STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON

KEVIN DASHNAW and HENRY DASHNAW, JR.,

Petitioners/Plaintiffs,

v.

TOWN OF PERU, TOWN OF PERU TOWN BOARD, PETER GLUSHKO, as Acting Code Enforcement Officer and Supervisor for Town of Peru, FRANK SLYCORD, as Code Enforcement Officer for Town of Peru, BRANDY MCDONALD, as Deputy Supervisor for Town of Peru, KREGG BRUNO, as a member of Town of Peru Town Board, JAMES DOUGLASS, as a member of Town of Peru Town Board, SUSAN POLHEMUS, as a member of Town of Peru Town Board, TOWN OF PERU ZONING BOARD OF APPEALS, LEON BLAIR, as a member and Chairman of Town of Peru Zoning Board of Appeals, JAMES FALVO, as a member and Vice-Chairman of Town of Peru Zoning Board of Appeals, ROB BASHAW, as a member of Town of Peru Zoning Board of Appeals, FRANK DENCHICK, as a member of Town of Peru Zoning Board of Appeals, TOM FUSCO, as a member of Town of Peru Zoning Board of Appeals, LAWRENCE BOSLEY, as a member of Town of Peru Zoning Board of Appeals, DONALD MCBRAYER, as a member of Town of Peru Zoning Board of Appeals and MICHAEL FARRELL, as Town of Peru Highway Superintendent,

Respondents/Defendants.

DECISION AND ORDER

Index No. 2011-1163
RJI No. 09-1-2011-0416

Briggs Norfolk LLP, Lake Placid (*Matthew D. Norfolk* of counsel), for petitioners/plaintiffs.

O'Connell and Aronowitz, P.C., Plattsburgh (*Donald W. Biggs* of counsel), for respondents/defendants.

ROBERT J. MULLER, J.S.C.

The facts of this matter are fully set forth in the June 6, 2012 Decision and Order of this

Court and will not be repeated at length herein. Briefly stated, petitioners/plaintiffs Kevin Dashnaw and Henry Dashnaw Jr. (hereinafter plaintiffs) own real property located in the Town of Peru, Clinton County, which they sought to subdivide and develop. The property is accessed by Fairway Drive. Plaintiffs applied for a building permit in connection with the development and were advised by respondent/defendant Town of Peru (hereinafter the Town) that the application would be denied due to "insufficient road frontage." As a result, plaintiffs commenced this combined CPLR article 78 proceeding and declaratory judgment action.

Defendants filed a pre-answer motion to dismiss, which motion was granted by this Court. Plaintiffs subsequently appealed and the Appellate Division, Third Department reinstated two causes of action: (1) their ninth CPLR article 78 challenge alleging that, by failing to maintain, repair and service Fairway Drive, the Town failed to perform a duty enjoined upon it by law; and (2) their declaratory judgment cause of action alleging that Fairway Drive is an active and open Town road and public right of way, which has not been formally abandoned (111 AD3d 1222, 1226 [2013]).[1] Discovery has now been completed and the note of issue filed. Presently before the Court is plaintiffs' motion and defendants' cross motion – each for summary judgment – which will be addressed *in seriatim*.

On a motion for summary judgment, the movant must establish, by admissible proof, its entitlement to judgment as a matter of law (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has met this initial burden, the burden then shifts to the opponent of the motion to establish, by

[1] The Third Department reinstated these causes of action based upon a finding that the Court "erred in treating [defendants'] pre-answer motion to dismiss as one for summary judgment" (111 AD3d at 1223-1224).

admissible proof, the existence of genuine issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

The central issues in this dispute are (1) whether Fairway Drive is a Town road; and (2) if so, whether it has been abandoned. The first issue will be addressed in the context of plaintiffs' motion. The latter issue will be addressed in the context of defendants' cross motion, as the burden of demonstrating abandonment rests with the Town (*see Ciarelli v Lynch*, 69 AD3d 1008, 1010 [2010]).

Plaintiffs have submitted ample proof in support of their motion that Fairway Drive is a roadway formerly known as Brand Hollow Road. Specifically, plaintiffs have submitted several maps depicting the former Brand Hollow Road in the precise location of what is now Fairway Drive. Most significant in this regard is a map contained within the plans of the New York State Department of Transportation (hereinafter the DOT) from its original construction of the Northway in 1961, which map clearly depicts the Northway bisecting Brand Hollow Road. According to plaintiffs, Brand Hollow Road ran through the Town from west to east prior to construction of the Northway. Then, following construction, that portion of Brand Hollow Road lying to the west was maintained by the Town as a public highway. That portion lying to the east, however, was not. When plaintiffs began construction of their development, that portion of Brand Hollow Road lying to the east – which was a dirt road – became the footprint for Fairway Drive. Plaintiffs have also submitted a March 12, 1990 memo to the Town Planning Board from Elmer Duprey, the former Town Highway Superintendent, and Bill Kivett, the former Town Planning Board Engineer, regarding approval of the subdivision. This memo acknowledges that the subdivision encompasses the abandoned portion of Brand Hollow Road, stating as follows:

> "The [B]oard should discuss and advise the developer as to whether the proposed road is to remain 'Brand Hollow Road' or if a new name is to be used in the approval plans. This is not necessarily a condition of approval but since the former name is involved it should be resolved as soon as possible."

The Court therefore finds that plaintiffs have satisfied their initial burden of establishing as a matter of law that Fairway Drive is a Town road.

In opposition to the motion, defendants have submitted the affidavits of William Cook, Clara Bruce, Ricky Bruce and Ronald Allen – ages 76, 82, 57 and 76, respectively – all of whom have lived in the Town for their entire lives and are familiar with Brand Hollow Road as it existed prior to and shortly after construction of the Northway.[2] According to these individuals, Brand Hollow Road always terminated at or near its intersection with State Route 22 and never extended east of where the Northway now lies. Allen, who has served as the Town historian since 2003, states as follows:

> "I am quite familiar with Brand Hollow Road in the Town of Peru and my familiarity with this road predates the construction of the Adirondack Northway. I have no recollection of this road ever extending east of where the Adirondack Northway is now located. Brand Hollow Road always ended at Route 22 – to the west of where the Northway now lies. . . .
>
> "It would not surprise me at all if there were dirt paths and trails in that area prior to and after the construction of the Adirondack Northway – as the same existed all over the Town of Peru – but I have no recollection of anyone using such a trail or path as a thoroughfare to get from New York State Route 22 to Rock Road or vice versa."

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[2] Defendants failed to disclose the names of these witnesses in response to plaintiffs' combined discovery demands, which expressly requested "[t]he name and address of each and every witness claimed by [d]efendants to possess relevant knowledge or information regarding the existence or creation of Brand Hollow Road in its entirety." While the Court could decline to consider their affidavits based upon this failure to disclose (*see Rossal-Daub v Walter*, 58 AD3d 992, 994 [2009]; *see also Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [2009]), counsel for plaintiffs conceded at oral argument that no prejudice has resulted. The affidavits will therefore be considered.

Clara Bruce, who has lived less than two miles from what is now Fairway Drive since she was four years old, states similarly:

> "I do not recall there ever being a time during my life when Brand Hollow Road connected directly to Rock Road. That is to say, I never remember a time during my life that Brand Hollow Road did not exist and it was always been, as far as I ever knew, maintained by the Town of Peru. However, Brand Hollow Road always terminated at or near its intersection with NYS Route 22 and never extended east to Rock Road. All my life, if I were on Brand Hollow Road and wanted to travel to Rock Road, the easiest and most direct route would be to take NYS Route 22 and use Lapham Mills Road to travel east to Rock Road. If there [was] a dirt road or path that extended east from Brand Hollow Road to Rock Road I can state without hesitation that I never knew of it and I certainly never traveled on it. Nor do I have any recollection of any other persons using such a road or path or hearing of people using such a road or path."

Mindful that "[c]ourts must focus on issue finding rather than issue determination, and deny the drastic remedy of summary judgment if there is any doubt as to whether a material factual issue exists or if such an issue is even arguable" (*Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958, 959 [2011]; *see Lacasse v Sorbello*, 121 AD3d 1241, 1242 [2014]), the Court finds these affidavits sufficient to raise a triable issue of fact as to whether Fairway Drive is a Town road.

Based upon the foregoing, plaintiffs' motion for summary judgment is denied in its entirety.

Turning now to the cross motion,[3] defendants contend that – even if the road now known as Fairway Drive was a Town road at one point – it was abandoned long ago. With that said, the procedure for abandonment of a public highway is set forth in Highway Law § 205 (1), which

[3] Plaintiffs contend that the Court should decline to consider defendants' cross motion because it was filed on April 8, 2015, one day after the deadline for filing dispositive motions. The Court finds, however, that a mere one-day delay is not sufficient to warrant such a harsh penalty.

provides as follows:

> "Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public, or laid out, shall cease to be a highway; . . . and every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right-of-way. The town superintendent with the written consent of a majority of the town board shall file, and cause to be recorded in the town clerk's office . . . a written description, signed by him, and by said town board of each highway and public right-of-way so abandoned, and the same shall thereupon be discontinued."

In support of their cross motion, defendants have submitted, *inter alia*, the affidavit of Town Highway Superintendent Michael Farrell (2009-present), as well as the affidavits of former Town Highway Superintendents Elmer Duprey (1980-2001) and Robert Timmons (2001-2008). Each of these individuals avers that, since at least the 1960s, the Town has maintained only that portion of Brand Hollow Road located to the west of the Northway, abandoning any portion that may have been located to the east. According to these individuals, this portion of roadway was not traveled or used in any capacity until it became Fairway Drive in the early 1990s. Incidentally, the map contained within the DOT's plans for the Northway also states that the portion of Brand Hollow Road to the east of the Northway is "to be abandoned." The Court therefore finds that defendants have satisfied their initial burden of demonstrating that – if the road now known as Fairway Drive was a Town road at one point – it was abandoned by operation of law.

In opposition to the cross motion, plaintiffs first contend that defendants failed to file a certificate of abandonment. With that said, however, where the evidence establishes that a road has not been traveled or used as a highway for six years, it will be deemed abandoned by operation of law notwithstanding the failure to file a certificate of abandonment (*see Abess v*

Rowland, 13 AD3d 790, 792 [2004]; *Matter of Wills v Town of Orleans*, 236 AD2d 889, 890 [1997]).

Plaintiffs next contend that travel on the road now known as Fairway Drive has occurred regularly over the years. Indeed, "'a municipality's intention regarding a road is irrelevant and its failure to maintain a road does not mean that the road ceases to be a highway'" (*Ciarelli v Lynch*, 69 AD3d 1008, 1010 [2010], quoting *Matter of Smigel v Town of Rensselaerville*, 283 AD2d 863, 864 [2010]; *see Daetsch v Taber*, 149 AD2d 864, 865 [1989]). "Instead, the relevant inquiry is whether travel on the road, whether by vehicle or on foot, continued to occur 'in forms reasonably normal, along the lines of an existing street'" (*Ciarelli v Lynch*, 69 AD3d at 1010, quoting *Town of Leray v New York Cent. R.R. Co.*, 226 NY 109, 113 [1919]; *see Matter of Smigel v Town of Rensselaerville*, 283 AD2d at 865; *Matter of Faigle v Macumber*, 169 AD2d 914, 916 [1991]). For example, in *Ciarelli v Lynch* (69 AD3d 1008 [2010], *supra*), the Court found that plaintiffs failed to demonstrate abandonment where the roadway – though not maintained – remained accessible and "routinely carried both motorized and pedestrian traffic for logging, hiking, camping and hunting" (*id.* at 1011).

Here, plaintiffs have submitted the affidavit of Kevin Dashnaw, who states as follows:

> "Since my childhood I have observed several of my neighbors and other members of the public traverse up and down the road now referred to as Fairway Drive. I also used the road regularly as a child to play, ride my bicycle or simply take a walk. In the 1960s to late-1980s, the road was a gravel/dirt road. But, it has always been easily passable by automobile and motorcycle. I would often see automobiles and motorcycles traveled up and down the road now known as Fairway Drive. I also regularly observed people hiking the road for exercise or recreation, or to go camping at the end of the road where undeveloped woods once were. Every winter snowmobiles and cross-country skiers [use] the road . . . All terrain vehicles were also common on the road throughout the seasons. In the 1960s to 1980s, members of the public would also travel down the road towards the dead end to go hunting. In the summer months I specifically

remember many of my neighbors would walk down the road to go berry picking along its shoulder and at the dead end."

The Court therefore finds that plaintiffs have raised a triable issue of fact as to whether Fairway Drive was abandoned by the Town.

Briefly, defendants also contend that plaintiffs' declaratory judgment cause of action is barred by the statute of limitations, as plaintiffs were aware in late 1989 or early 1990 of the Town's position that – even if Brand Hollow Road east of the Northway was a Town road at one point – it was abandoned. The Court, however, finds this contention to be without merit. A cause of action does not accrue until an injury is sustained (*see LaBello v Albany Med. Ctr. Hosp.*, 85 NY2d 701, 705 [1995]) and, here, plaintiffs did not sustain injury until their application for a building permit was denied as a result of insufficient road frontage. Indeed, prior to that time, the Town had granted at least one other application for a building permit in the subdivision and advised plaintiffs that it would resume control of Fairway Drive once certain repairs were made.[4]

Based upon the foregoing, defendants' cross motion is denied in its entirety.

Counsel for the parties are hereby directed to appear for a pre-trial conference on **April 22, 2016 at 11:00 A.M.** at the Clinton County Courthouse in Plattsburgh, New York.

Therefore, having considered the Affirmation of Matthew D. Norfolk, Esq., dated March 16, 2015, submitted in support of the motion; Affidavit of Kevin Dashnaw, sworn to March 16, 2015, submitted in support of the motion; Affidavit of Robert M. Marvin, sworn to March 16, 2015, submitted in support of the motion; Affidavit of Orville Keyes, sworn to August 9, 2011,

[4] It must also be noted that, even if the declaratory judgment cause of action was dismissed as untimely, the CPLR article 78 challenge – which raises identical issues – would nonetheless remain for consideration.

submitted in support of the motion; Affidavit of Robert B. Timmons with exhibit attached thereto, sworn to August 11, 2011, submitted in support of the motion; Affidavit of Donald Covel, sworn to September 8, 2011, submitted in support of the motion; Petitioners'/Plaintiffs' Exhibit Binder dated March 16, 2015, submitted in support of the motion; Memorandum of Law of Matthew D. Norfolk, Esq., dated March 16, 2015, submitted in support of the motion; Affidavit of Donald W. Biggs, Esq. with exhibits attached thereto, sworn to April 7, 2015, submitted in opposition to the motion and in support of the cross motion; Affidavit of Ronald Allen, sworn to April 6, 2015, submitted in opposition to the motion and in support of the cross motion; Affidavit of Clara Bruce, sworn to April 7, 2015, submitted in opposition to the motion and in support of the cross motion; Affidavit of Ricky Bruce, sworn to April 7, 2015, submitted in opposition to the motion and in support of the cross motion; Affidavit of William Cook, sworn to April 2, 2015, submitted in opposition to the motion and in support of the cross motion; Memorandum of Law of Donald W. Biggs, Esq., dated April 7, 2015, submitted in opposition to the motion and in support of the cross motion; and Reply Affirmation of Matthew D. Norfolk, Esq. with exhibits attached thereto, dated April 16, 2015, submitted in opposition to the cross motion and in further support of the motion; and oral argument having been heard on November 20, 2015 with Matthew D. Norfolk, Esq. appearing in support of the motion and in opposition to the cross motion and Donald W. Biggs, Esq. appearing in opposition to the motion and in support of the cross motion, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendants' cross motion for summary judgment is denied in its

entirety; and it is further

ORDERED that counsel for the parties shall appear for a pre-trial conference on **April 22, 2016 at 11:00 A.M.** at the Clinton County Courthouse in Plattsburgh, New York.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion dated March 16, 2015, the Notice of Cross Motion dated April 7, 2015 and the submissions enumerated above. Counsel for plaintiffs is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon defendants in accordance with CPLR 5513.

Dated: March 29, 2016
Lake George, New York

ROBERT J. MULLER, J.S.C.

ENTER: