THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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NOTICE OF DECISION

Paul McEachern, ESQ
Shaines & McEachern PA
PO Box 360
Portsmouth NH 03802-0360

Case Name: **Robert Jesurum v WBTSCC Limited Partnership, et al**
Case Number: **218-2013-CV-00134**

Enclosed please find a copy of the court's order of August 20, 2015 relative to:

Order on the Merits

August 26, 2015

Raymond W. Taylor
Clerk of Court

(398)

C: Michael Lee Donovan, ESQ; Rebecca L. Woodard, ESQ; Benjamin T. King, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

ROBERT JESURUM

v.

WBTSCC LIMITED PARTNERSHIP, et al.

Docket No. 218-2013-CV-00134

ORDER ON THE MERITS

Plaintiff Robert Jesurum has brought this action against Defendants WBTSCC Limited Partnership and William H. Binnie in his capacity as the trustee of the Harrison Irrevocable Trust (collectively "the Wentworth defendants"), as well as the Town of Rye ("the Town"), seeking to quiet title to a portion of the Wentworth defendants' land, which had been used by the public and by Plaintiff to access an adjacent beach. On November 26, 2014, the Court issued an order granting Plaintiff's motion for summary judgment. It held that the undisputed facts entitled Plaintiff to judgment as a matter of law on his claim for a prescriptive easement to access Little Harbor from Sanders Point. See Nov. 26, 2014 Order at 8–9 [hereinafter "Order"]. The Court reserved ruling on the scope of the easement, however, as the parties had not briefed the issue in detail. Id. at 9. On June 25 and 26, 2015, the Court held a hearing on the scope of the easement. This order describes the findings of fact and rulings of law on which the Court's decision is based.

Facts

The Court first describes the property at issue. Sanders Point is a slice of land in the northeastern corner of the Wentworth defendants' property.[1] Wentworth Road—Route 1B—abuts it to the north. In the years prior to 2012, Sanders Point was a flat, parabolic-shaped area covered with gravel and dirt. It had two points of ingress and egress, which were divided by a grassy square with a fire hydrant and two metal poles. The Wentworth defendants' golf course lies to the southwest of Sanders Point. Plaintiff testified that he believes the wooden fence dividing Sanders Point from the golf course has been there since the early 1990s.[2]

From Sanders Point, one can access Little Harbor beach by walking down what the parties have referred to as the trodden path, a five-foot-wide walkway. It is a sandy trail that is otherwise undeveloped. Surrounding it are wild grasses. Little Harbor beach extends down the eastern boundary of the Wentworth property. It is separated from the golf course by a stone retaining wall. Staircases provide access from the golf course to the beach.

The parties' dispute concerns whether and to what extent the public has access to Sanders Point and the trodden path. Their dispute arose in October 2012, after the Wentworth defendants blocked the entrance to Sanders Point by placing boulders, bushes, and a fence between it and Wentworth Road. By Defendants' actions, the public was denied access to Sanders Point and thereby to Little Harbor beach by way of the trodden path. There is no dispute that the public has a legal right to use Little Harbor beach up to the level of mean high tide. See RSA 483-C:1, III; Purdie v.

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[1] When the Court refers to Sanders Point, it is referring to the area depicted in Plaintiff's Exhibits 1, 2 and 3.

[2] The wooden fence is depicted in Plaintiff's Exhibit 1 on the right side of the photograph.

Attorney General, 143 N.H. 661, 665 (1999); see also Opinion of the Justices (Public Use of Coastal Beaches), 139 N.H. 82, 90 (1994) ("New Hampshire has long recognized that lands subject to the ebb and flow of the tide are held in public trust.").

For analytical reasons, the Court sets forth its findings of fact chronologically. At least since the 1950s, Sanders Point has been used as a means to access Little Harbor beach and the harbor's mudflats. Mike Flanigan testified that in the 1950s, his father would drive him and others to Little Harbor so that they could dig for worms at the mudflats. They would park at Sanders Point, which was at that time less developed than it was in 2012. From there, they would walk down to the beach. They would often go seven days per week during the season when the mudflats were accessible—usually from January to March. Flanigan further testified that other people would do much the same thing: they would park their cars at Sanders Point and walk down to Little Harbor's mudflats. This testimony is consistent with a report issued by the Rockingham Planning Commission in 1984. The commission's report, titled "Public Shorefront Access Study," compiled interviews with residents of Wentworth Road about their use of Little Harbor. Three of the residents, who had all lived in the area for twenty-five years or more, stated that they had used the area to access Little Harbor in search of worms. See Pl. Trial Ex. 12 at 35. The testimony supports the finding that in the 1970s and early 1980s, people continuously and consistently used Sanders Point to park their vehicles and to access the beach.

Edward Clancy testified that he had lived on Wentworth Road near Sanders Point from 1976 to 1984. He described the area as a gravel public parking lot. During the years he resided there, Clancy saw locals and tourists use Sanders Point to park

their cars and access the beach. Such use was consistent through the year. He saw people launching surfboards for windsurfing at the beach, but he never saw anyone launch a canoe. After he moved from his residence there, he returned to Sanders Point on a few occasions to walk his dogs. His walks usually occurred in the fall or spring.

Clancy's general testimony about Sanders Point is bolstered by other witnesses who recall engaging in specific activities in the area. Inger Arky testified that on two or three occasions in 1975, she and her friends rode their bikes to Sanders Point. Leaving their bikes in the parking area, they would walk down to the beach to relax. She also testified that Sanders Point was used as a "make out" spot in subsequent years. Demetrios Yiannacopoulos testified that in the early 1980s, when he was around eleven years old, he went to Little Harbor Beach two or three times to dig for worms.

The use of Sanders Point as a parking area and as a means to access the beach continued into the 1980s. Paul Connolly testified that Sanders Point's condition during the 1980s was similar to that depicted in Plaintiff's Exhibit 1, a picture which shows Sanders Point as a wide, gravel area, surrounded on two sides by grass and brush. George White, a Rye resident, testified that he used Sanders Point beginning in the late 1980s to park his vehicle and, via the trodden path, access the beach with his dogs. He would often park there in order to watch bird and inclement weather activity. He further testified that he saw people launch boats from the beach. Deborah White gave similar testimony about the use of Sanders Point. She stated that in the late 1980s she would park her car there before taking her dog down to Little Harbor beach. She used a path to get from the parking area to the beach. Deborah White added that, beginning in the late 1990s, she started using the beach to launch her kayak.

If anything, the public's use of Sanders Point increased in the 1990s and 2000s. Plaintiff testified at the hearing that he moved to Rye in 1990. From the time he moved until October 2012, he walked his dog on Sanders Point daily. His first route was across the golf course, up Little Harbor beach, and through the trodden path to Sanders Point. Later, he began accessing Little Harbor beach from Sanders Point and the trodden path. He testified that he rarely saw the beach empty of people. Moreover, the public continued to use Sanders Point as a parking area. This fact was confirmed by four of Plaintiff's witnesses: Deborah White, George White, Eleanor Stanford, and Leslie Parker. In 1995, the town of Rye voted to place signs on Sanders Point regulating parking. See Pl. Ex. 15 at 1–2.

The Court credits the testimony of the above witnesses.[3] Although some had gaps in their memory or were unable to identify specific times during which they frequented the area, they were all largely consistent about the uses that occurred during the relevant periods. In particular, the Court credits Clancy's testimony. His demeanor at trial, his minimal personal interest in the matter, and the consistency of his testimony with other witnesses persuades the Court that his observations are accurate.[4]

The Wentworth defendants called witnesses to rebut Plaintiff's evidence. The Court does not find their testimony persuasive. Mark Schlieper was one witness. He lived on Wentworth Road during his childhood, from 1950-1969, as well as intermittently

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[3] The testimony—including from Plaintiff, Thomas Steele, Clancy, and Yiannacopoulos—also confirmed what the Court had held in its previous order: that members of the public used Sanders Point under the assumption that it was public, without any belief that such access was dependent on the Wentworth defendants' permission. See Order at 4–5.

