STATE OF NEW HAMPSHIRE
SUPREME COURT

2019 TERM

No. 2019-0107

THOMAS J. LOEFFLER

V.

PAUL BERNIER

RULE 7 MANDATORY APPEAL OF FINAL DECISIONS OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT PAUL BERNIER

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July 26, 2019

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QUESTIONS PRESENTED

1. Did the Trial Court err when it granted Plaintiff's Motion for Partial Summary Judgment on the basis that Plaintiff has an easement via estoppel by deed to access Defendant's right-of-way at a proposed second access point on Plaintiff's historic Lot 21? See Trial Court's Order on Motion for Partial Summary Judgment dated October 17, 2018, Rockingham SS., Wageling, J. (No pleading raised this issue prior to this Order).

2. Did the Trial Court err when it ruled that Defendant could not present arguments on reconsideration in response to the Trial Court granting summary judgment on the basis of estoppel by deed where estoppel by deed was never raised by Plaintiff as a basis for relief? See App. at 36 (Defendant's Motion for Reconsideration).

3. Did the Trial Court err when it ruled that Plaintiff did not abandon any easement to access Defendant's right-of-way at the proposed second access point? See App. at 36 (Defendant's Motion for Reconsideration).

4. Did the Trial Court err when it ruled that any implied easement to access Defendant's right-of-way at the proposed second access point did not terminate as a result of the impossibility of purpose doctrine? See App. at 36 (Defendant's Motion for Reconsideration).

STATEMENT OF THE CASE AND FACTS

The Plaintiff/Appellee, Thomas Loeffler ("Loeffler"), and the Defendant/Appellant, Paul Bernier ("Bernier"), are neighbors who own abutting properties on Pillsbury Road (a public way) near the town border of Hampstead and Sandown, New Hampshire. See Appellant's Appendix ("App.") at 34. The land comprising Bernier's property and Loeffler's property were once part of a larger single parcel of land owned by Ernest Pillsbury. Ernest Pillsbury subdivided his property by way of an unrecorded subdivision plan in 1947. App. at 23. This plan created twelve new lots on the southwesterly portion of the Pillsbury property. App. at 23. The remaining land owned by Pillsbury, including the residence and associated buildings on the northerly portion of the property, were retained by Pillsbury. App. at 23. The subdivision plan also shows a right-of-way running from Pillsbury Road along the easterly boundary of six of the twelve lots (21, 23, 25, 27, 29 and 31) to the Pillsbury residence (the "ROW"). App. at 23.

Loeffler owns the property known as 21 Pillsbury Road, part of which is located in Sandown and part of which is located in Hampstead. App. at 19; 34. When Loeffler first acquired 21 Pillsbury Road, it consisted of lots 21, 23, 25, 27, and 29 as shown on Pillsbury's 1947 plan and on a revised plan that was recorded in 1968. App. at 23; 25. As a result of a lot line adjustment in 2009, Loeffler now owns the easterly portions of lots 21 and 23, and all of lots 25, 27 and 29. App. at 48. The Lot Line Adjustment Plan abolished the historic lot lines and consolidated them into one parcel. App. at 48. Loeffler constructed a single-family home on his consolidated property and improved the existing driveway running from the ROW across historic lot 29 to the dwelling. App. at 60. Bernier owns 19 Pillsbury Road in Sandown, which consists of the majority of the remaining land that was retained by Ernest Pillsbury along the easterly side of the ROW (running to the brook shown on the plans) and up to and including the residence and associated land on the northerly portion of the property at the end of the ROW. App. at 23; 25.

Both Loeffler and Bernier access Pillsbury Road via the ROW which is located on Bernier's property and to which Bernier owns fee title. App. at 23; 25; 34. When Ernest Pillsbury first conveyed lot 29, he conveyed it with an express easement over the ROW for the benefit of lot 29. App. at 27. The relevant language in the deed states:

> There is further conveyed, as appurtenant to and to be used in connection with the above described premises a right of way over other lands of the above grantors to the public highway, for all necessary purposes of entrance and exit to the conveyed premises.

App. at 27. When Pillsbury first conveyed lot 27, he did not include any such easement. The grantee of lot 27 was the then-owner of lot 29 which already benefited from this deeded easement over the ROW. App. at 29; 31. Later, in 1968, Pillsbury first deeded lots 21, 23, and 25 simultaneously. App. at 33. Pillsbury did not convey lots 21, 23, and 25 with an express easement over the ROW. Lot 21 fronts directly along Pillsbury Road – a public way – and thus these lots were not landlocked as was lot 29 when it was first conveyed. App. at 33.

Loeffler filed this action against Bernier in Rockingham County Superior Court (the "Trial Court") seeking various forms of relief in order to establish the respective rights of the parties in and to the ROW. App. at 64. On June 28, 2018, Loeffler moved for partial summary judgment seeking a ruling that he had a right to construct a second driveway on historic lot 21 to the ROW. See Order on Motion for Partial Summary Judgment dated October 17, 2018, Rockingham SS., Wageling, J. ("MPSJ Order") at 1; App. at 49-50. Loeffler based his motion on the principle cited in Gagnon v. Moreau, 107 N.H. 507, 509 (1967) which provides that:

> [W]here lots are sold by reference to a recorded plat or plan showing existing or proposed streets which constitute boundaries of the lots, a conveyance ordinarily operates to convey to the grantee the fee simple to land underlying adjoining streets and rights of way to the center line thereof, together with easements to use such rights of way as well as others which do not bound the lot conveyed.

App. at 61-63. Loeffler argued that since the deed originally conveying historic lot 21 contains a reference to a plan which shows the ROW as the eastern boundary thereof, he has an implied

easement to construct the second driveway on lot 21. App. at 61-63. Bernier objected on the basis that the "rule" cited in Gagnon is merely a presumption that Bernier can overcome based on the evidence of the original grantor's intent not to convey any such easement. Bernier argued that the original grantor conveyed an express easement to historic lot 29, which would have been otherwise landlocked, absent rights over the ROW, but did not include any such language in the deed for lot 21 because lot 21 has frontage directly along Pillsbury Road – a public way. App. at 11-12.

The Trial Court issued an Order dated October 17, 2018 granting Loeffler's request for partial summary judgement. However, the Trial Court did not base its ruling on Loeffler's argument that historic lot 21 benefits from an implied easement because the deed originally conveying same contains a reference to a plan which shows the ROW as the eastern boundary thereof. Rather, the Trial Court based its ruling on a new theory – estoppel by deed. See MPSJ Order at 10.

Estoppel by deed is a distinct theory from the reference to a plan theory cited in Gagnon. The reference to a plan theory cited in Gagnon arises based upon a deed that references a plan that shows a way as a boundary. See Gagnon, 107 N.H. at 509. An easement that arises through estoppel by deed is not an implied easement in the same sense as an implied easement that arises through the reference to a plan theory. See 700 Lake Ave. Realty Co v. Dolleman, 121 N.H. 619, 625 (1981). Rather, easements that arise through estoppel by deed do so purely from the language of a deed which describes a way as a boundary when the grantor owns the way. Id.

The general principle of estoppel by deed is, when "property is conveyed in a deed and one or more of the calls is an abuttal on a private way there is a grant or at least a presumption of a grant of an easement in such way when the way is owned by the grantor." Id at 623. Unlike an implied easement that arises through necessity or prescription, or through reference to a plan, the

basis for the theory of estoppel by deed is consistent with the key element of estoppel in other contexts – justifiable reliance, or, in other words, the original grantee's reasonable expectation. Underpinning the theory of estoppel by deed is the "assumption that the grantor who uses such a description intends to include the use rights shown on the map, or in the street used as boundary, and the grantee reasonably expects to receive them." See MPSJ Order at 8 (citing Restatement (Third) of Property (Servitudes) § 2.13). "The grantor's description, in effect, constitutes a representation to the grantee that the grantee will receive the use rights." Id. Unless it can be shown that the grantee did not reasonably rely upon receiving an easement over the way described in the deed as bounding his lot, "the grantor, and all claiming under him, are estopped by deed from denying such an easement exists." 700 Lake Ave. Realty Co., 121 N.H. at 623. In sum, the reference to a plan theory cited in Gagnon – the sole theory asserted by Loeffler as a basis for summary judgment – arises merely because a deed references a plan that shows a way as a boundary of the property conveyed. Comparatively, the estoppel by deed theory relied upon by the Trial Court arises solely through the language of the deed that describes a way as a boundary of the property conveyed when the original grantee reasonably expects to receive an easement over the way, and can be defeated upon showing that the grantee did not reasonably expect to receive such rights.

