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

REPLY BRIEF OF APPELLANTS TODD H. MADDOCK ET AL.

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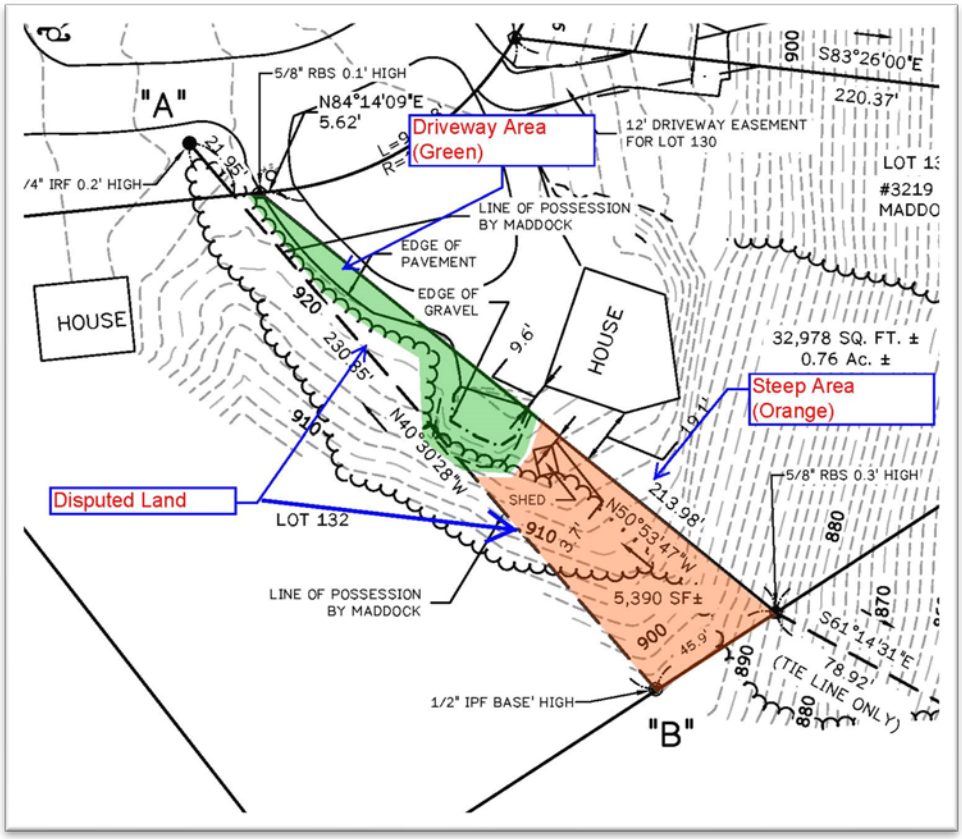
ARGUMENT

Adverse Possession

The issue of adverse possession is divided into two discussions: (1) the Maddock driveway and parking area including side slopes ("Driveway Area"); and (2) the portion of the Disputed Land lying south of the house, where the shed is located, thence running easterly down the steep slope ("Steep Area"). The "Disputed Land" is the entirety of the north of line A-B and south of the Mathematical Line labeled "N 50º 53' 47" W, 213.98'". The following sketch is an annotated portion of the Bailey Plan, Appendix to Plaintiffs' Brief at 109 ("*Apx.*") with the Driveway Area shown in green and the Steep Area shown in orange. This is not a trial exhibit and is provided for the sole purpose of the discussion in this Reply Brief.



The Driveway Area – Exclusive Use

The trial court found "[u]pon review, the Court finds the most appropriate remedy for the plaintiffs is a prescriptive easement covering the driveway area." *Plaintiffs' Addendum 57* ("*Add.*").

The elements of a prescriptive easement include twenty years' adverse, continuous, uninterrupted use in such a manner to give notice to the record owner of the adverse claim. *See Greenan v. Lobban*, 143 N.H. 18, 22 (1998) as cited in *Add. 57.*

The elements of adverse possession include twenty years of adverse, continuous, exclusive and uninterrupted use in such a manner to give notice to the record owner of the adverse claim. *See Mastroianni v. Wercinski*, 158 N.H. 380, 382 (2009).

The only element differentiating adverse possession to the fee, from a prescriptive easement of use, is exclusivity. The trial court found that the Maddocks' met the elements for a prescriptive easement over the Driveway Area. *Add. at 57*. The issue is whether the Halls', Guyers' and Maddocks' use of the driveway was exclusive. In reaching its decisions, the trial court did not analyze non-exclusivity of use of the Driveway Area.

Higgins argues that "During trial, Steven Guyer described the Ramsdells and their dogs entering the driveway. (*Trial Transcript 70, 8-20*). ("*T*") *Defendant's Brief at 44 ("DB.")*. "[M]ere casual entry by the record owner for a limited purpose is not necessarily sufficient to destroy adverse possession" *O'Malley v. Little*, 170 N.H. 272, 276, (2017). Steven Guyer's complete testimony on the issue of the Ramsdell's entering the driveway shows the Ramsdell's entry was limited to retrieve loose dogs and casual visits. *T. 70, 3-25, 71, 1-5*. Higgins produced no evidence at trial that Ramsdell, the Bank, or Higgins (prior to the Bailey survey in 2019) used the driveway or attempted to oust the Guyers or Maddocks. Higgins argues that "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." *DB. At 44*. It is well settled law that fencing and posting of the property is not a requirement to prove adverse possession.

> 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, ...
> *Lessee of Ewing v. Burnet*, 36 U.S. 41, 52-53, (1837).

If the record owner does not enter the land for the purpose of ouster, no fence or posting is necessary. The Maddocks have met their burden of production and persuasion showing that the Guyers' and Maddocks' use of the Driveway Area was exclusive.

The Steep Area

Higgins argues that the character of the Steep Area does not limit the types uses for which it could be made. *DB. 42.* "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).

Contrary to Higgins' argument, his expert surveyor, James Rines, stated in his report that the Steep Area is difficult to navigate and develop:

> Another critical observation in this matter is the character of the land. Aside from the location of the homes, which are relatively level in the developed areas, the remaining land on both parcels is extremely steep and undeveloped. In fact, the USGS topography depicted on the Bailey plan shows a 100-foot elevation change from Barefoot Place to the rear boundary line just over 200 away. There is a question in my mind whether any owner of either property, since the creation of these parcels, would have physically ventured down over this steep terrain to observe their physical boundary comers at the rear of these lots.
> *Defendant's Appendix 9* ("*D. App*.").

Rines testified at trial that the Steep Area was steep and that trees were down and there was slash. *T. 389, 1 – 9.* Stephen Guyer testified that he cut brush and small trees down the slope to Point B on a yearly basis to maintain the view. *T. 28, 5 – 12; 58, 10-25; 59, 1 – 5;* 90, 11-25, 91, 1-7. Higgins expert forester, Susan Romano, testified that there was historical cutting to provide a view for the Maddocks' house. *T. 416, 17 – 25.*

Maddocks' expert forester, Peter Farrell, testified that there were no trees growing in the Steep Area that would date from circa 1978. This testimony supports that there had been continual cutting in the Steep Area since 1978. *T. 221, 8-14; 222, 4-25; 223,1-5*.

The trial court erred as matter of law when it failed to consider the character of the land in finding that the Guyers' and Maddocks' "usage of the Disputed Area was not sufficiently notorious to justify a presumption that the owner was notified of it." *App. 13*. The Guyers used the Disputed Land by putting in a shed, burning in a firepit, stacking firewood, cleaning up brush, walking the property on a trail and cutting to maintain the view. *App. 97-98. T. 28, T. 58-59, Supra*.

The evidence supports that the character of the Steep Area is such that yearly cutting for a view and other uses are the kind and frequency of acts sufficient to support a finding of adverse possession.

Color of Title

Without waiving the above argument, the Maddocks claim that once they prove adverse possession to any portion of the Disputed Land that the doctrine of color of title extends their claim to line A-B; i.e., adverse possession of the Driveway Area extends the claim to the entire Disputed Land. *See Pease v. Whitney*, 78 N.H. 201 (1916).

The color of title claim is based upon the multiple public records that depict the Maddocks' driveway, parking area and house in the same relative position as the line A-B. (*App. 109*). The public records include: 1978 building permit (*App. 34*); 1978 driveway application (*App. 36*); 1978 septic design (*App. 37*); 1983 planning board approved site plans (*App. 53 &54*); and the 1992 ZBA application plan (*App. 62*). (Collectively, the "Town File Plans").

Higgins argues that the Town File Plans are "not 'plans' as anticipated under New Hampshire law." *DB. 27*. Higgins provides no authority for this claim. The experts agree that they depict boundary lines in relation to the improvements on the Maddocks' property. Higgins expert surveyor testified that the 1983 site plan shows boundary lines

and that lay people have been relying on these boundary lines. *T. 378, 11-25; 379, 1-13,* (*See Ex. 51-3 at App. 42 and Ex. 51-4 at App. 43). T. 379, 22-25; 380, 1-8.*

Maddocks' expert surveyor testified that the 1978 septic design plan depicts the boundary lines and that boundary lines are required to be depicted by the Water Supply and Pollution Control Commission (*See App 41 for Ex 10 – 1978 septic design*). *T. 188, 13-25; 189, 1-12.* Bailey testified that the 1978 building permit application contains boundary lines; the 1978 driveway permit application contained boundary lines with the driveway completely on the lot; the 1983 site plans depict the house, driveway, parking areas and boundary lines in the same relative location as the line A-B is to the Maddocks' house. *T. 146, 20-25; 147, 1-25; 148, 1-25; 149, 1-8; 149, 4-21.*

The 1983 Application for Site Plan Approval submitted by Marian Hall states "[t]his is my final plan and is to be considered under R.S.A. 36:23 with the request that it be put on the agenda within 30 days and acted upon for approval or disapproval within 90 days." *App. 47.*

Stephen Guyer had the 1978 septic plan when he owned the property and believed it showed the boundary lines. *T. 32-33.* Guyer gave the plan to the Maddocks when he sold the house to the Maddocks. *T. 33.* The Maddocks were given the septic design and the site plan by the realtors and believed it showed the boundaries. *T. 6-8 (10/7/22).*

A simple ocular review of the Town File Plans and comparison to the Bailey Plan show that the common boundary between Maddock and Higgins is in the same relative location on the Town File Plans as line A-B on the Bailey Plan. The real question is whether the Town File Plans are genuine and show the boundaries as the Maddocks' and their predecessors in title believe them to be. The evidence supports that the answer is "yes." The Town File Plans extends the Maddocks' adverse possession claim to the entirety of the Disputed Land.

Monuments in the Field Control

Maddock argues that the practical location of the monuments controls the location of the boundary between the parties. *See Heywood v. Wild River Lumber Co*., 70 N.H. 24, 31-32, (1899). The facts in *Heywood* are similar to the case at bar. In *Heywood* , the original charter line (like the Mathematical Line in Maddock) had never been run or monumented on the ground. There were existing monuments known as the "mill corner to the "old spruce corner that did not mathematically agree with the charter description. The *Heywood* Court held that the boundary line ran between the long existing physical monuments. The Court also rejected a later line "located with mathematical exactitude by measuring from the 'mill corner.'" *Id.*

> When the state bounded its grant to Bean, in 1832, upon the south by the north line of Jackson, the parties meant the only line that was known at that time,-a line running to the northwest corner of Chatham at the point where the corner had been located for thirty years. They did not mean a line to a corner which never existed, or which had been abandoned,--a mere tentative location,--but an actual, bona fide, corner bound. Such the "old spruce corner" is found to have been. Neither did they mean a corner which should exactly, with the precision of the growth of one hundred years in civilization and value, now be located with mathematical exactitude by measuring from the "mill corner," because they knew of no such corner. ...
> *Id. (emphasis added).*

Like *Heywood*, the Maddock Mathematical Line was not monumented or otherwise laid upon the ground and did not physically exist for over 40 years. The Mathematical Line does not control.

The evidence supports the bound at Point B was an original Gunstock Acres subdivision bound set by Tri-State Engineering, the Gunstock Acres engineers. *T. 125, l. 24-25, p. 126, l. 1 – 6* (Surveyor Bailey testifying that the subdivision plan of the subject area of Gunstock Acres was by Tri-State Engineering). *T. 138, l. 16 – 22* (Bailey testifying that Tri-State Engineering was the original engineering and survey company for Gunstock Acres). *T. 144, l. 5-16* (Bailey testifying it his opinion that Tri-State set the

monument at Point B sometime between 1970 and 1974). *T. 351, l. 8-23* (Surveyor Rines testifying that the back monuments along the lots are consistent as appearance and age).

The monument at Point A near the road existed when Ramsdell owned the property. *T. 495, 25; 496, 1-21* (Ramsdell testifying that the monument was in the roots of an old stump). *T. 16, 6-8* (T. Maddock testifying that Point A is next to the stump). *App. 123.*

Line A-B was long monumented on the ground and controls the location of the boundaries.

Acquiescence

It is undisputed that Nancy and Christopher Ramsdell attended the 1992 ZBA hearings and that the 1992 plan was part of the application. *Appellants' Brief at 29 – 30*. It is also undisputed that the Ramsdells did not object to the boundary lines depicted on the 1992 ZBA plans. *Id.*

This Court found in *MacKay v. Breault*, 121 N.H. 135, 140 (1981) that an abutters attendance at a planning board meeting without objecting to the boundaries shown on the plan is a "public acquiescence" to the boundaries shown.

> Testimony concerning Mr. Breault's statement of his understanding of his property boundaries, and testimony concerning Mr. Breault's public acquiescence to a subdivision plan showing boundaries consistent with plaintiff's construction of the deed, are evidence of the defendants' practical construction of the deed.
> *MacKay v. Breault*, 121 N.H. 135, 140, (1981).

Ramsdell's failure to object to the boundaries depicted on the 1992 ZBA site plan was a public acquiescence to those boundaries.

Conclusion

The trial court erred as a matter of law in not finding that the Maddocks' use of the Driveway Area was exclusive and therefore meets the elements of adverse possession. The trial court erred as a matter of law in not considering the character of the Steep Area land and the uses made by the Guyers and Maddocks was sufficient for adverse possession given the character of the land.

If the Court finds that the Maddocks meet the elements of adverse possession for either area, under the doctrine of color of title, the adverse possession extends to the A-B line based on the Town File Plans.

Ramsdells' failure to object to the boundaries as shown on the 1992 site plan was a public acquiescence to the boundary line A-B.

RULE 16 (11) CERTIFICATION

I certify the foregoing brief complies with the word limitation of 3,000 words and that it contains 2,703 words.

Respectfully Submitted for,
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CERTIFICATE OF SERVICE

I hereby certify that copies of this Reply Brief 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.

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