STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 SESSION
SEPTEMBER TERM

Docket No. 2022-0234

TODD H. MADDOCK ET AL.
PLAINTIFFS/APPELLANTS

v.

MICHAEL J. HIGGINS ET AL.
DEFENDANT/APPELLEE

BRIEF OF APPELLANTS TODD H. MADDOCK ET AL.

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> A municipality, having adopted a zoning ordinance as provided in RSA 3~: 60-89, an~ 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.

91-A:4 Minutes and Records Available for Public Inspection. –
I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.
I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee's agent or designee, upon the resignation, discharge, or

retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

II. After the completion of a meeting of a public body, every citizen, during the regular or business hours of such public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes of such meetings, and to make memoranda or abstracts or to copy such notes, materials, tapes, or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

III. Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

IV. (a) Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release.

(b) If a public body or agency is unable to make a governmental record available for immediate inspection and copying the public body or agency shall, within 5 business days of a request:

(1) Make such record available;

(2) Deny the request; or

(3) Provide a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay.

(c) A public body or agency denying, in whole or part, inspection or copying of any record shall provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

(d) If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No cost or fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law

for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.
VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.
VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to conclude that the undisputed monuments at points A and B, App. at 109, Ex. 88, establish as a matter of law the boundary between the properties. The Brief now includes Notice of Appeal Issues 3,4,7, 8 and 10 in the argument as to Issue 1.

2. Whether the trial court erred in not finding exclusive use of the disputed driveway and parking area by the Plaintiffs (Maddock) sufficient to conclude the Maddocks are entitled to title based on adverse possession of at least the driveway, parking area and area used for discarding snow. Notice of Appeal ("NOA") at 14. The Brief now includes Notice of Appeal Issues 3,4,7, 8 and 10in the argument as to Issue 2.

3. Whether the trial court erred in finding that the Maddocks' predecessor in title usage of the Disputed Land by clearing of brush to maintain the view, installing a shed, using a walking trail, raking leaves and using a fire pit "was not sufficiently notorious to justify a presumption that the owner was notified of it", NOA at 13.

4. Whether the trial court erred in failing to conclude that Ex. 10, 22, 23, 37, 38, 53 and 74, all being in the public record, put Higgins and his predecessors on notice of the Maddocks' claim and provided Color of Title that fixed the adverse possession claim to the line A – B. See above.

5. Whether the trial court erred in failing to find a timber trespass against Higgins and Dockham and damages to the Maddocks.

6. Whether the trial court erred in failing to grant the Maddocks' Motion for Partial Summary Judgment.

7. Whether the trial court in failing to conclude that the filings with the town offices provided constructive, actual and inquiry notice to the Defendant, and his predecessors in title, as to the extent of the Maddocks, and their predecessors in title, claim to line A-B. See above.

8. Whether the trial court erred in failing to conclude that the filings approved by the Town did not provide "color of title' to the Maddocks' claim. See above.

9. Whether the trial court erred in considering Ramsdell's testimony credible.

10. Whether the trial court erred in failing to find acquiescence between the abutting landowners based on the evidence submitted at trial. See above.

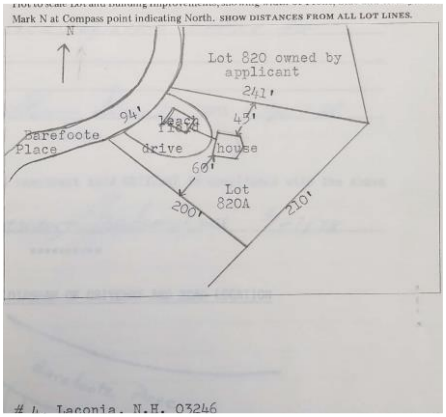
STATEMENT OF THE FACTS

The Plaintiffs, Todd and Margaret Maddock (collectively the "Maddocks"), own a home at 39 Barefoote Place, Gilford, New Hampshire. (hereinafter the "Maddock Property"). NOA at 2 (Order).

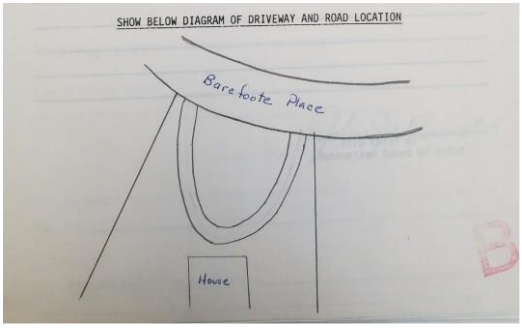
When the Maddocks purchased their property the circular driveway, parking area, shed and other improvements on the property existed as they are today with the exception that the Maddocks asphalted the driveway in late summer 2018. *App. at 19.*

The Defendant, Michael J. Higgins ("Higgins") Higgins owns real property located at 33 Barefoote Place, Gilford, New Hampshire ("Higgins Property"). NOA at 2 (order). The chain of title is listed in the trial court order. *Id.*

Prior owners of the Maddock Property, Dr. Marian L. Wilson, filed a building permit application with the Town of Gilford on March 27, 1978. *App. at 34*. A building permit was issued dated April 4, 1978. *App. at 35.* The sketch on the building permit application depicts boundary lines and a circular driveway and house located completely on the "Lot 820A," as follows:

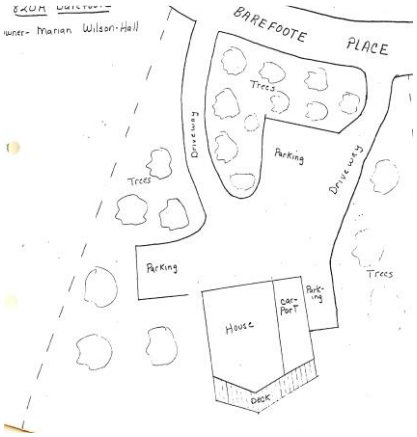


App. at 34. Dr. Marian L. Wilson filed an "Application for Driveway Construction Permit" dated March 27, 1978. *App. at 36.* The sketch on the driveway permit application depicts boundary lines and a circular driveway located completely on lot 820A, as follows:

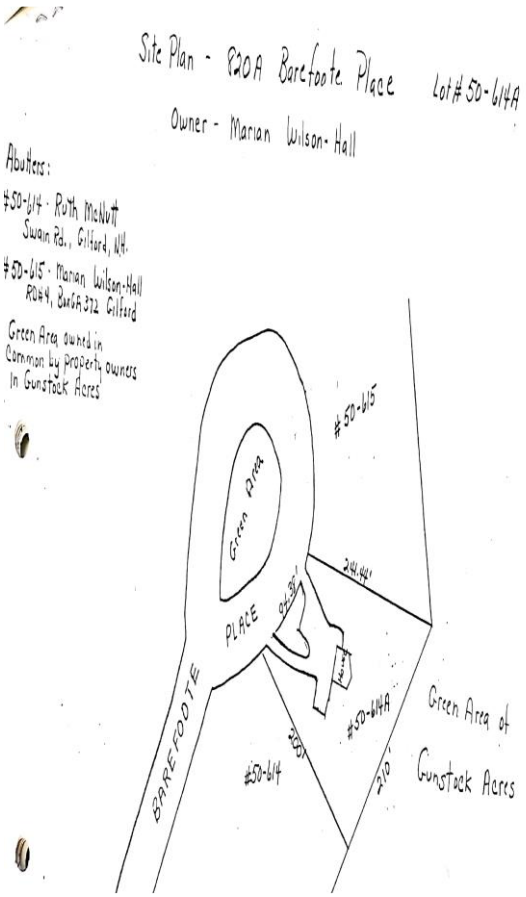


Id.

