S230104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAIME A. SCHER, et al., Plaintiffs, Appellants and Respondents,

v.

JOHN BURKE, et al., Defendants, Appellants and Respondents.

On Review From The Court Of Appeal For the Second Appellate District,
Division Three, 2nd Civil No. B235892

After An Appeal From the Superior Court For The State of California,
County of Los Angeles, Case Number BC 415646,

Hon. Malcolm Mackey

REPLY BRIEF ON THE MERITS (AS TO ALL ANSWER BRIEFS)

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I.

INTRODUCTION

"This case concerns two 'roadways' that are *really just long driveways*: Henry Ridge Motorway and Gold Stone Road. Henry Ridge crosses plaintiffs' property as well as the Marshall, Erickson/Malick and Schroder properties." (Malick/Schroder Brief, p. 12 [emph. added].)[1] Exactly; yet paradoxically, even though Defendants admit part of this "driveway" is on Jaime and Jane's property, and even though Jaime and Jane used the "driveway" peaceably for years, Defendants contend that they should not be allowed to use it. (3 RT 136:7-138:11; 7 RT 1249:25-1253:24/)

Defendants Malick/Schroder also note that Henry Ridge Motorway and Gold Stone do not "comprise a grand thoroughfare." (Malick/Schroder Answer Brief, p. 12.) Nothing says a road must be a "grand thoroughfare" to be public. These roads, in any event, were grand enough for a former owner of portions of the Schroder and Erickson Properties to operate as a "gentleman farmer" and run a fashion design business, with employees on the property five days a week. (10 RT 2145:13-28, 2146:6-14, 2148:21-27, 2149:16-2150:1.)

The interpretation of Civil Code Section 1009 ("Section 1009") argued for by Defendants would overturn a legal doctrine that had been

[1] The Answer Briefs on the Merits filed by the Defendants will be referred to in this Reply Brief as the "Burke Brief," the "Marshall Brief," and the "Malick/Schroder Brief."

in place for many decades without any clear evidence that is what the Legislature intended and without any clear evidence that implied dedication of roads was a "problem" the statute was intended to solve. Defendants' approach presents a solution to a problem that simply did not exist. As discussed in Plaintiffs' Opening Brief on the Merits at 46-49, other courts have recognized the context that gave rise to Section 1009 and construed it in light of that context. This Court should do so as well.

Defendants also present a list of problems they perceive arising out of interpreting Section 1009 as prior courts of appeal have – the need to become a "mind reader" to know who on their property they should confront, the need to improve the road, the potential for liability to the public – all of which are overblown, but were not problems the statute was intended to resolve in any event. Defendants do not cite as a concern the possibility that the public's use of a road across their property would affect their ability to continue to use their property or further improve it, which was the reason there was concern that *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 ("*Gion-Dietz*"), would cause property owners to exclude recreational users.

Defendants have not cited any harm that has come from the understanding of Section 1009 shared by all courts of appeal that have considered the issue prior to this case. In the absence of any indication that the interpretation of the statute applied to date has caused a real

problem, and particularly in the light of the absence of any clear legislative intent to completely do away with implied dedication arising from non-recreational use of well-defined roads, the interpretation of Section 1009 applied by the court of appeal in this case must be rejected.

II.

THE LEGISLATIVE HISTORY DOES NOT CONCLUSIVELY SHOW THE LEGISLATURE INTENDED TO DISMISS DECADES OF CASE LAW ON IMPLIED DEDICATION OF ROADS

A. *Gion-Dietz* Defined the Scope of What the Legislature Was Trying to Address; The Legislative History is Silent Regarding Roads Because Roads Were Not The Issue

As noted in Plaintiffs' Opposition to Request for Judicial Notice, several of the documents of which Defendants Erickson, Malick and Schroder ("Malick/Schroder") have asked this Court to take judicial notice do not qualify as legislative history. Even viewed as merely documents of some historical interest, these non-legislative history documents, as well as those that actually are legislative history, do not address the question of how Section 1009 was intended to affect implied dedication of roads. Similarly, the bar journal articles which Defendants have provided to the Court do not address the impact of *Gion-Dietz* or Section 1009 on implied dedication of roads. The reason for this is that

the concern created by *Gion-Dietz* was not that a single well-defined road impliedly dedicated to public use would cause property owners to exclude recreational users. The concern was not the potential for public use to establish a road. The concern was the potential for public recreational use of property to establish a right to use an entire parcel of property and the impact of that right on the ability of property owners to develop their property. Once the decision was made that recreational use of an entire parcel should not lead to the property owner's losing the ability to develop or use it, the need to address the public policy of ensuring public access to the coastline lead to the addition of subdivisions (e) and (f) of Section 1009 (which oddly enough perpetuated the potential for another *Gion-Dietz* case to arise if a property owner failed to avail himself of the protections afforded by subdivision (f)). (Compare SB 504 as originally introduced on March 9, 1971 with SB 504 as amended in the Assembly on July 22, 1971.)

The Marshall Brief at page 24 quotes the court of appeal's opinion in this case: "Such a result [applying statute only to recreational use] would improperly thwart the statute's declared purpose and return the law to the state it was under *Gion*, thus defeating the Legislature's motive for enacting the statute." This statement is clearly incorrect. The stated purpose of the statute is to encourage property owners to make their property available for recreational use. Recognizing Section 1009(b) only applies to recreational use does not return the law to the

state it was under *Gion-Dietz*. *Gion-Dietz* allowed recreational use to ripen into a vested right. Property owners would remain protected from losing all rights in their property by allowing recreational use. If anything, the statute itself, through subdivisions (e) and (f), has maintained the state of the law as it was under *Gion-Dietz* for coastal property.

Indeed, Justice Clark's dissent in *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, cited selectively in the Malick/Schroder Brief at page 26, fn. 9, makes it abundantly clear that the idea that *recreational* use could give rise to an easement over an entire parcel was the issue of concern, and that roads were really not the issue.

> Prior to *Gion-Dietz* no case held dedication of an easement occurred by *adverse use for recreation*, and substantial reason existed to believe that use could ripen into fee title only following compliance with statutory requirements for adverse possession. *All cases had rejected claims a right to recreational use was acquired by prescription. Because the undefined public easement for recreation would deprive an owner of practically all use of his land, a dedication for recreational use would be equivalent to transfer of the fee.* Civil Code section 802 enumerating servitudes which may be granted upon land does not include a recreational easement. In cases involving

implied and express dedication of an interest in land for use as a park, courts had always held the full fee interest was transferred, the owner losing all right to possession. Finally, deeds purporting to create public easements for park purposes were held to convey fee interest so that grantors or their successors were precluded from making any use of the property, even one consistent with the purported easement, such as selling refreshments. [Citations.]

The combination of statutory exclusion, park dedication cases, and *denial of owner use*, told us that a general public right to use private property *for recreational purposes* could not be acquired by prescription but rather only by compliance with requirements of adverse possession - substantial enclosure, cultivation, or improvement of the property. (Code Civ. Proc., § 325.)

Prior to *Gion-Dietz*, public use of open and unenclosed land was considered a license from the owner rather than an intention to dedicate. The presumption of license applied "where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. [Citation.] *It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would*

practically destroy his own right to use any part of the property. [Citations.]" (*F.A. Hihn Co. v. City of Santa Cruz* (1915) 170 Cal. 436, 448 [150 P. 62].) Like *Gion-Dietz, Hihn* involved public use of beach property. But the court concluded that the public did not obtain rights by adverse use or dedication. *Hihn* was followed in *Manhattan Beach v. Cortelyou* (1938) 10 Cal.2d 653, 668 [76 P.2d 483]; *Whiteman v. City of San Diego* (1920) 184 Cal. 163, 172 [193 P. 98]; and *City of San Diego* v. *Hall* (1919) 180 Cal. 165, 167-168 [179 P. 889].

A different rule was applied to roads where public use for more than the prescriptive period with knowledge of the owner and without permission or objection established dedicatory intent by the owner. (*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240-241 [267 P.2d 10] (citing numerous cases).) *In road cases the public ordinarily is deemed to make the same use as the owner, the road is sharply defined and determination of a prescriptive right of way has not been deemed to deprive the owner of all use of his property.* Additionally, roads are often expressly dedicated to the public. . . .

. . .

> In *Gion-Dietz*, this court announced a new doctrine of public easement for recreational use acquired by prescription. The court ignored *the purported easement was equivalent to transfer of fee* and did not even discuss requisites of obtaining title by adverse possession. . . .

(*County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 225-226 , *dissenting opinion* [footnote omitted, emph. added].)

