SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

ANTHONY GIAMMANCO, CATHY GIAMMANCO, VINCE GIAMMANCO JR., ALAN ROSENTHAL AND ANNELI ROSENTHAL,

Plaintiffs,

vs

HUCKLEBERRY RIDGE NO. 1 HOMEOWNERS ASSOCIATION, INC., CITY OF MONTEREY, et al,

Defendants,

AND RELATED CROSS-ACTIONS /

CASE NO. M63835

DECISION

C.C.P. section 638, 644
(PHASE 2)
(IMPLIED DEDICATION)

Pursuant to Stipulation and Order dated December 10, 2007 appointing the undersigned as referee pursuant to Code of Civil Procedure sec. 638, trial by general reference of the above-entitled matter commenced on December 20, 2007 and continued thereafter in separate phases through February 27, 2009.

Plaintiffs/cross-defendants[1] appeared by Gary E. Gray, Esq.; Defendant/cross-complainant, Huckleberry Ridge No.1 Homeowners Association, Inc. appeared by James Fitzpatrick, Esq. and Charles Swanston, Esq. of Fitzpatrick, Spini & Swanston; Defendant/cross-complainant, City of Monterey, appeared by Deborah Mall, Esq., City Attorney, and M.Christine Davi, Esq., Assistant City Attorney.

Nature of the Case

This matter involves a dispute between plaintiffs/residents of Huckleberry Ridge Subdivision in Monterey, California, the Huckleberry Ridge Homeowners Association, and the City of Monterey concerning the use and maintenance of an approximate 12.95-acre parcel of unimproved land (Parcel B) on which the owner/subdivision developer dedicated to City a Scenic and Utilities Easement. The primary issue is whether the public has the right to use Parcel B and/or several hiking trails thereon. A further question is whether the Homeowners Association <u>or</u> the City is required to maintain the Parcel.

[1] Alan and Anelli Rosenthal were dismissed from the action prior to trial.

Plaintiffs and the Homeowners Association, of which plaintiffs are members, contend that Parcel B is not open to public use. City, on the other hand, contends that at least three hiking trails across Parcel B are open to public use. City agrees to maintain the trails but contends the Homeowners Association is otherwise required to maintain Parcel B.

The parties stipulated at the outset that trial be bifurcated. In Phase1 the referee would decide: 1) whether, *based solely on the interpretation of certain documents (without aid of witness testimony)*, Parcel B is open to public use; and 2) whether the City or the Association is required to maintain Parcel B.

The parties further stipulated that if it were determined in Phase 1 that Parcel B was *not* open to public use, Phase 2 would be convened to determine whether the public had acquired the right to use Parcel B and/or its trails by *implied dedication* resulting from the public's continuous long-standing use of Parcel B or, alternatively, whether the public acquired the right to use Parcel B and/or its trails pursuant to the owner's dedication *in fact, in law, or, implied dedication* pursuant to the provisions of Civil Code sec. 1009 (d) enacted effective 1972.

Trial of Phase 1 was completed in January 2008. On February 1, 2008 the referee determined, based on submitted documents, that Parcel B was not open to public use because, in January 1984, the owner granted to City an open space easement on Parcel B that, by its terms, *expressly excluded public use*. The referee further determined, based on the Association's CC&R's, that the Homeowners Association, the then current owner of Parcel B, was required to maintain it. (Statement of Decision as to Phase1 is hereby incorporated herein by reference and is attached as Exhibit A) Trial then proceeded to Phase 2.

Trial of Phase 2—Implied Dedication

Following completion of substantial discovery including depositions, and hearing and denial of summary disposition motions, trial of Phase 2 commenced on January 12, 2009. (Plaintiffs did not participate in Phase 2 except as witnesses) After the introduction of testimony of many witnesses and documentary evidence, trial concluded with oral argument on February 19, 2009 and supplemental briefing on February 27, 2009. The referee, now having heard and considered the evidence, having read and considered the parties' written briefs and oral arguments, finds and concludes as follows:

Parcel B, an unimproved forested * area of approximately 12.95 acres, lies between City owned Veteran's Park to the north and Quarry Park to the south. Plaintiffs and Homeowners Association members reside in homes generally situated around Parcel B.

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*Parcel B contains one of the last known stands of *native* Monterey pine trees in California.

Pre-1972 Dedication

Use of Trails on Parcel B

The preponderance of evidence establishes that a well-defined walking trail approximately 1600 feet in length crossing the western part of Parcel B connects Veterans Park and Quarry Park. Two additional trails extend westerly from Hermann Drive up-hill to the Veterans Park-Quarry trail. The trails are more particularly shown on City's Ex.10. Substantial evidence establishes that for more than 30 years before 1972, various and diverse members of the general public, including visitors and users of Veterans and Quarry Parks, local residents and their families and friends, openly and continuously used these trails for travel, hiking, dog-walking, jogging, bicycling and general exercise. Neighborhood children crossed the parcel and its trails to walk to and from Walter Colton school. The public users never sought permission, believing Parcel B was part of the adjoining City parks. The owner or owners of Parcel B never objected or interfered with such use of Parcel B, and inferably acquiesced in the public's use of the trails for the described purposes.

The referee concludes, based on the above facts, that the above-described *trails* have thus been dedicated to public use. (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820, 821). "Dedication has been defined as an appropriation of land for some public use, made by the fee owner, and accepted by the public. By virtue of this offer which the fee owner has made, he is precluded from reasserting an exclusive right over the land now used for public purposes. American courts have freely applied this common law doctrine, not only to streets, parks, squares, and commons, but to other places subject to public use. California has been no exception to the general approach of wide application of the doctrine." (Gallagher et al., *Implied Dedication: The Imaginary Waves of Gion-Dietz* (1973) 5 Sw. U. L.Rev. 48, 52, fns. omitted (hereafter *Implied Dedication*).) "

Use of Entire Parcel B

In addition to the described use of Parcel B's trails, the evidence establishes that various and diverse members of the public likewise used *all* of Parcel B for recreational purposes including hiking, camping, exploring, and general outdoor enjoyment. Children considered the parcel their playground. They built forts, played games, rode and jumped bicycles throughout the parcel. Members of the public walked their dogs there, allowing them to roam unleashed throughout the Parcel. Virtually all users of Parcel B and its trails reasonably believed the City owned or controlled Parcel B and that the Parcel was part of Veterans Park and Quarry Park. As in the case of the trails, the public never sought permission and the owners of Parcel B never objected or interfered with the public's use.

Although City has requested a finding that only the trails across Parcel B are dedicated to public use, the evidence, as stated, establishes much wider public use of the

parcel, indeed of the entire Parcel. The amended cross-complaint filed by the Homeowners Association seeks a declaration of all rights and interests in Parcel B. Limiting the public's use of Parcel B to only its trails would, in light of the manner in which the public has historically used the entire parcel, likely prove unworkable. Historically, the public's use of the trails has been joined to its use of the entire parcel. Moreover, since City is herein authorized to bring this action on behalf of the public, it necessarily represents all public users. Accordingly, the referee finds that the *whole* of Parcel B has been dedicated to public use and that the public has acquired a *recreational easement* over the entire parcel. *(Los Angeles County et al v. Berk* (1980) 26 Cal.3d 201; *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29)

Post-1972 Dedication (Civil Code sec. 1009)

Civil Code sec. 1009 (d) provides: "*[W]here a governmental entity is using private lands by an expenditure of public funds on visible improvements on or across such lands or on the cleaning or maintenance related to the public use of such lands in such a manner so that the owner knows or should know that the public is making such use of his land, such use, including any public use reasonably related to the purposes of such improvement, in the absence of either express permission by the owner to continue such use or the taking by the owner of reasonable steps to enjoin, remove or prohibit such use, shall after five years ripen to confer upon the governmental entity a vested right to continue such use." (emphasis added)*

The evidence discloses that following enactment of Civil Code section 1009 effective 1972 and particularly during the years 1990 and following, City expended substantial public funds to maintain and preserve Parcel B. The City utilized and paid its employees as well as California Department of Forestry crews including State prison inmates to clear and eliminate fire hazards, remove brush and poison oak, control erosion and plant trees on Parcel B. Employees also constructed steps at a steep portion of trail adjacent to Quarry Park, and installed trail-markers and signs on the parcel. These improvements were substantially related to the public's on-going and continuous use of Parcel B.

Although City employees were authorized to enter Parcel B for the purpose of maintaining the sewer and utility easements on the property, they and the forestry workers also performed the *additional* maintenance and improvement work described above. The performance of such additional work was obvious. Therefore, the fact that work, in addition to sewer maintenance work, was being performed, should have been known by members of the Homeowners Association.

The Association further had notice of the public's open and continuous use of Parcel B for hiking and other recreational purposes. The evidence further establishes that the Association neither granted permission nor took steps to prohibit such use and that such use and the City's expenditure of funds continued for more than 5 years.

Based on the evidence and the provisions of Civil Code sec. 1009, the referee concludes the City acquired the vested right, on the public's behalf, to continue use of Parcel B's trails and of Parcel B itself for the described recreational and related purposes.

Final Subdivision Map Did Not Extinguish the Public Easement on Parcel B

The public's recreational easement on Parcel B was not abandoned or extinguished by the Final Subdivision Map filed in 1984. Government Code sec. 66434 provides that the filing of a Final Map constitutes abandonment of public easements not shown on the map "*provided that a written notation...is listed by reference to the recording data or other official record creating ...public easements and certified to...by the clerk of the legislative body approving the map.*"

No recording data or official record created the public easement at issue in this case. Thus, section 66434 is, by its very terms, not applicable and the Court should not expand the Statute's reach. Further, no other notice of abandonment was provided to the public in which the easement was vested. Also, Government Code §66434(g) was not adopted until 1997, and was not effective until January 1998 - some 15 years after the Huckleberry Ridge subdivision final map was recorded. Therefore, Government Code §66434(g) is not applicable to this case.

Nor was the easement extinguished under Civil Code section 811 (3). The developer's January 26, 1984 deed merely provided that "This easement...<u>is not to be construed</u> as authorizing" public use. The deed thus only made clear that it, itself, did not authorize public use. The owner's deed did not, and could not, unilaterally extinguish or restrict the public's vested right derived from the owner's prior dedication. In short, the deed does not, by its terms, constitute an integrated agreement precluding proof and effect of the owner's prior dedication of Parcel B to public use. And, by the same token, the fact that City "accepted" the grant did not operate to extinguish or abandon the previously created easement by dedication.

In any event, as determined above, City, on behalf of the public, *thereafter* acquired a vested public use easement in Parcel B under Code of Civil Procedure sec. 1009 (d). In the referee's view, the public was not estopped from acquiring such easement.

For the foregoing reasons, the referee determines the public has a vested right to use Parcel B and its trails for general recreational purposes including, but not limited to, hiking between Veterans Park and Quarry Park.

Privacy of Plaintiffs and Residents Adjacent to Parcel B

The evidence discloses that the privacy interests of some residents of Huckleberry Ridge Subdivision—plaintiffs in particular—are adversely affected by the close proximity of hikers, hiker's dogs, and other users of Parcel B and its trails. The Southwest portion of the Veterans Park-Quarry Park Trail runs very close to plaintiffs'

home exposing its occupants and the home interior to view of passing hikers. Often, dogs roam off-leash and enter private property with their owners following.

Plaintiffs purchased their properties and constructed their homes reasonably believing Parcel B was not open to the public. However, as seen, Parcel B had been dedicated to public use and although that fact was unknown to plaintiffs when they purchased and improved their properties, they are now left to accept it. *(See, Los Angeles County et al v. Berk* (1980) 26 Cal.3d 201, 220-221).

The referee recognises that Paragraph 2(a) of the 1984 Open Space Easement with Covenants Deed prohibits "...the erection, construction, placement or maintenance of any improvement, building or structure or other thing whatsoever..." on Parcel B. Nevertheless, no reason appears why, in equity and fairness, the privacy interests of plaintiffs on the one hand and public use of Parcel B on the other cannot each be accommodated. To the extent that the recreational easement arising from the implied dedication and acceptance of Parcel B is inconsistent with the restrictions in the Open Space Easement Deed, those restrictions are unenforceable. Consequently, paragraph 2(a) of the 1984 Open Space Easement with Covenants may not be enforced to prohibit the construction and maintenance of fences and alternative trails that would protect nearby residents from the intrusion on the privacy associated with the public presence on Parcel B. These protections should take into account not only current public use, but also the increase in public use seen on Parcel B since this action commenced, which increase will likely continue in the future. Balancing the hardships to the parties, the referee finds that the recreational easement over Parcel B arising from public use permits measures to protect the privacy of nearby residents from the public presence on Parcel B.

The referee orders that a fence be constructed in the southwest section of Parcel B as indicated on Exhibit B. The referee orders aesthetically and environmentally compatible fencing such as grape-stake fencing. The fence shall be 6' high and solid wood. The southwest portion of the trail above plaintiffs' property shall be rerouted as shown on Exhibit B. The plaintiffs shall select the type of fence and shall pay for its installation and materials. Thereafter, the City shall maintain the fence.

In order to protect the privacy of the residences located on the north side of Dorey Way, and to generally discourage the public from using the section of Parcel B that is in close proximity to their back yards, native shrubs such as a Ceanothus "Ray Hartman" shall be planted where indicated on Exhibit B. The type of native plant shall be determined by the City's Forester. The shrubs need not be planted in a straight line; however, they should be planted and maintained in a manner such that the plants once established are contiguous to one another and, together, the plants function as a vegetative screen that will serve the purpose of protecting the privacy of the Dorey Way residents. The City shall purchase the plants, install the plants, and water them until such time as the City's Forester determines that they are established (approximately one time per week for two years). The plaintiffs shall provide the City with access to the sewer maintenance road on Parcel B through their driveway, as needed, so that the City may appropriately establish and maintain the plants. If the plants fail, as determined by the

City's Forester, or after establishment are destroyed or die, the City shall replace them. The Homeowners' Association shall pay to the City the sum of $7,200.00 to cover the costs associated with the purchase, installation, and establishment of the plants. This payment is due 30 days from the entry of Judgment.

The use of Parcel B shall be consistent with Monterey City Code §23-5 which makes it unlawful "...for any person to enter or remain on the premises of any City park between the hours of 10:00 p.m. and 6:00 a.m. without written authorization from the Recreation and Community Services Director." Dogs are required to be on a leash while on Parcel B consistent with regulation in Veteran's Park and Quarry Park. The Homeowners' Association shall remove any no trespassing signs located on Parcel B within 5 days of the date of this decision.

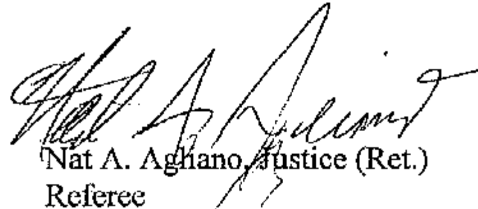
Maintenance of Parcel B

It was determined in Phase I that the Homeowners Association was required to maintain Parcel B. However, that determination was based on a provision of the Association's CC&Rs that, in turn, was based on the assumption that Parcel B was not subject to public use. With Parcel B and its trails now open to public use, City owns the dominant tenement and accordingly, is required to maintain Parcel B. The degree of maintenance required shall be determined by the City. The Homeowners' Association is relieved of any obligation to maintain Parcel B or any improvements on Parcel B.

Miscellaneous

The plaintiffs' first and third causes of action against the Homeowners' Association are still pending.

May 12, 2009



Nat A. Agliano, Justice (Ret.)
Referee

16 DOPEY WAY