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Alameda County  
MAR 05 2013  
Environmental Health

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March 4, 2013

***By Federal Express Overnight***

Ms. Donna Drogos, P.E.  
Alameda County Environmental Health Services  
1131 Harbor Bay Parkway  
Alameda, CA 94502

Re: Covenant and Environmental Restriction on Property  
3925 Alameda Avenue, Oakland, California  
Recorded 6-8-2005, Instrument Number 2005232708

Dear Ms. Drogos:

I received copies of Carl Paganelli's and William Adams's letters to you dated February 20 and February 25, 2013 regarding the above-referenced Covenant and Environmental Restriction on Property ("Covenant".) I am writing as the attorney for an interested party, Julia Kim, to add further legal analysis in support of Mr. Paganelli's and Mr. Adams's positions.

There is no need to rehash their explanation of the circumstances. The situation involves two commercial properties, the improved land located at 3925 Alameda Avenue ("3925 Alameda Avenue") and the vacant land to the south with a street address of 569 High Street ("569 High Street".) Ms. Kim is the current owner of 569 High Street. The City of Oakland ("City") owned 569 High Street when the Covenant was recorded.

Settlement in the lawsuit entitled *Kim v. Oakland, et al.*, Alameda County Superior Court No. RG07358758 resolved competing claims about the Easement recorded on April 10, 1992 as Instrument Number 92-109290 in the Alameda County Records ("Easement".) Some parties claimed that the Easement affects Ms. Kim's property. The settlement results in the formal extinguishment of the Easement as a matter of record.

The legal description attached to the Covenant includes the Easement. In his letter, Mr. Paganelli explained that the inclusion of the Easement in the description must have been an inadvertent mistake.

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As Mr. Adams explained in his letter, parties in the lawsuit learned that the Easement was extinguished by merger before the Covenant was recorded. The current owner of 3925 Alameda Avenue asserted in its cross-claims that the Easement could be re-established by reformation of the underlying documents. The settlement obviated the need for a judicial determination of those issues. But regardless of how the issues might have been decided in the lawsuit, we know that the Easement did not affect record title to 569 High Street when the Covenant was recorded and therefore the Covenant could not possibly affect 569 High Street.

But the Covenant cannot affect 569 High Street regardless of whether the Easement was valid when the Covenant was recorded. The legal impossibility that the Covenant affects 569 High Street is the focus of this letter.

The Covenant resolved the environmental concerns of two underground storage tanks at 3925 Alameda Avenue. The environmental impact of the tanks was remediated by removing the tanks and capping the ground above the tanks with asphalt. RIF I – Alameda LLC (“RIF”) owned 3925 Alameda Avenue when the Covenant was recorded. In the Covenant, Alameda County Environmental Health Services (“County”) and RIF agreed that the remediation sufficed on condition that RIF agreed to the restrictions specified in the Covenant.

The Covenant affected fee title to RIF’s property. But RIF only owned fee title to 3925 Alameda Avenue when the Covenant was recorded. The City owned fee title to 569 High Street – RIF did not own any fee interest in 569 High Street. The City was not a party to the Covenant and the Covenant therefore cannot affect 569 High Street’s title. To the extent RIF owned any interest in 569 High Street when the Covenant was recorded – which parties in the lawsuit dispute – the interest was limited to rights under the Easement. And the Easement did not include any rights to which the Covenant could possibly attach.

I typically shy away from clichés like “black letter law.” But here there is no grey area, and black letter law applies. The owner of an easement cannot increase the burden on the fee of the servient property. (*Bartholomew v. Staheli* (1948) 86 Cal.App.2d 844, 850 (“[o]ne who has acquired an easement by prescription or by grant may not use it to impose a substantial increase or change of burden on the servient tenement”).) The easement owner’s rights are limited to the grant of easement and the owner of the servient property owns the fee subject only to those easement rights. (*Atchison, Topeka and Santa Fe Railway Co. v. Abar* (1969) 275 Cal.App.2d 456, 464-465.)

If RIF had any interest in 569 High Street it was limited to rights of “ingress, egress, parking, fencing, security lighting, and landscaping and related purposes” in accordance with the

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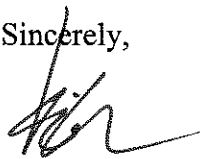
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Easement. RIF rights in 569 High Street did not include the rights that were the subject of the Covenant. RIF could not restrict those rights in 569 High Street and could not encumber 569 High Street with the restrictions specified in the Covenant. Thus, the Covenant cannot possibly affect 569 High Street.

I agree with the other attorneys. If the County asserts that the Covenant affects 569 High Street, despite the demands for the County's affirmation that the Covenant does not affect 569 High Street, its assertion constitutes slander of title and interference with contract. We join with the other attorneys in demanding that the County affirm that the Covenant does not affect 569 High Street, in accordance with the formal "termination" procedure under the Covenant.

Sincerely,



Richard Wallace

RW/mh

cc: Donna Ziegler, Esq., Alameda County Counsel (By FedEx Overnight)  
Kathleen Pacheco, Esq., Alameda County Counsel (By FedEx Overnight)  
Carl Paganelli, Esq.  
Duncan MacDonald, Esq.  
William Adams, Esq.  
Mitchell Stein, Esq.