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By order of the Court, *Pro Tempore Judge Maria T. Cenzon*

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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OLD LADY, LLC,)	CIVIL ACTION NO. 16-0057
)	
Plaintiff,)	
)	
v.)	ORDER DENYING PLAINTIFF'S
)	APPLICATION FOR A PRELIMINARY
)	INJUNCTION
MARY ANN MILNE,)	
)	
Defendant.)	

I. INTRODUCTION

THIS MATTER came before the Court on August 25, 2017 at 9:00 a.m. in Courtroom 223A for a preliminary injunction hearing, which included an evidentiary and field visit component. Attorneys Thomas E. Clifford and Jordan Sundell represented Plaintiff Old Lady, LLC (“Old Lady”). Attorneys Matthew T. Gregory and Charles Reyes represented Defendant Mary Ann Milne (“Milne”). The Court heard arguments on Old Lady’s application for a preliminary injunction, which seeks to prohibit Milne from blocking Old Lady’s use of an access ramp located on Milne’s land. After reviewing the oral and written submissions of the parties and the relevant law the Court **DENIES** Old Lady’s application for a preliminary injunction.

II. BACKGROUND

This case centers on a dispute over whether Old Lady is legally entitled to ingress and egress from its commercial warehouse by crossing Milne’s portion of a commercial warehouse development. The commercial warehouse development at issue is situated on Beach Road and is the

1 site of the former Basic Construction & Supply Corporation (“Basic”). The development is split
2 into two contiguous lots. The front lot, which is closest to Beach Road, consists of Lot No. 1925–4,
3 Lot No. 1925–5–1, Lot No. 1925–5–2, and Lot No. 1925–6–1. The back lot consists of Lot No.
4 1925–6–R1. Milne holds the front lot in fee simple. Old Lady holds a long-term lease for the back
5 lot, which is set to expire in 2047.

6 The history of the front lot, back lot, as well as the surrounding parcels is quite complicated,
7 but for purposes of the present matter the relevant history dates to the 1990s when Basic acquired
8 leasehold interests in the front lot and back lot. Specifically, in 1990, Basic subleased the front lot
9 from Milne. The lease was set to expire in 2005 with an option for a 25-year extension. In 1992,
10 Basic leased the back lot from Teresita Faisao Borja for 55 years, the maximum length permissible
11 under NMI CONST. art. 12 (“Article 12”). Thereafter, Basic constructed the presently existing
12 commercial development, which consists of a warehouse on the front lot, a warehouse on the back
13 lot, as well as a ramp on the front lot that provides access to the back lot. Basic constructed its
14 commercial development on the front lot and back lot as if the two parcels were one, since it held
15 the leases for both lots. After the two warehouses and the ramp had been constructed, Basic went
16 defunct resulting in the assignment of its separate leasehold interests in the front lot and back lot.

17 Basic’s leasehold interest in the front lot was assigned to Trans Pacific Export Company,
18 LLC (“Trans Pacific”). In 2005, due to the expiration of the front lot’s original lease term, Trans
19 Pacific sued Milne claiming that she did not honor the original sublease agreement by refusing to
20 honor the 25-year extension, which Trans Pacific sought to exercise. *See* Plaintiff’s Exhibit 7. In
21 2007, Trans Pacific and Milne reached a settlement of their lease renewal dispute. *See* Plaintiff’s
22 Exhibit 8. The settlement agreement and lease agreement executed pursuant to said agreement
23 provided that Milne would lease the front lot to Trans Pacific for a new 55-year term. *Id.* Further,
24 the settlement agreement and lease provided that Milne would receive 10% of the gross sales price

1 if Trans Pacific assigned its interest in the back lot. *Id.* At the close of the litigation before the
2 District Court, Trans Pacific held a fresh 55-year lease for the front lot. Thereafter, Trans Pacific
3 failed to make timely payments as provided for in the new 55-year lease, which resulted in renewed
4 litigation before the Superior Court. Once again, Trans Pacific and Milne were able to reach a
5 settlement, which resulted in the termination of Trans Pacific's lease of the front lot. *See Mary Ann*
6 *S. Milne v. Trans Pacific Export Company, LLC*, Civ. No. 10-0248 (Super. Ct. June 28, 2011)
7 (Order Setting Judgment); *see also* Plaintiff's Exhibit 6. The termination of the front lot lease left
8 Milne as the owner in fee simple absolute because she obtained the reversion to the front lot during
9 the duration of the front lot sublease.

10 Basic's leasehold interest in the back lot was also assigned to Trans Pacific whose interest
11 was then assigned multiple times, with Old Lady as the current holder of the leasehold interest. Old
12 Lady was assigned the Basic lease in May 2015. Old Lady's back lot lease is set to expire in 2047.
13 Essentially, after Basic went out of business, Trans Pacific took over the leaseholds for the front lot
14 and the back lot. Yet, Trans Pacific's interest in the front lot was terminated in 2011 and its interest
15 in the back lot was assigned to its successors in interest, with Old Lady as the current holder of
16 Basic's original leasehold. Currently, the complex, which was designed as a singular commercial
17 warehouse development, is split between the two parties now before the Court, Old Lady and
18 Milne.

19 On March 17, 2016, after the foregoing assignments and leasehold termination, Milne sent a
20 letter to Old Lady's authorized representative detailing that Old Lady's ingress and egress from the
21 back lot across the front lot would not be permitted as Old Lady has no legal right to cross the
22 property. *See* Plaintiff's Exhibit 5. Old Lady filed the present suit as a result of Milne's letter. Old
23 Lady claims that it is entitled to an equitable easement with the back lot as the dominant estate and
24 the front lot as the servient estate. Old Lady wants to be able to use the ramp designed to give the

1 back lot warehouse convenient access to Beach Road. Specifically, Old Lady moves for the Court
2 to enjoin Milne from blocking Old Lady’s use of the front lot ramp for the purpose of accessing the
3 back lot.

4 III. LEGAL STANDARD

5 NMI R. Civ. P. 65 (“Rule 65”) governs the process for seeking a preliminary injunction.
6 When determining whether to grant or deny a preliminary injunction the Court applies a traditional
7 four-factor test. *See Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12 ¶ 20. Specifically,
8 the Court analyzes:

- 9 (1) whether the plaintiff has a strong likelihood of success on the merits; (2) the level
10 of the threat of irreparable harm to the plaintiff if the relief is not granted; (3) the
11 balance between the harm the plaintiff will face if the injunction is denied and the
harm the defendant will face if the injunction is granted; and (4) any effect the
injunction may have on the public interest.

12 *Id.* (citing *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)
13 (citing in turn *Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985))).

14 “Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a
15 combination of probable success on the merits and the possibility of irreparable harm, or the
16 existence of serious questions going to the merits and a balance of hardships tipping in its favor.”

17 *Id.* (quoting *Villanueva v. Tinian Shipping and Transp., Inc.*, Civ. No. 02–0574 (NMI Super. Ct.
18 Nov. 14, 2002) ([Unpublished] Opinion at 3) (quoting in turn *Johnson*, 72 F.3d at 1430)).

19 IV. DISCUSSION

20 Here, the Court is tasked with assessing whether Old Lady’s application for a preliminary
21 injunction should be granted or denied under the four-factor preliminary injunction test. In
22 particular, the Court will focus on whether Old Lady’s three main legal theories in favor of an
23 easement—prior use, necessity, or estoppel—are likely to be successful on the merits. The Court
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1 will analyze each of the factors and will balance said factors under the traditional test as well as the
2 alternative test posited by the NMI Supreme Court in *Tinian Shipping*. See 2005 MP 12 ¶ 20.

3 **A. Likelihood of Success on the Merits.**

4 First, the Court addresses whether Old Lady is likely to succeed on the merits. See *Tinian*
5 *Shipping*, 2005 MP 12 ¶ 20. In doing so, the Court examines each of Old Lady’s three legal
6 theories: (1) whether Old Lady is entitled to an easement by prior use; (2) whether Old Lady is
7 entitled to an easement by necessity; and, (3) whether Old lady is entitled to an easement by
8 estoppel. Put simply, Old Lady contends that it is likely to be successful on the merits because the
9 front lot and back lot were developed as a singular commercial development, which was
10 specifically designed to allow access to the back lot using the front lot. Milne responds that, as a
11 matter of law, the fact that the front lot and back lot were developed as a singular commercial
12 development is irrelevant to the legal question of whether Old Lady is entitled to cross her lot in
13 order to access the back lot.

14 1. Whether Old Lady is Likely Entitled to an Easement by Prior Use.

15 First, the Court addresses whether Old Lady is likely to be successful on its argument that it
16 is legally entitled to an easement by prior use. The Restatement (Third) of Property: Servitudes §
17 2.12 (2000) (“Restatement § 2.12”) details the legal requirements for the recognition of an easement
18 by prior use, it provides:

19 Unless a contrary intent is expressed or implied, the circumstance that *prior to a*
20 *conveyance severing the ownership of land into two or more parts*, a use was made
21 of one part for the benefit of another, implies that a servitude was created to continue
the prior use if, at the time of the severance, the parties had reasonable grounds to
expect that the conveyance would not terminate the right to continue the prior use.

22 The following factors tend to establish that the parties had reasonable grounds to
23 expect that the conveyance would not terminate the right to continue the prior use:

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- 1 (1) the prior use was not merely temporary or casual, and
- 2 (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and
- 3 (3) existence of the prior use was apparent or known to the parties, or
- 4 (4) the prior use was for underground utilities serving either parcel.

5 (emphasis added).¹ Put in a different way,

6 The party asserting the right to an easement implied by prior use must establish the following: (1) unity of title; (2) severance of title; (3) the prior use was in existence at the time of unity of title; (4) the prior use was not merely temporary or casual; (5) the prior use was apparent or known to the parties; (6) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (7) the common grantor indicated an intent to continue the prior use after severance of title.

9 *E.g. Boyd v. Bell South Tel. Tel. Co.*, 369 S.C. 410, 417 (S.C. 2006) (citations omitted).

10 Every U.S. jurisdiction has recognized some variation of the legal elements posited by
11 Restatement § 2.12. Particularly noteworthy, every jurisdiction requires that there was common
12 ownership at severance, also known as unity of title and/or a common grantor. *See, e.g., Boyd*, 369
13 S.C. at 417; *Wood v. United States*, 2006 Dist. LEXIS 74706, *25–27 (E.D. Cal. 2006) (applying
14 California’s test the court traced, as a threshold matter, the history of the parcels in question to
15 ensure that the common ownership element was satisfied before moving to the other elements of the
16 legal test); *Lach v. United States*, 2010 U.S. Dist. LEXIS 128732, *15–16 (N.D. Ind. 2010)
17 (expressly recognizing the common ownership requirement and holding that the plaintiff was not
18 entitled to an easement because the servient and dominant estates were never in unity of title);
19 *Lobato v. Taylor*, 71 P.3d 938, 951 (Colo. 2002) (adopting the restatement’s position that common
20 ownership is a threshold requirement before moving to the other legal elements of the test); *Ass’n of*
21 *Apt. Owners of Wailea Elua v. Wailea Resort Co.*, 100 Haw. 97, 106 (2002) (assessing the common
22 grantor requirement before assessing whether the circumstances warranted the imposition of an

23 ¹ In *In re Estate of Reyes*, 2012 MP 13 ¶ 26, Restatement § 2.12 was found to be authoritative pursuant to 7 CMC §
24 3401’s mandate that Restatement and common law principles be applied when Commonwealth law does not expressly
address the issue.

1 implied easement); *Spectra Site Communs., Inc. v. Lawrence*, 160 Idaho 570, 574 (2016)
2 (recognizing the common ownership requirement); *Granite Properties Ltd. Partnership v. Manns*,
3 512 N.E.2d 1230, 1236 (Ill. 1987) (highlighting that common ownership is the bedrock principle
4 underlying all implied easements); *NAMN, LLC v. Morello*, 291 Neb. 462, 466–67 (2015)
5 (recognizing and applying the common ownership requirement before shifting the analysis to other
6 factors of the test); *Blaisdell v. Raab*, 132 N.H. 711, 716–17 (1990) (“during unity of title the owner
7 imposes an apparently permanent and obvious servitude on one tenement in favor of another, which
8 at the time of severance of title is in use and is reasonably necessary for the fair enjoyment of the
9 tenement to which such use is beneficial”) (citations omitted); *Carroll v. Meredith*, 59 S.W.3d
10 484, 490 (Ky. App. 2001) (recognizing the common ownership requirement); *CDC Pineville, LLC*
11 *v. UDRT of N.C., LLC*, 174 N.C.App. 644, 654 (2005) (exhaustively analyzing the history of the
12 property in question to ensure that the common ownership requirement was met before shifting the
13 analysis to the question of whether the use persisted for a sufficient duration before severance);
14 *Cadwallader v. Scovanner*, 896 N.E.2d 748, 755 (Ohio App. 2008) (recognizing the common
15 ownership requirement); *Seber v. Union Pac. R.R. Co.*, 350 S.W.3d 640, 648 (Tex. Ct. App. 2011)
16 (highlighting that Texas has long recognized easements by prior use, which require common
17 ownership at severance).

18 Critically, the common ownership requirement serves as the guidepost for the analysis in
19 every jurisdiction, i.e. courts look to whether the servient and dominant estate were once held in fee
20 simple by a common grantor who used the land in the same manner as the grantee. *See generally*
21 Restatement § 2.12. Essentially, as a threshold matter, the party seeking an easement by prior use
22 must be able to demonstrate that the servient and dominant estates were at one time joined and
23 owned by a common grantor. If there was common ownership then the question turns to whether
24 the four substantive factors have been satisfied. A court never arrives at an analysis of the

1 substantive factors if there was no common ownership of the dominant and servient estates at the
2 time of the severance. An easement by prior use is not created where the lots in question were never
3 held in fee simple by a single owner who then separated the lots via a conveyance of some kind.

4 Here, Old Lady argues that the common ownership requirement has been satisfied because
5 Basic, and subsequently Trans Pacific, held long-term leases for both the front lot and the back lot.²
6 Old Lady maintains that the front lot and back lot were “owned” by a single owner who then
7 severed the two parcels; Old Lady received the back lot after a series of assignments and Milne
8 regained possession of the front lot pursuant to the judgment in her favor. Old Lady claims that a
9 long term lease should be viewed as “ownership” for purposes of the creation and termination of
10 equitable servitudes because under Article 12 a long-term lease is the greatest interest that can be
11 held by a person who is not of Northern Marianas Descent (“NMD”). Old Lady fails to cite any
12 legal authority supporting its novel legal position, but merely rests its argument on faulty policy
13 grounds.

14 Milne counters that Old Lady has explicitly conceded that its argument under Restatement §
15 2.12 fails as a matter of law because the language of Restatement § 2.12 and the relevant case law
16 unequivocally provides that “ownership” means in fee simple and not a mere leasehold. Moreover,
17 Milne maintains that ownership by a common grantor of the servient and dominant estates is a
18 threshold requirement for an easement by prior use and that the Court’s inquiry does not shift to the
19 four substantive factors unless there was unity of title at severance.

20 In *In re Estate of Reyes*, 2012 MP 13 ¶ 26, while the NMI Supreme Court did not directly
21 address the question of whether a lessee who combines two parcels is an “owner” for purposes of

22 ² The Court notes that Old Lady focuses on the lessees’ interests and use of the properties to establish an easement,
23 instead of the original subdivision, which had a common grantor whose property was distributed in conjunction with a
24 probate. Presumably, Old Lady has not attempted to argue an easement as a result of the original subdivision because
the commercial warehouse development and ramp at issue wasn’t constructed at the time of the subdivision so even
though there was arguably a common grantor for the whole area, the use claimed did not exist at the time of severance,
making an implied easement wholly inapplicable.

1 Restatement § 2.12, the court’s reasoning and application of the rule is still instructive. In *In re*
2 *Estate of Reyes*, the NMI Supreme Court specifically outlined how the parcels at issue had been
3 severed by a common grantor who had held the land in fee simple. *Id.* at ¶¶ 1–9. The NMI Supreme
4 Court tacitly recognized that an easement by prior use is only applicable if there is a common
5 grantor who held the land in fee simple. *Id.* at ¶¶ 1–9, 25–34. The NMI Supreme Court only shifted
6 its analysis to the substantive factor at play, outlining the contours of reasonable necessity, after it
7 was evident that the common ownership element had been satisfied. *Id.* The NMI Supreme Court’s
8 application of the elements required for an easement by prior use was consistent with case law from
9 every jurisdiction. There is simply no legal support for Old Lady’s contention that ownership under
10 Restatement § 2.12 includes merely holding a leasehold interest. Moreover, Old Lady did not even
11 attempt to present the Court with a single authority that supports its novel theory. The tenuousness
12 of Old Lady’s legal theory makes it highly unlikely that Old Lady would prevail on the merits
13 because even accepting Old Lady’s characterization of the facts as true, those facts would not
14 support a finding that Old Lady is legally entitled to an easement by prior use.

15 While the Court is satisfied that Old Lady is extremely unlikely to be successful on the
16 merits due to the admitted lack of unity of title as required by Restatement § 2.12, the Court
17 considers it prudent to discuss Old Lady’s policy arguments. Old Lady contends that a large
18 percentage of the commercial development in the Commonwealth is held pursuant to long-term
19 leases in order to comply with Article 12’s mandate that non-NMDs are prohibited from holding fee
20 simple interests in land. Old Lady correctly intimates that but for Article 12 many commercial
21 developments, like the commercial warehouse development currently at issue, would likely not be
22 held pursuant to long-term leases, but would instead be owned in fee simple. Had they been able to,
23 Basic and/or Trans Pacific would likely have just purchased a fee simple interest in the front lot and
24 the back lot. If that had occurred then either Basic or Trans Pacific would have held the two lots in

1 unity of title. Then, if the front lot and back lot had been separated, the threshold common grantor
2 element would have been satisfied. Old Lady asks the Court to rectify the quandary created by
3 Article 12 by ruling that long term leaseholds, like the ones held by Basic, Trans Pacific, and now
4 Old Lady, amount to “ownership” so that non-NMDs can take advantage of the protections of
5 Restatement § 2.12.

6 It would be imprudent to adopt this reasoning advanced by Old Lady. If a mere lessee were
7 classified as an owner, then a fee simple owner who leases land could face the prospect of his or her
8 fee simple ownership being diluted by the actions of the lessee, who more often than not is non-
9 NMD. Such a result surely violates the spirit of Article 12, which is to protect the inherent rights of
10 NMDs to retain control over land in the Commonwealth.

11 For example, in this case, Milne appears to have recovered her interest in the front lot within
12 a few years of the execution of the new long-term lease because the leaseholder, Trans Pacific,
13 failed to pay the lease payments owed. *See Mary Ann S. Milne v. Trans Pacific Export Company,*
14 *LLC*, Civ. No. 10–0248 (Super. Ct. June 28, 2011) (Order Setting Judgment); *see also* Plaintiff’s
15 Exhibit 6. Even though it appears that Milne holds the fee, Old Lady wants the Court to conjure a
16 right to cross Milne’s lot for the period of the now terminated lease even though Milne never
17 received the benefit of her original lease bargain. Applying Old Lady’s proposed rule, Milne would
18 not receive the benefit of her long-term lease bargain, due to the non-payment of the third party
19 lessee, and her fee simple interest would still be restricted for the period of the now non-existent
20 lease because Old Lady would have an easement across her land. Essentially, Old Lady requests
21 that the Court establish a rule, which would cause NMDs who have not received the benefit of their
22 lease bargain still being subject to equitable servitudes thereby interfering with their use of the land
23 and/or severely prejudicing the land’s value. It would be extremely irresponsible for the Court to
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1 attempt to contort the firmly rooted legal test for the establishment of an easement by prior use so
2 that Old Lady can access the front lot; to do so would lead to potentially disastrous results.

3 Additionally, Old Lady’s legally unsupported “lessees are owners theory” is unworkable
4 because there would be no practical way for a lessor of a long-term lease to anticipate whether an
5 equitable servitude would come into existence. In this case, it is apparent from Old Lady’s
6 submissions that Milne assigned her original lease to Basic for a period of roughly 15 years plus an
7 option for another 25 years. Basic, the purported common owner according to Old Lady, did not
8 acquire the leasehold to the back lot until 1992. At the time of the original lease assignment
9 between Milne and Basic there would have been no way for Milne to know that Basic would
10 combine the front lot and back lot into a single commercial development. Old Lady contends that
11 Milne was on notice of the integrated warehouse development and since she had notice it is
12 reasonable to imply an easement. Yet, at the time of the original assignment, Milne would have had
13 no reason to monitor the title of contiguous parcels, such as the back lot, which was owned by
14 Teresita Faisao Borja. Old Lady focuses its argument not on the original assignment of the front lot
15 in 1990, but the new 55-year lease, which was entered between Milne and Trans Pacific in 2007. By
16 2007, the warehouse complex had been constructed, including the ramp to access the back lot. Old
17 Lady contends that Milne was on notice of the development and the need for access to the back lot
18 for the term of the new 55-year lease, arguing that Milne was aware since she specifically
19 recognized (in the 2007 settlement agreement with Trans Pacific) that the front lot and back lot
20 were a single warehouse development. Specifically, the settlement agreement provided:

21 Upon assignment of the Lease Agreement, if that assignment includes an agreement
22 to assign any leasehold interest that TransPac has in Lot No. 1925–6–R1 under that
23 lease agreement between Teresita Faisao Borja, lessor, and Basic Construction &
24 Supply Corporation, lessee, in that certain 55-year lease . . . Milne shall receive an
 amount representing Ten Percent (10%) of the Gross Sale Price of the assignment of
 the Borja lease

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Plaintiff’s Exhibit 8.

While the foregoing language in the settlement agreement signals that Milne recognized the value of the front lot and back lot being used as a single warehouse development, it does not affirm that Milne intended for any holder of the back lot to be able to ingress and egress across her front lot without specific authority. The Court is not convinced that Milne’s knowledge of prior use of the front lot to access the back lot indicates that Old Lady would prevail on its argument that it is entitled to an easement by prior use. On the contrary, the documents submitted to the Court by Old Lady show that all the parties were well aware that the front lot and back lot did *not* have a common grantor. Old Lady claims that it is self-evident from the history of the parcels that there should be an easement by prior use; yet, from even a cursory review of the relevant documents submitted by Old Lady and the applicable law, it is evident that an easement by prior use is a legal impossibility.

It is axiomatic that ownership of land—holding title in fee simple—is fundamentally different from holding a mere lease. Fee ownership includes a host of rights that do not apply to less than fee interests, such as a leasehold. Article 12 explicitly codifies that the benefits of fee ownership should only apply to NMDs because allowing non-NMDs to control the supreme form of land ownership in the Commonwealth could result in local control being weakened. To equate a mere leasehold interest with ownership would fundamentally alter the inherent power of a fee simple interest to the detriment of NMDs—such a result cannot be abided.

In sum, Old Lady is unlikely to prevail on the merits of its argument that a long-term lease is “ownership” for purposes of Restatement § 2.12 because the Court is not aware of a single jurisdiction that recognizes as much. Further, Old Lady’s policy arguments do not support altering the traditional rule because to do so would unjustly prejudice owners. Moreover, the Court is not

1 empowered to ignore Restatement § 2.12’s ownership requirement because 7 CMC § 3401 requires
2 the Court to apply the restatements.

3 2. Whether Old Lady is Likely Entitled to an Easement by Necessity.

4 The Court also addresses Old Lady’s argument that it is entitled to an easement by
5 necessity. The legal requirements for an easement by necessity are outlined in Restatement (Third)
6 of Property: Servitudes § 2.15 (“Restatement § 2.15”), which provides:

7 A conveyance that would otherwise deprive the land conveyed to the grantee, or land
8 retained by the grantor, of rights necessary to reasonable enjoyment of the land
9 implies the creation of a servitude granting or reserving such rights, unless the
language or circumstances of the conveyance clearly indicate that the parties
intended to deprive the property of those rights.

10 Comment C to Restatement § 2.15 further clarifies that an easement by necessity requires unity of
11 ownership/common ownership/unity of title, it provides:

12 The rule stated in this section applies only when a conveyance would otherwise
13 deprive property of rights necessary to its reasonable enjoyment. This means that,
14 prior to the conveyance, the property did enjoy such rights and that, absent the
15 implied servitude, the conveyance would deprive it of such rights. This set of
circumstances arises only when the conveyance severs interests held in a single
ownership, and when the owned interests include the claimed rights.

16 Servitudes by necessity arise only on severance of rights held in a unity of
17 ownership. This severance can take place when a grantor, who owns several parcels,
18 conveys one or more to others. It can also take place when a grantor divides a single
19 parcel into two or more parcels, and it can take place when a grantor conveys less
20 than full ownership in a single parcel. Implied servitudes can arise when the grantor
21 simultaneously conveys all the grantor's interests to two or more grantees, as well as
when the grantor retains some interest. Servitudes by necessity arise on conveyances
by governmental bodies as well as by other grantors. Whether servitudes by
necessity arise on severance of parcels held by concurrent owners whose interests
overlap, but are not identical, in the two parcels is determined under the principles
governing creation of servitudes by less than all owners of the servient estate under §
2.3.

22 Servitudes will be implied only in conveyances that cause the necessity to arise. If
23 the property did not enjoy the rights prior to the conveyance, there is no basis for
24 implying a servitude to continue the enjoyment of the rights after the severance.
Servitudes are not implied to enjoy rights later acquired by the owners of property
once held in common ownership.

1 The foregoing highlights that, like an easement by prior use, an easement by necessity is only
2 applicable where there was a common grantor who controlled the land in fee. A mere leasehold
3 interest, like the one held by Basic and later by Trans Pacific, is legally insufficient. The threshold
4 common ownership requirement for an easement by necessity has been widely adopted by
5 American courts. *See Murphy v. Burch*, 205 P.3d 289, 292–94 (Cal. 2009) (outlining that an
6 easement by necessity is only applicable if there is a common grantor and more specifically
7 highlighting that if the government is the common grantor then implied rights are generally not
8 recognized); *Lizama v. Dep’t of Pub. Works*, 2005 Guam 12 ¶¶ 38–39 (enunciating the test for an
9 easement by necessity, which includes a requirement that there is a common grantor); *Machado v.*
10 *Ryan*, 280 P.3d 715, 722–23 (Idaho 2012) (requiring a showing of unity of title before moving to
11 the question of whether the easement is reasonably necessary); *Nicolas v. City of Evansdale*, 687
12 N.W.2d 562, 568 (Iowa 2004) (recognizing that an easement by necessity is only appropriate where
13 the putative easement holder can show there was unity of title at the time of severance); *Borne v.*
14 *Estate of T.L. Carraway*, 118 So.3d 571, 584 (Miss. 2013) (recognizing the common ownership
15 requirement); *Yellowstone River, LLC v. Meriwether Land Fund I, LLC*, 264 P.3d 1065, 1080–81
16 (Mont. 2011) (highlighting that “if the alleged dominant and servient parcels were never held in
17 common ownership, or if the particular severance did not leave the dominant estate isolated, then
18 the inferred intent theory fails and the doctrine of easement by necessity simply has no
19 application.”); *Wagner v. Crossland Constr. Co.*, 2013 ND 219 ¶ 17 (adopting the common grantor
20 requirement and specifically ruling that “[a]n easement by necessity may not be obtained over the
21 land of a third party.”) (citation omitted); *Kennedy v. Bedenbaugh*, 572 S.E.2d 452, 454–55 (S.C.
22 2002) (“For unity of title to exist there must have been an absolute ownership of both tracts of
23 land.”) (citations omitted); *Clifton v. Wilkinson*, 748 S.E.2d 372 (Vir. 2013) (common ownership is
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1 required for an easement by necessity to be implied by a court); *Wilson v. Staats*, 751 S.E.2d 747,
2 750 (W. Va. 2013) (adopting the traditional common ownership test and further ruling that a gas
3 lease covering multiple properties does not give rise to an easement by necessity absent express
4 language in the lease).

5 Here, Old Lady argues that common ownership can be established by a mere lessee holding
6 lease interests in contiguous properties—it cannot. Old Lady is very unlikely to prevail on its
7 argument for an easement by necessity because it has failed to cite any legal authority that supports
8 its position that a mere holder of two contiguous leaseholds, both originating from different
9 grantors, qualifies as a common owner for purposes of Restatement § 2.15. Old Lady’s argument
10 runs counter to the text of Restatement § 2.15 as well as the overwhelming weight of American case
11 law interpreting the doctrine. Old Lady does present some policy arguments that argue for a change
12 in law based on the unique land ownership structure of the Commonwealth. *See* Article 12.
13 However, the proper avenue to effectuate such a change is not the courts, but through a
14 constitutional amendment as set forth in NMI CONST. art. XVIII.

15 Additionally, even if the common ownership element were satisfied, it appears unlikely that
16 Old Lady would be able to establish reasonable necessity. In *In re Estate of Reyes*, the NMI
17 Supreme Court indicated that Restatement §§ 2.12–2.15 expressly provides that a party merely
18 needs to establish reasonable necessity and not strict necessity. 2012 MP 13 ¶ 26. Here, it is
19 apparent that Old Lady is unlikely to prevail on its argument that an easement is reasonably
20 necessary. From the documents submitted by Old Lady, in particular Exhibit 1, it is apparent that
21 Old Lady has the legal right to use an alternative access point, the presently existing cul-de-sac
22 road; therefore, an easement across the front lot is not necessary. Old Lady has vigorously argued
23 that the alternative right of way shown on the plat map submitted to the Court is not a viable option
24 because: (1) a chain link fence practically cuts the back lot off from the alternative access; (2) a car

1 shop has placed junked cars on the alternative access; and (3) the alternative access is very narrow
2 and likely unsuitable for commercial purposes. During arguments and a site visit, Old Lady claimed
3 that even if it was legally entitled to utilize the alternative access road, an easement across the front
4 lot is still reasonably necessary because getting the alternative access up and running would be
5 difficult. If, as Old Lady claims, it has a legal right to use the alternative access road, it is unlikely
6 that Old Lady would be successful on its claim that it is reasonably necessary to utilize the front lot.
7 Based on Old Lady's own submissions it is apparent that Old Lady wants the Court to imply an
8 easement prejudicing Milne's use and the underlying value of the front lot despite the fact that Old
9 Lady has another access point, which is accessible with some physical effort. Such a result is
10 extremely inequitable and stretches the reasonable necessity doctrine beyond recognition. Under
11 Old Lady's interpretation, virtually any inconvenience would meet the reasonable necessity test
12 thereby sapping the doctrine of any meaning. This alternative access, while not currently in the state
13 of use and accessibility as the Milne property, is capable of being placed in such a state with some
14 relatively minimal effort by Old Lady.

15 After reviewing Old Lady's submissions to the court, it is unlikely that Old Lady will
16 prevail on the merits of its argument that it is entitled to an easement by necessity. First, Old Lady
17 is unlikely to prevail on its unsupported argument that holding leaseholds is akin to ownership for
18 purposes of implying an easement. Second, even if Old Lady were to overcome its threshold
19 deficiencies, it would still be unlikely to prevail because the prospect of a reasonably accessible
20 alternative access point, shown on Exhibit 1, appears to eviscerate its claim that it needs an
21 easement across the front lot in order to ingress and egress from the back lot.

22 3. Whether Old Lady is Likely Entitled to an Easement by Estoppel.

23 Old Lady also argues that it is entitled to an easement by estoppel because when Milne
24 regained control of the front lot in 2015 she allowed Old Lady to continue to use the front lot in the

1 same manner as its predecessors in interest. The Court is tasked with determining whether it is
2 likely that Old Lady will prevail on its argument that it is entitled to an easement by estoppel.

3 Restatement (Third) of Property: Servitudes § 2.10 (“Restatement § 2.10”) supplies the legal
4 elements for a court to make a finding that an easement by estoppel should be implied, it provides:

5 If injustice can be avoided only by establishment of a servitude, the owner or
6 occupier of land is estopped to deny the existence of a servitude burdening the land
when:

7 (1) *the owner or occupier permitted another to use that land under circumstances in*
8 *which it was reasonable to foresee that the user would substantially change position*
9 *believing that the permission would not be revoked, and the user did substantially*
10 *change position in reasonable reliance on that belief; or*

11 (2) the owner or occupier represented that the land was burdened by a servitude
12 under circumstances in which it was reasonable to foresee that the person to whom
the representation was made would substantially change position on the basis of that
13 representation, and the person did substantially change position in reasonable
reliance on that representation.

14 (emphasis added). Further, under subsection one of Restatement § 2.10:

15 A servitude is established if the permission is given under such circumstances that
16 the person who gives it should reasonably foresee that the recipient will substantially
17 change position on the basis of that permission, believing that the permission is not
revocable. The grant of permission under these circumstances impliedly represents
that the grantor does not retain the power to revoke the permission granted. Under
these circumstances, the grantor bears the burden of giving notice to the grantee that
the permission granted is revocable.

18 Normally the change in position that triggers application of the rule stated in this
19 subsection is an investment in improvements either to the servient estate or to other
land of the investor. However, other changes, such as a relinquishment of other
servitude rights, will also provide grounds for establishing servitudes by estoppel.
20 Failure to object to an investment made in improvements to land by another may
21 give rise to an estoppel against the owner or occupier of the land, if the owner or
occupier knows or reasonably should know that the investment is being made on the
22 basis of a mistaken belief that the investor has a nonrevocable right to use the land.

23 Restatement § 2.10 cmt. e.

24

1 Here, Old Lady argues principally that Milne knew of the prior use of the ramp, but did
2 nothing to block access and/or put Old Lady or its predecessors in interest on notice that she
3 intended to block access after the front lot lease was terminated. Old Lady contends that Milne
4 should not be allowed to sit on her hands while Old Lady invests in the back lot and then suddenly
5 block access. Further, Old Lady maintains that it substantially changed position by subletting
6 portions of its warehouse under the belief that it and its customers could use the ramp on Milne's
7 land, which it claims was a reasonable belief since Milne made no prior efforts to block access.

8 Milne responds that Old Lady's own characterization of the facts establishes that it is not
9 entitled to an easement by estoppel because temporary silence does not amount to permission,
10 which can be reasonably relied upon. Milne also contends that even if silence were enough, Old
11 Lady's argument would nonetheless fail because Old Lady did not change position relying on its
12 prior use of the front lot ramp. Instead, Old Lady appears to have purchased the leasehold with the
13 misapprehension that it had the right to access the front lot even though the land records, as
14 provided by Old Lady to the Court, show that it has no absolute legal right to use the ramp. Old
15 Lady did not change position, but was merely mistaken about the scope of its property rights from
16 the outset. Moreover, Milne argues that even if she allowed, through silence or acquiescence, Old
17 Lady's predecessors in interest to use the ramp it was unreasonable for Old Lady to assume, absent
18 any legal right, that it would be allowed to continue to use the front lot ramp in perpetuity.

19 Courts have long recognized that mere silence generally cannot create an easement by
20 estoppel. *See, e.g., Rogers v. P-M Hunter's Ridge, LLC*, 967 A.2d 807, nt. 11 (Md. 2009) (citing
21 *Greenwalt v. McCardell*, 12 A.2d 522, 525 (Md. 1940) for the proposition that even when the
22 claimant improves the servient estate, unless there is more than silence or acquiescence an easement
23 by estoppel is not created); *Arkes v. Gregg*, 2005 Ohio 6369, ¶¶ 27–39 (Ohio Ct. App. 2005)
24 (holding that an easement by estoppel was not created even when the owner of the alleged servient

1 estate stood by as the claimant made improvements to the part of the property, which subsequently
2 was blocked when permission was revoked); *Smith v. Reid*, 2015 Tex.App. LEXIS 6367, *20–22
3 (Tex. App. 2015) (“An easement by estoppel may not be predicated upon silence and passive
4 acquiescence alone.”); *Tallarico v. Brett*, 400 A.2d 959, 964 (Vt. 1979) (holding that unless there is
5 a duty to speak, a landowner can rest on their property rights even as the other party mistakenly
6 makes improvements to their land).

7 Here, Old Lady merely alleges that Milne silently acquiesced to its use of the front lot ramp
8 from when it was assigned Trans Pacific’s back lot lease in 2015 until Milne’s March 17, 2016
9 letter, which made clear that she would no longer tolerate Old Lady’s use of the ramp. Without any
10 legal support, Old Lady contends that Milne had some duty to inform Old Lady that it did not have
11 a legal right to ingress and egress over the front lot using the ramp. Old Lady’s argument is counter
12 to Restatement § 2.10’s express terms as well as the weight of case law, which provides that merely
13 staying silent is not enough to give rise to an easement by estoppel.

14 Additionally, Old Lady’s focus on the fact that its predecessors in interest used the front
15 lot’s ramp for decades is not helpful to its argument. From the exhibits submitted by Old Lady, it is
16 apparent that both Basic Construction and Trans Pacific had a legal right to use the front lot ramp
17 when they held leases in both the front lot and back lot. Old Lady argues that it can rely on the fact
18 that there was a long-standing use of the ramp; however, the prior use by its predecessors in interest
19 was pursuant to a clear legal right. By holding a leasehold over the front lot, Milne had a legal
20 obligation to permit both Basic and Trans Pacific to use the ramp because their lease of the front lot
21 provided as much. However, when the front lot lease was terminated in 2011, Trans Pacific and the
22 world, including Old Lady, were on notice that Milne had the exclusive right to possession of the
23 front lot. Old Lady asks the Court to determine that Milne stayed silent for decades. Instead, Milne
24 was silent for a mere 5 years before ultimately deciding that she no longer wanted to have the

1 holder of the back lot use the ramp exclusively located on her property. Old Lady's characterization
2 of the length of silence is erroneous because it cannot rely on its predecessors' use of the ramp for
3 the proposition that Milne stayed silent or acquiesced for decades. In reality, Milne stayed silent on
4 the issue of the holder of the back lot lease using the ramp from 2011 to 2016, which is a short
5 period of time.

6 Relatedly, any reliance on past use by Old Lady is likely unreasonable because the land
7 records clearly show that the holder of the back lot lease does not possess any legal right to use the
8 front lot ramp. Old Lady was on notice when it paid for its lease assignment that use of the front lot
9 ramp was contingent on Milne's acquiescence, which could be revoked at any time. Surely, for Old
10 Lady to be eligible for an easement by estoppel, Old Lady must show that it was reasonably diligent
11 when it first paid for the back lot lease. Here, it is apparent that Old Lady took no steps to ascertain
12 the scope of its rights. If Old Lady had done so it would have been evident that it had no right to use
13 the ramp.

14 As a result of its mistake, Old Lady wants the Court to manufacture a legal duty requiring
15 Milne to monitor the back lot and prospectively warn any possible purchaser of the back lot lease
16 that it may not be able to use the front lot ramp. Old Lady wants to shift the burden of
17 understanding its own property rights onto a third party, Milne.

18 In sum, it is very unlikely that Old Lady will be successful on its claim that it is entitled to
19 an easement by estoppel. Old Lady's argument rests on the faulty assumption that an easement by
20 estoppel is applicable even when the holder of the alleged dominant estate was on clear notice that
21 it had no legal right to use the servient estate. Moreover, Old Lady's argument fails because mere
22 silence or acquiescence is not enough to give rise to an easement by estoppel and even if it were
23 Old Lady did not so much change its position, but fail to confirm its property rights from the outset
24 of its original transaction to purchase its leasehold interest.

1 4. Conclusion as to Old Lady’s Likelihood of Success.

2 In sum, it is very unlikely that Old Lady will be successful on the merits. Specifically, Old
3 Lady has failed to present the Court with legal authority supporting its contention that holding
4 contiguous leaseholds amounts to ownership for purposes of Restatement § 2.12 and/or
5 Restatement § 2.15. The Court has not found, nor has it been directed to, a single case that supports
6 Old Lady’s argument. Quite the opposite, case law from in the Commonwealth as well as case law
7 from other jurisdictions indicates that Old Lady’s claims for an easement by prior use and/or by
8 necessity are without merit. Further, Old Lady is likely ineligible for an easement by estoppel
9 because Milne never made any representations and/or took actions, which would reasonably cause
10 Old Lady to substantially change its position. It appears that Old Lady purchased a long-term
11 leasehold interest in the back lot without conducting basic due diligence—even a routine
12 assessment of the land documents would have evidenced no legal right to use the ramp. Old Lady
13 appears to have wholly relied on the fact that the front lot and back lot had previously been operated
14 as a single warehouse development. Old Lady seems to believe—mistakenly—that just because the
15 parcels were developed together that somehow alters the bundle of sticks held by the respective
16 parties.

17 **B. Prospect of Irreparable Harm.**

18 When considering whether to grant or deny a preliminary injunction a court must also assess
19 the prospect of irreparable harm if the injunction does not issue. *See Tinian Shipping*, 2005 MP 12 ¶
20 20. To show irreparable injury the moving party must demonstrate that the injury is actual and
21 imminent, rather than a remote or speculative possibility, and such injury is not compensable with
22 monetary damages. *See Pacific Am. Title Ins. & Escrow (CNMI), Inc. v. Anderson*, 1999 MP 15 ¶¶
23 12–13.

24

1 In its application for a preliminary injunction, Old Lady argues that it would be irreparably
2 harmed if the injunction it requests does not issue because it would lose the ability to access the
3 back lot. Moreover, Old Lady maintains that it has a number of sublease agreements for its
4 warehouse on the back lot and if those tenants cannot access the back lot it will be in breach of its
5 agreements.

6 Milne counters that Old Lady's argument contains no meaningful analysis as to this factor
7 because Old Lady merely states that it is self-evident that it would lose access to the back lot. Milne
8 also responds that the potential breach of the subleases for the back lot warehouse is irrelevant to
9 the inquiry because the breach of any contract is compensable with money damages.

10 As noted above, from the documents submitted by Old Lady it is apparent that it has the
11 right to access the cul-de-sac road and thus the back lot is not a landlocked parcel. As the Court
12 observed during the site visit, Old Lady merely needs to remove part of its own fence and then
13 demand that the car shop relocate a few vehicles from the passageway. During the hearing and
14 the site visit, Old Lady vigorously argued that the neighbors who sit on the cul-de-sac road,
15 especially the car shop, have stated that they will not permit Old Lady to use the cul-de-sac road.
16 While that may or may not be true, at this point, it is speculative whether Old Lady will be barred
17 from accessing the cul-de-sac road, which it appears by the documents submitted by Old Lady to
18 have a legal right to use. If indeed the car shop and/or the other neighbors on the cul-de-sac road
19 attempt to block Old Lady, then Old Lady has apparent legal means to enforce its rights. In the
20 instant case, Old Lady brought suit against the front lot owner, Milne, despite that land records
21 indicate that it has no legal right to access the front lot. Arguably, it would have been prudent for
22 Old Lady to seek alternatives to litigation with Milne, including accessing the back lot through
23 means which were already legally established. The Court finds that Old Lady's alleged injury –
24 that the back lot is landlocked – is speculative at best because Old Lady has not even attempted to

1 use the cul-de-sac road. The Court simply cannot rely on unsupported assumptions when deciding
2 whether to place a significant restraint on property rights. At this time, Old Lady's alleged injury
3 has not been affirmatively established; therefore, this factor weighs against its application for a
4 preliminary injunction against Milne.

5 **C. Balance of the Hardships.**

6 When considering an application for a preliminary injunction a court must examine and
7 balance the hardships associated with granting or denying the application. *See Tinian Shipping*,
8 2005 MP 12 ¶ 20.

9 Here, Old Lady contends that allowing it to use the front lot ramp imposes no burden on
10 Milne as against the significant burden that would be placed on Old Lady if it was blocked from
11 accessing the ramp. Old Lady maintains that it would be practically blocked from using the back lot
12 at all because the lot would be landlocked. Old Lady contends that the burden on it is far greater
13 than any possible burden borne by Milne.

14 Milne counters that if she is forced to allow Old Lady to use the ramp on her lot that she will
15 continue to face the prospect of the value of her land being significantly impacted. Milne argues
16 that she previously had an agreement to lease the front lot, but the agreement was terminated for
17 cause by the prospective lessee because of the cloud hanging over her title as a result of Old Lady's
18 suit. Milne highlights that the island's economy has long experienced booms and busts; therefore,
19 lifting the cloud over her property is very time sensitive because if she wishes to lease or sell the
20 front lot she needs to do so before a possible collapse of the island's economy. While Milne cannot
21 predict whether the economy will experience turmoil, she argues that Old Lady's characterization
22 of the burdens placed on her have been distorted. Milne maintains that she has already lost out on
23 one transaction and that a preliminary injunction could well result in her being unable to lease or
24 sell her property while land prices are favorable.

1 After reviewing the arguments of the parties, it is evident that regardless of the Court's
2 ruling, one party will experience some burden. If the preliminary injunction is denied, Old Lady
3 will likely have to tear down part of its fence and possibly submit a demand letter to the car shop to
4 utilize its access point.³ On the other hand, if the Court grants the preliminary injunction the cloud
5 of title over Milne's property will significantly hamper her ability to use and dispose of her property
6 as she sees fit. Milne even presented the Court with a letter terminating for cause a land lease
7 contract for the front lot presumably because of the pending dispute. As the moving party, Old Lady
8 has the burden of demonstrating that the balance of the hardships tips in its favor. Old Lady
9 presented the Court with some arguments establishing some hardship, but the hardships pale in
10 comparison to a denial of Milne's quiet enjoyment of her property in any way she sees fit, including
11 by selling it without any encumbrances. The Court finds that Old Lady's burdens have been highly
12 exaggerated and that the balance weighs in favor of Milne.

13 **D. Public Policy Considerations.**

14 Assessing the public policy implications is the final factor that a court must consider when
15 deciding whether to grant or deny a preliminary injunction application. *See Tinian Shipping, 2005*
16 *MP 12 ¶ 20.*

17 On this factor, Old Lady argues that it and other commercial property owners similarly
18 situated need the protections associated with real property ownership because under Article 12 a
19 long-term lease is the most that a non-NMD can hold. Old Lady contends that if it is barred from
20 accessing the aforementioned common law doctrines the Commonwealth's land system will
21 experience great instability thereby tipping this factor in its favor.

22 ³ Old Lady's description of the hardships it would face is exaggerated because as already noted it has not actually taken
23 concrete steps in pursuit of accessing the existing cul-de-sac road. In its briefs and arguments, Old Lady makes it seem
24 as if the cul-de-sac road is impassable, surrounded by jungle and junk cars. In reality, as evidenced by the site visit, the
Court finds that there is an existing road, which leads directly to Old Lady's warehouse. Old Lady's fence and a few old
(junk) cars placed by the adjacent neighbor are the only things preventing Old Lady from being able to have reasonable
access to the back lot for its purposes.

1 Milne responds that upholding the rights of landowners like Milne is the critical public
2 policy consideration. Milne argues that everyone is on notice that non-NMDs are not entitled to
3 numerous legal presumptions and implied rights that are associated with fee simple ownership
4 because Article 12 explicitly says as much. Milne maintains that it defies logic that subsequent
5 tenants of an adjacent property can somehow claim an easement over private property simply
6 because they used the alleged servient estate for a number of months without permission or a legal
7 right to do so.

8 Old Lady asks the Court to rule, in a narrow situation such as the one at bar, a long-term
9 lease is necessarily the same as fee simple ownership. As previously noted, such a request may on
10 the surface seem reasonable, in limited situations. However, upon a closer examination it becomes
11 apparent that such a result would be ill advised to say the least. For example, in this case Old Lady
12 asks that Milne not receive her lease payments, but still be bound to allow the back lot lease holder
13 to use the front lot ramp for the duration of the back lot lease even though the front lot lease has
14 been terminated. The common law doctrines have been carefully constructed to avoid such results
15 and Old Lady asks the Court to wholly disregard the requirements of said doctrines in order to
16 imply an easement even though Old Lady was clearly on notice that it had no legal right to access
17 the front lot when it was assigned the back lot lease. Article 12 fundamentally alters the central
18 tenant of American land ownership—free alienation of land—which has profound implications. One
19 such implication is that non-NMDs are constitutionally ineligible to hold the rights necessary to
20 access many of the common law doctrines and rights, which are reserved to fee simple owners. The
21 whole point of Article 12 is to expressly reserve those unique rights to NMDs. To rule in Old
22 Lady’s favor would effectively abolish the essential distinction between a mere leasehold and fee
23 simple ownership, which would have significant negative implications and would practically
24

1 eviscerate Article 12’s mandate, which is to reserve the rights of fee simple ownership to one class
2 of persons—NMDs.

3 This factor weighs heavily against Old Lady’s application for a preliminary injunction
4 because the central thrust of Old Lady’s claims ask the Court to alter what it means to hold a lease
5 interest versus holding land in fee simple absolute. The Court is not empowered, nor inclined, to
6 make such a ruling.

7 V. CONCLUSION

8 After reviewing the arguments and submissions of the parties and following a site visit to
9 the subject properties, it is evident that Old Lady’s application for a preliminary injunction must be
10 and is hereby **DENIED**.

11 Put simply, even if the Court were to adopt Old Lady’s characterization of the facts, it is
12 very unlikely that Old Lady would be successful in establishing that it is entitled to an equitable
13 servitude thereby allowing it to use the front lot ramp. Further, the prospect for irreparable harm is
14 quite minimal – if it exists at all – because Old Lady has an alternative access point and its potential
15 breach of its sublease agreements concern mere breaches of contract, which could be compensated
16 with money damages. As to the balance of the hardships, the Court has found that the hardships
17 favor Milne because a ruling in favor of Old Lady would significantly impact her right to quiet
18 enjoyment of her property. Indeed, the instability caused by Old Lady’s suit has already resulted in
19 Milne’s new lease of the front lot to be terminated for cause. Old Lady is only inconvenienced by
20 having to physically create a passage through a lot that it has apparent authority to access. Finally,
21 as to the public policy considerations, if the Court were to rule in favor of Old Lady’s preliminary
22 injunction application the Court would be at the very least tacitly recognizing that a leasehold and
23 fee simple ownership are synonymous. Such a result would run afoul of Article 12’s mandate.

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IT IS SO ORDERED this 30th day of March, 2018.



MARIA T. CENZON
Judge Pro Tempore