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Testimony in Support of HB 1135 — Prohibiting the acquisition of prescriptive rights in private roads through adverse use – for the following reasons:

Good [morning/afternoon] Chairwoman Pauer and members of the NH House Municipal and County Government Committee:

My name is Wells Obrecht. My apologies for not being able to address the members of this committee in person; I am submitting written testimony instead. I am in full support of proposed HB 1135, which aims to clarify that no person may acquire rights over another persons' private road or property—whether held in common or wholly owned by a single party—through adverse possession or prescriptive use.

The Urgent Need to Modernize Property Law in the Age of Digital Discovery

In recent years, the landscape of land use and public access has changed dramatically and rapidly. The rapid rise of social media platforms and crowd-sourced mapping applications such as Strava, AllTrails, Trailforks, OnX, Zillow, and Google Maps has made it easier than ever for the public to discover and explore remote areas, including private property.[1] These platforms often feature trails, scenic routes, and outdoor experiences without distinguishing between public and private land, thereby encouraging users to venture into areas they do not have legal access to.[2]

What was once protected by obscurity and remoteness is now exposed to thousands [millions?] of users with GPS-enabled devices [watches, cell phones] and a desire to explore. The allure of a well-reviewed trail, or a geotagged photo, or to break a speed record for hiking and biking, can be compelling enough to override caution, especially when users assume that if it's online, it must be accessible to the public. This surge in online hand-held digital visibility has led to a significant uptick in unintentional, intentional, and oftentimes deliberate and willful trespassing.

This new reality presents a serious challenge for private property owners. Many are not opposed to limited, managed, public use, but they do not wish to open their land to a flood of unrestricted access or completely lose their ability to protect their private property rights. Yet, under current New Hampshire law, even passive or friendly trespass can lead to the ripening of **prescriptive**

[1] Google Maps has over 2 billion monthly active users. Strava reports over 180 million global users. Other map APPS [OnX, TrailForks] do not report specific user data but do list [for some trails] tens of thousands of trail reviews per trail.
[2] Strava has refused to remove user heatmaps on private property.

rights or **adverse possession**, resulting in a permanent loss of private property rights. This is especially concerning for smaller or seasonal landowners who lack the resources or practical ability to monitor, enforce, and police boundaries continuously. Under current vague law, landowners who wish to open land to the public for reasonable or limited use can only do so by risking prescriptive rights or adverse possession rights ripening, and thus losing all or a portion of their own [and potentially abutting neighbor's] private property rights.

Why This Legislation Is Necessary

Under current New Hampshire common law, landowners face significant uncertainty regarding how to defend their property against claims of prescriptive rights. The legal standards giving rise to prescriptive rights, such as "continuous," "open and notorious," and "adverse" are not clearly defined in case law. As a result, property owners must guess what defensive measures will be considered sufficient in court. This ambiguity forces owners to take the most extreme and often unpopular actions, such as erecting signage, fencing, or restricting access entirely, just to protect their rights to private property.

This is especially problematic for roads [driveways, paths] held in common, or owned in sections, by multiple owners. Without clear statutory protection, one owner's unilateral tolerance of unrestricted public access would jeopardize the property rights of all abutting neighbors who may not share the same views on public access. Achieving consensus among multiple owners on defensive strategies is often impossible, leaving the entire group vulnerable to legal claims of prescriptive rights if just one owner [or a minority of owners] does not cooperate.

Examples of Legal Vagueness

1. **"Continuous" Use**

Courts require the trespassers' use to be "continuous" for the statutory period, but do not define frequency:

- How much use is continuous?
    - Is monthly use considered continuous?
    - Does limited seasonal use count as continuous?
    - What if use is sporadic but consistent over the statutory period?

Without clear guidance, landowners cannot know whether occasional public use meets the standard of 'continuous' and thus threatens their rights. Thus, it is impossible for a landowner to (i) know in the first place whether it is even necessary to enact defensive measures to thwart "continuous" use and (ii) what defensive measures will legally break the 'continuous' use. standard.

2. **"Open and Notorious" Use**

This term implies that the trespassers' use must be visible enough for a diligent owner to notice. But what qualifies as "Open and Notorious" use?

- Is a visibly worn path sufficient?
- Must the trespasser announce their use to the landowner?
- Does trespassing that is visible from a public road count as 'open and notorious'?
- If the owner is a seasonal owner and cannot monitor year-round usage, what public usage qualifies as 'open and notorious'?

In wooded or rural areas, this standard is especially vague. For landowners wishing to defend their property rights, it is not clear when a public use rises to the level of 'open and notorious' and as such, it is not clear whether defensive measures are required. And it is not clear what defensive measures by the landowner would prevent a trespassers' 'open and notorious' use.

3. **"Adverse" or "Hostile" Use vs. Permission**

The distinction between "Adverse" [or "Hostile"] use and permissive use is critical, yet it is completely undefined by case law:

- If a landowner puts up a "Welcome" sign, or simply ignores obvious trespassers, does that imply permission? Is this a sufficient defense?
- Must permission be written by the legal owner to the trespasser, or must signage expressly state that "Permission is hereby Given" for the courts to agree that public use is not 'adverse' or 'hostile'?
  - How would a landowner convey Permission to users of Social Media Apps? What if there are miles of access points to a landowners property, must the owner post signs granting permission along the entire property line to defeat an adverse/hostile claim?
- Can permission be implied by conduct or verbal statements, or by the lack of conduct [e.g., not calling the police or simply not confronting every trespasser]?

Courts vary widely in interpreting these scenarios, leaving landowners exposed to the whims of a judicial system with vague and changing standards.

4. **Express vs. Implied Permission**

Some courts accept implied permission as a defense against prescriptive claims, while others require express, documented permission. This inconsistency makes it difficult for landowners to know how to protect themselves, especially when the public is crossing over many different landowners' properties and knowing who has permission [from, say, a neighbor with legal access rights] and who is trespassing is practically impossible.

5. **Exclusivity**

Prescriptive easements do not require exclusive use, but adverse possession does. The lack of clarity around what constitutes "exclusive" or "non-exclusive" use adds further confusion.

Examples of ambiguous court rulings

1. *Jesurum v. WBTSCC Limited Partnership*, 169 N.H. 469 (2016)

- **Issue:** Whether the public had acquired a *prescriptive easement* over private beach property.
- **Ambiguity Highlighted:** The court held that *public use* can be adverse even if the landowner is unaware of it, so long as the use is "open and notorious."
- **Tension:** This case contrasts the facts of the Sanders Point situation in *Jesurum* from the facts of *Warren v. Shortt* where it was difficult for the landowner to distinguish adverse (public) use from permissive use (people using the way in question to get to work pursuant to an easement.) It raises the thorny question: ***How can a landowner defend against adverse use they don't know is happening?***

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2. *Wallace v. Fletcher*, 30 N.H. 434 (1855) and its modern echoes

- **Legacy Case:** Often cited as foundational for prescriptive easements in NH.
- **Modern Confusion:** Courts still cite this 19th-century case, but its standards are vague by today's expectations. For example, it lacks clarity on how frequent or seasonal the trespassing use must be to qualify as "continuous." It highlights one of the hazards that exists today: occasional or seasonal use of a strip of land [path, trail, driveway] may ripen into prescription. How often that use must occur (daily-weekly-monthly?) is decided on a case-by-case basis, thus making these sorts of claims almost impossible to evaluate and thus impossible to defend against in advance. Prudence might dictate closing or gating a road altogether, which may be a solution when only one landowner is involved. But when many abutting landowners use the same long driveway over each other's property, there is no simple defense as a gate is not practical and arguably not permitted by the courts if it harms a neighbors' legal access rights.

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3. *Maddock v. Higgins*, 2023 N.H. LEXIS 45

- **Issue:** Plaintiffs failed to establish adverse possession over a driveway and parking area.
- **Contradiction:** The court found that sporadic use (e.g., parking and clearing brush) was insufficiently "continuous," but did not define what frequency would suffice.
- **Contrast:** In *Jesurum*, seasonal beach use, which many might also consider to be sporadic, was deemed 'continuous'.
- **Ambuiguity:** This inconsistency leaves landowners guessing about when the trespassing use is considered 'continuous.' These cases are highly fact-based, thus they inherently lack certainty and lack guidance for landowners where the facts may vary. Even if an experienced lawyer were consulted, the lawyer likely would have difficulty advising a

client as to whether the client would win or lose an adverse possession or prescription claim. As a result, a landowner wishing to defend his/her property would be advised to take the most extreme defensive measures, but the most extreme measures may not be practical, or affordable, or feasible or agreeable [among multiple owners of an access driveway].

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4. *Ajit Kumar v. SNHS Management Corp.*, No. 2021-0114 (N.H. Sup. Ct. 2022)

- **Issue:** Whether a narrow strip of land had been adversely possessed.
- **Key Point:** The court rejected the claim because the use was not "hostile" enough—despite being open and long-standing.

