STATE OF MAINE
LINCOLN, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-15-09

LESLIE B. LILLY et al.,
Plaintiffs,

v.

TOWN OF WESTPORT ISLAND et al.,
Defendants.

JUDGMENT AFTER TRIAL

Findings of Fact

Plaintiff Leslie Lilly owns property located on Baker Road[1] in the Town of Westport Island, which was previously owned by Josiah Parsons ("the Property"). Baker Road runs from State Route 144, crosses a bridge, passes the Plaintiffs' barn, then continues on toward a neighbor's property. The disputed section of the road is that which runs from the center of the bridge to the Plaintiffs' barn ("Disputed Section").

The Town of Westport Island ("the Town") was formerly part of the Town of Edgecomb. While still part of the Town of Edgecomb, the Town meeting minutes from July 5, 1785 ("the 1785 Document") state: "voted = to lay out a road from Josiah Parsons' house to the main road on his own cost." This is evidenced by a certified copy of a 1916 duplicate of the original 1785 Document, certified by the Town's clerk.[2]

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[1] Sometimes also called "Bakers Road" or "Baker's Road."

[2] In her Opposition to Defendant's Motion for Summary Judgment, Plaintiff Lilly objected to the admission of the 1785 Document, which the Court overruled in its Summary Judgment Order. Plaintiff renewed her objection at trial, and the Court agreed to re-consider the objection if new evidence regarding the Document was entered. As no further evidence regarding the 1785 Document was adduced at trial, the Court's earlier ruling on the admission of the 1785 Document stands.

This Property, formerly owned by Josiah Parsons, at a later point belonged to Robert Woods Baker and Margaret H. Baker, who conveyed it to Marine Research and Development Corp. ("Marine Research") in 1964. (*See* Def.'s Ex. 4, Lincoln County Registry of Deeds Bk. 607, Pg. 74-76). In the deed description, it provided: "EXCEPTING from the above [metes & bounds description] (1) the town roads." (*Id*). The Town foreclosed upon the Property while it was owned by Marine Research for unpaid taxes in the years 2011/12, 2012/13, and 2013/14. (*See* Def.'s Ex. 5, Lincoln County Registry of Deeds Bk. 4837, Pg. 210-212). The Town then conveyed the Property to Plaintiff Lilly in 2014. (*Id*). That 2014 deed description also provides: "EXCEPTING from the above [metes & bounds description] (1) the town roads" and declares that it is conveying the same property contained in the deed from the Bakers to Marine Research in 1964. (*Id*).

On September 30, 2015, the Plaintiffs filed a complaint in the Superior Court seeking declaratory judgment and an injunction, along with an appeal pursuant to M.R. Civ. P. 80B, decision on which has been stayed pending the result of this Order. Plaintiffs seek a declaration from the Court of the parties' respective rights to the Disputed Section of Baker Road and an injunction prohibiting the Town from entering the Property without the Plaintiffs' permission. Plaintiff Lilly argues that the Disputed Section is her private road, while the Town asserts that it has a public easement[3] over it. A trial was conducted in this matter on October 5 & 6, 2017. Any findings of fact contained in this judgment are based on the evidence admitted at trial.

Discussion

In an action for declaratory judgment, the burden of proof is determined "by reference to the substantive gravamen of the complaint." *Hodgdon v. Campbell*, 411 A.2d

[3] Referred to as "public easement," "town road," "town way," or the like.

667, 670-671 (Me. 1980) (internal citations omitted). The burden of proof is placed on "the party who asserts the affirmative of the controlling issues of the case, whether or not he is the nominal plaintiff in the action." *Id.* The party asserting that an easement exists is the party asserting the affirmative, and therefore has the burden. *See French v. Estate of Guzan*, 2015 ME 152, ¶ 16, 128 A.3d 657.

Here, Plaintiff Lilly brought this action seeking a determination that the Disputed Section of Baker Road is not a public way. The Town is asserting the affirmative: that the Disputed Section is an easement, either by prescription, by layout and acceptance, or by reservation. Therefore, the Town bears the burden of persuasion on these issues. If the merits lead to a discussion of abandonment of a public easement, that then becomes Plaintiff's burden.

1. Easement by Prescription

"The requirements for the creation of a public way by prescriptive use parallel those for the creation of a prescriptive easement. The party asserting an easement by prescription must prove continuous use for at least 20 years under a claim of right adverse to the owner, with his knowledge and acquiescence, or a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." *Stickney v. City of Saco*, 2001 ME 69, ¶ 16, 770 A.2d 592 (internal citations and quotations omitted). There was much evidence at trial admitted to prove or disprove whether there was maintenance to the Disputed Section of Baker Road for 20 years to establish prescription. However, easement by prescription is unavailable to the Town due to the doctrine of merger, which extinguished any public easement the Town may have had when it deeded the Property to Plaintiff in 2014.

