1. WALLACE V. WASHICK SC-20170014

Plaintiff's Motion for Summary Judgment.

Plaintiffs filed a complaint against defendant asserting causes of action for trespass to easement and trespass/nuisance related to a written easement that allegedly allows plaintiffs to use a portion of defendant's property as the front yard of plaintiffs' property; and that since the original owner of both parcels could not subdivide the property without running afoul of TRPA regulations regarding minimum lot size, the written easement was executed. (Complaint, paragraph 19.) The grant of easement was recorded on July 21, 1986. (See Complaint, Exhibit 2.)

Defendant filed a cross-complaint against plaintiffs seeking declaratory relief concerning the validity and enforceability of the subject easement and to quiet tile to the easement area on the ground that the easement was unenforceable and void as the easement effectively conveyed the easement area to the owners of the dominant tenement and the remaining portion of the servient tenement parcel located at 656 El Dorado was substantially smaller than the minimum lot size allowed by law.

Defendants' first affirmative defense asserted in their answer to the complaint is that while the grant of easement recorded in 1986 and attached to the complaint is in the form of an easement, it was effectively a transfer of the equivalent of an ownership of a possessor corporeal interest to the easement area to the then owner of 652 El Dorado resulting in the remainder of 656 El Dorado being smaller than the 6000 square feet minimum lot size, thereby violating the then applicable zoning ordinance promulgated by the City of South Lake Tahoe and rendering the grant of easement illegal, unenforceable, and void.

Plaintiffs move for entry of summary judgment/adjudication in favor of plaintiffs on defendants' first affirmative defense on the ground that the grant of the exclusive easement

was legal, valid, and enforceable. Plaintiffs argue in support of the motion: the subject easement is valid and enforceable and not a conveyance of a fee interest in a portion of the defendant's parcel to plaintiffs successor in interest; there remains no triable issue of material fact as to the intent of Mr. Kurtzman to grant only an easement that was less than a fee interest; the easement is not vague and ambiguous, therefore, parol evidence is inadmissible; and the language of the easement is clear and speaks for itself.

Defendant opposes the motion on the following grounds: the substance of the transaction in recording the subject easement and intent of the Kurtzmans was that they were granting a possessory corporeal interest in the defendant's property, which was illegal in that it violated the City ordinances concerning minimum parcel sizes in the area where the property is located, therefore, there remains a triable issue of material fact as to the validity of the easement that prevents entry of summary judgment on the first affirmative defense; and the parol evidence rule does not bar admission of evidence of the intent of the Kurtzmans to circumvent minimum lot size rules.

Defendant also asserts various objections to the declaration of Kevin Fabino submitted in support of the motion.

Plaintiffs replied to the opposition.

Defendant's Objections to Declaration of Kevin Fabino in Support of Motion

The court does not reach the objections to the Declaration of Kevin Fabino asserted by defendant, because the court finds that the evidence objected to is not material to its disposition of the motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code of Civil Procedure, 437c(q).)

Motion for Summary Judgment Principles

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code of Civil Procedure, § 437c(f)(1).)

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46;

Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American Can Co.* (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"For purposes of motions for summary judgment and summary adjudication: ¶ (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code of Civil Procedure, § 437c(p)(1).)

"…[I]t is axiomatic that the party opposing summary judgment " 'must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger,supra,* 199 Cal.App.4th at pp. 1144–1145, 131 Cal.Rptr.3d 596.) This requirement is black letter law (Code Civ. Proc., § 437c, subd. (p)(2)) that applies whether the alleged cause of action is statutory or under the common law." (All Towing Services LLC v. City of Orange (2013) 220 Cal.App.4th 946, 960.)

With the above-cited principles in mind, the court will rule on the motion for summary judgment/adjudication.

Effect of Easement

"Generally speaking, " '[a]n 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.' [Citation.]" (*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702, 43 Cal.Rptr.2d 810.)" (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1023.)

Exclusive easements are not prohibited by California law and while exclusive easements may amount to almost a grant of a fee interest in the land, an intention to convey a fee interest is not imputed unless there is a clear indication of the intention to grant an ownership/fee interest in the grant of the easement. (Emphasis the court's.)

Citing Pasadena v. California–Michigan (1941) 17 Cal.2d 576, the appellate court in Gray v. McCormick (2008) 167 Cal.App.4th 1019 stated with respect to exclusive easements: "…where exclusive easements are concerned, the court noted that "an 'exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. [Citations.] 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. [Citations.]" (*Id.* at pp. 578–579, 110 P.2d 983; accord, *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1308, 54 Cal.Rptr.2d 284.) The court confirmed that "[i]t is, of course, possible to draft an instrument ... which would make the easement exclusive." (*Pasadena v. California–Michigan etc. Co., supra,* 17 Cal.2d at p. 581, 110 P.2d 983.)" (Emphasis added.) (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1025.)

In determining that exclusive easements are not prohibited under California law the appellate court in Gray v. McCormick (2008) 167 Cal.App.4th 1019 discussed various appellate opinions supporting that conclusion and included the following statement with regard to one of those appellate opinions: "The trial court in *Hirshfield v. Schwartz, supra,* 91

Cal.App.4th 749, 110 Cal.Rptr.2d 861, exercised its equitable powers to grant relief in the form of a judgment for what it termed an exclusive easement, giving the defendants the exclusive right to use the property in question, until such time as they sold their property or ceased residing thereon. (*Id.* at pp. 757, 764, 110 Cal.Rptr.2d 861.) The appellate court affirmed. (*Id.* at p. 772, 110 Cal.Rptr.2d 861.) It noted, with respect to the law of prescriptive easements, that "exclusive easements, while rare, are possible [citation]...." (*Id.* at p. 769, fn. 11, 110 Cal.Rptr.2d 861.) However, it also stated that the judgment did not violate the law of prescriptive easements, because the right of exclusive use created by the judgment was not in reality a prescriptive easement. Rather, the trial court had created the right of exclusive use through the employment of its equitable powers, to grant affirmative relief to an encroacher. (*Id.* at pp. 754–755, 110 Cal.Rptr.2d 861.) ¶ Inasmuch as *Hirshfield v. Schwartz, supra,* 91 Cal.App.4th 749, 110 Cal.Rptr.2d 861, did not arise in the context of an express exclusive easement, it offers no assistance in interpreting the scope of the easement in question. It does, however, help dispel the notion that the exclusive use of the property of another is prohibited under California law, as being tantamount to the taking of fee title by a neighboring property owner. ¶ (*3) Conclusion*— ¶ The exclusive use of a defined area of the servient tenement by the owners of the dominant tenement is not prohibited under California law." (Emphasis added.) (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1031-1032.)

The appellate court concluded that language that the dominant tenement had exclusive use of the easement area to the exclusion of the servient tenement lawfully created an easement. The appellate court held: "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, section 12 of the Supplemental CC & R's, clearly expresses an intention that the use of the easement area be

exclusive to the owners of Lot 6, at least as to the surface thereof. It is, therefore, sufficient to create an exclusive easement under California law. (*Pasadena v. California–Michigan etc. Co., supra,* 17 Cal.2d at 578–579, 110 P.2d 983.) (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1032.) Therefore, an exclusive easement that grants exclusive use of the easement area to the owners of the dominant tenement is a lawful easement and is not a conveyance of ownership of the land to the dominant tenement.

The court notes that the only material facts in plaintiffs' separate statement of undisputed material fact that defendant purports to claim are disputed are fact numbers 18 and 19. The defendant has not met the requirements to properly dispute those facts in the manner required by statue in that the disputed facts were not followed by a reference to the evidence supporting the dispute. All that followed the defendant's statement that those facts were disputed were legal arguments, an assertion that a portion of the 656 El Dorado parcel was owned by a public utility without evidentiary basis for that legal conclusion, and evidentiary objections of relevancy, legal conclusion and not fact. Therefore, those facts are undisputed.

"The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (Emphasis added.) (Code of Civil Procedure, § 437c(b)(3).)

Furthermore, all evidentiary objections asserted in the defendant's opposing statement to plaintiffs' separate statement of undisputed material fact are improper and will not be considered.

"All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must: ¶ (1) Identify the name of the document in which the specific material objected to is located; ¶ (2) State the exhibit, title, page, and line number of the material objected to; ¶ (3) Quote or set forth the objectionable statement or material; and ¶ (4) State the grounds for each objection to that statement or material…"(Rules of Court, Rule 3.1354(b).)

Raising evidentiary objections in a manner other than in a separate document setting forth the objections as required by Rule 3.1354(a) and (b) and failure to raise it at the hearing results in a forfeiture of the objections. (Public Utilities Com'n v. Superior Court (2010) 181 Cal.App.4th 364, 376, fn. 9)

The following facts are undisputed: defendant owns 656 El Dorado, which he acquired by grant deed on January 5, 1993; plaintiffs owns 652 El Dorado, which is adjacent to 656 El Dorado; prior to June 1986 David Kurtzman and Karen Kurtzman owned both 652 and 656 El Dorado; prior to June 12, 1986 the Kurtzmans resided in the home at 652 El Dorado and rented the duplex at 656 El Dorado; on June 2, 1986 the Kurtzmans conveyed ownership of 652 El Dorado to John and Sally Foster by Grant Deed; the Kurtzmans and Fosters executed and recorded the subject grant of easement; the easement is attached as Exhibit 2 to the Complaint and Exhibit D of the Cross-Complaint; the provisions of paragraphs 3 and 4 of the

grant of easement are undisputed; the location of the easement is defined in paragraph 5 of the easement; while the Kurtzman's original intent was to subdivide 656 El Dorado and grant what became the easement area to 652 El Dorado so as to enlarge 652 El Dorado, Kurtzman was unable to subdivide the lots in that fashion, because the Tahoe Regional Planning Agency (TRPA) would not allow lots to be divided into less than 10,000 square feet parcels and Kurtzman's proposed subdivision would have rendered 656 El Dorado too small and non-compliant with TRPA regulations; because Kurtzman was not permitted to subdivide the lots as he had initially planned, in order to effect his original intent to make the front yard of 656 El Dorado to effectively be the front yard of 652 El Dorado Kurtzman granted for the benefit of the owner of 652 El Dorado a broad easement over 656 El Dorado, while simultaneously limiting the 656 El Dorado owner's rights to the easement area; in Kurtzman's own words, "652 El Dorado (Wallace) is situated in a way that the side door is used as the front door, so Kurtzman wanted the 56 [sic] El Dorado property (Washick) back yard to belong to the 652 El Dorado Property (Wallace)…"; throughout the Kurtzman's ownership of both parcels, what was to become the easement area was used exclusively by the Kurtzman family and not by the tenants residing on the 656 El Dorado property; when the Kurtzmans decided to sell 652 El Dorado in 1986 they considered the possibility of subdividing 656 El Dorado to ensure the backyard of 656 El Dorado would continue to be used as the front yard of 652 El Dorado for the new owners; although Kurtzman had not researched the issue, his general understanding was that TRPA would probably not permit them to reduce the lot size of 656 El Dorado; at that point because of his understanding of TRPA restrictions and time constraints to complete the sale of 652 EL Dorado and purchase his new home, Kurtzman decided that creating an easement was the most reasonable and timely solution to ensure that 656 [sic] El Dorado (Wallace) would continue to have rights to exclusively utilize the easement area as a front yard

and treat it as their own; in consideration for the sale of 652 El Dorado, Kurtzman executed and recorded the easement granting to the purchasers of 652 El Dorado expansive easement rights over 656 El Dorado so as to give effect to Kurtzman's original intent to make the backyard of 656 El Dorado into the front yard of 652 El Dorado; according to Kurtzman, "I gave the dominant tenement an incredibly large easement to do pretty much anything within the easement area, but left the servient tenement owner the right to cross the easement to get into and out of existing structures on the servient tenement"; according to Kurtzman "I intended that the owners, occupants, and/or invitees of 656 El Dorado be limited to their use of the easement area to ingress and egress only to the existing structures on that parcel outside the easement area; defendant Washick was aware of the grant of easement at the time he purchased 656 El Dorado; defendant took title to his property on January 5, 1993; the grant of easement was recorded on June 21, 1986; the easement is binding on defendant Washick by its term that the instrument binds and inures to the benefit of the respective heirs, personal representatives, successors and assigns of the parties hereto; the easement contains a secondary easement in favor of the South Lake Tahoe Public Utility District; photographs P/CD0050-0055 depict the easement area and plaintiff's deck; defendant Washick has admitted numerous times that he was aware of the easement when he purchased the property; after many, many years of living with the easement and plaintiffs' use of it, he told plaintiffs that he does not think anyone should be able to tell him what he can and cannot do on his property, so he was going to ignore the easement; photos attached to plaintiffs' response to defendant's requests for production, documents P/CD0050-0055 accurately depict the easement area and view from plaintiff's deck; and there exists a large structure in the South Lake Tahoe Public Utility District easement. (Defendant's Response to Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Numbers 1-23.)

The court takes judicial notice of the recorded grant of easement that is attached to the complaint and cross-complaint. "…a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256, 265, disapproved of on another ground in Yvanova v. New Century Mortg. Corp. (2016) 62 Cal.4th 919, 939.)

Both parties having relied upon the grant of easement by including it in both the complaint and cross-complaint have essentially judicially admitted the contents of that recorded document.

""A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.]" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48, 43 Cal.Rptr.3d 874.) "Judicial admissions may be made in a pleading.... [Citations.] Facts established by pleadings as judicial admissions ' "are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her." [Citations.] " '[A] pleader cannot blow hot and cold as to the facts positively stated.' " [Citation]' [Citation.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746, 100 Cal.Rptr.3d 658.) ¶ A defendant may rely on judicial admissions in moving for summary judgment. (*Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433, 266 Cal.Rptr. 695.) However, "[a] judicial admission is effective (i.e., conclusive) *only* in the particular case." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 453, p. 586, italics added; e.g., *Betts v. City Nat. Bank* (2007) 156 Cal.App.4th 222, 235, 67 Cal.Rptr.3d 152 [admission in proposed

probate pleading not binding because pleading was not filed in current case].)" (Minish v. Hanuman Fellowship (2013) 214 Cal.App.4th 437, 456.)

The grant of easement expressly provides: it is a non-exclusive perpetual easement appurtenant to and runs with the dominant tenement; the easement granted is the right of ingress and egress across the easement area, the right to erect and maintain a split rail fence approximately at the perimeter of the easement area, the right to landscape, maintain existing landscaping, replace and replant landscaping within the easement area, and the right to engage in outdoor recreation within the easement area, including such activities as barbecuing, horseshoes, badmitton, and like outdoor games, gardening, and like activities; and the easement is non-exclusive only to the extent that the owners, occupants, and invitees of the servient tenement are permitted use of the easement area for the right of ingress and egress only to and from the improvements that presently exist and may hereinafter exist on the servient tenement outside of the easement area. (Defendant's Response to Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Number 7 re: Grant of Easement, paragraphs 3-4; Complaint, Exhibits 2 and 5 – Grant of Easement, paragraphs 1-3; and Cross-Complaint, Exhibit D – Grant of Easement, paragraphs 1-3.) The grant of easement prohibits construction of structures within the easement area, other than the maintenance and reconstruction of the existing South Tahoe Public Utility District facility and excepting the maintenance, reconstruction and fencing as provided in paragraph 3; and in exercising rights to fence and landscape the easement area, the owner of the dominant tenement shall not cause fencing or landscaping to be constructed as to unreasonably impair ingress and egress to and from the servient tenement improvements. (Defendant's Response to Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Number 7 re: Grant of Easement, paragraph 4; Complaint,

Exhibits 2 and 5 – Grant of Easement, paragraph 4; and Cross-Complaint, Exhibit D - Grant of Easement, paragraph 4.)

City of South Lake Tahoe Ordinance No. 406 mandates that the minimum lot size is 6,000 square feet for residential lots in Medium Density Residential Districts; 652 and 656 El Dorado are located in a Medium Density Residential District; Ordinance Number 406 was applicable in 1986; the current City Code provides that the minimum lot size for residential lots is 6,000 square feet; the total area of 656 El Dorado Ave. is 10,398 square feet; the easement area on 656 El Dorado described in the subject grant of easement is 6,078 square feet; and the portion of 656 El Dorado not within the easement area is 4,320 square feet. (Defendant's Exhibit D – November 13, 2018 Order Taking Judicial Notice of These Facts.)

Defendant essentially argues that the broad easement granted by the predecessor in interest of both properties is illegal in that Mr. Kurtzman found out that he could not subdivide, so he decided to grant the easement instead, thereby rendering the easement illegal and void as it is an attempt to circumvent the minimum lot size law.

Defendant cites the following legal opinions in support of the argument that this easement is illegal: Baccouche v. Blankenship (2007) 154 Cal.App.4th 1551, 1557-1558; and Blackmore v Powell (2007) 150 Cal.App.4th 1593, 1605.

Defendant contends that Baccouche v. Blankenship (2007) 154 Cal.App.4th 1551 sets forth the legal proposition that where the purpose of the easement is to accomplish that which is violative of local ordinances and zoning laws, an easement will be declared void.

The appellate opinion did not state such a holding. The appellate court stated: "Baccouche argues that the easement granted by his predecessor is void because it conflicts with applicable zoning restrictions. He invokes maxims that, in California, contracts must have a "lawful object" (Civ.Code, §§ 1550, subd. (3), 1596) or are void (Civ.Code, § 1598). Further, a

contract whose object is a violation of law is itself against the policy of the law (Civ.Code, §§ 1441, 1667, 1668), and renders the bargain unenforceable." (Baccouche v. Blankenship (2007) 154 Cal.App.4th 1551, 1557–1558.)

A contract whose object is to violate the law is not the same as conduct that accomplishes an objective in a lawful manner by use of other means to achieve that objective other than by violating the law.

The appellate court in Baccouche v. Blankenship (2007) 154 Cal.App.4th 1551 found that an easement granted to an adjacent landowner to use a portion of the servient tenement parcel for equine purposes was not void, even where the use of that land for such purposes violated zoning laws unless a zoning variance was obtained. The appellate court held: "Baccouche's predecessor did not convey that which he did not have; instead, he parted with a twig from the proverbial "bundle of sticks" that made up the entirety of his fee ownership of the land. In doing so, he simply assented to use of a described portion of his property for equine purposes; he did not purport to require such use or to enter into any sort of joint enterprise with the grantee for such use. As is true with virtually all land use, whether the grantee could actually use the property for the purposes stated in the easement was subject to compliance with any applicable laws and ordinances, including zoning restrictions. Land use restrictions limiting use of property and a fee owner's consent to such use are quite distinct. (See *Mullally v. Ojai Hotel Co.* (1968) 266 Cal.App.2d 9, 12, 71 Cal.Rptr. 882 [argument that tennis courts should be allowed to operate with limitations related to lighting and noise better left to planning boards and private developers]. Nor are we dealing with an unconstitutional or otherwise illegal *restriction* on the use of land. (See Rest.3d Property, Servitudes, § 3.1).) Finally, the easement does not purport to authorize, much less require, some kind of malum in se use of property. As we already have discussed, an owner of estate property lacking a residence may

apply for a zoning variance. It would be unlikely that zoning authorities would seriously consider such an application unless the applicant could show that he or she owns the property or holds rights from the present or a previous owner for such use." (Baccouche v. Blankenship (2007) 154 Cal.App.4th 1551, 1558.)

Baccouche, supra, is factually distinguishable from this case.

The appellate court in Blackmore v. Powell (2007) 150 Cal.App.4th 1593 recognized that an exclusive easement is valid in California and does not transfer all interests in land equivalent to a conveyance of ownership unless the easement effectively transferred use and enjoyment of the land equivalent to conveyance of ownership.

The appellate court held: **"**We recognize that in *Pasadena v. California–Michigan etc. Co., supra,* 17 Cal.2d at page 578, 110 P.2d 983, our Supreme Court remarked, in dictum, that an " 'exclusive easement' " is an unusual interest in land" that "has been said to amount almost to a conveyance of the fee," and observed that "[n]o 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." In that case, no "serious claim" was presented that an exclusive easement had been conveyed. (*Id.* at pp. 578–579, 110 P.2d 983.) Whether a so-called exclusive easement constitutes ownership in fee, rather than an easement, depends upon the circumstances of the case (*Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1048, 3 Cal.Rptr.2d 223), including the terms of any applicable conveyance (*Raab v. Casper* (1975) 51 Cal.App.3d 866, 876–877, 124 Cal.Rptr. 590). Thus, a conveyance that " ' " 'purported to transfer to A an *unlimited* use or enjoyment of Blackacre ... would be in effect a conveyance of ownership to A, not of an easement. [Citation.]' " ' " (*Raab v. Casper, supra,* 51 Cal.App.3d at p. 877, 124 Cal.Rptr. 590.) In contrast, an easement incorporating a right of exclusive use may fall short of ownership in fee when the easement is restricted in scope. (*Otay Water Dist. v.*

Beckwith, supra, 1 Cal.App.4th at p. 1048, 3 Cal.Rptr.2d 223.)" (Emphasis added.) (Blackmore v. Powell (2007) 150 Cal.App.4th 1593, 1600.)

The appellate court further recognized that easements do not divide or sever property. "…the easement is merely the right to use a portion of appellants' property in a restricted manner, and does not divide or sever the property into distinguishable possessory estates or interests." (Blackmore v. Powell (2007) 150 Cal.App.4th 1593, 1604.)

The appellate court even rejected the argument that an exclusive easement by exclusive occupation of a garage in the easement area granted an ownership interest in the property and found that the easement was not an illegal circumvention of the subdivision map act.

The appellate court stated: "Here, respondent has no ownership interest in the easement, and his exclusive occupation of the garage—which will cover only a small portion of the easement—is restricted to the uses delineated in the 1979 deed. ¶ Appellants further contend that the trial court's interpretation of the 1979 deed, if affirmed, would encourage parties to circumvent the Map Act by subdividing property into "developable interests" through a pattern of exclusive easements. We recognize that courts must be vigilant regarding schemes designed to avoid the regulatory controls of the Act. (*Pratt v. Adams* (1964) 229 Cal.App.2d 602, 603–604, 40 Cal.Rptr. 505.) However, no such scheme is presented here. As the trial court correctly determined, the easement is too restricted in scope to constitute a subdivision under the Act. For the same reason, this determination does not assist attempts to evade the Act. As we have indicated (see pt. A., *ante*), an interest in land, however styled, sufficiently unrestricted to be "developable"—as that term is ordinarily understood—would be a possessory interest, not an easement. In sum, the grant deed, as interpreted by the trial court, does not contravene the Map Act." (Blackmore v. Powell (2007) 150 Cal.App.4th 1593, 1605.)

While the predecessor in interest, Mr. Kurtzman, originally envisioned that granting use of the subject land to 652 El Dorado would be accomplished by a subdivision of the property, the evidence submitted establishes that is not what happened in this case. It is undisputed that Mr. Kurtzman was unable to subdivide the lots as he had initially planned and in order to make the backyard of 656 El Dorado to effectively be the front yard of 652 El Dorado, Mr. Kurtzman granted for the benefit of the owner of 652 El Dorado a broad easement over 656 El Dorado, while simultaneously limiting the owner of 656 El Dorado's rights to the easement area. The evidence establishes that after Mr. Kurtzman rejected his original intent to sever the area from 656 El Dorado due to legal issues, he changed his intent to grant only an easement in order to meet the legal requirements. Had there been a subdivision or effectively a grant in fee of that portion of 656 El Dorado to the owner of 652 El Dorado, the portion of the parcel would have been added to the 652 El Dorado parcel thereby forever barring defendant from using the property for any purpose. In the instant case, the evidence establishes that the easement granted did not bar the servient tenement owner from all uses of the described easement area and the easement specifically limited the dominant tenement owner's use of the easement area to certain specific activities. The easement granted the dominant tenement owner the right of ingress and egress across the easement area, the right to erect and maintain a split rail fence approximately at the perimeter of the easement area, the right to landscape, maintain existing landscaping, replace and replant landscaping within the easement area, and the right to engage in outdoor recreation within the easement area, including such activities as barbecuing, horseshoes, badmitton, and like outdoor games, gardening, and like activities. In addition, the grant of easement specified that the owners, occupants, and invitees of the servient tenement are permitted use of the easement area for the right of ingress and egress only to and from the improvements that presently exist and may hereinafter exist on the

servient tenement outside of the easement area. The evidence establishes as a matter of law that the subject easement was not circumventing the lot size ordinance, because the easement did not effectively convey ownership of a portion of the 565 El Dorado parcel and did not sever the easement area from the 656 El Dorado parcel, therefore, the easement did not reduce the size of the 656 El Dorado parcel to below the minimum lot size mandated by the City ordinances.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds that it appears appropriate to grant summary adjudication of defendant's 1st affirmative defense in favor of plaintiffs.

TENTATIVE RULING # 1: PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION OF THE DEFENDANT'S 1ST AFFIRMATIVE DEFENSE IN FAVOR OF PLAINTIFFS IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THURSDAY, AUGUST 13, 2020. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

SHOULD ORAL ARGUMENT BE REQUESTED, IT WILL BE HEARD AT 1:30 P.M. ON FRIDAY, AUGUST 14, 2020 IN DEPARTMENT ONE UNLESS OTHERWISE NOTIFIED BY

THE COURT; AND APPEARANCES FOR ORAL ARGUMENT WILL BE REQUIRED AT 1:30 P.M. ON FRIDAY, AUGUST 14, 2020 IN DEPARTMENT ONE. IF YOU WOULD LIKE TO APPEAR FOR ORAL ARGUMENT BY ZOOM PLEASE CONTACT THE COURT AT ssams@eldoradocourt.org AND MEETING INFORMATION WILL BE PROVIDED.