

ROCKINGHAM, SS.

SUPERIOR COURT

RAINBOW LAKE HOMEOWNERS' ASSOCIATION

v.

TOWN OF DERRY and TOWN OF DERRY PLANNING BOARD

02-E-201

ORDER

In the within Petition for Declaratory Judgment, the plaintiff seeks to have this Court find and rule that all of the roads within a recognized area of the Town of Derry known as the Rainbow Lake subdivision are public as opposed to private. Should the Court so rule, the duty to maintain these roads would fall upon the Town of Derry, not the individual owners of property in the subdivision.

The plaintiff is an Association recently organized solely to initiate this litigation. While the defendant challenges the plaintiff's right to bring this lawsuit because the Association itself does not own any property in the area, nor does it claim to own the roads at issue, the Court will permit the named plaintiff to pursue this lawsuit. Given the limited purpose of this lawsuit, the Court determines that because it represents the interests of the homeowners whose property borders on the roads, it has standing to invoke Superior Court review of the defendant's decision regarding the status of these roads. The homeowners will be directly affected by the Court's

ultimate order.

The defendant also questions the propriety of the procedural method by which the plaintiff has elected to challenge the Town's decision as to whether the roads at issue are private or public. In fact, the plaintiff itself is seemingly not sure of the avenue it should take to secure a judicial determination as to the status of the roads. The Association's petition requests both a declaratory judgment, a remedy provided under RSA 491:22, as well as an appeal of a planning board decision, which can only be taken pursuant to RSA 677:15. After the Planning Board recommended to the Derry Town Counsel that it determined the roads to be private and the Town counsel adopted that recommendation, the plaintiff amended its petition to include an appeal of the Town Counsel's decision.

The Court determines that the plaintiff has no standing to seek relief under RSA 491:22 or RSA 677:15. The former statute is reserved for parties claiming a certain right or title to something and the latter statute is reserved for appeals of subdivision decisions of planning boards. Here the plaintiff Association does not claim right or title to the roads in question; in fact, it claims the opposite, it claims the roads are public. The Planning Board did not make a subdivision ruling or make a final determination as to the status of the roads. It merely made a recommendation to the Town Counsel which was free to either adopt or reject that recommendation.

The Planning Board action, therefore, is not appealable under RSA 677:15.

The defendant argues, and the Court agrees, that the plaintiff's petition must be considered to be a request of a Court of competent jurisdiction to use its general certiorari authority to resolve a dispute between parties. This Court has that power. See Citizens of East Derry Fire Precinct v. Town of Derry, 148 N.H. 510 (2002). That case also sets forth the criteria that the reviewing Court must employ when exercising its certiorari powers: "We uphold the Town Council's decision unless its decision was so lacking in reason as to be arbitrary, unreasonable or capricious or constitutes an unsustainable exercise of discretion." P. 512.

Leaving aside the procedural issues, both parties agree on the substantive issue that the Court is being asked to decide.

That issue is, are all of the roads in the Rainbow Lake

public or private. There are nine roads whose

status has been called into question by this litigation.

It is necessary for the Court to set forth a brief history of the roads at issue. While most of the facts

are undisputed, indeed many of them are set forth in written

agreements, the interpretation of the facts that causes the

parties to reach different conclusions. The Rainbow Lake

reservation was established in the late 1950s through three

1. Plan of Land in Derry, NH showing Rainbow Lake Shores

subdivided for Budget Finance Corp., September 1956 - Filed October 2, 1956 - Plan 02424; 2) Plan of Land in Derry, NH showing Rainbow Lake Shores as subdivided for Budget Finance Corp., April 1958 - Filed April 26, 1964 - Plan 205, drawer III, Section 1; and 3) Plan of Land in Derry, NH showing Section II Rainbow Lake Shores as subdivided for Budget Finance Corp., July 1959, recorded as plan 02820.

The Town of Derry established its planning board and formal subdivision regulations in 1960. Because the Rainbow Lake subdivision was formed before 1960, no approval of the three Budget Finance Corporation plans referenced herein and recorded in the 1950s was required or sought. However, after the Town's creation of a planning board and subdivision regulations, Budget Finance Corporation re-presented its plans and submitted them to the Planning Board. On April 14, 1964, the Planning Board approved the plan, but "for recording purposes only." It specifically noted that the approval was intended to reflect existing conditions and approval was in no way to be construed as an approval of the subdivision or any of the roads shown thereon." Although the location of the roads at issue was shown on said plan, no designation as to their status was made by the Planning Board on the recorded plan.

The only other plan of significance showing the Rainbow Lake subdivision was recorded in 1985. It is entitled "Town Map" and it depicts the roads of the entire Town. The parties

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EVIDENCE 2



dispute the purpose of the plan. The plaintiff refers to it as an "official map" thereby entitling it to be given great weight or at least be considered on a par with any other approved subdivision plan. The defendant refers to it as merely a "street plan" or "base plan," not a formally-approved plan, and therefore should be viewed as informational only, not as an official act of the Town. In the plaintiff's view, the plan is important because the nine streets at issue are set forth in the same fashion as all of the admittedly public roads in the Town. There is no marking thereon that would suggest to a reviewer of the map that the Rainbow Lake subdivision roads were private. Moreover, as the plaintiff points out, the map was prepared for the Master Plan, said plan being formally adopted by the Town in 1987.

Independent of the recorded plans, the evidence suggests that at or about the time that the Budget Finance Corporation filed its three plans in the late 1950s, that company began selling house lots to individuals. Initially the homes constructed thereon were seasonal only, but today most are occupied year-round. There are over 70 owners of homes on the nine streets in question.

This case was tried to the Court on March 12th and 13th, 1985. Two of the plaintiff's witnesses at trial, Peter and Alice Dizio, have lived in the subdivision since 1965. They were able to describe the condition of the roads and their

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EXHIBIT 3

maintenance in the 38 years that they have resided at Rainbow Lake. They testified that the Town always maintained the roads. It cut trees when necessary, plowed the snow in the winter, and regraded the roads in the spring. The roads were paved only once, in 1997, and the paving was not done adequately as it has now crumbled. Since 1999, the mail has been delivered right to their door. Before that time all property owners had mailboxes at the entrance to the subdivision. At least two businesses were conducted in the subdivision by subdivision owners in the past and all of the roads have always been open to the public. Street signs were installed by the Town and its police patrolled the roads, giving out parking tickets on occasion. None of the Division's testimony was vigorously contested by the Town.

From a review of the numerous Town records submitted to the Court by the parties, it appears that the issue as to whether or not the roads were public or private did not surface in terms of a policy decision having to be made until the year 2000. It arose in connection with road maintenance and it probably was the cost factor that forced the Town to publicly declare what it had always internally believed; namely, that the roads in the subdivision were private. In 2001 the Town council voted to discontinue maintenance of all roads which it deemed were private, including all of the roads in the Rainbow Lake subdivision. It is that decision that caused the plaintiff to file this lawsuit.

Recognizing the opposition that would come from the owners of the homes on "private" roads as a result of its decision, the Town gave the affected owners several options to pursue. It also agreed to continue to plow snow in the Rainbow Lake subdivision until the dispute was resolved. However, it has not graveled the roads in the past two years and at the present time, they are in poor condition. Although the Court was not asked to take a view, owners described parts of the roads now as being barely passable.

There is no dispute but that if the roads are ultimately determined to be private, the homeowners of Rainbow Lake would suffer a severe financial impact. The Town has submitted a cost benefit analysis which indicates that in order to upgrade the roads in question to Town specifications, it would have to expend over \$800,000. It is likely, therefore, that each homeowner's share of that cost would be well in excess of \$10,000. The majority of the owners are low to middle income people. Many, like the Dizios, could not afford such an expense.

Regarding the issue as to whether or not the roads are public or private, both parties submitted conflicting evidence to support their respective positions. For example, the Dizios testified that a former attorney for the Town of Derry assured them that the roads were public when they bought their home in 1965. On the other hand, the Town produced a letter written to Rainbow Lake residents by another former attorney for the Town.

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of Derry in 1967 declaring the roads to be private. Over the years as homes and additions were built, some official documents termed the roads private and some were silent on this issue. No deeds ever described the roads as being private, although the early ones from Budget Finance Corporation refer to them as "proposed roads."

After looking through dozens of Town records, the Court finds that the Town of Derry's policy with respect to what it now has declared to be private roads is best summed up by a memorandum written to the Town administrator by Alan Swan, the public works director. Mr. Swan testified at the trial. Back in 1993 he wrote:

The issue of private roads as it relates to maintenance is "one big can of worms." I say that because it appears that political decisions have driven/or not driven decisions concerning a particular road as it relates to Town maintenance. A perfect example of this was in 1988 when Mayor Collette was under great pressure from residents of the Rainbow Lake Area to provide road maintenance. This area is controlled by an Association with all dirt roads. The Mayor ordered that we provide gravel and grade all roads (\$5,000.00 to \$10,000.00).

Thus, it appears that up until the Town of Derry decided to formally declare the roads to be private in the year 2001, it was content to avoid a likely confrontation with the Rainbow Lake homeowners by doing minimum maintenance over the years. The Town seemingly chose not to formally declare the roads to be private for over forty years for fear of becoming embroiled in a public dispute, such as this litigation presents.

