health and safety or a public nuisance. (*Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 80, 101 Cal.Rptr. 768, 496 P.2d 840; *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158–159, 96 Cal.Rptr. 484.)

[10] In this case the attention of both the parties and the trial court was misdirected by Highland's insistent argument that several hundred thousand dollars of expenditures it had made to outfit the garage served by its driveway should be considered in the "reliance" scale when assessing the vested rights claim. Highland concurrently contended that a vested right to maintain the driveway derived from Highland's building permit, together with other antecedent decisions the City had made in approving the apartment project. Both contentions were erroneous: the permit about which Highland complains is the driveway permit; only that permit constituted definitive governmental approval for the driveway; and only construction and expenditures undertaken in reliance upon that permit were worthy of consideration in assessing whether a vested right had arisen. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at p. 793, 132 Cal.Rptr. 386, 553 P.2d 546; cf. ***187** *Spindler Realty Corp. v. Monning* (1966) 243 Cal.App.2d 255, 264–266, 53 Cal.Rptr. 7 (holder of grading permit and vested right thereto did not have a vested right to construct a building by virtue of the former permit and expenditures under it).)

[11] The trial court thus correctly rejected Highland's arguments about approvals and expenditures made before the July 26, 1983 issuance of the driveway permit. But the court then held that Highland's showing of expenditures and activities in reliance on *that* permit—certainly not the

$200,000 Highland claimed—was too insignificant to give rise to a vested right. Here we think the court erred. Highland's declarations[9] by its partner Barry Baron (an engineer formerly employed by the City's department of public works) stated that "the actual driveway approach"—i.e., the portion of the driveway traversing the public right of way, from the curb to the property line (L.A.Mun.Code, § 62.00), construction of which required the permit under Municipal Code section 62.105—had been inspected and poured in concrete after issuance of the driveway permit. This was confirmed by a declaration of a City inspector, who testified that he had approved the forms on July 27 and had inspected the finished concrete surface the following day. The inspector also testified that the cost of the driveway approach construction was approximately $1,000. While this was a small percentage of the expenditures Highland claimed should be attributed to the driveway for vested rights purposes, the extent of work thus done was extremely substantial in relation to the scope of construction contemplated and authorized by the permit in question. We have no hesitation in saying that such work and expenditures, even if small in absolute terms, could constitute substantial reliance sufficient to create a vested right in the driveway permit.[10]

**893 [12] WHCA presents two arguments in opposition to Highland's vested rights claim which are essentially legal and therefore deserve resolution now. Closely interrelated, the arguments are that Highland could not claim a *188 vested right because (1) its permit was void *ab initio* and (2) because any reliance it showed was not taken in good faith. Both contentions depend heavily on the premise that the permit the Board granted was not final because subject to reconsideration by the city council. In light of our holding above that the council lacked jurisdiction to revoke the permit, that premise is baseless. Similarly, WHCA's argument that Highland's spirited conduct of its construction activities after July 26 bespeaks a bad faith effort to present the City with a "fait accompli" (cf. *Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534, 548–549, 122 Cal.Rptr. 315) also is unpersuasive: having endured persistent and threatening administrative delays, Highland was entitled, once armed with a final permit, to proceed aggressively in reliance thereon.

Finally, the City argues that even if Highland had achieved a vested right in its permit, revocation of the permit was permissible under the exception to the vested rights doctrine, noted above, that applies in cases of land uses constituting a public nuisance or other menace to public health and safety. Because the instant permit revocation must be set aside for other, jurisdictional reasons, and because this question was not addressed below, we need not resolve it for the first time here. However, we do note that the "nuisance" exception to the vested rights doctrine must be carefully applied, lest it impermissibly swallow up the constitutional protections that doctrine provides.[11]

Here, the evidence before the Board and the city council concerning the possible hazards of Highland's driveway diverged; as noted earlier, although the public works committee reported that ingress from Las Palmas Avenue would pose a danger to traffic and was "unreasonable" in light of the availability of access from Highland Avenue, the department of transportation felt that to rely upon Highland Avenue alone would itself pose an intolerable traffic burden. Moreover, the Board, after hearing even more evidence on the question than did the council, narrowly approved the entrance driveway. Whether the Board now could find that Highland's driveway constitutes a menace to the public safety is a difficult question which we need not resolve. But it does appear from the record that only upon a considered and valid determination to this effect could Highland's permit now be restricted.

*189 5. *Entitlement to Relief.*

Our determination that the City's revocation of Highland's driveway permit was rendered in excess of jurisdiction requires that the order granting WHCA a preliminary injunction against operation of the driveway be reversed, and that the judgment denying Highland's petition for writ of mandate also be reversed, with directions to grant the writ. We stop short, however, of reversing the order denying Highland's application for preliminary injunction. Such alternative relief against the City's revocation is unnecessary in light of our decision concerning the petition for writ; moreover, insofar as it prayed for a preliminary injunction against the City's "interfering with completion of [Highland's] construction under plaintiff's lawfully secured permits and from unreasonably withholding consent and approval of plaintiff's construction project to its eventual **894 completion," Highland made no showing of threatened interference by the City, or of other entitlement to such relief.

DISPOSITION

The order denying plaintiff a preliminary injunction is affirmed. The order granting interveners a preliminary injunction is reversed. The judgment denying the petition for writ of mandate is reversed and the matter is remanded with directions to enter judgment granting a writ of mandate requiring the City to set aside its revocation of plaintiff's permit. Plaintiff shall recover its costs of appeal in equal shares from defendants and interveners.

SPENCER, P.J., and DALSIMER, J. *, concur.

All Citations

170 Cal.App.3d 169, 215 Cal.Rptr. 881

Footnotes

1 We summarize the facts as they appear in the record of proceedings below; WHCA's brief informs us that the apartment house in question has since been completed.

2 The following excerpts from the debate encapsulized above offer a provocative reflection of the administrative process that resulted in the present necessity for judicial review. Councilwoman Stevenson elicited applause from the public in attendance at the hearing when she concluded her remarks with the observation: "So I'm asking the Councilmembers to stand forward—stand up—we are the governing body of the City of Los Angeles. The City is still not run by the City Attorney's office. I'd just like you to remember that." In response, Councilman Snyder stated: "Well, it certainly isn't run by the City Attorney's Office although sometimes they, on occasion they wish that we would be more heedful of what they advise us and then later on we generally wish that we had been more heedful of what they advised us, when we go contrary to their advice. It's such things as this that it [*sic*] brought us into major judgments against the City of Los Angeles in the past. The same things such as this that have us in court now—when we are given advice by the City Attorney as to what our powers are and then we just simply overlook that because we want to be able to do something that we do not have the power to do.... It's not our business to violate the law."

3 As noted previously, Highland's apartment project is funded by City revenue bonds.

4 Furthermore, it is questionable whether Highland's driveway, privately constructed for the purpose of affording access to Highland's own project, constituted a *public* improvement such as section 37 empowers the council to ordain.

5 WHCA has cited *Cake v. City of Los Angeles* (1913) 164 Cal. 705, 710, 130 P. 723 and *Howard Park Co. v. City of L.A.* (1953) 119 Cal.App.2d 515, 521–522, 259 P.2d 977, as allegedly confirming city council authority to review decisions of the Board. These cases involved municipal assessments for public improvements undertaken pursuant to the Improvement Act of 1911 (Sts. & Hy.Code, §§ 5000 et seq.) and a similar, predecessor statute. The Improvement Act specifically provides for appellate review of such assessments by the local legislative body. (*Id.*, §§ 5003, 5220 et seq.) The instant permit proceedings did not arise under that Act, and hence the cited cases are not relevant.

6 Assuming that the permit authority "delegated" to the Board by Municipal Code section 62.105 is legislative in nature, it is accompanied by a wealth of detailed standards and specifications enacted by the council to guide and govern the Board in its application. (See L.A.Mun.Code, §§ 62.105.1 et seq.)

7 WHCA argues that the council was authorized to revoke Highland's permit by Municipal Code section 80.36.9, subdivision (A), which provides that "Whenever the City Council determines by order or resolution that it is necessary to regulate or prohibit the assemblage or procession of vehicles on a highway, street, or public way, or any portion thereof in order to prevent traffic congestion, injury to persons or property or to otherwise preserve the public peace, health or safety, it may in that action also authorize and direct the Department [of Transportation] and/or the Police Department to close any highway, street, or public way, or any portion thereof for the time and distance necessary for that purpose...." This contention is specious. The council neither purported to exercise the discrete powers conferred by this section—to close streets, not prohibit driveways from being maintained—nor did so: i.e., there was no direction made to either the department of transportation or the police department, only a communication of the council's action to the Board.

8 Here and below, Highland characterized its petition for writ of mandate as brought under Code of Civil Procedure section 1094.5. That provision for "administrative mandamus" applies to judicial review of administrative action taken "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer...." (*Id.*, subd. (a).) Although permit decisions by the Board may fall within this class of administrative decisions (see Cal. Administrative Mandamus (Cont.Ed.Bar 1966) p. 398), the council's decision of revocation, which was entirely unauthorized by law, did not, and

section 1094.5 accordingly did not apply. However, a "traditional" writ of mandate under Code of Civil Procedure section 1085 was and is available, through Highland's petition, to correct the council's unauthorized action.

9 The City argues that Highland did not show substantial evidence of a vested right in the administrative record, and hence that the trial court was correct. However, this was not an "administrative mandamus" case, to be decided by assessment of the administrative record. (See fn. 8, *ante.*) Rather, the question of vested rights was tendered by testimony in the form of declarations, and it was the substantiality of that evidence that the trial court was called upon to assess. The reporter's transcript shows that the trial court understood this.

10 WHCA also presented declarations, some of which stated that construction of the driveway had commenced before the permit issued. We do not undertake to weigh all of the evidence concerning Highland's construction activities, both because that is not our function and because decision of this appeal does not require it. Necessary and sufficient instruction appears from our observation that Highland's evidence of reliance on its permit, if not refuted, would establish a vested right.

11 In another context, our Supreme Court has contrasted the varying police power concerns which support zoning restrictions in general but which may not override vested rights with the narrower range of public wrongs which may be corrected under municipal nuisance abatement authority. (*Jones v. City of Los Angeles* (1930) 211 Cal. 304, 295 P. 14.)

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

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