The State of New Hampshire

Supreme Court

No 2018-0327

James G. Boyle, Individually and as
Trustee of the 150 Greenleaf Avenue Realty Trust,

v.

City of Portsmouth

and

James G. Boyle, Individually and as
Trustee of the 150 Greenleaf Avenue Realty Trust,

v.

Comcast of Maine/New Hampshire Inc.

MANDATORY APPEAL
FROM RULINGS OF THE ROCKINGHAM COUNTY SUPERIOR COURT

JAMES G. BOYLE, INDIVIDUALLY AND AS TRUSTEE
OPENING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. In issuing a permanent injunction against the City of Portsmouth for trespass, the trial court determined as a matter of law that the trespass started when a formal letter of revocation of a license was sent to the City on November 12, 2013, rather than when: (1) the plaintiff's lawyer sent a letter to the City on February 7, 2008 revoking any past permissions for possession and demanding the sewer line be removed or (2) when plaintiff filed suit for trespass in 2010, an act wholly incompatible with the continued existence of any license. This gives rise to two closely interrelated questions on appeal.

   a) In its orders on summary judgment and the request for permanent injunction, did the trial court commit an error of law or decide against the manifest weight of the evidence in determining that the City of Portsmouth license had been revoked by a letter in 2013, rather than a prior letter of 2008 or the filing of the lawsuit alleging trespass in 2010?[1]

   b) Did the Court err in excluding from the jury's consideration the 2008 letter which revoked all permissions granted to the City? [2]

2. Did the trial court commit an error of law when it eliminated future lost profits from a trespass and/or nuisance claim as a matter of law when it granted a motion in limine excluding all evidence and instructed the jury that damages could not accrue past December 2016 based on the City of Portsmouth's eminent domain proceeding where future lost profits are not recoverable in eminent domain proceedings under New Hampshire law?[3]

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[1] Preserved at: Motion for Summary Judgment at.14, Boyle App. 113; Motion for Reconsideration. at 6, Boyle App. 213, Boyle Aff. par. 17, Boyle App. 125.

[2] Preserved at: Trial Transcript Day 2, 188-189.

[3] Preserved at: Hearing on City's Motion in Limine, Pre-Trial Motions Transcript page 74 et. seq. *See also* Boyle's Motion Concerning Trial, Boyle App. 395; Boyle's Renewed Motion to Consolidate, Boyle App. 426.

INTRODUCTION

This is a complex and highly unusual case presenting an almost unprecedented situation of two intertwined legal actions. One concerns an old sewer line on Mr. Boyle's property for which no easement existed. Mr. Boyle needed it removed as it was preventing development of a large portion of his property. Since 2004, the City of Portsmouth has used every possible tactic and legal argument to have the line remain in place without compensation. It also appeared to have a vendetta against Mr. Boyle and his development. Ultimately, the Trial Court determined the sewer line was trespassing.

Trial to determine damages was set for 2017. On the eve of trial, the City took 4.6 acres by eminent domain. This second action had a radical impact on the scope of trial and damages, as well as effectively preventing future development. In large part, this appeal relates to the Trial Court's handling of this impact. Over Mr. Boyle's objections raising the uncertainty created and unique posture of the case, the trial proceeded. Mr. Boyle contended the taking was in bad faith and filed a preliminary objection. After a three day trial, the Superior Court sustained the objection, and found the taking was a ploy to influence this litigation. As will be demonstrated, the taking should not have been allowed to cut off damages and the Court committed legal error in doing so. This appeal can only be understood in conjunction with Supreme Court Docket No. 2018-0649 which is the City's appeal of the ruling on the preliminary objection.[4]

STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

There are over 340 docket entries in this case. The procedural history is torturous and, in large part, not germane to the appeal. A very brief history will be given.

In 2010, Mr. Boyle, individually and as Trustee of the 150 Greenleaf Avenue Realty Trust brought a multi-count action, including for trespass and nuisance against the City of Portsmouth (City). Boyle App. 5. A companion action was brought against

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[4] It is by chance that both matters are under appeal simultaneously.

Comcast, and the matters were consolidated. The City and Comcast denied Mr. Boyle's allegations.

I. Background Of The Trial Court's Determination Of The Date Of License Revocation.

After discovery, in 2013, the City moved for summary judgment and Mr. Boyle cross moved. Boyle App. 41, 100. The principal issue was the City's right to use Mr. Boyle's property for a sewer line. The Trial Court found that Mr. Boyle had given permission for the sewer line to be on the property. Order on SJ at 3, Boyle App. 174. It also held that the City had an executed license, obtained from the State Board of Education many years earlier. Order on SJ at 17-20, Boyle App. 188-191.

Mr. Boyle moved for reconsideration and argued that he had revoked any permission for the license through a 2008 letter or the filing of the lawsuit. The Trial Court found Mr. Boyle had given permission, and had not addressed the issue of revocation in its original order but now had to confront it. Motion for Reconsideration at 6, Boyle App. 213. He also sent another letter of revocation on November 12, 2013, this time using the word license since the Trial Court found the City had a license. The Court held the 2013 letter revoked the license and implicitly rejected as a matter of law the asserted revocation on any dates prior. Order on SJ Reconsideration at 6, Boyle App. 252. The City, therefore, became a trespasser as a matter of law with the only dispute on the sewer line being the date which the trespass commenced. The City sought an interlocutory appeal, which was initially granted but then this Court determined it was granted improvidently and declined to address the merits. After the case was remanded, the State of New Hampshire was added concerning an alleged title defect in Mr. Boyle's chain of title. Mr. Boyle moved for summary judgment which was granted. Although a nominal party, the State did not participate further after summary judgment.

II. Background Of The Trial Court's Determination Of Damages Available To Mr. Boyle

The two principal issues to be tried in January 2017 were damages arising from the trespass and whether or not the flow of water created a nuisance. Just before trial in December 2016, the City filed a declaration of taking of 4.6 acres of Mr. Boyle's

property. Immediately, Mr. Boyle filed a motion to postpone and consolidate the trial with the hearing on the preliminary objection, expressing concern over the impact of the eminent domain. In particular, he was concerned of the uncertainty of the cutoff date for damages while his challenge to the eminent domain proceeding was pending. Boyle App. 395. The Trial Court denied these motions. Pretrial Management Conference Transcript at 10, Boyle App. 484.

On January 19, 2017, the City filed a motion to preclude evidence of damages post-December 2016 as a consequence of the taking. Boyle App. 437. Due to the proximity of trial, the parties argued the motion but did not separately brief it. Pre-Trial Motions Transcript, 74-79. The Court granted the motion by written order dated January 24, 2017. Boyle App. 441.

A two week jury trial commenced on January 23, 2017. The case was tried on damages for the trespassing sewer line, which the Trial Court instructed the jury commenced in 2014 in accordance with its ruling on summary judgment. The jury found Mr. Boyle is entitled to lost profits for the trespass counts. Boyle App. 448. Both liability and damages on a nuisance theory for the water impounded by the sewer line were also tried, as the Court had denied motions for summary judgment on this issue. The jury found permission was granted for the flow of water, and that revocation for this permission occurred in 2013. The jury further found that Mr. Boyle proved the flow of water created a nuisance after revocation, and that Mr. Boyle proved he suffered lost profits as a result of the nuisance. Boyle App. 443[5]. The jury found no liability for Comcast and as there were no post-verdict motions or an appeal as to Comcast, Comcast is no longer participating in the suit. Mr. Boyle and the City filed various post-trial motions, and both Mr. Boyle and the City timely appealed.

As to the taking, Mr. Boyle filed a timely preliminary objection to its validity. Boyle App. 356. While this appeal was pending, Judge Delker sustained the preliminary objection. The City appealed that decision in Supreme Court Docket No. 2018-0649. It

[5] It appears the jury allocated the lost profits equally between the trespass and nuisance.

is being briefed in parallel with this appeal. Assuming this Court affirms the ruling on the preliminary objection, it is likely there will be further proceedings in the Trial Court concerning damages.

FACTS[6]

The property in question is a large parcel, just under 14 acres. Boyle App. 7. Originally it was developed to house the New Hampshire Vocational Technical School. Subsequently, it was sold to private developers who converted the property to commercial use. In 2003, Mr. Boyle investigated the property to possibly purchase it to transform the building into a new car dealership. *Id.* He also envisioned one or two additional dealerships could be built on the site. Transcript 114-115.

Towards the rear of the property, a City sewer line bisects the property. Boyle App. 7. The sewer line is in an elevated berm, although the berm was not visible in 2003 due to overgrowth of vegetation. The berm acted as a dam, and caused wetlands to form to the eastern side.

Mr. Boyle closed on the property on December 31, 2003. Boyle App. 7. At the time, he had no knowledge of the existence of the sewer line. He discovered it in 2004, and shortly thereafter learned there was no easement for it. Boyle Affidavit Par. 12, Boyle App. 123-124. Due to its location and the wetlands it created, the sewer line interfered with Mr. Boyle's development of additional dealerships. Accordingly, Mr. Boyle needed the City's cooperation to move the sewer line to be compatible with his development plans, and to remediate the wetlands created.

From 2004 to 2007, Mr. Boyle tried to resolve the status of the sewer line with the City, but was unable to reach a resolution. Boyle Affidavit Pars. 14-16, Boyle App. 124-125. During this time, he had given temporary permission for the sewer line to remain on the land as he was not going to resort to self-help and physically destroy a functioning sewer line. Boyle App. 125, Boyle Affidavit Par. 16. "I [Boyle] told him [City Attorney

[6] This is a complex dispute which has been active for over a decade. There are countless facts that have been developed over the course of the lawsuit. In the interest of brevity, Mr. Boyle is only setting out the facts needed to understand his questions on appeal.

Sullivan] the sewer line could stay as we tried to resolve it." Boyle Affidavit Par. 15, Boyle App. 124. The City denied any permission was ever given. The Trial Court made contradictory findings that permission was given and that the City denied such permission existed. SJ Order at 3, Boyle App. 174.

When resolution was not forthcoming, Mr. Boyle instructed his attorney to make demand on the City revoking any prior permissions. Boyle Affidavit Par. 16, Boyle App. 125. Demand was made by letter of John Kuzinevich to Assistant City Attorney Woodland dated February 7, 2008. Kuzinevich Affidavit Par. 2 P, Boyle App. 140. In relevant part, it provided: "Accordingly, demand is hereby made that the City immediately remove the sewer lines from the property. Since the City has no easement, or permission from the current owner as it had in the past ... it is my clients [sic] intent to erect suitable barriers to prevent unauthorized access." *Id.* It also clearly characterized the City's action as a trespass and provided: "Please let me know when I can review all plans and documents which you might contend justify your trespass." *Id.* Negotiations still continued but progress ceased. In 2010, Mr. Boyle filed suit to have the sewer line removed as a trespasser. Boyle Affidavit Par. 17, Boyle App 125. Paragraph 30 of the Verified Complaint (Count I – Trespass) states: "Mr. Boyle has demanded that the City remove the sewer line from his property." Boyle App. 12. In its amended answer the City admitted that at times Mr. Boyle demanded the sewer line be removed. Amended Answer Par. 30, Boyle App. 299. The complaint sought immediate relief from the trespass in seeking a temporary restraining order. (Count IX). Simultaneously, Mr. Boyle filed an Ex Parte motion for a temporary restraining order. Boyle App. 25. After the Trial Court issued its orders on summary judgment finding that the City had an executed license, Mr. Boyle sent another demand on November 12, 2013 revoking the license. Boyle App. 281. The Court held this demand was effective to revoke the City's license whereby it became a trespasser. Order on SJ Reconsideration at 6, Boyle App. 257. The Trial Court held that whether the flow of water was a part of that license was an issue of fact for jury. Transcript at 1287. Neither the 2008 revocation letter, nor the 2013 revocation letter were submitted to the jury.

At trial, the jury awarded lost profits for 2014 through 2016. Boyle App. 452. As a necessary component of the verdict, the jury had to determine that by no later than 2014, Mr. Boyle would have had another profitable dealership on the site, but for the City's actions. The Trial Court precluded consideration of future lost profits solely based on the taking.

Throughout the weeks leading to trial, Mr. Boyle consistently tried to argue the disastrous effect the improper taking would have on the trial. He filed a Motion Concerning Trial with a copy of his preliminary objection to the taking, and argued that the taking was in bad faith in an improper attempt to derail the trial. Boyle App. 395. He pointed out the taking was excessive and in fee simple to increase the harm to him, and that the City had no legitimate need for the property. He argued that the City failed to follow essential steps of the Eminent Domain Procedure Act, and that there would be no evidence that supported the taking. He argued that the City Council vote was a sham orchestrated by lawyers. His objections to the taking were specific and detailed in a 39 page objection. Mr. Boyle specifically argued: "Until such time as the preliminary objection is determined and all appeals exhausted, it is impossible as a matter of law to know the key date to instruct the jury on damages due to the uncertainty of the effectiveness of the City's attempts to take the property." Boyle App. 396. Mr. Boyle renewed his objection on January 17, 2017, after the superior court was properly referred jurisdiction of the preliminary objection by transfer from the Board of Tax and Land Appeals. Boyle App. 426. The Court, however, wanted to proceed with this long overdue trial, and determined the probability of Mr. Boyle winning numerous issues at trial and that the preliminary objection would be sustained did not justify further delay. In the end, the Trial Court agreed with much of Mr. Boyle's position about the taking when it sustained the preliminary objection.

ARGUMENT

SUMMARY OF ARGUMENT

The trial court erred in ruling, as a matter of law, that Mr. Boyle revoked the license in 2013, and not the date of his 2008 letter or the 2010 filing of this action. The

issue was at least one of disputed material fact. There are three ways to revoke a parol license; verbally, in writing, or by action incompatible with the licensee's rights. Here, the 2008 letter was an unambiguous writing revoking the license, and filing a lawsuit for trespass in 2010 was an action incompatible with the licensee's rights to occupy the property. The Trial Court erred as a matter of law in ignoring these two methods of revocation. It never explained why the 2008 letter was not an effective revocation. In finding the 2013 letter effective the Court noted it was "formal." The 2008 letter is just as formal as the 2013 letter. At a minimum there existed a dispute of material fact concerning the date of revocation. In the event the 2008 letter or the filing of suit were not revocations as matters of law, the trier of fact should have been permitted to hear the evidence and make its own determination on the issue.

