COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS CASE
No. 98 MISC 250365 (GHP)

GLORIA J. CATER and WILLIE J. CATER,

Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY BROWN, FRED GAECHTER, CAROL GREEN, CURTIN HARTMAN, HOWARD IRWIN, JOHN MARKSBURY, and JOEL SEARCY, as they are trustees of Truro Conservation Trust; LUCY CLARK, JENNIFER CLARK KRUGER, and MITCH BROCK, as they are trustees of Silvia M. Clark Revocable Trust; SUSAN B. CABOT, SYLVIA CLARK, and JOAN F. FOX, individually and as trustees of Cabot-Clark-Fox Real Estate Trust; JOAN F. FOX, as trustee of the Residence Trust Agreement; SARA C. MUELLER and PHILIP P. MUELLER, III, as trustees of the Philip P. Mueller Truro Realty Trust; PAUL D. KIERNAN; ELIZABETH ADLER; RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and MITCH BROCK, as trustees of the Silvia M. Clark Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of Shambles Realty Trust; ETHAN R. COHEN; and NATALIE FERRIE-COHEN,

Third-Party Defendants.

DECISION
FOLLOWING
SECOND PHASE OF TRIAL

In this case, I must fix the location of a general right of way easement, the bounds of which were not determined by the 1899 deed ("1899 Deed") that created the easement. The right of way benefits the land of the plaintiffs, Willie J. Cater and Gloria J. Cater ("Caters"), located on the shores of Cape Cod Bay in Truro, Barnstable County, Massachusetts. In a decision following an earlier phase of trial, I determined that the easement created in the 1899 Deed is in force and effect; that that easement burdens of record the land(s) of one or more of the following parties: the trustees of the Truro Conservation Trust (Lot 56), the trustees of the Cabot-Clark-Fox Real Estate Trust (Lots 89, 90, and 91), the Clark trustees (Lot 51), Cabot (Lot 52), Fox (Lot 57), and the Mueller trustees (Lot 58); and that it does not burden of record the lands of any other parties to this action. See Cater v. Bednarek, 15 LCR 336, 342 (2007) (Case No. 98 MISC 250365) (Piper, J.) (Decision Following First Phase of Trial).

I incorporate fully the procedural history of this case as set forth in the Decision Following First Phase of Trial. During the year following the first phase of trial, the Caters and the remaining defendants attempted settlement, including attending a mediation session which proved unsuccessful. The parties came before the court (Piper, J.) for a status and scheduling conference on September 23, 2008, at which it was reported that settlement efforts had stalled, and a pretrial conference was scheduled for December 23, 2008. On December 15, 2008, the defendants Mueller filed a motion for summary judgment, seeking a declaration that in light of the Phase I Decision, the easement would not as a practical matter cross Lot 58, notwithstanding the legal entitlement to do so. On December 23, 2008, the court (Piper, J.) held hearing on the motion for

summary judgment and a pretrial conference. The court denied the motion,[1] and instructed all parties to hold dates in April, 2009 for the second phase of trial. In advance of trial, and to focus and simplify the issues for trial of this multi-party case, I issued orders. The Caters were to serve on all parties a plan proposing routes for the easement to take. Defendants were to respond with their own proposals, and evidence at trial would be limited to routes proposed in advance. On January 16, 2009, the defending parties filed a Joint Motion in Limine to Establish Scope of Phase II Trial to include the question whether the 1899 Deed created only a pedestrian right of way. On February 17, 2009, the court (Piper, J.) denied the motion following argument, ruling the Phase I Decision already had determined the easement was for a general right of way, unlimited by its terms. I incorporate into this Decision the rulings, as reflected on the court's docket for this case, on the motion for summary judgment and the motion in limine.

This case was tried to the court (Piper, J.) on April 1-3, 2009. A court reporter, Karen Smith, was sworn to record the trial proceedings and produce a transcript. The fourteen witnesses testifying at the phase II trial were: Donald T. Poole (land surveyor), Martin Donaghue (engineer), John O'Reilly (engineer, land surveyor), Lucy Clark (party), David J. Crispin (land surveyor, engineer), Philip P. Mueller (party), Joseph M. Clancy (appraiser), Robert M. Perry (engineer), Susan Cabot (party), Timothy J. Brady (land surveyor, engineer), Anne Eckstrom (appraiser), Therese Steiner (daughter of Joan Fox), and Joan Fox (party). Following the thirty-two exhibits from Phase I, exhibits thirty-three through seventy were entered in evidence. All exhibits from both phases of trial are incorporated in this decision for the purpose of any appeal. Following the trial, the parties were given the opportunity to submit posttrial memoranda. The Caters filed a

[1] I discuss The Motion of the Mueller Trustee Defendants for Summary Judgment in greater detail infra.

posttrial brief on July 10, 2009. Defendants filed responsive briefs on July 14 and 24, 2009. Reply briefs were filed by the Caters and Joan Fox on July 24, 2009. I heard closing arguments on the record on August 18, 2009.

