STATE OF NEW HAMPSHIRE
SUPREME COURT

No: 2017-0110

Janet Balise and Stanley Balise

v.

Brad Balise, Jon Carpenter & Winifred Carpenter

Rule 7 Appeal from Rockingham County Superior Court

BRIEF OF DEFENDANT/APPELLANT BRAD BALISE & A.

Counsel for Brad Balise, Jon Carpenter and Winifred Carpenter

oral argument by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PERTINENT TEXT OF AUTHORITIES

231:43, III - Power to Discontinue. –

I. Any class IV, V or VI highway, or any portion thereof, in a town may be discontinued by vote of a town; provided, however, that: …

III. No owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's own risk.

§ 231:46. Authority to Reserve Existing Utility Easements

When any class IV, V or VI highway, or any portion thereof, has been discontinued, any existing sewer, drain, water pipe or other utility easements or any permits or licenses previously established pursuant to RSA231:159-182 shall be presumed to be reserved and shall remain in effect as an encumbrance upon the underlying land for so long as they remain in active use, unless such easements, permits or licenses are expressly included in the vote to discontinue the highway, or are subsequently discontinued by vote of the city or town.

STATEMENT OF THE FACTS AND THE CASE

STATEMENT OF THE CASE

The Plaintiffs brought a complaint, in the form of a petition to quiet the title and declaratory judgment to determine whether they had a right of access over a discontinued portion of Golden Brook Road\Simpson Road lying between the Defendant Brad Balise and Winifred Carpenter's homes pursuant to RSA 231:43. Pl. Comp. Appendix (App.) at 1-6. The Plaintiffs complaint also alleged trespass. The Plaintiff's complaint also included a count for trespass and damages against the Defendant Brad Balise for blocking the disputed area with a vehicle(s). App. at 3.

The Plaintiff's amended complaint also sought a determination that if they had a right of access - did the right of access also grant them the right to install utilities over the discontinued road. Pl. Mt. for Partial Summary Judgment. App. at 29.

The Defendants brought a cross-claim also seeking to quiet the title to discontinued road and a declaratory judgment that any right of access over the discontinued road had been extinguished by adverse possession. Def. Counter-claim. App. at 12-15.

The Plaintiff's moved for partial summary judgment that they had a statutory right of access under RSA 231:43 that could not be extinguished by adverse possession. Pl. Mt for partial SJ. App. at 23. Alternatively, the Plaintiff argued that if the statutory right of access under RSA 231:43 could be extinguished by adverse possession, that the evidence reflected that was that there were no material issues of fact in dispute and that the Plaintiffs failed to meet the elements of adverse possession for the requisite twenty year period. App. at 23.

The Plaintiff cited no law for the proposition that a statutory right could not be extinguished by adverse possession, instead only citing to the language in the statute itself that "no owner of land shall, without his written consent, be deprived of access over such highway." RSA 231:43, III.

In granting the Plaintiff's motion for partial summary judgment, the trial court determined that Plaintiffs did have a statutory right of access under RSA 231:43 over the disputed area, that the language in the deed from the Plaintiffs to the Defendant Brad Balise did not amount to a release of any interests on the rear lot, Lot 21-G-600 owned by the Plaintiff. See Order on Cross-Motions for Summary judgment, Def. Brief ADD at 14.

A two day trial was held on the issue of whether the Plaintiff was entitled to install utilities through the disputed area and, if so, to what extent.

Applying the law of easements to the issue of access, the trial court's Final Order, dated January 27, 2017, found that the Plaintiffs have a right to install underground utilities and to install an unpaved road for access to lot 21-G-600 owned by the Plaintiffs. Final Order at 6. Def. Brief ADD at 36.

The Defendants, on appeal, contend the trial court erred when it found that the Plaintiffs have a right of access under RSA 231:43 over a discontinued road that runs through the Defendant's properties where the Plaintiffs had other means of access. The Defendants also contend that the trial court erred in granting summary judgment where there were material facts in dispute regarding whether the Defendants had met the elements of adverse possession.

The Defendant also contend the trial court erred when it applied the law of easements to find that the Defendants had a right to install utilities even though the town, in its vote to discontinue the disputed area, had not reserved any easement for utilities.

STATEMENT OF THE FACTS

At trial, the Plaintiff called the Defendant's Brad Balise and Jon Carpenter as witnesses. The Plaintiff also called three additional witnesses: David Tokanel, an expert on construction; and Janet Balise and Stanley Balise.

The Defendant Brad Balise testified that he has always parked vehicles in the disputed area. He did not undertake parking them in the disputed area as a result of this action. He also testified that he had discussions with his parents about the rear lot they now seek to develop and said he would not have proceeded to purchase it had he known they were going to develop it. He testified that Plaintiffs did not reserve an easement in the deed they gave him. Further, he testified that he believed the Plaintiffs were now attempting to sell the land a second time by including in the listing his land. He testified he objected to the listing reflecting that because the Plaintiffs, through their realtor, were showing his property as if it was a part of Lot 21-G-600. He also testified that the Plaintiffs offered to sell him the property for $300,000. He testified that he had never seen his parents, or anyone else, drive through the disputed area. He stated he would have known, even if he were not present, because of the impact it would have on the ground. He also testified that you could not drive a vehicle through the disputed area because of trees and overgrowth. He testified that when he removed some of the trees in the early 2000s he had to use an

excavator - which failed due to conditions. He testified that a passenger vehicle could not drive up the disputed area and a four wheel drive at a minimum would be required.

He objected to the installation of utilities and the paving of the driveway. He believes the construction of the driveway and home will negatively impact his property.

Jon Carpenter testified that the Plaintiffs also offered to sell the land to the abutters for $300,000 and then listed it for approximately $275,000 to the public. He testified that he has lived at the property since the 1960s. He testified that his parent's property front window to their home faces out toward the area where the Plaintiffs want to install a driveway and utilities. He testified that he has a concern that the installation of utilities will impact his property. That he presently has a cracked foundation due to prior development. He also testified that he has never seen the Plaintiffs drive a vehicle through the disputed area to access their lot. He also testified that the Town plows snow up against the disputed area and was concerned where it would be placed if they are allowed to pave the driveway.

David Tokanel testified for the Plaintiffs as an expert in construction in home and driveways. It was his testimony that he had built over 100 houses and driveways, however, on cross examination he admitted that he had only developed one parcel with a shared driveway. That parcel did not include having to cross another person's property. Though he testified as to the costs to install underground utilities and above ground utilities - as set out in his report – in fact his report is simply the memorialization of discussions with a representative of Eversource – and not based on his expert knowledge. He also testified that he had not undertaken any testing of conditions underneath the soil in the disputed area.

Janet and Stanley Balise both testified that they owned the property in question since the 1960s. They both denied having any conversation with Brad Balise that they would not develop the rear lot (Lot 21-G-600). Janet Balise testified that she had driven their passenger car through the disputed area at three times a year until Brad Balise put the trucks in disputed area. Janet Balise testified that she did not know whether the snow would negatively impact the Defendants property due to runoff from the pavement.

SUMMARY OF ARGUMENT

The trial court erred when it granted summary judgment to the Plaintiffs where there were genuine issues of material fact in dispute regarding the acts of the Defendants to establish adverse possession to extinguish the Plaintiff's alleged right of access. The Defendant's argue that the statutory right of access set forth in RSA 231:43 can be extinguished by adverse possession. The Plaintiffs contend the statutory right of access cannot be extinguished. The case presents an opportunity for the Court to determine whether a right of access can be extinguished by through adverse possession.

The Defendants argue that the trial court erred when it found that the right runs with the land and attaches to the Plaintiff property, regardless of whether the Plaintiffs have other mean of access. The Defendant argue the right is not absolute, especially in light of the Plaintiff's having other means of access and whereby the Plaintiff's executed a deed in favor of the Defendant Brad Balise releasing all rights and interest the property they now seek to construct a road with utilities upon.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Pike v. Deutsche Bank Nat'l Trust Co., 168 N.H. 40, 42, 121 A.3d 279 (2015). " If our review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment." Id. " We review the trial court's application of the law to the facts de novo." Id. William Weaver & a. v. Randall Stewart, 169 NH 420, 425 (2016). Our review of the trial court's application of the law to the facts is de novo. Del Norte, Inc v. Arthur J. Provencher, 142 NH 535, 537 (1997).

II. The trial court erred when it found that the Plaintiffs have a right of access under RSA 231:43 over a discontinued road that runs through the Defendant's properties where the Plaintiffs had other means of access.

The Plaintiffs claim that RSA 231:43 grants them a right of access over the Defendants property in the area discussed as the "disputed area." The operative language in the statute as it exists today and that cited in Plaintiff's memorandum in their Motion for Summary judgment, App. at 23, is the portion that states that "no owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's risk." RSA 231:43, III.[1] If the statutory right of access can be extinguished by

[1] Plaintiffs' memorandum reflects the language in effect in 1962 to read "provided further that no owner of land shall, without his written consent, be deprived of access over such highway, at his own risk.

adverse possession, a question this court must decide, then the records reflects support for the Defendants position that the trial court erred when it granted summary judgment for the Plaintiffs. Reviewing the affidavits and other evidence in the light most favorable to the non-moving party, the affidavit of Brad Balise stated he had never observed anyone use the area of the discontinued road. Aff. of Brad Balise, App. at 78.

There is a material fact in dispute as to whether the access to the Plaintiffs Lot, 21-G-600, is via the discontinued portion of the town road in the disputed area. There is a material fact in dispute as to whether the Plaintiffs have ever used the disputed area for access to the lot they own, Lot 21-G-600. See Affidavit of Jon Carpenter and Brad Balise, App. at 78 and 106.

The Plaintiffs have access from at least four other deeded access points. See Exhibit attached to Defendants Motion to Reconsider Summary Judgment. App. at 170. The Plaintiff have other means of access, however they seek the most disruptive path over the Defendant's property.

The portion of the road that is the subject of this appeal was closed in 1962 by vote of the town meeting. The Plaintiffs purchased the lot at issue in 1964. See Affidavits of Janet and Stanley Balise. App. at 32. Lot 21-G-600 is undeveloped. The Plaintiff s' previously owned the lot, presently owned by the Defendant Brad Balise, as well as a very large trac of land next to Lot 21-G-600 along a portion of the discontinued road that is not the disputed area. Historically, the Plaintiffs did not need the disputed area owned by the Defendant because they had the ability to access it from the other points of the old road that was discontinued, as well as portions that have not been discontinued by the town. It is reasonable to infer that RSA 231:43 was adopted to protect a landowner from being

deprived of its only means of access. This is not what is before the court in this matter. Plaintiff had and has other means of access which between 1964 and today it sold without providing themselves an express easement over the surrounding land (including the disputed area) and now seeks equity to give them something they otherwise would have already had.

The statute is silent as what is meant by "access." RSA 231:43 is directed at the actions of a municipality and prevents a municipality from depriving the owner access without his written consent. There is nothing in the statute that addresses whether access can be lost by the actions of private individuals through the doctrine of adverse possession. The doctrine of adverse possession, like that of laches, prevents someone who does not assert their rights or, alternatively, sits on their rights – may lose those rights.

III. The trial court erred when it found that the language in the Plaintiff's deed to the Defendant Brad Balise for the conveyance of 231 Range Road did not constitute a written consent to release the Plaintiff's right of access, as contemplated by RSA 231:43.

The Plaintiff's sold 231 Range Road lot to Brad Balise. In their deed to Brad Balise they relinquished all rights they had in the lot, including any rights over the discontinued road. The deed is set forth in the Appendix. App. at 131. The deed states

> "The within Grantors [Stanley P. Balise and Janet F. Balise] hereby release to said Grantees [Brad Daniel Balise and Deborah Diane Balise] all rights of curtsey and homestead and other interests therein" (emphasis added) (sic).

The deed constitutes a written document, signed by both Stanley and Janet Balise, in which the Plaintiffs have released all of their rights in the lot. Brad Balise relied to his detriment that the Plaintiffs released all rights in the property. The Plaintiffs should not be allowed to benefit twice from the same parcel at the expense of the Defendant Brad Balise.

IV. The trial court erred when it granted summary judgment to the Plaintiffs on the issue of adverse possession where there were genuine issues material of fact in dispute precluding the granting of summary judgment.

It is undisputed that there has been a wooden barrier, whether bolted in or hung by brackets, at the entrance to the disputed area for at least 40 years dating back to the mid-1970s, that there has also been a no trespassing sign at the same location for that time period and that trees and seasonal acts of the town (e.g. snow) have created an impediment to anyone using the disputed area for access. App. at 106 – 111. (Affidavit of Jon Carpenter and photographs attached thereto). Since 1998 Brad Balise has undertaken acts to maintain the no trespassing sign and to assert control over the land which he rightfully owns. The Plaintiff's argue that, as a matter of law, RSA 231:43, gives them access yet the Plaintiffs in other proceedings before the Town, argued just the opposite in their RSA 674:41 building permit appeal. App. at 132 -138.

In their motion and memorandum, the Plaintiffs cited they have signed a waiver under RSA 674:41, however, the building inspector denied a building permit and the Plaintiff still do not have a building permit because under RSA 674:41, I (c)(3) and\or (d)(3) – as there is no right to build because the access is neither a class IV road or a private road as provided in the statute.

The affidavit of Jon Carpenter was that he had maintained a fort in the discontinued road in the 1970s. App. at 106. App. at 109 (See photograph of fort). The record also reflects in Jon Carpenter's deposition that he maintained the no trespassing sign since the 1970s. Despite affidavits in support of the Defendants claims that they have a colorable claim for adverse possession warranting a trial on the matter, the court granted summary judgment to the Plaintiffs. This was error and should be reversed.

V. The trial court erred when it found that the Plaintiffs had a right to install utilities in the discontinued road where no reservation for utilities was contained in the town vote to discontinue the road, pursuant to RSA 231:46 and found that the law of easements was applicable to a discontinued road to determine whether it was reasonable to allow the Plaintiffs to install utilities in the discontinued road and whether it was reasonable to allow utilities

The trial court applied the law of easements to determine whether the Plaintiffs have a right to install utilities in the discontinued road. As argued below, RSA 231:43 addresses access only. The statute is silent as to what rights other than access an abutter has to the area.

The trial court adopted the Plaintiff position that since there is no statute or case law on the issue, that the court should look to the law of easements. The Plaintiff cited Arcidi v. Town of Rye, 150 N.H. 694 (2004) to support its contention that the right of access should include the right to install utilities. The trial court agreed, in part, with the Plaintiff's position that that the rule of reason in the law of easements should guide the court. See Order on Cross Motions for Summary Judgment, Brief at 14.

The Defendants renew their argument that this is misplaced. The decision in Arcidi involved an inverse condemnation claim and a claim of overburdening an express easement by the Town of Rye. This case does not involve an express easement but is

simply a statutory right to access. The decision in Arcidi is not applicable to the issue at hand.

The Defendants encouraged the court to look to RSA 231:46 which provides: [w]hen any class IV, V or VI highway, or any portion thereof, has been discontinued, any existing sewer, drain, water pipe or other utility easements or any permits or licenses previously established pursuant to RSA 231:159-182 shall be presumed to be reserved and shall remain in effect as an encumbrance upon the underlying land for so long as they remain in active use, unless such easements, permits or licenses are expressly included in the vote to discontinue the highway, or are subsequently discontinued by vote of the city or town. App at 100 – 105.

This statute was adopted in 1992. Since 1992, if a town discontinues a road, pursuant to RSA 231:43, any utility easements in place remain so long as they (1) remain in active use or (2) such easements, permits or licenses are expressly included in the vote to discontinue the highway, or are subsequently discontinued by vote of the city or town. There are no utilities presently serving Lot 21-G-600. It is undisputed that the utilities end at that portion of the paved surface of the town road between the Defendants properties. It is undisputed that the town vote to discontinue that portion of the road in the disputed area occurred prior to 1992 and, in fact occurred in 1962. The statue was adopted because without it there is no preservation of the encumbrance for utilities for the discontinuance of a town or state road prior to 1992. App. 100. (See Affidavit of Steven A. Clark and attached thereto the Legislative history of Senate Bill 388 (RSA 231:46), Letter of Bernard Waugh attached hereto ("reverses the PRESUMPTION that utility easements are being discontinued")).

The trial court erred when it denied the Defendants summary judgment on the issue of utilities and granted the Plaintiff's the right to install utilities over the Defendants' properties under the rule of reasonableness.

CONCLUSION

For all the reasons set forth herein, Defendants respectfully requests that this Honorable Court reverse the trial court's order in its entirety. Alternatively, the Defendants respectfully request that this Honorable Court reverse and remand for further proceedings on the Defendants cross-claim for adverse possession.

STATEMENT REGARDING ORAL ARGUMENT

Should the Court determine in accordance with Rule 18 that oral argument will be of assistance in resolving this appeal, the Defendant's argument will be delivered by Steven A. Clark.

Respectfully submitted by:
Brad Balise
Winifred Carpenter
Jon Carpenter
By their attorneys
Forman, Clark, Pockell & Associates, P.A.

Dated: July 31, 2017

By: _____

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CERTIFICATIONS

I hereby certify that the decisions being appealed are addended to this brief.

I hereby certify that two copies of this brief and accompanying appendix were mailed on this date to David Sayward, Esquire, counsel for Appellee Janet and Stanley Balise.

Date: July 31, 2017

Steven A. Clark, Esquire
NH Bar ID No. 11257

ADDENDUM

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Janet Balise and Stanley Balise

v.

Brad Balise, Deborah Balise, Winifred J. Carpenter and Jon Carpenter

NO. 218-2015-CV-222

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Janet Balise, individually and as trustee of the Janet Balise Revocable Trust, and Stanley Balise brought suit against Defendants Brad Balise, their son, as well as Winifred and Jon Carpenter seeking to establish their right of access over a discontinued road. A fourth Defendant Deborah Balise has been defaulted for failing to file an answer or otherwise appear in the case. Before the Court now is Plaintiffs' partial motion for summary judgment. The Defendants Brad Balise and Winifred and Jon Carpenter object and filed a cross-motion for summary judgment. The Court held a hearing on May 11, 2016. For the reasons set forth below, Plaintiffs' partial motion for summary judgment is GRANTED IN PART AND DENIED IN PART and Defendants' cross-motion for summary judgment is DENIED.

Facts

The following facts are undisputed and taken from the pleadings, affidavits, and exhibits filed in this case. *See* RSA 491:8-a. The Plaintiffs currently own tax lot 21-G-600 in Windham, which has no frontage on a public way but abuts Simpson Road. Janet and Stanley Balise Aff. ¶¶ 3–4. Simpson Road was discontinued as a highway by

14

the passage of a 1962 Windham warrant article.[1] Am. Compl. ¶ 15; Defs. Answer ¶ 15. Simpson Road, however, runs perpendicular to Range Road, which is a public highway. Simpson Road is paved for a few hundred feet where it meets Range Road. Defs. Ex. A. The remainder of Simpson Road is unpaved. Jon Carpenter Aff. ¶ 9. Plaintiffs seek to construct a residential dwelling on tax lot 21-G-600, accessing Range Road and running utilities over the discontinued portion of Simpson Road. Janet and Stanley Balise Aff. ¶ 10.

Tax lot 21-G-600 abuts 231 Range Road in Windham. *Id.* ¶ 5. Brad resided with the Plaintiffs at 231 Range Road from 1969 until 1987 and returned to the property in 1998. Brad Balise Aff. ¶ 1–2. In 1999, Brad Balise purchased 231 Range Road from the Plaintiffs ("Brad's Property"). Compl. ¶ 9; Defs. Answer ¶ 9; Brad Aff. ¶ 4. The Carpenters own property adjacent to Brad's Property at 233 Range Road ("Carpenters' Property"). Carpenter Aff. ¶ 1.

In the 1970's after the discontinuance of Simpson Road, a wooden barrier was placed across the roadway. *Id.* ¶ 2; Brad Balise Aff. ¶ 3. Since 1998, Brad has posted "No Trespassing" signs on Simpson Road. On and off, Brad has also parked vehicles and placed logs or boulders on Simpson Road. Brad Balise Depo. 49:6–13, Jan. 25, 2016. The Carpenters noted that a "No Trespassing" sign had been posted on the wooden barrier, but could not say if or when they had posted any "No Trespassing" signs on Simpson Road. Carpenter Depo. 29:17–22, Jan. 25. 2016.

[1] Although the discontinued road in the present matter appears to have been known both as Simpson Road and Golden Brook Road, the parties do not dispute the portion of land at issue. Brad Balise Depo. 9:1–17. For clarity purposes, the Court refers to the disputed land in the present matter as Simpson Road.

15

The subject of the dispute is whether Plaintiffs can access Range Road and run utilities over the discontinued portion of Simpson Road running between Brad's and the Carpenter's properties. Both parties now move for summary judgment.

Analysis

A motion for summary judgment should be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In deciding the motion, the court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed" by the parties. *Id.* The court must consider the evidence, and all reasonable inferences therefrom, in a light most favorable to the non-moving party. *See Stewart v. Bader*, 154 N.H. 75, 85 (2006). The movant bears the burden of proving that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See id.* at 86. A fact is material if it affects the outcome of the litigation. *See Bond v. Martineu*, 164 N.H. 210, 213 (2012).

The plaintiffs have brought the following claims against Defendants: (1) petition to quiet title, (2) declaratory judgment, (3) trespass and damages, and (4) attorney's fees. In their motion for summary judgment, Plaintiffs argue that pursuant to RSA 231:43 they are entitled to a statutory right of access that is not subject to the doctrine of adverse possession, and if their statutory right of access is subject to the doctrine of adverse possession then Defendants have failed to prove the necessary elements of adverse possession as a matter of law. Additionally, Plaintiffs argue that they are entitled to judgment against Brad for trespass. Finally, Plaintiffs assert they are entitled to declaratory judgment that their statutory right of access includes a right to install utilities through Simpson Road. Defendants move for summary judgment on the matter

of Plaintiffs' right to run utilities over Simpson Road. The Court addresses each issue in turn below.

I. *RSA 231:43*

Plaintiffs argue RSA 231:43 provides them a statutory right to access their property over Simpson Road. Plaintiffs assert that this statutory right cannot be extinguished by adverse possession. Defendants do not dispute that, by statute, upon the town's discontinuation of Simpson Road in 1962 "[n]o owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's own risk." Pl.'s Partial Mot. Summ. J. 4; *see also* RSA 231:43, I & III. Defendants, however, argue that Plaintiffs' other means of access to tax lot 21-G-600 and nonuse of Simpson Road raise genuine issues of material fact as to whether tax lot 21-G-600 is still entitled to such statutory access. The Court disagrees.

In matters of statutory interpretation, the Court looks

> to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning. [The Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [The Court] construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [The Court does] not consider words and phrases in isolation, but rather within the context of the statute as a whole.

Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015) (internal citation and quotation marks omitted). "'Unless [the Court] find[s] statutory language to be ambiguous, [the Court] will not examine legislative history.'" *Everett Ashton, Inc. v. City of Concord*, __ N.H. __ (decided Apr. 29, 2016) (quotation omitted).

Here, the plain and ordinary meaning of the statutory language of RSA 231:43 provides that land owners abutting a discontinued highway, shall have the right to

access their property by that discontinued highway at their own risk. The statutory language itself does not condition the right of access on anything other than ownership of the land. Even if the statutory language was ambiguous, however, the legislative history of RSA 231:43 supports the same finding. In 1943, the statutory right of access over discontinued highways was limited to land owners who did not have other means of access to their property. Laws 1943, ch. 68 ("[N]o [town] vote [to discontinue a highway] shall in any case release the easement of the pubic to the extent of depriving an owner of property from using the same to gain access to his property, if other access thereto is not available."). In 1945, the legislature revised this statutory provision by eliminating any statutory right of access to landowners. Laws 1945, ch. 188, pt. 8. In 1949, however, the legislature reinstated the statutory right of access over discontinued highways to landowners, but did not include the limiting language of necessity contained in the 1943 version. Laws 1949, ch. 13. The 1949 right of access language was in effect at the time Simpson Road was discontinued. The Court, therefore, cannot now add language to this statute which the legislature did not see fit to include. Thus, Plaintiffs' right of access is not conditioned upon whether the access is necessary.

Likewise, it is well settled law in New Hampshire that the mere nonuse "of an easement, however acquired, does not result in its loss or destruction even if continued for a long period of time." *Gagnon v. Carrier*, 96 N.H. 409, 411 (1951); *see also Duchesnaye v. Silva*, 118 N.H. 728, 734 (1978) (implied easement for access); *Bruchhausen v. Walton*, 111 N.H. 98, 104 (1971) (way created by formal written grant); *Rosenblatt v. Kizell,* 105 N.H. 59, 62 (1963) (prescriptive easement rights). Accordingly, Plaintiffs' use of Simpson Road, or lack thereof, does not bear on their statutory right of access under RSA 231:43.

Defendants next assert that even if Plaintiffs have a right of access under RSA 231:43, they have extinguished that right through written consent. Defendants argue that the following language in Plaintiffs' deed conveying 231 Range Road to Brad amounts to written consent extinguishing their access over Simpson Road: "The within Grantors hereby release to said Grantees all rights of curtesy and homestead and other interest therein." Defs. Sur-Reply to Pls. Mot. Summ. J. and Reply to Pls. Obj. to Defs. Cross-Mot. Summ. J. Ex. Warranty Deed. The Court disagrees.

The statutory right of access under RSA 231:43 runs with the land and attaches to all abutting lots to the discontinued road. It is undisputed that tax lot 21-G-600 abuts Simpson Road. The right to access tax lot 21-G-600 over Simpson Road, therefore, runs with the property. Thus, as owners of tax lot 21-G-600, Plaintiffs have a statutory right of access, which they could not have extinguished in the conveyance of tax lot 21-G-700 (231 Range Road).

Additionally, Defendants argue that Plaintiffs' application for a building permit under the hardship exception to RSA 674:41 is inconsistent with their claim to a right of access under RSA 231:43. Specifically, Defendants argue that Plaintiffs cannot obtain a building permit on the grounds that they have no access to their property while arguing before the Court that they have a right of access pursuant to RSA 231:43. This argument, however, fails to take into consideration the hardship provision outlined in RSA 674:41, II. RSA 674:41 prohibits towns from issuing building permits unless the "street giving access to the lot" meets specific statutory requirements. RSA 674:41, II carves out the following hardship provision:

> Whenever the enforcement of the provisions of this section would entail practical difficulty or unnecessary hardship, and when the circumstances of the case do not require the building, structure or part thereof to be

> related to existing or proposed streets, the applicant for such permit may appeal from the decision of the administrative officer having charge of the issuance of permits to the zoning board of adjustment in any municipality which has adopted zoning regulations in accordance with RSA 674.

The parties do not dispute that Simpson Road is a discontinued road, and therefore is not an "existing or proposed street[]." RSA 674:41, II. The only way Plaintiffs are able to pursue a building permit for tax lot 21-G-600, therefore, is pursuant to the hardship provision of RSA 674:41, II. Thus, Plaintiffs obtainment of a building permit under RSA 674:41, II is not contradictory with their claim for a right of access under 231:43. Rather, their right of access over a discontinued road necessitates their application for a building permit under the hardship provision of RSA 674:41.

Finally, Defendants point to the passage of time in support of their argument that Plaintiffs cannot assert a right of access over Simpson Road. Here, fifty-two years have passed since the discontinuance of Simpson Road and the Plaintiffs' ownership of the affected properties. In some cases, this fact may result in an extinguishment of the easement holder's right. For example, an easement may be extinguished by adverse possession if the adverse use is against the enjoyment of the right of way for the prescriptive period of twenty years. *Rosenblatt,* 105 N.H. at 62. Additionally, holders of an easement may abandon their right of way through "clear, unequivocal, and decisive acts . . . [that manifest] either a present intent to relinquish the easement or a purpose inconsistent with its further existence." *Titcomb v. Anthony*, 126 N.H. 434, 437 (1985). In the present case, however, the facts do not suggest that Plaintiffs have lost their right of access over Simpson Road over the past fifty-two years. First, as discussed in detail below, the Defendants have not established adverse possession of Plaintiffs' right of access for the prescriptive twenty years. Moreover, the two properties at issue have

remained in the same family. Defendants point to Plaintiffs' alleged nonuse of Simpson road to support their argument that Plaintiffs have lost their statutory right of access under RSA 231:43. Mere nonuse, however, is not enough to establish Plaintiffs' abandonment of their right of access regardless of the amount of time that has passed.

For these reasons, the Court finds that Plaintiffs are entitled to a statutory right of access over Simpson Road pursuant to RSA 231:43. Plaintiffs argue that their statutory right of access under RSA 231:43 cannot be extinguished by the common law doctrine of adverse possession. The Court, however, need not address Plaintiffs' argument because Defendants have failed to establish the elements of adverse possession in the first instance.

II. *Adverse Possession*

In general, a claim for adverse possession is successfully maintained if

> the adverse possessor [can] prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. In addition, adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive."

Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 155 N.H. 29, 33 (2007) (citations omitted). With respect to extinguishing an easement by adverse possession, the adverse use must be against the enjoyment of the right of way for the prescriptive period of twenty years. *Rosenblatt*, 105 N.H. at 62. "The success or failure of a party claiming adverse possession is not determined by the subjective intent or the motives of the adverse possessor. Rather the acts of the adverse possessor's entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action." *Blagbrough Family Realty Trust*, 155 N.H. at 33.

Here, Defendants have failed to establish that either of them adversely used Simpson Road against the enjoyment of Plaintiff's right of access for twenty years. Although Defendants assert a wooden barrier has been placed across Simpson Road for over twenty years, the Defendants admit they were not the ones who erected it and that at one point it was constructed such that it could be removed. Defendants also admit that Brad only placed vehicles, logs or boulders within the boundaries of Simpson Way less than twenty years ago. Likewise, the earliest known date that the Defendants posted "No Trespassing" signs was in 1998. Defendants claim that Plaintiffs posted "No Trespassing" signs on Simpson Road prior to 1998. Because Plaintiffs were Brad's predecessor in title, Defendants argue the twenty year period for adverse possession is met by tacking Plaintiffs' time of posting "No Trespassing" signs onto Brad's time. The Court finds this argument unpersuasive. Plaintiffs' action of posting "No Trespassing" signs is not an adverse use trespassory in nature against themselves. Put another way, Plaintiffs could not adversely enter onto land they already owned or frustrate their enjoyment of their own right of way. Viewing the evidence in the summary judgment record in the light most favorable to the Defendants, therefore, the earliest adverse use of Simpson Road by Defendants was in 1998, which is less than the prescriptive twenty year period. Accordingly, Defendants are not able to maintain a claim for adverse possession as a matter of law.

III. *Trespass*

Plaintiffs assert that Brad's placement of a vehicle, log, and boulders on Simpson Road since 2013 has been a continuous trespass against their statutory right of access because it prevented Plaintiffs from being able to drive their own vehicles over the discontinued road. A trespass must be an intentional invasion of the property of

another. *Case v. St. Mary's Bank*, 164 N.H. 649, 658 (2013); *Moulton v. Groveton Papers Co.*, 112 N.H. 50, 54, 289 A.2d 68, 72 (1972). "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Case*, 164 N.H. at 649 (citing *Restatement (Second) of Torts* § 158 (1965)).

The evidence in the summary judgment record establishes Brad intentionally invaded Plaintiffs' right of access. Brad admits that he intermittently parked a vehicle within the boundaries of Simpson road, and placed a log and boulders in this same location. Brad further indicated that the purpose of the log was similar to the wooden barrier in that it acted as an obstruction to those entering Simpson Road. Although Defendants set forth facts that Plaintiffs did not use Simpson Road to access their property either by foot or motor vehicle, this speaks to the relative damages suffered by Plaintiffs and not to whether Brad's actions amounted to trespass. Accordingly, the placement of Brad's vehicles, log, or boulders on Simpson Road amounted to an intentional invasion of Plaintiffs' right of access.

IV. *Utilities*

Plaintiffs assert that they are entitled to a declaratory judgment that they may run utilities through their right of access over Simpson Road. Defendants also move for summary judgment on this issue, arguing Plaintiffs' installation of utilities and a paved driveway over the discontinued Simpson Road would exceed the scope of their right of access under RSA 231:43. Plaintiffs and Defendants both assume there is no direct guidance on this issue and point to different law in support of their arguments. Relying

on *Arcidi v. Town of Rye*, 150 N.H. 694 (2004), the Plaintiffs argue that private easements for residential purposes include the right to run utilities over or through the easement. Plaintiffs argue that the treatment of private easements in *Arcidi* is applicable to their statutory right of access. Plaintiffs, therefore, argue under the principles set forth in *Arcidi*, the Court must find that their statutory right of access carries with it the right to run utilities over it.

Defendants, on the other hand, point to the legislative history of RSA 231:46 to suggest that Plaintiffs have no right to run utilities over Simpson Road. RSA 231:46 addresses the town's authority to reserve existing utility easement in discontinued class IV, V, or VI highways. Prior to 1992, the language of the statute seemed to presume that utility easements were discontinued at the time a class IV, V, or VI highway was discontinued unless towns expressly reserved them. Steven Clark Aff. ¶ 2, attach. 3. In 1992, the legislature amended the statutory language to say:

> When any class IV, V or VI highway, or any portion thereof, has been discontinued, any existing sewer, drain, water pipe or other utility easements or any permits or licenses previously established pursuant to RSA 231:159-182 *shall be presumed to be reserved and shall remain in effect as an encumbrance upon the underlying land for so long as they remain in active use, unless such easements, permits or licenses are expressly included in the vote to discontinue the highway, or are subsequently discontinued by vote of the city or town.*

Laws 1995, ch. 59 (emphasis added). Defendants claim that the amendment to RSA 231:46 in 1992 reversed the presumption that utility easements were discontinued at the time a road was discontinued, and instead set up the expectation that utility easements would remain in effect unless the town explicitly indicated the extinguishment of the utility easement at the time of the discontinuance of the highway or in a subsequent vote. Clark Aff. ¶ 2, attach. 3. Defendants argue, therefore, that

because Simpson Road was discontinued in 1962, there is a presumption that the town also discontinued any utility easements at that time.

While there is some merit to both parties' arguments, the Court concludes that it cannot resolve the dispute by way of a summary judgment order. See *Cote v. Eldeen*, 119 N.H. 491 (1979) (applying the rule of reason to easements arising from owning land abutting a discontinued public highway). When looking generally at utility easements, there is a trend under New Hampshire law that a private easement or a right of access over a discontinued road carries with it the right to run utilities through it. *See Arcidi*, 150 N.H. at 701,703 (finding the law may imply supplemental right in determining the parties' intent of the scope of a private easement); *King v. Town of Lyme*, 126 N.H. 279, 285 (discussing in dicta the right to erect utility facilities on a discontinued road).

This trend, however, is not a bright line rule. The court in *Arcidi* found that the "[c]lear and unambiguous terms of a deed control how we construe the parties' intent" regarding the scope of a private easement, but "the law may imply supplemental rights." *Arcidi*, 150 N.H. at 694. Despite this finding that the Court could look beyond the deeded language to imply supplemental rights, the *Arcidi* court ultimately held that because the original conveyance intended the easement to provide secondary access, as opposed to sole access or primary access, they did not intend the easement to be used for utilities. *Id.* at 703. Although the holding in *Arcidi* implies that an easement intended to be the sole or primary access would more likely carry with it a right to run utilities through it, this is not an absolute rule. Rather, the Court must consider all of the surrounding circumstances to determine whether the use of the easement is reasonable.

The doctrine of reasonable use, moreover, was directly applied to the right to run utilities over a discontinued road in *Cote v. Eldeen.* In *Cote*, the issue was whether the trial court "erred in imposing what it determined to be reasonable use limitations on the plaintiffs' exercise of an easement against the defendants' land." *Cote*, 119 N.H. at 492. The parties in *Cote* owned adjacent tracts of land with frontage on a public way. *Id.* Running perpendicular to the public way was a discontinued road that was the subject of the underlying dispute. *Id.* Although the defendants in *Cote* owned the fee to the discontinued road, the plaintiffs claimed an easement over the discontinued road to haul large quantities of gravel and wood products over it. *Id.* As the plaintiffs increased their use of the discontinued road, the defendants attempted to block the road. *Id.* The trial court ultimately imposed restrictions on the hours the plaintiffs could use the vehicles that could traverse the road. *Id.* at 493. The plaintiffs argued that regardless of whether their right to use the discontinued road "arose by prescription or as a result of the discontinuance of a highway," their use could not be so restricted. *Id.* Without deciding whether the plaintiffs' rights were prescriptive or arose because their land abutted a discontinued road, the *Cote* court held that the doctrine of reasonable use applied in determining the scope of the plaintiffs' easement regardless of its origin. *Id.* at 493–94. The court in *Cote* described this reasonable use doctrine as follows:

> In this state the respective rights of dominant and servient owners are not determined by reference to some technical and more or less arbitrary rule of property law as expressed in some ancient maxim. . . .but are determined by reference to the rule of reason. The application of this rule raises a question of fact to be determined by the consideration of all the surrounding circumstances.

Id. (quoting *Sakansky v. Wein*, 86 N.H. 337, 229 (1933)).

It is clear under *Cote* that the scope of an easement arising from land abutting a discontinued public highway is limited to reasonable use. The Court, therefore, cannot resolve the utility question as a matter of law without making factual findings as to the reasonableness of the proposed utilities in light of the circumstances on the ground. "The application of [the rule of reason or reasonable use doctrine] raises a question of fact to be determined by the trier of fact." *King*, 126 N.H. at 285-86. Because the Court cannot summarily decide as a matter of law whether Plaintiffs running utilities and a paved driveway over Simpson Road is a reasonable use, the parties' motions for summary judgment on this issue are both DENIED.

Conclusion

In sum, Plaintiffs have a statutory right of access over Simpson Road pursuant to RSA 231:43, which the Defendants have not extinguished by adverse possession. Brad intentionally invaded Plaintiffs' right of access by placing vehicles, logs, or boulders on Simpson Road. Whether the Plaintiffs are able to run utilities and pave over their right of access is subject to the rule of reason, which is a question for the trier of fact. In accordance with this order, therefore, Plaintiffs' Partial Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART and Defendants' Cross-Motion for Summary Judgment is DENIED.

Plaintiff submitted requests for rulings of law at the May 11, 2016 hearing. To the extent a party may ask for rulings of law on a summary judgment motion, the Court's rulings are in narrative form in this order. Therefore, any requests for rulings are granted, denied, or determined to be unnecessary, consistent with the above narrative. E.g. *Howard v. Howard*, 129 N.H. 657, 659 (1987); *see also Geiss v. Bourassa*, 140 N.H. 629, 632-33 (1996) (finding that trial court is not required to specifically rule on

parties' requests for findings and rulings); *M.A. Crowley Trucking, Inc. v. Moyers*, 140 N.H. 190, 196, 665 A.2d 1077, 1081 (1995) (finding rulings of law unnecessary when the actual basis for the trial court's decision has been set forth and no impediment to appellate review is discernable); *Cote*, 119 N.H. at 420–21 (finding the Court's may answer request for findings of fact and rulings of law in narrative form).

So Ordered.

Date: July 5, 2016

David A. Anderson
Associate Justice

28

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Janet Balise and Stanley Balise

v.

Brad Balise, Deborah Balise, Winifred J. Carpenter and Jon Carpenter

NO. 218-2015-CV-222

ORDER ON MOTION TO RECONSIDER

Defendants Brad Balise and Jon and Winifred Carpenter filed a motion to reconsider this Court's findings of fact and conclusions of law in its order dated July 5, 2016. Plaintiffs Janet and Stanley Balise object. For the following reasons Defendants' motion to reconsider is DENIED, except as noted below.

Defendants ask this Court to reconsider five aspects of the July 5, 2016 order. To prevail on a motion to reconsider, the Defendants must "state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." N.H. Super. Ct. Civ. R. 12(e). The Court addresses each argument in turn below.

1. Plaintiffs' Access to Public Ways

Defendants argue that the Court's factual finding that Plaintiffs' property located at tax lot 21-G-600 in Windham has no frontage on a public way is incorrect and should be reversed. Defendants assert that Plaintiffs have three additional points of access to a public way, as evidenced by a map Defendants submitted both during the May 11, 2016 summary judgment hearing as well as an attachment to their motion to reconsider.

Because of these additional points of access, Defendants argue Plaintiffs ought to utilize those access points instead of asserting a statutory right right-of-way pursuant to RSA 231:43 over the discontinued portion of Simpson Road.

After reviewing the parties' testimony, it is unclear exactly what portion of the Plaintiffs' property has frontage on a public way and whether the additional access points alleged by Defendants are undisputed. However, even assuming without deciding that Defendants are correct that Plaintiffs' property has three access points to public ways, this factual finding does not change the Court's legal conclusion that Plaintiffs are entitled to a statutory right-of-way pursuant to RSA 231:43 over the discontinued portion of Simpson Road. As the Court explained in its July 5, 2016 order, a right-of-way pursuant to RSA 231:43 is not dependent on the landowner's necessity of its use. *See* Order Cross-Mots. Summ. J. 5 (discussing the legislative history of RSA 231:43). Accordingly, RSA 231:43 does not preclude Plaintiffs from asserting their statutory rights over the discontinued road. Defendants, therefore, have failed to point to any law the Court overlooked or misapprehended that requires landowners to forgo their use of statutory right-of-ways when they have other means of access to their property.

2. Adverse Possession

Defendants argue that the Court misconstrued Jon Carpenter's testimony in his deposition when making the factual finding that "[t]he Carpenters noted that a 'No Trespassing' sign had been posted on the wooden barrier, but could not say if or when they had posted any 'No Trespassing' signs on Simpson Road." Order Cross-Mots. Summ. J. 2. Defendants point to a separate section of Jon Carpenter's deposition not

cited by the Court for the proposition that Jon Carpenter had maintained a "No Trespassing" sign on Simpson Road since the mid-1970s.

As a threshold matter, Plaintiffs object, arguing that Defendants failed to offer the evidence they now rely on in their motion to reconsider prior to the Court's July 5, 2016 order. Plaintiffs assert the Court should decline to consider the newly proffered testimony of Jon Carpenter. However, a review of the summary judgment record demonstrates that the portion of Jon Carpenter's deposition to which Defendants now direct the Court's attention was properly before the Court as an attachment to Plaintiffs' motion for partial summary judgment. Thus, the Court may consider this evidence for purposes of addressing Defendants' motion to reconsider.

After reviewing Jon Carpenter's deposition, the Court notes that his testimony was:

Q: Okay. When's the first time you saw a "No Trespassing" sign in the disputed area?

A: Mid-[19]70's.

Q: And how did that happen? Who put it up?

A: I know that I have maintained it since then. You're saying originally or over the course of time?

Q: Originally.

A: I'm assuming the Town.

Q: And then did you add your own at some point?

A: Yes.

Q: When?

A: Would that include the other side, too? Because I know that the Balises had some signs up there, too.

31

Q: We already asked Mr. Balise about that during his deposition. I just wanted to know what you've put up for "No Trespassing" signs and when.

A: I couldn't honestly say. There was a "No Trespassing" sign there, at least, one, from the mid-[19]70's until today.

Carpenter Depo. 29:3–22. While the Court accurately found that Jon Carpenter testified that he was unaware of when he posted his own "No Trespassing" signs, the Court did not address the fact that he admitted to maintaining one "No Trespassing" sign since the mid-1970's, which he assumed was originally posted by the Town. To the extent the Court's July 5, 2016 order fails to reflect this factual finding, the Court clarifies this point now.

Defendants argue that the fact that Jon Carpenter maintained a "No Trespassing" sign since the mid-1970's is a material fact in dispute, which precludes the Court from granting summary judgment on the issue of adverse possession. Defendants, therefore, assert the Court must hold a trial to determine whether Defendants have extinguished Plaintiffs' statutory right-of-way. The Court disagrees.

As noted in the July 5, 2016 order, a claim for adverse possession requires Defendants to

> prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. In addition, adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive.

Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 155 N.H. 29, 33 (2007) (citations omitted). Specifically, the adverse use must be against the "enjoyment of the

32

right-of-way for the prescriptive period of twenty years." *Rosenblatt v. Kizell*, 105 N.H. 59, 62 (1963).

In light of all the evidence in the summary judgment record, Jon Carpenter's maintenance of one "No Trespassing" sign, which he admittedly did not post himself, is insufficient to prove by a balance of the probabilities that their adverse use would alert Plaintiffs of their cause of action. As explained in the July 5, 2016 order, Defendants admit that the wooden barrier was not erected by them and at one point was constructed so that it could be removed. Additionally, there is no evidence that Defendants posted their own "No Trespassing" signs prior to 1998. The only evidence even suggesting any adverse use of the Plaintiffs' statutory right-of-way for the prescriptive twenty year period is Jon Carpenter's maintenance of one "No Trespassing" sign, which he admits was posted by a third party. There is no evidence that this maintenance was uninterrupted, continuous, or exclusive. And even if these elements had been established, the maintenance of one "No Trespassing" sign is insufficient to establish that Jon Carpenter's use was trespassory or to put Plaintiffs on notice that they had a cause of action against Jon Carpenter. Accordingly, Defendants have failed to produce sufficient evidence to support their claim that they extinguished Plaintiffs' statutory right-of-way by their adverse use for the prescriptive twenty-year period.

3. Applicability of Easement Law

Defendants seem to raise the issue that the Court's reliance on the law of easements may be inapplicable to Plaintiffs' statutory right-of-way claim. While there may be differences between an easement and a statutory right-of-way, the overarching legal concept in both doctrines is a person's rights to pass through or use another's

property. *See Black's Law Dictionary* 622 &1522 (10th ed. 2014) (defining "easement" as "[a]n interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose," and defining "right-of-way" as "[t]he right to pass through property owned by another."). Thus, looking to how New Hampshire has interpreted easement rights is, at the very least, persuasive authority on how to interpret issues regarding statutory right-of-ways. Accordingly, the Court's reliance on established law of easements is appropriate, especially in the absence of law directly addressing the issue of statutory right-of-ways in New Hampshire.

4. Plaintiffs' Conveyance of Tax Lot 21-G-700

Defendants reassert their argument that the language in Plaintiffs' deed that conveyed tax lot 21-G-700 to Brad Balise released all of Plaintiffs' interests in the property, including any statutory right-of-way over the discontinued portion of Simpson Road. Mere restatement of an argument, however, fails to sufficiently "state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended." N.H. Super. Ct. Civ. R. 12(e). Accordingly, as the Court explained in its July 5, 2016 order:

> The statutory right of access under RSA 231:43 runs with the land and attaches to all abutting lots to the discontinued road. It is undisputed that tax lot 21-G-600 abuts Simpson Road. The right to access tax lot 21-G-600 over Simpson Road, therefore, runs with the property. Thus, as owners of tax lot 21-G-600, Plaintiffs have a statutory right of access, which they could not have extinguished in the conveyance of tax lot 21-G-700 (231 Range Road).

Order Cross-Mots. Summ. J. 6.

5. Trespass

Defendants argue the Court's conclusion that Brad Balise trespassed "on his own property against a party that sold him the land and told him that they were releasing all of their interests there in in the deed" is both unfair and unjust. Defs.' Mot. Reconsid. ¶ 19. As discussed above, Defendants misinterpret the interests that Plaintiffs released by deed in their conveyance of tax lot 21-G-700 to Brad Balise. Moreover, Defendants point to no law or facts the Court overlooked or misconstrued in finding that Brad Balise intentionally invaded Plaintiffs' statutory right-of-way by intermittently placing vehicles, logs, and boulders in the discontinued portion of Simpson Road. This finding supports the Court's legal conclusion that Brad Balise committed a trespass against Plaintiffs' statutory right of access.

Conclusion

For the reasons discussed herein, Defendants' motion to reconsider is DENIED, except as noted above.

So Ordered.

September 7, 2016
Date

David A. Anderson
Associate Justice

35

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Janet Balise and Stanley Balise

v.

Brad Balise, Deborah Balise, Winifred J. Carpenter and Jon Carpenter

NO. 218-2015-CV-222

Final Order

Plaintiffs Janet Balise, individually and as trustee of the Janet Balise Revocable Trust, and Stanley Balise brought suit against Defendants Brad Balise, their son, as well as Winifred and Jon Carpenter seeking to establish their right of access over a discontinued road.

On July 5, 2016, this Court granted partial summary judgment to Plaintiffs, concluding that under RSA 231:43 they are entitled to a statutory right of access over the discontinued portion of Simpson Road that forms the base of the "T" as that term has been used by the parties.[1] In that ruling, the Court deferred ruling on the scope of the access, i.e. whether Plaintiffs can run utilities over or under the Disputed Road and whether they may pave the road. Also left open by the ruling was Plaintiffs' entitlement to damages for Defendants' trespass. In the order, the Court found that there was no material dispute that Brad had trespassed on Plaintiffs' statutory right of access.

[1] The parties disagree as to whether the base of the "T" should be called Simpson Road or Golden Brook Road. They seem to be in agreement that the top of the "T" is Simpson Road. As has been well understood in this case, the Court has used the term "Simpson Road" to refer to the base of the "T" that leads to Plaintiffs' property. In this order to avoid any confusion, it now uses the term "Disputed Road" to refer to that same base of the "T." It refers to the top of the "T" as Simpson Road.

36

A bench trial was held on November 22, 2016 and December 7, 2016. The Court also took a view of the Disputed Road and surrounding property on November 22, 2016. After seeing, hearing and reviewing evidence, the Court makes the followings findings of fact and conclusions of law.

Facts

The Plaintiffs currently own tax lot 21-G-600 ("Lot 600") in Windham, which has no frontage on a public way but abuts Simpson Road and intersects the Disputed Road, which was discontinued as a highway by the passage of a 1962 Windham warrant article. As a result of the discontinuance, Brad and the Carpenters each own to the midpoint of the Disputed Road.

The Disputed Road runs perpendicular to Range Road, which is a public highway. The Disputed Road is payed for a few hundred feet where it meets Range Road. The remainder of the Disputed Road is unpaved. Plaintiffs seek to construct a residential dwelling on Lot 600, accessing Range Road by, and running utilities over or under, the Disputed Road.

Lot 600 abuts 231 Range Road in Windham. Brad resided with the Plaintiffs at 231 Range Road from 1969 until 1987 and returned to the property in 1998. In 1999, Brad Balise purchased 231 Range Road from the Plaintiffs. The Carpenters own property adjacent to Brad's Property at 233 Range Road ("Carpenters' Property").

Brad claims that his parents told him prior to selling 231 Range Road to Brad that they would not build on the back lot. Brad cannot point to any document supporting this claim, which Janet and Stanley strenuously denied during the bench trial. Janet testified credibly that she and Stanley are not wealthy and could not afford to simply give the land away. Janet and Stanley both said that they never discussed with Brad

the concept of not developing the property and that they would never have sold 231 Range Road to Brad if it meant that they could not develop Lot 600. Furthermore, Brad, during his testimony, conceded that his parents might have said that they might want to sell Lot 600. This concession significantly undercuts any suggestion that they promised Brad not to develop Lot 600.

During the view on November 22, 2016, the Court observed that the Disputed Road is a dirt road lined by trees on both sides. There are telephone poles along the paved section of the Disputed Road and one close to where the discontinued portion of the road begins. The upper part of the "T", or what the parties agree is Simpson Road, is a discontinued dirt road that divides Janet and Stanley's property from Brad's and the Carpenters' lots. Both sections of the "T" are in a woodsy setting.

Janet and Stanley plan to cut across the top part of the "T" from the Disputed Road. Brad argues that they do not need to use the Disputed Road because they could access their property from either end of Simpson Road. However, as noted by Janet, Plaintiffs' ability to access Lot 600 from the end of Simpson Road that intersects Princeton Road would require a driveway that would be roughly 4 times the length and would require obtaining access through parcels owned by other people. Similar distance and access problems would also apply to any attempt to access their property from the opposite end of Simpson Road. Janet suggested that a house in that direction might also block access.

Plaintiffs seek the right to pave the Disputed Road, to travel along the Disputed Road, and to run utilities along the Disputed Road. They provided expert testimony from David Tokanel, a home builder. Tokanel testified that running utility lines underneath the Disputed Road would not be difficult and that he has done the same

thing on other projects without encountering major problems. Tokanel testified that he has been informed by Eversource that it would be necessary to install a single above-ground pole at the beginning of the Disputed Road, fairly close to the existing telephone pole furthest from Range Road. This new pole would be shorter than the existing poles. He said the average width of a driveway in Windham is 14 feet.

Janet claimed that the inability to have contractors access their property has cost Plaintiffs money through the passage of time and the payment of annual property tax bills. Brad has through the years parked ex-military vehicles on the Disputed Road that makes passage by vehicle traffic impossible and posted no trespassing signs. On that basis, Plaintiffs seek an award of back property taxes as damages for Brad's trespass. Plaintiffs also seek attorneys' fees.

Analysis

This Court has already granted Plaintiffs summary judgment on the question of whether they have a right to use the Disputed Road to access Lot 600 under RSA 231:43 which states "'[n]o owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's own risk.'" Limiting its analysis to abutting landowners, this Court concluded that the statute does not condition the access provided to these landowners on anything other than ownership. In other words, the statute does not require that the Discontinued Road be the sole access to the property in question. The Court also noted that in enacting this legislation in 1949, the legislature deleted older language that would have required a showing of necessity by the landowner seeking access over a discontinued road.

In its summary judgment order, this Court also concluded that the scope of Plaintiffs' right to access and use the Disputed Road is governed by the rule of reason

See Cote v. Eldeen, 119 N.H. 491 (1979) (applying the rule of reason to easements arising from owning land abutting a discontinued public highway). When looking generally at utility easements, there is a trend under New Hampshire law that a private easement or a right of access over a discontinued road carries with it the right to run utilities through it. *See Arcidi*, 150 N.H. at 701,703 (2004) (finding the law may imply supplemental rights in determining the parties' intent of the scope of a private easement); *King v. Town of Lyme*, 126 N.H. 279, 285 (1985) (discussing in dicta the right to erect utility facilities on a discontinued road).