  The key factor in the court's decision was the granting of permission. The defendant's predecessor granted permission in 2001 and no subsequent acts showed repudiation of that permission. Since adverse possession requires use "without license or permission," permissive use defeats the element of hostility as a matter of law.

- The Kumar order demonstrates the difficulty in evaluating whether a use satisfies the elements of prescription (or adverse possession, per the Kumar case). The lack of clarity itself highlights the need for a legislative solution.
- **Ambiguity:** The court did not clarify what level of "hostility" is required, especially when the use is peaceful and neighborly, but without permission. The Court merely confined its reasoning to the specific record where permission had been granted and did not elaborate on cases involving peaceful, but nonpermissive occupation. Thus, it reaffirmed but did not develop the doctrine's "hostility" element beyond existing precedent. Nor did the court clarify what type of "permission" is sufficient and necessary [e.g., verbal approval, certified letter?] and what types of "permission" fail to prevent a hostile claim [e.g., implied, verbal, signage?] or how one might give permission to the general public without being overwhelmed.

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5. *Marshall v. Burke*, 162 N.H. 560 (2011)

- **Issue:** Whether a prescriptive easement survived a tax deed.
- **Holding:** A prescriptive easement, once vested, is not extinguished by a tax deed [or any sale of the property].
- **Implication:** Even when ownership changes, prescriptive rights can persist—raising concerns for buyers and title insurers.
- **Ambiguity:** How is a new owner to know if the property being purchased is subject to a prescriptive easement or adverse possession immediately after settling on the property, especially if the owner is not aware of such trespassing? Title companies will not insure

against this risk and thus the landowner must risk a complete loss of private property rights when buying property. With social media apps encouraging trespassing, this risk has increased exponentially over the past 10 years and puts downward pressure on land values.

6. *Garrett v. Mueller*, 927 P.2d. 612 (Or. App. 1996)

- **Issue:** Whether a prescriptive easement was established.
- **Holding:** A prescriptive easement was not established because the Plaintiff could not prove "continuous" use where the access to the easement was blocked three weeks before the end of the statutory period.
- **Implication:** An interruption of use of the easement as short as three weeks will be sufficient to defeat a prescriptive easement in this one fact-specific situation.
- **Ambiguity:** Will three weeks closure suffice where the use is only seasonal? Must the closure coincide with the seasonal use or can the closure occur off-season? And how exactly must the access be blocked? Must a guard be present? Is a closed gate sufficient, or must the gate be locked? Must access be blocked 24/7 or only during the times the public is typically trespassing [e.g., dawn to dusk]? Must the blockage be along the entire property line? What if the public merely walks around the blockage? Must the blockage be advertised to the general public and, if so, what qualifies as sufficient advertising?

How This Supports Testimony

These cases show that:

- **"Continuous" use** is inconsistently defined—monthly, seasonal, or sporadic use may or may not qualify depending on the court.
  - As such, what measures a landowner can take to defend their property is unclear. For example:
    - Is signage prohibiting public use sufficient to break continuous use.
    - Is signage welcoming the public use sufficient to prevent 'adverse' and 'hostile' use
    - Is closing the road for three weeks sufficient in all cases? The *Garrett v. Mueller* case would seem to suggest an interruption of use of three weeks is sufficient to defeat a prescriptive easement.
      - Is closing the road for just, for example, 1 day to the public sufficient or must it be closed year-round to the public? Is three weeks sufficient in every case or must it be closed depending on the seasonal usage patterns? Although, a well-documented interruption of use for a shorter duration may succeed in court to interrupt the continuous use of a prescriptive easement, there is no

    case law that supports interruptions of shorter durations such as a day or a week. And it is unclear what documentation is needed for the courts to be convinced that the access was sufficiently blocked.
    - Does the public need to be informed of a road closure and if so, how is 'informed' defined? This question is not answered by the courts.
  - What if use is only seasonal? Could prescriptive easements develop for just the summer? A prescriptive easement could develop according to a seasonal use and it would be limited to the seasonal use despite an extended closure during other months of the year.
  - What if a road [driveway] is closed to vehicles but not to walkers, would closing the road interrupt all uses or just the prohibited use? Closing the road would seem to interrupt the prescriptive right to traverse the road using vehicles but would it also prevent prescriptive rights of those who only wish to walk or ride a bike?

- **"Open and notorious"** is interpreted without clear thresholds—visibility, signage, and landowner presence vary in importance.
  - If a landowner occupies his own property infrequently, how is 'open and notorious' defined with an absent landowner?
    - If the public trespasses when the owner is not occupying the property, is that 'open and notorious'?
  - Is a landowner supposed to police all of his property on a daily basis? What defensive measures can a landowner take on large swaths of land that are not practical to police daily

- **"Adverse" or "hostile"** use is especially murky—courts differ on whether implied permission defeats a claim.
  - What actions are deemed sufficiently hostile for a landowner to know that a potential prescriptive right may ripen? How is a landowner to know if the public use is adverse and hostile – especially in situations where multiple owners have deeded access rights. How is a landowner to distinguish a permitted user [e.g., guest of a neighbor] from an illegal trespasser from a practical day-to-day perspective?

The Limits of Existing Legal Models

Some point to examples like **Kingdom Trails** in Vermont and **Green Woodlands** in New Hampshire as models for public access on private land. However, it is critical to understand that the legal protections these entities rely on pertain **only to liability** such as protection from litigation in the event of injury, not to the loss of property rights through adverse possession or prescriptive use.

These organizations **openly advertise and aggressively invite** the public and are not concerned about overuse or the ripening of adverse claims because the use is clearly **permissive**, not

adverse. Their landowners have made a conscious decision to allow broad, unrestrained, public access, and the law supports them in managing liability. But this model does not apply to landowners and homeowners who wish to retain control and limit [or exclude] public access. For them, the risk is real and growing and there is no clear path to defend private property rights.

The Public Benefits of This Legislation

Contrary to what some may assume, this bill does not restrict public access; it enables it. By removing the threat of prescriptive rights, landowners can feel secure in allowing limited, controlled public use of their property – in a similar way that Kingdom Trails and Green Woodlands allow access due to legal protections from liability. By eliminating the risk of losing private property rights, coupled with existing laws protecting landowners from legal liability, this opens the door to more recreational access, more goodwill between landowners and the public, and more opportunities for conservation-minded collaboration.
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Examples from other regions illustrate this point well:

- **Kingdom Trails** and **Green Woodlands** offer hundreds of miles of recreational trails [bike, XC ski] on private land. These arrangements are possible because landowners are protected from legal claims that could result in permanent loss of control.
- In areas like the **Lakes Region in NH**, where public usage has surged due to social media and tourism, landowners and homeowners are increasingly forced to restrict access to avoid the risk of losing their future rights to manage public access. If this legislation passes, they can instead manage public access responsibly without fear of legal consequences and total loss of control.

The Risks of Inaction

Without this legislation, the following risks remain:

- **Loss of control and ownership**: Once prescriptive rights ripen, landowners and homeowners may permanently lose the ability to exclude others or manage their property.
- **Difficulty obtaining clean title insurance**: The risk of prescriptive rights or adverse possession claims, especially those that may ripen shortly after a sale, can complicate or even prevent the issuance of clean title insurance. This creates uncertainty for buyers and undermines confidence in land transactions. New owners may unknowingly inherit public access rights they had no opportunity to prevent, jeopardizing their investment, private property rights, and long-term plans. This lowers land values.
- **Safety hazards**: Increased public use of narrow, private roads and driveways can impede emergency access and create dangerous conditions. Social media heatmaps [Strava, AllTrails, etc] demonstrate extensive use by the public on private driveways not designed for public vehicles and not designed for high-volume traffic. Publicizing speed records

[e.g., Strava] encourages subsequent users to travel at an excessive speed on driveways/paths not designed for public use or for speed.

- **Environmental degradation**: Overuse of roads and trails leads to erosion, runoff, and pollution, especially in sensitive lake and forest ecosystems.
- **Financial burden**: Maintenance costs fall entirely on private owners, even as public use increases.
- **Legal liability**: Injuries on private land, such as bike or ATV accidents, can expose owners to lawsuits and cleanup costs.
- **Reduced property values**: Uncontrolled public access diminishes the value of affected properties and complicates future sales.

This legislation is not about exclusion; it is about clarity, fairness, and the ability of landowners to manage their property responsibly in a rapidly changing world. Nothing in this HB1135 shall be construed to impair easements or access rights arising by necessity, implication, or express grant.

It is time to modernize our laws to reflect the realities of online digital exposure, widespread and growing trespassing, the complications of shared driveway ownership, and the evolving relationship between private land and public interest.

HB 1135 is a common-sense measure that protects private property rights, encourages and allows for responsible public access, and provides ownership clarity where the courts have failed to do so. It benefits landowners, homeowners, the public, and the legal system alike.

I respectfully urge the committee to support this legislation.

Thank you.

Damage from public use

Private Driveways are too narrow [8-10’ wide] for any increase in public usage over and above the historic 1950s – 2010 usage. Not designed for public access or two-way traffic.