[4] The Wentworth defendants attempted to undermine Clancy's credibility. They called Mark Schlieper, whose testimony suggested that Clancy had misidentified the house that he had rented in the 1970s. Assuming that Clancy had incorrectly identified which house he had rented, the Court does not find that such a minor mistake impugns his credibility. Schlieper's testimony did not undermine Clancy's testimony that he (1) had lived near Sanders Point from 1976 to 1984 and (2) had observed the public making use of the area as a parking lot and as an access point to Little Harbor.

in the 1970s. Beginning in the early 1990s, he would visit his family home on Wentworth Road weekly. He also played at the golf course and sailed in Little Harbor in the 1990s. He testified that Sanders Point was generally a quiet area until the late 1990s and 2000s and that the gravel parking lot was, until 1978, actually the terminus of a driveway that connected Wentworth road to a residence on the golf course. The house was torn down after 1978. Schlieper recalled that in his childhood, police officers would sometimes park their cruisers there, but it was not until the late 2000s that he noticed other cars parking there on a regular basis.

Schlieper did not have the same kind of contact with the area as other witnesses, rendering his testimony less probative. Although he lived there in the 1950s and 1960s, he lived only intermittently on Wentworth road in the 1970s. In the 1990s, his visits to the area occurred weekly. His observations are therefore less probative than those witnesses, like Clancy, Plaintiff, and George White, who lived in the area during the applicable time period. Indeed, Schlieper testified that he did not notice until 2004 or 2005 that a "Beach Access" sign had been installed at Sanders Point when it is clear the "Beach Access" sign was installed in 1995. This discrepancy suggests that Sclieper's observations were less searching than the other witnesses who were residents of the area.

The Wentworth defendants' other resident witness was Christopher McKenna. He lived in the area from the 1960s until 1983. He has also been a member of the golf course since 1984. He testified that in the 1970s Sanders Point was used strictly as a turn-around for cars. In the 1980s and 1990s, he testified that he never saw much activity on Sanders Point. McKenna stated that, until the 2000s, it was very rare to see

someone using Sanders Point to access Little Harbor beach—he estimates that he saw one to two people per year. He did not observe members of the public parking their cars there until 2004.

The Court does not find McKenna's testimony convincing. His statements—particularly his estimate that only one to two people used Sanders Point each year—is against the great weight of the evidence. Moreover, McKenna has a business relationship with William Binnie—he admitted on cross-examination that Binnie employs him in one of Binnie's business ventures.

The Wentworth defendants elicited testimony showing that their employees also made use of Sanders Point over the years. Jason Bastille, a groundskeeper, testified that employees had used Sanders Point as a staging area for an irrigation project on the course. This occurred at some point in 1996 or 1997. Piping and other materials were stored in the gravel area. He opined that it would have been difficult to park while the materials were being stored there. On another occasion, employees blocked off part of Sanders Point with cones so that they could prepare materials for rebuilding bunkers. He further testified that they "took over the area" in 2004 as they were rebuilding the pump house for the golf course, though he conceded that access was not restricted on a consistent basis during construction. Finally, in 2007, after a storm threw rocks and debris into a nearby waste bunker, contractors used Sanders Point as a staging area during the month-long cleanup effort. Bastille testified that people could not park there during that operation. William Binnie testified that Sanders Point had been originally used by the nearby marina—and, before that, the Wentworth hotel—to service and construct docks.

Regarding the closure of Sanders Point, Binnie testified that Little Harbor became a hotspot for kayakers beginning in the late 1990s. The testimony of Jason Bastille is consistent with Binnie's observation. The additional traffic in these years led to conflicts between the public and the Wentworth defendants' employees. Binnie described some of the issues. People would leave litter or dog feces on the beach and golf course. Members of the public would traverse the golf course, interfering with games and creating potential insurance liabilities. When employees would confront passersby, they would become confrontational. These factors led Binnie to close Sanders Point from public access. This litigation followed.

Analysis

Before delving into its analysis, the Court will summarize its previous order. The Wentworth defendants had hinged their motion for summary judgment on the lack of evidence demonstrating adverse use. See Wentworth Mot. Summ. J. at 21–24. In essence, their argument was that the "friendly and neighborly interactions" between their employees and members of the public proved that any use was permissive. Id. at 21. The Court disagreed. The relevant standard for adverse use is whether "[the] use was of a character calculated to appri[s]e the owner that it was had under a claim of right." Wason v. Nashua, 85 N.H. 192, 198 (1931); Mastroianni v. Wercinski, 158 N.H. 380, 382 (2009) ("A use of land is adverse when made under a claim of right where no right exists."). Put another way, the question is whether the public used the property "in reliance upon the owner's toleration or permission ... [or] without regard to the owner's consent." Bonardi v. Kazmirchuk, 146 N.H. 640, 642 (2001). The Court concluded that the undisputed facts presented in the motions entitled Plaintiff to judgment as a matter

of law, in part. See Order at 5–6. It noted, "[A]t no time during the relevant period did the Wentworth defendants manifest their toleration of [the use of Sanders Point] to the general public." Id. at 6 (internal quotation marks omitted). The Wentworth defendants' subjective belief that the use was permissive did not undermine the undisputed evidence that the public had used Sanders Point under the assumption that it could do so as of right and without regard to the Wentworth defendants' consent.

The Court reserved ruling on the scope of the easement until an evidentiary hearing could be conducted, however. Id. at 9. Having conducted that hearing, the Court may determine the scope of the public's prescriptive easements in the Sanders Point area. Plaintiff seeks an easement permitting the public, in all seasons, (1) to park vehicles—including cars, bicycles, and vehicles towing boats—in the gravel area of Sanders Point, (2) to use the trodden path to access Little Harbor beach, and (3) to carry (or tow by hand-cart) small boats and kayaks via the trodden path to the beach. See Pl. Req. Rulings ¶¶ 8–16. The Court examines each of Plaintiff's requests below.

I. The Nature and Scope of Public Prescriptive Easements

"To establish a prescriptive easement, the plaintiff must prove by a 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 was being made to it." Opinion of the Justices, 139 N.H. at 92 (quoting Mastin v. Prescott, 122 N.H. 353, 356 (1982)). Thus, Plaintiff has the burden of proving that the public's continuous use of Sanders Point began prior October 1992. As used in this context, "continuity of use is a relative term and is not used in an absolute sense." Mahoney v. Town of Canterbury, 150 N.H. 148, 151 (2003). Even intermittent or irregular use may

be continuous if it is characteristic of the property at issue, cf. Cataldo v. Grappone, 117 N.H. 1043, 1047 (1977), and is not "interrupted by [the] assertion of any paramount right," Mahoney, 150 N.H. at 151.

The evidence establishes that the public has a prescriptive easement to park vehicles at Sanders Point. Since at least the mid-1970s to early 1980s, locals and tourists alike parked at Sanders Point—what has been alternatively called the gravel parking area—during all seasons of the year.[5] This use continued until Binnie closed Sanders Point in October 2012.

The public used the area under claim of right. As noted in the Court's prior order, the Wentworth defendants made no effort to regulate the area or otherwise manifest their subjective permission of the public's use. There was no witness who indicated that he or she parked at Sanders Point under the belief that such use was conditioned on the Wentworth defendants' permission. Rather, many testified that they believed it was a public parking area. Because the Wentworth defendants did not attempt to regulate access, this was a reasonable conclusion for members of the public to make. Accordingly, all of the elements for a valid prescriptive easement claim are present.

The Court would like to note one caveat to its decision. Although the testimony indicates that Sanders Point was used for public parking, the public's right is not unbounded. The testimony establishes that the public used Sanders Point for short-term parking, from dawn until dusk. People would park at Sanders Point, enjoy the area, and leave. There was little evidence to indicate that people have been using the parking area at night continuously for the last twenty years. Furthermore, the testimony

[5] The Wentworth defendants elicited testimony from some witnesses to the effect that Sanders Point was not plowed in the winter. Without evidence that people did not park their vehicles there in the winter, despite the area being unplowed, this evidence does not undermine the Court's conclusion.

suggests that multiple cars could be parked in the area at any given time. But there was no evidence that members of the public used the area to park their vehicles for multiple days at a time or their RVs, campers, or trailers. Therefore, based on the testimony of the witnesses, in conjunction with the dimensions of Sanders Point, the Court finds that the prescriptive easement is limited to four short-term, regular-sized, public parking spaces. The public's right extends from dawn to dusk. While the public may not park larger vehicles, vehicles with carriers are permitted.

Likewise, the public has a prescriptive easement over the Wentworth defendants' property to access Little Harbor beach. This easement runs from Sanders Point, down the trodden path, to the level of mean high tide. See RSA 483-C:1, III. The evidence demonstrates that the public has used this path for at least twenty years to reach Little Harbor beach. Nearly all of Plaintiff's witnesses testified to their usage of the trodden path to access Little Harbor beach.

As for the use of kayaks and other boats, the Court must reiterate that the public's use of the beach is not at issue. The Wentworth defendants cannot prevent the public from boating in Little Harbor or from using Little Harbor beach up to mean high tide. The only issue is whether the public can access Sanders Point and the trodden path while carrying or carting a canoe, kayak, or other vessel. Although the evidence indicates that kayaking is a more recent phenomenon, there was no evidence presented that a person carrying a kayak to the water would burden the easement any differently than a person walking to the beach to walk his dog or dig for worms. The Court therefore concludes that the parking easement extends to vehicles carrying such vessels. But the easement does not extend to individuals who cart or tow their vessels

across the trodden path: Plaintiff presented insufficient evidence that people have used such devices to move their vessels from Sanders Point to the beach. These findings set the scope of the public's prescriptive easement rights in Sanders Point (i.e. the gravel parking area) and in the trodden path to the beach.

II. The Wentworth Defendants' Objections

The Wentworth defendants raise a number of objections, which the Court examines in turn. The Wentworth defendants first allege that Plaintiff has not demonstrated continuous use of the parking area or the trodden path because Wentworth employees had used Sanders Point as a staging area for various tasks over the years, which had the effect of restricting the public's access. The Court disagrees.

Standing alone, the fact that employees also made use of the area does not undermine a finding that the public's use was continuous and uninterrupted. See Elmer v. Rodgers, 106 N.H. 512, 514–15 (1965). The interruption must be an "assertion of [a] paramount right" by the property owner. Salminen v. Jacobson, 83 N.H. 219, 220 (1928). That is, the owner's act must evince "his intention to exclude others from the uninterrupted use of the right claimed ...." 25 AM. JUR. 2D Easements and Licenses § 69 (1996).

The case of Gallo v. Traina, 166 N.H. 737 (2014) is instructive. That case involves a dispute between neighbors. The Gallos had built retaining walls and planted a bush in an area that allegedly crossed the Trainas' boundary line. Id. at 738. Decades later, after the Trainas ordered them to remove the walls and the bush, the Gallos sought a declaration in superior court that they had had a right, by adverse possession, to maintain the walls and the bush. Id. One of the Trainas' responses was

that they had interrupted the Gallos' possession by installing a granite post and fence to the south of the walls and by doing yard work around the bush. Id. at 739. The trial court rejected this argument and explained that "to interrupt the adverse possession, the record owner must perform some act which constitutes an ouster of the adverse claimant." Id. The interruption "must be such as would put a reasonably prudent person on notice that he or she actually has been ousted." Id. The trial court therefore found that the Trainas' "casual" entries were insufficient to interrupt the Gallos' adverse use. Id. The supreme court affirmed the trial court's order. Id. at 740.

In this case, the employees' actions were insufficient to interrupt the public's otherwise continuous use. Significantly, neither Bastille nor Binnie testified that the employees' actions were intended to interrupt the public's use, nor was there any evidence that the public's use was, in fact, interrupted. While Bastille opined that the various construction projects would have made it difficult for people to park in the area, the Court does not infer from his testimony that the public was actually dissuaded from or stopped using Sanders Point. In short, the few projects that made access more difficult would not have led a reasonable person to conclude that the Wentworth defendants were interfering with his right to access Sanders Point or the trodden path to the beach. Rather, such conduct would have led a reasonable person to conclude that the Wentworth defendants were making use of the area like any other member of the public.

The Wentworth defendants next argue that any easement right over the trodden path should be "limited to pedestrian access for digging for worms." Defs. Req. Rulings at 7 ¶ 10. They insist that since worm-digging was the original purpose for which

people used the trodden path, the easement's scope is restricted to that purpose. The Court disagrees. It is true that "[t]he scope of a prescriptive easement is defined by the character and nature of the use that created it." Sandford v. Town of Wolfeboro, 143 N.H. 481, 490 (1999). Nevertheless, the character of the use is distinguishable from the subjective intent of the user who engages in the specified use. So long as the public has engaged in "a definite, certain and particular line of use," Vigeant v. Donel Realty Trust, 130 N.H. 406, 409 (1988), a prescriptive easement may be granted. For example, imagine the public has an otherwise sufficient claim for a prescriptive easement over a private road which provides access to a public highway. The property owner cannot defeat the easement by arguing that individual drivers had intended to drive to different destinations after leaving the road. The public's singular, definite use of the owner's property is what is relevant.

Similarly, even though members of the public may have parked their vehicles for different reasons—e.g., to watch for birds, to admire the sunset, or to appreciate the ocean—they all engaged in the same "line of use" by parking their vehicles for a short time on Sanders Point. Id. at 409. And while people may have intended to engage in different activities in the public area of Little Harbor beach—e.g., swimming, dog walking, or digging for worms—they all used the trodden path in the same manner. They walked from Sanders Point's parking area to the public area of the beach. These uses define the scope of the easements.[6] See Sandford, 143 N.H. at 490.

The Wentworth defendants also claim that the public's use cannot be considered adverse because any use was over "undeveloped and unenclosed" land. See Defs.

[6] There would be a different outcome if there were evidence that people engaged in different uses of Sanders Point or the trodden path based on the activity that they intended to engage in at the beach, but there was no such evidence.

Req. Rulings at 6 ¶ 7. This so-called "woodlands exception" provides that "[w]hen an easement is claimed on land that is unimproved or in a general state of nature, there is a legal presumption that the use is by permission of the owner." Breeding v. Koste, 115 A.3d 106, 114 (Md. 2015). The Wentworth defendants do not cite a New Hampshire case which holds that the woodlands exception applies in this state. Even assuming that the rule applies generally in New Hampshire, it is inapplicable under the present facts. Neither Sanders Point nor the trodden path is undeveloped or unenclosed. Sanders Point is a flattened, gravel parking area surrounded by tall grass and brush. The trodden path is similarly distinct from the grass and brush that surrounds it. Comparing them with the immediate surroundings, Sanders Point and the trodden path appear to be developed, as they are altered from their natural state. See id. at 117 (noting that exception applies when land is in "a general state of nature"). Furthermore, the woodlands exception is merely a presumption, which may be rebutted with "evidence ... indicating that the use[] was indeed adverse ...." Granite Beach Holdings, LLC v. State ex rel. Dep't of Natural Res., 11 P.3d 847, 855 (Wash. Ct. App. 2000). If the Court were inclined to find that the area is unimproved, it would hold that Plaintiff has met his burden of proving adverse use.

The Wentworth defendants also contend that any prescriptive easement the public may have has been terminated by "excessive use." Defs. Req. Rulings at 8 ¶ 17. They do not cite any New Hampshire case for that proposition, and the Court's review of the case law in other jurisdictions indicates that there is no absolute rule providing for the termination of an easement when the easement-holder's use is unreasonable or excessive.

Generally, "courts do not favor the extinguishment of an easement on the ground that it ha[s] been overburdened by increased use." Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1018 (R.I. 1999) (citing Frenning v. Dow, 544 A.2d 145, 146 (R.I. 1988)); see also 25 AM. JUR. 2D Easements and Licenses § 116 (1996). "The right to an easement is not lost by using it in an unauthorized manner or to an unauthorized extent, unless it is impossible to sever the increased burden so as to preserve to the owner the dominant tenement that to which he is entitled, and impose on the servient tenement only that burden which was originally imposed on it." Penn Bowling Rec. Center, Inc. v. Hot Shoppes, Inc., 179 F.2d 64, 66 (D.C. Cir. 1949). At a minimum, the misuse of the easement must be "willful and substantial" to justify termination. Bradshaw v. Enter. Realty, Inc., 115 So.3d 922, 931 (Ala. Ct. Civ. App. 2012).

The Wentworth defendants have not proven such egregious misuse to warrant termination. Since the 1980s, more members of the public have taken advantage of Sanders Point and Little Harbor beach. That increased traffic, by itself, is not an unreasonable use of the easement. See Downing House Realty v. Hampe, 127 N.H. 92, 96 (1985) ("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 enlargement of a use is not considered to burden unreasonably the servient estate."). In addition, the problems cited by Binnie as reasons for closing Sanders Point appear to be linked more to the public's use of the beach than to the parking and access easements over Sanders Point. The litter and dog feces left at the beach, for example, result from the public's use of Little Harbor beach, not from its use of the parking area or the trodden path. It would be somewhat asymmetrical to punish the public for its allegedly

unreasonable use of the beach by extinguishing separate parking and access easements. That being said, the Court understands the relation between the two: by preventing access to Sanders Point and the trodden path, the Wentworth defendants can effectively prevent the public from making unreasonable use of the public area of the beach. Even so, the Court does not find that the allegedly unreasonable burden on the Wentworth defendants warrants action at this juncture. Litter, dog feces, and unintentional trespasses onto the golf course are minor, technical, and remediable problems that cannot justify wholesale termination of the parking and access easements.

Finally, though they do not raise this argument in their post-trial brief, the Wentworth defendants suggested at the hearing that the alleged easement's noncompliance with state and local land use ordinances and environmental regulations bars the public from using the easement. Though these concerns are valid, they do not defeat the public's prescriptive easement rights in Sanders Point.

A prescriptive easement, like adverse possession, arises by virtue of the application of RSA 508:2, this state's statute of limitations for the recovery of real estate. The Court can find no case law to support the proposition that, in the absence of the legislature's delegation of such authority, local land use ordinances or administrative regulations can prevent or affect the operation of RSA 508:2. See Piper v. Meredith, 110 N.H. 291, 295 (1970) ("It is a long established principle under law that towns are but subdivisions of the State and have only the powers the State grants to them."). At least one other court has rejected that argument outright. See Mulloy v. Burum, 92 P.3d 614, 2004 WL 1489091, at *2 (Kan. Ct. App. July 2, 2004) (refusing to invalidate adverse

possession claim on ground that servient estate would become nonconforming under zoning ordinance). Other courts confronted by the issue have refused to interpret the local regulation in a manner that would conflict with state law. See, e.g., Wanha v. Long, 587 N.W.2d 531, 542–43 (Neb. 1998); Phillips v. Thaxton, 13-CV-16875, 2013 WL 8292680, at *3 (S.D. W. Va. Oct. 25, 2013). Without a state statute evincing such intent, the Court will not interpret local or administrative regulations as relevant to the application of RSA 508:2.

In sum, the Court finds that Plaintiff has established the public's easement rights in Sanders Point. None of the Wentworth defendants' objections is persuasive.

Conclusion

For the reasons discussed above, Plaintiff's requested equitable relief shall be granted as follows:

The Wentworth defendants are ordered to restore Sanders Point to the condition it was in prior to October 2012. This includes providing access from Wentworth Road, removing the bushes and boulders that prevent access, grading Sanders Point so as to allow for four parking spaces, and clearing the trodden path for pedestrian access. All costs shall be borne by the Wentworth defendants.

The Court encourages, but does not order, both parties to work with the town to create a manageable plan for Sanders Point. The public's right to use the area should be balanced by the town's interest in applying its land use, safety, and environmental regulations to the area, and by the Wentworth defendants' property and business interests. The Court also encourages the Wentworth defendants to erect signage to delineate the limits of the public areas and dissuade members of the public from

interfering with golf course operations. The Court assumes that the parties will work together to effectuate the Court's order, but the Court will not hesitate to order further equitable relief, along with the assessment of costs, should any party fail to comply.

Plaintiff is not entitled to attorney's fees. See Harkeem v. Adams, 117 N.H. 687, 691 (1977).

So Ordered.

August 20, 2015
Date

Marguerite L. Wageling
Presiding Justice