State of New Hampshire
Supreme Court

NO. 2012-0598

2013 TERM

FEBRUARY SESSION

Evelyn & Kenneth Doerr

v.

Dawn & Philip Tuomala

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

BRIEF OF PLAINTIFFS-APPELLANTS EVELYN & KENNETH DOERR

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I. Did the court err in holding that a way leading past the Tuomalas' house was a "driveway ... purely personal in nature"?
Preserved: PETITION FOR DECLARATORY JUDGMENT, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION (June 7, 2010), *Appx.* at 31; *Trn. passim*.

STATEMENT OF FACTS

One summer day in 2009, about a year after they purchased their land in Wilton, New Hampshire, Evelyn and Kenneth Doerr were exploring. Believing they owned deeded rights to be on other land in the vicinity, they drove on a narrow dirt road in what was once the John Bush Farm. Before they got far, they were stopped by Dawn and Philip Tuomala, told they were trespassing, threatened with the police, and asked to leave. The Doerrs have never returned. *Trn*. at 10-11, 16, 18, 21-23 25, 68-69, 107-108, 110.

To understand the rights of the Doerrs and the Tuomalas, attention must first be given to land that once was the John Bush Farm, then to deeds and documents of the late 1970s and early 1980s when John Bush subdivided, then to a landlocked tenancy and corporate ownership around the turn of the century, and finally to the confrontation that brought this to the attention of the court.

I. Boundaries and Interior Features of the John Bush Farm

John Bush, long deceased, once farmed a 475-acre tract in the northwest corner of Wilton, near the town lines of Temple to the west and Lyndeborough to the north. JOHN BUSH FARM MAP n.3 (Oct. 18, 1978), Exh. 1, *Appx.* at 2. To become familiar with it, reference is made to a color composite map on page 22 of this brief, *infra*.

A. Circumambience of the John Bush Farm

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

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

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

B. Interior Features of the John Bush Farm

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

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

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

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

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

There is a small house and garage (shown in white on the map), known locally as the "cottage," on a bluff steep above the western shore of the pond. FLOOD ELEVATION PLAN, ref.2 & n.3 (Dec. 7, 2009), Exh. A, *Appx.* at 6 (showing contour lines from pond to cottage); *Trn*. at 84, 98-99. While the land immediately around the cottage is within the floodzone, the cottage is just slightly higher and does not flood, as indicated by the red dashed lines ringing it. CHALET PEARL MAP - COVER SHEET, n. 14 (Oct. 26, 1999), Exh. 2, *Appx.* at 3; FLOOD ELEVATION PLAN (Dec. 7, 2009), Exh. A, *Appx.* at 6; PHOTOS, Exh S, *Appx.* at 90; *Trn.* at 100-105. There is a driveway – clearly private and shown in brown on the map – leading from the cottage to the unnamed travel

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

[2]The names of roads used here do not necessarily reflect the official names. *See e.g.*, TOWN OF WILTON, STREET NAMES (June 14, 2012), Exh. O, *Appx.* at 72. To ease confusion here, this brief and the map on page 22 *infra,* may reflect colloquial or informal names. *Trn.* at 45.

way which traverses the land. *Trn.* at 35-36. The driveway is about a half-foot higher than the surrounding area, which means it also does not normally flood. *Trn*. at 98-100. Because of the steep bluff on which the cottage sits, its access to the pond is by footpath to the south shore labeled "Easement B," *Trn.* at 30, colored pea-green on the map.

II. Breaking up the John Bush Farm

The cottage was built in 1976 as a place for John Bush to stay while he built the château, which was completed by the late 1970s, and then became a guesthouse. *Trn*. at 42. WILTON TAX CARD (June 19, 2012), Exh. L, *Appx.* at 52. In 1978 John Bush began the process of subdividing, with a long-term interest in developing the land. *Trn*. at 47, 127. All of the roadways pictured on the map on page 22 of this brief are at least as old as the house. *See* WILTON PLANNING BOARD MINUTES at 7 (Nov. 17, 1999), Exh. M, *Appx.* at 54; CHALET PEARL MAP - COVER SHEET (Oct. 26, 1999), Exh. 2, *Appx.* at 3 (noting "existing 9' gravel drive").

A. First Subdivision, Creating Lot 5

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

The remainder, Lot 5 (also referred to as Lot A-71 in town tax records), comprised about 393 acres, *Trn*. at 44, and is indicated on the map in light yellow. The Planning Board noted "[t]here is also another lot (6) which is a lot of separate record," but is not indicated on any drawing. *Id.* There was no mention by the Planning Board of the guest-cottage by the pond in the middle of Lot 5. The next month the Planning Board approved the subdivision. WILTON PLANNING BOARD

MINUTES at 1 (Oct. 19, 1978), Exh. K, *Appx.* at 50.

The subdivision plan indicates private roads on Lots 1 and 2, and the Woods Road. It also indicates the "private drive" later named Jackson Drive, but that is shown as ending at the flood mark where it enters the big Lot 5. JOHN BUSH FARM MAP (Oct. 18, 1978), Exh. 1, *Appx.* at 2. Moreover, the plan does not show the Jackson Drive road itself, but rather shows a long thin area through which Jackson Drive passes, and specifies this area is 50 feet wide. *Id.* Despite the Planning Board's request that all private roads be shown, Mr. Tuomala, who helped draft the plat, and also admitted the house then existed, *Trn*. at 41, nonetheless did not include them because the map was done hurriedly for a Planning Board deadline. *Trn*. at 47.

B. Sale of the Subdivided Lot 5 for Development

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

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

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

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

- It applies to both parties, "[t]he grantor and the grantee," and their successors.
- It creates three categories of roads: "all existing roadways, whether public or private" … and "future roadways built by the grantor or the grantee" – *i.e.*, existing public roads, existing private roads, and future roads.
- It specifies that the grantor's and grantee's successors "shall have joint and unlimited rights of way."
- It specifies that these joint and unlimited rights of way apply on all three types of roads – *i.e.* "over all existing roadways, whether public or private, … as well as over future roadways."
- It creates a driveway exception to these rights, but it appears the exception applies only to future roadways.
- It defines "driveways" to mean those "which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes."

The next sentence of the deed provides:

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

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

> IT IS A STRICT CONDITION AND COVENANT of this deed, binding upon the [parties and their successors], and a covenant running with the land, … that if the Town of Wilton, the County of Hillsborough or the State of New Hampshire should ever desire to take … any or all of said roadways, or any part of them, for public highways … [the parties and their successors] shall from time to time and without charge, convey to the Town of Wilton, the County of Hillsborough or the State of New Hampshire, as the case may be, all of their respective interest in as much of said roadways as is necessary for making said … public highways.

Thus the deed provides:

- Whatever the content of these two sentences, the parties intended them to be strictly construed.
- Cooperation with public authorities to facilitate improvement of any roads and acceptance of them by public authority is a condition of the deed in perpetuity.
- The roads must be 50 feet wide.

C. Sale of the Rest of the Subdivided Lots

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

A few months later, he sold Lot 2, the château. It contains the exact same language as the Bush→Comvest deed. DEED, BUSH→SAMARAS(Feb. 28, 1979), Exh. C, *Appx*. at 22. The next year he sold lot 1, on Old County Road. Probably because it is so far removed and separated by a public road, however, of all the lots comprising the former John Bush Farm, only Lot 1 does not repeat the language of the Bush→Comvest deed regarding rights on existing and future roads. DEED, BUSH→ROEDEL (Apr. 1, 1980), Exh. D, *Appx*. at 25. A year after that, in 1981, John Bush sold Lots 3 and 4 together. It contains the exact same language as the Bush→Comvest deed regarding existing

and future roads, and also specifies that portions of Lots 3 and 4 may be conveyed to Comvest in the event Jackson Drive needs to be widened. DEED, BUSH→CARNEY TRUST(May 18, 1981), Exh. E, *Appx*. at 27.

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

D. Tuomalas are Long-Term Tenants; New Ownership

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

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

14, 23.) This resulted in few people entering. *Trn.* at 110.

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

III. Mutual Interests in Clarifying Awkward Legal Situation

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

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

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

To the extent Chalet Pearl would agree to keep the cottage intact, and the Tuomalas had the

ability to purchase it, both would have mutual interests in formalizing the situation. Given that the Tuomalas' only attachment to the cottage was sentimental, however, the new corporate ownership would leave them with little leverage to bargain for expanded or wide-ranging exclusive rights.

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

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

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

The deed is barebones, and conveys a portion of Lot 5 from Chalet Pearl to the Tuomalas. The Declaration of Easements, along with the three plats, describe in detail what was conveyed. The tax stamp indicates paid Chalet Pearl was paid $150,000.[3]

The documents first create "Lot A-71-1, containing 14.7 acres." Lot A-71-1 is so named because it is formed from a portion of Lot 5, known as Lot A-71 in town tax records. TAX MAP, WILTON, N.H. (Apr. 1, 2010), Exh. B, *Appx.* at 7; CHALET PEARL MAP - COVER SHEET n. 4 (Oct. 26, 1999), Exh. 2, *Appx.* at 3. For want of better nomenclature, it will be referred to herein as Lot A-71-1, and is indicated in pink on the map included in this brief at page 22, *infra*.

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

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

The deed documents then create "Easement A," indicated in bright yellow on the map. There is a gravel pit on Easement A, indicated by a black dotted area. The purpose of Easement A is to give the Tuomalas "the right to remove gravel" for the purpose of "maintaining the existing gravel roads." DECLARATION OF EASEMENTS ¶ 1 (Apr. 26, 2000), Exh. I, *Appx.* at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *Appx.* at 3 ("Easement 'A' is proposed for the use of gravel thereon for maintenance of driveways"). The document then create "Easement B," shown as pea-green on the map, so that the Tuomalas can "gain access to the pond." DECLARATION OF EASEMENTS ¶ 2 (Apr. 26, 2000), Exh. I, *Appx.* at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *Appx.* at 5 ("Easement 'B' is proposed for access to the pond").

The deed documents also create "Easement D" and "Easement E." DECLARATION OF

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

Finally, the documents create "Easement C." On the map included in this brief on page 22 *infra*, Easement C is indicated in blue, and is striped to indicate it is co-extensive with a portion of Lot A-71-1.

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

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

V. Collection of Easements Meets Everyone's Needs

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

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

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

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

By creating Easement C, Chalet Pearl ensured that it and any others who have rights to the former John Bush Farm would continue their ability to traverse the entire road system and travel continuously from the Wilton side to the Route 101 side of the property. Easement C gave the

Tuomalas the ability to contain others' travel over their land to just a 50-foot linear area which they could relocate for privacy at their convenience.

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

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

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

The easements puts liability where it logically belongs: Chalet Pearl has none in a location that might pose difficult emergency access, and the Town has none unless it exercises its option to adopt the roads as facilitated by the easements. CHALET PEARL MAP - COVER SHEET, n. 11 (Oct. 26, 1999), Exh. 2, *Appx.* at 3 ("The Town of Wilton is not responsible for any maintenance of Jackson Drive [or] the driveway … unless they are brought to town standards and accepted by the

Town."); WILTON PLANNING BOARD MINUTES (Apr. 19, 2000), Exh. M, *Appx.* at 70 (noting release of liability); *see* LETTER FROM WILTON HIGHWAY DEP'T TO WILTON PLANNING BOARD (Nov. 15, 1999), Exh. N, *Appx.* at 71. The Tuomalas assume liability, given their desire to continue living in a remote (for now) location with a propensity to flood.

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

VI. Tuomalas Move Their Driveway

John Bush located the driveway apparently for his convenience building the cottage in 1976, and not for the Tuomalas living there a quarter century later.

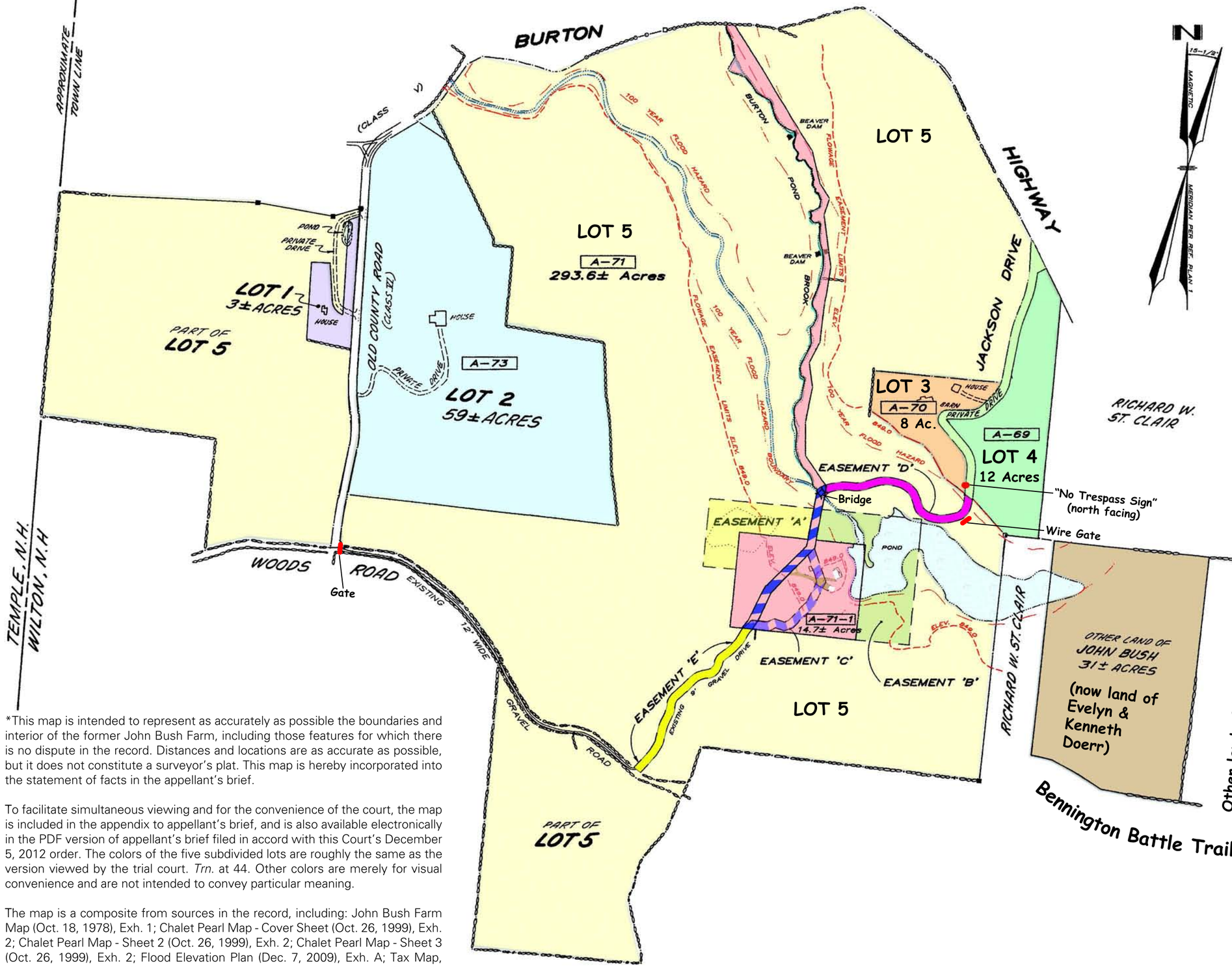
Its original location is indicated on the map included in this brief on page 22, *infra*, in faded blue stripe. The Easement C corridor through Lot A-71-1 was, Mr. Tuomala estimated, "about just under 40 feet from the garage," and close enough "so we could drive right up to the house." *Trn*. at 35, 99-100. This comports with the 1999 plat, and although overgrown, can still be perceived on the land. CHALET PEARL MAP - COVER SHEET, n. 14 (Oct. 26, 1999), Exh. 2, *Appx.* at 3; CHALET PEARL MAP - SHEET 3, det. B (Oct. 26, 1999), Exh. 2, *Appx.* at 5. The driveway, insofar as there was one, was very short.

Less than two years after Chalet Pearl's ownership was consummated, *Trn*. at 100, and in accord with the permission in the easement documents, the Tuomalas moved the entire corridor of Easement C farther from their house. According to the Tuomalas, the current configuration has several advantages: reduced hills and curves, improved drainage, increased safety, easier to plow and maintain. *Trn*. at 99, 101. They also got it out of the flood plain to facilitate access in watery conditions. *Trn*. at 100-101. The new location is indicated on the map included in this brief on page 22, *infra*, in darker blue stripe.

The move necessitated lengthening the driveway "a few hundred feet." It is shown in brown on the map. *Trn.* at 36, 43; ORDER ON PRELIMINARY INJUNCTION (Nov. 16, 2010); *Appx.* at 105 (finding new location of Easement C between 200 and 250 feet from house); FLOOD ELEVATION PLAN, ref.2 & n.3 (Dec. 7, 2009), Exh. A, *Appx.* at 6 (showing new location).

Finally, as the extended portion of the longer driveway did not before exist, it appears to be the only arguable "future roadway" pursuant to the Bush→Comvest deed.

John Bush Farm - Boundaries and Interior Features*



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

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

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

STATEMENT OF THE CASE

After Evelyn and Kenneth Doerr were confronted by Dawn and Philip Tuomala in 2009, they petitioned for a declaratory judgment and injunction allowing them unrestricted use of the travel ways through the former John Bush Farm. PETITION FOR DECLARATORY JUDGMENT, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION (June 7, 2010), *Appx.* at 978. The Hillsborough County (South) Superior Court (*Colburn*, J.), denied a preliminary injunction for lack of immediate harm. ORDER (ON PRELIMINARY INJUNCTION) (Nov. 16, 2010), *Appx.* at 105. The Tuomalas counter-claimed alleging that whatever rights the Doerrs might claim, they were extinguished by adverse possession. FIRST AMENDED ANSWER OF RESPONDENTS (Jan. 3, 2011), *Appx.* at 110.

The parties filed cross motions for summary judgment, RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and MEMO OF LAW (Jan. 31, 2011), *Appx.* at 115; PETITIONER'S MOTION FOR SUMMARY JUDGMENT (Mar. 1, 2011), *Appx.* at 130, and each objected to the other's. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT (Mar. 1, 2011), *Appx.* at 126; RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT (Mar. 31, 2011), *Appx.* at 137. The court held that the Doerrs have deeded rights to some use of the former John Bush Farm, but left for trial the counterclaim and the determination of which roads the Doerrs may use. ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT(May 19, 2011), *Appx.* at 142.

The court took a view and held a two-day bench trial during which Mr. Doerr, and both Mr. and Ms. Tuomala testified. (FINAL) ORDER (July 26, 2012), *Appx.* at 161;*Trn*. at 3. Because Chalet Pearl, the owner of Lot 5 was not a party, the court declined to address rights over Jackson Drive, Easement D, and Easement E. (FINAL) ORDER at 1 n. 1, *Appx.* at 161.

The court held that although Chalet Pearl has rights over Easement C, (FINAL) ORDER at 5, it is nonetheless "purely personal" to the Tuomalas because it is for their ingress and egress and nobody else uses it. (FINAL) ORDER at 8-9, *Appx.* at 168-69. It held that therefore the Doerrs have no rights to it. Given that, the court did not address the Tuomalas' adverse possession counterclaim. (FINAL) ORDER at 10, *Appx.* at 170.

SUMMARY OF ARGUMENT

Evelyn and Kenneth Doerr argue that their rights over land now owned by Dawn and Philip Tuomala pre-date the Tuomala's ownership, and that the corridor later established passing through the Tuomala's land is not a "driveway" within the meaning of the prior covenant.

ARGUMENT

I. Easement C is not a Private Driveway

The Bush→Comvest deed provides:

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

DEED, BUSH→COMVEST at 3 (Nov. 3, 1978), Exh. 3, *Appx*. at 8 (capitalization and minor punctuation altered). As noted, the deed:

- applies to both the parties and their successors;
- creates three categories of roads: existing public roads, existing private roads, and future roads;
- specifies that the grantor's and grantee's successors "shall have joint and unlimited rights of way";
- specifies that these joint and unlimited rights of way apply on all three types of roads – *i.e.* "over all existing roadways, whether public or private, … as well as over future roadways."
- creates a driveway exception;
- defines "driveways" to mean those "which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes."

The way which the subsequent Chalet Pearl→ Tuomala deed calls "Easement C" existed at the time of the Bush→Comvest deed. It had to have been there to construct the house in 1976, and it had to have been there during John Bush's sojourn while building his château on the hill. The

reason the existing roads were not on the 1978 plat was, according to Mr. Tuomala, because it was hurriedly completed for a Planning Board deadline. *Trn*. at 47.

Because the road traversing the John Bush Farm – from Burton Highway in the north to the Route 101 access in the south – existed at the time of the Bush→Comvest conveyance, all the grantors' and grantees' successors "have joint and unlimited rights of way over them." The Doerrs are the grantor's successors, and they thus have these rights. Accordingly, and regardless of the construction of any other terms in the deed, the Doerrs have rights of way that have been denied them.

Moreover, the driveway exception applies only to "future roadways." The deed sentence first makes clear that both parties' successors have rights over existing roadways, and then, following a comma, it uses the conjunctive – "as well as" – and it is only after the conjunctive that the parenthetical defining driveways appears. Thus the parenthetical applies only to the matter following the conjunctive, and whatever the meaning of the parenthetical driveway definition, it does not apply.

The only arguably "future roadway" here is the Tuomala's driveway leading from Easement C to their door. The Doerrs concede it is purely personal, and disclaim any right to be on it.

Even if the road within Easement C did not exist at the time of the Bush→Comvest deed and it is thus a "future roadway," *or* even if the parenthetical driveway definition applies to both existing and future roads, the way within Easement C does is not a driveway. The definition of driveway in the deed is specific:

> driveways which are *purely* personal in nature **and** are *solely* for ingress to and egress from buildings on any of the premises **or** are for the *sole* purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes.

Id. (emphasis added). Thus there are two types of qualifying driveways:

- those which are both "purely personal" "*and*" "solely" for access to buildings; and
- those which are for the "sole purpose" of using or enjoying the land and not for development purposes.

The two adverbs in the first type – "purely" and "solely" – have meaning. The parties meant not merely a personal place, but one that is "purely personal." Likewise the parties meant not merely a way in and out of buildings, but a way "solely" for that purpose. And to qualify, the way has to be meet both conditions.

The adjective in the second type – "sole" – also has meaning. The parties meant not merely a way whose purpose is for "using or enjoying the woodlands, field and the like," but one for which that is its "sole" purpose.

What the parties had in mind is not mysterious. The first driveway type is the common notion of a way leading from a street, ending at one's own abode, not intended for anyone else. The second type is commonly seen in rural areas leading from a street and ending in a farmers' field or woodlot, and not intended for subdivision or anything else.

The road occupying Easement C is not this. It does not dead-end, and it does not lead to a building, field, or forest. It is a through-road, a corridor, a passage from one end of the John Bush Farm to the other. It is a significant part of the development value John Bush saw when he subdivided, because it provides an avenue both north to Wilton and south to Route 101.

The fact that long after John Bush's passing Chalet Pearl reserved to itself rights through Easement C, the central reasoning for the court's decision below, is not dispositive nor even meaningful for many reasons.

First, a subsequent deed provision cannot constrain a prior one, *see Nashua Hosp. Ass'n v. Gage*, 85 N.H. 335 (1932) ("It seems at least clear, upon principles which scarcely need be stated,

that the subsequent conduct of the grantor in inserting a similar covenant in a subsequent conveyance of a part of the tract cannot be properly regarded as a circumstance in aid of the intention or purpose of the parties to the prior deed.") (quotations omitted), especially, as here, in the context of mutual or reciprocal deeds. *Bouley v. City of Nashua*, 106 N.H. 74 (1964). If, for example, this dispute arose before acquisition of the John Bush Farm by Chalet Pearl, the Doerrs' predecessor-in-title could walk on the land of the Tuomala's predecessor-in-title unimpeded. The Doerrs' rights pre-date, and neither Chalet Pearl nor the Tuomalas can take them away.

Second, Chalet Pearl is on equal footing with the Doerrs. Both are successors to the John Bush Farm, and both have equal rights under the Bush→Comvest deed.

Third, Chalet Pearl reserved the right to use Easement C for the exact same purpose as John Bush reserved the use of all existing ways for his successors – to get from one end of the property to the other and to perhaps someday realize the value of owning the traverse. Regardless of whether Chalet Pearl's plans are to enjoy the land or develop it, it is unreasonable to believe John Bush or any owner intended a restriction that would so substantially diminish its value. *Moulton v. Groveton Papers Co.*, 112 N.H. 50, 56 (1972) ("in arriving at what a reservation in a deed means the conditions which existed at the time of its execution are an important consideration"); *Abbott v. Stewartstown*, 47 N.H. 228, 229 (1866) ("The easement here may be considered as commencing by express grant, and its nature and extent are to be determined by the language of the deed, taken in connection with facts, usages, and the circumstances existing at the time of making it.").

Fourth, the fact that Chalet Pearl has use of Easement C defeats – all by itself – any claim that it is either: 1) "purely personal in nature and … solely for ingress to and egress from buildings," or 2) "for the sole purpose of using or enjoying the woodlands, field and the like." Moreover, Chalet Pearl's reservation does not purport to exclude others, but rather only ensures that it can get from

one end of the John Bush Farm to the other.

Fifth, the holding that nobody but Chalet Pearl and the Tuomalas can use Easement C either neglects or undermines the reasons it was required to be 50 feet wide. John Bush ensured that Jackson Drive could be made 50 feet wide so that if the Town or State ever wanted to make it public, it could be conveniently done. Complying with the "harmonious" clause in the Bush→Comvest deed, Chalet Pearl ensured the same for Easement C. If Chalet Pearl were concerned with only its own occasional passage, the Chalet Pearl→Tuomala deed would have reserved to it merely the right to cross, and not a 50-foot wide corridor. *Moulton v. Groveton Papers Co.*, 112 N.H. at 56; *Abbott v. Stewartstown*, 47 N.H. at 229.

Sixth, the court held that Easement C was personal to the Tuomalas in part based on the fact that nobody else uses it. But that is only because the Tuomalas chase everyone away, both in-person and by erecting signs and gates in places far outside the bounds of what they can claim to own.

For these reasons, the court erred in holding that Easement C was a "driveway" and thus off-limits to the Doerrs.

II. Tuomalas Overreached the Middle Route

When the Tuomalas negotiated the easements with Chalet Pearl, they had little leverage – they were at-will tenants on a non-conforming lot subject to frequent flooding whose predecessor-in-title burdened it with reciprocal restrictions. Given that the cottage would not likely attract many buyers, Chalet Pearl, Inc. could have put them out and razed it. The Tuomalas had to have understood they were not bargaining for expansiveness and exclusivity.

Yet the Tuomalas now claim that the entire 2¼ mile way – from the end of Jackson Drive where they put a no-trespass sign to the end of Woods Road where they put a gate – is their driveway. *Trn*. at 32, 110. While their attempts to create such privacy is understandable, it does not comport with the history or the documents.

There is, however, a middle route. While the Tuomalas can keep out the public at large, they cannot interfere with those who are successors to John Bush and therefore have deeded rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the court below.

Respectfully submitted,

Evelyn & Kenneth Doerr
By their Attorney,

Law Office of Joshua L. Gordon

Dated: February 6, 2013

Joshua L. Gordon, Esq.
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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Evelyn & Kenneth Doerr request that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction, and because the outcome below is prejudicial to the rights not only of several landowners in the vicinity of the John Bush Farm but also to the ability of public authorities to ever accept the roads as public as envisaged by the Farm's founder.

I hereby certify that on February 6, 2013, copies of the foregoing will be forwarded to Thomas J. Pappas, Esq.

Dated: February 6, 2013

Joshua L. Gordon, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
NO. 10-E-0184

Kenneth J. Doerr and Evelyn M. Doerr

v.

Philip E. Tuomala and Dawn B. Tuomala

ORDER

A two-day bench trial commenced on June 26, 2012, and concluded on June 27, 2012. The petitioners, Kenneth and Evelyn Doerr, and the respondents, Philip and Dawn Tuomala, were represented by counsel. On June 26, 2012, the Court conducted a view of the subject property and surrounding area, located in Wilton, New Hampshire.

This matter involves the petitioners' request for declaratory judgment and permanent injunction, alleging that they are entitled to the use and enjoyment of an easement by grant across certain property owned by the respondents.[1] The respondents claim that the easement does not apply to the way[2] at issue because it is a purely private driveway. They alternatively assert that if the easement does apply it has been revoked by adverse possession. In its May 19, 2011 Order on the parties' cross motions for summary judgment, the Court determined that the plain language of the petitioners' deed granted them rights of way across land formerly owned by John Bush.

[1] To the extent that the petitioners have requested declaratory judgment and a permanent injunction related to Jackson Drive, easement D and easement E, the Court concludes that it lacks jurisdiction to make these determinations absent notice to the respective landowners and an opportunity for them to be heard. Thus, the Court declines to make findings and rulings as to Jackson Drive, easement D or easement E.

[2] Because the parties dispute whether the dirt/gravel path at issue is a roadway or a driveway for purposes of the easement, the Court will refer to it as a "way".

However, the Court did not resolve the issue of whether the way across the respondents' property constitutes a roadway or a driveway. The Court's Order further determined that material factual issues remained as to whether the petitioners' right of way has been extinguished through adverse possession. Thus, these are the only remaining issues before the Court in this matter. The Court makes findings of fact and rulings of law as set forth below.

Findings of Fact

All of the land at issue in this matter at one time belonged to John H. Bush. In 1978, Mr. Bush subdivided a 474.5 acre parcel of land in Wilton, New Hampshire into five lots, (see Pet'rs' Ex. 1), and conveyed Lot 5, a 392.5 acre parcel, by warranty deed to Comvest Corporation (the "Bush-Comvest deed") (Pet'rs' Ex. 3). The Bush-Comvest deed included the following easement language:

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

(Id.) Although the Bush-Comvest deed pertained only to the conveyance of Lot 5, the language creating the easement specifically stated that, "[s]aid rights of way shall not be limited to the land herein being conveyed, but shall be extended to and may be used in conjunction with other land presently owned by the grantor," referring specifically to a plan entitled The John Bush Farm (the "Bush Plan"). (Id.)

The Bush Plan, created in 1978 in conjunction with the subdivision, depicts Lot 5 and the immediately surrounding area, including a thirty-one (31) acre parcel labeled "Other Land of John Bush." (Pet'rs' Ex. 1.) In 1981, Mr. Bush conveyed this parcel by warranty deed to Don and Dorothy Taylor (the "Taylor deed"). (Pet'rs' Ex. 4.) In 2008, the Taylors conveyed this parcel by warranty deed to the petitioners, Kenneth and Evelyn Doerr (the "Doerr deed"). (Pet'rs' Ex. 5.) Both the Taylor deed and the Doerr deed contained the same easement language as in the Bush-Comvest deed, creating express rights of way across public and private roadways on land then owned or formerly owned by Mr. Bush, specifically including the land conveyed to Comvest:

> The successors in title to John H. Bush and the grantees, their respective heirs, devisees, executors, administrators, successors and assigns, shall have joint and unlimited rights of way over all existing roadways whether public or private, and which are now or formerly the property of John H. Bush or reserved by John H. Bush in a deed to Comvest Corporation, dated November 3, 1978, and recorded in the Hillsborough County Registry of Deeds, Book 2652, Page 736, as well as over future roadways built by the successors in title to John H. Bush and/or Comvest Corporation, their respective heirs, devisees, executors, administrators, successors and assigns (except for those driveways which are purely personal in nature and are solely for ingress to [and] egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes). . . . Said rights of way shall not be limited to the land herein being conveyed but shall be extended to and may be used in conjunction with other land now or formerly of John H. Bush . . . .

