THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

Rumney School District
v.
David L. Saad and Elise M. Saad
Trustees of the Saad Living Trust

No. 215-2012-CV-311

ORDER

This is a declaratory judgment action in which the parties seek a judicial determination of the respective rights of the petitioner and the respondents in and to a right-of-way that crosses the petitioner's property to the respondents' property. In their pleadings the parties raise numerous issues regarding the location, scope, extent, and maintenance of the right-of-way. The parties have filed an agreed statement of facts (index #30), and they have either resolved or seek no ruling on many of those issues. The parties agree that the principal issue before the Court is the width of the right-of-way that the respondents may use.

The Court conducted an evidentiary hearing on July 24, 2013, at which the petitioner's expert, Roy Sabourn, and the respondents' expert, Richard Boulanger, testified and each of the parties submitted numerous exhibits. Based on the evidence presented, the Court makes the following findings and rulings.

I. Factual Background

The parties own adjoining parcels of land in the Town of Rumney. An elementary school and athletic fields, among other things, are located on the petitioner's property. The respondents have resided in a single-family home on their property since approximately 2006.

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7/30/13
CC: John J. McCormack, ESq.
William Parnell, ESq.

The parties' dispute relates to a right-of-way that benefits the respondents' property, the travelled portion of which is depicted in dark gray on petitioner's Exhibit 4, that extends from Wheeler Lane across the petitioner's land in a generally northeast direction to the respondents' property. The right-of-way is approximately 400 feet long and "the current travelled area is twelve feet (12') in width." (Agreed Statement ¶ 6.) The parties' experts agree that the current travelled portion of the right-of-way is not wide enough to allow motor vehicles to pass each other. The petitioner maintains that the present single-lane right-of-way provides suitable and reasonable access to the respondents' property; the respondents contend that the right-of-way should be wide enough to accommodate two-way vehicular traffic.

The respondents' right-of-way traces back to an express grant in an 1870 deed conveying the right-of-way now before the Court, in which the grantor described the right-of-way as "a cart path through my field [the petitioner's property] to said land." (Id. ¶ 3.) The 1870 deed did not specify either the location or the width of the right-of-way, but the parties' experts both agree that in 1870 "a 'cart path' easement was primarily agricultural in nature" and "that a 'cart' contained two wheels and the width between cart wheels was approximately eight feet." (Id. ¶ 4.) The only other reference to the right-of-way in the respondents' chain of title is contained in a 1968 deed which conveyed "a right-of-way for vehicular passage over the right-of-way which presently exists." (Resp'ts' Ex. D.)

"The parties agree that both are able to use the" right-of-way. (Agreed Statement ¶ 8.) The petitioner's staff and students use the right-of-way to access the soccer field

and baseball field located in the area east of the right-of-way. The respondents and their invitees use the right-of-way to access the respondents' property. Although the original easement grant referred to a "cart path," the petitioner concedes that "the general nature and character of the area has changed since the time of the original grant making vehicular access to a residence reasonable." (Pet.'s Prop. Decree at 3.)

The petitioner instituted this action in 2012, after the respondents proposed to expand and improve the right-of-way. The petitioner argues that the proposed expansion of the right-of-way (1) is not permissible under the terms of the easement grant; (2) would unreasonably burden the petitioner's property in general; and (3) will present a hazard to children and other persons using the athletic fields for recreational, maintenance, or other purposes. The petitioner does not object to the respondents making reasonable and appropriate improvements to the existing twelve-foot-wide right-of-way but opposes any expansion of the right-of-way. The petitioner contends that a twelve-foot-wide right-of-way, plus an additional six-foot-wide area on either side of the twelve-foot-wide travel portion for winter maintenance, plowing, and storage of snow, will provide the respondents with adequate and suitable access to their property and is reasonable. The respondents argue that "given the present demand on it, the Right of Way must include a twelve foot. . . wide travel portion, three foot . . . shoulders on both sides, plus additional six foot . . . winter snowplowing and snow storage areas on both sides, bringing the total width of the Right of Way to thirty feet." (Agreed Statement ¶ 7.)

Both experts testified regarding the reasonableness of the parties' respective

easement proposals. The petitioner's expert, Roy Sabourn, opined that a twelve-foot-wide travelled way, with the six-foot-wide areas on either side for winter maintenance, would provide reasonable and suitable access to the respondents' single-family home, especially in light of the relatively short distance (400 feet) involved, the topography of the area, the low volume of traffic utilizing the right-of-way, and the excellent visibility that motorists on the right-of-way enjoy. Mr. Sabourn acknowledged that presently motor vehicles cannot pass each other on the current travelled way. He testified, however, that on those rare occasions when incoming and outgoing vehicles approach one another on the road, each driver would see the other vehicle long before they met, and that either the outgoing driver could back his vehicle on the right-of-way without difficulty to the respondents' property and pull over to allow the other vehicle to pass or the incoming driver could back his vehicle on the right-of-way without much difficulty to Wheeler Lane and do likewise. Mr. Sabourn testified that incoming emergency vehicles would be visible from the respondents' premises. He opined that there was no need to create an open area or "turn-out" adjacent to the west side of the right-of-way onto which one vehicle could pull so as to allow the other vehicle to pass, but that creating such a turn-out in an appropriate location was not a "bad idea."

Mr. Sabourn further testified that the respondents' proposed thirty-foot-wide right-of-way is unreasonable and unnecessary. He testified that such a wide right-of-way would result in vehicles travelling faster on the right-of-way, which would be ill-advised since the right-of-way is immediately adjacent to an athletic field in which children play soccer, chase fly balls, and so forth. Mr. Sabourn opined that a thirty-foot-wide right-of-

way would "dramatically affect" the athletic fields and would unreasonably burden the petitioner's property. Finally, with respect to the volume of traffic on the right-of-way, Mr. Sabourn testified that he was working on the site for one week and never observed any vehicles meeting each other on the right-of-way.

The respondents' expert, Richard Boulanger, testified in support of the thirty-foot-wide right-of-way that he proposes and that is depicted on respondents' Exhibit B. He opined that his proposed right-of-way is appropriate given the respondents' "reasonable residential use needs." Mr. Boulanger acknowledges that he proposes "morphing" an eight-foot-cart path into a thirty-foot-wide easement and analogized that the respondents' "cart path has morphed from a caterpillar into some sort of butterfly." He testified that no municipal regulations apply to this right-of-way. He stated that the petitioner's soccer field would be affected by his proposed right-of-way in that the petitioner would have to move the goals and would have to reconfigure and/or reorient the soccer field, but that doing so would be a "simple matter" and not impose a "hardship" on the petitioner. (Resp'ts' Ex. A at 2.) Regarding the volume of traffic on the right-of-way, Mr. Boulanger testified that when he was working at the site he observed no motor vehicles on the right-of-way except his own and the respondents' vehicles.

II. Discussion

The parties disagree about the limits and scope of the respondents' express appurtenant easement. The "interpretation of a deeded right of way is ultimately a question of law for [the] Court to decide by determining the intention of the parties at the

time of the deed in light of surrounding circumstances." Gill v. Gerrato, 154 N.H. 36, 39 (2006) (quotations omitted). "Clear and unambiguous terms of a deed control how [the Court] construe[s] the parties' intent, but the law may imply supplemental rights." Arcidi v. Town of Rye, 150 N.H. 694, 701 (2004).

Because the precise location and limits of the granted right-of-way are not specified in the easement provisions of the parties' deeds, the Court must apply the so-called "rule of reason" in interpreting those provisions. In New Hampshire "the respective rights of dominant and servient owners are not determined by reference to some technical and more or less arbitrary rule of property law as expressed in some ancient maxim but are determined by reference to the rule of reason." Sakansky v. Wein, 86 N.H. 337, 339 (1933) (citations omitted).

> The rule of reason applies at two points in the analysis of easements. First, we use the rule to interpret and give reasonable meaning to general or unclear terms in the deed language granting an easement. Second, irrespective of the deed language, we use the rule to determine whether a particular use of the easement would be unreasonably burdensome. The rule of reason requires the court to give a meaning to words which the parties or their predecessors in title have actually used . . . or else to give a detailed definition to rights created by general words either actually used or, whose existence is implied by law.

Heartz v. City of Concord, 148 N.H. 325, 331 (2002) (quotations and citations omitted). "This rule of reason does not prevent the parties from making any contract regarding their respective rights which they may wish, regardless of the reasonableness of their wishes on the subject. The rule merely refuses to give unreasonable rights, or to impose unreasonable burdens, when the parties, either actually or by legal implication, have spoken generally." Sakansky v. Wein, 86 N.H. at 339–40. In short, the "undefined

outlines of a granted easement are to be drawn 'reasonably.'" 17 C. Szypszak, New Hampshire Practice, Real Estate § 8.03, at 198 (2003).

Where, as in this case, the precise location and limits of a granted right-of-way are not specified, the grant is "of a reasonably convenient and suitable way across the granted land to the place or places mentioned. The [user] is not necessarily entitled to the way which prior to his conveyance had been commonly used." Gardener v. Webster, 64 N.H. 520, 522 (1888); Barton's Motel, Inc. v. Saymore Trophy Co., 113 N.H. 333, 335 (1973). In applying the rule of reason the Court must, as noted earlier, consider all the surrounding circumstances, including "the location and uses of both dominant and servient estates and the advantage to be derived by one and the disadvantage to be suffered by the other owner." Barton's Motel, Inc., 113 N.H. at 335; Sakansky, 86 N.H. at 339.

As a preliminary matter, to the extent that the Court's findings and rulings are based on the testimony of the parties' respective experts, the Court finds that Mr. Sabourn's testimony is more credible and persuasive. The Court finds that Mr. Sabourn's investigation was more thorough, the bases of his opinions sounder, his explanations more reasonable, and his opinions more reliable.

Based on the evidence presented and the applicable law, the Court finds that, with the exception that the respondents may also create and maintain one turn-out on the west side of the right-of-way, the right-of-way that the petitioner proposes is consistent with the terms of the express easement grant and the doctrine of reasonable use. Considering all of the surrounding circumstances, including the "location and use

of both dominant and servient estates and the advantage to be derived by one and the disadvantage to be suffered by the other owner," Barton's Motel, Inc., 113 N.H. at 339, the Court finds that such an easement will provide reasonably convenient and suitable access across the petitioner's land to the respondents' property. The length of the right-of-way, the topography, and the low traffic volume do not reasonably require the thirty-foot-wide easement that would accommodate regular two-way vehicular traffic for which the respondents contend. Such an expansive right-of-way is not "reasonably necessary to enable" the dominant estate holder to enjoy the easement. Arcidi, 150 N.H. at 701.

The Court also finds that, in the circumstances presented, the respondents' proposed easement would confer unreasonable and unnecessary rights on the dominant estate and impose unreasonable burdens on the servient estate. It would give the respondents far more than a reasonably convenient and suitable way while posing a hazard to children and others lawfully using the athletic fields and requiring the petitioner to reconfigure and partially reconstruct those fields. The petitioner's proposed easement, with the addition of one turn-out, will provide the respondents with suitable access without unreasonably burdening the petitioner.

The respondents' own expert recognizes that he is proposing a dramatically expanded easement and stated that "the Court may conclude that such an expansion of the right-of-way is unreasonable and impermissible." Mr. Boulanger's characterization of his proposal as a metamorphosis is both accurate and significant. The respondents are not advocating for a modest and reasonable expansion of the easement as a consequence of a "normal development of conditions existing at the time of the grant."

Downing House Realty v. Hampe, 127 N.H. 92, 96 (1985). Rather, they propose a complete transformation of the character and purpose of the easement in both qualitative and quantitative terms. Considering all of the surrounding circumstances, the Court concludes that the respondents are not entitled to such an utter transmutation of the express easement.

The respondents' reliance on the 1968 deed is unavailing. First, they cite no authority for the proposition that the grantors in that deed had the right unilaterally to expand or otherwise alter the terms of the 1870 express grant so as to impose additional burdens on the servient estate. Moreover, even if they could have done so, the 1968 deed does no such thing. As the respondents' expert recognized on cross-examination, the 1968 deed merely purports to convey a "right-of-way for vehicular passage over the" existing right-of-way, a use that the petitioner concedes is permissible. The deed does not purport to expand the width of the easement or to confer additional rights on the dominant estate.

III. Conclusion

For the foregoing reasons, the Court makes the following orders:

1) The Court GRANTS the requests for relief in paragraphs A through F of the petitioner's Proposed Decree (Pet.'s Prop. Decree at 4–5);
2) In addition, the respondents may create and maintain one turn-out ten feet in width and fifteen feet in length, on the west side of the twelve-foot travelled way between the travelled way and the trees;
3) If and to the extent that the petitioner requests that it be awarded attorney's

fees (Pet.'s Pet., prayer C), the petitioner has not established the applicability of any exception to the general rule that each party to a lawsuit normally bears the costs of its own attorney's fees. See Daigle v. City of Portsmouth, 137 N.H. 572, 574 (1993); Harkeen v. Adams, 117 N.H. 687, 690–91 (1977). Accordingly, the request is DENIED;

4) The relief that the respondents request in their Proposed Order is DENIED.

SO ORDERED.

Dated: July 29, 2013

Hon. Peter H. Bomstein
Presiding Justice