Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-455

APRIL TERM, 2007

Armond J. Brisson and Ramona Brisson	}	APPEALED FROM:
	}	
v.	}	Addison Superior Court
	}	
Elizabeth Call	}	
	}	DOCKET NO. 266-11-05 Ancv
		Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Defendant Elizabeth Call appeals from the trial court's order granting summary judgment to plaintiffs Armond and Ramona Bisson in this dispute over the use of a right-of-way. She argues that the court erred by failing to consider certain evidence she presented about the past use of the right-of-way. We affirm.

Plaintiffs own approximately 78 acres of real property ("Lot 1"), which is the remaining acreage of their former 270-acre dairy farm. Plaintiffs ceased dairy-farm operations in 1994 and Mr. Brisson testified at deposition that he always intended to subdivide the land and sell it after he stopped dairying. Sometime after 1994, Mr. Brisson created a 60-foot-wide road that led to the current Lot 1. The road was constructed of gravel, at least a foot deep, topped with gravely pike stone, with ditches on either side. In 1995, plaintiffs began subdividing and selling portions of their property. By 2001, plaintiffs subdivided and sold approximately nine lots.

Plaintiffs sold three adjoining lots (Lots 3, 4, and 6) to Peter Fenn, defendant's predecessor-in-interest. Mr. Fenn purchased Lot 6 in 2001 and plaintiffs reserved an easement in Lot 6 as follows:

> SUBJECT TO a sixty foot (60') wide right-of-way benefitting Lot 1 as depicted on said survey leading from said Quaker Village Road through the lands of the Grantors in a northeasterly direction to the lands of said Lot 1 at or near the southeast corner of the parcel conveyed hereby.

Defendant purchased Lot 6 from Mr. Fenn in 2002.

Plaintiffs have now gained town approval for an eight-lot subdivision on Lot 1. During the permitting process, defendant objected to plaintiffs' use of the right-of-way to access the subdivision. She maintained that the right-of-way could be used only for agricultural purposes, as it had in the

past. In November 2005, plaintiffs filed a declaratory judgment action, asking the court to declare the parties' respective rights in the right-of-way. Plaintiffs later moved for summary judgment, and in September 2006, the court granted plaintiffs' request.

The court concluded that the language of the deed was plain and unambiguous, and it should be enforced as written. As the court explained, the deed did not contain any limitations on use, and there was nothing in the plain language to suggest that plaintiffs could use the road only for agricultural purposes. To the contrary, it allowed any use that benefitted Lot 1. Given this, and mindful that the use of an easement may change over time "to accommodate normal development of the dominant estate," the court concluded that it would be error to read a narrow agricultural-use restriction into the broad language of the deed. The court also noted that such a constricted reading was at odds with the obviously changing nature of Vermont agriculture, and the conversion of many farms throughout the state to other uses, including residential subdivisions. The court explained that it had reviewed defendant's statement of contested facts and found none of its contents pertinent to the resolution of the parties' dispute. It reiterated that the language creating the easement was not ambiguous, and thus, there was no need to consider any of the parol evidence offered by defendant. The court granted judgment to plaintiffs as a matter of law, and this appeal followed.

Defendant argues that the court erred in interpreting the terms of the easement. She asserts that there is no explicit language to suggest that the right-of-way could be used as a roadway for a residential development. She maintains that, as in the case of prescriptive easements, the past use of the road should be relevant to its future allowable use, and in this case, the road had previously been used only sporadically for seasonal agricultural purposes. Defendant suggests that the deed is ambiguous, and the court should have considered the circumstances surrounding the grant of the easement to discern the parties' intent.

We agree with the trial court that the undisputed facts show that plaintiffs were entitled to judgment in their favor as a matter of law. See V.R.C.P. 56(c); Richart v. Jackson, 171 Vt. 94, 97 (2000) (Supreme Court reviews summary judgment decision using same standard employed by trial court). "Our goal in interpreting a deed is to implement the intent of the parties." Rowe v. Lavanway, 2006 VT 47, ¶ 11, 904 A.2d 78. We presume that the language used by the parties declares their intent, id., and when the language used is plain and unambiguous, the writing must be enforced according to its terms. Kipp v. Chips Estate, 169 Vt. 102, 107 (1999).

Defendant suggests that the parties must have intended to limit the road to agricultural use because that is how the road was used in the past. In support of this assertion, she relies on cases that involve prescriptive easements as opposed to express easements. We reject this approach. See Rowe, 2006 VT 47, ¶¶ 24-25 (unlike express easements whose terms can usually be ascertained from the creating instrument, the permissible uses of a prescriptive easement are necessarily defined by the use of the servient land during the prescriptive period). The parties' intent is reflected in the plain language of the deed. They did not include an agricultural-use restriction, rather, they agreed that the easement was to be used as a "right-of-way" to benefit Lot 1. Plaintiffs' use of the right-of-way to access a subdivision on Lot 1 is consistent with this expressed intent. See id. ¶ 22 (explaining that easement-holder "must use a right-of-way in a manner consistent with the use contemplated at the time of its creation, and it may not use it in a way that materially increases the burden on the

servient estate"); see also Restatement (Third) of Prop.: Servitudes § 4.1 cmt. d (2000) ("Because servitudes are intended to bind successors and, frequently, to last indefinitely, the parties ordinarily are assumed to have intended that the servitude be interpreted dynamically to maintain its utility under changing circumstances.").

This does not mean, as defendant asserts, that plaintiffs have a "blank check for any and all uses." While, as a general rule, plaintiffs are authorized to make any use of the servient estate that is reasonably necessary for the convenient enjoyment of the easement, they cannot "cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." Id. § 4.10 cmt. c. Defendant asserts that any deviation from the past use of the easement unreasonably burdens her servient estate. This argument is inconsistent with the rules governing express easements. We recognize that "the manner, frequency, and intensity of use of the servient estate may change . . . to accommodate normal development." Id. cmt. f. In other words, a change in use is allowable if it is reasonably necessary "to accommodate normal development of the dominant estate." Id. As the Restatement explains, a gradual transition from wilderness to farm to suburban subdivision might be considered normal development, whereas an abrupt transition from wilderness to subdivision would not. Id. In the first case, a roadway easement could continue to be used by the dominant estate through all phases of its development, while in the second scenario, the roadway could not be used to serve the subdivision. Id.; see also id. illus. 14 (positing facts very similar to those presented here, and concluding that use of easement to serve subdivision was allowed where transition from rural to suburban was "normal development" and 60-foot-wide easement suggested that a substantial increase in use was contemplated by the parties).

The undisputed facts in this case show that plaintiffs' proposed use is consistent with the "normal development" of their property and with the intent of the parties to the deed. Plaintiffs' land, which is zoned to allow one dwelling per five acres, has been undergoing a transition from farmland to residential use. As the trial court recognized, similar transformations are taking place throughout the state. Mr. Brisson testified that he always intended to subdivide his land; he began doing so in 1995 and he continues to do so. It is undisputed that plaintiffs attempted to ascertain the feasibility of building on Lot 1 as early as 1995. We note, moreover, that defendant's predecessor-in-interest purchased three adjoining lots from the Brissons, including lot 6; it would be unreasonable to assume that he was unaware of the changing nature of this property. While certainly building a Wal-Mart or a similar commercial enterprise on Lot 1 would not appear to constitute "normal development" of this land, the conversion of Lot 1 into eight residential lots represents a normal and expected development of the dominant estate.

The "contested facts" identified by defendant are immaterial. As reflected above, evidence about the past use of the right-of-way does not determine its future allowable use, nor does it demonstrate that the parties intended to limit the use of the right-of-way to sporadic agricultural use. The purpose of the right-of-way, created by deed in 2001, is broadly stated, the parties' intent is manifest, and plaintiffs' proposed use was reasonably contemplated at the time the deed was executed. See id. cmt. h (explaining that determining what will be considered unreasonable interference with use of servient estate depends largely on circumstances, particularly purpose for which servitude was created and use of servient estate made or reasonably contemplated at time easement was created). The fact that defendant may have been unaware of plaintiffs' intent to

subdivide Lot 1 at the time she purchased her lot is irrelevant, as are any conversations she may have had with Mr. Brisson concerning his plans for Lot 1. She was not a party to the 2001 deed and her intent and knowledge are immaterial. The fact that plaintiffs may have another access to Lot 1 is similarly irrelevant—they possessed a deeded right to use the right-of-way across defendant's lot. Defendant fails to identify any material dispute of fact.

Defendant's reliance on Edwards v. Fugere, 130 Vt. 157 (1972), is misplaced. In that case, the deed at issue granted the defendants a twelve-and-a-half-foot right-of-way across certain land "for the use of campers that may build back of this lot." Id. at 162. The defendants argued that this language implicitly gave them the right to build a dock and maintain a boat landing at the end of the right-of-way. We rejected this argument, noting that no reservation of riparian rights was made in the original reservation. We concluded that the easement-holder could not have intended to reserve the right to build a dock and boat landing because he tried to secure these same rights through a later conveyance. Thus, because these uses were not intended at the time of the conveyance, they imposed a new burden on the easement and were not allowed. Id.

We are faced with a different situation here. Plaintiffs are not trying to extend the easement beyond that which was reserved. Rather, the parties intended and plainly agreed that the right-of-way could be used to benefit Lot 1. There was no need to consult extrinsic evidence, see Kipp, 169 Vt. at 107 (extrinsic evidence may not be used to vary the terms of an unambiguous writing), and we reject defendant's attempt to read an implied-use restriction into the broad language of the deed. Plaintiffs' proposed use of the easement is consistent with the intent of the deed and with the "normal development" of their property.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice