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

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

Counsel for Michael Guiney

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

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SUMMARY OF ARGUMENT

Michael J. Guiney ("Guiney") respectfully requests this Court reverse the Trial Court Order as legally erroneous because there is no evidence in the record to support a finding that the Disputed Portion became a public highway by prescription; or that the Boundary Line and Right of Way Agreements and Plan ("BLA") were enforceable or redeemable by acquiescence or estoppel by recitals. Cook v. Sullivan, 149 N.H. 774, 780 (2003); O'Hearne v. McClammer, 163 N.H. 430, 435 (2012). The outcome in this case discourages resident goodwill toward municipalities and condones illegal behavior.

When conducting its review, our hope is the Court will not overlook the Town of Dunbarton's ("Town") Board of Selectmen denied the petition to layout the Disputed Portion as a public highway submitted by David Nault, Joshua N. Nault and Leigh D. Nault ("Nault") in 2015, finding no public benefit after its review of the same evidence presented to the Trial Court[1]. Apx. III(3-13). The Town's "Verified Amended Petition for Declaratory Judgement for Public Highway by Prescription" ("Petition") likewise stated it believed the evidence did not support the Disputed Portion was public by prescription. Apx.VI(3-13);Apx I(9).

The BLA did not strictly comply with RSA 472 and the creation of a "new" boundary was unauthorized and unnecessary. Therefore, sustaining the BLA by relying upon acquiescence, without further analysis, was legal error, approved an "end run" around New Hampshire law and must be reversed.

[1] There is also no evidence in the record the Town conducted investigations confirming its right to use the Disputed Portion as stated in the Order. Ord. 12.

I. THE DISPUTED PORTION IS NOT KELSEA ROAD NOT PART OF.

A. Kelsea Road is Shown on the 2015 Boundary Plan.

The best evidence of Kelsea Road's location is its official layout. Davenhall v. Cameron, 116 N.H. 695, 696-697 (1976). Edward L. Rogers ("Rogers"), Guiney's expert depicted Kelsea Road's on the 2015 Boundary Plan prepared for Lot 5 ("Guiney Property") after finding is physical evidence ("2015 Plan") Apx. II(20). No discontinuance or relocation has ever been found and contrary to Nault's claims, Kelsea Road does not include the Disputed Portion or extend to Lot 7. Def. Br. (15).

B. Kelsea Road Is **NOT** the "Cart Road" Access to Lot 7.

The Brief filed by Nault repeatedly states Kelsea Road is *"a public road that travels between Guiney's house and barn"* and claims Guiney was held judicially estopped from arguing otherwise. Def. Br. (6 &10). Neither Trial Court Order states Guiney was estopped from arguing Kelsea Road does not extend to Lot 7 and in fact, the February 15, 2018 Order denied Nault's request for summary judgment on that issue. Nault Appx. (23); Guiney Br. (40). The Orders in this case estopped Guiney from denying Nault's easement rights over the "cart road". Guiney has never done that as is confirmed by the Order in the 2006 Litigation ("2008 Order"). Apx. I(45-49). Although obviously never mentioned in Nault's Brief, the "cart road" predates 1873, is shown as 12.65 feet wide on the Exhibit A to Petition, extends to the west through the Disputed Portion and ends to the west of Black Brook. Apx. II(3). The "cart road" is **NOT** Kelsea Road. Apx. I(7-16).

C. The Language of 2 Deeds Controls This Case.

Henry and Charlotte Johnson ("Johnson") transferred various parcels from the Johnson Farm, 2 of which are at the root of this case. Mansur v. Muskopf, 159 N.H. 216, 221 (2009):

Date	Description
8/28/1873	Transferred westerly 40-acres +/- of Johnson Farm to Colby ("Colby"), of which is easterly portion of Lot 7. Apx. I(45).
4/11/1976	Transferring Lot 5[2] to Albert Jones and "*[R]eserving a common cart road at all times for the use of those owning land beyond these premises."* Apx. I(47).

The 1873 Johnson to Colby deed transferred approximately 40-acres of the Farm with an appurtenant easement in the "cart road" for access. Apx. I(45). The Johnson to Jones deed transferred Lot 5 but reserved the "cart road" previously granted to Colby. Id. When analyzing an easement such as the "cart road" not defining its limits or location, courts consider the circumstances at the time of the grant. Duxbury-Fox v. Shakhnovich, 159 N.H. 275, 281 (2009). Parties to a deed with missing terms may agree or the court will determine reasonable terms enabling both to enjoy the grant and assume neither original party would have agreed to being disadvantaged. Id. *(referring to White v. Eagle and Phenix Hotel Co., 68 N.H. 38, 43 (1894*). Johnson's use of the term "old" to describe the "cart road" in the 1873 deed confirms it existed, its limits and location were fixed and at no time described it as 50-feet wide as stated in Nault's Brief. Duxbury-Fox at 281.

[2] Lot 5 is now owned by Guiney.

II. THE DISPUTED PORTION IS NOT A PUBLIC HIGHWAY BY PRESCRIPTION.

Public highways are created by: (a) layout; (b) road construction on public land; (c) dedication and acceptance; and (d) 20 years continuous adverse public use prior to January 1, 1968. RSA 229:1; Mahoney v. Town of Canterbury, 150 N.H. 148, 150-151 (2003). When a prescription claim is made to private land through which an express easement like the "cart road" passes, the claimant must introduce evidence of adverse public use over 20 years proving each element by the balance of the probabilities but the existence of a private easement elevates the level of adversity which must be shown. Warren v. Shortt, 139 N.H. 240, 244 (1994); McManus v. Royal, Case No. 2017-731 (Oct. 2, 2018).

When the claimed area is part of a property taken by tax deed, any prescriptive claim which has not ripened is immediately extinguished. Marshall v. Burke, 162 N.H. 560, 564 (2011) (*referring to Burke v. Pierro, 159 N.H. 504 (2009*); Apx. VI(8); RSA 477:34. The Town took the Guiney Property by tax deed on September 29, 1939. ("Period 1")

A. A Road's Appearance on an Ancient Map is NOT Conclusive as to Public Use.

While an ancient map may show a road, corroborating evidence must be introduced to prove public use. Mahoney at 151; Blagbrough Family Realty Trust v. A & T Forest Products, Inc., et al, 155 N.H. 29, 36 (2007); Williams v. Babcock, 116 N.H. 819 (1976). The 2006 photo of the Disputed Portion does not suggest public use.

Record evidence applicable to Period 1 includes the Town's 1858 and 1892 Atlases, its 1941 Property Ownership Map and the 1925 USGS Maps. Apx. II(3-12). Lines extending to the west from Kelsea Road but those lines are inconsistent and the record includes no corroborating evidence confirming public use. Mahoney at 151; Blagbrough Family Realty Trust at 29; Williams at 822-824; White Mt. Freezer Co., Inc. v. Levesque, 99 N.H. 15, 17 (1954); Catalano v. Windham, 133 N.H. 504, 507 (1990); Elmer v. Rodgers, 106 N.H. 512, 514 (1965). Through testimony, Rogers explained that USGS maps only show the land's physical features at a very small scale and generally do not ownership or a road's legal status. Apx. II(6-11); Tr. 114-115. No further evidence of public use was admitted to support prescription during Period 1 causing it to fail.

B. Public Prescription Also Fails During Period 2.

When a tax deeded property is transferred to a new owner, a new prescriptive period may begin anew and as to Lot 5, that date would have been March 25, 1944 ("Period 2"). Apx. VI(9-10); Marshall at 564. Relevant to Period 2 are the 1946 White Pine Blister Rust Map ("1946

Map"), a hand drawn map showing the land's physical features, showing Kelsea Road as a double dashed line up to the Guiney driveway where the line continues to the west a single broken line demarking the "cart road" location. Apx. II(14). The 1941 photograph shows Kelsea Road as a thick white line extending to the Guiney driveway and the "cart road" running westerly as a light gray line. Apx. II(13). The 1941 tax cards also show Kelsea Road as a double solid line up to Guiney's driveway and the "cart road" extending to the west as a double dashed line. Apx. VII(15-16). These differing demarcations confirm Kelsea Road was different from the "cart road".

Courts have found deed references to a road or highway, resident testimony, cellar holes photos, roads accessing recreational sites and maps or diagrams showing a road is part of a larger network or connecting to another town further corroboration of public use by persons other than the residents living along the road and their guests. Williams at 822-824; Mahoney at 151; White Mt. Freezer Co., Inc. at 17; Catalano at 507; Elmer at 514. **NO** corroborating evidence of public use during Period 2 appears in the record.

Simon Audet who is 80 years old, testified as a former Town employee about the Town grading and plowing Kelsea Road during Period 2, but was not specific about the location of those efforts. Tr. 194-196. Mr. Audet also described how he reversed directions with his plow truck within the Guiney driveway but confirmed the Owner had granted permission. Id. Mr. Nichols testified he began plowing Kelsea Road for the Town during the 50's and 60's and confirmed the same practice to reverse directions but never heard any objections. Tr. 324-326. No member of the public or local resident testified about using the Disputed Portion. Neither witness provided dates and **NO** testimony from local residents of members of the public testified about traveling through the Disputed Portion.

Adverse use must put a landowner on notice that an adverse claim is being made to their property, regardless of their toleration or consent, and must be conclusively proven. Wason v. Nashua, 85 N.H. 192, 198-200 (1931). When the claimed area is also encumbered by a private easement, a heightened level of adversity must be demonstrated because landowners are not presumed to monitor who is using of the easement. Warren at 244. **NO** evidence confirming adverse use appears in the record, much less a heightened level of adversity, causing prescription during Period 2 to fail.

III. THE COLBY DEED DESCRIPTION IS CLEAR.

It is undisputed that Johnson to Colby deed described the common boundary between Lot 5 and Lot 7, the subject matter of the BLA, 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 ... ".*

Apx. V(6). Rogers testified this description was *"crystal clear"* even before completing the 2015 Plan. Tr. 89 & 146. His research began in 2006 with reviewing each chain of title for the Johnson lots. Apx. I(46-49); Apx. III(15-51). This description is most easily reviewed with the plan entitled *"John Myhaver Compass & Tape Worksheet GILDERSLEEVE, Dunbarton, NH"* dated June 23, 1981 ("Myhaver Plan"); or the 1946 Map, both having been hand drawn and showing the physical evidence referenced on the land. Apx. II(14 & 16).

Beginning at the "stake and stones" ("POB") which are not in dispute, the Myhaver Plan shows 2 stonewalls located to the east of Black Brook which running "northerly" and "easterly" but only the stonewall closer to Black Brook divides the "Overgrown Field" and the "Old Field"

and continues north, along the wall of the Horse Pasture before reaching the southeast corner of the "Upper Field". Apx. II(16); Tr. 84-89. The walls shown on the Myhaver Plan also appear on the 1946 Map and nothing about this description is unclear. Apx. II(14).

Michael L. Dahlberg ("Dahlberg"), Nault's expert since 2006, submitted his "Surveyor's Report" with a "*Schematic Sketch of Bk. 213 Pg. 503*" ("Schematic") to illustrate what he alleged were "ambiguities" to support the Court sustaining BLA Plan. Apx. III(9). Dahlberg did not review the chains of title to the Johnson lots, did not survey any of them and assigned no weight to abutter calls in various deeds to abutting lots as did Rogers when he confirmed the location of the common boundary. Tr. 247-248. Matters addressed by expert testimony and reports confirm Rogers' was fare more comprehensive. Apx. I(45-49);Apx. III.

Dahlberg testified that directional calls should be strictly construed to produce 90-degree angles as shown on his Schematic, which created ambiguities which otherwise did not exist. Apx. III(9). Dahlberg also claimed Colby's descriptions could be read to follow the more easterly wall after departing from the POB, but doing so ends in a field further to the east, with no further guidance as to how to backtrack to the Horse Pasture wall to reach the southeast corner of the Upper Field. Id.

Ironically, in his 2008 Order, Judge Morrill gave Rogers' testimony more weight due to his efforts to uncover topographic and archeological evidence showing the "cart road" location and found Dahlberg's deed interpretations "improbable". Apx. I(47). Further supporting Rogers' testimony and reports being given more weight, Dahlberg's Schematic conflicts with his 2006 plans showing Nault's new driveway. Apx. III(32-33). In addition, 3 other sketches prepared by Dahlberg were included in the 2007 Rogers' Report providing an overview of the Johnson lots which

show the common boundary between Lot 5 and Lot 7 as described in the Colby deed and confirmed *"crystal clear"* by Rogers. Id. (34-37).

Rogers testified that while completing his field work for the 2015 Plan, he found NO monuments were set to demarking the end points and angles of the purported **"new"** boundary shown on the BLA Plan. Tr. 88-89. Rogers also explained to the Trial Court why the "July 1980 Plan of Land Braverman Realty" illustrated Braverman's effort to shop for the remainder of the *"20 acres, more or less"* Which Ruth Heath Keaney had added to the Lot 7 deed when she transferred to Bernatas in 1924. Apx. IV(13); Tr. 89-90; Apx. II(17). These facts from the record confirm the BLA's intent.

IV. THE BLA IS ILLEGAL & UNENFORCEABLE.

The BLA is invalid because: (a) the Colby deed description is clear; (b) a **"new"** boundary is not authorized by RSA 472; (c) no monuments were set to demark the purported **"new"** boundary; (d) the BLA was an illegal subdivision; (e) the Lot 7 owner stole 7+- acres from the Lot 5 owner; and (f) the title to Lot 5 is left clouded.

In 2002, this Court struck down a boundary line agreement signed well more than 20 years before, which did not strictly comply with RSA 472 and explained the legislature's use of the words *"shall"* and *"not otherwise"* meant strict compliance was required for a boundary line agreement to be found enforceable. N.H. Department of Resources & Economic Development ("DRED") v. Dow, 148 N.H. 60, 62-64 (2002); RSA 472:1 (emphasis, supplied). RSA 472:3 states once a line is validly confirmed, "*suitable and permanent monuments shall be placed at each end and at each angle of the boundary"* and no monuments were set on the ground relative to the BLA. Tr. 88-89. As was the case in DRED, the BLA is approximately 20 years old, does not strictly comply with RSA 472

which does not authorize the creation of a "new" boundary line and appears to have been, at least up until now, an end run around the local planning board. Apx. VII(31-34). Therefore, it must be found invalid and unenforceable to restore stability to Guiney's title and the title industry in New Hampshire, lest others avail themselves of this improper process.

V. THE BLA IS NOT SAVED BYACQUIESCENCE.

Acquiescence fixes the location of an ambiguously described common boundary when the abutting property owners have occupied their lots up to an agreed to line recognizing it as true for 20 years. O'Hearne v. McClammer, 163 N.H. 430, 435 (2012); Rautenberg v. Munnis, 108 N.H. 20, 23, (1967). This doctrine furthers public policy by allowing parties to settle a disputed boundary and clear their titles when their boundary cannot be located. O'Hearne at 436 *(referring to Richardson v. Chickering, 41 N.H. 380, 384(1860).* Recognizing the initial element of acquiescence is that the common boundary must be uncertain, the facts of this case do not satisfy this element. Id.

In O'Hearne, the court affirmed the boundary line honored by 2 abutters for more than 80 years which had become uncertain due to a shifting highwater mark and other intervening surveys. Id. (437-438). In Rautenberg, the court denied a claim of boundary by acquiescence because the opposing party's predecessors testified to not having agreed to a different boundary and believed "*everything was taken care of in the deed"*. Id. (23).

Although the Order stated *"the parties…treated the line described in the BLA…"* as the true boundary, this conclusion was not supported by the evidence because that boundary line was never marked and neither party knew its location. Tr. 88-89; Apx. VII(32-34). In addition, the Trial Court engaged in no analysis of whether the record evidence satisfied the

elements of acquiescence after it declined any opinion as to whether the BLA complied with RSA 472, which is reversible error. Lynn v. Wentworth By the Sea Master Assoc., 169 N.H. 77, 82 (2016); Ord. 23-24. While estoppel by recitals bars a deed grantee from denying the validity of an outstanding easement in their deed, Guiney has never denied the 50' ROW appears on the BLA Plan and referred to by his deed but states Nault has never been granted the right to use it but his Lots have access over the "cart road" as stated by Guiney in the 2008 Order. Kellison v. McIsaac, 131 N.H. 675, 682 (1989); Apx. I(45-49); Tr. 362-364.

CONCLUSION

Guiney requests the Court reverse the Trial Court Order because the evidence does not support the Disputed Portion being found a public highway by prescription. The Court must also find the BLA invalid unenforceable due to its failure to comply with RSA 472 and that it may not be saved by acquiescence.

STATEMENT REGARDING ORAL ARGUMENT

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

Respectfully submitted,
Michael Guiney

By his attorneys
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June 27, 2019

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RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that pursuant to guidance from the Court Clerk's Office, the Reply Brief have been sent via Court's electronic filing system to:

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

June 27, 2019 /s/ Patricia M. Panciocco

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within reply brief complies with Sup. Ct. R. 16 (11) and contains 3000 words, excluding the parts of the brief exempted by Sup. Ct. R. 16(11).

June 27, 2019 /s/ Patricia M. Panciocco