State of New Hampshire
Supreme Court

NO. 2012-0771

2013 TERM

APRIL SESSION

Granite Acres Property Owners Association, &a.

v.

Gail & John Montgomery

RULE 7 APPEAL OF FINAL DECISION OF THE
GRAFTON COUNTY SUPERIOR COURT

BRIEF OF DEFENDANTS-APPELLANTS GAIL & JOHN MONTGOMERY

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

New Hampshire Cases

New Hampshire Statutes

Secondary Authority

QUESTIONS PRESENTED

I. Do the deeds of the parties determine who has control over establishing the boundaries and maintenance of the right-of-way?
Preserved: RESPONDENTS' ANSWER AND COUNTERCLAIMS (JAN. 6, 2011), *Appx.* at 491; DEFENDANTS' MOTION TO RECONSIDER (Sept. 17, 2012), *Appx*. at 611.

II. Did the plaintiffs meet the standard for establishing a prescriptive easement?
Preserved: RESPONDENTS' ANSWER AND COUNTERCLAIMS (JAN. 6, 2011), *Appx.* at 491; DEFENDANTS' MOTION TO RECONSIDER (Sept. 17, 2012), *Appx*. at 611.

III. Did the court err in allowing the plaintiffs to encroach on the servient estate in violation of its owners' property rights?
Preserved: RESPONDENTS' ANSWER AND COUNTERCLAIMS (JAN. 6, 2011), *Appx.* at 491; DEFENDANTS' MOTION TO RECONSIDER (Sept. 17, 2012), *Appx*. at 611.

STATEMENT OF FACTS

This dispute is about who has the right to make decisions about a private road which runs through the Montgomerys' property, including widening the road and increasing its maintenance intensity. The question is whether those rights belong to its users or its owner. By virtue of use over time, the users claim these rights – even though it encroaches on the owner's land. This involves the nature of the road, its owner and those who live along it, and the history of its use and maintenance.

I. Sands O' Time Road

Once a logging track, Sands O' Time Road closely follows the western shore of Goose Pond, a 600-acre lake spanning the border of Hanover and Canaan, New Hampshire. *2010 Temp.Trn*. at 9.[1] Sands O' Time Road begins in Hanover at the northern tip of the pond at its intersection with Wolfeboro Road (formerly named Tunis Road) near a bridge over the brook feeding the pond. Sands O' Time Road runs south for about one mile in Hanover, continues for about another half-mile in Canaan, and then dead-ends, thus forming a 1½ mile-long cul-de-sac. TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420. Only the Hanover portion is relevant here, and of that, only the first 1,200 feet bisecting the Montgomerys' lots is at issue.

II. The Hanover Cottages, 1949-1968

In 1945 an unnamed logging road and the surrounding 800 acres was owned by one Pauline Barney. In 1948 she subdivided out about 700 acres toward the southern end of Goose Pond in Canaan, not relevant here. Starting in the 1950s, and continuing through 1966, she further subdivided the remainder and conveyed 42 small cottage lots mostly in Hanover (and a few in

[1]Trial occurred over three days, on August 1, 2, and 3, 2012. The transcripts of them are numbered sequentially, and are referred to herein simply as *Trn.* In addition there were two temporary hearings, one on December 13, 2010, and the second on August 31, 2011. The first is referred to herein as *2010 Temp.Trn.* The second is referred to herein as *2011 Temp.Trn.*

Canaan). She built her home near the intersection of what became called[2] Sands O' Time Road, and Wolfeboro Road. *See e.g.*, PROPOSED SUBDIVISION OF EISENBERG (1968), Exh. A, *Appx.* at 3.

The deeds to these lots contain rights to the road. They all provide (with minor differences not relevant here):

> Granting also the privilege of access to and from said premises over the Private Road now existing or over a similar right of way should it become advisable to alter the present route. The above right of way to be used by all grantees and grantor and being subject to use at their own risk and *to be kept in repair and maintained by grantor and grantees as they for their interests and convenience shall determine and among themselves shall agree*.

DEED, BARNEY→SOMES (1959), Exh. 3, *Appx.* at 63 (quoted in ORDER (Sept 4, 2012)) (emphasis added). By the mid-1960s, most of the Hanover lots were already improved with summer cottages. *Trn*. at 202, 207, 321; *Sands O' Time Group Forms Association on Goose Pond*, REPORTER AND ADVOCATE (July 31, 1958), Exh. 2, *Appx*. at 229 (60 residents as of 1958).

In 1968 Pauline Barney, who had moved to one of the cottages, *Trn.* at 474, conveyed the remainder of her Hanover holdings to Eisenberg, reserving, however, some rights over the road:

> Reserving to Pauline Barney, her heirs and assigns, a right of way from said Tunis Road to the property owned by her located in Canaan, over the road known as Sands O' Time private road, and subject to the rights of others deriving title from her to use said private road, *said road to be maintained by the various cottage owners entitled to use said road as they shall agree*.

DEED, BARNEY→EISENBERG (1968), Exh. L, *Appx.* at 212 (emphasis added).

A map of the Hanover lots is included on the first page of Appendix I. *See* SANDS O' TIME ROAD, HANOVER SECTION (detail of Exhibit A with road highlighted, source and date of original highlighting unknown, road highlighting enhanced for appendix), *Appx.* at 1.

---

[2]The record does not reveal the genesis or timing of the road's name. It does however appear in a 1958 reference. *Sands O' Time Group Forms Association on Goose Pond*, REPORTER AND ADVOCATE (July 31, 1958), Exh. 2, *Appx*. at 229.

III. The Canaan Subdivision, 1972-1987

In 1969 Pauline Barney conveyed her remaining large parcel in Canaan to Granite Acres, Inc., an entity established for the purpose of creating a cottage subdivision on the Canaan portion of Goose Pond. The deed contained rights to *use* the road, but omitted the provision present in the Hanover deeds regarding *maintenance*. It provided:

> Also conveying herewith a right of way from Tunis Road located in the Town of Hanover over the road known as the Sands O' Time private Road to the premises herein conveyed.

DEED, BARNEY→GRANITE ACRES (1969), Exh. M & Exh. 5, *Appx.* at 190, 214. Because Pauline Barney had previously conveyed a few small cottage lots in Canaan, the same deed to Granite Acres also provided:

> Subject to the rights of the owners of cottage lots situate in said Canaan to use that part of the private road known as the Sands O' Time private Road located in said Canaan and running through the premises herein conveyed.

In 1972, Granite Acres created the "Granite Estates" subdivision comprising 45 lots, and recorded it. RESIDENTIAL LOTS, COVENANTS ON "GRANITE ESTATES," CANAAN, N.H. (1972), Exh. 5, *Appx.* at 175.

Granite Acres is a modern-style subdivision with mutual covenants and an elected governing body – the Granite Acres Property Owners Association (GAPOA) – empowered to collect dues, make decisions, and maintain internal roads. COVENANTS OF GRANITE ACRES PROPERTY OWNERS ASSOCIATION (NON-PROFIT ASSOCIATION) (1972), Exh. 5, *Appx.* at 178.

Granite Acres began selling lots in 1972, *see e.g.*, DEED, GRANITE ACRES, INC→SOKOL (1972), Exh. 1, *Appx.* at 13, and in 1975 or 1976 owners began building cottages. The internal roads within the Granite Acres subdivision are two-lanes on municipal-standard 50-foot rights-of-way, and are in better condition than the access road at issue here. *Trn.* at 441.

A map of the Canaan lots is included on the second page of Appendix I. *See* GRANITE ACRES LOT PLAN (undated, source unknown), Exh. 7, *Appx.* at 2.

IV. The Montgomerys' Homestead, Beach, and Road, 1990-2001

Gail and John Montgomery live where Pauline Barney once lived, at the northern terminus of Sands O' Time Road at its intersection with Wolfeboro Road.

Their 1990 deed includes both the 2-acre homestead on the west side of Sands O' Time Road, and also a narrow beach strip between the road and Goose Pond. The deed description measures both parcels from points "ten feet from the center of said roadway," thus creating a 20-foot strip of road bisecting their property near the pond. DEED, CROWTHER→MONTGOMERY (1990), Exh. G, *Appx.* at 199. The deed is silent regarding use of Sands O' Time Road, probably because Pauline Barney continued to own it.

In 1995 the Montgomerys acquired the 10-acre parcel contiguously south of their homestead, with its accompanying beach strip along the pond. Thus, referring to the map of the Hanover lots on page 1 of Appendix I, the Montgomerys own collectively lots 1, 10, 11, and 12. Quoting its predecessor deed from Pauline Barney, the Montgomerys' 1995 deed gives them use and maintenance rights to Sands O' Time Road:

> Conveyed herewith is the right to use a the [sic] private road, known as Sands O' Time Road, in common with others; *said road is to be maintained by the various lot owners entitled to use said road as they shall agree*.

DEED, BARBER/BEEBE →MONTGOMERY (1995), Exh. H, *Appx.* at 202 (emphasis added).

Realizing that somewhere there was an outstanding ownership of the road, the Montgomerys found its owner and in 2001 acquired it from Eisenberg. The deed to the road describes it as:

> A (20-foot wide) strip of land which begins at the southerly side of Wolfeboro Road, just west of the bridge at the north end of Goose Pond, and runs generally south for approximately 1 mile, roughly paralleling the western shore of Goose Pond, to the Hanover-Canaan Town line, being he section of Sands O' Time Road located in Hanover, N.H.

DEED, EISENBERG →MONTGOMERY (2001), Exh. I, *Appx.* at 205. The deed describes its eastern and western boundaries by reference to all the small cottage lots dotting its inland and pond sides.

Id. The deed notes that:

> This parcel is subject to the rights of approximately 100-lot owners abutting Sands O' Time Road … in Hanover and Canaan to use said road for egress and ingress to their lots over the road known as Sands O' Time Road.

Id. Finally the deed provides: "Also conveying herein any rights held by the Grantor to alter the present route of Sands O' Time Road." *Id.*

Although the Montgomerys own the entire Hanover section of the road, it is only the first 1,200 feet abutting their four lots that is in controversy here.

V. Competing Interests in Sands O' Time Road

Given these differing deeds, a number of groups claim interest in Sands O' Time Road.

A. Owners

First, the Hanover (and a few Canaan) owners clearly have authority to both use and maintain the road because their deeds say it is "to be kept in repair and maintained by grantor and grantees as they for their interests and convenience shall determine and among themselves shall agree." *See e.g.,* DEED, BARNEY→SOMES (1959), Exh. 3, *Appx.* at 63.

Second, the Canaan Granite Acres owners have a right to use the road, but they have no deeded rights over maintenance and road expansion decisions. At most they have whatever rights were conveyed in the Granite Acres deed, which gives them "a right of way … over the road known as the Sands O' Time private Road." DEED, BARNEY→GRANITE ACRES (1969), Exh. M & Exh. 5, *Appx.* at 190, 214. The Granite Acres owners are aware their deed to the road is lesser than their Hanover co-plaintiffs. *Trn*. at 205.

Third, the Montgomerys have authority from several sources. They are like the Hanover owners in that their 1995 deed says "said road is to be maintained by the various lot owners entitled to use said road as they shall agree." DEED, BARBER/BEEBE→MONTGOMERY (1995), Exh. H, *Appx.* at 202. They are like Pauline Barney herself because their road deed gives them "any rights held by

the Grantor." Finally, because they are the fee owners of the road, they have all rights any property owner has, subject to cooperation with the Hanover owners who share rights of maintenance as they "shall agree."

All three of these owners' interests are present as individual parties in this case.

B. Associations

In addition, there are three owners' associations.

First, the Hanover (and a few Canaan) owners are nominally represented by the "Sands O' Time Association," which Pauline Barney organized at her home in 1958 when 30 participants discussed "future road maintenance and brush cutting." *Sands O' Time Group Forms Association on Goose Pond*, REPORTER AND ADVOCATE (July 31, 1958), Exh. 2, *Appx*. at 229. It has never been incorporated or registered, and has no formal authority to collect dues or take any action. *Trn*. at 32, 99, 136, 176; *Sands O' Time Group Forms Association on Goose Pond*, REPORTER AND ADVOCATE (July 31, 1958), Exh. 2, *Appx*. at 229. It has expressed a concern only in the Hanover portion of the road, *Trn.* at 90, and is listed as a plaintiff.

Second, the Granite Acres owners are represented by the Granite Acres Property Owners Association (GAPOA). It was formed in 1972 contemporaneous with the Granite Acres subdivision, and is authorized by covenants to enforce dues and act for Granite Acres owners collectively. It has a right to use the entire road, but is empowered with regard to maintenance only on ways internal to the Granite Acres subdivision which are not relevant here. COVENANTS OF GRANITE ACRES PROPERTY OWNERS ASSOCIATION (NON-PROFIT ASSOCIATION) (1972), Exh. 5, *Appx.* at 278; *Trn*. at 31-32, 97-98. GAPOA is a plaintiff.

Third, in 2001, some owners in both sections formed the "Ad Hoc Road Committee," neither incorporated or registered. Although it has a concern for the entire road, it has no independent interest or legal authority beyond the deeds of the owners who participate. *Trn*. at 49, 50, 90, 176.

While nominally the Montgomerys are eligible, they have been largely excluded. The committee has met, made decisions, hired contractors, and negotiated with the Montgomerys when problems have arisen. *Trn*. at 52, 412. The Montgomerys believe that the Ad Hoc Road Committee has been constructive at times, but also perceive that its formation has coincided with an increased level of confrontation and animosity. *Trn.* at 452. The Ad Hoc Road Committee is not a plaintiff.

C. Towns

Finally, not present here are the Towns of Hanover and Canaan, which nonetheless presumably have some interests.

