

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

LORI GILMORE MALLOY f/k/a LORI GILMORE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. ST-09-CV-414
	)	
MAGENS POINT, INC. and ISLAND DINING	)	
PROPERTIES, INC. d/b/a INDIGO BAR AND	)	
RESTAURANT,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Following a bench trial, the Court permitted the parties to submit written closing arguments and proposed findings of fact and conclusions of law.¹ For the following reasons, the Court finds that Plaintiff has a private right of access to her property.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff purchased Parcel 6s Estate Hansen Bay, located on the East End of St. John, as part of a tax sale in 1993. Before she permanently left the Virgin Islands in 2000, Plaintiff walked up the disputed roadway² about six times to access her property. On one occasion, she was accompanied by a team of archaeologists who conducted research on the settlement ruins located on her property. In 2009, a chain was placed over the disputed roadway restricting Plaintiff's access to her property,³ and Plaintiff instituted this action to establish a right of access to her property on September 14, 2009. In her

¹ Defendants filed their submissions on June 15, 2012, and Plaintiff filed her submissions on June 19, 2012.

² The disputed roadway has been termed the "Old Broad Road," formerly a segment of the East End Road.

³ Plaintiff's testimony, May 8, 2012, Trial Transcript, at 49.

Complaint, Plaintiff raised several legal theories in support of her right of access, including the existence of a public prescriptive easement (Count II), a private prescriptive easement (Count III), an easement by implication (Count IV), and an easement by necessity (Count V). Plaintiff also sought declaratory relief establishing that the roadway was public (Count I) and injunctive relief (Count VI). The Court held a bench trial on the matter on May 8, 2012, and May 9, 2012.

According to Plaintiff's expert, historian Steve Tyson, the East End of St. John was settled by an employee of the Danish West India Company named Johan Jacob Creutzer,⁴ who operated a single plantation around 1720.⁵ Jens Hansen acquired the plantation from Creutzer's widow in the 1740s and had a thriving "provision," fruit, and cotton business.⁶ In 1780, there were five settlements on the East End, located on the top of the hill near or upon Parcel 6s as well as near Newfound Bay.⁷ Tyson indicated that he believed there were between five and seven families living on the East End of St. John at that time.⁸ Thereafter, the land was further parceled out.⁹

The first documented evidence of a road on the East End of St. John appears on a map generated by Peter Oxholm in 1780.¹⁰ Oxholm "was a Danish engineer ... sent by the Danish Government for the purpose of basically providing drawings and surveys of

⁴ Tyson testimony, May 8, 2012, Trial Transcript, at 262.

⁵ *Id.*, at 221.

⁶ *Id.*, at 263.

⁷ *Id.*, at 202.

⁸ *Id.*, at 202.

⁹ *Id.*, at 249.

¹⁰ Plaintiff's Exhibit W. Plaintiff's exhibits are identified by letters and Defendants' exhibits are identified by numbers.

[St. Croix, St. Thomas, and St. John].”¹¹ The 1780 map depicted a road on the East End that traveled along the coastline near Limetree Bay, diverted into the interior of the island near Hansen Bay, and split at the top of a ridgeline, one segment traveling down the ridgeline toward Nye Bay and the other segment terminating further along the top of the ridgeline. The road was drawn as a single line in contrast to a network of double line roads that were located in the western part of the island near the port town of Cruz Bay.

In 1820, Oxholm generated another map¹² of the East End that was very similar to the 1780 map. The same year, the Governor General of the Danish West Indian Islands promulgated a set of road regulations for St. Thomas, St. Croix, and St. John. The regulations stated that “on St. John the ... Road from Cruz Bay to The Plantation Adrian¹³ ... must be maintained. The remainder are riding trails.”¹⁴

Tyson testified that roads under Danish rule were generally used to link economic enterprises, such as the Creutzer/Hansen plantation, to administrative centers, such as port towns like Cruz Bay.¹⁵ According to Tyson, some of the roads drawn as single lines on the 1780 Oxholm map—including the disputed roadway—and all roads drawn as double lines were colored in yellow,¹⁶ suggesting that these roads were public.¹⁷ Tyson also testified that the road traveling from “Cruz Bay to Susannaberg, Adrian area” was

¹¹ Tyson testimony, at 203.

¹² Exhibit D.

¹³ Plantation Adrian was located in the center of St. John. Tyson testimony, at 206.

