

Abutters can't block private school construction

Use consistent with easement to parcel

By: Eric T. Berkman ○ April 14, 2021

The Appeals Court has found that a 50-foot-wide easement that connected a cul-de-sac to a site the owners planned to develop for a private school would not be overburdened by the proposed project.

In 1989, the plaintiffs, who owned the parcel in question, negotiated the easement from the owner of abutting property. In exchange, they relinquished their right of way across the abutter's property, which he planned to develop into a subdivision.

At some point after the abutter built the subdivision, the defendants purchased lots encumbered by the easement and abutting the plaintiffs' parcel.

When the plaintiffs later decided to develop their parcel for a Montessori school, the defendants — following their predecessors' unsuccessful challenge to the existence of the easement — contended that the proposed use and associated traffic fell beyond the scope of what the easement's creators contemplated for the site and would overburden it.

A Land Court judge disagreed, issuing a declaratory judgment in the plaintiffs' favor, and the Appeals Court affirmed.

"[T]he scope of [an] easement is not constrained by the circumstances present at the time of its grant," Judge John C. Englander wrote for the court. "[W]hile the proposed project will result in substantial additional use of the easement, on the basis of the facts found we cannot say as a matter of law that such use was not reasonably foreseeable, and we perceive no error in the judge's conclusion that the proposed school is 'normal development' within the contemplation of the easement grant."

The 17-page decision is *FOD LLC, et al. v. White, et al.*, Lawyers Weekly No. 11-035-21.

Common issue

Plaintiffs' counsel Mark J. Lanza of Concord, who has litigated easement disputes in Land Court for more than 30 years, said issues like the ones in his clients' case arise frequently.

"They are almost always the result of vague or nonexistent terms in the easement document," Lanza said. "I realize that I am preaching to the converted when I say to real estate lawyers who read Lawyers Weekly that care should be taken when drafting easement documents to specify all terms of the easement."

Jason R. Talerman of Millis, who represented the defendants, said the decision was more about the deference the Appeals Court affords to trial judges' factfinding than about the law underlying easements.

"Here, we absolutely established that the plaintiffs' [traffic expert] had no experience in the actual subject matter and was unable to do basic math," Talerman said. "Nonetheless, the judge, in one of his last cases before retirement, credited her testimony over the un rebutted testimony of our expert and concluded that a 600-percent increase in traffic would not overburden the existing easement."

Talerman added that he had hoped the Appeals Court would avail itself of its authority to overturn a case on the facts.

"Alas, the court chose not to do so, instead choosing to retreat to the normal application of deference," he said.



"The interesting wrinkle is that even though the lot in question was zoned residential, under the Dover Amendment a school was an allowed use and therefore foreseeable, particularly since the lot was large."

— Daniel P. Dain, Boston

Daniel P. Dain, a real estate litigator in Boston, said the decision was both practical and supported by easement law.

"The interesting wrinkle in this case is that even though the lot in question was zoned residential, under the Dover Amendment a school was an allowed use and therefore foreseeable, particularly since the lot was large," Dain said. "The Appeals Court also emphasized that the grantor had not tried to limit the scope of the easement."

Donald J. Pinto of Boston said he thought it was the first appellate decision to cite the Dover Amendment in interpreting the scope of an easement.

Pinto said he expects the decision to be frequently cited in disputes over the scope of easements, even when the proposed use is not one that is exempt from zoning under G.L.c. 40a, §3, the statute in which the Dover Amendment appears.

Boston attorney Michael C. Fee said he was not surprised by the court's finding that nothing in the easement grant precluded a school use. Still, he said, the overburdening argument seemed like a closer call, particularly because the defendants' expert appeared to establish that there would be substantial additional use of the easement, and apparently there was no evidence to support the trial judge's conclusion that school traffic would not back up onto the abutters' property.

"The [Appeals Court] seemed to gloss over the issue on the basis that such impact was reasonably foreseeable from the easement grant," Fee said. "Not sure I agree with that, and if they wanted to be more rigorous about it, they might have considered a remand."

Proposed school

Plaintiff Brenda Knight and her husband, James, acquired their 13.7-acre Mansfield site in 1974. The parcel, which had no direct access to public roadways, had a roadway easement over abutter Nicholas Harris' parcel to the north. From there they could access nearby roadways.

In 1989, Harris decided to subdivide and develop his parcel. The Knights' right of way made that difficult, so after negotiations, the Knights relinquished their right of way and received a short, 50-foot-wide easement in return

The easement was not created by an express grant, but it was agreed to by the parties and implied from various sources, including Harris' subdivision plan approved by the town Planning Board.

That year, Harris subdivided his property into 16 new lots, serviced by new roads built on his property and — as shown in the plan — the easement running from the Knights' property line to the end of a new cul-de-sac on Harris' property.

No apparent restrictions were placed on the use of the easement or the Knights' land.



In 2007, plaintiff FOD LLC approached Brenda, who had been denied a plan for a residential subdivision on her own property, about locating a Montessori school on the site.

The owners of the encumbered lots at the time challenged the existence of the easement in Land Court, but a judge confirmed its existence while declining to rule on whether the proposed use would overburden the easement or whether its creators contemplated the development of a school and attendant traffic.

The plaintiffs filed suit against the defendants — subsequent purchasers of the encumbered lots — in Land Court in 2017, seeking a declaratory judgment that the proposed school would not, in fact, overburden the easement. They presented evidence at trial that there would be 750 feet of road on the site with parking areas, alleviating any backup traffic in the neighborhood.

The plaintiffs' traffic expert also testified that any traffic queues at pick-up and drop-off would not extend onto the easement. The defendants' expert, on the other hand, did not observe the operations of the school, which was currently at another site, but calculated that the school would generate nearly twice as many vehicle trips daily as what the plaintiffs' expert testified to and that traffic would likely back up into the subdivision.

Judge Keith C. Long ruled in the plaintiffs' favor, specifically finding that the creators of the easement anticipated further development and that a proposed school was already permissible at the time under the Dover Amendment. He also found that school traffic would not overburden the easement. The defendants' appeal followed.

No overburdening

The Appeals Court rejected the defendants' argument that the plaintiffs' proposed use fell outside the scope of the easement.

First, the court noted Harris' testimony that he and the Knights never discussed restricting the easement's scope.

"We think it particularly relevant that the easement was granted in return for the Knights relinquishing a significantly more invasive right of way over Harris' parcel," Englander wrote. "Harris needed that concession to develop his parcel, and would not have been in a position to limit the easement that he was granting in return."

The court also disagreed that the proposed use would overburden the easement or pose a nuisance.

"The judge ... found `no evidence, and ... no likelihood, that anyone will park on the easement or pause there more than momentarily,'" Englander said, as the court affirmed Long's judgment.

FOD LLC, et al. v. White, et al.

THE ISSUE: Was a 50-foot-wide easement that connected a cul-de-sac to a site the owners planned to develop for a private school overburdened by the proposed project?

DECISION: No (Appeals Court)

LAWYERS: Mark J. Lanza of Concord (plaintiffs)

Jason R. Talerman of Mead, Talerman & Costa, Millis (defense)

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