SEAL

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss. CASE 08 MISC 378123 (HMG)

R. DAVID BLACK and
RICA V. REYES

Plaintiffs

v.

FREDERICK J. KLAETKE and
SUSAN BATTISTA

Defendants

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ORDER ALLOWING IN PART AND DENYING IN PART DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

By virtue of the instant action, the plaintiffs have moved, pursuant to Mass. R. Civ. P. 56, for summary judgment on (a) their Complaint seeking a declaration that they are the record owners of a disputed parcel of land consisting of a yard area adjacent to their home; and (b) the defendants' Counterclaim seeking a declaration that the defendants have ownership and/or easement rights over the said yard area and in a certain passageway located in the plaintiffs' basement.

For their part, the defendants have moved for partial summary judgment regarding both the record title to the disputed yard area, and the easement rights in the passageway.[1]

[1] The defendants have waived their opposition to the plaintiffs' argument that the defendants *cannot establish* title to the yard area by adverse possession or an easement in the passageway by prescription.

Predicated upon the memoranda in support of the respective motions and the evidence introduced contained in the appendices, this court concludes that the defendants possess record title to the disputed yard area. At the same time, there remain outstanding genuine issues of material fact requiring further evidentiary development at trial on the issue of the defendants' easement rights in the passageway. The issue concerning the plaintiffs' possible acquisition of title by adverse possession to the disputed yard area was not briefed on summary judgment and so must await a trial on the merits.

Background

The material facts, not subject to dispute, are as follows:

(1) By deed dated September 5, 1846 and recorded with the Suffolk Registry of Deeds (Registry) at Book 566, Page 262, the City of Boston conveyed to Amos Trott a unified parcel of land which now comprises the properties known and numbered as 22 Rutland Street and 24 Rutland Street in Boston (locus / 22 Rutland Street and / or 24 Rutland Street). App. 1.[2]

(2) A plan dated September 4, 1846 by Henry W. Watson, C.E. and S.P. Fuller, Surveyor, was recorded with the above deed (1846 Plan). The 1846 Plan depicts the locus as a rectangle divided cross-wise into thirds. Two of these thirds were designated as house lots and labeled "House No. 1" and "House No. 2." The final third was divided in half and labeled "Yard No. 1" and "Yard No. 2." House No. 2 occupied the middle third between House No. 1 and the Yards 1 and 2. App. 3.

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[2] All references to specific exhibits in the record will be in the form of "App. __" and will correspond to the combined summary judgment appendices of both parties, containing 52 exhibits numbered sequentially.

The plan also depicts two narrow strips within the labeled lots. The first strip runs along the length of the back line of House No. 2, connecting House No. 1 with Yard No. 1. The strip is labeled "Passage Way from House to Yard No. 1."

The second strip runs along the edge of House No. 2 adjoining Yard No.1. This strip is labeled "Eaves of House No. 2." App. 3. The inference to be drawn is that the 1846 Plan allocated an equal portion of the side yard to each townhouse owner, with a passageway through one townhouse, House No. 2, for the benefit of the other townhouse, House No. 1.

(3) Calculating from the 1846 Plan, we arrive at the following dimensions and area for the locus and for each of the labeled lots within the locus:

(i) Total for locus: 27.5' x 54' = 1,485 square feet

(ii) House No. 1 and House No. 2: 27.5' x 18' each = 495 square feet each

(iii) Yard No. 1 and Yard No. 2: 13.75' x 18' each = 247.5 square feet each

(iv) Eaves of House No. 2 overhanging Yard No. 1: 13.75' x 1' = 13.75 square feet

(4) House No. 1 and House No. 2 correspond to what are now the townhouse buildings located at 24 Rutland Street (House No. 1) and 22 Rutland Street (House No. 2). Yard No. 1 and Yard No. 2 correspond to the entire yard area located next to 22 Rutland Street. The Passageway corresponds to the three-foot wide passage running from 24 Rutland Street to Yard No. 1 through the basement of 22 Rutland Street. Yard No. 1 and the Passageway are the disputed areas in the instant matter.

