CITATION: Adili and Donn, 2012 ONSC 4086
COURT FILE NO.: CV-10-24003
DATE: 2012-07-17

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
ELISA ANGELA ADILI	
Applicant	Derek A. Schmuck and Brian J. Decaire for the Applicant
- and -	
DEREK EDWARD RUSSELL DONN AND JENNIFER MAUREEN SPANGENBERGER	
Respondents	Michael J. Valente and Frank Pignoli for the Respondents
	HEARD: May 14, 16, 17 and 22, 2012

REASONS FOR DECISION

Cavarzan J.

[1] This case involves circumstances which call to mind the aphorism that good fences make good neighbours. The aphorism is attributed to a poem by Robert Frost entitled *The Mending Wall*. It tells the story of two neighbours separated by a wall which falls apart each winter. The neighbours are obliged to meet and

mend the wall, thereby spending more time together than they otherwise would have. In the process, they grow increasingly frustrated with each other.

[2] The frustration in this case arises from the respondents' claim to a right to construct a driveway and to erect a stone retaining wall on land owned by the applicant, based upon their view that a registered easement gives them the right to do so.

[3] The applicant seeks the following remedies:

> a) a declaration that the respondents' easement over Part 4 on Registered Plan 62R-16967, being the applicant's property, granted in the Agreement registered on title on June 6, 2005, is limited to an easement and right-of-way over the Part 4 property, only:
>
> i. for the purposes of placing and maintaining service lines including but not limited to sewer lines, water lines, gas lines, phone lines, hydro lines, T.V. cable lines and internet lines; and
>
> ii. for the purposes of vehicle traffic over the common laneway in order to access Part 3;
>
> b) an order that the respondents restore the natural grading and landscaping on Part 4 to the state existing prior to respondents' actions extending re-grading and widening the laneway; and
>
> e) a permanent injunction restraining the respondents from blocking, parking on, landscaping, altering or otherwise impairing the applicant's use and enjoyment of her property.

Background

[4] A large parcel of land on which is located a two-storey stone dwelling, was acquired by a development company which subdivided it into five building lots. These lands are located on the east side of Lover's Lane in Hamilton (formerly in Ancaster).

[5] A single access point from Lover's Lane is provided to four of the building lots in the form of an undulating common laneway which passes over lands owned by the applicant and by her neighbour Deanne Grace Day. A fifth lot owned by the Hines family fronts onto Lover's Lane and has access directly onto that roadway.

[6] Annexed hereto as Appendix I is a plan of survey showing the original large parcel of land and the stone dwelling, and the various parcels into which the large parcel has been subdivided. Those parcels are labelled Parts 1 through 12 for conveyancing purposes.

[7] All of the building lots were sold in June 2005. The applicant purchased the parcel containing the original homestead built in 1937. The Days constructed a residence in 2006, the Wendelaars in 2007, and the respondents in 2008.

[8] A registered Agreement dated May 1, 2005, granted easements which permitted all four building lots to be serviced and to have vehicular access via the common laneway. Annexed hereto as Appendix II is a sketch illustrating the common laneway and its relationship to the four building lots it was intended to serve. The May 1, 2005 Agreement refers to Part 3 in Appendix I as Lot 1 (the Donn property), to Parts 4 and 9 as Lot 2 (the Adili property), to Parts 5 and 6 (the Day property) as Lot 3[1], and to Part 7 as Lot 4 (the Wendelaar property).

[9] As a result of the Planning Act approval of the severance of the original large parcel into building lots, 1602500 Ontario Inc. became the owner of each lot and is described as such in the Agreement of May 1, 2005. The preamble to the Agreement states as follows:

> Whereas Lots 1, 2, 3 and 4 are being developed as part of the property located at 189 Lover's Lane, Ancaster, now in the City of Hamilton;
>
> And whereas the said lots are being serviced through one access point to the property and easements are required for such servicing;
>
> And whereas the said lots have a common laneway, over which easements and rights of way are required;

[1] The total Day property comprises Parts 4, 6 and 10.

> And whereas the owners of the said lots also require an agreement as to cost sharing for the maintenance of the common lane;

[10] In its operative parts, the Agreement has the owner of Lot 2 granting to the owner of Lots 1, 3 and 4 an easement and right of way over Part 4. The owner of Lot 3 makes a similar grant to the owner of Lot 2 over Parts 5 and 6. Similarly, the owner of Lot 3 grants to the owner of Lot 4 an easement (inexplicably the words "and right of way" are omitted) over Part 5.

