(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
11 MISC 455441 (AHS)

MICHAEL F. BURKE, DONNA M. BURKE and SEAN P. BURKE,
Plaintiffs,

vs.

SILVANE SPALENZA f/k/a Silvane Trecartin and JORGE SPALENZA,
Defendants.

and

THE BANK OF NEW YORK MELLON f/k/a The Bank of New York as successor to JPMorgan Chase Bank, N.A. as Trustee of BSALTA 2005-09,
Interested Party

DECISION

Plaintiffs Michael F. Burke ("Michael"), Donna M. Burke ("Donna") and Sean P. Burke ("Sean") (together, "Plaintiffs") filed their unverified Complaint on November 3, 2011, pursuant to G. L. c. 231A, seeking a declaratory judgment relative to their easement rights over property owned by Defendants Silvane Spalenza ("Silvane") and Jorge Spalenza ("Jorge") (together, "Defendants"). Defendants filed their Answer and Counterclaim and Request for Jury Trial on January 3, 2012, claiming extinguishment of any easement by adverse possession. A case management conference was held on January 17, 2012. Interested Party Bank of New York Mellon filed its Answer on January 24, 2012. Plaintiffs filed their Answer to Counterclaim on January 26, 2012. Defendants withdrew their request for jury trial on February 3, 2012. A pre-trial conference was held on March 13, 2013. A site view and the first day of trial at the Land Court in Boston were held on May 16, 2013. The second day of trial was held on May 17, 2013. Both parties filed their post-trial briefs on August 19, 2013, and at that time the matter was taken under advisement.

Testimony at trial for Plaintiffs was given by David Dwyer (professional land surveyor), Richard Salvo ("Salvo") (registered civil engineer), Edward Harnish (former owner of Plaintiff Property as hereinafter defined), Geraldine Harnish (former owner of Plaintiff Property), Kellyan Burke (current owner of Plaintiff Property), and Donna Burke (Plaintiff). Testimony at trial for Defendants was given by Paul Dewsnap (civil engineer) and Silvane Spalenza (Defendant). Kellyan Burke was a rebuttal witness. There were seventy-six exhibits submitted into evidence.

Based on the sworn pleadings, the evidence submitted at trial, and the reasonable inferences drawn therefrom, I find the following material facts:

Title:

1. Charles A. Patch ("Patch") owned the property located at 26 Oakland Street, Melrose, MA ("Plaintiff Property") and 30 Oakland Street, Melrose, MA ("Defendant Property") in 1902. By deeds dated January 18, 1902 (the "1902 Deeds"), Patch conveyed Plaintiff Property to Emma Wellman and Defendant Property to Clara Gowing. These deeds were recorded with the Middlesex South District Registry of Deeds (the "Registry") at Book 2941, Pages 488 and 487, respectively. Both deeds granted "a right of way over the whole of the driveway [the "Driveway"] as now laid out on said lots" (the "Easement").

2. Geraldine ("Geraldine") and Edward ("Edward") Harnish (together, the "Harnishes") acquired title to Plaintiff Property as husband and wife, tenants by entirety, by deed dated October 16, 1975, recorded in Book 12878, Page 172.[1] Edward deeded his interest in Plaintiff Property to Geraldine by deed dated May 23, 1990, and recorded with the Registry at Book 20769, Page 523. Geraldine conveyed Plaintiff Property to Michael and Donna

[1] The back title for Plaintiff Property is not in the trial record but is not disputed.

(undivided one-half interest) and Sean (undivided one-half interest), as tenants in common, pursuant to a deed dated April 27, 1995, and recorded with the Registry at Book 25309, Page 184. Michael and Donna conveyed their undivided one-half interest in Plaintiff Property to their daughter Kellyan Burke ("Kellyan") (together with Michael and Donna, the "Burkes"), reserving a life estate, by deed dated August 10, 2012, and recorded with the Registry at Book 59823, Page 400. Michael, Donna, and Sean conveyed all of their interest in Plaintiff Property to Kellyan by deed dated February 12, 2013, and recorded with the Registry at Book 61229, Page 360. Plaintiff Property is shown as Lot 3 and the easterly half of Lot 4 on the plan entitled "Plan of House Lots in Melrose" dated October 1857, prepared by H. M. Fosdick (the "1857 Plan"), and recorded with the Registry in Book 834, Page 400. Plaintiff Property contains 15,714 square feet.

3. Defendant Property has been used as a two-family residence since the 1950s. Silvane is the owner of Defendant Property pursuant to a deed from Joshua D. Lubar dated August 25, 2005, and recorded with the Registry at Book 45956, Page 426.[2] Defendant Property is shown as the easterly portion of Lot 5 and the westerly half of Lot 4 on the 1857 Plan, and contains 8, 664 square feet.

