THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

DOCKET NO. 2019-0688

Lauren Shearer

v.

Town of Richmond, Ron Raymond & Sandra Auvil

APPEAL FROM DECISION OF THE
TRIAL COURT

ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF RON RAYMOND AND SANDRA AUVIL

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1. Under New Hampshire common law does Lauren Shearer, who owns land abutting a public road that was discontinued in 1898, have an easement to travel over the portion of the discontinued road located on property owned by Ron Raymond and Sandra Auvil.[1] *Raymond Add.,47-49 Raymond Apx. p. 4 – 10.*

2. Whether the trial court had discretion under the rule of reason to define the scope of a common law easement based on a view and consideration of the evidence in the case, or was the court bound to define the scope of the easement as set forth in a 1766 road layout. *Raymond Add.,50-51 Raymond Apx.,p. 13 – 15; 39.*

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[1] Throughout this brief, citations to the record appear as follows:

"Raymond Add." refers to the Addendum attached to this brief;
"Raymond Apx." refers to the Appendix submitted with this brief;
"Tr." refers to the transcript from the April 15, 2019 trial;
"Add." Refers to the Addendum attached to Lauren Shearer's opening brief;
"Apx." refers to the Appendix submitted by Lauren Shearer with his opening brief
"PB" refers to the opening brief submitted by Lauren Shearer

STATUTES

An Act Relative to Discontinuance of Highways, ch. 68, § 1-a (1943) (current version at N.H. Rev. Stat.Ann. §231:43(iii)):

> **Right of Access.** In the case of highways hereafter discontinued, or discontinued as open highways and made subject to gates and bars, by vote of the town, no vote of such town shall in any case release the easement of the public to the extent of depriving an owner of property from using the same to gain access to his property, if other access thereto is not available, unless such owner shall execute in writing a release of such right, such release to be filed in the office of the town clerk.

RSA 231:43, Power to Discontinue**:**

I. Any class IV, V or VI highway, or any portion thereof, in a town may be discontinued by vote of a town; provided, however, that:

   a. Any highway to public waters, or portion of such highway, laid out by a commission appointed by the governor and council, shall not be discontinued except with eh consent of the governor and council.

   b. Any class V highway established to provide a property owner or property owners with highway access to their property because of a taking under RSA 230:14 shall not be discontinued except by written consent by such property owner or property owners.

II. Written notice shall be given to all owners of property abutting such highway, at least 14 days prior to the vote of the town.

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

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case:

This case is about the existence and scope of an easement. Ron Raymond and Sandra Auvil own a parcel of land in Richmond. Their property is bisected by the remnants of an old town road that was laid out in 1766. The road was discontinued by town vote in 1898. Lauren Shearer owns nearby property. Shearer's property is landlocked; he accesses it via the discontinued road. Shearer claims he has a common law easement to use the old road, the scope of which was established by the 1766 layout. Raymond and Auvil assert Shearer's use is permissive, and that New Hampshire does not recognize common law easements.

Shearer filed suit against the Town of Richmond, Raymond, and Auvil. The Town was dismissed on October 28, 2018 and is not part of this appeal. The remaining parties participated in a bench trial with view on April 15, 2019. After the trial, Shearer submitted a Request for Rulings of Law, and a separate Request for Findings of Fact. *Raymond Apx., p. 18 – 22.* Raymond and Auvil also submitted Proposed Findings of Facts and Rulings of Law. *Raymond Apx., p. 3 – 17.* On October 2, 2019, the court issued an "Order Quieting Title," holding that Shearer has a common law easement, but the scope of the easement is limited consistent with present-day conditions. *Raymond Add., p. 47-51.* Shearer filed a motion for reconsideration, asserting that the court erred by finding that the character of the easement was more restrictive that was included in the original

road layout. *Raymond Apx., p. 23.* Shearer's motion was denied on October 30, 2019. *Raymond Apx*., *p. 45.* Shearer appealed on the question of whether the trial court erred with respect to its decision on the scope of the easement. Raymond and Auvil cross-appealed on the issue of whether the easement exists.

B. <u>Statement of the Facts</u>:

Ron Raymond and Sandra Auvil own property located along Whipple Hill Road in Richmond, NH. *Raymond Add. p. 42; 45-46Tr.*, *p. 102, 134; Apx. p. 18.* Raymond and Auvil originally purchased their property in 2002. *Raymond Add., p. 46.* There are currently two houses on the property. Raymond lives in one; Auvil the other. *Tr., p. 106*; *Apx., p. 18*

The remnants of an old road, referred to in this litigation as "Bowker Road," bisect the Raymond/Auvil property and run between the two houses. *Raymond Add., p. 42; Tr.* p. 106, Apx. p. 18. Bowker Road was originally laid out by the Town of Richmond in 1766. *Raymond Add.*, p. 42; *Apx., p. 4-5.* It was discontinued by vote of the Town in 1898. *Raymond Add., p. 42-43*.; *PB., p. 40; Tr.* P. 70. Before it was discontinued, the road's southern terminus was Whipple Hill Road. *Apx. 18 – 21.*

At the time when Raymond and Auvil purchased their property, there was a locked cable-style gate across the mouth of the remnants of Bowker Road, where it meets Whipple Hill Road. The locked gate had been there since at least the 1970s. *Raymond Add., p. 42; Tr., p. 5-6; 77; 102-103; 136-137; 183*.

Sometime between 2002 and June 1, 2004, Raymond replaced the old cable-style gate with a locked swing-style gate. *Tr.. p. 79-80; 149.* The swing-style gate is approximately the same size, and in approximately the same location, as the cable gate. *Tr.*, *p. 150* The primary purpose of the gate is to prevent off-road vehicles, litterbugs, and other unwanted activity on the old road. *Tr., 108-109; 156-57; 170-71.*

Lauren Shearer also owns a parcel of land in Richmond; he purchased his property in June 2004. *Tr., p. 69.* Shearer's land is slightly north of the Raymond/Auvil parcel. However, the two properties do not abut. *Tr.*, *p. 155.* Shearer's land does not have frontage along any public road. *Raymond Add. p. 41; Apx.. p. 17.* His property is bound, in part, by the old Bowker Road. *Apx., p. 17; Tr., p. 75.* Shearer does not live at his parcel. *Tr., p. 82.* There is no residential or commercial structure on the lot. There is no running water or electricity. *Tr., p. 77 – 78; 81-82.*

Shearer uses the remnants of Bowker Road to access his property. *Tr., p. 81.* Shortly after Shearer took title, Raymond voluntarily gave Shearer a key to the gate. *Tr., p. 78-80.* In order to access his property, Shearer unlocks the gate, and drives up the remnants of the old road while passing over the Raymond/Auvil property, as well as couple of other properties, before arriving at his land. *Tr., p. 155.*

The area is rural. The remnants of the old road have been described as a "cow path," "woods road" "recreational foot trail" and "hiking trail." *Raymond Add., p. 41, 42; Tr., p. 7; 71; 170;* It is not paved. It is not otherwise maintained. While it cuts a clearing through surrounding woods, it is covered in grass, and in some places stumps and other plants grow in the clearing. *Tr., p. 71-72*. To the extent that the old road is currently traversed, its primary use is as a walking trail. *Tr., p. 107; 158.*

Only Shearer and one other nearby property owner, Chris Anderson, who also has a key to the gate, drive up the road. *Tr., p. 163-164; 184.* Until 2018, Shearer visited his property once or twice a year. Anderson, who only uses his land for camping, visits 4 or 5 times a year. *Id.*

At trial, there was conflicting evidence about the width of the traveled portion of the old road. The judge, based on his view and a survey prepared by Raymond in 2013, determined that the width of the traveled portion of the old road was 16 feet. *Raymond Add., p. 50; Apx. p. 18.* Wendy Pelletier, a surveyor retained by Shearer, testified that the traveled portion of the old road was about 10 feet. *Tr. p. 90; 94.* Shearer testified that you could fit two cars on the path, but it would be "tight." *Tr. P. 71.*

The dispute that gives rise to this litigation began in 2018, when Shearer approached Raymond and demanded that Raymond remove the locked gate. *Tr. 83, 153.* Shearer asserted that he had an easement to use Bowker Road that arose

out of the original 1766 road layout. *Tr. P. 13.* According to Shearer, this meant that his easement was three rods wide (approximately 50 feet), and that he could use Bowker Road in the same manner as any other public road. *Tr., p. 17,83-84.* Shearer further asserted that Raymond did not have the right to interfere with his use of the easement by maintaining the gate. *Tr., p. 83, 153.* Shearer has indicated in this litigation that he wants to begin using his lot for "agroforestry" purposes. *Tr., p. 83.* Shearer has also contacted Eversource about having electrical utilities installed along the old road. *Raymond Add., p. 44.*

Shearer purchased his lot from Roy Bartlett. *Tr., p. 69.* In 2000, Bartlett filed a lawsuit against the Town of Richmond asserting that the 1898 discontinuance was ineffective, and Bowker Road was a Class VI public highway. Bartlett lost. The Cheshire County Superior Court held that Bowker Road had been lawfully discontinued in 1898. *PB., 40-41; Apx. p. 23 – 31; 38 - 40; Tr. 44, 70,*

Shearer was aware of Bartlett's lawsuit, including the result, before he bought the property. *Tr., p. 70.* He was also aware that a locked gate had existed at the mouth of the old road "for decades." *Tr., p. 77.* Finally, he was aware that there was nothing in writing from Raymond or Auvil, or their predecessors in title, that granted him, or his predecessors in title, an easement to cross their land. *Tr., p. 75-76.* Shearer maintains that the 1766 town road layout is a deed, and that writing supports his position. *Id.*

SUMMARY OF THE ARGUMENT

Because it is more natural to consider whether an easement exists before assessing the scope of any such easement, the issues raised in the cross-appeal are addressed first.

Under New Hampshire common law, when a town discontinues a road absolute title to the land reverts to those who hold the fee simple in the roadbed. Avery v. Rancloes, 123 N.H. 233, 237 (1983); Sheris v. Morton, 111 N.H. 66, 71-72 (1971). Legally, there is nothing to distinguish the land over which a discontinued road passed from the surrounding land. Shearer's argument that he has a common law easement over Bowker Road is inconsistent with this clear and simple rule. Under the law, when Bowker Road was discontinued in 1898, all interest in the portion of the roadbed that bisects the Raymond/Auvil property reverted back to their predecessors in title. Thus, Raymond and Auvil own the land unencumbered.

This Court has never recognized a common law easement arising out of a discontinued road. Other jurisdictions that have a similar legal tradition as New Hampshire have rejected the theory. *See, e.g.*, Rudewicz v. Gagne, 582 A.2d 463 (Conn. App. Ct. 1990); Nylander v. Potter, 667 N.E. 2d 244 (Mass. 1996); Frederick v. Consolidated Waste Serv., Inc., 573 A.2d 387 (Me. 1990). Furthermore, Shearer purchased his property with the full knowledge that the land

did not abut a public road, and that no traditional easement allowed him to pass over Raymond and Auvil's property.

Shearer's position on appeal is that a warrant passed in 1766 – during the revolutionary war – for a road that was discontinued 122 years ago, gives him the right to install a 50 foot road through the middle of Raymond and Auvil's rural residential property. Shearer's position is contrary to precedent. Under New Hampshire law, if an easement exists, the determination of its scope is based on the rule of reason. Balise v. Balise, 170 N.H. 521, 526 (2017); Cote v. Eldeen, 119 N.H. 491, 493 (1979). Reasonableness is a question of fact, and considerable deference is given to the fact finder, particularly when he had the advantage of a view. Here, the trial judge took a 2-3 mile hike along the old road, heard testimony from 7 witnesses at trial, and reviewed numerous exhibits. His decision regarding the scope of the easement is fully supported by the record.

ARGUMENT

A. Standard of Review for Cross-Appeal:

The issue presented in the cross-appeal is whether under New Hampshire common law an easement survives the discontinuance of a road. This is a question of law and is reviewed *de novo*. Gauthier v. Manchester Sch. Dist., SAU #37, 168 N.H. 143, 146 (2015); Rogowicz v. O'Connell, 147 N.H. 270 (2001).

B. When Bowker Road was discontinued, absolute title to the roadbed reverted to Raymond and Auvil's predecessors in title, and therefore Shearer does not have a common law easement to use the road[2]

There is no dispute that Bowker Road was discontinued by vote of the Town of Richmond in 1898. *PB, p. 40*. Under New Hampshire common law, "when a town discontinues a road ... absolute title to the land reverts to those who hold the fee simple in the roadbed." Sleeper v. Hoban Family P'ship, No. 05-E-086, 2009 N.H. Super. LEXIS 9 at *7 (Belknap Co. Superior Ct., Jan. 8, 2009), *see also,* Avery v. Rancloes, 123 N.H. 233, 237 (1983) (explaining that after the town discontinued the road, the property owner had title to the land which had been part of the road and "[t]here was nothing legally to distinguish the land which had constituted the road from the surrounding land."); Sheris v. Morton, 111 N.H. 66, 71-72 (1971) (affirming that title to the a full roadbed that ran between the defendants' land and the ocean reverted back to the defendants when the road was discontinued). Thus, when Bowker Road was discontinued, all interest in the portion of the roadbed that bisects the Raymond/Auvil property reverted back to their predecessors in title.

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[2] In its order quieting title, the trial court referred to the theory of easement at issue in this case as a "common law" easement. In their proposed findings of fact and rulings of law, Raymond and Auvil used the term "private easement" to discuss the same theory. *Compare Raymond App., p.47-49 with Raymond Apx., p. 4-10.* Because the trial court used the phrase "common law" easement, that is the term Raymond and Auvil adopt here.

Nevertheless, the trial court determined that Sharer has a common law easement over Raymond and Auvil's land.[3] According to the trial court, under common law, property owners have a right to access abutting public roads, and therefore, when a public road is discontinued, the abutting landowner retains a private right to use the road to access her property. *Raymond App., p. 47-49.*

This theory of common law easement has never been recognized by this Court and has been rejected by numerous jurisdictions.[4] *See, e.g.*, Nylander v. Potter, 423 Mass. 158 (Mass. 1996); Rudewicz v. Gagne, 582 A.2d 463 (Conn. App. Ct. 1990); Frederick v. Consolidated Waste Serv., Inc., 573 A.2d 387 (Me. 1990)*;* Paul v. Carver, 24 Pa. 207 (Pa. 1855) ; *cf.* Russell Forest Mgmt., LLC v. Town of Henniker, 162 N.H. 141, 143 (2011) (explaining that the trial court's determination that an abutting land owner maintained an easement in a road that was discontinued in 1895 was not before the court on appeal).

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[3] Although Shearer has at various times throughout this lawsuit asserted he has an express easement, easement by prescription, and easement by necessity, the Court's decision was based exclusively on the conclusion that Shearer had a common law easement. *Compare Raymond Apx., p. 18-19; 47-55 with Raymond App., p. 47-49.* Shearer has not raised any appellate issues related to any of the other theories; thus, the only relevant question about the existence of the easement relates to common law easement.

