THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2019-0688

LAUREN SHEARER

v.

TOWN OF RICHMOND, RON RAYMOND & SANDRA AUVIL

MANDATORY APPEAL PURSUANT TO SUPREME COURT RULE 7 OF THE DECISION ON THE MERITS OF THE CHESHIRE COUNTY SUPERIOR COURT

OPENING BRIEF FOR PLAINTIFF

Lauren Craig Shearer, *pro se*
1 Old Loudon Road
Concord, NH 03301
(603) 380-5760

Lauren C. Shearer will argue the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITIES

STATUTES

TREATISES

QUESTIONS PRESENTED

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 liability to the public.
Issue preserved by argument at trial, and the trial court's decision on the record. See Tr. 13-21,76, Add. 56;[1] Issue also raised pursuant to this Court's plain error rule. See Sup. Ct. R. 16-A.

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 Cheshire Superior Court Case No. 213-2000-CV-00111, that held vote was of no effect. See Tr. 13-16, 33-34, 44, 70; Issue also raised pursuant to this Court's plain error rule. See Sup. Ct. R. 16-A.

---

1 Citations to the records are as follows:
"Add." refers to the Addendum included with this brief;
"Apx." refers to the separate Appendix to this brief;
"PB" refers to the petitioner's brief; and
"Tr." refers to the consecutively-paginated transcript of the trial, held April 15, 2019.

STATUTES , ORDINANCES, RULES OR REGULATIONS

STATUTES

RSA 31:95-a Tax Maps. -

I. Every city and town shall, prior to January 1, 1980, have a tax map, so-called, drawn. Each tax map shall:

(a) Show the boundary lines of each parcel of land in the city or town and shall be properly indexed.

(b) Accurately represent the physical location of each parcel of land in the city or town.

(c) Show on each parcel of land the road or water frontage thereof.

II. (a) The scale on a tax map shall be meaningful and adequately represent the land contained on the map, taking into consideration the urban or rural character of the land. The scale shall be sufficient to allow the naming and numbering of, and the placement of dimensions within, if possible, the parcel represented in the individual plat.

(b) Nothing in this paragraph shall apply to any city or town which, prior to the imposition of such scale requirements, has drawn a tax map, appropriated funds or contracted with any person or firm to prepare a tax map or expended funds in the initial phase of preparing a tax map.

III. Each parcel shall be identified by a map and parcel number and shall be indexed alphabetically by owner's name and numerically by parcel number.

IV. Tax maps shall be updated at least annually to indicate ownership and parcel size changes.

V. Each tax map shall be open to public inspection in a city or town office during regular business hours.

RSA 212:34 Duty of Care. –

I. In this section:

(a) "Charge" means a payment or fee paid by a person to the landowner for entry upon, or use of the premises, for outdoor recreational activity.

(b) "Landowner" means an owner, lessee, holder of an easement, occupant of the premises, or person managing, controlling, or overseeing the premises on behalf of such owner, lessee, holder of an easement, or occupant of the premises.

(c) "Outdoor recreational activity" means outdoor recreational pursuits including, but not limited to, hunting, fishing, trapping, camping, horseback riding, bicycling, water sports, winter sports, snowmobiling as defined in RSA 215-C:1, XV, operating an OHRV as defined in RSA 215-A:1, V, hiking, ice and rock climbing or bouldering, or sightseeing upon or removing fuel wood from the premises.

(d) "Premises" means the land owned, managed, controlled, or overseen by the landowner upon which the outdoor recreational activity subject to this section occurs.

(e) "Ancillary facilities" means facilities commonly associated with outdoor recreational activities, including but not limited to, parking lots, warming shelters, restrooms, outhouses, bridges, and culverts.

II. A landowner owes no duty of care to keep the premises safe for entry or use by others for outdoor recreational activity or to give any warning of

hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph V.

II-a. Except as provided in paragraph V, a landowner who permits the use of his or her land for outdoor recreational activity pursuant to this section and who does not charge a fee or seek any other consideration in exchange for allowing such use, owes no duty of care to persons on the premises who are engaged in the construction, maintenance, or expansion of trails or ancillary facilities for outdoor recreational activity.

III. A landowner who gives permission to another to enter or use the premises for outdoor recreational activity does not thereby:

(a) Extend any assurance that the premises are safe for such purpose;

(b) Confer to the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed; or

(c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted, except as provided in paragraph V.

IV. Any warning given by a landowner, whether oral or by sign, guard, or issued by other means, shall not be the basis of liability for a claim that such warning was inadequate or insufficient unless otherwise required under subparagraph V(a).

V. This section does not limit the liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity;

(b) For injury suffered in any case where permission to enter or use the

premises for outdoor recreational activity was granted for a charge other than the consideration if any, paid to said landowner by the state;

(c) When the injury was caused by acts of persons to whom permission to enter or use the premises for outdoor recreational activity was granted, to third persons as to whom the landowner owed a duty to keep the premises safe or to warn of danger; or

(d) When the injury suffered was caused by the intentional act of the landowner.

VI. Except as provided in paragraph V, no cause of action shall exist for a person injured using the premises as provided in paragraph II, engaged in the construction, maintenance, or expansion of trails or ancillary facilities as provided in paragraph II-a, or given permission as provided in paragraph III.