In May of 1983 Marian Wilson-Hall filed an "Application for Site Plan Approval) (the "1983 P/B App."). *App. 47 & 48.* The 1983 P/B App. is a public record. RSA 91-A:4. The 1983 P/B App. includes a plan entitled "820A Barefoote[,] Owner – Marian Wilson-Hall" with a notation "Scale: 1" = 20'". ("1983-20 Scale Plan"), as follows:

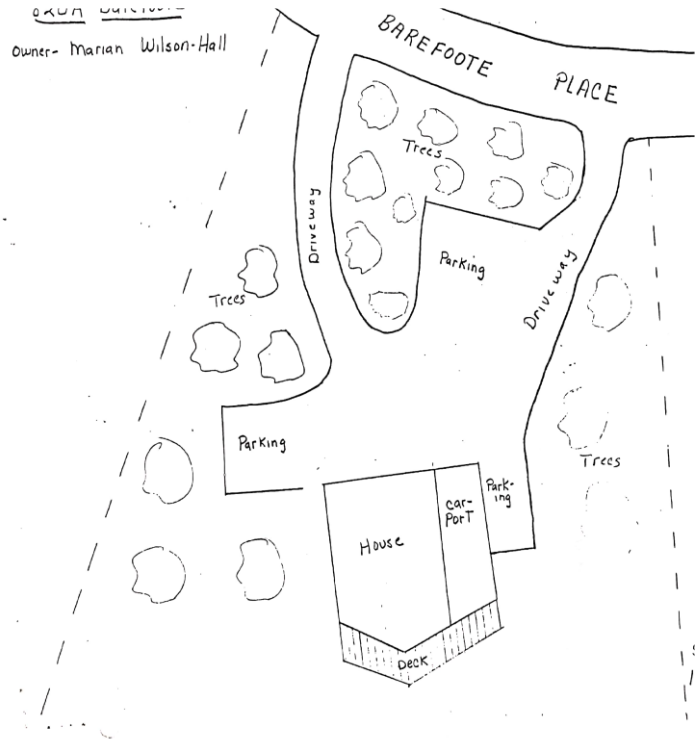


App. 48. The 1983 P/B App. Includes a plan entitled "Site Plan – 820A Barefoote Place[,] Lot #50- 614A[,] Owner – Marian Wilson-Hall" with a notation "Scale 1"=100'" and a list of abutters ("1983-100 Scale Plan"), as follows:

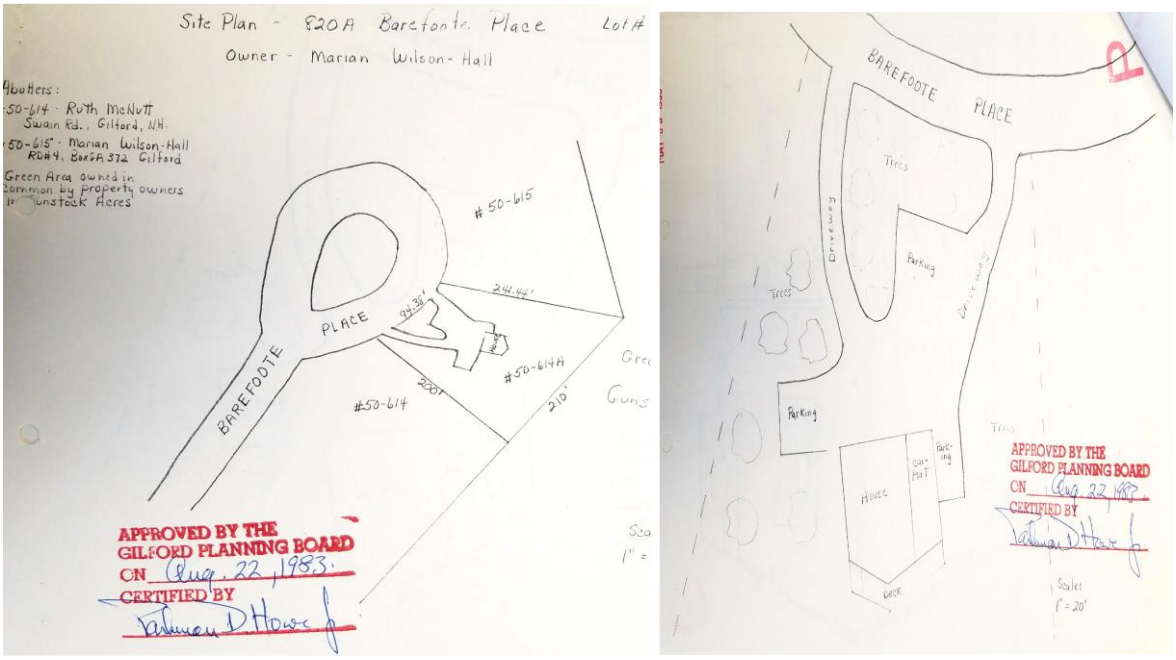


App. 49. The 1983-20 Scale Plan and the 1983-100 Scale Plan depicts Line A-B with the house and driveway all located within the boundaries of Lot 820A. *Id.*

In May of 1983 in her appeal application with the Gilford Zoning Board of Adjustment Marian Hall requested a Special Exception. ("1983 ZBA App."). *App. 50.* The 1983 ZBA App. is a public record. *RSA 91-A*. The 1983 ZBA App. Includes a copy of the 1983-20 Scale Plan:

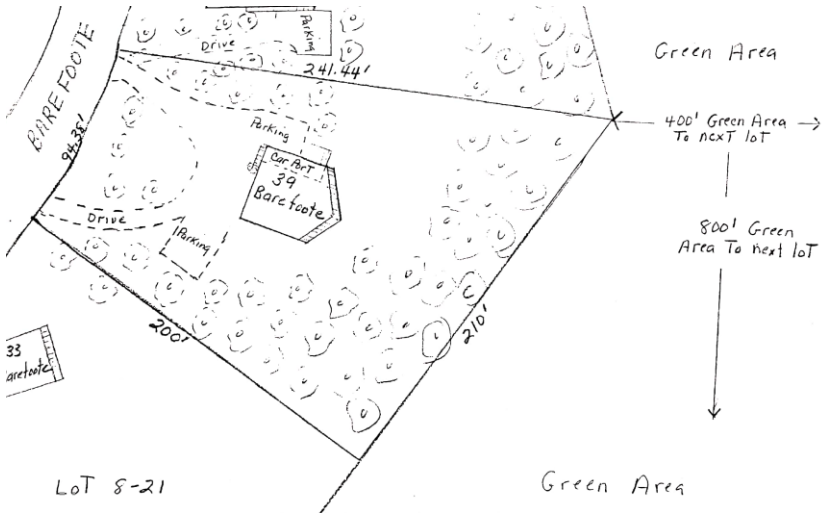


App 51. The 1983-20 Scale Plan and 1983-100 Scale Plan were stamped and signed "APPROVED BY THE GILFORD PLANNING BOARD ON August 22, 1983."



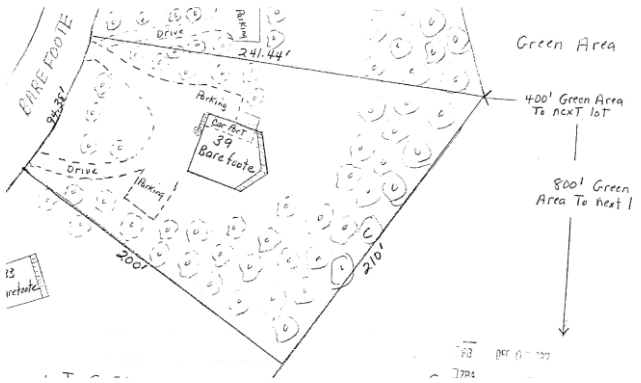
App. 53 & 54, Tr. Ex. 22 & 23.

In October of 1992, Hoyt and Marian Hall filed an application for a variance ("1992 ZBA App #1"). *App. 56-62*. Christopher and Nancy Ramsdell were listed as abutters in the 1992 ZBA App #1. *Id.* The 1992 ZBA App. #1 included the plan below, entitled "Site Plan Scale 1"-50'" ("1992 ZBA Plan"):



App. 62. The 1992 ZBA Plan depicts line A-B and the house/driveway within the boundary. *Id.* The minutes from the ZBA meeting show Christopher and Nancy Ramsdell attended. *App. 63-66. Tr. Trans. p. 508, p. 509; App. 67-69, (Deposition of N. Ramsdell Trans., p. 43; p. 44; p. 45).* There is no mention in the ZBA minutes of any objection to the drawing submitted. *App. 63-66*. The 1992 ZBA App #1 and meeting minutes are public records. *RSA 91-A:4.*

In December of 1992, the Halls filed an appeal challenging the building inspector's interpretation of the zoning ordinance ("1992 ZBA App. #2"). *App. 70-72*. Christopher and Nancy Ramsdell were listed as abutters. *App. 73*. The 1992 ZBA App #2 included a copy of the 1992 ZBA Plan:



App. 74. The minutes of the ZBA January 26, 1993 meeting reflect that Chris Ramsdell attended and spoke against the application. *App. 96.* The map attached to the application put the Ramsdalls on notice of the boundary claim by the predecessors to Maddocks. There is nothing in the ZBA minutes regarding any challenge by the Ramsdells to the boundary lines as depicted on the 1992 ZBA Plan. *App. 74.* The 1992 ZBA App. #2 and meeting minutes are a public record. *RSA 91-A.*

