Jeffrey DOUCETTE et al.

v.

Andrew BURNHAM.

No. CV0744007490.

Superior Court of Connecticut, Judicial District of New Haven.

August 2, 2007

MARK H. TAYLOR, Judge.

I. BACKGROUND

This action was initiated by an application for a temporary injunction, filed on April 19, 2007, by the plaintiffs, Jeffery and Angela Doucette. Instead of hearing the temporary injunction as a preliminary matter, a final hearing on the merits of the case was scheduled before the court on June 14, 2007. By agreement of the parties, an amended complaint, dated June 14, 2007, was filed at the time of trial, wherein the Doucettes sought a declaration of the rights of the parties to ingress and egress over certain land in dispute in this case as well as injunctive relief. The defendant, Andrew Burnham, simultaneously filed a counterclaim to quiet title and to declare the rights of the parties.

II. FACTS

A. Brief History

The Doucettes own a home located at 23 Carl Street in Meriden, Connecticut. They live in their home with their two minor children as well as Angela Doucette's father. It is a small home with a screened-in porch on one side and a breezeway leading to a garage in the rear of the property. The house is only a few feet from the western boundary of the property. The eastern edge of the property abuts Burnham's land and is approximately nine feet from the house. Three mature trees stand within this area between the house and Burnham's land. The Doucettes' garage is located in the rear of their property, the entrance to which faces toward Burnham's land.

Burnham's land also borders on Carl Street, is undeveloped and is wholly within a residential zone designated as Francis Street on a map filed with the Meriden Town Clerk, dated June 5, 1939. Both properties measure fifty feet by one hundred feet, consistent with many other lots in this residential area.

Since the Doucettes' home was built in 1932, [1] the only reasonable ingress and egress to and from their garage has been accomplished by traversing Burnham's land on Francis Street, a " paper street" lot. Prior to bringing this action for relief, access to the garage was over a gravel driveway which was conspicuous and obvious to both parties and highly convenient and beneficial to the Doucettes under the circumstances of this case.

Prior to the dispute between the parties, Jeffrey Doucette maintained Burnham's land on Francis Street. He has trimmed the trees, removed leaves, seeded, fertilized and mowed the lawn, plowed the snow, and added processed stone to the already existing driveway. For many years, the driveway serving the Doucettes' property has entered from Carl Street, utilized a large portion of Francis Street, and then turned left to approach their garage. Over many years, Burnham's land on Francis Street has been used by the Doucettes and others in the neighborhood for parking cars and as an area to walk, play, and ride bicycles.

The Doucettes' garage is located at the rear of their residential lot and faces Burnham's land on Francis Street in a manner that is consistent with a corner lot. Although the strip of land between the Doucettes' residence and Burnham's land on Francis Street is sufficiently wide for the Doucettes to build a driveway on their own land from Carl Street, reasonable access to their garage is thwarted by the position of the garage, as it faces Francis Street and would have to be moved to accommodate access on their own land from Carl Street. Access from Carl Street is further thwarted along this strip of land by three mature trees that would have to be removed to accommodate such a driveway.

During the winter and spring of 2004, Burnham entered his land to clear trees, remove stumps and grade the land. This was done as a part of a larger site development plan for a large commercial parcel owned by Burnham behind the Doucettes' home and the disputed area. After the completion of this commercial development, Burnham sold the commercial property and retained the only remaining portion of Francis Street, which is the fifty by one hundred foot piece of land in the residential zone, adjacent to the Doucettes' home. During this period of commercial development, the Doucettes' access to their garage over the existing gravel driveway was undisturbed.

During the fall of 2005, Burnham informed the Doucettes that they were no longer permitted to use his Francis Street land for any purpose other than ingress and egress to their garage and that he planned to build a home on the property for a motorcycle gang. This began an ongoing dispute between the parties, including Burnham calling the police in the summer of 2006 to complain of trespassers on his property during a tag sale held by the Doucettes. Burnham also testified that he has been concerned about liability for any injuries that might occur on his property and so he received a permit to build a

fence to protect his interest in the property. By the spring of 2007, the relationship between the parties had seriously deteriorated. Jeffrey Doucette was regularly photographing and filming Burnham's activity on the disputed property, especially after Burnham made a unilateral decision to reconstruct the Doucettes' driveway across his land on Francis Street.

