2005 WL 1793908
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Fourth District, Division 2, California.

THE COLONIES PARTNERS, L.P., Plaintiff and Respondent,
v.
SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, Defendant and Appellant.

No. E034524.
|
(Super.Ct.No. RCV 61971).
|
July 29, 2005.

APPEAL from the Superior Court of San Bernardino County. Peter H. Norell, Judge. Reversed with directions.

Attorneys and Law Firms

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OPINION

GAUT, J.

1. *Introduction*

***1** The Colonies Partners (Colonies) owns 289 acres [1] of real property in the City of Upland. The property was originally subject to a number of easements granted to the San Bernardino County Flood Control District (the District), or its predecessor, in the 1930's and the 1960's. In particular, an easement granted in 1933 allowed the construction of Desilting Basin No. 6 on the subject property. In 1939, a broader easement was granted for general flood control purposes.

[1] The present case concerns 289 acres of the original 404 acres acquired by Colonies in 1997.

Colonies has developed its property for residential and commercial uses. Part of its specific plan for development included a drainage and flood control plan requiring the construction of a new larger Basin A in the general area formerly occupied by Basin No. 6.

Colonies filed the present action seeking to quiet title to its property against any claims by the District based on its flood control easements. After trial, the court found in favor of Colonies and specifically found the construction of the Cucamonga Channel in 1980 obviated the need for any easements to help control flooding from Cucamonga Creek. For that reason, the trial court concluded the District had abandoned the easements by 1997. On appeal, the District and Colonies now dispute whether the flood control easements, especially those allowing the District's use of former Basin No. 6, now Basin A, are still valid. [2]

[2] Basin A was apparently constructed and completed after trial in June 2003 and entry of judgment in September 2003.

The District makes three legal arguments: first, abandonment required a formal resolution; second, no common-law abandonment was established; and third, Colonies is estopped from challenging the easements' validity. Colonies disputes the necessity for a resolution of abandonment and maintains that substantial evidence supports the trial court's decision.

We reverse the judgment. We hold that substantial evidence shows the relevant easements still exist for flood control purposes but may be more limited in scope than Basin A as designed and constructed. On remand, the trial court must decide the scope of the flood control easements, especially the 1933 and 1939 easements.

2. *Background*

We summarize the subject property's 70-year history, taking due notice when the parties disagree about the factual record.

The 289 acres owned by Colonies are located in the former 750-acre Cucamonga Creek Spreading Grounds or Works, once owned by the San Antonio Water Company (San Antonio), and part of the original alluvial fan of the Cucamonga Creek, also described by Colonies's expert as Watershed B. Watershed A is north and west of Colonies's property and does not naturally drain onto Colonies's property.

Periodically between 1914 and 1969, the area of Watershed B suffered episodes of severe flooding. In the 1930's, San Antonio granted several easements to the District's predecessor, San Bernardino County, for flood control purposes. The 1933 easement allowed the construction of a "wall-and-levee" system including Desilting Basin No. 6 on 30.67 acres with a capacity of 250 acre-feet on Colonies's property. A 1935 easement, and subsequent easements, allowed the 19th Street storm drain located in Watershed A to discharge either into Basin No. 6 in Watershed B or a Reception Ditch or both. The 1939 easement granted the District the blanket right with the owner's consent, to construct and maintain "ditches, shafts, embankments, walls and other diversion structures, including excavations, dams, outs, weirs, dikes, and all kinds of conduits and their appurtenances, all for the purpose of conserving and controlling flood water on, over and across said real property." The 1939 easement encompassed the whole Cucamonga Wash.

***2** Other easements were granted in 1962 and 1963. The District's 1966 comprehensive storm drain plan contemplated using Basin No. 6 to control runoff from the 19th Street storm drain.

The worst flooding occurred in 1969, leading to the construction of the concrete Cucamonga Channel in 1980 by the United States Army Corps of Engineers. The channel diverted the waters of Cucamonga Creek to the area east of Colonies' property.

According to the District, sand and gravel excavations, occurring behind Basin No. 6's levee in the 1960's and 1970's, had increased the basin's footprint to 82 acres by 1988. A draft Water Recharge Report, prepared for the City of Upland in 1990, recognized the use of Basin No. 6 as a recharge basin, for storm water retention, and for flood control. The report contemplated the conversion of Basin No. 6 into a impermeable decorative lake and made recommendations to replace its lost recharge capacity.

In contrast, Colonies asserts the District ceased to maintain or use Basin No. 6 after the 1980 completion of the Cucamonga Channel. Colonies relies on a 1990 drainage map that does not show any use being made of the area of Basin No. 6 for flood control or drainage originating from the 19th Street or proposed 20th Street storm drains. As noted by the trial court, the District's inspection reports between 1988 and 1991 document an accumulated list of deferred maintenance and repairs for Basin No. 6. For example, a report dated April 1990 comments, "This is no longer a flood control facility."

In June 1990, the District applied to the state Department of Water Resources to remove the dam (or levee) forming part of Basin No. 6 because it "is no longer needed due to the construction of the Cucamonga Debris Dam and Channel." Between 1992 and 1997, the District made plans to delicense Basin No. 6 because Cucamonga Channel had reduced the need for it and "precluded its original function." Delicensing occurred because it would cost $60,000 to repair the dam and $30,000 annually to maintain it and also because water storage could continue below ground without the need for the dam.

In July 1997, Colonies acquired the property. The delicensing was completed in October 1997 when the levee was notched and the District stopped using Basin No. 6 to store more than 15 acre-feet of above-ground water. There was evidence from both Colonies and the District's witnesses that the District intended and continued to use the underground capacity of Basin No. 6 for storage.

The planned eastern extension of freeway 210 caused changes in the north-south drainage patterns in Watershed A. In 1998, Colonies expressed concern to the District about the proposed 20th Street drain and plans "to outlet into existing Basin # 6, located within our property limits." For the next several years, there were ongoing proposals and discussions about the design of the 20th Street drain and its effect on Colonies' property. In November 1999, Colonies gave its

permission, "conditioned upon the use of a stone textured form liner for all exposed concrete surfaces ... within the outlet structure," to construct part of the 20th Street drain on its property in exchange for the District's release of the easements on Phase 1 of Colonies' development. The storm drain improvement plans supplied to Colonies included hydraulic data of 3,380 cubic feet per second (cfs). Colonies also agreed the District was not releasing its easements on the remaining property, including Basin No. 6.

***3** The District then recommended constructing the 20th Street and San Antonio drains "to intercept the flows from a 100-year storm and convey them into the south into the existing flood control basin known as Cucamonga Basin No. 6." In January 2000, the District, Upland, and SANBAG (San Bernardino Associated Governments) agreed to build the 20th Street storm drain to collect storm runoff and deposit it in Basin No. 6 using the outlet structure located on Colonies' property.

The trial court found "there was no estoppel created by the November 24, 1999 letter because [the District] had formed the intention to go forward with the 20th Street Drain irrespective of whether [Colonies] gave an approval."

In January 2000, the District agreed to transfer the 19th Street storm drain to the City of Upland and to assume ownership of the 20th Street drain from Upland. In June 2000, construction on the 20th Street storm drain began under the District's supervision. Construction was completed in 2001 at the cost of $15 million borne by SANBAG and Upland.

Throughout 2000, 2001, and 2002, Upland, the District, and the Colonies continued to try to resolve the drainage issues concerning the 19th and 20th street storm drains and the 210 freeway in a series of "water summit" meetings. In August 2001, Colonies first raised a question about the validity of the District's easements in a meeting with the District. It appears that a final breakdown of negotiations about Basin A occurred in February 2002 when both the District and the Colonies balked at its $25 million estimated cost. In March 2002, Colonies filed its complaint for declaratory relief, seeking to quiet title to the easements.

In the meantime, Colonies' September 2002 specific plan for development anticipated making Basin A, in the area formerly occupied by Basin No. 6, into open space and a 60-acre detention basin, handling storm water runoff from the 19th Street and 20th Street storm drains. A report prepared for Upland in October 2002 analyzed historical recharge at Basin No. 6 and referred to surface water being diverted by the 19th and 20th Street drains into Basin No. 6. In November 2002, Colonies acknowledged the District's plan to divert runoff from Watershed A, north and west of Colonies' property, into Basin No. 6. Nevertheless, Colonies proceeded with this lawsuit.

In its statement of decision, the trial court found that the 1933 easement had been "granted solely for the purpose of controlling Cucamonga Creek waters in an original and natural condition." It made similar findings about the 1934, 1939, 1962, and 1963 easements but not about the 1935 easement. The trial court determined that the District planned to use the subject easements for much greater amounts and for completely different purposes than those for which they historically were granted and especially to control contaminated water originating from Watershed A, northwest of the Colonies' property, rather than from Cucamonga Creek and Watershed B.

***4** The trial court concluded the easements, "individually or collectively, provide no right for the 20th Street Drain or Basin A." Such drainage facilities as were allowed "were fixed in their original locations, and were disused by 1980 and delicensed by 1997.[¶] [The District's] entire case is premised on a nonsupportable attempt to use these old easements, *even if not abandoned,* for uses completely impermissible and outside their original location and scope, magnitude, or use. [Emphasis added.]" The trial court identified differences in size and nature of the proposed use and "[a] change from natural to contaminated water...." Finally, the court found that the easements "would not permit the 20th Street Drain or the resulting Basin A impacts ... [or] obligate the servient tenement to pay for the improvements required by the actions of the dominant tenement to bring regional water on to the site. However ... by January 1, 1997 after the delicensing of Desilting Basin No. 6 ... abandonment of the public purpose of control of Cucamonga Creek floodwaters through the 'wall and levee' system known as the Cucamonga Spreading Grounds ... had terminated the 1933, 1934, 1939, 1962, and 1963 Easements."

3. *Abandonment of Public Easements*

Before considering whether a Board of Supervisor's resolution was necessary to accomplish abandonment, the nature of the easements must be clarified. The District treats the drainage easements broadly as being meant for any flood control purpose and especially asserts the easements are still necessary to control street and surface runoff from the 19th and 20th Street storm drains located in Watershed A into the proposed Basin A located in Watershed B. Colonies regards the easements narrowly as intending only specific historical uses, now unnecessary. We decide the easements exist for general flood control purposes but are limited to the extent of their original grants.

In interpreting a grant of easement, the primary objective is to carry out the parties' intent. (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.) The appellate court applies a mixed standard of review. We independently interpret an easement's language without deference to the trial court's interpretation. (Civ.Code, § 1066; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 521.) But interpretation based on extrinsic evidence is a question of fact and conflicts in the evidence are resolved in favor of the prevailing party. (*City of Manhattan Beach, supra,* at pp. 238, 246-248; *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507, overruled on other grounds by *Privette v. Superior Court* (1993) 5 Cal.4th 689, 696; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) Independent review operates when the evidence is not in conflict. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2; *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 360; *Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal.App.4th 1, 5.) Nevertheless, whether conducting an independent review or employing a standard of review favorable to Colonies, substantial evidence does not support the trial court's finding that the various easements, including the 1933 and 1939 easements, were granted solely as a means to control flooding in Watershed B and were abandoned.

***5** Both statute and case law provide that the extent of an easement is determined by the terms of the grant. (Civ.Code, § 806; *Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579, 581.) In *Winslow v. City of Vallejo* (1906) 148 Cal. 723, 725, the court commented: "The rule is well settled that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed." In *Winslow,* the court refused to allow the city to expand an easement to operate a water system with a 10-inch pipe to a 14-inch pipe. Other cases have limited the extent of an easement's burden on property. (*Youngstown Steel etc. Co. v. L.A.* (1952) 38 Cal.2d 407, 410-411; *Ballard v. Titus* (1910) 157 Cal. 673, 683.)

Here all the drainage easements were granted-and then used-as part of a general plan of flood control for the 750-acres of the Cucamonga Spreading Grounds located in Watershed B. Even the 1935 easement, which involved the 19th Street storm drain located in Watershed A, was part of this general flood control plan. The 1933, 1934, and 1939 easements do not contain any language limiting the easements to controlling only "natural" water, however that may be defined, from Watershed B. Instead, the easements were intended for flood control and, it is undisputed that, between the 1930's and 1980, the greatest need for flood control involved Cucamonga Creek.

Additionally, there was uncontradicted evidence from both parties the 1933 and 1935 easements permitted the use of Basin No. 6 for other waters, as originating from the 19th Street storm drain and Watershed A. That usage continued from the 1930's until the present and was dramatically illustrated in exhibit 96, the computer animation created and presented by Colonies' hydrologist expert, Ronald Sklepko, and confirmed by other evidence and testimony.

The 70-year history of using the easements for omnibus flood control purposes makes untenable Colonies' argument that the easements were only meant to control drainage from Watershed B. The terms of an easement may be defined by its use: " 'The mode in which the grantee of the easement, with the grantor's acquiescence, exercised the easement after its acquisition, that is, the practical construction of the grant by the parties, may be referred to in order to aid in ascertaining its meaning, ...' (*Haley v. L.A. County Flood Control Dist.* (1959) 172 Cal.App.2d 285, 292, citing Volume 3, Tiffany on Real Property (3d ed.), section 802, pages 321-322.) Here, neither the language of the easements nor the undisputed evidence support the trial court's conclusion

that the easements were limited to controlling "natural" water from Cucamonga Creek.

We reject, however, the District's argument that the flood-control easements have been expanded by sand and gravel quarries over the years to include much greater use than was originally permitted. The District reasons that the quarries were conducted with the agreement of the former owner, San Antonio, and under the direction of the District and, therefore, the surface acreage of Basin No. 6 increased to 82 acres and the storage capacity to 2,177 acre-feet. The District relies on the *Winslow* case and its language about the "acquiescence and consent of both parties" fixing the easement and limiting it "to the particular course or manner in which it has been enjoyed." (*Winslow, supra,* 148 Cal. at p. 725.) In contrast, however, are cases holding: " '[T]he owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement.' " (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 356, fn. 17; *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.) Furthermore, when there is no conflict in the evidence regarding how an easement has been used, it is a legal question as to "whether that use sufficiently complies with the terms of the governing instruments to permit survival of the easements. That inquiry solely presents a question of law; this court must reach its own resolution of that question." (*Faus, supra,* 67 Cal.2d at p. 361.)

***6** Although it is not disputed that quarries were operated at the site of Basin No. 6 for many years and the corresponding excavations were used for flood control, that does not mean there was a corresponding alteration in the flood-control easements. The District argues the documentary evidence-the sand and gravel leases and the District's permit-show that San Antonio agreed to an increase in the scope of the flood control easements. But none of those documents constitute an agreement to increase the easements. Instead, they acknowledge the existing easements and provide that the subject excavations shall not interfere with the District's flood control operations. The leases and permit do not expand the scope of the easements.

The evidence is also uncontradicted that the original Basin No. 6 could not have accommodated the amount of water to be received from the new 20th Street drain, an increase from 658-cfs to 1,758-cfs. Instead, Basin A expands from about 31 surface acres to about 61 surface acres the amount of property originally used by Basin No. 6 and from 250 acre-feet to 1,540 acre-fee the original capacity of Basin No. 6. The burden on Colonies' property is far more significant than slight. Thus, Basin A exceeds the original grant of the 1933 easement.

We return again to the principles expressed in *Winslow, Youngstown Steel,* and *Ballard,* all of which recognize that the extent of an easement's burden on property is limited to the original grant. Therefore, we agree that the District's easement rights continue to be confined to their original extent. In *Winslow,* a pipe could not be increased from 10 inches to 14 inches. Here the easement cannot double, triple, or increase by six times the original grant of the 1993 easement. On the other hand, the 1939 easement may provide broader rights to the District-an issue yet to be decided by the trial court.

Having decided how the easements should be interpreted, we turn to the issue of abandonment. The District's principal argument is that, according to state law and county policy, it can only abandon a public easement by express resolution of the Board of Supervisors. (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 823, 826.) The District also argues there is not substantial evidence of non-statutory common-law abandonment occurring due to nonuse.

Our analysis leads us to conclude there has not been a common-law abandonment of the District's flood-control easements. The evidence demonstrates the easements have been used continuously since they were granted although there have been both increases and decreases in usage. The latter, however, does not "clearly and convincingly demonstrate the necessary intent" to abandon. (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890, 891, fn. 28.) Instead, "[t]o effect an abandonment of an easement or public use of property acquired by grant to the public authorities, the intention to abandon must be clearly manifest. Mere nonuse of an easement acquired by grant does not amount to an abandonment." (*Humboldt County v. Van Duzer* (1920) 48 Cal.App. 640, 644.)

***7** An example of such abandonment is much more evident in *City of Stockton v. Miles and Sons, Inc.* (N.D.Cal.1958) 165 F.Supp. 554, in which "[a] public water channel had existed and was used for public purposes across private property pursuant to a public

easement for several years. Thereafter, in 1913, the channel was diverted, and a dam was built so that no water could go through the channel. In 1951, the city installed a culvert and filled in the channel, and the property owner used it for a truck terminal. The issue was whether the channel had been abandoned, and the city argued that municipal rights cannot be abandoned without a formal resolution. The court considered the channel to be comparable to a public road, that the applicable statute provides the statutory procedures as alternatives, and that the public right of way for the channel could be abandoned by a nonuse, together with the acts of the city agents showing an intent to abandon. The acts of the city in diverting the channel, building the dam, and filling the channel were sufficient to show the necessary intent to abandon." (6 Miller & Starr, Cal. Real Estate (3d ed.2000) § 15.80, p. 253.)

In comparison, the decreased use of Basin No. 6 after 1980, culminating in the dam delicensing in 1997 to avoid maintenance costs, did not mean the easements were abandoned for flood control purposes. Even after delicensing, Basin No. 6 continued to have a post-notch below-ground storage capacity of 510 acre-feet. Instead, the delicensing signaled that, for a period of time, now past, there was lesser need for the easements, not that the District had abandoned all future uses. (*Faus, supra,* 67 Cal.2d at p. 363.) Now, since 1998, the construction of the 210 freeway has revived the importance of the flood control easements.

For similar reasons, we also hold these flood control easements cannot be relinquished without the passage of a public resolution of abandonment. West's Annotated Water Code Appendix, Chapter 43, the San Bernardino County Flood Control Act, applies only to the District. Section 43-6 provides that public property can be disposed of only by resolution:

"(a)(1) The legal title to all property acquired under this act shall immediately and by operation of law vest in the district, and shall be held by the district, in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act.

"(2) The board of supervisors may hold, use, acquire, manage, occupy and possess the property, as provided by this act.

"(3) The board of supervisors may determine, by resolution duly entered in its minutes, that any real or personal property held by the district is no longer necessary to be retained for the uses and purposes of the district, and may thereafter sell or otherwise dispose of the property, or lease the property."

The resolution requirement is the exclusive method for abandonment, the reason being to protect public property rights from being lost through inadvertence or mistake. (*County of San Diego v. Cal. Water etc. Co., supra,* 30 Cal.2d at p. 823.) For example, as stated in *County of San Diego, supra,* at page 826: "[W]e are directly concerned with strong considerations of policy. The Legislature, for the protection of the public, has declared that a road may not be abandoned without notice, a hearing, and a finding that the road is unnecessary for present or prospective public use."

***8** The trial court was simply wrong in finding the county was estopped from asserting the requirement of a resolution for abandonment. The evidence showed the District always complied with the requirement for a resolution before releasing easement rights. Nor can estoppel be invoked against a government agency to defeat the operation of public policy: "[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public." (*County of San Diego, supra,* 30 Cal.2d at p. 826.)

We are also unconvinced that the resolution requirement is not mandatory. Admittedly, West's Annotated Water Code Appendix, section 43-6, subdivision (3) uses the word "may" rather than "shall" or "must" when it directs "[t]he board of supervisors may determine [ ] by resolution...." But the present case is not like *City of Stockton v. Miles & Sons, Inc., supra,* 165 F.Supp. 554 in which a statutory procedure for abandonment of public property expressly stated it was an alternative to other legal procedures. In *County of San Diego, supra,* 30 Cal.2d at p. 823, the court held that, "if the Legislature has provided a method by which a county or city may abandon or vacate roads, that method is exclusive." Under the San Bernardino County Flood Control Act-not principles of common-law abandonment; Civil Code section 811; the former or present Streets and Highways Code; or former Government Code sections 50430 through 50445, as cited

by Colonies-a formal resolution is the exclusive means for abandonment of a public flood control easement. No such resolution was passed in this instance. We conclude the District's easements have not been abandoned or extinguished. Furthermore, the trial court must still decide the full scope of the 1933 and 1939 easements and whether Basin A is allowed under them.

Although we do not reach the arguments about estoppel, waiver, and unclean hands, we observe these issues may have viability in this proceeding or a subsequent proceeding. The post-judgment completion of Basin A may have bearing on the trial court's ultimate interpretation of the easements and on an analysis of the respective liabilities of the parties.

4. *Disposition*

We reverse the judgment and remand for further proceedings by the trial court on the scope of the District's flood control easements.

The parties shall bear their own costs.

We concur: RAMIREZ, P.J., and HOLLENHORST, J.

All Citations

Not Reported in Cal.Rptr.3d, 2005 WL 1793908

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