STATE OF VERMONT
WINDSOR COUNTY

MICHAEL JOYCE, GREG FAILLACI, and TOWN OF BARNARD	)	**Windsor Superior Court**
	)	**Docket No. 565-11-05 Wrcv**
v.	)	
IRA STEVENS, DONALD WHITNEY, JEAN WHITNEY, DAVID WHITNEY, SHEILA WHITNEY, GORDON WHITNEY, OLIVER SEIBERT, PETER BRAMHALL, MEADOWSEND TIMBERLANDS, INC., and TOWN OF BRIDGEWATER	)	

DECISION RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Michael Joyce and Greg Faillaci are landowners who seek a declaration that the road abutting their Bridgewater camp is a town highway open to the public. The town opposes the complaint, as do the other individual defendants who own property along the road. The central question in the present cross-motions for summary judgment is whether plaintiffs have adduced sufficient evidence to show a genuine issue for trial as to whether the road was ever formally opened as a town highway. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Price v. Leland*, 149 Vt. 518, 521 (1988).

I.

The following facts are viewed in the light most favorable to plaintiffs. *Price*, 149 Vt. at 521. There is a town highway in Bridgewater (TH #11) that runs northerly from the village center to the site of an old red schoolhouse in an area of town known as Bridgewater Hollow. It is undisputed that this segment of the road is a public highway.

Beyond the schoolhouse, the road continues northerly to the Barnard town line. Plaintiffs and the individual defendants own property along this segment of the road, which is known as either the Lone Pine Trail or the Upper Bridgewater Hollow Road. It is this segment of road that is in dispute here. Beyond the town line, the road continues into the town of Barnard, where it is known as the Morgan Road.[1]

[1] "Morgan Road" is also another name for the northernmost portion of the road in Bridgewater. For ease of reference and for purposes of this decision, the court refers to the entire length of the road in Bridgewater between the old red schoolhouse as the Lone Pine Trail, even though the northern half of the road is also known as Bridgewater Hollow Road or the Morgan Road. Any reference in this opinion to "Morgan Road" means the continuation of the road in Barnard. The court notes that it was aware of the various names for the road when reviewing the record.

Plaintiffs hired a surveyor named Peter Franzoni to research the provenance of the Lone Pine Trail and the Morgan Road. He began by looking in the Bridgewater town records but was unable to find an original survey for the road. In fact, he was unable to find original surveys for any of the early town highways, and it appears that the original highway book is missing entirely. There is some suggestion in the town records that the original highway book might have been given over to one Benjamin Perkins in 1791 in exchange for a promise that Perkins would copy the records into another book to be kept by the town. Whether this is the explanation for the missing book or not, all parties agree that the book has been lost to the vicissitudes of time.

Franzoni then looked in the Barnard town records for evidence of the laying out of the Morgan Road. He was able to find the original highway book in Barnard but was not able to find any evidence that the town ever laid out or surveyed the Morgan Road. Nor, for that matter, was he able to find any evidence that the town ever opened the Chateaugay Road, which is another road that runs between the towns of Barnard and Bridgewater somewhat to the west of the roads disputed here. Franzoni thinks that perhaps these roads were laid out by acts of the county commissioners, rather than by the town selectboards, and that the necessary surveys might therefore be recorded in the county books rather than in the town highway books.

Franzoni accordingly searched the county records for evidence of the laying out of either of the two roads. He found that the county keeps very few of its older records on hand, and that many old records were sent to the state archives in Montpelier and Middlesex many years ago. He later learned that other county records might have been lost in courthouse fires that occurred in 1790 and 1854, or transferred to other locations such as the Rutland County Courthouse in the wake of those fires, or given over to private collections.

Franzoni found some old county records in Middlesex, but the volumes were not indexed, and mostly pertained to trial court matters rather than county business. He also visited the Rutland County Courthouse as well as the county libraries in Rutland and Woodstock, but in the end he never found any original records of the laying out or surveying of the Lone Pine Trail or the Morgan Road.

He did find circumstantial evidence that the roads existed. Most importantly, he found records showing that the Bridgewater selectboard twice discontinued portions of the Lone Pine Trail. The first discontinuance took place in November 1859, and was recorded in the town records under the following description: "This certifies that the road running from Noel Angell's to Barnard line is discontinued and set over to the farms from which they were taken originally." It is known from various maps that Noel Angell lived along the Lone Pine Trail somewhere north of where plaintiffs and the individual defendants now own property.

The second discontinuance took place in October 1920. Here, the selectboard discontinued five portions of road, including one meeting the following description: "Commencing at the turn in the road leading from the main road through Bridgewater

Hollow, so-called to buildings now owned by Ernest Adams and occupied by Joseph Adams; thence easterly by the red schoolhouse and northerly and easterly through a part of Bridgewater Hollow and over Jabez Hill, so-called, to the road that leads to the Jabez Maxham place now owned by Stephen Townshend."

Franzoni believes that this description involves a segment of the Lone Pine Trail beginning at the old red schoolhouse and continuing northerly to a fork in the road that bears to the east at Jabez Hill. The fork in the road is a little bit to the south of where Noel Angell's farm used to be. Franzoni concludes from this that, even if the discontinuances were valid, the selectboard never discontinued the portion of the road between the fork and Noel Angell's farm. The length of this segment would be about 2,200 feet or about 6,100 feet depending on whether the 1859 discontinuance began at Noel Angell's dwelling or at his northerly property line. Cf. *Oppenheimer v. Martin*, 2008 VT 78, ¶ 5, 184 Vt. 561 (mem.) (noting similar ambiguity in ancient property description).

Franzoni also found circumstantial evidence of the road in various ancient maps and property deeds. For example, both the 1856 Hosea Dutton map and the 1868 H.B. Thompson map show a road starting near the site of the old red schoolhouse and proceeding northerly across the town line into Barnard. Franzoni explains that these maps were prepared at the request of the towns for the purpose of indexing what was in the town as far as highways and dwellings were concerned, and that the mapmakers did not consult public records when making their maps but rather reported what was on the ground. In addition, there are older deeds that mention "an old highway, now discontinued, leading from Bridgewater Hollow to Barnard in the north line of the property belonging to Noel Angell," and other older town records reference highways running between the towns of Bridgewater and Barnard in the general area of the Lone Pine Trail and the Chateaugay Road.

From all of this circumstantial evidence, Franzoni concludes that there was once a road running from the old red schoolhouse in Bridgewater Hollow all the way to the village of Barnard. Although he does not know when the roads were laid out, he believes that they were laid out by the county commissioners. He is therefore of the opinion that the purported discontinuances that took place in 1859 and 1920 were invalid because they were attempted unilaterally by the town, rather than by the county court. *In re Petition of Mattison*, 120 Vt. 459, 462 (1958). Yet he concedes, as do plaintiffs, that there are no existing records showing that the roads were ever formally opened as public highways.

II.

Plaintiffs are seeking to establish that the Lone Pine Trail was once a town highway running from the old red schoolhouse in Bridgewater Hollow to the Barnard town line. In order to make out their prima facie claim, plaintiffs must show that the road was opened in accordance with the statutory requirements applicable at the time, since "[t]he procedure to be followed in laying out or discontinuing a highway is wholly statutory and the method prescribed must be substantially complied with or the

proceedings will be void." *In re Petition of Mattison*, 120 Vt. 459, 462 (1958); see also *In re Town Highway No. 20 of Town of Georgia*, 2003 VT 76, ¶ 10, 175 Vt. 626 (mem.); *In re Bill*, 168 Vt. 439, 442 (1998).

Plaintiffs concede that there is no evidence showing that the road was officially opened by the town in compliance with the statutory requirements. Nor is there any evidence showing when the road would have been laid out and opened. As a result, it cannot even be determined what the statutory requirements were at the time the road was opened, since those requirements have changed somewhat over time. See *Patchin v. Morrison*, 3 Vt. 590, 592–93 (1831) (describing evolution of statutory requirements pertaining to the opening of highways between 1797 and 1820).

It has always been the case, however, that the opening of a public highway required at least some act on the part of the town selectboard that was sufficiently notorious to place the general public on notice of the public status of the road. *Id.* And by 1833 at least, the statutes expressly required that the road be actually surveyed, that the survey be recorded in the town clerk's office, that the road be opened through a formal act of the selectboard, and that the selectboard issue a certificate of the opening of the road. *Austin v. Town of Middlesex*, 2009 VT 102, ¶ 8. It is for these reasons that "[t]he evidence, that a road has thus been laid out and opened for travel, is usually to be found on the records of the town." *Young v. Town of Wheelock*, 18 Vt. 493, 495 (1846). Here, it is undisputed that there are no town records establishing whether the road was laid out and opened for travel.

Plaintiffs nevertheless contend that there is sufficient circumstantial evidence in the record to support an inference that there was once a road running from the old red schoolhouse in Bridgewater Hollow and the village of Barnard. Plaintiffs point to the evidence of the road on the ground, the historical maps showing the road, the references to the road in the old deeds, the references to other roads in the old town records, and to the discontinuances that were attempted in 1859 and 1920.

