

# History of some Church Hill Easements

Dennis Meadows; December 20, 2021

Disclaimer: I compiled the following information from various sources. I have done my best to present the relevant historical information accurately and to avoid opinions and recommendations. I do not believe there are any significant errors or omissions in this text. However, I am not a lawyer. Thus no one should rely solely on the following for any decision. Those who wish to study the easement issues more thoroughly may be aided in that effort by the numerous Strafford Registry Book and Page references (XXX-YYY) I cite below.

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The Planning Board has received at least 8 plans for the proposed parking lot on Church Hill. The first four parking lot plans submitted (10/28/20, 12/15/20, 1/16/21, 2/2/21) deleted all traces of an access ROW portrayed in the Norway Plains survey of existing conditions. The 4/6/21 and subsequent plans reproduced the Norway Plains' allusion, which, however, locates the ROW differently from the ROW shown in the original subdivision plan.

None of the plans have provided an unobstructed 16' access ROW to Main Street, and all plans have implied the developer is entitled to move sewer lines unilaterally.

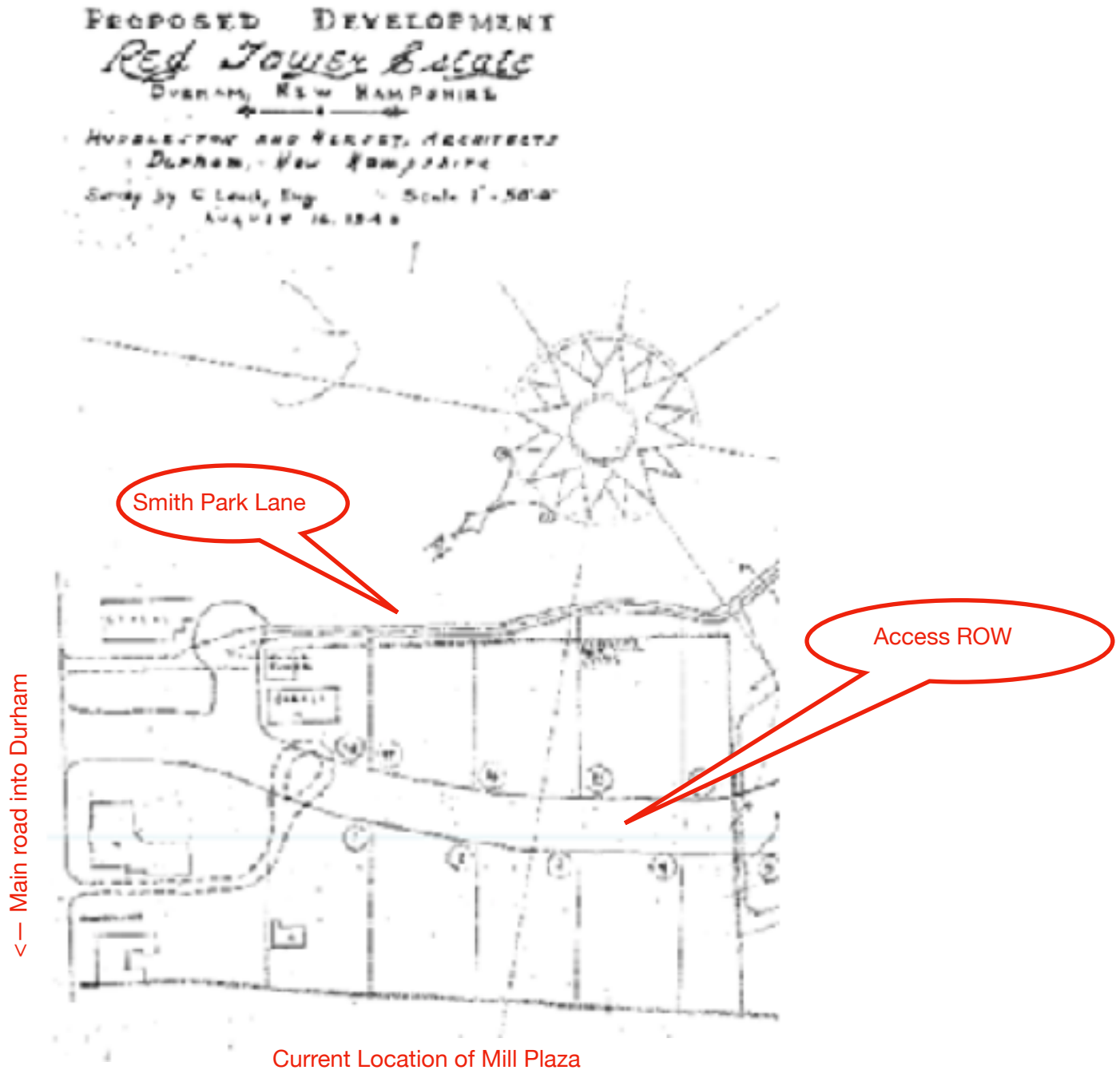
Private easements can create complex legal situations. I was confused by the conflicting statements on December 15, so I have studied the historical record to get some perspective on the dispute. The following is the result.

