THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2018-0591

TOWN OF DUNBARTON

v.

MICHAEL GUINEY, DAVID NAULT, JOSHUA N. NAULT

& LEIGH D. NAULT

BRIEF FOR APPELLANT, MICHAEL GUINEY
RULE 7 APPEAL FROM THE
MERRIMACK COUNTY SUPERIOR COURT

Counsel for Michael Guiney

Patricia M. Panciocco (NH Bar #15872)
Panciocco Law, LLC
One Club Acre Lane
Bedford, NH 03110
Phone: (603) 518-5370
E-mail: Pat@pancioccolaw.com

Oral Argument Requested to be Argued
by Patricia M. Panciocco, Esquire

TABLE OF CONTENTS

TABLE OF CASES

Other Authorities

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

QUESTIONS PRESENTED

1. Did the Trial Court err when it held the full area of the Disputed Portion became a public highway by prescription: (a) by relying upon inconsistent details shown on ancient maps without requiring corroborative evidence of public use; (c) by relying upon nonspecific testimony provided by two (2) former Town employees about reversing plow trucks during winter snow removal on the Guiney property; (c) but not limiting the testimony and evidence to the prescriptive period; and (d) by overlooking the physical evidence of the 12-14-foot wide traveled area?

Objection preserved by Defendant Guiney's Motion to Reconsideration; Objection to Court Order Raising New Defense Not Previously Raised and Request for Rehearing (Apx. I at 17-22), as further supported by Defendant Guiney's reply to Defendant Nault's Objection to Motion for Reconsideration (Apx. I at 38-49)

2. Did the trial court err by affirming an unenforceable boundary line agreement and plan ("BLA") prepared and recorded by the respondents predecessors in title by: (a) without deciding the whether the BLA was enforceable within its own 4 corners; (b) relying upon the doctrine of acquiescence and estoppel by recitals which were never raised by Nault; (c) ignoring the evidence in the record which all but provided an improper intent; and (d) by ignoring the title could left on the Guiney property?

Objection preserved by Defendant Guiney's Motion to Reconsideration; Objection to Court Order Raising New Defense Not Previously Raised and Request for Rehearing (Apx. I at 17-22), as further supported by Defendant Guiney's reply to Defendant Nault's Objection to Motion for Reconsideration (Apx. I at 38-49)

STATEMENT OF THE CASE

This appeal arises from the August 28, 2018 decision by the Merrimack County Superior Court ("Order"): (a) holding a portion of the private driveway owned by Michael J. Guiney ("Guiney") extending to the west from Kelsea Road is a public highway by prescription; and (b) denying Guiney's request that the Court find a 1988 boundary line plan and its related agreements (collectively, the "BLA") unenforceable. *Or 57 & 58*.

The lots owned by Guiney and David, Joshua N. and Leigh D. Nault were originally part a large tract owned by Timothy Johnson ("Johnson Farm"). *Or 41*. Guiney acquired Tax Map B, Lot 1-5 ("Lot 5") on March 30, 1999. *Or 47*. The Guiney property is bisected by Kelsea Road with its Class V length ending at Guiney's driveway. (Apx. II at 20). There is no hammerhead, turnaround or cul de sac located at the end of Kelsea Road where vehicles can reverse directions to return to Montelona Road. *Id*.

Nault owns three (3) lots with no frontage abutting Lot 5 known as Tax Map B, Lot 1-7 ("Lot 7"), Lot 1-8 ("Lot 8") and Lot 1-9 ("Lot 9"). *Or 40;* (Apx. II at 19[1]). Only Lot 7 owned by David Nault ("Nault") is directly relevant to this appeal. *Id*. Lot 7 which abuts Lot 5, Lot 8 and Lot 9 has an express right to use the "cart road" for access. *Or 41*. The "cart road" begins at the westerly sideline of Kelsea Road, runs across Lot 5, through Lot 7 and ends on the west side of Black Brook. *Id.*

On or about 2006, Nault began constructing a driveway across Lot 5 to reach Lot 8 and Guiney filed suit ("2006 Litigation"). *Or 51*. In 2008, the court ordered Nault to access Lot 8 through Lot 7 over the "cart road". *Id.* The court found the "cart road" was 13-15 feet wide. Tr. 29.

By 2008/2009, Nault began to intermittently widen the "cart road" where it extends from Kelsea Road and began to represent to the Town that

[1] The 2005 Tax Map Illustrates the physical relationship of the Lots.

it was a public way up to where it meets the "50' ROW" ("Disputed Portion") shown on a boundary line plan recorded by Guiney's predecessor ("BLA Plan") because Town plow trucks used it to reverse directions during the winter. (Apx. I at 7-16). Guiney had never objected to the Town using his driveway in light of the circumstances, but after hearing Nault's repeated prescription claims, he felt compelled to request the Town stop using his driveway as a turnaround. Tr. 11-12. Eventually Nault submitted a petition to lay out the Disputed Portion as a public way but the Town denied it on November 10, 2015 finding no public benefit. (Apx. VII at 3-13).

Finding itself in the middle of this escalating debate, the Town concluded it should submit its "Verified Amended Petition for Declaratory Judgement for Public Highway by Prescription" ("Petition") with a diagram of the Disputed Portion, name Guiney and Nault as respondents and ask the court to decide the question. The Petition states the Town does not believe the Disputed Portion is a public way by prescription. (Apx. I at 7-16).

In response, Guiney filed a crossclaim against Nault requesting the court find the BLA invalid relying upon the research completed by Edward J. Rogers ("Rogers"), his expert in the 2006 Litigation. *Or 60.* Rogers testified no monuments demarking the "agreed to line" as required by RSA 472:3 and this court's holding in N.H. Department of Resources and Economic Development v. Dow, 148 N.H. 60 (2002) leaving a cloud on his real estate title. *Id.*

After a three-day bench trial, the court held the Disputed Portion had become a public way by prescription, declined to rule on whether the enforceability of the BLA and held the parties had acquiesced to the "agreed to line" and Guiney was estopped by recitals in his deed, despite Nault not having raised these defenses and left the width of the Disputed Portion an open question.

STATEMENT OF THE FACTS

Kelsea Road Layout

All lots referred to in this case were originally part of the Johnson Farm") in 1803. (Apx. VII at 21). On May 29, 1821, the Town of Dunbarton ("Town") laid out a public highway now known as Kelsea Road ("Layout") through the Johnson Farm. (Apx. III at 38 & Apx. VII at 14). Rogers, a N.H. licensed land surveyor, professional engineer and Guiney's expert located the Layout when conducting the research for his expert report[2] during the 2006 Litigation ("2007 Rogers Report"). (Apx. III at 38 & Apx. VII at 14). The Layout area is described as follows:

> *"Road laid out 3 rods wide from Goffstown line nearly north to Timothy Johnsons house and thence nearly north east nearly on a straight line to the County[3] road, said road is to be a bridle[4] road for 9 years."*

Id.

After the 2006 Litigation concluded, Rogers surveyed Lot 5 for Guiney and on September 16, 2015 recorded a boundary plan. ("Guiney Plan"). (Apx. II at 19). During his field work, Rogers located the remaining physical evidence confirming the location of the Class VI length of Kelsea Road extending to the Goffstown town line, which was later described in his expert report prepared for this case ("2017 Rogers Report")[5]. (Apx. III at 40-46). Rogers also testified about the breaks in the stonewall, remnants of barbed wire fencing and clearings through the trees confirming Kelsea Road existed at an earlier time. *Id*; (Apx. VII at 23-25). A photo from a local Town historical publication entitled: *"Where the Settlors Feet Trod"*

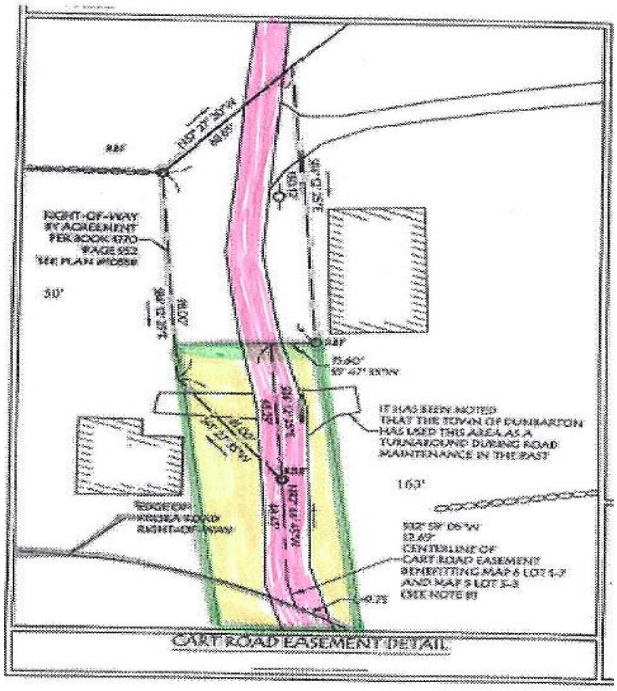
---

[2] Rogers' 2007 report was prepared for the 2006 litigation and includes snapshot diagrams the various conveyances from the Johnson Farm to the aid the Court's review.
[3] Montelona Road was formerly known as County Road.
[4] Free Dictionary defines a "*bridle road*" as suitable for riding or leading horses (but not for cars). https://www.thefreedictionary.com/bridle+road.
[5] The 2017 Rogers Report provides information relative to the status of the Disputed Portion and the BLA.

shows the original front door stoop of the Johnson homestead which also remains on the east side of the Guiney's home today. (Apx. VII at 21). Rogers testified no discontinuance of the Kelsea Road Layout has ever been found. Tr. 46.

Evidence Admitted to Support Nault's Prescription Claim

The Petition requested the court decide the legal status of the Disputed Portion as highlighted by the Town on Exhibit A[6] to the Petition shown below[7]. The "cart road" appears in pink as 12.65 feet wide. Photos from 2006 show the "cart road" prior to the 2006 Litigation. (Apx. VII at 26-30). Town employees testified about their recollection of the Town's plow trucks using the Disputed Portion to reverse directions and return Montelona Road because there was no other location available to turn around at the end of Kelsea Road. Tr. 203-204.



[6] The "Cart Road Easement Detail" was prepared by Rogers during the 2006 Litigation.
[7] The Disputed Portion is outlined in green.

Nault submitted maps[8], photos and tax cards from 1858 through 1985 to support his prescription claim. (Apx. II at 4-15; Apx. VII at 15-18). The Dunbarton pages from the 1858 Atlas and the 1892 Atlas both show Kelsea Road as a straight line ending at the Johnson Farm. (Apx. II at 4-5). The five (5) USGS maps from 1927 through 1965 show physical features and improvements to the land but no information regarding the legal status of local streets is provided. (Apx. II at 6-11); Tr. 114-115.

The Town's "1941 Property Ownership Map" shows the Class V portion of Kelsea Road as a double dashed line in the same location as it is shown on the Atlases. (Apx. II at 12). The 1941 aerial photograph shows Kelsea Road as a bright white line in that same area ending at the Johnson Farm, with a separate white stripe extending to the Goffstown town line and a narrow gray line extending to the west in the area of the "cart road". (Apx. II at 13). The hand drawn 1946 Blister Rust Map shows Kelsea Road[9] as a double dashed line extending southerly to the Goffstown town line and the "cart road" extending to the west as a single broken line. (Apx. II at 14). The Town's "Early Landmarks and Highway Map" shows an odd configuration unlike the other maps. (Apx. II at 15).

Both Lot 5 1941 tax cards show Kelsea Road as a double solid line up to the driveway of Lot 5 and the "cart road" extending to the west as a double dashed line. (Apx. VII at 15-16). The 1970 tax card[10] confirms there were no buildings located on Lot 7 at that time. (Apx. VII at 18). The 1941 tax card for Lot 5 confirms the Town took Lot 5 by tax deed in 1939. (Apx. VI at 16).

---

[8] Maps introduced by Nault prepared after 1968 were intentionally omitted as not relevant.
[9] Highlighted in yellow.
[10] The book and page of the deed confirm this is for Lot 7.

Several former Town employees testified about maintaining and/or plowing of Kelsea Road but only Simon Audet and William Nichols were old enough[11] to testify about those activities prior to 1968. Tr. 207; Tr. 327. Mr. Audet was born in 1938 and began working for the Town when he was about 20 years old, which would have been on or about 1958, leaving only 10 more years prior to 1968. Mr. Audet told the Court that as a young boy he often plowed with his father who was the Town's Road Agent, but he would have had to recall whether his father reversed directions within the Disputed Portion when he was 10 years old to cover 20 years of use. Tr. 201-207. While Audet's testimony described grading and plowing along Kelsea Road, but he did not state whether which of those activities took place within the Disputed Portion or along Kelsea Road between 1948 and 1968. *Id*.

Mr. Nichols testified he moved to Dunbarton in 1947 when he was 2 years old. Tr. 327. Nichols told the Court he began plowing for the Town on or about 1970 but also rode in the plow truck with his father during the 1950's and 1960's when he was 3-23 years old. Tr. 325. Both Audet and Nichols confirmed they reversed their plow trucks on the Guiney driveway and both confirmed no one ever objected to them doing do. Tr. 205 & 209; Tr. 326 & 328. Guiney testified he also did not object to the Town using his driveway until Nault began trying to convince the Town his driveway was a public way by prescription. Tr. 11-12.

Guiney testified that when he purchased Lot 5 in 1999 his gravel driveway, which is also the "cart road", shown in pink on Page 10 was approximately 12 feet wide. Tr. 8. Testimony from other Nault witnesses is not analyzed herein because the activities of those witnessed took place

[11] Evidence must be for activities prior 20 years prior to 1968 pursuant to RSA 229:1.

after 1968 and are not relevant to the issue before the Court. Tr. 199, 191, 211, 224, 235 & 329.

No testimony by or about local residents or the general public using any portion of Kelsea Road, the Disputed Portion or the "cart road" for public travel or any other purpose during any period of time was presented by Nault other that Guiney described an occasional lost motorist reversing directions in his driveway. Tr. 11. The 2006 photos show the area beyond the "cart road" within the Disputed Portion was thick grass. (Apx. VII at 26-30).

When Nault began to improve and widen the "cart road" running through Lot 5 on or about 2008/2009, Guiney objected and their ongoing discourse causing Guiney to request the Town stop turning around in his driveway. Tr. 17-22. At first, the Town agreed to having its plow trucks reverse directions to the west of the Guiney barn. When that area became too difficult to navigate, the Town agreed to install as new turnaround within the Layout area for which Guiney granted the Town a turnaround easement. Tr. 22; (Apx. II at 21; Apx. V at 30-32). Contrary to the statement appearing in the Order, at no time did the Town ever conduct investigations confirming it had a right to use the Disputed Portion of Lot 5. Or 50. When the Town found the new turnaround was also inadequate, it appeared to have joined Nault with his incremental widening of the "cart road", prompting Guiney to install the wooden posts 15-16 feet apart on either side of the "cart road" to prevent a taking of his property by the widening which appears to have been the final straw causing the Petition to be filed. Tr. 17.

Johnson Farm Lot Conveyances

When preparing his 2007 Rogers Report, Rogers reviewed the chains of title to every lot originating from the Johnson Farm as well as the plan entitled *"Plan of Land of Jean S. Gildersleeve With Common*

Boundary Line & Right of Way Located by Agreement of Jean S. Gildersleeve & Kenneth Braverman Dunbarton N.H." dated November 20, 1986 prepared by John T. Hills ("Hills") recorded in 1988 ("BLA Plan") and the 3 recorded versions[12] of the boundary line agreement ("Agreements"). (Apx. III at 24-31); Tr. 60-86. Rogers testified that during his field work to prepare the Guiney Plan, he did not find monuments set by Hills to demark the end points and angles of an agreed to boundary line shown on the BLA Plan. Tr. 89 & 146. Rogers was puzzled by the BLA Plan because he found the deed language describing the common boundary located between Lot 5 and Lot 7 to be *"crystal clear"*. *Id.*

The 2007 Rogers Report illustrates the chains of title of each lot conveyed from the Johnson Farm and also shows the abutting owners at the time of certain conveyances to confirm abutter calls. (Apx. III at 24-31). In 1854, Henry Johnson ("Johnson") became the owner of the Johnson Farm. (Apx. V at 3-4). On August 27, 1873, Johnson deeded the Horse Pasture ("Lot 8") and the Upper Field ("Lot 9") to Nathaniel J. Colby who owned a large tract abutting Lot 8 and Lot 9 to the north through which both Lots had access, explaining why neither has an express right to use the "cart road". (Apx. V at 5).

The Creation of Lot 7

Also, on August 27, 1873, Johnson deeded a 40-acre parcel from the westerly end of the Johnson Farm located *"on each side of Black Brook"*, describing the premises as follows:

> *"Beginning at a stake and stones on the east shore of Black Brook at the Town line of Goffstown,* ***thence Northerly and easterly by the pasture land to a stone wall dividing the fields; thence Northerly on the line of said stone wall and wall of the Horse pasture to the South east corner of the so called Upper Field so called*** *thence westerly and Northerly*

[12] The first 2 versions were entitled "Common Boundary Line and Right-of-Way Agreement". The third version is entitled "Confirmatory Common Boundary Line and Right of Way Agreement".

> *by the wall of said upper field owned by Nathanial Colby; thence westerly by said Colby's land to land of David Wells to stake and stones; thence southerly by said Wells land to Goffstown line to stake and stones; thence Easterly on said Town line to bound first mentioned, to contain forty acres, be the same more or less.* **…** *I also grant to the said Alfred Colby the right forever to cross my premises in any manner and a at all times in the old cart road."*

(Apx. V at 6; Apx. III at 26); Tr. (66-68). (emphasis, supplied). The bolded language above is the legal description of the original common boundary located between Lot 5 and Lot 7 which Rogers had found *"crystal clear"*. Tr. 88-89.

On May 14, 1874, Colby transferred the westerly *"thirty acres be the same more or less"* to the west of Black Brook to Albert P. Little with *"the right at all times for farming purposes to use the old cart road to the highway*." (Apx. III at 27[13]; Apx. IV at 507). (emphasis, supplied). The deed's reference to the *"highway"* appears to refer Kelsea Road and distinguish it from the "cart road". *Id.* The Colby's heirs deeded the remainder parcel located on the east side of Black Brook to Alonzo Richards in 1894, describing the premises without specific acreage, as bounded:

> *"…on the north by land of N.J. Colby* [Lot 8] *and the widow Simonds* [Lot 9]*; on the east by land formerly of A.D. Richards* [Lot 5] *on the south by the town line between Dunbarton and Goffstown."*

Both the 2007 Rogers Report and the 2017 Rogers Report illustrate this conveyance, walk the reader through the description and show the abutting owners. (Apx. IV at 5-7; Apx. III at 27-28; Apx. III at 51). (emphasis, supplied).

[13] Page 27 of the 2007 Rogers Report shows the parcel originally transferred to Richards before he transferred the northwesterly portion to Albert E. Jones 4 years later.

In 1898 Alonzo Richards transferred the northwesterly portion of the land Colby had deeded to him in 1894 to Albert Jones, leaving him with the remainder parcel now known as Lot 7 which he transferred to Leon Degrenier in 1920. (Apx. IV at 8-9). By 1922, Lot 7 came to be owned by Ruth Heath Keaney. (Apx. IV at 13). When Keaney transferred Lot 7 to Joseph Bernatas on September 8, 1924, she described the premises in the same manner but added: *"containing twenty (20) acres more or less"* to the description for reasons unknown because she had not acquired other acreage in this area. (Apx. IV at 13); Tr. 82-83. Subsequent Lot 7 conveyances repeated the same description, including *"containing twenty (20) acres more or less"* including the deed to Abraham Braverman. (Apx. IV at 14-24).

Lot 5 Transfers

Concurrent with the creation of Lot 7, Johnson deeded the remainder of the Johnson Farm to Albert Jones in 1876, describing the premises as including *"seventy-five acres be the same more or less"* and *[R]eserving a common cart road at all times for the use of those owning land beyond these premises."*. (Apx. V at 7). Jones transferred the Johnson Farm in 1885 using the exact same description which was followed by fifteen (15) additional conveyances using that same description until Edgar F. and Jean S. Wheeler came to own Lot 5 on March 10, 1967. (Apx. VI at 13). Before divorcing, the Wheelers subdivided a lot fronting on Kelsea Road from Lot 5, which Edgar retained when he quitclaimed his remaining interest in the Lot 5 to his former wife, Jean S. Wheeler in 1971. (Apx. VI at 14).

1988 BLA Plan & Agreements

Jean S. Wheeler Gildersleeve ("Gildersleeve") retained Hills sometime during the 1980's to survey Lot 5. (Apx. II at 18). In Hills December1986 letter to Gildersleeve, he advised her she did not have 75 acres and the "*Braverman's area will be well under 20 acres with any line*

chosen." (Apx. VII at 31). (emphasis, supplied). During his early research, Rogers obtained a copy of this letter and several other documents and plans from the Hills file[14]. Tr.94-96. One plan entitled: *"Compass & Tape Worksheet"* dated June 23, 1981 prepared by John Myhaver ("Worksheet") appearing as Reference Plan #2 on the BLA Plan, shows detailed physical evidence along the boundary of Lot 5 and Lot 7. (Apx. II at 16); Tr. 94-95. The stonewalls, fields, meadows and a pasture shown on the Worksheet are helpful when reading the 1873 Johnson to Colby deed and make it easy to locate the original common boundary. *Id*.; (Apx. IV at 3; Apx. II at 18).

A second plan entitled: *"July 1980 Plan of Land Braverman Realty"* ("Schematic") prepared by Walter F. O'Neill, and is listed as Plan reference #1 on the BLA Plan was also retrieved by Rogers. (Apx. II at 18). Rogers testified the Schematic shows O'Neil was looking for potential *"new lines"* to increase the size of Lot 7 to "*twenty (20) acres more or less"*. (Apx. II at 17); Tr. 97-98. Other letters from the Hills file stressed the importance of reaching an agreement to avoid a trip to the planning board. (Apx. VII at 32-34).

In addition to the questions raised by documents retrieved by the Hills file. Rogers specific issues with the BLA Plan included: (a) "*Ken Braverman Realty Co."* being listed as the owner of Lot 7 when Abraham Braverman owned Lot 7; (b) there was no physical or documentary evidence to show how Hills located "Kelsea Road" although he certified the ways shown were existing public or private streets; (c) Hills certified no *"new lines for division"* had been created which was blatantly false; and (d) no location for permanent monuments being placed was shown. Tr. 93-94. The BLA Plan also showed a reserved 50' ROW between the house and

[14] Rogers testified that John T. Hills and Walter O'Neill were among the older surveyors who were grandfathered when New Hampshire adopted licensing and may not have been well trained in deed research.

barn located on Lot 5 but Rogers found no easement granting anyone rights to use it. (Apx. II at 18).

As to the Agreements, Rogers cited the following concerns: (a) Jean "**O.**" Gildersleeve was "Jean S."; (b) Recital 3 directly conflicted with the statement by Hills in his letter to Gildersleeve that the title was too confusing; (c) Recital 4 was untrue because the "cart path" is very easy to locate on the ground and in fact, some of Nault's maps admitted in this case show it; and (d) Recital 5 is untrue because RSA Chapter 472 does not authorize landowners to create "a **new** common boundary" line. Tr. 92-93; (Apx. VI at 15-23). Despite the BLA Plan showing approximately 7 acres of land from Lot 5 becoming part of Lot 7 Rogers testified no deed to perfect that purported transfer has ever been found with a 50' ROW for access, no instruments perfecting either grant have ever been found, leaving a cloud hanging over Guiney's title. Tr. 104. Contrary to Nault's testimony, the Lot 7 deed does not reference the BLA Plan or its related Agreements. (Apx. IV at 24).

After the BLA Plan and the first 2 versions of the Agreement were recorded, on May 1, 1990, Jean S. Wheeler Gildersleeve ("Gildersleeve") who had moved to Florida in the 1980's, transferred Lot 5 into her Trust. (Apx.VI at 24-26). In 1999 Gildersleeve transferred Lot 5 to Guiney. (Apx.VI at 27-29). Both deeds begin with the same legal description used by Braverman to transfer Lot 5 to the Wheelers in 1967, recite statements from earlier deeds and simply list the BLA Plan, the Agreement and the 50-Foot ROW. (Apx. VI at 14; Apx. VI at 24-29). Prior to acquiring Lot 5 Guiney testified he was provided a copy of the BLA Plan that he saw the stakes along the 50' ROW, but never met Gildersleeve. Tr. 10.

SUMMARY OF THE ARGUMENT

A local resident who grants an informal seasonal accommodation to the municipality in which he resides, for its convenience and benefit, should not ripen into a claim of prescription by the municipality stating they have a right to that accommodation, even if that citizen incidentally benefits from the arrangement, nor should it result in a taking of private property without paying just compensation. To prove public prescription, the municipality must prove, by the balance of the probabilities, open, adverse and continuous public use for 20 years prior to 1968. Mahoney v. Canterbury, 150 N.H. 148, 150-151 (2003). When the area claimed is subject to a private easement, a heighted level of adversity must be proven. Warren v. Shortt, 139 N.H. 240, 244 (1994).

Town plow trucks reversing directions in your driveway does not rise to the level of maintenance, nor does it constitute use by the public at large, especially when that use is necessary do to no other options being available Clapp v. Jaffrey, 97 N.H. 456, 459 (1952). There is not a scintilla of evidence in the record of the public using the Disputed Portion, much less adverse use and the trial court's decision must be reversed.

For a boundary line agreement to be enforceable the parties to the agreement must strictly comply with RSA Chapter 472, unless the Court wishes to overrule its holding in N.H. Department of Resources & Economic Development v. Dow, 148 N.H. 60, 64 (2002). When the legislature uses language indicating compliance is mandatory, the Court must enforce its provisions even when there is an uncomfortable outcome.

The record evidence confirms the original boundary was easily found and the purported "new boundary line", although not authorized, was not monumented as required by RSA 472:3. In addition, there was ample testimony and evidence that the parties to the boundary line agreement in

this case deliberately misused the statute to make an end run around other requirements to relocate their common boundary. The trial court should not have held the parties acquiesced to the "new line" when Guiney was provided no opportunity to defend against that affirmative defense which was not raised by Nault requiring this Court find the BLA and its other details unenforceable.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT HELD THE DISPUTED WAY BECAME A PUBLIC HIGHWAY BY PRESCRIPTION.

A public highway may be created by: (a) formal layout; (b) constructing a road over public land or public easement; (c) dedication and acceptance pursuant to RSA 231:51; or (d) adverse and continuous public use for 20 years prior to 1968. RSA 229:1. Catalano v. Town of Windham, 133 N.H. 504, 508-509 (1990). When the road is also subject to a private easement and the claimant is trying to prove prescription, an enhanced level of adverse use by the public must be shown. Warren v. Shortt, 139 N.H. 240, 244 (1994). The evidence before the court did not satisfy this burden.

A. Kelsea Road Continues to Exist as Laid Out.

A road shown on an ancient map may infer public use but further corroborating evidence is required. Mahoney v. Town of Canterbury, 150 N.H. 148 (2003); Blagbrough Family Realty Trust v. A & T Forest Products, Inc., et al, 155 N.H. 29 (2007); Williams v. Babcock, 116 N.H. 819 (1976). The best evidence a public highway exists or has been discontinued is the official municipal record. Davenhall v. Cameron, 116 N.H. 695, 696-697 (1976).

As a form of eminent domain, the official record describes the public benefit the layout, the road's specific location and any damage payment. RSA 231:17; Town of Littleton v. Berlin Mills Co., 73 N.H. 11, 16 (1904).

Unless a formal record of discontinuance if found, a public highway is presumed to exist. RSA 231:43; Davenhall at 696-697. While the legislative body may vote to reclassify a road as Class VI, discontinue its maintenance or abandoned it for five (5) years, without a record of full discontinuance the road continues to exist. RSA 229:5(VII).

The Town's official Layout of Kelsea Road, as further supported by the Town's transcription, conclusively confirms Kelsea Road was laid out by the Town from "County Road[15]" to the Goffstown town line on May 29, 1821 through the Johnson Farm and damages were paid to Johnson in the form of a range lot. (Apx. III at 7; Apx. VII at 14). It is undisputed that no official discontinuance has ever been found and it indeed is shown on several maps admitted at trial (Apx. II at 4, 5, 13, 14). Although it is undisputed Kelsea Road is a Class V public highway up to Guiney's driveway, the trial court appears to have overlooked that Kelsea Road continues to the south as a Class VI road to up to the Goffstown town line and it does not tur to the west.

B. Any Prescription Period Appling to Disputed Portion is Limited to March 26, 1944 through January 1, 1968.

RSA 236:30 and RSA 477:34 both protect government owned property from adverse passion claims. The Town took Lot 5 by tax deed on September 29, 1939 and continued to own it through March 25, 1944. (Apx. VI at 8-10). The Disputed Portion is part of Lot 5 and for this reason, any period of prescriptive use about which a living person could testify or documentary evidence must post date March 25, 1944. Williams v. Babcock, 116 N.H. 819 (1976).

[15] "County Road" has been renamed as Montelona Road.

C. Ancient Maps, Photos and Tax Cards Alone Do Not Support the Disputed Portion Becoming a Public Way by Prescription.

The Dunbarton pages of the 1858 and 1892 Atlases and the 1941 Property Ownership Map show Kelsea Road as a straight line ending at the Johnson Farm with no turn to the west. (Apx. II at 4-5, 12). The 1946 Blister Rust Map, which is hand drawn map requiring personal inspection, shows the Kelsea Road Layout as a double dashed line extending past the Johnson farm to the Goffstown town line and the "cart road" turning west as a single broken line. (Apx. II at 14). The 1941 aerial photograph shows Kelsea Road as a bright white line extending to the Johnson Farm, and a pale gray line demarking the "cart road" extending to the west. (Apx. II at 13). The Lot 5 1941 tax cards show the Class V length of Kelsea Road as a double solid line ending at the Johnson Farm and a double dashed line for the "cart road" heading to the west. (Apx. VII at 15-16). None of these maps show the Disputed Portion as a public way or part of Kelsea Road and nothing about them demonstrates public use.

Although part of the Kelsea Road right of way is shown on the five (5) versions of the USGS maps introduced by Nault, Rogers explained USGS maps are a very small scale and are prepared to show physical features and other land improvements but they do not demonstrate ownership or legal status because that information changes all the time. (Apx. II at 6-11); Tr. 114-115.

The maps, photographs and tax cards introduced by Nault were generally consistent with the Kelsea Road Layout show only that the "cart road" existed and turned to the west. These maps may suggest there is a road on the ground but they do not demonstrate public use.

D. No Evidence of Use by General Public Exists in the Court Record.

Proof of adverse public use for 20 years prior to January 1, 1968 must be proven by the balance of the probabilities, to prove prescription. Williams v. Babcock, 116 N.H. 819 (1976); Mahoney v. Town of Canterbury, 150 N.H. 148 (2003); White Mountain Freezer Company, Inc. v. Levesque, 99 N.H. 15 (1954); Catalano v. Town of Windham, 133 N.H. 504 (1990); Blake v. Hickey, 93 N.H. 318 (1945). In Elmer v. Rodgers, 106 N.H. 512 (1965). Public use requires showing of persons other than those owning property in the area and their guests. *Id.*

Evidence of public use may include resident testimony, deed references and simple geography. *Id*. In Williams, the first case recognizing a road shown on an ancient map may infer public use, the court relied upon: (a) a 1827 layout by the Town showing the road provided access to several homes and a school; (b) several deeds referring to the road as a boundary; (c) photos of old cellar holes along the road; and (d) a map showing the road connected two towns, to support a finding that the road had become public by prescription. Williams at 822-824.

In Mahoney, the court held Old Still Road became a public road by prescription because it: (a) was approximately ½ mile long and part of a broader road network connecting Canterbury and Northfield; (b) appeared on a map entitled: *"1814 West Road School District Map"* and provided access to the parties' lots; (c) was shown on the 1858 and 1892 Atlases and the 1911 Town Map; and (d) was referenced in several deeds as a monument. Mahoney at 151.

In Blake, evidence of horse drawn wagons and other self-propelled vehicles routinely traveling over the road to reach a campground where local residents farmed, hunted and fished was found to demonstrate public use. Blake at 321. In White Mountain Freezer Co., Inc., the court held

public use was confirmed by the road connecting two towns and residents of both towns using the road to reach the beach at Half Moon Pond where there was a sawmill, slaughterhouse and recreation area used by residents from both towns to fish, hunt and pick berries. White Mountain Freezer Co., Inc. at 17.

In Catalano, the court held residential roads which had been previously maintained by the Town[16] became public by prescription because there was a grocery store located on one of the roads frequented by residents from other parts of the town and the general public used the roads to reach Shadow Pond for recreation year-round. Catalano at 507. In Elmer, testimony by year-round and seasonal residents from Woodstock and Thornton, church members and their guests was found to confirm sufficient public use of a driveway running through church property to find it became a public way by prescription. Elmer at 514.

During the 3-day bench trial in this case, no member of the general public testified about public use of the Disputed Portion, nor was there any evidence suggesting the public at large used the Disputed Portion, which is basically a small area of Guiney's driveway, between March 26, 1944 and January 1 of 1968.

E. The Town Plow Truck Turning Around Does Not Demonstrate Public Use.

When a municipality resumes its maintenance of a Class VI road for 5 continuous years, its status will be elevated to Class V but road maintenance requires more than just plowing. RSA 229:5 (VII). Catalano v. Town of Windham, 133 N.H. 504, 511 (1990). Each year as winter approaches, municipalities are reminded they are obligated to keep public highways safe, but the distinctions between by public highways, Class VI

[16] The Town had not formally accepted those roads.

roads, private roads and driveways are not always clear. RSA 231:90. See also, https://forumhome.org/clients/forumhome/LGC.pdf.

This is important because tax dollars may not be used to maintain private property. Opinion of the Justices, 88 N.H. 484, 486 (1937); Clapp v. Jaffrey, 97 N.H. 456, 459 (1952). The only exception to the rule is when a private citizen compensates the government for services found to be *"subordinate and incidental"* to a municipal need. Clapp at 459. Not honoring these statutory boundaries can expose a municipality to unnecessary liability. Blagbrough v. Town of Wilton, 145 N.H. 118, 119-120 (2000) *(finding the Town trespassed by attempting to improve site distance of a private road to accommodate safe access to plow a bridge it believed it must maintain).* In 2011, after a private resident whose driveway was being used by the town plow truck to reverse directions withdrew their permission, the Town of Rye found itself in a position similar to Dunbarton in this case, requiring it to file suit to determine the legal status of the road. Gordon v. Town of Rye, 162 N.H. 144, 146 (2011).

Nault introduced former Town employees to testify about their grading and plowing activities along Kelsea Road, and their historical practice of reversing the direction of the plow truck within the Disputed Portion. Tr. 207 & 327. Audet who testified he was 80 years old at trial, was only 4 years old in 1944 and boyhood recollections from 60-70 years ago often become unclear. Tr. 207. While Audet accurately confirmed there is no other location to reverse the direction of the plow truck explaining: *"we had to go beyond the barn so we could head out*" he would have had to be at least 16 years old to drive the plow truck in 1954 and that is too late to support a prescription claim. Tr. 206. Audet's recollection about pushing the snow beyond the Disputed Portion and reversing directions adjacent to the Guiney barn to return to Montelona Road confirmed his belief that the Town was obligated to maintain access for emergency vehicles and that no

owner of Lot 5 objected but they only demonstrated a private citizen's accommodation of the Town. Tr. 203-209.

William Nichols testified he moved to Dunbarton in 1946 and began plowing for the Town around 1970 and also rode with his father in the plow truck during the 1950's and 1960's. Tr. 325-328. In the first instance, the 1950's and 1960's were too late to begin a prescriptive period for the Disputed Portion but Nichols also confirm no owner on the Guiney property ever complained about the Town plow trucks reversing directions on the property. *Id.*

It was not until Nault began widening the "cart road" and claiming the Disputed Portion was public that Guiney became concerned and requested the Town stop using the Disputed Portion to reverse the plow truck's directions and eventually granted the Town a turnaround easement in 2015. (Apx. II at 21 & Apx. VI at 30-32). This was when Nault submitted a petition to layout the Disputed as a public way which the Town denied on November 10, 2015. (Apx. VII at 3-13). The evidence submitted to prove public use of the Disputed Portion between March 26, 1944 and January 1, 1968 was grossly inadequate to meet Nault's burden and the Petition confirmed the Town agreed. In the meantime, the Town found the turnaround easement inadequate, the Town resumed its use of the Disputed Area and its Road Agent began assisting Nault with his widening of the "cart road".

F. The Town's Use of the Disputed Portion Was Not Adverse.

Adverse and continuous use by the public is much broader and frequent than the Town's seasonal reversal of its plow truck in your driveway. Blake v. Hickey, 93 N.H. 318 (1945); White Mountain Freezer Company, Inc. v. Levesque, 99 N.H. 15 (1954); Catalano v. Town of Windham, 133 N.H. 504 (1990). Whether public use is adverse is an issue of fact, but at a minimum it must put the landowner on notice a claim is

being made to their property, regardless of their toleration, permission or consent. Wason v. Nashua, 85 N.H. 192, 198 (1931). In addition, when the area claimed by the public is subject to a private easement, the level of adversity must be substantially increased. Warren v. Shortt, 139 N.H. 240, 244 (1994). (emphasis, supplied)

Referring to Black's Dictionary, the Warren Court confirmed *"adverse use"* was without permission or a right to use; and as a consequence, permission was inconsistent with a claim of right and cannot ripen into prescription. *Id*. The court further explained that the existence of a license or easement to use the area subject to the Town's prescriptive claim must *"go further on the issue of adversity"* because it was not reasonable to expect the landowner to monitor whether the area was being used permissively or adversely. *Id*. The simple fact that no one complained about the Town's use of the Disputed Portion does not meet this burden because the evidence must demonstrate a heightened level of adversity within the 12-foot-wide strip running through the center of the Disputed Portion and the evidence failed to meet that burden.

Lot 7 has an express easement to use the "cart road" along with four (4) other lot owners located to the west of Kelsea Road. When coupled with no objections ever being raised by prior owners, no adversity was shown.

G. Any Public Use Of the Disputed Portion Limited to the 12.65' Width Shown on Exhibit A.

The scope of a prescriptive easement is defined by its use within a physically defined area. Jesurum v. WBTSCC Ltd. Partnership, 169 N.H. 469, 479 (2016) *(declining to limit the permitted use of defined area)*; Cote v. Eldeen, 119 N.H. 491, 493 (1979)*(declining to expand hours and frequency of road use)*; Stowell v. Andrews, 194 A 3d 953, 964 (N.H. 2018) *(holding the uncertain location of an easement area becomes fixed*

once established by use and may not be changed without the parties agreement).

No legal description of the "cart road" has ever been drafted but Exhibit A to the Town's Petition shows its physical width as confirmed by Rogers in 2006 at 12.65 feet. Photographs from 2006 Litigation further confirm the physical location of the "cart road". (Apx. VII at 26-30). If the Court does not find prescription is supported, its width must be fixed at 12.65 feet. (Apx. II at 3).

II. THE BLA IS UNENFORCEABLE.

A. The BLA does not comply with RSA Chapter 472.

A boundary line agreement must strictly comply with the statutory requirements of RSA Chapter 472. N.H. Department of Resources & Economic Development ("DRED") v. Dow, 148 N.H. 60, 64 (2002). To avail oneself of the curative provisions of RSA Chapter 472: (a) the shared boundary line must be in dispute; or (b) the existing monuments and descriptions in the parties' deeds, or those of the predecessors in title, prevent the common boundary being located on the ground, *"and not otherwise"*. RSA 472:1 (emphasis, supplied); DRED at 62.

The line to which the parties agree must be surveyed, legally described by courses and distances and "*suitable and permanent monuments shall be placed at each end and at each angle of the boundary so agreed upon"*. RSA 472:3; DRED at 63. The creation of a *"new lot"* line is not authorized by RSA Chapter 472 because a new line requires planning board approval. RSA 674:37; RSA 676:16. As a form of corrective instrument, a boundary line agreement may not substantially change an original grant. N.H. Practice, Vol. 17, §1.01, p. 247 (2003); See also, N.H. Bar Assoc. Title Exam. Std. 5-15 (2016).

Relying upon the language: *"and not otherwise"* found in RSA 472:1 the DRED Court held the legislature's use of the word *"shall"* regarding the placement of monuments at each angle and end of the agreed to line was mandatory and the parties' failure to monument that line left their predecessors' boundary line agreement unenforceable. DRED at 64.

The boundary line agreement found unenforceable in DRED was executed on September 7, 1974 and relied upon a 1973 survey and subdivision plan. DRED at 61. Both parties' lots originated from the same tract. *Id.* DRED's predecessor in title accepted a 1976 deed to which a sketch of the purported common boundary line was attached. *Id.* Two years later DRED acquired that parcel and blazed the trees along the line shown on the 1973 plan. *Id.* Respondent Dow acquired the abutting lot in 1995 and in 1997, about 23 years after the agreement had been executed and recorded, began cutting trees beyond the blazed line because he claimed the original line controlled. *Id.*

Dow raised several claims against DRED in the litigation, but the court never reached those issues because it almost instantly found the boundary line agreement unenforceable because RSA 472:3 requires permanent monuments be installed to demark the agreed to line. *Id.* at 64. In so holding, the Court explained the legislature's use of the word *"shall"* was a command requiring mandatory enforcement *(referring to City of Manchester v. Doucet, 133 N.H. 680, 682 (1990) holding injured firefighter entitled to attorney fees)* and went on to state the courts have no right to redraft legislation simply because the results may be unfavorable in some cases. Id. at 64. *(referring to Ahern v. Laconia Country Club, Inc. 118 N.H. 623 (1978)*.

As was the case in DRED, the Nault and Guiney lots adjoin each other, they both originated from the Johnson Farm and the BLA is approximately the same age as the boundary line agreement in DRED.

(Apx. II at 18; Apx. VI at 15-23). It is undisputed that no monuments were installed by Hills or the former owners to mark the angles and ends of the purported *"new line"* described in the BLA as required by RSA 472:3. Tr. 88. There is also substantial evidence in the trial court record confirming Braverman, Gildersleeve, their agents did not trace Lot 5 or Lot 7 back to a firm root in the title because had they done so, there would not have been any reason for a BLA. Mansur v. Muskopf, 159 N.H. 216, 223-224 (2009); CF Investments, Inc. v. Option One Mortgage Corporation, 163 N.H. 313, 315 (2012).

Rogers testified he researched the chains of title to all the lots originating from the Johnson Farm, illustrated those conveyances in the 2007 Rogers Report and found the description of the true common boundary between Lot 5 and Lot 7 *"crystal clear"*. Tr. 89 & 146. Rogers also opined that had this research been done, there would be no reason for a BLA and likely no litigation between Guiney and Nault. Tr. 92.

The 2007 and 2017 Rogers Reports illustrate the courses and distances of the 1873 Johnson to Alfred Colby deed and show the abutting owners for each important conveyance. (Apx. III at 26-31 & 51). This is especially important when reading the 1894 deed from the Colby's heirs to Alonzo Richards where the premises are describes by abutter calls. (Apx. III at 51). The hierarchy of evidence applied by surveyors when interpreting deeds provides for monuments to control over courses and distances with and area or acreage being the last consideration. Paull v. Kelly, 819 N.E.2d 963, 969 (2004) *(referring to Holmes v. Barrett, 269 Mass. 497, 499-500 (1929); Ryan v. Stavros, 348 Mass. 251, 258-259 (1964.)*) When abutter calls are used to describe a property, the land of that adjoining property owners are considered monuments and is therefore controlling. *Id.*

Unlike Rogers, Dahlberg testified he did not review all the chains of title originating from the Johnson Farm, nor did he survey any lot

originating from the Johnson Farm. Tr. 247-248. The abutter references found in the 1894 Johnson to Alfred Colby deed are not *"passing calls"* because those lots are considered monuments. *Paull* at 969. Most striking is that Dahlberg's plans from the 2006 Litigation which were part of the 2007 Rogers Report, show the common boundary between Lot 5 and Lot 7 as described in the 1873 Johnson to Colby, consistent with the opinion found in both Rogers Reports, suggesting he agreed with Rogers until Guiney filed his counterclaim in this case. (Apx. III at 34-37 & Apx. VII at 51).

Also, when viewing the "Schematic Sketch of Bk. 213 Pg. 503" found in the Dahlberg Report with the transcript of his testimony, he stated he strictly applied cardinal directions, and was looking for 90-degree angles when trying to interpret the 1873 Johnson to Colby deed, which was an explanation designed to create an ambiguity as was the second ambiguity he cited regarding where along the stonewall of the Horse Pasture the northerly and easterly running stonewall was intended to connect. Tr. 269-270. First, the 1873 Johnson to Colby deed describes the first course as "northerly and easterly" not "north" as required by a cardinal direction[17] because a 90-degree angle is not called for. Second, the 1946 Blister Rust Map shows the stonewall followed northerly and easterly as intersecting the south westerly corner of the Horse Pasture as did the Worksheet referenced on the BLA Plan. (Apx. II at 14). For these reasons, Dahlberg's opinion as to the BLA is implausible and appears to have been prepared simply to create confusion.

There was substantial evidence in the record showing Braverman was shopping for the 20 acres described in his deed which included: (a) the Schematic Plan showing the various options to reach 20 acres; (b) letters

[17] Cardinal directions are North, East, West, South. https://en.wikipedia.org/wiki/Cardinal_direction

stating they hoped to reach agreement to avoid the planning board; and (c) the December 9, 1986 letter from Hills to Gildersleeve in Florida advising Braverman's lot included far less than 20 acres. (Apx. II at 17; VII at 31-32). Had Braverman looked at his chain of title, he would have seen Keaney arbitrarily added *"20 acres more of less"* to her deed description. (Apx. IV at 13). When these facts are all viewed in the light of the statements made in the various iterations of the Agreements about creating a *"new line",* there is no sound basis to find the BLA are enforceable.

A boundary line agreement is a corrective instrument and does not authorize any substantial change to the original grant because doing so violates the Statute of Frauds which requires a reasonable description of the premises being conveyed to promote certainty and avoid fraud in the sale of land. RSA 506:1. By allowing private landowners to simply draw a *"new line"* between their lots without planning board approval invites chaos into real estate titles and zoning.

Braverman and Gildersleeve effectively attempted to shift about 7 acres of land from Lot 5 into Lot 7 with no corresponding conveyance; and reserved an area of Lot 5 for a 50' ROW without granting anyone the right to use it. A deed requires granting language as shown in RSA 477:27 & RSA 477:28 and Rogers testified he found no deeds to correct these errors leaving a cloud hanging over the title to the Guiney property. Tr. 107. The BLA was not monumented, was inconsistent with the curative purpose of RSA Chapter 472 and based upon numerous untruths and must be found unenforceable.

B. The BLA Plan & Agreements Cannot Be Saved By The Doctrine Of Acquiescence Or Estoppel By Recitals In Deeds.

Acquiescence may realign a common boundary when for 20 years: (a) the parties with adjoining lots; (b) occupied their lots up to the realigned boundary; and (c) recognized the realigned boundary as true. O'Hearne v.

McClammer, 163 N.H. 430, 435 (2012); Rautenberg v. Munnis, 108 N.H. 20, 23, (1967). The doctrine furthers public policy by allowing parties to settle boundary discrepancies themselves and clear their titles provided they abide by their agreement for at least 20 years. O'Hearne at 436 *(referring to Richardson v. Chickering, 41 N.H. 380, 384(1860))*.

In O'Hearne the parties' lots originated from the same tract along by the Little Sugar River. Id. at 432. After a State survey and fluctuations in the highwater mark of the River where observed to have altered their common boundary, the respondent and the plaintiff's predecessor agreed to their common boundary installed monuments and honored it for approximately 80 years before the plaintiff claimed it was invalid. *Id.*

The court found the parties had acquiesced to the boundary line for 20 years, relying upon: (a) testimony about discussions between the original parties relative to monuments being the true boundary; (b) the parties agreed the State survey was accurate; (c) both parties transferred lots to the State relying on its survey; (d) the plaintiffs predecessor requested permission to run an irrigation line along the common boundary; (e) the defendant remove certain debris from the disputed area for the plaintiff's predecessor; and (g) the defendant installing no trespassing signs along the boundary at the former owners request. *Id.* at 437-438.

In Rautenberg v. Munnis, 108 N.H. 20, 23 (1967) the court denied the plaintiffs claim that the former owner of the defendants' property had acquiesced to a different boundary line because there were no monuments set along the line and the former owners testified they never agreed to a different boundary, because they didn't really know where the boundary was, and assumed "*everything was taken care of in the deed"*. *Id.*

Gildersleeve moved to Florida by at least 1986. (Apx. VI at 24-29; Apx. VII at 31). Lot 7 was vacant land until Nault acquired the Property and built his home. (Apx. VII at 17). The location of the purposed *"new*

line" runs through the woods located between the Guiney and Nault homes and there is no evidence in the record showing either party knew where the "new line" was, occupied up to the line or recognized the "new line" as their true boundary line for 20 years, likely because it was never marked. O'Hearne at 437-438. Rautenberg at 21. Therefore, the BLA cannot be saved by the doctrine of acquiescence which was never raised by Nault as a defense.

Estoppel by recitals provides a grantee may not deny validity of an outstanding easement recited in their deed. Kellison v. McIsaac, 131 N.H. 675, 682 (1989). Guiney does not deny the 50' ROW appears on the BLA Plan, nor does Guiney deny Nault has a right to use the "cart road" to access his 3 Lots. However, Guiney cannot be required to abide by a 50' ROW shown on an invalid and unenforceable BLA Plan, especially when Lot 7 was never granted any right to use the 50' ROW by deed. Tr. 107. Contrary to Nault's testimony, the deed to Lot 7 does not refer to the BLA Plan or the Agreements. (Apx. IV at 24). Tr. 362-363.

Even if Nault claimed he detrimentally relied upon having a deeded easement to use the 50' ROW, he could not claim harm because Nault also confirmed he knew he had the right to use the "cart road" for access. Tr. 364. Furthermore, like the sketch attached to the deed into DRED's predecessor in title, DRED, a list of documents listed in a legal description without more should not estop a party from claiming any one of them is unenforceable. Therefore, estoppel by recitals does not save the BLA. *Id.* at 677.

CONCLUSION

Guiney respectfully requests the Court reverse the trial court decision because there is no evidence in the record to support adverse public use of the Disputed Portion for 20 years prior to January 1, 1968 by the balance of the probabilities.

Guiney also respectfully requests the Court find the BLA is unenforceable as a matter of law because the parties to the BLA did not comply with RSA Chapter 472. In addition, the evidence in the record confirms the BLA cannot be saved by relying upon the doctrine of acquiescence because the original line was not ambiguous; the "new line" was not marked preventing either party from occupying up to, or recognizing the "new line"; and allowing landowners privately alter their lot lines is inconsistent with the public interest, settled real estate titles and zoning. The BLA is also not saved by the doctrine of estoppel by recitals because Guiney had no part in those recitals and he should not be held estopped to recitals which are the result of a as statute's misuse.

STATEMENT REGARDING ORAL ARGUMENT

Michael Guiney respectfully requests 15 minutes for oral argument to be presented by Patricia M. Panciocco, Esq.

CERTIFICATION REGARDING THE APPEALED DECISION

I hereby certify that the appealed decision is in writing and appended to this brief.

Respectfully submitted,
Michael Guiney

By his attorneys
Panciocco Law, LLC

April 23, 2019

/s/ Patricia M. Panciocco
Patricia M. Panciocco (Bar #15872)
One Club Acre Lane
Bedford, NH 03110
Phone: (603) 518-5370
E-mail: Pat@pancioccolaw.com

RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that pursuant to guidance from the Court Clerk's Office, the Brief and Appendices have been sent via e-mail to:

- Michael J. Tierney, Esquire at mtierney@wadleighlaw.com
- Steven M. Whitley, Esquire at steven@mitchellmunigroup.com

April 23, 2019 /s/ Patricia M. Panciocco

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 9391 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix, etc.

April 23, 2019 /s/ Patricia M. Panciocco

DECISION BEING APPEALED OR REVIEWED

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

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

NOTICE OF DECISION

File Copy

Case Name: **Town of Dunbarton v Michael Guiney, et al**
Case Number: **217-2016-CV-00739**

Enclosed please find a copy of the court's order of August 16, 2018 relative to:

ORDER

August 24, 2018

Tracy A. Uhrin
Clerk of Court

(485)

C: Steven M. Whitley, ESQ; Patricia M. Panciocco, ESQ; Robert E. Murphy, Jr., ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS. No. 217-2016-CV-739

TOWN OF DUNBARTON

v.

MICHAEL GUINEY, *ET AL.*

ORDER

The Plaintiff, the Town of Dunbarton ("the Town"), brought this action against the Defendants, Michael Guiney, and David Nault, Joshua Nault, and Leigh Nault (collectively "the Naults"), seeking a declaratory judgment as to whether a portion of roadway is public by prescription.[1] Mr. Guiney has brought a cross-claim for declaratory judgment and to quiet title against the Naults. The Court held a bench trial on July 11, 12, and 13, 2018, and took a view to visit the properties at issue on the first day of trial.

Two primary issues are in dispute. First, the parties dispute the location of Kelsea Road, the road used to access both the Guiney property and the Nault properties. The Naults contend Kelsea Road spurs off to the west and comes to an end between Mr. Guiney's house and barn, whereas Mr. Guiney contends Kelsea Road continues in a southwesterly direction until it reaches the Dunbarton/Goffstown town

[1] Although the Town filed this action against the Defendants, the Town does not take a position on the issues raised in this case. During the bench trial, the Town presented no evidence, nor did it cross-examine the Defendants' witnesses. Additionally, the Town has not submitted a post-trial memorandum or made any request for findings of fact and rulings of law.

line. The Town's petition raises the question whether the portion of roadway between the Guiney house and barn (the "Disputed Portion") is a highway by prescription. Second, Mr. Guiney contends the Boundary Line Agreement ("BLA") executed in 1988 by the previous owners of Lots 5 and 7 is void as a matter of law and, as a result, the shared boundary between the Guiney property and David Nault's property is further west and the 50' right-of-way conveyed by that agreement is non-existent. The Naults take the position that the doctrine of estoppel by recitals in instruments prevents Mr. Guiney from challenging the validity of the BLA entered into by their predecessors in title.

The Court finds, first, that the trial testimony and maps submitted into evidence demonstrate that the Disputed Portion was used for public travel for at least 20 years prior to January 1, 1968, and is thus a public highway by prescription pursuant to RSA 229:1. Second, the Court finds that even assuming, without deciding, the 1988 BLA is invalid, the boundary between Lots 5 and 7 and the 50' right-of-way over Lot 7 remain, as described in the BLA, under the doctrines of boundary by acquiescence and estoppel by recitals.

I. FACTS

A. General Description of the Parties' Properties and Kelsea Road

The relevant properties and Kelsea Road are all located in Dunbarton, New Hampshire. Mr. Guiney is the current owner of property located at 32 Kelsea Road ("Guiney Property" or "Lot 5"), a property with frontage on Kelsea Road. Lot 5's southern border is located on the Dunbarton/Goffstown town line. Between 1990 and 1998, Mr. Nault purchased three lots to the west and north of Lot 5. Mr. Nault is the

current owner of property located at 34 Kelsea Road ("Lot 7"), which is located to the west of Mr. Guiney's property. Lot 7 shares its eastern boundary with the western boundary of Lot 5. Black Brook borders Lot 7 to the west. In 1990, Mr. Nault purchased property located at 35 Kelsea Road ("Lot 8"), also known as the "horse pasture," which is located to the north of Mr. Guiney's property.[2] The southern border of Lot 8 abuts Lots 5 and 7. Mr. Nault is also the current owner of "Lot 9," also known as the "upper field," an undeveloped property that abuts Lot 7 to the south and Lot 8 to the east. Lot 9 shares no common boundaries with Lot 5. Lots 7, 8, and 9 have no frontage on Kelsea Road or any other Class V road. The Naults currently access Kelsea Road by traveling across a right-of-way located on Lot 5.

Kelsea Road exits off Montelona Road to the west and continues in a southwesterly direction bisecting Lot 5 into a northern portion and a southern portion. Mr. Guiney's house and barn are constructed on the northern portion of Lot 5. Kelsea Road is a Class V gravel road from the point of departure from Montalona Road until Kelsea Road nears the location of Mr. Guiney's house on Lot 5. As Kelsea Road reaches Lot 5, the roadway spurs off to the west and continues between Mr. Guiney's house and barn. This westerly spur is referred to in this order as the "Disputed Portion" of Kelsea Road.

B. Transactions Prior to 1894

Before August 27, 1873, all land now owned by the Defendants was owned by Henry Johnson and his wife Charlotte ("the Johnson Land"). By deed dated August 27, 1873, the Johnsons conveyed a tract of the Johnson Land to Nathaniel Colby. (Ex. 48-B.) On August 1, 1876, Nathaniel Colby and his wife, Alicia, conveyed a portion of this

[2] Lot 8 is now owned by Mr. Nault's son and daughter-in-law, Joshua and Leigh Nault.

land to Asenath Simonds. (Ex. 51-B.) The land transferred to Simonds is the land now referred to as Lot 9, and is presently owned by David Nault. (Ex. 51-N (1995 Nault deed for Lot 9).) The remaining land owned by Nathaniel Colby after the transfer to Simonds is now referred to as Lot 8, and is presently owned by Joshua and Leigh Nault. (Ex. 50-M.)

By deed dated August 28, 1873, one day after the transfer to Nathaniel Colby, Henry and Charlotte Johnson conveyed another tract of the Johnson Land to Alfred Colby. (Ex. 48-C.) The Johnson Land remaining after the transfers on August 27 and 28, 1873, is the land now referred to as Lot 5, and is presently owned by Mr. Guiney. (See Ex. 46, Figure 3; Ex. 48-U Guiney Deed.) The deed from the Johnsons to Alfred Colby includes a description of the property being transferred. The deed reads, in relevant part:

> Beginning at a stake and stones on the east shore of Black Brook at the Town line of Goffstown, thence northerly and easterly by the pasture land to a stone wall dividing the fields, thence northerly on the line of said stone wall and wall of the horse pasture to the southeast corner of the upper field so called, thence westerly and northerly by wall of said upper field to land of Nathaniel J. Colby, thence westerly by said Colby's land to land of David Wells to stake and stones, thence southerly by said Wells land to Goffstown line to stake and stones; thence easterly on said Town line to bounds first mentioned to contain forty acres be the same more or less.

(Ex. 48-C.) This description includes approximately 40 acres of land, located on both the eastern and western sides of Black Brook. The deed also granted Alfred Colby "the right forever to cross [Lot 5] in any manner and at all times in the old cart road." (Ex. 48-C.) The cart path runs between the house and barn on Lot 5, and is approximately 13'-15' wide.

On October 12, 1894, Alfred Colby's heirs conveyed the property located to the east of Black Brook to Alonzo D. Richards, which is the land now referred to as Lot 7, and is presently owned by David Nault.[3] (Ex. 49-C – deed to Richards; Ex. 49-N – Nault Deed). On April 11, 1876, Henry and Charlotte Johnson conveyed what is now referred to as Lot 5 to Albert E. Jones. (Ex. 49-D – deed to Jones.) That parcel of land is now owned by Michael Guiney. (Ex. 48-U – deed to Guiney.)

C. **Braverman/Gildersleeve Ownership**

On August 2, 1966, Adam Bernatas, as guardian of Helen Bernatas, conveyed Lots 5 and 7 to Abraham Braverman via fiduciary deed.[4] (Ex. 48 Q – Lot 7 deed to Braverman; Ex. 49-L Lot 5 Deed to Braverman.) Less than a year later, Abraham Braverman conveyed Lot 5 to Edgar and Jean S. Wheeler, a married couple. (Ex. 48-R.) At this time, Abraham Braverman retained ownership of Lot 7. Edgar and Jean later divorced, and on April 28, 1971, Edgar Wheeler executed a quitclaim deed transferring Lot 5 to Jean S. Wheeler.[5] (Ex. 48-S.) Sometime between 1971 and 1988, Jean remarried and took the name Gildersleeve. (See 48-T.)

On June 24, 1988, Jean O. Gildersleeve,[6] then-owner of Lot 5, and Braverman Realty Company ("Braverman"), entered into a "common boundary line and right-of-way agreement," which was recorded in the Merrimack County Registry of Deeds on August 24, 1988, in Book 1740, Page 513, re-recorded on January 27, 1989, in Book 1770,

[3] Between 1874 and 1898, the land located on the western side of Black Brook was conveyed out of the parcel conveyed by the Johnsons to Alfred Colby in 1873.
[4] While a number of other conveyances occurred in which the deed language may have changed, the properties remained the same until 1988, the time of the BLA. These other conveyances have no bearing on the issues presented in this case.
[5] The deed reserved a one-acre parcel which is now Lot 6.
[6] The Court acknowledges that in some documents Jean Gildersleeve was written to have a middle initial of "S," and at other times, had a middle initial of "O." The Court addresses this inconsistency below.

Page 952 (collectively "Boundary Line Agreement" or "BLA").[7] (Ex. 52.) The BLA provides, in part:

> [T]he boundary line between [Lot 5] and [Lot 7] is in dispute, and its location cannot be determined by the boundaries and monuments named in the deeds by reason of loss and obliteration thereof, and other reasons; and . . . a right-of-way exists over [Lot 5] for the benefit of [Lot 7], but the location of the right-of-way cannot be determined because its dimensions were not identified in the deed that created it . . . .

(Id.) The BLA provides that it "shall be a covenant running with the land, and shall be binding on all future owners of [Lot 5] and [Lot 7]." (Id.) As part of the BLA, Surveyor John Hills prepared a plan, which is referenced in the BLA and was recorded in the Merrimack County Registry of Deed. The agreed upon boundary line and the 50 foot right-of-way are depicted on the 1988 Plan. (Ex. 52, Plan #10558.)

On May 1, 1990, after the BLA was executed, Jean S. Gildersleeve (previously Jean Wheeler) and her husband, William A. Gildersleeve, executed a quitclaim deed conveying Lot 5 to Jean O. Gildersleeve[8], trustee of the Jean O. Gildersleeve Inter Vivos Trust. (Ex. 48-T.) The deed recites the both the Johnson to Jones metes and bounds and the BLA.

Although Braverman Realty Company was named as a party to the BLA, there is no evidence that Abraham Braverman ever transferred Lot 7 to the company.[9] Diana Braverman, Abraham Braverman's wife, obtained title to Lot 7 via Abraham's will after his death on December 19, 1968. (Ex. 49-N.) Diana Braverman died on March 3, 1996, and Edith Novak was appointed as executrix of Diana's will. (Ex. 49-N.) On June

[7] There appears to be no material difference between the two recorded agreements.
[8] It appears from the evidence presented that Jean S. Gildersleeve and Jean O. Gildersleeve are the same person, and the difference in middle initial was an error. Neither party suggests they are different individuals.
[9] There is a deed dated May 31, 1979, where Braverman Realty, Inc. conveys Lot 7 to Braverman Realty Company. (Ex. 49-M.) However, there is no evidence of a transfer of Lot 7 by Abraham Braverman to Braverman Realty, Inc.

26, 1998, Edith Novak, as executrix of the estate of Diana Braverman, and Jean O. Gildersleeve executed a "confirmatory common boundary line and right-of-way agreement," which recited the terms of the original BLA ("Confirmatory Agreement"). (Ex. 52.) The document's stated purpose was "to correct the title to the Braverman Land [Lot 7] as being owned by the Estate of Diana Braverman." (Id.) The Confirmatory Agreement states:

> Whereas, Jean O. Gildersleeve is the owner of a certain tract of land on the northerly side of the southern boundary between the Town of Dunbarton and the Town of Goffstown, on the westerly side of Montelona Road in Dunbarton, New Hampshire, title to which is derived from a deed of Edgar F. Wheeler to Jean Wheeler dated April 28, 1971, recorded in Book 1094, Page 259 Merrimack Co. Reg. of Deeds.
>
> Whereas, Braverman Realty Company is the owner of a tract of land on the northerly side of the southern boundary between the Town of Dunbarton and the Town of Goffstown, on the westerly side of Montelona Road in Dunbarton, New Hampshire, title to which is derived from a deed of Braverman Realty, Inc., dated May 31, 1979, and recorded in the Merrimack County Registry of Deeds at Book 1347, Page 832 (hereinafter referred to as "the Braverman Land"); and
>
> Whereas, the boundary line between the land of Jean O. Gildersleeve and the land of Braverman Realty Company is in dispute, and its location cannot be determined by the boundaries and monuments named in the deeds by reason of loss and obliteration thereof, and other reasons; and
>
> Whereas, a right-of-way exists over the Gildersleeve land for the benefit of the Braverman land, but the location of the right-of-way cannot be determined because its dimensions were not identified in the deed that created it; and
>
> Whereas, the parties have agreed to hire a surveyor to establish a new common boundary of the land owned by Jean O. Gildersleeve and the land owned by Braverman Realty Company, and to more precisely identify the location of the right-of-way on the Gildersleeve land.
>
> Now, therefore, the parties hereby agree that the common boundary line between the Gildersleeve land and the Braverman land shall be as follows:

> Beginning at a point on the boundary line of the Town of Dunbarton and the Town of Goffstown, which point is in intersection of the town line with the easterly bank of Black Brook; thence
>
> 1. North 40 54' 08" East, 447.31 feet to a point; thence
> 2. North 24 40' 49" East, 142.97 feet to a point; thence
> 3. North 26 28' 58" East, 329.25 feet to a point;
> 4. North 22 20' 53" West, 393.98 feet to a point in a stone wall where the Gildersleeve land and the Braverman land meet land owned by Rudolphe Beliveau.
>
> The above described boundary line is shown on a plan of land entitled "PLAN OF LAND – OF – JEAN O. GILDERSLEEVE – WITH COMMON BOUNDARY LINE & RIGHT OF WAY LOCATED BY AGREEMENT OF – JEAN O. GILDERSLEEVE & KENNETH BRAVERMAN – DUNBARTON, N.H." ("Plan"), dated November 20, 1986, revised 10/29/87, by John T. Hills Eng., Inc., to be recorded in the Merrimack County Registry of Deeds.
>
> Now, therefore, it is further agreed, that the right-of-way shall be a fifty foot (50') wide right-of-way beginning on the boundary between the Gildersleeve land and the Braverman land, as shown on the above mentioned Plan.
>
> The right-of-way shall be for general purposes, including the ingress and egress to and from the Braverman land with the owner of the Braverman land having the right to improve the right-of-way as if it were a town road together with the right to lay or install utility lines or pipes in or over the right-of-way, all at the expense of the owner of the Braverman land. Any improvements to the right-of-way shall be maintained by the owner of the Braverman land.
>
> This Common Boundary Line and Right-of-Way Agreement shall be a covenant running with the land, and shall be binding on all future owners of the Gildersleeve land and the Braverman land.

(Id.) The Confirmatory Agreement was recorded in the Merrimack County Registry of Deeds at Book 2113, Page 1157. (Id.)

D. **Guiney Ownership/Testimony**

Mr. Guiney acquired Lot 5 by deed dated March 30, 1999, from Jean O. Gildersleeve, trustee of the Jean O. Gildersleeve Inter Vivos Trust. (Ex. 48-U.) The deed recites:

> That Jean O. Gildersleeve, Trustee of the Jean O. Gildersleeve Inter Vivos Trust, under Declaration of Trust dated May 2, 1974 . . . for consideration paid, grants to Michael J. Guiney. . . with warranty covenants a certain tract or parcel of land with the buildings thereon, situate in Dunbarton, County of Merrimack and State of New Hampshire, bounded and described as follows:
>
> Beginning at stake and stones on the east shore or Black Brook, so-called, at Goffstown line; thence
>
> 1. Easterly on said Goffstown line to land now or formerly owned by C.B. Littlefield to a stake and stones; thence
>
> 2. Northerly by said Littlefield land to the highway leading from East Dunbarton to Manchester; thence
>
> 3. Northerly by said highway to land now or formerly owned by Nathaniel J. Colby; thence
>
> 4. Westerly, southerly, and westerly on the line of the stone wall and the land of said Colby to land nor or formerly owned by Alfred Colby; thence
>
> 5. Southerly by said Alfred Colby land to the bound first mentioned.
>
> This above legal description purports to describe seventy-five (75) acres, more or less; however it is believed that the above description actually described forty-two (42) acres, more or less.
>
> Being a portion of the premises conveyed to me by deed of Abraham Braverman and Dianna Braverman recorded in the Merrimack County Registry of Deeds in Volume 1004, Page 201.
>
> Subject to the reservation of Abraham Braverman and Dianna Braverman, his heirs, successors and assigns the right to pass and repass over the old road leading from the present highway to the 20 acre tract described as Tract #2 in deed of Adam J. Bernatas, Guardian of Helen Bernatas to Abraham Braverman and recorded in Volume 989, Page 282 of the Merrimack County Registry of Deeds.

Said property is also specifically defined according to the boundary line between the land of Jean O. Gildersleeve and the land of Braverman Realty Company as follows:

Beginning at a point on the boundary line of the Town of Dunbarton and the Town of Goffstown, which point is the intersection of the town line with the easterly bank of Black Brook; thence

1. North 40 54' 08" East, 447.31 feet to a point; thence

2. North 24 40' 49" East, 142.97 feet to a point; thence

3. North 26 28; 58" East, 329.25 feet to a point; thence

4. North 22 20' 53" West, 393.98 feet to a point in a stone wall where the Gildersleeve land and the Braverman land meet the land owned by Rudolphe Beliveau.

The above described boundary line is shown on a plan entitled "PLAN OF LAND – OF JEAN O. GILDERSLEEVE – WITH COMMON BOUNDARY LINE & RIGHT OF WAY LOCATED BY AGREEMENT OF – JEAN O. GILDERSLEEVE & KENNETH BRAVERMAN – DUNBARTON, N.H." ("Plan"), dated November 20, 1986, revised 10/29/87, by John T. Hills Eng., Inc., to be recorded in the Merrimack County Registry of Deeds.

A fifty foot (50') wide right-of-way beginning at the end of Kelsea Road and extending to the nearest point on the boundary between the Gildersleeve land and the Braverman land, as shown on the above mentioned plan.

The right-of-way shall be for general purposes, including of the Braverman land having the right to improve the right-of-way as if it were a town road together with the right to lay or install utility lines or pipes in or over the right-of-way, all at the expense of the owner of the Braverman land. Any improvements to the right-of-way shall be maintained by the owner of the Braverman land.

(Ex. 48-U.)

Mr. Guiney testified he received a copy of the BLA Agreement and Plan #10558 prior to purchasing Lot 5. He did not question the BLA or the plan at that time, but was instead pleased that a survey had been done of his property. Neither did Mr. Guiney meet or speak with Ms. Gildersleeve when he bought the property. As quoted above,

the deed described the property and provided that the property was "also specifically defined according to the boundary line between the land of Jean O. Gildersleeve and the land of Braverman Realty Company." (Ex. 48-U.)

Mr. Guiney moved into the house almost immediately after purchasing Lot 5. When he first moved in, he observed very little traffic near his house. In the winters of 1999 and 2000, Mr. Guiney observed Town plows passing his house, in the area of the Disputed Portion in front of his barn and plowing out that area. The Town plow drivers used this area in the Disputed Portion to turn around and plow back out and go back up Kelsea Road. Mr. Guiney voiced no objections to the Town's plowing because he assumed that the area was Kelsea Road, based on the BLA survey. From 1999 to 2008, Mr. Guiney observed Town vehicles coming down Kelsea Road about twice a year to grade the road. The Town never graded the disputed area. The Town would turn around in front of his barn when grading.

David Nault purchased Lot 7 in 1998. In the spring of 2006, Mr. Nault asked Mr. Guiney for permission to use the road behind the west side of Mr. Guiney's barn so he could access the horse pasture and upper field (Lots 8 and 9, also owned by Mr. Nault). Mr. Guiney proposed that Mr. Nault give up his rights to the existing 50' right-of-way to Kelsea Road in exchange for a right-of-way to access the horse pasture. When Mr. Nault expressed that he wanted to retain the right-of-way to Kelsea Road, Mr. Guiney proposed that Mr. Nault pay him for the second right-of-way. That deal never materialized.

Mr. Guiney testified that Kelsea Road was in poor shape when he purchased Lot 5. He described it as a single lane road about 12'–14' wide. The specific condition of

the road depended on the time of year. The gravel was of poor quality and would wash out down the hill towards the Guiney property. The Town graded the road twice a year, but at first, the Town did not grade the Disputed Portion of Kelsea Road. In 2011, Mr. Guiney put up a single post blocking the Town's access to the turnaround area in front of his barn. When the Town asked for his reasoning behind the post, Mr. Guiney explained that he had noticed the Town slowly widening the Disputed Portion of Kelsea Road, and he wanted to protect his property from encroachment. The Town promised to work to reach an agreement between the Town, Mr. Guiney, and Mr. Nault, and asked Mr. Guiney to remove the post as a gesture of good faith, which Mr. Guiney did. According to Mr. Guiney, the Town never followed up on that offer and continued to widen the road. Mr. Guiney asked the Town to stop using his property, and the selectmen informed him that they had performed numerous investigations into the land that showed the Town to have rights to that area. In 2016, Mr. Guiney put new posts in the ground blocking the turnaround area.

E. Nault Ownership/Testimony[10]

David Nault acquired Lot 7 by way of fiduciary deed dated August 12, 1998. (Ex. 49-N.) His grandfather owned 101 acres at the southeast corner of Dunbarton near the properties currently at issue, as well as the horse pasture, since 1946. Mr. Nault spent time with his grandfather on the land – they would access the horse pasture by driving down Kelsea Road, using the cart road that went "to the westerly side, around the back side of the barn, the same cart road that the first court case [the 2006 litigation] told us we couldn't use to access [Lot 7]." When Mr. Nault purchased Lot 7, he "understood

[10] As previously noted, the Naults own Lots 7, 8, and 9. For purposes of this section, the only relevant property/transfers relate to Lot 7. The conveyances of Lot 8 and 9 have been omitted.

that the right-of-way gave a 50' access to the end of Kelsea Road, and [he] also understood by reading through [the deed and BLA] that it was binding on all future landowners." Mr. Nault's deed to Lot 7 incorporates the 50' right-of-way, and Mr. Nault specifically relied on that and on the BLA in determining his property rights. Without the right-of-way, if Kelsea Road were to end before the Disputed Area (as asserted by Mr. Guiney), Mr. Nault would be unable to access Lot 7. Prior to purchasing Lot 7, Mr. Nault spoke with both Ms. Gildersleeve and her tenant about the boundary between Lot 7 and Lot 5. Ms. Gildersleeve never took a position that she owned any land west of the boundary shown in the BLA.

F. 2006 Litigation

In 2006, Mr. Guiney filed a petition against David Nault, Joshua Nault, Leigh Nault, and Sugar River Savings Bank, to quiet title to a "driveway" constructed by David Nault over Mr. Guiney's property to access Lots 8 and 9. See Guiney v. Nault, Merrimack Cnty. Superior Ct., 217-2006-EQ-445 (hereinafter "Guiney"). The driveway was constructed beyond the Guiney barn near the western boundary of Lot 5 and continued in a northerly direction until reaching the southern border of Lot 8. (See Ex. 55 (showing location of driveway).)

The Guiney court explained that the driveway at issue was different from the right-of-way running east-west over Lot 5 to Lot 7, which is referred to in the order as the "cart path." (See Ex. 36 (Apr. 23, 2008) (Order, Morrill, J.) (hereinafter "2008 Order") at 2 n.1&2.) After a two-day bench trial, the Guiney court concluded the Naults did not have an easement by implication, necessity, or prescription to cross the driveway on Mr. Guiney's property to access Lots 8 and 9. See 2008 Order at 2–5.

In the Court's previous summary judgment order in the instant case, the Court held Mr. Guiney was judicially estopped from arguing there was no right-of-way across Lot 5 that permits travel to and from Lot 7 and Kelsea Road, because Mr. Guiney previously asserted, in Guiney, that such a right-of-way did exist.

G. History and Maintenance of Kelsea Road

On May 29, 1821, the Town recorded the creation of a "highway" off of the "County road" (now known as Montelona Road). This "highway" is now known as Kelsea Road. The document creating the road reads as follows:

> We the subscribers Selectmen for the Town of Dunbarton have this day laid out a highway three rods wide from Goffstown line nearly north to Timothy Johnson's house & from thence nearly north east nearly on a Straight line to the County road, said road is to be a bridle road from said County Road to Mr. Johnson's house for three years and from Mr. Johnson's house to Goffstown line said road is to be a bridle road for the term of six years. Timothy Johnson is to have the rangeway on the west end of his lot in compensation for said road–

(Ex. 34.) On March 18, 2016, a warrant article was introduced proposing the discontinuance of Kelsea Road, but the article was defeated by a vote. (Ex. 33.)

At trial, the Naults called various witnesses familiar with Kelsea Road, including the Disputed Portion, and the road maintenance performed by the Town in that area. Peter Gamache lives in Weare, New Hampshire, but has worked for the Town for the last five and a half years. As part of his job, Mr. Gamache plows Kelsea Road. For the first three years of working for the Town, Mr. Gamache plowed up Kelsea Road to the barn on Lot 5, until the new turnaround was provisionally agreed to and constructed off of the Class VI portion of Kelsea Road.

William Nichols has lived in Dunbarton since 1947, and has worked for the Town since adolescence, beginning in the 1950s/1960s. He worked for several different Road

Agents throughout that time. Beginning in 1970, Mr. Nichols plowed Kelsea Road himself, after accompanying Road Agents on that route in years prior. When plowing Kelsea Road, Mr. Nichols would plow down to the barn, and turn around immediately at or before the barn. Mr. Nichols testified he believed Kelsea Road ended "down by the barn," although he was not sure of the exact end.

Simon Audette lived in Dunbarton on Kimball Pond Road for almost 80 years. During that time, he worked for the Town for over 50 years. He was born in 1938 and started working for the Town around age 20. He worked for the Town for 17 years before he became Road Agent, a position he held for approximately 25 years. After he left his position as Road Agent, he assisted the Town as a subcontractor for about 14 more years, from 1963 to 1977. Mr. Audette's father was also a Road Agent for the Town, both before Mr. Audette became a Town employee, and at the beginning of Mr. Audette's employment. Mr. Audette maintained Kelsea Road, which included grading, cutting and removing brush from the roadside, plowing and sanding. He explained that this maintenance was necessary so that the people at the bottom of the hill, meaning the residents of the property now owned by Guiney, could drive out.

During Mr. Audette's father's tenure as Road Agent, the Town did not have a plow truck. They used his father's truck, which had a snow plow. They would plow down Kelsea Road until the barn on Mr. Guiney's property, and turn around next to the barn. He testified they never asked for permission to do this. Mr. Audette took over plowing Kelsea Road when he became a Town employee, when his father was still Road Agent. From the time he started working for the Town, and throughout his time as Road Agent, there were no changes made to the way that Kelsea Road was plowed.

Mr. Audette's understanding is that Kelsea Road runs from Montelona Road and continues to where the house and barn are located on the Guiney property. During the time he has been familiar with Kelsea Road, the Town has never used the area where the new turnaround is located.

Adrian Trudeau has lived in Dunbarton on Montelona Road for almost 60 years, beginning in 1958 or 1959. He started working for the Town in 1970s. At that time, Simon Audette was his boss. Mr. Trudeau plowed for the Town, including Kelsea Road. He plowed Kelsea Road for about 10 years, and stopped plowing Kelsea Road in the late 1970s. He used a four-wheel drive truck with a front plow and a "wing," which is a plow that drops to the side of the truck. With the wing down, the plow is 12'–14' wide. He testified that Kelsea Road is, for the most part, the same now as it was when he plowed it. He was instructed to plow "all" of Kelsea Road, which he understood to be from Montelona Road all the way down to the Disputed Portion to the barn on the Guiney property. He turned around right in front of the barn by the east side, the side facing Kelsea Road. He testified that the owners of Lot 5 gave the Town permission to turn around on the property. No one ever told him he could not bring a plow truck down in front of the barn. He did not perform any other maintenance on Kelsea Road, but other people he worked with graded the road. He believed those individuals graded all the way down to the barn and turned around in front of the barn.

Jeff Crosby has lived in Dunbarton for approximately 56 years. He started performing subcontractor work – including excavation, hauling gravel, and snow plowing – for the Town in the mid–1990s. He never performed the work on Kelsea Road, however. In 2005, he was elected Road Agent for the Town. As Road Agent, he

regularly attends Selectmen meetings, and has become familiar with the dispute between Mr. Guiney and the Naults. After becoming Road Agent, he visited Kelsea Road to check the condition of the road and see what maintenance was needed. He characterized Kelsea Road as a "glorified driveway." He testified the road is generally about 12–15 feet wide, the widest point being 18' wide. Before the instant issues arose, the Town performed routine maintenance on the road, including grading down Kelsea Road and just in front of the barn. When performing this maintenance, Town employees turned around in the property on the east side of barn.

After Mr. Guiney and the Town agreed to the new, temporary turnaround, Mr. Crosby helped in its construction. Based on a conversation with Mr. Guiney, Mr. Crosby's understanding of why Mr. Guiney erected posts on the Disputed Portion was to narrow the road so that the Naults could not construct a new house on Lot 8, because the Town requires that roads be 18' wide. Mr. Crosby was at the meeting for the warrant article in 2016, proposing the discontinuance of Kelsea Road as a public highway. After that vote (defeating the article), the Town continued to grade the road and plow snow, but they use the new, deeded turnaround, rather than the traditional turnaround in front of Mr. Guiney's barn.

As previously referenced, in 2015, the Town and Mr. Guiney reached an agreement to move the turnaround, at least for the time being, to the area immediately off of the Class VI portion of Kelsea Road, well before Mr. Guiney's barn. The agreement was finalized in the "Turnaround Easement Plat" prepared on November 4, 2015. (Ex. 53.) After this agreement, instead of traveling down Kelsea Road onto the Disputed Portion and turning around in the area immediately adjacent to the east side of

Mr. Guiney's barn, the Town will continue a short distance in a south westerly direction and use the new turnaround constructed to the east of Mr. Guiney's house. (Id.)

H. 2015 Survey & Surveyor Testimony

In 2015, Mr. Guiney retained surveyor Edward Rogers to survey his property for the purpose of subdividing Lot 5. Mr. Rogers' survey, the "2015 survey," shows Kelsea Road continuing in a southwesterly direction until it reaches the Dunbarton/Goffstown town line. (Ex. 55.) Mr. Rogers marked the boundary line between Lots 5 and 7 as agreed upon in the 1988 BLA and Plan #10558, but also showed what he believed to be the original boundary between the lots based on the language of the deed conveying out Lot 7 of Lot 5 in 1873. (Ex. 55, Ex. 48-C.)

Mr. Rogers testified that his main concern, after researching the properties and chains of title and reading the BLA, was that to him, the boundary between Lots 5 and 7 is "clear as day," and he is therefore confused as to why the parties to the BLA would not have been able to ascertain a decisive boundary. Mr. Rogers believed that the fifth paragraph of the BLA[11], which indicates that the parties intend to "establish a new common boundary" between the two lots, shows they were knowingly and intentionally changing the boundary, rather than clarifying a confusion.

The Naults retained the services of surveyor Michael Dahlberg, who prepared his own report on the boundary between the two properties. (Ex. 26.) Mr. Dahlberg examined the properties' original deeds from 1873, attempting to glean the intent of the original conveyer, Henry Johnson. Mr. Dahlberg's report concludes:

[11] "Whereas, the parties have agreed to hire a surveyor to establish a new common boundary of the land owned by Jean O. Gidlersleeve and the land owned by Braverman Realty, and to more precisely identify the location of the right-of-way on the Gildersleeve land." (Ex. 52.)

> After my careful examination of bk. 213 pg. 503, the surrounding circumstances at the time of conveyance and the careful examination of the field evidence, I was able to reconcile the deed calls contained in bk. 213 pg. 503 and conclude that the property lines that are shown on the 1988 John T. Hills plan [reflected in the BLA] for Gildersleeve & Braverman accurately show the common boundary line between Nault & Guiney.

(Id. at 5.)

II. ANALYSIS

A. Location of Kelsea Road

Pursuant to RSA 229:1, there are four ways to create a public highway: (1) through the laying out of a highway by some governmental authority; (2) the construction of a road on public land; (3) by prescription if the road had been used for public travel for 20 years prior to January 1, 1968; or (4) dedication and acceptance. See Hersh v. Plonski, 156 N.H. 511, 514–15 (2007). Here, the Town is seeking a declaratory judgment regarding whether the Disputed Portion of Kelsea Road is public by prescription.[12] To establish a highway by prescription, the party claiming the easement must prove, by a balance of the probabilities, that the public continuously and adversely used the road for the requisite period without interruption and "under a claim of right without the owner's permission." Mahoney v. Town of Canterbury, 150 N.H. 148, 150–51 (2003). "Whether a highway is created by prescription is a finding of fact." Mahoney v. Town of Canterbury, 150 N.H. 148, 150 (2003).

Mr. Audette testified that he began working for the Town when he was approximately twenty years old, which would be in 1958. Mr. Audette clearly testified that, between 1958 and 1968, the plowing and other maintenance of Kelsea Road included the Disputed Portion. Mr. Audette's father was elected Road Agent prior to the

[12] As noted above, the Town does not take a position nor has it presented evidence on the issue.

time Mr. Audette became an employee. He testified that prior to starting employment with the Town, he would ride along with his father to plow Kelsea Road. He testified that his father plowed Kelsea Road, including the Disputed Portion, in the same manner he did when he took over plowing that area. While there was testimony that residents of Lot 5 gave the Town permission to turnaround in the area immediately adjacent to the east side of the barn, there was no evidence that the Town ever asked for or was granted permission to plow or otherwise maintain the Disputed Portion.

The testimony of prior town employees is not the sole evidence supporting a finding that the Disputed Portion was used as a public road for the 20 year period prior to 1968. "[T]he inclusion of a road on a map is competent evidence to support the inference of use of the road . . . ." Blagbrough Family Realty Trust v. A & T Forest Prods., 155 N.H. 29, 36 (2007) (quoting Williams v. Babcock, 116 N.H. 819, 822 (1976). Here, various maps show evidence of a roadway going beyond the house on Lot 5 towards Lot 7. (Ex. 3 (1925 State of New Hampshire Highway Department Geological Survey); Ex. 4 (1925 USGS Map Revised in 1949); Ex. 6 (Atlas Map); Ex. 7 (1941 Property Ownership of the Town of Dunbarton); Ex. 11 (the 1949 revision of the 1925 USGS Map; Ex. 12 (the 1969 USUS Map and 1985 revision thereof); and Ex. 14 (the 1969 N.H. Department of Resources and Economic Development Map of Dunbarton Early Landmarks and Highways). These maps document the location and use of the Disputed Portion as a public road decades prior to 1968. This evidence, along with the testimony at trial, establishes its use as a public road for the 20 year period before 1968.

Mr. Guiney argues that "[n]one of these maps address the legal status of Kelsea Road as a public highway as that was not their purpose." (Memo. at 15.) While Mr. Guiney may be correct that these maps were not created with an eye to proving the legal status of the Disputed Portion of Kelsea Road, the Court finds that this does not diminish the maps' importance to this determination. The New Hampshire Supreme Court has held, "the inclusion of a road on a map is competent evidence to support the inference of use of the road." Blagbrough Family Realty Trust v. A&T Forest, Products, Inc., 155 N.H. 29, 36 (2007) (quotation omitted) (upholding the trial court's determination of a public highway created by prescription based upon references to the road in old maps). The maps cited above and introduced into evidence at trial clearly depict Kelsea Road traveling in a westerly direction, as asserted by the Naults, rather than in a southerly direction towards the Goffstown border, as asserted by Mr. Guiney.

Based on the testimony and evidence presented at the trial and referenced above, the Court thus finds that the elements of public highway by prescription have been met. Kelsea Road travels in a westerly direction, reaching the house and barn on Mr. Guiney's property, rather than traveling in a southerly direction towards the Goffstown border.

B. Boundary Line Agreement

The validity of a BLA is conditioned upon satisfying all of the statutory formalities, and that "[t]o otherwise uphold a BLA as valid would eviscerate that statute, rendering its mandatory language meaningless." N.H. Dep't of Res. & Econ. Dev. v. Dow, 148 N.H. 60, 64 (2002); see RSA 472:1 ("[T]he parties may establish said line by agreement

in the following manner, and not otherwise." (emphasis added)). The statute further provides that the agreement shall be in writing,

> reciting that the parties signing the same are adjoining owners, that the division line between their lands is in dispute, that the line described in their respective deeds or in the deeds of any of their predecessors in title cannot be located on the ground by reason of the loss or obliteration of the monuments and boundaries therein named and described, and containing a full and complete description of the line thus agreed upon and established . . . .

RSA 472:4. "The line agreed upon shall be surveyed and established by courses and distances, and suitable and permanent monuments shall be placed at each end and at each angle of the boundary so agreed upon." RSA 472:3.

Mr. Guiney asserts the BLA is invalid due to a number of failures to comply with the required statutory formalities. These claimed "errors" and "misrepresentations" include:

> a. It lists Jean "O." Gildersleeve as the owner of Lot 5 when the BLA Plan and the conveyance to her was to Jean "S." Gildersleeve.
>
> b. The facts within the third recital are false. Evidence in the trial record from Surveyor John Hill's file confirms he did not complete all the necessary deed research, found the title confusing and did not research back to the parent tract [ ] owned by Timothy Johnson. Hill appears to have ignored 1981 Gildersleeve Property Compass & Tape Worksheet which he listed as Reference Plan #2 on the BLA Plan which clearly shows the stonewall monuments described in the deed to Alfred Colby by Black Brook, the fields, the barways and the town line by which the location of the common boundary could easily have been located.
>
> c. The third recital is also false because Reference Plan #1 listed on the BLA Plan shows Surveyor Hills simply trying to find the "20 acres" stated in the Lot 7 deed. Had he reviewed the chain of title for Lot 7 carefully, he would have found the "20 acres" first appeared out of nowhere in the deed from Ruth Heath Keaney when she conveyed Lot 7 on October 2, 1924 to Joseph Bernatas but that the deed which conveyed the property to her included no such statement, and, in fact, included a clear legal description of the easterly boundary recited in the Alfred Colby Deed. Ex. 49(F).s

d. The fourth recital was also false because the 'cart path' is visible on the ground. Although much of it was formerly grass and shown on a number of maps predating 1987, the purpose of which was to show physical features of the land;

e. The fifth recital is true but neither the Statute of Frauds nor RSA Chapter 472 allow landowners [the] establishment of a 'new common boundary' without a local planning board approval.

(Guiney Trial Memo. at 11–12.) Additionally, Guiney asserts the BLA Plan recorded as Plan #10558 in the Merrimack County Registry of Deeds suffers from the following errors:

a. The Plan is titled as prepared for Kenneth Braverman and lists "Ken Braverman Braverman Realty Co." as the owner of Lot 7, but [n]ever owned Lot 7 (Ex. 49);

b. The name "Abraham Braverman" appears nowhere on the BLA Plan;

c. The BLA Plan did not specifically locate the 'cart road' or Kelsea Road but certifies the ways shown are existing public or private streets;

d. Mr. Hills also certified the BLA Plan does not show 'new lines for division' which it in fact does, as expressly stated in the fifth recital of the BLA Agreement;

e. Rogers testified he found no set monuments at the ends or angles of the 'new line.' The BLA Plan shows when he completed his field work for the 2015 BLA Boundary Plan (Ex. 55) and Michael Dahlberg provided no testimony to the contrary; and

f. Both Rogers and Dahlberg testified they disagree with the location of the purpose original line shown on the BLA Plan which was established by the Alfred Colby Deed. (Ex. 49(A).)

(Id. at 12–13.) For the reasons explained below, the Court finds that even assuming, without deciding, that the BLA is invalid, the boundary and right-of-way reflected in the BLA are nonetheless valid, as having been established through other means.

i. Boundary by Acquiescence

The doctrine of "boundary by acquiescence is grounded upon principles of public policy, [that preclude a party] from setting up or insisting upon a boundary line in opposition to one which has been steadily adhered to, upon both sides, for more than twenty years." O'Hearne v. McClammer, 163 N.H. 430, 436 (2012).

> To establish a boundary by acquiescence, a party generally must prove that: (1) the parties are adjoining landowners; (2) who have occupied their respective lots up to a certain boundary; (3) which they have recognized as the true boundary separating the lots; and (4) have done so for at least twenty years.

Id. at 435. "The bound thus acquiesced in will prevail even over the description in the deeds." Id. (quotation omitted). "A boundary established by acquiescence is conclusive upon successors in title." Id.