Burnham built this new driveway on the disputed property pursuant to a permit obtained from the city of Meriden and it is constructed in a manner that is consistent with other driveways in the neighborhood. It is a gravel driveway, approximately eight feet wide, extending from Carl Street to the Doucettes' garage. Instead of bisecting Burnham's lot, as it had in the past, the new driveway follows the shared border of the parties' property and is delineated on Burnham's side of the driveway by a berm made of earth, boulders and bushes, blocking any further encroachment onto Burnham's land. Burnham testified that he constructed the berm instead of building a fence to enhance the appearance of the land. The new driveway prevents the Doucettes from accessing their garage over their former driveway, which had provided them with a more generous approach to their garage. Although the new driveway is improved by landscaping, it is far narrower than the original driveway and is constructed in a manner and location that limits the turning radius allowed for access to the garage. In particular, Jeffrey Doucette testified that he is unable to properly park his large pick-up truck in front of his garage, and to otherwise approach his garage and back out of the driveway in a manner consistent with the access he previously had from Burnham's land on Francis Street. Although Jeffrey Doucette testified that adding four feet to the width of the driveway would allow him reasonable access to his property, he seeks the right of access over Burnham's land on Francis Street in the same manner as he would have if it were a road.

B. Chain of Title

The parties filed a stipulation, dated June 14, 2007, containing an agreement to certain, limited facts along with a full history of the chains of title, deeds and maps relevant to these properties. Plaintiffs' Exhibit 1. The court will summarize these facts, as follows: The Doucettes have lived at 23 Carl Street since 1996, when Jeffrey Doucette's mother purchased the property. Jeffrey Doucette became a joint owner of the property in 2002 and his wife, Angela, became a joint owner in 2003. The 2003 deed to the Doucettes refers specifically to Francis Street and a subdivision map No. 388, filed on the Meriden Land Records.[2] The legal description of the Doucettes' property is as follows: " All that certain piece or parcel of land, together with all the buildings and improvements thereon, situated in the City of Meriden, County of New Haven and State of Connecticut, known as 23 Carl Street, and shown as Lot No. 22 on ' Map Showing Property of Peter B. And Robert S. Bradley, West of the Railroad Track at Meriden, Connecticut, made by H.E. Daggett, Civil Engineer, as revised February 28, 1939' ... Said premises are also shown on a map entitled ' Map, dated June 5, 1939, showing location of certain lots originally shown on Map of Bradley Park West of R.R. Track Meriden, Conn. April 1923 Scale 1" = 100, ' H.E. Daggett Civil Engineer, Meriden, Conn. (Several Revisions of Original Map) (Last Revised Feb. 28, 1939)' on file in the Office of the Meriden Town Clerk as Map No. 388 said lot being shown as Carl L. Siino # 22." Plaintiff's Exhibit 1.

Francis Street is a " paper street" and has not been accepted as a public road by the city of Meriden nor has it been developed as a private road. This paper street area abuts Carl Street to the south, the property of the Doucettes to the west, and the property of James' family on the east. The Doucettes' property abuts the western edge of Francis Street and James' property abuts the eastern edge of the paper street.

A copy of Map 388 is Plaintiffs' Exhibit 2. The original map was filed on the Meriden Land Records in 1939 and sets forth the subdivision plan surrounding Francis Street. In 1939, the Francis Street area now in dispute in the present case, as well as the Doucettes' property, was part of a larger parcel owned jointly by two brothers named Bradley. The Doucettes' property was made into a lot out of this larger parcel of land, and it was originally sold to Carl Siino in 1939. His deed referred to Francis Street as the eastern boundary of the property, and specifically mentioned the 1939 subdivision map. All subsequent transfers of 23 Carl Street also referred to the lot as bordering Francis Street on the east and have specifically referenced subdivision Map No. 388 on the Meriden Land Records, which had been filed shortly after the Siino purchase.

Burnham is the owner of the fee interest in the disputed property; namely, the fifty by one hundred foot parcel located at the south end of Francis Street where it abuts Carl Street. Burnham's limited liability company, Kabur LLC, became the owner of a much larger parcel, which included the Francis Street parcel, in December 2003. His company then subdivided the property. It sold the much larger portion of the property situated to the north to a self-storage company, leaving the southern portion of Francis Street as a separate parcel abutting the Doucettes' property. Kabur LLC then transferred this fifty by one hundred foot portion of Francis Street to Burnham, personally.

The legal description of Burnham's property is as follows: " All that certain piece or parcel of land together with all improvements thereon, situated in the Town of Meriden, County of New Haven and State of Connecticut shown on a map entitled ' Map of Survey Showing Individual Properties to be Acquired by Kabur, L.L.C., Lying South of West Main Street East of Centennial Avenue and North of Carl Street Meriden, Connecticut Scale 1' = 50 ft.-15 May 2003, ' prepared by Bascom

Magnotta, Inc., Surveying and Engineering Consultants Durham, Conn ... Being a portion of " Parcel C" described in a quitclaim deed from Edward J. Barillaro a/k/a Edward Barillaro and Bette Jane Burnham a/k/a Bette-Jane Burnham to Kabur, LLC dated December 15, 2003 and recorded December 18, 2003 in Volume 3224 at Pages 185-90 of the Meriden Land Records." Plaintiffs' Exhibit 1.

