STATE OF VERMONT
WINDSOR COUNTY

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| Riverview Mews, LLC<br><br>v.<br><br>Richard Electric, Inc.,<br>Steven L. Richard,<br>Margret Richard individually and as, Trustee of the Margret Richard Revocable Trust | SUPERIOR COURT<br><br>Docket No. 748-11-07 Wrcv |

FINAL JUDGMENT ORDER

On the claims asserted by the plaintiff, judgment is entered for the defendants, and the plaintiff shall take nothing.

On the counterclaim asserted by the defendants, judgment is entered for the plaintiff, and the defendants shall take nothing.

Dated at Woodstock, Vermont this 23 day of October, 2009.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

OCT 23 2009

WINDSOR COUNTY CLERK

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for trial by court on April 8, 2009 and continued on June 19, 2009. Plaintiff was represented by Barry Schuster, Esq. Defendants were represented by C. Daniel Hershenson, Esq. Defendant Steven Richard was present for the hearing. Based upon the evidence adduced at hearing, the Court makes the following findings, conclusions and order.

Findings of Fact

This litigation arises between parties owning neighboring parcels of property on "A" Street in Wilder, Vermont. The area has both residences and businesses located along A Street. Richard Electric is one of the businesses. In 1951, Mary Frost owned all of the land which now comprises these two parcels. After that time, the land was divided, and the parcels went into separate ownership.

Riverview Mews is a condominium housing project, intended to consist of five buildings when completed, located immediately to the south of the Richard Electric property. Each building will have three condominium units in it. Riverview Mews is a joint project between Francis Blaskovich and James Punger. The permitting on the project was done by Punger Enterprises. The project is still under construction, with only two of the five buildings erected at this time. The project required both local and state (Act 250) approvals, which have been obtained. At present, Riverview Mews owns a 2/15ths interest in the lands jointly owned with Punger. For ease of reference, the lands will hereinafter be referred to as the Mews property, although they are in joint ownership.

The Richard Electric property is now owned by the Margret Richard Trust, which was named as a party defendant just prior to the start of the trial. Previously, Margret Richard owned the property and was a Defendant. Her Trust has been added as a result of the conveyance. Steven Richard was given party status at the Riverview Act 250 hearings, and he and his mother attended some of the local hearings. No objection to the

Riverview Mews project was voiced by any Defendant at the state or local level. A certificate of occupancy for Riverview Mews has been obtained from the Town of Hartford.

At issue is the existence and use of a right-of-way across the Richard Electric property and claims of nuisance which Plaintiff has asserted against Defendants. Plaintiff claims Defendants have trespassed in the right-of-way. Defendants claim the right-of-way does not exist, and if it existed at one time, it has been extinguished by adverse possession. Defendants deny any of their actions on their own property constitute a trespass or a nuisance.

A. The Right-of-Way

During the permitting process for Riverview Mews, a sidewalk was required to be constructed for safer pedestrian access to the housing complex. (Pl.'s Ex. 9.) The sidewalk as depicted in the plans, and as constructed, runs through the claimed right-of-way, which is a 50 x 75-foot triangular-shaped area on the northeast corner of the Richard property. The sidewalk is central to the dispute in this case; Plaintiff claims that Richard Electric is interfering with the use of the right-of-way by parking trucks on the sidewalk and by rutting grass which Plaintiff planted around the sidewalk. The Defendants did not object to the location of the sidewalk during the Act 250 proceedings.

Construction was started on the Riverview Mews condominium in July 2007. The sidewalk was constructed in August 2007. Mr. Richard did not avail himself of opportunities to discuss the location of the walkway within the right-of-way with Plaintiff's surveyor.

After the sidewalk was constructed, someone began driving over it, tearing up seed and mulch. One time Mr. Blaskovich saw Mr. Richard drive over the right-of-way. At other times Mr. Blaskovich saw an employee of Richard Electric drive over it. During the winter, Richard Electric had the snow plowed into the sidewalk. Richard Electric also left a truck parked in a manner so as to partially block the walkway for several months.

Paul Donohue is a paralegal-abstractor. In that capacity he has worked for many law firms, assisting them with title searches and conveyance issues. He has been doing this type of work since 1989 and has searched thousands of titles. He is a 1981Vermont Law School graduate, although he is not a practicing attorney at this time.

In connection with this case, at Plaintiff's request, Donohue conducted a title search of the properties involved in this litigation: the Mews property and the Richard Electric property, owned by the Trust, (hereinafter "Richard" property). The right-of-way dispute necessitated Mr. Donohue's search of both titles. Plaintiff's Exhibit 1 is Mr. Donohue's title search of the Mews property. Plaintiff's Exhibit 5 is Mr. Donohue's title search of the Richard property.

