SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 02/09/2022 TIME: 09:00:00 AM DEPT: 54

JUDICIAL OFFICER PRESIDING: Christopher Krueger
CLERK: G. Toda
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: N. Alvi, J. Reilly

CASE NO: **34-2021-00311042-CU-OR-GDS** CASE INIT.DATE: 11/12/2021
CASE TITLE: **Madsen vs. Westlund**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Preliminary Injunction

APPEARANCES
Zachary C Hansen, counsel, present for Plaintiff(s) remotely via video.
Todd C. Simonson, counsel, present for Defendant(s) remotely via video.
Diane Luczon, for Madsen, Carl (Plaintiff) Remotely

Nature of Proceeding: Motion for Preliminary Injunction

TENTATIVE RULING

Plaintiffs Carl and Laurie Madsen's motion for a preliminary injunction as against defendants Kenneth and Page Westlund, *et al*. is ruled upon as follows.

***** If oral argument is requested, the parties are directed to notify the clerk and opposing counsel at the time of the request which of causes of actions/issues discussed below and which objections to evidence will be addressed at the hearing. Counsel are also reminded that pursuant to local rules, only limited oral argument is permitted on law and motion matters. *****

The notice of motion does not provide notice of the Court's tentative ruling system, as required by Local Rule 1.06. Moving counsel is directed to contact opposing counsel and advise him/her of Local Rule 1.06 and the Court's tentative ruling procedure and the manner to request a hearing. **If moving counsel is unable to contact opposing counsel prior to hearing, moving counsel is ordered to appear at the hearing by Zoom or by telephone.**

Both moving and opposing counsel failed to comply with CRC Rule 3.1110(b)(3)-(4).

Factual Background

This action follows plaintiffs' June 2021 purchase of undeveloped real property located in Herald, California. The sellers were Kurt and Janet Ruebel, who had years before subdivided their property and sold a portion to plaintiffs while retaining the remainder. According to the complaint, plaintiffs' parcel is "completely landlocked" except for a private road that does not have a recorded description but is commonly known East Kirkwood Road, which runs along the eastern side of plaintiffs' property, and virtually all of the nearby properties owned by others who are named as defendants are located along this same road. (Compl., ¶¶42-43.) Plaintiffs allege that this once public road was abandoned by the

County of Sacramento via an unrecorded resolution and although property records show no single owner of the road, all of those who own property along the road have long used it for access. (¶44.)

Plaintiffs claim that in May 2021 they met with Mr. Westlund, who expressed concerns that construction vehicles going to and from plaintiffs' new property would damage the road and demanded plaintiffs pay $30,000 for repairs. (¶¶46-47.) Plaintiffs refused and they claim the Westlunds thereafter not only engaged in "a campaign of intimidation and harassment to prevent Plaintiffs from accessing the Disputed Road and from developing a home on their [new] Property" but also tried to block access to the road (¶¶48-50.) Plaintiffs further assert that the Westlunds recorded on 7/29/2021 a "Road Maintenance Agreement" which only the latter executed and which plaintiffs maintain is "void and unlawful on its face." (¶¶51-52.)

Plaintiffs commenced this action on 11/12/2022 and their complaint currently purports to assert against the Westlunds, a number of other adjacent landowners and their mortgage holders/servicers the following causes of action: Quiet title for equitable easement, quiet title for easement by necessity, declaratory relief relating to not only plaintiffs' right to use East Kirkwood Road to access their property but also the unenforceability of the "Road Maintenance Agreement" recorded by the Westlunds on 7/29/2021, and injunctive relief barring any future harassment/intimidation and attempts to hinder plaintiffs' use of the road.

Moving Papers. Plaintiffs now move for a preliminary injunction prohibiting the Westlunds, their agents and other acting in concert from "interfering, obstructing, blocking or closing in any way a private road, known as 'East Kirkwood road' (which provides the only access to Plaintiffs to enter and leave their property), and from preventing Plaintiffs (including Plaintiffs' guests, vendors or workers that are accessing East Kirkwood road to reach Plaintiffs' Property) ingress and egress to their Property" on the grounds that "there is an imminent...and ongoing threat...aris[ing] from the barriers...placed by the Westlund Defendants...to prevent Plaintiffs' continued use of the East Kirkwood road" and an injunction "is necessary to preserve the status quo that all the homeowners... that own land along East Kirkwood road be allowed to use [the] road until...trial...on this matter." (Not. of Mot., p.1:6-18.) Plaintiffs further insist they not only have "a strong probability of prevailing on the merits" of their claims for an equitable easement and easement by necessity over East Kirkwood Road which provides the only access to their landlocked property and their two claims for declaratory relief but also will "suffer irreparable injury" if "the Westlund Defendants are permitted to continue to block the road[,]...harass the Plaintiffs...[and] prevent[them] from developing their home and...enjoying their Property," while "[t]he Westlund Defendants will not be harmed...by the issuance of a preliminary injunction..." (*Id.*, at p.1:19-p.2:13.)

As already noted, plaintiffs insist East Kirkwood Road is a private road which was abandoned by the County long ago and it is not owned by any single person or entity, including the Westlunds but it has been used by adjacent landowners for access to their homes. However, even assuming the Westlunds owned fifty percent (50%) of the road directly in front of their property, plaintiffs contend California law provides that each owner of property abutting the road have a private right to use the road for access to his/her homes, citing *Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 307; *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663; *People v. Ricciardi* (1943) 23 Cal.2d 390, 397; *Rose v. State* (1942) 19 Cal.2d 713, 727; and 6 Cal. Real Est. §15:81 (4th ed.) (Abandonment of Public Easements-Effect on the Rights of Abutting Property Owners). For unknown reasons, the Westlunds have taken various steps to harass plaintiffs and prevent them from accessing and developing their property after refusing to pay the $30,000 demand, thereby necessitating this motion.

According to plaintiffs, the balance of harms weighs greatly in favor of an injunction which preserves the status quo (*i.e.*, all owners of land adjacent to East Kirkwood Road have the ongoing right and ability to use the road for access to their homes) because without the ability to use East Kirkwood Road, plaintiffs' parcel is landlocked and they are left without no access to their property despite the fact the prior owners

of plaintiffs' property had for over 35 years used the road for access and plaintiffs are not legally obligated to pay for repairs to a road defendants themselves have for years failed to repair.

Opposition. The Westlund defendants oppose, arguing "Plaintiffs will not prevail on the merits of their claims" and "cannot show any harm if they are denied access over the paved portion of West [*sic*] Kirkwood Road." (Oppos., p.4:16; p.16:26.) On the former point, the opposition first contends that plaintiffs failed to disclose the existence of a parcel map recorded in 1913 showing a "private road" adjacent to their property and leading directly west to a public road, Kirkwood Street. (*Id*., at p.4:17-p.5:18.) The Westlunds also insist that plaintiffs cannot assert an common law abutter's rights in East Kirkwood Road[,] an abandoned public road," because (1) the County never took "fee title to the land underlying the public road;" (2) in 1954 the County formally abandoned the "public road" via an unrecorded resolution, meaning that the land on which the road is located was after 1954 no longer subject to the public easement; and (3) no part of the paved portion of East Kirkwood Road is located on the property now owned by plaintiffs or the adjacent parcels. (*Id*., at p.5:26-p.7:8.) Indeed, the opposition maintains that the entirety of the paved portion of East Kirkwood Road is located on property now owned by the Westlunds and others and that plaintiffs' motion fails to address what happens to "common law abutter's rights when the public street is abandoned," thereby leading to incorrect conclusions in the moving papers. (*Id*., at p.7:5-16.)

Relying on a handful of California appellate decisions, the Westlunds assert that the County's abandonment of the public road in 1954 effectively extinguished the potential for plaintiffs to acquire "any easement rights on East Kirkwood Road, either in the form of common law abutters' rights[]...any other private easement rights." (*Id*., at p.7:16-p.8:10.) The opposition also takes issue with plaintiffs' reliance on Miller & Starr's California Real Estate, §15:81 which, contrary to plaintiffs' suggestion, actually indicates that owners of property abutting an abandoned public road may retain private easement rights "only if those private easement rights are derived from a source other than the mere fact that the property abutted a public road," such as "by express grant, necessity, or by prescription." (*Id*., at p.8:11-24.) The Westlunds add that although Miller & Starr recognize several scenarios where an owner of property abutting an abandoned public road may still have easement rights, none exists in the present case. (*Id*., at p.9:1-p.11:4.)

The opposition next contends that plaintiffs will not prevail on their equitable easement claim because plaintiffs' encroachment is "not innocent" but instead is either negligent or willful inasmuch as they knew or should have known at the time they purchased the property in June 2021 not only that the County abandoned the public road in 1954 but also that the parcel map recorded in 1913 shows a "private road" running adjacent to their property and directly to a public road known as Kirkwood Street. (*Id*., at p.11:5-27.) According to the opposition, plaintiffs also expressly acknowledged prior to their June 2021 purchase that they needed an easement to access the property and plaintiffs' characterization of the Ruebels' "historic use of East Kirkwood Road" prior to the June 2021 sale is "highly disputed," further undermining the likelihood of plaintiffs ability to satisfy the first element for an equitable easement. (*Id*., at p.12:1-16.) The opposition also argues that "the easterly half of the [abandoned public] road...lies entirely on the properties on the east, including the Westlunds" and that plaintiffs will suffer no harm if this motion is denied since, as discussed above, East Kirkwood Road is not the only available means to access plaintiffs' property and there are at least four different alternatives. (*Id*., at p.13:1-p.14:2.)

The Westlunds next insist that plaintiffs cannot prevail on their claim for an easement by necessity because there is no "strict necessity" for an easement over East Kirkwood Road" in light of the four other means of access to their property and plaintiffs cannot show any earlier "unity of ownership" between their property and the Westlunds'. (*Id*., at p.14:17-p.15:17.) The opposition adds that even if plaintiffs' property were in fact shown to be landlocked, any easement by necessity should run across the Ruebels' property since it had the necessary "unity of ownership" and since the Ruebels appear to be the ones who created the problem presented here. (*Id*., at p.15:18-p.16:1.)

The opposition further argues that plaintiffs' two declaratory relief claims relating to their alleged right to use East Kirkwood Road and to the alleged unenforceability of the "Road Maintenance Agreement" recorded by the Westlunds on 7/29/2021 will both fail because they are duplicative of the two preceding easement claims which fail for the reasons cited above and because they are premised on an incorrect factual assertion that the Westlunds "do not own" the road. (*Id*., at p.16:2-13.) Additionally, the opposition insists that plaintiffs' attempt to void of the Westlunds' Road Maintenance Agreement "is strange" since plaintiffs nowhere challenge an identical "Road Maintenance Agreement" recorded by co-defendants Mark and Dara-Lee Triebes or the similar agreements recorded or accepted by other neighboring landowners. (*Id*., at p.16:14-25.)

Finally, the opposition contends that "Plaintiffs cannot show any harm if they are denied access over the paved portion of West [*sic*] Kirkwood Road." (Oppos., p.16:26.) More specifically, the Westlunds contend the construction of plaintiffs' home will take place "over a year or two," plaintiffs have not yet secured building permits and the harms plaintiffs have alleged are all "of their own doing," while their use of East Kirkwood Road for "heavy construction trucks and equipment could result in great harm to the road." (*Id*., at p.16:26-p.18:19.)

The Court notes that defendants Mark and Dara-Lee Triebes filed a notice stating they "join in" the Westlunds' opposition but they offered nothing further in opposition.

Reply. According to the Reply, the Westlunds' have offered "numerous declarations that fail to contest the actual significant facts in this case" and are "riddled with irrelevant statements." (Reply, p.3:16-19.) The opposition's "new argument" about plaintiffs having four ways to access their property is not "supported by any facts and defies common sense," as it is premised on "incredibly old and outdated maps" claimed to provide access "alternatives...which are not reasonable or equitable in any way" because "there simply is no other roads in existence." (*Id*., at p.3:20-25.) Plaintiffs maintain that "the true facts remain" that their property is landlocked; East Kirkwood Road was previously "vacated by the County" and runs right in front of plaintiffs' property; no single person (including the Westlunds) or entity owns the road; the Westlunds and other neighbors have used the road for decades without any formal agreement governing its use or maintenance; Ms. Westlund's declaration confirms the road has been in a state of disrepair even before plaintiffs used the road and the cost to repair exceeds $90,000, which shows no one has previously maintained the road); the Westlunds "tried to shake down" plaintiffs by demanding $30,000 to use the road; when plaintiffs refused, the Westlunds began their campaign of harassment, including "a vicious and childish text message chain that showed their true intentions and desires to prevent Plaintiffs (alone)" from using the road. (*Id*., at p.4:2-18.)

The Reply further asserts current California law supports plaintiffs' position that all owners of property abutting East Kirkwood Road "have a private right of access...to their homes [citations omitted]" and takes issue with "the purported 'survey' submitted by the Westlund[s]...through the Declaration of Robert Snow," arguing it is "based on outdated maps and a fundamental misunderstanding of how roads are built after a public dedication." (*Id*., at p.4:19-26.) Plaintiffs add that the opposition fails to demonstrate "the balance of harms" does not weigh greatly in favor of the injunction to preserve the status quo of unfettered access to East Kirkwood Road and confirms the Westlunds have no qualms about submitting "false statements and unfounded accusations." (*Id*., at p.4:27-p.6:23.)

Objections to Evidence

The Westlunds' 10 written objections to evidence are ruled upon as follows:

Nos. 1, 6: Sustained only as to what Ms. Westlund stated because the declarations do not affirmatively establish that either declarant was actually present when this statement was made.

Nos. 2, 7: Sustained only as to what Mr. Westlund stated because the declarations do not

affirmatively establish that either declarant was actually present when these statements were made.

Nos. 3, 8: Sustained only as to the Westlunds' "verbal threats of violence to our vendors" and Ms. Westlund statement to the land surveyor because the declarations do not affirmatively establish that either declarant was actually present when these events occurred.

Nos. 4, 5, 9, 10: Sustained.

Plaintiffs' 74 written objections to evidence (which include two No. 64s) are overruled except for the following:

Nos. 1-6, 8-16, 18-21, 24, 26, 29-33, 37, 40-42, 44-45, 48, 53-61, 63, 64 (both), 71, 73: Sustained.

No. 7: Sustained only as to the statements attributed to the delivery driver and as to the final sentence because the declaration does not affirmatively establish the declarant's personal knowledge of the factual assertion in the final sentence.

No. 17: Sustained only as to the first two sentences because the declaration does not affirmatively establish that the declarant was actually present when these events occurred.

No. 22: Sustained only as to the assertion that Mr. Ruebel "always got to the front of his property from the main Kirkwood Street on the west."

No. 23: Sustained only as to the last sentence.

No. 28: Sustained only as to the last part of the sentence expressing the declarant's "opinion."

No. 35: Sustained only as to the last sentence.

No. 38: Sustained except as to the last half of the second sentence.

No. 47: Sustained only as to the description of the culvert at Page 4, lines 23-24 and the parenthetical sentence at Page 5, lines 1-2.

No. 49: Sustained only as to the statements attributed to Mr. Hedman.

No. 50: Sustained because the declaration does not affirmatively establish the declarant's personal knowledge of the factual assertions.

No. 62: Sustained only as to the statement attributed to Ms. Triebes.

No. 70: Sustained only as to the first sentence.

Request for Judicial Notice

The Westlunds' Request for Judicial Notice of various recorded documents is granted but "the fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein." (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 (underline added for emphasis).)

Analysis

At the outset, "[T]he issuance of an injunction involves '...the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should [it] be exercised in a doubtful case. [Citations.]'" (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1021-1022 (citing *Fleishman v. Sup. Court* (2002) 102 Cal.App.4th 350, 355-356).) Among the factors to be considered when injunctive relief is sought is whether the moving party will, absent such relief, suffer great or irreparable harm for which pecuniary compensation would not afford adequate relief or where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. (See, *e.g.*, Code Civ. Proc. §526(a)(2), (4), (5); *Jessen v. Keystone Sav. & Loan* (1983) 142 Cal.App.3d 454, 457.) With this standard in mind, the Court will now consider the facts of the present case.

Success on the Merits. The first question here is whether plaintiffs have shown a likelihood of succeeding on the merits of their causes of action currently alleged in the complaint. The opposition's primary argument about why plaintiffs cannot meet their burden on this issue is that a parcel map recorded in 1913 shows the existence of a "private road" adjacent to plaintiffs' property which runs west

to Kirkwood Street, a public road. (Oppos., p.4:17-p.5:18.) Although plaintiffs did not object to the admissibility of this 1913 map which is attached as Exhibit 11 to the Hansen Declaration in opposition, defendants failed to proffer any admissible evidence which affirmatively demonstrates that this 1913 map has not in the subsequent 100-plus years been altered or superseded in any material respect or otherwise remains a complete, accurate and/or binding description of the conditions at this particular subdivision. More specifically, while the Westlunds point to the description of a private road adjacent to lot Nos. 121-123 now owned by plaintiffs, the declarations of Mr. and Ms. Madsen in reply aver that no such road actually exists and there is no indication that a road ever existed in the location identified on the 1913 map. Given this evidentiary record, the opposition's reliance on the 1913 map is in this Court's view insufficient to establish for purposes of this motion that plaintiffs' property is, even without access to East Kirkwood Road, not completely landlocked as claimed in their complaint and moving papers.

The opposition next argues that contrary to the moving papers, plaintiffs do not have and cannot assert any common law right to use East Kirkwood Road by virtue of now owning land adjacent to this road since it was abandoned by the County back in 1954 and is therefore no longer subject to any public easement. As support for this argument based on the County's 1954 abandonment of the public road, the Westlunds rely largely on three California appellate decisions, the most recent of which is *Norcross v. Adams* (1968) 263 Cal.App.2d 362. In *Norcross*, similar to the case at bar, there was a dispute between owners of property abutting an abandoned county road, with the plaintiffs seeking *inter alia* to enjoin the defendants from fencing off portions of the road. (*Norcross*, at 363.) The trial court ruled against the plaintiffs, who argued on appeal that "they have a private easement over the strip of land in question which was unaffected by the abandonment of the road (1) because the deed by which they acquired title to lot 47 described it by reference to a recorded tract map which showed the lot abutting a public road, and (2) because an owner of property abutting a public highway, in addition to the rights enjoyed by the public, has certain private rights which may not be taken without payment of just compensation." (*Id.*, at 365.) The Fourth District Court of Appeal's discussion began with the following summary of pertinent law:

It is a well-settled rule in this state that the recordation of a tract map delineating streets followed by the conveyance of lots by reference to the map presumptively conveys to the grantee fee title to one-half of the street on which the property abuts and a private easement to use the streets shown on the map. [Citations.] The presumption applies even though the road has been vacated or abandoned prior to the conveyance. [Citations.] Private rights so acquired are unaffected by an abandonment or vacation of the street. [Citation.]

However, an implied grant [of fee title to one-half of the street abutting the property and a private easement to use the streets shown on the map] presupposes ownership of the street by the one who recorded the tract map. [Citations.] Where the abutting street is not a part of the recorded subdivision, the doctrine of implied grant can have no application. [Citations.]
(*Id.* (underline added for emphasis).)

Ultimately, the plaintiffs' claim of rights to the subject road was rejected because "the evidence shows that the road was never a part of tract 3866 in which plaintiffs' lot 47 was situated, but, in fact, was created by the dedication of the 30-foot strip by the lot owners of the adjoining tract." (*Id.*, at 365-366.)

This Court finds that the specific holding of *Norcross* (*i.e.*, that the plaintiffs had no rights with respect to the abandoned county road abutting their property) controls the outcome of the case at bar inasmuch as *Norcross* is factually distinguishable. In the case at bar, unlike in *Norcross*, there is no genuine dispute that (1) the road now known as East Kirkwood Road appeared on the original parcel map depicting the tract where plaintiffs' property is located, (2) this road was at least until 1954 a public road, and (3) this road is located immediately adjacent to the lots which plaintiffs acquired in 2021. Under this clearly different set of factual circumstances, the general rule set forth in *Norcross* would appear to apply to the

present case: There is a presumptive conveyance of not only fee title to one-half of the adjacent street but also a private easement to use the street shown on the map and as particularly important here, the private rights acquired by this presumptive conveyance "are unaffected by an abandonment or vacation of the street." (*Norcross*, at 365 (underline added for emphasis).) In short, the opposition's reliance on *Norcross* and the two other appellate decisions preceding it falls short of persuading this Court that plaintiffs do not, solely as a result of the County's 1954 abandonment of East Kirkwood Road, possess any common law right to use the road to access their property and thus, the Westlunds' assertion that no part of the paved portion of East Kirkwood Road is actually located on plaintiffs' property is inapposite.

Likewise, the opposition's reliance on Miller & Starr's commentary about private easement rights surviving the abandonment of a public road "only if those private easement rights are derived from a source other than the mere fact that the property abutted a public road" (Oppos., at p.8:11-24) is inconsequential here because in the instant suit, plaintiffs are *inter alia* seeking to establish an easement by necessity, one of a few potentially valid bases of rights which Miller & Starr expressly recognize as surviving the abandonment of a public road [*i.e*., private easement rights survive abandonment "only if...derived from a source other than...property abutted a public road," such as "by express grant, necessity, or by prescription" (underline added for emphasis)]. (*Id*., at p.8:22-24.)

A. Equitable Easement. With respect to plaintiffs' claim for an equitable easement, the Westlunds maintain that it will necessarily fail because plaintiffs cannot establish the first element of the claim, that their encroachment is "innocent," given that plaintiffs knew or should have known when they purchased the property (1) the County had long ago abandoned East Kirkwood Road; (2) the 1913 parcel map shows an adjacent "private road" running directly to Kirkwood Street, a public road; (3) they needed an easement to access the property; and (4) their characterization of the Ruebels' "historic use of East Kirkwood Road" is "highly disputed." (Oppos., at p.11:5-p.12:16.) Although the evidence presented here reveals a number of conflicts in the parties' respective evidence bearing on this first element of the equitable easement claim, this Court cannot conclude as a matter of law that plaintiffs have no probability of establishing their encroachment is "innocent" since a reasonable trier of fact could based on the current evidentiary record find it is more likely than not that plaintiffs neither knew nor should have known they would have no right to utilize East Kirkwood Road to access the property purchased in 2021 and/or this property would be completely landlocked without use of this road.

Because the Westlunds have failed to proffer any evidence sufficient to demonstrate they will suffer any "irreparable injury" if plaintiffs are permitted to utilize East Kirkwood Road to access their property, the only remaining element of plaintiffs' claim to be addressed here is whether the hardship plaintiffs would suffer from denial of the equitable easement to use the road is greatly disproportionate to the hardship which would be created by the continuance of the encroachment. As noted above, the opposition contends plaintiffs will suffer no harm if denied the right to use East Kirkwood Road since there are at least four other alternatives for access to plaintiffs' property. (Oppos., p.13:1-p.14:2.) The first alternative cited by the Westlunds is the "private road" identified on the 1913 parcel map but having addressed "private road" above, the Court need not discuss it further here. The second and third means of access described by the opposition are an equitable easement and an implied easement over the Ruebels' property, which is adjacent to the existing public road known as Kirkwood Street. (*Id*., at p.13:12-20; p.15:18-p.16:1.) While the Westlunds insist the declarations by plaintiffs and Mr. Ruebel indicate the existence of "'dirt road that ran east to west' all the way across the Plaintiffs' property to the 'western edge' of the Ruebels' lot next to the public Kirkwood Street" (*Id*., at p.13:15-18; p.15:20-22), the evidence included with plaintiffs' Reply explains that such a continuous road no longer exists and that a stand of trees now effectively creates a barrier between the properties, thereby making both unreasonable and impracticable this alternative access suggested by the Westlunds. The remaining alternative for access being proposed by the opposition is not well-defined, consisting of a single sentence at Page 13:20-24, and seems to suggest that instead of using the existing East Kirkwood Road to access their property, plaintiffs should build a new road right next to and parallel to East Kirkwood

Road. Such an alternative is clearly unreasonable under the circumstances and need not be discussed further.

For the reasons explained above, the Court finds that plaintiffs do have a reasonable likelihood of prevailing on their first cause of action for an equitable easement to utilize East Kirkwood Road to access their property.

B. Easement by Necessity. According to the Westlunds, plaintiffs will be unable to succeed on their easement by necessity claim because the existence of at least four other means of access to their property precludes the existence of any "strict necessity" for an easement entitling them to use of East Kirkwood Road. (Oppos., p.14:26-p.15:1.) This is essentially the same argument which was made and rejected in connection with the equitable easement claim and it must be rejected here for the same reasons.

The opposition further contends that plaintiffs will be unable to establish the necessary element of "unity of ownership" between their property and the Westlunds' in order to show entitlement to an easement by necessity. (*Id*., at p.15:2-17.) However, the opposition misconstrues the element of "unity of ownership" essential for an easement by necessity. In *Murphy v. Burch* (2009) 46 Cal.4th 157, the California Supreme Court explained:

To meet the common-ownership requirement [for an easement by necessity], the party seeking the easement must establish that the lands composing the alleged dominant and servient estates were once under common ownership and that a conveyance by the common owner gave rise to the necessity for a right-of-way. ... [¶] ... [T]he doctrine [of easement by necessity] is properly applied only when the circumstances establish that an access easement was intended at the time of the common owner's conveyance.
(*Murphy*, at 164 (underline added for emphasis).)

In the present case, the evidence indicates that tract identified in the 1913 map was at one time a single parcel under common ownership which was at some point subdivided into individual lots, including those which plaintiffs acquired in 2021. It also stands to reason that East Kirkwood Road was developed in order to provide access to a number of lots with the subdivision including but not limited to those now owned by plaintiffs. Therefore, not only does the element of common ownership appear satisfied but also the element of necessity is also present because without access to via East Kirkwood Road, plaintiffs have no viable means to get to and from their property.

Accordingly, the opposition has failed to demonstrate that plaintiffs will be unable to prevail on their easement by necessity claim and under the circumstances here, this Court finds that plaintiffs have a reasonable probability of succeeding on this cause of action as well.

C. Declaratory Relief Claims. The Westlunds' primary argument about why plaintiffs cannot prevail on the two declaratory relief claims (*i.e.*, a right to use East Kirkwood Road and the unenforceability of the "Road Maintenance Agreement" recorded by the Westlunds on 7/29/2021) is that these claims are "simply a restatement of Plaintiffs' other claims" and will fail for the same reasons. This Court is not persuaded that the declaratory relief claims are purely duplicative of the two preceding claims but regardless, the fact remains that the opposition has failed to demonstrate plaintiffs cannot prevail on either of the two easement claims addressed above. That the Westlunds find "strange" plaintiffs' attempt to void the Westlunds' Road Maintenance Agreement without making a similar challenge to similar Road Maintenance Agreements recorded by other co-defendants does not, without more, prove plaintiffs have no likelihood of succeeding on their two declaratory relief claims. Based on the present record, this Court holds that plaintiffs do have a reasonable probability of prevailing on their declaratory relief claims.

Irreparable Harm. While the opposition suggests that plaintiffs have failed to demonstrate they will in the absence of the requested injunction suffer any irreparable harm caused by being barred from using East Kirkwood Road for access to and from their property, this claim is not borne out by the record. Aside from plaintiffs' objections to the Westlunds' evidence purporting to show that plaintiffs have not yet secured building permits have been sustained, this Court concludes that without the requested prohibitory injunction plaintiffs will be effectively deprived of not only the present use and enjoyment of their property but also their right to develop their property as they may desire. This alone constitutes "great or irreparable injury" within the meaning of Code of Civil Procedure §526(a)(2) and/or harm for which pecuniary compensation would not afford "adequate relief" or would be difficult to ascertain within the meaning of §526(a)(4) and (5). Each of these circumstances independently, and certainly collectively, supports the grant of injunctive relief in this case.

In contrast, the primary, if not exclusive, harm claimed by the Westlunds in the event the requested injunction is granted is that East Kirkwood Road "could" suffer "great harm" from "heavy construction trucks and equipment" using the road. (Oppos. p.16:26-p.18:19.) Even assuming there were admissible evidence tending to show not only that "heavy construction trucks and equipment" will be using the road but also that they would cause "great harm" to the road, the Court finds no admissible evidence which indicates that such damage to the road could not be repaired or that compensation for same would be difficult to ascertain.

For these reasons, this Court holds that plaintiffs have met their burden of a showing the type of harm which supports the issuance of injunctive relief and that the balance of interim harms to the parties also weighs in favor of plaintiffs.

Disposition

In light of the foregoing, the Court finds that plaintiffs have satisfied their burden of showing not only a likelihood of succeeding on the causes of action currently alleged against defendants but also the likelihood of suffering irreparable harm unless the conduct attributed to defendants including but not limited to Westlunds, their agents and/or others acting in concert with them, is enjoined. Therefore, this Court will exercise its equitable powers by granting the requested preliminary injunction prohibiting defendants, their agents and others acting in concert from obstructing, blocking or limiting access to East Kirkwood Road and from otherwise interfering or limiting access to or use of East Kirkwood Road by plaintiffs, their guests, vendors or workers in order to travel to and from plaintiffs' property.

Plaintiffs shall post no later than 2/23/2022 an injunction bond pursuant to Code of Civil Procedure §529 in the amount of $20,000. Although neither the moving nor opposition parties appear to have addressed the amount of bond which would be appropriate here, this Court finds that a $20,000 bond would under the circumstances here represent a reasonable approximation of the damages defendants are likely to suffer in the event it is later determined that plaintiffs were not entitled to the preliminary injunction being granted here.

The TRO issued on 12/2/2021 is dissolved and the OSC issued on the same date is discharged.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.