

AFFIDAVIT PURSUANT TO G.L. c. 183, § 5B

Property Address:

Rustic Ridge in East Northfield, MA 01360, consisting of all property with frontage on the private ways listed in Exhibit A which is recorded herewith and incorporated herein by reference.

Cross Reference:

Recorded plans of Rustic Ridge Tracts 1 & 2, Pine Grove Addition, and South Extension, as more particularly listed on Exhibit A which is recorded herewith and incorporated herein by reference.

I, Michael Pill, Attorney at Law, P.O. Box 242, Shutesbury, MA 01072 being first duly sworn and having personal knowledge of the facts herein stated based on examination of the documents cited below, depose and state as follows:

1. This affidavit relates to the area of East Northfield, Massachusetts, known as Rustic Ridge (hereafter called the "locus"), being the same premises shown on the recorded survey plans of Rustic Ridge Tracts 1 & 2, Pine Grove Addition and South Extension (hereafter called the "Rustic Ridge Plans"), as more particularly listed on Exhibit A which is recorded herewith and incorporated herein by reference.
2. To the best of my knowledge, none of the deeds for the locus contain any easement by grant to use the private ways shown on the Rustic Ridge Plans. Therefore, in my opinion the provisions of Massachusetts General Laws (G.L.), Chapter (c.) 187, Section (§) 5, do not apply to the subject property. That statute provides in relevant part as follows:

The owner or owners of real estate abutting on a private way who have by deed existing rights of ingress and egress upon such way or other private ways shall have the right by implication to place, install or construct in, on, along and under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer service. . . . [underlining added]

The Massachusetts court has held that G.L. c. 187, § 5, "which extended authority to lay underground utilities to possessors of right of way, applies only to those general grants of right of way expressed by deed." *Nylander v. Potter*, 423 Mass. 158, 160 n. 6, 667 N.E.2d 244, 246 n. 6 (1996).

3. To the extent that the parcels with frontage on the private ways of the locus may enjoy the benefit of an easement by prescription (the existence of which is not conceded, acknowledged or recognized by this affidavit), then in my opinion any such easement is limited to its historic seasonal use. The Massachusetts court has held that while "some latitude, however, in variation of the use is permitted", the rule is that:

The extent of an easement arising by prescription, unlike an easement by grant [citations omitted] is fixed by the use through which it was created [citations omitted]. "[P]rescriptive rights are measured by the extent of the actual, adverse use of the servient property, not by the extent of the threats of the dominant owner." Holmes, J., in *Middlesex Co. v. City of Lowell*, 149 Mass. 509, 511, 21 N.E. 872, 873.

Lawless v. Trumbull, 343 Mass. 561, 562-563, 180 N.E.2d 80-, 82 (1962).

4. In my opinion, the the parcels with frontage on the private ways of the locus do enjoy the benefit of an implied easement by estoppel, based on boundary on a way. *Parker v. Smith*, 17 Mass. (16 Tyng) 413, 415-416 (1821) ("By this description [bounding land on two streets] the grantor and his heirs are estopped from denying that there is a street or way ... We consider this to be not merely a description, but an implied covenant that there are such streets"). This implied covenant extends to the Rustic Ridge Plans, because such a plans are considered to be a part of the deeds conveying the parcels shown on them: "[T]he lines laid down on this plan and the courses, distances, references to monuments, and other particulars appearing thereon, are to be as much regarded as the true description of the land conveyed as they would be if expressly recited in the deed." *Magoun v. Lapham*, 38 Mass. (21 Pick.) 135, 137-138 (1838).

On the one hand, an implied easement, "is not necessarily confined to the purposes for which the dominant estate was used at the time of the grant but is a right of way for every reasonable use to which the dominant estate may be devoted." *Labounty v. Vickers*, 352 Mass. 337, 345, 225 N.E.2d 333, 339 (1967), quoting *Rajewski v. MacBean*, 273 Mass. 1, 6, 172 N.E. 882, 883 (1930).

On the other hand, the same court decision makes it clear that a case by case determination is required: "The question as to the extent and limits of a reasonable right of way * * * (is) largely one of fact". *Id.* The court in *Labounty v.*

Vickers noted that the actual historical use made of the easement (such as the historic limitation to seasonal use of the locus in the present case) could be used as evidence to define the limits of permissible use:

“It is well settled that when an easement is created by deed, but its precise limits and location are not defined, the location and use of the easement by the owner of the dominant estate for many years, acquiesced in by the owner of the servient estate, will be deemed to be that which was intended to be conveyed by the deed.”

Kessler v. Bowditch, 223 Mass. 265, 268, 111 N.E. 887, 888 [(1916)]. We think that the same principle is applicable in determining the scope of an easement created by implication.

Id. In the present case, the use of the private ways shown on the Rustic Ridge Plans have been limited to seasonal use for nearly a century.

To determine the permitted use of an easement, one must go back and try to ascertain what was intended by the parties to the original grant or reservation: “[W]hat the uses are to which the land granted might be conveniently put depends on the various circumstances including what was in the minds of the plaintiff and her grantor when the conveyance was made. [Citation omitted.]” *Van Buskirk v. Diamond*, 316 Mass. 453, 460, 55 N.E.2d 687, 690 (1944).

Application of this principle led the court to conclude that an easement intended for private recreation (“appurtenant to lots evidently intended for summer residences”) cannot be used for commercial purposes:

The easement to use the beach “for the purpose of boating, bathing, fishing and other recreation” was made appurtenant to lots evidently intended for summer residences. The extent of the easement is determined “by the language of the grant, construed in the light of the attending circumstances.” [Citations. omitted.] It is true that an easement granted in general and unrestricted terms is not limited to the uses made of the dominant estate at the time of its creation, but is available for the reasonable uses to which the dominant estate may be devoted. [Citations omitted.] ... But we think that the maintenance on the triangular piece [of sandy land bordering on the ocean] of a substantial commercial business in letting boats to the general public surcharged the easement granted, and should be restrained by injunction ...

Hewitt v. Perry, 309 Mass. 100, 105, 34 N.E.2d 489, 491 (1941).

Where an easement was granted over a "concrete walk", the court stated "[t]he use that the defendant could make of the walk ... is to be determined by the language of the grant construed in the light of the attending circumstances which have a legitimate tendency to show the intention of the parties as to the extent and character of the contemplated use of the way." *Doody v. Spurr*, 315 Mass. 129, 132, 133, 51 N.E.2d 981, 983 (1943). The court used extrinsic evidence to support its conclusion that the "concrete walk" could not be used for automobiles:

The construction of the walk showed that it was intended for foot travel, and there is nothing to show that any portion of the walk was ever used for vehicular travel until the defendant used it as a driveway for automobile travel. the servient estate cannot be burdened to a greater extent than was contemplated or intended at the time of the grant, and the defendant would have no right to use the way for a purpose that was obviously inconsistent with the nature and condition of the premises over which she had a right of passage, and unwarranted by the terms of the grant, which was manifestly limited to the reasonable use of a right of way which then consisted of a foot walk ... as ... then constructed and located upon the servient estate. Whether the use of the walk for automobile traffic, in the absence of anything in the grant permitting such use, was, in all the circumstances, a reasonable use of the walk was largely a question of fact. [Citations omitted.]

315 Mass. 133-134, 51 N.E.2d at 983-984. The same conclusion was reached in *Rowell v. Doggett*, 143 Mass. 483, 10 N.E. 182 (1887), where an easement was limited to passage on foot even though it was 18 feet wide, based on a condition stated in the grant prohibiting any injury to or destruction of fruit trees located within the easement. The only way through the fruit trees was a winding foot path, with no room for horses and carriages to pass without destroying some of the trees. Extrinsic evidence was admitted to limit use of the easement:

A grant of way over one's premises, without limitation or restriction, is understood to be a general way for all purposes. But, in construing such a grant, reference is to be had to the nature and condition of the subject matter of the grant at the time of its execution, and the obvious purposes which the parties had in view in making it. [Citation omitted.] Where the words of a deed are ambiguous, and not explainable by the context, the construction given by the words themselves, as shown by the way and manner

in which the parties exercised their respective rights, is legal evidence. If a passageway has been used in a certain mode, from the time of making the deed to the time of an alleged trespass, without any objection being made, this evidence is admissible in order to show what was intended by the reservation. [Citation omitted.]

143 Mass. at 487, 10 N.E. at 184.

5. In the present case, the historic limitation of the locus is to seasonal use. Any implied easement for access to the locus, via the private ways shown on the Rustic Ridge Plans, is similarly limited to seasonal use, in my opinion. This history is fully documented in the publication entitled The Story of Rustic Ridge 1901-1976 (Northfield, Mass. 1976), to which reference may be had for more detail.

Michael Pill

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss.

August ____, 2000

Subscribed and sworn to by the above-named Michael Pill, before me

Notary Public

My commission expires:

CERTIFICATE OF ATTORNEY

I, Michael Pill, Attorney at Law, of 37 Leverett Road, P.O. Box 242, Shutesbury, MA 01072, phone (413) 259-1221, certify that the facts stated in the foregoing affidavit are relevant to the title to the land which is the subject thereof, and will be of benefit and assistance in clarifying the chain of such title.

Michael Pill

EXHIBIT A

Property Address: Rustic Ridge in East Northfield, MA 01360, consisting of all property with frontage on the private ways listed below:

Cliff Road
East Lane
Ferncliff Avenue
Ferncliff Circle
Heath Road
Holly Avenue
Ledge Way
Linden Avenue
Lyman Street
Mountain Road
Myrtle Street
Oak Terrace
Pine Road
Spring Street
West Lane
The Willows
Wood Way
Woodruff Way

Cross Reference: The "Rustic Ridge Plans" consist of the recorded plans of Rustic Ridge Tracts 1 & 2, Pine Grove Addition and South Extension, as more particularly listed below:

"Rustic Ridge Tract No. 1, Survey of the Alexander Tract, Situated in the town of Northfield, surveyed Summer of 1902 by Charles Morris of Mt. Hermon, Mass." recorded August 16, 1902 in the Franklin County Registry of Deeds Plan Book 1, Page 172.

Rustic Ridge Tract No. 2 . . . Franklin County Registry of Deeds Plan Book . . . ,
Page

Pine Grove Addition . . . Franklin County Registry of Deeds Plan Book . . . , Page
. . . .

South Extension . . . Franklin County Registry of Deeds Plan Book . . . , Page

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