The Red Tower on Main Street in Durham, N.H. was built by the Rev. John Blydenburgh circa 1790. In 1895 Hamilton Smith became its ninth owner when he bought land that included the Tower. He extensively renovated the house and acquired several more large parcels to create a 70 acre estate around it extending from Main Street down to the Oyster River.

Smith died in 1900, and his widow constructed Memorial Chapel to commemorate his death. Because Mill Pond Road was not built until the 1960s, an existing, private road, Smith Park Lane, was used to reach the chapel from Main Street.

In 1944 Alice H. O. Quinby sold the land and buildings to Loveran and Horne (L&H) (520-470). L&H subdivided the land in several phases. The first phase included all the land relevant to a consideration of the

easements on the site of the proposed parking lot. A plan for that first subdivision was filed with The Strafford Registry of Deeds in 1940.

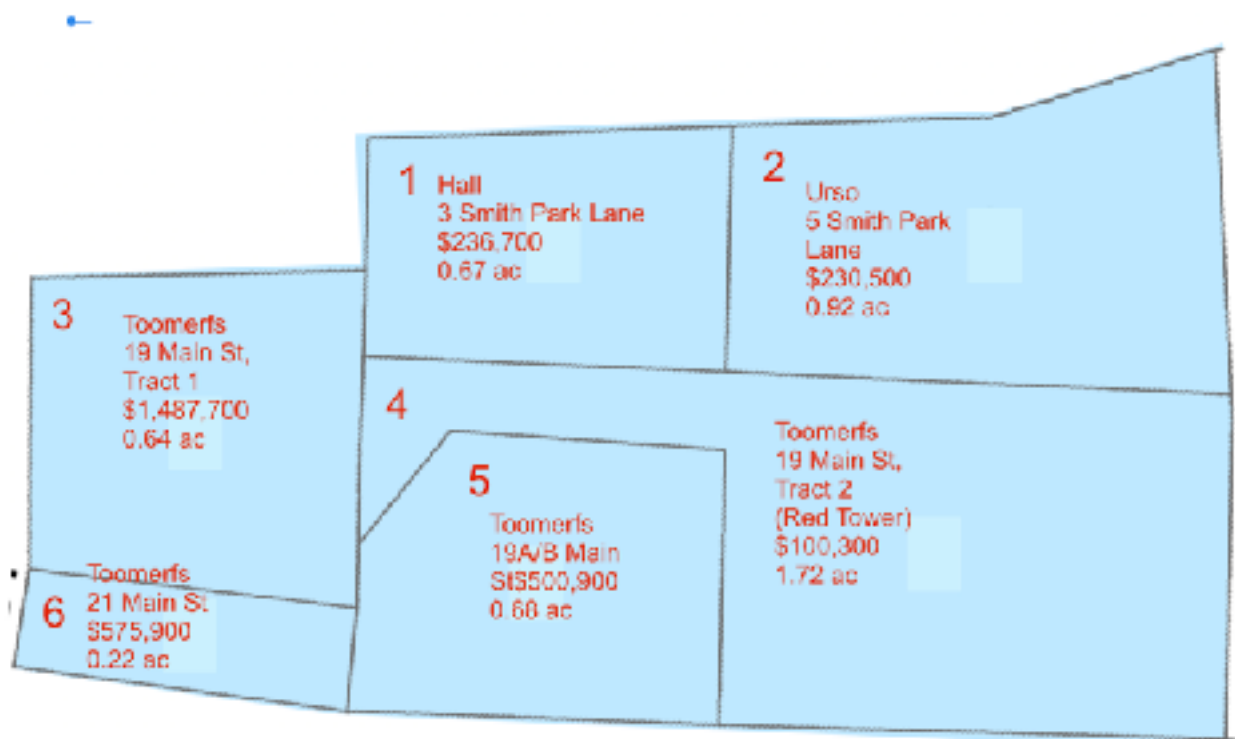


Because L&H did not own Smith Park Lane, implementing the first subdivision required them to create a legal right of way that provided

access to Main Street for the back lots that did not front on the Durham main road. The subdivision plan, which indicates the precise location of the ROW, is reproduced above with my four annotations in red. The subdivision's planned entrance road ran down the hill from Main Street between the main Red Tower residence and the land owned by the Community Church.

The land was subdivided into six separately deeded parcels totalling 4.85 acres.

These were sold at various times to various buyers. They passed down through several owners until today they appear on the Durham tax map as shown below. For each parcel I show my plot reference number (1-6), the current owner, and three data from the Durham tax database - postal address, 2020 assessed valuation, and lot size.



The second phase of the subdivision of L&H property involved the land between Thompson Lane and the Oyster River. A plan for that subdivision was filed with The Strafford Registry in December 1958. It now comprises about 60 separately deeded parcels.

In 2017 Kyreages Inc. sold six separately deeded parcels in a single sale to Toomerfs (4486-213). The transaction included Parcels 3, 4, 5, and 6 above as well as two nearby properties 12 Cowell Drive, and 18 Main Street. The sale price implied by the tax stamp was \$2,500,000. The land was financed with the help of a mortgage loan from Durham residents David and Leslie Schwartz as Trustees of the Geld Realty Trust. That loan was listed in March 2021 at \$2,200,000 (4879-667). In 2020 the total assessed value of the six properties covered by the loan was \$3,758,300.

**#1:** L&H sold Plot 1 to Mary and Harry Hall in 1944 (541-345). Bill Hall grew up in the house on that land, and he now owns it. The Hall deed states that the owner of their land has a right to use Smith Park Lane.

"Together with the right to use in common with others the roadway leading from the main road in Durham Village just north of the Congregational Church for the purpose of entering the above described property over the easterly boundary of said property"

However, this is not a legally enforceable provision, since L&H did not own the Lane and could not legally sell rights to use it.<sup>1</sup> Thus L&H had to include in the deed an explicit ROW across property they did own:

"together with the free and unobstructed use of a sixteen (16) foot wide right of way from the property herein described across other land of the grantors to Main Street."

**#2:** L&H sold Plot 2 to McIntyre July 14, 1950 (582-433). That land passed down through a chain of owners to the Ursos. Each deed contained the unenforceable permission to use Smith Park Lane and also acknowledged the legal right of the buyer to gain access to this parcel via a ROW through the Red Tower Estate:

In 1955 L&H additionally granted McIntyre a precisely located easement allowing the McIntyre sewage line to cross over the Loveren property and connect with the Loveren sewage drain pipe that extends from the original Red Tower residence down to a Durham main sewage line that now passes under the Plaza parking lot. (684-409) That original sewage easement deed conveys rights to a strip of land from the Loveren/McIntyre boundary

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<sup>1</sup> Indeed the ownership of Smith Park Lane is unknown. A recent survey of the Community Church land marked the Lane "Owner Unknown," and CAI reaffirmed that opinion in their current review of Durham land records.

to the point of intersection with the Loveren sewage line. The strip is 15 ' wide and extends 7.5' past the point of intersection. The easement deed states for this strip:

"we will not locate or erect any buildings or structures on or within said right of way which would damage or prevent such maintenance, use, operation, repair, or reconstruction."

The Urso deed explicitly refers to both entitlements:

"Together with the right to use in common with others the roadway leading from the main road in Durham Village just north of the Durham Community Church for purposes of entering said property from (sic) the easterly boundary of said property together with the free and unobstructed use of a sixteen (16) foot right of way across land herein described to Main Street; being the same right of way granted to Harry W. Hall and Mary Jane Hall and Clarence F. Hamilton."

"Together with a fifteen (15) foot right of way for the purpose of a sewer line contained in a deed from Harold W. Loveren to Robert McIntire dated June 8, 1955 and recorded at the Strafford Conty Registry of Deeds at Book 684, Page 409."

Those parcels have had many different owners in the past. Some chose to subdivide their land. The parcels probably will have many different owners in the future. Some may choose to further subdivide their land.

The minimum lot size in the Church Hill District is 5000 sq. ft. Plots 2 and 4 have a combined area of 115,000 sq. ft. It is therefore possible in the future that they could be further subdivided into numerous separately deeded parcels, which would not have access to Main Street via Smith Park Lane.

In 1963 Horne sold to Loveren her half interest in their venture (520-470).

**#3 & #4:** In 1964 Loveren sold Plots 3 and 4 to Gegas (779-245). Gegas sold them to Kyreages, Inc. in 1977 (993-713) and Kyreages Inc. sold them to Toomerfs in 2017 among the six parcels in the above mentioned deed.

**#5:** In 1944 L&H sold Plot 5 with its buildings to Hamilton (522-149). Hamilton sold the property to McCann in 1952 (604-109). He sold it to Kyreages, Inc. in 1977 (1000-674). Kyreages Inc. sold it to Toomerfs in 2017 among the six parcels in the above mentioned deed.

**#6:** Loveren & Horne (L&H) sold Plot 6 to Clarence Hamilton in 1944 (522-149). It passed down through a series of owners until it was sold to the Toomerfs in 2017 among the six parcels in the above mentioned deed.

The proposed parking lot will involve Plots 3, 4, and 5 and invoke the ROW provisions written into the deeds of all three parcels.

The June 2017 deed Toomerfs used to acquire their Church Hill properties contains the following three explicit ROW encumbrances:

for 19 Main Street Tract 1 (**#3**):

"This tract is subject to a right of way sixteen (16) feet wide extending through the property herein described to Main Street, said right of way to be used by the grantee in common with others."

for 19 Main Street Tract 2 (**#4**):

"This tract is subject to an extension of the sixteen (16) foot right of way as set forth in Tract I above for the benefit of the Hall property, said right of way having been granted by deed dated December 30, 1944, and recorded in Strafford County Registry of Deeds, Book 541, Page 34, and a further extension of said sixteen (16) foot right of way for the benefit of the McIntire property, said right of way having been granted by deed dated July 14, 1950, and recorded in Strafford Country Registry of Deeds, Book 582. Page 433."

"This deed is given subject to any and all existing rights of any party or parties to maintain water and/or sewer lines across the property herein described and to enter upon said property and repair said lines as the need should arise."

for 19A & 19B Main Street (**#5**):

"Granting to the Grantee, its successors and assigns, the free and unobstructed use of a sixteen foot wide right of way from the property herein described across land of said Harold W. Loveren and Madeline L. Horne, now owned by the said Kyreages, Inc., to Main Street."<sup>2</sup>

The access ROW obligation was recognized independently by the professional survey firm, Norway Plains Associates, which Toomerfs hired to prepare the survey of existing Church Hill features in August 2019.

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<sup>2</sup> Construction of the parking lot would also violate the easement rights of Plot 5.