VII. If, as to any action against a landowner, the court finds against the claimant because of the application of this section, it shall determine whether the claimant had a reasonable basis for bringing the action, and if no reasonable basis is found, shall order the claimant to pay for the reasonable attorneys' fees and costs incurred by the landowner in defending against the action.

VIII. It is recognized that outdoor recreational activities may be hazardous. Therefore, each person who participates in outdoor recreational activities accepts, as a matter of law, the dangers inherent in such activities, and shall not maintain an action against an owner, occupant, or lessee of land for any injuries which result from such inherent risks, dangers, or hazards. The

categories of such risks, hazards, or dangers which the outdoor recreational participant assumes as a matter of law include, but are not limited to, the following: variations in terrain, trails, paths, or roads, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps, and other forms of forest growth or debris, structures on the land, equipment not in use, pole lines, fences, and collisions with other objects or persons.

Source. 1961, 201:1. 1969, 77:1-3. 1973, 560:4. 1977, 208:1. 1981, 538:7. 2003, 29:1. 2005, 172:2; 210:11. 2010, 131:1, eff. Jan. 1, 2011. 2012, 214:1, eff. June 13, 2012. 2013, 162:1-3, eff. Jan. 1, 2014. 2015, 165:1, eff. Jan. 1, 2016.

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 the 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. The selectmen shall give written notice by verified mail, as defined in RSA 21:53, to all owners of property abutting such highway, at least 14 days prior to the vote of the town. In the case of a petitioned warrant article calling for discontinuance of a class VI highway, the petitioners shall bear

the cost of notice.

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.

Source. RS 54:1. CS 58:1. GS 65:1. GL 71:1. PS 72:1. 1903, 14:1. 1925, 19:1. PL 79:1. 1931, 12:1; 121:1. RL 95:1. 1943, 68:1. 1945, 188:1, part 9:1. 1949, 13:1. RSA 238:1. 1981, 87:1. 1991, 36:1. 1995, 77:3, eff. June 8, 1995. 2014, 41:1, eff. July 26, 2014. 2019, 242:3, eff. Oct. 10, 2019.

RSA 236:30 No Adverse Right. – No person shall acquire, as against the public, any right to any part of a highway by enclosing or occupying it adversely for any length of time.

Source. 1862, 2622:1. GS 70:8. GL 76:8. PS 77:7. PL 92:7. RL 108:7. 1945, 188:1, part 19:25. RSA 249:30. 1981, 87:1, eff. April 20, 1981.

RSA 508:14 Landowner Liability Limited. –

I. An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.

II. Any individual, corporation, or other nonprofit legal entity, or any individual who performs services for a nonprofit entity, that constructs, maintains, or improves trails for public recreational use shall not be liable for personal injury or property damage in the absence of gross negligence or willful or wanton misconduct.

III. An owner of land who permits another person to gather the produce of the land under pick-your-own or cut-your-own arrangements, provided said

person is not an employee of the landowner and notwithstanding that the person picking or cutting the produce may make remuneration for the produce to the landowner, shall not be liable for personal injury or property damage to any person in the absence of willful, wanton, or reckless conduct by such owner.

Source. 1975, 231:1. 1979, 439:1. 1981, 293:2. 1985, 193:2. 2006, 5:1, eff. Feb. 3, 2006.

ORDINANCES

Richmond, N.H., Selectmen's Minutes November 6, 1766 See Apx. 3

Richmond, N.H., Warrant and Minutes March 8, 1898 See Apx. 6

Richmond, N.H., Town Meeting, March 7 1972 See Apx.12

TREATISES

Restatement (Third) of Property Servitudes §4.1 (2000) 20

RULES

NHDOT Suggested Minimum Design Standards for Rural Subdivision Streets: December 4,2003 See Apx.50

Case No. 213-2000-CV-00111 Orders(@Apx.12, item 34) See Apx.23

STATEMENT OF THE CASE

On June 24, 2018, Plaintiff Appellant Lauren Shearer approached Defendant Ron Raymond to have him remove his locked gate from Bowker Road to facilitate planned agroforestry operations on the Barber Lot. See Tr. 80. A heated discussion followed, during which Mr. Raymond refused to remove the gate. The Defendants' position was that the 1898 discontinuance of Bowker Road had relieved them of all easement burdens upon their property and any travel across the old Bowker Road strip was by their permission. This position is what motivated the Plaintiff to file this action with the Cheshire County Superior Court, against the Town of Richmond, Ron Raymond and Sandra Auvil on July 24, 2018.

After several dispositive motions filed by the Plaintiff, the Town's Attorney and Ron Raymond, the Trial Court, on October 31st, 2018, issued an order dismissing the Town of Richmond from these proceedings. That same day, the Plaintiff made a deposit with a surveyor to gather information for the action against the remaining Defendants, Ron Raymond and Sandra Auvil. The Surveyor's on-site work was done in late November 2019 and the Surveyor's Report was generated and revised in December 2018-January 2019.

The Trial began the morning of April 15th, 2019, with a view of Bowker Road taking place that afternoon.

An Order Quieting Title affirming the Plaintiff's easement, with conditions, was issued on October 2nd, 2019. A subsequent Motion for

Reconsideration was denied on October 23rd, 2019 and Notice of Decision issued October 30th, 2019. This appeal was filed on November 27th, 2019.