In their summary judgment papers, the parties disagreed about the importance of amendments to RSA 231:46. RSA 231:46 addresses the town's authority to reserve existing utility easement in discontinued class IV, V, or VI highways. Prior to 1992, the language of the statute seemed to presume that utility easements were discontinued at the time a class IV, V, or VI highway was discontinued unless towns expressly reserved them. In 1992, the legislature amended the statutory language to say:

> When any class IV, V or VI highway, or any portion thereof, has been discontinued, any existing sewer, drain, water pipe or other utility easements or any permits or licenses previously established pursuant to RSA 231:159-182 *shall be presumed to be reserved and shall remain in effect as an encumbrance upon the underlying land for so long as they remain in active use, unless such easements, permits or licenses are expressly included in the vote to discontinue the highway, or are subsequently discontinued by vote of the city or town.*

Laws 1995, ch. 59 (emphasis added). Defendants claim that the amendment to RSA 231:46 in 1992 reversed the presumption that utility easements were discontinued at the time a road was discontinued, and instead set up the expectation that utility easements would remain in effect unless the town explicitly indicated the extinguishment of the utility easement at the time of the discontinuance of the highway.

40

or in a subsequent vote. Defendants argue, therefore, that because Simpson Road was discontinued in 1962, there is a presumption that the town also discontinued any utility easements at that time.

The problem with Defendants' analysis is twofold. First, the reference to RSA 213:159-182 is a clear indication that the legislature was addressing public utility easements rather than the rights of abutting property-owners to run utilities along a discontinued road. Second, Defendant's argument ignores the guidance of *Arcidi*, 150 N.H. at 703, in which the New Hampshire Supreme Court suggested that the right to run utilities is at least in part dependent on whether the access was intended to be primary. The court in *Arcidi* cited cases from Maine and Mississippi for the proposition that installation of utilities is presumed when the easement in question is the primary access for a planned residential development. *See id.* "'[I]ngress and egress to a tract on which a home is to be built means more than a surface roadway' it also includes ingress and egress for other necessities." *Id.* (quoting *Bivens v. Mobley*, 724 So.2d 458, 464-65 (Miss. Ct. App. 1998) (allowing installation of water line on easement)).

As the easement in this case arises by statute based on the discontinuation of the Disputed Road rather than agreement, the question of intent is replaced by the question of what is reasonable. *See Cote*, 119 N.H. at 492. In *Cote*, the issue was whether the trial court "erred in imposing what it determined to be reasonable use limitations on the plaintiffs' exercise of an easement against the defendants' land." *Cote*, 119 N.H. at 492. The parties in *Cote* owned adjacent tracts of land with frontage on a public way. *Id.* Running perpendicular to the public way was a discontinued road that was the subject of the underlying dispute. *Id.* Although the defendants in *Cote* owned the fee to the discontinued road, the plaintiffs claimed an easement over the

discontinued road to haul large quantities of gravel and wood products over it. *Id.* As the plaintiffs increased their use of the discontinued road, the defendants attempted to block the road. *Id.* The trial court ultimately imposed restrictions on the hours the plaintiffs could use the vehicles that could traverse the road. *Id.* at 493. The plaintiffs argued that regardless of whether their right to use the discontinued road "arose by prescription or as a result of the discontinuance of a highway," their use could not be so restricted. *Id.* Without deciding whether the plaintiffs' rights were prescriptive or arose because their land abutted a discontinued road, the *Cote* court held that the doctrine of reasonable use applied in determining the scope of the plaintiffs' easement regardless of its origin. *Id.* at 493–94. The court in *Cote* described this reasonable use doctrine as follows:

> In this state the respective rights of dominant and servient owners are not determined by reference to some technical and more or less arbitrary rule of property law as expressed in some ancient maxim . . . but are determined by reference to the rule of reason. The application of this rule raises a question of fact to be determined by the consideration of all the surrounding circumstances.

Id. (quoting *Sakansky v. Wein*, 86 N.H. 337, 229 (1933)).

Applying that standard here, the Court finds that it is reasonable for Plaintiffs to run utility lines underneath the Disputed Road. The portion of the Disputed Road that is open to traffic already has telephone poles and above ground utilities. Adding one more pole, that would be shorter than the existing poles, does not constitute either a significant or unreasonable use of the property. Moreover, the circumstances attendant to Plaintiff's property support their request. Running utilities from another direction would substantially increase the distance (and, therefore, costs) and assumes the agreement of private property owners. This conclusion is in keeping with the supreme

47

court's guidance in *Arcidi*. As the discontinued road is by far the most practical and, based on the parties' rights at this time, the only viable access to the planned residential development on Lot 600, it is reasonable to use the Disputed Road for utilities, especially when the utilities are going to be placed underground and, therefore, have little visibility beyond the single pole that is required. To the extent any potential agreement between Brad and his parents about developing Lot 600 is relevant, the Court finds that there was no agreement by Janet and Stanley not to develop Lot 600.

For the same reasons, the Court finds that it will be reasonable for Plaintiffs to use the Disputed Road as a road on which to drive their vehicles to and from the house to be developed on Lot 600. All other potential access points are, as just noted, considerably further away and would require the acquisition of rights not presently held by Plaintiffs. In view of their statutory right to use the Disputed Road, their use of the Disputed Road as a driveway is well within the parameters of the rule of reason.

The Court, however, reaches a different conclusion on Plaintiffs' request to pave the Disputed Road. The Disputed Road and Lot 600 are both in the woods. That presumably is one of the reasons why Brad and the Carpenters vehemently oppose the request. While the rule of reason mandates both vehicular and underground utility access, it does not require paving. Although Tokanel testified that most driveways in the area are paved, both dirt roads and dirt driveways are still commonplace in this state. And a dirt road will considerably aid in maintaining the woodsy feel of the area. Accordingly, Plaintiffs may build a dirt road no wider than 14 feet (the average per Tokanel) on the Disputed Road.

As for damages, the Court declines to award any. Plaintiffs seek their property taxes and the legal fees associated with the zoning board appeal. They claim that

Brad's successful attempts to block their access to Lot 600 has caused them delay. While in some sense that may be true in that open access may have advanced the pace of any development plans, the fundamental roadblock has been the uncertain status of their ability to use the Disputed Road to access Lot 600. In view of the scarce amount of case law on this subject and the fact-intensive inquiry required by the supreme court in *Cote*, Plaintiffs' statutory right to use the Disputed Road was an unsettled matter under New Hampshire law. With their ability to use the Disputed Road at least somewhat in doubt, the Court finds that Plaintiffs could not have substantially proceeded with development plans until the issues in this case were resolved. Accordingly, the Court does not find that Brad's actions caused any cognizable delay in the development of Lot 600. Moreover, Plaintiffs' use of LOT 600 prior to Brad's actions was too infrequent to justify an award of damages.

Nor does the Court award attorneys' fees in connection with the ZBA proceeding. As abutters, they had a right to participate in that process and oppose the requested variance and the subsequent extensions of that variance. As noted by Brad, the Court has not made a finding of bad faith against him in either this case or the ZBA appeal.

Finally, the Court declines to award attorneys' fees in this case. For the foregoing reasons, Plaintiffs have not established their entitlement to fees under *Harkeem v. Adams*, 117 N.H. 687 (1977).

Conclusion

For the foregoing reasons and on the foregoing terms, this Court awards partial judgment to Plaintiffs. More specifically, Plaintiffs are allowed to traverse the Disputed Road by vehicle and by foot, to build a 14 foot dirt road on the Disputed Road, and to install one utility pole on the Disputed Road in the area closest to the paved road and

Range Road. Otherwise, Plaintiffs may only install utilities underground. Plaintiff may not pave the Disputed Road and the cleared area on either side of the Disputed Road shall only be 3 feet. In all other respects, the Court adopts subparagraphs 1(a), 1(b) and 1(c) only of Plaintiffs' Proposed Order. Finally, the Court does not award damages or attorneys' fees.

So Ordered.

Date: January 27, 2012

David A. Anderson
Associate Justice

45