(Pet'rs' Ex. 5.)

Mr. Doerr testified that he and his wife use their Wilton property for purely recreational purposes, as the only structure on the property is a portable shed. He stated that they also own two similar adjacent parcels of land, totaling approximately one hundred and twenty-five acres. The petitioners' land includes a portion of a dam and a pond, which extends through property of Richard St. Clair and onto Lot 5. Their

land has frontage on Bennington Battle Trail, as well as access from Jackson Drive. The access from Jackson Drive is blocked by a wire gate, to which the petitioners have a key. Mr. Doerr testified that several others with property in the surrounding area also have keys, including the State. In order to access their property from Jackson Drive, the petitioners must first cross land of Mr. St. Clair. However, Mr. Doerr testified that when the water level is high in the pond, the land between Jackson Drive and his property is flooded.

The respondents own a parcel of land in the center of Lot 5 that contains a cabin, which is their permanent residence. Mr. Tuomala testified that their cabin was originally constructed in the 1970s by Mr. Bush to stay in while his main house was being constructed. The cabin was subsequently used as a guesthouse. Mr. Tuomala testified that the cabin and the ways connecting it to Jackson Drive on the east side of Lot 5 and to Woods Road[3] on the west side existed at the time the Bush Plan was created; however, none are depicted on this plan. (Pet'rs' Ex. 1.) Mr. Tuomala testified that he worked for T.F. Moran in 1978 at the time the Bush Plan was prepared by that company and personally participated in creating the plan.

The respondents moved into the cabin in 1981, though all of Lot 5, including the cabin, was still owned by Comvest at that time. In 1998, Lot 5 was conveyed to Chalet Pearl, Inc. ("Chalet Pearl"). Shortly thereafter, Chalet Pearl subdivided Lot 5 to create what is now the respondents' property. (See Pet'rs' Ex. 2.) Mrs. Tuomala testified that she is a licensed land surveyor, and that she and Mr. Tuomala started Monadnock Survey, Inc., which created the Chalet Pearl Plan in 1999. (See id.) On the Chalet

[3] Identified as "Woods Road" on the Bush Plan, (Pet'rs' Ex. 1), and "Existing 12' Wide Gravel Road" on the Chalet Pearl Plan, (Pet'rs' Ex. 2).

Pearl Plan the respondents' lot is referred to as Lot A-71-1, and the remainder of Lot 5 is labeled as Lot A-71. (Id.) Lot A-71-1 was conveyed by warranty deed from Chalet Pearl to the respondents in 2000. (See Resp'ts' Exs. H, J.)

The respondents testified that they have two means of accessing their property: from the northeast via Jackson Drive and easement D[4]; or from the southwest via Old County Farm Road, Woods Road and easement E. Easements D and E are connected through the respondents' property by easement C. Mrs. Tuomala testified that easement D is almost entirely within a one hundred year flood zone. As a result, for a portion of the year easement D is underwater and the respondents can only access their cabin from Woods Road across easement E. The respondents testified that since they moved into the cabin they have been the only people to use easements C, D, and E on a regular basis, and that they maintain easements C, D, and E "by default." However, the respondents admitted that Chalet Pearl has a right of way across easement C in order to access all portions of its property. (See Resp'ts' Ex. *I*.) The Declaration of Easements created in conjunction with the conveyance of Lot A-71-1, provided in relevant part:

> Lot A-71-1 shall be conveyed subject to an easement shown as Easement 'C' on the [Chalet Pearl Plan] for purposes of ingress and egress to Lot A-71; provided however, the owner of Lot A-71-1 shall have the right to relocate Easement 'C' to another portion of Lot A-71-1 at their own expense provided however the easement as relocated shall remain fifty (50) feet in width and the travel portion of the roadway shall be the same width as currently exists.

(Id.)

[4] The Court adopts the labels for these ways between Jackson Drive and Woods Road as designated in the Declaration of Easements, (Resp'ts' Ex. *I*), and on the Chalet Pearl Plan, (Pet'rs' Ex. 2), for clarity. The use of the term "easement" here does not connote any determination that these ways are subject to the petitioners' deeded rights of way.

When the respondents first purchased their property, easement C was approximately fifty feet from their cabin; however, they moved the way so that it is now between 200 and 250 feet away, with a driveway coming off of it towards the cabin. Jackson Drive, and easements C, D, and E are narrow dirt roads. Jackson Drive, running from Burton Highway to easement D, provides access to Lots 3 and 4, as depicted on the Bush Plan. Jackson Drive is labeled as a "private drive" on the Bush Plan, the Chalet Pearl Plan, and on the street sign where it intersects with Burton Highway. Where Jackson Drive meets easement D, the respondents testified that they posted no trespassing signs, though they admitted that those signs are not on their property. The respondents also installed a gate at the end of Woods Road, where it meets Old County Farm Road. Mr. Tuomala testified that he decided to put in the gate to stop hunters and others from using the ways that he maintains for ingress to and egress from the cabin. Again, they acknowledge that the gate is not located on their property.

On either June 28 or August 6, 2009[5], the petitioners were driving their vehicle from easement E onto easement C when the respondents stopped the petitioners' vehicle. Mr. Doerr, who was driving the vehicle, exited and introduced himself to the respondents. Mr. Tuomala informed him that he and his wife were trespassing on private property. Both Mr. and Mrs. Tuomala testified that Mrs. Doerr also exited the vehicle and the four engaged in small talk for several minutes. Mr. Doerr, however, testified that his wife remained in their vehicle the entire time. Mr. Tuomala testified that he may have told the petitioners that he would call the police if they came back onto the

[5] The parties disagree as to the date of this encounter. Mr. Doerr testified that it occurred on June 28, 2009, while Mr. and Mrs. Tuomala indicated that the date was August 6, 2009. The specific date is of no consequence to the Court's analysis.

respondents' property. Since that day, the petitioners have not attempted to use easement C again.

Rulings of Law

In order to determine whether the easement benefiting the petitioners' property grants them access to easement C across the respondents' property, the Court must determine whether it is a roadway or a driveway.

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

Soukup v. Brooks, 159 N.H. 9, 16 (2009) (internal quotations and citations omitted). "A deed is patently ambiguous when the language in the deed does not provide sufficient information to adequately describe the conveyance without reference to extrinsic evidence." Flanagan v. Prudhomme, 138 N.H. 561, 566 (1994). "A latent ambiguity exists when the language in the deed is clear, but the conveyance described can be applied to two different subjects or is rendered unclear by reference to another document." Id.

In this case, the relevant deeds describe driveways excepted from the deeded rights of way as follows: "those [ ] which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes." (Pet'rs' Ex. 3.) In order to determine whether the way at issue is a roadway or a driveway, the Court must consider extrinsic evidence.

To ascertain the intent of the parties at the time the rights of way were created, the Court first looks to the Bush Plan, drawn at the time the rights of way were reserved in the Bush-Comvest deed. (See Pet'rs' Ex. 1.) Although the Bush Plan includes several private drives and outlines existing houses on Lots 1, 2 and 3, there is no mention of a cabin or guest house within Lot 5, or of any roadways or driveways through Lot 5. The Court finds this absence significant, particularly where the Wilton Planning Board requested the designation of "all private roads as such" in the course of reviewing the subdivision plan in 1978. (Resp'ts' Ex. K.) This evidence indicates that at the time the rights of way were created, Mr. Bush did not consider the ways leading to the cabin to be roadways. Easement C has been utilized in the same manner for as long as it has existed; thus, its purpose today is the same as in 1978. While the respondents moved the way farther from their cabin in 2002, this did not alter its use. The respondents testified that they moved the road in order to have better access to their property when the water level is high. Mrs. Tuomala testified that she and her husband moved the way to its current location because that is the only section above the flood plain, and it is flatter and easier to maintain.

Based on its view of the subject property and surrounding area, it is logical to conclude that the purpose for which easements C, D, and E were created was to provide access to the cabin. Although the access from Burton Highway through Jackson Drive is the more direct and traversable route, the second entrance from the opposite side of the property is made necessary by the frequent flooding of easement D. Based on all of the evidence before it, the Court concludes that the use of easement C is purely personal. Moreover, the petitioners have admitted that they do not need to

use easement C in order to access any of their property. In fact, the date of the incident with the respondents was the first time that the petitioners had been on easement C. When asked for what purpose Mr. Doerr and his family wanted to use easement C, he testified that he had not given it much thought.

Additionally, the Court cannot find that granting Chalet Pearl a right of way across easement C negates the way's purely private use. (See Resp'ts' Ex. *I*.) Although the respondents allow Chalet Pearl occasional use of easement C in order to travel from easement D to easement E, the purpose of easement C has always been personal to those residing in the cabin for ingress to and egress from the residence, the only structure within what was formerly Lot 5.

The petitioners have also pointed to the use of the word "roadway" in the Declaration of Easements between Chalet Pearl and the respondents (the "Declaration") as evidence that easement C is not a purely personal driveway. The Declaration goes on to provide that, "The obligations for the costs of repair, maintenance and snow plowing of all roadways and driveways to gain ingress and egress to Lot A-71-1 shall be borne solely by the owner(s) of Lot A-71-1 without a duty of contribution by the owner(s) of Lot A-71." (Resp'ts' Ex. *I* (emphasis added).) This language indicates that, within the Declaration, the words roadway and driveway do not necessarily have the same meaning as in the applicable deeds; what is referred to as a roadway may still be purely for the purpose of ingress to and egress from the respondents' property. Thus, although easement C is referred to in the Declaration as a "roadway" the use of this word alone is not determinative and cannot alter the actual purpose of the way at issue. Therefore, the Court concludes that the reference to

easement C as a roadway in the Declaration does not preclude the finding that it is exempt from the petitioners' rights of way.

As a result of its conclusion that easement C is a purely personal driveway, the Court need not address the respondents' counterclaim of adverse possession. Accordingly, the Court finds and rules that the way at issue across the respondents' property is a driveway within the meaning of the easement language; thus, it is exempt from the easement by grant. Therefore, the Court DENIES the petitioners' request for declaratory judgment and permanent injunction.

So ordered.

Date: July 26, 2012

JACALYN A. COLBURN,
Presiding Justice