THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2018-0327

JAMES BOYLE, INDIVIDUALLY AND AS TRUSTEE OF
THE 150 GREENLEAF AVENUE REALTY TRUST
v.
THE CITY OF PORTSMOUTH & COMCAST OF
MAINE/NEW HAMPSHIRE, INC.

MEMORANDUM OF LAW
FOR THE STATE OF NEW HAMPSHIRE

The State of New Hampshire, by and through counsel, the Office of the Attorney General (hereinafter the "State"), files this Memorandum of Law pursuant to Supreme Court Rule 16(4)(b) in response to a single legal issue raised in Part III.B of the City of Portsmouth's (hereinafter "City") cross-appeal that could affect the State's ownership and/or disposition of real property. The States takes no position on the remainder of the issues raised on appeal by the City or Cross-Appellant James Boyle. For the reasons that follow, this Honorable Court should decline to recognize irrevocable licenses on state-owned lands.

STATEMENT OF THE CASE AND FACTS

The State takes no position on the factual issues raised in the instant appeal. Because the State's memorandum addresses legal arguments presented by the City, the State incorporates by reference Sections A-C of the City's Statement of the Case, City's Brief at 13-20, and Sections A & B

of the City's Statement of the Facts, City's Brief at 25-30, and assumes those facts to be true for the purposes of this memorandum.

ARGUMENT

In its cross-appeal, the City argues that it obtained a permanent property interest in state land by way of an irrevocable license created when the City expended funds in reliance on the Board of Education's permission to build a sewer line (the "Line") in 1967. *See* City's Brief at 68. In support of this claim, the City argues that this Court's prevailing precedent on irrevocable licenses—*Houston v. Laffee*, 46 N.H. 505 (1866)—"is facially unreasonable and does not serve the interests of justice." *Id.* Ultimately, the City asks this Court to adopt a rule that "a license for the use of land may become irrevocable when a licensee has expended substantial resources in reliance on the license and when required to prevent injustice." City's Brief at 68-69. The State asserts that even if the Court were to adopt the doctrine of irrevocable licenses, such doctrine would be unenforceable against the State and is, therefore, not appropriate in this case.

I. HISTORY OF IRREVOCABLE LICENSES IN NEW HAMPSHIRE.

In the early nineteenth century, this Court recognized that where a licensee "executed and acted upon" a license by incurring expenses in

reliance on it, the license became irrevocable. *Woodbury v. Parshley*, 7 N.H. 237, 240 (1834). *See also Ameriscoggin Bridge v. Bragg*, 11 N.H. 102, 108-9 (1840) (finding executed licenses "either irrevocable . . . or, if revocable at all, can only be so on full compensation for all expenditures made and damage occasioned by such revocation"). In *Houston v. Laffee*, however, this Court abrogated *Woodbury*, holding that the licensor retains a right of revocation even when the licensee expends funds in reliance on the permission afforded to them by the licensor. *Houston v. Laffee*, 46 N.H. 505, 507-8 (1866). *See also Batchelder v. Hibbard*, 58 N.H. 269, 270 (1878) (stating "*Woodbury v. Parshley*, 7 N.H. 237, was overruled in *Houston v. Laffee*. . . and the doctrine of the latter case must be regarded as the settled law of this state"). This 150-year old precedent remains controlling law in New Hampshire. On appeal, the City requests that this Court reverse *Houston v. Laffee*, and establish the doctrine of irrevocable licenses in New Hampshire.

II. REASONABLE RELIANCE IS A REQUIRED ELEMENT OF AN IRREVOCABLE LICENSE.

Modern jurisprudence, as the City points out, reflects a "split among jurisdictions as to whether a license may ever become irrevocable." *Tatum v. Dance,* 605 So. 2d 110, 112 (Fla. Dist. Ct. App. 1992). States choosing to recognize irrevocable licenses largely do so in the name of equity when a licensee has expended resources in reliance on the licensor's permission. *See, e.g., Brown v. Eoff*, 271 Or. 7, 10-11 (1975); *Richardson v. Franc*, 233 Cal. App. 4th 744, 751 (Cal. Ct. App. 2015). Of the States favoring irrevocable licenses, several clearly require "reasonable reliance," while others are less careful to articulate the need for reasonableness. *Compare*

Brown, 271 Or. at 11 (recognizing "that one who induces another to make significant expenditures for permanent improvements in *reasonable reliance* upon one's promise to allow a permanent use of land is subsequently estopped from revoking the license") (emphasis added) *and Richardson*, 233 Cal. App. 4th at 751 (recognizing in California that "a license may become irrevocable when a landowner knowingly permits another to repeatedly perform acts on his or her land, and the licensee, in *reasonable reliance* on the continuation of the license, has expended time and a substantial amount of money on improvements with the licensor's knowledge") (emphasis added), *with Boyce v. Cassese*, 941 So. 2d 932, 941 (Ala. 2006) ("An 'irrevocable license' may result from expenditures made in reliance on an existing license.") *and Tatum*, 605 So. 2d at 112 (finding cause in Florida for an irrevocable license "where money has been spent in reliance on a license").

Importantly however, "[a]n irrevocable license is, for most purposes, the functional equivalent of an easement by estoppel," a similarity so manifest that, at times, courts use the terms interchangeably. *See* John W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land* § 11:7 (Westlaw, Updated March 2019). Indeed, most States, including those that do not expressly articulate reasonableness as part of the reliance element of an irrevocable license, are careful to point out that the doctrine of irrevocable licenses arises from notions of estoppel. *See, e.g., Louisville and Nashville R.R Co. v. M/V Bayou Lacombe,* 597 F.2d 469, 473 (5th Cir. 1979) ("Under Alabama law, an irrevocable license arises from equitable principles of estoppel."); *Cooke v. Ramponi,* 38 Cal. 2d 282, 286 (Cal. 1952) (The principal basis for irrevocable licenses "is the doctrine of

equitable estoppel"). *See also Camp Ne'er Too Late, LP v. Swepi, LP,* 185 F. Supp. 3d 517, 550 (M.D. PA 2016) (suggesting under Pennsylvania law, that irrevocable licenses arise under the doctrine of equitable estoppel).

Because irrevocable licenses arise from notions of estoppel, it is necessary for the plaintiff to establish that they have a right to rely on a representation of fact by the licensor, and in so relying, they "must do so *reasonably* without knowledge or means to learn the true state of affairs." Richard A. Lord, *Williston on Contracts* § 8.3 (4th ed., Westlaw, Updated May 2019) (emphasis added). *Cf. New Canaan Bank & Trust v. Pfeffer,* 147 N.H. 121, 126 (2001) (finding that "[t]he reliance by the party bringing [an] estoppel claim on [a] representation or concealment must have been reasonable"); *Kienzle v. Myers*, 167 Ohio App. 3d 78, 84 (Ohio. Ct. App. 2006) ("Under common law, an easement claimant must establish reasonable reliance upon a representation, resulting in actual prejudice."); *Esplanade Patio Homes Homeowners' Ass'n, Inc. v. Role*, 613 So. 2d 531, 532 (Fl. Ct. App. 1993) (recognizing generally that two elements "indispensable" to the creation of an estoppel are "a statement by the party sought to be estopped and reasonable reliance upon that representation by the party claiming the estoppel"). Accordingly, if this Court were to revive the doctrine of irrevocable licenses in New Hampshire, "reasonable reliance" should be a required element.

III. THE DOCTRINE OF IRREVOCABLE LICENSES, IF ADOPTED IN NEW HAMPSHIRE, IS NOT APPLICABLE IN THIS CASE.

Even if this Court were inclined to overturn *Houston v. Laffee* and adopt the doctrine of irrevocable licenses, that doctrine would not apply to the undisputed facts in this case, because the City cannot demonstrate that it reasonably relied on the Board of Education's oral permission to construct the Line, and the equitable creation of an irrevocable property interest in state land without legislative action or approval by the Governor and Executive Council contradicts N.H. RSA 4:40.

A. Reasonable Reliance on Unauthorized Acts of State Officials is Not Possible under New Hampshire Law.

The City bases its claim to an irrevocable license on its reliance on the Board of Education's approval of the City's 1967 request to extend a sewer line across the rear of the State's property. City's Brief at 28-29. However, it is undisputed that no written easement granting a permanent property right to build and maintain the Line was recorded in the registry of deeds, and that the record contains no evidence of approval of a grant of permanent rights to the City by either the General Court or the Governor and Executive Council. As such, the City cannot establish the necessary element of reasonable reliance.

