IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PAUL G. KUHNS and ANNE M. KUHNS, Petitioners, v. BRUCE A. HILER DELAWARE QPRT, ELAINE M. CACHERIS DELAWARE QPRT, and LOT 27 AND 28, BLOCK 23, REHOBOTH HEIGHTS, REHOBOTH BEACH, DELAWARE, Respondents.	)	*Civil Action No. 7586-VCG*
BRUCE A. HILER, as Trustee of the BRUCE A. HILER DELAWARE QPRT and ELAINE M. CACHERIS, as Trustee of the ELAINE M. CACHERIS DELAWARE QPRT, Counterclaim and Third-Party Plaintiffs, v. PAUL G. KUHNS and ANNE M. KUHNS, Counterclaim Defendants, and THE CITY OF REHOBOTH BEACH, a municipal corporation of the State of Delaware, and GREGORY FERRESE, in his capacity as the City Manager of the City of Rehoboth Beach, Third-Party Defendants.	)	

MEMORANDUM OPINION

Date Submitted: December 5, 2013
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Date Decided: March 31, 2014

Vincent G. Robertson, of GRIFFIN & HACKETT, P.A., Rehoboth Beach, Delaware, Attorney for Petitioners, Counterclaim Defendants.

John W. Paradee and Nicole M. Faries, of PRICKETT, JONES & ELLIOTT, P.A., Dover, Delaware, Attorneys for the Respondents, Counterclaim/Third-Party Plaintiffs.

Stephen E. Smith and Glenn C. Mandalas, of BAIRD MANDALAS BROCKSTEDT, LLC, Dover, Delaware, Attorneys for the City of Rehoboth Beach and Mr. Gregory Ferrese.

GLASSCOCK, Vice Chancellor

Oh, Danny Boy, the pipes, the pipes are calling
From glen to glen, and down the mountain side.[1]

The pipes in question, a water lateral likely installed in the 1920s or '30s and a sewer lateral from the 1930s or '40s, have been serving their designed purpose of carrying clean water in, and black water out, for perhaps 150 years combined. Yet their call went unheeded until recently, when the Petitioners undertook repairs and the parties discovered their existence. The pipes run from the Petitioners' yard north under the Respondents' property, along the eastern boundary of the Respondents' lot, and ultimately to City water and sewer mains. No easement of record exists in favor of the Petitioners. Given that the burden on the Respondents' lot was so minimal that it went unnoticed over the course of an average human lifetime, one might assume that mutual goodwill and neighborly regard would quickly have resulted in an agreement between the parties for use to continue. If so, one would be wildly optimistic. Instead, wearisome litigation, involving many quaint and curious volumes of forgotten lore concerning the history of public water and sewerage in the Town, and now City, of Rehoboth, ensued.[2] Cross-requests for injunctive relief were filed, and damages demanded. The result is below.

[1] Although "most closely associated with Irish communities," the lyrics to Danny Boy were actually written by English lawyer Frederic Weatherly in 1910, which Weatherly later modified to the Irish tune, "Londonderry Air." *Danny Boy*, WIKIPEDIA, http://en.wikipedia.org/wiki/Danny_Boy.

[2] *See* Edgar Allen Poe, *The Raven* (Simply Read Books 2014) (1845). For ease of reference, I refer to Rehoboth exclusively as the City, recognizing that many of the historical references relate to a time when Rehoboth was, in fact, the Town of Rehoboth.

I. BACKGROUND

But come ye back
When summer's in the meadow.[3]

The properties involved in this matter were once part of Rehoboth Heights, a residential community of summer cottages located in present-day south Rehoboth and developed by the Rehoboth Heights Development Company ("RHDC") in the early twentieth century.[4]

A. *The Kuhns Property*

The property owned by the Petitioners, Paul and Anne Kuhns—101 Lake Drive (the "Kuhns Property")—was designated as Lots 41 and 42 on Block 23 by the RHDC.[5] In 1925, the RHDC conveyed Lots 40, 41, and 42 to Joseph E. Way.[6] The governing deed (the "Way Deed") conveyed the land, as well as "the buildings, improvements, fixtures, ways, woods, waters, watercourses, easements, rights, liberties, privileges, hereditaments and appurtenances to [that] land[] . . . ."[7] The Way Deed also provided:

> . . . that such *electric lines for water and gas as have been or shall be installed in this subdivision by the [RHDC] shall remain the property of the [RHDC]*, and are hereby reserved to the [RHDC] and that no other lines shall be installed nor franchise granted for electric gas or water service in said subdivision without the consent in writing of the

[3] *See supra* note 1.
[4] *See e.g.*, Pet'rs' Op. Br. at 3.
[5] A0270-72 (2008 Kuhns Deed); Pet'rs' Op. Br. at 2. Citations to numbered documents beginning with "A" refer to exhibits in the record.
[6] A0001-06 (1925 Way Deed).
[7] A0002.

> [RHDC], unless and until the [RHDC] shall have been reimbursed . . . and that the foregoing restrictions are made as a part of the consideration for this conveyance and are covenants to run with the land . . . .[8]

The Kuhns, as well as the City and City Manager Gregory Ferrese (the "City Defendants"), contend that the first house built on the Kuhns Property was constructed in the mid- to late-1920s.[9] The Hilers, however, emphasize the lack of documentation to support that assertion.[10] The original house was constructed by at least 1935.[11]

In 1942, Mr. Way conveyed Lots 41 and 42 (*i.e.*, the Kuhns Property) to Verna Mae Ten Weeges.[12] Title to the Kuhns Property subsequently underwent a series of conveyances, including transfers in 1944, 1954, and 1978.[13] On July 25, 2008, the Kuhns purchased this property from the estate of Catherine Flickinger, who had purchased the property in November 1978.[14]

B. *The Hiler Property*

The Respondents, Bruce Hiler and Elaine Cacheris (referred to herein as "the Hilers"), own property at 100 St. Lawrence Street in Rehoboth Beach (the

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[8] A0004 (emphasis added).
[9] *See, e.g.*, Pet'rs' Op. Br. at 2, 7; Pet'rs' Answering Br. at 4; City Defs.' Answering Br. at 9.
[10] *See, e.g.*, Resp'ts' Answering Br. at 7.
[11] A 1935 Sewer Map indicates that there was a structure on the Kuhns Property by at least 1935. City Defs.' Answering Br. at 4.
[12] A0286-87 (1944 Reed Deed).
[13] Pet'rs' Op. Br. at 2; Resp'ts' Op. Br. at 7-8; *see also* A0285-87 (1944 Reed Deed); A0283-84 (1954 Darling Deed); A0280-82 (1954 Brown Deed); A0277-79 (1954 Dyer Deed); A0273-75 (1978 Flickinger Deed).
[14] A0270-72 (2008 Kuhns Deed).

"Hiler Property"), which the RHDC identified in its plot plan as Lots 27 and 28 on Block 23.[15] The Hiler Property abuts the Kuhns Property to the north. In September 1930, the RHDC sold Lots 25 through 28 (including what is now the Hiler Property) to George Chardy.[16] Whereas the Way Deed conveyed the land, as well as "the buildings, improvements, fixtures, ways, woods, waters, watercourses, easements, rights, liberties, privileges, hereditaments and appurtenances to [that] land[],"[17] the conveyance to Mr. Chardy lacked similar language, merely conveying "all those certain lots, pieces or parcels of land . . . designated and described as follows to wit: Lots numbered twenty five (25) twenty six (26) twenty seven (27) and twenty eight (28) in Block numbered twenty three (23)."[18] Further, though the Way Deed provided ". . . that such *electric lines for water and gas as have been or shall be installed in this subdivision by the [RHDC] shall remain the property of the [RHDC]*,"[19] the deed conveying the property to Mr. Chardy lacked similar language.

The first home built on this property was constructed in 1938.[20] Like the Kuhns Property, this property also underwent a series of conveyances, including

[15] *See, e.g.*, Pet'rs' Op. Br. at 2; Resp'ts' Op. Br. at 1-2.
[16] A0365-67 (1930 Chardy Deed). During briefing, Mr. Chardy was also referred to as Mr. Chandy and Mr. Chardry.
[17] A0002 (1925 Way Deed).
[18] A0365 (1930 Chardy Deed) (emphasis omitted).
[19] A0004 (1925 Way Deed) (emphasis added).
[20] A0103 (Mem. to Comm'rs re: Partitioning Request).

transfers in 1941, 1972, 1973, 1990, 1998, and 1999.[21] In 1999, then-owners of 102 St. Lawrence—the original property, encompassing Lots 25 through 28—applied for a partition.[22] In March 2000, the City Commissioners approved partition of this property into two tracts, one of which is the Hiler Property.[23]

In June 2002, the Hilers purchased the property at 100 St. Lawrence Street, which consists of Lots 27 and 28.[24] The Hilers have transferred their interest in this property several times, to various trusts.[25] Currently, the owners of 100 St. Lawrence Street are Bruce A. Hiler Delaware Qualified Personal Residence Trust ("QPRT") and Elaine M. Cacheris Delaware QPRT.[26] Nevertheless, for the sake of convenience, I refer to the owners of 100 St. Lawrence Street as the Hilers.

C. *The Water and Sewer Laterals at Issue*

The water and sewer laterals providing these utilities to the Kuhns Property run from St. Lawrence Street, where the water and sewer mains are located, along the eastern boundary of the Hiler Property, into the northern portion of the Kuhns

[21] Resp'ts' Op. Br. at 8-9; *see also* A0363-64 (1941 Stein Deed); A0360-62 (1972 J.R.M. Corp. Deed); A0357-59 (1973 Stein Deed); A0356 (1990 Byron Deed); A0353-55 (1998 Deed); A0351-52 (1999 Transfer); A0343-50 (Partition Deeds); A0340-42 (2002 Hiler Deed); A0304; A0372-73.
[22] A0103-04 (Mem. to Comm'rs re: Partitioning Request); *see also* Resp'ts' Op. Br. at 9-11.
[23] A0129 (Mar. 21, 2000 Letter re: Subdivision Application).
[24] A0340-42 (2002 Hiler Deed).
[25] *See, e.g.*, Hiler Dep. 54:18-57:4 (describing the various transfers of the Hiler Property); A0301-02; A0318-37 (Documents Reflecting Transfers).
[26] Oral Arg. Tr. 36:23-37:2; *see also* Hiler Dep. 56:3-10.

Property.[27] Though the *exact* path of the laterals under the Hiler Property is unknown,[28] they generally run from the mains on St. Lawrence Street through the eastern portion of the Hiler Property.[29] I find, based on a preponderance of the evidence, that the laterals are located entirely in the side yard setback—that is, in an unbuildable portion—of the Hiler Property.[30]

1. Water

As mentioned above, the Hiler Property and the Kuhns Property were originally part of Rehoboth Heights. In the 1920s, the RHDC advertised these lots as "Where Pine and Brine are Ever Wooing."[31] Advertisements announced:

> When You Buy a Lot You are Assured of: First you are getting dollar for dollar in value for your money. Second you are assured of a delightful place in which to erect a Summer Cottage. Third, a

[27] *See* A0241 (Map Showing Laterals as Marked by Harry Caswell, Updated Apr. 2013); *see also* Pet. ¶¶ 4-5.

[28] *See, e.g.*, Blizzard Dep. 24:10-14 ("When the [C]ity puts [the water lateral] in, it runs straight from the main, straight to the curb. When a private contractor comes out, the water meter is right there. And if he wants to go right or left, it's no problem."); Stenger Dep. 47:19-48:3 ("There's really no rhyme or reason to where [sewer laterals typically run]—Once the lateral leaves the main, it's generally brought straight to the curb. But that's not even a hundred percent. Sometimes it's at a different angle. . . . Once they get to the curb, what the building owner or property owner does with that lateral, they can run it straight or they can run it on a 45-degree angle. They could do whatever they want[] with it."); A0396 (Blizzard Aff.) ("In my experience in the City of Rehoboth Beach, 99% of the time water laterals are installed in a straight line from the water main/water meter to the property served.").

[29] *See supra* note 27.

[30] *See, e.g.*, Pet. ¶ 6; *see also* Rehoboth City Code § 270-26 (governing side yards). The Hilers dispute the laterals' location, arguing that "a survey prepared for [the Kuhns] during this litigation only reflects merely the best guess of where the lines run on [the Hiler Property]." Resp'ts' Op. Br. at 3. However, the Hilers do concede that "the [Kuhns Property's] water line and sewer lines [sic] run under and through the entire eastern side of [the Hiler Property]." *Id.* at 34.

[31] Pet'rs' Op. Br. at 3 (internal quotation marks omitted).

> property with a splendid view of Ocean and Lake with sidewalks, curbing, *water and electric light facilities*.[32]

In 1926, Rehoboth Heights was part of an annexation that extended the boundary of Rehoboth Beach southward.[33] In April 1927, following annexation, then-Mayor of Rehoboth Beach appointed a committee of Commissioners to "mak[e] a survey of the Water Mains, Valves, Fittings, Fire Hydrants[,] etc., already installed and on the ground ready for installation in the recent annexed section known as Rehoboth Heights."[34] On April 9, 1927, the committee reported that there were 18,080 feet of four-inch Cast Iron Class "B" Pressure Pipe, 3,800 feet of which were "on the ground;" the remainder were already installed.[35]

Thereafter, the City acquired from the RHDC the title to "the water mains, piping and appurtenances hereinafter enumerated . . . together with all rights, privileges and franchises belonging to said Rehoboth Heights Development Company with reference to said streets, including electric light franchises, gas franchises, *water franchises* and all other franchises and rights now or heretofore owned by the [RHDC] . . . ."[36] The July 23, 1927 contract entered into between the City and the RHDC provided that:

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[32] *Id.* (emphasis added) (internal quotation marks omitted).
[33] *See, e.g.*, City Defs.' Answering Br. at 3.
[34] A0061 (April 1927 Comm'r Meeting Minutes).
[35] A0062 (Committee Results). I take judicial notice of the fact that the survey refers to *mains*, not *laterals*; a four-inch lateral would be rather robust for service to a summer cottage.
[36] A0017-18 (July 1927 Conveyance to the City) (emphasis added).

> This contract is to cover specifically all of the following enumerated articles: . . . said *water mains* having, prior to the enactment above referred to, been laid on the following streets and avenues of Rehoboth to wit: . . . *on St. Lawrence Street from King Charles Avenue Westward to Bayard Avenue* . . . .[37]

The contract also expressly conveyed 14,280 feet of four-inch Cast Iron Class "B" Pressure Pipe: apparently the 18,080 feet of pressure pipe, less the 3,800 feet on the ground, surveyed by the committee in April 1927.[38]

Although the language of this conveyance from the RHDC to Rehoboth Beach indicates that the water *main* on St. Lawrence Street was in place by 1927, the installation date of the water *lateral* is less clear. Nevertheless, the type of material from which the lateral was constructed offers insight into when that lateral was installed. The City Defendants' expert, Water Department Superintendent Howard Blizzard,[39] explained:

> As a long-time plumber in this area, you learn to recognize that certain types of pipes are associated with a certain time period. With regard to water laterals, in the 1930's all of the installed pipes were made of galvanized or black iron. By the 1940's, black iron was not used anymore and everything was galvanized. In the late 1960's, copper replaced galvanized. Finally, in the late 1970's and early 1980's, water laterals transitioned to plastic.[40]

[37] A0018 (emphasis added).
[38] *Id.*
[39] Blizzard Dep. 5:18.
[40] A0395 (Blizzard Aff.).

Mr. Blizzard, who viewed the water lateral at issue in the 1990s, testified that it was galvanized.[41] He elaborates in his Expert Report "that the water lateral serving the Kuhns [P]roperty is no newer than the late 1950's. In other words, I believe that the water lateral currently serving the Kuhns [P]roperty was installed in the late 1950's or earlier."[42]

Conversely, Harry Caswell, a plumber in Rehoboth Beach, testified at his deposition that the water lateral was copper,[43] which would place the installation in the late 1960s, at the earliest. To address the discrepancy between these testimonies, the City Defendants explain that Mr. Caswell viewed the lateral from the Kuhns Property, while Mr. Blizzard viewed the pipe from the water main on St. Lawrence Street.[44] In other words, the City Defendants maintain that, from the water main to the meter, the line is galvanized, and from the meter to the Kuhns Property, the line is copper.[45] Based on this testimony, the City Defendants contend that the water lateral was updated to copper in the 1960s or 1970s.[46] The Hilers, however, dispute this "supposed upgrade."[47]

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[41] A0396.
[42] *Id.*
[43] Caswell Dep. 14:12-13.
[44] *See, e.g.*, Oral Arg. Tr. 107:2-6.
[45] *Id.* at 107:2-24; *see also* Caswell Dep. 60:11-13.
[46] *See, e.g.*, City Defs.' Answering Br. at 5.
[47] Resp'ts' Reply Br. Against the City Defs. at 6.

In the early 1990s, water meters were installed throughout Rehoboth Beach.[48] The water meter servicing the Kuhns Property is located on the sidewalk of St. Lawrence Street abutting the Hiler Property, as is the water meter servicing the Hiler Property.[49] Both of these meters also have "a visible 'curb stop' a few feet away toward the curb of the street."[50] However, it is not obvious that the lateral serving the Kuhns Property originates in front of the Hiler Property, as there is no indication on the water meter lid of the address to which the meter corresponds. Instead, as Mr. Blizzard explained, "[w]hen you touch it with the wand, the meter will give you the address . . . ."[51]

2. Sewer

In the 1930s, Rehoboth Beach began exploring the possible installation of a City-wide sewer system. An editorial in support of this system, appearing in the August 3, 1934 edition of the *Delaware Coast News*, opined that "[c]esspools in Rehoboth are out of date. They are as much a thing of the past as the horse is for travel."[52]

[48] Blizzard Dep. 9:9-16.
[49] *See, e.g.*, City Defs.' Sur-Reply Br. Ex. A (Second Blizzard Aff.) at ¶¶ 2-8.
[50] City Defs.' Sur-Reply Br. at 2; *see also* City Defs.' Sur-Reply Br. Ex. A (Second Blizzard Aff.) at ¶¶ 5, 8 (describing these curb stops).
[51] Blizzard Dep. 10:17-18.
[52] A0028.

In August 1934, the citizens of Rehoboth voted in favor of establishing a central sewer system.[53] Following this vote, the State Legislature passed an act that authorized the Commissioners of Rehoboth Beach "to borrow money and issue bonds to secure the payment thereof, for the purpose of establishing a sewer system and sewage treatment plant and to control and regulate the same when so established."[54] After the citizens of Rehoboth voted in support of the issuance of this bond,[55] the City began preparing for the installation of a central sewer system and disposal plant.

Several citizens, including Joseph Way, then-owner of the Kuhns Property, were unhappy that the planned sewer infrastructure was to be located in front of their properties on Lake Drive. In 1936, these citizens lodged a protest with the City Commissioners, "requesting that the sewer should not be continued and not extended beyond a point on King Charles Street . . . ."[56] In response, the Commissioners adopted the following resolution:

> BE IT RESOLVED, that THE COMMISSIONERS OF REHOBOTH do approve of the proposed change in the course of the sewer as set forth provided the assent of *all the interested owners of land along*

[53] *See, e.g., id.*
[54] A0033 (Sept. 7, 1934 *Delaware Coast News* Article "To the Taxables of the Town of Rehoboth").
[55] *See, e.g., id.*; A0036 (Aug. 31, 1934 *Delaware Coast News* Article "Rehoboth to Hold Election for Sewerage on Sept. 15th); *see also* A0049 (Results of Sept. 1935 Election For or Against Rehoboth Sewer Bonds).
[56] A0070 (1936 Comm'r Meeting Minutes).

> *Silver Lake Drive* and the assent of the P. W. A. to such a change can be had without cost to the Town of Rehoboth.[57]

Pursuant to this resolution, no sewer main was installed on Lake Drive. Instead, sewerage services to these properties were (and are) provided via sewer mains located elsewhere.[58] Specifically, the Kuhns Property is served by the sewer main on St. Lawrence Street.

Although the parties agree that installation of the central sewer system was completed in 1936 or shortly thereafter,[59] the date of installation of the sewer lateral at issue cannot be so clearly determined. Nonetheless, the lateral is made of terra cotta clay, which was popular during the late 1930s and early 1940s.[60] Mr. Blizzard, in his Expert Report, noted "the sewer lateral serving the Kuhns [P]roperty is no newer than the late 1930's or early 1940's. In other words, I believe that the sewer lateral currently serving the Kuhns [P]roperty was installed

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[57] *Id.*; *see also* A0071 (noting that Rehoboth Beach, and not Joseph Way, would be responsible for paying "the bill created by the discontinuing of the Sewer around Silver Lake"). There is no evidence that the assent of the adjacent owners on St. Lawrence Street, whose lots would presumably be burdened with sewer laterals serving Lake Drive, was required.

[58] *See, e.g.*, Blizzard Dep. 62:3-7 (noting that four or five houses on Lake Drive probably receive water service from the main on St. Lawrence Street); Ferrese Dep. 37:17-23 (estimating there could be ten properties with "laterals on people's property being served on another street in that area"); Stenger Dep. 9:20-10:15 (describing the lateral locations for Lake Drive properties).

[59] *See, e.g.*, A0092 (1946 Report) ("The [sewer] system was built, and operation commenced in 1936."); A0030 (Mar. 13, 1936 *Delaware Coast News* Article) ("Rehoboth now has, or soon will have, a sewer system and a Treatment Disposal Plant."); Resp'ts' Op. Br. at 6; Pet'rs' Answering Br. at 9; City Defs.' Answering Br. at 4.

[60] A0395-96 (Blizzard Aff.) (explaining that "[t]erra cotta sewer laterals were used for many decades," but that, "[i]n the 1950's and 1960's, the sizing of the terra cotta laterals tended to change from 5" to 6""); *see also* Caswell Dep. 24:9 (describing the sewer lateral at issue as a 5-inch terra cotta lateral); Woods Dep. 18:6-7 ("The original pipes from those 1940 [sewer] plans [are] a clay called terra cotta.").

in the early 1940's at the earliest."[61] Mr. Blizzard explained that his opinion was based on his observation of the sewer lateral in 2012, and the fact that, "in approximately 75% of cases in the City of Rehoboth Beach the terra cotta lateral serving a lot is original to the first sewer installation in the late 1930's and early 1940's."[62]

The original sewer main on St. Lawrence Street was replaced within the last decade.[63]

And I shall sleep in peace
Until you come to me.[64]

D. *The Kuhns and the Hilers Discover the Placement of the Laterals*

Shortly after purchasing the Kuhns Property, the Kuhns began making arrangements to demolish the existing residence and construct their own home.[65] However, as a condition of demolition, the City required that the Kuhns' utilities be disconnected and capped.[66] The Kuhns were working with a construction company, Echelon Builders, who hired Mr. Caswell to cap off the water and sewer

[61] A0396; *see also* Stenger Dep. 14:15-17 (noting that terra cotta piping "was used until roughly the '50s, maybe into the very early '60s").
[62] A0396.
[63] Pet'rs' Op. Br. at 5; *see also* Stenger Dep. 10:21-11:5 (estimating that work took place "within the last, probably, eight years"); Woods Dep. 9:5-12, 39:14-20 (noting that this replacement occurred approximately five or fewer years ago).
[64] *See supra* note 1.
[65] *See, e.g.*, Pet'rs' Op. Br. at 7.
[66] *See, e.g.*, A0140 (Demolition Permit).

laterals.[67] Mr. Caswell was also hired to estimate the cost of a second water line for irrigation, and to determine whether the existing water and sewer laterals needed to be replaced.[68] In anticipation of the new residence, Mr. Caswell suggested that the Kuhns upgrade the laterals.[69] Although City approval was not required, Mr. Caswell often confers with Mr. Blizzard, who in this instance agreed with his recommendation.[70]

The Kuhns, in their Opening Brief, describe that, "[a]s part of the investigation into the method of improving the sewer line and possibly installing a new second water line, the existing utility lines were marked . . . including the water and sewer lines."[71] At this time, in approximately 2009, Mr. Caswell discovered that the laterals servicing the Kuhns Property ran through the Hiler Property, near or directly underneath a brick wall that runs along the eastern boundary of the Hiler Property.[72] Once he discovered their placement, he realized

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[67] *See, e.g.*, Caswell Dep. 61:20-23; Kuhns Dep. 19:14-16.
[68] Kuhns Dep. 25:19-26:2.
[69] *See, e.g.*, A0144 (Apr. 14, 2009 Letter from Mr. Robertson to Mr. Ferrese); *see also* Caswell Dep. at 62:16-22 (confirming there were not any specific concerns but that when he sees a terra cotta lateral, he likes to upgrade).
[70] *See, e.g.*, Caswell Dep. 17:14-17; *see also* Ferrese Dep. 17:5-12 ("[F]rom what I understand and recall is that for all water and sewer lines, it is the practice of the [C]ity that when you have all water and sewer lines and you have a vacant lot and you are going to build a new house—maybe the word require is a bad word. But we do everything we can to talk the property owner into upgrading the water and sewer at the time they are building their new home.").
[71] Pet'rs' Op. Br. at 8-9.
[72] Blizzard Dep. 28:3-6 (noting that the water lateral runs close to the brick wall); Caswell Dep. 9:12 ("They run kind of under that brick wall."); *id.* at 10:4-10 ("When we did the disconnect in 2009 [sic] on that existing house that was on the Kuhns [P]roperty, Miss Utility, by law, had to mark the utilities, and they marked right through that area. . . . I saw the spray paint that there

that there was no way to replace the laterals "because of the damage that would be done to [the brick] wall, the integrity and everything."[73] He "completely stopped" pursuing this option, noting that "[t]here wasn't enough room to put the sewer and water down through [that area]."[74]

Because the positioning of the laterals made replacement unworkable,[75] Mr. Caswell and his team decided to pursue an alternative, aiming to line, or "sleeve," the old terra cotta sewer lateral with a smaller piece of pipe.[76] However, this process could not be completed because his team, while trying to slide in the new liner, ran into a bend in the lateral; consequently, it became impossible to place the smaller pipe through the existing lateral without excavation.[77] While attempting to re-sleeve the sewer lateral, according to Mr. Caswell, his team dug on the Kuhns Property only.[78]

Prior to Mr. Caswell's discovery of the laterals' placement, the Kuhns were unaware that the water and sewer laterals were located under their neighbors' property.[79] Following this discovery, the Kuhns' attorney, Vincent Robertson, sent

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was [sic] utilities on that property. And that's how we found out the sewer and water went through [the Hiler Property]."); Woods Dep. 37:22-24; *see also* A0241 (Map Showing Laterals as Marked by Harry Caswell, Updated Apr. 2013).

[73] Caswell Dep. 20:5-9.

[74] *Id.* at 20:9, 21:23-24.

[75] *Id.* at 21:17-24.

[76] *Id.* at 24:8-12.

[77] *Id.* at 24:17-24, 25:1-5.

[78] *Id.* at 24:11-12.

[79] Kuhns Dep. 12:13-18.

a letter to Mr. Ferrese on April 14, 2009, noting the placement of the laterals and taking the position that

> [t]he City is obligated to provide access to its sewer and water infrastructure. The property currently has access; however, the pipes must be replaced. Because the City does not provide direct access to its infrastructure and because Mr. Hiler is objecting to the placement/replacement of the line within his property, the City must take the lead in obtaining the necessary easement over Mr. Hiler's property for not only the existing lines, but also their replacements.[80]

Conversely, the City took the position that, although it is responsible for providing water and sewer service to its residents,[81] it satisfied its obligation here by providing the Kuhns with access to the mains across the Hiler Property.[82] During this period, Mr. Kuhns also met with the Mayor of Rehoboth and Mr. Ferrese. Mr. Ferrese recounted that, during this brief meeting, "the [M]ayor told Mr. Kuhns that the [C]ity would not get involved, that we do serve water, and that was it."[83]

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[80] A0144 (Apr. 14, 2009 Letter from Mr. Robertson to Mr. Ferrese).

[81] *See, e.g.*, Ferrese Dep. 54:13-16; *see also* Rehoboth City Code § 220-11 ("Each consuming unit or property as defined in § 220-3 shall be separately connected to the water system of the City at the water main *along or in front of the lot in which the consuming unit or property is erected* or maintained unless approved otherwise by the City Manager.") (emphasis added).

[82] *See, e.g.*, Ferrese Dep. 14:3-8 ("[T]he [C]ity is not responsible for laterals. . . . [T]he [C]ity is responsible for the main, only the main line, in Rehoboth Beach. From the house to the main is the responsibility of the property owner, maintenance included.").

[83] *Id.* at 24:20-23. At his deposition, Mr. Ferrese was asked: "Do you agree that the [C]ity has an obligation to provide water and sewer hook-ups to Mr. Kuhns' property?" He replied, "[w]e already have it from St. Lawrence Street. That's the position I took all along, and that's the position that the [M]ayor took." *Id.* at 49:3-8.

E. *The Hilers' Opposition to the Laterals*

Prior to this 2009 discovery, the Hilers were also unaware of the placement of these laterals. Once aware, however, they immediately and adamantly opposed the laterals' placement.

In her Affidavit, Ms. Cacheris explained that she and her husband first learned of this situation when a plumber hired by the Kuhns called them.[84] Ms. Cacheris noted that this plumber explained

> that he had done some initial digging and that the pipes appeared to run under our property between the brick wall and the eastern side of our house. He further said that he would need to dig a very deep trench to do this work and he was concerned that such work might undermine the brick wall or the foundation of our home, and that is why he stopped digging and called us.[85]

Mr. Hiler also spoke with this unidentified plumber, whose name neither Ms. Cacheris nor Mr. Hiler remembers.[86] Mr. Caswell noted that he or someone from his office may have contacted the Hilers.[87] However, Mr. Caswell maintains that this would have been before he realized the laterals' placement vis-à-vis the brick

[84] Resp'ts' Op. Br. Ex. A (Cacheris Aff.) at ¶¶ 4-6.
[85] *Id.* at ¶ 6.
[86] Hiler Dep. 67:10-12, 67:22-68:3 (noting that he did not remember the name of this plumber or the company for which he worked); Resp'ts' Op. Br. Ex. A (Cacheris Aff.) at ¶ 4. During briefing, the Hilers took the position that this plumber was either Mr. Caswell or one of his employees. Resp'ts' Op. Br. at 12; Resp'ts' Reply Br. Against the City Defs. at 8.
[87] Caswell Dep. 63:5-10.

wall, before any digging occurred.[88] The discovery of the laterals' trajectory meant to Mr. Caswell that upgrading them "was an absolute[] no."[89]

The weekend after receiving the plumber's call, the Hilers traveled to their vacation home in Rehoboth.[90] At this time, they noticed a portion of the Kuhns' fence had been removed.[91] Though this fencing was on the Kuhns Property, the Hilers emphasize that removal "would allow access to [the Hiler Property] from the rear of [the Kuhns Property]."[92] Mr. Hiler also noticed signs that "there had been some digging and trenching on [his] property."[93] Specifically, Mr. Hiler recalled a "scar" approximately six feet long and two feet wide.[94] The Hilers' landscaper, Chris Fox, also observed the aftermath of this digging.[95] In his Affidavit, he noted that in or about April 2009, he "observed a very large hole . . . near the east side of the Hiler Property, and to the best of [his] recollection, it was six (6) or seven (7) feet long by three (3) feet wide and approximately three (3) feet deep, maybe larger."[96] Mr. Caswell denies ever digging on the Hiler Property.[97]

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[88] *Id.* at 63:10-13.
[89] *Id.* at 63:12-13 (explaining that, due to the laterals' positioning, "[i]t just couldn't be done that way").
[90] Hiler Dep. 69:15-20; Resp'ts' Op. Br. Ex. A (Cacheris Aff.) at ¶ 9.
[91] *See, e.g.*, Hiler Dep. 69:9-12; Resp'ts' Op. Br. Ex. A (Cacheris Aff.) at ¶ 9; *see also* Kuhns Dep. 80:18-24 (noting that, in 2009, a portion of his fence was removed, presumably by Mr. Caswell's team, and that "[i]t could have been [down] as long as a year").
[92] Resp'ts' Op. Br. at 13.
[93] Hiler Dep. 69:13-14.
[94] *Id.* at 71:12-19.
[95] A0394 (Fox Aff.) at ¶ 3.
[96] *Id.*

Soon after seeing the "scar" of digging, Mr. Hiler called Mr. Kuhns.[98] At that time, Mr. Hiler conveyed his opposition to the laterals, and mentioned the digging that had occurred on his property.[99] Although Mr. Kuhns offered to repair the damage, this offer was declined.[100] Instead, Mr. Hiler hired Mr. Fox to "repair the affected area."[101] Throughout the next several years, Mr. Hiler and Mr. Kuhns communicated sporadically through emails and letters; until this litigation ensued, they had never met face-to-face.[102]

The City also made its position known to Mr. Hiler. On May 4, 2009, Mr. Ferrese wrote to Mr. Hiler noting that

> [t]hese lines have been in existence for well more than 20 years. Furthermore, the City has provided access to sewer and water service to [the Kuhns Property] by directing a prior owner of that property to connect through the property that is now your lot for this service. As a result of this required connection point and the fact that the lines have been in existence for well more than 20 years, it is the City's position that an implied, or prescriptive easement exists across your property. Therefore, since the owners of [the Kuhns Property] are seeking to rehabilitate the existing lines (as opposed to installing completely new lines where ones did not exist previously), it is unlikely that you have standing to object to this necessary work.[103]

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[97] *See, e.g.*, Caswell Dep. 11:2-3 ("We never did any digging on the [Hiler Property] . . . ."); *id.* at 25:17-18 ("Nobody dug anything on the Hiler [P]roperty."); *id.* at 42:1 ("We never went on the Hiler [P]roperty.").
[98] *See, e.g.*, Hiler Dep. 72:19-73:8; *see also* Resp'ts' Op. Br. at 13.
[99] Hiler Dep. 74:1-4, 91:6-11; Kuhns Dep. 47:1-48:6.
[100] Hiler Dep. 91:6-11.
[101] Resp'ts' Op. Br. at 13.
[102] *See, e.g.*, Hiler Dep. 78:17-22.
[103] A0146 (May 4, 2009 Letter from Mr. Ferrese to Mr. Hiler).

Mr. Hiler replied to this letter on May 10, noting that it was his understanding that the rehabilitation project "would not be a minor intrusion," but that

> [a]t any rate, my call with Mr. Kuhn [sic] was quite pleasant, apart from Mr. Kuhn [sic] asserting several times that I didn't understand what he was saying, i.e., that the line was already in place. I expressed that we would repair the damage done to our property ourselves but that we did not like the idea of someone else's sewer and water lines running under our property. I suggested that he explore with the City whether he could run his lines out along Lake Street [sic] to the sewer lines, which I assume exist, on King Charles Street. . . . He said he would inquire of the City and agreed nothing else would be done until he contacted me again.[104]

Following this exchange of letters, Mr. Hiler and Mr. Ferrese spoke on the telephone on May 15, and scheduled to meet on May 22, 2009.[105] This meeting, which took place at the Hiler Property, was attended by Mr. Hiler, Mr. Blizzard, Mr. Ferrese, William Woods, the Assistant Manager of the Wastewater Facilities, and Glenn Mandalas, the City Solicitor.[106] Mr. Hiler did not want Mr. Kuhns or his attorney, Mr. Robertson, to attend.[107]

At this meeting, Mr. Hiler and City representatives discussed the location of the laterals.[108] The Hilers, in briefing, assert that the purpose of this meeting was

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[104] A0148 (May 10, 2009 Letter from Mr. Hiler to Mr. Ferrese).
[105] *See, e.g.*, Hiler Dep. 18:10-16; A0151 (Memo Confirming May 2009 Meeting).
[106] *See, e.g.*, Ferrese Dep. 43:8-11.
[107] *See, e.g.*, A0152 (May 21, 2009 Email from Mr. Mandalas to Mr. Robertson); City Defs.' Answering Br. at 21. Prior to the meeting, however, Mr. Robertson e-mailed Mr. Mandalas to remind him of the Kuhns' position "that the lines are there, and we are entitled to use them." A0152 (May 21, 2009 Email from Mr. Robertson to Mr. Mandalas).
[108] *See, e.g.*, Ferrese Dep. 24:3-14, 43:8-18, 46:19-23; Woods Dep. 27:12-20, 40:20-41:7.

"to get Mr. Hiler to agree to an easement."[109] In making this assertion, the Hilers rely on testimony that the City was "*hoping* to get Mr. Hiler to agree to an easement for Mr. Kuhns' water and sewer lines."[110] In fact, Mr. Hiler, at his deposition, recounted that, following this meeting, he thought the issue was "basically going to resolve" because he "felt that [Mr. Mandalas] had agreed with [him] that there's no easement and basically indicated that the City has a problem."[111]

As early as his receipt of Mr. Ferrese's May 4 letter, Mr. Hiler began to suspect that the City was acting on behalf of Mr. Kuhns. In his response to that letter, Mr. Hiler wrote that he and his wife

> had not ruled out the possibility of an arrangement whereby Mr. Kuhn [sic] might be able to have his lines through our property, but given how it appears he has proceeded, that is no longer an option. Indeed, in light of your letter I can't help but wonder whether Mr. Kuhns approached the City to ask for assistance, such as your letter. Can you please let me know if that is the case or if the City did indeed initiate this on its own.[112]

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[109] Resp'ts' Op. Br. at 16.

[110] At his deposition, Mr. Ferrese did answer "yes" to the following question: "[A]t this May 22, 2009 meeting at Mr. Hiler's property, was the [C]ity *hoping* to get Mr. Hiler to agree to an easement for Mr. Kuhns' water and sewer lines?" Ferrese Dep. 46:19-23 (emphasis added); *see also id.* at 21:11-15 ("Mr. Hiler was nice enough to set up a meeting at his house with myself and our attorney to discuss it. And he was pretty adamant at that meeting that he wasn't going to change his mind at that time. And we just didn't pursue it anymore."); *id.* at 43:12-15 (explaining that "the purpose of that meeting was to meet with Mr. Hiler and for Mr. Hiler to meet with our attorney, and for our department heads to explain to not only myself, but our attorney, the situation"); *id.* at 43:18 (noting that "[t]here was nothing to negotiate").

[111] Hiler Dep. 154:19-155:5.

[112] A0148-49 (May 10, 2009 Letter from Mr. Hiler to Mr. Ferrese).

When speaking to Mr. Ferrese on May 15, Mr. Hiler asked whether the City was "intervening on behalf of Mr. Kuhns," to which Mr. Ferrese responded in the negative.[113] Mr. Ferrese made clear at his deposition that he met with Mr. Hiler in May 2009 as a representative of the City and not "for asserting Mr. Kuhns' interest."[114] Further, when asked about the City's *assistance* to the Kuhns during this period, Mr. Ferrese replied, "[w]ell, I don't know if assist is a good word," before explaining that, in his position as City Manager, he is responsible for addressing problems of citizens and visitors of Rehoboth, and that he thought that the City could help resolve the controversy over the laterals.[115]

F. *The Search for Solutions*

The Kuhns sought alternative locations for water and sewer service to their property.[116] For instance, Mr. Kuhns asked four different property owners, in addition to Mr. Hiler, for an easement to run his utilities across their property.[117] Nevertheless, the possibility of an alternative easement via another neighboring

[113] Hiler Dep. 18:18-20.
[114] Ferrese Dep. 21:16-24 (clarifying that "[Mr. Kuhns'] interest is [to] have the [C]ity pay for the laterals. And I told him no. . . . My interest is to protect the [C]ity").
[115] *Id.* at 21:5-9, 22:3-7; *see also id.* at 35:13-19 ("[I]f there is a dispute like this, it would be my duty to assist in any way possible to try to get the parties together to resolve it rather than go to court. . . . I did not get involved in this because of Mr. Kuhns, period.").
[116] *See, e.g.*, Blizzard Dep. 62:22-69:7, 72:2-79:3 (discussing various alternatives, as well as the different considerations involved); A0160-61 (Memo Re: Water and Sewer Location for 101 Lake Avenue); A0162 (Sept. 8, 2009 Letter from Mr. Caswell to Mr. Kuhns).
[117] Kuhns Dep. 30:14-22.

property did not materialize.[118] Additionally, Mr. Kuhns and Mr. Hiler discussed a potential arrangement for the laterals at issue, though the Hilers never entertained the possibility of the Kuhns continuing to use the existing laterals, citing safety concerns[119] and rights that accompany property ownership.[120] Instead, Mr. Hiler suggested that the parties agree to exchange ten feet of the Kuhns' back lot for an easement on the west side of the Hiler Property (the laterals are currently on the east side).[121] However, because of the City's rear lot line ordinance, which requires property lines to align, Mr. Hiler would have been required to apply for a variance.[122] Although Mr. Hiler noted his willingness to submit an application,

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[118] *See, e.g.*, A0153 (May 21, 2009 Email from Mr. Robertson to Mr. Mandalas) ("In talking with Harry Caswell, it sounds as though the connection proposed by [Mr. Ferrese] across [the] Flickinger [property] may not be workable, since these are all gravity lines, and you can't do a directional drill or bore on a gravity line. Plus, the elevation of the main on King Charles may not be compatible with a gravity line from [Mr. Kuhns'] house . . . ."); A0175 (Oct. 4, 2011 Email from Mr. Faust to Mr. Mandalas) (noting "the recanting of Mr. Taylor's consent to an easement").

[119] *See, e.g.*, Hiler Dep. 184:16-20 (emphasizing his concern regarding "[t]he potential for them to break or burst, and the damage that I believe would have to be done to my fence, my brick wall, and maybe even under my house if you had to repair or replace them"); *id.* at 185:18-21 (explaining that his concern with the laterals bursting involves "[s]ewer coming out on [his] yard and possibly under [his] house . . . water possibly gushing out and undermining the foundation of [his] house"); A0180 (Dec. 8, 2011 Letter from Mr. Hiler to Mr. Kuhns) ("[B]ecause of the location of the lines, and my house, which was built as one of two on the lot where only one had existed before, continuing use of the lines creates an unsafe situation.").

[120] *See, e.g.*, Hiler Dep. 157:15-20 ("[T]his also goes back to my very nature in terms of property ownership and so forth. I didn't want to have somebody else's pipe's [sic] running through my property or have some restriction on my ability to use my property, et cetera.").

[121] *See, e.g.*, *id.* at 36:13-37:2 ("I had suggested to Mr. Kuhns maybe we could do an easement down that side of the property if it were safe, if it were certified, if it was safe. I was a little concerned—make sure there's enough room between my house and it, if anything ever blew up on the pipes or whatever. . . . I was proposing that Mr. Kuhns give me, deed me, in exchange for the easement, ten feet of his back lot, for various reasons in my mind.").

[122] *See, e.g.*, A0188 (Jan. 13, 2012 Email Exchange Between Mr. Mandalas and Mr. Hiler).

Mr. Mandalas communicated to him that the City was extremely unlikely to grant such a variance.[123]

As an alternative to the *sale* of land, Mr. Kuhns "proposed licensing, and eventually [an] easement on 10 feet of his property in exchange for [a west side easement for laterals]."[124] However, this potential solution—essentially, an exchange of easements—ultimately fell through.[125]

> ***It's you, it's you must go***
> ***And I must bide***.[126]

The Kuhns have abandoned their original plan of building a home on their property, and have instead attempted to sell the lot. The threat of litigation to resolve the utilities issue has made the sale process problematic, however, and the one serious buyer to have expressed an interest in the Kuhns Property decided not to pursue the purchase.[127]

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[123] *See id.* ("I did not get the sense the City was willing to pursue this option without the Planning Commission having an opportunity to consider the matter. The Planning Commission was a strong advocate for the relatively new rear lot line ordinance and I got the sense in limited discussions that there would be virtually no support for a proposal that was inconsistent with the ordinance.").

[124] Hiler Dep. 109:13-18; *see also id.* at 37:3-5.

[125] A0188 (Jan. 13, 2013 Email from Mr. Mandalas to Mr. Hiler) (encouraging Mr. Hiler to "reconsider the option of swapping easements with Mr. Kuhns").

[126] *See supra* note 1.

[127] *See, e.g.*, A0203-04 (Apr. 30, 2012 Email from Mr. Kuhns to Mr. Hiler).

G. *The Perma-lining of the Sewer Lateral and Installation of a Yard Hydrant*

In 2009, when the relining process proved unworkable, other available options required excavation, or drilling under the Hiler Property.[128] However, in the meantime, a new technique, called Perma-lining, emerged as a viable alternative, particularly because this process strengthens existing laterals without excavation.[129] At a minimum, the Perma-lining process extends the lateral's lifespan by fifty years.[130]

In 2012, the Kuhns hired Mr. Caswell to Perma-line the sewer lateral servicing the Kuhns Property. The Kuhns, in their Opening Brief, describe this process as "a new and innovative method of improving the line by installing a flexible sleeve or tubing into it running to a point near the connection with the St. Lawrence Street sewer main. Once inserted, that tubing was then heated by forced air so that it expanded and hardened to the interior surface of the existing pipeline, creating essentially a stronger pipe within a pipe."[131] The liner, notably, does not reach all the way to the main on St. Lawrence Street; if it had, the City Wastewater

[128] Caswell Dep. 25:1-5, 25:19-24.
[129] *See, e.g.*, Blizzard Dep. 87:11-24 (describing the City's interest in the process because there is no need "to tear the streets up").
[130] Pet'rs' Op. Br. at 8; *see also* A0199 (Perma-Lining Brochure)
[131] Pet'rs' Op. Br. at 8; *see also* Caswell Dep. 20:11-23, 45:12-20 (describing the Perma-lining process).

Department would have needed to be involved.[132] Instead, the liner extends beyond the Hiler Property, but only four feet into the street.[133] The Perma-lining process, which took approximately three hours, was executed entirely from the Kuhns Property.[134]

Following the Perma-lining process, Mr. Caswell and his team capped off the sewer cleanout at the end of the lateral, which is located approximately four to five feet onto the Kuhns Property, and which sticks out of the ground approximately one to two feet.[135] This cleanout was installed on the Kuhns Property when Mr. Caswell's team completed the 2008 disconnect in preparation for demolition of the existing summer cottage.[136] Additionally, Mr. Caswell installed a yard hydrant on the northeast corner of the Kuhns Property after completing the Perma-lining procedure.[137] Because the water had been previously capped off, during the demolition process, this yard hydrant provides the Kuhns

[132] *See, e.g.*, Stenger Dep. 34:23-24 ("Until you come out into the street, [the wastewater] department doesn't get involved.").
[133] Caswell Dep. 46:15-16.
[134] *Id.* at 65:12-66:6, 67:1-18; *see also* Hiler Dep. 105:22-106:3 ("I did not see any City employees operating any equipment on either my lot or Mr. Kuhns' lot, ever, that I recall. I've seen people . . . on his lot who may have been City employees, I just don't know, but they weren't operating equipment when I saw them.").
[135] Caswell Dep. 52:6-8, 52:15-18; Woods Dep. 16:20-21.
[136] Caswell Dep. 52:11-18. As Mr. Caswell explained, they used that cleanout "and put a cap in the back of that so that the new house could be tied into it." *Id.* at 52:16-18.
[137] *See, e.g., id.* at 42:13-18, 51:17-22.

Property with water, even in the absence of a residence.[138] Mr. Kuhns testified that he occasionally sprays water on the Kuhns Property.[139]

The City's involvement in this process was limited to confirming that the water had been disconnected from the main on St. Lawrence Street, and then reconnecting the water service after the yard hydrant was installed.[140]

H. *The Alleged Perma-lining Trespass*

The Hilers allege that the Perma-lining process in January 2012 constituted a trespass onto their property, and that the City was complicit in this trespass. To support this allegation, the Hilers contend that the City supervised the Perma-lining procedure.[141] Although several City employees did stop by to observe the Perma-lining process, they maintain that they were not there in a supervisory capacity, as the entire procedure was the result of a private contract between Mr. Caswell and the Kuhns.[142] In fact, Mr. Stenger noted that someone from the City Wastewater Department would only have been required to be present if Mr. Caswell reached

[138] *See, e.g.*, Blizzard Dep. 55:18-21.
[139] Kuhns Dep. 31:23-24.
[140] *See, e.g.*, Blizzard Dep. 54:15-21.
[141] *See, e.g.*, Resp'ts' Op. Br. at 18. The Hilers point to an email sent to Mr. Hiler on April 30, 2012 from Mr. Kuhns—who only attended a very short portion of the Perma-lining process—which says that the Perma-lining process "was applied with the full supervision of representatives of the City of Rehoboth." A0203; *see also* Kuhns Dep. 58:1-5 (explaining that he only stopped by briefly during the Perma-lining process).
[142] *See, e.g.*, Blizzard Dep. 53:2-18; Stenger Dep. 27:9-10 ("[T]here would have been no need for someone to supervise [the process], because it was within the property lines.").

the sewer main, which he did not.[143] Their presence was prompted by Mr. Caswell, who knew that the City was interested in this process, and who invited City employees from the water and sewer departments to observe.[144]

The Hilers also aver that a permit for this work was necessary but never obtained.[145] Conversely, Mr. Caswell maintains that a permit was not required for the Perma-lining process, because he was not replacing the lateral, there was no excavating or any street work, and no permit was required for digging on the Kuhns Property.[146]

[143] Caswell Dep. 46:15-16 (noting that the lining stopped short of the main); Stenger Dep. 25:24-26:3.

[144] *See, e.g.*, Stenger Dep. 23:19-24, 24:13-15, 41:17-18 (noting the City was invited by the contractor to view the lining operation, that maybe three employees from his department stopped by during the day, and that he was there "[r]oughly 45 minutes to an hour"); Woods Dep. 30:15-21 ("[T]hroughout the day, several [City employees from the water and sewer departments] stopped by. I know I was there. . . . We told everybody: This is something that if you have a chance to drive by, look at this equipment they are using. . . . So a good number of different people might have drove [sic] in for five minutes and left.").

[145] *See, e.g.*, Resp'ts' Op. Br. at 18 (citing Blizzard Dep. 41:9-13, 41:22-42:21, 59:14-16). Although during his deposition, Mr. Blizzard affirmed that the Perma-lining would require a permit, he then clarified that Mr. Caswell "didn't need a permit from us. As far as the building inspector's office, I'm not sure. . . . But there had to be some kind of permit or some kind of authorization to go ahead." Blizzard Dep. 59:14-23.

[146] Caswell Dep. 19:10-12, 19:15-23; *see also id.* at 49:12-14 (describing the types of work that require City permits); Stenger Dep. 34:23-24 ("Until you come out into the street, [the wastewater] department doesn't get involved.").

Ye'll come and find the place where I am lying
And kneel and say an* Ave *there for me.[147]

I. *This Litigation*

The Kuhns-Hiler dispute escalated considerably when, in January 2012, roughly three years after discovery of the laterals, Mr. Hiler sent two emails to Mr. Mandalas, conveying that he intended to tap off the laterals.[148] In the second iteration of this threat, Mr. Hiler conveyed:

> I will be tapping off the pipes that are run on my property as soon as the ground thaws. You should sue me if you want to assert an easement or stop me from capping the lines. . . . I suspect [Mr. Kuhns] has reconnected the lines. If so, any use of them would amount to trespass, and—this time—I will seek recompense against him or anyone else who trespasses by sending water or sewage across my property.[149]

Although Mr. Hiler recognizes that this threat was charged with emotion, he "definitely considered tapping them off."[150] In fact, in late 2012 or early 2013, Mr. Hiler asked his landscaper, Mr. Fox, to dig in his yard in order to locate the laterals so that Mr. Hiler "could have a plumber tap them off."[151] In an attempt to locate the laterals, Mr. Fox dug a hole about five feet deep.[152] He was, however, unable to find them, despite this diligent search; the laterals, of necessity, were left

[147] *See supra* note 1.
[148] *See, e.g.*, A0188 (Jan. 13, 2012 Email from Mr. Hiler to Mr. Mandalas) ("I also plan to take steps to disconnect the pipes on my property, as I see that Kuhns has done some more digging there. There is no easement through my property for the pipes.").
[149] A0187 (Jan. 15, 2012 Email from Mr. Hiler to Mr. Mandalas).
[150] Hiler Dep. 191:14-16.
[151] *Id.* at 111:16-112:1.
[152] *Id.* at 112:20, 115:4-5.

unmolested.[153] When no laterals were located, Mr. Hiler decided that he "was going to wait to be sued."[154]

J. *Procedural History*

On June 1, 2012, the Kuhns filed a Verified Petition to Quiet Title, contending that they are entitled to a permanent utility easement. On September 17, 2012, the Hilers filed an Answer, as well as a Counterclaim and Third-Party Complaint. In their Counterclaim, subsequently amended, the Hilers seek a declaratory judgment that no such easement exists, injunctive relief, and monetary damages.[155] In their Third-Party Complaint, also amended, the Hilers allege that the City Defendants trespassed on their property, and aided and abetted the Kuhns'

[153] *Id.* at 112:19-20, 115:4-5.

[154] *Id.* at 115:3-8; *see also id.* at 193:2-4 ("[W]hat really stopped me from suing and doing a lot of these things [including capping off the lines] was eventually the title company said you should just wait and get sued, really."); *but see id.* at 207:9-11 ("I wasn't really trying to get sued. I was surprised actually when there was a suit against me.").

[155] The Hilers request that this Court issue an order "(a) to Quiet Title to the Hiler Property in the name of the [Hilers], confirming that the Hiler Property is not subject to any easement; (b) declaring that the water and sewer lines servicing the [Kuhns'] lot may not be located on the Hiler Property; (c) ordering the water and sewer lines servicing the [Kuhns'] lot located on the Hiler Property be removed; (d) declaring the [Kuhns] are and shall be equitably estopped from enforcing an easement across the Hiler Property; (e) awarding [the Hilers] compensatory and punitive damages for all the harm and injury suffered as a consequence of the [Kuhns'] interference with the property rights of the [Hilers]; (f) awarding [the Hilers] all of their costs and attorneys fees [sic] incurred in securing quiet title to their property; and (g) granting such further relief as the interests of justice may require." Resp'ts' Answer, Second Am. Countercl., and Third Amended Third-Party Compl. at 11-12.

trespass onto the Hiler Property; and seek damages and an order that the City Defendants "remove the water and sewer lines" at issue.[156]

On November 2, 2012, the Kuhns responded to the Hilers' Counterclaim and filed a Cross-Claim against the City Defendants, contending that "in the event that [the] Kuhns incur any costs, damages, liability or are required to remove and relocate the sewer and water lines that serve their property then the City Defendants shall be obligated to perform the work or reimburse [the] Kuhns for any and all costs incurred in doing so."[157] The Kuhns also request "[t]hat any damages awarded to [the Hilers] and against [them] be assessed against [the] City Defendants."[158] On January 7, the City Defendants filed their Answers to the Kuhns' Cross-Claim and the Hilers' Amended Third-Party Complaint.

On September 16, 2013, the parties moved for summary judgment. I heard oral argument on the parties' Cross-Motions on November 18, 2013. At oral argument, I requested that the parties briefly address the Hilers' request to invoke 10 *Del. C.* § 1902 to transfer the damages aspect of their trespass claims to the

[156] *Id.* at 15-16. The Hilers request that this Court "enter judgment in favor of the [Hilers] and against the [City Defendants], jointly and severally, awarding compensatory and punitive damages for all the harm and injury suffered as a consequence of the [City Defendants'] interference with the property rights of the [Hilers];" "order[] that the [City Defendants] remove the water and sewer lines servicing the [Kuhns Property] that are located on the Hiler Property;" and "grant[] such other and further relief as this [Court] may deem just and proper under the circumstances." *Id.* at 16.

[157] Pet'rs' Response to Third-Party Pls.' Countercl. and Cross-Claim Against the City Defs. at 5.

[158] *Id.* The Kuhns also request attorneys' fees and costs, and that they "be granted such other and further relief as this Court deems just and equitable under the circumstances." *Id.* at 5-6.

Superior Court. This matter was submitted on December 5, 2013. Upon review of the record, it appeared to me that judicial resolution of this matter was not in any party's interest. I held an office conference and urged mediation. Counsel agreed to discuss the matter with their clients, and I suspended consideration of the Cross-Motions. On February 24, 2014, counsel informed me that compromise was not possible, and I consider the matter resubmitted as of that date.

II. STANDARD OF REVIEW

The parties before me have filed Cross-Motions for Summary Judgment pursuant to Court of Chancery Rule 56(c). A party will prevail on a motion for summary judgment "where the record reflects that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[159] In deciding the motions before me, "the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[160] Also, "[w]here [as here] the parties have not argued that there is an issue of fact material to the disposition of either motion, the Court shall deem the cross-motions to be the

[159] *Viacom Int'l, Inc. v. Winshall*, 2012 WL 3249620, at *10 (Del. Ch. Aug. 9, 2012) (internal quotation marks omitted).
[160] *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC*, 853 A.2d 124, 126 (Del. Ch. 2004).

equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[161]

III. ANALYSIS

I turn first to the requests for equitable relief made by the Kuhns and the City Defendants.

A. *Claims that a Prescriptive or Implied Easement Exists Over the Laterals*

The Kuhns, as well as the City Defendants, argue that the Kuhns have a prescriptive easement over the laterals.[162] The City Defendants also argue that the City has an implied easement over the laterals.[163]

Prescriptive easements are disfavored, as "they work a forfeiture of title."[164] Therefore, to establish an easement, the petitioning party must establish each element by clear and convincing evidence.[165]

To establish a prescriptive easement, the petitioning party must demonstrate, by clear and convincing evidence, that "they or persons in privity with them have

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[161] *In re Last Will & Testament of Daland*, 2010 WL 716160, at *2 (Del. Ch. Feb. 15, 2010).

[162] In addition to their prescriptive easement argument, the Kuhns assert that the water lateral was installed before the Hiler Property was conveyed to Mr. Chardy in 1930, meaning he "and subsequent owners acquired title subject to the existence of the water line." Pet'rs' Answering Br. at 8. However, the record does not plainly indicate that this was the case.

[163] Because of my decision here on the merits, I need not decide whether the City Defendants have standing to address these issues, or whether, as the Hilers aver, the City Defendants should have asserted their implied easement claim prior to summary judgment briefing.

[164] *Dewey Beach Lions Club, Inc. v. Longanecker*, 2006 WL 701980, at *3 (Del. Ch. Feb. 24, 2006).

[165] *Id.*; *see also CC Fin. LLC v. Wireless Properties, LLC*, 2012 WL 4862337, at *6 (Del. Ch. Oct. 1, 2012) ("The clear and convincing standard is an intermediate evidentiary standard, higher than mere preponderance, but lower than proof beyond a reasonable doubt.") (internal quotation marks omitted).

used the disputed area (1) *openly and notoriously*; (2) exclusively; (3) continuously; and (4) adverse to the rights of others for an uninterrupted 20-year period."[166] The open and notorious element of a prescriptive easement claim is meant "to ensure that the true owner has fair notice of the adverse use;"[167] the requirement may be satisfied through either actual or constructive notice.[168] A cryptic use of the lands of another cannot ripen into an easement, no matter how long the duration of that use.

To establish an implied easement arising from a quasi-easement, the petitioning party must demonstrate, by clear and convincing evidence, that "(1) the relevant properties were owned by a prior common owner who customarily used one property to benefit the other, (2) the resulting 'quasi-easement' was reasonably necessary to the enjoyment of the quasi-dominant tenement, and (3) *the quasi-easement was apparent at the time that the properties were separated*."[169]

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[166] *Brown v. Houston Ventures, L.L.C.*, 2003 WL 136181, at *5 (Del. Ch. Jan. 3, 2003) (emphasis added) (internal quotation marks omitted).

[167] *Tubbs v. E & E Flood Farms, L.P.*, 13 A.3d 759, 766 (Del. Ch. 2011).

[168] *See, e.g.*, *Old Time Petroleum Co. v. Tsaganos*, 1978 WL 4973, at *4 (Del. Ch. Nov. 8, 1978) (discussing the sufficiency of "actual notice to the owner or . . . conditions which will show or infer such notice").

[169] *Tubbs*, 13 A.3d at 764 (emphasis added). The City Defendants also suggest that the doctrine underlying easements arising by implication in general is broader than that governing implied easements arising specifically from quasi-easements, explaining that, although a quasi-easement must be apparent at the time of partition to ripen into a true easement, that requirement does not apply in all cases of implied easements. The City Defendants thus contend that "[a]n implied easement arises as a function of the presumed intent of the parties at the time the dominant and servient tracts are severed," and that "[t]he intent of those parties is not divined by formulaic analyses, but is instead determined by a consideration of the indicia of intent surrounding the conveyance;" therefore, according to the City Defendants, whether an easement is "apparent" is

The buried nature of the laterals at issue here makes dispositive the "open and notorious" element of an easement by prescription, as well as the requirement that a quasi-easement be apparent at the time the properties are separated in order for that quasi-easement to ripen into an easement by implication. I find that the buried laterals were neither open and notorious for the prescriptive period, nor—assuming there was a quasi-easement—sufficiently apparent at the time of partition; thus, I find that neither easement by prescription or by implication exists.

During briefing, the Kuhns and the City Defendants (which I refer to collectively in this section as the "Petitioning Parties"), highlight, among other things, the installation of the laterals; maintenance and replacement of the applicable sewer main; the installation of water meters; public discussions supposing the laterals' existence; and City maps through which a property owner could, with a bit of effort and a bit of luck, discern where the laterals at issue were positioned. Nevertheless, the record falls short of demonstrating, clearly and convincingly, that the laterals were open and notorious for the prescriptive period.

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only one of many "relevant factors" that may be "important to the intent determination." City Defs.' Sur-Reply Br. at 4; *see also Sandie, LLC v. Plantations Owners Ass'n, Inc*., 2012 WL 3041181, at *7 (Del. Ch. July 25, 2012) ("Importantly, however, and despite the sometimes inconsistent statements of the case law, quasi-easements and easements of necessity are merely species of implied easements; the central inquiry in the creation of an implied easement is intent, the determination of which is not bounded by formulaic analyses, but rather a consideration of the indicia of intent surrounding the conveyance."). However, despite their citation to the correct legal standard, the City Defendants have put forward no credible theory or evidence to explain how, in the absence of a quasi-easement, this Court could otherwise determine that the parties intended to create an easement.

I note that knowledge of one property owner based on ephemeral evidence of the installation of the laterals cannot be imputed to his successor.[170] I address each of those factors highlighted by the Petitioning Parties below.

The Petitioning Parties emphasize that installation of the laterals would have necessarily involved digging, providing the servient property owner with notice of their placement. Nevertheless, evidence of this digging would not have provided notice to subsequent property owners sufficient to satisfy the prescriptive period. Thus, even if I assume that the sewer lateral was installed in 1936 as the Petitioning Parties argue,[171] there is no indication that Mr. Chardy's successors were put on notice as a result of this digging when they purchased the property in 1941. For similar reasons, neither the digging accompanying the installation of the original water lateral, nor the digging that accompanied the purported replacement of the original water lateral in the 1960s or 1970s, provided sufficient notice to subsequent property owners of the servient property.

The Petitioning Parties also emphasize that, in the 1990s, two water meters were installed on the sidewalk in front of the Hiler Property, allegedly indicating that the water lateral serving the Kuhns Property runs through the Hiler Property.

[170] Although the Kuhns argue that "the open and notorious existence of the lines can be traced through knowledge of City personnel from the Mayor through the meter readers," the knowledge of these third parties is inconsequential. *See* Pet'rs' Op. Br. at 15.

[171] This contention is not supported by the record and conflates the installation of the sewer main, which was underway in 1936, with the installation of the sewer lateral, which occurred sometime thereafter. *See, e.g.*, A0396 (Blizzard Aff.) (noting that "the sewer lateral serving the Kuhns [P]roperty is no newer than the late 1930's or early 1940's").

These meters, however, are not located on the Hiler Property, but instead on the sidewalk. Moreover, as Mr. Blizzard testified, the covers to these water meters do not indicate to which property they belong; therefore, there was no reason for the Hilers, or their predecessors, to know that one meter corresponds to a property on Lake Drive. Consequently, placement of these water meters is not enough to put the Hilers' predecessors, or the Hilers, on notice that the Kuhns' water lateral runs under their property from the main on St. Lawrence Street to the Kuhns Property.

Similarly, installation of these water meters and the replacement of the sewer main—projects that took place on St. Lawrence Street and its sidewalk—did not provide sufficient notice of the laterals running under the Hiler Property.

Further, although public City maps show the location of the mains on St. Lawrence Street, they do not portray the laterals in a way that would provide a property owner with notice.[172] In fact, Mr. Blizzard testified that "[n]ormally, the water line itself, the service going in, is not indicated on the [City] map."[173] Mr. Stenger testified that the sewer map illustrating the mains and manholes, which is kept at his office, also has "little tick marks showing the location of the laterals."[174]

[172] *See, e.g.*, Pet'rs' Op. Br. at 7 (noting that "the actual location of the water and sewer *mains* throughout the City are shown on the official maps of both systems that publicly hang on the walls of the Commissioner's meeting room in City Hall") (emphasis added).
[173] Blizzard Dep. 22:15-16.
[174] Stenger Dep. 8:11-19, 8:24-9:1.

He confirmed, however, that there was no way to determine whether any specific lateral connection was being used.[175]

I also find that, although City maps indicate that there are no mains on Lake Drive, this does not necessarily notify a property owner of the Hiler Property that his backyard neighbor on Lake Drive receives utilities via laterals that run underneath his property. Although the mains are present on St. Lawrence Street and absent from Lake Drive, there are several potential paths the laterals could have taken that would not pass through the Hiler Property, as demonstrated by the Kuhns' attempt to find an alternative route across other neighboring properties.

Further, although the Petitioning Parties maintain that news articles, public reports, and public discussions throughout the decades regarding the water and sewer systems demonstrate that the laterals' existence and placement were open and notorious, I find that these articles, reports, and discussions are insufficient to demonstrate clearly and convincingly that the use of laterals running through the Hiler Property was open and notorious for a twenty-year period. I note that, although public discussions surrounding the partitioning request of the prior owners of the Hiler Property in around the year 2000 included discussions about

[175] *Id.* at 9:7-11; *see also* Woods Dep. 8:11-20 (noting that maps of the Rehoboth sewer system show the location of the mains, as well as "where the [lateral] hookup is on the sewer main"; however, these maps do not "specifically say how [the lateral] meanders in the street and onto the property").

whether an easement for the laterals existed,[176] these discussions are insufficient to meet the Kuhns' evidentiary burden here.

Additionally, though the City would have—or at least should have—made markings of existing utilities when the City upgraded the main on St. Lawrence Street and when the Hilers' predecessors demolished the house on the pre-partition property, this does not provide sufficient notice of the laterals at issue; similarly, neither do any markings that accompanied the installation of the water meters. Although this paint indicated that certain utilities ran under the Hiler Property—a fact these property owners undoubtedly realized, receiving water and sewer services themselves—these markings did not sufficiently provide notice that the water and sewer laterals for *another property* ran under their land.

Lastly, the Petitioning Parties point to a 1946 report that explains that "[e]ach fall, all street sewers are inspected and flushed by means of fire hose."[177] However, this report does not indicate that the City regularly maintained the *laterals*. Nevertheless, even if the City did routinely flush the sewer lateral at issue, because of its buried nature, this procedure would not have been sufficiently open and notorious to satisfy this element of prescription.

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[176] *See*, *e.g.*, A0113; A0116-17; A0120. Further, after the partition application was approved, a City Water and Sewer Service form corresponding to the to-be-partitioned-property had a handwritten note reflecting that "City records show two sewer taps to 100 + 102 St. Lawrence. Contractor to verify laterals." A0135; *see also* A0134 ("City records show two sewer laterals to 100 + 102 St. Lawrence. If only one exists . . . .").

[177] A0092 (1946 Report).

Put simply, for a property to be burdened by the creation of a prescriptive easement, there must exist, by clear and convincing evidence, indicia of use sufficient to put the owner on ongoing notice that another was asserting rights that would result in such a burden, over a period of twenty years. Such indicia of use is lacking here.[178] The evidence at most indicates that three excavations of the Hiler Property took place: two in the twenties, thirties, or forties, laying the initial laterals, and one later replacing the water lateral, each of which was presumably followed by a short period when the evidence of the excavation was noticeable. That does not equate to a twenty-year period of open use. The other evidence, extensive though it is, may be sufficient to demonstrate that a motivated and dedicated property owner *could* have ferreted out the location of the laterals, but is woefully short of the indicia of adverse use that should put a landowner on notice that his rights were potentially forfeited. I note that the Kuhns *themselves* were surprised to learn that their property was serviced by laterals running across the Hiler Property; if such use was not apparent to the owners of the purportedly-dominant tenement, it is difficult to see how it can be equitably imputed to the owners of the burdened property.

[178] *See Savage v. Barreto*, 2013 WL 3773983 (Del. Ch. July 17, 2013); *but see Brosius-Eliason Co. v. DiMondi*, 1991 WL 242640 (Del. Ch. Nov. 15, 1991) (holding, with limited analysis and despite the fact that "the evidence [was] not well developed," that there was an easement "for the purpose of connecting [the defendant's] residence with an existing sewer line" running under the adjacent property).

Similarly, I find the buried laterals would not have been sufficiently apparent at the time the properties were separated to satisfy the requirements of an implied easement, even assuming the other elements of an easement by implication were satisfied. For the purchaser of a property to be found to have received his land subject to an unexpressed but implied easement arising from an existing quasi-easement, that burden on the land must have been apparent at the time of transfer.[179] Evidence that such was the case is simply lacking.

Just as fundamental, and fatal to the implied easement claim, is the fact that the record fails to demonstrate that the water lateral was in place at the time of partition of the lots in question from other RHDC lands. With respect to the sewer lateral, it clearly was *not* in place at the time of partition.

Finally, although the Kuhns argue that the Hilers are equitably estopped from preventing the Kuhns' use of these laterals, they did not raise this argument until their Answering Brief; therefore, I consider this argument waived. Even if I

[179] *See, e.g., Brown v. Houston Ventures, L.L.C.*, 2003 WL 136181, at *4 (Del. Ch. Jan. 3, 2003) (noting that to establish an implied easement, "the nature of the servitude must appear to be permanent and obvious prior to the severance") (internal quotation marks omitted); *see also Judge v. Rago*, 570 A.2d 253, 258 (Del. 1990) ("If a single party owns two parcels of property and uses one to benefit the other, no actual easement is created since only one owner is involved. Because this use resembles an easement, however, it is referred to as a 'quasi-easement.' If the property owner then conveys the 'quasi-servient tenement,' he may retain an actual easement appurtenant to the land he keeps, even if the conveyance is wholly silent on the question of easements and even if the easement is not absolutely necessary for the enjoyment of the retained property. Thus, if a property owner has traditionally crossed parcel A to reach parcel B and he sells parcel A, he may continue to cross that parcel. *It is presumed that a grantor in this situation does not wish to abandon the preexisting land use; the grantee is put on notice by observing evidence of the preexisting use*.") (emphasis added) (citations omitted).

were to consider this contention, however, the Kuhns would not prevail. "The doctrine of equitable estoppel may be invoked when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment."[180] "To establish estoppel it must be shown that the party claiming estoppel lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; relied on the conduct of the party against whom estoppel is claimed; and suffered a prejudicial change of position as a result of his reliance."[181] Here, there is simply no evidence that any representation was made by the Hilers to the Kuhns that the Kuhns, having themselves only discovered the laterals' placement in 2009, relied upon. Consequently, the Kuhns have failed to establish the grounds for equitable estoppel.

For the foregoing reasons, the Kuhns' request for declaratory judgment, and the related equitable relief they seek, are denied.[182]

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[180] *Key Properties Grp., LLC v. City of Milford*, 995 A.2d 147, 152-53 (Del. 2010).

[181] *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990); *see also Cornerstone Brands, Inc. v. O'Steen*, 2006 WL 2788414, at *3 n.12 (Del. Ch. Sept. 20, 2006) ("In order to prevail on an equitable estoppel theory, plaintiff must show (1) conduct by the party to be estopped that amounts to a false representation, concealment of material facts, or that is calculated to convey an impression different from, and inconsistent with, that which the party subsequently attempts to assert, (2) knowledge, actual or constructive, of the real facts and the other party's lack of knowledge and the means of discovering the truth, (3) the intention o[r] expectation that the conduct shall be acted upon by, or influence, the other party and good faith reliance by the other, and (4) action or forbearance by the other party amounting to a change of status to his detriment.").

[182] I address the Kuhns' Cross-Claim against the City Defendants regarding the City's obligation to provide water and sewer below.

I next address the Hilers' Counterclaims for monetary and injunctive relief.

B. *The Hilers' Request for Monetary Damages for Trespass*

The Hilers contend that the Kuhns, as well as the City Defendants, have trespassed across their property, and that they should be awarded monetary damages as a result.[183] The elements of trespass, a strict liability offense, are as follows: "(1) the plaintiff must have lawful possession of the property; (2) the defendant must have entered onto the plaintiff's land without consent or privilege; and (3) the plaintiff must show damages."[184] "Any unlawful entry upon another's land constitutes a trespass, and the law implies damages for such a trespass, but the amount depends upon the damages actually done."[185]

The Hilers are not entirely clear as to which acts of trespass they complain.[186] Since the record does not indicate who owns or placed the laterals, and since it is as likely that the initial placement of the laterals was done pursuant

[183] Because of my decision here on the merits, I do not address whether the City is immunized from liability pursuant to the Municipal Tort Claims Act.

[184] *O'Bier v. JBS Const., LLC*, 2012 WL 1495330, at *2 (Del. Super. Apr. 20, 2012); *Beckrich Holdings, LLC v. Bishop*, 2005 WL 5756847, at *9 (Del. Ch. June 9, 2005).

[185] *O'Bier*, 2012 WL 1495330, at *2.

[186] During briefing, the Hilers—relying on the City Defendants' conduct between 2009 and 2012—argue multiple trespasses by the City Defendants, as well as several instances when the City Defendants allegedly aided and abetted trespasses of the Kuhns. *See, e.g.*, Resp'ts' Op. Br. at 37-40. However, the sole count of the Hilers' Third Amended Third-Party Complaint alleges that "[i]n or around January of 2012, [the City Defendants] entered, or aided and abetted the [Kuhns] in entering, the Hiler Property without permission, with notice of the [Hilers'] objection to their entry, and supervised the installation of operable water and sewer lines through the Hiler [P]roperty." Resp'ts' Third Am. Third-Party Compl. ¶ 18. Here, I only address trespasses by the City Defendants alleged in the Hilers' pleadings.

to a license as by trespass,[187] no damages are available from the time before the Hilers' discovery of and objection to the laterals in 2009.[188] The Hilers argue that, in that year, a plumber hired by the Kuhns trespassed on the Hiler Property to dig up the laterals. As evidence of this trespass, they point to the fact that the Kuhns' fence had been removed. Though conceding that that fence was on the Kuhns Property, they assert that this fence "obviously was removed for the specific purpose of digging across the border of the two properties and into the [Hiler Property]."[189] Further, the Hilers maintain that they saw the "scar" of the digging the weekend after it purportedly occurred. Their landscaper also maintains that he saw evidence of digging. The Kuhns were notified and offered to pay for any damage; the Hilers, however, declined. I find that the record—which contains conflicting testimony, as Mr. Caswell denies that he or his employees ever entered or dug on the Hiler Property[190]—is insufficient to demonstrate the trespass alleged.

[187] "A license amounts to a permissive use granted by the owner of a property to another which is terminable at the will of the owner." *Coker v. Walker*, 2013 WL 1858098, at *3 (Del. Ch. May 3, 2013) (explaining that a license "does not confer title, interest or estate in [the burdened] property") (internal quotation marks omitted).

[188] With this conclusion the Hilers apparently do not disagree; at Oral Argument, the Hilers clarified that "[w]hat we are asking for is trespass from the City then turning the water on and helping with the [P]erma-liner." Oral Arg. Tr. 127:17-19.

[189] Resp'ts' Op. Br. at 34

[190] *See supra* note 97.

The Hilers further contend that use of the laterals for their intended purpose constitutes a continuing trespass for which they are entitled to damages.[191] They also argue that passing the Perma-liner through the sewer lateral was an additional act of trespass by the Kuhns, as well as an act of trespass by the City Defendants.[192] The evidence demonstrates that, prior to installation of the Perma-liner, the sewer lateral was serviceable and was presumably in operation prior to the removal of the existing residence from the Kuhns Property in 2008. Since the Perma-liner was passed through the sewer lateral by running it entirely from the Kuhns Property, that trespass can have caused no quantum of damages beyond that

[191] *See, e.g.*, Resp'ts' Op. Br. at 1 (alleging "a continuing trespass that commenced in January of 2012 when the [Kuhns] had a water spigot installed on their property and the City turned on the water service to the water line"); *id.* at 42 ("[T]he [Hilers] have shown that the [Kuhns] trespassed on their land on a number of occasions in 2009 and again in 2012, lastly inserting material into the [Hilers'] land and leaving it there. Thus, [the Kuhns] are not only liable for trespass, but also continuing trespass."); Resp'ts' Reply Br. Against Pet'rs at 3 ("If there is water and sewage flowing through the lines, then that constitutes a continuous trespass on [the Hiler Property]."); *id.* at 18 ("The pipes themselves, the work on them, and the use of them all amount to trespasses, including continuing trespasses.").

[192] The Hilers argue that the 2012 Perma-lining process constituted an additional trespass by the Kuhns and the City Defendants; alternatively, the Hilers argue that the City aided and abetted the Kuhns' trespass. The Hilers' allegations are based largely on the contention that there was no operable service before this process; therefore, the Perma-lining process and the installation of the water spigot amounted to the "*installation* of operable water and sewer lines through the Hiler [P]roperty." *See, e.g.*, Resp'ts' Third Am. Third-Party Compl. ¶ 18 (emphasis added); *see also* Resp'ts' Second Am. Countercl. at ¶ 16; A0400 (Bross Professional Opinion Letter) (noting that the November 2008 demolition permit issued for the Kuhns Property "stipulated that *all* utilities must be disconnected, capped and inspected by the City prior to any demolition," and thereby concluding that "once the Kuhns' water service and sewer lateral were capped, they were no longer operative"). The evidence is to the contrary, however. There is no evidence that the laterals were inoperable before the installation of the Perma-liner.

resulting from the use of the lateral to carry sewage across the Hiler Property.[193] In other words, nothing in the record indicates that the Hiler Property is worth less as a result of the Kuhns lining of the sewer lateral.[194] Clearly, however, passage of water and the PVC liner through the buried laterals was an act of trespass by the Kuhns.[195] As explained above, damages are not an element of trespass and, because the Kuhns lack an easement for the use of these laterals, the Hilers have established that a trespass occurred as well as entitlement to a monetary award for that trespass. The amount of damages must be based on the evidence in the record.

Here, that evidence is that the damage worked on the owners of the Hiler Property by the identical ongoing trespass—passage of material through the laterals starting in the 1920s or '30s and running through 2009—was so slight, so utterly unburdensome, that it went completely unnoticed. The laterals run within the setback area of the Hiler Property; therefore, the laterals, in addition to being undetectable from the surface, lead to no loss of use, esthetics or function of the property. The Hilers are in the difficult position of arguing that the trespass was so

[193] To the extent the Hilers are also alleging that the attempted, ultimately unsuccessful, 2009 re-sleeving process constituted a trespass by the Kuhns, this same analysis applies. *See, e.g.*, Resp'ts' Op. Br. at 35.

[194] *See, e.g.*, *Farny v. Bestfield Builders, Inc.*, 391 A.2d 212, 213 (Del. Super. 1978) ("Generally, in Delaware, the measure of damages for trespass of land is the difference between the value of the land before the trespass occurred and the value of the land after the trespass.").

[195] The Hilers have failed to show trespass on their property by the City Defendants.

burdensome as to justify substantial damages,[196] but so unobtrusive as to not provide them, or their predecessors, notice of its occurrence; they have prevailed on the latter, but cannot on the former. I therefore find that the Hilers are entitled to nominal damages only, in the amount of $3.[197]

C. *Aiding and Abetting the Trespass*

The Hilers additionally allege that the City Defendants have aided and abetted the Kuhns' trespass. "Liability for aiding and abetting [a third party's commission of a tort] requires proof of three elements: underlying tortious conduct, knowledge, and substantial assistance."[198] In determining whether a party

[196] At Oral Argument, the Hilers contended that they are concerned that the Perma-liner, which is composed of PVC plastic, may in some way prove toxic to them. *See, e.g.*, Oral Arg. Tr. 79:13-14 ("[T]he [P]erma-liner is a source of distress and a potential health concern."); *id.* at 80:21-81:1 ("I think the Court can take judicial notice, for example, as indicated in articles, that flexible PVC, which this claims to be, has phthalates in it . . . and phthalates in 2008 were banned in children's toys."). Such a supposition is unsupported by the record.

[197] *See, e.g.*, *Reeves v. Meridian S. Ry., LLC*, 61 So. 3d 964, 968 (Miss. Ct. App. 2011) (awarding $10 in nominal damages for the defendant's trespass, noting that the plaintiff had not provided evidence of actual damages, and there was no evidence that indicated the trespassed-upon property had been damaged, or that the plaintiff had suffered any injury as a result); *Johnson v. Martin*, 423 So. 2d 868, 870 (Ala. Civ. App. 1982) (finding, where "there was no proof of actual damages to the land or any personal property," that nominal damages could be awarded in litigation involving a defendant who admitted that he trespassed); *see also Williams v. Manning*, 2009 WL 960670, at *9 (Del. Super. Mar. 13, 2009) ("The Court admits it is unclear as to whether the jury was making its award based on the behavior of the parties before or after the surveying was completed by both parties in the summer of 2004. However, this observation is not troubling upon review because the Court finds a reasonable jury could not award anything but nominal damages for the trespassing that occurred between 1988 to mid-2004 since the boundary lines were not 'known' at this time. . . . The Williams failed to show any damages during this period of time. This, of course, makes sense because the Mannings provided uncontradicted testimony that it was their belief they owned the strip of land. Therefore, the Mannings did nothing to devalue the property. The Williams could not and did not show otherwise.").

[198] *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Nov. 30, 2004).

has "substantially assisted" the commission of a tort, the Court considers "(1) [the] nature of the act encouraged, (2) the amount and kind of assistance given, (3) the defendant's absence or presence at the time of the tort, (4) the relationship to the tortious actor, (5) the defendant's state of mind, and (6) the duration of the assistance."[199] For the reasons that follow, I find that the Hilers have failed to demonstrate that the City Defendants substantially assisted the Kuhns' trespass.

The Hilers allege that in January 2012, the City Defendants "entered, or aided and abetted the [Kuhns] in entering, the Hiler Property without permission, with notice of the [Hilers'] objection to their entry, and supervised the installation of operable water and sewer lines through the Hiler Property."[200] Contrary to this assertion, there is no evidence that City supervision was required, or provided, for the Perma-lining process, or that the City employees present at the Kuhns Property did anything but observe the procedure at the invitation of the Kuhns' contractor, Mr. Caswell. Further, although the City confirmed that water had been disconnected from the main on St. Lawrence Street, and then reconnected this service after the yard hydrant was installed, this conduct does not amount to "substantial assistance" of the Kuhns' trespass. The record, moreover, does not support the Hilers' suggestion that the City Defendants "accommodated the surreptitious nature of [the Kuhns'] trespasses by failing to issue necessary permits

[199] *Patton v. Simone*, 1992 WL 398478, at *6 (Del. Super. Dec. 14, 1992).
[200] Resp'ts' Third Am. Third-Party Compl. ¶ 18.

and notices of the work."[201] Thus, I find that the Hilers' claim that the City Defendants aided and abetted the Kuhns' trespass fails as a matter of evidence.

D. *Request for a Permanent Injunction*

The Hilers seek, in addition to declaratory relief and monetary damages, a mandatory permanent injunction directing the Kuhns or the City Defendants to remove the laterals from the Hiler Property.[202] A mandatory injunction represents extraordinary relief that should be granted only sparingly.[203] In order to demonstrate entitlement to a permanent injunction, the movant must demonstrate "(1) actual success on the merits; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result from a failure to enjoin the actions that threaten [the movant] outweighs the harm that will befall the [non-

[201] Resp'ts' Reply Br. Against the City Defs. at 27.

[202] Resp'ts' Answer, Second Am. Countercl., and Third Amended Third-Party Compl. at 11, 16; *but see* Oral Arg. at 76:5-6 ("We are not asking for the pipes, by the way, to be removed."); *id.* 79:12-13 ("We do not necessarily want the pipes removed . . . ."); *see also* Resp'ts' Reply Br. Against the City Defs. at 28 ("What [the Hilers] are seeking from [the City Defendants] is a prohibition of the City using or allowing the use of the water and sewer lines that are serving the [Kuhns Property]. This can be accomplished by the City cutting the [Kuhns'] lines at the mains and capping off those lateral hook ups [sic] on the main. . . .").

[203] *See, e.g.*, *Tulou v. Hertrich*, 1998 WL 409160, at *1 (Del. Ch. June 22, 1998) ("Injunctive relief, especially the extraordinary remedy of mandatory injunctive relief lies only in equity and will only issue where the facts, the law and the conscience of the Court believe it to be appropriate."); *see also Hollingsworth v. Szczesiak*, 84 A.2d 816, 822 (Del. Ch. 1951) ("It does not necessarily follow in every case, even though the right may be clear, that the [movant] is entitled to a mandatory injunction. The courts will always consider the equities between the parties, and, in some cases, where a great injury will be done to the [non-movant], with very little if any to the [movant], will deny equitable relief."); *see also Bertucci's Rest. Corp. v. New Castle Cnty.*, 836 A.2d 515, 519 (Del. Ch. 2003) (noting that a preliminary injunction "'is granted only sparingly and only upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently,'" and that "[t]he standard for issuing a mandatory preliminary injunction is, for obvious reasons, even more demanding").

movant] if an injunction is granted."[204] As detailed above, prong one has been satisfied, as there is no easement for the laterals at issue.[205] I explore prongs two and three below.

1. There exists a likelihood of irreparable harm.

Here, the maintenance of the laterals serving the Kuhns Property, with no easement or license to do so, constitutes an invasion of the Hilers' property rights. The matter before me, therefore, fits squarely within this Court's prior findings that "interference with a property right constitutes irreparable harm,"[206] and that "loss of a property right is itself sufficient to support [an] injunction."[207] However, because an injunction is only proper when the balance of equities favors the movant, I must determine whether the irreparable harm suffered by the Hilers absent injunctive relief outweighs the harm to the other parties if an injunction is granted.[208]

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[204] *Sierra Club v. Delaware Dep't of Natural Res. & Envtl. Control*, 919 A.2d 547, 555 (Del. 2007).

[205] Given the failure of proof of who owned or laid the laterals, I need not address the issue of whether the mandatory injunctive relief sought here, even if otherwise justified, could be entered against the Kuhns, the City, or neither.

[206] *Vansant v. Ocean Dunes Condo. Council Inc.*, 2014 WL 718058, at *1 (Del. Ch. Feb. 26, 2014).

[207] *Jestice v. Buchanan*, 2000 WL 875417, at *3 (Del. Ch. May 23, 2000).

[208] *Id.*; *see also Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *13 (Del. Ch. Apr. 15, 2004) ("To merit a permanent injunction, [the movant] must show . . . the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction.").

2. The balancing of the equities weighs against injunctive relief.

Although the Hilers will suffer some quantum of irreparable harm absent an injunction, I find that balancing the equities here weighs against the imposition of such an extraordinary remedy.[209] Typically, this balancing requires the Court to address whether "the harm that would result if an injunction does not issue outweighs the harm that would befall the opposing party if the injunction is issued."[210]

I have determined that neither the Kuhns nor the City Defendants have demonstrated that an easement exists permitting use of these laterals. The parties, however, have not established who initially laid the laterals, or who owns the laterals currently. Consequently, if I were to grant the Hilers' request, either the Kuhns (who, though I have found them liable for trespass, did not take part in the laying of the laterals) or the City Defendants (who may not have been involved in the laterals' installation and who are not liable for trespass here) would face the heavy burden of removing the laterals from the Hiler Property. Although such a remedy would provide relief to the Hilers, it would also place an inequitable

[209] *See, e.g.*, *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *7 (Del. Ch. Jan. 27, 2000) ("For a permanent injunction the factors are the same [as for a preliminary injunction], except that the [movant] must actually succeed on the merits. This relief is extraordinary and the test is stringent.").

[210] *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *15 (Del. Ch. Dec. 15, 2005) (internal quotation marks omitted); *see also Homsey Architects, Inc. v. Nine Ninety Nine, LLC*, 2010 WL 2476298, at *12 (Del. Ch. June 14, 2010) ("In balancing the equities, a court will weigh the harm a plaintiff will suffer if an injunction is not issued against the harm the defendant will suffer if the injunction is issued.").

burden on the Kuhns or the City Defendants. I find that this burden outweighs the harm that would be suffered by the Hilers in the absence of an injunction, as the laterals at issue are so inoffensive that they have existed for at least seventy years without anyone even noticing them, let alone being offended or irritated by their presence. In this circumstance, therefore, the balancing of the equities prevents me from ordering either the Kuhns or the City Defendants to remove the laterals from the Hiler Property. Nothing in this opinion prevents the Hilers from excavating their own property and removing the laterals, assuming they are not so prevented by statute or ordinance.

E. *The Kuhns' Request that the City Defendants Provide Alternative Means of Water and Sewer Connection*

The Kuhns contend that, if no easement exists over the laterals, the City must provide an alternative means of connection to the City water and sewer systems. This obligation, according to the Kuhns, derives from the City's obligation to provide its residents with water and sewer service, and the City's recognition "that it directed the water and sewer service to [the Kuhns Property] to be via the main in St. Lawrence Street requiring a crossing of [the Hiler Property]."[211] The City Defendants counter that consideration of this issue was (prior to this Memorandum Opinion) premature; neither party addressed the legal

[211] Pet'rs' Op. Br. at 19; *see also* A0146 (May 4, 2009 Letter from Mr. Ferrese to Mr. Hiler) (noting that "the City has provided access to sewer and water service to [the Kuhns Property] by directing a prior owner of that property to connect through [the Hiler Property] for this service").

basis for the Kuhns' contention, if any, in bringing these Motions. Therefore, I withhold decision and direct the parties to inform me what remains to be submitted on this issue.

IV. CONCLUSION

Two neighbors find themselves unable to work out an agreement to solve what might seem to an outside observer a small controversy, and instead invest, in this litigation, funds that surely could have found a better use. Despite urging from this Court, they were unable to resolve the issue, resulting in a decision that must be unsatisfying for all concerned.[212]

For the foregoing reasons, I find that there is no prescriptive or implied easement for the water and sewer laterals at issue. The use of the laterals constitutes a technical trespass, and the Hilers are entitled to $3 in nominal monetary damages from the Kuhns. The balancing of the equities cannot support the mandatory injunctive relief sought by the Hilers: ordering the Kuhns or the City to remove the laterals from their property. Lastly, pursuant to the American Rule, all parties are responsible for their own attorneys' fees. The parties should confer as to whether the issues raised in the Kuhns' Cross-Claim against the City

[212] I note that counsel for all parties here are both experienced and skillful in the practice of real property and land-use law, and nothing in this Memorandum Opinion should be read as a criticism of the conduct of counsel in this matter.

Defendants need to be further addressed, and provide an appropriate form of order consistent with this Memorandum Opinion.