[11] As is evident from the sketch in Appendix II, the Donns need a right of way over Adili land for vehicular access to their lot from the common laneway, the Wendelaars need a right of way over Adili and Day land for vehicular access to their lot from the common laneway, and the Days and Adilis need a right of way from each other for that purpose.

[12] At the time of the purchases of these lots, the lands were subject to the jurisdiction of the Niagara Escarpment Commission (the NEC). NEC approval was required before construction could commence.

[13] Derek Donn made a development permit application to the NEC in March, 2007, in which he left blank the portion asking for a

description and terms of any easement registered on or affecting the title to the property.

[14] Prior to completing their purchase the Donns had received a package of documents which included the Agreement of May 1, 2005, a tree management report, a tree management plan (the TMP), and a grading and drainage plan.

[15] The NEC scheduled a meeting for July 19, 2007 to consider the Donn application. It sent notice to the Adilis offering them an opportunity to comment on the application. The Adilis did so in a letter of July 15, 2007 to the NEC.

[16] Essentially they objected to the Donn proposal to locate their double garage and its associated driveway in the south-east corner of their property. The attached garage was to be 1.76 m (5.77 ft.) from the southerly lot line. As noted in comments by the City of Hamilton in a letter of April 26, 2007, "any vehicle parked within this "L" shaped driveway[2] which is accessed from a private right-of-way/access driveway, will be located on lands not owned by the applicant/property owner".

[2] The "L" shaped driveway, entirely on Part 4, is shown on Appendix III, a 2011 Site and Grading Plan, even though a straight in driveway had already been established.

[17] Referring to the terms of the grant of easement the City of Hamilton letter notes that the easement/right of way in favour of the adjoining lots is for mutual access purposes only, "As such, parking is not permitted on the access driveway/right of way".

[18] In a NEC staff note in the Development Permit Application of July 3, 2007, it is stated that: "The applicant has revised the site plan to remove the "L-shaped" bend in the driveway to access his lot from the right-of-way. The access will come straight in towards the attached garage from the private driveway". When the Donn house was constructed in 2008, the driveway was built "straight in" from the common laneway.

[19] The NEC meeting to consider the Donn application was never held, its jurisdiction over land development in Ancaster having been removed by regulation effective July 19, 2007. In order to obtain the requisite building permit, the Donns had to apply to the City of Hamilton and to comply with the requirements of the applicable municipal by-laws.

[20] On May 8, 2007, the first of several letters sent to Derek Donn from solicitors representing the Adilis demanded that the

Donns refrain from activity infringing upon the Adilis' land rights.

[21] At page 2 of the May 8, 2007 letter, Mr. Maddalena writes suggesting alternatives:

> We suggest you amend the Application and Site Plan to provide a solution to these issues and implement a proposal that is consistent with your existing legal rights. Slight modifications to the Application and dimensions of the proposed dwelling would enable a more reasonable side yard setback between the proposed garage and the boundary of Part 4. Alternatively, the Application could incorporate direct access to your property from the current paved laneway, which would minimize disruption to the existing laneway and the green space. We urge you to discuss these possibilities with your planner, surveyor and other advisors. The existing Application cannot proceed as proposed.

[22] The Adilis objections had no effect upon the Donns who proceeded to construct their residence in 2008. Having made no provision to park motor vehicles on their land, they regularly parked on the Adili Part 4 lands.

[23] The Donns then proceeded to excavate part of the Part 4 lands along the boundary between Parts 4 and 9 in order to establish a driveway from the common laneway to their attached garages. In doing so, they excavated a portion of Part 9. In doing so, they exposed the roots of healthy mature trees located

on Part 9. They then proceeded to place armour stone blocks as a retaining wall for the exposed slope created by the excavation work. All of this was done without permission and against the wishes of the Adilis.

[24] On February 3, 2011, the applicant obtained a temporary injunction halting any further alterations to the laneway or Part 4 of the Adili lands, and prohibiting the parking objected to, except with the consent of the applicant.

[25] Derek Donn conceded when cross-examined at trial that he knew as of July 2007, before construction of his house began in 2008, that his proposal for his property failed to meet the requirements of the applicable by-laws in several respects. The roof of the house was too high and there was not adequate provision for parking on the Donn property. City officials had noted that parking was not permitted on the common laneway or on the portion of the driveway located on Part 4.

