

## **Use it or Lose it? Not in the Case of an Easement Acquired by Deed.**

A trial court did not have authority to extinguish portions of a road and utility easement notwithstanding its determination that the easement holder did not need the entire easement and that a smaller easement would constitute the least burden on the property subject to the easement. [\*Cottonwood Duplexes, LLC v. Barlow\*](#), 210 Cal. App. 4th 1501 (2012) Cottonwood Duplexes wished to subdivide property that was subject to a sixty-foot-wide roadway and utility easement. The property benefitting from the easement had itself been subdivided and now had separate roadway and utility access and hence no further need for the easement. The tentative map for the proposed subdivision included a condition requiring the easement to be removed or reduced to a width of fifteen feet before any building could occur on the subdivided property. Unable to obtain the easement by negotiation, Cottonwood filed an action seeking either to extinguish the easement or reduce its scope. The trial court determined that the benefitted property did not require the full easement because new roads now provided access and utilities. In order to minimize the burden on the Cottonwood property, the trial court reduced the length and width of the access easement and extinguished the utility easement. The court of appeal reversed, holding that an easement created by deed may not be extinguished, in whole or in part, based on a determination of the easement holder's reasonable needs. The court acknowledged that grant of a nonexclusive easement of a specified width does not bestow the right to use "every square inch" of the easement, and that the grantor may place improvements on the easement that do not unreasonably interfere with the access rights of the easement owner. However, these principles regarding the extent of the *use* of an easement could not be applied by extension to justify the *extinguishment* of all or part of an easement. Further, the appellate court noted, an easement acquired by deed is not lost simply by non-use. There must be an express or implied intent to abandon by the easement holder, and the owner of the burdened property must have incurred costs in reliance on the non-use or intent to abandon, neither of which was the case here. While California law promotes the productive use of land, the policy could not be invoked by an owner who had chosen to subdivide in a way that rendered a portion of its property unusable unless the easement was reduced in size or extinguished.

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