STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2022-0234

TODD H. MADDOCK, ET AL.

PLAINTIFFS/APPELLANTS

v.

MICHAEL J. HIGGINS

DEFENDANT/APPELLEE

BRIEF OF APPELLEE, MICHAEL J. HIGGINS

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Statutes:

NH RSA 674:33 Powers of Zoning Board of Adjustment

I.

(a) The zoning board of adjustment shall have the power to:

(1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(b)

(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

(c) The board shall use one voting method consistently for all applications until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change.

I-a.

(a) Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

(b) The zoning ordinance may be amended to provide for the termination of all variances that were authorized under paragraph I before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that variances authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

III. The concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

IV.

(a) A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance.

(b) Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.

(c) The zoning ordinance may be amended to provide for the termination of all special exceptions that were authorized under this paragraph before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for

one year and shall prominently state the expiration date of the notice. The notice shall state that special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

V. Notwithstanding subparagraph I(a)(2), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

(a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.

(b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.

VIII. Upon receipt of any application for action pursuant to this section, the zoning board of adjustment shall begin formal consideration and shall

approve or disapprove such application within 90 days of the date of receipt, provided that the applicant may waive this requirement and consent to such extension as may be mutually agreeable. If a zoning board of adjustment determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may, in its discretion, deny the application without prejudice, in which case the applicant may submit a new application for the same or substantially similar request for relief.

NH RSA 36:19-a (Referenced as included in Appellants' Brief. Repealed, January 1, 1984)

A municipality, having adopted a zoning ordinance as provided in RSA 31: 60-89, and where the planning board has adopted subdivision regulations as provided. in RSA 36: 19-24, may further empower the planning board to review, and approve or disapprove site plans for the development of tracts for nonresidential uses, or for multi-family dwelling units other than one and two-family dwellings, whether or not such development includes a subdivision or re-subdivision of the site.

STATEMENT OF THE FACTS

Pursuant to Rule 17(1), Appellee has cited to the Appellants' Appendixes and Addendum when possible. A supplemental Appendix has also been provided.

Appellants, Todd and Margaret Maddock, purchased the property at 39 Barefoote Place in Gilford, New Hampshire, on April 30, 2014. (Appellants' Appendix [Apx.] 1). Appellee, Michael J. Higgins, purchased the neighboring property at 33 Barefoote Place, Gilford, New Hampshire on September 5, 2018. (Apx. 20). The community in which the properties are situated has been historically referred to as Gunstock Acres. (Appellee's Appendix [Appellee's Apx.] 4). The relevant chains of title were agreed upon by the Parties and accepted by the Court. (Addendum to Brief of Appellants [App. Adden.] 45 (January 31, 2022, Order [Order])).

In September of 2018, Appellants hired Bryan Bailey to survey their property. (Tr. Trans. 121). Pins were placed on April 19, 2019. (Tr. Trans. 131). Subsequently, Bailey created a plan entitled "Boundary Retracement Worksheet" [The Bailey Plan], dated June 18, 2019. (Appellants' Appendix, Part II [Apx. Pt.2] 109). The Bailey Plan depicts the subject properties separated by the correct "Mathematical Line" and the erroneous "A-B Line". Id. The wedge-shaped area between these lines represents the "Disputed Land". Id.

Following the Bailey survey, Appellee requested that Appellants remove all non-natural elements from the Disputed Land. (Apx. Pt.2 110). Thereafter, Appellee commissioned the removal of a number of trees from

within the Disputed Land. (Tr. Trans. 532, 16-20). Appellants commenced this action on May 24, 2019, by filing a Verified Petition sounding in Adverse Possession (Count I), Boundary by Acquiescence (Count II) and Timber Trespass (Count III).

At trial, Nancy Ramsdell [Ramsdell], Appellee's predecessor-in-title, testified that Marian Wilson-Hall [Hall], predecessor-in-title to Appellants' immediate predecessors, informed Ramsdell that her driveway encroached slightly upon Ramsdell's property. (App. Adden. 48). The encroachment of Hall's driveway upon the Ramsdell lot became the subject "gentleman's agreement" whereby the Ramsdells permitted the continued encroachment. Id.; (Affidavit of Nancy Ramsdell, Apx. 55). The Court found that this permission was not revoked for the duration of the Halls' ownership of Appellants' property. Id.

Stephen and Deborah Guyer, Appellants' immediate predecessors-in-title both testified at trial. (App. Adden. 49; Tr. Trans. 21-114 and Tr. Trans. 241-262, respectively). Stephen Guyer's activities in the Disputed Land consisted of clearing brush, raking leaves and knocking small trees down the slope; he would also occasionally walk on what he described as a game trail; he did not post or mark trees in the Disputed Land, nor did he engage in any significant tree cutting; and he placed a shed on the property in 2010. Id. The Guyers also testified that a fire pit was located in the Disputed Land, however the area Deborah Guyer specified included the fire pit also included a substantial area outside the Disputed Land. (Tr. Trans. 259, 21- 260, 24; Appellee's Apx. 37)

Appellants purchased the Guyer's property on April 30, 2014. (Apx. 1; App. Adden. 50). Todd Maddock described clearing brush and occasionally walking his dog on the property and testified that Appellants did not post the property. (App. Adden. 50) The trial Court found that Appellants and their predecessors usage of the Disputed Land was not "*sufficiently notorious to justify a presumption that the owner was notified of it*." Id. at 56, citing Blagbrough Family Realty Trust v. A&T Forest Prods., 155 N.H. 29, 33 (2007).

Appellants argue that certain filings with the Town of Gilford by Appellants' predecessors provided Color of Title, putting Appellee's predecessors on notice of an adverse claim to the Disputed Land. The filings, [hereinafter, "Hall documents"] are described in detail below:

1978 Building Permit Application:

Hall filed a building permit application with the Town of Gilford on March 27, 1978 for Lot 8-20A Barefoote Place. (Apx. 34). A building permit issued dated April 4, 1978. (Apx. 35). The building permit application contains a hand-drawn sketch purporting to depict a circular driveway and house on what would become Appellants' lot. (Apx. 34).

While the Bailey Plan depicts a five-sided lot, the hand-drawn sketch depicts a four-sided lot. (Apx. 34 and 109). Comparing the dimensions on hand-drawn sketch with the Bailey Plan, we see the following (starting with the road frontage boundary and moving clockwise): 94' v. 94.38 actual, 241 v. 220.37 actual, 210 v. 70.14 & 163.96 actual, 200 v. 213.98 actual. Id.

1978 Driveway Application:

Hall filed an "Application for Driveway Construction Permit into Town of Gilford Right-of-Way" dated March 27, 1978. (Apx. at 36). The sketch contains no orientation or dimensions. Id. The locations of the circular driveway and house depicted bear little similarity to their locations on the building permit application or the Bailey Plan. (Apx. at 36, 34 and 109).

1978 Septic Plan:

Appellants further reference the "Septic Tank Disposal System for Dr. Marian Wilson … Site Locus 8-20A Gunstock Acres, Gilford, NH" by Seely F. White, Jr., dated May 18, 1978 ["Septic Plan"]. (Apx. 37). The inaccuracy of this sketch was confirmed by Appellee's Expert, James F. Rines, as follows:

> "*When I overlay this as-built septic plan in* [Apx. 37] *over the December 2019 survey by Bailey Associates* [Apx. Pt.2 at 109]*, you quickly gain a sense of how inaccurate the graphics are on everything except the dimensions of the home and the septic components.* ***The locations of the boundary lines, driveway and Barefoot Place bear no resemblance to what is depicted on the December 2019 survey by Bailey***."

(Appellee's Apx. 9, 15 and 20, emphasis added)

The inaccuracy of the Septic Plan is referenced in correspondence of April 23, 2019, between surveyor, Bryan Bailey, John B. Ayer, AICP,

Director, Department of Planning and Land Use, Town of Gilford, and Appellant, Margaret Maddock. (Appellee's Apx. 22). In an e-mail to John Ayer, Bailey states:

> "*I have also included a plan of the 1978 approved Septic System for this lot.* ***These plans both show the property configuration other than per the deed and the record plan from 1970***."

Id. at 26, emphasis added.

In response, Ayer states:

> "*The septic plan is a bit of a mystery since it has such precise measurements for the boundary lines-****numbers that appear to have been pulled out thin air [sic].*** *The 210' tie line is again a problem. I can't figure that one out where the numbers are so precise but founded on who knows what*."

Id. at 25, emphasis added.

In his report back to Margaret Maddock, Mr. Bailey states:

> "*As to how the septic plan got off on the wrong foot, I have no explanation. Mr. Seeley White was a full time fireman and did septic designs as a side line.* ***He was not a surveyor***."

Id. at 27, emphasis added.

1983 Application for Site Plan Approval:

In May of 1983, Hall filed an "Application for Site Plan Approval" for "[p]ermission to open a bed and breakfast in her home at 820A Barefoote Place" with the Gilford Planning Board. (Apx. at 47). The

application incudes a sketch entitled “820A Barefoote, Owner – Marian Wilson-Hall” with a notation “Scale:1”=20’”. (Apx. 48 and 54).

The 1983 application includes a second hand-drawn sketch entitled “Site Plan- 820A Barefoote Place, Lot #50-614A, Owner – Marian Wilson-Hall” with a notation “Scale:1”=100’”. (Apx. 49 and 53).

Rines addressed the 1983 submissions as follows:

> “*The author of the plan is not identified, but it is clear that this plan was not prepared by a Licensed Land Surveyor. Like the 1978 septic plan the home matches the home on the December 2019 Bailey plan, but* ***the boundary lines, depiction of Barefoot Place bear little resemblance to the Bailey plan, showing how inaccurate they are***.”

Id., emphasis added. Rines provided an overlay of the 1983 1”=20’ to illustrate the inaccuracy. (Appellee’s Apx. 9, 19 and 21, emphasis added)

The inaccuracy of the 1983 1”=20’ sketch is also confirmed in the correspondence of April 23, 2019, between Bryan Bailey, John B. Ayer and Appellant, Margaret Maddock. Bailey states:

> “*I have recently surveyed this lot and have informed the owner of my findings. Her response is one of shock. I am not surprised by this anymore in Gunstock Acres…*
>
> * * *
>
> [Mrs. Maddock] *has recently provided my [sic] with copies of a plan reviewed and approved by the Gilford Planning Board in 1983 (see attached file Scan 2019- 4-22 19.2304.pdf) that she believes depicts the property she purchased. I have*

> *also included a plan of the 1978 approved Septic System for this lot.* ***These plans both show the property configuration other than per the deed and the record plan from 1970****.*
>
> *Can you find out what was going on back in 1983 and why this was before the planning board? I am trying to understand this very odd situation*."

(Appellee's Apx. 26, emphasis added).

Ayer replies:

> "*The 1983 site plan was for a bed and breakfast. I have attached the minutes and a copy of the agenda for that meeting.* ***Clearly that site plan's not a surveyed drawing***."

Id. at 24, emphasis added.

Bailey reports to Ms. Maddock:

> "*It looks like the plan that the P/B approved in 1983 is a Site Plan.* ***It is not a Boundary Plan. It is in error to show the lot as they did.*** *The plan looks to have been prepared by the homeowner. This plan is just plane [sic] wrong in so many ways*."

Id. at 27, emphasis added.

1992 Application for Special Exception:

On October 7, 1992, Hall filed an application for a special exception to allow two dwelling units on one lot with the Gilford Zoning Board of

Adjustment [ZBA]. (Apx. 56). Christopher and Nancy Ramsdell were listed as abutters. Apx. 58. Included was a sketch entitled "Site Plan Scale 1"-50'". (Apx. 62).

The hand-drawn sketch depicts a four sided lot, while the Bailey Plan depicts a five-sided lot. (Apx. 62 and Apx. Pt2 109). Comparing the dimensions on the sketch with those on the Bailey Plan, we see the following (starting with the road frontage boundary and moving clockwise): 94.38 v. 94.38 actual, 241.44 v. 220.37 actual, 210 v. 70.14 & 163.96 actual, 200 v. 213.98 actual. Id.

The trial Court was persuaded by Bailey's testimony and recalled his opinion that:

> "*[N]one of these exhibits had the purpose of accurately portraying the property boundaries."*

(App. Adden. 48).

SUMMARY OF ARGUMENT

I. The Trial Court Correctly Held That Appellants Failed To Meet Their Burden To Show Adverse Possession of the Disputed Land

A. Location of Monuments

Appellants' blanket assertion that monuments control over deed descriptions is unsupported by New Hampshire law. The location of boundaries as set out in a deed is a question of fact and the intent of the parties upon conveyance must be considered. The court will not disturb the findings of the trial judge that the intent of the parties was to convey by deed property which was most accurately described by the courses and distances. The testimony of an expert with respect to the location of a boundary is sufficient evidence for the court to establish the boundary in question.

B. Color of Title

Appellants' alleged reliance upon numerous hand-drawn sketches associated with the Hall documents to support their Color of Title argument is not reasonable. The sketches in question were not intended to depict the location of boundaries and there is no consistency between the sketches with respect to the elements depicted therein. Both the Appellants', and Appellee's, experts testified that these documents could not be relied upon to provide the correct location of boundaries and that neither would recommend that any purchaser do so.

C. Actual Possession Of The Disputed Land

The testimony of the Guyers, Appellants' immediate predecessors-in-title, proved that their activity within the largest portion of the Disputed Land was minimal and, therefore, not sufficiently notorious to justify a presumption that the owner of the Disputed Land was on notice of a claim of title. Appellee's predecessor-in-title, Nancy Ramsdell, testified that she had permitted the Guyers' predecessors-in-title, the Halls, to maintain the encroachment of their driveway on her property via a "gentleman's agreement".

i. The Driveway

The Court accepted Ramsdell's testimony as fact and, where neither Appellants, nor their predecessors-in-title, the Guyers, engaged in exclusionary activity, held Appellants had not met their burden to show adverse possession of the driveway and parking area. The Court correctly awarded Appellants only a prescriptive easement over the small portions of the driveway and parking area that encroached upon the Disputed Land.

II. Appellants Failed To Produce Evidence Of Acquiescence.

Occasional brush clearing and use of a game trail was not sufficient to establish that the parties recognized the "A-B" line on the Bailey Plan to be their true boundary. Consistent with its adverse possession analysis, the trial Court held that Appellants, and their predecessors-in-title, occupied their property within the deeded boundaries, with the exception of the limited driveway encroachment onto the Disputed Land. To the extent Appellants assert that their Acquiescence argument is bolstered by hand-

drawn sketches found in the Hall documents, this argument fails for the reasons set forth above.

III. Timber Trespass.

Where the trial Court found that Appellants did not hold title to the Disputed Land, the issue of Timber Trespass was rendered moot. Appellants' Brief, section V, is a statement of procedural status only. No argument is presented.

IV. Nancy Ramsdell Testified Truthfully To Her Recollection Of Events.

Appellants attempt, without evidence or reasonable justification, to impugn Ramsdell's credibility, solely because her testimony is inconvenient to their case. Appellants manipulate the record in a manner that seeks to paint Ramsdell in a negative light, yet when the record is reviewed in its entirety, Appellants' accusations of coaching are revealed as false. The Supreme Court defers to the trial court's judgment on such issues as resolving conflicts in the testimony, meaning the credibility of witnesses, and determining the weight to be given evidence. The evidence shows that Ramsdell was not coached, and her full testimony was rightfully accepted as fact.

ARGUMENT

I. The Trial Court Correctly Held That Appellants Failed To Meet Their Burden To Show Adverse Possession of the Disputed Land.

Appellants assert that the monuments labeled on the Bailey Plan as A and B, despite their erroneous placement, control the location of the boundary as a matter of law. This is unsupported by the facts and by New Hampshire law.

A. Location of Monuments.

Appellants' assertion that it is a settled rule of law that monuments control over deed descriptions is incorrect. (Appellants' Brief [AB] at 24, citing Colby v. Collins, 41, N.H. 301, 303 (1860)). Forty years after Colby, the Court clarified that this idea:

> "**[O]*ften erroneously referred to as a rule of law*** *rather than a recognition of the fact that upon the question of intent the fact must be found according to the weight of the evidence, -* ***- is merely the statement of the general result from the weight of evidence.*****"**

Heywood v. Wild River Lumber Company, 70 N.H. 24, 31 (1899), emphasis added.

The location of boundaries set forth by the terms of a deed is a question of fact. (App. Adden. 51, citing MacKay v. Breault, 121 N.H. 135, 140 (1981)). The general rule, when interpreting deeds, is to determine the intent of the parties at the time of conveyance in light of the surrounding circumstances. Id., citing MacKay, *supra*, at 139. The construct that

monuments prevail over courses and distances is merely an aid used to determine the intent of the grantor and is not mandatory in the face of convincing proof of contrary intent. Id., citing Chao v. Richey Co., 122 N.H. 1115, 1119 (1982) Testimony by an expert with respect to the location of a boundary is sufficient evidence for the court to establish said boundary. Id., citing Brown v. Rines, 123 N.H. 489, 493 (1983).

Appellants' expert, Bryan Bailey, did not "*inappropriately ignore*" the erroneous original A-B line, but accurately utilized the intended boundary description to finally clarify the actual location of the boundary. (AB at 25). The trial Court found Bailey's testimony credible with respect to establishing the location of the true boundary between the properties; the Mathematical Line. (App. Adden. at 52). Having determined this, the Court held that it was "*not bound by exact locations of monuments in the ground*" and that, in granting title to Appellants, their predecessors-in-title, the Guyers, intended to convey the property as it is most accurately described through the courses and distances in the deed. Id., citing Chao, *supra*, at 1119. As such, the Court held that Appellants did not hold the Disputed Land as a matter of title. Id.

Appellants assert that the very presence of the iron "A" pin between the two properties, combined with a series of hand-drawn sketches associated with the Hall documents put Appellee and his predecessors on notice that Appellants and their predecessors claimed that the boundary followed line A-B. (AB at 23). This is incorrect.

First, it is unreasonable to suggest that the mere presence of a single pin, one that was not obviously misplaced, would provide incentive to any landowner to "*inquire where the other end would be located*" in the absence of some present confusion regarding the location of the boundary. (AB 22). Second, as will be discussed below regarding Color of Title, the hand-drawn sketches associated with the Hall documents cannot be seen as putting Appellee, or his predecessors, on notice with respect to Appellants' claim as these filings are inaccurate, inconsistent with one another and were never intended to depict the location of boundaries. (App. Adden. 10).

Appellants seek legal refuge for their assertions that the locations of monuments must control over the descriptions within a deed in the archaic writings of Justice Thomas McIntyre Cooley, who suggested that it was "*the surveyors' duty to respect long established monumented lines and occupations and avoid a mathematical reconstruction that results in unwarranted litigation*." (AB 25, citing *Justice Thomas McIntyre Cooley and the Judicial Functions of Surveyors*, 1883 The Michigan Engineer pp. 112-122, Apx. Pt.2 124).

Cooley's position defies logic as it suggests a surveyor should ignore the specific intent set forth in a deed and simply consider erroneously placed markers to govern the boundaries of a landowner's property. Id. No modern surveyor of any repute would adhere to this antiquated and, arguably, reckless maxim. As Appellants' expert and surveyor, Bryan Bailey, confirmed at trial, his is a profession that deals in accuracy. (Tr. Trans. 177, 4-7).

The 1883 article offered by Appellants is found in the 1994 Alaska Society of Professional Land Surveyors Standards of Practice Manual. It is notable that the Organization felt it necessary to preface the article with the following:

> "*Shall a surveyor be guided only by the deed in retracing boundaries, or should consideration be given to lines of possession**? This subject has been long debated. Although some of the ideas presented in this essay may benefit today's surveyors, this reprint is being provided only as a historical note of interest and its publication in this manual does not constitute an endorsement by ASPLS***."

Id., emphasis added.

Cooley was a former member of the Michigan Supreme Court, writing with respect to Michigan's historic surveying concerns. (Apx. Pt.2 133). While a learned jurist, he was not a surveyor, and the article is not regarded as reflecting the black letter principles of the law governing surveyors of that period. Subsequent commentators reaffirmed this:

> "*Thomas Cooley's paper is not a time-dated document stating era specific principles and doctrines.* ***The document is a philosophical statement*** *of the land surveyor's role in boundary determination and boundary retracement*."

(Herbert W. Stoughton, *Thomas McIntyre Cooley and the Judicial Functions of Surveyors*, American Congress on Surveying and Mapping Bulletin No. 155 (May/June 1995; Apx. Pt.2 134, emphasis added).

Appellant further emphasizes that the composition of marker B was consistent with other monuments in Gunstock acres. (AB at 25). Whether or not this is true is irrelevant to whether or not Appellants or their predecessors actively engaged in possession and control of the Disputed Land.

Appellants cite Seely v. Hand which states:

> "*In construing an **ambiguous** boundary description, monuments, especially marked corners, prevail over courses and distances*."

Seely v. Hand, 119 N.H. 303 (1979), emphasis added, citing Fagan v. Grady, 101 N.H. 18, 21 (1957). Id. at 305-06. Reliance upon this passage is inappropriate as it has never been alleged in this case that the boundary descriptions in the deeds to either Party, or their predecessors, are ambiguous.

Appellants further rely on Minot v. Brooks, 16 N.H. 374 (1844) for the prospect that "*The law supports that the notice provided by Point A and the various filings with the town agencies provided the requisite notice of a potential adverse claim and require inquiry*." (AB at 23). The passage cited does little to bolster this position. The Minot Court stated:

> **"[I]***t is the occupation itself that furnishes the notice, and as we said before the registry is not provided to give limits to it. The actual occupation being of a character to put anyone claiming upon inquiry, he must inquire. If he does so he will be charged with notice of what he actually learned. If he does not he is*

> *chargeable with notice of what he might and would naturally have learned had he done so*."

Minot v. Brooks, *supra*, at 377-378, emphasis added.

The presence of a single marker, coupled with a series of inaccurate hand-drawn documents, none of which were created for purposes of depicting boundaries, are not evidence of "*actual occupation*.", and are wholly insufficient to place Appellee and his predecessors on either actual or inquiry notice. See Blagbrough, *supra*, at 33.

Here, the trial Court correctly held that it was not bound by the locations of monuments in the ground.

B. Color of Title.

Appellants rely upon hand-drawn sketches in the Hall documents filed with the Town of Gilford to support their color of title argument. Appellants consistently refer to these sketches as "plans" despite full knowledge they are not "plans" as anticipated under New Hampshire law. (AB 25, citing Perry v. Parker, 101 N.H. 295, 296 (1958)). These are hand-drawn sketches to which, as experts for both sides testified, no reliance may be accorded. It is not reasonable to suggest that Appellee, or his predecessors, were placed on notice of the extent of Appellants' claim by virtue of these documents as they are inconsistent with one another, do not depict elements in proper locations, and list corner distances differently from document to document.

Appellants place undue emphasis on Perry where the Court found it proper to admit as an exhibit a plan, created by a surveyor, without the testimony of that surveyor, considering the age, appearance and custody of the document. Perry, *supra*, at 297. The Perry Court stated "*Maps, surveys, plans and plots which are thirty years old, free on their face of suspicion and found in proper custody are admissible as exception to hearsay . . .*" Perry, *supra*, at 296., citing Lawrence v. Tennant 64 N.H. 532, 15 A. 543 (1888), 1888 N.H. LEXIS 50, 6.

Perry does not support the notion that hand-drawn, inaccurate sketches may be relied upon by finders of fact. In Lawrence v. Tennant, cited in Perry, the Court states:

> "*An ancient map or plan may be received in evidence to prove public boundaries,* ***if it appears that it was an authorized survey. If it purports to be an authorized survey****, or it be proved aliunde to be official, and is produced from an appropriate place, as in State v. Vale Mills, 63 N.H. 4, there may be little doubt of its admissibility*."

Id., emphasis added.

Appellants further seek to derive an unintended meaning from the case of Bailey v. Carlton to the extent the Bailey references the general rule that: "*when a party having color of title enters into the land conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed*", *i.e.,* however limited Appellants' entry may have been, Appellees were on notice of Appellants'

intended possession of the entire tract up to the A-B line. (AB at 22, citing Bailey v. Carlton 12 N.H. 9 (1841) at 15).

But Bailey specifically states that:

> **"[T]***he rule cannot apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which is grantor owned, but makes no entry into that part which he could not lawfully convey.* *There is no notice in such case to the owner of the land thus embraced in the deed, and no possession which can be deemed adverse to him. If it may be said that the color of title gives such a constructive seizin and possession that the grantee could maintain trespass against any person who did not show a better right (that is, a title, or prior possession) there is nothing in the nature of it which give it the character of disseizin, or possession adverse to the true owner, so as to bind him.* ***For that purpose, there must be actual possession of some portion of the land of such owner, and that of a nature to give notice of an adverse claim***."

Bailey, *supra*, at 17-18, emphasis added.

Even if accepted, *arguendo*, that Appellants and their predecessors entered the small area of Appellee's property upon which the driveway was located, there can be no finding that Appellee, or his predecessors, were on notice with respect to the remainder of the Disputed Land up to the erroneous A-B line.

Further, Appellants' suggestion that Wallace v. Lakes Region Const. Co. Inc somehow applies "*the limited application of the holding in Perry to situations identical to this one*" is deeply flawed. (AB at 34, citing Wallace v. Lakes Region Const. Co. Inc., 124 N.H. 712, 717 (1984)). Wallace was a personal injury matter and the issue for which Perry was cited therein was the admissibility of medical records. Id.

The Wallace Court indicated the defendant improperly cited Perry as Perry referred to public records and was readily distinguishable from the Wallace subject matter, *i.e.*, medical records. Id. The Wallace Court went on to reiterate the true basic premise of Perry, that "*the authenticity and truth of a public record, which was compiled in performance of an official duty, need not be confirmed by 'those usual and ordinary tests of truth.'*" Id. at 296, 141 A. 2d at 884, quoting Ferguson v. Clifford, 37 N.H. 86, 95 (1858).

Here, as the documents in question were accepted as full exhibits at trial by agreement of the Parties, the issue is not admissibility. The issue is whether the sketches within the Hall documents are sufficient to establish that Appellee, and/or his predecessors, were placed on notice of an adverse claim.

Appellants rely, to their detriment, upon a passage from the 1865 Vermont case of Hodges v. Eddy that falls well short of supporting their position that the Hall documents confer color of title. (AB at 35-36). The passage cited is as follows:

> "*So where one enters upon an unoccupied lot under color of title, and actually occupies a part, claiming the whole, his actual possession is extended by construction to all that* ***his deed covers****, and if he continues such possession for fifteen years, he acquired a title not only to the part actually occupied, but to the whole lot.* ***The term color of title, as it is used in the cases on this subject, means a deed or survey of the land****, placed upon the public records of land titles, whereby notice is given to the true owner, and all the world, that the occupant claims title*."

Hodges v. Eddy, 38 Vt. 327, 345 (1865), emphasis added by Appellee. Here, Appellants are relying upon hand-drawn sketches, not deeds or surveys of land. The fact that documents containing color of title must be of a character more trustworthy than a layperson's hand-drawn sketch is readily derived from the frequently referenced case law cited above.

The trial Court did not "*confuse the concept of precision measurements*" with the notice provided and the general accuracy of the relative location of the common boundary line to the improvements on Appellants' property as alleged by Appellants. (AB 36). The documents, as described in Appellees statement of facts, are unreliable as to the locations of the elements within them and differ with respect to the exact parameters of the lot in question.

Appellants look to Pease v. Whitney for the prospect that: "*NH law recognizes entry under color of title leading to title by adverse possession*."

Pease v. Whitney, 78 N.H. 201 (1916) However, Appellants' choice of excerpts from Pease is puzzling as it stands for the proposition that claimed color of title cannot be denied when a true owner actively induces an incorrect belief in his grantee that a deed covers a particular piece of land. (AB at 19-20, citing Pease, *supra*, at 202). No such situation exists in this case. No allegation has been made that any grantor in Appellants' chain of title knowingly misled any grantee to believe the extent of their ownership was other than that which was described in the deed. Appellants' assertion that "*color of title extends the adverse possession of limits of the documents providing color of title*" stands naked without corroborating authority. (AB 20).

Appellants cite RSA 36:19-a regarding the jurisdiction of the Planning Board to approve or disapprove site plans. (AB at 34-35) Here again, Appellants' purpose in citing this statutory provision is unclear. Notably, this statute was repealed as of January 1, 1984. Repealed status notwithstanding, nowhere did the statute say, nor could it reasonably be interpreted to suggest, that a ZBA's approval of a site plan, based on a hand-drawn sketch, should serve as a basis to redraw boundaries if the presentations are faulty.

The appearance of Nancy and Christopher Ramsdell at the October 27, 1992, ZBA meeting, and Christopher Ramsdell's appearance at the January 2, 1993, meeting do not support Appellants' position that the Ramsdells were on notice of an adverse claim. (Apx. Pt.2 63 and 75). The purpose of these meetings was solely to hear arguments with respect to the Halls' application for a variance to allow two dwelling units on one lot.

(Apx. Pt.2 at 56) Had the Ramsdells raised a boundary line issue, simply due to the nature of the hand-drawn sketch submitted with the application, it is reasonable to assume the ZBA would have advised that a boundary dispute was outside their jurisdiction. (NH RSA 674:33 Powers of Zoning Board of Adjustment).

Here, the trial Court ultimately found Appellants' arguments as to Color of Title unpersuasive. (App. Adden. at 53). The Court found that Appellants' reliance upon the 1982 and 1983 site plans as the basis for their claim was not sustainable as those documents "*were neither intended nor sufficiently precise to provide notice that the plaintiffs claimed title to the Disputed Land*." Id. The Court looked to the testimony of Appellants' own expert, Bryan Bailey, who described the documents as mere sketches which could not be relied upon to depict the true boundary. (Id.; Tr. Trans. 178, 10-18).

The trial Court also noted that the dimensions referenced in these documents, as well as the meets and bounds, were inconsistent, stating:

> *"The Gunstock Acres plan and the deed itself make reference to the lot being a five-sided figure. Ex's 1, 40* **[Appellee's Apx. 4 and Apx. 1, respectively]**. *However, these plans each demonstrate the same as a four sided figure. Ex.'s 8,9,10,14 and 15* **[Apx. 34, 36, 37, 48 and 49 respectively]**. *In addition, the meets and bounds vary on each plan and conflict with that of the "A-B" Line established through the Bailey plan. Accordingly, none of these documents can reasonably be construed as putting the abutters on notice of a claim of title,*

> *nor could the plaintiffs have reasonably relied upon same to determine the actual boundary of their property."*

In a footnote, the Court states:

> *"If the plaintiffs view these five documents as demonstrating the true dimensions of their property, then not only is the shape of same a concern, but also the size of the line currently in dispute. The Bailey Plan finds the distance of the "A-B" Line to be 230.85', which is a significant variation from the measurements within the five documents (same range from 200' to 210') and within the deed itself (213.98'). Accordingly the documents are not reliable for establishing color of title."*

(App. Adden. 53, emphasis added).

Appellee's expert, surveyor and engineer, James Rines, was questioned in detail at trial with respect to the hand-drawn sketches. (See generally, Tr. Trans. 347-393). Rines created and presented overlays comparing the information in the Bailey Plan to the 1978 Septic Plan and the 1983 Site Plan. (Appellee's Apx. 15 and 19) The enlargements of these overlays were discussed during testimony and accepted as Exhibits MM and NN respectively. (Appellee's Apx. 20 and 21) When asked if he would ever rely on the 1978 or 1983 plans, he testified he would not. (Tr. Trans. 387 21-388, 3). He further testified that he would never recommend that a homeowner rely on them. (Tr. Trans. 361, 6-9). Rines further testified that none of the hand-drawn sketches depict the elements within boundaries in the same way. (Tr. Trans. 392, 23-25)

Bryan Bailey was questioned regarding the hand-drawn sketches presented by Appellant appearing at trial Exhibits 8, 9, 10, 14, and 15 [Apx. 34, 36, 37, 48 and 49 respectively]. (Tr. Trans. 176-177) Bailey testified that none of the referenced Exhibits had the purpose to accurately depict the boundaries. (Tr. Trans. 177, 8-12) Bailey confirmed he would never rely on any of these to determine the location of a boundary, nor would he ever encourage the purchaser of a home to do so. (Tr. Trans. 178, 15-23).

Finally, the Appellants' alleged reliance upon the Hall documents is not credible. During his deposition, Appellant, Todd Maddock was asked about whether he was familiar with the septic plan. (Appellee's Apx. 29-30) At deposition, he indicated only that he had "*seen it*" at his closing and was not sure why it was presented to him at that time. (Id.) However, when questioned by his attorney at trial regarding the same document, Mr. Maddock alleged that he and his wife reviewed the document with two realtors and relied upon it with respect to the location of boundaries. (Tr. Trans. 6, 9-7,3) Upon cross-examination, when asked why he never referenced the significance of this document at deposition, he alleged he did not understand what was being asked. (Tr. Trans. at 40, 19 through 42, 18).

C. Actual Possession Of The Disputed Land.

The trial Court correctly held that the Appellants had not met their burden to establish adverse possession of any portion of the Disputed Land. (App. Adden. 56).

The adverse possessor must prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so

as to give notice to the owner that an adverse claim is being made. Blagbrough, *supra*, at 33, citing Flanagan v. Prudhomme, 138 N.H. 561, 571-72 (1994). In addition, adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive. Id.

The success or failure of a party claiming adverse possession is not determined by the subjective intent or the motives of the adverse possessor. Id. Rather, the acts of the adverse possessor's entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action. Id. In evaluating the merits of an adverse possession claim, courts are to construe evidence of adverse possession of land . . . strictly. Id.

The law requires more than occasional, trespassory maintenance in order to perfect adverse title; the use must be sufficiently notorious to justify a presumption that the owner was notified of it. Id. at 34, citing Pease v. Whitney, 78 N.H. 201, 204 (1916); (App. Adden. at 54).

The determination of whether the use of a property has been adverse or permissive is a matter of fact to be determined by the trial court. O'Malley v. Little, 170 N.H. 272, 278 (2017); citing Ucietowski v. Novak, 102 N.H. 140, 145 (1959).

The New Hampshire Supreme Court has instructed that occupancy must be "*so marked by definite boundaries as to indicate, by clear and unequivocal acts, the exercise of ownership up to defined and visible boundaries, to the exclusion of the legal owner; thus giving him unequivocal notice of an adverse claim*." Livingston v. Pendergast, 34 N.H. 544, 550 (1857). The Court has said it is "*not enough that* [the claiming party] …… *had occasionally gone upon it for some particular*

purpose, or that he had cut wood upon it from time to time." Wendell v. Mouton, 26 N.H. 41, 46 (1852).

The Supreme Court defers to the trial court's findings of fact if supported by the record. Mastroianni v. Mercinski, 158 N.H. 380, 382 (2009) The Court "*reviews a trial court's application of law to the facts de novo*." Blagbrough, *supra* at 33. The Court will accord deference to a trial court's findings of historical fact, where those findings are supported by evidence in the record. Id., citing Elwood v. Bolte, 119, N.H. 508, 510 (1979).

The Blagbrough Court held that the would-be adverse possessors had engaged in certain conduct on a disputed parcel, but that such conduct did not support finding of adverse possession. Id. The Blagbrough family (1) tore down a dilapidated boat house on the disputed land; (2) routinely entered the land for walks and recreational activities; (3) allowed their children to play on the parcel; (4) visit the parcel as a source for Christmas trees; and (5) cut grass, removed trees and planted flowers on the parcel. Id. Nonetheless, the Court found that their actions were not sufficiently notorious to justify a presumption that the true owner would have been notified of their adverse claim. Id. at 34

Testimony of Predecessors in Title:

At trial, Appellee's predecessor-in-title, Nancy Ramsdell, read the following paragraph from her June 19, 2019, Affidavit and reaffirmed that the same was true:

> "*5. When I first purchased my property, Dr. Hall personally told me that the dirt driveway extended over onto our property. We decided as good neighbors to let the Halls continue using the area. We thought of it as a Gentlemen's Agreement*."

(Tr. Trans. 484 6-17; Apx. 55).

Ramsdell testified that she had a great relationship with the Halls and had rented from them at the location on the opposite side of 39 Barefoote Place for years. (Tr. Trans. 473, 12-17). Ramsdell did not witness the Halls engage in any cutting, posting, or fencing any part of the disputed area from the street to the driveway or in the area to the Southeast of the driveway. (Tr. Trans. 486, 21-24). Ramsdell testified that she never withdrew the permission to the Halls to maintain the encroaching elements on her land. (Tr. Trans. 491, 4-7).

Ramsdell testified she also had a cordial and friendly relationship with the Halls' successors-in-title, the Guyers. (Tr. Trans. 487, 8-10) During the time the Guyers lived on what is now Appellants' property, any use of any portion of the Disputed Land was with the implied permission of the Ramsdells. Nancy Ramsdell, in her Affidavit of June 19, 2019, states:

> "*While my husband and I were cutting trees down on our property to take advantage of the equitable view the residents of Barefoote Place enjoy, Deborah [Guyer] approached us. She asked that we not cut certain trees down that were on my property to maintain some privacy. We asked her to mark the trees and she did. We did not cut them down as to maintain a good*

> *neighborly relationship. We were in agreement as to where the line was*."

(Apx. at 55). Nancy Ramsdell testified to her belief that the Guyers knew of the encroachment. (Appellee's Apx. 31) Ramsdell testified that she and her husband refrained from cutting trees at the request of the Guyers, not because she did not believe she owned the trees in question, but to maintain good relations with her neighbors. (Tr. Trans. 488, 10-20). Ramsdell testified that she never witnessed the Guyers cutting, fencing or posting the property in the disputed area from the road to the driveway or the larger area to the Southeast. (Tr. Trans. 489, 16-490, 4). Ramsdell testified that, following Appellants' purchase of the property from the Guyers, she never witnessed Appellants engaging in cutting, posting or fencing in the disputed area. (Tr. Trans. 490, 18-22)

Even if it were decided that they did not have permission from Ramsdell, the Guyers' activities within the vast majority of the Disputed Land were not sufficient to place Ramsdell on notice of an adverse claim. With respect to the area from the shed northwest to the road, Mr. Guyer testified that he did little in the area other than dealing with snow or picking up sticks. (Tr. Trans. 87, 22-88, 6). He further confirmed that he never posted or fenced the property or actively took action to prevent others from using the property. (Id.).

Stephen Guyer submitted an Affidavit stating that he placed a shed on the property in 2010, just nine years prior to the commencement of this action. (Apx. Pt.2 at 78). At trial, Guyer confirmed his Affidavit was correct. (Tr. Trans. 80,8-81,5). Prior to his installation of the shed in 2010, no shed existed in that location. (Tr. Trans. 84, 22-24). As to the area south

of the shed, once a year, he would cut some brush and rake some leaves. (Tr. Trans. 90,3–91,7) He did not clear cut, nor did he cut large trees in the area southeast of the shed. (Id.) Mr. Guyer referenced a trail leading to a stream well removed from either property, adding that characterizing it as a "trail" was not accurate and that it was "*more like a game trail*". (Tr. Trans. 96, 3-6)

The Guyers' activities beyond the shed area were significantly limited. In his deposition, Mr. Guyer testified:

> "*I maintained it in terms of cleaning up brush. I **may** have stacked some firewood there from time to time. You know, I—you know, obviously, you know, we used the property so we walked around the property. There is a little bit of a trail going down—um—which we **probably would have** been on from time to time going down to the –you know, kind of down toward the gorge down at the bottom of the hill there. There's a brook and a spring. **Probably walked down that way..***"

(Appellee's Apx. 32, Emphasis added). Occupancy must be set forth by clear and unequivocal acts. Livingston v. Pendergast, *supra* at 550. Stephen Guyer demonstrated little independent memory of engaging in specific activities within Disputed Land.

The Guyers sold to Appellants on May 1, 2014. (Apx. 1). When shown 2014 and 2015 aerial photographs of the property, Mr. Guyer confirmed that the area above the southern border appeared heavily wooded. (Appellee's Apx. 35 and 34; Tr. Trans. 104, 10-12 and Tr. Trans. 103, 2 – 104, 2) Mr. Guyer again confirmed that he had engaged in no

significant tree clearing, nor did he mark or post the property. (Tr. Trans. 105, 13 – 106, 2).

Deborah Guyer testified that they did not post the area from the road to the parking area. (Tr. Trans. 256 16-22). Ms. Guyer was shown a copy of the Bailey Plan and was asked by Appellee's counsel to indicate where an alleged fire pit was with a green marker. (Tr. Trans. 259, 21- 260, 24). Ms. Guyer made a large circle, but indicated the circle represented an area cleared around the fire pit on both the disputed and non-disputed land. (Id.). Ms. Guyer further confirmed that after that area, it "*went wild*". [1] Ms. Guyer confirmed that while they maintained the area between the shed and the walkway to the house, beyond that, they left the rest wild. (Tr. Trans. 257, 15-19).

During Ms. Guyer's deposition, the following colloquy occurred:

> *6 Q. And I believe your testimony was that you*
> *7 believed that the parking area constituted, in your*
> *8 mind, the boundary between -- a delineation between*
> *9 the properties, correct?*
> *10 A. Well, not exactly. What I believed was we*
> *11 owned at least to that point. You know, I don't*
> *12 really -- didn't have the specifics of what beyond*
> *13 that point we might have had because* ***I didn't***
> ***14 really look at the pins or follow the boundary***
> ***15 line or -- but I assumed we at least had to have***
> ***16 owned the parking area and as it sloped away from***
> ***17 our property****.*

[1] Appellee advises the Court that there is an error in the transcript at page 258, lines 23 and 24. The word "wide" on both lines should be "wild".

(Appellee's Apx. 37). Ms. Guyer testified at trial that her deposition testimony accurately confirms her understanding of the location of the boundary. (Tr. Trans. 261,17-262,4) Ms. Guyer confirms she never went and located the pins. (Tr. Trans. 254,16-20) Ms. Guyer never had any conversations with her predecessors-in-title, the Halls, about the boundary lines. (Tr. Trans 254, 21-24)

Appellants' Testimony:

When asked what activities he conducted between the shed and the B pin, Appellant, Todd Maddock, indicated brush cutting, brush clearing and walking his dog. (October 7, 2021 Tr. Trans. 47,18-48,9)[2] Mr. Maddock has no independent knowledge of activities on the land by the Guyers or the Halls. (Id. at 48,17-49,19) Mr. Maddock admits that Appellants never posted the property or put up any signs, including no trespassing signs. (Id. at 49,20-50,7) Appellant, Margaret Maddock, confirmed that Appellants never posted or fenced the Disputed Land. (Tr. Trans. 307,22-308,6)

Appellants seek to explain the limited nature of their use of the disputed land by repeatedly referring to the property as "steep". However, the character of the Disputed Land clearly does not preclude use. While the Disputed Land contains a slope, Appellants allege that they, and their predecessors, walked dogs on the property, occasionally walked a game

[2] The October 7, 2021, transcript is paginated separately from the main trial transcript.

trail and cut brush sufficient to give notice to the true owners of an adverse claim.

The trial Court found the above uses by Appellants and their predecessors to be minimal, "*hardly* ris[ing]*above occasional maintenance of a forested area*." (App. Adden. 56). As to the location and notorious nature of the firepit, upon which Appellants place much emphasis, the Court found the related testimony from Appellants' witnesses unpersuasive. (Id.). Ultimately, the Court correctly and reasonably found that Appellants', and their predecessors, use of the Disputed Area was insufficient to justify a presumption that the true owner was notified of such use. (Id.).

i. The Court Did Not Err In Granting A Prescriptive Easement Over The Limited Area Upon Which The Driveway And Parking Area Are Located.

The trial Court clearly acknowledged that an adverse possessor "*must show 20 years of adverse, continuous, **exclusive**, and uninterrupted use of the land claimed*" in order to place the record owner on notice. (App. Adden. 54, citing Mastroianni v. Wercinski, 1558 N.H. 380, 382 (2009), emphasis added). The Court was equally clear in its acknowledgment that exclusivity need not be present in the context of a prescriptive easement. (App. Adden. 57, citing Greenan v. Lobban, 143 N.H. 18, 22 (1998)). Appellants did not present evidence of exclusive use

of the driveway and parking area sufficient to sustain findings of adverse possession of the driveway and parking area.

Appellants introduced no evidence to suggest that they, or their predecessors, specifically made efforts to exclude others from use of any portion or the disputed area, including the driveway. Mr. Guyer testified that he did not do much of anything in the area from the shed to the road other than dealing with snow or picking up sticks. (Tr. Trans. 87, 22-88, 6). He also confirmed he never posted it or fenced it in any way. (Tr. Trans. 105, 13 – 106, 2) During trial, Steven Guyer described the Ramsdells and their dogs entering the driveway. (Tr. Trans. 70, 8-20) Appellants never posted the property, nor did they take any action to exclude Appellee's predecessors-in-title from this area prior to the dispute arising between the Parties. (Tr. Trans. 49,20-50,7 and 307, 22-308,6)

Appellants argue that Appellee's predecessors-in-title did not engage in ouster of Appellants or their predecessors from the driveway and parking area. (AB at 32, citing O'Malley, *supra*, at 278). Even if this were deemed factual, this would not preclude a finding that Appellants had not obtained rights exceeding a prescriptive easement over the driveway and parking area. In the context of a prescriptive easement, adverse use does not require hostility between the parties as long as the use is trespassory. Jesurum v. WBTSCC Ltd. P'ship, 169 N.H. 469, 477 (2016). Appellants' failure to provide evidence of exclusion of Appellee or his predecessors, combined with the evidence of unrebuked entries by the Appellee's predecessors supports the Court's finding of a prescriptive easement over subject area of the Disputed Land.

While the driveway was paved in 2016, this cannot be viewed as an act of exclusion of Appellee or his predecessors falling within the requisite time period. (Appellees Apx. Pt.2 34 and 35) Prior to that, it is clear that no record exist of the true location, width and appearance of the original driving area sufficient to prove its actual location and footprint.

Following the brief discussion of ouster, Appellants revert to further discussion of the non-driveway areas of the Disputed Land and the sketches in the Hall Documents. (AB 32-33). As discussed in detail above, these documents cannot be relied upon to provide the location of the driveway because none of them accurately depict the location of the elements within them. The Court held that Appellants and their predecessors maintained a driveway on the property since 1978 and that their use had been continuous and uninterrupted during that time, but made no finding as to exclusivity. (App. Adden. 57) Accordingly, the trial Court found that the appropriate remedy was a prescriptive easement over the driveway area, including a limited adjacent area for clearing snow. (Id.).

II. Appellants Failed To Produce Evidence Of Acquiescence

The trial Court correctly rejected Appellants argument that the Parties had occupied their respective properties up to the "A-B" boundary line depicted in the Bailey Plan for over 20 years. (App. Adden. at 58).

"*Acquiescence requires occupation sufficient to provide notice of claim*." O'Hearne v. McClammer, 163 N.H. 430, 438 (2012). Boundaries may be established by acquiescence where the parties have recognized a certain boundary as being the true one and have occupied their respective

lots accordingly for twenty years or more. Id. at 435. "*The bound thus acquiesced in will prevail even over the description in the deeds*" and "[a] *boundary established by acquiescence is conclusive upon successors in title*." Id. (quotation and citation omitted).

To establish a boundary by acquiescence, a party generally must prove that: (1) the parties are adjoining landowners; (2) who have occupied their respective lots up to a certain boundary; (3) which they have recognized as the true boundary separating the lots; and (4) have done so for at least twenty years. Id.

Here, there was no evidence of any agreement between the parties as to the nature of the boundaries. In his deposition, Stephen Guyer testified that he never discussed his understanding of how the boundary was determined with the Ramsdells. (Appellee's Apx. 33).

Consistent with the evidence discussed in its adverse possession analysis, the trial Court held that Appellants, and their predecessors, occupied their property within the deeded boundaries, with the exception of the limited driveway encroachment. (App. Adden. 58). The Court emphasized that occasional brush clearing, and use of a game trail was not sufficient to establish that the Parties considered the "A-B" line to be their true boundary. (Id.).

The Court also reaffirmed that the documents, upon which Appellants relied, were too inaccurate to suggest that the parties recognized the "A-B" line as their true boundary. (Id.). Appellants failed to provide sufficient evidence at trial that the current and prior landowners occupied their

respective lots to the "A-B" line, recognizing the same as their true boundary. (Id.).

III. Timber Trespass

The trial Court held that Appellants' timber trespass claim failed because "*they lack title to the Disputed Land.*" (App. Adden. 59). Appellants' argument V is a statement of procedural status only.

Appellee asserts that where the trial Court correctly held that Appellants failed to meet their burden and, thus, did not reach the issue of Timber Trespass, no substantive responsive briefing is warranted or legally required. Appellee objects, generally, to Appellants' request for relief pertaining to Timber Trespass.

IV. Nancy Ramsdell Testified Truthfully To Her Recollection Of Events

The June 16, 2019, Affidavit of Nancy Ramsdell was admitted as a full exhibit at trial and her trial testimony was deemed credible. (Apx. 55; App. Adden. 48). The New Hampshire Supreme Court defers to the trial court's judgment on issues such as resolving conflicts in the testimony, meaning the **credibility of witnesses**, and determining the weight to be given evidence. Omalley v. Little, *supra*. at 275, emphasis added; Blagbrough, *supra*, at 38.

Appellants splice together two e-mail discussions, from two separate occasions, in an attempt to create the illusion that Ramsdell was coached.

(AB at 38). When the actual communications between Michelle Mellius, Appellee's fiancée, and Nancy Ramsdell are read in order and context, the true nature of these communications is clear. Mellius wrote to Ramsdell:

> "*Per the texts exchanged by you and Michael, attached is an Affidavit outline. The dates outlined in the document are based on Belknap County Registry of Deeds database.* ***The information that is in the is document is Michael's best recollection as told to me of your conversation. Please correct, add, delete any information***."

(Apx. Pt.2. at 140-141, emphasis added).

Ramsdell responded:

> "*I have read the document you produced, is that the correct spelling of Mrs. Hall's name? Always thought it was Marion.? Also, is that a strong enough statement?*"

(Id. at 140).

Mellius responds:

> "*Feel free to change it as you see fit.* ***We did not want to put words into your mouth****…"*

(Id., emphasis added).

There is no indication in this colloquy that the information contained in the Affidavit was contrary to Ramsdell's memory of events. At trial, Ramsdell testified that she met with Mellius to sign the Affidavit, stating:

> "*And I read it, and I signed it because I had spoken to her on the phone. So she just translated –*"

(Tr. Trans. 489, 1-4).

At trial, Ramsdell was specifically asked about the nature of her communications with Mellius:

> *Q: And at any time did Michael Higgins or Michelle Melius suggest that you should agree -- - anything should be in that affidavit that you hadn't told them already?*
>
> *A: No. No, no.*

(Tr. Trans. 489, 8-11)

Ramsdell testified that her Affidavit was true to the best of her recollection. (Tr. Trans. 489, 12-15). Under questioning from Appellants' attorney, Ramsdell specifically denied being coached, reiterating that she would not have signed the Affidavit if it was not true. (Tr. Trans. 519 15-21). She further reiterated she was not coached and does not "*do well with coaching*." (Tr. Trans. 520 6-9). Finally, Ramsdell reaffirmed:

> *Q: Ramsdell, when that affidavit was created and signed, at any time did Mr. Higgins or Michelle Melius ask you to include anything that's not absolutely true?*
> *A: No.*

(Tr. Trans. 524 22-25).

Given the e-mail exchanges, coupled with Ramsdell's specific assurances during trial that she was not coached, it is unreasonable to assume otherwise. The trial Court's view of Ramsdell's testimony as credible was reasonable under all circumstances and does not warrant additional scrutiny.

CONCLUSION

Appellee respectfully requests that the Court affirm the rulings of the Superior Court and hold that Appellants failed to meet their burdens with respect to Adverse Possession and Acquiescence, that the issue of Timber Trespass is moot, and that witness, Nancy Ramsdell, testified truthfully.

REQUEST FOR ORAL ARGUMENT

Appellee requests 15 minutes for oral argument.

RULE 16(11) CERTIFICATION

I hereby certify that, in compliance with New Hampshire Supreme Court Rule 16(11), this brief contains 9,379 words, exclusive of table of contents, tables of citations, statutory text and addendum.

Respectfully submitted,
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/s/ William D. Woodbury

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CERTIFICATION OF SERVICE

I hereby certify that copies of this brief were served upon all Parties via the Supreme Court's electronic filing system.

Date: 12/07/2022 /s/ William D. Woodbury

ADDENDUM TO APPELLEE'S BRIEF

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STATE OF NEW HAMPSHIRE

SUPERIOR COURT **BELKNAP COUNTY**

Todd H. Maddock and Margaret V. Maddock

v.

Michael J. Higgins Docket No. 211-2019-CV-150

DEFENDANT'S OBJECTION TO "PLAINTIFFS MADDOCKS' MOTION FOR RECONSIDERATION ON COURT'S ORDER ON THE MERITS"

NOW COMES the Defendant, Michael J. Higgins, by and through his attorneys, Normandin, Cheney & O'Neil, PLLC, and submits Defendant's Objection To "Plaintiffs Maddocks' Motion for Reconsideration on Court's Order on the Merits" and, in support thereof, says as follows:

BACKGROUND

1. The Plaintiffs filed their original Complaint in this matter on May 24, 2019, and an Amended Complaint on January 17, 2020, seeking relief against the Defendant under three specific Counts: Adverse Possession, Acquiescence and Timber Trespass Pursuant to RSA 227-J:8.
2. A bench trial was held in this matter spanning seven non-consecutive days between October 4, 2021, and November 15, 2021, during which numerous witnesses testified and significant documentary evidence was received and admitted.
3. The Court issued its ORDER on January 31, 2022, holding that the Plaintiffs had not met their burdens under any of the three specific Counts plead, but that the Plaintiffs "*hold a prescriptive easement over the driveway area, including a limited adjacent area required for the purpose of clearing snow.*" (ORDER of January 31, 2022, pg 14)
4. The Plaintiffs submitted "Plaintiffs Maddocks' Motion for Reconsideration on Court's Order on the Merits" [hereinafter Plaintiffs' MFR] on February 10, 2022, to which Defendant now objects.

STANDARD OF REVIEW

5. A Motion to Reconsider shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended. Super. Ct. Civ. R. 12(e). The Defendant asserts that the Court has neither overlooked, nor misapprehended, any point of law or fact in its analysis of this case, thus reconsideration is not warranted.

EXCLUSIVITY AND ADVERSE POSSESSION OF THE PRESCRIPTIVE EASEMENT AREA

6. The Court did not err when "*it did not find that the Maddocks' use of the Driveway was also exclusive*", nor did the Court err "*in not finding the Maddocks own the fee title to the driveway by adverse possession.*" (Plaintiffs' MFR, pg 2, para 5)
7. In order to obtain title by adverse possession, the adverse possessor must prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. Blagbrough Family Realty Tr. v. A & T Forest Prods., 155 N.H. 29, 33 (2007), citing Flanagan v. Prudhomme, 138 N.H. 561, 571-72 (1994).
8. In addition, adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive. Blagbrough Family Realty Tr. v. A & T Forest Prods., 155 at 33, citations omitted.
9. The Plaintiffs did not present evidence of exclusive use of the Prescriptive Easement area sufficient to sustain findings of adverse possession of the Prescriptive Easement area.
10. Neither the testimony of Steven Guyer, nor that of Nancy Ramsdell, support Plaintiffs' theory of exclusive use of the Prescriptive Easement area. (Plaintiffs' MFR, pg 2, para 7)
11. Plaintiffs allege that entry upon the driveway area by the Ramsdells was "*rare*". (Plaintiffs' MFR, pg 2, para 7.a.)

12. Twice, during the testimony specifically referenced by the Plaintiffs, Steven Guyer, mentions the Ramsdells' use of the driveway area:

Q: *Did you ever see the Ramsdells in the area North of Point B?*

A: *Um*

Q: *That you had described as the steep area?*

A: *I would um...I would have seen them along the driveway when they had the dogs...little dogs...would run and they'd go get them.*

* * *

Q: *Did they come over onto your driveway?*

A: *Yes, they had little dogs that would come in my driveway.*[1]

Belknap Superior Court CR1_20211005-1007_01d7b9d0ddbbbc6a at 28:38 and 29:12

13. The testimony is mischaracterized by the Plaintiffs. The word "*rare*" is not used by Guyer at any time.

14. The Plaintiffs further ask the Court to draw inferences regarding exclusivity of use of the Prescriptive Easement area from testimony of Nancy Ramsdell when she specifically responds to questions regarding her efforts to view the "*back pin*" and the "*back of the lot*"; an area entirely separate from the Prescriptive Easement area. (Plaintiffs' MFR, pg. 3, para 10)

15. At paragraph 10, Plaintiffs emphasize that "*Ramsdell never walked the slope to the back pin.*" Id. The testimony is not accurately represented.

16. The deposition testimony referenced does not indicate Ms. Ramsdell "*never*" walked the slope. (D. Ex. H, Ramsdell Depo, p. 51, lines 2-5)

[1] Transcribed in good faith by undersigned counsel from courtroom audio. Not from official transcript.

17. Further, while Ramsdell answers "*no*" to the question of whether she had ever walked the property line, her actual testimony is that she did not "*feel like going down the slope*". This does not suggest that she never went down the slope at any other time. **Belknap Superior Court CR1_20211115-1038_01d7da0cea8dadac at 3:40-4:10**

18. No citation is given by the Plaintiffs for the statement at paragraph 11 that "*Ramsdell testified that she never went into the back of the lot down the steep slope.*" (Plaintiffs' MFR, pg. 3 para. 11)

19. Further, the Plaintiffs' descriptions of the "*steep wooded ravine*", "*narrow wooded area*" and boulder lined driveway are exaggerated in order to suggest the area is impassable. (Plaintiffs' MFR, pg 3, para 9)

20. In paragraph 9 of the Plaintiffs' Motion for Reconsideration, in support of the prospect that "*the driveway is lined with large boulders*", the following exhibits are cited: "D. Ex. D2, D4, D10 and P. Ex. 115". (Plaintiffs' MFR, pg. 3, para. 9)

21. The Defense exhibits above appear to have been miscited. Defense Exhibit D was the deposition of Steven Guyer and the numbers 2, 4 and 10 do not appear to refer to pages, nor do they refer specific exhibits within the deposition, thus Defendant is at a loss as to what Plaintiffs are referring.

