IN THE SUPREME COURT OF IOWA

SUPREME COURT APPEAL NO. 19-1681

WOODBURY COUNTY CASE NO. EQCV180496

WILLARD B. MCNAUGHTON,
Plaintiff-Appellant,

v.

STANLEY E. CHARTIER, JEANINE K. CHARTIER, CHAR-MAC, INC., CITY OF LAWTON and ABILIT HOLDINGS (LAWTON), LLC,
Defendants-Appellees.

FROM THE JUNE 26, 2021, RULING OF THE
IOWA COURT OF APPEALS -
ON APPEAL FROM THE DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JEFFREY A. NEARY

APPELLANT'S RESISTANCE TO APPELLEES' APPLICATION FOR FURTHER REVIEW

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REPLY TO STATEMENT SUPPORTING FURTHER REVIEW

In support of their Application for Further Review, Appellees ("the Chartiers") claim the Court of Appeals' ruling is in direct conflict with Iowa Supreme Court case precedent. Specifically, the Chartiers claim the Court of Appeals' determination that Appellant ("McNaughton") did not publicly dedicate the easement area to the City of Lawton conflicts with this Court's decisions in *Henry Walker Park Association v. Mathews*, 249 Iowa 1246, 91 N.W.2d 703 (Iowa 1958) and *Kinsinger v. Hunter*, 195 Iowa 651, 192 N.W.2d 264 (Iowa 1923). The Court of Appeals' ruling does not directly conflict with these two decisions. The court properly set forth the elements of public dedication and considered those elements against the backdrop of Iowa caselaw. The legal propositions set forth in the *Henry Walker* and *Kinsinger* rulings have been incorporated and adapted through the years, with the Court of Appeals relying on more current caselaw. Further, a reading of the two opinions reveals they do *not* support a finding of public dedication under the facts of this case. There is no conflict. The Court of Appeals ruling was correct.

Appellees further contend the Court of Appeals' conclusion that the clear language of the Easement provides a private, personal, nontransferable

easement that was not appurtenant to adjacent property is in direct conflict with this Court's decisions in *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008), *Sherwood v. Greater Mammoth Vein Coal Co. et al.,* 185 N.W. 279, 283 (Iowa 1921), and *Wiegmann v. Baieri*, 203 N.W.2d 204, 208 (1972). All three of those cases were brought to the attention of the Court of Appeals by Appellee AbiliT in its briefing. The Chartiers are contending the language of the easement is ambiguous and, therefore, to determine the parties' intent, the court erred in failing to consider the circumstances existing at the time of the agreement and the parties' subsequent behaviors, *i.e.*, allowing the City of Lawton to construct the street, McNaughton's failure to object to the ongoing use, and there allegedly being no other reasonable access alternatives.

The Court of Appeals, citing applicable Restatement authority, concluded the plain language of the easement clearly identified the intent of the parties to create a private easement. Further, the record is clear that an analysis of any post-easement conduct demonstrates the use and actions were in accord with the use permitted under the easement and only supports and strengthens the Court of Appeals' conclusion that the easement was intended to be private, personal, and nontransferable. Its analysis and ruling are not in conflict with Iowa caselaw.

BRIEF IN SUPPORT OF APPELLANT'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

I. STATEMENT OF FACTS.

In 1998, McNaughton purchased property commonly known as 2156 Highway 20, Lawton, Iowa. At the time of purchase, there was a house and garage located on the property. (App. 370; App. 25; App. 27). The property had direct access from Highway 20 by virtue of a driveway that led from Highway 20 south to the garage. (App. 28-29).

McNaughton and Jeanine Chartier ("Chartier") are siblings. (App. 27). In 1999, Chartier and her husband purchased property that is directly east of McNaughton's property. The Chartiers' property was approximately fifteen acres in size and, prior to their purchase, had been primarily used for agricultural purposes. (App. 371; App. 114-16).

After the Chartiers purchased their tract of land, they began the process for constructing an assisted living facility on the property. That process included seeking involvement from the City of Lawton for purposes of obtaining tax increment financing for various improvements needed to build the facility. Those needed improvements included the installation of water and sewer as well as the development of a street to provide access to

the facility. (App. 354; App. 356; App. 357; App. 360; App. 361; App. 363; App. 364; App. 186; App. 171-72).

For the street to have access from the facility to Highway 20, the Chartiers sought McNaughton's cooperation in applying for access to Highway 20 through the Iowa Department of Transportation ("IDOT"). The access the parties jointly applied for was slightly different than the access McNaughton originally had to Highway 20. In particular, the original Highway 20 access from McNaughton's driveway had to be moved east and partially onto the Chartiers' property. Moving the Highway 20 access east effectively divided the access point between the two parcels. The access was required to straddle the parcels because the IDOT wanted the access off Highway 20 to mirror the access across the highway to Cedar Street. (App. 347; App. 180-81). Application to the IDOT occurred in 1999. (App. 349; App. 352).

In addition to jointly applying for a Special Access Connection to the IDOT, McNaughton and the Chartiers entered into an Easement Agreement ("Agreement") dated September 17, 1999. (App. 336). In that Agreement, an easement area 23 feet by 80 feet on McNaughton's property is described. The easement area includes a portion of the access to Highway 20 and

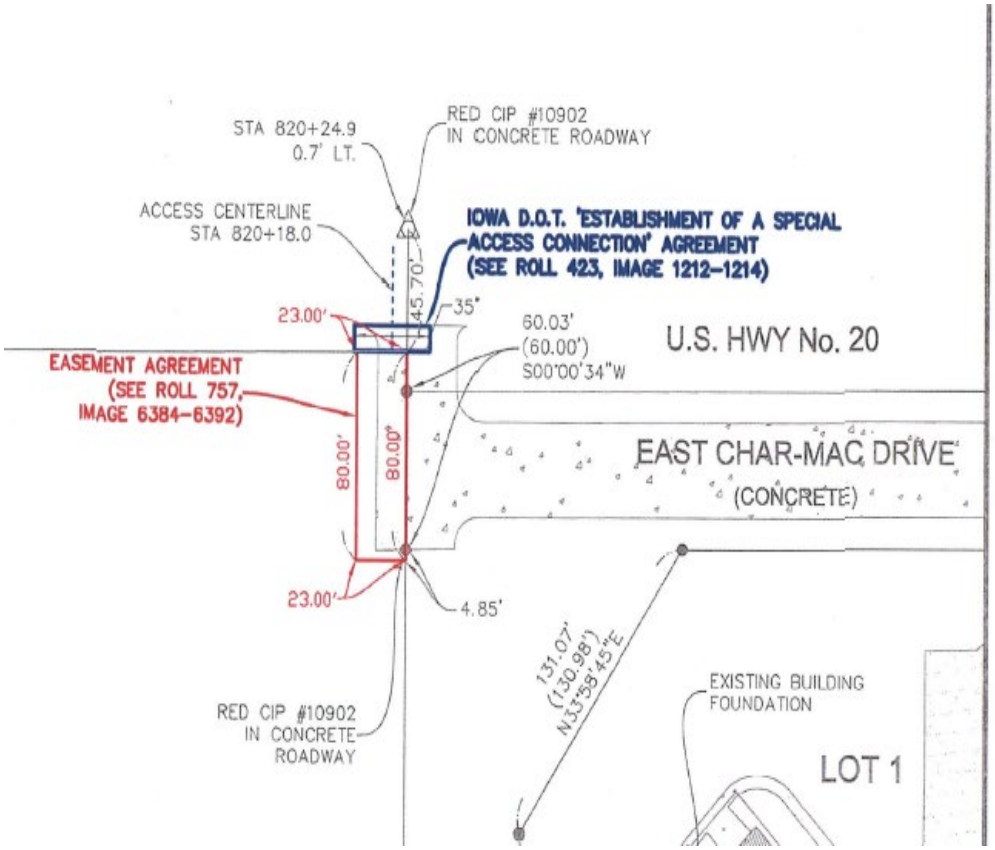
extends south along McNaughton's private driveway. (App. 336). In that Agreement, the parties stated as follows:

> 6. The easement rights granted herein are for the exclusive use and benefit of Chartier and the residents, guests and other invitees of the assisted living facility located on Chartier's property. The easement rights granted herein may not be assigned by Chartier to any other party or parties without the express written consent of McNaughton or his successors or assigns. It is specifically understood that this Agreement creates a "private" easement granted for the use and benefit of the parties identified in this paragraph and it is not to be construed as an easement for the use and benefit of the general public.
>
> …
>
> 8. This instrument may not be modified except by written instrument executed by all of the parties hereto or by their legal successors and/or assigns.

(App. 336). McNaughton provided the easement to Chartier primarily because she was family and he wanted to help her out. (App. 32). When creating the easement, McNaughton specifically restricted assignment so that, if the use were to change, the parties would be required to renegotiate and agree to any change in ownership or use. (App. 36-37).

In August 1999, one month prior to execution of the Agreement, the City of Lawton contracted with a construction company to build a street on the Chartiers' property. (App. 360; App. 361; App. 363). Access to the street was via concrete that was placed on both the Chartiers' property and a portion of the easement area on McNaughton's property. (App. 186-87).

The street runs in an east-west direction parallel to Highway 20. Access to Highway 20 from the road is via the Chartiers' property and the paved portion of the easement area on McNaughton's property. (App. 345). The street is commonly known as East Char-Mac Drive and has no outlet because the street dead ends into the parking lot at the assisted living facility. (App. 347). An engineer's rendering of East Char-Mac Drive and the easement area depicts the following:



(App. 345).

An aerial view depicts the following:

(App. 347).

Although the Chartiers intended from the outset to dedicate East Char-Mac Drive to the City of Lawton, actual dedication to the City did not occur until 2012. (App. 393; App. 395; App. 130). The City of Lawton approached McNaughton at least three times about publicly dedicating the

easement area of the paved road to the City. McNaughton consistently refused to publicly dedicate his property because he did not want to give up ownership or control of it. (App. 40-42).

The City of Lawton is not a party to the Agreement at issue, and the City has stated it does not have any claim of ownership to the easement located on McNaughton's property. (App. 17; App. 306). When the parties entered into the Agreement, the property was not within the City of Lawton's limits. It was not until sometime in 2010 that the City annexed the property. (App. 46).

In October 2012, the Chartiers separated the parcel with the assisted living facility from the remaining land they owned and conveyed that parcel to Char-Mac. (App. 369; App. 130-132). Char-Mac was wholly owned by the Chartiers. (App. 38). McNaughton was unaware this transfer took place until much later. (App. 68-69).

In 2017, McNaughton sought legal counsel regarding his concerns about road access and future expansion plans for Char-Mac and the surrounding land. (App. 65-66). The potential remains for additional development south with access via the easement. Additional development would substantially increase the traffic along the easement and

McNaughton's property thereby expanding the easement's use beyond the intent of the Agreement. (App. 64; App. 142-43).

Chartier began experiencing health issues and, as a result, she and her husband decided to sell the assisted living facility in Lawton, along with two other assisted living facilities they owned. (App. 203). The Chartiers eventually found a buyer, AbiliT, for the assisted living facility, and they signed a letter of intent. Chartier disclosed the existence of the easement to AbiliT. (App. 135-36). However, during its investigation, AbiliT discovered the easement had not been properly recorded. (App. 135; App. 71-73).

On February 2, 2018, Chartier's attorney, Chad Thompson, advised various representatives of AbiliT that if Chartier was unable to produce an assignment or new easement within 20 days after signing the purchase agreement, AbiliT could rescind the purchase agreement. (App. 383). On February 15, 2018, Chartier visited McNaughton and asked him to sign an amendment to the Agreement allowing AbiliT access via the easement. She presented him with a document entitled "Clarification of Easement." (App. 378). The document intended to clarify that the assisted living facility retained access via the easement, regardless of apparent ownership. Chartier offered McNaughton $15,000 to sign the clarification. McNaughton was

concerned about the wording and the possibility he was giving up control of his property. Therefore, he told Chartier that he wanted to have his attorney review the matter before signing the clarification. (App. 228-29). This was the first notice McNaughton had that the Chartiers were selling the property to an unrelated party. (App. 229). Up until that point, McNaughton had no reason to question the use being made of the easement. (App. 79).

On February 19, 2018, Mr. Thompson disclosed to AbiliT that Chartier had been unable to reach an agreement with McNaughton regarding the easement and proposed allowing her up to forty-five days after the effective date of the transaction to have a signed easement in place granting AbiliT's users access. Mr. Thompson further stated that AbiliT could terminate the purchase agreement if the Chartiers could not produce an easement agreement providing such access. (App. 385).

On February 21, 2018, Chartier sent McNaughton's counsel, Robert Meis, a letter advising him of the potential sale and the failure of the original easement to be recorded. She requested that Mr. Meis record the easement. (App. 372). On March 5, 2018, Mr. Thompson disclosed to AbiliT that McNaughton's attorney intended to record the easement in its original form and that Chartier was still attempting to work out an agreement with McNaughton "to modify the easement so the terms of the easement are more

definite." (App. 387). He further opined that it was "plausible" for AbiliT to interpret the easement as being written to extend the right and privilege of use to AbiliT. (App. 387).

As part of the negotiating process, McNaughton offered to extend the easement rights to AbiliT in exchange for $100,000 and the rights to purchase fifty acres from another sister's estate, for which Chartier was the executor. He also offered to sell his entire property to Chartier for $410,000. McNaughton then suggested Chartier purchase the assignment of the easement for $160,000. Finally, he offered to extend the easement to AbiliT in exchange for the Chartiers transferring him twelve acres of farmland they own just south of the AbiliT property. Chartier declined all the offers finding them unreasonable. (App. 198; App. 202-03; App. 233-34). Therefore, McNaughton did not sign the Clarification of Easement presented to him. Instead, he had the easement agreement properly recorded in the property records on March 7, 2018, and, on April 19, 2018, he filed suit with the District Court seeking a declaration of the parties' rights surrounding the easement area. (App. 336; App. 9). McNaughton also filed a Lis Pendens notice when he filed the action. (App. 243-45; App. 62).

On March 13, 2018, Chartier disclosed to AbiliT that she was unable to reach an agreement with McNaughton stating: "He will not agree to

change the wording of the body of easement, nor write a clarification." (App. 389). She also stated:

> "**We are open to suggestions to remedy this.** The buyers and I are going to have to be creative on a solution or decide if this is a deal breaker
> …
> Solutions I can think of:
> 1. Sign the current affidavit and record it again.
> 2. We could get a court ruling which we have been advised that we would win, but that will take a long time, as our county is severely backlogged in the courts due to numerous open judge positions/retirements. He cannot land lock our property.
> 5. [sic] Or the City could take action."

(App. 389-91) (emphasis in original). Ultimately, the Chartiers closed the transaction with AbiliT, providing a Warranty Deed to the Char-Mac property on April 30, 2018, and recording it May 22, 2018. (App. 380). Due to the pending declaration action, the Chartiers agreed to indemnify AbiliT for any expenses associated with litigation regarding the easement agreement. (App. 202).

Although the easement makes it easier to access East Char-Mac Drive, the parties generally agree that access to the AbiliT property is possible on the Chartiers' portion of the road because it is large enough to allow traffic and, therefore, access via the easement is not necessary. (App. 385; App. 60-61; App. 90). Although McNaughton generally does not

object to AbiliT using the easement area as originally intended, his main concern in filing this action was to maintain his rights to the easement area and limit any assignment should additional development occur. (App. 64; App. 87-88).

II. THE COURT OF APPEALS THOROUGHLY CONSIDERED APPELLEES' CLAIM OF PUBLIC DEDICATION AND CORRECTLY CONCLUDED MCNAUGHTON NEVER PUBLICLY DEDICATED THE EASEMENTAREA.

There are three elements necessary to establish a public dedication. They are:

> (1) an appropriation of the land by the owner for a public use, evidenced by a positive act or declaration manifesting an intent to surrender the land to the public; (2) an actual parting with the use of the property to the public; and (3) an actual acceptance of the property by the public.

Marksbury v. State, 332 N.W.2d 281, 284 (Iowa 1982).

The court in *Marksbury* found that the intent of the offeror or dedicator determines the extent, scope, and character of the dedication. 322 N.W.2d at 284. A dedication may be express or implied. "An express dedication may be shown by an explicit or positive declaration, or manifestation of intent to dedicate the land to the public. An implied dedication is shown 'by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn.'" *Barz v.*

State, 2012 WL 5356106, at *3 (citations omitted). However, "[w]hether a dedication is express or implied, *the intent to dedicate 'must be unmistakable in its purpose.*" *Barz*, 2012 WL 5356106, at *3 (quoting *Merritt v. Peet*, 24 N.W.2d 757, 762 (Iowa 1946)) (emphasis added).

McNaughton never, not once, stated expressly or otherwise that he intended to abandon his rights to the easement area and dedicate the area to the City of Lawton. In fact, when asked if he wanted to dedicate the area, he expressly, on multiple occasions, said he did not want to publicly dedicate it. (App. 40-42).

In *Barz*, the court found that the intent to dedicate must be manifested by "some unequivocal act, indicating clearly an intent that it be so devoted." *Barz*, 2012 WL 5356106, at *3. When discussing the intent to dedicate, the court further stated: "A dedication 'may not be predicated on anything short of deliberate, unequivocal, and decisive acts and declarations of the owner, manifesting *a positive and unmistakable intention to permanently abandon his property to the specific public use*.'" *Id.* (quoting *Culver v. Converse*, 224 N.W.2d 834, 835 (Iowa 1929)) (emphasis added).

The Chartiers first attempt to discredit the Court of Appeals ruling by stating the court improperly focused on the language in the easement, rather than focusing on the actions and inactions of McNaughton. They then go on

to say that the terms of the easement are "not relevant" because the agreement was between McNaughton and the Chartiers and did not involve the City of Lawton. The Chartiers miss the point. The court was properly focused on the first element of public dedication: intent. The language in the easement provides clear evidence McNaughton intended the easement to be private and used by a designated class of individuals. Given the dead-end nature of the street, it can be assumed the users of the street were in accord with that Agreement.

Furthermore, the Court of Appeals did refer to the actions and inactions of McNaughton regarding the easement area but noted that the use by the public was in line with the easement. The court then properly observed that public use, "without more[,] is not sufficient to indicate such a clear and unequivocal act on the owner's part to establish the intent to dedicate." (Ruling at 10 (quoting 3 John Martinez, Local Government § 17:3 (Oct. 2020 update)).

The Chartiers then take issue with the Court of Appeals observing that "mere permissive use of way, no matter how long continued, will not amount to a dedication. The user is presumed permissive, and not adverse." (Ruling p. 10). The court relied upon and quoted this Court's 2010 ruling in

Sons of the Union Veterans of the Civil War v. Griswold Am. Legion Post 508, 641 N.W.2d 729, 723 (Iowa 2002). The Chartiers now argue that, notwithstanding the direct quote from this Court's 2010 ruling, this statement is in direct conflict with this Court's rulings in *Henry Walker Park Association v. Mathews*, 249 Iowa 1246, 91 N.W.2d 703 (Iowa 1958) and *Kinsinger v. Hunter*, 195 Iowa 651, 192 N.W.2d 264 (Iowa 1923). Specifically, the Chartiers quote the following from those rulings:

> Mere permissive use of the way, not matter how long continued, will not amount to a dedication; but if, in addition to the long-continued use, it be shown it has been so used with the knowledge and consent of the proprietor, in other words, if his conduct is reasonably explainable **only on the theory of his consent or upon the theory of his waiver or abandonment of his right for the benefit of the public**, he will not thereafter be permitted to repudiate or deny its legal effect.

(Application for Further Review p. 25 (quoting *Kinsinger v. Hunter*, 195 Iowa 651, 192 N.W.2d 264, 265 (Iowa 1923) and referencing *Henry Walker Park Association v. Mathews*, 249 Iowa 1246, 1256, 91 N.W.2d 703, 710 (Iowa 1958)).

Those cases, however, only support a finding of public dedication based on long-term, acknowledged use, when the owner's conduct is explainable "only on the theory" of consent, waiver, or abandonment. Further, they did *not* involve permitted use via an easement. Here, there is

another "theory" available to explain the permitted use and that is *exactly* why the Court of Appeals addressed the language of the easement. McNaughton's conduct in allowing the ongoing use is due to the agreement, not some abandonment or waiver of his rights to the land. The use of the property and McNaughton's conduct were clearly explained through his decision to grant a private easement for use by a designated group of people. There is no conflict, direct or otherwise, with Iowa Supreme court precedent.

The Chartiers go on to argue that, because he was not paying real estate taxes on the property, it was evidence of his intent to dedicate it as a public street. First, the Chartiers put forth a proposition that was not clearly established at trial. The proof of nonpayment of taxes at trial included beacon assessment information for McNaughton's property (App. 582) and Chartier's opinion, objected to by counsel, that he must not be paying on the concrete because it is not listed on the beacon sheet. (App. 215-16). Nothing on the assessment information clarifies whether the land description does or does not include the concrete portion, and Chartier would have no particular expertise in that area. Further, countering her testimony was McNaughton's testimony that he was in fact paying taxes on the easement area. (App. 42). Finally, even if there was a lack of payment, that in and of itself would be insufficient to overcome both the use being allowed pursuant

to the easement and McNaughton declining *three times* to publicly dedicate the property when so approached. McNaughton never intended to publicly dedicate the concrete portion of the easement area to the City of Lawton, and his express refusal to do so should weigh heavily against any perceived implied intent.[1] [2]

After attempting to establish an intent by McNaughton to dedicate, the Chartiers conclude by attempting to demonstrate there was public acceptance of the dedication. Once again, their argument fails. To establish property was publicly dedicated, the party claiming dedication must demonstrate actual acceptance of the property by the public. *Marksbury*, 332 N.W.2d at 284. Although it is generally agreed the public used the subject easement area and roadway, only those members of the public who

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[1] Further, in the context of this case, the City of Lawton requested to be dismissed from this case claiming it has no interest in the easement area. As stated in its pretrial brief: "*The City does not own any portion of the property covered by the [easement] agreement*." (App. 306) (emphasis added).

[2] The Chartiers take issue with the Court of Appeals citation to a treatise that stated a tacit or implied dedication cannot be found when the owner actively opposes dedication. The Chartiers argue the citation was inappropriate because it was related to a Louisiana case citing a Louisiana statute. Implied dedication, however, is a common law concept strongly rooted in Iowa caselaw. To suggest the Court of Appeals erred in citing a proposition related to implied dedications, without showing any Iowa caselaw to the contrary, is without substance or merit.

"were residents, guests and other invitees" of the facility on the Chartiers' property were using the roadway, not the general public. Those were the individuals allowed to use the easement area pursuant to the express wording of the Agreement and, given the road dead ends into the facility's parking lot, no other member of the public would have reason to use the roadway. Using the road pursuant to the Agreement's language does not translate into a public dedication. The Chartiers offer *nothing* to show the public at large used the street.

McNaughton's testimony, combined with the express language of the Agreement and the dead-end nature of the roadway, supports his contention that the use allowed was permissive to the limited class of individuals noted in the Agreement. It is Appellees' burden to prove otherwise. Based on the above, McNaughton submits that the Court of Appeals correctly found McNaughton did not publicly dedicated the concrete portion of the easement area to the City of Lawton.

III. THE COURT OF APPEALS THOROUGHLY CONSIDERED APPELLEES' CLAIM OF AN APPURTENT EASEMENT AND CORRECTLY CONCLUDED THE CLEAR LANGAUGE OF THE EASEMENT PROVIDED A PRIVATE, PERSONAL, AND NONTRANSFERABLE EASEMENT THAT WAS NOT APPURTENANT TO ADJACENT PROPERTY.

"An easement is a liberty, privilege, or advantage in land without profit, existing distinct from ownership." *Hawk v. Rice*, 325 N.W.2d 97, 98 (Iowa 1982). An easement may be either appurtenant or in gross. "An appurtenant easement is an incorporeal right which is attached to, and belongs with, some greater or superior right-something annexed to another thing more worthy and which passes as an incident to it." *Wymer v. Dagnillo*, 162 N.W.2d 514, 517 (Iowa 1968). An easement in gross is an easement that, while "the use it authorizes is connected with the use of a particular tract of land in the possession of the owner, it was not intended by its creator or creators to be appurtenant to such land." Restatement (First) of Property § 434 cmt. a (1944; Oct. 2019 update). Whether an easement is appurtenant or in gross is determined primarily by the intention of the parties. *See Sherwood v Greater Mammoth Vein Coal Co.*, 185 N.W. 279, 283 (Iowa 1921).

Private easements are "limited to specific individuals and/or uses." 28A C.J.S. *Easements* § 11 (June 2019). A private easement "is not open to use by the general public[] but may be used by the easement holder's family members, guests, tenants, employees, and tradesmen or others whom he or she is transacting business." *Id.* A public easement is "open to all members

of the public for any uses consistent with the dimensions, type of service, and location of the roadway." *Id.*

McNaughton has consistently maintained that the only reasonable reading of the entire Agreement is that the parties intended the easement to be exclusively used by the Chartiers and the residents, guests, and other invitees of the assisted living facility on the Chartiers' property. Once the Chartiers sold the assisted living facility and land to AbiliT, the assisted living facility no longer fell within the "exclusive use" provisions of the Agreement and, therefore, any continued use requires the express permission of McNaughton.

The Chartiers claim that the Court of Appeals erred in concluding the language of the easement was clear. They suggest that, by not taking into account the actions of the parties after execution of the Agreement, the court's analysis was in direct conflict with *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008), *Sherwood v. Greater Mammoth Vein Coal Co. et al.,* 185 N.W. 279, 283 (Iowa 1921), and *Wiegmann v. Baieri*, 203 N.W.2d 204, 208 (1972).

Those cases, however, stand for the proposition that, upon a finding that the terms of an agreement are ambiguous, it is proper for the court to analyze the context and surrounding facts and circumstances to determine

the meaning of the terms. However, even those three cases acknowledge that the words of the contract, when clear, are given great weight. *See Pillsbury*, 752 N.W.2d 436, 436 (finding that "after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention"); *Sherwood*, 185 N.W. 279, 283 (finding that the setting and circumstances of the agreement are considered when "the language in the instrument is ambiguous"); *Wiegmann*, 203 N.W.2d 208 (finding the manner in which the parties have construed the terms of the agreement is considered only when ambiguity exists).

A plain, simple reading of the Agreement reveals there is no ambiguity. The parties crafted the Agreement to meet their specific needs. The language was not boilerplate, and the parties wrote the Agreement with detail and specificity. For example, the Agreement clearly states it is a "private easement" for the parties designated and that the easement is *not* to be construed to be for the general public. (App. 336). The Agreement further states that the easement rights "are for the *exclusive* use and benefit of *Chartier*, and the residents, guest and other invitees of the assisted living facility located on the *Chartier's property*." (App. 336) (emphasis added). The language is specific and intentional as to its exclusiveness and is not

generalized in any manner. Regarding use by other individuals, the parties specifically agreed that the easement rights granted could "not be assigned by Chartier to any other party or parties without the express written consent of McNaughton or his successors or assigns." (App. 336). The language limiting assignment of the easement rights by the Chartiers demonstrates a strong intent that the easement granted was *not* for general, public use. The Agreement further protects McNaughton's interests by requiring his consent to any assignment. (App. 336). To find the easement is public in nature and appurtenant to the property now owned by AbiliT runs counter to the Agreement's clear, detailed, expressed intent that the use be limited to the Chartiers *and* that McNaughton agree to any assignment.

The Chartiers also argue that, because the subject easement provides for "ingress and egress," it is necessarily an appurtenant easement. They cite the Court of Appeals ruling in *Rank v. Frame*, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994) for this proposition. However, the facts in the *Rank* case involved an *implied* easement, not an express easement. Thus, the *Rank* court was left to determine the intent of the parties based on the use of the property. Because the use involved ingress and egress, the court determined it should be appurtenant. Here, there is an express easement setting forth articulated uses – the intent is clear.

Further, although the Agreement *did* provide ingress and egress to the Chartier's facility, that access was *limited* to McNaughton's sister and the "residents, guests, and other invitees of the assisted living facility located on Chartier's property." (App. 336). Once the Chartiers sold the property, the Agreement no longer applied to the residents, guests, and other invitees of the assisted living facility because it was no longer on the Chartiers' property. It was at that point the provision permitting the Agreement to continue only with McNaughton's consent kicked in.

In addition, considering factors outside the clear language of the Agreement does not result in a conclusion that the parties' intended an appurtenant easement. Particularly, the Chartiers point to the failure of McNaughton to object to the public's use of the easement area. However, the easement is not part of a through street and dead ends at the assisted living facility. McNaughton, for the past 20 years, has never had reason to object to the use of the easement because he would naturally have believed it was being used by either his sister or the residents, guests, and invitees of the assisted living facility on his sister's property. It is certainly logical for him to assume that the general public would not be using the easement area because the road dead ends into the facility. No one, other than those

designated in the easement, would have reason to venture onto the roadway. Therefore, McNaughton had no reason to object to any use.

Further, the easement was granted in 1999. Up until 2012, access to the facility was essentially a private driveway. In 2012, the City accepted the Chartiers' dedication of their portion of the road to the City. (App. 130). The easement language, anticipated use, and rights conveyed should not change simply because a neighbor changes the nature of adjoining property.[3]

CONCLUSION

The issues in this case were well briefed before the Court of Appeals with the both the Chartiers and AbiliT providing briefs in opposition to McNaughton's claims. The Court of Appeals carefully considered and weighed the parties' positions and rendered its ruling according to current Iowa caselaw. A public dedication must involve some unequivocal act by the grantor to dedicate the property. The Court of Appeals considered the language of the Agreement to determine McNaughton's intent and properly concluded the facts did not support an express or implied dedication.

[3] Lastly, the Chartiers take issue with the Court of Appeals' determination that the easement was not necessary for access to the assisted living facility. The testimony and evidence at trial, however, demonstrated that the parties generally agree access to the AbiliT property is possible on the Chartiers' portion of the road because it is large enough to allow traffic and, therefore, access via the easement is not necessary. (App. 385; App. 60-61; App. 90).

The Court of Appeals also properly concluded that the words of the easement are clear in providing for a private easement and that any actions subsequent to the easement are in accord with the terms of the Agreement.

As set forth above, the Court of Appeals ruling was not in direct conflict with Iowa Supreme Court precedent. After extensive briefing, the court provided a well-considered analysis of the facts against applicable law. Therefore, McNaughton respectfully requests that this Court deny the Chartiers' Application for Further Review.[4]

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[4] The Chartiers footnoted in their application that they were not putting forth the issue of attorney fees but opined that the trial court's award was correct. If at issue, Appellant requests this Court review Appellant's detailed briefing and analysis of why an award of common law attorney fees is not warranted or appropriate in this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitations of Iowa R. App. P. 6.903(1)(d), 6.903(1)(g)(1), and 6.1103(4) because this brief has been prepared in a proportionally spaced typeface using Times New Roman typeface in 14-point font size and contains 5,502 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) and 6.1103(4).

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on July 12, 2021, I caused the foregoing Appellant's Resistance to Appellees' Application for Further Review to be filed with the Iowa Supreme Court Clerk using the Electronic Document Management System (EDMS) which, pursuant to Iowa R. Elec. P. 16.315(1) and Iowa R. App. P. 6.702(2), will send notification of such filing to the attorneys of record who are registered with EDMS.

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