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.

REPLY 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.

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INTRODUCTION

The Court has had extensive briefing from the parties on Boyle's appeal and Portsmouth's cross-appeal and is well-versed on the key issues presented. Portsmouth therefore will address in this Reply only certain assertions of Boyle in his answering brief that stand out as warranting rebuttal or requiring additional context. Portsmouth's points fall under the following overarching themes: Boyle's speculative lost profits and unsustainable damages award; the trial court's error in granting Boyle summary judgment on Portsmouth's prescriptive easement defense; and the issue of irrevocable licenses. On this latter point, Portsmouth will also address the State's arguments in its Memorandum of Law. However, the Memorandum is most notable for what it does not say: The State nowhere disagrees with Portsmouth's interpretation of RSA 539:6 as preventing the prescriptive easement "clock" from running only during the time lands are State-owned. If any party has an interest in ensuring the proper interpretation and application of RSA 539:6, it is the State. Its silence here, together with its statements in the interlocutory appeal of this matter, buttress Portsmouth's interpretation of the plain language of RSA 539:6 and its position that the prescriptive "clock" started ticking upon the State's conveyance of the Property in 1983.

ARGUMENT

I. Boyle's Claimed Damages Were Speculative and the Award Is Unsustainable

- The standard of review for upholding an award for damages for lost profits is whether the profits were "reasonably certain" to result. *Indep. Mech. Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110, 115 (1993). Boyle attempts to turn this standard into "it could have happened":
    - He refers to "the *possibility* of getting a Lexus franchise since the point was open," Boyle Ans. Br. at 17 (emphasis added), yet it is undisputed that Boyle and his counsel instructed his expert *not* to use Lexus data precisely because Boyle was not confident that he could obtain a Lexus dealership, the only open point in the Portsmouth area. Tr.795-96.
    - Boyle also says he could have obtained "another dealership by purchase," Boyle Ans. Br. at 17, yet there was no evidence as to what dealers were willing to sell a franchise, if any, or what steps Boyle had taken to even investigate a potential purchase of a franchise. Boyle's expert testified that he did not know if the franchise agreement of Toyota would allow another franchise, such as Nissan, to share the same lot or vice versa. Tr.817-18. The purchase of another dealership was

pure speculation. Boyle's argument, in essence, is that he "was an experienced and respected dealer[.]" Boyle Ans. Br. at 17. In other words, Boyle took the most biased actor involved—himself—and used his self-proclaimed business acumen as the only evidence for his ability to obtain another dealership. If this is the standard, there is precious little left of the "reasonable certainty" standard.

o Nor was it reasonably certain that Boyle would obtain the land use permits necessary to develop the dealership. It is undisputed Boyle did not have the necessary permits from Portsmouth. Boyle opted to put his permit application on hold and could have, but did not, restart the process. Tr.989. While Boyle proclaims that he "always got the appropriate permits from the City," Boyle Ans. Br. at 17, his proposal to install a second dealership on the Property was very different from his efforts with respect to the now-operating Toyota dealership. There, he repurposed an existing building and parking area, whereas his application for a second dealership required the construction of new buildings and parking areas and the paving over of existing wetlands. Boyle did not show that his plans for the new dealership met the variance requirements. The same trial judge who presided over this case—and was

thus well aware of the evidence presented—later described Boyle's prospects of obtaining land use permits for his dealership "speculative in light of the significant zoning and planning hurdles associated with paving over the wetlands." City.ED.Add.19. Notwithstanding Boyle's strained attempts to marginalize or reinterpret the trial judge's clear statement, Boyle Ans. Br. at 13-14, this was not haphazard or accidental language by a judge who was well-aware of the evidence presented in both proceedings.

- Boyle's claim that the Consent Decree between DES and himself—necessitated by self-help dredging, filling, and site development measures Boyle took with respect to the berm while this lawsuit was ongoing—*required* the development of the full parcel is simply incredible. Boyle Ans. Br. at 17-18. The Consent Decree required Boyle to submit an application which the State would evaluate in accordance with DES regulations and applicable laws. Boyle.Reply.App.21. It is undisputed that the State had not granted Boyle the necessary permits to develop the Property. Nor does the Consent Decree trump or obviate the need for Boyle to comply with Portsmouth's regulations.

- Boyle also did not present sufficient relevant data for his lost profits claim and his methodology was a far cry short of, much less the "same" as, that used in *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 117 N.H. 843 (1977). Boyle Ans. Br. at 12. In *Wilko*, claimed lost profits of a KFC franchise were based on the records of another local KFC franchise and lost profits for a Chinese restaurant were based on another local Chinese restaurant with the same owner. Here, Boyle is basing lost profits for an *unknown* dealership franchise on past data from his Toyota dealership when it is undisputed that Toyota is the one franchise that could absolutely *not* be the hypothetical second dealership. To apply Boyle's analysis to the *Wilko* example would be the equivalent of basing lost profits for a restaurant "to be determined" on data from a local KFC when the restaurant "to be determined" could be a steakhouse, TGI Friday's, IHOP, or White Castle. Boyle's own expert testified that profits for car dealerships vary widely from manufacturer to manufacturer sales, service volume, and other measures. Tr.135, 794-95. It was clear error for the trial court to allow the question of lost profits to go to the jury.

- The award of damages is also unsustainable because Boyle was not the proper party to receive the award. The trial

court did not have discretion, Boyle Ans. Br. at 14, to simply allow him (via his Trust) to recover trespass and nuisance damages instead of Minato, the party leasing the premises. Boyle Ans. Br. at 14. It is black-letter law that a lessee, and not the property owner, is entitled to such damages. City Br. at 48.[1] This is not just a formality, particularly where, as here, the LLC lessee has more than one member. While Boyle claims to be the managing member of Minato (he does not provide any record cite for that assertion), there is another member of Minato who was not present at trial. One reason to require Minato to be a party is to ensure that the *entity's* interests (not just Boyle's) are addressed, including ensuring that damages are awarded to the proper party.

- Even if Boyle were entitled to damages, and he is not, the jury impermissibly awarded double damages. Boyle points out that he testified as to total lost profits of $5,300,000 for the years 2013 through 2016 and then claims this is consistent with the $5,950,000 number that comes from the jury's award of $4,165,000 in nuisance damages for 2007 through 2016 and $1,785,000 in trespass damages for

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[1] Boyle quibbles about the precise area of the Property subject to the Minato lease, but he does not deny that the area he plans to develop—or at least the vast majority of it—is subject to the lease. Boyle Ans. Br. at 14-15.

2014-2016. Boyle Ans. Br. at 18. Those numbers and timeframes self-evidently are not consistent.[2] Boyle also argues that the jury's ultimate award of $3,570,000 was consistent with what his counsel presented in closing argument as to Boyle's testimony about his claimed lost profits. Boyle Ans. Br. at 12-13 & n.3. But his counsel's statement during closing argument was dramatically in error and inconsistent with Boyle's lost profits testimony—or, as Boyle puts it in his brief, the amount of $3,570,000 "was given" in closing argument as opposed to the $4,040,000 Boyle actually testified to for that same time period. Boyle Ans. Br. at 13 n.3.[3] The $470,000 difference in these numbers is hardly consistent, and an attorney's statements during closing are not evidence. The only rational explanation for the jury's award of $3,570,000 is that it took O'Brien's $595,000-per-year lost profits number and applied it to each applicable year of 2014, 2015, and 2016 ($595,000

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[2] The $5,950,000 "total" award is consistent with 10 years (2007-2016) of the $595,000-per-year lost profits number that Boyle's expert testified to.

[3] *Compare* Tr.174:8-24 (Boyle testifying that he incurred lost profits of $1,260,000 for 2013, $1,260,000 for 2014, $1,340,000 for 2015, and $1,440,000 for 2016) *with* Tr.1371:16-18 (Boyle's counsel stating that Boyle testified as to lost profits of $860,000 for 2013, $960,000 for 2014, $1,250,000 for 2015, and $1,360,000 for 2016).

x 3 = $1,785,000) and awarded those damages for **both** nuisance and trespass for those years ($1,785,000 x 2 = $3,570,000).

II. The Trial Court Erred in Granting Summary Judgment to Boyle on the Prescriptive Easement Issue

- That City will not address Boyle's flawed reading of RSA RSA 539:6, other than to refer to its detailed explanation of the statute in its opening brief, City Br. at 57-60, and to note that the State had an opportunity in this appeal to contest Portsmouth's reading of RSA 539:6 and did not do so. This was not inadvertent or an omission. Portsmouth's interpretation of this provision is entirely consistent with the State's position set forth in its *Amicus Curiae* Brief filed in the interlocutory appeal of this matter. *See*, Nov. 26, 2014 State Br., filed in No. 2014-0293, at 9-11.[4] Portsmouth's prescriptive period began upon the State's conveyance of the Property on February 18, 1983.

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[4] The State asserted: "[I]f the prescriptive clock were to run during *state ownership*, the State's grantees would not be able to warrant clear title of the property to a prospective purchaser. The risk of a third-party claim of prescriptive rights arising from adverse possession during *prior State ownership* would reduce the value of state lands." *Id.* at 11 (emphases supplied).

- Boyle's claim that he was a bona fide purchaser for value was already addressed and rejected by the trial court, which found that Boyle could have discovered the Line upon reasonable inspection. City.Add.91-92 (citing Restatement (Third) of Property § 7.14(3)). This was due to the presence of the Line on a plan recorded by the State's successors-in-interest and the physical nature of a berm rising in places almost six-feet above the ground and the Line stretching across the entire length of the Property. *Id.*[5] Moreover, New Hampshire's recording statute does not require the recordation of title to property acquired by adverse possession and thus a conveyance of such property by the apparent record holder is ineffective against title acquired by adverse possession. RSA 477:3-a; *see also*, 3 Am. Jur. 2d *Adverse Possession* § 243 (May 2019 update). Even if a prescriptive easement were subject to the recording statute, it is not subject to extinguishment where such extinguishment would, as here, deprive the dominant estate of utilities necessary for the reasonable enjoyment of the land. Restatement (Third) Property § 7.14(1).

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[5] Boyle sought reconsideration of this issue, but the trial court determined it was moot given its other rulings on reconsideration. City.Add.131-32.

- Boyle's claim that Portsmouth's possession and use of the Line was not sufficiently adverse widely misses the mark. Boyle Ans. Br. at 27-29. Portsmouth installed the Line, which stretches 450 to 500 feet across the Property, in a berm that rises approximately 6 feet above the ground. It is undisputed that Portsmouth regularly inspects the Line, like all others in Portsmouth. Tr.456:18-457:19, 929-30, 1042. The State's successors acknowledged Portsmouth's use of the Line by including it on their development plan. CityApp.365. It is hard to imagine a stronger claim of open and notorious possession than the installation and physical maintenance of a visible, enormous structure containing a line that ran across the length of a property that Portsmouth did not own. This is clearly distinguishable from the situation in *Wason v. Nashua*, 85 N.H. 192 (1931), Boyle Ans. Br. at 27-28, involving a sidewalk *installed by the property owners* which a municipality later claimed was for public use and where that alleged public use was incidental to the private use of the sidewalks for the owners' own businesses.

- Boyle's claim that Portsmouth must have asserted that the Line was there "as of right instead of permission", Boyle Ans. Br. at 28, is irrelevant. *Hewes v. Bruno*, 121 N.H. 32, 34 (1981) (irrelevant that claimant for adverse possession did not subjectively think that they held land adversely to true owner and noting that a claim of adverse possession can in fact be strengthened where one has color of title).
- The prescriptive clock began to run immediately upon the revocation of the license, which occurred upon the State's conveyance of the Property to Coakley. Boyle claims that some time must be allocated for Portsmouth to remove the Line before the prescriptive period can begin. Boyle Ans. Br. at 29-30. However, the cases Boyle relies on are distinguishable because they involve damages for claims of trespass once notice of license revocation is given and not the timing of the start of a prescriptive period. *Case v. St. Mary's Bank*, 164 N.H. 649, 658 (2013); *Cablevision of Boston, Inc. v. Shamatta*, 827 N.E.2d 246, 249 (Mass. Ct. App. 2005). Here, the license was revoked as a matter of law upon the State's conveyance, no notice of revocation was given to Portsmouth, and no claim of trespass was then made. Portsmouth had no

reason to remove the Line and instead asserted its claimed right to keep the Line and berm on the Property.[6]

III. Portsmouth Has an Irrevocable License

• Both the State and Boyle make much of RSA 4:40 and accuse Portsmouth of acting unreasonably because the State can only convey property through the Governor and Executive Council. Boyle Ans. Br. at 20-21; State Memo. at 3-9. This ignores the fact that, as recognized in other jurisdictions, an irrevocable license is not an easement or interest in land, but a distinct concept to remediate an inequity. *E.g.*, *Tatum v. Dance*, 605 So.2d 110, 112-13 (Fla. Ct. App. 1992), *affirmed at* 629 So.2d 127 (Fla. 1993). It is specifically used in situations where a conveyance of land has *not* occurred but the licensee has nevertheless expended funds and changed position to its detriment based on the licensor's conduct. Here, Portsmouth obtained permission for the State Board of Education, which possessed the Property at the time the Line was constructed. If the strictures of conveyancing statutes were required to be followed in order for an irrevocable license

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[6] Boyle provides no record citations for his claim that two years is a "reasonable" time. Boyle Ans. Br. at 30. This claim, under Boyle's rationale and the cases he cites, is also completely at odds with his effort to recover damages for 2014 and 2015, since he would provide Portsmouth with two years to remove the Line.

to attach, there would be no need for the concept of an irrevocable license in the first place. However, the concept does exist and is recognized because on rare occasions situations arise, such as the present one, which require an equitable remedy in order to avoid an injustice.

- Boyle's claim that an irrevocable license only lasts so long as necessary for the licensee to recoup its investment is off base. Boyle Ans. Br. at 24. It is true that an irrevocable license is not a permanent interest in land and cannot be conveyed to a successor. However, the license necessarily protects the reliance investment of the licensee. *Tatum*, 605 So.2d at 113. That is, it allows the licensee to realize upon the expenditures made. It is not simply a matter of "recouping" an investment, but instead having the ability to utilize subject of the license (*e.g.*, a dam, sewer line, drainage system, etc.) so as not to be deprived of the investment made. *See*, Restatement (Third) of Property § 4.3 cmt. e (licenses which have become irrevocable generally terminate when they become obsolete). Here, there was testimony that the Line had a lifespan of another 50 years. Tr.1042:23-24. Thus, a reasonable time for the irrevocable license is 50 years from the time of trial.

- While Boyle relies on the doctrine of stare decisis, the fact of the matter is that times change. Boyle Ans. Br. at 25. As the State recognizes, there are a number of jurisdictions

that recognize irrevocable licenses, and as Boyle recognizes, the Restatement does, as well. It is important to note that the recognition of irrevocable licenses will not open the floodgates to undermine property rights. By its very nature, it is only applicable in narrow circumstances so as to avoid the working of an injustice. The specific, unique circumstances here, in which a municipality that relied upon the duly recorded vote of a State agency in order to expend significant resources and construct the Line for the benefit of the public health of its citizens only to decades later have its claim to that Line challenged by a successor property owner, present the rare situation where the application of an irrevocable license is warranted.

CONCLUSION

For the reasons stated herein and in Portsmouth's Opening Brief, Portsmouth respectfully requests that this Court grant Portsmouth the relief it requested in its Opening Brief.

Respectfully submitted,

Dated July 15, 2019

CITY OF PORTSMOUTH

By its attorneys,

By: Bruce W Felmly BOF

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

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I served two (2) copies of the foregoing CITY OF PORTSMOUTH'S REPLY BRIEF by first-class mail to all counsel of record.

Bruce W. Felmly BBF

Bruce W. Felmly

CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 2,938 words, exclusive of the cover page, table of contents, table of authorities, page numbers, signature block, certificate of service, and certification of word count.

Bruce W. Felmly BBF

Bruce W. Felmly