

FILED  
LOS ANGELES SUPERIOR COURT  
FEB 24 2011  
JOHN A. CLARKE, CLERK  
By CANDACE LUTZ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

WINDSOR PACIFIC LLC, a California  
Limited liability company,

Plaintiff,

vs.

Samwood Co. Inc. et al

Defendants.

CASE NO: PC046686

Assigned For All Purposes to:

Hon. Michael S. Mink (Ret.)

Dept. F46

The Court Trial in the above-referenced matter came on regularly for hearing on January 10-14, 2011 in Department F46 of the North Valley District of the Los Angeles Superior Court, the Honorable Michael S. Mink, Assigned Judge presiding. Plaintiff Windsor Pacific, LLC (hereafter "Windsor") appeared and was represented by John P. Flynn Esquire and Allen W. Hubsch, Esquire. Defendant Samwood, Inc. ("Samwood") appeared and was represented by Joseph Di Gulio, Esquire and Defendant Shadow Pines, LLC ("Shadow Pines") appeared and was represented by Eric J. Rans, Esquire. The

1 Defendants, unless otherwise noted, shall jointly be referred to as Shadow Pines throughout. The  
2 Court, after receiving all of the evidence and written closing argument of counsel took its decision under  
3 submission. The Court now renders its Memorandum of Decision as follows:

4 **1. Procedural Background.** On October 22, 2009 Plaintiff filed its Complaint against Defendants  
5 stating causes of action for "Quiet Title, Ejectment and Declaratory Relief. On November 23, 2009  
6 Samwood filed its Answer to the Complaint as did Shadow Pines on November 24, 2009. On March 19,  
7 2010 Plaintiff filed an Amendment to Complaint changing the name of Samwood as named in the  
8 complaint from "Samwood Co., Inc. a Maryland Corporation to Samwood Co., Inc. a District of  
9 Columbia Corporation doing business as Samwood Co. Inc., a Maryland Corporation. Concurrently  
10 therewith it also added three Doe Defendants, Pinetree Properties, a Joint Venture, Donna Land  
11 Company, a California Corporation, and KB Homes Greater Los Angeles, Inc. ("KB Home"). The  
12 defaults of Pinetree Properties and Donna Land Company were entered on July 30, 2010. KB Home  
13 filed its Answer on May 28, 2010. The matter was scheduled for trial on 1/10/ 2011. On January 3, 2011  
14 the parties filed with the Court a document entitled "Stipulation and [Proposed Order] Between Plaintiff  
15 and Defendants KB Homes Greater Los Angeles, Inc. and Donna Land Company." This stipulation on  
16 January 3, 2011 was made an order of the Court. The stipulation was in two parts, a stipulation made by  
17 KB Home as to certain facts, as set for therein, and a stipulation entered into by Plaintiff and KB Home,  
18 as follows:

- 19 1. Any default of Donna Land (KB Home's predecessor in interest) which was entered by  
20 the clerk shall be set aside.
- 21 2. KB Home and Donna Land shall be dismissed without prejudice from this action for all  
22 purposes, except that:
  - 23 (i) KB Home shall makes its officer or employee most knowledgeable as to the Stipulated  
24 Facts available to testify at trial, if called by Plaintiff therefore, and if such notice is given  
25 (including by email or facsimile transmission) by Plaintiff to KB Home's counsel of  
26 record in this action prior to 5:00 p.m. on the date which is 2 or more days prior to the  
27 date proposed by Plaintiff for such testimony;

1 Emerson, and Lezli Thompson Emerson . At the time of acquisition no recorded easements were  
2 found related to Tick Canyon Road affecting this property. Thereafter, on March 29, 2007  
3 Synregy's title to the property was transferred to Shadow Pines

4 (b) Synergy entered into an option to purchase real property with Billy Rains. No recorded  
5 easements were found related to Tick Canyon Road affecting the property. In September, 2006  
6 title to the property was transferred to Shadow Pines.

7  
8 (c) Synergy entered into an option to purchase real property with Samwood Co. Inc. Thereafter  
9 on February 27, 2006, all rights and interests in the Samwood Option were assigned to Shadow  
10 Pines. No recorded easements were found relating to either Tick Canyon Road or Trash Canyon  
11 Road, affecting this property.

