

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001890-MR

GRAND-DELL HOMEOWNERS ASSOCIATION, INC.

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 17-CI-00149

CREEK ALLEY CONTRACTING, LLC  
AND OLDHAM COUNTY FISCAL COURT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: In this declaration of rights action, the Grand-Dell Homeowners Association, Inc., appeals an order of the Oldham Circuit Court concluding that roads in a residential development, including Grand Dell Drive, are county roads. We affirm.

Appellee Creek Alley Contracting, Inc., acquired a roughly triangular parcel of real property at the entrance of Grand Dell Subdivision in Oldham County. The property adjoins both Kentucky Highway 53 and Grand Dell Drive at the entrance of Grand Dell Subdivision. Creek Alley intended to improve the property for residential development. In December 2016, the Office of the Oldham County Road Engineer issued a road encroachment permit authorizing Creek Alley to construct a culvert and driveway providing ingress and egress to Grand Dell Drive. By virtue of this road access, Creek Alley's property was designated 4601 Grand Dell Drive, a lot upon which Creek Alley intended to build a home that was not a part of Grand Dell Subdivision.

Grand Dell Drive winds through Grand Dell Subdivision. The subdivision was developed in 1990 by McMahan Developers through a recorded plat and deed restrictions. The subdivision's roads were dedicated to public use. The roads were expressly included in the county road system at a fiscal court meeting conducted in December 1993. The minutes of the meeting are recorded in the office of the Oldham County Clerk.

It is undisputed that Creek Alley's property is not (nor has it ever been) part of the recorded plat of Grand Dell Subdivision and is not subject (nor has it ever been) to its deed restrictions. Instead, the property is part of a tract

contiguous to Grand Dell Subdivision that was never acquired by McMahan Developers.

On March 3, 2017, the Homeowners Association filed a petition for declaration of rights in Oldham Circuit Court. In part, it sought a ruling from the court that would prevent Creek Alley from connecting its driveway to Grand Dell Drive. The Homeowners Association challenged issuance of the road encroachment permit, contending that: Appellee Oldham County Fiscal Court did not have fee simple title either to Grand Dell Drive or to Creek Alley's property; that issuance of the permit violated its deed restrictions; and that the issuance of the permit constituted an unconstitutional taking of property.

Following a hearing and the submission of memoranda by the parties, the Oldham Circuit Court found that: McMahan Developers had dedicated the roads throughout Grand Dell Subdivision to public use through its submission of a plat in March 1990; that the Oldham County Planning Commission had duly approved the plat in April 1990; and that the Oldham County Fiscal Court had issued an order on December 7, 1993, expressly providing that the Grand Dell Subdivision roads would be included in its county road system. The court found that the subdivision roads, including Grand Dell Drive, had been maintained by the county ever since.

The court concluded that the disputed road had been dedicated to public use pursuant to the provisions of KRS<sup>1</sup> 100.277; that it became a county road pursuant to the provisions of KRS 178.010; and that the fiscal court did not exceed its authority by issuing a road encroachment permit to Creek Alley. The court denied the subsequent motion of the Homeowners Association to alter, amend, or vacate. This appeal followed.

On appeal, the Homeowners Association argues that the circuit court erred by failing to conclude that the Oldham County Fiscal Court acted beyond its authority by granting the road encroachment permit. It bases its argument on these grounds: (1) the fiscal court does not have a fee simple interest in the public right-of-way abutting Grand Dell Drive; (2) Creek Alley failed to establish that it was entitled to an easement by necessity; (3) the road encroachment permit was not authorized by the provisions of KRS 178.410; (4) the actions of the fiscal court violate the deed restrictions imposed upon the development's homeowners; and (5) the actions of the fiscal court constitute an unconstitutional taking. We address each of these contentions in the order in which it was presented.

The Homeowners Association first contends that the fiscal court lacked authority to grant the disputed road encroachment permit because it does

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<sup>1</sup> Kentucky Revised Statutes.

not possess fee simple title to the public right-of-way over the portion of Creek Alley's lot that adjoins the roadway. We disagree.

The Homeowners Association has acknowledged that Grand Dell Drive (with its 60-foot right-of-way) was duly dedicated to public use. County roads are public resources maintained at public expense. Property dedicated to public use does not belong to any individual, and the county's easement provides it the authority to permit an encroachment. *Kemper v. Cooke*, 576 S.W.2d 263 (Ky. App. 1979). Furthermore, a landowner along a public road has a right to reasonable access to the road. *See Commonwealth of Kentucky, Department of Highways v. Carlisle*, 363 S.W.2d 104 (Ky. 1962), *overruled on other grounds by Commonwealth, Department of Highways v. Denny*, 385 S.W.2d 776 (Ky. 1964). The county does not need fee simple title to the disputed property in order to justify its authority to issue a valid encroachment permit over its right-of-way.

The Homeowners Association next contends that Creek Alley failed to establish that it was entitled to an easement by necessity. However, the argument ignores the fact that the easement was created by express written grant -- and that the county specifically authorized the encroachment by Creek Alley. Under these circumstances, Creek Alley is not required to show that an easement exists as a matter of necessity.

The Homeowners Association presents as its third argument that the trial court erred by finding that the road-encroachment permit was authorized by the provisions of KRS 178.410. That statute authorizes a fiscal court to accept for public use any private road, street, or highway that has been openly and continuously used by the public for a period of at least fifteen years provided that fifty-five percent of the property owners abutting the road indicate their willingness to dedicate it accordingly. The trial court made no such finding in this case, but we note that its conclusions were not premised on the provisions of this statute. Instead, the court determined that the road had been dedicated by an express written grant. Thus, the provisions of KRS 178.410 do not pertain or relate to this dispute.

Next, the Homeowners Association argues that the circuit court erred by failing to recognize that permitting Creek Alley to access Grand Dell Drive violates the subdivision's deed restrictions. The Homeowners Association argues that its inability to enforce the deed restrictions against Creek Alley jeopardizes "the integrity of the unique neighborhood which the [deed restrictions] were imposed to protect." This argument overlooks the fact that Creek Alley's property is not burdened by the deed restrictions to which the Homeowners Association refers. We are unaware of any precedent or authority that would empower a court

to impose by judicial *fiat* the deed restrictions of a homeowners association on property located outside the development.

As its final argument, the Homeowners Association contends that the court erred by failing to conclude that the encroachment permit constitutes an unconstitutional taking of its property. It relies upon the provisions of Section 13 – the “takings clause” -- of the Kentucky Constitution, which provides that no one’s property shall be “taken or applied to public use **without the consent** of his representatives, and without just compensation being previously made. . . .” (Emphasis added).

However, the Homeowners Association lacks an enforceable property interest in the public right-of-way to support a claim under the takings clause of our Constitution. The disputed property was applied to **public use with the express consent** of the subdivision’s developer. Rather than being violated, the takings clause has been satisfied as to the element of consent. Consequently, the trial court did not err by concluding that the encroachment permit did not constitute a taking of property.

We affirm the order of the Oldham Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard L. Master  
Louisville, Kentucky

BRIEF FOR APPELLEE:

D. Berry Baxter  
LaGrange, Kentucky