STATEMENT OF THE FACTS

Plaintiff Appellant, Lauren Shearer, owns property on Bowker Road in the southwest portion of Richmond, N.H.. Bowker Road is a former town road that was laid out in 1766. See Apx. 3-5. Bowker Road was subsequently discontinued, by valid and binding vote, in 1898. See Apx. 6-11. Bowker Road's northern terminus connects to the Class VI portion of Barrus Road. Bowker Road runs southerly from Barrus Road, crossing several properties, to become the easterly bound of both the Plaintiff's property ('Barber Lot') and a lot held by the Town of Richmond ('Nash Lot'). See Apx. 17. Bowker Road then turns westerly and crosses property of Chris Anderson ('Anderson Lot') before finally bisecting the property of the Defendants, Ron Raymond and Sandra Auvil. Bowker Road ends at a gate and Whipple Hill Road. See Apx.18. The gate was installed by the Defendants, shortly after purchase of their property in 2002. See Tr. 149., Add. 49. Bowker Road is the sole access for the Plaintiff's property and several other lots of record.

SUMMARY OF ARGUMENT

1. Character of Easement.

This appeal principally involves the construction of the character of easement rights derived from a discontinued road in Richmond, NH. When this case went to trial, the Defendants held that all use of Bowker Road across their property was by permission. See Tr. 142-143. They held that because of the 1898 road discontinuation, there was no easement. The Court found "that the Plaintiff has established an easement–by operation of common law–that exists to allow access to his lot." See Add. 44. The Plaintiff's position is that the Superior Court erred in decreeing the easement width to be only 16 feet, and that such construction is not congruent with common law precedent. In determining the width of the easement, the Court should have looked at the the intent specified in the 1766. External evidence should have only been used to clarify ambiguities found in that layout, if any, not to contradict the terms of said layout. As a result of that error, the Plaintiff asks the court to review the legal basis of the lower courts determination. The Plaintiff challenges the Trial Court's determinations with respect to the easements width, allowed purposes, and the presumption of increased in liability exposure to the Plaintiff borne out of the successfully affirmed right to remove the Defendants' interfering gate.

2. Res Judicata

Bowker Road was also the subject of an action initiated by the Plaintiff's predecessor-in-title Roy Bartlett, Sr.. As such, the findings in

that case impact the this action under appeal. The Plaintiff seeks review and clarification of the Trial Court's interpretation of the relevant Orders issued in Cheshire County Superior Court Case No. 213-2000-CV-00111.

THE ARGUMENT

Standard of Review

The questions presented for review concern the Trial Court's determinations impacting scope, dimension and nature of an easement. The Trial Court based its finding on an interpretation of the road grant of 1766, a view of the road on the day of the trial, and how the right of way has been used for the last century. "The proper interpretation of a deed is a question of law for this court." Lynch v. Town of Pelham, 167 N.H. 14, 20 (2014) (quotation omitted). "We base our judgment on this question of law upon the trial court's findings of fact." Id. "If the language of the deed is clear and unambiguous, we will interpret the intended meaning from the deed itself without resort to extrinsic evidence." Id. "If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms." Id. The interpretation of a deed represents a question of law. Appletree Mall Associates v. Ravenna Investment Associates, 162 N.H. 344, 347 (2011). Accordingly, to the extent the Trial Court's decision involves the interpretation of the Deed, the Court's review is *de novo.* Id.

Additionally, the Trial Court in the October 2nd, 2019 Order makes statements that are contrary to previous findings in Case No. 213-2000-CV-

00111, which involved the same road as the instant case. See Apx. 23-49. Such determinations sow confusion and are barred by the doctrine of res judicata.

I. THE TRIAL COURT ERRED IN CONSTRUING THE EASEMENT TO BE OTHER THAN THAT CONTEMPLATED BY THE TOWN OF RICHMOND IN THEIR 1766 LAYOUT, IN TERMS OF WIDTH, ALLOWED PURPOSES, MAINTENANCE RESPONSIBILITY, AND LIABILITY.

The Trial Court (*Ruoff, D.*), stated in support of its holding, '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 the public use forever." See Add. 53. The grant also appears to measure the width of the road by reference to the names of the 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, 27'. See Apx. 19-20, 20-21, 18. The Trial Court further found "that the easement exists from 8 feet in each

direction from the centerline of the Bowker Road as depicted on Exhibit 27, for a total width of 16 feet." See Add. 54.

The determination in the previous paragraph does not cite any New Hampshire precedent or statute, but the determination of the easement overall was "-by operation of common law-" See Add. 44. In support of that common law analysis the Trial Court did state: '"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, 846 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., 516 S.E.2d 383, 386 (N.C. Ct. App. 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'. See Add. 50-51.

To address this decision we will look at the Trial Court's conclusions on width , allowed purposes, and liability.

A. THE TRIAL COURT ERRED IN CONSTRUING WIDTH.

1. Rules to construe width.

The Trial Court does not cite specific New Hampshire law to support its determination of an easement width of 16 feet. The width of the easement is expressly set forth in the 1766 layout as '3 rods wide' (50 feet). In construing a deed, a court seeks to determine the parties' intent at the time that the property at issue was originally conveyed in light of the surrounding circumstances. Red Hill Outing Club v. Hammond, 143 N.H. 284, 286 (1998). Unless the parties' apparent intent violates public policy or statute, it will govern the scope of the conveyance. Id. The starting point for determining the parties' intent is the language of the deed itself. Flanagan v. Prudhomme, 138 N.H 561, 565-566 (1994). If the language of the deed is unambiguous, then it is deemed to reflect the parties' intent and there is no need to resort to outside or extrinsic evidence to clarify the parties' intent. However, if a deed is ambiguous, outside or extrinsic evidence may be relied upon to clarify, but not contradict, the ambiguous language in the deed. Id. At 566. Ambiguities may either be patent, Ouellette v. Butler, 125 N.H. 184, 188 (1984) [A patent ambiguity exists if the deed on its face fails to provide sufficient information.], or latent, MacKay v. Breault, 121 N.H. 135, 139 (1981)[A latent ambiguity exists if the deed language is clear, but is made ambiguous by reference to another document.].

Given that existence of the easement was determined on a common law basis we also look to Restatement (Third) of Property: Servitudes, §4.1, for these rules:

"(1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.
(2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred."

2. Deeds to indicate intent of parties.

The rules and citation above support granting deference, where possible, to the deed. That deference does not seem to have been granted in the present case. We present the text of the layout from 1766 for further analysis: See Apx. 3-5.

> Richmond Nov 6 AD 1766
>
> That we the selectmen of the aforesaid town of Richmond laid out a public highway in said town in the following manner begining 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 untill it comes to the land of Israel Whipple than a little to the eastward of Israel 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 Warwick line the aforesaid way to extend three rods in width through out the west side of the said marked

> trees for the marked is all on the east side of said way and to be open for public use forever as witness our hands
> David Thurber
> David Baruey }Selectmen
> Edward Ainsworth

In discussing the above layout the Trial Court states: "The grant also appears to measure the width of the road by reference to the names of the 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.". See Add. 53. This conclusion appears to be in error. The 1766 layout specifically states, "... the aforesaid way to extend three rods in width through out the west side of the said marked trees for the marked is all on the east side of said way...". See PB 21-22. While the property owners are mentioned, the width is measured relative to marked trees 'through out' that were to be the eastern bound along the entire way. Admittedly, these trees are likely to have been harvested, or the marks upon them healed over in the 250+ year interim. The phrasing of the layout is somewhat archaic with deficiencies in spelling and punctuation, yet the Proprietors intent to specify a strip of land '3 rods in width' for a 'public highway' is clear.

We also review the text of the road's discontinuance for 1898: See Apx. 7, 8,11. (relevant excerpts included inline below)

> To the Inhabitants of the town of Richmond in the County of Cheshire in said State qualified to vote in Town Affairs. You

are hereby notified to meet at Town Hall in said Richmond on Tuesday the eighth day of March next, at nine of the clock in the forenoon to act upon the following subjects:
...
5. To see if the Town will vote to discontinue the highway leading from John Lees to the Lucius Carroll place via Medad Evans place or act anything relating thereto.
...

Fred A. Prescott
Silas O. Marlin } Selectmen of Richmond
Lewis R. Cass

Richmond March 8th, 1898
We hereby certify that we gave notice to the inhabitants within named, to meet at the time and place and for the purpose within mentioned by posting up an attested copy at the Post Office being a public place in said town on the nineteeth day February, 1898

Fred A. Prescott
Silas O. Martin } Selectmen of Richmond
Lewis R. Cass
A true record, Attest: Almon Twitchell Town Clerk

At a legal meeting of the Inhabitants of the Town of Richmond on the 8th day of March 1898. At the Town Hall at nine of the clock in the forenoon, the meeting was called to order by the moderator and before any business was transacted a portion of chapter 39 of the general laws was read by the Clerk, the warrant was then read.
...
Article 5 By major vote voted to discontinue the highway leading from John Lees to the Lucius Carroll place via Medad Evans place.
...

A true record, Attest: Almon Twitchell Town Clerk

No words in this document are shown that would suggest the Town intended to diminish the width of the right of way that would be retained by the abutting property holders, upon discontinuance.

3. Erroneous prescriptive style analysis by Trial Court.

In making their determination of the easement width, the Trial Court appears to have applied a type of analysis normally reserved for creation by Prescription. The Trial Court states, "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 last century. To that end, the Court uses its own observations from the view, locations of the observed lanes of the travel and placement of stonewalls and three historical maps: Exhibit 11, 17 and 27." See Add. 53, Apx. 19-20, 21-22, 18.

The Order's statement in the previous paragraph shows the Trial Court has not used the rule from Red Hill Outing Club v. Hammond, 143 N.H. 284, 286 (1998). No violation of public policy or statute has been indicated, thus the apparent intent of the parties should govern. The Trial Court even appears to use an analysis that is inverse to the one used in Willey v. Portsmouth, 35 N.H. 303. In Willey. "It appeared that the street called Islington Street, crossed a brook called Islington Creek, nearly at right angles. It was generally about three rods wide between the fences, but where it crossed the creek, the stone wall on the west side was set further back, leaving the space between the fences about six rods wide. The fences have remained in the same position since the memory of the oldest

inhabitant, until recently. There was no evidence of the laying out of this street.". Willey found, where the Islington Street was generally found to be 3 rods wide, in an area where the stone wall and culvert were constructed 6 rods apart, the whole 6 rods was deemed part of the street. In the instant case, the road is not one by prescription, but by layout, so this type of analysis should not be applied, inverse or not. While prescriptive use can be used to expand the scope of an easement it should not be used to diminish an easement.

