COPY

At a Term of the Supreme Court of the State of New York, held in and for the County of Lewis at Lowville, New York on August 2, 2007.

Present: Hon. Joseph D. McGuire, Justice

FRANK KOGUT and DEBRA KOGUT
Petitioners,

DECISION/ORDER

Index No. CA2007-00264
RJI No. S24 2007-0100

TOWN OF MARTINSBURG

Respondents .

McGuire, J.

Petitioners have applied to the Court for an Order overturning Respondent Town of Martinsburg's (Town) decision not to maintain Freeman Road, a road located in the Town; and for an Order directing the Town to comply with the New York State Highway Law, and maintain Freeman Road (CPLR 7801).

BACKGROUND

Petitioners year-round home in the Town of Martinsburg is located on what they refer to as 'Freeman Road' [the disputed road], a road they claim to be a Town Road. Petitioners requested year-round road maintenance from the Town, specifically snow and ice removal, as well as snow removal from Maple Ridge Road, an acknowledged Town Road. The Town has refused those requests.

Petitioners' Argument

Petitioners argue the Town improperly refused their request to maintain Freeman Road. They say the disputed road is a town road in part because their 1999 deed referenced access to their property "from

Maple Ridge Road along an abandoned town highway known as Freeman Road...". Petitioners claim a second deed in 2003 from other grantors contained the identical description. Petitioners claim there are two other residences on the road; that at least two motor vehicle per day travel the road; and the Town has placed road signs on the road. Petitioners claim the Respondents denial "...as to ownership of the Freeman Road" has deprived them of "emergency service protection such as fire, police and ambulance." Petitioners claim their expert, a New York State Department of Transportation Engineer, submitted a sworn affidavit opining the disputed road was a town road.

Respondent's Argument

Respondents set forth several affirmative defenses, including procedural objections.

Substantially, the Respondents claim Freeman Road is not, and has never been, a Town Road, or part thereof, and is in fact a private road. Respondents set forth affidavits they have reviewed all available information on the road(s), including the Town 'Road Book' which includes roads from 1803 to 1907, and the Town's meeting minutes from 1907 to present. According to the Town they could not find any reference in the records to 'Freeman Road' nor could they match any descriptions or locations in recorded Town Roads to such a road.

Further, the Town Highway Superintendent claims in his 19 years of work for the Town, the Highway Department "had not improved, worked on, repaired, maintained or plowed snow on the roadway..." claimed by Petitioners as Freeman Road. Respondents also submitted the affidavit of another Town employee with 32 years service who stated under oath that in all his time the Town had never maintained

the disputed road. The Superintendent acknowledged in or about 2004 the Town placed a 'Dead End' sign on the Maple Ridge Road right of way, near the intersection with 'Freeman Road' but claims they did so as an accommodation to Mr. Kogut, and at his request.

Respondents claimed the intersecting Town Road, Maple Ridge Road, was declared a 'minimum maintenance road' in 1997 by the Town. Respondents claim that classification was properly done, and the Petitioners have not started the required "... process for declassifying all or a portion of Maple Ridge Road...". Maple Ridge Road intersects with another Town Road, Graves Road, which was classified as a 'Seasonal Limited Access Road', a designation which allows the Town to omit snow removal from December 1 to April 1st. According to Respondents when the designation was made in 1997, Petitioners did not own the property on the disputed road, and in fact, the property was vacant with no structures. According to the Respondents the closest year round maintained road is nearly four miles away from Maple Ridge Road. Additionally, Respondents claim Maple Ridge Road is not wide enough or stable enough for town plows and equipment.

DISCUSSION

Petitioners have not specified the grounds for their Article 78 challenge to the Town's alleged actions. The four areas of inquiry in an Article 78 proceeding are: "(1) whether the body or officer failed to perform a duty enjoined upon it by law; or (2)whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious; (4) whether a determination made as a result

of a hearing held, at which evidence was taken pursuant to direction by law is, on the entire record supported by substantial evidence." (CPLR 7803).

It is not clear this is the type of proceeding to which the substantial evidence rule (CPLR 7803(4)) would apply, mandating transfer to the Appellate Division (CPLR 7804 [g]). However, even if a substantial evidence question has been raised, before there is transfer to the Appellate Division, the Supreme Court ". . . shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata. . . ." (CPLR§ 7804 [g]). Upon further review hereafter detailed, it is clear the Court need not to determine the substantial evidence question or transfer the case.

CPLR Article 78 require a verified petition to commence a proceeding. Here, the submitted Petition is unverified.

In the submitted Petition they have requested this Court "... order the Town of Martinsburg to comply with the New York State Highway Law, and maintain Freeman Road...". There is no separate plenary action pending, and neither party has specifically requested declaratory relief. Though the Court has the authority to convert an Article 78 proceeding to one for declaratory relief, the Court does not believe this is a situation that warrants such *sua sponte* (see CPLR 3001; *Costa v Callahan*, 41 AD3d 1111; *Bingham v. Town Bd. of Burlington*, 103 AD2d 923 appeal dismissed 63 NY2d 943).

Additionally, the Court cannot determine whether there has been any final action by the Town the Court has authority to review under an Article 78 action, or that warrants the Court granting a declaratory

judgment. There exists a question whether the Petitioners have exhausted their administrative remedies. Petitioners could have requested the Town take formal action on Petitioners' request to maintain Freeman Road. The action complained of, apparently, is a February 15, 2007 letter from the Town attorney which had advised Petitioners that the Town Board has "analyzed the situation" and does not intend to plow Maple Ridge Road.

The "informal" letter of a non-elected official, the Town attorney, with no reflection of a Town Board vote or adoption, is not a formal board action warranting the Court to proceed on the Article 78 petition (see *Treadway v. Town Bd. of Ticonderoga*, 163 AD2d 637). An adoption of the Town Attorney's letter, or Town Board resolution would be a "'quasi-legislative' act ... capable of being resolved by means of a CPLR article 78 proceeding" (*Salvador v. Town Bd.*, 303 AD2d 826).The Court cannot determine, based on the record here, if Respondent Board has taken final action sufficient to warrant Article 78 review (*see Van Aken v. Town of Roxbury*, 211 AD2d 863). "A prerequisite to a proceeding in the nature of mandamus is a demand and refusal, and the four-month period does not begin to run until the refusal is made. (*Van Nostrand v. Town of Denning*, 132 AD2d 93). Respondent's legal memorandum appears to reference *de facto* authorization of the Town Attorney's February letter, but that is not akin to formal action. Accordingly, it appears Petitioners action is either untimely or premature (*Van Aken*, 211 AD2d 863).

The record reflects Petitioners submitted their building permit application in 1999 for a 'seasonal camp', not a year round residence.

That application was submitted two years after the Town declared Maple Ridge Road a 'minimum maintenance road.' The evidence submitted is that in 1997 the Town properly complied with its classification of Maple Ridge Road as a 'minimum maintenance road.' The burden is upon the Petitioners to properly petition the Town to re-classify Maple Ridge Road, and the record is clear Petitioners have not filed or petitioned to change that classification.

In addition, there is some concern that the Petitioners failed to name the Town Highway Superintendent as a party (see Highway Law § 171; *Schleiermacher v. Town of Rockland*, 236 AD2d 695). For the Petitioners to be accorded full relief they seek they should have named the Highway superintendent as a necessary party.

Were the Court to consider the Petition on its merits it would assume this is an action by Petitioners for a mandamus to compel (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753.) There is no question that a Town has a duty to maintain Town Roads (Highway Law § 140). It is also understood that, when challenged, the Town has the burden of proving proper abandonment of a "Town Road."(*Van Aken v. Town of Roxbury*, 211 AD2d 863).

But, before the Town needs to prove valid abandonment, an objectant has to establish that the road existed to begin with. Here the parties dispute the initial status of the road. The Town denies Freeman Road ever was a Town road, and thus not subject to formal, or even informal, abandonment. The Petitioners claim their evidence proves Freeman Road was a Town Road, and was never abandoned, or if abandoned, done so improperly.

There are four methods established for creation of public

highways: 1.appropriate proceedings as provided by law;2. prescriptive use by the public for more than the statutory period; 3. dedication through offer followed by implied acceptance; or 4. dedication through offer together with actual acceptance. (See *Cohoes v. Delaware & H. Canal Co.*, 134 NY 397; see also *Perlmutter v. Four Star Dev. Assoc.*, 38 AD3d 1139). It is true that "[o]nce a road becomes a public highway, it remains such until the contrary is shown" (*see Hewitt v Town of Scipio*, 32 AD2d 734 [4th Dept. 1969], affd 26 NY2d 934) Petitioners failed to present any proof that the disputed road became a public highway under any of the above methods.

