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| **DOCKET NO.: KNL-CV19-6041188S** | **:** | **SUPERIOR COURT** |
| **PETER B. VIERING, ET AL** | **:** | **J.D. OF NEW LONDON** |
| **VS.** | **:** | **AT NEW LONDON** |
| **GROTON LONG POINT ASSOCIATION, INC.** | **:** | **OCTOBER 18, 2022** |

**MEMORANDUM OF DECISION RE:**
**CROSS MOTIONS FOR SUMMARY JUDGMENT (ENTRY NO.'S 152.00, 159.00)**

**Introduction.**

The plaintiffs are owners of lots in Groton Long Point which abut two right of ways, designated in the complaint as "East ROW" and "West ROW." Those lots and rights-of-way were originally the property of the Groton Long Point Land Company ('the Company") which, prior to 1931, owned the area of Groton now known as "Groton Long Point." The defendant, Groton Long Point Association, Inc. ("the Association"), is an entity, created in May 1921 by special act of the General Assembly, and endowed, generally, with "all the powers granted to boroughs under the general statutes" and, specifically, with, among other things, the power to tax property within its limits, to police, to "provide for the extinguishment of fires," to create and maintain a sewerage system, to establish its own water authority, and the right to be immune from claims of trespass when entering upon private property situated within its borders for the purpose of making repairs. The legislative charter declared that the Association property owners "are hereby constituted a body politic." Between 1900 and 1931, the Company subdivided its land and sold individual lots while retaining ownership of

roadways, rights-of-way, beaches, and its boardwalk. By 1931, it had conveyed by deed the entirety of the shore, roads and rights-of-way located at Groton Long Point to the Association. Affidavit of Peter Viering, ¶14, Exhibit E to Memorandum in Support of Plaintiff's Motion for Summary Judgment.

The various lots owned by the plaintiffs were among the lots which comprised the second of five subdivisions recorded by the Company ("Subdivision 2"). Id. at ¶5. Some of those lots had direct frontage to Shore Avenue; others had frontage to the shore but not to Shore Avenue. Id. at ¶6. Two five-foot rights-of-ways running between the shorefront and roadfront – one between lots 330, 331, 340 and 341 (the "West ROW") and one between lots 328, 329, 341 and 342 (the "East ROW") were established and referenced in the deeds to the lots abutting them, affording the owners of the Shorefront Lots access to Shore Avenue. Id. at ¶7. Plaintiff Peter Viering contends that the Company intended for the rights-of-way to be used exclusively by the abutting property owners, not by the Association as a whole, and were created by the Company for the benefit of the abutting owners only. Id. at 32, Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 6, Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 6, Exhibit M to Memorandum in Support of Plaintiff's Motion for Summary Judgment. It is undisputed that the Association acquired title in fee simple to the rights-of-way subject to the rights of the abutting property owners.

Of the lots owned by the plaintiffs, four – two shorefront and two roadfront – have been owned by brothers Peter Viering and Russell Viering, Jr. since June 2003 and have been owned by the Viering family since the 1920's. Id. at ¶18. Two lots – one shorefront and one roadfront – were conveyed to plaintiff Christine Carr by deed dated April 4, 1996. Id. at ¶¶22-23. "Lot 326" was conveyed to plaintiff Jane M. Battles by deed dated January 6, 2006. Id. at ¶¶27-28. "Lot 345" was conveyed to plaintiffs Thomas E. Kingston, Jr. and Bobbye Lou Sims by deed dated September 6, 2002. ¶¶29-30.

Over the course of many decades, the rights-of-way abutting the plaintiffs' properties became overgrown "with wild growth including beach rose and bittersweet." Two utility poles were placed in them. Id. at 32. Prompted by discussions "from time to time" about the rights-of-way at meetings of the Board of Directors of the Association, Peter Viering, between November 1999 and March 2000, sent a series of letters to the board urging it to recognize the rights-of-way as having been "dedicated to and reserved for the lots they abutted" and not for use by the residents and guests of Groton Long Point at large. Exhibit M to Memorandum in Support of Plaintiff's Motion for Summary Judgment. At the end of May 2019, the Association informed the plaintiffs that it intended to "clean up" the rights-of-way by removing bushes and "other impediments." Amended Complaint ¶35. Shortly thereafter, the "clean up" began, prompting the filing of this lawsuit.

In their four-count complaint, the plaintiffs claim that they have, either through adverse possession, abandonment, abutters access easement, or prescriptive easement acquired the right of ownership or the right to exclusive use of the rights-of-way which, they assert, had become overgrown and had "never been used for foot passage other than by very limited use by [themselves], their family [sic] and guests." Complaint, ¶¶31, 32. The defendant, in turn, claims that as an entity with all of the attributes of a municipality, it is immune to claims of adverse possession and that, in any event, the claim of adverse possession must fail as a matter of law, there being no genuine issue of material fact as to whether the plaintiffs' use of the rights-of-way have been open, notorious and exclusive continuously for a period of fifteen years or more; that having obtained the rights-of-way by deed, it cannot lose them to claims of abandonment; that the plaintiffs, as members of the Association, already have the right and ability to use the rights-of-way and, thus, cannot obtain an abutters access easement; and that given their inherent right to use the rights-of-way, they cannot obtain a prescriptive easement over them. Before the court are the parties' cross-motions for summary judgment

I.

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must

view the evidence in the light most favorable to the nonmoving party." *Connecticut Medical Insurance Co. v. Kulikowski*, 286 Conn. 1, 4-5 (2008). To satisfy its burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11 (2008). This does not mean, however, that the nonmoving party can prevail simply by invoking the mantra "genuine issue of material fact" over and over: "When a motion for summary judgment is supported by affidavits and other documents, an adverse party . . . must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, the court is entitled to rely upon the facts stated in the affidavit of the movant." *Bartha v. Waterbury House Wrecking Co., Inc.*, 190 Conn. 8, 11-12 (1983). "[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment.... [T]he trial court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Citations omitted; internal quotation marks omitted.) *Field v. Kearns,* 43 Conn. App. 265, 269–70, 682 A.2d 148, cert. denied, 239 Conn. 942, 684 A.2d 711 (1996), as cited in *Kroll v. Sebastian*, 58 Conn. App. 262, 265, 753 A.2d 384, 386 (2000).

**II.**

The plaintiffs argue, in the first instance, that there is no genuine issue of material fact as to whether they have acquired ownership of the rights-of-way by adverse possession. The defendant argues, conversely, that there is no genuine

issue of material as to the claim of adverse possession as it is a "quasi-municipality" and, as such, is immune from liability for claims of adverse possession. The court disagrees with both arguments.

The Groton Long Point Association is not just another property owner. If not a municipality *per se*, it has, by virtue of its legislative charter, all of the attributes of a municipality, e.g. taxing authority, zoning authority, a police force, a fire department, water and sewerage authorities, and immunity from claims of trespass when entering upon private property within its limits to make repairs. It is expressly vested with "all of the powers granted to boroughs under the general statutes." Its members are a "body politic." Indeed, the Appellate Court has recognized the Groton Long Point Association as "a municipal corporation pursuant to an act of the General Assembly dated May 19, 1921." *Kroll v. Sebastian*, 58 Conn App. 262, 264, n. 5 (2000). That it does not serve the general welfare of the public-at-large does not defeat its quasi-municipal status (hence, the "quasi").

"It is well established that [t]itle to realty held in fee by a state or any of its subdivisions

for a public use cannot be acquired by adverse possession." *Caminis v. Troy*, 300 Conn. 297, 308 n.13 (2011) (quoting *Am. Trading Real Est. Props., Inc. v. Town of Trumbull*, 215 Conn. 68, 77 (1990)). "Municipal immunity from adverse possession is the rule and not the exception . . .", as "the public should not lose its rights to property as a result of the inattention of a government entity. Id. at 80. As the court in *Am.*

*Trading Real Est. Props, Inc. v. Town of Trumbull*, supra, noted, this rationale "applies with even greater force to situations [as in this case] involving undeveloped lands, which may, by their nature, garner even less attention from local governments suffering from the constraints of scarce fiscal resources." Id.

