STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018-0327

James Boyle, Individually and as Trustee of the 150 Greenleaf Avenue Realty Trust,
Plaintiff,
v.
The City of Portsmouth & Comcast of Maine/New Hampshire, Inc.,
Defendants.

# BRIEF OF APPELLEE/CROSS-APPELLANT CITY OF PORTSMOUTH

RULE 7 APPEAL FROM FINAL ORDER OF ROCKINGHAM COUNTY SUPERIOR COURT


Charles P. Bauer,
Bar No. 208
Robert J. Dietel,
Bar No. 19540
Gallagher, Callahan & Gartrell, P.C.
214 North Main Street
Concord, NH 03301
Tel: (603) 228-1181
bauer@gcglaw.com
dietel@gcglaw.com

Bruce W. Felmly, Bar No. 787
Benjamin B. Folsom, Bar No. 268352
McLane Middleton, P.A.
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
Tel: (603) 625-6464
bruce.felmly@mclane.com
benjamin.folsom@mclane.com

*Counsel for Appellee/Cross-Appellant City of Portsmouth*


Oral Argument Requested. Mr. Felmly will argue.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**State Cases**

**State Statutes**



**Rules**

## QUESTIONS PRESENTED FOR REVIEW[1]

1. Boyle[2] sought lost profits from the operations of a hypothetical second dealership on the property but did not have a dealership agreement nor even attempt to obtain one, did not have the required state and local permits needed to develop land for such a dealership (and obtaining such permits was itself speculative), and based the amount of his claimed lost profits on the past performance of his existing Toyota dealership when the second dealership undisputedly would *not* be a Toyota dealership. Did the trial court err in permitting Boyle's speculative lost profits claims to go to the jury and then in refusing to set aside the jury's award of lost profits or in refusing to at least remit due to Boyle's double recovery? (Portsmouth Cross-Appeal Issue)

*Preserved in Portsmouth's Motion in Limine to Exclude Evidence and Claims of Alleged Lost Profit Damages ("Motion to Exclude Lost Profits"), CityApp.205; Its Motion to Set Aside Award of Speculative Lost Profit Damages, CityApp.247; and Its Motion for Remittitur, CityApp.266.*

2. Did the trial court err in allowing Boyle's lost profit claims to go to the jury and then in refusing to set aside the jury's award of lost profits where lost profits were unavailable to Boyle as a matter of law due to the fact that the property was leased to a multi-member LLC that was not a party to the action? (Portsmouth Cross-Appeal Issue)

---

[1] This matter involves both Boyle's appeal and Portsmouth's cross-appeal. Given the interrelatedness of the issues in the direct and cross appeals, Portsmouth addresses both simultaneously in this brief.

[2] Portsmouth uses Boyle to refer to the Plaintiff, James Boyle, Individually and as Trustee of the 150 Greenleaf Avenue Realty Trust (the "Trust").

*Preserved in Portsmouth's Motion to Exclude Lost Profits CityApp.205; its Motion for Partial Directed Verdict Regarding Alleged Rent and Lost Profit Damages, CityApp.239; and its Motion to Set Aside Award of Lost Profit Damages Due to Lack of Evidence Regarding Limited Liability Company Interests, CityApp.260.*

3. Did the trial court correctly decide that Boyle did not revoke what it determined to be Portsmouth's license in the sewer line until late 2013, when Boyle sent a letter to Portsmouth explicitly revoking the license following the court's determination of Portsmouth's rights in the sewer line, and thus correctly determine that Boyle was not entitled to trespass damages for the time period prior to 2014 and could not submit a 2008 letter into evidence? (Boyle Appeal Issue)

*Preserved at the court's Order re Summary Judgment Motions, Add.78; Order on Motions to Reconsider Summary Judgment, Add.112; and trial sidebar at Tr.50-52, Add.173.*

4. Did the trial court err in determining that Portsmouth did not have permanent rights in the sewer line? (Portsmouth Cross-Appeal Issue)

a. With the permission of the State Board of Education, Portsmouth installed, in or about 1968, a sewer line in a near-six-foot-high berm spanning 650 feet across the length of the subject property, at that time used as a vocational school. On February 18, 1983, the State conveyed the property to a private party. Boyle subsequently purchased the property in December 2003 after the twenty-year prescriptive rights period elapsed. In 2004, Boyle first disputed Portsmouth's right to keep the line on the property but gave permission to keep the line there pending resolution of the dispute. Where the trial court determined that Portsmouth originally received only a revocable license from the Board, and the prescriptive period began to run upon the State's conveyance of the

property in 1983 and continued until 2004 at the earliest, did the trial court err in determining that Portsmouth did not have a prescriptive easement in the sewer line?

b. Portsmouth was given express, written permission in 1967 to install the sewer line over the subject property and shortly thereafter in reliance on such permission expended significant resources to install the line and has continuously used and serviced the sewer line ever since. The sewer line provides a critical public health service to Portsmouth residents and it would be tremendously expensive for Portsmouth to remove the sewer line and build a suitable replacement. Boyle had at least record notice of the sewer line when he purchased the property in 2003. Did the trial court err in determining that Portsmouth did not have an irrevocable license?

*Preserved at Portsmouth's Motion for Summary Judgment, CityApp.67; Its Objection to Boyle's Cross Motion for Summary Judgment, CityApp.142; Its Motion to Reconsider, CityApp.153; and Its Memorandum of Law on Reconsideration, CityApp.185.*

5. Where Portsmouth, per the trial court's order requiring it to exercise its eminent domain power or remove the sewer line, filed its Declaration of Taking on December 19, 2016 with respect to the areas of the subject property containing the sewer line and wetland areas claimed to have been flooded by the sewer line, thus taking title to the land subject to the Declaration of Taking as of that date, did the trial court correctly decide that Boyle could not, as a matter of law, be awarded damages for the period after Portsmouth's filing of the Declaration of Taking? (Boyle Appeal Issue)

*Preserved at the court's Order on Portsmouth's Motion in Limine Regarding Evidence of Damages After 2016. Add.168.*

## PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS

The applicable statutes are set out in Portsmouth's Addendum at 186.

## STATEMENT OF THE CASE

### A. Boyle Initiates this Lawsuit Asserting Claims of Trespass, Nuisance, and Inverse Condemnation Based on a Municipal Sewer Line.

This appeal[3] relates to a municipal sewer line (the "Line") constructed in 1967 or 1968 by the City of Portsmouth ("Portsmouth") on property now known as 150 Greenleaf Avenue (the "Property"). Tr.918-919. The Property was then owned by the State of New Hampshire ("State"). CityApp.330. The Line was installed with the knowledge and express written approval and recorded vote in 1967 of the State Board of Education (the "Board"). CityApp.345. The Line was constructed at considerable cost to Portsmouth in a raised earthen berm approximately 650 feet in length and near 6 feet high due to the swamp area in which it was located.

---

[3] This appeal is inextricably intertwined with the eminent domain case also on appeal (the "Eminent Domain Case"). The appeals are set on parallel briefing schedules. In its Eminent Domain Case brief, Portsmouth necessarily addressed aspects of the procedural background of this matter. It will not repeat those points herein, except as needed to provide clarity. The procedural history of this case is long and complex, and Portsmouth's intent is to highlight only those aspects relevant to the issues raised on appeal.

BoyleApp.0033; Tr.49, 838, 918-920. It has been operational and serving Portsmouth residents for 50 years. Tr.455-458, 1041-1044.

Boyle purchased the Property in late 2003 to relocate a Toyota dealership onto the Property. Tr.113; CityApp.369. He initiated this lawsuit in 2010 against Portsmouth alleging, *inter alia*, trespass, nuisance, and inverse condemnation. BoyleApp.0005. All of these claims arise out of Portsmouth's operation of the Line on the Property in the absence of a recorded easement and its maintenance of the Line allegedly causing water to pool and flow on the Property, which, in turn, Boyle claims prevented him from developing a second car dealership on the Property. *Id.*

### B. The Court Rules on Summary Judgment that Portsmouth Does Not Have an Equitable or Prescriptive Easement in the Line But Does Have Possessory Rights Via a License and Could Have Exercised Its Eminent Domain Powers.

On August 1, 2013, Portsmouth filed a motion for summary judgment. BoyleApp.0041. Germane to this appeal were Portsmouth's assertions that it had legal rights in the Line and therefore was not trespassing on, nor had taken, Boyle's property. Portsmouth argued that it had an easement-by-estoppel due to its reliance on the 1967 Board written approval in expending funds to construct the Line on the Property. Alternatively, Portsmouth argued that it held a

prescriptive easement due to its continued possession of the Line for over 40 years. Boyle objected and filed a cross-motion for summary judgment. BoyleApp.0100.

In its October 30, 2013 Order (the "Summary Judgment Order"), the court granted Portsmouth summary judgment on Boyle's trespass claim as to the Line, finding that Portsmouth had at a minimum a license, because the Board gave Portsmouth written permission to construct the Line across the Property. Add.97. The court further found that, due to Portsmouth's expenditure of resources and the obviously permanent nature of the Line, Portsmouth had executed the license. *Id.* Nevertheless, relying on *Houston v. Laffee*, despite its "grave reservations about the equity of the" rule set forth therein, the court stated that Boyle could revoke the license. Add.85-86, 97. However, it found that Boyle had not yet done so and that once Boyle "realized that there was a question about the legal basis for the [Line], he claims he granted Portsmouth continued permission to keep the [L]ine until the case was resolved." Add.99. The court thus denied Boyle's motion for summary judgment on his permanent and temporary taking claims.

The court denied summary judgment to both parties on Portsmouth's easement-by-estoppel claim. It found that New Hampshire recognizes easements-by-estoppel where there is a written license and the surrounding circumstances indicate a

clear intention to give more than a license, but that the party asserting estoppel must show both reliance and injustice absent an easement. The court found that there was a dispute of fact over whether Portsmouth's reliance on the Board's approval was reasonable. This was based on RSA 4:40, which provides that the State may convey land only through the Governor and Executive Council, and there was a question as to whether the State ratified the Board's approval of the Line. Add.86-92. As to injustice, the court found a genuine issue of material fact because Portsmouth "could exercise its eminent domain authority, take the property, and compensate Boyle for it...." Add.91.

With respect to a prescriptive easement, the court extended the protections of RSA 539:6 beyond State ownership, holding the prescriptive period would begin on October 21, 1988, because that is when the State's original grantee conveyed the Property. Add.92-93. The court also found that Portsmouth's use of the Line started and continued as a permissive use until Boyle sought to remove it. Add.93-94.

Finally, the court denied summary judgment to both parties relating to the claims of flooding over portions of the Property, finding that there were disputed issues of fact as to the cause of the flooding or flowage of water on the Property, whether the wetlands pre-existed the Line, and whether the

scope of Portsmouth's license or claimed easement provided rights with respect to flowage on the Property. Add.100-104.

Following the court's Summary Judgment Order, Boyle sent correspondence to Portsmouth on November 12, 2013 seeking to revoke Portsmouth's license in the Line. BoyleApp.208-212.

### C. On Reconsideration, the Court Rules that Boyle Revoked the License in November 2013 and that Portsmouth Is a Trespasser and Must Remove the Line or Exercise Eminent Domain.

Both sides filed motions to reconsider the Summary Judgment Order. CityApp.153; BoyleApp.0213. Portsmouth sought reconsideration of the court's ruling that it had only a revocable license in the Line. CityApp.156-159. Arguing that *Laffee*'s continued utility was limited and based on recent cases and the clear modern trend, it asserted that the court should have found it had an irrevocable license. *Id.* Portsmouth further challenged the court's rulings that Portsmouth had no prescriptive easement, asserting it misapplied RSA 539:6 in finding that the prescriptive period only began to run after the State's grantees, as opposed to the State, conveyed the Property and that Portsmouth's use was permissive while simultaneously finding that the Board, which gave permission, could not bind the State. CityApp.161-163.

In its February 27, 2014 Order on Motions to Reconsider Summary Judgment (the "Reconsideration Order"), the court focused on whether Portsmouth had a revocable or an irrevocable license in the Line.[4] Add.116. It acknowledged that "the distinction between a revocable and irrevocable license [is] a troublesome area of law" and that "the issue is far from clear," while admitting that its ruling on this nebulous issue would have a "significant impact on the outcome of the litigation." Add.117.

The court identified the key issue to be whether the license was executed or unexecuted. It acknowledged that several cases from the early-to-mid 1800s supported Portsmouth's position that a license becomes executed once the licensee expends money in reliance on the license. Add.118-121 (citing *Woodbury v. Parsley*, 7 N.H. 237 (1834) and *Ameriscoggin Bridge v. Bragg*, 11 N.H. 102 (1840)). The 1866 *Houston v. Laffee* case, however, in the court's view, changed New Hampshire law with respect to an "executed parol license." Thereafter, a license was unexecuted "so far as

---

[4] The court also found that it overlooked evidence that showed the State had never ratified the Board's approval of the Line and therefore determined that Portsmouth could not establish that it had an easement-by-estoppel. Add.114-115. Without addressing Portsmouth's arguments on reconsideration, it also found that Portsmouth could not establish a prescriptive easement. Add.114.

any future enjoyment of the easement is concerned[,]" regardless of whether the licensee expended funds in reliance on the license. Add.121. Despite a dearth of "modern" New Hampshire cases on point, the court did not believe this Court had deviated from *Laffee* and continued to view irrevocable licenses as "tantamount to the rights associated with easements," which in turn required a writing that satisfied the statute of frauds. Add.123. Because the Board's approval of the Line did not come from the State acting through Governor and Council, the court found that there was not a writing that satisfied the statute of frauds. Add.126-127.

The court acknowledged the numerous modern out-of-state authorities Portsmouth cited for the proposition that an irrevocable license was a concept distinct from an easement and finding, as in *Woodbury* and *Ameriscoggin*, that a licensee executed a license by expending resources and making improvements in reliance on it. Nevertheless, the court felt that it could not deviate from *Laffee*. Add.126.

The court reiterated its ruling that "by granting permission for the [Line] to remain on [Boyle's] property pending the outcome of the litigation, there was no trespass." However, it ruled that Boyle had revoked Portsmouth's license via the November 12, 2013 letter and that thereafter

Portsmouth was a trespasser which needed to either exercise eminent domain or remove the Line. Add.118 n.2.

On April 29, 2016, the court scheduled the case for a January 2017 trial. CityApp.203. Shortly after the trial notice, Portsmouth began eminent domain proceedings.

### D. Portsmouth Files Pre-Trial Motions to Exclude Boyle's Lost Profits Evidence as Speculative and Unrecoverable as a Matter of Law.

On October 21, 2016, Portsmouth filed a motion in limine to exclude evidence of alleged lost profits because they were based on speculative development plans for a non-existent second car dealership on the Property. CityApp.205. Boyle had not pursued municipal approval for the potential dealership and did not have the required land-use permit from the State. In addition, no franchise or dealership agreement from any automobile manufacturer had been obtained or even sought. Moreover, Boyle could not use the profits from his current dealership to calculate his claimed lost profits because it was for a different manufacturer operating at a different time with different employees selling different cars to a different market. CityApp.212-213. Portsmouth further asserted that Boyle's expert opined as to lost profits to be awarded only to an entity called Minato Auto, LLC ("Minato"). Minato is a separate and distinct entity that leased the Property from Boyle and operates the existing

car dealership but was not a party to the case. CityApp.214-215.

In ruling on Portsmouth's motion, the court acknowledged that under New Hampshire law, "[w]here operations have never commenced, evidence of expected profits have generally been considered incompetent because speculative" (quoting *Van Hooijdonk v. Langley*, 111 N.H. 32, 34 (1971)). Add.152. Finding it "clear" that Boyle had no "concrete plan" to build a second dealership on the Property at the time he initiated the action, the court acknowledged the difficulty of Boyle proving lost profits with "reasonable certainty" in light of his lack of required permits and a franchise agreement. Add.152-153. Nevertheless, the court decided that Boyle could take his lost-profits claim to the jury and try and prove that he formed a "concrete plan" sometime *after* he filed his complaint. *Id.* The court also found that Boyle's lost-profits claim was based on "sufficient relevant data," likening the case to *Wilko of Nashua v. TAP Realty*, 117 N.H. 843 (1977). Add.153. With respect to Minato, the court found that Boyle was not trying to obtain lost profits on behalf of Minato but instead using the finances from Minato to show how a second dealership would have performed. Add.154-155.

In the same order, at Portsmouth's request, the court ordered Boyle to produce his tax returns, which he was

required, but failed, to do by rule. Add.155-156; Super. Ct. R. 28A(d). Boyle did not comply with the order, and Portsmouth was forced to file a second motion in limine to exclude lost profits before Boyle finally produced his returns practically on the eve of trial. CityApp.237. While acknowledging that Boyle violated its order and his actions "put[] the defendants at a disadvantage," the court denied the motion and did not limit Boyle's proof of his claim. Add.166.

Portsmouth also filed a motion in limine to exclude evidence of lost profits after 2016 due to the fact that Portsmouth had filed its Declaration of Taking and ended any possible trespass as of that date. BoyleApp.0437. Since lost profits are not available for a governmental taking, and Portsmouth could exercise its power of eminent domain even if Boyle had somehow developed a second dealership on the Property, the court found Boyle would not be entitled to lost profits after 2016 as a matter of law. Add.169.

### E. The Jury Awards Boyle $3,570,000 in Lost Profits Damages, and Portsmouth Files Post-Trial Motions to Set Aside the Award as Speculative and Unrecoverable as a Matter of Law.

The parties tried the case over 10 days. At the close of Boyle's case, he withdrew his inverse condemnation claims and elected to pursue lost profits through his trespass and nuisance claims. Tr.836.

At the close of evidence, Portsmouth filed a Motion for Partial Directed Verdict asserting that, because Boyle admitted that the Property was leased to Minato, a non-party, multi-member LLC, Boyle could not, under black-letter law, be awarded damages (other than nominal damages) for trespass and nuisance as a landlord without possession. CityApp.239. The court found the motion "well researched," the case law "compelling," and Portsmouth "correct as a matter of law." Tr.1274. Nevertheless, it stated granting the motion was "not in anyone's interest" because it was "technical." *Id.* The court initially allowed Boyle to amend his complaint to add Minato as a plaintiff. Tr.1275. However, the next day it reversed itself and said it would not allow Minato to be added. Nevertheless, in a statement from the bench, the court upheld its denial of the motion for directed verdict because it found the jury could have "inferred" that Boyle would essentially ultimately receive any profits that Minato collected. Tr.1304-05.

The case was submitted to the jury on Boyle's trespass and nuisance claims. The jury found that Portsmouth received permission to flow and store water on the Property but that Boyle had revoked that permission in 2013. BoyleApp.0444. It found that Portsmouth thereafter caused a nuisance on the property causing Boyle to suffer lost profits

in the amount of $1,785,000 for 2014, 2015, and 2016.[5] BoyleApp.0450-452. The jury found that the trespass of the Line itself entitled Boyle to lost profits in the identical amount of $1,785,000 for the same time period. BoyleApp.0448. The jury inexplicably awarded Boyle a total of $3,570,000 in damages, thereby providing him a double recovery. BoyleApp.0452.

Portsmouth filed post-trial motions to set aside the award of lost profits as speculative and due to the lack of evidence regarding Boyle's limited liability company interests in Minato, and for remittitur of lost profit damages to $1,785,000 due to the award of double damages. CityApp.247-277. On June 7, 2017, the court denied all of these motions in a perfunctory order with no analysis. Add.171.

Boyle appealed, seeking to enlarge his $3,570,000 verdict by challenging the court's determinations that Boyle did not revoke Portsmouth's license in the Line until his November 2013 letter and that lost profits after 2016 were not available due to Portsmouth's filing its Declaration of Taking. Portsmouth cross-appealed, challenging, *inter alia*, the court's

---

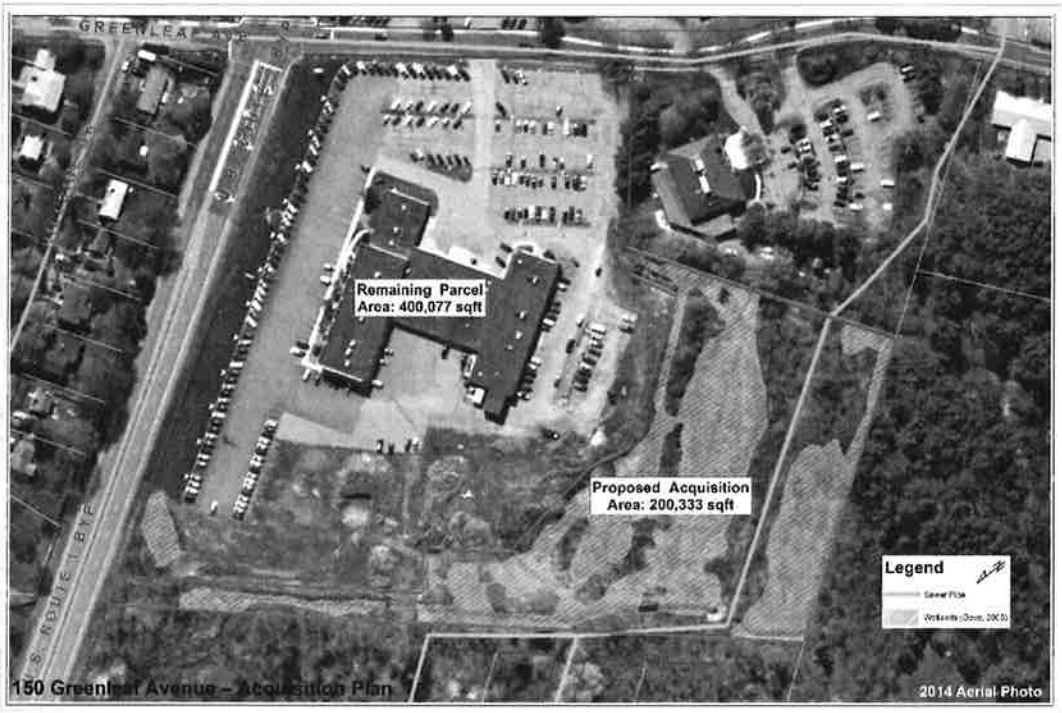
[5] Boyle's expert testified that Boyle incurred (speculative) lost profits of $595,000 per year (albeit for 2008-2012, not 2014-2016), which totals $1,785,000 for three years. Tr.783.

rulings allowing the award of speculative lost profits and that Portsmouth had no permanent legal rights in the Line, and the court's failure to grant remittitur to correct the jury's plain error doubling the award.

## STATEMENT OF THE FACTS

### A. The Property and the Wetlands.

This matter involves property now commonly known as 150 Greenleaf Avenue in Portsmouth, situated on the corner of Greenleaf and the Route 1 bypass:[6]




To the north (towards the bottom in the above photo) and east of the Property are residential neighborhoods, with several

[6] This photograph was a trial exhibit in the Eminent Domain Case. CityEDAdd.112.

residential streets dead ending at or near the Property's northern boundary. To the west lies the Chase Home for Children, a residential program for at-risk youth.

The State owned the Property from 1964 until 1983. Tr.930. The Board operated a vocational school on the Property. Tr.917-918. In February 1983, the State conveyed the Property to private parties ("Coakley"). CityApp.363. Coakley then conveyed the Property to MSM Brothers, Inc. ("MSM") in October 1988. CityApp.366. In December 2003, more than twenty years after the State conveyed the Property, MSM conveyed it to Boyle, as trustee, by a warranty deed. CityApp.369.

The property has long contained undeveloped wetlands. George "Buzzy" Dodge, who at the time of trial was a 74-year-old, long-time resident of Portsmouth who had lived across the Route 1 bypass from the Property in the 1950s, described the property as a "swamp," and testified that he and his friends would jump from grassy mound to grassy mound to avoid pools of water while hunting muskrats. Tr.430-432.

Peter Loughlin is an attorney and life-long Portsmouth resident who grew up in the neighborhood adjacent to the Property to the north. Tr.1190. He described jumping from berm to berm over streams when playing with friends on the Property in the 1950s. Loughlin showed photographs he took

of his cousin skating or sliding on ice between the berms. Tr.1193-96; CityApp.328.

A 1964 State map shows that the area of the Property where the Line now lays was designated as "swamp." Tr.909-10; CityApp.327. A tax card for the Property from the same year contained a notation that the Property was "low and swampy." Tr.911-12; CityApp.330. Building plans for the vocational school show a low and swampy area on the Property. Tr.912; CityApp.384-385.

Boyle's wetlands expert, James Gove, was hired by Boyle to create a wetland delineation map of the Property in 2003. Tr.638; CityApp.371. This map delineated two areas of then-existing wetlands on the Property. Tr.638-40; CityApp.371. Gove testified that there was no question substantial water was in those areas when Boyle purchased the Property in 2003. Tr.652-653. In September 2005, Gove was asked to separate out manmade from natural wetlands. He identified the wetlands areas as natural wetlands. Tr.641; CityApp.360. At some later point in time, Gove changed his designation of the wetlands, claiming they were manmade. Tr.644-645.

Mark West, Portsmouth's wetland expert, gave his expert opinion that there were naturally occurring wetlands on the Property prior to the installation of the Line in 1968. Tr.1145. Basing his opinion on multiple in-person visits to

the Property and a careful review of historical records, he found that there was always some amount of water flowing through the Property and there has always been some form of naturally occurring wetlands system there, although it may have been altered by human activity from time to time. *Id.* Dr. Leonard Lord, a certified wetlands scientist, testified that in his expert opinion there were naturally occurring wetlands on the Property decades before the Line was constructed. Tr.1229-30, 1236-39.

### B. Portsmouth Constructs the Line Based on Express Written Approval and the Line Operates for 40 Years Without Interruption.

The Line was not hastily built. In 1964, the Board voted to authorize its chairman to make arrangements with Portsmouth "with respect to the sewer problem[.]" Tr.913; CityApp.332. By 1967, the residential neighbors to the north of the Property were complaining about sewage seeping up from the ground and septic tanks overflowing onto the neighboring swampland. Tr.914-16; CityApp.338-340. They wanted a sewer line to service the area. *Id.*; CityApp.344.

On November 20, 1967, the Board approved Portsmouth's request to construct the Line across the Property. The Board's minutes state:

> VOTED: To Approve the request of the Department of Public Works of the City of Portsmouth to extend a sewer line across the rear of the property of the

> Vocational-Technical Institute in Portsmouth.

Tr.917; CityApp.352. The next day, the Portsmouth Herald reported that the Board had granted an easement to Portsmouth for the Line. Tr.918; CityApp.357. Later reporting in the Herald described that a contract for sewer extension work for the project had been awarded for $23,552 and that engineering work would begin. Tr.919; CityApp.358. A Public Utilities Plan of Portsmouth from 1968 identified the area where the Line now sits as a proposed sewer easement area. Tr.920; CityApp.359.

In reliance on the Board's unqualified approval, Portsmouth began constructing the Line. CityApp.123, 127. Constructed in an earthen berm, the Line was installed across the rear of the Property, entering from the residential neighborhood to the north and heading southwest along the Property's northern boundary before turning south and exiting at the Property's southern boundary. *See*, green line on aerial photograph on page 25, *infra*.

On January 19, 1983, shortly before conveying the Property, the State recorded a Plan of Land for State of New Hampshire Portsmouth Voc. Technical School with the Rockingham County Registry of Deeds. CityApp.362. This Plan showed the Line crossing the Property with exposed manhole covers along the way. The quitclaim deed from the

State to Coakley excepted the "rights, if any, of ordinary public utilities servicing the premises." CityApp.363. Coakley subsequently recorded a plan in the Registry of Deeds on June 25, 1985 (the "1985 Plan") showing the Line crossing the Property. CityApp.365. The 1985 Plan was incorporated by reference into the 1988 conveyance to MSM, as well as into the deed to Boyle. CityApp.366, 369.

The Line has been in continuous operation for about 50 years and remains in very good shape. Tr.455-458, 1041-1044. It currently serves approximately 110 residences and the Chase Home for Children. Tr.925; BoyleApp.0033; CityEDApp-II.88-89. Until Boyle raised an issue with the Line in 2004, Portsmouth received no complaints about the Line and had no reason to question its legal rights in it. Tr.458-60. There were no complaints about flooding, the Line, the berm, or the culverts from the State, Coakley, or MSM. Tr.931.

