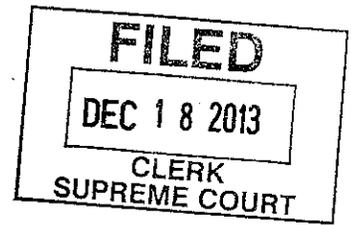


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2012-SC-00716-D  
(2009-CA-001263)



SHEILA T. KIRCHEIMER  
THOMAS KIRCHEIMER  
RACHEL S. CUPP  
JIMMY R. CUPP  
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T. ALAN CLAYPOOL  
RALPH PENDY GRAFT  
R. MICHAEL TEMPE  
SHEILA J. TEMPE  
ALLEN W. AMSTUTZ  
BEVERLY J. AMSTUTZ

APPELLANTS

V.

BRIEF FOR APPELLEES

REGINA S. CARRIER  
CARL WAYNE CARRIER

APPELLEES

---

APPEAL FROM KENTUCKY COURT OF APPEALS  
CASE NO. 2009-CA-002163

---

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The undersigned certifies a copy of this Brief for Appellees has been mailed U.S. postage prepaid on this 17 day of December, 2013 to: Hon. Donald W. Cottrell, 30 Public Square, Leitchfield, KY 42754, Attorney for Apellants; Hon. Robert A. Miller, Chief Circuit Court Judge, Meade County Courthouse, 516 Hillcrest Drive, P.O. Box 245, Brandenburg, KY 40108; Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Ky 40601.

And I further certify the Record on Appeal has not been withdrawn by the undersigned from the Breckinrdige Circuit Court Clerk.

A handwritten signature in black ink, appearing to read "Rachel T. Caudel", written over a horizontal line.

John E. Spainhour  
Rachel T. Caudel  
Attorney for Appellees

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**MAY IT PLEASE THE COURT:**

**INTRODUCTION**

This is a Declaratory Judgment case in which the Carriers (Appellees) appealed from a Circuit Court Judgment declaring Sandy Beach Lane to be for the sole use and benefit of lot owners of Sandy Beach subdivision, their heirs, successors, assignees, licensees and guests and that the Carriers, have no right in a turn around cul da sac or right of access to Sandy Beach Road across a nominal one foot strip of land previously retained and owned by the Carriers. The Kentucky Court of Appeals reversed the Circuit Court and classified Sandy Beach Lane as a public roadway.

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellees desire oral argument and believe argument would be helpful to the Court in deciding issues presented. This case involves multiple parties, complex facts, issues common to some parties and not to others, and interpretation of multiple documents.

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## COUNTER STATEMENT OF THE CASE

Appellants, Sheila T. Kircheimer, Thomas Kircheimer, Rachel S. Cupp, Jimmy R. Cupp, Jack Smith, Rebecca R. Smith, Michelle Amstutz, Ann E. Clark, Cecil M. Taylor, Carla S. Love, Danny S. Neely, Evelyn S. Neely, Michael J. Michalak, Penny M. Michalak, T. Alan Claypool, Ralph Pandy Graft, R. Michael Tempe, Sheila J. Tempe, Allen W. Amstutz, Beverly J. Amstutz were owners of real property located in Sandy Beach Subdivision in Breckinridge County, Kentucky. They filed a Complaint for Declaration of Rights against the Appellees, Carl Wayne Carrier and Regina S. Carrier, who were both developers and land owners in Sandy Beach Subdivision; and against adjoining real property owners in subdivisions referenced in the O'Donoghue property, i.e. Taylor's Landing and Sandy Beach II Subdivision. Appellants sought a declaration that Sandy Beach Lane existed solely for the use and benefit of the Appellants and other land owners in Sandy Beach.

They further asserted that the nominal retention of a one foot strip between Sandy Beach Lane in Sandy Beach Subdivision did not permit owners of adjoining properties to access Sandy Beach Lane, or install driveways or culverts. Appellants contended that owners of property in the O'Donoghue property, Taylor's Landing and Sandy Beach II were prohibited from doing so. (Complaint, R., p. 5-12)

Appellees were the successor owners and developers of Sandy Beach, having purchased unsold lots from Sandy Beach, Inc., and having filed amended and supplemented restrictions and revised subdivision plats. (R., p. 289-291; 285-288) The Appellees maintain they acquired the one foot strip of land when they purchased the land

from the original owners and developers.

