

## DIVISION OF ST. THOMAS AND ST. JOHN

Plaintiff )

**ACTION FOR: DECLARATORY RELIEF**

**VS**

BRUCE STREIBICH, ESQ.  
WARREN STRYKER  
MARGARET STRYKER

**NOTICE OF ENTRY OF  
MEMORANDUM OPINION  
AND ORDER**

Please take notice that on February 25, 2019 a(n) **MEMORANDUM  
OPINION AND ORDER** dated February 22, 2019 was entered by the Clerk in  
the above-entitled matter.

Estrella H. George  
Clerk of the Court

DONNA DONOVAN  
COURT CLERK SUPERVISOR

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN**

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| KAREN R. UNDERWOOD,         | ) |                                |
|                             | ) |                                |
| Plaintiff,                  | ) | CASE NO. ST-95-CV-459          |
| v.                          | ) |                                |
|                             | ) |                                |
| BRUCE W. STREIBICH,         | ) | ACTION FOR DECLARATORY RELIEF, |
|                             | ) | PRELIMINARY AND PERMANENT      |
| Defendant.                  | ) | INJUNCTIVE RELIEF, AND DAMAGES |
| <hr/>                       |   |                                |
| WARREN STRYKER and MARGARET | ) |                                |
| STRYKER,                    | ) |                                |
|                             | ) |                                |
| Intervening Plaintiffs.     | ) | Cite as 2019 V.I. Super 24P    |
| <hr/>                       |   |                                |

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**CARTY, RENÉE GUMBS, JUDGE**

**MEMORANDUM OPINION**

**THIS MATTER** is before the Court on Plaintiff Karen Underwood's motion for summary judgment filed on March 19, 1996, and motion to deem conceded the motion for summary judgment filed on April 9, 1996, pursuant to V. I. R. Civ. P. 56<sup>1</sup> and LRCi 56.1. Defendants filed

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<sup>1</sup> V.I. R. Civ. P. 56, noting that at the time of the filing of the motion for summary judgment in 1996, the Federal

an opposition to Plaintiff's motion for summary judgment and a cross motion for summary judgment on April 11, 1996. Since Defendants were served with Plaintiff's motion for summary judgment on March 19, 1996,<sup>2</sup> time began to run on March 20, 1996. Twenty (20) days from March 20, 1996, was April 8, 1996, and because Defendants were served by mail they had until April 11, 1996, to file their response. Defendants filed their response on April 11, 1996, therefore, the response was timely.

## **I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Karen R. Underwood, the owner of Parcel No. 4-27 Estate Tabor and Harmony seeks a judgment declaring her rights to an easement appurtenant over property owned by Defendants Bruce W. Streibich and Katharine H. Streibich<sup>3</sup> located at Parcel No. 4-26 Estate Tabor and Harmony.

### **a. Chain of title for Defendant Bruce Streibich's Parcel No. 4-26 Estate Tabor and Harmony, Nos. 5 & 6 East End Quarter, St. Thomas, V.I.**

On June 6, 1956, Marshall and Sidney Dierssen (hereinafter the "Dierssens") purchased, by warranty deed, Parcel No. 4 Estate Tabor and Harmony, Nos. 5 & 6 East End Quarter, St. Thomas, Virgin Islands (hereinafter "Parcel No. 4"), which referenced Public Works Department Drawing No. A3-62-T45.<sup>4</sup> In February 1958, the Dierssens subdivided a portion of Parcel No. 4 into 19 plots and filed, pursuant to Title 29 V.I.C. §275, a subdivision plan with the Planning

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Rules of Civil Procedure governed the motion practice in the Virgin Islands made applicable to the Superior Court (then Territorial Court) through Rule 7. On March 31, 2017, the V.I. Supreme Court adopted and promulgated the Virgin Islands Rules of Civil Procedure which, in substance and numbering, are generally the same. Local Rule of Civil Procedure formally 7.1(j).

<sup>2</sup> Defendant's Opposition to Plaintiff's Motion to Deem Conceded.

<sup>3</sup> At the inception of this lawsuit, Katharine Striebich was a named defendant however she passed away on February 28, 1999. See certificate of death recorded at the Office of Recorder of Deeds on June 2, 1999.

<sup>4</sup> See Defendant's Exhibit A (The Dierssens deed was received at the Recorder of Deeds on June 15, 1956); see also Defendant's Cross Motion for Summary Judgment, p. 3.

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Board.<sup>5</sup> A survey map of the subdivision was approved and identified as Public Works Drawing No. B9-31-T57 (hereinafter “PWD T57”).<sup>6</sup> These plots range from Parcel No. 4-18 through No. 4-36.<sup>7</sup> The map depicts a right-of-way “ROW” that abuts Parcel Nos. 4-22, 4-26, and 4-27.<sup>8</sup>

On November 9, 1962, the Dierssens conveyed Parcel No. 4-26 by warranty deed to Norman Brilliant and June Brilliant (hereinafter the “Brilliants”), subject to certain covenants.<sup>9</sup>

One of the covenants contained in the Brilliants’ warranty deed reads:

Together with all the appurtenances and all the estate, title, rights and interests of the parties of the first part [Dierssens] their heirs and assigns, in and to said premises, *including perpetual easements to the parties of the second part [Brilliants] their heirs and assigns, to run with the land over all roads in Parcel No. 4* which are now in existence or shall hereafter be constructed for the ingress and egress from the public roads or otherwise, and subject to the following restrictions. (Emphasis added).<sup>10</sup>

The conveyance of Parcel No. 4-26 Estate Tabor and Harmony identified on PWD T57, clearly depicts a right-of-way running through Parcel No. 4-26.<sup>11</sup> Therefore, when Parcel No. 4-26 was transferred to the Brilliants, they had record notice of the right-of-way.

On August 15, 1969, the Brilliants conveyed Parcel No. 4-26 to Sylvia Weaver by warranty deed, subject to the easements that ran with the land and referred to on PWD T57.<sup>12</sup>

The warranty deed to Sylvia Weaver contained the following easement and restrictions:

*“TOGETHER with a perpetual easement to the party of the second part, [Brilliants] their heirs and assigns, to run with the land over all roads in Parcel No. 4* which are not in existence or shall hereafter be constructed for ingress to and egress from the Public Road or otherwise, and SUBJECT to restrictions,

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<sup>5</sup> See Title 29 V.I.C. §235(a) (requiring that accurate records of actions taken by builders and owners shall be maintained by the Commissioner of Public Planning and Development).

<sup>6</sup> See Defendant’s Exhibit C (St. Thomas Public Works Department Drawing No. B9-31-T57 is dated February 1958); *see also* Defendant’s Cross Motion for Summary Judgment, p. 3.

<sup>7</sup> See Defendant’s Exhibit C; *see also* Defendant’s Cross Motion for Summary Judgment, p. 3.

<sup>8</sup> See Defendant’s Exhibit C.

<sup>9</sup> All of the properties discussed in this memorandum were conveyed after the Dierssens’ 1958 subdivision of Parcel No. 4. See Plaintiff’s Motion for Summary Judgment, pgs. 1-2; *see also* Plaintiff’s Exhibit 2.

<sup>10</sup> See generally Plaintiff’s Exhibit 1 (contained in the Dierssens’ deed to the Brilliants).

<sup>11</sup> Defendant’s Exhibit C.

<sup>12</sup> See Plaintiff’s Motion for Summary Judgment, pgs. 2-3; *see also* Plaintiff’s Exhibit 3.

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easements, *rights-of-way* and agreements of record as set forth in deed dated November 9, 1962, by and between Marshall Dierssen and Sidney C. Dierssen, and Norman Brilliant and June Brilliant, *recorded November 9, 1962, in the Office of the Recorder of Deeds St. Thomas, Virgin Islands.*" (Emphasis added).<sup>13</sup>

Therefore, when Parcel No. 4-26 was conveyed to Sylvia B. Weaver, she had record notice that the parcel was subject to the right-of-way shown and described on PWD T57.

On August 6, 1981, Sylvia B. Weaver conveyed Parcel No. 4-26, by warranty deed, to Brenton E. Battles and Susan Lugo Battles (hereinafter the "Battles"), subject to certain covenants and easements with reference to a description of that parcel on PWD T57.<sup>14</sup> The warranty deed to the Battles contained the following provision:

SUBJECT, HOWEVER, to the covenants, restrictions, *easements, rights-of-way*, and agreements set forth in or attached to a deed dated November 9, 1962, from Marshall B. Dierssen to Norman Brilliant and June Brilliant recorded November 9, 1962 in Volume 6-L, page 162, No. 3059, in said office and to the easements and rights-of-way shown on said Drawing No. B9-31-T57.<sup>15</sup>

Next, on August 17, 1989, Brenton E. Battles and Susan Laura Lugo conveyed, by warranty deed, Parcel No. 4-26 to Defendants Bruce W. Streibich and his wife Katharine H. Streibich.<sup>16</sup> The warranty deed conveyed Parcel No. 4-26 to the Streibichs, subject to the easement and with reference to a description of the parcel on Map No. D9-4345-T88 (hereinafter "PWD T88"), which depicts a 20' wide dirt road, or right-of-way, that runs across Parcel No. 4-26 and Parcel No. 4-27 to Parcel No. 4-28.<sup>17</sup> Moreover, PWD T88 discloses a 20' wide easement to parcels 4-27 and 4-28, and the dirt road [or right-of-way] is within the easement and also references PWD T57.<sup>18</sup> Additionally, Defendants' warranty deed contained the provision: "SUBJECT, HOWEVER, to Virgin Islands zoning regulations and to covenants, restrictions and

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<sup>13</sup> See generally Plaintiff's Exhibit 3 (contained in the Brilliants' deed to Sylvia Weaver).

<sup>14</sup> See Plaintiff's Motion for Summary Judgment, p. 3; *see also* Plaintiff's Exhibit 4.

<sup>15</sup> See generally Plaintiff's Exhibit 4.

<sup>16</sup> See Plaintiff's Motion for Summary Judgment, pgs. 3-4.

<sup>17</sup> See also Plaintiff's Exhibits 5 & 6.

<sup>18</sup> See also Plaintiff's Exhibits 5 & 6.

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easements of record.”<sup>19</sup> Therefore, when Parcel No. 4-26 was transferred to Defendant Streibich and his wife, they also had record notice that it was subject to the right-of-way shown and described on PWD T88, and PWD T57.

Therefore, every purchaser or grantee of Parcel No. 4-26, the Brilliants, Weaver, the Battles, and the Streibichs all had record notice that it was subject to the right-of-way shown and described on PWD T57.

**b. Chain of title for Plaintiff Karen Underwood’s Parcel No. 4-27 Estate Tabor & Harmony, Nos. 5 & 6 East End Quarter, St. Thomas, V.I.**

On March 30, 1990, Macdonald Budd, administrator of the Dierssens’ estate, conveyed Parcel No. 4-27 Estate Tabor & Harmony, Nos. 5 & 6 East End Quarter, St. Thomas to Susan Laura Lugo by Administrator’s Deed, subject to the easement and with reference to subdivision plan PWD T57.<sup>20</sup> The administrator’s deed describes Parcel No. 4-27 and the easement that burdened the parcel as follows:

“Grantor, [Dierssens’] does hereby grant and release unto the Grantee [Susan Laura Lugo], her heirs, successors and assigns, forever with warranty covenants, the following described real property:

Parcel No. 4-27 Estate Tabor and Harmony Nos. 5 & 6 East End Quarter, St. Thomas, U.S. Virgin Islands as shown on P.W.D. No. B9-31-T57 dated February 1958[.]

TOGETHER WITH all right, title and interest of Grantor the use of the estate roads and *rights-of-way shown on the aforesaid survey* for access for ingress and egress;” . . . (Emphasis added).<sup>21</sup>

Therefore, when Parcel No. 4-27 was transferred to Lugo, she had record notice that it was subject to the right-of-way as shown and described on PWD T57.

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<sup>19</sup> See generally Plaintiff’s Exhibit 5 (contained in the Battles’ deed to Defendant).

<sup>20</sup> See Plaintiff’s Motion for Summary Judgment, p. 5.

<sup>21</sup> See Plaintiff’s Exhibit 7.

Susan Laura Lugo conveyed Parcel No. 4-27, by quitclaim deed, to herself and George H.T. Dudley on September 16, 1992.<sup>22</sup> The quitclaim deed conveyed Parcel No. 4-27 to Lugo and Dudley, subject to, certain covenants and with reference to subdivision plan Map No. D9-4961-T90 (hereinafter “PWD T90”), dated May 25, 1990.<sup>23</sup> PWD T90 depicts a 20’ wide “easement to public road” that ran through the Defendant’s Parcel No. 4-26, to the Plaintiff’s Parcel No. 4-27.<sup>24</sup> A surveyor’s notation at the top left-hand corner of the 20’ wide easement on PWD T90 refers to PWD T57.<sup>25</sup> Lugo and George H.T. Dudley executed a warranty deed for Parcel No. 4-27 to Plaintiff Karen Renee Underwood on January 23, 1994.<sup>26</sup> The warranty deed conveyed Parcel No. 4-27 to the Plaintiff, her heirs and assigns, in fee simple absolute forever, the real property described as follows:

“Parcel No. 4-27 Estate Tabor and Harmony Nos. 5 and 6 East End Quarter, St. Thomas, U.S. Virgin Islands as shown on P.W.D. No. D9-4961-T90 dated May 25, 1990 . . . TOGETHER with all appurtenances thereunto belonging and all the estate title and rights of the Grantors in and to said premises; SUBJECT, HOWEVER, to the covenants, restrictions and easements of record....”<sup>27</sup>

As such, all the Dierssens’ rights, title, and interest in the easement were transferred to Plaintiff when she acquired the property and Plaintiff had record notice that Parcel Nos. 4-26 and 4-27 were subject to the right-of-way shown and described in PWD T90. In sum, Lugo, Dudley, and Underwood all had record notice of the right-of-way on Parcel No. 4-27.

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<sup>22</sup> See Plaintiff’s Motion for Summary Judgment, p. 5; Plaintiff’s Exhibit 8.

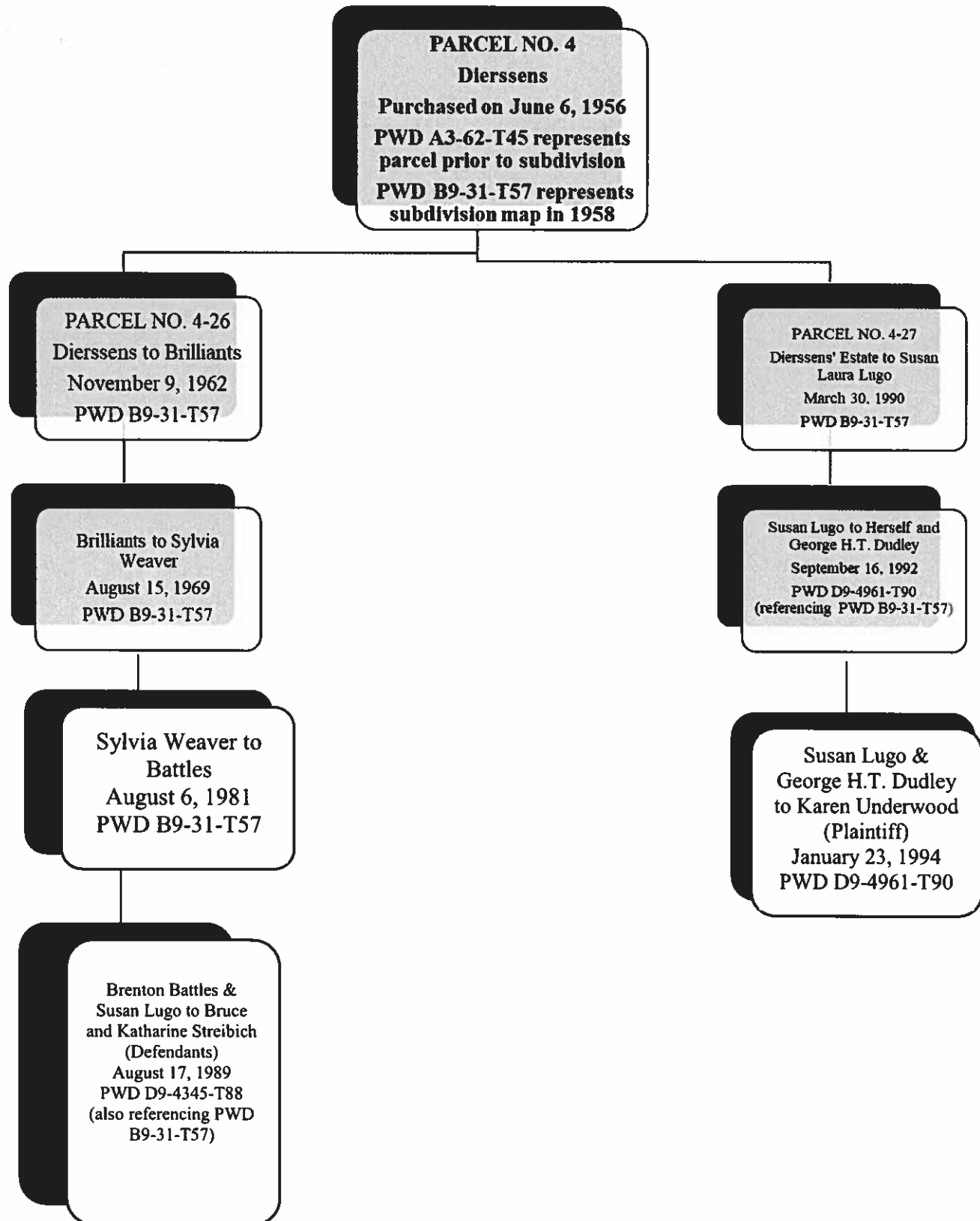
<sup>23</sup> Plaintiff’s Exhibit 8.

<sup>24</sup> See *generally* Plaintiff’s Exhibits 8 & 9.

<sup>25</sup> See Plaintiff’s Exhibit 9 (noting that the easement shown running through the Streibichs’ parcel on PWD T90, and the right-of-way on PWD T57, are one and the same).

<sup>26</sup> See Plaintiff’s Motion for Summary Judgment, pgs. 5-6; Plaintiff’s Exhibits 9 & 10.

<sup>27</sup> Plaintiff’s Exhibit 10.





**c. Claims of Respective Parties**

On June 14, 1995, Plaintiff Karen Underwood filed the instant action against Defendant Bruce Streibich and Katharine Streibich (hereinafter “Defendant”)<sup>28</sup> alleging that the right-of-way in question was created expressly through conveyance in the deeds and was also impliedly created through the subdivision plan that incorporated by reference PWD T57.<sup>29</sup> Plaintiff seeks a judgment declaring her rights to the easement across Parcel Nos. 4-26 and 4-27.<sup>30</sup> On August 18, 1995, the Defendant filed an answer. Defendant, on the other hand, argues that no easement burdens Defendant’s property because the developer’s declaration made no express mention of it nor did the maps convey that the grantor intended to open the right-of-way, thus there was never an express or implied easement.<sup>31</sup> Alternatively, Defendant puts forth that the failure of the Dierssens to construct or maintain the undeveloped right-of-way from 1962 to 1990 constitutes an abandonment.<sup>32</sup> Defendant also claims that due to Plaintiff’s lack of use, Defendant made improvements on the area, created a recreation area for his children, and regularly maintained the area.<sup>33</sup>

Plaintiff then filed a motion for summary judgment against Defendant on March 19, 1996, and motion to deem conceded on April 9, 1996. On April 11, 1996, Defendant filed a motion in opposition to Plaintiff’s motion to deem conceded, a motion in opposition to Plaintiff’s motion for summary judgment, and a cross motion for summary judgment against Plaintiff. Plaintiff filed a reply to Defendant’s opposition to her motion for summary judgment on May 3, 1996, and Defendant filed a response on May 17, 1996.

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<sup>28</sup> Bruce Streibich remains as the sole Defendant.

<sup>29</sup> See Plaintiff’s Motion for Summary Judgment, pgs. 8-10.

<sup>30</sup> See Plaintiff’s Motion for Summary Judgment, pgs. 8-10.

<sup>31</sup> See *generally* Defendant’s Cross Motion for Summary Judgment, p. 2.

<sup>32</sup> See Defendant’s Cross Motion for Summary Judgment, p. 18.

<sup>33</sup> Defendant’s Cross Motion for Summary Judgment, p. 19.

Subsequently, after an extensive period of time had passed and upon Defendant Streibich's motion to conduct a site inspection filed on March 22, 2011, this Court scheduled a site visit on February 4, 2019, and all interested parties, including counsel for Intervening Plaintiffs' Warren and Margaret Stryker, as well as potential Intervening Defendants, were present.<sup>34</sup>

## **II. LEGAL DISCUSSION**

The two issues arising before this court are: (1) whether the Court may deem conceded the Plaintiff's motion for summary judgment; and if not (2) whether the Plaintiff has an express and/or implied easement in the right-of-way and therefore entitled to summary judgment as a matter of law.

### **A. Motion to Deem Conceded the Motion for Summary Judgment**

Local Rule of Civil Procedure 56.1(b) states that "any party adverse to a motion [for summary judgment] may file a response... within twenty (20) days of the filing of the motion."<sup>35</sup> In order to determine when the twenty (20) day time period runs, V.I. R. Civ. P. 6(a)(1) states:

"When the period is stated in days or a longer unit of time: exclude the day of the event that triggers the period, when the period is 15 days or more, count every day including intermediate Saturdays, Sundays, and legal holidays... and include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."<sup>36</sup>

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<sup>34</sup> Intervening Plaintiffs Warren and Margaret Stryker, as the owners of Parcel 4-28, filed their motion to intervene on May 14, 2002. The Court granted their motion on February 7, 2008. Potential Intervening Defendants, Arthur Schmauder, Elizabeth McGuire, and Blue Water Retreat, LLC, owners of Parcel Nos. 4-22B and 4-25, filed their motion to intervene on October 26, 2018, through Maria Tankenson Hodge, Esquire. The issues pertaining to the Intervening Plaintiffs, represented by Michael Fitzsimmons, Esquire, and potential Intervening Defendants were addressed in separate opinions. Also, noting that the site visit was originally scheduled for October 24, 2018, but upon notice of a road closure, the site visit was rescheduled to February 4, 2019. Court record also reflects a site visit was conducted on October 15, 1997.

<sup>35</sup> LRCi 56.1(b). *See also* V.I. R. Civ. P. 6-1(f)(3) (noting that at the time of the filing of the motion for summary judgment in 1996, the Federal Rules of Civil Procedure governed the motion practice in the Virgin Islands made applicable to the Territorial Court through Rule 7.

<sup>36</sup> V.I. R. Civ. P. 6(a)(1)(A)-(C).

Therefore, since Defendant was served with Plaintiff's motion for summary judgment on March 19, 1996, time began to run on March 20, 1996.<sup>37</sup> Twenty (20) days from March 20, 1996, was April 8, 1996. However, V.I. R. Civ. P. 6(d) adds an additional three (3) days after the prescribed time period has expired for service by mail.<sup>38</sup> As such, since service of process was completed by mail, this Court is obligated to give Defendant an additional three (3) days to respond to Plaintiff's motion because the twenty-third day from March 20, 1996, was April 11, 1996. Here, Defendant filed its response to Plaintiff's motion on April 11, 1996, within the prescribed period of time. Therefore, the Court must deny the motion to deem motion for summary judgment conceded.

#### **B. Summary Judgment Standard**

Addressing Plaintiff's motion for summary judgment, V.I. R. Civ. P. 56 requires that summary judgment be granted if there is an absence of a "genuine issue of material fact."<sup>39</sup> Merely alleging a factual dispute between the parties is an insufficient basis for denying a summary judgment motion.<sup>40</sup> Thus, a fact is deemed material if it affects the outcome of a cause of action, and a dispute over a "material fact" is genuine if the evidence is such that a verdict could be returned in favor of the nonmoving party.<sup>41</sup> The proponent of a summary judgment motion, the movant, initially bears the burden and must show that the pleadings, affidavits, depositions, stipulations, answers to interrogatories, and admissions on file demonstrate that there is no genuine dispute of material fact.<sup>42</sup> Once the movant has met its burden, the

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<sup>37</sup> Defendant's Opposition to Plaintiff's Motion to Deem Conceded.

<sup>38</sup> V.I. R. Civ. P. 6(d) (mirroring the exact language of F.R.C.P. 6(d)).

<sup>39</sup> V.I. R. Civ. P. 56(a).

<sup>40</sup> *Hawkins v. Greiner*, 66 V.I. 112 (V.I. Super. Ct. 2017).

<sup>41</sup> *See Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014); *Manbodh*, 47 V.I. at 223-224; *Williams*, 50 V.I. at 194-95; *see also Machado*, 61 V.I. at 391-392.

