



MEMORANDUM

To: Thompson Zoning Board of Appeals

From: Richard P. Roberts, Esq.

Date: June 4, 2020

Re: Prescriptive Easement – ZBA Appeal No. 20-03
705 Washington Avenue, LLC

At your request, I have reviewed the attached documentation pertaining to ZBA Appeal No. 20-03 filed by 705 Washington Avenue, LLC with respect to the cease and desist order pertaining to the use by the residents of 1391 Riverside Drive of a driveway for access which crosses over property of the Town of Thompson located at 1395 Riverside Drive. I have also reviewed the online deeds for the two properties to confirm that there do not appear to be any reserved or granted rights of way reflected in the land records since 1975.

As a general matter, the discussion of the legal principles of prescriptive easements provided by the applicant's attorney is accurate. A party may obtain a prescriptive easement over the land of another by open, visible and adverse use for an uninterrupted period of not less than fifteen years (CGS §47-37). There is a substantial body of case law surrounding this subject and the determination of whether or not a prescriptive easement exists is highly fact specific.

For purposes of the application, it would be necessary for the applicant to demonstrate to the ZBA that the owners and/or residents of the property located at 1391 Riverside Drive had been using the access at issue for an uninterrupted and continuous period of not less than fifteen years prior to the acquisition of the property by the Town of Thompson in August 2007 and that such use was adverse to the owners of the property located at 1395 Riverside Drive, i.e., that it was not being used with the consent of the owners of 1395 Riverside Drive.

In the place of live testimony to that effect, the applicant may use circumstantial evidence such as photographs or other documentation to support its position. The Zoning Board of Appeals may determine that such a prescriptive easement exists for purposes of deciding this application (but not as a definitive matter of title binding on the parties) if it believes that there is more evidence that the access way existed for the required period of time at some point prior to August 2007 and that it was not being used with the permission or consent of the owners of 1395 Riverside Drive.

Please let me know if you have any other questions in this regard.

Roberts, Richard P.

From: zeo@thompsonct.org
Sent: Tuesday, May 26, 2020 12:32 PM
To: Roberts, Richard P.
Subject: ZBA APP 20-03
Attachments: zba 20-03 1391 riverside dr application.pdf

Rich
Attached is the application, supporting documents and Minutes from the ZBA meeting held on May 11, 2020. The issue is the tenants of 1391 Riverside Drive using the driveway of 1395 as an entrance to 1391 property. A letter requesting the owner to notify his tenants to cease using 1395 as an access to 1391 resulted in an appeal to my decision. The Public Hearing was heard on May 11th at which time the Attorney for the 1391 Riverside owner submitted a memo. The ZBA members requested I send the memo over to legal counsel for an opinion to be read at our next ZBA meeting to be held on Monday, June 8, 2020.

Any assistance in this matter is appreciated.

Thank you

Cindy

Town of Thompson
Zoning Enforcement Officer
815 Riverside Drive
North Grosvenordale, CT 06255

860-923-9475
Office Hours
Mon., Wed., Fir. 9 am to 2 pm

RECEIVED
5-11-2020

CJA

TOWN OF THOMPSON
ZONING BOARD OF APPEALS

MAY 07, 2020

APPEAL NO. 20-03

MEMORANDUM IN SUPPORT OF PETITIONER'S
(705 WASHINGTON AVENUE, LLC) APPEAL

The Petitioner claims an easement by prescription over adjacent property owned by the Town of Thompson. Specifically, the claim is for ingress and egress over an existing driveway to reach a garage located to the rear of the Petitioner's residence.

To successfully claim an easement by prescription the use must be open and visible; under a claim of right; and continuous and uninterrupted for fifteen consecutive years. C.G.S. Section 41-37; *Crandall v. Gould*, 224 Conn. 583, 590, 711 A.2d 682 (1998).

While it is well established that a party cannot adversely possess a governmental entity, in this case the town has only owned the servient premises since 2007. The easement claimed has at least been in existence since the mid 1950's at which time the town's own aerial assessor's maps show the driveway and garage *in situ*, as they are today. Furthermore, both properties' boundaries remain the same.

The easement by prescription as claimed was therefore well established and in place decades prior to the town taking title. When the town did take the title in 2007, it took subject to the existing prescriptive easement. *Frech v. Plontkowski*, 296 Conn. 43, 57, 994 A.2d 84 (2010).

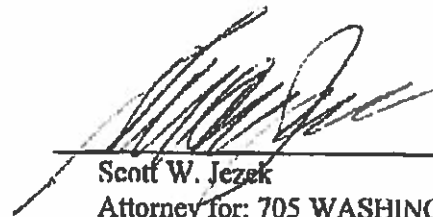
JEZEK & BARBI
ATTORNEYS AT LAW

P.O. BOX 376 • MOODUS, CT 06469 • (860) 873-1449 • FAX (860) 873-1113
JURIS NUMBER 105045

It is equally well established law that the fifteen year period may run at anytime over the time continuum at issue. *Frech, Supra*. The Petitioner need not have been the owner when the fifteen year period ran. Therefore, as a matter of law, when it took title, it took together with that easement by prescription. It is apparent from examining the town's Building Department records that the garage was in existence prior to Thompson's adoption of its zoning regulations in 1973 because no permits were taken to construct that garage subsequent to 1973., consistent with the structure's appearance in the 1956 aerial photograph.

Finally, members of a zoning board of appeals are permitted to rely their personal knowledge of a property independently obtained by virtue of them being a member of the general community. *Oakwood Development Corporation v. Zoning Board of Appeals of Torrington*, 20 Conn.App. 458, 567 A.2d 1260 (1990). In this instance, that knowledge, or duly convened meeting and inspection of the property, would demonstrate unequivocally the age of the garage and driveway and that the prescriptive easement claim is decades old and not recent vintage.

Whereof, the Petitioner respectfully requests the Zoning Board of Appeals grant its appeal. Both the underlying facts and applicable law support that conclusion.



Scott W. Jezek
Attorney for: 705 WASHINGTON
AVENUE, LLC

- USLegal
- Legal Definitions
- P
- Prescriptive Easement

Prescriptive Easement Law and Legal Definition

A prescriptive easement is an easement upon another's real property acquired by continued use without permission of the owner for a legally defined period. State law, which varies by state, defines the time period required to acquire a prescriptive easement. Prescriptive easements may be difficult for an owner to discern, since they do not show up on title reports, and the exact location and/or use of the prescriptive easement is not always clear and occasionally moves by nature of the prescriptive use.

A prescriptive easement arises if someone uses a portion of an owner's property openly, notoriously, and without the owner's permission. A prescriptive easement involves only the loss of use of part of a property, for example a pathway or driveway. State law should be consulted for the exact statutory requirement for an easement by prescription in each state. Easements can be further broken down into easements appurtenant and easements in gross. The characterization of an easement will affect the right to transfer the easement to another. Easements appurtenant are adjacent to the servient estate (the underlying land). If the dominant estate (the property which enjoys the benefit of an easement over the servient estate) is sold or otherwise transferred to another, the easement appurtenant over the servient estate transfers with it.

Easements in gross are unrelated to the easement holder's possession of a dominant estate and do not ordinarily transfer with title to an adjacent property. As a general rule, easements in gross are not transferrable unless transfer is specifically authorized in the document creating the easement. However, if the easement has commercial value, unless there is an express intent to limit transferability, the commercial easement in gross has the same attributes of transferability as other interests in property. Laws regarding transferability of easements vary by state, so local laws should be consulted.

in si·tu

*/,in 'sītōō, in sētōō/
adverb · adjective*

1. in the original place.



Town of
THOMPSON
PLANNING and ZONING OFFICE – Zoning Enforcement Officer

CERTIFIED MAIL 7017 3380 0000 6972 8894

February 10, 2020

705 Washington Avenue LLC
58-1 Townwoods Rd
Old Lyme CT 06371

*Mark McWilliam
at 860-559-7701
call more day
A-1 Survey*

To Whom It May Concern

RE: 1391 Riverside Drive, Map 57, Block 61, Lot 3, Zone R40

It has come to the attention of the Town of Thompson Zoning Office and the Public Works Department that the resident (s) living at 1391 Riverside Drive are encroaching on Town owned property, 1395 Riverside Drive. As delineated in the attached GIS data map, the entrance and exit from 1391 Riverside Drive is through 1395 Riverside Drive.

This communication is a request to inform the residents of 1391 Riverside to cease using 1395 Riverside Drive for the entrance and exit to 1391, by February 25, 2020.

Your cooperation in resolving this issue is appreciated.

For questions or information please contact my office, 860-923-9475 between the hours of 9 – 2 on Monday, Wednesday and Friday.

Regards,

Cynthia Dunne
ZEO, Town of Thompson]

1 Enclosure

Cc: Director of Town of Thompson Highway Department

MUNICIPAL BUILDING

815 Riverside Drive, P.O. Box 899 North Grosvenordale, Connecticut 06255
Telephone: (860) 923-9475 Fax: (860) 923-9897



TOWN OF
THOMPSON
ZONING BOARD OF APPEALS

MINICHA BUILDING
815 RIVERSIDE DRIVE
MO. GROSVENOR, CT 06255
PHONE (860) 923-1852
Fax (860) 923-9697

FILE COPY
5/13/2020

**CERTIFIED MAIL 7017 3380 00006972 8634
RETURN RECEIPT REQUEST**

May 13, 2020

705 Washington Avenue LLC
58-1 Townwoods Rd
Old Lyme, CT 06371

Dear Mr. McWilliams,

RE: ZBA Application #20-03, 705 Washington Avenue LLC, Owner, 1391 Riverside Drive, Map 57, Block 61, Lot 2, Zone R40 appealing enforcement letter issued by the Town of Thompson Zoning Enforcement Officer

At the Zoning Board of Appeals meeting on Monday, May 11, 2020, a motion was made and seconded to continue the public hearing on application #20-03 Monday, June 8, 2020. At this time due to the temporary closure of The Thompson Town Hall meeting place has not been determined. As soon as a decision is made on the meeting place you will be notified.

The meeting is continued to allow the Attorney for the Town of Thompson to review document "Memorandum in Support of Petitioner's (705 Washington Avenue, LLC) Appeal. The Attorney's Review will be forwarded to you, your Attorney and the ZBA members.

The legal notice sign that is presently posted on the property at 1395 Riverside Drive will need to be changed to reflect the new meeting date. Out of Courtesy for the distance you have to travel I will change the posting on the sign.

I strongly suggest to support your application you or your Attorney attend the ZBA meeting on June 8, 2020.

If you have any questions please contact me at the Thompson Town Hall, Planning and Zoning Office. My office hours are Monday, Wednesday and Thursday from 9 am to 2 pm or call at 860-923-9475.

Regards



Cynthia Dunne
Town of Thompson ZBO

Cc: Attorney Jezek



TOWN OF THOMPSON

ZONING BOARD OF APPEALS

Minutes: Zoning Board of Appeals

Monday, May 11, 2020

Zoom Meeting 7:00 PM

PAGE 1 OF 7

Topic: Zoning Board of Appeals

Time: May 11, 2020 07:00 PM Eastern Time (US and Canada)

Join Zoom Meeting

<https://us02web.zoom.us/j/83611457603?pwd=ZEprhENBSmthY2YkYWdzM01TVjFtQT09>

Share recording with viewers:

https://us02web.zoom.us/rec/share/-8d7f73P2iROGpWOWl3IU7VmRLbqX6a81SMY-vAMyEm-_m_8J3YSciQTociadNRJ

Password: 3M+@2z=&

Meeting ID: 836 1145 7603

Password: 453327

Dial by your location

+1 312 626 6799 US (Chicago)

+1 929 205 6099 US (New York)

+1 301 715 8592 US (Germantown)

+1 346 248 7799 US (Houston)

+1 669 900 6833 US (San Jose)

+1 253 215 8782 US (Tacoma)

Meeting ID: 836 1145 7603

Password: 453327

Find your local number: <https://us02web.zoom.us/j/83611457603>

- 1. Chair Kevin Beno called the meeting to order at 7:00 PM**
- 2. Roll call: Chairman Kevin Beno, Kirby Cunha, Jason St. Onge, Geoff Bolte
Alternate Seating: Ken Weiss
Alternate: Leslie Lavalley
Staff Present: Cynthia Dunne, Zoning Enforcement Officer and Gloria Harvey,
Recording Secretary**
- 3. Public Hearing**
**Public Hearings ZBA Application #20-02, Joshua and Jessica Rhodes, Owner,
0 Pompeo Rd, Map 61, Block 59, Lot 5A, Zone R40 requesting a 25' varlance
front setback.**

Applicant Joshua and Jessica Rhodes, 293 Brickhouse Road, Danielson, CT 06239, are requesting a Front Setback Variance from 50' to 25'. Engineer Norman Thibeault, Killingly Engineering Associates, 114 Westcott Road, Danielson, CT 06239 represented Joshua and Jessica Rhodes. The engineer stated the owners want to build a house at 0 Pompeo Road. The site plan indicates significant wetlands on this property. Town of Thompson Zoning Regulations require 50' setback from the wetlands. ZEO stated that the site cannot be developed to meet code requirements if the 50' setback is required. The engineer referred to the site plan and stated that the 50' setback from the wetlands is through the garage and the 25' setback is from the corner of the garage to the stone wall which is the property line. If the house was moved down radiant so it is within 50' of the front setback they would not be able to have a gravity system that would be able to maintain proper separation distances from the septic without pushing it closer to the wetlands which is required by the health codes. Kirby Cunha asked the ZEO to comment and she said the house was fine as positioned on the site plan and everything else is in place. She also stated because of the delay of the April meeting, letters were sent to all surrounding property owners within 200'. One letter was received from one of the neighbors and filed in the Zoning Office stating they were supporting this application. Ken Weiss asked about Paula Cahill's property which is closest to 0 Pompeo Road and the ZEO said no comment was received from her.

Public Input: None

Kevin Beno moved and Kirby Cunha seconded to close the Public Hearing. A roll call vote was taken. The motion carried unanimously.

**Kirby Cunha – Yes Geoff Bolte – Yes Jason St. Onge – Yes
Kevin Beno – Yes Ken Weiss - Yes**

Discussion from ZBA members: Kirby Cunha had no issue and Ken Weiss also had no issue and said he thought it should be granted.

Kevin Beno moved and Kirby Cunha seconded the motion to approve ZBA Variance Application #20-02 as requested.

A roll call vote was taken:

**Kirby Cunha – Yes Geoff Bolte – Yes Jason St. Onge – Yes
Kevin Beno – Yes Ken Weiss - Yes**

The motion carried.

Public Hearings ZBA Application #20-03, 705 Washington Avenue LLC, Owner, 1391 Riverside Drive, Map 57, Block 61, Lot 2, Zone R40, appealing enforcement letter issued by the Town of Thompson Zoning Enforcement Officer.

Applicant represented by Attorney Scott Jezek, PO Box 376, Moodus, CT 06469. He stated his client is appealing a letter, dated February 10, 2020, from the ZEO stating that the tenants at 1391 Riverside Drive are using Town owned property at 1395 Riverside Drive as access to a garage at 1391 Riverside Drive. In the letter the ZEO stated my client is accessing a garage on Town of Thompson property and requested my client to discontinue using the town property for access into 1391 Riverside Drive, therefore my client had no alternative but to file an appeal to protect their rights. He further stated that his client has a "Prescriptive Easement" over the property owned by the town to the driveway accessing the garage behind my client's home. Kevin Beno asked Attorney Jezek to explain the term "Prescriptive Easement." Attorney Jezek explained the difference between "Adverse Possession" and "Prescriptive Easement." "Adverse Possession" means that under certain terms a person may gain ownership after using a person's property long enough after going to land court and "Prescriptive Easement" means have a right to use it. My client is claiming that by prescription, that is having used this property for more than 15 consecutive years openly, my client has acquired the right to use this. In order to prove this, Attorney Jezek reviewed Thompson's municipal records and Ariel assessor's maps and in the 1956 map it shows my client's and the town's property under prior owners and it shows the driveway and garage that is the issue of this appeal. Property lines are the same, therefore we know that in 1956 these conditions existed and there is no evidence that it stopped. Also looking at the town's Building Department records, in 1973 no permits were taken to build this barn leading one to conclude that the barn existed prior to 1973 consistent with what we see in 1956 Ariel photographs. The fact that the town owns the property and acquired it later is irrelevant to this because when the town took title that easement was already in place. Therefore the town, because we could not adversely take possession once the easement was there and the town took title, it was subject to that easement. A brief memorandum dated May 7th outlined my authority on this. If the February 10, 2020 letter was meant as an order, then my client's position is that we have a "Prescriptive Easement" and they have a right to pass on that driveway to access the garage that is on my client's property.

Kevin Beno commented that 705 Washington Avenue LLC is saying they have a legal right but don't have anything in writing to prove they have a legal right. Attorney Jezek agreed with Kevin Beno's comment stating that a "Prescriptive Easement" is non-binding. Ken Weiss asked if someone brought up the issue

with the driveway and the way it has been used all these years? Attorney Jezek replied his interpretation from the letter his client received from the ZEO dated February 10, 2020 took issue so my client is appealing this letter to protect their rights. The ZEO provided Attorney Jezek with legal documents from Town Counsel, Attorney Roberts. Kevin Beno asked if Attorney Roberts had given a definite decision in this document and Attorney Jezek replied he has not spoken to him about it. Kevin Beno commented that he would like our own Town Attorney to look over the documents relating to this appeal before the ZBA makes a decision. Kirby Cunha stated that he agreed with Kevin Beno because he didn't feel he could make a decision on property that belongs to the town without input from Town Counsel. Jason St Onge agreed with Kirby Cunha to ask Town Attorney to make a decision on behalf of the ZBA.

Kevin Beno moved and Kirby Cunha seconded the motion to move this Public Hearing for Application #20-03 to next month.

A roll call vote was taken:

Kirby Cunha – Yes

Geoff Bolte – Yes

Jason St. Onge – Yes

Kevin Beno – Yes

Ken Weiss - Yes

The motion carried.

Public Hearings ZBA Application #20-04, Joseph and Wanda Kelly, Owner, 0 Lowell Davis Road, Map 120, Block 30, Lot 3A, Zone IND, requesting a variance to build a house on property in non-conforming zone.

Joseph Kelly, owner of 0 Lowell Davis Road, North Grosvenordale, CT. He is requesting a Variance to build a house on a lot that is in an industrial zone. They purchased 0 Lowell Davis Road when they bought their home at 86 Lowell Davis Road. They requested a Zone Change through the PZC on November 25, 2019. The PZC recommended they wait until the new Zoning Regulations were passed which would allow a residential structure in an Industrial Zone, however the Kelly's chose to apply for a Variance now because they want to begin the process of building their house.

Ken Weiss asked if there was an industrial building on the property and Joseph Kelly replied that there was a farm. Kevin Beno commented that the houses in that area were all residential. Joseph Kelly stated that he was on the Numa Tool end which is zoned Industrial. Kirby Cunha asked the ZEO for a status on the new Zoning Regulations. The ZEO replied the intent of the Zoning Regulations is to have it passed by June 30th, however she did not know if it would be possible to have an Informed Public Hearing by then with the social distancing in place. She also stated that there is a lot of work that has to be done before then. The ZEO said that people are looking through the regulations and making suggestions from the draft that is online. There is no guarantee that you can