THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2019-0197

EDWARD E. FAVART

v.

STEVEN M. OUELLETTE AND KEVIN F. OUELLETTE

Appeal from Lower Court Decision
(Cheshire County Superior Court)

BRIEF OF APPELLANT, EDWARD E. FAVART

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7. Whether the Trial Court erred in determining that any easement by implication endured as a vested right of Defendants under RSA 477:26. Add. at 40.

[1] Citations in this Brief are as follows: "Add." refers to Addendum to this Brief containing the Trial Court's March 8, 2019 Notice of Decision being appealed; "Apx." refers to Appellant's Appendix; "Transcript" refers to the trial transcript.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

STATEMENT OF THE CASE

This Appeal challenges the Superior Court Decision (Ruoff, J.) (the "Decision" Add. at 33) finding an easement by implication burdening a portion of real estate in Fitzwilliam, New Hampshire owned by Appellant, Edward E. Favart ("Favart"), and benefitting adjacent real estate owned by Appellees, Steven M. Ouellette and Kevin F. Ouellette ("Ouellette"). The Favart real estate comprises about 5.7 acres, with frontage on Turnpike Road to the west, and water frontage on Sip Pond to the east. The Ouellette real estate comprises about 1.46 acres abutting the Favart real estate, with frontage on Turnpike Road to the west, and no water frontage on Sip Pond to the east. Apx. at 5; 7; 8; 10.

The easement by implication found by the Decision locates the rights on a specific beach and ledge area (the "Implied Easement Location")[2] on a portion of the Favart real estate's water frontage on Sip Pond, and includes within the scope of the easement by implication the right to gain access to the Implied Easement Location over the Favart real estate from the Ouellette real estate, the right to access Sip Pond from the Implied Easement Location, and the right to permanently maintain a dock in Sip Pond adjacent to the Implied Easement Location. Add. at 34; 40.

As detailed below, the Favart real estate and the Ouellette real estate were part of a larger parcel (containing about 15.5 acres) in unitary ownership until 1961 among four siblings (Hilma N. Koskola, Henry A. Anderson, Selma L. Michaelson, and Lillian E. Bellis). Apx. at 11. In 1961 the parcel was subdivided into four separate lots, with one lot conveyed to each sibling. Of the four lots, only one lot was further subdivided. Apx. at 16; 18; 21; 23.

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[2] Although the easement by implication is not shown on any plans, the testimony established that the claim of Ouellette for the Implied Easement Location is the area shown on the 1992 Plan (Apx. at 5) at the approximate location of the area of water frontage of Lot 8 on the 1992 Plan, where the dark shaded area labeled "LEDGE" intersects at the water frontage with the area labeled "BEACH AREA" to the north. The dock installed in the water adjacent to this area in 2016 is located just south of these two points. [Apx. at 5 and Add. at 40.

From 2004 – 2011, Favart acquired through a series of purchases ownership of his real estate. Apx. at 56; 58; 63; 65. Steven Ouellette acquired ownership of the Ouellette real estate in 2007 and Kevin Ouellette in 2016.[3] Apx. at 60; 75. This litigation ensued in 2016 after Ouellette installed and began using a dock for the first time in the water adjacent to Implied Easement Location.

The Decision specifically finds no express easement or easement by prescription benefitting the Ouellette real estate over the Favart real estate. Add. at 36 (footnote 2); 38. No deeds in the chain of title to the Favart or Ouellette real estate grant easement rights for water access or for a dock at the Implied Easement Location, and no plans show rights in favor of Ouellette or others on the Implied Easement Location.

STATEMENT OF FACTS

Chronology of Written Instruments Relating to the Real Estate.

The real estate at issue was in unitary ownership until 1961, when it was subdivided and conveyed out as four separate lots. Apx. at 6. The only written evidence on which to find an easement by implication are documents recorded in the Cheshire County Registry of Deeds, and one unrecorded plan (listed below). Since review of relevant documents in the Cheshire County Registry of Deeds is critical to analysis of finding an easement by implication, the documents are described and listed below in chronological order of recording date or date of document.

1. By deed dated June 9, 1947 and recorded July 26, 1961 Susanne Anderson conveyed 13 parcels of land, including the real estate at issue, to her four children: Hilma N. Koskola, Henry A. Anderson, Selma L. Michaelson, and Lillian E. Bellis, recorded in Book 684, Page 103. Apx. at 11.

2. Plan entitled "William Anderson Est." dated April 1961 (the "1961 Plan") recorded in Plan Book 11, Page 53B of the Cheshire County Registry of Deeds, shows the real estate at issue subdivided into four lots each with similar acreage, similar frontage on Sip Pond, and similar frontage on Turnpike Road.

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[3]A reduced version of the 1992 Plan, Apx. at 40, shows the Favart real estate highlighted in yellow and the Ouellette real estate highlighted in pink.

The Plan shows no easements of any kind, and shows a broken dotted line indicating a driveway, running from Turnpike Road along and within Lot 1 and Lot 2. The Plan does not identify any beach area or ledge area on lot 3 or the other lots. Apx. at 10.

3. By deeds recorded July 26, 1961, the four siblings and grantees of the deed referenced in #1, above, conveyed the real estate, one lot to each sibling, per the 1961 Plan, as follows:

3A. Lot 1 to Irene Koski. Book 684, Page 118 of the Cheshire County Registry of Deeds. Apx. at 23.

3B. Lot 2 to Lillian E. Bellis. Book 684, Page 113 of the Cheshire County Registry of Deeds. Apx. at 18.

3C. Lot 3 to Henry A. Anderson. Book 684, Page 111 of the Cheshire County Registry of Deeds. Lot 3 is conveyed with no right of way for access from Turnpike Road over lots 1 and 2. Lot 3 is conveyed with no encumbrances This lot is not encumbered by any easements rights benefitting the other lots. Apx. at 16.

3D. Lot 4 to Selma Michaelson Inki. Book 684, Page 117 of the Cheshire County Registry of Deeds. Apx. at 21.

The four lots contain, respectively: 5.2 acres, 3.6 acres, 3.4 acres, and 3.3 acres; Turnpike Road frontage of about 200 feet, 200 feet, 200 feet, and 235 feet; and water frontage on Sip Pond of about 240 feet, 160 feet, 160 feet, and 210 feet.[4] Apx. at 5; 6. None of the 1961 deeds creating the four lots conveys the lots with, or subject to, any rights of way, easements, or servitudes referencing the other lots.

4. From 1964 through 1975, Lillian E. Bellis, the owner of Lot 2 by virtue of the deed cited in #3B, above, subdivided Lot 2 into seven separate lots (the "Bellis lots"). Five of the seven lots were conveyed without reference to a

[4]Lot 2 (conveyed to Lillian E. Bellis in 1961) and Lot 3 (conveyed to Henry A. Anderson in 1961) are the lots most pertinent to this appeal; the Ouellette real estate is part of Lot 2, and the Favart real estate comprises the remainder of Lot 2 and all of Lot 3.

subdivision plan, recorded or unrecorded. Apx. at 25. The seven lots were conveyed as follows:

4A. Parcel with frontage on Sip Pond to Henry A. Anderson by deed recorded August 20, 1964 in Book 724, Page 577 of the Cheshire County Registry of Deeds (Lot 1 on a plan recorded in 1992, #5, below). Apx. at 26.

4B. Parcel with no water frontage or road frontage to Henry A. Anderson by deed recorded September 3, 1964 in Book 725, Page 210 of the Cheshire County Registry of Deeds (Lot 2 on a plan recorded in 1992, #5, below). Apx. at 27.

4C. Parcel with no water frontage or road frontage to Robert A. Anderson by deed recorded September 10, 1964, and recorded in Book 725, Page 211 of the Cheshire County Registry of Deeds (Lot 3 on a plan recorded in 1992, #5, below). This deed conveys with it a "right of way fifteen feet wide on the land of Lillian Bellis and bounding the land of Henry Anderson [#4A, above] to the shore of the Sip Pond." This deed also conveys a "right of way on the Westerly side of the old turnpike road leading from Fitzwilliam to Winchendon across the land of Lillian Bellis to the above-mentioned lot." Apx. at 28.

4D. Parcel with no water frontage or road frontage to Henry A. Anderson by deed recorded April 27, 1965 in Book 733, Page 533 of the Cheshire County Registry of Deeds (Lot 4 on a plan recorded in 1992, #5, below). Apx. at 31.

4E. Parcel with road frontage on Turnpike Road to Henry A. Anderson by deed recorded April 27, 1965 in Book 733, Page 534 of the Cheshire County Registry of Deeds (Lot 5 on a plan recorded in 1992, #5, below). Apx. at 32.

4F. Unrecorded plan dated July 10, 1973 entitled "Remaining Land Of Lillian Bellis" dated July 10, 1973" showing the Bellis lots. No easement is shown on this plan as running from the Bellis lots to Lot 3 or Lot 4 of the 1961 Plan. Apx. at 7.

4G. Two parcels conveyed in one deed, one parcel with water frontage on Sip Pond and one with frontage on Turnpike Road, to Frank A.

Michaelson and Joan Michaelson, husband and wife, by deed recorded February 20, 1975 in Book 895, Page 94 of the Cheshire County Registry of Deeds.[5] This deed describes the lots by reference to the unrecorded July 10, 1973 Plan, #4F above, and are also shown as Lots 6 and 7 on a plan recorded in 1992, #5, below. Both parcels are conveyed subject to and with the benefit of the access driveway from Turnpike Road to the lots by specific reference (in quotations) to the name given that driveway ("Right of Way to Sip Pond") on the unrecorded July 10, 1973 Plan. Apx. at 7; 35.

5. Plan recorded July 13, 1992 (the "1992 Plan") entitled "Plan of Lands in Fitzwilliam, NH owned by Robert H. Anderson and Annie S. Anderson Tax Map Reference: Map 26-Lots 8 & 10" in Cabinet 11, Drawer 6, Slide 782 of the Cheshire County Registry of Deeds. Apx. at 5. The Bellis lots (Lot 2 on the 1961 Plan) are shown as Lots 1-7 on the 1992 Plan, and Lot 3 on the 1961 Plan is Lot 8 on the 1992 Plan. The 1992 Plan is a 15+ year after-the-fact survey showing the location and boundaries of the previously conveyed Bellis lots and the lot conveyed in 1961 to Henry Anderson, Lot 3 on the 1961 Plan. There was no dispute at trial regarding the accuracy of the boundaries shown on the 1992 Plan.

No easement is shown on the 1992 Plan across Lot 8 (Lot 3 of the 1961 Plan). Apx. at 5.

The 1992 Plan "Detail" shows a "15' WIDE R.O.W." from Sip Pond along the north side of Lot 6 to the Lot 6 boundary with Lot 1. This is the location of the right of way reserved to Robert Anderson in deed #4C, above (Apx. at 28), which grants a right of way over Lot 6 to Sip Pond. It is important to note that this right of way is <u>not</u> the Implied Easement Location in the Decision; the Implied Easement Location is located on Lot 8 (Lot 3 on the 1961 Plan), north of Lot 1 on the 1992 Plan. Add. at 34; 40, Apx. at 5.

6. Plan recorded April 29, 1993 entitled "SIP POND, LOT LINE ADJUSTMENT TO CORRECT VIOLATION OF BUILDING LOCATION

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[5]Frank Michaelson, a/k/a Frank Michelson, was the son of Selma Michaelson Inki (the sibling conveyed Lot 4 in 1961, #3D, above), and nephew of Henry A. Anderson, the owner of Lot 3. Apx. at 139.

BOUNDARY LINE CHANGE BETWEEN LAND OWNED BY IRENE N. KOSKI AND LAND OWNED BY FRANK AND JOAN MICHELSON" at Cabinet 11, Drawer 8, Slide 928 of the Cheshire County Registry of Deeds. This plan shows no easements or water rights over or for the benefit of any lots, including Lot 3 on the 1961 Plan. It shows driveway access from Turnpike Road to the Bellis lots on a road labeled "Right of Way to Sip Pond Cottages." Apx. at 8.

7. Deed (corrective) recorded March 8, 1995 from Lillian Jean, formerly Lillian E. Bellis (one of the four siblings conveyed a lot in 1961, #3B, above), conveying all her right, title, and interest in and to Lot 3 on the 1961 Plan (conveyed in 1961 to Henry A. Anderson, #3C, above) to Annie S. Anderson (the widow of Henry A. Anderson). Book 1517, Page 140 of the Cheshire County Registry of Deeds. The deed states "[m]eaning and intending to convey hereby all my right, title and interest in and to the foregoing property however acquired." This deed contains no reference to any easement reserved over Lot 3 for the Bellis lots. Apx. at 48.

8. Deed (corrective) recorded March 8, 1995 from Irene Koski (one of the four siblings conveyed a lot in 1961, #3A, above) conveying all her right, title, and interest in and to Lot 3 on the 1961 Plan (conveyed in 1961 to Henry A. Anderson, #3C, above) to Annie S. Anderson (the widow of Henry A. Anderson). Book 1517, Page 144 of the Cheshire County Registry of Deeds. Apx. at 50. The deed states "[m]eaning and intending to convey hereby all my right, title and interest in and to the foregoing property however acquired." This deed contains no reference to any easement reserved over Lot 3. Apx. at 50.