On all of the testimony, exhibits, stipulations, and other evidence properly introduced at trial or otherwise before me, and the reasonable inferences drawn therefrom, and taking into account the Decision Following First Phase of Trial, the order denying the motion for summary judgment of the Mueller defendants, and the ruling on the Defendants' Joint Motion in Limine, as well as the pleadings, memoranda, and argument of the parties, I find and rule as follows:

1. The Caters are record owners of a parcel of land ("Cater Parcel") known as and numbered 9B Benson Road in Truro, and shown as Lot 50 on Sheets 53 and 54 of the Town of Truro Assessor's Atlas ("Assessor's Map").
2. Benson Road is a public way lying generally to the east of the Cater Parcel, between that location and Fisher Road. The Truro selectmen laid out Benson Road and the Truro Town Meeting voted to accept Benson Road on February 15, 1943.
3. By deed dated September 7, 1899 and recorded with the Barnstable County Registry of Deeds ("Registry") at Book 2, Page 39 ("1899 Deed"), Charles W. Cobb ("Cobb"), who at one point owned the land of Cater and all the defendants (except Lot 74) subdivided his property, creating and conveying the Cater Parcel to Lorenzo D. Baker ("Baker"). The 1899 Deed states in relevant part:

> "...including also a right of way to above described premises across my land on the east in the road now established reserving however my right of way to the shore on the south side of said described premises."

4. At the time of the 1899 conveyance, each of the defendants' parcels constituted a portion of Cobb's land to the east of the Cater Parcel.

5. The Caters acquired the Cater Parcel from Howard B. French ("French") by deed dated June 26, 1979 and recorded with the Registry on June 29, 1979 in Book 2944, at Page 75. The deed states:

> The premises are conveyed together with a right of way as mentioned in and reference is made to, deed of Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded in Barnstable Registry of Deeds, Book 2, Page 39; and a further right of way as more particularly described in deed of said grantor to Douglas S. Callander, et ux., dated April 19, 1979, recorded with said Barnstable Registry of Deeds in Book 2903, Page 181.* See below.

6. Currently, the following parties own the following parcels, as those parcels are shown on Sheets 53 and 54 of the Assessor's Map:[2]

Lot 50 (9B Benson Road)	Caters
Lot 51 (7 Benson Road)	Clark trustees
Lot 52 (9 Benson Road)	Cabot
Lot 56 (9A Benson Road)	Trustees of Truro Conservation Trust
Lot 57 (11 Benson Road)	Trustee of Residence Trust Agreement
Lot 58 (1 Benson Lane)	Mueller trustees
Lots 60, 64, 65 (10 Benson Road)	Paul Kiernan and Elizabeth Adler ("Kiernan/Adler defendants")
Lots 66, 69, 71; the "Carrie Fisher Right of Way"	Raymond E. Demming and Lois C. Demming ("Demmings")

[2] A copy of a marked portion of these sheets, showing the location of the parcels involved, accompanies the Decision Following First Phase of Trial as an exhibit to help explain the general location of the holdings involved. On this exhibit, the 1899 Cobb land is outlined in bold.

Lots 89, 90, and 91	Trustees of the Clark-Cabot-Fox Trust
Lots 67 and 97	Nancy Callander, Trustee of the Shambles Realty Trust ("Callander")
Lot 74	Cohens

7. There was not in 1899 and has never since then been a way on the ground leading from the Cater Parcel (Lot 50) over the land of the Truro Conservation Trust (Lot 56) and thence through any of the properties of the defendants or third-party defendants.

8. Cabot and her husband purchased Lot 52 with frontage on Benson Road, and the existing house on that parcel, in 1972. By deed dated April 13, 1978, recorded with the Registry in Book 2696, at Page 168, Cabot acquired Lot 52 solely in her name.

9. The Mueller trustees acquired Lot 58 from Phillip P. Mueller ("Mueller"), who acquired title to that parcel by deed dated November 9, 1979, recorded with the Registry in Book 3012, at Page 261. A single family residence existed on the parcel at the time of Mueller's purchase. The Mueller trustees' parcel does not front on Benson Road: instead, it enjoys a deeded right of way, created in Mueller's 1979 deed and various easements to his predecessors, that runs from the Mueller trustees' parcel to Benson Road across land owned by the Kiernan/Adler defendants and the Demmings. This easement appears on both the ground and on plans to be a southerly extension of Benson Road, and is known variously as "Benson Lane" or "Benson Way."

10. Fox, as trustee of the Residence Trust Agreement, acquired title to Lot 57, which has frontage on Benson Road, by deed dated December 3, 1983, recorded with the Registry in Book 3962, at Page 262. Fox acquired the parcel with an existing single-family residence. Her deed has no reference to her property being subject to any right of way, and contains a

restriction attempting to prohibit or limit access over her property.

11. The Clark trustees acquired Parcel 51 from Sylvia M. Clark ("Clark") by deed dated February 15, 1989, recorded with the Registry in Book 6705, at Page 308. Clark acquired the parcel, with an existing single family residence, as an individual by deed dated October 20, 1976. Clark's deed has no reference to any right of way. Since 1976, Clark and her family have used the property exclusively as a residence.

12. The defendant trustees of the Cabot-Clark-Fox Trust (Cabot, Clark, and Fox), acquired Lots 89, 90, and 91 by deeds dated August 19, 1994 and recorded with the Registry in Book 9328, at Pages 145, 147, and 149. These parcels form a narrow strip that abut the land of Cabot (Lot 52), the Clark trustees (Lot 51), and Fox (Lot 57), which all lie to the east of the strip, and land of the Truro Conservation Trust (Lot 56), which lies to the west of the strip.

13. The trustees of the Truro Conservation Trust acquired Lot 56 by deed dated December 27, 1994, recorded with the Registry in Book 9500, at Page 282. The Truro Conservation Trust has been recognized as a not-for-profit organization by the Attorney General of the Commonwealth, and as a public charity by the Internal Revenue Service. The Truro Conservation Trust is a land trust and its primary charitable purpose is to "help preserve the rural character of the Town of Truro."

14. The Truro Conservation Trust has admitted that the Caters have "deeded claims of access" over their Lot 56. Lot 56 is part of a rare coastal heathland. The portion of the heathland which has been designated as Lots 50, 56, 67, 73, 74, and 78, and Lot 105 on Sheet 54 of the Assessor's Atlas constitutes a forty-acre area, on which are only four structures. Subsequent to the Truro Conservation Trust's purchase of Lot 56,the Trust was granted a

conservation restriction on 3.84 acres of Lot 67, and received a gift of Lot 105.

15. The entirety of the former Cobb estate is mapped as a priority habitat under the Massachusetts Endangered Species Act, and is habitat for Broom Crowberry, a species of plant designated for Special Concern in Massachusetts, see 321 CODE MASS. REGS. § 10.90.

16. From 1899 to 1997, the Caters and their predecessors in title did not seek to define the location of the easement granted in the 1899 Deed. During that time, Cobb's former land was subdivided into nineteen lots and Benson Road was laid out, constructed, and accepted as a public way. In addition, fourteen homes were constructed on the land, including on the following lots owned by parties to this case in the years indicated: the Clark trustees' Lot 51 (1969); Cabot's Lot 52 (1950); Fox's Lot 57 (1931); the Mueller trustees' Lot 58 (1948); the Kiernan/Adler defendants' Lot 60 (1937); and the Demmings' Lot 69 (1964).

17. The Cater Parcel sits atop a high dune, overlooking Cape Cod Bay. The top of the Cater Parcel is approximately 100 feet above sea level. Benson Road, as it runs southerly (perpendicular to the rise in the Cater Parcel) climbs gently from approximately thirty feet to approximately fifty feet.

18. The Clark trustees' Lot 51 comprises 1.21 acres, and is relatively flat, at or below elevation thirty.

19. Cabot's Lot 52 comprises 0.78 acres. The Cabot lot slopes from elevation thirty-three to elevation thirty from Benson Road to the rear lot line.

20. Fox's Lot 57 comprises 1.47 acres. The Fox property has an elevation of fifty feet at its frontage on Benson Road, then descends steeply toward the Trust Property to a nadir of

approximately fourteen feet.

21. The Mueller trustees' Lot 58 comprises 2.82 acres; like the Fox property, the Mueller land slopes westerly, starting at an elevation of fifty feet, reaching a nadir of seven feet, and then rising quickly to twenty feet at the boundary line.

22. In evidence as Exhibit 37 is a plan titled "Plan of Proposed Driveway, William J. Cater, Benson Road, Assessor's Map 53, Parcel 50, Truro, Mass," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, 02653, dated March 17, 2003 under the stamp of Martin R. Donaghue ("Original Coastal Engineering Route").

23. A subsequent plan by Coastal Engineering, titled "Plan Showing Proposed Driveway Option CEC-2, William J. Cater, 9 Benson Road, Truro, MA," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, dated March 31, 2009 under the stamp of Martin R. Donaghue, is in evidence as Exhibit 38 ("Revised Coastal Engineering Route").

24. Defendant Clark trustees presented a plan titled "Road Concepts Off Benson Road, Truro, MA" by J.M. O'Reilly & Associates, Inc., 1573 Main Street – Route 6A, Brewster, Massachusetts ("O'Reilly Plan"). This plan, in evidence as Exhibit 40, depicts five different road concepts: Routes 1, 2, and 3 were designed by J.M. O'Reilly & Associates for Clark, Route 4 was designed by John O'Reilly for the Truro Conservation Trust in 2005, and the Original Coastal Engineering Plan, prepared for the Caters in 2003, appears as Route 5. All parties have stipulated that Route 3 on the O'Reilly Plan is not a serious consideration, and no party argues in favor of that route.

