

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss,

LAND COURT DEPARTMENT  
CIVIL ACTION NO. \_\_\_\_\_

CROSSROADS PRESENTS, LLC

Plaintiff,

v.

HOLOCAUST LEGACY FOUNDATION, INC.

Defendant.

**VERIFIED COMPLAINT**

The historic Orpheum Theatre has been located at the eastern terminus of Hamilton Place since 1852. Hamilton Place, a private way, is the sole means of vehicular access to the Orpheum Theatre, and runs off of Tremont Street, a public way. For at least thirty years, on 40-50 event days per year, the Orpheum Theatre has utilized the full width and length of Hamilton Place for many purposes, including, but not limited to the transit of 75-foot tractor trailers (so-called “WB-67”), which transport equipment utilized by performing artists), touring artist busses and assorted vehicles. For at least twenty-five years, on event days, the Orpheum Theatre has blocked vehicular access to Hamilton Place with physical barriers and security personnel, for security purposes (Hamilton Place serves as a queueing area for patrons) and to ensure an access lane for emergency equipment. Defendant Holocaust Legacy Foundation, Inc. (the “Foundation”) recently purchased the property<sup>1</sup> at the southwest corner of Hamilton Place and Tremont Street, claims record title to the fee in the western portion of Hamilton Place (adjacent to its building),

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<sup>1</sup> Upon information and belief, the Foundation intends to construct a museum and educational center to preserve and perpetuate the memory and lessons of the Holocaust for future generations, which Crossroads Presents, LLC wholeheartedly supports.

and that the Orpheum Theatre does not have the right to use and control the western portion of Hamilton Place on event days as it has for the past 25-30 years at least. Plaintiff Crossroads Presents, LLC, seeks a declaratory judgment that as tenant at the Orpheum Theatre, it holds an easement by prescription over the portion of Hamilton Place that the Foundation claims ownership of, as well as related injunctive relief precluding the Foundation from interfering with the Orpheum Theatre's use of Hamilton Place. Given that the Orpheum Theatre commences its events for the coming season on September 8, 2024, and that the Foundation has commenced demolition, preliminary injunctive relief is sought as well.

### **PARTIES**

1. Plaintiff Crossroads Presents, LLC ("Crossroads") is a Delaware Limited Liability Company that leases the Orpheum Theatre located at 1 Hamilton Place, Boston, MA 02108 ("Orpheum Theatre").

2. Defendant Holocaust Legacy Foundation, Inc. ("Foundation") is a Massachusetts nonprofit corporation with a principal place of business at 125 Tremont Street, Boston, MA 02108.

### **JURISDICTION AND VENUE**

3. This Court has personal jurisdiction over the Foundation, because it is a nonprofit corporation incorporated in the Commonwealth of Massachusetts and its principal place of business is in the Commonwealth of Massachusetts.

4. This Court has jurisdiction over the dispute, because M.G.L. c.185, § 1(a) vests in the Land Court jurisdiction over all cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved.

5. The declaratory judgment statute, M.G.L. c.231A, § 1, provides that . . . the land court . . . may on appropriate proceedings make binding declarations of right, duty, status, and

other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings . . .”

## **FACTUAL BACKGROUND**

### **The Historical Significance and Importance of the Orpheum Theatre.**

6. The Orpheum Theatre is the oldest continuously operating theatre in Boston and has been at its current location since 1852, operating at the outset as the Boston Music Hall. It was the first home of the Boston Symphony Orchestra from 1881 to 1990. Renovated in 1905-1906, it became the Orpheum Theatre; it was renovated again between 1910 and 1916 by the famous architect Thomas Lamb and re-opened in its current form in 1916.

7. Since opening its doors in 1852, the venue has played host to some of the most well-known and influential artists, speakers, thinkers, and musicians of the last 170+ years.

8. Most notably, the Orpheum Theatre served as a gathering place for Northern Abolitionists such as when Frederick Douglass read the Emancipation Proclamation from the stage as the clock struck midnight on January 1, 1863. In attendance were Wendell Phillips, Harrier Beecher Stowe, William Lloyd Garrison, and Harriet Tubman.

9. The Orpheum Theatre is located in Boston’s Midtown Cultural District. According to §38-1 of the Boston Zoning Code, the purpose of the district is to revitalize the district as the region’s center for performing and visual arts by rehabilitating historic Theatres and preserving Boston’s historic resources.

