IN THE COURT OF COMMON PLEAS

COUNTY OF PHILADELPHIA

CIVIL TRIAL DIVISION

Top of the Hill Plaza Partners, L.P.,	**:**	
Plaintiff	**:**	**May Term, 2014**
	:	**No. 00147**
v.	**:**	
	:	**Commerce Court**
Hayden Holdings, Ltd., Spa Elysium, LTD	**:**	
Park 55 L.L.C., and	**:**	
Wendy Feldman and Francis Hayden	**:**	
Defendants	**:**	

MEMORANDUM OPINION

After a bench trial held June 29, 2017, this Court concluded that the original 1950 deed ("Original 1950 Deed") grants Plaintiff an easement of ingress and egress over Lot C, but does not grant use of the parking lot.[1] In response, Defendants filed post-trial motions,[2] claiming the 1950 deed does not expressly grant any rights to Plaintiff. Instead, Defendants argue the deed only allows such rights as "may" be granted to "others."[3] Defendants also request the following of this Court: clarify that the express easement does not give Plaintiff any right to park in the Lot

[1] Findings of Fact and Conclusions of Law, *Top of the Hill Plaza Partners v. Haden Holdings*, No. 140500147, at 14-16 (Pa. Ct. Com. Pl. Philadelphia County June 30, 2017). This Court's interpretation of the 1950 deed is explained more fully *infra* pp. 5-7. This Court's Findings of Facts and Conclusions of Law were followed by an order to account damages and a permanent injunction. Order, *Top of the Hill Plaza Partners v. Haden Holdings*, No. 140500147 (Pa. Ct. Com. Pl. Philadelphia County June 30, 2017); Permanent Injunction Order, *Top of the Hill Plaza Partners v. Hayden Holdings*, No. 140500147 (Pa. Ct. Com. Pl. Philadelphia County June 30, 2017).

[2] Defendants' Post-Trial Motions, *Top of the Hill Plaza Partners v. Haden Holdings*, No. 140500147, Control Number 17070765 (Pa. Ct. Com. Pl. Philadelphia County July 10, 2017).

[3] Defendants further argue that any easement created by the 1950 deed was terminated by the Termination Agreement. Defendants' Post-Trial Motions, *supra* note 2, at p. 14.

C parking area;[4] clarify the precise location of the ingress easement the Court found exists over the Lot C driveway; hold accounting is improper because Plaintiff has no right to use the Lot C parking area;[5] and hold Defendants' counterclaims were improperly denied because Defendants may charge any amount for parking.[6] For the reasons stated below, all defense motions are DENIED.

Plaintiff filed its own post-trial motions[7] claiming (1) the Original 1950 Deed granted an easement over the "passageways" and the "parking area";[8] (2) an irrevocable license existed because of improvements made to Lot A in reliance on promises made by Lot C's prior owners;[9] (3) Plaintiff should not have to pay for maintenance and upkeep of the Lot C parking area because under the Findings of Facts and Conclusions of Law, Plaintiff was not granted the right to use this parking area for parking;[10] and (4) Defendants should not be entitled to Lot A's driveway for ingress/egress without compensation.[11] For the reasons explained here, the motion claiming the Original 1950 Deed granted an easement over the "passageways" and "parking areas" is GRANTED. In addition to the aforementioned motions, plaintiff had also moved for an

[4] Defendants' Post-Trial Motions, *supra* note 2, at p. 20.

[5] Defendants' Post-Trial Motions, *supra* note 2, at pp. 22-23.

[6] Defendants' Post-Trial Motions, *supra* note 2, at p. 24.

[7] Plaintiff's Post-Trial Motions, *Top of the Hill Plaza Partners v. Haden Holdings*, No. 140500147, Control No. 17072656 (Pa. Ct Com. Pl. July 20, 2017).

[8] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 2.

[9] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 3.

[10] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 4.

[11] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 7.

accounting and this had been GRANTED. Our decision specifying amounts owed by Plaintiff to Defendant Hayden Holdings, Ltd. is explained here.

I. STATEMENT OF FACTS

Plaintiff Top of the Hill Plaza Partners, LP ("TOHP Partners") owns two adjacent parcels of land ("Lot A" and "Lot B").[12] Defendant Hayden Holdings, Ltd. ("Hayden Holdings") owns "Lot C" (hereinafter, Lots A, B, and C, collectively "Shared Lot"). The original 1950 deed ("First 1950 Deed") conveys Lot C from Sylvan S. Levy and Leona G. Levy to Charles Henry Jr. and contains the following easement language:

> TOGETHER with the right, liberty and privilege of using passageways to the Northeast and Southwest and a parking area in the rear of the premises hereinbefore described as follows: [Metes and Bounds description] as and for a PARKING AREA, PASSAGEWAYS and DRIVEWAYS for the mutual use and accommodation of the owners, tenants and occupiers of the premises hereinbefore described *and/or others to whom the use thereof may be granted by the said Grantors for ingress, egress and regress to and from Bethlehem Pike to said parking area*; PROVIDED, however that said passageways or driveways shall be kept free and clear of all parked vehicles, and/or any other obstruction, which might prevent free access to the Parking Area from Bethlehem Pike; SUBJECT, however, to the proportionate part of the expense of the maintenance and upkeep of said passages and parking area at all times, hereafter, forever.
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> Plaintiff's Ex. 2-A. (emphasis added).[13]

At the time of the First 1950 Deed all lots were used as commercial property and this continues to the present time, From 1950 to 1973, Lots A and B used separate parking areas from Lot C.[14] In 1973, the owners of Lot C, now the Trustees under the Last Will and Testament of

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[12] For a complete accounting of the facts *see generally* Findings of Fact and Conclusions of Law, No. 140500147, *supra* note 1. Plaintiff acquired this property in 2007 after several prior conveyances. Stipulated Facts, No. 1.a. Stipulated Facts, No. 1.b. Stipulated Facts, No. 1.g. 2. Lot B was conveyed to Top of the Hill in 2007 as well. Stipulated Facts, No. 2.f.

[13] This language was referenced in several subsequent conveyances of Lot C. *See* Findings of Facts and Conclusions of Law, No. 140500147, *supra* note 1, at pp. 4-8.

[14] Defendants' Ex. 11; N.T. 9/7/16, p. 86.

Leona O. Levy ("Bert Levy Trustee"),, began a plan to develop all three lots into a unified shopping center.[15] Bert Levy Trustee was the originator and he brought well known construction developer Ed Driscoll into his plan. During the early development process, Ed Driscoll and Company became general partner of a new entity called Top of the Hill Associates.[16] By an Agreement to Lease, an Agreement of Lease, and a Lease Memorandum ("Lease"), Ed Driscoll's Top of the Hill Associates was granted managing rights over the Shared Lot giving his company the right to develop a single shopping center using all three lots. Top of the Hill Associates management and development rights over land on Lot C were secured by lease as tenant from landlord Bert Levy Trustee. But this Lease has termination provisions, expiration terms and important precedent conditions to be satisfied before the Lease was to become effective. It is not a property law easement which runs with the land forever as stated in the First 1950 Deed.

Therefore, actual assembly in property law of the three lots was accomplished on a separate track. Bert Levy and Ed Driscoll worked together to win necessary variances from the Zoning Board of Adjustment for a plan involving joining all three lots. At first through an associated company named LETR but later as Bert Levy Trustee, Lot C's owner applied for a variance. Ed Driscoll filed separate applications on behalf of Top of the Hill Associates. Through Wolf Block attorney Franklin H. Spitzer, Esquire, Levy and Driscoll consolidated their zoning applications and submitted the joint building plans that show the three lots merged into the Shared Lot. The building plans also show a driveway originating at Bethlehem Pike. This driveway is on Lot C land and connects to designated parking areas on both Lot A and Lot C.[17] After the Top of the

[15] N.T. 9/7/16, p. 117.

[16] N.T. 9/7/16, p. 85.

[17] *See* Plaintiff's Ex. 1.

Hill Shopping Center ("Shopping Center") was built, the Shared Lot was used by all owners, tenants, employees, customers and guests of the Shopping Center.[18] Two one-way lanes were used by motor vehicle drivers to enter and leave the Shared Lot from the single entrance point on Bethlehem Pike.[19]

Plaintiff acquired Lot A and Lot B on July 31, 2007.[20] Following difficulties with its role as manager under the Lease, Plaintiff elected to terminate the Lease on December 2, 2010, and consented to Lot C owner, now the Bert O. Levy Living Trust ("Living Trust") to manage the Shared Lot.[21]/ [22] Plaintiff continued using the Shared Lot without any written agreement for the remainder of the Living Trust's ownership of Lot A.[23]

Defendant Hayden Holdings, Ltd, acquired Lot C from the Living Trust on December 17, 2010.[24] After this sale, Plaintiff continued to use Lot C passageways and parking in the same manner as all its predecessors since the Shopping Center was built in the 1970's. Sometime in 2014, Defendants unilaterally changed the Lot C parking configuration and attempted to disjoin the Shared Lot.[25] At the time of trial, the Shared Lot had been reconfigured in such a way that

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[18] N.T. 9/7/16, p. 111.

[19] N.T. 9/12/16, p. 181. As originally used by owners, tenants, employees, customers and guests of the Top of the Hill development going back to 1974, drivers entered the Shared Parking Lot on a single driving lane which was on Lot C land. Drivers exited the Shared Parking Lot using a single driving lane on both Lot A and Lot C land. Neither party satisfactorily proved the exact metes and bound dimensions at trial. But evidence is clear that land from both Lot A and Lot C was used by drivers since the 1970's as they drove to the parking lots.

[20] Stipulated Facts, p. 1.

[21] N.T. 9/7/16, p. 168.

[22] At this time, Lot C was owned by Levy-Kessler-Kahn Partnership, but Bert Levy continued to manage the property. Facts and Conclusions, *supra* note 1, at p. 7. N.T. 9/07/17 at p. 168.

[23] N.T. 9/07/16, p. 173.

[24] Stipulated Facts, p. 2.

[25] N.T. 9/07/16, p. 88. Facts and Conclusions, *supra* note 1, at p. 10.

ingress/egress was unsafe for drivers and pedestrians.[26] Also, several parking spaces situated on the property line were roped-off. These were lost to Shopping Center customers until issuance of injunctive orders.[27]

After Hayden Holdings changed the Shared Lot configuration, this lawsuit was filed, a Preliminary Injunction was issued, and our Findings of Fact and Conclusions of Law were entered along with a Permanent Injunction.

II. PROCEDURAL HISTORY

Recapping, after the bench trial, this Court found that the Original 1950 Deed grants Plaintiff an easement of ingress and egress over Lot C, but does not grant use of the Lot C parking lot.[28] In response, Defendants filed post-trial motions,[29] claiming (1) the 1950 deed does not expressly grant any rights to Plaintiff, but rather only allows such rights as "may" by granted to "others"[30]; (2) seeking clarification that the express easement does not give Plaintiff any right to park in the Lot C parking area;[31] (3) clarify the precise location of the ingress easement the

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[26] Zoning and traffic regulations require that a two-way lane which is being used as a driveway must be at least 24 feet in width. N.T. 9/12/16, p. 112. From the wall of the shopping center building on Lot A to the property line dividing Lot A and Lot C is a distance of 26.2 feet. N.T. 9/12/16, p. 112. Applicable zoning and safety code regulations require any two way driveway now on Lot A to be at least 29 feet wide. Currently, the available 26.2 feet violates applicable zoning and safety regulations for a two-way ingress and egress driveway on Lot A. Nearly three feet of land from Lot C is necessary for the Changed Configuration to meet applicable zoning and licensing requirements.

[27] N.T. 9/08/16 at p. 27.

[28] Findings and Conclusions, No. 140500147, *supra* note 1, at 14-16. This Court's interpretation of the 1950 deed is explained more fully *infra* pp. 5-7. This Court's Findings of Facts and Conclusions of Law were followed by an order to account damages and a permanent injunction. Order, *Top of the Hill Plaza Partners v. Haden Holdings*, No. 140500147 (Pa. Ct Com. Pl. Philadelphia County June 30, 2017); Permanent Injunction Order, *Top of the Hill Plaza Partners v. Hayden Holdings*, No. 140500147 (Pa. Ct Com. Pl. Philadelphia County June 30, 2017).

[29] Defendants' Post-Trial Motions, *supra* note 2.

[30] Defendants further argue that any easement created by the 1950 deed was terminated by the Termination Agreement. Defendants' Post-Trial Motions, No. 140500147, *supra* note 2, at p. 14.

[31] Defendants' Post-Trial Motions, No. 140500147, *supra* note 2, at p. 20.

Court has imposed over the Lot C driveway;[32] (4) accounting is improper because Plaintiff has no right to use the Lot C parking area;[33] and (5) Defendants' counterclaims were improperly denied because Defendants may charge any amount for parking.[34]

Plaintiff's post-trial motions[35] claim (1) the Original 1950 deed granted an easement over the "passageways" and the "parking area";[36] (2) an irrevocable license existed upon improvements made to Lot A by Plaintiff's predecessors in reliance on promises made by Defendants' predecessors, [37] (3) Plaintiff should not have to pay for maintenance and upkeep of the Lot C parking area because Plaintiff was not awarded the right to use the Lot C parking area by operation of law[38] (4) and Defendants should not be entitled to use Lot A's driveway for ingress/egress without compensation.[39]

III. DISCUSSION

A. Express Easement

Plaintiff is entitled to an express easement of ingress/egress and use of the parking area because the 1950 deed creates the right to the owner of Lot A to grant use to an "other." In this

[32] Defendants' Post-Trial Motions, No. 140500147, *supra* note 2, at p. 20. As a matter of clarification, the Court has not imposed any easement, but rather has found the 1950 deed to Lot C created an express easement which was extended to Plaintiff.

[33] Defendants' Post-Trial Motions, No. 140500147, *supra* note 2, at pp. 22-23.

[34] Defendants' Post-Trial Motions, No. 140500147, *supra* note 2, at p. 24.

[35] Plaintiff's Post-Trial Motions, No. 140500147, *supra* note 7.

[36] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 2.

[37] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 3.

[38] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 4.

[39] Plaintiff's Post-Trial Motion, No. 140500147, *supra* note 7, at p. 7.

case, the predecessors of Lot A were granted use of Lot C land for a driveway and parking during the development stage of Chestnut Hill's Top of the Hill Shopping Center in 1973-74.

When interpreting whether a deed creates an express easement, the same rules of construction applicable to contracts are used to determine the language of easement grants.[40] The meaning and extent of an express easement is governed by the intent of the parties.[41] "Where a deed or agreement or reservation therein is obscure or ambiguous, the intention of the parties is ascertained in each instance not only from the language of the entire written instrument in question, but also from consideration of the subject matter and surrounding circumstances."[42]

The First 1950 Deed's easement language relevant to this case is ambiguous. Its arcane language, questionable punctuation, confusing clausal structure, and generalized language allows for several reasonable interpretations. Because of these limitations, the intent of the parties must be determined with guidance from the unique facts and circumstances of this case. As a matter of course and given the commercial nature of the subject matter, the buyer's and seller's primary intent was to further and protect their economic interests. The geographic layout of Lot C and its proximity to empty land on adjoining Lot A and Lot B suggests as early as 1950 that the Levy family anticipated that someday their own property value could be enhanced by grant of easement rights to "others."

With these considerations in mind and after careful study of the deed language, this Court finds the First 1950 Deed created an express easement. The language gives "the right, liberty and

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[40] *Zettlemoyer v. Transcon. Gas Pipeline Corp.*, 657 A.2d 920 (Pa. 1995).

[41] *Merrill v. Mfrs. Light and Heat Co.*, 185 A.2d 573, 575 (Pa. 1962); *Amerikohl Mining Co. v. Peoples Natural Gas Co.*, 860 A.2d 547, 550 (Pa. Super. Ct. 2004).

[42] *Id.* Ambiguous terms are construed in favor of the grantee. *Columbia Gas Transmission Corp. v. Savage*, 863 F. Supp. 198 (M.D. Pa. 1994).

privilege of using passageways . . . and a parking area" on Lot C to "others." "Others" is defined in the deed's easement language as those who are not "owners, tenants, and occupiers" of Lot C to whom use of "passageways for ingress, egress and regress to and from Bethlehem Pike to the parking area" had already been granted. This clause, as it relates to the easement rights of "others," extends use of Lot C land for a driveway and parking to persons who are (1) not an "owner, tenant, or occupant"[43] of Lot C, and (2) have already been granted use of the passageway to and from the parking area on Lot C.[44] The durational term for this grant is "forever." Thus, when the owner of Lot C expressly grants its land to an adjoining lot owner for use as a passageway to the parking area on Lot C, the grant is also an easement in favor of the adjoining lot owner to use Lot C as a parking area as well. An adjoining landowner by definition is not an owner, tenant or occupant of Lot C and is therefore an "other" under the deed.

This interpretation of the First 1950 Deed differs from this Court's analysis expressed in our Findings and Conclusions. There, we held an easement exists for Lot A's use of the passageways for ingress/egress, but not for use of the parking lot.[45] This is incorrect because an express grant involving the driveway and parking area was granted on February 12, 1974. This is the date that Mr. Spitzer wrote his "clarification" letter to the ZBA on behalf of Bert Levy Trustee and Top of the Hill Associates (Driscoll). In his correspondence, Mr. Spitzer uses the word "combined", explicitly assuring the ZBA that the "*combined* sites have adequate space for

[43] Interestingly, the categories of "owners, tenants, and occupiers" do not on its face include patrons Lot C businesses, which would be considered "invitees." However, because no parties provided argument on this point to the Court, we decline to fully analyze the potential expansiveness of this language.

[44] The deed does not require this grant to be in writing.

[45] *See* Findings and Conclusions, *supra* note 1, at pp. 14-17.

at least sixty-five parking spaces, together with all needed access to the parking spaces and buildings." [46] (Italics added)

By deciding in our Findings of Facts and Conclusions of Law that Bert Levy Trustee's easement grant did not include *both* the parking and the passageway on Lot C, this Court erred and grants Plaintiff's post trial motion. Our error created an anomaly by which Plaintiff, until now, was obligated to pay for future maintenance of the Lot C parking lot on Lot C without an easement to park on Lot C itself.

Accordingly, we correct our previous conclusion and hold that Bert Levy Trustee expressly granted use of Lot C's parking lot and the passageway from Bethlehem Pike and did so on February 12, 1974 when Mr. Spitzer assured the ZBA that the plan would include the Shared Lot.

To be sure, on the ground fulfillment of this grant did not take place until a year later on August 6, 1975 when the Philadelphia Industrial Development Corporation ("PIDC") purchased both Lot A and Lot B from third parties. Tis August 6, 1975 closing was the legal go ahead which triggered Top of the Hill Associates authority under the Lease to commence the management and Driscoll and Company's construction of the Shopping Center. After this, there was no point of return as the authorized plan included eliminating a city street connecting Germantown Avenue to the interior of Lots A and B.

[46] When he wrote this letter, Mr. Spitzer was attorney for the developer applicants. In late 1973, LETR, a corporate creation of Bert Levy submitted the initial application for zoning approval. Writing on behalf of LETR, Mr. Spitzer's application proposed a residential and commercial project combining Lots A, B, and C. A few months later, Mr. Spitzer submitted an amended application, this time on behalf of Top of the Hill Associates, an entity which linked Bert Levy to construction developer Ed Driscoll, as reflected on ownership and address lines in ZBA notices of decision and other paperwork relating to this project. Mr. Spitzer's February 12, 1974 letter, relating to ZBA applications at Cal. No. 73-1286-8705 Germantown Avenue and Cal. No. 73-1287 51-55 Bethlehem Pike, records Bert Levy's decision to publicly grant use of his land on Lot C to assure "adequate space for at least sixty-five parking spaces, together with all needed access to the parking spaces and buildings."

Defendants may argue that termination of the Lease suggests an intent by Plaintiff, as owner of Lots A and B to abandon the easement, but actual conduct proves otherwise. Both Top of the Hill Plaza Partners, L.P. and Hayden Holdings, Ltd., along with third party Chestnut Hill Parking Foundation, continued to operate the Shared Parking Lot as usual after the December 2, 2010 Lease termination. As they had since the opening of the Shopping Center until the defendants' disruption, the parties and the community understood there was authority for the Shared Lot other than the Lease.

During this post-trial review, determining the scope of the First 1950 Deed easement language has been challenging because of the creation and termination of the Lease. The key point to remember is that the Lease, by its own terms, did not take effect until all the deal's components were completed. This took place on August 6, 1975 when the three lots were finally assembled with PIDC's purchase of Lot A and Lot B alongside Bert Levy Trustee's Lot C. Only then could Top of the Hill Associates begin to manage the project under the Lease and contract Driscoll's company to do the construction. By then the easements had already been expressly granted.

Finally, we observe that the PIDC is a hybrid governmental agency which owes a fiduciary duty to its bondholders. This fiduciary duty may fail when an agency relies on a mere lease to protect property values secured in fee simple. In this case, guaranteed access to Lot C has financial value to the owners of Lot B and C. So does the right to park on both lots forever. Any threat to these rights is incompatible with the fee simple ownership acquired by PIDC on August 6, 1975 over Lot A and Lot B. It is simply irrational for PIDC and its bondholders in 1975 to have relied on a Lease which by its terms could be terminated by others not including themselves. Without a doubt, the easement language in the First 1950 Deed and its conveyance

by Bert Levy through Mr. Spitzer on February 6, 1974 assured PIDC's lawyers to let their client go ahead and buy Lots A and B. In doing so, PIDC gave its final stamp of approval on a shopping center to be built on the Shared Lot.

B. Irrevocable License

No irrevocable license was granted to the Plaintiff. This is because an irrevocable license is not assignable. It is also because the substantial expenses and changes carried out by predecessor owners of Lot A in the 1970's were made in reliance to the development plan.

A license is a personal and revocable privilege to do something on the land of another.[47] A license becomes irrevocable when the privilege is followed by the expenditure of substantial money in reliance on the licensee's ability to use the land for purposes permitted under the grant. This relationship between the parties is treated as a binding contract.[48] However, an irrevocable license is a personal grant and may not be assigned; assignment of the property terminates the license.[49]

In this case, Plaintiff was not given an irrevocable license because Plaintiff only became the owner of Lot A in 2007. For several years thereafter, Plaintiff freely used Lot C passageways and parking area, which may be considered a promise under the doctrine of irrevocable license.[50]

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[47] *Baldwin v. Taylor*, 31 A. 250 (Pa. 1895).

[48] *Huff v. McCauley*, 53 Pa. 206, 208 (Pa. 1866).

[49] *Dark v. Johnson*, 55 Pa. 164, 171 (Pa. 1867) ("That a license is a personal privilege, and not assignable, is a well-settled principle. It is induced almost always by confidence in the character of the licensee. A man may well accord a privilege upon his lands to one person, which he would refuse to all others. Hence it is held that a personal license is not assignable, and that an assignment by a licensee determines his right. Though a licenser may be estopped from recalling the privilege granted, the licensee may destroy it. He may abandon or release. He cannot substitute another to his right..."); *see Dailey's Chevrolet v. Worster Realties*, 458 A.2d 956, 960 (Pa. Super. Ct. 1983); *Waltimyer v. Smith*, 556 A.2d 912, 914 (Pa. Super. Ct. 1989).

[50] The elements of an estoppel are: (1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; (2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and (3) the lack of a duty to inquire on the party asserting the estoppel. *Louis W. Epstein Family P'ship v. Kmart Corp*., 13 F.3d 762, 774 (3d Cir. 1994); *Philadelphia Reg'l Port Auth. v. Approximately 1.22 Acres of Land*

However, no substantial improvements or expenditures of money were made by Plaintiff.[51] Although Plaintiff paid for maintenance of the property, equitable relief afforded by an irrevocable license is only appropriate when substantial and permanent improvements are made.[52] Because no evidence has been presented that such improvements were made or paid for by Plaintiff in reliance on any promises since 2007, there is no irrevocable license.

C. Easement by Implied Reservation

This Court adopts and incorporates by reference paragraphs 16-18 of our Conclusions of Law dated June 29, 2017. The absence of common ownership among Lot A, B and Lot C is dispositive. The enforceability of an easement by implied reservation is the same as an easement by implication. [53]

D. Damages

This Court's June 29, 2017 Order requires Plaintiff Top of the Hill Plaza Partners, L.P. and Defendant Hayden Holdings, Ltd. each to pay one-half of the future expense of upkeep and maintenance of the driveway on Lot C, and to each pay one-half the expense of having a third-party entity implement terms of the permanent injunction, including the cost of hiring full or part time staff to operate the tollbooth.[54]

(Identified as Savage Yard) *in Philadelphia, Pa.*, No. CIV. A. 04-5930, 2008 WL 1018324, at *5 (E.D. Pa. Apr. 9, 2008). Easement by estoppel is inducement coupled with justifiable reliance on that inducement." *Id.* "The permission need not be express, but may be inferred through the owner's acquiescence in an open and obvious use of the land." *Kapp v. Norfolk Southern Ry. Co.*, 350 F.Supp.2d 597, 612 (M.D. Pa. 2004).

[51] Plaintiff has burden of proving the existence of an irrevocable license by clear and convincing evidence. *Bishop v. Buckley*, 33 Pa. Super. 123, 127 (Pa. Super. Ct. 1907).

[52] *Cf. Ziemba v. DeWalt*, 12 Pa. D. & C 5th 375, 379 (Pa. Ct. Com. Pl. Berks County 2010) (holding an irrevocable license was created when neighbors spent time and labor together to improve a "scraggly" road when they were promised the road would be shared).

[53] *See Bucciarelli v. DeLisa*, 691 A.2d 431, 448 (Pa. 1997).

[54] Order, *Top of the Hill Plaza Partners v. Haden Holdings*, No. 14050014716 (Pa. Ct. Com. Pl. Philadelphia County *filed* June 29, 2017).

This Court conducted an assessment of damages hearing on January 23, 2018, in which Defendant Hayden Holdings, Ltd. resented an accounting totaling $180,476.85 in costs for the years between 2014 to July 2017.[55] Defendant also provided detailed accounting for its transactions during these years.[56] Plaintiff presented evidence that it is holding $139,090.00 in an escrow account.[57]

In response, Plaintiff objected to the following expenses: (1) staffing costs, (2) "duplicate" costs for a vehicle in addition to charges for snowplowing, (3) miscellaneous business expenses including insurance, meals, office costs, accounting and legal fees, (4) the cost of moving the toll booth, (5) parking supplies believed to be the cost for fencing, (6) legal fees, (7) salting for the sidewalks outside Lot C businesses, (8) parking costs associated with attendance at this court's hearing on accounting, and (9) real estate tax for the proportion of land included in the easement. Plaintiff claimed it should only be required to pay $23,789.65.[58]

First, Defendant's staffing costs are reasonable. Both parties are responsible for half of the expenses of a third-party to implement this Court's permanent injunction.
This necessarily includes the cost of hiring employees to operate the toll booth. This Court agrees with Defendant that "absent staffing, there can be no maintenance, or operation of the tollbooth or any other kind which can be characterized as 'maintenance, expense and upkeep."[59]

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[55] Plaintiff's Exceptions to Defendants' Accounting, Assessment of Damages Hearing, January 23, 2018, Plaintiff's Ex. 5.

[56] Transaction Detail By Account, Assessment of Damages Hearing, January 23, 2018, Defendant's Ex. 1; Transaction Detail By Account, Assessment of Damages Hearing, January 23, 2018, Defendant's Ex. 2; Transaction Detail By Account, Assessment of Damages Hearing, January 23, 2018, Defendant's Ex. 3; Transaction Detail By Account, Assessment of Damages Hearing, January 23, 2018, Defendant's Ex. 4.

[57] Top of the Hill Plaza Partners-Escrow, Assessment of Damages Hearing, January 23, 2018, Plaintiff's Ex. 1.

[58] Plaintiff's Exceptions to Defendants' Accounting, *supra* note 71.

[59] Defendants' Response to Plaintiff's Exceptions to Damages, Assessment of Damages Hearing, January 23, 2018, Defendants' Ex. 6, p. 2.

Defendant provided a detailed accounting of these staffing expenses, and Plaintiff failed to identify at the hearing any specific staffing expenses it found to be unreasonable. Furthermore, Defendant satisfactorily explained at the hearing that the high cost of staffing in 2014, followed by gradually decreasing costs, was caused by gradually reducing the number of staff from four to one.[60] This Court finds Defendant's staffing costs, totaling $106,166.85 were reasonable and Plaintiff must pay half.

Second, the costs associated with snow plowing and the vehicle used by Defendant were reasonable and non-duplicative. Defendant explained that an unusually harsh winter and heavy snowfall required a greater expense than prior years.[61] The Court is satisfied and declines to delve into the minutia of a third-party's operating expenses.

Third, the Court finds Defendant's miscellaneous operating expenses are reasonable, excluding the cost of meals and legal fees. Defendant voluntarily elected to deduct the costs of meals and legal fees, which totals $19,174.97.[62] We find the remainder of Defendant's expenses, which include insurance, office overhead and accounting, to be reasonably necessary to operate the Shared Lot including its toll booth.

Fourth, Defendant elected to deduct $1,173 to move the toll booth.[63]

Fifth, this Court finds the cost of parking supplies to be reasonable.

Sixth, as stated previously, Defendant elected to deduct the total $19,031.60 cost of legal fees.

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[60] N.T. 01/23/18 at pp. 45-46.

[61] N.T. 01/23/18 at pp. 44.

[62] Defendants' Response to Plaintiff's Exceptions to Damages, *supra* note 74, at p. 3.

[63] Defendants' Response to Plaintiff's Exceptions to Damages, *supra* note 74, at p. 3.

Seventh, this Court finds the cost of salting the sidewalks to be within the scope of our Order.

Eighth, Defendant elected to deduct the $48.00 cost for parking at the hearing.

Finally, the proportionate charge of $8,145.74 in real estate taxes is reasonable. Plaintiff claimed real estate taxes are not included in "maintenance and upkeep" and that the proper allocation by Philadelphia taxing authorities is twenty-percent ("20 %") rather than one-third ("33.3 %").[64] Defendant voluntarily elected to deduct a proportionate charge of $5,430.49, for a total of $8,145.74, representing 20% of the tax.[65] The Court finds this amount to be reasonable.

Thus, of the $189,569.26 in costs requested by Defendant, this Court finds $163,790.80 is reasonable. Plaintiff must pay Defendant half this amount, which totals $81,895.45. This sum shall be paid from the $139,090.00 Plaintiff holds in escrow. Remaining funds in escrow shall be returned to Top of the Hill Plaza Partners L.P's deposit account.

IV. CONCLUSION

This Court will enter judgment within thirty days unless a party has entered judgment by praecipe consistent with this Memorandum Opinion.

DATE: JULY 2, 2018 **BY THE COURT**

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RAMY I. DJERASSI, J.

[64] Plaintiff's Exceptions to Defendants' Accounting, *supra* note 71, at p. 2.

[65] Defendant's Response to Plaintiff's Exceptions to Damages, *supra* note 74, at p. 3.