25. The Mueller defendants introduced "Plan of Land, Benson Road in Truro Massachusetts (Barnstable County) Topographic Detail Plan," dated February 29, 2002, by BSC Group,

349 Route 28, Unit D, West Yarmouth, Massachusetts, in evidence as Exhibit 39 ("BSC Group Route").[3]

26. Exhibit 41 is a plan titled "Sketch Plan Showing Fox Proposed Easement Location, Benson Road to Cater Property, Truro, MA" dated February 20, 2009, prepared by East Cape Engineering, Inc., Orleans, Massachusetts, depicting a route labeled "B1" ("Route B1").

27. Original Coastal Engineering Route represents a maximum twelve percent slope or grade as it climbs the dune from Benson Road to the top of the Cater Parcel. The Revised Coastal Engineering Route is shown at a ten percent maximum grade. Both routes are intended to be fourteen-foot wide driveways with a two-foot shoulder on each side.

28. O'Reilly Route 2 and O'Reilly Route 4 are designed to have grades of ten percent or less. Route 4 has grades of eight percent or less.[4]

29. The BSC Group Route is drawn at a ten-percent grade and is designed to be a twelve-foot roadway within a twenty-foot easement area.

30. Route B1 calls for a maximum grade of twelve percent. Although its width is not depicted on Exhibit 41 (the East Cape Engineering plan), the Fox defendants (Lot 57) who offer Route B1 concede that the easement should be twelve to fourteen feet in width.

31. The result of the December 23, 2008 denial of the Motion of the Mueller Trustee Defendants for Summary Judgment was a ruling that the Decision Following First Phase

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[3] Chalk B is a copy of Exhibit 39 with some color-coding as well as some annotations made during the examination of one witness.

[4] Route 4 was originally developed at the request of the Conservation Trust; O'Reilly's instructions were to develop an alternative to the Original Coastal Engineering Route across the Trust land. This is why Route 4 and Original Coastal Engineering overlap from the Cabot property line to Benson Road.

of Trial did not preclude the possibility that the Cater easement would burden the southerly extension of Benson Road, portions of which may be owned in fee by Keirnan/Adler, Demmings, Callander, or Cohen.

32. The Cabot septic system is between the house and the Clark property, and comprises a leach pit, septic tank, and connecting pipes.

* * * * *

"The law is settled that if the bounds of a way are not located by the deed which creates it, the parties may fix the location upon the servient premises, and, if they do not, a court may do so." Mahoney v. Wilson, 260 Mass. 412, 414 (1927); see also Mugar v. Mass. Bay Transp. Auth., 28 Mass. App. Ct. 443, 445-46 (1990) ("In the absence of agreement, the court may fix the bounds of a way not located by the instrument creating it."). "[A] right of way not definitely fixed by deed will be construed as the 'right to such a way as is reasonably necessary and convenient for the purposes for which it is granted.'" Mugar, at 446 (internal citations omitted). "[A] general right of way obtained by grant may be used for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant." Cannata v. Berkshire Natural Resources Council, Inc., 73 Mass. App. Ct. 789, 795 (2009) (citing Tehan v. Security Natl. Bank of Springfield, 340 Mass. 176, 182 (1959)).

When a court is called upon to fix the location of an easement, the court looks to principles of equity and fairness. The Restatement (Third) of Property (Servitudes) (2000), while not dispositive, offers some guidance in this task. Section 4.10, in comment b states "In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. Socially productive uses of land include maintaining stable

neighborhoods, conserving agricultural lands and open space, and preservation of historic sites, as well as development for residential, commercial, recreational, and industrial uses." Comment h states that "In balancing the interests of the dominant- and servient-estate holders, conservation and neighborhood preservation concerns should be relevant as well as developmental concerns." The interest of servient estate holders includes other concerns not enumerated by the Restatement, such as maintaining property values, privacy, and convenient access.

I also take guidance from the Truro Subdivision Regulations. The Design Standard section of the Regulations, at Section 3.3, titled "Respect for natural landscape," provides that "consideration should be shown for the protection of natural features, such as large trees, water-courses, ponds, wetlands, beaches, dunes, scenic views and points, historic spots, and similar community assets."

The competing equities are the right of the Caters to a "general right of way . . . for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant." Cannata, 73 Mass. App. Ct. at 795. The Caters argue that this standard necessarily requires the court to locate an easement within which can be constructed a right-of-way "sufficient to meet today's legal requirements."[5] On the other extreme is the argument that the scope of the Cater easement is limited to what would have been laid out at the time it was created in 1899. Neither position is correct.

The easement is not limited to what was reasonable in 1899. The Restatement (Third) of Property (Servitudes) § 4.8 (2000) states where the dimensions of a servitude are not determined by the instrument or circumstances surrounding its creation, the dimensions are those reasonably

[5] I take no position on which version of the Truro zoning bylaws or subdivision regulations might be applicable to the locus in the event Cater seeks some kind of permitting or subdivision approval. There is, of course, no appeal of a decision of the zoning board or the planning board currently before the court.

necessary for the enjoyment of the servitude. Section 4.10 provides that, except as limited by the terms of the servitude, the "manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate[.]" This embodies the principle long followed by courts of this Commonwealth to be "very slow to hold that even ancient rights of way, not expressly restricted as to the type of vehicle could not be employed at all for the means of transportation in common use by a succeeding generation." See Hodgkins v. Bianchini, 323 Mass. 169, 172-73 (1948) (quoting Swenson v. Marino, 306 Mass. 582, 587 (1940)) (internal elision omitted). When an easement is granted in "general terms without limitation or restriction[, s]uch a way is not limited to the purposes for which the dominant estate was used at the time the way was created." Mahon v. Tully, 245 Mass. 571, 577 (1923).

Likewise, the Truro Subdivision Regulations are evidence of what might be reasonable – they are not determinative of what is reasonable. I am not bound to fix either the width of the driveway easement, or its location, in such a fashion as will guarantee approval by the Planning Board. The Decision Following First Phase of Trial determined that the easement was a general right of way serving a single house. The second phase of this trial was about locating that easement using equitable principles of property law, not determining whether various proposed routes and driveway designs would comply with the town's land use regulations. To the extent that I rely on the Truro Subdivision Regulations, I treat them as just one more factor I must balance.

Within the Subdivision Regulations are "Recommended Geometric Design Standards" for

subdivision roads, and I take these design standards into account without being bound by them.[6] I also take into account the Rural Road Alternative in section 3.7 of the Subdivision Regulations, which gives the Planning Board discretion to waive strict compliance with the Design Standards for subdivisions on land "of a rural or sensitive nature" to allow the road to be "more in keeping with the rural landscape[.]" The Planning Board is instructed to weigh the following factors in deciding to grant waivers:

> length of the road; design of the road and its compatibility with bordering permanent open space, scenic amenity, any other conservation measures; public safety; the adequacy of the proposed surface to withstand the expected intensity of vehicular traffic upon build-out of the subdivision; the provision of pull-offs, the applicant's willingness to resurface following the construction of residences; provisions for protecting the road surface during the construction of residences; and the long-term adequacy of any homeowner's maintenance agreement to protect the proposed surface; and applicable covenants restricting future density increases.

Cases such as M.P.M. Builders, LLC v. Dwyer, 442 Mass. 87 (2004), Western Massachusetts Elec. Co. v. Sambo's of Massachusetts, Inc., 8 Mass. App. Ct. 815 (1979), and Pratt v. Sanger, 70 Mass. 84 (1855) (reversed on other grounds, O'Loughlin v. Bird, 128 Mass. 600 (1880)) stand for the proposition that, to the extent the Cater's preferred location for the driveway is at odds with any of the defendants', the court should be more favorable to the defendants. With the adoption of Restatement (Third) of Property (Servitudes) § 4.8 (3) (2000), the Supreme Judicial Court indicated that the appropriate balance between the needs of the dominant and servient estates is one which maximizes the "property utility" of the servient estate, and minimizes the costs associated with being burdened with an easement, all without "unreasonably interfering with the easement holder's rights." M.P.M. Builders, 442 Mass. at 90-

[6] According to the Design Standards, a "Type A" subdivision road should have a right-of-way width of forty feet, a minimum roadway width of fourteen feet exclusive of berms, and a minimum four-foot shoulder on each side. The maximum grade is said to be eight percent.

91.

The equities that therefore I must balance are the Cater's right to reasonable access, against the rights of the defendants to have the natural environment, their scenic vistas, property values, and privacy preserved. These interests are in conflict because a road in most any location will infringe to some degree on these interests of the defendants. The more substantial the road, the more unwelcome impact on the servient estates, because construction of a wide, flat roadway produces increased disturbance of the surrounding landscape.

Width of the Cater Driveway

The Cater driveway should not exceed twelve feet when constructed. The overwhelming evidence at trial convinces me that a safe and convenient driveway does not require more than twelve feet. I am not convinced that equity requires a driveway that automatically complies with every requirement of the design standards of the Truro Subdivision Regulations, especially in light of the Rural Road Alternative, which specifically recognizes that strict adherence to the Design Standards is not always the best option for roadways over land "of a rural or sensitive nature[.]" I also am convinced by the argument pressed by the defendants that the Caters should not benefit from their extreme delay in exercising their easement rights. If the Cater Parcel had been developed contemporaneously with the rest of the neighborhood, the driveway would have preexisted the adoption of subdivision control regulations in 1955. Indeed, of the defendants, only the Clark house was constructed after the adoption of subdivision control in Truro. Increasing the width of the driveway from twelve feet to fourteen feet substantially increases the amount of the landscape that is disturbed, and there is no countervailing reason to do that.

Easement Route From Benson Road to Trust Land

On balance, the most equitable way to reach the Trust Land from Benson Road is to construct a driveway over the boundary line between the Clark and Cabot properties. The shortest distance between Benson Road and the Trust Property is along the Cabot/Clark boundary line, where it is about 230 feet. The Trust Property is over 380 feet away from Benson Road traveling along the Fox/Mueller boundary line.

Straddling the property line is also the best way to spread the burden; the O'Reilly Route 2 places all the burden on Fox, with 380 linear feet of driveway on the Fox property, amounting to nearly 4,600 square feet of driveway on the Fox property. In contrast, straddling the property line between Cabot and Clark puts only about 1,400 square feet on each property. Dividing the driveway over two parcels leads to a smaller burden on each of the affected lot owners, and for that reason, locating the driveway on the boundary between Cabot and Clark causes the least amount of harm to any one property.

While I am aware that the Caters cannot possess an easement over their own land, nonetheless, where and how the driveway is likely to be constructed on the Cater Parcel is one equitable factor that I considered in making my determination on where the easement ought to be located. This is because I must attempt to minimize the impact on all of the sensitive dune areas, not just those held by the Conservation Trust. A driveway that enters the Cater land on its southern bound would require substantial additional construction to reach the "top" of the Cater land; this construction would require more disturbance of the dune, and a longer driveway has more potential to mar scenic vistas, the preservation of which I find to be a substantial equitable benefit to all the defendants. This is a major problem with Route 4 on the O'Reilly Plan, also Route 2, and with the Revised Coastal Engineering Route. I credit the opinion of Timothy J.

Brady that "[a]ny of the driveways that come to the southeast corner of the Cater property, in my opinion, are not done until they get up to the middle of the lot. They're entering the lot at approximately elevation fifty-five. They're going to, in my opinion, have to get up to at least elevation seventy or eighty[.]" Transcript Phase II Day 3, April 3, 2009, page 22 lines 13-19. I find more support for this position in that the Original Coastal Engineering plan, prepared for the Caters, shows the end of the driveway at the top of the dune, at about ninety-four feet. I find that the only reasonable conclusion that the evidence supports is that the location of the structure on the Cater Parcel will be at some location above ninety feet in elevation (the high point of the Cater Parcel is approximately 103 feet).

The amount of cut and fill required to construct a driveway that traverses the steep dunes at a passable slope[7] is a factor that I weighed heavily, but mostly in the context of determining the grade of the easement, infra. The only actual testimony at trial as to actual, calculated amounts of cut and fill came from Mr. O'Reilly, who claimed that Route 2 would require 525 cubic yards of fill and 230 cubic yards of cut and that the Original Coastal Engineering plan would require 1,550 cubic yards of cut and eighty-four cubic yards of fill. I am forced to discount the weight of this testimony because of the additional amount of cut and fill that would be required to extend O'Reilly's Route 2 up the side of the dune northerly to the top of the Cater parcel. The Original Coastal Engineering Route ends at an elevation of approximately ninety-six. O'Reilly's Route 2 is only shown climbing to an elevation of about thirty-six. I am convinced that the sixty feet of elevation that would need to be ascended eliminates any advantage in the amount of cut and fill

[7] To get up the dune, which has a slope of twenty percent to thirty percent, the driveway will climb diagonally across the contours at a more shallow grade. To construct a level road on the side of a hill, earth is removed from the part of the hill above the road, and added to the hill below the road. The earth removed is "cut" and the earth added is "fill." The technique of "balanced fill" seeks to use the cut as the fill to avoid trucking in extra earth, although this is not always possible depending on the actual conditions on the ground.

that Route 2 appears to have over the Original Coastal Engineering Route.

Perhaps more importantly, to get above ninety feet in elevation on the Cater Parcel, Route 2 would be substantially longer than Original Coastal Engineering because while the two routes would end in substantially the same location, Route 2 needs to traverse an extra 330 feet to get from the point where it meets the Cater Parcel, to the top of the dune. That number is not the length of the road, it is about 330 feet as a straight shot. A road which must curve to maintain passable grades would be markedly longer. The result would be an extension of Route 2 that cuts back in a northerly direction essentially parallel to Benson Road, but at an elevation twenty-five feet to thirty-five feet up the side of the dune from Benson Road. The impact on the view from below would be substantially worse than the Original Coastal Engineering Route.

A driveway that meets Benson Road at the Fox/Mueller property and traversed the Trust land westerly, like O'Reilly Route 2, would lie in the view to the south from the Cabot, Clark, and Fox properties. The fill required at the bottom of the so-called "valley" – the area of low elevation along the Fox / Trust bound – would significantly raise any driveway running in this location, making it a conspicuous feature of the view to the south from Cabot, Clark, and Fox. In contrast, a driveway along the BSC Group route, or the Original Coastal Engineering route, would be less conspicuous as it cuts across the Cabot/Clark land because it would lie at or about the existing grade. A driveway along a northern route would be visible only from the Clark property looking south.

The argument that a southern route is preferable because of the "dangerous curve" depicted on Original Coastal Engineering does not persuade me. The Cater Property is to the west and north of the land of the defendants and as a matter of simple geometry, all the proposed routes proceed from east to west across the Trust Land. O'Reilly's Route 2 does not show a curve (as

shown on Original Coastal Engineering) because it terminates at the boundary of the Cater parcel. To reach the top of the dune, Route 2 would also need some kind of a curve similar to that depicted on Original Coastal Engineering. Testimony about dangerous downgrade curves in roads is not persuasive because both routes would have such a curve.

The testimony at trial on how the presence of a driveway easement would affect property values does not convince me that one defendant would suffer worse than another. There is little question that the construction of an actual driveway across the land of one of the defendants will have an impact, of some sort at least, on the property value of the land traversed by the new drive. The evidence which I credit, however, leaves me unsatisfied just what the amount of that impact might be, measured in dollars.

It is unfortunate that one or at most two of the defendants with improved parcels must bear the attendant effect on their property value that comes from location of the easement route over their land, while those freed of that burden will have no loss. But this is a natural consequence of the task the court is asked to carry out. The easement must follow some particular route, and when it goes there, it doesn't go elsewhere. The parties have not referred me to authority for the proposition that those defendants who, as a result of this decision, will not find the easement crossing their parcels, should be ordered to pay some compensation to the other defendants, across whose parcels the drive will run. And even were I authorized to do that, the evidence which I credit in this case is insufficient for me to make any such award grounded in reliable fact.

It is important, but not critically so, to minimize the disruption of the footpath. A driveway straddling the Clark/Cabot lot line and proceeding relatively straight up the dune misses the footpath altogether. Any driveway easement that accesses Benson Road to the south of the

existing Cabot driveway must bisect the footpath at some point. There is nothing in the evidence that demonstrates an easement for a driveway must not disturb the footpath, but I find and rule that an easement which does not disturb the footpath is preferable to one that does.

Finally, a curb cut for a driveway off of Benson Road at the Clark/Cabot boundary is a preferable location compared to coming in on the Fox or Mueller land. For one, the presence of the retaining wall directly opposite the Fox driveway limits the area available for turning. More importantly, the Cater driveway would be the fifth route that converges at the end of Benson Road: the Fox driveway, the two twenty-foot ways on the Daisy Plan, and the private extension of Benson Road, Benson Lane. There is no need to further clog this area of the street when a driveway coming in on the Clark/Cabot boundary would be over twenty feet away from the nearest curb cut, the existing Cabot driveway.

The fact that the Clark septic system might lie in the path of the easement does not dissuade me. I am convinced, however, that if it turns out that the route as I have found it does in fact conflict with the Clark septic system, that relocating or reinforcing the system is an expense of constructing the driveway that is properly born by the Caters.

Route of the Easement Across the Trust Land

Whatever way the drive comes in from the street, it must make its way across the Trust Land to reach the Cater site. The route across the Trust Land is dictated by what is an acceptable grade for the driveway. A steep dune rises from the rear lot line of Cabot and Clark, climbing almost sixty vertical feet before reaching the Cater property, approximately 240 feet away. A road constructed to follow this direct line would be twenty-five percent grade, which is not practical for passage. Accordingly, the route of the easement will need to curve to follow the slope of the land, to permit construction of a road that has a reasonable steepness. The more the driveway curves,

the ratio of vertical rise to horizontal run changes to enable a more shallow driveway. The longer the driveway becomes, the more it damages the Trust property. What I must do is find a balance between the Caters' desire to have a shallow driveway, and the interest of the other parties in limiting the length of the driveway. To do this, I must first determine what is a reasonable slope for this particular easement.

Again, I am mindful of the subdivision regulations, as Cater urges me to be. As stated, I do not find them controlling or find myself bound to locate the easement in a way which would necessarily comply with the subdivision regulations. The subdivision regulations are just one factor of many in determining a reasonable slope. For their part, the Subdivision Regulations state the maximum grade for a Type A roadway is eight percent. A footnote to the Recommended Geometric Standards states that "The 'Maximum Grade' may be waived, but cannot exceed 10%, [sic] for a distance of one hundred (100) feet."

In the Decision Following First Phase of Trial, I determined that the easement as originally contemplated would not have been steeper than fifteen percent. Taking this number as a starting point, and apparently also taking into account the Design Standards, all of the routes proposed are between eight percent grade and ten percent grade. I find and rule that the route depicted on the Original Coastal Engineering plan is the best option for a route across the Trust Land. My decision is supported by the fact that a ten percent grade allows for a shorter driveway because it is a more direct route up the face of the hill. There are two ways to go about constructing a driveway at a shallower grade: one is to proceed at a more shallow angle by making the driveway longer. The second is to increase the amount of cut and fill. It appears that a substantial amount of cut and fill is required to construct the Original Coastal Engineering route, however, I am convinced that the shorter length of that route, and the fact that it crosses the Cater property line at

a higher elevation, mean less aggregate cut and fill than a shallower, longer driveway, like Route 2.

On balance, the most equitable location for the easement is to pass westerly from Benson Road over the boundary line between Cabot and Clark, then to proceed west-southwesterly up the dune at a ten percent grade across the Trust Land to the Cater Parcel, and then curve to the north to terminate above the ninety-foot elevation mark on the Cater Parcel. The judgment that will enter in this case will provide for construction of a twelve-foot-wide driveway along the route just described, but within some band of discretion to account for unforseen conditions on the ground.

Judgment accordingly.