Since the Trial Court based its decision granting Loeffler's request for partial summary judgment on a theory not asserted by Loeffler – and thus not addressed by Bernier in his objection thereto – Bernier moved for reconsideration. App. at 36. Bernier asserted that even if the doctrine of estoppel by deed operates to estop Bernier from denying the grant of an easement for the benefit of historic lot 21, (1) Loeffler abandoned any such easement by eliminating its purpose when it consolidated the independently buildable historic lots (which previously may have required separate access) via the lot line adjustment without proposing a second driveway and by

developing the historic lots as one single family parcel; and (2) any such easement had terminated because the purpose of the easement was to provide access to the ROW for the benefit of lot 21 as an independently buildable property and this purpose can no longer be fulfilled because lot 21 is no longer independently buildable and can never again become independently buildable pursuant to the lot line adjustment. App. at 39-43. The Trial Court denied Bernier's Motion for Reconsideration, holding that Bernier could not raise the abandonment and termination issues on reconsideration and, even if he could, consolidating the lots and developing them as one single-family parcel did not show an intent to abandon or terminate an easement for the benefit of historic lot 21. See Order on Motion for Reconsideration and Further Order on Motion to Stay dated January 8, 2019, Rockingham SS., Wageling, J. ("Reconsideration Order") at 5-7. This appeal followed.

SUMMARY OF THE ARGUMENT

The Trial Court erred when it granted partial summary judgment and held that lot 21 benefits from an easement over the ROW via estoppel by deed. The Trial Court overlooked the fact that the existence of alternate means of access on Pillsbury Road is relevant to the analysis of whether the original grantee of historic lot 21 reasonably expected to receive an easement over the separate private ROW under the estoppel by deed theory. When, as is the case here, the grantee knew of the alternate access at the time of the original conveyance, and knew that it could be utilized because it is a public way, these circumstances are sufficient to overcome the presumption of the grantee's expectation of rights in a private ROW and do not estop the grantor or Bernier as his successor from denying the existence of an easement in the private ROW.

Moreover, the Trial Court abused its discretion when it declined to allow Bernier to argue on reconsideration that, to the extent lot 21 does benefit from an easement over the ROW via estoppel by deed, Loeffler had abandoned or terminated any such easement by consolidating the

historic lots and developing them as one single-family parcel. The Trial Court held that these arguments should have been raised in Bernier's initial Objection to Loeffler's Motion for Partial Summary Judgment. However, it was not readily apparent to Bernier to argue in his objection that an easement arising through estoppel by deed had been abandoned or terminated because Loeffler did not argue estoppel by deed. Therefore, Bernier had no reason to argue in his original objection that the easement alleged by Loeffler had been abandoned or terminated because the theory argued by Loeffler in seeking partial summary judgment does not support the existence of an easement.

Loeffler never argued the theory of estoppel by deed in seeking partial summary judgment. Accordingly, since Loeffler never briefed the issue, the Trial Court granted summary judgment on the basis of estoppel by deed *sua sponte*. The fact that the issue of estoppel by deed was not raised by Loeffler in and of itself is sufficient grounds for Bernier to argue abandonment and termination on reconsideration. The Trial Court should have permitted Bernier to argue the abandonment and termination theories on reconsideration due to this shift in the scope of legal theories before the Trial Court on summary judgment as a matter of due process. As such, the Trial Court abused its discretion by declining to allow Bernier to raise those issues on reconsideration. Nonetheless, the Trial Court did proceed to address the merits of Bernier's abandonment and termination claims in the alternative. In doing so, the Trial Court erred when it held that Bernier's arguments were unavailing.

To the extent that any easement arose for the benefit of historic lot 21 through estoppel by deed, the Trial Court erred when it held that Loeffler had not abandoned the easement. By consolidating the historic lots into one buildable parcel and developing it as one single-family parcel, Loeffler unequivocally demonstrated an intent to abandon any easement that arose via estoppel by deed for the historic purpose of providing lot 21 with independent access as an independently buildable lot. Similarly, the Trial Court erred when it held that Loeffler had not

caused any such easement to terminate by consolidating the historic lots because the purpose for which it arose was to provide independent access to lot 21 as an independently buildable lot. It is impossible to accomplish that purpose because the historic lots have been consolidated and developed as one property. Accordingly, the decisions of the Trial Court granting Loeffler's Motion for Partial Summary Judgment and denying Bernier's Motion for Reconsideration should be reversed.

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing a trial court's grant of summary judgment, this Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. White v. Asplundh Tree Expert Co., 151 N.H. 544, 547 (2004). If this Court's review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, it will affirm the trial court's decision. Id. This Court reviews the trial court's application of the law to the facts de novo. Id.

II. THE TRIAL COURT ERRED WHEN IT GRANTED PARTIAL SUMMARY JUDGMENT ON THE BASIS THAT HISTORIC LOT 21 BENEFITS FROM AN EASEMENT TO THE ROW VIA ESTOPPEL BY DEED.

Lot 21 cannot benefit from an easement through estoppel by deed because the doctrine is based upon the justifiable reliance of the grantee to receive such an easement, and the grantee of lot 21 could not have reasonably relied upon access rights over the ROW because the lot fronts directly along Pillsbury Road – a public way. In light of the fact that lot 21 fronts a public way, the Trial Court erred when it held that lot 21 nonetheless benefits from an easement through estoppel by deed on the basis that means of alternate access do not effect a grantee's justifiable reliance. See MPSJ Order at 9. The Trial Court's broad analysis that the "presumption concerning an easement may be overcome if a different intent is express or implied by the

circumstances . . . [but] the existence of alternate means of access to a parcel is not a circumstance which adequately expresses or implies such a different intent", see MPSJ Order at 9, ignores the effect that the nature of the alternate access – i.e. whether the alternate access is a public or private way – has on the grantee's expectation to receive an easement to a separate private ROW.

Estoppel by deed rests on the "assumption that the grantor who uses such a description intends to include the use rights shown on the map, or in the street used as boundary, and the grantee reasonably expects to receive them." See Restatement (Third) of Property (Servitudes) § 2.13). "The grantor's description, in effect, constitutes a representation to the grantee that the grantee will receive the use rights." Id. Unless it can be shown that the grantee did not reasonably expect to receive an easement over the way described in the deed as bounding his lot, "the grantor, and all claiming under him, are estopped by deed from denying such an easement exists." 700 Lake Ave. Realty Co., 121 N.H. at 623. While easements arising through estoppel by deed are fundamentally different than implied easements by necessity, the existence of alternate means of access is relevant to the analysis of the grantee's reasonable expectation to receive an easement over a separate private way under the estoppel by deed theory. See Flynn v. Brassard, 4 Mass. App. Ct. 795, 796 (1976) (limiting scope of easement arising through estoppel by deed based on the grantee's need for access). For example, the mere fact that a deed describes a lot as bounding a way, in the absence of any allegation that the way had been opened to the public, is insufficient to pass an easement to the grantee of the lot when the lot bounds a public street. See Milliken v. Denny, 135 N.C. 19, 47 (1904); see also Bushman v. Gibson, 15 Neb. 676, 20 N.W. 106 (1884) (where the owner conveys a lot by metes and bounds, and one side of the lot is described in the deed as bounded by a way, but all parties understand that the way has not been dedicated to the public, the grantor is not estopped to maintain that the way is not public).

Perhaps if Pillsbury Road was also a private way, alternate access from lot 21 thereon would not affect the original grantee's reasonable expectation to receive an easement over the ROW for the benefit of lot 21, since the grantee would expect to have at least one point of access. However, where, as is the case here, the grantee knows at the time of the conveyance that he or she has an alternate means of access, and knows that he or she has the right to utilize that alternate access because it is a public way, the grantee's expectation of an easement over a separate private ROW is not a reasonable expectation. The Trial Court ignored these circumstances by improperly concluding that easements arising through estoppel by deed are not easements by necessity, and thus alternate access through a public way is not relevant to the estoppel by deed analysis. See MPSJ Order at 9. The Trial Court overlooked the fact that the existence of alternate means of access is relevant to the analysis of whether the grantee reasonably expected to receive an easement over the separate private way under the estoppel by deed theory. Here, the fact that the original grantee knew that lot 21 fronts along Pillsbury Road at the time of original conveyance overcomes the presumption that he reasonably expected to receive an easement over the private ROW for the benefit of lot 21.

Indeed, under the Trial Court's analysis, lot 21 could be bounded on three sides by public streets and one side by the private ROW, and the Trial Court's conclusion would be unaffected because it completely dismissed the nature and circumstances related to the alternate means of access. No grantee would reasonably rely upon access over a private ROW when the lot is bounded by three public streets. However, this is the natural extension of the Trial Court's decision. Accordingly, the Trial Court erred when it held that lot 21 benefits from an easement over the ROW arising through estoppel by deed and its decision should be reversed.

The inclusion of an express easement over the ROW for the benefit of lot 29 and the absence of same for lot 21 further underscores that the original grantee of lot 21 would not have

justifiably relied upon an easement over the ROW for the benefit of lot 21. Pillsbury conveyed lot 29 from the parent parcel with the express right to use the ROW. App. at 27. The conveyances for the remainder of the historic lots contain no such language. App. at 29; 33 The inclusion of an express easement for lot 29 and the absence of same for lots 21, 23, 25, and 27 makes sense in light of the location of the lots, when they were conveyed, and to whom they were conveyed. Lot 29 was conveyed first and was otherwise landlocked absent rights over the ROW, so use of the ROW to access Pillsbury Road was necessary and explicitly conveyed. Lot 27 did not require additional access to the ROW since it was first conveyed to the then-owner of lot 29, which already had access rights through lot 29. App. at 29; 31. Later, lots 21, 23, and 25 were conveyed simultaneously. App. at 33. Because lot 21 has frontage along Pillsbury Road, it was not necessary for Pillsbury to convey rights to the ROW where all three lots were conveyed together to the same grantee. The grantor did not convey such rights and the grantee would not have reasonably expected access rights over the ROW where lot 21 already had access directly on a public way. Moreover, the original grantee of lot 21 either did or should have discovered the express easement benefiting lot 29 during the title search before purchasing lot 21 since the lots are all part of a common subdivision and depicted on the same recorded plan. App. at 25. These circumstances overcome the presumption that the original grantee of lot 21 justifiably relied upon access over the ROW at the time of conveyance, but they were improperly dismissed by the Trial Court. Accordingly, the Trial Court erred when it held that lot 21 benefits from an easement via estoppel by deed because the original grantee did not reasonably expect to receive an easement over the private ROW for the benefit of lot 21 at the time of conveyance.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO ADDRESS BERNIER'S ABANDONMENT AND TERMINATION ARGUMENTS ON RECONSIDERATION.

In Bernier's Motion for Reconsideration, he argued that, to the extent any easement for the

benefit of lot 21 arose via estoppel by deed at the time of the original conveyance, Loeffler abandoned any such easement by consolidating the historic lots via the lot line adjustment without proposing a second driveway and by developing the historic lots as one single family parcel; and (2) any such easement had terminated because the purpose of the implied easement was to provide access to the ROW for the benefit of lot 21 as an independently buildable property and this purpose can no longer be fulfilled because lot 21 is no longer independently buildable. App. at 39-43. On reconsideration, the Trial Court declined to decide Bernier's abandonment and termination theories on the basis that they should have been raised in Bernier's initial Objection to Loeffler's Motion for Partial Summary Judgment. See Reconsideration Order at 5. In doing so, the Trial Court unsustainably exercised its discretion.

A motion for reconsideration shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present. See Superior Court Rule 12(e). This Court reviews the Trial Court's decision declining to address issues raised for the first time on reconsideration on an abuse of discretion standard. See Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 655 (2000) (when the trial court expressly refuses to consider the merits of a claim asserted for the first time on reconsideration, the Supreme Court reviews that decision for an abuse of discretion). The trial court does not abuse its discretion when it declines to address an issue raised for the first time on reconsideration that was readily apparent when the party initially filed for relief. Id. Nor does the trial court abuse its discretion when the moving party raises factual issues that would have required the trial court to conduct a new evidentiary hearing in order to properly address, or when the moving party makes no showing of an inability to raise the argument at the time of the original hearing. Taylor v. Sch. Admin. Unit #55, 170 N.H. 322, 331 (2017).

The Trial Court abused its discretion when it declined to address Bernier's abandonment and termination issues on reconsideration. It was not readily apparent to Bernier to argue the abandonment and termination theories in his original objection. Loeffler's only basis for partial summary judgment was that he had an implied easement by the reference to a plan theory cited in Gagnon. However, the Trial Court granted summary judgment on the separate basis of estoppel by deed *sua sponte*. Loeffler never relied upon the estoppel by deed theory cited in Gagnon. As such, since Loeffler never raised estoppel by deed, Bernier had no reason to argue in his original objection that the implied easement alleged by Loeffler had been abandoned or terminated because the theory argued by Loeffler in seeking partial summary judgment does not support the existence of an easement. Accordingly, it was not readily apparent to Bernier to argue in his objection that an implied easement arising under the reference to a plan theory had been abandoned or terminated.

Moreover, raising the abandonment and termination issues on reconsideration did not raise new factual issues or require the Trial Court to conduct a new evidentiary hearing in order to properly address. See Taylor, 170 N.H. at 331. The only evidence introduced by Bernier on reconsideration was Loeffler's Lot Line Adjustment Plan. App. at 46-48. However, Loeffler had already introduced the Lot Line Adjustment Plan with his Motion for Partial Summary Judgment. App. at 51-54. Bernier only resubmitted the Lot Line Adjustment Plan for the Trial Court's convenience becomes it formed the basis for his arguments that Loeffler abandoned any easement or caused it to terminate by consolidating the historic lots and developing them as one single-family parcel. App. at 39-43. Bernier argued the abandonment and termination theories on reconsideration as a reaction to the sudden shift in the scope of the litigation pursuant to the Trial Court's *sua sponte* invocation of the estoppel by deed theory. The Trial Court could have decided Bernier's abandonment and termination claims on the merits without holding any further hearings,

as evidenced by the fact that it addressed these claims in the alternative. The fact that it chose not to decide Bernier's abandonment and termination claims on their merits under these circumstances amounts to an unsustainable exercise of judicial discretion.

Once the Trial Court ruled *sua sponte* that lot 21 benefits from an easement that arose via estoppel by deed, the scope of the issues on summary judgment shifted. Despite Bernier's passing reference to the doctrine in his Objection to Loeffler's Motion for Partial Summary Judgment, Loeffler never briefed the estoppel by deed issue upon which the Trial Court ultimately based its decision. Some jurisdictions encourage trial courts to reconsider their prior rulings and take up issues on a motion for reconsideration when an issue was inadequately briefed when first contemplated by the court. See, e.g., Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah Ct. App. 1994). The issue of estoppel by deed was certainly inadequately briefed by the parties in this instance where Loeffler never raised the theory and therefore Bernier had no reason to argue it directly. Once the Trial Court established the existence of an easement for the benefit of lot 21 through estoppel by deed *sua sponte*, it should have exercised its discretion to allow Bernier to raise the termination and abandonment issues on reconsideration due to the sudden change in the scope of the litigation as a matter of due process. The Trial Court's failure to do so was an unsustainable exercise of its discretion, and its decision declining to address these issues on reconsideration should be reversed. Since the Trial Court unsustainably exercised its discretion when it declined to consider Bernier's abandonment and termination arguments on their merits, this Court should address on the merits the Trial Court's alternative decision that, even if Bernier could advance these theories on reconsideration, they would still be unavailing. See Reconsideration Order at 5-7.

IV. TO THE EXTENT AN EASEMENT AROSE VIA ESTOPPEL BY DEED FOR THE BENEFIT OF HISTORIC LOT 21, THE TRIAL COURT ERRED WHEN IT RULED IN THE ALTERNATIVE THAT LOEFFLER HAD NOT ABANDONED THE EASEMENT.

Since the Trial Court abused its discretion when it declined to decide the abandonment and termination issues on their merits, this Court should do so in the context of this appeal. The Trial Court held in the alternative that the purpose of the easement that arose via estoppel by deed for the benefit of lot 21 was to provide access, but not exclusive access, to the land comprising lot 21, and therefore the "consolidation of [Loeffler's] lots, and the construction of a home thereon, is not so inconsistent with the need for additional access along the [ROW] that the Court can deem the implied easement abandoned." See Reconsideration Order at 6. However, the Trial Court interpreted the purpose of the easement too broadly. By consolidating the historic lots into one buildable parcel and developing it as one single-family parcel, Loeffler unequivocally demonstrated an intent to abandon any easement that arose via estoppel by deed for the historic purpose of providing lot 21 with independent access as an independently buildable lot.