The deed from Sandra Doucette to Jeffrey and Angela Doucette is dated August 29, 2003, and refers to their property as bordering " on proposed Street, known as Francis Street, as shown on said map, 100 feet." The deed specifically refers to a 1939 subdivision map. The Doucettes' property is described as A LOT No. 22 on ' Map Showing Property of Peter B. And Robert S. Bradley, west of the Railroad Track at Meriden, Connecticut, made by H.E. Daggett, Civil Engineer, as revised February 28, 1939. The deed specifically refers to Map No. 388 on file with the Meriden Town Clerk. The 1939 map depicts Francis Street, along with the other nearby streets, identifies the parcel as the one first transferred to Carl Siino in 1939 as Lot 22, and clearly depicts the Doucettes' parcel as a corner lot bounded on the south by Carl Street and on the east by Francis Street. Similarly, the deeds of the Doucettes' predecessors in title all described the property as bordering on Francis Street to the east, and all refer to the subdivision map of the Bradley property last revised on February 28, 1939, by H.E. Daggett.

Burnham's title history also reflects the existence of Francis Street as a paper street. As noted above, in the 1930s, Burnham's property and the Doucettes' property were part of the same parcel owned by Robert S. Bradley and Peter B. Bradley. The Doucettes' parcel was transferred out first in 1939. The area of Francis Street now owned by Burnham was transferred in 1941 as part of the transfer of numerous parcels to Bradley Park Development, Inc. The property remained in the name of Bradley Park Development, Inc. until 1991, when an approximately 600' long portion of Francis Street was transferred to Edward Barillaro. The 1991 deed to Barillaro depicts the Doucettes' (formerly Gollnick) property as abutting Francis Street, and references an April 30, 1991 map of Francis Street. The 1991 map specifically states that the Francis Street area set forth in the 1991 map is not a building lot. Also, the 1991 map specifically references the 1939 subdivision map No. 388, which as noted earlier, depicts the Doucettes' parcel as a corner lot bounded by Carl Street and Francis Street.

In December 2003, Edward J. Barillaro transferred his large parcel of property to Kabur LLC, Burnham's company, including the approximately 600' stretch of Francis Street. The deed (PARCEL C) includes a property description referencing a May 2003 map by Bascom Magnotta. The May 2003 map depicts and labels the area known as Francis Street. In the notes and reference section, it specifically refers to Map 388, and notes in the highways section that Francis Street was not improved, and that only the northern portion had been accepted and abandoned by the City. The map specifically depicts the Doucettes' driveway as it existed at the time (substantially larger than the current driveway after reduction by Burnham), and acknowledged that the disputed portion of Francis Street may be subject to the rights of the Doucettes.

In December 2004, Kabur LLC split the disputed fifty by one hundred foot section of Francis Street off from the larger parcel. The larger parcel containing most of Francis Street was transferred to Connecticut Self Storage of Meriden, LLC. The deed to Connecticut Self Storage, signed by Burnham, refers to the 1939 subdivision map No. 388, and notes that the property may be subject to the possible rights of others to Francis Street. The deed also references a December 14, 2004 map by Kratzerts-Jones & Associates. That map depicts Francis Street, shows the Doucettes' existing gravel driveway as covering a large portion of Francis Street, and includes a reference to Map 388, the 1939 subdivision map. In the upper left corner, the map notes that the area of Francis Street just north of the fifty by one hundred foot portion in dispute in this case was " subject to rights of others, if any, in and to Edward and Francis Streets, which were paper streets as shown on a map entitled " Map dated June 5, 1939 ..." The notes also indicate a possible right of way in favor of the Doucettes and the James family. Plaintiffs' Exhibit 1.

The remaining fifty by one hundred foot portion of Francis Street that was not included in the transfer to Connecticut Self Storage was transferred to Burnham, personally. This deed, also signed by Burnham, describes the entire parcel that was transferred earlier to Kabur LLC, and then excludes from the property being transferred, the larger piece of land transferred to Connecticut Self Storage. This deed to Burnham references both the 2003 Bascom Magnotta map and the 2004 Kratzerts-Jones map discussed above, which include multiple references to Francis Street, the subdivision map, and the rights of the Doucettes in the paper street.

III. DISCUSSION

A. Easement Implied By A Map

The issue of whether a map creates an easement by implication is a question of law. See *Stankiewicz v. Miami Beach Assn., Inc.,* 191 Conn. 165, 170, 464 A.2d 26 (1983). " [T]he law is well settled that where an owner of land causes a map to be made of it upon which are delineated separate lots and streets and highways by which access may be had to them, and then sells the lots, referring in his conveyances to the map, the lot owners acquire the right to have the streets and highways thereafter kept open for use in connection with their lands." *Whitton v. Clark,* 112 Conn. 28, 32, 151 A. 305

(1930). See 1 Restatement (Third), Property, Servitudes § 2.13, p. 172 (2000). " This is so even if at the time of the lot transfer the delineated roadways are not developed." *Stankiewicz v. Miami Beach Assn., Inc., supra,* 191 Conn. at 169, citing *Lake Garcia Co. v. D'Arche,* 135 Conn. 449, 66 A.2d 120 (1949).

The Supreme Court has " identified two theories under which a map may imply an easement: first, under an equitable estoppel theory, an implied easement exists in a lot owner when the owner reasonably anticipated the use of the streets disclosed on the map that would prove beneficial to him ... and, second, a lot owner may acquire an implied easement by virtue of a map under an implied covenant theory, if the [anticipated] use served as an inducement to the purchase of the lot ... Thus, we have not required a showing that such an easement is necessary in order for the implication of its existence to arise. Instead, we have stated that 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 ... In keeping with these principles, in determining whether an easement by implication has arisen, we examine: (1) the intention of the parties, and (2) [whether] the easement is reasonably necessary for the use and *normal enjoyment* of the dominant estate ..." (Citations omitted; emphasis in original; internal quotation marks omitted.) *McBurney v. Cirillo,* 276 Conn. 782, 799-800, 889 A.2d 759 (2006).

The genesis of the titles to these two parcels of land involved a common owner in the 1930s. All of the deeds in the chains of title to these properties refer to maps showing Burnham's land to be within an area shown as Francis Street. Although the Doucettes' deed specifically refers to Map 388, filed in 1939, Burnham's land was transferred from the common owner much later in time. Therefore, his deed and other deeds in his chain of title generally refer to more recent maps. However, all of the relevant deeds in Burnham's chain of title refer to maps showing his land to be within Francis Street and these maps include references to Map 388, the same 1939 map referred to in the Doucettes' chain of title.

Although the Doucettes could have access to their garage over their own property by removing three trees and repositioning or restructuring the building, access to their garage over the disputed parcel is highly convenient and beneficial to the Doucettes for the normal enjoyment of their land. *Id.* Therefore, based upon a review of the maps and deeds entered into evidence, as well as the circumstances giving rise to the easement in this case, the court finds that the Doucettes have an implied easement for ingress and egress to their garage over Burnham's land on Francis Street. Although the existence of this implied easement is not strenuously disputed by Burnham, either in his legal arguments to the court or through his act of providing limited access to the Doucettes' garage by reconfiguring their driveway over his own land, the parties vigorously dispute the scope of the implied easement to which the Doucettes are legally entitled.

B. Scope of the Easement

The court must determine the appropriate manner in which to determine the scope of this appurtenant easement, implied by reference to Map 388. This case presents an unusual set of facts in that most " paper road" cases involve back lots where access over the paper street is absolutely necessary or, alternatively, where there are multiple means of access available to the dominant estate. In this case, the theory of absolute necessity does not apply and, similarly, since there is no other reasonable access to the Doucettes' garage, cases involving multiple means of access do not specifically apply. Therefore, the court must review the underlying principals for the interpretation of the scope of easements and, in particular, the principals applicable to easements arising by implication from maps.

The case of *Whitton v. Clark, supra,* 112 Conn. at 28, is uniformly cited in Connecticut cases involving easements implied by maps. In *Whitton,* Justice Maltbie authored the unanimous opinion of the court that set forth the general considerations for the establishment and the scope of an implied easement arising from a map or recorded plan. " The courts are in decided conflict as to the extent to which any lot owner can claim that the streets plotted upon the map must remain subject to be opened for use. Some courts hold that he has a right to require this as to all streets plotted on the map ... Others restrict his right to such streets or parts of streets as give him access to some other public way ... Where the owner of village property makes and publishes a map of it, with streets distinctly delineated, and then sells lots bounded on these streets, he comes under obligation to his vendees to open the streets to the public; the precise extent of the obligation being dependent on the particular circumstances of the case. While thus we accept the principle that the right of a lot owner does not extend of necessity to all the streets in the tract delineated upon the map, we have not in that case or elsewhere attempted to fix the limits of his right. On the one hand, to restrict that right to such streets as will give him access to some other public way is to take too narrow a view, for it must fairly be assumed that he bought his lot in reliance upon the situation disclosed upon the map so far as it would be beneficial to him. On the other hand, to give to every lot owner in the tract the right to demand that every portion of a street delineated upon it shall be held subject to a future use for highway purposes, no matter how remote it may be from his premises, and how clear it may be that it will never be of any value to him, is to adopt a doctrine calculated to lay a dead hand upon the natural use,

development, and sale of property as the needs of a community may develop. This public policy forbids. If the doctrine in question be rested upon estoppel ... there is no sound reason to extend it as regards any lot owner to include streets which in any situation reasonably to be anticipated would not prove beneficial to him and from the deprivation of which he would suffer no injury ... Or, if it be rested upon an implied covenant, as is sometimes stated, there is no occasion to extend that covenant beyond a situation which could in reason have furnished an inducement to the purchase of the lot because of some benefit to accrue to it. In *Pearson v. Allen,* 151 Mass. 79, 81, 23 N.E. 731, the court, speaking by Holmes, J., states that the fact that the particular street did not lead to a highway and that the lot in question did not abut upon it would not in themselves be conclusive against a right to have it left open for use, but in that case the right was denied because no benefit could be shown which the court could recognize as having a value." (Citations omitted; internal quotation marks omitted.) *Whitton v. Clark, supra,* 112 Conn. at 32-34.

Justice Borden considers Connecticut as adopting a broad view of the scope of easements originating with maps. " The Connecticut view, or the broad view, that a grantee to whom a conveyance is made by reference to a map or plat acquires a private right, or easement, in a park or other open area delineated on such map or plat, is followed in numerous jurisdictions ... One court has explained that the policy reason underlying this broad view is to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated ... [The Supreme Court] has implicitly relied on similar reasoning in articulating the rule ... [The Supreme Court's] analysis of the map that was at issue in *Pierce v. Roberts* ... serves as an illustration of this principle. In that case, [the Court] noted that use of the area designated as ' [p]ark' on the map was so prominent and attractive a feature of the individual lots that such use was essential to the completeness of those lots ..." (Citations omitted; internal quotation marks omitted.) *McBurney v.. Cirillo, supra,* 276 Conn. at 803-04. In Connecticut, therefore, some benefit to the dominant estate must be found to exist in order to extend an implied easement to a particular area on a map.

American Jurisprudence, Second Edition, describes the " broad view" of easements implied from maps in slightly broader terms than is described by Justice Borden in *McBurney.* " Under the broad view adopted by some jurisdictions, the grantee acquires a private right ... to the use of all the streets and alleys delineated on the map or plat. Other jurisdictions support the intermediate view, referred to as the beneficial or the complete enjoyment rule, that the extent of the grantee's private right of user in streets or alleys shown on the map or plat is limited to such as are reasonably or materially beneficial to the grantee and of which the deprivation would reduce the value of his or her lot. Still other jurisdictions adhere to the narrow view, sometimes referred to as the necessary rule, that the private right of user accruing to the grantee in the streets and alleys referred to in the map or plat is limited to the abutting street and such others as are necessary to give him access to a public highway." (Internal quotation marks omitted.) 25 Am.Jur.2d 520, Easements and Licenses § 21 (2004). Therefore, it appears that the rule in Connecticut lies closer to the broad view than to the intermediate view, at least as described by American Jurisprudence, Second Edition. Although some benefit to the dominant estate must be shown in Connecticut to establish the right to an easement implied from a map, generally, the easement itself is not " limited to such as [is] reasonably or materially beneficial to the grantee." *Id.*

C. Facts Relating to the Scope of Easements

" The determination of the scope of an easement is a question of fact." *Strollo v. Iannantuoni,* 53 Conn.App. 658, 659, 734 A.2d 144, cert. denied, 250 Conn. 924, 738 A.2d 662 (1999) (easement of necessity for landlocked parcel); *Reynolds v. Soffer,* 190 Conn. 184, 190, 459 A.2d 1027 (1983) (the scope of a prescriptive easement is a question of fact); *Gioielli v. Mallard Cove Condominium Assn., Inc.,* 37 Conn.App. 822, 833, 658 A.2d 134 (1995) (question of what constitutes a reasonable use of a prescriptive easement is question of fact); *Everett v. Pabilonia,* 11 Conn.App. 171, 177, 526 A.2d 543 (1987) (determination of the scope of a prescriptive easement is a question of fact); *Pender v. Matranga,* 58 Conn.App. 19, 23, 752 A.2d 77 (2000) (determination of the scope of an express easement is a question of fact).

Burnham claims that the scope of the easement in this case is a question of fact to be determined by the court. In making this claim, Burnham seeks to limit the location of the easement to one that is reasonably necessary for ingress and egress, the so-called intermediate view of easements implied by a map. However, the location of the new driveway advocated, and now imposed, by Burnham is inconsistent with the historical use of the easement and inconsistent with the broader metes and bounds description of Francis Street as indicated on Map 388. Limiting the location of the easement to the new driveway would require the court's judgment as to the reasonable and beneficial use that should be permitted under the current facts and circumstances of this case.

The court does not believe that this is the proper analysis required under Connecticut law. It is quite different from determining the scope of the easement, based upon the intent of the original grantor of the implied easement, based upon the maps, deeds and circumstances of the particular case. Although Burnham's proposed approach involves fact finding, it will lead to the court substituting its own judgment of the reasonable,

current purpose of the easement for that of the original purpose of the easement, based upon a factual determination of the original intentions of the grantor and the historical uses and circumstances of the property. Connecticut appears to take a broader view of maps implied by easements.

Burnham cites *Bolan v. Avalon Farms Property Owners Assn., Inc.,* 250 Conn. 135, 735 A.2d 798 (1999), for the proposition that the scope of an implied easement is a question of fact to be determined by the trial court. In *Bolan,* the case was " remanded for a new trial limited to a determination of the extent and nature of the plaintiff's easement." *Id.,* at 147. The court did so because the trial court did not reach this critical issue because it found that there was no enforceable easement due to the unity of title doctrine. The Supreme Court reversed the trial court after holding that the unity of title doctrine should be abandoned. Therefore, the case is not especially elucidating regarding the nature of the factual inquiry to be conducted by the trial court in this case.

The *Bolan* case involved a contested easement, implied from a map, for access to a landlocked parcel. On the one hand, the easement arose from a map. On the other hand, the easement appears to have involved absolute necessity. In reciting the law applicable to the determination of an easement in *Bolan,* the court stated that " *[o]ur basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance,* and that it shall, if possible, be so construed as to effectuate the intent of the parties ... In arriving at the intent expressed ... in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence ... The construction of a deed in order to ascertain the intent expressed in the deed presents a question of law and requires consideration of all its relevant provisions in light of the surrounding circumstances." (Emphasis in original; internal quotation marks omitted.) *Bolan v. Avalon Farms Property Owners Assn., Inc., supra,* 250 Conn. at 140-41.

Burnham also cites *Mandes v. Godiksen,* 57 Conn.App. 79, 747 A.2d 47 (2000), for the proposition that the court must find facts " relevant to the establishment of the particular dimensions of the easements." *Id.,* at 83. In *Mandes,* the court held that " [a] deed shall, if possible, be construed to effectuate the intent of the parties. It is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence." *Id.,* at 90. In interpreting the language of the easement, it is important to note that the court's focus was on the intent of the parties involved in the original transaction. In determining the scope of the easement, however, the court was required to construe ambiguous language in deeds giving rise to an easement for beach rights along the shifting, sandy shore of Long Island Sound. In the present case, the location of Francis Street has not changed and there is no ambiguity as to its original purpose.

Burnham similarly cites *Gemmell v. Lee,* 59 Conn.App. 572, 757 A.2d 1171 (2000), involving an easement implied by a map. In *Gemmell,* the court considered " [c]ircumstances existing at the time of the transfer of title [that] would indicate some use of the [r]oad by the plaintiffs was anticipated by the grantor. [The court found], on the basis of [a] review of the deed, map and circumstances surrounding the conveyance to the plaintiffs' predecessor in interest, that it was the intent of the grantor to create an easement over [the road]." *Id.,* at 577. The court's analysis included a review of facts necessary for the trial court's finding that the easement was convenient and beneficial for the enjoyment of the dominant estate, which would also be required by this court to establish an implied easement over Burnham's land on Francis Street. In *Gemmell,* the court also reviewed facts which the trial court found insufficient to establish a special defense of adverse possession.

Therefore, it appears that the court must consider any language on a map or other instrument as a matter of law and consider that legal language in light of the surrounding circumstances involving the facts of the case. This factual consideration appears to be related to a court's determination of the intentions of the parties at the time the easement was granted, and not the factual circumstances and intentions of parties later in the chain of title, who were never involved in the transactions giving rise to the easement. Consideration of the actual use of an easement by parties later in the chain of title would most certainly be relevant to a court's consideration of the scope of an easement obtained by prescription or adverse possession, where the actual and historical use of an area of land over time is of critical importance. The same would be true for claims that an easement is overburdened, compared with the original intent of the grantor and circumstances. In addition, factual findings that the easement is convenient and beneficial for the enjoyment of the dominant estate may encompass the present as well as the historical uses of the property.

Where easements are implied by maps, facts relating to the location of the implied easement are a question of fact. Facts relating to the original purpose and use of an express or implied easement are also appropriate areas of factual inquiry by the court. In addition, the establishment of an existing benefit to the dominant estate is a question of fact for the court. Similarly, current and historical uses of easements are an important factual inquiry for a trial court to determine whether an easement is presently overburdened or exists by adverse possession. Therefore, although the scope of an easement is a question of fact, not all factual questions

are relevant to the court's inquiry into the scope of a particular easement. The factual analysis of easements established by certain uses of land over time, such as by adverse possession and prescription, require a different factual analysis than easements implied by maps of record, especially when the dispute is over its proper location.

Burnham also cites *Abington Ltd. Partnership v. Heublein*, 246 Conn. 815, 717 A.2d 1232 (1998), on appeal after remand, 257 Conn. 570, 778 A.2d 885 (2001), and *Kuras v. Kope*, 205 Conn. 332, 533 A.2d 1202, (1987), to support his argument that the Doucettes' easement should be limited to the newly established driveway, with the possibility of a minor expansion of its width by four feet to provide more reasonable access to the garage, according to Jeffrey Doucette's own testimony. Although Burnham's argument is reasonable on its face, his reliance on these cases is misplaced. *Abington* involved the alleged overburdening of an express easement due to " after-acquired property." *Kuras* involved the alleged expansion or improvement of the existing scope of an easement by prescription. Here, the opposite has occurred. The owner of the servient estate, Burnham, has imposed a more limited use of the easement than the owners of the dominant estate, the Doucettes, have enjoyed since they purchased the land.

The analysis of Justice Peters in *Abington* is, however, instructive in this case. After restating " the principle that the construction of an easement requires inquiry into the intent of the parties when the easement was created"; *Abington Ltd. Partnership v. Heublein*, *supra*, 246 Conn. at 830; she cites Restatement (Third), Property, Servitudes (Tentative Draft No.4) (1994) (officially adopted 1998) § 4.1.[3] The current version of the Restatement (Third), Property, Servitudes § 4.1 provides: " (1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created. (2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred." 1 Restatement (Third), Property, Servitudes § 4.1, p. 496-97 (2000).

The implied easement in this case arises from written documents which have been recorded in the Meriden land records. Therefore, the court must follow the intentions of the grantor of the implied easement at the time it was granted, even though the circumstances have changed significantly since 1939, when Map 388 was filed upon the Meriden land records. To do otherwise would likely be inconsistent with the recorded property rights of the parties, and inconsistent with the original grantor's implicit, recorded intention for the use of this land. It is the intention of the grantor that should prevail in determining the scope of an easement created by implication from a map, not the current factual circumstances and desire of one party to limit the use of an existing easement. Although an abandoned intention to construct a roadway may give rise to new possible uses for Burnham's real property, the recorded property rights giving rise to the implied easement is best left undisturbed in this case, unless adjusted by recorded agreements. This approach is consistent with the clear public policy of creating and maintaining a public record of real estate titles.

The court does not know if this land will ever qualify as a residential building lot in Meriden. The court does not know the reasonable use the implied easement will be for some subsequent owners, based upon their particular circumstances and plans for the property. If the court were to impose its subjective view of the proper width and position of the driveway, it may render the lot inappropriate for some other use under Meriden land use regulations. Further, by substituting its judgment for the original grantor of the implied easement in this case, the court would provide one side of this dispute with an advantage better left to market forces and local land use regulations to determine the best and proper use of this land.

D. Declaration of the Parties' Rights

The court finds that, based upon the maps, deeds and circumstances that existed at the time Map 388 was created in 1939, Francis Street was clearly intended to provide ingress and egress to the Doucettes' garage, as though it was a public highway. The physical scope of the easement for ingress and egress is clearly established by the metes and bounds description of Francis Street on Map 388 and recorded in the Meriden land records. Therefore, to the extent that the Doucettes have used Burnham's land on Francis Street in the past to access their garage, they have not overburdened their right to do so as the owners of the dominant estate. If Francis Street were a public highway, the Doucettes would be free to approach their garage with a wider turning radius than has been provided by the new driveway. They would be able to back out of their driveway and drive toward Carl Street. Additionally, they would be able to drive past their garage and back into it. None of these ordinary driving maneuvers, among others, appear to be possible as the driveway has been reconfigured by Burnham.

Since the original purpose of the easement over Francis Street was to provide ingress and egress to the Doucettes' garage, the scope of the Doucettes' use of the easement is limited to the normal and natural activities that may be conducted on a residential roadway. This would include parking of motor vehicles by the Doucettes and their visitors, and for ingress and egress to the Doucette property by foot or bicycle. Roadways, however, are not intended to be used as a playground or

for conducting other social activities. Therefore, this easement was not intended to provide the Doucettes with access to a park or to open space, for their general use without limitation.

E. Injunctive Relief

This action was initiated by an application for a temporary injunction, and the Doucettes seek permanent injunctive relief in this case. This prayer for relief is in addition to the mutual request of the parties for a declaration of their rights. In particular, the Doucettes seek an order for Burnham to cure the obstruction he has placed upon his land on Francis Street and to refrain from piling dirt, asphalt and processed stone, as well as digging holes, piling snow, parking his vehicle, maintaining signs, constructing a fence or building, falsely reporting the Doucettes to the police as trespassers or other conduct that would obstruct their full use of Francis Street.

An " [i]njunction is the proper remedy to stop interference with an owner's use and enjoyment of an easement ... Injunctions fall within the field of equitable remedies ... They are not issued as of right, but in the sound discretion of the court ..." (Citations omitted; internal quotation marks omitted.) *Gerald Park Improvement Assn., Inc., v. Bini*, 138 Conn. 232, 236, 83 A.2d 195 (1951). " [I]n exercising its discretion, the court, in a proper case, may consider and balance the injury complained of with that which will result from interference by injunction." (Internal quotation marks omitted.) *Walton v. New Hartford*, 223 Conn. 155, 167, 612 A.2d 1153 (1992).

IV. CONCLUSION

An injunction is granted in favor of the Doucettes, as follows. Based upon the equities and the circumstances of this case, the court orders Burnham to remove the obstruction he has placed upon the right of way that the Doucettes have used for ingress and egress to their garage. The obstruction to be removed is in the form of a berm, boulders and bushes that have limited the Doucettes from using the easement in a manner consistent with access from a roadway, as was intended by the original grantor, implied by Map 388 and recorded in 1939.

The Doucettes are not, however, free to use Burnham's property at will or to build a driveway in whatever manner and location they choose in the future. In the most recent Supreme Court case on the subject of easements implied by maps, Justice Borden states that " in determining whether an easement by implication has arisen, we examine ... [whether] the easement is reasonably necessary for the use and *normal enjoyment* of the dominant estate ..." (Citation omitted; emphasis in original; internal quotation marks omitted.) *McBurney v. Cirillo, supra*, 276 Conn. at 800. Although this language appears to be applicable to a determination of the manner in which an implied easement may arise and is directed toward the normal use of the dominant estate, it is instructive in this case regarding the proper use of the easement and the physical location of the driveway over Burnham's land on Francis Street. Therefore, based upon Justice Borden's language in *McBurney* and the equities determined by the court to exist in this case, Burnham is further ordered to restore the driveway and land where the new driveway was constructed, to its normal condition and location, as it existed prior to his interference with the Doucettes' right of way to their garage, unless otherwise agreed to by the parties.[4] This includes any grading and seeding required to restore the land upon which the new driveway was constructed to its normal condition. The restoration of the easement shall be completed within sixty (60) days.

Notes:

[1] Evidence was presented at trial that, according to certain tax records, the Doucettes' home was built in 1932. However, the chain of title reflects the first sale of this individual lot from the larger subdivision to Carl Siino on March 9, 1939.

[2] It appears the original 2/28/39 revised map was never filed and a replacement map was made and filed in June 1939.

[3] This provision provided: " (1) A servitude should be interpreted to give effect to and he consistent with: (a) the intentions of the parties to an expressly created servitude; (b) the intentions or reasonable expectations of the parties to a servitude created by implication, necessity or estoppel; and (c) the reasonable expectations of the party against whom a servitude is created by prescription. (2) A servitude should be interpreted to carry out the purpose for which it was created. (3) To the extent not inconsistent with the interpretation arrived at under subsections (1) and (2), a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consistent with public policy should be preferred." See *Abington Ltd. Partnership v. Heublein, supra*, 246 Conn. at 831 n. 23.

[4] The court notes that other property owners may have an interest in Francis Street, such as the property of the James' family to the east.