James F. O'Donoghue owned land adjoining a tract owned by Daniel O'Donoghue. James O'Donoghue then sold his land to Charles L. Martin and Friedell Hinton, who then brought in Barbara Hinton. The Hintons and the Martins were the original owners of Sandy Beach and recorded a Plat and Restrictions. The Plat contains a statement that:

“developer retains a one-foot strip of land between existing road and the James F. O'Donoghue and Danny O'Donoghue property.” (Appendix D)

Paragraph 17 of the original restrictions contained the language that stated:

“in the event that a government body assumes the responsibility for the maintenance of said road and utilities, the assessment will be terminated and all property owners shall grant such government body a 40 foot easement; however, said easement shall not infringe on the 1.0 foot strip of land between the roadway and the property of James O'Donoghue which, strip is reserved by developer.” (Appendix B)

However, such language was omitted from the Amended Restrictions, § 17.

(Appendix C)

The Hintons and Martins ultimately assigned their property to Sandy Beach, Inc., after having sold some of the lots in Sandy Beach Subdivision.

In 2002, Sandy Beach, Inc., sold the remaining interest in Sandy Beach Subdivision to the Carriers 3 who filed an Amended Deed of Declaration and Restrictions. That declaration contained the same provisions against infringement but added the right to assign the use of the one foot strip, by adding the words “or his assignee” to the Amended Restrictions. Later, the Carriers acquired property, consisting of part of the land owned by O'Donoghue's heirs and additional adjacent property subsequently

identified as Taylor's Landing. Carriers also recorded a Plat for Sandy Beach II that is a completely separate property from Sandy Beach.<sup>4</sup>

This matter came on for trial before the Breckinridge Circuit Court on May 11, 2009 to hear the claims relating to the motion and petition by Plaintiff for Declaratory Judgment. The parties, by agreement, referenced the deeds and attachments that have been filed in the record in support of the prior Motion for Declaratory Judgment. See Exhibits 1 through 12 (R., p. 351-396; 397- 449):

At trial, testimony was presented that Danny O'Donoghue (09:20)<sup>6</sup> was the owner of property adjacent to Sandy Beach, part of which was sold later to Defendant Carrier. He was the successor to ownership that once held common title to the entire area, including Sandy Beach. That property is later described in the evidence as the Taylors Landing and Sandy Beach II tracts. During O'Donoghue's ownership, he built, or at least provided for, some alternative access to his property as developed to other public thoroughfares, because the original developer of Sandy Beach (Don Martin) would not let O'Donoghue tie on to Sandy Beach Lane.

At the time of his alleged oral statements concerning the nature of the strip of land, Friedell Hinton (9:30) claims to be an original developer and he does appear as a predecessor owner to Sandy Beach, Inc., Carrier is grantor. He owned a single lot, which he sold to Appellants Sheila Kirchheimer and Thomas E. Kirchheimer. (See Deed, Lot 60, Declaratory Judgment Motion, R., p. 165). His objectionable oral assertions and testimony that there would never be land developed adjacent to Sandy Beach were not made by an owner of the development, but rather the owner of a single lot who was trying to sell it to Ms. Kirchheimer.

Plaintiff, Mike Tempe (09:48) testified and says he “understood” there was a strip of land between Sandy Beach Road and other property that kept others from tying on to Sandy Beach Lane. He also testified that he had lived on the property since 1990. He affirmed that individuals other than property owners had used Sandy Beach Lane to access Sandy Beach and had been doing so since he had lived there and continued to do so until he left and sold his property after this suit was filed. He was and remains a party. Mr. Tempe never told anyone that they could not use the road, and he knew of no efforts to prohibit public use of the road to access Sandy Beach.

Ms. Kirchheimer testified for Appellants, relating her reliance on Mr. Hinton (10:11).

The defense then offered a number of witnesses concerning the use of Sandy Beach Lane as a thoroughfare to come and go to Sandy Beach.

John Kenny stated he had used the road, without permissions, since 1988 or 1989 (10:31)

The Defendants Carrier also called Kim Jones, a present owner in Sandy Beach, to describe to her use of the road to go to Sandy Beach prior to her ownership (10:41). A number of other people testified they frequently used Sandy Beach Lane to travel to and from Sandy Beach without interruption whenever they desired. Those witnesses are: John Kenny (11:05), William Hart (11:18), Chester Melton (11:30), Matt Kirk (11:38).

Defendant Carrier then presented the testimony of Larry Johnson (11:48) who testified concerning his assistance in identifying the roadway, the properties and the result of his research. Surveyor Johnson also testified to his free and unencumbered use of the road, both for his private use and professionally. He identified a roadway map that

shows and depicts Sandy Beach Lane as part of the roadway system in Breckinridge County from the records of the Kentucky Transportation Cabinet.

Wayne Carrier (01:18 and 03:00), testified that he first acquired ownership in Sandy Beach before he became the developer. His personal home was burned down as a result of arson. That action prompted him to attempt to close Sandy Beach to public traffic while he was still a lot owner. His attempts to do so were unsuccessful, having been opposed by subdivision co-owners and some Appellants. It was only after that event that Mr. Carrier acquired a number of lots in Sandy Beach (See Deed Book 281, Page 96, March 20, 2002). He caused to be prepared and filed a revised plat of Sandy Beach. He filed restated restrictive covenants and agreements that essentially mirrored the original ones prepared by Martin.

The Carriers expended approximately \$85,000.00 on improvements to the roadway. They also later acquired portions of the O'Donoghue property that adjoined the Sandy Beach Subdivision tract, being separated from Sandy Beach Lane by a strip of land. They conveyed properties to others of the named Defendants.

Six of the parcels that Defendant Carrier purchased from Sandy Beach, Inc., are clearly not numbered lots of the Sandy Beach Subdivision. However, the only access to these parcels is by Sandy Beach Lane. Among those are the Vandersyde tract. Those tracts use the roadway, even though they are not platted lots. They touch the road even

though they do not have numbers and have use of the road. They are not separated from the road by the strip.

The O'Donoghue family originally sold property that was to become Sandy Beach to the Martins. They kept a 75 foot lake access and the Sandy Beach 75 foot

public access that borders the end of Sandy Beach Lane. (R., p. 339) Both of those accesses are clearly shown on both the plat and the revised plat. (R., p. 396) In addition, Lots 22 and 23 were clearly dedicated for multiple residential or commercial use as originally contemplated in the development (See Deed of Declaration of Restrictions, Deed Book 202, page 71, prepared by Sam Monarch, attorney, referencing paragraph 16, "Lots 22 and 23 may be used by developers for commercial and/or multi-family purposes".) The unnumbered lot between lot 22 and 21 shown on the plat contains the two 75 foot passways for public access and for private access to Sandy Beach.

The O'Donoghue's originally reserved the right to traverse Sandy Beach Lane to themselves, reserving the two strips, one public and one private, at the end of the road for access to Sandy Beach. Such obvious written indication of two separate strips in writing contemplated expanded use of Sandy Beach Lane in the future. The original developers clearly retained a one foot wide strip of land between the existing road and the O'Donoghue property (See original restrictions, paragraph 17). Nothing in the restrictive covenant makes a grant or conveyance of that strip of land to the Homeowners Association or to others.

The conveyance to Mr. Carrier by express terms is an unencumbered fee simple general warranty title to the strip of land, excepting only encumbrances and restrictions of record. Those original restrictions contain provisions (at paragraph 15), after 75% of the lots were sold, that allow a committee of three owners to form a Lot Owners Association which could arrange for the maintenance of roads, enforce or change restrictions and relieve the developer of all responsibility. Nowhere do the restrictions confer dominion over the strip or ownership of the road to the Association.

Mr. Carrier indicated that he was never notified of nor invited to the meetings at which this putative action was proposed or undertaken. Mr. Carrier indicated that he had never noticed the property was gated and never saw evidence of a sign posted on Sandy Beach that it was a private road. Even understanding that there was some evidence of such, there was no evidence that the sign was posted prior to the suit being filed<sup>11</sup>. It does not appear that any of the Appellants, from the deeds evidenced, purchased from Mr. Carrier but rather bought from Sandy Beach, Inc., or by resale to others that purchased from Sandy Beach, Inc<sup>12</sup>. It is only when Mr. Carrier acquired the common ownership of properties from O'Donoghue that front his strip, which in turn fronts the road, that an issue arose. Carrier, believing the usage is a public passway (especially given his prior attempts to close it unsuccessfully), logically asserts and now maintains the right to grant access to Sandy Beach Lane, across his strip of retained ownership. Carrier asserts that the use of the road is public and that his ownership of the strip gives him control over who can access and who can not access the public thoroughfare. He asserts that a Homeowners group assuming the maintenance of the roadway does not change the ownership or use of the road. He also asserts that having spent \$85,000.00 to improve and upgrade the roadway, he should not be estopped from gaining the benefit of his expenditure by a marginal increase in the usage by others<sup>13</sup>.

Mr. Carrier understood that the purpose of the strip maintained by the Martins was done to prohibit undesirable development next to Sandy Beach and to keep O'Donoghue out unless he paid for the use of the road. At the time, neither the Martin property nor the remainder of the O'Donoghue property was in any way developed. The strip was maintained as a buffer against undesirable adjacent development. It was not

maintained as a buffer against any future development at all. The ownership and maintenance of the strip was never relinquished to the Homeowners Association and remains vested in the Carriers to this day.

Regina Carrier testified concerning her use and the expenditure of over \$85,000.00 in the maintenance and upkeep of the roadway by Mr. and Mrs. Carrier.

After hearing, the Court issued findings and rulings:

- that Sandy Beach Lane is reserved to the lot owners on Sandy Beach and their successors and invitees
- that O'Donoghue heirs may access Rough River on the reserved area of the Plat (but not assign it to others). R. p, 625)
- no access is permitted other Defendants over the 1 foot strip with Defendants enjoined from such use. R.p, 625)

In so doing, the Court described the record chain of title and documents. (R., p. 604-627)<sup>14</sup> The Court places great import on the oral interpretative testimony of Friedell Hinton about the 1 foot strip (R., p. 613-614) noting that Donald Martin was available but not called.<sup>15</sup>

The Court characterized Mr Carrier's prior attempts to block use of the road by

others and gate the road as contradictory to the claim of public use.<sup>16</sup>

This appeal followed. (R., p. 630-632)

The Court, in its trial order overruling Motion for Declaratory Judgment, felt compelled to conduct an evidentiary hearing on the construction of deeds, plats and restrictions relating to Sandy Beach Subdivision, and relied on the cases of Belcher v. Elliott, 312 F.2d 245 (CA 6, 1962) and Delph v. Daily, 444 S.W.2d 738 (Ky 1969).<sup>5</sup> (R.,

p. 295)

In addition to the concerns evidenced by the Court in its trial order relating to the construction of deeds, plats and restrictions for Sandy Beach Lane, the Carriers, and other Defendant Appellees assert the public usage of Sandy Beach Lane by prescriptive right. They also assert initial public use of Sandy Beach Drive and the fact that the use by others over time is congruent with an interpretation and construction of the deeds, plats and restrictions as creating public usage. Carriers assert that the balancing of equities, including Defendants Carrier's expenditure of almost \$85,000.00 on the roadway improvement, allows to them the right to minimally expand the usage and burden of the easement regardless of whether it is public or private.

**I. SANDY BEACH LANE WAS DEDICATED AS A PUBLIC ROAD THROUGH  
DEDICATION BY ESTOPPEL, WHICH CONTROLS**

Appellants contend that McBrayer v. Davis, 307 S.W.2d 14 (Ky. 1957), which holds that an easement cannot be enlarged to include property not a part of the original tract, thereby increasing the burden on the dominant tenement, without the consent of the parties affected controls and as such spend a substantial portion of their brief discussing whether allowing the adjoining property owners to install additional driveways on Sandy Beach Lane creates an impermissible burden. However, McBrayer was concerned with the extension of a private easement and an increased burden on a private roadway. *See Id.* at 14, 16. In fact, the Court specifically held that it confined its review "to the rights of the owner of the dominant tenement in the **private** roadway in dispute." *Id.* at 16 (*emphasis added*).

