

November 7, 2008

GRANTOR BEWARE: EXCLUSIVE EASEMENT MAY PRECLUDE ANY USE OF THE LAND BY THE GRANTOR

In a recent California appellate court case, *Gray v. McCormick*, 2008 Cal.App. LEXIS 1675 (Cal.App.4th Dist. Oct. 23, (2008)), the court upheld the right of the grantee of an "exclusive easement" for access, ingress, and egress to prevent the owner of the property burdened by the easement from making any surface use of the easement area. Notwithstanding the court's acknowledgment of the general rule that the owner of the burdened land is entitled to use the easement area in any manner not inconsistent with the easement holder's specified use (see *Pasadena v. California - Michigan etc. Co.*, 17 Cal. 2nd 576 (1941)) and much to the surprise and consternation of the burdened property owner, the court reversed the trial judge's ruling in favor of the owner of the burdened property. Based primarily upon the absence of language in the easement instrument reserving to the burdened property owner any surface use rights, the court concluded that the parties intended the easement owner's surface use to be exclusive not only as to third parties, but also as to the burdened property.

The facts in *Gray* were somewhat unusual in that the easement in question was created in the covenants, conditions and restrictions (CC&Rs) recorded at the time of the subdivision of the large high-end residential development project in which the subject properties were located. At the time of the action, the easement area was yet to be improved with the easement owner's planned driveway, perimeter walls, and landscaping. Apparently, the burdened owner had for several years after recordation of the CC&Rs utilized the unimproved easement area for equestrian and access purposes. The language contained in the CC&Rs creating the easement was typical and in no way remarkable.

What Happened?

In support of its holding, the court in *Gray* noted that the instrument creating the easement (i) repeatedly used language of exclusivity; (ii) failed to contain an express reservation of use rights for the benefit of the burdened property owner; (iii) imposed upon the owner of the easement the full obligation of improvement and maintenance of the access drive improvements; and (iv) required the owner of the easement to indemnify the burdened property owner from loss or damage arising out of the easement holder's use of the easement area. The court appears to have, in part, applied the general rule by finding that the burdened property owner's concurrent surface use would be inconsistent with the easement holder's use and enjoyment of the easement:

"It is inconceivable that the owners of a multi-million dollar property who build out 90 feet of access drive improvements would be expected to share that drive with a neighbor whose property abuts the street and to bear the costs of cleaning up the horse droppings and hay scatterings associated with that neighbor's use of the easement area."

It is notable that the court specifically stated that it was not deciding whether subsurface or air rights use of the easement area by the burdened property owner would be precluded, as those issues had not been addressed by the parties. Interestingly, the court's decision seems to have been influenced by some form of balancing of hardships analysis as evidenced by the court's reference to the fact the burdened property abuts the street, while the benefited property's only means of access is through the easement created by the CC&Rs. Also of interest is the fact that the court made no effort to allow the burdened property owner continued surface use rights of a limited nature which would not interfere with the access rights granted (e.g., shared pedestrian and vehicular access, but no equestrian use, so as to avoid the horse droppings and hay scattering burdens).

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One can only speculate if the court's decision might have been different if (i) the burdened property required use of the easement area to gain access to the street; (ii) the burdened property owner's previous and intended use had been of a less messy nature; or (iii) there had been evidence of a contrary intent on the part of the declarant when it signed and recorded the CC&Rs containing the exclusive easement provision.

So What Now?

Every easement (whether by grant, reservation, or contained in CC&Rs) needs to be carefully drafted to make certain that both the easement owner's and burdened property owner's intentions and rights are clearly articulated. If any use rights are to be retained by the property owner, the precise nature and extent of those rights should be expressly set forth. The parties' respective obligations regarding maintenance, repair and liability should also be specified. In the situation where a property is sold or financed and easements are already in place, the terms of the easements should be reviewed in detail to ascertain if any ambiguities exist. If ambiguities are found, an amendment to the easement, or some form of easement estoppel, may be necessary to avoid future difficulties.

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