10. The Orpheum Theatre is unique in that it is an actively used historical resource that successfully, but not without difficulty, competes with other venues that do not have the physical constraints of the building in which it operates and the location on Hamilton Place, including a lack of dedicated parking facilities.

11. Although the unique qualities of the Orpheum Theatre make it difficult to operate, the Orpheum Theatre draws people into the Midtown Cultural District where they can not only enjoy a live presentation in an historic structure but can also explore other points of interest in Boston.

**The Orpheum Theatre’s Only Vehicular Access By Hamilton Place.**

12. The plan attached hereto as **Exhibit A** is a true and accurate copy of a Plan titled “Plan of Land in Boson, Mass., scale 20 feet to an inch, July 12, 1950, recorded in the Suffolk Registry of Deeds in Plan Book 6724, Page 1 (the “1950 Plan”).

13. The Orpheum Theatre is located as shown on the plan and is owned by Crossroads’ landlord, Winsum Limited Partnership (“Winsum”).

14. On or about March 1, 2023, the Foundation acquired the parcel shown as the building lot marked as “Merchants Cooperative Bank,” on the 1950 Plan, pursuant to the deed recorded in Book 68739 Page 199 (the “Foundation Property”).

15. The Foundation claims fee ownership of the full width of Hamilton Place adjacent to its building and the passageway easterly of that building (the “Western Portion of Hamilton Place” or the “Western Portion”).

16. Since at least 1994, the Orpheum Theatre, a performance venue, has held 40-50 events per year.

17. The Orpheum Theatre is not open in the summer.

18. Starting at around 6:00 a.m. on most days when the Orpheum Theatre has events and sometimes even the day before (“Event Days”), large, 75-foot-long tractor trailers (so-called “WB-67”) back down Hamilton Place from Tremont Street to unload at the Theatre. They do this by driving down Tremont Street, past Hamilton Place, towards the Boston Common, then

turn right on Park Street, and then back down Hamilton Place, travelling over the complete width and length of the Western Portion of Hamilton Place. Often times they must roll over the existing curb at southwest corner of the intersection of Hamilton Place and Tremont Street in order to complete the maneuver. At the conclusion of an artist's performance, those same trucks come back and reload, using the full width and length of Hamilton Place, including the Western Portion of Hamilton Place, to get back to Tremont Street. This has been the case since at least 1994. See, Affidavits of Michael A. Marchetti ("Marchetti Aff.") at ¶¶ 4 -6, 9; Lee Zazofsky ("Zazofsky Aff.") at ¶¶ 6-7; and Deirdre Kelly ("Kelly Aff.") at ¶¶ 3-7, filed herewith.

19. Since at least 1999, on Event Days at the Orpheum Theatre, Crossroads personnel and those of its predecessors (collectively, "Orpheum Theatre Personnel") have controlled access to Hamilton Place through the use of barricades and security personnel. On Event Days, those barricades are placed at the intersection of Tremont Street and Hamilton Place, and Orpheum Theatre Security Personnel are nearby. No vehicular access is allowed by Orpheum Theatre Personnel other than for vehicles servicing the Orpheum Theatre or otherwise permitted by Orpheum Theatre Personnel. Orpheum Theatre Personnel have exercised complete and exclusive control over who may enter Hamilton Place on Event Days at the Orpheum Theatre for at least twenty-five years. See, Marchetti Aff. at ¶¶ 7-8, Zazofsky Aff. ¶¶ 8-9; Kelly Aff. at ¶¶ 3-7

20. If the Suffolk University Garage is open, those barricades are placed behind the entrance to the garage during the earlier parts of the day, before they are moved to the intersection of Hamilton Place and Tremont Street. See, Marchetti Aff. at ¶¶ 7-8; Zazofsky Aff. at ¶¶ 10; Kelly Aff. at ¶¶ 4-5.

21. The photograph attached hereto as **Exhibit B** fairly and accurately depicts Hamilton Place from Tremont Street, with labels added by counsel. The Foundation's building is

in the foreground on the right, the Orpheum Theatre is at the rear, and the entrance to the Suffolk University garage is on the left. The barricades are behind the garage entrance, and security personnel monitor the area to ensure that no vehicles enter Hamilton Place other than those servicing the Orpheum Theatre or to park in the Suffolk University garage. See, Marchetti Aff. at ¶¶ 6-8; Kelly Aff. at ¶¶ 5-6.

22. In 2018, in a dispute between Winsum and the ownership of the buildings on the southerly side of Hamilton Place (on the right in Exhibit B) between the Orpheum Theatre and the Foundation Property, *Winsum Limited Partnership v. 17-33 Winter Street, Inc.* 93 Mass. Ap. Ct. 1106 (unpublished decision) (April 13, 2018) (**Exhibit C** hereto) (the “Winsum Decision”), the Appeals Court accurately stated as follows: “Winsum’s property presently houses the Orpheum Theatre and The Corner Mall, a twenty-tenant enclosed retail mall. Hamilton Place, which extends from Tremont Street, is the main access point to the Orpheum Theatre, as well as a second access point to The Corner Mall. Members of the public use Hamilton Place to access both locations.” This is on the first page of the Winsum Decision.

23. As noted in footnote 2 of the Winsum Decision, “Janelon”, who owned the parcels on the southerly side of Hamilton Place between the Orpheum Theatre and the Foundation Parcel from at least 1979 through 2007 gave the Orpheum Theatre, “a Winsum tenant, permission to use parking spaces [on Hamilton Place abutting its parcels, i.e. not the Western Portion] for tour buses, vans, and trucks to unload equipment.”

24. The only way for those “tour buses, vans, and trucks” to get from Tremont Street to the easterly portion of Hamilton Place next to Janelon’s land, was to drive over the Western Portion of Hamilton Place, i.e. the portion which the Foundation claims ownership of.

25. Although Crossroads and its predecessors, and upon information and belief, Winsum and its predecessors, have never received permission from the Foundation or its predecessor-in-interest to use the Western Portion of Hamilton Place, Crossroads and its predecessors have used the Western Portion of Hamilton Place as described herein for at least the past thirty years.

26. The Foundation claims that Crossroads does not have any right to use the Western Portion of Hamilton Place and, more specifically, that the Foundation can preclude Crossroads from utilizing Hamilton Place as it and its predecessors have done for at least the past thirty years. See Marchetti Aff. at ¶ 13.

27. Crossroads has attempted in good faith to resolve this dispute with the Foundation, to no avail.

**The Orpheum Theatre Faces Irreparable Harm If Not Permitted to Use Hamilton Place.**

28. The Orpheum Theatre is an historic structure, smaller than many performance venues, with very difficult access for performance acts. In order for performance acts to perform at the Orpheum Theatre, equipment must be unloaded at the front door on Hamilton Place, and pushed through the front door, through the seating area, and up a temporary ramp onto the stage. It is unlike more modern facilities such as the Boch Center, the Citizens Opera House, and the MGM Music Hall at Fenway, which have better access for performers, service personnel and patrons, and places for the trailers that carry equipment necessary for performers to park.

29. For these reasons and more, the Orpheum Theatre is a uniquely difficult venue for event production in the City of Boston.

30. The Foundation commenced demolition of its building during the summer (while the Orpheum Theatre was closed), and, upon information and belief, intends to continue

demolition and commence construction of a new building thereafter, each of which, based on current plans, will interfere with the Orpheum Theatre's use of the Western Portion of Hamilton Place as described herein for at least the past thirty-years. The Orpheum Theatre recommences performances on September 8, 2024. See Marchetti Aff. at ¶¶ 10-11, 13-15.

31. If the Foundation impedes the ability of the Orpheum Theatre to use Hamilton Place on Event Days, by leaving equipment on Hamilton Place or otherwise, in accordance with its apparent claim that the Orpheum Theatre and its invitees have no right to utilize the Western Portion of Hamilton Place, the Orpheum Theatre will go out of business. The Orpheum Theatre can't operate without performers, their equipment and patrons traveling over the Western Portion of Hamilton Place as they have been for many decades. See, Kelly Aff. at ¶ 7.

32. The Foundation claims that it can leave construction and other vehicles and bollards on Hamilton Place even though they are blocking access for tractor trailers utilizing Hamilton Place to get to or leave the Orpheum Theatre and blocking the public from using Hamilton Place.

33. Restricting the ability of performance acts including their tractor trailers from utilizing the Western Portion of Hamilton Place will likely lead to a cascade of cancellations by performers and the loss of confidence in the Orpheum Theatre throughout the live performance industry, resulting in damage to the reputation of the Orpheum Theatre as a venue and the reputation of Crossroads and its part owner Live Nation (which operates many other concert venues throughout New England and the country) as a concert operator, not to mention substantial and immediate economic losses suffered by Crossroads/Live Nation as result of breach of contract and professional competence obligations.



34. The Orpheum Theatre commences its fall season with an event on September 8<sup>th</sup>, 2024, and if its ability to use Hamilton Place on Event Days, including the Western Portion of Hamilton Place is impaired as threatened by the Foundation, Crossroads will be irreparably harmed as described herein.

## **CAUSES OF ACTION**

### **COUNT I - Declaratory Judgment**

35. Crossroads repeats and incorporates herein by reference the allegations set forth in the foregoing paragraphs of this Verified Complaint.

36. There is an actual controversy between Crossroads and the Foundation regarding whether the Orpheum Theatre has the right to use the Western Portion of Hamilton Place as it and its predecessors have for the past 25-30 years at least as detailed above.

37. Crossroads' use of Hamilton Place and that of its predecessors and their invitees over the Western Portion of Hamilton Place has been open, notorious, and adverse for well more than twenty years.

38. Pursuant to M.G.L. c.231A, Crossroads is entitled to a declaration that to the extent that the Foundation owns the Western Portion of Hamilton Place, Crossroads and its invitees have an easement by prescription over the Western Portion of Hamilton Place.

### **COUNT II - Permanent Injunction**

39. Crossroads repeats and incorporates herein by reference the allegations set forth in the foregoing paragraphs of this Verified Complaint.

40. Crossroads seeks a permanent injunction, forever restraining and enjoining the Foundation from interfering with the rights of Crossroads to enjoy such rights as it has acquired by prescription.

**WHEREFORE**, Plaintiff respectfully requests that this Court:

- A. Enter a temporary restraining order, restraining and enjoining the Defendant, Holocaust Legacy Foundation from interfering, impairing, or blocking in any way, the use by Crossroads and its invitees of Hamilton Place in connection with events at the Orpheum Theatre, including but not limited to: (1) the use by Crossroads and its invitees of the full width of Hamilton Place for 75 foot long WB-67 tractor trailer access, tour bus access, vehicular access, and pedestrian access, from 6:00 a.m. on the morning of events and/or the evenings prior to the days of events until all vehicles have left after removing equipment associated with the performance acts, and (2) the control of access to Hamilton Place by Orpheum Theatre personnel on days that the Orpheum Theatre is hosting a performance event. In connection with such order Crossroads shall provide to the Foundation on a weekly basis a two week “look ahead” schedule, detailing events planned for the following two weeks.
- B. For a preliminary injunction, on the terms of Prayer A.
- C. For a permanent injunction, on the terms of Prayer A.
- D. For a declaratory judgment, declaring the rights that the Plaintiff, Crossroads Presents, LLC, has acquired by prescription, and otherwise declaring the rights of the parties; and
- E. For such other relief, legal, equitable, and declaratory as this Honorable Court deems just and proper.

Respectfully submitted,

**CROSSROADS PRESENTS, LLC**

By Their Attorneys,

/s/ Alan E. Lipkind

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Boston, MA 02110

(617) 345-3000

Dated: September 3, 2024

**[VERIFICATION PAGE TO FOLLOW]**

VERIFICATION

I, the undersigned, on September 3<sup>rd</sup>, 2024, hereby verify and swear under oath and the penalties of perjury that the above-stated facts are true and accurate to the best of my knowledge and recollection based upon first-hand knowledge or information and belief I have developed from third parties (see affidavits attached) or independent research.

Signature: 

Name: Douglas C. Borg

Title: Senior Vice President

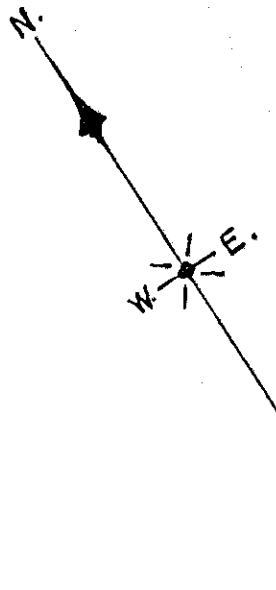
Date: September 3, 2024

# **EXHIBIT A**

Plan of Land in  
**BOSTON - MASS.**  
 Scale 20 feet to an inch.  
 July 12, 1950.

William S. Crocker, Civil Engineer  
 Successor to Aspinwall & Lincoln  
 46 Cornhill, Boston, Mass.

Elevations are referred to Boston City Base.



David D. Cline et al., Trs.  
 SIX STORY BRICK BUILDING  
 No. 3

HAMILTON PLACE

(PRIVATE) PLACE

ORPHEUM THEATRE  
 Loew's Boston Theatres Company

LAND COURT CASE NO. 13740

Penneth M. Cline et al.

68.34  
 AREA UNDER SIDEWALK  
 75.70  
 AREA UNDER SIDEWALK  
 74.30  
 AREA UNDER SIDEWALK

No. 124  
 No. 11  
 Merchants Cooperative Bank

Philip H. Theopold et al., Trs. of Boston Real Estate Trust  
 No. 7-10

Philip H. Theopold et al., Trs. of Boston Real Estate Trust

Edward W. Grew Jr. et al., Trustees of Wigglesworth Real Estate Trust.

TREMONT ST. (PUBLIC)

PASSAGEWAY

MUSIC HALL PLACE (PRIVATE)

Philip H. Theopold et al., Trs. of Boston Real Estate Trust

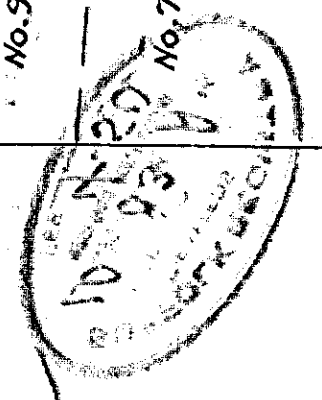
WINTER ST. (PUBLIC)

ST.

WINTER PLACE

JACKSON PLACE

58285



*Handwritten signature and notes in the bottom right corner.*

# **EXHIBIT B**

Google Maps 125-119 Freedom Trl

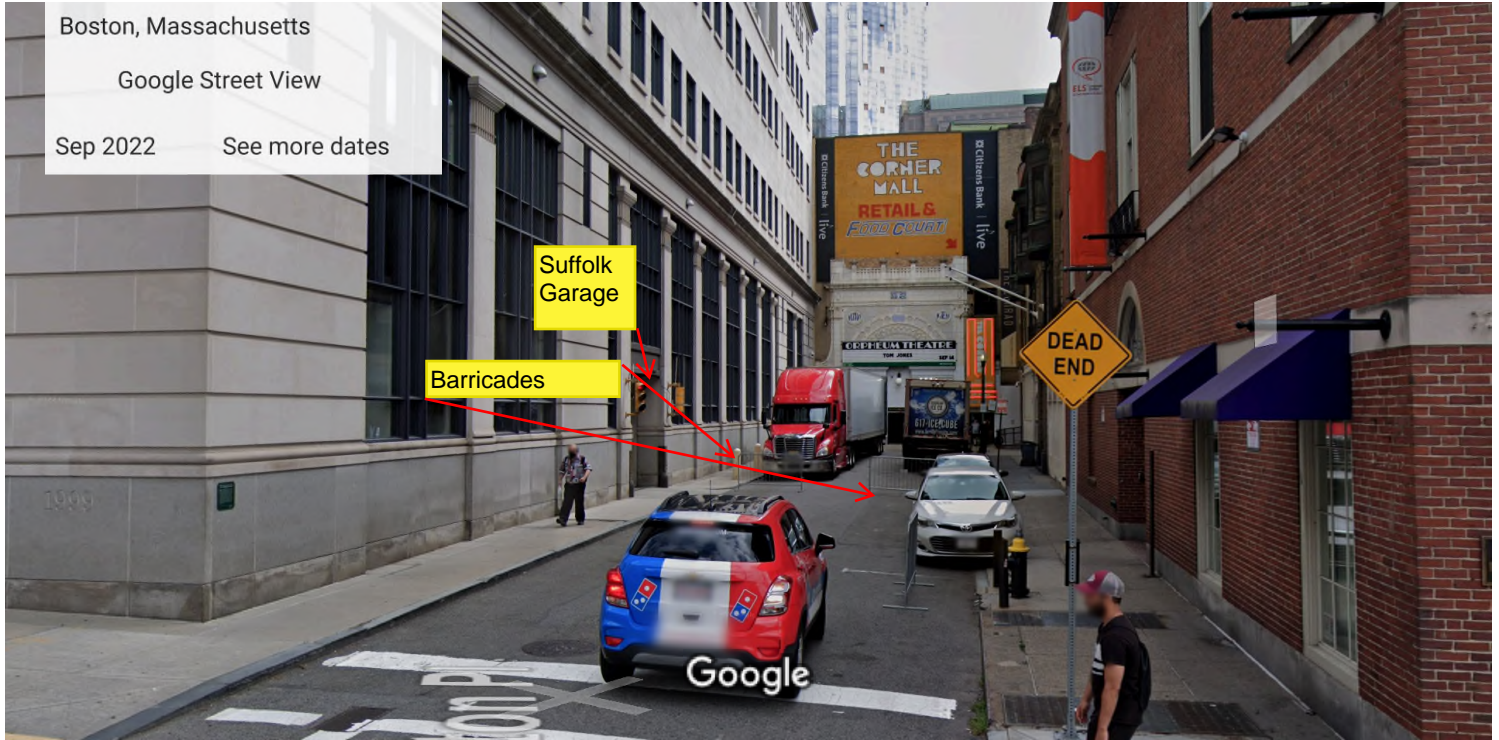
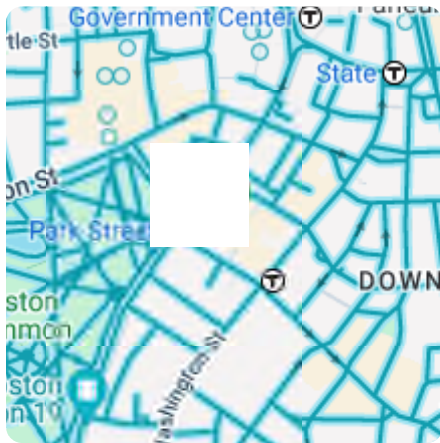


Image capture: Sep 2022 © 2024 Google



# **EXHIBIT C**



93 Mass.App.Ct. 1106

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass.

App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover,

such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

Appeals Court of Massachusetts.

WINSUM LIMITED PARTNERSHIP

v.

17–33 WINTER STREET, LLC.

17–P–646

|

Entered: April 13, 2018.

By the Court (Meade, Sullivan & Henry, JJ. <sup>1</sup>)MEMORANDUM AND ORDER  
PURSUANT TO RULE 1:28

\*1 In these cross appeals, the plaintiff, Winsum Limited Partnership (Winsum), and the defendant, 17–33 Winter Street, LLC (Winter Street), appeal from a judgment issued by a judge of the Superior Court granting, in part, Winsum's motion for partial summary judgment. Winsum contends that the judge erred in concluding that its right to enforce a parking prohibition on the south side of Hamilton Place, a private way in Boston, has been extinguished by Winter Street's adverse use of six parking spaces for a period greater than twenty years. Winter Street maintains that any rights that Winsum had to enforce a parking ban on the whole of Hamilton Place were granted through a restriction that expired in 1980. We affirm.

1. Background. We briefly summarize the evidence presented to the judge on Winsum's motion for partial summary judgment. In 1950, Loew's Boston Theaters Company

(Loew's) and The Boston Real Estate Trust (BRE Trust) entered into an indenture in which BRE Trust granted Loew's easement rights “to use [Hamilton] Place throughout its entire extent for purposes of travel on foot and with vehicles, and of light and air.” In addition, the parties agreed that “[n]either party shall permit vehicles to stand in Hamilton Place longer than necessary for loading and unloading.” In 1994, Winsum acquired and became successor in interest to Loew's interest. In 2007, Winter Street acquired and became successor in interest to the Janelon Trust's (Janelon) interest, which had acquired its interest from BRE Trust. Both Winsum and Winter Street became bound to the rights identified in the 1950 indenture.

Winsum's property presently houses the Orpheum Theatre and The Corner Mall, a twenty-tenant enclosed retail mall. Hamilton Place, which extends from Tremont Street, is the main access point to the Orpheum Theatre as well as a second access point to The Corner Mall. Members of the public use Hamilton Place to access both locations.

Since at least 1979, Janelon employees parked cars in six parking spaces on the south side of Hamilton Place—in direct conflict with Winsum's rights established in the indenture. In addition, any vehicle parked without Janelon's permission was towed.<sup>2</sup> Janelon did not receive any complaints about the use of the parking spaces. Janelon used the spaces on a daily basis for itself and its guests from the time it acquired the property until it sold the property to Winter Street in 2007. Winsum's agent, Thomas Frawley,<sup>3</sup> submitted an affidavit dated January 2016, asserting, however, that “[r]ecently, Winter Street or its agents have allowed parking in Hamilton Place.”

In 2015, the board of appeal of Boston (board) granted Winter Street a variance permitting three food trucks to use the north side of Hamilton Place (as opposed to the south side where Winter Street used the six parking spaces). Subsequently, Winsum brought the present action in the Superior Court, appealing the board's decision granting the variance and seeking declaratory relief to determine the parties' rights in Hamilton Place. The Superior Court judge allowed, in part, Winsum's motion for partial summary judgment. Separate and final judgment then entered pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974). These cross appeals ensued.

\*2 2. Standard of review. “We review a grant of summary judgment de novo, construing all facts in favor of the nonmoving party.” Miller v. Cotter, 448 Mass. 671, 676

(2007). Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Community Natl. Bank v. Dawes, 369 Mass. 550, 553 (1976). If the moving party asserts the absence of any triable issue, the nonmoving party “must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion.” Drakopoulos v. U.S. Bank Natl. Assn., 465 Mass. 775, 778 (2013) (quotation omitted). “[C]onclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment.” O'Rourke v. Hunter, 446 Mass. 814, 821 (2006) (quotation omitted). See Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974).

3. Discussion. a. Applicability of G. L. c. 184, § 23. Winter Street contends that the judge erred in concluding that the parking prohibition in the indenture was a feature of the affirmative easement not subject to the thirty-year limitation for restrictions set forth in G. L. c. 184, § 23. It maintains that Winsum no longer has the right to enforce the parking prohibition anywhere on Hamilton Place because the rights conferred in the indenture should be classified as a restriction that expired in 1980, thirty years after it was signed. We disagree.

“A restriction on the use of land is a right to compel the person entitled to possession of the land not to use it in specified ways.” Patterson v. Paul, 448 Mass. 658, 662 (2007) (quotation omitted). Restrictions on land are generally disfavored. See ibid. Conversely, “[a]n affirmative easement ‘creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.’ ” Id. at 663, quoting from Restatement (Third) of Property (Servitudes) § 1.2 (2000). “[A]ffirmative easement[s] allow [ ] easement owner[s] to enter [the] servient estate and do acts thereon.” Ibid.

Here, the indenture is replete with affirmative easement rights that BRE Trust and Loew's granted to each other.<sup>4</sup> Section 4 of the indenture gives Winsum the right “to use [Hamilton] Place throughout its entire extent for purposes of travel on foot and with vehicles, and of light and air.” It also prohibits both parties from allowing “vehicles to stand in Hamilton Place longer than necessary for loading and unloading.” The indenture specifically confers on Winsum the right to enter and use land in the possession of another, and preserves the right to pass along the entire way, free of obstacles, except for

temporary parking. This right was of value given the nature of the commercial operations, which included a theater. The rights identified in the indenture are properly classified as an affirmative easement. See Patterson, supra at 664.<sup>5</sup> Cf. Labounty v. Vickers, 352 Mass. 337, 347–348 (1967) (“A restriction on the use of land is a right to compel the person entitled to possession of the land not to use it in specified ways.... But the holder of such a restrictive right has no right to use the land on which he holds the restriction as he would if he held an affirmative easement” [quotation omitted] ). As a matter of law, the judge correctly determined that Winsum holds an affirmative easement and thus its rights established in the indenture are not subject to the thirty-year limitation set forth in G. L. c. 184, § 23.

\*3 b. Adverse use. Winsum contends that the judge erred in determining that its right to enforce its affirmative easement, as it relates to the parking proviso on the south side of Hamilton Place, has been extinguished.

In order to extinguish an easement there must be occupation of the easement that is irreconcilable with its use as a way. The use must be open, notorious, adverse, and without interruption for more than twenty years. Brennan v. DeCosta, 24 Mass. App. Ct. 968, 969 (1987), citing Lemieux v. Rex Leather Finishing Corp., 7 Mass. App. Ct. 417, 422–424 (1979). Here, Winter Street produced evidence that cars parked in the parking spaces on the south side of Hamilton Place for a period greater than twenty years, contrary to the provision of the indenture which prohibited “vehicles to stand in Hamilton Place longer than necessary for loading and unloading.”

Winter Street provided affidavits that its immediate predecessor, Janelon, used the south side of Hamilton Place for parking between 1979 and either 2007 or 2012.<sup>6</sup> In addition, the affidavit of Janelon's property manager, Judee Shupe,<sup>7</sup> stated that Janelon maintained the six parking spots and only people authorized by Janelon were allowed to park in the spots. This evidence satisfied Winter Street's burden to show, on summary judgment, that its use of the parking spaces was continuous, adverse, open, and notorious.<sup>8</sup> See Brennan, supra. Furthermore, Winter Street provided evidence that it had used the south side of Hamilton Place “in a manner so inconsistent with [the rights provided in the indenture].” Lemieux, supra at 423 (quotation omitted).

Nonetheless, Winsum claims that the affidavit of its agent, Frawley, creates a dispute of material fact as to whether

Winter Street satisfied the twenty-year period necessary for adverse use. The Frawley affidavit states that “[r]ecently, Winter Street or its agents have allowed parking in Hamilton Place.” The affidavit not does raise a dispute of material fact because it fails to challenge the evidence of adverse, exclusive, and continuous use beginning in 1979. See [Dawes](#), 369 Mass. at 555–556 (“vague and general allegations of expected proof” are not enough to defeat motion for summary judgment [quotation omitted] ). In light of the evidence submitted by Winter Street that Janelon continuously used the south side of Hamilton Place for automobile parking for a period greater than twenty years, some specific factual averments were necessary to raise an issue of material fact. See [id.](#) at 559–560. Partial summary judgment in favor of Winter Street extinguishing so much of the affirmative easement that precluded the parking of automobiles on the south side of Hamilton Place was proper.<sup>9</sup>, <sup>10</sup>

\*4 c. Modification of the judgment. The final judgment states that the “parking prohibition in Section 4 of the 1950

Indenture Agreement has been extinguished with respect only to the parking of six automobiles along the southerly side of Hamilton Place.” Winter Street contends that the judge abused her discretion by declining to amend the final judgment to refer more liberally to “vehicles,” rather than automobiles, to avoid potential ambiguity.<sup>11</sup> The judge concluded that the judgment, as entered, “accurately states the findings of the Court.” After careful review of the record, the evidence shows that the six parking spaces were predominantly used to park automobiles. The judge properly limited Winsum's affirmative easement in accordance with Winter Street's use. We discern no abuse of discretion.

Judgment affirmed.

#### All Citations

93 Mass.App.Ct. 1106, 103 N.E.3d 771 (Table), 2018 WL 1770250

#### Footnotes

- 1 The panelists are listed in order of seniority.
- 2 Janelon, for a fee, gave Live Nation, a booking agent that booked acts for the Orpheum Theatre, a Winsum tenant, permission to use the parking spaces for tour buses, vans, and trucks to unload equipment.
- 3 Frawley's responsibilities as an agent of Winsum included the day-to-day oversight of the property at issue for the past thirty-one years.
- 4 For example, in section 2 of the indenture, Loew's grants to BRE Trust “common rights in Music Hall Place,” including the right to “install, maintain and use connections” with various utilities. In section 3, BRE Trust grants to Loew's “the common ... right to use for travel on foot only, the area between Music Hall Place and the south-east wall of the building known as 17–19 Winter Street.”
- 5 Based on the language of the indenture, Winter Street's suggestion that portions of the indenture were easements while the parking prohibition was a restriction is not consistent with a reading of the document as a whole. See [Sheftel v. Lebel](#), 44 Mass. App. Ct. 175, 182 n.8 (1998) (language in indenture “cannot be read in isolation ... but must be read in its proper context, as part of the instrument as a whole”).
- 6 Although Winsum moved for partial summary judgment, the judge granted partial summary judgment in favor of Winter Street, as she was permitted to do. See [Mass.R.Civ.P. 56\(c\)](#), as amended, 436 Mass. 1404 (2002). For this reason, we review the entry of summary judgment as if Winter Street was the moving party.
- 7 Shupe stated in her affidavit that she was the property manager of Janelon between 1979 and 2007 and “worked there 5–6 days a week during [that] time period.”

- 8 Winsum contests that Winter Street's use was neither "exclusive" nor "uninterrupted" as Live Nation used the parking spaces when there were shows at the Orpheum Theatre. This argument is unavailing for two reasons. First, the Cinelli affidavit states that "when the Orpheum Theatre had shows or concerts, it would pay a fee to [Winter Street] to park buses, trucks and other motor vehicles." Even if Live Nation used the parking spots, it did so with the permission of Winter Street. Second, the affidavits state that Live Nation has used the parking spots since 2004. By that time Winter Street had already established its adverse use for more than twenty years.
- 9 The partial extinguishment of its easement as it pertains to the south side of Hamilton Place does not extinguish Winsum's easement as it relates to the northerly side of Hamilton Place. See [Post v. McHugh](#), 76 Mass. App. Ct. 200, 205 (2010) (partial adverse use can extinguish easement to extent of such use).
- 10 Having determined that Winsum's easement has been partially extinguished due to Winter Street's adverse use, we decline to address the abandonment or estoppel arguments.
- 11 We review a decision on a motion to alter or amend a judgment for an abuse of discretion. [Quarterman v. Springfield](#), 91 Mass. App. Ct. 254, 260 (2017).