9. Deed recorded March 17, 1995 from Irene Koski (the owner of Lot 1 on the 1961 Plan, #3A, above) conveying Lot 1 on the 1961 Plan and revised on the Plan at #6, above. Book 1517, Page 714 of the Cheshire County Registry of Deeds. Apx. at 5. The deed contains no easement over Lot 3 on the 1961 Plan, but conveys a "Right of Way To Sip Pond Cottages" shown on the Plan at #6, above. Apx. at 54.

10. Deed recorded January 27, 2004 from Annie S. Anderson to Favart conveying Lot 3 on the 1961 Plan (Lot 8 on the 1992 Plan) for $80,000. Book 2105, Page 919 of the Cheshire County Registry of Deeds. The deed conveys the lot subject to no easements or rights of way, but states it is subject to all matters shown on the 1992 Plan. Apx. at 56.

11. Deed recorded September 16, 2004 from Frank A. Michaelson and Joan Michaelson to Favart conveying Lot 6 on the 1992 Plan for $35,000. Book 2177, Page 52 of the Cheshire County Registry of Deeds. Like the deed by which Michelson acquired Lots 6 and 7 (#4G, above; Apx. at 35), this deed makes reference to the unrecorded 1973 plan, and conveys Lot 6 subject to and with the benefit of the access driveway from Turnpike Road to the lots by specific reference to the name given that driveway ("Right of Way to Sip Pond") on the July 10, 1973 Plan. Apx. at 58.

Frank A. Michelson and Joan Michelson still owned Lot 7 on the 1992 Plan at the time of this sale. See deed at #4G, above and Apx. at 35. No easement was reserved for the benefit of Lot 7 in the location labeled "15' WIDE R.O.W." on the north side of Lot 6 on the 1992 Plan.

12. Deed recorded August 1, 2007 from Frank A. Michaelson and Joan Michaelson conveying to Steven M. Ouellette Lot 7 on the 1992 Plan by non-contractual transfer. Book 2454, Page 512 of the Cheshire County Registry of Deeds. This deed restates language in the source deed referenced in #4G, above, and conveys Lot 7 subject to and with the benefit of the access driveway "to other lands" from Turnpike Road and references the July 10, 1973 Plan, #4F, above. Apx. at 60.

This deed does not purport to grant an easement over the "15' WIDE R.O.W. across the north side of Lot 6 shown on the 1992 Plan and does not grant an easement of any kind over Lot 8 of the 1992 Plan (Lot 3 on the 1961 Plan).

13. Deed recorded August 13, 2010 from Janice M. Anderson conveying to Favart Lot 3 on the 1992 Plan for $10,000 (with the source of title being #4C, above). Book 2649, Page 818 of the Cheshire County Registry of Deeds. This deed conveys with it the same "right of way fifteen feet wide on the land of

Lillian Bellis and bounding the land of Henry Anderson to the shore of the Sip Pond" conveyed in #4C, above. This right of way encumbers Lot 6 on the 1992 Plan, which was acquired by Favart in the deed at #11, above. This deed also conveys the same "right of way of the westerly side of the Old Turnpike Road leading from Fitzwilliam to Winchendon across the land of Lillian Bellis to the above-mentioned lot" conveyed in #4C, above. Apx. at 63.

14. Deed recorded March 28, 2011 from Ruth A. Lafreniere conveying to Favart Lots 1, 2, 4, and 5 on the 1992 Plan for $25,000. Book 2685, Page 873 of the Cheshire County Registry of Deeds. Apx. at 65.

15. Deed recorded June 30, 2016 from Steven M. Ouellette conveying to Steven M. Ouellette and Kevin F. Ouellette Lot 7 on the 1992 Plan by non-contractual transfer. Book 2949, Page 1228 of the Cheshire County Registry of Deeds. Apx. at 75.

From the time of the 1961 subdivision and prior to ownership by Favart beginning in 2004, no portions of the four lots were again in the same unitary ownership. Thus, to exist, the easement by implication must have arisen in 1961 with the subdivision of the four lots.

Testimony at Trial Regarding Activity at the Implied Easement Location.

No testimony was offered at trial regarding use of the four parcels prior to severance in 1961.

Favart only testified to activity at the Implied Easement Location from after the date of his 2004 purchase of Lot 3 on the 1961 Plan. He testified his access to Lot 3 was via a driveway on Lot 3 from Turnpike Road. Transcript (Day 1) at 10. He also testified that when he purchased Lot 6 on the 1992 Plan from the Michelsons, there was a dock adjacent to the Lot 6 water frontage. Transcript (Day 1) at 30.

Steven Ouellette Testimony.

Steven Ouellette, son of Joan Michelson and stepson of Frank Michelson, testified he was born in 1957 and thus would have been 4 years old or less in 1961 at the time of severance of title into the four lots. Transcript (Day 2) at 261.

Regarding the use of the Implied Easement Location after 1961, Steven Ouellette's testimony confirms such use was permissive, and available to anyone renting cabins on the four lots or visiting the four lots. Transcript (Day 2) at 268-269.

Steven Ouellette testified no permanent structures were placed on Lot 3 as part of the any claimed rights. Transcript (Day 2) at 273.

Steven Ouellette confirmed the 2016 placement of the dock by Kevin Ouellette adjacent to the Implied Easement Location was a "new spot." Transcript (Day 2) at 270.

Kevin Ouellette Testimony and Interrogatory Answers.

Kevin Ouellette, another son of Joan Michelson and stepson of Frank Michelson, testified he was 63 years old on the date of trial, August 9, 2018, and began going to the property at age 6. Transcript (Day 1) at 142; 180. Thus, in 1961 he was 6 years old at the time of severance of title into four lots. In his answers to interrogatories, he states he began using the beach on the Implied Easement Area in 1966. Apx. at 138.

Kevin Ouellette testified the four siblings who owned the four lots got along well and there was "no problem with any of the individual brothers and sisters with people going to other people's lots." Transcript (Day 1) at 183.

Kevin Ouellette confirmed that Lot 4 on the 1961 Plan has its own access from Turnpike Road. Transcript (Day 2) at 209-210.

Kevin Ouellette testified the dock he installed in 2016 adjacent to the Implied Easement Area was installed for the first time in 2016, and prior to that he had "never installed a dock adjacent to the ledge and beach area on Lot 8" and admitted "there never was a dock adjacent to Lot 8." Transcript (Day 1) at 199-200; Transcript (Day 2) at 206.

Kevin Ouellette testified he did not apply to New Hampshire Department of Environmental Services for a dock permit until August 30, 2017, more than a year after installing the dock. He admitted the application was rejected and no other application was filed for the dock. Transcript (Day 2) at 229-231.

Joan Michelson Testimony.

Joan Michelson testified she first began going to Sip Pond "around '61, right in there." Transcript (Day 2) at 280-281; 296. She learned of the ownership of the four lots by the four siblings only after she began visiting the lots after severance of title:

Q So let's talk about the background of your knowledge of this area when you started going there in the '60s. Did you have any real knowledge of the different rights and so forth of people when you started going there in the '60s with Frank Michelson?

A It was always done before I went there. It was a family thing. And any --

Q You had no knowledge of it at that time when you first started going there?

A No.

Q But then you got to know the family members who owned the properties?

A And the different ones that rent the camps or whatever, you know.

Transcript (Day 2) at 298-299.

Joan Michelson acknowledged the permissive use granted by Henry Anderson (the owner of Lot 3 on the 1961 Plan) of the beach area on Lot 3 on the 1961 Plan by anyone renting cabins on his property, or anyone from the public who came on to the properties:

Q Okay. And at that time, when you started going there with frequency, and in the '60s and '70s, everyone got along, and there were no issues about going onto other people's properties --

A No, there wasn't.

Q -- and using things?

A No.

Q Okay. And so Henry Anderson's lot 8 on this plan. Henry Anderson had rental cabins on it, didn't he?

A He the New Yorkers, yes.

Q Yes.

A And the fishermen, like that, yeah.

Q And so Henry Anderson freely allowed anyone who wanted to come onto the property and go to the beach and rock to come onto it, correct?

A Correct. It all started with the -- his mother and father.

Q Well, you weren't around when his mother and father were there, correct?

A No, but I was around talking with Henry and -- and Selma.

Q Okay. And so anybody from the public could go onto the property --

A That's true.

Q -- and use that beach.

A That's right.

Q You have to let me finish my question before you answer or else the record will get a little confusing.

A All right.

Q Okay?

A Um-hum.

Q And in fact, you mentioned that at one time there was a refreshment stand set up near the beach --

A That's right.

Q -- that sold --

A Yeah.

Q -- that sold refreshments to the members of the public, and members who were staying on the different lots, correct?

A Correct.

Q All that said, you were aware, weren't you, that Henry Anderson owned lot 8 on which the beach and rock were located, right?

A Right.

Q Okay. And the testimony of your sons -- and I want to ask if you agree -- was that the owners of the other four lots we've described, the siblings, all used the property in the same open manner.

A Yes.

Transcript (Day 2) at 299-301. See also Deposition of Joan Michelson, Apx. at 105 (Deposition, p. 34, lines 15-23; p. 35, lines 4-17); 108 (Deposition, p. 45, lines 15-23; p. 46, lines 1-7).

When Joan Michelson and Frank Michelson sold Lot 6 (on the 1992 Plan) to Favart (deed described at #11, above), there was a dock in the water frontage off Lot 6, south of the cottage on Lot 6. Transcript (Day 2) at 314; Deposition of Joan Michelson, Apx. at 107-108 (Deposition, p. 44, lines 16-23; p. 45, lines 1-11).

SUMMARY OF ARGUMENT

The Decision errs in finding an easement by implication in the Implied Easement Location, and that the scope of the easement by implication to include an adjacent dock, because prior to severance of title in 1961 there was no physical evidence of a permanent and obvious servitude, no recorded or unrecorded written agreement evidencing an easement by implication, and no evidence of use prior to 1961 to support an easement by implication.

The Decision errs in finding that RSA 477:26 gives support for an easement by implication because there is no evidence the easement by implication was established or recognized by the parties prior to or after severance of title in 1961.

ARGUMENT

Standard of Review

The existence of an easement by implication is a question of fact for the trial court, which must be reversed if a reasonable person could not have reached the same conclusion based on the evidence presented. *Choquette v. Roy*, 159 N.H. 504 (2015). This Court will "accord deference to the trial court's findings of historical fact, where those findings are supported by evidence in the record." *Burke v. Pierro*, 159 N.H. 504, 508 (2009). This Court reviews the trial court's application of law to the facts *de novo*. *Smith v. HCA Health Services of N.H.*, 159 N.H. 158, 160 (2009), and will "uphold a trial court's equitable order unless it constitutes an unsustainable exercise of discretion." *Burke v. Pierro*, 159 N.H. 504, 508 (2009).

I. The Trial Court Decision erred in finding an easement by implication, as no evidence satisfied the elements required by New Hampshire law to support such a finding.

A. Elements to establish an easement by implication.

Under New Hampshire law, an easement can only be created by: (1) written conveyance; (2) prescription; or (3) implication. *Soukup v. Brooks*, 159 N.H. 9, 13 (2009). The Decision only finds an easement by implication was established. Add. at 34; 40.

This Court in *Blaisdell v. Raab*, 132 N.H. 711, 716 (1990) sets forth the requirements of an easement by implication:

> The rule concerning easements by implication is that an easement is presumed to exist if during unity of title the owner imposes an apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial. However, since this doctrine is based on the theory of an implied grant, the circumstances surrounding the conveyance control. The question is whether or not the parties could reasonably have thought that the right was not granted. The law is well settled that an easement by implication will not be found merely because it would be convenient to have the grant. An easement by implication arises only because the parties so agreed.

Blaisdell v. Raab, 132 N.H. 711, 716 (1990) (citations and quotations omitted).

An easement by implication can arise by "prior use" or by "common plan or development." As to prior use, see *Blaisdell v. Raab*, 132 N.H. 711, 716 (1990) and *Lynn v. Wentworth by the Sea Master Association*, 169 N.H. 77, 82 (2016); as to common plan, see *Soukup v. Brooks*, 159 N.H. 9, 13 (2009) and *Lynn v. Wentworth by the Sea Master Association*, 169 N.H. 77, 82-83 (2016).

B. The evidence fails to meet the required elements of an easement by implication.

i) No evidence of establishment during unity of title in one owner or owners.

Unity of title ended for the real estate in 1961 with the recording of the deeds to each of the four lots, one to each sibling. Apx. at 32. Thus, evidence supporting an easement by implication must exist prior to the 1961 deeds.[6] No documents recorded in the Cheshire County Registry of Deeds prior to (or after) 1961 contain evidence to support an easement by implication. Further, the only testimony regarding activity in support of an easement by implication was from Joan Michaelson, Steven Ouellette and Kevin Ouellette, and all three testified to activity that took place after 1961. Transcript (Day 2) at 280-281; 296; 299-301; Transcript (Day 2) at 268-269; Transcript (Day 1) at 142; 180.

The Decision errs in citing this testimony as support for the easement by implication and even acknowledges that "[e]vidence at trial established that Defendants and their families (who are descendants of the Andersons) used the property, specifically the "beach" along Lot 3 and the right of way to access Sip Pond, for 40 years prior to the filing of this suit." Add. at 39 (emphasis added). As suit was filed in 2017, forty years prior is 1977, 15 years after severance of title of the four lots in 1961.

[6]The Decision recognizes, stating for "any easement to exist, it must be an easement by implication, created when the lots were first subdivided" - a reference to the 1961 deeds for the four lots. Add. at 38.

ii) During unity of title prior to 1961, no imposition of an apparently permanent and obvious servitude on one tenement in favor of another, and circumstances surrounding the conveyance suggest no servitude.

Prior to the 1961 deeds severing the unity of title, no writing exists indicating an intention by the four sibling owners (or their mother as the sole owner before them) to place the easement by implication at the Implied Easement Location. There is no language granting or referencing rights at the Implied Easement Location on the 1961 Plan or set out in the 1961 deeds to the four lots. The Decision correctly acknowledges this, stating, "although none of the deeds that created these four lots contain, create, or reserve any expressed easements or rights of way…" (Add. at 35) and "if such an easement over Lot 3 exists, it must be by implication or prescription, because none of the 1961 conveyance [sic] expressly created one." Add. at 36 (footnote 2).

In addition, the circumstances surrounding the 1961 deeds, conveying lots of similar size and configuration, with similar water frontage and road frontage, confirm no easement by implication was intended.

Another circumstance of great significance is that *after* 1961, the owners of the Lot 1 and Lot 2 on the 1992 Plan were in a position to document and reference an easement by implication at the Implied Easement Location, but did not do so: nothing is stated by Lillian E. Bellis (the owner of Lot 2 on the 1961 Plan) in deeds conveying the Bellis lots or on her Plan of the Bellis lots (#4A-4F and #7 in Statement of Facts, above, Apx. at 25-37); nothing is stated by Irene Koski (the owner of Lot 1 on the 1961 Plan) in deeds conveying Lot 1 or on her Plan (#6, #8 and #9 in Statement of Facts, above, Apx. at 8; 50; 54); and most significantly, nothing is stated by Joan Michelson and Frank Michelson (the owners of Lots 6 and 7 on the 1992 Plan), in deeds conveying Lot 6 and Lot 7 on the 1992 Plan or on their Plan (#6, #11, and #12 in Statement of Facts, above, Apx. at 8; 58; 60).

iii. The easement by implication was not in use in 1961 at the time of severance of title and was not reasonably necessary for the fair enjoyment of the other lots; an easement by implication will not be found merely because it would be convenient to have the grant.

While there was testimony that after 1961 each of the sibling lot owners gave permissive, open access for each of the lots to one another, their renters, families and guests, no evidence established that use at the Implied Easement Location on Lot 3 was reasonably necessary for the fair enjoyment of the other lots, and in particular Lot 7 on the 1992 Plan, which was a lot not created until 1975. Apx. at 5. This lack of necessity is supported by testimony that docks were located off the water frontage of Lot 2 and Lot 4 on the 1992 Plan, and the creation by deed of a 15 foot wide easement to the water by Lillian Bellis, the original owner of Lot 2. See deed at #4C in Statement of the Case and Statement of Facts and Apx. at 29.

iv. An easement by implication did not arise because there was no agreement by the siblings who owned the four lots prior to severance of title in 1961.

The narrow issue in this case is the claim of Ouellette, the owner of Lot 7 - created in 1975, 14 years after the severance of unity of title in 1961 - to an easement by implication for rights of access to the beach and ledge area at the Implied Easement Location, which rights must have arisen prior to the severance of the four lots in 1961.

The Decision finds that "all the 'camps'.... were accessed by Mr. Anderson's children and friends via a single private road that weaved its way between the lots. The access road – the location and extent of which is the central issue in this case–is still used, still exists,...." Add. at 35 (emphasis added).

The access road, however, is not the "central issue" in the case, as the Bellis deeds make clear the access road was an easement for driveway access to the Bellis lots from Turnpike Road.[7] Rather, the central issue is whether an

[7]This driveway is shown on the 1992 Plan and the Michelson/Koski Plan recorded April 29, 1993 entitled "Sip Pond, Lot Line Adjustment To Correct Violation of Building Location," which labels

easement by implication was agreed to prior to 1961 at the Implied Easement Location for the benefit of Lot 7. On this narrow issue, no evidence exists of agreement prior to 1961.

The Decision notes that historically "structures on Lot 4 were accessed by travelling along the access road, across the "beach" area of Lot 3 and across a small bridge depicted on the recorded plan." Add. at 35. The only evidence at trial about the "historic" use of the four lots was testimony of activity by permission on the four lots after 1961 and the severance of title in four lots.

C. New Hampshire case law regarding claims of easement by implication.

Comparison of the facts in this case with facts of other cases decided by this Court on this issue shows a clear lack of evidence here to support the easement by implication.

In *Blaisdell v. Raab*, 132 N.H. 711 (1990) an easement by implication was claimed by the owner of back land for an access easement across an abutting lot fronting on a street. The Court found the parties never agreed to an easement, as there was nothing recorded in the registry records at the time of severance of title to indicate an agreement, even though an existing roadway across the lot with frontage "provided the exclusive access to the back land." Further, the claimed easement was not "reasonably necessary for [the back land's] beneficial use." Since the Court found wanting a claim of reasonable necessity under the facts of *Blaisdell*, no claim of reasonable necessity here can be sustained given the lack of agreement and the lack of reasonable necessity in 1961 at the time of severance of the four lots, as each lot had similar water frontage access.

Burke v. Pierro, 159 N.H. 504 (2009) is similar factually this case, involving a claim of several owners of "back lots" to the right to use a strip of waterfront beach for recreational purposes, based on a theory of "implied servitude." *Burke* analyzed an easement by implication based on a common scheme of development, prior use, necessity, and prescriptive right.

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that driveway as "Right of Way to Sip Pond Cottages" with no reference to accessing Lot 3. See #6 in Statement of Facts and App. at 8.

No "common scheme" was found, despite evidence in the registry records of a common scheme to create rights to use the waterfront beach. The Court did not find an intention that these rights were granted to owners of back lots. *Id.*, at 509. The Court noted that even though the "language in one back lot deed" contained rights to use the waterfront beach, this was "insufficient to establish" that the common owner intended to create an implied easement for all the back lots. *Id.*, at 509.

In this case, there is no written evidence of an intent to create a common scheme of use at the Implied Easement Location for any of the four lots, or for the Ouellette real estate, and the Decision acknowledges this. Add. at 36.

Burke also rejected claims of an easement by implication by prior use and necessity. Citing *Restatement (Third) of Property (Servitudes)* §§ 2.12, 2.15 (2000), the Court noted that implication by prior use concerns the use of benefited property before two or more parcels are severed. "Unless a contrary intent is expressed or implied, the circumstances that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use." *Id.*, at 510 (emphasis added) (citations and quotes omitted).