Gordon H. Piper
Justice

Dated: July 12, 2010

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL)

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS CASE
No. 98 MISC 250365 (GHP)

GLORIA J. CATER and WILLIE J. CATER,

Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY BROWN, FRED GAECHTER, CAROL GREEN, CURTIN HARTMAN, HOWARD IRWIN, JOHN MARKSBURY, and JOEL SEARCY, as they are trustees of Truro Conservation Trust; LUCY CLARK, JENNIFER CLARK KRUGER, and MITCH BROCK, as they are trustees of Silvia M. Clark Revocable Trust; SUSAN B. CABOT, SYLVIA CLARK, and JOAN F. FOX, individually and as trustees of Cabot-Clark-Fox Real Estate Trust; JOAN F. FOX, as trustee of the Residence Trust Agreement; SARA C. MUELLER and PHILIP P. MUELLER, III, as trustees of the Philip P. Mueller Truro Realty Trust; PAUL D. KIERNAN; ELIZABETH ADLER; RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and MITCH BROCK, as trustees of the Silvia M. Clark Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of Shambles Realty Trust; ETHAN R. COHEN; and NATALIE FERRIE-COHEN,

Third-Party Defendants.

JUDGMENT

This action, which commenced August 21, 1998 with the filing of a complaint by Willie J. Cater and Gloria J. Cater ("Caters"), is request for declaratory and injunctive relief confirming the validity, and establishing the location, of a general right of way of record benefitting their land in Truro, Barnstable County, Massachusetts. The Caters' land is that acquired by them from Howard B. French by deed dated June 26, 1979 and recorded with the Barnstable County Registry of Deeds on June 29, 1979 in Book 2944, at Page 75.

This case came on to be tried before the court in two phases. In a decision dated July 9, 2007 and a decision of even date ("Phase II Decision"), the court (Piper, J.) has made findings of fact and rulings of law; the court has determined that the easement is in force and effect, and that the location of the easement is to be as described in the Phase II Decision.

In accordance with the court's decisions, it is

ORDERED, ADJUDGED and DECLARED that the easement ("Easement") recited in the deed from Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded with the Barnstable County Registry of Deeds ("Registry") in Book 2, Page 39 is in force and effect, and has not been extinguished, abandoned, frustrated in its purpose, or otherwise ceased to be valid and effective. It is further

ORDERED, ADJUDGED and DECLARED that, in equity, the Easement ought to be and hereby is located as follows:

> From Benson Road, the Easement shall run westerly so that the centerline of the Easement coincides, as substantially as reasonably possible, with the boundary line between Lot 51 (7 Benson Road) of the Clark trustees, and Lot 52 (9 Benson Road) of Cabot.
>
> From the boundary between the Cabot and Clark land and Lot 56 (9A Benson Road) of the Truro Conservation Trust, the Easement shall follow generally the route depicted on Exhibit 37, which is a plan titled "Plan of Proposed Driveway, William J. Cater, Benson Road, Assessor's Map 53, Parcel 50, Truro, Mass," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, 02653, dated March 17, 2003 under the stamp of Martin R. Donaghue.

It is further

ORDERED, ADJUDGED and DECLARED that, in the event a driveway or roadway is constructed within the Easement, the finished surface of such driveway or roadway is not to exceed twelve (12) feet in width. It is further

ORDERED, ADJUDGED and DECLARED that, in the event a driveway or roadway is

constructed within the Easement, such driveway or roadway shall cross any terrain, the slope of which terrain is equal to or greater than ten (10) percent, at a finished grade equal to or greater than ten (10) percent; absent further order of this court, the Easement does not permit cut or fill on the land of any defendant to accommodate a finished grade of less than ten (10) percent of any driveway or roadway constructed on terrain the slope of which terrain is equal to or greater than ten (10) percent. It is further

ORDERED, ADJUDGED and DECLARED that the Easement shall permit, in addition to the width of a twelve-foot driveway or roadway, the construction of drainage features, improvements and site work for roadway support and stabilization, erosion controls, vegetative screening, habitat restoration, and timber guardrail. It is further

ORDERED, ADJUDGED and DECLARED that the costs of designing, engineering, obtaining approvals for, and constructing any driveway or roadway within the Easement shall be solely the responsibility of the dominant estate. These costs include without limitation the cost of any reasonably necessary or desirable upgrade, repair, or relocation of the Cabot septic system that may be caused, directly or indirectly, by the construction of a driveway or roadway within the Easement. It is further

ORDERED, ADJUDGED and DECLARED that nothing in this Judgment or the accompanying Phase II Decision shall permit the construction of any driveway, roadway, or route, including any curb cut, or any related work, other than in compliance with all applicable laws, nor without first obtaining all permits and approvals required by law. It is further

ORDERED, ADJUDGED and DECLARED that the Easement burdens the area described for its location in this Judgment, and no longer burdens any other land of any of the defendants. It is further

ORDERED and ADJUDGED that no damages, fees, costs, or other amounts are awarded to any party.

By the Court. (Piper, J).

Attest:

Deborah J. Patterson
Recorder

Dated: July 12, 2010.

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER