COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
No. 17 MISC 000605 (HPS)

TOWN OF CONCORD,

Plaintiff,

v.

NEIL E. RASMUSSEN, ANNA W. RASMUSSEN, BROOKS S. READ, SUSANNAH KAY, RUSSELL ROBB III, LESLEE ROBB, and THOMAS WRAY FALWELL, TRUSTEES of the PIPPIN TREE LAND TRUST, and NINA I.M. NIELSEN, TRUSTEE of the BAKER REALTY TRUST,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Town of Concord filed this case on October 24, 2017 in order to obtain a determination that unpaved portions of Estabrook Road, also called the Estabrook Trail, an unpaved way in Concord popular with hikers, was a way to which the public continued to have a right of access. The dispute concerning the public's right of access had arisen between the Town and the owners of much of the land abutting the trail. During most of the pendency of this action, the Trail remained open to the public. On April 5, 2020, three weeks into the coronavirus pandemic lockdown in Massachusetts, which commenced on or about March 16, 2020, the owners of two of the properties abutting the trail, Neil Rasmussen and Anna Rasmussen, and Brooks Read and Susannah Kay, took matters into their own hands to unilaterally change the

status quo. Citing increased usage of the trail abutting their properties by members of the public since the beginning of the coronavirus lockdown, and claiming as well improper and unsafe behavior by some of the members of the public using the trail, they closed a gate they had erected at the southern end of the trail near where it meets the paved portion of Estabrook Road, and they also closed a gate they had erected three hundred yards to the north, at an intersection in the Trail, thus closing off public access at two points at the southern end of Estabrook Road, and closing off the section of the Trail abutting the occupied parts of their properties. They also posted signage at both closure points indicating that the trail was private, and one sign that, paradoxically and misleadingly, and somewhat ironically, indicated that the Trail, which they maintain has always been private and not in public control, was closed "by order of County Commissioners."

The unilateral closure of the trail by the Rasmussens and the Read-Kays precipitated a conference between the parties and the court on May 14, 2020, and the filing of the present motion for a preliminary injunction by the Town on July 6, 2020.

The court took a view on July 20, 2020, and a hearing was held by videoconference later the same day. Upon consideration of the affidavits and memoranda filed by the plaintiff and by the defendants, and the arguments of counsel, and for the reasons stated below, the motion for preliminary injunction is ALLOWED.

FACTS

The following facts appear in the record and are credited by the court for the purposes of consideration of this request for preliminary injunctive relief:[1]

The northern two-thirds of Estabrook Road, from roughly adjacent to Mink Pond northerly to the Carlisle town line, was laid out in 1763 by the Middlesex County Court of General Sessions. Specifically, at the southern terminus of the way as laid out, the way went "to the Dam at David Brown's land then as the Road is now trod to a Town Way thro' said David Brown's Land."

The plaintiff presented evidence that the Town Way referred to in the 1763 layout of the northern two-thirds of Estabrook Road was the result of a reservation for a road reserved in a 1730 deed of the Harris Farm. The plaintiff presented other evidence of the maintenance and repair of the road by records dating from 1754 into the 19th century. A 1754 map shows Benjamin Clark's house near the southern end of Estabrook Road, in approximately the present location of 299 Estabrook Road. A 1764 assignment to the highway surveyors refers to the way "by Benjamin Clarks & so by Harris's to the new way lately laid out in the new way as far as the way goes through Captain John Buttrick's pasture." The plaintiff's expert testified by affidavit that this was a reference to the southern portion of Estabrook Road, south of the 1763 layout, and therefore inclusive of the portion of the way in dispute in this motion. He further testified by affidavit that there are similar descriptions of the way in the Town's records until at least 1829.

It is undisputed that in 1932 the Concord road commissioners petitioned the Middlesex county commissioners to discontinue, pursuant to G. L. c. 82, § 32A, that portion of Estabrook

[1] The court makes only preliminary findings based on "an abbreviated presentation of the facts and the law," *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980), and does not purport to make the detailed, and final, findings and rulings of law that will follow a dispositive motion or a trial on the merits pursuant to Rule 52, Mass. R. Civ. P.

Road from roughly the present-day location of the gate erected by the defendants blocking the southern entrance to the Estabrook Trail, north to the Carlisle town line.

Prior to the current litigation, the defendants replaced a chain blocking vehicular access to the Estabrook Trail with a vehicular gate and a pedestrian gate, but did not close the pedestrian gate. On April 5, 2020, the Read-Kays, with the concurrence of the Rasmussens, closed the pedestrian gate as well, and posted signage to the effect that the closed portion of the Trail is private property and that the public may not enter. One sign, however, indicated that the closure was at the order of the "county commissioners."

The Rasmussens live on a two-hundred acre property that borders on the Trail for about a mile, with the southerly entrance onto their property near their house just to the west of the gate that is the subject of this dispute. Their driveway leads up a hill to their home, which is a few hundred feet from the western edge of the Trail. They maintain several other buildings on their property, all but one of which are also significantly distant from the edge of the trail. They have a guest house, in which a relative lives, which is directly adjacent to the Trail. Its front door is on the side of the building opposite the side of the trail, about thirty feet from the trail. It does not have a back door adjacent to the trail.

The Read-Kays live on property to the east of the Trail. Their home is also a considerable distance, at least 100 feet, off the Trail, and up an incline. No other defendant resides in the vicinity of the Trail.

The Rasmussens and the Read-Kays have presented evidence that their reason for closing the section of the Trail was increased usage of the Trail since the beginning of the coronavirus pandemic, and poor behavior by those using the trail, including bringing dogs off-leash onto the Trail, hikers not wearing masks, increased bicycle usage leading to trespassing on the

defendants' private property, and a burning cigarette butt found on the trail, leading to concern about fires, especially in light of the lack of any nearby fire hydrant.

DISCUSSION

STANDARD FOR ISSUANCE OF PRELIMINARY INJUNCTION

The familiar standard for consideration of a request for preliminary injunctive relief is as follows: "[W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Where, as here, "a public entity is a party, a judge may weigh the risk of harm to the public interest when deciding a preliminary injunction motion." *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 246 (1991).

Further, "[a] preliminary injunction ordinarily is issued to preserve the status quo pending the outcome of litigation." *Doe v. Superinendent of Schools of Weston*, 461 Mass. 159, 164 (2011). "It is proper, indeed desirable, to issue an injunction if its issuance is the only way to preserve the status quo and it promotes the public interest to do so, even though it grants the ultimate relief sought." *Petricca Const. Co. v. Com.*, 37 Mass. App. Ct. 392, 400 (1994).

LIKELIHOOD OF SUCCESS ON THE MERITS

The public has made undisturbed use of Estabrook Road, including the portion adjacent to the defendants' properties, for hundreds of years. The defendants maintain that, at least since 1932, such use has been only with the permission and license of them and their predecessors. Whether the public has a right to continue to use Estabrook Road is a function of whether Estabrook Road is a public way, or a private way with public rights of access, or is a private way to which the public has no rights of access.

The manner of creation of a public way is well established. A way may become a "public way" in one of three ways: "(1) a laying out by public authority in the manner prescribed by statute (see G.L. c. 82, ss 1-32); (2) prescription; and (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal…, coupled with an express or implied acceptance by the public." *Fenn v. Town of Middleborough*, 7 Mass. App. Ct. 80, 83-84 (1979) (internal citations omitted). The *Fenn* court also left open "the possibility of showing that a way is public, as, for example, by means of ancient maps or other records, without showing the means by which the way came to be public." *Id.* at 87.

The defendants argue, and the Town appears to concede, that the Town has no evidence of the statutory laying out of the disputed portion of Estabrook Road. The Town argues, however, that it has sufficient evidence to establish the existence of the way in dispute, prior to 1932, by prescription, including evidence of public use and maintenance of portions of the road by the Town. The defendants argue that the evidence offered is of use too intermittent and sporadic to support a successful claim of prescription. The court is unwilling, on the record before it, to characterize the evidence of prescription offered as either sufficient to establish a claim of prescription or as too meager to do so. But the evidence offered is enough to characterize the

Town's claim as one that has a sufficient likelihood of success on the merits to justify considering it in combination with the Town's assertion of irreparable harm as enough to warrant the issuance of a preliminary injunction.

The court also does not discount, simply because it has never been relied on in any case after *Fenn*, the *Fenn* court's holding out of the "possibility" that the public character of a way can be established by means showing that the way had obtained the character of a public way "without showing the means by which the way came to be public." *Id.* at 87. Certainly the 1932 discontinuance is an indication that those acting on the petition considered the way to be public.

The parties dispute the legal effect of the 1932 discontinuance of portions of Estabrook Road, including the section near the occupied portions of the Rasmussen and Read-Kay properties. The court is not willing to rule on that purely legal dispute until it is fully and properly before the court on a dispositive motion or a trial, but neither position is frivolous by any means. For the purposes of assessing likelihood of success on the merits, and without drawing a final conclusion, the court notes that the plaintiff's position on the question of the effect of the 1932 discontinuance is supported by dicta in at least one appellate case. In *Coombs v. Bd. Of Selectmen of Deerfield,* 26 Mass. App. Ct. 379 (1988), the Appeals Court opined that a discontinuance under the pre-1983 version of G. L. c. 82, § 32A had the effect of "eliminating the expense of the town's burden of maintenance, while leaving unimpaired the public's right of access over the road." *Id.* at 381. The court finds that the plaintiff has a sufficient likelihood of success on this issue to justify consideration of its likelihood of success in combination with the parties' relative claims of irreparable harm.

IRREPARABLE HARM

The court does not doubt the genuineness of the concerns raised by the Rasmussens and the Read-Kays when they resorted to self-help to close off public access to the portions of the Estabrook Road adjacent to the occupied portions of their properties. But even if they felt the situation to require desperate action, "theirs was not the kind of desperation that justifies self-help." *Goulding v. Cook*, 422 Mass. 276, 278 (1996).

The concerns related by the defendants, to the extent they are coronavirus-related, while understandable, do not place the defendants in any closer proximity to people on the Trail, and in most cases far less proximity, than would be any person walking out of a house near a public way to people walking on a public sidewalk or street. Both the Rasmussens' home and the Read-Kays' home are considerable distances from the Trail, as much as hundreds of feet in the case of the Rasmussens. The guest house on the Rasmussen property adjacent to the Trail has a front door that is on the side of the building away from the Trail and is an estimated thirty feet off the trail and protected by the building. Anyone walking out of the guest house would be a safe distance from anyone on the Trail not wearing a mask. Notwithstanding the defendants' estimates of the number of people using the Trail, the number, compared to pedestrian use of any average public way, appears to be sporadic and light. The court notes that during the hour-long view taken on July 20, 2020, no persons were observable along about a mile of the Trail other than those participating in the view.

Other concerns raised by the defendants are to some extent speculative, as their assertion that people using the Trail are destined to trespass on private property off of the Trail. The defendants also assert a concern about fire hazards, and state that they found a burning cigarette on the Trail the day before they closed the gate. The defendants presented no evidence of any fire

causing any damage on or adjacent to the Trail at any time since they have owned their properties, and the court finds that evidence of the possibility of a fire risk as a result of members of the public traversing the Trail is remote.

In view of the nature of the Town's participation in this action, the court considers the public interest component of the balancing test as overlapping with the Town's interest as an individual party. The court considers the deprivation of long-standing public access to a hiking trail to be a harm that is irreparable to the Town and to the public interest. The court does not accept the defendants' argument that the ability to access Estabrook Road from other locations in Concord means that the public is not being irreparably harmed by the loss of only three hundred yards of the Trail. Other access points are more or less accessible to members of the public depending on where they live, and other access points are of course more remote from the part of the trail at the southern end of Estabrook Road.

CONCLUSION

The court concludes, for the reasons described above, that the risk of irreparable harm to the plaintiff, in light of its chances of success on the merits of its claim, outweighs the defendants' probable irreparable harm and likelihood of prevailing on the merits. See *Commonwealth v. Mass. CRINC*, 392 Mass. 79 (1984).

Accordingly, it is

ORDERED that the plaintiff's motion for preliminary injunction is ALLOWED. It is further

ORDERED that, during the pendency of this action, or until further order of the court, the defendants Neil Rasmussen, Anna Rasmussen, Brooks Reid, and Susannah Kay, and their agents, representatives, employees, contractors, and others acting in concert with them or

otherwise having actual knowledge of this Order, are hereby **ENJOINED and RESTRAINED** from gating, closing, blocking, or otherwise interfering with public access to Estabrook Road, Estabrook Trail, or any part thereof, and are further enjoined from maintaining or posting any signage on or near said Estabrook Trail designed, intended, or tending to have the effect of discouraging or prohibiting public access to said Estabrook Road or Estabrook Trail, until further Order of this court, and it is further

ORDERED that the Town of Concord shall post signs at the location of the current gates, and at other prominent locations on Estabrook Road and Estabrook Trail, with the conditions proposed by the Town to the court in its proposed order, and in addition a rule that dogs are to be leashed at all times while on Estabrook Road, and the Town is further ORDERED as a condition of the issuance of this injunction to provide reasonable enforcement of the posted rules, including enforcement of parking restrictions on Estabrook Road.

No security is to be required in connection with the issuance of this Order.

So Ordered.

By the Court. (Speicher, J.)
/s/ Howard P. Speicher
Attest:

/s/Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: July 23, 2015.