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March 29, 2022

VIA: HAND DELIVERY

The Honorable Sam Glasscock III
Court of Chancery
34 The Circle
Georgetown, DE 19947

RE: *Swann Keys Civic Association v. Michael Dippolito, et al.*
C.A. No. 2021-0614-SG

Dear Vice Chancellor Glasscock:

Enclosed please find two (2) convenience copies of Petitioner Swann Keys Civic Association Post-Trial Answering Brief electronically filed on March 28, 2022.

Respectfully Submitted,

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Word Count: 22

Enclosures

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SWANN KEYS CIVIC ASSOCIATION, Petitioner, v. MICHAEL DIPPOLITO, JOSEPH W. MANNING, SHARON MANNING, THERESA A. CORRICK, ROBERT C. DUFFY, and JESSICA L. DUFFY, Respondents.	)	C.A. No. 2021-0614-SG

PETITIONER SWANN KEYS CIVIC ASSOCIATION POST-TRIAL ANSWERING BRIEF

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Dated: March 28, 2022

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INTRODUCTION

At trial, Petitioner Swann Keys Civic Association (the "Association") established that the Association is entitled to an order quieting title to the two boat ramps at issue in this matter (the "Boat Ramps") pursuant to the terms of the 1985 Settlement Agreement, or adverse possession, or alternatively, an easement by prescription or an easement by estoppel. By contrast, Respondents failed to prove any of their affirmative defenses and failed to prove that the Association's use of the Boat Ramps constitutes a nuisance under Delaware law. Therefore, the Association is entitled to continued use of the Boat Ramps.

Instead of focusing on facts, the Respondents' Post-Trial Opening Brief focuses on fiction. Consider the "Introduction" to Respondents' Opening Brief, which concludes that Respondents' "good deeds" have exposed them to "untold liability, and, finally, being hauled into Court by a bully who couldn't get satisfaction." (Resp. Post-Trial Op. Br. at 1). That is misleading for multiple reasons. First, the Respondents (except Mr. Dippolito, whose ownership is brief) all testified that they did not realize they even potentially owned a part of a boat ramp. In other words, the Association's use was so ubiquitous that ownership was believed to lie with the Association; thus, there was not a "good deed" or neighborly act occurring. Second, the uncontroverted record demonstrates that this is a fight picked by the Respondents, not the Association. The dispute began in October 2020 when

one of the Respondents placed a Jersey barrier across part of the East Boat Ramp blocking access to that ramp. (JX: 3; TR: 14-15). The Association's (i.e., alleged bully's) response was to send correspondence to all the owners of property immediately adjacent to the Boat Ramps agreeing to indemnify them and add them as additional insureds to the Association's insurance policy until this matter could be resolved. (TR: 15). The alleged bully then corresponded with the adjacent property owners for the next nine months prior to filing suit—settling the dispute with two adjacent property owners which means that the Association has already confirmed title to parts of the Boat Ramps with those owners. (TR: 10-11). The alleged bully did not seek a Temporary Restraining Order or Preliminary Injunction until the Respondents took steps to close the second boat ramp thus shutting down both Boat Ramps. (TR: 18-20).

In actuality, the Respondents' claims of being good neighbors are belied by their own lack of knowledge of their ownership of the Boat Ramps, their malicious responses to attempts at compromise, and their self-victimizing claims of being "bullied" in this lawsuit. All of these are contrary to the actual history of this dispute as set forth in the stipulated record and the evidence presented at trial.

