

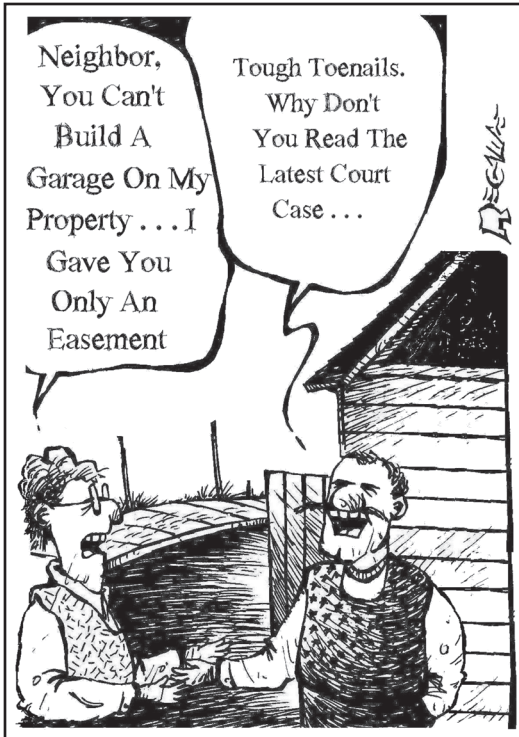


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ARTICLE

Recent Exclusive Easement Case Opens the Door to “Construction” Issues

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I. INTRODUCTION

Can your neighbor build an entire garage on your property? For most people, this question immediately elicits a resounding “no way.” With the recent case of *Blackmore v. Powell*,¹ addressing this very issue, the answer appears to be “maybe so—it depends....” As detailed below, whether a structure may be built depends on the “construction” of numerous concepts pertaining to easements.

This publication has addressed the changes in long-standing common law principles relating to easements twice in the past three years.² Both articles discussed, in part, the related 1996 cases of *Silacci v. Abramson*³ (“*Silacci*”), and *Mehdzadeh v. Mincer*⁴ (“*Me-*

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bdizadeb”). Both *Silacci* and *Mehdizadeb* support the general proposition that a landowner may not obtain an *exclusive prescriptive easement* through the existence of encroachments, fences—or even garages—on another’s real property. These cases suggested a trend in California law away from long-standing common law rules upholding the scope and extent of prescriptive easements based on prior use and toward creating equitable exceptions for such prescriptive rights based on a “reasonableness” standard.

The second article also addressed the 1995 case, *Scrubby v. Vintage Grapevine, Inc.*⁵ (“*Scrubby*”). There, in a case involving a deeded non-exclusive easement, the court of appeal allowed encroachments within the easement so long as they did not “‘interfere unreasonably’ with the with the easement’s purpose,” again suggesting a trend away from common law rules and towards a “reasonableness” standard.

In apparent furtherance of this trend, in *Blackmore v. Powell*⁶ (“*Blackmore*”), the Second District Court of Appeal, Division 4, this year addressed the issue of exclusive easements in the context of an *express grant of easement* (as in *Scrubby*), as opposed to an easement created by prescription. In *Blackmore*, the court upheld an express grant of easement that permitted the construction, and the exclusive use, of a garage on the adjacent servient tenement. Forced to address the rejection of similar exclusive easements in *Silacci* and *Mehdizadeb* as well as subsequent decisions, the *Blackmore* court distinguished those cases on the ground that the easement rights there derived from prescriptive use as opposed to a grant.

Unlike these cases, respondent’s claim of an easement arises not from his conduct, but from the 1979 grant deed, which expressly accords him rights short of fee ownership.⁷

Blackmore did not cite any legal authority for this comparison, nor did it provide any rationale for its determination. But the court apparently viewed the easement rights created by express deed as *superior* to easement rights created by “conduct.” Arguably, the court’s holding is consistent with, or at least continues the trend in California, of moderating the real property rights that may be obtained through prescriptive use.

The *Blackmore* decision also provides the mirror image of *Scrubby*—but viewed from the perspective of the other party. There, the court allowed encroachments (i.e., exclusive possession) by the owner of the *servient* tenement on a wide access easement. In *Blackmore*, the court allowed the *dominant* easement holder an exclusive easement for a garage on the servient property.

Where this trend leads the law of easements in California is not completely clear. One result may be the moderation of bright-line, common law rules of easements for application to an ever-increasing urbanized society. Common law prescriptive rights were mostly developed in a rural setting and economy, whereas today, in a more urban society, most prescriptive

claims arise from fence disputes and encroachments. Easements created by other means may also be construed in accordance with modern needs of an urbanized society. Arguably, strict, bright-line rules may not be appropriate in every situation and the courts increasingly seem headed toward a standard of “reasonableness” in resolution of easement issues. This trend may be consistent with related attempts at modernizing the law, such as the rejection of caveat emptor and the creation of comparative negligence.

II. BACK TO FIRST YEAR LAW SCHOOL— WHAT IS AN EASEMENT?

Most non-attorneys think they know what an “easement” is—the right of one person to use the property of another person for access (e.g., “ingress and egress”). Also in a vast majority of cases, those access easements are “non-exclusive”—i.e., the property subject to the easement can be used by the easement holder (the “dominant tenement”) and by the owner of the fee title (the “servient tenement”). With respect to the cases discussed here, the easements are appurtenant (as opposed to “in gross”) and run with the land so as to benefit the dominant tenement and burden the servient tenement. In other words, they are not personal interests or licenses, but interests in real property.

A conceptual difficulty arises when considering an “exclusive” easement. If an easement is exclusive, does that mean that only the dominant tenement owner can use the property encompassed in the easement? And if so, then how does an exclusive easement differ from fee title ownership?

Indeed, the California Supreme Court, in a case cited and discussed in *Blackmore*, previously discussed its unease with the notion of exclusive easements because they start to look like fee title ownership.

“Furthermore, an ‘exclusive easement’ is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. (2 Thompson, Real Property [1939], sec. 578; Jones, Easements, sec. 378, p. 302.) 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 omitted]⁸

The *Blackmore* court addressed the issue of an exclusive easement. First, it noted that easements are distinguished from estates in land (such as ownership in fee title) and leaseholds, which are forms of possession of land.⁹ In contrast, easements are considered a “non-possessory” right to a specific use or activity on another’s property, which right “must be less than the right of ownership.”¹⁰

The conceptual difficulty, therefore, is the line delineating an exclusive easement from a possessory right.

III. ALONG CAME *SILACCI* AND *MEHDIZADEH*

As a prelude to these related 1996 decisions, the 1975 case of *Raab v. Casper*¹¹ (“*Raab*”) rejected a trial court’s determination with respect to a prescriptive easement for physical encroachments. In contrast to the 1996 decisions, the *Raab* court did not define the dispute as relating to an exclusive prescriptive easement. Instead, it concluded that the elements of adverse possession had not been satisfied.

In *Raab*, the defendants had mistakenly, and in good faith, constructed a cabin on the plaintiff’s property. The trial court concluded that the defendants were “good faith improvers” and realigned the property line to adjust for the cabin and surrounding land. The trial court also held that the defendants had acquired a prescriptive easement, at least covering their driveway, utility lines and yard.

The court of appeal rejected both findings and remanded the matter to the trial court. Although it did not label the issue as one relating to “exclusive easements,” it focused on the difference between “a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the use of land, the other with possession.” The court reversed and remanded, concluding that because defendants sought to exclude plaintiffs from their “domestic establishment,” they were in fact seeking fee title, but they had not satisfied the elements of adverse possession.

Then, in 1996, came *Silacci*. The defendants had fenced in a portion of the plaintiffs’ property and sought an exclusive prescriptive easement. The trial court agreed with the defendants. The court of appeal reversed, relying almost exclusively on *Raab* and distinguishing the 1991 decision in *Otay Water Dist. v. Beckwith*¹² (“*Otay*”). Relying on the notion that “[a]n exclusive prescriptive easement is . . . a very unusual interest in land,” and that such an interest would preclude the landowner from using his or her land, the court concluded that an exclusive prescriptive easement, “has no application to a simple back yard dispute like this one.” Following *Raab*, it concluded that allowing an exclusive prescriptive easement would permit the defendant to acquire the equivalent of possession of plaintiff’s land. The court reversed and remanded, but expressly allowed the defendants to argue that they could satisfy the requirements for adverse possession (as opposed to a prescriptive easement).

A few months later in *Mehdizadeh*, the defendants obtained a survey and discovered that the fence line with their neighbor was not on the property line, so defendants removed the old fence and built a new fence on the property line. Plaintiffs filed suit, and the trial court ruled in favor of the plaintiffs both on the agreed-boundary doctrine and on the creation of a prescriptive easement. The court of appeal reversed on both grounds. It focused on the difference between obtaining title to the property through

adverse possession, and obtaining an easement to use property through prescription. It relied on *Raab* and *Silacci*. It was also forced to confront *Otay*.

Subsequent decisions have affirmed *Raab*, *Silacci*, and *Mehdizadeh*.¹³ These cases generally hold that a landowner cannot obtain an exclusive prescriptive easement to use the land of another through encroachments or fences.

IV. OTAY—FITTING A SQUARE PEG INTO A ROUND HOLE

Silacci and *Mehdizadeh*, and all subsequent cases addressing exclusive prescriptive easements, have had to distinguish—or more-cynically stated, ignore—the holding in the 1991 decision of *Otay*.¹⁴ There, the plaintiff Otay Water District filed suit against an adjacent property owner seeking quiet title to a prescriptive easement. The plaintiff had mistakenly built its reservoir on part of defendant’s property. That mistake was discovered twenty-five (25) years after the reservoir was constructed. The trial court ruled in favor of the Otay Water District.

On appeal, defendant argued, among other things, that a prescriptive easement could not be exclusive and that “an exclusive easement is tantamount to a fee estate,” citing to *Raab* for its holding. The court rejected these arguments, concluding that the easement granted was “significantly less than a fee title” in part because plaintiff could only use the property for reservoir purposes—“[i]f Otay stops using the property as a reservoir or increases the burden on [defendant’s] property, Otay’s easement can be taken away.” “Such a restricted use is not the same as a fee interest.”

Silacci and *Mehdizadeh* and subsequent exclusive prescriptive easement cases have attempted to limit the *Otay* case to its facts as a “public policy” case (i.e., it related to a public interest in securing water for public use). For example, *Silacci* distinguished *Otay* with the following two sentences:

The *Otay Water Dist.* case must be limited to its difficult and peculiar facts. A public water company’s right to keep drinking water safe from contamination must be given precedence.¹⁵

The *Mehdizadeh* court similarly concluded that *Otay* “must be limited to its facts.” It generally stated that courts may recognize exclusive easements for, “the socially important duty of a utility to provide an essential service, such as water or electricity.”

V. THE BLACKMORE COURT PREVIOUSLY REJECTS AN EXCLUSIVE PRESCRIPTIVE EASEMENT, BUT UPHOLDS AN EXCLUSIVE EASEMENT (IF CREATED BY GRANT, NOT PRESCRIPTION)

Interestingly, the same Division that heard *Blackmore* in 2007 (Second District Court of Appeal, Division 4) addressed the issue of an exclusive prescriptive easement in a 2006 unpublished decision, *Morrow v. Winkler*.¹⁶

There, the plaintiffs filed suit, in part to establish prescriptive easements over several structures that were built on express easements, namely a gate, a fence, a retaining wall and steps leading from the street to the driveway. The trial court refused to recognize an exclusive prescriptive easement. The court of appeal affirmed, citing to *Raab*, *Silacci*, and *Mehdizadeh*. With respect to the encroaching structures, it concluded that, “the creation and maintenance of the structures constitutes a use of land ‘so comprehensive as to supply the equivalent of ownership. [citing to *Raab*].” “Respondents are prevented from any use of the land where the structures exist.”

As an aside, the court also discussed, and rejected, the application of “equitable balancing” as set forth in the decision of *Hirschfield v. Schwartz*¹⁷ (“*Hirschfield*”). In cases involving equitable hardship, the *Hirschfield* holding allows a court to fashion an equitable remedy—for example, in a case involving encroachments, by allowing time to remove the encroachments or creating a personal license so that the encroachments must be removed upon sale or conveyance of the dominant owner’s property.

As noted above, leading up to the *Blackmore* decision, the trend of California authority—and indeed even in the Division that heard *Blackmore*—was that exclusive use of another’s property, such as through fencing or encroachments, could not result from prescriptive easement rights. Because common law does not distinguish between the extent of prescriptive easement rights as compared to express easement rights (i.e., once those rights are established), it was reasonable to expect that a court would reject an express easement that similarly amounted to a possessory fee interest.

In *Blackmore*, the plaintiff filed suit for declaratory relief stating that he was entitled to build a garage on an easement appurtenant to his property. The trial court ruled in his favor. On appeal, the servient owner argued that the trial court misinterpreted the express appurtenant easement and that the easement violated the Subdivision Map Act. The court of appeal rejected both claims and affirmed the judgment.

The express easement derived from an 1979 grant deed. It stated that the easement was for, “parking and garage purposes” over a defined area (encompassing 6,138.29 square feet). *Blackmore* later purchased the dominant tenement, and in 2003, “obtained a building permit from the City of Glendale to erect a two-car garage covering approximately 660 square feet—roughly 11 percent—of the easement.” The court framed the argument of the servient tenement owner as follows: “The crux of their argument is that according to respondent the right to build a garage on the easement for respondent’s exclusive use amounts to awarding respondent ownership in fee simple (or its equivalent) of a portion of their property.”¹⁸

After citing a series of cases involving interpretation of easements, the court concluded that the parties intended to grant an easement, “for parking and garage purposes.” The court agreed with the trial court’s conclu-

sion that for all practical purposes the construction and use of the garage must be “exclusive”:

The trial court further concluded that respondent was entitled to exclusive use of the garage as “a necessary incident” of the easement, reasoning that a shared garage would generate disputes about allocation of parking spaces, security, and maintenance costs. In view of the evidence presented at trial, we see no error in the determination that nonexclusive use of the garage would interfere unreasonably with respondent’s rights. (*Scrubby v. Vintage Grapevine, Inc.*, 37 Cal. App. 4th 697, 43 Cal. Rptr. 2d 810 (1st Dist. 1995), as modified on denial of reh’g, (Sept. 6, 1995).)¹⁹

Now faced with the prospect of upholding an “exclusive easement,” the court reviewed the generalized language of easements from *Raab* and from *Otay*. The court’s decision to uphold the exclusive written easement was based on three grounds. First, the court concluded that the conveyance constituted an easement, as opposed to fee title ownership, because:

- (1) the rights accorded respondent under the 1979 deed are circumscribed; and
- (2) the award of exclusive control over the garage—which will occupy only a small portion of the easement—is intended solely to protect these restricted rights.

The court never explained its reasoning. Most likely, it intended that because the land would be used solely for one purpose—i.e., a garage—and not any and all purposes, the use was “circumscribed” and thus could be interpreted as an easement as opposed to fee title. The *Otay* court had made the same argument. But, the *Otay* case has been limited to its facts as a public utility case, and no such public purpose existed in *Blackmore*. (This argument would support exclusive prescriptive easements in encroachment cases, although perhaps not in mistaken fence cases.)

Second, the court relied on the case of *Heath v. Kettenhofen*²⁰ (“*Heath*”). In *Heath*, a forty (40) foot wide easement existed on defendant’s property “for roadway and utilities.” The defendant sought to fence off the easement, which resulted in the litigation. The trial court not only upheld the easement, but also held that both plaintiff (on the north end) and defendant (on the south end) were entitled to exclusive use of a ten (10) foot strip for parking purposes. The court of appeal affirmed.

Interestingly, *Blackmore* cited *Heath* for the proposition that granting such exclusive use of an easement, “was necessary to protect the easement holder’s rights.” What the *Blackmore* court did not address was that in *Heath* the court found that the defendant’s parking in “that portion of the easement was an interference with plaintiff’s right to use the easement as a means of access to their property.” Alternatively stated, the court’s creation

of exclusive use—on the north side for plaintiff, and on the south side for defendant—was more akin to an injunction to prevent the defendant from interfering with plaintiff’s right to use the easement.

Third, the appellant servient owners argued to the *Blackmore* court that exclusive control over the garage was inconsistent with the grant of an easement, citing *Silacci* and *Mehdizadeh* and subsequent exclusive prescriptive easement cases. The court rejected this argument, because the cases involved acquisition of easement rights by prescription and were thus “factually distinguishable.” According to the *Blackmore* court:

Unlike these cases, respondent’s claim of an easement arises not from his conduct, but from the 1979 grant deed, which expressly accords him rights short of fee ownership.²¹

The court never explained why it believed that an easement created by “conduct” should be viewed as affording lesser rights than an express grant of easement.

VI. THE *BLACKMORE* COURT REJECTS THE ARGUMENT THAT AN EXCLUSIVE EASEMENT VIOLATES THE SUBDIVISION MAP ACT

The second principal argument raised by the servient property owner in *Blackmore* was that the easement, as construed by the trial court, violated the Subdivision Map Act (“Act”), by constituting a subdivision under the Act. They argued that because the easement holder failed to obtain approval for the easement, it contravened the Act.

The court disagreed. Relying on “statutory interpretation” and “legislative intent,” the court focused on statutory language that a “subdivision” related to the division of land, “for the purpose of sale, lease or financing.” The court then concluded:

In our view, these provisions, by their plain language, encompass the division of real property into units that constitute possessory interests in land, including leaseholds, but not the creation of the private easement at issue here. As we have indicated (see pt. A., ante), 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.²²

Arguably, this conclusion is a bit circular. By first concluding that the interest was an easement, the court’s reasoning would preclude any finding of violation of the Act. For example, given the court’s acceptance of exclusive granted easement, one might envision the use of easements as a substitute for leases or other real property financing devices. If so, the court’s reasoning may need to be revised in the future.

Finally, the court cited to the 1987 case of *Robinson v. City of Alameda*.²³ There, the court held that an agreement to allow one neighbor to “use a rear portion” of the other neighbor’s property did not violate the Act. The court also rejected the holding in *Pescosolido v. Smith*,²⁴ and four opinions of the Attorney General that concluded that an exclusive easement constitutes a subdivision under the Act. The court deemed these opinions “factually distinguishable.” The court determined that the grant deed in *Pescosolido* “created ownership interests in land.” Again, arguably this conclusion is a bit circular because the result is reached merely by defining the interest, and *visa versa*. The court similarly dismissed the Attorney General decisions because they arose from ownership interests.

Finally, in addressing concerns that the court’s conclusion would encourage parties to circumvent the Map Act through the use of the exclusive easements, the *Blackmore* court encouraged future courts to be vigilant, but concluded that “no such scheme is presented here.” The court concluded that, “the easement is too restricted in scope to constitute a subdivision under the Act.” This conclusion appears to focus on the size of the encroachment/easement—here a garage—as opposed to the intent and the use of the neighbor’s property.

VII. CONCLUSIONS

While one may criticize the *Blackmore* decision—and in particular its acceptance, with little detailed analysis, of an exclusive easement—the ruling is in accord with recent California decisions regarding easements that adopt a “reasonableness” standard as opposed to a bright-line rule. As an observation, throughout the decision the court focused on the size of the encroachment and its limited purpose. For example, in disposing of the Attorney General opinions regarding exclusive easements, the 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.²⁵

One may speculate, therefore, that if the garage covered a larger portion of the easement, it would “unreasonably” interfere with the property owner’s rights, and the decision would be different. If the garage was not a garage, but instead was a house and the limited use purpose was a “household,” then, presumably, the court would rule otherwise.

The courts’ collective movement away from common law rules and towards a “reasonable” based standard creates more questions, but allows more flexibility to resolve disputes. It is also a trend that may derive from necessity as the population continues to move from rural living, in which the old common law rules were derived, to a urbanized society, in which accommodations are required to ameliorate the interactions of competing

property rights of adjacent owners, regardless of the method by which the easement rights were acquired.

NOTES

1. *Blackmore v. Powell*, 150 Cal. App. 4th 1593, 59 Cal. Rptr. 3d 527 (2d Dist. 2007).
2. Ten Years After Silacci, Mehdizadeh and Scruby, Neighbors in California are Still Behaving Like the "Hatfields and McCoys," Miller & Starr Newsalert (Volume 16, No. 6, July 2006); Too Much of a Good Thing: California Courts Weigh in on Exclusive Prescriptive Easements, Miller & Starr Newsalert (Volume 14, No. 6, July 2004).
3. *Silacci v. Abramson*, 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37 (6th Dist. 1996).
4. *Mehdizadeh v. Mincer*, 46 Cal. App. 4th 1296, 54 Cal. Rptr. 2d 284 (2d Dist. 1996), as modified on denial of reh'g, (July 24, 1996).
5. *Scruby v. Vintage Grapevine, Inc.*, 37 Cal. App. 4th 697, 43 Cal. Rptr. 2d 810 (1st Dist. 1995), as modified on denial of reh'g, (Sept. 6, 1995).
6. *Blackmore v. Powell*, 150 Cal. App. 4th 1593, 59 Cal. Rptr. 3d 527 (2d Dist. 2007).
7. *Blackmore, supra*, 150 Cal. App. 4th at 1601.
8. *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 578-79, 110 P.2d 983, 133 A.L.R. 1186 (1941).
9. *Blackmore, supra*, 150 Cal. App. 4th at 1598.
10. *Blackmore, supra*, 150 Cal. App. 4th at 1598.
11. *Raab v. Casper*, 51 Cal. App. 3d 866, 124 Cal. Rptr. 590 (3d Dist. 1975).
12. *Otay Water Dist. v. Beckwith*, 1 Cal. App. 4th 1041, 3 Cal. Rptr. 2d 223 (4th Dist. 1991).
13. *Harrison v. Welch*, 116 Cal. App. 4th 1084, 11 Cal. Rptr. 3d 92 (3d Dist. 2004); *Kapner v. Meadowlark Ranch Ass'n*, 116 Cal. App. 4th 1182, 11 Cal. Rptr. 3d 138 (2d Dist. 2004).
14. *Otay Water Dist. v. Beckwith*, 1 Cal. App. 4th 1041, 3 Cal. Rptr. 2d 223 (4th Dist. 1991).
15. *Silacci v. Abramson*, 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37 (6th Dist. 1996).
16. *Morrow v. Winkler*, 2006 WL 2349995 (Cal. App. 2d Dist. 2006), unpublished/noncitable.
17. *Hirshfield v. Schwartz*, 91 Cal. App. 4th 749, 110 Cal. Rptr. 2d 861 (2d Dist. 2001).
18. *Blackmore, supra*, 150 Cal. App. 4th at 1598.
19. *Blackmore, supra*, 150 Cal. App. 4th at 1599.
20. *Heath v. Kettenhofen*, 236 Cal. App. 2d 197, 200, 45 Cal. Rptr. 778 (1st Dist. 1965).
21. *Blackmore, supra*, 150 Cal. App. 4th at 1601.
22. *Blackmore, supra*, 150 Cal. App. 4th at 1604.
23. *Robinson v. City of Alameda*, 194 Cal. App. 3d 1286, 239 Cal. Rptr. 926 (1st Dist. 1987).
24. *Pescosolido v. Smith*, 142 Cal. App. 3d 964, 191 Cal. Rptr. 415 (5th Dist. 1983).
25. *Blackmore, supra*, 150 Cal. App. 4th at 1605.

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