Yet even when all the circumstantial evidence is viewed in the light most favorable to plaintiffs, it still does not show whether the road was ever officially opened by the town or the county court. All it proves that the road once existed.[2] This is an important distinction because it was not uncommon for nineteenth-century roads to be surveyed, and even laid out, but still never formally opened by the town. For example, the ancient cases note that sometimes "the towns or the selectmen were adverse or unfriendly to the road laid out by the committee from the legislature, [and thus] they neglected either to make or open the road, and thus rendered nugatory the proceedings of the committee." *Patchin*, 3 Vt. at 592. Other times the town selectboard would survey a road but still "withhold their certificate [of opening], until they were satisfied" that it was

[2] The maps show that roads existed on the ground in the nineteenth century, but they are not reliable evidence to show that the roads were formally opened by the selectboard. *Austin v. Town of Middlesex*, 2009 VT 102, ¶ 5 n.2; *Young*, 18 Vt. at 495–96. And while the ancient deeds and town records also support the existence of the road, they do not make the requisite showing of compliance with the statutory procedures.

appropriate for the town to begin "assum[ing] the responsibility of treating it as an open road." *Young v. Town of Wheelock*, 18 Vt. 493, 496 (1846). It is for this reason that it is not enough merely to assume that because the road existed, it was public.

Plaintiffs argues that the discontinuances themselves are record evidence that the road was officially created, since the selectboard would not have attempted to discontinue a road that did not exist. Yet this is an assumption, since the nineteenth-century cases reflect a considerable degree of confusion on the part of both towns and townspeople about whether particular roads were officially open to the public or not. See, e.g., *Young v. Town of Wheelock*, 18 Vt. 493 (1846); *Blodget v. Town of Royalton*, 14 Vt. 288 (1842). It was apparently not uncommon for towns to discontinue roads that had never been officially opened "as a way of finally shutting a door on the question of their status." Paul S. Gillies, *Sewing Clouds*, 35 Vt. Bar J. 10 (Winter 2010). As a result, the court is not persuaded that it should pry those doors open now by using the discontinuances as evidence that the road had been formally opened in accordance with the statutory procedures. It simply presumes too much, and it would be absurd in the extreme to conclude that the ultimate legal consequence of these discontinuances, 150 years later, was to *create* rather than *discontinue* a road.

Plaintiffs argue in a related vein that the selectboard judicially admitted the existence of the road through the discontinuances in 1859 and 1920, and also by ruling in 2005 that the discontinuances had been conducted in accordance with the law. The doctrine of judicial admissions is meant to provide "an efficient means by which to isolate the contested facts from the facts which either party has already admitted are true," but "[t]he requirements for an admission are strict," and here there is nothing in the ancient discontinuances or in the 2005 ruling that establishes an unequivocal concession of the fact that the roads were laid out in accordance with the statutory procedures, or that such was made "for the express purpose of dispensing with formal proof of one of the facts in issue" in this litigation. See *Trotier v. Basset*, 174 Vt. 520, 521–22 (2002) (mem.) (explaining doctrine of judicial admissions). It is plain that the parties contest whether the Lone Pine Trail was ever formally opened as a town road, and the court is not persuaded that the doctrine of judicial admissions applies in this context.

Finally, plaintiffs argue that the burden of proof has been wrongly assigned here, and that it should be the town who bears the burden of disproving the existence of the road, since they are the ones who lost the original highway book. Yet the rule here is simply that "[i]n a quiet title action, the plaintiffs have the burden of proof and must make out a prima facie case of title. If the plaintiffs make out a prima facie case, the defendants then have the burden of proving superior right or title in themselves." *McAdams v. Town of Barnard*, 2007 VT 61, ¶ 13, 182 Vt. 259 (quoting *Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet County Road Comm'n*, 600 N.W.2d 698, 700 (Mich. Ct. App. 1999)). To the extent that some of the reported cases mention that the burden of proof was properly assigned "to the town" to prove the existence of a public road, e.g., *McAdams*, 2007 VT 61, ¶ 13, it was only because it was the town who was asserting the existence of a public road in that case. Nothing in the

recent cases changes the general rule that it is the party seeking to establish the existence of a public road who bears the burden of proving that proposition.

For these reasons, the court must conclude that plaintiffs have not adduced sufficient evidence to make out their prima facie claim that the Lone Pine Trail was opened as a public highway in compliance with the legal requirements in existence at the time.

III.

It is not uncommon for ancient records to be lost, and Vermont law accordingly permits parties to establish the existence of public roads through methods other than demonstration of compliance with the statutory procedures. See *Young v. Town of Wheelock*, 18 Vt. 493, 495 (1846) (explaining that "when resort is had to any other evidence than the records of the town, as prescription, or usage, it supposes, that the highway is, or has been, legally laid out and established, and that the record has either been lost, or was omitted to be made"). Here, plaintiffs contend that the existence of the road can be proven under the theory of dedication and acceptance, which involves "the setting apart of land for public use, either expressly or by implication of law." *Druke v. Town of Newfane*, 137 Vt. 571, 574 (1979). Dedication of a roadway requires both an offer to dedicate the land and an acceptance of that offer by the town. *Smith v. Town of Derby*, 170 Vt. 553, 554 (1999) (mem.).

The record contains at least some evidence from which dedication may be inferred. Plaintiffs have submitted affidavits from longtime Bridgewater residents Nelson Lee and Charles Astbury, who assert that the Lone Pine Trail has been "open to the general use and circulation of the public" for as long as they can remember, extending at least as far back as the 1940s. Such "long acquiescence in use by the public" can constitute evidence tending to show dedication. *Town of South Hero v. Wood*, 2006 VT 28, ¶ 11, 179 Vt. 417 (quoting *Druke*, 137 Vt. at 574).

Missing from the record here, however, is any evidence of acceptance. See *Druke*, 137 Vt. at 576 ("Dedication . . . is not complete without an acceptance."). Acceptance normally requires "both an act of acceptance and an intent to accept the dedication," *Smith v. Town of Derby*, 170 Vt. 553, 554 (1999), and these elements are most often inferred from evidence that the town, acting through its proper officials, has voluntarily assumed the burden of maintaining the road. *Town of Springfield v. Newton*, 115 Vt. 39, 43–44 (1947). Here, the record shows no evidence that the town ever maintained the road, either before or after the purported discontinuances.

Indeed, the only suggestion of acceptance in the record is that the road appeared twice on the town maps in the 1940s and 1970s as a legal trail. Such a designation is not sufficient evidence to show that the road was accepted as a town highway, since legal trails are not highways, and since the town has no responsibility for maintaining them. 19 V.S.A. § 302(a)(5). Nor does this evidence tend to show that the roads were dedicated and accepted as highways before the discontinuances. Since there is no evidence of

maintenance in this case, or any other evidence that the town accepted the road *as a highway*, the court must conclude that there is no genuine issue for trial on the theory of dedication and acceptance.

In reaching the foregoing conclusions, the court has been mindful that it must view all of the record evidence in the light most favorable to plaintiffs when deciding whether a genuine issue exists for trial. *Price v. Leland*, 149 Vt. 518, 521 (1988). Even when viewed in this light, however, the evidence shows only that there is a road running between the old red schoolhouse in Bridgewater Hollow and the village of Barnard, and the road has existed on the ground for quite some time. The record does not go on to show that the road was ever formally surveyed, laid out, or officially opened, or that the road was ever accepted as a road by the town. As such, the court must conclude that plaintiffs have failed to adduce evidence sufficient to make out their prima facie claim; summary judgment is accordingly granted to defendants on the demands for relief numbered (1)–(5) in the Amended Complaint for Declaratory Relief filed October 24, 2006. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

IV.

In Count VII of the Second Amended Complaint, filed July 16, 2008, plaintiffs requested a declaration in the alternative that they have a common-law right of private access to their property under the holding of *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 208 (2000). The common-law right of private access, however, applies only "when a public road is discontinued or abandoned." *Id.* It therefore does not apply here, since it has not been proven that the Lone Pine Trail was ever a public road. See *id.* (explaining that the common-law right of access expressly requires a finding that the road was public).

Yet defendants concede that plaintiffs have a right to access their property. See *Defendants' Motion for Summary Judgment* at 4 ("It is not in dispute and is admitted by each of the defendants that there exists an easement to the benefit of each of the property owners along Bridgewater Hollow Road, for purposes of ingress and egress within the traveled portion of the so-called Bridgewater Hollow Road and proceeding in a generally southerly direction from each such property to the northerly terminus of Bridgewater town road number 11. This easement is an easement in common with other property owners adjacent to and southerly of each property owner."). The concession, however, differs in scope from the relief requested by plaintiffs in Count VII of the Second Amended Complaint, which includes the right to travel north on the road to the Barnard town line. It therefore appears that the parties are perhaps close to an agreement that would resolve Count VII, but the record does not support the grant of summary judgment at this time.

ORDER

(1) Defendants' Motion for Summary Judgment (MPR #14), filed September 1, 2009, is ***granted*** as to the demands for relief numbered (1)–(5) in the Amended

Complaint for Declaratory Relief filed October 24, 2006, and ***denied*** as to Count VII of the Second Amended Complaint filed July 16, 2008;

(2) Plaintiffs' Motion for Summary Judgment (MPR #15), filed September 1, 2009, is ***denied***; and

(3) A final hearing shall be scheduled on Count VII of the Second Amended Complaint.

Dated at Woodstock, Vermont this 30 day of April, 2010.

Hon. Harold E. Eaton, Jr.
Presiding Judge

FILED

APR 30 2010

WINDSOR COUNTY CLERK