STATE OF NEW HAMPSHIRE
Inter-Department Communication

DATE: September 18, 2018

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SUBJECT: Ownership of Mount Washington Summit

TO: The Mount Washington Commission

Attorney-Client Privileged

This memorandum is in response to a request by the Mount Washington Commission ("Commission") at the meeting on April 13, 2018, for a legal opinion regarding the ownership of the Mount Washington summit. Please be aware that the opinions in this memorandum are subject to the same disclaimers and waivers attending normal title research including a disclaimer that they are based on and limited by information properly recorded in the Coos County Registry of Deeds or other documentation specifically noted.[1] In addition, this memorandum contains the opinions of the Office of the Attorney General ("OAG") only and is not intended to be a guarantee of ownership to any party. Although the OAG can provide its opinion regarding ownership, it cannot arbitrate disputes or definitively determine ownership. Absent an agreement of the parties, only the superior court can make such a determination. Finally, this opinion constitutes an attorney-client privileged communication to the Commission that cannot be made available to the public or used in any private action unless the Commission votes to waive the attorney-client privilege.

[1] The following draws extensively from several N.H. Supreme Court opinions (formerly called the Superior Court of Judicature of New Hampshire) and from various deeds and third-party information, specifically – *Wells v. Jackson Iron Mfg. Co.*, 44 N.H. 61 (1862); *Wells v. Jackson Iron Mfg. Co.*, 47 N.H. 235 (1866); *Wells v. Jackson Iron Mfg. Co.*, 48 N.H. 491 (1869); *Wells v. Jackson Iron Co.*, 50 N.H. 85 (1870); Coos County Registry of Deeds – ("Book/Page") B8/117; 22/28; B22/28; B22/29; 22/68; B25/255; B28/334; 33/358; 34/321; 34/323; 40/213; 59/286; 59/288; 65/71; 65/72; 65/73; 65/74; 65/75; 65/76; 65/77; 65/78; 68/23; 68/22; 68/24; 68/310; Plan 71/402; 79/2; 83/194; 90/148; 90/154; 126/171; 132/298; 132/315; 132/347; 134/172; 134/178; 134/188; 134/199; 153/150; 176/98; 252/827; 306/10; 419/117; 471/245; 474/1; 474/5; 474/7; 474/58; 481/96; 481/209; 482/344; State of N.H. Archives, Book of Deeds of State Land; *Plan of Merger* of The Cog Railway, Inc. and Marshfield, Inc. filed with the N.H. Secretary of State on December 9, 1988; *Lease Agreement between the State of N.H. Dept. of Resources and Economic Dev. Div. of Parks and Rec. and Mount Washington Summit Road Co.* dated June 30, 2015; *Easements and Right-of-Way Agreement* between the Mount Washington Railway Co. and the State of N.H. through its Dept. of Resources and Economic Dev. dated November 21, 2008.

This opinion consists of the following:

- Map of the Mount Washington Summit
- A Summary of Property Rights
- Legal Analysis
- History of the Mount Washington Summit

Map of Mount Washington Summit

Figure-1. This map, taken from a map prepared for the former N.H. Dept. of Resources and Development, roughly depicts only those easement and ownership interests that have been delineated by metes and bounds or an equally rigorous description. Yellow represents property owned by the State in fee. Blue represents property owned in fee by the Mount Washington Railway Co. ("Railway"). Green represents an easement right-of-way held by the Railway over State fee-owned property. Road Company easement and lease interests are not shown as they lack a precise boundary.

SUMMARY OF PROPERTY RIGHTS

Property Rights of the State of New Hampshire

The State of New Hampshire owns a circular tract 50 rods (825 feet) in radius (herein referred to as "Tract A" or "summit circle") and a quasi-rectangular tract measuring 1,000 feet along its longest side (herein referred to as "Tract B" or "quasi-rectangular tract") at the summit of Mount Washington in fee. Tracts A and B are subject to certain easements and restrictions that are more specifically described as follows but otherwise, the State enjoys all of the rights attending fee ownership:

Tract A is subject to a right-of-way in the form of an easement ("ROW") in favor of the Mount Washington Railway Co. ("Railway") that is 99 feet wide until a point near the location of the Summit House as it existed in 1962 where it is reduced to 50 feet wide until the railroad's terminus, also as it existed in 1962. The State retains the fee interest under the ROW but cannot unreasonably interfere with the easement rights of the Railway. Conversely, the Railway cannot unreasonably interfere with the State. Although parking within the ROW by the State does not *per se* interfere with use of the ROW, whether such parking unreasonably interferes with the Railway's use of the ROW, which includes railway maintenance and the embarkation and disembarkation of passengers, is a factual matter not addressed by this opinion. The State may allow any other party to use its fee property to the extent of its own rights; however, any agreement by the State allowing a third-party to unreasonably interfere with the ROW would be ineffective and any third party unilaterally interfering with this ROW in an unreasonable manner would be violating the rights of the Railway.

In addition, although a private party cannot obtain property rights through adverse possession (i.e., prescriptive rights) against the State, the State and the public can obtain property rights through adverse possession against private parties. However: "No title to any real estate or to any interest therein shall be acquired by or against a railroad by adverse possession, however exclusive or long continued." RSA 367:45. Whether or not any area on the summit is subject to a claim for adverse possession is a factual matter not addressed by this opinion. In addition, it is unlikely that any portion of the ROW has been abandoned; however, this is also a factual matter not addressed by this opinion.

Tract A also encompasses what was originally an 80-foot by 200-foot parcel, later reduced by a boundary line adjustment, known as the "Marshfield Inc. Property" (Tract D). This tract is not owned by the State but, instead, is owned by the Railway in fee. The Railway has the right to pass over Tracts A and B to reach the Marshfield Inc. Property using both pedestrian and vehicular means and to place railroad siding within the adjusted piece.

Both Tracts A and B are subject to the right of the Mount Washington Summit Road Co. ("Road Company), also in form of an easement, to use the road, portions of two of the three currently-existing parking lots (former stables) and a turning area near the stage office as described in an agreement dated April 30, 1894. Tracts A and B are also subject to the other rights of the Road Company as described in the agreement of 1894. The Road Company also obtained additional rights to use certain areas in a lease with the State in 2015, including the right to use the third parking lot.

In addition, the State has the right to enforce those terms found in the 1894 agreement appurtenant to the property it owns in fee that have not yet merged.

Property Rights of the Mount Washington Railway Co.

The Railway has a right-of-way (easement only) for railroad purposes within the summit circle. The ROW is 99 feet wide until near the Summit House as it existed in 1962 where it is then reduced to 50 feet wide until the railroad's terminus as it existed in 1962. The Railway may use the area within the ROW for all legitimate railway purposes but must not unreasonably interfere with the rights of the owner of the servient estate, in this case, the State.

As opposed to its easement interest in the ROW within the summit circle, the Railway owns Tract C in fee. This so-called "right of way" is 99 feet wide and stretches from the base of the mountain to the summit.

Finally, the Railway owns the "Marshfield Inc. Property" in fee along with the right to pass over Tracts A and B using both pedestrian and vehicular means to access this property and the right to place railroad siding within the adjusted portion.

The Railway has the right to enforce the terms of paragraph IV, VI, and VIII of the 1894 agreement.

Property Rights of the Mount Washington Summit Road Co.

The Road Company has an easement to use the roadway, portions of two parking lots (former stables), and a turning area near the stage office. In addition, the Road Company continues to possess all rights set forth in the agreement of 1894 related to the Road Company which include the right to use "customary walks." The Road Company has the right to use the third parking lot and any portion of the older two parking lots not previously occupied by stables under a lease with the State.

Property Rights of the Mount Washington Observatory (Observatory)

The Observatory does not own any fee property or easements at the summit. The Observatory may occupy certain portions of the Sherman Adams building through its lease with the State. The Observatory is subject to the restrictions of that lease including restrictions on

overnight guests. The Observatory is not restricted with respect to providing lodging by the 1894 agreement. Third-party agreements may further restrict the rights of the Observatory.

LEGAL ANALYSIS

The following analysis focuses on only the most important aspects of the relevant deeds and conveyances. For a detailed and lengthy history of the ownership of the summit, please see "History of the Mount Washington Summit," attached.

The first relevant deed is an agreement reached by the parties with interests in lands at the summit in 1894.

I. The 1894 Agreement

In 1894, after longstanding disagreements, the Railway, the Road Company, and the heirs of David Pingree,[2] reached an agreement with respect to ownership and uses of the summit of Mount Washington, the railway corridor and base, and the portion of the roadway near the summit. Later conveyances reference this recorded agreement as a "deed," and it functions as such, but its structure differs markedly from the normal form of instruments conveying interests in land. A careful examination of this unusual document reveals that the agreement was not universal; in other words, not all rights and restrictions applied equally to all parties. Instead, rights and obligations and the parties subject to them varied from paragraph to paragraph.

A. Paragraph I

In paragraph I of the agreement, the heirs of Pingree gave the Railway all of the summit circle (Tract A) in fee subject to enumerated rights that the heirs of Pingree reserved in favor of the Road Company. These rights included:

- The right to continue to use the carriage road;
- The right to use the stage office and stage building to lodge and victualize road employees and the right to use the stables;
- The right to use the area between the then-existing stage office and the signal station and in front of the stables as turning grounds;
- The right to pass from the carriage road to other parts of the summit by "the usual and customary walks and passageways"[3] to the same extent as the patrons of the railway (this

[2] The heirs of Pingree also conveyed rights, to the extent they had any, in the Summit House and all fixtures and appurtenances at the summit and base of Mt. Washington to the Boston and Montreal Railway Co. This transfer does not impact this opinion.

[3] "[T]he usual customary walks and passageways" likely referred to pedestrian access, not vehicular access. The paragraph specifically refers to "walks" and limits the access to that enjoyed by railway patrons who were necessarily limited to pedestrian transportation once the railway dropped them off at the summit.

clause includes a statement that neither the Road Company nor the Railway may make use of the buildings of the other); and,

- The right to use water in two springs.

Although paragraph I recognized rights of the Road Company, it did not purport to describe the full extent of the rights of the Road Company and did not limit the Road Company to only these rights. The paragraph merely states that the owner of the summit circle must recognize *at least* the rights enumerated. The owner of the circle (the Railway) was free to grant the Road Company additional rights if it so desired or to grant any party additional rights to the full extent of its own rights. Any subsequent owner of the summit circle (now the State) could do the same.

To determine what entity can enforce the requirements in paragraph I, it is necessary to first determine whether the rights constitute an easement in gross (personal rights) or an easement appurtenant (rights connected to an adjacent parcel of land). In *Burcky v. Knowles*, 120 N.H. 244 (1980), the N.H. Supreme Court held that an interest:

> which is not in its very nature a mere personal and temporary right will always be held an easement running with the land absent some controlling provision to the contrary. Furthermore, the general rule of construction favors appurtenant easements over easements in gross, and an easement is never presumed to be in gross or a mere personal right when it can be fairly construed to be appurtenant to some other estate.

Id. at 248 (internal citations omitted). Paragraph I relates to the use of land within the summit circle, appears to create permanent rights, and does not specifically indicate that the rights are personal only. Therefore, the rights described therein are appurtenant and run with the land, not with the parties. The property impacted by paragraph I is limited to the land within the summit circle as it relates to the property interests of the Road Company; therefore, to the extent enforcement of these rights is contemplated, the State and the Road Company may enforce the terms of paragraph I.

B. Paragraph II

In paragraph II, the heirs of Pingree gave the Railway the entire 99-foot wide "right-of-way" outside the summit circle to the base. Although usually a grant of a "right-of-way" constitutes a grant of an easement only, the heirs of Pingree included additional language to indicate that this grant was in fee. *State v. Ladd*, 110 N.H. 381, 383 (1970) (recognizing the general rule that "the fee in the land is not transferred by a grant of a right of way over a tract of land [but is instead] transferred by a grant of a tract of land for a right-of-way"). Specifically, this paragraph states: "intending to convey *all the land* within the limits of said right of way as above described." Paragraph II also provides rights to certain water-related appurtenances as well as two parcels at the base.

C. Paragraph III

In paragraph III, the heirs of Pingree provided a warrantee covenant for the transfer of the interests described above but only against those claiming "under said estate." Therefore, the heirs of Pingree provided a warrantee against those claiming through them but not through any source whatsoever.

D. Paragraph IV

In contrast to the preceding paragraphs, paragraph IV reflected agreements between the Railway and the Road Company – not the heirs of Pingree. In paragraph IV, the Railway and the Road Company agreed to two major provisions:

1. The Railway and the Road Company agreed that the Road Company would provide platforms necessary to facilitate exchanging passengers and baggage between the two.

2. The parties further agreed that "neither … shall so transact business at the Summit of Mount Washington as to divert the business or depreciate the revenue of the other…."

It is unknown whether the Road Company ever provided the platforms described in the first provision. Presumably, the Road Company remains subject to this obligation. The meaning of the second provision is uncertain; however, given that any act by either party to entice the public to use either service would necessarily "divert the business or depreciate the revenue of the other," this clause cannot be read in its broadest sense. Instead, the reasonable interpretation is that each agrees not to unnecessarily or unduly interfere with the other. *Lussier v. N.E. Power Co.*, 133 N.H. 753 (1990) (finding that the court must "give reasonable meaning to unclear or general terms in an easement deed").

To determine who can enforce these provisions, one must determine whether the rights are appurtenant or in gross and, if they are appurtenant, what entity now owns the property to which they are appurtenant.[4] As with the rights described in Paragraph I, these rights relate to the use of land at the summit, appear to create permanent restrictions, and do not specifically indicate that the rights are personal only. Therefore, the rights described therein are appurtenant and run with the land, not with the parties. Having determined that the rights are appurtenant, the owners of the parcels to which these rights attach must be identified.

[4] Although it may appear unusual to consider this type of agreement to be an "easement," the New Hampshire Supreme Court has recognized similar business restrictions as part of a "recorded cross-easement agreement" in the past. *See Holl v. Claremont Assocs.*, 143 N.H. 563 (1999) (discussing injunction related to easement restrictions prohibiting "any restaurant or public eating establishment").

1. Enforcement Rights of the Road Company

Since 1894, the Road Company continued to maintain its easement interest in the land at the summit and its fee interest in lands approaching the summit. It still maintains these interests today. Therefore, the Road Company can enforce the terms of this agreement in a manner unchanged since 1894.

2. Enforcement Rights of the Railway and the State

The Railway's ownership path is more circuitous. The Railway gave all of its interest in land to the Mount Washington Summit House Inc. ("MWSH") in a series of transactions beginning with an indenture in 1939 and ending with a deed transfer in 1962. No specific transfer of the Railway's rights to MWSH was required as easement interests appurtenant to land pass automatically with the transfer of the fee interest associated with the dominant estate. *Mansur v. Muskopf*, 159 N.H. 216, 222 (2009) ("easements automatically pass with the transfer of property to which they are appurtenant, even when absent from the face of the deed"); *see also Burcky*, 120 N.H. at 250 ("once an easement has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easement belonging to it, whether mentioned in the deed or not"); *see also* RSA 477:26 (codifying the concept that all "appurtenances" to real estate transfer with the property). To the extent specific language were needed to effectuate such a transfer, this language exists in the 1962 deed. It states: "Meaning and intending to convey all of the real estate and interests therein owned by the grantor and there is also included herein the grantor's interest in any other real estate in Coos County." Therefore, although the Railway continued to exist, the rights and obligations in the 1894 agreement passed along with the land to MWSH.

MWSH thereafter transferred all fee interests to Dartmouth College which subsequently transferred the summit circle to the State except for the 80-foot by 200-foot parcel that it transferred to Marshfield, Inc. (Tract D). MWSH also transferred Tract C (railroad base-to-summit fee "right-of-way") to Marshfield, Inc. As stated above, the Railway now holds the interests formerly transferred to Marshfield, Inc. One must now determine to which of these three properties the rights in paragraph IV are appurtenant.

The actual railroad structure was (and is) physically located on both the summit circle (which at the time of the agreement was one contiguous lot) and Tract C. It is, therefore, logical to assume that these restrictions were intended to benefit both the summit circle and Tract C as both were used for railroad activities. Consequently, both the owner of the summit circle (the

State with respect to the bulk of the summit circle and the Railway as owner of Tract D) and the owner of Tract C (the Railway) can enforce the terms of paragraph IV.[5]

E. Paragraph V

Paragraph V forbids the operation or maintenance of "any boarding house or other place for boarding, victualizing or otherwise entertaining tourists, travelers or other persons" not just on the summit, but "at any point on said mountain" within one half mile of the railway "except said stage office and stables." However, this paragraph only forbids such operation and maintenance by anyone "claiming title from the estate of David Pingree" either through Ebenezer Coes and David Pingree as trustees of the Pingree estate, the legatees of David Pingree, or the Jackson Iron Mfg. Co. This is, again, an easement appurtenant for the reasons described above.

No mention is made of the Road Company in paragraph V and none can be implied. Although Coe and Pingree may have been officers of the Road Company from time to time, the Road Company was and is a separate legal entity. When the agreement wanted to refer to the Road Company, it repeatedly referred to it specifically as the "Road Company." In addition, the paragraph specifies that it applies to the named individuals only in their capacity as trustees. The paragraph was intended to limit the Pingree legatees and the Jackson Iron Mfg. Co. – entities who still had other interests on Mount Washington other than the summit – from creating this type of accommodation and ran in favor of the property owned by the Railway. It appears that one tract on the summit, Tract B (quasi-rectangular tract) does originate from the heirs of Pingree and would have been subject to this restriction. Specifically, in 1910 the Conway Co. gave this tract to the Railway. Conway Co. traces its title back to the heirs of Pingree. However, Dartmouth College eventually obtained all the land benefited by this easement that had formerly belonged to the Railway as well as the only property burdened by the easement – Tract B. Because Dartmouth College owned both the easement restriction and all of the relevant underlying property (all other property from the heirs of Pingree et al. having been condemned by the federal government) these interests merged.[6] The State eventually obtained title from Dartmouth College in the manner described herein. No other lot traces its title back to "the estate of David Pingree" and, therefore, the restraint has no further application. In short, the interests in paragraph V are no longer enforceable.

F. Paragraph VI

Paragraph VI reflects an agreement between the Railway and the Road Company not to allow garbage and refuse to lie exposed upon the premises. For the reasons described above, this

[5] Although it is slightly more difficult to determine whether the owner of the Marshfield, Inc. Property could separately enforce the terms of paragraph IV, this issue is currently moot given that the Railway owns both Tract C and the Marshfield, Inc. Property.
[6] The doctrine of "merger" is more fully discussed in Section II.

provision is also appurtenant and may be enforced by the Road Company, the Railway, and the State.

G. Paragraphs VII and VIII

Paragraph VII assigned interests in the summit house to the Concord and Montreal Railroad Co. Paragraph VIII merely finalizes the agreement to ensure that it resolves all disputes among the parties.

II. Later Conveyances

The analysis above describes the extent of the 1894 agreement. Since that time, other interests have arisen through numerous, and sometimes convoluted, property transfers.

As mentioned above, in 1939 the Railway entered into an indenture (i.e., deed with continuing obligations) with the Mount Washington Club, Inc., an entity that would later become the MWSH. This indenture covered tracts A and B at the summit. It reserved a 99-foot right-of-way through the summit circle in favor of the Railway. As it was described only as a right-of-way, this reservation created an easement for a right-of-way, not a fee estate. *Ladd*, 110 N.H. at 383.

Later the club, having changed into the MWSH, obtained an additional deed from the Railway giving it not only the fee right-of-way to the base and the quasi-rectangular tract B which it had obtained from the Conway Co., but "the grantor's interest in any other real estate in Coos County." At the time, "all other interests" would have included the right-of-way easement. Even without this language, the right-of-way easement would have passed with the land to which it was appurtenant to the MWSH. *Mansur*, 159 N.H. at 222; *see also Burcky*, 120 N.H. at 250; *see also* RSA 477:26. Once the MWSH had all of these interests, the easement was extinguished through merger. Under the doctrine of merger, combined ownership of both a fee interest and an easement interest eliminates the easement. In *Soukup v. Brooks*, 159 N.H. 9, (2009), the N.H. Supreme Court held:

> We stated long ago: A man cannot have a right of way through his own land, independent of his right to the land. He may have a way through his own land at any place he may choose, and may vary it from time to time, or abandon it, as he may please, but such a way is not an easement.

Soukup v. Brooks, 159 N.H. 9, 14-15 (2009) *quoting Clark v. The Boston, Concord and Montreal Railroad*, 24, N.H. 114, 118 (1851); *see also Blaisdell v. Raab*, 132 N.H. 711 (1990) ("According to the law of easements, a landowner cannot have an easement over his or her own property independent from the ownership of it").

Nevertheless, when the MWSH transferred all of its Mount Washington property to Dartmouth College, it included language indicating a reservation of a 99-foot wide right-of-way

in favor of the Railway.[7] However, the transaction did not involve the Railway and, therefore, the reference to a "reservation" in favor of the Railway was ineffective to create an easement as "reservations" run in favor of the grantor. Specifically, "[t]he reservation of an easement in a deed generally creates an easement on behalf of the grantor only, based on the rule that a reservation to a stranger of the instrument is void for all purposes." 25 AMERICAN JURISPRUDENCE 2d, Easements and Licenses, §16; *see also Tripp v. Huff*, 606 A.2d 792 (Me. 1992) ("an easement in favor of a stranger … conveyed no property rights"); *see also Hodgins v. Sales*, 139 Idaho 225, 232; 76 p.3d 969, 976 (Idaho 2003) ("This is based on the rule that a reservation to a stranger to the instrument is void for all purposes"). In addition, Dartmouth conveyed an interest to the Railway only four days after receiving this property. This deed conveys a right-of-way of different dimensions indicating that at least the recipient of the conveyance, Dartmouth College, had no intent to be limited by the attempted reservation. *Flanagan v. Prudhomme*, 138 N.H. 561, 565-6 (1994) (stating: "Our determination of disputed deeds is based on the parties' intentions gleaned from construing the language of the deed from as nearly as possible the position of the parties at the time of the conveyance and in light of surrounding circumstances"). It is more likely that the drafter was merely parroting previous reservations which had now merged.

As stated above, although the initial reservation was ineffective, Dartmouth College created a new right-of-way in favor of railway uses in its subsequent deed to Marshfield, Inc. This transfer created a right-of-way within the summit circle that is 99-feet wide until near the Summit House, as it existed at the time, where it was reduced to 50-feet wide. Here, again, Dartmouth College transferred an easement interest only. *Ladd*, 110 N.H. at 383.[8]

Although the right-of-way is an easement only, the Railway enjoys the right to reasonable use and the right to be free from unreasonable interference. So too does the fee owner. *FDIC v. Caia*, 830 F. Supp. 60, 63 (D.N.H. 1993) ("The right of [an] easement owner and the right of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that

[7] This language, again, merely referred to a right-of-way and would have created an easement had it been effective.

[8] It should be noted that a State easement related to power lines in 2008 purported to recognize a fee ownership interest on the part of the Railway. *See Easements and Right-of-Way Agreement* between the Mount Washington Railway Co. and the State of N.H. through its Dept. of Resources and Economic Dev. dated November 21, 2008. To the extent that this easement referred to the ROW outside of the summit circle, this statement is correct. If this relates in any way to the right-of-way inside the summit circle, it would be incorrect for the reasons discussed herein. Further, the 2008 power line easement, if in some way incorrect, cannot create a fee ownership because: (1) it purports to recognize, not create the interest; and (2) the State would not have had the authority to give away this interest unless it went through specific required processes. *See* RSA 4:40 (for an example of the procedure necessary to transfer State-owned real estate). Estoppel would not apply as private parties are charged with knowledge of the limits of authority of government officials. *See Concord v. Tompkins*, 124 N.H. 463, 470 (1984).

there may be a due and reasonable enjoyment of both"). As the N.H. Supreme Court stated in *Dumont v. Town of Wolfeboro*, 137 N.H. 1 (1993):

> The rights inherent in dominant and servient tenements are correlative, not absolute. The owner of a servient estate has the privilege to use the land affected by an easement to the extent that his or her use does not impair the dominant tenant's right of way. Likewise, the dominant tenant must use the easement reasonably, so as not to damage the servient tenant's possessory interest.

Id. at 6 (internal citations omitted).[9] Even when a right-of-way is conveyed without restrictions, the "doctrine of reasonable use" controls the rights of the parties. *Delaney v. Gurrieri*, 122 N.H. 819, 821 (1982). Parking would not *per se* violate the easement because easements are, by their nature, non-possessory estates. *Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons*, 170 N.H. 299, 304 (2017) (holding: "Because an easement is a non-possessory interest in land, easement owners cannot bring actions that are traditionally established to protect possession, such as trespass and ejectment"). Whether a use unreasonably interferes with an easement right presents a question of fact.

> The theory of "reasonable use" provides that the rights of the parties to a right-of-way are questions of fact that must be determined in light of the surrounding circumstances, including the location and uses of both parties' property, and by taking into consideration the advantage of one owner's use and the disadvantage to the other owner caused by that use.

Id. Because it presents a question of fact, this opinion does not address whether uses at the summit unreasonably interfere with easement interests, or vice versa.

One of the opinions provided by the parties suggests that the Railway may have abandoned its right-of-way through the lack of use. However, only definitive action to cease using a particular easement would be likely to result in abandonment. Mere non-use of an easement "does not result in its loss or destruction, even if continued for a long period of time." *Downing House Realty v. Hampe*, 127 N.H. 92, 95 (1985). Abandonment must be shown by "clear, unequivocal and decisive acts." *Id*. "The holder of an easement does not forfeit a part of it because he has no present need for it or because he is unlikely to exercise the whole of it." *Id*. The construction of new inconsistent structures may factor into a court's determination regarding

[9] At least one other jurisdiction suggests that unreasonable interference could result from activities of the servient estate's owner even if they occur outside of the bounds of the easement. *Rogers v. Roach*, 2012 Tenn. App. LEXIS 402, 26-27* (Appeals Middle Grand Division 2012) (holding that the rule for erecting fences within easements "is the same for fences abutting the easement").

"an intent to abandon," but mere removal of a structure would likely be inconclusive. *Id*. Whether or not the actions in this case satisfy these requirements is also a factual question not addressed by this opinion.

In addition to its easement interest, the Railway also owns the Marshfield Inc. Property (Tract D). The parcel was originally 80 feet by 200 feet long but has been subject to a small change by way of a lot line adjustment with the State. Its current configuration is shown on *Figure 1*. Dartmouth College originally gave this parcel to Marshfield, Inc. The Railway obtained the tract when it merged with Marshfield, Inc. in 1988. *See Plan of Merger* of The Cog Railway, Inc. and Marshfield, Inc. filed with the N.H. Secretary of State on December 9, 1988 (designating the Railway as the "Surviving Entity"). The Railway also has the right to pass over Tracts A and B by both pedestrian and vehicular means to access this tract and to place railroad siding within the adjusted portion.[10]

The State as fee owner has entered into additional agreements with respect to the summit circle and its quasi-rectangular tract. First, the State entered into an agreement with the Road Company allowing use of the roadway and the three lower parking areas. As the Road Company already had an easement over the road surface and portions[11] of two of the three parking areas (as the site of the former stables), the lease provides for the additional use of the third parking area. Consideration for this lease includes the right of the State to use winter vehicles (snowcats) which may result in delaying the opening of the road to Road Company customers in the spring. The State may also use the road during non-winter months to reach its summit parcels. *See Lease Agreement between the State of N.H. Dept. of Resources and Economic Dev. Div. of Parks and Rec. and Mount Washington Summit Road Co.*, pg. 1, para. 4 (stating: "The Auto Road shall allow passage on the auto road by the State and those conducting business on behalf of the State, at no cost to the State or to those conducting business on behalf of the State on a year-round basis").

The State entered into another lease with the Mt. Washington Observatory ("Observatory") in 2009. The payment terms within this lease are described in detail in a previous legal opinion provided to the Commission on July 18, 2017. That lease restricts uses including the number and type of overnight guests. In addition to these restrictions, the Observatory as a lessee of the State, cannot exceed the State's authority, specifically with respect to the 1894 agreement. However, for the reasons stated above, the restriction on lodging in the 1894 agreement does not apply to the State as owner of Tract A or its assignees, only to those

[10] To the extent that the previously described right-of-way in favor of the Railway overlaps with the Marshfield Inc. Property, that right-of-way has also merged into the fee ownership for the reasons described above.

[11] A map labeled as "Plan, Book 71, Page 402" entitled "Copy of J.W. Versall's [sp] Plan of Summit of Mt. Washington" noted by the Coos County Registry of Deeds as being "first received on June 13, 8:00 am 1894" and more recently received on January 9, 2018, seems to indicate that the former stables were smaller than the existing parking lots.

claiming rights through the heirs of Pingree. The Governor and Executive Council approved the State's lease to the Observatory on September 23, 2009. The Observatory also appears to be subject to third-party agreements. As private documents, these are not subject to this opinion.

The various ownership interests at the summit may have been changed over time through prescriptive rights, i.e., adverse possession. Adverse possession applies to easements as well as fee ownership. Although rights may be adjusted through adverse possession, elimination of an easement in its entirety is unlikely. As one jurisdiction has stated:

> Adverse possession and use for the prescriptive period will terminate an easement, but, to be effective, adverse possession of a right of way by the servient owner must be of the same character required to obtain title to real estate and the use must be wholly inconsistent with the right to enjoy the easement and amount to an ouster of the dominant owner.

Schade v. Simpson, 295 Ky. 45, 48 (Ct. App. KY 1943). Adverse possession does not apply to State-owned lands. RSA 539:6. In addition, as stated previously: "No title to any real estate or to any interest therein shall be acquired by or against a railroad by adverse possession, however exclusive or long continued." RSA 367:45. Permissive use also defeats a claim to adverse possession. *Ucietowski v. Novak*, 102 N.H. 140, 145 (1959) (holding: "A permissive use no matter how long or how often exercised cannot ripen into an easement by prescription"). Whether and to what extent any party at the summit has obtained prescriptive rights against any other is a question of fact not addressed by this opinion.

The Railway has also provided citation to RSA 265:69 which prohibits parking within 50 feet of a rail at a railroad crossing. On its face, this section refers to "railroad crossings" only. There are no railroad crossings at the summit and, therefore, this section does not apply. The Railway further raises RSA 381:14 which prohibits the entry onto any railroad property and treats such an entry as a criminal trespass. However, this section limits that prohibition to those who are not licensed or otherwise privileged to enter. *Id*. It, therefore, would not apply at the summit to the State as fee owner or its invitees.

I hope that this answers any questions you may have had.