The Line provides a critical service to Portsmouth residents. Tr.920, 925. If Portsmouth were required to move the Line, it would have to find a way to replace sewer service to the 110 residences and Chase Home currently served by the Line. Tr.925. To move the Line would be tremendously expensive. Tr.926.

### C. Boyle Purchases the Property With At Least Record Notice of the Line, then Complains About the Line But Agrees that Portsmouth Can Keep It on the Property Until the Matter Is Resolved.

Boyle purchased the Property in 2003 with the intent of relocating his Toyota dealership there. Tr.113; CityApp.369. At that time, the Line was running some 650 feet across the length of the Property in its earthen berm rising about 6 feet above ground, as it had been for the previous 35 years. BoyleApp.0033. The Line was also of record in the 1985 Plan, which was incorporated into the deed to Boyle. CityApp.369. Boyle's own 2003 plan for the Property specifically refers to the 1985 Plan. CityApp.371.

Boyle testified that in 2004, when he was walking the Property, he noticed a sewer cover. He started investigating and discovered that there was no recorded easement deed for the Line. Tr.123-129. Boyle testified that he discussed the issue with City Attorney Robert Sullivan in October 2014. Tr.129-130. During that meeting, Boyle told Sullivan that he would give Portsmouth an easement if Portsmouth would allow him to move forward with his dealership. Tr.339. He also told Sullivan that Portsmouth could "leave [the sewer line] there till we try to get this resolved." Tr.130. Boyle understood that in giving Portsmouth permission to keep the Line in place, he was agreeing to keep the status quo. Tr.340.

There are repeated confirmations of Boyle's permission to Portsmouth that the Line could remain while the parties sought resolution. Tr.130, 202, 339-340, 347; BoyleApp.0124. The parties engaged in substantial and substantive negotiations with respect to the Line. Boyle admitted during his trial testimony that these negotiations were even then still ongoing. Tr.347.

After Boyle obtained the necessary building permits, he renovated and expanded the existing school structure and parking on the site for a Toyota dealership. Tr.123. While Boyle owns the Property through the Trust, he leases the Property to Minato. CityApp.373. It is Minato that owns the Toyota dealership, not Boyle. Tr.205-207. Minato is a two-person limited liability company. Boyle is the 51% owner and another non-party investor owns a 49% share of the LLC. Tr.207.

### D. Boyle Submits a Proposed Plan to Build a Second Dealership on the Property But Then Asks Portsmouth Not to Act on it And Does Not Further Pursue the Second Dealership.

In 2009, Boyle submitted a proposed development to Portsmouth for land-use approval seeking to construct a new building on the undeveloped uplands and a paved parking area covering nearly all of the wetlands on the Property. CityApp.375. However, he admits that he then asked Portsmouth not to act on the application due to the Line

issue. Tr.216-217. This was his decision, not Portsmouth's. Tr.989. There was nothing preventing Boyle from pursuing his application, including the parties' ongoing negotiations about the Line.

Boyle did not effectively pursue a second dealership thereafter. Prior to and at the time of trial, Boyle did not have necessary City land-use approvals and permits nor the necessary state permits for his plan. Tr.275. There was certainly no guarantee that Portsmouth would approve the variances that would be required for Boyle's proposed development. Tr.992-1000 In fact, in the 2018 final order in the Eminent Domain Case, the same judge who presided over the trial of this action declared that the "ultimate success" of Boyle's proposed development was "speculative" due to the "significant zoning and planning hurdles associated with paving over the wetlands."[7] Boyle also had not obtained necessary permits from DES to develop the wetlands area at the time of trial. Tr.275.

Nor did Boyle secure or even submit an application for a dealership agreement with any car manufacturer. Tr.274-76 Boyle's expert testified that there were no available dealerships in the market with the exception of Lexus—and Boyle expressly told his expert not to rely on Lexus in forming

---

[7] *See*, Portsmouth's Addendum in Eminent Domain Case at 75.

his opinion. Tr.794-798. In fact, Boyle's expert testified that he could not even opine as to whether Boyle could *ever* secure a second dealership. Tr.799, 810. Boyle's second dealership was entirely hypothetical.

## SUMMARY OF THE ARGUMENT

The court below erred on two critical issues. First, it erred in allowing Boyle's lost profits damages claim to go to the jury and compounded that error by allowing the jury verdict as to lost profits to stand (or at least remit to cure the award of double damages). Boyle claimed lost profits for a hypothetical second dealership that he proposed to develop on the Property. However, he did not have and had not even sought a dealership agreement with a car manufacturer and admittedly did not have the necessary state and local permits and land use approvals for the hypothetical development. Moreover, Boyle supported his claim for an unidentified, generic second dealership with irrelevant past financial data from his current Toyota dealership—when the second dealership could not be a Toyota dealership because Boyle already owns that point in the Portsmouth market. The second dealership was not "reasonably certain" to occur nor supported by sufficient, relevant data and was thus impermissibly speculative. The court's decision to let that aspect of the verdict stand should be reversed.

Second, the court erred in finding that Portsmouth did not have permanent rights in the Line. Portsmouth demonstrated that it had a prescriptive easement. It had over 20 years of adverse, continuous, and uninterrupted use starting when the State conveyed the Property to Coakley on February 18, 1983 and ending, at the earliest, when Boyle gave Portsmouth permission to keep the Line on the Property in 2004. The court also erred in finding that Portsmouth did not have an irrevocable license for the Line. The Board gave Portsmouth express, written permission to install the Line on the Property, Portsmouth relied on that permission in expending significant resources to do so and has since continuously used and maintained the Line for over 50 years. The Line provides a critical public health benefit to Portsmouth residents and it would be enormously expensive to relocate it. Boyle was on at least record notice of the near-6-foot-high and 650-foot-long Line when he purchased the Property. Under these facts, it would be inequitable and work an injustice not to find that Portsmouth had an irrevocable license.

If this Court reverses the trial court on the prior two issues, it renders the issues on Boyle's appeal moot. However, to the extent the Court addresses those issues, it should affirm the trial court's well-supported determination that Boyle revoked Portsmouth's license over the Line in

November 2013 as well as its decision to exclude evidence of damages after 2016 given that Portsmouth had title to the Line and associated areas of the Property as of December 19, 2016 when it filed its Declaration of Taking. Those rulings were supported by the facts and law, and Boyle's claims on appeal that this Court should remand to enable him to seek additional years of damages to be added to the jury verdict should be rejected.

## STANDARD OF REVIEW

With respect to the trial court's decision to allow Boyle to recover damages for alleged lost profits, this Court will uphold an award of damages for lost profits only if sufficient relevant data support a finding that profits were reasonably certain to result. *Indep. Mech. Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110, 115 (1993).

In reviewing cross motions for summary judgment, this Court reviews the trial court's application of the law to the facts *de novo*. *Newell v. Markel Corp.*, 169 N.H. 193, 195 (2016). The trial court ruled that Portsmouth did not have a prescriptive easement and had only a revocable, as opposed to irrevocable, license on summary judgment, so these rulings are reviewed *de novo*, as is the court's determination that Boyle revoked Portsmouth's license in November 2013.

The court's determinations to exclude evidence of Boyle's claimed damages after 2016 and to exclude Boyle's

February 2008 letter are reviewed under an abuse of discretion standard. *MacDonald v. Bishop*, 145 N.H. 442, 444 (2000) (admissibility of evidence reviewed under abuse of discretion standard).

## ARGUMENT

### I. The Court Erred in Allowing the Jury to Consider Boyle's Claim for Lost Profits and in Failing to Set Aside the Jury's Verdict as to Lost Profits or Remit.

Boyle's damages award consisted entirely of lost profits from a fictional, future second unspecified car dealership on the Property. It was error for the court to let this claim go to the jury and to allow the verdict to stand for two reasons. First, Boyle's claimed lost profits are entirely speculative because they involve a non-existent dealership for which he had no dealership agreement (nor had even applied for one) and it was speculative whether he would even be able to obtain the necessary land use approvals to develop a second dealership on the Property. It is undisputed that any dealership that he theoretically could develop would not be a Toyota dealership, but instead a dealership for a completely different make with a different market operating under different circumstances. The evidence clearly showed Boyle had no pending approvals to develop the Property and that the wetlands character of the site made obtaining such approvals highly uncertain. Additionally, a separate bar to such claimed lost profits arises because Boyle leased the

Property to Minato, a non-party, and it is black letter law that a landlord cannot receive damages relating to the possession of property that he has leased to a tenant.

### A. Boyle's Speculative Lost Profit Claim Was Based on a Non-Existent Second Dealership that Was Not Reasonably Certain to Exist and Historical Financial Data From His Toyota Dealership, Which Could Not Reasonably Support the Profits from a Non-Toyota Future Dealership.

It is a fundamental tenet of New Hampshire law that lost profits "must be reasonably foreseeable, ascertainable, and unavoidable." *Mahoney v. Town of Canterbury*, 150 N.H. 148, 154 (2003). While "absolute certainty" is not required, this Court will only uphold awards for lost profits "if sufficient relevant data supports a finding that profits were reasonably certain to result." *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270, 296 (1992). Damages cannot be awarded for "speculative losses." *Miami Subs Corp. v. Murray Family Trust*, 142 N.H. 501, 517 (1997) (quoting *Hydraform Prods. Corp. v. Am. Steel & Alum. Corp.*, 127 N.H. 187, 197 (1985)). Here, profits from a new hypothetical dealership were neither reasonably certain to result nor supported by sufficient relevant data and were inherently speculative. Boyle's claims set out the clearest possible circumstance of speculating on lost profits, violating all requirements of this body of New Hampshire law.

### 1. Boyle's Hypothetical Future Dealership Was Not Reasonably Certain to Exist.

Boyle stated that he dreamed that he would one day develop the entirety of the Property with an additional car dealership, but not every dream becomes a reality. Here, Boyle did not show with reasonable certainty that he would be able to develop the wetlands portion of the Property or obtain from an auto manufacturer the rights to develop a second dealership.

Boyle's expert on lost profits in the auto industry, Francis O'Brien, testified that his opinion on lost profits was based on the assumption that Boyle would purchase an existing auto franchise or receive a letter of intent for an "open point" dealership,[8] neither of which Boyle had. Tr.793-794. In fact, O'Brien testified that Boyle advised that he never pursued the purchase of another dealership or a franchise from an existing dealer. Tr.793. Lexus was the only "open point" dealership in the market, and Boyle did not apply for a dealership agreement with Lexus. Tr.793-799. Boyle admitted at trial that he had no dealership agreements in place as of 2016, had not applied for dealership agreements, and had no financing in place for a second

---

[8] An "open point" dealership is a place, such as the Portsmouth area, where a particular manufacturer does not currently have, but would like to have, a dealership.

dealership. Tr.274-76. Obviously, one cannot open a dealership without a dealership agreement with a car manufacturer. Boyle will argue that it was futile to spend time negotiating a dealer agreement when there was uncertainty over the status of the Line. However, that does not relieve him of the obligation to present evidence that he would be reasonably certain to obtain a second dealership agreement, which he simply did not do and made the tactical decision to forego when pursuing his lawsuit.

The hypothetical second dealership was plainly not "reasonably certain" to ever exist, because Boyle did not show that it was reasonably certain that he would obtain all of the myriad permits and land-use approvals he would need in order to develop a second dealership on the Property. Boyle admitted that he does not have the requisite land-use permits from Portsmouth to develop a second dealership and parking. Tr.275. He actually requested that his 2009 development proposal be put on hold with Portsmouth. Tr.989. At the very least, Boyle would have been required to obtain variances in connection with his proposed development. He did not and could not show that his plan addressed the required variances, or whether the variances would even be granted. Even if Portsmouth were to hypothetically approve his proposal, it was likely that conservation groups or abutters—living in the residential neighborhood adjoining the

northern side of the Property—would appear and be heard regarding the variances and may well appeal the granting of any variances. Tr.992-1000. The judge who presided over this trial later declared in the Eminent Domain Case that it was "speculative" whether Boyle would ultimately succeed with his plan in the face of zoning hurdles.[9] Boyle further admitted that he did not have the requisite permit from DES to place a second dealership on the wetlands. Tr.275.

The fact that Boyle's second dealership was a dream or hypothetical at the time of trial clearly distinguishes it from *Wilko of Nashua v. TAP Realty*, 117 N.H. 843 (1977), which the court relied upon in denying Portsmouth's motion in limine to exclude evidence of lost profits. Add.153. In *Wilko*, the two plaintiffs entered into recorded leases to run two separate restaurants. They were awarded lost profits when another business was found to have recorded a fraudulent assignment of sublease rights, creating a cloud on title and thus intentionally interfering with their contractual relationship with the landlord. *Id.* at 845. In *Wilko* there was no evidence that the plaintiffs faced any obstacles to opening their restaurants other than the defendant's wrongful acts. The leases with the restaurants were in place and recorded

---

[9] *See*, Portsmouth Addendum, Eminent Domain Case, at 75.

and the specific restaurants—a Kentucky Fried Chicken and a Chinese restaurant—were known and identified. They did not need to obtain franchises, as Boyle does here. There was no indication that the plaintiffs needed land-planning approvals before beginning operations.

Boyle's speculative second dealership was not reasonably certain to be realized, and it was error for the court to allow his lost-profit claims to go to the jury and the award of lost profits to stand. *See, Great Lakes Aircraft*, 135 N.H. at 297 (reversing lost profits award where new business depended on allying investors, obtaining capital from bond not within plaintiff's control, and negotiating a purchase of assets). Indeed, the court expressly recognized the "speculative" nature of Boyle's proposal in its decision in the Eminent Domain Case. Note 9, *infra.*

### 2. Boyle's Lost Profits Were Based on Highly Speculative Data that Could Not Establish the Amount of Profits of Boyle's Hypothetical New Dealership with Reasonable Certainty.

O'Brien acknowledged at trial that his opinion on lost profits from Boyle's hypothetical second dealership was inherently "speculative." Tr.798-800. This is because he based his opinion on a generic dealership, as opposed to a dealership of a specific car manufacturer—a crucial piece of information in order to predict lost profits with reasonable

certainty in the car dealership industry. Tr.794-795, 810-812.

Identifying a particular car manufacturer is critical because, as O'Brien testified, the data used to project profits varies dramatically from manufacture to manufacturer. Some of the many key data points that vary from franchise to franchise are:

- New vehicle sales;
- Used vehicle sales;
- Service and parts volume;
- New and used gross profits per unit; and
- Parking requirements for new-car storage, display, employees, and customers.

Tr.135, 794-795. The type of dealership drives the profits. For example, if Boyle's second dealership were a Nissan dealership, it would make less profit per year than a Toyota dealership based on national averages. Tr.811.

Not surprisingly, then, O'Brien testified that in his view he needed to use data from a particular dealership for his model. He wanted to use Lexus, because it was the only open point in the market, going so far as to say that, without Lexus information, it would "be very difficult to defend the projection" of profits. Tr.794-95. However, Boyle and his attorney told O'Brien not to use Lexus and to use a "hypothetical" dealership instead. *Id.* O'Brien was reluctant

to do so because there are "significant variations in the dealership operations," such as volume, expense, structure, and franchise performance. Tr.796-97.

Despite his professional reservations, O'Brien was persuaded to use past financial information from Boyle's Toyota dealership—deeming it an "average" dealership—in order to project how a hypothetical dealership of an undetermined manufacturer would fare. Tr.781. Remarkably, the choice to use the Toyota dealership for the hypothetical modeling could never have occurred in the real world. Toyota was not an "open point" in Portsmouth—Boyle already filled that point. In any case, since Boyle had no dealership agreement nor even sought one, there was no way for the jury to know if Boyle's hypothetical new dealership would exist, much less be "average," or anything like his Toyota dealership. O'Brien was not informed of the permission that Boyle provided to Portsmouth to continue to operate the Line until 2013. Tr.791. As a result, he averaged financial data for 2008-2012. Tr.804-807.

As a starting point, therefore, O'Brien's calculation is for years which were expressly excluded from the 2014-2016 span for which the jury awarded Boyle lost profit damages. Compounding the error, the jury took O'Brien's speculative $595,000 annual lost profits number for 2009-2013, clearly applied it to each year from 2014 to 2016 for a total of

$1,785,000, and then awarded that amount to Boyle for *each* of his trespass and nuisance claims thereby incomprehensibly doubling his award to $3,570,000. The only rational explanation is that the jury mistakenly believed Boyle was entitled to recover the same damages for each of his theories. This required at least the remittitur of the award to $1,785,000. Of course, due to the entirely speculative nature of Boyle's claimed lost profits, the award should not have been allowed to stand at all.

This case is dramatically different than *Wilko*, where the plaintiffs knew exactly what franchise restaurant was set to open on the premises prior to the defendant's wrongful conduct. There, the plaintiffs were able to use data from franchises or restaurants that were known to be virtually identical to their restaurants in order to project lost profits with reasonable certainty. One plaintiff used finances from a locally based KFC franchise to show how his new KFC franchise would perform. The other plaintiff used data from a Chinese restaurant he owned to project his profits from the proposed Chinese restaurant in the same city. *Wilko*, 117 N.H. at 850.

This case is very different. Boyle did not ask the jury to use the profits of a KFC to project the profits of a KFC, or in his case the profits of a Toyota dealership in order to open another Toyota dealership in a city with an open point. He

instead asked the jury to presume he would get *some* brand of dealership and then used past profits from his Toyota dealership to project the profits of the universe of possible car dealerships. This turns any requirement of data based on "reasonable certainty" on its head and invites a litigant to simply imagine or dream about some venture and then plug numbers into an unspecified model to run up a lost profits calculation. The entire exercise here calls for pure speculation and is impermissible. *See, Miami Subs*, 142 N.H. at 517 ("[W]e will not award damages for 'speculative losses'"). O'Brien said as much in his testimony and that should have been the end of it.

In terms of the speculative nature of the amount of damages, this claim is akin to the plaintiff's speculative calculations in *Fitz v. Coutinho*, 136 N.H. 721 (1993). There, the plaintiff contracted with a landowner to remove timber from a lot so the plaintiff could sell it. Shortly after entering into the contract, the landowner forbid the plaintiff from removing further timber. *Id.* at 723. The trial court awarded lost profits, because the plaintiff was prevented from harvesting and selling all of the timber permitted under the contract. *Id.* at 724.

This Court found that the plaintiff produced reasonably certain proof of the existence, but not the *amount*, of lost profits. In order to determine the amount of lost profits for

removing the timber, one would have to know the volume of removable trees, as well as the quality of the timber, all of which can vary greatly and affect the financial impact. *Id.* at 726. The Court found that the plaintiff's "walk-through appraisal" and estimates of the "normal yield" of a 150-acre lot, although based on his personal experience, were an insufficient basis for "grounding a *reasonably certain* conclusion" of lost profits. *Id.* at 727. The Court reversed the award of lost profits and remanded for entry of nominal damages.

Boyle's effort to present damages here based on his personal experience as a Toyota dealer suffers from the same defects. It is not enough to take the past profits from his Toyota dealership (a "normal yield") and apply it to a hypothetical dealership which, depending on the manufacturer, may have drastically different sales volume and per-car profit margins. This does not meet the standard of reasonable certainty. O'Brien knew this and asked Boyle to focus on a model based on a Lexus dealership, the only "open point" available in Portsmouth. Tr.794-799, 812. Boyle's litigation strategy precluded that course, precisely because of Boyle's lack of confidence that he could obtain a Lexus franchise. Tr.795-796. The consequence of the rejection of any calculation that could be supported by reality was to manufacture a hypothetical based on Boyle's Toyota

dealership, an option that was impossible to achieve in a closed point.

### B. Under Black Letter Law, Boyle Should Not Have Been Awarded Lost Profits Because the Property Was Leased to Minato, a Non-Party.

It is black letter law in New Hampshire that a landlord cannot recover in trespass when the land has been leased because, unless the plaintiff was in actual possession at the time the injury was committed, trespass cannot be supported. The tenant is entitled to damages for the possessory interest, while the landlord is entitled only to damages for the reversionary interest. *Wentworth v. Portsmouth & Dover R.R.*, 55 N.H. 540, 544-45 (1875). This rule likewise applies to nuisance claims. *Leary v. City of Manchester*, 90 N.H. 256 (1939).

The evidence at trial established that the Property is encumbered by a lease from the Trust to Minato. CityApp.373. Thus, Minato, not Boyle or the Trust, was entitled to any damages due to trespass or nuisance. Further, Minato is not the equivalent of Boyle as Boyle is only the 51% interest holder in the LLC—the 49% interest-holder was not a party to the lawsuit. The court should not have allowed the jury to "infer" the relationship and award damages attributable to Minato as a non-party.

## II. The Court Correctly Determined that Boyle Was Not Entitled to Damages for Trespass for Any Time Period Prior to 2013.

The court ruled on summary judgment that Boyle had given Portsmouth permission to keep the Line on the Property "until the parties resolved the matter" and thus did not revoke Portsmouth's license to operate the Line until November 2013, shortly after the court determined that Portsmouth's only interest in the line was a license. Add.99. Boyle contends the court erred in determining the date of the revocation and asserts that he revoked Portsmouth's license either pursuant to a February 7, 2008 letter his counsel sent to Portsmouth or by filing this lawsuit in 2010. The court's ruling on this point should be affirmed, because it correctly ruled that Boyle had given Portsmouth permission to keep the Line on the Property while the parties tried to resolve the issue and there was no ruling on the issue until the Summary Judgment Order.[10]

There is no evidence that any owner of the Property raised any issue with the presence of the Line until Boyle

---

[10] The court's ruling on this matter was confirmed by the jury's special verdict form which found Portsmouth received permission from Boyle to flow and/or store water on the Property and that the date of Boyle's revocation of permission was in 2013. BoyleApp.0444. Boyle remarkably describes this happening as the "jury landed on" the 2013 date. Boyle Br. at 21.

raised the issue with Portsmouth in 2004. However, he has repeatedly admitted—both in affidavits and at trial—that he expressly gave Portsmouth permission to keep the Line on the Property as the parties "tried to resolve it":

- "I told [City Attorney Sullivan] the sewer line could stay as we tried to resolve it." BoyleApp.0124.
- He told Portsmouth "you can leave it there till we try to get this resolved." Tr.130.
- In giving Portsmouth permission to keep the sewer line on the Property, he was essentially assenting to the continuation of the status quo. Tr.340.
- He testified that he gave permission to Portsmouth: "I allowed them to leave the sewer line and associated wetlands in place until we could work out something." Tr.202.

Boyle does not contest that until February 7, 2008, Portsmouth had Boyle's permission to keep the Line on the Property but claims his February 7, 2008 letter revoked Portsmouth's license. It did not. While Boyle's letter demands that Portsmouth remove the Line, it does not state that it is revoking the permission Boyle previously granted to Portsmouth. BoyleApp.0140. Instead, it states that it was Boyle's "intent to erect suitable barriers to prevent unauthorized access." *Id.* Boyle admits such barriers were never actually erected specifically because the parties continued with their negotiations after the letter was sent and

arrangements were made whereby Portsmouth would continue to access the Line. Boyle Br. at 16 & n.8.

The parties undisputedly continued to "try to resolve" the matter of the Line after the February 8 letter. Correspondence from Boyle's counsel to Portsmouth later that year shows that Portsmouth was conducting repairs on the Line with Boyle's permission—Boyle in fact demanded Portsmouth perform additional work on the Line. CityApp.380. Moreover, in his Verified Complaint filed in 2010, Boyle sought to enforce a settlement agreement and alleged that the parties had for at least the past year been engaging in negotiating a settlement of "the issues in this complaint." BoyleApp.0017. Thus, the parties continued to act in accordance with the permission Boyle gave to Portsmouth in the fall of 2004—that the Line could stay as the parties "tried to resolve it."

Boyle's claim that his initiation of the lawsuit in 2010 was effective to revoke the license likewise fails, because his words and conduct in the litigation manifested a continued assent to the presence of the Line on the Property pending a determination as to the legal status of the Line. While Boyle asserted in his Complaint that the Line was trespassing and originally sought an injunction to remove it, he later clarified that he was really only seeking an injunction requiring Portsmouth to fix a culvert. CityApp.383 ("The Court

misperceived the scope of relief requested and did not appear to consider one element of relief—fixing the culvert....."). The Line remained on the Property—the status quo continued.

After the court ruled that Portsmouth had a license in the Line in October 2013, Boyle developed his strategy to revoke the license and acted accordingly. He sent a letter to Portsmouth stating that he was revoking the license on November 12, 2013. On December 9, 2013, he filed a Motion to Amend his Complaint on the basis that he had "hand delivered a letter to Portsmouth revoking the license." BoyleApp.0283. In that Motion, Boyle sought leave to add the following allegations:

> By letter from Mr. Boyle, as Trustee, to the Portsmouth City Council hand delivered on November 12, 2013, Mr. Boyle revoked the license and demanded the sewer line be removed.
>
> **By virtue of the revocation of the license for the sewer line**, and the City's failure to remove it, **the sewer line's and berm's presence on Mr. Boyle's property constitutes a trespass by the City of Portsmouth**.[11]

---

[11] Boyle also alleged that he had "revoked all prior permissions and demanded the sewer line and berm be removed" in his February 7, 2008 letter but notably did not claim that such letter revoked the license and did not allege that by virtue of that letter the Line's continued presence thereafter constituted a trespass. BoyleApp.0283.

BoyleApp.0283 (emphasis added). In granting Boyle's Motion, the court relied on these allegations: "The motion alleges that on November 12, 2013, Boyle unconditionally revoked the license by delivering a letter to the City notifying the City Council of his action." BoyleApp.0274.

In his opening statement at trial, Boyle's counsel confirmed that Boyle revoked his permission in 2013:

> During all this time, Mr. Boyle told the City he wasn't going to go out there and dig up the sewer line or do anything. He gave permission for it in hopes of resolution although ultimately resolution was not forthcoming. This suit was filed in 2010 and then in 2013, there was a formal revocation of any permission for the sewer line.

Tr.52. The evidence from Boyle's own statements and conduct prior to and throughout the course of this litigation overwhelmingly supports the court's determination and the jury's finding that he did not revoke Portsmouth's license in the Line until he delivered the November 2013 letter to Portsmouth. The court appropriately did not allow Boyle's February 2008 letter into evidence at trial.

None of the cases Boyle cites involve a situation factually resembling the present matter in any way. *Quimby v. Straw*, 71 N.H. 160 (1901) actually supports Portsmouth's position. There, the plaintiffs and defendants owned adjoining lots upon which one structure was built. A wall

separated the first two floors along the property line. The top floors were open but only accessible through stairs on the defendants' property. The defendants built a wall preventing the plaintiff from accessing the stairs. The Court ruled that the plaintiffs only had a license to use the stairs, which defendants revoked by building the wall. By contrast, Boyle admits that he only threatened to restrict access to the sewer line by erecting barriers but did not actually do so because the parties continued to negotiate.

*Batchelder v. Hibbard*, 58 N.H. 269 (1878) found that it could not be determined from the record whether a party who "from time to time" objected to the use of a mill to flow his property had actually revoked the license. *Steinfeld v. Monadnock Mills*, 81 N.H. 152 (1923) involved a situation in which a license that a co-owner of property gave to loggers was automatically revoked upon that co-owner's death. The surviving owner told the loggers not to cut timber, but they entered the land anyway. The situation was not like this one where Boyle gave Portsmouth permission to keep a pre-existing Line on his property while the parties "try to resolve" the issue and assured Portsmouth that the Line would not be dug up.

## III. The Court Erred in Finding that Portsmouth Did Not Have Permanent Rights in the Line.

The court should have determined that Portsmouth had permanent legal rights in the Line. The Line had been in place for over 40 years—several generations—at the time suit was brought, was originally installed pursuant to written authorization, was intended to be permanent, is a conspicuous structure rising approximately 6 feet above the ground, and is part of a municipal utility providing an essential public service to Portsmouth residents. While it is true that by mistake or circumstances lost to history Portsmouth does not have a recorded easement in the Line, if ever there were a case in which some form of permanent rights is not only appropriate, but essential to the interests of justice, this is it.

Portsmouth demonstrated that it has such rights and that they are established under multiple legal grounds. First, it proved that it has a prescriptive easement in the Line, yet the court erroneously granted summary judgment in favor of Boyle on that issue. Second, Portsmouth demonstrated that it met the criteria for an irrevocable license. The court acknowledged the case law Portsmouth cited from numerous jurisdictions finding irrevocable licenses in similar circumstances, but nevertheless felt constrained by what it found to be controlling case law from this Court and decided

that an irrevocable license to use land is not recognized in New Hampshire. This was error, but to the extent this Court accepts that view, it should align New Hampshire with jurisdictions following the modern view and hold that irrevocable licenses may be appropriate in narrow circumstances, such as those here, where Portsmouth expended substantial resources in reliance on the permission granted and application of the concept is necessary to prevent inequity.

**A. Portsmouth Has a Prescriptive Easement.**

To establish a prescriptive easement, the claimant must show adverse, continuous, and uninterrupted use of another's private land for a period of twenty years. *Sandford v. Wolfeboro*, 143 N.H. 481, 484 (1999). Portsmouth meets these criteria with respect to the Line.

The court made two related erroneous findings in granting summary judgment to Boyle on Portsmouth's prescriptive easement claim. First, the court determined that the prescriptive period did not begin to run until October 21, 1988, when the State's grantee, Coakley, conveyed the Property to MSM. Add.92-93. In fact, it began to run on February 18, 1983, when the State conveyed the Property to Coakley. The court misinterpreted RSA 539:6, which prevents adverse possession as to State-owned lands. Second, in its Summary Judgment Order, the court found

that Portsmouth had an "executed" license from the Board and thus had continued permissive use of the Line even after the State conveyed the Property. Add.97. However, in its Reconsideration Order, the Court reversed course and found that, in fact, Portsmouth did *not* have an executed license, but then failed to reconsider how that reinterpretation of the law impacted the permissive-versus-adverse aspect of Portsmouth's use of the Line. Add.121-123.

### 1. The Prescriptive Period Began to Run on February 18, 1983 and Vested Prior to Boyle's Ownership.

RSA 539:6 is entitled "No Right Acquired by Adverse Possession of State Lands" and provides: "No right shall be acquired by such entry or possession, nor by any adverse possession of such land, as against the state or its grantees." As this Court recently noted, RSA 539:6 is merely a codification of the doctrine of *nullum tempus occurrit regi* (Time does not run against the King), which exempts the sovereign from certain limitation periods. *See Rochester v. Marcel A. Payeur, Inc.*, 169 N.H. 502, 505 (2016). As this Court explained:

> Given the vast extent and wide variety of publicly-owned land...as well as governmental bodies' need to rely on the finite universe of public employees...application of the doctrine of *nullum tempus* to adverse possession claims serves the important purpose of protecting public property rights from loss that could otherwise result from failure to detect unknown encroachments."

*Id.* at 506 (emphasis supplied). Nothing in the doctrine or statute protects property from adverse claims beginning to accrue once it is in private hands. Time still runs against private parties.

The court misinterpreted the statute to provide that the prescriptive period would not run during the times both that the State *and* the State's initial grantees owned the Property. It thus determined that the prescriptive period would begin to run October 21, 1988, when Coakley conveyed the Property to MSM, rather than on February 18, 1983, when the State conveyed the Property to Coakley, a private party. Add.92-93. This is clear error.

Properly construed, the statute prohibits adverse possession from accruing against land *while it is owned by the State*, regardless of whether a claimant asserts such adverse possession against the State or the State's grantees. The purpose is not to preclude adverse possession from running on land once it is privately owned.[12] This is evident from the language and context of the statute and this Court's interpretation thereof.

---

[12] The lower court's interpretation would lead to the absurd result that prescriptive rights could never accrue against a subsequent private purchaser regardless of whether adverse use or occupation started during public ownership or long after the public sold the rights.

RSA 539:6's use of "*such* entry or possession" and "*such* land" clearly references the statute immediately preceding the provision, entitled "State Lands," which provides:

> Whoever shall, without authority, willfully enter into or upon, or take possession of, *land belonging to the state*...shall forfeit one hundred dollars, to the use of the state.

RSA 539:5 (emphasis supplied). Read together with RSA 539:5, clearly RSA 539:6 is referring to the willful entry on and possession of *State* lands. Thus, the prohibition on acquiring rights by adverse possession over "such land" refers to State-owned land.

As noted, the statute exists to protect public rights because: "[T]he State's rights in land and waters are not always enforced and protected with the same alacrity as private rights." *State v. George C. Stafford & Sons, Inc.*, 99 N.H. 92, 97 (1954). Properly read in light of underlying the doctrine, RSA 539:6 both protects State lands from being acquired by adverse possession and helps ensure the State has marketable title to sell its land to private parties by assuring they will not be subject to claims of adverse possession arising during the State's ownership. This is consistent with this Court's interpretation of RSA 539:6. *State v. Tallman*, 139 N.H. 223, 225-26 (1994) ("[N]o person can acquire title to *State lands* by adverse possession.") (citing

RSA 539:6); *Stafford & Sons*, 99 N.H. at 97 ("[T]he Legislature has provided that no person can acquire title to *state lands* by adverse possession.") (citing predecessor to RSA 539:6) (emphases supplied). Once a private party owns the land, however, it is subject to the same duties of inspection and vigilance as any other private property owner.

The court should have found that the prescriptive period started to run on February 18, 1983, when the State conveyed the Property to Coakley and ripened twenty years later on February 18, 2003, well before Boyle's purchase in December 2003. Since Boyle admits he did not give Portsmouth permission to keep the Line on the Property until sometime in 2004, the prescriptive period had already passed.

### 2. Portsmouth's Use Became Adverse on February 18, 1983, When the State Conveyed the Property to a Third Party.

In its Summary Judgment Order, the court determined that Portsmouth could not have acquired an easement by prescription because its "use of the sewer line over time could not have been adverse because it began and continued with permission." Add.93. The basis for this determination was the court's finding that Portsmouth had an "executed" license—meaning that Portsmouth invested substantial resources in constructing the Line based on the Board's permission—that runs with the land. Add.94. Thus, the court found, unless an owner subsequent to the State

terminated the license (and there was no evidence of this), the permission ran through subsequent owners. *Id.*

In its Reconsideration Order, however, the court reconsidered its ruling that Portsmouth held an executed license. Based on *Houston v. Laffee*, 46 N.H. 505 (1866) and subsequent cases, the court reversed itself and determined that a license does not, in fact, become executed when the licensee expends resources in reliance on the license. Add.121-123. Instead, the court found that a license is *un*executed "so far as any future enjoyment of the easement is concerned." Add.121 (quoting *Laffee*, 46. N.H. at 507). While not entirely clear, it appears the court ruled that a license is only executed to the extent it has not yet been revoked. The application of such a rule on these facts is inequitable, inconsistent with the law generally, and works an injustice.

Irrespective of the inequities and injustice of such a rule, the court then misapplied it in the context of the prescriptive easement Portsmouth possessed. It is clear that the court did not reconsider the impact of its new ruling on its previous finding that Portsmouth had an "executed" license that carried the permissive use through from the State to subsequent property owners. The court should have determined, in light of its new ruling, that the license was revoked by the conveyance of the Property from the State to Coakley and the period for establishing prescriptive rights

was running. The very cases the court cites in its Reconsideration Order establish this rule.

In *Blaisdell v. Portsmouth, Great Falls & Conway R.R.*, 51 N.H. 483 (1871) (cited at Add.122), this Court held that a license given by a property owner to a railroad was "revoked and terminated" simply by virtue of the death of the property owner and title passing to the plaintiff. This principle was affirmed in *Waterville Estates Ass'n v. Town of Compton*, 122 N.H. 506, 509 (1982) (cited at Add.124), wherein this Court stated that a license for the use of land terminates "when the licensor dies or conveys the servient estate."

Here, the State conveyed the Property (the servient estate to the Line) to Coakley on February 18, 1983. At that point in time, under the court's revised reasoning that Portsmouth had only a revocable license, Portsmouth's license was terminated by the transfer of title, and its use of the Line continued *without* any evidence of permission from the subsequent owners. Portsmouth continued to operate a 650-foot sewer line running across the length of the Property in a berm that rises well above the ground, in some places to almost six feet. Accordingly, the use was open and notorious and gave notice to the record owner(s) of an adverse claim. *Sandford*, 143 N.H. at 484. This adverse use went uninterrupted until at least the fall of 2004 when Boyle gave Portsmouth permission to keep the Line on the Property while

the parties resolved the issue. Since the period of adverse use began on February 18, 1983, Portsmouth met the requirements for a prescriptive easement: 20 years of adverse, continuous, and uninterrupted use not later than February 18, 2003. The court should have granted summary judgment to Portsmouth on Boyle's trespass claim based on the existence of the prescriptive easement.

**B. Portsmouth Acquired an Irrevocable License.**

Relying on this Court's opinions from the 19th Century, the court found that the current state of New Hampshire common law does not recognize an irrevocable license for the use of land. Add.121-128. Or, put differently, the court understood the Supreme Court holdings as treating irrevocable licenses as the "functional equivalent" of an easement, requiring a writing satisfying the statute of frauds. However, the court also acknowledged that cases from other jurisdictions recognize both irrevocable licenses and easements and differentiate between the two. The court further stated that "the law on this issue is far from clear," its ruling on the issue would have a "significant impact on the outcome of the litigation," and encouraged the parties to bring this issue to this Court. Add.117; BoyleApp.277-78. The historic line of cases is plainly out of step with the law in many jurisdictions and generates unfair and unnecessarily harsh results. The modern trend or state of the law is to

recognize irrevocable licenses as a concept separate and distinct from easements. Here Portsmouth demonstrated that it acquired an irrevocable license under well-recognized criteria, and this Court should explicitly recognize that irrevocable licenses for the use of land are available in proper circumstances including the unique facts of this case.

Prior to 1866, the New Hampshire Supreme Court recognized that when a licensee expended resources in reliance on a parol license, the license was executed and could not be revoked until a reasonable time for the use for which the license had been granted had elapsed. *Ameriscoggin Bridge v. Bragg*, 11 N.H. 102 (1840) (license to build and operate toll bridge became irrevocable once acted upon and was irrevocable "while the bridge continues"); *Woodbury v. Parsley*, 7 N.H. 237 (1834) (license for dam on property, once dam was built, could not be revoked until licensee had reasonable time to dispose of water).

In 1866, this Court decided *Houston v. Laffee*, 46 N.H. 505 (1866). There, a property owner granted a license for the licensee to put a well and pipe on his property to supply water to the licensee's house. The licensee expended resources in installing the well and pipe, but the property owner later terminated the license by cutting the pipe. The Court held that the property owner could revoke the license even though the licensee had expended resources in reliance on the

license. Several cases from this Court following *Laffee* similarly held that licenses for the use of land may be revoked at the will of the licensor even after the licensee expends resources in reliance on the license. *E.g., Batchelder v. Hibbard*, 58 N.H. 269 (1878) (license to build and operate mill on property revocable by property owner after mill built); *Hallett v. Parker*, 68 N.H. 598 (1896) (oral license to lay aqueduct on land revocable after aqueduct laid). There have been no New Hampshire Supreme Court cases in over 100 years directly addressing this issue.

Portsmouth submits that, to the extent an irrevocable license is inconsistent with this Court's case law from the 19th Century, it is time to revisit the issue. While the issue may arise rarely, the facts here demonstrate that persons and entities may suffer severe damage and unfair impacts by rigid adherence to the position enunciated in *Houston v. Laffee.* This may be especially true for municipalities that have developed and are dependent on municipal infrastructure where historic documentation may be sparse or non-existent as to legal rights in the property.

A number of other jurisdictions hold that an irrevocable license is a valid concept separate and apart from an easement. An irrevocable license is not an easement or interest in land, but instead a "distinct remedial concept." *Tatum v. Dance*, 605 So.2d 110, 112-13 (Fla. Ct. App. 1992),

*affirmed at* 629 So.2d 127 (Fla. 1993). It arises when a licensee has expended substantial sums on improvements in reliance on the license. *Id.* at 112. Equity estops the licensor from revoking the license at will. *Id.* These principles arise under narrow circumstances and should only be applied to the extent needed to avoid inequity. *Id.* at 113. An irrevocable license is different from, and stops short of, an easement in scope and function. First, unlike an easement, it is a personal right that cannot be conveyed. *Id.* Second, irrevocable licenses last only as long as necessary to protect the reliance investment of the licensee. *Id.*

In *Tatum*, the defendant constructed a drainage system from his property (an auto dealership) to a "borrow pit" on a neighboring property based on an oral license from the neighboring property owner. *Id.* at 111. The layout and operation of the dealership depended on this design. *Id.* at 113. The trial court held that, due to the defendant's expenditure of resources and because the drainage system was continually used and would have been apparent based on reasonable inspection, the license became irrevocable and the subsequent owner of the neighboring property was bound. *Id.* at 111. The appellate court agreed, but modified the irrevocable license so that it would not inure to the benefit of the defendant's successors-in-interest, because a license is a personal right that cannot be conveyed.

Other cases from courts finding irrevocable licenses for the use of land abound. *E.g.*, *Morning Call, Inc. v. Bell Atl.-Pa., Inc.*, 761 A.2d 139, 144-45 (Pa. Super. Ct. 2000) (telephone provider found to have irrevocable license where it installed telephone equipment on property in 1917 and continued to maintain the equipment); *Blackburn v. Lefebvre*, 976 So. 2d 482, 493-95 (Ala. Civ. App. 2007) (finding license to use boat slip irrevocable and valid against successor to licensor where licensees made expenditures in reliance on license and successor had notice of license); *PSP N., LLC v. Attyboys, LLC*, 391 S.W.3d 396, 398-99 (Ky. Ct. App. 2013) (license to ramp on neighboring property irrevocable, including against successor licensor, where resources were expended to build ramp); *Noronha v. Stewart*, 199 Cal.App. 485, 490 (Cal. Ct. App. 1988) (where licensee expends money or labor in execution of parol license, license becomes irrevocable and licensee will continue "for so long a time as nature calls for"); *Guilbault v. Bowley*, 498 A.2d 1033, 1035 (Vt. 1985) (defendants had irrevocable license over water line running on plaintiff's property).[13]

---

[13] *See also*, *Harber v. Jensen*, 97 P.3d 57, 62-63 (Wyo. 2004); *Eppling v. Seuntjens*, 117 N.W.2d 820, 823 (Iowa 1962); *Hermann v. Lynnbrook Land Co.*, 806 S.W. 128, 130 (Mo. App. Ct. 1991).

An irrevocable license likewise should be found to exist here in order to avoid injustice. Portsmouth expended significant resources to install the Line over the Property over 50 years ago in reliance on the Board's approval. It has openly used the Line ever since and continued to inspect and maintain the Line over timè. The Line connects to and forms part of Portsmouth's municipal sewer system, which provides essential public health benefits to Portsmouth's residents. It would be extremely costly for the City to remove and replace the Line. Tr.926. Boyle was, as the court found, at least on record notice of the Line when he purchased the Property due to the Line's presence on the 1985 plan incorporated by reference into his deed. Add.99. Moreover, any reasonable inspection of the Property would have revealed a berm rising about six feet off the ground and extending 650 feet across the length of the Property. The application of the *Laffee* holding to the facts here is facially unreasonable and does not serve the interests of justice.

Consistent with *Ameriscoggin* and *Woodbury*, the court should have ruled that Portsmouth had an irrevocable easement in the Line. To the extent that this Court believes that those cases were no longer good law in light of *Laffee*, it should revisit that case and its 19th Century counterparts in light of the body of modern case law cited herein and hold that a license for the use of land may become irrevocable

when a licensee has expended substantial resources in reliance on the license and when required to prevent injustice. Such a standard will not upset the rule of law and will enable our courts to provide fair and sensible remedies, avoiding elaborate technical rulings which unfairly disrupt and injure parties that reasonably relied on well-established rights in property. In either case, this Court should reverse the grant of summary judgment to Boyle on his trespass claim and remand for judgment to be entered in favor of Portsmouth.

## IV. The Court Correctly Precluded Evidence of Damages After 2016 Because Portsmouth Had Initiated Eminent Domain Proceedings.

The court's determination that Boyle could not be awarded lost profit damages beyond 2016 was legally and factually correct and should be affirmed. Boyle could not have obtained lost profit damages beyond 2016 because Portsmouth owned, as a consequence of filing its Declaration of Taking on December 19, 2016, a 4.6-acre area of the Property containing both the Line and the portion alleged to suffer flooding caused by the Line (the "Eminent Domain Land"). It is uncontested that the Eminent Domain Land includes much of the area Boyle proposed for the development of the parking lot for the second dealership. Boyle had no legal right to develop those areas of the Property

following the taking and therefore cannot recover lost profits for a dealership that literally could not have existed.

It is not disputed that, pursuant to statute, Portsmouth held title to the Eminent Domain Land as of the filing of the Declaration of Taking. RSA 498-A:5, I ("[T]itle which the condemnor seeks in the property condemned shall pass to the condemnor on the date of" the filing of the declaration of taking); *see also*, RSA 498-A:11, I. As of the time of trial, Portsmouth had title to the Eminent Domain Land and could not be trespassing on it. Nor was Portsmouth required to abate the alleged nuisance of pooled water on property to which it held title.

As described in detail in its brief in the companion case, Portsmouth validly exercised its power of eminent domain for a number of reasons. Far from "manipulating" damages, as Boyle alleges, Portsmouth was following the court's instructions in its Reconsideration Order that Portsmouth exercise its eminent domain power or remove the Line. Moreover, one valid purpose for exercising the power of eminent domain is to obtain relief from the public burden of paying for damages due to a nuisance. *Leary v. City of Manchester*, 91 N.H. 442 (1941).

There is no lost profits remedy available to Boyle after 2016 as a consequence of these events. However, Boyle will be compensated for the Eminent Domain Land regardless of

what happens in the Eminent Domain Case appeal. If the taking is upheld and Boyle's Preliminary Objection is overruled, the Eminent Domain Case will continue and Boyle will be paid just compensation for the Eminent Domain Land, as is required under statute. *See* RSA 498-A:24 *et seq.* If, on the other hand, this Court were to affirm the court's order granting Boyle's Preliminary Objection, Boyle will be entitled to damages, if any, in accordance with the eminent domain statute. RSA 498-A:9-b, IV & 498-A:9-a, V. Boyle's wish that New Hampshire law provided *additional* remedies in this scenario, Boyle Br. at 24-25, does not control.[14]

The court was clearly correct in limiting the timeframe for Boyle's lost profit damages given that Portsmouth held title to the Eminent Domain Land at the time of trial.

---

[14] Boyle fixates on his claim that Portsmouth exercised eminent domain in bad faith. Boyle Br. at 26-28. As set out in Portsmouth's Eminent Domain Case brief, the taking was legally justified, identified by the court, was an essential response to the trespass finding, and undertaken consistently with the court's procedural orders. This Court has yet to address the issues raised in the Eminent Domain Case. Regardless, any purported damages relating to Boyle's "bad faith" argument are a matter, if at all, for a separate proceeding.

## CONCLUSION

For the foregoing reasons, Portsmouth respectfully requests the following:

(1) That the Court reverse the trial court's orders allowing Boyle's lost profits claim to go to the jury and refusing to strike the lost profits verdict and remand with instructions to enter an award of nominal damages, if any, or in the alternative reverse the trial court's order denying remittitur of damages to $1,785,000.

(2) That the Court reverse the trial court's grant of summary judgment to Boyle on Portsmouth's claims of prescriptive easement and irrevocable license and remand with instructions to enter judgment in favor of Portsmouth on Boyle's trespass count based on Portsmouth's prescriptive easement, or in the alternative, irrevocable license in the Line.

(3) Should this Court affirm the trial court's finding that Portsmouth only has a revocable license, that the Court also affirm its finding that Boyle revoked that license on November 12, 2013 and decision to exclude evidence of any prior claimed revocation.

(4) That the Court affirm the trial court's decision to exclude evidence of claimed damages after 2016.

Portsmouth certifies that the decisions it cross-appeals are in writing and appended to this brief. S. Ct. R. 16(3)(i).

Respectfully submitted,

Dated May 23, 2019

CITY OF PORTSMOUTH

By its attorneys,

By: _____

Charles P. Bauer, Bar No. 208
Robert J. Dietel, Bar No. 19540
Gallagher, Callahan & Gartrell, P.C.
214 North Main Street
Concord, NH 03301
Tel: (603) 228-1181
bauer@gcglaw.com
dietel@gcglaw.com

Bruce W. Felmly, Bar No. 787
Benjamin B. Folsom, Bar No. 268352
McLane Middleton, P.A.
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
Tel: (603) 625-6464
bruce.felmly@mclane.com
benjamin.folsom@mclane.com

**REQUEST FOR ORAL ARGUMENT**

Oral argument requested. Mr. Felmly will argue.

## CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2019, I served two (2) copies of the foregoing BRIEF FOR APPELLEE & CROSS-APPELLANT CITY OF PORTSMOUTH, together with the Addendum, and two (2) copies of Portsmouth's Appendix by first-class mail to all counsel of record.

Bruce W. Felmly

## CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 13,958 words, exclusive of the cover page, table of contents, table of authorities, page numbers, addendum, signature block, certificate of service, and certification of word count.

Bruce W. Felmly

STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018-0327

James Boyle, Individually and as Trustee of the 150 Greenleaf Avenue Realty Trust,
Plaintiff,
v.
The City of Portsmouth & Comcast of Maine/New Hampshire, Inc.,
Defendants.

# ADDENDUM TO BRIEF OF APPELLEE/CROSS-APPELLANT CITY OF PORTSMOUTH

RULE 7 APPEAL FROM FINAL ORDER OF
ROCKINGHAM COUNTY SUPERIOR COURT

Charles P. Bauer,
Bar No. 208
Robert J. Dietel,
Bar No. 19540
Gallagher, Callahan & Gartrell, P.C.
214 North Main Street
Concord, NH 03301
Tel: (603) 228-1181
bauer@gcglaw.com
dietel@gcglaw.com

Bruce W. Felmly, Bar No. 787
Benjamin B. Folsom, Bar No. 268352
McLane Middleton, P.A.
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
Tel: (603) 625-6464
bruce.felmly@mclane.com
benjamin.folsom@mclane.com

**TABLE OF CONTENTS**
**TO ADDENDUM**

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**Charles P. Bauer, ESQ**
**Gallagher Callahan & Gartrell PC**
**PO Box 1415**
**214 North Main Street**
**Concord NH 03302-1415**

Case Name: **James Boyle, Ind., et al vs. City of Portsmouth**
Case Number: **218-2010-EQ-00100** ***218-2010-CV-01205***

Enclosed please find a copy of the court's order of October 30, 2013 relative to:

Order re: Motions for Summary Judgment and Cross Motion for Summary Judgment

November 1, 2013

Raymond W. Taylor
Clerk of Court

(655)

C: John Kuzinevich; Bernard W. Pelech, ESQ; Donald J. Perrault, ESQ

# The State of New Hampshire
# Superior Court

## Rockingham, SS.

James Boyle, Individually and as Trustee, 150 Greenleaf Avenue Realty Trust

v.

City of Portsmouth

No. 2010-EQ-100

&

James Boyle, Individually and as Trustee, 150 Greenleaf Avenue Realty Trust

v.

Comcast of Maine/New Hampshire, Inc.

2010-CV-1205

**ORDER**

Plaintiff/Petitioner James Boyle ("Boyle") brought a nine count petition against Respondent, City of Portsmouth ("Portsmouth"), seeking damages associated with a buried sewage line located on property Boyle, as trustee of 150 Greenleaf Avenue Realty Trust, owns at 150 Greenleaf Avenue in Portsmouth. Portsmouth moves for summary judgment, and Comcast joins. Boyle objects to Portsmouth's Motion for Summary Judgment. Boyle also filed a cross-motion for partial summary judgment on the issue of flowage and drainage. Boyle also objects to Comcast's motion to the extent that Comcast sets forth no fact or law independent of Portsmouth's despite the different interests of each entity. For the reasons discussed herein, Boyle's Cross-Motion for partial Summary Judgment is GRANTED in part and DENIED in part, Comcast's Motion for Summary Judgment is DENIED, and Portsmouth's Motions for Summary Judgment is GRANTED in part and DENIED in part.

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2005). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, 'sufficient . . . to indicate that a genuine issue of fact exists so that the party should have the opportunity to prove the fact at trial . . .'" Phillips v. Verax Corp., 138 N.H. 240, 243 (1994) (quoting Dolan v. Maple Leaf Health Care Ctr., Inc., 119 N.H. 424, 425 (1979)). A fact is material if it affects the outcome of the litigation under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, together with all reasonable inferences therefrom. Sintros v. Hamon, 148 N.H. 478, 480 (2002).

The pleadings and affidavits reflect the following historical record for the subject property. In 1967, the State owned the subject property, and the New Hampshire Board of Education was planning—or had already constructed, the record is unclear—a vocational school on the property. On November 20, 1967, the Board of Education approved a request by the Portsmouth Public Works Department to run a sewer line across the rear of the subject property. Mot. Summ. J., Ex. 7 at 9. Then on February 18, 1983, by quitclaim deed, the State sold the property to three New Hampshire residents as tenants in common. Mot. Summ. J., Ex. 4 at 1. In that deed, the State sold the subject property, "[e]xcepting the rights, if any, of ordinary public utilities servicing said premises." Id. At some time while the tenants in common owned the subject property, they caused a plan to be filed in the Rockingham County Register that reflects the 1967

sewer line crossing the subject property. These three tenants in common then conveyed the property to MSM Brothers, Inc., a New Hampshire corporation, on October 21, 1988. That deed contained no description of the sewer line and did not except any utility easements. On December 30, 2003, MSM conveyed the subject property to Boyle, as trustee, by warranty deed that contained no description of the sewer line or easement exceptions.

Boyle states that he did not have actual, record, or constructive notice of the sewer line until 2004, when seeking a variance from Portsmouth's Zoning Board of Appeals, he observed the sewer line manholes from an adjoining property. Boyle Aff. ¶ 12. Boyle claims that he went to see the Portsmouth city attorney upon discovering the sewer. Boyle Aff. ¶ 15. During this visit, Boyle told the city attorney he would be willing to give Portsmouth an easement if, in return, Portsmouth made Boyle's development plans easier. Id. Boyle also claims that during this visit he gave oral permission for the sewer line to remain on the property until the parties resolved the matter. Id. This meeting occurred sometime in 2004. Portsmouth contests that Boyle ever gave permission.

## I. Portsmouth as Respondent

Boyle brought a nine count petition against Portsmouth. It alleges: Count I (trespass); Count II (permanent taking); Count III (temporary taking); Count IV (nuisance); Count V (declaratory relief); Count VI (overburdening easement); Count VII (negligence); Count VIII (enforce settlement agreement); Count IX (temporary restraining order/preliminary injunction). Count IX is moot because this Court has previous denied a preliminary injunction, and Count V is also moot because Boyle has allowed his site

plan to be reviewed by Portsmouth's Zoning Board of Adjustment ("ZBA"), and it applied the 2009 Ordinance as Boyle requested. With regard to the remaining Counts, Portsmouth asserts that it has an easement either by prescription or estoppel that resolves Boyle's Counts I, II, or III. Portsmouth further avers that it is entitled to discretionary function immunity with respect to Counts IV, VI, and VII. Finally, Portsmouth contends that the parties never executed a settlement agreement, so there is nothing to enforce pursuant to Count VIII. The Court considers these Counts in turn below.

A. Counts I, II, and III

The validity of Counts I, II, and III turn on what type of interest Portsmouth has in the sewer line that crosses Boyle's property. Portsmouth does not dispute that it lacks an express easement. It has presented no formal recording demonstrating such. Rather, Portsmouth argues that it has obtained an easement by prescription and/or estoppel.

1. Easement by Estoppel

"One who attempts to create an easement by estoppel must show that a representation was communicated to the promisee, the representation was believed, and there was reliance upon such a communication." 25 AM. JUR. 2D Easements and Licenses § 14 (2013). The reliance must also be reasonable. Healey v. Town of New Durham, 140 N.H. 232, 240 (1995). Easement by estoppel must be applied with great care. See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.10 cmt. c (2000). Ultimately, an easement by estoppel will not be recognized unless it is necessary to avoid an injustice. Id. § 2.10 cmt. d; see also Douglass v. Belknap Springs Land Co., 76 N.H. 254, 255–56 (1911) (enforcing subdivision plan as easement where initial purchaser re-

lied to her detriment on plan that reflected roadways for accessing plaintiff's property, and developer later tried to change the location of roads).

While Boyle claims that New Hampshire has not recognized easements by estoppel, he is only partially correct. See Gagnon v. Moreau, 107 N.H. 507, 509–10 (1967); Douglass, 76 N.H. at 256. The Restatement (Third) of Property (Servitudes) section 2.10 explains that there are two types of easements by estoppel. The first type is known in the case law as the "executed parol license doctrine." See id. § 2.10(1). This type of easement by estoppel is created when:

> [A] land owner or occupier gives permission to another to use the land, but does not characterize the permission as an easement or profit, and does not expressly state the duration of the permission.
>
> A servitude is established if the permission is given under such circumstances that the person who gives it should reasonably foresee that the recipient will substantially change position on the basis of that permission, believing that the permission is not revocable. The grant of permission under these circumstances impliedly represents that the grantor does not retain the power to revoke the permission granted. Under these circumstances, the grantor bears the burden of giving notice to the grantee that the permission granted is revocable.
>
> Normally the change in position that triggers application of the rule stated in this subsection is an investment in improvements either to the servient estate or to other land of the investor. . . .

Id. § 2.10 cmt. e.

The second type of equitable easement recognized by the Restatement is based on an express representation that an easement exists. Id. § 2.10 cmt. f. This type of easement differs from the first:

> [I]n that the representation giving rise to the estoppel is express rather than implied. The character of the reliance necessary to give rise to the

> estoppel is the same as that required under [the executed parol license doctrine]. However, it is often easier to conclude that reliance on an express representation that a servitude does exist is reasonable than that reliance on an implied representation is reasonable. It is also easier to conclude that justice requires establishment of the servitude because there is no social interest in encouraging people to induce others to make investments by lying to them.

Id. New Hampshire does recognize this latter category of equitable easement. See Douglass, 76 N.H. at 255-56.

With respect to the executed parol license doctrine, the law in this State is more choppy. Early New Hampshire case law recognized that licenses could become irrevocable even if they were orally given as long as they were executed, meaning the licensee detrimentally relied on the permission and expended resources in that reliance. See Ameriscoggin Bridge v. Bragg, 11 N.H. 102, 109 (1840) ("A license to an individual to do an act beneficial to him, but requiring an expenditure upon another's land, is held not to be revocable after it has once been acted upon. Such a license is a direct encouragement to expend money; and it is said it would be against conscience to revoke it as soon as the expenditure begins to be beneficial."); Sampson v. Burnside, 13 N.H. 264, 266 (1835) ("Licenses are . . . revocable where the party, on having such license countermanded, is left in status quo. But it has been said that where the license becomes executed by an expenditure incurred, it is either irrevocable, or cannot be revoked without remuneration, on the ground that a revocation under such circumstances is fraudulent, and unconscionable"); Woodbury v. Parshley, 7 N.H. 237, 239 (1834) ("[T]he statute of frauds does not apply to a parol agreement for an easement for seven years in the lands of another, such as a right of way, or a privilege of placing goods upon land, or a license to be exercised upon land.).

Then, later cases seemed to overturn this line of precedent by ruling that parol licenses could never become easements, even if they were executed, because they did not comply with the Statute of Frauds. To hold otherwise would mean the license would become an interest in land by virtue of being irrevocable once executed. Houston v. Laffee, 46 N.H. 505, 507 (1886) (finding a parol license to do a certain act or series or succession of acts on the land of another is always revocable even where the licensee expended of money in reliance on the license because otherwise it would allow parties to obtain interests in land by parol); Dodge v. McClintock, 47 N.H. 383, 386–87 (1887) (citing Laffee affirmatively); see also Blaisdell v. Portsmouth, G.F. & C.R.R., 51 N.H. 483, 485 (1871) ("parol licenses may be in writing, or verbal; but there is no distinction between the two, if the writing has not the legal requisites to make it a deed or grant of real estate."); Quimby v. Straw, 71 N.H. 160, 162 (1901) (citing Laffee in finding executed license not enforceable as an easement). Blaisdell also explained that licenses are not transferable. Id. So when the licensor transfers the property, the license expires. Id. Indeed, Batchelder v. Hibbard, 58 N.H. 269, 270 (1878), seemed to end the debate once and for all. In Batchelder, the Court explained:

> The plaintiffs' counsel strenuously contend that a parol license to exercise a privilege upon the land of another cannot be revoked when it has been executed. The more recent decisions in this state, and the weight of authority, are to the effect that a mere license of this character is always revocable at the will of the licenser, so far as any further enjoyment of the privilege is concerned; for otherwise, such parol license would acquire the force of a conveyance of a permanent character in real estate.
> The doctrine, that such a license cannot be revoked without first reimbursing the money expended, or doing what is equivalent to restoring the licensee in statu quo, as held in Woodbury v. Parshley 7 N. H. 237, was overruled in Houston v. Laffee, above cited; and the doctrine of the latter case must be regarded as the settled law of this state.

Id.[1]

Later, Ouellette v. Butler, 125 N.H. 184, 188-89 (1984), clarified the state of the law on executed licenses. It held that although oral licenses could not create interests in land because they would violate the Statute of Frauds, written licenses could still be treated as easements even when they did not meet the requirements of a formal easement when the surrounding circumstances indicated a clear intention to give something more than a mere license. Id.

Notwithstanding Ouellette, the detrimental reliance aspect of an easement by estoppel still requires that the party asserting estoppel demonstrate that absent an easement, there will be injustice. The Restatement (Third) of Property section 2.10 comment d explains that courts usually decline to find injustice when the entity asserting estoppel could exercise eminent domain. However, Waterville Estates Ass'n v. Town of Campton, 122 N.H. 506, 508 (1982), adds another consideration. In Waterville Valley, the Court, in categorizing an interest in land as an easement, considered that the disputed interest burdened the property and reduced its fair market value. Id.

In this case, Portsmouth is asserting estoppel based on a promise made by a State agency, so there is an additional level to the estoppel inquiry: whether the Board of Education had authority to bind the State. This issue goes to the reasonableness of

[1] This Court notes that it has grave reservations about the equity of the Laffee rule. The law, as originally applied in this State in Ameriscoggin Bridge and Woodbury appears to be a more logical and equitable principle. The position of these earlier cases is also consistent with the Restatement (Third) of Property. The common law is an evolving body of law. See Southern New Hampshire Medical Ctr. v. Hayes, 159 N.H. 711, 720 (2010) ("reject[ing] such antiquated and obsolete notions concerning women by modernizing the common law necessaries doctrine"). The law established by Laffee has not been revisited in detail by the New Hampshire Supreme Court for nearly 140 years. This Court, however, also recognizes the importance of the stability of the doctrine of *stare decisis*. See Ford v. N.H. Dep't of Transportation, 163 N.H. 284, 290 (2012). This stability is particularly important in the context of land transfers. For these reasons, and despite this Court's broad equitable authority, the Court is bound to follow the precedent of the New Hampshire Supreme Court on this issue.

Portsmouth's reliance because "[r]eliance is unreasonable when the party asserting estoppel, at the time of his or her reliance or at the time of the representation or concealment, knew or should have known that the conduct or representation was improper, materially incorrect or misleading." Thomas v. Town of Hooksett, 153 N.H. 717, 722 (2006). Neither party disputes that the State never expressly authorized the conduct of the Board of Education. Rather, Portsmouth claims the State ratified the Board of Education's permission.

"The State and its municipalities are not estopped by the unauthorized conduct or statements of its officials. Thus, estoppel may be applied against the government, as a result of conduct or statements by government [agents], provided that the [agent] had the authority to act, and the party invoking governmental estoppel satisfies the elements of estoppel." City of Concord v. Tompkins, 124 N.H. 463, 468 (1984) (citation omitted); Sunapee Difference, LLC v. State, 164 N.H. 778, 794-95 (2013) ("Under New Hampshire law, the State is not estopped by an unauthorized statement of its official. [The Supreme Court has] long recognized that all private parties dealing with government officials are charged with notice of the extent and limits of their authority. Governmental estoppel is appropriate, however, when government officials are acting within their prescribed sphere and functions, and are exerting no excess of authority.") (quotations and citations omitted). "The party asserting estoppel has the burden of establishing that the government ratified the conduct of the government official relied upon." Tompkins, 124 N.H. at 468.

In its motions before this Court Portsmouth has simply equated the State Board of Education with the State *qua* State. State agencies are only permitted to bind the

State within the scope of their statutory authority. See Sunapee Difference, 164 N.H. at 794. Portsmouth is presumed to understand that agents of the State of New Hampshire do not have the authority to give away or encumber public property without proper authority from the Governor and Executive Council. See id, 164 N.H. at 795 (recognizing that a private entity is presumed to know the limits of a governmental agency); see also, e.g., RSA 4:40 (2013) (addressing process for disposal of state-owned lands); Sunapee Difference, 164 N.H. at 791-92 (same); cf. Appeal of Lathrop, 122 N.H. 262, 263–64 (1982) (detailing the procedure followed when an agency considers conveying land that the State entrusted to it; said procedure included public hearings and a formal agency recommendation); Thompson v. Carr, 5 N.H. 510, 516 (1831) (discussing that when the legislature has given agencies authority to sell state land, those agencies can make conveyances in their own name). In fact, State v. George C. Strafford & Sons, Inc., 99 N.H. 92 (1954), is directly on point. In that case, the issue was whether the State Highway Commissioner had the authority to grant fee title to certain public lands. Id. at 93. The Court recognized that no person can acquire rights to state-owned lands by estoppel, waiver, or laches when the state agent did not have authority to act. Id. at 97. The Court went on to recognize that despite very broad authority over state-owned lands vested in the Highway Commissioner, he did not have the power to transfer title to the property without proper approval by the Governor and Council. Id. at 98.

Nonetheless, ratification of an agent's unauthorized acts may be implied from the acts or conduct of the principal provided that there are some acts or conduct on his or her part that reasonably tend to show the requisite intention to ratify. 2A C.J.S. Agency § 69 (2013). Ratification is liberally implied as between the principal and third parties

when the agent's acts benefit the principal. Id. "Silence of government officials does not constitute governmental ratification and will not provide a basis for estoppel." Tompkins, 124 N.H. at 469–70.

In support of its Motion for Summary Judgment Portsmouth did not submit any documentation reflecting the Board of Education's rights and powers over the subject property. Portsmouth has submitted Board of Education meeting minutes that demonstrate Portsmouth sought permission from the Board of Education to place a sewer line across the subject property. Those meeting minutes, for November 20, 1967, are sparse on this issue and state only this:

> Request from Department of Public Works, Portsmouth –
>
> Voted: To approve the request of the Department of Public Works of the City of Portsmouth to extend a sewer line across the rear of the property of the Vocational-Technical Institute in Portsmouth.

Portsmouth Mot. Summ. J., Ex. 7 at 8. These minutes make it clear that the New Hampshire Board of Education granted Portsmouth permission to place a sewer line on property that the State owned, and that permission is in writing. These minutes do not indicate what authorization the Board of Education had over the subject property or that the State affirmatively ratified Portsmouth's conduct.

Instead, Portsmouth cites language in the deed the State granted to the tenants in common that succeeded the State in owning the subject property. That deed contains a provision, following the description of the property: "Excepting the rights, if any, of ordinary public utilities servicing said premises." Portsmouth Mot. Summ. J., Ex. 4 at 1. This language is the only evidence Portsmouth has submitted that the State ever impliedly ratified the permission the Board of Education gave for the sewer line. Certainly,

the language contemplates that the subject property was encumbered by public utilities and that the State was aware of and burdened by those utilities; in that, it conveyed the property subject to them. A sewer line is a public utility. See 11 McQuillin Mun. Corp. § 32:69 (3d ed. 2013) (explaining that courts generally indulge the presumption that public sewers and drains are for the public use). The subsequent owners of the property—the tenants in common—recorded a property plan that reflects the sewer line. This evidence clearly demonstrates that the State's successors were aware of the sewer line and incorporated it into the property's description.

However, the State itself was not benefitted by the sewer line; Portsmouth was. In light of the deed language coupled with the knowledge of the State's successors, there is some evidence that the State ratified the Board of Education's sewer authorization even if it was unauthorized at the time made. That evidence is not conclusive, the balance of evidence of ratification at this point in the proceedings creates a genuine issue of material fact: whether the State ratified the Board of Education's permission for a sewage line through the language contained in the deed or other acts. In other words, it is not clear whether the State contemplated the sewer line in using the term "ordinary public utilities servicing said premises" or whether this language referred to some other utilities which serviced the property.[2] It is also possible that this language was boilerplate included in all deeds granted by the State at the time and did not contemplate the

[2] In his Reply to the City's Objection To Boyle's Cross Motion For Summary Judgment, Boyle argues that the sewer line does not service his property and never has. Id. at 6-7. This is a bald assertion with no sworn affidavit submitted in support of this claim. The Court cannot consider such unsupported allegations. See Phillips, 138 N.H. at 243. Moreover, the Court would note that in his Objection and Cross-Motion for Summary Judgment, Boyle did not seek summary judgment on this issue. Rather, he asserted that the matter could not be determined on summary judgment and required a trial on the merits. See Boyle's Objection And Memorandum In Opposition To The City's Motion For Summary Judgment, And Cross Motion For Summary Judgment On the Issues of Drainage, Prescriptive Easement and Easement by Estoppel at 6.

sewer line in this case. The record is silent on these issues. At this juncture, the Court does not have sufficient information to interpret this particular language in the deed to determine whether the State ratified the sewer line.

Further, as discussed above, whether Portsmouth would suffer injustice from the Court's refusal to find an easement requires considering that Portsmouth could exercise its eminent domain authority, take the property, and compensate Boyle for it creates a genuine issue of material fact. The Court must determine whether Boyle received the property at a reduced price due to the sewer line burden. If, in granting the property to its successors, the State sold the property at a discount because the property's fair market value decreased as a result of the sewer burden, and that diminished value passed to subsequent purchasers, then Boyle would have received a discount when he purchased the property. He cannot obtain property at a discount and then also terminate the sewer line right of way: he is not entitled to a windfall. Evaluating whether these circumstances properly fulfill the injustice prong of the easement by estoppel inquiry involves factual findings.

In this way, Portsmouth has failed to sustain its burden of showing it is entitled to judgment as a matter of law on the issue of ratification and genuine issues of material fact regarding injustice preclude summary judgment, so Portsmouth's Motion for Summary Judgment is DENIED on this point.

Finally, Boyle asserts that he was unaware of the sewer line, so, as a bona fide purchaser for value, an easement by estoppel could not be enforced against him. This statement of law is accurate and would prevail if the facts fit Boyle's argument.

The Restatement (Third) of Property section 7.14 states:

> The benefit of an unrecorded servitude, including a servitude created by prescription, implication, estoppel, or oral grant, is subject to extinguishment under an applicable recording act, except that, unless the statute requires a different result, the following servitude benefits are not subject to extinguishment:
>
> . . .
>
> (3) a servitude that would be discovered by reasonable inspection or inquiry.

Portsmouth asserts that the sewer line and its berm were discoverable upon reasonable inspection. Indeed, as will be more fully discussed below, the State's successors in title recorded a plan that clearly reflects the sewer line. Although this plan does not reflect that the sewer line represents an encumbrance on the property, it, combined with the physical structure on the property is sufficient to have put Boyle on constructive notice of the sewer line. Because Boyle had constructive notice, if an easement by estoppel is established at trial, he is not protected by the doctrine discussed in Restatement section 7.14. Because Portsmouth has not shown that it is entitled to judgment as a matter of law based on undisputed fact on the issue of an easement by estoppel, its Motion for Summary Judgment as to Counts I, II, and III is DENIED on that basis.

2. Easement by Prescription

"To establish an easement by prescription, the claimant must prove, by a preponderance of the evidence, twenty years of adverse, continuous and uninterrupted use of the land." Marshall v. Burke, 162 N.H. 560, 564 n.3 (2011).

In this case the prescriptive period did not begin to run until October 21, 1988 when the tenants in common sold the property to MSM because the prescriptive period did not run while the State or the tenants in common owned the property. RSA 539:6 ("[n]o right shall be acquired by such entry or possession, nor by any adverse posses-

sion of such land, as against the state or its grantees.") (emphasis added). This means the earliest the prescriptive period could have ended was on October 21, 2008. Boyle asserts that prior to this date, he gave permission for Portsmouth to continue using the sewer line, which would have ended the prescriptive period.

The burden of proving adverse possession is on the claimant. When use of another's land begins with permission, it cannot become adverse in nature without an explicit repudiation of the earlier permission. Taylor v. Gerrish, 59 N.H. 569, 571 (1880); see In re Estate of Smilie, 373 A.2d 540, 543 (Vt. 1977); Hilley v. Lawrence, 972 A.2d 643, 653 (R.I. 2009) ("When permission is granted for a particular use, a later use of the same kind cannot be characterized as adverse."); 25 AM. JUR. 2D Easements and Licenses § 58 (2013) ("if the original use by the claimant is by permission, it is presumed to so continue; continuance of a use which was originally permissive does not become hostile or adverse by a mere lapse of time. [P]ermissive use means more than acquiescence; it denotes permission in fact, expressly . . . , or a license.").

In Gowen v. Swain, 90 N.H. 383, 386 (1939), rev'd on other grounds by Marshall v. Burke, 162 N.H. 560 (2011), the New Hampshire Supreme Court explained that a presumption arises that a prescriptive use is adverse when the user demonstrates open, notorious, and continuous use, the true owner may rebut that presumption by showing permission. See id. (citations and quotations omitted) ("where an actual, uninterrupted use and enjoyment, as of right, with knowledge of the other party, is shown to have existed a sufficient length of time to create the presumption of a grant, the presumption stands as sufficient proof and establishes the grant, unless it is rebutted by proof that the use and enjoyment were permissive. Notwithstanding this presumption,

however, the character of the use remains a question of fact, unless the proof and inferences are all one way and the burden of proof remains on the defendant.").

In this case, when the Board of Education gave Portsmouth permission, Portsmouth received a license—as the Court will further discuss below. Ordinarily a license is a personal interest and not a property interest, and the license terminates when the servient estate changes hands. Waterville Estates v. Town of Campton, 122 N.H. 506, 509 (1982). However, an executed license, as will be discussed below, is treated in some respects as an interest in land. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2 cmt. g (2000). As an interest in land, it runs with the land. Although New Hampshire law differs from other jurisdictions in the revocability of executed licenses, the transferability of an executed license would still relate to the license in its form as an interest in land. Id. In fact, it makes sense that an executed license would not automatically terminate when the property changes hands. If the licensee expends money in reliance on the permission to use the servient estate, the consent to use that land must necessarily continue until the new landowner revokes the permission and reclaims the land free of the encumbrance.

Thus, when the State conveyed the property to the tenants in common that succeeded the State in owning the subject property, the executed license transferred to the tenants in common. Unless a subsequent owner terminated the license, which neither party presents evidence regarding, then the permission created by the license ran through subsequent owners. In this way, Portsmouth's use of the sewer line over time could not have been adverse because it began and continued with permission.

Thus, Portsmouth could not have an easement by prescription. Portsmouth's Motion for Summary Judgment on this basis is DENIED. Boyle has also moved for summary judgment on the easement issue. Boyle's Motion for Summary Judgment that Portsmouth never had acquired an easement by prescription is GRANTED.

However, the ruling that Portsmouth could not have an easement by prescription but may have an easement by estoppel does not end the inquiry. Portsmouth made additional arguments to rebut Boyle's Counts I, II, and III. Turning to those arguments next, Portsmouth is entitled to partial summary judgment.

3. Trespass

Boyle's first Count asserts that Portsmouth is trespassing by maintaining a sewer line and diverting water onto the property. The Court parses these arguments into two separate claims. One part of Boyle's claims against Portsmouth arises directly out of the existence of the sewer line on his property. The other relates to the indirect effect of the sewer line: flooding, allegedly caused by the sewer line preventing water from properly draining off Boyle's land. Because Portsmouth encased the sewer line in an earthen berm, the line itself does not cause or create flooding, but rather, as Boyle contends, the earthen structure relating to the sewer has caused flooding on his property. The Court will address this argument in its own section. See § I (A)(5) supra. The remainder of this discussion will address whether the sewer line itself constitutes a trespass.

"[A] trespass [is] an intentional invasion of the property of another." Moulton v. Groveton Papers Co., 112 N.H. 50, 54 (1972).

> Under the Restatement (Second) of Torts: 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 v. St. Mary's Bank, 164 N.H. 649, 658 (2013) (citing RESTATEMENT (SECOND) OF TORTS § 158 (1965)). Privileges exist to except certain invasions from the definition of trespass. Id. A license provides one type of privilege. Carleton v. Redington, 21 N.H. 291, 309 (1850) (discussing that after a license is revoked the former licensee becomes a trespasser, by implication, finding that while the license continues, there is no trespass). A licensee and the owner of servient estate enter into a personal agreement, allowing the licensee to enter onto land for some purpose. The agreement is personal and does not create an interest in land, so it need not comply with the statute of frauds. Laffee, 46 N.H. at 507.

Most licenses are revocable. 53 C.J.S. Licenses § 144 (2013). However, when a licensee, relying on permission from the owner of the servient estate, invests substantial resources in improvements related to the license, the license becomes executed. Id. An executed license is revocable, but in some circumstances, the licensor may be required to pay any damages resulting from revocation. Laffee, 46 N.H. at 508.

Laffee presented similar facts to the case at bar. In that case, the owner of the servient estate granted a license to place a well and pipe on his land to supply water to the licensee's house. Id. at 506. When the licensor revoked the license, he cut the pipe. The licensee then brought an action in trespass against the licensor for damage to the pipe. The Court held that the licensor had the right to terminate the license even if the licensee expended money and relied on the license. Id. at 508. The Court also held that the licensee was not entitled to any compensation from the licensor. Id. How-

ever, the Court did not address what remedy the licensee may have had because the action the licensee brought was one in trespass, and the licensee had no property interest in his pipe while the pipe trespassed over another's property—and the pipe was trespassory when the licensor revoked the license. Id. The Court remanded for consideration of whether the licensor acted maliciously or wantonly in cutting the pipe, and owed damages on that basis but suggested without deciding that the licensee had failed to present any evidence on damages. Id.

In this case, it is undisputed that the Board of Education gave Portsmouth permission to erect a sewer line on the subject property.[3] Portsmouth then erected the sewer and earthen berm. There is no doubt that the structure was intended to be permanent. The permission the Board of Education gave Portsmouth was, at a minimum, a license. By expending resources, constructing the sewer, with the intention that it would be permanent, Portsmouth executed the license. Decades later, a new owner of the servient estate now seeks to revoke the executed license. If Portsmouth is forced to move the sewer line, it will, no doubt, result in a substantial cost to the city. Portsmouth asserted that that Boyle cannot revoke the sewer license because it constitutes an easement. Mot. Summ. J. 12 –14. The Court has rejected that argument. Neither party has addressed whether Portsmouth has any remedy if Boyle revokes the sewer license. Without a pending motion on this issue, the Court cannot address Portsmouth's available remedies at this time. Nonetheless, at this time, the Court finds that because the sewer line itself is the product of—at a minimum—a license, it is not an unauthor-

[3] In the context of a license—because it is not an interest in land but a personal interest between persons—the Board of Education acting as an agent of the State, could grant the license because the State could later revoked it.

ized invasion of property. As a result, Portsmouth's Motion for Summary Judgment on Boyle's Count I is GRANTED as to the existence of the sewer line.

4. Taking

The Court considers Boyle's taking argument only as to the existence of the line, not any associated flowage or pooling water. "Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain. It gives rise to an action for compensation. We look to the individual circumstances of each case to determine whether there is an unconstitutional taking." Morrissey v. Town of Lyme, 162 N.H. 777, 783 (2011) (citation and quotation omitted). Governmental action that substantially interferes with, or deprives a person of, the use of his property in whole or in part, may constitute a taking, even if the land itself is not taken. Id. The interference must be sufficiently direct, peculiar, and of a magnitude so as to cause the court to conclude that fairness and justice, as between the State and the citizen, requires that the burden imposed be borne by the public and not by the individual alone. Id. Boyle alternatively asserts a temporary takings argument. A temporary taking requires the same elements be shown as a permanent taking, but the plaintiff need only show temporary deprivation of use. Id. at 124.

Where the sewer line arose by executed license over State property, there was no taking of private property for public purpose because the property was initially public land. When Portsmouth executed the license, the State still owned the property. Upon conveying the property, the State excepted from the conveyance any public rights of way. Even if the right of way was created without authorization and the State never ratified it, the conveyance language put subsequent owners on notice of potentially imper-

fect title. Indeed, then the State's successor in title recorded a plan reflecting the sewer line crossing the subject property. In this way, no subsequent owner could assert they were unaware of the line.[4] Based on the state of the record at the Registry of Deeds, Boyle was placed on constructive notice that there was a sewer line across the property when he purchased it. That line was there either as a result of an easement of record ratified when the State sold the land or as a result of an executed license. If it was the later, then Boyle could have revoked the license at the time he purchased the property. He did not do that. Instead, once he realized that there was a question about the legal basis for the sewer line, he claims he granted Portsmouth continued permission to keep the line until the case was resolved. Accordingly, the existence of the sewer line itself does not constitute a permanent or temporary taking, and Portsmouth's Motion for Summary Judgment is GRANTED in part on Counts II and III. To the extent Boyle asserts Portsmouth has taken his property by flooding it, the Court addresses that argument next.

5. Pooling Water/Flowage

---

[4] In New Hampshire, every deed or other conveyance of real estate that affects title to any interest in real estate must be recorded in the registry of deeds for the county in which the real estate lies and will not be effective as against bona fide purchasers for value until it is recorded. RSA 477:3-a.

> New Hampshire is a "race-notice" jurisdiction. Therefore, a person or entity with a claim to real estate, such as the plaintiff, must record its interest in order to prevail over a bona fide purchaser for value. . . . The recording requirement "provide[s] notice to the public of a conveyance of or encumbrance on real estate" and "serve[s] to protect both those who already have interests in land and those who would like to acquire such interests." Accordingly, in order . . . to claim the protection of the recording statute as bona fide purchasers, [litigants] must have lacked notice—actual, record, or inquiry—of the . . . prior interest.

C F Investments, Inc. v. Option One Mortg. Corp., 163 N.H. 313, (2012) (citations and quotations omitted). "[P]roperly recorded instruments are deemed to give notice to prospective purchasers of any outstanding claims against property". Id.

In addition to Boyle's other arguments, he asserts that the sewer line's earthen berm causes water to pool on his property. Boyle also asserts that because this pooled water has persisted for so many seasons, New Hampshire Department of Environmental Services ("DES") and Portsmouth administrative agencies now deem approximately five acres of Boyle's property a wetland. Boyle asserts that this classification results in his being unable to make any economic use of this portion of his property. Boyle also claims that Portsmouth uses his property to store water runoff from neighboring areas and that this flooding constitutes a trespass, a permanent taking, and a temporary taking. Addressing these contentions in turn, there exist genuine issues of material fact regarding the trespass claim, and part of Boyle's taking argument is not yet ripe.

a. *Trespass due to water*

A trespass, as discussed above, involves unprivileged entry onto the land of another. Although the Court has already decided the sewage line itself is privileged because it arose as part of an executed license and Boyle had at least record notice of it, Boyle's additional argument—that the water flowage constitutes a trespass in and of itself—raises genuine issues of material fact. Whether Portsmouth also had permission to drain waters onto Boyle's property, and indeed whether Portsmouth actually did drain any water—or rather, as Portsmouth argues, whether Boyle's property always was a wetland—turns on the scope of the license Portsmouth received from the Board of Education.

The scope of an interest in land is a question of fact. See, e.g., Flanagan v. Prudhomme, 138 N.H. 561, 574 (1994) (discussing that scope of an easement is a question of fact). Portsmouth has provided no evidence tending to establish that the sewer line

license explicitly included a right to pool water. Nonetheless, the parties at the time may well have recognized that by installing a sewer line where there was flowing water, that would cause the water to back up and accumulate to a degree on the property. Therefore, the permission to install the sewer line (whether it is characterized as an easement or license) could by implication include the right to store some water on the adjacent property.

Alternatively, however, Portsmouth submitted historic land surveys and newspaper articles discussing water pooling in the area of Portsmouth that Boyle now owns to show that the contested five acres of Boyle's property has always been a wetland. To rebut this evidence, Boyle has submitted the affidavit—albeit, unsworn—of an expert who would testify that historic land surveys were notoriously sloppy and that he does not agree that Boyle's property has always been a wetland. Gove Aff. This evidence demonstrates a dispute of fact that is material because it directly relates to the scope of the license Portsmouth received and whether Portsmouth was (1) entitled to pool water on Boyle's property and (2) whether Portsmouth did pool water, or if it was the result of natural forces. As such, Portsmouth's Motion for Summary Judgment on Boyle's Count I with respect to flowage is DENIED. Boyle has also moved for summary judgment on this flowage issue in his own favor; that motion is also DENIED.

b. *Taking due to water*

Turning to Boyle's takings argument, for there to be a taking, the plaintiff must be deprived use of his property to a substantial and especially onerous degree. Soucy v. State, 127 N.H. 451, 454 (1985). The remainder of Boyle's takings argument is two-part. Boyle asserts that by draining surrounding areas and thereby using his property

for water disposal and storage, Portsmouth has effected a taking. Resolution of this issue hinges on the disputed factual question about how and why the water has pooled on Boyle's property. In other words, whether there was a taking to store water depends on whether Portsmouth is responsible for the accumulation of water or that is the result of natural forces. Even if Portsmouth is responsible for the water, there is an issue about the scope of the easement or license.

Boyle's second argument is that Portsmouth's activity storing water on his property has caused a wetland to develop and that Portsmouth's regulation of his land prohibits him from realizing an economically beneficial use of the property due to the regulations. Considering these arguments out of order, the second portion of Boyle's takings argument is not yet ripe.

Ripeness relates to the degree to which the issues in a case are based on actual facts and are capable of being adjudicated. In re City of Concord, 161 N.H. 344, 354 (2011); Appeal of State Employees' Ass'n of N.H., 142 N.H. 874, 878 (1998) ("Appeal of SEA"). Many jurisdictions evaluate ripeness based on the fitness of an issue for judicial determination and the hardship to the parties if the court declines to consider it. Appeal of SEA, 142 N.H. at 878. The New Hampshire Supreme Court has affirmatively cited this two-prong test although it has not adopted it. Id.

In Count V, Boyle requested that Portsmouth apply the Zoning Ordinance in effect in 2009 because he apparently believes it is more lenient regarding wetlands regulation than the version Portsmouth adopted in 2010. Since filing suit, Boyle has submitted his site plan application to Portsmouth for determination, and the ZBA applied the 2009 Ordinance. Portsmouth Obj. 10. If Portsmouth has issued a final decision on the

merits of Boyle's site plan application, the parties have not made the Court aware of it. The Court therefore assumes there has not yet been a final determination on the merits.

Because Portsmouth is applying the Ordinance that Boyle requested, the hardship to him if this Court declines to consider his regulatory taking at this time is not great because he has already won a partial victory and has not yet suffered any harm because Portsmouth has not yet declined his application. Further, on August 20, 2013, this Court approved a consent decree between DES and Boyle.[5] Some of the relevant terms of the Decree permit Boyle to apply to dredge and fill the contested property for development and parking purposes. Although Boyle's application has not yet been approved, the Consent Decree requires that DES review the application "in good faith and with the intent of granting [it]". Consent Decree ¶ 9. In this way, if Portsmouth approves Boyle's site plan, he no longer has a regulatory takings argument because DES—the only other relevant entity to enforce wetlands regulations—has already indicated its intention to attempt to permit Boyle's development plans.

Without a determination by Portsmouth regarding how it will characterize and then treat the inundated portions Boyle's property, the facts have not yet developed to the point where the Court can evaluate a regulatory taking argument. See Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010) (explaining that decision based upon, or involving the construction, interpretation or application of, a zoning ordinance, are final, for purposes of ripeness for appellate review, when made). As such, due to the absence of a record and no undue hardship to Boyle, the Court finds that Boyle's regulato-

[5] In referencing this Consent Decree, the Court takes judicial notice of DES v. Boyle, No. 218-2012-CV-015, which was previously consolidated with this case. DES v. Boyle has been closed pursuant to the terms of the consent decree.

ry taking argument is not yet ripe. Thus, Boyle's Count II and III are dismissed as unripe as to Boyle's regulatory taking argument.

However, the first part of Boyle's takings claim asserts that Portsmouth's use of his property for water flowage and storage constitutes a taking raises genuine issues of material fact. Whether Portsmouth in fact created the condition on Boyle's property is one main issue of fact that the parties dispute, as is the reasonableness of that condition—even if Portsmouth caused it. Accordingly, these matters preclude summary judgment, and Portsmouth's Motion for Summary Judgment as to Boyle's Counts II and III is GRANTED in part and DENIED in part consistent with this analysis.

B. Immunity

Portsmouth argues that it is entitled to discretionary function immunity with respect to Counts IV, VI, and VII of Boyle's complaint. Accordingly, the Court addresses the immunity argument with respect to all of these claims together here. Portsmouth cites several cases in support of its discretionary function immunity argument.

Discretionary function immunity applies to governmental decisions that involve "weighing alternatives and making choices with respect to public policy". In re N.H. Dep't of Transp., 159 N.H. 72, 74 (2009).

> Discretionary function immunity is premised upon the notion that certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern. [I]t seeks to limit judicial interference with legislative and executive decision-making, because to accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations.
>
> [Municipalities] are immune from liability for conduct that involves the exercise or performance or the failure to exercise or perform a discretionary executive or planning function . . . , or official acting within the scope of his

> office or employment. In resolving discretionary immunity questions, [courts] distinguish between planning or discretionary functions and functions that are purely ministerial. When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.

Id. Another way to consider discretionary function immunity is that a municipality is immune for the decision of a plan itself, but a plaintiff can challenge the implementation of the plan. Id. at 75.

In this case, Boyle categorizes his claims as relating to Portsmouth's implementation of a drainage maintenance plan. However, what Boyle actually asserts is that Portsmouth did not maintain the drainage culverts associated with the sewerage berm. As a result of Portsmouth's inaction, Boyle alleges the culverts have failed to drain water from the property as they were designed. It is the second part of this claim that the Court must evaluate; what duty or plan obligated Portsmouth to maintain the culverts in the first place. If, for example, Portsmouth made a budgetary decision that it could not afford to regularly maintain the drainage systems on Boyle's property and that it would manage water flow in another way, Portsmouth would be entitled to immunity for that decision.

However, Portsmouth has not asserted that it has a plan for drainage. Rather, it has stated only: "The decision of when and how to repair and maintain a sewer line inherently involves competing economic, social, and political factors such as the prudent allocation of municipal resources." Mot. Summ. J. at 15 (citation and quotation omitted). Without a plan, the structure and form of which would be entitled to immunity, Portsmouth is not entitled to immunity. "In the absence of such a plan or policy, the City's

alleged failure to maintain the drainage systems does not . . . qualify as a discretionary function entitled to immunity." Tarbell Adm'r, Inc. v. City of Concord, 157 N.H. 678, 688 (2008). Since Portsmouth has not presented evidence of a plan or policy with respect to this issue, there is no genuine issue of material fact.

Additionally, municipalities are not immune for the intentional torts of their employees. See RSA 541-B (abrogating tort immunity for State activities); City of Dover v. Imperial Cas. & Indem. Co., 133 N.H. 109, 115 (1990) (explaining that municipal immunity would exist for intentional torts where a governmental official reasonably believed they were acting lawfully). Nuisance, trespass, and takings are intentional torts. Accordingly, as a matter of law Portsmouth is not entitled to immunity for its alleged failure to maintain the drainage culverts along the earthen berm that houses the sewage line if the water was there as a result of a trespass, nuisance, or taking. Tarbell Adm'r, Inc., 166 N.H. at 688 (citation and quotation omitted) ("As a result of the constitutional implications of [trespass and takings] claims, [w]hile a municipality enjoys immunity for its exercise of discretion and judgment in the development of a ... plan, such immunity does not protect it from liability for the creation of a nuisance or actual trespass.")

Nonetheless, Portsmouth is entitled to immunity for its decision to house the sewage line in an earthen berm because that decision necessarily required planning and design decisions that are of the kind protected by discretionary function immunity. Gardner v. City of Concord, 137 N.H. 253, 258 (1993) ("It is possible for workers to implement a faulty design or plan, for which no tort liability should result."). Thus, Boyle cannot challenge the number, location, or character of the culverts that drain water associated with the berm in which the sewer line is housed. Portsmouth's Motion for

Summary Judgment on the basis of immunity is GRANTED in part and DENIED in part consistent with this opinion. Because Portsmouth is not entitled to immunity, the Court must consider Portsmouth's Motion for Summary Judgment on the merits of the remaining claims.

C. Count IV

Boyle's next Count asserts a nuisance. The nuisance claim is based on water flowage and pooling. Portsmouth argues that the wetlands on Boyle's property were a preexisting condition when he purchased the property

Nuisance is a substantial and unreasonable interference with the use and enjoyment of land. Morrissey v. Town of Lyme, 162 N.H. 777, 781 (2011). Even if Portsmouth was privileged to erect a sewer on Boyle's property, it could still be liable for a nuisance based on water flowage and pooling if it is unreasonable. Tarbell Adm'r, Inc., 166 N.H. at 688.

As discussed above, whether the scope of Portsmouth's sewer line easement or license permits such pooling and whether Portsmouth in fact caused such pooling raises genuine issues of material fact. In addition, even assuming Portsmouth caused the pooling and its easement or license did not permit such pooling, the pooling might not constitute a nuisance if it is reasonable. Accordingly, these issues raise genuine issues of material fact that preclude summary judgment. Portsmouth's Motion for Summary Judgment is DENIED as to Count IV.

D. Count VI

In Count VI, Boyle alleges Portsmouth's accumulation of water on his property overburdens the easement—assuming for the sake of argument that there is an easement. The scope of an easement turns on reasonable use of the right. See e.g., Flanagan, 138 N.H. at 574; Crocker v. College of Advanced Science, 110 N.H. 384, 388 (1970). As discussed above, the scope is a question of fact. As such, genuine issues of material fact, preclude summary judgment. Portsmouth's Motion for Summary Judgment is DENIED.

E. Count VII

In Count VII, Boyle alleges Portsmouth's accumulation of water on his property constitutes negligence. Although Portsmouth asserts it is entitled to discretionary function immunity on this Count, the Court has previously determined Portsmouth is not entitled to immunity on any of the Counts because it has failed to show there was a plan of maintenance of the culverts that Boyle asserts have clogged, causing flooding on his property. Because Portsmouth has no immunity, the Court must address Boyle's negligence claim under a summary judgment standard.

To prevail on a negligence claim, the plaintiff must show: (1) the defendants owed him a duty; (2) the defendants breached this duty; and (3) the breach proximately caused his injuries. Macie v. Helms, 156 N.H. 222, 224 (2007). Whether Portsmouth owed Boyle a duty and whether it breached that duty turns on the nature and scope of the interest Portsmouth had in the berm associated with the sewer. As discussed at length above, the answers to these issues involves disputes genuine issues of material fact. As such, Portsmouth's Motion for Summary Judgment is DENIED on this basis.

F. Count VIII

Boyle's final Count asks this Court to enforce a settlement agreement that Boyle claims he reached in principle with Portsmouth. Although Boyle cites some authority for this proposition, he himself admits that even if at one time there was a tentative agreement—which Portsmouth's counsel disputes—Portsmouth revoked its offer. Where there is no dispute that there was no meeting of the minds and there is no final executed settlement agreement, the Court declines to enforce one. Portsmouth's Motion for Summary Judgment on Count VIII is GRANTED.

## II. Comcast as Defendant

Comcast joins Portsmouth's Motion for Summary Judgment and essentially asserts that any injury Boyle has suffered as a result of a drainage culvert on its property is Portsmouth's fault not Comcast's. Comcast states that Portsmouth owed Boyle and Comcast alike the obligation of maintaining the drainage culverts in such a manner as to avoid injuring their property. Comcast makes no other substantive arguments. For this reason, the Court's rulings on Portsmouth's Motion for Summary Judgment partially apply to Comcast's joinder to this motion. However, because Comcast bears an independent obligation to maintain its property in such a way as to prevent injury to neighboring properties via nuisance or trespass, it is immaterial to Comcast's independent obligation that Portsmouth has a license that caused this Court to partially grant Portsmouth's motion for summary judgment. See RESTATEMENT (SECOND) OF TORTS § 158 (1965). Thus, Comcast's Motion for Summary Judgment is DENIED in whole as to Counts I, II, III, IV, and VII. Count V is moot, and Counts VI and VIII do not apply to Comcast. With respect to Count VI, Comcast does not have an easement or other interest over Boyle's property and does not assert that it does. Similarly, Count VIII asks

this Court to enforce a settlement agreement between Boyle and Portsmouth. Although the Court ruled there is no agreement, Comcast was not a party to those negotiations anyway, so Count VIII is unrelated and inapplicable to Comcast.

## III. Conclusion

In conclusion, Portsmouth's Motion for Summary Judgment is GRANTED in part and DENIED in part as to Counts I, II, and III. It is DENIED as to Counts I, II, and III on the claim that Portsmouth has an easement by prescription because Portsmouth has not demonstrated it is entitled to judgment as a matter of law on this basis. It is also DENIED as to Counts I, II, and III because whether there is an easement by estoppel presents genuine issues of material fact. For these same reasons, Boyle's Cross-Motion for Summary Judgment is DENIED on the issue of whether Portsmouth had an easement by estoppel and GRANTED on the issue of whether Portsmouth had an easement by prescription.

Portsmouth's Motion for Summary Judgment on Count I is GRANTED to the extent that the existing sewer line and berm over the subject property does not constitute a trespass but DENIED with respect to whether the water pooling and flowage constitutes a trespass. The issue of flowage and whether the permission that existed for the line extended to flowage—indeed whether Portsmouth caused such flowage at all—presents genuine issues of material fact. Portsmouth's Motion for Summary Judgment on Counts II and III is GRANTED as to the sewer line only but not the water flowage. Similarly, because genuine issues of material fact exist, Boyle's Cross-Motion for Summary Judgment on the issue of flowage is DENIED.

Boyle's regulatory taking claims, Counts II and III, are not ripe with respect to the claim that Portsmouth caused a wetland to develop on his property that makes it unable to be developed. With respect to Boyle's taking claim based on Portsmouth's alleged storage of water on Boyle's property, Portsmouth's Motion for Summary Judgment on Counts II and III must be DENIED because these claims present genuine issues of material fact.

Portsmouth's Motion for Summary Judgment on Counts IV, VI, and VII is DENIED because these Counts raise genuine issues of material fact and Portsmouth is not entitled to immunity on any of them. Counts V and IX are MOOT.

Comcast's Motion for Summary Judgment is DENIED as to Counts I, II, III, IV, and VII. Count V is moot, and Counts VI and VIII do not apply to Comcast.

So ORDERED.

Date: 10/30/2013

N. William Delker
Presiding Justice

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**Charles P. Bauer, ESQ**
**Gallagher Callahan & Gartrell PC**
**PO Box 1415**
**214 North Main Street**
**Concord NH 03302-1415**



Case Name: **James Boyle, Ind., et al vs. City of Portsmouth**
Case Number: **218-2010-EQ-00100** ***218-2010-CV-01205***

Enclosed please find a copy of the court's order of February 27, 2014 relative to:

Motions to Reconsider Summary Judgment

February 27, 2014

Raymond W. Taylor
Clerk of Court

(504)

C: John Kuzinevich; Bernard W. Pelech, ESQ; Donald J. Perrault, ESQ

# The State of New Hampshire
# Superior Court

## Rockingham, SS.

James Boyle, Individually and as Trustee, 150 Greenleaf Avenue Realty Trust, 150 Greenleaf Avenue, Portsmouth New Hampshire

v.

City of Portsmouth

2010-EQ-100

James Boyle, Individually and as Trustee 150 Greenleaf Avenue Realty Trust

v.

Comcast of Maine / New Hampshire, Inc.

2010-CV-1205

**ORDER ON MOTIONS TO RECONSIDER SUMMARY JUDGMENT**

On October 30, 2013, this Court issued a 33-page order on motions for summary judgment (hereinafter "October 30 Order"). The Court met with the parties in chambers after issuing the order. The parties agreed to a briefing scheduling on motions to reconsider. Both Portsmouth and Boyle filed various pleadings requesting that the Court reconsider certain aspects of its order. The Court held a hearing on the motions to reconsider on January 23, 2014.

The present order addresses the arguments made by the parties through their various pleadings and at the hearing. The Court has reconsidered and/or clarified parts of its October 30 Order. The Court will not repeat the facts set forth in the October 30



167

Order except as necessary to address the issues presented here. To the extent that the present Order is not inconsistent with the Court's October 30 Order, that Order remains in effect. Any request to reconsider those portions of the October 30 Order not addressed by the present order is denied.

I. Easement By Ratification

In the October 30 Order, this Court ruled that the State Board of Education did not have authority to grant Portsmouth an easement because only the State through Governor and Council could alienate state-owned land. Nonetheless, the Court determined that there was a genuine issue of material fact as to whether Portsmouth had obtained an easement over Boyle's land by means of ratification. October 30 Order at 12-13. More specifically, the Court noted that the language in the deed granted by the State, through Governor and Council, provided that the property would be subject to any "ordinary public utilities servicing said premises." Id. at 12. The Court ruled that this language presented a genuine issue whether it was intended to refer to the sewer line at issue in this litigation. Boyle has requested that the Court reconsider this ruling. He contends that there is no dispute in this case that the sewer line does not service Boyle's property and never has. At the hearing on the motion to reconsider, he pointed to Exhibits 3 and 5 of Suzanne Woodland's Affidavit in support of Portsmouth's motion for summary judgment and Exhibit F in support of his own motion for summary judgment. He highlights that this undisputed evidence demonstrates that the vocational school and property was not serviced by the sewer line at issue in this case. In fact, the plans demonstrate that the property is actually connected to a different branch of the

City's sewer system. He also points out that the City has presented no evidence that any of the parties intended the sewer line to be covered by this language. Portsmouth does not dispute the fact that the sewer line at issue in this case does not, and never has, serviced the property. Rather, Portsmouth counters that there is other evidence that the State ratified the Board of Education's actions and thereby granted an easement for the sewer line by filing a plan depicting a sewer line on the property when it deeded the property to a private owner. See Portsmouth Mot. Reconsider at 7-8.

The Court overlooked the evidence Boyle cited in his motion for reconsideration demonstrating that the property was not serviced by the sewer line at issue. As a result, the Court finds that there is no evidence demonstrating that the State ratified the Board of Education's actions in allowing Portsmouth to install the sewer line. The 1983 Plan, even if it could be construed to depict the sewer line at issue in this case,[1] does not create an easement by ratification. See Soukup v. Brooks, 159 N.H. 9, 13-14 (2009).

The Court finds that Portsmouth cannot establish at trial that it obtained an easement to use the sewer line. The undisputed evidence is that the language "ordinary public utilities servicing said premises" in the deed from the State of New Hampshire does not refer to the sewer line at issue in this case. Therefore, if the State Board of Education intended to grant Portsmouth an easement, the State did not ratify that decision through the deed. Portsmouth has presented no evidence to establish that the State otherwise ratified the granting of an easement to Portsmouth. Because Portsmouth has not pointed to a writing signed by the grantor – here the State of New

[1] Boyle raises significant question about whether the 1983 Plan even depicts the sewer line at all. See Boyle Obj. to Portsmouth Mot. Reconsider ¶ 4; Morris Depo. 52–58. Nonetheless, the Court must construe the 1983 Plan and all reasonable inferences in the light most favorable to Portsmouth at this stage of the proceedings.

Hampshire through Governor and Council – Portsmouth did not obtain an interest in land in the form of an easement. See RSA 477:15. For the reasons stated in the October 30 Order and this Order, Portsmouth cannot establish at trial that it obtained an easement by estoppel, ratification, or prescription. The Court, therefore, reconsiders the October 30 Order and grants Boyle's motion for summary judgment on this point.

II. Revocable Versus Irrevocable License.

As explained in the October 30 Order, there is no dispute in this case that the Board of Education had the authority to grant Portsmouth a license to use the property for the sewer line. A license is not an interest in land and therefore can be granted without the formalities of a writing signed by the grantor. See RSA 477:15 (noting that any interest in land without a writing signed by the grantor is "an estate at will only"); Waterville Estates Ass'n v. Town of Campton, 122 N.H. 506, 508-09 (1982) (discussing the distinction between an easement and a license).

The parties dispute whether Portsmouth obtained a revocable or irrevocable license when it expended money to erect the sewer line. Portsmouth has asked the Court to reconsider its October 30 Order finding that the license was revocable. Portsmouth contends that when a licensee expends money in reliance on the license, the license becomes an executed license. Portsmouth concludes that once the license is executed it is irrevocable. It further argues that the Board of Education did not exceed its authority because an irrevocable license is not an interest in land. Boyle counters that the Court correctly found the license was revocable.

In the context of the case at bar, the issue of whether the license is revocable or irrevocable is purely an issue of law. The Court denies Portsmouth's motion to reconsider its October 30 Order finding the license in this case was revocable. The Vermont Supreme Court long ago recognized that the distinction between a revocable and irrevocable license was a troublesome area of law: "The adjudications upon this subject are numerous and discordant. Taken in their aggregate they cannot be reconciled; and if an attempt should be made to arrange them into harmonious groups . . . some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification." Clark v. Glidden, 15 A. 358, 360-61 (Vt. 1888) (quotation omitted). Because the law on this issue is far from clear and because this ruling has significant impact on the outcome of this litigation, the Court will address the arguments made by the parties in their pleadings and at the hearing on the motion to reconsider.

This Court is bound by New Hampshire case law as established by the New Hampshire Supreme Court's published decisions. Therefore, this Order will address the parties' arguments with reference to New Hampshire case law, relying only on case law from other jurisdictions as necessary and where it appears to be consistent with New Hampshire law.

There is no disagreement between the parties that the determination of whether a license is revocable hinges on whether the license is executed or unexecuted. The parties, however, disagree about the distinction between an executed and unexecuted license. The City contends that a license is executed whenever the licensee expends money in reliance on the license. Boyle disagrees and contends that the expenditure of

money is irrelevant to the issue of whether the license is revocable. He posits, rather, that execution of a license is temporal: a license is executed with respect to the past exercise of the license rights. With respect to any future license rights, he argues the license is unexecuted.

It is helpful to understand both sides' arguments by placing them in the context of the case at bar. The City argues that by spending a considerable sum of money and erecting a sewer line and berm in reliance on the license granted by the Board of Education, the license became executed. As a result, it is irrevocable. Boyle counters that the license is only executed up to the point in time when the license was revoked. As of November 12, 2013, Boyle formally revoked permission to have the sewer line on his property. Boyle concedes that he cannot obtain rent or damages for trespass or any other remedy based on the existence of the sewer line from 1967 through November 12, 2013,[2] because Portsmouth's license rights have been executed and cannot be revoked retroactively. Any rights that Portsmouth had in the license from November 12, 2013 into the future were unexecuted, and therefore revocable, according to Boyle's interpretation of the law.

As with the issue of revocable and irrevocable licenses, the law with respect to the meaning of executed and unexecuted licenses is not a model of clarity. After review of the case law, this Court reconsiders its original finding that Portsmouth had a fully

[2] In the context of the motions for summary judgment, Boyle argued that he had revoked the license in 2008. In the October 30 Order, this Court found that by granting permission for the sewer line to remain on his property pending the outcome of the litigation, there was no trespass. Boyle has not presented evidence that the Court has overlooked or misapprehended on this point. Based on Boyle's November 12, 2013 revocation, however, there is now no genuine issue of material fact regarding revocation. Portsmouth is trespassing on Boyle's property by leaving the sewer line in place unless the license at issue in this case is irrevocable.

executed license. In order to understand the Court's reconsideration on this point it is useful to review the development of the law.

Among the oldest New Hampshire cases on this point is Woodbury v. Parsley, 7 N.H. 237 (1834). In that case, the plaintiff and the defendant erected a dam on the plaintiff's property by mutual agreement in 1827. Id. at 239-40. There was no dispute in the case that this agreement to erect the dam was a parol license because it was based on an oral agreement between the parties. Id. at 239. The Supreme Court observed, "The license is a privilege, to be exercised upon the land, and not an interest in the land." Id. The plaintiff changed his mind in 1830 and insisted that the defendant remove the dam. Id. Although the defendant appears to have eventually removed the dam, the plaintiff sued as a result of the delay. Id. at 240. The Court instructed the jury to determine whether defendant's delay in removing the dam caused damage, which would indicate the delay was unreasonable and therefore unprivileged by the existence of the license. Id.

The Court addressed the issue of whether the parol license was revocable at the will of the plaintiff. Id. The Court noted that the defendant had incurred the cost of erecting dam. Id. The Court held:

> The license had been executed and acted upon. From the nature of the case, the defendant had a right to maintain the dam until he had had a reasonable time to dispose of the right to the water; and until such reasonable time had elapsed the license was irrevocable. Certainly the plaintiff could not revoke it without tendering to the defendant the expenses that had been incurred in the project. The law on this point is well settled.

Id. (emphasis added).

The next important case on this point is Ameriscoggin Bridge v. Bragg, 11 N.H. 102 (1840). In that case, a corporation was formed to build a toll bridge on land the defendant owned. Id. at 103. The plaintiff built the bridge and then, when it began to decay, invested additional resources in repairing the bridge. Id. at 104. After the repaired bridge was operational the defendant claimed he had a right to revoke the license and collect tolls from the bridge. Id. at 105. The defendant argued that because the agreement to erect the bridge was not in writing, the Statute of Frauds had not been satisfied, and therefore he had a right to revoke the license at will. Id. at 108-09. The New Hampshire Supreme Court acknowledged that "[t]he distinction between a privilege, or easement, carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is . . . quite subtle, and that it is difficult in some of the cases to discern a substantial difference between them." Id. at 108. Nonetheless, the Court held that the license became irrevocable "after it has once been acted upon. Such a license is a direct encouragement to expend money; and it is said it would be against conscience to revoke it as soon as the expenditure begins to be beneficial." Id. In other words, the Court held that "when it is once executed it is either irrevocable while the bridge continues; or, if revocable at all, can only be so on full compensation for all expenditures made and damage occasioned by such revocation." Id. at 109 (emphasis added). The Court concluded that the license only terminated once the bridge decayed. Id.; see also Sampson v. Burnside, 13 N.H. 264, 266 (1842) ("where the license becomes executed by an expenditure incurred, it is either irrevocable, or cannot be revoked without remuneration, on the

ground that a revocation under such circumstances is fraudulent, and unconscionable.").

Thus, at the time of Woodbury and Ameriscoggin Bridge, the meaning of an executed parol license was consistent with Portsmouth's position in the case at bar. A sea change in the law occurred in Houston v. Laffee, 46 N.H. 505 (1866). This Court discussed Houston at length in its prior Order. See October 30 Order at 7-8, 18-19. The Court need not reiterate that analysis here. What remains clear in the aftermath of Houston and its progeny is that the doctrine of irrevocable license established in Woodbury and Ameriscoggin was no longer good law in this state. See Batchelder v. Hibbard, 58 N.H. 269, 270 (1878).

Portsmouth maintains that Houston did not change the law with respect to irrevocable licenses to the extent the license was executed. See Portsmouth Mem. at 8-10 (filed Jan. 23, 2014). In support of its position, Portsmouth cites the following language in Houston: a "license is in all cases revocable so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned." Id. at 9 (quoting Houston, 46 N.H. at 507 (emphasis added by Portsmouth)). Contrary to Portsmouth's position, the New Hampshire Supreme Court in Houston changed the very concept of an executed parol license. The expenditure of money in reliance on the license was no longer what made the license executed. In Houston and its progeny a license was unexecuted "so far as any future enjoyment of the easement is concerned." Id. at 507. A closer examination of some of the post-Houston cases illuminates this distinction.

In Batchelder v. Hibbard, much like in Woodbury, the plaintiffs erected and maintained a dam on the defendant's property pursuant to a parol license. 58 N.H. at 269. The defendant revoked the license to keep the dam on his property. Id. The plaintiffs argued that the license was irrevocable because they had expended money to erect and maintain the dam. Id. The New Hampshire Supreme Court rejected this position, holding: "The more recent decisions in this state, and the weight of authority, are to the effect that a mere license of this character is always revocable at the will of the licenser, so far as any further enjoyment of the privilege is concerned; for otherwise, such parol license would acquire the force of a conveyance of a permanent character in real estate." Id. at 269-70 (emphasis added). Importantly, in Batchelder, the Court did not address "what remedy, if any, on account of their expenditures, on the faith of the defendant's license, the plaintiffs have in equity." Id. at 270.[3]

Similarly, in Hallett v. Parker, 68 N.H. 598, 600 (1896), the Court held that the landowner was entitled to revoke a parol license even though the licensee had constructed an aqueduct across the licensor's property. The Court reasoned that an irrevocable license would amount to "a permanent easement in real estate" if the Court adopted the licensee's position. Id.; see also Taylor v. Garrish, 59 N.H. 569, 570 (1880) (landowner who gave neighbor permission to use a spring if the neighbor improved the spring and laid pipes to her property granted only a revocable license even though the neighbor had relied on the owner's representations and made the improvements); Blaisdell v. Portsmouth, Great Falls & Conway R.R., 51 N.H. 483, 485 (1871) (written license allowing defendant to build a railroad was revoked when the land and railroad were transferred to new owners, even though the railroad had actually been constructed

[3] This is an issue this Court will address in more detail below.

at the time of the lawsuit); Dodge v. McClintock, 47 N.H. 383, 386–87 (1867) ("We had occasion to consider this question in Houston v. Laffee, 46 N.H. 505, and to examine the authorities, and we there came to the conclusion that a parol license to do a certain act or series or succession of acts on the land of another, is in all cases revocable, so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned, at the will of the licensor, even where the licensee has made an expenditure of money upon the land of the licensor upon the faith of such license.") (emphasis added).

Although these cases are all old, Portsmouth has cited no authority to indicate that they are no longer good law in this State. Rather, Portsmouth contends that they represent an "arcane" view of property rights that come down from an era long since past. In Portsmouth's view the parties in these cases were caught between the Scylla and Charybdis of the procedural anomalies of law and equity, a peril which has vanished in the modern practice. Contrary to this position, these cases are not merely an arcane remnant of a bygone era. Because of the immutable and finite nature of real property, stability in property rights and property law is critical in a system governed by the rule of law. As the case at bar illustrates, disputes about property rights often do not arise for decades or even generations after the transfer that gave rise to the law suit before the Court. The cornerstone of a system in which sellers and buyers have confidence in the rights they grant and obtain respectively, is stability in the law over time. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544 (1979) (discussing the value of stability in legal rules).

The only "modern" cases to address the distinction between a license and easement do not address the issues presented in the case at bar. Waterville Estates discussed the distinction between a license and an easement. 122 N.H. at 508-09. The Court observed that even though Waterville Estates did not obtain an actual easement, the Court would treat homeowner's rights as such for purposes of a tax assessment. Id. at 509-10. This case therefore does not address the issues of revocability. It only stands for the unremarkable proposition that the particular rights created by the condominium documents at issue in that case were more valuable for tax purposes than a license revocable at will. See Locke Lake Colony Ass'n v. Town of Barnstead, 126 N.H. 136, 141-42 (1985).

Ouellette v. Butler, 125 N.H. 184 (1984), also does not support the conclusion that the New Hampshire Supreme Court has departed from Houston v. Laffee and its progeny. In fact, if anything, that case reinforces the holding of Houston. In Ouellette, the defendants negotiated the purchase a home. Id. at 186. The defendants also thought they were purchasing a paved parking area and walkway, which had been constructed by the seller's husband. Id. In fact, the parking lot and walkway were constructed on property owned by the seller's deceased brother-in-law, Wilfred Butler. Id. Prior to the closing the defendants learned that the parking lot and walkway were not owned by the seller. Id. The trustee of the actual owner of the parking lot and walkway property agreed to grant the defendants a "license" to use the land for an indefinite period to time. Id. at 186. The document was signed by the trustee, witnessed, and sealed. Id. It was not, however, filed with the registry of deeds. Id. The later owners of the land underlying the parking lot and walkway sued the

defendants seeking to revoke the "license," preventing the defendants from further using the parking lot and walkway. Id.

The New Hampshire Supreme Court found that the writing conveying to the defendants an interest in land met all of the formalities of a writing required by the Statute of Frauds. Id. at 188. Moreover, the Court noted that the original grantor intended to convey rights equivalent to an easement and not a mere revocable license. Id. at 189. Under these circumstances, the Court held that it would interpret the meaning of the writing to convey an easement to the defendants despite the grantor's use of the word "license" in the written document. Id.

Importantly, consistent with Houston v. Laffee and its progeny, the New Hampshire Supreme Court continued to recognize that an irrevocable license would be tantamount to the rights associated with an easement. See Ouellette, 125 N.H. at 185-86 ("We are asked to determine whether an instrument which on its face gives the defendants a 'license' to use the plaintiffs' land, may under the circumstances of this case be deemed to create an irrevocable interest; *i.e.*, an easement.") (emphasis added). Nothing in Ouellette suggests that the Court was prepared to recognize an irrevocable license in the absence of a document satisfying the Statute of Frauds. In fact, the language of the case leads to the opposite conclusion. Id. at 188 ("The cases cited by the plaintiffs in their argument for revocability all emphasize the danger in finding that an irrevocable interest in land could be conveyed *orally,* or by a writing which failed to comply with the statutory requirements for such a conveyance; this would permit circumvention of the Statute of Frauds. . . . Here there is no such

danger.") (emphasis in original) (citing Blaisdell, 51 N.H. at 485; Houston, 46 N.H. at 507-08).

In its various pleadings on the motions to reconsider, Portsmouth has cited a number of cases from other jurisdictions which recognize the legal distinctions between the property rights associated with an irrevocable license and those attendant to an easement. Portsmouth Mem. Law Support Reconsideration at 2-3, 9-10. The distinctions are certainly consistent with the general conceptual differences between a license and an easement. The New Hampshire Supreme Court, however, has determined that the differences are not sufficiently great to recognize an irrevocable license. In other words, despite some limitations in the rights associated with an irrevocable license, since Houston v. Laffee the New Hampshire Supreme Court has treated an irrevocable license as the functional equivalent of a permanent interest in land, *i.e.* an easement. See Ouellette, 125 N.H. at 185-86.

As noted in the Court's October 30 Order, in the case at bar the State Board of Education, which granted Portsmouth the original authority to build the sewer line, had no authority to permanently encumber state-owned land through an easement. As noted in this Order, there is no writing issued by the owner of the property—the State of New Hampshire acting through Governor and Council—which satisfies the Statute of Frauds. Accordingly, Portsmouth cannot have acquired an irrevocable license because that would amount to granting Portsmouth an easement without meeting the requirements of the Statute of Frauds. As the Court observed in its October 30 Order, this is no mere formality. As a matter of public policy, the Legislature has determined that state agencies cannot be granted the power to sell or encumber publicly owned

lands without approval of the Governor and Executive Council. Portsmouth, which is presumably a sophisticated entity represented by legal counsel, was aware it had not met the prerequisites for obtaining a permanent interest in state-owned property.

Similarly, no exception to the Statute of Frauds applies. In some circumstances, a grantee can enforce an oral promise regarding land in the absence of a writing that satisfies the Statute of Frauds to prevent the grantor from perpetrating a fraud when the grantee has partly performed pursuant to the oral promise and in reliance on it. See Sawin v. Carr, 114 N.H. 462, 466 (1974) (recognizing the existence of the exception in New Hampshire); Whitney v. Hay, 181 U.S. 77, 90 (1901) (summarizing the part performance exception to the statute of frauds: "if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute [of frauds] in defense"); see also 10 WILLISTON ON CONTRACTS § 28:3 (4th ed. 2013). However, the circumstances in which part performance will excuse application of the statute of frauds are not present here.

Primarily, the City of Portsmouth—who is the party seeking to avoid application of the Statute of Frauds—did not act with the knowledge and consent of the owner of the land. Rather, here the State acted through its agent, the Board of Education. As discussed above, the State, with consent of Governor and Council, is the only entity with authority to alienate state-owned property in New Hampshire. See 73 AM. JUR. 2D Statute of Frauds § 303 (2014) ("The princip[al], not an agent, must accept the acts of partial performance in order for the exception to the Statute of Frauds to apply.").

Therefore, the State must have been aware of Portsmouth's reliance on the grant of permission to erect the sewer line. The record contains no evidence demonstrating that the State knew Portsmouth was acting to its detriment in constructing the disputed sewer line. As such, the part performance exception to the Statute of Frauds does not apply to obviate the need for a formal writing in this case.

Absent a writing that satisfied the Statute of Frauds, Portsmouth only obtained a revocable license to use the vocational school land to erect a sewer line. Boyle has now revoked that permission, as became his right when he purchased the property.

## III. Compensation for Revocation of a License

In the October 30 Order, the Court left open the question of whether Portsmouth would be entitled to compensation if Boyle revoked the license. At that time the Court found that Boyle had not formally revoked the license. Moreover, neither party had addressed the issue. Since the October 30 Order, Boyle has formally revoked the license. Boyle moved to amend the complaint to add this issue, which the Court has granted by separate order today. Further, Portsmouth has moved to add an affirmative defense seeking compensation for revocation of the license. Both parties have also briefed the issue of whether Portsmouth is entitled to any compensation. Now the issue is ripe for consideration.

Portsmouth argues that it is entitled to compensation based on Boyle's revocation of the license because the City expended considerable money to construct the sewer line in reliance on the grant of permission from the State Board of Education. Boyle counters that Portsmouth is not entitled to any compensation because it knew

that the City had not obtained permanent easement rights from the State of New Hampshire pursuant to the process established by law. In other words, Boyle contends that whatever reliance Portsmouth may have placed in the State Board of Education's grant of permission was not reasonable. Portsmouth knew or should have known that it was building the sewer line based only on a license that was revocable at will.

As with the issue of a revocable versus an irrevocable license, the case law on this issue from other jurisdictions is far from settled. See generally Annotation, Right of Licensee for Use of Real Property to Compensation for Expenditure upon Revocation of License, 120 A.L.R. 549 (1939) (gathering cases with cumulative supplement through 2014). Woodbury and Ameriscoggin Bridge both recognized that a licensee is entitled to compensation for sums expended by the licensee in reliance on the license. Those cases are no longer good law. This Court has found no case law from New Hampshire since Houston v. Laffee addressing this issue. In fact, as noted above, the Court specifically refused to consider the issue in Batchelder v. Hibbard, 58 N.H. at 270. The New Hampshire Supreme Court in Batchelder v. Hibbard recognized that the question of compensation was a matter of equity.

The equities of the present case do not justify compensating Portsmouth for its expenditures.[4] The City built the sewer line knowing, or it should have known, that it had not obtained a permanent easement from the State. There is no evidence in the record that building the sewer line on the vocational school property benefitted the

[44] In the October 30 Order, this Court noted that it had qualms about the equities of the application of the law as established in Houston v. Laffee. See October 30 Order at 8 fn.1. Upon closer examination of the issue in the context of the motions to reconsider, the Court has revisited this issue as well. While the strict application of Houston v. Laffee rule might be inequitable in some cases, the Court does not believe it is in this case. Since the decision of whether to grant compensation upon revocation of a license is a matter of equity, the Court's concerns about the rule of law established in Houtson v. Laffee are ameliorated.

owner of that property in any way. As noted above, the sewer line did not service that property and there is no evidence that it enhanced the property's value. There is also no evidence that Portsmouth paid the State for the privilege to build or keep the sewer line on the property. Rather the City of Portsmouth alone has benefited by being able to keep the sewer line on property it did not own for the more than 45 years.

This case is indistinguishable from Mayor and City Council of Baltimore v. Brack, 3 A.2d 471 (Md. 1939). In that case, Brack purchased a parcel of property in 1936. Id. at 472. Brack knew that the City had placed a water main across the property when he bought it. Id. The water main had been constructed with the permission of the prior owner of the land. Id. The City never obtained a formal easement or other written grant of authority to keep the water main on the property. Id. Thus, the evidence showed that that City obtained no more than an oral license to have the water line on the property. Id. at 473. Nor had the City paid the prior owner any compensation for installing the water main on the property. Id. at 472.

Brack filed suit to have the City remove the water line because he wanted to develop the property, and the City's utility interfered with that use of the land. Id. at 473. The Maryland Court of Appeals found that the City had obtained only a revocable license to maintain the water line on the property. Id. at 472-73, 475. Further, the court held that the City was not entitled to any compensation from Brack when he revoked the license. Id. at 475. He was not the original licensor and did nothing to encourage the City to build or maintain the water line on the property. The court noted:

> There is nothing inequitable in that point of view, because the City did not install the works referred to upon any false representations or unfulfilled promises, but at its own risk, knowing precisely the Laceys' title and the extent and revocability of the permission granted. It follows, therefore,

> from what has been said, that the City is not entitled to compensation for expenditures made upon the premises, but on the contrary, is liable to the appellee for reasonable compensation for the use of the easement, pending such time as may be necessary to effectuate either the removal of the utilities from the property, or the acquisition of the easements or property by condemnation proceedings.

Id.

The court concluded that the City must either remove the sewer line at its own expense or exercise its rights of eminent domain to acquire easement rights to the property. Id. at 475-76. In the meantime, the City was required to pay Brack for the right to continue to use his property because the water main was trespassing on land that the City did not own. Id. The court held that this resolution satisfied the interests of justice because the City could not simply discontinue and immediately remove the water main because it had an obligation to continue to provide public utilities to the residents of the City. Id. at 475.

IV. Boyle's Status of *Bona Fide* Purchaser.

In his motions to reconsider, Boyle has urged this Court to reconsider its finding that there is no genuine issue of material fact regarding whether he was a *bona fide* purchaser of the property without knowledge of the sewer line. He points to a number of facts in the record, which taken in the light most favorable to him, give rise to a question about whether he had actual or constructive knowledge of the sewer line when he brought the property. In light of the Court's rulings in the motion to reconsider this issue is now moot. Even if the Court were to assume that Boyle had actual knowledge of the sewer line on the property, he would still be entitled to revoke the license. See Bruchhausen v. Walton, 111 N.H. 98, 104 (1971) (recognizing that even where the

property owner saw a path and fence on property he obtained, he was not equitably estopped from revoking license because there was no prescriptive easement, no deed granting permanent rights to the path and fence, no easement by necessity, or other basis to create permanent easement rights); see also Brack, 3 A.2d at 472.

## V. Conclusion

Based on the record before the Court, this Court holds that there is no genuine issue of material fact that Portsmouth had acquired only a revocable license to install and maintain the sewer line on the property at issue in this case. As of November 12, 2013, Boyle unequivocally revoked the license. As a result, the sewer line is trespassing on Boyle's property. Portsmouth must either remove the sewer line or obtain easement rights by eminent domain within a reasonable time.[5] Portsmouth is not entitled to compensation for removing the line. Rather, Portsmouth must provide reasonable compensation to Boyle from November 12, 2013 until the line is removed or easement rights are acquired. The value of damages for trespass is a matter that is subject to jury trial. Accordingly, the pending trial shall include the issue of trespass damages from November 12, 2013 forward as a result of Portsmouth maintaining of the sewer line and berm on Boyle's property.

Boyle has remaining claims with respect to whether accumulated water on the property also constitutes trespass. As the Court articulated in its October 30 Order, there are genuine issues of material fact about whether the accumulated water is a result of the sewer line or is naturally occurring. Even if the accumulated water is the

[5] Boyle has requested that Portsmouth be barred from exercising its rights to eminent domain. Boyle has not developed any argument with respect to that claim. Accordingly, the Court will not consider it.

result of the installation of the sewer line, there is a factual issue about whether the pooling of water was within the scope of the license granted by the State Board of Education. These matters must be resolved at trial. Finally, if the pooling water was the result of trespass, there remains a genuine issue of fact as to damages.

SO ORDERED.

2/27/2014
Date

N. William Delker
Presiding Justice

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**File Copy**

Case Name: **James Boyle, et al v Comcast of Maine/New Hampshire, Inc., et al**
Case Number: **218-2010-EQ-00100** ***218-2010-CV-01205***

Enclosed please find a copy of the court's order of December 22, 2016 relative to:

Omnibus Order on the Parties' Motions

December 22, 2016

Maureen F. O'Neil
Clerk of Court

(504)

C: John Kuzinevich; Bernard W. Pelech, ESQ; Charles P. Bauer, ESQ; Donald J. Perrault, ESQ; Roy W. Tilsley, ESQ; Michael A. Klass, ESQ; Christopher G. Aslin

# The State of New Hampshire
## Superior Court

Rockingham S.S.

JAMES BOYLE, INDIVIDUALLY
AND AS TRUSTEE OF THE 150 GREENLEAF AVENUE REALTY TRUST

V.

CITY OF PORTSMOUTH, et. al.

NO. 218-2010-EQ-00100

**OMNIBUS ORDER ON THE PARTIES' MOTIONS**

The plaintiff, James Boyle, proceeding individually and as Trustee of the 150 Greenleaf Avenue Realty Trust (collectively "Boyle") commenced the instant action against the City of Portsmouth (the "City") and Comcast of Maine/New Hampshire, Inc. (the "defendants"), alleging, inter alia, trespass, permanent taking by the City, temporary and substantial taking by the City, nuisance, and negligence. The matter is scheduled for a two-week jury trial commencing January 23, 2017. On October 24, 2016, the City filed five motions in limine and a motion to dismiss. Boyle objects and moves to exclude the City's two experts.[1] The Court held a hearing on December 14, 2016, during which

[1] Boyle sought to withdraw the motion at the hearing, to which the defendants objected. "Admissions by a party which have been abandoned may be used in evidence as an admission against interest, but they are not conclusive against the pleader." Valadez v. Barrera, 647 S.W.2d 377, 382 (Tex. App. 1983). "The admissions are, however, evidence that the jury is entitled to consider in deciding the issue, and the probative value of the admissions against interest is a question of fact for the jury." Id. "Any admission contained in an abandoned pleading ceases to be binding on the pleader in the sense that he is prevented from disproving facts alleged therein." Id. Thus, when an admission constitutes "compromise of the claim or a confession of judgment," Milliken v. Dartmouth-Hitchock Clinic, 154 N.H. 662, 670 (2006), it may only be "offered in evidence against, or used to impeach, the party on whose behalf it was filed", Valadez, 647 S.W.2d at 382–83. Subject to these considerations, Boyle's withdrawal is **GRANTED** —the Court will not rule on the merits of the motion, but the contents of the motion may be used by the defendants to the extent permitted by law. Compare United States v. Belculfine, 527 F.2d 941, 944 (1st



255

the City made an oral motion to compel the production of Boyle's tax returns. After consideration of the pleadings, the arguments made at the hearing, and the applicable law, the Court finds and rules as follows.

Facts

The following facts are derived from Boyle's amended complaint, unless otherwise noted. Boyle is the Trustee of the 150 Greenleaf Avenue Realty Trust, which owns property at 150 Greenleaf Avenue, Portsmouth, New Hampshire (the "Property"). Am. Compl. ¶ 1. The Property is approximately 14 acres of land. Id. ¶ 4. Boyle purchased the Property on December 31, 2003, intending to renovate it and convert it into a Toyota dealership. Id. ¶ 3.

When Boyle purchased the property, he observed several manmade ditches with water flowing through them, but he was unable to observe a large berm on the back of the property due to severe overgrowth. Id. ¶ 5. In 2004, Boyle learned that the City had a sewer line crossing the property, which was housed within the berm. Id. ¶ 6. There was no recorded easement for the sewer line, nor was any easement referenced in Boyle's deed. Id. ¶ 7. Once Boyle discovered the sewer line and culverts, "he began to maintain them . . . [by] cutting back overgrown brush and removing debris" from the surrounding area. Id. ¶ 11. Due to the failure of maintenance over the years, an area near the rear of the property, in the area of the berm, has become flooded. Id. ¶ 16.

The City promised Boyle to repair the sewer line, but has not done so. Id. ¶ 16–17. Because of the condition of the sewer line, the pipes become backed up and flood

---

Cir. 1975) (holding the trial court is "given broad discretion to relieve parties from the consequences of judicial admission in appropriate cases.") with Leone v. Leone, 161 N.H. 566, 568 (2011) ("The trial court has broad discretion in managing the proceedings before it.") (quotation omitted).

when it rains. Id. ¶ 19. Additionally, road salt used in the winter months has rotted some of the pipes. Id.

Analysis

The City seeks to exclude the expert opinions of Robert P. LaPort and Francis X. O'Brien, as well as any other evidence concerning the actual or rental fair market value of any portion of the Property and the amount of any lost profits resulting from the City's alleged conduct in this case. Additionally, the City moves to dismiss. Because the City's motion to dismiss is intertwined with its motions in limine, the Court addresses the evidentiary motions first.

A. **Motions in Limine**

The City has filed five motions in limine, arguing: (#1) Boyle is prohibited from introducing evidence of the fair market value of the wetlands because he failed to supplement his expert reports by the August 1 deadline; (#2) Boyle is prohibited from introducing evidence of the fair market rental value of the wetlands because he failed to supplement his expert reports by the August 1 deadline; (#3) Boyle is prohibited from introducing evidence of the fair market rental value of the sewer line because he failed to supplement his expert reports by the August 1 deadline; (#4) Boyle is prohibited from supplementing his expert reports because he missed the August 1 deadline and supplementation at this junction would be prejudicial; and (#5) that Boyle should be barred from introducing "evidence and claims of alleged lost profit damages." Because the City's arguments concerning motions in limine #1 – #3 are premised on the fact that Boyle failed to provide it with LaPort's supplemental expert report on or before the

August 1, 2016, discovery deadline, the Court first addresses the City's motion to exclude LaPort's supplemental report.

1. *Motion in Limine #4—Supplementing LaPort's Expert Report*

The City argues that permitting Boyle to supplement LaPort's report would prejudice the City because it would require the City's experts to review the report prior to trial, as well as require the City to re-depose LaPort. This, in the City's view, would be gravely prejudicial given the close proximity to trial and the voluminous discovery already conducted by both parties. Boyle argues that the non-disclosure was due to the fact that a similar property was being sold after the discovery deadline, and that he wanted to ensure that their comparable sales information was the most accurate and up-to-date. According to Boyle, the sale of this property, which amounted to "the perfect comparable," "occurred about six weeks ago." Id. at 11:10:55–11:11:31. Boyle "knew it was coming down the pipe," but because the sale did not occur until after the expert deadline, Boyle thought it appropriate not to inform the City of this fact. Id. 11:11:25–11:11:35.

The Court has broad discretion in matters relating to discovery. See id.; Kukesh v. Mutrie, 168 N.H. 76, 80 (2015); New Hampshire Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 431 (2009) ("The admissibility of evidence is generally within the discretion of the trial court, and we will uphold its rulings unless the exercise of its discretion is unsustainable."). Under New Hampshire law, "[a] party is entitled to disclosure of an opposing party's experts, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions . . . A party's failure to supply this information should result in the exclusion of expert opinion testimony unless good cause

is shown to excuse the failure to disclose." J & M Lumber and Constr. Co., Inc. v. Smyjunas, 161 N.H. 714, 723 (2011) (quotation and citation omitted) (alteration in original). "The policy of disclosure of expert witnesses rests upon the premise that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." Laramie v. Stone, 160 N.H. 419, 426 (2010) (quotation omitted).

The Court agrees with the City that non-disclosure by Boyle, and the attempted supplementation with trial closely looming, would result in actual prejudice. See Barking Dog, Ltd. v. Citizens Ins. Co. of America, 164 N.H. 80, 86–87 (2012) ("In the context of a discovery violation, actual prejudice exists if the defense has been impeded to a significant degree by the nondisclosure.") (quotation omitted). This case has been pending before the Court for some time, and the parties have conducted thorough discovery on all issues. Permitting Boyle to supplement at this juncture would result in unnecessary additional discovery on the City's part. Contrary to Boyle's assertion, the supplemental report is not as simple as adding one more comparable sale. Comparable property sales in an analysis of property value are not fungible. Rather, they require careful analysis to evaluate whether the sales price is truly an accurate assessment of fair market value. With trial less than one month away, requiring the City to invest the new comparable, issue a revised expert report of its own, and engage in further depositions of both LaPort and its own expert would be extremely unfair.

Moreover, the Court is not persuaded by Boyle's argument that he had good cause for the non-disclosure. See J & M Lumber, 161 N.H. at 723. First, Boyle did not inform the City of the impending comparable sale, nor did he attempt to provide the City

with more recent data on or before the August 1 discovery deadline. Moreover, the City indicated that LaPort, during his December 10 deposition, indicated that he had not been asked by Boyle to supplement his original report. Hr'g 10:26:03–10:26:53. Given that the sale took place over a month before the hearing, and weeks before LaPort's deposition, no good cause exists to explain why LaPort was not asked to conduct a supplemental report by Boyle or why the City was not informed of the sale. See J & M Lumber, 161 N.H. at 723. Accordingly, LaPort may not supplement his 2013 report nor may he testify testimony as to any opinions not disclosed in accordance with the applicable discovery deadlines.

Having concluded that LaPort may not supplement his report, the Court must now address the admissibility of LaPort's timely report and the opinions expressed therein. In 2013, LaPort created an expert report that was provided to the City. The report, in essence, hypothesizes the Property's market value—assuming that a car dealership was built and used on the Property. The report further "assumes all court-stipulated conditions outlined in the Court [Consent] Decree will be complied with . . . ." LaPort Letter of Transmittal at 2. The report makes no concrete determinations, but instead outlines the Property's value while assuming multiple conditions are met. For example, the report assumes that Boyle would be able—notwithstanding the issues present in the instant action—to secure the necessary permitting and licensing to build a car dealership from the City, State, and the relevant car manufacturer. Moreover, the report "disregards the fact that recent zoning by-law changes preclude the property's proposed development." LaPort Report at 14. Similarly, the report assumes that the wetlands on the Property are manmade and not naturally occurring. The report

concludes that the Property's highest and best use would be the continuation of the car dealership. Id. at 53.

Under New Hampshire law, "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." N.H. R. Ev. 104(b). Thus, Boyle bears the burden at trial to establish sufficient facts that would render LaPort's 2013 report relevant and admissible. Cf. Allen v. State, 110 N.H. 42, 48 (1969) (holding evidence was properly admitted where later proof "could lead to an inference" of fact at issue); Herbert v. Boston & Maine R.R., 90 N.H. 324, 329 (1939) ("In other words, certain evidence which is superficially relevant may not be the basis for a finding by the jury and is not fit to be submitted to them."). Such necessary facts would include: (1) that the wetlands on the Property were man-made as opposed to naturally occurring; (2) that Boyle would be able to acquire a franchisee license from a car manufacturer; and (3) that Boyle would be able to acquire all necessary permits from the State and City to erect his dealership. See N.H. R. Ev. 104(b) Reporter's Notes ("Rule 104(b) permits the trial court to admit evidence upon the condition that the offering party will at a later time produce further evidence of another fact which is necessary to establish the relevancy of the evidence being offered."). These factors are indispensable to the relevance of LaPort's opinion. If the wetlands are naturally occurring then the City's actions have not precluded Boyle from developing the land. Rather, the natural condition of the land poses that impediment. Second, without a dealer franchise for the location Boyle, building a car dealership on the property is nonsensical. Finally, if regulatory impediments other than the existence of the wetlands

and sewer line prevent the development of the property, the City would not be responsible for the damages upon which LaPort's report is premised.

Because LaPort's opinion is premised on all three of these conditions, his opinion as to value is only valid if these conditions can be met. It is unclear from the motion, objection, and hearing whether Boyle has evidence to establish all three of the presumptions upon which LaPort's opinion is grounded. Without evidence that the hypotheticals posed to LaPort are true, the opinion cannot be considered by the jury. See generally Canney v. Travelers Ins. Co., 110 N.H. 304 (1970). The plaintiff, however, must be given an opportunity to establish at trial the basis for the hypothetical assumptions that underlie the expert's opinion. Id. at 308. Based on the record at this juncture, the Court cannot rule as a matter of law that LaPort's opinion will be inadmissible.

Consistent with the foregoing, the Court **GRANTS IN PART** the City's Motion in Limine #4 as it pertains to the supplementing of LaPort's report. The Court defers ruling on the admissibility of the opinions expressed in LaPort's 2013 report. Before the plaintiff may introduce LaPort's opinions at trial he must establish a *prima facie* case that the hypothetical conditions upon which LaPort's opinion is premised can be established. Doe v. Lucy, 83 N.H. 160, 164-65 (1927) ("The practice in such cases is well settled. The court may rule upon the admissibility of the evidence as the case stands when the evidence is offered, or the ruling may be based upon the offer of proof, de bene esse, or it may be postponed until the other evidence has been introduced.") (quotation omitted).

2. *Motions in Limine #1, #2, and #3—Evidence of Fair Market Value and Fair Market Rental Value*

The City argues that Boyle should be prohibited from: (#1) submitting evidence of the fair market value of the wetlands; (#2) submitting evidence of the fair market rental value of the wetlands; and (#3) submitting evidence of the fair market rental value of the sewer line. According to the City, because Boyle does not have a recent expert opinion as to the fair market value of the Property, Boyle's claims for damages fail as a matter of law.

"It is well established that expert testimony is required 'where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.'" Wong v. Eckberg, 148 N.H. 369, 373 (2002) (quoting Lemay v. Burnett, 139 N.H. 633, 634, 660 A.2d 1116 (1995)); see N.H. R. Ev. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.). When a witness is not testifying as an expert, the witness is permitted to testify to as to their opinion when such opinion is "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the testimony or the determination of a fact in issue." N.H. R. Ev. 701.

It is the City's position that expert opinion is required when determining fair market value. The City cites no case law in New Hampshire or elsewhere supporting this proposition. Under New Hampshire Law, fair market value is "defined as 'the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy taking into account all

considerations that fairly might be brought forward and reasonably given substantial weight in such bargaining.'" Edgcomb Steel of New England, Inc. v. State, 100 N.H. 480, 487 (1957); see Daly v. State, 150 N.H. 277, 279 (2003); Opinion of the Justices, 131 N.H. 504, 510 (1989). Valuation of property is not an exact science, and the City has put forth no case law supporting the contrary. Cf. N.H. R. Ev. 702. In fact the definition of fair market value is in harmony with New Hampshire's evidentiary rule relating to lay opinion testimony. Compare Edgcomb Steel, 100 N.H. at 487 ("[T]he price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy taking into account all considerations that fairly might be brought forward and reasonably given substantial weight in such bargaining.") (quotation omitted) with N.H. R. Ev. 701 ("(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the testimony or the determination of a fact in issue.").

Moreover, New Hampshire courts have generally permitted property owners to testify as to their opinions on the value of their own property. See Joslin v. Pine River Development Corp., 116 N.H. 814, 818 (1976) ("We find no error in the trial court's admission of the plaintiffs' opinions as to the value of their property."); Roy v. State, 104 N.H. 513, 515–17(1963) (holding the trial court did not err in permitting a property owner to testify "as to market value and damage by the taking."); cf. Transmedia Restaurant Co., Inc. v. Devereaux, 149 N.H. 454, 460–61 (2003) (holding "opinion evidence on the value of the restaurant equipment offered by its lay purchaser and owner was properly admitted".). The opinions rendered on this issue can be explored "by careful cross-examination," because any inconsistency goes "to the weight of his testimony rather

than its admissibility." Roy, 104 N.H. at 517. This is because "New Hampshire does not require that damages be calculated with mathematical certainty, and the method used to compute damages need not be more than an approximation." Transmedia Restaurant, 149 N.H. at 461 (quoting Maloof v. Bonser, 145 N.H. 650, 655 (2000)).

In this case, the Court finds that Boyle, as the owner of a parcel of land, should be permitted to testify as to the valuation of his property. Mathematical certainty is not needed for this calculation, see Transmedia Restaurant, 149 N.H. at 461, and any issue the City has with Boyle's testimony can be explored on cross-examination or rebutted via competing testimony or evidence, see Roy, 104 N.H. at 517. Moreover, Boyle indicated at the hearing that he presently leases ground-space to AT&T, and that he would testify to the current rate at which he leases the space. Hr'g 10:50:36–10:51:30. This, according to Boyle, would provide the basis for the rental rate of the present space being used by the City. Id. at 10:51:10–10:51:32. It is thus permissible for Boyle, as owner of the property, to testify as to his opinion of the fair market value of the Property, both in terms of rental value and market value for sales purposes.

Accordingly, the Court **DENIES** the City's motions in limine #1 (to exclude evidence of fair market value of the wetlands), #2 (to exclude the fair market rental value of the wetlands), and #3 (to exclude the fair market rental value of the sewer line). LaPort may testify as to these matters to the extent that his 2013 report contained opinions thereon subject to the limitations set forth above. Furthermore, Boyle, as the property owner, may render opinions concerning these matters.

3. *Evidence of Lost Profits*

In its Motion in Limine #5, the City seeks to exclude "evidence and claims of alleged lost profit damages." City's Mot. #5, at 1. Specifically, the City argues: (1) that lost profit damages are not available remedies in inverse condemnation and trespass actions; (2) that Boyle failed to specifically plead lost profit damages in his complaint; (3) that the lost profit damages are too speculative in this case because they are based on "losses for a non-existent business on portions of wetland that the City has voted to take by eminent domain"; (4) that Boyle cannot recover lost rental profits on behalf of the Realty Trust because he has not produced an expert to opine on the rental value of a new auto dealership or the rental value of the existence of the sewer line; and (5) that Boyle cannot recover lost profits on behalf of Minato Auto, LLC, because Minato is not a named party, and Boyle cannot seek lost "profits for a business to be formed" because such damages would be speculative. The Court will address each argument, in turn.

The City first argues that Boyle cannot recover lost profit damages in connection with his claims for inverse condemnation and/or trespass. City's Mot. #5, at 2–6. In response, Boyle concedes that lost profit damages are unavailable with respect to the inverse condemnation claims. Pls.' Consol. Obj. 4. Thus, with respect to this argument, the sole issue before the Court is whether lost profit damages are available in the context of a trespass claim.[2] The City bases its argument on the general proposition that, for trespass claims, "the measure of damages is 'the fair rental value of the

[2] Boyle argues that lost profit damages are available not only in connection with his claim of trespass, but also with respect to his claims for nuisance and negligence. Because the City's motion makes no argument with respect to the availability of these damages under the nuisance and negligence claims, the Court need not address whether those damages are actually available to Boyle. Cf. Dunlop v. Daigle, 122 N.H. 295, 300-01 (1982) (recognizing a claim for lost rental profits is available even in cases of a temporary, abatable nuisance).

property for the period [the Property] was taken plus any actual damage sustained as a result of that taking.'" City's Mot. #5, at 6 (quoting Capitol Plumbing & Heating Supply Co. v. State, 116 N.H. 513, 515 (1976)). The Court does not find that this general principle mandates a conclusion that lost profits are never an available remedy for trespass. While neither party cites specific case law on this issue, Court finds instructive the reasoning set forth by the United States Court of Appeal for the Tenth Circuit:

> Special damages depend on particular circumstances of the case; general damages, on the other hand, are the ordinary result of the conduct alleged. 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1310 (3d ed. 2005). Thus, general damages for trespass would be injury to the land itself. Restatement (Second) of Torts § 929. Lost profits, by contrast, are special damages subject to the pleading requirement of Rule 9(g) because they depend on circumstances unrelated to the trespass, i.e. Weyerhaeuser's plans for the property. See Quinones v. Penn. Gen. Ins. Co., 804 F.2d 1167, 1170 (10th Cir. 1986).

Weyerhaeuser Co. v. Brantley, 510 F.3d 1256, 1266-67 (10th Cir. 2007); see also 325 Goodrich Ave., LLC v. Southwest Water Co., 891 F. Supp. 2d 1364 (M.D. Ga. 2012) (acknowledging the availability of damages for lost profits where trespass resulted in the destruction of business's inventory).

Although it is clear that lost profits will not result from every trespass, there are certainly situations in which a trespass will result not only in injury to the land, but also in harm to business operations conducted on that land. At the December 14, 2016, hearing, the parties and the Court discussed a theoretical case in which a property was burdened with a trespassing Winnebago parked thereon. Extending that example for purposes of this issue, if the trespassing Winnebago was parked across the driveway to a business located on the property, thereby preventing customers from accessing the

business, the trespass would necessarily result in lost profits to the business owner. Damages relating to the rental value of the piece of driveway occupied by the Winnebago, or any physical damage to the driveway caused by the Winnebago's presence thereon, would not sufficiently remedy the harm done. Thus, in the absence of contrary case law, the Court finds that, generally, lost profit damages are an available remedy in the context of a trespass claim.[3]

Having concluded that lost profit damages theoretically may be available in connection with Boyle's trespass claim, the Court now turns to the City's argument that Boyle "failed to specifically plead such damages in his complaint." City's Mot. #5, at 7. The City argues that under Superior Court Rule 28A, Boyle was required "to identify in detail all special damages claimed," and that the complaint is insufficient in this regard. Id. (quotation omitted). The City concedes that Boyle's complaint contained allegations "that the sewer line and wetland areas have a value 'for expansion purposes of approximately $1,000,000 per acre.'" Id. at 8 (quoting Compl. ¶ 43). In response, Boyle argues that the complaint contained information that "the affected property was intended for development," thereby putting the City on notice of the lost profits claim. Pls.' Consol. Obj. 3. Boyle further argues that the City received a report from O'Brien, the

[3] The City briefly sets forth a policy argument for finding that lost profits should not be permitted under Boyle's trespass claim. Specifically, the City's argument appears to be that the lost profits at issue were not reasonably foreseeable at the time of the "underlying trespass" (which, based on the logic of the City's argument, apparently means the initial placement of the sewer line). See City's Mot. #5, at 6. However, this argument ignores the factual dispute present in this case as to when the actual trespass occurred. Under one theory of this case, the City had a revocable license to maintain a sewer line on the Property, and therefore did not commit a trespass until it failed to remove the sewer line once that license was revoked sometime after Boyle's 2003 purchase of the Property. Moreover, there is a substantial factual dispute as to the nature of the wetlands on the Property, including questions concerning whether the wetlands existed prior to the placement of the sewer line, whether the scope of the wetlands increased after Boyle purchased the Property, and whether the wetlands were created as a necessary consequence of the placement of the sewer line, or were instead the result of improperly maintained culverts that deteriorated and/or failed sometime after the sewer line was installed. Accordingly, the Court cannot conclude that lost profits should be unavailable in this case as a matter of law.

plaintiff's expert on lost profits, "two years ago," and has therefore been "aware of the claim for substantial time." Id. Boyle avers that there has been no surprise or prejudice to the City, but that he "will move to technically amend to include the words 'lost profits' if required." Id.

This action was first initiated in 2010, and the lengthy and complicated procedural posture renders it fairly unique. As an initial matter, the Court notes that at the time this action was initiated, current Superior Court Rule 28A had not yet been adopted. Rather, the applicable rule at that time was Superior Court Rule 63(B). Under either rule, however, Boyle would be required to provide the City with "a list specifying in detail all special damages claimed." See Super. Ct. R. 28(A)(d) (2013); see also Daly v. Cambridge Mut. Fire Ins. Co., Belknap County Superior Ct., No. 09-C-253 (June 23, 2011) (Order, O'Neill, J.)(quoting New Hampshire Superior Court Rule 63(B), the predecessor to Rule 28A(d): "Any party claiming damages shall furnish to opposing counsel, within six months after entry of the action, a list specifying in detail all special damages claimed; copies of bills incurred thereafter shall be furnished on receipt."). The purpose of requiring a plaintiff to specify claimed special damages is to avoid unfair surprise at trial. See Diehl v. Cty. of Allegheny, Civil Action No. 06-0150, 2009 U.S. Dist. LEXIS 57771, at *4 (W.D. Pa. July 7, 2009) ("[F]ailure to plead special damages does not preclude a special damages award as long a defendant had adequate notice, as the purpose of the rule is to prevent the defendant from being surprised by the extent and character of the plaintiff's claim.") (quotation and citation omitted). Where the nature of the damages suffered by a plaintiff have changed during the pendency of litigation, it may be appropriate to permit the plaintiff to add those damages to the

pending claim. See generally Nat'l Marine Underwriters v. McCormack, 138 N.H. 6, 8 (1993) ("We allow liberal amendment of pleadings unless the changes surprise the opposite party, introduce an entirely new cause of action, or call for substantially different evidence.") (quotation omitted).

It is clear from a reading of the initial complaint that, although Boyle intended to further develop the Property in some fashion, he did not, at the time of entry of this action, have concrete plans to build a second dealership on the property. See Compl. ¶ 39 ("[A]pproximately 5 acres . . . have been rendered useless to Mr. Boyle and cannot be developed."); id. at ¶ 43 ("The land is extremely valuable commercial acreage on the Route 1 By-Pass. Parcels in the vicinity are valued at $500,000 - $800,000 per acre. The property holds a higher value to Mr. Boyle for expansion purposes of approximately $1,000,000 per acre."); id. ¶ 40 ("Mr. Boyle would like to develop the land, possibly for a second car dealership which will make reasonable economic use of the land."). However, the Court acknowledges that, over the course of a six-year period of time, Boyle's plans for the Property may well have changed and/or solidified. Boyle's complaint made it clear that, at the time of filing this action, he was already considering the addition of a second dealership to the Property. Moreover, he produced an expert report concerning lost profits more than two years ago. Importantly, the City does not assert that it is surprised by Boyle's lost profits claim. Rather, the City argues that, technically, lost profits "must be specifically pled" because "the factual circumstances that gave rise to [Boyle's] claims for trespass . . . began in 1967 and have no factual nexus to his plans for the speculative development of the property." City's Mot. #5, at 7. Thus, the City's complaint (that there is an alleged lack of a "factual nexus" to events

that "began" in 1967) would have existed even if Boyle had specifically pled lost profits at the time he filed his 2010 complaint in this matter. Under these circumstances, the Court finds it appropriate to permit Boyle to proceed with his claim for lost profits. See Nat'l Marine Underwriters, 138 N.H at 8.

The City next argues that Boyle's claim for lost profits is too speculative, and that evidence concerning lost profits should therefore be excluded from trial. Specifically, the City avers that Boyle has not taken the necessary steps to actually open a second dealership, and that "there is no evidence upon which a reasonable jury could calculate lost profits . . . ." City's Mot. #5, at 9. In arguing that his lost profits claims are not overly speculative, Boyle states:

> Mr. Boyle has operated a Toyota dealership at the site since January 2004. During that time he has accumulated significant evidence of how well his dealership performs. Thus, Mr. O'Brien used this data to extrapolate the financial performance of another two dealership[s] which the site can accommodate. In this way, there is no impermissible speculation. The location is the same. The person running the dealership, Mr. Boyle, is the same. The workforce and the surrounding demographics are the same. Two additional dealerships are not new businesses but a reasoned expansion of Mr. Boyle's existing business. The sewer line and wetlands have denied him this expansion, for which he ought to recover.

Pls.' Consol. Obj. 3–4. Boyle argues that these facts provide "'enough information under the circumstances to permit the fact finder to reach a reasonably certain determination of the amount of gain prevented.'" Id. at 4 (quoting Indep. Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc., 138 N.H. 110, 118 (1993)).

Although the New Hampshire Supreme Court "do[es] not require that prospective lost profits be proven with absolute certainty, the courts do require that plaintiffs produce sufficient evidence to demonstrate that profits are reasonably certain to result." Whitehouse v. Rytman, 122 N.H. 777, 780 (1982); see also Petrie-Clemons v.

Butterfield, 122 N.H. 120, 125 (1982). Expert opinion as to lost profits "must be based on sufficient relevant data so that it enables the [trier of fact] to resolve uncertainties." Fitz v. Coutinho, 136 N.H. 721, 726 (1993) (citation omitted). Generally, the valuation of a business for the purpose of assessing damages can be based on data from which future income projections can be reasonably determined. Van Hooijdonk v. Langley, 111 N.H. 32, 34 (1971) (finding that evidence as to a new seasonal business's performance during a single two-month season provided a sufficient basis for making future income projections). "Where operations have never commenced, evidence of expected profits has generally been considered incompetent because speculative." Id.; cf. Wilko of Nashua v. TAP Realty, 117 N.H. 843, 850 (1977) (upholding an award for lost profits for a Kentucky Fried Chicken franchise and for a Chinese restaurant, both of which had not yet opened, where the franchisee presented the financial records of similar Kentucky Fried Chicken franchises and where the proprietor of the Chinese restaurant presented the testimony of a local restaurateur who operated a similar establishment).

The City raises two distinct issues within the context of this argument—whether Boyle can establish that his lost profits were "reasonably certain to result," see Whitehouse, 122 N.H. at 780, and whether O'Brien's expert opinion as to lost profits is "based on sufficient relevant data," see Fitz, 136 N.H. at 726. The Court finds that the first issue raises a factual question to be determined by the jury. As set forth above, based on the language of the complaint, it is clear that Boyle did not have a concrete plan to build a second dealership on the property at the time this action was first entered. It will be up to Boyle to prove at trial that he formed such a concrete intention

at some point thereafter, and that but for the City's alleged trespass, he would have been able to put his plan into action. See Whitehouse, 122 N.H. at 780. The arguments raised by the City concerning Boyle's ability to secure a franchise/dealership agreement, and his ability to obtain municipal and State approval to construct a dealership on the property, will be relevant to the jury's consideration of this issue. See City's Mot. #5, at 8–9. Although the Court acknowledges the difficulty of proving the "reasonable certain[ty]" of these issues, see id., the Court cannot say, prior to trial, that such proof does not exist.[4]

Turning to the second issue raised with respect to this argument, the Court finds that the expert report provided by O'Brien is "based on sufficient relevant data" to warrant consideration by the jury. See Fitz, 136 N.H. at 726. The Court finds that the evidence at issue here is similar to the evidence admitted in Wilko —evidence as to the actual financial performance of a substantially similar business in the same general location. See Wilko, 117 N.H. at 850. Although the parties are free to argue as to the appropriate amount of weight the jury should give to this evidence, the Court finds that this evidence is sufficiently relevant to warrant admission. See State v. Gallant, 108 N.H. 72, 75 (1967) ("'In this state evidence does not have to be infallible to be admissible. If it is of aid to a judge or jury, its deficiencies or weaknesses are a matter of defense which affect the weight of the evidence but does not determine its admissibility.'") (quoting State v. Roberts, 102 N.H. 414, 416 (1960)).

[4] The Court would note that the City has not presented its arguments by way of motion for summary judgment, and the time for doing so has long since passed. Rather, the issue is only whether as a matter of law Boyle is precluded from pursuing the claim for lost profits. Based on the record, the Court cannot rule as a matter of law that Boyle should be barred from establishing lost profits damages at trial.

Moreover, the Court is mindful that evidence as to the amount of lost profit damages is only relevant if Boyle successfully establishes that any amount of claimed profit from a desired second dealership was "reasonably certain to result" but for the City's alleged conduct. See Whitehouse, 122 N.H. at 780. There are significant factual questions which directly impact the admissibility of this evidence. These questions include, but are not necessarily limited to, when Boyle developed a concrete intention to establish a second dealership, whether Boyle could have gotten a franchise, whether he could have obtained the necessary permits, the timetable for securing said permits, and the nature of the wetlands at issue (i.e., whether they were naturally occurring, or were created and/or enlarged as a result of the City's alleged conduct). The Court will defer ruling on the admissibility of O'Brien's opinion on lost profits pending the admissibility of *prima facie* evidence at trial that Boyle is entitled to recover lost profits, generally. See Doe, 83 N.H. at 164-65.

The City next argues that Boyle should be precluded from claiming lost rental profits derived from a new auto dealership on the property, or from seeking a rental value for the existence of the sewer line, because he does not have an expert to opine on those matters. For the reasons set forth above, the Court finds that Boyle is qualified to testify as to the fair market value, including fair market rental value, of his own property. Accordingly, the Court is unpersuaded by this argument.

The City's final argument is that Boyle cannot recover lost profits on behalf of Minato Auto, LLC, because Minato is not a named party to this action. The City explains this argument by noting that O'Brien's report contains evidence concerning Minato's financial performance from 2008 to the present. The City avers that, if this

evidence is being introduced in support of a claim that Minato's profits were impacted by the City's alleged conduct, such evidence should be excluded. Boyle has not indicated that he is seeking lost profits on behalf of Minato relative to the financial performance of the Toyota dealership. Rather, Boyle has provided evidence concerning the financial performance of the Toyota dealership as evidence of how a second dealership would have performed, had one been established. Although the City argues that this evidence is "too attenuated and speculative to be admissible," the Court has already addressed that argument. Here, as in Wilko, evidence concerning the performance of a substantially similar business in the same market is admissible as evidence of how an unestablished new business could have performed. See Wilko, 117 N.H. at 850.

In summary, the Court finds that Boyle may pursue his claim for lost profits resulting from the inability to establish a second dealership on his property. The opinions expressed in O'Brien's report will be admitted on the condition that Boyle first establish *prima facie* evidence that he is entitled to recover any amount of lost profits – that is, Boyle's ability to establish that, but for the City's alleged conduct, Boyle was "reasonably certain" to earn profits from a new dealership. See Whitehouse, 122 N.H. at 780. Accordingly, the City's motion in limine seeking to exclude evidence of lost profits is **DENIED**.

B. **Oral Motion to Compel Production of Boyle's Tax Returns**

At the December 14, 2016 hearing, the parties raised a verbal issue as to whether Boyle should be required to produce his personal income tax returns. The City argued that the tax returns were necessary to evaluate Boyle's claimed damages in this case. In effect, the City's argument amounted to an oral motion to compel the

production of Boyle's tax returns. Boyle objected, arguing that because he could produce Schedule K-1 forms showing the income he received from the Toyota dealership, he should not be required to produce his complete tax returns.

Superior Court Rule 28(a)(d) requires "[a]ny party claiming loss of income" to "furnish opposing counsel . . . copies of the party's Federal Income Tax Returns for the year of the incident giving rise to the loss of income, and for two years before, and one year after, that year . . . ." Although this rule was not in effect at the time that Boyle filed his complaint in this matter, his claim for lost profits apparently accrued at some point after that initial filing—at whatever time he formed a concrete intent to actually construct a second dealership on the property. Given the factual ambiguity as to when Boyle's claim for lost profits first accrued, the Court finds that Boyle's tax returns may be particularly relevant in this case—not only for establishing the income he received from his Toyota dealership, but also for assessing his overall financial position as it pertains to the question of when his intention to open a second dealership became concrete. Accordingly, the City's oral motion to compel the production of Boyle's tax returns is **GRANTED**. At the earliest possible opportunity, but no later than ten days following the issuance of this Order, Boyle shall produce copies of said returns for the period of 2010 to the present. Upon motion, the Court will consider the necessity of producing returns from any additional years.

C. **Motion to Dismiss**

The City moves to dismiss Counts I (Trespass), II (Permanent Taking), III (Temporary Substantial Taking), IV (Nuisance), VI (Overburdening the Easement), VII (Negligence). The gravamen of the City's motion is that: (1) Boyle failed to produce

credible evidence of damages because he does not have expert testimony with respect to damages; (2) Boyle cannot maintain an action for trespass, nuisance, or overburdening the easement because he is prohibited from proceeding on theories of both tort and inverse condemnation, and because he cannot prove special damages; and (3) Boyle cannot maintain an action for damages because the taking occurred while his predecessor in title held interest in the Property. The Court addresses these arguments in turn.

In ruling on a motion to dismiss, the Court must determine "whether the allegations in the plaintiff[s'] pleadings are reasonably susceptible of a construction that would permit recovery." Plaisted, 165 N.H. at 195. The Court assumes that the plaintiffs' "pleadings are true and construe[s] all reasonable inferences in the light most favorable to [them]." Id. The Court "then engage[s] in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief," the Court must deny the motion to dismiss. Id.

The City's request for dismissal of Counts II, III, and VII naturally dovetails with its motions in limine. See City's Mot. #1, p. 1, n.1 ("This dispositive motion did not become ripe until after the expiration of the expert deadlines in this case, which occurred on August 1, 2016 . . . . Upon expiration of those deadlines, Plaintiff [sic] promptly filed five motions in limine of which this motion is a natural consequence (akin to a motion for directed verdict)."). According to the City, without expert testimony relating to damages, Boyle's claims must be dismissed. Because, as set forth above, the Court finds that Boyle is permitted to testify as to the fair market value of his property, the City's motion as to this issue fails.

The City further argues that in order to establish damages for a permanent taking "Plaintiff would have needed an expert to explain what portion of the purchase price paid in 2003 was attributable to the backland of the property, which has no frontage, and contains wetlands and the City's sewer line. He has no such expert." Id. at 2. It is unclear from the City's pleading where it draws this proposition from.

Under takings law, damages are traditionally "the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." United States v. Miller, 317 U.S. 369, 373 (1943); see 14 PETER LOUGHLIN, NEW HAMPSHIRE PRACTICE: LOCAL GOVERNMENT LAW § 829, at 22-37 (2011). Courts have determined such damages by adopting the concept of market value. See Edgcomb Steel, 100 N.H. at 487; LOUGHLIN, supra § 829, at 22-37. "The rule is the same whether an entire tract of land is taken, or it is severed by the taking. The actual damage caused . . . is not limited to that part which is taken and appropriated to the public use . . . and the injury to the whole tract may much exceed the value of the land actually taken." Edgcomb Steel, 100 N.H. at 487 (quotation omitted) (alteration in original). Nothing in the case law suggests the required proof of damages the City urges here. Moreover, as set forth above, there are factual disputes impacting the question of when the alleged taking occurred, including disputes as to the nature and duration of the City's permission to use the Property, as well as the nature of the wetlands located on the Property. Accordingly, the Court is unpersuaded by the City's arguments on this point.

The City likewise seeks to dismiss Boyle's claims of trespass, nuisance, and overburdening the easement because, in the City's view, Boyle can either elect his

remedy under takings law or tort law, but not both. A brief synopsis of Boyle's claims is warranted.

"[A] trespass [is] an intentional invasion of the property of another." Case v. St. Mary's Bank, 164 N.H. 649, 658 (2013) (quotation omitted) (alteration in original).

> 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.

Id. (quoting Restatement (Second) of Torts § 158 (1965)). "A private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property." Cook v. Sullivan, 149 N.H. 774, 780 (2003) (quotation omitted). "To constitute a nuisance, the defendants' activities must cause harm that exceeds the customary interferences with land that a land user suffers in an organized society, and be an appreciable and tangible interference with a property interest." Id.

According to the City, Boyle's claims fail because he "has alleged that the City had already permanently taken the sewer line and wetlands area when he purchased the property in 2003" and thus "cannot show any unlawful invasion of his property rights (while maintaining a permanent taking claim) because the areas he is claiming are impacted are on land he claims was already taken by the City prior to his ownership." City's Mot. Dismiss at 3. To support this proposition the City relies on Allianz Global Risks U.S. Ins. Co. v. State, 161 N.H. 121 (2010). In Allianz, the New Hampshire Supreme Court held that in order "[t]o prevail on an inverse condemnation claim, . . . a plaintiff 'must establish that treatment under takings law, as opposed to tort law, is

appropriate under the circumstances.'" Id. at 124 (quoting Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

Boyle concedes this point in his objection. See Consol. Obj. 4 ("Mr. Boyle cannot recover under both inverse condemnation theories and trespass, nuisance and negligence"). Boyle, however, argues that because he "pled alternate counts does not mean that he has no damage." Id. Indeed, dismissal is not appropriate merely because Boyle pled alternative theories because he is afforded the opportunity to elect his remedies at trial to the extent that he can prove damages. J.K.S. Realty, LLC v. City of Nashua, 164 N.H. 228, 232 (2012) ("The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, or to alternative remedies, but to prevent double recoveries or redress for a single wrong. Its purpose has also been described as preventing a litigant from presenting inconsistent causes of action or testimony before a court. It does not prohibit assertion of multiple causes of action, nor does it preclude pursuit of consistent remedies, even to final adjudication, so long as the plaintiff receives but one satisfaction.") (internal quotations and citations omitted). Thus, to the extent that Boyle is permitted to recover at trial, he is limited in his recovery to either damages under takings law or those under the law of torts, but not both. Nevertheless, this conclusion does not warrant the dismissal of any of Boyle's pending claims.

Lastly, the City argues that Boyle's claims should be dismissed because the alleged unconstitutional action occurred prior to Boyle's interest in the Property arose. According to the City, Boyle cannot establish that he incurred damages because the alleged injures are incidental and consequential to the City's prior actions on the land.