[4] Below, Shearer relied upon an order in Hanson v. Richard, No. 06-E-075 (Merrimack Co Superior Ct., May 8, 2008) as support for his position that he has an easement. In Hanson, Judge Sullivan found that the plaintiff had a "private" easement arising out of a discontinued road. The Hanson order has no precedential value, and for the reasons set forth in this brief, is inconsistent with New Hampshire common law. Notably, the Trial Court's order in this case does not reference Hanson.

For example, Nylander v. Potter is a Massachusetts case with factual circumstances virtually identical to the case at bar. Both parties owned land in Warwick, MA. *Id.* at 159. There was an old town road that bordered the Potter land and bisected the Nylander land. *Id.* The town discontinued the road in 1879. *Id*. At the time of the lawsuit, the road was unimproved, rutted, and overgrown. *Id*. Potter wanted to use the old road as access to her property. *Id*. at 160. This included the installation of electrical polls and allowing heavy equipment to traverse the road. *Id*. The Nylanders installed snow fences blocking the entrance to the road and moved to enjoin Potter from using it. *Id*. Potter counterclaimed seeking a declaratory judgment that she had the right to use the road for ingress and egress. *Id*. The trial court held that Potter had an "abutter's easement," and the appeals court concluded that she had "Public Access" that survived the road's discontinuance. *Id*. at 162. The Massachusetts Supreme Judicial Court reversed. The court explained that when the road was discontinued, under Massachsetts law, full ownership in the roadbed reverted back to the Nylanders' predecessors in title. *Id.* at 161. The land was therefore owned by the Nylanders. The court found that any theory that an easement over the Nylanders' land survived the road discontinuance was "contrary to settled Massachusetts law." *Id.* at 162. The court also noted that its holding was supported by sound public policy "because an easement founded solely on the fact that land abuts a former public

way would leave no indication in the public records and could prove disruptive to title examination . . . ." *Id.* at 163.

Similarly, in Rudewicz v. Gagne, a Connecticut case, the plaintiff asserted a private easement over a highway that was discontinued in 1910. *Jd.* at 464. In 1959, Connecticut enacted a statute that held that property owners with land abutting a discontinued highway continue to have a right of way over the discontinued highway for access to the nearest or most accessible road. *Jd* at 465. The Appellate Court of Connecticut first concluded that the statute did not apply retroactively. *Id.* at 465-66. It then held that under Connecticut common law as it existed in 1910 when the road was discontinued, title reverted back to the underlying fee owners whose land the road crossed. *Id.* at 466. The "neighboring property owners had no right-of-way over the former road because once it was discontinued it was considered private property to which no automatic easement attached." *Id.*; *see also*, Frederick v. Consol. Waste Serv., Inc., 573 A.2d 387, 389 (Me. 1990) (holding that the discontinuance of a road did not "in and of itself" create a private easement over the defendant's land where the road used to run);Warchalowski v. Brown, 417 A.2d 425, 428 (Me. 1980) ("Nor was such an easement created by the road's discontinuance . . . that discontinuance could give a right to damages against the town . . . [but give] no right to an easement by necessity over land of his neighbor .").

Notably, similar to the circumstances that faced the Connecticut court in Rudewicz v. Gagne, in 1943 New Hampshire enacted a statutory provision for "right of access." *See* "An Act Relative to Discontinuance of Highways," ch. 68, § 1-a (1943) (enacted March 16, 1943) (current version at N.H. Rev. Stat.Ann. §231:43(iii)). The 1943 statutory language provided:

> In the case of highways **hereafter discontinued**, or discontinued as open highways and made subject to gates and bars, by vote of the town, no vote of such town shall in any case release the easement of the public to the extent of depriving an owner of property from using the same to gain access to his property, if other access thereto is not available, unless such owner shall execute in writing a release of such right, such release to be filed in the office of the town clerk.

(emphasis added). Bowker Road was discontinued in 1898, approximately 45 years before the statute was enacted. *PB, 40.* The statute's plain language, which refers to highways "hereafter discontinued," is indicative of the legislature's recognition that the rule was something new, not enshrined in the common law, and that it would only apply to roads discontinued *after* the statute was enacted. *Cf.* Autofair 1477 v. Am. Honda Motor Co., Inc., 166 N.H. 599, 602 (2014) (citing Appeal of Silk, 156 N.H. 539, 542 (2007) (holding that statutes presumptively apply prospectively).

Thus, under the common law as it existed in1898, when Bowker Road was discontinued, all right to the land that comprised the former road reverted

back to Raymond and Auvil's predecessor in title. No common law right to an easement arose from the discontinuance.

As mentioned above, the trial court based its conclusion that Shearer has a common law easement over Raymond and Auvil's property on the theory that at common law property owners have "both the right to use the road in common with other members of the public and a private right for the purpose of access." *Raymond App., p. 47-49.* From there, the court extrapolated that when a public road is discontinued, an abutting landowner retains a private right to continue to use the road to access his property. *Id.* (*citing* Sebree v. Bd of County Comm'r, 840 P.2d 1125 (Kan. 1992); Smith v. State Highway Comm'n., 346 P.2d 259 (Kan. 1959); Southern Furniture Co. of Conover, Inc. v. Dep't of Transp., 516 S.E.2d 383 (N.C. Ct. App.1999); State ex rel. OTR v. City of Columbus, 667 N.E.2d 8 (Ohio 1996); Moore v. Comm'r Court of McCulloch County, 239 S.W. 2d 119 (Tex. Civ. App. 1951); Gillmor v. Wright, 850 P.2d 431 (Utah 1993); Mason v. State, 656 P.2d 465 (Utah 1982); Hague v. Juab County Mill & Elevator Co., 107 P. 249 (Utah 1910); Okemo Mountain Inc. v. Town of Ludlow, 762 A.2d 1219, 1224 (Vt. 2000);C.C. Marvel, Annotation, *Power to directly regulate or prohibit abutter's access to street or highway*,73 A.L.R.2d 652; C.C. Marvel, Annotation, *Power to restrict or interfere with access of abutter by traffic regulations*, 73 A.L.R. 2d 689; Local Government Center, A Hard Road to

Travel (2004)). Not only is this conclusion inconsistent with established New Hampshire common law that fee simple to a roadbed reverts back to the landowner upon the road's discontinuance, the foreign authority cited by the trial court is not persuasive for a number of additional reasons.

Several of the cases simply do not address the question of whether a landlocked neighbor retains an easement to cross another private property owner's land after a road has been discontinued. Rather, these cases address separate and distinct questions about what liability *the government* may have for discontinuing a road or limiting access to it. For example, in Okemo Mt., Inc. v. Town of Ludlow, the appellate question was whether a landowner had a right to use a town-owned road in the winter, when the road provided the only access to his property. 762 A.2d at 1221. The court held that the Town violated the property owner's common law right to access his property from a public road when it closed the road to vehicular traffic during the winter and allowed a nearby ski area to use it as a ski trail. *Id.* at 1224-25. However, because the Town had the right to regulate use of the road as it saw fit, the property owner's remedy was to recover damages against the Town for inverse condemnation. *Id.* at 1228. Although the court noted in its holding that "when a public road is discontinued or abandoned, the abutting landowner retained the private right of

access," this language has nothing to do with the facts of the case and is mere dicta. *Id.* at 1225.

Similarly, State ex rel. OTR v. City of Columbus involved a dispute between a property owner and the City of Columbus over whether the construction of a railroad overpass bridge interfered with a property owner's right to access their property, and if so, whether that was an unconstitutional taking. *See generally,* 667 N.E.2d 8. Moore v. Comm'r was about whether a governmental body had the authority to order a road closed over the protest of an adjacent property owner. *Id.* at 121. The Court found that the defendant did not have authority to close the road, and that by extension, any obstructions that neighbors had placed in the road after it had been improperly closed had to be removed. *Id.* at 122. In Smith v. State Highway Comm'n., the issue was whether the state highway commission's regulation of the plaintiff's access to a state highway was a reasonable exercise of the commission's police power, or whether it was sufficiently intrusive to constitute a taking. 346 P.2d at 266-67.

Likewise, the two referenced A.L.R.s assess issues of government accountability. 73 A.L.R. 2d 652 covers "questions of the power, constitutional or statutory, of any governmental unit to specifically prohibit, or regulate the extent of, an abutter's direct access to any kind of public way upon which his property abuts without compensation to the abutter." 73 A.L.R. 2d 689 "is

concerned with the question of the power, constitutional or statutory, of any governmental unit to restrict or interfere with an abutter's access to the general system of public ways, by traffic regulations applicable to the general public's use of the streets and highways, without compensating the abutter."

The issues addressed in Southern Furniture Co. of Conover, Inc. v. Dep't of Transp. and Sebree v. Bd of County Comm'r are also irrelevant to the question of whether a landowner has a common law easement over another property owner's land after a road is discontinued. In Sebree v. Bd. Of County Comm'r, the only issue on appeal was whether the defendants' land actually abutted the old highway, which was a public road. 840 P.2d at 1130. Southern Furniture Co. of Conover, Inc. v. Dep't of Transp., was a contract case. 516 S.E.2d at 385. The plaintiff's predecessor in title had entered an agreement with the department of transportation's predecessor allowing for the construction of a highway. *Id.* at 384. In part, the agreement required the department to provide cross-over access between the portions of the plaintiff's property that would be bisected by the highway. *Id*. at 384-85. The parties subsequently entered a new contract whereby the plaintiff's predecessor in title released any "abutter's rights" and "access rights appurtenant" to the highway. *Id.* at 385. The crossover was not mentioned in the subsequent agreement. *Id.* Several decades later, the department closed the crossover. *Id.* The issue was whether the

reference in the subsequent contract to "abutter's rights" and "access rights appurtenant" extinguished the department's obligation to maintain the crossover. *Id.* The court found that the requirement that the department maintain the crossover was a sperate contractual obligation and not released by reference to abutter's rights and access rights appurtenant in the second agreement. *Id.* at 386-88.

Nor does the Local Government Center's A Hard Road to Travel identify any authority that supports the conclusion that New Hampshire recognizes common law easements. The discussion in the treatise addresses: (1) an open question of whether a municipality can own land underlying a highway in fee simple; (2) authority holding that roadways shown on subdivision plans as the only access to property creates implied private easements; and (3) the impact of RSA 231:43, III on roads discontinued after 1943. *Id.* at 66-67. There is no discussion about the existence of easement over roads that were discontinued before 1943.

Finally, the trial court cited three Utah cases, Gillmor v. Wright, 850 P.2d 431, Mason v. State, 656 P.2d 465, and Hague v. Juab County Mill & Elevator Co., 107 P. 239. While there is some authority in those cases for the contention that a landowner retains an easement to use a discontinued street, none of the cases consider the issue in the context of the established New

Hampshire common law principle that fee simple to a discontinued road reverts back to the underlying property owner. Thus, Utah law is inconsistent with New Hampshire law, and the precedent should not be adopted in this State.

The distinction between the majority of the authority cited by the trial court, which involves government interference with a landowner's right of access, and the circumstances of this case, is important. The government is constitutionally prohibited from taking land the belongs to private citizens. It follows that a government that removes access to a public street may have effectuated a taking by making the land essentially useless. Eminent domain and inverse condemnation rules are necessary to protect citizenry against the potential tyranny of the state. However, those concerns do not exist when the parties involved are all private property owners. Raymond and Auvil's predecessor in title did not make the decision to close Bowker Road, or effectuate a taking against Shearer's lot. There is no reason why Shearer's property interests should be prioritized over Raymond and Auvil's, particularly when Shearer purchased his lot knowing that it did not abut a public road and that he lacked a traditional easement.

The common law rule, as it existed in 1898 when Bowker Road was discontinued, is simple and straightforward: full ownership in the roadbed reverted back to Raymond and Auvil's predecessor in title when the road was

discontinued. New Hampshire does not recognize the doctrine of common law easements, and the trial court's decision on this issue should be reversed.

C. Standard of Review for Appeal

In his appeal, Shearer argues that the trial court incorrectly defined the scope of the easement. He asserts that the easement must be consistent with the terms of the 1766 road layout. Under Shearer's conception, therefore, the easement must be 3 rods wide (approximately 50 feet), as opposed to the 16 feet width found by the trial court, and he should be permitted to use it as he would any other public road.

As stated above, Raymond and Auvil dispute that a common law easement exists over their land. However, to the extent that this Court finds that New Hampshire recognizes common law easements, than the scope of such an easement is determined by applying the rule of reason. *See* Balise v. Balise, 170 N.H. 521, 526 (2017) (holding that the rule of reason applies to determination of the scope of an easement arising out of RSA 231:43 (iii)); Cote v. Eldeen, 119 N.H. 491, 493 (1979) ("[I]f we assume that the plaintiffs' easement arose because their land abutted a discontinued public highway, the exercise of that easement would also be limited to reasonable use."). "Reasonableness is a question of fact that is determined by considering the surrounding circumstances, such as location and use of the parties' properties, and the advantages and disadvantages to each party." Heartz v. City of Concord, 148 N.H. 325,332

(2002). The findings of the trial court are considered to be within its sound discretion, particularly when a view has been taken. Flanagan v. Prudhomme, 138 N.H. 561, 574 (1994). The question is not whether this Court would would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the evidence. Marist Bros. of N.H. v. Town of Effingham, 171 N.H. 305, 309 (2018).

Although the rule of reason is most typically relevant to express easements, it has been applied by this Court at least twice in cases involving unwritten easements arising out of old discontinued roads. *See* Balise v. Balise, 170 N.H. at 522-23; Cote v. Eldeen, 119 N.H. at 419.

In Cote v. Eldeen, the parties owned adjacent tracts of land. 119 N.H. at 492. In dispute was Old Grantham Road, which had been discontinued as a highway in 1930. *Id.* The defendants owned the fee to the roadbed, but the plaintiffs asserted they had an easement to haul large quantities of gravel and wood over it. *Id.* Notably, the defendants sold the property while the case was on appeal, and their successors in title did not appear in the appeal. *Id.* Therefore, the question of whether the plaintiffs had an easement at all – either by prescription or based on the discontinuance – was not before this Court. The trial court had determined the plaintiffs had "a certain minimal easement right," and limited the hours during which the road could be used, the number of loads of gravel and wood that could be hauled per week, and held that the plaintiffs

could only use vehicles they owned to pass over the road. *Id.* at 492-93. The issue on appeal was whether the trial court could impose these restrictions. In upholding the trial court's decision, this Court held that:

> [I]f we assume that the plaintiffs' easement arose because their land abutted a discontinued public highway, the exercise of that easement would also be limited to reasonable use. . . . The application of this rule raises a question of fact to be determined by consideration of all the surrounding circumstances. In deciding what was reasonable use, the trial court heard the testimony of witnesses [and] had the benefit of a view . . . . . We will not substitute our own judgment for that of the trier of fact if it is supported by the evidence, especially when he has been assisted in reaching his conclusions by a view. This decision does not prevent the present landowners from making any contract regarding their respective rights which they may wish, with or without compensation.