¹⁴ Exhibit 27, at 10.

¹⁵ Tyson testimony, at 223.

¹⁶ The Court notes, however, that only a black and white copy of the 1780 map was submitted into evidence.

¹⁷ Tyson testimony, at 206-207.

“24 by 28 feet wide.”¹⁸ The rest of the roads in St. John “didn’t reach the dimensions of a normal Danish public road” and their dimensions were generally unknown.¹⁹ Tyson stated that unlike main roads and lesser roads,²⁰ riding trails like the disputed roadway did not have to be maintained.²¹

Following Denmark’s transfer of the Virgin Islands to the United States in 1917, the U.S. Department of Commerce generated a U.S. Coast and Geodetic Survey report in 1919 indicating that the roads on St. John “are scarcely more than good mountain trails ... As they are all public roads and maintained they are shown in full ... Owing to the heavy grades they can only be used for riding purposes.”²² The map associated with the U.S.C.G.S. report depicted the road in the East End as the “East End Road” which traveled up the hill starting from Hansen Bay as depicted in the 1780 and 1820 Oxholm maps.²³ However, in the 1919 map, the East End Road was not shown as extending as far up the hill as in the earlier maps, nor was it shown to split near the top of the ridgeline. Instead, the road terminated a considerable distance short of certain ruins near the top of

¹⁸ Tyson testimony, at 233-234.

¹⁹ Tyson testimony, at 233-234.

²⁰ Tyson testimony, at 236.

²¹ Tyson testimony, at 247. Conversely, Plaintiff’s witness Harry Gauriloff, a local surveyor, testified that Danish roads were classified as major and minor roads. Gauriloff testimony, May 8, 2012, Trial Transcript, at 289. On direct examination, Gauriloff stated that minor Danish roads were about 23 to 27 feet wide and opined that the disputed roadway was a minor road. *Id.*, at 289-290. However, on cross examination, Gauriloff stated that he could not answer whether the disputed roadway was a major or minor road in 1780 and stated that the road was a major road in 1918. *Id.*, at 307. Gauriloff also acknowledged he owned property in the vicinity of Parcel 6s and has a personal interest in ensuring there is access to his property. *Id.*, at 292. Another of Plaintiff’s witnesses, local surveyor Marvin Berning, testified that the standard Danish public road was about 30 feet wide. Berning testimony, May 9, 2012, Trial Transcript, at 52. In his estimation, the trails near Parcel 6s are “probably public” because they were “basically how people accessed their property.” *Id.*, at 71 and 73. Berning testified that he “assume[d the trails] would be considered public or at a minimum a legal right-of-way to their properties.” *Id.*, at 73. The Court notes that neither Berning nor Gauriloff were offered as qualified expert witnesses in this case.

²² Exhibit H, U.S.C.G.S. report, at 6.

²³ Exhibit I.

the ridgeline that are located on Plaintiff's property. Two other U.S.C.G.S. maps were generated in 1922 and 1934 and are virtually the same as the 1919 map with respect to the East End of St. John.²⁴

"[T]he same government entity"²⁵ that generated the U.S.C.G.S. maps generated a U.S. Geological Survey map in 1958²⁶ that showed the East End Road terminating along the coast near Hansen Bay. In 1982,²⁷ the U.S.G.S. map was revised to indicate that the East End Road extended past Hansen Bay along the coast until it terminated near Long Point at the far end of Long Bay. In neither U.S.G.S. map does the East End Road extend into the interior of the island as shown in the U.S.C.G.S. maps.

The other documents submitted into evidence include maps generated by local surveyors Martin Berning and Harry Gauriloff that depict the general area where Parcel 6s is located. Two of Berning's maps were not recorded²⁸ or registered in the Virgin Islands Cadastral Office, and Berning testified in his deposition²⁹ that his one recorded map does not depict the disputed roadway. Although both of Gauriloff's maps³⁰ were recorded,³¹ the maps refer to the disputed roadway as both a public road and as a trail and

²⁴ Exhibit K and Exhibit Y.

²⁵ Tyson testimony, at 271.

²⁶ Exhibit 4. The Court notes that in the trial testimony, the map is referred to as Exhibit 11.

²⁷ Exhibit 5. The Court notes that in the trial testimony, the map is referred to as Exhibit 12.

