20-P-698 Appeals Court

FOD, LLC, & another[1] vs. JAMES N. WHITE, JR., & others.[2]

No. 20-P-698.

Suffolk. February 2, 2021. - April 6, 2021.

Present: Sullivan, Massing, & Englander, JJ.

Real Property, Easement, Restrictions, Nuisance. Easement. Nuisance. Zoning, Educational use. Declaratory Relief. Witness, Expert. Evidence, Expert opinion.

Civil action commenced in the Land Court Department on September 13, 2017.

The case was tried before Keith C. Long, J.

Jason R. Talerman for the defendants.
Mark J. Lanza for the plaintiffs.

ENGLANDER, J. Plaintiffs FOD, LLC (FOD), and Brenda Knight, are seeking to develop a mostly undeveloped, 13.7-acre

[1] Brenda Knight.

[2] Amy C. White (together with James N. White, Jr., Whites); and Kirsten R. Murawski and Stephen J. Murawski, III (Murawskis).

parcel in Mansfield (site) for use as a private elementary school. To do so they will have to use a short, fifty-foot wide easement (easement) to connect the site to an existing, public cul-de-sac. The easement runs over two abutting properties, owned by the defendants, the Murawskis and the Whites. The plaintiffs brought this lawsuit, seeking a declaration that the proposed school use was consistent with the easement, and would not overburden it. The defendants opposed, arguing that the proposed school use will result in extensive additional traffic, and is beyond the contemplation of the parties to the original easement grant. The case thus presents recurring issues regarding how to determine what limits there may be on the use of an easement. After a bench trial, the judge ruled for the plaintiffs, and the defendants appeal. We affirm.

Background. This is the second Land Court lawsuit regarding the easement; the same judge decided both cases. In the first, the abutters (predecessors to the defendants) challenged the existence of the easement; the judge ruled that an implied easement did exist, having been agreed to between a prior owner of the defendants' properties, and the Knights. This court affirmed. See Perillo v. Knight, 86 Mass. App. Ct. 1107 (2014) (Knight I). The facts set forth herein are taken from the judge's findings in Knight I, as well as his findings in this matter.

James and Brenda Knight acquired the 13.7-acre site in 1974. At that time, the site had no direct access to any public roadway, but instead benefited from a roadway easement (right of way) over the abutting parcel to the north, which allowed access to nearby roadways. The abutting parcel was owned by one Nicholas Harris.

Harris sought to subdivide and develop his parcel in 1989. Because the Knights' right of way across Harris's property interfered with Harris's ability to develop his parcel, Harris entered into negotiations with James Knight. The result of these negotiations was that the Knights relinquished their right of way across Harris's property, and in return, received the short, fifty-foot wide easement that is the subject of this case.

The easement was not created by an express grant; rather, in Knight I the judge ruled that the easement was agreed to by Harris and James Knight, and implied from various sources. One such source was Harris's subdivision plan, filed in 1989 and approved by the Mansfield planning board, which plan showed the easement. The subdivision plan showing the easement is expressly referenced in the deeds of each defendant.

Harris's 1989 subdivision divided his property into sixteen new lots, serviced by new roads that were built on Harris's property. As shown in Harris's subdivision plan, the easement

runs from the Knights' property line to the end of a cul-de-sac on Harris's property. The easement is fifty feet wide and very short. On one side, it runs approximately thirty feet from the Knights' property across the Murawskis' property; on the other side, approximately five feet across the Whites' property. The subdivision roads shown on the plan have since been accepted by the town, and are public ways.

As noted, the easement at issue was negotiated between Harris and James Knight. As to the purpose of the easement, the judge found that James[3] desired the easement so that he could eventually develop his property, and that James expressly requested a fifty-foot wide easement so that it could be used for that purpose. The judge also found that Harris and James Knight placed no restrictions on the use of the easement, or on the use of the Knights' land. He cited Harris's unequivocal testimony in support of this finding.[4] The judge concluded: "All that was ever said to the grantor of the easement, Nicholas Harris, or to the [p]lanning [b]oard reviewing the easement in connection with Mr. Harris'[s] request for approval of his subdivision plan, was that Mr. Knight needed a [fifty-foot]

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[3] We sometimes refer to James Knight as James or Knight.

[4] Harris's trial testimony from the first case was introduced at trial in this case, by agreement; James Knight passed away before trial in the first case.

right of way 'because he intended to develop the property at a later date' with no statement of, or limitation on, what that development might be."

Many years after the easement was granted, in 2007, Brenda Knight submitted a plan for a residential subdivision of the site, but the plan was not approved. Thereafter, FOD approached Brenda Knight about locating a Montessori school on the site. In 2009, the defendants' predecessors brought the prior action against Brenda Knight, challenging the existence of the easement; that action culminated in the judgment described earlier, confirming the easement's existence. See Knight I, 86 Mass. App. Ct. at 1110. Late in the litigation of Knight I, the abutters also raised the argument that even if the easement did exist, the proposed use of the Knights' property would overburden the easement -- that is, that the creators of the easement had, at most, contemplated the continuing residential development of the neighborhood, but could not have foreseen the development of a school and the attendant school traffic across the easement. In his decision in Knight I, the judge ruled that he did not have sufficient information regarding the proposed school design or the traffic it might generate to decide the

overburdening issue, and commented that "[t]he challenge may be raised in another lawsuit."[5]

Thereafter, in 2017 the plaintiffs filed the instant suit, seeking a declaratory judgment that the proposed school use would not overburden the easement. At trial, the plaintiffs presented a proposed plan for the site that showed the school, the road leading from the easement to the school, and the area where the school children would be dropped off and picked up. The plan showed approximately 750 feet of road on the site, extending from the property line adjacent to the easement to the drop-off area, and also showed parking areas next to that road. The plaintiffs also presented testimony regarding the anticipated school drop-off and pick-up procedures; this testimony explained that the school already exists, in smaller form, at another location in Mansfield. The principal of the

[5] In this case, the defendants filed a pretrial motion to dismiss, alleging that the matter was not ripe. They contend on appeal that the matter will not be ready for a declaratory judgment until FOD secures further approvals in the development process. The defendants also argue that the plaintiffs must first exhaust their administrative remedies by securing the required municipal approvals and permits. The judge denied the motion and we perceive no error. The rights of the parties are clearly in dispute with respect to the plaintiffs' proposed use of the easement, and the facts regarding the proposed site layout were sufficiently concrete for the judge to enter a declaratory judgment. See G. L. c. 231A, §§ 1, 9; Boston v. Keene Corp., 406 Mass. 301, 305 (1989) ("There is a measure of discretion in deciding whether a case is appropriate for declaratory relief").

school testified about the procedures then being employed, as well as the anticipated schedule and procedure for the new school. The principal also described how the school traffic procedures would coordinate and stagger the student drop-offs and pick-ups, which the judge found were "designed to eliminate congestion," and "to ensure smooth and swift unloading and loading of the students."

The plaintiffs also presented expert testimony on the likely traffic impacts of the proposed school. The plaintiffs' expert's firm had observed the traffic flow and drop-off and pick-up procedures at the existing school, and the expert's testimony relied upon these observations. The plaintiffs' expert estimated that the proposed school would generate an additional 462 vehicle trips over the easement per day that the school was in session. The expert also testified that, based upon the observations of the existing school's traffic flow and traffic control procedures, and the approximately 750 feet of road separating the pick-up and drop-off area from the property line and the easement, any traffic queues that did occur at the proposed larger school would not extend onto the easement.

The defendants also presented an expert. He did not observe the operations of the existing school, but he calculated, based on the Institute of Transportation Engineers trip generation manual, that a private school of the proposed

size would generate 800 additional trips daily. The defendants' expert opined that poor conditions, reluctant children, and the large delivery trucks necessary to provide supplies to the school could disrupt the flow of traffic and lead to congestion in the neighborhood. The expert also opined that the plaintiffs' claimed pick-up and drop-off efficiency could not be achieved at the larger school site. He opined that substantial queueing would occur, and that traffic queues would likely back up onto the easement and into the subdivision at times.

The judge found that the creators of the easement had "certainly anticipated further development," and that the creators had neither reduced to writing nor agreed to any restrictions on the easement. He noted that the proposed school use was allowed as of right in light of the Dover Amendment, G. L. c. 40A, § 3, and he concluded that the proposed use was a "normal" and reasonably anticipated development of the site and would not overburden the easement. In regard to the traffic impacts of the proposed school, the judge found, after considering the testimony of both experts, that school traffic would not result in queues or back-ups onto the easement itself. The judge further found that "[p]rivate vehicle use will certainly increase over what it was before (there was only the Knights' house on the parcel at the time), but it will not

increase in a way that materially affects the easement, and will not overburden it."

Discussion. 1. Limitations on the easement. The defendants first challenge the judge's finding that there are no limitations on the grant of the easement that would prevent the school use. Easements may be expressly limited in scope by the terms of their grant. See Parsons v. New York, N.H. & H.R.R., 216 Mass. 269, 273 (1913). The judge found that no express restriction was placed upon the easement and "that Mr. Knight, like all landowners in similar situations, intended to reserve all of his development options, and the easement grantor, Mr. Harris, had no objection to that." The defendants argue that this finding was clear error, and that Harris's testimony established that the parties only intended -- and agreed -- that the easement would be used for access to a residential subdivision.

On appeal, we review findings of fact for clear error, and review any conclusions of law de novo. See Kitras v. Aquinnah, 474 Mass. 132, 138-139, cert. denied, 137 S. Ct. 506 (2016). The burden to establish clear error is a heavy one. We may only find clear error where the judge's findings are not "supported on any reasonable view of the evidence, including all rational inferences of which it was susceptible" (quotation omitted). Buster v. George W. Moore, Inc., 438 Mass. 635, 642 (2003).

Here, the judge's finding is not clearly erroneous, but rather is well supported by Harris's testimony and by an understanding of the circumstances of the transaction. While Harris's testimony indicated that residential development might be a likely use, Harris testified that he and Knight never discussed limiting or restricting the scope of the easement. We think it particularly relevant that the easement was granted in return for the Knights relinquishing a significantly more invasive right of way over Harris's parcel. Harris needed that concession to develop his parcel, and would not have been in a position to limit the easement that he was granting in return. Brenda Knight's testimony does not contradict Harris's, particularly where she did not participate in the negotiations.

2. Normal development. The defendants next argue that the proposed school use of the site will overburden the easement because it is outside the scope of the implied grant, in that a school use does not qualify as "normal development" under the circumstances.[6] Again, we disagree.

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[6] As the court explained in Southwick v. Planning Bd. of Plymouth, 65 Mass. App. Ct. 315, 319 n.12 (2005), the term "overburdening" is sometimes used to describe different concepts. In this case the defendants' contentions addressed two of those concepts: (1) that the proposed use of the dominant estate is beyond the scope of the easement grant, and (2) that the proposal will result in use of the easement that amounts to a nuisance. See id.

Where an easement is not expressly limited in scope, its use is nevertheless limited to "the reasonable uses to which the dominant estate may be devoted." Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 82 (2004) (Cerasuolo), quoting Parsons, 216 Mass. at 273. Here, at the time the easement was granted, only one structure existed on the site, and the easement experienced relatively little use. However, the scope of the easement is not constrained by the circumstances present at the time of its grant. See Labounty v. Vickers, 352 Mass. 337, 345 (1967). The Restatement (First) of Property § 484 comment b (1944) states:

> "The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance and give rise to the implication. Among these circumstances is the use which is being made of the dominant tenement at that time. Yet it does not follow that the use authorized is to be limited to such a use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from future uses of the dominant tenement. . . . It is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement" (emphasis added).

The determination of what constitutes "normal development . . . is largely a question of fact." Cerasuolo, 62 Mass. App. Ct. at 84. As used in the case law and the Restatement (First) of Property, the concept of "normal development" means development that was within the reasonable contemplation of the parties at the time the easement was granted. Drawing on prior

Land Court decisions, the judge identified several factors that are relevant to this determination, as follows:

> "(a) did the original parties to the easement anticipate further development of [the dominant] parcel; (b) at the time of its creation, was the easement the parcel's sole means of access; (c) was anyone already using the way described in the easement (and if so, what was the nature and frequency of that use); (d) did the size of the dominant parcel make its later development reasonably foreseeable; (e) at the time of creation of the easement, were the dominant and servient parcels zoned for the later-proposed use; (f) are there any express restrictions on use of the easement; and (g) at the time of creation of the easement, did the dominant parcel have any natural features that would limit its development."

We do not suggest that the above list is exhaustive, but it is a useful distillation of relevant considerations. Here, the judge addressed each of the above factors, and concluded that they weighed in favor of the proposed school use being reasonably contemplated at the time the easement was granted. In ruling as he did the judge made several findings of fact that are essentially unassailable: the site is substantial in size; there were no alternative access points; there were no natural features that would have limited the site's development into a school; and there were no express restrictions noted in the deeds of the subservient (abutting) parcels. The judge also found, as discussed above, that no restriction on the easement was contemplated during negotiations, and that James Knight had negotiated the easement with potential future development in mind. All of these findings favor the plaintiffs.

The defendants argue that a school was an unforeseeable use in a neighborhood zoned for residential uses only, but the judge was correct in rejecting this contention as well. General Laws c. 40A, § 3, has provided an exception to local zoning regulations for nonprofit educational organizations since passage in 1975. That provision of the so-called Dover Amendment predates the creation of the easement by approximately fourteen years, and the development of the site into a nonprofit school thus was permissible at the time the easement was created. The defendants contend that a use authorized by an exception to local zoning is inherently abnormal, but as mentioned above, "normal development" is "reasonably foreseeable" development, and where the school use was authorized at the time, it was (at least a school of the size at issue here) reasonably foreseeable.

Finally, the judge also considered the impacts of additional traffic over the easement. The proposed change in the use of the easement, both in frequency and character, is plainly a relevant factor in evaluating whether a proposed use was within the reasonable contemplation of the parties to the easement grant. As to the traffic issue, the judge credited the plaintiffs' expert, and concluded that while there would be considerable additional traffic, that traffic would still only briefly pass over the easement, and would be unlikely to queue

onto the easement.[7] The judge also noted that the nature of the use -- automobile traffic and some delivery trucks, but no school buses -- would not change. He accordingly concluded that the proposed school use would not "materially affect[]" the easement. Although the defendants challenge the judge's factual findings, the judge did not clearly err in crediting the plaintiffs' expert's testimony. The judge's evaluation of competing expert testimony involved an assessment of credibility and weight, both of which were within the province of the judge. See New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 675 (1977) (trial judge in best position to judge weight and credibility of competing evidence); North Adams Apartments Ltd. Partnership v. North Adams, 78 Mass. App. Ct. 602, 607 (2011) ("Deference is also given to the trial judge's credibility assessments of experts"). Moreover, here the plaintiffs' expert testified with the benefit of actual observations of the existing school nearby, whereas the defendants' expert did not.

[7] The defendants argue that the judge went beyond the stipulated facts by considering that the plaintiffs could adjust some part of their pick-up and drop-off procedure if queueing onto the easement actually occurred. We do not agree that this amounted to disregarding the parties' stipulation. The stipulation that the determination would be based on the site and proposed building configuration does not preclude the judge from pointing out that modifications would be feasible within the constraints of that design.

In short, while the proposed project will result in substantial additional use of the easement, on the basis of the facts found we cannot say as a matter of law that such use was not reasonably foreseeable, and we perceive no error in the judge's conclusion that the proposed school is "normal development" within the contemplation of the easement grant. See Parsons, 216 Mass. at 273; Cerasuolo, 62 Mass. App. Ct. at 82.

3. Increased frequency of use. Finally, the defendants argue that the proposed school will overburden the easement because the increased use will simply be too much -- that it will be "tantamount to a 'nuisance,'" citing Southwick v. Planning Bd. of Plymouth, 65 Mass. App. Ct. 315, 319 n.12 (2005).

The judge rejected this contention as well, and we perceive no error. At the outset, we note that while the cases do say that the extent of travel across an easement is "not without limits," Hodgkins v. Bianchini, 323 Mass. 169, 173 (1948), it is not clear that a "nuisance" overburdening argument exists independently from the issue we addressed above -- whether a proposed use is within the scope of the reasonably foreseeable development of the site at the time that the easement was granted. See Lane v. Zoning Bd. of Appeals of Falmouth, 65 Mass. App. Ct. 434, 440 (2006). Put differently, where as here

the proposed use of an easement was reasonably foreseeable, including in nature and frequency, see supra, it is difficult to see how that use could nevertheless constitute a nuisance that the servient parcels could prevent.

In any event, the proposed use cannot be determined to be a nuisance under the circumstances, based upon the record and the facts found by the judge. The defendants' properties abut a public way,[8] and the traffic at issue would pass over that public way before crossing the easement. The defendants do not suggest how such traffic can meet the standards for a nuisance. The judge further found "no evidence, and . . . no likelihood, that anyone will park on the easement or pause there more than momentarily." The proposed increase in vehicle traffic, while marked, does not "sink to the level of an actionable nuisance." See Lane, 65 Mass. App. Ct. at 440 ("That development [of the lot], contrasted with its present status, will result in [more

[8] The defendants cite the rules and regulations governing the subdivision of land for the town of Mansfield in effect during the late 1980s, which defined "minor street" as a street that "will be used primarily to provide access to abutting lots and which will not be used for through traffic nor carry more than three hundred (300) vehicles per day." The defendants contend that the subdivision roads were constructed to be minor streets, according to the subdivision plan submitted by Harris. Regardless, the public ways are not limited in use, and their design does not bear materially on whether the proposed school use will overburden the easement.

frequent use of the easement] is a virtual certainty; but this by itself does not constitute overburdening").

Judgment affirmed.