IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WARREN E. REYNOLDS, Plaintiff, v. STATE OF DELAWARE, DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL; AUBURN VILLAGE, LLC, a Delaware limited liability company; MILL 6 REDEVELOPMENT, LLC, a Delaware limited liability company, Defendants.	)	C.A. No. 2018-0184-TMR

ORDER REGARDING MOTION FOR JUDGMENT ON THE PLEADINGS

WHEREAS, on March 14, 2018, Plaintiff Warren E. Reynolds filed a Verified Complaint;

WHEREAS, Defendant Delaware Department of Natural Resources and Environmental Control ("DNREC") filed a timely answer and a Motion for Judgment on the Pleadings (the "Motion"), which the parties thereafter fully briefed;

WHEREAS, on September 10, 2019, the Court heard argument on the Motion;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. When reviewing a motion for judgment on the pleadings, "a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party. The court must take the well-pleaded facts alleged in the complaint as admitted. A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993) (internal citations omitted).

2. Warren E. Reynolds owns a property at 121 Gun Club Road in Hockessin, Delaware (the "Property"). Compl. ¶ 1. His 2002 deed to the Property granted a "right of way over other lands belonging to the National Vulcanized Fibre Company from his land to the public road." *Id.* at Ex. 1, at 2. For the majority of his ownership of the Property, Reynolds used Gun Club Road (the "Old Access Road") as his "right of way" to Yorklyn Road (the "Public Road"). Compl. ¶¶ 9-10.

3. DNREC purchased land near the Property that included the Old Access Road. *Id.* ¶ 2. DNREC then tore up the majority of the Old Access Road as part of a "hazardous waste remediation project," but not before paving a new road on

neighboring property that connected the remaining portion of the Old Access Road to the Public Road (the "New Access Road"). DNREC Answer ¶¶ 12-13.

4. Reynolds subsequently filed suit claiming that DNREC violated his easement rights by removing and relocating the right of way without his permission. Compl. ¶¶ 20-34. He also asserts that DNREC and other Defendant landowners did not grant Reynolds an equivalent "permanent easement right" in the New Access Road, allegedly rendering Reynolds's property landlocked and devalued. *Id.* Reynolds seeks either a "[m]andatory [i]njunction requiring the reinstallation of the [Old Access Road] or for [q]uiet [t]itle establishing permanent easement rights" to the New Access Road. *Id.* ¶ 34.

5. DNREC responds that it was not obligated to "seek 'authorization' from Reynolds" to move the right of way. DNREC Answer ¶ 12. Instead, DNREC contends that it "constructed the new roadway segment as alleged as a significant improvement to the previous segment, thus providing better and safer access to Reynolds and other property owners." *Id.* ¶ 13. DNREC argues that Reynolds suffered no harm from the relocation because DNREC subsequently recorded a public easement to the New Access Road (the "Public Access Easement"). *Id.* ¶¶ 14-15. Accordingly, DNREC argues that the Public Access Easement guarantees Reynolds access to the Public Road, maintains Reynolds's rights under his deed, and renders his claims moot. *Id.* ¶¶ 23, 30.

6. Considering the Public Access Easement. In his opposition to the Motion, Reynolds argues that this Court may not consider the Public Access Easement. Pl.'s Opp'n Br. 10-11. Citing *Standard General L.P. v. Charney*, 2017 WL 6498063 (Del. Ch. Dec. 19, 2017), Reynolds argues that courts deciding a 12(c) motion may look *only* to the pleadings themselves and exhibits attached to the complaint. Pl.'s Opp'n Br. 10. Because the Public Access Easement was attached as an exhibit to DNREC's Answer, but not the Complaint, Reynolds argues that this Court must ignore the Public Access Easement entirely when resolving this Motion. *Id*.

7. This Court recently addressed the scope of review under Rule 12(c) and determined that "[t]he pleadings to which this Court may look are not limited to complaints or counterclaims, but also include answers and affirmative defenses." *Jimenez v. Palacios*, 2019 WL 3526479, at *8 (Del. Ch. Aug. 2, 2019). Further, "[t]he weight of authority, and the only Delaware decision addressing the issue, favors considering attachments to the answer . . . ." *Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at *2 (Del. Ch. May 8, 2019) (citing *Ketler v. PFPA, LLC*, 2015 WL 3540187, at *1 (Del. Super. June 3, 2015) (reviewing a document attached to the answer and finding that "[e]xhibits to pleadings are considered part of the pleadings")). Thus, this Court may review the pleadings and exhibits attached to both the Complaint *and* Answer when deciding this 12(c) Motion, not just those

attached to the Complaint.[1] Because DNREC attached a copy of the Public Access Easement to its Answer, the Public Access Easement is part of the pleadings and the Court will consider it to resolve this Motion.

8. Unilaterally Moving the Right of Way. Next, Reynolds argues that DNREC violated his easement rights when it unilaterally demolished the Old Access Road and created the New Access Road. Compl. ¶ 23. Reynolds contends that "an easement may not be relocated without the consent of both the dominant and servient estates." Pl.'s Opp'n Br. 16. Here, because "no consent from Reynolds was ever sought or obtained," Reynolds states that his right of way is "legally fixed, determined, and immovable as a matter of law." *Id.*

9. DNREC does not contest that it moved the right of way without permission. Instead, DNREC responds that it "had no legal obligation to seek authorization from Reynolds to undertake the improvements, and did not seek it." DNREC Answer ¶ 12. DNREC further points out that Reynolds's deed does not

[1] In *Mehta*, Vice Chancellor McCormick traced the source of this Court reviewing exhibits to answers under 12(c). She concluded that "[m]ost decisions addressing this issue are based on Federal Rule of Civil Procedure 10(c), which provides that '[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.' This Court's rules contain nearly identical language. Because '[d]ecisions interpreting the Federal Rules of Civil Procedure are usually of great persuasive weight in the construction of parallel Delaware rules,' the Court will consider the exhibits attached to the defendants' answer." *Mehta*, 2019 WL 2025231, at *2 (internal citations omitted); Ct. Ch. R. 10(c).

"mention . . . the concrete paved road or a specific alignment to access [the Public Road]." *Id.* ¶ 7.

10. "Generally speaking, the owners of a servient estate burdened by an easement in favor of a dominant estate may use the premises as they choose, but 'may not interfere with the proper and reasonable use by the [dominant estate owner] of their dominant right.'" *Vandeleigh Indus., Inc. v. Storage P'rs of Kirkwood, LLC*, 901 A.2d 91, 96 (Del. 2006) (internal quotations and citations omitted). Consistent with the above principle, "[t]he general rule is well established that an easement may not be relocated without the consent of the owners of both the dominant and servient estates [and] '[a] way once located cannot be changed by either party without the consent of the other.'" *Edgell v. Divver*, 402 A.2d 395, 398 (Del. Ch. 1979) (internal citations and quotations omitted); *see also Smith v. Reserves Dev. Corp.*, 2008 WL 3522433, at *9 (Del. Ch. Aug. 12, 2008) (a servient estate owner "cannot unilaterally relocate the position of the 15 foot easement in the disputed road."). Stated differently, "[w]hen the right of way has once been exercised in a fixed and definite course, with full acquiescence and consent of both parties, it cannot be changed at the pleasure of either of them." *Edgell*, 402 A.2d at 398 (quoting *Sibbel v. Fitch*, 182 Md. 323, 34 A.2d 773 (Md. 1943)). Thus, if the dominant estate owners "consistently refuse[] to agree to a relocation of the

easements . . . there can be no relocation regardless of the inconvenience to the plaintiffs." *Id.*

11. Here, the Old Access Road was fixed for decades. Compl. ¶ 10. While DNREC is correct that Reynolds's deed does not describe the right of way's exact location, Reynolds consistently used the Old Access Road as his sole right of way to the Public Road. *Id.* Consistent, long-term use as a right of way evidences that the Old Access Road was "exercised in a fixed and definite course, with the full acquiescence and consent" of both servient and dominant estate owners. *Edgell*, 402 A.2d at 398. Applying the general rule, Reynolds's consent was necessary to relocate the right of way. DNREC has not challenged the applicability of this authority; nor has DNREC identified any other authority that would allow it to relocate the easement. Thus, I assume the general rule articulated in *Edgell* controls.

12. Two Potential Remedies. When an easement is improperly moved without the consent of both the dominant and the servient estate owner, the Court may either (1) require reconstruction of the original road, or (2) if reconstruction is inequitable, require the servient estate to create a replacement road. *Acierno v. Goldstein*, 2005 WL 3111993, at *11 (Del. Ch. Nov. 16, 2005) ("Where, as here, the servient landowner (Acierno) has blocked the dominant landowners' (Counterclaimants) express easement, the Court may either order restoration of the easement or relocate it.").

13. This Court specifically addressed inequitable reconstruction scenarios in *Acierno*. In *Acierno,* the dominant estate owners claimed that the servient estate owner blocked their right of way by building a stormwater management basin. *Id.* at *7. This Court, after affirming the dominant estate owners' right to their easement, reasoned that "[r]estoration of the express easement according to its original terms is not practicable in this case because it likely would require the destruction or modification of the stormwater management basin, regrading of the land between the Disputed Parcel and Neury's Lane, regulatory approval and significant expense." *Id.* at *11. Instead, the Court ordered the servient estate owner to construct a serviceable replacement route at its expense. *Id.* at *11-12. The Court noted that a replacement road was particularly equitable in *Acierno* because the dominant estate owners had constructive knowledge of the stormwater basin and failed to use "any diligence on their part" to prevent the invasion onto their easement. *Id.* at *10.

14. Unsurprisingly, DNREC argues that "[t]here are no grounds for 'reconstructing' [the Old Access Road]." DNREC Reply Br. 17. First, like the dominant estate owners in *Acierno*, Reynolds had notice of DNREC's plans to relocate the right of way and did not take action until after it completed the relocation. Compl. ¶ 12. Because DNREC tore up the Old Access Road in 2016 and Reynolds waited until 2018 to file suit, DNREC argues that Reynolds did not

diligently protect his easement rights. DNREC Answer ¶ 12. Second, like restoration of the right of way in *Acierno*, ordering DNREC to remove the retention pond and repave the Old Access Road would cause it to incur extreme expense.[2] But I need not decide the appropriate remedy for Reynolds at the judgment on the pleadings stage because Reynolds's counsel ultimately conceded in oral argument that Reynolds does not want the Old Access Road restored. Oral. Arg. Tr. 25:18-24. Instead, Reynolds seeks to secure unconditional and irrevocable access to the New Access Road. *Id.*

15. The Public Access Easement as a Replacement. Assuming *arguendo* that creating a replacement road is the appropriate remedy, DNREC argues that it already granted Reynolds the appropriate replacement via the New Access Road and the Public Access Easement. DNREC Answer ¶ 14. First, DNREC intended the New Access Road to be an improved replacement for the Old Access Road, and it runs across former National Vulcanized Fibre Company land just as Reynolds's deed describes. DNREC Answer ¶ 25; Oral Arg. Tr. 17:12-21. Second, DNREC and the other Defendants then granted the public, including Reynolds, access to the New Access Road through the Public Access Easement. DNREC Answer Ex. 1.

[2] This Order should not be read to suggest that reconstruction costs alone will tilt the equities toward relocating the easement. Because servient estate holders may not unilaterally move easements, dominant estate holders may well be entitled to reconstruction even when the costs are high. Here, as in *Acierno*, the dominant estate holder's lack of diligence is a key factor in this analysis.

Therefore, DNREC argues that the Public Access Easement gives Reynolds equivalent access rights, moots any injury Reynolds faced as a result of the relocation, and entitles DNREC to judgment as a matter of law because Reynolds has suffered no harm. DNREC Answer ¶ 25.

16. Reynolds disagrees with DNREC's contention that the Public Access Easement gives Reynolds the rights he is entitled to under his deed. Pl.'s Opp'n Br. 12. Reynolds's private easement was "unconditional and irrevocable," but two provisions of the Public Access Easement allegedly render it both "conditional and revocable," and therefore insufficient. *Id.* Reynolds specifically identifies: (1) the "Dedication of Public Access Easement" provision (the "Dedication Provision"); and (2) the "Indemnification; Release and Hold Harmless; Assumption of Risk" provision (the "Hold Harmless Provision"). *Id.* at 13-14.

17. Restrictive Terms in the Public Access Easement. The Dedication Provision states, in part, that upon "dedicat[ing] the Public Access Easement to public use through the recordation of a plan and/or deed of dedication . . . the Public Access Easement shall terminate and be extinguished and shall be of no further force and effect." DNREC Answer Ex. 1 ¶ 4. DNREC states that dedicating the Public Access Easement to the public would "ensure full access for Reynolds to his parcel." DNREC Reply Br. 8-9. Reynolds disagrees and claims that his easement was demoted from a perpetual easement to an easement DNREC can terminate without

guaranteeing any replacement. Pl.'s Opp'n Br. 13. This is because Defendants can "simply record a plan that dedicates the area for public use and thereby eviscerate the [Public Access] Easement." *Id.* Announcing a plan to dedicate the Public Access Easement would leave Reynolds easement-less for the time between the announcement and the actual dedication. Depending on the administrative rigor used to execute the dedication plan, Reynolds could even be stuck in limbo indefinitely without an easement. DNREC provides no response to Reynolds's argument.

18. The Hold Harmless Provision states, in part, that "[u]se of the Public Access Easement by the public shall be further understood to be at the sole risk of the user and the user shall release and hold the Parcel Owners harmless from and against any loss, cost or liability of any kind or nature (including reasonable attorneys' fees) arising from such access . . . . Further, the use of the Public Access Easement without assuming such risk shall be deemed to be an unauthorized use." DNREC Answer Ex. 1 ¶ 6. Reynolds argues that the Hold Harmless Provision imposes a condition on using the Public Access Easement that did not exist under his original easement, namely that he must forego his rights to sue the owners of the servient estates. Pl.'s Opp'n Br. 14. Further, Reynolds asserts that he does not accept the terms of the Hold Harmless Provision; therefore, his property is "legally

landlocked" because his use of the road is "unauthorized" according to the Public Access Easement conditions. *Id.*

19. DNREC stated at oral argument that Reynolds was subject to conditions similar to the Dedication and Hold Harmless Provisions under his original easement, but DNREC offered no support for its assertion. Oral Arg. Tr. 34:6-12. Critically, the original easement in Reynolds's deed makes no mention of any such restrictions. Compl. Ex. 1. Therefore, accepting "all well-pleaded allegations as true" for this Motion, Reynolds adequately alleges that his original easement was free of any restrictive conditions. *Desert Equities*, 624 A.2d at 1206; Pl.'s Opp'n Br. 12. Thus, Reynolds submits well-pled allegations that the Public Access Easement is not an equivalent replacement because it imposes restrictions.

20. Having construed "the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party," Reynolds adequately alleges that DNREC improperly relocated the Old Access Road and failed to provide him with equivalent easement rights to the New Access Road. *Desert Equities*, 624 A.2d at 1205. Because DNREC has not met its burden of showing that it is entitled to judgment as a matter of law, the Motion for Judgment on the Pleadings is DENIED.

/s/ Tamika Montgomery-Reeves
Vice Chancellor
Dated: November 20, 2019