VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

TIMOTHY EATON, *et als,*	)	
	)	
Plaintiffs	)	
	)	
v.	)	**CASE NO. CL 82643**
	)	
CARLA BAER, *et als,*	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

The parties to this action own adjoining parcels of land north of Hillsboro on the eastern slope of the Short Hill. Neither parties' property fronts on a public road. The lot belonging to the Baer defendants is to the east of the plaintiff Eatons' three lots, and lies between them and the closest public road, Route 690 which runs in a generally north-south direction. Apparently, there is no recorded access for the Eatons to travel the entire way to and from Route 690. Consequently, they seek to establish access across the Baers' lot under theories of easement by necessity (Count I), or easement by implication from prior use (Count II).

The Baers' 10-acre parcel known as PIN 441-35-8155 was previously part of a larger parent tract which was subdivided into four lots by a plat of the Lowry & Frye Subdivision recorded at Deed Book 644, Page 5. (Complaint Exhibit 5.) The Baers' lot is described as Lot 1 on this subdivision plat. The Lowry & Frye Subdivision, totaling 40.264 $\pm$ acres, was once part of a larger tract of approximately 62 acres. This 62-acre parcel and the Eatons' lots, PINs 476-30-6861, 441-35-1336 and 441-35-1223, once had the same owner. The Eatons allege that when the unity of ownership of the 62 acres and the three Eaton lots was severed in 1941, these and other

facts gave rise to either an easement by necessity or an implied easement by prior use for the benefit of the three Eaton lots.

The Eatons have already secured easements from State Route 690 across two lots, one being Lowry & Frye Lot 4 and the other not being a part of this subdivision but was apparently part of the original 62-acre parcel. This easement establishes access to and from the public road to the edge of the Baers' Lot 1. However, in order to reach their lot, the Eatons must connect these already-acquired easements with an easement that crosses the Baer lot. As one of their responses to the Eatons' Complaint, the Defendants filed a Motion which asserts that this case cannot proceed without the joinder of the other lot owners in the Lowry & Frye Subdivision and the owners of the other lands which formerly comprised the 62 acres. The Baers argue that these lots must be considered along with the Baers' lot for the possible location of the access easement sought by Plaintiffs, and therefore these other lot owners are necessary parties.

> "Necessary parties include all persons, natural or artificial, however numerous, materially interested either legally or beneficially in the subject matter or event of the suit and who must be made parties to it, and without whose presence in court no proper decree can be rendered in the cause. This rule is inflexible, yielding only when the allegations of the bill state a case so extraordinary and exceptional in character that it is practically impossible to make all parties in interest parties to the bill, and, further, that others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons." (Citations omitted.)

Jett v. DeGaetani, 259 Va. 616, 619-620 (2000).

The Baers argue that they, as the owners of a potentially servient estate: 1) have the discretion to locate any easement obtained by necessity; and 2) may choose to locate the access easement on their lot so that it will be necessary for it to traverse other lots carved out of the 62-acre parcel; and, therefore, 3) the other owners whose properties once comprised a part of the 62-acre parcel need to be joined as parties so that the possibility of locating a portion of the easement

on their lots can be adjudicated. In evaluating the arguments on the necessity of joinder, it must be kept in mind that whatever the configuration of an access easement might be—should the Court determine that the Eatons are entitled to one-- it will need to be located in part on the Baers' lot.

Defendants' counsel has directed the Court's attention to *Eureka Land Co. v. Watts*, 119 Va. 506, 509 (1916) which held that:

> When a right of way is reserved over a tract of land without any designation of the location, if there be in fact at the time of the reservation a well defined road over the land which is in actual use by the persons in whose favor the right is reserved, the way in use will be treated as the one which the parties contemplated. If there be no such road in existence at the time of the conveyance, the owner of the servient estate may fix the location, having due regard to the particular terms of the instrument.

As Mr. Stein, acknowledges, this case is not directly on point. He also directed attention to the annotation "*Easement of Way by Necessity – Location*," 36 ALR 4th 769. At § 4 (p. 775) is a collection of cases where "a right-of-way has been created by necessity, but has not been located by use and acquiescence or other means." The majority, if not unanimous, rule is that in such cases the owner of the servient tract can select the location of the easement, subject to the requirement of reasonableness.[1]

The Baers' argument is that in order to honor fully their right to locate an easement on their lot, that the other lot owners must be joined so that the Baers can select a route across their lot which connects with this other lots and not the lots over which the Eatons have already secured access. Expressed differently, the Baers do not want their range of choice in locating an easement for the Eatons to be circumscribed by the existence of easement rights over other parcels.

While under this authority from other states, the Baers have the right to select the location of an easement by necessity, subject to its reasonableness, I do not find that it is reasonable to join

[1] No Virginia decision is cited in this ALR annotation.

other neighboring landowners as parties defendant so that the Baers can have complete freedom in selecting where on their Lot 1 such an easement may be sited. And therefore, such other neighboring landowners are not necessary parties.

In weighing the reasonableness of allowing the Baers complete freedom to locate an easement for the Eatons, it must be kept in mind that under **any** plan for locating such an easement, it **must** cross the Baers' lot. Other considerations weighing against reasonableness are as follows:

- An access easement benefiting the Eatons' parcel has already been established and sited on two of the lots comprising the original 62-acres parcel. It is reasonable to assume that they would not welcome the trouble and expense of litigation.
- As to the other owners of land once comprising the 62 acres, each one of these would likely insist on their own right to specify the location of the easement which would result in a stalemate.
- As the Court raised at oral argument, the trustees (as well as the secured noteholders) under any deed of trust on land at issue must be joined as necessary parties which is another item of expense and inconvenience. See *Glasser & Glasser v. Jack Bays, Inc.*, 285 Va. 358, 371 (2013).
- The Eatons' claim of an easement by implied prior use will depend on such prior use to establish an easement on the Baers' lot. If this prior use is established (as well as the other requirements for an implied easement), the Court will locate the easement in the site of the prior use on the Baers lot, and so these other landowners would have no role to play with respect to the implied easement claim.

Consequently, the Court will deny the Defendants' Motion to Join Additional Parties at

this time. As previously noted, the Court raised the issue that the trustees under the Baers' deed of trust are necessary parties. Mr Bosson may prepare an order which denies Defendant's Motion and joins these trustees. Please submit it directly to me for entry when fully endorsed.

4 November 2014

Stephen C. Price, Judge *pro tempore*
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