"[A]n easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right." *Dority v. Dunning*,

78 Me. 381, 387, 6 A. 6 (Me. 1886). "Once extinguished, as here by merger, the easement does not come again into existence upon a separation of the former servient and dominant estates unless a proper new grant or reservation is made." *Fitanides v. Holman*, 210 A.2d 65, 67 (Me. 1973) (*citing Dority*, 78 Me. 381).

After the Town foreclosed upon and gained title to the Property, it then owned both the "dominant" as well as the "servient" estate of any public easement over the Property that would have existed prior to the Town's ownership of it. Therefore, any easement would have merged and extinguished when the Town gained ownership of the Property. Consequently, when the Town conveyed the Property to Plaintiff Lilly in 2014, any easement that may have existed prior to the Town's ownership would not have been revived upon conveyance of the formerly "dominant" estate to Plaintiff Lilly.

Thus, any easement by prescription that the Town attempted to establish prior to 2014 has been extinguished. And as it has not been 20 years since the Town conveyed the Property to Plaintiff Lilly, an easement by prescription cannot be established post-Town ownership. Thus, the Town cannot meet its burden to show it has a public easement by prescription.

2. Layout & Acceptance and Abandonment

The Town has also argued that Plaintiff Lilly has not shown 30 years of non-maintenance, and therefore cannot prove abandonment under 23 M.R.S. § 3028. However, an easement cannot be abandoned unless it first exists. The Town asserts that a public easement was created through layout and acceptance,[4] and that it continues to exist because the Plaintiff Lilly has not met her burden to show abandonment.

[4] In its Motion for Summary Judgment, the Town argued establishment of a public easement through either the 1785 Document another Town document from 1838. The Town has since abandoned its

As Maine was part of Massachusetts until 1820, the laws of Massachusetts at the time are applicable in analyzing the 1785 Document. Although the Massachusetts Constitution was ratified in 1780, the first law post-ratification regarding the laying out and accepting of town ways was enacted 1786. (1786 Mass. Act, Ch. 67, "An Act Directing the Method for Laying Out Highways"). Therefore, the Massachusetts Province Laws in place at the time of the Constitution's ratification, which remained in place post-ratification, control. *See* Frederick Huntley Magison & Thomas Tracy Bouvé, *The Statute Law of Municipal Corporations in Massachusetts*, 590 (Matthew Bender & Company, 1917).

The first of the Province Laws regarding highways were enacted in the 1690s. (Prov. Law. 1692-93 Chap. 28 "An Act for Regulating of Townships, Choice of Town Officers, And Setting Forth Their Power"; Prov. Laws 1693-94 Chap. 6, "An Act For Highwayes"). There were several other statutes, or amendments to statutes, throughout the first half of the 1700s. The one with the most effect on the matter at hand was enacted in 1756-57 because the prior method of laying out roads was "found inconvenient." (Prov. Laws 1756-57, Chap. 18; *See also* Magison & Bouvé, The Statute Law of Municipal Corporations in Massachusetts, 587). A Massachusetts Land Court decision citing the Province Laws describes the state of the law as follows:

> The procedures required in 1766 to establish a county highway are set forth in the Provence Laws of 1756-1757, chapter 18, section 1. In short, the statute required: (i) petition to the court of general sessions; (ii) the court's determination whether common convenience and necessity required a new layout or alteration; and (iii) the court's appointment of a committee of five "disinterested, sufficient freeholders" to (a) view and lay out the highway, (b) serve notice to all interested persons, (c) swear under oath to perform their service, (d) ascertain the place and course of the road, (e) determine damages, if any, to abutters, and (f)

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argument regarding the 1838 document and proceeds solely on arguing layout and acceptance through the 1785 Document.

> make its return to the court under the hand and seal of a majority of the committee.

Recore v. Town of Conway, 8 LCR 329, 330, 2000 Mass. LCR LEXIS 28 (Mass. Land Ct. 2000).[5]

The only evidence establishing the layout and acceptance of the road is the 1785 Document, which stated: "voted = to lay out a road from Josiah Parsons' house to the main road on his own cost." There is no evidence of a petition to the court of general sessions or whether any action was taken by that court in accordance with the Province Laws of 1756-57 that were in place in 1785. The Town, therefore, has not met its burden to show that a county highway (or a public easement) was laid out and accepted through the 1785 Document. Since no public easement has been established, a discussion of abandonment as a consequence of 30 years of non-maintenance via 23 M.R.S. § 3028 is not necessary.

3. "Excepting . . . Town Roads"

The Town last claims that the language in the deeds stating "EXCEPTING . . . town roads" is evidence that a public easement exists.

The Town argues that the same language was used in the 2014 deed as the 1964 deed, perhaps in older deeds as well, and that the language itself created and reserved an easement when it was written. "A mere reservation in favor of one not a party to the deed cannot create any right in interest not previously existing." *Town of Manchester v. Augusta Country Club*, 477 A.2d 1124, 1130-1121 (Me. 1984) (*citing Hill v. Lord*, 48 Me. 82 (1861)). Since there is no evidence that the Town owned the property prior to 2014, and therefore not a party to any prior deeds, using the language "EXCEPTING . . . town

[5] There were no other amendments to the Province Laws regarding layout and acceptance of public ways between 1766 and 1785. *See* Magison & Bouvé, The Statute Law of Municipal Corporations in Massachusetts, 588. This passage, therefore, accurately describes the state of the law in 1785.

roads" did not itself create a public easement for the Town. *See also Anchors v. Manter*, 714 A.2d 134, 137-138 (Me. 1998) (*citing* 7-60 Thompson on Real Property § 60.03(a)(2)(ii), "the conceptual problem underlying the existence of the rule [that an easement may not be reserved in a deed to a third party] was that the easement one wished to convey to a third person did not exist before the property was conveyed away").

The Town also did not properly reserve a public easement when it conveyed the Property to Plaintiff Lilly in 2014.[6] The 2014 deed purports to convey the same property described in the 1964 deed from the Bakers to Marine Research, and uses the exact language for both the description and the exceptions as in the 1964 deed. (*See* Def.'s Ex. 4, 5). Therefore, it appears to be the intent of the parties for the Town to convey to Plaintiff exactly what the Bakers conveyed to Marine Research in 1964. Since it has been established that no public easement existed in 1964 by prescription, by layout and acceptance, or by the language of the deed, it could not have been the parties' intent to create any new property rights not existing in the 1964 deed. Therefore, no public easement was transferred or reserved when the Town deeded the exact same property rights to Plaintiff Lilly in 2014 as it gained in the foreclosure of the Property as deeded to Marine Research from the Bakers.[7]

Lastly, the fact that the deed description says "town roads," plural, is not evidence that there was a public easement over the Disputed Section of Baker Road. It is agreed that a public easement exists over Fowles Road, another road on the Property. The Town

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[6] Although the deed says "excepting," the Town can argue reservation because "[t]he distinction between 'reservation' and 'exception,' however, is now virtually obsolete because the intention of the parties-not the words in the deed-controls and the two terms are used interchangeably." *Stickney*, 2001 ME 69, ¶ 35.

[7] Note also that 23 M.R.S. § 3022 only allows a public easement to be created by first posting notice of its intentions for at least 7 days in two public places near the proposed pubic way. There is no evidence this was done before the Property was conveyed to Plaintiff Lilly in 2014. So it is unclear whether the Town could have even created a public easement by reserving it in the conveyance to Plaintiff.

argues that use of the plural "roads," indicates that both Fowles Road and Baker Road are public ways. For the same reasons as set forth above, that language does not create or reserve a public easement.

80B Appeal

Plaintiffs' appeal pursuant to M.R. Civ. P. 80B requested that two letters from the Town, dated September 3 and 8, 2015, ordering them to remove obstructions from the public way, and any Town deliberations of the letters, be "reviewed and set aside as being in excess of the lawful exercise of power of a local government." (Compl. ¶ 71). As the Disputed Section of Baker Road is not a public way, the Town has no authority to order Plaintiff Lilly to remove obstructions from it. Therefore, a review of the letters, and the deliberations surrounding them, is no longer necessary. Although a stay was issued on this Count, pending the outcome of this Order, it is not necessary to issue a separate ruling on the 80B issue because it is now moot.

Conclusion

Count I – Declaratory Judgment: The Court finds that Baker Road is owned by Plaintiff Lilly and no public easement exists over the Disputed Section of the road that is on her Property. Judgment is entered for the Plaintiffs on this count.

Count II - Injunction: The Town must cease all efforts to alter or maintain the Disputed Portion of Baker Road, as it has no right to do so. Judgment is entered for the Plaintiffs on this count.

Count III – 80B Appeal: Moot.

DATE: January 30, 2018

Daniel I. Billings
Justice, Maine Superior Court