

PETER F. HARRINGTON

COPY

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August 9, 2018

Terrance P. Morris, Esq.
27 Elm Street
Newtonville, MA 20460

Dear Terry:

Once again, I am writing on behalf of Roger and Virginia Cerqua of 189 Adams Street to express their concerns about the application for Special Permit at 189-193 Adams Street.

It is unfortunate we were not able to resolve the differences between you and Mr. & Mrs. Cerqua. As I see it, Roger & Virginia are upset because the project is just too big to be built just 20 feet from their home. They are of the strong belief that a 9 unit building would be less intrusive on their home. An important aspect of this problem is that the site is not designed to accommodate your proposed 12 unit building.

Another major problem is that the limited 15 foot passageway access is not sufficient for the project. The Developer's proposal to expand the passageway creates an unusual situation that may have to be decided by the Massachusetts Supreme Judicial Court.

While the legal issues surrounding the use of rights of way is a narrow part of land use law, I am not aware of any Massachusetts case that allows one land owner (holding title to ½ the land comprising a right of way) to expand the size of a right of way so as to increase the burden of use on the land of the holder of title to the other half of the right of way.

The Cerqua's are not opposed to the development of the site nor are they against your client's making a profit from this project. They do have something of value to contribute to the project; that is, their agreement to the expanded use of their portion of the right of way. This is, after all, a request for a special permit, not an as of right use and they are being asked to allow their land to be used for this project without any compensation. The compensation they seek is not monetary. It is a request that the project be sized to allow them to enjoy a certain quality of life while living beside such a large project.

A review of the law applicable to this matter leans heavily in favor of the Cerqua's.

An easement holder "is entitled to make only the uses reasonably necessary" for the purpose of the easement. Martin v. Simmons Props., LLC, 467 Mass. 1, 8 (2014). Put another way, "[t]he servient estate cannot be burdened to a greater extent than was contemplated or intended at the time of the grant [of the easement]..." Doody v. Spurr, 315 Mass. 129, 133 (1943); see also, Codman v. Wills, 331 Mass. 154, 158 (1954); Rigo v. Friedin, 88 Mass. App. Ct. 1119 (2016).

"The extent of an easement depends on the circumstances of its creation ... When created by conveyance, the grant or reservation 'must be construed with reference to all its terms and the then existing conditions so far as they are illuminating.'" Cannata v. Berkshire Natural

Resources, Inc., 73 Mass. App. Ct. 789, 795 (2009), *quoting*, Lowell v. Piper, 31 Mass. App. Ct. 225, 230 (1991).

To ascertain the parties' intentions at the time of the creation of the easement, courts will consider the "relevant instruments and the objective circumstances to which they refer." Cannata, 73 Mass. App. Ct. at 796-97; see also, Pion v. Dwight, 11 Mass. App. Ct. 406, 411 (1981) ("The scope of an easement, granted in general terms, has been determined by the language of the grant construed in the light of the attending circumstances"); Labounty v. Vickers, 352 Mass. 337, 344 (1967).

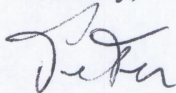
Whether the easement holder's use of the servient estate is reasonable is a question of fact. Martin, 467 Mass. at 14; Doody, 315 Mass. at 134; Labounty, 352 Mass. at 345 ("the question as to the extent and limits of a reasonable right of way... is largely one of fact"). The party asserting the benefit of an easement has the burden of proving its existence, its nature, and its extent. Martin, 467 Mass. at 10; Hamouda v. Harris, 66 Mass. App. Ct. 22, n.1 (2006).

The complication in this case is the fact that the right of way involved is defined as a "passageway". It is the Cerqua's position that such a term is limiting and places additional restrictions on the use and/or proposed expansion of the right of way.

Again, the Cerqua's ask that you consider their request as an attempt to avoid litigation and to come to a reasonable compromise before the vote.

Thank you for your consideration.

Sincerely,



Peter F. Harrington