

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1441

JOHN STACK & another¹

vs.

ANTHONY D'AMBROSIO, trustee.²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, John and Carol Stack, and the defendant, Anthony D'Ambrosio, as trustee of the Lot Two Gray Street Realty Trust, own adjoining lots in Billerica that are known as lot 1 and lot 2. The Stacks own and reside on lot 1, which has frontage on Gray Street. D'Ambrosio owns lot 2, which is undeveloped and accessible from Gray Street only by a fifty-foot wide paper road called Capodilupo Lane that is located along the northern edge of lot 1. The Stacks knew when they purchased lot 1 that D'Ambrosio intended to divide and construct a residential development on lot 2. They did not oppose D'Ambrosio's plans until the spring of 2017, when D'Ambrosio obtained a comprehensive permit to construct Graystone Estates, consisting

¹ Carol Stack.

² Of the Lot Two Gray Street Realty Trust.

of twenty, four-bedroom homes that can be accessed only by Capodilupo Lane.

In April 2017, the Stacks filed a complaint in the Land Court seeking declarations that (1) they own the fee interest in Capodilupo Lane, (2) any easement D'Ambrosio may have to use the lane is limited to accessing one house on lot 2, and (3) using the lane to access Graystone Estates would overburden the easement. A Land Court judge determined on cross motions for partial summary judgment that the Stacks own the fee beneath Capodilupo Lane subject to an easement appurtenant to lot 2. A trial that included a view of lots 1 and 2 then took place, before the same judge, on the questions of the scope of the easement and whether it would be overburdened by the proposed development.

In August 2018, the judge issued findings of fact and rulings of law and ordered entry of a judgment dismissing the Stacks' request for declarations that the easement is limited to accessing one house and would be overburdened by Graystone Estates. Judgment so entered, along with a declaration that the Stacks own the fee beneath Capodilupo Lane subject to an easement appurtenant to lot 2, which "may be used for all purposes for which ways in the Town of Billerica may be used." The Stacks timely appealed and claim error only in the judge's

rulings regarding the scope of the easement and the issue of overburdening. We affirm.

Background. We summarize the judge's pertinent findings. The Capodilupo family placed Capodilupo Lane as far as possible from the existing residence on lot 1 when they created lots 1 and 2 in 1999. In 2001, the family sold lot 1 to Michele DeSimone, as trustee of 102 Gray Street Trust, and lot 2 to D'Ambrosio. Lot 1 was later sold to the Stacks. D'Ambrosio, who was also cotrustee of 102 Gray Street Trust at the time of the sale to the Stacks, told them of his plan to construct a four-lot subdivision on lot 2, and the Stacks agreed "not to interfere with said subdivision" as a condition of purchasing lot 1. The Stacks understood that the subdivision would be accessed by Capodilupo Lane and that the lane is a subdivision road and not a driveway.

D'Ambrosio pursued the four-lot subdivision until 2010, when he learned that the town might extend sewer lines to the neighborhood.³ In 2015, the town extended the sewer lines and D'Ambrosio applied for a comprehensive permit to construct a twenty-four-lot subdivision on lot 2. That permit was denied, but a permit for Graystone Estates was approved. The approved development includes industry standard engineering plans for

³ Lots 1 and 2 are located in a "rural residence zone" under the town's zoning bylaws.

Capodilupo Lane that meet or exceed all local and State codes and regulations. The lane is required to be built in accordance with the town's subdivision regulations, and, as designed, will be able to handle the increased traffic from Graystone Estates.

Standard of review. "Upon appeal, we accept a trial judge's findings of fact unless they are clearly erroneous, and do not review questions of fact if any reasonable view of the evidence and the rational inferences to be drawn therefrom support the judge's findings" (quotation and citation omitted). Martin v. Simmons Prop., LLC, 467 Mass. 1, 8 (2014). We defer to the judge's credibility determinations because he heard the testimony and observed the witnesses. See Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). However, "we scrutinize without deference the legal standard that the judge applied to the facts to ensure that [his] ultimate findings and conclusions are consistent with the law." Bui v. Ma, 62 Mass. App. Ct. 553, 565 (2004). The judge's conclusions of law are reviewed de novo. Martin, supra.

Discussion. The judge applied the "notion of overburdening" outlined in Southwick v. Planning Bd. of Plymouth, 65 Mass. App. Ct. 315, 319 n.12 (2005), because "[t]he parties tried this case under [that] notion." The Stacks agree

that this is the correct standard,⁴ and they do not challenge the judge's subsidiary findings of fact.⁵ Instead, the Stacks argue that the judge misapplied the facts to the standard, leading him to conclude erroneously that (1) D'Ambrosio and the Capodilupos anticipated Capodilupo Lane being used to access a development like Graystone Estates when the easement came into existence, and (2) Graystone Estates will not overburden the easement.

There was no error. The scope of the easement over Capodilupo Lane, and whether use of the lane to access Graystone Estates "is reasonable, in light of what might be considered the normal development of [lot 2]," were questions of fact for the judge. Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 84 (2004). See McLaughlin v. Selectmen of Amherst, 422 Mass. 359, 364 (1996) ("We construe the scope of an easement from the parties' intent, which we ascertain from the relevant instruments and the objective circumstances to which they refer"). We do not see

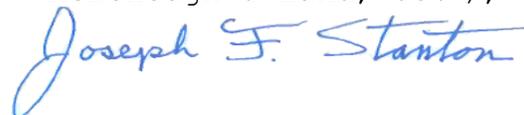
⁴ Although the Stacks argue in their brief that "[t]he Land Court misapplied the legal standards governing overburdening of easements," they clarify that "[t]he applicable legal standard is not in dispute" and that "the debate is [instead] over how these standards are applied."

⁵ In a reply brief, the Stacks challenge the judge's finding that the design for Capodilupo Lane meets or exceeds all local and State codes and regulations. Assuming without deciding that the issue was properly raised, see Bassett v. Blanchard, 406 Mass. 88, 90 n.1 (1989) (argument made for first time in reply brief does not satisfy rules of appellate procedure); Mass. R. A. P. 16 (c), as appearing in 481 Mass. 1631 (2019) ("No new issues shall be raised in the reply brief"), we see no clear error. D'Ambrosio's expert so testified at the trial.

any clear error in the judge's resolution of these questions of fact because his findings are supported by the record. See Martin, 467 Mass. at 8. While the Stacks contend that use of Capodilupo Lane is limited to accessing one house on lot 2, or maybe four, because that was the proposal when the easement came into existence, what was originally proposed is not dispositive of what was anticipated. See Davis v. Sikes, 254 Mass. 540, 547 (1926) (easement by necessity "is not necessarily limited to such use as was being made of it at the time of the conveyance"). Finally, while the judge did not make any subsidiary findings with respect to the negative impacts from the construction and existence of Graystone Estates that are predicted by the Stacks' expert, whose testimony the judge seemed to credit, his general finding for D'Ambrosio imports a finding of all subsidiary facts essential to that conclusion. See Rosenblum v. Ginis, 297 Mass. 493, 496 (1937).

Judgment affirmed.

By the Court (Ditkoff,
McDonough & Hand, JJ.⁶),



Clerk

Entered: November 26, 2019.

⁶ The panelists are listed in order of seniority.