

State of New Hampshire
Supreme Court

NO. 2014-0139

2014 TERM
AUGUST SESSION

Walter W. Cheney

v.

Town of Newmarket

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF APPELLANT WALTER W. CHENEY

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225 www.AppealsLawyer.net

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QUESTIONS PRESENTED

- I. Did the court err in denying Walter Cheney a building permit when he owns a buildable lot, and when there are no restrictions on the lot imposed by statute, ordinance, the Planning Board, condominium documents, or self-imposed?

Preserved: PETITIONER'S ANSWER AND OBJECTION TO NEWMARKET ZONING BOARD OF ADJUSTMENT'S MOTION TO DISMISS AND PETITIONER'S SUPPORTING MEMORANDUM OF LAW (Feb. 4, 2013), *Appx.* at 835; PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTER-CLAIMS PURSUANT TO RSA491:8-a (July 10, 2013), *Appx.* at 979; PLAINTIFF'S MOTION TO RECONSIDER (Jan. 21, 2014), *Appx.* at 1081

STATEMENT OF FACTS

Walter Cheney was ahead of his time. Recognizing the importance of the Great Bay estuary before Newmarket did, the town prevented him from realizing the wildlife sanctuary he envisaged. Now that Moody Point is built, the town has discovered it likes the beauty of saltmarshes, and is denying a building permit on the one lot he reserved.

I. Great Bay, Moody Point, Environmental Assessments

As environmental awareness gained in the 1970s, the 1973 proposal to build an oil refinery on Great Bay¹ educated Seacoast New Hampshire on the importance of the estuary system, being "at the base of the food chain." LETTER FROM MATHIESON TO CHENEY (Feb. 11, 1983) at 1, Exh 6, tab B, pg 8, *Appx.* at 18.²

¹"Save Our Shores' was a citizens group organized in 1973 to combat the proposal by Greek shipping magnate, Aristotle Onassis and others for a massive oil refinery to be built on Great Bay just outside of Durham, N.H. Olympic Oil Refinery's plan was to build the refinery at Durham Point, supply it with the necessary freshwater from Lake Winnepesaukee and pump oil back and forth to the terminal at the Isles of Shoals via a pipeline through Great Bay, Newington, Portsmouth and Rye. The pipeline's final leg would have crossed the ocean floor from Rye to a supertanker terminal at the Shoals. Had Olympic Oil been successful, the 400,000-barrel-per-day refinery would have been the largest built from scratch in the United States at the time. It would also have changed Great Bay and Durham Point, areas of outstanding natural beauty, forever." GUIDE TO THE SAVE OUR SHORES PAPERS, *UNH Library Milne Special Collections* (1973-2001) <<http://www.library.unh.edu/special/index.php/save-our-shores>>.

²The record in this case comprises two large binders. The first is the certified record of the Newmarket
(continued...)

In the 1980s, Walter Cheney was the largest developer on the Seacoast. He ran a business with 74 employees producing \$5 million annually and had built over 600 homes and 500 apartments in the area. Cheney, *Have Hammer Will Bang* (2006) at 95, Exh 61, tab R, pg 327, *Appx.* at 528. Cheney lived near the Bay and considered himself an environmentalist. *Id.*, ch. 6.

In 1982 Cheney³ acquired Moody Point, in Newmarket, New Hampshire. DEED, GALLANT & SANDERS TO MOODY'S POINT COMPANY (May 11, 1982), Exh 5, tab B, pg 5, *Appx.* at 15. The 170-acre site includes both the Lubberland Creek saltmarsh, and the mouth of the Lamprey River where it empties into Great Bay. AERIAL PHOTO WITH TAX PARCEL BOUNDARIES (May 2013), Exh 1, tab A, pg 4, *Appx.* at 1. "This parcel of land, being bordered by the Lamprey River, Great Bay and including the Lubberland Creek salt marsh is one of the most pristine and unaltered wetland/wildlife habitats in the Great Bay system." LETTER FROM RICHARDSON, NH WETLANDS BOARD, TO JAMES, GREAT BAY TRUST (May 21, 1984), Exh 16, tab C, pg 25, *Appx.* at 47; MEMORANDUM FROM MILLER TO GREAT BAY CONSERVATION

²(...continued)

Zoning Board of Adjustment, NOTICE OF DELIVERY OF CERTIFIED RECORD (Feb. 4, 2013), *Appx.* at 825, which has been transferred to this Court. SUPREME COURT ORDER (May 21, 2014). The second contains the agreed exhibits submitted to the superior court. NOTICE OF DELIVERY OF JOINT EXHIBITS (July 3, 2013), *Appx.* at 872. There is much duplication.

Although both appear to have some internal order, neither are in a consistent organization lending chronological or other clarity to this dispute. Together they total 1,266 pages, but they are not consistently paginated. Accordingly, accompanying this brief the appellant has provided an appendix of all record documents. Duplicates have been removed, with the choice made to include in the appendix the most complete and most readable versions.

Citation herein to the appendix include, where available, the exhibit number, the tab name where the cited document appears in the binders, and the page number within such tab. It is apparent from the record that tab names which are numbers indicate the document was in the ZBA certified record; tab names which are letters indicate the document was in the superior court joint exhibits. In any event, citation to the appellant's appendix is indicated for all record documents.

³Walter Cheney operated through a variety of closely-held business entities, the identities of which are not relevant to this appeal. He is referred to herein by his name without regard to the entities.

TRUST COMMITTEE (June 26, 1984) Exh 17, tab C, pg 27, *Appx.* at 49 (“Moody’s Point is a high-value wildlife area because of its position between two streams, its undulating topography, its tidal marsh systems and its varied vegetative component.”).

In 1983 Cheney proposed an innovative subdivision on Moody Point. MOODY POINT TOPOGRAPHIC PLAN (July 1983), Exh 7, tab B, pg 10, *Appx.* at 20; PLAN NO 12,044 (Dec. 13, 1983), Exh 10, tab C, pg 13, *Appx.* at 24. Newmarket asked him to give the Town a year to enact a cluster development ordinance, and to submit any available environmental assessments. CONDITIONS OF APPROVAL MOODY POINT SUBDIVISION PLAN (Dec. 13, 1983), Exh 14, tab 038, *Appx.* at 23.

The Great Bay Conservation Trust enlisted Cheney to convene a group of experts in ecology, soils, wildlife biology, forestry, botany, wetlands, and other fields, which included professors and students from UNH, State agencies, municipal governments, and non-profit environmental organizations. *See generally*, CORRESPONDENCE, *Appx.* at 18-126. Later, the Town’s consultant remarked the experts Cheney assembled were a mix of “public agencies, groups of concerned citizens, and consultants with academic or organizational affiliations,” who produced “credible environmental information and recommendations.” REPORT TO NEWMARKET PLANNING BOARD (July 23, 1985) at 21-22, Exh 37, tab I, pg 160, *Appx.* at 171.

The 18-month effort was considered a public interest project by the UNH participants, where each was expected to submit a written report that would get summarized into an overall set of recommendations under the auspices of the Great Bay Conservation Trust. The report had many categories of recommendations, including protecting the salt marsh, creating a buffer zone, discouraging excavation, clustering of housing units, selective cutting of trees, hydrological analysis, limited access to the Bay, marsh, and river even by pedestrians, severe restrictions

against pets, inventorying and preservation of existing wildlife population, conservation easements, development of a management plan for future residents, and education of residents and the public regarding the area's environmental fragility. NATURAL RESOURCES MANAGEMENT PLAN (Sept. 2, 1983), Exh 9, tab B, pg 12, *Appx.* at 22. *See* citations, *supra*, and also REPORT TO BROWN BY MOODY POINT COMMITTEE (Dec. 29, 1983), Exh 12, tab C, pg 17, *Appx.* at 27; MEMORANDUM FROM LEE AND MATHIESON TO JAMES (Apr. 30, 1984), Exh 14, tab C, pg 21, *Appx.* at 45; MEMORANDUM FROM JAMES TO BROWN (July 26, 1984), Exh 19, tab C, pg 31, *Appx.* at 53; OVERVIEW FOR ZBA MEETING (Aug. 6, 2012) at 1, tab 037, *Appx.* at 730.

II. Environmentally Conscious Design, Planning Board Consideration, Revisions to the Plan

With the environmental assessments in mind, Cheney evolved a 10-lot development plan, and in February 1985 presented it to the Newmarket Planning Board under its "Alternative Design Subdivision" (ADS) regulations. TOWN OF NEWMARKET SUBDIVISION REGULATIONS (1985), Exh 36, tab H, pg 136, *Appx.* at 209. Cheney explained that as part of the cluster condominium project, he was planning "133 acres of open space." PLANNING BOARD MINUTES (Feb. 26, 1985) at 3, Exh 22, tab E, pg 83, *Appx.* at 108. The Planning Board hired a consultant to review Cheney's environmental assessments and subdivision proposal, which became known as the "Kapala Report." *Id.* at 3-4.

The ADS mandated a preliminary conceptual review. At the February 1985 Planning Board meeting, Cheney had not yet filed a formal application, *id.* at 2, the Board's secretary noted it was an "[i]nformational hearing or a "[p]reliminary [c]onsultation," *id.* at 4. Cheney emphasized "[t]his is a *conceptual* plan." *Id.* at 3 (emphasis in original). The hearing was then "continue[d]" to give time for the regional planning commission's review. *Id.* at 4.

The next day Cheney filed an application for 10-lot subdivision and site plan review.

APPLICATION FOR SUBDIVISION AND/OR SITE APPROVAL (Feb. 27, 1985), Exh 23, tab E, pg 87, *Appx.* at 112. A month later, the Planning Board continued its preliminary consultation. PLANNING BOARD MINUTES (Mar. 12, 1985) at 3-4, Exh 24, tab E, pg 88, *Appx.* at 113. At the end of its April meeting, the Board voted to accept Cheney's 10-lot application, but not take any action until review by the town attorney. PLANNING BOARD MINUTES (Apr. 9, 1985) at 4, Exh 26, tab E, pg 95, *Appx.* at 120.

At its May meeting Cheney submitted a 10-lot plat showing the location of lots and placement of multi-unit buildings, PROPOSED 10-LOT SUBDIVISION (May 23, 1985), Exh 28, tab F, pg 103, *Appx.* at 131, which the Planning Board considered. PLANNING BOARD MINUTES (May 23, 1985), Exh 31, tab F, pg 106, *Appx.* at 129. In June, July and August, the Board continued discussing the Kapala report, which is dated "July 1985." After public comment regarding traffic and the access road, the Board began to consider an alternative. REPORT TO THE NEWMARKET PLANNING BOARD, MOODY POINT ALTERNATIVE DESIGN SUBDIVISION IMPACT ANALYSIS AND EVALUATION (July 1985), tab 006, *Appx.* at 233; PLANNING BOARD MINUTES (June 11, 1985), Exh 33, tab F, pg 112, *Appx.* at 138; PLANNING BOARD MINUTES (July 23, 1985), Exh 38, tab J, pg 198, *Appx.* at 164. PLANNING BOARD MINUTES (Aug. 27, 1985) at 6, Exh 39, tab J, pg 202, *Appx.* at 271. In September the Planning Board did nothing on the matter other than extend its deadlines which would otherwise expire in October. PLANNING BOARD MINUTES (Sept. 24, 1985), Exh 41, tab J, pg 224, *Appx.* at 293. In October, the Planning Board discussed several items regarding the plan, but then approved a "motion to continue the hearing." PLANNING BOARD MINUTES (Oct. 8, 1985), Exh 42, tab J, pg 229, *Appx.* at 298.

Reflecting these discussions, Cheney submitted revised maps depicting a 13-lot subdivision, which the Planning Board approved in November. PLANNING BOARD MINUTES (Nov. 12, 1985), Exh 44, tab K, pg 238, *Appx.* at 323.

III. Consultant Approves 10-Lot Plan, Neighbors' Concern About Traffic, Change from a 10-Lot to a 13-Lot Plan, Context of Statements Made to the Newmarket Planning Board

A. Description of 10-Lot Plan

The Great Bay Conservation Trust's environmental consultants were adamant that any development maintain the integrity of the saltmarsh and avoid bifurcation of wildlife corridors which include the upland around Lubberland Creek. Thus Cheney proposed a 10-lot plan which clustered housing and maximized wildlife habitat. COLOR COMPOSITE MAP #1, MOODY POINT: 10 LOT SUBDIVISION, *infra* at 24 and *Appx.* at 2. Kapala, the Town's consultant, agreed with the Conservation Trust's objective, and endorsed Cheney's 10-lot plan. REPORT TO NEWMARKET PLANNING BOARD (July 23, 1985), Exh 37, tab I, pg 160, *Appx.* at 171.

Lot 9, shown in pink on the Color Composite Map #1,⁴ would have extended from the southern boundary of the parcel, to a setback 150 feet from Lubberland Creek.

Lot 10, shown in brown, would have extended from that setback, to the northern boundary of the parcel, thereby including Lubberland Creek and its surrounding saltmarsh. PROPOSED 10-LOT SUBDIVISION (May 23, 1985), Exh 28, tab F, pg 103, *Appx.* at 131. Almost all of its 61 acres was within the shoreland protection zone. Only one acre was buildable upland, with frontage on a cul-de-sac, indicated by darker brown on the Color Composite Map #1.

⁴Three color composite maps have been created to aid the reader in visualizing the land. They do not constitute surveyor's plats and are not part of the record below. They are intended to represent as accurately as possible salient features of the Moody Point development which changed over time, and for which there is no dispute in the record. They are composites of various plats which are part of the record.

The three maps are hereby incorporated into the statement of facts in this brief, and thus appear *infra* at the pages noted:

- #1 MOODY POINT: 10 LOT SUBDIVISION, appears *infra* at 24 and *Appx.* at 2.
- #2 MOODY POINT: 13 LOT SUBDIVISION, appears *infra* at 25 and *Appx.* at 3.
- #3 MOODY POINT: 13 LOT SUBDIVISION-BOUNDARY LINE ADJUSTMENT, appears *infra* at 26 and *Appx.* at 4.

To facilitate simultaneous viewing and for the convenience of the Court, the three color composite maps appear again in the first several pages of the appellant's appendix, at the pages also noted.

The colors used to demarcate lots and features of the Moody Point development are a matter of visual convenience, and not intended to convey particular meaning.

At the time, Cushing Road was a stub serving a single existing house on the top-left corner of the parcel, shown in purple on the Color Composite Map #1. Beyond that it was a logging right-of-way, which would have been abandoned, PLANNING BOARD MINUTES (Feb. 26, 1985) at 2-3, Exh 22, tab E, pg 83, *Appx.* at 108; PLANNING BOARD MINUTES (Sept. 10, 1985) at 5-6, Exh 40, tab J, pg 212, *Appx.* at 281, thus leaving Lubberland Creek with an undisturbed upland buffer hundreds of feet wide. PROPOSED 10-LOT SUBDIVISION (May 23, 1985), Exh 28, tab F, pg 103, *Appx.* at 131.

B. Neighbors Nix Smith-Garrison Access

Access to the Moody Point development would have been an extension of Smith-Garrison Road, which serves an unrelated neighborhood of about 50 residences, an elbow of which is shown in yellow on the Color Composite Map #1. For the access, Cheney acquired an easement through the “Karambelas lot,” shown in turquoise on the Color Composite Map #1.

While endorsed by Kapala and environmentally sensible, the Smith-Garrison access raised the ire of that neighborhood. A “crowd” turned up at every meeting concerned about traffic, and vociferously urged the Planning Board to extend Cushing Road instead. PLANNING BOARD MINUTES (Feb. 26, 1985), Exh 22, tab E, pg 83, *Appx.* at 108; PUBLIC HEARING NOTES (May 23, 1985) at 1, Exh 32, tab F, pg 108, *Appx.* at 134; PLANNING BOARD MINUTES (July 23, 1985), Exh 38, tab J, pg 198, *Appx.* at 164. More numerous than the handful of people who lived on Cushing Road, they prevailed. PLANNING BOARD MINUTES (Aug. 27, 1985) at 6, Exh 39, tab J, pg 202, *Appx.* at 271 (“Only four people live out there.”); PLANNING BOARD MINUTES (Sept. 10, 1985) at 5-6, Exh 40, tab J, pg 212, *Appx.* at 281 (“Cushing eliminates almost all abutters’ objections.”); WALTER CHENEY MARK-UP OF NEWMARKET TAX MAPS (June 2013), Exh 99, tab Y, pg 516, *Appx.* at 787; Cheney, *Have Hammer Will Bang* (2006) at 119, Exh 61, tab R, pg 317, *Appx.* at 528.

After an executive session on the matter, Cheney first formally proposed using Cushing Road at the August 1985 Planning Board meeting. PLANNING BOARD MINUTES (Aug. 27, 1985) at 6, Exh 39, tab J, pg 202, *Appx.* at 271. At its September meeting, the Planning Board voted to require access via Cushing Road, PLANNING BOARD MINUTES (Sept. 10, 1985) at 5-6, Exh 40, tab J, pg 212, *Appx.* at 281, and in November the 13-lot plan was approved. PLANNING BOARD MINUTES (Nov. 12, 1985), Exh 44, tab K, pg 238, *Appx.* at 323.

C. Context of Statements by Cheney

Although it failed to get approval, 10 LOT SUBDIVISION PLAN NOT APPROVED (MAY 23 1985), Exh 28, tab F, pg 103, *Appx.* at 131, Cheney strongly believed the environmental benefits of access by Smith-Garrison Road. PLANNING BOARD MINUTES (Feb. 26, 1985) at 2, Exh 22, tab E, pg 83, *Appx.* at 108 (“Abutter: Can’t you use Cushing Road? Cheney: Do you care about the environment?”). In advocating for it, he and his agent Diane Langlois made five statements which the Town now claims were enforceable commitments.

First, at the February 26, 1985 preliminary meeting, Cheney told the Planning Board that his wildlife plan was conditional on the 10-lot plan he had assembled with the Conservation Trust, which provided access:

Through the Karambelas lot. 16½ acres will be a field for wildlife by the river. 133 acres of open spaces. If we run a road through this, it would just destroy it as a wildlife center. No impact on the open space area this way; 100+ acres completely untouched.

PLANNING BOARD MINUTES (Feb. 26, 1985) at 3, Exh 22, tab E, pg 83, *Appx.* at 108.

Second, in April 1985, Langlois “explained that the white pine trees have been clear cut on advice of a forrester with the exception of the 150’ buffer. *No additional buildings can be built in the future.*” PLANNING BOARD MINUTES (Apr. 9, 1985) at 1, Exh 26, tab E, pg 95, *Appx.* at 120 (emphasis added). At the time of that statement, the Planning Board had not yet voted to accept

the application making Langlois's statement part of the non-binding preliminary consultation. It was also directed to the 10-lot subdivision and not the 13-lot subdivision proposed several months later. Most telling, the comment was directed to the area near the river (currently lot 4), the only place on the parcel where a stand of white pines was clearcut. LETTER FROM AUGER TO CHENEY (Apr. 25, 1984), Exh 13, tab C, pg 19, *Appx.* at 41

Third, in August, when the Planning Board was considering both plans, the Board and an abutter had questions:

- [Chairman]: There would be difference in traffic if using Cushing. Would that access eliminate the traffic problems?
- Abutter: How much closer to Lubberland March [sic] is the road?
- Langlois: 600'
- Abutter: How will you protect it? Reports say it should stay untouched.
- Langlois: No buildings are proposed nearby. There is a 400-600' buffer.
- Abutter: Why don't you follow the logging road instead of the marks? [sic]
- Langlois: We're not going near the marsh. We're 400' away.
- Abutter: You could build houses near it.
- Langlois: We're not going to.

