NO. CV-09-4018663

CHASE & CHASE, LLC	: SUPERIOR COURT
V.	: JUDICIAL DISTRICT OF WATERBURY
WATERBURY REALTY, LLC	: MAY 20, 2011

MEMORANDUM OF DECISION

The plaintiff, Chase & Chase, LLC, brings this action against the defendants, Waterbury Realty, LLC (Waterbury Realty) and Great Brook Realty, Inc. (Great Brook Realty). The plaintiff is owner of property known as 40 East Farm Street, Waterbury, Connecticut, (East Farm property) and seeks an easement over adjacent property located on its west side known as 730 North Main Street, Waterbury, Connecticut, (North Main property) which is owned by Waterbury Realty. Great Brook Realty holds a mortgage to the North Main property and has not filed an appearance in this action.[1]

The plaintiff alleges it has an easement over a driveway on the North Main property, which leads out onto East Farm Street and abuts the west side boundary of the East Farm

[1] On July 22, 2009, the clerk granted the plaintiff's motion for default for failure to appear with respect to Great Brook Realty.

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property (East Farm Street driveway). Additionally, the plaintiff seeks an injunction ordering Waterbury Realty to remove a fence it has erected along the border of the two properties, which prohibits the plaintiff from using the East Farm Street driveway.

The plaintiff's amended complaint contains six counts. In counts one and four the plaintiff seeks injunctive relief by way of a prescriptive easement and implied easement, respectively. In counts two and three, the plaintiff seeks to quiet title to its prescriptive easement and implied easement, respectively. In count five, the plaintiff seeks injunctive relief regarding the alleged malicious erection of the fence. In count six, the plaintiff alleges a trespass. In its prayer for relief the plaintiff seeks: (1) damages; (2) an injunction requiring Waterbury Realty to remove the fencing and poles placed in the easement area and prohibiting Waterbury Realty from blocking the easement area; (3) an order declaring the plaintiff's right, title and interest to a prescriptive easement over Waterbury Realty's property; (4) an order declaring the plaintiff's right, title and interest to an implied easement over Waterbury Realty's property; and (5) such other relief as the court deems proper. On October 22, 2010, the plaintiff withdrew its claim for damages.[2]

It is Waterbury Realty's position that the plaintiff has not acquired any rights on the North Main property by way of a prescriptive or implied easement because it and its

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[2] The court considers the plaintiff's withdrawal of its claim for damages as a withdrawal of count six, which alleges trespass.

predecessors in interest have permitted the plaintiff and its predecessors to use its land for egress and ingress. Waterbury Realty now wishes to terminate the permission it previously granted the plaintiff. Additionally, it argues that it has rightfully erected a fence on the line dividing the North Main property and the East Farm property.[3]

This court agrees with the plaintiff that it and its predecessors have acquired prescriptive and implied easements over the East Farm Street driveway and that Waterbury Realty must remove the fence erected on the boundary line since it interferes with the plaintiff's easement.

FACTS

After hearing the testimony at trial and reviewing the exhibits, the court finds the following facts.

Prior to 1973, the East Farm property and the North Main property were one parcel of land owned by Great Brook Realty. Pl.'s Ex. 2 and 4. On July 5, 1973, it was subdivided into two parcels with the transfer of the East Farm property to Marktel Realty. Pl.'s Ex. 6. East Farm Street borders the East Farm property to the north. Pl.'s Ex. 1. Orange Street borders the East Farm property to the east. Pl.'s Ex. 1. The North Main property borders the East Farm property to the west. Pl.'s Ex. 1. Two buildings exist on the East Farm parcel: a large building of approximately 70,000 square feet abutting East Farm Street and Orange Street (main building)

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[3] Waterbury Realty also filed a three count counterclaim, which it withdrew just prior to trial. Waterbury Realty's post trial brief, 4 n4.

and a smaller building of 4,000 to 5,000 square feet abutting Orange Street and located in the rear of the parcel (garage). Pl.'s Ex. 1. On its west side, the main building has two loading docks and a truck ramp. Pl.'s Ex. 1. On its south side, the main building has a loading dock entry door and two overhead doors. Pl.'s Ex. 1. The owners and occupants of both properties accessed the properties from the East Farm Street driveway that runs along the west side of the main building. Pl.'s Ex. 1. The tenants, suppliers and customers of the main building use the East Farm Street driveway to access the loading docks and parking on spaces on the building's west side.

