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California Supreme Court Hands Victory to Private Property Owners Over Public Use

In 1970 the California Supreme Court held that, under certain circumstances, private property owners impliedly dedicate their property to the public if they permit the public to use it. *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29. This holding was controversial, and the next year the California Legislature enacted Civil Code section 1009 limiting the public's ability to permanently use private property through an implied dedication.

In the 40-plus years since then, the lower courts have wrestled with the issue of whether the statute limiting implied dedication applies only to recreational uses by the public, or also to nonrecreational uses. On June 15, 2017, the California Supreme Court issued its unanimous opinion in *Scher v. Burke* (June 15, 2017, S230104) ___ Cal.4th ___, holding that the limitations on implied dedication apply to nonrecreational as well as recreational uses. The case is significant because it demonstrates that the Supreme Court will apply the plain language of the state's statutes to uphold private property rights, even against arguments good enough to persuade other courts to allow public use of private property.

Scher v. Burke

Plaintiffs owned property in Topanga Canyon, and found it convenient to access their property by driving on two roadways that cross their neighbors' land, rather than taking other, less convenient routes. When the neighbors blocked the roadways with gates, plaintiffs sued them seeking a declaration from the court that the neighbors (or the neighbors' predecessors) had impliedly dedicated the roadways for

public use by permitting public use of the roadways for more than five years (the statutory period required to obtain a prescriptive easement).

The neighbors defended the lawsuit by citing Civil Code section 1009 – the statute passed by the Legislature in 1971. Subdivision (b) of that section provides, in relevant part, that “no use of such property by the public . . . shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently”

The trial court entered judgment in favor of plaintiffs, holding that Civil Code section 1009(b) does not restrict the implied dedication of public roads for nonrecreational uses. The Court of Appeal reversed, and the California Supreme Court affirmed the Court of Appeal.

The plaintiffs argued that legislative findings in section 1009 indicated that the Legislature’s primary concern in enacting section 1009 was to “encourage owners of private real property to continue to make their lands available for public recreational use.” Civ. Code, § 1009(a)(1). Moreover, three opinions from the state’s intermediate courts of appeal have described section 1009(b) as applying only to recreational uses. *Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 484-485; *Pulido v. Pereira* (2015) 234 Cal.App.4th 1246, 1252; *Bustillos v. Murphy* (2002) 96 Cal.App.4th 1277, 1280-1281.

Nevertheless, the Supreme Court held that despite the legislative findings expressing intent to encourage private property owners to allow public recreational uses of their property, the plain and unambiguous language of section 1009(b) limits implied dedications without regard to whether the public’s use of property is for recreational or nonrecreational purposes. The court reasoned that “[t]he Legislature might reasonably have concluded that unless subdivision (b) extended to all uses of privately owned property, landowners skeptical of their ability to distinguish recreational users from nonrecreational users might decide to exclude all users alike to avoid ‘the threat of loss of rights in their property’ In sum, the Legislature’s expressed concern with public recreational use of private lands . . . ‘does not mean that a court may add this concept as a separate requirement in the operative sections of the statute’ when the Legislature chose not to do so.”

Conclusion

Property owners should be encouraged by this decision, in which the Supreme Court declined the calls to erode private property rights in favor of public use, and instead stuck to a straightforward application of the statutory language.

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