Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-171

OCTOBER TERM, 2010

Dale A. Merritt and Brenda J. Merritt	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
	}	
Steven Daiello, Sandra Daiello,	}	DOCKET NO. 49-1-08 Wmcv
Jose Tellechea, Marypaz Tellechea and	}	
Doolittle Mountain Lots, Inc.	}	
		Trial Judge: David Howard

In the above-entitled cause, the Clerk will enter:

Defendants appeal from the superior court's declaratory order that they have no rights over the Stebbins Road, which runs across plaintiffs' property. Defendants argue that the court erred in finding that the road was never properly laid out. In the alternative, defendants contend that the road exists by later dedication and acceptance by the town or by necessity. We affirm.

Plaintiffs' land, the Merritt property, consists of 200 acres in Vernon. This land is the former Eliakim Stebbins property. The Merritts have owned this land for forty-five years, and currently plaintiffs reside there and run a small horse training business. A portion of the old Stebbins Road, now known as West Road, is used to access the Merritt property from the east. An undisputed public way terminates within the Merritt property. The road path continues westward across plaintiffs' property, through a portion of state property, then next to defendants' lands, which border the road on the north side, and eventually to the Guilford town line. It is the status of the portion of the road running westerly from plaintiff's residence that is the focus of the parties' dispute.

The history of the disputed road begins in 1801 when a survey of what was labeled as the Stebbins Road in Vernon was done by Samuel Sheppardson and recorded in the Vernon land record. The land records state that the survey was done under the direction of the town selectboard, but there is no record of the Vernon selectboard approving the opening of this road or accepting it as a public road. The board did not sign off on the survey. In the warnings of the 1806 town meeting there is an article "[t]o see if the Town will open a road through Eliakim Stebbins' land or any part of it" and "discontinue the road." The town minutes from the 1806 town meeting indicate that a committee was created to "treat" with Stebbins regarding the road, but there is no record of any resulting selectboard action. An 1809 town meeting article warns that the town will consider whether to "discontinue the road by Eliakim Stebbins' and lay one by Samuel Brooks to said Warren's." This article was not approved at the meeting. A lease from 1813 also describes part of the land as being bordered by "the road as it was laid from Eliakim Stebbins' to Guilford."

In 1841, the selectboard surveyed, laid out and opened a portion of the 1801 surveyed road. This road, which begins to the east, terminates at what is now plaintiffs' residence and barn. In 1904, the town records indicate that Stebbins Road was discontinued from the location of plaintiffs' present residence west through what is now defendants' land. Several maps from the 1800s and onward depict Stebbins Road running through plaintiffs' property to the Guilford town line. The maps vary in length and exact location of the road.

Between 2000 and 2001, in several different transactions, defendants purchased 164 acres of land to the west of the Merritt property. The deeds mention "the discontinued Town Highway formerly known as Stebbins Road and now known as West Road and the Old Wright Road" and give defendants rights over the road "if any there may be." Defendant Daiello constructed a vacation home on his parcel and then sought to improve the Stebbins Road for access to his land. To reach the Daiello property required driving through the Merritt property, within a few feet of plaintiffs' house and farm buildings. Plaintiffs protested against this use and the concurrent improvements, but the parties were unable to resolve their differences. Plaintiffs brought an action in superior court to resolve the legal status of the road.

Defendants' claims over the road rest on their assertion that the road was a town road and, although it was discontinued in 1905, it nonetheless provides legal access to their property under Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201 (2000). In Okemo we held that a property owner with land abutting a public road retains right of access even if the road is discontinued or abandoned. Id. at 207. Plaintiffs initially denied the asserted right of access, claiming that the discontinuance prevented defendants' use because access across it was not necessary for defendants. Later, plaintiffs amended their complaint to allege that the road was never formally laid out as a town road and therefore defendants lacked any right to use it.

The court held a two-day trial. At trial, the parties submitted evidence concerning the history and current status of the road. There was no evidence submitted at trial that defendants' properties were ever owned in common with plaintiff's property, or that the parcels became landlocked as the result of a common division of land. The court issued a written decision, finding that "the disputed roadway herein was never officially created by the town at least as to that portion from the area of plaintiffs' residences and buildings on westerly to defendants' land and, therefore, defendants did not obtain an abutting right of access that would survive later discontinuance action by the town." The court emphasized that although the 1801 survey was initiated under the authority of the selectboard, it was not officially approved or adopted by the selectboard as required. Thus, the court granted judgment in favor of plaintiffs. Defendants appeal.

On appeal, defendants argue: (1) that the facts do not support the court's finding that Stebbins Road was not properly laid out as a town road, (2) that even if the road was not properly laid out in 1805, the road was later established by dedication and acceptance, and (3) that the court erred in concluding that their property was not landlocked and there was no easement by necessity. We discuss each of these arguments in turn.

Defendants first argue that the court erred in concluding that the town did not officially lay out the Stebbins road. In support, defendants argue that the town's procedure met the statutory requirements in effect at that time, and that the evidence creates a strong inference that a road was officially laid out. Defendants contend that the only statutory recording requirement was that a survey of the highway be recorded in the town clerk's office, which was accomplished.

The procedure for laying out a highway is statutory, and the method must be substantially complied with. Austin v. Town of Middlesex, 2009 VT 102, ¶ 7 (mem.). In 1801, the statute pertaining to laying out roads stated:

> That the selectmen of the several towns in this state, shall have power . . . to lay out new highways, or alter old ones, as they shall judge proper . . . . And every highway or road which shall in future be laid out or opened, shall be actually surveyed, and a survey thereof made out, entered and recorded, in the town clerk's office, where such highway or road lies . . . .

Laws of Vermont, 1824, Ch. LIII, No. 1, § 1 (passed March 3, 1797). In construing this statute, we have stated that it requires both a survey and "a formal act by the selectboard or another official body." Austin, 2009 VT 102, ¶ 8.[*] The statute does require some affirmative act on the part of the selectboard, which was missing in this case. As in Austin, the town records do not demonstrate that the selectboard officially authorized the laying out of the road. In addition, like Austin, the trial court here found that the town selectboard knew how to properly lay out a road, as other town roads during that time were properly established according to the statutory process. See id. ¶ 9. Therefore, we reject defendants' argument that it was sufficient under the law at the time to simply perform a survey without adoption by the selectboard.

Next, defendants point to evidence of the town's minutes, maps, leases and other documents claiming that these "subsequent instances of acknowledgment or recognition" create a presumption of the road's validity. Defendants highlight that leases referred to land in the area as bordered by a "laid out" road and that Stebbins Road was depicted as a class 3 or class 4 town highway on official state highway maps. Defendants infer from the 1806 and 1809 town minutes that the committee created in 1806 to "treat" with Stebbins presumably carried out its mission to create a road, although no record of such exists. Defendants also construe the town's discontinuance of a portion of Stebbins Road in 1904 as evidence that the road was properly created some time before that. Defendants essentially are arguing that different inferences could have been drawn from the evidence. This challenge of the evidence is insufficient to overturn the trial court's findings. See Town of Bethel v. Wellford, 2009 VT 100, ¶ 13 (mem.). The court's findings of fact will be upheld unless they are clearly erroneous. Id. ¶ 5. To overturn a finding, an appellant must demonstrate not just that the evidence underlying it is contradicted but that no credible evidence supports it. Id.

We conclude that, when viewing the evidence in the light most favorable to the prevailing party, the evidence was sufficient to conclude that the town did not properly lay out Stebbins Road. There is no evidence of acceptance by the selectboard of the survey or the road. As the trial court explained, none of the evidence "cure[s] the initial missing authority," and the various evidence mentioning adoption and discontinuance of the Stebbins Road "only increases the lack of reliable evidence that the disputed road was legally laid out [in 1801]." We agree with the trial court that later references in leases and on town maps to a town road cannot retroactively create the missing approval of the selectboard, and conclude that the court's finding that no such approval occurred is supported by the evidence.

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[*] Austin contained a third requirement—that the selectboard issue a certificate of opening. We do not discuss this requirement because it was not in effect until 1820. See Laws of Vermont, 1824, Ch. LIII, No. 10, § 2 (passed Nov. 15, 1820).

Next, we turn to defendants' argument that even if the road was not laid out, it was later established by dedication. Dedication involves the express or implied setting aside of private land for public use. Town of S. Hero v. Wood, 2006 VT 28, ¶ 10, 179 Vt. 417. It requires both an offer, either express or implied, from the landowner and an acceptance of that offer from the town. Id. Implied intent of the landowner can be inferred from the public's long-term use of the land. Id. ¶ 11. Intent is a question of fact that we review for clear error. Id. ¶ 10.

The trial court concluded there was no dedication in this case because there was no compelling evidence of implied intent from the landowner or acceptance by the town. As to use, the court found that the limited seasonal use of the road was by hunters and hikers who asked plaintiffs' permission. In addition, the court noted there was no acceptance from the town, in that the town maintained the road only up to plaintiffs' residence, and even that was irregular.

On appeal, defendants renew their argument that dedication occurred in this case. Defendants claim that there is evidence of prolonged public use, including that the road appeared on state maps and that school children allegedly used it in the mid-nineteenth century. Defendants also argue that there was evidence of acceptance by the town because the road appeared on maps as a town highway. See Druke v. Town of Newfane, 137 Vt. 571, 576 (1979) (explaining that dedication is not complete without acceptance by the town, which can be implied). The evidence of intent to dedicate was mixed in this case. The trial court considered all of the evidence and found that evidence of intent to dedicate was not convincing. Id. at 573 ("The court's conclusions must stand if the findings of fact fairly and reasonably support them."). The trial court's finding on this point was not clearly erroneous, and we defer to it on appeal. Town of Bethel, 2009 VT 100, ¶ 5.

Finally, we address defendants' argument that they have an easement by necessity across the Stebbins Road. Defendants claim that the trial court erroneously found that they have alternative access to their property from the west. Defendants argue that the evidence unequivocally shows that without access across Stebbins Road from the east, defendants' parcels are landlocked and therefore they should have an easement by necessity. We conclude that defendants have failed to prove an easement by necessity. "To obtain a way of necessity, one must show that (1) there was a division of commonly owned land, and (2) the division resulted in creating a landlocked parcel." Okemo Mountain, Inc., 171 Vt. at 206. Even assuming that the second factor is met and their parcels are landlocked, defendants admit that they cannot satisfy the first factor because there was no common division of land. Consequently, the court property denied the claim for an easement by necessity.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice