

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
JACKSON COUNTY

2014 SEP 24 AM 11:20
CLERK
CLERK

Rebecca Kolar and Clay Kolar,)
 Plaintiffs,)
))
))
vs.)
))
))
Makanda Township Road District,)
and Danny Williams, Highway)
Commissioner of Makanda Township,)
 Defendants.)

13-CH-60

ORDER

Plaintiffs were granted a Preliminary Restraining Order herein and the status quo has been the order since. The Plaintiff's were present at hearing with Mr. Daniel Orloski, their attorney, and the Defendant's were personally present and by their attorney, Gregory Veach. Evidence was presented over two days herein and all exhibits were presented and admitted without objection. The Court took the matter under advisement and received memoranda from counsel.

FACTS: Plaintiffs Clay and Rebecca Kolar made their home in 1993 on a sixty seven acre tract of land that has part of its western boundary within Sheppard Lane in Makanda Township, Illinois, where Defendant Danny Williams is the Township Highway Commissioner and has been since 1986. When he took over the job from Norris Hagler, Sheppard Lane, a basically North/South running gravel road, with its northern genesis at Makanda Road, ran South a mile and a half and dead ended at Union County, and had three homes on it. Seven homes were added since then, with the Kolar's home being built in 1993. The Kolars took this property in fee simple, without recorded rights of way, easements or dedications, or other instruments of record.

However, the road was maintained by the Township during Mr. Hagler's tenure beginning in 1977 and Mr Williams' tenure to present. It is not disputed that maintenance has included the usual periodic road grading, gravel replacement, cutting of brush and small trees along the road edge, along with mowing while bush-hogging, and snow plowing. In 2013 Defendant Williams began large tree removal and clearing on the North end of Sheppard Lane where the road was oil and chip, and spoke with residents individually about his plans, to upgrade the whole road to oil and chip, and to widen and to provide drainage on Sheppard Lane. The Kolars

and Mr. Williams met and discussed Mr. Williams' plans for improvement in the Summer, and Mr. Williams staked out a 20 foot distance from the center of the road, for a proposed 40 foot right of way, 20 feet of oil and chip road bed and 10 feet beyond on either side for shoulder, drainage, etc. This 40 foot width is apparently thought by Williams to comply with statute for width when widening township roads.

The existing road at the Kolar residence ranged from 14 to 18 total feet from each edge of gravel. Mr. Kolar began an inventory, measurement and photo documentation of existing trees, as Mr. Williams was cutting trees within the proposed 40 feet of right of way. Many of these were old growth oak and other hard woods and were valuable to the Kolars to stop erosion and to maintain seclusion, which was the reason they bought the property initially.

Mr. Williams promoted public safety in reasoning to choose the only width mentioned in the Township Roads code, as the width that he would proceed to build, after 28 years of maintaining this gravel road of substantially less width. He suggested that one of the residents on the South end, Mike Huskey, owned a recycling service and he hauled tractor trailers on the road and that road conditions were not good for him. He did not mention that Huskey has been in the business since 1987 driving his rigs on this road. He also stated that current finances allowed him to upgrade at this time.

The width proposed by Williams, according to Defendant's memorandum, is taken from 605 ILCS 5/6-301, which is a guideline for **arterial** roads and requires an approval process through the County Superintendent of Roads. This is certainly not an arterial road, as it is a dead end road. Nor has there been **any** formal process followed by the Commissioner, no hearing, no survey, nor real cost analysis or budget. The record does show that there was no dedication nor recorded easement and that property owners continue not only to pay taxes on their full property, but those taxes also include the Makanda Township road and bridge levy.

Other evidence developed that Mr Williams argued with Mrs. Kolar in a threatening manner over the cutting of the old growth trees; that one of the ten residents also has a cabin rental business now; and that Blue Sky Vineyard had been looking at property on the road. Regardless of these things, there was no evidence presented by Mr. Williams, or anyone for that matter, that **any other Makanda Township maintained road was even close to a 40 foot wide right of way**, nor is this court aware of any close to this suggested width, even arterial roads. The 40 foot right of way would, in Mr. Williams words, "doubles the existing bed." A couple of these factors are significant however, in that it is some evidence that the road is used by the public **increasingly** and not just by the property owners, their invitees and those finding themselves on a road they mistakenly had taken. Further, no one would disagree that the public was not prohibited from using the road in any way.

ISSUE: Has Plaintiff established a basic right involved in this process such that

injunctive relief should be extended? On the other hand, are the elements present in the evidence for a highway by prescription and, if so, what would constitute such a highway by prescriptive easement, and if not, should a permanent injunction issue?

Property Right or Prescriptive Public Highway:

While Plaintiffs formally deny that Sheppard Lane is a public road, they do not deny that Defendant Township has maintained the road and used public funds to do so since Plaintiffs bought the property in 1992 and they are aware that the public is not prohibited from use of the road. While Defendants maintain that all they desire to do is to improve the existing right of way to oil and chip with appropriate drainage, they know that there is no evidence that a forty foot right of way exists, and the road surface, as established over the years, is what Plaintiff testified to, that is, from where the grass ends, gravel begins and the width varies from 14-18 feet. As with any gravel road, the gravel spills out and may be somewhat wider than the grass allows. This would account for, at most, an additional foot on either side of the road, leaving a twenty foot maximum road surface. It is not contradicted in the evidence that proper drainage has been an issue on Sheppard Lane over its history due to the steep banks and other topography issues. Any road surface would be self defeating if it did not include **reasonable** room on either side of the road for proper drainage, and, the contour of the road and topography may require use of under road drainage tile and culverts which may modify right of way outside the road surface, from one side of the road to the other. Without reasonable proper drainage, the road would continuously be in a state of repair from washouts from no proper drainage.

In order to succeed on injunctive relief, Plaintiffs must show a clearly ascertained right in need of protection, irreparable harm if not enjoined, absence of adequate remedies at law, and likelihood of success on the merits. The Court agrees that peaceful enjoyment of the property by the certainty that old growth timber would be there to provide the seclusion and privacy they have enjoyed these many years, is as viable a reason as any in trying to establish an identifiable right. However, until the suit herein, there is no evidence of action or complaints from homeowners over some 22 plus years that Plaintiffs have resided there. During that time Defendant's have maintained the road in all ways. The Court believes the right Plaintiff presents is **not clearly ascertainable**, but believes that the result in protecting old growth timber and preventing erosion they hoped to achieve may be ascertainable without further injunctive relief.

In order to establish a public highway in this case, because neither is there a statute establishing a highway, nor is there a dedication of a public highway, Defendant must show a highway by **prescription**, that is one that has been used by the public as a highway for more than 15 years. (605 ILCS Sec. 5/202) The same elements for an easement by prescription must be present for a highway by prescription. Use must be adverse, under a claim of right, open and notorious,

continuous and uninterrupted, with the knowledge of the owner, but without his or her consent. Limestone Development Corporation v. Village of Lemont, 284 Ill. App. 3rd 84, at 854. Public maintenance of a road " is strong evidence that the roadway is in fact a public highway. " City of Des Plaines v. Redella, 365 Ill. App. 3rd 68, 847 NE2d 732, at page 739. While the evidence shows that Defendant never acquired easements , there was no dedication, Plaintiffs and others still pay taxes on the full amount of their acreage, their tax bills include Makanda Township road and bridge levy, and neither Plaintiffs nor other landowners ever received any compensation for the road surface on their properties, a highway by prescription comes about despite these things.

The evidence shows that all circumstances point to periodic grading, rock replacement maintenance, brush, weed and grass cutting, and snow plowing, by the Township Road Commissioner each year, for far more than 15 years. It is equally clear that the public, not just homeowners, have used and are increasingly using the road since the 1980's. Now there are cabins to which the paying public is invited and the number of homeowners has increased , as have their invitees, members of the public. The Defendant's maintenance has been adverse to any ownership of individual owners, engaged by a claim of right by history of 20-30 years of maintenance, which has been open and notorious, continuous and uninterrupted and with the knowledge of all.

Plaintiff's cite People ex rel Carson v. Mateyka, 57 Ill. App. 3rd 991 as support for their theory that Sheppard is but an extended driveway. In Mateyka there was no continuous adverse use of the road, it was maintained by the Commissioner as a favor to a landowner who permitted the practice for a few years, and the Commissioner then ceased maintenance, making the circumstances distinguishable from this case. It is clear to the Court that a prescriptive public highway has been established in our circumstances where the public had the free and unrestricted right to use the road for well in excess of 15 years and this is the test enunciated in Mateyka and numerous cases, beginning with the Supreme Court case of Van Amburg v. Reynolds, 372 Ill. 117, 23 NE 2d 694.

40 Foot Right of Way or a Reasonable Prescription

While Defendants, particularly Mr. Williams, maintain they have a 40 foot right of way, there is no support from the evidence or statute, nor anything in this record, except Mr. Williams testimony, to suggest the township has a right to a 40 foot right of way. Common sense in travelling the township would end such a notion. The common law tells us that the extent of an easement by prescription is defined by its prescriptive use. In re Onarga, Douglas & Danforth Drainage District of Iroquois County 179 Ill. App. 3rd 493, citing therein Vallas v. Johnson 72 Ill. App. 3rd 28. It is rudimentary that easements are limited to what is strictly necessary.

The Court finds that the Township's highway easement by prescription is limited

to no more than a twenty feet wide road surface, that is, 10 feet either side of center, and that reasonable drainage should be determined according to the scientific issues involved if financially possible, and the Court believes that **reasonable** might be 3-5 feet on either side of surface, again, where necessary. There is evidence that the Commissioner was flexible in attempting his dealing with adjacent and across the road property owners to minimize concerns of owners where possible and the Court would hope that reason and practicality would rule the day in going forward.

ENTER THIS 23rd day of September, 2014.

J. Charles Erace

Circuit Judge