As an additional note, in Willey v. Portsmouth, 35 N.H. 303., 'Towns are not generally bound to make the whole that is laid out as a highway passable...'. Thus, the Trial Court is in error to the extent it used the width of Bowker Road's constructed travelled way as a basis to contradict the stated intent of the 1766 layout. See Add. 53, Apx. 3-5.

If the Order of the Trial Court is upheld, it would put land reserved for easements, including town roads, in jeopardy, in that the Trial Court's order requires construction over the entire easement width to remain valid.

The Plaintiff's Surveyors Report spoke to Surveyor Pelletier's observations, "The present location of the road is bounded mostly by stonewalls that vary in width. The road is shown on the Town tax maps to be 33' wide, though tax maps cannot be relied upon as accurate. As a matter of practice, we locate the stonewalls along a road right of way along the face of the walls with the assumption that the land owner installed the walls and owns the walls, not the Town." See Apx. 15. The date of

construction of the stonewalls in unknown. Presumably, as these are are not mortared constructions, but are dry-stacked raw field stone, these walls are likely the product of clearing and tilling of fields when land was under active agriculture use, after the layout of the road. As such, we may look to RSA 236:30: "No person shall acquire, as against the public, any right to any part of a highway by enclosing or occupying it adversely for any length of time.". The source of this RSA is from as far back as 1862, during the time the road was maintained by the Town, and prior to its discontinuance. As well, in 1766 when Bowker Road was laid out, New Hampshire was under colonial law, so the similar doctrine of *nullum tempus occurrit regi* would have applied. As no recorded adverse claim against the Bowker Road easement was presented to the Trial Court, nor evidence supporting a present day adverse claim has been entered, this court need not consider them. Accordingly, the placement of these walls, within the 3 rod strip, would not serve to diminish the width of the easement.

4. Misinterpretation of Surveyor's Report and maps.

The Order makes reference to the Plaintiff's survey of 2018 done by Cardinal Surveying and Land Planning. The Order states, "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 the center line as measured from the referenced wall.".(emphasis added) See Add. 46-47. To contrast, we include the actual text of the Surveyor's Report report here: "The present location of the road is bounded mostly by

stonewalls that vary in width. The ***road*** is shown on the Town tax maps to be 33' feet wide, though tax maps cannot be relied upon as accurate. As a matter of practice, we locate the stone walls along a road right of way along the face of the walls with the assumption that the land owner installed the walls and owns the walls, not the Town." (emphasis added). See Apx. 15.

Contrasting the text of the finding of the Trial Court's Order with the Surveyor's Report reveals several discrepancies. The Court concluded, "...the right of way is bounded by stone walls." Contrarily, the Surveyor Report states, "The present location of the road is bounded by stonewalls..." apparently referring to the travelled way **not** the legal width of the easement. To support this, Ms. Pelletier's testimony specifically mentions "-- we did locate the travelled way.", and later the same paragraph, "As to rights, I cant give you an opinion on that, that's a legal – not a survey issue.". See Tr. 90-91.

The conclusion of the Trial Court, as to the width of the Trial Court, speaks directly to the Court's use of three 'historical' maps: EXHIBITS 11 17 27. See Apx. 19-20, 21-22, 18. The first 2 maps are Town of Richmond tax maps. Tax Maps are addressed in the prior litigation involving Bowker Road in Cheshire County Superior Court Case No. 213-2000-CV-00111.

As detailed in the October 3, 2002 Order in Case No. 213-2000-CV-00111 ORDER ON DEFENDAANTS MOTION FOR SUMMARY JUDGEMENT , "Tax maps are required to accurately represent the

physical location of each parcel of land within a municipality. RSA 31:95-a, 1(b). They may sometimes be used for purposes other than taxation. However, tax maps are not surveys. Surveys are plans and maps prepared under specific statutory and regulatory standards relative to the surveying of land. See, for example, RSA 310-A:53 et seq., N.H. Code Admin. R. Lan 501.06.

There is no evidence before the court that the Town of Richmond tax maps, whether correct or incorrect, had been prepared for purposes other than developing information for tax administration purposes concerning the Town as a whole. As noted by the New Hampshire Supreme Court in the context of the use of real estate tax assessments, "[v]aluations made by tax assessors in their official capacity are not admissible as evidence of value in proceedings other than those relating to to the tax assessment." Ibey v, Ibey, 94 N.H. 425, 427 (1947)" See Apx.44-46.

We note, as well, that Trial Court Exhibits 11 and 17 do not appear to make any reference to the width of Bowker Road. See Apx. 19-20, 21-22. They provide no basis for negating or altering the easement width provided by the 1766 Layout of the road, to less than 3 rods of width.

The third historical map referred to by the Court is the 2013 Subdivision Plat commissioned by the Defendants. See Apx.18. This map does make reference to the "BOWKER ROAD DISCONTINUED 1897"(near center of drawn survey). It also schematically shows remnants of the stone walls and indicates the current travelled way, locating these

existing physical features. It does not indicate the legal width of the *easement* of Bowker Road. It also provides no basis for construing an easement width of less than the 3 rods stated by the 1766 road layout.

5. General practice of co-use of easement strip.

In general, easements are an interest in property, not fee simple absolute ownership. The fee of the land burdened by the easement belongs to the servient estate holder. While use of an easement, like a road, can be of such intensity as to effectively preclude any other use by the fee holder, this is not always the case.