[26] It appears, as well, that the City officials were led to believe that the front of the proposed residence would face Lover's Lane. The applicable zoning by-law required a minimum front yard of 7.5 metres. The set-back of 17.96 metres conformed to the by-law. The minimum side yard requirement of

1.5 metres was met by the proposal indicating a set-back of 1.76 metres.

[27] Derek Donn denied having attempted to mislead anyone about the proposed orientation of the house to be constructed. The main entrance to the house as constructed is on the south elevation adjacent to the double garage which is only 1.76 metres from the boundary between the Donn lot and Parts 9 and 4 of the Adili lands. The front steps reach almost to the property line.

[28] In summary, the Donns purchased their lot in June, 2005 and commenced building in 2008. In the interim they learned about deficiencies in their proposal to build from the municipal authorities and received correspondence from the Adili solicitors claiming breaches of property rights by the Donns.

[29] None of this caused the Donns to alter course. They established, as early as May, 2008, a driveway straight south from their double garage to the common laneway. Even after receipt of a further solicitor's letter of June 2, 2010, from Dermot Nolan, solicitor for the Adilis, the Donns' response was to order further work and the placing of armour stone as a retaining wall on the driveway.

[30] The Donns never applied for a variation of the zoning by-law concerning the parking of motor vehicles. They never advanced a proposal to re-orient the house in order that a driveway might be located entirely on their property.

The Positions of the Parties

[31] The applicant's position is that the respondents have a limited right of way over Part 4 of her land which includes neither the right to park motor vehicles on Part 4, nor the right to alter the established grading of Part 4. She seeks the remedies specified in paragraph [3] above.

[32] The respondents' position is that the easement agreement of May 1, 2005, does indeed give them the right to alter the grading of Part 4 and to establish a driveway access to their garages as they have thus far endeavoured to do.

[33] In his oral submissions at the conclusion of the trial, respondents' counsel advanced the alternative argument that the true easement document is not the Agreement of May 1, 2005. He cited Exhibit 43, the transfer of the parcel of land forming the land now owned by the applicant at 189 Lover's Lane, from

1602500 Ontario Inc. to James Gregory Warnick, Trustee, being registered as WE314450 on June 8, 2005.

[34] The statement portion of that transfer provides that: "the easement over Part 4, 62R16967 in favour of Part 3, 62R16967 is for the purpose of access and utilities including sewers, water, bell, cable, hydro and gas."

The Issues

1. Is the grant of a right of way in this case found in the Agreement of May 1, 2005, or in the Transfer of June 8, 2005, from 1602500 Ontario Inc. to James Gregory Warnick, Trustee?

2. What is the nature and extent of the right so granted?

The Law

[35] "Easement" is defined in *Black's Law Dictionary* (seventh edition) as follows:

> An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). The land benefiting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land. The primary recognized easements are (1) a right of way, (2) a right of entry for any purpose relating to the

> dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate.

[36] The same dictionary defines "right-of-way" as:

> A person's legal right, established by usage or by contract, to pass through grounds or property owned by another.

[37] The respondents say that the Agreement of May 1, 2005 is ineffective in creating and defining the easement in this case for two reasons. In the first place it does not meet the four essential characteristics of an easement at common law cited in the reasons of the Court of Appeal in *Kaminskas v. Storm* 2009 ONCA 318 at paragraph 27. The second reason is that it violates the prohibition in section 50(3) in Part VI (Subdivision of Land) in the Planning Act, R.S.O. 1990, c.P.13 against conveying an interest in land for a period of 21 years or more.

[38] With respect to the second reason, section 50(3) provides that:

> (3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use

> of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,
>
> > (a) the land is described in accordance with and is within a registered plan of subdivision.

[39] It is not disputed that the lands in question are within a registered plan of subdivision and appropriately described in the registered documents. There is no merit to the suggestion that the Agreement of May 1, 2005 breaches the terms of s. 50(3) of the Planning Act.

[40] Counsel for the applicant submitted, correctly in my view, that the Agreement of May 1, 2005 comes within the exception in section 50(3)(b) as well. Since the various exceptions listed are disjunctive, it suffices if any one of them is applicable in the circumstances.

[41] With respect to the first reason, counsel for the respondent submits that the Agreement of May 1, 2005 fails to meet two of the essential ingredients of an easement at common law. At paragraphs 27 and 28 of the reasons in *Kaminskas v. Storm* (supra) the Court of Appeal describes the characteristics of prescriptive easements in a case in which the applicant

applied for a finding of prescriptive easement for use of a driveway:

> 27. To establish a prescriptive easement of either kind (lost modern grant or under ss. 31 and 32 of the Ontario Real Property Limitations Act), the user must first meet the four essential characteristics of an easement at common law, namely:
>
> a) there must be a dominant and servient tenement;
>
> b) an easement must accommodate the dominant tenement;
>
> c) the dominant and servient owners must be different persons; and
>
> d) a right must be capable of forming the subject matter of a grant.
>
> 28. In addition, for an easement to be created by prescription, the user of the alleged right (for the applicable time period) must be shown to have been (i) continuous, and (ii) "as of right".

[42] Counsel for the respondents submitted that the May 1, 2005 Agreement fails to meet requirements c) and d). In my view, he has misinterpreted the meaning and applicability of the reasoning in the *Kaminskas* case.

[43] The easements created by the May 1, 2005 Agreement do not purport to create easements at common law.

[44] They are easements established by contract. Moreover, 1602500 Ontario Inc. was owner *pro tem* of the individual lots in the plan of subdivision for the purpose of sale to individual owners. In such a case, it would be a triumph of form over substance to prevent the creation of the requisite rights of way by the rigid application of the requirement that the dominant and servient owners be different persons. In reality, the numbered company as owner of each parcel in the subdivision is the surrogate for the eventual owners. The Agreement was registered on title. Each owner of Lots 1, 2, 3 and 4 (Donn, Adili, Day and Wendelaar respectively) took title subject to the terms of the Agreement.

[45] As noted above, the rights of easement are capable of forming the subject matter of grants. Nothing in the Planning Act prohibits the making of such grants.

[46] I conclude, therefore, that the grant of a right of way in this case is the one found in the Agreement of May 1, 2005.

[47] Issue 2. What is the nature and extent of the right so granted?

[48] The operative parts of the Agreement affecting Lot 1 (Donn) and Lot 2 (Adili) are found in paragraphs 1 and 4:

> 1. 1602500 Ontario Inc., as owner of Lot 2, does hereby grant to the owners of Lots 1, 3 and 4, an easement and right-of-way over Part 4, Plan 62R16967:
>
> > (a) for the purpose of placing and maintaining service lines including but not limited to sewer lines, water lines, gas lines, phone lines, hydro lines, T.V. cable lines and internet lines.
> >
> > (b) for the purpose of vehicle traffic over the common lane in order to access their lots.
>
> 4. The easements and rights of way are subject to the following conditions:
>
> > (a) no vehicle can park on the laneway so as to block other vehicles;
> >
> > (b) during construction of the residences on the lots, it may be necessary for construction equipment and vehicles to temporarily block the lane. Such blockage can be for no more than four (4) hours on any given day.

[49] Derek Donn stated in cross-examination at trial that: "I believe I have an easement over Part 4 fully". By that he meant that the easement is unrestricted, permitting him to park vehicles on Part 4, and to cut a trench into and alter the grade of Part 4 in order to accommodate the straight-in driveway to his garages.

[50] In oral argument, his counsel supported that view, reliance being placed, in particular, upon the concept of ancillary rights.

[51] The applicant argues that the wording of the express grant is clear and unambiguous, a view supported by reference to circumstances existing at the time of the grant.

[52] Both sides cited and rely upon the law in the Ontario Court of Appeal reasons in *Fallowfield v. Bourgault*, (2003) 235 D.L.R. (4th) 263. The circumstances in the *Fallowfield* case are sufficiently set out in the headnote:

> The parties were next-door neighbours whose subdivision houses were about four feet apart. When the subdivision was developed a mutual easement was granted by deeds giving each neighbour an easement for repairs over the two-foot strip of land adjacent to the other's house and running between the houses from front corner to back corner. In 2002 the appellants built a fence to separate their front yard from that of the respondents. The fence was on the appellants' side of the lot line and ran from the sidewalk to a point two and a half inches in front of the land subject to the easement. Access to the back yards of both houses was available on the non-easement side of each house but the predecessors in title to the respondents had constructed a patio and deck which prevented back yard access for equipment from that side.

[53] At trial, the respondents obtained an order requiring the appellants to remove part of the fence. The appeal from that decision was allowed. No ancillary rights existed extending the dimensions of the easement over more of the appellants' property for the purpose of access to the easement.

[54] The Court of Appeal adopted the following propositions from *Halsbury's Laws of England*, vol. 14, 4th ed. in paragraphs 10 and 11 of the reasons by the majority:

> 10. Where an easement is created by express grant, the nature and extent of the easement are determined by the wording of the instrument creating the easement, considered in the context of the circumstances that existed when the easement was created.
>
> ...
>
> 11. In interpreting the meaning and intent of an express easement, the concept of ancillary rights arises. The grant of an express easement includes such ancillary rights as are reasonably necessary to use or enjoy the easement. However, to imply a right ancillary to that which is expressly granted in the easement, the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable.

[55] In this case the express grant of easement is clear and unambiguous. Paragraph 1(a) grants an easement for the purpose of placing and maintaining service lines. This necessarily involves digging into the land. The evidence is that the

developer installed the requisite service lines to the Donn property either directly under the straight in driveway begun by the Donns (according to Derek Donn in his testimony in court) or, more likely, in close proximity to that area as seen in the photographic exhibits. It is not disputed that the developer regraded the land to its original profile after the services were installed.

[56] The grant of a right of way over Part 4 in paragraph 1(b) is "for the purpose of vehicle traffic over the common lane in order to access their lots".

[57] The common lane traverses a portion of Part 4 of the Adili lands. The circumstances which existed when the easement was created are well-known to the parties. The NEC had jurisdiction. One of its requirements was that property owners comply with the Tree Management Report and Plan dated November 22, 2004.

[58] To begin with, the design of the common laneway is such that it undulates from north to south and back again to bring it within close proximity to all four lots (1, 2, 3 and 4). For a distance of about 60 feet east of the intersection of the southern boundary of the Donn lot and the Lover's Lane road

allowance, the common laneway runs parallel to and about one foot south of the southern boundary of the Donn lot.

[59] A large triangle in the south-west part of the Donn lot was outside the tree protection zone. It contains one tree (No. 40) marked on the TMP for removal. The Tree Management Report contemplates the removal of tree number 40 in order to accommodate a driveway (Tree Identification Inventory at page 2: "Remove, condition, fill, driveway").

[60] At page 3 of the Report itself is found the statement: "The servicing (sanitary, water, driveway) of the lot requires the removal of 2 Thuja (cedar) – Tag no. 40, 48". Tree 48 is located on the TMP at the location where the developer installed the services for the Donn lot.

[61] The configuration of the common laneway and the specifics of the TMP and Report are circumstances existing at the time of the creation of the right of way which support the applicant's interpretation.

[62] Ironically, Derek Donn cited a desire to preserve and protect trees for his decision to locate the house and garages so that access to the garages could be gained only by the straight in driveway over Parts 4 and 5. Notwithstanding the

evidence to the contrary in the TMP and Report, and the fact that NEC jurisdiction and any binding effect of the TMP and Report ended on July 19, 2007, long before construction of the Donn house began, Derek Donn insisted that the TMP "pretty much depicts exactly where I have put my driveway". The following exchange is from his cross-examination at trial:

> Q. Did anywhere in that tree management plan or grading plan or any other document you want to come up with, when it shows a building envelope, does it tell you where your garage has to be? Does it tell you where you have to orient your house within the building envelope?
>
> A. As I mentioned earlier, if you relate to the tree preservation plan and you look at the way the lots are all situated and the indications made by the tree management end plan it pretty much depicts where I have put my driveway.

[63] Further circumstances in existence at the time the right of way was created were the Kenneth Youngs Engineering Inc. Grading and Drainage Plan dated October 14, 2004 and the Consent Agreement between the numbered company and the City of Hamilton dated April 30, 2005. The Consent Agreement requires the developer to submit an Overall Grading Plan and for individual Lot Grading Plot Plans to be submitted before the issuance of a building permit. The individual Lot Grading Plot Plans are to conform with the Overall Grading Plan, a further circumstance

suggesting that the express grant of a right of way here did not include the right to alter the grading of the land.[3]

[64] The circumstances referred to above support the applicant's position that access to the Donn lot was to be at the location shown in Appendix II as "Private Drive".

[65] The respondents argue that because the common laneway comes only to within one foot of the southern boundary of their lot, it must be concluded that what was intended was the right to enter "fully" onto Part 4. In my view this is where the concept of ancillary rights is of service. The right to cross the one foot gap between the common laneway and Lot 1 is an ancillary right reasonably necessary for the use and enjoyment of the easement. It places a minimal additional burden on the servient tenement.

[66] Derek Donn conceded in his testimony at trial that he never considered the option, nor applied for approval of, entering his lot from the common laneway near the south-west angle of his lot, establishing a driveway entirely on his lot, or re-orienting the residence so that a driveway, entirely on his lot, would permit access to the double garage.

[3] See the surveyor's note on Appendix III regarding Part 9, "Regrade with owner's permission".

[67] There is much force to the applicant's submission that permitting the respondents to complete construction of their straight in driveway would effectively sever Part 4 from her lot, amounting to expropriation without compensation of a parcel of land 9 metres x 31 metres covering an area of 279 square metres. This would increase the area of the Donn lot by about one-third.

[68] A circumstance invoked by the respondents in favour of their interpretation of the easement is the Driveway Maintenance Agreement which is part of the May 1, 2005 Agreement. It makes the owners of the four lots jointly responsible to maintain the paved lane over Parts 4, 5 and 6. The cost is allocated 20% to Lot 1, 30% to each of Lots 2 and 3, and 20% to Lot 4.

[69] The argument is that the Donn 20% share means that it was contemplated that access to Lot 1 would be much farther east along the common laneway than within sixty feet of the east limit of the Lover's Lane road allowance. There are two problems with this argument.

[70] In the first place it ignores the fact that services to Lot 1 come along the common laneway to a point considerably east of Lover's Lane. Secondly, paragraph 10 stipulates that:

> 10. The obligation to contribute to the lane maintenance, includes all of the lands being Parts 4, 5 and 6, Plan 62R16967, and not just the lane itself.

[71] In my view this is for aesthetic reasons, this *cul-de-sac* being in a picturesque wooded area, and not, as suggested by the respondents, indicating a broader easement than the limited one intended.

[72] Finally, paragraph 11 is an arbitration clause pursuant to which an adjustment to the 20% share can be sought if it is thought to be inequitable.

[73] Regrettably, the Donns have painted themselves into a corner. The situation they knowingly created is not unlike the one in the *Fallowfield* case, supra, where the following observation occurs at paragraph 18:

> 18. Moreover, because the grant of the easement occurred at the time of the planning and construction of the homes in the subdivision, it is the intention and circumstances at that time that govern. Therefore, the fact that at some point following the grant of the easement the respondents or their predecessors built a deck and patio at the back of their house obstructing their access to their backyard on the non-easement side of their house is irrelevant in construing the nature and extent of the easement.

[74] In this case, the option of building a private drive as shown on Appendix II is still open. Derek Donn confirmed that the area between Lover's Lane and the house on Lot 1 remains unlandscaped to date. The fact that they located the double garage where they did is irrelevant in construing the nature and extent of the easement.

[75] The ancillary right which the respondents ask the court to imply, namely, the right to construct the straight in driveway on the Adili land may be convenient for them but in my view not necessary for the use and enjoyment of the easement and I so find.

[76] The applicant seeks a permanent injunction. The respondents oppose the granting of this remedy because of what is termed an inordinate delay in commencing this application. Letters were written on behalf of the Adilis by Mr. Maddalena on January 2, 2009, and by Mr. Nolan on June 2, 2010 indicating that legal action is contemplated.

[77] The gist of those letters, however, is an attempt to solicit the co-operation of the respondents in respecting the legal rights of the Adilis. I would not characterize this

neighbourly accommodation as inordinate delay depriving the applicant of the remedy of a permanent injunction.

Conclusion

[78] The applicant is entitled to the items of relief mentioned in paragraph [3] above. Accordingly there will be:

> a) a declaration that the respondents' easement over Part 4 on Registered Plan 62R-16967, being the applicant's property granted in the Agreement registered on title on June 6, 2005, is limited to an easement and right-of-way over the Part 4 property, only:
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> i. for the purposes of placing and maintaining service lines including but not limited to sewer lines, water lines, gas lines, phone lines, hydro lines, T.V. cable lines and internet lines; and
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> b) an order that the respondents restore the natural grading and landscaping on Part 4 to the state existing prior to respondents' actions extending re-grading and widening the laneway; and
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> c) a permanent injunction restraining the respondents from blocking, parking on, landscaping, altering or otherwise impairing the applicant's use and enjoyment of her property.

[79] If necessary, the parties may exchange and send to me brief written submissions on the issue of the costs of these proceedings within 30 days.

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Cavarzan J.

Released: July 17, 2012

COURT FILE NO.: CV-10-24003
DATE: 2012-07-17

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

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Respondents

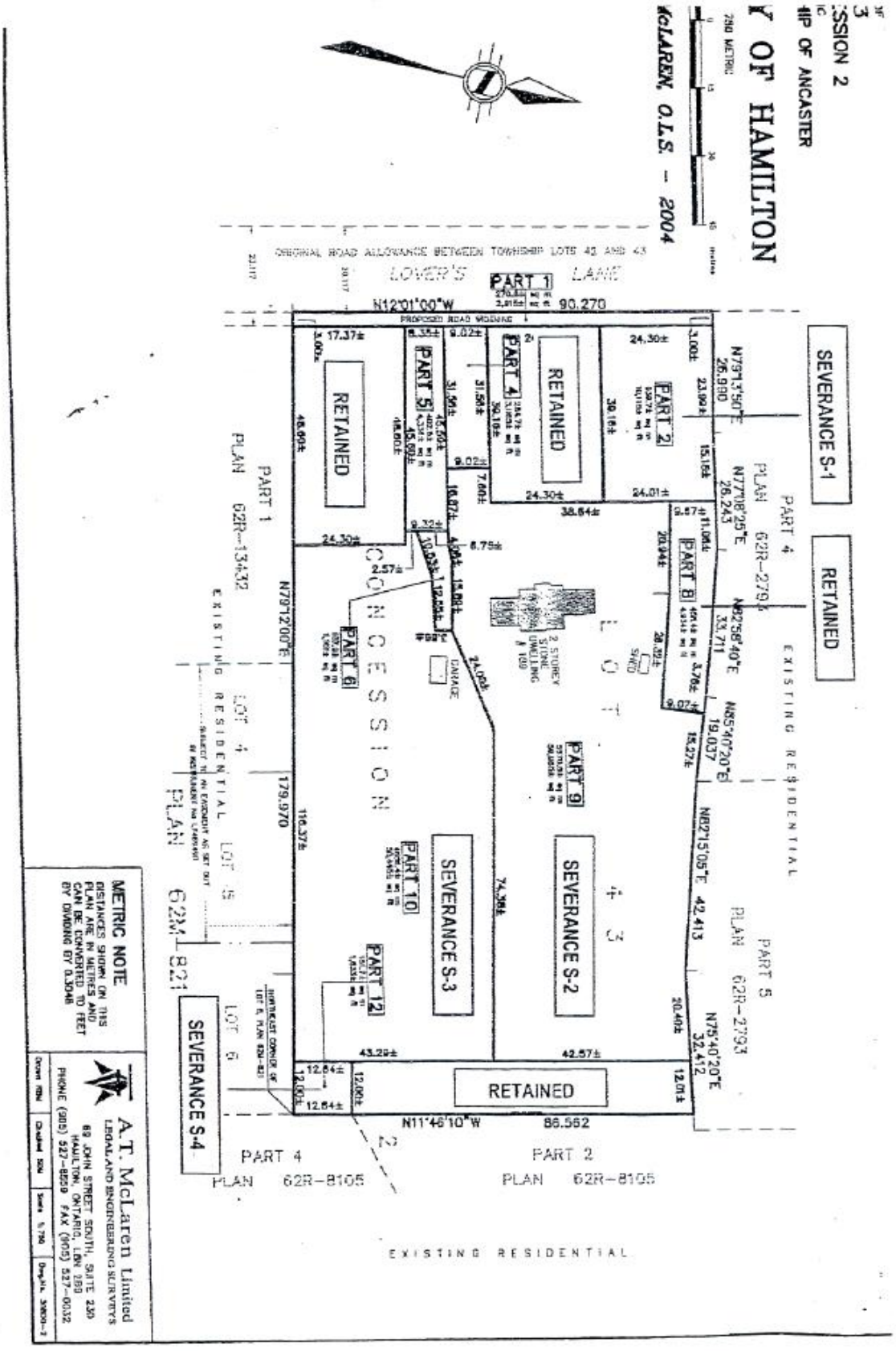
REASONS FOR DECISION

Cavarzan J.

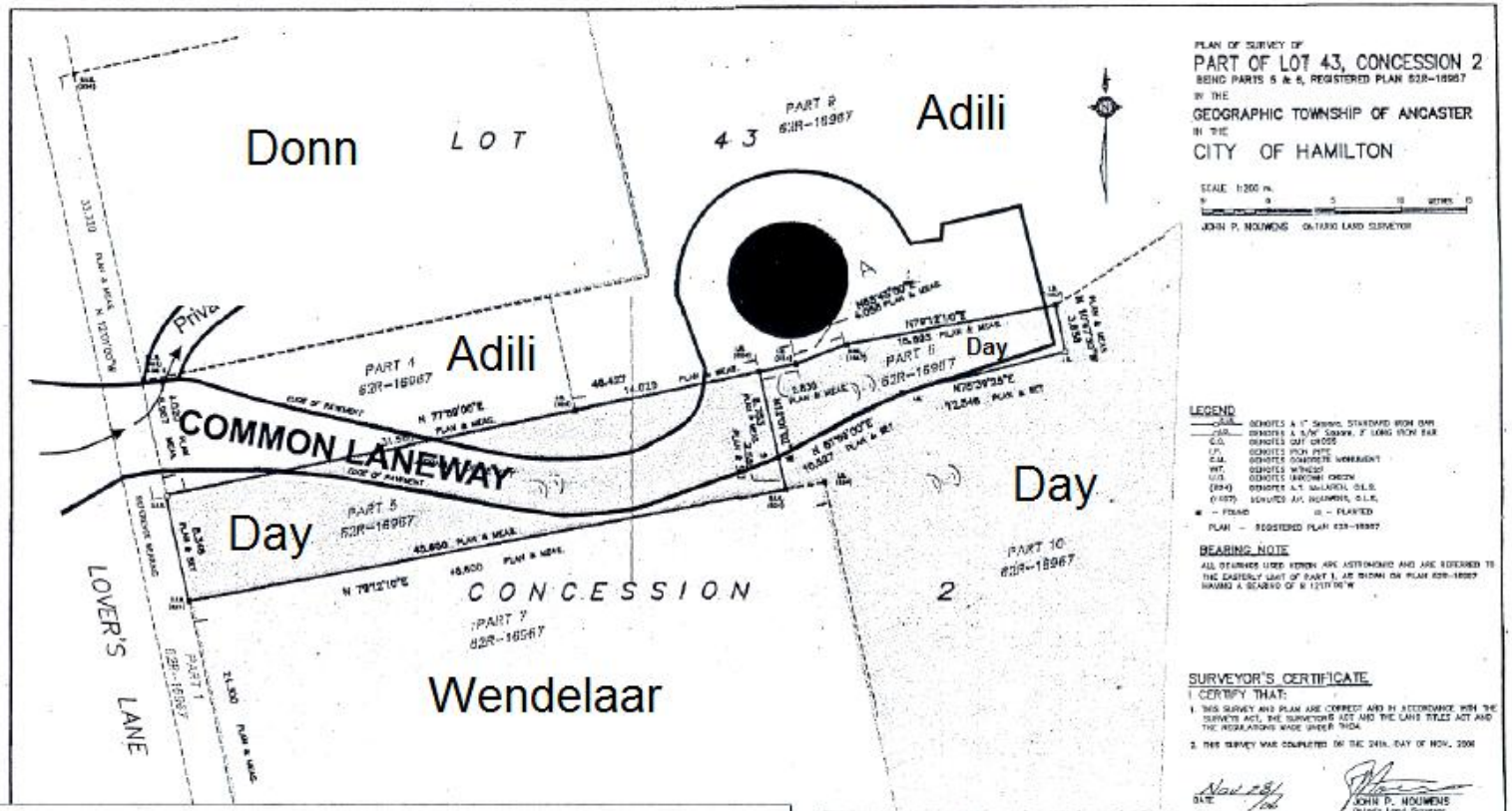
JC // dm

Released: July 17, 2012

Appendix I



Appendix II



Overview:

Access to Lot 1 through the Common Laneway has been outlined in RED and labeled "Private Drive L1" The owner of Lot 1 will access their Lot immediately upon entering the Common Laneway within the first 25' of the Common Laneway entrance.

Index

Don = Lot 1 (Parts 3)

Adili = Lot 2 (Parts 4 & 9)

Days=Lot 3 (Parts 10,6,5)

Wendilaars =Lot 4 (Parts 7)

Appendix III