

COMMONWEALTH OF MASSACHUSETTS

LAND COURT  
FILED

2017 OCT 24 AM 10:28

Middlesex, ss.

LAND COURT  
CASE NO.: \_\_\_\_\_

TOWN OF CONCORD,

Plaintiff,

v.

NEIL E. RASMUSSEN, ANNA  
RASMUSSEN, BROOKS S. READ,  
SUSANNAH KAYE, RUSSELL ROBB III,  
LESLIE ROBB, AND THOMAS WRAY  
FALWELL, TRUSTEES OF THE PIPPIN  
TREE LAND TRUST, PRESIDENT AND  
TRUSTEES OF HARVARD COLLEGE,  
JOHN K. BAKER, TRUSTEE OF THE  
NEILSEN REALTY TRUST, AND NINA I.M.  
NEILSEN, TRUSTEE OF THE BAKER  
REALTY TRUST,

Defendants.

COMPLAINT

The Town of Concord ("Town") seeks a declaration and judgment from this Court to confirm the public's longstanding rights to access the foot trail where pavement ends at Estabrook Road (sometimes referred to as the "Road") as it enters into Estabrook Woods, a large area of preserved open space, much of which is subject to conservation restrictions. The Town also seeks a permanent injunction against the defendant-landowners from interfering with the public's access rights along the Road.

Since colonial times, Estabrook Road was a well-known public way linking Concord and Carlisle. Historic references to its use as a public way are numerous, including meanderings up and down the Road by Henry David Thoreau. In 1932, upon petition under G. L. c. 82, §32A, the Middlesex County Commissioners "discontinued" the Road. This action had the legal effect

of discontinuing the Town's obligation to maintain the Road, but did not surrender the public's right of access to it. The Road became a "public access" private way, and remains so today.

Defendant-landowners have recently erected signage and a large gate to deter public access to the Road. These landowners have repeatedly refused to negotiate with the Town to resolve this dispute, despite the Town's efforts to respond to the landowners' concerns regarding public access. The Town therefore has been forced to seek a judicial resolution of this dispute.

### Parties

1. Plaintiff Town of Concord is a municipal corporation with an address of 22 Monument Square in Concord, Massachusetts.
2. Defendants Neil E. Rasmussen and Anna Winter Rasmussen reside at 393 and 42A Estabrook Road, shown on the Town Assessor's Map 5G as Parcel 1442 and Parcel 1442-3, respectively. The Rasmussens furthermore own a parcel abutting Estabrook Road, more particularly identified as 39X Estabrook Road and shown on the Town Assessor's Map 5G as Parcel 1442-1.
3. Defendant Brooks S. Read owns 366 Estabrook Road, shown on the Town Assessor's Map 6G as Parcel 1444-1, which is adjacent to the entrance of the Road. He and Dr. Susannah Kaye reside there.
4. Defendants Russell Robb III, Leslie Robb, and Thomas Wray Falwell, Trustees of the Pippin Tree Land Trust ("Pippin") own property abutting Estabrook Road, more particularly identified as 47Y Estabrook Road and shown on the Town Assessor's Map 5G as Parcel 1438.
5. Defendants President and Fellows of Harvard College ("Harvard"), with an address of 1033 Massachusetts Avenue, Cambridge, own property abutting Estabrook Road as follows:

Address	Assessor's Map and Parcel No.
129B Estabrook Road	2G-1422
122B Estabrook Road	2G-1423
115B Estabrook Road	2G-1424
108B Estabrook Road	3G-1429
90X Estabrook Road	3G-1431
77B Estabrook Road	4G-1432
68B Estabrook Road	4G-1439
60B Estabrook Road	5G-1440
97A Estabrook Road	3G-1527
110A Estabrook Road	2G-1528
116A Estabrook Road	2G-1529

6. Defendant, John K. Baker, Trustee of the Neilsen Realty Trust, owns property abutting Estabrook Road, more particularly identified as 1285 Estabrook Road and shown on the Town Assessor's Map 2G as Parcel 1531-1.

7. Defendant Nina I.M. Neilsen, Trustee of the Baker Realty Trust, owns property abutting Estabrook Road, more particularly identified as 45C Autumn Lane and shown on the Town Assessor's Map 2G as Parcel 1531-2.

**Jurisdiction and Venue**

8. The Land Court has jurisdiction in this matter pursuant to M.G.L. c. 185, § 1(k).

9. Venue is proper in this Court pursuant to M.G.L. c. 185, § 1, because the plaintiff Town and the Road at issue are located in Middlesex County.

**Estabrook Woods**

10. The Estabrook Woods is an area of approximately 1,200 to 1,400 acres spanning northern Concord and southern Carlisle.

11. Public access to Estabrook Woods from Concord exists at three primary points on the following roads: (1) Estabrook Road; (2) Monument Street; and (3) Lowell Road.

12. A portion of Estabrook Woods – the Punkatasset Conservation Land – is owned by the Town under the custody of its Natural Resource Commission and generally accessed from Monument Street.

13. Another portion of Estabrook Woods is owned by several individuals and institutions, several parcels of which are subject to conservation restrictions. This portion of the Woods is often accessed by the public from Estabrook Road.

14. In 2016, abutters to the unpaved portion of Estabrook Road began to engage the Town on issues of overcrowding and overuse of the Road as it becomes a trail through Estabrook Woods. The Town worked with these abutters to restrict parking areas along the paved portion of Estabrook Road.

#### **Maps Depicting Estabrook Road**

15. Estabrook Road has been depicted on historic maps and plans since at least 1830.

16. It is shown on an 1830 Map, an 1852 Map (produced with the help of Civ. Eng. H.D. Thoreau and showing apparent mile markers), an 1875 Map (with distances presumably measured in “rods”<sup>1</sup>), an 1889 Map, a 1905 Map (and labeled “Estabrook Road), the Town’s 1921 Directory map, the Town’s 1928 zoning map, the “1976 Bicentennial Map of Middlesex County” prepared under the direction of Philip Lynch, County Engineer, and in close detail on the Town’s Assessors Tax Maps (e.g., the Assessor’s “FY94” map). These Maps are attached hereto as Exhibits 1-9.

17. The Road appears as a landmark on the 2014 Estabrook Woods Trail Map produced by the Town’s Natural Resources Commission. This Map is attached hereto as Exhibit 10.

---

<sup>1</sup> A rod is equivalent to approximately 16.5 feet.

### Estabrook Road's Historic Significance and Historic Use

18. Historic records and secondary sources of Concord history establish centuries-long public use of Estabrook Road. The information contained in those records is described below.

19. In or about 1670, Thomas Estabrook settled on what has been variously referred to in the historic records as the Way (or Road) to Twenty Score, the County Road, the Lime Kiln Road, the Road from Concord to Carlisle by Benjamin Clark, the Old Carlisle Road, the County Road leading from Concord to Carlisle, and, finally, Estabrook Road.

20. In colonial times, the Road was the most direct route between Concord Center and Carlisle Center and had, at one time, been considered as a site for the Carlisle Meeting House.

21. A portion of Estabrook Woods was granted in 1697, in twenty twenty-acre parcels (the "Twenty Score"), to householders in the north quarter of Concord with parcels drawn by lot. The Twenty Score parcels were later split among heirs of the original holders of rights in the Twenty Score.

22. In 1697, a committee of the proprietors of the northern part of the Town of Concord met to "appoint" at least three highways in the Twenty Score.

23. Generations of Estabrooks continued to live in this area until 1838. The Estabrook Home foundation exists today along the Road.

24. In the late 1700s, the Road was used to cart limestone from a quarry in the Woods to a lime kiln there. The ruins of that kiln exist today along the Road.

25. The Carlisle Minutemen traveled the Road to join the Battle of Concord in April 1775.

26. Henry David Thoreau walked the Road, referring to it as Old Carlisle Road and documenting his walks in his Journals. He mentioned the Road specifically numerous times. As just one example, Thoreau wrote:

What shall this great wild tract over which we strolled be called? Many farmers have pastures there, and wood-lots, and orchards. It consists mainly of rocky pastures. It contains what I call the Boulder Field, the Yellow Birch Swamp, the Black Birch Hill, the Laurel Pasture, the Hog-Pasture, the White Pine Grove, the Easterbrooks Place the Old Lime Kiln, the Lime Quarries, Spruce Swamp, the Ermine Weasel Woods; also the Oak Meadows, the Cedar Swamp, the Kibbe Place, and the old place northwest of Brooks Clark's. Ponkawtasset bounds it on its south. There are a few frog-ponds and an old mill-pond within it and Batemans' Pond on its edge. What shall the whole be called? The old Carlisle road, which runs through the middle of it, is bordered on each side with wild apple pastures, where the trees stand without order, having, many if not most of them, sprung up by accident or from pomace sown at random.... It is a paradise for walkers in the fall.

27. Thoreau was thoroughly familiar with Estabrook Road because, with a title of "Civ Eng.," he assisted J.F. Walling, the Boston surveyor who completed an 1852 map of Concord pursuant to a Town grant.

28. The Brooks Clark Farm once existed near the point where paved portion of the Road now ends. James Clark, the owner of the farm, purchased Thoreau's Walden Pond cabin and moved it to the farm on Estabrook Road, where it remained for several decades before it deteriorated.

29. Ellen Tucker Emerson, daughter of Ralph Waldo Emerson, wrote of a merry, jolting hayride in 1866 with the daughters of Nathaniel Hawthorne "into the Brooks Clark road."

30. In 1932, certain landowners, including the Rasmussens' predecessor in title, appeared before the Town Road Commissioners to request that the Town petition the County Commissioners to close Estabrook Road as a public way since "the road is now almost impassable and is used only by picknickers [*sic*] and is a serious fire hazard. There are no houses on this stretch of road in Concord." Exhibit 11.

### **Estabrook Road Is Well-established in the Title Record**

31. Equally longstanding is the Road's appearance in the title record as a boundary between parcels of land.

32. The title record for the parcel currently owned by the Pippin Land Trust (Town Assessor's Map 5G, Parcel 1438) and certain parcels currently owned by Harvard to the east of Estabrook Road can be traced to 1765. Each deed in the title record refers to the road now known as Estabrook Road to mark the boundaries of the property (e.g., "Bound by a country road;" "On the County Road leading from Concord to Carlisle;" "On the Estabrook Road;" "To a wall on the sideline of Estabrook Road").

33. The title record for the parcel currently owned by the Rasmussens (Town Assessor's Map 5G, Parcel 1442-1) and certain parcels currently owned by Harvard to the west of Estabrook Road can be traced to 1838. Each deed in the title record refers to the road now known as Estabrook Road to mark the boundaries of the property (e.g., "At the wall at said Estabrook Road;" "To the Estabrook Road;" "By the road leading from Concord to Carlisle;" "On the easterly side of Estabrook Road;" "Southerly by the road leading from Concord to Carlisle, now known as Estabrook Road").

34. No deed or other land record for the parcels abutting the Road states that the land beneath the Road is (or was) owned by any such parcels, and none of these records refer to Estabrook Road as merely a right-of-way or easement.

### **The Creation, Use, and Maintenance of Estabrook Road**

35. Estabrook Road was once a public way in Concord that extended from Liberty Street to the Carlisle Town Line.

36. Walcott's Manuscript of "Notes on Concord Highways" reports that, in 1801, Estabrook Road is described as a "Town Way."<sup>2</sup>

37. In 1877, the Concord Road Commissioners reported, "[t]he Estabrook Road, which had been badly cut up by teaming wood over in the spring, was repaired and graded to the town line."

38. In 1888, they proposed to officially name "the road...from Liberty Street near Mr. Joseph Derby's, by Mr. Cyrus Clark's place" as "Estabrook Road." The Town voted to make it so at a Special Town Meeting on April 22, 1889.

39. In 1890, the Concord Road Commissioners referred to it as a "town road."

40. In 1899, the Board of Selectmen approved New England Telephone and Telegraph's petition to install along the entire length of Estabrook Road ("between Carlisle line and Liberty Street") utility poles to carry wires. The petition reserved space for Town wires.

41. The Town repaired and improved the Road in 1890, 1892, 1895, 1896, and 1906.

42. In 1903, Town Meeting voted to change the position of the Town's boundary line with Carlisle, and in doing so used Estabrook Road as an anchoring landmark.

43. The Town's 1915 Annual Report reflects that the Town patched parts of Estabrook Road with gravel. The report says Estabrook as  $2\frac{2}{10}$  miles long (exactly the length it is today from Liberty Street to the Carlisle line).

44. The Town patched and graveled the Road in 1916 and 1917 as well.

45. In 1922, the Concord Road Commissioners recommended that "[s]ections of...Estabrook...should be regraveled."

---

<sup>2</sup> Upon information and belief, Charles Walcott was a conveyancing attorney circa 1896 who researched Town and County Commission records to compile information about road layout, dedication, and acceptance. Over the years, Town officials have relied on Mr. Walcott's Manuscript to understand Concord's roads.

46. At a meeting on May 7, 1930, the Town Road Commissioners voted to place the Road “on the list for graveling as soon as possible.”

47. Near the end of 1930, “work was in progress...on Estabrook Road toward Mr. Raymond Emerson’s house.”

48. In 1931, the Road was graveled again from Estabrook Road to Mr. Raymond Emerson’s house.

### The Mounting Costs of Maintenance

49. As far back as 1890, the Town grappled with the costs to repair the Road. The Road was one of several in Town that the Road Commissioners stated cannot be “put in decent condition unless at an expense out of all proportion to the amount of travel over them, or to the amount of taxable property found in the vicinity.” The Commissioners continued:

They are, it is true, town roads but many of them are little better than paths in the grass or ruts through a piece of woodland. ... And it always happens that, after carting heavy loads of...timber over them in the fall and spring, they are left in a condition which is far from satisfactory; your Commissioners are then called upon to repair them, in language sometimes mild and reasonable, but oftener the reverse of both. If we have not been able at all times to comply with these requests, it is because we have other and more important duties to attend to, and not from any unwillingness on our part. But it should be understood that there is a limit to the amount of work that can be accomplished...; that this department has been kept up to that limit..., and that any increase in duties will necessarily call for larger appropriations, which the town may grant or withhold as it sees fit.

50. During the early 1920s, residents implored the Town to fix Concord roads and to compensate them for damage to their automobiles caused by poor road conditions.

51. On April 13, 1932, the Town Board of Road Commissioners determined that the Town could no longer maintain a portion of the Road and should petition the County Commissioners to declare just that.

52. The Town's decision coincides with the height of the Great Depression and the advent of widespread automobile use in the area.

53. The Town was obliged to either maintain roads suitable for automobile use, or relieve itself of that burden. If the Town did neither, it faced liability for failing to provide safe public travel. M.G.L. c. 84 §§ 1, 15, 22 (1932).

**The Town Petitions to Discontinue Maintenance of a Part of Estabrook Road**

54. On June 10, 1932, the Town's Road Commissioners petitioned the Middlesex County Commissioners pursuant to G. L. c. 81, § 32A to discontinue a portion of Estabrook Road from "a point...at the entrance to R. Emerson driveway...(which said point is 2,344.05 feet from...Barnes Hill Road, at its junction with Estabrook Road), to the boundary line between the Town of Concord and the Town of Carlisle, on said Estabrook Road." *See* Exhibit 12 at 2.

55. The Road Commissioners determined that "Estabrook Road...is a public way, and that common convenience and necessity no longer require that such way shall be maintained in a condition reasonably safe and convenient for travel." (*Id.*)

56. They stated that: "There are no residences served by that portion of said way...and it would be an inordinate and unreasonable expense upon [the Town] to keep [it] in a condition reasonably safe and convenient for travel." (*Id.*)

57. The Road Commissioners therefore asked the County Commissioners to declare it a "private" way, and declare that the Town "no longer be bound to keep the same in repair, upon condition that the...Town give sufficient notice to warn the public against entering thereon by the posting of adequate notice or notices where such way...unites with an existing public way." (*Id.* at 3.)

58. The County Commissioners granted the Town's petition on July 9, 1932, "in accordance with Chapter 289 of the Acts of 1924", now codified as amended at G. L. c. 82, § 32A. (*Id.* at 5.)

59. Chapter 289 of the Acts of 1924 read:

Upon petition in writing of the board or officers of a town having charge of a public way, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, adjudicate that said way shall thereafter be a private way and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities.

60. Both the Town's Road Commissioners and the County Commissioners followed all of the procedures prescribed by that law, and borrowed heavily from its text.

61. In conformance with that law, the County Commissioners concluded, "said way shall hereafter be a private way, and the Town shall no longer be bound to keep the same in repair." (*Id.* at 5).

62. This unpaved portion of Estabrook Road is now known colloquially as the "Estabrook Trail."

63. The paved portion of Estabrook Road continues to be a public way for all purposes. Neither the defendants nor other abutting residents along the Road have ever asserted otherwise. The Town continues to maintain and provide services, including water and electric utilities, along the paved portion of Estabrook Road.

### The Law of Discontinuance

64. The General Laws already in effect before 1924 allowed Counties to discontinue roads pursuant to Chapter 82 §§ 1, 17, & 30 and Towns to discontinue roads pursuant to § 21.

65. Section 1 vests the County Commissioners with the authority to lay out, alter, and discontinue highways.

66. Section 17 grants Selectmen and Road Commissioners certain limited jurisdiction concurrent with County Commissioners to discontinue parts of a highways, upon petition for altering, relocating and making specific repairs, and by such action a part of the highway becomes unnecessary for public use.

67. Section 21 grants municipalities the same authority, and specifies that it may discontinue a road by Town Meeting (or city council) vote.

68. If a municipality refuses to discontinue a road, Section 30 allows a person aggrieved to petition the County Commissioners to order that it be discontinued.

69. Nevertheless, the Legislature enacted Chapter 289 of the Acts of 1924, entitled “An Act Relative to the Discontinuance of Certain Ways as Public Ways.”

70. This Act was sparked by a petition filed by a Mr. Judd of Southampton.

71. It was a petition “for the establishment of *limited public ways* in cities and towns, or for such other or further legislation *relieving municipalities from the duty of maintaining* disused ways or highways and from the burdens incident thereto.” (emphasis added)

72. That legislation was codified at M.G.L. c. 82, § 32A (“Section 32A”). (General Laws of Massachusetts (1932)).

73. Section 32A must have had a different effect than §§ 1, 17, 21, and 30 – or else there would have been no reason for its enactment in 1924.

74. In the case of the unpaved portion of Estabrook Road, the County Commissioners discontinued maintenance pursuant to c. 82, § 32A. They did not discontinue it pursuant to Section 1 or Section 30. Nor did the Town discontinue the Road under Section 17 or by Town Meeting vote pursuant to Section 21.

75. The Appeals Court in *Coombs v. Board of Selectmen of Deerfield*, 26 Mass. App. Ct. 379 (1988), determined that a discontinuance under Chapter 289 of the Acts of 1924 ceases the Town's obligation to maintain the road, but otherwise does not affect the nature or status of the way.

76. *Nylander v. Potter*, 423 Mass. 158 (1996), likewise determined that a Section 32A discontinuance (1) ceases a municipality's responsibility to maintain the road; and (2) transforms the road into a "public access' private way", which the public has the right to access.<sup>3</sup>

---

<sup>3</sup> Section 32A was amended in 1983, and again in 2006. These amendments clarified, but did not alter, the statute's legal effect. Today Section 32A reads:

**Section 32A.** The board or officers of a city or town *having charge of a public way may*, after holding a public hearing, notice of which shall be... published..., upon finding that a city or town way or public way has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the city or town shall no longer be bound to keep such way or public way in repair and upon filing of such declaration with the city or town clerk such declaration shall take effect, provided that sufficient notice to warn the public that the way is no longer maintained is posted at both ends of such way or public way, or portions thereof. Upon petition in writing of the board or officers of a city or town in which a county highway is located, the county commissioners, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for public travel, after giving notice in the manner prescribed in section 3, and after viewing the premises and hearing the interested parties in the manner prescribed in section 4, may adjudicate that the town shall no longer be bound to keep the way in repair, and thereupon the adjudication shall take effect; provided, that sufficient notice to warn the public that the way is no longer maintained is posted at both ends of the way, or portions thereof.

(emphasis added).

### **Continued Public Use After Discontinued Maintenance**

77. Following the discontinuance of maintenance of the unpaved portion of Estabrook Road, the public continued to access and use that portion of the Road.

78. In 1986, the Town secured an amendment to the conservation restriction placed on the "None-Such Lot", now owned by the Rasmussen defendants and located adjacent to the Road and at some distance from where the pavement ends, on the condition that the public have the right to access that lot from Estabrook Road or the nearby Hugh Cargill Road.

79. The Town publishes a brochure to inform and educate the public about the history of Estabrook Woods and the multiple points where the public may access the Woods.

80. In recent decades, members of the public have regularly used Estabrook Road to enter Estabrook Woods without seeking permission from abutting landowners or being advised that public access along the Road was prohibited.

81. Group events are often organized along the Road, without permission from abutting landowners. To the Town's knowledge, no abutting landowner has objected to such activities. For example, the march of the Carlisle Minutemen from Carlisle Center to Concord Bridge is reenacted annually along the Road. Other local groups organize walks or runs along the Road.

### **Current Dispute**

82. In or around March, 2016, the Rasmussens erected a sign pronouncing, "You are now entering private property", and setting rules of use for the public. "Not following these rules constitutes trespassing," the sign says. (The Rasmussens modified the sign's verbiage in February, 2017, calling the Road "private lands".)

83. On March 29, 2016, the Rasmussens, acting through legal counsel, wrote to Town asserting their legal position that they and their neighbors have the right to prevent public access to the Road and establish rules for its use to the extent they permit the public to access the Road. The letter raised concerns about parking near the Road and trail usage.

84. Up to this point, it had been the longstanding and prevailing attitude of the abutters and their predecessors, as well as the Town and the public – as evidenced by their conduct and by the documentary record – that the public had the right to access and use the unpaved portion of Estabrook Road. Nevertheless, in an effort to respond to the Rasmussens' concerns about parking and trail usage, the Town formed the Estabrook Woods Access Study Committee ("Committee"), composed of interested citizens (including Mr. Rasmussen), to recommend to the Select Board solutions for these emerging issues.

85. The Committee met regularly through November 2016, and held two well-attended public hearings in June and October. In December, 2016, it issued a public report which recommended, among other things, that the Select Board "work with town counsel and abutters to resolve legal uncertainties...*in order to secure permanent public access.*" (emphasis added.) The Committee also recommended a set of guidelines for management of dogs and other matters to preserve Estabrook Woods and protect property owners. The Select Board unanimously adopted the Committee's findings and has faithfully worked to implement its recommendations.

86. The Town meanwhile worked to ensure safe and orderly public use of Estabrook Road, and continues to do so today.

87. The Town has also worked with the Rasmussens to limit parking to certain areas along the shoulder of the paved portion of the Road, as designated by the Rasmussens.

88. The Town erected "No Parking" signs along the paved portion of the Road, and temporary no-parking signs when necessary.

89. Concord Police enforce these rules and respond to the neighbors' and the public's emergency calls or calls to preserve orderly access and use of Estabrook Road.

90. The Town Animal Control Officer and the Natural Resources Commission likewise promptly respond to calls from neighbors and the public.

91. Since the inception of this dispute, the Town Manager and Select Board members and Mr. Rasmussen have regularly met and corresponded to try to resolve legal and practical issues.

92. In October and November 2016, the Rasmussens' counsel and Town Counsel conferred in an attempt to reach a Memorandum of Agreement on these issues, including incorporation of the Committee's guidelines as endorsed by the Select Board. The discussions did not reach conclusion.

93. On May 1, 2017, the Rasmussens' counsel again wrote to the Town asserting their legal position on the matter. As before, the Town carefully evaluated and considered the Rasmussens legal and historical submission when conducting its good faith negotiations.

94. On June 29, 2017, the Rasmussens, through separate counsel, requested several categories of historic Town records pertaining to Estabrook Road. The Town responded fully, as required. The records produced to the Rasmussens' counsel contain many of the historical facts alleged in this Complaint.

95. In September, 2017, Mr. Rasmussen unilaterally installed a large latched gate and granite pavers at the beginning of the unpaved portion of the Road, giving the area an appearance of a private driveway. In doing so, Mr. Rasmussen removed a chain across the Road and a sign

marked "Fire Lane", which exists to prevent parking that would block the trail entrance for use by emergency vehicles.

96. Despite these unlawful and potentially unsafe actions, Select Board Chair Michael Lawson contacted Mr. Rasmussen in mid-October about the proposed Memorandum of Agreement (MOA) in another attempt to resolve the parties' dispute while preserving their legal claims. Mr. Rasmussen, regrettably, did not wish to continue discussion of the MOA.

97. Mr. Lawson then provided Mr. Rasmussen with a copy of a legal memorandum prepared by Town counsel and proposed that the parties engage in formal settlement discussions to resolve the dispute facilitated by a retired judge to be selected by the parties. Mr. Rasmussen stated he would need a few days to consider the proposal.

98. Instead of either renewing consideration of the draft MOA or responding to the proposal for facilitated settlement discussions, the Rasmussens, through counsel, sent the Town a draft complaint and threatened to commence litigation.

### **COUNT I**

#### **(Declaratory Judgment (G.L. c. 231A, § 1))**

##### **The Public Has a Right to Access and Use the Road)**

99. The Town realleges and incorporates by reference the allegations of paragraphs 1 through 98.

100. There is an actual controversy between the parties with respect to the extent of the Town's and the public's rights to the unpaved portion of the Road.

101. There is an actual controversy between the parties with respect to the defendants' rights to regulate or close the unpaved portion of the Road.

102. For centuries, the Town, the public and predecessors to the abutters understood Estabrook Road to be a public way for all purposes, and the paved portion of the Road continues to be regarded as such.

103. The 1932 Discontinuance under Chapter 289 of the Acts of 1924 did not, and could not, surrender the public's rights to access and use the unpaved portion of the Road. The public continues to have a right to access and use the unpaved portion of the Road, and the Town has a right to regulate that access and use.

104. In the alternative, if the Court were to conclude that the unpaved portion of Estabrook Road was never a public way or that the public's right of access was surrendered by the County's action in 1932, then the Road was and remains public by prescription.

105. For more than twenty continuous years before 1932, the Town controlled, regulated, and repaired Estabrook Road, and the Town and the public openly used Estabrook Road.

106. The Road therefore became public by prescription prior to 1932.

107. For more than twenty continuous years after 1932, the Town has used and secured the unpaved portion of the Road, and the public has openly used the unpaved portion of the Road without objection by abutting landowners.

108. The Town has a prescriptive easement to use the Road for trail purposes. Some defendants have infringed on the Town's and the public's right to use the Road in that customary manner.

## COUNT II

### (Permanent Injunctive Relief Against Defendants from Interfering with Public Access)

109. The Town realleges and incorporates by reference the allegations of paragraphs 1 through 108.

110. The Rasmussens' recently-erected gate across Estabrook Road (which by virtue of its location in the roadbed alone justifies injunctive relief) impedes access to the Road for the public and emergency and Town services. The Rasmussens also unlawfully removed a clearly-marked "Fire Lane" sign. Moreover, the Rasmussens' gate and landscaping have the real – and intended – effect of discouraging public access, especially for users who may be visiting the trail for the first time, by giving it the appearance of a private driveway.

111. Signage erected by the defendants claiming the right to expel members of the public for trespassing also deters public access.

112. The loss of public access, and delays to or loss of emergency access, are irreparable injuries for which money damages cannot compensate.

113. The continued existence of the gate and signage impinges on the public's rights to access Estabrook Road and may diminish public safety. These harms outweigh any harm that the defendants may claim since they have, for decades, done without such structures or signage. Moreover, public access to the Road will not be unregulated. The Town has regulated and will continue to regulate public access and impose restrictions where necessary to address safety or environmental concerns.

114. A permanent injunction furthers the public interest because it would preserve public access along the Road to which the public is entitled.

WHEREFORE, the Town requests the Court to enter judgment:

(a) declaring that Estabrook Road, including the unpaved portion, was a “public way” prior and up to 1932; or, in the alternative, declaring that the Road was a “public way” prior to 1932 by prescription;

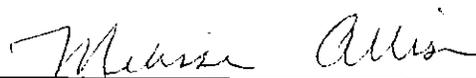
(b) declaring that the 1932 Discontinuance relieved the Town of its obligation to maintain the unpaved section of Estabrook Road;

(c) declaring that the 1932 Discontinuance did not affect any Town rights other than its obligation to maintain the discontinued portion of Estabrook Road, that it became a “public access” private way, and that therefore the general public has the right to access and the Town has the right to regulate that portion over the objections of the Defendants and any other unknown party with a claim of right therein; or, in the alternative, declaring that the Town (and the public) has a prescriptive easement to use Estabrook Road for trail purposes;

(d) entering a permanent injunction (i) prohibiting Defendants from maintaining the newly-installed gate across the Road; (ii) requiring Defendants to remove that gate and landscaping in its vicinity; (iii) preventing the Defendants from interfering with Town undertakings to install appropriately redesigned barriers, markers and signage as determined by the Town to ensure public safety and environmental protection and to warn the public that the way is no longer maintained for vehicular traffic; and (iv) barring Defendants from taking any action to prevent or deter members of the public from using the Road for pedestrian access and trail purposes; and

(e) ordering such other relief as is equitable and just.

By its attorneys,



---

Melissa Cook Allison (BBO #657470)

mallison@andersonkreiger.com

Kevin D. Batt (BBO #634852)

kbatt@andersonkreiger.com

Andrew W. Fowler (BBO #690464)

afowler@andersonkreiger.com

ANDERSON & KREIGER LLP

50 Milk Street

21st Floor

Boston, MA 02109

617-621-6500

Dated: October 24, 2017