In the case of Bowker Road, use of the easement has diminished to such an extent that the Town of Richmond discontinued the road by vote in 1898. See Apx. 7,8,11. The effect of this vote was to relinquish the viatic use rights the Town was holding in trust for the general public. As such, the public no longer has a right to use the road. Rights to use the Bowker Road strip must now be derived from permission granted by those landlocked backlot owners on Bowker Road.

The Bowker Road easement may be used by the underlying land owners in any manner that does not interfere with its use as a way. To date, this has included: storage of stone from cleared fields in the form of dry stacked stone walls; installation of culverts to assist in drainage; natural growth of trees; storage of sawlogs in the periphery; gating by consent of the easement holders. As the intensity of the easement use is now increasing, those other uses 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 behaviour. These customs have long been part of the law governing servitudes such as easements.

6. Present use of easements.

From the Trial Court's Order opening paragraph, "..the Court finds that the Plaintiff has established an easement –by operation of common law-- that exists to allow access to his lot...and exists for the purposes of accessing the plaintiff's lot for residential and agricultural purposes.". See Add. 44. To that end we examine the appropriateness Trial Courts determination of width with respect to residential and agricultural purposes.

The State currently promulgates through the New Hampshire Department of Transportation, Suggested Minimum Design Standards for Rural Subdivision Streets:

(https://www.nh.gov/dot/org/projectdevelopment/planning/documents/SuggestedMinimumDesignStandardsforRuralSubdivisionStreets.pdf) See Apx. 50-53. These State wide minimum standards are currently required for private and public roads in rural areas. In municipalities with active engineering departments more stringent standards can be specified, but in small towns like Richmond this is the current baseline standard. Of particular note are items 5, 10, 22, and 23: (inline excerpts provided for convenience)

5. **RIGHT-OF-WAY**: The minimum width of right-of-way shall be 15.5 m (50 ft). A greater width may be required for arterial and collector streets.

...

10. **CLEARING**: The entire area of each street shall be cleared of all stumps, brush, roots, boulders, and like material, and all trees not intended for preservation.

...

22. **UTILITIES:** Utility poles should be kept close to the right-of-way line, in no case closer than the ditch line and always well back of a curb. Water and sewer mains should be constructed outside the surface area and preferable outside the ditch line.

23. **SAFETY**: Safety is an important factor on all roadway improvements. On development roads it may not be possible or practical to obtain obstacle- free roadsides but every effort should be made to provide clear areas within the maintenance limits. The use of flatter slopes, the use of guardrail where necessary, and the use of warnings signs are other safety factors to be considered. These areas are addressed in the publication "Roadside Design Guide" by AASHTO, 2002.

...

It appears that the Town of Richmond's proprietors choice of 3 rods for the width of Bowker Road was prescient. As noted in section 5 above, the current minimum state standards for a rural street is 15.5 m (50 ft). This is identical to the archaic '3 rods' of the 1766 road layout. Sections 10, 22 and 23 also are indicative of the need for space outside the travelled way of the road for clearing, location of utility poles (as is appropriate for modern residential usage), safe obstacle free road sides. In the light of these minimum state standards, the Trial Court's finding of an easement of only 16 ft., for the stated residential and agricultural purposes, is inadequate. It appears that in order to avoid violating public policy, and the rules of construction the easement must be construed to be the full 3 rods. See PB 20-21.

B. THE TRIAL COURT ERRED IN CONSTRUING ALLOWED PURPOSES.

The Order of the Trial Court also found, "Since the lands off of Bowker Road have only ever been used for residential or agricultural purpose, the easement is limited in scope to those uses (assuming local land use regulations allow for such use).". These restrictions are contrary to the rule from Red Hill Outing Club v. Hammond, 143 N.H. 284, 286 (1998), as no such restriction was contemplated in the 1766 layout. See Apx. 4-5.

The imposition of the Trial Court of 'residential or agricultural' restriction on the easement is unnecessary as such restriction is currently in line with Town of Richmond Zoning regulation. In placing this unneeded restriction, future owners may be required to return to the Courts for relief

should Zoning classifications evolve beyond their current residential and agricultural nature.

For this reason, and for judicial economy, this redundant restriction should be removed from the Trial Court's Order by modification.

C. THE TRIAL COURT ERRED IN CONSTRUING LIABILITY.

The closing paragraph of the Trial Court's order states, "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]" Footnote 4 states, "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 steps 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 behaviour and injury along the right of way." This contradicts standing New Hampshire statutes.

RSA 508:14, I states:

> **508:14 Landowner Liability Limited. –**
>
> I. An owner, occupant, or lessee of land, including the state or any

political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.

RSA 212:34 also states:

212:34 Duty of Care. –

I. In this section:

(a) "Charge" means a payment or fee paid by a person to the landowner for entry upon, or use of the premises, for outdoor recreational activity.

(b) "Landowner" means an owner, lessee, holder of an easement, occupant of the premises, or person managing, controlling, or overseeing the premises on behalf of such owner, lessee, holder of an easement, or occupant of the premises.

(c) "Outdoor recreational activity" means outdoor recreational pursuits including, but not limited to, hunting, fishing, trapping, camping, horseback riding, bicycling, water sports, winter sports, snowmobiling as defined in RSA 215-C:1, XV, operating an OHRV as defined in RSA 215-A:1, V, hiking, ice and rock climbing or bouldering, or sightseeing upon or removing fuel wood from the premises.

(d) "Premises" means the land owned, managed, controlled, or overseen by the landowner upon which the outdoor recreational activity subject to this section occurs.

(e) "Ancillary facilities" means facilities commonly associated with outdoor recreational activities, including but not limited to, parking lots, warming shelters, restrooms, outhouses, bridges, and culverts.

II. A landowner owes no duty of care to keep the premises safe for entry or use by others for outdoor recreational activity or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph V.

II-a. Except as provided in paragraph V, a landowner who permits the use of his or her land for outdoor recreational activity pursuant to this section and who does not charge a fee or seek any other consideration in exchange for allowing such use, owes no duty of care to persons on the premises who are engaged in the construction, maintenance, or expansion of trails or ancillary facilities for outdoor recreational activity.

III. A landowner who gives permission to another to enter or use the premises for outdoor recreational activity does not thereby:

(a) Extend any assurance that the premises are safe for such purpose;

(b) Confer to the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed; or

(c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted, except as provided in paragraph V.

IV. Any warning given by a landowner, whether oral or by sign, guard, or issued by other means, shall not be the basis of liability for a claim that such warning was inadequate or insufficient unless otherwise required under subparagraph V(a).

V. This section does not limit the liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity;

(b) For injury suffered in any case where permission to enter or use the premises for outdoor recreational activity was granted for a charge other than the consideration if any, paid to said landowner by the state;

(c) When the injury was caused by acts of persons to whom permission to enter or use the premises for outdoor recreational activity was granted, to third persons as to whom the landowner owed a duty to keep the premises safe or to warn of danger; or

(d) When the injury suffered was caused by the intentional act of the landowner.

VI. Except as provided in paragraph V, no cause of action shall exist for a person injured using the premises as provided in paragraph II, engaged in the construction, maintenance, or expansion of trails or ancillary facilities as provided in paragraph II-a, or given permission as provided in paragraph III.

VII. If, as to any action against a landowner, the court finds against the claimant because of the application of this section, it shall

determine whether the claimant had a reasonable basis for bringing the action, and if no reasonable basis is found, shall order the claimant to pay for the reasonable attorneys' fees and costs incurred by the landowner in defending against the action.

VIII. It is recognized that outdoor recreational activities may be hazardous. Therefore, each person who participates in outdoor recreational activities accepts, as a matter of law, the dangers inherent in such activities, and shall not maintain an action against an owner, occupant, or lessee of land for any injuries which result from such inherent risks, dangers, or hazards. The categories of such risks, hazards, or dangers which the outdoor recreational participant assumes as a matter of law include, but are not limited to, the following: variations in terrain, trails, paths, or roads, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps, and other forms of forest growth or debris, structures on the land, equipment not in use, pole lines, fences, and collisions with other objects or persons.

Source. 1961, 201:1. 1969, 77:1-3. 1973, 560:4. 1977, 208:1. 1981, 538:7. 2003, 29:1. 2005, 172:2; 210:11. 2010, 131:1, eff. Jan. 1, 2011. 2012, 214:1, eff. June 13, 2012. 2013, 162:1-3, eff. Jan. 1, 2014. 2015, 165:1, eff. Jan. 1, 2016.

The above statutes specifically address the liability issues mentioned in Order Footnote 4. The definition of Landowner, above, includes both ‘owner’ and ‘holder of an easement’. The Plaintiff, in holding the

Defendants to their duty to not interfere with the Bowker Road easement, under the Court's Order may compel them to remove the gate. If, under section RSA 212:34 § V(a) the Defendants know of some dangerous condition not excluded by §VIII, they have recourse to the use of signage, rather than interference with the Bowker Road easement.

The conclusion to be taken from the above paragraph is that no additional liability accrues to the Plaintiff as a result of exercising his easement rights.

II. THE TRIAL COURT ERRED IN APPARENTLY AFFIRMING THE TOWN OF RICHMOND'S 1972 VOTE THAT MADE BOWKER ROAD CLASS VI SUBJECT TO GATES AND BARS.

The Trial Court in its Order states, "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.". Later the on the same page it states, "In present day, Bowker Road would have simply been considered a non-town maintained, or 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." See Add. 52. These statements appear to be giving undeserved weight to the Town of Richmond's 1972 vote, contrary to *res judicata.*

*R*es judicata has been established "to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end."

Cook v. Sullivan, 149 N.H. 774, 777 (2003) (quotation omitted). "Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." Sleeper v. Hoban Family P'ship, 157 N.H. 530, 533 (2008).

From the Order, "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 by valid and binding town vote in 1898. (Plaintiff exhibit 6). In 1972 the town voted to put Bowker road under "gates and bars." (Plaintiff exhibit 10, item 34).". See Add. 45-46.

On 08/10/2000, the Plaintiff's predecessor-in-title, Roy M. Bartlett Sr., filed a case in Cheshire Superior Court (213-2000-CV-00111). One of the issues in this case was the status of the road that is also being examined in the instant case. The conclusion of the Bartlett case, narratively detailed in Orders dated 02/18/2002 and 05//07/2002, was that Bowker Road was discontinued in 1898. See Apx. 23-40. Thus the condition in the Town vote of 1972 requiring "...if they have ***not*** already been discontinued..." (emphasis added) prevented Bowker Road from attaining Class VI status via this 1972 warrant article. See Apx. 12,13.

The conclusion to be made from this sequence of events is that Bowker Road was discontinued from Barrus Road to Whipple Hill Road in 1898 and is **not** a Class VI road by the 1972 warrant article. As such, the Order under appeal must be modified to remove wording inferring that Bowker

Road to be Class VI subject to gates and bars, as per *res judicata*. See Add. 52.

CONCLUSION

For the reasons set forth above, the Trial Court's decision declaring the width of the Bowker Road easement to be 16 feet in width should be modified to change the width to the 3 rods (50 feet) stated in the 1766 layout, in order to be consistent with standing construction rules. As well removal of the language restricting the road use to argricultural and residential purposes should be removed. Any inference of increased liability to the plaintiff stemming from his exercise of his easement rights should likewise be removed. Additionally, any confusing text from the order that erroneously indicates Bowker Road is Class VI should be modified by removal. See Add. 46,50,52.

Respectfully submitted,

Lauren C. Shearer, *pro se*

Dated: May 18, 2020

By : /s/ Lauren C. Shearer
Lauren C. Shearer, *pro se*
1 Old Loudon Road
Concord, NH 03301
(603) 380-5760
shearerlauren@gmail.com

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16, the Plaintiff hereby requests 15 minutes oral argument. Lauren C. Shearer, Plaintiff *pro se*, shall present oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to New Hampshire Supreme Court Rule 26(7), I served the foregoing document upon Clara E. Lyons, Esq. the attorney of record for the Defendants by electronically filing it with the Clerk of Court using the Court's electronic filing system, which will automatically send email notification of such filing to registered attorneys of record.

Dated: May 18, 2020 /s/ Lauren C. Shearer
Lauren C. Shearer

CERTIFICATION AS TO WORD COUNT

The undersigned certifies that the above brief consists of 8552 words, exclusive of the Table of Contents and Table of Authorities.

Dated: May 18, 2020 /s/ Lauren C. Shearer
Lauren C. Shearer

CERTIFICATION CONCERNING TRIAL COURT DECISIONS

The undersigned certifies that the written Superior Court's Order Quieting Title and Motion for Reconsideration: Denied, are are included in the Addendum at pages 43 through 56.

Dated: May 18, 2020 /s/ Lauren C. Shearer

Lauren C. Shearer

ADDENDUM

Table of contents:

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Cheshire Superior Court
33 Winter Street, Suite 2
Keene NH 03431

Telephone:
TTY/TDD Relay:
http://www.c

NOTICE OF DECISION

File Copy

Case Name: **Lauren C Shearer v Town of Richmond, et al**
Case Number: **213-2018-CV-00114**

Enclosed please find a copy of the court's order of October 02, 2019 relative to:

Order Quieting Title

October 02, 2019

Daniel J. Swegart
Clerk of Court

(555)

C: Lauren C Shearer; Clara E. Lyons, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. SUPERIOR C

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 ca When the lot in question was originally created, it was accessed by a town road kn 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 evid at trial and conducting an extended view (a 2-3 mile hike along Bowker Road), the finds that the Plaintiff has established an easement – by operation of common law 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 pla 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 o

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.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Cheshire Superior Court
33 Winter Street, Suite 2
Keene NH 03431

Telephone:
TTY/TDD Relay:
http://www.co

NOTICE OF DECISION

File Copy

Case Name: **Lauren C Shearer v Town of Richmond, et al**
Case Number: **213-2018-CV-00114**

Enclosed please find a copy of the court's order of October 23, 2019 relative to:

Motion for Reconsideration: Denied

October 30, 2019

Daniel J. Swegart
Clerk of Court

(555)

C: Lauren C Shearer; Clara E. Lyons, ESQ

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Cheshire County Superior Court
Case Name: Lauren Shearer vs. Town of Richmond, Ron Raymond and Sandra Auvil
Case Number: 213-2018-CV-00114

MOTION FOR RECONSIDERATION

Pursuant to Rule 12(e) of the Rules of the Superior Court of the State of New Hampshire, the Plaintiff n reconsideration of the Court's "Order Quieting Title" of October 2, 2019.

The order as it stands appears to have errors of law as well as errors of fact. While many of the errors n rather than holdings in this case, they are listed for completeness and judicial economy in correcting problems th impact future litigation.

Errors of Law and Fact

1. The primary error of law in the aforementioned Order, is the determination that the easement that the Pl received by operation of common law is of lesser width and more restricted in character than that reserv original road layout warrant article (see Plaintiff Exhibit 1). It appears the Court has conflated visible pa travelled way of Bowker Road, observed during the view (and subsequently characterized as a "width o 8 feet from the centerline of the "pathway""), with the overall width of the easement. In doing so, the C effect engaged in a partial extinguishment of the reserved easement. Plaintiff believes under standing N Hampshire law there are only a small number of doctrines by which easements can be extinguished (Me Abandonment by Written Agreement or Overt Action, Adverse Possession, Lack of Necessity, or Impos Purpose) and none of those apply in the instant case. By inference from the text of the Order, it appears Court may be concluding that the abutters, by allowing natural growth along the sides of the travelled pa somehow indicating Abandonment of that portion of the easement. Non-user has not been held as Aban easement in any jurisdiction of which the Plaintiff is aware. Indeed, the Plaintiff has found it has alway law in, for instance, California that "[a]n easement acquired by deed is not lost by mere non-user. 'It mu accompanied with the express or the implied intention of abandonment, and the owner of the servient es