In the case at hand, the roadway in dispute has been clearly dedicated to public

use by the recording of the plat without an express statement reserving the roadway as private. As the Court of Appeals correctly stated in its opinion, the established law in this state as to whether a roadway is dedicated as public or private is that “streets, roads, alleys, parks and other open spaces appearing on a plat of subdivided land are considered to be offered for public use absent an **express intent** to the contrary appears on the plat or other recorded instrument.” Opinion, Pg. 9, emphasis added. This is the law that was established in 1931 by City of Middlesboro v. Kentucky Utilities Co. when the Court held:

“Where the owner of real property makes a plat of it ... he thereby dedicates the streets and alleys to the use of the public, unless it appears ... by **express statement** in the conveyance ... that the mention of the street was solely for purposes of description and not as a dedication thereof.”

City of Middlesboro v. Kentucky Utilities Co., 35 S.W.2d 877 (Ky.App. 1931)

(*Emphasis added*). This decision was affirmed and restated twenty-years later in Louisville & N.R. Co. v. City of Owensboro, 238 S.W.2d 148 (Ky. 1951) when the Court of Appeals held:

“the principle is also well settled that where the owner of land lays the same out into building lots, streets, and alleys, and exhibits a map of it, which defines the lots, streets, and alleys, though the streets and alleys are not yet actually opened, and sells the lots as bounded by such streets or alleys, this is an immediate dedication of such street or alley to the use of the purchaser and to the public.”  
Id. at 152.

It is clear that Sandy Beach Lane was effectively dedicated as a public roadway. The subdivision was platted and recorded. There is no express statement reserving Sandy Beach Lane as private. As such, there is no issue of an increased burden on a private roadway as there was in McBrayer. There is only a public roadway at issue. Whatever

rules this Court set forth in McBrayer and the cases that follow regarding increasing the burden on private easements and private roadways have no applicability to the public roadway in the case at hand.

Moreover, even if McBrayer did control, the burden on the roadway initially considered by the developers is not increased by the tying in of driveways from the adjacent single family lots, as the original developers intended that Lots 22 and 23, to which ingress and egress were by Sandy Beach Lane be developed for commercial and / or multi-family purposes, Deed of Declaration of Restrictions, paragraph 16, filed as "Exhibit B" is attached hereto.

Appellants also rely on Sawyers v. Beller, 384 S.W.3d 107 (Ky. 2012) to contend that the Carriers cannot increase the use of Sandy Beach Lane. Appellants' reliance on Sawyers is similarly misguided. Sawyers is concerned with a private easement expressly granted by deed. There is no such easement in this case. As Appellants admit, an easement "is created by a written grant with the formalities of a deed." Id. at 111. There is no such written grant to the lot owners in Sandy Beach subdivision. Rather, Sandy Beach lane is merely identified and referenced on the plat for Sandy Beach Subdivision. As such, the lot owners have not been granted an easement. On the contrary, the recording constitutes a dedication of Sandy Beach Lane for public use. City of Middlesboro v. Kentucky Utilities Co., *supra*.

Because McBrayer and Sawyers are clearly distinguishable and do not control, the increased burden on Sandy Beach Lane is immaterial. Sandy Beach Lane is a public roadway, dedicated by estoppel, and as such, Appellants cannot prohibit additional driveways and tie-ins.

## II. IMPLIED INTENT DOES NOT CONTROL OVER DEDICATION BY ESTOPPEL

The law of this Commonwealth on the dedication of is that where land has been platted and recorded, the streets and alleys thereon are dedicated to the use of the public, unless it appears by **express statement** that the mention of the street was solely for purposes of description and not as a dedication of the same. City of Middlesboro v. Kentucky Utilities Co., *supra*. Any sort of implication of intent to dedicate the roadway as private is of no consequence. Intent must be shown through an express statement in plat or other recorded instrument in order to overcome dedication by estoppel. In this case there simply is no express statement of intent to restrict the roadway to private use in the plat, the Deed of Restrictions, or any instrument.

However, even if one accepts Appellants' argument that the implied intent of the developer controls over his failure to expressly reserve the roadway as public as required by law, such intent is not present in this case either by the original developers or the parties.

The original developers intended that Lots 22 and 23, to which ingress and egress were by Sandy Beach Lane be developed for commercial and / or multi-family purposes, Deed of Declaration of Restrictions, paragraph 16, filed as "Exhibit B" is attached hereto. It does not follow that two of the lots be developed for commercial or business use, but the roadway to access those lots be private. This is contradictory to the very nature of commercial development.

Appellants rely on provisions in the Deed of Restrictions and the testimony of witnesses to show that the developers and property owners intend for the roadway to be private. Appellants contend that paragraph 17 imposing a maintenance fee and discussing

easement procedure in the event the government took over maintenance and Friedell Hinton's testimony that he collected a road fee from lot owners are indicative of intent that the roadway be private. This simply does not follow. Merely making a road public does not obligate the government to maintain it. Maintenance may be undertaken by acceptance by the county into the county road system after certain requirements are met. KRS 178.080. Absent such acceptance, some provision for upkeep is entirely appropriate and necessary and does not imply the road is private. In fact, the restrictions as written expressly contemplate acceptance of the road by the county and the elimination of the road maintenance fee. If anything, the restrictions, as worded, imply public use.

**III. ROADWAYS MAY BE DEDICATED TO PUBLIC USE IN A NUMBER OF WAYS,  
NOT SOLELY THROUGH PRESCRIPTION**

Appellants cite Nash v. Campbell County Fiscal Court, 345 S.W.3d 811 (Ky. 2011) and argue that Sandy Beach Lane must be dedicated by prescription in order to be dedicated to public use. Appellants have clearly overlooked the substantial portion of the Nash opinion in which the Court discusses the numerous ways to dedicate a roadway to public use. The Court specifically stated that dedication may be accomplished in a number of ways. *Id.* at 819. In enumerating those ways, the Court acknowledged that the majority of "public streets and alleys in [existing] cities have been created by dedication in the platting and development of various city subdivisions." *Id.* The Court then went on to state "A private land owner may also be presume to have made a dedication of land for public way. This is creating a public highway by prescription. The theory behind a dedication by prescription holds that the long continued use of a highway by the general public rests upon a presumption of a lost grant, arising from the continuous adverse use

of land (with the same elements of adverse possession).” Id.

Rather than this Court opting not to expand the law to dedication by estoppel involving plat as Appellants argue, this Court expressly acknowledged that dedication by estoppel involving plat was in fact one of the most common methods of dedication. There is nothing in this Court’s statement that dedication may also occur by prescription to suggest that dedication to public use must occur through prescription.

### **III. DEDICATION BY ESTOPPEL DOES NOT CREATE AN UNCONSTITUTIONAL TAKING**

Appellants contend that dedication by estoppel constitutes a taking in violation of due process .This is simply not the case. It is axiomatic that property cannot be taken without due process of law. U.S. Const. amend. XIV. However, due process is simply not implicated here because there is no taking. As Appellants correctly state in their brief a “taking is generally defined as the entering upon private property and devoting it to the public use.” Martin v. Commonwealth, 199 S.W.3d 195 (Ky.App. 2006).

Dedication by estoppel causes no taking. There can be no dedication of the roadway to public use without some volitional act on the part of the owner or developer of the land. Before a roadway can be dedicated to public use, the owner or developer must take the action of recording the plat and has full control and choice over whether or not to reserve the roadway as public. If the developer records the plat with an express reservation that the roadway is to be private, no public dedication will occur.

This is not a situation where the government or the public at large swoops in and claims a piece of land belonging to a private individual or corporation. It is simply a framework by which developers and owners can opt to dedicate their roadways to public use or retain them privately. There is no taking. There is only the schematic for retaining

or dedicating one's property. Due process is simply not implicated.

**CONCLUSION**

As the law in this Commonwealth is clearly established that platting a parcel of land including a roadway without an express statement reserving that roadway as private constitutes a dedication by estoppel, such dedication occurred and there being no express reservation, no implication of intent to reserve the property as private and no unconstitutional taking, the decision of the court of appeals must be affirmed.

Respectfully submitted,  
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