In May, 1981, Marktel Realty conveyed the East Farm property to Frank and Concetta LaPorta. Pl.'s Ex. 1. In August, 1986, the LaPortas conveyed the East Farm property to Chase Realty, a partnership. Pl.'s Ex. 8. In April, 1997, Chase Realty conveyed the East Farm property to the plaintiff, the current owner. Pl.'s Ex. 9. The plaintiff is owned and controlled by the LaPorta family, descendants Frank and Concetta LaPorta. In August 2001, Great Brook Realty conveyed the North Main property to Waterbury Realty. Pl.'s Ex. 10.

On or about February, 2009, a representative of Waterbury Realty visited the plaintiff to inform it that Waterbury Realty intended to erect a fence along the west boundary of the East Farm property. The fence would prevent all vehicular traffic to the main building. The plaintiff's attorney wrote a letter to Waterbury Realty in which she claimed the plaintiff had a prescriptive easement over the driveway. Pl.'s Ex. 12. Despite the letter, Waterbury Realty began to erect the fence. After Waterbury Realty erected the fence, the plaintiff pursued a

temporary injunction. The parties entered into a temporary agreement that has allowed the plaintiff to gain access in a limited way to the East Farm property and reserved the rights of both parties to litigate this matter. The court will discuss additional facts as necessary in its analysis of the issues.

DISCUSSION

Prescriptive Easement

The plaintiff argues that it is entitled to a prescriptive easement pursuant to General Statutes § 47-37. "[General Statutes §] 47-37 provides for the acquisition of an easement by adverse use, or prescription. That section provides: No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years. In applying that section, this court repeatedly has explained that [a] party claiming to have acquired an easement by prescription must demonstrate that the use [of the property] has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right. . . . The purpose of the open and visible requirement is to give the owner of the servient land knowledge and full opportunity to assert his own rights. . . . To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent. Open generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent. . . . An openly visible and apparent use satisfies the requirement even if the neighbors have no actual

knowledge of it. A use that is not open but is so widely known in the community that the owner should be aware of it also satisfies the requirement. . . . Concealed . . . usage cannot serve as the basis [for] a prescriptive claim because it does not put the landowner on notice." (Internal quotation marks omitted.) *Slack* v. *Greene,* 294 Conn. 418, 427-28, 984 A.2d 734 (2009).

The credible evidence presented by the plaintiff clearly establishes that the plaintiff and its predecessors in interest used this driveway to gain access to the main building over the North Main property in a way that was open, visible, continuous and uninterrupted for fifteen years and made under a claim of right. The court finds the testimony of Alan Hertzmark, George Telesco, Frank LaPorta Jr. and Douglas Beardsworth to be very credible and helpful in resolving the issues.

Based on the testimony of Hertzmark and Telesco, the court finds the following facts. Hertzmark was a principal of Marktel Realty, which acquired the East Farm property when it was subdivided in 1973. Telesco was also a principal of Marktel Realty. Telesco visited the East Farm property at least once a week and always accessed the East Farm property from the East Farm Street driveway. At the time Marktel Realty bought the property, several tenants who occupied the main building used the East Farm driveway to accept deliveries from trucks at the loading docks on the west side of the main building. The tenants and their customers parked on the west side of the main building. This use of the

East Farm driveway was continuous and uninterrupted from the time Marktel purchased the property in 1973 until it was sold to the LaPortas in 1981.

Based on the testimony of Frank LaPorta Jr., the court finds the following facts. Frank LaPorta Jr., is the son of Frank LaPorta Sr., and Concetta LaPorta. He has visited the East Farm property almost daily since 1981. Since that time, trucks, customers and tenants have gained access to the main building by using the East Farm Street driveway. Trucks have loaded and delivered goods to the docks on the west and south sides of the main building continuously until Waterbury Realty erected the fence in 2009. LaPorta not only used the East Farm Street driveway but also removed snow from it on many occasions.

