

Smith v Town of Eagle
2010 NY Slip Op 30736(U)
March 31, 2010
Supreme Court, Wyoming County
Docket Number: 42105
Judge: Michael F. Griffith
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

**JEFFREY SMITH, VERONICA SMITH
and RONALD CLARK,**

Plaintiffs

v

**DECISION AND ORDER
Index No. 42105**

**TOWN OF EAGLE, TOWN OF CENTERVILLE,
RANDY WILLIAMS, TOWN OF EAGLE
HIGHWAY SUPERINTENDENT, and JAMES
MAKOWSKI, TOWN OF CENTERVILLE
HIGHWAY SUPERINTENDENT,**

Defendants

The above-named petitioners having filed an Article 78 petition seeking an Order directing the defendants to repair the subject section of Pattridge/Washburn Road to a condition safe for motor vehicle traffic, and the respondents having opposed that relief, and said notice of petition having duly come on to be heard.

Now, on reading the Article 78 petition and attached exhibits, sworn to on November 20, 2009 by Jeffrey Smith and Veronica Smith, and sworn to on November 21, 2009 by Ronald Clark, and the accompanying Notice of Petition, dated December 2, 2009 and filed the same date; the Verified Answer of the Town of Eagle and Randy Williams, Town of Eagle Highway Superintendent, dated December 21, 2009, supported by the Affidavit of Randy Williams and attached exhibits, sworn to on December 21, 2009; the Verified Answer of the Town of Centerville and James Makowski, Town Highway Superintendent of the Town of Centerville, dated December 30, 2009, together the attached exhibits; the Verified Reply of the petitioners through their attorney, the Law Office of David M. DiMatteo, dated February 16, 2010, and the

attached exhibits; the letter dated March 4, 2010 from the Law Office of David M. DiMatteo; the letter response from David T. Pullen, Esq., attorney for the Town of Centerville, dated March 11, 2010; and after hearing David M. Roach, Esq., attorney for the plaintiffs in support of the Petition; and David M. Nelson, Esq., attorney for the Town of Eagle, in opposition thereto, and David T. Pullen, Esq., attorney for the Town of Centerville, also in opposition to the Petition, and due deliberation having been had, including a visual inspection of the property in question, the following decision is rendered.

The petitioners own homes located on Pattridge/Washburn Road in the Town of Eagle, in Wyoming County. This road is situated on the border of the Town of Eagle and Town of Centerville, Allegany County. The petitioners allege the respondents have denied their requests to repair or maintain Pattridge/Washburn Road caused by weather related storm damage occurring in April and/or May, 2009. The respondents in their Answer, state that the road in question has been properly abandoned. In relevant part, Pattridge/Washburn Road runs in an east/west direction for an approximate .9 mile stretch from its western dead end to Pochuck Road. Specifically, a 0.12 mile section of the aforementioned .9 mile section of Pattridge/Washburn Road is in issue.

The verified answer from respondent Town of Centerville additionally raises the procedural issue of whether the proceeding is barred by the applicable Statute of Limitations. Respondents assert the applicable four month statute of limitations has run under any argument, including from the date of the storm damage. However, the respondents official refusal to maintain this portion of Pattridge/Washburn Road was not communicated to petitioners until they received the letters dated October 19 and November 6, 2009 (Petition Ex. B and C). This

proceeding was commenced by the filing of the petition on December 2, 2009, and since the petition is in the nature of a mandamus to compel the performance of a duty imposed by law, the proceeding was timely commenced (Highway Law § 140; Matter of Van Aken v. Town of Roxbury, 211 AD2d 863, 864 *lv den* 85 NY2d 812).

Turning to the merits of the petition, it is undisputed that no certificate of abandonment was ever filed by either Respondent Town as provided for in Highway Law § 205. Once a road becomes a highway, it remains such until the contrary is shown (Id. at 865). Pursuant to Highway Law § 205(1), a highway will be deemed abandoned if it had not been “traveled or used as a highway for six years”. The burden of establishing abandonment of a highway is on the party claiming that the abandonment has occurred (see, Daetsch v. Taber, 149 AD2d 864).

The respondents have failed to sustain their burden of showing that the portion of Pattridge/Washburn Road at issue ceased to be a highway by reason of not being open and worked or because of a lack of travel or use for a period of six years (Highway Law § 205[1]). The respondents argue that abandonment exists because they have not maintained this 0.12 mile portion of road for 16 years. However, a highway does not cease to be a highway merely because the Town has failed to service it (Matter of Van Aken v. Town of Roxbury, 211 AD2d 863, 865 *lv den* 85 NY2d 812; Hewitt v. Town of Scipio, 32 AD2d 734, *aff'd* 26 NY2d 934). In any event, the Town of Centerville meeting minutes and oral arguments reflect that 2 loads of gravel had been dumped in the portion of road in question, and graded, in 2006 (Petition Ex. N).

The respondents also allege that in 1993, the Town of Centerville in a series of board meetings, put on the record that the portion of Pattridge/Washburn Road was abandoned (Answer Ex. B). While it appears the from the pleadings that the Town of Centerville wished to abandon

this portion of road, it is the substantive facts themselves which establish whether there is an abandonment (Daetsch v. Taber, 149 AD2d 864, 865). The respondents have failed to provide any copy of any resolution of meeting minutes reflecting this alleged abandonment. While it is true the filing of a certificate of abandonment is a ministerial act, there has been no showing that the town board of Centerville ever enacted any resolution deeming the road abandoned.

Additionally, it appears the tax and zoning maps display the subject section of Pattridge/Washburn Road as an open road (Reply Ex. A and B). There has been no change or closing of the subject section of Pattridge/Washburn Road on the zoning maps pursuant to Town Law § 273, thereby indicating the subject section of the road is open.

Conversely, the uncontroverted evidence submitted by the petitioners establishes that the portion of Pattridge/Washburn Road in question, has been and continues to be, regularly used and traveled as a passable road. The portion of the road in question is unique, in that, the westerly end of this 0.12 mile area in question abuts a completely abandoned and impassable section of Pattridge/Washburn Road that extends westerly to Centerville Road for approximately 1.2 miles (Answer Ex. B). Thereafter, Pattridge/Washburn Road then picks up and continues as a westerly “through” road, bordering the Town of Arcade and Allegany County. For the respondents to contend that vehicular traffic does not regularly uses this 0.12 mile section of road in question is true; because this section in question abuts the abandoned and impassable former section of Pattridge/Washburn Road. Traffic would not normally travel on a ‘dead end’ section of road except for those individuals that reside on that road. Notwithstanding the number of vehicles that travel on the section in question, the travel continues in forms reasonably normal along the lines of an existing road. Travel is not limited to four wheelers, all-terrain vehicles,

farm equipment or only four wheel drive vehicles. Likewise, the section of road in question is not covered with brush or extensive overgrowth that makes it virtually indistinguishable from the surrounding wooded area; it is still a traveled and used road (see, Pless v. Town of Royalton, 185 AD2d 659). Accordingly, the Court finds no abandonment of the road exists and the contested road segment continues to be a Town Road.

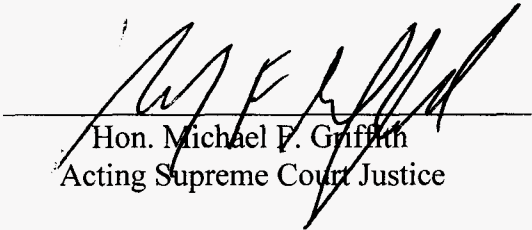
NOW, THEREFORE, it is hereby

ORDERED, the 0.12 mile segment of Pattridge/Washburn Road is not an abandoned road and the respondents are directed to maintain said segment of road pursuant to Highway Law § 187; with repair and maintenance of the subject road to begin as soon as practicable based upon weather conditions, but in no event later than 30 days from the entry of the Order; and it is further

ORDERED, requests for sanctions and attorney fees are denied.

Dated: Warsaw, NY
March 31, 2010

ENTER


Hon. Michael F. Griffith
Acting Supreme Court Justice