22. As to Plaintiffs' Exhibit 115, this photo does not depict a driveway "*lined with boulders*" Id.

23. To the contrary, the area depicted is gently sloped and moderately wooded with few stones that would qualify as boulders. (Plaintiffs' Trial Exhibit 115)

24. Finally, Plaintiffs introduced no testimony to suggest that they, or their predecessors, specifically made efforts to exclude others from use of any portion or the disputed area,

including the driveway.

25. Mr. Guyer testified that he did not do much of anything in the area from the shed to the road other than dealing with snow or picking up sticks if they fell. He also confirms that he never posted it or fenced it in any way. **Belknap Superior Court CR1_20211005-1125_01d7b9dbc59afc83 at 5:13**

26. Mr. Maddock admits that they never posted the property, put up any signs, including no trespassing signs. **Belknap Superior Court CR1_20211007-1119_01d7bb6d3d1df1a8 at 30:24**

27. It is clear from the analysis within the Court's ORDER that the Court fully comprehended and rejected the Plaintiffs' Adverse Possession arguments, including any pertaining to purportedly exclusive use of the Prescriptive Easement area, and no argument presented by the Plaintiffs supports the Court having misapprehended any fact or point of law such that reconsideration is warranted.

COLOR OF TITLE

28. The Court did not err when it found the 1983 and 1992 site plans, as well as the 1978 septic plan, were neither intended nor sufficiently precise to provide notice that the Plaintiffs claimed title to the Disputed Land.

29. The Plaintiffs suggest that a more extensive reading of the section of the American Law Register cited by the Court in its Color of Title analysis supports their reliance on these historic documents. This is incorrect.

30. Specifically, the Plaintiffs invoke the following passage:

> "*Color may be given for title without deed or writing at all, and commence in trespass; and when founded upon a writing, it is not essential that it should show upon its face a prima facie title, but that it may be good as a foundation of color, however defective.*"

(Plaintiffs' MTR, citing 35 American Law Register 410, emphasis by the Plaintiffs)

31. Plaintiffs then argue, based on the above, that the Court should consider the septic and site plans sufficiently precise to place the Defendant's predecessors in title on notice of their adverse claim "***regardless of their precision and however defective***" they may be. (Plaintiffs' MFR, pg 5, para 24, emphasis added)

32. Defendant asserts that the Plaintiffs misinterpret the relied upon passage of the American Law Register. Acceptance of Plaintiffs' interpretation would render the underlying document internally contradictory. Further, the extent to which Plaintiffs urge the Court to eschew precision is directly contrary to the remainder of the body of law cited by the Court.

33. First, as the Court cited:

> "*Color of title may exist without any instrument purporting to convey title, provided always that there is a bona fide claim of title and some record or some public and notorious act, such as a survey,* ***whereby the precise extent of the claim is defined*** *and with reference to which it is made.*"

(ORDER of January 31, 2022, pg 10, citing 35 American Law Register 410, Jul. 1887, emphasis added)

The Court also cites the following:

> "'*Color of title is allowed to give a constructive possession beyond the actual occupation, for the reason that* ***the colorable title is notice of the extent of the claim*** *of the party holding under it.' Dame v. Fernald, 86 NH 468 (1934). 'The doctrine of color of title is based upon the idea that it presumptively amounts to* ***notice to the true owner of the extent of the tenant's claim.'*** *Id. 'Obviously* ***if no bound is described, there can be no notice of the extent of the claim****, and an instrument defective in that particular cannot give color of title.' Id.*"

(ORDER of January 31, 2022, pg 10, emphasis added)

34. It is clear that the "*however defective*" language from the American Law Register upon which Plaintiffs seek to rely does not refer to the necessary precision of the notice, but to the writing itself, i.e., whether the writing is "defective" as to its intended usage, whatever that may be.

35. It is clear from the language of the American Law Register directly preceding the Plaintiffs' chosen passage, as well as from the relevant New Hampshire case law cited by the Court, that color of title may only be claimed if it can be shown that the extent of the claim has been provided with precision. 35 American Law Register 409-411, Jul. 1887.

36. As surveyor Bryan Bailey confirmed, and as the Court recounted in its ORDER, the documents in question were never intended to provide notice of a claim to the disputed land, nor were they sufficiently precise to do so. (ORDER of January 31, 2022, pg 10)

37. Further, when questioned about the historic documents allegedly relied upon by the Plaintiffs with respect to whether or not the depictions of the elements within were consistent between the documents, Defendant's expert, surveyor James Rines, testified that none of the hand drawn sketches depict the elements within boundaries in the same way. **Belknap Superior Court CR1_20211105-1110_01d7d235bff57258 at 41:00**

38. As to the remainder of the Plaintiffs' Color of Title argument, no argument is presented to suggest that the Court misapprehended any related fact or point of law such that reconsideration is warranted.

ADVERSE POSSESSION OF THE SHED AND "STEEP" SLOPE AREA

39. The Court did not err when it found the testimony surrounding the location of the fire pit unpersuasive, nor did it err in finding, with respect to the sloping part of the disputed land that "*the usage of this portion of the disputed land is minimal and hardly rises above*

occasional maintenance of a forested area." (Plaintiffs' MFR, pg. 8, para. 36)

40. The Court also did not err "*by not considering the condition of the property when finding that the usage was insufficient to find adverse possession.*"

41. In their Motion to Reconsider, Plaintiffs cite the testimony of Steven Guyer and his wife Deborah Guyer; testimony which proved highly inconsistent. (Plaintiffs' MFR, pgs. 6-7, paras. 31-34)

42. When asked by Defendant's Counsel to indicate the location of the fire pit with a green marker, Deborah Guyer made a large circle indicating that this was an area cleared around the fire pit. **Belknap Superior Court CR1_20211006-1503_01d7bac34aeb8e3f at 47:00**, Plaintiffs' Exhibit 152.

43. The circles referenced by the Plaintiffs as indicating the location of the fire pit, i.e. the red circle drawn by Steven Guyer on "Exhibit 139"[2], and the green circle drawn by Deborah Guyer on Exhibit 152, do not even overlap.

44. Further, the aerial photo referenced by the Plaintiffs designated as Plaintiffs' Exhibit 83 allegedly depicting this fire pit was taken in 2011, just eight (8) years prior to the initiation of the Plaintiffs' adverse possession action against the Defendant.

45. Given these inconsistencies, the Plaintiffs' suggestion that the location of this fire pit would have been sufficient to place the Defendant's predecessors in title on notice of a claim to the total area of the disputed land is unsupported by the evidence.

46. As to the condition and character of the property, here again, the Plaintiffs exaggerate and overemphasize the slope of the area in question when it suits this particular purpose, despite

[2] Plaintiffs' reference to this exhibit as 139 is not accurate. Exhibit 139 was the general designation of an enlargement of the disputed area and copies were used several times and marked separately. Defendant has only an electronic copy of the exhibit in question and the exhibit number is blurred. The actual Exhibit is either Plaintiffs' 148 or 149.

their repeated assertions that the Maddocks and their predecessors in title used this area with sufficient frequency to place the Defendant's predecessors in title on notice of an adverse claim.

47. As the testimony revealed, and the Court accepted as fact:

> "*The most significant use established by the evidence presented at trial consisted of Mr. Guyer annually cutting some brush and raking leaves, while occasionally wandering on a game trail in the area. He did not significantly clear trees in the Disputed Area. Maddock also testified that he occasionally cut brush in the area. The usage of this portion of the Disputed Land is minimal and hardly rises above occasional maintenance of a forested area*"

(ORDER of January 31, 2022, pg 13)

48. While there was testimony with respect to the general character of the land, e.g., its slope, the testimony was not sufficient to support Plaintiffs' position that the condition of the property should have led the Court to consider such minimal use sufficient to sustain a claim of adverse possession.

49. Again, the Plaintiffs have produced no evidence to suggest that the Court misapprehended any fact or point of law in arriving at its holding that the Plaintiffs failed to meet their burden to show adverse possession of the disputed area.

50. Because the Court did not err in finding only a prescriptive easement and not adverse possession, Plaintiffs' attempt to reassert its Timber Trespass claim is moot.

WHEREFORE, the Defendant respectfully requests that the Honorable Court:

A. Deny the Plaintiffs' Motion for Reconsideration in full; and

B. Grant any and all other and further relief as to the Court appears just.

Respectfully submitted,
Michael J. Higgins
by his attorneys
Normandin, Cheney & O'Neil, PLLC

Date: 02/22/2022

/s/ William D. Woodbury
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CERTIFICATION

I hereby certify that a copy of the foregoing has this day been served upon the Parties via E-File and Serve:

Date: 02/22/2022

/s/ William D. Woodbury
William D. Woodbury, Esq.

STATE OF NEW HAMPSHIRE

SUPERIOR COURT BELKNAP COUNTY

Todd H. Maddock and Margaret V. Maddock
v.
Michael J. Higgins

Docket No. 211-2019-CV-150

Requests for Findings of Fact and Rulings of Law Submitted by Michael Higgins

NOW COMES Michael Higgins, Defendant in the above-entitled matter, by and through his attorneys, Normandin, Cheney & O'Neil, PLLC, and respectfully requests that the Court incorporate the following Findings of Fact and Rulings of Law into its Final Order:

Accepted Background Facts

1. The Plaintiffs have sought relief under three specific Counts: Adverse Possession, Acquiescence and Timber Trespass Pursuant to RSA 227-J:8,II. (Plaintiffs' Amended Complaint)

2. A bench trial was held in this manner spanning seven non-consecutive days between October 4, 2021, and November 15, 2021, during which numerous witnesses testified and significant documentary evidence was received and admitted.

3. At the conclusion of trial, the Parties waived a view and the case was submitted with Requests for Findings of Fact and Rulings of Law due twenty (20) days from the conclusion of trial.

4. Plaintiffs' Exhibit 88, otherwise referred to, generally, as The Bailey Plan, contains an undisputed depiction of what was referred to, generally, as "The Disputed Land", a wedge-shaped area between 33 and 39 Barefoote Place, Gilford, New Hampshire.

***NOTE**: (There are 13 individual audio files associated with this trial. The citations below beginning with "**Belknap Superior Court CR1**" reference the individual audio files and the time markers where the cited testimony is found.)*

Regarding Plaintiffs' predecessor in title, Stephen Guyer, the following testimony and/or conclusions related thereto are accepted as fact:

5. Mr. Guyer testified that his activities on the disputed land included knocking brush down and small trees from the shed down the slope. **Belknap Superior Court CR1_20211004-1538_01d7b935d34e200c** [10:08 and 11:13]

6. When confronted on cross examination about the discrepancy between his in court testimony and his affidavit which indicated that the shed on the property was placed in 2010, Mr. Guyer testified that the affidavit is correct. **Belknap Superior Court CR1_20211005-1007_01d7b9d0ddbbbc6a** [46:50]

7. Mr. Guyer testified that prior to his placing the shed at its location in 2010, there was no shed in that location. He indicates that he had not owned or maintained a shed at that location. **Belknap Superior Court CR1_20211005-1125_01d7b9dbc59afc83** [1:37]

8. Mr. Guyer testified that he did not do much of anything in the area from the shed to the road other than dealing with snow or picking up sticks if they fell. He also confirms that he never posted it or fenced it in any way. [Id. at 5:13]

9. Mr. Guyer testified that once a year he would cut some brush and rake some leaves and that he did not clear cut, nor was he cutting down large trees in the area southeast of the shed. [Id. at 8:58]

10. There was discussion about a trail toward the back of the property. Mr. Guyer confirms that he did not blaze a trail to the stream discussed. [Id. at 14:30]

11. Mr. Guyer testified that characterizing the referenced trail as a "trail" is not accurate and that it was more like a game trail. [Id. at 15:28]

12. When shown Defendant's Exhibit Q-7, Mr. Guyer confirmed that it was an aerial photograph of his former property and that the area above the southern border appeared heavily wooded. He further concurred that the date of the Exhibit was 2015, the year after he had sold it. [Id. at 25:44]

13. Mr. Guyer was also shown Defendant's Exhibit Q-6. He confirmed the date of the Exhibit was 2014 and that the area to the southeast of the house appeared heavily wooded. [Id. at 27:27]

14. Finally, Mr. Guyer confirmed that there was no significant tree clearing by him when he lived there, nor did he mark or post it. [Id. at 30:30]

Regarding Plaintiffs' predecessor in title, Deborah Guyer, the following testimony and/or conclusions related thereto are accepted as fact:

15. Ms. Guyer was shown Exhibit 152. When asked by Defendant's counsel to indicate where the fire pit discussed was with a green marker, she made a large circle but indicated this was an area cleared around the fire pit. **Belknap Superior Court CR1_20211006-1503_01d7bac34aeb8e3f** [47:00]

16. She indicated that the fire pit was in the center of the green circle. She also admitted that the cleared area was in both the disputed land and their land. [Id. at 48:00]

17. Ms. Guyer further confirmed that after that area, it "went wild". She indicated that after that there was really quite a drop off. [Id. at 48:45]

18. During her deposition testimony, which is **Defendant's Exhibit C**, the following colloquy occurred at page 42, lines 6-17.

> *6 Q. And I believe your testimony was that you*
> *7 believed that the parking area constituted, in your*
> *8 mind, the boundary between -- a delineation between*
> *9 the properties, correct?*
>
> *10 A. Well, not exactly. What I believed was we*
> *11 owned at least to that point. You know, I don't*
> *12 really -- didn't have the specifics of what beyond*
> *13 that point we might have had because I didn't*
> *14 really look at the pins or follow the boundary*
> *15 line or -- but I assumed we at least had to have*
> *16 owned the parking area and as it sloped away from*
> *17 our property.*

19. Ms. Guyer indicated that her deposition testimony, at page 42, lines 10-17, accurately confirms her understanding of where the boundary was. [Id. at 50:05]

20. Ms. Guyer confirms that they did cut trees a few times as the view became obstructed. [Id. at 52:02]

21. She confirms that the green circle she drew on Exhibit 152 represents a cleared area that the tenants used as their front yard and that after that it "plummeted pretty steeply". [Id. at 52:32]

Regarding Plaintiff, Todd Maddock, the following testimony and/or conclusions related thereto are accepted as fact:

22. Upon cross-examination, when asked why he never mentioned during his deposition the fact that he had met with his realtor and the seller's realtor about the septic design document and considered it a survey, he testified that he did not understand what was being asked. **Belknap Superior Court CR1_20211007-1119_01d7bb6d3d1df1a8** [20:46]

23. At no time did the Maddocks employ an expert to indicate any effect the cutting of the trees would have on the parking pad. [Id. at 25:33]

24. When asked what activities he has conducted between the shed and the B pin, he indicated brush cutting, brush clearing and walking his dog. [Id. at 28:14]

25. Mr. Maddock has no independent knowledge of activities on the land by the Guyers or the Halls. [Id. at 29:42]

26. Mr. Maddock admits that they never posted the property, put up any signs, including no trespassing signs. [Id. at 30:24]

Regarding Plaintiffs' expert, Bryan Bailey, the following testimony and/or conclusions related thereto are accepted as fact:

27. Mr. Bailey was questioned regarding the hand-drawn sketches presented by the Plaintiff (appearing at Plaintiffs' Exhibits 8, 9, 10, 14, and 15). **Belknap Superior Court CR1_20211006-1025_01d7ba9c858d8fa8 [7:35]**

28. Mr. Bailey testified that his profession is one that deals in precision and accuracy. [Id. at 10:40]

29. Mr. Bailey testified that none of the referenced Exhibits had the purpose to accurately depict the boundaries. [Id. at 10:58]

30. Mr. Bailey testified that he would never rely on any of these to determine the location of a boundary. [Id. at 12:18]

31. Mr. Bailey testified that he would never encourage the purchaser of a home to rely on these documents. [Id. at 12:26]

32. Mr. Bailey testified that, with respect to the elements depicted within the Exhibits, they would never be utilized to reestablish or retrace the boundary lines and he would never advise a homeowner to rely on these for that purpose. [Id. at 13:14]

33. Mr. Bailey testified that, with respect to the septic design plan frequently referred to by the Plaintiffs, the plan elements do not accurately depict the proximity of any element to the boundary line. [Id. at 15:55]

34. Mr. Bailey confirmed that all of the hand-drawn sketches referenced were created for some purpose other than depicting the location of a boundary. [Id. at 18:06]

Regarding Peter Farrell, the following testimony and/or conclusions related thereto are accepted as fact:

35. Peter Farrell testified "My first conclusion was that this was not a 'timber operation' as its commonly used but that the trees that were cut had what we call more commonly shade tree value…" **Belknap Superior Court CR1_20211006-1025_01d7ba9c858d8fa8** [58:22]

36. Upon inquiry as to what training Mr. Farrell had to conduct appraisals of this nature with respect to residential property, Mr. Farrell testified "I am self-taught in doing these appraisals." He further confirmed he does not hold a realtor's license nor has he taken classes in real estate appraisal. [1:30:35]

37. When questioned about the market value of the trees in question, Mr. Farrell indicated that the trees have negative standing value. **Belknap Superior Court CR1_20211006-1503_01d7bac34aeb8e3f** [4:40]

38. With reference to Exhibit 90, Mr. Farrell indicates that the values he gives are for the replacement of the trees. [Id. at 9:20]

39. Mr. Farrell indicates that the market value of these trees was less than $100.00, maybe $150.00. [Id. at 9:53]

40. Defendant's counsel read RSA 227-J:8 to Mr. Farrell [Id. at 14:42].

41. Mr. Farrell confirmed that the market value of the logs and firewood that were produced as a result of the tree cutting is very small and cannot be considered here. [Id. at 15:50]

Regarding Plaintiff, Margaret Maddock, the following testimony and/or conclusions related thereto are accepted as fact:

42. Ms. Maddock acknowledged that the accuracy of the Bailey Plan has not been disputed by the Respondent during these proceedings, nor had she presented evidence to dispute its accuracy. **Belknap Superior Court CR1_20211104-1012_01d7d16483b35cac** [41:52]

43. Ms. Maddock has no information to dispute Mr. Guyer's representation that the shed was put there in 2010. [Id. at 54:56]

44. Ms. Maddock confirmed that Plaintiffs never posted, never fenced, never constructed any buildings or structures in the disputed land, other than laying pavers, building a ramp to the shed and placing plantings. [Id. at 58:18]]

Regarding Defendant's expert, James Rines, the following testimony and/or conclusions related thereto are accepted as fact:

45. Mr. Rines testified with respect to the overlays comparing the information in the Bailey Plan to the 1978 Septic Plan and the 1983 Site Plan. **Belknap Superior Court CR1_20211104-1437_01d7d1898aa3ab0e** [1:05:04, 1:06:23, 1:14:00]

46. The enlargements of these overlays were discussed during testimony and accepted as Exhibits MM and NN respectively.

47. When asked if he would ever rely on the 1978 or 1983 plans, he testified he would not. He further testified that he would never recommend that a homeowner rely on them. [Id. at 1:17:50]

48. Mr. Rines testified to his observation that the areas over the steep banks were clearly not being used. [Id. at 1:19:00]

49. Mr. Rines testified that his only issues with respect to the Bailey Plan were the references to "lines of possession" in that, given the nature of the land, he would not consider it as being possessed. [Id. at 1:20:56]

50. When questioned about the historic documents allegedly relied upon by the Plaintiffs with respect to whether or not the depictions of the elements within were consistent between the documents, Mr. Rines testified that none of the hand drawn sketches depict the elements within boundaries in the same way. **Belknap Superior Court CR1_20211105-1110_01d7d235bff57258** [41:00]

Regarding Defendant's expert, Susan Romano, the following testimony and/or conclusions related thereto are accepted as fact:

51. Dr. Romano testified that she visited the property and that it was sloped but walkable. **Belknap Superior Court CR1_20211105-1410_01d7d24edd1d1a9d** [0:30]

52. Dr. Romano testified that the tree removal at this site was "absolutely not" a timber harvest. [Id. at 3:40]

53. Dr. Romano testified regarding her belief that the slash in this case was remaining on the site due to the case, thus Plaintiffs' expert, Peter Farrell's application of RSA 227-J:10 was not appropriate. [Id. at 4:00]

54. Dr. Romano testified that Peter Farrell used the Replacement Cost method to determine the value of the trees removed. [Id. at 5:00]

55. Dr. Romano testified that the Replacement Cost method is inapplicable in this situation as it is used in urban forestry where you have lawns, and trees that are landscaped. Id.

56. Dr. Romano testified that these trees were in natural condition and were not pruned to a landscaped standard nor were they fertilized and mowed around. Id.

57. Dr. Romano testified that, since Peter Farrell was referring to aesthetics, he should have used what was recommended in his referenced text "Arboriculture and the Law" which states that **aesthetic tree value can be determined by the value of the real estate before and after the cutting**. [Id. at 6:30, Emphasis added] **(See Rulings of Law below for discussion of supporting NH case law)**

58. Dr. Romano testified that Peter Farrell's report, leans on urban landscape formula which does not apply and really emphasizes aesthetics, however these were not landscaped tress, thus this was a misappropriated formula for calculation for the value of the trees. [Id. at 7:00]

59. Dr. Romano testified that Peter Farrall utilized the "unusual situation" category from his referenced text because nothing in the book supports use of this method. Per the referenced text, an unusual situation would be one such as in a college or university or amusement park. Dr. Romano categorized it as a "huge stretch to apply this formula to this particular situation." [Id. at 8:00]

60. Dr. Romano applied her analysis to both Group I and Group II trees as categorized in Peter Farrell's report. [Id. at 9:00]

61. With respect to Peter Farrell's replacement values for the trees, even if replacement value was accepted as the correct method of assessing damages, Dr. Romano testified that his conclusions were not reasonable. The trees naturally regenerate, so the cost of putting new trees on a steep slope would likely result in the trees not surviving. [Id. at 9:48]

62. Dr. Romano testified that the actual value of the trees is zero. [11:15]

63. Dr. Romano disagreed with Peter Farrell's assessment of the maturity of a tree. [12:20]

64. Dr. Romano testified that there are actual measurements to describe maturity of a tree. These diameters vary by species. [Id. at 12:28]

65. Dr. Romano testified that a mature tree in landscaping is one that is full grown. [Id. at 14:02]

66. Dr. Romano testified that she agrees that there was no commercial value to the trees and no replacement value. [Id. at 14:24]

67. During cross examination, Dr. Romano stated that "historic cutting" as referenced in her report, simply means "prior to" the date of her assessment and that only way you could determine when the cutting happened would be to look at aerial photos and footage. [Id. at 21:45]

68. Dr. Romano quoted from Peter Farrell's referenced text, "Arboriculture and the Law" during cross-examination regarding Peter Farrell's use of the Replacement Cost Method, specifically his categorization of this matter as an "unusual situation". Specifically, she quoted text on Page 67 regarding replacement cost of large specimen trees and adapting the replacement cost method to unusual situations: "Credible conditions under which this method would be used are limiting. But they may include settings such as amusement parks or institutional campuses where Large trees are integral part of a public display." She concludes by stating that "this situation entirely does not fit these conditions." [Id. at 47:51]

