State of New Hampshire
Supreme Court

NO. 2014-0516

2015 TERM

JANUARY SESSION

EVELYN & KENNETH DOERR

v.

DAWN & PHILIP TUOMALA

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF OF APPELLANTS, EVELYN & KENNETH DOERR

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QUESTIONS PRESENTED

I. Did the court err by imposing restrictions on the Plaintiffs' use, when the deed creating their easement provides that they have "unlimited rights of way"?

Preserved: PETITIONERS' POST-HEARING MEMORANDUM (May 28, 2014), *2014 Appx.* at 31; PETITIONERS' MOTION FOR PARTIAL RECONSIDERATION OF REMAND ORDER (June 30, 2014), *2014 Appx.* at 44.

II. Did the court err in excluding the Plaintiffs from using their easement at night, such that they cannot even take an after-dinner walk without first gaining the Defendants' permission, and prohibiting any vehicular use (except for bicycles), when there is no evidence on which to base either restriction, and the restrictions are not reasonable?

Preserved: PETITIONERS' POST-HEARING MEMORANDUM (May 28, 2014), *2014 Appx.* at 31; PETITIONERS' MOTION FOR PARTIAL RECONSIDERATION OF REMAND ORDER (June 30, 2014), *2014 Appx.* at 44.

III. When the Supreme Court directs remand for consideration of a particular issue, did the remand court err when it ruled on another issue never previously pled in any court?

Preserved: PETITIONERS' MOTION FOR PARTIAL RECONSIDERATION OF REMAND ORDER (June 30, 2014), *2014 Appx.* at 44.

STATEMENT OF FACTS

One summer day in 2009, about a year after they purchased their land in Wilton, New Hampshire, Evelyn and Kenneth Doerr were exploring. Believing they owned deeded rights to be on other land in the vicinity, they drove on a narrow dirt road in what was once the John Bush Farm. Before they got far, they were stopped by Dawn and Philip Tuomala, told they were trespassing, threatened with the police, and asked to leave. *2012 Trn.* at 10-11, 16, 18, 21-23 25, 68-69, 107-108, 110.[1]

To understand the rights of the Doerrs and the Tuomalas, attention must first be given to land that once was the John Bush Farm, then to deeds and documents of the late 1970s and early 1980s when John Bush subdivided, then to a landlocked tenancy and corporate ownership around the turn of the century, and finally to the road passing in front of the Tuomala's house.

I. Boundaries and Interior Features of the John Bush Farm

John Bush, deceased, once farmed a 475-acre tract in the northwest corner of Wilton, near the town lines of Temple to the west and Lyndeborough to the north. JOHN BUSH FARM MAP n.3 (Oct. 18, 1978), Exh. 1, *2012 Appx.* at 2; DEED, BUSH→COMVEST at 3 (Nov. 3, 1978), Exh. 3, *2012 Appx.* at 8 (referring to "cattle and farm equipment sheds and feeding pens"). To become familiar with it, reference is made to a color composite map on page 19 of this brief, *infra*.[2]

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[1]Because this case has previously been before this Court, *Doerr v. Tuomala*, No. 2012-0598 (decided by unpublished decision Dec. 3, 2013), because the record in the first appeal was voluminous, and because the facts stated herein are generally undisputed, appellants have not re-submitted those portions of the record already possessed by this Court from the previous appeal.

Accordingly, throughout this brief, the previous record is cited as from 2012, and the current record as from 2014. Thus "*2012 Trn.*"and "*2012 Appx.*"refer to the pre-remand transcript and appendix submitted with the previous appeal. Likewise, "*2014 Trn.*" and "*2014 Appx.*" refer to the post-remand transcript and post-remand appendix filed herewith.

[2]This same color composite map was included in the statement of facts section of the Doerrs' opening brief in the prior appeal. It is reprinted here without change at page 19, *infra*. In statements during oral argument the Tuomalas conceded its accuracy. *See* recording of oral argument in prior appeal at 7:37-8:01 minutes, available at <http://www.courts.nh.gov/cstream/index.asp>.

A. Circumambience of the John Bush Farm

Starting on the left edge of the map, the western boundary of the John Bush Farm is the Wilton/Temple town line. Old County Road (Class-V & VI), runs north/south between Lot 1 (purple) and Lot 2 (blue). Burton Highway (Class-V) creates the northern boundary. Further clockwise, Jackson Drive provides a northeast entrance from the quaint town of Wilton, running north/south between Lot 3 (orange) and Lot 4 (green) to the interior.

On the right edge of the plan, the eastern boundary is a 31-acre parcel now owned by Evelyn and Kenneth Doerr (brown), and the Doerrs' other land east of that, both bounded on the south by a road running east/west named Bennington Battle Trail. The Doerr parcels are non-contiguous with the Bush Farm, separated by a narrow strip (white) owned by a third party.

Continuing clockwise, a portion of the old Bush Farm hangs south. Bounding the southwest corner is Woods Road, which runs generally east/west, and forms the southwestern second entrance to the land, giving convenient access to New Hampshire Route 101.

B. Interior Features of the John Bush Farm

Referring again to the western portion of the map, the house depicted on Lot 2, known locally as the "château," occupies the crest of the hill. *2012 Trn.* at 42. The land drops quickly to the pond, and rises back up on the east toward both Jackson Drive and the Doerr parcels, and also rises gently to the south.

The land thus forms a bowl with the pond (blue) at its center. Historically the area around the pond periodically flooded, but since approximately 1967 has a dam on its northern shore, which is part of the state's flood control system. FLOOD ELEVATION PLAN, ref.2 & n.3 (Dec. 7, 2009), Exh. A, *2012 Appx.* at 6. The state now limits the flooding, capped at the 849-foot elevation line, indicated on the map by red dashed lines. *2012 Trn.* at 33, 91, 98-99

Currently the John Bush Farm is largely wooded, except for a field at the top of the hill near the château and some clearings around the dam on the pond. There is a small gravel pit, indicated by a black dotted area in the corner of what is labeled "Easement A" (bright yellow) just west of the pond near the center of the map. *2012 Trn.* at 30. There are houses on both lots 3 and 4 (not pictured), not involved in this appeal.

There are three existing private travel ways[3] in the interior of the land: Jackson Drive which forms the northeast entrance (shown in green on the map), Woods Road[4] which forms the southwestern boundary and second entrance, and an unnamed way – which runs generally north/south within the several easements bisecting the land (shown in various colors on the map), and connecting the two entrances. There are two ways labeled "private drive" on the map which serve the house on the west in Lot 1 and the château on the hill in Lot 2. Burton Highway on the north boundary and Old County Road toward the west are both public. There is a small bridge over a brook just northwest of the pond. *2012 Trn.* at 41, 106.

There are two wire gates, indicated on the map by red ovals. Just north of the pond, one blocks access to the state-controlled dam. *2012 Trn.* at 7-8. The second is at the entrance to the private Woods Road, at its intersection with the public Old County Road. *2012 Trn.* at 30, 38, 73; *2014 Trn*. at 12.

There is a small house and garage (shown in white on the map), known locally as the "cabin," on a bluff steep above the western shore of the pond. FLOOD ELEVATION PLAN, ref.2

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[3]Because the nature of the various ways, roads, driveway, etc., were disputed, the court and parties below referred to them generically as "ways" and "travel ways" and that convention is followed here. *2012 Trn.* at 33, 94, 133-34; (FINAL) ORDER (July 26, 2012), *2012 Appx.* at 161; *see also* ORDER (June 20, 2014), *2014 Appx.* at 37.

[4]The names of roads used here do not necessarily reflect the official names. *See e.g.*, TOWN OF WILTON, STREET NAMES (June 14, 2012), Exh. O, *2012 Appx.* at 72. To ease confusion here, this brief and the map on page 19 *infra,* may reflect colloquial or informal names. *2012 Trn.* at 45.

& n.3 (Dec. 7, 2009), Exh. A, *2012 Appx.* at 6 (showing contour lines from pond to cabin); *2012 Trn.* at 84, 98-99. While the land immediately around the cabin is within the floodzone, the cabin is just slightly higher and does not flood, as indicated by the red dashed lines ringing it. CHALET PEARL MAP - COVER SHEET, n. 14 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3; FLOOD ELEVATION PLAN (Dec. 7, 2009), Exh. A, *2012 Appx.* at 6; PHOTOS, Exh. S, *2012 Appx.* at 90; *2012 Trn.* at 100-105. There is a driveway – clearly private and shown in brown on the map – leading from the cabin to the unnamed travel way which traverses the land. *2012 Trn.* at 35-36. The driveway is about a half-foot higher than the surrounding area, which means it also does not normally flood. *2012 Trn.* at 98-100. Because of the steep bluff on which the cabin sits, access to the pond is by footpath to the south shore labeled "Easement B," *2012 Trn.* at 30, colored pea-green on the map. DECLARATION OF EASEMENTS ¶ 2 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3 ("Easement 'B' is proposed for access to the pond").

II. Breaking up the John Bush Farm

The cabin was built in 1976 as a place for John Bush to stay while he built the château, which was completed by the late 1970s, and then became a guesthouse. *2012 Trn.* at 42. WILTON TAX CARD (June 19, 2012), Exh. L, *2012 Appx.* at 52. In 1978 John Bush began the process of subdividing, with a long-term interest in developing the land. *2012 Trn.* at 47, 127. All of the roadways pictured on the map on page 19 of this brief are at least as old as the cabin. *See* WILTON PLANNING BOARD MINUTES at 7 (Nov. 17, 1999), Exh. M, *2012 Appx.* at 54; CHALET PEARL MAP - COVER SHEET (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3 (noting "existing 9' gravel drive").

A. First Subdivision, Creating Lot 5

John Bush's subdivision plan was to carve out his own large lot and three smaller lots that already had structures. Lot 1 (purple, 3 acres) took on a long shape along Old County Road to give sufficient frontage for the existing house but maintain the farm's access to the land behind. WILTON PLANNING BOARD MINUTES (Aug. 17, 1978), Exh. K, *2012 Appx.* at 43; WILTON PLANNING BOARD MINUTES (Sept. 21, 1978), Exh. K, *2012 Appx.* at 48; JOHN BUSH FARM MAP (Oct. 18, 1978), Exh. 1, *2012 Appx.* at 2 (showing existing structures). Lot 2 (blue, 59 acres) contained John Bush's château. *Id.* Lot 3, already with house and barn, was created on one side of Jackson Drive (orange, 8 acres), and Lot 4 on the other (green, 12 acres). *Id.*

The remainder, Lot 5 (also referred to as Lot A-71 in town tax records), comprised about 393 acres, *2012 Trn.* at 44, and is indicated on the map in light yellow. The Planning Board noted "[t]here is also another lot (6) which is a lot of separate record," but is not indicated on any drawing. *Id.* The Planning Board approved the subdivision. WILTON PLANNING BOARD MINUTES at 1 (Oct. 19, 1978), Exh. K, *2012 Appx.* at 50.

The subdivision plan indicates private roads on Lots 1 and 2, and the Woods Road. It also indicates the "private drive" later named Jackson Drive, but that is shown as ending at the flood mark where it enters the big Lot 5. JOHN BUSH FARM MAP (Oct. 18, 1978), Exh. 1, *2012 Appx.* at 2. Moreover, the plan does not show the Jackson Drive road itself, but rather shows a long thin area through which Jackson Drive passes, and specifies this area as 50 feet wide. *Id.; 2012 Trn.* at 41, 47.

B. Sale of the Subdivided Lot 5 for Development

Just two weeks after the subdivision was approved, John Bush sold Lot 5 to Comvest Corporation, with an eye toward future development. DEED, BUSH→COMVEST at 3 (Nov. 3, 1978), Exh. 3, *2012 Appx.* at 8 (referring to John Bush Farm subdivision plan "to be recorded herewith"). Comvest Corporation, based in Nashua, had experience with previous subdivision projects in other states, and planned further development of the John Bush land. *2012 Trn.* at 52, 55. The deed, for example, ensured its covenants applied to all land then owned by John Bush and not just the contiguous parcels, and also required seller and buyer and their successors to cooperate with public bodies and private parties to facilitate development. DEED, BUSH→COMVEST at 3-4 (requiring abandonment of ownership of Jackson Drive and secession along other roads to ease adoption by public authorities, ensuring future development "not be in disharmony" with Comvest's restrictions and uses, and giving Comvest right of first refusal to buy other portions of Bush's land for development purposes).

The construction of the Bush→Comvest deed forms the central dispute in this appeal, and its language is worthy of extended attention. After reciting the metes-and-bounds of Lot 5, the deed provides:

> The grantor and the grantee, their respective heirs, devisees, executors, administrators, successors and assigns, shall have *joint and unlimited rights of way* over all existing roadways, whether public or private, and which are now the property of the grantor to convey, as well as over future roadways built by the grantor or the grantee, their respective heirs, devisees, executors, administrators, successors and assigns (except for those driveways which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes).

DEED, BUSH→COMVEST at 3 (Nov. 3, 1978), Exh. 3, *2012 Appx.* at 8 (capitalization and minor punctuation altered) (emphasis added). There are several salient features of this long sentence:

- It applies to both parties, "[t]he grantor and the grantee," and their successors.
- It creates three categories of roads: "all existing roadways, whether public or private" … and "future roadways built by the grantor or the grantee" – *i.e.*, existing public roads, existing private roads, and future roads.
- It specifies that the grantor's and grantee's successors "shall have joint and unlimited rights of way."
- It specifies that these joint and unlimited rights of way apply on all three types of roads – *i.e.,* "over all existing roadways, whether public or private, … as well as over future roadways."
- It defines "driveways."

The next sentence of the deed provides:

> Such rights of way shall, to the extent necessary, be FIFTY (50) feet in width, and should, at a later date, the town, county or state increase the required road width beyond FIFTY (50) feet, the width of said rights of way shall be accordingly increased, if reasonably possible, insofar as is necessary to comply with the public highway conveyance obligation hereinafter set forth.…

Thereinafter the deed defines the "public highway conveyance obligation":

> IT IS A STRICT CONDITION AND COVENANT of this deed, binding upon the [parties and their successors], and a covenant running with the land, … that if the Town of Wilton, the County of Hillsborough or the State of New Hampshire should ever desire to take … any or all of said roadways, or any part of them, for public highways … [the parties and their successors] shall from time

> to time and without charge, convey to the Town of Wilton, the County of Hillsborough or the State of New Hampshire, as the case may be, all of their respective interest in as much of said roadways as is necessary for making said … public highways.

Thus the deed provides that:

- Cooperation with public authorities to facilitate improvement of any roads and acceptance of them by public authority is a condition of the deed in perpetuity.
- The rights-of-ways must be 50 feet wide.

C. Sale of the Rest of the Subdivided Lots

In the three years following the sale of Lot 5 to Comvest, John Bush sold all the others.

In 1979, he sold Lot 2, the château. Its deed contains the exact same language as the Bush→Comvest deed. DEED, BUSH→SAMARAS (Feb. 28, 1979), Exh. C, *2012 Appx.* at 22. In 1980, he sold lot 1, on Old County Road, which contains the same language. DEED, BUSH→ROEDEL (Apr. 1, 1980), Exh. D, *2012 Appx.* at 25. In 1981, John Bush sold Lots 3 and 4 together, whose deeds contains the exact same language as the Bush→Comvest deed regarding "unlimited" rights on existing and future roads, and also specifies that portions of Lots 3 and 4 may be conveyed to Comvest in the event Jackson Drive needs to be widened. DEED, BUSH→CARNEY TRUST(May 18, 1981), Exh. E, *2012 Appx.* at 27.

Finally, also in 1981, John Bush sold the 31-acre unnumbered lot that the plaintiffs Evelyn and Kenneth Doerr now own. Its deed contains the exact same language as the Bush→Comvest deed regarding "joint and unlimited" rights on existing and future roads on the former John Bush Farm. DEED, BUSH→TAYLOR (May 27, 1981), Exh. 4, *2012 Appx.* at 14. Thereafter the Doerrs acquired the land from Taylor, which repeats the "joint and unlimited" rights on the Bush Farm roads. DEED, TAYLOR→DOERR(July 14, 2008), Exh. 5, *2012 Appx.* at 17. Later the Doerrs also acquired an adjoining lot yet further east. *2012 Trn.* at 9-10.

D. Tuomalas are Long-Term Tenants; New Ownership

Also in 1981, Philip Tuomala, one of the defendants here, moved into the cabin, and became a tenant of Comvest. *2012 Trn.* at 27. A short time later he and Dawn Tuomala, the other defendant, had their wedding at the cabin in 1982. *2012 Trn.* at 26, 82. No lease is in the record; it appears the Tuomalas were tenants-at-will for the next 15 years.

During that time, as part of an informal arrangement with the owners and neighbors, the Tuomalas assumed responsibility for maintaining the existing roads with gravel from the close-by pit, *2012 Trn.* at 32, 110, and generally policed the area from hunters, partiers, trash-leavers, and trespassers. *2012 Trn.* at 67, 107. With the explicit permission of the owners, the Tuomalas posted the land, *2012 Trn.* at 38, put up a no-trespassing sign on Jackson Drive, and erected the gate at the intersection of Woods Road and Old County Road (on the map sign indicated by red dot and gate indicated by red oval). *2012 Trn.* at 33, 38-39, 69-70. (The second gate, just off Jackson Drive west of the pond giving access to the dam, and to which the Doerrs and others in the neighborhood have a key, is part of the state flood control system and was not erected by the Tuomalas. *2012 Trn.* at 8, 13-14, 23.) This resulted in few people entering. *2012 Trn.* at 110.

Meanwhile, Comvest's development plans apparently did not come to fruition, and instead, as part of its dissolution the Corporation quitclaimed Lot 5 subject to all easements and covenants, to its three principals personally – the "Residents of Spain" – who used the land a few weeks each summer for recreation. *2012 Trn.* at 95; DEED, COMVEST→CHICO/JAIME/GENER (Dec. 28, 1988), Exh. F, *2012 Appx.* at 31. Apparently tiring of it, ten years later they quitclaimed it, again subject to all easements and covenants, to another development corporation, Chalet Pearl, Inc. DEED, CHICO/JAIME/GENER→CHALET PEARL, INC.(June 29, 1998), Exh. G, *2012 Appx.* at 33.

III. Mutual Interests in Clarifying Awkward Legal Situation

At the time the new corporate owner took over from the three Residents of Spain, the Tuomalas were living in an awkward tenancy with no separate legal existence, whose boundaries and rights and duties were undefined, but which was completely landlocked. Significant changes in ownership structure were inevitable.

As a developer, Chalet Pearl would have an interest in maximizing the value of the land for future occupants, whether residential or commercial. It would want to maintain access to both Wilton from the north and Route 101 from the south. It would want to ensure unlimited rights of passage through the parcel for all those who had such rights, and also the ability to improve the through-road if necessary. Depending upon the nature of a future subdivision, Chalet Pearl would have an interest in guaranteeing occupants the privacy of their own driveways. Chalet Pearl would see the pond as an asset, and want to maintain control. To the extent it had an interest in not razing the flood-prone cabin, it would want to give it a legal lot without conceding value, clarify the rights and duties of its occupant, and minimize its liability for people and property.

Although the Tuomalas might have been content with informality had the Residents of Spain remained their landlords, if they were to purchase the cabin, they would need to create a legal non-landlocked lot. They would have to determine what they own for stability, investment, insurance, and mortgage. *2012 Trn.* at 98. They would want to clarify what constitutes their curtilage: where they could garden, excavate, cut trees, roam animals, swim in the pond, keep out trespassers, and the like. *2012 Trn.* at 29-30, 100, 108. They would have to secure ingress and egress, assure safety and emergency access, and provide for the maintenance of the way leading past their door. *2012 Trn.* at 100, 110-111.

To the extent Chalet Pearl would agree to keep the cabin intact, and the Tuomalas had the ability to purchase it, both would have mutual interests in formalizing the situation. Given that the Tuomalas' only attachment to the cabin was sentimental, however, the new corporate ownership would leave them with little leverage to bargain for expanded or wide-ranging rights.

IV. Solution: Lot A-71-1 with Frontage Tail, and Collection of Easements

Given Chalet Pearl's interests, and the fact that both Dawn and Philip Tuomala were licensed land surveyors, *2012 Trn.* at 26, 81, they appear to have worked mutually on the situation, *2012 Trn.* at 112 (Ms. Tuomala drew the subdivision plan); WILTON PLANNING BOARD MINUTES at 6 (Nov. 17, 1999), Exh. M, *2012 Appx.* at 54 (Ms. Tuomala represented Chalet Pearl before the Planning Board for its subdivision approval), and it is unsurprising they together developed a creative solution.

The solution involves a deed, which incorporated a declaration of easements, and three subdivision plats. DEED, CHALET PEARL→DAWN TUOMALA (Nov. 29, 2000), Exh. H, *2012 Appx.* at 36; DECLARATION OF EASEMENTS (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38; CHALET PEARL MAP - COVER SHEET (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3; CHALET PEARL MAP - SHEET 2 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 4; CHALET PEARL MAP - SHEET 3 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 5; *see also* DEED, DAWN TUOMALA→PHILIP & DAWN TUOMALA (as husband and wife) (Feb. 29, 2008), Exh. J, *2012 Appx.* at 40.

The deed is barebones, and conveys a portion of Lot 5 from Chalet Pearl to the Tuomalas. The Declaration of Easements, along with the three plats, describe in detail what was conveyed. The tax stamp indicates Chalet Pearl was paid $150,000.[5]

[5]The tax stamp indicates a tax of $1,875. The tax rate at the time of conveyance was 15¢ per $1,000. See <http://www.nhdeeds.com/hillsborough/HiTransferTax.html>.

The documents first create "Lot A-71-1, containing 14.7 acres." Lot A-71-1 is so named because it is formed from a portion of Lot 5, known as Lot A-71 in town tax records. TAX MAP, WILTON, N.H. (Apr. 1, 2010), Exh. B, *2012 Appx.* at 7; CHALET PEARL MAP - COVER SHEET n. 4 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3. For want of better nomenclature, it will be referred to herein as Lot A-71-1, and is indicated in pink on the map included in this brief at page 19, *infra*.

Note that Lot A-71-1 is a rectangle box in the center of Lot 5, but that it also has a tail which extends north to Burton Highway, and that the tail follows and is bounded by a brook. It is this tail that gives Lot A-71-1 frontage on a Class V road, and makes it a legal non-landlocked lot. CHALET PEARL MAP - COVER SHEET n. 4 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3; WILTON PLANNING BOARD MINUTES at 6 (Nov. 17, 1999), Exh. M, *2012 Appx.* at 54 ("intent is to subdivide one 14.7 [acre] reduced frontage single family residential lot"); *2012 Trn.* at 86 ("reduced by frontage single-family residential lot [created] [u]nder the alternative lot requirements."); WILTON ZONING ORDINANCE ¶ 6.3 (March 2009), Exh. Q, *2012 Appx.* at 82 (Planning Board may designate "reduced frontage lot" in Alternative Lot Requirements); WILTON ZONING ORDINANCE ¶ 3.1.10 (March 2009), Exh. P, *2012 Appx.* at 78 (defining "frontage"). Because the tail is narrow, is essentially occupied by a brook, and appears within the floodzone, however, it cannot and does not operate as access to the rectangular portion of Lot A-71-1 where the Tuomalas' house is.

The deed documents then create "Easement A," indicated in bright yellow on the map. There is a gravel pit on Easement A, indicated by a black dotted area. The purpose of Easement A is to give the Tuomalas "the right to remove gravel" for the purpose of "maintaining the existing gravel roads." DECLARATION OF EASEMENTS ¶ 1 (Apr. 26, 2000), Exh. I, *2012 Appx.*

at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3 ("Easement 'A' is proposed for the use of gravel thereon for maintenance of driveways"). The documents then create "Easement B," shown as pea-green on the map, so that the Tuomalas can "gain access to the pond." DECLARATION OF EASEMENTS ¶ 2 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 5 ("Easement 'B' is proposed for access to the pond").

The deed documents also create "Easement D" and "Easement E." DECLARATION OF EASEMENTS ¶ 4 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38. Easement D runs from the point where Lots 3 and 4 meet Lot 5, and ends at the point where it intersects the tail of Lot A-71-1; it contains a gravel road. CHALET PEARL MAP - SHEET 2, det. A (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 4. Easement E runs from Woods Road to the rectangular portion of Lot A-71-1, and also contains a gravel road. CHALET PEARL MAP - SHEET 3, det. A (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 5. Easements D and E are "for purposes of ingress and egress to Lot A-71-1," and thus also include the right to use Woods Road and Jackson Drive. DECLARATION OF EASEMENTS ¶ 4 and referring to ¶ 1 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38. The declarations make clear Chalet Pearl has no obligation to maintain the roads within the easements, and any maintenance costs "[s]hall be borne solely by the owner(s) of Lot A-71-1 without a duty of contribution." DECLARATION OF EASEMENTS ¶ 4 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38. Collectively Easements D and E give the Tuomalas access to their land from public roads in both directions, over land otherwise owned by Chalet Pearl. These are necessary because the tail that provides Lot A-71-1 legal frontage is a brook not practicably passable. CHALET PEARL MAP - COVER SHEET n. 4 & 13 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3 ("primary access will be by Jackson Drive") ("Easements 'D" and 'E' are proposed for access to benefit Lot A-71-1").

Finally, the documents create "Easement C" at issue here. On the map included in this brief on page 19 *infra*, Easement C is indicated in blue, and is striped to indicate it is co-extensive with a portion of Lot A-71-1.

While the other easements just described give the Tuomalas rights over Chalet Pearl's land, Easement C is the reverse; it gives Chalet Pearl rights over the Tuomala's land. DECLARATION OF EASEMENTS ¶ 3 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3 ("Easement 'C' is proposed for access to benefit Lot A-71"); WILTON PLANNING BOARD MINUTES at 7 (Nov. 17, 1999), Exh. M, *2012 Appx.* at 54.

Easement C is "for purposes of ingress and egress to Lot A-71," and was created explicitly to ensure Chalet Pearl's ability to cross from one side of its land to the other, thus maintaining "ingress and egress" between the two entrances. DECLARATION OF EASEMENTS ¶ 3 (Apr. 26, 2000), Exh. I, *2012 Appx.* at 38. Unlike the other easements, the precise location of Easement C was unimportant, so long as Chalet Pearl could get across. *Id.* ("the owner of Lot A-71-1 shall have the right to relocate Easement 'C'"). Also unlike the other easements, the configuration of which Chalet Pearl necessarily retains control, Easement C was specified to remain 50 feet wide, regardless of any relocation, and the "travel portion" of the road contained within it "shall be the same width" as it then existed. *Id.*

V. Collection of Easements Meets Everyone's Needs

This creative collection of easements met everyone's interests. Chalet Pearl could maintain the value of the land for itself and any future occupants if it ever subdivides; the Tuomalas could stay on the land; and Wilton could be ensured code-compliance and no liability.

By carving Lot A-71-1 out of Lot 5, Chalet Pearl earned $150,000 selling a flood-prone property probably with few natural buyers, while satisfying its duty to provide access to an otherwise landlocked parcel, *see Bradley v. Patterson*, 121 N.H. 802 (1981), all while giving up no useful land because the Lot A-71-1 tail tracks an unbuildable area along a brook. The Tuomalas got a legal mortgageable lot under the provisions of Wilton's "Alternative Lot Requirements." The Town was ensured a conforming lot and a taxable property. WILTON PLANNING BOARD MINUTES (Feb. 16, 1999), Exh. M, *2012 Appx.* at 66 (approving subdivision).

Also by creating Lot A-71-1, Chalet Pearl solved the awkwardness of what belongs to their former tenant, while the Tuomalas gained definiteness regarding what constitutes their curtilage. FLOOD ELEVATION PLAN (Dec. 7, 2009), Exh. A, *2012 Appx.* at 6 (showing locations of house and garage, as well as garden, trees, shrubs, sheds, well, and septic).

By creating Easements D and E, Chalet Pearl ensured that it and others who have rights to the former John Bush Farm would have "unlimited" use, and the ability to enter and exit at both ends of the land; the Tuomalas ensured they had perpetual rights to come and go in both directions; and the Town kept the option of establishing public rights of way in the future. WILTON ZONING ORDINANCE ¶ 3.1.26 (March 2009), Exh. P, *2012 Appx.* at 78 (requirements for "Public Right-of-Way").

By creating Easement C, at issue here, Chalet Pearl ensured that it and any others who have rights to the former John Bush Farm – including the Doerrs – would enjoy them jointly,

and continue their "unlimited" ability to traverse the entire road system and travel continuously from the Wilton side to the Route 101 side of the property. Easement C gave the Tuomalas the ability to contain others' travel over their land to just a 50-foot linear area which they could relocate for privacy at their convenience.

The 50-foot width requirement in Easement C accomplished several things for Chalet Pearl: it ensured there would be room to improve the road through the Tuomalas' lot in the event of a future subdivision; it ensured that use would not be curtailed due to insufficient width; it ensured the dimensions would match Jackson Drive which is specified as 50-feet wide on the Bush Farm Subdivision Map; and it ensured the corridor through the Tuomalas' lot could be developed by satisfying the "not be in disharmony" mandate of the Bush→Comvest deed. As noted, the Tuomalas got clarity regarding the status of their privacy and could control the corridor's location. The Town was ensured that if it or the State wished to someday adopt these ways as public roads, there would be room. WILTON ROAD DESIGN SPECIFICATIONS ¶ 1.4 (Nov. 20, 1991), Exh. R, *2012 Appx.* at 85 ("The minimum street width right-of-way shall be 50 feet.").

By creating Easement A while at the same time disclaiming any duty to maintain the roads, Chalet Pearl enabled their perpetual maintenance, but escaped all costs. The Tuomalas ensured a convenient source of gravel, otherwise expensive to buy and haul, but took on no more duties than they had traditionally performed during their long tenancy. *2012 Trn.* at 32-35.

By creating Easement B, Chalet Pearl maintained ownership and value of the pond for itself and any future occupants, while the Tuomalas continued their enjoyment without having to limit their use to the steep embankment directly in front of their house.

The easements puts liability where it logically belongs: Chalet Pearl has none in a

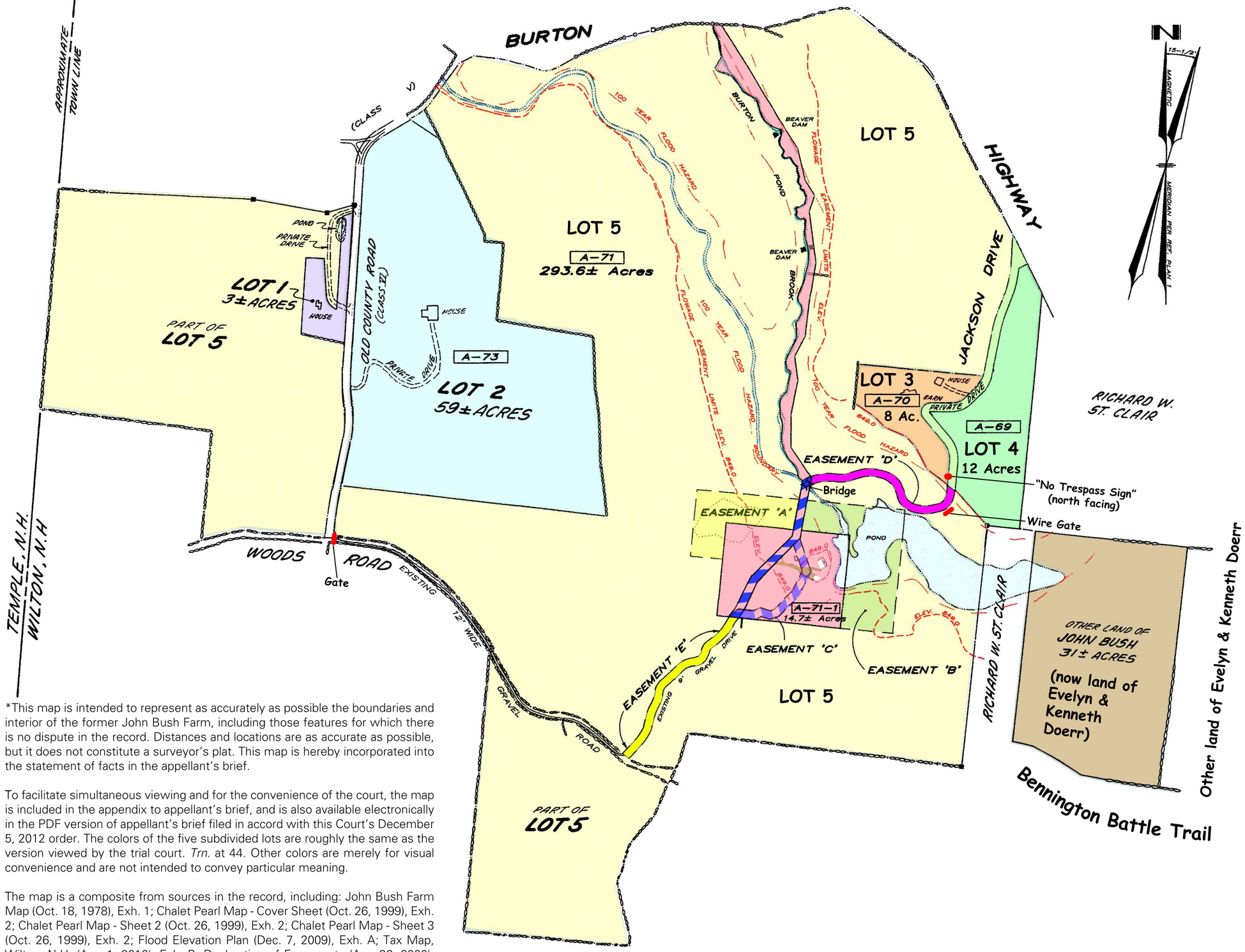
location that might pose difficult emergency access, and the Town has none unless it exercises its option to adopt the roads as facilitated by the easements. CHALET PEARL MAP - COVER SHEET, n. 11 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3 ("The Town of Wilton is not responsible for any maintenance of Jackson Drive [or] the driveway … unless they are brought to town standards and accepted by the Town."); WILTON PLANNING BOARD MINUTES (Apr. 19, 2000), Exh. M, *2012 Appx.* at 70 (noting release of liability); *see* LETTER FROM WILTON HIGHWAY DEP'T TO WILTON PLANNING BOARD (Nov. 15, 1999), Exh. N, *2012 Appx.* at 71. The Tuomalas assume liability, given their desire to continue living in a remote location with a propensity to flood.

Consideration for the easements is that they are "joint" and mutual, the Tuomalas own Lot A-71-1, and Chalet Pearl was enriched $150,000. Collectively they relieve the awkward legal tension posed by the presence of the cabin and the Tuomalas' long residence there, in light of new corporate ownership.

VI. Tuomalas Move Their Driveway

In 1976 John Bush established a driveway to the cabin, the original location of which is indicated on the map included in this brief on page 19, *infra*, in faded blue stripe. For their own convenience and in accord with the easement documents, in 2002 the Tuomalas moved the entire corridor of Easement C so it is now between 200 and 250 feet from their house, indicated on the map in darker blue stripe, and commensurately lengthened their driveway, as shown in brown on the map. *2012 Trn.* at 35-36, 43, 99-101; CHALET PEARL MAP - COVER SHEET, n. 14 (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 3; CHALET PEARL MAP - SHEET 3, det. B (Oct. 26, 1999), Exh. 2, *2012 Appx.* at 5; ORDER ON PRELIMINARY INJUNCTION (Nov. 16, 2010); *2012 Appx.* at 105; FLOOD ELEVATION PLAN, ref.2 & n.3 (Dec. 7, 2009), Exh. A, *2012 Appx.* at 6.

John Bush Farm - Boundaries and Interior Features*



*This map is intended to represent as accurately as possible the boundaries and interior of the former John Bush Farm, including those features for which there is no dispute in the record. Distances and locations are as accurate as possible, but it does not constitute a surveyor's plat. This map is hereby incorporated into the statement of facts in the appellant's brief.

To facilitate simultaneous viewing and for the convenience of the court, the map is included in the appendix to appellant's brief, and is also available electronically in the PDF version of appellant's brief filed in accord with this Court's December 5, 2012 order. The colors of the five subdivided lots are roughly the same as the version viewed by the trial court. *Trn.* at 44. Other colors are merely for visual convenience and are not intended to convey particular meaning.

The map is a composite from sources in the record, including: John Bush Farm Map (Oct. 18, 1978), Exh. 1; Chalet Pearl Map - Cover Sheet (Oct. 26, 1999), Exh. 2; Chalet Pearl Map - Sheet 2 (Oct. 26, 1999), Exh. 2; Chalet Pearl Map - Sheet 3 (Oct. 26, 1999), Exh. 2; Flood Elevation Plan (Dec. 7, 2009), Exh. A; Tax Map, Wilton, N.H. (Apr. 1, 2010), Exh. B; Declaration of Easements (Apr. 26, 2000), Exh. I; Photos, Exh S.; Transcript, *passim*.

STATEMENT OF THE CASE

Upon being warned away by the Tuomalas in 2009, the Doerrs petitioned for a declaratory judgment allowing them unrestricted use of the travel ways through the former John Bush Farm and an injunction to prevent the Tuomalas from hindering their access. PETITION FOR DECLARATORY JUDGMENT, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION (June 7, 2010), *2012 Appx.* at 978. The Tuomalas made a single-issue counter-claim that whatever rights the Doerrs might have, they were extinguished by adverse possession. FIRST AMENDED ANSWER OF RESPONDENTS (Jan. 3, 2011), *2012 Appx.* at 110. In their Answer the Tuomalas did not assert any counter-claim regarding use restrictions on the easement in the event they lost their broader claim that they had a right to wholly prevent the Doerrs' presence. *Id.*

The parties filed cross-motions for summary judgment, RESPONDENTS' MOTION FOR SUMMARY JUDGMENT and MEMO OF LAW (Jan. 31, 2011), *2012 Appx.* at 115; PETITIONERS' MOTION FOR SUMMARY JUDGMENT (Mar. 1, 2011), *2012 Appx.* at 130; PETITIONERS' OBJECTION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT (Mar. 1, 2011), *2012 Appx.* at 126; RESPONDENTS' OBJECTION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT (Mar. 31, 2011), *2012 Appx.* at 137. The Hillsborough County (South) Superior Court (*Colburn*, J.) held that even though non-contiguous, the Doerrs' deed gives them rights to the former John Bush Farm. It left for trial two issues – whether the road traversing the land was the Tuomalas' driveway, and whether the Doerrs' rights had been extinguished by adverse possession. ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT(May 19, 2011), *2012 Appx.* at 142.[6]

The court took a view and held a two-day bench trial during which Mr. Doerr, and both

[6]Because Chalet Pearl, the owner of Lot 5, was not a party, the court declined to address rights over Jackson Drive, Easement D, and Easement E. (FINAL) ORDER at 1 n. 1, *2012 Appx.* at 161.

Mr. and Ms. Tuomala testified. (FINAL) ORDER (July 26, 2012), *2012 Appx.* at 161; *2012 Trn.* at 3. It held that Easement C was a personal driveway over which the Doerrs had no rights, and thus did not address the adverse possession counterclaim. (FINAL) ORDER at 8-10, *2012 Appx.* at 168-170. As before, at no time during this stage of the litigation did the Tuomalas assert use-restrictions in the event they lost their claim that they could bar the Doerrs' completely.

The Doerrs appealed and the Tuomalas cross-appealed. This Court affirmed that easement rights benefit the Doerrs' property, but reversed on the driveway issue – thus holding that the Doerrs' have rights to Easement C. In its mandate this Court ordered:

> As a result of the trial court's conclusion that Easement C is a purely personal driveway, it did not address the [Tuomalas'] counterclaim of adverse possession. Accordingly, we remand for the trial court to address this issue."

Doerr v. Tuomala, No. 2012-0598 at 4 (decided by unpublished decision Dec. 3, 2013), *2014 Appx.* at 2, 5. The remand court described its actions:

> Subsequently, a hearing was held in [the superior court] on May 12, 2013 on the adverse possession issue. At the hearing, the Tuomalas claimed that they had extinguished the Doerrs' right to use Easement C by adverse possession in that they had performed acts thereon through open, continuous, uninterrupted, and exclusive possession of Easement C in a manner adverse to the Doerrs' or their predecessors in title for a period of twenty years. Additionally, the Tuomalas argued that if the Court did not find that they had extinguished the Doerrs' right to use Easement C by adverse possession, that the Court should place reasonable restrictions on the Doerrs' use of Easement C. The Doerrs' argued that the Tuomalas' acts were not sufficient to terminate the Doerrs' right to use Easement C by adverse possession. They further claimed that the issue of any reasonable restrictions on the Doerrs' use of Easement C was not properly before the Court and that it had been waived by the Tuomalas because it had never been raised at any stage during the proceedings.

ORDER at 2-3 (June 18, 2014), *2014 Appx.* at 37, 38-39. The parties each filed day-of-hearing and post-hearing memoranda. MEMORANDUM IN SUPPORT OF THE ENTRY OF JUDGMENT FOR RESPONDENTS ON THEIR ADVERSE POSSESSION CLAIM (May 12, 2014), *2014 Appx.* at 6;

PETITIONERS' ARGUMENT REGARDING REMANDED ISSUE (May 12, 2014), *2014 Appx.* at 17; RESPONDENTS' POST-HEARING MEMORANDUM (May 22, 2014), *2014 Appx.* at 22; PETITIONERS' POST-HEARING MEMORANDUM (May 28, 2014), *2014 Appx.* at 31.

On the adverse possession issue, quoting *Titcomb v. Anthony*, 126 N.H. 434 (1985), the court (*Colburn*, J.) held that the Tuomalas' actions were not sufficiently exclusive or adverse, and thus did not extinguish the Doerrs' rights. *Id.* at 4-5. The Tuomalas did not appeal that order.

The court continued, however, to hold that "this does not mean that the Doerrs' use of Easement C is completely unrestricted." *Id.* at 5. Overlooking the fact that the issue of use restrictions had not been preserved, it held that "it ha[d] sufficient facts to render such a determination." *Id.* at 6. The court noted that the travel way is narrow, that the Tuomalas' access over it is necessary, and that because the Doerrs have alternative access to their land they currently make relatively minor use of it. The court then ruled that "the Doerrs should be reasonably limited in their use … to non-vehicular traffic," that the Doerrs' "use after daylight hours is only appropriate with the prior approval from the Tuomalas, and that "the Doerrs shall use Easement C in a reasonable fashion consistent with this [o]rder." *Id.* at 6. Finally, the court granted the Doerrs' request for permanent injunction. *Id.* at 7.

The Doerrs filed a motion for reconsideration, to which the Tuomalas objected. PETITIONERS' MOTION FOR PARTIAL RECONSIDERATION OF REMAND ORDER (June 30, 2014), *2014 Appx.* at 44; OBJECTION TO PETITIONERS' MOTION FOR PARTIAL RECONSIDERATION (July 9, 2014), *2014 Appx.* at 51. Upon reconsideration, the court modified its order to make clear that prohibited "vehicular traffic" does not include bicycles. NOTICE OF DECISION (July 15, 2014), *2014 Appx.* at 55.

Understanding their deed gives them "joint and unlimited rights of way" on Easement C, the Doerrs appealed.

SUMMARY OF ARGUMENT

Evelyn and Kenneth Doerr first discuss New Hampshire's easement law, and point out that, when there is no ambiguity in the deeds or on the ground, this Court has consistently rejected any application of reasonable-use restrictions. Likewise, they explain that when there is no such ambiguity, this Court has consistently enforced deed requirements.

They then note that because the deed language here – "joint and unlimited rights of way" – is not ambiguous, there is no need to resort to any reasonable-use restrictions. Indeed, they argue, the "unlimited" language here is even more clear and more emphatic than deeds this Court has already declared enforceable.

The Doerrs then explain that even if reasonable-use restrictions can be applied, the restrictions the court imposed here are not reasonable in light of the expectations of the parties and the usages of the easement.

Finally, the Doerrs point out that the Tuomalas did not request use-restrictions until after this Court had remanded this case for other purposes, and that their request was thus far too late.

ARGUMENT

I. Comparative Easement Rule of Reason Applies Only When There is Ambiguity, But Not When the Parties Clearly Express Their Wishes

Although there are dozens of easement cases construing deed language such as, for example, the right to "pass and repass,"[7] there is no case construing "unlimited rights of way" or "joint and unlimited rights of way" in New Hampshire, and also no known case in any other jurisdiction.

Deed construction requires determining the intent of the parties at the time the easement was granted. *Lussier v. New England Power Co.*, 133 N.H. 753, 756 (1990) ("The beginning and end of our inquiry is found in the words of the easement deeds. Our task is to determine the parties' intent in light of the surrounding circumstances at the time the easements were granted."). Easement deeds that are clear on their face are enforced as to their terms. *Lussier,* 133 N.H. at 757-58 (electric transmission line utility easement granting right to "construct all necessary appurtenances" included installation of electrical switching station). This court reviews disputed deeds *de novo*. *Mansur v. Muskopf*, 159 N.H. 216 (2009).

A. Comparative Rule of Reason Applies When a General Grant is Ambiguous

Some easements are "determined by reference to the rule of reason" which seeks to balance the needs of the disputing parties. *Sakansky v. Wein*, 86 N.H. 337, 339 (1933). "When, however, the words of the deed are clear and their meanings unambiguous, there is neither a need to resort to extrinsic facts and circumstances to aid our determination, nor a need to rely

[7]There are nine cases in New Hampshire alone construing "pass/repass" or "cross/recross" deeds in the context of applying the comparative easement rule of reason: *Duxbury-Fox v. Shakhnovich*, 159 N.H. 275 (2009); *Mansur v. Muskopf*, 159 N.H. 216 (2009); *Arcidi v. Town of Rye*, 150 N.H. 694 (2004); *Flanagan v. Prudhomme*, 138 N.H. 561 (1994); *Dumont v. Town of Wolfeboro*, 137 N.H. 1 (1993); *Downing House Realty v. Hampe*, 127 N.H. 92 (1985); *Burcky v. Knowles*, 120 N.H. 244 (1980); *Barton's Motel, Inc. v. Saymore Trophy Co.*, 113 N.H. 333 (1973); *Bean v. Coleman*, 44 N.H. 539 (1863).

on *Sakansky v. Wein*'s "'rule of reason.'" *Lussier*, 133 N.H. at 756.

Thus the comparative "rule of reason" applies "[w]hen the uses of a deeded right of way are not specified or restricted in the deed." *Flanagan v. Prudhomme*, 138 N.H. 561, 574 (1994); *Delaney v. Gurrieri*, 122 N.H. 819, 821 (1982) ("The doctrine of reasonable use applies … to a right-of-way expressly conveyed, *without restrictions*.") (emphasis added); *Cote v. Eldeen*, 119 N.H. 491, 493 (1979) ("The doctrine of reasonable use applies … to a right-of-way expressly conveyed, *without restrictions*.") (emphasis added).

In *Bean v. Coleman*, 44 N.H. 539 (1863), for example, the deed reserved an undefined "right of passway" between two fields; this Court upheld an order requiring the dominant owner to close the gate to prevent escaping cows. *See also Arcidi v. Town of Rye*, 150 N.H. 694, 701 (2004) (applying comparative easement rule where deed language gave unrestricted right "to pass and repass and for ingress and egress"); *Nadeau v. Town of Durham*, 129 N.H. 663, 664 (1987) (applying comparative easement rule where deed language gave unrestricted right "to be used in common"); *Downing House Realty v. Hampe*, 127 N.H. 92, 94 (1985) (applying comparative easement rule where deed language gave unrestricted "right over my land"); *Donaghey v. Croteau*, 119 N.H. 320 (1979) (applying comparative easement rule where deed language gave unrestricted right of way); *Sakansky v. Wein*, 86 N.H. at 337 (same); *Chapman v. Newmarket Mfg. Co.*, 74 N.H. 424 (1908) (applying comparative easement rule where deed language gave unrestricted flowage rights).

Application of the comparative rule-of-reason in New Hampshire is consistent with other jurisdictions. Annotation, *Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms,* 3 A.L.R.3d 1256 (cited with approval in *Lussier*, 133 N.H. 753 (1990), and in *Burcky v. Knowles*, 120 N.H. 244 (1980)).

B. Comparative Rule of Reason Applies When a Grant is Ambiguous Due to Unclear Deed Language, Geographic Facts of the Land, or a Change in the Law

Likewise, the comparative easement rule applies when there is ambiguity caused by unclear deed language, difficulty or impossibility applying otherwise clear deed language to geographic facts on the land, or an unanticipated change in the law.

Thus this Court has applied the comparative easement rule in the context of unclear deed language. In *Town of Sandown v. Kelley*, 97 N.H. 418, 419-20 (1952), a parcel had been occasionally used as a dump, and the town sought to expand it. Access was by an easement, the deed for which both broadly provided "all necessary purposes of entrance and egress," but also narrowed it to "as now used." Because of the ambiguity, this Court held that "[t]he requirement of reasonable use is implied." Similarly, in *Duxbury-Fox v. Shakhnovich*, 159 N.H. 275 (2009), common deed language gave the dominant estate "the right to pass and repass over land" but as the easement was a shore-side clearing used to park cars and launch boats to access landlocked camps across the pond, this Court held that the phrase "over land" was "patently ambiguous" because it "does not provide sufficient information to adequately describe the conveyance."

This Court has also applied the comparative easement rule where deed language could not be made to fit geographic reality. In *Barton's Motel, Inc. v. Saymore Trophy Co.*, 113 N.H. 333, 334 (1973), the deed conveyed a parcel "together with a right to pass and repass on foot or by vehicle … along a strip fifty feet in width." Given the lay of the land, this Court held that it was ambiguous whether the dominant estate had the right to unobstructedly use the entire 50-foot strip, or merely to pass somewhere on it, and thus "decreed that the [dominant owner's] right of way should extend 30 feet in width … and that the remaining 20 feet … could be utilized by the [servient owner] for any purpose which would not interfere with the [dominant owner's] use." In *Crocker v. Canaan College*, 110 N.H. 384 (1970), use of an otherwise clear sewage

easement had so expanded over time that it became a smelly nuisance, making the easement incompatible with surroundings, and allowing the court to find that continuing use was unreasonable. In *White v. Eagle & Phoenix Hotel Co.*, 68 N.H. 38 (1894) the deed purported to "permit a continuous and uninterrupted passage around the hotel," but in fact, "the level of the east way was 12 feet above that of the north way at the point of their junction." Thus this Court found "[t]he natural meaning of the language of the deed is inconsistent with the existence of an impassable gulf across the way," and remanded for imposition of an equitable solution.

This Court also applied the rule to address statutory changes. In *Dumont v. Town of Wolfeboro*, 137 N.H. 1 (1993), otherwise clear deed language became untenable after the law changed regarding how driveways open onto State highways, thus allowing the court to fashion a reasonable solution.

In each of these examples, ambiguity in the deed, on the ground, or in the law made enforcement of the deed language impractical, thus necessitating "the requirement of reasonable use." *Town of Sandown v. Kelley*, 97 N.H. at 419.

C. Courts Enforce Terms of Non-Ambiguous Deeds

The situation is different, however, when grantors and grantees put specific restrictions in their deeds, and this Court has made clear that parties are free to write into deeds whatever limitations they wish, to ensure that easements are not ambiguous:

> This rule of reason does not prevent the parties from making any contract regarding their respective rights which they may wish, regardless of the reasonableness of their wishes on the subject. The rule merely refuses to give unreasonable rights, or to impose unreasonable burdens, when the parties, either actually or by legal implication, have spoken generally.

Sakansky v. Wein, 86 N.H. at 339-40.

When the parties make clear "their respective rights," this Court has indicated it will enforce specific easement language to its full extent, whether it broadens or narrows the grant.

> The owner of a way on land of another is limited in its use to the terms of the grant from which the way is derived. If granted for one purpose, he cannot use it for another. But while the terms of the grant cannot be enlarged beyond their natural meaning, they will not be so narrowed as to prevent the beneficial use by the grantee of what is granted, in the manner and for the purposes fairly indicated by the grant.

Abbott v. Butler, 59 N.H. 317, 317-18 (1879) (citations omitted); *see e.g., Ettinger v. Pomeroy Limited Partnership*, slip op. 13-0354, __ N.H. __ (decided July 2, 2014) (addressing deed which conveyed rights not only to use road easement, but also how parties share maintenance costs).

Thus this Court has enforced deeds without resort to any canons of comparative construction when they contain general broadening language, specific broadening language, and specific narrowing language.

In six cases, this Court has enforced, without application of any "rule of reason," deed language which indicates the broadest possible construction. That is, phrases such as "any and all purposes," "at all times and for all purposes," and "for all necessary purposes" are broadening agents and not ambiguous. *Soukup v. Brooks*, 159 N.H. 9 (2009) (enforcement of: "for all purposes"); *Gill v. Gerrato*, 154 N.H. 36 (2006) (enforcement of: "for all purposes of ingress and egress"); *Heartz v. City of Concord*, 148 N.H. 325 (2002) (enforcement of: "at all times and for all purposes"); *Lussier*, 133 N.H. 753 (1990) (enforcement of: "all necessary … appurtenances"); *Titcomb v. Anthony*, 126 N.H. 434 (1985) (enforcement of: "any and all purposes," although some rights forfeited by adverse possession); *Town of Sandown v. Kelley*, 97 N.H. at 418 (enforcement of: "for all necessary purposes of entrance and egress").

In two cases this Court has enforced deeds with specific broadening language. In *Abbott*

v. Butler, the deed gave the dominant owner "a right of way, for all purposes, … to and from" the public road. This Court held that the deed applied to not only hauling farm produce one direction, as had been traditional, but also hauling rocks in the other – that is, "all purposes" and "to and from" indicated both items in both directions. *Id*. at 319. In *Mansur v. Muskopf*, 159 N.H. at 216, back-lot owners claimed an easement by a deed that specified "the right and privilege to cross and re-cross" lake-front lots "in order to gain access to the shore of Lake Winnipesaukee and the right to use the … said shore frontage … being 75 [feet] in width … as shown on said plan." While many mesne conveyances confused the issue to the benefit of the front-lot owners, because the 75 feet could be discerned on both the plan and the ground, this Court held the back-lot rights could not be narrowed.

This Court has also enforced specific narrowing language. In *Thurston Enterprises, Inc. v. Baldi*, 128 N.H. 760, 765 (1986), a boat marina was located behind a drive-in movie theater. The deeds provided the marina a right-of-way over the theater's land, which went under the theater's marquee and past its ticket booth, but cautioned that the marina "shall not interfere with the [theater's] use of the property." Expanding its operation, the marina brought in gravel fill and began moving boats on fork-lifts, but the trucks were too high to fit under the marquee, could not turn to avoid the ticket booth, and their weight harmed the theater's light-duty parking lot. This Court rejected the lower court's attempt to impose a rule-of-reason-based usage limit and re-payment scheme, and held that the marina could not be allowed to interfere.

Accordingly, when parties in their deeds make clear "their respective rights which they may wish, regardless of the reasonableness of their wishes on the subject," *Sakansky v. Wein*, 86 N.H. at 339-40, those wishes are enforced.

II. The Parties Have Unambiguously Expressed Their Wish That the Doerr's have "Unlimited Rights of Way" Over the Tuomala's Land, Which Must be Enforced

As noted, the deeds here provide that the Doerr's "shall have *joint and unlimited rights of way* over all existing roadways … as well as over future roadways." DEED, BUSH→COMVEST at 3 (Nov. 3, 1978), Exh. 3, *2012 Appx.* at 8 (emphasis added).

The word "unlimited" is clear on its face, meaning "lacking any controls," "unconfined," "boundless," "infinite," "not bounded by exceptions," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2002), "not limited," "vast," without any qualification or exception," "unconditional," "unconstrained," "unrestrained," "unfettered." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2001). "Unlimited" is at least as definitive as the half-dozen cases in which this Court has fully enforced language such as "all purposes," "all purposes of ingress and egress," "at all times and for all purposes," "all necessary appurtenances," "any and all purposes," and "all necessary purposes of entrance and egress." *Soukup v. Brooks*, 159 N.H. at 9; *Gill v. Gerrato*, 154 N.H. at 36; *Heartz v. City of Concord*, 148 N.H. at 325; *Lussier*, 133 N.H. at 753; *Titcomb v. Anthony*, 126 N.H. 434 (1985); *Town of Sandown v. Kelley*, 97 N.H. at 418. Because of the rarity of the term, and the comprehensiveness of its dictionary definition, "unlimited" is even *more* emphatic than those phrases. Given that the Doerr's rights over Easement C is "unlimited," this Court must enforce the deed, reverse the lower court, and grant the Doerr's request for an injunction to prevent the Tuomalas from hindering their use to any degree. *Lussier*, 133 N.H. at 757-58.

Even if the meaning of "unlimited" is not plain from the deed, the word is nonetheless unambiguous in light of the intentions of its drafters and the geographic reality of the former John Bush Farm. As noted, John Bush and later Chalet Pearl had an eye toward future subdivision and development of the large parcel, and the travel way which traverses it is a

valuable commodity. It provides access to both the town of Wilton in the northeast and Route 101 in the southwest. It allows access to the pond from all points. It provides egress for municipal safety vehicles in both directions, and avoids long cu-de-sacs eschewed by planners. It maintains the ability of public bodies to adopt the travel way, as envisaged by the deeds and their 50-foot width requirement. Thus the fact that the way provides uninhibited travel and complete traverse through the land has great value – value that a grantor would be unlikely to relinquish without clear indication and adequate consideration.

At the time of the deed granting the Doerr's "joint and unlimited rights of way" on Easement C, moreover, the Tuomalas were mere tenants in a precarious situation – landlocked, without lawful frontage, at the mercy of the owners, having no legal claim to the cabin, which was unmortgageable, uninsurable and not separately taxable. There is no basis to suggest they had bargain leverage to prevent their neighbors from driving vehicles or taking an evening stroll.

By using the rare term "unlimited," the drafters deliberately emphasized the broad scope of allowable uses of the easement. This Court's "task is to determine the parties' intent in light of the surrounding circumstances at the time the easement was granted." *Arcidi v. Town of Rye*, 150 N.H. at 694; *Lussier v. New England Power Co.*, 133 N.H. at 756. The breadth of the term and the circumstances here indicate the parties meant what they said – that the Doerrs with easement rights have "unlimited" rights of way.

As noted, canons of construction are useful only when a deed is ambiguous because it is "unrestricted" or its language is unclear in its application to the land. There is none of that here. The deed is carefully restricted – rights are "unlimited." No ambiguity has been alleged or found – because there is none. Accordingly, this Court must enforce the terms of the deed without resort to any comparative easement rights or canons of construction, reverse the trial court, and rule that the Doerrs have an unimpeded and uninhibited right to use their easement.

III. Use Restrictions Imposed by Remand Court are Not Reasonable

If this Court determines that the "rule of reason" applies, the restrictions imposed by superior court are nonetheless not reasonable.

In applying reasonable-use restrictions, the court:

> consider[s] the proposed use, the rights and burdens of the parties at the time of the creation of the right-of-way, the reasonable expectations of the parties relative to its future use, changed circumstances of the parties, and the advantages and disadvantages of the proposed use to each party.

Nadeau v. Town of Durham, 129 N.H. at 668.

Because a deeded right-of-way is an ownership interest, whether one party or the other has alternative access is not a relevant consideration. *Downing House Realty v. Hampe*, 127 N.H. at 96 ("The servient estate has no right to insist upon the use of any other land of the dominant estate, regardless of how little damage or inconvenience such use of the dominant estate might occasion.") (quotation omitted); *Sakansky v. Wein*, 86 N.H. at 340 ("The use which the plaintiff may make of the way is limited by the bounds of reason, but within those bounds it has the unlimited right to travel over the land set apart for a way. It has no right to insist upon the use of any other land of the defendants for a way, regardless of how necessary such other land may be to it, and regardless of how little damage or inconvenience such use of the defendants' land might occasion to them. No more may the defendants compel the plaintiff to detour over other land of theirs.").

Here the proposed uses are the standard usages of a road, which were the reasonable expectations of the parties then, as now, particularly in light of the expectation that the land would be developed. This Court has already ruled that the Tuomalas do not have exclusive use of Easement C, and while the Tuomalas live in a remote area, they cannot reasonably expect that there will never be any traffic, however light, on the road that intersects their driveway several

hundred feet from their house. People occasionally getting stuck on back roads is the reasonable risk taken by people who live on them.

Use of the road is a part of the value of the Doerrs' land, whether or not they build a home on it. If they build, or if Chalet Pearl someday resurrects John Bush's plans to develop, or if there are ever the "future roadways" as envisaged in the deed, traversing the road will be an even greater portion of its value. Restricting the Doerrs to non-vehicles and day-use only impacts the value of their interest. Forcing the Doerrs to get the permission of their neighbor to walk there unreasonably sets up both parties for further future feuds, effectively eliminates the possibility that the Doerrs will ever be inclined to make use of their easement, and additionally undermines its value.

Whether the Doerrs have a compelling reason to be on the road, or whether the Tuomala's have a greater perceived need, is not a valid consideration, and to the extent the lower court considered those, it was in error.

Accordingly, restricting the Doerrs from ever driving on Easement C is not a reasonable restriction. Restricting them from even walking on it at night without permission bears no relation to any evidence, and is likewise not reasonable.

Moreover, it must be recalled that the deed provides that the Doerrs' easement rights are "*joint* and unlimited." Thus, any restriction imposed on the Doerrs must necessarily be imposed on any others who have such rights, including the Tuomalas, Chalet Pearl, and the few surrounding neighbors with similar deeds. Given the deed language, it is not reasonable to single out the Doerrs without imposing the same restrictions on the others – an imposition the Tuomalas must necessarily reject.

IV. The Time for Raising Issue of Use Restrictions was Pre-Trial, Not Post-Remand

Several overlapping doctrines prevent the Tuomalas – for the first time at the late date of the remand hearing – from asking for relief in the form of use-restrictions.

First, preservation requires that parties request relief at the earliest possible time. *Liam Hooksett, LLC v. Boynton*, 157 N.H. 625, 631 (2008); *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 786 (2006); *Mountain Valley Mall Associates v. Town of Conway*, 144 N.H. 642, 654 (2000).

Second, although New Hampshire has a liberal policy toward amending pleadings, equity prevents addition of a counterclaim when it would prejudice the other party. *Gulf Ins. Co. v. AMSCO, Inc.*, 153 N.H. 28, 44 (2005) ("[C]ounterclaims are generally permitted where appropriate to avoid circuity of action, multiplicity of suits, inconvenience, expense, unwarranted consumption of the court's time, and injustice by resolving all controversies and granting full relief in one proceeding."); *City of Concord v. 5,700 Square Feet of Land*, 121 N.H. 170, 172 (1981) ("[W]hether to allow a counterclaim is within the discretion of the trial court [unless] the allowance of a counterclaim would cause undue complexity or prejudicial confusion") (citations omitted); *Varney v. Gen. Enolam, Inc.*, 109 N.H. 514, 517 (1969) ("The trial court will also consider whether the allowance of … [a] counterclaim would produce undue complexity and confusion of issues which might prejudice the rights of one or of both parties.").

Third, law-of-the-case bars post-remand litigation of issues that could have been raised, but were neglected, before the first appeal. *Saunders v. Town of Kingston*, 160 N.H. 560, 566-68 (2010); *Taylor v. Nutting*, 133 N.H. 451, 454-55 (1990); *see also Penrich, Inc. v. Sullivan*, 140 N.H. 583, 587 (1995).

Fourth, this Court's mandate was clear – the purpose of remand was to "address the [Tuomalas'] counterclaim of adverse possession." *Doerr v. Tuomala*, No. 2012-0598 at 4 (decided

by unpublished decision Dec. 3, 2013), *2014 Appx.* at 2, 4.

Here, the time for a counterclaim asserting the application of the "rule of reason" and requesting affirmative relief in the form of easement restrictions based on comparative use of the easement, would have been when the Tuomalas filed their answer in 2011, or at some other time before the court held its evidentiary hearing in 2012. The Doerrs were prejudiced by the late addition of the use-restrictions counterclaim: had they known in 2012 that the issue was before the court, they would have provided evidence regarding the use to which they intend to put their easement in the future, testified about the importance and value of the easement to their current ownership, and offered a map created by John Bush around the time of the Bush→Comvest deed showing the John Bush Farm carved up into small suburban lots.

Instead, the Tuomalas raised the issue on the day of the remand hearing, by a pleading handed to the Doerrs at the hearing. *2014 Trn*. at 34. Having reviewed this Court's mandate, the Doerrs came to the remand hearing prepared to address what they believed was the only remaining issue – adverse possession. PETITIONERS' ARGUMENT REGARDING REMANDED ISSUE (May 12, 2014), *2014 Appx.* at 17. Although the court allowed post-hearing memoranda to account for this, the date for raising the new issue had long passed.

Accordingly, the remand court had no authority to reach the issue of use-restrictions, and erred in imposing them.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the court below, and issue an injunction preventing the Tuomalas from impeding the Doerrs from making full and unrestricted use of the easement they own.

Respectfully submitted,

Evelyn & Kenneth Doerr
By their Attorney,

Law Office of Joshua L. Gordon

Dated: January 3, 2015

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Evelyn & Kenneth Doerr request that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the language of this deed, while clear and unequivocal, has never been construed, and because the court below so egregiously erred in its imposition of use restrictions.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on January 3, 2015, copies of the foregoing will be forwarded to Thomas J. Pappas, Esq.

Dated: January 3, 2015

Joshua L. Gordon, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2012-0598, Kenneth J. Doerr & a. v. Philip Tuomala & a., the court on December 3, 2013, issued the following order:

The petitioners, Kenneth J. Doerr and Evelyn M. Doerr, appeal the trial court's order following a bench trial denying their request for a declaratory judgment concerning easement rights over property belonging to the respondents, Philip Tuomala and Dawn Tuomala. The petitioners argue that the trial court erred in concluding that Easement C is a "purely personal" driveway over which they have no right of way. The respondents cross-appeal, arguing that the court erred in ruling that the deeded easement rights benefit the petitioners' property. We affirm in part, reverse in part, and remand.

The record shows that the petitioners own a thirty-one acre parcel known as Lot A-68 in Wilton. The respondents own a nearby 14.7 acre parcel known as Lot A-71-1. All of the land at issue at one time belonged to John H. Bush. In 1978, Bush subdivided a 474.5 acre parcel into five lots and conveyed Lot 5, a 392.5 acre parcel, by warranty deed to Comvest Corporation (Comvest). The deed incorporates by reference a subdivision plan (Bush plan). The Bush plan depicts the area surrounding Lot 5, including a parcel referred to on the plan as "other land of John Bush," which is now the petitioners' parcel. The petitioners' parcel is separated from Lot 5 by a parcel formerly owned by Richard W. St. Claire. In 1998, Chalet Pearl, Inc., acquired Lot 5, and in 1999, Chalet Pearl subdivided Lot 5, creating the respondents' parcel.

We first address the respondents' cross-appeal. The respondents argue that the trial court erred in ruling that deeded easement rights across Lot 5 benefit the petitioners' property. Resolving this issue requires that we interpret the relevant deeds.

> The interpretation of a deeded right of way is ultimately a question of law for this court to decide by determining the intention of the parties at the time of the deed in light of surrounding circumstances. If the terms of the deed are clear and unambiguous, those terms control how we construe the parties' intent. Thus, when the language of the deed is clear and unambiguous, we need not consider extrinsic evidence.

Gill v. Gerrato, 154 N.H. 36, 39 (2006) (quotations, citations and brackets omitted).

The deed from Bush to Comvest provides that the grantor and grantee, as well as their successors, "shall have joint and unlimited rights of way over all existing roadways, whether public or private, and which are now the property of the GRANTOR to convey, as well as over future roadways built by the GRANTOR or the GRANTEE," with certain exceptions. The deed further provides that these rights of way:

> shall not be limited to [Lot 5], but shall be extended to and may be used in conjunction with other land presently owned by the GRANTOR (see [Bush plan], to be recorded herewith[)], as well as land hereinafter acquired by the GRANTOR and/or the GRANTEE, their respective heirs, devisees, executors, administrators and assigns in the general area, provided said lands have common boundaries with the premises presently owned by the GRANTOR, includ[ing] those being hereby conveyed.

The respondents argue that the plain language of the deed demonstrates the parties' intent to convey easements over Lot 5 only for the benefit of land having "common boundaries" with Lot 5, or properties connected to Lot 5 by other properties Bush owned in 1978 or thereafter acquired, not for non-contiguous parcels such as the petitioners' property. There is no dispute that the petitioners' parcel does not have common boundaries with any other land Bush owned in 1978 or later acquired. Nor is it disputed that Bush owned the petitioners' parcel in 1978, when Lot 5 was created.

We construe the deed to unambiguously extend the right of way easements to the petitioners' parcel. The deed states that the rights of way created therein extend to other land Bush owned at that time, as depicted on the Bush plan. The Bush plan depicts what is now the petitioners' parcel, described as "other land of John Bush." Thus, we agree with the petitioners that the "common boundaries" requirement applies only to "land hereinafter acquired," not to land Bush owned in 1978. Although our conclusion is based upon the language of the deed and the incorporated plan, we note that the deeds conveying the petitioners' parcel from Bush to Don R. Taylor and Dorothy B. Taylor in 1981, and from the Taylors to the petitioners in 2008, which contain nearly identical easement language, strongly support our interpretation. Accordingly, we affirm the trial court's ruling that the easement rights benefit the petitioners' property.

We next address the petitioners' appeal. The petitioners argue that the trial court erred in concluding that Easement C is a "purely personal" driveway over which they have no right of way.

The deed from Bush to Comvest includes the following easement language:

> THE GRANTOR AND THE GRANTEE, their respective heirs, devisees, executors, administrators, successors and assigns, shall have joint and unlimited rights of way over all existing roadways, whether public or private, and which are now the property of the GRANTOR to convey, as well as over future roadways built by the GRANTOR or the GRANTEE, their respective heirs, devisees, executors, administrators, successors and assigns (except for those driveways which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes).

We first examine the deed's easement terms. Gill v. Gerrato, 154 N.H. at 39. If the language of the deed is clear and unambiguous, we will interpret the intended meaning from the deed itself without resort to extrinsic evidence. Austin v. Silver, 162 N.H. 352, 354 (2011). If the language of the deed fails to provide sufficient information to describe the conveyance adequately without reference to extrinsic evidence, we will consider extrinsic evidence to clarify its terms. Id. The issue in dispute is whether Easement C is a driveway "purely personal in nature . . . solely for ingress to and egress from buildings on any of the premises," and not a "roadway" for "subdivision-development purposes." Because the deed does not refer to specific, existing roadways and driveways on the property, the trial court properly considered extrinsic evidence. See id. Typically, a "driveway" is "a private road giving access from a public thoroughfare to a building or buildings on abutting grounds." Webster's Third New International Dictionary 692 (unabridged ed. 2002). The "way" in dispute, referred to as Easement C, is a relatively short section of a long dirt road that passes through Lot 5 connecting Burton Highway in the northeast and County Farm Road in the southwest. Easement C, in its original location, was approximately fifty feet from the respondents' cabin and garage, the only buildings on Lot 5, at its closest point. The respondents have since relocated Easement C so that it is now no closer than approximately 200 feet from their cabin and garage. Even before the relocation, however, there was a driveway from Easement C to the cabin and garage.

The trial court noted that Easement C was not designated on the Bush plan; the plan shows no roadway connecting Jackson Drive and Woods Road. The trial court found this absence to be significant, given that in 1978, the Wilton Planning Board, during its site plan review, required Bush to "designate all private roads as such." We note, however, that the deed does not refer to the Bush plan to identify then-existing roadways and driveways for purposes of the rights of way created therein. In addition, the respondents concede that the entire length of the way from Jackson Drive to Woods Road, including

Easement C, existed at the time the Bush plan was created. Therefore, we attach no particular significance to the omission of Easement C from the Bush plan, and conclude that the trial court erred in relying upon it to find that Easement C is a "purely personal" driveway.

Ordinarily, we will remand unresolved factual issues for analysis under the appropriate legal standard. Auger v. Town of Strafford, 158 N.H. 609, 614 (2009). However, when the record reveals that a reasonable fact finder necessarily would reach a certain conclusion, we will decide the issue as a matter of law. Id. Based upon the location and configuration of the roadway of which Easement C is a part, we conclude as a matter of law that Easement C does not fall within the exception in the deed for driveways that are "purely personal in nature . . . solely for ingress to and egress from buildings on any of the premises," and not for "subdivision-development purposes." Accordingly, we reverse the trial court's ruling that the petitioners have no deeded right of way in Easement C.

As a result of the trial court's conclusion that Easement C is a purely personal driveway, it did not address the respondents' counterclaim of adverse possession. Accordingly, we remand for the trial court to address this issue.

Affirmed in part; reversed in part; and remanded.

CONBOY, LYNN, and BASSETT, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Clerk, Hillsborough County Superior Court South, 226-2010-EQ-00184
Honorable Jacalyn A. Colburn
Honorable Tina L. Nadeau
Joshua L. Gordon, Esquire
Jennifer T. Beaudet, Esquire
Thomas J. Pappas, Esquire
Timothy Gudas, Supreme Court
Allison Cook, Supreme Court
Lorrie Platt, Supreme Court
Irene Dalbec, Supreme Court
File

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

Daniel J. Kalinski, ESQ
Brennan Caron Lenehan & Iacopino PA
85 Brook Street
Manchester NH 03104-3605

Case Name: **Kenneth J. & Evelyn M. Doerr v. Philip & Dawn Tuomala**
Case Number: **226-2010-EQ-00184**

Enclosed please find a copy of the court's order of June 18, 2014 relative to:

Order on May 12, 2014 Hearing

June 20, 2014

Marshall A. Buttrick
Clerk of Court

(574)

C: Thomas J. Pappas, ESQ; Jennifer Turco Beaudet, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
NO. 226-2010-E-00184

Kenneth J. Doerr and Evelyn M. Doerr

v.

Philip E. Tuomala and Dawn B. Tuomala

ORDER

This case arises from a dispute between the petitioners, Kenneth J. Doerr and Evelyn M. Doerr ("the Doerrs"), and the respondents, Philip E. Tuomala and Dawn B. Tuomala ("the Tuomalas"), concerning the Doerrs' claim that they have a right to use a certain "travel way" in Wilton, New Hampshire. This "travel way" consists of what has been referred to by this Court and the parties as: Easements C, D, E, Woods Road, and Jackson Drive. The extensive facts and exact wording of specific deeds describing the area and this "travel way" have been set forth in previous orders and the Court incorporates those facts here.

In previous pleadings and at a bench trial conducted in June of 2012, the Doerrs *claimed that they had* an easement by deed that allowed them to use the "travel way," specifically Easement C, which traverses the Tuomalas' property. The Tuomalas, however, maintained that the deed at issue granted no such easement. Moreover, they argued that even if the deed granted the Doerrs an easement, the Tuomalas had extinguished the alleged easement by adverse possession. After the two-day bench trial, which included a view of the properties, this Court (Colburn, J.) determined that the

deeded easement rights benefited the Doerrs' property, but held that the deed at issue had not granted an easement to the Doerrs' predecessors in title to use Easement C, as it was a "purely personal" driveway over which the Doerrs had no right of way. As such, the Court denied the Doerrs' request for a declaratory judgment. Because the Court concluded that Easement C was a purely personal driveway, it did not address the Tuomalas' argument regarding adverse possession.

On appeal, the New Hampshire Supreme Court affirmed this Court's ruling that the easement rights benefitted the Doerrs' property. However, it reversed the part of the decision addressing Easement C and ruled that the deed at issue granted an easement to the Doerrs' predecessors to use at least a portion of the "travel way." It found, as a matter of law, that "Easement C does not fall within the exception in the deed for driveways that are 'purely personal in nature . . . solely for ingress to and egress from buildings on any of the premises,' and not for 'subdivision-development purposes.'" Doerr v. Tuomala, No. 2012-0598, 2013 N.H. LEXIS 145, at *6 (Dec. 3, 2013). It then remanded the case to this Court to address the Tuomalas' claim that the easement was extinguished by adverse possession.

Subsequently, a hearing was held in this Court on May 12, 2013 on the adverse possession issue. At the hearing, the Tuomalas claimed that they had extinguished the Doerrs' right to use Easement C by adverse possession in that they had performed acts thereon through open, continuous, uninterrupted, and exclusive possession of Easement C in a manner adverse to the Doerrs' or their predecessors in title for a period of twenty years. Additionally, the Tuomalas argued that if the Court did not find

that they had extinguished the Doerrs' right to use Easement C by adverse possession, that the Court should place reasonable restrictions on the Doerrs' use of Easement C. The Doerrs' argued that the Tuomalas' acts were not sufficient to terminate the Doerrs' right to use Easement C by adverse possession. They further claimed that the issue of any reasonable restrictions on the Doerrs' use of Easement C was not properly before the Court and that it had been waived by the Tuomalas because it had never been raised at any stage during the proceedings. After the hearing, the parties submitted post-hearing memoranda. As such, the Court now considers the adverse possession issue and makes findings of fact and rulings of law as set forth below.

Analysis

"It is well established that an easement acquired by grant may be extinguished through continuous adverse possession for a period of twenty years." Titcomb v. Anthony, 126 N.H. 434, 437 (1985) (citing Howard v. Britton, 67 N.H. 484, 487 (1893)). In Titcomb, a case with facts very similar to those here, the Court stated that "[a]nyone claiming adverse possession must 'show that the nature of her use . . . was sufficient to put the owner on notice that an adverse claim was being made' to the owner's rights." 126 N.H. at 437 (quoting Avery v. Rancloes, 123 N.H. 233, 238 (1983)). It noted, however, that "[t]here is a difference . . . between the type of adverse possession sufficient to acquire fee title to property and the type necessary to extinguish an easement." Titcomb, 126 N.H. at 437 (citing Regan v. Hovanian, 115 N.H. 40, 43 (1975)). The court then went on to describe the requirements to extinguish an easement:

> Since the servient tenant . . . , as long as he does not interfere with the right of user, may use his land in any manner he desires, an act which serves to start the prescriptive period in his favor must be one *clearly* wrongful as to the owner of the easement. This requires that the use of the land by the servient tenant must be one which is incompatible or irreconcilable with the authorized right of use. Thus, the erection of permanent structures, such as building[s] or walls, or other obstructions seriously interfering with the right of use, are sufficient to extinguish the right. The erection of fences or gates, however, is often compatible with the continued use of an easement, and thus is not adverse. Even the use of the servient land for farming purposes does not necessarily bar the exercise of an easement. But where the land over which the use is authorized is fenced off and used by the servient owner in a way which indicates the exercise of exclusive dominion by him incompatible with the future exercise of the easement, such use is adverse and thus sufficient to commence the prescriptive period.

Titcomb, 126 N.H. at 437-38 (quoting 3 Powell on Real Property ¶ 424, at 34-258 through 34-260 (1984 ed.) (emphasis in original)).

Here, the Tuomalas have established that they put up "No Trespassing" signs throughout the right-of-way, including on Easement D and/or Jackson Drive. They admit, however, that none of the signs were on Easement C. Additionally, they installed a gate at the end of Woods Road where it meets Old County Farm Road. Mr. Tuomala testified that he decided to put in the gate to stop hunters and others from using the ways that he maintains for ingress to and egress from their home. Again, however, they acknowledged that the gate is not located on their property. The Tuomalas also stopped various people they encountered on Easement C, including the Doerrs, and told them that they were trespassing and that they needed to leave the area.

The Court, however, cannot find that these actions seriously interfered with the Doerrs' right of use and thus must conclude that they are not sufficient to extinguish the easement. The Tuomalas did not build any permanent structures on Easement C, nor

did they place any signs on Easement C. The gate and the signs (not on their property) could not have reasonably kept anyone off Easement C or conveyed to anyone that the Tuomalas had the exclusive use of Easement C. Additionally, when they encountered a few people on their property, the only action they took was to tell them to leave. Although the Tuomalas' desire to exclude others from the property is understandable, their actions cannot constitute "exclusive dominion" or show something that is "clearly wrongful" to the owner of the easement. Titcomb, 126 N.H. at 437 (citation omitted). Even considering any past actions taken by the Tuomalas' predecessors in title to contribute to the twenty year required period, none of the actions can be considered "adverse" in the extinguishment context.

However, this does not mean that the Doerrs' use of Easement C is completely unrestricted. "[E]very right of way of the type involved here is subject to the 'rule of reason.'" Titcomb, 126 N.H. at 438 (citing Cote v. Eldeen, 119 N.H. 491, 493-94 (1979)). The rule provides that:

> the rights of the parties to a right-of-way are questions of fact that must be determined in light of the surrounding circumstances, including the location and uses of both parties' property, and by taking into consideration the advantage of one owner's use and the disadvantage to the other owner caused by the use.

Titcomb, 126 N.H. at 438-39 (quoting Delaney v. Gurrieri, 122 N.H. 819, 821 (1982)). In applying the reasonable use doctrine, the Court considers: "the relative location of the parties' lots [and the right-of-way] . . .; the physical characteristics and topography of the area in general, and of the right-of-way in particular; the past use of the right-of-way . . .; and the surrounding circumstances as they existed when the right-of-way was created .

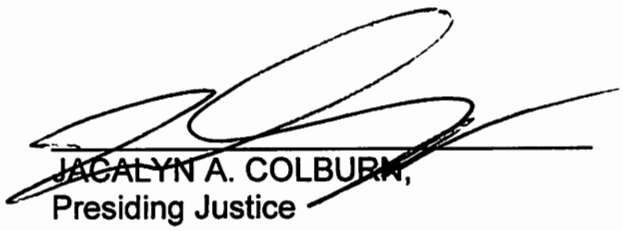
. . ." Delaney, 122 N.H. at 821-22 (citation omitted). Contrary to the Doerrs' assertion that the Court, at this juncture, cannot decide any limitations on the Doerrs' use of Easement C, the Court finds that from the testimony at the bench trial, as well as a view of the property, it has sufficient facts to render such a determination.

In this case, the "travel way," including the use of Easement C, is the only access that the Tuomalas have to their home. Thus, they alone must maintain it to ensure that they and emergency vehicles always have access. However, it is a narrow dirt road and portions of it are at times under water. Break downs are not unlikely and any disabled vehicle on the "travel way" could potentially block the limited access that the Tuomalas and any emergency vehicle have. As such, it is clear that any increased vehicular traffic could result in increased maintenance and affect the Tuomalas' own access to their home. In contrast, the Doerrs only use their own nearby property, upon which there are no buildings, for recreational purposes. It has been well established that there is no need for the Doerrs to use Easement C to gain access to their property. Their use of Easement C is purely for recreational pleasure. Because the Doerrs have no need for access on Easement C, any vehicular use by them would greatly disadvantage the Tuomalas while not benefitting the Doerrs in any meaningful way. Accordingly, the Court finds that the Doerrs should be reasonably limited in their use of Easement C to non-vehicular traffic. Additionally, as there is no need for the Doerrs to use Easement C to gain access to their property, use after daylight hours is only appropriate with prior approval from the Tuomalas. As such, the Doerrs shall use Easement C in a reasonable fashion consistent with this Order.

In light of these findings, the Court GRANTS the Doerrs' request for permanent injunction, consistent with this Order.

So ordered.

Date: June 18, 2014



JACALYN A. COLBURN,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
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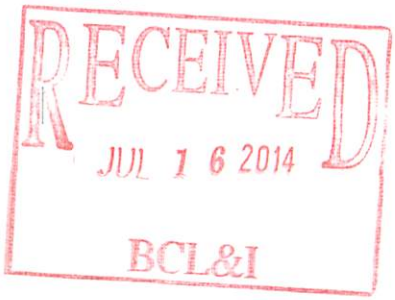
NOTICE OF DECISION



DANIEL J. KALINSKI, ESQ
BRENNAN CARON LENEHAN & IACOPINO PA
85 BROOK STREET
MANCHESTER NH 03104-3605

Case Name: **Kenneth J. & Evelyn M. Doerr v. Philip & Dawn Tuomala**
Case Number: **226-2010-EQ-00184**

Please be advised that on July 11, 2014 Judge Colburn made the following order relative to:

Petitioner's Motion for Partial Reconsideration of Remand Order; MOTION DENIED for the reasons stated in the respondent's objection. The Court's reference to vehicular traffic in its prior order, was intended to mean motorized vehicles, not bicycles.

July 15, 2014

Marshall A. Buttrick
Clerk of Court

(293)

C: Thomas J. Pappas, ESQ; Jennifer Turco Beaudet, ESQ

Parcel right refused see vol. 2764 p 68 (Lot 1)

BK-2652 PGE-736

WARRANTY DEED

JOHN H. BUSH, a married man, of Burton Highway, Wilton in the County of Hillsborough and State of New Hampshire,

FOR CONSIDERATION PAID, grants to:

CONVEST CORPORATION, a Delaware corporation with a principal place of business at 2 Wellman Avenue, Nashua in the County of Hillsborough and State of New Hampshire,

WITH WARRANTY COVENANTS:

a certain tract of land, with all buildings (except the moveable cattle and farm equipment sheds and feeding pens, which are considered personal property) thereon, situated in Wilton in the County of Hillsborough and State of New Hampshire, on the southerly side of Burton Highway, consisting of THREE HUNDRED NINETY-TWO AND ONE-HALF (392.5) acres, more or less, and being shown as Lot 5 on plan of land entitled "SUBDIVISION PLAN OF LAND, THE JOHN BUSH FARM, WILTON, N.H., SCALE: 1" = 400', Oct. 18, 1973, THOMAS F. MORAN INC., SURVEYORS, CIVIL ENGINEERS, LAND PLANNERS", to be recorded herewith in the Hillsborough County Registry of Deeds, bounded and described as follows, to wit:

Beginning at the northeast corner of the lot at Point A on the southerly sideline of the Burton Highway, said point also being the northwest corner of Lot 3; thence by Lot 3

(1) S 03°-26'-30" W - 200.39', (2) S 09°-34'-19" W - 55.43', (3) southerly R = 675.00' L = 142.53' (4) S 21°-40'-13" W - 91.94', (5) southerly R = 725.00' L = 134.74', (6) S 11°-01'-18" W - 258.41', (7) southerly R = 175.00' L = 13.31', (8) N 85°-31'-17" W - 189.75', (9) N 84°-03-00" W -134.49', (10) N 84°-43'-29" W - 451.36', (11) S 05°-08'-49" W - 60.12', (12) S 05°-38'-27" W - 193.81', (13) S 56°-11'-29" E - 146.87', (14) S 44°-17'-24" E - 100.23', (15) S 66°-22'-37" E - 139.09', (16) S41°-11'-07" E - 85.18', (17) S 27°-26'-42" E - 164.05', (18) S 50°-25'-15" E - 167.20', (19) S 59°-01'-07" E - 40.77', (20) S 41°-10'-04" E - 9.23' to Point B, said point being the southwest corner of Lot 4; thence (21) S 41°-10'-04" E - 299.35' to Point C; thence (22) S 06°-15' W - 722', (23) S 06°-00'W - 778' to Point D; thence (24) N 83°-30' W - 137', (25) N 80°-30' W - 28', (26) N 84°-00'-W - 114', (27) N 83°-30' W -1291', (28) N 82°-00' W - 133', (29) S 16°-00' W - 62', (30) S 17°-45' W - 140', (31) S 37°-00'W - 35', (32) S18°-00' W - 68', (33) S 42°-30' W - 39', (34) S 22°-00' W - 220', (35) S 41°-00' W - 199', (36) S 23°-00' W - 55', (37) S 13°-00' W - 34', (38) S 24°-00' W - 27', (39) S 09°-00' W - 37', (40) S 16°-00' W 60', (41) S 25°-00' W - 48", (42) S 05°-00' E - 41', (43) S 13°-00' E - 132', (44) S 14°-00' E - 157', (45) S 07°-00' E - 31', (46) S 02°-30' W -45', (47) N 89°-00' W - 61', (48) N 88°-00' W 40', (49) N 86°-00' W -112', (50) N 84°-00' W - 200', (51) N 85°-00' W - 125', (52) N 86°-00' W - 226', (53) N 87°-00' W - 30', (54) N 85°-00' W - 61', (55) N 85°-00' W - 173' to Point E; thence (56) N 05°-45' E - 193', (57) N 02°-45' E - 47', (58) N 00°-15' E 87', (59) N 04°-45' E - 652', (60) N 05°-15' E - 407', (61) N 04°-45' E - 148', (62) N 03°-45' E - 190', (63) N 15°-00' E - 64', (64) N 36°-45' W - 69', (65) N 35° 30' W - 140', (66) N 37°-00' W 123', (67) N 37°-30' W - 45', (68) N 47°-00' W - 144', (69) N 52°-45' W - 260', (70) N 59°-45' W - 122', (71) N 80°-15' W - 126', (72) N 84°-45' W - 152', (73) N 88°-45' W - 134', (74) N 87°-15' W 72', (75) N 76°-45' W - 29', (76) N 84°-30' W - 124', (77) N 88°-45' W - 170, (78) N 79°-15' W - 90', (79) S 76°-45' W - 99',

Nov 8 | 14 PM '78

STATE OF NEW HAMPSHIRE TAX ON TRANSFER OF REAL PROPERTY RSA 78-B 800.00 NOV-8'78 89120

STATE OF NEW HAMPSHIRE TAX ON TRANSFER OF REAL PROPERTY RSA 78-B 600.00 NOV-8'78 89120

LAW OFFICES OF TEVER & SULLIVAN WILTON, N. H.

(80) S 75°-30' W - 177', (81) N 05°-30' E - 180', (82) N 07°-15' E - 198', (83) N 05°-15' E - 198', (84) N 05°-15' E - 104', (85) N 81°-30' W - 104', (86) N 83°-00' W - 200', (87) N 82°-15' W - 198', (88) N 82°-30' W - 199', (89) N 83°-15' W 137', (90) N 82-15' W - 200', (91) N 86°-00' W - 33' to Point F, said point being a corner of stone walls on the Temple/Wilton line and at land of Eugene S. and Isabella H. Martin; thence (92) N 04°-45' E - 194', (93) N 05°-00' E - 199', (94) N 04°-45' E - 200', (95) N 04°-15' E - 200', (96) N 04°-15' E - 199', (97) N 05°-15' E - 119', (98) N 04°-45' E - 114', (99) N 03°-45' E - 149' to Point G; thence (100) S 85°-15' E - 172', (101) S 85°-15' E - 129', (102) S 87°-30' E - 900', (103) S 80°-00' E - 465', (104) N 71°-30' E - 173', (105) S 03°-30' W - 55' to Point F said point also being the most northerly corner of Lot 1; thence (106) S 69°-00'-00" W - 69.19', (107) S 03°-29'-43" W - 571.54', (108) N 63°-33'-15" W - 12.08', (109) northwesterly R = 90.00' L = 94.01', (110) N 03°-42'-11" W 226.46', (111) N 86°-30'-17" W - 115.25', (112) S 03°-29'-43" W - 470.27', (113) S 76°-21'-29" E - 119.57', (114) S 78°-10'-47" E - 155.85' to Point J; thence (115) S 03°-29'-43" W - 132.72', (116) southerly R = 1225.00 L = 245.47', (117) southerly R = 575.00' L = 200.27', (118) S 11°-58'-13" W - 286.30', (119) S 83°-21'-20" E - 50.22' to Point K, said point being the southwest corner of Lot 2; thence (120) S 83°-21'-20" E - 1653.03', (121) N 06°-20'-13" W - 335.38', (122) N 02°-28'-27" W - 316.47', (123) N 07°-10'-10" W - 169.95', (124) N 01°-12'-32" W - 166.38', (125) N 03°-19'-31" W - 150.94', (126) N 80°-59'-13" W - 370.15', (127) N 79°-40'-21" W - 233.48', (128) N 04°-50'-00" E - 478.73', (129) N 85°-09'-07" W - 120.64', (130) N 05°-18'-12" E - 41.76' (131) N 25°-46'-12" W - 51.49', (132) N 25°-27'-45" W - 170.06', (133) N 23°-47'-30" W 117.23', (134) N 26°-36'-15" W - 316.98', (135) N 56°-07'-17" W 223' to Point L at the Old County Road; thence (136) N 64°-00' E - 51', (137) N 51°-30' E - 55', (138) N 48°-30' E - 39', (139) N 33°-45' E - 36', (140) N 36°-15' E - 98', (141) N 36°-30'E - 194', (142) N 48°-30' E - 58', (143) N 30°-15' E - 48' to Point M at the Burton Highway; thence (144) S 84°-30' E - 145', (145) S 78°-00' E - 62', (146) S 73°-45' E - 103', (147) S 72°-30' E - 89', (148) S 71°-30' E - 40', (149) N 87°-30' E - 41', (150) N 67°-15' E -59', (151) N 59°-30' E - 125', (152) N 64°-45' E - 74', (153) N 68°-45' E - 248', (154) N 74°-15' E - 68', (155) N 74°-45' E - 114', (156) N 80°-15' E - 57', (157) N 75°-00' E - 70', (158) N 80°-45' E - 77', (159) S 89°-30' E - 104', (160) S 87°-30' E - 236', (161) S 83°-15' E - 146', (162) N 81°-30' E - 137', (163) N 73°-00' E - 121', (164) N 70°-15' E - 100', (165) N 76°-30' E - 65', (166) N 75°-45' E - 64', (167) N 85°-30' E - 44', (168(S 81°-30' E - 37', (169) S 70°-00' E - 32', (170) S 57°-30' E - 20', (171) S 48°-00' E - 24', (172) S 51°-00' E - 128', (173) S 51°-45' E - 243', (174) S 53°-00' E - 94', (175) S 37°-00' E - 157', (176) S 25°-00' E - 203', (177) S 24°-15' E - 193', (178) S 26°-15' E - 230', (179) S 29°-00' E - 293', (180) S 27°-15' E - 143', to Point A, the bound of beginning.

Meaning and intending to convey:

1. A portion of the premises conveyed to John H. Bush and Corine N. Bush by Charles B. Sullivan, administrator of the estate of Danforth Jackson, by deed dated November 20, 1974, and recorded in said Registry of Deeds, Vol. 2381, Page 49 (see also Vol. 2416, Page 452);

2. A portion of the premises conveyed to John H. Bush by David Beebe et als by deed dated July 7, 1975, and recorded in said Registry of Deeds, Vol. 2411, Page 85; and

Addendum p. 51

3. All of the premises conveyed to John R. Bush by Royden C. Sanders, Jr., by deed dated August 6, 1976, and recorded in said Registry of Deeds, Vol. 2473, Page 41.

SUBJECT TO AND TOGETHER WITH all easements, reservations, flowage rights, highways, rights of way, and the like referred to in purchase and sale agreement between the GRANTOR and the GRANTEE dated August 9, 1978, as amended by letters from Charles B. Sullivan, attorney for the GRANTOR, to the GRANTEE dated August 10, 1978, and October 11, 1978, and in any or all of the deeds or instruments herein or therein mentioned, or of other record. The streams and pond on the premises are a part of the headwaters of the water supply of the Town of Wilton and as such are subject to any town ordinances or state statutes which might relate thereto.

THE GRANTOR AND THE GRANTEE, their respective heirs, devisees, executors, administrators, successors and assigns, shall have joint and unlimited rights of way over all existing roadways, whether public or private, and which are now the property of the GRANTOR to convey, as well as over future roadways built by the GRANTOR or the GRANTEE, their respective heirs, devisees, executors, administrators, successors and assigns (except for those driveways which are purely personal in nature and are soley for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes). Such rights of way shall, to the extent necessary, be FIFTY (50) feet in width, and should, at a later date, the town, county or state increase the required road width beyond FIFTY (50) feet, the width of said rights of way shall be accordingly increased, if reasonably possible, insofar as is necessary to comply with the public highway conveyance obligation hereinafter set forth. Said rights of way shall not be limited to the land herein being conveyed, but shall be extended to and may be used in conjunction with other land presently owned by the GRANTOR (see plan of land entitled: SUBDIVISION PLAN OF LAND, THE JOHN BUSH FARM, WILTON, N. H., SCALE: 1" = 200', OCT. 18, 1978, THOMAS F. MORAN, INC., SURVEYORS, CIVIL ENGINEERS, LAND PLANNERS", to be recorded herewith, as well as land hereinafter acquired by the GRANTOR and/or the GRANTEE, their respective heirs, devisees, executors, administrators and assigns in the general area, provided said lands have common boundaries with the premises presently owned by the GRANTOR, included those being hereby conveyed.

IT IS A STRICT CONDITION AND COVENANT of this deed, binding upon the GRANTOR and the GRANTEE, and their respective heirs, devisees, executors, administrators, successors and assigns, and a covenant running with the land, binding not only on the premises herein conveyed but also on other land of the GRANTOR and the GRANTEE, presently owned or hereinafter acquired, all as above referred to and limited in the preceding paragraph, which condition and covenant is for the benefit of all of said land, that if the Town of Wilton, the County of Hillsborough or the State of New Hampshire should ever desire to take, or should any of the latter at the request of any of the former be inclined to take any or all of said roadways, or any part of them, for public highway or highways, then the GRANTOR and the GRANTEE, or their successors in interest, shall, from time to time and without charge, convey to the Town of Wilton, the County of Hillsborough or the State of New Hampshire as the case may be, all their respective interest in as much of said roadways as is necessary for making said roadways, or any one or any parts thereof, public highway or highways, or public

road or roads.

AND THE GRANTOR further covenants and agrees that should the GRANTEE subdivide the premises herein conveyed within a period of ten (10) years from the date hereof, Lot 1, Lot 3 and Lot 4 shown on said plans shall thereafter be subdivided in a manner which will not be in disharmony with the GRANTEE'S subdivision, restrictions and use.

FURTHER RESERVING TO THE GRANTOR, his heirs, devisees, executors, administrators and assigns, the right to use without charge for a period of no more than TEN (10) years for the GRANTOR'S BEEFALO PROJECT any and all land within the flood boundary shown on the floodway map as well as any other land presently being used by the GRANTOR for such project, including the fields lying west of the old town road (Old County Road), provided that if such used fields or any part of them, are hereafter sold and conveyed, the right to use them or any such part so sold shall terminate at the end of the year of sale. The use of the land within the flood boundary for this purpose shall be limited to twice the acreage presently utilized.

FURTHER GRANTING to the GRANTEE, its successors and assigns, the right of first refusal to purchase any other real estate (except for Lot 2 as shown on said plans) of the GRANTOR which was conveyed to him in the deeds above referred to and is not being conveyed to the GRANTEE under this instrument, or any part thereof, at any price which the GRANTOR may have been offered bona fide and which he bona fide desires to accept. An opportunity to purchase for a period of thirty (30) days after written notice shall satisfy the foregoing provision. Said written notice mailed prepaid, certified or registered, return receipt requested, to the GRANTEE its successors or assigns), at its last known address, shall satisfy the notice requirement. The thirty (30) day period shall commence upon the mailing of the notice. Exercise of the right of first refusal shall be in writing, similarly mailed, and be posted within said thirty (30) day period. This right of first refusal shall terminate upon the earliest of the following:

(1) Ten (10) years from the date hereof; or

(2) When the offer has been made and the right of first refusal has not been exercised within said thirty (30) day period, but only insofar as the premises offered are concerned, provided the right to purchase arises, as above provided, as a result of a bona fide offer to purchase; or

(3) If, after the exercise of the right by the GRANTEE, its successors or assigns, the purchase price is not actually tendered to the GRANTOR, or his successors in interest, in cash or by certified or cashier's check, within thirty (30) days after such exercise.

The affidavit of the GRANTOR, or his successors in interest, that said right of first refusal has terminated because of any of the above happenings, shall terminate all rights hereunder insofar as any subsequent innocent purchaser for value is concerned.

The right of first refusal shall not prohibit the GRANTOR from conveying or otherwise transferring said premises, or any part thereof, to any blood member of his or his wife's immediate family, by deed or otherwise, nor from mortgaging the same, as if such right of first refusal did not exist, but any such conveyance,

transfer or mortgage shall be made subject to the continuance of said right of first refusal.

AND THE GRANTOR further promises and covenants, for himself, his heirs, devisees, executors, administrators and assigns, which promis shall be a covenant running with the land, that at such time as the roadway leading from the Burton Highway southerly along with westerly side of Lot 4 and then between Lot 3 and Lot 4, as shown on said plans, becomes a public highway, he will convey to the GRANTEE, its successor or assigns, in consideration of the sum of ONE (1) DOLLAR, that part of Lot 3 and Lot 4 which is bounded and described as follows:

Beginning at the northeasterly corner of the premises at a point on the westerly side of Burton Highway; thence

1) S 5° 27' 20" W by land of Richard H. St Clair, 665.07 feet to a point; thence

2) N 77° 28' 32" W, 358.93 feet to a point on the westerly side of a Private Drive; thence

3) northerly in a gentle interior curve the radius of which is 175.00 feet, for a distance of 106.68 feet to a point; thence

4) N 11° 01' 18" E, 258.41 feet to a point; thence

5) northerly in a gentle exterior curve, the radius of which is 725.00 feet for a distance of 134.74 feet to a point; thence

6) N 21° 40' 13" E, 91.94 feet to a point; thence

7) northerly in a gentle interior curve the radius of which is 675.00 feet for a distance of 142.53 feet to a point; thence

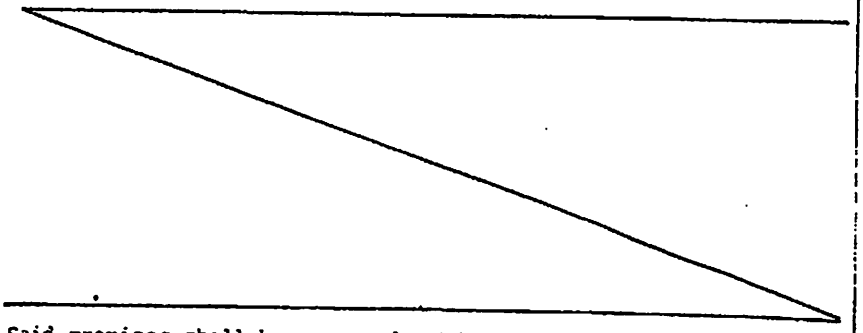
8) N 9° 34' 19" E, 55.43 feet to a point, (the last 6 boundaries all being by said Private Drive); thence

9) N 3° 26' 30" E, 200.39 feet to a point on the westerly side of Burton Highway; thence

10) S 26° 24' 30" E by said Burton Highway 410.88 feet to the bound of beginning.

Containing 5.158 acres, be the same more or less.

The Private Drive referred to in the preceding description is the roadway which may become a public highway, thus triggering the conveyance to the GRANTEE.



Said premises shall be conveyed subject to the public highway-to-be and only upon receipt of approval from the Hilton Planning Board, the intent of the parties being that that portion of the premises to be conveyed which will lie westerly of the public highway-to-be is to become a part of Lot 5, while that portion lying easterly thereof is to become a separate lot.

AND I, BARBARA A. BUSH, wife of the GRANTOR, JOHN F. BUSH, hereby release my homestead rights and any other rights I may have in the above premises herein conveyed.

The 1978 real estate taxes are to be prorated as of the date of the delivery of this deed.

IN WITNESS WHEREOF we, the said JOHN H. BUSH and BARBARA A. BUSH, husband and wife, have hereunto set our hands and seals this 3rd day of November A. D., 1978.

C S Sullivan
Witness

John H. Bush
John H. Bush

G. Smith
Witness

Barbara A. Bush
Barbara A. Bush

STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS.

The foregoing instrument was acknowledged before me this 3rd day of November A. D., 1978, by John H. Bush and Barbara A. Bush.

C S Sullivan
Justice of the Peace
~~Notary Public~~

BK-2652 PGE-741