NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PAN KANAVOS et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

KEITH LEE WILSON,

Defendant, Cross-complainant and Appellant.

B135168

(Los Angeles County Super. Ct. No. BC 190586)

APPEAL from the judgment of the Superior Court of Los Angeles County. Florence-Marie Cooper, Judge. Affirmed.

Keith Lee Wilson, in pro. per., for Defendant, Cross-complainant and Appellant.

Mosten, Barbakow & Ribet, Daniel R. Barbakow; Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiffs, Cross-defendants and Respondents.

* * * * * *

Appellant Keith Lee Wilson appeals from a quiet title judgment entered in favor of respondents Pan and Elli Kavanos. We affirm.

CONTENTIONS

Appellant contends that the trial court erred in: (1) determining that the doctrine of agreed boundaries did not apply; (2) determining that the appellant had not acquired a prescriptive easement or established a right to use the disputed property through adverse possession; and (3) rejecting the affirmative defenses of statute of limitations, laches and waiver and estoppel.

FACTS AND PROCEDURAL BACKGROUND

Respondents, who live in Greece, bought a house located in Pacific Palisades at 701 El Medio, in September 1981. The property is managed by relatives of respondents, the Collas, who live nearby. Appellant previously acquired the adjoining property, at 705 El Medio, in May 1980. Between the two properties is a five-foot strip, extending from the wall of respondents' house to the edge of appellant's driveway, which was the subject of the quiet title action (the disputed property). At the rear of the properties are fence No. 1 and gate No. 1, which separate appellant's garage from respondents' backyard. (See attached diagram.) Fence No. 2 and gate No. 2 are closer to the middle of the property, and run from the side of appellant's house to the side of respondents' house. There is no fence running parallel to the two houses separating the disputed property. A post and rail fence which ran from the front corner of respondents' house to the sidewalk, parallel to appellant's driveway, was torn down in 1998.

On May 6, 1998, respondents filed a complaint against appellant for: (1) ejectment; (2) to establish boundary and quiet title; (3) willful trespass; (4) negligent trespass; (5) nuisance; and (6) preliminary and permanent injunction-trespass. Appellant filed a cross-complaint for: (1) declaratory judgment; (2) quiet title to real property; (3) trespass to real property; and (4) preliminary and permanent injunction.

The matter was tried to the court, which physically viewed the parties' property, in the presence of counsel, at the conclusion of presentation of evidence. On July 2, 1999, the trial court filed a statement of decision, finding that "the boundary line between the parties' property is the line established by the surveys conducted for [respondents] in 1998 and 1999, Exhibits 10, 11, and 12, essentially establishing that the [respondents'] property extends to a line approximately five to five and one-half feet from the north exterior wall of [respondents'] residence. There is no evidence to support [appellant's] argument that the boundary line is, or ever genuinely was, in dispute. What has been a subject of recent dispute is the issue of the right to use that strip of land, but not its ownership."

The trial court determined that there was no uncertainty as to the true boundary line, thereby defeating appellant's contention that title was established by agreed boundaries. The evidence established that appellant and respondents had both used the disputed property for many years. Appellant used the disputed property as a storage area and connected a large wooden gate which crosses his driveway to a fence erected across the disputed property extending out from respondents' house. The trial court found that appellant had not established a right to adverse possession of the disputed property because he had paid no taxes on it. Nor had the appellant established a right to a prescriptive easement, which requires open and notorious use of the property, that is continuous and uninterrupted, hostile to the true owner, exclusive, and under claim of right. Rather, the evidence showed that appellant's use of the property was sporadic and inconsistent, and that he consented to allow respondents to haul away boards and other wood and debris belonging to him, which had been piled up against respondents' house.

The trial court concluded that appellant had not established a right to any title or interest in, or to the use of, respondents' property.

The trial court entered judgment in favor of respondents on their action for quiet title, and entered judgment in favor of appellant on the other causes of action brought by respondents. The trial court entered judgment in favor of respondents on appellant's cross-complaint.

This appeal followed.

DISCUSSION

1. Whether the trial court erred in determining that the "agreed boundary doctrine" did not apply

Under the "agreed boundary doctrine," when coterminous landowners are uncertain as to the location of their common boundary, that boundary may be established by agreement. (*Bryant v. Blevins* (1994) 9 Cal.4th 47, 49.) In order to establish title by agreed boundary, there must be: "'[1] an uncertainty as to the true boundary line, [2] an agreement between the coterminous owners fixing the line, and [3] acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position.' [Citation.]" (*Id.* at p. 55.) Existence of a fence is not proof of an agreement of a boundary without evidence that the fence had been built to resolve the uncertainty of the boundary lines. (*Id.* at p. 56.)

On appeal, appellant contends that the trial court erred in determining that the "agreed boundary doctrine" did not apply because its decision was based on the lack of agreement between the actual parties to the lawsuit, rather than on the agreement made by the parties' predecessors.

It is true that "'[i]f a measurement is made and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds.' [Citations.]" (*Bryant v. Blevins, supra,* 9 Cal.4th at pp. 54, 55.) However, we conclude that substantial evidence supports the trial court's findings that: "There is no evidence to support [appellant's] argument that the boundary line is, or ever genuinely was, in dispute. What has been a subject of recent dispute is the issue of the right to use that strip of land, but not its ownership."

First, the record shows that there is no fence running along the boundary line between the properties separating the disputed property. Only fences and gates Nos. 1 and 2 were erected, which were accessible by both parties. There was no evidence as to

who erected the fences or why. Mr. Kavanos and Mrs. Collas testified that fence No. 2 and Gate No. 2 did not exist when Mr. Kavanos purchased the house. Second, surveys conducted by both appellant's and respondents' surveyors show the disputed property is part of respondents' setback. In 1988, a fire destroyed appellant's house, and when he rebuilt the house in 1992, appellant commissioned a survey. Although at trial, appellant disputed the characterization of 5.1-foot measurement indicated in his surveyor's report, respondents' expert testified that the 5.1-foot measurement represented the distance from 701 El Medio to the property line, and that the 5.1-foot setback was consistent with the requirements of the City of Los Angeles. The surveyor hired by respondents testified that he performed two surveys, one on January 7, 1998, and one the day before trial. The results showed that the property line was 5.1 feet north of respondents' house. (See attached survey prepared for appellant, dated January 14, 1992.) At oral argument, appellant raised the point that the houses were built prior to the enactment of the five-foot setback ordinance of the City of Los Angeles. Even were this so, appellant has not shown that a property line drawn to the very edge of respondents' house was legal then or now.

Additionally, the record shows that both parties used the disputed property over the years. Respondents hired plumbers and electricians who used the disputed property to gain access to the house. In 1992 and 1997, respondents hired contractors who used the disputed property to paint the house. Respondents and the Collas walked around the entire house several times over the years, for inspection purposes, and gained access to the side yard by using gate No. 1, and inspecting the area between gate No. 1 and gate No. 2. The evidence showed that appellant used the disputed property in 1983 for his wedding. Appellant briefly stored personal items on the disputed property, including garbage cans, firewood, a barbeque, and gardening tools. (See attached photographs of garbage cans.) In 1997, Mrs. Collas received permission from appellant to have debris belonging to appellant removed from respondents' side of the house.

In December 1997 or January 1998, respondents decided to put up a fence along the property line to keep appellant's personal property away from the wall of their house,

and commissioned a surveyor to determine the boundary line. Mr. Kavanos and appellant met for the first time when Mr. Kavanos was standing on the disputed property with his surveyor. At that time, Mr. Kavanos noticed the lock on gate No. 1, but never consented to the locking of the gate. It was then that appellant informed Mr. Kavanos that he could not put up a fence because appellant owned the disputed property.

Nevertheless, appellant urges that the trial court erred as a matter of law in deciding that the doctrine of agreed boundaries did not apply, asserting that the trial court never addressed the alleged agreement between the prior owners of 701 and 705 El Medio.[1] We conclude however, that the trial court acted within its discretion in rejecting the evidence proffered by appellant in favor of the evidence introduced by respondents. Indeed, the trial court stated, "There is no evidence to support [appellant's] argument that the boundary line is, or ever genuinely was, in dispute. What has been a subject of recent dispute is the issue of the right to use that strip of land, but not its ownership." At trial, appellant testified that he purchased the property from Warren Marvin and Stuart Ellis. While walking around the property, Marvin, now deceased, told appellant that the boundary between the two properties was unclear, and that he and his predecessors had observed the existing fences. A man named Julian Gallardi, whom Marvin introduced as the owner of 701 El Medio, joined the conversation. However, appellant testified that the deed for 701 El Medio reflected a name slightly different than the one given by Mr. Gallardi. Mr. Gallardi indicated that the disputed property belonged to appellant. Appellant stated: "The exact words he used to manifest that, I don't remember. It wasn't a: [']Oh, yeah, you own it.['] I know it wasn't that dramatic. But it was a confirmation of the fact that we were the ones that dealt with this. We watered these trees. We moved this lawn. We did all that."

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1 Under Evidence Code section 1323, evidence of a statement concerning the boundary of land is not inadmissible under the hearsay rule if the declarant is unavailable as a witness, had sufficient knowledge of the subject, and made the statement under circumstances as to indicate trustworthiness.

Appellant testified that when tenants of 701 El Medio became obnoxious, he locked gate No. 1, removing the lock when good tenants moved in. In his affidavit, appellant stated that Stuart Ellis, now deceased, told appellant of his recollection of the property situation, was willing to testify as to his long-standing usage and acquiescence by prior owners of the adjoining property as to the disputed strip, and the existence and placement of fences as boundaries.

Despite appellant's attempt to construe a solid agreement out of these vague conversations, we conclude that there is no substantial evidence that the prior owners ever were uncertain about the boundaries or attempted to make an agreement or record any legal instrument expanding the location of the boundary line. *Finley v. Yuba County Water Dist.* (1979) 99 Cal.App.3d 691 is instructive. There, the plaintiffs sought to claim title to a strip of land based upon, among other things, the doctrine of agreed boundaries. The court refused to apply the doctrine in their favor, finding that the fence that plaintiffs claimed marked the boundary meandered and had partly collapsed; plaintiffs often leased the land from the defendants' predecessors for the grazing of their cattle; there was no evidence indicating that the boundary line was uncertain at the time the fence was constructed; or evidence as to who constructed the fence, the corral, or who planted apple trees in the disputed area. The court concluded that: "'[I]t is fundamental that a party who would quiet his title must prevail, if at all, on the strength of his own title and not on the weakness of the claims of an adversary.' [Citation.]" (*Id.* at p. 701.)

Similarly, appellant was not able to testify with specificity regarding the previous owners' comments about the boundaries. Nor has appellant shown that the erection of fence No. 1 and gate No. 1 was a direct result of an agreement to fix the boundary at the location of the fence. The physical location of fences Nos. 1 and 2 do not prevent respondents from using the disputed property, since they run perpendicular to the driveway.

Moreover, as previously discussed, the boundary line is clearly marked in all legal documents, and it would be a great leap to assume that previous owners would allow a neighbor to expand his property to the very wall of their house, especially in light of the

Los Angeles City ordinance requiring a five-foot setback. The most reasonable interpretation to be given to the conversations is that the former owners of 701 El Medio had given permission to the former owners of 705 El Medio to use the disputed property. However, permissive use does not fix the boundary between neighbors under the agreed boundary doctrine. (*Finley v. City of the County Water District, supra,* 99 Cal.App.3d at p. 700 [the doctrine of agreed boundaries was not meant to subvert neighborliness or prudence whereby a neighbor allows another to use part of his land for their mutual benefit.].)

We conclude that substantial evidence supports the trial court's findings that the doctrine of agreed boundaries does not apply.

2. Whether the trial court erred in concluding that appellant had not established a right to a prescriptive easement over the disputed property

In order to establish a prescriptive easement, the party claiming the easement must show open, notorious, continuous and adverse use of the disputed property for an uninterrupted period of five years. (*Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604.) Whether the elements exist is a question of fact for the trial court, and the findings of the trial court will not be disturbed if substantial evidence supports them. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.)

On appeal, appellant urges that the trial court erred in determining that appellant must use the disputed property exclusively in order to establish a prescriptive easement. Rather, he contends, exclusive use is not required as long as the party claiming a prescriptive easement uses under claim of right. It is true that the trial court, in its statement of decision, stated that the use of the prescriptive easement must be exclusive, and that both appellant and respondents simultaneously made use of the disputed property over the years since respondents took occupancy. However, the trial court may well have been responding to appellant's argument in his posttrial brief that a prescriptive easement requires exclusive use. Appellant also testified that only he used the land between gate

No. 1 and gate No. 2, and that respondents never objected to his exclusive use from May 1980 until December 1997.

We conclude that the trial court's finding that there was no exclusive use of the disputed property does not compel a reversal because substantial evidence supports the trial court's finding that the other elements establishing a prescriptive easement were not met. The evidence supports the trial court's finding that appellant's use of the disputed property was sporadic and inconsistent. Appellant's brother testified that appellant stored items like boxes and a barbeque on the disputed property for a short time before removing them. Appellant did not store his garbage cans on the disputed property until 1997, and only began storing debris there in the late 1990s. Moreover, appellant agreed to allow respondents to haul away his boards, wood and debris which had been piled up against respondents' house, which supports the inference that both he and respondents knew the disputed property belonged to respondents.

Having so concluded, we need not address respondents' argument that a prescriptive easement cannot be obtained against a landlord.

3. Whether the trial court erred in determining that appellant had not established title by adverse possession

In order to establish title by adverse possession, the party claiming title must show: "1) Possession under claim of right or color of title; 2) actual, open, and notorious occupation of the premises in such a manner as to constitute reasonable notice to the true owner; 3) possession which is adverse and hostile to the true owner; 4) possession which is uninterrupted and continuous for at least five years; and 5) payment of all taxes assessed against the property during the five-year period. [Citation.]" (*Buic v. Buic, supra,* 5 Cal.App.4th at p. 1604.)

On appeal, appellant urges that the erection of fence No. 1 established open, notorious and hostile possession. He cites from his trial testimony that no one raised any questions or concerns regarding his exclusive use of property bounded by fence No. 1, and that the Collas asked his permission to remove the materials stacked against

respondents' house. However, appellant did not present evidence as to who erected fence No. 1 or why. Moreover, Mr. Kavanos and Mrs. Collas testified that they were able to inspect the property using gate No. 1. As we previously discussed, substantial evidence supports the conclusion that appellant's use of the disputed property was a matter of neighborly accommodation by respondents; there is no evidence to show that respondents' grant of permissive use to appellant was given under claim of right. Further, appellant does not claim to have paid taxes assessed against the disputed property during a five-year period and therefore cannot establish title through adverse possession. Therefore we conclude that substantial evidence supports the trial court's finding.

4. Whether the trial court erred in rejecting appellant's affirmative defenses of statute of limitations, laches, waiver and estoppel

Appellant contends that respondents' claims are barred by the statute of limitations because respondents took title to their property in September 1980, while under Code of Civil Procedure section 338, subdivision (b),[2] the statute of limitations for trespass upon real property is three years and under section 318, an action for the recovery of real property must be commenced within five years of the time the plaintiff possessed the property. Appellant also urges that the doctrine of waiver applies because respondents intentionally relinquished a known right after knowledge of the facts. (*Waller v. Truck Insurance Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) Finally, he contends that the elements of estoppel have been met, in that respondents were apprised of the facts; respondents acted so that appellant had a right to believe respondents' conduct was intended as an estoppel; appellant was ignorant of the true state of facts; and appellant relied upon respondents' conduct to his injury. (*Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1110.)

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2 All further statutory references are to the Code of Civil Procedure.

We disagree and conclude that the trial court correctly rejected the affirmative defenses. As to the trespass cause of action, the trial court entered judgment in favor of respondents on the cause of action for quiet title, and entered judgment in favor of appellant on all other causes of action. Therefore, the trespass statute of limitations is moot. Laches, waiver and estoppel are factual determinations for the trier of fact. (*In Re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1159; *Plut v. Fireman's Fund Ins. Co.* (2000) 85 Cal.App.4th 98, 110.) The trial court determined that appellant had not established title through agreed boundary, adverse possession, or prescriptive easement. Rather, the trial court found that appellant's use was not continuous or hostile, but was sporadic and inconsistent. Thus, appellant's use of the property was a matter of neighborly accommodation and it was not until January 1998, when respondents undertook a survey in order to erect a fence that they became aware that appellant asserted a right to ownership of the disputed property. Respondents timely sued to quiet title four months later.

DISPOSITION

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

NOT FOR PUBLICATION.

_____, Acting P.J.
NOTT

We concur:

_____, J.
COOPER

_____, J.
TODD

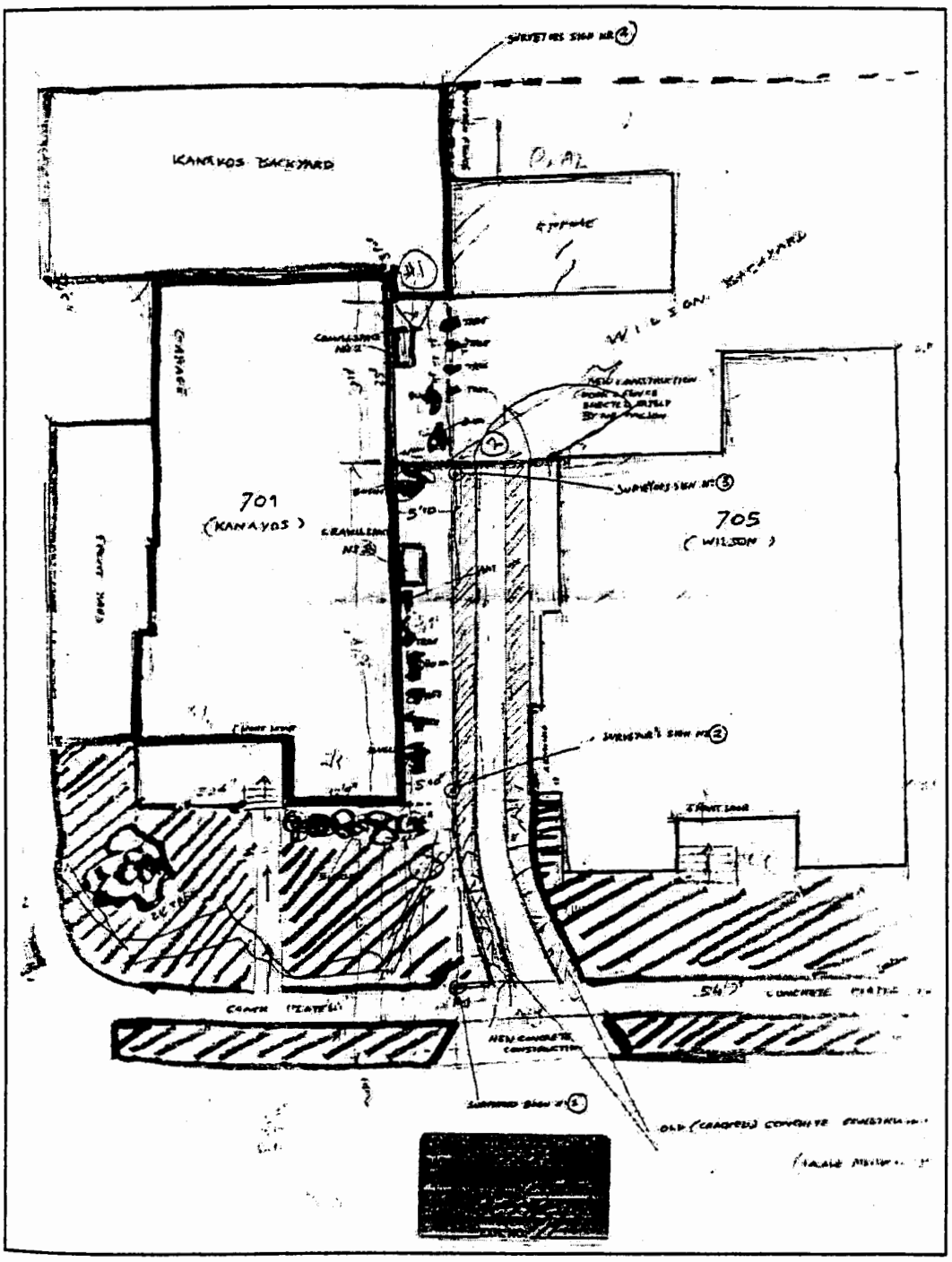
KANAYOS BACKYARD
WILSON BACKYARD
GARAGE
701
(KANAYOS)
705
(WILSON)
FRONT YARD
CONCRETE

Exhibit 19

LINE #	BEARING	LENGTH
L1	N15° 18' 32.0" E.	.06'
L2	N74° 41' 28.0" W	29.06'
L3	N24° 02' 54.2" E	52.31'

Curve #	Radius	Delta	Length	Tangent	Chord/Brg
C1	2551.70'	1° 12' 20"	53.69'	26.85'	53.69' N12-47-38.7E
C2	10.00'	91° 31' 55"	15.98'	10.27'	14.33' S60-17-07.2W
C3	2581.70'	15° 18' 31"	689.79		
C4	860.00'	34° 41' 20"	520.67		
C5	835.00'				

TRACT 9300

LOT 11
BLK. 105

N77° 48' 23.1"W 108.15' REC.)
N77° 48' 31.3"W 108.15' CALC.

N76° 36' 11.3" W 118.36' CALC.
(N76° 36' 02.3" W 118.36' REC.)

L=53.69' P.M.

N15° 18' 32.0"E 172.71'

EL MEDIO

MEATHFIELD ST.

30'

25'

222.03'

F.B. 20308 PAGE 10
FND. SPIKE & TIN

SET TAG R.C.E. 18216 IN 1" IRON PIPE 1.00' OFFSET TO PROPERTY CORNER ON PROPERTY LINE AS SHOWN

SET LEAD & TAG R.C.E. 18216 2.00' OFFSET TO PROPERTY CORNER

SET TAG R.C.E. 18216 IN 1" IRON PIPE 1.00' OFFSET TO PROPERTY CORNER ON PROPERTY LINE AS SHOWN

SET 2"x2" & NAIL 58.00' OFFSET TO TRUE CORNER ON PROPERTY LINE

SET NAIL & TAG R.C.E. 18216 ON ℄ AT TRUE INTERSECTION

SCALE: 1" = 30'

F.B. 20308 PAGE 10
FND. SPIKE & TIN

F.B. 20308 PAGE 10
FND. STD. MON.

GARAGE

71.41'

SET L & TAG

SET 2"x2" NAIL

DETAIL
SCALE: 1"=20'

REGISTERED PROFESSIONAL ENGINEER
ROBERT REISS
No. 18216
Exp. 6-30-93
CIVIL
STATE OF CALIFORNIA

000133

SURVEY PREPARED FOR:

WILSON

DATE OF SURVEY: JANUARY 14TH 1992
BASIS OF BEARINGS: EL MEDIO AVE - N 15°18'32"E

SIGNED AND SEALED: ENGINEERING & SURVEYING, INC.
[illegible] SOUTH MACADDEN PLACE
LOS ANGELES, CA [illegible]
By Robert Reiss, R.C.E. 18216