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is to produce some recorded document evidencing that fact. Remember that when Budget Finance Corporation prepared its three subdivision plans in the late 1950s, there was no regulation in place for planning board review and, therefore, the plans were recorded without Town approval of the roads. After the subdivision regulations were in place, Budget Finance Corporation sought de facto approval from the Town, but it did not get it. The Planning Board merely acknowledged the fact that the subdivision existed without approving any of the lots or roads contained therein. Thus the Budget Finance Corporation subdivision plan does not prove "acceptance" of the roads.

The plaintiff points to the recording of the Town map in 1985 in connection with the Town's approval of its Master Plan in 1987 as evidence of acceptance of the roads by the Town. Based upon the map entries, it would appear that the Town considered the roads in question to be public. However, the Town argues it never adopted an official map pursuant to the provisions of RSA 674:9 and RSA 674:10. While that may be true, the recording of the Town map in 1985 certainly is some evidence that the Town accepted the roads at issue.

The testimony of Hugh Lee was most instructive on this point. He is a long-time resident of Derry; however, he does not live in the Rainbow Lake subdivision. He is both an attorney and engineer. He served on the Town planning board for ten years from 1984 through 1994. He also worked closely with

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in 1985 was, in fact, an official map. Because the roads in question were not designated as private roads on said map, he believed that by approving the Master Plan which adopted the Town map, the Town of Derry had, in fact, accepted the roads in question as public. The defendant argued that because the alleged approval of the Town map was not completed pursuant to RSA 674, any such approval could not be found to be official. While that may be true, nevertheless, the opinion of a respected Town official as to the status of the roads is entitled to be weighed by the Court in considering the reasonableness of the Town Counsel's decision.

Although a showing of formal acceptance is desirable, acceptance can be proven impliedly. On this issue, both parties have listed distinct acts of the Town over the years which tend to show either that the Town had accepted the roads as public or that the roads had always been considered to be private. The Town has reviewed its records and produced several documents wherein a Town official had opined that the roads were public. Those documents include memoranda between various Town Department officials wherein the subject of the Rainbow Lake residential roads was discussed, said memoranda being authored in 1975, 1977, 1982, 1985 and 1993. There were also letters sent by Town officials over the years to individual homeowners

In the final analysis the Court finds that the true status of the roads must be determined under the law that sets forth how public highways are created; to wit, RSA 229:1. Although cited by the parties, the Court determines that neither RSA 674:40 or RSA 674:41 are applicable in resolving the status of the roads. RSA 229:1 describes the four methods by which a public highway can be created. See also Polizzo v. Town of Hampton, 126 N.H. 398 (1985). The plaintiff concedes that the facts would not support three of the four methods referenced in the statute. Thus, the only way the plaintiff can prevail in this case is to demonstrate that the original owner of the roads dedicated them for public use and the Town of Derry accepted them.

"Dedication" and "acceptance" are terms of art when it comes to the status of roads. Although sometimes the words are used interchangeably, they do not, in fact, mean the same thing. An owner of land may "dedicate" its use to the public by some formal act. The filing of a subdivision plan is the most obvious example. Generally the owner lays out defined lots of land and creates proposed roads to surround them. By filing a subdivision plan, an owner is relinquishing title to the proposed roads thereon. If the owner is then permitted to sell the lots on the plan, then there can be no doubt as to its intention to "dedicate" the roads to the public. That is exactly the situation here. Budget Finance Corporation filed

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three subdivision plans and sold the lots as set forth on said plans beginning in the late 1950s. The fact that the Town did not immediately "accept" the roads as public has no bearing on the issue of owner dedication.

The Town argues that Budget Finance Corporation did not "dedicate" the roads for public use because it elected to convey record title to them along with accompanying beach rights to three separate associations formed back in the late 1950s. However, the homeowners of Rainbow Lake were never taxed for the roads. The individual property tax cards do not declare the abutting roads as being private. Whatever became of these associations is not clear. Public use of the roads has been constant, according to the residents, from their creation through the present.

As an aside, the Court notes that even the Town's highway coordinator, Alan Cote, in an interoffice memo dated January 11, 2002 reported that "There is little argument that can be made with regard to the dedication of these roadways by the recording of plats at the registry showing the roads." The Court finds that the roads in question have, in fact, been "dedicated" for public use, said dedication dating back to the late 1950s.

In order for the Court to find the roads to be public under RSA 229:1, the plaintiff must also prove that the Town "accepted" them. The easiest means of showing that the Town of Derry accepted all of the roads in the Rainbow Lake subdivision.

in Rainbow Lake concerning snowplowing wherein said official reminded a homeowner that the roads were private. The Town also pointed to some registry recordings made by individual property owners in Rainbow Lake acknowledging that the roads at issue were private, said recordings being primarily in 1982 and 1983. Finally, the Town noted that residents of Rainbow Lake have over the years petitioned the zoning board of adjustment for variances for several building projects and those petitioners were notified in writing that their requests were being denied because their property was not on a Town approved road.

To prove that the Town had, in fact, accepted the roads, the plaintiff pointed to the Town's maintenance policy which has existed since the roads were constructed over 40 years ago until the Town elected to change that policy in the year 2001. The evidence suggests that the Town fully maintained the roads with no assistance from the homeowners throughout that period of time. Maintenance included not only snowplowing, but also road repair and the installation of all road signage. The subdivision was never gated, nor were there any private property signs displayed at the entrance. The public was never directly or indirectly prohibited from entering the subdivision. At least two businesses were conducted therein and the police patrolled the roads. Several banks did property appraisals for the homeowners and they noted in their written reports that the roads were public. Some residents testified that although there

JUDGES DECISION

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may have been some no trespassing signs at the beach on Rainbow Lake, the public had access to this area and, in fact, used it for fishing and boating purposes over the years. In addition, the State of New Hampshire was asked and did pass a speed limit for boat traffic on Rainbow Lake, which was an indication that the State considered it for public use.

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① Boat ramps designed by Town.  
② Making Record

The defendant as part of its legal research in this case referenced an article written by Attorney Paul J. Alfano entitled Creation and Termination of Highways in New Hampshire, 31 New Hampshire Bar Journal (1990). At Page 36 the author concluded that "A court may deem a road accepted if the municipality repairs the road or if the public uses the road for 20 years." If indeed that is the test for acceptance, then the 20-year exclusive maintenance and public use of the Rainbow Lake subdivision roads clearly mandates a finding of Town acceptance. In summary fashion, what the evidence shows in this case is the following. The creation of the Rainbow Lake subdivision predates the establishment of the Derry Planning Board. The roads in the subdivision may have, in fact, always been substandard. Faced with that reality, the Town characterized the roads as private for its internal purposes over the years rather than openly declare them to be private. The presentation of the subdivision plan by Budget Finance Corporation in 1964 to the Planning Board afforded the Town with the perfect opportunity to clearly state that the roads in the Rainbow Lake

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subdivision were private. Rather than taking advantage of that opportunity, the Planning Board elected to simply note that the recorded plan was not an officially-approved subdivision. A second opportunity was presented to the Town to formally proclaim that the roads were private when it prepared and recorded its Town map in 1985. Again, the Town elected not to face the issue head on by choosing to depict the Rainbow Lake roads as public rather than private.

Over the years when the issue of the status of the roads came up, the Town elected to take the non-confrontational approach of doing what little it could expense-wise to keep the roads passable so as to placate the residents. Although the Town may have generated several individual documents in which it deemed the roads private, it never proclaimed that fact publicly so that all of its residents would clearly understand its position that the roads were indeed private until the last couple of years. In the interim, by all outward appearances, the Town seemed to treat these roads as it treated all of its admittedly public roads.

Under the specific facts of this case, the Court finds and rules that by its actions and inactions the Town accepted the roads as Class V highways as that term is defined under the law. The Court determines that the Derry Town Council's decision that the roads are private is a decision "as lacking in reason as to be arbitrary, unreasonable or capricious." Accordingly, the

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plaintiff Association is entitled to have the Town maintain these roads.

Although the Court has found that the Town has accepted the roads pursuant to RSA 229:1, it is not prepared to set forth herein what specifically the Town must do in order to maintain these roads in the future. In defense of the within lawsuit, the Town argues that if these roads are accepted, they must be brought up to Town specifications at a cost of over \$800,000. However, the plaintiff does not want to put the Town to that expense. All it wants is an order that the Town must continue the status quo with respect to its past maintenance of the roads. The plaintiff wants snowplowing and sufficient grading to make the roads passable. It would seem that the Town has the authority to make an exception to its general road specification policy for the roads in Rainbow Lake given that the exception would appear to be acceptable to the residents. The Town is free to consider the residents' request in its determination as to what should be done with respect to the maintenance of these roads.

Both parties have filed a series of Requests for Findings of Fact and Rulings of Law. All of the plaintiff's requests are granted. With respect to the defendant's requests, the Court grants 1 through 7, 10 through 17, 19, 20, 21, 23, 27 through 31, 33, 34, 36 through 39, 45, 46, 47 and 56. The Court denies requests 18, 22, 24, 32, 40 through 44, 48, 49, 51, 54, 55, 57

and 58. Requests 8 and 9 are granted as to ownership, but denied as to the Association's having obtained exclusive use of the roads. Requests 25 and 26 are neither granted nor denied, there being insufficient evidence presented for the Court to make definitive rulings on these requests. Requests 35 and 50 are granted if the word "always" is deleted. Requests 52 and 53 are neither granted nor denied as the Court finds that the facts of each individual case must be studied before the conclusions expressed therein are deemed to be correct.

So ordered.

Dated: May 1, 2003



Kenneth R. McHugh,  
Presiding Justice