The Driveway and the Garage

4. An 1899 Atlas of the Town of Melrose shows Plaintiff Property and Defendant Property with a curb cut from Oakland Street onto Defendant Property. The 1899 Atlas does not show the Driveway. The curb cut from Oakland Street is defined by stone pillars which are approximately eleven feet apart. The Driveway has existed on the ground since the 1902

[2] The back title for Defendant Property is not in the trial record, but is not disputed.

Deeds, but evidence of its original location has been "lost in time."

5. The 1978 and 1979 Massachusetts Historical Commission photographs (the "MHC Photographs") of Defendant Property depict the Driveway as a well-defined paved area running from Oakland Street to Defendant Property and then up to Plaintiff Property.[3] The grade of the Driveway as it rises from the curb cut is approximately 20% as it veers sharply to the left in an "S" curve. The MHC Photographs depict the Driveway as beginning at the curb cut in Oakland Street, reaching the Garage, and continuing in front of Defendant's house to Plaintiff Property. The photographs show a grassy area in front of the Driveway, which previous owners of Defendant Property would later pave over.

6. As of 1967, the garage on Defendant Property (the "Garage") was a two-car garage. Sometime between 1967 and 1979 the Garage was converted to a one-car garage. At present, one small car can be parked in the Garage.

7. On February 28, 2013, David A. Dwyer, Jr. ("Dwyer"), a professional land surveyor, prepared two alternative plans for Plaintiffs, sheet A ("Sheet A") and sheet B ("Sheet B"), depicting the existing conditions at Defendant Property and two possible locations for the Driveway, which he labeled "Available Driveway Area." Dwyer also prepared an alternative version of Sheet A, which is labeled Sheet A.1, which superimposes the vehicular path of a nineteen foot long vehicle and lines depicting possible places for three parked cars within the remaining paved surface in the front of Defendant Property. Sheet A.1 shows two parking spaces measuring 8.7' x 18' and one parking space measuring 8.7' x 16'. Dwyer further

[3] A portion of Plaintiff Property can be seen in the MHC Photographs, but the focus of the MHC Photographs is Defendant Property. Exhibit 42 shows a blown up version of the 1978 MHC Photograph.

prepared an alternative version of Sheet B, which is labeled Sheet B.1, which superimposes a vehicular path for a nineteen foot long vehicle and also shows areas where four vehicles could park. Sheet B.1 shows three parking spaces measuring 8.7' x 18' (Spaces 1-3, defined, infra) at the front of Defendant Property and one parking space measuring 8.5' x 15' in front of the Garage (Space 4, defined, infra). "Space 1," "Space 2," and "Space 3" are shown adjacent to one another and are located to the north of the Driveway. Space 1 is the closest space to Oakland Street. "Space 4," as shown on Sheet B.1, is located in front of the Garage.[4]

8. Edward testified that in the early 1980s, the former owners of Defendant Property paved over a grassy area in the front yard of their property, to the north of driveway, which is where Space 1, Space 2, and Space 3 are currently located.

9. On May 12, 2013, Paul Dewsnap ("Dewsnap"), a professional surveyor, prepared a plan (the "May 2013 Plan") for Defendants. The May 2013 Plan shows three parking spaces measuring 9' x 18' (in substantially the same location as Spaces 1-3) and one parking space measuring 9' x 16.5' (in substantially the same location as Space 4). This plan is based on a 2007 survey Dewsnap conducted for the purpose of a possible condominium conversion of Defendant Property.

10. The Melrose Zoning Code (the "Code") was adopted in 1972. The Code provides that every single family house in any Melrose zoning district, including zone UR-A (where Defendant Property and Plaintiff Property are located), requires two off-street parking spaces.

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[4] Parking in Space 1 and Space 4 has given rise to this litigation. The Burkes contend that it is very difficult to maneuver from Plaintiff Property onto Oakland Street if longer vehicles are parked in both Space 1 and Space 4.

Consequently, the Code requires that every two-family dwelling have four off-street parking spaces. The Code defines "parking space" as "[a]n off-street space inside or outside a structure for exclusive use as a parking stall for one motor vehicle."

11. Salvo testified that the Driveway has a grade of about 20%, and the Massachusetts Highway Department (the "Highway Department") recommends a grade of no more than 10% - 15% for residential driveways. At the crest of a hill when traversing the Driveway, the Driveway turns to the left towards Plaintiff Property but the topography simultaneously slopes down to the right.

12. Plaintiffs (through Dwyer and Salvo) and Defendants (through Dewsnap) each created plans that depicted a proposed path of travel along the Driveway for a large vehicle. Dewsnap's version of said path of travel is incorporated onto the May 2013 Plan, and he utilized a twenty foot Cadillac to depict a vehicular path. The widest point of the vehicle path traveling up the Driveway, as shown on the May 2013 Plan, is 12.43 feet. Dwyer and Salvo depicted the vehicle path of a Chevrolet Suburban on both Sheet A.1 and Sheet B.1. The widest point of the vehicle path traveling up the Driveway, as shown on Sheet A.1 and Sheet B.1 is approximately sixteen feet.

13. Defendants submitted a video (the "Video") of a car traveling along the Driveway. The Video depicted a chalk outline of Spaces 1-4, as shown on the May 2013 Plan. The Video also showed a vehicle parked in either Space 1 or Space 4, but not in both spaces at the same time. The Video depicted a vehicle traveling up the Driveway and not colliding with a parked vehicle and not crossing over into what was marked on the ground as any of the parking spaces.

Use of the Driveway

A. Plaintiffs' Use of the Driveway

14. Edward lived at Plaintiff Property continuously from 1975 to 1989, at which point he moved out, although Geraldine continued to live at Plaintiff Property until 1995. Edward worked as a courier and regularly traveled across the Driveway in a large panel van, on a daily basis from 1977 to 1989, and in a large twenty-four foot long delivery truck, which he would bring home overnight, on a monthly basis from 1977 to 1989. Edward encountered no interference from the owners of Defendant Property and only small cars were parked in front of the Garage or in Spaces 1-3. Edward stated that he would have been unable to traverse the Driveway had a large vehicle been parked in front of the Garage.

15. Geraldine regularly drove up and down the Driveway from 1975 to 1995, pointing her wheels straight as she ascended the Driveway and not turning left until she reached the crest in front of the Garage. Geraldine states that she was able to do so because only small cars were parked in front of the Garage. Geraldine did not discuss the types of vehicles parked in Spaces 1-3.

16. The Burkes have lived at Plaintiff Property continuously since 1995.[5] At any given time, the Burkes have owned between three and five cars, which they have parked on Plaintiff Property. The Burkes stated that if a large vehicle is parked in parking space 4 and another vehicle is parked in parking space 1, it is very difficult, and sometimes impossible, for a driver to navigate from Oakland Street up the Driveway to Plaintiff Property. The Burkes

[5] According to Kellyan, Sean moved in to Plaintiff Property in 1995 and moved out sometime around 2002, although it is uncertain exactly when.

state that they never had any problems driving across the Driveway from Oakland Street to Plaintiff Property with any of the previous owners of Defendant Property prior to Silvane.

B. Defendants' Use of Driveway

17. Edward testified that the former owners of Defendant Property only parked "small, compact" cars on Defendant Property. The Burkes testified that while the previous owners, the Hardimans and the Lubars, resided at Defendant Property, there were between two and four small cars parked at Defendant Property. When there were four cars parked at Defendant Property during this time, one car would be parked in the Garage.

18. Edward also testified that sometimes a vehicles would be parked in the space in front of the Garage, but any such vehicle would not extend past the stairs leading down from the house on Defendant Property. Based on this court's review of several plans submitted by the parties, the stairs extend approximately 8.75 feet into the Driveway.

19. Silvane acquired title to Defendant Property on August 25, 2005. Silvane, Jorge, and Silvane's tenants have all parked in Spaces 1 - 4 and in the Garage. When Jorge moved in to Defendant Property in 2006, he began parking a large utility van in Space 4 in front of the Garage. When either of Defendants' long utility vehicles were parked in parking space 4, the Burkes state they had difficulties navigating across the Driveway to Plaintiff Property and that they were unable to use their customary route, which would be to drive across part of where the utility vehicle was parked in parking Space 4.

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Both parties agree that the record title for the Easement does not evidence the location and dimensions of the Driveway. The central issue in this case, thus, is the location and dimensions of the Driveway.[6] Plaintiffs argue that, based on the 1902 Deeds, it appears that the location of the Driveway is as shown on Sheet A and Sheet A.1. Plaintiffs also argue that they have established the location of the Driveway through prescriptive rights over a thirty year period from 1975 to 2005, and that any easement for Defendant Property over Plaintiff Property has been extinguished by prescription.[7] Defendants argue that, based on the 1902 Deeds, the location of the Driveway is as shown on the May 2013 Plan. Defendants also argue that they have extinguished the Easement by adverse possession. I shall examine each issue in turn.

I. Scope and Location of the Driveway in the 1902 Deeds.

It seems clear that one purpose of the Easement was to afford access from Oakland Street over Defendant Property to Plaintiff Property. Plaintiffs argue that the Easement's plain language gives them a right of way over all of the Driveway to reach Plaintiff Property, including a right to use the portion of the Driveway in front of the Garage, shown as Space 4 on Sheet B.1. Defendants argue that the Easement gives Plaintiffs a right of way over the Driveway directly to Plaintiff Property, not inclusive of the area in front of the Garage or other areas where Defendants park cars. The question which must be decided is the scope and location of the

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[6] Plaintiffs and Defendants both claim that the other party has been unreasonable and dangerous in their use of the Driveway. Plaintiffs assert that Defendants purposely parked their cars in the middle of the Driveway to prevent Plaintiffs from passing to and from Plaintiff Property. Plaintiffs further claim that Defendants harassed Plaintiffs through striking and swearing at vehicles and standing in the path of vehicles. Defendants assert that Plaintiffs almost hit Defendants and their children with their car while driving on the Driveway. Defendants further claim that Donna screamed at Silvane until a police officer had to be called. The parties have introduced evidence of the aforementioned through videos and police reports. This conduct of the parties is irrelevant to the issue of use and will not be considered in this decision.

[7] In their post-trial briefs, neither Plaintiffs nor Defendants raise the argument that Defendants' use of the Driveway over Plaintiff Property has been extinguished, so this court will not address this argument in its decision.

Easement.

"The party asserting an easement . . . has the burden of proving the nature and extent of any such easement." Levy v. Reardon, 43 Mass. App. Ct. 431, 434 (1997) (quoting Foley v. McGonigle, 3 Mass. App. Ct. 746, 746 (1975)). " In construing a deed it is the duty of the court to ascertain the intent of the parties from the language used in the light of the surrounding circumstances." Brackett v. Pitcher, 296 Mass. 295, 297 (1936). If the easement's language is deemed ambiguous, a reasonableness standard determines the easement's scope. Tehan v. Nat'l Bank of Springfield, 340 Mass. 176, 186-87 (1959); Western Mass. Elec. Co. v. Sambo's of Mass., Inc., 8 Mass. App. Ct. 815, 824-25 (1979). The reasonableness analysis is not restricted by deed language, rather "[t]he extent of an easement depends on the circumstances of its creation . . . . [T]he grant or reservation 'must be construed with reference to all its terms and the then existing conditions so far as they are illuminating." Lowell v. Piper, 31 Mass. App. Ct. 225, 230 (1991) (quoting Mugar v. Mass. Bay Transp. Auth., 28 Mass. App. Ct. 443, 444 (1990) (internal citations omitted)).

The 1902 Deeds state only that the Easement provides "a right of way over the whole of the driveway as now laid out on said lots." "Over" is defined as "[a]bove and across from one end . . . to the other" or "[t]hrough the extent of; all through." American Heritage College Dictionary 990 (4th ed. 2002). This would suggest that the Easement provides some form of access across the Driveway to both Plaintiff Property and Defendant Property. "Whole" is defined as "[c]ontaining all components" and "[c]onstituting the full amount . . . or extent." American Heritage College Dictionary 1565 (4th ed. 2002). The 1902 Deeds express no defined limits of the Driveway, but rather the 1902 Deeds definition of the Driveway is broad. The 1902

Deeds are thus not clear as to the location of the Driveway as it existed in 1902. It can be ascertained from the language in the 1902 Deeds, however, that the easement "over the whole" of the Driveway was intended to be broad.

The first evidence of the layout of the Driveway is the 1978 MHC Photograph, which shows the Driveway included an area in front of the Garage. The MHC Photographs, particularly the one from 1978 that is blown up in Exhibit 42, depict a clearly defined driveway, including pavement all the way up to the Garage. As the 1902 Deeds state that the Easement includes a right over the "whole of the driveway," this would indicate that the original meaning of the 1902 Deeds was to give a right of way over the Driveway in front of the Garage as well. While it is unclear as to what was contemplated by the 1902 Deeds, the best evidence is what is represented by the MHC Photographs in 1978 and 1979, prior to the re-paving of the Driveway. It also appears from Edward's testimony that the area where Spaces 1-3 are located should not be considered part of the Driveway. Edward testified that this area used to be grassy and was paved over by Defendants' predecessors at some point in the early 1980s.

Sheet A is consistent with the broad language of the 1902 Deeds conveying a right of way over the "whole of the driveway" to the owners of Plaintiff Property. Sheet A is also consistent with the MHC Photographs, which depict the area in front of the Garage to be paved. Sheet A allows Plaintiffs to continue to access their property, as they have for many years, through driving over a portion of the Driveway in front of the Garage. If the area in front of the Garage is allowed to be a parking space for a large vehicle, as depicted in the May 2013 Plan, Plaintiffs would be prevented from using the Easement as they have used it for many years. Furthermore, the evidence shows that the May 2013 Plan does not provide Plaintiffs with sufficient Driveway

space to reach their property, as such plan allows for basically a single vehicular path to reach Plaintiff Property with little margin of error.

There are also several conditions relating to the Driveway that make it difficult for any driver to negotiate up the driveway from Oakland Street. These conditions are relative to the reasonable use of the "whole" Driveway as part of the Easement. One must first negotiate the 20% grade of the Driveway turning onto the Driveway from Oakland Street. Salvo testified that a 15% slope is the maximum recommended by the Department of Highways. Furthermore, when one reaches the approximate first crest, the Driveway turns to the left towards Plaintiff Property but the pitch/slope of the Driveway falls off to the right. Salvo credibly testified that the confluence of the pitch, slope and curve of the Driveway make the Driveway difficult to negotiate. This creates the need for a reasonable margin of error for any driver attempting to negotiate the Driveway.

Salvo testified that if a vehicle is parked in Space 4 in front of the Garage, the driver coming up the Driveway would have to both turn to the left and accelerate, simultaneously, in order to safely negotiate the Driveway and avoid any vehicular contact. Salvo credibly testified that it is more natural to first accelerate and then turn to the left when negotiating the hill on the Driveway, which would be very difficult or impossible if a vehicle was parked in Space 4. Defendants counter Plaintiffs' expert testimony in two ways. First, Defendants' own expert, Dewsnap, testified that the May 2013 Plan depicts a possible scope of the Easement, which allows for a 9'x18' parking space in front of the Garage (i.e. Space 4); a 9'x16.5' parking space where Space 1 is located; and two 9'x18' parking spaces where Spaces 2 and 3 are located. Defendants also submitted the Video showing a vehicle maneuvering the Driveway with

Dewsnap's version of parking spaces 1-4 on the May 2013 Plan either drawn on the ground with chalk or occupied with a vehicle. The Video shows a vehicle staying within the bounds of the scope of the Easement proposed by Dewsnap and not traveling into any of the delineated parking spots in chalk or occupied by another vehicle.

Considering all of the evidence, this court is convinced that the scope of the Easement is more reasonably shown on Sheet A. First, the Video is self-serving and does not represent actual conditions complained about by Plaintiffs. Specifically, the Video showed either chalk parking spots or a car parked in *either* Space 1 or Space 4. The Video does not show a vehicle attempting to negotiate the Driveway when vehicles are parked in *both* Space 1 and Space 4, the very circumstance giving rise to this litigation. Next, the May 2013 Plan allows for a very small margin of error when traveling up the driveway from Oakland Street, even though such plan was created utilizing a large vehicle's potential driving path. As noted at the site view and as heard through witness testimony, this court is aware that the Driveway contains difficult conditions, i.e. slope, curve, and pitch at the crest of the hill on the Driveway. Sheet A depicts the most reasonable means of traveling up the Driveway, not only for Plaintiffs, but for Defendants and their tenants, too. Finally, this court stresses the plain language of the easement regarding "the whole of the Driveway." This court is of the opinion that the whole of the Driveway includes some space in front of the Garage, which would inevitable prevent Defendants from parking a vehicle in front of the Garage and in Space 4.

Based on the foregoing, I find that the Easement includes the space in front of the Garage, and as a result, Defendants cannot park a vehicle in such space in any manner that interferes with Plaintiffs' use of the Driveway. In this regard, this court adopts Sheet A and Sheet A.1 as a valid

depiction of the scope and location of the Driveway, and therefore the parties are bound by the size and location of each parking space as shown on Sheet A.1.[8/9]

II. Prescriptive Rights[10]

I shall now consider prescriptive use of the Driveway as an alternative theory to using the 1902 Deeds, Sheet A and Sheet A.1, and MHC Photographs to define the scope and location of the Easement. A party cannot have both deeded easement rights and prescriptive rights in the same easement. As such, the subsequent analysis shall only apply if Plaintiffs are deemed not to have such rights based on the 1902 Deeds. In Massachusetts, one may obtain an easement by prescription through "uninterrupted, open, notorious and adverse use for twenty years . . . ." Ryan v. Stavros, 348 Mass. 251, 263 (1964); Tucker v. Poch, 321 Mass. 321, 323 (1947); Boothroyd v. Bogartz, 68 Mass. App. Ct. 40, 44 (2007); Brown v. Sneider, 9 Mass. App. Ct. 329, 331 (1980). See also G.L. c. 187, § 2. Specifically, Plaintiffs may be entitled to a prescriptive right relative to the Driveway if it is shown by clear proof of a use of the land in a manner that

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[8] Both parties make much about whether or not Defendant Property will/does comply with parking requirements contained in the Code. This is not an issue before this court and is irrelevant to this court's analysis regarding the scope of the Easement. This court notes, however, that there are four off street parking spaces appurtenant to Defendant Property: the space in the Garage and Space1, Space 2, and Space 3 to the north of the Driveway.

[9] This case was ripe for settlement and this court strongly encourages the parties to resolve any further disputes amongst themselves. Moreover, there was evidence that Defendants and/or their invitees have parked vehicles in the middle of the Driveway completely blocking access to Plaintiff Property. This activity is also prohibited as it interferes with Plaintiffs' rights under the terms of the Easement. This court is aware, however, that in certain short term or emergency situations, Defendants may be forced to temporarily idle in the Driveway. All reasonable accommodations should be made by both parties in this regard and the court encourages the parties to display neighborly courtesies to one another. Both parties will be subject to sanctions for any disregard of this Decision and accompanying Judgment for any violations of the terms herein.

[10] Plaintiffs' prescriptive rights would only be applicable to areas of the Driveway that Plaintiffs did not obtain through the 1902 Deeds.

has been (a) open, (b) notorious, (c) adverse to the owner, and (d) continuous or uninterrupted over a period of no less than twenty years. The party claiming an easement by prescription has the burden of proof and persuasion on each of the four elements of the test. Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 762 (1964). Plaintiffs, as the claimant, bear the burden of proof on each and every element mentioned above. Failure to provide sufficient evidence on any of the elements defeats the entire prescriptive easement claim. Gadreault v. Hillman. 317 Mass. 656, 661 (1945). This court must look into the evidence admitted at trial to determine whether Plaintiffs satisfied their burden of proving each element required for prescriptive rights.

The first issue is whether Plaintiffs and their predecessors' use of the Driveway constitutes actual use. According to Edward, in the early 1980s a clearly defined Driveway existed that proceeded from Oakland Street to the Garage and then turned left toward Plaintiff Property. At some point in the early 1980s the previous owners of Defendant Property paved over part of their front lawn to add additional parking spaces to their property, obscuring the location of the original Driveway. Edward testified that while he lived at Plaintiff Property from 1975 to 1989, he would routinely drive across the Driveway to reach Plaintiff Property and that he would often drive a twenty-four foot truck up the Driveway, driving on the portion of the Driveway in front of the Garage, now defined as Space 4. Geraldine and Kellyan likewise testified that they each used the Driveway in the same fashion from 1975 to 1995 and from 1995 to the present, respectively. Edward further testified that he would routinely drive a delivery truck up and down the Driveway with no problems of being boxed out due to parked vehicles. The previous owners of Defendant Property regularly parked a small car in front of the Garage. The Harnishes never had any problem with their use of the Driveway. The Burkes never had a

problem with using the Driveway, since they took title to Plaintiff Property in 1995, until the Defendants moved in in 2005. As a result of the foregoing, I find that Plaintiffs have established actual use of the Driveway as it is shown on Sheet A and Sheet A.1.

The second issue is whether Plaintiffs and their predecessors' use of the Driveway, including the area in front of the Garage, was sufficiently "open and notorious." The use by Plaintiffs must be "open and notorious" to "secure to the owner [of the affected land] a fair chance of protecting" his or her property interests. Foot v. Bauman, 333 Mass. 214, 218 (1955). Under this alternative theory, Plaintiffs must establish that they have a prescriptive easement over areas not covered by the Easement. Defendants asserted that Plaintiffs failed to meet their burden of proving "open and notorious use." For a use to be found notorious, it is enough that the use be of such a character that the landowner is deemed to have been put on constructive notice of the adverse use. Lawrence v. Concord, 439 Mass. 416, 421-22 (2003). The nature of the use is relevant to determine whether a use is "open and notorious." In this case, the prior owners of Plaintiff Property, the Harnishes, drove up and down the Driveway regularly at normal hours, passing over the part of the area of Space 4 in front of the Garage. Plaintiffs likewise regularly drive up and down the Driveway and, when they are not blocked from doing so, drive over Space 4. Kellyan states that due to the steep grade of the Driveway, it is difficult to navigate. She further states that the route a driver must follow is to enter the Driveway, accelerate until the driver reaches Space 4, then turn the wheel sharply to the left, and drive straight to reach Plaintiff Property. I find Plaintiffs' use of the Driveway as shown on Sheet A and Sheet A.1 has been open and notorious.

The third issue is whether Plaintiffs' and their predecessor's use was adverse to Defendants. Defendants asserted that Plaintiffs failed to prove the use of the Driveway was adverse to them since they knew of Plaintiffs' use of the Driveway and allowed such use because of the recorded easement, and thus there was implied permission. However, adverse use "may exist where there is possession with the forbearance of the owner who knew of such possession and did not prohibit it but tacitly agreed thereto." Ivons-Nispel, Inc., 347 Mass. at 763. There is no evidence of any conversations between the parties or other evidence to indicate that the Burkes or Harnishes ever received permission to drive across any portion of Space 4 from Defendants or the previous owners of Defendant Property. As a result, I find that such use of the Driveway was adverse to Defendants.[11]

The fourth issue is whether Plaintiffs have proved that their and their predecessor's use was continuous and uninterrupted over a period of not less than twenty years. At trial, Plaintiffs advised this court that their period of prescriptive use on which they would rely was from 1975 to 2005. Edward lived at Plaintiff Property from 1975 to 1989. Edward states that he was able to drive a large truck across the Driveway from Oakland Street to Plaintiff Property because if there was a car parked in front of the Garage, it was a small car, much smaller than an eighteen foot utility vehicle. Geraldine lived at Plaintiff Property from 1975 to 1995, and likewise during this time drove across the Driveway, including the portion in front of the Garage, to reach Plaintiff Property on a regular basis. Like Edward, Geraldine states that she was able to drive with ease due to the former owners of Defendant Property only parking a small car, if any car at all, in front of the Garage. Plaintiffs testified that since taking title to Plaintiff Property in 1995 and

[11] This finding is applicably only to the extent that the Plaintiffs' rights in the Driveway pursuant to the 1902 Deeds is not consistent with the scope and location of the Easement as depicted on Sheet A and Sheet A.1.

continuing until 2005 (when they were blocked by Defendants' parking), they have regularly driven across the Driveway, including over Space 4. I find that Plaintiffs' and their predecessors' use of the Driveway as shown on Sheet A and Sheet A.1, including the area in front of the Garage, to have been continuous and uninterrupted for a period of at least twenty years.

As a result of the foregoing, I find that, if Plaintiffs do not have such rights pursuant to the 1902 Deeds, Plaintiffs have established prescriptive rights to the portion of the Driveway in front of the Garage and as shown on Sheet A and Sheet A.1.[12]/[13]

Judgment to enter accordingly.

Alexander H. Sands, III
Justice

Dated: December 27, 2013

[12] The Code requires that a two-family dwelling have four off-street parking spaces. Sheet A will still allow Defendants to have four off-street parking spaces for Defendant Property. The Code defines "parking space" as "[a]n off-street space inside or outside a structure for exclusive use as a parking stall for one motor vehicle." As a parking space may be a space "inside" a structure, the space in the Garage may be used as a parking space for a small car. Thus, with the three parking spaces provided by Sheet A and the parking space in the Garage, Defendants will still have four parking spaces for their two-family dwelling.

[13] Defendants claim adverse possession in their Counterclaim to Plaintiffs' Complaint; however no mention of adverse possession is made in Defendants' Post-Trial Memorandum, so this court will not address this argument in its decision. This court deems Defendants to have waived this argument. Moreover, Defendants did not establish facts to justify a claim of adverse possession to extinguish any rights in Space 4. Accordingly, I find that Defendants have not extinguished any portion of the Easement through adverse use or prescriptive rights.

(SEAL)

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Interested Party

JUDGMENT

Plaintiffs Michael F. Burke ("Michael"), Donna M. Burke ("Donna") and Sean P. Burke ("Sean") (together, "Plaintiffs") filed their unverified Complaint on November 3, 2011, pursuant to G. L. c. 231A, seeking a declaratory judgment relative to their easement rights over property owned by Defendants Silvane Spalenza ("Silvane") and Jorge Spalenza ("Jorge") (together, "Defendants"). Defendants filed their Answer and Counterclaim and Request for Jury Trial on January 3, 2012, claiming extinguishment of any easement by adverse possession. A case management conference was held on January 17, 2012. Interested Party Bank of New York Mellon filed its Answer on January 24, 2012. Plaintiffs filed their Answer to Counterclaim on January 26, 2012. Defendants withdrew their request for jury trial on February 3, 2012. A pre-trial conference was held on March 13, 2013. A site view and the first day of trial at the Land Court in Boston were held on May 16, 2013. The second day of trial was held on May 17, 2013. Both parties filed their post-trial briefs on August 19, 2013, and at that time the matter was taken under advisement.

Testimony at trial for Plaintiffs was given by David Dwyer (professional land surveyor), Richard Salvo ("Salvo") (registered civil engineer), Edward Harnish (former owner of Plaintiff Property as hereinafter defined), Geraldine Harnish (former owner of Plaintiff Property), Kellyan Burke (current owner of Plaintiff Property), and Donna Burke (Plaintiff). Testimony at trial for Defendants was given by Paul Dewsnap (civil engineer) and Silvane Spalenza (Defendant). Kellyan Burke was a rebuttal witness. There were seventy-six exhibits submitted into evidence. A Decision of today's date has been issued (the "Decision"). In accordance with the Decision, it is hereby:

ORDERED and ADJUDGED that "a right of way over the whole of the driveway [the "Driveway"] as now laid out on said lots" (the "Easement"), pursuant to deeds dated January 18, 1902 (the "1902 Deeds") in which Charles A. Patch conveyed to Emma Wellman property located at 26 Oakland Street in Melrose ("Plaintiff Property") and conveyed to Clara Gowing property

located at 30 Oakland Street, Melrose ("Defendant Property"), includes the space in front of a garage (the "Garage") located on Defendant Property, and as a result, Defendants cannot park a vehicle in such space in any manner that interferes with Plaintiffs' use of the Driveway. In this regard, this court adopts "Sheet A" and "Sheet A.1," both of which are dated February 28, 2013, and prepared by Otte and Dwyer, Inc., as a valid depiction of the scope and location of the Driveway, and therefore the parties are bound by the size and location of each parking space as shown on Sheet A.1.[1][2]

ORDERED and ADJUDGED that Plaintiffs have established actual use of the Driveway as it is shown on Sheet A and Sheet A.1.

ORDERED and ADJUDGED that Plaintiffs' use of the Driveway as shown on Sheet A and Sheet A.1 has been open and notorious.

ORDERED and ADJUDGED that Plaintiffs' use of Driveway as shown on Sheet A and Sheet A.1 was adverse to Defendants.[3]

ORDERED and ADJUDGED that Plaintiffs' and their predecessors' use of the Driveway as shown on Sheet A and Sheet A.1, including the area in front of the Garage, to have been continuous and uninterrupted for a period of at least twenty years.

ORDERED and ADJUDGED that, if Plaintiffs do not have such rights pursuant to the 1902 Deeds, Plaintiffs have established prescriptive rights to the portion of the Driveway in front of the Garage and as shown on Sheet A and Sheet A.1. [4]

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[1] Both parties make much about whether or not Defendant Property will/does comply with parking requirements contained in the City of Melrose Zoning Code. This is not an issue before this court and is irrelevant to this court's analysis regarding the scope of the Easement. This court notes, however, that there are four off street parking spaces appurtenant to Defendant Property: the space in the Garage and Space1, Space 2, and Space 3 to the north of the Driveway.

[2] This case was ripe for settlement and this court strongly encourages the parties to resolve any further disputes amongst themselves. Moreover, there was evidence that Defendants and/or their invitees have parked vehicles in the middle of the Driveway completely blocking access to Plaintiff Property. This activity is also prohibited as it interferes with Plaintiffs' rights under the terms of the Easement. This court is aware, however, that in certain short term or emergency situations, Defendants may be forced to temporarily idle in the Driveway. All reasonable accommodations should be made by both parties in this regard and the court encourages the parties to display neighborly courtesies to one another. Both parties will be subject to sanctions for any disregard of this Decision and accompanying Judgment for any violations of the terms herein.

[3] This finding is applicably only to the extent that the Plaintiffs' rights in the Driveway pursuant to the 1902 Deeds is not consistent with the scope and location of the Easement as depicted on Sheet A and Sheet A.1.

[4] Defendants claim adverse possession in their Counterclaim to Plaintiffs' Complaint; however no mention of adverse possession is made in Defendants' Post-Trial Memorandum, so this court will not address this argument in its decision. This court deems Defendants to have waived this argument. Moreover, Defendants did not establish facts to justify a claim of adverse possession to extinguish any rights in Space 4. Accordingly, I find that Defendants

AHS

By the court. (Sands, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: December 27, 2013

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

have not extinguished any portion of the Easement through adverse use or prescriptive rights.