Circuit Court for Prince George's County
Case No. CAE15-28998

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 866

September Term, 2018

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JOSEPH SKILLMAN, et ux.

v.

PAULEN INDUSTRIAL CENTER, INC.

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Kehoe,
Nazarian,
Shaw Geter,
JJ.

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Opinion by Kehoe, J.

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Filed: September 11, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

This is an appeal from a judgment of the Circuit Court for Prince George's County, the Honorable Thomas P. Smith presiding, in which the court entered a declaratory judgment that a prescriptive easement exists for the benefit of property located in Beltsville, Maryland owned by Joseph Skillman and Cynthia Skillman, but limiting the scope of the easement. The Skillmans are unhappy with this result and have appealed. The appellee is the Paulen Industrial Center, Inc., which owns the servient estate. The Skillmans raise four issues, which we have broken down into five and reworded for purposes of analysis:

> 1. Did the prior litigation between the Skillmans and Prince George's County regarding Frederick Avenue have issue-preclusive effects in the present action?
>
> 2. Was the judgment entered in a civil action in 1960 regarding Frederick Avenue erroneous or otherwise flawed?
>
> 3. Did the trial court err in determining that the Skillmans did not have an easement by implication over Paulen's property?
>
> 4. Did the trial court err in restricting the permitted uses of the Skillman Property by restricting the easement over the Frederick Avenue Right of Way?
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> 5. Does the declaratory judgment entered in this case accurately reflect the trial court's findings of fact and conclusions of law in its memorandum opinion?[1]

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[1] The Skillmans phrase the issues as:

> 1. Did the trial court err in ignoring the preclusive effects of the prior proceedings on Paulen's claimed right to restrict travel over the Frederick Avenue right-of-way?
>
> 2. Did the trial court err in restricting the permitted uses of the Skillman property by restricting the easement over the Frederick Avenue right-of-way?
>
> 3. Did the trial court err in concluding that the Frederick Avenue right-of-way is not a public street?

Our answer to the first four questions is no. However, there is an inconsistency between the wording of the court's declaratory judgment and its memorandum opinion. Therefore, although we fully agree with the trial court's reasoning, we will affirm in part, reverse in part, and remand this case so that the trial court can modify the wording of the declaratory judgment.

**Before we begin**

The record extract in this case is 2,648 pages long. It contains relatively little in terms of extraneous information or duplicative documents. A statement of facts that summarizes all of this information would not be 2,648 pages long but, would nonetheless be excessive in an opinion by an intermediate appellate court. At times, we will be painting with a broad brush.

**Background**

*A possibly unfamiliar legal context*

Currently, Maryland political subdivisions control the design and location of new streets within their boundaries through either one of the various modes of express delegation from the General Assembly, *see, e.g.* Md. Code Local Gov't § 10-317(a)(1) (granting charter counties the authority to regulate "the location, construction, repair, and use of streets[.]"), or, in the case of municipalities, authority granted by the Maryland

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4. Did the trial court err in determining no right to travel over the Frederick Avenue right-of-way was reflected in the land records?

Constitution. *South Easton Neighborhood Association v. Town of Easton*, 387 Md. 468, 489 ("Home Rule empowers municipal corporations with the authority to close streets. Md. Const. Art. XI–E, § 3[.]"). In Prince George's County, the standards and procedures for opening and closing roads are set out in detail in Subtitle 23 of Title17 of the Code of Public Local Laws of Maryland, more familiarly known as the Prince George's County Code ("PGCC"). In years past, however, things were a bit more haphazard.

At common law, if an owner of real property prepared a plat showing individual lots fronting on an as-yet non-existent street, and then either recorded the plat in the local land records or conveyed lots depicted on the plat, the owner was said to have "dedicated" the street to the relevant political subdivision for public use. *See, e.g.*, *North Beach v. North Chesapeake Beach Land & Improvement Co*., 172 Md. 101, 115 (1937). The design and location of the streets were matters largely up to the discretion of the developer. A proposed street, however, did not become public until it was "accepted" by the government. *Town of Glenarden v. Lewis*, 261 Md. 1, 4 (1971); *City of Baltimore v. Broumel*, 86 Md. 153, 157–58 (1897) ("The owner of land cannot, by merely making a plat of it, and designating streets thereon, force the public authorities to assume control over it as a highway. . . . In addition to a dedication, there must be an acceptance by competent authority[.]").

Acceptance was a legal concept fraught with uncertainty. For example, if acceptance did not occur within a "reasonable time," the landowner could revoke the offer. *Glenarden*, 261 Md. at 7. What a reasonable time might be "depend[ed] upon the circumstances of the case." *Id.* To further complicate matters, use by the public, as opposed to an affirmative

action by the relevant public authority, could count as acceptance. *Id.* at 4; *Broumel*, 86 Md. at 158 (At common law, "[i]n addition to a dedication there must be an acceptance by competent authority, and such an acceptance may ordinarily be evidenced in one of three ways, viz., by deed or other record; by acts *in pais*, such as opening, grading or keeping the road in repair at the public expense; or by long continued user[2] on the part of the public.").

The General Assembly addressed several of these problems in Prince George's County by means of a local public law that was in effect from at least 1908 through at least 1967.[3] *See Maryland-National Capital Park and Planning Commission v. McCaw*, 246 Md. 662, 667 (1967). In the period relevant to the issues raised in this appeal, the statute was codified as Article 17 § 308 of the Code of Local Public Laws of Prince George's County.[4] Two aspects of Section 308 are relevant to the present case.

The first addressed some of the dedication and acceptance problems by providing that recordation of a subdivision plat constituted both a dedication of all of the proposed streets depicted thereon to Prince George's County and an acceptance by the County of those

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[2] Earlier cases and treatises used the term "user" to describe the use of a public or private right-of-way. *See, e.g., United Finance Corp. v. Royal Realty Corp.,* 172 Md. 138, 145 (1937); *City of Baltimore v. Canton Co. of Baltimore,* 124 Md. 620, 632 (1915).

[3] Covid-19 restrictions have prevented us from fully exploring the legislative history of this interesting statute.

[4] The relevant portions of § 308 are set out verbatim in *Whittington v. Good Shepherd Evangelical Lutheran Church*, 236 Md. 185, 190–92 (1964).

streets for public use. *McCaw*, 246 Md. at 193; *Whittington v. Good Shepherd Evangelical Lutheran Church*, 236 Md. 185, 192 (1964).

The other relevant part of the statute established a cause of action whereby owners of lots in the subdivision could petition the circuit court for a judgment to abandon all or part of the subdivision and to "'reconvert the same into one tract or parcel[.]'" *McCaw*, 246 Md. at 667; *Whittington*, 236 Md. at 192. The court could grant the relief if it concluded that "'no damage can be in any wise sustained by persons other than the petitioners[]'" if the petition is granted and the subdivision and roads abandoned. *McCaw*, 246 Md. at 667 (quoting § 308). The provisions of the statute were distinct from the common law rules of dedication and acceptance. *Id.* at 672.[5]

*The 1891 and 1930 Plats*

Our story begins in 1891 when the owner of a tract of land in Beltsville filed a subdivision plat titled "Section 3, Beltsville" in the land records of Prince George's County. The Section 3 plat laid out a large number of lots[6] on a tract of land located on both sides of what is now U.S. Route 1 and extending across that highway to what is now called Old Baltimore Pike. Additionally, the plat broke down the subdivisions in "blocks," which were

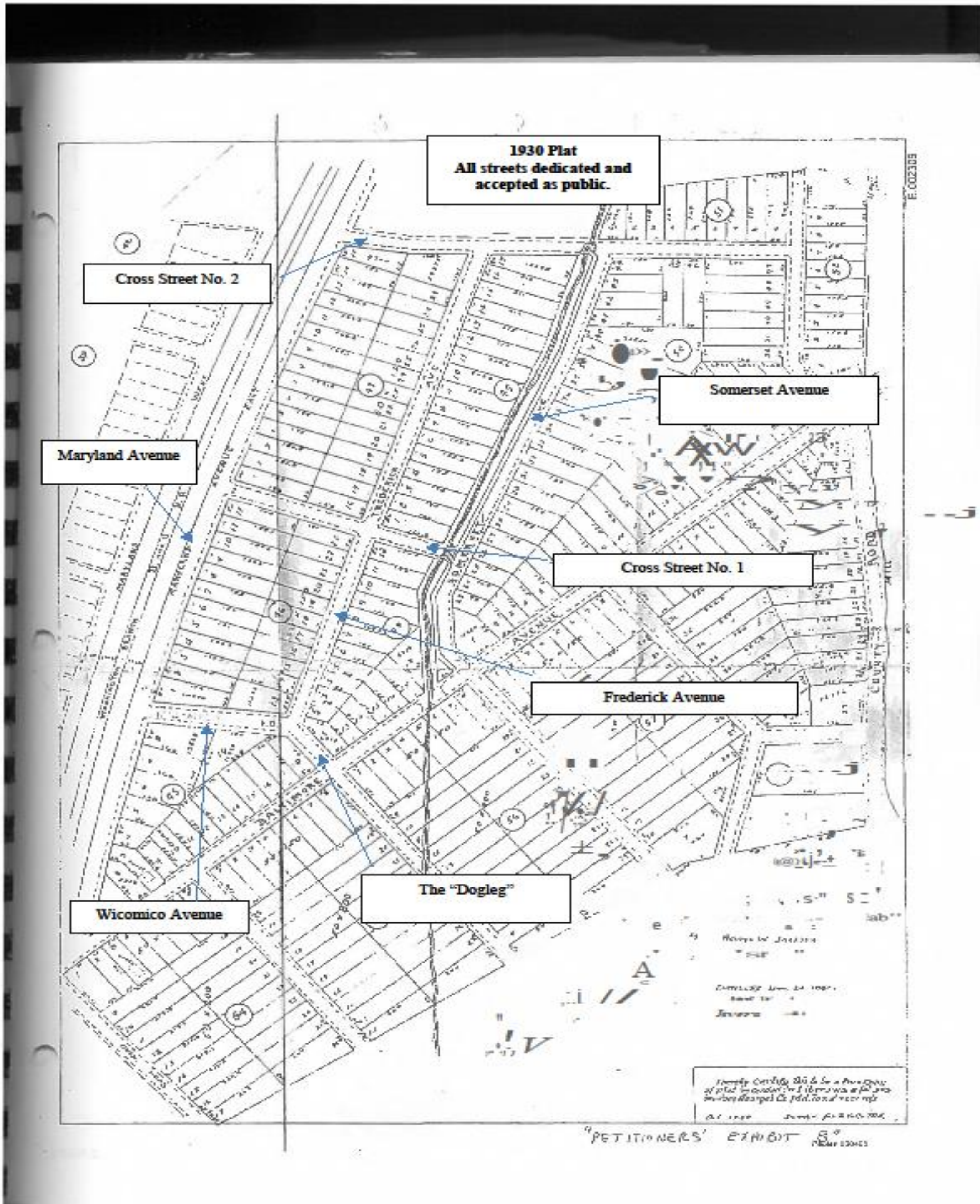
[5] The General Assembly enacted a very similar statute for Montgomery County. *See, e.g., Rockville v. Geerart*, 261 Md. 709, 714 (1971); *Welker v. Strosnider*, 22 Md. App. 401, 406 (1974).

[6] Our best estimate is that the plat depicts in excess of 200 lots. However, the passage of time, as well as the digitizing of land records, has affected the legibility of the versions of the Section 3 plat that are in the extract.

conglomerations of contiguous lots (usually between twenty and thirty). Individual lots were referred to by lot and block number. (The only specific lot that will figure into our analysis is lot no. 3 of block no. 49.) The plat also depicted a number of proposed streets. Some of these streets were named on the plat. Others, for reasons that escape us, were not.

The focus of this appeal is on Frederick Avenue, one of the proposed streets depicted on the plat, and the area surrounding it. The relevant part of the plat laid out three named streets, from west to east, Maryland Avenue, Frederick Avenue, and Somerset Avenue. These streets were oriented on an approximately north-south axis and ran more or less parallel to one another. Had all of the streets shown on the plat been actually constructed, Frederick Avenue would have begun at a three-way intersection between it, a street designated on the plat as Wicomico Avenue and an unnamed street that the parties term the "Dogleg." Wicomico Avenue connected Frederick Avenue with Maryland Avenue. The Dogleg connected Frederick Avenue with Somerset Avenue. About 600 feet north of the three-way intersection, Maryland Avenue intersected with an unnamed street—which we will refer to as "Cross Street No. 1"—that connected Frederick Avenue with Maryland and Somerset Avenues. Continuing north for about 800 more feet, Frederick Avenue terminated at an intersection with what we have named "Cross Street No. 2." This street also connected with Maryland and Somerset Avenues. To summarize, had all the streets shown on this portion of the plat been constructed, Frederick Avenue, which would have been approximately a quarter of a mile in length, would have had no fewer than six points of connection with other public streets.

In an effort to make this less obscure, we have attached an annotated version of the relevant part of the Section 3 plat.



The Section 3 plat was recorded again in 1930.[7] Pursuant to Article 17 § 308, one of the legal effects of the 1930 recordation was that all of the streets shown on the plat were dedicated to, and accepted by, Prince George's County.

In 1957, Paul and Lenora Gottfried purchased lots in the Section 3 subdivision, including lot no. 3 of block no. 49. Part of this lot is now owned by the Skillmans.

*The 1960 road closure case*

In 1960, the Gottfrieds and other lot owners brought an action pursuant to Article 74 § 308 to vacate some of the lot boundaries and to close portions of some of the streets depicted on the 1930 plat. The action was docketed as Equity No. B-6080 in the Circuit Court for Prince George's County. The court granted the relief sought.[8] The judgment closed the southerly part of Frederick Avenue, including the Dogleg, Wicomico Avenue, and the southerly of the two intersecting unnamed streets. The court's judgment provided that the portions of the closed streets were "reconverted into separate parcels according to the respective ownership of the petitioners[.]" We take this to mean that the title to the beds of the closed streets to the centerline of the street were to merge with the titles to the abutting lots. (This is the default rule in Maryland. *See South Easton Neighborhood Ass'n*,

[7] Why the plat was recorded a second time is unclear.

[8] The presiding judge in the 1960 case was the Honorable Charles C. Marbury. About six weeks after he signed the final decree, he became an associate judge of the Court of Appeals for what was then the Fourth Appellate Judicial Circuit.

