79 Mass.App.Ct. 1125
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Robert C. **SMITH**, trustee [1] & others [2]
v.
TOWN OF **WEST** **TISBURY** & others. [3]

No. 10–P–785.
|
June 14, 2011.

By the Court (BERRY, WOLOHOJIAN & HANLON, JJ.).

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** The plaintiffs are property owners and trustees of two realty trusts; they sought to resolve ownership and access rights to portions of Rogers Path, an unpaved way that crosses their property in **West** **Tisbury** (**town**). After a jury-waived trial, a judge of the Superior Court granted declaratory judgment in favor of the **town** and its selectmen. The plaintiffs appeal, arguing there was insufficient evidence to support the finding that the **town**, in its corporate capacity, had acquired a prescriptive easement over the path by asserting dominion and control over it. We affirm.

Background. Rogers Path is an unpaved way about a mile in length. It extends from State Road on the south to South Indian Hill Road on the north. The path passes a cemetery, curves around the cemetery, and travels northeasterly to a point within property purchased by several of the plaintiffs. The path has existed since at least 1826. It is believed that the cemetery was deeded to the **town** between 1860 and 1863; the **town** meeting records from 1922 forward show that the **town** regularly appropriated and spent funds to maintain the **town** cemeteries.

The southern portion of the path has been regularly used for vehicle traffic. As found by the judge, the northern portion of the path's "topography is consistent with that of a cart and vehicle path of historical use.... The width of the pathway remains quite consistent [and the] encroachment of vegetation is relatively new growth." Although the judge found that the northern section of the path was not regularly used for vehicle traffic, he found that the section had been used by carts and vehicles and that it had not been used solely for human and equine foot traffic. Historically, Rogers Path in its entirety was a through route which connected two villages and the judge found it "began as a cart way, became a path, then a lane, [and] then a road."

The parties do not dispute that the southern portion of the path has been in continuous and regular use, including for the **town's** maintenance of the cemetery. As to the northern portion of the path, the **town** cemetery workers used it when exiting the cemetery, when going to other jobs, or to move equipment. The judge found that "[t]he sum of [the witnesses] testimony established that the public has made open, notorious, and continuous use of the [p]ath for well more than twenty years. This use includes use by [**t]own** officials and employees, including cemetery commissioners, the cemetery superintendent, the [**t]own** highway superintendent, and the veterans' agent." [4] The judge also noted that the **town** has never had more than 500 residents and, thus, the frequency of the use of the path by the public was expected to be proportionate to the small number of residents.

In 1995, the planning board approved a subdivision plan for the plaintiffs' land which contained a provision prohibiting vehicular access on the path. In 2001, the **town** entered into a land management agreement for the path, calling for the Martha's Vineyard Land Bank Commission to maintain the path to allow public access by foot, hoof, and bicycle passage. "The plaintiffs, wishing to prevent public passage, prevented Land Bank representatives from entering the [p]ath to trim vegetation, and brought this action [in 2002] to void the [a]greement."

***2** *Discussion.* On review of a jury waived trial, "[t]he findings of fact of the judge are accepted unless they are clearly erroneous" and "[w]e review the judge's legal conclusions de novo." *T.W. Nickerson, Inc. v. Fleet Natl. Bank*, 456 Mass. 562, 569 (2010). See *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 420 (2005) ("[W]e are bound by a judge's findings of fact that are supported by the evidence, including all inferences that may reasonably be drawn from the evidence"). "Whether the elements of a claim for prescriptive easement have been satisfied is essentially a factual question for the trial judge." *Denardo v. Stanton*, 74 Mass.App.Ct. 358, 363 (2009).

The plaintiffs contend there was insufficient evidence to show that the **town** had acquired prescriptive rights over the northern portion of Rogers Path, that crosses their property. See *McLaughlin v. Marblehead,* 68 Mass.App.Ct. 490, 495 (2007) ("The **town**, as the proponent of public rights in [a way], bears the burden of proof"). A road may become a public way through prescription. *Fenn v. Middleborough,* 7 Mass.App.Ct. 80, 83–84 (1979). "The test by which a municipality acquires a prescriptive easement is basically the same as that for an individual—any unexplained use for more than twenty years which is open, continuous, and notorious is presumed to be adverse and conducted under a claim of right.... In addition to these requirements, it is also necessary for a municipality to establish that its acts of disseisin constitute 'corporate action.' " *Daley v. Swampscott,* 11 Mass.App.Ct. 822, 827–828 (1981) (internal citations omitted). "What appears to be necessary is proof sufficient to satisfy a trier of fact that the municipality has exercised dominion and control over the land in its corporate capacity through authorized acts of its employees, agents or representatives to conduct or maintain a public use thereon for the general benefit of its inhabitants." *Id.* at 829.

Without conceding that the **town** has satisfied the other elements of its prescriptive easement claim, the plaintiffs argue, in the main, that the **town** did not prove that it exercised dominion and control over their land in its corporate capacity. We disagree, as the "judge's determination that corporate action was present must stand 'if warranted on any view of the evidence and all inferences therefrom.' " *Id.* at 830, quoting from *Otis Power Co. v. Wolin,* 340 Mass. 391, 395–396 (1960). Here, the judge ruled that "the evidence of the **town's** budgetary appropriations and use of Rogers Path in relation to maintenance of the cemetery at the southern end of the path is meager, but sufficient, corporate action to support the establishment of prescriptive rights. In contrast to circumstances where **town** officials used property in a purely personal, unauthorized capacity, here there is evidence of use, and at least some maintenance, of the path for purposes related to providing a municipal benefit, namely the maintenance of the cemetery." [5]

***3** The judge's careful and thorough findings adequately establish that the entire portion of Rogers Path was acquired by the **town** through prescription; they are not clearly erroneous. Contrast *McLaughlin v. Marblehead,* 68 Mass.App.Ct. at 499–500 ("[T]here is no evidence in the record that the **town** ever performed maintenance or work on [the road]").

Judgment affirmed.

All Citations

79 Mass.App.Ct. 1125, 948 N.E.2d 918 (Table), 2011 WL 2313836

Footnotes

1 Of RTS Realty Trust

2 Tracey **Smith** as trustee of RTS Realty Trust, Scott F. Bermudes, Cynthia L. Cornwell, Mark Baumhofer, Kimberly C. Baumhofer, Alex Alexander, and Laura L. Alexander as trustees for AA Realty Trust.

3 John S. Alley, Cynthia E. Mitchell, and John G. Early in their capacity as selectmen of the **town** of **West Tisbury**.

4 The judge also found "Limited use by members of the public post–1995 is irrelevant to ... the [**t]own's** claim of a prescriptive easement. Implicit neighborly consent by the plaintiffs to use [the path] post–1995 is also irrelevant."

5 The plaintiffs argue that the court erroneously admitted, over their objection, copies of the **town's** annual report from 1922 to 1987, which showed that the **town** allocated and spent funds for the maintenance of the cemetery. They contend that the judge's admission and substantial reliance on this evidence was clear error where it had no bearing on the **town's** use or control over the northern section of the path, crossing their property. However, as the primary contested issue at trial was the **town's** use of the entire path, there was no error in the admission of these records. Mass. G. Evid. § 401 (2010). *Commonwealth v. Tucker,* 189 Mass. 457, 467 (1905) ("Evidence must go in by piecemeal, and evidence having a tendency to prove a proposition is not inadmissible simply because it does not wholly prove the proposition. It is enough if in connection with other evidence it helps a little").