Based on the testimony of Beardsworth, the court finds the following facts. Beardsworth has been a tenant of the main building since 1978. Since 1978, trucks and trailer trucks have enjoyed uninterrupted use of the East Farm Street driveway. Beardsworth, other tenants, customers and delivery vehicles use the East Farm Street driveway to access the main building. Since 1978, Beardsworth and other tenants have used the west side and south side loading docks for shipment of freight by trucks, including tractor trailers of every size.

The court finds the following. The plaintiff has established that since at least from the time Marktel Realty purchased the East Farm property in 1973, Marktel Realty, the LaPortas and their related corporations have used the East Farm Street driveway for ingress and egress to the East Farm property. Additionally, the plaintiff has established that since

1973, the owners of the East Farm property have permitted trucks of all sizes and pedestrians to use the East Farm Street driveway to gain access to the main building. The use has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right. The right to the easement ripened in 1988.[4]

Waterbury Realty argues that the plaintiff has failed to establish that it used the driveway under a claim of right since the plaintiff used the driveway unaware of the property line.

"The requirement that the [use] must be exercised under a claim of right does not necessitate proof of a claim actually made and brought to the attention of the owner . . . . It means nothing more than a [use] 'as of right,' that is, without recognition of the right of the landowner, and that phraseology more accurately describes it than to say that it must be 'under a claim of right.' . . . [When] there is no proof of an express permission from the owner of the servient estate, on the one hand, or of an express claim of right by the person or persons using the way, on the other, the character of the [use], whether adverse or permissive, can be determined as an inference from the circumstances of the parties and the nature of the [use]. . . . A trier has a wide latitude in drawing an inference that a [use] was under a

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[4] "If one party's period of use or possession is insufficient to satisfy the fifteen year requirement, that party may tack on the period of use or possession of someone who is in privity with the party, a relationship that may be established by showing a transfer of possession rights." (Internal quotation marks omitted.) *Caminis* v. *Troy*, 300 Conn. 297, 310 n.14, 12 A.3d 984 (2011).

claim of right." (Citation omitted; Internal quotation marks omitted.) *Slack* v. *Greene,* supra, 294 Conn. 418.

The court finds that whether the plaintiff knew precisely where its property line was is not important. The important evidence was that it and its predecessors in interest used the East Farm Street driveway as if they had the "right" to use it. There was no evidence that Waterbury Realty objected to the plaintiff's use of the East Farm Street driveway until 2009 when Waterbury Realty erected the fence and the plaintiff commenced this lawsuit. The court finds that the plaintiff and its predecessors in interest used the East Farm driveway under claim of right. Therefore, the court finds that the plaintiff has established by a preponderance of the evidence that the plaintiff has acquired a right of way over the East Farm driveway by adverse use and enjoyment thereof for a period of fifteen years.

Waterbury Realty argues as a special defense that it consented to the plaintiff's use of the East Farm Street driveway, which defeats the plaintiff's claim of easement by prescription. Waterbury Realty argues that the plaintiff and its predecessors accessed the East Farm Street driveway through a locked gate with the permission of Waterbury Realty and its predecessors. Waterbury Realty concedes in its brief that it has the burden to prove permission. The court finds that the defendant has not met that burden.

"[I]t is not the plaintiff's burden to establish that an otherwise apparently adverse use of the defendant's property was conducted without the defendant's permission or license. . . . When the defendant raises permission by way of a special or affirmative defense, the

burden of proof rests on the defendant . . . who must prove the special defense by a fair preponderance of the evidence. . . . Indeed, a contrary rule would unfairly charge a party with proving a negative." (Citation omitted; internal quotation marks omitted.) *Slack* v. *Greene*, supra, 294 Conn. 435.

Based on the testimony and exhibits, the court finds the following facts. Since at least the time Marktel Realty took title to the East Farm property, a locked gate existed across the East Farm driveway. Telesco testified that someone gave him a key, but he could not remember who gave it to him or who put it on the gate. Carl Begley, who from 1990 to 2005 was a tenant of Great Brook Realty and Waterbury Realty on the North Main property, testified that he once replaced the lock on his own initiative without obtaining Great Brook Realty's consent. He said that it was a security measure to keep others off the premises at night. Begley testified that he gave keys to the LaPortas and that they were favor of keeping the gate locked. The LaPortas also replaced the lock and gave keys to their tenants and others. Begley and the LaPortas testified that the last person to leave the premises at night would lock the gate and the first one to arrive in the morning would unlock the gate. Beardsworth testified that he did not know who installed the lock but that Begley and the LaPortas gave him the keys. He could not say that Great Brook Realty installed the lock.

Waterbury Realty offered the testimony of Edward Pagano, who from the mid 1980s to approximately 2002 was a tenant of Great Brook Realty on the North Main property. Pagano testified that Great Brook Realty gave him a key to the lock. Additionally, Water-

bury Realty offered the testimony of Salvatore Cascino. Cascino testified that in 2004 he installed a new lock on the gate on behalf of Waterbury Realty.

The court finds the following. Pagano's testimony does not establish that Great Brook Realty originally installed the lock. There is no credible evidence that Waterbury Realty or its predecessors in interest installed a lock before 2004, well after the plaintiff acquired its prescriptive easement. Additionally, there is no evidence that before 2004, Waterbury Realty or its predecessors in interest ever exercised any dominion over the driveway, ever gave permission to the plaintiff to use the driveway or ever told the plaintiff that it could not use the driveway. The tenants on the North Main property and the LaPortas purchased the locks. All of the tenants were given keys to the lock because the purpose of the lock was to keep trespassers off both properties at night.

Implied Easement

The plaintiff also argues that it has an easement by implication. "The law adopted in this state regarding the creation of easements by implication is well established. Where ... an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership ... there arises by implication of law a grant or reservation of the right to continue such use. . . . Further, in so far as necessity is significant it is sufficient if the easement is highly convenient and beneficial for the enjoyment of the portion granted.... The reason that absolute necessity is

not essential is because fundamentally such a grant by implication depends on the intention of the parties as shown by the instrument and the situation with reference to the instrument, and it is not strictly the necessity for a right of way that creates it. . . .

"The two principal elements we examine in determining whether an easement by implication has arisen are (1) the intention of the parties, and (2) if the easement is reasonably necessary for the use and normal enjoyment of the dominant estate. . . . The intent of the grantor to create an easement may be inferred from an examination of the deed, maps and recorded instruments introduced as evidence. . . . A court will recognize the expressed intention of the parties to a deed or other conveyance and construe it to effectuate the intent of the parties. . . . In doing so, it always is permissible to consider the circumstances of the parties connected with the transaction. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity." (Citations omitted.) *Utay* v. *G.C.S. Realty, LLC*, 72 Conn. App. 630, 636-37, 806 A.2d 573 (2002).

In cases where the deeds contain neither a mention of an easement nor a reference to any document from which an easement might be implied, "we must look beyond the deeds to determine whether there exists an easement by implication." *Sanders* v. *Dias*, 108 Conn. App. 283, 291, 947 A.2d 1026 (2008). An implied easement may be found despite the absence of documents showing the intent of the grantor. See id., 293-94.

"[A]lthough there exists a similarity between an easement by necessity and an easement by implication . . . these easements are not identical: The difference between the two types of easements is that an easement by necessity requires the party's parcel to be landlocked, and an easement by implication does not require that the parcel be landlocked." (Citation omitted; internal quotation marks omitted.) Id., 289.

Based on the testimony and exhibits the court finds the following facts. The map of the subdivision does not show an easement. Pl.'s Ex. 2 and 3. When Great Brook Realty subdivided the original property and conveyed the East Farm property to Marktel Realty, the main building existed. The only access to the main building was from the East Farm driveway. Both Hertzmark and Telesco testified that before and after the subdivision the tenants of the main building used the East Farm Street driveway to access the East Farm property. Cars, trucks, and customers of these tenants used the East Farm Street driveway to access the main building and its loading docks. This use of the East Farm Street driveway continues to this day.

The court finds the plaintiff has proven the necessary elements for an implied easement. The court finds that it was the intent of the grantor, Great Brook Realty, to create an easement for the use of the East Farm Street driveway at the time of the subdivision. Additionally, the court finds that the easement was reasonably necessary for the use and normal enjoyment of the East Farm property. Then, as is currently the situation, the only way vehicles could access the main building was to use the East Farm Street driveway.

Great Brook Realty must have intended an easement for the use of the East Farm Street driveway so the East Farm property tenants, customers and new owner could continue to access the main building.

Waterbury Realty argues that the plaintiff has significant frontage on both East Farm Street and Orange Street and therefore the plaintiff cannot establish that it had no other means of access to the East Farm property other than the East Farm driveway. The court does not agree. Absolute necessity is not essential, because a grant by implication depends on the intention of the parties at the time of the subdivision. As previously discussed, the court finds that the intentions of the parties at the time of the subdivision was for the current tenants, customers and new owner to continue to use the East Farm Street driveway as they had always done.

Additionally, Waterbury Realty argues that the plaintiff failed to establish that easement is reasonably necessary for the use and normal enjoyment of its property. The defendant argues that the plaintiff could access the East Farm property using a small area between the main building and the garage on the east side of the East Farm property abutting Orange Street.

Based on the testimony and the exhibits, the court finds the following facts. The Orange Street roadway at the small area between the main building and the garage is at least ten feet above the grade of the East Farm property. To access the East Farm property from Orange Street it is necessary for the plaintiff to construct a steep ramp with a 5 to 6 percent

grade. WB67 tractor trailer trucks would not be able to use such a ramp. The construction of the ramp would eliminate some of the use of delivery entrances on the south side of the main building. Additionally, Orange Street is narrower than East Farm Street so it would be unsafe for trucks to make the turns onto Orange Street. Moreover, all of the loading docks on the west side of the main building would be inaccessible from an access point on Orange Street.

The court finds that all of these handicaps substantiates the court's finding that at the time of the subdivision the parties presumed an easement over the East Farm Street driveway because the easement was reasonably necessary for the use and normal enjoyment of the East Farm property.

Scope of the Easement

"A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." (Internal quotation marks omitted.) *Schulz* v. *Syvertsen,* 219 Conn. 81, 92, 591 A.2d 804 (1991). "A right of way must be defined in terms of its boundaries with reasonable certainty. . . . If the trial court cannot determine the bounds to a reasonable degree of certainty, a judgment for a prescriptive easement is invalid." (Citations omitted.) *Wadsworth* v. *Zahariades*, 1 Conn. App. 373, 377, 472 A.2d 29 (1984). "[T]he right of a plaintiff to recover is limited by the allegations of the complaint . . . and any judgment should conform to the pleadings, the issues and the prayers for relief." (Internal quotation

marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, 261 Conn. 673, 686, 804 A.2d 823 (2002).

Waterbury Realty argues that the plaintiff in its complaint alleges an easement 28 feet wide running the entire length of the plaintiff's property line, but at trial claimed that it was entitled to an easement over a much larger strip of land. Waterbury Realty argues that the plaintiff failed to establish the exact bounds that it has continuously used for the last fifteen years. The court disagrees with Waterbury Realty.

The court finds the following facts. The plaintiff in its complaint alleged an easement "approximately 28' wide." Plaintiff's exhibit 1 is a surveyor's map titled "Map Showing Historic Truck Access Off of East Farm Street." It shows the historic access area over the East Farm Street driveway, which varies in width, but is approximately 28 feet in width. Frank LaPorta testified that exhibit 1 accurately depicted the easement area that the owners and tenants of the East Farm property used. Therefore, the court finds that the scope of the easement is the area on plaintiff's exhibit 1 labeled "historic access area", and as legally described in plaintiff's exhibit 1A.

Malicious Erection of the Fence

The plaintiff has withdrawn all claims for monetary damages under general statutes § 52-570, but seeks a permanent injunction that orders Waterbury Realty to remove the fence and prevents the construction of a fence or any other obstructions in the future under general statutes § 52-480.

Section 52-480 provides: "Injunction against malicious erection of structure. An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

Section 52-570 provides: "Action for malicious erection of structure. An action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land."

"The Connecticut progenitor of what have commonly been called the 'spite fence' cases appears to be *Whitlock* v. *Uhle*, 75 Conn. 423, 53 A. 891 (1903). . . . In *Whitlock* v. *Uhle*, supra, 75 Conn. 426, our Supreme Court construed and applied the predecessors to General Statutes §§ 52-480 and 52-570 and set forth the elements necessary to state a cause of action under §§ 52-480 and 52-570." *Jackson* v. *Lee*, 51 Conn. Sup. 399, 416-17, 996 A.2d 762 (2009), aff'd, 121 Conn. App. 375, 996 A.2d 302 (2010). These elements were restated in *Rapuano* v. *Ames*, 21 Conn. Sup. 110, 111, 145 A.2d 384 (1958) as "(1) A structure erected on the owner's (defendant's) land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure [is] useless to the defendant; (6) the enjoyment of the adjacent landowner's

land [is] in fact impaired." Our courts continue to apply these elements in malicious erection actions. e.g. *Jackson* v. *Lee*, supra, 417; *Palladino* v. *Pellini*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 04 0199821, (February 2, 2005, *Wilson*, *J.*). "Whether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it." *DeCecco* v. *Beach*, 174 Conn. 29, 32, 381 A.2d 543 (1977).

The court finds that the plaintiff has proven the necessary elements under § 52-480. First, the court finds that Waterbury Realty erected a fence on the North Main property which was useless to it. Waterbury Realty argues that it erected the fence to block the plaintiff's use of the main building's south loading dock, which would obstruct access to the North Main property and negatively impact Waterbury Realty's $2,000,000 worth of improvements to the North Main property. The court rejects Waterbury Realty's argument. It has produced no credible evidence that the plaintiff and its tenants' use of the loading docks had any negative impact on the proposed development of the North Main property.

Second, the court finds that Waterbury Realty erected the fence with the intention to injure the enjoyment of the plaintiff's East Farm property. Judging from the fence's character, location and use, the only purpose that the fence serves is to block the plaintiff's use of its loading docks. As previously mentioned, the court finds that the fence is of no use to Waterbury Realty. When the plaintiff became aware of Waterbury Realty's intention to construct the fence, the plaintiff, through its attorney, sent a letter to Waterbury Realty

informing Waterbury Realty of its claim of prescriptive easement. Pl.'s Ex. 12. Despite the letter, Waterbury Realty proceeded to install the fence. Waterbury Realty's installation of the fence to obstruct the plaintiff's use of its property was not justified and was malicious.

Third, the court finds that the erection of the fence has impaired the plaintiff's use of its East Farm property and its value because the fence prohibits the plaintiff, its tenants and their customers from accessing the loading docks of the main building.

Judgment

The court finds that the plaintiff has proved all of the allegations contained in counts one through five of the complaint[5]. The court therefore renders judgment on counts one through five of the amended complaint against all defendants declaring that the plaintiff has a legal right and title to the use and enjoyment of the easement as described and shown on plaintiff's exhibit 1 as "historic access area", and legally described in plaintiff's exhibit 1A. The plaintiffs use of said easement shall include the right to pass and repass and to maneuver and park trucks including trailer trucks within said easement while using the loading docks all as shown on plaintiff's exhibit 1. The court will grant a permanent injunction barring the defendants from constructing any obstacle that would interfere with the plaintiff's use and enjoyment of said easement. The court will order that the defendant Waterbury Realty at its own cost and expense to remove the fence that it constructed on the boundary

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[5]As mentioned, the court will consider Count 6 to have been withdrawn.

of the North Main and East Farm properties and restore the East Farm Street driveway to its former condition in the area where the fence was constructed.

Judgment will enter accordingly.

PELLEGRINO, JTR