12  
13 On or about September 27, 2005 Shadow Pines entered into a Real Estate Purchase Agreement  
14 with KB Homes Greater Los Angeles, Inc. Upon entry into the agreement no easements were  
15 found related to Tick Canyon Road. The transaction was completed and title to the property was  
16 transferred to Shadow Pines on June 24, 2009.

17  
18 Windsor owns three parcels of real property located directly north of and adjacent to the  
19 Samwood Property. It acquired title thereto as follows:

- 20  
21 a. Windsor purchased the first parcel of its property on or about August 13, 2003 from Frank J.  
22 Reget, Trustee of the Frank J. Reget Family Revocable Trust Established December 13, 1991  
23 and from Glenn A. and Doris M. Darrow. No evidence was presented that any easement was  
24 passed to Plaintiff in regard to Tick or Trash Canyon Roads when it purchased this property.
- 25 b. Windsor purchased two other parcels of land adjoining the first parcel its purchased from the  
26 Orange County Southern Baptist Foundation on or about November 6, 2003. No evidence  
27 was presented that any easement was passed to Plaintiff in regard to Tick or Trash Canyon  
28 Roads when it purchased these two parcels of property.

Windsor and Shadow Pines both intended to develop their properties. Shadow Pines submitted  
its original proposed Tentative Tract Map to the County of Los Angeles on August 18, 2003.

1 Windsor and Shadow Pines each faced separate challenges in relation to grading, debris basins,  
2 dirt import and export, density, and providing utilities in this remote area. In mid-2005 Windsor  
3 and Shadow Pines entered into discussions as to how they could assist each other in various  
4 aspects of the development of their respective properties. From that time forward through 2006,  
5 Shadow and Windsor, with their respective consultants, worked together handling issues  
6 regarding the developments with the County of Los Angeles and its Public Works Department as  
7 well as dealing with numerous environmental issues. As part of this process the parties orally  
8 agreed (later reduced to writing) that they had permission to travel onto and over each other  
9 property as was needed. After some nine months of negotiations, involving 15 draft agreements,  
10 the parties finally signed a contract (hereafter "Easement Contract.") Pursuant to the contract  
11 Shadow Pines and Windsor each gave to the other permissions to travel other and use their  
12 respective parcels of real property. Included in the Easement Contract was a provision that upon  
13 a termination of the contract Shadow Pines was obligated to provide a non-exclusive easement to  
14 Windsor for purposes of vehicular and pedestrian ingress and egress over both Tick and Trash  
15 Canyon Roads to and from the Windsor Property ("Termination Easement"). The form of the  
16 Termination Easement was attached as Exhibit J to the Easement Contract. Shadow Pines  
17 specifically retained the right to relocate the easement from time to time to comply with the tract  
18 map so long as Windsor maintained access to the Windsor Parcels over the Shadow Pines  
19 properties. As a result of a dispute between the parties Shadow Pines terminated the Easement  
20 Contract. Provided with the notice of termination of the Easement Contract was the fully  
21 executed and notarized Termination Easement in the form provided in Exhibit J to the Easement  
22 Contract, which provided Windsor with an express easement over Tick Canyon Road and Trash  
23 Canyon Road as they traversed the Shadow Pines Property. Windsor did not return the easement  
24 but it did not record same, and is still in possession of it. Despite having dealt with Shadow Pines  
25 on numerous occasions since early 2004, coming to many oral agreements regarding the  
26 development of their respective properties, and having entered into the written Easement  
27 Contract, Windsor for the first time on February 12, 2009, informed Shadow Hills that it was  
28 claiming that it owned a prescriptive easement over Tick and Trash Canyon Roads as they

1 (ii) KB Home, its successors and assigns, shall be bound by any Judgment entered by the  
2 trial court in this action on the claims which are the subject of Plaintiff's complaint, and  
3 KB Home may and shall be named in any such judgment as a defendant for said  
4 purpose, as if it were a party to such judgment, and its rights in the property affected by  
5 such judgment shall be subject and subordinate to such judgment.

6 3. Plaintiff is not seeking any monetary judgment against KB Home by  
7 way of its complaint, and neither Plaintiff nor KB Home shall recover any monetary  
8 damages, expenses, attorney's fees, expert fees or cost, or any other costs from the other  
9 in this action or by way of any post-trial motions.

10 4. Pursuant to the California Code of Civil Procedure, Section 664.6, this  
11 Court shall retain jurisdiction over the parties to enforce this Stipulation. Neither party  
12 shall be entitled to recover attorney's fees incurred in any action to enforce this  
13 stipulation."