PLANNING BOARD MINUTES (Aug. 27, 1985) at 6, Exh 39, tab J, pg 202, *Appx.* at 271. Because there is not nearly 400 or 600 feet between a proposed Cushing Road extension and either the saltmarsh or Lubberland Creek, and because Langlois was advocating for the plan she and Cheney favored, it is apparent she was discussing the distance from the Smith-Garrison access and not the later Cushing Road plan.

Fourth, at the August meeting, after the Planning Board came out of its executive session with its lawyer, the lawyer asked, "What about legal notice to other abutters?" Langlois answered, "There are no others. It's still a continuation of the same plan. It's not a new plan." Board members continued debating the issue of whether it was or was not a new plan. The Board then solicited the advice of its lawyer, who insisted for constitutional reasons that abutters get new notice. LETTER FROM MCNEILL, ESQ. TO HODSDON, CHAIRMAN (Sept. 24, 1985), Exh

40A, tab J, pg 219, *Appx.* at 288. Thus in October the Board noted: “New abutters’ notice sent. [S]ince plan was changed to Cushing access.” PLANNING BOARD MINUTES (Oct. 8, 1985) at 2, Exh 42, tab J, pg 229, *Appx.* at 298. Accordingly, any commitments by Langlois were directed only to the abandoned 10-lot proposal.

Fifth, one of Kapala’s recommendations was for an environmental management plan to ensure appropriate treatment of the fragile ecosystem into the future. For that purpose, along with the 10-lot site plan, Cheney proposed specific deed language that would be included in each of the ten deeds. PROPOSED DEED RESTRICTIONS (June 25, 1985), Exh 34, tab G, pg 117, *Appx.* at 151. It is apparent the proposed deed language applies to the 10-lot proposal because its cover-letter is dated June 25, 1985, *id.* at 1, two or three months before the change to Cushing Road and the 13-lot subdivision, and because there are only ten proposed deeds, not thirteen. *Id.*

The proposed deeds are preceded by a document entitled “Moody Point Environmental Management Program,” which enunciates some basic restrictions and would have created an Environmental Control Committee (populated by residents of the condominium and outside environmental experts) empowered to enforce them. *Id.* at 1-3. Following that are proposed deeds to each lot “#1” through “#10,” containing additional restrictions appropriate to each. *Id.* at 3-13. The proposed deed for lot 10 says it is to be “a conservation area.” *Id.* at 13.

None of these five statements commit Cheney to forgoing construction on the upland area immediately north of Cushing Road.

IV. 13-Lot Subdivision Proposed, Approved With Conditions, Recordation, Compliance

At its November meeting, Langlois submitted both a subdivision plan and a site plan to the Planning Board depicting the new 13-lot plan. PLANNING BOARD MINUTES (Nov. 12, 1985) at 2, Exh 44, tab K, pg 238, *Appx.* at 323.

A. Description of 13-Lot Plan

The plans showed access via Cushing Road, widened and no longer a logging track, which terminates in a loop to the southeast. The access from Smith-Garrison Road was abandoned. COLOR COMPOSITE MAP #2, MOODY POINT: 13 LOT SUBDIVISION, *infra* at 25 and *Appx.* at 3.

Lot 4, shown in blue on the Color Composite Map #2, occupies the shore of the Lamprey River and Great Bay to the south and east, and comprises about 26 acres.

Lot 11, also shown in blue, is long and narrow, parallels Cushing Road on its southern side, and comprises about 17 acres.

Lot 12, shown in yellow, is both longer and narrower, except that it includes the existing house on the northwest corner. It also parallels Cushing Road, but on its northern side, and comprises about 14½ acres.

Lot 13, shown in green on the Color Composite Map #2, includes Lubberland Creek and the saltmarshes on either side of it, and runs east toward the Bay. It comprises about 65⅓ acres. Lot 13 has several more upland acres and additional frontage on the extended Cushing Road, shown in darker green, near the T-intersection where the access road turns into a loop.

Lot 6, shown in orange, occupies the northern side of Cushing Road near the Bay, and comprises about 5½ acres.

The plan clearly depicts 13 lots, not 10. *See, e.g.,* COMBINED PLAN NO. 14,312 (Nov. 12, 1985), Exh 46, tab L, pg 246, *Appx.* at 303; PLAN D-14312 FINAL SUBDIVISION PLAN MOODY POINT (Nov. 12 1985), Exh 3, tab 024, *Appx.* at 309; NEW 13 LOT SUBDIVISION OF MOODY POINT (1985), Exh 8, tab 003, *Appx.* at 331; 13 LOT SITE PLAN OF MOODY POINT (1985), Exh 8, tab 003 (approved Nov. 12, 1985), *Appx.* at 334. Other than the 150-foot “shoreland protection zone” running along the Lamprey River, Great Bay, and Lubberland Creek, nothing on any plan indicates any lot was reserved for “open space,” any similar designation, or any other restriction.

B. Approval With Conditions

As part of its consideration, the Planning Board asked its lawyer for advice on the “original plan restrictions.” PLANNING BOARD MINUTES (Oct. 8, 1985) at 3, Exh 42, tab J, pg 229, *Appx.* at 298. On November 12, the attorney wrote three letters to the Board.

The first concerned a private dispute between Cheney and the owner of Cushing Road, not relevant here.

The second letter, regarding the “original plan restrictions,” noted the Planning Board had “discussed four ... probable conditions” of approval, which he numbered: 1) a \$25,000 environmental bond, 2) improvements to Bay Road, 3) pump testing, and 4) bonding for the access road. LETTER FROM MCNEILL TO PLANNING BOARD (Nov. 12, 1985), Exh 2, tab 024, *Appx.* at 316. The lawyer added: “It is also necessary that the Moody Point Environmental Management Program, the Moody Point Condominium Declaration and the By-Laws of the Moody Point Condominium Association be properly executed.” *Id.* No other conditions were recommended; specifically no others regarding “open space.”

The third letter stated that having reviewed the Declaration, the By-Laws, and the “Moody Point Environmental Management Program,” the lawyer suggested two changes to the Environmental Management Program. First, “[i]t is respectfully suggested that *paragraph 9A* should be modified” to require consent of the Planning Board for any changes. Second, “I also recommend that *paragraph 9B* be amended” such that the Town have enforcement authority. LETTER FROM MCNEILL TO PLANNING BOARD (regarding document review) (Nov. 12, 1985), Exh 16, tab 038, *Appx.* at 319 (emphasis added).

Although the Town has produced a “Moody Point Environmental Management Program” encompassed within the proposed deed for old-plan lot 10, discussed *infra*, it has not produced a “Moody Point Environmental Management Program” indicating it affects new-plan

lot 13. While there is a document in the record entitled “Moody Point Management Program” – which lacks the word “Environmental” in its title – the undated document has *seven numbered* paragraphs. In the document the Town has provided, there is no paragraph 9, 9A or 9B. *See* MOODY POINT MANAGEMENT PROGRAM (May 23, 1985), Exh 16, tab 038, *Appx.* at 125. It thus appears that whatever document the lawyer may have reviewed, the Town has not produced it.

On the same date as the lawyer’s letters, the Planning Board met, and had an extended discussion regarding the four recommended conditions for bonds, road improvements, and pump testing, but none involving an environmental management program.

After the discussion, the entire Moody Point project was the subject of three motions to approve, the first two of which were quickly withdrawn. The first motion was: “Motion to approve ... *with the conditions stated in [lawyer’s] letter...*” The second motion was: Motion to “[a]pprove ... *subject to 3 letters from [lawyer.]*” The third motion was: “Motion to approve ... *subject to the advice* included in the three letters from [lawyer].” The third motion carried. PLANNING BOARD MINUTES (Nov. 12, 1985) at 3-4, Exh 44, tab K, pg 238, *Appx.* at 323 (emphasis added). Had either of the first two motions passed, it might be said that an environmental management program was a condition. The third motion, however, appears only to acknowledge the lawyer’s “advice,” but not implement it.

Although the Town suggests that some environmental management program was lost in the 1987 fire which destroyed the Newmarket Town Hall, *see* <<http://www.newmarketnhhistoricalsociety.org>>, whatever that was, it was never adopted.

C. Recordation of Subdivision and Site Plan Plats

In any event, on November 12, 1985, the Planning Board approved the 13-lot subdivision plan and its associated site plan.

Two days later, Cheney recorded the approved subdivision plat at the Rockingham

County Registry of Deeds, FINAL SUBDIVISION PLAN MOODY POINT D-14312 (approved Nov. 12, 1985, recorded Nov. 14, 1985), Exh 3, tab 003, *Appx.* at 335 (date-stamped by registry on top left edge on each of three sheets); AFFIDAVIT OF WALTER CHENEY IN SUPPORT OF PETITIONER'S SUMMARY JUDGMENT ¶ 10 (July 10, 2013), *Appx.* at 924 ("subdivision ... recorded on November 14, 1985"), thereby preserving rights conferred by recording a subdivision plat. A few months later, Cheney recorded the approved site plan plat. FINAL SITE PLAN MOODY POINT D-14571 (approved Nov. 12, 1985, recorded Jan. 28, 1986), Exh 48, tab L, pg 249, *Appx.* at 336 (date-stamped by registry on top left edge on each of three sheets).

D. Compliance With Conditions

In Newmarket's zoning scheme, whenever conditions are imposed, the Planning Board "[s]hall hold a compliance hearing to determine whether the applicant has complied and fulfilled the conditions previously set by the Board." TOWN OF NEWMARKET SUBDIVISION REGULATIONS ¶ 3.09 (1985), Exh 36, tab H, pg 136, *Appx.* at 209. At Langlois's request a compliance hearing was held, LETTER FROM LANGLOIS TO TOWN (Jan. 28, 1986), Exh 4, tab 024, *Appx.* at 340; *see also*, PUBLIC HEARING NOTICE (Jan. 1, 1986), Exh 4, tab 003, *Appx.* at 337, at which the Chairman stated, "[t]he only condition precedent is the environmental bond" "for landscaping around the units." Langlois "present[ed] the bond and sign[ed] it." PLANNING BOARD MINUTES (Jan. 28, 1986), Exh 5, tab 024, *Appx.* at 341.

This course of events confirms no other outstanding unmet conditions.

V. Condominium Documents

A. Lots 4 and 11 are the Remaining Land Reserved for Common Area

As noted, lot 11, shown in blue on the Color Composite Map #2, is long and narrow, parallels Cushing Road its south, and comprises about 17 acres. Lot 4, shown also in blue, forms the shoreline of both the Lamprey River and Great Bay, and comprises about 26 acres.

Because “[l]ots 4 and 11 are environmentally sensitive areas,” WARRANTY DEED LOTS 4 AND 11 ¶ 6 (Aug. 26, 1987), Exh 69, tab U, pg 373, *Appx.* at 364, they “are conveyed together” and share the same deed. *Id.* Lot 11 contains the condominium’s water well, *Id.* ¶ 5, while lot 4 contains the “shoreland conservation zone.” Lot 4 is Moody Point. *Id.* ¶ 2. They are owned by the “Moody Point Condominium Association.” *Id.* at 1.

Lots 4 and 11 are burdened with a list of use restrictions: no hunting, no boats, no fishing, no swimming, no motorized vehicles, no pets, no fertilizer, no forestry, *Id.*, ¶¶ 6A, 6B, 6C, 6D, 6E, 6O, 6P, 6Q, which the condominium association is charged with enforcing. *Id.* ¶ 6R (emphasis added).

Together lots 4 and 11 total 43 acres, slightly exceeding the 25 percent “minimum common area” the subdivision regulations require.

B. Declaration, and Articles of Agreement

The Moody Point Condominium Declaration contains what is normally found in such documents – definitions, descriptions, common areas, boundaries, assessments, maintenance, repairs, etc. DECLARATION OF MOODY POINT CONDOMINIUM (Oct. 27, 1988), Exh 70, tab U, pg 378, *Appx.* at 405. It references the Moody Point Condominium Association, Board of Directors, and the Bylaws. *Id.* art. XII. The Declaration does not mention Lot 13.

The Moody Point Articles of Agreement establishes the Moody Point Condominium Association, references each of the lots which “condominium units [are] to be built upon,” and generally defines the Association’s role. MOODY POINT COMMUNITY ASSOCIATION ARTICLES OF AGREEMENT (Aug. 26, 1987), Exh 67, tab T, pg 362, *Appx.* at 362. The Articles of Agreement do not mention lot 13.

C. The Bylaws Are the Environmental Management Program

The bylaws similarly reference the lots which “condominium units [are] to be built upon,”

BY-LAWS OF THE MOODY POINT COMMUNITY ASSOCIATION (Aug. 26, 1987), art. II § 1, Exh 68, tab T, pg 364, *Appx.* at 353, and address issues expected to be in bylaws – Association membership, voting, quorums, assessments, etc.

The bylaws also specify that “[l]ots #4 and #11 ... are intended to be used as *open space*, as a visual and noise barrier, a wildlife habitat and an area for peaceful enjoyment of nature” by its members. *Id.*, art. III § 1.A.1 (emphasis added). Again, there is no mention of lot 13.

Notably, the bylaws contain the “Environmental Management Program” that, when Cheney proposed the initial 10-lot plan, was in the proposed deed to lot 10, discussed *infra*. In nearly identical language to that proposed deed, the bylaws create an “Environmental Control Committee,” populated by residents of the condominium and the same list of outside environmental experts as in that original proposed deed. *Id.*, art. V § 3.K.(1).

The bylaws provide that the Environmental Control Committee “shall be responsible for ... [t]he enforcement of all provisions, restrictions, covenants and requirements set forth in all deeds, the condominium declaration and *the within by-laws hereinafter called ‘the Environmental Management Program’* of the Associations’ property.” *Id.*, art. V § 3.K.(1)(a) (quotes in original, emphasis added).

Following that are the details of the Committee’s responsibility to enforce the bylaws, including “promotion [and] education of new and existing members” about the environmental restrictions “to insure use of the property at all times in the future for purposes intended”; maintenance of “all signs” “necessary to provide adequate notice of the environmentally sensitive nature of the Moody Point area”; “maintenance, grooming and repair of all paths” to ensure “thick natural vegetation ... in appropriate areas”; responsibility to “deter pedestrian traffic into restricted areas”; “preservation and protection of [the] area”; “formulating rules, ... relative to the use” of the natural areas to “enforce and promote” the “Environmental

Management Program”; and imposing “penalty assessments for such violations.”

In short, -it appears the bylaws *are* the Environmental Management Program – “*the within by-laws hereinafter called ‘the Environmental Management Program’*” – and there is no need to search further for an elusive Environmental Management Program in the ashes of the burned town hall. *See* LETTER FROM RICHARDSON TO ZBA (Aug. 1, 2012) at 1-2, tab 038, *Appx.* at 713.

D. No Environmental Management Plan Was Ever Submitted

The Town’s own expert, in the “Kapala Report,” twice lamented that “[n]o environmental management plan has been submitted. A number of issues and recommendations have been raised by the developer’s consultants.... The developer’s willingness to comply with any or all of them is not known.” REPORT TO NEWMARKET PLANNING BOARD (July 23, 1985) at 30 & 40, Exh 37, tab I, pg 160, *Appx.* at 171 (“Recommendations for legal and binding protection of ‘various sensitive environmental areas’ from the impacts of development constitutes [the consultant’s] task. The developer did not submit any reports for consideration.”). It is impossible now to suggest there was one, or that Cheney agreed to it.

VI. 1987 Lot Line Adjustments Among Lots 6, 12, and 13

As noted, lot 12 was long and narrow, with an existing house. Lot 13 included Lubberland Creek and the saltmarshes, and lesser frontage on Cushing Road. Lot 6 occupied the northern side of the Cushing Road circle. COLOR COMPOSITE MAP #2. This arrangement bifurcated among lots 12 and 13 the land between Cushing Road and Lubberland Creek, provided lot 12 (with the existing house) an odd long thin road frontage, and prevented additional access to lot 6 from the T-intersection where the Cushing Road access meets the loop. *Id.*

In 1987 the Planning Board uncontroversially allowed Cheney to adjust the lot lines among lots 6, 12, and 13. PLANNING BOARD MINUTES (May 26, 1987) at 1, Exh 49, tab M, pg 252, *Appx.* at 344.

Lot 12, shown in yellow, lost its long handle and was shaped to more comfortably surround and contain the existing house. COLOR COMPOSITE MAP #3, MOODY POINT: 13 LOT SUBDIVISION - BOUNDARY LINE ADJUSTMENT, *infra* at 26 and *Appx.* at 4. It shrank from 14½ to about 4¼ acres.

Lot 13, shown in green, was more reasonably extended all the way to Cushing Road so it included the upland surrounding Lubberland Creek. It grew from 65⅓ to about 71⅔ acres.

Lot 6, shown in orange on the Color Composite Map #3, was given additional access from the T-intersection, and grew from 5½ to about 9 acres. REVISED FINAL SITE PLAN D-17107 (approved May 26, 1987, recorded Oct. 3, 1987), Exh 50, tab N, pg 255, *Appx.* at 337.

The deed to lot 13 describes it with reference only to the revised final site plan resulting from the lot-line adjustment:

Subject to any and all restrictions and dedications and easements as may appear of record or which may apply to the above-described premises by virtue of declarations of condominium and revisions and amendments thereto with respect to the scheme of development of the property of which the ... premises by virtue of any federal, state or local statutes, regulations or ordinances.

WARRANTY DEED BOOK 3447 PAGE 2696 (Jan. 4, 2000), Exh 71, tab V, pg 423, *Appx.* at 517.

There are no known “restrictions” to lot 13 “by virtue of declarations of condominium,” because lot 13 is not mentioned in the declaration. Cheney owns lot 13 in fee simple. *Id.* FINAL ORDER, ROCKINGHAM CNTY. SUPER. CT. (Mar. 3, 2011) at 2, Exh 63, tab S, pg 349, *Appx.* at 678.

Additionally, the Town has pointed to the resulting lot 12 deed as particularly significant. That 12 deed notes “[a]ll pets shall be suitably restrained so that they can not get onto Lot #13 ... [it] being an environmentally sensitive area upon which pets are not permitted.” WARRANTY DEED BOOK 2743 PAGE 1236 ¶ 10 (June 2, 1988), Exh 58, tab P, pg 280, *Appx.* at 401. The notification on lot 12 cannot be construed as a restriction on lot 13, however.

VII. Smas Sideshow

A few months after the lot-line adjustment, Cheney tried to add land north of Lubberland Creek, then owned by one Frank Smas, to Moody Point. This is relevant only because of statements Langlois made to the Planning Board.

In August 1987, Langlois brought the matter to the Board's attention on its "new business" agenda, PLANNING BOARD MINUTES (Aug. 11, 1987) at 3, Exh 51, tab O, pg 258, *Appx.* at 350, and in September Langlois filed an application for permission. APPLICATION FOR SITE PLAN REVIEW (Sept. 16, 1987), Exh 7, tab 003, *Appx.* at 369. In October the Planning Board conducted a "[p]reliminary consultation," PLANNING BOARD MINUTES (Oct. 27, 1987) at 2, Exh 54, tab O, pg 266, *Appx.* at 375, and in November held a public hearing, where it appears there were concerns about adding land to a subdivision after it was established. PLANNING BOARD MINUTES (Nov. 24, 1987) at 1-2, Exh 56, tab O, pg 273, *Appx.* at 382. In December the Board denied the application. PLANNING BOARD MINUTES (Dec. 22, 1987) at 1-2, Exh 57, tab O, pg 277, *Appx.* at 386.

At the November public hearing, in response to a question from a member – "Which lots are open space?" – Langlois told the Planning Board, "lots 4, 11, 12 & 13 are open space."

There are no buildings on lots 4, 11, and 13. Although an existing house sits on lot 12, the rest of the lot remains undeveloped. The statement thus appears to be descriptive as to the visual condition of all four lots – that is, the "space" is "open." Moreover, the Smas proposal was denied, such that the statement was not a commitment on which the Planning Board relied.

A decade later, however, the Town attempted to read into Langlois's statement a normative or legal interpretation that lot 13 had been set aside as conservation land. LETTER FROM SPECTOR TO CHENEY (July 2, 2008) at 2, Exh 74, tab W, pg 454, *Appx.* at 590.

Relying on Langlois statement is nonsensical for several reasons. Lot 11 had been deeded

to the Association as open space so its development rights were already restricted; lot 12 already had a house on it and thus had no further capacity for development. In addition, both Langlois and members of the Planning Board repeatedly discussed donation of lot 13's "development rights" to a responsible organization, PLANNING BOARD MINUTES (Nov. 24, 1987) at 2, Exh 56, tab O, pg 273, *Appx.* at 382 (Langlois: "NH forrests [sic]⁵ is interested in lots 11, 12 & 13 for the development rights."), thus intimating in 1987 that lot 13 was legally capable of being developed.

VIII. 2005 Letter to DES

In 2005 Cheney corresponded with the New Hampshire Wetlands Bureau regarding the small pond on lot 4. LETTER FROM CHENEY TO WETLAND INSPECTOR (Nov. 14, 2005), *Appx.* at 524. The subject of the lengthy letter is not important here, but the Town points to a line in which Cheney mentioned that he "took this 167-acre parcel and used only 35 acres to build the units.... The remaining 132 acres are preserved as open space." *Id.* at 2.

The sentence raises two issues.

First, the 35 acres is a reference to the amount of land actually covered with impervious material – buildings and pavement – as Cheney had calculated that the amount of built space was about 25 or 27 acres, leaving 8 or 10 acres for further potential development. EXISTING DEVELOPED AREA CALCULATION TABLE (Feb. 2012), tab 037, *Appx.* at 695, *Appx.* at 695; TABULATION OF OPEN SPACE (undated), tab 006, *Appx.* at 792.

Second, there being no certain definition of "open space," the context indicates Cheney intended it to mean acres of "space" which is "open" and not covered by impervious material – not a further commitment to preserve a 132-acre park as the Town now suggests.

⁵From other comments at the meeting it is assumed this is a reference to the Society for the Protection of New Hampshire Forests, *i.e.*, the "Forest Society." See <<https://www.forestociety.org/>>.

IX. 2008-2011, Attempt to Donate Lot 13 to Nature Conservancy

The condominium documents make clear Cheney expected the residents would be good stewards of the land. He had observed, however, that they were not, noting they had cut vegetation along Lubberland Creek in front of lot 6. PLANNING BOARD CONDITIONAL APPROVAL (Mar. 18, 2008) at 3-4, Exh 73, tab W, pg 435, *Appx.* at 571; PLANNING BOARD MINUTES (Dec. 16, 2008) at 5, Exh 75, tab W, pg 456, *Appx.* at 596. He took over enforcement, but eventually concluded that the New Hampshire Nature Conservancy “are the best qualified for the long range protection of this valuable environmental property.” LETTER FROM CHENEY TO HARDY (Feb. 27, 2008) at 1, Exh 10, tab 038, *Appx.* at 569; see <<http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/newhampshire/>>.

He planned to donate lot 13 to the Nature Conservancy outright, but it was concerned about the burden of policing residents’ encroachments, and disclaimed a portion of the donation. PLANNING BOARD CONDITIONAL APPROVAL (Mar. 18, 2008) at 6, Exh 73, tab W, pg 435, *Appx.* at 571; LETTER FROM CHENEY TO HARDY (Feb. 27, 2008) at 1, Exh 10, tab 038, *Appx.* at 569.

Thus, Cheney sought to subdivide out of lot 13 a four-acre strip that wraps around in front of lot 6. He would keep that, and donate the rest – about 67½ acres. DEVELOPED AREA PLAN OF MOODY POINT (Feb. 2011), Exh 98, tab Y, pg 515, *Appx.* at 677. The deed, drafted by the Nature Conservancy, would place both parcels in conservation easements. SUBDIVISION APPLICATION (Feb. 20, 2008) at 10, Exh 72, tab V, pg 424, *Appx.* at 558.

The subdivision was conditionally approved. PLANNING BOARD CONDITIONAL APPROVAL (Mar. 18, 2008) at 10-11, Exh 73, tab W, pg 435, *Appx.* at 571. Later the Town and the Association alleged that Cheney did not, or could not, own lot 13. They insisted Cheney deem the land as belonging to the Association, and threatened to sue. *Id.*; PLANNING BOARD MINUTES (Dec. 16, 2008) at 4, Exh 75, tab W, pg 456, *Appx.* at 596; LETTER FROM SPECTOR

TO CHENEY (July 2, 2008) at 2, Exh 74, tab W, pg 454, *Appx.* at 590. The Town also argued lot 13 could not be subdivided, and – citing the statements Langlois made in the Smas extension – claimed it was already conservation land. *Id.* Ultimately the Planning Board rescinded its approval, PLANNING BOARD MINUTES (Dec. 16, 2008) at 10, Exh 75, tab W, pg 456, *Appx.* at 596, which the superior court upheld. ORDER, ROCKINGHAM COUNTY SUPERIOR COURT (May 16, 2011), Exh 91A, tab Y, pg 495, *Appx.* at 681.

X. 2009-2012, Nature Conservancy Take-Two: Denied

Frustrated by the failed Nature Conservancy subdivision, Cheney tried another route. He wrote to the Town, “my goal is to transfer the land to the Nature Conservancy once I have established that all my legal rights are intact.” Although “I have no intentions of building, ... I will ... apply for a new building permit.” EMAIL FROM BRIGHAM TO VINCENT (Aug. 10, 2011), tab 020, *Appx.* at 683; LETTER FROM CHENEY TO NEWMARKET TOWN COUNCIL (Mar. 18, 2009), Exh 81, tab X, pg 474, *Appx.* at 630 (“My goal is to transfer 69± acres of the land at Moody Point to the NH Nature Conservancy.”). Presumably permission to build would maximize the tax benefit of the subsequent donation. *Summary Judgment Hrg.* at 53.

Cheney applied for a permit to build a 2,000 square foot single-family house on lot 13. BUILDING PERMIT APPLICATION (Feb. 19, 2009) at 1, tab 023, *Appx.* at 608. Of lot 13’s 71 total acres, 45 is saltmarsh, and 26 is upland; of that, 14 acres are within the 150-foot buffer, leaving about 12 acres available to build. AFFIDAVIT OF WALTER CHENEY ¶ 9 (July 10, 2013), *Appx.* at 924. A permit was denied by the building inspector, however, because “[i]t has been determined that Lot 13 is unbuildable open space.” DENIAL OF BUILDING PERMIT APPLICATION (Mar. 16, 2009), Exh 80, tab X, pg 473, *Appx.* at 629.

In 2009 Cheney appealed to the ZBA. APPEAL FROM ADMINISTRATIVE DECISION (Apr. 1, 2009), tab 023, *Appx.* at 631; ZBA AGENDA (Apr. 13, 2009), tab 008, *Appx.* at 647; NOTICE

OF ZBA PUBLIC HEARING (May 18, 2009), Exh 86, tab X, pg 482, *Appx.* at 658. The Board noted the Moody Point Association had filed suit in the superior court a few days before, and decided to “postpone any discussion on this issue until the lawsuits have been properly adjudicated.” ZBA MINUTES (May 18, 2009) at 3-4, tab 016, *Appx.* at 659.

Two years later, the Rockingham County Superior Court (*Tina L. Nadeau, J.*) held:

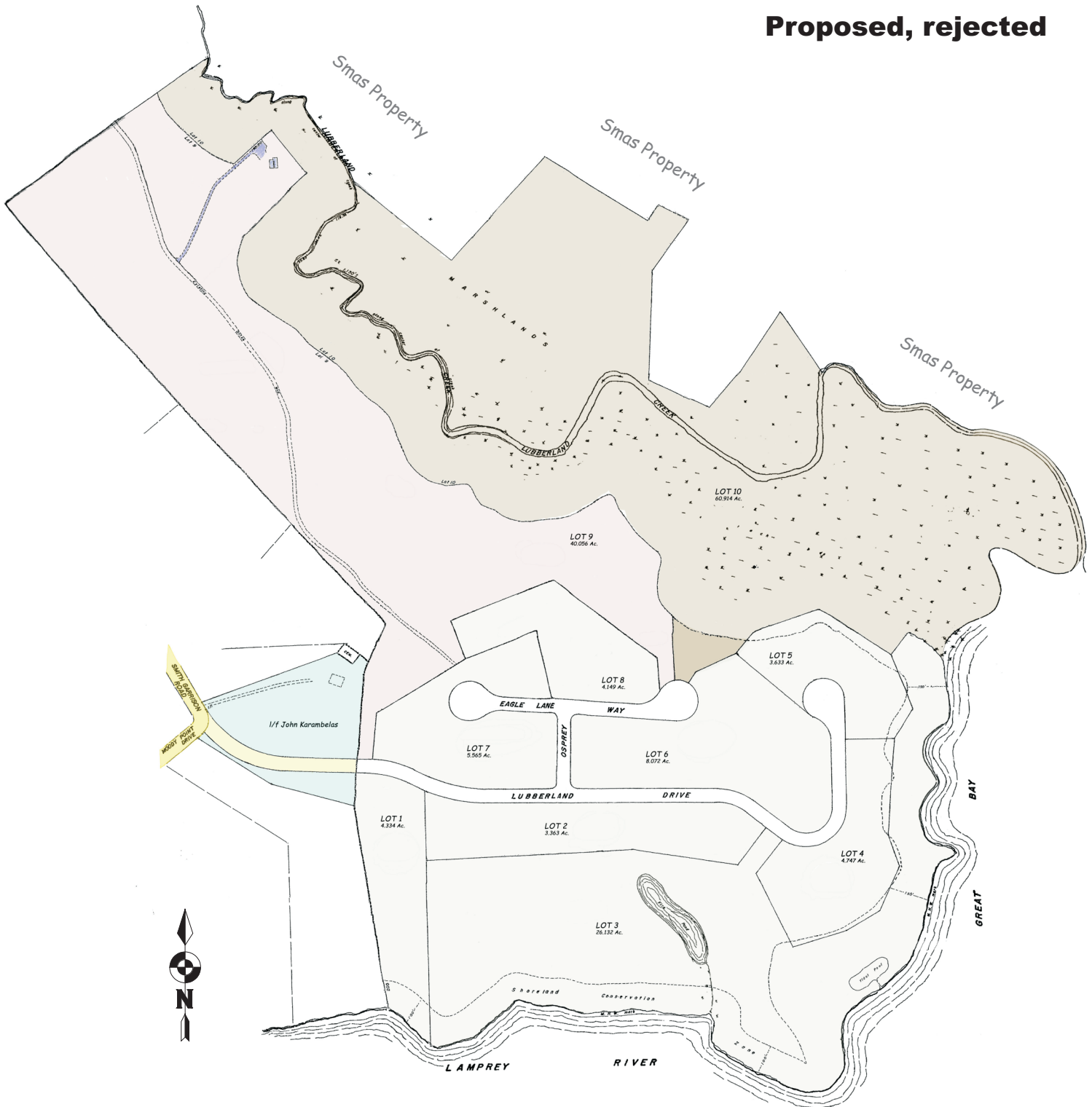
Lot 13 is an independent lot of record and was excluded from the declaration. . . . The court agrees with [Cheney]’s assessment of the [Association]’s reliance on loose and non-binding references to the term “open space” in various planning board minutes, unofficial documents, and unclear representations by individuals without authority to alter the nature of lot 13. It is clear from the testimony of Walter Cheney, which the court found credible, that lot 13 was to be treated separately from the remaining lots and was not to be governed by the declaration. While Mr. Cheney clearly intended the lot to remain undeveloped and intended to preserve the land from regular human access, such intention does not mean the lot was to be designated as “open space” for the benefit of the association. Indeed, a conveyance of the lot to the association would mean that more than 60% of the land would remain as open space. The [Association]’s hope, unsupported expectation, or desire for lot 13 to be included as common area does not create a legally binding covenant of the lot to the association, or a contract for a promise to convey it in the future.

FINAL ORDER, ROCKINGHAM COUNTY SUPERIOR COURT (Mar. 3, 2011) at 2, Exh 63, tab S, pg 349, *Appx.* at 678.

Having been declared the owner of lot 13, Cheney still sought a permit to build. On remand the ZBA determined it did not have jurisdiction to review the denial of the building permit because the application arose from the subdivision regulations, not the zoning ordinance, and thus declined to reach the merits. ZBA MINUTES (Aug. 6, 2012) at 6-7, tab 035, *Appx.* at 721; ZBA NOTICE OF DECISION (Aug. 6, 2012), tab 036, *Appx.* at 729; ZBA MINUTES (Sept. 17, 2012) at 3, tab 045, *Appx.* at 756 (denying reconsideration); ZBA NOTICE OF DECISION (Sept. 17, 2012), tab 046, *Appx.* at 760 (same).

#1 Moody Point: 10 Lot Subdivision

Proposed, rejected



*Map Sources

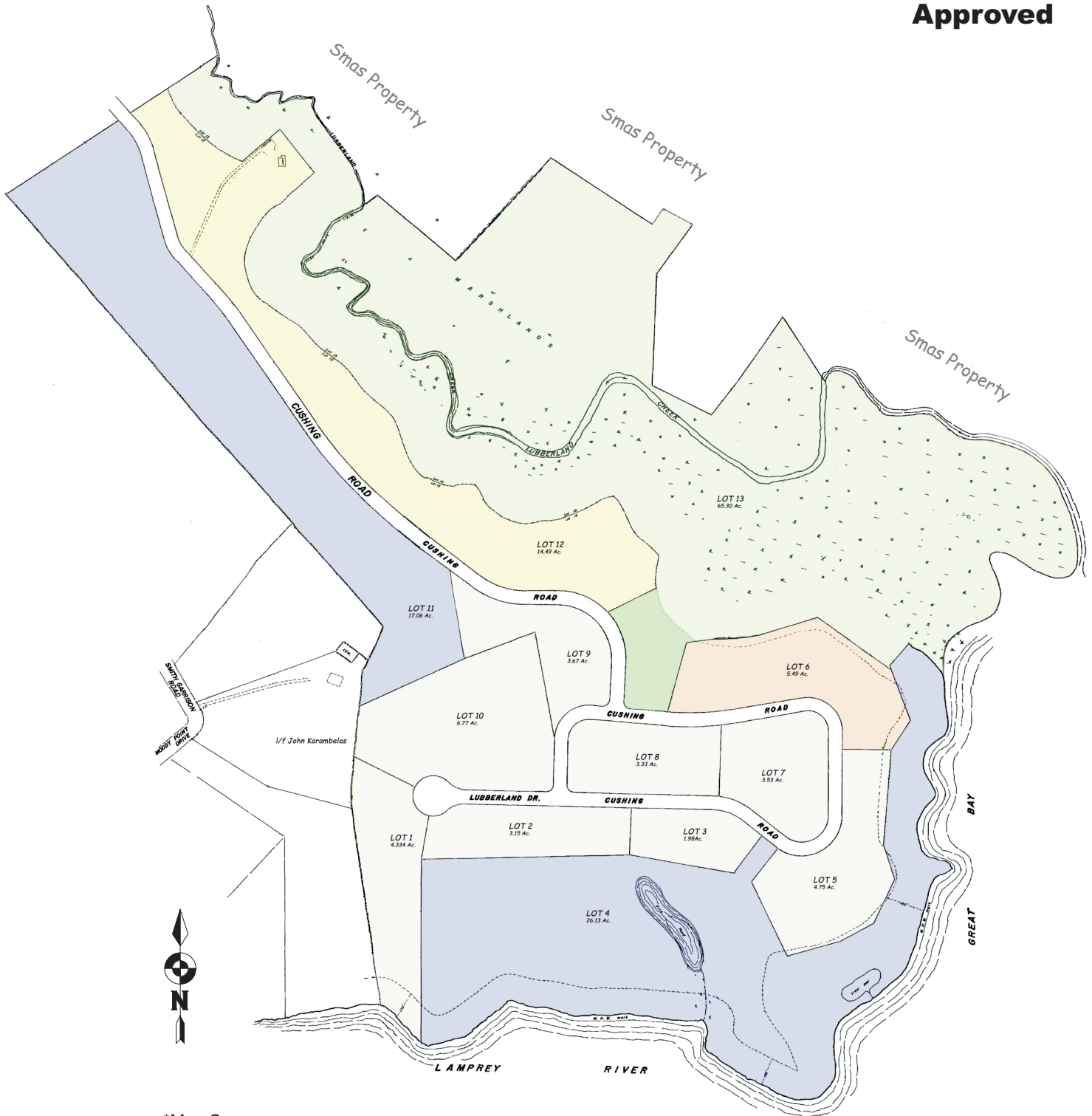
This color composite map has been created to aid the reader in visualizing the land discussed in this brief. It does not constitute a surveyor's plat and is not part of the record below. It is intended to represent as accurately as possible salient features of the Moody Point development which changed over time, and for which there is no dispute in the record. It is a composite of various plats which are part of the record. It is hereby incorporated into the statement of facts of appellant's brief.

To facilitate simultaneous viewing and for the convenience of the Court, this color composite map appears both in this brief and again in the first several pages of the appellant's appendix.

The colors used to demarcate lots and features of the Moody Point development are a matter of visual convenience, and are not intended to convey particular meaning.

#2 Moody Point: 13 Lot Subdivision

Approved



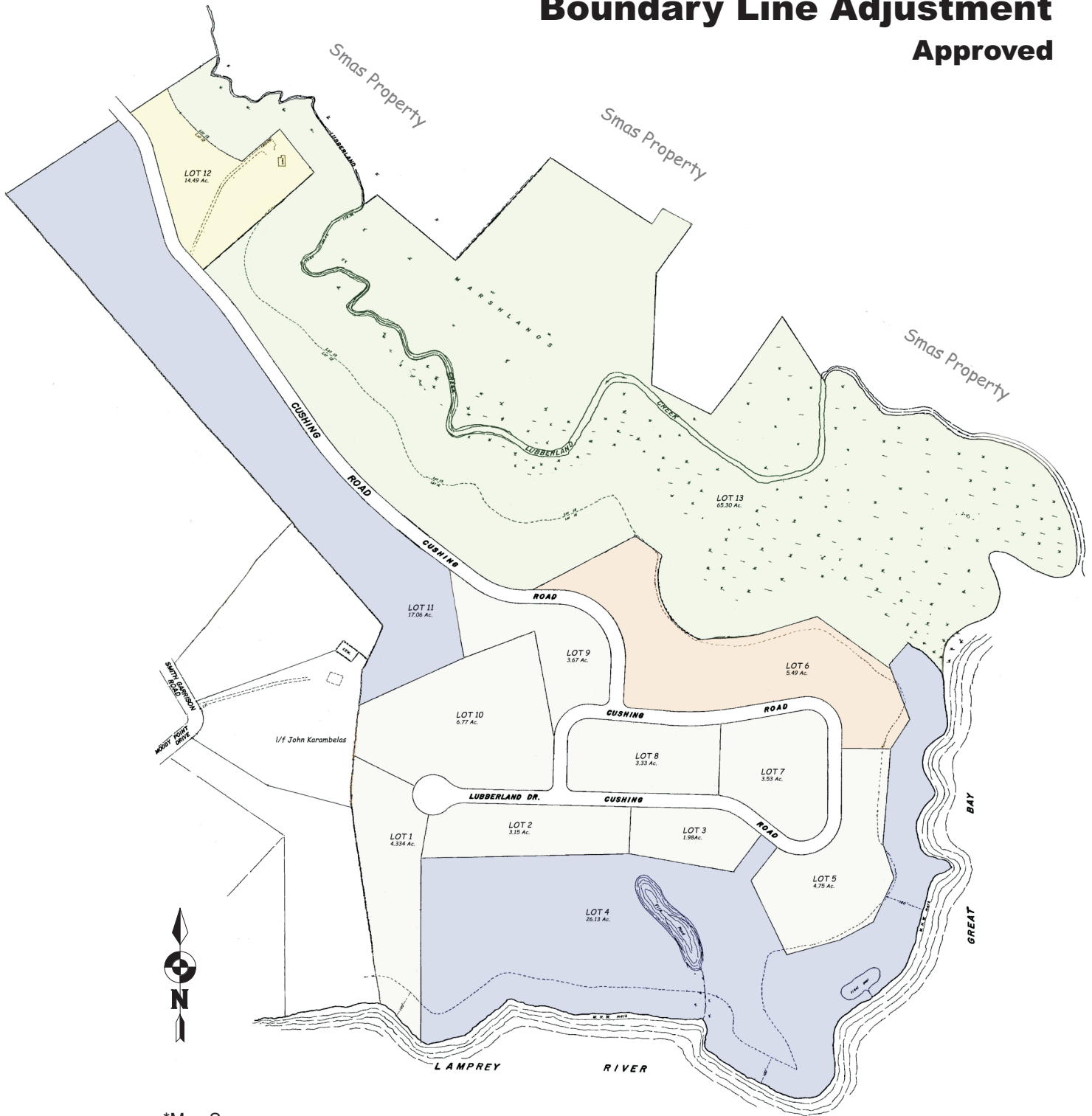
*Map Sources

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The colors used to demarcate lots and features of the Moody Point development are a matter of visual convenience, and are not intended to convey particular meaning.

#3 Moody Point: 13 Lot Subdivision Boundary Line Adjustment Approved



***Map Sources**

This color composite map has been created to aid the reader in visualizing the land discussed in this brief. It does not constitute a surveyor's plat and is not part of the record below. It is intended to represent as accurately as possible salient features of the Moody Point development which changed over time, and for which there is no dispute in the record. It is a composite of various plats which are part of the record. It is hereby incorporated into the statement of facts of appellant's brief.

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The colors used to demarcate lots and features of the Moody Point development are a matter of visual convenience, and are not intended to convey particular meaning.

STATEMENT OF THE CASE

Upon being denied a second time permission to build on his land, in October 2012 Cheney sought a declaratory judgment in the Rockingham County Superior Court. PETITIONER'S APPEAL PURSUANT TO RSA 477:4 AGAINST NEWMARKET ZONING BOARD OF ADJUSTMENTS AND REQUEST FOR DECLARATORY JUDGEMENT [sic] (Oct. 22, 2012), *Appx.* at 793. The Town filed cross-claims regarding its authority to enforce its ordinances pursuant to RSA 674:21-a, and RSA 676:17, II, and requesting to quiet title. TOWN OF NEWMARKET'S ANSWER AND COUNTER-CLAIMS (Feb. 4, 2013), *Appx.* at 844. Because he filed untimely, the court dismissed Cheney's claims, but allowed the Town's cross-claims to go forward. ORDER (on dismissal) (Mar. 15, 2013), *Appx.* at 857.

Both parties then filed motions for summary judgment, PETITIONER'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTER-CLAIMS (July 10, 2013), *Appx.* at 994; TOWN OF NEWMARKET'S MOTION FOR SUMMARY JUDGMENT (July 10, 2013), *Appx.* at 930, on which the court heard argument. *Summary Judgment Hrg.* (Nov. 1, 2013).

The court (*N. William Delker, J.*) made findings in its narrative order, and, granting the Town's request for summary judgment, held that it was not buildable and that Newmarket could enforce restrictions on lot 13. ORDER (on summary judgment) (Jan. 9, 2014), *Appx.* at 1066. Cheney moved for reconsideration, to which the Town objected, and which the court denied. PLAINTIFF'S MOTION TO RECONSIDER (Jan. 21, 2014), *Appx.* at 1081; TOWN OF NEWMARKET'S OBJECTION TO MOTION FOR RECONSIDERATION (Jan. 31, 2014), *Appx.* at 1091; NOTICE OF DECISION (Feb. 4, 2014), *Appx.* at 1132. This appeal followed.

SUMMARY OF ARGUMENT

Walter Cheney first notes that as the owner of a recorded lot, he has a constitutional right to build as he wishes, within the zoning ordinance. He then explores the provisions of

Newmarket's ordinances, and shows that none of them are an impediment to constructing a modest house on his land. He points out that he did not draw a box on the site plan to indicate a single-family house because it was not required. Cheney then reviews the actions of the Newmarket Planning Board at the time he subdivided, and shows that the Board did not place any restrictions on construction. He reviews the condominium documents and shows they likewise did not create restrictions. Finally, Cheney recalls, through Planning Board minutes and other contemporaneous documents, that he did not volunteer any restrictions. He concludes by requesting this Court reverse the restrictions imposed by the Town.

ARGUMENT

I. As Owner of a Lot of Land, Cheney Has a Right to Build A House

Cheney owns lot 13. The court held in 2009 that it is not part of the condominium, and except for the shoreland buffer zone, was not promised as "open space" or to be kept forever without a house. As owner, Cheney can build whatever he wishes on the lot, within the zoning ordinance and applicable law. U.S. CONST., amd. 5 & 14; N.H. CONST., pt. I, art. 2 & 12; *Burrows v. City of Keene*, 121 N.H. 590, 597 (1981) ("Property,' in the constitutional sense, is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it. The term refers to a person's right to 'possess, use, enjoy and dispose of a thing and is not limited to the thing itself.'") (citing *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945)).

Town documents confirm Cheney's constitutional rights. Newmarket's zoning ordinance permits "one unit dwelling" in the "low density residential" zone where lot 13 is located. NEWMARKET ZONING ORDINANCE § 204 (Nov. 6, 1984), *Appx.* at 56. Newmarket's subdivision regulations provide that a "lot" is a "single parcel of land considered as a unit and recorded" at the registry, and that subdivision is "for the purpose, whether immediate or

future, of sale or of building development.” TOWN OF NEWMARKET SUBDIVISION REGULATIONS ¶¶ 2.17, 2.19 (1985), Exh 36, tab H, pg 136, *Appx.* at 209.

After subdivision, Cheney had a recorded lot and the constitutional right to build on it.

II. Ordinance Does Not Impose Any Restrictions on Construction

A. Lot 13 Is Neither “Common Area” Nor “Open Space Land

In 1984 Newmarket enacted an “alternative design subdivision” (ADS) to enable the construction of cluster-style neighborhoods that set aside otherwise developable land for environmental protection. The ordinance defines terms, and specifies what must be done to perfect the set-aside. TOWN OF NEWMARKET SUBDIVISION REGULATIONS (1985), Exh 36, tab H, pg 136, *Appx.* at 209:

The ADS defines several terms:

- “Alternative Design Subdivision” is a residential subdivision in which “the same number of housing units may be arranged on lots of the same or reduced dimensions. The remaining land in the tract, which has not been built upon, is reserved for common area.” *Id.* at 2.20.
- “Conservation Land” is “[l]and given to a public body” or a “private conservation trust” and “dedicated for conservation ... in its original natural condition.” *Id.* at 2.22.
- “Open Space Land” is “[l]and whose development rights have been legally restricted, either by deed or public acquisition of those rights ... to allow or disallow recreational development.” *Id.* at 2.24.
- The open space land “legal restriction” must be “recorded in the Town land records to assure permanence of its use as open space. *Id.* at 4.12.
- “Property will not be *accepted* for open space” unless it meets environmental or other criteria. *Id.* at Addendum #3 (emphasis added).
- “Common area” is areas “set aside ... and intended for the benefit and enjoyment of the residents” of the ADS. It may “contain accessory structures and improvement.” Common area may be coincident with “Open Space Land as defined herein.” *Id.* at 2.21.
- “Minimum Common Area” “shall not be less than 25 percent of the total area of the tract.” *Id.* at 4.15.D.

- “Ownership of Common Area: All areas *designated* as open space shall become common area, to be commonly owned” by a homeowner’s association. *Id.* at 4.15.G (emphasis added).

The ordinance thus specifies three types of set-aside land. In declining order of protection, they are 1) “conservation land,” which is “dedicated for conservation,” 2) “open space land,” where recreational development may or may not be allowed, and 3) “common area,” which is intended to be used by residents.

While the creation of “open space land” is optional, the process for creating it is not. To create “open space land,” the area must be “designated as open space,” “accepted” by the Town, and “recorded.” Once designated or accepted, it is closed to residential development. *Simpson Dev. Corp. v. City of Lebanon*, 153 N.H. 506, 508 (2006) (“New Hampshire land use statutes . . . prohibit development in the designated open space area of cluster subdivisions.”).

The creation of “common area,” however, is required. The ADS developer must set aside at least 25 percent of the tract as “common area” owned by the association. While the land available to be “common area” is the “remaining land in the tract,” the regulation does not automatically make all “remaining” land “common area”; rather it does not become “common area” until it is “set aside” as such.

In Cheney’s case, lots 4 and 11 were the “remaining land” set aside as common area and deeded to the Association. The entire tract was 167 acres, and together lots 4 and 11 comprise 43 acres, which is slightly more than 25 percent. Thus the common area provision was satisfied (and appears carefully calculated) without regard to lot 13. Moreover, lot 13 cannot be “remaining land” because Cheney owns lot 13 in fee and it was not part of the condominium declaration.

Lots 4 and 11 were “legally restricted” by their deed and by the environmental management plan included in the bylaws, which were recorded, and are “open space land.” Other

than the 150-foot buffer, no part of lot 13 was legally restricted in any way, however, and cannot be considered “open space land.”

In addition, other than the 150-foot buffer, at no time did Cheney or the Planning Board designate, and at no time did the Town accept, any portion of lot 13 as “open space land.” This leaves 12 acres of lot 13 unrestricted. Further, because lot 13 is privately owned, it cannot be “conservation land.”

Lot 13 was never made available for use by the residents, so it cannot be “common area.”

Accordingly, except for the saltmarshes and their buffer zone, lot 13 is neither “common area” nor “open space land.” Cheney is trying, however, to make all but a few acres of lot 13 “conservation land,” but is being thwarted by the Town.

B. Lack of Boxes on Site Plan is Meaningless

The ADS regulations require the developer submit a “site plan” showing “existing and proposed buildings.” *Id.* 4.15.I.1. The Town notes there is no box drawn on lot 13 and therefore says nothing can be built. That ignores the statute, which provides that municipalities can require site plans only “for nonresidential uses or for multi-family dwelling units, which are defined as any structures containing more than 2 dwelling units.” RSA 674:43, I; *see New England Brickmaster, Inc. v. Town of Salem*, 133 N.H. 655, 663 (1990) (site plans necessary for commercial and multi-family housing developments).

Newmarket’s zoning ordinance recognizes “site review” is required for “non-residential use.” NEWMARKET ZONING ORDINANCE § 12.2.6.3 (Nov. 6, 1984), *Appx.* at 56. Even the Planning Board understood that “[s]ingle family houses and even duplexes don’t require a site review.” PLANNING BOARD MINUTES (Aug. 27, 1985) at 3, Exh 39, tab J, pg 202, *Appx.* at 271.

Cheney never intended or “proposed” any “nonresidential” or “multi-family dwelling units” on lot 13 (nor on lot 1, which has a house on it today, *Summary Judgment Hrg.* at 53). Thus

he never drew a box on the site plan indicating a structure. Accordingly, his building permit application requests permission for a modest *single*-family house.

III. Planning Board Did Not Impose Any Restrictions on Construction

Newmarket's regulations permit the Planning Board to place conditions on approval of a subdivision. TOWN OF NEWMARKET SUBDIVISION REGULATIONS §3.09 (1985), Exh 36, tab H, pg 136, *Appx.* at 209 ("If the completed application is approved with . . . conditions precedent, . . . the Planning Board shall hold a compliance hearing to determine whether the applicant has complied."); *See Brickmaster v. Salem*, 133 N.H. at 658 ("[P]lanning boards have the authority to impose conditions upon the approval of a site plan.").

If the Planning Board imposes conditions, it must clearly say so. RSA 676:3, I & III ("If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval. . . . Whenever a plat is recorded to memorialize an approval issued by a local land use board, the final written decision, including all conditions of approval, shall be recorded with or on the plat.").

The Newmarket Planning Board was clearly aware of its authority, having imposed bonding and pump testing conditions on Cheney's subdivision approval.

But it imposed none on lot 13.

Between September 1985 when the 13-lot plan was proposed and November when it was approved, no Planning Board minutes ever make reference to lot 13. Moreover, although both the Planning Board's lawyer and its consultant insisted on "imposition of various conditions" and offered details on how to implement them, on a third vote the Board rejected the advice. And, there are no conditions written on or with the recorded plat.

It is thus not credible now to claim the Planning Board imposed restrictions.

IV. Condominium Documents Do Not Impose Any Restrictions on Construction

Nothing in any deed or any condominium instrument imposes any restrictions on building a house on lot 13. There are plenty of very detailed restrictions on lots 4 and 11, more modest restrictions on lot 6, and a barking dog restriction on lot 12. But there are no building restrictions on lot 13.

When Cheney initially proposed a 10-lot subdivision, he suggested severe development restrictions on then-lot 10, which was to be part of a 100-acre wildlife sanctuary, and included the land that eventually became lot 13. While the Town's argument and the court's order repeatedly cite documents and statements concerning that early proposal, the Planning Board *rejected* the 10-lot plan. Thus those documents and statements are nothing more than evidence of an abandoned idea.

V. Cheney Did Not Volunteer Any Restrictions on Construction

The court below held that:

Over the course of seeking approval of the 10-Lot ADS, [Cheney] made several representations to the Planning Board, including that the ADS would have left 133 acres as open space.

ORDER (on Summary Judgment) at 3 (Jan. 9, 2014), *Appx.* at 1066. It also held:

Because [Cheney] applied for an ADS project and the Planning Board considered it as such, [Cheney]'s representation that 133 acres would be common open area is binding on [Cheney]. This representation led the Planning Board to believe that the roughly 133 acres reflected in the final site plan would remain intact and unimproved, as required by the ADS ordinance. Thus, in enforcing the ordinance, the town is entitled to enforce it as applied to this particular project.

Id. at 12.

However, the quotation with which the court commits Cheney was during a meeting where the Planning Board was discussing access. Cheney told the Board access would be:

Through the Karambelas lot. 16½ acres will be a field for wildlife by the river. 133 acres of open spaces. If we run a road through this, it would just destroy it as a wildlife center. No impact on the open space area this way; 100+ acres completely untouched.

PLANNING BOARD MINUTES (Feb. 26, 1985) at 3, Exh 22, tab E, pg 83, *Appx.* at 108.

For four reasons Cheney cannot now be held to this “133 acres” comment. First, he made the representation just once – during the non-bidding conceptual review stage, even *before* he filed the 10-lot plan. Second, it pertained to the 10-lot plan that was rejected. Third, Newmarket’s subdivision ordinance provides that “[p]reliminary review shall not bind either the applicant or the [Planning] Board. TOWN OF NEWMARKET SUBDIVISION REGULATIONS §3.02 (1985), Exh 36, tab H, pg 136, *Appx.* at 209. Fourth, Cheney talked of “open space” and “open space area.” He did not say or write “open space land” used by the ordinance. Cheney meant literally “space” that is “open” and not covered with impermeable surfaces such as buildings a streets. *Dahar v. Manchester Dep’t of Buildings*, 116 N.H. 122, 123 (1976) (“[M]eaning depends on popular usage and the circumstances surrounding their use unaffected by statutory definitions.”).

The Town and the court similarly rely on an Environmental Management Plan which either never separately existed, or if it did exist it has never been produced, or most likely, if it did exist it was incorporated into and endures today in the condominium declaration and bylaws.

They rely also on Langlois statement during the August 1985 meeting:

Langlois: We’re not going near the marsh. We’re 400’ away.
Abutter: You could build houses near it.
Langlois: We’re not going to.

PLANNING BOARD MINUTES (Aug. 27, 1985) at 6, Exh 39, tab J, pg 202, *Appx.* at 271. Given the context, it is apparent Langlois was still advocating the 10-lot plan, and the 400 or 600 she mentioned was the distance between the marsh and the Smith-Garrison access she favored. But even if they were at this point talking about the 13-lot plan, the “it” that “we’re not going to”

“build houses near” is the marsh. By virtue of the 150-foot shoreland buffer, plus several hundred additional feet of upland, by proposing a modest house along the road on current lot 13, Cheney is honoring any commitment to not “build houses near it.”

Even if all statements accorded to Cheney restricting old-plan lot 10 are applied to new-plan lot 13, there is a significant portion of lot 13 that was never contemplated as part of lot 10. A comparison of the maps makes this obvious. *Compare* COLOR COMPOSITE MAP #1, *supra* at 24 and *Appx.* at 2 (brown indicating lot 10) *with* COLOR COMPOSITE MAP #2 and COLOR COMPOSITE MAP #3, *supra* at 25 & 26 and *Appx.* at 3 & 4 (green indicating lot 13). All of the long yellow handle that originally was part of lot 12 on the 13-lot plan is thus eligible for lawful building.

Accordingly, Cheney’s representations, which the Town and court repeatedly cite, do not apply to or limit what he can build along Cushing Road on lot 13.

CONCLUSION

Because this case was decided on summary judgment, this Court applies *de novo* review to the application of law to the facts, and will uphold the trial court’s decision only if the moving party, here the Town of Newmarket, is entitled to judgment as a matter of law. *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248 (2006).

For the reasons explained, this Court should order Newmarket to issue a building permit.

Respectfully submitted,

Walter W. Cheney
By his Attorney,

Law Office of Joshua L. Gordon

Dated: August 6, 2014

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Walter W. Cheney requests that Attorney Joshua L. Gordon be allowed oral argument because this case involves several land-planning statutes that have never or rarely been construed, because constitutional property rights are at stake, because the facts are complex and will benefit from oral presentation and the lower court misunderstood them, and because the parcel of land involved is iconic to Seacoast New Hampshire.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on August 6, 2014, copies of the foregoing will be forwarded to Justin C. Richardson, Esq., counsel for the Town of Newmarket.

Dated: August 6, 2014

Joshua L. Gordon, Esq.

ADDENDUM

ORDER (on dismissal) (Mar. 15, 2013). 37
ORDER (on summary judgment) (Jan. 9, 2014).. . . . 43