

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

Case No. 2018-0591

Town of Dunbarton

v.

Michael Guiney,
David Nault, Joshua N. Nault, & Leigh D. Nault

TOWN OF DUNBARTON'S MEMORANDUM OF LAW

Appeal Pursuant to Supreme Court Rule 7
From the Final Order of the Superior Court of Merrimack County
in Docket No. 217-2016-CV-0739

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June 7, 2019

NOW COMES the Town of Dunbarton (“town”), by and through its attorneys, Mitchell Municipal Group, P.A., and state as follows:

Introduction

The town submits this Memorandum of Law pursuant to Supreme Court Rule 16(b) for the limited purpose of responding to Mr. Guiney’s argument regarding the appropriate prescriptive width of Kelsea Road. See Guiney Brief, Sect. I(G), 27-28. The town understands Mr. Guiney’s argument to be that in the event the Court affirms the trial court’s prescriptive public use ruling, the width of Kelsea Road should be “fixed at 12.65 feet” because, in part, that is what was depicted on a diagram attached to the town’s petition. *Id.*

The town disputes that it made any representation below about the correct width of the Kelsea Road prescriptive public right-of-way (“ROW”). *Cf.* Guiney Brief, 28. Also, to the extent that the Court affirms the trial court’s prescriptive public ROW finding, the prescriptive ROW width should not be fixed at 12.65 feet but should vary as observed by the trial court, and should include approximately 1-2 additional feet on either side for road maintenance purposes as recognized by this Court’s prior decisions.

I. Neither the Town Nor the Trial Court Set the Prescriptive ROW Width at 12.65 feet

The town acknowledges that it affixed a diagram to the petition that initiated this proceeding below. See Town's Verified Amended Petition for Declaratory Judgment for Public Highway by Prescription ("Town's Petition"), Appendix I to Mr. Guiney's Brief ("Guiney Apx I"), 16. That diagram was provided for illustrative purposes only and was not provided to represent any particular width along the area in question. In fact, the Town's Petition described the area in question as "the yellow box in the 'Cart Road Easement Detail' blowup roughly approximates the Disputed Portion." See *id.*, 10-11, para. 17 (emphasis added). Therefore, the town never represented the physical width as a certain precise distance.

In ruling that Kelsea Road was public by prescription, the trial court similarly did not find a particular width. See *generally* August 28, 2018 Order ("Order"), Guiney Brief, 38-64; see *e.g.*, *id.*, 57-59. However, despite the silence on this issue, the trial court does note the evidence before it that described the observed width: Mr. Guiney testified to the width "as a single lane road about 12'-14' wide," *id.*, 40; Adrian Trudeau, hired by the town to perform road maintenance, plowed the road with a truck that included a wing, the plow and wing measured 12'-14' wide, *id.*, 54; and Jeff Crosby, the town's current road agent, testified to the road as "about 12-15 feet wide, the widest point being 18' wide..." *id.*, 55. The evidence before the trial court therefore established that the width varies as one travels along the

road, which is consistent with the trial court's silence on a finding of a precise, blanket width.

II. The Width of Prescriptive Public Roads Is Not By Law Limited to the Traveled Way

This Court's prior precedent recognized that when a public road is created by prescription, the width of that road is not by law limited to the portion physically used for travel:

The [prescriptive public use] easement is not necessarily limited to the travelled path and the ditches on each side, but where the road has been fenced out for many years about the usual width, and there is nothing to control it, a jury would be justified in finding the whole space between the fences to be a public highway... the space between the wrought road and its exterior limits may be needed for various purposes, as for furnishing earth and other materials for making the road, constructing culverts and watercourses, making changes in the travelled path, and avoiding obstructions by snow...; and for these and other reasons the space given to highways is very generally much more than what is occupied by the travelled path,... and... it is competent for a jury to find, from ancient fences and other circumstances, that the true limits of a highway extend beyond the wrought road.

Hobin v. Bucklan, 88 N.H. 73, 79-80 (1936) (citations omitted). The *Hobin* court went on to explain the appropriate legal test when considering the width of a public road created by prescription:

The "established line of travel with reasonable allowance at the sides" is not the legal test of width of a highway established by prescription. The inquiry is how

much width has in fact been taken, both for actual travel, and, as incidental thereto, for the safety, convenience, and maintenance of the traveled part. ... Topography and soil may call for road construction with substantial variations of widths on each side. It is for the plaintiff to establish the side lines of the highway. Although laid out three rods wide, it may not be possible to locate the lines to such a width. If there is no balance of probabilities as between the land east and that west of the wrought road to make up the width, only so much width can be established as the evidence shows has been taken and used for highway purposes.

Id., 80 (emphasis added).

III. The Evidence Before the Trial Court Established that the Prescriptive Rights Include Additional Width for Maintenance of the Traveled Way

As described above, the Order did not specify a precise width for Kelsea Road. *See infra*, Sect. I. Rather, the Order noted the evidence indicating that the width of the traveled way varied from as narrow as twelve (12) feet to as much as eighteen (18) feet. *Id.* The testimony before the trial court established that maintenance of the traveled portion took place during the prescriptive period. *See* Order, Guiney Brief, 57-59. That maintenance necessarily required additional width on either side of the traveled way to maintain it and ensure that it continued to carry out its purpose as an easement for public travel. *See Hobin v. Bucklan*, 88 N.H. 73, 79-80 (1936), *infra*. While the trial court did not make a specific finding with regard to the precise additional width necessary to maintain the traveled way, the

town avers that the physical evidence before the trial court supports an additional width of 1-2 feet on either side. Provided this Court agrees, the Keslea Road public ROW would thus range from 14' - 20', depending on the location along the road, and inclusive of the additional area required to maintain the traveled portion. Should the Court disagree, this question should be remanded back to the trial court for further factual findings consistent with *Hobin v. Bucklan*.

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ORAL ARGUMENT

Pursuant to Supreme Court Rule 16(b), the town has waived oral argument.

CERTIFICATION OF WORD COUNT

This hereby certifies that this memorandum of law contains 1,106 words exclusive of the cover page, certificate of service, and certification of word count.

Respectfully submitted,
TOWN OF DUNBARTON

By Its Attorneys
**MITCHELL MUNICIPAL GROUP
P.A.**

Date: __June 7, 2019__

By: __/s/ Steven Whitley_____
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CERTIFICATION

I have provided on this date a copy of the Town's Memorandum of Law via the Court's electronic service platform to Patricia M. Panciocco, Esq., and Michael J. Tierney, counsel of record.

Date: __June 7, 2019__

_____/s/ Steven Whitley_____
Steven M. Whitley, Esq.