Regular Meeting
Of the
Putnam Town Board
August 13, 2020 at 7p.m. - Putnam Town Hall

7:00Meeting called to order

Councilman Larry Shiell led the Pledge of Allegiance.

Roll Call

Members present:	Supervisor	Darrell Wilson
	Councilman	Christopher Mallon
	Councilman	Larry Shiell
	Councilman	Charles Bain

Others present: Mary Jane Dedrick (Deputy Clerk, P.O. Box 14), Gary Treadway (Highway Superintendent, Treadway Lane), John LaPointe (Budget Officer, 109 County Route 2), Carole Schneider (Resident, 358 Pulpit Point Road), Bert Windle (5211 Sagamore Road), Rich Foster (Resident, 4524 Crow Point Way), Nancy Foster (Resident, 4524 Crow Point Way) . **Present via ZOOM:** John Breitenbach (Town Attorney, 23 Father Jogues Place, Ticonderoga, NY 12883), Galen Seerup (Planning Board Chair, 17360 State Route 22) Cee McKenzie (BAR Chair, 526 Gull Bay Road), Bob Rudt (Planning Board, 526 Gull Bay Road), May Drinkwine-Shiell (Resident, 439 County Route 3), Nancy Wolf-Fisher (Resident, 5183 Sagamore Road), Dave Manchester (Resident, 5177 Sagamore Road).

Resolution #79
Accept the minutes of the July 28th Special meeting
On motion of Councilman Charlie Bain, seconded by Councilman Larry Shiell; all in favor, Resolution unanimously adopted.

Resolution #80
Accept the minutes of the July 9, 2020 meeting
On motion of Councilman Larry Shiell, seconded by Councilman Charlie Bain; all in favor, Resolution unanimously adopted.

Resolution #81
Accept the Budget Officer's report for the month of July 2020
On motion of Councilman Larry Shiell, seconded by Councilman Charlie Bain; all in favor, Resolution unanimously adopted.

Resolution #82
Accept the Town Clerk's report for the month of July 2020
On motion of Councilman Charlie Bain, seconded by Councilman Larry Shiell; all in favor, Resolution unanimously adopted.

Resolution #83
Pay bill as audited
On motion of Councilman Christopher Mallon, seconded by Councilman Charlie Bain; all in favor, Resolution unanimously adopted.

Resolved, the bills on the following are paid as audited.

General Fund	# 200-237	$13,241.18
Highway Fund	# 68-82	$10,447.74
Black Point Sewer District	#6	$14,438.96

Correspondence (7:09)
Supervisor Wilson read aloud a letter from Joan Charboneau:
"Town of Putnam, Darlene. Thank you so much for allowing us to enjoy a wonderful evening at the Cummings Memorial Park. It is a lovely peaceful site, and very well maintained, thanks again. Enclosed is a token of our appreciation. ($50 check) Sincerely, Joan and Jim Charboneau, Mary Lou and Glen Greenough, Joyce and Jerry Cooper, Jan and Jim Pulling, Darcey Crammond." Supervisor Wilson expressed gratitude for the letter complimenting Cummings Park, as well as the donation.

Courtesy of the floor (7:10)
Cee McKenzie addressed the Board first referencing a discussion from a board meeting a few months earlier. Ms. McKenzie inquired about liability on a bucket truck the Highway Department had borrowed from another town for roadside tree trimming. Highway Superintendent Gary Treadway replied saying he had checked with the insurance company; it is covered under our current policy. HS Treadway also noted that the boom on the truck is inspected annually.
David Manchester advised that the Agenda sent in the email with the meeting link was July's agenda, not the August agenda. The Town Clerk apologized for the mistake.
Nancy Foster addressed the Board next. Mrs. Foster, and her husband Rich, have been in a legal dispute with their neighbor, Sandra Mentiply. Mrs. Foster stated the issue began in May of 2017 when the Fosters returned to their summer home to find that the neighbor had built illegally on their property. The former Code Enforcement Officer, Bill Ball, had given the neighbor a permit to build. The neighbor did not build according the plans submitted for the building permit for a 6' X 6' installation, instead building a much larger structure. At that point in time Mrs. Foster approached the then Town Supervisor John LaPointe, however since there was pending litigation, and as it was an issue between private landowners, Mr. LaPointe declined getting involved as the Town has no authority in landowner disputes. Bill Ball did issue a stop work order cease and desist. After Bill Ball was replaced with Washington County Code Enforcement, Washington County would not enforce Mr. Ball's orders. Mrs. Foster asserted the neighbors continued to build despite the stop work order. Eventually the two parties went to court. The Foster's prevailed in court. Mrs. Foster provided documentation of the court decision to the Board. (See attached)
Bert Windle addressed the Board on behalf of the Lake Communities of Putnam (LCP) saying that solar panels have been part of the discussion for years, but the revised Site Plan Review went forward without addressing solar panels. Mr. Windle stated he noticed in the Planning Board minutes that roof top solar panel installation was approved. Mr. Windle continued he did not believe the concern of the LCP was with homeowner panels, the concern is solar farms that could take over the valley areas of Putnam creating a blight on the landscape. Mr. Windle also addressed code enforcement compliance, or lack of, asserting that a strongly worded letter from the Town Attorney may have no impact on non-compliant individuals without enforcement. He continued that the Town Board needs to back the Planning Board. Mr. Windle then addressed budget implications saying he does not think the Town has a "handle" on the Town's income this year. Mr. Windle stated his understanding is that the equalization rate will change this year which has direct implications on the total assessed value of the Town. He relayed there have

