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Mr. Robert O. Wright  
Ms. Deborah A. Wright  
P.O. Box 447  
Wilmington, DE 19899-0447

Re: Lowry v. Wright, et al.  
C.A. No. 20185-NC  
Date Submitted: February 15, 2006

Dear Mr. Haley, Mr. Wright, and Ms. Wright:

**I. Introduction**

Plaintiff Sandra Lowry and her mother, Plaintiff Anne Lowry, (the “Lowrys”) claim a right of way from the end of an alley behind their dwelling over lands owned by Defendants Robert and Deborah Wright (the “Wrights”) to a public road. For the reasons set forth in this post-trial letter opinion, the Court concludes that the Lowrys hold an easement by prescription.

## II. Findings of Fact

The Lowrys' property was once a part of a larger tract of land owned by J.A. Bader & Co., Inc. ("Bader Tract").<sup>1</sup> The Bader Tract was subdivided into eight smaller parcels, known as 115-129 Eastlawn Avenue, on which row houses were erected.<sup>2</sup> A twelve-foot wide common driveway ran parallel to Eastlawn Avenue behind each of these homes.<sup>3</sup> The driveway, or alley, opened onto Garden Place at the northwest end and onto Spruce Street at the southeast end.<sup>4</sup>

Anne Lowry took title to one of these units, 123 Eastlawn Avenue, in 1958.<sup>5</sup> The common driveway running along the rear of her lot was described in the deed as running parallel with Eastlawn Avenue and "opening into Spruce Street and Garden Place."<sup>6</sup> The deed granted "free and uninterrupted use and privilege of the above mentioned driveway in common with others entitled thereto forever."<sup>7</sup> The alley generally was one way—traffic went from Garden Place to Spruce Street.<sup>8</sup>

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<sup>1</sup> Pretrial Stipulation ("PT Stip.") ¶ 2. The lands are in the City of Wilmington, Delaware.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Joint Exhibit ("JX") A. She conveyed it to her daughter, Sandra Lowry, in 2003. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Tr. at 17, 22.

The portion of Spruce Street which connected the common driveway to Eastlawn Avenue, came to be known as 201 Eastlawn Avenue (sometimes, the “Parcel”).<sup>9</sup> The Parcel was undeveloped, though, and the Lowrys and their neighbors, after proceeding down the shared driveway behind their homes, were able to access Eastlawn Avenue over the Parcel.<sup>10</sup>

In 1965, the City of Wilmington passed a resolution that “removed, obliterated and effaced [the Parcel and an additional area of Spruce Street] from the official map or plan of the City of Wilmington.”<sup>11</sup> Nevertheless, the Lowrys, as well as other residents of that block of Eastlawn Avenue, continued to use the common driveway by turning onto, and traveling over, the Parcel to reach Eastlawn Avenue.

In 2002, the Wrights purchased 201 Eastlawn Avenue.<sup>12</sup> Mr. Wright has operated a funeral home near there since 1987.<sup>13</sup> Due to his expanding business,

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<sup>9</sup> PT Stip. ¶ 2(f).

<sup>10</sup> This use involved only a portion of the Parcel.

<sup>11</sup> JX C.

<sup>12</sup> JX B. The quitclaim deed to the Wrights recites that the tract conveyed “[c]omprise[d] a portion of the bed of Spruce Street as laid out on the map of the City of Wilmington.” The Parcel is more particularly describe as Parcel No. 2 in the deed of Robert G. Lubach, et al., dated June 19, 2000.

<sup>13</sup> Tr. at 91.

he acquired the Parcel to provide additional parking.<sup>14</sup> Since purchasing the Parcel, Mr. Wright has erected various barriers which prevent the Lowrys, as well as their neighbors, from using the Parcel to reach Eastlawn Avenue from the southeast end of the alley.<sup>15</sup>

### **III. Contentions**

The Lowrys contend that they have an easement (by express grant or, in the alternative, by prescription) over the Parcel, and that the Wrights have unlawfully restricted their use and enjoyment of that easement. The Wrights rely upon the City's abandonment of Spruce Street and argue that the Lowrys have not satisfied the exacting standards of an easement by prescription.

### **IV. Analysis**

“[T]o establish a prescriptive easement, a party must establish by clear and convincing evidence, that she or a person in privity with her, used the disputed property: (i) openly, (ii) notoriously, (iii) exclusively, and (iv) adversely to the rights of others for an uninterrupted period of twenty (20) years.”<sup>16</sup>

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<sup>14</sup> Tr. at 93.

<sup>15</sup> See Plaintiffs' Exhibits 1-5.

<sup>16</sup> *Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732, 740 (Del. Ch. 2001) (citing *Lickle v. Frank W. Diver, Inc.*, 238 A.2d 326, 329 (Del. 1968)). Easements by

The Lowrys have, by clear and convincing evidence, proved each of these elements. “‘Open and notorious’ means that the possession must be public so that the owner and others have notice of the possession.”<sup>17</sup> The evidence establishes that from 1958 (when the Lowrys moved in) until recently (when the Wrights obstructed it), the Parcel was regularly used by the Lowrys and their neighbors to get from their homes to Eastlawn Avenue.<sup>18</sup> Additionally, it was used by utility and commercial vehicles in the course of providing services to the residents.<sup>19</sup> For example, garbage trucks used the alley; they stopped behind the residences to pick up the trash, and then exited the alley over the Parcel to Eastlawn Avenue.<sup>20</sup> The Lowrys have, thus, satisfied the “open and notorious” requirement because the

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prescription are “generally disfavored because they necessarily work forfeitures of existing property rights.” *Johnson v. Bell*, 2003 WL 23021932, at \*2 (Del. Ch. Dec. 11, 2003).

<sup>17</sup> *Mitchell v. Dorman*, 2004 WL 117580, at \*3 (Del. Ch. Jan. 16, 2004).

<sup>18</sup> Tr. 22-30; 43. Sandra Lowry’s description of the use of the alley and the Parcel for access to Eastlawn Avenue was confirmed by several of her neighbors. For example, Jeanette Saunders has resided at 121 Eastlawn Avenue for about 33 years. Tr. at 65. She testified that she regularly used the driveway and the Parcel to access her property. Tr. at 68. Furthermore, she observed the driveway and the Parcel being put to similar use by her neighbors on a daily basis. Tr. at 71. Her testimony regarding the pattern of use she observed during her 30 year residence on Eastlawn Avenue bolsters Sandra Lowry’s testimony. Similarly, Virginia Crawford, has resided at 125 Eastlawn Avenue since 1996. Tr. at 56. She testified that she used the Parcel to exit onto Eastlawn Avenue. Tr. at 56-57. Furthermore, Ms. Crawford testified that she observed her neighbors use the Parcel in the same manner on a daily basis. Tr. at 58. The testimony of the neighbors is credible.

<sup>19</sup> Tr. at 23-24.

<sup>20</sup> *Id.* The alley is narrow, and it best works in one direction. Tr. at 26, 29-30.

Parcel was used in such a way as to “apprise the community in its locality that it is in [their] exclusive use and enjoyment, and to put the owner on inquiry as to the nature and extent of the invasion of his rights.”<sup>21</sup> Furthermore, the “exclusively” element is met because, although the Lowrys shared use of the Parcel with their neighbors, their use was exclusive to the public at large.<sup>22</sup> The alley was used by the residents of the homes and served their guests and invitees. Finally, the requisite twenty-year period of use is satisfied because the Lowrys have used the Parcel as an access way for well over twenty years,<sup>23</sup> under a claim of right, and, thus, adversely to the interests of the owners of the parcel.<sup>24</sup>

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<sup>21</sup> *Marvel v. Barley Mill Road Homes*, 104 A.2d 908, 912 (Del. Ch. 1954).

<sup>22</sup> *See Anolick*, 787 A.2d. at 740 n.15 (“The user need be exclusive only in the sense that it must not depend on its enjoyments upon a similar right in others; it must be exclusive as against the public at large, but two or more persons may independently acquire an easement by prescription to use the same road or way, and the easement may be acquired in common with the true owner.”) (quoting *Marta v. Trincia*, 22 A.2d 519, 520 (Del. Ch. 1941)).

<sup>23</sup> Although Sandra Lowry has only held title to 123 Eastlawn since 2003, her mother’s period of ownership (approximately 45 years) may be “tacked” in order to establish a prescriptive use. *See, e.g., Rowe v. Everett*, 2000 WL 1655233, at \*5 (Del. Ch. Oct. 25, 2000); *Marta v. Trincia*, 22 A.2d 519, 521 (“In order to make up the prescriptive period, successive adverse users by different persons may be tacked, but there must be privity between such persons.”). The twenty-year period did not commence before 1965, when the City abandoned Spruce Street.

<sup>24</sup> “A use is hostile or adverse if it is inconsistent with the rights of the owner. The use must not be subordinate or subservient to the owner’s rights. Where the use of the disputed property is open and visible and there is no semblance of proof that the use was permissive, a court may find the use adverse.” *Cartanza v. Lebeau*, 2006 WL 903541, at \*3 (Del. Ch. Apr. 3, 2006). Since Anne Lowry’s purchase of her home in 1958, the Plaintiffs believed that they had the right to access 201 Eastlawn Avenue by express grant. As Sandra Lowry explained, “It was always set up that you could use it that way . . . . I see in the deed—it was part of the deed.” Tr. at 59.

## V. Conclusion

The Lowrys have demonstrated that they hold a prescriptive easement giving them the right to use the Parcel for access to Eastlawn Avenue from the end of the alley.<sup>25</sup> The Wrights may not restrict their access, and the barriers must be removed.

Plaintiffs' counsel is requested to submit, after reviewing it with the Defendants, a form of order to implement this letter opinion.<sup>26</sup>

Very truly yours,

*/s/ John W. Noble*

JWN/cap

cc: Register in Chancery-NC

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*Compare Lewes Trust Co. v. Grindle*, 170 A.2d 280 (Del. 1961) (holding that mere possession without a claim of right or color of title will not create a title by right of adverse possession).

<sup>25</sup> Whether the Lowrys hold an easement by express grant or by prior public dedication would require assessment of the impact of City of Wilmington's 1965 resolution. The Court, in light of its conclusion that the Lowrys' hold an easement by prescription, need not resolve these issues.

<sup>26</sup> The prescriptive easement, a right which "runs with the land," is, more accurately, held by Sandra Lowry, as the fee simple owner of the parcel at 123 Eastlawn Avenue. *See, e.g., Grotto Pizza, Inc. v. Ocean Bay Mart, Inc.*, 1998 WL 388402, at \*4 (Del. Ch. June 30, 1998) ("The fundamental notion of an easement is that it runs with the land, i.e., attaches to a fee simple interest in real property.").

Also, the Court has not precisely delineated the area burdened by the prescriptive easement. That, at least for now, is better left to the parties. The purpose, of course, is to protect the Plaintiffs' rights while minimizing the impact on the Defendants' use of their property.