The question of whether property held in fee by a tax district can be acquired by adverse possession was squarely before the court In *Campanelli v. Candlewood Hills Tax District*, 126 Conn. App. 135, 10 A.3d 1073 (2011). There, the court, recognizing that the defendant tax district as a "quasi-municipal corporation" that is "governed by the law applicable to municipal corporations," concluded that the tax district was immune from a claim of adverse possession involving property held in fee by the tax district for a public use. Id. at 139, citing to *Goldman v. Quadrato,* 142 Conn. 398, 402–403, 114 A.2d 687 (1955). "In light of the myriad of public uses that may be advanced through public ownership of undeveloped lands ...," wrote the court, "property that is held in fee simple ownership by municipalities must be presumed to be held for public use." Id. "It follows that the party seeking title by adverse possession must bear the burden of rebutting that presumption." Id. Public rights to municipal property will not be forfeited by lack of use absent some additional evidence indicating that the municipality intended to abandon the property. *Appeal of Phillips,* 113 Conn. 40, 45, 154 A. 238 (1931). "[T]he public use requirement can be satisfied even if a property is not presently subject to public use so long as it is held with an intention to develop it at some time in the future." *American Trading Real*

*Estate Properties, Inc. v. Trumbull,* supra, at 79, 574 A.2d 796, as cited in *Campanelli v. Candlewood Hills Tax Dist.,* supra at 140.

The plaintiffs suggest that the overgrowth of the rights-of-way and the placement of utility poles within them are evidence of the defendant's intention to abandon the rights-of-way and that, in any event, the rights-of-way were reserved for use by the abutting property owners only and not the public. The October 18, 2003 and January 11, 2004 letters of the Association's Board of Directors to the "residents" and "landowners" of Groton Long Point (Exhibit N to Memorandum in Support of Plaintiff's Motion for Summary Judgment) expressing an intention to "ensure that [the rights-of-way] do not become encumbered with man-made structures causing a safety hazard or limiting access," reasserting ownership of the rights-of-way, and instructing owners of properties abutting the rights-of-way to "remove all hazardous impediments . . . and other obstacles that obstruct access" indicate otherwise. Thus, there are genuine issues of material fact as to whether the defendant is immune to the claim for adverse possession. The same cannot be said for the claim for adverse possession itself.

**III.**

"The doctrine of adverse possession is to be taken strictly." *Jablonski v. Wilson*, No. CV 950067071, 1997 WL 716451, at *5 (Conn. Super. Ct. Nov. 10, 1997) (quoting *Huntington v. Whaley*, 29 Conn. 391, 398 (1860)). To "establish title by adverse

possession, the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his own and without the consent of the owner." *O'Connor v. Larocque*, 302 Conn. 562, 581 (2011) (internal citations omitted). "To acquire title by adverse possession, the possession must be hostile from its inception," i.e., the "'claimant's possession must be without license or consent of the owner.'" *Woodhouse v. McKee*, 90 Conn. App. 662, 672 (2005) (quoting *Kramer v. Petisi*, 53 Conn. App. 62, 71 (1999)). "In determining what amounts to hostility, the relation that the adverse possessor occupies with reference to the owner is important." *Id.* (internal quotation marks omitted). "If the parties are strangers and the possession is open and notorious, it may be deemed to be hostile"; however, "if the parties are related, there may be a presumption that the use is permissive." *Id.* (internal quotation marks omitted).

The very nature of the rights-of-way defeats the claim for adverse possession. They are strips of land owned in fee by the defendant which the plaintiffs have at all relevant times had the right to use. As the plaintiffs' use of the rights-of-way has at all relevant times been permitted, there is no genuine issue of fact as to whether that use has been hostile to the ownership right of the defendant. By the same token, the mere fact that the rights-of-way had over the course of decades become overgrown, while reflective of the Association's use – or disuse, as it were – of the rights-of-way during that time is in no way reflective of the plaintiffs' use of the rights-of-way during that

time, let alone probative of their ouster of the defendant from those strips of land. Furthermore, even assuming, arguendo, that there is a genuine issue of material fact as to the plaintiffs' open, visible, and hostile possession of the rights-of-way, the element of exclusive use fails as a matter of law where each of the plaintiffs claims to have used the rights-of-way as their own. As the court in *Roberson v. Aubin*, 120 Conn. App. 72, 76 (2010) wrote: "Shared dominion defeats a claim of adverse possession."

**IV.**

Next, the parties claim that each is entitled to summary judgment on the plaintiffs' claim of an easement by necessity over the rights-of-way. The court sides with the defendant.

The requirements for an easement by necessity were articulated by the court in *Deane v. Kahn*, 317 Conn. 157, 175-77 (2015):

> [A]n easement by necessity will be imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor, or where the grantor retains an adjoining parcel which he can reach only through the lands conveyed to the grantee ... [T]o fulfill the element of necessity, the law may be satisfied with less than the absolute need of the party claiming the [right-of-way]. The necessity element need only be a reasonable one ... Moreover, although it is true that [a]n easement of necessity may occur when a parcel has become landlocked from outside access such that the owner would have no reasonable means of ingress or egress except over lands promised by another and a right-of-way is necessary for the enjoyment of the parcel ... [t]he inverse also is true; that is, a common-law right-of-way based on necessity expires when the owner of a dominant estate acquires access to a public or private road through another means. The basis of the right is the presumption of a grant arising from the circumstances of the case. If the situation is such that the landowner has absolutely no access to his property

> except across the land of his grantor, the presumption is clear and the right undoubted. If he has such access over other land of his own, the mere fact that such access is inconvenient or expensive will not raise the presumption of a grant of a more convenient way over the land of his grantor. It may be, however, that, while access to the property is not absolutely cut off, the circumstances of the case are such that the means of access available would not afford the landowner any real beneficial enjoyment of his property. Such a situation would arise when the expense of making the means of access available would exceed the entire value of the property to which access was sought. Such a means of access would be no better than none at all, and there would seem to be equal reason for presuming a grant under such circumstances as in the case where there was no access. Although there are cases which hold that the way must be one of strict necessity, the weight of authority supports what seems to us to be the better rule—that the necessity need only to be [a] reasonable one ...
>
> It has been said that the test of necessity is whether the party claiming the right can at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute ... In most of the cases which have held that a way of necessity does not exist when a man can get to his own property through his own land, the way was sought on the grounds of convenience and economy only. [T]he necessity does not create the way, but merely furnishes evidence as to the real intention of the parties; [f]or the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties. A way of this kind is limited by the necessity which creates it. [T]he element of necessity has been rather strictly construed and made to depend on the situation of both parties, the nature and adaptability of the property, and surrounding circumstances. The presumption as to the intent of the parties is a fiction of law, as the court recognized long ago in *Robinson* ... and merely disguises the public policy that no land should be left inaccessible or incapable of being put to profitable use.

*Deane v. Kahn,* 317 Conn. 157, 175–77 (2015).

The plaintiffs' claim of an access easement fails as a matter of law for the simple reason that their properties abut the rights-of-way; their deeds reference the rights-of-way; and as members of the Groton Long Point Association they have the

right to use the rights-of-way. Thus, an access easement would be redundant and, a fortiori, unnecessary.

**V.**

Finally, the parties each claim that there is no genuine issue of material fact as to the claim of prescriptive easement that each is entitled to judgment as a matter of law. The court, again, sides with the defendant.

"The well-established statutory elements necessary to establish an easement by prescription are that the use is (1) open and visible; (2) continuous and uninterrupted for fifteen years; and (3) engaged in under a claim of right. *Zavisza v. Hastings*, 143 Conn. 40, 45, 118 A.2d. 902 (1955), as cited in *Hoffer v. Swan Lake Ass'n., Inc.,* 66 Conn. App. 858, 860, 786 A.2d 436, 438 (2001). No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years. *Slack v. Greene*, 294 Conn. 418, 427–28, 984 A.2d 734, 741 (2009). "The purpose of the open and visible requirement is to give the owner of the servient land knowledge and full opportunity to assert his own rights . . . To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent. Open generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent . . . An openly visible and apparent use satisfies the requirement even if the neighbors have no actual knowledge of it. A use that is not

open but is so widely known in the community that the owner should be aware of it also satisfies the requirement *Waterbury v. Washington,* 260 Conn. 506, 576–77, 800 A.2d 1102 (2002). *Slack v. Greene,* 294 Conn. 418, 427–28, 984 A.2d 734, 741 (2009).

Here, there is no dispute about the use or disuse, as it were, of the rights-of-way over the course of many decades. Significantly, the plaintiffs have failed to submit proof of any kind as would demonstrate that they had for a continuous period of fifteen years openly and visibly used the rights-of-way under a claim of right. To the contrary, the undisputed fact is that over time the rights-of-way became impassible by reason of the overgrowth. Ironically, it was the threat to remove the overgrowth and make the rights-of-way again passable – and useable by the greater populace of Groton Long Point and their guests - which prompted the filing of this lawsuit.

**Conclusion.**

For the foregoing reasons, the defendant's Motion for Summary Judgment is hereby GRANTED and the plaintiffs' Motion for Summary Judgment is hereby DENIED.

Jacobs, J.