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Real Estate And Construction Highlights—A Newsletter for Real Estate and Construction Professionals

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*"An easement appurtenant is extinguished by unity of ownership of estates in the dominant and servient tenements."*

## EASEMENTS EXTINGUISHED BY MERGER

### THIS ISSUE

One person's ownership of two parcels of land will extinguish easements benefitting either of the parcels through the process of "merger." But what happens when the parcels are owned by multiple parties?

### BACKGROUND

Easements are frequently misunderstood. They are not personal rights; rather they are benefits that attach to one parcel of land, burdening another. They are best understood by example. One parcel may have an easement allowing travel across the land of another for access, or allowing for water rights, or even simply the right to pump water across the land. An easement might prevent use of a parcel in a certain way, such preventing construction of a building that impairs a view or blocks sunlight. Easements may be created in a variety of ways: they may be granted by deed, acquired by adverse use of another's land, or may be implied at the time of division of property, under certain circumstances.

Easements are said to "run with the land." That is, they are considered a part of the rights that attach to the land, rather than belonging to a specific person. Thus, a person who sells property with easements benefitting it would sell those easements along with the land; he would not personally continue to benefit from those rights. Likewise, easements burdening land will pass with that land upon sale as well.

Easements may also be extinguished in a variety of ways, such as by grant deed, lack of use of the easement or changed use of the land overall. This months' newsletter will discuss the loss of easements through the concept of "merger." Where two properties are owned by one person, the easements between them are extinguished by unity of title; they are merged out of existence because they are unnecessary. The impact can be significant.

## THE LANGUAGE OF EASEMENTS

Perhaps the greatest difficulty in understanding easements lies in the language that lawyers use in describing them. When one property has an easement against it for the benefit of another, the burdened property is referred to as the "servient tenement." That is, it serves the other property in some way. The property benefitting from that easement is called the "dominant tenement," and is said to have an easement "appurtenant" (belonging) to it. And where it is important to distinguish between them, the *benefit* may be referred to as an "easement," while the *burden* on the land may be referred to as a "servitude." The statutes dealing with easements use these ancient descriptions when discussing the acquisition and loss of easements and can be somewhat confusing. Lawyers spend a good deal of time in law school trying to learn this language, and frequently forget it as soon as they pass the bar exam.

In discussing how an easement is extinguished by "unity of title," Civil Code section 811 seems to ignore the ancient distinction between a servitude and an easement and provides that a servitude is extinguished "[b]y the vesting of the right to the servitude and the right to the servient tenement in the same person." Likewise, section 805 provides: "A servitude thereon cannot be held by the owner of the servient tenement." And in still more lawyer-speak, the Restatement of Property states the rule as follows: "An easement appurtenant is extinguished by unity of ownership of estates in the dominant and servient tenements to the extent to which the uses which could have been made prior to the unity by virtue of ownership of the estate in the dominant tenement can be made after the unity by virtue [of] ownership of the estate in the servient tenement." The rationale underlying sections 805 and 811 is "to avoid nonsensical easements — where they are without doubt unnecessary because the owner owns the estate."

## RECENT CASE LAW ON EXTINGUISHMENT

A recent case decided on appeal after a trial in the San Francisco Superior Court examined how these statutes would be impacted by *joint* ownership of property, as opposed to one person holding title to both parcels. The case dealt with two adjoining residential properties in San Francisco, 60 and 66 Clarendon Avenue.

In the matter of *Zanelli v. McGrath*, the Court decided whether common ownership of a servient tenement and dominant tenement by two people jointly would extinguish a previously-recorded view easement, and also whether the ultimate sale of one of those parcels would revive the prior deeded easements if they were extinguished by merger.

As laid out by the Court: "the facts relevant to the question whether the 1981 view easement was extinguished when Sommer and Dunham acquired title to 60 Clarendon in 1994 are not disputed: Sommer and Dunham acquired title to 66 Clarendon as joint tenants on February 14, 1992. In 1994 Sommer and Dunham acquired title to 60 Clarendon as tenants in common. Each held an undivided 50 percent interest, but Dunham held his interest as trustee for the Jeffrey S. Dunham Revocable Trust. Sommer and Dunham owned both 66 Clarendon and 60 Clarendon until June 30, 1998, when Dunham transferred his interest in 66 Clarendon to Sommer by grant deed."

The Court considered whether "merger" as codified in sections 805 and 811 applies when "the right to the servitude, i.e., the 1981 view easement appurtenant to 66 Clarendon, and the right to the servient tenement, i.e., 60 Clarendon, are not vested in a single individual, but in the same persons?"

## HOW DID THE COURT RULE?

The Court found that it was irrelevant whether the property was owned by a single person or by multiple persons. Either way, the easement is extinguished.

The Court's reasoning was instructive on the purposes served by the statute regarding extinguishment by merger.

"Consistent with this rationale, when Sommer and Dunham owned both 66 and 60 Clarendon, the 1981 view easement served no purpose because Sommer and Dunham did not require an easement to make use of 60 Clarendon in the manner provided by the 1981 view easement. Nor did any one else have an interest in enforcing the easement if they instead chose to develop 60 Clarendon in a manner that disregarded the restriction, or sold it to someone else free of the restriction. As the owners of both lots, they could choose to develop 60 Clarendon in a manner that preserved their view, hold it undeveloped, or even exercise their right to develop 60 Clarendon in a manner that interfered with the view from 66 Clarendon. If they chose to sell 60 Clarendon to anyone else, they could protect their view by creating and reserving a new easement for the benefit of 66 Clarendon, or they could elect not to impose such restriction and sell it at a price reflecting the highest and best possible use for the lot. Therefore, extinguishment of the 1981 view easement by merger served their interest as the owners of both the dominant and servient tenement in making whatever use they chose of their own property, and did not adversely affect anyone else's property interest in enforcing the easement.

"In sum, nothing in the plain language of section 811, or in the cases cited by defendant, precludes finding extinguishment by merger when ownership of the right to the servitude and to the servient tenement is united in the same person, or persons."

This decision also reviewed numerous other requirements for extinguishment of easements in some detail, and gives a fairly comprehensive summary of California law on this issue. It should be required reading for attorneys with an easement extinguishment case.

## CONCLUSION

Although easements may seem archaic, their function is vital in nearly all real estate rights. Without them, utilities cannot be delivered to homes, certain driveways cannot be used, and common areas might not exist. When those vital easements are extinguished by merger, a buyer, such as the one in the case profiled here, may end up with less than he bargained for in the purchase of a property. In the case at hand, the lack of a view easement meant that the purchaser of 66 Clarendon, which apparently had views worth protecting, would not be able to stop the owner of 60 Clarendon from blocking them. The difference in value is obvious and considerable.

## NEXT ISSUE

Recent appellate decision on California's anti-deficiency statutes – a vital topic in this foreclosure-filled environment.

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