State of New Hampshire
Supreme Court

NO. 2011-0732

2012 TERM

SEPTEMBER SESSION

State of New Hampshire

v.

Alan Lathrop

RULE 7 APPEAL OF FINAL DECISION OF
OSSIPEE DISTRICT COURT

REPLY BRIEF OF DEFENDANT/APPELLANT ALAN LATHROP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other States' Cases

New Hampshire Statutes

Secondary Authority

ARGUMENT

I. State's Position

The State concedes that "Alderberry Lane … is 'privately owned and maintained,' that it is a dead-end, and that "[t]he sign posted at the entry to Wildwood on Winnipesaukee is a clear indication that the Association has not granted permission for general ingress." STATE'S BRF. at 6, 9, 22.

Its position is that the meaning of "open for public use" however, "focuses not on the legal rights of access to private streets, but on accessibility itself: that is, on the presence or absence of a physical impediment to enter the road and travel upon it." STATE'S BRF. at 8. The State says that "[i]t is the absence of physical impediment to entry, not signage, which is dispositive," and that unless the entrance is outfitted with "gates, bars, bollards, or … barriers," the way is "open for public use." STATE'S BRF. at 11, 16.

II. Legislative History is Silent on Signs

As the State notes, the 1981 legislation was a crackdown on DWI. It is conceded that the language of the statute itself, as well as its legislative history, makes clear the Legislature intended prosecution of DWI on privately-owned roads in lakefront communities.

The State's legislative history argument, however, is a non-sequitur. Nothing in the legislative history addresses the issue here – whether signs expressly enjoining entry negate the presumption that a road is open for public use.

New Hampshire's trespass statute defines a place in which the public is unwelcome as "any place which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders, or which is fenced or otherwise enclosed in a manner designed to exclude intruders." RSA 635:2, V. The posting statute specifies how "[a] person may post his land to prohibit criminal trespass and physical activities." RSA 635:4.

Because posting against trespass is a fixture of American law, *see e.g.*, *Brown v. Boston & Maine*

R.R., 73 N.H. 568 (1906); Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004), had the legislature intended to toy with the ability of land owners to post against trespass, it is likely the matter would have been directly addressed. The Legislature's silence suggests it intended to leave those things alone.

III. Signs Matter

New Hampshire law deems a person welcome unless they have been warned otherwise. As noted, the trespass statute requires either a barrier or a sign, and the posting statute specifies what the signs should look like. Barriers constitute a warning, but so do signs.

Thus in *Catalano v. Town of Windham*, 133 N.H. 504, 510 (1990), where the issue was whether a road had been used for 20 years to become public by prescription, this Court wrote: [b]ecause no "Private Road" sign was ever erected …, the public could assume the roads were open for public use."

Some private roads – such as those leading to big-box store parking lots – clearly invite visitors, and their owners presumably want the DWI laws enforced. But lakeside owners associations may not, and the DWI, posting, and trespass statutes collectively allow them to specify the level of privacy they reasonably expect.

Signs have meaning. In *Catalano*, this Court gave meaning to the presence or absence of signage, and did not demand physical barriers to indicate the public was unwelcome. Ungated but clearly signed military installations are off-limits to the public. *See e.g.*, http://www.lazygranch.com/fg.htm (warning of intruders on "Area 51" in Nevada). The sign behind the New Hampshire Supreme Court, for example, "Reserved Parking Only," indicates the spots there are not for the public. A reasonable person can surmise that consequences will follow if they enter Area 51 or park behind the Supreme Court. Yet the State's position would make these sorts of warnings meaningless because there is no physical barrier.

Requiring a physical barrier to close a place for public access, moreover, is problematic. Signs are cheap and convenient. Gates are costly, easily left ajar, and sometimes inoperable by weather or

vandalism. If a private road has more than one entrance, the problems multiply. This Court should not make owners erect and maintain a gate when no statute says so.

IV. The Legislature Wrote "Any" not "All"

The statutory definition of "way" is "*any* privately owned and maintained way open for public use." RSA 259:125 (emphasis added). The State draws attention to the word "any," arguing that because it "has an expansive meaning," "open" therefore implies actual physical access and not merely legal access. STATE'S BRF. at 15.

The State's argument however, turns "any" into "all." The State suggests the intended definition of "way" is "*all* privately owned and maintained ways open for public use." If the Legislature had used the word "all," the definition of way would trump the posting and trespassing statutes, RSA 635:4; RSA 635:2, and landowners could not designate the level of privacy they can reasonably expect.

Some states have specified that DWI laws apply everywhere. *See e.g., Farley v. State*, 170 So.2d 625 (Miss. 1965) (unlawful to drive under the influence "within this state"). Some states have accomplished the same thing by specifying no geographical limitation, thereby indicating DWI is unlawful everywhere. *See e.g., Sanders v. State*, 846 S.W.2d 651 (Ark. 1993)*; State v. MacDonald*, 527 A.2d 758 (Me. 1987).

But the New Hampshire Legislature provided a definition, and it does not say "all." The Legislature used the less expansive word "any," thus indicating there are some places where the DWI law does not apply. A private road with signage clearly indicating an expectation of privacy is such a place.

V. Legal Versus Physical Access

The State notes that the 1981 Legislature commissioned a legal memorandum reviewing how bordering states defined the ways on which their DWI statutes applied. STATE'S BRF. at 16; STATE'S APPX. at 6. It draws particular attention to the Massachusetts statute, and a then-recent Massachusetts appellate decision.

According to the memorandum, Massachusetts had two simultaneous definitions: "a place to which the public has a right of access" and also "places to which members of the public have access." Thus the Legislature understood Massachusetts to have defined ways as roads with either *legal* access or *actual* access. The memorandum demonstrates the 1981 Legislature was aware of the two possible methods of defining "way." But its apparent rejection of a definition based on *actual* access undermines the State's suggestion that the statute compels the result it urges.

VI. Wildwood Roads are Private Driveways

The Legislature acknowledged the law allows owners on their private driveways to drive drunk. STATE'S APPX. at 26. The Legislature also recognized, however, that steering into a private driveway from a public road is not refuge for a drunk driver. STATE'S APPX. at 26-27; *State v. Pinkham*, 141 N.H. 188 (1996).

What constitutes a person's private driveway is its owners' expectation of privacy as indicated by the physical aspects of the place. *Pinkham*, 141 N.H. at 191 (DWI arrest in driveway upheld because "no evidence at trial that the driveway was blocked by a gate or posted with 'No Trespassing' signs"); *see also*, *State v. Orde*, 161 N.H. 260 (2010) (owner had expectation of privacy in porch around home because obscured by tall bushes and not visible from public road).

The Wildwood Association roads here are essentially a long private driveway, with just one portal, useless to through-traffic. Unlike *Pinkham*, Mr. Lathrop and his co-owners clearly indicated their expectation of privacy. There *were* "No Trespassing" signs, and Mr. Lathrop was not visible from any

public road. It is not sufficient to suggest that because the Association road serves more than one residence it does not constitute a "driveway" – shared driveways serving multiple residences are common, *see e.g.*, *Appeal of New Hampshire Dept. of Transp.*, 152 N.H. 565 (2005), *Young v. Prendiville*, 112 N.H. 190 (1972); *Sanborn v. Keroack*, 103 N.H. 297 (1961), and there is no expectation-of-privacy basis to distinguish single- from multiple-home driveways.

Mr. Lathrop did not seek refuge from police pursuit. He was found on a private road for which its owners' expectation of privacy could not be more clearly expressed.

VII. Other States With Similar Statutes

At least two other jurisdictions have statutory phrasing similar to New Hampshire's.

In *City of Seattle v. Wright*, 433 P.2d 906, 907 (Wash. 1967), the ordinance defined its application on "any road, alley, lane, parking area or any place, private or otherwise, adapted to and fitted for travel, that is in common use by the public with the consent, expressed or implied, of the owner or owners … and rights of way open to the use of the public." The Washington Supreme Court upheld a conviction for DWI because "[t]he street in question was surfaced and improved in such a manner that it was hardly distinguishable from the adjacent publicly maintained thoroughfares. The public was invited to use the roadway and it was extensively used. The owner made no travel restrictions except as to speed." *Seattle v. Wright*, 433 P.2d at 909. Had the Seattle road been a dead-end with signs like Wildwood's, the result would have probably been different.

Similarly, in *State v. Boucher*, 541 A.2d 865 (Conn. 1988), the defendant was idling drunk in a parking lot, and claimed he was not guilty of DWI because Connecticut's statute applies only to parking lots which are "open to public use." In upholding the conviction the court held:

> For an area to be "open to public use" it does not have to be open to "everybody all the time." The essential feature of a public use is that it is not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public. It is the indefiniteness or unrestricted quality of potential users that gives a use its public character.

State v. Boucher, 541 A.2d at 867 (citations omitted).

What distinguishes *Boucher* from Mr. Lathrop's situation is that the Wildwood roads *are* "confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria" – namely the "members & guests" brazened on its warning sign.

VIII. "Open for Public Use" is Ubiquitous in the Law

The State disputes that a decision here might affect other areas of the law. It must be pointed out, however, that the phrase "open for public use" is ubiquitous throughout the law, both in New Hampshire and everywhere else.

At least five New Hampshire statutes use the phrase. *See* RSA 422-C:1 (allowing State to take abandoned aircraft, which have been left on public airfield or "private airfield *open for public use*"); RSA 422:35 (directing expenditure of certain moneys to "the purpose of funding maintenance of airports within the state that *are open for public use*"); RSA 367:44 (requiring company building railroad to make a filing within a year of when railroad is "*opened for public use*"); RSA 231:115, I (defining "public parking facilities" as "lots, garages, parking terminals and other structures of one or more levels, facilities and accommodations for the parking of motor vehicles off the street or highway and *open to public use* with or without charge"); RSA 227-L:17, IV (allowing "[c]amp or cooking fires may be built without written permission on public camp or picnic grounds when such areas are *open for public use* or private camp and picnic places where suitable fireplaces approved by the forest fire warden are provided for such fires.").

