Case No. S275023

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

CESAR ROMERO and TATANA SPICAKOVA ROMERO,

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO,

Defendants and Respondents.

REVIEW OF A PUBLISHED DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B310069
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. EC064933, THE HONORABLE CURTIS A. KIN PRESIDING JUDGE

REPLY TO ANSWER TO PETITION FOR REVIEW

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Li-Chuan Shih and Tun-Jen Ko ("Shih-Kos") submit this Reply to the Answer of Tatana Spicakova Romero and Cesar Romero ("Romeros") to the Shih-Kos' Petition for Review.

I.
THE ANSWER CONFIRMS WHY THE SHIH-KOS' PETITION FOR REVIEW SHOULD BE GRANTED

The Romeros' Answer to the Shih-Kos' Petition for Review purports to explain why the Shih-Kos' Petition for Review should be denied. However, the arguments made by the Romeros simply confirm that this Court should grant the Shih-Kos' Petition for Review.

It should be noted that the Romeros' Answer largely repeats the same recitation of facts and arguments set forth in the Romeros' Petition for Review. The Romeros have repeated verbatim the lengthy statement of facts contained in their Petition and the same general legal argument – that prescriptive easement cases should apply to preclude exclusive implied easements.

As explained in the Shih-Kos' Petition for Review, this Court should reject the application of prescriptive easement cases to preclude exclusive use implied easements because the basis for an implied easement is markedly different that the basis for a prescriptive easement. The Shih-Kos will not repeat those arguments in this Reply. The Shih-Kos have filed this Reply to address certain specific points raised by the Romeros in their Answer.

A. There Is No Authority That Supports The Romeros' Argument That An Exclusive Implied Easement Can Only Be Found Where The Easement Is Necessary For Public Health Or Safety, Or Is De Minimis

The Romeros argue that under California law, a court can find an exclusive use implied easement only if the easement is necessary for public health or safety, or for a *de minimis* use. (Answer, p. 25) The Romeros cite no authority to support this proposition, nor is there any.

In the Opinion, the Court of Appeal asserted there were two exceptions where exclusive prescriptive easements have been allowed: (1) cases involving utility services or important essential public health and safety purposes (citing *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 104); and (2) cases involving the so-called *de minimis rule* (citing *McKean v. Alliance Land Co.* (1927) 200 Cal. 396) These cases relied on by the Court of Appeal did not involve implied easements, nor did they purport to articulate "exceptions" that must exist before an exclusive easement could be found.

In *Otay*, at issue was whether a water district had established a prescriptive easement by the operation of a reservoir that encroached on adjacent property, which constituted an exclusive use. The court in *Otay* held:

> Where, as here, the use during the statutory period was exclusive, a court may properly determine the future use of the prescriptive easement may continue to be exclusive. The court's ruling is particularly justified on this record where *Otay* submitted uncontested evidence showing Beckwith's proposed recreational use would unreasonably interfere with Otay's right to continue

> operating a reservoir. *Otay* established its exclusive use as necessary to prevent potential contamination of the water supply and for other health and safety purposes.

Id. at 1047-1048

Otay is clearly limited to cases involving prescriptive easements. Even with respect to prescriptive easements, it does not purport to limit an exclusive prescriptive easement solely to "health and safety purposes."

McKean also does not help the Romeros. In *McKean*, the plaintiff sought a mandatory injunction to force the defendant to remove a building that encroached on plaintiff's property. *McKean* did not involve a claim of implied easement. In fact, the defendant did not allege it was entitled to any type of easement, nor did the court refer to an easement in the decision. In affirming the judgment of the trial court which denied plaintiff a mandatory injunction and instead awarded nominal damages to plaintiff, the court simply held: "It is also true, as a general rule that the court should not interfere by way of mandatory injunction . . . where the injury is so slight as to bring it within the maxim *de minimis*, or full compensation can be made in damages." *Id*. at 399

Significantly, neither the Court of Appeal nor the Romeros have cited any case holding that an exclusive implied easement can only be found if its purpose is for public health or safety, or for a *de minimis* use. In fact, there simply is no such limitation in the law with respect to implied easements.

B. The Cases Cited By The Shih-Kos In Their Petition Do Support Implied Easements For Exclusive Uses And The Romeros Cite No Cases To The Contrary

The Romeros argue that none of the cases cited by the Shih-Kos in their Petition suggest exclusive implied easements are permissible. The Romeros are wrong.

To begin with, the Romeros do not dispute the statutory foundation for implied easements, California Civil Code Section 1104, which provides: "The transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." *Cal. Civ. Code* § 1104. Nor do the Romeros dispute the obvious consequence of Civil Code Section 1104 as articulated by *Miller & Starr*: "An easement may be implied for a building on the quasi dominant tenement that encroaches on the quasi servient tenement as a result of the conveyance." (6 *Miller & Starr Cal. Real Estate* (4th Ed. 2021) Easements, Section 15:20, p. 15:95)

The Romeros' attempts to distinguish the cases cited by the Shih-Kos in their Petition fail. The Romeros concede that in *Zeller v. Browne* (1956) 143 Cal.App.2d 191, the court did affirm a judgment finding an exclusive implied easement, but argue the case is distinguishable because it falls within the *de minimis* exception and because the easement in *Zeller* "was in fact necessary for ingress and egress to and from the upper levels of the house."

(Answer, p. 33) However, the court in *Zeller* makes no mention of relying on any *de minimis* exception to affirm the judgment for the exclusive implied easement. Further, the implied easement found by the trial court in favor of the Shih-Kos was also clearly reasonably necessary for the use of their property.

The Romeros seek to distinguish *Dixon v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260 by claiming it also falls within the *de minimis* exception. However, like *Zeller*, there is no mention by the court in *Dixon* that it found an exclusive implied easement based upon the purported *de minimis* exception.

The Romeros attempt to distinguish *Navarro v. Paulley* (1944) 66 Cal.App.2d 827 because the court found no implied easement in that case. Of course, the importance of the *Navarro* case is that the court recognized an implied easement could be available for exclusive use because in analyzing whether there was an implied easement, the court did not say that an implied easement could not be found because the use at issue (an encroaching garage) was exclusive. The Romeros simply fail to address this point.

Similarly, in both *Owsley v. Hammer* (1951) 36 Cal.2d 710 and *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, there was no discussion about whether exclusive use would bar the implied easements at issue in those cases.

In addition to failing to meaningfully distinguish the cases cited by the Shih-Kos in their Petition, notably, the Romeros do not cite a single case that prohibits an exclusive implied easement, or prohibits an exclusive implied

easement unless the easement is for *de minimis* use or public health and safety use.

II

THE ADDITIONAL ISSUE UNDER THE TAKINGS CLAUSE RAISED FOR REVIEW BY THE ROMEROS IN THEIR ANSWER SHOULD NOT BE CONSIDERED BECAUSE IT WAS NOT RAISED IN THE COURT OF APPEAL AND HAS NO MERIT IN ANY EVENT

In their Answer, the Romeros seek review of an additional issue: "Whether a court order awarding an exclusive easement which effectively takes real property from a private citizen and gives it to another private citizen for no reason other than to confer a private benefit violates the takings clause and is void?" (Answer, p. 7)

Generally, an answering party can request the court to consider additional issues in response to a petition for review in the event the petition is granted. *California Rule of Court* 8.500(a)(2) However, in this case, the Romeros' attempt to add an additional issue for review should be rejected.

First, the Romeros ignore the fact that they previously filed their own Petition for Review to this Court and failed to list this additional issue they now seek to raise by way of their answer to the Shih-Kos' Petition.

Secondly, the Supreme Court normally will not consider an issue that a party failed to timely raise in the Court of Appeal. *California Rule of Court*, Rule 8.500(c)(1); *Jiminez v. Superior Court* (2002) 29 Cal.4th 473, 481 Here, the Romeros' new issue of whether the trial court's decision in this case

violate the Takings Clause of the *United States Constitution, Amendment* 5 (the "Takings Clause") was never raised by the Romeros in their appeal from the trial court's judgment, and therefore was never considered by the Court of Appeal. Accordingly, it should not be considered by this Court in the event the Shih-Kos' Petition is granted.

Moreover, this additional issue the Romeros present in their Answer lacks merit and there is no reason for this Court to review it. The Takings Clause states that "private property [shall not] be taken for public use, without just compensation." *United States Constitution, Amendment* 5 Here, the easement found by the trial court in favor of the Shih-Kos did not result in any property of the Romeros being taken for public use and therefore cannot constitute a taking as a matter of law.

The cases cited by the Romeros have no application here. None of the Takings Clause cases cited by the Romeros involved a court decision finding an easement in favor of a private party. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702 involved the alleged taking of private beach property to become property of the state of Florida. *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229 involved enforcement of the Hawaii Land Reform Act, a legislative action, to take private property. *Kelo v. City of New London* (2005) 545 U.S. 469 involved condemnation proceedings for a public purpose initiated by a redevelopment agency on behalf of a city. Significantly, the Romeros cite no easement case in support of their Takings Clause argument, nor even a California case.

Here, the trial court's decision finding an implied easement, and in the alternative, an equitable easement, in favor of the Shih-Kos clearly did not constitute a taking of real property by a governmental entity for public use and therefore was not a violation of the Takings Clause.

III.

CONCLUSION

For the reasons stated above, and the reasons stated in their Petition, the Shih-Kos respectfully request that this Court grant their Petition for Review in all respects, and deny the Romeros' request for review of the additional issue identified in their Answer.

Dated: July 15, 2022

SONGSTAD RANDALL
COFFEE & HUMPHREY LLP

By: /s/ Janet E. Humphrey
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1).)

I certify that the foregoing Petition for Review contains 1,864 words (not including the cover, the Table of Contents, the Table of Authorities, the signature block and this certificate). In preparing this certificate, I relied on the word count of Microsoft Word version 2019 word processing program used to prepare the Petition.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California, over the age of eighteen years, and not a party to the within action. My business address is SONGSTAD RANDALL COFFEE & HUMPHREY LLP, 3200 Park Center Drive, Suite 950, Costa Mesa, California 92626.

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