(5) By deed dated November 14, 1849 and recorded with the Registry at Book 605, Page 144, Amos Trott conveyed House No. 1 and Yard No. 1, together with a "right of way between the two said parcels" to Enoch Robinson. App. 4. As a consequence, the properties were no longer under common ownership.

(6) By deed dated October 6, 1869 and recorded with the Registry at Book 976, Page 114, one Isaac Adams conveyed House No. 2 and Yard No. 2 to Charles Wilson. The deed specifically referenced "a right of way through the lower parts of the house about three feet wide ... to the yard of said Francis [Adams] ... for the benefit of said Francis [Adams]." App. 5. Six days later, by a deed dated October 12, 1869 and recorded with the Registry at Book 976, Page 304, Francis Adams conveyed House No. 1 and Yard No. 1, together with a right of way, to Charles Wilson. App. 6. This conveyance returned 22 Rutland Street and 24 Rutland Street to common ownership. The two properties remained under common ownership until 1980.

(7) On June 15, 1956, both parcels were conveyed to John M. Coor. App. 7.

Up to and including the conveyance to Coor, the deeds conveying ownership of 22 Rutland Street and 24 Rutland Street described the property conveyed by utilizing the 1846 Plan designations, i.e., House No. 1, House No. 2, Yard No. 1, and Yard No. 2. Moreover, those deeds recited that the properties were conveyed subject to and with the benefit of existing easements of record.

(8) On August 26, 1959, the City of Boston took both parcels for the nonpayment of property taxes that had been assessed to John M. Coor. The Instruments of Taking were recorded with the Registry on August 28, 1959 at Book 7420, Pages 537-38. Significantly, the Instruments of Taking described the parcels without reference to the house and yard designations which had originated with the 1846 Plan. The Instrument of Taking for 24 Rutland Street described the parcel as follows:

> Land, with the buildings thereon, on the southwesterly side of Rutland Street, numbered twenty-four (24) in the numbering of said Rutland Street, making the southerly corner of and numbered 454 Shawmut Avenue, adjoining another estate now or formerly of John M. Coor (numbered 22 Rutland Street) and supposed to contain about seven hundred twenty-nine (729) square feet.

> Said land is situated in Block 596 in the City District shown on the Boston Assessors' Plans of said City, filed in the office of the Board of Assessors.
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> App. 8.
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> The Instrument of Taking for 22 Rutland Street described that parcel as follows:
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> Land, with the buildings thereon, on the southwesterly side of Rutland Street, numbered twenty-two (22) and twenty-two A (22A)[3] in the numbering of said Rutland Street, between another estate now or formerly of said Coor (numbered 24) and an estate now or formerly of Albert G. Kurko, Trustee (numbered 20) and supposed to contain about seven hundred fifty-six (756) square feet.
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> Said land is situated in Block 596 in the City District shown on the Boston Assessors' Plans of said City, filed in the office of the Board of Assessors.
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> App. 9.

(9) On June 28, 1962, the Land Court entered a decree in Tax Lien Case No. 38985 against the assessed owner Coor, thereby foreclosing his rights of redemption. The decree was recorded with the Registry at Book 7664, Page 541 and contained no description of the properties other than by reference to the recorded 1959 Instruments of Taking. App. 10.

(10) By deed dated September 20, 1967 and recorded with the Registry at Book 8149, Pages 92-93, the City of Boston conveyed thirty-eight properties, including 22 Rutland Street and 24 Rutland Street, to the Boston Redevelopment Authority as part of the South End Renewal Project (BRA Deed). App. 11. The properties were identified by their Land Court Tax Lien case number (No. 38985) and by their BRA Block and Parcel numbers. No other description was provided.

(11) By virtue of an Order of Taking dated May 2, 1968 and recorded with the Registry at Book 8199, Pages 477-80, the BRA took 22 Rutland Street by eminent domain together with all

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[3] There is nothing in the summary judgment record that would explain the use of the term, "22A Rutland Street." The court assumes, therefore, that it is without significance.

appurtenant easements and rights. App. 12. By virtue of a second Order of Taking dated September 3, 1970 and recorded with the Registry at Book 8387, Pages 667-70, the BRA took 24 Rutland Street by eminent domain, together with all appurtenant easements and rights. App. 13. These Orders of Taking did not contain property descriptions, identifying the properties only by their address, BRA Block/Parcel number, and Assessor's Parcel number.

(12) By deed dated September 3, 1970 and recorded with the Registry at Book 8400, Pages 30-39, the BRA conveyed four parcels of land, including 22 Rutland Street and 24 Rutland Street to the Low Cost Housing Corporation (LCHC) for redevelopment purposes. App. 14. The parties executed a Confirmatory Deed dated November 16, 1972 and recorded with the Registry at Book 8585, Pages 331-338 which did not alter the provisions of the original deed. In both deeds, the descriptions of the parcels were identical to the descriptions appearing in the 1959 Instruments of Taking.

(13) By deed dated December 20, 1980 and recorded with the Registry at Book 9626, Page 285, LCHC conveyed the parcel located at 22 Rutland Street to John A. Perry, Jr. App. 16. On the same date, LCHC conveyed 24 Rutland Street to Derek P. Greene. App. 17. The descriptions in both deeds were identical to the descriptions appearing in the 1959 Instruments of Taking and the deed in to LCHC.

(14) The plaintiffs, the Blacks, are the current record title owners of 22 Rutland Street. They acquired title by virtue of a deed dated November 15, 1994 and recorded with the Registry at Book 19440, Page 325. App. 18. After LCHC conveyed 22 Rutland Street to John A. Perry, Jr., Perry conveyed the property to Richard K. Bacon and Gary W. Niro by a deed dated April 16, 1986 and recorded with the Registry at Book 12427, Page 343. App. 19. The description in this deed was identical to the LCHC deed and the 1959 Instrument of Taking. Thereafter, Bacon and

Niro conveyed the property to the plaintiffs. For some reason, the plaintiffs' deed description does not include the language "and supposed to contain about seven hundred fifty six (756) square feet." that had been present in all deeds to 22 Rutland Street since the 1959 Instrument of Taking. *Compare* App. 19 *with* App. 18.

(15) The defendants, the Klaetkes, are the current record title holders of 24 Rutland Street, having acquired title by virtue of a deed dated September 27, 2005 and recorded with the Registry at Book 38185, Page 247. App. 20. After LCHC conveyed 24 Rutland Street to Derek P. Greene, Greene conveyed the property to Ramlakhan Maharaj by deed dated July 30, 1986 and recorded with the Registry at Book 12718, Page 185. App. 21. Maharaj conveyed the property to Bruce Phelps and Claude Lancaster by a deed dated March 10, 1999 and recorded with the Registry at Book 23547, Page 112. App. 22. Phelps and Lancaster conveyed the property to Keith C. Bouthillier by a deed dated July 15, 2005 and recorded with the Registry at Book 37562, Page 309. App. 23. Bouthillier, in turn, conveyed the 24 Rutland Street property to the defendants. The descriptions in all of these deeds were identical to the LCHC deed and to the 1959 Instrument of Taking for 24 Rutland Street.

Summary Judgment Standard

This case comes before the Court on summary judgment. Summary judgment is to be granted when "pleadings, depositions, answers to interrogatories, and responses to requests for admission ... together with affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c). The moving party bears the burden of proving the absence of controversy over material facts and that it deserves a judgment as a matter of law. *Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 232 (1997). The substantive law which controls the outcome of the issue determines which

facts are material for purposes of summary judgment. *Hogan v. Riemer*, 35 Mass. App. Ct. 360, 364 (1993). A corollary to the moving party's burden is that the court is to "make all logically permissible inferences" from the facts in the non-moving party's favor. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991).

