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9 **IN THE MAGISTRATE COURT OF THE TOWN OF ORO VALLEY**
10 **IN AND FOR THE COUNTY OF PIMA**

11 STATE OF ARIZONA,
12 Plaintiff,

13 vs.

14 STEVEN J. BLOMQUIST, SHARYL V.
15 CUMMINGS, and, THERESA D.
16 CHAMBERLAIN,
17 Defendants.

CASE NO. CR 200900291; CR200900292;
CR200900295; CR200900296;
CR200900297; CR200900298;
CR200900299

**CONSOLIDATED MOTION TO
DISMISS**

HON. GEORGE A DUNSCOMB

18 The Town of Marana Police Department cited Defendants for allegedly violating
19 ARS 13-1502 (Trespassing in the Third Degree). To prove trespassing in the third
20 degree, the State must prove that a defendant knowingly entered or remained **unlawfully**
21 on any real property after a reasonable request to leave by the owner or any other person
22 having lawful control over such property, or reasonable notice prohibiting entry.

23 The Defendants were within a lawfully deeded public easement granting each of
24 them a right of ingress and egress. There is no unlawful use where a member of the
25 public traverses on a deeded public ingress/egress easement. Accordingly, the State
26

1 cannot meet its burden of proof. As more fully set forth in the following Memorandum of
2 Points and Authorities and pursuant to Rule 16.1(b) Arizona Rules of Criminal Procedure,
3 Defendant moves for an order dismissing the charge of trespassing in the third degree.
4

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 **I. FACTUAL BACKGROUND**

7 **The Public Easement.** On February 7, 1986, certain real property owners in Pima
8 County's Tortolita area recorded a public ingress/egress easement. The easement is
9 recorded at Docket 7718 Pages 333-338 (the "Easement"). (Exhibit 1). In or around
10 2002, the Town of Marana ("Marana") incorporated a portion of the Easement
11 encumbered land into its town limits but never took any control or custody of the
12 easement (i.e. never provided maintenance, never posted the road as a non-maintained
13 town road, etc.). (Exhibit 2 – Cassidy Deposition 6:25-8:14).
14
15

16 Shortly thereafter, Saguaro Ranch received plat approval for a section of the
17 Easement encumbered land. The Easement, as it snaked through the subdivision, was
18 delineated as a public ingress/egress easement on the plat maps. (Exhibit 3).
19

20 In 2008, a legal dispute arose between members of the public (including some of
21 the Defendants here) and Saguaro Ranch's developer over the public's right to use the
22 Easement to enjoy the scenic Tortolitas. The public demanded their rights of ingress and
23 egress. The developer blocked the path with a gate and boulders. At the suggestion of
24 Marana's town Counsel, Frank Cassidy, the Defendants hired lawyers and filed a lawsuit
25 to determine the rights and responsibilities of the Easement. (Exhibit 2). The lawsuit is
26

1 currently pending in Pima County Superior Court (C20083779) to determine the rights
2 and responsibilities vis-à-vis the Easement.

3 During this dispute, the Defendants exercised their Constitutional right to free
4 speech, and occasionally walked the Easement carrying picket signs (which stated words
5 to the effect "This is a Public Easement"). (Exhibit 4)

7 **Saguaro Ranch's Use of the Marana Police Department.** Saguaro Ranch knew
8 that the Easement existed from before the time it submitted its plat maps. Indeed, the
9 Easement is recorded as a deed exception on every parcel of land Saguaro Ranch
10 purchased that passed through the Easement. (Exhibit 5). Despite its knowledge,
11 Saguaro Ranch employees repeatedly, and wrongfully, called the Marana police to harass
12 those who carried signs asking Saguaro Ranch to unblock the public easement.
13

14 This is important, Marana's police department knew it was only being called out to
15 harass people exercising their constitutional right of free speech. (Exhibit 6). Saguaro
16 Ranch employees did not report those who did not carry signs to the police – and made
17 the police aware of this fact. (Exhibit 6).

18 **The Town's Choice.** The Developer wanted the Town Council to "abandon" the
19 Easement in hopes that abandonment would give it a strategic advantage in the pending
20 lawsuit.

21 Marana was faced with a difficult choice. On the one hand, Marana could side
22 with a Developer. This Developer had promised an elite development and in doing so,
23 intentionally lied in its marketing materials (claiming that the only access was through a
24
25
26

1 private tunnel when in reality the Easement provided secondary, and public, access).
2 Furthermore, if Marana sided with the Developer it was effectively siding with an entity
3 that regularly and repeatedly filed false police reports whenever members of the public
4 protested the Developer's blocking of the Easement.
5

6 On the other hand, Marana could side with the public, those it has a duty to protect
7 and whose rights it must uphold. At the February 3, 2009 Town meeting an estimated one
8 hundred members of the public showed up protesting any Council action favoring the
9 Developer on the Easement. Marana chose to conduct a study and table any issues related
10 to the Easement.
11

12 The Developer subsequently filed for bankruptcy protection.

13 **The Escalation.** The matter apparently escalated with the filing of the
14 bankruptcies by the various Saguaro Ranch entities. In the filings Saguaro Ranch
15 Investments and Saguaro Ranch Development Company each filed claims against Marana
16 and its council/employees. When the filings hit, each sitting council member found
17 himself or herself facing a claimed personal liability to the tune of \$270 million. (Exhibit
18 7).
19
20

21 On the day after all council members were re-elected, and without warning, an
22 item to abandon the Easement was added to the Town Council's "Consent Agenda".
23 (Exhibit 8). The item was added with just over 24 hours before the Council meeting, a
24 meeting called on an odd day (Thursday instead of the typical Tuesday meeting), and
25 declared an "emergency" item. The consent agenda passed unanimously. (Exhibit 9)
26

1 **The “Abandonment”.** Marana effectively choose to side with the bankrupt
2 developer. Whereas before, members of the public were previously stopped, but not
3 usually cited for trespassing, the Town ordered its police officers to cite any member of
4 the public walking on the Easement.¹ To effectuate the “abandonment” the Town signed
5 a series of quitclaim deeds to the underlying fee owner of the servient tenement.
6 Interestingly, each quitclaim deed quits claim to the Town’s interest, “if any”. (Exhibit
7 10).
8

9
10 The Developer, for its part, has not appeared to press any of its claims in
11 bankruptcy against the councilmembers. Indeed, the Developer now offers thanks to the
12 Council for the Abandonment. (Exhibit 11)
13

14 **The Problems with the “Abandonment”.** The first, and most glaring problem, is
15 that Marana does not own the Easement and cannot destroy the public’s rights to use the
16 Easement. Arizona recognizes three types of roads:

- 17 1. those owned by the public (i.e. a Town road),
18 2. those owned by private individuals who maintain a right to prohibit public use,
19 and
20 3. those owned by private individuals with a deeded public right to make use of
21 the road.
22

23 This Easement is the third type of road. Under current, binding Arizona law, Marana
24 does not own any cognizable interest in a road of the third type. It is not a “Town” road.
25

26 ¹ A previous citation was issued against Defendants Blomquist and Cummings. The Town of Marana dismissed those citations with prejudice.

1 It is a private road with public rights.

2 The effect of quitclaiming an interest a party does not own is to quitclaim a nullity.
3 I can quitclaim my neighbor's house to my wife. That does not mean my wife owns my
4 neighbor's house. The act is a nullity. Marana knows it does not own, and did not own
5 the Easement. Marana knows that its act was a nullity and that there is no legal basis for
6 filing these charges.
7

8 **II. Easement Law**

9 What is an easement?

10 "An easement is a right of use over the property of another.
11 Traditionally the permitted kinds of uses were limited, the
12 most important being rights-of-way and rights concerning
13 flowing waters. The easement was normally for the benefit of
14 adjoining lands, no matter who the owner was, (an easement
15 appurtenant), rather than for the benefit of a specific
16 individual (easement in gross). The land having the right to
17 use as an appurtenance is known as the dominant tenement
18 and the land which is subject to the easement is known as the
19 servient tenement.

20 "Affirmative Easement one where the servient estate must
21 permit something to be done thereon, as to pass over it, or to
22 discharge water on.

23 "Private or Public Easements. A private easement is one in
24 which the enjoyment is restricted to one or a few individuals,
25 while a public easement is one the right to the enjoyment of
26 which is vested in the public generally or in an entire
community; such as an easement of passage on the public
streets and highways or of navigation on a stream." *Black
Law Dictionary* expedition at 509-510.

To narrow this down, an easement at its most basic is a vested right to use another
person's property. The owner of the servient estate does not have a right to prohibit the
use of the property for the valid purpose set forth within the easement.

Destruction of Public Easements. Under Arizona law once an easement has been

1 dedicated to the public, and a parcel of land is sold subjecting that parcel to the easement,
2 the easement becomes an immediate and irrevocable gift to the public at large.

3
4 **“the sale of lots referencing a recorded plat containing the**
5 **dedication constitutes an “immediate and irrevocable”**
6 **dedication. *County of Yuma v. Leidender*, 81 Ariz. 208,**
7 **213, 303 P.2d 531, 535 (1956) (holding that park was properly**
8 **dedicated because the “mere act of surveying land into lots,**
9 **streets, and squares by the owner, and the recordation of such**
10 **plat, constituted an offer to dedicate and was subject to**
11 **revocation by the dedicator until it was accepted, but the mere**
12 **act of selling lots with reference to such plat resulted in an**
13 **immediate and irrevocable common law dedication of areas**
14 **delineated thereon for public purposes”); *Evans*, 4 Ariz. at**
15 **316, 39 P. at 814 (holding that dedication of park “certainly ...**
16 **had been accepted on the part of the public by those persons**
17 **who had bought lots in the addition”). *Pleak v. Entrada***
18 ***Property Owner’s Association* 207 Ariz. 418, 424; 87 P.3d**
19 **831, 837 at ¶23 (2004).**

20 **Termination by Merger.** There is a process by which an easement can terminate
21 if there is a merger of all available interests.

22 §7.5 A servitude is terminated when all the benefits and
23 burdens come into a single ownership. Transfer of a
24 previously benefited and burdened parcel into separate
25 ownership does not revive a servitude terminated under the
26 rule of this section. Revival requires re-creation under the
rules stated in Chapter 2. *Restatement of Property (3rd)*
Servitudes

27 So, if all of the land were to come under one ownership, in one giant parcel, and
28 the easement would terminate and would need to be revived if revival was warranted.
29 Saguardo Ranch did not purchase all of the land encumbered by the easement, so its
30 purchase of some of the land subject to the Easement did not act to terminate the
31 Easement by merger.

32 **When does a Government Body own an Easement?** A government body can
33 become the owner of an easement. §2.18(1) of the Restatement (3rd) Property: Servitudes

1 provides two circumstances special to governmental bodies apart from the standard
2 easement construction.

3 "Governmental bodies may acquire servitudes by dedication
4 and condemnation, as well as by the methods set forth in §§
5 2.1 through 2.17. . ."

6 The section goes on to say that, additionally, the public at large itself may acquire
7 servitudes by dedication and prescription.

8 "Governmental bodies may acquire servitudes by dedication
9 and condemnation, as well as by the methods set forth in §§
10 2.1 through 2.17. The public may acquire servitudes by
11 dedication and prescription." § 2.18(1)

12 This demonstrates that there is a differentiation between when a public governmental
13 body can become the owner of an easement and when the public at large can become the
14 owner of an easement. And, binding Arizona law follows the Restatement on this exact
15 point:

16 "Indeed, *Richardson* expressly recognized that "public
17 highways" and "private roads" were not the only two
18 categories of roads in the territory in 1904. Rather, this
19 court noted that "a way may be a road that is neither a
20 public highway nor a private road or way, under our
21 statutes." 8 Ariz. at 339, 76 P. at 457. *Richardson* therefore
22 emphasized that "many, if not a majority, of the roads and
23 ways running throughout all parts of the territory, and
24 frequently in general public use, are neither public highways
25 nor private ways." *Id.* This category of roads, as *Richardson*
26 recognized, included roads where individuals had obtained
an easement to pass over grounds owned by another,
whether by grant or other means. *Id.* at 339, 76 P. at 457."
Pleak supra at 422, 835 ¶15. (Emphasis added).

23 The Easement is the third class of road. Marana's incorporation of a portion of the
24 Easement within its Town limits would not even happen for approximately 17 more years.
25 The original grantors certainly expressed no intent that Marana own the use of the road
26 for ingress and egress. The original grantors conveyed the roadway to the public – as was

1 their right.

2 Here, the deed deeded a right of ingress and egress to the public. It was not deeded
3 to a governmental entity.
4

5 Section 7.8 of the Restatement does provide a method for a municipality such as
6 Marana to come into actual ownership of an Easement such that it can extinguish it:

7 **Modification or Extinguishment by Condemnation.**
8 **Condemnation of the benefit of a servitude in the exercise of**
9 **the power of eminent domain modifies or extinguishes the**
10 **benefit only if that is the purpose of the condemnation.**
11 **Condemnation of an estate burdened by a servitude modifies**
12 **or terminates the servitude to the extent that the taking permits**
13 **a use inconsistent with continuance of the servitude. (Second**
14 **Emphasis added).**

15 So, if a condemnation action is undertaken, for the express purpose of terminating the
16 Easement, that is a method allowable under the Restatement and which would also be
17 consistent with Arizona law. So far, Marana has not undertaken any efforts to condemn
18 the land subject to the Easement.

19 Based on Arizona law, the only possible means available to Marana to obtain the
20 right to fully abandon the Easement would be to undertake a condemnation action for the
21 entire Easement. This would require condemnation of area both within the Town limits
22 and without the Town limits, since the Easement snakes through Marana and the County,
23 and create a unity of ownership. It would have to undertake the condemnation for the
24 express purpose of destroying the Easement.

25 Needless to say, Marana has not taken any steps to condemn all land subject to the
26 Easement.

So, what happens to easements dedicated to the public and not to a governmental

1 entity? According to the Restatement (Third) of Property: Servitudes §2.18(2),

2 "the right to control a servitude for the benefit of the public is
3 located in the state and the right to use the servitude benefit
4 extends to the public at large."

5 The *Pleak* holding indicates that an abandonment does not destroy the public's rights to
6 use the third category of road, but merely destroys any duties owed by the State.

7 "Nor does the final phrase of paragraph 3956, which provides
8 that "all roads in the territory of Arizona now in public use,
9 which do not come within the foregoing provisions of this
10 section, are hereby declared vacated," abrogate the common
11 law allowing dedications of roadway easements to public use.
12 This portion of the statute merely declares certain existing
13 roads in "public use" to be "vacated." As the
14 contemporaneous construction of paragraph 3956 in
15 *Richardson* makes clear, this "vacation" simply meant that
16 these roads could no longer be considered "public
17 highways," not that they thereby reverted to solely private
18 ways. 8 Ariz. at 340, 76 P. at 456." *Pleak* supra at 422, 835
19 ¶14. (Emphasis added).

20 In other words, it does not appear that there is any legal method of destroying the
21 Easement, an easement Marana does not own title to, unless and until Marana condemns
22 all underlying land in an attempt to destroy it through the doctrine of merger. Quite
23 simply, Marana does not have a right to come into an area used by Arizonan's public for
24 decades, and try to destroy the vested rights enjoyed by, not only Marana's citizens, but
25 by Oro Valley's citizens, Tucson's citizens, and citizens and visitors from across the state.

26 III. CONCLUSION

The question for this Court is, can Marana destroy the public's right to use an
Easement that Marana itself does not own. The Easement is not now, and never has been,
within the entire boundaries of Marana. The Easement is not now, and never has been,
condemned by Marana. Marana has never had legal control over the Easement.

1 Under binding, recent (2004), Supreme Court authority (*Pleak*), Marana does not
2 have any right to destroy the public's rights to use a publicly dedicated (i.e. Class 3)
3 roadway.
4

5 Accordingly, the Defendants had a vested right to walk on the Easement. Since the
6 Defendants were lawfully on the Easement, they cannot be convicted of trespassing, a
7 claim which necessarily requires an unlawful presence on another's property.
8

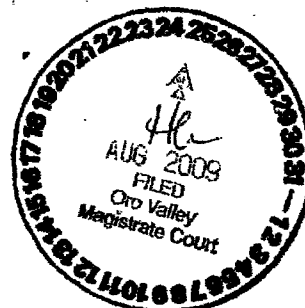
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13 DATED this 30th day of JULY, 2009.

