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 ORDER

By a final order entered September 26, 2017, the Court vacated the easement by necessity across Carla Baer's parcel (PIN 441-35-8155), provisionally granted in an October 27, 2015 decree, because the plaintiffs failed to "establish that Loudoun County will allow the construction of a roadway within the easement" as required by the order entered March 17, 2016. This final order dismissed this cause with prejudice and the plaintiffs have moved the Court to reconsider its ruling.

In the recent case of *Palmer v. R. A. Yancey Lumber Corp.*, 2017 Va. Lexis 135, p. 13 the Supreme Court noted that the judicial implication of an easement by necessity is based on "sound public policy that lands should not be rendered unfit for occupancy or successful cultivation..." because of lack of access (citing *Keen v. Paragon Jewel Coal Co.*, 203 Va. 175, 178-179 (1961)). Despite such public policy, a chancellor, in administering equitable relief, cannot be blind to the fact that Ms Baer is an innocent party who bought her home without notice that an adjoining landowner would seek to establish an easement across her property.

A necessary element for the establishment of an easement by necessity is that such easement must be "reasonably necessary to the enjoyment of the dominant estate..." *Palmer*, note 11. The court went on to say that in "making the reasonable necessity determination..." a court must consider "the reasonable needs, present and future, of the dominant estate..." (Citations omitted.) *Palmer* p. 17.

In the instant case, the Eatons propose residential use of their three lots. Residential use requires that a roadway be constructed—a mere hiking path would be insufficient. The proposed easement is in very steep terrain and is subject to the stringent development regulations of Loudoun County's Mountainside Overlay District and Facility Standards Manual. Because the plaintiffs failed to establish that they could either comply with such regulations or obtain appropriate waivers, they did not establish that the county was likely to approve construction of a roadway to serve their three residential lots. Absent the likelihood of such approval, there is no "reasonable necessity" to imply a mere paper easement to encumber the Baer property. And without "reasonable necessity" a needed element to establish an easement by necessity is lacking. Moreover, the implication of a paper easement that encumbers the Baer property will not render the Eatons' lots fit for occupancy or successful cultivation.

The judicial establishment of an easement by necessity is an equitable remedy. "In the administration of remedies, an equity court is not bound by the strict rules of the common law, but adapts its relief and molds its decrees to satisfy the requirements of the case. Its purpose is the accomplishment of justice, and it will administer such relief as the exigencies of the case demand." First Nat'l Exchange Bank v. Hughson, 194 Va. 736, 753-754 (1953) (Buchanan, J. concurring.) (Citations omitted.) Under the facts of this case an easement by necessity should not be established.

Wherefore it is ORDERED that the Motion to Reconsider be, and hereby is, denied.

ENTERED this 27th day of September 2017

Stephen C. Price, Judge pro tempore