STATE OF VERMONT

SUPERIOR COURT Chittenden Unit	CIVIL DIVISION Docket No. 833-9-17 Cncv
Daren Smith, et al., Plaintiffs v. Stephen Heney, et al., Defendants	DECISION ON THE MERITS

The matter before the Court involves a boundary dispute between two neighboring property owners in Richmond, Vermont. Daren Smith and Tara Huntoon Smith initiated this action for declaratory judgment in the Chittenden Unit of the Civil Division of the Vermont Superior Court on September 11, 2017, regarding the boundary they share with Stephen and Jennifer Heney. This matter is entitled Smith et al v. Heney et al, No. 833-9-17 Cncv. Around the same time, the Heneys applied with the Town of Richmond (Town) for a permit to construct a fence along the shared boundary. The Town's Zoning Administrative Officer approved the permit, and on appeal by the Smith's, the Town's Development Review Board affirmed that decision. The Smiths then appealed to the Environmental Division, initiating the matter entitled Heney Zoning Permit Approval, No. 157-11-17 Vtec.

To advance the fair and efficient resolution of the parties' claims, the Civil case was specially assigned to the undersigned and the two matters have been processed in a coordinated fashion. The parties agree that the decision in the Civil matter will resolve the dispute in its entirety. Thus, we do not reach the Smith's appeal of the fence permit in the Environmental Division.

This Court presided over a five-day trial at the Costello Courthouse in Burlington, Vermont. After the first two days of trial on October 2nd and 3rd, 2018, the parties asked for additional trial time and the proceedings concluded on November 27th through the 29th, 2018.

We conducted a site visit in the morning on the first day of trial. The Court permitted the parties to file post-trial proposed findings of fact and conclusions of law.

The Smiths are represented by Liam Murphy, Esq. The Heneys are represented by William Heney, Esq., and Stephen Murphy, Esq.[1]

Based upon the evidence produced at trial, which was placed into context through the site visit, the Court renders the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Daren Smith and Tara Huntoon Smith own the property located at 95 Orchard Lane in Richmond, Vermont. They purchased the property in November 2001 from Sven and Donita Osgood. They lived at the property with their children until recently.

2. Stephen and Jennifer Heney own the property at 117 Orchard Lane in Richmond, Vermont. They purchased their property from James Brian Thompson and Katherine Knox in November 2003. They continue to live at the property with their children.

3. The Thompson-Knoxes owned 117 Orchard Lane when the Smiths first moved into 95 Orchard Lane. The Thompson-Knoxes lived there from 1994 to 2003.

4. Paul and Cherie Fabiani have lived across the street from 95 and 117 Orchard Lane at 102 Orchard Lane since 2000. They are friends of the Smiths and have spent time at 95 Orchard Lane throughout the years.

5. The Smiths and the Heneys testified that their interactions as neighbors were generally cordial before this dispute.

Boundary Description

6. 95 and 117 Orchard Lane share a common boundary that generally runs from northwest to southeast, with the Smiths' property laying to the south and the Heneys' to the north.

7. The parties dispute the location of this common boundary.

8. The properties were created by subdivision in 1968. Keller and Lowe, Inc., developed the subdivision plan, entitled "Land of Philippe Cote Richmond, Vermont" (1968 Philippe Cote Plan).

[1] Attorney Heney, who is admitted to practice law in Massachusetts, was admitted pro hac vice for this particular case pursuant to V.R.C.P. 79.1(e). Attorney Stephen Murphy, who is a member of the Vermont Bar and Attorney Heney's sponsoring attorney, was a signatory to the filings submitted by Attorney Heney, but he did not appear before this Court at trial.

The plan was last revised in September 1972. The plan contains bearings and distances for the lots it depicts along Orchard Lane and Dugway Road in Richmond, Vermont, but does not reference any artificial or natural monuments.

9. 95 Orchard Lane corresponds to Lot 64 of the 1968 Philippe Cote Plan.

10. 117 Orchard Lane is comprised of Lots 65 and 66 of the 1968 Philippe Cote Plan.

11. Before purchasing the Smith property in November 2001, Mr. Smith walked the property with a realtor who pointed out the property boundaries.

12. Mr. Smith has a two-year technical degree in property surveying. He worked in surveying part-time for a few months after obtaining his degree.

13. Mr. Smith observed three corner markers that he believed delineated the boundaries of the Smith property, including what he believed to be the northwest corner marker, an iron pin (disputed iron pin). The northeast corner marker was not apparent at the time of purchase.

14. When walking with the realtor upon first purchasing 95 Orchard Lane, Mr. Smith also observed what he believed to be the common boundary with 117 Orchard Lane. He believed that the common boundary was defined by a line of physical monuments (herein after referred to as the physical line), including the disputed iron pin, a lilac bush, a rock garden with a maple tree in its center, and a flowering bush. As discussed below, a cedar hedgerow later supplemented the physical line.

15. The Heneys claim that the common boundary is about sixteen feet to the south of the physical line (herein after referred to as the Heney line). No monuments marked the Heney line, which cuts through lawn, when the Smiths purchased the property.

16. The Heneys do not dispute that the Smiths use the area of land bounded by the physical line to the north and the Heney line to the south (disputed area).

17. Mr. Heney alleges that the disputed iron pin was moved in the late 2000s.

18. Nancy de Tarnowsky, owner of Lot 56, which adjoins both Lots 64 and 65 to the west, is familiar with the boundary markers between Lots 56, 64, and 65. She has viewed them every couple of years to understand where her property boundaries are located. She has owned Lot 56 since 1994. Ms. de Tarnowsky does not believe that the disputed iron pin has moved or changed.

19. The northwest portion of the disputed area is mostly grass contiguous with the Smiths' lawn. The physical line extends halfway down the common boundary, from northwest to southeast, where it meets the wooded portion of the disputed area. The wooded portion of the disputed area is largely unused and slopes down to Orchard Lane.

20. At the time the Smiths purchased the Smith property there was a swing set near the northwest corner of the disputed area. There was also a basketball hoop in the disputed area which still remains. Part of the Smiths' driveway extends into the disputed area.

21. The current setback in this zoning district is 25 feet. If the common boundary was located at the Heney line, the Smith property would be non-conforming because the Smiths' house would be less than 25 feet from the line.

Surveying History

22. The Smith, Thompson-Knox, and Heney deeds only reference the lots in the 1968 Philippe Cote Plan and do not contain any other descriptions of the property lines.

23. In 1995, the Thompson-Knoxes had 117 Orchard Lane surveyed by Keller and Lowe, Inc. (1995 Thompson-Knox Survey). The 1995 Thompson-Knox Survey identifies an iron rod set by Keller and Lowe in 1972 as the marker of the northwest corner of Lot 64. This survey showed a new north line for Lot 66 but did not change the common boundary of Lots 64 and 65.

24. The Thompson-Knoxes shared the 1995 Thompson-Knox Survey with their neighbor to the north. They may have shared it with other neighbors, but they are unsure.

25. In 2016, the Heneys replaced their wastewater system with the assistance of Willis Design Associates, Inc. The new system included a site plan developed by site technician Justin Willis (2016 Wastewater Plan). This plan located the common boundary along the Heney line. It indicated that the disputed iron pin was not the proper marker of the northwest corner of Lot 64. This location of the property line supported the setback necessary for the wastewater system. Mr. Willis testified as an expert for the Heneys at trial.

26. In May 2017, the Heneys had their property surveyed by Chris Haggerty of Button Professional Land Surveyors, PC (2017 Retracement Survey). Mr. Haggerty conducted a retracement and placed new pins along the disputed boundary. Like the 2016 Wastewater Plan, the 2017 Retracement Survey placed the common boundary along the Heney line and showed

that the disputed iron pin was not the proper marker of the northwest corner of the Smiths' property. Mr. Haggerty testified as an expert for the Heneys at trial.