14  
15 **2. Statement of Decision.** This Memorandum of Decision shall constitute a Statement of Decision,  
16 if one is so requested, unless within the time period provided by law, additional requests are made by  
17 a party in conformity with statutory procedures and the Rules of Court.

18  
19 **3. Summary of Facts.** The Court after weighing the evidence presented at trial, including judging  
20 the credibility of the percipient and expert witnesses who testified therein, finds the facts to be as  
21 follows: Tick Canyon Road is an unpaved dirt road that intersects Defendant Shadow Pines, LLC's  
22 property (hereafter Shadow Pines Property") in an east -west direction. Trash Canyon Road aka  
23 Trash Alley, aka La Jolla Canyon Road (hereafter "Trash Canyon Road") is a more remote, unpaved  
24 road or trail, that intersects with Tick Canyon and crosses the Shadow Pines Property in a north-south  
25 direction. Currently there is a locked gate at the intersection of the two roads, and Plaintiff and  
26 Defendant Shadow Pines, LLC, each have keys to the gate. Throughout the years, due to the remote  
27 nature of this outlying area, Tick Canyon Road has been used almost exclusively by the approximate  
28 18 local home and property owners, who live off of Tick Canyon Road, for purposes of ingress and

1 egress to their properties. The road which is not paved has a regular tendency of becoming  
2 impassable due to heavy rains and related mudslides. The road over the years has meandered due to  
3 the need to make it passable following weather related mudslides and subsequent re-grading by local  
4 residents. No persons other than the aforesaid local residents, or people entering the area for  
5 recreational purposes, use or have used Tick Canyon Road. No evidence was presented as to the use  
6 of Tick Canyon Road prior to 1972.

7  
8 Trash Canyon Road \* has always been considered by local residents as a motorcycle or recreational  
9 vehicle trail, and due to its rough terrain, it has been used almost entirely by off road vehicles  
10 engaged in recreational activities. The road is not paved. One does not take Trash Canyon Road as a  
11 means of getting somewhere. Even the sheriffs patrol in off road vehicles. Prior to Plaintiff re-  
12 grading the road in 2008, almost all of the locals were afraid of becoming stuck on Trash Canyon  
13 Road, if they attempted to drive up there in a passenger vehicle. The only evidence of a passenger  
14 vehicle on Trash Canyon Road, was that the Plaintiff 's principal and co-counsel Allen W, Hubsch,  
15 on several occasions drove his wife's SUV up to his property located adjacent thereto. There are  
16 no homes located adjacent to or in the vicinity of Trash Canyon Road. No evidence was presented as  
17 to the use of Trash Canyon Road prior to 1972.\*\*

18  
19 \* The Court found that the residents of Tick Canyon who testified were very believable witnesses,  
20 and in reaching its decision, the Court has extensively relied on their testimony.

21  
22 \*\*Windsor engaged the services of expert witnesses who testified as to the existence of Trash  
23 Canyon Roads for many years prior to 1972. However, no evidence was presented as to its use prior  
24 to 1972.

25  
26 Shadow Pines acquired title to the Shadow Pines Property as follows:

- 27 (a). Synergy, a member of Synergy Brookfield, LLC, which is the sole member of Shadow Pines  
28 entered into an option to purchase real property with Michael R. Thompson and Raquel R.  
Thompson, William G. Dory and Joan R. Dory, Dennis M. Wesley and Joanne M. Wesley

1 traversed the Shadow Pines Property. In early 2010, Shadow Pines installed a gate at the  
2 entrance of Trash Canyon Road where it met Tick Canyon Road, and provided a key to the gate  
3 to Windsor, in compliance with the terms of the Easement Contract.

4 **4. Findings by the Court.** The Court, after determining the facts herein from the  
5 evidence provided by the parties, and after applying the applicable law thereto,  
6 makes the following findings:

7  
8 **a. Quiet Title Cause of Action:** Plaintiff contends that on behalf of itself, and of the public, that  
9 it has acquired and is entitled to a judgment establishing a prescriptive easement for ingress and  
10 egress over a portion of the Shadow Pines Property. An easement is an interest in the land of  
11 another which entitles the owner of the easement to a limited use or enjoyment of the other's  
12 land. **Wolford v. Thomas** (1987) 190 CA 3d 347, 354. There are several means for creating  
13 easements. One means is by adverse use. This is referred to as a "prescriptive easement." An  
14 easement by prescription may be acquired by adverse use for a period of five years. The  
15 elements necessary for a finding of prescriptive use must be proved by clear and convincing  
16 evidence. **Brewer v. Murphy** (2008) 0 161 CA 4<sup>th</sup> 298, 938; **Applegate v. Ota** (1983) 146  
17 Cal.App.3d 702, 708. Clear and Convincing Evidence is evidence that is so clear that as to leave  
18 no substantial doubt and is sufficiently strong to command the unhesitating assent of every  
19 reasonable mind. **In re Michael G.** (1998) 63 Cal. App. 4<sup>th</sup> 700. In addition to the adverse use  
20 provision referred to above, the following elements must be established in order for a  
21 prescriptive easement to be created: (a) open and notorious use; (b) that is continuous and  
22 uninterrupted; (c) which is hostile to the rights of the owner of the land (d) under a claim of  
23 right; and (d) if taxes are separately assessed against the prescriptive property they must be paid,  
24 otherwise a prescriptive easement may be acquired without the payment of taxes. See discussion  
25 in Witkin, Summary of California Law, Volume 12 of Section 401 of Real Property; **Warsaw v.**  
26 **Chicago Metallic Ceilings, Inc.** (1984) 35 Cal. 3d 564, 570. Prescription cannot be gained if  
27 the use of the land is permissive. **Lyons v. Schwartz** (1940) 40 C.A. 2d 60, 66. The burden of  
28 proof in attempting to establish the right to a prescriptive easement is on the claimant. See **Hahn**

1 v. **Curtis** (1946) 73 C.A. 2d 382, 389; Code of Civil Procedure Section 321. There appears to be  
2 a split of authority as to whether upon the claimant proving open and uninterrupted use of the  
3 easement for the requisite time period, without interference or protest of the owner thereof, a  
4 rebuttal presumption of prescription arises, and if the landowner relies on the defense that the use  
5 was permissive, the burden shifts to the landowner on that issue.

6 The California Supreme Court tackled the question as least twice. In the case of **O'Banion v.**  
7 **Borba** (1948) 32 Cal. 2d 1145, 149-150, the Court concluded that no such presumption arises,  
8 stating: "The preferable view is to treat the case the same as any other, that is, the issue is  
9 ordinarily one of fact, giving consideration to all the circumstances and the inferences that may  
10 be drawn therefrom. The use may be such that the trier of fact is justified in inferring in inferring  
11 an adverse claim and user and imputing constructive knowledge thereof to the owner. There  
12 seems to be no apparent reason for discussing the matter from the standpoint of presumptions.  
13 For the trial court the question is whether the circumstances proven do or not justify an inference  
14 showing the required elements." Later in **Warsaw v. Chicago Metallic Ceilings, Inc.** the  
15 California Supreme Court, without even mentioning **O'Banion v. Barber, supra**, stated "We  
16 think the better and more widely held rule is that continuous use of an easement over a long  
17 period of time without the landowner's interference is presumptive evidence of its existence."  
18 Thereafter the Second District of the Court of Appeal in **Grant v. Ratliff** (2008) 164 CA 4<sup>th</sup>  
19 1304, 1309-1310, discussed these apparently contradictory positions taken by the Supreme  
20 Court, and stated the following:

21  
22 "Miller and Starr take the position that there is a split of authority on whether the presumption  
23 arise, with the more recent Court of Appeal decisions favoring the creation of a presumption that  
24 shifts the burden to the owner of the servient tenement to establish the use was permissive. (6  
25 Miller & Starr Cal. Real Estate (3d Ed. 2006) Sec. 15:32. [15-123 to 15-125. Witkin cited the  
26 holding in both **Obanion and MacDonald**, thus also indicating a split of authority. (12 Witkin,  
27 Summary of Cal. Law (10<sup>th</sup> ed. 2005) Real Property Sec. 402, pp. 470-472."  
28

1            "We too are convinced that **Warsaw** did not overrule **O'Banion**.

2  
3            "First **Warsaw** entirely ignored **O'Banion's** substantial discussion of the presumption and its  
4 reasons for rejecting it. It would seem that had **Warsaw** intended to overrule **O'Banion**, it would  
5 have discussed its reasons for doing so.

