IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

DENNIS WISE and POLAR EVANGELISM, INC., d/b/a GOLD NUGGET RANCH and TRAINING CENTER,

Plaintiffs,

vs.

ROBERT GAMBLE,

Defendant.

No. 4FA-78-1807

DENNIS WISE and POLAR EVANGELISM, INC., d/b/a GOLD NUGGET RANCH and TRAINING CENTER,

Plaintiffs,

vs.

ALEXANDER SZMYD,

Defendant.

No. 4FA-78-1338

ORDER ON MOTIONS

This matter comes before the Court upon three motions: (1) plaintiffs' Motion to Strike Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, (2) defendants' Motion for Summary Judgment and (3) plaintiffs' Cross Motion for Summary Judgment. The Court has read the memoranda of the respective parties, the depositions insofar as they are referred to in the memoranda, and has heard the arguments of counsel.

The first motion under consideration is plaintiffs' Motion to Strike. Plaintiffs base this motion on their belief that opposition to their Cross Motion for Summary Judgment was filed late. Therefore, Mr. Aschenbrenner (of all people) argues it should be stricken. According to plaintiffs' calculations,

opposition was due on March 13, 1979, and according to the file opposition was in fact filed on March 13, 1979. Plaintiffs' Motion to Strike on its face is spurious, falacious and unfounded in either fact or law. Therefore plaintiffs' Motion to Strike be and the same hereby is DENIED and defendants are awarded attorneys' fees against plaintiffs in answering said motion in the sum of $150.00.

The second motion for the Court's consideration is defendants' Motion for Summary Judgment. Defendants advance several theses in support of their motion for summary judgment. First, they challenge the standing of plaintiff Polar Evangelism to bring this action. Defendants point out that Wise allegedly acquired the lease from the Division of Lands and that Polar Evangelism has no standing to seek an injunction except as an interested member of the public. Polar Evangelism has no property right in the ESRO site. Plaintiffs in their oppostion to this motion do not contradict defendants' assertion.

Defendants next argue that they legally may control access to the ESRO site inasmuch as access is by way of their private road which has neither been dedicated to the public by defendants nor which is located on public lands so as to justify an argument for declaring it a public road because of public use. In support of this argument defendants cite Hamerly v. Denton, 359 P.2d 121 (Alaska 1961), in which the court set forth tests for determining whether or not a road was a public highway. The court stated that a public highway could be established if the proponent of the public highway argument proved

> (1) that the alleged highway was located 'over public lands' , and
> (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant. Hamerly at 123.

In the instant case, plaintiffs have presented no evidence to suggest that the alleged easement is "over public lands". Therefore,

plaintiffs cannot prevail on a public highway theory.

In Hamerly the court also recognized the possibility of a right-of-way established by dedication to the public. In discussing the requirements for finding that a landowner has dedicated land to the public, the court stated,

> Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient. Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character. (footnotes omitted) Hamerly at 125.

The burden of proving dedication rests on the party relying on dedication. Hamerly at 125. In Hamerly the court concluded that the landowner's indifference to infrequent and sporadic use of his property by hunters and sightseers did not constitute a clear and unequivocal manifestation of his intent to dedicate the land to public use. In the instant case, the only evidence which plaintiffs might rely on is the fact that defendants have permitted school buses and mail vehicles to pass over ESRO Road. However, defendants have closed the road to all traffic at least once a year. I would conclude that the yearly closing refutes any suggestion that defendants have clearly and unequivocally dedicated ESRO Road to public use. The passage of school buses and mail vehicles was not of benefit to the public. Rather, only defendants themselves benefitted from the use by these vehicles of ESRO Road. I see nothing in plaintiffs' presentation which suggests clear and unequivocal dedication of ESRO Road to the public by defendants.

Plaintiffs in their opposition argue that ESRO Road is a "de facto public road". They cite no authority for their contention that such a road is legally cognizable.

Plaintiffs place great reliance on the requirements of

4 AAC 27.010 which sets forth the requirements for the establishment of a school bus route. That section provides:

> ESTABLISHMENT OF REGULAR ROUTES.
> (a) A regular pupil transportation route may be established by a school district if
>
> (2) the entire route is over regularly maintained roads, having at least a gravel surface, which are under the supervision and all-weather maintenance of the Alaska Department of Highways, a public utility district, a municipality, a borough service area, or any other agency supported by public funds;
> . . .

Plaintiffs suggest that because ESRO Road is on a school bus route, it is a public road under the supervision of one of the enumerated agencies. It is undisputed that defendants receive no public funds for the maintenance of ESRO Road. However, plaintiffs contend that the passage of the buses in combination with the above quoted statute compels one to conclude that the road is public.

I am not convinced by plaintiffs' argument factually or legally. As plaintiffs note, there is no question of fact that maintenance of ESRO Road is conducted entirely by defendants without state assistance. Legally plaintiffs' approach does not withstand scrutiny. The Administrative Code sets forth requirements for the establishment of school bus routes. Presumably a person could object to a particular route because the roads did not conform to 4 AAC 27.010. However, nothing in the Administrative Code or in statutes cited by plaintiffs supports the theory that once a school bus travels on a particular road, the road conclusively is deemed public. In addition, it might be argued that "supervision" by one of the agencies simply means that the agencies may require private owners to keep their roads up to a particular standard or else lose the bus route. Nothing supports plaintiffs' thesis that that sort of supervision converts a private road to a public road.

Finally, plaintiffs accuse defendants of accepting public benefits, i.e., the school bus service, while "trying to avoid the burdens common to a public road." (Opposition at p. 5) That accusation is not followed by any citation of law to support what I assume is their conclusion that this "cavalier attitude" mandates a finding that ESRO Road is a public road.

Defendants next argue that ESRO Road is private and that plaintiffs have failed to demonstrate any recognized easement to their benefit. It is agreed that Hazel Hall has an easement by implication over Gamble's land arising from the transfer to her of land from defendant Gamble. Since then, Hall conveyed to Polar Evangelism a "Temporary Limited Easement". Defendants' argument at this point is a little unclear. They point out that in the conveyance from Gamble to Hall, Gamble retained an easement over Hall's land which easement was made subject to the easement granted to the European Space Research Organization (which easement terminated upon the termination of the ESRO lease). It seems clear that the termination of the ESRO lease simply meant that the easement retained by Gamble over Hall's land would no longer be burdened by the ESRO easement. It did not limit Hall's use of the land.

The critical issue is Hall's implied easement over Gamble's land and the extent of her authority to encumber or convey that easement. The scope of an implied easement is to be determined by the nature of the prior use and the intent of the parties. Powell on Real Property, Vol. 3 §416 at pp. 34-203 - 34-205 (1977). In this case questions of fact appear to exist as to the scope of Hall's easement over Gamble's property. Determination of those questions is required before a legal determination can be made of the validity of any purported easement conveyed by Hall to plaintiffs over Gamble's property.

It is worth noting that there is no possibility of finding an implied easement appurtenant to the ESRO property itself over Gamble's property inasmuch as the two pieces of land were never transferred from one owner to the present owners. Therefore, the common ownership requirement of establishing an implied easement over Gamble's property to the ESRO property is lacking. The only easement over Gamble's property to the ESRO property (except for Hall's implied easement) was the express easement in the lease. That easement terminated with the termination of the lease.

Even if plaintiffs establish an easement over Gamble's property, plaintiffs have presented no argument to support the conclusion that they have an easement beyond Gamble's property over Szmyd's property. Because there was no prior common ownership of the ESRO land by Szmyd, no argument for an easement by necessity or implication can be made.

Defendants' final point is their contention that plaintiffs have no right of eminent domain. Plaintiffs rely on AS 09.55.240(a)(6) for their authority to acquire an interest in ESRO Road by power of eminent domain. That section provides:

> Uses for which authorized; rights-of-way.
> (a) The right of eminent domain may be exercised for the following public uses:
>
> (6) private roads leading from highways to residences, mines, or farms;

As defendants point out, the fallacy in plaintiffs' argument is their failure to establish any legal support for their authority to exercise the power of eminent domain. AS 09.55.240(a)(6) merely sets forth the uses authorized. No provision in the Alaska Statutes permits a private party to exercise the power of eminent domain even for an arguably public purpose. AS 09.55.420 which covers declarations of taking contemplates state action by the state or municipality. No provision exists for private declarations of taking. It is common knowledge that the term "eminent domain" taken from

Black's Law Dictionary supports that general understanding, defining it as follows:

> The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good.

For the foregoing reasons defendants Motion for Summary Judgment is GRANTED except insofar as it relates to the question of whether or not Hall has an implied easement over Gamble's land and the extent of her authority to encumber or convey that easement.

The third motion for consideration is the plaintiffs' Cross Motion for Summary Judgment. With this motion plaintiffs seek summary judgment declaring that ESRO Road is a public road. They base their motion on the application by defendant Gamble in July, 1968, for a waiver of the requirement that he submit a plat in connection with his subdivision of his property. Gamble made that application pursuant to the provisions of AS 29.33.170(b) (titled AS 40.15.110 in 1968) which permits such a waiver provided that no dedication of a street is required because each parcel has adequate access to a public highway. AS 29.33.170 provides:

> (a) The platting authority shall, in individual cases, waive the preparation submission for approval, and recording of a plat upon satisfactory evidence that
>
> > (1) each tract or parcel of land will have adequate access to a public highway or street;
> >
> > (2) each parcel created is five acres in size or larger and that the land is divided into four fewer parcels;
> >
> > (3) the conveyance is not made for the purpose of, or in connection with, a present or projected subdivision development;

> (4) no dedication of a street, alley, thoroughfare or other public area is involved or required.

> (b) In other cases the platting authority may waive the preparation, submission for approval, and recording of a plat, if the transaction involved does not fall within the general intent of AS 29.33.150 - 29.33.240 of this chapter and AS 40.15 if it is not made for the purpose of, or in connection with, a present or projected subdivision development and no dedication for a street, alley, thoroughfare, park or other public area is involved or required. (emphasis added by plaintiffs)

The waiver to Gamble was granted by the Borough Planning Authority. Plaintiffs argue that the request and granting of the waiver constitute a declaration that ESRO Road is a public road. Plaintiffs cite no authority for their proposition. Plaintiffs are again flitting merrily through the garden of euphemisms proclaiming them law. They simply argue that the Planning Authority was acting in a quasi-judicial capacity and that its findings are binding on interested parties.

The problem with plaintiffs' theory is that the statute does not require that the subdivision itself be served by a public road. It simply requires that each parcel have access to a public road. It does not specify what sort of access is involved. Presumably a private road is sufficient access. Because of this flaw in plaintiffs' reasoning, the findings of the Planning Authority cannot be considered to have any binding authority in this action. Therefore, plaintiffs' Motion for Summary Judgment be DENIED.

DATED at Fairbanks, Alaska, this 17 day of May, 1979.

Gerald J. Van Hoomissen
Superior Court Judge