> Commentators were severe in their criticism of *Gion-Dietz*, noting not only departure from precedent, *the failure to consider total loss to the owner*, and the prohibition of taking property without compensation, but also that the case created an obvious inequity and would prove counterproductive to the public policy espoused. (Armstrong, *Gion v. City of Santa Cruz; Now You Own It - Now You Don't; or The Case of the Reluctant Philanthropist* (1970) 45 L.A. Bar Bull. 529; Berger, *Nice Guys Finish Last - At Least They Lose Their Property: Gion v. City of Santa Cruz* (1971) 8 Cal.Western L.Rev. 75; Comment, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches* (1971) 44 So.Cal.L.Rev. 1092; Comment, *Implied Dedication: A Threat to the Owners of California's Shoreline* (1971) 11 Santa Clara Law. 327; Comment,

Public or Private Ownership of Beaches: An Alternative to Implied Dedication (1971) 18 UCLA L.Rev. 795; Note, *Californians Need Beaches - Maybe Yours*! (1970) 7 San Diego L.Rev. 605; Note, *Implied Dedication in California: A Need for Legislative Reform* (1970) 7 Cal.Western L.Rev. 259; Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner* (1971) 4 Loyola L.A.L.Rev. 438; Note, *Public Access to Beaches* (1970) 22 Stan.L.Rev. 564; Note (1971) 59 Cal.L.Rev. 231.)

(County of Los Angeles v. Berk, supra, 26 Cal.3d at 228, *dissenting opinion* [footnote omitted, emph. added].)

Defendants note that *Gion-Dietz* states the law of implied dedication should be applied to entire parcels of land the same way it is applied to roads and, on that basis, they argue Section 1009 should be applied to roads the same way it is applied to entire parcels of land. (Malick/Schroder Brief, pp. 37-38.) This argument does not reflect the fact there is nothing in *Gion-Dietz* or other case law indicating implied dedication of roads was particularly problematic, in contrast to the total loss of use of the property arising from the application of *Gion-Dietz*. Applying the same law of implied dedication that pertain to roads to an entire property created a problem – it prevented the owner from making

any use of the property. Applying the law of implied dedication to the establishment of roads does not have that effect.

Concerns that the use of property by one who is not the owner could infringe on the owner's rights are not new and do not exist solely in the context of public use. The law has recognized those concerns in the context of private use as well and has dealt with them. In *Bustillos v. Murphy* (2002) 96 Cal.App.4th 1277, the plaintiff's attempt to assert a prescriptive right to use a network of trails across the defendant's property failed. The court of appeal found that the use of a network of trails traversing the entire property could not ripen into a vested right due to Section 1009 because the use was recreational. (*Id.* at 1281.) The plaintiff sought to avoid the impact of Section 1009 by asserting a private right, rather than a public one. Although Section 1009 was a sufficient reason to deny the plaintiff's claims, the court of appeal went on to note that even a private prescriptive easement would not be found on these facts.

> We do note that the cases have limited prescriptive easements for traveling across the property of another to a single defined right-of-way and have denied easements to generally travel across another's property. (*See Dooling v. Dabel* (1947) 82 Cal.App.2d 417, 424, 186 P.2d 183; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 710, 194 Cal.Rptr. 331.) Bustillos has not cited any case nor have we

> found any case that would support granting a prescriptive easement for a network of trails. As to Bustillos's other argument, case law generally holds that a prescriptive easement may not be granted if doing so would result in depriving the owner of essentially all rights in the property; in that case, the claimant must proceed under the adverse possession doctrine and show payment of taxes on the disputed property. (See *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305–1307, 54 Cal.Rptr.2d 284, but see *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 110 Cal.Rptr.2d 861 [holding that a court in equity, applying the hardship doctrine, may grant an easement that effectively denies the owner the use of his property].) Here, *Bustillos's claim for a network of trails crisscrossing the majority of the property would divest Murphy of essentially all rights to the property, rendering it unbuildable and unsaleable.* Accordingly, Bustillos would have to proceed under the adverse possession doctrine and establish the payment of taxes on the property.

(*Id.* at 1281-1282 [emph. added].) Nothing in *Bustillos* or any other case cited indicates the concern about rendering property unbuildable and unsaleable exists if there is but a single road or pathway through the property that is recognized.

B. There Is No Clear Statement Of Legislative Intent To Reverse A Longstanding Body of Law

All of the Defendants make the argument that "no use" means "no use" can develop into any sort of vested right. However, the legislative history is utterly devoid of any recognition of the long history of implied dedication in California law, going back at least as far as *Schwerdtle v. County of Placer* (1895) 108 Cal. 589, or of a clear intent to completely eliminate the law of implied dedication from California law, even as it related to roads. None of Defendants has disputed that one of the tenets of statutory interpretation is that "[t]he Legislature should not be presumed to overthrow long-standing principles of law unless such intention is made clear either by express declaration or by necessary implication. (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-50.)" (Opening Brief on the Merits, p. 45.) None of Defendants has argued that "no use," by itself, is an express declaration of intent to overthrow decades of case law or that the overthrow of decades of case law necessarily must be implied from *Gion-Dietz* and Section 1009.

Defendants Malick/Schroder assert: "The Legislature wanted certainty—not more questions for the bar, the bench and scholars to ponder and debate." (Malick/Schroder Answer Brief, p. 31.) Nothing in the legislative history indicates a desire for certainty; Defendants appear

to simply be projecting their own desires. If the Legislature was seeking certainty, it did not do a very good job of making it clear and certain that it intended to overturn a longstanding legal doctrine.

C. The Limited Use Of The Word "Recreational" Is Not Determinative

Defendants all argue the fact the word "recreational" appears only in subdivision (a) of Section 1009 means the impact of the statute is not limited to recreational use. (Marshall Brief, p. 21; Burke Brief, p. 14; Malick/Schroder Brief, pp. 18-19.)

Marshall and Burke cite *Klein v. United States* (2010) 50 Cal.4th 68, 80, stating that when one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning. *Klein*, however, and the cases therein cited, do not involve statutes that, like section 1009, contain an express statement of legislative intent. An express statement of legislative intent in the statute itself cannot simply be ignored. Doing so would be contrary to the fundamental tenet of statutory interpretation, to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

Malick/Schroder follow up by citing *Rashiki v. Moser* (2014) 60 Cal.4th 718, 725 [holding reduced non-economic damages award

under MICRA was not subject to offsets for pretrial settlements as to non-economic damages with other parties; defendants should not be allowed a set off against damages he caused; making distinction between "losses" and "damages," the latter being "money ordered by a court"], and *In re Young* (2004) 32 Cal.4th 900, 907 [sentencing credits under 3 strikes law includes only credits available under statutes that use the word "credits"]. Again, neither case deals with an express statement of legislative intent that the Legislature considered important enough to make it a codified part of the statute.

D. Subdivision (a) Of Section 1009 Is Not Just A "Preamble"

Defendants try to dismiss subdivision (a) of Section 1009, the Legislature's statement of intent, as a mere "preamble" with no meaning. (Marshall Brief, p. 32; Malick/Schroder Brief, pp. 20-21.) The various cases they cite in support of their position reveal "preambles" very different in nature from that of subdivision (a) of Section 1009.

The "preamble" in *Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1103, was an uncodified statement of facts, not a codified, express statement of legislative intent as in Section 1009.

Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1118, involved the interpretation of the anti-SLAPP statute, Code of Civil Procedure section 425.16. One of the issues was whether every cause of action subject to the anti-SLAPP statute must be one that

involves an "issue of public interest." The plaintiff based this argument on language in the statute's "preamble" indicating that the Legislature desired "to encourage continued participation in matters of public significance." This Court found there was no need to incorporate such a requirement because its absence did not diminish the statute's effectiveness in encouraging participation in public affairs. "Any matter pending before an official proceeding possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect. The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues." (*Id.* at 1118.) In effect, this Court found no specific reference to the preamble was necessary because the matter was otherwise addressed, not because the "preamble" was totally meaningless.

The "preamble" at issue in *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 53, was a statement of legislative intent grafted onto the Fair Employment and Housing Act after its original enactment. This Court concluded the "preamble" was not indicative of the Legislature's intent when the act was originally approved. (*Id.* at 52.)

None of these "preambles" rises to the level of significance of the contemporaneous, express statement of legislative intent found in subdivision (a) of Section 1009.

III.

THE LEGISLATURE'S AMENDMENT OF CIVIL CODE SECTION 813 CONCURRENTLY WITH ENACTING SECTION 1009 SUPPORTS THE CONTINUED EXISTENCE OF THE LAW OF IMPLIED DEDICATION WITH RESPECT TO ROADS

In addition to focusing on the phrase "no use," Defendants focus on the introductory phrase of subdivision (b) of Section 1009: "Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property pursuant to Section 813 of the Civil Code or has posted signs on such property pursuant to Section 1008 of the Civil Code . . ." (Malick/Schroder Brief, p. 20.) Defendants then go on to make it appear that complying with Section 813 or 1008 is tremendously burdensome. (Malick/Schroder Brief, p. 20.) Sections 813 and 1008 are significant, however, because Section 1009 identifies them both as means of preventing coastal property from becoming subject to a vested right of the public, without limiting the application of those statutes to coastal property.

Under Section 1009(f), an owner of coastal property who wishes to open the land to the public, but prevent the use from becoming a vested public right, has three options for protecting title to the property, two of which are relevant for the present discussion. The first is to post signs pursuant to Section 1008. Section 1008 provides for the posting of signs at each entrance to the property or at intervals of not more than 200 feet along the boundary which reads substantially as follows: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code." Section 1009(f)(1) expands on that slightly. The signs must be renewed at least once a year if they are removed. In addition, Section 1009(f)(1) provides an alternative approach based on Section 1008: the owner can publish a notice annually pursuant to Government Code section 6066 (requiring publication once a week for two successive weeks) in a newspaper of general circulation in the county or counties in which the property is located, consisting of the description of the property and the same language required in the signs.

The second alternative is to record a notice as provided in Section 813. (Section 1009(f)(2).) Defendants bemoan the necessity of specifying the uses for which the property is open to the public and having to record a notice each year. (Malick/Schroder Brief, p. 20.) In fact, Section 813 never required that the notice be recorded annually; once is enough. (*See* SB 504 as amended in Assembly on July 22, 1971.) More importantly, however, Section 813 was amended

concurrently with the adoption of Section 1009, in the very same piece of legislation. The amendment eliminated the requirement to list the uses for which the property was available. The notice need only consist of a description of the land and a statement of substantially the following: "The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: Section 813, Civil Code." The recorded notice is conclusive evidence that subsequent use of the land by the public or any user for any purpose is permissive and with the owner's consent. After recording such a notice, "the owner shall not prevent any public use appropriate thereto by physical obstruction, notice or otherwise." The notice can be revoked by recording a notice of revocation.

Neither Section 813 nor Section 1008 was amended upon the enactment of Section 1009 or at any time since to provide such notice or signs are effective only as to coastal property. Section 813 continues to provide the notice can be recorded in any county where property is located; it was not amended to limit recordation of such a notice to coastal counties. While Section 1009(b) indicates the posting of signs or recordation of notices is not required with respect to non-coastal property, it is not prohibited. However, if Defendants are correct that Section 1009 means that "no use" of non-coastal property can ripen into

a vested right, there would be no need to perpetuate the use of recorded notices or posted signs with respect to non-coastal property to show the use is permissive. Because the Legislature did not limit the impact of these notices and signs to coastal property, such notices and signs must continue to have some meaning with respect to non-coastal property. Otherwise, the statutes would be superfluous in the context of non-coastal property. In the absence of language clearly limiting the application of the statutes to coastal property, a construction having that effect must be avoided. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 24; *Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 395.) The fact such signs and notices continue to have meaning with respect to non-coastal property can only support the conclusion that Section 1009 does not prevent non-recreational use of non-coastal property from ripening into a public vested right.

IV.

THERE IS NO FUNCTIONAL DIFFERENCE BETWEEN A DEDICATION IMPLIED IN FACT AND A DEDICATION IMPLIED IN LAW; THE 1970 DECLARATIONS AND GRANTS OF EASEMENTS ESTABLISHED AN INTENT TO DEDICATE ROADS AND THE LAW PROVIDED FOR ACCEPTANCE OF THE DEDICATION BY USE

Defendant Burke attempts to find a distinction between "express dedication" and "implied dedication" and hang the meaning of Section

1009 on it. (Burke Brief, pp. 11-12, 15, 20.) In reality there is little practical difference between express and implied dedication. Both are theories of common law dedication. In an express dedication, some writing indicates the intent to dedicate; in an implied dedication, the intent to dedicate is implied from the property owner's conduct or the lack of objection to use of the property as if it were public. In either situation, where there is no formal acceptance of the dedication, the acceptance of the dedication may be the result of use of the property by the public. (*Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 474, 477-479.) The apparent distinction between express and implied dedication is not of any great significance. (*See, Friends of Martin's Beach v. Martin's Beach 1 LLC* (First District, Case No. A142035, April 27, 2016), Slip Opinion, pp. 33-39.)[2]

Defendant Burke contends Section 1009 requires an express written offer of dedication. (Burke Answer Brief, p. 20.) In fact, there was just such an express dedication in this case. In 1970, three

[2] *Martin's Beach* describes Section 1009 as "*partially abrogat[ing]* the common law of dedication in the wake of the *Gion* decision." (Slip Op., p. 37 [emph. added].) The First District thus joins the Third and Fourth Districts in indicating Section 1009 did *not* completely do away with the concept of implied dedication or common law dedication based on acceptance of a dedication by public use of the property. Because Section 1009 "expressly excludes coastal property from its reach" and the property involved in *Martin's Beach* was coastal property, the court of appeal did not engage in any detailed analysis of the scope of the statute.

"Declarations and Grants of Easements" were recorded concurrently evidencing that Henry Ridge Motorway was the access for multiple subdivisions of properties in the area, including the Marshall Property, and part of the Erickson Property ("1970 Declarations and Grants of Easements"). The 1970 Declarations and Grants of Easements were recorded by a developer, Brett Smithers, whose three companies owned parcels of property along Henry Ridge Motorway, and who had to create access easements as a prerequisite to subdivision and development. (Ex. 54, 55, 56; 5 RT 753:13-761:3; Ex. 194, Documents, Tabs 5, 14, 16 and 25.)

As Defendant Burke notes (Burke Brief, p. 17), the 1970 Declarations and Grants of Easements state that the dedications could be accepted by the recording of a written acceptance by a grantee of any of the parcels created by the map. That acceptance of the dedication in that manner was allowed does not mean that the dedications could not be accepted by use, which is what occurred in this case. (*Hanshaw v. Long Valley Road Assn., supra,* 116 Cal.App.4th at 474, 477-479.)

Defendants Malick/Schroder contend common law dedication has been completely superseded by the Subdivision Map Act, citing *Stump v. Cornell Construction Co.* (1946) 29 Cal.2d 448, 451. (Malick/Schroder Brief, p. 39.) This overstates the holding of *Stump,* which does not say that the Subdivision Map Act completely abrogates the common law related to dedication. What *Stump* actually said was "the provisions of

[the Subdivision Map Act] clearly indicate an intention to abrogate the common law rule whereby *an offer to dedicate might be impliedly revoked* by a conveyance without reservation." (*Id.* at 451 [emph. added].) All of the cases citing *Stump* similarly pertain to the revocation of offers of dedication. (*Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, 1015; *County of Orange v. Cole* (1950) 96 Cal.App.2d 163, 167-170, 43; *Quacchia v. County of Santa Cruz* (1958) 164 Cal.App.2d 770, 771.) Further, *Hanshaw* is directly contrary to *Stump*, finding an incomplete dedication can become a public road by use despite the Subdivision Map Act and expressly rejecting the argument that the Subdivision Map Act precludes common law dedication. (*Hanshaw v. Long Valley Road Assn., supra,* 116 Cal.App.4th at 474, 477-480.)

V.

THE PRACTICAL ISSUES DEFENDANTS RAISE ARE NOT RELEVANT TO INTERPRETATION OF SECTION 1009

Defendants raise a number of issues they claim would arise if Section 1009 only applies to recreational uses. These issues exceed the scope of Section 1009 in that the statute was never intended to resolve all potential issues that could arise from one person crossing or using the property of another and therefore are irrelevant to the interpretation of the statute. The statute was specifically and solely directed at the question whether public recreational use of the entirety of a property can

ripen into a vested right. As such, it was not intended to resolve questions such as who is responsible for improving or maintaining the road, who is liable in case of injury, or any other question. Further, while these extraneous issues should not drive the interpretation of Section 1009, Defendants have blown these issues out of proportion.

A. Mindreading is Not Required

Defendants all contend that the interpretation of Section 1009 advanced by Plaintiffs and reflected in prior court decisions is unworkable because it requires the property owner to read the mind of a person crossing the property to determine whether the use of the property is recreational or non-recreational, so they will know who to confront and who not to confront. (Marshall Brief, pp. 2, 24-26; Burke Brief, pp. 16-17; Malick/Schroder Brief, pp. 28-29.) No mindreading or confrontation is necessary if the property owner complies with Sections 813 or 1008 as compliance with those statutes provides protection whether the use is recreational or non-recreational. Indeed, confronting persons on the property is contrary to Section 813, which reads in part: "After recording a notice pursuant to this section, and prior to any revocation thereof, the owner shall not prevent any public use appropriate thereto by physical obstruction, notice or otherwise."

B. Defining "Recreational" Use Is Not An Issue

Defendants protest that Section 1009 cannot mean that non-recreational uses could still result in a common law dedication because the term "recreational" is not defined in the statute and any activity, depending on the state of mind of the user of the property, could be recreational. (Marshall Brief, pp. 24-25; Burke Brief, pp. 16-17; Malick/Schroder Brief pp. 24-25.) This has not inhibited courts from applying the recreational/non-recreational distinction in cases involving Section 1009 to date. Perhaps what Defendants are concerned about is that property owners cannot be absolutely certain of whether a particular use qualifies as recreational. As noted above, the answer is to comply with Section 813 or 1008 and then the nature of the use will not matter.

It is not unusual for statutes to contain undefined terms that may be subject to interpretation. Courts are capable of determining what terms such as "recreational" mean either by resort to a dictionary or by looking to definitions or usage in other statutes. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1240 [relying on dictionary definition of "furnished"]; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 83 [relying on dictionary definition of "inadvertent"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 570 [looking to other statutes for the meaning of the term "capital case"]; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 578 [looking to other statutes for the meaning of "party"].)

Should the day come when it is necessary to apply Section 1009 to a use that is not obviously "recreational," the courts have the resources to address that issue.

Further, the existence of a definition would not necessarily resolve all issues in any event, as Defendants note with regard to Civil Code section 846, regarding immunity of property owners from liability to recreational users of their property. (Malick/Schroder Brief, p. 32; Marshall Brief, p. 25.) That being the case, it makes no sense to protest that interpreting Section 1009 to affect only recreational uses of non-coastal property is wrong because the term "recreational" is not defined.

C. Liability Issues Can Be Addressed By Insurance

Defendants also protest that their costs for maintenance of the road and potential for liability would be greatly expanded if Section 1009 does not prevent the road from becoming public. Issues regarding maintenance of the road and potential liability for injury are not relevant to the interpretation of Section 1009. From a practical standpoint, however, the roads in question are located where they are unlikely, even if public, to garner a large volume of traffic that would require major improvements to or maintenance of the road. Because Defendants themselves are using the roads in question to access their own property, there is a minimum level of maintenance they must undertake for themselves and various service providers, some of whom likely make

deliveries by truck. There is no need to improve the road further just because the public can use it.

In the absence of a specific statute, the owner of the underlying fee in a public street has no obligation to maintain it. The Legislature recognized this in enacting Streets and Highways Code section 5610 which mandates the owner of property adjacent to a street is obligated to maintain only the sidewalk and parkway, not the road itself. In any event, the duty of maintenance does not mean the property owner generally is liable to someone injured on the sidewalk. (*See, Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487.)

Defendants speculate, but cite no law, to the effect they would be liable to persons injured on the roads. Concerns about liability, like most liability concerns, can be addressed by purchasing insurance. Defendants no doubt have homeowner's liability insurance which should provide coverage, although abutting property owners are not generally liable for injuries sustained on public streets. Further, Defendants are most likely immune from liability to recreational users of their property under Civil Code section 846. While there is a possibility someone could be injured and have no one to sue, it would not be the first time that there is no remedy available for a person who suffers damage.

D. The Solution is Found in Sections 813 and 1008

All of the Defendants assert, "[a]ny rational landowner would bar all use, contravening the very purpose of the statute," or words to similar effect. (Malick/Schroder Answer Brief, pp. 30, 33-34; Burke Brief, pp. 17-18; Marshall Brief, p. 2.) Actually, any rational landowner would record or post notice pursuant to Sections 813 or 1008. Closing the land to the public is not now, and has never been, the only alternative.

VI.

PLAINTIFFS DO NOT HAVE A SECURE, RELIABLE AND SAFE ALTERNATIVE ROUTE TO AND FROM THEIR HOME

Defendants contend that Plaintiffs have other routes to and from their home. (Marshall Brief, pp. 11-12; Burke Brief, p. 9; Malick/Schroder Brief, pp. 41-43.) Plaintiffs do not dispute other routes exist, but whether there are other routes is not relevant to the question whether there has been an implied or common law dedication of the roads in question. In any event, Defendants choose to ignore the question whether those other routes are safe, legal and reliable, and are going to remain open to Plaintiffs. The issues with those other routes are detailed in Plaintiffs' Opening Brief on the Merits at pages 21-23.

