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Exclusive Use Easements

THIS ISSUE

Typically, courts do not interpret an easement as an "exclusive use" right in land, since such a use would preclude all others – including the owner of the land – from using it. But one recent case held that the clear language of a granted easement created just such an exclusive use right, entitling the easement holders to use the land without interference of any kind from anyone, including the fee owners of the land.

BACKGROUND

In that case, an easement owner (also called the "dominant tenement owner") was granted the right to permanently prevent the landowner (sometimes called the "servient tenement owner") from making any use of the land at all.[1]

Plaintiffs held an exclusive use access easement over an undeveloped parcel, which they used for transporting their horses, feed and manure and for other equine-related matters. The defendants purchased the 6-acre parcel burdened by the easement. They sought to improve the land, including changing the easement area, adding a driveway, retaining walls and landscaping; they also sought to limit the plaintiffs' use of the land. The plaintiffs sued for a judgment that the defendants were precluded from making any use whatsoever of the easement area.

The Superior Court of Orange County, found that the defendants (the purchasers of the 6-acre parcel) could use the easement area in any manner not inconsistent with the access, ingress, and egress rights of plaintiffs – essentially transforming the exclusive easement to a non-exclusive easement. Plaintiffs, the owners of the dominant tenement, appealed.

[1] Gray v. McCormick (2008)

EASEMENT LAW REVIEW

Generally speaking, an easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be less than the right of ownership. The concept of an "exclusive use" easement has been reluctantly acknowledged by the courts of appeal over time, but the most widely discussed case on this concept – *Scruby v. Vintage Grapevine, Inc*. (1995) – held that the owners of the servient tenement could make any use of the easement area that was not inconsistent with the easement use of the land. The *Scruby* court rationalized that to hold otherwise would grant the easement holder something akin to full ownership of the land.

Moreover, California courts have historically been reluctant to grant "exclusive prescriptive easement rights," since that would be akin to granting a fee interest in the land, as opposed to merely an easement right to use the land for a specific, defined, purpose.

The question raised in *Gray v. McCormick* (decided in October 2008) was the degree of exclusivity of the easement described in the granting instrument, the supplemental CC&R's. "The term 'exclusive' used in the context of servitudes means the right to exclude others. The degree of exclusivity of the rights conferred by an easement… is highly variable and includes two aspects: who may be excluded and the uses or area from which they may be excluded. At one extreme, the holder of the easement… has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude. … At the other extreme, the holder of the easement… has the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries."

RULING ON APPEAL

The court of appeal in *Gray v. McCormick* reversed the judgment of the trial court, holding that the servient owners were precluded from making any use of the surface of the easement area because such use would be inconsistent with the rights granted by the easement contained in the subdivision's CC&Rs.

The court reasoned that any use by the servient tenement holder of the easement area would be considered adverse to the dominant tenement holder of an exclusive-use easement. "The express easement in question clearly provides that the easement is for the exclusive use of the owners of the dominant tenement. While as a general rule, the owners of a servient tenement … are entitled to use the easement area in any manner not inconsistent with the specified use by the owners of the dominant tenement … in this case, any use of the surface of the easement area, by the owners of the servient tenement, would be inconsistent with the exclusive use by the owners of the dominant tenement."

The court noted that, in contrast to a non-exclusive easement, "an 'exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention." The court confirmed that "[i]t is, of course, possible to draft an instrument… which would make the easement exclusive."

An exclusive easement may be created by an instrument clearly stating the intention that the easement be exclusive. And exclusive easements may be created in other ways as well. In the prescriptive easement context, it has been stated that "[t]here are some circumstances in which the grant of an exclusive

easement, which resembles or is nearly the equivalent of a fee interest, can be justified." As the court concluded, "while exclusive easements that exclude even the owners of the servient tenement from the easement area may be less common than nonexclusive easements, they do nonetheless arise from time to time and have been held to be valid and enforceable under California law."

The court's confirmation that one may obtain an exclusive use prescriptive easement appears to contradict longstanding California law on this issue, which has held that one cannot obtain an exclusive prescriptive easement. In fact, the court of appeal has said that California law does not allow an adverse possession case to masquerade as a prescriptive easement in order to avoid the more stringent obligations of obtaining land by adverse possession.

Nevertheless, the court found in favor of the dominant tenement holder in this new case, finding "The exclusive use of a defined area of the servient tenement by the owners of the dominant tenement is not prohibited under California law. In this case, the language of the instrument by which the easement was created … clearly expresses an intention that the use of the easement area be exclusive to the [easement] owners, at least as to the surface thereof. It is, therefore, sufficient to create an exclusive easement under California law."

But the Court also confirmed that a "question remains as to whether there is any conceivable use of the subsurface of, or the air rights above, the easement area that would be consistent with the intended exclusive use of the surface of the easement area."

CONCLUSION

This new case on appears to further confuse an already jumbled landscape of easement law. It seems to recognize the creation of an exclusive use prescriptive easement, contrary to commonly believed tenets of California law. It remains to be seen whether this comment, unnecessary to the holding of this case, will undo the holdings of prior cases on this point.

In the mean time, however, this new easement law case is a "must read" for those who deal with easement matters in California.

NEXT ISSUE

Landlord protection from tenant-related mechanic's liens.

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