*Id.*at 493 (citations omitted).

Similarly, Balise v. Balise was an action to quiet title and for a declaratory judgment that the plaintiffs had a right to use a discontinued portion of a road to access the plaintiff's property and to install utilities to service it. 170 N.H. at 523. The road had been discontinued in 1962, after the statutory provision preserving abutters' rights to use discontinued roads had been enacted. *Id.* at 524. Relying on the statute, the plaintiffs asserted that their right to use the road had survived the discontinuance, and that their right of access included the right to install utilities. *Id.* at 523. The trial court had a bench trial, including a view, and determined that it was reasonable for the plaintiffs to install a single utility pole on the road and to install utilities underneath the road. *Id.* at 526-27.

This Court affirmed that the trial court had correctly followed the rule of reason in determining the scope of the easement. *Id.* at 526.

Shearer incorrectly asserts that the appropriate standard of review for his appeal is *de novo*, because "the interpretation of a deed represents a question of law." Appletree Mall Associates v. Ravenna Investment Associates, 162 N.H. 344, 347 (2011). However, there is no relevant deed to be interpreted in this case. Shearer, as he did below, apparently takes the position that the 1766 Road Layout is a deed. The road layout is not a deed. A deed is a document that transfers ownership of real estate. There is no evidence that Raymond and Auvil's predecessors in title ever conveyed actual ownership of the roadbed. Furthermore, even if the road layout was a deed, the rule of reason would still govern the trial court's decision regarding the scope of the easement. *See, e.g.*, Heartz, 148 N.H. at 331 (explaining that the rule of reason applies at two points in the analysis of written easements: (a) to interpret any unclear language in the deed granting the easement; and (b) to determine whether a certain use of the easement would be unreasonably burdensome)

For the reasons stated above, the correct standard of review for Shearer's challenge to the trial court's decision regarding the scope of the easement is whether there is evidentiary support for the holding. This standard provides a significant degree of deference to the trial court's factual decision making, as the trial court had the benefit of a view, heard the witnesses, and presided at the trial.

D. The trial court's decision regarding the scope of the easement is supported by the evidence.

Although the trial court did not expressly state that it was following the rule of reason, the court plainly applied the rule in substance. In the order, the court discusses the evidence it considered when making its decision, including "its own view and how the right of way has been used for the past century." The view was a 2-3 mile hike along Bowker Road. *Raymond App., p. 41.* The order references surveys, historical maps, deeds and other relevant documents, as well as witness testimony. *See generally, Raymond App., p. 41-51.* Trial witnesses included all three parties to the case, and three long-time neighbors, Jane Tandy, Chris Anderson, and Kevin Marcotte. The witnesses, including Shearer, agreed that the area is rural, wooded, and rarely traveled. *Tr., p. 7; 71; 107; 136; 170; 181; 184* It is not paved. It is not otherwise maintained. While it cuts a clearing through surrounding woods, it is covered in grass, and in some places stumps and other plants grow in the clearing. *Tr., p. 71-72*. The court also specifically cited a 2013 survey of the Raymond/Auvil property, prepared by Raymond, that showed the width of the easement to be 16 feet. Based on this, there was more than sufficient evidence to support the trial court's conclusion that the reasonable width of the easement was 16 feet, that the nature of the easement was akin to a "driveway," and its use should be limited consistent with the current use of the road.

Notably, Shearer does not argue that there was *no* evidence to support the trial court's decision. Instead, he argues that the trial court made the wrong decisions, and interpreted information incorrectly. For example, the trial court found that the terms of the 1766 road layout were ambiguous. Shearer disputes the ambiguity. But the 1766 language *is* ambiguous.[5] The trial court is under no obligation to interpret evidence in the way that was most helpful to Shearer. For the same reason, Shearer's arguments about the import of stone walls, his surveyor's testimony, and conflicting tax maps, does not undermine the trial court's decision.

Shearer's primary argument in support of his appeal – that the trial court did not have any discretion to alter the scope of the easement from the terms of the 1766 road layout – is not supported by citation to any relevant authority. Shearer asserts that the trial court should have used the "rule" from Red Hill Outing Club v. Hammond,143 N.H. 284 (1998). In Red Hill Outing Club v.

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[5] The layout states:

That we the selectmen of the aforesaid town of Richmond laid out a public highway in said town in the following manner beginning at the South side of the highway near the dwelling house of Abraham Barrus than running southerly across the land of said Abraham Barrus to the land of John Barrus than southerly a little to the westward of said Barruses dwelling house than running Southerly until it comes to the land of Isreal Whipple than a little to the eastward of Isreal Whipples dwelling house than running a little southerly to the range line between the land of Considiere Atherton and said Whipple than running southerly to Warick line the aforesaid way to extend three rods in width through out the west side of the said marked trees for the markes is all on the east side of said way and to be open for public use forever as witness our hands.

Hammond, the defendants deeded the plaintiff a piece of land subject to a condition subsequent that the plaintiff use the land as a ski slope. 143 N.H. at 285. Pursuant to the deed, if the defendant failed to make the premises available as a ski slope, the plaintiffs had the right to re-take the premises. *Id.* Several years later, the stopped providing ski lessons and rope tows, and the plaintiffs tried to take the property back. *Id.* The trial court strictly construed the terms of the condition precedent and held that even though the defendant had stopped offering lessons and rope tows, it still operated a ski club and the hill was open to skiing. *Id.* at 286. In upholding the trial court's decision, this court explained that construction of deeds is an issue of law; the general standard for interpreting a deed involves determining the parties' intent at the time of conveyance, in light of the surrounding circumstances, provided those intentions are not contrary to public policy *Id.* at 286. That rule has no relevance to this case. The 1766 road layout was a town instrument, not a deed from Raymond and Auvil's predecessors in title. Whatever "intent" the municipal authorities may have had in laying out the road does not bind Raymond and Auvil.

The other case cited by Shearer, Willey v. Portsmouth, 35 N.H. 303 (1857) is not any more on point. Willey was a tort case; the question was whether the area where the plaintiff was injured was part of the City's road. *Id.*at 307. The court engaged in a long analysis regarding the evidence tending to show, or weigh against, the conclusion that the site was part of the City's road.

Id. at 310-14. That evidence – which was specific to Islington Street in Portsmouth – has nothing to do with Bowker Road in Richmond.

Shearer's arguments about the New Hampshire Department of Transportation's Suggested Minimum Design Standards for Rural Subdivision Streets is similarly unavailing. Shearer is not entitled to install a 50-foot wide road through the middle of Raymond and Auvil's property. Applying the rule of reason, the trial court found that Shearer was entitled to a 16-foot easement, akin to a *driveway*. Thus, the minimum design standards for a street are not relevant.

E. Shearer's argument that Raymond and Auvil's use of the old road must "cede to accommodate" his use has no merit and was not preserved.

In §A(5) of his brief, Shearer sets forth his position regarding the "general practice of co-use of easement strip." Specifically, Shearer asserts that although the modern use of Bowker Road has been slight, so as to not interfere with Raymond and Auvil's use of their property, "as the intensity of [Shearer's] easement use is now increasing, [Raymond and Auvil's] uses [of the easement] will need to cede to accommodate more use of the strip as a right of way. The duty of the servient estates, to not interfere with the servitude, requires this behavior." *PB,* p. 30-31.

It appears that Shearer is asserting that Raymond and Auvil should be prevented from using their own land, in deference to his purported easement.

However, Shearer did not preserve this question for appeal. Shearer's notice of appeal lists three questions:

> 1. Whether the trial court erred in exercising unsustainable discretion in its finding for the plaintiff of an easement under the common law by attaching additional restrictions that were not contemplated by the proprietors of the Town of Richmond in the Road Layout Warrant Article of 1766, such as lesser width, allowed purposes of road use and sole responsibility of the plaintiff for costs of maintenance, signage and for liability to the public?
>
> 2. Whether the trial court erred in apparently affirming in its order the Town of Richmond's vote of 1972 placing Bowker Road on gates and Bars, contrary to res judicata and the holding of 00-cv-0011 that said vote was of no effect?
>
> 3. Whether the trial courts holdings that: Bowker Road only exists as recreational foot trail; Mr. Shearer was aware there was no written or express easement granting him the right to travel over the portion of Bowker Road that bisects the Defendants' property; the right of way is bounded by stone walls; Mr. Shearer made a request for a quitclaim to the 3 rod width of Bowker Road; are dicta and of no binding legal effect?

None of these questions touches upon the issue of whether Shearer can preemptively prevent Raymond and Auvil from making use of their own property. Furthermore, Shearer did not make this argument in his proposed findings of fact or rulings of law, or in his motion to reconsider. *Raymond Apx., p. 18 – 38.* Accordingly, the argument set forth in this section of Shearer's appeal is not preserved.

The argument also fails substantively. There is no authority for Shearer's position that an easement holder can preemptively prevent all use by the servient

estate. To the contrary, the law of this State is that "the owner of an easement may not increase the burden on the servient estate or unreasonably interfere with the rights of its owner." Choquette v. Roy, 167 N.H. 507, 515 (2015). Shearer is not entitled to a blanket prior restraint precluding Raymond and Auvil from using the road.

F. **The reference to liability in the trial court's order was dicta.**

Shearer also asks this Court to overturn the trial court's order because it includes language asserting that Shearer may be liable if he compels Raymond and Auvil to remove the gate that exists at the mouth of the old road and a member of the public enters the road and is injured. *PB, p. 34-39.* This was not a binding holding by the trial court. It was dicta – a warning to Shearer about what may happen if he persists in insisting that the gate be removed. It is axiomatic that if a person is injured on an easement that Shearer maintains, then Shearer may be liable. However, the trial court does not have the capacity to make a blanket determination as to the delineation of tort liability before an accident has occurred. Because this portion of the order was not binding on any issue in this case, it is not justification for overturning the trial court's decision.

G. The reference in the order to the property being in gates and bars was dicta

Finally, Shearer takes issue with the portion of the trial court's order analyzing the impact of a 1972 town vote placing certain roads into gates and bars. *PB, p. 39-40.* In the order, the trial court stated that one of Shearer's

arguments was that he was entitled to an easement because of this. *Raymond App., p. 41* However, in his brief, Shearer clarifies that he did not make such an argument, and that any finding that Bowker Road was placed in gates and bars in 1972 violates *res judicata*. *PB, p. 39-41.* As noted above, and as acknowledged by Shearer, Roy Bartlett, Shearer's predecessor in title, sued the Town of Richmond to clarify the status of Bowker Road. As part of that lawsuit, the court determined that Bowker Road had been legally discontinued in 1898. The effect of the 1972 gates and bars vote was considered, and the court determined that the vote only applied to roads that had not already been discontinued. Since Bowker Road was previously discontinued, the 1972 vote had no effect. *PB, p. 40.*

Consistent with Shearer's representation in his brief, undersigned counsel did not understand Shearer to have raised an argument about gates and bars below. Although the trial court's order references such an argument, because the court's order was not premised on the contention that Bowker Road was validly placed in gates and bars, but rather on the trial court's determination that there was a common law easement, this portion of the order appears to be dicta. *See generally, Raymond App.* Accordingly, reversal on the grounds of reference to gates and bars is unnecessary.

CONCLUSION

For the foregoing reasons, the Defendants/Cross-Appellants, Ron Raymond and Sandra Auvil, respectfully request that this Honorable Court:

A. Reverse the trial court's order finding that Lauren Shearer has a common law easement over Raymond and Auvil's property, because the order is inconsistent with New Hampshire common law;

B. In the alternative, deny Lauren Shearer's appeal requesting that the trial court's order be overturned because the scope of the easement must be consistent with the 1766 road layout; and

C. Grant such other and further relief as is just and equitable.

REQUEST FOR ORAL ARGUMENT

The Defendants/Cross-Appellants, Ron Raymond and Sandra Auvil request oral argument before the full court. The issue of whether common law easements are recognized under New Hampshire law is a novel question of law, and therefore oral argument on this issue is warranted.

Respectfully submitted,

RON RAYMOND AND
SANDRA AUVILL

By their Attorneys,

GETMAN, SCHULTHESS,
STEERE & POULIN, P.A.

Date: July 2, 2020

By: /s/ Clara E. Lyons

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answering Brief and Opening Cross-Appeal Brief of Ron Raymond and Sandra Auvil was emailed on this date to Lauren Shearer, *pro se* plaintiff, as well as served through the Court's efiling system.

Dated: July 2, 2020

By: /s/ Clara E. Lyons

Clara E. Lyons, Esq.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

DOCKET NO. 2019-0688

Lauren Shearer

v.

Town of Richmond, Ron Raymond & Sandra Auvil

APPEAL FROM DECISION OF THE
TRIAL COURT

ADDENUDM TO BRIEF OF RON RAYMOND AND SANDRA AUVIL

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. SUPERIOR COURT

Lauren C. Shearer

v.

Town of Richmond, Ronald Raymond, and Sandra Auvil

No. 213-2018-CV-00114

Order Quieting Title

Before the Court is –essentially – the Plaintiff's request for an easement to access his land-locked parcel of land. The Town has been dismissed out of the case. When the lot in question was originally created, it was accessed by a town road known as Bowker Road. That road has long since been discontinued and exists only as a recreational foot-trail. For the reasons articulated below, after considering the evidence at trial and conducting an extended view (a 2-3 mile hike along Bowker Road), the Court finds that the Plaintiff has established an easement – by operation of common law - that exists to allow access to his lot. It exists for a width of 16 feet – 8 feet from the centerline of the existing "pathway" and exists for the purpose of accessing the plaintiff's lot for residential and agricultural purposes.

Facts

Plaintiff Lauren Shearer is the owner of a parcel of land in Richmond, New Hampshire which he purchased in 2004. This parcel does not have any frontage on a public right of way. One of its boundaries is a road that was discontinued by vote of the

town in 1898, known as Bowker Road. The records suggests that the sole occupant – a farmer - along Bowker Road lived in a dwelling located on the lot in question, but that he had passed away and the dwelling was dilapidated. Thus, at the time of its discontinuance, no one lived on the road. This discontinued road also bisects the property of Ronald Raymond and Sandra Auvil, who are the defendants in this case. Mr. Shearer is seeking right of way across the land owned by Ronald Raymond and Sandra Auvil, and removal of the gate that is presently installed on the defendants' land specifically to allow him to prepare for agroforestry operations on his property. A gate on the defendant's property has barred access to Bowker Road since the 1970's or before, and continues to be maintained, and locked. Mr. Shearer was aware of the lack of access to his property prior to acquiring it. At the time of purchase Mr. Shearer was aware that a lawsuit had been filed against the town of Richmond regarding the status of Bowker Road by the previous owner of his land, Mr. Bartlett.[1] He was aware that Mr. Bartlett had lost that action.