Steven W. Guyer and Deborah B. Guyer (hereinafter "Guyer") purchased what is the Maddock property from Hoyt H. and Marian L. Hall. NOA, at 2. During the time that

the Guyers owned the Maddock Property, the Guyers stopped the Ramsdells from cutting trees in the Disputed Land. *App. 78; Tr. Trans. p. 61, l 12 – 25, App. 80.* Nancy Ramsdell admitted she never walked the common property line between the Maddock Property and the Ramsdell property nor did she discuss the boundary line with the Guyers. *App. 82-84.*

The Guyers believed they owned the Disputed Land. *App. at 85-87.* The Ramsdells asked the Guyers for permission to cut trees in the Disputed Land. *App. 87-88.* Ramsdell did not make a claim of ownership to the Guyers of the Disputed Land. *App. 90-93; App. 94-95.* The Guyers believed they owned to Line A-B during the entire 19 years 11 months that they owned the property. *App. 96.* During their ownership, the Guyers used the Disputed Land by putting in a shed, stacking firewood, cleaning up brush, walking around the property and using a walking trail. *App. 97-98.*

The Maddocks purchased their property from the Guyers on April 30, 2014. NOA, at 2. The Maddocks believed the property they were purchasing included the Disputed Land. *App. at 11-12.* During their ownership, the Maddocks used the driveway, parking area and shed. *App. 11-12.* During their ownership, the Maddocks asphalted the driveway, cleared brush around the shed, had trees removed, installed a ramp and pathway to the shed, plowed snow into the Disputed Land, cleared leaves and debris and placed branches on the parking area slope to prevent erosion. *App. 11-12; App. 102-106.* During the ownership of their property, the Maddocks did not have any conversations with Ramsdell about the common boundary line. *App. 106 – 107.*

U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust (the "Bank") foreclosed on Ramsdell on November 15, 2017, by BCRD 3145/634. NOA, at 2. There is no evidence that the Bank gave the Maddocks permission to use and occupy the Disputed Land. Higgins obtained title from the Bank on September 5, 2018. NOA, at 2.

The Maddocks exercised dominion and control over the disputed property, as did the Guyers, for an additional four years prior to Mr. Higgins purchasing the property. Together with the Guyers' ownership, the Guyers/Maddocks exercised ownership over the disputed

property for a total of 22 years 7 months prior to Mr. Higgins even purchasing the property.

In 2019, the plaintiffs retained surveyor Bryan L. Bailey. He surveyed the plaintiffs' property lines in April 2019. *Tr. Trans p. 284; p. 285.* Mr. Bailey produced a boundary retracement worksheet plan. *App. 109.* The Bailey Plan depicts a mathematically reconstructed boundary between the Higgins Property and the Maddock Property as a line labeled "N 50° 53' 47" W, 213.98', (The "Mathematical Line")." *Tr. Trans p. 130, l 4 – 11 (Test. B. Bailey, Surveyor).*

The Maddocks claim fee ownership of the land south of the Mathematical Line to the line labeled "A" to "B" ("Line A-B") and the small area of fill south of Line A-B that is part of the Maddocks' parking area ("Parking Area"). *Tr. Trans. p. 130; p. 131.* Bailey found a ¼" iron rod 0.2' high at Point "A" (the northern end of Line A-B). *Tr. Trans p. 143; p. 144.* The iron rod at Point "A" was located next to an Oak stump. *Tr. Trans., 10/07/21, p. 15; p 16. App. 123 (photo of oak stump near driveway).* Bailey found a ½" iron rod in stones at Point "B" (the southern end of Line A-B). *Tr. Trans. p. 144.* Bailey believed that the monument found at Point B was set between 1970 and 1974. *Tr. Trans. p. 144. App. 135 (photo of monument at Point B).* The Bailey Plan did not locate any monuments at the north or south end of the Mathematical Line. *App. 109.* The Bailey Plan shows that it is Mr. Bailey who set 5/8" rebar at the ends of the Mathematical Line. *Id.*

STATEMENT OF THE CASE

The Maddocks filed a Petition to Quiet Title and Timber Trespass on May 24, 2019 in response to tree cutting actions taken by Mr. Higgins in the disputed land. A bench trial was held over seven days between October 4, 2021 and November 15, 2021. The trial court issued its order on January 31, 2022, finding that the Maddocks had a prescriptive easement in the driveway and parking area but did not meet their burden to prove adverse possession on the Disputed Land. On February 10, 2022, the Maddocks filed a Motion for Reconsideration, which was denied on March 28, 2022. This appeal followed.

SUMMARY OF THE ARGUMENT

I. THE UNDISPUTED MONUMENTS AT POINTS A AND B ESTABLISH AS A MATTER OF LAW THE BOUNDARY BETWEEN THE PROPERTIES.

(Issues 3, 4, 6, 7 , 8 and 10 are subsumed within this argument)

Monuments Found In The Field Control Over Metes And Bounds In Deeds And Plans.

The line A-B as claimed by the Maddocks is bounded at Point A by an iron pin in the root of a stump near the road and Point B by an ancient iron pin in a ring of stones. Point B was identified by the surveyor expert as an original Gunstock Acres monument set in the 1970's. The origin of Point A is unknown but acknowledged by Higgin's predecessor, Ramsdell, as the pin being there since at least 1990 when she purchased the property. The pin at Point A is near the road and was easily found. The Maddocks' surveyor, Bailey, performed a boundary survey in April of 2019and, from deed and recorded plan metes and bounds, created a mathematical line as depicted on the Bailey Plan as the line labeled N 50° 53' 47" W, 213.98', See *App. 109*. The Points A and B are labeled on the Bailey Plan. The Disputed Land is located between the mathematical line and line A-B containing portions of the Maddock driveway, parking area, shed and downslope view clearing area.

Under the long- established rule that monuments in the field control over bearings and distances in a deed or plan, the Maddocks argue that the long monumented line A-B controls. *Colby v. Collins*, 41 N.H. 301, 303 (1860).

Notice of Claimed Line and Acquiescence to Line A-B.

The Maddocks' predecessor in title filed several documents with the town and state that depict Line A-B in the same relative location to the house and driveway as exist today. They include: 1978 building permit application, App. 34; 1978 septic design, App. 37; 1978 driveway permit application, App. 36; 1983 planning board site plan approval, App. 53 & 54; and a 1992 ZBA variance application site plan, App. 62. All documents are in the Town of Gilford files and are public documents. The local planning

and zoning boards were required to provide notice to abutters and hold public hearings on the applications. The evidence shows that Higgins predecessor in title was noticed and attended two 1992 ZBA public hearings where the 1992 site plan was discussed. The minutes of the meetings and testimony by Nancy Ramsdell do not show any objection to the boundary lines as depicted.

The Maddocks argue that Higgins predecessors in title were on actual notice of the 1983 and 1992 site plans and the boundary lines depicted thereon. Even if there was not actual notice, the occupation by Maddocks' predecessors in the Disputed Land put Higgins' predecessors on inquiry notice, upon such inquiry the public record shows the extent of the Maddocks' claim. *Minot v. Brooks*, 16 N.H. 374, 377-378, (1844).

The evidence supports that there was no claim of ownership, ouster of Maddock or their predecessors, or occupation of any portion of the Disputed Land by Higgins and his predecessors, until April of 2019. The Maddocks further argue that Higgins' predecessors' silence regarding the boundaries depicted on the 1983 site plans and 1992 site plan after having been notified and participating in the ZBA and planning board hearings, coupled with Maddocks' occupation within the Disputed Land is an acquiescence to Line A-B. See *O'Hearne v. McClammer*, 163 N.H. 430, (2012).

Adverse Possession to the Disputed Land

> The Trial Court found that:
>
> "[t]he plaintiffs and their predecessors in title have maintained a driveway on the property since 1978. Their use has been continuous and uninterrupted throughout that time. Their use of the driveway is sufficient to put notice to the record owner of an adverse claim. Accordingly, the Court finds the plaintiffs hold a prescriptive easement over the driveway area, including a limited adjacent area required for the purpose of clearing snow",

Notice of Appeal ("NOA") at 14.

The Maddocks argue that the evidence supports that the Maddocks met their burden of proof to establish adverse possession to the entirety of the Disputed Land. (The issue of exclusivity of use to the driveway and parking area is discussed separately below).

The evidence supports that the land north of the house and shed is steep and unsuited for uses associated with the curtilage of the home. Notwithstanding, the Maddocks and their predecessors kept the area cut for a view, cleared brush, used a walking path, cleared leaves, used a fire pit, installed a shed and ramps and stored firewood. The Maddocks argue that given the character of the land that their uses were sufficient to establish adverse possession. "The kind and frequency of acts sufficient to support a finding of adverse possession depends somewhat on the condition of the property and the uses to which it is adapted in reference to the circumstances of the possessor." Page v. Downs, 115 N.H. 373, 374, (1975).

Color of Title

Maddock argues that the 1983 site plans and 1992 site plans established color of title that extends their adverse possession claim to the driveway, parking and/or steep sections of the Maddock Property to the Line A-B. The plans are a matter of public record dating back to 1983 and 1992:

> "Maps, surveys, plans and plots which are thirty years old, free on their face of suspicion and found in proper custody are admissible in evidence as ancient documents as an exception to the hearsay rule."
>
> * * *
>
> Reduced to its simplest terms the Trial Court could find that the plan in the present case considering its age, appearance and custody was reliable and helpful in deciding the boundary dispute before him and therefore admissible

Perry v. Parker, 101 N.H. 295 (1958).

New Hampshire law recognizes entry under color of title leading to title by adverse possession. *Pease v. Whitney*, 78 N.H. 201 (1916). In *Pease*, the court stated:

> [T]he 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, which is essential to the acquisition of title by adverse possession, no sound reason

> is perceived for its technical application, when the true owner has actively induced the belief in his grantee that the deed covers a particular piece of land, upon which the latter has entered. Though lot C is not covered by the deed, the defendant had as much information of the extent of the plaintiff's claim, as she would have had if it were specifically described in the deed. *Id.* at 202.

Color of title extends the adverse possession to limits of the documents providing color of title. The Maddocks argue that the adverse possession of the driveway and parking area and any other area withing the Disputed Land extends the claim to Line A-B.

II. THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT THE EXCLUSIVE USE OF THE DRIVEWAY AND PARKING AREA BY THE PLAINTIFFS (MADDOCK) IS INDEED SUFFICIENT TO CONCLUDE THE MADDOCKS ARE ENTITLED TO TITLE BASED ON ADVERSE POSSESSION OF AT LEAST THE DRIVEWAY AND AREA USED FOR DISCARDING SNOW

To acquire title to real property by adverse possession, the possessor must show twenty years of adverse, continuous, ***exclusive*** and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made." … The adverse possessor must prove these elements by a balance of probabilities. *O'Malley v. Little*, 170 N.H. 272, 276, (2017), (emphasis added). The difference between a finding of a prescriptive easement and adverse possession is exclusive use.

In addition to the above finding, the court also found as follows regarding the driveway:

> It is undisputed that the plaintiffs' driveway is located in the top portion of the Disputed Land. This includes a gravel parking area and a fill slope supporting same. The driveway was initially constructed with the home in 1978. The driveway has been located in the same area since this time, though it was recently paved. Specifically, the 1983 and 1992 site plan memorialize the continued existence of same.

NOA, at 5.

The Maddocks argue that there is no evidence in the record that Higgins or his predecessors used the driveway and parking area or otherwise ousted the Maddocks and their predecessors.

> [even] mere casual entry by the record owner for a limited purpose is not necessarily sufficient to destroy adverse possession" (quotation omitted)).
> ...
> ***[O]uster of an adverse possessor requires conduct that puts a reasonably prudent person on notice that he or she actually has been ousted.***

O'Malley, 170 N.H. at 278 (citations omitted; emphasis added).

V. THE TIMBER TRESPASS RIPENS UPON A FINDING REVERSING THE DECISION AS TO LINE A-B OR ADVERSE POSSESSION

In reversing the trial court decision regarding the boundary between Higgins and Maddocks, there exists a timber trespass claim the court dismissed based on finding the boundary line to be the "mathematically reconstructed line." The evidence regarding line A-B as the true boundary, and the evidence that supports at least an adverse possession claim out to line A-B, warrants reversal of the timber trespass dismissal given the boundary line is not the mathematically reconstructed line.

IX. MS. RAMSDELL'S TESTIMONY WAS NOT CREDIBLE

Higgins argues that Nancy Ramsdell gave permission to Mariam Hall (Maddocks' predecessor) to leave the driveway, parking and shed. The evidence supports that the Ramsdell affidavit and testimony in deposition and at trial regarding permission is not credible. The evidence supports that Higgins (through his fiancé, Michelle Melius) coached Ramsdell regarding the language in her affidavit, and in her testimony.

The Maddocks ague that Ramsdells' testimony is not credible and there was no permission granted to Mariam Hall.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT THE UNDISPUTED MONUMENTS AT POINTS A AND B ESTABLISH AS A MATTER OF LAW THE BOUNDARY BETWEEN THE PROPERTIES

Plaintiffs have included issues 3, 4, 6, 7,8 and 10 within this section of the brief.

In this case, predecessors to Mr. Higgins were on notice of point A of line A-B existing directly next to the road, as an iron pin next to an Oak stump. *Tr. Trans. p 495; p. 496. Tr. Trans. 10/07/21, p. 15; p 16; App. 123 (photo of oak stump near driveway).* Point A is directly northeast of the Maddock driveway, with the driveway well inside the boundary. *Id.* It was open and obvious. It invited one to inquire where the monument on the other end would be located. Point A is the point Mrs. Ramsdall, a former owner of the Higgins property, understood to be the northeast boundary of the property between what is now the Higgins and Maddock properties. *Tr. Trans. p 495; p. 496.*

> If facts exist such as should put a party on enquiry, he is of course to enquire If he neglects to enquire it is at his peril, and he is in such case chargeable, constructively, with notice of what he might have learned on examination.
> *Rogers v. Jones*, 8 N.H. 264, 268-269 (1836).

The iron pin itself, as well as the various town administrative filings showing the boundary line as following Line A-B, and the driveway area of the Maddocks' property inside that boundary, put the predecessors and Mr. Higgins on inquiry notice that the predecessors of the Maddocks all claimed the boundary followed line A-B. It squarely put the driveway well within the Maddocks' boundary. *Bailey v. Carlton*, 12 N.H. 9 (1841). As the court stated, in the *Bailey* case:

> The general rule that where 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, seems to be settled by the current of authorities. ... And such entry may operate as a disseizin of the whole tract; and the possession under it, continued for the term of twenty years, may be deemed an adverse possession, which will bar the entry of the owner after that lapse of time.

Id. at 15. The Maddocks, and their predecessors, relied on the iron pin next to the Oak

stump as the mark for the northeast corner. Even if it were located incorrectly, it put all parties on either side of the pin on notice to inquire about the state of the boundary. *Mastroianni v. Wercinski*, 158 N.H. 380 (2009). As this court stated, in the *Mastroianni* case:

> The widely accepted view is that an adverse claim, otherwise valid, is not defeated by an initial mistake as to where the claimant's property ends and the neighbor's property begins Thus, where a landowner-claimant holds actual possession of a disputed strip of land under a claim of right openly, exclusively, and continuously for the statutory period, mistakenly believing that he or she is holding to the true line, the landowner-claimant acquires the neighbor's title up to that line, and it is immaterial what the landowner-claimant might have claimed in the absence of a mistake.
> *Id.* at 382 (citations and quotations omitted).

The filings with the government agencies provide support that Higgins' predecessors in title were on notice of the plans submitted, putting them on inquiry notice that the predecessors to Maddocks relied on the line starting at point A that is well outside the location of the driveway, parking and associated property. The governmental filings did not occur once, they occurred multiple times with multiple plans submitted to the various governmental agencies. The law supports that the notice provided by point A and the various filings with town agencies provided the requisite notice of a potential adverse claim and required inquiry. *Minot v. Brooks*, 16 N.H. 374, 377-378, (1844). As the court stated in the *Minot* case:

> The color of title only extends the limits of that occupation constructively. But it 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 any one claiming upon inquiry, he must inquire. If he does so he will be charged with notice of what he actually learns. If he does not he is chargeable with notice of what he might and would naturally have learned had he done so.

Id. at 377-378.

Moreover, the evidence at trial demonstrated that the iron pipe in stones at point B was an original (circa 1970) Gunstock Acres developer's monument. The Maddock

Property is part of the Gunstock Acres development. The iron pin in the stump at point A (near the road) was admitted by Ramsdell (Higgins' predecessor in title) to be the boundary monument Ramsdall recognized as a known boundary point between the Higgins and Maddocks properties at the northeast corner of the property.

This court has held that markers should prevail, and even if markers have been obliterated, the location of the marker should prevail as to a boundary. *Seely v. Hand*, 119 N.H. 303 (1979). In the *Seely* case the court opined as follows:

> In construing an ambiguous boundary description, monuments, especially marked corners, prevail over courses and distances. *Fagan v. Grady*, 101 N.H. 18, 21, 131 A.2d 441, 444 (1957). "If the monuments themselves have disappeared, the positions where they were placed may be shown, and, when established with reasonable certainty by evidence, they govern, just as the monuments . . . would." 6 G. Thompson, Real Property § 3044, at 586 (perm. ed. 1962).

Id. at 305-06 (citations in original). As the court held in the *Fagan* case:

> It follows that the decree adjudging the disputed strip to be 'the sole property' of the plaintiffs could properly be entered, and is sustainable according to the familiar principle that 'when courses and distances in a deed are inconsistent with fixed monuments, the latter govern.

Fagan v. Grady, 101 N.H. 18, 21-22 (1957), (citations omitted).

In this case the monuments for line A-B, dating back to the 1970s, still existed at the time of the Bailey survey, with the northeast corner mark quite visible. *App.109, Tr. Ex. 88 (Bailey Plan), App. 123 (photo of oak stump).* Line A-B is the only line physically monumented between the two properties, and the only line serving as a visible boundary. Respecting such monuments is well-settled in New Hampshire law:

> [I]t is a settled principle, that monuments control the language of a description, if named in the deed, and then existing on the ground; ... if named in the deed, and afterward erected on the ground; ... ***and, though not named in the deed, yet if subsequently erected by the parties on the ground***; ...

Colby v. Collins, 41 N.H. 301, 303 (1860) (emphasis supplied).

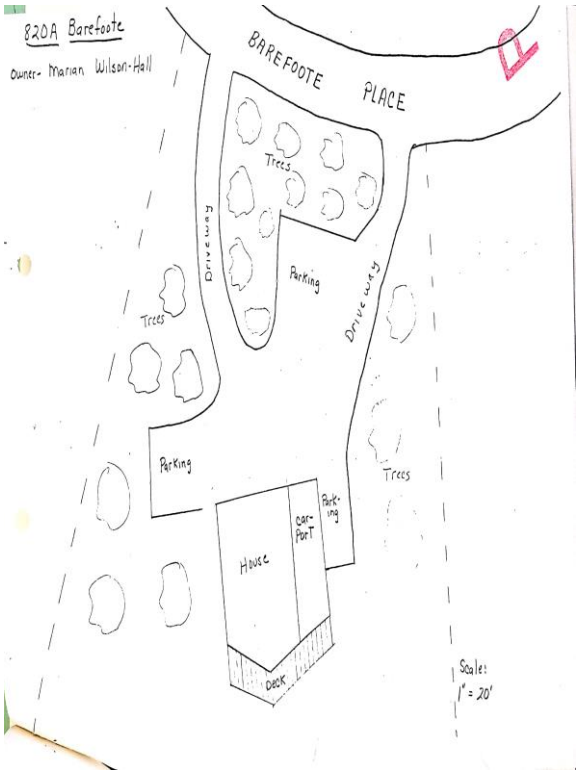
Line A-B is reflected on early submissions to local government agencies (showing driveway and home proximity aligned with A-B) that required, under the law, inquiry notice to the prior owners of title to Mr. Higgins. The proof of notice is contained in the minutes of the local agency records showing the predecessors to Higgins in attendance at said meetings. The court has held that such filings should be given weight. *Perry*, 101 N.H. at 296. The trial court erred by disregarding the decades old plans submitted in the public record that put prior owners of the Higgins property on notice regarding the boundary line. At trial, the court considered the prior submissions as efforts to establish the boundary and discounted them based on Mr. Bailey's testimony. However, the submissions did much more. They not only show the A-B boundary line and the driveway for the Maddocks property well within the Maddock property boundary, they provide direct evidence to put the prior owners of the Higgins property on notice to inquire about point A as an obvious known surveyed point between the properties and the boundary line A-B between the two properties. The clearest reference point at the northeast corner is the point A, the pin at the oak stump, clearly identifiable and known to the prior owners of the Higgins and Maddocks properties.

The expert cited by the trial court inappropriately ignored the long monumented line A-B. *See Justice Thomas McIntyre Cooley and the Judicial Functions of Surveyors*, 1883 The Michigan Engineer pp. 112-122, (where Justice Cooley stated it is the surveyors' duty to respect long established monumented lines and occupations and avoid a mathematical reconstruction that results in unwarranted litigation). *App. 124-132*. *See also* Herbert W. Stoughton, Thomas McIntyre Cooley and the Judicial Functions of Surveyors, American Congress on Surveying and Mapping Bulletin No. 155 (May/June 1995), (republished Cooley paper and commentary), *App. at 133-134.*

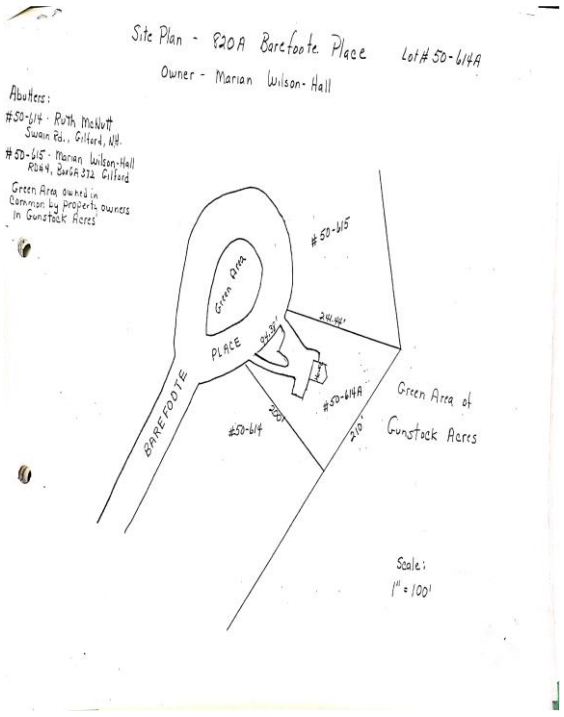
The uncontroverted evidence is that the iron pipe in stone at Point B was consistent with other ancient monuments surveyed as part of the Gunstock Acres development in the 1970s. The iron pin at point A was long established and recognized

as the northeast corner for decades. *Tr. Trans. p. 144.* App. at 123 (Point A), *App. 135 (Point B)*. Line A-B served as the only boundary line between the two properties since the early 1970s. It is referenced by the first occupants that built the Maddocks' home in 1978. The points remained the boundary points for over forty years. *Colby*, 41 N.H. at 303 ("[I]t is a settled principle, that monuments control the language of a description . . ***though not named in the deed, yet if subsequently erected by the parties on the ground***; ...") (emphasis supplied).

The facts of prior submissions to town agencies, requiring notice to the predecessors to Higgins, are uncontested. This includes Dr. Marian L. Wilson's building permit application *App. at 34*. It includes the attachment to the building permit issued. *App. at 35*; *App. at 34*. It includes Dr. Marian L. Wilson's driveway application, and attached sketch, dated March 27, 1978. *App. at 36.* It also includes the sketch attached to the 1983 site plan application (the "1983 P/B App."). *App. at 47* The 1983 application. is a public record. The 1983 application includes a plan entitled "820A Barefoote[,] Owner – Marian Wilson-Hall" with a notation "Scale: 1" = 20'". ("1983-20 Scale Plan"):

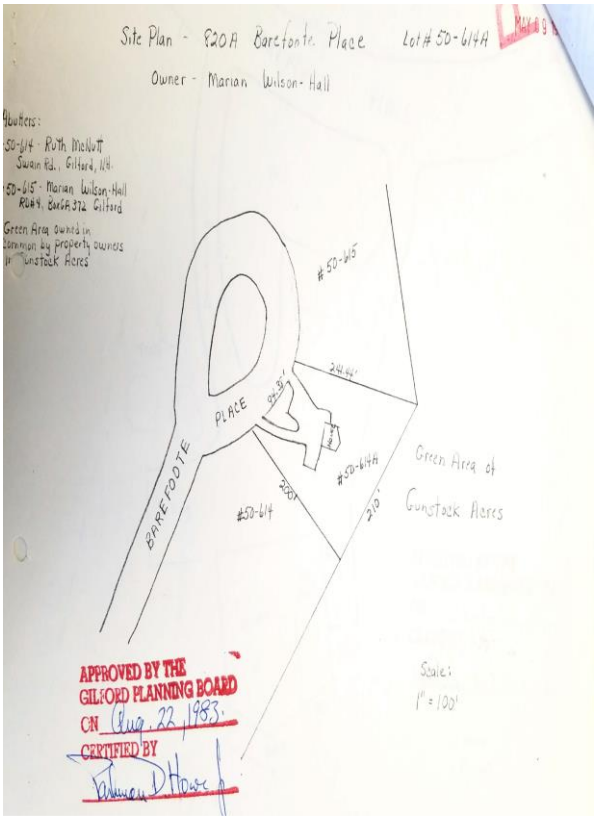


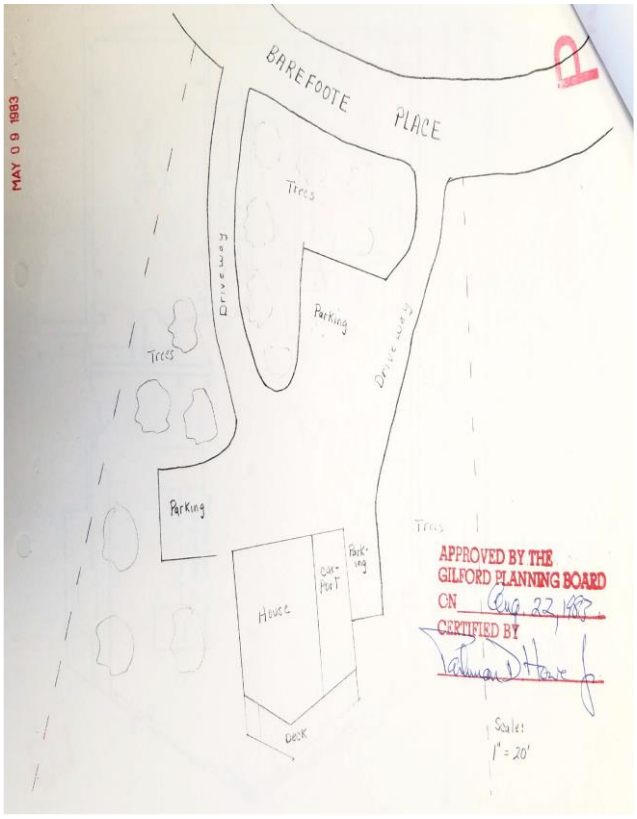
.App. at 48. The 1983 P/B App. Includes a plan entitled "Site Plan – 820A Barefoote Place with a notation "Scale 1"=100'" and a list of abutters ("1983-100 Scale Plan").



App. at 49. The 1983-20 Scale Plan and the 1983-100 Scale Plan depict Line A-B and the property within those boundary lines. *Id.*

Further, in May of 1983 Marion Wilson-Hall also filed an "Application of Appeal" with the Gilford Zoning Board of Adjustment requesting a Special Exception for a Bed and Breakfast use. ("1983 ZBA App."). App. at 50. The 1983 ZBA App. is a public record. The 1983 ZBA App. Includes a copy of the 1983-20 Scale Plan. App. at 48. App. at 52 The 1983-20 Scale Plan and 1983-100 Scale Plan were stamped and signed "APPROVED BY THE GILFORD PLANNING BOARD ON August 22, 1983."

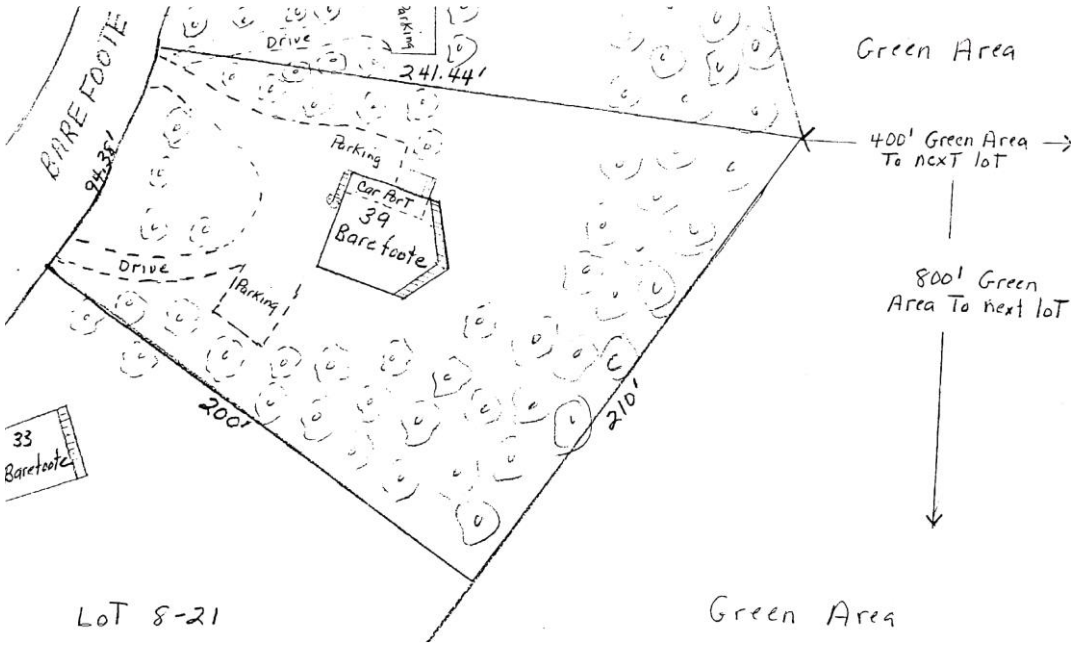




App. at 53-54.

In October of 1992, Hoyt and Marian Hall filed an application for a variance to allow two dwelling units on one lot ("1992 ZBA App #1"). App. at 56. Christopher and Nancy Ramsdell were listed as abutters. App. at 56. The 1992 ZBA App. #1 included a

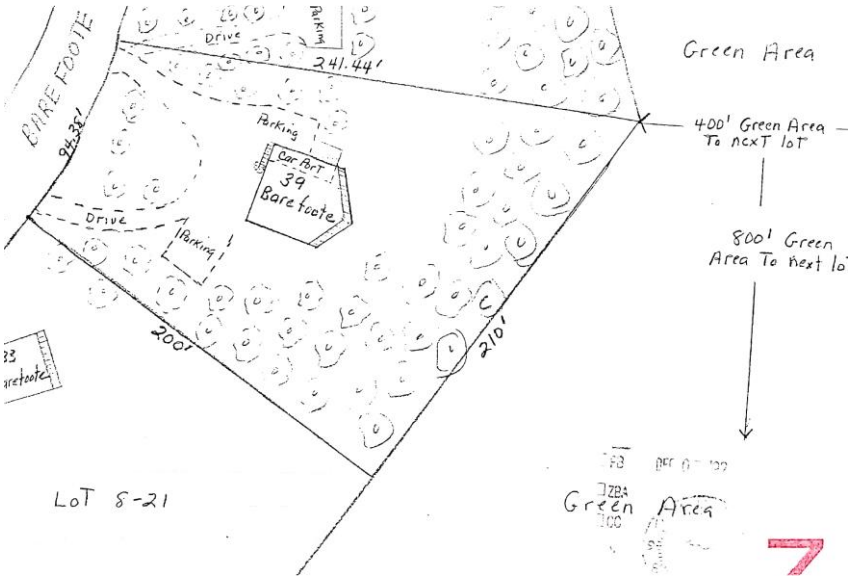
plan entitled "Site Plan Scale 1"-50'" ("1992 ZBA Plan"):



App. at 62. The 1992 ZBA Plan shows Line A-B as the boundary relied upon. *Id.*

The minutes from the ZBA meeting reflect that Christopher and Nancy Ramsdell attended, and objected to the variance being granted. However, they never raised the issue of the boundary as a challenge. App. at 63. The maps in the plan put the Ramsdells' on notice of the reliance on the line A-B or at least that a boundary existed from point A and did not overlap the driveway.

In December of 1992, the Halls filed an appeal of an administrative decision ("1992 ZBA App. #2"). *App. at 50*. Christopher and Nancy Ramsdell were listed as abutters in the 1992 ZBA App #2. *App. at 70.* The 1992 ZBA App #2 included a copy of the 1992 ZBA Plan:



App. at 74. Chris Ramsdell attended the ZBA meeting and spoke against the application. *Id.* The map included in the packet likewise put the Ramsdells on notice of reliance on point A of the boundary. Such notice required further inquiry by them if they did not believe line A-B marked the boundary between the properties.

Separately, this Court laid out the elements of acquiescence in O'Hearne v. McClammer, 163 N.H. 430, (2012):

> Acquiescence may establish a boundary where the parties for twenty years or more have recognized a certain boundary as being the true one and have occupied their respective lots accordingly." *Rautenberg*, 108 N.H. at 23; *see Mastroianni*, 158 N.H. at 383. "The bound thus acquiesced in will prevail even over the description in the deeds." *Rautenberg*, 108 N.H. at 23. 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. *See id*.; 9 R. POWELL, POWELL ON REAL PROPERTY § 68.05[2], at 68-24 (Michael Allan Wolf ed., 2011). A boundary established by acquiescence is conclusive upon successors in title. *Lakeview Farm, Inc. v. Enman*, 166 Vt. 158, 689 A.2d 1089, 1092 (Vt. 1997).

Id. at 435. Although in *O'Hearne* the owners walked the acquiescence line, this is not a requirement to find acquiescence. As discussed below, recognizing the true boundary may occur through actual and inquiry notice of the line without objection.

The location of Point A, as well as the various applications before the administrative boards seeking approval for various projects all included maps depicting line A-B as the boundary between the properties. The evidence clearly establishes that line A-B is the marked boundary between the two properties and the trial court decision must be reversed.

II. THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT THE EXCLUSIVE USE OF THE DRIVEWAY AND PARKING AREA BY THE PLAINTIFFS IS INDEED SUFFICIENT TO CONCLUDE THE MADDOCKS ARE ENTITLED TO TITLE BASED ON ADVERSE POSSESSION OF AT LEAST THE DRIVEWAY AND AREA USED FOR DISCARDING SNOW.

Plaintiffs have included issues 3,4,6,7,8 and 10 in this section of the Brief.

The finding by the trial court does more than justify a prescriptive easement. It justifies a finding of adverse possession. To acquire title to real property by adverse possession, the possessor must show twenty years of adverse, continuous, ***exclusive*** and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made." … The adverse possessor must prove these elements by a balance of probabilities. *O'Malley v. Little*, 170 N.H. 272, 276, (2017), (emphasis added).

> A use of land is adverse when made under a claim of right where no right exists. … To establish a prima facie case of adverse use, the plaintiff must first produce evidence of acts of such a character that they create an inference of non-permissive use. … Once the plaintiff satisfies this initial burden, the burden shifts to the defendant to produce evidence that the plaintiff's use of the disputed area was permitted. … The burden of persuasion remains at all times on the plaintiff … 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. … 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.

Id. at 278 (quotations and citations omitted).

In addition to the above finding, the court also found as follows regarding the driveway:

> It is undisputed that the plaintiffs' driveway is located in the top portion of the Disputed Land. This includes a gravel parking area and a fill slope supporting same. The driveway was initially constructed with the home in 1978. The driveway has been located in the same area since this time, though it was recently paved. Specifically, the 1983 and 1992 site plan memorialize the continued existence of same.

NOA, at 5. There is no evidence in the record that Higgins or his predecessors in title used the driveway and parking areas or took action to oust the Maddocks and their predecessors.

In the *O'Malley* case, this court held that:

> [W]e have recognized that entry upon the land does not necessarily interrupt adverse possession. *See Alukonis v. Kashulines*, 97 N.H. 298, 300, (1952) (holding that a survey of a property did not interrupt the continuity of an adverse possession claim over that property); *Gallo v. Traina*, 166 N.H. 737, 739, (2014) (holding that a party failed to demonstrate that a trial court committed reversible error, where the trial court asserted that a "mere casual entry by the record owner for a limited purpose is not necessarily sufficient to destroy adverse possession" (quotation omitted)).
>
> * * *
>
> ***[O]uster of an adverse possessor requires conduct that puts a reasonably prudent person on notice that he or she actually has been ousted.***

O'Malley 170 N.H. at 278 (citations omitted; emphasis added).

It is undisputed that the portion of the disputed land was very steep. *Tr. Trans. p. 361, l. 10-15*. In this situation "[t]he kind and frequency of acts sufficient to support a finding of adverse possession depends somewhat on the condition of the property and the uses to which it is adapted in reference to the circumstances of the possessor." *Page v. Downs*, 115 N.H. 373, 374, (1975).

In the seminal case by the Supreme Court, *Lessee of Ewing v. Burnet*, 36 U.S. 41 (1837), (cited in *Johnson v. Conant*, 64 N.H. 109 (1886); *Hopkins v. Deering*, 71 N.H.

353 (1902); *Minot v. Brooks* 16 N.H. 374 (1844); and *Wendell v. Moulton*, 26 N.H. 41 (1852)), the U.S. Supreme Court opined as follows:.

> It is well settled that to constitute an adverse possession, there need not be a fence, building, or other improvement made it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy, for twenty-one years, after an entry under claim and colour of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said, that where acts of ownership have been done upon land, which, from their nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant without interruption, or an adverse entry by him, for twenty-one years; such acts are evidence of an ouster of a former owner, and an actual adverse possession against him: if the jury shall think, that the property was not susceptible of a more strict, or definite possession than had been so taken, and held. Neither actual occupation, cultivation, or residence, are necessary to constitute actual possession; when the property is so situated as not to admit of any permanent useful improvement: and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.

Id. at 52-53.

Here the Maddocks and their predecessors identified the property as their own by relying on line A-B in filings with local officials, filings that required notice to the predecessors to Higgins, and which identified the disputed property as being part of the Maddocks' parcel. The fact that this included reference line A-B, and point A was readily identifiable to the owners of both properties only adds to the legally hostile open and obvious nature of the ownership by the Maddocks and their predecessors.

Where the predecessors to the Maddocks cleared brush, by itself it left a permanent "scar" on the land. In order to maintain the view for the Maddock property, the cutting and clearing served as notice the predecessors in title demonstrated ownership of the parcel consistent with line A-B. They built a shed, had a walking trail obvious to

anyone walking the land, raked the leaves to keep it clear and had a permanent fire pit on the ground marked by the ashes of prior fires.

The Guyers and Maddocks used and maintained the Disputed Land for the driveway, parking area, shed, snow plowing, depositing snow on the south side of the driveway and over the parking area bank, raked leaves, clearing brush and limbs, used the firepit, rock garden, storage and as access to the downslope gorge. App. at 78. The firepit existed on the property when the Guyers purchased. App. at 93. Guyer used it to burn brush cleared from the Disputed Land. *Id*. The Guyers and Maddocks cut brush and trees around the shed and southeast of the shed (downslope) to maintain the view to Gunstock Mountain. *Tr. at p.58, 60, App. 20*. The Maddocks' house had a view when the Guyers purchased the property. The Guyers stopped Ramsdell from cutting trees in the Disputed Land. *Tr. at 246-47.*

The supreme court has endorsed the limited application of the holding in *Perry* to situations identical to this one, involving real estate and relying on documents submitted to officials that are part of a public record. *Perry*, 101 N.H. at 296; *Wallace v. Lakes Region Const. Co., Inc.*, 124 N.H. 712 (1984). In Wallace, the supreme court stated as follows:

> The defendant's argument relies, in effect, on the court's dictum in *Perry* that the "Trial Court could find that the plan in the present case considering its age, appearance and custody was reliable and helpful in deciding the boundary dispute before him and therefore admissible." *Id.* 297-298, 141 A.2d at 884-85. *Perry*, however, involved public records and, therefore, is distinguishable from the case at bar. In *Perry* we held that the authenticity and truth of a public record, which was compiled in performance of an official duty, *id*. at 297, 141 A.2d at 884, 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)).

Id. at 717.

The 1983-20 Scale Plan was submitted to the Gilford Planning Board as part of a site plan review application for a bed and breakfast use on the Maddock lot. App. at 48-49. The Gilford Planning Board had jurisdiction to review non-residential site plans under RSA 36:19-a which stated:

> A municipality, having adopted a zoning ordinance as provided in RSA 3~: 60-89, an~ 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.

RSA 36:19-a (supp. 1979), (emphasis added).

The 1983-20 Scale Plan was the "final plan to be considered under RSA 36:32 ..." *App. at 47*. The 1983-20 Scale Plan depicted the boundary lines of the tract. *Id.* Abutters were notified by certified mail; The planning board held a public hearing on the application, App. at 52, and approved the plan. *App. at 54*. The approved site plan is filed in the Town of Gilford planning board. *Id.* The Maddocks were given a copy of the 1983-20 Scale Plan at closing and relied upon the boundaries depicted thereon. *Tr. at 280-281*.

New Hampshire law recognizes entry under color of title leading to title by adverse possession. *Pease v. Whitney*, 78 N.H. 201 (1916). In *Pease*, the court stated:

> [T]he 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, which is essential to the acquisition of title by adverse possession, no sound reason is perceived for its technical application, when the true owner has actively induced the belief in his grantee that the deed covers a particular piece of land, upon which the latter has entered. Though lot C is not covered by the deed, the defendant had as much information of the extent of the plaintiff's claim, as she would have had if it were specifically described in the deed.

Id at 202. Likewise, in *Hodges v. Eddy*, 38 Vt. 327 (1865), (cited in Writing as Essential to Color of Title in Adverse Occupant of Land, 2 *American Law Reports* 1457 (1919)) the Vermont Court found:

> 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 acquires 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 the title. And it is on the same principle that it is held that, occasional entries upon land, cutting timber, &c., which ordinarily would be mere acts of trespass in a stranger, when done by one having color of title, are considered as acts of possession, because the true owner of the land has notice upon the public records that the person committing such acts claims a title to the land.

Id. at 345. Similarly the 35 *American Law Register* 410 (Jul 1887) states:

> [C]olor 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 is made.

Id. In 35 ALR 410, the citation is under the heading "Written Instrument not Essential," which is a discussion of cases regarding same. The annotation further states:

> Thus, in the case of *McClellan v. Kellogg*. 17 Ill. 501, SCATES, C. J., observes: "Color may be given for title without a 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 for color, however defective..." When a party is in possession pursuant to a state of facts which in themselves show the character and extent of his entry and claim, the case is entirely different, and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more. ... But still it is very necessary that there should be some visible acts, signs or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title.

Id. (citations omitted).

The expert testified that the 1983 site plan, *App. at 48-49* "shows lines that are obviously to me intended to bespeak of property lines" *Tr. at 148*. The Trial Court erred by confusing the concept of *precision* of measurements (the mathematical analysis) with the notice provided and the general *accuracy* of the relative location of the common

boundary line to the improvements on the Maddock Property. *See W. G. Robillard, Clark on Survey and Boundaries, §4.20 (7th ed., 1997)(law journal)*:

> Some attorneys may equate precision with accuracy. A well-worn apothegm should remind them that it is more important to have a somewhat imprecise (accurate) measurement where the line actually exists than it is to have a precise measurement where the line does not exist at all. This statement is over eighty years old, sums up the problem: the responsibility is first to look for the original marks and, fi found, they control.

The 1983-20 Scale Plan, the 1973 Septic Plan and the 1992 Site Plan accurately depict the relative location of the common boundary line A-B. *App. at 34, 36, 38, 42, 43, 48, 49, 51, 53, 54, 62, 74, 113, and 114*. Though they lack the precision of modern technical surveying techniques, they provide notice to the legally interested partes.

This court found in *Dame v. Fernald*, 86 N.H. 468 (1934) as follows:

> That the agreement was not executed with the formalities required of a conveyance of land, or in accordance with that required of agreements concerning disputed boundaries, ... is not material, since invalidity to operate according to its tenor is the distinguishing feature between color of title and title itself ... Nor does failure to record the instrument prevent it from operating as color of title.

Id. at 470. The Trial Court erred in finding the ancient plans did not provide color of title, and the court failed to address the notice provided to the predecessors to the Higgins.

The Guyers and Maddocks entered upon the Disputed Land under color of title from the prior administrative acts by the prior owners. Their line of possession extends to Line A-B. *App. at 44, 42, and 56*.

These findings are consistent with a finding that the Maddocks use of the driveway and parking area was exclusive and support a finding of adverse possession as a matter of law.

Accordingly, the decision of the trial court should be reversed.

V. THE TRIAL COURT ERRED IN FAILING TO FIND A TIMBER TRESPASS AGAINST HIGGINS AND DOCKHAM AND DAMAGES TO THE MADDOCKS.

In reversing the trial court decision regarding the boundary between Higgins and Maddocks, there exists a timber trespass claim the court dismissed based on finding the boundary line to be the "mathematically reconstructed line." The evidence regarding line A-B as the true boundary, and the evidence that supports at least an adverse possession claim out to line A-B, warrants reversal of the timber trespass dismissal given the boundary line is not the mathematically reconstructed line.
[remand or ask for damages?]

IX. THE TRIAL COURT ERRED IN CONSIDERING RAMSDELL'S TESTIMONY CREDIBLE.

The evidence supports that the Ramsdell affidavit and testimony in deposition and at trial regarding permission is not credible. Ramsdell claims that her relationship with Hall was cordial where the evidence supports an adversarial relationship. *Tr., at 473.* The record evidence shows that Ramsdell filed complaints with the Town against Hall, and Hall considered the Ramsdells as a nuisance and interfered with the Halls' sale of their property. *App. at 61, 64.* The evidence supports that Higgins (through his fiancé, Michelle Melius) coached Ramsdell regarding the language in the affidavit, *App. at 138-39*, stating:

> I think the lawyer will build on that important information and put that into play in the defense, if needed. What I believe attorney would like to so is get your affidavit stressing the fact that there was an open agreement between the neighbors so that can nullify the adverse possession case, in the immediate.
> ...
> Our attorney stated that an affidavit from you stating that the neighbors and you had a conversation and were aware of the lot line and that the driveway was on your property would be all that is needed to nullify an adverse possession claim because that is what makes it open or hostile. So, the important point to note in the affidavit is that you had a conversation with Dr Hall where she said that the driveway was on your property, and you were okay with it, etc ...

The affidavit was provided to Ramsdell by Higgins. Tr. 488, 489, 518, 519, 520. The evidence supports that Higgins, through his agent, coached Ramsdell to testify that there was an agreement between Ramsdell and Hall regarding the location of the Maddock driveway.

Notwithstanding, if permission to Hall existed at all; the conveyance of the Maddock Property from Hall to Guyer terminated permission and/or agreement from Ramsdell to Hall. *See Blaisdell v. Portsmouth, G.F & C. R.R.,* 51 N.H. 483 (1871). The conveyance of the property owned by the licensee terminates the license:

> A license, on the other hand, is a transient or impermanent interest which does not constitute an "interest in land. … It may be created orally and is merely a revocable personal privilege to perform an act on another individual's property. … As such, it terminates when the licensee attempts to assign his rights, …

Waterville Estates Ass'n v. Campton, 122 N.H. 506, 509, (1982).

There is no evidence in the record that Ramsdell granted the Guyers permission. In fact, the Guyers stopped Ramsdell from cutting trees in the Disputed Land. Upon termination of the permissive use by Wilson/Hall, if it existed at all, the Guyers commenced a new clock on May 27, 1994, the date of their deed. App. at 3-5. There is no evidence in the record that Ramsdell, the Bank or Higgins granted permission to the Maddocks for their occupancy. The Maddocks took title to the property on April 30, 2014. *App. at 1-2.* Higgins' demand letter is dated April 20, 2019. *App. at 110.* May 27, 1994 to April 30, 2014 is 24 years, 10 months and 24 days. Notwithstanding any permissive use granted to Wilson/Hall, the permission terminated and the new 24 year adverse possession clock had concluded to establish adverse possession.

CONCLUSION

For the reasons provided, this court should reverse the trial court. Line A-B, under the law, is the boundary line between the properties. Alternatively, the use and reliance

on Point A and the notices to the abutting neighbors from 1978 forward demonstrate title vested by adverse possession. The court should remand as to the timber trespass.

REQUEST FOR ORAL ARGUMENT

Appellants requests 15 minutes for oral argument. Oral argument to be delivered by R. James Steiner, Esq.

RULE 16 (11) CERTIFICATION

I certify the foregoing brief complies with the word limitation of 9,500 words and that it contains 9,178 words, inclusive of the Questions Presented and the Conclusion and Request for Relief.

Respectfully Submitted,

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By and Through Their Attorneys,

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Sept 22, 2022

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CERTIFICATE OF SERVICE

I hereby certify that copies of this notice of appeal were served pursuant to the

Supreme Court's electronic filing system on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Supreme Court Rules 5(1) and 26(2) and with Rule 18 of the Supplemental Rules of the Supreme Court.

/s/ R. James Steiner___
R. James Steiner, Esq.