In *Burke*, as here, the back lot owner submitted evidence of prior use of the waterfront *after* severance of the parcel (establishing that "[s]ince 1967, when they purchased one of the back lots containing a cottage, [the back lot owner]... used the beach"). *Id.*, at 507. As *Burke* notes, however, the record in *Burke* - and here - is "devoid of any evidence demonstrating that the property that became the subject back lots included beach rights prior to severance." (emphasis added) *Id.*, 510, citing "*Gulf Park Water Co. v. First Ocean Springs Dev. Co.*, 530 So.2d 1325, 1331 (Miss.1988) (no easement based on prior use where evidence did not establish that use existed at time of severance of parcel ownership)." *Id.*, 510-511.

In this case as well, the record is devoid of evidence showing that prior to severance in 1961, Lots 1, 2, or 4 on the 1961 Plan included rights at the Implied Easement Location on Lot 3.

Burke then addressed whether use of the waterfront beach was justified by the necessity doctrine, which "applies where the rights are necessary to the reasonable enjoyment of the property" and elaborated on necessary rights:

> Necessary rights are not limited to those essential to enjoyment of the property, but include those which are reasonably required to effective use of the property. If the property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section. Reasonable enjoyment of the property means use of all the normally usable parts of the property for uses that would normally be made of that type of property. Restatement (Third) of Property (Servitudes), Supra Section 2.15 comment D at 207. *Id.*, at 511.

Burke discussed the level of necessity for an implied easement, citing examples: to "install utilities because electricity is necessary for modern residential use;" necessity 'where property could not be reached without crossing appellant's land;" lack of necessity "for installation of television antenna;" lack of necessity "for pleasure and recreation over ranch" which were "novelty easements." *Id.*

Here, the 1961 subdivision denied no single lot owner of access to approximately equal water frontage to Sip Pond. There was simply no necessity in 1961 for the preservation of any right for the benefit of the four lot owners to use the beach area on Lot 3.

In *Choquette v. Roy*, 167 N.H. 507 (2015) the Court found an easement by implication because the evidence in the case was that the road over which the easement was claimed was the "only road in existence for the subdivision...and the only access" to a public road. *Id.* at 514. Further, the owner of the property benefitted by the easement testified "he would not have bought the property without the right to travel over" the roadway over which the easement was sought. *Id.*

Here, in contrast, there was no such necessity for use of the Implied Easement Location to enjoy the recreational benefits of the Ouellette real estate,

given the equal amounts of water frontage of each of the four lots at the time of severance. Further, unlike the facts in *Choquette*, the easement at the Implied Easement Location was not "permanent and obvious and reasonably necessary for the fair enjoyment" of the other lots. *Id.* The only permanent and obvious evidence in this case of *any* easement rights are the notations on the various Plans of the driveway access from Turnpike Road across Lot 1 and Lot 2 giving access to the Bellis lots.

Hayes v. Moreau, 104 N.H. 124 (1962) found an implied easement to benefit a lot in a subdivision which was conveyed without an express easement for a sewer and water line over an adjoining lot, even though the sewer and water line was already installed on the burdened lot, and the burdened lot was later conveyed "subject to existing sewer and water privileges." *Id.*, at 126.

Even under these facts, however, *Hayes* confirms the strong evidence needed to sustain an implied easement. When "during unity of title the owner imposes an apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial, then upon a severance of ownership a grant of the dominant tenement includes by implication the right to continue such use." .... [S]ince the doctrine rests upon the theory of an implied grant, the circumstances surrounding the transaction are controlling and they must be such as to raise a reasonable implication of right granted. The right is granted or reserved because the parties so agreed." *Id.*, at 526 (citations and quotes omitted) (emphasis added).

Here by contrast, there was no evidence that Lillian Bellis, the original owner of Lot 2 on the 1961 Plan, made use of the Implied Easement Location prior to 1961. Rather, the evidence establishes only permissive use after 1961 of the Implied Easement Location by, among others, Frank Michaelson, Joan Michaelson, Steven Ouellette and Kevin Ouellette. Frank Michaelson and Joan Michaelson, however, owned no real estate until 1975, when they acquired two of the Bellis lots, Lot 7 and Lot 6 (by deed at #4G in Statement of the Case and Statement of Facts; Apx. at 35). Such evidence is not sufficient to establish an

easement by implication by prior use. Similar to the evidence required to establish a prescriptive easement, to establish prior use to support an easement by implication, evidence must show the prior use was "not in reliance upon the owner's toleration or permission, but without regard to the owner's consent" ... to "create an inference of non-permissive use." *Jesurum v. WBTSCC Limited Partnership*, 169 N.H. 469, 477 (2016). The testimony at trial only established an inference of permissive use of the Implied Easement Location after severance of title in 1961. Such permissive use does not satisfy the prior use requirement. See *G.C.G. Mann-Hoff v. Boyer*, 413 Pa.Super. 1, 13; 604 A.2d 703, 709 (1992); see also *Louis W. Epstein Family Partnership v. Kmart Corporation*, 13 F.3d 762, 773-774 (3rd Cir. 1994).

II. <u>The Decision errs in finding that the easement by implication includes the right to maintain a dock adjacent to the Implied Easement Location as no dock was placed in that location until 2016.</u>

The Decision errs in finding the easement by implication includes the right to install a dock adjacent to the Implied Easement Area. Add. at 40.

There was no evidence that prior to 2016 a dock was located adjacent to the Implied Easement Area. The first time such a dock was place there was when Kevin Ouellette installed a dock adjacent to the Implied Easement Area, without notice to Favart and without benefit of a New Hampshire DES permit). Transcript (Day 2) at 199-200; 206; 229-231; 270; 273.

The Decision wrongly concludes, however, that due to "the existence and use of prior docks in the area, that a dock is a reasonable use of the easement." Add. at 40. The only evidence of docks "in the area" was testimony regarding docks adjacent to Lot 2 and Lot 4 on the 1992 Plan. Transcript (Day 2) at 314. Transcript (Day 1) at 48-50.

The Decision errs in finding the existence of docks adjacent to the other subdivided parcels is a basis for finding agreement by the four siblings prior to 1961 to a dock adjacent to Lot 3's Implied Easement Location, as there was no permanent and obvious servitude in the form of a dock in 1961. By contrast, the permanent servitude in the form of an installed sewer and water line in *Hayes v.*

Moreau, 104 N.H. 124 (1962) supported an easement by implication, as did a road providing access for the benefitted lot in *Choquette v. Roy*, 167 N.H. 507 (2015).

III. The Decision errs in finding application of RSA 477:26 as support for the easement by implication because no document on record in the Cheshire County Registry of Deeds rescinded the easement by implication.

The Decision states that "[b]ecause no deed in the trial record expressly rescinded the easement, the easement by implication endured and is a vested right of the current owners: the Defendants'. See RSA 477:26." Add. at 40.

RSA 477:26, entitled "Easements, Appurtenances, Etc." states: [i]n a conveyance of real estate or any interest therein, all rights, easements, privileges and appurtenances belonging to the granted estate or interest shall be deemed to be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary in order for their inclusion to enumerate or mention them either generally or specifically."

The Decision errs because nothing in the recorded documents in the Cheshire County Registry of Deeds establishes the easement by implication. The 1961 deed to Lillian E. Bellis of Lot 2 grants no rights of any kind over Lot 3 and the Implied Easement Location. Apx. at 18. The 1961 deed to Lot 3 conveys the lot subject to no rights of others, and no rights over the Implied Easement Location. Apx. at 16. Presumably, if Lillian E. Bellis thought she had such rights in 1961 and thereafter when she subdivided Lot 2 into seven lots, she could have made reference to her implied easement rights over Lot 3, but she did not. Indeed, in 1963 she created water rights on one of her own subdivided lots, Lot 6, in favor of Lot 3 of her subdivision. 1992 Plan and deeds at #4C in Statement of the Case and Statement of Facts, infra. Apx. at 5; 28.

For RSA 477:26 to apply, an easement must validly exist and belong to the granted estate for the easement to pass. *Blaisdell v. Raab*, 132 N.H. 711, 717-718 (1990). That is not the circumstance in this case, as nothing filed in the Cheshire County Registry of Deeds establishes the easement. Given the absence

of any document evidencing the easement by implication, no document that "expressly rescinded the easement" was necessary under RSA 477:26.

CONCLUSION

At severance of unity of title into the four lots subdivided in 1961, there were no plans or written agreements regarding rights over the Implied Easement Area for the owners of Lots 1, 2, or 4 on the 1992 Plan. Testimony that after 1961, the siblings who owned each of the lots got along well and permitted the public, guests of the owners, and renters to freely access the driveways and recreational amenities on all the lots is irrelevant to the circumstances prior to 1961 required to support an easement by implication, and in any event this testimony does not show agreement to an easement by implication.

The evidence is clear no dock was located adjacent to the Implied Easement Location until 2016, but that docks were installed adjacent to the water frontage at Lot 2 and Lot 4 on the 1992 Plan years ago.

The Decision of the Trial Court finding an easement by implication at the Implied Easement Location is erroneous. The trial court's ruling about the existence, location and extent of the easement by implication is not supported by the evidence, and the Decision should be reversed. Since the Decision finds no rights arising by express deed grant or by prescription and these findings were not appealed, judgment should be entered for Plaintiff, and the case remanded for further orders.

Respectfully submitted,

Edward E. Favart
By his Attorneys:
Bradley & Faulkner, P.C.

Date: August 12, 2019

By: _____
Gary J. Kinyon, Esq.
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(603) 352-2030

REQUEST FOR ORAL ARGUMENT

Edward E. Favart requests oral argument not to exceed 15 minutes presented by Gary J. Kinyon, Esquire.

_____
Gary J. Kinyon, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief contains less than 9,500 words and conforms with Supreme Court Rule 16 (3)(i) and 16(11).

_____
Gary J. Kinyon, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was emailed to Silas Little, Esq., counsel for Defendants on August 12, 2019.

_____
Gary J. Kinyon, Esq.

ADDENDUM TO BRIEF OF APPELLANT, EDWARD E. FAVART

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Edward E. Favart v Steven M Ouellette, et al**
Case Number: **213-2017-CV-00024**

Enclosed please find a copy of the court's order of March 06, 2019 relative to:

Final Order

March 08, 2019

Daniel J. Swegart
Clerk of Court

(555)

C: Gary J. Kinyon, ESQ; Silas Little III, ESQ

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

Edward E. Favart

v.

Steven M. Ouellette, et al.

Docket No. 213- 2017-CV-024

FINAL ORDER

As noted in this Court's prior order, this case arises from a dispute about whether the plaintiff's parcel of land along Sip Pond is subject to an easement or right of way to access the water for the benefit of the defendant's parcel of land. After a bench trial on these issues, the Court finds that an easement by implication was created when the defendant's predecessors in title's lot was created. Accordingly, the Court finds for the defendants in the matter and decrees that the defendants' lot is benefitted by a right-of-way easement to access the beach area and contiguous "rock" along the littoral boundary of Lot 3 (now Lot 8).

Background

All the properties discussed in this order were once part of a single parcel owned by Susanna and William Anderson. In 1947, the property was conveyed to their four children and ultimately subdivided in 1961 into four lots of approximately equal dimension and size. All four lots were rectangular in shape and each had waterfrontage along the shores of Sip Pond. The waterfront along Lot 3 was the only lot that contained a beach-like section of waterfront because of the littoral topography (which

has not changed since 1961). Lot 1, the southerly most lot, was 5.2 acres; Lot 2 was 3.6 acres, Lot 3 was 3.4 acres; Lot 4, the northerly most lot, was 3.3 acres. At the time of the subdivision in 1961, there were 10+/- cottage-like structures scattered among all four lots. (See Ex. 5.) Although none of the deeds that created these four lots contain, create, or reserve any expressed easements or rights of way, all the "camps" were accessed by Mr. Andersons's children and friends via a single private road that weaved its way between the lots. The access road—the location and extent of which is the central issue in this case—is still used, still exists, and is in the approximate location as depicted in Exhibit 5. (See Ex. 1.) However, though not depicted in the Exhibit 5 sketch, the structures on Lot 4 were accessed by traveling along the access road, across the "beach" area of Lot 3 and across a small bridge depicted on the recorded plan.[1] Clearly, this a case in which a family lakefront camp was passed down from parents to siblings with the intent of continued common usage of the property. Based on this Court's view of the property, presently, there are plainly visible pathways—approximately 15 feet wide—that run throughout the parcels and "connect" the various structures located on all the lots. They are roughly in the same position (and width) as depicted as the plans in this case.

Evidence at the trial established that the defendants and their families (who are descendants of the Andersons) used the property, specifically the "beach" along Lot 3 and the right of way to access Sip Pond, for 40 years prior to the filing of this suit.

[1] Based on this Court's view of the property, the bridge still exists, but is currently a small foot-bridge.

In the 1960's and 1970's, Lillian Bellis, owner of Lot 2[2] executed a series of conveyances that effectively subdivided Lot 2 and also created a number of landlocked parcels. The defendant's lot (Lot 7) was one of them. It was during these various conveyances that there appears for the first time the expressed creation and reservation of any right of way and a recorded plan delineating the pre-existing right of way. (Ex. 3, 1973 Survey Plan for Lillian Bellis.) In 1992, the remaining Anderson heirs recorded another survey plan. (Ex. 1.) This plan is the most detailed plan that surveyed the lots and buildings originally described in the 1961 Plan. Two lots described in this plan were amended by a lot-line adjustment (approved by the Town) in 1993. (Ex. 4.) Both plans show the right of way.

When Lillian Bellis (Jean) conveyed/created Lot 7 in 1975, she, as grantor, provided that the conveyance of Lot 7 was "subject to a right of way <u>in favor of the grantees and others</u> across part of [the fee conveyed] Old Winchendon Turnpike to <u>other lands on Sip Pond as said right of way is presently used</u>." (Ex. 6F (emphasis added).) This lot is currently owned by the defendants. However, in the same conveyance she also conveyed another parcel (Lot 6 on Ex. 1) and granted "also a right of way fifteen (15) feet to the grantees, their heirs, successors and assigns, along the 'right of way to Sip Pond' from the Old Winchendon Turnpike and across [Lot 7] herein conveyed and also across land of Henry Anderson and others as presently used by the residents of the area." Henry Anderson owned Lot 3 at that time. Both conveyances (of Lots 6 and 7) were to the same grantees: Frank and Joan Michelson (Joan is the mother of both defendants in the instant case). Joan Michelson conveyed Lot 6 to the

[2] As the owner of Lot 2, Ms. Bellis was not capable of creating a right of way over Lot 3 (currently owned by the Plaintiff). Therefore, if such an easement over Lot 3 exists, it must be by implication or prescription because none of the 1961 conveyance expressly created one.

plaintiff in 2004. By that time, he had already acquired Lot 3. However, in her conveyance of the plaintiff, she reserved the "'right of way to Sip Pond' from the Old Winchendon Turnpike and across [Lot 7] herein conveyed and also across land of Henry Anderson and others as presently used by the residents of the area." (Ex. 7k.) She conveyed her interest to defendant Stephen Ouellette (her son) in 2007.

In January 2004, the plaintiff acquired his first piece of property at issue in this case. He acquired Lot 3 (currently Lot 8). His deed simply describes the fee conveyed solely by reference to Lot 8 on Ex.1 and that "[t]he premises are subject to all conditions, easements, matters and state of facts" shown on Ex. 2 and Ex.1. Subsequently, he acquired all the formerly subdivided parcels of the former Lot 2, except that portion owned by defendants (Lot 7). See Ex. 7A. Because he acquired all the contiguous lots, any pre-existing easements that benefitted and encumbered those lots are merged by the unity of ownership. Therefore, the narrow issue before the Court is whether the current owners of Lot 7 enjoy an easement to access Sip Pond and, if so, what is the extent and nature of any such easement.

Analysis

The New Hampshire Supreme Court has held that an easement cannot be created solely by a recorded plan. Soukup v. Brooks, 159 N.H. 9, 14 (2009) ("The mere approval and recording of a subdivision plan which refers to a roadway does not convey an easement in favor either of those owning property abutting the subdivision or the public generally."). However, a plan, in combination with other writings, can create such an estate in land. Id. The deeds in both chains of property refer to the ambiguous "right of way to Sip Pond" as "said right of way is presently used." It is far from clear, under

New Hampshire law, whether a subsequently filed plot plan can legally describe, amend or clarify the boundaries of a pre-existing right of way. The 1992 plan itself can be interpreted to support both the plaintiff's and defendants' arguments.

Moreover, the deeds at issue—although containing language that discusses reservations of rights of way and referring to the various plans on file—do not unambiguously create an easement in Lot 7 and burdening Lot 3. Therefore, for any easement to exist, it must be an easement by implication, created when the lots were first subdivided.

"The rule concerning easements by implication is that an easement is presumed to exist if 'during unity of title the owner imposes an apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial . . . .'" Blaisdell v. Raab, 132 N.H. 711, 716–17 (quoting Hayes v. Moreau, 104 N.H. 124, 126 (1962); Elliott v. Ferguson, 104 N.H. 25, 28 (1962). This doctrine is based on the theory of an implied grant, thus, the circumstances surrounding the conveyance control. Id.; Bean v. Dow, 84 N.H. 464, 467 (1930). As is clearly on display in this case, the question is whether or not "the parties could reasonably have thought that the right was not granted." Bean, 84 N.H. at 469. The law is well settled that an easement by implication will not be found merely because it would be convenient to have the grant. See Locke Lake Colony Assoc. v. Town of Barnstead, 126 N.H. 136, 139 (1985) ("[T]he intent of the parties is what determines whether an 'interest' in land is a license or an easement."). The plaintiff has argued in this case that—if anything was created—it was a revocable license by Henry Anderson. The

plaintiff suggests that any use of Lot 3—by anyone—was as the result of permission and not an easement. The Court disagrees because such an analysis the virtually uncontested historical use of the original four lots along Sip Pond.

On this issue, the Court is convinced by—and finds quite credible—the testimony of the Ouellettes and Joan Michelson (their mother) concerning the historical use of the properties. They provided ample photographic evidence—spanning over 40 years—that support their claim that the original intent of the grantor(s) when these lots were subdivided among the Anderson children was that they enjoy rights of way to access the beachfront on Lot 3. As noted earlier, Lot 3 was the only lot that had easy access (due to topography that is readily apparent) to Sip Pond for the family activities that were described at trial.

The Courts decision is also supported by the fact that, when subdivided in 1961, several camps (all used by the family) were interspersed throughout the lots and connected by foot or small vehicle paths—none of which is mentioned in the deeds. The Court finds that the language referring to "roads" as "presently used" must refer to the pre-existing practice of the family using the pathways to access the cabins and the waterfront on lot 3. In fact, such a "path" was the <u>only</u> way to access the structures on Lot 4 when the property was subdivided in 1961. There is no doubt in the Court's mind that mutual use of all the pathways to access structures and the waterfront on Lot 3 was an unwritten intention of the original grantor(s), because all the evidence supports that that was how the properties were actually used by the successors in title for decades. Lastly, the Court finds that the lots' location along Sip Pond also supports the creation of an easement by implication. All these lots are in a very rural, undeveloped area. It is

safe to say that swimming, fishing, boating, watching sunsets (as described by the witnesses) on Sip Pond were the only reasons these lots were created and used. In other words, the enjoyment of Sip Pond is the singular use for these lots. There is nothing else in the area. Because no deed in the trial record expressly rescinded the easement, the easement by implication endured and is a vested right of the current owners: the defendants'. See RSA 477:26. The Court also finds, based on the evidence of the existence and use of prior docks in the area, that a dock is a reasonable use of the easement.

Accordingly, it is ordered that Lot 7 is benefitted by an easement over the plaintiff's land along the 15-foot right of way, as depicted in Exhibit 1, filed in CCRD Cabinet 11, Drawer 6, Number 782, Sheet 1 (Recorded July 13, 1992), along and through Lot 7 and terminating at, but also including, the "beach area" on said plan.

All the plaintiff's requests for relief are DENIED.

SO ORDERED.

Date 3-6-19

David W. Ruoff
Presiding Justice