

VIA EMAIL
February 10, 2023

Town of Hinesburg Selectboard
c/o Todd Odit, Town Manager
todithvt@gmavt.net

RE: PR&R Development, LLC (“Applicant”)
Subdivision Application # 09-01-69-100-Mobbs
340 Observatory Road, 09-01-69.100, 61.26 acres (the “Property”)

Dear Selectboard:

It has come to Applicant’s attention through communications with Town Manager Todd Odit and Development Review Coordinator Mitch Cypes that the Town may have questions or concerns about Applicant’s rights to use Observatory Road in connection with Applicant’s planned subdivision of the Property, which is currently pending before the Development Review Board. This letter will put Applicant’s position regarding Observatory Road on the record, and hopefully answer some of the Town’s questions. However, Applicant does request to be heard at an upcoming hearing of the Selectboard to determine whether the Selectboard has any further questions or is taking a different position on Applicant’s rights to Observatory Road.

In the Warranty Deed from Maurice J. Goodrich, Ralph B. Goodrich, and Robert H. Goodrich (the “Goodriches”) to the Town of Hinesburg dated October 4, 1991 and recorded in Book 79, Pages 32-35 of the Hinesburg Land Records (the “Deed,” a copy of which is attached), the Goodriches conveyed what is now known as Observatory Road to the Town. The metes and bounds description of the property conveyed by the deed establishes that the Goodriches conveyed a 60’ wide strip of land from the point where the westerly boundary of the Town landfill and Applicant’s Property abut the Reidinger/Mello property all the way to North Road (essentially the road as it is currently laid out and improved) (“Observatory Road”).

The Deed also included the following language:

“As part of the consideration for this transfer, the Grantee [the Town of Hinesburg] covenants and agrees to be responsible for, indemnify and save harmless, the Grantors [the Goodriches], their executors, administrators, successors and assigns, from and against any and all liability arising directly or indirectly from the past, present or future use of the granted premises including, without limiting the generality of the foregoing, any liability, for environmental contamination or injury, whether strict or by virtue of negligence or under federal, state or municipal environmental statutes, ordinances or regulations or common law.

By acceptance of this Deed, Grantees agree to maintain the property as a Class 3 Town Road, open to the general public and Grantors expressly reserve a right of way over said premises.”

As stated in the Deed, part of the consideration for the Goodriches' transfer of Observatory Road to the Town was that the Town would "maintain the property as a Class 3 Town Road, open to the general public." To my knowledge, the Town has never classified or made Observatory Road a Town road, and that fact was the subject of a dispute between the Town and a former subdivision applicant (Steve Pcolar) back in 2016-2018. That dispute was never resolved because Mr. Pcolar died and his subdivision application/sketch plan approval expired. Nonetheless, at all times since it was conveyed to the Town by the Goodriches, the portion of Observatory Road that runs north-south from North Road to the VT Astronomical Society's observatory has been open to and used by the public and maintained and plowed by the Town. The portion of Observatory Road running east-west from the observatory to the Reidinger/Mello boundary was only recently opened up and improved by the Applicant and is now used and maintained by the Applicant for purposes of accessing the garage with accessory dwelling located at 340 Observatory Road. This portion of the road was also recently used by Town contractors in connection with the landfill re-capping project. Over a period of weeks, the contractors regularly drove dump trucks and heavy equipment on that portion of the road in order to access the landfill and move dirt and other materials.

At this time, the Applicant is not asking the Town to classify or take over Observatory Road as a Town road (though that may ultimately make sense once the Property is developed). However, the Applicant does request that the Town recognize the legal existence and scope of the Applicant's rights in, to, and over Observatory Road as set forth in the Deed and under Vermont law.

The Goodriches conveyed Observatory Road to the Town in 1991 expressly subject to a right of way over the road: "*Grantors expressly reserve a right of way over said premises.*" This language created an express appurtenant easement which runs with land for the benefit of the Property (regardless of who owns it).

There are generally two types of easements under Vermont law: easements in gross and appurtenant easements. An easement in gross is intended to benefit only the specifically named easement holder. It is a personal interest in or right to use land of another and is usually created for a limited purpose and/or limited duration. Since personal easements are specific to a person or entity, they expire when property is conveyed to someone else. Appurtenant easements, on the other hand, serve a parcel of land rather than a particular person, and are incident to the ownership of the dominant estate (the property benefitting from the easement). Appurtenant easements run with the land of the dominant estate and pass to subsequent owners regardless of whether the easement is referenced in subsequent deeds.

According to the Vermont Title Standards (adopted by the Vermont Bar Association and regularly relied upon as authoritative by VT real estate practitioners), there is no specific or required language to create an express appurtenant easement other than the words of grant or reservation in the deed. Use of a phrase such as "and their heirs and assigns" is not required. Vermont title examiners may presume that an appurtenant easement is created when a right benefitting one property (the dominant estate) to use another property (the servient estate) for a specific purpose is established in an instrument executed with deed formalities. A copy of Title Standard 5.1 on Appurtenant Easements is attached to this letter for the Selectboard's reference.

I do not think it can reasonably be argued that the Goodriches' reservation of a right of way in the 1991 Deed to the Town did not create an appurtenant easement running with the land.

The next question, then, is what is the scope or extent of the easement? Clearly it covers the entirety of the 60' strip conveyed to the Town, but the Deed did not include language, other than the phrase "right of way," to limit or restrict the purposes for which the easement could be used. For example, sometimes rights of way are limited to use for ingress and egress purposes. There is no similar restricting or limiting language in the 1991 Deed. We believe that means the Applicant is entitled to use the right of way in any manner that is reasonably necessary for the convenient enjoyment of the servitude, including use for ingress and egress (including ingress and egress by future owners once the Property is developed) and for utilities. There are many Vermont cases which hold that a right of way for ingress and egress may not be used for utilities, but the right of way over Observatory Road is not limited to ingress and egress. Furthermore, any utilities located within the right of way are right on the edge of the right of way and present no material additional burden on the servient estate.

Additionally, Vermont law is clear that the manner, frequency, and intensity of the use of an easement may change over time to take advantage of developments in technology and to accommodate normal development, permitting the right of way to retain its utility over time. No unlawful additional burden is imposed on a servient estate by an increased number of persons using an unlimited right of way, for example, or by uses which utilize technology that did not exist at the time of creation of the easement. These principles clearly cover the situation here, where the Applicant is seeking subdivision of this 61.26-acre developable Property into 8 lots. The subdivision proposal includes 2 or 3 additional curb cuts onto Observatory Road (which we do not believe need to be approved since they are cuts onto Observatory Road, over which we own a right of way), with underground utilities running along and mostly adjacent to the right of way on Applicant's Property (underground power now being the norm, and often required by municipalities when approving development). The proposed curb cuts, additional traffic, and underground power accommodate normal development of the Property, flow from technological advances between 1991 and 2023, and are reasonably necessary for our full use and enjoyment of the right of way.

We do not believe Applicant's positions set forth above are controversial in any way, and we would welcome a conversation with the Town attorney on this point. While we appreciate the Selectboard's stated goal of preserving and not selling this Town-owned property, the Town's ownership rights are necessarily subject to the Applicant's unlimited right of way.

Please let us know if and when the Selectboard will be discussing this matter at a meeting, and we will plan to attend. Thank you for your consideration.

Sincerely,



Renee L. Mobbs

cc: Mitch Cypes (mcypes@hinesburg.org)
Jason Barnard (jason@barnardandgervais.com)

RECEIVED

OCT 27 2015

WARRANTY DEED

TOWN OF HINESBURG
DRB & ZONING

KNOW ALL MEN BY THESE PRESENTS THAT We, MAURICE J. GOODRICH, of Hinesburg, Chittenden County, Vermont, RALPH B. GOODRICH, of South Burlington, Chittenden County, Vermont, and ROBERT H. GOODRICH of South Burlington, Chittenden County, Vermont, Grantors in consideration of Ten and more Dollars paid to their satisfaction by the Town of Hinesburg, Chittenden County and State of Vermont, Grantee, by these presents do freely GIVE, GRANT, SELL, CONVEY AND CONFIRM unto the said Grantee and its successors and assigns forever, a certain piece of land in Hinesburg, in the County of Chittenden and State of Vermont, described as follows:

A vacant parcel of land in the Town of Hinesburg, more particularly described as follows:

Commencing at an existing iron pin in the southerly boundary of the former "Eli P. Goodrich Farm", which pipe marks the northeast corner of lands now or formerly of Robert A. Mello and Priscilla K. Redinger; thence proceeding north 7 degrees 25' 47" east for a distance of 60 feet; thence deflecting to the right 90 degrees and proceeding south 82 degrees 34' 13" east for a distance of 979.32 feet; thence deflecting to the left 63 degrees 15' 19" and proceeding north 34 degrees 10' 28" east for a distance of 160.30 feet to a point; thence proceeding along an arc the radius of which is 1268.81 feet and a tangent of which is 161.54 feet for a distance of 321.36 feet to a point (the tie line between the last two mentioned points runs in a course north 41 degrees 25' 49" east for a distance of 320.50 feet); from the last mentioned point deflecting to the right and proceeding north 48 degrees 41' 10" east for a distance of 386.61 feet to a point in the westerly sideline of North Road; thence deflecting to the right and proceeding south 8 degrees 50' 21" west in and along the westerly sideline of North Road for a distance of 93.64 feet; thence deflecting to the right and proceeding south 48 degrees 41' 10" west for a distance 314.72 feet to a point; thence

proceeding along an arc the radius of which is 1208.81 feet and the tangent of which is 153.90 feet for a distance of 306.16 feet to a point (the tie line between the last two mentioned points runs along a line south 41 degrees 25' 49" west a distance of 305.33 feet); thence deflecting to the left and proceeding south 34 degrees 10' 28" west a distance 197.25 feet to a point in the southerly line of the aforesaid "Eli P. Goodrich Farm"; thence deflecting to the right and proceeding north 82 degrees 34' 13" west for a distance of 1016.27 feet to the aforementioned existing iron pipe to the point of beginning.

Being a portion of the real estate in Hinesburg, Vermont, whereof Eli P. Goodrich died ceased and being a portion of the land and premises conveyed to Leonard J. Goodrich, Jr., Maurice J. Goodrich, Ralph B. Goodrich and Robert H. Goodrich, as tenants in common, by warranty deed of Leonard J. Goodrich and Alma V. Goodrich, dated September 29, 1966 and of record in Volume 32 at Page 172 of the Land Records of the Town of Hinesburg. The interest of Leonard J. Goodrich, Jr., was conveyed to the within Grantors by Warranty Deed of Leonard J. Goodrich, Jr. and Lila Goodrich, dated January 12, 1981 and of record in Volume 78, Page 317-318 of said Hinesburg Land Records.

The premises conveyed are on a plan prepared by Fred C. Koerner C.E., entitled "Parcel of land to be conveyed to The Town of Hinesburg, Vermont for Highway Purposes", which plan is to be recorded simultaneously with this Deed in Volume _____, Page _____ of said Land Records.

As part of the consideration for this transfer, the Grantee covenants and agrees to be responsible for, indemnify and save harmless, the Grantors, their executors, administrators, successors and assigns, from and against any and all liability arising directly or indirectly from the past, present or future use of the granted premises including, without limiting the generality of the foregoing, any liability, for environmental contamination or injury, whether strict or by virtue of negligence or under federal, state or municipal environmental statutes, ordinances or regulations or common law.

By acceptance of this Deed, Grantees agree to maintain the property as a Class 3 Town Road, open to the general public and Grantors expressly reserve a right of way over said premises.

Reference is hereby made to the aforementioned deeds and the references contained therein, in further aid of this description.

TO HAVE AND TO HOLD said granted premises, with all the privileges and appurtenances thereof to the said Grantee, the Town of Hinesburg, and its successors and assigns, to its own use and behoof forever; and the said Grantors, MAURICE J. GOODRICH, RALPH B. GOODRICH and ROBERT H. GOODRICH, for themselves and their heirs, executors and administrators, do covenant with the said Grantee and its successors and assigns, that until the ensealing of these presents we are the sole owners of the premises and have good right and title to convey the same in manner aforesaid, that they are FREE FROM EVERY ENCUMBRANCE; except as noted above and we hereby engage to WARRANT AND DEFEND the same against all lawful claims whatever.

IN WITNESS WHEREOF, we hereunto set our hands and seals this 4th day of October, 1991.

IN PRESENCE OF

Nicole M. Reese
WITNESS

Nicole M. Reese
WITNESS

Nicole M. Reese
WITNESS

Maurice J. Goodrich
MAURICE J. GOODRICH

Ralph B. Goodrich
RALPH B. GOODRICH

Robert H. Goodrich
ROBERT H. GOODRICH

STATE OF VERMONT/
COUNTY OF CHITTENDEN, SS.

At So. Burlington this 4th day of October, 1991,
personally appeared MAURICE J. GOODRICH and he acknowledged

this instrument, by him sealed and subscribed to be his free act and deed.

Nicole M. Ross
Notary Public

Commission Expires: Feb 10, 1995

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At So. Burlington this 4th day of October, 1991,
personally appeared RALPH B. GOODRICH and he acknowledged
this instrument, by him sealed and subscribed to be his free
act and deed.

Nicole M. Ross
Notary Public

Commission Expires: Feb 10, 1995

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At So. Burlington this 4th day of October, 1991,
personally appeared ROBERT H. GOODRICH and he acknowledged
this instrument, by him sealed and subscribed to be his free
act and deed.

Nicole M. Ross
Notary Public

Commission Expires: Feb 10, 1995

RWDEED.278

5.1 Appurtenant Easements

A title examiner may presume that an appurtenant easement is created when a right benefiting one property (the dominant estate) to use another property (the servient estate) for a specific purpose is established in an instrument executed with deed formalities. An express appurtenant easement may be created either by grant to a grantee or by reservation of an easement by the grantor.

Comment 1. An appurtenant easement is one that serves a parcel of land rather than a particular person and one which is incident to the ownership of the dominant estate. An appurtenant easement runs with the land to which it is appurtenant, and passes with the land to a subsequent grantee with passage of the title of the dominant estate, whether or not reference is made to the appurtenant easement within the vesting instrument. Construction of an easement appurtenant is favored over an easement in gross. See generally *Barrett v. Kunz*, 158 VT 15 (1992) and *Rowe v. Lavanway*, 180 VT 505 (2006).

Generally, an appurtenant benefit may not be severed and transferred separately from all or part of the benefitted property. A dominant estate's interest in an easement cannot be severed from the land by transferring it to a third party. An appurtenant easement is incapable of an existence separate from the dominant estate. See generally, *Nordlund v. Van Nostrand*, 2007-027 (VT) (all citations and references omitted).

Comment 2. There is no specific or required language to create an express appurtenant easement other than the words of grant or reservation in the deed. For example, use of a phrase such as "and their heirs and assigns" is not required; however, use of such a phrase creates a presumption that the easement is intended to run with the land.

Comment 3. Under the common-law merger doctrine, an easement ceases to exist when the dominant and servient estates come into common ownership. When the burdens and benefits of an easement are united in a single person the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates by operation of law. See generally, *Fletcher v. Ferry*, 181 Vt. 294, 296 (2007) (all citations and references omitted).

Comment 4. Unless extinguished, easements created outside the time period covered by the Marketable Record Title Act still encumber the property. 27 VSA §604(a)(6), (7). However, an easement by necessity may be extinguished by the application of the Marketable Record Title Act in certain circumstances if notice is not timely recorded. See, Standard 5.4.

Comment 5. In construing an express easement, the intent of the parties governs. Several principles guide interpretation. First, a dominant estate is entitled to use an easement in a manner that is reasonably necessary for the convenient enjoyment of the servitude. Second, the easement

must be used in a manner consistent with the use contemplated at the time of its creation and may not be used in a way that materially increases the burden on the servient estate. Whether a particular use overburdens an easement depends on the easement's original purpose and the scope of its authorized use. Third, the manner, frequency, and intensity of the use of the easement may change over time to take advantage of developments in technology and to accommodate normal development permitting servitudes to retain their utility over time, if doing so would reflect the expectations of the parties who create servitudes of indefinite duration. See generally, *Post & Beam Equities Group, LLC v. Sunne Village Development Property Owners Association*, 199 Vt. 313, 339 (2015) (all citations and references omitted).

Comment 6. A change in location generally requires the consent of the owners of both the benefitted property and the burdened property, but the consent can be implied from acts or acquiescence. As to the unilateral movement or relocation of easements, see *Sweezey v. Neel*, 179 Vt. 507 (2006) for surface easements, and *Roy v. Woodstock Community Trust, Inc.* 195 Vt. 427 (2014) for subsurface easements.

Comment 7. An appurtenant easement may not be created in favor of a third party by reservation in a deed. *First National Bank of St. Johnsbury v. Laperle*, 86 A.2d 635, 639 (Vt. 1952).

Comment 8. An appurtenant easement may be terminated by conveyance or release by the owner of the dominant estate to the owner of the servient estate.

Comment 9. While an easement may be extinguished by an abandonment, non-use alone will not suffice, no matter how long continued. To establish an abandonment there must be, in addition to non-use, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence. As noted in *Okemo Mountain, Inc.*, "it is difficult to establish adverse possession of an easement where the dominant owner abstains from using the easement." See, *Rowe v. Lavanway*, 904 A.2d 78, 180 Vt. 505, 2006 VT 47, (Vt. 2006), all citations omitted.

Comment 10. A negative easement prohibits the owner of the servient estate from doing something that would otherwise be permissible such as constructing a building to block light or air.

History

September 2020 – Standard Added.