Numerous decisions of this Court also use the phrase. *See e.g.*, *Catalano v. Town of Windham*, 133 N.H. 504, 510 (1990) ("Because no 'Private Road' sign was ever erected on the roads, the public could

assume the roads were *open for public use*.') (emphasis added); *Kearsarge Soaring Ass'n v. Kearsarge Valley Golf Club, Inc.*, 123 N.H. 263, 266 (1983) ("[W]e hold that the defendant, which admittedly advertised and promoted its airfield as a means of attracting paying customers to its business premises, and which also caused itself to be listed as being *open for public use* on the NOAA map used by pilots, cannot be exempted from liability by virtue of [the statute]."") (emphasis added); *Town of Hanover v. City of Lebanon*, 116 N.H. 264, 265 (1976) ("At all times since dumping operations ceased in 1972, the tract has been held *open for public use* and has in fact been used by the public for hiking, ski touring, snowmobiling, conservation field trips, bird watching and fishing.") (emphasis added); *Wiggin v. Baptist Society*, 43 N.H. 260 (1861) ("The duty of maintaining partition fences does not extend to the owners of public buildings erected on lands laid *open to public use*.") (emphasis added); *Hall v. City of Manchester*, 40 N.H. 410, 412 (1860) ("[S]aid street had not been *opened for public use* so long as twenty years when the accident occurred to the plaintiff, but that it was originally laid out in compliance with the regulations of the statute law, by the selectmen of Manchester.") (emphasis added); *Petition of Mt. Washington Rd. Co.*, 35 N.H. 134, 140 (1857) ("If the enterprise was of a public character and the road *open to public use*, the legislature would have the power to authorize the taking of private property to accomplish the public object.") (emphasis added); *Town of Troy v. Haskell*, 33 N.H. 533, 536 (1856) ("Since the date of said deed …, all the land therein described … has remained unenclosed and *open to public use*, except that part of the demanded premises not disclaimed ….") (emphasis added); *State v. Town of Canterbury*, 28 N.H. 195, 226 (1854) ("As the public may have other rights of access to a bridge than those of a public highway, as, for example, the town may own the land used for a way, or an easement upon it, to pass over the bridge, or the way may have been *opened for public use* by individuals, so that a general license exists to use it, evidence that there is no public highway is not conclusive; but the evidence should have been received and submitted to the jury, whose duty it would be to consider whether a town could be found guilty of a nuisance, without some proof that the neglect of the town has been to the public injury.") (emphasis added).

Moreover, although not comprehensively canvassed here, an electronic search of the phrase "open for public use" suggests it is used in every American jurisdiction in a great variety of areas of the law. *See e.g.*, *Fournier v. Elliott*, 966 A.2d 410, 414 (Me. 2009) (status of paper streets); *Opinion of the Justices*, 47 N.E.2d 260 (Mass. 1943) (whether state can require towns to plow and maintain private ways "open to public use"); *Okemo Mountain, Inc. v. Town of Ludlow Zoning Bd. of Adjustment*, 671 A.2d 1263, 1266 (Vt. 1995) (whether owner can build house on land not easily accessible).

Although the definition of "way" is limited by the New Hampshire motor vehicle code to apply only to particular statutes, the *construction* of the phrase this Court enunciates cannot be so constrained. Henceforth "open for public use," wherever it appears, will mean either the absence of physical barriers, or the absence of adequate signage.

Thus the decision in this case cannot avoid informing such statutory matters as the taking of abandoned airplanes, the types of airports that get funding, when railroads must make filings, what constitutes a parking garage, and where campfires may be kindled. Because the phrase is ubiquitous, it will also inform all manner of issues, including when a road is public by prescription, tort liability for owners of airfields, recreational tax abatements, the duty to maintain partition fences, municipal liability for sidewalk defects, the authority of private companies to exercise eminent domain for public projects, municipal ownership of donated land, whether a town must maintain infrastructure, and other matters that cannot be predicted.

IX. Misstatement of Mr. Lathrop's Position

Finally, the State several times misstates Mr. Lathrop's position.

In its brief the State says that the defendant's position "exempts drunk drivers on private roads from prosecution" for DWI," and that "[u]sing the defendant's definition of 'open,' then no private road may qualify as a way." STATE'S BRF. at 17.

Not so. Mr. Lathrop's position extends only to private roads with clear signage disinviting the public.

CONCLUSION

For the foregoing reasons, this Court should find that Alderberry Lane in Moultonboro is not "open for public use" and not a way pursuant to the drunk-driving statute, and thus reverse Alan Lathrop's conviction.

Respectfully submitted,

Alan Lathrop
By his Attorney,

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Dated: September 6, 2012

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CERTIFICATION

I hereby certify that on September 6, 2012, copies of the foregoing will be forwarded to Lisa L. Wolford, Assistant Attorney General.

Dated: September 6, 2012

Joshua L. Gordon, Esq.