The Malick/Schroder Brief asserts Plaintiffs have five other routes to and from their home. (Malick/Schroder Brief, p. 42.) A close look at the citations in that paragraph shows this is a myth. The citations to the

court of appeal's opinion are to a description of the roads in the area, not a description of routes that could actually lead Plaintiffs, legally and safely, to Topanga Canyon Boulevard. The citations to the trial transcript are repetitive descriptions of the same routes, which indicate some are unsafe. While there may be five street names involved, that does not equate to five routes.

Further, Defendants dismiss the issue of the reliability of other routes, saying Jaime Scher has "only" been "stuck" once and there is no evidence all routes could be closed at the same time. (Marshall/Schroder Brief, p. 42, 43.) Defendants admit there was one occasion when all routes were closed. If it happened once, it could happen again. Must Plaintiffs wait until they have been "stuck" multiple times, or until they are "stuck" in an emergency, to take steps to be sure they always are able to get to or from their home? Would Defendants accept a situation where *they* must spend the better part of an hour or more trying different routes to Topanga Canyon Boulevard, only to find none are open to them? Why do Plaintiffs have to find themselves in a situation where they feel like mice trying to escape a maze before they are entitled to relief and security of legal access to their home?

Defendants note that the fire department's established access route is from the north. (Burke Brief, p. 9; Malick/Schroder Brief, p. 41.) Yet, there have been circumstances where the fire department has attempted access from the south and been impeded by closed gates (not hairpin

turns or narrow spots), forcing them to waste time going back around to access the area from the north. (7 RT 1298:9-1301:15; 10 RT 2202:11-2202:20; 10 RT 2208:17-2210:11.) Defendants suggest the fire department uses the northern access because the road is wider and more accessible. However, fire department vehicles are considerably larger and heavier than passenger vehicles, so a route that the fire department might not want to use is not necessarily problematic for all vehicles.

VII.
CONCLUSION

There is no compelling and clear legislative history showing the Legislature, in enacting Section 1009, meant to reverse longstanding case law regarding implied dedication of roads. Further, implied dedication of roads does not implicate the concerns that arose in the wake of *Gion-Dietz*, and there is nothing to show any harm has come from the interpretation of Section 1009 applied by the courts of appeal prior to this case. Accordingly, this Court should find, for the reasons set forth in Plaintiffs' Opening Brief on the Merits, and in this Reply Brief, that Section 1009 affects the law of implied dedication only as it relates to recreational use of entire parcels of land and does not affect the application of implied or common law dedication to roads, particularly when the use of those roads is non-recreational.

In light of the fact the court of appeal did not properly consider the issue of use of the roads in question after 1972, this case should be remanded to the court of appeal to consider the sufficiency of the evidence in that regard.

Alternatively, if this Court concludes Section 1009 did completely eliminate implied dedication of roads, then this matter should be remanded to the trial court for the taking of additional evidence of public use of the roads prior to 1972. Otherwise, Plaintiffs would be prejudiced by their reliance, and the trial court's reliance, on the common understanding of Section 1009 prior to this case in that there was no clear necessity to present evidence of use of the roads after the federal patent of the land and before 1972.

Dated: June 6, 2016

Respectfully submitted,

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By: 

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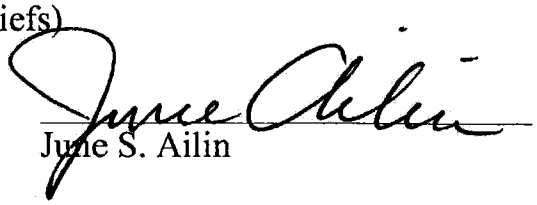
CERTIFICATE OF WORD COUNT

I certify pursuant to Rule 8.204(c) of the California Rules of Court, the attached Opening Brief on the Merits was produced on a computer and contains 6,806 words, excluding cover pages, tables of contents and authorities and signature lines, as counted by the Microsoft Word 2010 word-processing program used to generate the Reply Brief on the Merits (as to all Answer Briefs).



June S. Ailin

CERTIFICATE OF SERVICE

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At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On June 6, 2016, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS (AS TO ALL ANSWER BRIEFS)** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 6, 2016, at El Segundo, California.

Rosie A. Ortiz

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