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MURPHY
SULLIVAN
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Via U.S. Mail

August 29, 2016

Carmen Cote, COM
Vermont Superior Court
Chittenden Civil Unit
175 Main Street
PO Box 187
Burlington, VT 05402-0187

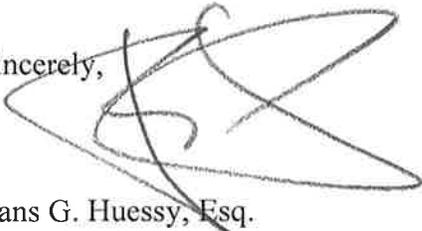
**Re: Brianne E. Chase, Trustee of the Revocable Living Trust of Barbara S. Eastman v.
Town of Underhill, Docket No. 333-4-15 Cncv**

Dear Carmen:

Please find enclosed Defendant Town of Underhill's Reply to Plaintiff's Renewed Motion for Summary Judgment for filing with the Court, along with a Certificate of Service, in the above-captioned matter.

Thank you.

Sincerely,



Hans G. Huessy, Esq.

Enclosures

cc: Town of Underhill (*via email*)
Elizabeth M. Demas, Esq.
Stanley and Sue Senger
Carl and Carol Menard

{00230032.1}

that spawned the litigation with the two other landowners and elected not to participate in that litigation. *Exhibit A, Select Board Minutes, June 12, 2000.* More importantly, there is no evidence in the record that Plaintiff or its predecessors in title ever used the Repa Trail for such purposes and there is uncontroverted testimony that they have not used it for such purposes any time during the last fifty-five years. *See Exhibit B, Affidavit of David Arnold.*

II. Use of the Trail for Residential Purposes.

Plaintiff has submitted evidence indicating that prior to 1963, the year the Eastmans purchased the property, a Mr. Nolan and his family resided on the property for a period of fifteen years. However, Plaintiff has not suggested that such use continued past 1961 or that anyone was living on the property before the Nolans built their home. There is a discrepancy between the Nolan affidavit and the chain of title. Plaintiff attached a deed to its Complaint, Exhibit 1, which states that the Nolans bought the property in 1957, twelve years after they supposedly built their home.² The deed suggests the Nolan's occupation of the property might have been shorter than recalled by Mr. Nolan. Mr. Arnold's testimony establishes that neither the Eastmans nor the Trust ever used the Trail to access the property for residential, logging, or any other silvicultural purposes. *Exhibit B at ¶5, 6.* In point of fact, the Eastmans appear to have consciously decided to cease all residential use of the property and to allow the former Nolan residence to fall into ruins. *Exhibit B at ¶9.* Mr. Arnold's uncontested testimony is that the Eastmans and the Trust never used the Trail for any purpose other than to walk onto the property to engage in bird-watching. *Exhibit B at ¶5.*

The Court must make a determination as to the "individual's [Plaintiff's] and the historic use" of the Trail to access Plaintiff's property. *Court Order of March 25, 2016, at 5.* The record is clear that the neither Plaintiff nor the Eastmans ever used the Trail to access a residence on the Property. *Exhibit A at ¶5-8.* The record is also clear that the Trail has not been used for this purpose by anyone for fifty-five years. *Exhibit A at ¶4-9.* Furthermore, there is no evidence in the record that anyone used the property for residential purposes during the hundred years prior to the Nolan's occupation of the property

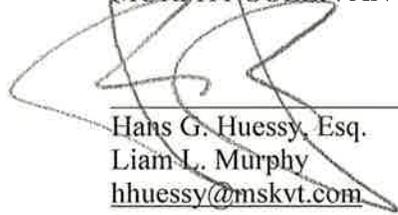
² The deed states that the Nolans bought the land in 1957 and sold it to the Eastmans in 1963, who then deeded it to the Plaintiff in 1993. Complaint, Exhibit 1.

The fact that a property owner's predecessor in title once used the Trail for such a purpose does not mean that no matter what happens in the ensuing fifty-five years, that use should still be considered the "historic use." A use can be discontinued, as it was here. Over fifty years ago, the Eastmans purchased the property and made a conscious decision to change the use of the property and to change the scope of their use of the Trail to access the property. This change of use pre-dated the Road's reclassification as a trail by forty years. Having voluntarily changed the use, and having allowed that change in use to stand for fifty-five years, Plaintiff should not be able to now allege that the prior use, the use the Eastmans terminated, constitutes the historic use.

Wherefore, Defendant respectfully requests that the Court deny Plaintiff's Renewed Motion for Summary Judgment.

Dated at Burlington, Vermont this 29th day of August, 2016.

MURPHY SULLIVAN KRONK



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(802) 861-7000

Attorneys for Defendant Town of
Underhill

EXHIBIT A

GOODRICH ROAD/REPA ROAD PUBLIC HEARING
JUNE 12, 2000 WESTFORD, VT
WESTFORD SELECTBOARD AND UNDERHILL SELECTBOARD

FINDINGS OF FACT

1. IN 1972, THE TOWN OF WESTFORD DISCONTINUED PART OF GOODRICH ROAD AND TURNED ANOTHER SECTION OF IT INTO A TRAIL. THEY DID THIS WITHOUT REALIZING THAT, ACCORDING TO 19 VSA 790, THEY SHOULD HAVE WORKED JOINTLY WITH THE TOWN OF UNDERHILL, SINCE THE ROAD, CALLED GOODRICH ROAD IN WESTFORD AND REPA ROAD IN UNDERHILL, IS AN INTERTOWN HIGHWAY.

2. IN 1996, THE UNDERHILL SELECTBOARD DISCONTINUED A SMALL SECTION OF REPA ROAD TO THE BOUNDARY WITH WESTFORD. THE UNDERHILL BOARD KNEW THAT THE WESTFORD SIDE OF THE ROAD HAD BEEN DISCONTINUED, AND THEY NOTIFIED THE TOWN OF WESTFORD THAT THE ACTION TO DISCONTINUE THE ROAD WAS TAKING PLACE. HOWEVER, UNDERHILL DID NOT NOTIFY THE PROPERTY OWNED ON THE WESTFORD SIDE OF THE BOUNDARY LINE.

3. THE TOWN OF UNDERHILL WAS ADVISED BY PAUL GILLIES, ESQ., THAT THE SITUATION COULD BE REMEDIED BY GOING THROUGH A ROAD RECLASSIFICATION PROCESS ACCORDING TO 19 VSA 790 JOINTLY WITH WESTFORD.

4. AFTER DUE NOTICE TO ALL INTERESTED PARTIES, THE SELECTBOARDS MET JOINTLY IN WESTFORD, HEARD FROM INTERESTED RESIDENTS, WALKED A PORTION OF THE GOODRICH ROAD, WALKED THE AFFECTED PORTION OF THE REPA ROAD IN UNDERHILL, AND HEARD FROM OTHER INTERESTED PARTIES ON THE ROAD AND IN THE UNDERHILL TOWN HALL.

5. WESTFORD: JOHN LOUIS, REPRESENTING ABUTTING LANDOWNER A. JOHNSON COMPANY, TESTIFIED THAT THE COMPANY NEEDED ALL AVAILABLE ACCESSSES. THEY RECONSTRUCTED THE ROAD FROM MACHIA HILL RD. TO THEIR LANDING. THEY WANT TO MAINTAIN A ROW, AND NOT LOSE THAT OPTION. IF THE ROAD GOES TO THE EASTMAN PROPERTY AND STOPS, THEN THEY DO NOT HAVE THAT OPTION. THEY HAVE AN ACCESS CLOSE TO THE HOUSE OF PEOPLE WHO WILL TESTIFY LATER. THEY WOULD LIKE THE TRAIL TO BE AS WIDE AS POSSIBLE. THEY WOULD LIKE THE ROAD TO REMAIN CLASS 4, BUT REALIZE PEOPLE DO NOT LIKE LOG TRUCKS COMING ON A TRAIL. JOHNSON CO. LAND ABUTS EASTMAN PARCEL. HE IS SYMPATHETIC TO NO ATV USE.

6. WESTFORD: MOLLY LIEBOWITZ, REPRESENTING ABUTTING LANDOWNERS THE EASTMAN FAMILY, SAID THE FAMILY HAD NO OBJECTION TO WESTFORD DISCONTINUING THE ROAD ON THE WESTFORD SIDE, BUT WANTS ACCESS ON THE UNDERHILL SIDE. THEY WOULD LIKE REPA ROAD TO BE CLASS 3, BUT WOULD SETTLE FOR CLASS 4. THEY DO WANT A DISCONTINUANCE OF GOODRICH ROAD THROUGH THE EASTMAN PARCEL.

7. WESTFORD: TIM AND DELLA BUDELL LIVE AT THE END OF THE PRESENTLY MAINTAINED ROAD. HOW WILL YOU KNOW WHERE THE ROAD IS? A COUPLE OF PEOPLE SEEM TO KNOW WHERE IT IS, INCLUDING DAVID ARNOLD ON THE UNDERHILL SIDE. DELLA BUDELL SAID, IF THE ROAD EXISTS, WE WANT IT DISCONTINUED. SHE IS OPPOSED TO MOTORIZED ACCESS.

8. WESTFORD: JOHN COOLEY, WHO ABUTS JOHNSON LAND TO THE WEST, WANTS ACCESS FOR VEHICLES BECAUSE HE CUTS WOOD.

9. WESTFORD: JACOB AND LAURA HOLZSCHEITER, ABUTTING LANDOWNERS, WOULD LIKE TO HAVE THE ROAD DISCONTINUED. THEY DO NOT WANT A THROUGH TRAIL OR ATV ACCESS. ANYTHING THAT WOULD DECREASE ACTIVITY ON THE TRAIL WOULD PLEASE THEM. IN 1998 THE WESTFORD CONSERVATION COMMISSION SUBMITTED A REPORT ON TRAILS. THEY DO NOT WANT TO RESTRICT ACCESS TO THE PEOPLE ALREADY UP THERE. THEY HAVE HAD ATV AND DRINKING PROBLEMS WITH USERS OF THE TRAIL. PEOPLE RECALL THAT THE OLD TRAIL BY THE HOUSE (WHICH HOUSE?) IS NOT WHERE THE TRAIL CURRENTLY IS.

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EXHIBIT B

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO. 333-4-15 Cncv

Brianne E. Chase, Trustee of the Revocable Living)
Trust of Barbara S. Eastman,)
))
Plaintiff)
))
v.)
))
Town of Underhill, David Arnold,)
Stanley and Sue Senger, and Carl)
and Carol Menard,)
))
Defendant)

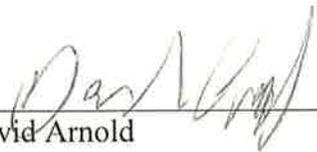
AFFIDAVIT OF DAVID ARNOLD

I, David Arnold, being more than eighteen years old, first duly sworn, depose and say as follows, based on my personal knowledge:

1. I own property in Underhill adjoining the property owned by the Eastman Trust in Westford.
2. The entire length of the Repa Trail is located on my property.
3. On the property is a camp that I have resided in part-time since 1964.
4. In the 60's, I spent as much as 60% of the year at my camp. Over time my use has diminished, but I spent substantial amounts of time at my camp in the 60s, 70s, 80s and 90s. I actively explored the area around my property, hiking and XC skiing on trails located on the Eastman and other properties.
5. I have never observed any member of the Eastman family use the Repa Trail for any purpose except to access their property by foot. They would park near my driveway where the improved part of Repa Road ends and walk in to their property, usually to go bird watching.
6. I have never observed the Trail being used for commercial logging or maple sugaring by owners of the Eastman property.

7. No one has resided on the Eastman property while I have owned my property.
8. To the best of my knowledge, the Eastmans never logged the property and never sugared on the property.
9. The Nolan residence that was located on the Eastman property was abandoned when I bought my land in 1964 and the Eastmans elected not to maintain the buildings.

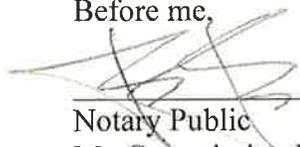
DATED at South Burlington, Vermont this 24th day of August, 2016.



David Arnold

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

At South Burlington, in said County and State, on this 24th day of August, 2016, personally appeared David Arnold, a person known or properly identified to me, and he acknowledged this instrument to be his free act and deed.

Before me,


Notary Public
My Commission Expires: 2/10/19

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO. 333-4-15 Cncv

Brianne E. Chase, Trustee of the Revocable Living)
 Trust of Barbara S. Eastman,)
)
 Plaintiff,)
)
 v.)
)
 Town of Underhill, David Arnold,)
 Stanley and Sue Senger, and Carl and)
 Carol Menard,)
)
 Defendants.)

CERTIFICATE OF SERVICE

I certify that I have today delivered **Defendant Town of Underhill's Reply to Plaintiff's Renewed Motion for Summary Judgment** to all other parties to this case as follows:

- By first class mail by depositing it in the U.S. mail;
- By personal delivery to _____ or his/her counsel;
- Other. Explain: _____

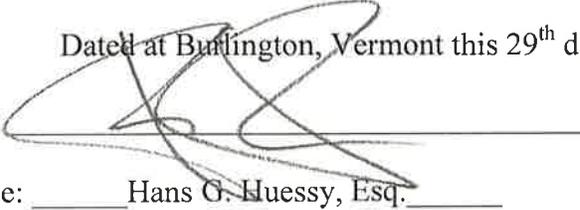
The names and addresses of the parties/lawyers to whom the mail was addressed or personal delivery was made are as follows:

Elizabeth M. Demas, Esq.
 Clark Demas & Baker
 346 Shelburne Road, Suite 203
 PO Box 4484
 Burlington, VT 05406-4484

Stanley and Sue Senger
 99 Repa Road
 Underhill, VT 05489

Carl and Carol Menard
 100 Repa Road
 Underhill, VT 05489.

Dated at Burlington, Vermont this 29th day of August, 2016.

Signature: 

Print Name: _____ Hans G. Huessy, Esq. _____

Counsel for: _____ Defendant Town of Underhill _____