ARGUMENT

I. THE ASSOCIATION HAS DEMONSTRATED THAT IT IS ENTITLED TO AN ORDER QUIETING TITLE OF THE BOAT RAMPS IN THE ASSOCIATION.

A. THE 1985 SETTLEMENT AGREEMENT VESTED TITLE TO THE BOAT RAMPS IN THE ASSOCIATION.

The 1985 Settlement Agreement, the Class Action Notice, the 1985 Court Order along with the 1986 deeds from BET, Inc. ("BET") demonstrate that the Boat Ramps were conveyed (or intended to be conveyed) in 1986 as part of the settlement of the Class Action. The inclusion of "two concrete boat ramps" in the 1985 Settlement Agreement, also contained in the Class Action Notice, and the adoption of that agreement by way of the 1985 Court Order prove that the Court should issue an order quieting title in favor of the Association.[1]

Respondents argue that because specific language referencing "two concrete boat ramps" was not included in either deed from BET to the Association after the 1985 Court Order was issued, title to the Boat Ramps was never transferred to the

[1] Respondents argue that the 1985 Settlement Agreement addresses another easement stating that "part of Swann Drive appears to be owned by other parties, but a permanent easement exists to insure ingress and egress to the Park," but no such reference to an easement for the Boat Ramps exists. (Resp. Post-Trial Op. Br. at p. 2; JX: 467). It is unclear what ingress and egress to the Swann Keys has to do with the instant matter, but it demonstrates that the parties recognized when an easement existed. This demonstrates that the Boat Ramps were such widely accepted amenities of the community that there was no question that the Association was becoming the owner of the roadways, lagoons and boat ramps.

Association. The notion that this "omission" was both material and intentional was invented by Respondents and has no basis in the record. *See* Resp. Post-Trial Br. at 6. Indeed, the record demonstrates just the opposite.

The 1985 Settlement Agreement listed the following amenities as part of the common elements to be transferred from BET to the Association (JX: 565-580, 566):

- Pool
- Recreation area
- Wells
- Water treatment system
- Sewer lines
- Basketball court
- Playground equipment
- Clubhouse
- Tennis court
- Two concrete boat ramps
- Entrance gatehouse
- Mobile home office
- All roads
- Streetlights
- Lagoons

The 1986 deeds from BET to the Association included the following amenities that were originally listed in the 1985 Settlement Agreement (JX:398-401):

- Pool
- Recreation area
- Wells
- Water treatment system
- Sewer lines
- Roads and streets
- Lagoons and canals

The 1986 deeds from BET to the Association omitted the following amenities that were originally listed in the 1985 Settlement Agreement (JX:398-401):

- Basketball court
- Playground equipment
- Clubhouse
- Tennis courts
- Two concrete boat ramps
- Entrance gatehouse
- Mobile home office
- Streetlights

Neither Respondents nor anyone else has ever disputed that the community basketball court, clubhouse, tennis courts, entrance gatehouse, mobile home office and streetlights were all conveyed to the Association by BET. In fact, some of these amenities remain, and are used by the Association, to this day. The Class Action Notice, the 1985 Settlement Agreement, and the 1985 Court Order made it clear to all owners of property within Swann Keys (*i.e.*, recipients of the Class Action Notice) that the settlement of the Class Action would result in the conveyance of all of the existing common elements as they were identified in the 1985 Settlement Agreement to the Association. This is supported by the fact that all of the Respondents testified that until recently, they all believed that the Association owned the Boat Ramps. (TR: 131, 168, 215, 228, 241).

More importantly, Respondents' speculation about the omission of the Boat Ramps from the deeds, *see* Resp. Post-Trial Op. Br. at pp. 6-7, reflects an abject

failure to read the 1985 Settlement Agreement. Pursuant to the express terms of the 1985 Settlement Agreement, "a title search will be performed within 60 days from the date of execution of this agreement." (JX: 568). The 1985 Settlement Agreement is dated September 10, 1985. (JX: 565). This means that the 60-day period to conduct a title search would have expired on November 9, 1985. According to the 1985 Court Order, issued *after* the due diligence period expired, on November 14 and 15, 1985, the Class Action Notice was mailed to all property owners. (JX: 553). The Class Action Notice was also run in the *Sussex Countian* once a week for the three consecutive weeks of November 25, 1985, December 2, 1985, and December 9, 1985 — again after the 60-day due diligence expired. (JX: 553).

Respondents ask this Court to ignore the timeline and instead, fantasize that the parties who had already conducted their due diligence when they appeared in Court on December 17, 1985, failed to amend the 1985 Settlement Agreement. On top of that, Respondents fantasize that all parties failed to advise the Court that their title search showed a title problem with the Boat Ramps (and all the other items omitted from the 1986 deeds) and on top of that, all parties then asked this Court to approve the Settlement Agreement and enter it as a Court Order anyway. This wild, unsupported speculation is contradicted by the time periods set forth in the documents, all notions of good faith, and the recorded history of the Class Action.

Furthermore, the 1986 deeds from BET to the Association specifically conveyed "the streets or roads…including not only these roadways but all canals [and] lagoons." (JX: 398). The Boat Ramps connect the roadways to the lagoons and canals, so the conveyance of all roadways, canals and lagoons already included the Boat Ramps, regardless of whether the deeds separately referenced the Boat Ramps. Similarly, the real property on which the basketball court, playground equipment, clubhouse, tennis courts, etc. (all items omitted in the 1986 deeds from BET) was conveyed to the Association without need of separately identifying the improvements on the property. This makes these items identical to the conveyance of the roadways, lagoons and canals but not the Boat Ramps, the improvements on them. This is far more likely than Respondents' speculation, particularly since there is no evidence of a title search or an amendment to the 1985 Settlement Agreement.

1. Respondents failed to prove their defenses of waiver, estoppel or merger.

For similar reasons, Respondents' attempts to assert the doctrines of waiver, estoppel and merger fail. To succeed on their affirmative defense of waiver, Respondents were required to introduce "competent evidence" to establish "the intentional relinquishment [by the Association] of a known right*." KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Corp.*, 1993 WL 285900, at *7 (Del. Ch. July 27, 1993). But instead of evidence, Respondents merely speculate as to the "undocumented

reasons" for lack of express reference to the Boat Ramps in the 1986 deeds. Resp. Post-Trial Op. Br. at 6. That is insufficient to meet the Respondents' burden.

Likewise, there is no support for Respondents' argument that the Association is estopped from quieting title to the Boat Ramps. Estoppel "arises when a party, by its conduct or words intentionally or unintentionally induces the other party, who is ignorant of the truth, to act in reliance on the words or conduct to change its position to its detriment." *KE Prop. Mgmt. Inc.*, 1993 WL 285900, at *7. Although it is unclear exactly how Respondents assert that estoppel applies, it is clear that one element is missing: ignorance of the truth. The 1985 Settlement Agreement has been of record for almost four decades, and all relevant parties were (at minimum) constructively aware of it. In fact, the Respondents believed the Association owned the Boat Ramps until recently. (TR: 131, 168, 215, 228, 241).

As with estoppel it is not entirely clear how Respondents assert that merger-by-deed applies in this context. But, in any event, as indicated above, a fair reading of the deeds would include the Boat Ramps, and Respondents identified no evidence that indicated the Association, in the deeds, meant to abandon what it gained in the Settlement Agreement. Instead, the Boat Ramps were part of the settlement of the Class Action as demonstrated by all parties' actions since 1985. As set forth previously, the timeline of the Class Action makes clear that the Boat Ramps

remained part of the 1985 Settlement Agreement, along with the other omitted items, irrespective of whether they are all found in the 1986 deeds.

2. Respondents mischaracterize the record with respect to the composition of the Boat Ramps.

As a final gambit, on page 8 of their Post-Trial Opening Brief, Respondents boldly state that it was "undisputed" at trial that the Boat Ramps are pavement and not concrete. The truth of the matter is that the record shows the opposite.

First, the testimony of Michael Dippolito simply stated that the "actual surface" of the Boat Ramps is asphalt — not that the entirety of the Boat Ramps is asphalt. (TR: 239-240). Misrepresentation number one. Furthermore, during Leo Winterling's testimony he specifically stated that during one of the jobs that he performed on the East Ramp he remembers that he "jackhammered up some old concrete and then extended the concrete from that point [of the Boat Ramps] into the water." (TR: 124). Misrepresentation number two.

Respondents' bold misstatement also ignores the fact that the Association provided fifteen affidavits of long-time residents stating that the Boat Ramps at issue are the only two boat ramps to have existed in the Swann Keys community as far back as 1971. (JX: 275-305). Thus, the Association's unrebutted evidence clearly establishes that the Boat Ramps at issue are the "two concrete boat ramps" referenced in the Class Action Notice, and transferred to the Association by way of the 1985 Settlement Agreement, the 1985 Court Order and the 1986 deeds.

In a related misstatement of the record, Respondents also claim that the Association never raised the issue of a third boat ramp at trial. Resp. Post-Trial Op. Br. at 9. The irony is that it was *Respondents* who claimed in their opposition to the Motion for a Temporary Restraining Order that there was visual and testimonial evidence of two other concrete boat ramps in the community that could have been the ones referenced in the Class Action Notice, the 1985 Settlement Agreement and the 1985 Court Order. Resp' Mem. in Response to Pet'r's Op. Br. in Support of Its Mot. for Expedited Proceedings & a Temp. Restraining Order (Trans. ID 66856322), at *3.

During discovery, Respondents pointed toward a prior opening on the lot at the end of Laws Point Road as their basis for this claim. Based upon this, the Association noticed the deposition of Dennis Napieralski, the owner of that lot, who said that when he purchased the lot there was a "boat ramp" of gravel or mud, more specifically stating, "[i]t was made from the same material that you see up there in the water. It was mud and more mud. This whole creek Dirickson Creek is all mud." (JX: 595-596). Mr. Napieralski confirmed that during his ownership since 2008 it was used twice by him in emergency situations, and he was worried about getting stuck in the mud and becoming a YouTube video. (JX: 596). The Association's trial deposition of Mr. Napieralski is part of the record evidence in this matter and

demonstrates that the Boat Ramps at issue are the ones referenced in the Class Action Notice, the 1985 Settlement Agreement and the 1985 Court Order.

In sum, the formative documents for the Association arising from the Class Action demonstrate what all of the litigants (property owners in Swann Keys and BET) intended to be conveyed to the Association. The history of the Boat Ramps plainly establishes that all the members (residents) of Swann Keys, including the Respondents, believed that the Association was the owner of those Boat Ramps, and the Association treated the Boat Ramps as their own property with locks and maintenance activities. Further, in addition to the Class Action Notice to all the owners in Swann Keys, the 1985 Settlement Agreement and the 1985 Court Order were recorded in the Office of the Recorder of Deeds in and for Sussex County. As set forth in the Opening Brief, the Respondents were either members of the original class or accepted deeds expressly subject to all "agreements of record"[2] which, of course, includes the 1985 Settlement Agreement and the 1985 Court Order.

B. ADVERSE POSSESSION

Respondents dispute that the Association provided sufficient evidence as to the exclusive, open and notorious and adverse elements required to establish title by either adverse possession or an easement by prescription. As set forth in the

[2] Every deed in the Dippolito and Duffy Respondents' chain of title contains the clause "subject to all "agreements of record."

Association's Opening Brief, the uncontroverted evidence plainly establishes both adverse possession and an easement by prescription.

1. Exclusive

Respondents mistakenly argue that because there is the possibility that members of the general public have used the Boat Ramps over the years, there is no evidence of exclusive use by the Association. But Delaware law imposes no requirement that an adverse possessor's use of the disputed property be 100% exclusive at all times.

Rather, in order to establish a prescriptive easement when the use of such easement has been participated in by the general public, "the individual must perform some act to the knowledge of the servient owner clearly indicating his individual claim to the prescriptive use." *Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128, 137 (Del. Ch. 2006).

Similarly, when proving a claim for adverse possession, the exclusivity requirement does not require absolute exclusivity. *Tumulty v. Schreppler*, 132 A.3d 4, 26 (Del. Ch. 2015). Rather, "exclusive possession means that the adverse possessor must show exclusive dominion over the land and an appropriation of it to his or her benefit." *Tumulty*, 132 A.3d at 26.

Here, the record shows that the Association has used the Boat Ramps as if it were the true owner since 1985, and the Association performed several acts to put

the Respondents and their predecessors on notice that clearly indicated the Association's individual claim to the prescriptive use.

First, the very existence of the Boat Ramps demonstrates the adversity of the Association's claim. The Boat Ramps are made of concrete and, at the water, bounded by bulkheading. The Respondents cannot use the concrete area of the Boat Ramps without interfering with the use of the Boat Ramps. For nearly half a century, the Respondents and their predecessors in title made no separate use of the Boat Ramps. In October 2020, the Respondents interfered with that use by placing a jersey barrier across part of the East Ramp.

Second, the Association erected signage, locks and chains at the Boat Ramps. (JX: 34-35; TR: 33-35, 83, 96, 162). The testimony established several methods of limiting access to members of the Association beginning with locks, boat stickers and, most recently, signage. (TR: 33, 95-97, 104-105, 163-166). Third, the Association performed repairs on the Boat Ramps. (TR: 81, 94, 112-122).

Finally, and most importantly, the Association, by and through its members, have used the Boat Ramps as if it were a matter of right since 1985 as reflected in the meeting minutes stipulated to be part of the record of this matter.

These actions all support the conclusion that the Association put the Respondents and their predecessors on notice of the Association's claim to the prescriptive use. This is further supported by the fact that Respondents all believed

(with the exception of Michael Dippolito who was unsure who owned the Boat Ramps but did not think that he did) that the Association owned the Boat Ramps. (TR: 131, 168, 215, 228, 241).

2. Open and Notorious

The Association presented uncontroverted evidence that is has, by and through its members, used the Boat Ramps since 1985, the beginning of the Association. The Association presented testimony from residents that they have used the Boat Ramps for years and provided affidavits of fifteen long-term residents to support the assertion that these Boat Ramps have always been in the community. (JX: 275-305). The Association also proved that it is the sole entity responsible for repairing and maintaining the Boat Ramps and that the Association has funded all repairs. (TR: 113-121). Again, this is further supported by the fact that all Respondents (with the exception of Michael Dippolito who was unsure) testified that they believed that the Association owned the Boat Ramps. (TR: 131, 168, 215, 228, 241).

Against this, Respondents arbitrarily argue that the Association itself does not actually use the Boat Ramps because the Association does not own any watercraft. This simplistic view of the facts falls flat. An "association" does not swim in a pool or use the amenities it owns as these are instead used by the members of the association.

Respondents also present thin arguments about the use of the Boat Ramps claiming that water marks leading from a boat ramp out of the community show that the person must not have been a member (resident), family, friend or invitee of a member (resident). When questioned about if they asked the people specifically, each of the Respondents and their witnesses testified that they had not. (TR: 144-146, 185).

Respondents also appear to think that the Maryland registration sticker on a boat is *prima facie* evidence that a non-member (resident) was using the Boat Ramps. Boats of Delaware residents are registered in Delaware. However, boats of non-residents only have to be registered in its "State of Principal Use." According to Delaware regulations, if the vessel is to be used, docked, or stowed on the waters of this State for over 60 consecutive days, Delaware is its "State of Principal Use." 7 Del. Admin. C. § 3100.

Respondents also find fault with local boat launch facilities (companies providing marine services) having the access code to the lock/chain for the Boat Ramps. But Respondents cannot explain why this is unusual given that marine servicers often render services such as launching, loading and storing boats for boat owners. Thus, a member (resident) of the Association would provide that code to their boat servicer so their boat could be launched or loaded by that company. (This

is also another reason why a boat would leave a boat ramp and immediately exit the community.)

Rather than any direct evidence of use by complete strangers to the Swann Keys Community, *i.e.*, non-members (residents), their family, invitees, etc., the Respondents provide speculation and a lack of understanding of boating. Respondents repeatedly reference an encounter between Ms. Duffy and an unruly individual where she is called a "bitch." Resp. Post-Trial Op. Br. at p. 25. However, this situation, as offensive as it is, demonstrates the point that this was not unauthorized use of the Boat Ramps. When questioned by Ms. Duffy, the bad actor responded several times that his authority to use the Boat Ramps was his grandmother who lived across the street. Respondents' Video Exhibit ending in 5436; (TR: 200). Like any other community, one of the rights enjoyed by members of that community is the right to share the amenities with their invitees, including tenants, family members and friends. The evidence from the video demonstrates that the bad actor was visiting his grandmother and using the Boat Ramps. This is not unauthorized use of the Boat Ramps by the public.

More importantly, Respondents' arguments are largely centered around the Association not providing enough "security," "maintenance," or "repairs" to establish the elements of adversity. However, Respondents presented no evidence that they ever provided any of these things other than picking up trash and removing

poison ivy and some limbs, which merely confirms the general consensus that the Association owned the Boat Ramps. Indeed, certain homeowners' criticisms of the Association's actions, as reflected in the Associations' minutes over the years, demonstrate the Association's exercise of dominion, or adverse possession, as well as the failure to act by Respondents and their predecessors in title.

3. Adverse

Respondents argue that the Association's use of the Boat Ramps was not adverse, rather it was a neighborly accommodation whereby the Respondents and their predecessors permitted the Association to use the Boat Ramps.

According to Delaware law, use of another's land is permissive and constitutes a "neighborly accommodation" "where a space is *designedly* left open by the owner." *Dewey Beach Lions Club v. Longanecker*, 905 A.2d 128, 135 (Del. Ch. 2006) (emphasis added). The word "designedly" implies intent, so as posited by Respondents, they needed to prove a plan of accommodation or a grant of authority. But, that is the exact opposite of what occurred. First, the Respondents never asserted ownership over the Boat Ramps, much less that the Respondents left the Boat Ramps open to the public. To the contrary, the Association and its predecessors were locking and maintaining the Boat Ramps as early as the 1960s.

Again, the Respondents all testified that they did not believe that they owned the Boat Ramps until recently. (TR: 131, 168, 215, 228, 241). Respondents Jessica

Duffy and Robert Duffy and witness Nancy Flacco all testified that they believed that the Association owned the Boat Ramps. (TR: 168, 215, 228). Respondent Michael Dippolito testified that he did not know who owned the Boat Ramps but that he initially did not believe that he did. (TR: 241).

These admissions raise the obvious question: How can the Respondents give permission to use something that the Respondents are not aware that they own? The answer is simple, they cannot.

Under Delaware law, a "use is adverse or hostile if it is inconsistent with the rights of the owner." *Jones v. Collison*, 2021 WL 6143598, at *4 (Del. Ch. Dec. 30, 2021). In the case of *Brown v. Houston Ventures, L.L.C.*, this Court found that the use of a disputed piece of property was adverse because the party used the land in question "as if they had a legal right to use [it]." 2003 WL 136181, at *5 (Del. Ch. Jan. 3, 2003). That is exactly what the Association did, and exactly what the Respondents believed was happening.

Here, witnesses for the Association and Respondents (with the exception of Michael Dippolito) all testified that they believed that the Association was the true owner of the Boat Ramps. (TR: 131, 168, 215, 228). The Association further demonstrated that it acted in reliance on its belief that it was the true owner of the Boat Ramps over the past half century, first by, installing locks and chains, and funding repairs to the Boat Ramps and, most recently, erecting signage. (JX: 34-35;

TR: 33-35, 81, 83, 94, 96, 112-122, 162). In fact, the concrete and bulkheading on Respondents' properties is the definition of adversity as Respondents cannot plant grass, have a garden or otherwise use the area within the Boat Ramps as part of their property. Therefore, the Association has met its burden to prove that the Association's use was adverse to the interest of the Respondents.

II. AT MINIMUM, THE ASSOCIATION HAS DEMONSTRATED THAT IT IS ENTITLED TO AN EASEMENT COVERING THE BOAT RAMPS.

Although the Association contends that it has established fee simple title to the remaining parts of the Boat Ramps, the Association has, at minimum, an easement to use those portions for which ownership was not already confirmed. In response to the Association's claim to an easement, Respondents argued that "a bona fide purchaser of land without actual or constructive notice of the existence of an easement in such land takes title free and clear of the burden of the easement." Resp. Post-Trial Op. Br. at 11. Of course, as stated previously, both the 1985 Settlement Agreement and the 1985 Court Order are both of record in the Recorder of Deeds and the Respondents all took title subject to those documents as expressly stated in their deeds or were parties to the Class Action itself. In either circumstance, Respondents were on record notice of the Boat Ramps. Of course, they were also on actual notice as hundreds of boats and personal watercraft are launched and loaded each year using the Boat Ramps.

A. EASEMENT BY PRESCRIPTION

The elements for an easement by prescription are identical to the elements for adverse possession. Although the burden of proof is greater for an easement by prescription (*i.e.*, the preponderance of evidence for adverse possession and clear-

and-convincing for an easement by prescription), the Association meets both legal standards for the reasons stated in the preceding argument.

B. EASEMENT BY ESTOPPEL

Section 2.10(1) of the Restatement of Property sets forth the easement by estoppel doctrine: "If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when: (1) the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief…" Restatement of the Law, Property 3d (2000), 143.

The testimony and affidavits plainly establish that the Boat Ramps existed and were used by property owners within the Swann Keys community since the late 1960s, even before BET was developing the property and involved in the Class Action resulting in the 1985 Settlement Agreement and 1985 Court Order.

The documentary evidence includes written notice to each of the Respondents or their predecessors in title through both publication and written notice, *i.e.*, the Class Action Notice, mailed to their personal addresses. (JX: 457-550). The Class Action Notice specifically described the Boat Ramps, and no objection was raised by the Respondents or their predecessors in title.

The arguments raised by Respondents to oppose an easement by estoppel ignore the substantial and uncontroverted history of the Boat Ramps, and as indicated by the lack of citation to the record, the Respondents' arguments are unsupported.

Another remarkable position taken by Respondents is that the Association is estopped from claiming ownership because it did not assert its rights previously. Of course, those rights were described in the Class Action Notice and formalized in the 1985 Settlement Agreement as well as the 1985 Court Order, both of which were then recorded in the Recorder of Deeds. (JX: 551-580). Those documents made it reasonably foreseeable that the Association was going to take possession and operation of the Boat Ramps. As established in both the Association's case and the testimony of the Respondents, the Association took on that responsibility and the Respondents along with their predecessors in title abdicated that responsibility. This irrefutable evidence supports an easement by estoppel.

One of the cases referenced by the Respondents, states that there is a "duty to disclose the existence of an easement (or lack thereof) where the servient estate owner observes the claimant improving the servient estate." *K & G Concord, LLC v. Charcap, LLC*, 2017 WL 3268183 (Del. Ch. Aug. 1, 2017). This is similar to the other jurisdictions where an easement by estoppel can be created by actions or silence of the part of the servient estate owner. *See*, *Louis W. Epstein Family*

Partnership v. Kmart Corp., 13 F.3d 762 (3d Cir. 1994) citing *Chester Extended Care Ctr. v. Commonwealth*, 586 A.2d 379, 382 (1991) (elements of estoppel include "misleading words, conduct, or silence by the party against whom the estoppel is asserted"); *Cleaver v. Cundiff*, 203 S.W.3d 373 (Tex. App. 2006) ("representations may be verbal or nonverbal"). In the present matter, the Respondents or their predecessors in title did not object to the 1985 Settlement Agreement, despite notice through the Class Action Notice, and have not objected from 1985 until Mr. Dippolito installed a jersey barrier in October 2020. In short, the law is clear that the servient estate owner cannot stand by in silence while others assert rights and act on those rights.

Similar to the definiteness required when quieting title, the Association agrees that the area of the easement must be defined. As set forth in the Restatement a right of way over a prescribed area is definite, but 'the privilege of strolling at pleasure through a field' is too indefinite. 5 Restatement, Property, 2910, s 450 Servitudes (1944). The Boat Ramps are defined by concrete and bulkheading, thus meeting this requirement.

Since 1985 when the Association was formed, it has secured and maintained the Boat Ramps without objection from the Respondents or their predecessors in title until this dispute. As stated in the Opening Brief, Mr. Dippolito's predecessor in title even provided a letter of no objection to work on the East Boat Ramp.

III. RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT THE USE OF THE BOAT RAMPS IS UNREASONABLE OR CONSTITUTES A NUISANCE.

As stated in the Association's Post-Trial Opening Brief, the Respondents have failed to prove a claim of nuisance under Delaware law. While Respondents presented evidence of noise, trash and slight damage related to the use of the Boat Ramps, none of the evidence presented constitutes *unreasonable damage* resulting from the use of the Boat Ramps. Furthermore, three of the Respondents, the Duffys and Michael Dippolito, all purchased their properties with the knowledge that they were adjacent to a boat ramp.

Although the Association can understand the frustrations of the Respondents, the reality of the situation is that owning property next to a boat ramp will be noticeable by the property owners. This is why the Association offered to work with Respondents to establish operating hours and install key cards to allow the Association to monitor the use of the Boat Ramps. For example, if and when the Association installs key cards, the Association will be able to monitor the use of the Boat Ramps by specific members and identify any wrongdoers. Unfortunately, some of the Respondents have refused to cooperate with the Association in order to resolve their complaints. Namely, Respondent Jessica Duffy testified that she rejected proposals by the Association to build a fence on a portion of their property in order to prevent trespassing. (TR: 218). Additionally, the Association has designated

significant funds to repair the Boat Ramps and build fencing to prevent trespass on the Respondents' properties. (JX: 146; TR: 32).

Respondents admitted throughout their testimony that despite complaining at trial about the volume of problems, they had not complained to the Association except for once when the Association resolved the problem for Ms. Duffy. (TR: 150, 157, 175-176, 243). Returning to the bad actor in the previously mentioned video, if requested, the Association would have located the property owner within Swann Keys and worked toward resolving the matter as it did with the prior circumstance.

Regardless of the Association's proposed improvements, the current level of noise and disturbances associated with the Boat Ramps are not unreasonable and do not justify the closure of the Boat Ramps.

CONCLUSION

For the reasons set forth in the Association's Opening Brief and herein, the Association respectfully requests that the Court grant judgment in its favor quieting title to the other half of the East Ramp and West Ramp shown on the Surveys confirming the recorded 1985 Settlement Agreement and 1985 Court Order. This quieting of title will align with both the actual usage of the Boat Ramps for the last half century as well as the other half of the Boat Ramps which the neighboring property owners already confirmed title to by virtue of confirmatory deeds.

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SWANN KEYS CIVIC ASSOCIATION,	:	
	:	C.A. No.: 2021-0614-SG
Petitioner,	:	
v.	:	
MICHAEL DIPPOLITO, JOSEPH W. MANNING, SHARON MANNING, THERESA A. CORRICK, ROBERT C. DUFFY III, and JESSICA L. DUFFY,	:	
Respondents.	:	

CERTIFICATE OF SERVICE

I, David C. Hutt, Esq., hereby certify that a copy of the foregoing Petitioner Swann Keys Civic Association's Post-Trial Answering Brief was served via *File & ServeXpress* upon the following:

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