Abandonment of an easement must involve clear, unequivocal, and decisive acts by the owner of the dominant estate manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence. Titcomb v. Anthony, 126 N.H. 434, 437 (1985) (internal quotations and citations omitted). "[M]ere non-use of an easement does not result in its loss or destruction, even if continued for a long period of time." Downing House Realty v. Hampe, 127 N.H. 92, 95 (1985). However, non-use may support a finding of intent to abandon if the owner of the dominant estate performs clear, unequivocal and decisive acts. Id. For example, "[i]f the land owner and easement beneficiary alter the relationship of the property in such a way that the easement no longer serves any purpose, the easement may be deemed to have been modified or abandoned." 17 New Hampshire Practice: Real Estate, Ch. 8, §8.04 (citing, e.g., First National Bank of Portsmouth v. Portsmouth Savings Bank, 71 N.H. 547, 550 (1902) (negative

easements, or covenants, could be extinguished where same required parties to maintain shared building entrance and separate entrances were created without objection from either party)).

To the extent any easement arose via estoppel by deed in 1968 at the time of the original conveyance of lot 21, its purpose was to provide that lot, as an independently buildable parcel, with access to the ROW.[1] However, the Lot Line Adjustment Plan decisively evidences Loeffler's intent to abandon any such easement by consolidating the historically independently buildable lots into one consolidated parcel. In 2009, Loeffler consolidated historic lots 21, 23, 25, 27, and 29 into one single family parcel pursuant to a Lot Line Adjustment Plan recorded as Plan No.: 36135 in the Rockingham County Registry of Deeds. App. at 48. The Lot Line Adjustment Plan abandoned the historic lot lines within the parcel. App. at 48. The Lot Line Adjustment Plan shows an existing foundation and one proposed driveway from historic lot 29 to the ROW. App. at 48. It does not depict any other means of access to the ROW. App. at 48. The Chairman of the Planning Board for both the Town of Hampstead and the Town of Sandown signed the Lot Line Adjustment Plan, thereby approving same. App. at 48. Such approvals required public hearings pursuant to RSA 676:4. Loeffler then constructed a single family home and the proposed driveway on his property. App. at 60. Loeffler never proposed a second driveway on historic lot 21 to either Town via the Lot Line Adjustment Plan. App. at 48.

Accordingly, Loeffler abandoned the purpose of any easement for the benefit of historic lot 21 as an independently buildable parcel because that piece of land is no longer separately buildable. Even if lot 21 previously benefited from an easement to the ROW through estoppel by deed because it could have been conveyed separately and developed independently, Loeffler developed the lot for a purpose inconsistent with the original purpose of the easement because it

[1] While lot 21 was conveyed together with lots 23 and 25, the Trial Court did not consider whether any additional points of access on lots 23 and 25 would be permissible because Loeffler's Motion for Partial Summary Judgment was limited to a proposed second access point on lot 21. See Reconsideration Order at 6. As such, the permissibility of any additional points of access on lots 23 and 25 is outside the scope of this appeal.

can no longer be conveyed separately or developed independent of the other historic lots as a result of the consolidation and development pursuant to the Lot Line Adjustment Plan. Therefore, as a result of Loeffler's consolidation and subsequent development of the historic lots as one single family parcel, he abandoned any easement that once existed for the benefit of lot 21 by developing the lots for "a purpose inconsistent with [their] further existence." See Titcomb, 126 N.H. at 437. For these reasons, to the extent any easement arose through estoppel by deed for the benefit of lot 21, the Trial Court's decision that Loeffler did not abandon the easement should be reversed.

V. TO THE EXTENT AN EASEMENT AROSE VIA ESTOPPEL BY DEED FOR THE BENEFIT OF HISTORIC LOT 21, THE TRIAL COURT ERRED WHEN IT RULED IN THE ALTERNATIVE THAT THE EASEMENT HAD NOT TERMINATED PURSUANT TO THE IMPOSSIBILITY OF PURPOSE DOCTRINE.

Similar to its decision regarding abandonment, the Trial Court held in the alternative that the purpose of the easement for the benefit of lot 21 that arose via estoppel by deed "was simply to provide access to the land contained within [lot 21] . . ." and "consolidation of the lots into a single parcel did not frustrate the purpose of the implied easement [because Loeffler] can still use the [ROW] to gain additional points of access to the land contained within [lot 21]." See Reconsideration Order at 7. Again, the Trial Court construed the purpose of the easement too broadly. The purpose of the implied easement that arose via estoppel by deed when lot 21 was first conveyed in 1968 was to provide access to the ROW to lot 21 as an independently buildable lot. This purpose can no longer be fulfilled because the historic lots are no longer independently buildable and can never again become independently buildable. As such, Loeffler's development of the lots as one single family parcel has made it impossible to accomplish the purpose of the easement.

The impossibility of purpose doctrine provides that "an easement for a particular purpose

terminates when it becomes impossible to use the easement for the purpose intended." Boissy v. Chevion, 162 N.H. 388, 393 (2011). This doctrine is "designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose." Id. at 394. "Inquiry in the cessation of purpose cases begins with determining the particular purpose of the easement in question." Id. "Next, one must decide whether the contemplated purpose still exists." Id. "If not, the easement is considered to have expired." Id. The purpose of the easement arising through estoppel by deed was to provide access to the ROW to lot 21 as an independently buildable lot. This purpose no longer exists because Loeffler consolidated the historic lots and developed them as one single-family parcel. As such, the easement has expired or terminated.

Even though the Trial Court did not address whether Loeffler is entitled to similar points of access on historic lots 23 and 25, its broad interpretation of the purpose of the easement as simply providing access to the land within historic lot 21 without regard for the consolidation of the historic lots and their development as one parcel would seem to suggest that lots 23 and 25 might also benefit from implied easements via estoppel by deed that have not terminated.[2] This would mean that Loeffler could build – in addition to the existing driveway on lot 29 – three additional driveways on only 250 feet of total frontage along the ROW to serve his single-family home. No reasonable person would look at four driveways side-by-side along the same frontage of the same single-family property and believe that the purpose of the homeowner's right of access is being fulfilled. However, this absurd result is the natural extension of the Trial Court's decision that the purpose of the easement for the benefit of lot 21 is merely to provide access to the land within lot 21 without regard to how that land is being used.

[2] Again, the Trial Court has not established that lots 23 or 25 are entitled to any additional points of access. Bernier submits that Loeffler is not entitled to any access points beyond the existing driveway on historic lot 29 pursuant to the express easement conveyed by Pillsbury for the benefit of lot 29.

In reaching such a conclusion, the Trial Court confuses the principle of impossibility of purpose with the concept of impossibility of use. Of course, the consolidation via the Lot Line Adjustment Plan and the development of the property as one single-family parcel does not make it impossible to construct one driveway on each of the historic lots. However, the applicable doctrine focuses on whether the *purpose* has become impossible to fulfill, not whether the easement is impossible to use. See id. ("[w]hen a change has taken place since the creation of a servitude that makes it *impossible as a practical matter to accomplish the purpose* for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude.") (Emphasis added). The purpose of any easement for the benefit of lot 21 arising through estoppel by deed – and assuming solely for the sake of argument that lots 23 and 25 also benefit from their own – was not simply to provide access to the land within those lots. Rather, the purpose for which any such easement arose would have been to provide independent access to each independently buildable lot. It is impossible to accomplish that purpose because the lots have been consolidated and developed as one property. As such, any easement that once existed for the benefit of lot 21 has terminated or expired. See Boissy, 162 N.H. at 393. Accordingly, applicable law does not support the Trial Court's holding, and this Court should reverse same and find that to the extent any easement arose through estoppel by deed for the benefit of lot 21, it terminated or expired when Loeffler consolidated the historic lots and developed them as one single-family parcel.

CONCLUSION

For the foregoing reasons, Bernier submits that the decisions of the Trial Court granting Loeffler's Motion for Partial Summary Judgment and denying Bernier's Motion for Reconsideration should be reversed.

ORAL ARGUMENT

The Appellant requests 15 minutes for oral argument before the full Court. Attorney Roy W. Tilsley, Jr., Esq. will argue on the Appellant's behalf.

RULE 16(3)(i) CERTIFICATION

I hereby certify that the decisions being reviewed are in writing and that copies thereof are appended to this Brief.

Respectfully submitted,

Paul Bernier

By his attorneys
Bernstein, Shur, Sawyer & Nelson, P.A.

Dated: July 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant has on this day been forwarded to Bernard H. Campbell, Esq., counsel for the Plaintiff/Appellee, via the Court's electronic filing system.

Dated: July 26, 2019

/s/ Brett W. Allard
Brett W. Allard, Esq.

ADDENDUM

FINAL ORDERS

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Thomas J Loeffler v Paul Bernier**
Case Number: **218-2018-CV-00074**

Enclosed please find a copy of the court's order of October 17, 2018 relative to:

Plaintiff's Motion for Partial Summary Judgment.

October 30, 2018

Maureen F. O'Neil
Clerk of Court

(218340)

C: Bernard H. Campbell, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

THOMAS LOEFFLER

v.

PAUL BERNIER

Docket No. 218-2018-CV-0074

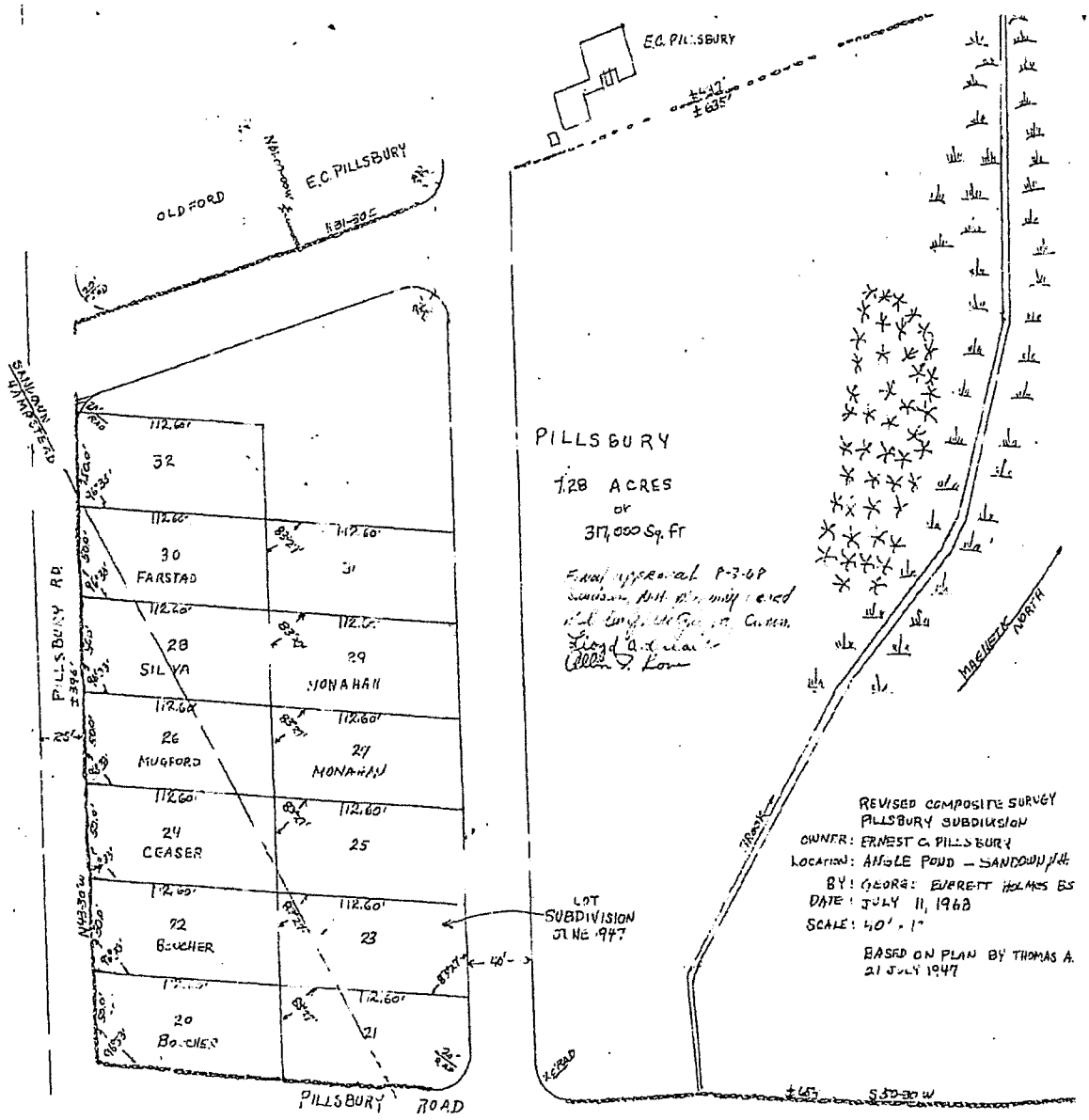
ORDER

On January 25, 2018, Plaintiff Timothy Loeffler ("Plaintiff") initiated this action against Defendant Paul Bernier ("Defendant"). See Doc. 1. The dispute centers on the extent to which Plaintiff may use and/or improve a right-of-way running along Plaintiff's property. Presently before the Court is Plaintiff's June 29, 2018 motion for partial summary judgment, wherein Plaintiff seeks a ruling "that Plaintiff has a right, under New Hampshire law, to access . . . Defendant's right-of-way at the proposed 'second access point.'"[1] See Doc. 17, at 2. Defendant objects. See Doc. 21; see also Doc. 24 (Pl.'s Reply). The Court held a hearing on the matter on September 25, 2018. For the reasons that follow, Plaintiff's motion for partial summary judgment is GRANTED.

Facts

The following facts are undisputed. Plaintiff and Defendant each own land that once belonged to Ernest Pillsbury. See Def.'s Obj., Exs. D–H. As shown in Exhibit D to Defendant's Objection (depicted, in part, on page 2, infra), by 1968 Pillsbury had subdivided and/or sold off the following lots from his land:

[1] The "second access point" would be located on Lot 21. See Doc. 18, ¶¶ 16–17; accord Doc. 17, Ex. D.



See id. at Ex. D.[2]

[2] Ernest Pillsbury originally owned the land in common with other members of his family. The Court need not specify the family members who also owned the land at any given time, because there is no dispute that each such family member signed the relevant deeds when conveying the lots at issue here. Thus, for the sake of simplicity, the Court will refer only to "Pillsbury" when discussing the grantor(s) of the relevant lots.

As shown above, Lots 21, 23, 25, 27, and 29 were each positioned adjacent to a right-of-way running from Pillsbury Road to Pillsbury's home. Id. Although Lot 21 had frontage on Pillsbury Road, Lots 23, 25, 27, and 29 had no road frontage. Id. Rather, each of those lots was bordered by either (1) other lots, or (2) the right-of-way. Id.

Plaintiff presently owns a portion of Lots 21 and 23, and all, or nearly all, of Lots 25, 27, and 29. See Pet. ¶ 10; see also id. at Ex. C (depicting lot line adjustment whereby the majority of Lots 21 and 23 was transferred to the owner of Lots 20 and 22); accord Def.'s Obj. Mem. 1. At the time when each of Plaintiff's lots was first carved out, Pillsbury owned the land underlying the right-of-way. See Def.'s Obj., Exs. D–H. Lot 29 was the first of the lots now owned by Plaintiff which was carved out by Pillsbury. See id. at Ex. E. The deed for Lot 29 described that lot, inter alia, as "proceeding along Lot No. 31 a distance of one hundred twelve and six tenths (112.6) feet to the Westerly side line of a twenty-foot right of way; thence turning a right deflection angle of 83 degrees and 27 minutes and proceeding along Westerly side line of said right of way a distance of fifty feet to a stake; thence turning a right deflection. . . ." Id. (deed dated June 19, 1948). In addition, the deed "further conveyed, as appurtenant to and to be used in connection with the above described premises a right of way over other lands of the above grantors to the public highway, for all necessary purposes of entrance and exit to the conveyed premises. . . ." Id.

In September of 1955, Nellie Monahan became the owner of Lot 29. See id. at Ex. G. Thereafter, in April 1966, Pillsbury conveyed Lot 27 to Monahan. See id. at Ex. F. The corresponding deed described Lot 27, inter alia, as "[b]eginning at a stake located at the Northeasterly corner of the conveyed premises at the Southwesterly side

of a 20 foot Right of way . . . ; thence Southeasterly Fifty (50) feet by said 20 foot Right of Way to a stake at Lot #25. . . ." Id.

Finally, as relevant here, Pillsbury deeded Lots 21, 23, and 25 to Albert and Maura Ceaser in July of 1968. See id. at Ex. H. The corresponding deed described these lots, inter alia, as:

> turning and running in a Northeasterly direction along Lot #27, land of Monahan for a distance of 112.60 feet to a 40 foot right of way and the Easterly corner of Lot #27, land of Monahan; thence turning and running in a Southeasterly direction along the 40 foot right of way for a distance of 150 feet, more or less, to the intersection of said 40 foot right of way and said Pillsbury Road at the said stone wall; thence turning and running in a Southwesterly direction along said Pillsbury Road . . . .

Id.

Standard of Review

In deciding whether to grant summary judgment, the Court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Purdie v. Attorney General, 143 N.H. 661, 663 (1999). "[S]ummary judgment may be granted only where no genuine issue of material fact is present, and the moving party is entitled to judgment as a matter of law." Id. (citation omitted); see also RSA 491:8-a, III (1997). An issue of fact is "material for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." Sandford v. Town of Wolfeboro, 143 N.H. 481, 484 (1999) (citation and quotations omitted). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, sufficient . . . to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial." Phillips v. Verax, 138 N.H. 240, 243 (1994) (citation and quotations omitted). In other words, the non-moving party may not rest

upon mere allegations or denials; instead, "[its] response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial." Panciocco v. Lawyer's Title Ins. Corp., 147 N.H. 610, 613 (2002).

Analysis

In this case, the parties disagree as to whether Lots 21, 23, 25, and/or 27 enjoy access rights to use the right-of-way located on Defendant's property. Plaintiff contends that, pursuant to the plain language of the relevant deeds, each of his lots enjoys such access rights. Defendant disagrees, and argues that a comparison of the relevant deeds belies any suggestion that Pillsbury intended to grant such rights to Lots 21, 23, 25, or 27.[3] Defendant further suggests that there are genuine issues of material fact which preclude an entry of partial summary judgment in this matter.

In essence, the parties disagree as to the proper interpretation of the relevant deeds. Because the proper interpretation of a deed is a question of law, Ettinger v. Pomeroy Ltd. P'ship, 166 N.H. 447, 450 (2014) (citation omitted), the Court may resolve such a dispute in the context of a motion for summary judgment, see RSA 491:8-a, III. When interpreting a deed, the Court must "give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time." Ettinger, 166 N.H. at 450 (citation omitted). "If the language of the deed is clear and unambiguous," the Court "will interpret the intended meaning from the deed itself

[3] Because Plaintiff has only sought summary judgment concerning his "right, under New Hampshire law, to access . . . Defendant's right-of-way at the proposed 'second access point,'"[3] see Doc. 17, at 2, and the second access point is located on Lot 21, the Court need not determine, at this juncture, whether Plaintiff has any such access rights in connection with Lot 27 (which was created via a different deed than the one that created Lots 21, 23, and 25).

without resort to extrinsic evidence." Id. (citation omitted). "If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms." Id. (citation omitted).

The New Hampshire Supreme Court has previously recognized that "[w]here property is conveyed in a deed and one or more of the calls is an abuttal on a private way there is a grant or at least a presumption of a grant of an easement in such way when the way is owned by the grantor." 700 Lake Ave. Realty Co. v. Dolleman, 121 N.H. 619, 623 (1981) (quoting 2 G. Thompson, Commentaries on the Modern Law of Real Property s 360, at p. 378 (1980 repl.)). "This rule of law has been recognized in this State since at least 1851." Dolleman, 121 N.H. at 623 (citing Greenwood v. The Wilton Railroad, 23 N.H. 261, 265 (1851)). In such a case, "[i]t is of no consequence . . . that the grantor did not intend to grant an easement, or that the easement is not one of necessity, because the grantor, and all claiming under him, are estopped by deed from denying such an easement exists." Dolleman, 121 N.H. at 623 (citations omitted).

In Dolleman, the New Hampshire Supreme Court emphasized the distinction between a situation in which "the face of the deed itself represents that the conveyed parcel borders on a way," as compared to "a case where the deed only refers to a plan which in turn indicates the existence or planned construction of streets and ways. . . ." Id. (citations omitted). The Dolleman court explained that "[a]lthough both situations appear similar, they involve two distinct rules of law . . . ." Id. (citations omitted). The court also noted that under New Hampshire law, where "restrictions appear on the face of the deed, they may be enforced as covenants, but if they appear outside the deed, an

equitable servitude might result depending on the grantee's awareness of the restrictions." Id. (citation omitted). Thus, "[i]n Greenwood v. The Wilton Railroad, the use of a way as a boundary in the deed operated as an estoppel against the grantor's denying the grantee's right to use the way." Dolleman, 121 N.H. at 624 (citing 23 N.H. at 265, and explaining that "[s]uch an estoppel is one by deed . . . because the deed on its face makes either an express grant or one arising by necessary implication and prevents the grantor from denying the representation made").

As the Dolleman court observed, although Greenwood was decided in 1851, it "has never been specifically overruled." Dolleman, 121 N.H. at 625. Accordingly, the Dolleman court applied Greenwood to the situation before it, "in which a deed use[d] a way as a boundary and the grantor own[ed] the way." Dolleman, 121 N.H. at 626. Citing Greenwood, the Dolleman court concluded that "[a]n implied easement" had "been created." Id. The Dolleman court explained that "[b]ecause the necessary implication contained by that description appear[ed] on the very face of the grantor's deed, he, and all parties in privity with him, [we]re estopped to deny that grant." Id.

The holdings in Dolleman and Greenwood are consistent with the general principle that "[i]n a conveyance or contract to convey an estate in land, description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied by the circumstances." See Restatement (Third) of Property (Servitudes) § 2.13 (2000) (collecting cases, and explaining that "[a] description of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way"); accord Annotation,

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R. 2d 461 (Originally published in 1956) (collecting cases) ("[I]t is generally held that where a street or other way is called for as a boundary in a conveyance of land, and the grantor owns the fee in the land represented as the way or street, he is estopped, as against the grantee, to deny that the street or other way exists, and an easement in such way passes to the grantee by implication of law.").

According to the Restatement, the basis for this rule "is the assumption that the grantor who uses such a description intends to include the use rights shown on the map, or in the street used as a boundary, and the grantee reasonably expects to receive them. The grantor's description, in effect, constitutes a representation to the grantee that the grantee will receive the use rights." Restatement (Third) of Property (Servitudes) § 2.13, cmt. a. The Massachusetts Appeals Court recently recognized and applied the foregoing principle, explaining that "[t]his principle of estoppel seems to have become a rule of law rather than a mere canon of construction," and noting that "[a] way created by estoppel . . . is not a way by necessity, and the right exists even if there be other ways either public or private leading to the land." Melrose Fish & Game Club, Inc. v. Tennessee Gas Pipeline Co., LLC, 52 N.E.3d 1089, 1093 (Mass. App. Ct. 2016) (citations and quotations omitted).

In this case, as in Dolleman, the deed to Lots 21, 23, and 25 "represent[ed] that the conveyed parcel[s] border[] on" the right-of-way. See Dolleman, 121 N.H. at 623 (citations omitted); Def.'s Obj., Exs. F & H. Thus, because the right-of-way was owned by Pillsbury at the time of the relevant conveyance, the deed establishes "a grant or at least a presumption of a grant of an easement in" the right-of-way. See Dolleman, 121

N.H. at 623. Accordingly, Pillsbury, "and all claiming under him, are estopped by deed from denying such an easement exists." Id. (citations omitted).

In view of the foregoing, the Court is unpersuaded by Defendant's argument that Pillsbury could not have intended to grant an easement to Lots 21, 23, or 25 because Lot 21 already had frontage on Pillsbury Road. As set forth above, "[a] way created by estoppel . . . is not a way by necessity, and the right exists even if there be other ways either public or private leading to the land." Melrose Fish & Game Club, Inc., 52 N.E.3d at 1093 (citations and quotations omitted); accord Dolleman, 121 N.H. at 623. Although the presumption concerning an easement may be overcome "if a different intent is . . . expressed or implied by the circumstances," see Restatement (Third) of Property (Servitudes) § 2.13, the existence of alternate means of access to a parcel is not a circumstance which adequately expresses or implies such a different intent, see id. If the Court were to hold otherwise, then easements recognized under this principle would always be "by necessity," and the law is clear that this is not the case, see Dolleman, 121 N.H. at 623; Melrose Fish & Game Club, Inc., 52 N.E.3d at 1093.

Similarly, the Court is unpersuaded by Defendant's argument that Pillsbury must not have intended to convey such an easement to Lots 21, 23, or 25 because the deed to those lots lacked the express language used in the deed to Lot 29. Compare Def.'s Obj. Ex. H, with Ex. E. As set forth above, "[i]t is of no consequence . . . that the grantor did not intend to grant an easement. . . ." Dolleman, 121 N.H. at 623. Moreover, the principle of "estoppel . . . by deed" turns on what a grantee would reasonably expect based upon the language used on the face of the deed. See Dolleman, 121 N.H. at 624; Restatement (Third) of Property (Servitudes) § 2.13 (explaining that "[a] description

of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way"); id. at cmt. a. (explaining that where a grantor uses a street "as a boundary . . . the grantee reasonably expects to receive . . . use rights"). There is no evidence that the original grantees of Lots 21, 23, or 25, or their assigns, would have conducted that comparison, thereby becoming apprised of Pillsbury's intent. Thus, although the language used in the various deeds may shed light on what Pillsbury intended, it would be unfair to give legal effect to that intention where the deed to Lots 21, 23, and 25, on its face, contained a "necessary implication" that the lots at issue would have an easement in the right-of-way. See Dolleman, 121 N.H. at 626.

In view of the foregoing, the Court concludes that because Pillsbury defined Lots 21, 23, and 25 by using the right-of-way "as a boundary in the deed" at a time when he owned the right-of-way, this "operated as an estoppel against" Pillsbury's (and now Defendant's) "denying the grantee's right to use the way." Dolleman, 121 N.H. at 624. Simply put, the undisputed facts compel the conclusion that Plaintiff is entitled to partial summary judgment with respect to his right to access and use the right-of-way from the proposed second access point on Lot 21.[4] See RSA 491:8-a.

[4] As set forth above, it is possible for the above-described presumption to be overcome where "a different intent is . . . expressed or implied by the circumstances." See Restatement (Third) of Property (Servitudes) § 2.13. Here, Defendant has pointed to circumstances which, in his view, express and/or imply such a different intent. However, for the reasons set forth above, the Court does not agree that the circumstances identified by Defendant can, as a matter of law, overcome the presumption. Thus, in the absence of any evidence which could competently rebut the presumption, the Court may grant summary judgment based upon the presumption. Cf. N.H. R. Ev. R. 301 ("In all actions and proceedings, unless the constitution, a statute, case law, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."). Moreover, although Defendant suggests that he may yet uncover additional relevant circumstances, such speculation is insufficient to defeat a motion for summary judgment. Cf. RSA 491:8-a, IV ("When a motion for summary judgment is made and supported . . . the adverse party may not rest upon mere allegations or denials . . . but. . . must set forth specific facts showing that there is a genuine issue for trial.").

Conclusion

Consistent with the foregoing, Plaintiff's June 29, 2018 motion for partial summary judgment—wherein Plaintiff seeks a ruling that he has a right to access Defendant's right-of-way at the proposed second access point on Lot 21—is GRANTED. In light of this ruling, and the limited nature of Plaintiff's summary judgment motion, the Temporary Order which the Court originally issued on June 29, 2018, see Doc. 19; see also Docs. 20, 25, is hereby LIFTED IN PART. Specifically, Plaintiff and his agents are no longer prohibited from conducting any construction work within the subject right-of-way—including the removal of trees, survey markers, or rocks—to the extent that such work is necessitated by, and directed related to, Plaintiff's ability to access the right-of-way at the proposed second access point. The prohibitions set forth in the Temporary Order shall otherwise remain in full force and effect, thereby barring Plaintiff and/or his agents from conducting any construction activities within the right-of-way which are not related to the second access point.

So Ordered.

October 17, 2018
Date

Marguerite L. Wageling
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Thomas J Loeffler v Paul Bernier**
Case Number: **218-2018-CV-00074**

Enclosed please find a copy of the court's order of January 08, 2019 relative to:

Order on Motion to Reconsider and Further Order on Motion to Stay

January 10, 2019

Maureen F. O'Neil
Clerk of Court

(523)

C: Bernard H. Campbell, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY SUPERIOR COURT

THOMAS LOEFFLER

v.

PAUL BERNIER

Docket No. 218-2018-CV-0074

ORDER ON MOTION TO RECONSIDER AND FURTHER ORDER ON MOTION TO STAY

This case centers on the extent to which Plaintiff Timothy Loeffler may use and/or improve a right-of-way owned by Defendant Paul Bernier. On October 17, 2018, the Court granted Plaintiff's motion for partial summary judgment vis-à-vis Plaintiff's "right to access Defendant's right-of-way at the proposed second access point. . . ." See Doc. 26, p. 11.[1] Defendant now moves for reconsideration, claiming that the Court relied on a legal theory that Plaintiff had not articulated himself, and thus Defendant "should [now] be permitted to assert additional defenses to" that theory. See Doc. 27, ¶¶ 8–9, 11; see also Doc. 29 (Pl's Obj.). Importantly, Defendant does not claim that the Court's reliance upon this legal theory was improper, or that the Court's rulings concerning the presence of an implied easement pursuant to that legal theory were otherwise erroneous. Rather, Defendant seeks leave to raise new arguments as to why Plaintiff may no longer utilize the implied easement recognized in the Court's October 17, 2018 Order. For the reasons that follow, Defendant's motion is **DENIED**.

[1] The Court also partially lifted a June 29, 2018 Temporary Order prohibiting Plaintiff from conducting any construction activities within the right-of-way. See Doc. 26, p. 11. However, by Margin Order dated November 30, 2018, the Court stayed "that portion of the . . . Order lifting in part the Temporary Order pending this Court's ruling on" Defendant's motion for reconsideration. See Doc. 28, p. 1.

Standard of Review

Under Superior Court Rule 12(e), a party moving for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended . . . ." Super. Ct. Civ. R. 12(e); see Broom v. Continental Cas. Co., 152 N.H. 749, 752 (2005) (noting that the decision to grant or deny a motion for reconsideration is within the trial court's discretion). Although "a party who has received an adverse ruling" may "seek reconsideration, the rule does not purport to authorize either party to submit further evidence bearing on the motion." See Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989) (discussing former Superior Court Rule 59-A). In addition, a party seeking reconsideration "cannot raise an issue for the first time in [a] motion for reconsideration when the issue was readily apparent at the time the party initially filed for relief." Appeal of Vicky Morton, 158 N.H. 76, 79 (2008) (summarizing, in part, the holding in Mt. Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 654–55 (2000)).

Analysis

As set forth above, Defendant contends that in concluding that Plaintiff had a right to access Defendant's right-of-way at the proposed second access point on Lot 21, the Court's October 17, 2018 Order relied on a slightly different legal theory than that urged by Plaintiff. Specifically, Defendant argues that Plaintiff claimed entitlement to an implied easement based upon the information contained in the original subdivision plan—which was referenced in the corresponding deeds—whereas the Court focused its analysis on the language of the deed(s) alone. Thus, in Defendant's view, he should

be allowed to assert the following new arguments as to why Plaintiff may no longer avail himself of the implied easement at issue:

> Plaintiff's claim of implied easements for the benefit of [L]ots 21, 23, and 25 fails – regardless of whether they arose by reference to the plan or estoppel by deed – because (1) the Plaintiff has abandoned any such easements; and (2) it is impossible to accomplish the purpose for which the easements were created.

See Doc. 27, ¶ 12.

The Court is unpersuaded by Defendant's arguments as to why he should be allowed to raise these new arguments at this juncture. As set forth above, Defendant concedes that Plaintiff claimed entitlement to an "implied easement." See id. Moreover, in seeking partial summary judgment concerning his implied easement claim vis-à-vis Lots 21, 23, and 25, Plaintiff noted: "Each of the three (3) lots . . . are depicted on the plan as bordering on the right-of-way, *and the deed describes it as a 'right of way.'*" See Doc. 17 Mem., p. 2 (emphasis added). Thus, in seeking partial summary judgment, Plaintiff relied on the information contained within the subdivision plan and the language of the deed. See id. Although Plaintiff may not have cited the cases on which the Court ultimately relied, he plainly argued that the language of the deed itself supported his implied easement claim. See id.

Moreover, in objecting to Plaintiff's motion for partial summary judgment, Defendant quoted the case of 700 Lake Ave. Realty Co. v. Dolleman:

> [w]here property is conveyed in a deed and one or more of the calls is an abuttal on a private way there is a grant *or at least a presumption* of a grant of an easement in such way when the way is owned by the grantor.

See Doc. 21 Mem., p. 8 (quoting, with alteration, Dolleman, 121 N.H. 619, 623 (1981)). Indeed, Defendant's objection cited Dolleman again in conjunction with a substantive

discussion of "an underlying principle of the doctrine of implied easements, which is one of estoppel":

> "An owner retaining land adjoining land being conveyed is prevented by equity from denying that an easement was conveyed if the conveyance is made under circumstances indicating the grantee justifiably relied on conveyance of an easement." See 17 New Hampshire Practice: Real Estate, Ch. 8, §8.02 (citing [Dolleman], 121 N.H. at 625; Gagnon, 107 N.H. at 509). Here, just as the original grantee to [L]ot 27 could not have justifiably relied upon the conveyance of an easement . . . neither could the original grantee of [L]ots 21, 23, and 25 have relied upon the conveyance of an easement because the lots were conveyed together and [L]ot 21 fronts directly on Pillsbury Road, rendering access to the [right-of-way] unnecessary.

Doc. 21 Mem., pp. 10–11.

Relying on, inter alia, Dolleman, the Court concluded in its October 17, 2018 Order that Lots 21, 23, and 25 enjoyed an implied easement over Defendant's right-of-way pursuant to the legal theory of estoppel by deed. See Doc. 26, pp. 6–10. Having (a) cited Dolleman; (b) discussed the legal theory of estoppel by deed; and (c) presented substantive (though unavailing) arguments against the application of that legal theory in his July 31, 2018 objection, Defendant cannot successfully argue that he "had no reason to meaningfully argue the estoppel by deed theory" prior to the Court's October 17, 2018 Order. See Doc. 27, ¶ 11.

Furthermore, Defendant has conceded that the two new arguments he now wishes to raise—abandonment and impossibility of purpose—might have undermined "Plaintiff's claim of implied easements for the benefit of [L]ots 21, 23, and 25 . . . regardless of whether they arose by reference to the plan or estoppel by deed. . . ." See id. at ¶ 12. Accordingly, it is unclear to the Court why the Court's reliance on the language of the deed, as opposed to the subdivision plan, impacted Defendant's need

to raise these arguments. In other words, Defendant has failed to articulate why, given that these new arguments could have potentially undermined a claim of implied easement based upon the subdivision plan, he did not assert these arguments in his July 31, 2018 objection. Simply put, the existence and relevance of Defendant's arguments concerning abandonment and impossibility of purpose were "readily apparent" prior to the Court's October 17, 2018 Order, and the Court therefore declines Defendant's request for leave to assert those new issues in the context of a motion for reconsideration. See Appeal of Vicky Morton, 158 N.H. at 79.

Before concluding, the Court notes that even if Defendant could raise the aforementioned new arguments at this juncture, those arguments would be unavailing. Defendant's theory of abandonment relates to the fact that in consolidating Lots 21, 23, 25, 27, and 29 into a single parcel, Plaintiff filed a Lot Line Adjustment Plan which showed a single proposed driveway without depicting "any other means of access to the" right-of-way. See Doc. 27, ¶ 14. In Defendant's view, "[t]he Lot Line Adjustment Plan indicates [] Plaintiff's intent to abandon any implied easements that may have come into existence . . . via estoppel by deed or otherwise" because the Lot Line Adjustment Plan did not show any "additional driveways." Id. at ¶ 17.

The Court is unpersuaded. As Defendant concedes, "[a]bandonment of an easement must involve clear, unequivocal, and decisive acts by the owner of the dominant estate manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence." Id. at ¶ 18 (citing Titcomb v. Anthony, 126 N.H. 434, 437 (1985)) (quotations omitted). Although Defendant argues that the consolidation of the lots at issue and the construction of a single-family home thereon

"has eliminated the purpose of any implied easements to the [once] independently buildable historic lots," see Doc. 27, ¶ 21, the Court noted in its October 17, 2018 Order that "'[a] way created by estoppel . . . is not a way by necessity, and the right exists even if there be other ways either public or private leading to the land.'" See Doc. 26, p. 9 (quoting Melrose Fish & Game Club, Inc. v. Tennessee Gas Pipeline Co., LLC, 52 N.E.3d 1089, 1093 (Mass. App. Ct. 2016)). Thus, the purpose of the implied easement at issue was to provide access, but not exclusive access, to the land comprising Lots 21, 23, and 25. The consolidation of those lots, and the construction of a home thereon, is not so inconsistent with the need for additional access along the right-of-way that the Court can deem the implied easement abandoned. See Titcomb, 126 N.H. at 437.

Indeed, as Plaintiff notes, the Lot Line Adjustment Plan does not contain an affirmative representation that Plaintiff would never seek to construct additional access points along the right-of-way. See Doc. 29, p. 2. Moreover, Defendant has not established Plaintiff's failure to note the possibility of additional access points along the right-of-way in his Lot Line Adjustment Plan will now bar him from obtaining town approval for the creation of such additional access points. Rather, just as the original grantee of Lots 21, 23, and 25 could use the right-of-way to obtain additional points of access to those lots, Plaintiff may continue to use the right-of-way to obtain additional access to his home at the proposed second access point on Lot 21.[2] Thus, even if Defendant could properly raise his abandonment argument at this juncture, that argument would not warrant reconsideration of the Court's October 17, 2018 Order.

[2] Because Plaintiff's summary judgment request was limited to the proposed second access point, the Court does not consider here whether any additional points of access to Lots 21, 23, and 25 would be permissible.

For similar reasons, Defendant's argument concerning frustration of purpose would also be unavailing. As Defendant notes, "[t]he impossibility of purpose doctrine provides that 'an easement for a particular purpose terminates when it becomes impossible to use the easement for the purpose intended.'" See Doc. 27, ¶ 23 (quoting Boissy v. Chevion, 162 N.H. 388, 393 (2011)). To the extent that the implied easements at issue here—which arose out of the legal theory of estoppel by deed—can be characterized as serving a "particular purpose," that purpose was simply to provide access to the land contained within Lots 21, 23, and 25. Because the Court has previously ruled that the implied easements could be used to provide additional points of access to the land contained within those lots, their consolidation into a single parcel did not frustrate the purpose of the implied easement: Plaintiff can still use the right-of-way to gain additional points of access to the land contained within Lots 21, 23, and 25. Despite the presence of a single residence on that land, there could be any number of reasons why Plaintiff would need additional access points along the right-of-way. Thus, even if Defendant could properly raise his frustration of purpose argument here, that argument would not warrant reconsideration of the Court's October 17, 2018 Order.

In light of the foregoing, Defendant's motion for reconsideration is **DENIED**. The Court now turns to Defendant's motion to stay, which asked the Court to stay its lifting of its June 29, 2018 Temporary Order pending, inter alia, resolution of the motion for reconsideration discussed herein. As noted supra, on November 30, 2018, the Court granted Defendant's stay request pending its ruling on Defendant's motion for reconsideration. The Court has now denied Defendant's motion for reconsideration. Thus, absent a further order from this Court, the term of the stay has ended.

In his motion to stay, Defendant alternatively asked that the stay continue pending an appeal of the Court's ruling on Plaintiff's motion for partial summary judgment. Plaintiff responds to Defendant's request by suggesting that if the Court denies the motion for reconsideration, the Court should bifurcate the issues in this litigation to allow for an immediate appeal of the access issue. Plaintiff does not specifically address Defendant's request to stay. Interestingly, Defendant has not responded to Plaintiff's bifurcation suggestion. The Court has considered these pleadings and rules that Defendant's motion to continue the stay pending appeal is **CONDITIONALLY GRANTED**, subject to Defendant's assent to bifurcation of the issues as Plaintiff has suggested.

Superior Court Rule 46 allows for an appeal of one issue when others remain pending if the Court refers to the rule, identifies the specific order that is to be treated as final on the merits, explains why the issue should be bifurcated, and makes a finding that there is no just reason for a delay as to the claim that is to be severed from the rest of the litigation. See Super. Ct. Civ. R. 46(c)(1). Upon Plaintiff's motion, the Court is inclined to make such a finding here. Defendant would then be required to file an appeal within the prescribed time. If Defendant assents to Plaintiff's motion to bifurcate, the Court will **GRANT** Defendant's motion to stay pending appeal. If the Rule 46 appeal is denied by the Supreme Court, this Court will lift its stay of its June 29, 2018 Temporary Order. Alternatively, if Defendant does not assent to Plaintiff's motion to bifurcate, Defendant's motion to stay will be **DENIED** and the above-described conditional stay will be immediately lifted.

The Court will require Plaintiff to file his motion to bifurcate no later than January 18, 2019. Defendant shall have 10 days to respond. The Court thereafter will review the pleadings and issue an order.

Conclusion

For the reasons set forth above, Defendant's November 9, 2018 motion for reconsideration is **DENIED**. Defendant's request that the Court continue to stay its lifting of its June 29, 2018 Temporary Order pending an appeal of the Court's ruling on Plaintiff's motion for partial summary judgment is **CONDITIONALLY GRANTED**, consistent with the terms outlined above. The Court defers ruling on the balance of Defendant's motion to stay pending further filings as noted herein.

So Ordered.

January 8, 2019
Date

Marguerite L. Wageling
Presiding Justice