The Trial Court also erred in excluding lost profits after the date of the taking (2016). The taking did not cut off future damages because the act of trespass is distinct from the damages flowing from that trespass, which may continue after the trespass ceases. Likewise, a nuisance is not abated by a taking. Mr. Boyle was denied a complete remedy by the exclusion of future lost profits. Moreover, we now know the taking cannot support any exclusion of future damages because the taking has been invalidated by the Superior Court in a separate matter also on appeal to this Court. The eminent domain process resulted in erroneous exclusion of the future lost profits based on the assumption that the City's taking was valid. Under general concepts of Court governance, the City should not be able to eliminate damages by filing a taking, which the Trial Court found to be a "ploy" to influence the litigation.

I. The City's License To Use Mr. Boyle's Property Was Revoked By Either The 2008 Letter Or The Filing Of Suit As Each Follows Black Letter Law As To What Constitute a Revocation.

The Trial Court decided as a matter of law that the City had an executed license for the sewer line to be on Mr. Boyle's property in its order on summary judgment. On reconsideration, the Trial Court held as a matter of law, that the 2013 letter to the City was a formal letter which revoked the City's license to use Mr. Boyle's property for the

sewer line. The Trial Court did not accept Mr. Boyle's contention that the prior 2008 letter or the filing of the lawsuit in 2010 constituted an earlier revocation. The date of revocation determines when damages are measured. Thus, the Trial Court's ruling deprived Mr. Boyle of an additional four or six years of damages. The Court's ruling as to these earlier events ignored black letter law on how a parol license is revoked.

Since the Trial Court made its determination as to revocation on summary judgment, this issue is subject to *de novo* review to determine if the Trial Court committed an error of law. *Town of Goshen v. Casagrande*, 170 N.H. 548 (2018); *Conant v. O'Meara,* 167 N.H. 644 (2015). There is no dispute a letter was sent in 2008, or that the lawsuit was filed in 2010. Nor is either ambiguous in intent. Thus, this Court need only determine if as a matter of law the 2008 letter or the filing of a lawsuit constitutes a revocation of the City's license. Alternatively, if the 2008 letter or the filing of the lawsuit do not constitute revocation as a matter of law, the issue is at least one of disputed material fact that should have been left to resolution by the trier of fact.

A. <u>THERE ARE THREE WAYS TO REVOKE A PAROL LICENSE.</u>

A parol license can be revoked by: (1) a writing, (2) verbally or (3) performing any act inconsistent with the license. *Batchelder v. Hibbard,* 58 N.H. 269 (1878). Indeed, revocation is accomplished as long as the licensee has notice of the revocation. *Hodsdon v. Kennett,* 73 N.H. 225 (1905). Mr. Boyle revoked with all three methods: (1) his 2008 letter constitutes a written revocation; (2) he was constantly telling the City to get off his land (City Amended Answer Par. 30, Boyle App. 299); and (3) by bringing suit, he performed an act wholly inconsistent with the license.

Further, there is no case law or statutory requirement that the revocation of a license be formal as the Trial Court held. Order on Reconsideration of SJ at 6, Boyle App. 257. Indeed, simple oral complaints about a license can serve as revocation. *Steinfield v. Monadnock Mills*, 81 N.H. 152 (1923). In *Keck v. Scharf,* 80 Ill. App. 3d 832, 836, 36 Ill. Dec 83,86, 400 N.E.2d 503, 506 (1980) the Illinois appellant court summarized the ways of revoking an oral license:

> It is in the nature and definition of a license that it is revocable at the will of the licensor. A verbal license, such as the one in the present case, may be revoked by express notice, by acts which are entirely inconsistent with enjoyment of the use, or by appropriating the land in question to any use contrary to its enjoyment by the licensee. (Forbes v. Balenseifer.) Indeed, a parol license is subject to revocation even where consideration has been paid or expenditures have been made in reliance on such an agreement. Mueller v. Keller; Lang v. Dupuis (1943), 382 Ill. 101, 46 N.E.2d 21; Boland v. Walters (1931), 346 Ill. 184, 178 N.E. 359; Baird v. Westberg (1930), 341 Ill. 616, 173 N.E. 820; Mercer v. Sturm (3rd Dist. 1973), 10 Ill.App.3d 65, 293 N.E.2d 457.

As will be detailed below, even though formality is not a requirement, both the letter and the initiation of a lawsuit can be considered "formal" events.

B. THE 2008 LETTER PUT THE CITY ON NOTICE OF A REVOCATION.

While there is no requirement for formality, any method of revocation must put the licensee on notice. *Steinfield v. Monadnock Mills*, 81 N.H. 152 (1923) (complaints and demands for reparation were sufficient revocation of a license).

In this case, the 2008 demand letter from counsel clearly revokes all prior permissions. Kuzinevich Affidavit Par. 2 P, Boyle App. 140. It identifies the City's use of the property as trespassing. There can be no question that the City was put on notice to remove the sewer line. As a matter of law the Court erred[7]. The Trial Court apparently disregarded the letter because it was not "formal", and because the Court characterized Mr. Boyle as having given the City permission to keep the sewer line on the property pending litigation. Both of these errors will be discussed below.

Here, the 2008 letter was in writing and sent to the assistant city attorney. There was no basis for the trial court to determine that the 2008 letter was not "formal." It was more than an informal complaint, as it was a formal writing directed to the appropriate official in authority, sent by counsel to counsel. There was no ambiguity in Mr. Boyle's demand that the sewer line be removed. It also threatened to put up gates to block the

[7] The Trial Court appeared to waver on its earlier ruling and was ready to admit evidence of an earlier revocation date at the pre-trial hearing until the City objected. Pre Trial Motions Transcript at 25.

City's access, which is entirely inconsistent with the City's use.[8] It was express notice and an effective revocation.

Further, it did not materially differ from the 2013 revocation letter, which the Trial Court characterized as formal. The difference, besides the context of each letter, is that one letter used the word "permission" while the other used the word "license." – a difference which is not material. Both clearly demanded removal of the sewer line. (*Compare* Boyle App. 140 *with* Boyle App. 281.) It was an error of law not to recognize the effectiveness of the 2008 letter. Nor did the trial Court's opinion contain any reasoning or indicate why it was inserting this new requirement of formality, which is not supported by case law. The Trial Court itself even described a trespass in its jury instructions as using property "without permission", just like the 2008 letter referenced permissions. Transcript at 1376.

Documents, like contracts, are construed as a matter of law. *Frederick v. Frederick*, 141 N.H. 530 (1996). When there are no ambiguities, effect is given to the plain meaning of the words. *Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333 (2002). Here, there are no ambiguities - all prior permissions were revoked. Under the plain meaning of the words, the original permission creating the license was revoked, irrelevant of whether that permission was given by the Board of Education or Mr. Boyle. Indeed, the letter was crafted to be a blanket revocation of all permissions as it was unclear the precise permissions the City had when it was sent. The Trial Court erred as a matter of law in reaching a different conclusion. It did not address the revocation of Mr. Boyle's 2004 permission, and set forth no grounds why the 2008 letter would be ineffective. As such its decision must be reversed on this issue, and this Court may determine that the 2008 letter constitutes revocation as a matter of law.

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[8] The gates were never put up as counsel for both parties reached an agreement that the City would seek Mr. Boyle's permission before accessing the property. Order on Pending Motions at 4-5, Boyle App. 276-277. By entering this agreement, the City was implicitly recognizing that Mr. Boyle was asserting and possessed superior rights.

The Trial Court did not directly address Mr. Boyle's arguments about the 2008 letter in its orders on summary judgment or reconsideration. The Trial Court did, however, incorrectly find in its order on reconsideration that Mr. Boyle had given permission "pending the outcome of the litigation," Boyle App. at 174, 257 n.2. In that respect, the Trial Court's Order had no basis in the summary judgment factual record. To begin, in its original summary judgment Order, the Trial Court found that Mr. Boyle granted permission for the sewer line to remain in 2004, which was consistent with Mr. Boyle's summary judgment affidavit. SJ Order at 6, Boyle App. 174. The Trial Court's footnote on reconsideration erroneously states Mr. Boyle gave permission pending the outcome of litigation, but both his affidavit and the order on summary judgment stated he gave permission pending resolution. Permission pending resolution does not foreclose or even conflict with the 2008 letter being an effective revocation. Mr. Boyle sent the 2008 letter when it became apparent to him that there would be no resolution - therefore he was revoking that permission as well as all others. The Court without further reasoning did not address why the 2008 letter did not revoke all prior permissions. It was error, and there is nothing irrevocable about agreeing not to take action for a period during negotiations.

There was no permission and waiver of damage claims during the litigation. In deciding summary judgment the court is limited to reasonable inferences from the record before it. *Grossman v. Murray*, 141 N.H. 265 (1996). Mr. Boyle testified that he was not giving up any rights by giving permission. Transcript at 401. The only feasible construction is that Mr. Boyle was not resorting to self-help and destroying the sewer line as the matter was being negotiated or determined in the courts. During this time, he was always asserting his superior rights. In no reasonable construction was he waiving his damage claims while actively pursuing them. Nor was there any basis to conclude that he could not revoke this temporary permission. Indeed, such a result in which a party waives damages while litigating would nullify all trespass actions as a party would have to resort to self-help and eject the trespasser rather than engage in the legal process or orderly negotiation while the trespassing structure stays on the property.

Further, this Court should determine as a matter of law that the 2008 letter revoked both the permission for the sewer line and permission to flow water. It is an indisputable fact that removal of the sewer line would cause the water to free-flow off the property. While there can be permission for a sewer line without permission for standing water, as a matter of fact, there cannot be standing water without the sewer line as constructed. Thus, of necessity, should the Court determine that the 2008 letter is a revocation as a matter of law, it must apply to both the sewer line and the wetlands. Boyle's Motion for JNOV.[9], Boyle App. 462.

C. <u>IF THE 2008 LETTER IS NOT AN EFFECTIVE REVOCATION, THE LAWSUIT IS.</u>

Revocation of a license is performed by performing any act which is inconsistent with the license. *Quimby v. Straw*, 71 N.H. 160 (1901) (holding license to use a stairway was revoked when a wall was erected); *Batchelder v. Hibbard,* 58 N.H. 269 (1878).

Even if the 2008 letter was somehow unclear and ineffective to revoke prior permissions or licenses, filing a lawsuit unequivocally provides notice and demands the sewer line be removed and water flow remedied. It is entirely inconsistent with any use of the land by the City. *Keck, supra.* The lawsuit characterized the City as a trespasser. It sought both a temporary restraining order, and preliminary and permanent injunctions. There can be no doubt that Mr. Boyle was exerting all rights, and the license was revoked no later than filing the lawsuit. A lawsuit is the most formal of actions putting a party on notice that they are a trespasser and that they no longer have a license. The complaint even pleaded that Mr. Boyle demanded the City remove the sewer line. Complaint par. 30, Boyle App 12. It also pleaded the 2008 letter as a revocation and attached it. Amended Complaint par. 30a, Boyle App 283. Thus, the complaint expressly put the City on notice that it no longer had a license.

The Trial Court erred in not holding the 2008 letter or the filing of suit were revocations as matters of law. There were no disputes of fact that the letter was sent and

[9] The motion pointed out that the jury had no evidence of the 2013 letter, and therefore no evidence to support a 2013 revocation date. It only had testimonial evidence of the 2008 letter.

received, or that suit was filed and served. There were no ambiguities in either what they said or Mr. Boyle's intent in so acting. Thus, the Trial Court should have granted summary judgment on the issue. If ambiguities were found to exist, then those indicate a dispute of material fact and the date of revocation should have gone to the jury.

D. TO THE EXTENT THAT THERE ARE DISPUTES OF FACT ABOUT REVOCATION, THE TRIAL COURT ERRONEOUSLY EXCLUDED THE 2008 LETTER EVEN THOUGH IT WAS CRITICAL EVIDENCE

The Trial Court excluded the 2008 letter from the jury's consideration. This Court reviews evidentiary determinations for unsustainable exercise of discretion. *See State v. Rice*, 169 N.H. 783, 800 (2017). The Trial Court unsustainably exercised its discretion.

Relevant evidence should be admitted. *N.H.R.Ev.* 402; *State v. Kelly*, 125 N.H. 484 (1984). It is obvious that a letter purporting to revoke permissions is relevant to determining the issue of when permission was revoked - a "fact [that] is of consequence in determining the action". *N.H.R.Ev.* 401. Not only was the evidence relevant, its omission was material and caused prejudice. Without the letter, the only evidence which the jury had to determine the date of revocation was Mr. Boyle's testimony that he instructed counsel to send a letter. However, numerous times either through the Court's summary of the case or instructions or cross-examination on various matters, 2013 was constantly mentioned. Most likely the jury landed on 2013 as the revocation date because that was the date they heard the most, since the 2008 letter had been excluded. The power of testimony that a letter was sent is ephemeral compared to assessing the actual document and its directness. The letter, a tangible exhibit, simply written and easy to understand would likely have produced a different result in the jury's mind.

The only reason the Trial Court excluded the 2008 letter was that it was not relevant in light of its holding the 2013 letter controlled revocation. Transcript 188. However, if it was incorrect to determine as a matter of law the 2013 letter controlled, the 2008 letter would have been highly probative of revocation and it was error to exclude it. Further, even if the Trial Court were correct as to relevancy for it ruling of when the

sewer line license was revoked, the revocation date concerning water flow was an issue of fact for the jury and the letter was obviously relevant to that.

II. The Court Erred In Granting The City's Motion In Limine And Precluding Damages After December 2016 As Mr. Boyle Is Entitled To Future Lost Profits.

In light of the declaration of taking being filed in December 2016, the Trial Court ruled as a matter of law, that Mr. Boyle would not be entitled to any future damages as the City would no longer be trespassing. The issue came up in various pretrial conferences, and in Mr. Boyle's motions to postpone trial or consolidate trial with the preliminary objection. The Trial Court ruled trial would proceed although it recognized the great danger to the proceedings if Mr. Boyle prevailed on the preliminary objection. Trial Management Conference Transcript at 9-10, App. 483-484. Ultimately, the Court granted a motion *in limine* to exclude damages after December 2016, holding that there could be no damages after the City ceased to be a trespasser and became the owner of a portion of the property. Boyle App. 441. Consistent with its ruling on the motion, it instructed the jury not to consider damages after December 2016. This was error. When there are parallel proceedings in eminent domain and the superior court, all damages for trespass are to be determined in the Superior Court, and not perhaps in an eminent domain proceeding at the BTLA as the Trial Court mused. *Public Service Company v. Shannon,* 105 N.H. 67 (1963). The issue of the effect of the taking on damages is a pure issue of law as no factual disputes were involved. Thus, the issue is subject to *de novo* review for an error of law.

A. DAMAGES FOR TRESPASS INCLUDE LOST PROFITS.

A plaintiff is entitled to compensatory damages arising from a trespass. *Morris v. Ciborowski*, 113 N.H. 563 (1973). Here, the trespass of the sewer line and the wetlands created by it rendered the land undevelopable until the sewer line was removed and the wetlands remediated. Thus, the damages were the lost profits that Mr. Boyle would have earned from developing a second dealership but for the City's trespass. Lost profits are recognized damages for trespass in an appropriate case. *PYA International LTD. v.*

White, Zuckerman, Warasavsky, Luna Wolf & Hunt, B214232 (Cal App. 2d Dist. June 20,2011); *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 56 Tex. Sup. Ct. J. 77 (Tex., 2014); *Bagby v. Hodge*, 297 S.W. 882 (Tex. App., 1927); *see also City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska, 1975); *Primetime Hospitality v. Albuquerque*, 206 P.3d 112, 2009 NMSC 11, 146 N.M. 1 (N.M., 2009).

There is widespread support that lost profits can be recovered for trespass. "Where a trespass to land causes the owner to lose a specific sale or to lose a ready market, damages can be awarded for the loss." Restatement (Second) of Torts § 931 comment e (1979); See Also Id. § 929(1)(b) and comment d (recognizing damages for loss of use); *Wright v. Vickaryous*, 598 P.2d 490, 500 (Alaska 1979) (allowing farmer whose land had been unlawfully possessed to recover lost profits for his failure to "obtain[] a second cutting of hay"); *Inyo Chemical Co. v. Los Angeles*, 5 Cal.2d 525 (1936) (affirming that one whose land was flooded could recover lost profits for loss of 90,000 tons of trona that would have taken thirty-six years to process, but requiring reduction to present value); *Zinn v. Gjps Lukas*, 695 So.2d 499, 500 (Fla. App. 1997) ("Where a business continues after suffering from an act of negligence, the business is entitled to recover the lost profits attributable to the defendant's negligent act.")

B. TRESPASS DAMAGES MAY CONTINUE TO ACCRUE AFTER THE TRESPASS CEASES.

In its order, the Trial Court mistakenly reasoned that once the declaration of taking was filed, there was no longer a trespass and therefore, no damages. That, however, confuses the improper conduct and the damages flowing from it. The effects of a trespass may continue even after the trespass is removed. *Perrilloux v. Sitwell,* 814 So.2d 60 (La. 1st Cir. 2002); *Abraham v. P Exploration & Oil, Inc.*, 149 Ohio App.3d 471, 778 N.E.2d 48 (2002); *Bagby v. Hodge*, 297 S.W. 882 (Tex. App., 1927); *see Also Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, 440 S.E.2d 606, 247 Va. 187 (1994). For example, the *Perrilloux* court distinguished between the construction of a trespassing driveway and the "continued ill effect of the original trespass." Clearly damages are distinct from the act of trespass. Similarly, in analyzing the damages caused by environmental pollution under

a theory of trespass, the *Abraham* court stated: "...there is a distinction between continuous tortious conduct and continuing damage." The Court noted that the tortious conduct ceased when BP vacated the property even though the damages continued. *Abraham* at 53.

Although it is not a trespass case, the difference between the wrongful act and continuing or future damages is seen clearly in *State v. Exxon Mobil Corp.,* 168 N.H. 211 (2015). The Court extensively discussed how future harm may arise from past actions and allowed for recovery. *State* at 261 et seq. Similarly with direct reference to profits, the *Bagby* court quoted the United States Supreme Court as follows: "In the case of *Weinman v. De Palma,* 232 U.S. 571, 34 S.Ct. 370, 58 L.Ed. 733 (1914), the Supreme Court of the United States, speaking through Mr. Justice Pitney, a case very similar to that at bar, ruled: 'In our opinion, the court correctly held that where a trespass results in the destruction of a building, with consequent interruption of a going business, the loss of future profits (these being reasonably certain and proved with reasonable exactitude) forms a proper element for consideration in awarding compensatory damages'." *Id* at 884. There is no automatic linkage that once the past conduct ceases, the damages stop. If damages ceased with the conduct, no accident or assault victim would ever get future medicals or pain and suffering as the accident or assault, the tortious conduct, would have ceased.

The Court extensively discussed lost profits as an element of trespass damages. It used the analogy of a Winnebago blocking access to a retail store. Clearly profits are lost as customers cannot shop. This analogy can be taken a step further in the analysis. If the Winnebago is trespassing for a long time, customers may stop coming to the store. As its customer base erodes even more, business is lost. When the Winnebago drives off, there could be a substantial period of time before the business recovers, if it ever does. Thus, the loss of profits continues even when the Winnebago is no longer trespassing. The amount of lost profits and their duration are disputed issues of fact. It would be the province of the jury to determine damages.

For example, at any time during this litigation, the City could have relocated the sewer line, at which point it would not be trespassing. Yet, it could take some time to build and develop a dealership that should have already been there. Mr. Boyle would have lost profits during this time period even though the trespass itself had ended. Even when built, it would take time to develop a customer base, further extending the period of damages.

The fact the eminent domain temporarily ended the trespass does not alter this analysis. Mr. Boyle would still suffer future damages because he needed time after the City was no longer a trespasser to develop and build a dealership that should have been up and running at the site. In this instance, however, he now needs even more time as the site the City deprived him of was engineered, ready to permit and operate. The jury found a new dealership would have been operating prior to 2014. Now he has to find a new location, which is rare in Portsmouth and re-engineer the project. The jury should have been able to make a determination as to future lost profits. Essentially, the trespass coupled with the eminent domain has driven his envisioned business into the ground.

Moreover, the trespass here has not ended, further underscoring why future lost profits should have been allowed.[10] The same judge who tried the sewer line case also considered and sustained the preliminary objection to the taking. Thus, unless this Court reverses the decision on the preliminary objection, Mr. Boyle would be denied a recovery through an improper manipulation of the system by the City, as will be discussed below.

C. NUISANCE DAMAGES INCLUDE FUTURE LOST PROFITS.

Lost profits may be recovered when caused by a nuisance. *Atun Investments Corp. v. Ergas,* 549 So.2d 706 (Fla. 3d Dist. 1989); *Curt Bullock Builders, Inc. v. HSS Development,* 586 N.E.2d 1284 (Ill. 4th Dist. 1992); *Post and Beam Equities Group, LLC v. Sunne Village Development Property Owners Association,* 124 A.3d 454 (Vt 2015). Future lost profits may be awarded until the nuisance is abated. *Atun, supra.*

[10] Some of the "future" lost profits are now just past lost profits for 2017 and 2018.

Unlike trespass, which can be cured by a change in title to the property if the trespasser gets a legal interest which allows possession, nuisance is not abated by a mere change in title. The physical conditions giving rise to the nuisance must be altered. The taking only changed title. After the taking, the City did nothing to abate the nuisance the jury found exists. There is no evidence in the record that the City took any steps to abate the nuisance. To the contrary, the record conclusively established that at the time of trial the nuisance existed while the City held title. The Trial Court and the jury viewed the property. The jury saw the water and found it was a nuisance. After the trial, Mr. Boyle moved for an order that the City abate the continuing nuisance which continued to affect the property he owns even after the taking as there was no evidence that the effect of the nuisance was limited to the area of the taking. Boyle App. 453. The Court denied the motion without reasoning. It was error as a matter of law not to allow future lost profits in such circumstances.[11]

Further, eminent domain cannot be used to abate a nuisance. *City of Tempe v. Fleming*, 168 Ariz. 454, 815 P.2d 1 (Ariz. App., 1991). Eminent domain may only be used as permitted by the legislature. *Id.* Abating a nuisance is not one of the expressed or implied reasons to allow eminent domain under New Hampshire R.S.A., and the City can not use eminent domain to cut off nuisance damages unless there was an independent reason which permitted the eminent domain, which there was not.

D. <u>WITHOUT ALLOWING FUTURE LOST PROFITS, MR. BOYLE IS LEFT WITHOUT A REMEDY.</u>

Article 14 of the New Hampshire Constitution provides that all citizens shall be entitled to remedies for any injuries to person or property. *Aranson v. Schroeder*, 140 N.H. 359 (1995). The right to recover for injuries is an important substantive right. *Estabrook v. American Hoist & Derrick, Inc.*, 127 N.H. 162 (1986); *Gonya v.*

[11] The record in the eminent domain appeal will show that the City planned to do nothing to abate the nuisance or otherwise change the property. Moreover, the taking took only the areas of water. It did not take the wetlands buffer zone so even if the faulty taking is reinstated, the nuisance will still be affecting land which Mr. Boyle still owns. The effect is detailed in Mr. Boyle's Motion to Abate and accompanying affidavit, Boyle App. 453.

Commissioner N.H. Insurance Dept., 153 N.H. 521, 525 (2006). When a statute abridges a remedy, the courts look to a quid pro quo test to determine if an alternate remedy exists. If a remedy is completely abolished, the statute is unconstitutional. In this case, if Mr. Boyle is denied future lost profits, he is left without a complete remedy for his injuries. The Trial Court rationalized this by finding that Mr. Boyle would be compensated through the eminent domain process. This was error.

Mr. Boyle must be allowed to recover future lost profits in this action because, barring that, he lacks any remedy in the eminent domain proceeding. Unlike the tort liability of trespass and nuisance, which allows for lost profits, eminent domain is an in rem proceeding. During Day 1, the Trial Court stated: "I'm not sure he would be entitled to lost profits because he hasn't actually developed the dealership and as a function of the eminent domain, the City has cut off that avenue of damages." Transcript, 11. On Day 6 the court described the issues of damages for the jury to determine as: "it depends on how the jury finds he would have used this property, how he was damaged. That is was the loss of the use and enjoyment because he could have built another dealership and, therefore, lost that profit or was it because he didn't have exclusive right to possess that portion and, therefore, was entitled to fair market rent for that portion that was disruptive in his use of." Transcript, 891. Mr. Boyle as the person who would develop the additional dealership is different than Mr. Boyle as trustee of the 150 Greenleaf Realty Trust which owns the property. Without the dealership actually having been built and subject to a lease, Mr. Boyle as the operator of the prospective dealership would not be a party to the eminent domain. He would not get the damages from terminating a lease which, when valued, would presumably account for his interruptions in profits.

It would be unprecedented for Mr. Boyle to claim damages in eminent domain for a building that does not exist. The City did not magically create a dealership by the taking. Nor did it create a dealership that would be valued. Eminent domain would protect the owner of the property but not the projected business. Thus, to have a remedy, the entire matter concerning the new business, including future lost profits, must be heard in the Superior Court. The fact lost profits are not awarded in eminent domain cases

definitively establishes his right to have the issue fully tried in the Superior Court. To require Mr. Boyle, the prospective dealer, to bear his own loss for injury caused by the City "offends the basic principles of equality of burdens and of elementary justice." *Merrill v. City of Manchester*, 114 N.H. 722 (1974). It would be unconstitutional to use the various statutes authorizing a taking as a way to cut off damages without compensation.

E. THE PRECLUSION OF FUTURE LOST PROFITS WAS PREMISED ON AN INCORRECT ASSUMPTION

The Trial Court's preclusion of future lost profits was based on the premise that the City had validly taken the property by eminent domain. In virtually every proceeding leading to the trial, the parties argued the issue and the Court struggled with it. Indeed, the Trial Court recognized the drastic impact on its ruling that a successful challenge to the taking would have. At the trial management conference, the Court stated: "Second, it strikes me that if Mr. Boyle is successful on his challenges to the eminent domain that only would result, potentially even result, in an issue impact on the damages in this case, which is a fairly -- it's a significant issue, but it's discreet in the overall scheme of things." Boyle App. 483. A ruling based on an obviously incorrect factual or legal assumption must be reversed. *Lamphire v. State*, 73 N. H. 463 (1906); *Quimby v. Boston & M. R. R.*, 69 N.H. 334 (1898).

F. THE CITY CANNOT USE EMINENT DOMAIN TO MANIPULATE THE DAMAGES IT OWES.

The City contended it properly took Mr. Boyle's property by eminent domain. That, however, was far from accurate. After a several day bench trial, in a lengthy opinion, the Trial Court upheld Mr. Boyle's preliminary objection, and found the City did not have valid reason to exercise the awesome power of eminent domain. The Court expressly found: "The timing and procedure for the acquisition creates a strong inference that the exercise of eminent domain over the wetlands was an eleventh hour ploy to gain an advantage in the Sewer Line Litigation." 218-2017-CV-00071, Superior Court Order dated 10/17/2018 at 27. The precise advantage was the exclusion of future lost profits. The taking was a sham, and the City lacked any evidence to justify its taking. A

wrongdoer or someone who uses a litigation ploy should not benefit from the wrongful conduct. *Lakeman v. La France*, 102 N.H. 300 (1959) (holding the statute of limitations is tolled and a wrongdoer does not gain an advantage from the fraudulent concealment of facts essential to the cause of action).

Ordinarily, the initial remedy would be to address this legal and factual change with the Trial Court. However, this notice of appeal was already filed, precluding additional proceedings in the Trial Court when the eminent domain decision issued. Since this issue is tied up so closely with the above arguments concerning lost profits, Mr. Boyle raises it. He also asks the Court to take judicial notice of the record in that appeal and in particular, Judge Delker's decision.[12] *See N.H.R.Ev.* 201(f).

A party cannot use eminent domain in bad faith to gain a litigation advantage. See *Crablex, Inc. v. Cedar-Riverside Land Company*, C2-02-1854 June 24, 2003 (Minn. App., 2003). Although it was only presented with an issue of retrospective damages, as the court in *Harris v. L. P. And H. Construction Company,* 441 S.W.2d 377 (Mo.App 1969) said: "In short, the proceeding by way of condemnation cannot relieve defendants from liability for the damages resulting to the plaintiffs from the prior trespassing" quoting *Mapco, Inc. v. Williams*, 581 S.W.2d 402, 406-07 (Mo. App. 1979). Dicta in *Mapco,* at 406 suggests that the Court might consider bad faith or malevolence by the condemning authority and eliminate a taking as a defense to a trespass. It declined to rule on the hypothetical situation raised by the plaintiffs. Here, in both the sewer line case and the eminent domain case, there was ample evidence of bad faith by the City. In the sewer line trial, Mr. Boyle testified extensively how the City has targeted him for a decade. In electrifying testimony which illustrated the lengths the City would go to personally harm Mr. Boyle, the City Attorney described numerous litigations forced by the City, extensively more litigation than against anyone else, all of which it lost. Transcript, 953. The Trial Court's opinion of the conduct of the City in the ruling on the

[12] The preliminary objection is already part of the record in this case as it was attached to the motion to postpone trial filed by Mr. Boyle.

preliminary objection is self-evident. It is astonishing that a City would use eminent domain as a ploy. Given the conduct of the City, eminent domain should not have been a defense to the full measure of damages, including future lost profits.

Generally, a party injured by a taking in bad faith may recover any damages flowing from the taking. *St. Tammany Parish Hosp. Serv. Dist. No. 2 v. Schneider*, 808 So.2d 576, 585 (La. App. 2001) (recognizing damages for lost damages could be sought if eminent domain had been used in bad faith or abused, which claimant failed to show); *Northern Kentucky Port Authority, Inc. v. Cornett*, 700 S.W.2d 392, 393 (Ky. 1985) (same); *Torrance Unified School Dist. v. Alwag*, 145 Cal. App. 2d 596, 598-99 (1956) (same); *North v. Public Serv. Co.*, 101 N.M. 222, 229-30 (1983) ("we hold that a condemnor may not with impunity cause damage which arises from fraud, bad faith or gross abuse of discretion"); *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003) (holding that landowner could recover compensation for abuse of condemnation authority, that caused the subject properties to be "unmarketable for years"). Here, the damage to Mr. Boyle was the preclusion of the jury considering lost profits. The Trial Court precluded any mention of the taking to the jury, considering it too prejudicial. However, the taking itself creates the damage of loss of future profits. For years, the City never did anything concerning the property. There was no evidence that the City would ever be interested in doing anything with the property. Only in light of the trespass and a pending trial, did the City attempt the taking. The taking was proximately caused by the trespass and for no other legitimate municipal reason. Thus, the taking itself establishes that future lost profits should have been considered in the trespass case.

Without the taking occurring, future lost profits would have gone to the jury, and with hindsight of the eminent domain decision, they should have gone to the jury. The only remedy is to remand the case for determination of lost profits occurring after December 2016. This is a highly unusual situation where a party should not benefit from litigation ploys.

CONCLUSION

Mr. Boyle asks the Court to reverse the Trial Court and find that as a matter of law the 2008 letter is a revocation of the City's license. Further, Mr. Boyle asks the Court to reverse the trial Court's ruling on the motion in limine and instructions precluding damages after 2016, and to remand the case to the Trial Court for further proceedings to determine the additional damages, and for any other just relief. Specifically, Mr. Boyle asks the Court to instruct the Trial Court to determine any damages prior to 2014 and after 2016 as may be allowed, and to otherwise affirm the jury's verdict.

REQUEST FOR ORAL ARGUMENT

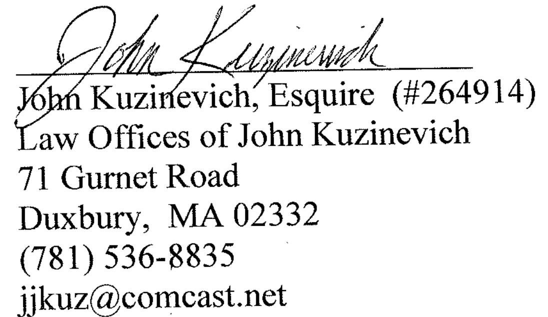
Mr. Boyle requests oral argument before the full court to be presented by Attorney Kuzinevich.

RULE 16(3)(i) CERTIFICATION

Pursuant to Rule 16(3)9i) I certify that a copy of the following decision being appealed are included as an addendum to this brief:

Respectfully submitted,
James G. Boyle, individually and as
Trustee of the 150 Greenleaf Avenue
Realty Trust

By his attorneys,



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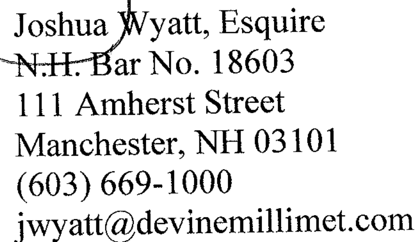

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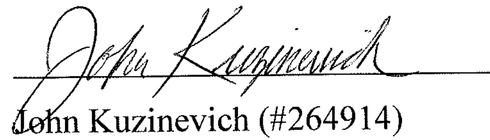
CERTIFICATE OF SERVICE

I, John Kuzinevich, hereby certify that two copies of the foregoing and the Appendix has been forwarded to Bruce Felmly, Esquire, counsel for the City of Portsmouth, Charles P. Bauer, Esquire, counsel for the City of Portsmouth, Donald Perrault, Esquire, counsel for Comcast of Maine/New Hampshire, Inc., and Christopher Aslin, Esquire, counsel for State of New Hampshire on April 8, 2019.



John Kuzinevich (#264914)

The State of New Hampshire

Supreme Court

No 2018-0327

James G. Boyle, Individually and as
Trustee of the 150 Greenleaf Avenue Realty Trust,

v.

City of Portsmouth

and

James G. Boyle, Individually and as
Trustee of the 150 Greenleaf Avenue Realty Trust,

v.

Comcast of Maine/New Hampshire Inc.

MANDATORY APPEAL
FROM RULINGS OF THE ROCKINGHAM COUNTY SUPERIOR COURT

JAMES G. BOYLE, INDIVIDUALLY AND AS TRUSTEE
ADDENDUM TO BRIEF

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

John Kuzinevich
Four Sanger Circle
Dover MA 02030

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: Bernard W. Pelech, ESQ; Charles P. Bauer, ESQ; Donald J. Perrault, ESQ

NHJB-2503-S (07/01/2011)

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:
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> . . .
>
> (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-

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[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

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[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-

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[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
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

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

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[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.

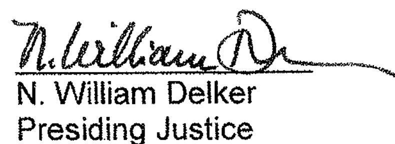
Boyle has remaining claims with respect to whether accumulated water on the property also constitutes trespass. As the Court articulated in its October 30 Order, there are genuine issues of material fact about whether the accumulated water is a result of the sewer line or is naturally occurring. Even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

The present litigation began in 2010 when James Boyle, Individually and as Trustee of the 150 Greenleaf Ave. Realty Trust, filed a complaint against the City of Portsmouth. This action was later consolidated with other related matters. This Court has outlined the procedural history of these consolidated cases in its order dated March 23, 2012. On todays date, by way of a separate order the Court issued a decision on the parties' motions for reconsideration of the motions for summary judgment. The present order addresses all other motions pending before this Court as of the date of this order.

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I. Boyle's Motion to Amend The Complaint.

On December 9, 2013, Boyle moved to amend the trespass count of the Complaint. 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. The City Council took no action other than to accept the letter. At the hearing on the motions to reconsider, Portsmouth indicated that it does not object to amending the complaint to add these new allegations to the case. Accordingly, this motion is granted.

II. Boyle's Motion For Preliminary and Permanent Injunctions Concerning Trespass After Revocation of License.

On December 9, 2013, in conjunction with his motion to amend the complaint, Boyle filed a motion seeking a preliminary and permanent injunction to prohibit Portsmouth from maintaining the sewer line on his property after his unconditional revocation of the license. On the same date, Boyle also filed an *ex parte* motion for relief. Portsmouth has objected to both of these motions.

At the hearing on the motions to reconsider, Boyle conceded that these motions were filed in view of the Court's reasoning in the October 30 Order on the motions for summary judgment to preserve his claim that the license was not unconditionally revoked. In the order on the motions for reconsideration issued today, this Court has addressed the future of the sewer line. The Court has ordered Portsmouth to either remove the sewer line or exercise its power of eminent domain within a reasonable period of time. This order is in the form of permanent injunctive relief. If the City does not remove the sewer line in a

reasonable period of time or begin the process of eminent domain to acquire easement rights, Boyle may seek additional relief to enforce this injunction. In the meantime, so long as the sewer line remains on the property Boyle is entitled to damages for trespass.

III. Boyle's Motion To Strike Affidavit of Timothy J. Connors

On December 18, 2013, Portsmouth filed a motion to strike the affidavit of Timothy J. Connors. This affidavit was submitted by Boyle on October 23, 2013 in support of Boyle's reply to Portsmouth's objection to his cross-motion for summary judgment. Boyle has objected to the motion to strike.

The Court finds this dispute is moot. Connors' affidavit has formed no part of the Court's reasoning in its orders. Connors' views about whether Portsmouth and the State Board of Education intended the sewer line to be permanent is irrelevant to the outcome of this matter. As explained in the Court's order on the motion to reconsider, even if the State Board of Education had intended to grant a permanent encumbrance on the land, it did not have the authority to do so. Thus, whatever the intention of the parties to the original transaction was, the grant of permission did not satisfy the Statute of Fraud so Portsmouth only acquired a revocable license.

IV. Boyle's Motion To Strike Affidavits Submitted In Support Of City's Motion To Reconsider.

On December 30, 2013, Boyle filed a motion to strike affidavits of Peter J. Loughlin and George Dodge. These affidavits were submitted by Portsmouth in

support of its motion to reconsider. Portsmouth has objected to Boyle's motion to strike those affidavits.

The Court certainly has discretion to consider newly submitted evidence filed in support of a motion to reconsider. In this case, the Court did consider the affidavits. Those affidavits do not alter the Court's view that there remain genuine issues of material fact about whether the sewer line caused more water to back up on the property than would have otherwise been present without the berm and sewer line. Accordingly, the motion to strike the Loughlin and Dodge affidavits is denied.

V. Boyle's Motion For Relief On Account of Spoliation of Evidence Concerning the City of Portsmouth Altering Evidence.

On December 9, 2013, Boyle filed a motion seeking relief from the Court for actions he claims resulted in spoliation of evidence. In summary, Boyle asserts that city officials visited the site of the sewer line with his permission. Boyle alleges that sometime after this visit the property had been altered in that certain trees had been removed and other objects moved. Boyle claims that only Portsmouth could be responsible for these changes. He alleges that the changes enhance Portsmouth's claim that the sewer berm was apparent. Boyle requests only that the Court order that no agents of Portsmouth enter his property without his permission. Portsmouth objects to the motion and seeks attorney's fees.

Boyle's motion is denied. At the hearing on the motions for reconsideration both sides recognized that they already had an agreement not to

enter Boyle's property without his permission. Portsmouth has presented persuasive affidavits indicating that it does not violate this agreement and was not responsible for the changes to Boyle's property. Based on these representations there is no need for further Court order. Moreover, the Court finds that Boyle's motion was made in good faith so no award of attorney's fees is justified.

VI. Portsmouth's Notice of Additional Affirmative Defenses and Boyle's Motion To Strike Those Defenses.

On January 10, 2014, Portsmouth filed a notice of additional affirmative defenses. In essence, Portsmouth seeks to preserve its claim for compensation if it is forced to remove the sewer line based on Boyle's revocation of the license. Boyle has moved to strike the notice of defenses. He contends that Portsmouth is not entitled to compensation.

The Court has dealt with the substance of these claims in its order on the motions to reconsider. The Court ruled as a matter of law that Portsmouth is not entitled to compensation based on the revocation of the license. Accordingly, the motion to strike the notice of defenses is granted on the grounds articulated in the order on the motions for reconsideration.

VII. Portsmouth's Motion To Stay Proceedings Pending Interlocutory Appeal.

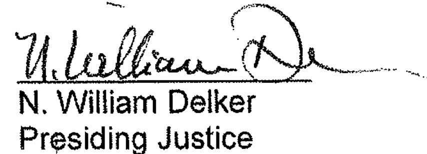
On February 5, 2014, Portsmouth filed a motion to stay these proceedings pending an interlocutory appeal. Boyle has objected. As the Court has

previously informed the parties, it believes that an interlocutory appeal is appropriate in this case. The outcome of such an appeal would have a significant impact on the scope of a trial. Accordingly, Portsmouth's motion to stay the case is granted.

Now that the Court has issued its Order on the motions to reconsider, the parties have 30 days to file paperwork with this Court requesting permission to transfer the case to the New Hampshire Supreme Court for an interlocutory appeal. All further proceedings will be stayed pending the outcome of a decision on a motion to accept the appeal. A new structuring order issued and the trial in this case will be rescheduled as soon as a decision is rendered by the New Hampshire Supreme Court.

SO ORDERED.

2/27/2014
Date



N. William Delker
Presiding Justice

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