Between the execution of the BLA in 1988 and Mr. Guiney's filing of his crossclaim in September 2017, a period of almost 30 years, the parties and their predecessors in title have treated the line described in the BLA and shown on the Plan #10558 as the true boundary separating Lots 5 and 7. The execution of the BLA is evidence that the Bravermans and the Gildersleeves understood this to be the common boundary between their properties.[13] Additionally, it is conceivable the Bravermans and the Gildersleeves treated this as the boundary even prior to 1988, given that they owned their properties at the same time since 1967. Based on this evidence, the Court finds, even if the BLA is

[13] The Court notes that the Bravermans and the Gildersleeves became adjoining landowners in 1967 when Abraham Braverman deeded Lot 5 to Jean Gildersleeve, formerly Wheeler, and her then-husband, (see Ex. 48-R), and continued to own adjoining land until 1998, when Lot 7 was transferred to David Nault. (Ex. 49-N). In light of this fact, it is conceivable that the Defendants' successors in interest treated the line described in the BLA as the true boundary separating Lot 5 and Lot 7 sometime prior to 1988, which is the year the BLA was executed. (See Ex. 48-R.)

invalid[14], the boundary laid out in the BLA is nonetheless the legally established and enforceable boundary between Lots 5 and 7.

ii. 50' Right of Way

"The doctrine of estoppel by recitals in instruments provides that a grantee is estopped to deny the validity of any outstanding interest to which his deed recites that the conveyance is subject." Kellison v. McIsaac, 131 N.H. 675, 682 (1989) (quotation & citation omitted). "This rule applies to recitals concerning easements." Id. Even in the context of estoppel by recitals in instruments, "[e]stoppel requires words or conduct which induce another to act in reliance and to change position." Trachy v. Laframboise, 146 N.H. 178, 182 (2001).

Mr. Guiney argues the BLA is invalid, and therefore the 50' right-of-way described therein does not legally exist. However, even assuming, without deciding, that the BLA is indeed invalid, the Court finds Mr. Guiney cannot now assert that the 50' right-of-way is similarly invalid, because it was explicitly included in the deed by which Mr. Guiney obtained title to Lot 5:

> A fifty foot (50') wide right-of-way beginning at the end of Kelsea Road and extending to the nearest point on the boundary between the Gildersleeve land and the Braverman land, as shown on the above mentioned plan.
>
> The right-of-way shall be for general purposes, including of the Braverman land having the right to improve the right-of-way as if it were a town road together with the right to lay or install utility lines or pipes in or over the right-of-way, all at the expense of the owner of the Braverman land. Any improvements to the right-of-way shall be maintained by the owner of the Braverman land.

(Ex. 48-U.) Under the doctrine of estoppel by recitals, Mr. Guiney cannot now assert that the right-of-way is invalid, when years ago he signed a deed specifically alerting

[14] The Court emphasizes that it has not found the BLA to be invalid, but is merely assuming so for the purposes of this order.

him to the right-of-way's existence. See Kellison, 131 N.H. at 682. Furthermore, the testimony at trial, as well as Mr. Guiney's position in the 2006 litigation, establishes that both Mr. Guiney and Mr. Nault relied upon the belief that the 50' easement existed, and acted in accordance. See Trachy, 146 N.H. at 182. Mr. Guiney has thus fulfilled the requirements of the doctrine of estoppel by recitals. Based on this evidence, the Court finds, even if the BLA is invalid[15], the 50' right-of-way laid out in the BLA is nonetheless legally established and enforceable.

Conclusion

For the foregoing reasons, all submitted findings of fact and/or rulings of law consistent with this order are GRANTED and all inconsistent are DENIED.

SO ORDERED.

8/16/18
Date

John C. Kissinger, Jr.
Presiding Justice

[15] The Court emphasizes, again, that it has not found the BLA to be invalid, but is merely assuming so for purposes this order.

RELEVANT STATUTES

229:1 Highways Defined. – Highways are only such as are laid out in the mode prescribed therefor by statute, or roads which have been constructed for or are currently used for motor vehicle, bicycle, or pedestrian public travel over land which has been conveyed to a city or town or to the state by deed of a fee or easement interest, or roads which have been dedicated to the public use and accepted by the city or town in which such roads are located, or roads which have been used as such for public travel, other than travel to and from a toll bridge or ferry, for 20 years prior to January 1, 1968, and shall include the bridges thereon. Highway does not include any bridge, trail, or path intended for use by off highway recreational vehicles, as defined in RSA 215-A:1, or snowmobiles, as defined in RSA 215-C:1.

229:5 Classification. – Highways of the state shall be divided into 7 classes as follows:

VII. Class VI highways shall consist of all other existing public ways, and shall include all highways discontinued as open highways and made subject to gates and bars, except as provided in paragraph III-a, and all highways which have not been maintained and repaired by the town in suitable condition for travel thereon for 5 successive years or more except as restricted by RSA 231:3, II.

231:17 Payment or Tender of Damages. – No land or other property taken for a highway or alteration shall be appropriated or used for making the same until the damages assessed therefor are paid or tendered to the owner or his guardian or conservator.

231:43 Power to Discontinue. –
I. Any class IV, V or VI highway, or any portion thereof, in a town may be discontinued by vote of a town; provided, however, that:
(a) Any highway to public waters, or portion of such highway, laid out by a commission appointed by the governor and council, shall not be discontinued except with the consent of the governor and council.
(b) Any class V highway established to provide a property owner or property owners with highway access to their property because of a taking under RSA 230:14 shall not be discontinued except by written consent by such property owner or property owners.
II. The selectmen shall give written notice by verified mail, as defined in RSA 451-C:1, VII, to all owners of property abutting such highway, at least 14 days prior to the vote of the town. In the case of a petitioned warrant article calling for discontinuance of a class VI highway, the petitioners shall bear the cost of notice.

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

231:51 Dedicated Ways. – Any street, lane or alley within this state which has been dedicated to public use by being drawn or shown upon a plan of lands platted by the owner, and the sale of lots in accordance with such plan, may be released and discharged from all public servitude by vote of the governing body of a city or town if such street, lane, or alley has not been opened, built, or used for public travel within 20 years from such dedication.

231:90 Duty of Town After Notice of Insufficiency. –
I. Whenever any class IV or class V highway or bridge or sidewalk thereon in any municipality shall be insufficient, any person may give written notice of such insufficiency to one of the selectmen or highway agents of the town, or the mayor or street commissioners of the city, and a copy of said notice to the town or city clerk. The notice shall be signed and shall set forth in general terms of the location of such highway, bridge, or sidewalk and the nature of such insufficiency.
II. For purposes of this subdivision, a highway or sidewalk shall be considered "insufficient" only if:
(a) It is not passable in any safe manner by those persons or vehicles permitted on such sidewalk or highway by state law or by any more stringent local ordinance or regulation; or
(b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway at posted speeds or upon such sidewalk, in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state or repair of the highway or sidewalk, including any warning signs, and prevailing visibility and weather conditions.
III. A highway or sidewalk shall not, in the absence of impassability or hidden hazard as set forth in paragraph II, be considered "insufficient" merely by reason of the municipality's failure to construct, maintain or repair it to the same standard as some other highway or sidewalk, or to a level of service commensurate with its current level of public use.

236:30 No Adverse Right. – No person shall acquire, as against the public, any right to any part of a highway by enclosing or occupying it adversely for any length of time.

472:1 Disputed Boundary. – Whenever the boundary line between the land or estates of adjoining owners is in dispute, and the location of the same as described in the deeds of said owners or of their predecessors in title cannot be determined by the monuments and boundaries named in any of said deeds, the parties may establish said line by agreement in the following manner, and not otherwise.

472:3 Survey; Monuments. – The line agreed upon shall be surveyed and established by courses and distances, and suitable and permanent monuments shall be placed at each end and at each angle of the boundary so agreed upon.

472:4 Agreement in Writing. – A writing, reciting that the parties signing the same are adjoining owners, that the division line between their lands is in dispute, that the line described in their respective deeds or in the deeds of any of their predecessors in title cannot be located on the ground by reason of the loss or obliteration of the monuments and boundaries therein named and described, and containing a full and complete description of the line thus agreed upon and established, and the volume and page where their said respective deeds are recorded, or if title was not acquired by deed, a statement identifying each owner's other source of title, shall be signed and acknowledged by the parties to the agreement before any officer having authority to take the acknowledgment of deeds, and recorded with the registry of deeds for the county where the lands are located, and, when the volume and page of an owner's deed is set forth in said agreement, the register of deeds shall note the recording of said agreement on the margin where the said respective deeds of the parties to said agreement are recorded. In those registries recording on microfilm, in lieu of noting the recording of said agreement on the margin where the respective deeds of the parties to said agreement are recorded, the register of deeds shall list all parties to the agreement in both the grantor and grantee indices.

477:27 Statutory Form of Warranty Deed. – A deed in substance following the form appended to this section shall, when duly executed and delivered, have the force and effect of a deed in fee simple to the grantee, heirs, successors and assigns, to their own use, with covenant on the part of the grantor, for himself or herself, heirs, executors and administrators, that, at the time of the delivery of such deed, the grantor was lawfully seized in fee simple of the granted premises, that the said premises were free from all incumbrances, except as stated, that the grantor had good right to sell and convey the same to the grantee, heirs, successors and assigns, and that the grantor will, and the heirs, executors, and administrators shall, warrant and defend the same to the grantee and heirs, successors and assigns, against the lawful claims and demands of all persons.

(Form for warranty deed)

_____, of _____ County, State of _____, for consideration paid, grant to _____, (complete mailing address) _____, of _____ Street, Town (City) of _____, _____ County, State of

_____, with warranty covenants, the _____ (Description of land or interest being conveyed: incumbrances, exceptions, reservations, if any) _____, (wife) (husband) of said grantor, release to said grantee all rights of homestead and other interests therein.

(Here add acknowledgment)

477:28 Statutory Form of Quitclaim Deed. – A deed in substance following the form appended to this section shall, when duly executed and delivered, have the force and effect of a deed in fee simple to the grantee, heirs, successors and assigns, to their own use, with covenants on the part of the grantor, for himself, or herself, heirs, executors and administrators with the grantee, heirs, successors and assigns, that at the time of the delivery of such deed the premises were free from all incumbrances made by the grantor, except as stated, and that the grantor will, and the heirs, executors and administrators shall, warrant and defend the same to the grantee and heirs, successors and assigns forever against the lawful claims and demands of all persons claiming, by, through or under the grantor, but against none other.

(Form for quitclaim deed)

_____, of _____ County, State of _____, for consideration paid, grant to _____, (complete mailing address) _____, of _____ Street, Town (City) of _____ County, State of _____, with quitclaim covenants, the _____ (Description of land or interest therein being conveyed: incumbrances, exceptions, reservations, if any) _____, (wife) (husband) of said grantor, release to said grantee all rights of homestead and other interests therein.

(Here add acknowledgment)

477:34 Property. – No person shall acquire by prescription a right to any part of a town house, schoolhouse or church lot, or of any public ground by fencing or otherwise inclosing the same or in any way occupying it adversely for any length of time.

506:1 Sale of Land. – No action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person authorized by him in writing.

674:37-a Effect of Subdivision on Tax Assessment and Collection. –
The collection of taxes with respect to land being subdivided shall be governed by the following provisions:
I. If approval of a subdivision plat has been granted on or before April 1 of a particular tax year, giving the owner a legal right to sell or transfer the lots, parcels or other divisions of land depicted on the plat without further approval or action by the municipality, then such lots or parcels shall for that tax year be assessed and appraised as separate estates pursuant to RSA 75:9, whether or not any such sale or transfer has actually occurred, and shall continue to be so assessed unless and until subdivision approval is revoked under RSA 676:4-a, or the parcels are merged pursuant to RSA 674:39-a.
II. If subdivision approval does not become final until after April 1, then all assessments, appraisals, and tax warrants for that property during that tax year shall pertain to the entire non-subdivided property as it was configured on April 1, notwithstanding any later sale or transfer of subdivided lots or parcels which may occur during that year.
III. When property has been assessed as a single parcel or estate in accordance with paragraph II, and some subdivided portion of that property is later sold or transferred prior to the payment of all taxes, interest, and costs due for that tax year, the municipality's tax lien shall remain in effect with respect to the entire property, and each lot or parcel transferred or retained shall remain obligated for the entire amount, and shall be subject to all procedures of RSA 80 until that amount is collected.
IV. In order to avoid the liability of subdivided lots or parcels for taxes due on the entire property as set forth in paragraph III, any person with a legal interest may, at the time of subdivision approval or any time thereafter, prepay all taxes to be assessed on the entire property for that tax year. If such prepayment is offered prior to the determination of the property's full tax obligation for that year, the collector shall notify the assessing officials, who shall make a reasonable jeopardy assessment in accordance with the provisions of RSA 76:10-a, and commit it to the collector. After full prepayment the tax collector shall upon request execute a statement identifying the subdivision plat, and stating that all real estate tax obligations for the tax year have been fulfilled with respect to the property shown on the plat. Such a statement may be recorded in the registry of deeds at the expense of the party requesting it.
V. Nothing in this section shall be construed to prevent the parties to a conveyance from making alternative provisions, through privately-held escrow or other means, for the allocation and satisfaction of tax obligations; provided, however, that the municipality shall not, with respect to property assessed as a single parcel or estate pursuant to paragraph II, be required to apportion taxes among subdivided lots, or to release any subdivided portion of such property from the municipality's tax lien unless and until the full tax obligation for the assessed property has been satisfied.

676:16 Penalties for Transferring Lots in Unapproved Subdivisions. – Any owner, or agent of the owner, of any land located within a subdivision in a municipality that has adopted subdivision regulations who transfers or sells any land before a plat of the subdivision has been approved by the planning board and filed with the appropriate recording official under RSA 674:35, II, shall forfeit and pay a civil penalty of $1,000 for each lot or parcel so transferred or sold; and the description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties. The municipality may enjoin a transfer or sale which violates the provisions of this section and may recover the penalty imposed by civil action. In any action to recover a penalty, the prevailing party may recover reasonable court costs and attorney's fees as may be ordered by the court.