6  
7            "Second, **Warsaw's** analysis was based on substantial evidence, not a presumption. **Warsaw**  
8 stands for nothing more than that the open, notorious and continuous use of another's land is  
9 sufficient evidence to support a finding that the use was adverse. Not to be presumptive, we think  
10 the discussion of presumption was at best dictum. **O'Banion** distinguished sufficiency of the  
11 evidence cases from cases in which presumptions are truly at issue ...the **O'Banion** court  
12 recognized it is one thing to say that particular evidence supports a finding the trier of fact made;  
13 it is quite another thing to say that the evidence requires the trier of fact to make a particular  
14 finding.

15  
16            "For these reasons, **Warsaw** does not control merely because it was decided after **O'Banion** .  
17 The analysis in **O'Banion** governs this case.

18  
19            "Even if **Warsaw** dictates that we analyze the issue as a presumption, it does not specify the  
20 type of presumption. The trial court here stated that presumption was one affecting the burden of  
21 producing evidence, not the burden of proof. If a presumption is warranted, we agree with the  
22 trial court that it is one affecting the burden of producing evidence.

23  
24            "A presumption affecting the burden of producing evidence requires the trier of fact to presume  
25 the existence of the presumed fact unless or until evidence is introduced to support a finding of  
26 its non-existence. (Evidence Code Sec. 604). When such evidence is introduced, the trier of fact  
27 must determine the existence or nonexistence of the presumed fact without regard to the  
28 presumption. (Ibid). A presumption affecting the burden of producing evidence is not

1 established to implement a public policy. Typically such a presumption does nothing more than  
2 reflect a logical inference....”

3  
4 “A presumption affecting the burden of proof is a presumption established to implement some  
5 public policy. (Evidence Code Sec. 605). Certainly the doctrine of prescriptive easement, like all  
6 doctrines, exists to provide some social benefits. But continually trespassing on another’s land is  
7 generally not a socially useful activity that a presumption affecting the burden of proof in favor  
8 of an easement by prescription is warranted. In addition, a party seeking to establish a  
9 prescriptive easement has the burden of proof by clear and convincing evidence. (**Brewer v.**  
10 **Murphy** (2008) 161 Cal. App. 4<sup>th</sup> 928, 938. The higher standard of proof demonstrates there is  
11 no policy favoring the establishment of prescriptive easements.”

12  
13 Whether this Court in weighing the evidence in this case follows the dictates of the Supreme Court in  
14 **O’Banion v. Borba, supra**, or as stated in **Warsaw v. Chicago Mettalic Ceilings, Inc.** And whether or  
15 not the interpretation of those two cases by the Court of Appeal in **Grant v. Ratliff, supra**, is correct,  
16 the decision in the present case, based on the evidence presented by the parties, does not change.

17  
18 In discussing Windsor’s prescriptive claims the Court, in order to clarify the issues, shall break down its  
19 findings as follows: (1) Claimed public easement over Tic Canyon Road; (2) Claimed public easement  
20 over Trash Canyon Road aka La Jolla Canyon Road; (3) Claimed private easements by Plaintiff over the  
21 portion of Tic Canyon From Greencourt Road to the intersection of Trash Canyon Road, Plaintiff over a  
22 portion of Trash Canyon Road as it crosses the Shadow Pines Property.

23  
24 **(i). Claimed Public Easement Over Tick Canyon Road.** The evidence is uncontradicted: (a)  
25 that there are 18 homes which are adjacent to upper Tick Canyon Road, which is their only  
26 practical means of ingress and egress from “civilization” to these individuals’ rural abodes; (b)  
27 that it has been this way many years\* far more than the required 5 year prescriptive period; (c)  
28 that their use of Tick Canyon Road, was open, notorious, continuous, hostile and clearly visible

1 to the owner of the burdened land. In fact the homeowners even maintained the road over at least  
2 the last 30 years.

3  
4 However, the evidence was also clear that this use of Tick Canyon Road was for the benefit of  
5 these few homeowners only, and it was not used by the general public.\* Use by a few private  
6 persons and not the general public is not sufficient for the creation of a public easement. See  
7 **O'Banion v. Borba, supra** at Page 151. Therefore, the Court finds that there is no public  
8 easement over Tick Canyon Road based upon the aforesaid use by local residents.

9 \* Further, as discussed in detail below members of the general public did use a portion of Tick  
10 Canyon Road up to its intersection with Trash Canyon Road to access the latter road for the  
11 purpose of engaging in recreational activity As stated above, the use of this portion of Tick  
12 Canyon Road for recreational purposes has not since 1972, based upon Civil Code Section 1009,  
13 conferred a prescriptive public right over that road. No evidence was introduced as to pre-1972  
14 use of Tick Canyon Road for recreational purposes prior to 1972. Therefore, no public  
15 prescriptive rights was established from the public use of Tick Canyon Road to access Trash  
16 Canyon Road.

17  
18 **(ii). Claimed Public Easement over Trash Canyon Road.** As discussed above, in order to  
19 encourage private owners of land to permit entry for recreational purposes by the public, Civil  
20 Code Section 1009\* was enacted in 1972 limited the ability to obtain a prescriptive easement for  
21 public recreational use of private land. The evidence presented in this case, including the  
22 testimony of several impartial witnesses who have lived off of Tick Canyon for the last 10 to 30  
23 years, was that Trash Canyon Road, which the "locals" called "Trash Alley," was used solely for  
24 recreational purposes, including hiking, riding motorcycles, dirt bikes, ATC's and other off road  
25 vehicles. \*\* These witnesses were adamant that it was not used for any other purpose of which  
26 they aware. Section 1009 supra, is limited to all time subsequent to its enactment in 1972, and  
27 though the evidence is uncontroverted that Trash Canyon was referred to in maps prior thereto,  
28 no evidence (let alone clear and convincing evidence) was presented of its use prior to 30 years

1 ago. Therefore, even if Plaintiff were able to establish by clear and convincing evidence all of the  
2 elements of a prescriptive recreational easement in favor of the public over Trash Canyon,  
3 subsequent to 1972, Section 1009 would still bar its creation. In view of same it is not necessary  
4 for the Court to make this determination. Therefore, the Court finds that there is no public  
5 prescriptive right over Trash Canyon Road.

6  
7 \*Civil Code Section 1009 provides in part that no use of private property by the public for  
8 recreational uses shall ever ripen to confer upon the public a vested right to continue to make  
9 such use permanently, in the absence of an express written irrevocable offer of dedication of  
10 such property to such use made by the owner thereof.

11  
12 \*\* There was testimony that Trash Canyon was also used for a while as a dumping ground for  
13 trash, after Plaintiff graded the road in 2008 .But, in any event, Plaintiff did not contend at trial  
14 that engaging in this illegal activity constituted a public use which could result in the creation of  
15 a public easement over Trash Canyon Road. Moreover, Plaintiff failed to present evidence to  
16 support any contention that this illegal dumping was of such duration to result in prescriptive  
17 rights being granted to the public to dump trash to the area abutting Trash Canyon, and in view  
18 of Windsor's desire to develop its land this is the last thing he would want. The Court also notes  
19 that subsequent to the grading of Trash Canyon Road by Windsor in 2008 which resulted in the  
20 trash dumping along the roadside, Shadow Pines took vigorous steps to prevent public access to  
21 Trash Canyon Road. Finally, resulting in the installation of a gate blocking access to Trash  
22 Canyon where it intersected with Tick Canyon Road.

23  
24 **(iii) Claimed Private Easement by Plaintiff over Tick and Trash Canyon Roads**

25 Windsor failed to provide sufficient evidence to prove that prior to its purchase of the Windsor  
26 Property that the prior owners thereof had established a prescriptive right to use Tick Canyon  
27 Road to get to Trash Canyon Road, or to Trash Canyon Road as it crosses the Shadow Pines  
28 Property. Thus though the doctrine of "tacking"\* would be legally appropriate, it is not  
applicable in the present case, since no evidence of use of Trash Canyon Road prior to its

1 purchase by Windsor was presented. See **Abar v. Rogers** (1972) 23 CA 3d 506, 510-511. The  
2 Court may only consider the prescriptive period commencing on or about August 13, 2003 when  
3 Plaintiff purchased the first Windsor parcel. As stated above, in order to prevail on a cause of  
4 action to establish a prescriptive easement a plaintiff must prove by clear and convincing  
5 evidence the following:

- 7 a. adverse use of another's land for a period of five years;
- 8 b. the adverse use must be open and notorious;
- 9 c. the adverse use must be continuous and uninterrupted;
- 10 d. the adverse use must be under a claim of right; and,
- 11 e. if taxes are separately assessed against the prescriptive property, they must be paid by  
12 the adverse user.

13 Allen W. Hubsch, the principal of Windsor testified that subsequent to his purchase of the  
14 Windsor Property he went on to the property on many occasions (at least 30 to 40 days,  
15 including many times on the same day) over the ensuing years (more than 5) in conjunction with  
16 his efforts to develop the Windsor Property for residential purposes. Additionally, Windsor's  
17 agents used Tick and Trash Canyon Roads for ingress and egress to the Windsor Property on  
18 approximately 20 or 30 other days. He also testified and introduced evidence, consisting of  
19 photographs, showing that he went onto the Windsor Property with his family, on at least one  
20 occasion at least in part for recreational purposes. That to get to the Windsor Property he drove  
21 his wife's white Ford Explorer up Tick Canyon Road and then up Trash Canyon Road, across the  
22 Shadow Pines Property onto the Windsor Property. He did so openly during daylight hours. He  
23 further testified that he drove across the Windsor Property based on his belief that he had a  
24 prescriptive easement across the Windsor Property. Expert testimony was presented by Windsor  
25 that both roads were both plainly visible on the ground and from the air. Prescriptive use of a  
26 road is sufficiently visible, open, and notorious if the roadway itself is "plainly visible." See  
27 **Wallace v. Whitmore** (1941) 47 Cal. App. 2d 369, 374. His driving across the Windsor  
28 Property constituted an adverse use of that property. No evidence was presented that real  
property taxes were separately assessed against the prescriptive property.

1 Defendants do not deny that Windsor used the Tick and Trash Canyon Roads for ingress and  
2 egress to the Windsor Property subsequent to its purchase of the Windsor Property. They  
3 contend, however, that Windsor cannot prove that any "adverse use" by it of Tick and/or Trash  
4 Canyon Roads, continued for a period of 5 consecutive years. Windsor only acquired title to the  
5 first parcel of the Windsor Property in August of 2003, and that in 2004 or 2005 at the latest, it  
6 was agreed by Windsor and Defendants that they would work together to develop their  
7 respective properties, including the right to go onto the others property (by means of Tick and  
8 Trash Canyon Roads) for necessary testing, surveys, permits and grading. Throughout 2005 and  
9 2006 Shadow and Windsor, along with their respective consultants and agents, worked together  
10 handling issues regarding their respective developments. As part of this process they parties  
11 orally agreed (later reduced to writing) that each had permission to travel onto and over each  
12 others property as needed, and in fact they did so on many occasions. Negotiations in regard to a  
13 written contract commenced in mid-2005 and continued for about 9 months and were concluded  
14 with the execution of the 15<sup>th</sup> version of the Easement Contract on or about March 8, 2006. Mr.  
15 Hubsch, who is a practicing real estate attorney, handled all negotiations and drafting of the  
16 Easement Contract for Windsor. The Easement Contract gave each party (and their consultants  
17 and agents) permission to travel over and to use the others' real property. As part of the  
18 Easement Contract, Windsor negotiated a provision to be included therein , that upon termination  
19 of the Easement Contract Shadow Pines was contractually obligated to provide a non-exclusive  
20 permissive easement to Windsor for purposes of vehicular and pedestrian ingress and egress over  
21 both Tick and Trash Canyon Roads to and from the Windsor Property ("Termination Easement")  
22 The form of the Termination Easement, attached as Exhibit J to the Easement Contract, was  
23 proposed by and accepted in its final form by Windsor. Thereafter, in or about July of 2006, for  
24 reasons irrelevant to this Memorandum of Decision, Shadow Pines terminated the Easement  
25 Contract, in the manner provided for therein. Provided with the notice of termination of the  
26 Easement Contract was the Termination Easement, in the exact form as the one attached as  
27 Exhibit J to the Easement Contract, duly signed by Shadow Pines and notarized, which provided  
28 Windsor with an express permissive easement up Tick Canyon Road and Trash Canyon Roads.\*

