

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

Hampshire, ss.

Misc. Case No.

ELIZABETH C. WALDRON, PAUL A. MARDAS,)
STEPHEN B. HATHAWAY, MARIE HERSHKOWITZ,)
LAWRENCE R. TATRO, KAREN K. TATRO,)
EILEEN O'KANE and MARY NOW,)
Plaintiffs)

v.)

TOFINO ASSOCIATES, INC.,)
NORTHERN AVENUE HOMES, INC.,)
LIVING CITY PROPERTIES, INC., and)
AVETUS VANASSE a/k/a AVETUS G. VANASSE,)
and such other persons, if any, as may)
be the heirs of Avetus Vanasse, and)
such other persons, if any,)
unascertained, not in being, unknown,)
within or without the Commonwealth, or)
who cannot be served with process,)
their heirs or legal representatives or)
such persons as shall become their)
heirs, devisees or appointees,)
Defendants)

COMPLAINT

PARTIES

1. The plaintiff Elizabeth C. Waldron is a natural person residing at 176 North Street, Northampton, Massachusetts.

2. The plaintiff Paul A. Mardas is a natural person residing at 7 East Street, Northampton, Massachusetts.
3. The plaintiff Stephen B. Hathaway is a natural person residing at 32 Northern Avenue, Northampton, Massachusetts.
4. The plaintiff Marie Hershkowitz is a natural person residing at 32 Northern Avenue, Northampton, Massachusetts.
5. The plaintiff Lawrence R. Tatro is a natural person residing at 188 Bridge Street, Northampton, Massachusetts.
6. The plaintiff Karen K. Tatro is a natural person residing at 188 Bridge Street, Northampton, Massachusetts.
7. The plaintiff Eileen O'Kane is a natural person residing at 50 Northern Avenue, Northampton, Massachusetts.
8. The plaintiff Mary Now is a natural person residing at 186 North Street, Northampton, Massachusetts.
9. The defendant Tofino Associates, Inc. is a Massachusetts business corporation with a principal office located at 31 Campus Plaza Rd., Suite 3, Hadley, Massachusetts 01035 (hereinafter "Tofino").
10. The defendant Northern Avenue Homes, Inc. is a Massachusetts business corporation with a principal office located at 31 Campus Plaza Rd., Hadley, Massachusetts 01035 (hereinafter "Northern").

11. The defendant Living City Properties, Inc. is a Massachusetts business corporation with a principal office located at 150 Main Street, Suite 310, Northampton, Massachusetts 01035 (hereinafter "Living City").
12. The defendants Avetus Vanasse, also known as Avetus G. Vanasse, and other such persons who may be the heirs of said Avetus Vanasse are said Vanasse, his heirs, legal representatives, and successors whose names and whereabouts are unknown to the plaintiffs (hereinafter "Vanasse").

ALLEGATIONS OF FACT COMMON TO ALL CLAIMS FOR RELIEF

13. All references to deeds, plans or other documents of record refer to instruments recorded in the Hampshire County Registry of Deeds in Northampton, Massachusetts.
14. The plaintiff Elizabeth C. Waldron owns land in Northampton, Massachusetts, more particularly described in a deed from Elizabeth C. Waldron and Theresa J. Coffey to Elizabeth C. Waldron dated June 23, 1997, and recorded in, Book 5144, Page 63.
15. The plaintiff Paul A. Mardas owns land in Northampton, Massachusetts, more particularly described in a deed from Margaret B. Mardas to Paul A. Mardas dated August 10, 1994, and recorded in, Book 4533, Page 185.
16. The plaintiffs Stephen B. Hathaway and Marie Hershkowitz own land in Northampton, Massachusetts, more particularly

described in a deed from Roger Walaszek, Executor u/w Harriett M. French to Stephen B. Hathaway and Marie Hershkowitz dated October 15, 1987, and recorded in, Book 3074, Page 197.

17. The plaintiffs Lawrence R. Tatro and Karen K. Tatro own land in Northampton, Massachusetts, more particularly described in a deed from Robert F. Colby to Lawrence R. Tatro and Karen K. Tatro dated June 30, 1977, and recorded in, Book 1835, Page 156.
18. The plaintiff Eileen O'Kane owns land in Northampton, Massachusetts, more particularly described in a deed from David J. McCutcheon dated October 13, 2000, and recorded in, Book 6043, Page 305.
19. The plaintiff Mary Now owns land in Northampton, Massachusetts, more particularly described in a deed from Thomas M. Cavanaugh and Cynthia A. Cavanaugh dated October 7, 1980, and recorded in, Book 2189, Page 111.
20. The defendant Tofino claims to own land with buildings thereon in Northampton, Massachusetts, more particularly described in a deed from Agnes T. Moriarty and Mary Moriarty Moynihan to Tofino Associates, Inc. dated August 8, 2006, and recorded in Book 8829, Page 341, and shown on a plan of land in Plan Book 3, Page 101.

21. The defendant Northern claims to own land in Northampton, Massachusetts, more particularly described in a deed from McCutcheon Development, LLC to Northern Avenue Homes, Inc. dated September 7, 2005 and recorded in Book 8428, Page 219, and shown as Lots 22, 24, 26, 28, 30, 32, 47, 49, 51, 53, 57 and 59 on a plan of land in Plan Book 3, Page 16.
22. The defendant Living City owns land in Northampton, Massachusetts, more particularly described in a deed from Roland Lavallee and Gabrielle Lavallee to Living City Properties, Inc. dated July 6, 2007 and recorded in Book 9191, Page 300, and shown as Lot 12 and Lot 37 on a plan of land in Plan Book 3, Page 16.
23. Upon information and belief, the defendants Tofino and Northern have filed documentation with the Conservation Commission for the City of Northampton seeking a determination of issues relating to wetlands, vernal pools and other matters within the jurisdiction of the said Conservation Commission, in contemplation of a proposed 26 unit condominium project (hereinafter "the Project") on their respective parcels of land described herein.
24. Upon information and belief, the defendants Tofino, Northern, and Living City, or any combination thereof, intend to file and pursue an application pursuant to the Zoning Bylaw of the City of Northampton, Massachusetts

seeking a permit or permits to construct the Project on their respective parcels of land described herein.

25. The plaintiffs believe the defendant Living City is the alter ego of the defendants Tofino and Northern for purposes of the construction of the Project insofar as the land of Living City was acquired in whole or in part to afford potential alternate access to the land of the defendant Northern.
26. The defendant Vanasse appears as the owner of record in fee simple of certain land shown on a plan recorded in Plan Book 3, Page 16, said land abutting lots as shown thereon but not designated as a street or way on said plan. The defendants Tofino and Northern claim fee ownership or a right of way in the said land of Vanasse.
27. The defendant Vanasse neither conveyed title nor granted any easement or right of way to any persons as to said land.
28. The status of the title to the aforementioned land of Vanasse was the subject of a Final Judgment and Findings of Fact in the matter of Alan R. Kirouac, et al. v. Avetus Vanasse, et al., Hampshire County Probate Division, Docket No. 91E001G1, and recorded in Book 3716, Page 298.
29. No street or way was constructed on the land of the aforementioned land of Vanasse.

30. Any rights of way over, or benefitting, the aforementioned land of Vanasse have been abandoned.
31. The land of each one of the plaintiffs, with the exception of the plaintiff Mary Now, abuts the land of one or more of the defendants.
32. Preparation for construction or construction of the Project, in whole or in part, by the defendants Tofino, Northern and or Living City will adversely affect the rights of the plaintiffs.

ALLEGATIONS OF FACT AS TO INDIVIDUAL PLAINTIFFS

33. The plaintiffs Waldron, Mardas, Hathaway and Hershkowitz and their respective predecessors-in-title have each engaged in use of portions of the premises claimed by the defendants Northern and/or Vanasse adjacent to their respective parcels which has been open, notorious, actual, peaceable, hostile, exclusive, continuous and uninterrupted for twenty or more years.
34. The plaintiffs Lawrence R. Tatro and Karen K. Tatro and their respective predecessors-in-title have each engaged in use of portions of the premises claimed by the defendant Tofino, colloquially known as View Avenue, adjacent to their parcel which has been open, notorious, actual, peaceable, hostile, exclusive, continuous and uninterrupted for twenty or more years.

35. Any rights of way over the land of the plaintiffs Lawrence R. Tatro and Karen K. Tatro, or benefitting the land of Tofino, whether located on the portion of the premises colloquially known as View Avenue or elsewhere on the said premises have been abandoned.
36. The plaintiff Mary Now has engaged in use of portions of the premises claimed by the defendants Northern and/or Vanasse which has been open, notorious, actual, peaceable, hostile, exclusive, continuous and uninterrupted for twenty or more years.

FIRST CLAIM FOR RELIEF
DECLARATORY JUDGMENT

37. The plaintiffs reallege Paragraphs 1. through 36. of this Complaint as though fully set forth herein.
38. There exists between the parties to this action an actual justiciable controversy, within the jurisdiction of this court pursuant to the General Laws of Massachusetts, Chapter 231A, Section 1, and the General Laws of Massachusetts, Chapter 185, Section 1(a) concerning the matters alleged above in this Complaint.

SECOND CLAIM FOR RELIEF
EQUITABLE RELIEF

39. The plaintiffs reallege Paragraphs 1. through 38. of this Complaint as though fully set forth herein.

40. In addition to declaratory relief adjudicating the rights of the parties, the plaintiffs believe that it will be necessary for the court to grant equitable relief preventing the defendants, individually or in concert, or through their agents, from acting to interfere with the rights of any of the plaintiffs.

THIRD CLAIM FOR RELIEF

QUIET TITLE

41. The plaintiffs reallege Paragraphs 1. through 40. of this Complaint as though fully set forth herein.

42. The plaintiffs are the rightful, legal owners of the portions of the disputed premises abutting or adjoining their respective parcels and are in possession thereof.

43. The plaintiffs bring this action to quiet title to their respective premises.

FOURTH CLAIM FOR RELIEF

CLOUD ON TITLE

44. The plaintiffs reallege Paragraphs 1. through 43. of this Complaint as though fully set forth herein.

45. The existence of the claims of the defendants constitute clouds upon the plaintiffs' title to their premises and with the plaintiffs' ability to sell and/or refinance mortgages on their premises.

FIFTH CLAIM FOR RELIEF
PETITION TO ESTABLISH TITLE

46. The plaintiffs reallege Paragraphs 1. through 45. of this Complaint as though fully set forth herein.
47. The plaintiffs and their respective predecessors-in-title have each engaged in use of the disputed premises which has been open, notorious, actual, peaceable, hostile, exclusive, continuous and uninterrupted for twenty or more years.
48. The defendants had actual notice of the aforesaid use of the disputed premises, and took the disputed premises subject thereto.

SIXTH CLAIM FOR RELIEF
PRESCRIPTIVE EASEMENT

49. The plaintiffs reallege Paragraphs 1. through 48. of this Complaint as though fully set forth herein.
50. Even if one or more of the plaintiffs do not have title to the disputed premises by deed and/or adverse possession (which all do) each has by virtue of their and their predecessor's open, notorious, actual, peaceable, hostile, exclusive, continuous and uninterrupted use for twenty or more years, acquired a prescriptive easement over land claimed by the defendants, and because of said notice the said defendants took their respective parcels subject thereto.

SEVENTH CLAIM FOR RELIEF
TRESPASS

51. The plaintiffs reallege Paragraphs 1. through 50. of this Complaint as though fully set forth herein.

52. The plaintiffs allege that the defendants Tofino and/or Northern have, without lawful authority, entered upon the premises of each of the plaintiffs.

WHEREFORE the plaintiffs pray that the court:

- a. Adjudicate and declare the rights of the parties;
- b. Grant a temporary restraining order, preliminary injunction and a permanent injunction prohibiting the defendants, individually or in concert, or through their agents, from acting to interfere with the rights of any of the plaintiffs.
- c. Declare that no right of way exists in favor of the defendants, or alternatively, that any right of way has been abandoned;
- d. Declare that the use of any right of way (which there are none) by the defendants in connection with the Project would overburden said right of way;
- e. Grant such other and further declaratory relief as the court deems just; and
- f. Award the plaintiffs costs of this action.

Respectfully submitted,
the plaintiffs,
by their attorney,

Dated:

Brad A. Shimel BBO#544109
Wilhelm, Shimel & King
74 King Street
Northampton, Massachusetts 01060
413-586-3480