27. The Smiths did not have their property surveyed at any time. They considered commissioning a survey of Lot 64 but were advised that the only way to have an accurate survey was to complete a comprehensive survey for the entire subdivision.

Use of the Disputed Area

28. The Osgoods generally treated the physical line in the way the Smiths did.

29. Before the Smiths purchased 95 Orchard Lane, Mr. Thompson had a conversation with the Osgoods about the results of the 1995 Thompson-Knox Survey. He mentioned that he believed the common boundary went through some of the Osgoods' areas of use, including the portion of driveway, rock garden, woodpile, and basketball hoop that the Osgoods had added to the disputed area.

30. Mr. Thompson did not ask the Osgoods to stop using the disputed area and did not have any concerns regarding their use.

31. The Smiths used the disputed area continuously from November 2001 to April 2017. They continue to use the disputed area, even with the new survey pins in place and the commencement of this matter, although they modified their behavior to avoid confrontations with the Heneys.

32. When they resided at 117 Orchard Lane, the Thompson-Knoxes did not discuss the line with the Smiths or ask them to stop using the disputed area.

33. When the Smiths first moved in, Mr. Smith took over a woodpile near the physical line that the Osgoods had maintained. The apple tree in the disputed area was used to support the wood. The following year, Mr. Smith moved the woodpile to the northwest corner of the disputed area along the physical line.

34. Once they moved in, the Smiths mowed the lawn in the disputed area. They also raked and removed sticks from the area as part of their routine maintenance of the lawn.

35. The Smith children and their friends played on the lawn in the disputed area. The children also played on the swing set.

36. The Smiths weeded and planted flowers in the rock garden.

37. Mr. Smith rototilled the area along the physical line where the woodpile was formerly located and planted a garden. The garden failed because it was too shaded, so the Smiths returned the area to lawn.

38. Whenever the Smiths plowed their driveway, they created a large pile of snow along part of the physical line. In the spring, they raked up any gravel that was disturbed by plowing in the disputed area.

39. The Smiths parked their vehicle in the portion of their driveway that crossed into the disputed area.

40. A mature cherry tree grew in the disputed area by the rock garden. Mr. Smith hired Bill Agnew to remove the cherry tree in 2009. Mr. Smith rented a stump-grinder and ground down the stump himself.

41. A number of apple trees grew on 117 Orchard Lane near and along the physical line.

42. Mr. Smith removed an apple tree south of the physical line in 2002 or 2003.

43. The Heneys hired Barrett's Tree Service, Inc., to remove the apple trees north of the physical line in 2006 to create space in the yard for their children and dog.

44. The Heneys did not make use of the disputed area before April 2017. It was even rare for the Heney children to cross the physical line except to retrieve stray balls.

45. Mr. Heney claimed that he mowed in the disputed area once or twice in the spring of 2016 and defined his actions as assertions of ownership at trial.

46. The Heneys stored firewood close to, but not in, the disputed area along the physical line.

47. In 2008, the Heneys planted three small pine trees near the physical line between the lilac and the rock garden with the maple tree.

48. In 2008 or 2009, Mr. Smith spoke with Mr. Heney about replacing the pine trees with a cedar hedgerow. Mr. Smith asked to be neighborly; he was not asking permission to plant the hedgerow.

49. Mr. Heney agreed with the hedgerow. He then relocated the small pine trees to another part of the Heney property.

50. Following the relocation of the Heneys' pine trees, Mr. Smith installed the hedgerow along the physical line. Installation included running a line from the lilac bush to the maple tree,

spray painting the line, excavating a trench, and planting. He dug the trench on a Sunday and planting took place the following Thursday or Friday. The Heneys never objected to the location of the hedgerow.

51. Once the hedgerow went in, the Heneys installed a dog fence on their side.

52. In April 2017, the Heneys began asserting ownership of the disputed area for the first time.

53. On April 30, 2017, Mr. Heney attempted to move the Smiths' woodpile out of the disputed area and onto an undisputed section of the Smiths' property.

54. In May 2017, Mr. Heney mowed the lawn in the disputed area when the Smiths were away. He mowed the lawn so low that it killed the grass.

55. On June 28, 2017, the Heneys sent the Smiths a cease and desist letter, demanding that the Smiths stop using the disputed area.

56. The Smiths continued to use the disputed area.

57. The Heneys then applied for a permit for a fence along the Heney line. On July 21, 2017, the Town's Zoning Administrative Officer granted the permit. The Town's Development Review Board affirmed that decision on October 20, 2017. The Smiths timely appealed to this Court on November 16, 2017, initiating the matter entitled Heney Zoning Permit Approval, No. 157-11-17 Vtec.

58. On September 11, 2017, the Smiths filed a complaint for declaratory judgment against the Heneys in the Chittenden Unit of the Civil Division of the Vermont Superior Court, starting the matter entitled Smith et al v. Heney et al, No. 833-9-17 Cncv.

59. The undersigned was specially assigned to the Civil case on March 11, 2018.

60. The Civil and Environmental Division matters were treated in a coordinated fashion starting on the record during an April 30, 2018 pretrial conference.

Conclusions of Law

Both the Smiths and the Heneys claim ownership of the disputed area under their respective deeds. In the alternative, the Smiths assert that they have acquired the disputed area by acquiescence. The Smiths also lay claim to the land under the closely related doctrine of adverse possession.

I. Whether the Smiths own the disputed area by deed

The Heneys argue that the 2016 Wastewater Plan and the 2017 Retracement Survey show that the physical line does not mark the boundary of the Smiths' property. They assert that the real boundary corner is south of the disputed iron pin where Mr. Haggerty placed the new iron pin as part of the 2017 Retracement Survey, which supports their position that the Heney line is the common boundary. The Smiths assert that the method used to produce the 2017 Retracement Survey was flawed.

The location of a boundary line is a question of fact that this Court determines on the evidence. Pion v. Bean, 2003 VT 79, ¶ 15, 176 Vt. 1 (citing Monet v. Merritt, 136 Vt. 261, 265 (1978)). To determine whether a party owns land by deed, this Court first looks to the language of the written instrument "because it is assumed to declare the intent of the parties." Kipp v. Estate of Chips, 169 Vt. 102, 105 (1999). If the terms of the deed do not clearly define the boundary, we evaluate other evidence that may bear on the property line. See Pion, 2003 VT 79, ¶ 15.

The Smiths' deed does not contain any description of 95 Orchard Lane's boundaries. Instead, it simply incorporates the 1968 Philippe Cote Plan by reference, stating that the deeded property corresponds to Lot 64 of the Plan. Similarly, the Thompson-Knoxes' and the Heneys' deeds only define the boundaries of 117 Orchard Lane by reference to Lots 65 and 66 in the 1968 Philippe Cote Plan. Because the plain language of the deeds contains no other indicators of where the common boundary might lay, we conclude that the deeds themselves do not clearly define the true boundary. Thus, we next consider the various surveys produced by the parties at trial.

The original 1968 Philippe Cote Plan details the bearings and distances for Lots 64, 65, and 66 but contains no reference to artificial or natural monuments. The 1995 Thompson-Knox Survey is very similar.

Both the 2016 Wastewater Plan produced by Mr. Willis and the 2017 Retracement Survey produced by Mr. Haggerty define the common boundary along the Heney line and indicate that the disputed iron pin is not an accurate marker.

While we assign less weight to the 2016 Wastewater Plan because Mr. Willis produced it for the limited purpose of assessing the Heneys' wastewater system, we conclude that the 2017 Retracement Survey contains the most accurate depiction of the legal boundary between 95 and 117 Orchard Lane.

The Smiths raised concerns regarding the accuracy of any retracement survey that did not start with the original pin of the first lot of the subdivision, suggesting that a proper survey needed to reassess all of the subdivision's lots and pins back to Dugway Road.

Mr. Haggerty, however, used well-established methods in producing the 2017 Retracement Survey. He testified credibly as to its accuracy and his method. See Id., ¶¶ 17-19 (affirming trial court's reliance on one party's survey over another's based on surveyor credibility and well-justified results).

In addition, while the Smiths may have raised some doubts relating to the 2017 Retracement Survey's methodology, they did not present evidence affirmatively showing that their deed included the disputed area. Accordingly, we conclude that the Smiths do not own the disputed area under their deed.

II. Whether the Smiths' acquiescence claim is properly before the Court

The parties continue to dispute whether the Smiths' acquiescence claim is properly before this Court. This Court granted the Smiths' motion to amend the complaint to add the acquiescence claim on the record during the first day of trial. The Heneys assert that despite the granted motion, the Smiths did not follow up the motion to amend by filing and serving a full amended complaint. See V.R.C.P. 4, 5, and 15(a).

The Smiths did not fully comply with the procedural rules governing the amendment of complaints. But they did include their proposed amendment—the acquiescence claim—in the body of the motion to amend. Given that the Heneys argued to strike this specific claim in their October 1, 2018 motion in limine and filed an answer to the Smiths' motion to amend the complaint on November 26, 2018, it is apparent that the Heneys were on notice of the contents of the amendment. Further, the parties addressed the acquiescence claim throughout discovery and trial. And while the Heneys reargue that granting the motion to amend to add acquiescence to the matter is prejudicial, this Court already discussed and decided that issue at trial. The

Heneys do not show any prejudice specifically deriving from the Smiths' failure to serve a separate amended complaint after this Court granted their motion to amend. We decline to elevate form over substance. See Sweet v. Roy, 173 Vt. 418, 429-30 (2002) (citing N. Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 432 (11th Cir. 1993)) (allowing the amended complaint despite the party's failure to file and serve a full, separate amended complaint in part because the motion to amend included the contents of the amendment).

III. Whether the physical line is a boundary-by-acquiescence

The Smiths assert that, regardless of any deeded title, they own the disputed area under the doctrine of acquiescence because all parties involved treated the physical line as the common boundary. The Smiths do not allege a written or oral agreement. Instead, they base their claim on implied acquiescence.

Claims of acquiescence pose "mixed question[s] of law and fact." Mahoney v. Tara, LLC, 2014 VT 90, ¶ 17, 197 Vt. 412 (citation omitted). To establish a boundary line by acquiescence, the claimant must show a mutual recognition of the line by the adjoining property owners and continuous possession of the property up to the line for a fifteen-year period. Amey v. Hall, 123 Vt. 62, 66 (1962); see 12 V.S.A. § 501 (requiring that an action for the recovery of lands be initiated no more than fifteen years after the cause of action accrues). In assessing whether adjoining landowners have mutually recognized a line, this Court looks for "continued satisfaction and compliance with a boundary marked on the ground," which is "persuasive evidence that it is the correct boundary." Okemo Mountain, Inc. v. Lysobey, 2005 VT 55, ¶ 14, 178 Vt. 608 (citing N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 446 (1999)).

The Court often considers objective circumstantial evidence, rather than subjective testimony, to assess satisfaction and compliance with the boundary. Id., ¶ 14 (citation omitted). A failure to dispute the line; occupation up to, but never over, the line; a failure to identify any other indicators of a boundary; and maintenance of property consistent with the marked boundary have all given rise to boundaries-by-acquiescence. See Id. (citing RHN Corp. v. Veibell, 2004 UT 60, ¶ 25, 96 P.3d 935); Lakeview Farm, Inc. v. Enman, 166 Vt. 158, 162-63 (1997); Amey, 123 Vt. at 68-69; Beresford v. C. W. Gray & Sons, Inc., 138 Vt. 308, 310 (1980).

The adjoining landowners do not have to have knowledge of the true boundary to acquiesce to a different line. See Beresford, 138 Vt. at 310 (refuting that a claim by acquiescence cannot prevail where both parties are unaware of the location of the actual line, stating "[i]n fact, this is one of the most frequent sources of lines established by acquiescence.") On the other hand, both parties must know the location of the boundary to which they acquiesced. Heath v. Dudley, 148 Vt. 145, 148-49 (1987); see also Reynolds v. MacDonald, No. 2002-150, slip op. at 1-2 (Vt. Sup. Ct. Sept. 2002) (unpub. mem.) (rejecting claim of acquiescence because the non-claimant property owner could not locate or describe the purported boundary-by-acquiescence).

We also note that once a line is established by acquiescence, that boundary is conclusive upon successors in title. Lakeview Farm, 166 Vt. at 162 (citing O'Neil v. Buchanan, 136 Vt. 331, 333 (1978)).

Based upon the evidence presented at trial, we conclude that the Smiths, the Thompson-Knoxes, and the Heneys mutually recognized and implicitly agreed that the physical line marked the common boundary between 95 and 117 Orchard Lane. Given that the Smiths moved into 95 Orchard Lane in November 2001 and the Heneys did not assert ownership over the disputed area until April 2017, the physical line served as the common boundary for over fifteen years.

Much of the evidence before the Court, both photographic and testimonial, relates to the Smiths' use of the northwest portion of the disputed area and the parties' respective understanding of the physical line. The parties directly contradicted each other on certain points in their testimony. As factfinder, this Court is required to assess the credibility of witnesses and to weigh their testimony accordingly. See In re Application of Lathrop Ltd. P'ship, 2015 VT 49, ¶ 75, 199 Vt. 19 (citation omitted) (discussing the Environmental Court's role as factfinder).

The Smiths used the disputed area in a variety of ways consistent with ownership. They mowed and raked up to the physical line. They played with their children and dog, used the swing set, gardened, and entertained guests in the disputed area. They tended to the lilac bush and the rock garden that formed part of the physical line. They also parked in the corner of their driveway that crosses into the disputed area and raked the gravel when it was disturbed by snow plowing.

Mr. Smith maintained a log and lumber pile along the line. He originally maintained a woodpile in a different location on the line when the Thompson-Knoxes lived at 117 Orchard Lane but moved it farther down the physical line for easier access.

Mr. Smith also removed a cherry tree and an apple tree that grew in the disputed area on the Smith side of the physical line. Mr. Smith did not request permission from the Heneys to remove either tree. Mr. Heney later cut down the remainder of the apple trees on the Heney side of the physical line, but none in the disputed area.

While the Smiths did not necessarily make constant or daily use of the disputed area, they treated the lawn in the disputed area as the average landowner treats a back corner of lawn. See Darling v. Ennis, 138 Vt. 311, 313-14 (1980) ("[C]ontinuous use is not synonymous with constant use. Continuity of use is merely such as an average owner would make of the property, taking into account its nature and condition." (citation omitted)).[2] The Fabianis' testimony and the photographic evidence corroborated the Smiths' account of their use of the disputed area.

The Heneys did not contest most of the uses the Smiths made of the disputed area. While Mr. Heney claimed that he cut down the cherry tree on the Smith side of the physical line, Mr. Smith presented a more detailed account of hiring Bill Agnew to cut the tree, with Mr. Smith renting a stump-grinder and removing the stump himself.

The Heneys also did not produce substantial evidence demonstrating their use of the disputed area.[3] See Roy, 2013 VT 100A, ¶ 61 ("[C]omplete absence from the contested area

[2] Though Darling examined continuity of use in the context of adverse possession, the principles inherent to the doctrine of adverse possession are routinely applied to acquiescence claims given the close kinship between the two claims. See, e.g., Roy v. Woodstock Cmty. Tr., Inc., 2013 VT 100A, ¶¶ 60-61, 195 Vt. 427 (affirming that a statute barring adverse possession claims on public or pious lands applies equally to acquiescence claims because the two doctrines are premised on the same principle); Okemo Mountain, 2005 VT 55, ¶ 14 (citing Pafundi, 169 Vt. at 446) (importing a principle from an adverse possession case and applying it to an acquiescence claim).

[3] Mr. Heney did testify to mowing the disputed area once or twice in the spring of 2016 and defined his actions as assertions of ownership. We conclude that his testimony does not give us cause to find an interruption in the continuity required for acquiescence. Mr. Heney offered no explanation as to why, after about thirteen years of leaving lawn care in the disputed area to the Smiths, he suddenly mowed twice. The Smiths did not see him mowing or notice that the disputed area was mowed. Mr. Heney also did not explain why he then ceased mowing until the following year, when he killed the grass in the disputed area by mowing it so low.

Even if Mr. Heney did mow the disputed area, we conclude that his isolated action, of which the Smiths were unaware, did not serve as an act of ownership sufficient to interrupt continuity. Compare MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, ¶ 24, 175 Vt. 382 (finding an interruption of continuity of adverse possession because the record title holder also used the disputed parking area continuously), with First Congregational Church of Enosburg v. Manley, 2008 VT 9, ¶ 15, 183 Vt. 574 (noting that the act of mowing the grass

implies acquiescence to whatever boundary line the [party asserting acquiescence] observed . . . a landowner so inattentive as to permit occupation of its land for fifteen years must accept the subsequent loss of title." (quoting Pafundi, 169 Vt. at 446)). Mrs. Smith testified that even the Heney children were reluctant to pass the physical line to collect any lost balls.

The Heneys counterargue that the physical line was not the clear demarcation the Smiths make it out to be, asserting that the disputed iron pin, the lilac bush, the rock garden with the maple tree, and the flowering bush were isolated features of the landscape, not dots connecting a line. The Heneys especially focus on the years when the Smiths first moved in. They claim that the apple trees that grew in and near the disputed area obscured any line created by the lilac, maple tree, rock garden, etc., before Mr. Heney removed them in the summer of 2005.

While the evidence shows that the apple trees did interfere with the physical line, in the sense that the features of the physical line became more obvious with the removal of the trees, the evidence also shows that all of the apple trees save one grew on the 117 Orchard Lane property. Thus, the features of the physical line were still apparent as the edge of the 117 Orchard Lane property, a view which was reinforced by the alignment of the features with the disputed iron pin. This was the boundary Mr. Smith testified to walking with the realtor in 2001.

The Heneys offer the related argument that, even after the removal of the apple trees, the physical line was not substantial or obvious enough for a claim of acquiescence. They argue that the features comprising the physical line did not form a continuous line or impede passage between the two properties, especially before the planting of the cedar hedgerow.

While the physical line was not as obvious or impervious as a fence or wall, there is no requirement in the doctrine of acquiescence that the mutually recognized boundary needs to bar passage or be continuous. See, e.g., Okemo Mountain, 2005 VT 55, ¶ 16 (concluding that blazed line of trees marked boundary-by-acquiescence); O'Neil, 136 Vt. at 332-33 (affirming that a low, narrow grassed-over ridge between neighboring lawns established a boundary-by-acquiescence). The features of the physical line did not need to form a barrier to symbolize the common boundary, especially where the Smiths and the Heneys live in close proximity, the

in a disputed area "could also well have been an act of neighborly accommodation." (citation omitted)). The Heneys did not show the type of use or maintenance necessary to interrupt the Smiths' continuity of use, or to convincingly rebut the Smiths' showing of mutual acquiescence to the physical line.

boundary between the properties is not long, and the Smiths regularly and openly maintained and made use of the disputed area up to the line. Also, the physical line was clear enough to the Heneys that they planted pine trees near it in 2008.

The Heneys also claim that they, like the Thompson-Knoxes before them, allowed the Smiths to use the disputed area but did not agree to treat the physical line as a new boundary. This is where the parties' respective testimony divided most sharply.

Mrs. Knox testified to mentioning to the Smiths that she and Mr. Thompson owned the disputed area. Mr. Thompson, however, could not recall any conversations with the Smiths regarding the boundary. The Smiths credibly testified that the Thompson-Knoxes did not discuss the boundary with them. While the evidence shows that Mr. Thompson and the Osgoods discussed his belief that they were using part of his property based on the 1995 Thompson-Knox Survey, he and Mrs. Knox did not disallow the Osgoods' use. Nor did they speak to the Osgoods about the boundary when the Osgoods added the basketball hoop, constructed the rock garden, and placed their woodpile in the disputed area. While the Thompson-Knoxes may have been aware of the true boundary, they acquiesced to the physical line when they did not raise the matter with the Smiths and accepted the Smiths' use of the disputed area. We also did not receive evidence showing that the Osgoods informed the Smiths that the physical line was not the true boundary at the time of sale.

Mr. Heney referenced a conversation with the Smiths regarding their use of the Heneys' property. He also stated that when Mr. Smith proposed replacing the pine trees with the hedgerow, Mr. Smith was requesting permission to plant the hedgerow on the Heneys' land. The Smiths denied that they had any conversations regarding the boundary or that Mr. Smith was asking permission when he proposed the hedgerow.

A number of other considerations support the Smiths' account of the parties' understanding of the common boundary. Mr. Heney did not explain why he and Mrs. Heney consented to a hedgerow that bisected what they claim to be their property (or why they planted pine trees that did the same) when they previously exerted considerable effort to remove the apple trees with the goal of opening up their yard for their children and dog. They repeatedly used their property up to, but never over, the physical line prior to 2017. We are also inclined to

doubt that Mr. Heney's first assertion of ownership over the disputed area would take the form of moving the Smiths' woodpile unannounced if the two families had already discussed the counterintuitive boundary line alleged by the Heneys and were generally on good terms, as both parties stated.

Accordingly, we conclude that the physical line became a boundary-by-acquiescence after the Smiths resided at 95 Orchard Lane for fifteen years.[4] The physical line, however, does not extend along the full length of the shared boundary. It ends at the wooded area in the southeast corner of the Heneys' lot. The Smiths' claim of acquiescence, like the physical line itself, becomes vague and indistinct where it meets the wooded section. The Smiths did not make use of the wooded area and did not present evidence of a clear boundary line through the wooded area. For this reason, we bisect the disputed area and conclude that the Smiths own the open, northwest portion while the Heneys retain the wooded area in the eastern part of the disputed area. The boundary-by-acquiescence extends from the disputed iron pin through the lilac bush, the cedar hedgerow, the rock garden with the maple tree, and the flowering bush, and then joins the record line that is located within and along the wooded area.

Conclusion

As detailed above, we conclude that the Smiths do not own the disputed area by deed. The Smiths, the Heneys, and the Thompson-Knoxes did, however, mutually recognize the physical line as the common boundary between 95 and 117 Orchard Lane for a period of more than 15 years. Thus, the physical line marks a boundary-by-acquiescence. The boundary-by-acquiescence extends from the disputed iron pin through the lilac bush, the cedar hedgerow, the rock garden with the maple tree, and the flowering bush, and then joins the record line that begins at the wooded area. See Exhibits XX and WW. Because the physical line ends at the wooded portion of the disputed area and the Smiths do not have claim to the wooded area by title, acquiescence, or adverse possession, the boundary-by-acquiescence ends with the physical

[4] Because we conclude that the Smiths took title to the northwestern portion of the disputed area by acquiescence, we do not reach their very similar adverse possession claim. Also, the Smiths did not produce any evidence relevant to adverse possession for the wooded portion of the disputed area.

line and the Heneys retain title to the remainder of the disputed area.

This concludes the matter before the Court.[5] A Judgment Order accompanies this Decision.

Electronically signed on January 31, 2019 at 10:21 AM pursuant to V.R.E.F. 7(d).

Thomas G. Walsh, Judge
Superior Court, Civil Division

[5] Because the parties agreed that this decision in the Civil Division regarding the boundary dispute would resolve the coordinated appeal of the Heneys' fence permit in the Environmental Division, we do not reach that matter. We leave it to the parties to take the steps necessary to conclude the Environmental Division appeal.