Plaintiff's Exhibit 2 is a survey of land done in 1961 by K.A. Leclair, C.E. This survey shows a parcel described as No. 1, from which the Mews and Richard lots would later be created. Plaintiff's Exhibit 3 is another survey, also done by K.A. Leclair, C.E., dated 1974. The Richard property is depicted as Parcel A in that survey. The area of the right-of-way is improperly depicted as a parallelogram in that survey. The claimed right-of-way is actually triangular in shape.

Plaintiff's Exhibit 4 is a 1984 survey by Wayne McCutcheon Associates, identifying the Mews property as Lot 1 in that survey. This survey also shows the right-of-way area, depicting it as a triangular-shaped area, in the northeast corner of lands owned at that time by Accro Machine, and now owned by Richard.

Plaintiff's Exhibit 6 is a site plan approval by the Town of Hartford concerning the Richard property in 1985. It is not recorded in the Town land records, but was found in the Hartford Zoning Offices as approved. A review for site plan approvals would customarily be part of a title search. This site plan shows the right-of-way in the northeast corner of the Richard property.

The Mews parcel was originally created by lands coming into common ownership of B&C Realty through two deeds, one by Hartford Industrial Foundation (HIF) in 1974 and another by Julius Sklar in 1970. The parcel now owned by Mews was created from those lands by a deed from B&C Realty to Sol Brandstatter in 1985 and duly recorded in the Hartford land records. Plaintiff's Exhibit 4 shows the Mews property as Lot 1, consisting of 2.53 acres. This is partially shown as parcel B on Plaintiff's Exhibit 3.

The right-of-way was first created by HIF when it leased some of its lands to Accro Machine Company in 1967. At that time, HIF reserved unto itself a 50 x 75-foot triangular-shaped right-of-way across the leased premises. The right-of-way reserved in the lease document does not describe the uses permitted in connection with the right-of-way. The lease was for a period of 15 years, expiring on July 1, 1982.

HIF conveyed the reserved right-of-way and its non-leased lands to B&C Realty in a deed to B&C dated May 20, 1974. (Defs.' Ex. H.) The B&C deed describes the metes and bounds of the Mews lot, including a right-of-way over the northeasterly corner of the lands leased to Accro Machine. This right-of-way is shown on Plaintiff's Exhibit 4. The conveyance from HIF to B&C also does not specify the uses to which the right-of-way may be put. B&C subsequently conveyed the property to Sol Brandstatter; again, this conveyance did not specify the uses for the right-of-way.

At the time of the 1974 conveyance, Accro Machine continued to lease lands from HIF. The leased premises, burdened by the right-of-way, continued to be owned by HIF after 1974, but the right-of-way was conveyed to B&C at that time. In addition to the deed documents, a survey from May 14, 1974 (Pl.'s Ex. 3) recites the conveyance of the right-of-way from HIF to B&C Realty, although the survey incorrectly depicts the shape of the right-of-way.

In 1982, the lease between HIF and Accro Machine expired. At that time, Accro purchased the lands it had previously leased from HIF. The deed from HIF to Accro references the reserved right-of-way and, for the first time, contained the additional language: "The said right-of-way is to be used for all purposes without limitation as to use." At that time, HIF was no longer the holder of the right-of-way because HIF conveyed it to B&C Realty some eight years previously.

In 1989, Mr. Brandstatter conveyed what is now the Mews property to Steven, Allen, and Brian Richard, each with a one-third interest. Included in the conveyance was the right-of-way, with reference to the original lease between HIF and Accro. Again, the deed does not specify the uses to which the right-of-way may be put. Brian Richard subsequently conveyed his one-third interest to C. Kevin Tibbits. In 1993, Mr. Tibbits and Steven and Allen Richard conveyed the Mews property, including the right-of-way, to Suzanne and Jean Marc Lamoureux.

In 2004, the Lamoureuxs conveyed the Mews property and the right-of-way to James and Keely Punger. An approximately 3/15ths interest in the property was conveyed to Riverview Mews by the Pungers in May 2007. The right-of-way is referenced in the deed from the Pungers to Riverview Mews, again without description as to use. No where in the chain of title creating or conveying the right-of-way is there any description of the uses to which the right-of-way may be put. That language is found in the chain of title to the servient estate (the Richard parcel), which referenced the right-of-way and indicated that it was to be used "for all purposes, without limitation as to use."

The Richard parcel was created by deed of HIF to Accro Machine in 1982. At the time Accro Machine received the property, a right-of-way was excluded and reserved by HIF to be used for all purposes and without limitation as to use. As noted, however, HIF did not hold the right-of-way at the time of conveyance to Accro Machine because HIF conveyed the right-of-way to B&C Realty in 1974. Accro Machine subsequently conveyed the property to Lawrence and Margret Richard. Lawrence Richard conveyed to his wife and then died. Margret Richard later conveyed the property into Trust in 2008. Regardless of who held the right-of-way, the deeds in the chain of title to the Richard property refer to the existence of the right-of-way, although the expansive language concerning uses is found only in the deeds to the servient estate. A 1985 site plan for the proposed Richard property expansion also shows the existence of the right-of-way.

Steven Richard was, at one time, a part-owner of the property where Riverview Mews is now located. He is well aware of the existence of the right-of-way, having conveyed it when he conveyed his interest in the Riverview Mews property.

The deed documents prove that a right-of-way exists in a 50 x 75-foot triangular area in the northwest corner of the Richard property. That right-of-way was not further defined as to the scope of use in the documents creating that right-of-way when B&C Realty acquired it from its creator HIF in 1974. It is axiomatic that a right-of-way can be used for ingress and egress; the other uses which Plaintiff wishes to make of it, such as turning it into a grassy area, are not expressly authorized in any evidence before the

court. The right-of-way is not stated to be exclusive, and Plaintiff has not shown any exclusive possessory right.

B. Trespass and Nuisance

During its occupancy, Richard Electric has maintained and plowed the area within the right-of-way. Mr. Richard has used it for parking vehicles and other purposes during that time. This was confirmed by independent witnesses familiar with the area. Defendants have never fenced, posted or sought to exclude others from using that area.

There is evidence that vehicles have been driven over the sidewalk in the right-of-way recently. Given the proximity of many Richard Electric vehicles to the sidewalk, and the crowded conditions on the Richard premises, it is reasonable to infer that the vehicles travelling over the sidewalk were either Richard Electric vehicles or vehicles associated with that business. Some grass has been disturbed by the travel of vehicles over the sidewalk. Plaintiff alleges that repairing the right-of-way will cost about $1500-$2000. There has been some damage to the grass seeding in the right-of-way through vehicle traffic. While Plaintiff obviously would like the sidewalk area to appear appealing, Plaintiff has produced no evidence allowing for it to control how the right-of-way looks. The Defendants have consented to the construction of a sidewalk, which, even without their consent, would be consistent with the use of a right-of-way to access the property.

Plaintiff also suggests that water from the Richard property has caused some of the trees along the property line to die. The cause of the loss of these trees is not proven. Further, no evidence was offered on cost of replacement of any trees. Plaintiff also claims storm water run-off from the Richard property has adversely affected Plaintiff's storm water drains. This evidence is likewise unconvincing.

Richard Electric has four offices in Williston, Springfield, Wilder (Hartford) and Hanover, N.H. Wilder is the main office of the company. Currently, Richard Electric has about 20 vehicles which it uses, including vans, bucket trucks, and trailers.

There are several trailers on the Richard property in Wilder. The red trailer was brought on in 1985. It is currently registered and is used to store fixtures. It has not moved since 1985. Another trailer on the eastern boundary line was brought in during 1986. It has not moved since that time. It is used to store material carts and for job-specific storage. A trailer in the front eastern side was brought in during 1987. It is used to store tools. That trailer has not moved since it was brought in. There are two trailers toward the southern boundary line. These are smaller trailers, approximately 25 feet in length. They were also brought in during 1987. They are used to store breakers, office furniture, tools, and threading equipment. The Red trailer is made of steel. The others are made of aluminum. All of these trailers have been registered since the time the Plaintiff's complaint was served. The area around many of these trailers has grown up with brush. The trailers are in a very used condition.

Plaintiff alleges the storage of junk and debris on the Richard property has caused water run-off onto Plaintiff's land. Plaintiff alleges there has been contaminate run-off, such as oils from the various construction equipment found on the Richard property. There is photographic evidence showing junk and debris on the Richard site. A site visit was conducted by the court on April 8, 2009. At that time, several old box trailers and job trailers were seen on the premises. While there is some old electrical equipment outside on the Richard premises, it is not extensive. The run-off onto Plaintiff's land does not appear to have been caused by the storage of materials on the Richard property. Further, the storage of materials on the property has not contributed to water run-off. There is scant, if any, evidence that any contaminates have run onto Plaintiff's land. What run-off has occurred has been primarily ground water.

Earl Bushor lives in Wilder. He has lived there since 1969. He is a certified DMV inspection mechanic. He also works as a mechanic on trailers. He has inspected the trailers on the Richard property approximately within the month before the hearing. When he inspected the property it was raining. He did not see any discharge of materials from the Richard Electric trailers. There was no sign of leakage from any of the trailers.

The trailers he inspected were structurally sound. If the tires on the trailers were replaced and wiring and lights operable, Mr. Bushor feels they could pass inspection.

Donald Marsh is a registered professional engineer in Montpelier, Vermont. He has been an engineer for 39 years. He has done a great deal of work as a private consultant, especially with respect to storm water management. He worked as a senior project manager for several engineering firms in Vermont. For the last four years he has been on his own. Mr. Marsh also served two years on the Vermont Environmental Board.

In considering storm water issues, the existing conditions, the amount of new impervious material, and the grading must all be considered in dealing with a storm water plan. If there is storm water coming onto the land from off-site that must be considered. The goal is to keep the existing point of water exit and its volume the same after development.

Mr. Marsh looked at the existing conditions plan (Defs.' Ex. GG at 3) and grading and drainage plans, *id.* at 7, of the Riverview Mews project. He obtained these plans from the District Environmental Commission.

Sheet 3 is the existing conditions plan prior to the construction of Riverview Mews. It shows where run-off goes off the subject (Mews) property and where, if at all, run-off comes onto the property. The existing conditions show water ran off the northern portion of the Richard property onto the Mews property before any construction was undertaken. Plaintiff suggests that this condition was caused by unauthorized practices on the Richard property concerning parking lot construction, but this is, at best, speculative.

Defendants' Exhibit Z shows the existing conditions on the Richard property as of spring 2009. It shows the same groundwater flow path on the Richard's property as was shown in Defendants' Exhibit GG. The existing conditions on the Richard property have not changed. Only a small area of the Richard property drains into the Mews property. In that area there is only one, and perhaps a portion of another, trailer.

The one trailer is next to the Richard Electric building and is 8 x 35 feet. The trailer accounts for a very small amount of the water run-off, especially when compared to the impervious surfaces on the Riverview Mews side. Mr. Marsh has seen no discharge of any materials from the trailer onto the Mews property. There has been some run-off from the Richard parking lot onto the grass swale on the Mews side. This is typical when dealing with gravel parking lots.

The presence of trailers on the Richard property has not had a significant impact on the amount of groundwater run-off. Further, those conditions existed at the time the Mews project was proposed and should have been accounted for in the Mews groundwater plan.

Defendants' Exhibit S shows the proposed buildings, roads, storm water collection system, swales, and project contours of the Riverview Mews project, as well as the tree line along the property boundary. The engineer designing the Riverview Mews project showed a berm as part of the Mews project to prevent storm water from entering the Mews property from the Richard property. However, the Riverview Mews project, as built, did not contain all of the berms as designed. The absence of a berm as designed has allowed for the continued run-off from the Richard property onto the Mews property. If built as designed in Defendants' Exhibit S, no storm water would run off onto the Mews property.

The water run-off onto the Mews property comes from about .2 acres of the Richard property. This is about 29% of what runs into the storm water system from the Riverview Mews site.

To the extent Riverview Mews complains of nuisance caused by water run-off from the Richard land, that run-off existed before the Riverview Mews project began. To the extent the water run-off into the Riverview Mews storm system is a concern, that problem can be addressed by constructing the berm shown in the design plan, despite Mr. Marsh's opinion that appropriate design standards would require Riverview Mews to account for this in their design.

Before construction of Riverview Mews, the boundary between the two properties was heavily wooded. In connection with the Mews construction, most, if not all, of the trees along the property line were removed. Storm water drainage for Riverview Mews was constructed along the property line in the area south of the right-of-way. When the sidewalk was constructed in the right-of-way, grass seeding and some landscaping was done in that area. Plaintiff's Exhibit 22 shows the condition of the right-of-way just after construction of the sidewalk and the condition of the Richard property just prior to and at

the beginning of the Riverview Mews construction. Other photos are offered to show an increase in traffic along the eastern side of the Richard Electric building.

Plaintiff alleges that Richard Electric has driven many vehicles over the easterly edge of its property since the Riverview Mews project was started. Plaintiff claims this has been done out of spite for the construction of the Mews project. Testimony presented by Defendants establishes that vehicles have driven over that area since the mid-1980s. The evidence of any action being taken by Defendants out of spite is slight at best and, in any event, unconvincing. The court is convinced Defendants are using their land in conjunction with an ongoing business operation and drive along the easterly edge of their property to access storage trailers for use in their business. This conduct has been on-going for many years before the Riverview Mews project was undertaken.

One of the Richard Electric trailers is very near the property line between the Richard and the Mews properties. That trailer was leaning over toward the Mews property. It has now been righted. The trailer remains on the Richard property, very near the property line. There is no evidence the trailer encroaches onto the Mews property.

To the extent that the Richard Electric operation is unsightly, about which reasonable minds might differ, the condition of that land has remained largely unchanged since 1986. The storage trailers on the Richard property have been in place for over 20 years and have not moved during that time. When they were brought in there was substantial screening due to existing vegetation on the parcel where Riverview Mews is now located. Riverview Mews purchased its interest in its property in 2006 and removed the existing vegetation during construction. While they have planted some trees since construction, those trees are quite different in their screening capacity than the dense underbrush which existed before the Mews project began.

On the easterly boundary of the Mews property, Plaintiff was required to plant 40 white pine trees in connection with the Act 250 process. The site plan did not require planting of trees along the westerly boundary, which borders the Richard property. The site plan shows existing trees along that line, but those trees were removed during construction of storm water drainage. Some of the trees along that line were 40 feet high. This wooded "buffer" was 30-40 feet in width. Photographic evidence, specifically Plaintiff's Exhibit 12 and Defendants' Exhibit HH show the extent of trees between the two properties before construction of Riverview Mews. Those trees provided much more screening than those put in by Riverview Mews and which are in place at present along the property line.

One of the requirements of the Act 250 process was for Riverview Mews to provide adequate landscaping to screen it from surrounding properties. (Pl.'s Ex. 9.) There is no evidence that Richard or other neighbors have complained about the amount of screening Riverview Mews has provided. Had Riverview Mews put in additional screening, the activities or conditions on the Richard property would not be as visible as is currently the case.

In short, although Mews dislikes the operations on the Richard property, those operations are hardly new or different in kind or extent than what was occurring long before the Riverview Mews project began. What has changed is the removal of screening, which was done by Riverview Mews for their purposes, and not at the behest of the Defendants.

## Conclusions of Law

### A. Establishment of Right-of-Way

Defendants claim that Plaintiff has no right-of-way over the Richard property. "Rights-of-way are easements, legally recognized property interests, of which the owner is entitled to 'reasonable' use." *Northern Sec. Ins. Co., Inc. v. Rossitto*, 171 Vt. 580, 582 (2000) (mem.). "The determination of the existence of an easement is a question of fact in a law action." *Revis v. Barrett*, 467 S.E.2d 460, 462 (S.C. Ct. App. 1996).

In this case, Plaintiff has demonstrated by a preponderance of the evidence that it has a right-of-way over the Richard property. HIF created a right-of-way, in favor of its non-leased property, on the property it leased to Accro in 1967. HIF subsequently conveyed that right-of-way to B&C Realty in 1974, and that right-of way was eventually conveyed to Plaintiff. Each conveyance of the right-of-way referenced the Accro land as the servient estate. The Accro land—the servient estate—eventually came into the hands of Defendants.

Defendants contend that the right-of-way expired in 1982 because it was first created in the 1967 Accro lease, and the term of the lease was fifteen years. In other words, Defendants take the position that the right-of-way that B&C acquired in 1974 was limited in duration to the original fifteen-year lease term, which expired in 1982. This argument requires the court to examine the intent of the grantors in creating the right-of-way. See *Main Street Landing, LLC v. Lake Street Ass'n, Inc.*, 2006 VT 13, ¶ 7, 179 Vt. 583 (mem.) ("When construing a deed or other written agreement, the 'master rule' is that the intent of the parties governs.").

"There is no formula for the creation of a right-of-way; the only essential is that the parties' intention be clear." *Griffith v. Nielsen*, 141 Vt. 423, 428 (1982). The parties' intentions are inferred from the language of the conveyance, and "[i]f the language of the instrument is not clear, the intentions of the parties must be gathered from the total language and from the circumstances which prevailed at the time of the conveyance." *Id.* "A deed term is ambiguous if reasonable people could differ as to its interpretation." *DeGraff v. Burnett*, 2007 VT 95, ¶ 20, 182 Vt. 314 (internal quotation omitted).

Here, the court does not find the conveyance to be ambiguous. The right-of-way was first created by the 1967 Accro lease. Even though the initial term of the lease was fifteen years, there is no language in the lease suggesting that the grantor intended for the right-of-way to be limited to the duration of the initial lease agreement, or that the right-

of-way would not survive a renewal or modification of the lease agreement. Instead, the language simply creates a right-of-way.

Moreover, and more importantly, the 1974 conveyance to B&C did not contain any limitation on the duration of the right-of-way. Instead, the deed transferred a right-of-way to the new holder of the dominant estate that was unlimited in terms of duration. The court does not interpret the reference to the Accro lease as a limitation on the right-of-way, but rather as identifying the servient estate through which the right-of-way runs. There is no indication in the 1974 deed that the transferred right-of-way was set to expire in 1982.

Under these circumstances, the court concludes that the grantors intended for the right-of-way to be presumptively perpetual in duration. See *Kapp v. Norfolk Southern Ry. Co.*, 350 F. Supp. 2d 597, 608 (M.D. Pa. 2004) ("An express easement is presumptively perpetual in duration, and will be rendered void only if circumstances change to such a degree as to render the easement useless to the grantee.") (citing Restatement (Third) of Property: Servitudes § 4.3); see also *Corbett v. Ruben*, 290 S.E.2d 847, 849 (Va. 1982) ("Even when the grant is made without term, courts may presume that an appurtenant easement was intended to terminate when the purpose for which it was created can no longer be served."). Therefore, Plaintiff's deed contains a valid easement appurtenant over Defendant's land.

The court finally notes that this conclusion should not be surprising to the present holders of the servient estate, since the deeds in the chain of title for the servient estate have consistently contained references to the right-of-way burdening the estate from 1982 to present, thus providing ample notice of the continued existence of the right-of-way.

B. Extinguishment by Adverse Possession

Defendants next argue that Plaintiff's easement was extinguished through adverse possession. "To extinguish an easement held by a dominant estate, a servient estate must establish an ouster, which requires 'open, notorious, continuous, hostile and adverse possession' of an easement maintained for fifteen years; '[t]he possession must be unequivocal and incompatible with possession and use by the dominant owner.'" *Rowe v. Lavanway*, 2006 VT 47, ¶ 15, 180 Vt. 505 (mem.) (quoting *Percival v. Fletcher*, 121 Vt. 291, 296 (1959)).

Defendants contend that they adversely possessed the easement by using it "as part of their property and as part of their ongoing business operation," e.g., driving and parking its trucks on it. (Defs.' Mem. at 38.) Defendants support this assertion with *Jarvis v. Gillespie*, 155 Vt. 633 (1991). "The ultimate fact to be proved in an adverse possession case is that the claimant has acted toward the land in question as would an average owner, taking properly into account the geophysical nature of the land." *Id.* at 638-39 (quotations and citation omitted). Defendants, however, take this quote out of context. The issue in *Jarvis* was whether "plaintiff's uses of the parcel constituted sufficient possession to establish adverse possession." *Id.* at 638. The *Jarvis* Court

found that the plaintiff in that case did possess the land, sufficient to establish adverse possession, because his use of the land for "[g]razing cattle and horses, cutting hay, planting and tapping trees, and cutting firewood and Christmas trees are the types of acts which are consistent with the nature of the parcel" and are "uses an average owner would have made of the parcel." *Id.* at 639.

In the instant case, there is no dispute Defendants possessed the land burdened by the easement and used it as an average owner would. But contrary to Defendants' assertion, this alone does not establish adverse possession. "Use of the road by the servient owner during periods of nonuse by the dominant owner is not adverse use." *Rowe*, 2006 VT 47, ¶ 16. In order to claim that Plaintiff's easement was extinguished, Defendants must show that they acted "clearly wrongful as to the owner of the easement. [Defendants'] use of the land must be incompatible or irreconcilable with use of the easement." *Id.* ¶ 15 (citation and quotations omitted). Merely using property subject to an easement by a servient owner during periods of nonuse by a dominant owner is not adverse possession. See *Okemo Mountain, Inc. v. Town of Ludlow*, 164 Vt. 447, 453 (1995). Here, even though there is little if any evidence in the record indicating the manner in which the holders of the right-of-way used the easement prior to the establishment of the paved walkway, the evidence that was presented did not show that Defendants' use of the right-of-way for driving and parking its trucks was incompatible or irreconcilable with any other uses of the easement, including use as a walkway.

Defendants have also failed to proffer sufficient evidence to establish that their use of the easement has been hostile and adverse for the past 15 years. In this case, Defendants have only shown that they treated the easement as their own property, but they have failed to show that this was done to exclude Plaintiff and its predecessors and prevent them from exercising their right to use the easement. At best, the evidence shows only nonuse by the dominant estate holder until recently. However, "it is difficult to establish adverse possession of an easement where the dominant owner abstains from using the easement." *Id.* In the absence of hostile actions evincing an intent to exclude the dominant estate holder, Defendants' adverse possession claim fails, and Plaintiff has established a valid right-of-way over the Richard property.

C. Trespass

Plaintiff claims that Defendants trespassed on Plaintiff's easement. "The character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement." *Barrett v. Kunz*, 158 Vt. 15, 18 (1992). None of the evidence in this case suggests that the right-of-way at issue here is an exclusive easement solely for the benefit of the dominant estate with no benefit at all for the servient estate, i.e., the Richard property. "Where a private right of way exists, the owners of the dominant and servient tenements must each use the way in such a manner as not to interfere with one another's utilization thereof." *Lindsey v. Shaw*, 49 So. 2d 580, 584 (Miss. 1950). An "easement does not dispossess the landowner." *Arcidi v. Town of Rye*, 846 A.2d 535, 541 (N.H. 2004). Because Defendants retains their

possessory rights in the property, Plaintiff cannot maintain a trespass action against them. See *Harris v. Carbonneau*, 165 Vt. 433, 437 (1996) ("A person who intentionally enters or remains upon *land in the possession of another* without a privilege to do so is subject to liability for trespass." (emphasis added)).

Although the easement deed in this case describes the size, shape and location of the right-of-way, neither the 1967 lease nor the 1974 deed describe the uses permitted in connection with the right-of-way. Where a general right-of-way is specified in a deed, the owner of the easement is entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land. *Patch v. Baird*, 140 Vt. 60, 66 (1981); see also *Rossitto*, 171 Vt. at 582 ("[T]he [easement] owner is entitled to 'reasonable' use."). This means that Defendants cannot unreasonably interfere with Plaintiff's use of the right-of-way, such as by blocking it with trucks or otherwise preventing its use.

> The grantor, or those claiming under him, cannot . . . legally obstruct the way, . . . because an easement such as a right of way appurtenant is an incorporeal hereditament, and one holding the title thereto has the same right of property therein as he has in land. He is entitled to his specific property and cannot be divested thereof without his consent. If his way is illegally obstructed, he is entitled to injunctive relief.

*Lafleur v. Zelenko*, 101 Vt. 64, 71-72 (1928) (citations omitted).

Plaintiff maintains that Defendants are liable for the damages to the grass Plaintiff planted in the right-of-way. However, Plaintiff's reasonable right to use the easement for a grassy walkway cannot interfere with Defendants' reasonable right to use the land for its trucks.

> The rights inherent in dominant and servient tenements are correlative, not absolute. The owner of a servient estate has the privilege to use the land affected by an easement to the extent that his or her use does not impair the dominant tenant's right of way. Likewise, the dominant tenant must use the easement reasonably, so as not to damage the servient tenant's possessory interest.

*Dumont v. Town of Wolfeboro*, 622 A.2d 1238, 1241 (N.H. 1993). Plaintiff has failed to show that it has the right to exclusive use of the right-of-way or that Defendants' use is unreasonable and impairs Plaintiff's rights. As a result, Plaintiff has not proven entitlement to damages from Defendants for trespass or for destroying the grass.

D. Nuisance

Finally, Plaintiff alleges that the water run-off from Defendants' land to Plaintiff's land and the unsightly trailers on Defendants' land constitute a nuisance.

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D (1979). "An upper property owner is entitled to have surface water pass to lower lands in its natural condition. . . . However, an upper property owner cannot artificially change the manner of flow by discharging it onto the lower land at a different place from its natural discharge." *Canton v. Graniteville Fire Dist. No. 4*, 171 Vt. 551, 552 (2000) (mem.) (citations omitted). "Such interference with the flow of surface water is a form of conduct that may result in a trespass or nuisance." *Id.* (citing Restatement (Second) of Torts § 821D cmt. e). "An upper property owner creates a nuisance when he or she causes water to flow onto lower lands in a manner or place different from its natural state, harming the lower property owner's interest in the use and enjoyment of that land." *Id.* (citing Restatement (Second) of Torts § 821D).

In this case, Mr. Marsh credibly testified that before Plaintiff began construction, water ran off the northern portion of the Richard property onto the Mews property. As of this spring, the groundwater ran off the Richard property along the same path it did before Plaintiff began construction. The existing conditions on the Richard property have not changed.

Plaintiff suggests that the presence of trailers on the Richard property has artificially changed the manner of flow of the run-off onto the Mews property. However, the credible testimony of Mr. Marsh establishes that the trailers have not affected the run-off onto the Mews property. Furthermore, there was insufficient evidence to establish that the parking lot on the Richard property affected the water run-off or that other materials and equipment stored on the Richard property have caused contaminants to run-off onto the Mews property.

In order to be liable for a water nuisance, Defendants must have *caused* water to run-off onto Plaintiff's land. Plaintiff has not submitted sufficient evidence to establish by a preponderance that Defendants caused the water run-off which preexisted Plaintiff's construction on the Mews property, and in fact, Defendants' evidence established that it was Plaintiff's failure to include a berm in its construction project that allowed water to run-off onto the Mews property. In the absence of proof of causation, Plaintiff has failed to show that Defendants' water run-off is a nuisance.

Turning to the issue of Defendants' unsightly property, "[i]n order to be considered a nuisance, an individual's interference with the use and enjoyment of another's property must be both unreasonable and substantial." *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 457 (1988). "The standard for determining whether a particular type of interference is substantial is that of definite offensiveness, inconvenience or annoyance to the normal person in the community . . . . Substantial harm is that in excess of the customary interferences a land user suffers in an organized society." *Id.* (quotations and citations omitted).

It cannot be doubted that in nuisance cases,

> [t]he court . . . has authority to grant injunctions to restrain parties from the use of their own lands and building for trades and purposes in themselves lawful, but necessarily so noxious, unhealthy, dangerous or unwholesome to the occupants of neighboring buildings as to destroy, or seriously and substantially to impair, their value for the purposes for which they were designed.

*Curtis v. Winslow*, 38 Vt. 690, 691 (1866).

In this case, there is no dispute that Defendants are using the Richard property "for trades and purposes in themselves lawful," but despite Plaintiff's contentions, it has failed to show that Defendants' use of the Richard property is "so noxious, unhealthy, dangerous or unwholesome to the occupants of [the Mews property] as to destroy, or seriously and substantially to impair, the[] value for the purposes for which [it was] designed." Although the Richard property has several old trailers on it, there has been no evidence that they are dangerous or that noxious and unhealthy contaminants discharged from them. In fact, the trailers are registered and structurally sound and could be operable if Defendants chose to replace the tires and wiring.

The trailers on the Richard property are used to store Defendants' equipment. This is in marked contrast to the "large, rusty storage tank . . . placed in the meadow" in the *Coty* case, which "was never used." *Coty*, 149 Vt. at 454. Furthermore, the *Coty* Court affirmed the trial court's nuisance finding in part because "the weightiest factor in its analysis was defendants' malicious motive." *Id.* at 458. In contrast, Plaintiff has failed to establish any malice or spite on Defendants' part because Defendants have been using their property in the same manner since before Plaintiff purchased the neighboring property.

The main "offensiveness, inconvenience or annoyance" Plaintiff complains of is the *appearance* of the Richard property. However, "[a]s a general rule, the unsightliness of a thing, without more, does not render it a nuisance under the law." *Id.* at 458. The court's conclusion that the appearance of the Richard property does not substantially interfere with the enjoyment of the Mews property is further supported by the fact that Defendants' use of the property has not changed in over 20 years, since before Plaintiff purchased the Mews property. See *Williams v. Oeder*, 659 N.E.2d 379, 382 (Ohio Ct. App. 1995) (fact that plaintiff voluntarily places himself in situation whereby he suffers inconvenience and injury from use of defendant's property may be considered along with other evidence in determining whether the use of a nuisance on defendant's property is unreasonable); Restatement (Second) of Torts § 840D (fact that plaintiff has acquired his land after a nuisance interfering with it has come into existence is a factor to be considered in determining whether the nuisance is actionable).

Finally, it should be noted that, like Plaintiff's failure to place a berm on its property contributed to the water run-off onto that property, Plaintiff's removal of the trees bordering the Richard property contributed to the lack of screening between the two properties and caused Plaintiff to see the unsightly appearance of Defendants' property.

See *id.* § 840B(1) ("When a nuisance results from negligent conduct of the defendant, the contributory negligence of the plaintiff is a defense to the same extent as in other actions founded on negligence."). Consequently, the court finds that the appearance of the trailers and other materials on the Richard property does not substantially interfere with the enjoyment of the Mews property, and thus there is no nuisance.

Order

On Count 1 of Plaintiff's Complaint: Judgment is for Defendants.

On Count 2 of Plaintiff's Complaint: Judgment is for Defendants.

On Count 1 of Defendants' Counterclaim: Judgment is for Plaintiff.

Dated at Woodstock, Vermont this 23 day of October, 2009.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

OCT 23 2009

WINDSOR COUNTY CLERK