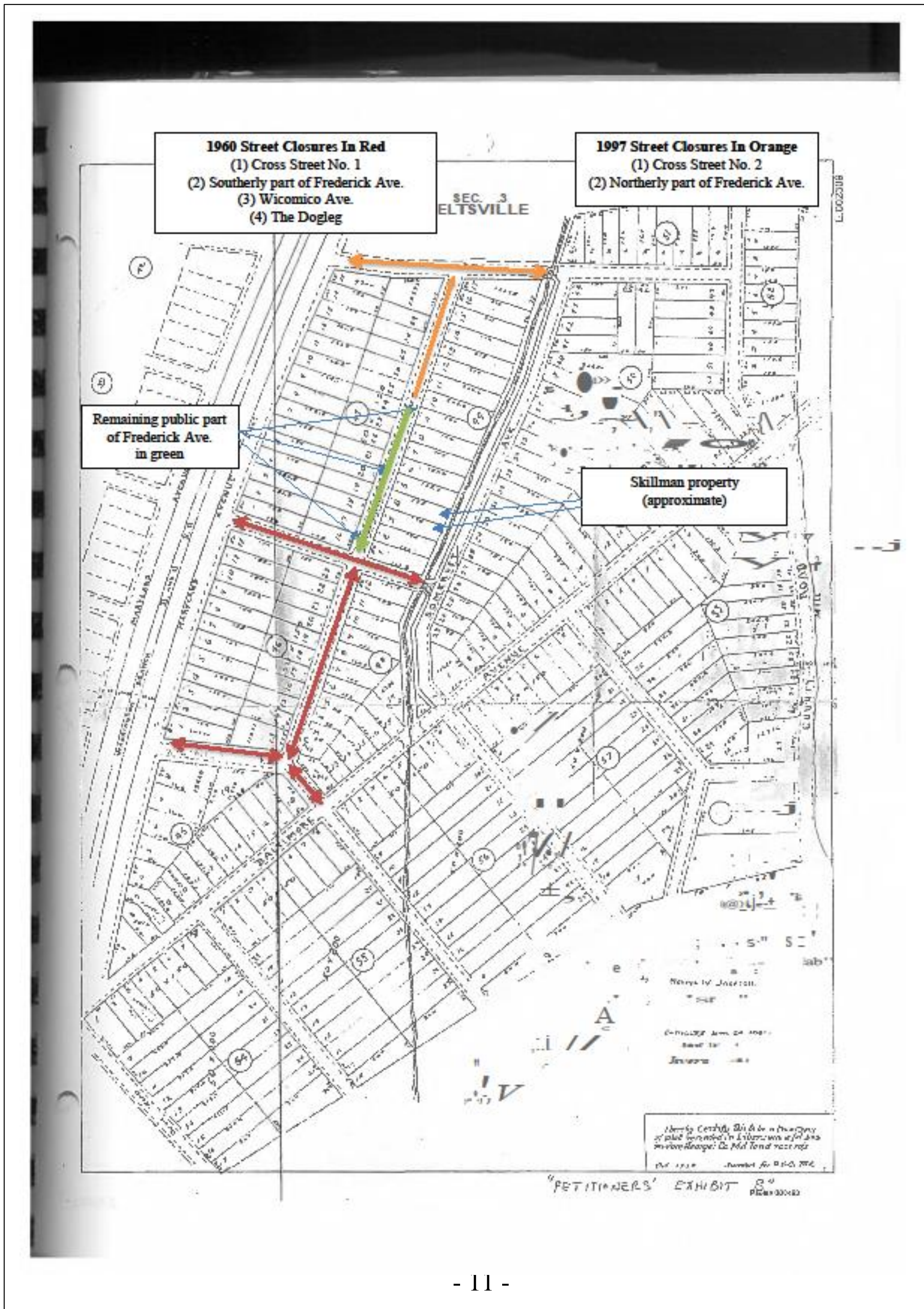
387 Md. at 494 n.17 (citing, among other authorities, Md. Code Real Prop. § 2-114); *see also, Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 592 (2019)).

We will refer to the portion of Frederick Avenue that was closed by the court's judgment as the "closed part of Frederick Avenue." There is nothing in the court's judgment that suggests that the closed part of Frederick Avenue was subject to a right of access by any person. Among the lots vacated in the 1960 judgment was lot no. 3 of Block no. 49, part of which was eventually acquired by the Skillmans. Lot no. 3 did not front on the closed part of Frederick Avenue. Thus, even after the 1960 judgment, what eventually became the Skillman property had public road access via the unclosed part of Frederick Avenue to Cross Street No. 2 which at the time and least on paper connected to Maryland and Somerset Avenues.

*The 1997 road closure*

In 1997, Joseph Nazario, the owner of property on parts of both sides of a portion of Frederick Avenue located to the north of the Skillman parcels, filed an application to vacate the northernmost portion of Frederick Avenue as well as Cross Street No. 2, which constituted the sole remaining points of connection between Frederick Avenue and Maryland and Somerset Avenues. The application was approved by Prince George's County. After the 1997 road closing, there remained a part of Frederick Avenue which was, and still is, a public road. We will refer to this part of the street as "the public part of Frederick Avenue." The Skillmans' property fronts on that street. However, the 1960 and 1997 street closures left the public part of Frederick Avenue isolated and without a

connection to any other public street. (On the following page is an annotated version of the Section 3 plat depicting the 1960 and 1997 road closures and their relationship to the part of Frederick Avenue that is still a public street.)


1960 Street Closures In Red
(1) Cross Street No. 1
(2) Southerly part of Frederick Ave.
(3) Wicomico Ave.
(4) The Dogleg
1997 Street Closures In Orange
(1) Cross Street No. 2
(2) Northerly part of Frederick Ave.
SEC. 3
ELTSVILLE
Remaining public part
of Frederick Ave.
in green
Skillman property
(approximate)
"PETITIONERS' EXHIBIT B"

*The Skillmans' property*

In 1966, the Gottfrieds conveyed what is now the Skillman property to Kenneth and Blanche Breisch. (We will discuss the relevant particulars of these deeds and the other deeds in the Skillmans' chain of title in part 3 of our analysis.) At the time of the conveyance, the property had frontage on the public part of Frederick Avenue and Frederick Avenue which, at least on paper, connected with Maryland Avenue and Somerset Avenue by the unnamed street at its northerly end.

The lots currently have addresses of 11407 and 11409 Frederick Avenue. One of the Skillmans' parcels is improved with a warehouse structure and the other is generally used as a parking lot and for storage. Up until the events that we are about to relate, the Skillmans used the properties as a warehouse, and occasionally an office, for their roofing business.

At some point, some or of all the Gottfried lots in Section 3 were conveyed to Paulen, which is owned by their children. These lots include the closed part of Frederick Avenue.

This brings us to the controversary between the parties.

*Round 1: Prince George's County v. Skillman*

In 2012, the Skillmans leased their property to Joseph Campofelice for use as an adult entertainment venue. In 2014, Joseph Skillman filed an application for a use and occupancy permit for an adult entertainment venue on the Skillman property. The County permit review agency denied the application. The denial triggered an administrative appeal, a petition for judicial review and an appeal to this Court. We will describe the administrative proceeding and the judicial review action in more detail in part 1 of our analysis. At this

point, what is important is that, during the course of this controversy, Paulen, through its president, Phillip Gottfried, sent a letter to the County stating that it would not permit the Skillmans to have access across Paulen's property for adult entertainment purposes. In his capacity as Paulen's president, Gottfried also participated in the proceedings before the administrative agency.

*Round 2: The Present Action*

On September 24, 2015, Skillman filed the current action against Paulen.[9] In their operative complaint, and in addition to other relief, the Skillmans sought a judgment declaring that the 1960 abandonment proceeding was ineffective or, alternatively, that they have the right to use the closed part of Frederick Avenue for access to its property without restriction, by means of either an implied or a prescriptive easement.

The case came before the circuit court in a two-day bench trial. The Skillmans and Gottfried testified and each party presented expert testimony as to land surveying and real estate title matters. After the trial was concluded, the court issued a thorough and well-reasoned memorandum opinion addressing the parties' contentions.

[9] The complaint also asserted claims against Phillip Gottfried, who was the president of Paulen, Mary Lehman, and Bridget Warren. At the time the complaint was filed, Lehman was a member of the Prince George's County Council. Warren was Lehman's chief of staff. {E. 26} By consent of the parties, Skillman dismissed his claims, with prejudice, against Gottfried, Lehman, and Warren prior to trial.

First, the court concluded that the 1960 abandonment action was valid. It found that there was no ambiguity in the judgment in the 1960 road closing case and, as a result of that judgment, the bed of the closed portion of Frederick Avenue became property of the Gottfrieds because they owned the lots abutting on both sides of the abandoned part of the street.[10] Additionally, the court found that the stretch of Frederick Avenue directly in front of the Skillman property, was and remains a public street.

Second, the court rejected the Skillman's contention that they had an implied easement of access over the closed part of Frederick Avenue.

Third, the court concluded that a prescriptive easement exists over the closed part of Frederick Avenue for the benefit of the Skillman property. The court found that the Skillmans and their predecessors-in-title had been using the closed part of Frederick Avenue for access since at least the late 1980s or early 1990s, and that their use otherwise satisfied the requirements for a prescriptive easement.

The trial court then addressed the scope of the Skillmans' easement and, specifically, whether the Skillmans' adult entertainment business unduly burdened the servient estate. It concluded that the Skillmans' proposed use would do so.

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[10] The court's opinion indicates that another entity, Frederick, LLC now owns part of what had been Paulen's property fronting on the closed part of Frederick Avenue. Although the issue is not before us, it appears that Frederick LLC consented to be bound by the court's judgment.

In sum, the court entered judgment in favor of the Skillmans as to the prescriptive easement, over the closed part of Frederick Avenue, but limited its scope to "motor vehicle and pedestrian traffic consistent with the past operation of [the Skillmans'] roofing business." {E. 619}

The Skillmans have appealed.

**The Standard of Review**

Because this case was tried without a jury, the standard of review that we will apply is found in Maryland Rule 8-131(c):

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

We review the evidence in a light most favorable to the prevailing party. *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010) (citing *Ryan v. Thurston*, 276 Md. 390, 392 (1975)). Where "there is any competent and material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *L.W. Wolfe Enterprises, Inc. v. Maryland National Golf, L.P.*, 165 Md. App. 339 343 (2005). We review the trial court's legal conclusions *de novo*. *Della Ratta*, 414 Md. at 565.

## Analysis

### 1. Issue Preclusion

The Skillmans' primary argument on appeal is that the judgment entered by the circuit court in the judicial review proceeding has issue preclusive effects in this litigation. We do not agree. The first step in explaining why requires us to provide additional information about the prior litigation.

A.

On November 7, 2014, Joseph Skillman filed a request for a use and occupancy permit to change the use of his property from a roofing business to adult entertainment venue pursuant to the relevant provisions of the Prince George's County Code ("PGCC").

The County's Department of Permitting, Inspection and Enforcement denied the application. From the department's perspective, the critical issue was whether the Skillmans' property complied with PGCC § 27-466.01 which, in pertinent part, requires that "[e]ach lot shall have frontage on, and direct vehicular access to, a public street, except lots for which private streets or other access rights-of-way have been authorized pursuant to . . . this Code." The department denied the permit request because it concluded that: (1) the Skillmans' property had direct access to the public part of Frederick Avenue, (2) the street lacked access to any other public street, and (3) there was no access agreement between the Skillmans and Paulen. {E. 89} The Skillmans appealed the permit denial to the Prince George's County Board of Appeals.

In the proceeding before the board, Paulen's lawyer stated that "there is no easement existing on the Paulen property for ingress-egress for the benefit of the Skillman property." Counsel went on to assert that, if the Skillmans were granted the permit, "Paulen will erect a barrier on Frederick Avenue that will prevent Mr. Skillman and any potential patrons from access the subject site from Frederick Avenue."

However, during the administrative hearing, the lawyer for the Skillmans stated that it was his position that the merits of the right-of-way dispute were not relevant "to the determination of whether [the permit denial] was an error . . . . because the error that we allege . . . doesn't relate to a private right-of-way." {E 1591} Counsel further informed the board that the Skillmans had filed a separate action against Paulen and others in the circuit court regarding their right to access the property and that the court was the appropriate forum resolve the matter. (The "separate action" is the case before us in this appeal.) {E 1592}

After an evidentiary hearing, the board affirmed the denial of the Skillmans' application. {E. 88-91} The board did not address who owned the closed part of Frederick Avenue or whether the Skillmans had an easement over any portion of Paulen's property. Instead, the board concluded that, although the portion of Frederick Avenue abutting the Skillmans' property was a public road, it was "an island unto itself" unconnected to any other public road. The board gave "substantial weight to the testimony of Mr. Gottfried that Petitioner does not have vehicular access to cross his property (at the south end of Frederick Avenue) by expressed right-of-way" and that there was no evidence of an express

or written right-of-way agreement" and concluded that "to give meaningful application to Section [27-466.01] in this matter . . . connectivity must exist for the island street of Frederick Avenue to some public street."

The Skillmans filed a petition for judicial review of the board's decision to the Circuit Court for Prince George's County.

The circuit court reversed the board on two grounds. The first was that (emphasis added):

> Land records, of which the court takes judicial notice, show that the Gottfried family purchased 19 lots in this subdivision all abutting Frederick Avenue. *See*, *e.g.*, Deed dated July 3, 1957 to Paul M. Gottfried and Lenora N. Gottfried and recorded at book 2132, page 414. They did not purchase the roadway of Frederick Avenue itself. So while Gottfried may have maintained that portion of Frederick Avenue, *he does not own it and cannot control access to it*.
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> * * *
>
> Since Mr. Gottfried does not own the southern portion of Frederick Avenue and *is unable to dispute its dedication to public use by the recorded subdivision plat*, the Board was arbitrary and capricious in finding that the Skillmans had no direct vehicular access to their lot.

The second basis of the court's decision was that the board erred in its application of PGCC § 27-466.01 to the facts before it. The court observed that, § 27-466.01 requires lots to have access to public streets and that it was undisputed that the Skillmans' property "fronts on and is accessible to Frederick Avenue." By that standard, according to the court, the question became "whether Frederick Avenue is a public street." {E. 80} The court answered that inquiry in the affirmative and held that "the plain language" of § 27-466.01 "does not contain a 'connectivity' requirement and none is implied." {E. 84}

The County appealed to this Court. In an unreported decision, a panel of this Court affirmed. *Prince George's County v. Skillman, et al.*, 2017 WL 2981871 (*Skillman I*).

First, the panel declined to consider the parties' contentions regarding the circuit court's holding that the Gottfrieds never acquired title to the closed part of Frederick Avenue because "our review in this appeal is of the Board of Appeals' determination, not of the circuit court's determination. As such, we frame the issues on appeal . . . focusing on the specific legal arguments raised by the County rather than on specific alleged errors by the circuit court." *Id.* at *4.

Second, the panel declined to consider whether Frederick Avenue in its entirety was a public road; rather, it held that the Skillmans' property:

> has "frontage on and direct vehicular access to" Frederick Avenue and, therefore, satisfies the requirements of County Code § 27–466.01, regardless of whether the relevant portion of Frederick Avenue connects to other public streets.

*Id.* at *8.

To summarize:

(1) The Board of Appeals concluded that the public part of Frederick Avenue was a public road for the purposes of the relevant County Code provisions but that there was a dispute as to whether the Skillmans had the right to use the closed part of Frederick Avenue. The existence of the dispute cast doubt on whether there was actual connectivity between the public part of Frederick Avenue and, without actual connectivity, the legislative purpose of § 27-466.01 was frustrated.

