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 AND FINAL DECREE

Defendant Carla Baer has raised two grounds for reconsideration of the Court's decisions which grant the plaintiffs an access easement across her lot on grounds of necessity. The first ground is Ms. Baer's assertion that the necessity for such an easement— *viz.* the lack of access— must result from the severance of a newly-created parcel of land, and that the Eaton lots preexisted their becoming landlocked, thereby failing to meet a requirement for establishment of an easement by necessity. The second ground is the assertion that the Eatons failed to establish by clear and convincing evidence that they lacked alternative access. By order entered May 30, 2019 Ms. Baer was granted reconsideration of these two issues which are addressed in this opinion and decree.

BACKGROUND

The parties to this action own adjoining lots or parcels of land north of Hillsboro, on the eastern slope of the Short Hill in Loudoun County. The plaintiffs are members of the Eaton family[1] (herein "the Eatons") who own three contiguous lots (herein "the Eaton Lots") located to the west of a lot belonging to defendant Carla Baer. Neither the Eaton Lots nor the Baer lot front on a public

[1] Timothy and Jade Eaton own PIN 476-30-6861, Andrew Eaton owns 441-35-1336, and Julie [nee' Eaton] Adamson and Zachary Adamson, her husband, own 441-35-1223.

road, however the Baer lot lies between the Eaton Lots and the closest public road, Route 690, which runs in a generally north-south direction. It should be noted that Mark and Suzanne Eaton, the parents of Timothy, Andrew and Julie, own a lot (PIN 441-35-7119) contiguous to the parties' lots.[2]

Although the Eatons have obtained recorded access easements from the lot owners to the east of Baer, granting them the right to use the roadway which runs from State Route 690 towards the Baer and the Eaton Lots,[3] the Eatons cannot connect to this roadway because they lack an easement across the Baer lot. Consequently, in this case the Eatons seek to establish an easement by necessity across the Baer lot.

Baer's 10-acre lot was previously part of a 62-acre tract, fronting on State Route 690. This tract was divided in 1976[4] and the Baer lot-- PIN 441-35-8155-- is shown as Lot 1 on the subdivision plat. The 62-acre tract and the Eaton Lots were owned by John J. Arnold from 1939-41.[5] John J. Arnold had acquired the Eaton Lots in 1925[6] and the 62-acre parent tract in 1939[7]. When Arnold sold the 62 acres in 1941, the deed of conveyance failed to reserve an access easement across the 62 acres for the benefit of the three lots which Arnold retained, and are now owned by the Eatons.[8]

THE EATONS' CLAIM OF AN EASEMENT BY NECESSITY

The Eatons assert that, upon the 1941 severance of Arnold's unity of ownership of the 62-acre tract and the three Eaton Lots without any explicit reservation of access for the Eaton Lots,

---

[2] On Plaintiffs' Exhibit 18 (attached) the Eaton Lots are outlined in green, the Baer is one of the lots outlined in blue, and the Mark & Suzanne Eaton lot is outlined in red.
[3] Plaintiffs' Exhibit 6. Deed of Easement and Restrictive Covenants, Instrument # 20081003-0060079.
[4] The Lowry & Frye Subdivision plat is recorded at Deed Book 644, Page 5, and was attached as Exhibit 5 to the Complaint. The lots in this subdivision are outlined in blue on Plaintiffs' Exhibit 18.
[5] See Plaintiffs' Exhibit 14.
[6] Deed Book 9-V, Page 285.
[7] Deed Book 11-F, Page 18.
[8] This deed recorded at Deed Book 11-N, Page 307 is Plaintiffs' Exhibit 3.

an easement by necessity was created as a matter of law. *Clifton v. Wilkinson*, 286 Va. 205, 211 (2013) laid out the requirements for an easement by necessity:

> A right of way by necessity is based on the theory that when a grantor conveys property he does so in a manner which will allow beneficial use of both the property he conveys as well as any property he retains. This type of easement arises from an implied grant or implied reservation. **It is essential to this theory that the necessity arise simultaneously with the conveyance.** If the conveyance does not preclude the beneficial use of either the property conveyed or the property retained, an implied grant or reservation is unnecessary. The necessity cannot arise subsequent to the conveyance because "the necessity referred to is the subjective necessity of the inference that the parties so intended at the time of the grant" or reservation.
> To establish a right of way by necessity certain conditions must be met. First, **the land must have been under common ownership at some time and this unity of title must have been severed. The severance must have given rise to the need for the right of way.** (Emphasis added.)

BAER'S ARGUES THAT ENTITLEMENT TO AN EASEMENT BY NECESSITY IS LIMITED TO PARCELS LAND-LOCKED BY SUBDIVISION

Baer argues that, to establish the requisite unity of ownership for an easement by necessity, a claimant must prove his grantor owned the dominant and servient estate as a single tract prior to the severance, and that such an easement does not arise when the owner of several parcels conveys one to another, resulting in a land-locked parcel.

> It would defy logic and common sense to say that two separate parcels, clearly distinct from each other, with distinguishable property lines and boundaries, have not already been severed from each other. *They are not one.* It follows, then, at least for easement-by-necessity purposes, that if there are two parcels already distinct from each other, that there has already been a severance. And unless the necessity arose at the time the parcels became distinct, and was caused by that division, easement by necessity simply cannot later arise, regardless of who may later come to own them or sell them. Perhaps, for some other purposes, selling one of several already-distinct parcels might be some sort of 'severance;' but it is clearly not a severance for the purposes of establishing an easement by necessity.

This issue has not been explicitly addressed in Virginia, however Baer argues that the holding in *Davis v. Henning*, 250 Va. 271 (1995) establishes such a requirement for the establishment of an easement by necessity.

Davis v. Henning

Baer relies on the *Davis* Court's statement at p. 276 that:

> To establish an easement by necessity, a claimant must demonstrate that the severance of a parcel of land previously under common ownership created the need for access to a public right of way from one of the new parcels.

Emphasizing the phrase "severance of a parcel" and the term "new parcels," Baer argues that this language limits the judicial establishment of an easement on grounds of necessity to cases where the division of a tract of land, coupled with the conveyance of a newly-created parcel, results in one of the newly-created parcels being land-locked. Consequently, Baer asserts, an easement by necessity will not arise upon the transfer of an existing parcel which results in it or an adjoining parcel becoming land-locked. Certainly, the quoted language from *Davis* can be read this way, however the facts of the case should be carefully reviewed to support such a reading.

The essential events in *Davis* are as follows:

1. Parco Bldg. Corp. acquires a 7+ acre parcel.
2. Parco divides the 7+ acre parcel and conveys a land-locked portion (the Davis Parcel) to Parker, keeping the remainder (the Henning/Cross parcel).
3. Parco grants Parker an access easement across the Henning/Cross Parcel to the David parcel.
4. Parker acquires the Henning/Cross Parcel, thereby extinguishing the access easement previously granted.
5. Parker conveys the Henning/Cross Parcel to Parker Rd. Assocs.
6. Parker Rd. Assoc.s conveys the Henning/Cross Parcel to Henning.
7. Davis becomes the contract purchase of the Davis Parcel from Parker.

When Henning and Cross sought to enjoin Davis from traversing the Henning/Cross Parcel to access the Davis Parcel, Davis raised several defenses, including a claim of easement by necessity which the Court upheld. After stating that "[t]o establish an easement by necessity, a

claimant must demonstrate that the severance of a parcel of land previously under common ownership created the need for access to a public right of way from one of the new parcels."— the language relied on by Baer— the Court said that "[t]he record here clearly shows that both parcels were previously owned by Parker. Furthermore, severance of the Henning/Cross parcel resulted in the need for access to Parker Lane from the Davis Parcel."

If the Court based its recognition of such an easement on Event # 2, *Davis* would be authority for limiting recognition of easements by necessity to where the land-locking of a lot resulted from the act of subdivision. In the wake of Event #2, Parco granted Parker an easement (Event # 3), thereby eliminating any claim for an easement by necessity. However, this express easement was extinguished under the merger doctrine when Parker acquired both parcels (Event # 4). Upon conveyance of the Henning/Cross Parcel (Event # 5) the Davis Parcel became land-locked once again. While it is not entirely clear as to whether recognition of an easement by necessity was based on Event # 2 or Event # 5, the more convincing reading of the decision is that the Court based its recognition of an easement on Event # 5 (Parker conveys the Henning/Cross parcel to Parker Rd. Assoc's) – not Event # 2 (Parco divides the 7+ acre parcel and conveys the land-locked portion to Parker).[9]

Although a literal reading of the *Davis* opinion supports Baer's assertion that, in order to establish an easement by necessity, the claimant must prove his grantor owned the dominant and servient estate as a single tract prior to the severance, the *Davis* Court recognized such an easement

[9] Event # 2 would have entitled Parker to an easement by necessity, however such easements are incohate until judicially established. See *Cartensen v. Chrisland Co rp.*, 247 Va. 433 (1994). Once an access easement had been conveyed (Event # 3), it is doubtful that a Court would judicially establish an easement by necessity because necessity is absent due to the existence of an express easement. See *American Small Business Inv. Co., v. Frenzel*, 238 Va. 453 (1989).

where an owner of two preexisting lots conveyed one, resulting in the retained lot becoming land-locked. Consequently, *Davis* cannot be read as supporting Baer's argument. As the Court said in *Robinson Family, LLC v. Allen*, 295 Va. 130, 149-150 (2018):

> ... our duty to "follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding." *Vasquez v. Commonwealth*, 291 Va. 232, 242, 781 S.E.2d 920, 926 (2016). Chief Justice John Marshall said it best: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400, 5 L. Ed. 257 (1821)...

OTHER VIRGINIA DECISIONS

It would appear that *Linkenhoker v. Graybill*, 80 Va. 835 (1885) is the first reported Virginia case which recognized easements by necessity. No Virginia authority is cited for the remedy except LOMAX'S DIGEST which is quoted as follows: "'If a person voluntarily takes a conveyance of land, which is surrounded, on all sides, by lands of his grantors and others, he can enforce the right of way under plea of necessity, against none but his grantor.'"[10] Lomax says nothing about a requirement that the dominant and servient estates be carved out of a previously undivided parcel in order to be entitled to an easement by necessity. And indeed, his description of the grounds for establishment of such an easement is broad enough to include the circumstance where a grantor, who owns several parcels, conveys one or more to others, resulting in a land-locked parcel.

[10] John Tayloe Lomax, I DIGEST OF THE LAWS OF REAL PROPERTY 674 (2nd Ed. 1855). (Lomax was the first professor of law at the University of Virginia.)

In the case of *Bond v. Willis,* 84 Va. 796 (1888) an implied easement was recognized, citing both Blackstone's Commentaries and Goddard on Easements.[11] The facts of the case are not entirely clear and apparently the easement was found to be implied both from its prior use and its necessity.[12]

The first Virginia decision which clearly established an easement by necessity was *Smith v. Va. Iron, Coal & Coke Co.,* 143 Va. 159 (1925). The opinion does not give a detailed history of the parcels concerned from the time that the parent tract was divided so it is unclear whether or not the land-locking of the parcel in question had arisen from the act of division. The Court relied on MINOR ON REAL PROPERTY as authority for its recognition of an easement by necessity, quoting it as follows:

> Easements are sometimes implied upon a grant of land, because without them the property granted could not be used by the grantee, or could not be used for the purpose for which it was granted. Such easements are said to arise by necessity, that is, by necessary inference, since otherwise the whole grant would be nugatory... But the most usual and important of these easements is the *right of way by necessity*, which arises where one conveys to another land which is either *entirely surrounded by the land of the grantor*, or else is bordered in part by the land of a stranger and in part by the lands of the grantor. In either case the grantee of the land, even in the absence of express stipulations, has a *way by necessity over*

---

[11] I have been unable to locate the quotations from these authorities used in the opinion, but did find other language in these authorities which supports the decision: see William Blackstone, III COMMENTARIES, Book II, Part II, p. 36 (St. George Tucker, editor; 1803) ("A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come on it; and I may cross his land for that purpose without trespass."); and John Leybourn Goddard, THE LAW OF EASEMENTS 328 (2nd Ed. 1891) ("... the law has always and in every case annexed a right of way of necessity to the ownership of land-locked ground when that and the surrounding land have been severed by sale.") This quotation from Blackstone was cited as authority by then Judge Kelsey in *French v. Va. Marine Resources Comm'n.*, 64 Va. App. 226, 238, n.7 (2015).

[12] Easements implied from prior use and from necessity are conceptually similar which has led, occasionally, to them being confused with each other. *See, e.g. Jennings v. Lineberry*, 180 Va. 44 (1942). As the Court said in *Fones v. Fagan*, 214 Va. 87 (1973): "While the two theories [easement by necessity and by implication from preexisting use] are similar and both require a showing of necessity, they are analytically distinct."

> *the grantor's land*, since otherwise the land granted to him would be unapproachable and useless. (Italics in the original.)[13]

As in Lomax, there is nothing in Minor which explicitly limits the establishment of easements by necessity to parcels which became land-locked from the act of subdivision.

In *Keen v. Paragon Jewel Coal Corp.*, 203 Va. 175 (1961), an easement by necessity was established where a tract of land had been partitioned some 70 years earlier which created several land-locked parcels. The severance of title which created the necessity of land-locking did, in fact, result from the partition. However, the Court did not attach any significance to the fact that the dominant and servient estates were carved out of a previously undivided parcel, and that it was not a situation where the owner of several parcels, conveys one resulting in a land-locked parcel. As in *Smith*, the Court looked to Minor as authority, quoting him as follows:

> the most usual and important of these easements is the right of way by necessity, which arises by implied grant where one conveys to another land which is either entirely surrounded by the lands of the grantor, or else is bordered in part by the land of a stranger and in part by the lands of the grantor. In either case the grantee of the land, even in the absence of express stipulation, has a way by necessity over the grantor's land, since otherwise the land granted to him would be unapproachable and useless. The grantor cannot take advantage of the absence of stipulation thus to derogate from his own grant... [Since] it would be contrary to public policy to permit such tract to remain forever useless and unproductive, it will be assumed that the parties intended that the grantor should reserve a way by necessity over the lands conveyed...[14]

Neither *Davis* nor any other reported Virginia decision has explicitly held that easements by necessity are limited to situations where the land-locking of a parcel arises from the act of subdivision.

---

[13] Raleigh Colston Minor, I THE LAW OF REAL PROPERTY § 102 at p. 124 (1st Ed. 1908). The same comment can be found in the second edition (1928) by Frederick Deane Goodwin Ribble, §98 at pp. 132-33.

[14] MINOR ON REAL PROPERTY (Ribble Ed. 1928) § 98, p. 132.

VIRGINIA'S PUBLIC POLICY

As the Supreme made clear in *Palmer v. R.A. Yancey Lumber Corp.*, 294 Va. 140, 153 (2017) easements by necessity "are implied…by operation of law based on long-standing policy considerations under the common law. In *Keen*, we explained:

> A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. (Citations omitted.)

The Court continued, quoting with approval "4 POWELL ON REAL PROPERTY § 34.07(1) (Michael Wolf ed., 2017) ('These fictional implications of 'intent' are actually rooted in considerations of public policy.'); James W. Simonton, *Ways by Necessity*, 25 COL. L. REV. 571, 601 (1925) ('The so-called presumed intent is pure fiction; the easement [by necessity] arises by operation of law, and it arises because the courts are influenced by the social interests involved.')"

Consequently, the Court has made it clear that the basis of easements by necessity is public policy, not the presumed subjective intent of the parties to the transfer which renders a parcel land-locked. Virginia's strong policy in favor of rendering lands fit for occupancy or successful cultivation supports a more expansive reading of the grounds for recognizing easements by necessity. Baer's argument for a restrictive allowance of such easements is at odds with this policy. I am unable to divine a policy justification for limiting the establishment of easements to where a claimant can prove that the dominant and servient parcels were part of a single tract prior to the severance giving rise to the necessity of being afforded access to a public road. I find that Virginia's public policy supports the recognition of an easement by necessity across the Baer lot to provide access to the Eaton Lots.

THE SPLIT IN AMERICAN AUTHORITY

Among those states which have addressed this issue, there is a split in authority as to whether an easement by necessity can arise when an owner of several parcels conveys one resulting in the land-locking of a parcel. *See e.g., Koonce v. J.E. Brite Estate*, 663 S.W.2d 451 (Tex. 1984) ("To establish unity of ownership the claimant must prove prior to severance, his grantor owned the dominant and servient estate as a unit or single tract."); and *Hurlocker v. Medina,* 878 P.2d 348, 351 (N.M. 1994) ("... unity of title under New Mexico law does not require the dominant and servient estates be carved out of a previously undivided parcel.") The Restatement of Property adopts the view that the dominant and servient estates need not be carved out of a previously undivided parcel. RESTATEMENT (3rd) of PROPERTY: *Servitudes*, § 2.15, comment c. ("Servitudes by necessity arise only on severance of rights held in a unity of ownership. This severance can take place when a grantor, who owns several parcels, conveys one or more to others.")[15]

The authorities from outside Virginia are divided and do not provide clear support for Baer's argument that an easement by necessity can only be implied where prior to severance, the dominant and servient estates were owned as a unit or single tract.

NECESSITY THAT NO ALTERNATIVE ACCESS EXISTS

A lot owner cannot establish an easement by necessity across his neighbor's property if he has alternative access. *Middleton v. Johnston*, 221 Va. 797, 803 (1981) ("a way of necessity will not be established if there is another way of access"). "[T]he burden to prove lack of other means of ingress and egress rests upon the party seeking to establish a right of way by necessity..." and

[15] The Restatement (3rd) of Property: *Servitudes* was cited as authority in *Sainani v. Belmont Glen HOA*, 831 S.E.2d 662 (2019).

that lack "must be proven by clear and convincing evidence." *Middleton*, 221 Va. at 804. Baer asserts that the Eatons failed to establish that they lacked alternative access by clear and convincing evidence.

Title examiner Jeff Ball, who has examined land records in Loudoun County for 31 years and had examined hundreds of titles on Short Hill mountain where the subject parcels are located, testified as an expert witness. He said that he had conducted a title search of the Eaton Lots, the Baer lot, the Lowrey Frye subdivision and the other parcels surrounding the Eaton Lots, and had not found any express easements for the benefit of the Eaton Lots. Ball stated: "...in the course of the title examination I did not find access to the public road for these parcels [the Eaton Lots]." Transcript 5/5/15 pp. 85-94.

Mark Eaton, the owner of a lot contiguous to the Eaton and Baer lots, and, in fact, a former owner of the Eaton Lots,[16] testified that he had owned land in the area for about 20 years and that he was unaware of any access for the Eaton Lots. Transcript 5/5/15 p. 70. The plats offered into evidence show that the Eaton Lots do not abut a public road, and none revealed any access for the Eaton Lots to a public road.[17]

No evidence was offered in rebuttal by the defendant to show the existence of other access available to the Eaton Lots to a public road. Baer's counsel noted, however, that the lot belonging to Mark and Suzanne Eaton (PIN 441-35-7119) had been the subject of a suit concerning access from this lot to Route 690, which resulted in a consent decree[18] by which the parties acknowledged that the right of access was the product of a deed which had granted access for only this Mark and Suzanne Eaton lot, and not the Eaton Lots.

---

[16] He conveyed them to his children-- Timothy, Andrew and Julie—and their spouses.
[17] See Plaintiffs' Exhibits 2, 4, 11, 13 & 18, and Defendant's Exhibit 3.
[18] Defendant's Exhibit 2, Decree in Chancery # 14610.

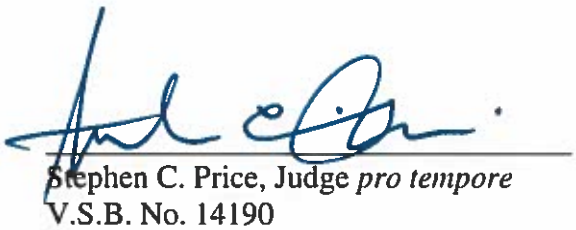
I find that the plaintiffs met their burden to prove by clear and convincing evidence that the Eaton Lots lack other access.

CONCLUSION

Having reconsidered the Court's prior rulings, I find them to be consistent with the law and the facts; wherefore it is ADJUDGED and DECREED that the Final Decree entered May 13, 2019, the finality of which was suspended by the Order entered May 30, 2019 granting reconsideration, be, and hereby is, confirmed as the ruling of the Court.

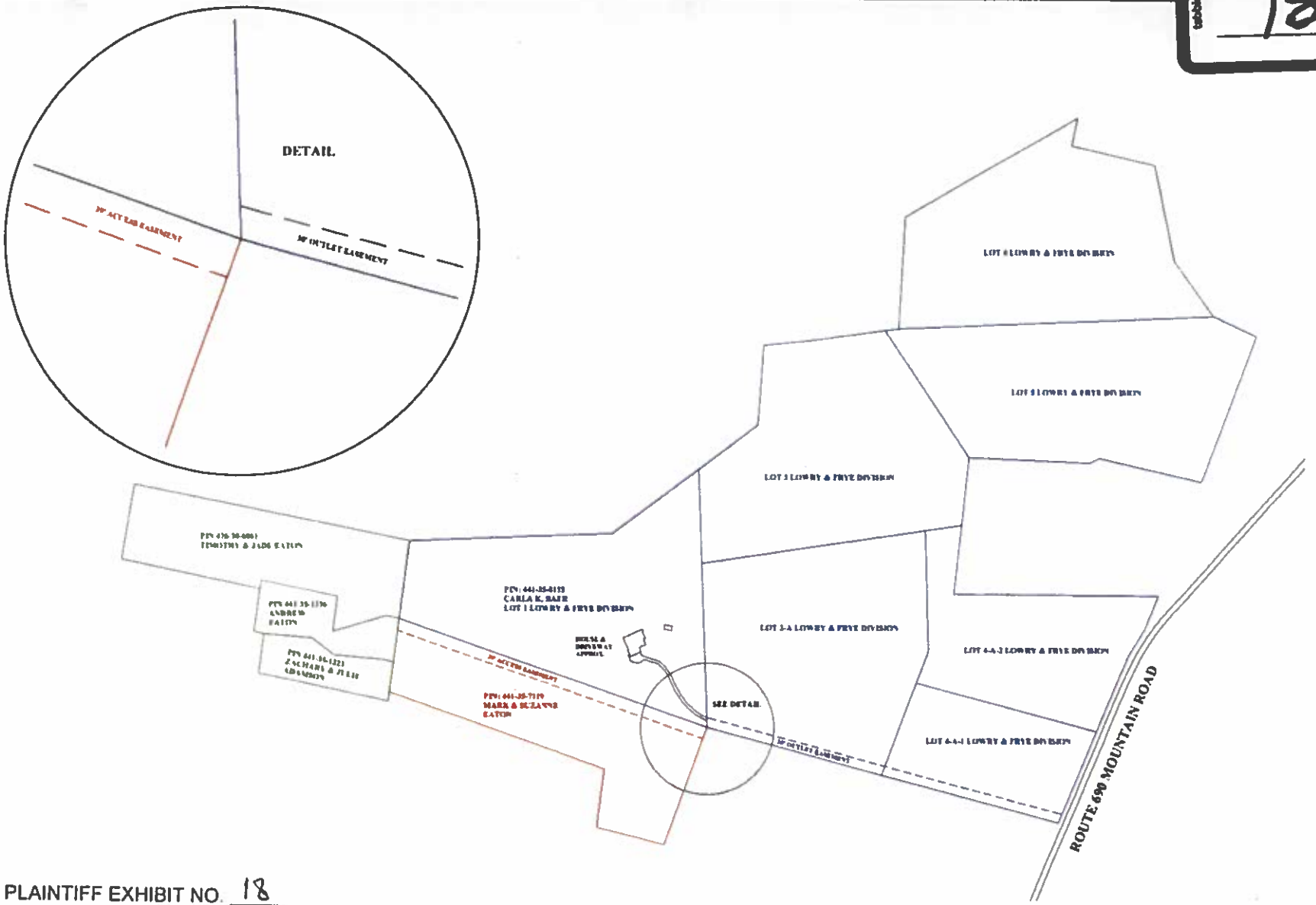
And this Decree is FINAL.

ENTERED this 2nd day of October, 2019:



Stephen C. Price, Judge *pro tempore*
V.S.B. No. 14190
McCANDLISH & LILLARD, P.C.
201 Loudoun Street, SE, Suite 201
Leesburg, Virginia 20175
Telephone: 703.934.1134
Facsimile: 703.737.0165
Email: sprice@mccandlishlawyers.com

EXHIBIT
18



PLAINTIFF EXHIBIT NO. 18
CASE NO. CL 82643
DATE 5/6/15
JUDGE'S INITIALS