Highway Law §189 provides that: "All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least three rods." It appears to be Petitioners' argument that the disputed road was established by use, since the Respondent has proven there are no Town records, going back to at least 1803, referencing the road, its establishment, usage, or abandonment.

However, bare public usage is not the sole determinative factor. "That the public have been permitted to travel over the [*road*] for a few years is unquestioned; but that alone is not such a user as is requisite to constitute a highway. Mere travel by the public upon the roads, without action by the public authorities in repairing or maintaining them, is insufficient."(*Johnson v. Niagara Falls*, 230 NY 77). The record submitted demonstrates the disputed road does not meet the physical requirements of Highway Law §171, it is too narrow. Additionally, the

Town Superintendent submitted the disputed road does not have the physical stability, or base, to meet the requirements for a town road; a decision that would be within his discretion to make *(see Schleiermacher v. Town of Rockland*, 236 AD2d 695). The Town would be unable to maintain, or repair the road as it now exists. There was also no evidence the Town ever submitted the disputed road for state funding. These factors in combination militate against any finding of roadway by usage.

There can be situations where the combination of old maps, expert testimony, and evidence of maintenance and repair establish a Town road in the 19th century (*See LaSalle Co. v. Town of Hillsdale*, 199 AD2d 685). However, the Court does not find such evidence in the record here. Petitioners' expert stated the disputed road must be a town road, because it was not a state or county road. Respondents correctly pointed out the maps relied upon by expert contained no legends detailing exactly what the roads were. This Court does not find that unofficial maps prevail over the Town's own records. The complete absence of any reference in the Town records, or official maps, and the complete and total lack of evidence as to Town maintenance, repair, or control, overwhelmingly supports the conclusion the disputed road was not ever a Town Road (see *Nogard v. Strand*, 38 AD2d 871;*Gardner v. Suddaby*, 70 AD2d 99). "While it is generally assumed that a highway is a thoroughfare, it is not necessarily so."(*People ex rel. Johnson v. Keesler*, 138 Misc. 607). "In pertinent part, Highway Law 205(1) provides that every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall

be deemed abandoned as a right-of-way."(*Abess v. Rowland*, 13 AD3d 790). Because a disputed factual issue exists whether the road was traveled or used for six years, normally a hearing is required (*Wills v. Town of Orleans*, 236 A.D.2d 889 [4th Dept. 1997]). Here however, based upon the record submitted, the Court finds the Petitioners have failed to demonstrate the need for further testimony. The evidence submitted is insufficient. "[P]laintiffs failed to establish that the road was at one time a town road and that it was not abandoned by operation of law" (*Dwyer v. Town of Rodman*, 1 AD3d 972 [4th Dept. 2003] appeal withdrawn 6 NY3d 772.). Additionally, Petitioners have presented no evidence that the Town acted unlawfully, erroneously, or arbitrarily, in classifying Maple Ridge Road as a 'minimum maintenance road.'

Conclusion

Accordingly, in light of the foregoing, it is

ADJUDGED, that Petitioners have failed to carry their initial burden to prove that Freeman Road was ever established as a Martinsburg Town Road, or that the Town's declaration of Maple Ridge Road as a minimum maintenance road was done in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious; and it is hereby

ORDERED, that the Petition is Dismissed without costs.

ENTER

Dated: October 2, 2007
Lowville, NY

Joseph D. McGuire, J.S.C.

CPLR Documents:

The Court has considered the following pursuant to CPLR 2219: Order to Show Cause, signed June 5, 2006; Petition dated May 30, 2007, with Exhibits A-C; Verified Answer dated July 18, 2007; Affidavit of Carl Morrison in Support of Town's Verified Answer, dated July 24, 2007; Kenneth Ayer's Affirmation in Support of Verified Answer, dated July 25, 2007, with Exhibits 1-5; Affidavit of Jerry Gorczyca in Support of the Town's Verified Answer, dated July 24, 2007; Memorandum of Law in Support of Respondent's Verified Answer, dated July 25, 2007; Affidavit of Service by mail, dated July 25, 2007; Petitioners' Reply Affidavit, dated August 1, 2007; Petitioners' Memorandum of Law, dated August 1, 2007.