²⁸ Berning testimony, May 9, 2012, Trial Transcript, at 21 and 41. Exhibit P was a map that was prepared for litigation in a boundary dispute case. See *Id.*, at page 41. Exhibit O was Berning's master map that depicted the property boundaries on the East End of St. John. Berning pieced the map together based on his conversations with the "old time people" in the area. *Id.*, May 9, 2012, Trial Transcript, at 328.

²⁹ Berning testimony, at 48. The map only shows a trail beginning near Parcel 6ae that travels in a northwest direction. Above the trail, Berning wrote a note "To public road" with an arrow directed northwest.

³⁰ Exhibits S and T.

³¹ Gauriloff testimony, at 287-288.

state that the trails on the map are “probably public.”³² Plaintiff also produced other title documents that reference a public road on the East End but do not give a location for the road.³³

The Court also heard testimony from several lay witnesses. Plaintiff’s witness Violet Mahabir, who owns property near Parcel 6s, testified that the disputed roadway—termed the Old Broad Road—was a trail³⁴ until 1956 when Camille Paris, an employee of the Department of Public Works, bulldozed the roadway³⁵ from the base of the road in Hansen Bay to Anton George’s house, removing the switchback turns and straightening a portion of the road.³⁶ She also indicated that Public Works continued to maintain the roadway to some degree until the 1970s.³⁷ However, Defendant’s witness Lealye Battiste, a great nephew to Anton George, testified that while he was working for Public Works in the late 1960s he used a bulldozer without Public Works’ authorization to relocate and straighten the roadway from Hansen Bay to his great uncle’s house.³⁸

Mahabir also indicated that the roadway beyond the bulldozed portion remained a trail that no vehicles could drive up.³⁹ Mahabir’s testimony was supported by the deposition testimony of Plaintiff’s witness Kendell Anthony⁴⁰ and contradicted by the

³² Exhibits S and T.

³³ See Exhibits E and F.

³⁴ Mahabir testimony, May 8, 2012, Trial Transcript, at 105.

³⁵ *Id.*, at 82.

³⁶ *Id.*, at 84.

³⁷ *Id.*, at 82.

³⁸ Battiste testimony, May 9, 2012, Trial Transcript, at 223 and 226.

³⁹ Mahabir testimony, at 103.

⁴⁰ Anthony indicated at a deposition that the driving section ended and that vehicles “didn’t go all the way up the hill.” Anthony testimony, May 8, 2012, Trial Transcript, at 164-166.

deposition testimony of Plaintiff's witness Guy Benjamin.⁴¹ Mahabir also indicated that no one lived beyond Anton George's house during her lifetime,⁴² which was supported by Battiste's testimony⁴³ and Anthony's deposition testimony⁴⁴ and contradicted by Benjamin's deposition testimony.⁴⁵

ANALYSIS

The Virgin Islands Code, Virgin Islands case law, and the Restatements do not set forth rules governing the establishment of a public road.⁴⁶ Looking at other jurisdictions for guidance, the Court notes that "[i]n many jurisdictions, a public road may be created in several ways, including '(1) by laying out and acceptance of a road by a town; (2) by dedication; and (3) by prescriptive use.'"⁴⁷

Implicit in the powers and duties of the Commissioner of Public Works is the procedure for laying out and accepting a road by the Virgin Islands government. 20 V.I.C. § 2 provides that the Commissioner of Public Works shall:

- (a) ... maintain official maps showing in detail the boundaries and rights of way of all public highways in the Virgin Islands[, determine]
- (b) [t]he classification of public highways, and the width of rights of way thereof[, and publish]

⁴¹ Guy Benjamin stated in a deposition that vehicles traveled to the top of the hill. See Benjamin testimony, May 8, 2012, Trial Transcript, at 145. He also stated that although donkey carts were used on the disputed roadway, the "East End is a boat place. Donkey carts belong to Cruz Bay. We really didn't use donkey carts. We used boats ... we are boat people, not the donkey people." *Id.*, at 146-147.

⁴² Mahabir was born in 1949. See Mahabir testimony, at 96.

⁴³ Battiste was born in 1939. See Battiste testimony, at 223.

⁴⁴ Anthony began living on the East End in 1952. See Anthony testimony, at 166.

⁴⁵ Benjamin testified that two to three families lived on Parcel 6s at some unspecified time. See Benjamin testimony, at 149-150.

⁴⁶ *Bluebeard's Castle, Inc. v. Hodge*, D.C. Civ. App. No. 2002-154, 2009 WL 891896, at *10 (D.V.I. 2009).

⁴⁷ *Id.* (citing 39 Am. Jur. 2d Highways, Streets, and Bridges § 21).

- (c) [a] list of all public highways which are added to, or discontinued from, the official maps.⁴⁸

The Commissioner of Public Works may also accept property dedicated to the public: “[w]hen the construction of a new highway or the increase in width of an existing highway is authorized ... [i]f the interest of the public can be adequately served by the acquisition of easements.”⁴⁹

Under the doctrine of implied dedication, an offer to dedicate property and public acceptance of the offer are inferred from circumstances such as “a longstanding acquiescence in the right of the public to use [a] road and from acts of public maintenance.”⁵⁰ Prescription may be established by a showing of a use⁵¹ by the general public⁵² that is “open or notorious” and “continued without effective interruption for the prescriptive period,”⁵³ which is 15 years⁵⁴ in the Virgin Islands. The establishment of a right of way by prescription⁵⁵ or implied dedication⁵⁶ must be proven with clear and convincing evidence.

⁴⁸ 20 V.I.C. § 2.

⁴⁹ 20 V.I.C. § 3.

⁵⁰ *Wojahn v. Johnson*, 297 N.W.2d 298, 307 (Minn.1980); see also Restatement (Third) of Prop.: Servitudes § 2.18 (a public acceptance may be demonstrated “by [long-continued] public use of the designated areas or by acts of maintenance or control by a governmental unit”).

⁵¹ Restatement (Third) of Prop.: Servitudes § 2.16 defines a prescriptive use as “(1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.”

⁵² *Flaherty v. Muther*, 17 A.3d 640, 661 (Me. 2011) (“To create a public easement, ... the adverse use must be general and not limited to a few specific individuals”).

⁵³ Restatement (Third) of Prop.: Servitudes § 2.17.

⁵⁴ 28 V.I.C. § 11.

⁵⁵ *McNamara v. Christian*, 26 V.I. 109, 112 (Terr.Ct.1991).

⁵⁶ *Clayton, Village Of, v. Colorado & S. R. Co.*, 232 P. 521, 522 (N.M. 1924) (“In order to show the establishment of a street by common law or implied dedication, it is essential to prove clearly,

The Oxholm maps and other evidence indicate that rights of way of unknown dimensions and passable only on foot or horseback were recognized as public “riding trails”⁵⁷ in Danish times. Shortly after the transfer of these islands from Denmark to the United States, these rights of way were recognized as “roads” that were “scarcely more than good mountain trails [that could] only be used for riding purposes.”⁵⁸ Notwithstanding, Virgin Islands law has not generally recognized nor established standards for a “public trail,” and Plaintiff has presented no evidence that the disputed right of way has been laid out and accepted by the Virgin Islands government as a public road. The disputed right of way is not located on any official map of the Virgin Islands promulgated by the Commissioner of Public Works or by any other branch of the Virgin Islands government. Moreover, the record reflects conflicting evidence as to whether the Virgin Islands government maintained the road and little definitive evidence that members of the public—other than the family members of Anton George—used the road. As a result, there is insufficient proof of an implied dedication. Similarly, other than the George family in recent times, there is no definitive evidence that the general public used the road in the manner, and for the time period, necessary to establish a public prescriptive easement.

Assuming, *arguendo*, irrespective of any action or non-action by the Virgin Islands government, that the disputed roadway was historically a public trail in Danish

satisfactorily, and unequivocally that the owner of the land intended to donate it to the public for that use”).

⁵⁷ Exhibit 27, at 10.

⁵⁸ Exhibit H, U.S.C.G.S. report, at 6.

times, and remained a public right of way upon the transfer⁵⁹ of these islands to the United States and then to the Virgin Islands government,⁶⁰ there is clear and convincing evidence that the disputed roadway has been abandoned. The U.S.C.G.S. maps show that a portion of the disputed roadway—depicted in the Oxholm maps along the ridgeline and near Newfound Bay—was not considered a road by the United States government. The U.S.G.S. maps establish that no portion of the disputed roadway was considered to be a road, public or otherwise, by the United States government as late as 1958. As Plaintiff's own expert testified:

roads are dynamic things. They are not fixed in point and time and there forever ... [t]hey are part and parcel of the changing human dynamic of a place. And as people move and places get abandoned[,] roads get abandoned ... [The reason why the disputed roadway is not on the U.S.G.S. maps is] because people no longer were there or no longer could advocate and no longer need[ed] it ... [Now] people are moving back over the hillside, up to the top and over the hillside. And, of course, they have an interest in it now being a public road, *after it being abandoned for so long and not maintained*.⁶¹ (Emphasis added).

The fact that Anton George lived in his house on Parcel 6ae until 1976 and that his family members may have lived in the house until the 1990s does not demonstrate that the right of way was still used by the general public. In addition, there is little evidence that anyone used the trail for traveling up the hill beyond the George house for the majority of the 20th century. Accordingly, the Court finds that, even if it was

⁵⁹ By virtue of the 1916 Treaty of Acquisition.

⁶⁰ By virtue of the 1936 Organic Act.

⁶¹ Tyson testimony, at 274-276.

recognized as a “public” road or trail historically, the disputed right of way has been abandoned by the general public⁶² and the Government of the Virgin Islands.

When a right of way is abandoned, the “servitude on the land is removed and the road surface reverts to the private owner on whose property it is located.”⁶³ Here, the surface of the disputed roadway that crosses former Parcel 6t—beginning at the East End Road in Hansen Bay and ending at the western boundary line of Plaintiff’s property—would normally revert back to the owners of former Parcel 6t for their exclusive use. However, the disputed roadway is the only way Plaintiff accessed her property since she purchased it, and there is no definitive evidence in the record establishing that Plaintiff has an alternative means of access to her property.⁶⁴ As a result, Plaintiff has an easement by necessity⁶⁵ over the portion of the disputed roadway crossing former Parcel 6t.^{66 67}

⁶² See *Gay v. Dube*, 39 A.3d 52, 55 -56 (Me. 2012) (“At common law, a presumption of a public intent to abandon a road may be raised by evidence of nonuse for twenty years or more”).

⁶³ 3 V.I. Op. A.G. 241.

⁶⁴ Although one unrecorded map indicates there may be a second access point to Plaintiff’s property that splits from, and then rejoins, the disputed roadway (see Exhibit O, which was generated in the 1970s), several later maps that were recorded or approved by Public Works do not depict the existence of this second right of way. See Exhibit S and T, which were generated in 2000 and 2005, respectively; Exhibit 21, which was generated in 2007; and Exhibit 2, which was generated in 1981.

⁶⁵ A servitude is created by necessity when a “conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.” Restatement (Third) of Prop.: Servitudes § 2.15.

⁶⁶ Exhibit 14 states that “all adjoining owners to Parcel 6t that utilize the roads hereon for ingress and egress to their lands shall be responsible for their prorated share of construction costs.” Although this issue is not yet before the Court, the Court notes that a fair apportionment of the construction costs will depend on a variety of circumstances. See Comment (e) to Restatement (Third) of Prop.: Servitudes § 4.13; see also *Freeman v. Sorchych*, 245 P.3d 927 (Ariz. Ct. App. 2011).

⁶⁷ Plaintiff’s other legal theories in support of a public or private right of access to her property were not adequately proven at trial.

A Judgment and Order consistent with this Opinion shall follow.

Dated: July 20, 2012

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor 7/25/12



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

SUPERIOR COURT OF THE VIRGIN ISLANDS
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MAGENS POINT, INC. and ISLAND DINING	)	
PROPERTIES, INC. d/b/a INDIGO BAR AND	)	
RESTAURANT,	)	
	)	
Defendants.	)	
	)	

JUDGMENT AND ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the disputed right of way in this matter, termed the Old Broad Road or trail that was formerly a segment of the East End Road on St. John, is not a public road; and it is

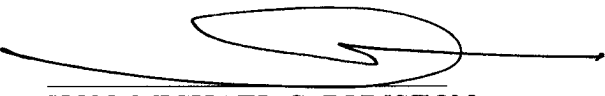
ORDERED, ADJUDGED, AND DECREED that Plaintiff has an easement by necessity over the Old Broad Road or trail that intersects with the East End Road in Hansen Bay and extends across former Parcel 6t Estate Hansen Bay to the western boundary of Plaintiff's property, Parcel 6s Estate Hansen Bay; and it is

ORDERED that a copy of this Judgment and Order shall be directed to counsel of record.

Dated: July 20, 2012

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor 7/25/12


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS