

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: December 21, 2015]

PLAINFIELD PIKE DEVELOPMENT, LLC :

:

:

v.

:

C.A. No. PC 2009-5447

:

VICTOR ANTHONY PROPERTIES, INC. :

DECISION

K. RODGERS, J. This matter came before the Court, sitting by designation in Kent County without a jury, on Plaintiff’s Complaint for Declaratory Judgment. Plaintiff Plainfield Pike Development, LLC (Plaintiff or Plainfield) owns real estate located at 1901 Plainfield Pike in Johnston, Rhode Island, which property is identified as Assessor’s Plat 29, Lots 53 and 90. Defendant Victor Anthony Properties, Inc. (Defendant or Victor Anthony) owns real estate identified as Assessor’s Plat 29, Lot 11, which is situated generally to the north of Plaintiff’s Lot 90 and runs along the south and southwest coast of the Simmons Lower Reservoir. Ingress and egress to Lot 11 is by way of a roughly 400-foot long roadway from Plainfield Pike, which measures approximately twenty-three feet wide, and which intermittently has been referred to as Elks Lane. The easterly boundary of Lot 90 abuts this roadway. Plaintiff seeks a declaration that it has a right-of-way over this roadway and a determination of the extent of its permitted use of that right-of-way.

Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13, 8-2-14(a), and 9-30-1. For the reasons set forth herein, judgment shall enter for Plaintiff.

I

Findings of Fact

Having reviewed the evidence presented by both parties and having viewed the property at issue with counsel, this Court makes the following findings of fact.

A

Overview of the Property

The properties at issue in this matter appear to have been originally owned by the Weeden family dating back to the early 1900's, and designated as Assessor's Plat 29, Lots 11 and 12. In 1922, Lena Weeden and Esther Frances Weeden conveyed each lot to the parties' predecessors in title. The first deed, dated April 11, 1922 and recorded on September 23, 1922 in Book 33, Page 480, conveyed Lot 12 to Plaintiff's predecessor in title, Guiseppi Iannelli¹ and Domenico Cardillo, and, importantly, included an express easement over "said other land of Lena Weeden and Esther Frances Weeden," to wit, Lot 11. (Ex. 2, Apr. 11, 1922 deed.) The April 11, 1922 deed to Lot 12 provided as follows:

"with the right to the said grantees, their heirs, executors, administrators, and assigns, to use the roadway with teams and otherwise, running through said other land of the said Lena Weeden and Esther Frances Weeden, they paying one-half of the expense of maintaining said roadway; being the westerly portion of the premises conveyed to the said Amos P. Weeden by deed from William S. Merritt, and wife, dated November 24, 1916, and recorded in the office of the Town Clerk of said Johnston in Deed Book 24 at page 338." Id.

Just three months later, by deed dated July 31, 1922, Lena Weeden and Esther Frances Weeden conveyed Lot 11 to Charles Fradin, Defendant's predecessor in title. (Ex. 1, July 31, 1922 deed.) The July 31, 1922 deed to Lot 11 states:

¹ "Guiseppi Iannelli's" name is spelled in a variety of ways. For consistency, this Court will adopt the spelling in this early deed.

“This conveyance is made subject to the right of Guiseppi Iannelli and Domenico Cardillo, their heirs, executors, administrators, and assigns, to use the roadway running through the premises described with teams or otherwise, they paying one-half of the expense of maintaining said roadway . . .” Id.

That deed was recorded at Book 33, Page 465.

It is the presence of the aforementioned language in the chains of title for both Lot 11 and Lot 12 which is the genesis of Plaintiff’s request for declaratory relief. Defendant, on the other hand, contends that the absence of this language from various deeds within the chains of title to Lot 11 and Lot 12 evidence an abandonment of the easement as does the changed use of the land. Accordingly, a closer analysis of the chains of title to Lot 11 and Lot 12 is warranted.

B

Chain of Title to Lot 11

The chain of title to Lot 11 was introduced into evidence as Plaintiff’s Exhibit 1, and was testified to by title examiner Thomas Mercier (Mercier) and Attorney Peter Nolan (Nolan).

The first relevant deed dates back to November 24, 1916, recorded in Book 24, Page 338, whereby Lot 11 is transferred from William and Ellen Merritt to Amos P. Weeden. As noted, on July 31, 1922, Lena Weeden and Esther Frances Weeden, Amos’s widow and daughter, sold the land to Charles Fradin, recorded in Book 33, Page 465. (Ex. 1, July 31, 1922 deed.)

The next deed in evidence transfers Lot 11 from The Rhode Island Ice Land Company to May Volatile on September 2, 1939, recorded in Book 57, Page 298. (Ex. 1, Sept. 2, 1939 deed.) This 1939 deed states: “[s]aid tract or parcel of land is subject, however, to the right of [Guiseppe] Iannelli and Domenico Cardillo, their heirs, executors, administrators and assigns, to use the roadway running through the premises above described with teams or otherwise, they paying one half of the expense of maintaining said roadway.” Id. May Volatile subsequently

transferred Lot 11 to her husband, Thomas Volatile, on October 3, 1955, recorded in Book 60, Page 337. (Ex. 1, Oct. 3, 1955 deed.) Again, it states that the land is subject to the right of Guiseppi Iannelli and Domenico Cardillo and their heirs, executors, administrators and assigns to use the easement. Id. Thomas Volatile transferred the land back to May Volatile on August 4, 1962 recorded at Book 97, Page 924. (Ex. 1, Aug. 4, 1962 deed.) That deed included the identical easement language as the previous deed between the Volatiles. Id.; cf. Ex. 1, Oct. 3, 1955 deed. On February 14, 1963, May Volatile transferred the property to Vincenza Riccitelli, who immediately transferred it back to both May and Thomas Volatile as tenants by the entirety, both of which were recorded at Book 99, pages 893-894. (Ex. 1, Feb. 14, 1963 deed.) Both deeds described the same easement rights as had been granted to Guiseppi Iannelli and Domenico Cardillo. Id.

In an agreement recorded on January 22, 1970, in Book 116, Page 373, there is a description of the easement provided.² (Ex. 1, Jan. 22, 1970 Agreement.) This agreement was entered between Cranston Print Works Company and May Volatile to define and clarify a decision rendered in the Rhode Island Superior Court titled Cranston Print Works Company v. William E. Merritt, Equity No. 3818 entered on June 22, 1917. The Agreement described the easement, stating it:

“shall be twenty-three feet (23) in width and shall extend in a northerly direction across the land of MAY VOLATILE from the northerly line of Plainfield Turnpike, also known as Plainfield Pike, to Simmons Lower Reservoir and running adjacent to the easterly line of said land of MAY VOLATILE. Said easement,

² The fact that this agreement and clarification was issued after the creation of the easement has no bearing on the easement’s validity. See Frenchtown Five L.L.C. v. Vanikiotis, 863 A.2d 1279, 1282 (R.I. 2004) (“[O]ur law clearly states that the precise location of an easement need not be designated for the easement to be valid.” (citing McConnell v. Golden, 104 R.I. 657, 663, 247 A.2d 909, 912 (1968))).

wherever it is in a common right-of-way, will be reserved to the use of CRANSTON PRINT WORKS COMPANY, MAY VOLATILE and owners of property abutting such easement, and their respective heirs, executors, administrators and assigns.” Id.

On September 29, 1970, May Volatile sold Lot 11 to Clemency Realty, Inc., which is recorded at Book 117, Page 688. (Ex. 1, Sept. 29, 1970 deed.) Clemency Realty sold Lot 11 to Joseph A. Maraia and his wife Mary R. Maraia and John B. Giusti and his wife Ethyl Giusti on May 8, 1972 and recorded at Book 122, Page 319. (Ex. 1, May 8, 1972 deed.) Neither of these deeds contains a reference to the right-of-way.

There is a deed between the Maraias and Giustis to Michael Brophy, recorded November 6, 1981 in Book 158, Page 1172, which describes the land and states that the land is subject to an easement set forth in the original deed. (Ex. 1, Nov. 6, 1981 deed.) On February 12, 1987, in Book 195, Page 1200, Lot 11 was deeded to the Giustis. (Ex. 1, Feb. 12, 1987 deed.) The Giustis subsequently deeded the property to Providence Lodge No. 14 of the Benevolent and Protective Order of the Elks on March 10, 1988, which was recorded in Book 209, Page 555, with the same language as that of the previous deeds, including the easement. (Ex. 1, Mar. 10, 1988 deed.)

The next deed in evidence concerning Lot 11 is not until August 12, 2003, when Bory Ban, Bopha Ban and Chutekma Am sold Lot 11 to Victor Anthony, which is recorded at Book 1356, Page 191. (Ex. 1, Aug. 12, 2003 deed.) Nicola Ricci (Ricci) is president and sole shareholder of Victor Anthony. At the time Defendant bought Lot 11,³ it was described as 6.85 acres and zoned as B-2, which is for small businesses. That deed provided that “[s]aid tract or parcel of land is subject also to the right to use the roadway running through the demised

³ Ricci testified that he purchased Lot 11 in 2004. Tr. 201:1. This testimony clearly differs from the deed itself. (Ex. 1, Aug. 12, 2003 deed.)

premises, with teams or otherwise, as set forth in deed from Lena Weeden et al to Charles Fradin dated July 31, 1922 and recorded in the Office of the Town Clerk of said Town of Johnston in Deed Book 33 at Page 465.” Id. Further, on February 26, 2008, Peter Vassilopoulos granted Victor Anthony a mortgage which also included a collateral assignment of rents and leases. Both the Assignment and Mortgage, recorded at Book 1906, Pages 129-144; 146-154, also state “said tract or parcel of land is subject also to the right to use the roadway running through the demised premises, with teams or otherwise, as set forth in deed from Lena Weeden et al to Charles Fradin dated July 31, 1922 and recorded in the Office of the Town Clerk of said Town of Johnston in Deed Book 33 at Page 465.” (Ex. 1, Feb. 26, 2008 Assignment and Mortgage.)

C

Chain of Title to Lot 12

The property originally designated as Lot 12 has been subdivided to include Plaintiff’s present property, Lots 53 and 90.⁴ The chain of title to the original Lot 12 was presented as Exhibit 2 and was also testified to by Mercier and Nolan.

Following the Weedens’ conveyance of the entire Lot 12 to Guiseppi Iannelli and Domenico Cardillo by deed dated April 11, 1922, which expressly conveyed the right-of-way over Lot 11, the property was used for a farming business. (Ex. 2, Apr. 11, 1922 deed.) On April 27, 1956, Guiseppi Iannelli deeded a portion of Lot 12 to Allesio Iannelli and his wife, Laura, as joint tenants, which parcel was ultimately designated as Lot 53 and measured .52 acres. (Ex. 2, Apr. 27, 1956 deed.) That deed was recorded on April 30, 1956, in Book 83 at Page 160, and does not reference the right-of-way that had been included in the April 11, 1922 deed. See id.

⁴ In addition to Lots 53 and 90, Lots 89 and 91 were also subdivided from the original Lot 12. Neither Lot 89 nor Lot 91 is implicated in this case.

On November 12, 1963, Guiseppi Iannelli deeded the remainder of what was known as Lot 12 to Iannelli Brothers, Inc. (Ex. 2, Nov. 12, 1963 deed.) That deed was recorded on November 18, 1963, in Book 101, Page 624, and did include language evidencing and conveying the right-of-way, which states:

“with the right to said grantee, its successors and assigns, to use the roadway with teams and otherwise, running through land now or formerly of Lena Weeden and Esther Francis Weeden, and however the same may be bounded and described being the first described lot of land and all the rights of way as conveyed and more fully described in the deed of Lena Weeden and Edna [sic] Francis Weeden to this grantor and Domenico Cardillo by Deed dated April 11, 1922, and recorded in the Town Clerk’s Office, Johnston, Rhode Island, in Deed Book 33 at Page 480.” Id.

By the late 1980s, Iannelli Brothers, Inc. was seeking to dissolve. In connection with this dissolution, the corporation executed two deeds on December 29, 1988, both of which were recorded on January 3, 1989. One deed granted to Alessio and Laura Iannelli another portion of Lot 12 that is now designated as Lot 90; the other deed granted to Anthony and Joseph Iannelli, as tenants in common, the remaining portion of Lot 12 (Ex. 2, Dec. 29, 1988 deeds). Neither of these deeds includes language concerning the right-of-way that had been included in the April 11, 1922 deed. Id.

Since that time, the property deeded to Alessio and Laura Iannelli has been divided and sold. On October 25, 1991, Alessio and Laura Iannelli sold a portion of their property, now designated as Assessor’s Plat 29, Lot 91, to Mobil Oil Corporation.⁵ (Ex. 2, Oct. 25, 1991 deed.) On June 18, 2008, after Alessio Iannelli and Laura Iannelli died, Alessio having predeceased his wife, the Estate of Laura Iannelli conveyed Lot 53 and Lot 90 to BTN Development, LLC (BTN

⁵ A corrective deed was executed on February 24, 1992, and recorded on March 24, 1992, in Book 372, Page 277, to address an error in the legal description of the property. (Ex. 2, Feb. 24, 1992 deed.)

Development). (Ex. 2, June 18, 2008 deeds.) Those two deeds were recorded in Book 1931, Pages 237 and 242, and neither includes a reference to the right-of-way. Id.

Plaintiff purchased Lots 53 and 90 on January 8, 2009, from BTN Development. (Ex. 2, June 8, 2009 deed.) That single deed with two separate exhibits describing the lots conveyed was recorded in Book 1970, pages 223. Id. It does not contain a reference to the right-of-way. Id.

D

Plaintiff's Development of Lots 53 and 90

The northerly and easterly boundaries of Lot 53 abut Lot 90; the southerly boundary of Lot 53 abuts Plainfield Pike, providing ingress and egress to the commercial development on Plaintiff's property. Lot 53 is approximately .51 acres, and Lot 90 is approximately 1.92 acres, for a total of approximately 2.43 acres.

After purchasing Lots 53 and 90, Plaintiff applied for a Special Use Permit from the Town of Johnston Zoning Board of Review (Zoning Board) seeking to build an auto repair facility. Tr. 111:10-13. The application included various site plans, which were updated throughout the application process. Tr. 112:15-21. One of the site plans submitted contained a notation stating that "approval from owner of AP 29, Lot 11, will be required for this access," but the site plan was later updated and the notation removed. Tr. 126:20 -127:14; Defendant's Ex. P). The final site plan submitted on January 15, 2009 did not contain the notation concerning the necessary approval from the owner of Lot 11.

The Zoning Board held a public hearing on March 26, 2009. In a written decision issued April 28, 2009, the Zoning Board unanimously approved Plaintiff's Special Use Permit.

Thereafter, a preliminary landscape review was conducted before the Town of Johnston Planning Board (Planning Board) on July 7, 2009.

Ricci testified before the Court that although he reviewed the plans before the Zoning Board hearing, he did not object to Plaintiff's application for a Special Use Permit and did not even attend the hearing before the Zoning Board because he read the notation that stated Plainfield would need his permission, as owner of Lot 11, to use the easement. Tr. 209:6-210:9; 228:2-229:2. At some point subsequent to the public hearing before the Zoning Board and after Plaintiff started construction on his auto facility, however, Ricci erected a fence along Lot 11, thereby blocking access from Lot 90 to the easement over Lot 11. Tr. 208:6-20. On January 26, 2010, Plainfield filed a notice of *lis pendens* in the records of the Town of Johnston.

II

Presentation of Witnesses

Plaintiff's witnesses were distinguished in their fields of work and presented compelling testimony. The most notable expert was Peter Nolan, a well-regarded attorney practicing in the areas of land use and real estate title law, who presented a very thorough report about the history of the easement which he discovered through a title of search of both Lot 11 and the original Lot 12. Nolan credibly and convincingly opined that the easement over Lot 11 exists and that it runs with the land, to wit, the owner of Lot 12 and its successors in title, including the present owner of Lot 90.

Licensed land surveyors Eric Colburn (Colburn) and Anthony Muscatelli (Muscatelli) also presented credible testimony that the Court found persuasive, the former testifying to the location and scope of the easement, and the latter refuting any allegation that the site plan submissions seeking a Special Use Permit for Lots 53 and 90 would in any way estop Plaintiff

from maintaining this declaratory judgment action. Colburn opined to a reasonable degree of certainty as recognized by his profession that the right of way “begins at Plainfield Pike and runs northerly along the narrow strip that is Lot 11, and then abuts around the backside of what used to be Lot 12 and is now Lot 90, and then continues outside the area I investigated.” Tr. 83:13-23. Further, he calculated the width of the easement was 22.75’, not 23’ wide. Tr. 89:14-23. Muscatelli testified he knew about the easement and informed Plaintiff of it in 2009. Tr. 249:12-23. Muscatelli also included the easement on a map, and noted that although Plaintiff had a right to use the easement, he intended to speak to the owners of the land to work out maintenance plans and its location. Tr. 253:1-11.

The Court found Defendant’s evidence deficient in many regards. Defendant’s president, Ricci, was less than persuasive and continually lacking focus in his responses. Joseph Iannelli, the son of Guiseppi Iannelli, testified to the condition of the roadway—a dirt road leading down to “the pond” that was wide enough for a small truck. Tr. 259-262. Farming on the property ended in approximately 1951. Tr. 262-63. Numerous other defense witnesses testified to matters involving Defendant’s efforts to purchase Lots 53 and 90, Defendant’s financial difficulties encountered in owning Lot 11, and with respect to exhibits introduced before the Zoning Board.

Defendant presented no credible evidence that the Zoning Board, in granting the Special Use Permit, had relied upon the particular site plan which stated that Plaintiff’s use of Elks Lane⁶ as ingress/egress “required approval of owner of Lot 11,” or that Ricci in any way relied upon

⁶ Testimony showed that the right-of-way came to be named after the Elks Lodge because this right-of-way was used as the driveway servicing the Elks Lodge from Plainfield Pike to its parking lot in or about 1988. Tr. 55:11-15; 105:11-15; 172:18-23.

any similar statements in the approval process that reasonably persuaded him not to attend the Zoning Board hearing.

III

Burden of Proof

Superior Court Rule of Civil Procedure 52 governs non-jury trials. In a bench trial, the Court must “find the facts specially and state separately its conclusions of law thereon. . . .” Super. R. Civ. P. 52. The judge “sits as a trier of fact as well as of law.” Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984); Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006). As a trier of fact and law, the judge “considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.” Hood, 478 A.2d at 184; Walton v. Baird, 433 A.2d 963, 965 (R.I. 1981).

In a case involving a plaintiff asking for a declaration of rights to an easement, the plaintiff has the burden to prove the existence of the easement by clear and convincing evidence. Kinder v. Westcott, 107 A.3d 321, 325 (R.I. 2015) (citing Pelletier v. Laureanno, 46 A.3d 28, 35 (R.I. 2012)). In addition to the other evidence presented, the Court must analyze the document that purportedly created the easement, and “[w]hen interpreting an instrument that purportedly creates an easement, this Court must effectuate the intent of the parties by examining the entire instrument.” Id.; see also Grady v. Narragansett Elec. Co., 962 A.2d 34, 43 (R.I. 2009). However, when the easement language is clear and unambiguous “such provisions can be interpreted and applied to the undisputed facts as a matter of law and neither oral testimony nor extrinsic evidence will be received to explain the nature of extent of the rights acquired.” Id. (quoting Carpenter v. Hanslin, 900 A.2d 1136, 1147 (R.I. 2006) (internal quotation marks omitted)).

IV

Analysis

A

Deeded Right-of-Way Exists over Lot 11

Plaintiff's Complaint for Declaratory Judgment requests that the Court declare that an easement exists over Lot 11, and that Plaintiff has a right to use it. Defendant does not argue that an easement never existed, but rather asserts that (1) the easement has since been extinguished, and (2) that Plaintiff is estopped from seeking an equitable remedy from the Court.

Plaintiff has proven by clear and convincing evidence that an easement exists over Lot 11 for the benefit of the original Lot 12, including present Lots 53 and 90. See Kinder, 107 A.3d at 325. Plaintiff provided a full title search for both Lot 11 and Lot 12, which clearly and convincingly demonstrates that an easement existed. As continually referenced in the chain of title to Lot 11, as well as in the 1922 deed to Lot 12, the following language is evidence that a right of way exists:

“with the right to the said grantees, their heirs, executors, administrators, and assigns, to use the roadway with teams and otherwise, running through said other land of the said Lena Weeden and Esther Frances Weeden, they paying one-half of the expense of maintaining said roadway; being the westerly portion of the premises conveyed, to the said Amos P. Weeden by deed from William S. Merritt, and wife, dated November 24, 1916, and recorded in the office of the Town Clerk of said Johnston in Deed Book 24 at page 338.” (Ex. 2, Apr. 11, 1922 deed.)

This language conclusively shows that an easement was intended over Lot 11 for the benefit of Lot 12.

It is of no consequence that the original deed which created the easement was conveyed on April 11, 1922 and not recorded until September 23, 1922. A deed does not have to be recorded to convey an effective easement. See 26A C.J.S. Deeds § 165 (“Even an unrecorded

instrument is fully enforceable between the parties to the transaction. The fact that a deed is unrecorded does not affect the efficacy or validity of the instrument as between the grantor and grantee.”); Shappy v. Downcity Capital Partners, Ltd., 973 A.2d 40, 44 (R.I. 2009) (“The purpose of recording statutes is to provide protection to those diligent enough to conduct a search of the title records.”). Indeed, it is necessary for a deed to be executed before it is recorded, but the lapse in time between execution and recordation does not in any way affect the validity of the instrument itself. Thus, although the original deed in the chain of title for Lot 12 was not recorded until six months after its execution, the easement created therein is still valid.

B

Deeded Right of Way Is Appurtenant

Plaintiff asserts that the easement is appurtenant, benefitting the original Lot 12 and present Lots 53 and 90 and not benefitting an individual holder of the easement. In response, Defendant argues that there was no evidence to support the conclusion that the easement was appurtenant, but offers no argument or law to refute that the easement is not appurtenant.

There are two types of easements: appurtenant and in gross. McAusland v. Carrier, 880 A.2d 861, 863 (R.I. 2005) (citing 7 Thompson on Real Property § 60.02(f) at 399 (Thomas ed. 1994)). An easement appurtenant is “[a]n easement created to benefit another tract of land, the use of easement being incident to the ownership of that other tract.” EASEMENT, Black’s Law Dictionary (10th ed. 2014). An easement in gross is “[a]n easement benefitting a particular person and not a particular piece of land. The beneficiary need not, and usu[ally] does not, own any land adjoining the servient estate.” Id. An easement in gross is personal to that holder and cannot be passed on, while an “easement appurtenant ‘conveys a good and rightful title forever.’” McAusland, 880 A.2d at 863 (citing Greenwood v. Rahill, 122 R.I. 759, 763, 412 A.2d 228, 230 (1980)). There is a presumption in favor of easements appurtenant rather than in gross.

Sullivan Granite Co. v. Vuono, 48 R.I. 292, 137 A. 687, 688 (1927); McAusland, 880 A.2d at 863-64.

Throughout the many deeds in the chain of title to Lot 11 that mention the easement in the instant case, the language clearly indicates that the easement is for the benefit of Lot 12's owners, heirs, executors, administrators and assigns, and not anyone that is not associated with the land. Nolan, a title attorney, opined that the easement runs with the land because the easement was "obviously" for the benefit of the original Lot 12, and "it's not just for somebody else who has no connection with this property to drive in and use a well or something of that nature." Tr. 59:1-23. Because the easement over Lot 11 is for the benefit of another tract of land, the easement is, by definition, appurtenant, inasmuch as it runs with the land and is not specific to a person or entity. See EASEMENT, Black's Law Dictionary (10th ed. 2014). The easement is for the benefit of the original Lot 12 and all its present subdivided parcels, including Lots 53 and 90.

It is of no consequence that a number of deeds in the chain of title to Lot 11 fail to mention the easement because "[o]nce an easement appurtenant has been established it becomes an incident of possession of the dominant tenement and it passes automatically with any effective transfer of the land." Manish v. Potvin, 472 A.2d 1220, 1222 (R.I. 1984) (citing 2 American Law of Property § 8.71; 3 Tiffany, Real Property § 761 (3d ed.)). Further and importantly, subdividing the dominant estate does not end the easement. Id.; Catalano v. Woodward, 617 A.2d 1363, 1367 (R.I. 1992). Thus, the subdivision of the original Lot 12 did not terminate easement; rather, the easement continued on for the benefit of the owners of the subdivided parcels, including Lots 53 and 90. See Crawford Realty Co. v. Ostrow, 89 R.I. 12, 19, 150 A.2d 5, 9 (1959) ("If a dominant tenement is subdivided between two or more owners, the easements

appurtenant to it become subdivided and attach to each separate part of the subdivided dominant tenement unless this result is prohibited by the terms of its conveyance.”) (citing 2 American Law of Property § 8.74 at 285).

The clear and convincing evidence of record establishes that the easement is appurtenant; it is not specific to any holder, and it runs with the land. The right to use the easement over Lot 11 has passed with the chain of title to Lot 11 for the benefit of the owners, heirs, executors, administrators and assigns of the original Lot 12, including the present owner of Lots 53 and 90.

C

Deeded Right-of-Way Has Not Been Abandoned

Defendant argues that Iannelli Brothers, Inc. acted in a voluntary and decisive manner to show an unequivocal intention to abandon the easement over Lot 11 because (1) the Iannelli Brothers, Inc., as well as the individuals Anthony and Joseph Iannelli, no longer used the easement for farming purposes as had been used at the time the easement was granted in 1922; (2) the land was subdivided; and (3) the easement was excluded from subsequent deeds. Defendant also maintains that there has been such a change in conditions since the granting of the easement which renders the purpose of the easement impossible to accomplish, and that Plaintiff’s use of the easement will cause a hardship for Ricci. In response, Plaintiff contends that the easement was not abandoned because mere non-use cannot terminate an easement and, in any event, there is no evidence that any owner of original Lot 12 or present Lots 53 or 90 acted voluntarily and with an unequivocal intention to abandon the easement. Moreover, Plaintiff argues that the subdivision of the dominant estate also does not extinguish the right-of-way and the right-of-way attaches to each subdivided parcel.

An easement can be terminated in the following ways: “(1) by expiration; (2) by act of the dominant owner (either release or abandonment); (3) by act of the servient owner (prescription or conveyance to a bona fide purchaser without notice); (4) by conduct of both parties (merger or estoppel) or, (5) by eminent domain, mortgage, foreclosure, or tax sale.” Jackvony v. Poncelet, 584 A.2d 1112, 1114 (R.I. 1991) (citing 3 R. Powell, The Law of Real Property ¶¶ 421-426 (1987)). Further, the servient estate owner must prove the easement owner intended to abandon the easement by clear and convincing evidence. 98 Am. Jur. 2d Trials § 371 (2005).

In determining whether an easement has been abandoned, “it has long been settled under Rhode Island law that the question of abandonment of easement rights is one of intention that must be determined by the facts of each case.” Id. (citing Spangler v. Schaus, 106 R.I. 795, 806, 264 A.2d 161, 167 (1970)). For the easement to be abandoned, “it is necessary to prove that the holder of the easement acted voluntarily and in such a decisive manner as to show an unequivocal intention to abandon the easement.” Id. (citing Steere v. Tiffany, 13 R.I. 568, 571 (1882)); see Nahabedian v. Jarcho, 510 A.2d 425, 428 (R.I. 1986) (citing Charles C. Gardiner Lumber Co. v. Graves, 63 R.I. 345, 8 A.2d 862 (1939)) (finding that the easement was abandoned because there were permanent physical obstructions installed that were inconsistent with the easement, defendant affirmatively agreed to the relocation of the boundary, defendant failed to object timely, and plaintiff relied on defendant’s conduct). The burden is on the servient estate owner to prove the easement was abandoned and must be established by clear and convincing evidence. 98 Am. Jur. 2d Trials § 371 (2005). Mere non-use is not sufficient to prove abandonment of the easement. Spangler, 106 R.I. at 806, 264 A.2d at 167. When there is a question as to whether an easement is abandoned, “[e]vidence that the easement holder acted in a

manner inconsistent with a further desire to use the easement is the most persuasive type of evidence.” Nahabedian, 510 A.2d at 427 (citing 3 Powell, The Law of Real Property ¶ 423 at 34-252 (1985)).

In the present case, there has been no overt act by Plaintiff or its predecessor in title that constitutes an abandonment of the easement over Lot 11. See Jackvony, 584 A.2d at 1114. Nor is this Court persuaded that because no payments were made by Plaintiff or its predecessors in title for upkeep of the easement, that such nonpayment demonstrates intent to abandon the easement. Indeed, there was no recitation in any deed that failure to pay the one-half share of maintenance expenses would void the easement. See Ex. 2, Apr. 11, 1922 deed; Tr. 71:13-14. As there was no evidence presented that there was an unequivocal intent to abandon the easement, this Court concludes that the easement over Lot 11 has not been abandoned. See Jackvony, 584 A.2d at 1114.

D

Location and Scope of Deeded Right-of-Way Over Lot 11

Plaintiff next seeks a declaration of the extent of its permitted use of the easement over Lot 11. Plaintiff argues that the deeded right-of-way was not limited to a specific scope because the phrase “with teams or otherwise” demonstrates that the easement could be used for any purpose. Further, Plaintiff presented evidence that the road was used by the Rhode Island Ice Land Company and the Elk’s Lodge for purposes other than farming, as further support that the easement must have been granted for a wide variety of uses. Finally, Plaintiff asserts that Defendant did not present any credible testimony that the easement will be overburdened by Plaintiff’s proposed use because Ricci’s testimony on this point was self-serving.

Defendant argues that the easement was granted to the Iannelli Brothers, Inc. for their farming business to obtain water from Simmonsville Reservoir and to cultivate the farm, and that

Plaintiff's intention to use the easement for purposes other than farming is an impermissible expansion of the scope of the easement. Furthermore, Ricci testified that the easement road is narrow and would be overburdened by Plaintiff's use of the land.

The Court must review the entire deed and determine the intent of the parties in declaring its scope. See Kinder, 107 A.3d at 325. After reviewing the chain of title for Lot 11 and testimony from the various experts, this Court finds that the easement exists over the "roadway" that is continually and consistently referenced in the deeds, and which roadway was at one time named as "Elks Lane." The use of that roadway is not restricted to a specific use, such as water collection or ice hauling, as it was permitted to be used "with teams and otherwise." (Ex. 2, Apr. 11, 1922 deed.)

There is reference in numerous deeds in the chain of title of Lot 11 to a 1970 Agreement. The Agreement clarified a court decision that defined an easement granted by May Volatile, a former owner of Lot 11, and Cranston Print Works Company, which also ran to all the owners of property abutting such easement, to include owners in the chain of title to Lot 12. (Ex. 1, Jan. 22, 1970 deed.) The Agreement states that the easement is twenty-three feet (23) wide and extends from northerly line of Plainfield Pike all the way to Simmons Lower Reservoir and running adjacent to the easterly line of May Volatile's property—meaning along the boundary between Lot 11 and Lot 10 (to the east of Lot 11) from Plainfield Pike directly to the Simmons Lower Reservoir. Book 116, Page 373, recorded on January 22, 1970 (Ex. 1.); see Ex. 1, Mar. 10, 1988 deed; Ex. 1, Aug. 12, 2003 deed; Ex. 1, Feb. 26, 2008 Mortgage. There are no restrictions on the "use" of the easement as identified in any of these recorded instruments. See Richards v. Halder, 853 A.2d 1206, 1210 (R.I. 2004) ("[i]t is true that where in a written instrument an easement of way is granted in express terms, the nature and extent of the easement

thus established is to be determined primarily from the language used in the writing, and if the terms thereof are free from uncertainty and ambiguity, oral testimony is not admissible to explain the nature or extent of the easement granted.”) (quoting Waterman v. Waterman, 93 R.I. 344, 349, 175 A.2d 291, 294 (1961)).

Land surveyor Colburn credibly and convincingly testified as to the scope of the easement. Colburn stated that the actual width of the easement is 22.75’ and not 23’. He opined that that easement “begins at Plainfield Pike and runs northerly along the narrow strip that is Lot 11. . . .” Tr. 83:9-23. He created an aerial mapping overlay with the 2004 Rhode Island DOT photo and then used older aerials from 1939 and 1951, introduced as Plaintiff’s Exhibit 3, which shows “a roadway coming off of Plainfield Pike heading northerly over Lot 11, and it falls next to the line between the old Lot 12 and Lot 11.” Tr. 85:10-86:7 (reviewing Ex. 3). He also looked to the original 1922 deeds wherein Lena Weeden and Esther Frances Weeden conveyed both Lots 11 and 12 through which the grantors left a 23’ wide strip of land going out to Plainfield Pike that he opined was because of the easement. Tr. 93:16-22.

This Court concludes, after reviewing the specific language of the deeds and testimony of expert Colburn, who testified about the exact length and width of the easement, that the easement consists of the 22.75’ wide entry at Plainfield Pike between Lots 90 and 11, and abuts the easterly boarder of Lot 11 extending in a northerly line from Plainfield Pike all the way to the Simmons Lower Reservoir.⁷

⁷ Although Colburn testified credibly, this Court does not agree that the easement abuts the backside of what used to be Lot 12 and is now Lot 90. Tr. 83:9-23. This Court finds instead the language of the January 22, 1970 Agreement to be clear and unambiguous, and establishes that the right-of-way extends along the eastern boundary of Lot 11 all the way to the Simmons Lower Reservoir; there is no reference in that Agreement to the easement instead following the curvature of the backside of Lot 12 (or Lot 90 as it is now known). See Ex. 1, Jan. 22, 1970 Agreement.)

E

Plaintiff Is Not Estopped from Claiming Right-of-Way

Defendant argues that Plaintiff is judicially estopped from seeking declaratory relief because in its application for a Special Use Permit before the Zoning Board, Plaintiff failed to include the easement on its site plan as required. Also, Defendant asserts that Plaintiff is judicially estopped from seeking declaratory relief because Plaintiff misrepresented to the Zoning Board that egress and ingress over Lot 11 was conditioned on approval by Defendant, thereby misleading both Defendant and the Zoning Board. Lastly, Defendant asserts that accessing the easement is an unauthorized expansion of the scope of the project, beyond what was testified to before the Zoning Board, thereby requiring further approval from the Zoning Board.

The doctrine of judicial estoppel “is an equitable doctrine invoked by a court at its discretion” to protect the judicial process by preventing parties from changing positions in a single case. New Hampshire v. Maine, 532 U.S. 742, 749-50, (2001) (citing Russell v. Rolfs, 893 F.2d 1033, 1037 (C.A.9 1990)). The doctrine of judicial estoppel promotes, “truthfulness and fair dealing in court proceedings.” Gaumond v. Trinity Repertory Co., 909 A.2d 512, 519 (R.I. 2006) (quoting D & H Therapy Assocs. v. Murray, 821 A.2d 691, 693 (R.I. 2003)). “[J]udicial estoppel focuses on the relationship between the litigant and the judicial system as a whole,” rather than solely on the “relationship between the parties.” Id. (citing 28 Am. Jur. 2d Estoppel and Waiver § 34 (2000)). The Court must determine whether the “party seeking to assert an inconsistent position would derive an unfair advantage . . . if not estopped.” Id. (quoting New Hampshire, 532 U.S. at 751).

Beyond the tenuous claim of judicial estoppel, Defendant further asserts that Plaintiff should be estopped from claiming access to the easement because, in the original plans submitted to the Zoning Board, one of the surveys included language that Plaintiff would need to seek the approval of the owner of Lot 11 before being able to utilize the easement. Defendant claims that this notation was false and put in the plans to both mislead the Zoning Board into approving the Special Use Permit and to induce Ricci not to object. Ricci testified that when he reviewed the plans prior to the hearing, he did not object to the Special Use Permit being issued because he did not think the plans affected his property. Tr. 209:17-23, 210:3-9. Victor Anthony's lawyers attempted to show that Ricci relied on the notation, and therefore did not object. Tr. 126:8-24.

An estoppel claim requires two elements:

“first, an affirmative representation . . . on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury.” Waterman v. Caprio, 983 A.2d 841, 847 (R.I. 2009) (citing Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 391–92 (R.I. 1997)).

The key element is “intentionally induced prejudicial reliance.” Id. (quoting El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1234 (R.I. 2000)). Equitable estoppel is an extraordinary remedy that should be “applied carefully and sparingly and only from necessity. Each of the elements of estoppel must be proved with the requisite degree of certainty; no element may be left to surmise, inference, or speculation.” Faella v. Chiodo, 111 A.3d 351, 357 (R.I. 2015) (quoting 28 Am. Jur. 2d Estoppel and Waiver § 166 at 633 (2011)).

Defendant's alternative theories of estoppel fail. Defendant presented no credible evidence that the Zoning Board, in granting the Special Use Permit, had relied upon the singular site plan which stated that use of the lane as ingress/egress required approval of owner of Lot 11.

The site plan containing the notation was one of at least eleven different site plans that were submitted to the Zoning Board, and there was no testimony or evidence as to whether this particular plan that contained the notation was even presented to the Zoning Board. See Tr. 127:15-22. Even if the plan including the notation was presented to the Zoning Board, there was no evidence offered which demonstrated that the notation influenced the Zoning Board to approve the Special Use Permit request and which would in any way warrant the application of judicial estoppel. Accordingly, there is no evidence that Plaintiff did or would have derived an unfair advantage in having its Special Use Permit approved without first obtaining permission from the owner of Lot 11 as noted in one of many site plans.

Further, Ricci himself testified that he consulted the plans submitted at the Johnston Town Hall on his own and did not seek the advice of counsel as to whether he should object. Tr. 228:9-23. Even though Ricci claims that he relied on the notation to his detriment because it induced him not to attend the Special Use Permit hearings or object, there was no evidence presented that Plaintiff purposely or affirmatively included the notation to induce Ricci to not object or so that the Zoning Board would approve the plan. Instead, Muscatelli, a licensed land surveyor from International Mapping and Surveying Corporation, explained that the notation was included because his research indicated there was a right-of-way over Lot 11 and he thought it could be agreed upon with the owner of Lot 11 to upgrade it and maintain it. Tr. 250:14-251:5. He testified that the notation was put there because Plaintiff intended to talk to the owner of Lot 11, as a gentleman's gesture, to negotiate the location and maintenance of the ingress and egress of that right-of-way. Tr. 253:2-11.

Defendant did not present credible evidence that Plaintiff included the notation in its plans in order to induce reliance of either the Zoning Board or Ricci. Accordingly, this Court

concludes that the doctrine of estoppel does not apply and that Plaintiff has rightfully sought declaratory relief before this Court.

V

Conclusion

For all these reasons, this Court grants Plaintiff's request for declaratory relief and finds that an easement exists over Lot 11 for the benefit of the owner of the original Lot 12, including Plaintiff as the present owner of Lots 53 and 90. The easement is 22.75 feet in width and extends in a northerly direction over Lot 11 from the northerly line of Plainfield Turnpike, also known as Plainfield Pike, to the Simmons Lower Reservoir, running adjacent to the boundary between Lot 11 and Lot 10 (to the east of Lot 11). Accordingly, judgment shall enter for Plaintiff.

Counsel for Plaintiff shall prepare a judgment consistent with this Decision.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Plainfield Pike Development, LLC v. Victor Anthony Properties, Inc.

CASE NO: PC 2009-5447

COURT: Providence County Superior Court

DATE DECISION FILED: December 21, 2015

JUSTICE/MAGISTRATE: K. Rodgers, J.

ATTORNEYS:

For Plaintiff: James Moretti, Esq.

For Defendant: Paul A. Sassi, Esq.