(2) Even though the Board did not address the legal status of the closed part of Frederick Avenue or the parties' claims to the ownership of, or right of access over, the closed part of Frederick Avenue, the circuit court conducted its own investigation in the land records and concluded that (i) Paulen's predecessor-in-title never had an ownership interest in the bed of the closed part of Frederick Avenue, and (ii) Frederick Avenue had dedicated as a public road and no part of it had been closed or abandoned.[11] As an alternative basis of its decision, the circuit court interpreted the relevant county statute as not requiring connectivity.

(3) The *Skillman I* panel expressly declined to address the first or the second grounds of the circuit court's judgment. Instead it affirmed the decision of the administrative agency solely on ground that, even though the part of Frederick Avenue abutting the Skillmans' property was an "island" unconnected to other public roads, it was nonetheless a public road and the county statute did not require connectivity.

B.

The question of the preclusive effective of the judgment in the judicial review proceeding arose at the trial. The Skillmans asserted that Paulen was bound by the conclusions by the circuit court that Frederick Avenue was a public street and that

[11] Although it doesn't matter for our issue preclusion analysis, it seems clear that the circuit court in the judicial review proceeding was unaware of the 1960 road closure litigation and the judgment entered in that action.

Gottfried, i.e., Paulen, had neither an ownership interest in the street nor the right to control access to it. More by implication than by direct statement, the trial court ruled that the judgment in the judicial review action did not have preclusive effect upon the issues raised by the parties in the present case.

C.

With this as a backdrop, the Skillmans present several arguments to us as to why the judgment by the circuit court in the judicial review proceeding should preclude Paulen from asserting that any portion of Frederick Avenue was abandoned or that Paulen has any ownership interest in the part of the closed part of Frederick Avenue that abuts their properties. We do not have to address any of them in detail because the principle of issue preclusion simply does not apply to the current case in the way that the Skillmans think that it does.

The doctrine of issue preclusion, or collateral estoppel:

> precludes a party from re-litigating a factual issue that was essential to a valid and final judgment against the same party in a prior action. Maryland has adopted a four-pronged test that must be satisfied in order to apply collateral estoppel:
>
> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?
>
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

*Shader v. Hampton Imp. Ass'n*, 217 Md. App. 581, 605–12, (2014), *aff'd*, 443 Md. 148 (2015).

As we have explained, the judgment of the circuit court in the judicial review proceeding was based on two grounds. The *Skillman I* panel expressly declined to consider whether the circuit court in the judicial review proceeding was correct as to its conclusions about ownership of the bed of the closed part of Frederick Avenue and whether that was still a public street. The *Skillman I* panel affirmed solely on the basis that the relevant county code provision did not require that the public part of Frederick Avenue to connect to another public road.

In considering claim and issue preclusion questions, Maryland appellate courts have often looked to the Restatement (Section) of Judgments (1982). *See, e.g., Rowland v. Harrison*, 320 Md. 223, 232 (1990); *Maryland Green Party v. State Board of Elections*, 165 Md. App. 113, 132–33 (2005). Section 27 of the Restatement sets out the general rule (emphasis added):

> When an issue of fact or law is *actually litigated* and determined by a valid and final judgment, and the determination is *essential to the judgment*, the determination is conclusion in a subsequent action between the parties, whether on the same or a different claim.

Although it is not at all clear to us that the issue of Paulen's ownership interest in the closed part of Frederick Avenue was "actually litigated" in the judicial review

proceeding,[12] the fact remains that the circuit court did address the issue in its judgment. So we will assume for purposes of analysis that both parts of the judicial review court's opinion satisfy the "actually litigated" requirement for issue preclusion. But the judicial review court's judgment was based on two independent grounds. Were both of them "essential" to the judgment for issue preclusion purposes? And does the fact that the circuit court's judgment was affirmed on appeal affect the preclusive effects of the circuit court's judgment? If so, how?

Comment o to § 27 of the Restatement answers these questions. It states in pertinent part (emphasis added):

> *If the judgment of the court of first instance was based on a determination of two issues,* either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. . . .
>
> If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination.
>
> *If the appellate court upholds one of these determinations as sufficient and refuses to consider* whether or not the other is sufficient and accordingly affirms the judgment, *the judgment is conclusive as to the first determination.*

This case falls squarely into comment o's third scenario. The *Skillman I* panel affirmed the judgment of the circuit court that the relevant County statute did not require connectivity. The *Skillman I* panel declined to consider the alternate basis of the circuit

[12] Nor is it clear that Paulen had a "fair opportunity" to be heard on the issue at the board hearing. *See Shader*, 217 Md. App. at 612.

court's judgment. Therefore, the conclusions of the circuit court in the judicial review proceeding as to ownership of the closed part of Frederick Avenue, Paulen's right to control access, and the legal status of the closed part of Frederick Avenue do not have issue preclusive effect. The trial court did not err in its sub silento treatment of the issue.[13]

**2. The validity of the 1960 judgment**

The Skillmans also argue that the trial court erred when it concluded that the closed part of Frederick Avenue is no longer a public street. This contention is based on what the Skillmans view a discrepancy in the court's analysis and because all or a portion of the 1930 plat, which is referenced in the court's judgment, was either not attached as an exhibit to the court's written judgment or became detached at a later time.[14]

We will not address these contentions. The proper way for the Skillmans to raise them is to file a motion to revise the judgment in the 1960 litigation pursuant to Md. Rule 2-

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[13] We have previously relied on comment o, albeit in the context of claim, as opposed to issue, preclusion. *See Maryland Green Party*, 165 Md. App. at 131. Comment o is also consistent with earlier Maryland caselaw. *See Cook v. State*, 281 Md. 665, 675 (1978):

> Considerations of fairness would seem to require that a prior determination of fact or mixed law and fact should not normally be treated as final, and hence binding, in a subsequent proceeding against a particular party, where the party against whom preclusion is sought was denied the opportunity, as a matter of law, to have the disputed issue decided by an appellate court on direct review.

[14] The asserted "discrepancy" in the 1960 judgment appears to us to be purely one of nomenclature: the court considered what the parties have called the "Dogleg" to be part of Frederick Avenue.

535(b).[15] Asking the trial court in the present action to enter a judgment modifying the judgment in the 1960 abandonment case is an impermissible collateral attack on the judgment entered in the earlier case. *See LVNV Funding LLC v. Finch*, 463 Md. 586, 611 (2019) (holding that, in the absence of a failure of fundamental jurisdiction,[16] final judgments are not subject to collateral attack); *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 366 (2013) ("[A] final judgment entered by a circuit court may be reversed or vacated only on appeal or revised pursuant to Maryland Rule 2–535 or § 6–408[17] of the Courts and Judicial Proceedings Article.").

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[15] Rule 2-535(b) states:

> (b) Fraud, Mistake, Irregularity. On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

[16] A court has "fundamental jurisdiction" in a given case when it:

> ha[s] general authority over the class of cases to which the case in question belongs. Any action taken by a court while it lacks fundamental jurisdiction is a nullity, for to act without such jurisdiction is not to act at all.

*Bereska v. State*, 194 Md. App. 664, 686 (2010) (cleaned up).

Because the road closing case involved a statutory cause of action, there can be no question that the circuit court in the 1960 road closing case had fundamental jurisdiction.

[17] Courts & Jud. Proc. § 6-408 states:

> For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

### 3. An implied easement?

The Skillmans present two theories as to why they have an easement over the closed part of Frederick Avenue for access purposes. The first is an easement by implication. The second is an easement by prescription. The trial court concluded that the Skillmans had not shown that they had an implied easement but that they had met their burden regarding an easement by prescription. Although Paulen contested the prescriptive easement issue at trial, it does not on appeal. What remains at issue is the *scope* of the easement, that is, how many cars, trucks and pedestrians who are bound for the adult entertainment venue for the Skillmans' property can use the easement.

We will break our analysis down into two parts. First, we will address the relatively straightforward question of whether the Skillmans have an easement by implication over the closed part of Frederick Avenue. They do not. Then, we will turn to the parties' contentions regarding the scope of the prescriptive easement in favor of the Skillmans that Paulen now concedes burdens its property.

The first step in this process is getting the terminology straight. In this regard there is no better place to start than Judge Robert N. McDonald's capsule summary of some of the critical terms of the law of easements in *USA Cartage v. Baer*, 429 Md. 199, 207–08 (2012) (cleaned up):

> At the basic level, an easement is a nonpossessory interest in the real property of another. It is a species of servitude. When the easement is for the benefit of another property—for example, an easement to provide access to an adjacent property—the neighboring property is known as the dominant

> estate, while the property subject to the easement is known as the servient estate.
>
> An easement may be created by express grant, by reservation in a conveyance of land, or by implication. An easement by implication can be created in several ways[.]

"A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land." Restatement (Third) of Property (Servitudes) § 1.1 (2000). "Running with the land" means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs." *Id.*

The "several ways" by which implied easements arise are: "by prescription, necessity, the filing of plats, estoppel, and implied grant or reservation where a quasi-easement has existed while the two tracts are one." *Lindsay v. Annapolis Roads Prop. Owners Ass'n*, 431 Md. 274, 291 (2013) (quoting *Boucher v. Boyer*, 301 Md. 679, 688 (1984) (cleaned up).[18]

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[18] An easement by reservation is established "when a property owner conveys a portion of his property to another, which would otherwise render the retained part inaccessible, so the reservation permits a right-of-way." *Rogers v. P-M Hunter's Ridge*, 407 Md. 712, 729–30 (2009) (quoting *Miller v. Kirkpatrick*, 377 Md. 335, 349 (2003)). An easement by necessity is the mirror-image of an easement by reservation. An easement of necessity is established when a landowner conveys a parcel that has no road access other than other than through the property retained by the grantor. *Cf. Purnell v. Beard & Bone, LLC*, 203 Md. App. 495, 506 (2012).

An easement by estoppel is a more amorphous concept—it is intended give effect to "the presumed intention of the parties at the time of the grant or reservation as disclosed from the surrounding circumstances rather than on the language of the deed." *Hunter's Ridge*, 407 Md. at 730.)

The implied easement theory that the Skillmans pursue on appeal is that part of their property was described by reference to the 1930 Section 3 plat in a prior deed of conveyance. Therefore, they assert that they have an implied easement over Frederick Avenue as it is depicted on the 1930 plat. The basis of their appellate argument is based on the contention that, when property is conveyed by reference to a plat, the law in Maryland is that grantee has an implied easement to use the streets shown on the plat. The principle of law is correct but is not applicable to the facts of this case.[19]

The leading Maryland case on the topic is *Boucher v. Boyer*, 301 Md. 679 (1984). In that case, the Pipers established a two lot subdivision on part of their property by a recorded subdivision plat. The plat depicted a street, George Street, that provided access to the two lots and terminated at the Pipers' reserved land. *Id.* at 684. The descriptions in the deeds conveying the two lots referenced the subdivision plat and did not describe the property conveyed by a metes and bounds description. *Id.* After the lots were sold, the Pipers sold their remaining acreage to the Bouchers, who were neighboring farmers. The deed to the Bouchers described the property conveyed "by reference to the description by which the

[19] Paulen argues that this argument was not raised to the trial court and so is not preserved for appellate review. *See* Md. Rule 8-131(a). Paulen might be correct, although the Skillmans did allude to the issue in their proposed findings of fact and conclusion of law that were submitted to the trial court at the close of the trial. We have our doubts as to whether presenting a contention in such a fashion satisfies Rule 8-131(a)'s requirement that appellate courts should only review contentions that "plainly appear[] by the record" to have been raised to the trial court. We will give the Skillmans the benefit of the doubt.

Pipers had acquired the property, and excluded Lot Nos. 1 and 2 by reference to the Piper Estates plat." *Id.* The Bouchers and the owners of the lots fell into a dispute about the ownership and usage of George Street. *Id.* at 685. Pertinent to the issue before us, the Bouchers argued that they had an implied easement over the street because the Pipers' deed to them referred to the subdivision plat. *Id.* at 687. After reviewing existing Maryland caselaw, decisions from other jurisdictions, and scholarly authorities, the Court agreed (emphasis added):

> An obvious but important factor in determining whether the Bouchers can prevail on this theory *is whether their deed contains a reference to a plat that contains a right of way.* We hold that it does.
>
> * * *
>
> *As we see it, a deed that is silent as to the right of way but refers to a plat that establishes such a right of way creates a rebuttable presumption that the parties intended to incorporate the right of way in the transaction*. A party may therefore point to the existence of the plat to establish that the parties intended that the right of way depicted in the plat be used by the grantee. In sum, we view this as a reasonable application of the common law rule that a deed reference to a plat incorporates that plat as part of the deed.

301 Md. 688–89 (some citations omitted).

The Court concluded that "absent an express provision to the contrary in the deed, those who purchase a lot with reference to a plat depicting an abutting street acquire a private easement in that street regardless of whether it has been dedicated to the public and accepted by the local government." *Id.* at 694.

What distinguishes *Boucher v. Boyer* from the case before us is the language in the Gottfrieds' deed to the Breisches.

In 1966, the Gottfrieds conveyed part of what is now the Skillman property to Kenneth and Blanche Breisch. The deed from the Gottfrieds to the Breisches described the property conveyed as being part of "*former* Lot No. 3 of Block No. 49 as shown on a former plat of subdivision . . . said property having been *abandoned*." (Emphasis added.) The deed also referred to the judgment entered in "Circuit Court for Prince George's County Equity Case #B-6080," that is, the 1960 abandonment case. The parcel conveyed was described by a metes and bounds description, which was logical in light of the fact that Lot 3 of Block 49 had been abandoned. The deed did not purport to grant an easement over the closed part of Frederick Avenue nor any other right of access to the Breisches' property.

After some intervening conveyances, the Skillmans purchased their Frederick Avenue parcels in two separate deeds in 2003. The deed that conveyed the property previously owned by the Breisches is the one that is relevant to the Skillmans' implied easement contention.[20] That deed, dated January 21, 2003, identified the property conveyed in terms that were identical to the description in the 1966 Gottfried/Briesch deed, noted that the property had once been part of an abandoned subdivision, referred to the 1960 abandonment action, and described the property to be conveyed by the same metes and bounds description used in the 1966 deed. The Skillmans argue that the reference to the

[20] The second deed, dated October 14, 2003 conveyed lot 4 of block 49 of the Section 3 Plat. This lot was not part of the 1960 abandonment litigation. The Skillmans do not argue that they have an implied right of easement arising out the second deed.

Section 3 plat in their deeds and the deeds in their chain of title have the effect of establishing an implied easement over the closed part of Frederick Avenue for access purposes.

We do not agree. The fatal difficulty with the Skillmans' implied easement argument is the language in the critical deed in their chain of title. Unlike the deed in *Boucher v. Boyer*, the Gottfrieds' deed to the Brieschs did not describe the property to be conveyed by reference to the subdivision plat. Instead, the deed stated that the property conveyed had at one time been in a subdivision that had been abandoned as the result of a judicial decree. The deed identified where the relevant judgment could be located in the court records. Describing the property to be conveyed by reference to a valid plat (the situation in *Boucher*) is not the same thing as describing the property to be conveyed by a metes and bounds description and noting that the property conveyed had at one time been a part of a since-abandoned subdivision. To the extent that there was any ambiguity, the deed also referred to the 1960 court judgment, which explicitly stated that lot number 3 of block number 49 had been abandoned, that a portion of Frederick Avenue was closed, and title to the bed of the closed part of the street reverted to the owners of the abutting properties. The deed to the Skillmans contained exactly the same language. The Skillmans presented no other evidence to show that the Gottfrieds intended to convey an easement over the closed part of Frederick Avenue to the Breitsches.

In order to establish an easement by implication, there must be a "'clear manifestation' of the intent of the common grantor" to grant the easement in the deed of conveyance. *Koch*

*v. Strathmeyer*, 357 Md. 193, 198 (1999) (quoting *Williams Realty Co. v. Robey*, 175 Md. 532, 539 (1938). The deeds in question do not cross the requisite evidentiary threshold or even come close to it.

**4. The Scope of the Prescriptive Easement**

The trial court concluded that the Skillmans had proven that they have an easement by prescription over the closed part of Frederick Avenue. A prescriptive easement "is a nonpossessory interest in the real property of another which arises when a party makes an adverse, exclusive, and uninterrupted use of another's real property for twenty years." *Breeding v. Koste*, 443 Md. 15, 19 n.1 (2015) (quoting *Banks v. Pusey*, 393 Md. 688, 698, (2006) (cleaned up).

A use is "adverse" when it is without license or permission from the owner of the property in question. *Turner v. Brouchard*, 202 Md. App. 428, 447 (2011). A use is "exclusive" when the claim of right to use the prescriptive area does not depend upon the claim of another person. *Id.* 451–52 (citing *Shuggars v. Brake*, 248 Md. 38, 45 (1966)). Finally, "[t]o be uninterrupted and continuous, the claimant need not use the right of way every day for the full twenty year period." *Turner*, 202 Md. App at 452. Instead, the person claiming the easement must exercise the right:

> more or less frequently, according to the nature of the use to which its enjoyment may be applied, and without objection on the part of the owner of the land, and under such circumstances as excludes the presumption of a voluntary abandonment on the part of the person claiming it.

*Id.* (quoting *Cox v. Forrest*, 60 Md. 74, 80 (1883).

In the present case, there was no real factual dispute as to the "exclusive" and the "uninterrupted and continuous" nature of the use of the closed part of Frederick Avenue by the Skillmans and their predecessors-in-title. The issue at trial was whether the Skillmans' use of the closed part of Frederick Avenue for access to their property was adverse or permissive. The court concluded that the evidence supporting Paulen's contention that the Skillmans used the closed part of Frederick Avenue with its permission was not persuasive. Paulen did not file a cross-appeal. Therefore, the court's conclusion that the Skillman properties have a prescriptive easement over the closed part of Frederick Avenue is no longer a matter of dispute.

However, the scope of the easement was—and is—very much in dispute. After considering the evidence, the court stated:

> [S]ome of the roofing company's seven employees use Defendant's portion of Frederick Avenue during regular business hours to access the warehouse. They do not utilize the Plaintiffs' warehouse on a daily basis and only access the warehouse from Monday – Friday between 6:30 a.m. – 5:30 p.m. Plaintiffs' use of Defendant's road in connection with their roofing business is, and has always been relatively insubstantial. Plaintiffs' roofing company has employed a small number of people, ranging from seven to twenty-five employees and Plaintiffs have only used their properties for storage, fabricating, and as an office/shop and have never used their properties as a public entertainment venue.

The trial court then found that the proposed adult entertainment venue would be a far departure from the normal use of the easement:

> Plaintiffs testified that they expect the strip club to attract approximately 300 – 450 people a night, Thursday-Sunday evenings (not including days of "special events"). Therefore, Plaintiffs propose that customers, entertainers, security personal, and management would use Defendant's road to access the

> strip club and such use would occur late at night and outside normal business hours. A change to strip club use would increase the number of people using Defendant's road and thus opening a strip club would dramatically shift the type of business operation from the original use by Plaintiffs' roofing business.

The court also considered the concerns raised by Paulen through Gottfried's testimony:

> [Paulen] has concerns that the strip club would bring secondary negative effects associated with strip club to the Paulen Industrial Center, such as crime. Such secondary negative effects are a legitimate concern, as one of [Paulen]'s tenants, Orbital ATK, is an aerospace and defense technology contractor and is concerning about security for its operations and wants to avoid security threats such as the secondary negative effects of adult entertainment business. [Paulen] is also concerned about the increased number of cars/traffic that would cross its property, and diminish the life of the paving on its portion of Frederick Avenue potentially leaving Frederick impassable. [Paulen] is also concerned about limited parking because [the Skillmans] anticipate forty-four employees and hundreds of customers per night, but provide parking at [the Skillmans]' properties for fewer than fifty cars, making overflow parking on Paulen's property a legitimate concern.

The trial court interpreted *Mahoney v. Devonshire*, 86 Md. App. 624, 638 (1991), and *Hoffman v. United Iron*, 106 Md. App. 117, 135 n. 8 (1996), as teaching that "[i]n Maryland, the scope of a prescriptive easement may only be expanded where the expansion reasonably increases the burden imposed on the servient estate and is reasonably foreseeable based on the evidence of past use." Applying that standard, the court concluded that the increase in traffic that would result from using the Skillmans' property as an adult entertainment venue would unreasonably burden Paulen's property.

Dissatisfied with this result, the Skillmans present several arguments as to why the trial court erred.

As a preliminary matter we must identify the appropriate scope of review. The Skillmans assert that it is *de novo* and present a number of arguments to us that boil down to proposition that we should independently review the evidence and reach conclusions that are different from the trial court's. Their premise is wrong. In *Mahoney*, we explicitly identified the appropriate scope of review:

> In the case before us, we are called upon to determine whether the trial court clearly erred in expanding the scope of a prescriptive easement. Md. Rule 8–131(c).[21]

86 Md. App. at 629.

The applicable legal principle is well-established:

> The law is . . . clear that when an easement has been acquired by prescription, the character and extent of the use permissible are commensurate with and determined by the character and extent of the use during the prescriptive period.

*Bishields v. Campbell*, 200 Md. 622, 625 (1952); *see also Maryland & Pennsylvania R. R. v. Mercantile-Safe Deposit & Trust*, 224 Md. 34, 38, 166 A.2d 247, 249 (1960); *Hub Bel Air v. Hirsch*, 203 Md. 637, 643 (1954); *Washington Land v. Potomac Ridge*, 137 Md.

[21] Md. Rule 8-131(c) states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

App. at 59 (2001); *Hoffman v. United Iron & Metal*, 108 Md. App. 117, 135 n.8 (1996); *Mahoney*, 86 Md. App. at 638; *Kiler v. Beam*, 74 Md. App. 636, 640 (1988).

That the scope of an easement, a concept which necessarily includes the corresponding burden on the servient estate, must be "commensurate" with the use during the prescriptive period does not mean that the scope of the easement and the corresponding burden are immutably frozen in time. Our analysis in *Mahoney* illustrates the point. In that case, we first held that the trial court had not erred in deciding that an existing farm lane was subject to an access easement for the benefit of a neighboring farm. 86 Md. App. at 638. We further concluded that the trial court was not clearly erroneous in finding that the owners of the dominant estate had the right to pave the existing farm lane and permit it to be used to provide access to a residential subdivision even though the lane had not been paved during the prescriptive period. *Id.* Finally, we held that the trial court was not clearly erroneous in permitting an "increased use of the roadway" because it was "foreseeable that the neighboring property would be subdivided and the right-of-way required to bear an increased burden of use." *Id.*

We recognized the same principle of law in *Bassett v. Harrison,* 146 Md. App. 600, 619–20 (2002). In that case, the owners of the dominant estate sought to use the right-of-way as a "haul road" to permit trucks to carry sand and gravel from their barrow pit across the servient estate to a public road. The evidence, however, showed that the farm lane in question had been used only for personal and agricultural purposes during the prescriptive period. We concluded that permitting the road to be used for hauling sand and gravel was

not reasonable in light of the nature of the use of the farm lane during the prescriptive period. *Id.* at 620–21.[22]

We now turn to the Skillmans' substantive contentions.

*First*, the Skillmans argue that Gottfried's testimony as to the scope of the issue related to "what the Skillmans purportedly plan to do on their property [as opposed] to the burden on the easement itself." The issue before us is not whether Gottfried understood the correct legal standard but whether the trial court did. We hold that the trial court did not err in applying the standard articulated in *Mahoney* and the other Maryland cases.

*Second*, the Skillmans contend that the changes in traffic volume that would result from using their property as an adult entertainment venue "would be one of degree, not of kind" and therefore permitted by application of what they say is our analysis in *Mahoney.* In reality, the relevant part of *Mahoney* stands for an entirely different proposition, which was accurately summarized by the trial court: "the scope of a prescriptive easement may only be expanded where the expansion reasonably increases the burden imposed on the servient

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[22] In an attempt to further buttress their case, the Skillmans cite a passage from *Chevy Chase Land Co. v. U.S.*, 355 Md. 110, 145 (1999), which is to the effect that the scope of an easement should be interpreted to permit the "free and untrammeled use of the easement." But the easement in question in that case was an express and not a prescriptive easement. *Id.* at 142. There is nothing in the Court's analysis in *Chevy Chase Land Co.* that suggests that the same standard applies to prescriptive easements. The Skillmans also state that the same page of the Court's opinion stands for the proposition that "there is a presumption of allowing uses now permitted by law or zoning." We do not see this in the cited page.

estate and is reasonably foreseeable based on the evidence of past use." *Mahoney* certainly suggests that an unreasonable increase in use can unduly burden the subordinate estate. In *Bassett*, we held that to be the case. The trial court's analysis was consistent with *Mahoney* and *Bassett* and its findings were not clearly erroneous.

*Third*, the Skillmans concede that "various snippets of Mr. Gottfried's testimony do establish that Paulen was concerned" about the effects that the changes in traffic patterns associated with their proposed adult entertainment use. Nonetheless, they assert that his testimony as the effect of such traffic on Paulen's property was neither "reasonable, factual, credible [nor] proper bases to restrict their use of the right-of-way. For this reason, they say that "[t]here was no evidence suggesting that the lawful operation of a properly-licensed adult entertainment venue would present any materially greater burden on the servient estate."

This bundle of contentions is unpersuasive. Assessing the credibility and probative weight of Gottfried's testimony was a matter for the trial court. And, based upon the evidence that the court found credible, it concluded that the proposed use of the Skillmans' property would have a significant negative effect on the subordinate estate in terms of increased traffic on the right-of-way. The trial court's finding on this issue was not clearly erroneous.

*Fourth,* the Skillmans take issue Paulen's concerns regarding parking. The evidence was that the Skillmans' typically had between seven and twenty-five employees and that not all of them visited the property on a daily basis. Their property had space for parking

about forty vehicles. The Skillmans anticipated that their adult entertainment venue would have forty-four employees and would draw between 300 and 450 customers per night. Paulen's concern that some or most the patrons and employees would park on its property was reasonable. The Skillmans dismiss the problem with the observation that Paulen could always have the vehicles towed. The trial court did not share the Skillmans' insouciance on this issue. We hold that the court did not err in including such a major and clearly foreseeable negative effect in its assessment of whether the proposed use of the Skillmans' property was reasonable in light of the history of use in the prescriptive period.

*Finally*, the Skillmans argue that the trial court's judgment has given Paulen a "heckler's veto." They point to the fact that the Prince George's County Code recognizes that adult entertainment venues sometimes involve constitutionally-protected speech and that the County's regulations are intended to address adverse secondary effects of such businesses. "By approving Paulen's desire to avoid a specific type of protected speech," they say, the trial court has enabled Paulen to restrict their right of free expression.

We recognize the principle, *see, e.g.*, *Melzer v. Bd. of Educ*, 336 F.3d 185 (2d Cir. 2003),[23] but are hard-pressed to understand how it applies in a purely private dispute over the scope of a prescriptive easement. We are not assisted by the Skillmans because the only

[23] In that case, the Court "recognize[d] that allowing the public, with the government's help, to shout down unpopular ideas that stir anger is generally not permitted under our jurisprudence." 336 F.3d at 199.

support for their First Amendment contention is a string citation in their brief. By failing to support their contention in any meaningful fashion, they have waived the argument. *See HNS Dev., LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 458–60 (2012).

**5. On remand**

In its memorandum opinion, the trial court concluded its analysis of the scope of easement issue by citing *Mahoney*, 86 Md. App. at 683, and *Hoffman v. United Iron*, 106 Md. App. at 135 n.8, for the proposition that:

> In Maryland, the scope of a prescriptive easement may only be expanded where the expansion reasonably increases the burden imposed on the servient estate and is reasonably foreseeable based on the evidence of past use.

To that, we would add that "past use" is determined by evidence of use during the prescriptive period. *See*, *e. g*, *Bishields v. Campbell*, 200 Md. at 625. Certainly, there is no error in the way that the court applied this legal principle to the evidence before it in its memorandum opinion.

In its declaratory judgment, however, the court used different language. It stated that the Skillmans have a prescriptive easement from their property "to Baltimore Avenue for the purposes and uses set forth in the Court's Opinion and Order, and for no other purposes."

The shift in focus from what is *reasonably foreseeable* based on use during the prescriptive period to the *current* purposes and uses—and by implication nothing else—is problematic. The Skillmans' right of access over Paulen's property is not dependent upon their maintaining a roofing business but rather upon their using their property in a way that

(i) would be reasonably foreseeable in light of their use during the prescriptive period and (ii) would not cause an unreasonable increase in the burden on the easement. To put it another way, the scope of the Skillmans' easement is not based upon the history of their past use but by what is reasonably foreseeable in light of that history and whether increased burden is reasonable.

Whether a specific use is reasonably foreseeable and the resulting increase in the burden is reasonable can only be resolved on a case-by-case basis. The language in the declaratory judgment to the effect that the Skillmans are limited to the use described in the court's opinion and none other is not consistent with Maryland law as we understand it. We will vacate the declaratory judgment and remand the case for the court to enter an amended judgment.

The Skillmans assert that there are two other problems with the declaratory judgment.

The first is one of nomenclature. The declaratory judgment refers to "Baltimore Avenue," which was the name of a public road depicted on the 1931 plat. The Skillmans assert that the road is now known as "Old Baltimore Pike." We don't know whether this is correct but if it is then the court can consider modifying the declaratory judgment.

The final problem that the Skillmans raise is that the declaratory judgment does not specifically state the width of their right-of-way over the closed part of Frederick Avenue. As far as we can tell from the parties' briefs, the width—as opposed to the existence— of the right-of-way was not an issue at trial. If the parties cannot agree on the physical dimensions, then the court will have to resolve the question.

**THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED IN PART AND VACATED IN PART. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLANTS TO PAY 80% OF THE COSTS; APPELLEE TO PAY 20%.**