been discussions within the LCP about the current Assessor, saying they have found multiple improvements and builds that have not transitioned to the tax rolls. Mr. Windle finished saying the LCP is in support of the Fire Department and would like to see a more appropriate approach to the Fire Department's needs. Mr. Windle then moved to the topic of recycling saying the program was successful and should be addressed again. Mr. Windle asserted that he disputes the claim that the town subsidizes garbage services in Putnam, Mr. Windle stated that it is the Town's obligation to pick up the garbage. Nancy Wolf-Fisher asked if there has been a response from Kevin Wood regarding the letter sent last month. Town Attorney John Breitenbach replied that the DEC said they did not receive his letter; the response from the Town was sent again via E-mail. Mrs. Wolf-Fisher advised that she was told there had been a response. Mrs. Wolf-Fisher suggested rather than waiting for the back and forth in correspondence that someone from the Town contact the DEC pre-emptively. Mrs. Wolf-Fisher also stated that her understanding of the pending response from Kevin Wood will include an invitation to plan a meeting with the Town to discuss issues and solutions revolving around Putnam's recycling program. Supervisor Wilson responded that replying to a letter that has not been received is pre-mature. Supervisor Wilson stated when the letter is received, the DEC position will be considered, and a response will be formed. Town Attorney John Breitenbach advised that he would be agreeable to meeting with the DEC for a conversation.

Highway report (7:50)
Highway Superintendent (HS) Gary Treadway reported that paving has begun on Pulpit Point road, Backus Lane will follow, finishing with a light shim on B Lane.
HS Treadway continued reporting that the new truck is expected to be ready at the end of August, or early September. COVID-19 has slowed shipments of parts to complete the sanding unit and brine unit, slowing the process. Councilman Bain asked if the work was done in time to get the supplemental funding from the State. HS Treadway replied yes.

Planning Board report (7:53)
Planning Board Chair Galen Seerup reported the Planning Board had met the prior evening at Cummings Park.
Peggy Ives returned with the appropriate paperwork for a subdivision of her property. Mrs. Ives subdivision was approved.
Bob Murray attended. Mr. Murray would like to demolish a current garage/storage building and re-build it. Mr. Murray's plan was permitted.
John Herttua has a shed that has been in violation since last fall. Mr. Herttua did not attend the meeting; documentation has been sent to the town attorney for action.
Tom Eliopoulos' property was discussed. A piece of Eliopoulos' property has been leased/sold in exchange for the use of two fingers of a dock. Nothing has been submitted pertaining to land use when they start using the dock, such as where will the parking be, if they'll have garbage receptacles, portable bathrooms, etc.
The Planning Board resolved to send Northern Lake George Realty a letter regarding signs that exceed the size limit.
Bruce Jones attended the Planning Board meeting to inform the Planning Board that he plans to do more agricultural building on his property.
Mr. Seerup also stated that the Planning Board discussed enforcement also. The Planning Board expressed enforcement is lacking.
The Planning Board signed the *Exemption of Matters of Local Concern*, an agreement with Washington County giving the Planning Board authority to handle simple matters that would normally be in the County's jurisdiction. The Planning Board must notify the County of any matters handled, as part of the agreement. The Planning Board has historically participated in this tri-annual agreement.

Fire Department report (7:57)
Councilman Shiell began by posing the question "How do we think about building a new firehouse, is that something we do?" Supervisor Wilson replied that the FD owns the building, property, and equipment, the Town does not own anything in the FD. Bert Windle stated when we needed a town garage it was built. Councilman Shiell pointed out that yes, a town shed was built, but the Town invested in Town property owned by taxpayers when building the shed with taxpayer dollars. The Town does not own the FD property, building or equipment. Councilman Mallon joined the discussion saying he thought the answer begins with more education, "I don't think anybody in this room is against the fire department or doesn't want them well equipped". Councilman Mallon expressed concern that thus far the FD seems reluctant to open their books to the Town, which seems "absurd" given the amount of money they are asking from taxpayers. Councilman Mallon also opined that the little bit of information obtained from the budgets of surrounding towns, and towns in Washington County of comparable size, suggests that the Putnam FD is spending two and three times that of other departments in the area. He asserted that he believes it is a reasonable request to see the fire departments books so that the Board can make comparisons and make an educated choice for constituents. Councilman Mallon communicated that in his opinion, discussions about buildings are premature until "we" understand what their books are, until we understand how much equipment they have in comparison to other towns our size. More information is needed to address the needs of the FD in an intelligent way. Councilman Shiell commented he did not know how much of this is the Town's responsibility given that the Town does not own the building or property occupied by the FD. "The fact we don't own the building or equipment creates a problem". Councilman Shiell reported that he voiced at the FD meeting that the Town Board would like a monthly abstract of expenditures from the FD, which was met with reluctance. Councilman Shiell would like to see this as a requirement in future contracts so that the Town Board will know where the taxpayer's monies are being spent. Councilman Shiell stated that it is not about trust or a lack of trust in the FD, it is about the Town Board's responsibility of being accountable when spending taxpayer's money. Supervisor Wilson joined saying some of the costs are associated with requirements. He continued that there needs to be a discussion about what is necessary based on need. Cee McKenzie stated at the joint FD/Board meeting some of the items being discussed were addressed with the FD.

Old business (8:11)
Code enforcement - Supervisor Wilson began a discussion about a Code Enforcement Officer, saying he believes there is an occasional need, a Code Enforcement Officer would be a per diem position. Supervisor Wilson asked the Board to think about if $2000 annually would be enough to cover a Code Enforcement Officer. Supervisor Wilson asked Planning Board Chairman Galen Seerup how often he felt the CEO would be used. Chairman Seerup answered, on average 2 visits a month plus any complaints that might occur.
Direct Deposit - Supervisor Wilson gave an update on direct deposit for payroll indicating the first round of direct deposit payroll has been completed and went well.

New business (8:20)
2021 Budget timeline - Supervisor Wilson reviewed the budget process for this year recommending to the Board that two budgets be considered, one with the Fire Department's desired increase if passed by voters, a second with the normal increase to the Fire Department. He stressed that the Town does need a fund balance and operating cash that will take the Town into the next year. The cash flow is a concern for the end of the year as the revenue stream will not be what was anticipated a year ago due to COVID-19. A budget timeline made by Supervisor Wilson was reviewed. A budget workshop was scheduled for Saturday, August 29th at 10 am at the Putnam Town Hall. Residents are welcome to view the meeting, however, no comments or questions will be permitted at that time, comments and questions will be welcomed at the public hearing of the budget before approval. In September additional action will need to

be taken to pass the local law enabling the Town to break the tax cap should the Fire Department's budget be approved by voters in November.

2020 Census - Supervisor Wilson reminded everyone to please fill out the Census. The Census will impact the Town's, State and County aid, and we could lose a house seat, possibly two seats. The Town Clerk reiterated what Supervisor Wilson stated adding that the Census will impact funding for a decade, until the next Census. The Town Clerk also offered assistance to residents that may need help with the Census, either by phone or in person. the Clerk said she will go to resident's homes to help if necessary, so that Putnam can achieve the highest numbers possible.

Parks & Recreation Committee - Councilman Bain gave a brief report about the first meeting of the Parks and Recreation Committee. The Committee discussed fees for the use of Cummings Park. The fees would be used for maintenance and further development of the park. Possible fee structures were discussed. The Committee reviewed a resident survey that was completed in the spring of 2019. On the survey residents commented a walking path at Cummings Park is desired. One of the Committee discussions revolved around a walking path where individuals could purchase Memorial benches to be placed along the path. A deck overlooking Lake Champlain on the north end of the park, and a playground were also considered in the discussion. The bathrooms at Clemm Ulcher Park on Route 22 and at the Gull Bay Beach were also issues commented on many times on the resident survey as well as parking at Gull Bay Beach/Boat Launch, bathrooms and parking will be part of future discussions of the Committee.
Supervisor Wilson thanked Councilman Bain.

Resolution #84
Adjourn the regular meeting of the Putnam Town Board
On motion of Councilman Charlie Bain, seconded by Councilman Christopher Mallon; all in favor. Resolution unanimously adopted.

Meeting closed at 8:50 P.M.

The next regular meeting is September 10th, 7 P.M. at Putnam Town Hall/ Zoom

Respectfully submitted,

Darlene Kerr
Putnam Town Clerk

Darrell Wilson_____Supervisor

Christopher Mallon_____Councilman

Larry Shiell_____Councilman

Charles Bain Sr._____Councilman

TOWN OF PUTNAM STATION

STOP WORK ORDER

Cease and desist

Tax Map Parcel Number: 11.20-1.1
Property Owner or Agent's Name: ALEXANDER-LE-MENTIPLY
Owner's Address: 1090 KINGS RD. SCHENECTADY 12303
Site Address: 4522 CROW POINT WAY.

AT THESE PREMISES HEREINAFTER DESCRIBED IN THAT
Construction has commenced with A Building Permit being issued with incorrect information

YOU ARE THEREFORE DIRECTED AND ORDERED

1) **TO STOP WORK IMMEDIATELY UNTIL LOT LINE DISPUTE IS CONCLUDED AN POSSIBLE APA SET BACK VIOLATION IS RESOLVED.**

IN ACCORDANCE WITH- New York State Uniform Fire Prevention and Building Code, Secti any person who is violating any provision of this law, may be liable to a civil penalty of not more tha for each day or part thereof during which such violation continues.

Signed,

William Ball
Code Enforcement Officer
Dated: May21, 2017
My Cell 518-802-0780

STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON

SANDRA A. MENTIPLY, as Executrix of the Estate of A. DONALD MENTIPLY,

Plaintiff,

-against-

NANCY FOSTER and RICHARD FOSTER,

Defendants,

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, ORDER, AND JUDGMENT

Index No.: 27535
RJI No.: 57-1-2017-0291

Assigned Judge
Hon. Martin D. Auffredou

APPEARANCES:

DuCharme Clark, LLP, Clifton Park (*John B. DuCharme* and *John W. Clark* of cousel) for plaintiff.

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (*Mark E. Cerasano* of counsel) for defendants.

HON. MARTIN D. AUFFREDOU, J.S.C.

The outstanding issues having been submitted to me as one of the Justices of this Court at a Term hereof, held in and for the County of Washington over several days between September 18, 2019, and September 27, 2019, and having heard testimony and received other evidence from the witnesses and the parties, and due deliberation having been had thereon,

NOW, after hearing, reading and considering the papers, testimony and other evidence, including the exhibits received in evidence, and having evaluated the credibility of witnesses based upon their demeanor, the manner in which they testified, and the consistency, accuracy and

probability or improbability of their testimony in light of all other evidence, and upon review and consideration of the prior proceedings and orders heretofore had herein, I do hereby make the following findings of fact, which I deem established by the evidence, and reach the following conclusions of law with respect to the claims pending before the Court:

PROCEDURAL HISTORY

1. A. Donald Mentiply commenced the above-referenced action by summons and verified complaint filed on July 6, 2017, against defendants Nancy and Richard Foster (collectively referred to as "defendants"), in which he alleges that he had acquired title by adverse possession to a portion of their real property, acquired title by prescriptive easement to that portion of real property, acquired title by prescriptive easement to a footpath going through their real property, and is entitled by an easement by necessity to those portions of their property.

2. Issue was joined on September 6, 2017, when defendants filed a verified answer in which they denied the material allegations in the complaint and raised two counterclaims, the first counterclaim alleges trespass by A. Donald Mentiply and his agents and the second counterclaim seeks declaratory judgment declaring defendants the lawful owners of the portions of real property at issue.

3. After commencement of the action, on November 30, 2018, A. Donald Mentiply passed away.

4. By Order signed on February 22, 2019, Sandra A. Mentiply, as Executrix of the Estate of the Estate of A. Donald Mentiply was substituted as a party plaintiff in the place of deceased plaintiff A. Donald Mentiply ("plaintiff").

5. A note of issue was filed on May 30, 2018, declaring the action ready for trial.

FINDINGS OF FACT

1. Plaintiff and Defendants own adjoining parcels of lake front property located at Crow Point in the Town of Putnam, Washington County, New York (Transcript ["Tr."] 117).

2. The homes in Crow Point are primarily seasonal camps (Tr. 33-34, 521). Owners access Crow Point from New York State Route 22 to Gull Bay Road, a Town Road, and to the Town beach. There is also beach access to Crow Point along Link Way, then along Link Way to Crow Point Way, both private roads (Exhibit ["Exh."]. 10).

3. The properties in Crow Point are small and parking is limited (Exh. 12, 13). Historically, some of the property owners, including plaintiff and defendants and their respective predecessors in title, have had the right to park in an area at the bottom of the incline on Crow Point Way known as the "Gleason Lot," named after an owner (Exh. 13). Parking rights in the Gleason Lot did not limit the number of vehicles each owner could park (Tr. 473-74). The Gleason Lot has space for six to eight vehicles, and availability is determined on a first come first served basis (Tr. 267, 474).

4. The properties at issue were a part of a unitary parcel owned by Harley Parker and Cecilia Parker ("the Parkers") (Exh. 3). By deed dated November 16, 1957, Alexander Mentiply, father of decedent A. Donald Mentiply, acquired from the Parkers the property ("the Mentiply property") presently owned by plaintiff. (Exh. 4; Tr. 437). Plaintiff is the spouse of decedent A. Donald Mentiply, who acquired the property from his father by deed dated May 15, 1990 (Exh.14).

5. By deed dated November 16, 1957, Charles Thomas acquired from the Parkers the

property ("the Thomas property") presently owned by defendants (Exh. 5). On May 28, 1992, Charles Thomas conveyed the Thomas property to his nephew, Jeffrey Thomas (Exh. 15). On October 31, 1994, Jeffrey Thomas conveyed the Thomas property to defendants and Michael Mills, Jennifer Mills, and Harry Mills ("the Mills") (Exh. 16). Thereafter, on January 5, 1999, the Mills conveyed their interest in the Thomas property to defendants, who have held title as tenants by the entirety since that date (Exh. 17).

6. The Mentiply and Thomas properties adjoin each other and are depicted with other adjoining properties in Crow Point on a survey map prepared by John Grady, Land Surveyor, dated May 18, 1983 ("the Grady Survey") (Exh. 10, A, HH).

7. The Mentiply property is approximately five feet lower than the Thomas property and there is a stone retaining wall on the Thomas property along the common boundary line (Exh. 31, 39, B, F, G, P).

8. Sometime between November 1957, when Charles Thomas acquired title to his property, and 1967, Charles Thomas built a seasonal camp on his property (Tr. 125).

9. In 1967, Alexander Mentiply retained a contractor who constructed a seasonal camp on the Mentiply property (Tr.125-26; Exh. 49 at 56).

10. The northwesterly most corner of the roof to Alexander Mentiply's seasonal camp overhangs the rock retaining wall by 1.6 feet (hereinafter the "roof overhang") (Tr. 514-15; Exh. 49 at 15).

11. At that time in 1967, there was no survey of the property line separating the Mentiply Property and the Thomas Property (Tr. 117).

12. Alexander Mentiply was at his residence at Crow Point primarily on the weekends until he retired in 1972, after which he was a full-time summer resident (Tr. 442).

13. Plaintiff met A. Donald Mentiply ("Don Mentiply") on December 9, 1967 (Tr. 98), and they were married on June 21, 1969 (Tr. 98). They have one child, Donald R. Mentiply (Tr. 98).

14. From 1967 until the time of trial, plaintiff spent time at the Mentiply property (Tr. 100, 124-27, 440-42). She has personal knowledge of the use and ownership of the Mentiply property. She was there primarily on the weekends until around 2003, when she and Don Mentiply retired (Tr. 441-42). From that point, the couple spent their summers at Crow Point (Tr. 441-42).

15. Charles Thomas also spent weeks at his property on Crow Point during the summer months (Tr. 283).

16. While rights to park in the Gleason Lot are available to several of the property owners at Crow Point, most of the owners also have the ability to park a vehicle on their own lot. Defendants, and their predecessors, can and do park their vehicles on the Thomas property near the rear entrance to their camp (Tr. 291-92; Exh. D).

17. Prior to 2017, the Mentiply family could not park a vehicle on the Mentiply property because of its lower elevation (Exh. 31, 39, B, F, G, P). Since at least 1967, the Mentiply family has parked a vehicle on the Thomas property up to the overhang and near the retaining wall and their camp (hereinafter the "parking space") (Tr. 99, 127-31, 140-41, 163-66, 176-77, 181-92, 197-202, 331, 334, 336-38, 389-91; Exh. 6, 7, 12, 32). The parking space gave the Mentiply

family a place to park closer to their camp than any space they could use in the Gleason Lot (Tr. 99). If the Mentiply family traveled to the Crow Point in more than one vehicle, they would park one vehicle in the parking space and the other in the Gleason Lot (Tr. 71, 83-84, 127, 298, 444-45).

18. Since 1967, it was generally known that the Mentiply family uses the parking space when they are at their camp (Tr. 34, 146, 240, 297). No one else has consistently used the parking space (Tr. 72-73, 222, 645, 883). Plaintiff could only recall one occasion when someone else had parked a car in the parking space, as did her son, and the Mentiply family asked the owner to move the car so they could park there (Tr. 622-23, 645).

19. The Mentiply family did not place any signs designating the parking space as theirs, cordon off the area to prevent others from parking there or otherwise indicate to others that the parking space belonged to them and was not for others' use (Tr. 299, 446).

20. Neither Plaintiff nor any witness could identify the exact area the Mentiply family had used as a parking space since 1967 (Tr. 71, 127-28, 225, 242-44, 250-51, 315, 318, 391-92). The parking space was on the Thomas property, near the retaining wall drop off and the Mentiply property boundary line (Tr. 225, 242-44, 250-51, 391-92).

21. The area plaintiff designated on the Grady Survey as the parking space was measured by plaintiff and Donald Mentiply as the amount of space they needed to park a vehicle, not the actual, exact space the Mentiply family had used since 1967 (Tr. 165-67, 189-90, 624-25).

22. The parking space as shown on the Grady Survey commences at a point marking the northeast corner of the Mentiply property and northwest corner of the Thomas property, then

south along the common boundary line a distance of 29 feet, then 14 feet east, 20 feet north, and 14 feet west along the northern boundary line of the Thomas property to the point of beginning (Exh. 12). The area on the Grady Survey is cross-hatched (Exh. 12).

23. The proof established that the areas between the two stone walls located on the Thomas property and the common boundary line to the west depicted on a on a survey map prepared by John Grady, Land Surveyor, dated October 28, 1994, (Exh. A) and including within the parking space, are actually 5 foot drop-offs from the land east of the walls, which made it impossible for any vehicle to park with its wheels to the west of either portion of the stone wall and within the parking space as designated by plaintiff (Tr. 625, 632, 657).

24. In the years since 1967, members of the Mentiply family have driven several different makes and models of vehicles of varying sizes (Tr. 165-68, 189-92).

25. The Mentiply family have used a footpath crossing the Thomas property to access the lakefront side of their camp since at least 1967 (Tr. 138, 231, 302, 331-32, 532, 637). Without the footpath, the Mentiply family could access the lakefront side of their camp only by going through the camp's back entrance and walking through the residence. They used the footpath to access their lakeside dock, stairs, and gazebo (Tr. 423-24). Their primary access to their camp was down a set of stairs located at the northeast corner of their property to the upland or rear entrance (Exh. 31, F, G).

26. The footpath was intended to provide land access to the property originally acquired by George and Anna Bourgeois by deed dated June 29, 1954, by an express grant contained in the deed (Exh. 1). The Bourgeois property was thereafter conveyed to Harold and Josephine

Brown by deed dated November 11, 1970, and remains in the Brown family (Exh. MM).

27. The Brown family, who does not have a parking space on their property and had to park in the Gleason Lot and walk to their property, has been the principal user of the footpath. As plaintiff noted, "the Browns use it most often" (Tr. 138).

28. Defendant Richard Foster characterized use of the footpath by the Mentiply family as "occasional" which he defined as once in a while and usually for bringing large objects to their camp (Tr. 831). Plaintiff's son confirmed Defendant Richard Foster's description by stating that the footpath was basically used for larger items that could not be brought through their camp from the rear, upland entrance (Tr. 637).

29. Although the Mentiply family used the footpath for years, there is no indication of a fixed location at which they would exit the footpath to get to their camp or that they used the same portion of the footpath regularly (Tr. 136-37, 319).

30. The evidence at trial did not demonstrate that right-of-way described in the deeds to the Mentiply property are to the footpath crossing the Thomas property (Tr. 768, 782-83; Exh. 4). Such right-of-way describes the right to access the Mentiply property through the Gleason Lot (Tr. 766-69).

31. Plaintiff did not know of any discussion in which Charles Thomas gave the Mentiply family permission to use the parking space or footpath on his property, nor did any witnesses (Tr. 75, 90, 532-33, 646-47). Likewise, neither plaintiff nor any witnesses knew of any discussions wherein Charles Thomas prohibited the Mentiply family from using the parking space or footpath (Tr. 646-47).

32. Plaintiff and her family recall maintaining the retaining wall on the Thomas property that they parked above over the years by planting, checking for loose rocks, weed whacking, and filling any holes with gravel (Tr. 141). None of the other Crow Point residents observed them doing so (Tr. 292, 294, 535, 802).

33. The Mentiply family also used the dock on the Thomas property for at least a decade (Tr. 145, 290). The Mentiply family had a boat and their own dock, but preferred to dock it at the Thomas property which is on the calmer, bay side (Tr. 145, 290). No members of the Mentiply family asked Charles Thomas for permission to use his dock, they just used it (Exh. 49 at 65). Charles Thomas did not ask the Mentiply family to move their boat until his nephew wanted to place a boat in the space used by the Mentiplys (Tr. 145).

34. Charles Thomas and Alexander Mentiply were close friends and they treated each other like family (Tr. 288-89, 526). Their families enjoyed close relationships with each other as well (Tr. 526-27). Apparently, when they purchased their properties at Crow Point, they flipped a coin to decide who got which lot. Alexander Mentiply won the coin toss and chose the lot on the lakeside and Charles Thomas took the lot on the bay side (Exh. 49, p. 58).

35. During the summers when both men were at Crow Point, they were often together, either spending time in their camps or on a boat (Tr. 285, 526). They paid for each other's dinners (Tr. 315). They each had a key to the other's camp (Tr. 467-68).

36. Even when the men were not at Crow Point, they enjoyed each other's company (Tr. 287-88, 466). Every winter, Charles Thomas and Alexander Mentiply vacationed together with their families in Florida for four months (Tr. 287-88, 466).

37. It was not just Charles Thomas and Alexander Mentiply who shared a friendship at Crow Point. Residents went into one another's camps and on to each other's properties regularly without seeking permission and without objection by the owners (Tr. 64-65, 87, 91-92). The residents regularly socialized with each other, shared meals, and had parties in the Gleason Lot (Tr. 64-65, 88, 149, 285, 527).

38. The residents' relationships went beyond socializing. Residents at Crow Point offered to pick up groceries for one another if someone was going into Ticonderoga (Tr. 148-49). Charles Thomas and Alexander Mentiply jointly and cooperatively organized maintenance for Crow Point Way (Tr. 280-81). They also split the cost of a septic service, which practice plaintiff and defendants continued (Tr. 510; Exh. K). Neighbors helped the Mentiply family build the dock on the Mentiply property (Tr. 462-63).

39. Once defendants purchased the Thomas property, plaintiff and her family continued to park on the Thomas property and use the footpath (Tr. 334-38, 884). Defendants never objected to plaintiff and her family using the parking space or footpath and never gave them explicit permission to do so (Tr. 334-38, 884). Plaintiff believed she and her family had the right to park in the parking space (Tr. 643-44). The relationship between plaintiff and defendants was cordial until 2017, when plaintiff commenced a construction project in the area of the parking space (Tr. 481-82).

40. In and before 2016, plaintiff and her husband grew concerned that the rock retaining wall located on the northeast corner of their property was deteriorating (Tr. 339, 364). The Mentiply family was finding loose rocks and sediment which had been

dislocated by water running through the retaining wall and carried downhill towards their seasonal camp (Tr. 339, 364). The Mentiply family decided that they needed to repair and restore the rock retaining wall (Tr. 339).

41. The Mentiply family contacted a contractor ("contractor") who submitted a proposal to: (a) cut back and support the existing deck located on the northeast side of the Mentiply camp (the rear deck); (b) build a 3-sided retaining wall with inside cribs using lumber to prevent soil erosion and also create a new additional parking area on the uphill northeast corner of the Mentiply Property; (c) fill the newly created parking area with gravel; and (d) construct a new, safer stairway with a railing so that the Mentiply family could safely walk from the new uphill parking area down to the rear deck located approximately five feet below it ("the project") (Tr. 340, 343-44; Exh. 19). The Mentiply family accepted the contractor's proposal (Tr. 341).

42. Plaintiff did not provide the contractor with any map depicting the common boundary line, or with a copy of the deed to the Mentiply property, or any other documents respecting the location of the boundary line (Tr. 471-73). The Boundary Line Agreement between Alexander Mentiply and the Browns dated September 25, 1986, recites and is based upon the Grady Survey, which delineates the north-south boundary line between the parties' properties (Exh. 10, 11).

43. In or about March 2017, the Mentiply family hired Dedrick's Tree Service and paid it $1,350.00 to remove a large tree located next to the rock retaining wall, but left its

dislocated by water running through the retaining wall and carried downhill towards their seasonal camp (Tr. 339, 364). The Mentiply family decided that they needed to repair and restore the rock retaining wall (Tr. 339).

41. The Mentiply family contacted a contractor ("contractor") who submitted a proposal to: (a) cut back and support the existing deck located on the northeast side of the Mentiply camp (the rear deck); (b) build a 3-sided retaining wall with inside cribs using lumber to prevent soil erosion and also create a new additional parking area on the uphill northeast corner of the Mentiply Property; (c) fill the newly created parking area with gravel; and (d) construct a new, safer stairway with a railing so that the Mentiply family could safely walk from the new uphill parking area down to the rear deck located approximately five feet below it ("the project") (Tr. 340, 343-44; Exh. 19). The Mentiply family accepted the contractor's proposal (Tr. 341).

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43. In or about March 2017, the Mentiply family hired Dedrick's Tree Service and paid it $1,350.00 to remove a large tree located next to the rock retaining wall, but left its

trunk in place because it was assisting in fortifying the retaining wall (Tr. 344-46; Ex. 20).

44. On April 28, 2017, the contractor applied for and obtained a building permit dated April 28, 2017 from the Town of Putnam (Tr. 346, 353-354; Ex. 22). The contractor advised the Mentiply family that as long as the deck remained in the existing footprint, no approvals or permit would be required from the Adirondack Park Agency (Tr. 375).

45. After the building permit was issued, the contractor commenced work on the project (Tr. 354). The contractor established a cribbing, built a retaining wall, filled in the cribbing with gravel to create the parking area and built railings around the parking area (Tr. 355). The contractor removed the existing stairs and began to construct the new stairway (Tr. 355-56).

46. The Mentiply family did not contact defendants to discuss the project or inform them of it prior to construction (Tr. 479, 481-82).

47. Defendants first became aware of the project on May 14, 2017, and they immediately informed plaintiff that a portion of the new construction was on the Thomas property (Tr. 481-82). The Mentiply family did not take any steps to investigate defendants' assertions (Tr. 481-83).

48. During construction, between 20 and 30 feet of the stone retaining wall on defendants' property was lost or buried, and the area west of the wall to the common boundary line between the two properties was replaced with fill (Tr. 702, 850; Exh. HH).

49. Additionally, the new stair case down to the Mentiply camp was built partially in the area of the Thomas property upon which plaintiff parked a vehicle (Tr. 843).

50. Prior to construction, the Mentiply family were aware that, except for a small wedge of the stone wall located on the Mentiply property, the other sections of the stone wall to the east of the boundary line were located on the Thomas property (Tr. 453-54).

CONCLUSIONS OF LAW

1. "To establish [her] claim of adverse possession [over the parking space and area under the roof overhang], plaintiff[was] required to prove by clear and convincing evidence that her possession of the disputed property [was] hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of ten years[.] Additionally, where, as here, the adverse possession claim is not based upon a written instrument,[plaintiff] must establish that the land was usually cultivated or improved or protected by a substantial enclosure" (*Bergman v Spallane*, 129 AD3d 1193, 1193 [3d Dept. 2015] [internal citations omitted]; *see Estate of Becker v. Murtagh*, 19 NY3d 75, 81 [2012]).

2. Fundamental to her claim of adverse possession is identifying with particularity the area actually occupied and possessed (*see Van Valkenburgh v Lutz*, 304 NY 95, 98 [1952]; *Silipigno v F.R. Smith & Sons, Inc.*, 71 AD3d 1255, 1257 [3d Dept. 2010]; *Gorman v Hess*, 301 AD2d 683, 686 [3d Dept. 2003]; *Krol v Eckman*, 256 AD2d 945, 947 [3d Dept. 1998]). While there is ample proof that the Mentiply family parked a vehicle on the Thomas property for a number of years, including the alleged prescriptive period of 1967 to 1977, plaintiff and her witnesses could only point to a general location on the Thomas property as the parking space for the Mentiply family vehicles, not one exact location that the family always used.

3. Also, substantial testimony established that whatever parking spot the Mentiplys claimed was never distinguishable as a parking space or as anything else. There were no boundary markers, posts, signage, or other identifiable features fixing the location of any particular area as the parking space (*cf Gorman v Hess*, 301 AD2d at 684 [border of claimed lawn area marked by white rocks and tires sufficient to identify area claimed]).

4. Plaintiff's evidence of planting and filling holes with gravel fails to satisfy the requirement of cultivation or improvement (*see Simpson v Chien Yuen Kao*, 222 AD2d 666, 667 [2d Dept. 1995]; *Yamin v Daly*, 205 AD2d 870, 871 [3d Dept. 1994]). Plaintiff could not provide evidence of how often her family weed whacked, and such activity does not meet the requirements of cultivation or improvement (*see Yamin v Daly*, 205 AD2d at 871; *see, also Robbins v Schiff*, 106 AD3d 1215, 1217 [3d Dept. 2013]; *Mayville v Webb*, 267 AD2d 711, 712 [3d Dept. 1999]; *Winchell v Middleton*, 226 AD2d 1009, 1010 [3d Dept. 1996]).

5. While "[t]ypically, the use is presumed hostile when . . . the other elements of advserse possession have been established[,]" permissive use of another's property may be implied when the parties share a close friendship and have a cooperative relationship to rebut that presumption of hostility (*see Bergman v Spallane*, 129 AD3d at 1198; *Chaner v Calarco*, 77 AD3d 1217, 1218-19 [3d Dept. 2010]).

6. Not only has plaintiff not established the other elements by clear and convincing evidence, she has also failed to prove the element of hostility. Given the strength and obvious depth of the personal relationship between Charles Thomas and Alexander Mentiply, any use by Alexander Mentiply of the property owned by Charles Thomas for parking or for any other reason was permissive from the beginning (*see Taverni v Broderick*, 111 AD3d 1197, 1199 [3d Dept. 2013]). "A use which was permissive in its inception continues until the contrary appears"

(*Wechsler v New York State Dept. of Envtl. Conservation*, 193 AD2d at 860; *see Chaner v Calarco*, 77 AD3d at 1217).

7. The testimony established permissive use, so the burden shifted back to plaintiff to demonstrate that the permissive use became hostile by the assertion of an adverse right by plaintiff made known to defendants (*Pickett v Whipple*, 216 AD2d 833, 834 [3d Dept. 1995]; *Pitson v Sellers*, 206 AD2d 575, 577 [3d Dept. 1994]; *Van Deusen v McManus*, 202 AD2d 731, 731 [3d Dept. 1994]). Such an assertion must be clear and unequivocal (*see Hinckley v State*, 234 NY 309, 317 [1922]).

8. Here, there was never an assertion of any adverse right by plaintiff until plaintiff commenced the project in 2017. While plaintiff's commencement of the project qualifies as a clear, unequivocal assertion of a hostile right, the hostile right must satisfy the 10 year statutory period. Because plaintiff cannot satisfy the 10 year statutory period, plaintiff cannot meet her burden on this element (*see Susquehanna Realty Corp. v Barth*, 108 AD2d 909, 910 [2d Dept. 1985]).

9. To establish her claim of easement to the parking space and footpath by prescription, plaintiff must prove, by clear and convincing evidence, "adverse, open and notorious, and continued and uninterrupted use of the [property] for the prescriptive period, which is ten years" (*Levy v Morgan*, 31 AD3d 857, 858 [3d Dept. 2006][internal citations omitted]).

10. As in a claim for adverse possession, when making a claim for easement by prescription, hostile use is implied when the other elements are established, however that presumption may be rebutted by "a history of cooperation and accomodation" (*Allen v Mastrianni*, 2 AD3d 1023, 1024 [3d Dept. 2003]) between the parties or where the parties are "part of a select

group of friends" (*Barra v Norfolk S. Ry. Co.*, 75 AD3d 821, 824 [3d Dept. 2010] quoting *Wechsler v New York State Dept. of Envtl. Conservation*, 193 AD2d 856, 860 [3d Dept. 1993]).

11. For the same reasons that plaintiff's use of the Thomas property for parking purposes was permissive, plaintiff's use of the footpath was permissive as well (*see Millington v Kenny & Dittrich Amherst, LLC*, 124 AD3d 1108, 1109-10 [3d Dept. 2015]). Also missing is any evidence that the Mentiply family maintained the footpath, which is activity tending to show that use is hostile (*see Epstein v Rose*, 101 AD2d 646, 647 [3d Dept. 1984]).

12. Further, to prevail on her claim to the footpath, because a prescriptive easement is measured by the extent of use, plaintiff was required to demonstrate that the Mentiply family's use was confined to one definite and certain line or path (*see Austin Realty Corp. v Klondike Ventures, Inc.*, 163 AD3d 1107, 1109 [3d Dept. 2018]; *Zutt v State of New York*, 50 AD3d 1133, 1133 [2d Dept. 2008]; *Nellis v Countryman*, 153 AD 500, 501 [3d Dept. 1912]). The evidence shows that the Mentiply family exited the footpath at different points and did not always use the same exact route to get to their camp. The absence of such particularity is fatal to her claim to a prescriptive easement (*see Zutt v State of New York*, 50 AD3d at 1133).

13. Plaintiff also failed to establish any prescriptive easement over the parking space because she could not demarcate the exact parking space used and because the Mentiply family use of the parking space was permissive (*see Zutt v State of New York*, 50 AD3d at 1133).

14. Turning to their counterclaim, to succeed on their claim of trespass, defendants must establish an intentional entry upon their land by plaintiff, or plaintiff's agent under her direction, without defendants' permission (*see Ivory v Intl. Bus. Mach.* Corp., 116 AD3d 121, 130 [3d Dept. 2014]; *Long Island Gynecological Servs., P.C. v Murphy*, 298 AD2d 504 [2d Dept. 2002]; *Golonka*

v Plaza at Latham, LLC, 270 AD2d 667, 669 [3d Dept. 2000]). Defendants established that plaintiff knew a portion of the project was on their property and that she directed the contractor to compete the project, which establishes trespass.

15. Plaintiff's intrusion upon and damage to defendants' property constitutes a continuing trespass (*509 Sixth Avenue Corp. v New York City Tr. Auth.*, 15 NY2d 48, 52 [1984]).

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that plaintiff's complaint is dismissed in its entirety, and it is further

ORDERED AND ADJUDGED that defendants are awarded judgment on their counterclaims against plaintiff for trespass and declaratory judgment, and it is further

ORDERED, that an inquest will be scheduled to determine defendants' nominal damages, if any.

The within constitutes the Decision, Order and Judgment of this Court.

Dated: May 13, 2020

Martin D. Auffredou

HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The Court is filing the original Findings of Fact, Conclusions of Law, Decision, Order, and Judgment, together with the original papers, in the Washington County Clerk's Office. The Court is also providing all counsel with a copy of the Findings of Fact, Conclusions of Law, Decision, Order, and Judgment; such delivery does not constitute service with notice of entry.

Distribution:

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