69. Dr. Romano testified and reiterated that these were not landscaped trees that were planted for this specific purposes. [Id. at 58:30]

70. When questioned regarding her opinion that the application of the methods in Peter Farrell's cited text "Arboriculture and the Law" was inappropriate, Dr. Romano testified that you can't apply it to the natural forest condition that's unmaintained. [Id. at 1:00:00]

71. On cross examination, Dr. Romano reaffirmed that there is no value to the trees. **Belknap Superior Court CR1_20211105-1525_01d7d25956247fb0 [3:00]**

72. When questioned further about the value of the trees, specifically under NH RSA 227-G:12, Dr. Romano stated that she stood by her opinion that there was no value to the trees under any definition. [Id. at 7:00]

73. Dr. Romano reaffirmed that, if the value of the trees is tied to aesthetics, you must be able to show the real estate value before and after the cutting to determine the loss, which is supported by Peter Farrell's relied upon text Arboriculture and the Law. [Id. at 9:12]

74. Dr. Romano testified that you cannot use the Arboriculture and the Law book in an unmanaged landscape scenario such as this one. [11:15]

75. Upon re-direct, Dr. Romano viewed Defendant's Exhibit Q6, the October 11, 2014, aerial photograph of the Plaintiffs' property and agreed that the disputed area, especially to the Southeast, was forested at that time. [Id. at 12:50]

76. Upon re-direct, Dr. Romano viewed Defendant's Exhibit Q7, the 2015, aerial photograph of the Plaintiffs' property and agreed that the disputed area, especially to the Southeast, was forested at that time. [Id. at 12:50]

77. Also, upon re-direct Dr. Romano testified that, with respect to her reference to "historical clearing", this clearing could have occurred after 2015. [Id. at 16:30]

Regarding Nancy Ramsdell, the following testimony and/or conclusions related thereto are accepted as fact:

78. Ms. Ramsdell testified that she purchased the property at 33 Barefoote Place, Defendant's current property, in 1990. **Belknap Superior Court CR1_20211115-1004_01d7da082ffcb286 [ ]**

79. Ms. Ramsdell testified that at the time of her purchase, her neighbors at 39 Barefoote Place, were Hoyt and Marian Hall, the Plaintiffs' predecessors in title. [Id. at 3:18]

80. Ms. Ramsdell testified that she had a great relationship with the Halls and had rented from them at the location on the opposite side of 39 Barefoote Place for years. [Id. at 3:56]

81. Ms. Ramsdell read the following paragraph from her Affidavit, Defendant's Exhibit N and reaffirmed that the same was true:

"5. Dr. Marian Hall held title to the abutting lot know as 30 Barefoote Place, Gilford, NH from 8/31/1983 to 10/17/1990. When I first purchased my property, Dr. Hall personally told me that the dirt driveway extended over onto our property. We decided as good neighbors to let the Halls continue using the area. We thought of it as a Gentlemen's Agreement." [18:45]

82. Ms. Ramsdell testified that she did not witness the Halls engage in any cutting, posting, or fencing any part of the disputed area from the street to the driveway or in the area to the Southeast of the driveway. [Id. at 21:00]

83. Ms. Ramsdell testified that she had a good relationship with the Halls successors in title, the Guyers. [Id. at 22:14]

84. Ms. Ramsdell testified that she and her husband had refrained from cutting trees at the request of the Guyers, not because she did not believe she owned the trees in question, but to maintain good relations with her neighbors. [Id. at 23:50]

85. Ms. Ramsdell testified that she never witnessed the Guyers cutting, fencing or posting the property in the disputed area from the road to the driveway or the larger area to the Southeast. [Id. at 25:20]

86. Ms. Ramsdell testified that, following the Maddocks' purchase of the Guyer property, she never witnessed the Maddocks engaging in cutting, posting or fencing in the disputed area. [Id. at 26:35]

87. Ms. Ramsdell testified that she never withdrew the permission to the Halls to maintain the encroaching elements on her land. [Id. at 27:15]

88. Ms. Ramsdell testified that the shed that is currently in the disputed area is not the same shed as the one the Halls owned. **Belknap Superior Court CR1_20211115-1038_01d7da0cea8dadac** [10:05]

Regarding Defendant, Michael Higgins, the following testimony and/or conclusions related thereto are accepted as fact:

89. Defendant is the current owner of 33 Barefoote Place.

90. At no time, did the Defendant dispute the accuracy of the Bailey Plan, Plaintiffs' Exhibit 88.

91. Mr. Higgins testified that he waited until the Bailey Survey was completed before he had the trees in question cut. Once he saw the markers delineating what has been called the Mathematical line in this case, this is when he felt it was safe to cut the trees. **Belknap Superior Court CR1_20211115-1127_01d7da13c8e53cdb** [9:36]

92. Mr. Higgins testified that, at no time, did he doubt that trees cut were on his property. [Id. at 14:35]

93. Mr. Higgins testified that, at no time, has he denied cutting the trees. Id.

RULINGS OF LAW

Count I: Adverse Possession

94. In order to obtain title by adverse possession, the adverse possessor must prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. Blagbrough Family Realty Tr. v. A & T Forest Prods., 155 N.H. 29, 33 (2007), citing Flanagan v. Prudhomme, 138 N.H. 561, 571-72 (1994).

95. In addition, adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive. Blagbrough Family Realty Tr. v. A & T Forest Prods., 155 at 33, citations omitted.

96. The success or failure of a party claiming adverse possession is not determined by the subjective intent or the motives of the adverse possessor. Id. Rather the acts of the adverse possessor's entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action. Id. In evaluating the merits of an adverse possession claim, courts are to construe evidence of adverse possession of land . . . strictly. Id.

97. The law requires more than occasional, trespassory maintenance in order to perfect adverse title; the use must be sufficiently notorious to justify a presumption that the owner was notified of it. Id. at 34, citing Pease v. Whitney, 78 N.H. 201, 204, 98 A. 62 (1916).

98. The determination of whether the use of a property has been adverse or permissive is a matter of fact to be determined by the trial court. O'Malley v. Little, 170 N.H. 272, 278 (2017); citing Ucietowski v. Novak, 102 N.H. 140, 145 (1959). The nature of the use, whether adverse or permissive, may be inferred from the manner, character, and frequency of the exercise of the right and the situation of the parties. See Id. "*We will reverse the trial court's findings and rulings only if they are unsupported by the evidence or are erroneous as a matter of law.*" Id., citing Bonardi v. Kazmirchuk, 146 N.H. 640, 643, (2001).

99. Permission in the context of adverse possession can be either explicit or implied. O'Malley v. Little, 170 N.H. at 278; citing Ucietowski, 102 N.H. at 145.

100. However, implied permission must be evidenced by the use of the property and the "*situation of the parties*," not by the Littles' failure to oust the plaintiffs after making a verbal assertion of title. O'Malley v. Little, 170 N.H. at 278.

101. The New Hampshire Supreme Court has instructed that occupancy must be "*so marked by definite boundaries as to indicate, by clear and unequivocal acts, the exercise of ownership up to defined and visible boundaries, to the exclusion of the legal owner; thus giving him unequivocal notice of an adverse claim.*" Livingston v. Pendergast, 34 N.H. 544, 550 (1857)

102. The court has said it is "*not enough that* [the claiming party] ..... *had occasionally gone upon it for some particular purpose, or that he had cut wood upon it from time to time.*" Wendell v. Mouton, 26 N.H. 41, 46 (1852).

Count II: Acquiescence

103. Boundaries may be established by acquiescence where the parties have recognized a certain boundary as being the true one and have occupied their respective lots accordingly for twenty years or more. O'Hearne v. McClammer, 163 N.H. 430, 435, 42 A.3d 834 (2012). "*The bound thus acquiesced in will prevail even over the description in the deeds*" and "[a] *boundary established by acquiescence is conclusive upon successors in title.*" Id. (quotation and citation omitted).

104. To establish a boundary [***17] by acquiescence, a party generally must prove that: (1) the parties are adjoining landowners; (2) who have occupied their respective lots up to a certain boundary; (3) which they have recognized as the true boundary separating the lots; and (4) have done so for at least twenty years. Id.

Count III: Timber Trespass

105. During cross examination of Defendant's forestry expert, Dr. Susan Romano, Plaintiffs incorrectly invoked Woodburn v. Chapman 116 N.H. 503 (1976) to support the argument that Replacement Value is an appropriate method of assessing damages in this matter. In Woodman, a case decided under prior law, the Court stated:

> *"Where a tree is valuable principally as a marketable commodity, the penalty provided by RSA 539:1 fully compensates the plaintiff for its loss. But where a tree confers other benefits on the plaintiff in the enjoyment of his property, he may join a count for compensatory damages with his count to recover the statutory penalty. Morley v. Clairmont, 110 N.H. 12, 259 A.2d 136 (1969).* ***The ordinary measure of damages in these circumstances is the difference between the value of the land before the harm and the value after the harm.*** *Restatement (Second) of Torts § 929 (Tentative Draft No. 19 (1973)).*"

Woodburn v. Chapman, 116 N.H. 503, 505 (1976), Emphasis added.

106. Here, Plaintiffs did not join a Count for compensatory damages, but requested compensatory damages under Count III of their Amended Complaint under New Hampshire's Timber Trespass statute, stating specifically:

> *"Pursuant to RSA 227-J:8,II, the Maddocks claim 10 times the market value of the trees cut, compensatory damages for the restoration of the tree buffer and damages from loss of privacy and quiet enjoyment of their property."*

107. Plaintiffs' Amended Complaint, Paragraph 39. Further, even if compensatory damages were available to the Plaintiffs, no evidence was introduced to show any difference between the value of the land before the harm and the value after the harm. See Id.

Final Rulings

108. The boundary retracement created by Bryan Bailey at the request of the Plaintiffs, and submitted as Exhibit 88 by the Plaintiffs, accurately depicts the corrected boundary between the two subject properties, i.e., 33 Barefoote Place and 39 Barefoote Place.

109. Plaintiffs have failed to meet their burdens necessary to prevail upon their Count I: Adverse Possession.

110. Plaintiffs have failed to meet their burdens necessary to prevail upon their Count II: Acquiescence.

111. The above, notwithstanding, Plaintiffs have failed to meet their burdens necessary to prevail upon their Count III: Timber Trespass under 227-J:8.

112. Within ten days of the date of this Order, Plaintiffs shall record this Order, along with a copy of the

Bailey Boundary retracement, Exhibit 88, with the Belknap County Registry of Deeds.

113. Within 90 days from the date of this Order, the Plaintiffs shall remove any and all encroachments upon the Defendant's land. This process shall occur in a manner that ensures a minimum of damage or disruption to the Defendant's property.

114. Should the Parties choose following this ruling, the Parties may arrive at some alternative agreement regarding said encroachments under the following conditions: Any proposed agreement by either party must be made to the other party within 30 days of this Order. However, should the Parties fail to reach any agreement regarding Plaintiffs' encroachments within two (2) weeks of such proposal, Plaintiffs shall remove any and all encroachments upon the Defendant's land within 90 days from the date of this Order pursuant to above Paragraph 113.

Respectfully submitted,
Michael J. Higgins
by his attorneys
Normandin, Cheney & O'Neil, PLLC

Date: 12/06/21

/s/ William D. Woodbury
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CERTIFICATION

A copy of these Requests for Findings of Facts and Rulings of Law was served upon Counsel for the Plaintiffs, Stephan Nix, via e-file.

Date: 12/06/21

/s/ William D. Woodbury
William D. Woodbury, Esq.