Mass R. Civ. P. 56(c) permits the disposition of controversies if in essence there is no real dispute as to the salient facts, such that resolution of the matter depends solely upon judicial determination of a question of law. For summary judgment to enter, the undisputed facts have to be sufficient to furnish the judge with evidence upon which the key question of law might be resolved. With respect to the root issues of whether the defendants hold record title to Yard No. 1 and an easement through the Passageway, there is no dispute as to the underlying facts. Consequently, this case is ripe for summary judgment.

Discussion

The primary question before this Court is whether the owners of 24 Rutland Street hold record title to the portion of the side yard labeled Yard No. 1 on the 1846 Plan. A secondary question, depending on the resolution of the first, is whether the owners of 24 Rutland Street hold an easement through the Passageway, and if so, for what purpose.

1. *Record Title to Yard No. 1*

Based upon the following analysis, this court concludes that the defendants, as owners of 24 Rutland Street, hold record title to Yard No. 1. "The general principle governing the interpretation of deeds is that they are to be construed so as to give effect to the intent of the parties." *Town of Stoughton v. Schredni*, 7 LCR 61, 66 (1999), citing M. Park & D. Park, Real Estate Law § 241 (2d ed. 1981). When a deed description is clear and explicit, there is no room for construction or for the admission of parol evidence to prove that the parties intended something different than what they expressed in writing and recorded in the deed language.

Cook v. Babcock, 61 Mass. (7 Cush.) 526, 528 (1851). Conversely, when a party invokes rules of construction to interpret a deed's description, the consideration of circumstances outside the express language of the deed is necessary, as the description itself is no longer sufficient to show the intent behind the conveyance. *See Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 680 (1965) (in considering a rule of construction, "the basic question remain[ed] one of ascertaining the intent of the parties as manifested by the written instrument *and the attendant circumstances*") (emphasis added).

Each party argues that the rules of deed construction warrant an interpretation that favors him or her. The relevant rules "provide a hierarchy of priorities for interpreting descriptions in a deed. Descriptions that refer to monuments control over those that use courses and distances; descriptions that refer to courses and distances control over those that use area; and descriptions by area seldom are a controlling factor." *Paull v. Kelley*, 62 Mass. App. Ct. 673, 680 (2004), citing *Holmes v. Barrett*, 269 Mass. 497, 499-500 (1929) and *Ryan v. Stavros*, 348 Mass. 251, 258-259 (1964).[4] However, an exception to this hierarchy occurs in cases "where, by strict adherence to monuments, the construction is plainly inconsistent with the intention of the parties as expressed by all the terms of the grant." *Temple v. Benson*, 213 Mass. 128, 132 (1912), citing *Davis v. Rainsford*, 17 Mass. 207, 210 (1821) (foregoing application of the rule in favor of monuments over courses and distances where the reason for the rule, that monument descriptions are less liable to mistakes, failed under the circumstances).

Adherence to a monument description may be inconsistent with the intent of the parties when the description contains a latent ambiguity. As *Temple* suggests, a latent ambiguity arises when "[o]n the face of the deed no uncertainty as to the distances or the location of the

[4] Abutter calls are statements in a deed that describe the landowner's parcel by reference to the owners of adjoining properties. *Paull*, 62 Mass. App. Ct. at 674 n.4. When a deed description contains abutter calls, the land of the adjoining property owner is considered to be a monument. *Ryan*, 348 Mass. at 259.

monuments or boundaries is disclosed, yet *upon applying the description to the land*" it is shown that the terms of the deed cannot be satisfied as written. *Id.* at 132-34 (emphasis added). In such a case, extrinsic evidence is admissible to show what distances or boundaries the terms of the deed were intended to describe. *Id.* at 134. *See also Cook*, 61 Mass. (7 Cush.) at 528 ("When ... upon application of the description to the land, it is doubtful what was intended, this is a latent ambiguity, and then [extrinsic evidence] may be given."); *Ryan*, 348 Mass. at 259 ("[I]n ascertaining the location of the 'land of Maher and Hood' the master could have found a latent contradiction in the description in the deed which permitted the use of extrinsic evidence to show what boundary the language of the deed was intended to describe.").

Here, the deeds in to both parties contain descriptions bounded by abutter calls.[5] The plaintiffs' deed locates their parcel between 20 Rutland Street and 24 Rutland Street. If so, this deed would have conveyed the townhouse and the entire side yard.

The defendants' deed locates their parcel between 22 Rutland Street and Shawmut Avenue.[6] If so, this deed would have conveyed the townhouse and none of the side yard. The plaintiffs' argue that this language is unambiguous and should, therefore, be the controlling description. However, this argument overlooks the fact the defendants' deed also contains an area call—"supposed to contain about [729 square feet]"—that, when applied to the land, is

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[5] The plaintiffs' deed describes the conveyed parcel as the "land with buildings thereon ... between another estate now or formerly of Coor (numbered 24 [Rutland Street]) and estate now or formerly of Albert G. Kurko, trustee (numbered 20)." App. 18.

The defendants' deed describes the conveyed parcel as the "land with the buildings thereon ... making the southerly corner of, and numbered, 454 Shawmut Avenue adjoining another estate now or formerly of John M. Coor (numbered 22 Rutland Street) and supposed to contain about seven hundred twenty-nine (729) square feet." App. 20.

We find it crucial to read both deeds together since the Locus was once a unified parcel and the subject properties share connected chains of title.

[6] Shawmut Avenue is shown on the 1846 Plan as Suffolk Street.

inconsistent with the square footage of the defendants' townhouse.[7] Therefore, the terms of the defendants' deed contains a latent ambiguity. As a result, the parties may introduce extrinsic evidence in order to clarify the intent behind the conveyances.

The evidence submitted by the parties provides support for the conclusion that the defendants possess record title to Yard No. 1. Most compelling are the chains of title developed once the City of Boston took both properties into Tax Title in 1959 for the nonpayment of property taxes. These Instruments of Taking replaced the historical descriptions of the properties with a new set of descriptions containing abutter calls and, significantly, complementary area calls. *Compare* App. 7 *with* App. 8 *and* App. 9, *supra*. These new descriptions appear in every deed in the respective chains of title by identical language or by reference. The exception concerns the plaintiffs' deed, where the area call "supposed to contain about [756 square feet]" is conspicuously absent, though that language appears in the deed in to the plaintiffs' predecessors. Since "it is an elementary principle of law, that a person cannot grant or convey property ... to which he has no title," *Gardner v. Hooper*, 69 Mass. (3 Gray) 398, 400 (1855), the plaintiffs' predecessors-in-title could not have conveyed more than the 756 square feet described in their deed.[8] Absent a showing that the plaintiffs' have acquired the portion of the side yard not

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[7] As noted above, the actual square footage of both townhouses on the Locus is 495 square feet. The defendants' 729-square-foot area call is satisfied by the area of their townhouse (495 sq. ft.) plus the area of Yard No. 1 (247.5 sq. ft.) minus the area of the eaves of 22 Rutland's townhouse which overhang onto Yard No. 1 (13.75 sq. ft.). App. 30, ¶ 29; *see also Ansin v. Taylor*, 262 Mass. 159, 162 (1928) (noting the "general rule of construction that the grant of a house carries with it title to all the land under the house, including the land on which the building stands and the *land under the projecting eaves*") (emphasis added). Although technically this calculation totals to 728.75 square feet, this Court is content that this calculation matches the area call in the defendants' deed.

[8] As noted above, 756 square feet corresponds to the area of the plaintiffs' townhouse (495 sq. ft.) plus Yard No. 2 (247.5 sq. ft.), plus the overhanging of the eaves of their townhouse onto Yard No. 1 (13.75 sq. ft.). *See Ansin*, 262 Mass. at 162, *supra* note 7. Despite the plaintiffs' claim, their predecessor could not have conveyed the entire side yard because they did not own it.

By comparison, had the plaintiffs' predecessor conveyed the entire side yard, the plaintiffs' would own a total area of 990 square feet, significantly more than the 756 square feet that appears throughout their chain of title.

included in the 756 square feet, the plaintiffs' cannot claim record title to Yard No. 1. No such showing has been made.[9]

Support for the notion that the defendants hold record title to Yard No. 1 derives from the property tax records pertaining to 22 Rutland Street and 24 Rutland Street. The City of Boston assessors' map shows the square footage of 22 Rutland Street and 24 Rutland Street as 756 and 729, respectively. These figures are consistent with the area calls from the 1959 Instruments of Taking. *See* App. 32 (reproducing certified copy of assessors' map, originally dated Sept. 1933, certified Aug. 20, 2009). Similarly, the City's tax assessment as of January 1, 2008 listed these same square footage amounts. App. 34. The fact that the City assesses the parcels in this manner while, by no means determinative, serves to lend support to the idea that the area calls contained in the 1959 Instruments of Taking are the intended descriptors for the properties. Therefore, based on the foregoing, this court concludes that record title to Yard No. 1 is vested in the defendants as owners of 24 Rutland Street.

2. ***Easement Rights in the Passageway***

The second question before this court on summary judgment asks whether the defendants, as owners of 24 Rutland Street, hold easement rights through the Passageway, and if so, for what purpose. As to this issue, there remain outstanding, genuine issues of material fact that require resolution at trial.

Under the law of the Commonwealth, an easement may arise by grant, prescription, estoppel, or implication. *Silverleib v. Hebshie*, 33 Mass. App. Ct. 911, 911-13 (1992).[10] Although an express easement connecting 24 Rutland Street to Yard No. 1 through the Passageway first

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9 In fact, the record reflects that prior to the initiation of this litigation, the plaintiffs' former attorney attempted to obtain a release deed to Yard No. 1 from the defendants. *See* App. 42, at ¶ 9 (reproducing Affidavit of defendant Susan Battista).

10 As noted above, the defendants have waived their claim to an easement by prescription. In addition, neither party argued an easement by estoppel.

appeared in 1849, *see* App. 4, such an easement terminated when title to 22 Rutland Street and 24 Rutland Street merged under a common ownership. *See Busalacchi v. McCabe*, 71 Mass. App. Ct. 493, 497-98 (2008), citing, *inter alia*, *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 146-50 (1851) (explaining that an easement is extinguished under the doctrine of merger when the dominant and servient estates come into common ownership because there is no practical need for the servitude's continued existence, as the common owner already has the unlimited right to make any possible use of the land); *see also* Restatement (Third) of Property (Servitudes) § 7.5 (2000).[11] In any event, the taking of the Locus by eminent domain extinguished any easement that existed before 1959. *See New Eng. Cont'l Media, Inc. v. Town of Milton*, 32 Mass. App. Ct. 374, 376 (1992) ("[A]n eminent domain taking in fee simple extinguishes all other interests in the subject property.... In particular, where an easement exists, the taking of the servient estate will destroy the easement rights of the dominant estate.") (internal citations omitted). Thus, by the time of the acquisition by LCHC, the locus was effectively wiped clear of any easements of record. If an easement through the Passageway now exists in favor of the defendants, it would have to have been created by implication from LCHC's conveyance to their successors.

An easement by implication is an oft-confused term that can refer to either an implied easement or an easement by necessity:

> While both types of easement might appropriately be described as implied—that is, implied rather than arising from an express grant—an easement by implication is a term more commonly applied to an implied grant derived from an established pattern of prior use rather than from the necessity to access a newly landlocked parcel.

Town of Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 77-78. The creation of both easements requires the severance from common ownership of the dominant and servient estates. *See, e.g.*,

[11] The two prerequisites for application of the doctrine, i.e., that the ownership interests united be (1) of indefeasible estates and (2) coextensive, *Busalacchi*, 71 Mass. App. Ct. at 498, are met here because both parcels merged in fee simple. *See* App. 5 *and* App. 6.

Boudreau v. Coleman, 29 Mass. App. Ct. 621, 628-29 (1990) (focusing on the intention of the parties at the time common ownership was first severed when determining whether an easement by implication was reserved); *Nylander v. Potter*, 423 Mass. 158, 162 (1996) (finding no easement by necessity where there was no previous common ownership). The two easements differ in the rights that each bestows upon their dominant owners after severance. For an easement by implication, it is the right of continued use; for the easement by necessity, it is the right of access.

Here, the potential easement through the Passageway falls somewhere between an easement by implication and an easement by necessity. Undoubtedly, there is a common owner (LCHC) and a severance of its common ownership of the locus (the conveyances to John A. Perry, Jr., *see* App. 16, and Derek P. Greene, *see* App. 17). However, there are unresolved issues of material fact that preclude resolution of this issue at the summary judgment phase.

In particular, with regard to an easement by implication, there are unresolved issues as to whether LCHC had established a pattern of use of the Passageway prior to severance. In addition, the issue of whether LCHC intended to convey an easement through the Passageway connecting 24 Rutland Street and Yard No.1 is a question of fact. In determining this issue, whether the use of the Passageway was both reasonably ascertainable and reasonably necessary for the enjoyment of Yard No. 1 at the time of severance are important factors. *See Cerasuolo*, 62 Mass. App. Ct. at 78 n.6; *Boudreau, supra* at 628-29; *Krinsky v. Hoffman*, 326 Mass. at 687-89 (1951).

With regard to an easement by necessity, there remain unresolved issues regarding the availability and sufficiency of alternative access to Yard No. 1 by the owner of 24 Rutland Street. The issue of the extent to which the Passageway was necessary for the convenient and

reasonable enjoyment of Yard No. 1 as it existed at the time of severance is a question of fact. *See Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285, 291 & 298-99 (2005).

For these reasons, the parties' motions for summary judgment must be denied as they relate to existence of easement rights in the Passageway.

3. ***Plaintiffs' Adverse Possession Claim as to Yard No. 1***

The plaintiffs' have attempted to include in the summary judgment record a prima facie showing of exclusive use of the entire side yard by the owners of 22 Rutland Street.[12] Such evidence is relevant only to a claim that the plaintiffs have acquired title to Yard No. 1 by adverse possession. There remain genuine issues of material fact regarding such a claim, and since the parties have not fully briefed the issue on summary judgment, this court will reserve the issue for resolution at trial. .

In view of the foregoing, it is hereby

ORDERED that the plaintiffs' Motion for Summary Judgment be, and hereby is, **DENIED** It is further

ORDERED that the defendants' Cross-Motion for Partial Summary Judgment be, and hereby is, **ALLOWED IN PART** insofar as this court determines that the defendants, as owners of 24 Rutland Street hold record title to Yard No. 1. It is further

ORDERED that the defendants' Cross-Motion for Partial Summary Judgment be, and hereby is, **DENIED IN PART** insofar as this court determines that there remain genuine issues of material fact as regards the defendants' easement rights in the Passageway. It is further

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12 *See* App. 28 (reproducing Plaintiff R. David Black's Answers to the Defendants' First Set of Interrogatories, at pp. 5-6).

ORDERED that the issue whether the plaintiffs have acquired title to Yard No. 1 by adverse possession, not briefed on summary judgment, shall await resolution pending a trial on the merits. It is further

ORDERED that a pre-trial conference shall be scheduled within thirty days.

SO ORDERED.

By the court (Grossman, J.)

H Grossman

Attest:

Deborah J. Patterson
Recorder

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Dated: March 9, 2012