<sup>42</sup> *See United Corp. v. Hamed*, 64 V.I. 297, 309 (V.I. 2016); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Manbodh v. Hess Oil V.I. Corp. et al.* (In re Manbodh Asbestos Litigation Series), 47 V.I. 215 (V.I. Super. Ct. 2005).

nonmoving party must then put forth specific facts to show that there is a genuine dispute as to a material fact.<sup>43</sup> Thus, once the non-moving party has presented evidence that “amounts to more than a scintilla but less than a preponderance,” the court must deny summary judgment.<sup>44</sup> However, if the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” the court must grant summary judgment.<sup>45</sup>

### **C. Creation of Implied and Express Easements**

#### **i.) Express Easements**

In *Olson v. Mee*, the District Court held that an express easement is derived from the contents of the deed.<sup>46</sup> Thus, where a deed recites that a conveyance “is subject to covenants and restrictions contained in earlier deeds,” it is sufficient to find that an easement is capable of existing.<sup>47</sup>

#### **ii.) Implied Easements**

The Restatement (Third) of Property: Servitudes, section 2.11 states that “the creation of a servitude burden may be implied by the circumstances surrounding the conveyance of another interest in land, and the identity of the beneficiary may be implied by the facts and circumstances of the transaction creating the servitude.”<sup>48</sup> Section 2.14 further addresses that “unless the facts or circumstances indicate a contrary intent, conveyance of a land pursuant to a general plan of development implies the creation of...implied benefits and burdens that are imposed on the

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<sup>43</sup> See *id.*

<sup>44</sup> *Hawkins*, 66 V.I. at 117 (citing *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009). See also *United Corp. v. Tutu Park*, 55 V.I. 702, 707 (V.I. 2011); *Williams v. United Corp.*, 50 V.I. at 195. *Williams v. United Corp.*, 50 V.I. 191, 194-95 (V.I. 2008) (noting that the evidence presented can be direct or circumstantial but showing the mere possibility that something occurred in a particular way is not sufficient); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that if the moving party fails to carry the initial burden of proof, the non-moving party must then present evidence that goes beyond the alleged pleadings that create an issue of material fact on an essential element of that party’s case, and on which that party will bear the burden of proof at trial).

<sup>45</sup> See *Celotex Corp.*, 477 U.S. at 322-23.

<sup>46</sup> *Olson v. Mee*, 8 V.I. 253, 257 (D.V. I. 1971).

<sup>47</sup> *Id.* at 255-58.

<sup>48</sup> RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §2.11 (AM. LAW INST. 2000).

general plan and burden all the land included in the general plan.”<sup>49</sup> This idea was reinforced in *Smith v. Defrietas* where the Third Circuit ruled that “under common law, when a land is conveyed by a description which refers to a plan or map on which an abutting way is shown, an easement... is implied in the conveyance and deemed part of the property to which the grantee is entitled, and neither the grantor nor any person claiming under him may repudiate the easement or deny that it exists.”<sup>50</sup> Further, *McIntosh v. Prince* sets forth that no use may be made of a right-of-way that is different from the one that was established at time of its creation, and *McIntosh* requires the court to look at the intention of the parties connected with the original creation of the easement, as shown by the “circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the way has been used or occupied.”<sup>51</sup>

Moreover, *Brodhurst v. Frazier* further reasoned that a deed that references any drawings or maps by incorporation is sufficient to provide a buyer with notice that the plot is encumbered with an easement, and accordingly, it is reasonable to infer that the grantor or real estate developer believed that recording the drawing that depicts the easement complies with the public record requirement.<sup>52</sup>

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<sup>49</sup> RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §2.14 (AM. LAW INST. 2000).

<sup>50</sup> *Smith v. Defrietas*, 329 F.2d 629, 633 (3d Cir. 1964) (additionally stating that even if the right-of-way is unregistered, it may not be removed by the later owners of the servient estate). *See also Olson*, 8 V.I. at 257 (adding that “it is a well-accepted rule of equity that where property is sold with reference to a plot or map, an easement is implied in the existing or proposed roadways described therein”).

<sup>51</sup> *McIntosh v. Prince*, 9 V. I. 3, 10-11 (Mun. Ct. 1971).

<sup>52</sup> *Brodhurst v. Frazier*, 57 V.I. 365, 383-86 (V.I. 2012) (explaining that conspicuous markings and descriptions on a map or drawing incorporated by reference to a deed provided at least actual notice of an easement or other encumbrance).

**D. Abandonment of Easements**

The Restatement (Third) of Property: Servitudes, section 7.4 states “that abandonment is when the beneficiary relinquishes the rights created by a servitude.”<sup>53</sup> *Defrietas* also stands for the prevailing rule that an express or implied easement cannot be lost by mere non-use, thus in order to establish abandonment of such right, the onus rests on the defendant to show both an intent to abandon as well as some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement.<sup>54</sup> Likewise in *Malloy v. Reyes*, the Virgin Islands Supreme Court ruled that abandoning an easement requires the evidence presented before the court to show that both non-use and a showing that “[the party] has taken an affirmative step demonstrating a clear intention never to make use of it again.”<sup>55</sup> *Malloy* also holds that allowing the extinguishment of the right to an easement through simple neglect makes little sense given that no other property interest can be lost in this way.<sup>56</sup>

**E. Analysis of Parties’ Arguments**

In support of the motion for summary judgment, Plaintiff relied on *McIntosh* to argue that an easement by implication is created when a plot of a subdivision is conveyed by a deed that refers to a map or plan in which a right-of-way is shown. In *McIntosh*, the Plaintiff owned and subdivided Plot 5, of Estate La Grange, St. Croix, V.I. into 12 plots, which were recorded on P.W.D. 2218. Plaintiff then conveyed Plot 5-H to Williams by Deed of Gift. According to the deed, the property was granted “together with all and singular the privileges, hereditaments, improvements and appurtenances thereunto belonging or in any wise appertaining.” Prior to

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<sup>53</sup> RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.4 (AM. LAW INST. 2000). *See also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.4 cmt B (AM. LAW INST. 2000) (stating also that abandonment is where a servitude has terminated because all beneficiaries have relinquished their rights to use an easement or relinquish their rights to enforce it).

<sup>54</sup> *Defrietas*, 329 F.2d at 634 (noting similarly that judgment was affirmed against the appellants who utilized similar premises as defendant in this matter).

<sup>55</sup> *Malloy v. Reyes*, 61 V. I. 163,178 (V.I. 2014).

<sup>56</sup> *Id.*

making the first conveyance of Plot 5-H to Williams, the plaintiff constructed a fence across the western boundary of the plot which blocked access to the right-of-way that was shown and described on P.W.D. 2218. The Court determined that the factual circumstances surrounding this matter gave rise to an implicit agreement between the plaintiff/grantor and Williams/grantee, to maintain the fence between Williams' property and the proposed right-of-way. McIntosh and Williams also agreed that McIntosh would continue to pasture his goats on the land compromising the right-of-way on the other side of the fence and adjacent to Plot 5-H. Williams subsequently granted Plot 5-H to the defendant by warranty deed. The provisions of that deed were the same as those found in the deed from the plaintiff to Williams. The northern front of Plot 5-H abutted a public road, while the southern and eastern boundaries of the parcel were fixed by an adjacent tract of land and another parcel. The defendant's Plot 5-H abutted the right-of-way on the western side of Plot 5-H. Like Williams, the defendant could not access the right-of-way and the western boundary of defendant's parcel. Since the right-of-way was delineated on the map of the defendant's parcel, the defendant tore down the fence believing that he had an easement by implication to use the right-of-way. The plaintiff argued that although the right-of-way was delineated on the map, and the defendant's parcel abutted the right-of-way, the plaintiff never intended to give owners of Plot 5-H access to the right-of-way. The issue thus presented was whether the defendant had an easement by implication to use the right-of-way when the plaintiff or grantor never intended to open it.

Ordinarily, an easement by implication is created in favor of a grantee whenever property is sold and conveyed with reference to a plot or map on which streets or alleys are shown. However, when an unopened right-of-way is neither necessary nor beneficial for the enjoyment of the dominant tenement, an implied easement should not be presumed if contrary to the

grantor's intent, particularly where it would operate as an onerous servitude upon the land of the grantor. After weighing the grantor's intent against the competing interest of the defendant's easement by implication, the Court reasoned that the plaintiff/grantor never intended to create an easement over the right-of-way abutting Plot 5-H, and held that:

"No use may be made of a right-of-way, different from that established at the time of its creation, which burdens the servient estate to a greater extent than was contemplated at the time of the grant."<sup>57</sup>

In the instant matter, the Plaintiff argues that since there are no facts which demonstrate that the Dierssens did not intend to create an implied easement over the Defendant's Parcel No. 4-26, and the maps and warranty deeds in the chain of title clearly and explicitly refer to the right-of-way, the Plaintiff has an easement by implication over the Defendant's parcel. The warranty deed conveying Parcel No. 4-27 to the Plaintiff described the parcel as follows:

"Parcel No. 4-27 Estate Tabor and Harmony Nos. 5 and 6 East End Quarter, St. Thomas, U.S. Virgin Islands as shown on P.W.D. No. D9-4961-T90 dated May 25, 1990 . . . TOGETHER with all appurtenances thereunto belonging and all the estate title and rights of the Grantors in and to said premises; SUBJECT, HOWEVER, to the covenants, restrictions and easements of record. . . ."<sup>58</sup>

While Parcel No. 4-27 was conveyed to the Plaintiff's grantors as shown on P.W.D. No. B9-31-T57,<sup>59</sup> Parcel No. 4-27 was conveyed to Plaintiff as shown on P.W. D. Map No. D9-4961-T90. Depicted on P.W.D. D9-4961-T90<sup>60</sup> was a 20' wide "easement to the public road" which runs through Plaintiff's parcel and through Defendant's Parcel No. 4-26. Therefore, Plaintiff argues that the grantors created an implied easement in the right-of-way over the Defendant's parcel as shown on Map No. D9-4961-T90 and Map No. B9-31-T57.

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<sup>57</sup> *McIntosh*, 9 V.I. at 4.

<sup>58</sup> Plaintiff's Exhibit 10.

<sup>59</sup> See Plaintiff's Chain of Title Parcel above.

<sup>60</sup> See Plaintiff's Exhibit 9.



In opposition, Defendant also relied on *McIntosh*, but for the premise that since the Dierssens did not intend to open the right-of-way over Defendant's and Plaintiff's parcels, that Plaintiff does not have an implied easement in the right-of-way. In support of this premise, Defendant argues that when the Dierssens subdivided Parcel No. 4, it was for them to construct "access roads" to subdivided parcels to ensure that the parcels would not become landlocked.<sup>61</sup> Defendant contends that the Dierssens constructed one of these "access roads" in approximately the same place as the right-of-way as shown in Map No. D9-4345-T88.<sup>62</sup> Furthermore, Defendant contends that when the Dierssens constructed the "access road," title to it remained in the Dierssens' name and was not conveyed to the purchasers of those parcels crossed by the "access road." In the inverse, Defendant argued that the Dierssens intended for title to any parcel upon which the "access road" was not created, to be conveyed to the owner of that parcel in fee simple absolute terms. Defendant further contends that the Dierssens stopped construction of the "access road" at the northwest corner of Defendant's parcel where it abuts Parcel 4-25. Therefore, the Defendant argues that since the "access road" was not constructed over his property, he owns, in fee simple absolute terms, that portion of his parcel delineated as being subject to the right-of-way on Map No. D9-4345-T88. Map No. D9-4345-T88 describes Defendant's Parcel No. 4-26 and is incorporated in the Defendant's warranty deed. In sum, the Defendant is arguing that the Dierssens did not create access to his parcel in the area where the right-of-way is shown crossing his parcel. Defendant's contentions are incorrect.

Defendant also maintains that from 1962 to 1990, the Dierssens failed to construct access to the right-of-way over the Defendant's parcel. That, too, is proven incorrect by the Defendant's own admission. Access over Defendant's parcel exists because Defendant conceded that "[i]t

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<sup>61</sup> See Defendant's Opposition to Plaintiff's Motion for Summary Judgment, at 6.

<sup>62</sup> Plaintiff's Exhibit 6 (Plaintiff's Exhibit 6 is also referred to in Defendant's warranty deed that describes Defendant's Parcel No. 4-26 and shows the right-of-way running through it to Plaintiff's parcel).

appears that at some undetermined time, but during the early 1960's at the latest, some unknown person may have cleared a path over Defendant's property. If that was done, we have no evidence of who did it, when it was done, or why it was done."<sup>63</sup> Obviously, access to the right-of-way was constructed over Defendant's property between 1962 and 1990, because Defendant and his wife purchased their property on August 17, 1989. Further, it is reasonable to assume that at the very least the "cleared path" that Defendant speaks of was a dirt path. Notably, Defendant concedes that his own "Exhibits L and Q reference a dirt road."<sup>64</sup> Exhibit L is a copy of the Map No. D9-4345-T88, which is referenced in Defendant's warranty deed and describes Parcel No. 4-26. Both exhibits depict a 20' wide easement to Parcel Nos. 4-27 and 4-28 and also refer to PWD T57. In light of Defendant's admission that a path was cleared over Parcel No. 4-26 when they purchased it, and the fact that a dirt road is reflected in the warranty deed, his supporting affidavits of Violet Schmauder and Verna Ruan are inconsequential and inconsistent with the Defendant's very own affidavit.

Ms. Schmauder, then-owner of Parcel No. 4-22B, and Verna Ruan, then-owner of Parcel 4-25, both made statements asserting that the road does not extend across the Defendant's Parcel No. 4-26.<sup>65</sup> The affiants also stated that they have never known vehicles to be able to travel over Parcel No. 4-26. While the affiants may have never known a road to pass over Defendants' parcel, Defendant has. Furthermore, while affiants have never known vehicles to be able to travel over Parcel No. 4-26, Defendant's own affidavit states:

10. That with one exception, I have never known vehicles to travel or to be able to travel through the recreation area.

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<sup>63</sup> Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, at 19.

<sup>64</sup> Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, at 19.

<sup>65</sup> Exhibits I and J. *See also* Exhibit A, Adjudication in the Matter of the Estate of Verna Ruan attached to Affidavit (of Elizabeth McGuire) in Support of Motion to Intervene.

11. That the one exception referred to above was when, for a period of a few days, we moved our swing set, tether ball post, and golf driving platform, as an accommodation to the plaintiff, so that plaintiff could haul away cut bush that had been piled adjacent to Parcel 4-26, in the vicinity of the recreation area. Following the bush removal, we replaced the swing set and tether ball post.

The totality of the circumstances revealed to the Court by Defendant's own admissions are: (1) that a path existed over Defendant's parcel before they purchased it; (2) that it is possible for vehicles to traverse this path; and (3) that Defendant had set up a recreation area for his children on the path. The court in *Smith v. Defreitas* held that:

“[U]nder the common law when land is conveyed by a description which refers to a plan or map on which an abutting way is shown, an easement therein is implied in the conveyance and deemed a part of the property to which the grantee is entitled, and neither the grantor nor any person claiming under him may repudiate the easement or deny that it exists, *if it is capable of existing.*”

Defendant's admissions prove that the easement is capable of existing and that it does exist over the Defendant's Parcel No. 4-26. Therefore, the path exists. Whether Defendant has used it as a recreation area for his children; or has plans for the expansion of his home in the area is irrelevant. The path does not belong exclusively to the Defendant. The Dierssens intended for the path, as it is above the properties, to be used as the logical, most feasible access to all parcels: 4-22A, 4-26, 4-27, and 4-28.

Nonetheless, Defendant contends that his theory of the Dierssens intent not to create an “access road” or right-of-way through his parcel is supported by the fact that the right-of-way does not appear in the metes and bounds description of the Defendant's parcel, or those parcels traversed by the “access road.” He contends that the exclusion of a metes and bounds description of the right-of-way in the respective warranty deeds of Parcel No. 4-22A and Defendant's Parcel No. 4-26, indicates the Dierssens' intent to extinguish the right-of-way. Parcel No. 4-22A's warranty deed refers to Map No. F9-741-T61 for a depiction of that parcel,

and also contains a metes and bounds description of the “Estate Road” or right-of-way burdening it.<sup>66</sup> Although titled an “Estate Road” on P.W.D. F9-741-T61, that road is the same road that appears as a right-of-way on other maps. Therefore, when Parcel No. 4-22A was conveyed to the purchaser, the “Estate Road” or right-of-way, was not, as Defendant suggested, extinguished by the Dierssens creation of the “access road.” If it were, the “estate road” or right-of-way would not, according to Defendant’s theory, appear in the metes and bounds description of Parcel 4-22A’s warranty deed.

Similarly, Defendant argues that the right-of-way depicted crossing Parcel No. 4-26 on Map No. D9-4345-T88, which is the map of Defendant’s parcel, is extinguished because the Dierssens did not intend to extend the “access road” across their property, and that the right-of-way therefore does not appear in the metes and bounds description of the Defendant’s warranty deed. Again, Defendant’s argument is incorrect. Virgin Islands Engineering and Survey No. 1162-3 contains a boundary description of Defendant’s Parcel No. 4-26.<sup>67</sup> The survey includes a metes and bounds description of the right-of-way and refers to Map No. D9-4345-T88.<sup>68</sup> Moreover, Map No. D9-4345-T88 depicts a “dirt road” or right-of-way cutting across Defendant’s parcel through Plaintiff’s Parcel No. 4-27 terminating at Parcel No. 4-28. In sum, Defendant’s metes and bounds theory is contradicted by Defendant’s own evidence and does not show that the Dierssens did not intend to open the right-of-way.

Plaintiff, on the other hand, as well as providing Virgin Islands precedent which shows that Plaintiff has an implied easement over the Defendant’s parcel, submits Virgin Islands law which establishes that Plaintiff also has an express easement across Defendant’s parcel.

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<sup>66</sup> See Defendant’s Opposition to Plaintiff’s Motion for Summary Judgment and Cross Motion for Summary Judgment, Exhibit E.

<sup>67</sup> See Exhibit M.

<sup>68</sup> See Exhibit M.

In further support of the motion for summary judgment, Plaintiff cites *Olson v. Mee* for the premise that she has an express easement arising from a description of the right-of-way in her warranty deed. *Olson* also provides further support for the premise that an implied easement exists across Defendant's parcel by holding that: "it is a well- accepted rule of equity that where property is sold with reference to a plot or map, an easement is implied in the existing or proposed roadways described therein."<sup>69</sup> The grantor in *Olson* subdivided several plots of land and filed a subdivision plan with the Planning Board as required by V.I. Code, Ann. tit. 29, §275. The subdivision plan was titled Public Works Drawing No. 1766, and several roadways appeared in it. Similarly, the Dierssens, in the matter *sub judice*, subdivided Parcel No. 4 and filed a subdivision plan with the Planning Director for approval of the subdivision plan pursuant to V.I. Code Ann. tit 29, §275. The February 1958 subdivision plan is titled B9-31-T57, and the right-of-way at the center of this dispute is clearly depicted upon it.

The defendant in *Olson*, purchased one of the plots from the grantor subject to certain covenants and restrictions in the grantor's deed. One of the covenants in the deed between the grantor and the defendant read that "[a]ll owners of plots in this subdivision shall have a perpetual easement over and upon all roadways as constructed, located or relocated by the Grantors."<sup>70</sup> In this case, Defendant purchased Parcel No. 4-26 from the grantor subject to a perpetual easement that was passed down to Defendant through the chain of title. Both the first warranty deed made by the Dierssens conveying Parcel No. 4-26 to the Brilliants, and the Brilliants' subsequent conveyance of that parcel to Sylvia B. Weaver, contained covenants that granted perpetual easements to the purchaser or grantee of Parcel No. 4-26. Specifically, the

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<sup>69</sup> *Id.* at 257.

<sup>70</sup> *Id.* at 256.

November 9, 1962, warranty deed from the Dierssens to the Brilliants contained the following covenant:

“TOGETHER with all the appurtenances and all the estate, title, rights and interests of the parties of the first part, [Dierssens’] their heirs and assigns, in and to said premises, including a perpetual easement to the parties of the second part, their heirs and assigns, to run with the land over all roads in Parcel No. 4 which are now in existence or shall hereafter be constructed for ingress and egress from the Public Road or otherwise, and subject to the following restrictions.”<sup>71</sup>

The August 15, 1969 warranty deed from the Brilliants to Weaver conveying Parcel No. 4-26 contained a similar provision that read in pertinent part:

“TOGETHER with a perpetual easement to the party of the second part, her heirs and assigns, to run with the land over all roads in Parcel No. 4 which are now in existence or shall hereafter be constructed for ingress to and egress from the Public Road or otherwise.”<sup>72</sup>

Thus, Defendant’s warranty deed conveyed Parcel No. 4-26 subject to the easement in the grantors’ warranty deeds above.<sup>73</sup>

Furthermore, in *Olson*, each of the plaintiffs’ deeds were similar to the defendants in that the deeds were conveyed to the plaintiffs by the grantor with reference to a subdivision plan and were subject to the same covenant. In comparison to the case at bar, Plaintiff and Defendant’s warranty deeds are similar because both were conveyed to them by the Dierssens with reference to subdivision plan B9-31-T57, and both warranty deeds gave the Plaintiff and Defendant record notice that the easement burdened each of their parcels. Defendant’s Map No. D9-4345-T88 and the Plaintiff’s Map No. D9-4961-T90, refer the reader to the Dierssens’ original Map No. B9-31-T57 depicting the right-of-way.

Returning to the facts in *Olson*, the defendant’s construction of his home substantially encroached upon the road leading to the plaintiffs’ homes. The Court determined that the

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<sup>71</sup> See Plaintiff’s Exhibit 1.

<sup>72</sup> Plaintiff’s Exhibit 3.

<sup>73</sup> See Defendant’s Chain of Title for Parcel No. 4-26.

plaintiffs had an easement arising from two (2) sources: (1.) the plaintiffs had an express easement derived from the deed, and (2.) an equitable easement by implication resulting from the description of the road in Public Works Drawing No. 1766. The *Olson* Court held that although “[n]o Virgin Islands statute governs the effect of providing roadways in a subdivision plan, it is a well-accepted rule of equity that where property is sold with reference to a plot or map, an easement is implied in the existing or proposed roadways described therein. Likewise, since Underwood and Striebich’s maps and warranty deeds described the right-of-way, Underwood and Stryker (Parcel No. 4-28) have an express easement as well as an implied easement over Defendant’s parcel.

Even in light of the unambiguous, obvious evidence presented in the chain of title and his own warranty deed, Defendant argues that his warranty deed to Parcel No. 4-26 does not expressly state that the parcel is subject to any right-of-way. Again, the map referred to in Defendant’s warranty deed for Parcel 4-26 is P.W.D. D9-4345-T88. Defendant’s warranty deed describes Parcel 4-26 as follows:

“Parcel No. 4-26 Estate Tabor and Harmony Nos. 5 and 6 East End Quarter, St. Thomas, U.S. Virgin Islands as shown on P.W.D. No. D9-4345-T88 dated May 28, 1987.

...

**SUBJECT, HOWEVER, to Virgin Islands zoning regulations and to covenants, restrictions and easements of record.”<sup>74</sup>**

A 20’ wide dirt road running across Parcel 4-26 to Parcels 4-27 and 4-28 is depicted in Map No. D9-4345-T88.<sup>75</sup> Moreover, Map No. D9-4345-T88 shows that there is a “20’ wide easement from Defendant’s parcel to Plaintiff’s Parcel No. 4-27,” and the “dirt roads within this easement.”<sup>76</sup> As set forth above in Defendant’s warranty deed, Parcel No. 4-26 was conveyed to

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<sup>74</sup> Plaintiff’s Exhibit 5.

<sup>75</sup> See Plaintiff’s Exhibit 6.

<sup>76</sup> *Id.*

Defendant subject to easements of record. In addition, there is also a notation at the top left-hand corner of the easement in Map No. D9-4345-T88 that cross references the reader to Map No. B9-31-T57. Therefore, when Defendant's Parcel No. 4-26 was conveyed to Defendant and his wife, they had record notice that it was burdened by an easement as described in their warranty deed and shown in Map Nos. D9-4345-T88 and B9-31-T57.<sup>77</sup> Therefore, based on all evidence contained in the record, this Court concludes that Plaintiff has both an express and implied easement over Defendant's parcel, and that Defendant has been put on record notice of the location and existence of the easement over his parcel.

Nevertheless, in an effort to further analyze Defendant's position, the Court will address Defendant's other arguments. He contends the use of "road" "right-of-way" and "easement" represents an inaccurate usage of terms.<sup>78</sup> This Court is unable to determine the relevance of Defendant's contention. The allegation of Plaintiff interchanging the terms "road," "right-of-way," and "easement" and Defendant's suggestion that estate roads shown in PWD F9-741-T61 and PWD C9-47-T62 "do not appear in the chain of title with Plaintiff's or Defendant's parcels" is without merit and patently ignores the express inclusion of clauses regarding conveyance, easement, and right-of-way contained in Defendant's and Plaintiff's respective deeds for Parcels No. 4-26 and No. 4-27.<sup>79</sup>

Second, Defendant argues that the original grantors, the Dierssens, deviated from the development plan when they created Parcels No. 4-22A and No. 4-22B, the drawings of which

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<sup>77</sup> See generally Defendant's Exhibit M.

<sup>78</sup> See Defendant's Cross Motion for Summary Judgment, p. 4.

<sup>79</sup> *Olson v. Mee*, 8 V.I. 253, 257 (1971) (reiterating that an express easement is derived from the restrictions, conveyances, and grants contained in the deed) (noting the similarities between the instant case and *Olson*: Olson received a deed with essentially similar terms as plaintiffs, the plats of land which were co-owned by the same grantor); see also Defendant's Cross Motion for Summary Judgment, pgs. 4-6 (noting that PWD F9-741-T61 and PWD C9-47-T62 offer nothing to the issues between Parcels No. 4-26 and No. 4-27); see also Defendant's Exhibits D, E, & F.



were not incorporated into any deeds.<sup>80</sup> Plaintiff offered evidence of maps and drawings PWD F9-741-T61 and PWD C9-47-T62 to illustrate the alleged deviation; however, to the Court this line of argument amounts to mere speculation. Nothing in the record indicates that the Dierssens' intent was to deviate from the original subdivision plan and Defendant's conclusion is inadequately supported by case law, thus this analysis is lacking because the subdivision of Parcel No. 4-22 is not in question in this current case. Furthermore, this Court notes that the easement runs right through Parcel No. 4-22 which is more than twice the size of Parcels No. 4-26, 4-27, and 4-28, individually, however, none of the evidence offered purports to show a dispute between Parcel No. 4-22 and Plaintiff's parcel. With a thorough review of the record, this Court finds no evidence of the Dierssens' alleged modification of the subdivision plan.

Third, Defendant argues that the Dierssens' deed to Defendant defines a road and concludes that the undeveloped right-of-way has neither been developed into a road nor reserved for construction of a road "for at least twenty-six years."<sup>81</sup> It is unclear where or how Defendant discovered or deduced this definition from the deed provisions or any other evidence in the record. Thus, this contention also fails.

Then, Defendant asserts that an express easement was not created because the deed does not expressly declare a right-of-way for "vehicular access" across Defendant's parcel nor does the deed expressly state that Defendant's parcel is subject to any right-of-way depicted in PWD T57.<sup>82</sup> Additionally, Defendant argues that *Olson's* holding that: "all owners of plots in [subdivision plan] shall have perpetual easement over and upon all roadways as constructed, located, relocated by Grantors" is solely applicable to constructed roadways.<sup>83</sup> This Court refuses

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<sup>80</sup> Defendant's Cross Motion for Summary Judgment, pgs. 4-6; *see* Defendant's Exhibits D, E, & F.

<sup>81</sup> *See* Defendant's Cross Motion for Summary Judgment, p. 8.

<sup>82</sup> *See* Defendant's Cross Motion for Summary Judgment, pgs. 9-10.

<sup>83</sup> *See Olson*, 8 V.I. at 256; Defendant's Cross Motion for Summary Judgment, p. 10.

to accept Defendant's viewpoint that *Olson* is so narrowly construed to cover only constructed roadways. Such a distinction in treating undeveloped and developed rights-of-way differently has never been explicitly established in any precedent that this court is required to follow. Instead this Court concludes that there was an express easement contained in the language of Defendant's and Plaintiff's deeds with respect to the right-of-way abutting the respective parcels. The deeds reference language such as "subject however to the... easements...right-of-way...set forth in the deed... and to rights-of-way shown in Drawing No. B9-31-T57," "...all subsequent purchasers of Parcel No. 4 shall maintain the road upon which their property abuts in Parcel No. 4," "... subject however to the... easements on record."<sup>84</sup> The inclusion of these provisions in Defendant's and Plaintiff's deeds satisfy the creation of an express easement and the incorporation by reference of PWD T57 in these deeds also puts Defendant on notice that the Dierssens intended to create a right-of-way in the disputed area.<sup>85</sup>

Thereafter, Defendant proffered that an implied easement is evidenced by the intention of the parties at the time of conveyance, and the Dierssens never intended to create a right-of-way over Parcels No. 4-26 and 4-27.<sup>86</sup> Defendant contends that Plaintiff inaccurately states *McIntosh v. Prince*'s ruling that "whenever a conveyance refers to a plan or map on which a road or abutting way is shown, then an easement exists and is deemed part of the property to which the grantee is entitled."<sup>87</sup> Defendant specifically enumerated five points that allegedly establish that the Dierssens never intended to create an easement in the undeveloped right-of-way: 1.) the

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<sup>84</sup> See generally Plaintiff's Exhibits 1, 4, & 5; see also Defendant's Exhibits H, M, N, O & P (highlighting that Exhibits M and P reference PWD T88 and T90 respectively, and both drawings also reference measurements of the right-of-way depicted in PWD T57).

<sup>85</sup> See generally *Brodhurst v. Frazier*, 57 V.I. 365, 385-86 (V.I. 2012) (ruling that it is reasonable to infer that recording drawings that depict an easement complies with the public record requirement and the drawings may be incorporated by reference to subsequent deeds to put a buyer on at least inquiry notice).

<sup>86</sup> See generally Defendant's Cross Motion for Summary Judgment, pgs. 10-14.

<sup>87</sup> See *McIntosh v. Prince*, 9 V.I. 3, 7-8 (Mun. Ct. 1971); see also Defendant's Cross Motion for Summary Judgment, p. 10.

Dierssens demonstrated that they knew how to create an easement as they explicitly did so in Parcels No. 4-22A and No. 4-22B, 2.) the Dierssens never created a right-of-way for vehicular access, 3.) the Dierssens never created the right-of-way depicted in PWD T57 because it would devalue Parcels No. 4-26 and 4-27 4.) the absence of the disputed right-of-way in the deeds of Parcels No. 4-22A and 4-22B highlights that the Dierssens never intended to create an easement across Parcel 4-26, and 5.) the creation of the developed lower estate road serves the same purpose as the disputed right-of-way.<sup>88</sup> With respect to the second and fourth points, the Court has addressed these claims above.<sup>89</sup> Regarding the first and third points, the cases and restatements that Defendant relies on in discussing its claims fail to adequately support its position.<sup>90</sup> Notably, also, Defendant's interpretation or understanding of *McIntosh* is incomplete, thus rendering its approach incorrect. While the *McIntosh* court discussed that there was no right-of-way for Defendant despite the original grantor subdividing the parcel and the deed referencing a drawing showing a right-of-way, it ultimately concluded that use of the right-of-way different from what was originally established by the grantor, through unilateral action by a subsequent grantee, will be considered a trespass with liability for damages.<sup>91</sup> *McIntosh* requires that the answer to whether an implied easement was created is decided by looking at the grantor's intent at the time of the conveyance, and in light of the circumstances.<sup>92</sup> Lastly, the fifth point will be addressed more fully below under Site Visit.<sup>93</sup>

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<sup>88</sup> Defendant's Cross Motion for Summary Judgment, pgs. 13-14.

<sup>89</sup> See *supra* fn. 64, 67, Mem. Op. pgs.18-19.

<sup>90</sup> See generally Defendant's Cross Motion for Summary Judgment, p. 12 (finding that Defendant largely relied on an incorrect interpretation of *McIntosh* and RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.2 & 2.13 (AM. LAW INST. 2000).

<sup>91</sup> See *id.* at 7-11.

<sup>92</sup> *Id.* at 9-10.

<sup>93</sup> *McIntosh*, 9 V.I. at 7 (recognizing that the court is only inclined to focus on issues relevant to resolving the real issue.) The lower estate road is not the issue.

Accordingly, this Court has demonstrated that the Dierssens' intent to create a right-of-way is evidenced by the incorporation of PWD T57 in essentially all the relevant deeds in Plaintiff's and Defendant's chain of title, and absence of any evidence indicating the effect of the easement on the value of the properties or the purported knowledge of the Dierssens' intent with respect to any other parcels, this Court, holds that Defendant incorrectly applied *McIntosh* to the instant case.

Afterwards, Defendant proposed arguments for creation of an easement subject to estoppel, necessity, and prescription and concluded that an easement could not have been created under these theories.<sup>94</sup> This Court will not address these arguments as Plaintiff did not assert claims under these theories in her motion.

Then, Defendant proposed arguments that neither Defendant's nor Plaintiff's deed contained the necessary easement language.<sup>95</sup> Defendant provides little to no applicable case law to support his contention regarding the Dierssens' intent against conveying an easement. Moreover, this Court has established above that the express language in the deeds, coupled with the implied easement created by the subdivision plan which incorporated and referenced PWD T57 in subsequent deeds, and sufficient demonstration of the Dierssens' intent to create a right-of-way as depicted by PWD T57, renders Defendant's arguments futile.<sup>96</sup> Consequently, this Court disagrees with Defendant on this claim.

Finally, Defendant offered that even if an easement was created in 1962, it has been terminated by abandonment because the subsequent development of the lower road access rendered it obsolete.<sup>97</sup> Defendant also alleges that according to *Defreitas*, the Dierssens' failure

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<sup>94</sup> See Defendant's Cross Motion for Summary Judgment, pgs. 14-15.

<sup>95</sup> See Defendant's Cross Motion for Summary Judgment, pgs. 3-5, 15-18.

<sup>96</sup> See *supra* fns. 67, 69, & 70.

<sup>97</sup> See Defendant's Cross Motion for Summary Judgment, p. 18.

to act on developing the right-of-way coupled with Defendant's action of clearing the overgrown bush, leveling the area, and creating a recreational area for his children demonstrates a lack of Plaintiff's intent to retain an interest in the easement.<sup>98</sup>

This Court does not agree with Defendant's arguments regarding abandonment. First, this Court finds that the evidence and affidavits offered by Defendant to illustrate Plaintiff's abandonment fail to show any legally recognized act of abandonment.<sup>99</sup> Secondly, Defendant has only demonstrated non-use as a showing of abandonment, which is insufficient under Virgin Islands common law as articulated in *Malloy v. Reyes*.<sup>100</sup> Lastly, the creation of another access road does not automatically render a long-standing easement obsolete. Here, Defendant continues to attribute the prior owners' or grantors' inaction, lack of activity, and failure to "either construct a road or provide any other indication of a continuing interest in the undeveloped right-of-way from 1962 until 1990" as evidence of an abandonment.<sup>101</sup> This Court cannot rely on Defendant's contention absent any clear evidence that demonstrates that either the Dierssens or other prior owners intended to abandon the easement. Rather, what is more important to this Court is that the instant cause of action, brought in 1995, actually serves to affirm that Plaintiff undertook an overt act to signal her intent to retain rights to the easement. Seeing as this suit only commenced in 1995, about a year after Underwood acquired Parcel No. 4-27, in 1994, the Court cannot draw any logical inference of Plaintiff's abandonment. Thus,

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<sup>98</sup> See Defendant's Cross Motion for Summary Judgment, pgs. 19-20. *But see Smith v. Defreitas*, 329 F.2d 629, 634 (3d Cir. 1964) (highlighting that the 3<sup>rd</sup> Circuit also held that the prevailing rule for abandonment of an easement created expressly, impliedly, or by necessity "is not lost by mere nonuse," instead it is necessary to show both an "intention to abandon and some overt act" to show that owner disclaims any interest in the easement).

<sup>99</sup> See Defendant's Exhibit K (noting that Defendant inadvertently demonstrated elements that go against the nonuse requirement, as Defendant described at least one occasion of use by Plaintiff).

<sup>100</sup> See *Malloy v. Reyes*, 61 V.I. 163, 178 (V.I. 2014) (deciding that the "soundest rule for the Virgin Islands is that both nonuse and an affirmative intent to abandon constitutes a showing of abandonment").

<sup>101</sup> See Defendant's Cross Motion for Summary Judgment, p.18.

absent any other showing that Plaintiff intended to extinguish her rights to the easement,

Defendant's reasoning remains unsupported by case law.

### **III. SITE VISIT**

Moreover, following the site visit, the Court makes the following additional findings. At the site, Plaintiff's contentions remained the same. However, Defendant pointed out that the right-of-way depicted supposed to veer further to the right than where the map depicts and cuts through Parcel No. 4-22A. However, this Court fails to see the validity of this argument because it was observed at the site visit that the intended direction of the right-of-way that Defendant proposes is on a steeper surface compared to the flat surface where the right-of-way was actually situated and designed to exist. Additionally, Streibich acknowledged that he also purchased Parcel No. 4-22A after the present suit commenced, thus signaling to the Court that the same issues surrounding the contested right-of-way could potentially arise between the same parties, which leads this Court to the next and final issue. That is, as the fifth point Defendant contends: use of the lower estate private road.

Defendant proposed that Plaintiff and Intervenor could, in the alternative, create a driveway or road that extends from the lower private road through Parcels No. 4-27 and No. 4-28. Defendant also proffered an engineer's drawing showing the feasibility of a road drawn through both parcels with a minimum of two switchbacks. In contrast, Intervenor's proffered drawings depict four switchbacks. Upon inspection during the site visit, this Court finds that this option, on its face, presents a cost-prohibitive, cumbersome, time-consuming option and may run the risk of violating the Virgin Islands road grading restrictions because the land upon which Parcel Nos. 4-27 and 4-28 are situated is significantly steep, encumbered with boulders and rocks, and any road construction from the lower road could potentially diminish the value, size,

and use of those properties, particularly where a flat right-of-way already exists and is more readily accessible. Further, at the northern edge of Parcel No. 4-28 is a turn-around and a house adjacent to it.

Contrary to Defendant's assertions, the private road does not provide a means of convenient access to Plaintiff's or Intervenor's properties. Therefore, the right-of-way depicted in PWD T57 actually holds out to be the most feasible and reasonable access for Plaintiff to get to her property and this Court rejects that the alternative of using the lower private road is a sufficient showing of the abandonment of the contested right-of-way.<sup>102</sup>

#### **IV. CONCLUSION**

Ultimately, this Court finds that Defendant's assessments and contentions are clearly against the weight of the evidence on record and established legal precedent. Defendant relies on baldly asserted claims that remain unsupported by the evidence, and where Defendant does rely on case law, common law, or the Restatements, it is largely based on misstated and inaccurate representations and conclusions of law.

Absent any evidence to the contrary, this Court holds that there is no genuine dispute of material fact, and as such Defendant has failed to demonstrate any evidence supporting a finding of summary judgment in his favor. Therefore, on the question of whether an easement was created, this Court holds that: 1.) an express easement was created through the relevant conveyance language contained in the parties' deeds, 2.) an implied easement was also created by the subdivision plan and incorporated into the deeds, by reference to PWD T57, 3.) the inclusion of PWD T57 (that depicts the contested right-of-way in the subsequent deeds) provides notice to Defendant of the right-of-way abutting the parties' properties, and 4.) the evidence does not support a finding of Plaintiff's abandonment of the easement.

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<sup>102</sup> See Defendant's Exhibit C.


Since there exists no genuine issue of material fact disclosing that the Dierssens did not intend to create a right-of-way over Defendant's Parcel No. 4-26, and the Plaintiff has set forth Virgin Islands case law which establishes that an implied and express easement exists in the right-of-way over the Defendant's parcel, the Plaintiff is entitled to summary judgment in her favor as a matter of law.

An Order consistent with this Memorandum Opinion shall follow.

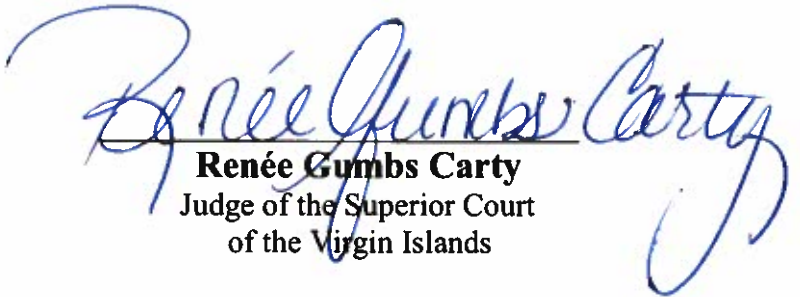
Dated: February 22 2019

ATTEST:  
Estrella H. George  
Clerk of the Court

By:

  
Donna D. Donovan  
Court Clerk Supervisor

2/25/2019

  
**Renée Gumbs Carty**  
Judge of the Superior Court  
of the Virgin Islands



**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN**

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| KAREN R. UNDERWOOD,         | ) |                                |
|                             | ) |                                |
| Plaintiff,                  | ) | CASE NO. ST-95-CV-459          |
| v.                          | ) |                                |
|                             | ) |                                |
| BRUCE W. STREIBICH,         | ) | ACTION FOR DECLARATORY RELIEF, |
|                             | ) | PRELIMINARY AND PERMANENT      |
| Defendant.                  | ) | INJUNCTIVE RELIEF, AND DAMAGES |
| _____                       | ) |                                |
|                             | ) |                                |
| WARREN STRYKER and MARGARET | ) | Cite as 2019 V.I. Super 24P    |
| STRYKER,                    | ) |                                |
|                             | ) |                                |
| Intervening Plaintiffs.     | ) |                                |
| _____                       | ) |                                |

**ORDER**

**THIS MATTER** is before the court on Plaintiff Karen Underwood's motion for summary judgment filed on March 19, 1996. Defendant filed his opposition and cross-motion for summary judgment on April 11, 1996. Plaintiff filed her reply to Defendant's opposition and opposition to Defendant's cross-motion on May 3, 1996. Subsequently, on May 17, 1996, Defendant filed his response to Plaintiff's opposition to its cross-motion for summary judgment.

Plaintiff argued that an easement was expressly and impliedly created by the deeds and the subdivision plan. Accordingly, Plaintiff seeks a declarative judgment to enforce her rights in the easement. However, Defendant countered that no valid easement, whether express or implied, was created. Alternatively, Defendant asserted that even if an easement was created, it has effectively been abandoned by Plaintiff's inaction and rendered obsolete by creation of the lower private road. The court conducted a site visit on February 4, 2019, and took all the memoranda and evidence under advisement. The court being satisfied in its premises, it is hereby

**ORDERED** that Plaintiffs' motion for summary judgment is **GRANTED**; and it is further

**ORDERED** that a copy of this Order shall be directed to Henry C. Smock, Esquire, Bruce W. Streibich, Esquire, and Michael Fitzsimmons, Esquire.

Dated: February 22, 2019

ATTEST:  
Estrella H. George  
Clerk of the Court

By: Denna D. Donovan  
Denna D. Donovan  
Court Clerk Supervisor 2/25/2019

Renée Gumbs Carty  
**Renée Gumbs Carty**  
Judge of the Superior Court  
of the Virgin Islands