1 Despite the above oral and written agreements, on February 12, 2009, Windsor informed Shadow  
2 Pines that it claimed a prescriptive easement for ingress and egress to the Windsor Property,  
3 across the Shadow Pines Property. In early 2010 Shadow Pines installed a gate at the entrance of  
4 Trash Canyon Road at Tick Canyon Road and provided a key to the gate to Windsor in  
5 compliance with the terms of the Termination Easement.. Therefore, the Court finds, based on  
6 the evidence presented, that Windsor failed to prove by clear and convincing evidence that its  
7 adverse use of Tick and Trash Canyon Roads continued for at least 5 consecutive years. It is  
8 clear to the Court that at least since mid-2005 its use of these roads was purely permissive and  
9 that Windsor has not acquired any prescriptive rights over the Shadow Pines Property.  
10

11 \* The Easement Contract provided that the Termination Easement could be relocated by  
12 Shadow Pines as necessary for the development of the Shadow Pines Property and as  
13 provided in Shadow Pines' current and/or future approved tract map. The County of Los  
14 Angeles indeed did require a minor relocation of Trash Canyon Road as one of many  
15 conditions of its approval of a tract map for the proposed residential development. It also  
16 required Shadow Pines to build an all weather road through its property to the Windsor  
17 Property, which pursuant to the Termination Easement will be available to Windsor.  
18

19 **b, Ejectment Cause of Action:** The common law cause of action for ejectment requires proving that a  
20 person owns certain real property, or an interest therein, and the defendant has obtained possession of it  
21 and withholds the possession from him. **Payne Dewey v. Treadwell** (1860) 16 C. 220, 243. The action  
22 for ejectment has been largely superseded by the statutory actions of quiet title and unlawful detainer.  
23 Where plaintiff is not the owner of the real property in question, but grounds his right based upon  
24 possession, this need be alleged and proved. Unlike other common law actions, an ejectment action may  
25 be brought by one with an equitable title and right to possession against the holder of legal title.  
26 **Murphy v. Crowley** (1903) 140 C. 141, 149.  
27

28 Windsor's only right to use Tick and Trash Canyon Roads is, as previously found by the Court, is  
pursuant to the Termination Easement. The evidence is uncontroverted that though the entrance to Trash

1 Canyon Road is at this time blocked by a gate, that Windsor was provided with a key to the gate in 2010  
2 (in accordance with the terms of the Easement Contract). It is also uncontroverted that Shadow Pines  
3 provided Windsor with the signed and notarized Termination Easement. Therefore, the Court finds in  
4 favor of the Defendants on the ejectment cause of action.

5  
6 **c. Declaratory Relief Cause of Action.** Code of Civil Procedure Section 1060 et se. provides that the  
7 following persons may seek a judgment of declaratory relief:

8  
9 “Any person interested under a written instrument, excluding a will or trust, or under a contract, or who  
10 desires a determination of his rights or duties with respect to another, or in respect to, in, or upon  
11 property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual  
12 controversy relating to the legal rights and duties of the respective parties, bring an original action or  
13 cross-complaint...for a declaration of his or her rights or duties in the premises, including a  
14 determination of any question of construction or validity arising under the instrument or contract.”


15  
16 All that is required in a pleading seeking declaratory relief is: (a) A proper subject of declaratory relief  
17 under CCP 1060 and (b) an actual controversy involving justiciable questions relating to the rights or  
18 obligations of a party.

19  
20 The purpose of the action, which is equitable, is to determine and declare rights before an actual  
21 invasion of those rights has occurred. Thus it operates prospectively, rather than merely to redress past  
22 wrongs. **Gafcon v. Ponsor & Associates** (2002) 98 CA 4<sup>th</sup> 1388, 1403. However, a court may refuse to  
23 grant declaratory relief “where its declaration or determination is not necessary or proper at the time  
24 under all of the circumstances. Code of Civil Procedure Section 1061.

25  
26 In the present case the Court’s findings as set forth above deal with all of the issues raised in this case  
27 and therefore it is not necessary or proper for the Court to rule on the Plaintiff’s cause of action for  
28 declaratory relief.

1 **5. Preparation of Judgment.** Counsel for Defendant Shadow Pines shall prepare, file and serve the  
2 proposed judgment on or before March 10, 2011. The proposed judgment shall be held by the Court  
3 for the time period allowed by law for the submission of objections, prior to its filing same. If  
4 objections are filed the Court shall rule on same without hearing, unless the Court determines in its  
5 discretion, that a hearing is required to resolve same.  
6

7  
8 Dated: FEB 24 2011  
9

  
MICHAEL S. Mink  
Judge of the Superior Court