14
15 WEEKS & LAIRD PLLC

16 
17 _____
18 Stephen Weeks
Attorneys for Defendants

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20
21 Copy of the foregoing mailed this
22 ___ day of _____, 2009 to:

23 Troy Simon
24 Assistant Town Prosecutor
25 Office of the Oro Valley Prosecutor
26 11000 N. La Canada Drive
Oro Valley, AZ 85737
Attorneys for Plaintiff



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9 **IN THE MAGISTRATE COURT OF THE TOWN OF ORO VALLEY**
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11 STATE OF ARIZONA,

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14 STEVEN J. BLOMQUIST, SHARYL V.
 15 CUMMINGS, and, THERESA D.
 16 CHAMBERLAIN,

17 Defendants.

CASE NO. CR 200900291;
 CR200900292; CR200900295;
 CR200900296; CR200900297;
 CR200900298; CR200900299

**CONSOLIDATED APPLICATION FOR
 ORDER DISMISSING WITH
 PREJUDICE**

HON. GEORGE A DUNSCOMB

18 On July 31, 2009, the defendants listed above filed a consolidated Motion to
 19 Dismiss the above-referenced cases. Plaintiffs provided the Town Prosecutor with
 20 supplemental authority requiring dismissal, and subsequently filed notice of supplemental
 21 authority. On August 21, 2009, the Town Prosecutor filed Motions to Dismiss as to each
 22 defendant.

23 Pursuant to Rule 16.4(d), Arizona Rules of Criminal Procedure, all dismissals of
 24 prosecutions shall be without prejudice unless the court finds that the interests of justice
 25 require dismissal with prejudice.

26 Plaintiffs' request for dismissal of the cases was/is based on the decision in *In the
 Matter of the Appeal in Maricopa County, Juvenile Action No. JV-512490, 942 P.2d 477,*

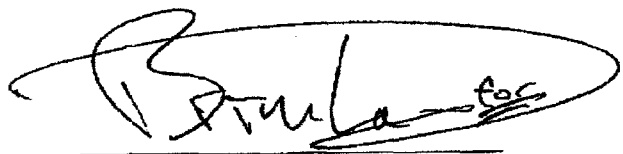
1 189 Ariz. 318 (1997), holding that where, as here, there is a dispute over property rights
 2 (in this case access to a recorded public easement) it is an abuse of process to file criminal
 3 trespass charges, a conviction cannot be upheld, and the charges should be dismissed. See
 4
 5 *In the Matter of the Appeal in Maricopa County*, a copy of which is attached to
 6 defendants' August 20, 2009 Notice of Supplemental Authority.

7 Defendants' counsel notes that the Oro Valley Town Prosecutor did not file the
 8 charges – the Town Prosecutor took over the cases due to the existence of a conflict for
 9 the Marana prosecutor based on the civil case involving Marana over the disputed
 10 easement. Because the decision cited above holds that prosecution of the defendants
 11 would be an abuse of process and the charges must be dismissed, the defendants' request
 12 pursuant to Rule 16(d), Ariz.R.Crim.Pro. that the dismissal, previously granted without
 13 prejudice, be ordered with prejudice.
 14
 15

16 Defendants counsel has spoken to the Oro Valley Town Prosecutor, and it is
 17 defendants' counsel's understanding from the telephone conversation that the Town
 18 Prosecutor does not oppose this motion.
 19

20 DATED this 24 day of August, 2009.

21 WEEKS & LAIRD PLLC

22 

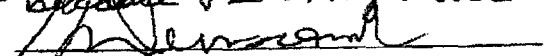
23
 24 Stephen Weeks
 25 Attorneys for Defendants
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ORDER OF DISMISSAL WITH PREJUDICE

It is ordered that dismissal of the following cases is with prejudice:

CR200900291; CR200900292; CR200900295; CR200900296; CR200900297;
CR200900298; CR200900299. Pursuant to Rule 16.6 D as the
interests of justice require it because the charges were an
~~abuse of~~ improper use of
criminal process.


Town Magistrate

Copy of the foregoing mailed this
24 day of August, 2009 to:

Tobin Rosen
Tobin Sidles
Office of the Oro Valley Prosecutor
11000 N. La Canada Drive
Oro Valley, AZ 85737



ORO VALLEY MAGISTRATE COURT

11000 N. LA CAÑADA DRIVE
ORO VALLEY, ARIZONA 85737
(520) 229-4780 • Fax (520) 229-4789

George A. Danscomb
Town Magistrate

Judy Thompson-Ng
Court Administrator

JUST THE FAX.....

TO: Aug Stephen Weeks

FROM: Geri Mora

DATE: 10/14/09

RE: Bloomquist / Cummings & Chamberslain

Pages including this cover sheet: 12

Message:

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