Filed 5/18/17 Brokaw v. Guigliano CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CYNTHIA BROKAW et al., Plaintiffs and Respondents, v. MICHAEL F. GUIGLIANO et al., Defendants and Appellants.	2d Civ. B270393 (Super. Ct. Nos. 1393491 consolidated with 1457078) (Santa Barbara County)
MICHAEL F. GUIGLIANO et al., Plaintiffs, v. CYNTHIA BROKAW et al., Defendants.	

Michael F. Guigliano, Barbara J. Guigliano, Frederick W. Guigliano, and Roberta A. Guigliano appeal from a judgment declaring that respondents Cynthia Brokaw and Brian

Bailey have a prescriptive right to use a dirt road on appellants' property at 1234 Catarina Street, Santa Ynez. The trial court factually found that the use of the road ripened into a prescriptive easement well before appellants purchased the property. The court further found that appellants have a non-exclusive Utility Easement across respondents' property for utility purposes, which includes an "entry envelope" to turn into appellants' driveway. We affirm.

Facts and Procedural History

Appellants and respondents own adjoining properties at 1234 Catarina Street and 1231 Catarina Street. The properties share a dirt road that historically lays 14 to 16 feet on appellants' property and four feet on respondents' property. Next to, and overlapping part of the road easement, is a recorded Utility Easement that is 20 feet by 85 feet long. The Utility Easement is located on 1231 Catarina and extends to 1245 Catarina, north of 1231 Catarina.

In 1988, the owners of 1231 Catarina and 1234 Catarina discussed a 1987 survey which determined that most of the dirt road lays on 1234 Catarina. Chris Castagna, the owner of 1231 Catarina, continued to use the road for egress and ingress to his property. The Hirzels took no steps to stop Castagna's use of the road or post a "no trespassing" or "private property" sign.

Appellants purchased 1234 Catarina in 2011 and, in June 2011, put up a fence and traffic cone to block the road. Respondents bought 1231 Catarina in September 2011 and demanded that appellants remove the fence but appellants refused to do so.[*]

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[*] (Photographs depicting entry envelope, fence and cone; land surveys and property map, attached as Appendix A, *post*, p. 10.)

Respondents sued for quiet title, injunctive relief, and damages. (*Brokaw v. Guigliano et al.*, Santa Barbara County Sup. Ct., Case No. 1393491.) Appellants filed a separate action, which was consolidated for trial, for interference of the Utility Easement. (*Guigliano et al. v. Brokaw et al.*, Santa Barbara County Sup. Ct., Case No. 1457078.)

After six days of testimony and a court visit to the road site, the trial court issued a written statement of decision declaring that respondents had a prescriptive right to use the road. It found that the prescriptive easement extended 10 feet over appellants' side of the property line and two feet over respondents' side of the property line. With respect to the Utility Easement, the trial court found that it was an easement for utilities only and included an "entry envelope" for ingress and egress to the driveway at 1234 Catarina.

Prescriptive Easement

A prescriptive easement may be acquired by open, notorious, continuous, adverse use, under claim of right, for a period of five years. (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 709; see, e.g., *O'Banion v. Borba* (1948) 32 Cal.2d 145, 150 [continuous, uninterrupted, *peaceable*, and adverse use under a claim of right with notice of which defendants and their predecessors could be charged is sufficient].) The party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 938.)

Appellants argue that the clear and convincing evidence standard at trial changes the standard of review on appeal. We disagree. (*O'Banion v. Borba*, *supra*, 32 Cal.2d at p. 147.) "Although the trial court's finding of the existence of a prescriptive easement must be based upon clear and convincing

evidence, if there is substantial evidence to support its conclusion, the determination is not open to review on appeal. [Citation.]" (*Applegate v. Ota*, *supra*, 146 Cal.App.3d at p. 708.) As in any sufficiency of the evidence appeal, we review the evidence in the light most favorable to the prevailing party and resolve all conflicts in the evidence in support of the judgment. (*Ibid*.) Our power begins and ends with a determination as to whether there is any substantial evidence to support the trial court's findings and judgment. (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370)

Appellants claim there is no evidence of adverse use and the trial court erred in drawing the inference that long term use of the road matured into a prescriptive easement. The evidence shows that Chris Castagna lived at and owned 1231 Catarina from 1984 to March 2011, approximately 26 years. Castagna assumed the road was part of his property and noticed that the house at 1234 Catarina was vacant when he moved in. The Wells purchased 1234 Catarina in 1985 and sold it to Gilda Wechsler in May 1987 who surveyed the property before selling it to the Hirzels in 1988. The Hirzels owned the property from March 1988 until September 2010.

In 1988, the Hirzels discussed the survey with Castagna and acknowledged that the dirt road was "mainly on" 1234 Catarina. There was no discussion about permissive use and the Hirzels took no action to stop Castagna's use of the road. Castagna continued to use the road at least twice a day and saw visitors and delivery trucks use the road to access the house at 1231 Catarina.

In 1989, Castagna built a carport at the south end of his property where the road ends. The Hirzels did not complain or object to Castagna's use of the dirt road to access the carport.

Castagna stated that he would not have built the carport had he thought he did not have the right to use the road. Castagna sold eggs near the carport and neighbors used the road to purchase the eggs and put money in a coffee can.

Daniel Beattie lived at 1245 Catarina Street from 1962 to 2012. Beattie stated that the dirt road "was just a street to me"and like a public road. During the 50 years that Beattie lived at 1245 Catarina, Beattie did not see a "no trespassing" or "private property" sign on the road. Beattie's daughter, Wendy Berry, grew up at 1245 Catarina and saw vehicles, utility company and delivery trucks use the dirt road. Berry considered the road to be part of Catarina Street and never saw a "private property" or "no trespassing" sign. No one told Berry that it was a private road or that she needed permission to use it.

Respondent Cynthia Brokaw, was no stranger to the neighborhood. Before Brokaw purchased 1231 Catarina, she saw cars, utility and delivery trucks use the road, walked her dog on the road, and used the road to buy eggs from Castagna. Before escrow closed on 1231 Catarina, Brokaw noticed that someone had put up a fence and traffic cone to block the road. Brokaw asked about it. Michael Guigliano said he was concerned about "safety" and worried that "squatters" would be attracted to the empty house at 1231 Catarina. Appellant told Brokaw that all but three of the fence posts were set in sand and could be easily removed.

Appellants contend there was no adverse use under claim of right to perfect a prescriptive easement. Castagna however, used the road as if he owned the right of way and helped maintain the road by fixing potholes. "Such acts of maintenance constitute evidence of a claim of right. [Citation.]" (*LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 163 [maintenance of

trail or roadway is evidence of claim of right].) Castagna also built a carport and used the road to access the carport. Castagna would not have gone to the time and expense of building the carport had he believed the neighbors at 1234 Catarina could stop him from using the road. No one questioned Castagna's right to use the road and Castagna did not ask for permission to use it and repair it. (See, e.g., *Weideman v. Staheli* (1948) 88 Cal.App.2d 613, 616.)

Appellant's reliance on *Clark v. Redlich* (1957) 147 Cal.App.2d 500, a permissive use case, is misplaced. There, plaintiffs tried to buy a right of way. (*Id.* at p. 504.) The owners refused to sell a right of way but gave plaintiffs permission to use the road. The Court of Appeal concluded that plaintiffs' permissive use of the road did not ripen into a prescriptive right. (*Ibid.*) Unlike *Clark v. Redlich*, Castagna did not ask for permission to use the road or offer to buy a right of way. After the Hirzels were told about the road survey, Castagna continued to use the road under claim of right and built the carport.

Appellants argue that Castagna's use of the road was a matter of neighborly accommodation rather than adverse use. That was a question of fact for the trial court to determine based on the surrounding circumstances and the relationship between the parties. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 572; *O'Banion v. Borba*, *supra*, 32 Cal.2d at p. 150.) There was ample evidence to conclude that Castagna's (respondents' predecessor) use of the road was continuous, uninterrupted, peaceable, adverse and under a claim of right, with notice to appellants and their predecessors. (*Ibid.*; see *Weideman v. Staheli*, *supra*, 88 Cal.App.2d at p. 616 [road was only means of ingress and egress to defendant's property and

used 20 times a year; no one questioned defendant's use or repair of road].)

Castagna's use was sufficiently "adverse" and "hostile" because he used the road without permission. (*Aaron v. Dunham* (2006) 137 Cal.App.4th 1244, 1252.)

Road Easement South of the Carport Entrance

Appellants argue that the trial court erred in finding that the road area south of the carport was used during the prescriptive period. The neighbors testified that the road easement extended all the way to the end of the road. This was confirmed by Jed Blake, a licensed surveyor who surveyed the property for Wechsler in 1987 and saw people driving down the road to the lots at the end of the road. Substantial evidence supports the trial court's finding that the prescriptive easement runs the length of the road.

Recorded Utility Easement

Appellants argue that the trial court erred in extinguishing their right to use the Utility Easement for ingress and egress to 1234 Catarina.[1] The trial court found that the recorded easement was "reduced to an easement for utility purposes" and includes an "entry envelope" where appellants turn into their driveway. Stated another way, appellants may use the Utility Easement to access their driveway but do not have unfettered ingress-egress rights over the entire easement.

Appellants cite *Heath v. Kettenhofen* (1965) 236 Cal.App.2d 197 for the principle that historical use of a recorded

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[1] Appellants claim that the trial court found that the Utility Easement is no longer in effect and the judgment extinguishes the rights of ingress and egress as conveyed to appellants. The trial court made no such ruling.

easement does not limit the dominant tenant's right to use the easement. A trial court may not extinguish a recorded easement simply because the easement owner does not need the entire easement. (See *Cottonwood Duplexes, LLC v. Barlow* (2012) 210 Cal.App.4th 1501, 1509-1510.)

Appellants complain that they cannot use the entire easement because trees and vegetation were planted on part of the easement. David Marx, a real-estate appraiser, was asked about the Utility Easement and testified that "[t]he historic use of the easement has been primarily just the front lawn, and there's telephone, there's a utilities easement on it, but there's been no road, . . . or ingress and egress." Marx was aware of the claim that respondents' trees interfere with the Utility Easement and testified that the trees do not interfere with appellants' access to 1234 Catarina.

The trial court credited Marx's testimony and found that appellants' right to use the Utility Easement for egress and ingress was limited to the "entry envelope" where they turn into their driveway. It did not err. Where a grant deed "grants an easement in general terms, without specifying or limiting the extent of its use, the permissible use is determined in the first instance by the intention of the parties and the purpose of the grant. Once the easement has been used for a reasonable time, the extent of its use is established by the past use." (6 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 15:56, p. 15-202.)

That was the case in *Rye v. Tahoe Truckee Sierra Disposal Company, Inc.* (2013) 222 Cal.App.4th 84. There, the grant deed provided for an easement for ingress, egress, parking, storage, and utilities over a portion of Parcel One. (*Id.* at p. 92.) The Court of Appeal rejected the argument that defendant (the dominant tenement) had the right to park and store equipment

on all areas of the easement. That would "preclude the plaintiffs from any effective use of the servient tenement" and create an exclusive easement. (*Id.* at pp. 92-93.) Citing Civil Code section 806, the court held that the "'extent of a servitude'" can be inferred from the intention of the parties based on "'"such uses as the parties might have reasonably expected from the future uses of the dominant tenement. . . ."'" (*Id.* at p. 92.) "If the defendant were correct that it had a right to use all of the area subject to the easement, it could effectively preclude the plaintiffs from any effective use of the servient tenement . . . , thereby creating an exclusive easement." (*Id.* at pp. 92-93.)

Here the Utility Easement is a non-exclusive easement and describes the extent and use of the easement in general terms.[2] There is no evidence that the Utility Easement was intended to be exclusive or grant appellants unfettered access to any part of the easement. The trial court reasonably concluded that the Utility Easement had been reduced to an easement for utility purposes and includes an "entry envelope" where appellants turn into their driveway. As the dominant tenement, appellant must use the easement in such a way as to impose as slight a burden as possible on the servient tenement.

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[2] Appellants' grant deed provides for a "non-exclusive easement for ingress, egress and public utilities purposes, over, under, along and across those portions of lots one and six of tract 10148." The cases cited by appellants are distinguishable and involve the grant of a specific easement (*Heath v. Kettenhofen*, *supra*, 236 Cal.App.2d at p. 206), the complete extinguishment of a utility easement (*Cottonwood Duplexes, LLC v. Barlow supra*, 210 Cal.App.4th at p. 1507), and the extinguishment of an easement based on the dominant tenement's threat to run over anything including children and animals (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 769).

(*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.) "[T]he owner of the servient tenement [has] the right to place improvements [on] the easement as long as they do not unreasonably interfere with the right of the owner of the dominant tenement to ingress and egress." (*Id.* at p. 700.)

Disposition

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

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Keywords: Image provided by Michael P. Ring & Associates
File Size: 1.77 MB
Date: 6/13/11, 7:03:14 AM PDT

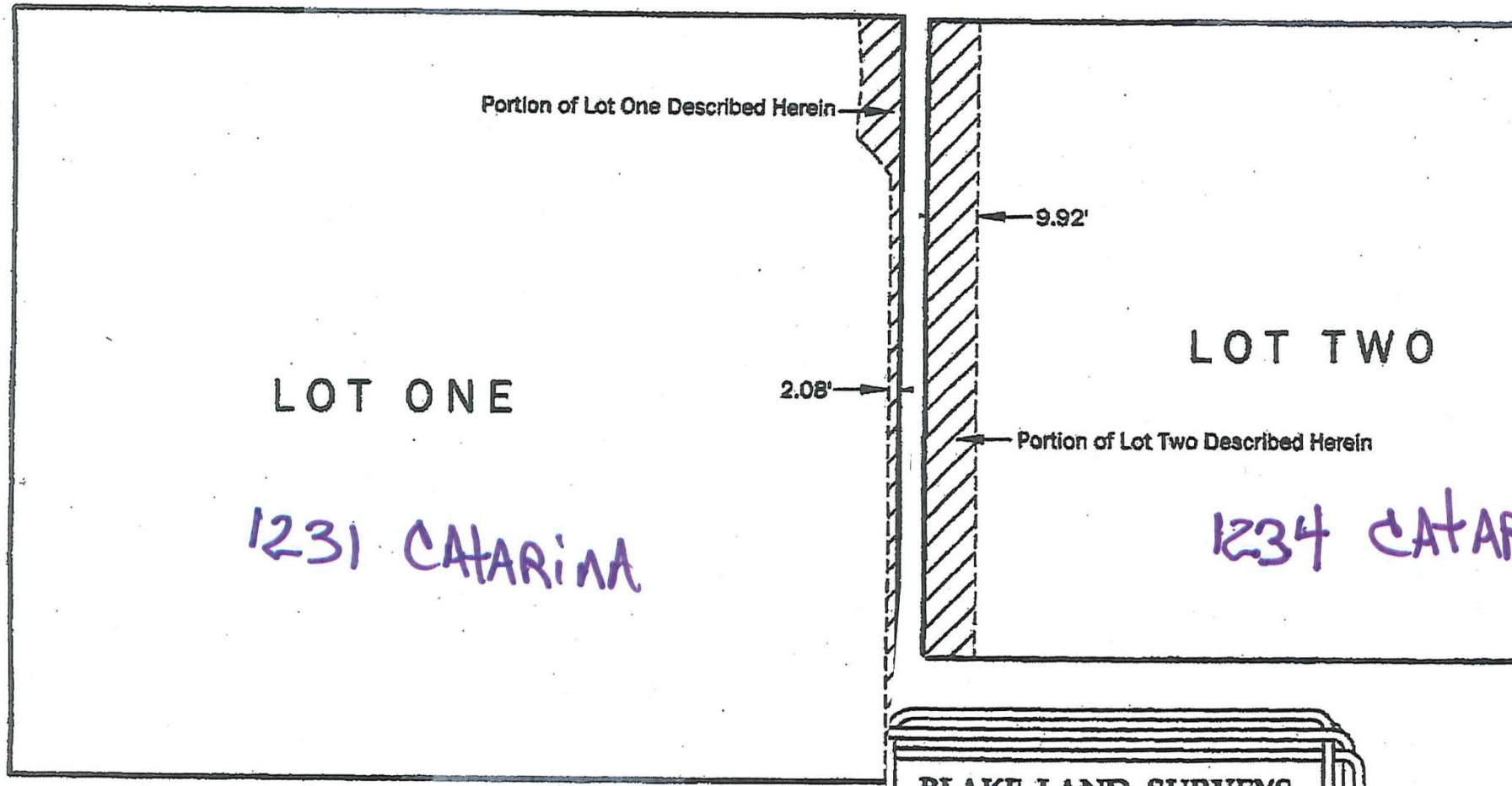
Trial Brief, Exhibit

ENTRY ENVELOPE ACROSS UTILITY EASEMENT

FENCE AND CONE INSTALLED BY GUIGLIANO

APPENDIX A

DIRT ROAD EASEMENT



BLAKE LAND SURVEYS
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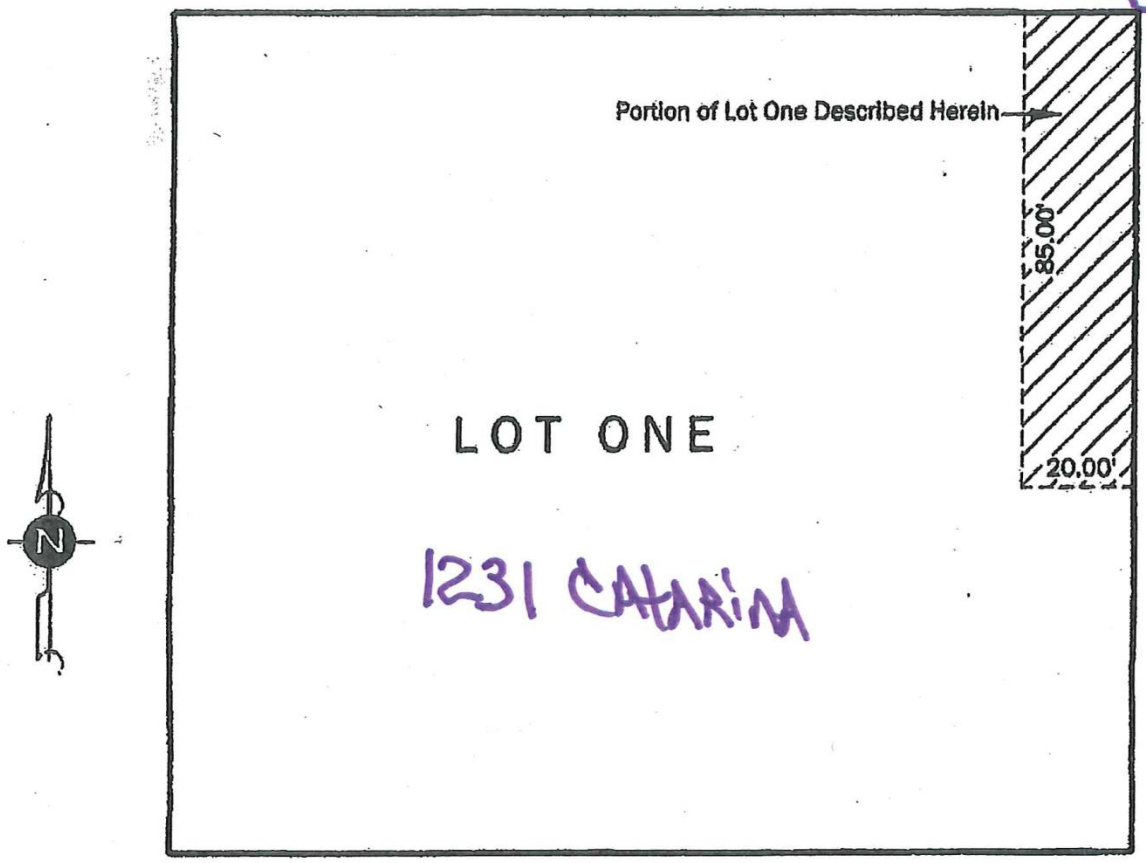
tel 805-688-2054
Est. 1980 PLS 4786

30' 0' 15' 30' 60'

Public Utility Easement
per
Superior Court Case No. 1393491
Brokaw v. Guigliano
over Lot 1, Tr. Map No. 10,148 per 55/M/81-82
lying in the County of Santa Barbara, CA

Utility Easement



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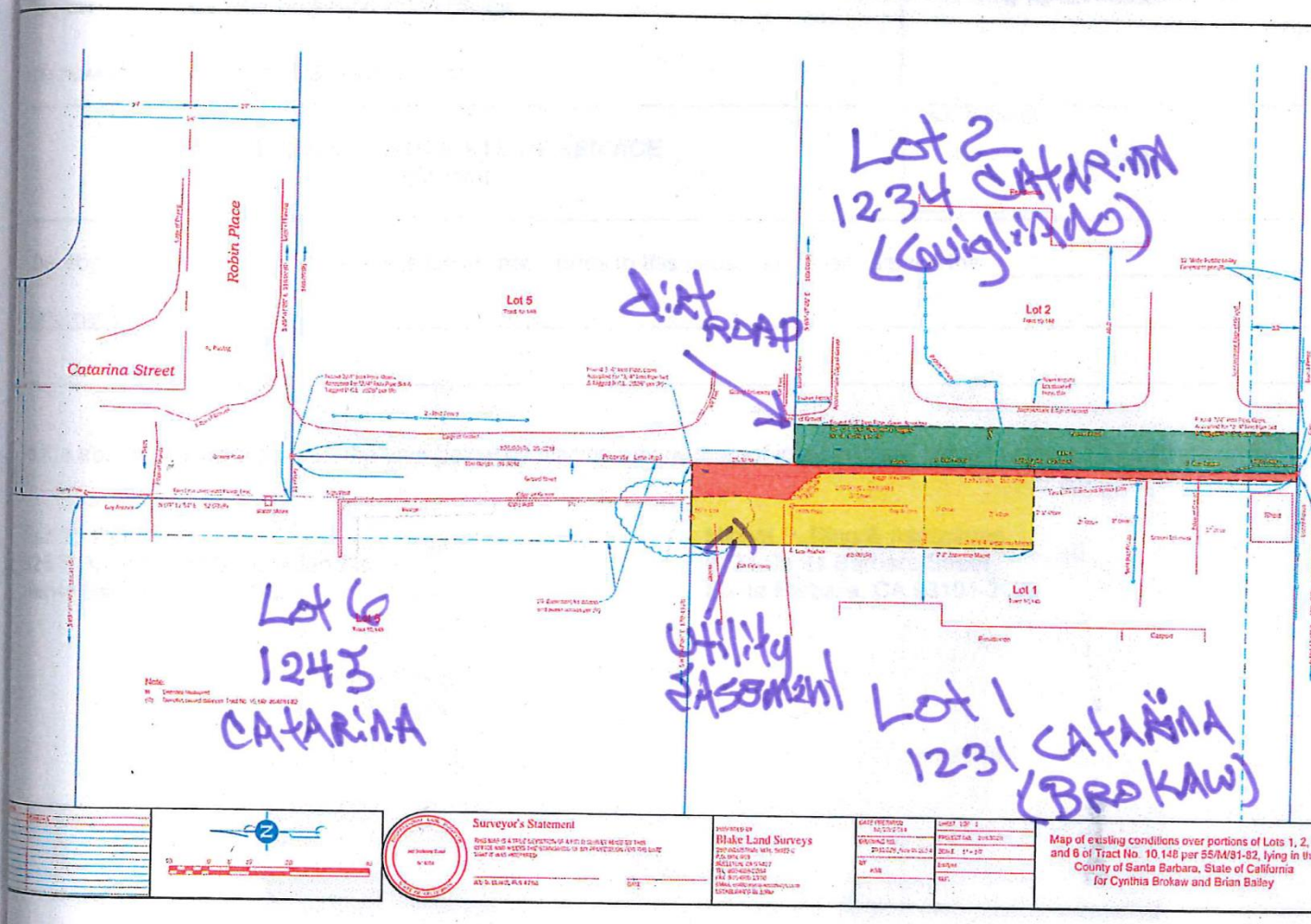
PROFESSIONAL LAND SURVEYOR
Jed Berkeley Blake
N° 4786
05-26-2015
STATE OF CALIFORNIA

30' 0' 15' 30' 60' 120'


Robin Place
Catarina Street
Lot 5
Lot 2
Lot 1
Lot 6
1243 CATARINA
Utility Easement
Lot 2
1234 CATARINA
(Gulgliano)
Lot 1
1231 CATARINA
(Brokaw)
Surveyor's Statement
Blake Land Surveys
Map of existing conditions over portions of Lots 1, 2,
and 6 of Tract No. 10,148 per 55/M/81-82, lying in th
County of Santa Barbara, State of California
for Cynthia Brokaw and Brian Bailey

James F. Rigali, Judge

Superior Court County of Santa Barbara

Law Offices of Michael P. Ring & Associates, Michael P. Ring and Iris L.M. Ring, for Defendants and Appellants.

Will Tomlinson, for Plaintiffs and Respondents.