STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Mark Stengel & Susan Stengel
v.
Town of Brookfield

Docket No.: 212-2014-CV-00104

ORDER ON DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Mark Stengel and Susan Stengel (the "Stengels"), bring this action against the defendant, the Town of Brookfield (the "Town"), seeking declaratory and injunctive relief relating to the Town's plan to move the location of Brice Drive, a traveled roadway, asserting that the relocation of the roadway would constitute a taking in violation of Part I, Article 12 of the State Constitution and Article XIV of the Federal Constitution. The Town asserts a counterclaim seeking a declaratory judgment that it is permitted to move the location of Brice Drive within the deeded right of way, and that the right of way is as depicted on certain plans.

The Town moved for summary judgment on its counterclaim. (Court index #7.) The Stengels objected. (Court index #8.) After a hearing, the Town filed a notice relating to its motion, and the Stengels further objected.[1] (Court index #10, 11.) On November 9, 2015, the court issued an order denying the Town's motion, finding that a genuine dispute of fact existed regarding the location of the Brice Drive right of way—a fact that is essential to a determination regarding the Town's ability to move the traveled

[1] In their further objection, the Stengels requested that the court view Brice Drive and surrounding properties before entering an order on the Town's motion. (Pls.' Further Obj. Def.'s Mot. Summ. J. ¶ 5.) Because the court has access to photographs of the scene as well as the Noyes survey, the court concludes that a view would be unnecessary and denies the Stengels' request. See Kallgren v. Chadwick, 134 N.H. 110, 115–16 (1991) (denial of view request not plainly wrong because cumulative of photographs of scene); RSA 519:21 (2007) (court "may, in [its] discretion," order a view).

roadway. (Court index #13.) The Town subsequently submitted a renewed motion for summary judgment accompanied by additional evidence, to which the Stengels objected. (Court index #14, 16.) After considering the parties' arguments, the factual circumstances of the case, and the applicable law, the court GRANTS the Town's renewed motion for summary judgment.

I. Factual Background

The following facts are undisputed or are otherwise agreed upon by the parties, unless otherwise indicated. In June of 1962, surveyor Stephen H. Boomer ("Boomer") prepared a plan (the "1962 plan") for a subdivision known as Cedar Park, which is located in Brookfield. (Def.'s Mot. Summ J., Ex. B.) The subdivision developer, Robert Palmer ("Palmer"), recorded this plan at the Carroll County Registry of Deeds the following month. (Id., Ex. B.)

The 1962 plan depicts, among other things, the rights of way for several roadways within the subdivision, including the roadways known as Brice Drive and Piney Road. (Id., Ex. B.) In 1975, Palmer conveyed these roadways to the Town by quitclaim deed. (Def.'s Mot. Summ. J., Ex. A.) The deed stated, in relevant part:

> THAT I, ROBERT T. PALMER, . . . grant to THE TOWN OF BROOKFIELD . . . all right, title and interest in and to Brice Drive and Piney Road, including the underlying fee therein, in Brookfield, County of Carroll and State of New Hampshire, being approximately 50 feet wide, as now laid out on the ground and shown on [the 1962 plan], said Brice Drive extending southwesterly of Route 109 approximately 1792 feet to intersect with Piney Road, which extends northwesterly approximately 800 feet from Sanborn Road, so-called, including the right to maintain in place such culverts, drains and alterations of natural water courses as now exist . . .

(Id. (emphasis added).)

The traveled way of Brice Drive—i.e., the paved portion of the road laid out on the ground—is not, however, the same size as the right of way depicted in the 1962 plan; the right of way is wider than the traveled way. (Def.'s Ex. A; Pls.' Ex. 1.) According to the 1962 plan, there is a kink and/or curve in the right of way located directly in front of a parcel of property—Lot 13. (Def.'s Mot. Summ J., Ex. B.)[2] The traveled way is also curved at that location; though, because the traveled way and right of way are different sizes, the westerly edge of the traveled way is not in the same location as the westerly edge of the right of way. (See id., App. 2 to Ex. C; Def.'s Ex. A; Pls.' Exs. 1, 3–4.)

In January of 1984, Susan Stengel purchased the parcel referred to as Lot 13 in the 1962 plan (the "Stengel property"). (Def.'s Mot. Summ J., Ex. B; Pls.' Obj. Def.'s Mot. Summ. J., Ex. C ¶ 1.) She subsequently transferred the property to herself and Mark Stengel by quitclaim deed in October of 1991. (Pls.' Obj. Def.'s Mot. Summ. J., Ex. B.) That deed describes the Stengel property as:

> A certain lot or parcel of land together with the buildings thereon, situated in the Town of Brookfield, County of Carroll, State of New Hampshire, on the [s]outherly side of Route 109, leading from Sanbornville to Brookfield Corner, said Lot being known as LOT NO. 13 on the [w]esterly side of Brice Drive leading from Route 109 at Brookfield to the Sanborn Road in Cedar Park, a residential development, as shown on [the 1962 plan.]

(Id., Ex B.)

Recently, the Town has considered repaving Brice Drive. (Id. ¶ 4; Def.'s Mot. Summ. J. ¶ 2.) In preparation for this, the Town retained a surveyor, Brian Berlind ("Berlind"), to determine the location of the right of way. (Def.'s Mot. Summ. J., Ex. C ¶ 1.) Berlind reviewed the 1962 plan, conducted a closed traverse study of Brice Drive,

[2] This curve is also depicted in a subsequent plan, which was drafted and recorded in 1977. (Def.'s Mot. Summ J., Ex. E.)

and prepared a new plan[3] for the Town (the "Berlind plan"). (Id., Ex. C ¶¶ 2–3, App. 2 to Ex. C.) Berlind concluded that the traveled way is not located within the right of way depicted in the 1962 plan, but is, rather, encroaching on the lot across the street from the Stengels. (Id., Ex. C ¶¶ 4–5; see Pls.' Ex. 1 (copy of Berlind plan highlighting traveled way crossing over property line and onto another lot).) Because of this conclusion, the Town began exploring whether it should move the location of the traveled way. (Pls.' Obj. Def.'s Mot. Summ. J. ¶ 4; see Def.'s Mot. Summ. J. ¶¶ 4–5.)

The Stengels oppose the relocation of the traveled way, asserting that the Berlind plan improperly depicts a portion of the Stengel property as being part of the right of way. (Pls.' Obj. Def.'s Mot. Summ. J. ¶ 4; Def.'s Mot. Summ. J. ¶ 4.) The Stengels have used that portion of property as part of their front yard "[o]ver the years"; it contains several trees, shrubs, flowers, and rock gardens, which they have maintained. (Pls.' Obj. Def.'s Mot. Summ. J., Ex. C ¶¶ 5, 9; see also Def.'s Mot. Summ. J., Ex. C ¶ 5; Pls.' Exs. 2–5 (photographs of disputed area).) They rely, in part, on the fact that the traveled way of Brice Drive has been in the same location for approximately 50 years. (See Pls.' Obj. Def.'s Mot. Summ. J., Ex. C. ¶¶ 2, 8 (indicating that paved portion of Brice Drive is in the same location today as the graveled[4] portion was when Susan Stengel was approximately eleven or twelve years old[5]).)

The Stengels retained a surveyor, David R. Noyes ("Noyes"), to verify their position with respect to the location of the right of way. (See Def.'s Ex. A.) Noyes

[3] While Berlind's affidavit refers to this document as a "plan[,]" it appears to be a computer-aided design drawing of a field survey. (See Def.'s Mot. Summ. J., Ex. C ¶ 3; Def.'s Ex. A.)
[4] At some time prior to 1984, Brice Drive—which had previously been graveled—was paved. (Pls.' Obj. Def.'s Mot. Summ. J., Ex. B, Ex. C ¶¶ 1–3.)
[5] Although Susan Stengel's affidavit does not state her current age, at the hearing, her counsel made an offer of proof, indicating that she would testify that she was that age approximately fifty years ago.

reviewed, among other things, the 1962 plan and the Berlind plan, before preparing a field survey (the "Noyes survey"). (Id.) The Noyes survey indicates that Berlind was mistaken about the location of the right of way, and that the right of way is actually located farther east than indicated on the Berlind plan. (Id.) Noyes also maintains that "[t]he present location of the existing paved road has no significant impact on any of the lots abutting Brice Drive." (Pls.' Obj. Def.'s Mot. Summ. J., Ex. D ¶ 4(c).)

In addition to the discrepancy between Berlind's plan and Noyes's survey, the record contains multiple mortgage inspection plots depicting a variety of distances between the Stengel's house and the edge of Brice Drive. (Compare Pls.' Obj. Def.'s Mot. Summ. J., App. A to Ex. C (fifty-six feet), with Def.'s Mot. Summ. J., Ex. F (eighteen feet).) Nevertheless, on August 29, 2015, the Town's Board of Selectmen ("BOS") voted that "for the purposes of summary judgment, the Town will utilize the alleged right of way on Brice Drive as shown [on the Noyes survey]." (Def.'s Notice of Vote ¶ 2.)

After the court found the BOS's limited acceptance of the Noyes survey to be insufficient to render the parties' dispute regarding the location of the right of way moot, (court index #13), the BOS "voted to recognize the Brice Drive right of way as illustrated on the [Noyes survey] as the true and accurate location of the Brice Drive [r]ight of [w]ay." (Def.'s Renewed Mot. Summ. J., Ex. A ¶ 2.)

II. Legal Standard

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2010). "An issue of fact is 'material' for

purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006). The moving party has the burden of proving his right to summary judgment. Concord Grp. Ins. Co. v. Sleeper, 135 N.H. 67, 69 (1991). The court "must consider the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." Id. The court may not "weigh the contents of the parties' affidavits and resolve factual issues[,]" but must simply determine "whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial." Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000).

III. Analysis

The Town seeks summary judgment on its counterclaim, which requests, among other things, a declaration regarding the location of the Brice Drive right of way. (Def.'s Answer and Countercl. 6.) Specifically, it requests that the court declare "that the Brice Drive right of way is as shown on the 1962 plan and [find] that the [T]own may . . . relocate the traveled way [] within that right of way, and further order [the Stengels] to remove any improvements they have made within the right of way or, in the alternative, . . . authorize the [T]own to remove those improvements." (Id. at 5–6.)

In its motion, the Town primarily argued that the location of the right of way is as depicted in the Berlind plan, and that this location was undisputed. (Def.'s Mot. Summ. J. ¶¶ 1–17.) However, at the hearing, the Town recognized that the Noyes survey created a genuine issue of material fact regarding the location of the right of way; it instead asserted that the BOS would likely vote to adopt Noyes's view of the location of the right

of way for the purposes of summary judgment, thus removing any genuine disputes of material fact.[6] After the BOS made such a vote, (Def.'s Notice of Vote ¶ 2), the court found the vote insufficiently definite to moot the issue. (Court index #13.) Since this time, the BOS has voted to "recognize the Brice Drive right of way as illustrated on the [Noyes survey] as the true and accurate location of the Brice Drive [r]ight of [w]ay." (Def.'s Renewed Mot. Summ. J., Ex. A ¶ 2.) The Town now argues that the new vote removes any genuine issue of material fact, and that it is entitled to judgment on its counterclaim as a matter of law. (Id. ¶ 5.)

Determination of the issues raised in the parties' pleadings will require the court to consider: (1) whether the BOS's new vote removed the genuine dispute of fact regarding the location of the Brice Drive right of way; (2) whether it is legally permissible for the Town to relocate the traveled way within the right of way; and (3) whether the court can order the Stengels to remove improvements to land located within the right of way. The court addresses each of these issues in turn.

A. Location of the right of way

First, the court agrees with the Town that the new BOS vote removed any genuine dispute of fact regarding the location of the Brice Drive right of way. Even the Stengels seem to agree. (See Pls.' Obj. Def.'s Renewed Mot. Summ. J. at 1 ("The Town has agreed to the location of the right of way . . . .").) Unlike the earlier BOS vote, the new BOS vote was not a limited acceptance. (Compare Def.'s Notice of Vote ¶ 2 ("for the purposes of summary judgment, the Town will utilize the alleged right of way on Brice Drive as shown [on the Noyes survey]"), with Def.'s Renewed Mot. Summ. J., Ex. A ¶ 2 (vote

[6] Even if the Town had not agreed, the court would have found that the Noyes survey created such a genuine issue of material fact regarding the location of the right of way. (See court index #13 n.5.)

indicated that the Town would "recognize the Brice Drive right of way as illustrated on the [Noyes survey] as the true and accurate location of the Brice Drive [r]ight of [w]ay") (emphases added).) The new vote is sufficiently definite and final to render the issue moot. See 5 R. Wiebusch, New Hampshire Practice: Civil Practice and Procedure § 39.09, at 36-13 (2014) ("[T]he need for declaratory relief may be rendered moot by . . . actions that show that one of the parties has definitely and finally abandoned his adverse position. . . . In order to render [a] request for declaratory judgment moot, the controversy between the parties must be finally and conclusively resolved. " (emphasis added)). Thus, the court concludes that there is no longer a genuine dispute of fact regarding the location of the Brice Drive right of way. As the parties have agreed, the location of the Brice Drive right of way is as depicted in the Noyes survey.

B. Relocation of the traveled way within the right of way

Second, the court addresses the Town's ability to relocate the traveled way within the right of way. The Stengels concede that, as a general rule, the Town would be permitted to relocate the traveled way within the right of way. (Pls.' Further Obj. Def.'s Mot. Summ. J. ¶ 2.) However, they assert, among other things,[7] that the general rule does not apply here because the deed language is patently ambiguous as to whether the deed required the traveled way to remain "as [then] laid out on the ground . . . ." (Id. ¶ 3; see Def.'s Mot. Summ. J., Ex. A.)

The interpretation of a deed is a question of law to be decided by the court. Duxbury-Fox v. Shakhnovich, 159 N.H. 275, 279 (2009); Thurston Enter., Inc. v. Baldi,

[7] The Stengels argue that the Town has failed to establish that there is an "occasion or need" for relocation of the Brice Drive right of way. (Pls.' Obj. Def.'s Renewed Mot. Summ. J. at 2); see RSA 231:8 (2009). However, because the Town has yet to begin the statutory alteration process, the issue is not yet ripe for this court's review. Petition of State of N.H. (State v. Fischer), 152 N.H. 205, 210 (2005), superseded by rule on other grounds as stated in State v. Mottola, 166 N.H. 173, 176 (2014).

128 N.H. 760, 765 (1986). "Defining the rights of the parties to an expressly deeded easement requires determining the parties' intent in light of circumstances at the time the easement was granted." Dumont v. Town of Wolfeboro, 137 N.H. 1, 5 (1993). "If the terms of the deed are clear and unambiguous, those terms control how [the court] construe[s] the parties' intent." Mansur v. Muskopf, 159 N.H. 216, 221 (2009) (quotation omitted). If "the words of the deed are clear and their meanings unambiguous," there is no need for the court to refer to extrinsic facts or circumstances, or to apply the "rule of reason" to determine the deed's meaning. Lussier v. New England Power Co., 133 N.H. 753, 756 (1990). When, however, the deed language is ambiguous or vague, the court may rely on "[e]xtrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance . . . to clarify the terms." Flanagan v. Prudhomme, 138 N.H. 561, 566 (1994). "A deed is patently ambiguous when the language in the deed does not provide sufficient information to adequately describe the conveyance without reference to extrinsic evidence." Id.

As noted above, Palmer conveyed Brice Drive to the Town by quitclaim deed in 1975. (Def.'s Mot. Summ. J., Ex. A.) The deed conveyed "all right, title and interest in and to Brice Drive . . . , including the underlying fee therein, . . . being approximately 50 feet wide, as now laid out on the ground and shown on [the 1962 plan]" to the Town. (Id. (emphasis added).)

The court disagrees with the Stengels that this language is patently ambiguous. Here, the deed contains "sufficient information to adequately describe the conveyance[.]" See Flanagan, 138 N.H. at 566. Specifically, the language in the deed clearly conveyed Brice Drive "as now laid out on the ground and shown on [the 1962

plan.]" (Def.'s Mot. Summ. J., Ex. A); see Mansur, 159 N.H. at 221. Contrary to the Stengels contention, the phrases "as now laid out on the ground" and "as . . . shown on [the 1962 plan]" are not inconsistent. (Def.'s Mot. Summ. J., Ex. A .) Indeed, the Noyes survey—the survey both parties have adopted as identifying the correct location of the right of way—depicts the traveled way within the right of way. (See Def.'s Ex. A.) That the traveled way and the right of way are different sizes does not alter this result; the deed conveyed Brice Drive as a whole—both the traveled way and the right of way.

Additionally, to the extent the Stengels argue that the deed contained either a restrictive covenant or a condition subsequent, the court disagrees. The plain language of the deed does not evince an intent to create such a servitude, and neither party has identified any circumstances that would alter this result. See Lynch v. Town of Pelham, 167 N.H. 14, 22 (2014) ("The parties' intent has long been the touchstone of our interpretation of contracts, including deeds." (citation omitted)). Although "the intent to create a servitude may be . . . implied[,]" Restatement (Third) of Property (Servitudes) § 2.2 (WEST 2015), the Stengels have failed to identify any language in the deed or any factual circumstance supporting such an implication. The deed contains no requirement that the Town engage in or refrain from engaging in any identified activity; it also fails to identify a property or person entitled to enforce any such requirement. Thus, the language does not support a conclusion that the deed created a covenant or condition. See Lynch, 167 N.H. at 20–21 (defining a "covenant" as "an agreement by one person . . . to do or refrain from doing something enforceable by another person . . . ."); Anna H. Cardone Revocable Trust v. Cardone, 160 N.H. 521, 528 (2010) ("A fee simple subject to condition subsequent is a conveyance of land in which the

grantor expressly retains the right of re-entry upon breach of a stated condition, the exercise of which results in a forfeiture of estate for the grantee." (quotation omitted)).

For these reasons, the court concludes that the Town is entitled to judgment as a matter of law on its declaratory judgment counterclaim. The Town may relocate the traveled way within the right of way, so long as it complies with any applicable statutory or other requirements. See, e.g., RSA ch. 231 (2009 & Supp. 2015) (describing, among other things, the process for the laying out and alteration of highways); see also 16 P. Loughlin, New Hampshire Practice: Municipal Taxation and Road Law § 53.01, at 53-3 (2015) ("[T]he layout process is also used for altering and widening highways . . . .").

C. Removal of improvements

Third, the court considers the Town's request for a court order requiring the Stengels to remove improvements they have made within the Brice Drive right of way. The Town contends that they are entitled to injunctive relief under RSA 236:19 (2009)[8] and RSA 236:29 (2009).

The Town's motion, in this respect, seeks injunctive relief. (Def.'s Mot. Summ. J. ¶ 17.) However, on the face of the Town's counterclaim and its renewed motion for summary judgment, the Town fails to address the elements of a preliminary or permanent injunction. (See Def.'s Answer Countercl. 6; Def.'s Mot. Summ. J. ¶¶ 7–19; Def.'s Renewed Mot. Summ. J. ¶¶ 1–8); N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). Further, the provisions the Town cites do not provide statutory authorization to enjoin the Stengels under these circumstances.[9] See RSA 236:19

[8] The Town actually cites RSA 239:19, (Def.'s Mot. Summ. J. ¶ 17), however, no such statute exists. The court assumes that the Town intended to cite RSA 236:19, as that provision is, arguably, applicable.

[9] Statutory interpretation is a question of law; the court considers the statute as a whole and ascribes the plain and ordinary meaning to the words used. See Trefethen v. Town of Derry, 164 N.H. 754, 755 (2013).

(providing only criminal liability of persons causing water obstruction on highway—an obstruction not alleged here); RSA 236:29 (merely authorizing towns to "remove all obstructions on [certain highways and portions thereof]"). The court, therefore, cannot award the Town injunctive relief.

Accordingly, the court finds that the Town may remove the improvements that the Stengels have made within the right of way, so long as it complies with any applicable statutory or other requirements. See, e.g., RSA 236:29 (authorizing towns to "remove all obstructions" (emphasis added)); cf. Marrone v. Town of Hampton, 123 N.H. 729, 733–35 (1983) (plaintiffs' improvements effectively discontinued highway where improvements made vehicular passage impossible).

IV. Conclusion

Considering the evidence in a light most favorable to the Stengels, the court finds that there is no reasonable basis to dispute the Town's evidence at trial. See Iannelli, 145 N.H. at 193; Concord Grp. Ins. Co., 135 N.H. at 69. Accordingly, the Town's motion for summary judgment on its counterclaim is GRANTED. The location of the Brice Drive right of way is as depicted in the Noyes survey; the Town may relocate the traveled way within the right of way and remove any improvements, so long as it complies with any applicable statutory or other requirements.

SO ORDERED.

Dated: 2-2-16

Charles Temple,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
CARROLL COUNTY SUPERIOR COURT
A TRUE COPY ATTEST:
Court Assistant