VI. Narrow and Curvy Dirt Road

It is not disputed that the Hanover section of Sands O' Time Road has always been a one-lane dirt road, location unchanged, in a 20-foot wide right-of-way. *Trn*. at 178, 188, 266-268, 344, 409; CHA ASSO., ENGINEERING ASSESSMENT OF SANDS O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426. Where it passes between the Montgomerys' lots, it is and always has been just a few feet from the pond, curvy, bounded by large hemlock trees and other greenery. The road lacks shoulders and drainage infrastructure, and is closely edged with steep banks on both sides that have been cut-and-filled into the hill at or near the width of the right-of-way. *See* PHOTOS, Exh. U, *Appx.* at 301; CHA ASSO., ENGINEERING ASSESSMENT OF SANDS O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426; DEED, BARNEY→EISENBERG (1968), Exh. L, *Appx.* at 212 (noting presence of hemlock tree). There have never been streetlights or other road improvements. *Trn.* at 35.

Sands O' Time Road residents were aware from their time of purchase that this was the road's nature and condition. *Trn*. at 267, 201, 227.

The road also poses environmental issues. It comes within a few feet of Goose Pond, *Trn*. at 503, and a University of New Hampshire study in 2000 found that due to lack of drainage infrastructure the road was leaking sediment and phosphorus into the water, which is contributing

to eutrophication of the pond. ESS GROUP, INC., ENVIRONMENTAL REVIEW (Nov. 23, 2004), Exh. VVV, *Appx.* at 446. The problem gullies were readily apparent at the time of trial. *Trn*. at 501-508.

The width of the right-of-way is known, definite, and undisputed. The width of the travel way is less clear, but not greatly disputed.

Sands O' Time Road has always been a one-car travel way. The plaintiffs testified the travel way varied between 11 and 12 feet wide, whereas the defendants' experts allowed that it varied from 10 to 18 feet wide. *Trn*. at 58-59, 339; ROAD LOCATION PLAN (2012), Exh. E, *Appx.* at 8; TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420; CHA ASSO., ENGINEERING ASSESSMENT OF SANDS O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426. A road engineer expert testified that although Sands O' Time Road is a one-laner, because a typical pickup truck is 6½ wide, along most of the road there is enough clearance for two cars to safely pass, and that he personally witnessed two cars passing when he visited the site for measurements. *Trn*. at 348-349, 374-377.

The plaintiffs testified that two cars passing has often involved one pulling over or backing up to make way. *Trn*. at 35, 138, 171, 230, 435. In 2001 when the Montgomerys' traffic expert was at the site collecting data, there were "two observations of a vehicle backing up to let another vehicle exit, two observations of vehicles passing closely at curve near end of Sands O' Time Road, two observations of near collisions from vehicles entering and exiting at the same time, and two observations of vehicle/pedestrian conflicts due to narrow road width." TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420.

The plaintiffs testified that at some spots the road is somewhat wider so two cars can pass without hitting mirrors, and that these spots were 19½ or 20 feet wide and thus within the right-of-way. These "turnouts" or "pullouts" were established by 1959, have evolved over time to appear part of the road, and it has long been common practice for one car to pull-in or back-in to let others by.

Trn. at 63-64, 80, 95-96, 137-38, 142, 146-147, 153, 167, 171-175, 193, 203, 210, 230, 241-243, 250, 261, 340, 396-399, 434-435.

The location of these spots is somewhat indefinite, but there appear to be three that have been commonly used, one at about 225 feet in from Wolfeboro Road, one at 716 feet, and one at 750 feet. *Trn*. at 164, 170-171, 397-398, 437; ROAD LOCATION PLAN, SANDS O' TIME ROAD (2003), Exh. E, *Appx.* at 8; *see also Trn*. at 341 (defendants' expert referring to Exhibit C; turnouts in front of lots 51-9, 51-12, and 51-13). In addition, it has been common practice for cars to use the camps' driveways and parking areas along the road as pullouts. *Trn*. at 138, 170, 251, 435-439.

VII. Traditional Maintenance

After Pauline Barney first subdivided, Sands O' Time Road changed from a logging track to serve the summer Hanover cottages along the lake. The plaintiffs established that in the 20 year period from 1959 to 1979, they regularly maintained it for summer use. As there were no winterized homes during the period, although they testified once-in-a-while the snow was cleared, it was not regularly plowed.

Witnesses who recall the period testified that maintenance was cooperative and by consensus among the residents. *Trn*. at 128, 133, 137, 270. Everybody was expected to maintain in front of their own cottage. *Trn*. at 211, 430. People worked together and sometimes combined work sessions with a picnic. *Trn*. at 240, 254. Notably, Pauline Barney was both a participant and organizer. *Trn*. at 262; *Sands O' Time Group Forms Association on Goose Pond*, REPORTER AND ADVOCATE (July 31, 1958), Exh. 2, *Appx*. at 229. A man recalling the times said she was "glad to see the maintenance done" and never objected to it, possibly because "she owned the road and was prone for lawsuits that might come out of it," *Trn*. at 262, 266, and also because it was also her driveway.

Two witnesses, whose knowledge extended to 1959 and 1960, testified that back then summer maintenance was done with hand tools – shovels, rakes, scythes, brush-blades, loppers, watering cans

– and a pickup truck. *Trn*. at 263-266, 240, 253-257. A third witness, who bought his land in 1974, said that at that time, all the work was done by hand. *Trn*. at 207-208, 223, 231. The hand-work was probably confined to the width of the right-of-way. *Trn*. at 147, 153, 258. The road was smoothed with a non-motorized grader towed behind a pickup truck. *Trn.* at 247. Larger equipment, such as a bulldozer and an excavator, was not used, according to the plaintiffs' witnesses, until earliest around 1990. *Trn.* at 223, 225. As of 2003, an expert witness testified that summer maintenance had exceeded the 20-foot right-of-way. CHA ASSO., ENGINEERING ASSESSMENT OF SANDS O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426.

Winter maintenance followed a similar pattern. Plaintiffs who could recall the period testified that for many years it was a "closed road" in the winter: it was not plowed, access was by snowshoe and snowmobile, and it was not open and usable until the spring thaw and after the mud dried. *Trn*. at 247-248, 256. Mr. Montgomery noted that through the 1990s the road was often not plowed for days or even a week after snowstorms, and that there was a chain across the road in winter, the rings from which can still be seen on the trees at the head of the road. *Trn.* at 400-401, 448. According to the plaintiffs, this changed "after more cottages were built further down the road." *Trn*. at 248. Two plaintiffs testified that regular plowing began in the late 1980s. *Trn*. at 248. Mr. Montgomery concurred that regular plowing started after the first year-round residency was established along Sands O' Time Road, which he placed sometime in the mid-1990s. *Trn.* at 448.

Plowing in earlier times was done with a blade mounted on a pickup truck, according to the plaintiff who for a decade actually did the work. *Trn*. at 222, 225-226. Later-arriving plaintiffs concurred, saying that by the late 1970s and early 1980s, the road was plowed with a pickup. *Trn*. at 33, 169, 192-193, 197-198, 225-226. According to the man who did the work, the earliest any larger equipment was used – a bulldozer to push back the snowbanks – was 1979. *Trn*. at 227. Another plaintiff concurred. *Trn.* at 193. Judicial notice may be taken of an historic blizzard in February 1978. *See* <http://en.wikipedia.org/wiki/Northeastern_United_States_ blizzard_of_1978>.

The record contains lots of old receipts showing that the Sands O' Time Road Association, which Pauline Barney founded for the purpose, routinely maintained the road. There are, however, no work-orders or receipts in the record showing GAPOA ever maintained Sands O' Time Road. There was some speculative testimony that GAPOA may have done some maintenance in 1991, *Trn.* at 97; the contractor testified he began work beginning in 2000 but was ambiguous regarding what entity hired him, *Trn.* at 284; and Mr. Montgomery thought GAPOA started maintaining in 2001, 2002, or 2003. *Trn.* at 448.

VIII. Community Contentment with Narrow Curvy Road and Traditional Maintenance

In 2003, in communications to town boards, the Granite Acres Association and numerous individual residents made clear they were content with keeping the road small and private. They wrote that the community "appreciate[s] its rural character" and "[t]he conditions that reduce speeding and protection of the privacy it offers … for a summer retreat." They declined need for improvement of the road because "during the winter months … all the cottages aren't occupied." They noted that "[t]he road is posted for 15 miles per hour" and "has been free from accidents for over 50 years." The letter expressed pride in the preservation of the road and said that "[t]he road is not inadequate." *Trn*. at 78-80 (document not in evidence, but portions read into record).

Three plaintiffs, apparently testifying for the group, said they still desire to keep it small and private. *Trn*. at 81, 127, 218-291. Town decisions from the era reflect their sentiment:

> A number of Hanover and Canaan neighbors … argue in favor of the existing conditions on Sands of Time Road, noting that its twists and turns and narrow width gives the community a sense of privacy. And that its relative lack of development enhances the desire of camp-like character of the community. The narrowness of the road is seen as an asset that promotes safety which requires safe driving, and that deters development in the area to which it provides access.

Trn. at 443 (document not in evidence, but portions read into record).

> Sands of Time Road, at least the portion closest to Wolfeboro Road, has a right-of-way of only 20 feet. It is extremely narrow at places, less than ten feet with no shoulders. The entire length of the road is unsuitable for two passenger vehicles

> to pass, except at turnout spots connected to driveways to the individual camps. The topography is steep especially at that portion of the road nearest Wolfeboro Road, such that any widening at all would require a larger right-of-way and substantial grade and filling. However the board is not aware of any landowner except Mr. Montgomery who … is dissatisfied with the current state of the road. On the contrary in an earl[ier] hearing … a large number of the owners expressed appreciation for the rustic nature of the road and the privacy afforded for their second home getaway use.

Trn. at 444-445 (document not in evidence, but portions read into record).

IX. Growth of the Community Puts Sands O' Time Road Beyond its Carrying Capacity

The Hanover portion of Sands O' Time Road was developed by the early 1970s, comprising 30 to 40 cottages. *Trn.* at 202, 207. As of 2001, there were "52 single-family homes primarily used as summer recreational homes," in addition to "48 undeveloped lots and a 90 acre parcel having access to Sands O' Time Road." TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420. Although the 90 acres is still undeveloped, all or most of the Granite Acres lots have been built upon, *Trn.* at 300, resulting in "nearly 100" houses, *2010 Temp.Trn.* at 11, or some large number, *Trn*. at 190, 202, 230, 248, 300, now on the road.

Not only has the number of houses tripled, but their use has also changed. In 1977 there were no year-round houses. *Trn*. at 201. In 1995 there was one. *Trn*. at 448. Currently there are more, but the exact number is unknown. *Trn*. at 83, 190, 208, 229.

Consequently, traffic on Sands O' Time Road has increased, and more is expected. *Trn*. at 199, 202, 229-230. A traffic volume expert reported that in 2001, daily summer traffic was 150 vehicles per day (vpd). The expert reported that "[f]uture traffic volumes on Sands O' Time Road are estimated at 300-475 vpd depending on the percentage of homes used as primary residences." TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420.

X. Towns Decline to Regulate

Soon after the Montgomerys moved in they perceived the growth and potential for continued growth in usage of the road. They realized that the road as it existed, even if it were acceptable to the Sands O' Time Road residents, for both environmental and traffic volume reasons had already or was quickly overgrowing its carrying capacity. *Trn*. at 422-423, 460-461. The Montgomerys could foresee encroachment on their abutting properties, the inability to accommodate it within the existing easement, and the pressure to someday forcibly donate their land. *Trn*. at 456-457; LETTER FROM MONTGOMERY TO CANAAN PLANNING BOARD (July 29, 1994), Exh. AA, *Appx*. at 325. Thus they repeatedly drew attention to the issue, approached their numerous neighbors, complained to both towns, hired road and environmental engineer consultants, and got involved in dozens of planning board, zoning board, selectboard, and court procedures. *Trn*. at 421, 483; *see e.g.*, EXHIBITS AA through ZZ, *Appx*. at 325-365.

The Montgomerys repeatedly pointed out to everybody the provisions of New Hampshire's road access statue, which provides:

> [N]o building shall be erected on any lot within any part of the municipality nor shall a building permit be issued … unless the street giving access to the lot …
> (a) Shall have been accepted or opened as, or shall otherwise have received the legal status of, a class V or better highway prior to that time; or
> (b) [Is an approved street]; or
> (c) Is a class VI highway, provided [certain conditions]; or
> (d) Is a private road, provided that … [t]he local governing body, after review and comment by the planning board, has voted to authorize the issuance of building permits for the erection of buildings on said private road or portion thereof; and [waivers of liability have been registered]; or
> (e) Is an existing street constructed prior to the effective date of this [statute].

RSA 674:41, I. The statute is mandatory in all towns, regardless of whether it has adopted a zoning ordinance, RSA 674:41, II, and requires towns to coordinate despite town lines. RSA 674:53.

Although Hanover has an active planning regime, Canaan has no zoning ordinance. Despite the clarity of "no building shall be erected," its application to Sands O' Time Road, and Hanover's

acknowledgment of the apparent illegality, the concerted activism of the Sands O' Time community persuaded both towns to decline enforcement or otherwise address the unregulated growth. *See e.g.,* LETTER FROM HANOVER TO MONTGOMERY (July 26, 1996), Exh. DD, *Appx.* at 331; LETTER FROM MITCHELL TO CLAUSON (Feb. 23, 1999), Exh. LL, *Appx.* at 342; LETTER FROM MITCHELL TO CLAUSON (Feb. 26, 1999), Exh. MM, *Appx.* at 343; *Trn*. at 81, 127, 218-291, 443-445.

XI. Increased Intensity of Maintenance

Commensurate with higher density and year-round use, the Sands O' Time residents desired better and more intensive maintenance; the informal consensus system broke down around 2000. *Trn*. at 255.

Starting in either the late 1990s (contractor's recollection) or 2001 (Montgomerys' recollection), *Trn*. at 275, 448, either Granite Acres or the Ad Hoc Road Committee hired a contractor for both summer and winter road maintenance. The contractor testified his goal, both seasons, is a 12- to 15-foot cleared path. *Trn*. at 277. This exceeds by several feet both the traditional maintenance widths, and the width of the travel way in at least some places where it narrows to just the 10 or 11 feet as the parties agreed. *Trn*. at 58-59, 339; TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420; CHA ASSO., ENGINEERING ASSESSMENT OF SANDS O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426.

In the summer the contractor shapes the road using a grader with a 12-foot blade that barely fits on the travel way. *Trn.* at 276, 408; PHOTOS, Exhs. W1-W3, *Appx.* at 314. In the winter he plows with a larger pickup truck and a bulldozer. *Trn.* at 274 (contractor describing equipment). Using that equipment, snow banks now extend 30 feet wide, necessarily exceeding the right-of-way "on one side or the other." *Trn.* at 384. SNOW BANK SURVEY (2011), Exh. F, *Appx.* at 10. This is due to the efficiency of heavier equipment, wide goals of the contractor, and magnitude of snowfall. *Trn*. at 335-337, 347-352, 356, 376, 382-34, 391; CHA ASSO., ENGINEERING ASSESSMENT OF SANDS

O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426; LETTER REPORT OF CHA (Dec. 10, 2003), Exh. TTT, *Appx.* at 442; LETTER REPORT OF SVE (Apr. 8, 2011), Exh. UUU, *Appx.* at 445.

These maintenance activities have damaged the Montgomerys' property. Landscaping rocks and boulders have been moved, PHOTOS, Exhs. T1-T4, T6-T8, *Appx.* at 291, an electric wire was severed, *Trn.* at 426; PHOTOS, Exhs. X4-X5, *Appx.* at 317, and the banks of the road have been torn. *Trn.* at 403; PHOTOS, Exhs. T5-T9, *Appx.* at 291. Greenery has been flattened, *Trn.* at 403, and trees have been gouged. *Trn.* at 350, 360-361, 366-367, 402; PHOTOS, Exhs. T10, X1 & Y, *Appx.* at 291, 317 & 322, possibly causing a birch to fall and damage the Montgomerys' dock, narrowly missing their boat. PHOTOS, Exhs. Z1 & Z2, *Appx.* at 406-407. It also exacerbates erosion. *Trn.* at 404, 503.

XII. Landscaping Rocks

Meanwhile, responding to heavier maintenance, increased encroachment, and a foundering campaign for municipal oversight, in the mid-1990s the Montgomerys took physical measures.

Mr. Montgomery used a wheelbarrow to line the road with rocks, not blocking the travel way, *Trn.* at 173, 339-340, 457, with the intention of creating clear boundaries: "Like any fence. To say, this is yours and this is mine." *Trn.* at 423. The rocks were too small for drivers to see, however, had potential to damage contractors' equipment, and were too easily and inadvertently moved during summer and winter maintenance. *Trn.* at 457, 277. In 1996 he replaced the rocks with boulders. *Trn.* at 423-424. They were also displaced from time to time by the maintenance contractor, hired and supervised without the Montgomerys' participation, driving oversize machinery. *Trn.* at 281, 401-402, 404-406, 451; LETTER FROM MONTGOMERY TO GRANITE ESTATES ASSO. (Feb. 18, 1997), Exh. GG, *Appx.* at 335; PHOTOS, Exh. T1-2, T7-8, *Appx.* at 291.

The Montgomerys put up a sign[3] which got defaced, *Trn.* at 425-426, 462-463; PHOTOS, Exhs. X2 & X3, *Appx.* at 317, and dug traffic-calming speed bumps which got filled in and caused a confrontation. *Trn.* at 416. Mr. Montgomery cut one end of a culvert which was clearly wider than the right-of-way. *Trn.* at 433, 462, 479; LETTER FROM MONTGOMERY TO GRANITE ESTATES ASSO. (July 15, 1995), Exh. BB, *Appx.* at 327; LETTER FROM MONTGOMERY TO GRANITE ACRES PROPERTY OWNERS ASSO. (Aug 19, 1996), Exh. EE, *Appx.* at 332.

The Montgomerys sent letters to their neighbors warning of the physical problems they were causing, and of trespass and legal action. LETTER FROM CLAUSON TO MITCHELL (Apr. 6, 1999), Exh. NN, *Appx.* at 344; LETTER FROM CLAUSON TO RESIDENTS (Apr. 8, 1999), Exh. OO, *Appx.* at 346; LETTER FROM MONTGOMERY TO GRANITE ACRES PROPERTY OWNERS ASSO. & AD HOC ROAD COMMITTEE (June 10, 2005), Exh. GGG, *Appx.* at 377. They personally confronted the large-equipment maintenance operator, *Trn.* at 280, and involved the police. *Trn.* at 280-281, 446-447; LETTER FROM MONTGOMERY TO HANOVER POLICE (July 20, 1998), Exh. II, *Appx.* at 337.

Each effort, which the Montgomerys acknowledge came at a cost, *Trn.* at 460, was met with escalating emotion, *Trn.* at 485-486, eventually prompting this lawsuit.

XIII. Build a Better Road

All the experts who assessed Sands O' Time Road, including the defendants' experts, the plaintiffs' expert, and the plaintiffs' maintenance contractor, agreed the road is inadequate, substandard for its purposes, poses environmental and safety issues, and should be widened. *Trn.* at 278, 289, 303, 307-308.

The plaintiffs' road expert testified that "I don't think that you can expect a fire truck to go down there in the middle of a snowstorm, for example, or even an ambulance. Fire truck, obviously,

[3]The sign read: "Private easement. No outlet. Limited width - 20 ft. Expansion, Encroachment & Trespass Prohibited." *See* PHOTOS, Exhs. X2 & X3, *Appx.* at 317.

if there's a fire down at the far end and you start jamming up trucks, the whole development would be in jeopardy." *Trn*. at 294-295. The plaintiffs' expert admitted he had never seen a subdivision of this magnitude served by a road so small, *Trn.* at 305-306, and thus recommended:

> I'd start with a 50-foot right of way and put a 24-foot road in the middle of it and clean everything off and create drainage and storm drains and … room for the power poles, et cetera.

Trn. at 294. The Montgomerys' expert likewise concluded:

> [O]rdinary municipal standards require a 50-foot right of way to build a two-lane road. The reason for that extra width is … to accommodate the road travel surface along with the earth work associated with it and roadside ditches and that type of infrastructure that's required to construct a road.

Trn. at 350. These measures cannot be accommodated within the road's 20-foot right-of-way.

> The limited width of the road easement, existing encroachment, steep topography and proximity to the shore line of Goose Pond make expansion of existing travel lanes impractical.

CHA ASSO., ENGINEERING ASSESSMENT OF SANDS O' TIME ROAD (Aug. 18, 2003), Exh. SSS, *Appx.* at 426; *see also* TRAFFIC STUDY - SANDS O' TIME ROAD (Oct. 28, 2001), Exh. RRR, *Appx.* at 420; *Trn.* 343-344.

XIV. Montgomerys Offer a Solution

At many junctures the Montgomerys and the Sands O' Time Road users attempted solutions as development continued, different people were in change of the property owners' associations, and different contractors were on the job. The parties sent each other proposed maintenance agreements over the years, but none appear to have been signed. There was a period of cooperation between about 2003 and 2009, but it broke down. *See generally* CORRESPONDENCE, Defendants' Exhibits AA through QQQ, *Appx.* at 325-398. At one point the Montgomerys' lawyer wrote to the residents' lawyer a one-line letter, "Can we work this out?" LETTER FROM CLAUSON TO HOTCHKISS (June 13, 2003), Exh. DDD, *Appx.* at 373. Unfortunately nothing came of these many efforts.

In 1995 the Montgomerys put a comprehensive offer in writing they thought would solve

all problems. LETTER FROM MONTGOMERY TO GRANITE ESTATES ASSOCIATION (July 15, 1995), Exh. BB, *Appx*. at 327. The Montgomerys noted they owned the 10-acre lot just south of their homestead lot, which already contains a utility right-of-way. *See* SANDS O' TIME ROAD, HANOVER SECTION, Exh. 6, *Appx*. at 1. They offered to relocate the road there:

> I am offering to provide an expanded right-of-way through my property (approximately the first 1200 ft of the road) if the first 750 feet of the road is relocated to run along the utility right-of-way behind my property. The specific details of my offer are described below:
>
> • I will provide an expanded right-of-way (ROW) through my property. The expanded right-of-way will extend 20 feet rom the center of the road providing a 40 foot right-of-way for the section of road that passes through my property.
>
> • I will provide an option to purchase an additional 10 feet for future expansion of the ROW to 50 feet. A 50 foot ROW would enable the Sands O Time community to bring the road up to code providing an opportunity for town take-over of the road if the community elected to pursue this option.
>
> • The Granite Estates Association will agree to abandon the first 750 feet of the existing ROW in exchange for a new ROW which will run along the utility ROW. With input from representatives of the Sands O Time community, I will layout the path of the new ROW, have a survey performed, obtain any necessary permits, remove trees, and record the relocated and expanded ROW on my deeds.
>
> • I will make a $2,000 contribution toward the cost of constructing a new road.
>
> • The Granite Estates Association will select a qualified contractor and construct a road along the new ROW in a timely manner. Upon completion of construction the new ROW will be put into use and the existing ROW will be abandoned.
>
> This offer represents the most constructive and mutually beneficial approach that I can come up with. I am open to considering any alternative approach that will address the issue. I believe this offer represents a[] mutually beneficial and economically viable approach to address the concerns that have been expressed regarding the inadequacy of the existing ROW while preserving the integrity of my property.

LETTER FROM MONTGOMERY TO GRANITE ESTATES ASSOCIATION (July 15, 1995), Exh. BB, *Appx*. at 327. In 2004 the Montgomerys had an engineer take a preliminary look to determine feasibility. He found that the proposed relocation was "the ideal solution." *Trn*. at 513.

Some Sands O' Time owners were open to the idea, and there was a meeting about it with

a discussion of costs and the difficulty of getting everyone to agree. *Trn*. at 52, 84, 87. At one point the offer looked like it had a hope of acceptance, but the effort appears to have stalled. LETTER FROM HOTCHKISS TO CLAUSON (Jan. 5, 2001), Exh. RR, *Appx.* at 349.

The Sands O' Time owners denigrated the idea as "a 12 year effort to have the road relocated," *Trn*. at 82 (witness reads non-exhibit letter she wrote to planning board), and suggested that the Montgomerys' actions in placing rocks was merely retaliation for rejection. *Trn*. at 264.

When they realized the abutters were not interested, the Montgomerys long ago dropped the relocation idea. *Trn*. at 453-454; *2010 Temp.Trn*. at 21. They continue to believe it is the only long-term solution, however, and are wistful that money spent on litigation could have been better spent on an improved road. *Trn.* at 463. Short of such a global solution, the Montgomerys want the ability to have a role in maintenance and a limit to continued encroachment. *Trn.* at 477.

STATEMENT OF THE CASE

The plaintiffs here are abutters of Sands O' Time Road both in Hanover and a few in Canaan, who are not associated with Granite Acres; and abutters of Sands O' Time Road in Canaan who are part of the Granite Acres subdivision. Also plaintiffs are the Granite Acres Property Owners Association, an organization created by the Granite Acres deeds, and the Sands O' Time Road Association, an informal body with no independent existence. The defendants are Gail and John Montgomery, who own Sands O' Time Road, and also own a homestead and three other parcels at the intersection of Wolfeboro and Sands O' Time Roads.

The Grafton County Superior Court held two temporary hearings on December 13, 2010, and August 31, 2011 (*Timothy J. Vaughan*, J. & *Peter H. Bornstein*, J.), following both of which it issued temporary orders regarding then-imminent needs for establishing winter and summer road maintenance pending resolution of this matter. Those temporary orders remain in effect. ORDER ON DEFENDANTS' MOTION TO STAY ORDER PENDING RECONSIDERATION/APPEAL (Sept. 26,

2012), *Appx.* at 628.

The court (*Peter H. Bornstein*, J.) took a view and heard three days of trial in August 2012, after which it issued the order herein appealed. ORDER (Sept. 4, 2012), *Addendum* & *Appx*. at 583.

The court construed the express easements in the various deeds, and also granted the plaintiffs adverse possession for their historic use of the road. Accordingly, the court undid the Montgomerys' status as both grantor and grantee of Sands O' Time Road, and adjusted the property rights of the parties with regard to the boundaries between the road and the Montgomerys' surrounding property.

As to the express easements, it ordered:

> The [Montgomerys] shall, as soon as practicable, remove any rocks, boulders or other obstructions that they have placed within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs.

Id. at 27. As to the use of the road by adverse possession, the court ordered that the plaintiffs have:

> prescriptive maintenance rights [which] include, but are not limited to, the rights to (1) grade the Road and the three turn-outs, add gravel to them, and otherwise maintain their surfaces; (2) have the Road and the turn-outs free of any rocks, boulders, logs, or other obstructions; (3) remove, or have removed, any such obstructions within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs; (4) cut trees (including the hemlocks about which the plaintiffs complain) and brush within ten feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs; (5) install and maintain culverts and drainage ditches and otherwise provide for reasonable drainage; (6) plow and remove snow within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs; and (7) use contemporary commercial vehicles, machinery, and equipment to perform such maintenance.

Id. at 16.

The Montgomerys had counterclaimed seeking a declaratory judgment regarding which parties have maintenance authority, and damages for costs of repairing previous encroachments. RESPONDENTS' ANSWER AND COUNTERCLAIMS (Aug. 13, 2013), *Appx.* at 491. The court denied the counterclaims, denied the Montgomerys' motion for reconsideration, but granted a stay pending

this appeal. ORDER ON DEFENDANTS' MOTION TO STAY ORDER PENDING RECONSIDERATION/ APPEAL (Sept. 26, 2012), *Appx.* at 629.

SUMMARY OF ARGUMENT

The Montgomerys first note that the result of the court's order below was to effectively widen Sands O' Time Road, from a 20-foot wide easement, to occupy at least a 30-foot swath, and more depending upon crowns of trees and snowfall in the winter. They argue that in doing so, the court set aside express deed language limiting the width of the easement, the circumstances by which the original grantor created several subdivisions, and the change in use of the easement.

The Montgomerys argue that the plaintiffs cannot have established adverse possession to maintenance of the easement because there was no proof that traditional use was wider than 20 feet, the change in use was more recent than 20 years, the original grantor gave permission to maintain and thus there was no adversity, and even if there is adverse possession, the plaintiffs proved it only with regard to a very small number of users and not the community at large.

Finally, the Montgomerys point out the court has taken private property and given it to a community benefit, a value not condoned in American law. They also note that reversal does not leave the plaintiffs without remedies, and would engender a fair sharing of costs.

ARGUMENT

I. Court Widened Sands O' Time Road and its Right-of-Way

The deeds specify that the Sands O' Time Road right-of-way is 20 feet wide where it passes between the Montgomerys' parcels. The court's order, however, explicitly widens the easement. It ordered that the Montgomerys must move their landscaping features to "within fifteen feet of the centerline of the traveled way" and "within five feet of the outer edges of the turn-outs." ORDER (Sept. 4, 2012), *Addendum* & *Appx*. at 583.

At a minimum, this means that the right-of-way is now broadened to 30 feet: 15 feet on both

sides of the centerline of the road equals a 30-foot swath. Moreover, although it did not pin a number on them, the court held that "[s]ome portions of the three historic turn-outs extend more than ten feet from the [r]oad's centerline." *Id.* at 10. Although it is unclear how far away from the centerline of the road the Montgomerys' rocks are not allowed to be, depending upon the width of any particular turnout, the order may require expansion of the right-of-way to something even greater than 30 feet.

Likewise, the court also allowed the plaintiffs to "remove … obstructions within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs," "cut trees … within ten feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs," "install and maintain culverts and drainage ditches," "plow … snow within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs," and "use contemporary commercial … equipment" to accomplish this. *Id.* at 16, 27.

Each of these orders involve activity wider than 20 feet, some explicitly and some implicitly:

- "Obstructions" will have 30 feet between them, and perhaps more at the turnouts;
- Trees may be cut within 20 feet, and perhaps more at the turnouts, but the photos show that some of these are tall with enormous crowns and great lateral branches, far overhanging the Montgomerys' land on both sides, and impacting their land far past 20 feet;
- Culverts can be installed, which to be effective the experts said, generally requires ditching some feet past the edge of the road they serve;
- Drainage ditches can be dug, which according to the road engineers who testified, will necessarily push the road structure beyond 20 feet;
- Snow can be plowed to a 30-foot width, which according to the expert witness and the maintenance contractor will cause banks to be even wider;
- Use of "contemporary commercial equipment" means that the cut-and-fill slopes banking the road will be pushed some distance wider than they are now, depending upon the vehicle chosen by the contractor or demanded by future efficiencies and technology.

- None of these orders take into account erosion problems enumerated by the environmental expert, which tree cutting, ditching, and bank widening will all exacerbate.

In summary, the court widened Sands O' Time Road and its right-of-way.

In adverse possession cases, this Court "accord[s] deference to a trial court's findings of historical fact, where those findings are supported by evidence in the record," but "review[s] a trial court's application of law to facts *de novo*." *Blagbrough Family Realty Trust v. A & T Forest Products, Inc.*, 155 N.H. 29, 33, (2007). The interpretation of deeds and express easements are questions of law. *Robbins v. Lake Ossipee Village, Inc*., 118 N.H. 534, 536 (1978).

II. Express Easements Prohibit Expansion of Use and Maintenance Which was Ordered by the Court

A. Court Ignored Specific Deed Language Limiting the Express Easement

The court ruled that because the residents of Sands O' Time Road have an express easement to use it, they necessarily have a secondary easement that includes reasonable maintenance. This is the general rule for a standard pass-and-repass easements. *See e.g., Arcidi v. Town of Rye*, 150 N.H. 694, 701 (2004) ("Under an express grant, a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. This includes the right to make improvements that are reasonably necessary to enjoy the easement."); *Burcky v. Knowles*, 120 N.H. 244, 248-49 (1980) ("The grant of a general right to pass and repass entitles the dominant owner to use the right of way for any necessary or convenient purpose of passing pertaining to the ownership and occupancy of his land to which the right of way is appurtenant."); *Hatch v. Hillsgrove*, 83 N.H. 91 (1927) ("Title to the easement gave the plaintiff all the rights of an owner to enjoy the way free from obstruction, and entitled him to an owner's remedy to protect his easement."); *Abbott v. Butler*, 59 N.H. 317 (1879).

White v. Eagle & Phoenix Hotel Co., 68 N.H. 38 (1894), provides a stark example. The dominant estate holder had a general use easement in a "passway" ringing the hotel. Because of an elevation difference, however, one could not drive around, and dominant estate holder therefore sought to excavate

and build to remedy the disconnection. This Court held:

> A stranger reading the deed would never suspect that the ways described would not permit a continuous and uninterrupted passage around the hotel. He could learn only by inspection or other extrinsic information that the level of the east way was 12 feet above that of the north way at the point of their junction. The natural meaning of the language of the deed is inconsistent with the existence of an impassable gulf across the way. It would deceive a grantee ignorant of the lay of the land, and defraud him, if the gulf could not be bridged or otherwise made passable. The parties knew the situation. If their intention was that the obstruction should be permanent and irremovable, they naturally would, as they easily might, have expressed such intention. It cannot reasonably be supposed that they would select words apt to describe a continuous and uninterrupted way of passage around the hotel, without mention of or allusion to the then-existing, impassable barrier, if they understood such passage was to be forever impossible.

White v. Eagle & Phoenix Hotel, 68 N.H. at 40 (1894).

Thus the court was correct here in holding that a general pass-and-repass easement carries with it the right to maintain and improve the easement commensurate with the use. The court erred, however, in regarding this as a general pass-and-repass easement.

Where there are explicit limitations in the deeds, the easement is not a general pass-and-repass. In *Arcidi v. Town of Rye*, 150 N.H. 694 (2004), for example, the servient estate did not have to allow underground utilities (a burden normally borne by the servient estate in a general pass-and-repass easement), because the easement was not the primary access to the dominant estate holder's property. That is, the dominant estate holder owned something less than a standard pass-and-repass easement; and consequently the servient estate was commensurately relieved of burdens it would have otherwise borne.

"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) (pass-and-repass easement conveyed without knowledge of later-enacted statute limiting driveways).

Here Pauline Barney did not convey open-ended rights to pass-and-repass on Sands O' Time Road. Rather, she intended two specific limitations, specified by the language of her deeds.

First, the way is limited to 20 feet wide: whatever rights to pass and repass were conveyed, they

cannot occur outside of the 20-foot swath. Second, maintenance is specifically limited by the requirement that *both* "grantor and grantees as they for their interests and convenience shall determine and among themselves shall agree."

Thus, unlike *White v. Eagle & Phoenix Hotel*, a stranger reading Pauline Barney's deeds would be immediately apprised that: 1) use cannot exceed the specified width, and 2) maintenance must proceed by agreement with others. Accordingly this is not a general pass-and-repass easement limited only by the rule of reason.

The court however, treated it like it was. It ignored the 20-foot maximum width, and it ignored the agree-to-maintain requirement. Freed from these constraints, it ordered the Montgomerys give up their land to a width of 30 feet or more. This Court should construe the deeds with regard to their explicit limitations, and reverse.

B. Court Ignored the Circumstances Pauline Barney Created

There is a clear difference in Pauline Barney's deeds to the Hanover (and a few Canaan) lots, and her deed to Granite Acres.

When Pauline Barney subdivided the Hanover section in the 1950s, she lived there (on the lot the Montgomerys now occupy). She subdivided without a recorded plot plan, and without corporate or institutional structure. She conducted sales one-by-one, each deed being from her to the buyer. Those deeds both grant and reserve a right to participate in decisions regarding maintenance of Sands O' Time Road – "grantor and grantees as they for their interests and convenience shall determine and *among themselves* shall agree." (Emphasis added.) Pauline Barney actively promoted and participated in maintenance of Sands O' Time Road, as recorded by the 1958 newspaper and witnesses' recollection.

When she sold her Hanover home to move into the cottage, she no longer wanted a personal role in maintenance. She thus transfered her rights as grantor, and recognized the pre-existing rights of others that the road "is to be maintained by the various lot owners entitled to use said road as *they* shall agree."

(Emphasis added).

By the time Granite Acres was created, Pauline Barney had liquidated her land holdings and was living in one of the cottages. The Granite Acres subdivision exists by deed to a professional developer, planned, with mutual covenants. Its deed is silent on maintenance – it grants *only* a right to pass.

By this process Pauline Barney made maintenance an issue. She appears to have gone through three stages in her life as it involves her concern for road maintenance: first she was engaged in it by agreement and participation with her neighbors, then she wanted others to agree and take care of it, and finally she regarded it as done by others and granted only a right to use the road but not maintain it.

As noted, the court held that the right to use subsumes the right to maintain. That may be in accord with a simple statement of the rule, but the analysis does not truncate there. "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). To construe an express easement, the court *must* ask the intent at the time.

Here the court ignored not only the language of the deeds, *supra*, but also the circumstances Pauline Barney created at the three times she granted three differing sets of conveyances.

Moreover, by the time Pauline Barney conveyed to Granite Estates, the right to maintain was already burdened with a requirement that the Hanover (and a few Canaan) neighbors had to agree with each other in their "interests and convenience." One cannot convey what one does not own, *Wells v. Jackson Iron Mfg. Co.*, 47 N.H. 235 (1866) (purporting to convey summit of Mt. Washington when title in doubt), nor can an easement "interfere with the use and enjoyment of [the servient] estate" or the independent rights of others. *Lussier v. New England Power Co.*, 133 N.H. 753, 758 (1990). By holding that Granite Acres has an implicit right to maintain, the court gave them more than what Pauline Barney owned, and also diminished the "shall agree" right (or restriction) of the up-road owners.

For these reasons, the court erred in granting the Granite Acres residents of Sands O' Time Road

a role in maintenance. This Court should take into account the history of the conveyances and the circumstances surrounding them, and reverse.

C. Suburban Subdivision is a Different Servitude From That Which Previously Existed

Although an express easement might naturally grow with the times, a change in magnitude and use limits the growth of a servitude.

> An enlargement of use is permissible if the change of a use is a normal development from conditions existing at the time of the grant, such as an increased volume of traffic. The easement holder cannot, however, materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon. The test to determine the right to make a particular alteration is whether the alteration is so substantial as to result in the creation and substitution of a different servitude from that which previously existed.

Duxbury-Fox v. Shakhnovich, 159 N.H. 275, 284 (2009).

In *Nadeau v. Town of Durham*, 129 N.H. 663, 667 (1987), this Court held that a right-of-way, which had served two single-family dwellings and two small apartments, could not grow to serve fourteen housing units. In *Crocker v. Canaan College*, 110 N.H. 384, 387 (1970), a summer inn had an easement to pipe its sewage onto the servient estate. When the express easement was granted in 1908, it operated just two months during the summer and held 35 guests. It grew, however, to a nine-month season and 200 users. This Court held that the growth "impose[d] an unwarranted additional and new burden on the servient property" and thus was not within the terms of the easement. *Id.* at 388. *See also*, *Delaney v. Gurrieri*, 122 N.H. 819, 451 A.2d 394 (1982) (10-foot easement for access to lake did not allow cutting of trees for boat to be hauled by vehicle rather than carried); *Boston & Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513 (2004) ("grade crossing" easement did not allow installation of commercial underground fuel pipes).

The Montgomerys' situation is like *Nadeau* and *Canaan College*. The Sands O' Time neighborhood shifted from a few dozen summer cottages in the 1950s to as many as 100 homes with year-round residential occupancy. While Sands O' Time Road may have once been barely adequate, there has been a change of use, and it is no longer even that. As there is yet even more acreage available at the end

of the road – and no zoning in Canaan that might restrict it – demands for access improvements are likely to grow: today a few turnouts, tomorrow a two-lane road. The easement, intended for transient getaway cottages, now serves a sizable suburban subdivision with perpetual need for safety and emergency access.

The use here is not merely change with the times, but a "new and additional burden" given the nature of Sands O' Time Road. Not contemplated by Pauline Barney, the volume of use has "impose[d] a new [and] additional burden" which is "so substantial" for this road, that it is "a different servitude from that which previously existed." Consequently, like *Nadeau* and *Canaan College*, Pauline Barney's little 20-foot easement should not be required to carry a load it cannot physically handle.

The plaintiffs cannot stand behind the observation that vehicle technology changes over time. *Sakansky v. Wein*, 86 N.H. 337 (1933) ("In the absence of contract on the subject, the owner of the dominant estate is not limited in his use of the way to such vehicles only as were known at the time the way was created, but he may use the way for any vehicle which his reasonable needs may require in the development of his estate."). Unlike *Sakansky*, where there was no "contract on the subject" of how tall were the vehicles, here there is a "contract on the subject" of how wide is the right-of-way.

This Court should thus rule that Sands O' Time Road is overburdened beyond its original scope, and that the easement as characterized by the lower court has become "a different servitude from that which previously existed." Accordingly, it should reverse.

III. Easement by Prescription

"The law of prescriptive easement is well settled." *Vigeant v. Donel Realty Trust*, 130 N.H. 406, 408 (1988).

> The claimant has the burden of proving the existence of a prescriptive easement by establishing by the balance of probabilities twenty years adverse continuous, uninterrupted use of the land claimed in such a manner as to give notice to the record owner that an adverse claim is being made to it. It is not enough to show that the use was made for the requisite period. Evidence of continuous and uninterrupted public use of the premises for the statutory period is insufficient alone to establish prescriptive title as a matter of law. The nature of the use must be such as to show the owner knew or ought to have known that the right was being exercised, not in reliance upon his toleration or

> permission, but without regard to his consent. Moreover, the claim can not be for a right to cross the owner's property generally, but rather, it must be for a definite, certain and particular line of use.

Vigeant, 130 N.H. at 408 (quotations and citations omitted).

The court held that the plaintiffs (collectively, not distinguishing among them) earned by prescription an easement to use the road at a width greater than 20 feet, and to maintain commensurately.

There are several problems with this holding.

A. No Proof of Turnouts Beyond 20 Feet

First, there was no evidence that the roads or turnouts were ever wider than 20 feet. The widest any witness suggested was 19½ or 20 feet. Insofar as the court granted adverse possession beyond that width, it is not supported by the historical record or the evidence.

B. Change of Use is Recent

Second, traditional patterns of use changed no earlier than the mid-1990s, and the intensive mechanization began around 2001 when the Ad Hoc Committee hired a heavy-equipment contractor. The Montgomerys have no issue with the traditional patterns, but objected to the increased intensity at its inception. Thus, no period of 20 years ever began to run regarding the intensive maintenance.

C. Pauline Barney Gave Permission

Third, proof of prescription requires that the use be "not in reliance upon [the owner's] toleration or permission, but without regard to his consent." *Vigeant*, 130 N.H. at 408.

> It is well established that a permissive use no matter how long or how often exercised cannot ripen into an easement by prescription.… When a use of another's land began under that person's permission, it cannot become adverse in nature without an explicit repudiation of the earlier permission."

Town of Warren v. Shortt, 139 N.H. 240, 244 (1994) (quotation omitted).

Pauline Barney gave permission for maintenance of Sands O' Time Road. She helped organize Sands O' Time Association in 1958 for the purpose of maintenance, and witnesses recalled her

participation. The issue of her permission has been conceded by the plaintiffs. OBJECTION TO MOTION TO RECONSIDER (Sept. 20, 2012), *Appx.* at 624 ("Not only did Pauline Barney grant rights to the road, she was present at the outset of the Sands O' Time Association and aided its formation for maintaining the road. That she was aware of the use and maintenance of the road is reasonably understood."). Unlike *Bonardi v. Kazmirchuk*, 146 N.H. 640 (2001), where permission was assumed but never sought, Pauline Barney was not only permissive, but she was an instigator, providing proactive encouragement.

There is no evidence that Pauline Barney or her successors repudiated the earlier permission, until the Montgomerys unambiguously did, by placing rocks in the 1990s. And no plaintiff can claim adverse possession based on a period after the Montgomerys made their objections known.

Accordingly, the plaintiffs have not demonstrated a 20-year period of adverse use, and the court's rulings must be reversed.

D. The Deeds Give Permission

Fourth, the deeds themselves give permission. The deeds to the Hanover (and some Canaan) lots contain the provision that the road is "to be kept in repair and maintained by grantor and grantees as they for their interests and convenience shall determine and among themselves *shall agree*." (Emphasis added.) The Montgomerys' deeds similarly provide that "said road is to be maintained by the various lot owners entitled to use said road as they *shall agree*." (Emphasis added.) The evidence was that before the Montgomerys, and to some degree even after, maintenance was conducted by consensus pursuant to these provisions. Even without that historical record, agreement is necessarily a permissive act, and therefore no period of adverse use could have ever begun. *Hoag v. Wallace*, 28 N.H. 547, 553 (1854) ("The general rule is undoubtedly true, that an entry under color of title is presumed to be according to the extent of the title.").

E. At Most, Only Two Hanover Owners Could Have Established a Prescriptive Easement

Finally, even if the plaintiffs can show they squatted long enough and adversely enough, that only

applies to the Hanover (and a few Canaan) owners.

The court made no effort to distinguish the plaintiffs from each other. Rather, in its order it grouped them all together, repeatedly referring to them as "the lot owners," "the individual plaintiffs," "the individual plaintiffs and their predecessors in title," and similar groupings. ORDER *passim* (Sept. 4, 2012), *Addendum* & *Appx*. at 583. The court failed to recognize the differing rights among the plaintiffs, the differing language in their deeds, the differing times when they arrived, the differing times they got involved with maintenance, and their commensurate differing rights to use and maintain the road. "Evidence of continuous and uninterrupted *public use* of the premises for the statutory period is insufficient alone to establish prescriptive title as a matter of law." *Vigeant*, 130 N.H. at 408 (emphasis added). The court erred in simply failing to distinguish among plaintiffs.

As to the Hanover (and some Canaan) owners, if they were able to establish a prescriptive easement, they cannot do so on behalf of Granite Acres or its constituent lot owners. The Hanover (and some Canaan) owners each enjoy their deeded rights individually, not collectively as is the case with the Granite Acres Property Owners Association. Thus to the extent there is a prescriptive easement, it would be earned and owned individually by the Hanover (and some Canaan) owners.

At most two of the Hanover (and some Canaan) owners have the possibility of establishing the prescriptive period. A total of seven individual plaintiffs testified at trial. Of these, four owned in Hanover, one in Canaan who is not part of Granite Acres, and two in Canaan who are part of Granite Acres. Their surnames, ownership locations, and the earliest year they acquired ownership or had personal knowledge of the Goose Pond area are listed below, in the order they appeared in the witness box:

Garipay	Granite Acres	1989	Estes	Canaan	1974
Burnham	Hanover	1981	Taylor	Hanover	1959
Bruno	Hanover	1984	Ragan	Hanover	1960
Mulinski	Granite Acres	1977			

It is apparent from this list that only two, Taylor and Ragan, have the requisite qualifications to

establish prescription. They are not part of Granite Acres, and they have personal knowledge or ownership at a time more than 20 years before the Montgomerys placed stones along the road in the 1990s. Thus, at most, only these two could have proved a prescriptive easement. Joan Garipay, the first of the plaintiffs' witnesses and president of the GAPOA, conceded that testimony of these two witnesses who could recall 1959 and 1960 would not apply to those who came thereafter. *Trn*. at 93.

As to Granite Acres, nobody there can claim by prescription. It was not established and its first lot was not sold until 1972, the first houses were built later, and the first evidence of it getting involved with maintaining the road did not occur until 1989, 1991, or 2000. The Montgomerys made clear they regarded the plaintiffs' maintenance regime as trespassory by placing stones and complaining to the towns soon after they arrived in the 1990s, less than 20 years later. *See* 3 AM. JUR. 2d *Adverse Possession* § 107 ("The conduct claimed by an owner to work an interruption of adverse possession must be such as would put a reasonably prudent person on notice that he or she actually has been ousted.").

By the court's failure to distinguish among the plaintiffs, the plaintiffs' failure to enter the testimony of any other individual Hanover (or some Canaan) owners, and the inability of Granite Acres owners to possibly establish any prescription whatsoever, the court erred in holding that there is a general prescriptive right for the plaintiffs individually or collectively to use or maintain Sands O' Time Road.

IV. Montgomerys Retain Right to "Agree" to Maintenance

The Montgomerys have three deeds to five parcels.

The 1990 deed to their homestead lot is described as "ten feet from the center" of Sands O' Time Road, but it is otherwise silent with regard to use or maintenance of it.

The 1995 deed to their three other lots abutting Sands O' Time Road provides explicit rights to use the road, and also contains a provision regarding maintenance. It specifies the Montgomerys as among those who, with their neighbors, have rights to maintain the road "as they shall agree."

The 2001 deed to the road itself both gives the owner "grantor" rights, and makes clear it is

"subject to the rights of approximately 100-lot owners abutting Sands O' Time Road … in Hanover and Canaan to use said road for egress and ingress to their lots over the road."

The court found these five deeds had merged. That is plain error because it is settled that unless remaining rights in merged deeds are superfluous, *see e.g., Soukup v. Brooks*, 159 N.H. 9, 17 (2009) (merger made need for access over adjoining property unnecessary), when deeds that are not "precisely co-extensive" are owned by the same person, either they do not merge, or they merge but without extinguishing the rights contained in the individual deeds.

> [T]o effect a merger at law, the right previously acquired, and the right subsequently acquired, in order to coalesce and merge, must be precisely co-extensive – must be acquired and held in the same right, and there must be no right outstanding in a third person to intervene between the right held, and the right acquired. If any of these requisites are wanting, the two rights do not merge, but both may well stand together.

Stantons v. Thompson, 49 N.H. 272, 277 (1870).

Accordingly, even if the deeds are merged, the Montgomerys retain the right to "agree" about the maintenance of Sands O' Time Road. The court, however, appears to have erroneously eliminated the right, and thus should be reversed.

V. Property Redistribution

By widening Sands O' Time Road and its right-of-way, the court accomplished judicially what the towns refused when they declined enforcement, and the plaintiffs refused when they rejected the Montgomerys' relocation offer. Here, instead of rational cost-sharing to solve a vexing problem, and contrary to principles of American law, the court took property from its owner and gave it to a community benefit. *See e.g., Arkansas Game & Fish Comm'n v. United States*, __ U.S __, __ 133 S. Ct. 511, 518 (2012) (flooding to benefit public to detriment of timber owner); *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82 (1994).

In addition, this case poses an issue of proper remedies, to which the lower court alluded.

The explicit language of Pauline Barney's deeds, and the history and circumstances of her

conveyances, suggests some problems: What happens if the parties cannot agree on maintenance? If a tragedy occurs due to the size or condition of Sands O' Time Road, but the users of the road do not have maintenance rights, who is liable? Such matters create pressure, to which both towns and perhaps the lower court succumbed, to ignore the history and the deeds, to condone continued and increasing use of a road all agree is substandard, and leave in place conditions for continuing animosity and litigation.

But there is an equitable outcome, likely to result in a long-term solution.

Upon this Court's reversal, the plaintiffs will be forced to bear some cost of the road *they* enjoy, some cost of the municipal oversight *they* fought, and some cost of the growth *they* begat. The plaintiffs assumed the risk of those costs when they purchased knowing their sole access was a 20-foot right-of-way.

The Montgomerys have demonstrated they are willing to share in those costs. But it is not equitable to take their land and thus impose on the Montgomerys the entire burden of solving a problem, six decades in the making, which is not theirs alone. That is, however, the result of the lower court's order.

Upon reversal the plaintiffs will not be without options: they might petition the towns to adopt Sands O' Time Road as a municipal way, offer to buy a wider easement, pursue the Montgomerys' relocation idea, or engage in a serious search for some solution. They already have the institutional infrastructure in place for decision-making, fund-raising, and implementation.

Accordingly, this Court should reverse.

This Court might also consider remanding for further proceedings concerning temporary and permanent remedies, and if necessary, the Montgomerys' counterclaims.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the court below, and order equitable remedies.

Respectfully submitted,

Gail & John Montgomery
By their Attorney,

Law Office of Joshua L. Gordon

Dated: April 22, 2013

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

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Gail & John Montgomery request that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the outcome of this case involves the homes of an entire community, the issues raised apply in other places in New Hampshire that have grown haphazardly, and because this case raises a public policy matter of the judiciary's authority to take land from an owner to serve a community interest.

I hereby certify that on April 22, 2013, copies of the foregoing will be forwarded to Barry C. Schuster, Esq.

Dated: April 22, 2013

Joshua L. Gordon, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2010-CV-412

Granite Acres Property Owners Association et al.

v.

Ralph John Montgomery et al.

ORDER

This is a declaratory judgment action in which the parties seek a judicial determination of the respective rights of the plaintiffs and the defendants in and to a road that crosses the defendants' property and provides access to the individual plaintiffs' lots. The individual plaintiffs assert that they have acquired both express easements and prescriptive easements to use and maintain this road. The Court heard testimony from fourteen witnesses, received numerous exhibits from each party, and conducted a view. Based on the evidence presented, the Court makes the following findings and rulings.

I. Factual Background

A. The Neighborhood and the Parties

The parties' dispute relates to Sands O'Time Road, a private road in the towns of Hanover and Canaan that provides the sole means of access to the individual plaintiffs' properties. Sands O'Time Road (hereinafter the Road) is a dead-end road that begins at its intersection with Wolfeboro Road (formerly the Tunis Road), which is a public road in the town of Hanover that runs in a generally east-west direction along the northern most tip of Goose Pond, and runs in a generally southerly direction to the west of Goose Pond. (Defs.' Exs. B and C; Pls.' Ex. 6.) The land on either side of the Road has been subdivided into

scores of lots. The lots in Canaan are known as the Granite Acres subdivision.

The individual plaintiffs own lots on either side of the Road in Hanover and Canaan. The Granite Acres Property Owners Association (GAPOA) is an incorporated association of property owners in the Granite Acres subdivision. The Sands O'Time Road Association (SOTRA) is an unincorporated association of lot owners in Hanover and Canaan. The plaintiffs acknowledge that the GAPOA and the SOTRA do not have any easement rights with respect to the Road but are merely entitles through which the individual plaintiffs exercise any such easement rights they have acquired. The defendants own four lots in Hanover located at the entrance of the Road, two on either side of the Road. They also own that portion of the Road located in Hanover, that extends from Wolfeboro Road to the Canaan town line for approximately one mile. (Defs.' Ex. I.) The defendants reside on the west side of the Road.

B. The Conveyances

At one time Pauline Barney owned all of the subject property in Hanover and Canaan on the west side of Goose Pond. In the late 1940s she began subdividing and selling lots, the deeds to which all included express grants of a right-of-way over the Road. Between 1949 and the late 1960s, Barney sold scores of lots in Hanover and Canaan. (Defs.' Exs. J and K; Pls.' Exs. 1, 3, 4 and 15.) In 1968, she sold a large tract of land in Hanover to Donald and Jacqueline Eisenberg, but

> [r]eserv[ed] to Pauline Barney, her heirs and assigns, a right of way from said Tunis Road to the property owned by her located in Canaan, over the Road known as the Sands O'Time private road, and subject to the rights of others deriving title from her to use said private road, said road to be maintained by the various cottage owners entitled to use the road as they shall agree.

(Def.' Ex. L.) In 1969, Barney conveyed a tract of land in Canaan to Granite Acres, Inc.

along with "a right of way from Tunis Road located in the Town of Hanover over the Road known as Sands O'Time private road to the premises herein conveyed." (Defs.' Ex. M.) Granite Acres, Inc. subdivided that property (Defs.' Ex. B) and sold lots, the deeds to which also conveyed a right-of-way over the Road. The Road is depicted on at least three plans between 1949 and 1972. (Pls.' Pet. ¶ 16; Defs.' Ans. ¶ 16.)

With respect to the individual plaintiffs' express easement grants, their deeds and those of their predecessors in title to lots in Hanover generally provide as follows:

> Granting also the privilege of access to and from said premises over the Private Road now existing or over a similar right of way should it become advisable to alter the present route. The above right of way to be used by all grantees and grantor and being subject to use at their own risk and to be kept in repair and maintained by grantor and grantees as they for their interests and convenience shall determine and among themselves shall agree.

(Pls.' Ex. 3 at 1.) The deeds to lots in Canaan generally provide as follows:

> Also conveying herewith a right of way from the Tunis [now Wolfeboro] Road located in the Town of Hanover over the private road known as the Sands O'Time private road to the private road as shown on a Plan of Land entitled 'Subdivision portion of land of Granite Estates, Canaan.'

(Pls.' Ex. 1 at 1.) The parties agree that any minor variations in the language of the easement grants of such deeds are immaterial to the issues presented in this case.

The defendants purchased lots on either side of the Road at the Road's entrance (Defs.' Ex. A., Lots 10 and 11) in 1990. The deed describes each lot's boundary adjacent to the Road as being "ten feet from the center of said roadway." (Defs.' Ex. G.) In 1995, the defendants acquired two parcels abutting their southern borders, a ten-acre tract on the west side of the Road and a small lot on the east side of it. (Defs.' Ex. A., Lots 1 and 12.) The deed also "[c]onveyed herewith . . . the right to use . . . the private road, known as Sands O'Time Road, in common with others; said road is to be maintained by the various

lot owners entitled to use said road as they shall agree." (Defs.' Ex. H.) Finally, in 2001 the Eisenbergs sold to the defendants that portion of the Road located in Hanover. The deed (Defs.' Ex. I) conveys the Sands O'Time Road as shown on the Eisenbergs' 1979 subdivision plan (Defs.' Ex. A) and describes the road as a "(20-foot wide) strip of land which begins on the southerly side of Wolfeboro Road. . . and runs generally south for approximately 1 mile. . . to the Hanover-Canaan Town line." (Defs.' Ex. I.) This deed also proves that

> [t]his parcel is subject to the rights of approximately 100-lot owners abutting Sands O'Time and Cove Roads in Hanover and Canaan to use said road for egress and ingress and to their lots over the road known as Sands O'Time Road. See deeds from Barney conveying neighboring lots beginning 1948 and later deeds from Eisenberg, and, in particular, the deed from Eisenberg to Patten Corporation . . . conveying the rights to use the private road, but reserving the title to the road.

(Id.)

C. Historic Use of the Road

The individual plaintiffs and their predecessors in title have used the Road regularly for access purposes since the 1950s. Because the Road is a dead-end road that provides the sole means of access to the individual plaintiffs' lots, it was always intended to accommodate two-way vehicular traffic. The graveled surface of the Road in Hanover is relatively narrow and in most places is not wide enough to allow motor vehicles to pass each other. In 2001, for example, the graveled road surface varied from ten to fifteen feet in width. (Defs.' Ex. RRR at I.) Consequently, over time the individual plaintiffs and their predecessors in title (hereinafter sometimes referred to as the lot owners) created three open areas or "turn-outs" adjacent to the west side of the graveled road onto which incoming vehicles could pull so as to allow outbound vehicles to pass. The first turn-out is

approximately 225 feet south of the Wolfeboro Road; the second is approximately 716 feet south of Wolfeboro Road; and the third is approximately 35 feet south of the second (Pls.' Ex. 14 at 4.) The turn-outs are not professionally designed and engineered but are areas that the lot owners and their agents opened up, to which they added gravel from time to time when grading the Road, and that they kept clear of snow, stones, brush, and other obstructions until the defendants began placing large boulders in the turn-outs in 1996. The three turn-outs were well established by 1960, and the lot owners and their agents have since regularly used and maintained them, as and when they needed and wished to do so, until the defendants started interfering with such use and maintenance in the late 1990s.

The individual plaintiffs and their predecessors in title have also regularly maintained the Road, as and when they needed and wished to do so, from the late 1950s until the defendants began interfering with such maintenance sometime after 2001. In 1958, Pauline Barney and at least thirty lot owners formed the Sands of Time Association in order to address, among other things, "the needs for further road maintenance and brush cutting." (Pls.' Ex. 2 at 2.) Since that time, the lot owners, either on their own or acting through the SOTRA and the GAPOA, have maintained the Road so that motor vehicles can safely travel on it in both directions. The lot owners, directly or through a contractor, have added substantial quantities of gravel to the Road, graded it, filled potholes, and otherwise maintained the road surface. They have cut trees and brush on and alongside the Road, removed stones and other obstructions from it, and conducted at least one blasting and drilling operation. They have maintained and improved ditches alongside the Road and have installed and maintained culverts. They have plowed and removed snow from the Road in order to keep it open and accessible during winter months, pushing snow as far

back as 15 feet or more from the centerline of the Road. The lot owners or their contractors have used commercial graders, bulldozers, backhoes, dump trucks, plow trucks, tractors, and other heavy equipment to perform such maintenance. The individual plaintiffs and their predecessors in title so maintained the Road without interruption for more than forty years.

D. **The Parties' Dispute**

Sometime after the defendants purchased their property in 1990, they proposed relocating the right of way to another part of their land. The lot owners declined this invitation. In the mid-1990s, the defendants began placing rocks (small enough for the defendants to lift) in various spots on either side of the Road. Defendant John Montgomery testified that he intended the rocks "to act like a fence" so as to keep the right of way from expanding onto the defendants' property. The plaintiffs or their contractors pushed the stones back out of the way. Consequently, in 1996, the defendants started placing larger stones and boulders on the sides of the graveled road surface and in the turn-outs. Doing so left only a relatively narrow way on which vehicles could travel and made it difficult to use the turn-outs. The lot owners continued maintaining the Road generally as they had in the past. Their contractors pushed some of the stones as far as 10—15 feet from the graveled road surface, pushed a number of the large boulders back, cut into the embankments on the road sides, and pushed or otherwise deposited snow 10—15 feet from the travelled way.

The defendants have also threatened legal action against the lot owners if the latter cut trees or brush on the Road or otherwise damage the defendants' trees or land. Over the past fifteen years a row of hemlock trees has grown on the side of the Road obstructing one's view of vehicles and pedestrians. There are also a number of other trees that are very close to the travelled way. The defendants complain that the lot owners' grading and

plowing contractors have damaged the hemlocks, gouged other trees, and caused one tree to fall on the defendants' dock. The defendants also removed a portion of a culvert that the lot owners had installed long ago.

Relations between the parties deteriorated further in 2008, when defendant John Montgomery prevented the plaintiffs' contractor from grading the Road by standing in front of the grader and not allowing it to pass. When the plaintiffs attempted to have their contractor grade the Road in 2011, Mr. Montgomery again stood before the grader at the Road's entrance and would not allow it to pass. In the meantime, the plaintiffs had instituted this action in October 2010.

On August 1, 2012, the day on which the Court viewed the property, the condition of the Road was essentially the same as it was the previous summer. The travelled way was fairly narrow. Its surface was irregular, bumpy, and pitted with numerous potholes, some quite large and deep. The Road has not been graded for at least four years. There were numerous trees, some dead or dying, close to either side of the graveled road: The row of hemlocks and other trees alongside the road obstruct one's view of vehicles and pedestrians. It is very difficult for vehicles to pass one another on most parts of the Road and impossible on at least some parts. Backing a vehicle on the Road would be very difficult.

II. Discussion

"An easement is a nonpossessory interest in land that can be created by written conveyance, prescription or implication." Soukup v. Brooks, 159 N.H. 9, 13 (2009) (quotations omitted). The individual plaintiffs argue that they have acquired a prescriptive easement to use and maintain the Road and the turn-outs. They also contend that they

have such rights by virtue of the express grants in their deeds and those of their predecessors in title. The defendants maintain that the plaintiffs have not established the elements of a prescriptive easement. The defendants concede that the individual plaintiffs have an express easement in the Road but assert that the plaintiffs use and maintenance thereof exceeds the limits and scope of the granted easement. The defendants counterclaim, arguing that they have the right to supervise and approve any maintenance that the plaintiffs propose to conduct on the Road and that they are entitled to damages for the plaintiffs' actions that the defendants characterize as "encroachments" on their land.

A. Prescriptive Easement

"The claimant has the burden of proving the existence of a prescriptive easement by establishing by the balance of probabilities 'twenty years' adverse, continuous, uninterrupted use of the land claimed in such a manner as to give notice to the record owner that an adverse possession claim is being made to it.'" Vigeant v. Donel Realty Trust, 130 N.H. 406, 408 (1988) (quoting Page v. Downs, 115 N.H. 373, 374 (1975)); see also Bonardi v. Kazmirchuk, 146 N.H. 640, 642 (2001). "In evaluating the merits of an adverse possession claim, courts are to construe evidence of adverse possession of land strictly." Blagbrough Family Realty Trust v. A&T Forest Prods., 155 N.H. 29, 33 (2007) (quotations and citation omitted). "When determining whether a claimant's use is adverse, the claimant's subjective intent is immaterial; it is the nature of the use that is controlling." Bonardi, 146 N.H. at 643 (quotations and citations omitted). In other words, the "nature of the use must be such as to show the owner knew or ought to have known that the right was being exercised, not in reliance upon his toleration or permission, but without regard to his consent." Vigeant, 130 N.H. at 408; see also Bonardi, 146 N.H. at 642. "The nature of the

use may be inferred from the manner, character and frequency of the exercise of the right and the situation of the parties." Ucietowski v. Novak, 102 N.H. 140, 145 (1959). Whether the claimant's use of the land is adverse is a question of fact to be determined by the trial court. Gill v. Gerrato, 156 N.H. 595, 597 (2007); Avery v. Ranclose, 123 N.H. 233, 238 (1983).

With respect to the element of adverse use, the individual plaintiffs presented substantial evidence that they and their agents have used the Road and the three turn-outs in such a manner as to give notice to the defendants and the defendants' predecessors in title that an adverse possession claim was being made to them. The individual plaintiffs and their predecessors in title have used the Road and the turn-outs, and operated motor vehicles thereon, regularly and extensively to travel to and from their lots for decades. They did so as and when they pleased and in plain view of the defendants and their predecessors in title since 1960. The traveled way and the three turn-outs were wider until the defendants began placing large stones and boulders alongside them in the late 1990's, by which time the lot owners had already acquired their prescriptive rights.

The three turn-outs were well established by 1960 or earlier, and the lot owners and their agents regularly used and maintained them thereafter until the defendants started obstructing them. Sargent Taylor testified that the turn-outs were present when his father purchased a lot on the Road in 1959, that the turn-outs were originally "grassy" and that gravel was added to them over time when the Road was graded, that in 1959 the turn-outs were already wide enough to allow him to pull his 1957 Chevrolet automobile completely onto them, and that in the fifty-two years that he has been at the Goose Pond property he has used the turn-outs regularly and frequently and has observed numerous other lot

owners use them many times. Wallace Ragan likewise testified that the turn-outs had been "established by use" by 1960, when his family acquired a camp on the Road, and that the lot owners thereafter regularly used and maintained them. Four other lot owners testified that the turn-outs were well established when they or their families acquired their lots in the 1970s and 1980s and were regularly used thereafter as and when needed. Some portions of the three historic turn-outs extend more than ten feet from the Road's centerline.

The individual plaintiffs and their predecessors in title have also regularly maintained the Road and the three turn-outs so as to accommodate safely two-way vehicular traffic since the late 1950s, except to the extent that the defendants have interfered with the lot owners doing so in the past decade. The lot owners or their agents have regularly graded the Road, added hundreds of loads of gravel to it, filled potholes, installed and maintained drainage ditches and culverts, and cut brush and trees on and alongside the Road and the turn-outs. They have kept the Road and the turn-outs clear of stones and other obstructions and have drilled and blasted on the Road. The invoices for maintenance performed on the Road in the 1960s and 1970s (Pls.' Ex. 2 at 96—103) document the nature and extent of many of these maintenance activities and the regular use of large commercial equipment to maintain and repair the Road. For more than fifty years the lot owners have plowed snow and have pushed it back or otherwise deposited it fifteen feet or more from the Road so that they and others may use it throughout the winter. The plaintiffs' witnesses who testified about and confirmed the lot owners' use and maintenance of the Road and the three turn-outs from the late 1950s to the present all have personal knowledge of the nature, magnitude, and frequency of such maintenance. Their testimony demonstrated the adverse nature of the lot owners' use and maintenance for the past five

decades. The defendants and their witnesses have no personal knowledge of the use and maintenance of the Road and the turn-outs prior to 1990.

The defendants argue that the lot owners' use and maintenance of the Road and the turn-outs has not been sufficiently open and notorious so as to have given the defendants and their predecessors in title notice of an adverse claim. The Court disagrees. The defendants correctly observe that "[a]bsent actual notice by the dispossessed party of the adverse possession [or use] of his or her land, the law requires more than occasional, trepassory maintenance of another's property in order to perfect adverse title; the use must be sufficiently notorious to justify a presumption that the owner was notified of the claim." O'Hearne v. McClammer, 163 N.H. ____, ___ (March 23, 2012) (slip op. at 5). The Court, however, rejects the defendants' characterization of the lot owners' use and maintenance as insufficiently notorious. The lot owners have regularly and extensively used and maintained the Road and the three turn-outs in plain view of the defendants and their predecessors in title for more than five decades. The lot owners' use and maintenance of the Road and the turn-outs was not secret or barely perceptible but obvious to all. The results of their use and maintenance likewise has been open and notorious. John Bruno, for example, testified that he has not seen many acts of maintenance being performed since he purchased his lot in 1984 because he usually visited the property on weekends only but that he always observed the effects of such maintenance. The fact that the lot owners have regularly graded, filled and plowed the Road and the turn-outs, have cut trees and brush, have removed stones and other obstructions, and have installed and maintained ditches and culverts has always been readily apparent to the defendants and their predecessors in title. So have the location and extent of the snow banks. That these acts

have been open and notorious is further demonstrated by the fact that the defendants have complained about many of them. The Court finds that the lot owners' use and maintenance of the Road and the turn-outs has always been sufficiently notorious as to give notice to the defendants and their predecessors in title that an adverse possession claim was being made to them. See Bonardi, 146 N.H. at 642; Vigeant, 130 N.H. at 408.

The defendants also contend that the plaintiffs' use and maintenance of the Road has not been continuous. The Court disagrees. The lot owners' use and maintenance of the Road and the turn-outs since the late 1950s has been regular, reasonably frequent, and, until at least 1996, entirely uninterrupted. The word "continuous" in the prescriptive easement doctrine is not synonymous with incessant. The lot owners' use and maintenance of the Road need not be unremitting to give rise to prescriptive rights. On the contrary, "[i]ntermittent use is sufficient to establish prescriptive rights if it is 'characteristic of the kind of road claimed.'" Ellison v. Fellows, 121 N.H. 978, 981 (1981) (quoting Cataldo v. Grappone, 117 N.H. 1043, 1047 (1997)). Courts have long recognized that "[r]ights of way, and some other easements, are not continuously exercised; but the right is acquired by an uninterrupted use of the right at all times, *at the pleasure or convenience of the party claiming the right.*" Sandford v. Town of Wolfeboro, 152 N.H. 1, 4—5 (2005) (quoting Winnipiseogee Lake Company v. Young, 40 N.H. 420, 436 (1860)). From 1959 or earlier until at least 1996, the lot owners have used and maintained the Road and the turn-outs in order to provide access to and from their lots as and when they pleased. The lot owners have since continued to use and maintain same regularly and to a considerable degree, as and when they wished to, albeit with interference by the defendants on some occasions.

Any such interference, however, has not extinguished or altered the prescriptive rights that the individual plaintiffs and their predecessors in title had already acquired as of 1996. Because the lot owners claimed the right to use and maintain the Road and the turn-outs *"whenever they chose . . .* and exercised that right for twenty years, agreeably to their claim, it [is] conclusive that they possessed the right." Sandford, 152 N.H. at 5 (quoting Young, 40 N.H. at 436).

The defendants further assert that the plaintiffs seek to use and maintain the right of way in ways that go beyond the scope of any prescriptive easement of which the plaintiffs have presented evidence. The "scope of a prescriptive easement is defined by the character and nature of the use that created it." Cote v. Eldeen, 119 N.H. 491, 493 (1979); see Cataldo, 117 N.H. at 1049. Consequently, "the character and extent of the use that the [plaintiffs] may make of the easement must be consistent with its previous use." Ellison, 121 N.H. at 982. The Court finds that the individual plaintiffs and their predecessors in title have not expanded or altered the scope of the prescriptive easement at any time or in any way, but that the nature, magnitude, intensity, and frequency of their use and maintenance of the Road and the turn-outs since the late 1950s has been consistent. On the contrary, it is the defendants who in recent years have endeavored to narrow the prescriptive right of way on which the lot owners always traveled and to interfere with the lot owners' historic maintenance practices.

The defendants specifically maintain, however, that the plaintiffs have changed and expanded the scope of any claimed prescriptive easement by maintaining it with heavy commercial equipment that is both considerably larger than previously used and unsuitable

on this relatively narrow right of way. The defendants assert, for example, that the plaintiffs' grading contractor only began using a commercial grader in 2001 and that, in contrast, in the 1960s the lot owners and their agents used a small grader manufactured in the 1930s.

The Court rejects this argument for two reasons. First, since at least the early 1960s, the lot owners or their agents have regularly employed large commercial equipment, including bulldozers, backhoes and dump trucks, to maintain the easement. The size and type of equipment with which the plaintiffs have maintained the right of way in recent years is comparable to that used in past decades. There is no evidence that such equipment damaged the right of way or was otherwise unsuitable. Indeed, the feasibility of using heavy equipment on the Road is demonstrated by the fact that the defendants' contractor used an extremely large piece of equipment (Pls.' Exs. 8A and 8B), a 30,000 – 40,000 pound machine that is bigger than the grader with which the plaintiffs' contractor attempted to grade the Road in 2008 and 2011, to place boulders in the right of way.

Moreover, even if the plaintiffs or their contractors could now obtain a Depression-era grader in working condition, they are not restricted to using only such antiquated equipment to maintain the right of way. "What is or is not a reasonable use of a way does not become crystallized at any particular moment of time." Sakansky v. Wein, 86 N.H. 340, 341 (1933). "There is an element of time as well as of space in this question of reasonableness." Id. As commentators have observed,

> The only thing in this world which does not change is change. Families and the members thereof change. The character of neighborhoods changes. Social and economic orders change. The use to which a property is put in a neighborhood is never static over a long period of time. It changes with the evolution of the community. Such changes are always foreseeable in the aggregate even though not in detail. During the prescriptive period a right of way is used to serve the needs of a dominant tenant in his use of the

> dominant tenement. But while the nature of the use and its extent during the prescriptive period set the general pattern which determines the extent of the use to be made of the servient tract after the easement is matured, it cannot be maintained that such use is limited to the use for the benefit of the dominant tenement in the condition in which the dominant tract existed during the prescriptive period. Both the adverse user and the servient tenant must be charged with foreseeing normal, natural and reasonable evolution and development in the use of the property in the neighborhood, including such changes in the use of the dominant tenement.

Smith and Boyer, Survey of the Law of Property at 394 (2d ed. 1971). The Court finds that the manner in which and the equipment with which the plaintiffs seek to maintain the Road and the turn-outs are reasonable and that they are consistent not only with the lot owners' previous maintenance, see Ellison, 121 N.H. at 982, but also with the normal development of both the neighborhood and relevant technology. See Sakansky, 86 N.H. at 341 (ruling that "[i]n the absence of contract on the subject the owner of the dominant estate is not limited in his use of the way to such vehicles only as were known at the time the way was created, but he may use the way for any vehicle which his reasonable needs may require in the development of his estate"); Heartz v. City of Concord, 148 N.H. 325, 332 (2002) (observing that "[i]f the proposed use of the easement is a normal development from conditions existing at the time of the grant, the use is not considered to be unreasonably burdensome"); Downing House Realty v. Hampe, 127 N.H. 92, 96 (1985) (same, regarding vehicular use of a right of way).

Finally, the Court finds that the individual plaintiffs' use and maintenance of the Road and the three turn-outs does not unreasonably burden the defendants' property. The defendants' land to either side of the right of way is mainly wooded and contains no structures or other improvements. The plaintiffs' activities do not "interfere with the [defendants'] use of their own property," Ellison, 121 N.H. at 982, or their access to their

various parcels. Nor do the individual plaintiffs' prescriptive rights "damage the possessory interest of the" defendants in their property. Thurston Enterprises, Inc. v. Baldi, 128 N.H. 760, 764 (1986).

For the foregoing reasons, the Court rules that the individual plaintiffs have acquired a prescriptive easement to use and maintain the Road and the three turn-outs for the purpose of accessing their respective lots. They have sustained their burden of establishing by a balance of probabilities twenty years adverse, continuous, and uninterrupted use of the Road and the turn-outs in such a manner as to give notice to the record owner that an adverse possession claim was being made to them. The individual plaintiffs' prescriptive maintenance rights include, but are not limited to, the rights to (1) grade the Road and the three turn-outs, add gravel to them, and otherwise maintain their surfaces; (2) have the Road and the turn-outs free of any rocks, boulders, logs, or other obstructions; (3) remove, or have removed, any such obstructions within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs; (4) cut trees (including the hemlocks about which the plaintiffs complain) and brush within ten feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs; (5) install and maintain culverts and drainage ditches and otherwise provide for reasonable drainage; (6) plow and remove snow within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs; and (7) use contemporary commercial vehicles, machinery, and equipment to perform such maintenance.

B. Express Easement

The parties agree that the individual plaintiffs have acquired express appurtenant easements but disagree about their extent and scope. "An appurtenant easement is a

nonpossessory right to the use of another's land." Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). "It creates two district estates-- the dominant estate, which is the land that benefits by the use of the easement, and the servient estate, which is the land burdened by the easement." Id.

The "interpretation of a deeded right of way is ultimately a question of law for [the] Court to decide by determining the intention of the parties at the time of the deed in light of surrounding circumstances." Gill v. Gerrato, 154 N.H. 36, 39 (2006) (quotations omitted). "Clear and unambiguous terms of a deed control how [the Court] construe[s] the parties' intent, but the law may imply supplemental rights." Arcidi, 150 N.H. at 701.

The defendants acknowledge that the easement grants to the individual plaintiffs and their predecessors in title "encompassed the right to ingress and egress by motor vehicle," Arcidi, 150 N.H. at 702, but argue that the "right of way was created as a single lane road." (Defs.' Trial Mem. at 6.) The Court disagrees. From the outset, Pauline Barney intended to subdivide her property and sell scores of lots, all of which could be accessed only by the Road. By 1966, she had already conveyed forty-three lots with appurtenant access easements. (Pls' Ex. 15 at 1–2.) The 1969 deed by which Barney conveyed a large parcel of land in Canaan to Granite Acres, Inc. along with "a right of way. . . over the Road . . . to the premises herein conveyed[,]" (Defs.' Ex. M), reflects Barney's expectation and understanding that the grantee would subdivide that property and sell numerous lots for which the Road likewise afforded the exclusive means of access. Given the sheer number of lots that Barney all along intended to benefit from the appurtenant access easements and the fact that the Road has always been a dead-end road that was to provide the sole means of access to the lot owners' lots, the Court finds that Barney always intended and

expected that the Road would accommodate, and be wide enough to accommodate, two-way vehicular traffic. See Arcidi, 150 N.H. at 703 (distinguishing between easements that "provide secondary access, as opposed to sole or primary access").

The defendants next assert that the three turn-outs exceed the scope of the easement and therefore encroach on their land. "Under an express grant, a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially." Id. at 701; White v. Hotel Co., 68 N.H. 38, 42 (1894). "This includes the right to make improvements that are reasonably necessary to enjoy the easement." Arcidi, 150 N.H. at 701. "The grant of a general right to pass and repass entitles the dominant owner to use the right of way for any necessary or convenient purpose of passing pertaining to the ownership and occupancy of his land to which the right of way is appurtenant." Burcky v. Knowles, 120 N.H. 244, 248—49 (1980); see White, 68 N.H. at 42 (holding that a "grantee of a defined way has the right to do whatever is necessary to make it passable or useable for the purposes named in the grant").

The Court concludes that the lot owners' use and maintenance of the three turn-outs come within the ambit of the easement grants. The graveled road is not wide enough in most places to accommodate the two-way vehicular traffic that the easement grants contemplate and permit. The lot owners' use and maintenance of the three turn-outs is not only convenient but also necessary for inbound and outbound vehicles to pass each other and thereby access the lots to which the easements are appurtenant.

The testimony of both parties' experts demonstrated that the three turn-outs are reasonably necessary to enable the lot owners to enjoy their easements. Laurie Rauseo, an engineer who performed a traffic impact evaluation for the defendants in 2001, testified

that, because the Road is a dead-end road, "all vehicles going in must come out the same way," that the traveled way was too narrow for vehicles to pass each other, and that she would recommend that the road provide at least an 18-foot wide traveled way plus shoulders two or three feet in width. Her "observations of vehicles nearly colliding at the intersection [with Wolfeboro Road], having difficulty passing each other as well as pedestrians, and the incidences of drivers backing up to let others pass, further support [her] conclusion that the Sands O' Time Road is inadequate to serve current demand." (Defs.' Ex. RRR at 3.)

Martin Risley, a civil engineer who conducted an engineering assessment of the Road in 2003 for the defendants, observed that the "gravel surface roadway width was . . . approximately 11 to 17 feet," found that "[t]here was insufficient width to allow two automobiles to safely pass each other," and opined that "[t]his restrictive width carries significant safety implications since the presence of just one distressed vehicle or other obstruction could prevent access for emergency vehicles." (Defs.' Ex, SSS at 4.) He testified that if two vehicles meet each other, "one has to find a place to pull over," that the Road "really is too narrow for two-way vehicular traffic," and that having turn-outs alongside the Road would make using the right of way "more convenient" and would help accommodate emergency vehicles.

Robert Kline, who was the City of Lebanon's engineer for twenty years, visited the Road in 2011, and in July 2012, at the plaintiffs' request to evaluate the Road. He testified that the traveled way is too narrow and presently needs "a considerable amount of [additional] width," and that the "best design" for a road serving so many lots would be a fifty-foot wide right of way having a twenty-four foot wide traveled way. Laurie Rauseo had

similarly observed that given the number of occupied lots for which the Road provides exclusive access, applicable roadway standards call for a fifty-foot wide right of way having a twenty-foot wide traveled way and three-foot wide shoulders. (Defs.' Ex. RRR at 3.) Kline also stated that turn-outs "are definitely necessary for safety and reasonable travel," that there should be turn-outs alongside the Road every 300–500 feet, or within sight distance of each other, that the three existing turn-outs "were a necessity," and that the three turn-outs are reasonably well located and "fairly well spaced." The Court finds that the location, number, and size of the three existing turn-outs is reasonable and that they are reasonably necessary to enable the lot owners to enjoy their express access easements.

The defendants also argue that the lot owners' past and proposed maintenance of the Road and the turn-outs exceed the scope of the easement grants. The grants themselves are silent as to how and to what extent the lot owners may maintain the right of way. The law, however, implies certain rights in the grants; namely, "whatever rights are reasonably necessary to enable" the dominant estate holder to enjoy the easement. Arcidi, 150 N.H. at 701; Burcky, 120 N.H. at 248–49. The rights that the law typically implies in the grant of a right of way include the right to grade the road, add gravel to it, and otherwise maintain its surface. See Arcidi, 150 N.H. at 701 (citing Page v. Bloom, 584 N.E.2d 813, 816 (1991) ("The owner of the easement must be allowed to do such things in the way of repairs [such as grading] as to make the easement reasonably usable.")); Beneduci v. Valadares, 812 A. 2d 41, 49 (Conn. App. 2002) (upholding a referee's finding authorizing the dominant estate holder to grade and put gravel on a right of way); Sell v. Finke, 129 N.E. 90, 93 (Ill. 1920); Lanier v. Burnette, 538 S.E. 2d 476, 479 (Ga. Ct. App. 2000); 1 Restatement (Third) Property, Servitudes § 4.13(l) (2000); G. Thompson, Real Property §

428 at 666-67 (1980). They also include the rights to remove obstructions from the right of way that "unreasonably interfere with the contemplated use by the holder of the right," C. Szypszak, New Hampshire Practice, Real Estate § 8.03 at 199 (2003), to plow snow from the right of way, and otherwise to keep it reasonably open and passable. See e.g., Hatch v. Hillsgrove, 83 N.H. 91, 97 (1927) (observing that "[t]itle to the easement gave the plaintiff all the rights of an owner to enjoy the way free from obstruction" and that the dominant estate holder had a "right to an unobstructed passage"); White, 68 N.H. at 42 (ruling that the grantee of a defined way had the right to remove such obstructions as may be necessary to make the way passable); 100 Am. Jur. Trials § 337 (2006) (discussing dominant estate holder's right to have right of way free of fences and locked gates that unreasonably interfere with ingress and egress). The grantee of an access easement also typically has the implied rights to cut trees and brush that unreasonably interfere with his contemplated use of the right of way, see Arcidi, 150 N.H. at 697; L. Jones Easements § 817 at 658 (1898); Lanier, 538 S.E. 2d at 479, and to install and maintain culverts and drainage ditches and otherwise to provide suitable drainage for the right of way. See Arcidi, 150 N.H. at 697; Lanier, 538 S.E. 2d at 479. As the Court previously noted, the grantee of an easement has the implied "right to make improvements that are reasonably necessary to enjoy the easement." Arcidi, 150 N.H. at 701. In Arcidi, the New Hampshire Supreme Court ruled that the grant of an "easement and right-of-way . . . to pass and repass and for ingress and egress by motor vehicle, foot and otherwise" permitted the construction of an access road, which "included clearing trees, ground excavation, filling wetlands, and installing culverts." Id. at 697, 702-03.

In this case, the grantees of the access easements took by implication whatever

rights are reasonably necessary to enable them to enjoy the easements beneficially. These rights included the rights to grade and add gravel to the road and the turn-outs, to plow and remove snow from them, remove rocks, trees, brush and other obstructions that unreasonably interfere with their ability to access their lots by foot or motor vehicle, to install and maintain culverts and ditches to provide suitable drainage, otherwise to keep the Road and the turn-outs in repair, and to make any other improvements that are reasonably necessary to enjoy their easements. Grading, filling, plowing, draining and clearing, among other things, are simply tasks that holders of rights of way, in most circumstances, reasonably need to do to keep them passable. In the circumstances presented, the Court rules that the lot owners' easement grants give the individual plaintiffs and their predecessors in title the same rights to maintain the Road and the three turn-outs as they acquired by prescription.

The Court must also determine whether the individual plaintiffs' rights to use and maintain the Road and the three turn-outs pursuant to their easement grants conforms to the rule of reason. "Under this rule, the parties involved must act reasonably under the terms of the easement to prevent interference with the use and enjoyment of each other's property." Arcidi, 150 N.H. at 702. The rule of reason "refuses to give unreasonable rights, or to impose unreasonable burdens, when the parties, either actually or by legal implication, have spoken generally." Sakansky, 86 N.H. at 340. "Reasonableness is a question of fact that is determined by considering the surrounding circumstances, such as location and the use of the parties' properties, and the advantages and disadvantages to each party." Arcidi, 150 N.H. at 702.

Based on the evidence presented, the Court finds that the lot owners' rights to use

and maintain the Road and the turn-outs under the easement grants are reasonable for the same reasons that their prescriptive rights to do so are reasonable. Even the defendants' experts' testimony demonstrates the reasonableness of the lot owners' said rights. Laurie Rauseo testified that a right of way should have as few obstructions as possible and that "it is never a good idea purposely to put boulders on the side of a road." Martin Risley explained that for the Road to be maintained properly, it should be adequately graded and crowned, gravel should be added to the Road as and when needed, and "normal" plowing of snow, which includes pushing snow off the traveled way, should be done. He also noted that having turn-outs would make use of the Road more convenient. In short, the Court finds that the plaintiffs' use and maintenance of the Road and the turn-outs do not unreasonably burden the defendants' property or interfere with the defendants' use of it.

Nor does the individual plaintiffs' exercise of their rights under the express easements "encroach," as the defendants allege, on the defendants' land. The defendants acquired their four parcels subject to the express easements previously granted to the lot owners. The defendants acquired the fee simple interest in the Hanover portion of the Road expressly "subject to the rights of approximately 100 . . . lot owners . . . to use [the Road] for egress and ingress . . . to their lots." (Defs.' Ex. I.) The defendants seem to ignore the fact that those portions of their property within the scope of the express easements comprise "the servient estate, which is the land burdened by the easement." Arcidi, 150 N.H. at 698. The plaintiffs' acts that the defendants characterize as encroachments on their land are not, in fact, encroachments at all. They are merely the reasonable burdens that the easement grants impose on the servient estate in the circumstances presented.

The defendants also assert that they "have deeded property rights to regulate

maintenance operations along their portion of" the Road. (Defs.' Trial Mem. at 9; Defs.' Requests for Findings ¶ 31.) They contend that the relevant deeds give them the right to supervise, approve and, in essence, veto any maintenance of the Road. They based their claim on the language in their 1995 deed to the ten-acre lot, which also "[c]onveyed herewith . . . the right to use . . . the private road, known as Sands O'Time Road, in common with others; said road is to be maintained by the various lot owners entitled to use said road as they shall agree." (Defs.' Ex. H.) The defendants also rely on the following language in the deeds to the lot owners conveying lots in Hanover.

> Granting also the privilege of access to and from said premises over the Private Road now existing or over a similar right of way should it become advisable to alter the present route. The above right of way to be used by all grantees and grantor and being subject to use at their own risk and to be kept in repair and maintained by grantor and grantees as they for their interests and convenience shall determine and among themselves shall agree.

(Pls.' Ex. 3 at 1.)

The Court rules in the plaintiffs' favor on this issue for three separate, independent reasons. First, although the defendants quoted the language in the Hanover lot owners' deeds in their Answer and Counterclaim (Defs.' Ans. ¶ 10 at 6), they did not plead this claim but raised it for the first time at trial. The plaintiffs are "entitled to be informed of the theory on which the [defendants] are proceeding." Morency v. Plourde, 96 N.H. 344, 346 (1950). "[C]ontestants in a law suit . . . must be bound by a set of rules. The most basic of these rules is that the rules cannot be changed in the middle of the contest." Morancy v. Morancy, 134 N.H. 493, 497 (1991). Because this litigation began and continued up until the first day of trial without the question of the defendants alleged deeded rights to regulate and approve maintenance "being a theory before the trial court," to allow the defendants to

raise that issue for the first time at trial and litigate it "would be grossly unfair to the" plaintiffs. Id. at 498. The Court rules that the plaintiffs are "entitled to have the case tried and decided on the grounds alleged by" the defendants, id. at 497, which do not include the deeded maintenance rights claim.

Second, the defendants' reliance on the above-quoted language in their 1995 deed is misplaced. Once the defendants acquired the fee simple interest in the Hanover portion of the Road in 2001, the easement over the Road that the 1995 deed conveyed to them "was extinguished through merger" of the dominant and servient estates. Soukup v. Brooks, 159 N.H. at 17. Consequently, the language in the 1995 deed to which the defendants point is irrelevant to the present dispute.

Finally, the Court finds the defendants' interpretation of the quoted deed language unpersuasive. Under the defendants' interpretation, each and every one of the numerous owners of lots abutting the Road in Hanover must agree to the precise nature, extent, and frequency of any and all maintenance of the Road, failing which no maintenance at all could be performed. The Court concludes that such an interpretation is illogical and unreasonable. It is undisputed that the parties do not, and cannot, agree on how to repair and maintain the Road. The Court rules that the language on which the defendants rely merely states that the Road shall be maintained in the way or the manner that said lot owners shall agree and that, absent such unanimous agreement, the dominant estate holders' rights to maintain the Road are governed by the rule of reason.

The defendants ask the Court to "recognize the full magnitude of the subdivision regulatory failure at the heart of this dispute and recognize that a clear message must be sent to the municipalities involved that it will be necessary to negotiate and resolve the

impacts of the regulatory failure." (Defs.' Trial Mem. at 13.) That horse, however, has long since left the barn. The defendants have previously litigated their various land use planning claims in numerous proceedings and have not prevailed. The defendants acquired their four parcels subject to the lot owners' express easement rights and acquired the Hanover portion of the Road expressly "subject to the rights of approximately 100 . . . lot owners . . . to use said road for egress and ingress . . . to their lots." (Defs' Ex. I.) The issue before the Court is not whether there has been such a failure of municipal planning. Rather, this declaratory judgment action merely requires the Court to determine the parties' respective rights in the Road under the law of easements. The Court cannot rule on land use planning decisions, made by towns that are not parties to this proceeding, that the defendants have previously litigated without success.

Finally, the defendants maintain that the plaintiffs' use and maintenance of the Road has caused runoff into, and pollution of, Goose Pond and has caused other environmental damage. (Defs.' Ans. ¶ 12 at 6; Defs.' Trial Mem. at 4–5, 12.) There is no evidence, however, that the plaintiffs have violated any applicable state or federal environmental laws. The New Hampshire Department of Environmental Services, for example, has not found that the plaintiffs have violated applicable state environmental statutes or regulations. If and when the plaintiffs violate any such laws, the government and perhaps the defendants have available remedies. In the meantime, the Court cannot assume that the plaintiffs will use or maintain the Road in a manner that would violate environmental regulations. Rather, the Court expects that the plaintiffs will, as they have in the past, use and maintain the Road and the turn-outs in a reasonable manner that complies with the law.

III. Conclusion

For the foregoing reasons, the Court rules that the individual plaintiffs have acquired prescriptive rights to use and maintain the Road and the three turn-outs in the manner described hereinabove. The Court also rules that the individual plaintiffs have the same rights to use and maintain the Road and the turn-outs by virtue of the easement grants. The Court finds that defendants have attempted to narrow unreasonably the right of way and that they have unreasonably interfered with the individual plaintiffs' use and maintenance of the Road and the three turn-outs.

The Court has already addressed most of the plaintiffs' claims for relief in their Proposed Decree. In addition, the Court makes the following orders:

1. The defendants shall, as soon as practicable, remove any rocks, boulders or other obstructions that they have placed within fifteen feet of the centerline of the traveled way and within five feet of the outer edges of the turn-outs;
2. The Court denies the plaintiffs' request that the defendants be ordered to replace and/or restore that portion of the culvert that the defendants removed. (Pls.' Prop. Decree ¶ 11.) The culvert was already fairly old and worn at the time the defendants removed a portion thereof. Moreover, the defendants have no duty to maintain the right of way. Thurston Enterprises, 128 N.H. at 767. The plaintiffs may, at their expense, replace, repair and/or restore the culvert; and
3. The Court denies the plaintiffs' request for admonitions regarding civil contempt (Pls.' Prop. Decree ¶ 16) inasmuch as the request is premature and unnecessary. The Court assumes that all parties will comply with the Court's Order and with applicable law.

The defendants' claim for damages and their other counterclaims are DENIED.

The parties have submitted requests for findings of fact and rulings of law. The Court's findings and rulings are set forth in narrative form in this Order. See Harrington v. Town of Warner, 152 N.H. 74, 86 (2005); Geiss v. Borassa, 140 N.H. 629, 632–33 (1996). Insofar as the parties' requests for findings and rulings are consistent with this Order, they are granted; otherwise, they are denied or determined to be unnecessary.

So Ordered.

Dated: 9/4/12

Peter H. Bornstein
Presiding Justice