"In order to challenge a taking one must have a property interest which is affected." Midwest Television, Inc. v. Champaign-Urbana Commc'ns, Inc., 347 N.E.2d 34, 41 (Ill. App. Ct. 1976). In general, "[t]he damages belong to the owner at the time of the taking, and do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein." Taylor Inv. Co. v. Kansas City Power & Light Co., 322 P.2 817, 828 (Kan. 1958). However, "[w]hether the use after the conveyance was permissive or adverse [is] a question of fact and . . . the plaintiff [bears] the burden of proof." City of Anchorage v. Nesbett. 530 P.2d 1324, 1330 (Alaska 1975).

This Court ruled in the context of the earlier motions for summary judgment that the City had permission to be present on the land with respect to the sewer line until that permission was revoked. Thus, no taking or trespass occurred as a result of the sewer line on the property until Boyle revoked the permission in 2013.

The Court also ruled that there were still genuine issues of material fact about the water on the property. See Order on Motions for Summary Judgment at 22-26 (Oct. 30, 2013). As noted, there is a factual question about whether the water was natural or man-made. If the water was not naturally occurring there is a factual question about whether the right to maintain the sewer line included the right to flood the land adjacent to the sewer line. Finally, there appears also to be a factual dispute about whether the wetlands expanded based on the City's conduct, even if they were naturally occurring. Thus, there is an issue as to when Boyle's damages occurred because "a license to use another's land is revocable not only at the will of the owner of the property on which it is to be exercised, but by alienation of the land by him." Nesbett. 530 P.2d at 1330. Accordingly, Boyle has pled sufficient facts to show that he incurred damages from the

City's use of the sewer line on the Property, as well as the City's continued use of the line after he revoked the City's implied permission to maintain that line. Plaisted, 165 N.H. at 195.

In light of the foregoing, the City's motion to dismiss is **DENIED**.

**SO ORDERED.**

12/22/2016
DATE

N. William Delker
Presiding Justice

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**File Copy**

Case Name: **James Boyle, et al v Comcast of Maine/New Hampshire, Inc., et al**
Case Number: **218-2010-EQ-00100** ***218-2010-CV-01205***

Enclosed please find a copy of the court's order of January 12, 2017 relative to:

Order on Dfts' Motion in Limine to Exclude Evidence of Lost Profits Based on Discovery Violation and

Boyle's Motion Concerning Trial
"Denied for the reasons stated on the record"

January 12, 2017

Maureen F. O'Neil
Clerk of Court

(504)

C: John Kuzinevich; Bernard W. Pelech, ESQ; Charles P. Bauer, ESQ; Donald J. Perrault, ESQ; Roy W. Tilsley, ESQ; Michael A. Klass, ESQ; Christopher G. Aslin

# The State of New Hampshire
# Superior Court

Rockingham S.S.

JAMES BOYLE, INDIVIDUALLY
AND AS TRUSTEE OF THE 150 GREENLEAF AVENUE REALTY TRUST

V.

CITY OF PORTSMOUTH, et. al.

NO. 218-2010-EQ-00100

**ORDER ON DEFENDANTS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF LOST PROFITS BASED ON DISCOVERY VIOLATION**

The plaintiff, James Boyle, proceeding individually and as Trustee of the 150 Greenleaf Avenue Realty Trust (collectively "Boyle") commenced the instant action against the City of Portsmouth (the "City") and Comcast of Maine/New Hampshire, Inc. (the "defendants"), alleging, inter alia, trespass, permanent taking by the City, temporary and substantial taking by the City, nuisance, and negligence. The matter is scheduled for a two-week jury trial commencing January 23, 2017. The Court held a hearing on several motions on December 14, 2017. At the hearing, for the first time, the City made an oral motion to compel the plaintiff to produce his income tax returns. The City argued those were relevant to his claim for lost profits. The Court took the motion under advisement and issued a detailed order on December 22, 2017. That order required the plaintiff to produce tax returns from 2010 to the present within 10 days of the Court's order. Plaintiff's counsel apparently did not receive the order until December 26 as a result of an email error by the clerk's office. As of yesterday, the City received tax

returns from 2010-2015. Comcast has not received any of the tax returns. Both defendants have moved to dismiss the defendant's claim for lost profits as a result of the late disclosure and discovery violation. The plaintiff objected.

The plaintiff is in violation of the Court's discovery order. The plaintiff was obligated to turn over the tax returns on January 2, 2017 (or January 5, 2017 if he is given the benefit of the court's error providing late notice of the order). He did not produce a complete copy of the tax returns to the City until January 11, 2017, and has not done so at all for Comcast.

Having found that the plaintiff has violated the Court's discovery order, the Court must now turn to the appropriate remedy. The New Hampshire Supreme Court has only rarely, and often indirectly, addressed the issue the appropriate sanctions for discovery violations. See New Hampshire Ball Bearing, Inc. v. Jackson, 158 N.H. 421 (2009); Murray v. Developmental Servs. of Sullivan County, Inc., 149 N.H. 264, 271 (2003). The reason for this is because "[r]esolution of discovery issues is, for obvious reasons, a task best undertaken by the trial judge." Merrill Lynch Futures, Inc. v. Sands, 143 N.H. 507, 514 (1999). What is clear from the case law, is that the extreme remedy of dismissal of claims is only permitted for the most egregious and intentional conduct. For example, the Court will dismiss claims for repeated and intentional failure to respond to discovery requests that obstructs the ability to litigate the case on the merits. See Miller v. Basbas, 131 N.H. 332, 339 (1988).

New Hampshire Rule of Civil Procedure 21(d) provides the Court with guidance for the appropriate exercise of discretion in this regard to the appropriate range of sanctions. In fact, the rule creates a presumption that the court "should normally

impose sanctions" unless the offending party can "demonstrate substantial justification for the conduct" or the sanctions would otherwise be unfair. N.H. R. Civ. P. 21(d)(1). Rule 21(d) is premised, however, on "discovery abuse." The rule lists examples of discovery abuse which would warrant the presumption of sanctions. See N.H. R. Civ. P. 21(d)(A)-(F). A single violation of a discovery order is not listed as an example of "discovery abuse" within the scope of the rule. The rule goes on to set forth a non-exclusive list of examples of potential sanctions for discovery abuse. See N.H. R. Civ. P. 21(d) (2)(A)-(D).

In this case, the Court finds that the severe sanction of dismissal of the plaintiff's loss profit damage claim is not warranted. The Court recognizes that disclosure of complex tax returns shortly before trial puts the defendants at a disadvantage. This predicament was not entirely of the plaintiff's creation. The City did not raise the issue of the tax returns until it made an oral motion on December 14. Comcast never raised the issue on its own. The Court issued an order within 7 days and almost on the eve of the Christmas and New Year holidays. The plaintiff can only be held responsible for a 5 day delay in producing those records to the City from the date he received notice. This is not the type of egregious conduct that warrants dismissal of his claim.

The City also complains that he has not produced tax returns prior to 2010 even though the plaintiff's pretrial statement refers to lost profits going back to 2006. The City also asserts that the plaintiff has not produced tax returns for his business partner. In this respect, the plaintiff has complied with the Court's order which only required him to produce tax returns from 2010 to the present. The City has never requested an order from this Court to compel tax returns from the defendant's business partner.

The plaintiff is ordered to produce tax returns from 2010 to the present forthwith to Comcast. In order to give the defendants time to review the tax returns before Mr. Boyle's deposition, and in light of the late disclosure, the plaintiff (and counsel) shall also make themselves available for Mr. Boyle's deposition at the convenience of the defense attorneys.

**SO ORDERED.**

1/12/2017
DATE

N. William Delker
Presiding Justice

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**File Copy**

Case Name: **James Boyle, et al v Comcast of Maine/New Hampshire, Inc., et al**
Case Number: **218-2010-EQ-00100** ***218-2010-CV-01205***

Enclosed please find a copy of the court's order of January 24, 2017 relative to:

Order on the City of Portsmouth's Motion in Limine re; Prior Zoning & Enforcement Litigation

Order on the City of Portsmouth's Motion in Limine re; Evidence of Damages after 2016

Order on Dfts' Motion for Sanctions re; Spoliation of Evidence-Site View

January 24, 2017

Maureen F. O'Neil
Clerk of Court

(504)

C: John Kuzinevich; Bernard W. Pelech, ESQ; Charles P. Bauer, ESQ; Donald J. Perrault, ESQ; Roy W. Tilsley, ESQ; Michael A. Klass, ESQ; Christopher G. Aslin; Kaitlyn Hilbert, ESQ; Robert J. Dietel, ESQ; James C. Wheat, ESQ

# The State of New Hampshire
## Superior Court

Rockingham S.S.

JAMES BOYLE, INDIVIDUALLY
AND AS TRUSTEE OF THE 150 GREENLEAF AVENUE REALTY TRUST

V.

CITY OF PORTSMOUTH, et. al.

NO. 218-2010-EQ-00100

**ORDER ON THE CITY OF PORTSMOUTH'S MOTION IN LIMINE REGARDING EVIDENCE OF DAMAGES AFTER 2016**

The plaintiff, James Boyle, proceeding individually and as Trustee of the 150 Greenleaf Avenue Realty Trust (collectively "Boyle") commenced the instant action against the City of Portsmouth (the "City") and Comcast of Maine/New Hampshire, Inc. (the "defendants"), alleging, inter alia, trespass, permanent taking by the City, temporary and substantial taking by the City, nuisance, and negligence. As addressed in a prior order on motions in limine, the plaintiff seeks lost profits damages was a result of the City's actions. The City has filed a motion in limine to preclude evidence of damages after 2016 when the City exercised its power to take the property by eminent domain. The Court held a hearing on that motion after jury selection. The plaintiff argued that this Court's prior ruling that the plaintiff was entitled to present evidence of lost profits entitles him to project profits into the future beyond the eminent domain taking. The City counters that, as this Court has already found in its prior order, lost profits are not available as a remedy for eminent domain.

The City's motion in limine is GRANTED. As noted in the prior motion in limine order, the plaintiff had pled alternative claims for relief. His claim for lost profits is founded on this argument that the City's actions constitute a trespass. That trespass ended when the City exercised its power to take the land by eminent domain. As this Court has already ruled, damages based on a claim of a governmental taking does not include a claim for lost profits. Thus, even if the plaintiff had actually realized his claimed intention to build a second dealership on the land, the City could still have exercised its power of eminent domain to take the land. As a result, the plaintiff's claim to any future profits from the dealership would have been lost.

In a related issue, the City made an oral motion to preclude any mention of its eminent domain action in front of the jury. It contends this evidence is not relevant and would confuse the issues and be highly prejudicial. The plaintiff has objected but has not clearly articulated why evidence that the City exercised its power of eminent domain is relevant. The Court finds that this evidence is inadmissible under N.H. R. Ev. 401 and 403. Accordingly, plaintiff is precluded from mentioning that the City has taken the land by eminent domain.

**SO ORDERED.**

1/24/2017

DATE

N. William Delker
Presiding Justice

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**FILE COPY**

Case Name: **James Boyle, et al v Comcast of Maine/New Hampshire, Inc., et al**
Case Number: **218-2010-EQ-00100** ***218-2010-CV-01205***

Please be advised that on June 07, 2017 Judge Delker made the following order relative to:

Motion for Entry of Judgment Dismissing All Counterclaim Counts: Granted. The Court, however, does not make any finding regarding whether Boyle was justified in his actions. Rather for the reasons set forth in the City's objection/response the counterclaims were rendered moot by various rulings and events which occurred after the City brought these counterclaims.

Motion for Entry of Judgment and for JNOV or to Reform the Verdict as to Verdict Question 3: Denied.

Motion for Permanent Injunction Requiring the City to Abate Existing Nuisance and Pay Rent or Lost Profits until Abatement is Complete: Denied.

Boyle's Motion for Attorneys' Fees: Denied.

Motion for Remittitur of Lost Profit Damages to be Reduced to $1,785,000: Denied.

Motion to Set Aside Award of Speculative Lost Profit Damages: Denied.

Motion to Set Aside Award of Lost Profit Damages Due to Lack of Evidence Regarding Limited Liability Company Interests of Plaintiff James Boyle: Denied.

June 01, 2018

Maureen F. O'Neil
Clerk of Court

(278)

C: John Kuzinevich; Bernard W. Pelech, ESQ; Charles P. Bauer, ESQ; Donald J. Perrault, ESQ; Roy W. Tilsley, ESQ; Michael A. Klass, ESQ; Christopher G. Aslin; Kaitlyn Hilbert, ESQ; Robert J. Dietel, ESQ; James C. Wheat, ESQ

back to him. He makes further progress in developing the building. The City never gets back to him. Finally, after some meetings, the City says no, we're never going to move the sewer line, this is our right. Mr. Boyle's then faced with a dilemma because true expansion could not be done with the sewer line and wetlands in place. And I'll talk about the creation of wetlands in a few minutes.

So Mr. Boyle concentrates on redoing the front line of the building, expanding parking and expanding parking on the side and he goes through the whole site review process and the City approves him. Then Mr. Boyle says well, I want to put a third -- a second, maybe a third building on here and what you've approved is all pavement where I want to put the new building. So can we at least agree the pavement is on hold while we develop plans?

Now, Mr. Boyle then tries to develop plans, but he can't develop anything buildable because the sewer line and wetlands are there. There's some negotiation back and forth throughout all of this. Until finally in 2008, Mr. Boyle says there's no reason for your sewer line, get it off my property. Sends a formal letter. And the City responds no, we have the right to keep everything as is.

MR. BAUER: Your Honor, I'm going to object at this point and I'll ask to approach the bench please.

(Sidebar begins at 10:40 a.m.)

MR. BAUER: This is an issue that has been decided twice by you, once in your summary judgment. And then on the motion for summary judge -- reconsideration of your motion for summary judgment. You ruled twice that the revocation occurred in November of 2013 and you put that also in the interlocutory appeal to the New Hampshire Supreme Court. And I instruct you to -- ask you to instruct the jury to disregard that and to have Mr. Kuzinevich correct it please.

MR. KUZINEVICH: The true fact is that letter was sent to her and if you talk about a special verdict question, I'm just arguing the evidence that we're going to put in.

THE COURT: Well, I know I mentioned this issue, but I do go back to the motion for summary judgment and I agree with the City that I think this issue has been resolved by summary judgment so.

MR. BAUER: Then you can approach with the other.

THE COURT: Well, I think you can correct this by just saying that he agreed to allow this to continue and don't belabor about the permission in 2013.

MR. KUZINEVICH: Right.

THE COURT: Okay.

MR. BAUER: And will you instruct the jury to disregard his statement?

THE COURT: Well, if -- I think --

MR. KUZINEVICH: I think I know how to correct it.

Yeah.

(Sidebar ends at 10:41 a.m.)

MR. KUZINEVICH: During all this time, Mr. Boyle told the City he wasn't going to go out there and dig up the sewer line or do anything. He gave permission for it in hopes of resolution although ultimately resolution was not forthcoming. This suit was filed in 2010 and then in 2013, there was a formal revocation of any permission for the sewer line.

Mr. Boyle was not submitting new plans at the time because again he couldn't build anything until this lawsuit was resolved so he knew and the engineers knew the status of the sewer line and the wetlands. However, he did submit another development plan in 2009. This development plan was submitted just before there was a major revision to the Portsmouth zoning ordinance. There were certain changes that were becoming less favorable to automobile uses.

He wanted to preserve his rights. There was some back and forth about it. But it was clear that there was going to be a lot of energy expended. He could not build what he proposed because of current circumstances so Mr. Boyle and the City agreed to put that on hold in 2009. The evidence will show he still had to solve the drainage problem and the location of the sewer line problem.

In 2011, Mr. Boyle installed two culverts. Not on Comcast property. There had been four culverts designed on

here --

THE COURT: I understand. I mean I think --

MR. DIETEL: Yeah.

THE COURT: -- you played it out in the motion.

MR. DIETEL: So these aren't mere formalities. Thank you, Your Honor.

THE COURT: I'm going to take a recess and come back.

UNIDENTIFIED SPEAKER: I will also make two motions for -- oral motions for directed verdict.

THE BAILIFF: All rise, please.

(Recess at 11:42 a.m., recommencing at 11:50 a.m.)

THE BAILIFF: Will the Honorable Court all rise? Please be seated.

MR. PERRAULT: Your Honor, Don Perrault. Can I go get him?

THE COURT: Oh, yeah. Sorry.

(Pause)

THE COURT: Is your client here?

MR. KUZINEVICH: He's on the phone, but I think we can proceed without him.

THE COURT: I'd rather he be here.

MR. KUZINEVICH: Okay.

(Pause)

THE COURT: Okay. So I have considered the motion for partial directed verdict. And I'm going to deny it for

three reasons. And I want to explain my rationale here.

So let me being by observing that I think that the motion is very well researched. I think the case law is compelling. I think -- I think you're correct as a matter of law. But ultimately I think that granting a partial directed verdict is not in anyone's interest in this case frankly. I think that given that the history of this litigation between these parties, all three parties in this case, have a jury make a decision here on the merits of this case as opposed to a technical pleading -- as opposed to ending a significant portion of the case based on a technical pleading default. It is not in the interests of justice.

And I think that as a matter of law, the reason -- as a matter of law not granting the -- so that's a matter of discretion. The matter of law that I'm not granting the partial -- motion for partial directed verdict on is I am granting the motion to amend, to add Minato Auto LLC. I think that the evidence in this case has been fairly -- well, I think unconverted -- uncontroverted that Mr. Boyle is Minato Auto LLC. And I understand that that company has a separate legal existence. But for all intents and purposes he controls. He is a majority shareholder. He is -- runs the day-to-day operations, and that's been the state of the evidence in this case.

And so I think that there's no prejudice from adding

Minato Auto LLC. There's no surprise about the relationship here or the nature of that entity. And so I don't think that anyone's prejudiced by adding that entity as a Plaintiff in this case to correct it, what I think is a technical pleading default.

Third -- the third reason I'm doing it -- that I'm adding Minato Auto at this stage is because I think it would be a colossal waste of judicial resources to go through this trial only to have the opportunity for Minato Auto LLC to bring a new lawsuit tomorrow on these very same issues because if there's a trespass, and if there's a nuisance and Minato Auto LLC has damages, those damages continue until that trespass, that nuisance, have been lifted. And so Minato Auto has an ongoing claim based on the facts that exist here, that exist prior to today, and that will exist tomorrow or whenever the jury reaches its verdict. And to go through this exercise to allow a new case to go forward only to bring Minato Auto into it as a matter of fulfilling what is, I think, correctly in for a lot of correct reasons, correct statement of law is not in the interests of justice.

So I think for all of those reasons despite a very well researched and reasoned memo, I'm denying the motion for a partial directed verdict.

MR. DIETEL: Thank you, Your Honor.

MR. BAUER: Your Honor, may I just be heard in light

of your ruling? With all due respect, I do take exception to it on behalf of the City of Portsmouth. Adding Minato at the close of the case is not in the interest of the parties. You said that there's not -- it's not in anyone's interest. It certainly is in the interest of the City of Portsmouth and I trust also Comcast.

There's been absolutely no opportunity to discover Minato through the discovery process. We have asked for various documents, particularly the lease. It was never produced in this case. And I suspect there may be a good reason why that lease was never produced. And that lease may, in fact -- I don't know because there's no evidence in this case. But that lease may prohibit dealerships coming onto the property in some fashion that's germane to this case; that is, that the Minato lease could prohibit dealerships. And that's one of the issues.

THE COURT: But if -- but that evidence would have been relevant whether or not it's a party or not. I mean if that evidence existed, you could have asked for it and --

MR. BAUER: We did ask for it.

THE COURT: -- would have -- and well, okay.

MR. BAUER: And it wasn't produced.

THE COURT: You could have filed a motion to compel it. So but I -- okay. I didn't mean -- I don't want to --

MR. BAUER: Well --

THE COURT: -- argue with you but --

MR. BAUER: -- the point is that Minato's not a party and there was no other way to --

THE COURT: I understand that.

MR. BAUER: -- enforce that.

Secondly, Minato -- you indicated that Minato could bring a suit tomorrow, but we're still in the same position. It still is the lessee in possession. And you would run into -- we would run into the same facts that have been submitted for several days now. And that is that Minato is the lessee and doesn't have any legal rights under the well-established case law in New Hampshire. And --

THE COURT: Well, I'm not sure that's the way I'm reading this case law. I mean as I read the cases, I thought and as a matter of logic it makes sense. Minato could -- it's essentially like treating the City, the trespasser, as a sub lessee. So you have the landlord, the lessee, and the trespasser. And so the reason that, as the law seems to indicate, that the land, when the whole property is leased, the landlord can't bring a claim is because it's only the lessee that can alienate its interest in the property.

MR. BAUER: Right.

THE COURT: And so in this case it would be entitled to --

MR. BAUER: Yes. And I did --

THE COURT: -- misplaced rents.

MR. BAUER: I did misspeak. And that is that the lessee, which is Minato which is not a party to the case and shouldn't be a party despite your ruling, that Minato in light of the eminent domain process, that has significant implications now. So this issue about another lawsuit is really speculative and moot. It has really no bearing on this case.

And, you know, I guessed last week this issue -- and I think what I hear you saying -- is that the law is correct. There is a straight line of law of cases back in the 1840s. And it is -- it is not in the interest of the parties to neglect that law. This motion could not have been filed until today when Plaintiff rested on its direct and rested on its rebuttal. I renew a motion for reconsideration.

THE COURT: Oh, so the motion is denied. I had not considered the effect of the eminent domain so perhaps that part of my rationale may not have much weight in terms of this. But I think the case law certainly is clear that the Court has wide discretion to amend a complaint even up to and after the verdict frankly to correct -- to conform to the evidence and to correct pleading defects. And so I think that in the context of this case, exercising that discretion is the appropriate thing to do. So for those reasons the motion to reconsider is denied.

MR. PERRAULT: Your Honor, just for point of clarification on this, and perhaps the suggestion of some path going forward. And I'm certainly joining with my brother on behalf of Comcast in taking exception to the ruling. But what troubles me, Your Honor -- well, two things. One has to do with the claim for lost rent. And I think it was your analysis and perhaps -- I haven't had that same benefit of reading the cases as my brothers on behalf of the City.

But it sounds like what I'm hearing is that the argument is now that Minato as the lessee is entitled to rent from sub lessee trespasser, arguably. And certainly there's, you know, been no evidence about that in this case. And I'm concerned about where we go with argument here. And perhaps the compromise, I guess, I suggest while preserving our objections is, you know, that we stay with the status quo as to the evidence and that -- and that neither party, I guess, or no party argue this distinction unless the City feels that they have to make that case because I think at this point in time, nothing good can come of it in terms of other than -- other than confusion to the jury when these matters have been litigated with different parties, essentially. And suddenly we find ourselves defending against claims from a party that weren't in the case when we started two weeks ago.

So I don't know how this plays out, I guess, is where with all this. And I don't know where at least us, tomorrow

morning, when we have to stand up in front of these people and explain what this case is now about and what evidence you can point out to suggest that so I think that has to be solved. And I don't envy you the task of solving it, Your Honor.

MR. KUZINEVICH: Well, I actually join with Comcast and just say direction for how we present it in the simplest way. The pleading technicalities, I appreciate Your Honor's ruling. But I also don't want to overly confuse the jury so I join in that substantively.

MR. BAUER: I take no position on this at this point in time. I'd like to reserve at least a lunch to think about how we deal with the most recent ruling, adding another party at this stage. I mean the jury has been -- has been hearing throughout this case that Minato is not a party, not a party, not a party. And I don't -- as I sit here, I don't have the answer of how to --

THE COURT: Okay.

MR. BAUER: -- deal with this.

THE COURT: I'll take that issue under advisement or I'll give the City sometime to think about the ramifications of that. Obviously you won't want to waive your -- you won't want to waive any argument about this issue so, you know, I feel that there's a deal in this case. So I'm not sure what the right answer to that is either. So okay.

What motions do you have, Attorney Kuzinevich?

(Proceedings commence at 9:05 a.m.)

THE COURT: So I wanted to put a couple of issues on the record just before we bring the jury in.

So we had a lengthy chambers conference yesterday to discuss the jury instructions and the mechanics of the special verdict form. During the course -- I should say at the beginning of that discussion I informed the lawyers that I had given more thought to the motion for partial directed verdict as it related to Minato Auto, and concluded that I was going to reconsider the -- not the outcome of the motion, but the reasoning.

Well, I should say I was going to reconsideration -- partially reconsider the outcome of the motion and the reasoning for my decision. So I wanted to put that on the record because I think that has bearing on how the case gets argued here.

So what I informed the lawyers in chambers was that I wasn't going to add Minato Auto as a new party, contrary to what I indicated on the record yesterday, but that I thought still the issue in the particular context of the facts of this case of allowing the Plaintiff to argue lost profits was permissible, because the facts -- because of the reason a jury could infer from the evidence presented that Mr. Boyle personally would have realized -- could have realized lost profits, if all the conditions had been met here or if the jury

finds they're met, because he testified that the various entities that are relevant in this case are S Corporation or LLCs, in which the money passes through to him and is reported on his individual income tax statements. And as a result of that, he would have realized these profits, but for -- if the jury finds the prerequisites -- but for the nuisance and/or trespass.

And so I thought, given the particular -- despite the case law about the distinction between tenant and landlord and the nature of the LLC based on the particular evidence presented in this case, I thought that Mr. Boyle could still argue that without adding Minato Auto, LLC, to this case. I think adding Minato Auto adds a layer of complication, and frankly injects new issues about what Mr. Kelly's role would be in all of that. And so for those reasons I didn't think -- I reconsidered my decision to add Minato Auto as a formal party to the case. So I wanted to put that on the record.

MR. DIETEL: Your Honor, for the record, the City renews its objection.

THE COURT: Okay. And you did in chambers, that's correct. So the other thing I just want to put on the record, so that it's clear, is we did have a lengthy discussion; much of it was mechanical. To the extent we had substantive discussion about the jury instructions, those mirrored the arguments that had been made at various points throughout this

## STATUTES

## CHAPTER 539
## WILFUL TRESPASS

### Section 539:5

**539:5 State Lands.** – Whoever shall, without authority, wilfully enter into or upon, or take possession of, land belonging to the state, and continue in possession thereof without right for the space of three months, shall forfeit one hundred dollars, to the use of the state.

### Section 539:6

**539:6 No Right Acquired by Adverse Possession of State Lands.** – No right shall be acquired by such entry or possession, nor by any adverse possession of such land, as against the state or its grantees.

## CHAPTER 498-A
## EMINENT DOMAIN PROCEDURE ACT

### Section 498-A:5, I

**498-A:5 Condemnation; Passage of Title; Declaration of Taking.** –
I. Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in the board of a declaration of taking, with sufficient copies for giving notice as required by RSA 498-A:8. The declaration shall be considered filed after receipt by the board and review by the board for compliance with paragraph II. If the board finds the declaration of taking is not compliant with paragraph II, the board may direct the filing of a more specific declaration of taking. After the giving of any bond and security as may be required under RSA 498-A:6, the title which the condemnor seeks in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in RSA 498-A:11. A declaration may include more than one parcel and multiple condemnees so long as the identity of the property taken of each condemnee and the nature of their interests are readily ascertainable.

## Section 498-A:9-a, V

**498-A:9-a Preliminary Objections. –**

V. The board shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages, including costs and expenses, to be determined by the board in the manner prescribed in RSA 498-A:24. The board may allow amendment or direct the filing of a more specific declaration of taking.

## Section 498-A:9-b, IV

**498-A:9-b Determination of Preliminary Objections Based on Necessity, Public Use, and Net-Public Benefit. –**

IV. If the superior court grants the preliminary objection, the board shall determine the damages, if any, in accordance with RSA 498-A:9-a, V and then dismiss the declaration of taking and record such dismissal order in the registry of deeds.

## Section 498-A:11, I

**498-A:11 Possession; Entry and Payment of Compensation. –**
I. The condemnor, after the filing of the declaration of taking, shall be entitled to possession or right of entry upon deposit with the board of the amount of just compensation as estimated by the condemnor, and interest shall not accrue thereafter on such sum, but shall only accrue on the amount of final award or judgment in excess thereof. The clerk of the board shall pay over the sum deposited upon demand to the condemnee. Whenever the board is satisfied that any person, whether holding under the owner or not, is preventing or obstructing the condemnor from entering upon or taking possession of the property after the condemnor is entitled to do so, it may grant such rights as it may think necessary or may proceed for contempt.