At the time of the purchase Mr. Raymond and Ms. Auvil gave Mr. Shearer a key to the gate on their property, and granted him permission to travel across the portion of Bowker Road that crosses their land. At the time of the purchase Mr. Shearer was aware that there was no written or express easement granting him the right to travel over the portion of Bowker Road that bisects the defendants' property.

History of Bowker Road and Mr. Shearer's attempt to have the road Reinstated

Bowker Road was laid out by the Town of Richmond in 1766. It ran between Whipple Hill Rd and Barrus Road. It was discontinued by valid and binding town vote in

[1] Mr. Bartlett unsuccessfully attempted to compel the Town to re-open the road.

1898. (Plaintiff exhibit 6). In 1972 the town voted to put Bowker road under "gates and bars." (Plaintiff exhibit 10, item 34) The road is currently an unpaved, unimproved woods road. There is no evidence that the road was used for any commercial purpose other than sporadic logging, or that it has ever been used to provide utility services.

Mr. Shearer submitted two petitions to the town to have the road reinstated. The first was in 2006, the second in 2008. The petition was considered on June 26, 2008. (Plaintiff's exhibit 24). In the initial discussion the defendant expressed his opposition to the petition, as the road would bisect his land, take land from him, and impact his privacy and use of his own property. Further, in that initial hearing it was raised that the road would not offer the properties the 250 feet of frontage required by the Town of Richmond NH Zoning Ordinance as Amended Through March 13, 1990. The petition was held over for a further special hearing on July 24, 2008. (Plaintiff's exhibit 25). At this hearing the Board of Selectmen denied the petition for three reasons: 1) the board found there was no public necessity. 2) To grant the petition would infringe on the property rights of the primary abutter, namely the defendants Ron Raymond and Sandra Auvil. 3) It would require the town to incur a financial burden. Also included in the documents for hearing was a letter from the Richmond Conservation Commission outlining concerns about the impact of the proposed road to two areas of wetlands on the Barber Lot. A Notice of Decision was issued on the same day. (Plaintiff's exhibit 26).

Mr. Shearer had a Survey done of the Barber Lot, as his property is known, by Cardinal Surveying and Land Planning in December of 2018 in support of his efforts to have the road reinstated. (Plaintiff's exhibit 34). The results referenced the fact that the

right of way is bounded by stone walls. On the tax map it is described as being 33' wide. The surveyor used the stone walls as the right of way line, with ownership of the discontinued road reverting to its center line as measured from the referenced wall. In their report, the surveyor also expressed that while the discontinuance of a road by vote did not create a private way per RSA 674:41, abutting land owners do maintain a private easement over the road to access their property.

On May 10, 2018, Mr. Shearer inquired of Eversource how to go about installing electrical service to the Barber Lot. In this inquiry he characterized the lot as being recreational, but zoned for residential. He characterized Bowker Road as having all the legal features of Whipple Hill Road, which is a public way.

Title to property known as the Barber Lot

The land currently owned by the plaintiff was part of 100 acres sold by Ira Barrus to Jesse Watson in September if 1850. Jesse B. Watson carved out 15 acres and sold it to Ebenezer Barber in 1850. After that point these 15 acres were known as the Barber Lot. 0.5 Acres were subsequently split off and purchased by William Nash, in 1853. Ebenezer Barber conveyed the remaining 14 acres to the town of Richmond in 1865.

As mentioned above, the town voted to discontinue the road that the lot fronted in 1898. (Plaintiff's exhibit 6). In 1934 the town would survey and convey the land, including by error the 0.5 acres belonging to Nash, to one Thomas Hanifin. The town of Richmond actually came into possession of the Nash lot in 1961 via Tax deed.

A number of conveyances followed for the lot purchased by Thomas Hanifin. It was conveyed to Ann Dunbar though the record shows no evidence of from whom or

when she acquired it. Ann Dunbar deeded the land to Forest Resources Inc. in March 1982. Forest Resources subsequently deeded it to Roy and Simone Bartlett in October of 1982. Finally the Bartletts deeded it to the Plaintiff, Lauren Craig Shearer in June of 2004.

On June 11, 2018, Mr. Shearer sent an email to the town of Richmond requesting information, including where he might send his taxes in lieu of sending them to the town, as he wished to no longer be a part of the Town of Richmond, and a request for a quitclaim to the "3 Rod" width of Bowker Road. He also requested any documentation associated with his property. He received a response from the town on June 20th. It included tax assessment documents, a building permit dated 1984 stating that building could not be residential because of the condition of the road at the time, and information that he would need to continue to pay property taxes to the Town of Richmond per RSA 73:10. He was also informed that the quitclaim deed would only be provided if he could provide evidence that he owned the "3 rod" span.

In July of 2018 a site specific Forest Management/Conservation Plan was created for Mr. Shearer through the USDA Walpole Service Center, which expires on December 31, 2021. The plan is binding. (Defendants' exhibit K)

Title to Property known as St. Clair Lot

The Defendants' property, known as the St. Clair lot, was deeded by John Lee to Oscar Thompson in 1901. Mr. Thompson subsequently deeded it to Carl Carlson in 1919. Carl Carlson deeded it to Eva Mary Liscord in 1927. She deeded it back to Carl Carlson in 1930. Carl then deeded it to Edith Amidon in 1938. Edith N. Amidon deeded it to Robert V. Lewis in 1947. Mr. Lewis conveyed the property to himself and his wife

Edith as a Joint Tenancy with Right of Survivorship in 1956. His wife having died, Mr. Lewis conveyed the property to the Defendants Ronald Raymond and Sandra Auvil in 2002. At this time the gate at issue was a cable style gate. Sometime after 2002 and before Mr. Shearer purchased his property in 2004, the defendants replaced the cable style gate with the gate that is currently in place, and continue to maintain it locked. In 2013 the property was split between Ronald Raymond and Sandra Auvil. In 2014, Mr. Raymond and Ms. Auvil both conveyed their individual lots of the property to both Mr. Raymond and Sandra Auvil as joint tenants with rights of survivorship.

Dispute between Plaintiff and Defendant

A Richmond Police call for service record dated May 30, 2018 shows that Mr. Shearer notified the Richmond Police department that he felt the gate maintained by the defendants needed to be removed so that he could retain access to his property. He informed the department that he intended to remove it for that reason. A similar record dated June 11, 2018 shows that Mr. Shearer reiterated his intent to take the gate down. A record dated June 24, 2018 shows that Mr. Raymond called the Richmond Police to notify them of Mr. Shearer's threat to tear down the gate on Mr. Raymond's property. The complaint originating this action by Mr. Shearer against Mr. Raymond and Ms. Auvil was received by the court on July 24th, 2018.

At the trial in this matter, both parties testified about the confrontation that ensued. Not long after, this action was filed. In reaching the conclusion discussed below, the Court found the view of the properties – and the remains of Bowker Road – very helpful. It is clear that the old road has been used by many to access the properties along the old road.

Analysis

The plaintiff relies on both common law and statutory law in his claim of an easement. With respect to present-day discontinued roads, RSA 231:43,III, provides that "[n]o owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's own risk." This reserved right of way across a discontinued road appears to have been created by statute in 1943. Clearly, if the Town had discontinued Bowker Road after 1943, RSA 231:43 would conclusively establish the plaintiff's right of way. The central question before the Court is whether such a right of way existed at common law in 1898, or whether the Plaintiff is nonetheless entitled to an easement because the Town placed the road in "gates and bars" in 1972. There is no controlling law on this question in New Hampshire, but other states have resolved this issue on common law grounds.

Under the common law, property owners have a right to access abutting public roads. See *Sebree v. Board of County Comm'rs*, 251 Kan. 776, 840 P.2d 1125, 1129 (1992); *State ex rel. OTR v. City of Columbus*, 76 Ohio St.3d 203, 667 N.E.2d 8, 12 (1996); *Moore v. Commissioners Court of McCulloch County*, 239 S.W.2d 119, 121 (Tex.Civ.App.1951); *Gillmor v. Wright*, 850 P.2d 431, 437-38 (Utah 1993). See generally Annotation, *Power to Directly Regulate or Prohibit Abutter's Access to Street or Highway,* 73 A.L.R.2d 652, 656-57 (1960) (overwhelming weight of authority recognizes right of access to and from public highway as incident of property ownership); Annotation, *Power to Restrict or Interfere with Access of Abutter by Traffic Regulations,* 73 A.L.R.2d 689, 691 (1960) (same). "The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members

of the public and a **private right** for the purpose of access." Okemo Mountain Inc. v. Town of Ludlow, 762 A.2d 1219, 1224 (Vt. 2000) (emphasis added). See *Smith v. State Highway Comm'n*, 185 Kan. 445, 346 P.2d 259, 266 (1959); *City of Columbus*, 667 N.E.2d at 12.

Under this doctrine, when a public road is opened adjacent to private property, the owner of the abutting property obtains a right to access the public road by operation of law, see *Southern Furniture Co. v. Department of Transp.*, 133 N.C.App. 400, 516 S.E.2d 383, 386 (1999), and when a public road is discontinued or abandoned, the abutting landowner retains the private right of access. See *Gillmor*, 850 P.2d at 437-38 (abandonment of public right-of-way has no effect on right of abutting landowner to use way); Okemo Mountain, 762 A.2d at 1224. The Court finds Gillmor and the cases cited therein (*Mason v. State*, 656 P.2d 465, 468 (Utah 1982) and *Hague v. Juab County Mill & Elevator Co.*, 37 Utah 290, 296, 107 P. 249, 252 (1910)) particularly on point.

While Bowker Road, in this case is a discontinued road – abandoned by the Town – there is no dispute that it was a public road when the plaintiff's lot was created. Arguably, the plaintiff's lot was developed (as a residence back in the early 1800's) *because* it was on the public road. This situation falls squarely in line with the cases cited above. This common law recognition of easements across discontinued roads is at least tangentially discussed in one New Hampshire treatise. See Local Government Center: A Hard Road to Travel: NH Law of Local Highways, Streets and Trails, 2004 at 66-67 (LGC Treatise).

The statutes in effect in 1898 are discussed in Grossman v. Town of Dunbarton, 118 N.H. 519, 520-22 (1978). The Town was authorized to discontinue Bowker Road by

virtue of G.S. 65:1 (1867), which simply states, "[h]ighways in a town may be discontinued by vote of the town. . . .". G.S. ch. 65 (1867) did not allow a town to lower the status of an open public highway to anything other than a totally discontinued highway. It was not until 1903 that towns were given the power to discontinue an open highway and make it subject to gates and bars. Laws 1903, ch. 14., which was done in this case in 1972. Upon discontinuance, G.S. ch. 65 (1867) granted an abutter a right to petition the supreme court for an award of damages. See. G.S. 65:4 (1867). In the Court's view, such an award was to compensate a landowner for a loss of public access to the property and to indemnify a landowner for the private casts of maintaining a private right of way to access now-landlocked property. The Legislature addressed this in 1943 when it enacted the prior version RSA 231:43 that required landowner consent to discontinue a road. Therefore, in the statutory scheme, the issue has always centered around who pays to maintain the land: the Town if a public road; or land owners once a road is discontinued. As noted by the LGC Treatise, the only thing that is "discontinued" when a Town so votes is the Town's obligation to maintain the road. It does not extinguish the private property rights that co-existed along the public road. In present day, Bowker Road would have simply been considered a non-town maintained, or a Class VI, road. That is true today and was true back in 1898. RSA 231:43 plainly applied to the Town vote to place the road in "gates and bars" in 1972. Thus, the plaintiff maintains a right of way to access his lot along the old Bowker Road, but he must maintain it at his own expense.

The last issue to be resolved is the scope, dimension and nature of the easement.[2] The plaintiff asserts that he is entitled to a right of way that was the original width of Bowker Road – which was "three rods wide", or approximately 48 feet. Plaintiff's Exhibit 1.

The road grant in Exhibit 1 does not explain why the road was three rods wide. The only description for the creation of the road was that it was intended "to be open for public use forever." Id. The grant also appears to measure the width of the road by reference to the names of abutting property owners, without reference to a specific width in certain places. Based on this document, the Court cannot conclude any private right of way owned by the plaintiff mirrors the footprint of the original roadway. Therefore, in determining the size and nature of the easement, the Court looks to its own view and how the right of way has been used for the past century. To that end, the Court uses its own observations from the view, the location of observed lanes of the travel and placement of stonewalls and three historical maps: Exhibit 11, 17 and 27.

It is clear from this evidence that any existing easement is 16 feet wide – the approximate width of the current path, and width of the "Bowker Road" on Exhibit 27 – which is a subdivision plot plan of the defendants' lot. Having walked the entire length of the old Bowker Road it is clear that the only use for the old roadway was to access the residential dwellings and farmland in the area. Presently the "trail" has been used to access other small structures – like hunting cabins – on lots along the old road. In fact the gate that was erected that seems to be the flashpoint that started this lawsuit, was erected to prevent OHRV's from traveling down the road. The northeasterly half of the road – due to the grade and erosion – cannot be navigated by car or truck. However,

[2] The Court uses the phrases "right of way" and "easement" interchangeably.

the old Bowker Road is easily navigable by a car up to and slightly past the plaintiff's lot traveling from south to north. It is clear that vehicles have consistently travelled over it for many years.

Based on all of this, the Court finds that the easement exists from 8 feet in each direction from the centerline of the Bowker Road as depicted on Exhibit 27[3], for a total width of 16 feet. This is amply for a driveway. Since the lands off of Bowker Road have only ever been used for residential or agricultural purposes, the easement is limited in scope to those uses (assuming local land use regulations allow for such use).

Nothing in this order shall be construed as granting the plaintiff road frontage. Any development of his lot must comply with all land use regulations. The plaintiff shall cause this order and the plan recorded at Cab. 13, DR. 9 #219, to be recorded in plaintiff's chain of title.

Lastly, because the erection of the gate is inconsistent with the plaintiff's right of way, the plaintiff may have it removed. However, the plaintiff may be held liable for anyone injured along the right of way because the defendant's erected the gate to safeguard their property and the plaintiff is now requiring its improvident and unwise removal.[4]

SO ORDERED.

10-2-19
DATE

David W. Ruoff
Presiding Justice

[3] Exhibit 27 is recorded at the Cheshire County Registry of Deed in Cab. 13, DR. 9 #219 and is dated 6-14-2013.

[4] The Court makes this observation because both of the defendants live in dwellings adjacent to Bowker Road and have observed unsafe OHRV traffic on it in the past. The Plaintiff, on the other hand, is rarely present on the land. Thus, to the extent the defendants have taken measures to minimize risks of injury (e.g. installing the gate) and the plaintiff is now compelling them to remove the gate, he may be responsible for any unsafe behavior and injury along the right of way.