In New Hampshire, governmental officials may not dispose of permanent property interests in state lands in the absence of legislative action or an express grant by Governor and Council. *See* N.H. RSA 4:40 (authorizing the Governor and Council to dispose of or lease state lands

upon the recommendation of the head of any state department). Thus, while the Board of Education may have had authority to grant a permissive revocable use of the Property, it had no authority to grant an irrevocable property interest in the Property without Governor and Council approval. *Id.*

Here, the City claims to have relied on the Board of Education's approval as constituting a grant of an irrevocable property interest. Such reliance is, however, unreasonable as a matter of settled law in New Hampshire. *See Sunapee Difference, LLC v. State*, 164 N.H. 778, 794-95 (2013) ("We have long recognized that all private parties dealing with government officials are charged with notice of the extent and limits of their authority."). *Cf. Smith v. Town of Epping*, 69 N.H. 558, 560 (1899) ("It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract.") (emphasis in original).

Indeed, just as "there can be no estoppel by an unauthorized statement of an official," *Turco v. Town of Barnstead*, 136 N.H. 256, 262 (1992), the City cannot reasonable rely on "the representations or conduct of a government official," nor on "the 'apparent authority' of a governmental official . . . when the official acted outside his actual authority." *Concord v. Tompkins*, 124 N.H. 463, 469 (1984). Here, the City's case turns on an assumption that the Board of Education intended to approve more than a permissive, revocable license; yet absent Governor and Council approval, the Board had no authority to grant an irrevocable property interest in state land. As such, the City's reliance on the Board's

approval as constituting an irrevocable property interest was unreasonable as a matter of law. *Cf. Tompkins*, 124 N.H. at 469 ("[t]he authority of a public official to act 'cannot be supplied by estoppel.'") (quoting *State v. Hutching*, 79 N.H. 132, 140 (1919)).

B. Irrevocable Licenses on State Lands are Inconsistent with New Hampshire Statutory Law.

In addition to the City's inability to prove reasonable reliance on the facts of this case, the City's argument for an irrevocable license on state land is fundamentally irreconcilable with RSA 4:40. The version of RSA 4:40 in place at the time of the Board of Education's approval of the Line stated as follows:

> **Disposal of Real Estate.** Upon recommendation of the head of any state department having jurisdiction over the same the governor and council may sell, convey, transfer, or lease any real property owned by the State. The funds accruing from such disposal shall revert to the credit of such department except as provided by RSA 219:15. This section shall not apply to sale of institutional lands as provided by RSA 10:4, nor to real estate given or bequeathed to the state under provisions of trust, nor to state lands or products thereof required to be held to procure a continuance of federal conservation work.

N.H. RSA 4:40 (1967).

Through RSA 4:40, the General Court established a prescribed process for the disposal of property interests in state lands; namely, recommendation by a state department head and approval by the Governor and Council. Allowing an irrevocable license to arise on state lands, as the

City argues in this case, would effectively bypass the statutorily prescribed procedure for the disposal of property interests in state land set forth in RSA 4:40. Indeed, the City argues for an irrevocable license—the functional equivalent of a permanent easement—in state land without obtaining Governor and Council approval or special legislative action. Such a result would contravene the intent of the General Court in enacting RSA 4:40, and would contravene the long-standing rule of law in New Hampshire that "the State does not forfeit or lose its rights to public lands and waters by laches, estoppel or waiver." *State v. George C. Stafford & Sons*, 99 N.H. 92, 97 (1954).

CONCLUSION

For the foregoing reasons, the State respectfully submits that this Honorable Court should decline to apply the doctrine of irrevocable licenses to cases involving state-owned land. In filing this memorandum of law, the State consents to waive oral argument. Should the court request oral argument from the State, Senior Assistant Attorney General Christopher Aslin will present oral argument on behalf of the State.

Respectfully Submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

OFFICE OF THE ATTORNEY GENERAL

Date: June 24, 2019

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Certificate of Compliance

This memorandum complies with the word limitation set out in Supreme Court Rule 16(4)(b), by containing 2347 words.

Certification of Service

I hereby certify that copies of the foregoing were served via the e-file system to Bruce Felmly, Esq., Benjamin B. Folsom, Esq., Matthew V. Burrows, Esq., Charles P. Bauer, Esq., and Robert J. Dietel, Esq., counsel for the City, and to John Kuzinevich, Esq., Jonathan M. Eck, Esq., and Roy W. Tilsley, Jr., Esq., counsel for Mr. Boyle.

June 24, 2019

/s/ Christopher G. Aslin
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