

8-25-10 15 Medway Closing

---[ P 1 ]---

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT	SUFFOLK, SS	LAND COURT
COURT		OF THE TRIAL
		MISC. CASE
NO.:	364237	

\* \* \* \* \*

J.

)  
 15 MEDWAY STREET, LLC, )  
 Plaintiff )  
 )  
 vs. )  
 )  
 OAKTREE SLR, LLC, )  
 Defendant )  
 )  
 \* \* \* \* \*

Before: PIPER,

CLOSING ARGUMENT

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Wednesday, August 25, 2010  
 Courtroom 3  
 226 Causeway Street  
 Boston, Massachusetts 02114

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---[ P 2]---

APPEARANCES:

KENNETH J. DeMOURA, ESQ.  
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(617) 502-8200  
Representing the Plaintiff

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Representing the Defendant

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---[ P 3 ]---

I N D E X

8 CLOSING ARGUMENT FOR PLAINTIFF

DEFENDANT CLOSING ARGUMENT FOR 14

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---[ P 4]---

1

PROCEEDINGS

2

(10:07 a.m.)

3

THE CLERK: Miscellaneous Case 364237,

4

15 Medway Street v. Oaktree SLR.

5

THE COURT: Good morning everyone.

6

MR. DeMOURA: Good morning.

7

MR. JOHNSON: Good morning.

8

THE COURT: I hope everybody's had a chance

9

to dry off. It's wild and woolly out there. It took

10

me an hour to let the moisture leave my clothing, so

11

I hope everybody is settled in.

12

We last were together in the trial of this

13

case about three months ago on the 24th of May. At

14

that point we concluded the taking of evidence, and I

15

deferred the rest of the trial to today so the

16

parties could, as they now have done, have a chance

17

to receive the transcript, reflect on it and make

18

written submissions to me which are intended to guide

19

me in the decision making I yet have to do in this

20

case.

21

Since that time we have received the

22

transcript. We have received your post-trial written

23

submissions, both in the form of memoranda and

24

proposed findings and rulings. I have been through

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---[ P 5]---

1 all of that carefully, and I now await argument by  
2 counsel.

3 Let me also note there is I think a motion  
4 in which was filed in which the court has not acted.  
5 Was there a -- you're aware of that, Mr. DeMoura?

6 MR. DeMOURA: I am aware of that motion,  
7 Your Honor.

8 THE COURT: And have you responded to it?

9 MR. DeMOURA: We have not responded,  
10 actually. I know we understand the arguments and  
11 objections that were made in respect to the motion to  
12 strike.

13 Our point in having those cases brought to  
14 the attention of the court for the request of the  
15 ruling were not to try to revisit the summary  
16 judgment issues that the court's already decided but  
17 rather to lay the burden squarely on the defendants  
18 here, which we think the law is regarding where this  
19 easement ought to be placed given that it's silent.

20 THE COURT: Mr. Johnson, do you want to  
21 address the motion or respond to what your Brother  
22 just said?

23 MR. JOHNSON: I'd be happy to, Your Honor,  
24 the purpose of filing the motion was that I believe

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---[ P 6]---

1 the findings and rulings requested by the plaintiff  
2 was clearly beyond the scope of what was left to be  
3 tried in this case.

4 This court's decision of September 17th,  
5 2009 stated the only issue left unresolved by the  
6 court's ruling on summary judgment is plaintiff's  
7 alternative plan to have the court localize to a  
8 confined area on lot 2 the parking egress easement.  
9 And I believe that the other issues had been dealt  
10 with on summary judgment, and I looked at the -- a  
11 number of the rulings filed by the plaintiff as an  
12 attempt to relitigate or reopen those issues, which I  
13 understood is certainly beyond the scope of what  
14 we're trying. And I felt to preserve the record, I  
15 needed to formally object to those request for  
16 rulings.

17 THE COURT: Just for the purpose of closure  
18 here, let me act on the motion. I'm going to deny  
19 the motion, but in doing so I rely on my ability to  
20 sort through the requests made by the plaintiff in  
21 its post-trial submissions for findings and rulings.  
22 Obviously anything requested is nothing more than  
23 that. It's a request to the court, and the court  
24 will exercise its independent judgment at arriving at

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---[ P 7]---

1 the decision it renders in the case. And I will do  
2 so.

3 And if I conclude, as I think certainly,  
4 given the colloquy we've just had, all conceived is  
5 likely to be the case, there are some requests which  
6 exceed that which was tried given the earlier summary  
7 judgment rulings, I will select accordingly in  
8 arriving at my findings of fact and rulings of law.  
9 So the motion is denied, but I will certainly pay  
10 close attention to that which I think is worthy of  
11 adoption and that which is not when I move through  
12 the findings which I've already digested in full.

13 That being behind us, then I think we're  
14 ready for argument. I will respect any arrangement  
15 counsel have arrived at regarding the order of  
16 argument. Normally, I would think the plaintiff  
17 would argue last, but if you have a treaty otherwise,  
18 we will follow that.

19 MR. DeMOURA: We haven't reached any  
20 agreement.

21 THE COURT: All right, then, I think  
22 it's...

23 MR. JOHNSON: I guess it's up to me.

24 THE COURT: I think it is, Mr. Johnson,

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---[ P 8]---

1 please.

2 MR. JOHNSON: Unless you'd like to start?

3 MR. DeMOURA: Be my guest.

4 MR. JOHNSON: Thank you.

5 CLOSING ARGUMENT FOR THE DEFENDANT

6 MR. JOHNSON: Your Honor, the court has  
7 already made a decision that the easement that  
8 benefits the defendant's property, being lot 1, is a  
9 valid easement. The question left to be tried is  
10 whether or not under the NPM line of cases the  
11 plaintiff has a right to localize or relocate the  
12 easement. Currently there is an easement whereby the  
13 defendant can park 40 cars on the plaintiff's  
14 property.

15 There -- the court's taken a view and there  
16 has been testimony that currently there exists two  
17 paved areas historically where the parking could take  
18 place. One is to the right of the current building  
19 on the Medway property, which is to the left of the  
20 defendant's property. The other is to the rear.  
21 That rear area has been changed by the plaintiff over  
22 time.

23 The plaintiff has the burden seeking a  
24 relocation to show that it does not significantly

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---[ P 9]---

1           lessen the utility of the easement, increase the  
2           burden on the owner of the easement for its enjoyment  
3           or frustrate the purpose for which the easement was  
4           created.

5                        The court, in looking at a request by the  
6           servient estate, is looking at the equitable  
7           principles involved as well.  Strecker v. Tavares  
8           case, which was decided by the Appeals Court on  
9           June 10th of 2010, makes it clear that the question  
10          of unclean hands is something the court can consider  
11          when looking at a relocation request.

12                       When you look at the two plans that are  
13          submitted -- and let me start at the outset by  
14          stating I believe the court can do a number of  
15          things, based upon the request by the plaintiff to  
16          relocate the easement.  The court can say that the  
17          plaintiff's suggested localization of the easement to  
18          something that's reasonable, something that we  
19          certainly do not believe is so, and I'll go into  
20          that.  The court can find the defendant's suggested  
21          area for relocation is reasonable and adopt that.  Or  
22          the court can simply state that the plaintiff has not  
23          met its burden of localizing the easement and  
24          therefore the general easement remains.

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---[ P 10]---

1                   In looking at what the plaintiff comes to  
2                   court and what the evidence which the plaintiff has  
3                   brought before this court is the attempt to relocate  
4                   an easement in probably the most unsafe location on  
5                   the plaintiff's property. The plaintiff is seeking  
6                   to have 17 parking spaces along Medway Street, a  
7                   public way which has sidewalks, and in effect  
8                   17 parking spaces would be accessing from Medway  
9                   Street into 17 individual parking spaces.

10                   No permitting has been sought by the  
11                   plaintiff. No suggestion as to how people can go in  
12                   a safe manner. No traffic report has been presented  
13                   or done by the plaintiff to indicate what the traffic  
14                   is like and whether or not there could be safe access  
15                   to those parking spaces.

16                   Clearly anybody parking, pulling off of  
17                   Medway Street into the individual parking spaces and  
18                   then going to the Oaktree property, would be walking  
19                   either in the street or through other parking spaces.  
20                   And it certainly is not the same character or safety  
21                   that I believe the plaintiff would have to show.  
22                   They only have a request for 23 parking spaces along  
23                   what would be the only access to the plaintiff's  
24                   condominium project on the property.

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---[ P 11]---

1           The evidence is that the access way would  
2           be 14 or 15 feet wide, keeping in mind that the  
3           testimony is that that access way would provide the  
4           only access to these 23 parking spaces, as well as  
5           for at least 30 vehicles that are going to access the  
6           new garage that the plaintiff plans to have to the  
7           rear of the property and that this would be 2-way  
8           traffic. So that each of the cars who might be  
9           parking in these 23 spaces would be backing up into a  
10          row of traffic. Again, the plaintiff has no traffic  
11          report to indicate any of this can be done safely.  
12          And I believe it is difficult to understand how  
13          23 cars can park, pull in, pull out on a 14- or  
14          15-wide aisle, which is also providing 2-way traffic.

15                 The plaintiff's proposed plan clearly  
16          frustrates the purpose of the easement. Now I have  
17          no doubt that the plaintiff is looking to localize  
18          these easements as part of the development plan on  
19          the property, but at the same time, the plaintiff's  
20          ability to relocate is not guided solely based upon  
21          what's needed for the plaintiff to develop the  
22          property. The plaintiff can develop the property,  
23          but at the same time cannot frustrate the purpose or  
24          interfere with the legitimate interests of the

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---[ P 12]---

1           easement holder, and in effect that's what the  
2           plaintiff is seeking to do.

3                       Further, the plaintiff's development plan  
4           for the property, quite frankly, I couldn't tell you  
5           what it is. The plaintiff is -- has submitted  
6           documents to the city of Boston indicating that  
7           buildings are going to be taken down, when the  
8           plaintiff testified under oath that he has absolutely  
9           no plan to take buildings down.

10                      The plaintiff testified that there's an  
11           alternative means of access to the rear of the parcel  
12           that doesn't go -- that doesn't need the 14- or  
13           15-foot-wide aisle to get to the rear, yet the  
14           plaintiff's own expert I believe testified that the  
15           only way to access the rear of the property was  
16           through an elevator, that the grade was such you  
17           couldn't access the rear of the property by going  
18           through a route that's to the right of the current  
19           building on the plaintiff's property, which is a  
20           paved area.

21                      The plaintiff comes before the court with  
22           contradictory evidence, with no evidence that any of  
23           this can be accomplished, either through permitting  
24           or safety. And I would suggest that the plaintiff

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---[ P 13]---

1 attempt to relocate easement in accordance with his  
2 plan is nothing more than an attempt to avoid the  
3 easement, to make it such that it is of no utility to  
4 Oaktree. You couldn't have a more unsafe location  
5 for parking on that site if you tried.

6 The plan submitted by Oaktree makes use of  
7 the areas that realistically can be used for safe  
8 parking. The first would be the paved area, the  
9 current paved area, which is to the left of the  
10 current Oaktree building or the right of the current  
11 Medway building, and parking spaces can be localized  
12 in that location.

13 The second area that it could be is to the  
14 rear of the building. Those are areas where if the  
15 plaintiff wanted to relocate there would be utility  
16 to the plaintiff -- utility to the defendant, and it  
17 would be safe access.

18 The alternative is that the court find that  
19 Oaktree has a right to park 40 cars wherever it can  
20 park on the site, that the plaintiff has not met its  
21 burden to bring forth an alternative parking in a  
22 localized area that meets the test of NPM.

23 And I would suggest that what the plaintiff  
24 is seeking to do in this case is to find an area that

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---[ P 14]---

1 is very unsafe so that it wouldn't be used. And at  
2 the same time, I couldn't tell what the plaintiff's  
3 real plans are for the property.

4 And I think that's a summary of what our  
5 position is and what we believe the evidence has  
6 shown. I'll certainly rely upon the brief that we  
7 filed and the findings that we have submitted to the  
8 court.

9 THE COURT: Thank you, Mr. Johnson.

10 Mr. DeMoura?

11 MR. DeMOURA: Good morning, Your Honor.

12 THE COURT: Good morning.

13 CLOSING ARGUMENT FOR THE PLAINTIFF

14 MR. DeMOURA: My apologies on behalf of  
15 Mr. Dunlap who was originally planning to be here  
16 today and do the closing argument, but he's actually  
17 trying his I believe first jury trial, so he could  
18 not be here.

19 We also believe most of the arguments we  
20 would make are included in the papers that we have  
21 filed with the court, so I will also try to be brief.  
22 But what we would want to emphasize, for purposes of  
23 this argument, is I think that the defendants missed  
24 the point in the sense that they keep referring to

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---[ P 15]---

1           this as a relocation of an easement. The fact of the  
2           matter is, the easement was never located in the  
3           first place. It's not as if there was a 40-car  
4           parking lot sitting at 15 Medway before my client  
5           bought the property. And now they're here asking the  
6           court to move the property -- the 40-car parking lot.

7                         Indeed, we originally thought that there  
8           was no valid easement. My client's testimony is he  
9           never saw anybody parking on there; he didn't even  
10          know about the easement until well after he had  
11          already begun construction on the redevelopment of  
12          the property and he received a letter from Oaktree's  
13          attorneys saying, "Hey, guess what, guys, before you  
14          go much further, there's an easement on the property  
15          for us to park 40 cars that you should know about."  
16          So there was never location on the property that  
17          Oaktree used to park 40 cars on; it simply wasn't  
18          there.

19                        So to use the standards of a relocation we  
20          believe would be misleading. And therefore, if we  
21          just look at this from the perspective of, "Where can  
22          we locate this parking," I believe if you look at the  
23          brief that was filed by the defendant in this case,  
24          they cite to NPM and they cite to a Restatement on

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---[ P 16]---

1 Property that says that the owner of the subservient  
2 estate has the first crack at locating where the  
3 easement should be and that they should do so in a  
4 reasonable period of time after the easement's  
5 created.

6 Now here, obviously we didn't -- our client  
7 did not own the property when the easement was first  
8 created. It doesn't appear as if anybody bothered to  
9 take any time to locate the easement, either on  
10 behalf of the subservient estate or on behalf of the  
11 defendants in the case. And the first time -- as  
12 soon as our client got information indicating that  
13 there was an easement, we did come into court, file a  
14 declaratory judgment action on the validity of the  
15 easement and request that the easement be located.  
16 So we have taken the steps that we believe were  
17 reasonable under the circumstances to exercise that  
18 first right of locating the easement. It's not a  
19 relocation. It's actually a location, and we are  
20 exercising that right to locate the easement. And we  
21 believe that we've taken appropriate steps to locate  
22 that easement reasonably, given what we understand to  
23 have been the use, the historical use, and the  
24 purpose for which the easement was created.

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---[ P 17]---

1           The easement -- the only testimony in this  
2           case regarding the purpose of the easement is the  
3           deposition testimony that's been submitted as an  
4           exhibit in the case, the 30(b)(6) deposition of  
5           Oaktree. And during that testimony it became very  
6           clear that the only purpose that the easement had was  
7           to permit the development of Oaktree's building on  
8           its property, that it wasn't for overflow parking or  
9           anything else. It was just done in order for them to  
10          get the permits they needed to do the development of  
11          their property, and I would -- I'm not going to read  
12          it, but the pages of the deposition testimony are  
13          pages 35 through 39. I will read one section on page  
14          39. "So it's your understanding that the creation of  
15          the easement was a condition for approval of the  
16          project?"

17                        "Yes."

18           So all this talk about, "Oh, yeah, we used  
19           this easement. We need it for when we have parties  
20           at the facility or for our staff to overflow," none  
21           of that was the purpose of the easement. The only  
22           evidence about what the purpose of this easement was  
23           for was to permit that building to get the permits  
24           that it needed -- for the owners of that building to

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---[ P 18]---

1 get the permits they needed in order to develop that  
2 property.

3 And so it has served the purpose. And  
4 locating the easement on any -- anywhere on the  
5 parcel would not frustrate the purpose of the  
6 easement.

7 And we also had no evidence from the  
8 defendants about the historical use of the easement,  
9 where they parked, why they parked, how often they  
10 parked. It appears the best they have is  
11 infrequently when they were having some sort of  
12 parties at the facility or other events, they might  
13 need it, might need a few spaces for the use of  
14 guests or staff when the lot on the defendant's  
15 property is full. And yet there's nobody testified,  
16 no building manager testified, "Here on the following  
17 dates we had overflow and we could have used that  
18 easement," or "We did use it, and here's where we  
19 parked the cars." No evidence like that at all. And  
20 you did hear testimony from my client that no one, as  
21 far as he knows since they've owned the property, has  
22 ever used the property or asked to use the property  
23 to park cars on.

24 So to the extent that there is any

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---[ P 19]---

1 historical use, it's very infrequent and no evidence  
2 as to where, how they used it.

3 To the extent that we are required to  
4 prove, based on the theory that this is a relocation  
5 as opposed to an initial location of the easement,  
6 that this relocation is reasonable, I believe that  
7 the plaintiff's -- we have sustained and met that  
8 burden.

9 And if the court looks at the factors that  
10 the defendants have proposed, namely, "Does this  
11 lessen the utility of the easement? Does our  
12 proposal lessen the utility of the easement?" Well,  
13 if we look at the purpose of the easement, which is  
14 to continue to allow them to have a permit to operate  
15 their property, no, it doesn't do that. Or if we  
16 look to the alternative purpose, which is to provide  
17 infrequent overflow parking on our property so that  
18 -- for their use, it doesn't frustrate that purpose  
19 either. They are going to have the ability to park  
20 on the property when they need to use it under our  
21 plan. So it does not lessen the utility of the  
22 easement. It doesn't -- I didn't hear any evidence  
23 it increases the burden on the defendants to use or  
24 enjoy the easement. They still can park cars.

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---[ P 20]---

1           Albeit in some cases maybe 20, 30 feet away from  
2           where they want to park them, but, nevertheless, they  
3           still can park cars on the property.

4                     Additionally there's been some talk or some  
5           argument that, you know, consider the fact that  
6           you're going to have 23 spaces in an area where  
7           there's also going to be a driveway going down into  
8           the back where we're going to have people parking,  
9           our tenants will be parking or the owners of the  
10          newly developed condominiums there parking, there's  
11          been no evidence that they've ever used all 40 cars  
12          -- they've had to park 40 cars on the property at  
13          once. So this notion or this picture of a major  
14          thoroughfare with cars parked on both sides, cars  
15          coming in and out at all times, is a little bit  
16          far-fetched. It's a residential development that  
17          they're going to be -- that my client wishes to  
18          develop. The cars will be coming in and out  
19          infrequently. It's not as if there's going to be a  
20          traffic jam on Medway Street with respect to these  
21          cars. And it's very unlikely, given what we heard in  
22          the testimony about the historical use of the  
23          easement, that the 17 spaces along Medway Street and  
24          all 23 spaces on the side of the property are all

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---[ P 21]---

1 going to be used at the same time.

2 And with respect to the frustration --  
3 whether or not the easement frustrates the purpose,  
4 again the only stated purpose was the permit and with  
5 respect to the overflow situation, don't see how it  
6 frustrates the purpose there, they still get to park.  
7 To the extent there's some concern that guests of  
8 residents of their property are going to be  
9 inconvenienced by having to walk a little bit further  
10 from where they would have parked if the overflow  
11 would be where they want it to be, my suggestion  
12 would be that they tell the staff to park in the  
13 spaces that are further away and have the guests park  
14 in their lot on the front of their building. And if  
15 not and if they have to use the spaces that are  
16 designated on our property, that the guests be  
17 allowed to use the ones that are closer to their  
18 property and building and that their staff park down  
19 in the spaces that are on the right-hand side of the  
20 building.

21 Essentially, Your Honor, we believe this  
22 comes down to what is reasonable, equitable, given  
23 the historical use or nonuse of the parcel for  
24 parking, given that the purpose of the easement, the

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---[ P 22]---

1           only stated purpose that the defendants have is  
2           because, "We needed to do that in order to get the  
3           permits to build our building," is it fair to hold up  
4           the subservient -- the owner of the subservient  
5           estate from developing and using that parcel as long  
6           as he continues to provide 40 parking spaces.

7                         With respect to the issues about safety, I  
8           didn't hear any evidence from any experts regarding  
9           that the property -- that the design of the property  
10          parking locale that we have proposed is unsafe.

11                        If you drive around the city of Boston,  
12          many buildings, commercial and otherwise, have  
13          parking along the front of the building, no issue of  
14          safety. There will be a sidewalk, so I don't know  
15          what Mr. Johnson was referring to when he said people  
16          are going to have to walk across parked cars. If you  
17          look at the design, the parking lot at the street  
18          will -- the parking lot is not on the street, it is  
19          on our property, so there will continue to be a  
20          sidewalk for pedestrians to walk there.

21                        Your Honor went and viewed the property,  
22          went and viewed the locale, the neighborhood; Medway  
23          Street is not a major thoroughfare. It's a  
24          residential area. Not a lot of traffic in that area.

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---[ P 23]---

1                   And you also heard testimony from  
2                   Mr. George testifying that in order to rent the  
3                   building that's on the property, most -- in fact all  
4                   of the tenants, as a condition of renting the  
5                   building, need the space that is up on the hill right  
6                   next to the building for parking for their employees  
7                   and their clients, or anybody that would be coming  
8                   into that building to use for their business. So  
9                   it's not practical to permit those parking spaces to  
10                  be used for the purpose of this easement.

11                  I did want to briefly touch, Your Honor, on  
12                  one of the prayers for relief that the defendants  
13                  have made in the case. In their proposed judgment,  
14                  they've requested that the court order my client to  
15                  pay for the construction and cost of developing the  
16                  40-car easement. And they say it right in the  
17                  proposed judgment, notwithstanding the language of  
18                  the easement that the court ought to order that.  
19                  That claim has never been brought by the defendants  
20                  in this case.

21                  Moreover, the reasoning behind that,  
22                  according to that proposed judgment, is because we --  
23                  my client did some development on the property that  
24                  took away spaces from them and that, therefore, we

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---[ P 24]---

1 ought to be ordered to pay for parking for them.

2 The fact is that while that development was  
3 going on, nobody on the defendant's side tried to  
4 stop the development and say, "Hey, you're  
5 interfering with our easement."

6 And I had one other point on that, let's  
7 see if I can find it...and there's nothing in the  
8 easement that requires us to pay for the construction  
9 and permitting of a parking lot. All it says is they  
10 have the right to park 40 cars there.

11 So to the extent that they're seeking that,  
12 they should have brought a claim for it. They  
13 haven't. And our defense would have been laches.  
14 They had an opportunity -- if we were doing that  
15 development and they saw us doing it, we were right  
16 next door, and they didn't do anything to stop us,  
17 they've given up the right to argue now that that's  
18 put them in a bad position and that we ought to pay  
19 to develop a parking lot for them.

20 I will refer the court to the other  
21 arguments we've made in our closing brief and request  
22 that judgment be entered on behalf of the plaintiff  
23 with respect to relocating -- or not relocating, with  
24 locating the easement on the property and locating it

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---[ P 25]---

1 in the place that was proposed in the exhibit that  
2 was entered by the plaintiffs as a reasonable place  
3 to locate the easement. Thank you.

4 THE COURT: Thank you, Mr. DeMoura.

5 MR. JOHNSON: Can I briefly respond or --

6 THE COURT: I'm not sure you need to.

7 MR. JOHNSON: Okay, then I'll --

8 THE COURT: What I'm going to do now is  
9 take a short recess and then I'll return to the  
10 bench.

11 MR. JOHNSON: Thank you.

12 (Court recessed at 10:37 a.m.)

13 (Court reconvened at 11:21 a.m.)

14 THE COURT: Let me begin by thanking  
15 counsel for the arguments you just delivered. And  
16 I'm going to thank you, as well, for the patience  
17 you've exhibited in waiting for my return to the  
18 bench. The time I spent away from you was time spent  
19 further reflecting on the arguments that you had made  
20 to me this morning. I've already deliberated  
21 extensively about this case, but have, as I promised  
22 you, kept my mind open until the case is fully  
23 submitted to me. But I wanted to go back and look at  
24 a number of things in light of the arguments that I

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---[ P 26]---

1 heard this morning. I've done that. And I want to  
2 thank you for the presentation of all the evidence,  
3 and I've taken all that into account, as well as your  
4 post-trial written submissions. Based on all the  
5 evidence, I now am prepared to decide the case.

6 I intend that what follows as I lay it down  
7 on the record and as it is transcribed to constitute  
8 the findings of fact and the rulings of law which a  
9 court is required to make in a case tried without  
10 jury pursuant to Mass. Rule of Civil Procedure 52(a).

11 I will, after everything is transcribed,  
12 invite the assistance of counsel in correcting any  
13 errors that may creep into what I say, but otherwise,  
14 and subject to any later amendment in response to the  
15 errors or defects in what I say, or I think less  
16 likely how what I say is taken down by the reporter,  
17 I intend the transcript of this morning's session to  
18 constitute your decision in this case.

19 On all of the testimony, the exhibits, the  
20 stipulations and the other evidence properly  
21 introduced at trial or otherwise before me and the  
22 reasonable inferences I draw therefrom and taking  
23 into account the pleadings and the memoranda and  
24 argument of the parties, I find the following facts

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---[ P 27]---

1 and I rule as follows.

2 Let me begin first with a succinct  
3 recitation of the procedural history of this case.  
4 This action was commenced by plaintiff, 15 Medway  
5 Street, LLC with the filing of a complaint in this  
6 court on Christmas Eve, 2007. The answer from  
7 Oaktree SLR, LLC, the defendant, to the verified  
8 complaint came in on March 7, 2008. I held a case  
9 management conference with counsel present. On the  
10 13th of March, 2008 the plaintiff and  
11 defendant-in-counterclaim, 15 Medway Street, answered  
12 and counterclaimed on April 22nd of 2008.

13 After various preliminary proceedings,  
14 there was a motion for summary judgment filed by the  
15 plaintiff on June 15th, 2009 with supporting  
16 memoranda and affidavits. And in accordance with our  
17 Rule 4 on August 13th the defendants reply in  
18 opposition to the plaintiff's motion for summary  
19 judgment came in also similarly supported.

20 Hearing was held on the 17th of September,  
21 2009 on summary judgment and more about the details  
22 of that, but at the conclusion of argument on summary  
23 judgment the court from the bench ruled on the  
24 motions competing against each other for summary

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---[ P 28]---

1 judgment and as a result of that ruling disposed of a  
2 number of the issues in this case, leaving to the  
3 parties the task of deciding whether the limited  
4 issue left unresolved on summary judgment could be  
5 resolved by themselves or require the court's  
6 assistance. After some efforts to further agree and  
7 resolve the case on their own, the parties reported  
8 an inability to do that on the 16th of November,  
9 2009, and the case was scheduled for a status  
10 conference which the parties reaffirmed their  
11 inability to close out the case and allow it to  
12 proceed to judgment and requested that the case be  
13 assigned for trial on the remaining issues.

14 I scheduled a pretrial conference for the  
15 23rd of February, and with the pretrial memorandum in  
16 hand filed beforehand conducted that pretrial  
17 conference. The case was assigned for a view to take  
18 place on May 21st and a trial to take place on  
19 May 24th and 25th of this year.

20 I did take the view in the presence of  
21 counsel and a number of the parties' representatives  
22 on the 21st of May. And the trial was held in one  
23 day on the 24th of May. Attorneys Johnson, Carey,  
24 DeMoura and Dunlap appeared. The court reporter

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---[ P 29]---

1 Pamela St. Amand was sworn to transcribe the  
2 testimony and the proceedings.

3 At the close of the testimony the court  
4 allowed the record to be held open for the limited  
5 purpose of receiving a redacted transcript of  
6 Mr. Klipfel's deposition, which it was subsequently  
7 filed. The court then suspended the trial and  
8 directed the filing of post-trial memoranda following  
9 the receipt of the transcript. And that, as I said  
10 earlier this morning, has all taken place, and I've  
11 had the benefit of your post-trial submissions.

12 At the trial five witnesses testified.  
13 Called by the plaintiffs were Douglas George, the  
14 manager and principal of the plaintiff LLC; Bruce  
15 Porter Eaton; and Kenneth J. Bouffard. Called by the  
16 defendants were Robert F. Larkin and Sean Patrick  
17 Reardon.

18 Thirteen exhibits, some of them in  
19 subparts, were introduced into evidence at trial, a  
20 number of them by the parties' agreement, some for a  
21 limited purpose, all as reflected in the transcript.

22 After the trial an edited deposition  
23 transcript of Arthur Klipfel came into evidence by  
24 agreement as the fourteenth trial exhibit.

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---[ P 30]---

1           The parties by their counsel, despite the  
2           court's request at the time of the pretrial  
3           conference and at trial, did not stipulate in any  
4           material way to agreed facts. I have found the facts  
5           based on the evidence presented to me.

6           This case concerns an easement of record  
7           established by deed in 1993 for the parking of  
8           40 motor vehicles and for related ingress and egress.  
9           The easement burdens the plaintiff's land and  
10          benefits and is appurtenant to the defendant's  
11          next-door property in Boston.

12          The plaintiff's land is as the plaintiff's  
13          name suggests at 15 -- actually 15 through 21, Medway  
14          Street in Dorchester in the Lower Mills section and  
15          is also lot 2 on the relevant record plan.

16          The defendant's land, located at 1190 Adams  
17          Street, is the neighboring parcel, the site of the  
18          Standish Village Assisted Living Nursing Home  
19          facility, and is lot 1 on the record plan.

20          Here the defendant operates a relatively  
21          large, busy assisted living nursing home facility  
22          with aged, infirmed residents, including a  
23          memory-impaired patient unit. It is an 84-bed  
24          facility.

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---[ P 31]---

1           A number of the issues raised by the  
2 parties have been, as I've said, disposed of on  
3 summary judgment, greatly narrowing the issues for  
4 trial.

5           At summary judgment the court ruled as  
6 follows, following the hearing the court granted the  
7 summary judgment motion of the defendant and denied  
8 the summary judgment motion of the plaintiff for the  
9 reasons that then were laid upon the record from the  
10 bench and for substantially the reasons set forth in  
11 the defendant's briefs, the court pursuant to Mass.  
12 Rule of Civil Procedure 56, giving every reasonable  
13 inference to the party opposing summary judgment,  
14 based on the summary judgment record, there being no  
15 material issue of fact in dispute, ruled as a matter  
16 of law that:

17           "1. The easement for parking of 40 cars,  
18 established by recorded deed in July 1993, perpetual  
19 in nature and running with the land, remains in force  
20 and effect, burdening generally all of plaintiff's  
21 lot 2 and benefitting and appurtenant to defendant's  
22 lot 1.

23           "2. The record demonstrates the easement  
24 has not been extinguished by merger of title, none

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---[ P 32]---

1           having been shown by the record title instruments nor  
2           by the underlying beneficial ownership to the extent  
3           relevant.

4                       "3. The easement is not so insufficiently  
5           defined as to be an ineffective conveyance. The  
6           court rejected as a matter of law the argument that  
7           no easement arose based on imprecise localization.

8                       "4. The language in the seminal 1993 deed  
9           regarding relocation of the easement is irrelevant in  
10          determining whether an easement arose. Whatever  
11          ambiguity exists regarding relocation, the intent of  
12          the party clearly was to create an easement and to  
13          allow relocation within certain parameters and the  
14          limitations on relocation were for the benefit of  
15          lot 1's owner not lot 2.

16                      "5. The purpose of the easement is not  
17          frustrated by the fact that lot 1 may be unable to  
18          count parking on lot 2 for its own zoning compliance.  
19          The record does not permit an inference that parking  
20          required by zoning was the only or even principle  
21          purpose for creating the easement.

22                      "6. The nonuse of the easement, if any, is  
23          insufficient to extinguish the easement as easements  
24          do not expire due to nonuse and the record permits no

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---[ P 33]---

1 inference that the benefitted parties abandon the  
2 easement.

3 "6 (sic). There is no encroachment onto  
4 lot 2 by the building on lot 1. The record,  
5 including the 1993 deed and the plan it incorporated  
6 plainly establishing that the boundary to lot 1 was  
7 intended to run along the face of the brick of the  
8 building in existence at the time of the conveyance,  
9 there being nothing in the record to show any  
10 expansion or addition of the subject building.

11 "8. Lot 2 is conveyed according to that  
12 plan. The building allegedly encroaching onto lot 2  
13 is a monument on said plan. The court, treating  
14 monuments as controlling, rules that the intent of  
15 the parties to the deed was to include the entirety  
16 of the building on lot 1 as evidenced by the plain  
17 language of the deed.

18 "9. Even if the boundary in the deed were  
19 construed differently, the court would find an  
20 easement implied by prior use being reasonably  
21 necessary to permit the owners of lot 1 to maintain  
22 the building in its then current location.

23 "10. There, therefore, is no trespass by  
24 defendant's building onto plaintiff's land."

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---[ P 34]---

1           The only issue left unresolved by the  
2           court's ruling on summary judgment is plaintiff's  
3           alternative prayer to have the court localize to a  
4           confined area on lot 2 the parking ingress and egress  
5           easements. Counsel were directed by the court's  
6           order in September to submit no later than  
7           October 2nd, 2009, jointly or severally, a report  
8           detailing the parties' view whether the location of  
9           the easement can be fixed by agreement or whether  
10          further court involvement is required. And if so  
11          whether the court can act upon motion or whether the  
12          taking of evidence will be required.

13                 These rulings, which I have just read into  
14          the record on summary judgment, were made as a matter  
15          of law in the absence of disputed fact shown by the  
16          Rule 56 record and left for me a confined question of  
17          fact to address after hearing evidence.

18                 There has been no occasion for the court to  
19          revisit or alter its rulings on summary judgment.  
20          And there is nothing in the evidence at trial which  
21          has caused me in any way to doubt the rulings made at  
22          summary judgment.

23                 Following the rulings by the court on  
24          summary judgment, there remain the need to take

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---[ P 35]---

1 evidence at trial and make findings concerning the  
2 location of the parking easement on plaintiff's  
3 parcel.

4 I have heard the evidence put in by the  
5 parties on that question and now, in accordance with  
6 the governing legal principles, I proceed to make  
7 findings. And based on the facts, I have found,  
8 applying the governing law, I fix on the land of the  
9 plaintiff the location of the parking easement of  
10 which defendant is the record holder.

11 Let me begin this part of my decision by  
12 reviewing the legal principles which govern my  
13 decision in this case. A leading case on easements  
14 recently decided by the Supreme Judicial Court in  
15 2007 is Patterson v. Paul. The court reminds us that  
16 an affirmative easement creates a nonpossessory right  
17 to enter and use land in the possession of another  
18 and obligates the possessor not to interfere with the  
19 uses authorized by the easement. Quoting from the  
20 Restatement (Third) of Property (Servitudes) at  
21 section 1.21, citing as well to Powell in Real  
22 Property, which is described by the court as stating  
23 that "affirmative easements allow the easement owner  
24 to enter the servient estate and do acts thereon. An

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---[ P 36]---

1 affirmative easement is not considered to be a  
2 'restriction' affecting the use of real property such  
3 that it is subject to the statutory time limitations  
4 imposed by statute in chapter 184, section 23."

5 The court went on to teach us that, "The  
6 basic principle governing the interpretation of deeds  
7 is that their meaning, derived from the presumed  
8 intent of the grantor, is to be ascertained from the  
9 words used in the written instrument, construed when  
10 necessary in light of the attendant circumstances."  
11 The court cited to Sheftel v. Lebel and other cases.  
12 "It follows the same considerations govern our  
13 interpretation of an easement created by deed,"  
14 citing to McLaughlin v. The Selectmen of Amherst, a  
15 1996 decision of our Supreme Judicial Court and again  
16 to Sheftel.

17 "The extent of an easement depends on the  
18 circumstances of its creation," citing to Mugar v.  
19 MBTA, a 1990 appeals court decision. "When created  
20 by conveyance, the grant or reservation 'must be  
21 construed with reference to all its terms and the  
22 then existing conditions so far as they are  
23 illuminating.'"

24 The court also referred us to the

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---[ P 37]---

1 Restatement of Property Section 483 at comment d.  
2 where it is written that the "meaning of an easement  
3 created by conveyance 'is to be found in its language  
4 construed in the light of the relevant  
5 circumstances.' The terms and conditions under which  
6 an easement may be created and the manner of its  
7 exercise are within the control of the creating  
8 parties so long as no forbidding principle of law is  
9 violated. The fact that the owner of an easement is  
10 not deemed to have a possessory interest in the land  
11 with respect to which it exists indicates a lesser  
12 degree of control of the land than is normally had by  
13 persons who do have possessory interests. Considered  
14 from a different perspective, a servient owner  
15 retains the use of his land for all purposes except  
16 such as are inconsistent with the right granted to  
17 the dominant owner."

18 In the Supreme Court's 1958 decision in  
19 Desotell the court held that it has been said that  
20 whether there is abandonment of an easement is a  
21 question of intention.

22 In Willard v. Stone it was said that, "The  
23 abandonment of an easement, whether acquired by grant  
24 or prescription, cannot be found unless it clearly

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---[ P 38]---

1 appears that such abandonment was intended by the  
2 owner." The defendant in this case concedes, as she  
3 must," the court said, "that nonuse of itself, no  
4 matter how long continued, will not work an  
5 abandonment."

6 In Desotell the court also dealt with  
7 questions about the location of an easement, in this  
8 instance a right-of-way easement. It said that,  
9 "Even if evidence of the intent of the original  
10 grantor and grantee is insufficient, the location of  
11 a right of way may be fixed or changed by the  
12 parties. An undefined right of way by grant may be  
13 located by the parties, and a way once located may be  
14 changed by them."

15 And in this case "when Hardings took  
16 possession of their property, when the defendant  
17 objected to the use of the roadway by the Hardings  
18 and the Desotells, the Hardings used the described  
19 right of way. The defendant apparently acquiesced in  
20 this use during a 6-year period. These acts of the  
21 parties were sufficient to fix the location of the  
22 right of way, or to change the location if the  
23 original grantor and grantee ever intended to  
24 establish a different location."

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---[ P 39]---

1                   In any event, an easement that is unclear  
2                   as to its location may be placed on the ground by the  
3                   court.

4                   The court's job in fixing an unspecified or  
5                   unlocalized easement has been treated in a number of  
6                   cases. Most of these cases deal with the location of  
7                   a right of way, like the piece of the easement  
8                   involved here that concerns ingress and egress. But  
9                   there is nothing in the decisional law that suggests  
10                  to me that the same or very similar principles ought  
11                  not to govern the task of the court when localizing  
12                  an easement which concerns the parking of motor  
13                  vehicle on another's land.

14                  "Law is settled that if the bounds of a way  
15                  are not located by the deed which creates it, the  
16                  parties may fix the location upon the servient  
17                  premises, and if they do not, a court may do so."  
18                  That's what our SJC said in Mahoney v. Wilson in 1927  
19                  and in Mugar v. the MBTA case, I've already referred  
20                  to, by the appeals court decided in 1990, "In the  
21                  absence of agreement, the court may fix the bounds of  
22                  a way not located by the easement creating it. A  
23                  right of way not definitely fixed by deed will be  
24                  construed as the 'right to such a way as is

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---[ P 40]---

1 reasonably necessary and convenient for the purposes  
2 for which it is granted,'" that again from Mugar.

3 "A general right of way obtained by grant  
4 may be used for such purposes as are reasonably  
5 necessary to the full enjoyment of the premises to  
6 which the right of way is appurtenant," that's a  
7 citation from a decision last year by the appeals  
8 court in Cannata v. The Berkshire Natural Resources  
9 Council, citing the SJC's 1959 decision Tehan v. The  
10 National Security Bank.

11 When a court is called upon to fix the  
12 location of an easement, the court looks to  
13 principles of equity and fairness. The Restatement  
14 (Third) of Property governing servitudes, the 2000  
15 decision, while not dispositive, offers some guidance  
16 to the court in this task.

17 Section 410 in comment B says that, "In  
18 resolving conflicts among the parties to servitudes,  
19 the public policy favoring socially productive use of  
20 land generally leads to striking a balance that  
21 maximizes the aggregate utility of the servitude  
22 beneficiary and the servient estate."

23 Socially productive uses of land include  
24 maintaining stable neighborhoods, conserving

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---[ P 41]---

1 agricultural lands and open space and preservation of  
2 historic sites, as well as development for  
3 residential, commercial, recreational and industrial  
4 uses.

5 Comment 8 states that, "In balancing the  
6 interest of the dominant and servient estate holders,  
7 conservation and neighborhood preservation concerns  
8 should be relevant as well as developmental  
9 concerns."

10 The interest of servient estate holders  
11 includes other concerns not enumerated by the  
12 Restatement, such as maintaining property values,  
13 privacy and convenience of access.

14 In 1967 the SJC decided *Labounty v.*  
15 *Vickers*, and in that case the court said, "It is well  
16 settled that when an easement is created by deed, but  
17 its precise limits and location are not defined, the  
18 location and use of the easement by the owner of the  
19 dominant estate for many years, acquiesced in by the  
20 owner of the servient estate, will be deemed to be  
21 that which was intended to be conveyed by the deed."

22 In the case decided recently by the Appeals  
23 Court in *Hamouda v. Harris*, 2006 decision, the  
24 Appeals Court said first on the question whether the

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---[ P 42]---

1           easement was extinguished, "We agree with the judge  
2           that the burden of proof is on the plaintiff, as the  
3           plaintiff affirmatively asserted that the easement  
4           had been extinguished. As to the permissible extent  
5           of use, assuming that the easement has not been  
6           extinguished, the burden of proof is upon Harris,"  
7           the defendant, "even though she is the defendant.  
8           The [party] asserting the easement...[has] the burden  
9           of proof proving its existence. This burden includes  
10          'the burden of proving the nature and extent of any  
11          such easement.'"

12                         "To determine," in this case, "whether,"  
13          the predecessor, "McElroy intended, by the 1954  
14          deeds, to create an easement to benefit the whole  
15          Harris lot, rather than a specific and more limited  
16          area, with restrictions and conditions, the court  
17          must determine the presumed intent of the grantor  
18          from the words used in the deed, 'construed when  
19          necessary in the light of the attendant  
20          circumstances.' When the language of the applicable  
21          instruments is 'clear and explicit, and without  
22          ambiguity, there is no room for construction, or for  
23          the admission of parol evidence, or to prove that the  
24          parties intended something different. [T]he words

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---[ P 43]---

1 themselves remain the most important evidence of  
2 intention, but those words may be construed in light  
3 of the attendant circumstances, and the objective  
4 circumstances to which the words refer. [T]he grant  
5 or reservation [creating an easement] 'must be  
6 construed with reference to all its terms and the  
7 then existing conditions as far as they are  
8 illuminating.'"

9 In 2004 in a case that originated in this  
10 court, the Supreme Judicial Court in *M.P.M.*  
11 *Builders v. Dwyer* announced its adoption of the rule  
12 of the Restatement of Servitude section 4.83 allowing  
13 a servient estate owner to seek, in certain cases,  
14 upon a sufficient showing, a judicial order allowing  
15 relocation of the easement.

16 As quoted in *M.P.M.* and as adopted by the  
17 court in that case, the Restatement establishes  
18 minimal standards which must be met before the  
19 request for relocation may be approved.

20 The Restatement section provides that,  
21 "Unless expressly denied by the terms of an easement,  
22 as defined in section 1.2, the owner of the servient  
23 estate is entitled to make reasonable changes in the  
24 location or dimensions of an easement, at the

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---[ P 44]---

1 servient owner's expense, to permit normal use or  
2 development of the servient estate, but only if the  
3 changes do not (a) significantly lessen the utility  
4 of the easement, (b) increase the burdens on the  
5 owner of the easement in its use and enjoyment, or  
6 (c) frustrate the purpose for which the easement was  
7 created.

8 "Section 4.8(3) is a default rule, to apply  
9 only in the absence of an express prohibition against  
10 relocation in the instrument creating the easement  
11 and only to changes made by the servient, not the  
12 dominant, estate owner. It 'is designed to permit  
13 development of the servient estate to the extent it  
14 can be accomplished without unduly interfering with  
15 the legitimate interests of the easement holder.'  
16 Section 4.83 maximizes the over-all property utility  
17 by increasing the value of the servient estate  
18 without diminishing the value of the dominant estate,  
19 minimizes the cost associated with an easement by  
20 reducing the risk that the easement will prevent  
21 future beneficial development of the servient estate  
22 and encourages the use of easements."

23 With those principles of law in mind, I now  
24 take up the evidence as it was presented to me by the

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---[ P 45]---

1 parties at trial and make the following findings. On  
2 or about July 23rd, 2004 the plaintiff, 15 Medway  
3 Street, LLC, took title to property in Dorchester,  
4 Massachusetts, known as 15-21 Medway Street by a  
5 recorded deed that is in the Suffolk County Registry  
6 of Deeds at Book 35089, Page 68.

7 At the time of the purchase by 15 Medway  
8 Street of lot two, a duly recorded deed which  
9 contained the parking easement benefitting the  
10 defendant, Oaktree SLR's, adjacent property known as  
11 1190 Adams Street in Dorchester and burdening the  
12 15 Medway Street property with a 40-car parking  
13 easement was on record in the registry at Book 18458,  
14 Page 78.

15 This deed establishing the parking easement  
16 has been submitted to the court as trial exhibit  
17 number 1. This is a deed from the grantor Unihab  
18 Fabreeka, Inc. to Adams Square Limited Partnership.  
19 And I will focus us only on two provisions of the  
20 deed, both found in its exhibit A, which are  
21 relevant.

22 First, there is the description at the  
23 start of exhibit A which conveys, "The land with the  
24 building thereon in Boston, Suffolk County,

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---[ P 46]---

1           Massachusetts, more particularly shown as Lot 1 on a  
2           Plan entitled, 'Subdivision Plan of Land in  
3           Dorchester, Mass. for Unihab, Inc.' by Landmark  
4           Engineering & Surveying, Inc. dated January 25th,  
5           1991, last revised October 11, 1991 which Plan is  
6           recorded with the Suffolk County Registry of Deeds at  
7           the end of Book 18033 and to which plan reference is  
8           made for a more particular description. Said Lot 1  
9           contains 76,415 plus or minus square feet according  
10          to the Plan."

11                         The exhibit goes on to say, "This  
12           conveyance is made together with the following  
13           easements which easements shall be for the benefit of  
14           the grantee, its successors and assigns and shall run  
15           with the land."

16                         Relevant here is item C in the exhibit A  
17           which establishes, "An easement to park up to  
18           forty (40) motor vehicles, together with the right of  
19           ingress and egress, on said Lot 2. Said easement to  
20           park motor vehicles shall be used only for the  
21           benefit of Lot 1 herein conveyed to the Grantee. The  
22           Grantee agrees that the actual parking spaces shall  
23           be relocated and/or moved as may be reasonably  
24           requested by any entity or person holding a mortgage

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---[ P 47]---

1 on purchase therefrom on said Lot 2, provided said  
2 easement continues to comply with applicable parking  
3 zoning requirements of the City of Boston as  
4 affecting Lot 1 and provided further such relocation  
5 is located only within the portion of said Lot 2  
6 assessed by the City of Boston as 17-19 Medway  
7 Street. Any such right to relocate said parking  
8 spaces shall not include responsibility to construct,  
9 improve, pave and/or stripe said parking spaces which  
10 shall remain the responsibility of the Grantee, its  
11 successors and assigns."

12 Douglas George is the manager of the  
13 plaintiff LLC and a principal of the plaintiff. He  
14 first became aware of the property located at  
15 15-21 Medway Street in late 2003 or early 2004. A  
16 real estate broker informed George the property was  
17 available for sale. George was interested in  
18 purchasing the property. George was interested in  
19 purchasing the property in part because of its zoning  
20 classification, which was multi-family residential.  
21 George visited the property before 15 Medway Street,  
22 LLC purchased the property.

23 At the time George first visited the  
24 property, the building located on the property was

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---[ P 48]---

1 occupied and there was ledge extending out in the  
2 rear of the property where a concrete slab  
3 constructed by 15 Medway now is located. Prior to  
4 15 Medway's purchase of the property, there was a  
5 2-car garage located at the rear of the property with  
6 a driveway leading to it from Medway Street. Prior  
7 to 15 Medway's purchase of the property, there was a  
8 brick communications or electrical structure located  
9 on top of the ledge area. Prior to 15 Medway's  
10 purchase of the property, the top of the ledge area  
11 was covered with grass. No cars were parked on the  
12 top of the ledge area when George observed it in 2003  
13 or 2004.

14 15 Medway purchased the property in 2004  
15 with the intention to construct at least  
16 42 residential housing units as a development project  
17 to be carried out on the property.

18 After purchasing the property, 15 Medway  
19 obtained at least some of the permits that were  
20 required for a smaller number, 14 residential units,  
21 to be constructed on the property. After securing  
22 those preliminary permits, 15 Medway commenced site  
23 work for the construction of the development project.  
24 As part of the site work for the construction of the

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---[ P 49]---

1 development project, 15 Medway removed several  
2 thousand yards of ledge from the rear of the property  
3 using hydraulic hammers. The removal of the ledge  
4 with a hydraulic hammer took six to nine months.  
5 15 Medway removed the 2-car garage and the  
6 communications or electrical structure as part of the  
7 site work for the construction of the development  
8 project. And in doing so, the plaintiff incurred  
9 costs of somewhere in the neighborhood of 4 to  
10 \$500,000 to remove the ledge and to construct the  
11 concrete slab at the rear of the property.

12 Construction of the slab at the rear of the  
13 property has not been completed, although the entire  
14 so-called pad at the bottom of the lot  
15 topographically in the area that is furthest from the  
16 street and nearest the river, which is at the rear of  
17 the property, has been leveled and has been covered  
18 with concrete.

19 The concrete slab located at the rear of  
20 the property is available for the parking of motor  
21 vehicles. However it is available only physically at  
22 this time and from the evidence I heard to allow  
23 parking of motor vehicles on the concrete slab to  
24 take place in compliance with applicable regulations,

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---[ P 50]---

1 the slab would have to be approved at least by the  
2 city of Boston Conservation Commission as a parking  
3 area. The use of the concrete slab for the parking  
4 of motor vehicles would require some additional site  
5 work, including, most importantly, the construction  
6 of a drainage system and installation of an oil-water  
7 separation system. The construction of that drainage  
8 system and oil-water separator to enable lawful use  
9 of the concrete slab as a parking area might be  
10 expensive. It might well require some trenching  
11 through the ledge and tying into an existing sewer  
12 line at a cost of several hundred thousand dollars  
13 more.

14 The purpose of the concrete slab, as  
15 conceived by the plaintiff, is to serve as the  
16 foundation for a 6-story building as part of the  
17 development project. 15 Medway intended to place  
18 enclosed parking on the first level below the  
19 building to be used by building tenants and owners.

20 Devotion of parking in this location to  
21 serve the defendant's easement would take away the  
22 spaces that would be used by building tenants or  
23 owners on the slab area and would reduce the density  
24 of the project and thus reduce the value of any

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---[ P 51]---

1 building because the new building would require  
2 on-site parking in formulas established by the city  
3 to serve its own residents and occupants.

4 Without the planned parking spaces  
5 designated for use by building tenants and owners,  
6 15 Medway would not be able to complete the  
7 development project to the degree and intensity it  
8 had planned.

9 At the time 15 Medway purchased the  
10 property, the existing building located on the  
11 property was occupied by the tenant. The tenant was  
12 a human services agency called Women in Action.  
13 Women in Action leased the existing building pursuant  
14 to a written lease agreement until 2006 or 7. Under  
15 the terms of that lease agreement, Women in Action  
16 had the right to exclusive use of parking spaces  
17 adjacent to the existing building on the property.  
18 Women in Action used the parking spaces adjacent to  
19 the building.

20 15 Medway now intends to lease the existing  
21 building and has had communication with a variety of  
22 prospective tenants, including the Millwrights'  
23 Union. That union would require, as a condition of  
24 leasing the existing building, that parking be made

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---[ P 52]---

1 available in the existing paved parking area adjacent  
2 to the building to the right as one faces from the  
3 street. The Millwrights' Union would require parking  
4 for more than 12 vehicles on the property.

5 Another prospective tenant who has  
6 expressed interest in the use of the 15 Medway site  
7 existing building is an elder care facility. They  
8 would require as a condition of leasing that the  
9 entire paved area adjacent to the building be  
10 available for parking.

11 Another prospective tenant about which  
12 there was testimony is the Police Patrolman's Union.  
13 The Police Patrolman's Union would require as a  
14 condition of the leasing of the building that exists  
15 currently on the 15 Medway site that the entire paved  
16 area adjacent to on the right of that building be  
17 available for parking. And I find that the  
18 availability of parking adjacent to the existing  
19 building is a feature of the property that 15 Medway  
20 uses in marketing the existing building to  
21 prospective tenants.

22 The 15 Medway site slopes somewhat markedly  
23 from a high elevation by the street where it has now  
24 occupied the existing now vacant building and its

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---[ P 53]---

1 adjacent paved parking lot to the right at the top  
2 and then descends somewhat steeply to the rear of the  
3 lot, away from the street in the area nearest the  
4 Neponset River in the back.

5           Since the time that it purchased lot 2,  
6 15 Medway has made dramatic changes to the topography  
7 of the site. Prior to 15 Medway commencing the  
8 removal of several thousand yards of ledge and  
9 construction of the concrete structural slab  
10 currently located at the rear of the site, the slope  
11 running from 15 Medway Street toward the rear of  
12 plaintiff's property adjacent to the Neponset River  
13 between the existing building on plaintiff's property  
14 and the Standish Village Nursing Home assisted living  
15 facility on the defendant's property, was a generally  
16 flat, gradually sloped area on which vehicles could  
17 have been driven, parked if the area was paved and  
18 made ready for parking with some minor undulations  
19 and a total elevation change of approximately 3 feet.

20           The plaintiff's expert witness, who was an  
21 engineer and land surveyor named Bruce Porter Eaton,  
22 at trial testified that the current topography in the  
23 same location after the plaintiff's work has been  
24 carried out is now much more in the nature of a

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---[ P 54]---

1 cliff, having a drop of approximately 30 feet. Eaton  
2 further testified that one would need an elevator to  
3 access the rear of the lot, which is one of the two  
4 paved areas on the site that would be as now  
5 configured currently available for parking. And it  
6 is, as I've said, the location proposed by 15 Medway  
7 for their condominium building and for the parking  
8 associated with that condominium building yet to be  
9 built.

10 Oaktree has used its parking easement on  
11 15 Medway's property occasionally for overflow staff  
12 and visitor parking associated with the Standish  
13 Village Assisted Living Facility. The use has been  
14 occasional, but it has taken place.

15 The easement continues to be needed by and  
16 would at least from time to time be used by Oaktree  
17 in this densely settled urban neighborhood where  
18 parking is decidedly scarce.

19 Historically there have been two paved  
20 locations on lot 2 where cars have parked under the  
21 easement, which includes the primary parking area in  
22 the existing paved area adjacent to Medway Street, as  
23 I've said, located just to the right of the existing  
24 building on 15 Medway's property, which happens to be

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---[ P 55]---

1 just to the left of the Standish Village Assisted  
2 Living Facility on the defendant Oaktree's property  
3 when one looks at it from Medway Street. And also  
4 there was additional parking in a formerly paved area  
5 to the rear of lot 2 adjacent to the river, most of  
6 which is now consumed by the concrete slab that the  
7 plaintiff erected in 2005 and 2006.

8 Oaktree seeks to have the court locate the  
9 parking easement in these two areas on Medway's site.  
10 The Oaktree proposal for parking is as shown on the  
11 conceptual parking plan, which is trial exhibit 8,  
12 prepared by Tetra Tech Rizzo, dated October 7, 2009.

13 Oaktree's plan puts 18 spaces on the  
14 parking area adjacent to the existing building,  
15 occupying it all, and 22 spaces on the concrete slab  
16 or pad, occupying about two-thirds of that slab.

17 15 Medway seeks to have the court locate  
18 the parking easement's 40 spaces from the -- any  
19 location it may have previously made available for  
20 parking under the easement to two new alternative  
21 areas on lot two, 17 parking spaces to be set out in  
22 front of the existing building on lot 2, adjacent to  
23 Medway Street and 23 parking spaces along both sides  
24 of a relatively narrow driving lane on the downward

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---[ P 56]---

1 slope from Medway Street towards the river at the  
2 rear of lot 2, the drive and the parking spaces  
3 hugging it on either side to be located to the left  
4 of the existing building on lot 2 when viewed from  
5 Medway Street. The plaintiff's plan is trial  
6 exhibit 7.

7 The relocation of the parking easement as  
8 proposed by 15 Medway would move the majority of the  
9 easement parking spaces a materially greater distance  
10 from the Standish Village Assisted Living Facility  
11 located on Oaktree's adjacent property, as compared  
12 with the parking as arrayed on the Oaktree plan.

13 Parking in the lot adjacent to the existing  
14 building and on the pad would be easily reached by  
15 pedestrians from the Standish Village building.  
16 There is, as we saw it on the view, a lower level  
17 door out of the assisted living facility that affords  
18 ready access to the parking that would be located on  
19 the pad.

20 Location of the parking easement as  
21 proposed by 15 Medway I find would result in unsafe  
22 conditions for pedestrians and for vehicular traffic.  
23 The firm that created 15 Medway's proposed parking  
24 plan, C.E.C. Land Surveyors, did not conduct a

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---[ P 57]---

1 traffic study to determine how pedestrian or  
2 vehicular traffic to and from lot 2 and along Medway  
3 Street would be affected by 15 Medway's proposed  
4 relocation of the parking easement.

5 15 Medway proposes, as I've said, creating  
6 17 parking spaces in front of the existing building  
7 on lot 2 by removing an existing wall or ledge and  
8 creating a lengthy curb cut, 17 spaces in width,  
9 along Medway Street in front of the existing  
10 building.

11 The proposal requires the vehicles using  
12 these spaces to drive head in at right angles to the  
13 street directly across an existing sidewalk,  
14 currently separated from the traveled public street  
15 by a curb which would need to be reduced or  
16 eliminated to accommodate the passage of vehicles  
17 across it to reach the parking.

18 15 Medway's plan for relocation of the  
19 parking easement assumes the requisite curb cut and  
20 other necessary permits would be forthcoming from the  
21 Boston Public Improvement Commission and other  
22 agencies, none of which was proved nor none of which  
23 do I find would be likely to be forthcoming given the  
24 difficulties associated with this configuration of

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---[ P 58]---

1 the parking perpendicularly in front of the existing  
2 building off Medway Street.

3 Using these 17 spaces would require curb  
4 cut permits for vehicles to cross across the curb  
5 that divides Medway Street from the sidewalk and  
6 would cause the cars backing in -- driving in and  
7 backing out in this urban neighborhood to interact  
8 with pedestrians both those originating at the  
9 Standish Village location, as well as others  
10 unrelated to the defendant's property.

11 Mr. George, the manager of 15 Medway  
12 Street, testified at trial regarding Medway's  
13 permitting history with the city of Boston regarding  
14 its planned development of the site. There are  
15 various inconsistencies and ambiguities that attend  
16 his account of the development plans.

17 In particular, Mr. George's testimony was  
18 that 15 Medway apply to the city of Boston, on paper  
19 at least, to build 14 residential condominium units  
20 on the site in the rear to avoid so-called large  
21 project review by the city. But he testified, and I  
22 accept his testimony on this, that this was not at  
23 all reflective of the true and ultimate intention of  
24 15 Medway Street, which was to build 42 and perhaps

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---[ P 59]---

1 even more units on the site. The application which  
2 he put forward was intended to bifurcate the  
3 permitting process in a way that would eliminate the  
4 heavy regulatory burden he would face were the  
5 project to be treated as a large project site by the  
6 Boston Redevelopment Authority and other city  
7 agencies.

8 Mr. George also testified at trial that  
9 15 Medway had represented to the city that it  
10 intended to demolish the existing building on the  
11 property, and it did so as a way of securing the  
12 initial permits to proceed with what the city was  
13 told was to be a 14-unit project, again to reduce the  
14 size and density of the project.

15 But he testified, and I accept his  
16 testimony on this, and I find that at no time did  
17 15 Medway Street actually intend to tear down the  
18 existing building. To the contrary, their plan was  
19 to redevelop it and to lease it out in substantially  
20 its same footprint, reserving the opportunity to  
21 exploit the value both in the existing building and  
22 the new one to be constructed in the back.

23 I find that the experts who prepare the  
24 parking plan for 15 Medway did not in any reasonable

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---[ P 60]---

1 way explore the feasibility of obtaining permits,  
2 such as curb cut permits, from the city, which would  
3 be conditions precedent to implementing the portion  
4 of the parking plan C.E.C. proposed.

5 If 15 Medway were to relocate the  
6 40 easement spaces the way it proposed in the C.E.C.  
7 plan, those who are on the staff and visiting  
8 Standish Village who were parking in the 17 spaces  
9 along Medway Street, as well as those parking in the  
10 23 remaining easement spaces proposed on the  
11 left-hand side of the existing building, would have a  
12 long walk with no direct means of access to the  
13 Standish Village building on Oaktree property,  
14 certainly none without traversing the sidewalk along  
15 Medway Street in the area where the cars now are  
16 proposed to be parked perpendicularly.

17 As I've said, both these pedestrians and  
18 others in this residential neighborhood would have to  
19 face the maneuvering vehicles should they be driving  
20 in or backing out at a time when the pedestrians need  
21 to cross the sidewalk at the same time as do the  
22 vehicles.

23 The remaining 23 parking easement spaces  
24 under the proposal by the plaintiff located to the

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---[ P 61]---

1 left of the existing building on lot 2 would provide  
2 a single driveway, no more than 14 or 15 feet wide,  
3 which would serve multiple purposes. It would  
4 provide access in and out of the building to be  
5 constructed at the rear of the lot by 15 Medway and  
6 would also need to accommodate the maneuvering of  
7 cars going in and out of the parking spaces shown on  
8 the plan, which, as I've said, closely hug the side  
9 of the 14- or 15-foot drive that is part of the  
10 proposal here.

11 All traffic, at least as far as the  
12 evidence shows me, heading to the rear of the  
13 property would need to negotiate this inclining way  
14 to get into the parking located underneath the  
15 building in the rear. There was no evidence I find  
16 credible or satisfying that showed any other route to  
17 be employed to gain access to or egress from the  
18 proposed building to the rear.

19 The effect of this is that the traffic  
20 generated and serving the building in the rear would  
21 need to share this limited and narrow space with the  
22 parkers making use of the spaces designated on the  
23 C.E.C. plan as straddling this space in an area which  
24 is itself fairly constrained tight against the

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---[ P 62]---

1 leftmost property line of the 15 to 21 Medway Street  
2 property.

3 I do credit the testimony of Oaktree's  
4 professional engineer, Sean Reardon, that safety  
5 considerations dictate that a minimum 20 foot width  
6 would be required as an aisle given this volume of  
7 use and given the configuration of the spaces and the  
8 contemplated shared use of the drive both to serve  
9 the rear building and to serve as a parking aisle  
10 dividing spaces on either side of it.

11 And the safety concerns that are raised by  
12 having a materially narrower driveway is something  
13 which I find the 15 Medway plan fails to accommodate.  
14 C.E.C.'s plan does not reflect, nor did the testimony  
15 at trial establish, that there had been any traffic  
16 study done to determine the number of vehicles which  
17 would be moving up and down and making use of this  
18 access aisle.

19 The evidence suggests, however, that if  
20 42 or more units are built below, the building's  
21 occupants and visitors would generate significant  
22 intensive passage use of the single drive dividing  
23 the 23 spaces which is proposed by 15 Medway in a way  
24 which will create, given the narrowness, the

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---[ P 63]---

1 steepness of the drive, a real safety concern to the  
2 passing and parking vehicles, as well as to  
3 pedestrians.

4 I do also conclude that the relocation of  
5 the parking easement as proposed by 15 Medway would  
6 be particularly risky and pose some safety concerns  
7 in a marked way, particularly given the demographics  
8 of the visitors to Standish Village. I heard  
9 testimony, which I accept, that many of those who  
10 would make use of the parking when it is used to  
11 visit residents in Standish Village are relatives,  
12 friends who are at a stage of advanced years and  
13 would be elderly.

14 The 15 Medway proposed parking plan was  
15 prepared by Bruce Eaton of C.E.C. He is a licensed  
16 professional engineer and a land surveyor.

17 On all of the evidence, including that  
18 which I have previously recited as found facts, I am  
19 unable to accept as credible or persuasive the  
20 testimony of Mr. Eaton in which he opined that the  
21 location of parking as proposed by 15 Medway in its  
22 plan is feasible, reasonable, safe and in conformance  
23 with applicable standards for design of this type of  
24 parking.

---

---[ P 64]---

1                   The 15 Medway proposal simply is not a  
2                   reasonable plan for providing parking for 40 motor  
3                   vehicles on the property. While 15 Medway's proposal  
4                   might be significantly less costly than the use of  
5                   the slab, which would require several hundred  
6                   thousand dollars of work to make it usable, and while  
7                   the placement of 40 parking spaces on the property as  
8                   proposed by 15 Medway would allow 15 Medway to  
9                   complete its development project and would allow  
10                  15 Medway to provide parking to tenants of the  
11                  existing building that does not lead -- that none of  
12                  that leads to the conclusion that the selection of  
13                  the 15 Medway plan is legally correct nor the  
14                  equitable choice for the court to make.

15                  My task here is to determine the nature,  
16                  scope and location of the parking easement  
17                  established in the 1993 easement document when the  
18                  lots were sold into separate ownership. I must use  
19                  the language of the instrument and the surrounding  
20                  circumstances, to the extent discernible from the  
21                  evidence, to derive the meaning and purpose of the  
22                  parties to that deed.

23                  I come to the certain conclusion that the  
24                  easement established a right to park a definite and

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---[ P 65]---

1 fixed number of cars, 40. That is the starting point  
2 of my analysis.

3 The Oaktree land has a perpetual right to  
4 have 40 cars park on the 15 Medway land. Nothing  
5 about this was hidden. The title documents are  
6 recorded and in plain view to any purchaser of the  
7 15 Medway lot. Whether or not Mr. George and the LLC  
8 he managed somehow overlooked or treated cavalierly  
9 as not binding on them the express easement in the  
10 chain of title, I do not determine and need not to be  
11 able to resolve this dispute.

12 I can find, as I do, that the easement is  
13 duly established and recorded to bind the 15 Medway  
14 parcel's title for the benefit of the Standish  
15 Village lot. Failure to abide by the recorded  
16 servitude, whether initially a result of negligence  
17 or willful blindness or of conscious disregard of the  
18 known right, the outcome is the same in the case  
19 before me. The easement right persists in the  
20 15 Medway land's title and must be given meaning and  
21 effect.

22 The right to park was and remains a value  
23 to Oaktree and its owners and to the land and to its  
24 occupants. The neighborhood is densely built upon

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---[ P 66]---

1 and has inadequate parking all around. It's easy to  
2 see how the nursing home would have at least, from  
3 time to time, if not at all times, a genuine need to  
4 park cars of its staff and some of the many visitors  
5 who come to the facility above and beyond the other  
6 parking in use on the Oaktree lot and other land.

7 That the parking is not as deeply vital to  
8 the core use of the nursing home as it might be to  
9 the development plans contemplated by 15 Medway when  
10 it bought its lot in 2004, is not a reason to  
11 restrict or reduce the Oaktree easement. They have a  
12 right to park 40 cars. The right is not to park  
13 something less than 40 cars or to park 40 cars only  
14 if the burden owner doesn't happen to at a given time  
15 to need the space for its own use. It is an  
16 unfettered right to park 40 cars. And the 15 Medway  
17 parcel must accommodate that right as a matter of its  
18 property law obligation under the express easement.

19 I do not accept the argument that the only  
20 purpose of the easement was to create some phantom  
21 fake document setting up a nonexistent right just to  
22 help the rehabilitation and expansion of the  
23 defendant's property get a permit and slide through  
24 the approval process. Mr. Klipfel did not testify

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---[ P 67]---

1 personally, but his deposition, or at least extracts  
2 of his deposition, are in evidence.

3 The finding I make is that the easement,  
4 though undoubtedly animated by the permitting  
5 concerns spoken of in the deposition, was really  
6 driven by a real tightness of parking in the  
7 neighborhood. And a need to be a good neighbor, not  
8 just to get the permit, but in real life thereafter,  
9 by not impressing 40 cars on the streets surrounding,  
10 and particularly at times of high visitation and  
11 vehicular traffic. The purpose of the easement was  
12 to provide this overflow or excess parking as needed  
13 and was not achieved once the permit was secured.

14 I find as a fact that there was from time  
15 to time parking on the 15 Medway lot by cars  
16 emanating from the Oaktree property in reliance on  
17 the easement during the years after the giving of the  
18 easement. This parking was not frequent, certainly,  
19 nothing approaching daily or regular use, but it took  
20 place. Mostly it occurred when there were large  
21 events which brought in greater volumes of cars to  
22 the defendant's site. That Mr. George says he never  
23 saw parking, does not mean it never happened, given  
24 the limited contact he had with the property while it

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---[ P 68]---

1 was in development and given especially the fact that  
2 much of the use which was made in this fashion was  
3 before Mr. George's first arrival on the scene.

4 The locus of this parking was on the  
5 existing paved parking lot adjoining the existing  
6 building on the 15 Medway land. The parties to the  
7 easement to some degree fix the locus of the right to  
8 park some of the cars on the 15 Medway land based on  
9 this conduct. So for at least some part of the right  
10 available to the defendant to park on the plaintiff's  
11 land, there was conduct which helped fix a portion of  
12 the area of the plaintiff's land, subject to the  
13 right.

14 Given, however, that the right was to park  
15 a full 40 vehicles, a volume of cars that simply  
16 doesn't fit on the lot which exists alongside the  
17 existing building on 15 Medway, I cannot find that  
18 the parties' behavior fixed the parking rights  
19 location in its entirety.

20 I also cannot find, given the clear  
21 admonition of the law, that nonuse does not result in  
22 loss of easement rights, that the owner of Standish  
23 Village somehow abandoned or relinquished the full  
24 reach of the 40-car vehicle parking easement.

---

---[ P 69]---

1                   If there had been no parking whatsoever  
2                   from 1993 on, the easement, on the facts presented at  
3                   summary judgment time, was not extinguished or  
4                   abandoned or frustrated in its purpose, that there  
5                   was some parking from time to time, pursuant to the  
6                   easement of a smaller number of cars than authorized  
7                   under the easement, does not work an abandonment or  
8                   modification of that record right.

9                   I, thus, treat this as a case where the  
10                  location of the easement has been in part fixed by  
11                  the conduct of the parties, the parking of between 15  
12                  to 20 vehicles in the parking area paved alongside  
13                  the existing building. And with the court applying  
14                  equitable principles, still must locate the balance  
15                  of the parking called for by the easement, as well as  
16                  the ingress and egress points for all that parking.

17                  With respect to the location of the parking  
18                  in the lot alongside the existing building, it is  
19                  certainly true that under the Restatement principle  
20                  announced in *M.P.M. Builders*, the court would be able  
21                  to authorize a relocation of the easement area  
22                  established by the parties. As to the balance, a  
23                  general equitable task is required to locate the rest  
24                  of the spaces.

---

---[ P 70]---

1           The tasks are only a bit different for the  
2           court in their purpose and the methodology is not  
3           much different in analyzing the two issues. As I  
4           have addressed these closely related lines of cases  
5           under which I must operate to analyze the parties  
6           positions, I must confront, given the evidence  
7           presented and the competing parking plans advocated  
8           for by the parties of trial, whether the parking  
9           either is located in the existing paved lot or as the  
10          balance of it is by the court first to be located  
11          somewhere else, may be positioned on the plaintiff's  
12          lot in a location or locations which accommodate the  
13          purpose of the easement to safely and practically  
14          park 40 vehicles and then to consider whether that  
15          may be accomplished in a way which respects the right  
16          of the servient estate holder to use its land  
17          beneficially to maximize its value and development  
18          potential.

19                 The grave difficulty in this case, however,  
20                 is that the lot of the plaintiff, given its size,  
21                 configuration, topography and current improvement is  
22                 greatly constrained to accommodate both the easement  
23                 of record to which it is subject and the bold and  
24                 extensive development plan adopted for it by its

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---[ P 71]---

1 current owner.

2 What I find happened here is that the  
3 plaintiff, totally absorbed by its development plans  
4 to exploit the maximum value derivable from the piece  
5 it bought, proceeded in a way which assumed, without  
6 any factual or legal justification that it need not  
7 honor its easement obligation to the abutting land  
8 owner.

9 The 15 Medway plan called for an intensive  
10 development of its site, preserving the existing  
11 building for rehab and rental, and installing a large  
12 new residential building on the location away from  
13 the street and towards the river in the back.

14 This was to be sure the way to extract the  
15 most value out of the parcel. It was not, however, a  
16 plan which was at all attainable without somehow  
17 dishonoring the easements right to which the land of  
18 record is and has at all relevant times been subject.

19 The evidence convinces me that there is  
20 simply no reasonable safe, fair way to accommodate  
21 the parking of 40 vehicles with the requisite ingress  
22 and egress on the 15-21 Medway Street site and at the  
23 same time keeping in place the existing building and  
24 building the new residential structure in back. The

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---[ P 72]---

1 pieces simply do not fit together at all in any  
2 workable way. The site does not support the intense  
3 development the LLC owner planned for without  
4 infringing materially and impermissibly on the  
5 easement right of Standish Village's property owner.

6 The proof of this is found in the utterly  
7 unsafe, unworkable, unapprovable plan which 15 Medway  
8 came up with when required by the court to show how  
9 it could squeeze 40 spaces out of its lot and still  
10 keep for itself the upper existing lot and the lower  
11 concrete pad destined for parking beneath the  
12 to-be-built new structure destined by 15 Medway for  
13 parking by future buyers or renters of that new  
14 improvement.

15 The plan proposed forces a dangerous and  
16 unworkable perpendicular parking location for 17  
17 cars, driving over what is now a curb and sidewalk at  
18 right angles to the street and requires those cars to  
19 back out across the sidewalk and into oncoming  
20 traffic. This is something which will not work, and  
21 I find will not be approved by any responsible public  
22 authority.

23 The 15 Medway plan also forces 23 more  
24 spaces in a tightly twisted irregular alignment along

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---[ P 73]---

1 a dangerously narrow drive down an incline a way,  
2 though only able, given the site's limitation, to be  
3 about 14 or 15 wide and yet necessary to be used by  
4 all cars, trucks and pedestrians who have to reach  
5 the rear new building. This is a very tight fit down  
6 the incline down the left side of the 15 Medway site  
7 as it is.

8 The spaces for Oaktree that would hug both  
9 sides of this narrow drive would be in jeopardy  
10 maneuvering in and out of them given the likely  
11 volume of traffic up and down this drive. Even  
12 though there was no substantial or persuasive expert  
13 evidence by either party, it's not an unreasonable  
14 inference to draw, as I do, that there will, given  
15 the trip that the residential occupants, not to  
16 mention delivery trucks, service people's vehicles  
17 and so forth, that will be there daily will produce  
18 far more than sporadic or minor passage up and down  
19 the way, the way the plaintiff has posited. The  
20 volume that will take place will not permit safe  
21 interaction with the parking close by by the  
22 defendant's vehicles on both sides of the narrow way.

23 I'm unconvinced that given the dimensions  
24 and the topography there's any real chance that the

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---[ P 74]---

1 spaces could fit alongside even this narrow drive and  
2 little or no chance, as well, that two vehicles, one  
3 coming and the other going, could pass in the limited  
4 space 15 Medway would allot to the drive should  
5 Oaktree be parking cars on both sides of that.

6 The plan by 15 Medway, the best it could  
7 come up with to satisfy the plain number of vehicles  
8 required to be served by the recorded easement is  
9 simply not safe or workable. This is so even if the  
10 defendant were not to increase, as is its privilege,  
11 the frequency of the use of the spaces. It's not  
12 reasonable to impose on the defendant's drivers the  
13 safety risks of the plaintiff's plan simply because  
14 they may not now encounter those risks on a daily  
15 basis.

16 The court cannot but be aware of the  
17 expenditures that 15 Medway has already made to  
18 doggedly remove ledge and configure its site for the  
19 creation of the concrete and subbuilding pad that I  
20 saw when I visited the site. The sheer projection of  
21 the remaining ledge, which now presents a very steep  
22 drop to the edge of the now cleared lower pad area,  
23 shows how much difficult and expensive work must have  
24 been undertaken to reach this point.

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---[ P 75]---

1                   But the fact that the plaintiff will incur  
2                   a significant financial loss cannot be reason to  
3                   excuse the entity from its liability as a landowner  
4                   to hold its title subject to valid recorded  
5                   easements. If there were any equitable and  
6                   reasonable way to locate the disputed parking and  
7                   ingress and egress easements on the 15 Medway site  
8                   without depriving the plaintiff of the use of the  
9                   parking areas adjacent to the existing building and a  
10                  substantial portion of the pad it has created, the  
11                  court, of course, would do so. On the evidence I  
12                  have heard, I am, no matter how hard I try, unable to  
13                  do that.

14                  The plan the plaintiff has proposed is  
15                  utterly inadequate for the reasons I have given, and  
16                  I see no basis to fit in the parking without  
17                  impinging on land the plaintiff wishes to use for its  
18                  own account. I could not locate the easement where  
19                  the plaintiff wants it to go, or indeed anywhere but  
20                  where the defendant says it should go, without  
21                  frustrating the purpose of the easement and rendering  
22                  its utility to the defendant materially deficient. I  
23                  thus find and rule that the easement is to be located  
24                  as set forth in the defendant's proposal, as depicted

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---[ P 76]---

1 in the Tetra Tech Rizzo plan, which is exhibit 8.  
2 The judgment that will enter in this case will  
3 declare and establish the plaintiff's land is subject  
4 in those areas, but in no others, to the easement to  
5 park 40 cars and for ingress and egress over the  
6 areas shown on the plan as needed to reach those  
7 parking locations.

8 Let me say a word about the pad and the  
9 costs which yet may need to be incurred to make  
10 lawful use of the pad for parking. I do not read the  
11 record easement to require the plaintiff to pay for  
12 the cost of constructing or improving the parking  
13 facilities on its land to be used by the defendant.  
14 It so happens that here there is in the only areas  
15 where I found the parking easement can feasibly take  
16 place, a parking lot paved along the existing  
17 building and a pad of concrete, a substantial portion  
18 of which nearest the Standish Village building is to  
19 be available to the defendant for parking.

20 I could not require the plaintiff to pay to  
21 build these parking areas. They have been built by  
22 the plaintiff with respect to the pad in the rear and  
23 by the plaintiff's predecessor owner with respect to  
24 the existing paved building parking lot prior to this

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---[ P 77]---

1 lawsuit.

2                   However, in the areas which will be the  
3 loci of the parking easement for the defendant's  
4 benefit, notwithstanding the expenditures made by the  
5 15 Medway Street property's owners. But to the  
6 extent that going forward there needs to be  
7 additional improvements made to allow parking to take  
8 place, those costs are the responsibility of the  
9 easement holder, the defendant.

10                   The evidence suggests that there might be  
11 substantial costs, for example, to put in a run-off  
12 drainage system before the pad can be used to park  
13 cars. And the drive along the left side of the site  
14 needs to be graded and considerably improved to reach  
15 to and from the pad with vehicles. These are the  
16 responsibility of the holder of the easement to bear.  
17 They may do the work but must do so lawfully and with  
18 necessary permits and approvals, the cost of which,  
19 as well of the work itself, fall on Oaktree.

20                   The plaintiff must cooperate in all  
21 reasonable ways and certainly not interfere with the  
22 permitting and the carrying out of necessary work on  
23 its site by Oaktree, but should not be required to do  
24 the work or to pay for it.

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---[ P 78]---

1           Also, as I have said, the plaintiff as the  
2           owner of the fee subject to the easement is  
3           privileged to do all things with its land which do  
4           not unreasonably interfere with the exercise by the  
5           defendant of the easement rights as I have found and  
6           ruled them to be.

7           This means that the plaintiff may make any  
8           use of the land not inconsistent with the defendant's  
9           easement rights. To the extent that the plaintiff  
10          may reconfigure its plans to improve and develop its  
11          land in a manner which respects the easement rights  
12          as, for instance, by putting a smaller building above  
13          the parking on the pad and using the remainder of the  
14          pad not used by the defendant's parking spaces for  
15          parking by building occupants, of course the  
16          plaintiff would be free to do so.

17          I reject, as well, defendant's request to  
18          leave the entire lot burdened by the easement, as  
19          this would conflict with the principles I'm bound to  
20          apply in both locating initially and relocating under  
21          M.P.M. I would, in doing that, unduly constrain far  
22          more use and development of the lot than would be  
23          necessary were I to leave it all encumbered.

24          Throughout this litigation and certainly at

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---[ P 79]---

1 the trial of the case, the plaintiff adhered without  
2 deviation to the position that it was firmly intent  
3 on building the new residential structure with its  
4 42 housing units and also on keeping in place the  
5 existing building closer to the street. I have been  
6 required to analyze the easement locational questions  
7 in light of this unyielding position by the  
8 plaintiff.

9 In some respects, at least, a change in  
10 those development plans might have facilitated a  
11 different answer on where parking the 40 cars might  
12 end up on the site. If the residential building in  
13 back were to be eliminated or scaled back  
14 substantially, the issues of safe passage to and from  
15 the street and the parking on the rear pad might be  
16 addressed better and some or all of the cars now  
17 being designated for parking in the existing parking  
18 area along the existing building might more safely  
19 and readily be parked alongside the way leading on  
20 the left side of the site to the rear. This might  
21 free the existing parking area of some or all of the  
22 defendant's vehicles allocated to it in my decision.

23 Alternatively, if the plaintiff elected to  
24 remove or reduce the size of the existing building

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---[ P 80]---

1 and provide thereby an enlarged parking area at the  
2 front, the top street side of the plaintiff's land,  
3 that might hold some or all of the spaces required by  
4 my decision as it now stands to be parked on the rear  
5 pad area.

6 But I can't decide the case without  
7 evidence speculating on what might be done in a  
8 hypothetical case. I thus will direct the entry of a  
9 judgment based on the facts as I found them which  
10 deal with the layout of the plaintiff's lot and the  
11 current and planned use of it as the plaintiff  
12 presented those facts to me.

13 The judgment that will enter in this case  
14 will enter for the defendant. The judgment will  
15 establish and declare the rights of the parties in  
16 and concerning the disputed parking easement on the  
17 plaintiff's land for the benefit of the defendants in  
18 accordance with summary judgment rulings earlier made  
19 and the findings and rulings today made following  
20 trial.

21 In addition to addressing the easement  
22 locational questions, the judgment will also embody  
23 the court's ruling on plaintiff's unsuccessful claim  
24 as to an alleged encroachment by the defendant's

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---[ P 81]---

1 building. To the extent the pleadings would even  
2 allow me to do so, I will not direct any award of  
3 damages, costs, fees or other amounts, no entitlement  
4 having been proved to me therefore.

5 A word about our next steps, I will ask us  
6 all to await the arrival of the transcript of today's  
7 session. Once it's in hand, I'll ask the defendant,  
8 as the prevailing party to draft and to file and  
9 serve a proposed form of judgment within 14 days  
10 after the arrival of the transcript at the court.

11 The plaintiff can either agree and file  
12 agreement with the court, or may file and serve an  
13 alternative form of judgment within 14 days after  
14 receipt of the defendant's form of judgment.

15 Please help me in your draft or drafts by  
16 being specific and detailed in the language you would  
17 like to see in the final judgment I will order  
18 entered. I want to be very clear on the record that  
19 there is no waiver of any appellate right of any  
20 party as a result of your participation in the  
21 process of advising the court about the form of  
22 judgment it ought to enter.

23 Also, as I said at the start, within the  
24 same time frames, I'd ask the parties to consult with

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---[ P 82]---

1 each other on suggested corrections to my findings  
2 and rulings. As far as I'm concerned, your focus  
3 ought to be on typographical, mechanical or  
4 transcriptive errors, rather than disagreement with  
5 the views I've taken of the evidence and the  
6 governing legal principles. And please submit to me,  
7 not later than the time the proposed form or forms of  
8 judgment come in, the suggested changes, either  
9 jointly to the extent you are able to agree, or  
10 severally to the extent you do not. Give me your  
11 suggestion of particular errors requiring correction  
12 and I will, if I agree, enter an order correcting  
13 them as the judgment enters.

14 Is there any question about the procedure  
15 I've just outline for counsel?

16 MR. DeMOURA: No, Your Honor.

17 MR. JOHNSON: One question.

18 THE COURT: Yes, Mr. Johnson.

19 MR. JOHNSON: As to the form of the  
20 judgment within 14 days, do you want us to serve it  
21 on the plaintiff or file it with the court, as well?

22 THE COURT: Both.

23 MR. JOHNSON: Thank you.

24 THE COURT: The idea here is that you'll

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---[ P 83]---

1 give Mr. DeMoura a look at it, and I will know that  
2 it's been done. And then I will wait for his either  
3 acquiescence in it or his competing form. And I will  
4 look carefully at your suggestions and enter a form  
5 of judgment that is consonant with what we've done  
6 here so far in the trial.

7 Mr. Demoura?

8 MR. DeMOURA: I've perhaps missed it then,  
9 after the -- after I'm served with the agreement for  
10 judgment, how much time will I have to --

11 THE COURT: Fourteen days for the first and  
12 then 14 days for your response, a total of 28 days.

13 MR. DeMOURA: Thank you.

14 THE COURT: That concludes the trial, I  
15 thank counsel, --

16 MR. JOHNSON: Thank you, Your Honor.

17 THE COURT: -- and we will be adjourned.

18 (Closing arguments

19 concluded at 12:41 p.m.)

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---[ P 84]---

84

## COMMONWEALTH OF MASSACHUSETTS

I, Pamela J. St. Amand, Professional Court Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that the foregoing record, Pages 1 to 83, inclusive, is a true and accurate transcript of my system recording to the best of my knowledge, skill and ability.

I am not connected by blood or marriage with any of the said parties, nor interested directly or indirectly in the matter in controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and Notary Seal this 12th day of September, 2010.

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PAMELA J. ST. AMAND, Notary Public  
My Commission expires: 2/18/2011

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