

## Neighbor's Continued Use of Landowner's Property for Access and Parking Following Division of Lots at Trustee Sale Established Prescriptive Easement



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For many

years the landowner's and neighbor's properties had been held under common ownership and used for residences. One property (the "El Camino" property) was developed with a large apartment complex and an underground parking garage, while the other property (the "Willow" property) was developed with a duplex and a surface parking lot. Former owners had obtained local approval of a nonconforming use to allow tenants of the apartment complex to utilize off-site parking on the Willow lot. In 2011, the former owner defaulted on its mortgages and the El Camino and Willow properties were sold to different lienholders at trustee sales, after which tenants of the El Camino apartments continued to use the Willow property driveway for access and parking consistent with past use despite the severance of ownership. In 2017, plaintiff acquired the Willow property and shortly thereafter brought a quiet title action against the bank owner of the El Camino property, who cross-complained for a prescriptive easement. Under state common law, a person establishes a prescriptive easement over another's property through open, notorious, continuous and adverse use of the property for an uninterrupted period of five years. The owner of the servient estate must have at least constructive notice of the others' use, and such use must be made without express or implied recognition of the owner's property rights. At

trial, plaintiff attempted to defeat a prescriptive easement finding by arguing that the residential tenants' use was "permissive," citing precedent that a permissive use survives a change in ownership until a new owner unequivocally repudiates the prior permissive use. However, the Court of Appeal faulted plaintiff's argument on dual grounds. First, because a property owner cannot hold an easement against itself, the court found that the prescriptive period did not begin to run until 2011 when the dominant and servient estates were severed via the trustee sales. The court also highlighted evidence in the record that the former owner characterized the El Camino owner's use of the Willow property as a "trespass" during foreclosure proceedings in 2011. Moreover, the court emphasized that whether or not a use of property is permissive or adverse is a question of fact for the trial court and no abuse of discretion had been shown. Last, the Court of Appeal found equitable support from the indemnification terms of plaintiff's purchase agreement. When it purchased the Willow property in 2017, plaintiff signed an indemnification and hold harmless agreement that cited "potential easement issues" and identified with specificity the known past use of the Willow property by tenants of the El Camino property. The agreement further stipulated that "buyer is on notice to conduct its own diligence and legal review of these issues." Accordingly, where plaintiff had actual notice of the potential easement prior to its purchase of the property and would have had the opportunity to account for the easement in negotiations of the purchase price and other recourse terms, equitable considerations reinforced the determination that a prescriptive easement had been established.

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