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BURLINGTON, VT 05406-4484

Of Counsel: PETER L. POTTS

January 25, 2016

Christine Brock, Clerk
Superior Court Chittenden Unit
PO Box 187
Burlington, Vermont 05401

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

Dear Christine:

I am enclosing Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, with attached Revised Statement of Undisputed and Disputed Material Facts, and our certificate of service.

Thank you for your assistance. Please give me a call if you have any questions or concerns regarding this matter.

Sincerely,



Elizabeth M. Demas, Esq.
Clarke Demas & Baker, PLLC
346 Shelburne Road, Suite 203
Burlington, Vermont 05401
(802) 652-1400
edemas@cdbesq.com

cc: Hans Huessy, Esq.
Liam Murphy, Esq.
PO Box 4485
Burlington, Vermont 05406-4485
encs

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.

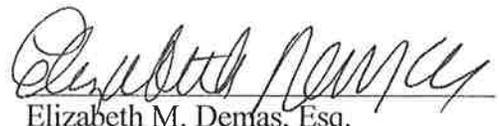
Town of Underhill
Defendant

CERTIFICATE OF SERVICE

I, Elizabeth M. Demas, attorney for Plaintiff in the above-entitled matter, hereby certify that I served a copy of Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, and Revised Statement of Disputed and Undisputed Facts, by first class mail to Hans G. Huessy, Esq. and Liam L. Murphy at P.O. Box 4485, Burlington, VT 05406-4485, as Attorneys for Defendant Town of Underhill.

Dated at Burlington, Vermont, this 25th day of January, 2016.

By:



Elizabeth M. Demas, Esq.
Clarke Demas & Baker PLLC
346 Shelburne Road, Suite 602
Burlington, Vermont 05401

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
Defendant

**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

NOW COMES Plaintiff Brianne E. Chase, Trustee of the Revocable Living Trust of Barbara S. Eastman ("Plaintiff"), by and through her attorneys, Clarke Demas & Baker, PLLC, and, pursuant to V.R.C.P. 56, hereby replies to Defendant Town of Underhill's Response to Plaintiff's Motion for Summary Judgment.

MEMORANDUM

Defendant's opposition is based on the underlying assumption that Plaintiff is required to access its property primarily over Westford's trails and roads, because Plaintiff's land lies in Westford. There is no case law substantiating this assumption.

Vermont's supreme court has stated in *Thompson v. Ryan*, No. 2006-286, 2007, WL 5313344, at 203 (Vt. May 2007 (unpublished mem.) (citing *Okemo Mountain Inc. v. Town of Ludlow*, 171, Vt. 201, 209, (2000)) that "when a public road is discontinued or abandoned, the abutting landowner retains the private right of access". The court qualified this right by stating that most jurisdictions allowing a private right of way to abutting landowners following the discontinuance of a public highway have conditioned the existence of the right of way on the abutting owner demonstrating, at minimum, a reasonable need for it. See, e.g. *Paul v. Wissalohican*

Camp. Co., 148 N.E. 2d 248, 250-51 (Ohio Ct.App. 1957) (“A private easement in public highway is already in existence when the highway is vacated, and continues if there is a reasonable need for it”; the abutting owner’s easement continues after vacation of the highway if “no other road is reasonable suitable to meet the necessities of such owner.”); *Taylor v. Cox*, 63 S.E.2d 470 472(S.C. 1951). “the right of access of an abutting property owner upon a public street or highway is merely a right to reasonable, but not unlimited, access to and from the abutting property. *Small v. Kemp*. 727 P.2d 904, 910 (Kan.1986).

The *Thompson* court limited the uses of the discontinued road to those reasonable and convenient, as evidence by lifetime use. But, In *Thompson*, the court found that the discontinued public highway was never the principal means of ingress and egress to and from plaintiff’s property. There was primary access over an existing public highway. The uses allowed by the Court were in addition to existing access provided by that public highway. That is not true here. There is no access to Plaintiff’s land over a publicly maintained road. Both affidavits of David Crane, and Douglas Edwards state that the only reasonable access to Plaintiff’s land and house site is over Repa Trail. There is no evidence that Goodrich Road ever provided the principal means of access to Plaintiff’s land and farmhouse site. Goodrich Road has been effectively downgraded to an unmaintained trail since 1972, and does Goodrich Trail not provide reasonable access to any of Plaintiff’s land.

Plaintiff has requested a license for uses that are consistent with the uses now held by the adjacent neighbors, The A. Johnson Company and Joseph Bernstein. Plaintiff is seeking to use 238 feet of Repa Trail for “motor vehicles, pick-up trucks, four-wheel drive vehicles, logging trucks, logging equipment and the like”, which rights are currently held by the A. Johnson Company and Bernstein.

The dicta in *Thompson v. Ryan* does not require Plaintiff to forge a way over a “rough, not

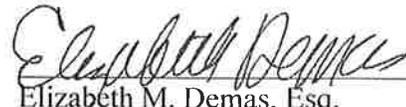
passable” path that “cannot be physically located in areas”¹ because that path is sited in the same town as the land it would access. To the contrary, Vermont has historically considered Town highways as not a purely local matter: “It is plain from the provisions of the statute, and from the entire course of usage and sentiment on the subject, that, as between towns, the matter of highways is one of mutual comity, the inhabitants of each town having in all other towns the same free and full right to use and enjoy the highways as the inhabitants of such towns have. In this way the duty imposed on each town respectively, is compensated and counterbalanced in respect to other towns, by the fruits of the equal duty proffered to the inhabitants of each town by every other town in the state.” *Brock v. Town of Barnet*, 57 Vt. 172, 177 (1884) “The town or its inhabitants have no more interest in the highways within its limits, than any other citizens. *Panton Turnpike Co. v. Bishop*, 11 Vt. 198 (1839).

The remains of the farmhouse site on the Eastman property are situated less than 500 feet from the termination of Repa Trail where it abuts the Eastman property. The only reasonable access to this farmhouse site is over Repa Trail.²

Therefore, Plaintiff respectfully requests that Plaintiff’s Motion for Summary Judgment be granted.

DATED at Burlington, Vermont this 25th day of January, 2016.

By:



Elizabeth M. Demas, Esq.

Attorney for Plaintiff

Clarke Demas & Baker, PLLC

346 Shelburne Road, Suite 602

Burlington, Vermont 05401

¹ Affidavit of Douglas Edwards, Para. 4, (copy attached).

² Affidavit of David Crane, Dec. 2015, Para 4 and 5. (copy attached).

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. _____

Brianne E. Chase, Trustee of the Revocable Living
Trust of Barbara S. Eastman
Plaintiff

v.

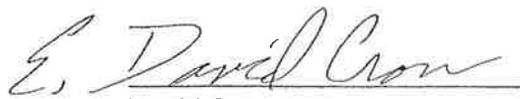
Town of Underhill
Defendant

AFFIDAVIT OF DAVID CRANE

NOW COMES David Crane, and being duly sworn, deposes and says:

1. I am employed as a licensed real estate agent by Coldwell Banker, Hickok & Boardman in Burlington, Vermont. I am the listing agent for the Eastman Property.
2. I have personally visited the Eastman Trust Property, and am familiar with access from Repa Road, in Underhill, Vermont.
3. At the Underhill-Westford town line, Repa Road becomes Goodrich Trail. The trail is evident for about 500 feet, then is unrecognizable and is certainly not passable by passenger car.
4. I observed the remnants of a house foundation, and crumbling barn structures on the Eastman Trust property. These structures are located approximately 500 feet from the terminus of the trail at the end of Repa road in Underhill, which is where the trail "disappears".
5. The only reasonable access to the old house site is over Repa Road, and the 238 feet of trail in Underhill.

Dated at Burlington, Vermont this 27 day of March, 2015.

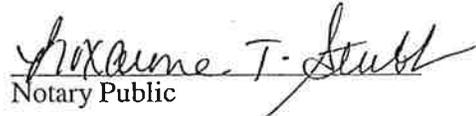

David Crane



STATE OF VERMONT
CHITTENDEN COUNTY, SS.

At Burlington in said County this 27 day of March, 2015, personally appeared David Crane and made oath to the truth of the foregoing.

Before me,


Notary Public

Roxanne T. Stubbs
Notary Public
Commission Expires:
February 10, 2019

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.

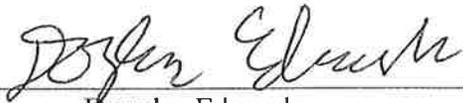
Town of Underhill
Defendant

AFFIDAVIT OF DOUGLAS EDWARDS

NOW COMES Douglas Edwards, and being duly sworn, deposes and says:

1. I have a contract to purchase the Eastman property in Westford, Vermont.
2. I plan to use the property for logging, maple sugaring, and for a single family residence.
3. I am familiar with the property, and have attempted to follow a portion of the old Goodrich Trail in Westford to access this property.
4. The trail is steep and rough and is not passable. It disappears into the woods and cannot be physically located in areas.
5. The house site on the Eastman property is located within approximately 500 feet of the Underhill town line, and was accessed by the former owner, Robert Nolan, via Repa Road.
6. There is a visible trail from the boundary of the Eastman property at the Underhill-Westford town line, located at the terminus of Repa trail, and the foundation of this old farmhouse.
7. The only reasonable access to this house site is over Repa Road and Repa Trail, which is consistent with visual evidence of its historic use.

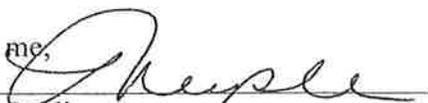
Dated at Essex 12-11-15, Vermont this 11 day of December, 2015.



Douglas Edwards

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

At Essex in said County this 11 day of December, 2015, personally appeared Douglas Edwards and made oath to the truth of the foregoing.

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,
Defendant

PLAINTIFF'S REVISED STATEMENT OF MATERIAL DISPUTED AND UNDISPUTED

FACTS

1. Plaintiff Brianne E. Chase, Trustee of the Revocable Living Trust of Barbara S. Eastman (hereinafter "Eastman Trust") is the record owner of 300 acres of land, more or less, located in Westford, Vermont, which land was conveyed to the Eastman Trust by Deed of Oliver R. Eastman and Barbara S. Eastman, recorded on February 2, 1993, of record in Volume 68 at Page 189 of the Westford land records (the "Eastman Parcel"). (*Not disputed by Defendant*)
2. Said Eastman Parcel is adjacent to and bounded on the east by the Underhill-Westford Town Line. (*Not disputed by Defendant*)
3. Prior to 1972, access to the Eastman Parcel was by Goodrich Road (Westford Town Highway #24) which entered from the west and continued in a generally easterly direction through the Eastman Parcel, and by Repa Road (Underhill Town Highway #21) which provided access through Underhill, to the border of Westford-Underhill, and connected with Goodrich Road on the Eastman Parcel in Westford. (*Disputed by Defendant*)
4. In 1972 the Town of Westford attempted to discontinue part of Goodrich Road, and reclassify another portion as a trail. (*Undisputed by Defendant*)
5. In 1972 the Town of Westford stopped maintaining the discontinued and reclassified

portions of Goodrich Road. (*Undisputed by Defendant*)

6. In 1996 the Town of Underhill attempted to discontinue a small portion of Repa Road to the boundary with Westford, which was also the boundary with the Eastman Parcel.

(*Undisputed by Defendant*)

7. Neither attempt at discontinuance complied with 19 V.S.A. §790. (*Undisputed by Defendant*)

8. During May and June of 2000, the Selectboards of both towns met to hear testimony regarding the discontinuance or re-designation of both Goodrich Road and a small portion of Repa Road (adjacent to the Eastman Parcel) as trails. (*Undisputed by Defendant*)

9. On July 28, 2000, the Town of Westford reclassified Goodrich Road in its entirety as a trail. (*Undisputed by Defendant*)

10. On August 2, 2000, the Town of Underhill reclassified 238 feet of Repa Road, from the Westford/Underhill Town Line (also the easterly boundary of the Eastman Parcel) to the Arnold Driveway. The newly designated portion of Repa road was continued as a trail at the same width of three rods. (*Undisputed by Defendant*)

11. In September 2001, The A. Johnson Co., Joseph Bornstein, the Town of Underhill and the Town of Westford settled litigation which arose over the re-designation of Repa Road and Goodrich Road (Chittenden Superior Court Docket No. S1201-00). (*Undisputed by Defendant*)

12. The Stipulation to Dismissal with Prejudice in the above-referenced case, entered on September 26, 2001, provided that "the Parties enter into this Stipulation and Order to ensure that the Petitioners may not be deprived of access to, or any economic benefits from, their respective parcels". The Court further found that "The A. Johnson Company and Joseph Bornstein are hereby granted, pursuant to 19 V.S.A. Section 1111, the right to use the Trails by any motor vehicles, pick-up trucks, four-wheel drive vehicles, logging trucks, logging equipment and the like in order to

continue their programs of forestry management on the A. Johnson Company lands and the Bornstein parcel, respectively, and periodically, to effect the removal of timber from their respective lots during the term of this Stipulation.” Said Stipulation provided that it was to run with the land, and be binding on the Parties, their heirs, successors and assigns. (*Defendant disputes the definition of “Order” and “Findings”*)

13. Goodrich Road is impassable (See Affidavit of Douglas Edwards). (*Defendant disputes this paragraph but offers no opposing evidence*)

14. Repa Road, in Underhill, has historically provided access to the Eastman Parcel, particularly to the farmstead located approximately 500 feet westerly from its terminus. (*Defendant disputes this paragraph*) (*See Affidavit of Edwards, Para. 5, 6, and 7*)(*See Affidavit of David Crane, Para. 3 and 4*).

15. Said farmstead is depicted on the 1858 “Wallings Map” as “Hapgood”, and on “Beers Atlas”, published in 1869, as “L. Cushing”. (*Not disputed*)

16. The remains of the farmstead, including barn remnants and a house foundation, are still evident on the site. (See Affidavit of David Crane). (*Defendant disputes this paragraph but offers no opposing evidence*).

17. Plaintiff has sought a license from the Town of Underhill, pursuant to 19 V.S.A. 1111, for vehicular and logging access and for service to a single residential dwelling. (See Town of Underhill Selectboard Minutes, September 30, 2014, January 6, 2015, February 3, 2015 and February 17, 2015). (*Defendant disputes this paragraph*)

18. Plaintiff’s request to the Town Selectboard for the aforesaid license has consistently included the offer that the costs of upgrading and maintaining the trail will be borne by Plaintiff, and not by the Town. (*See January 6, 2015 minutes*). (*Defendant disputes this paragraph*)

19. Plaintiff’s land abuts Repa Trail. (*Defendant disputes Plaintiff’s definition of “abut”*)

to not include three rods width of abutting land.)(But, See Para. 6 and 10, above).

20. Repa Road was a public highway when re-designated to a Town Trail in August, 2000. *(Not disputed by Defendant).*

21. Plaintiff's land is inaccessible without access through Repa Trail. *(Disputed by Defendant, but Defendant offers no contradictory evidence. (See Affidavits of Douglas Edwards and David Crane.*

Dated at Burlington, Vermont this 25th day of January, 2016.

By:



Elizabeth M. Demas, Esq.

Attorney for Plaintiff

Clarke Demas & Baker, PLLC

346 Shelburne Road, Suite 602

Burlington, Vermont 05401

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& BAKER

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