IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

No. A157073

TIBURON/BELVEDERE RESIDENTS UNITED TO SUPPORT THE TRAILS ("TRUST"), an unincorporated association,

Plaintiff/Appellant,

v.

MARTHA CO., a California corporation,

Defendant/Respondent.

Appeal from the Superior Court,
State of California, County of Marin
Case No. CIV 1703276
The Honorable Roy O. Chernus

RESPONDENT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

Pursuant to Rule 8.208 of the California Rules of Court, the undersigned counsel of record for Respondent Martha Co. discloses that Respondent is not aware of any other person or entity, other than the parties themselves, that have a financial interest in the outcome of this proceeding.

DATED: February 13, 2020 COX, CASTLE & NICHOLSON LLP

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I. INTRODUCTION

Since the 1920s, the Reed family (now the Martha Co.) has owned 110 acres of land on the Tiburon Peninsula (the "Property"). Since 1976, the Martha Co. has had the right to develop 43 homes on the site, and since the mid-1990s its project has been the subject of intense public debate. In late 2017, on the eve of the family finally receiving planning entitlements from the County of Marin, TRUST (an unincorporated association of local citizens opposed to the development) asserted that—nearly half a century ago—"trails" on the Property were impliedly dedicated to the public. After a lengthy trial in September 2018, the trial court found that TRUST failed to prove its case. The issue on appeal is whether any substantial evidence supports that decision. As the record shows, the evidence in support of the trial court's ruling was overwhelming, and this appeal must fail.

At trial, TRUST had to show "long-continued adverse use of the land sufficient to raise the conclusive and indisputable presumption of knowledge and acquiescence," which must have occurred for *at least* five years prior to March 4, 1972.[1] (*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 38.) This requires use that is "substantial, diverse, and sufficient, considering all the circumstances, to convey to the owner notice that the public is using the passage as if it had a right to do so." (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th at 826, fn. 7.) It must have "clearly indicated" to the Martha Co. that the site was at risk of dedication. (*County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 565.) On top of all that, the Martha Co. could defeat TRUST's claim by showing it made a "bona fide attempt to prevent public use." (*Gion*, 2 Cal.3d at 41.)

[1] Civil Code section 1009 took effect on March 4, 1972, providing that "no use of [private property] by the public after the effective date of this section shall ever ripen to confer upon the public . . . a vested right to continue to make such use" without an express dedication by the owner. (Civ. Code, § 1009(b).) Section 1009 abrogated the *Gion* decision prospectively.

The trial court found that TRUST failed to carry its burden as to the level of use, and the Martha Co. carried its burden as to efforts made to restrict any use. These findings were based on the testimony of nearly 50 witnesses, exhibits admitted at trial, and documents of which the court took judicial notice. In so finding, the trial court weighed the evidence, assessed the credibility of witnesses, resolved conflicts, and applied the standard articulated in *Gion v. City of Santa Cruz*, the applicability of which was undisputed at trial. On appeal, its decision is entitled to "great deference," and this Court's review both begins and ends with a determination as to whether *any* substantial evidence, contradicted or uncontradicted, exists to support the findings. (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.) As long as any substantial evidence supports the trial court's finding, this Court must affirm, even if the individual justices would have ruled differently. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429, fn. 5.) Here, more than the required substantial evidence exists.

The only evidence of use prior to March 4, 1972, was by neighbors who lived near the site, many of who did not even move to the area until 1967 or later, short of the required five-year window. This use was casual, involving only a few persons at a time, and often occurred early in the morning or at sunset. Many witnesses also were children at the time and accessed the site because they viewed it as an extension of their backyard. The trial court's finding that this use was not substantial, diverse, or sufficient, considering the circumstances—and that such use by neighbors and children would not have "clearly indicated" that the Martha Co. was at risk of losing title to its Property—was well supported by the evidence.

The trial court also relied on evidence reflecting actions taken by local public agencies that were inconsistent with an implied dedication. No governmental agency has ever taken the position that public rights already exist or otherwise taken steps to facilitate public use of the site. (See *Gion*,

2 Cal.3d at 39 [evidence that the public "looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public"].) To the contrary, prior to March 4, 1972, both Marin County and the Town of Tiburon were engaged in widely-publicized efforts to develop public trails across the Tiburon Peninsula. Both entities recognized that public rights on the Property did not exist and would need to be obtained. Again, the trial court's conclusions in this regard were well supported by substantial evidence.

The trial court's finding that the Martha Co. made bona fide efforts to restrict public use likewise was supported. Extensive testimony showed that members of the Reed family, principally Edgar Reed (who lived across the street from the site), made substantial efforts to restrict use by, among other things, maintaining fencing, posting "no trespassing" signs, and asking trespassers to leave. Contemporaneous photographs of the site during the relevant years depict the presence of fencing and signs, as do numerous documentary photographs taken in March 1973. Although some neighbors were able to access the site, the trial court's finding that these efforts were reasonable in light of the circumstances was well supported.

While TRUST characterizes some claims as legal issues, it simply disagrees with the trial court's factual conclusions, all of which are entitled to great deference on appeal. Nor is there any indication that the trial court was biased against TRUST. The trial court did not hold TRUST to a higher burden of proof. Nor did it reach the issue of laches, although the prejudice resulting from TRUST's decades-long delay in bringing this case was both manifest and noted by the court. It also appropriately considered that an overlapping group of neighbors previously brought an implied dedication claim nearly 25 years ago against the adjacent parcel of land (known then as the Harroman property, now the Old St. Hilary's Open Space Preserve), which was rejected even though that case involved the same type of use by

neighbors and defendants offered weaker evidence of efforts to restrict such public use. Nothing about this reasoning constitutes legal error or serves as a basis on which to reverse the trial court's finding.

Ultimately, rather than attempting to show that trial court's decision lacks substantial evidence, TRUST re-asserts the same arguments that it made—and which were rejected—at trial. All of these issues were properly resolved by the trial court in its role as the trier of fact. Abundant evidence supports its findings, and its decision was consistent with the law, which requires far greater levels of use than TRUST could show to prove an implied dedication. For the reasons set forth below, therefore, the Martha Co. respectfully requests that this Court affirm the trial court's entry of judgment in favor of the Martha Co.

II. STATEMENT OF FACTS

A. The Martha Co. Property

The Property is an approximately 110-acre parcel located on the southeastern tip of the Tiburon Peninsula, wholly within an unincorporated area of Marin County.[2] The parcel is adjacent to the Town of Tiburon. Today, it is the largest undeveloped private land holding in the area, although during the relevant years it was one of several large undeveloped tracts in the area. The Property is bounded by Paradise Drive to the north and east, the residential neighborhoods of Hill Haven and Lyford Cove/Old Tiburon within the Town of Tiburon to the south, and the Old St. Hilary's Open Space Preserve to the west. Four roads essentially dead-end at the Property: Spanish Trail Road, Ridge Road, Mountain View Drive, and Straits View Drive. (See RA 1224, 1336 [maps]; see also AA 47.)

[2] Members of either the Reed family or the Martha Co. (a family-run corporation owned and directed by the Reed family) have owned the Property since the early 1920s. (RT 186:11-187:16; 838:7-11.)

The Property is undeveloped except for a spring serving a nearby property, a fire road installed with the family's permission in the early to mid-1960s, and "social paths" created by various uses, including past cattle grazing activities, motorized vehicles, grading by public agencies, and foot traffic. The site has steep slopes and is heavily vegetated. (RT 196:4-7.) Higher elevations are relatively flatter and vegetated by grasslands. Given the topography, the entire site cannot be viewed from one place. (RT 193:17-194:4.) The Property also includes over a mile of frontage along Paradise Drive, much of which is shrouded by vegetation. (RT 193:16.)

B. The Property Was Historically Used For Cattle Grazing

Until 1959, the Property was used for cattle grazing. (RT 886:8-17.) The site was enclosed by fencing and operated to contain livestock and thereby exclude members of the public. (RT 889:1-10; RA 740.) There is no evidence that the Property was accessed with any regularity by anyone other than ranchers during these years. Only one of TRUST's witnesses testified to use during this time, and he recalled that the area was fenced and that he went to "seek solitude."[3] (RT 555:6-10, 560:23-561:16; 562:10-18.) The Reed family, who owned property across the street on Paradise Drive, also regularly visited the Property during this time to, among other things, hike and post signs. (RT 1270:21-1271:22.)

C. From 1959 Through March 1972, The Property Was Managed By The Reeds And Access Remained Restricted

After grazing ceased, surrounding residential populations began to grow as adjacent open space land was developed with homes. Roads within the adjacent Hill Haven subdivision were graded sometime in the

[3] Few of TRUST's witnesses even resided in the area by 1959, and most of those who did were very young and provided no testimony regarding this time period. (See RT 274:12-14 [Norman, born 1954]; 361:2-4 [Barnes, born 1956]; 476:9-10 [Lamott, born 1954]; 563:23-25 [Vonlackum, born 1954].) Others who were slightly older did not access the Property until 1959 or 1960. (See, e.g., RT 502:06-08.)

early to mid-1950s. (AA 126.) By the mid-1960s, a number of homes in Hill Haven appear to have been developed, which trend continued through the late 1960s and into the 1970s. (AA 88 [Hill Haven is in lower portion of photo], 96, 100, 104, 108, 112, 116, 122.) Development along nearby Lyford Drive was similar. (AA 88 [Lyford Drive is along left-hand side of photo], 96, 100, 104, 108, 112, 116, 122; see also RT 201:12-203:4.)

TRUST's witnesses corroborated this timeline. Twelve of them moved into these newly developed residential areas in 1965 or later, including 10 who arrived in 1968 or later.[4] Testimony from the Martha Co.'s witnesses was in accord. (See RT 1093:4-5 [Harts, moved in 1968]; 1129:11-20 [Wayne, moved in 1966]; 1190:23-24 [Pedersen, moved in 1969 or 1970].) Aerial photos introduced at trial likewise depict this development trend during the late 1960s and early 1970s. (AA 88-128.)

Edgar Reed, who was the primary caretaker for the site during the relevant years, along with his wife Eileen and their three children, Patricia, Mark, and Richard, moved in across the street from the Property in 1956. (RT 1269:21-1270:10.) Even before Edgar and his family moved to Tiburon in 1956, they spent summers and weekends in the family's "Ark,"[5] which also is located across the street. (RT 1270:13-20.) During these visits, they would recreate and, among other activities, walk the Property and post "no trespassing" signs. (RT 1270:13-1272:10; 1280:4-23.)

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[4] RT 226:7-12 [Stotters, 1968]; 265:1-6 [Gnoss, 1969]; 333:20-334:6 [O'Neill, 1968]; 378:18-20 [Dracott, 1969]; 400:20-21 [Drew, 1969]; 439:16-21 [Lobedan, 1965]; 464:14-19 [Green, 1970]; 535:13-15 [Chapman, 1965]; 574:1-15, 580:18-21 [Kahn, 1971]; 592:13-16 [Knights, 1969]. Although a few of these people lived elsewhere in Tiburon or Belvedere prior to 1965, they did not regularly access the Property during that time. (RT 595:20-23; 439:18-440:22.)

[5] The "Ark" is a small structure located on the water, across the street from the Property, which previously floated in the bay. (RT 993:18-994:4.)

(RA 736 [photo of Edgar Reed on Property, near Paradise Drive, showing old fencing and years of signs, March 1973]; see also RT 844:15-881:5.)

When Edgar and his family moved to Tiburon on a permanent basis, their time on the site increased. (See, e.g., RT 1272:19-23.) Edgar's three children (born in 1949, 1957, and 1959) basically grew up on the Property. (RT 993:8-1033:9 [Mark]; 1285:11-1266:12 [Richard]; 1272:19-1281:8 [Patricia].) They used the site extensively for, among other things, hiking, biking, mini-biking, cardboard sledding, and camping. (*Id.*) Members of the large extended Reed family also visited in the summers and frequently accessed the Property. (RT 840:6-22; 993:13-995:14.) Friends of the Reed children likewise spent significant time on site and would camp during the weekends.[6] Others were given permission to access the site.[7]

[6] RT 421:17-434:12; 1070:21-1079:12; 1094:1-1099:4; 1102:9-1108:19; 1152:1-1164:18; 1171:2-1174:13; 1210:9-1217:13; 1234:18-1240:4.
[7] See, e.g., RT 168:7-14; 1081:9-12; 1121:24-1122:16; 1155:22-1156:22.

(RA 649 [Mark Reed and friend on mini-bike on Property, at boundary with former Harroman property, on fire road, behind fence and signs, circa 1970]; see also RT 423:25-424:21; 1016:20-1019:12.)

Between 1967 and 1972 (the years upon which TRUST focused at trial), Mark and Richard Reed, along with approximately 30 neighborhood friends, accessed the Property on a nearly constant basis to ride mini-bikes.[8] Compared to other activities, mini-biking caused considerable disturbance. It was very noisy. (RT 1161:23-1162:8; 1183:8-9.) It also was hard on the Property, creating scars and deep tracks due to skidding. (RT 1022:13-22.)

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[8] See RA 649, 769 [photos of mini-bikes on Property, circa 1970]; see, e.g., RT 422:5-434:12 [Gary Kuhn, rode almost daily during spring and summer]; 1000:6-1031:13 [Mark Reed, used mini-bike daily]; 1070:21-1079:12 [Steven Kuhn, rode at least once a week, sometimes more]; 1094:23-1099:4 [Joseph Hart, road a couple of times a week]; 1102:9-1108:19 [John Hart, rode nearly every inch of Property]; 1157:2-1164:18 [Kuwatani, would visit Property as often as he could]; 1173:4-1174:13 [DeGregory]; 1216:7-1217:1 [Drohan]; 1237:17-1238:20 [Murphy]; 1249:2-1251:22 [John Read]; 1259:10-1261:19 [Richard Reed, accessed Property at least once a week, spent a lot of time riding mini-bikes].

The mini-bikers also created race tracks on the Property, some of which were visible in the aerial images introduced at trial. (AA 90-92, 94-95; RT 426:18-429:18 ; 1076:10-22; 1106:12-21; 1161:7-22; 1237:17-1238:20.)

Although the surrounding residential population increased in the late 1960s and early 1970s, few people accessed the Property.[9] Throughout this time period, the Reeds continued to post "no trespassing" signs at possible ingress and egress points.[10] With the end of grazing, they also continued to maintain the fencing surrounding the Property.[11] When "no trespassing" signs were removed, they would be replaced, and when the fencing was damaged by neighbors, it would be fixed.[12] Photographs of the site taken

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[9] See, e.g., RT 232:23-24 [could take child "and be alone"]; 243:7-244:6 ["private little neighborhood trail"]; 252:24-253:6 ["not a lot" of people]; 278:14-19; 432:2-19 ["very rarely" saw anyone]; 562:10-18 [went to "find solitude" and "get away from everyone else"]; 585:15-19; 1077:20-1078:6 ["very rare" to see others]; 1098:3-8 ["we were on our own out there," "hardly never" saw others]; 1108:12-19 ["you wouldn't find anybody else up there"]; 1124:18-20; 1135:19-20 ["Just us, really."]; 1155:2-14 ["nobody"]; 1162:9-14 ["nobody went up there"]; 1174:1-13 ["alone out there"]; 1212:20-23;1239:12-22; 1247:1-6; 1261:20-1262:17 [saw people "very rarely," it "was a place to go and nobody would bother you"].

[10] See, e.g., RT 1073:22-25, 1074:20-25 ["there always were signs"]; 1105:10 ["signs all around the property"]; 1117:11-18 ["there were signs"]; 1134:5-11 ["there were signs up there that said 'no trespassing'"]; 1163:13-24 ["I used to see signs all the time. . . . pretty much anywhere we would access the property"]; 1172:15-17; 1194:13-22; 1216:20-1217:1; 1238:24-1239:6 [there were signs]; 1247:13-16 ["there's always been posted signs"].

[11] See, e.g., RT 437:16-23 ["the fence was always there"]; 998:11-14 ["the property was always fenced"]; 1074:6-8 ["I remember lots of barbwire"]; 1103:23-1104:6 ["posts and fencing and wire"];1117:3-10 ["there was a fence"]; 1159:10-15 ["there's a fence"]; 1172:18-20 [barbed wire fences]; 1186:9-19 [would need to "crawl[] through the barbed wire" to access Property]; 1194:5-12 [fences around the Property]; 1238:21-23 ["there was always a fence up there"]; 1247:10-12 [Property was fenced].

[12] See, e.g., RT 431:12-23 [signs would be replaced]; 841:15-24, 844:15-881:5 [extensive testimony by John Reed regarding repairing of fences and posting of signs]; 1016:3-15 [would fix fences and replace signs]; 1163:13-24 [signs were replaced "all the time"]; 1215:8-23 [Edgar would go out "to

prior to March 4, 1972, depict signs being posted and the site being fenced. (RA 649, 769.) Photographs taken in March 1973 to document historical efforts likewise reflect fencing and signs during the relevant years.[13] (RA 704-738; see also RT 844:15-881:5 [describing photos].) Indeed, the Reeds were well aware of the need to limit access. (See, e.g., RA 748 [letter on behalf of Martha Co. to neighbor, sent in 1971, stating property owners "have to keep people off of their property to protect their property rights"].)

(RA 769 [photo of boy on mini-bike on Property, at boundary with former Harroman property, circa 1970]; see also RT 425:6-14; 1019:13-1022:22.)

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fix a fence or put signs back up"]; 1238:24-1239:6 [signs would be replaced]; 1264:24-1265:9 [Edgar was always replacing signs and "our garage always had signs and wire"]; 1275:25-1277:4 ["we spent a lot of time posting signs up in many places" and repairing fences].

[13] As John Reed testified, these photographs were taken in 1973 to reflect historical efforts made by the Martha Co. to restrict access to the site, after photos taken prior to March 4, 1972, were discovered to be missing. (RT 855:13-856:8.) Among other things, the photographs depict visibly older fencing, wires, and signs, and the work done by Edgar and John Reed that day was typical of the work done through March 4, 1972, and thereafter. (RT 844:15-881:5.) In addition, the local hardware store typically stocked different "no trespassing" signs each year, so the various signs depicted reflect the numerous years that signs were posted. (RT 848:23-849:6.)

This ongoing work was primarily the responsibility of Edgar Reed, who retired at the age of 44 and lived across the street from the Property. (RT 838:17-21; 992:9-15.) From the time that he retired in about 1960 to the time of his death in 1989,[14] one of Edgar's main activities was to monitor and maintain the Property. (See, e.g., RT 880:13-881:5 ["did it until the year he died"]; 1038:1-2 ["my father went to the property all of his life"].) Indeed, Edgar was on the Property constantly.[15] He was assisted in these activities by family and friends, who joined him in limiting access, fixing fences, and posting signs.[16] A number of witnesses (including some

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[14] Edgar passed away in 1989. (RT 1035:8-9.) His two brothers, who were also involved in the management of the Property, died that same year. (RT 1037:1-1038:2.) Many other people, from the other family and friends who assisted in these efforts to the individual who ran the local hardware store and supplied signs and fencing, have long since passed away. As the trial court rightfully observed, the prejudice to the Martha Co. from TRUST's extreme delay in bringing this lawsuit cannot be disputed. (RT 1066:22-24.)

[15] See, e.g., RT 430:5-431:11 [Edgar "was out there half the time I was out there. . . checking the fence and going and kicking people off"]; 841:25-843:7, 844:7-12, 853:11-19 [Edgar would post signs, repair fences, and patrol and ask people to leave]; 1022:23-1024:21 [Edgar "constantly walked the dog and put up signs" and asked people to leave]; 1029:15 ["my father would confront everyone"]; 1122:6-13 [patrolling]; 1258:11-1259:23, 1264:15-1265:9 ["my father was the caretaker for the property. . . . so he took it to heart of maintaining the fences, maintaining signs. . . . was always up there repairing fences and putting signs"].

[16] See, e.g., RT 190:21-191:3 [family "made every effort" to ask strangers to leave]; 432:25-433:13 ["Mark kind of took after Edgar's lead, asking people to leave"]; 841:11-24 [would help repair fences and replace signs]; 775:8-21 [Dr. Flint would help]; 844:15-881:5 [extensive testimony by John Reed regarding fences and signs]; 1011:9-14 [would ask people to leave]; 1016:3-15 [would repair fences and replace signs]; 1037:1-17 [Bob Reed and Norman Reed helped]; 1252:7-1253:10 [Edgar instructed family to tell people "it was private property and ask them to leave politely"]; 1265:10-1266:12 [extended family helped with fencing]; 1275:15-24 [Edgar had "very clear instructions" to ask strangers to leave]; 1275:25-1277:4 [a lot of time posting signs and repairing fences]; 1280:4-1281:8 [working on the fences "was a very big family project"].

of Mark's friends when it was not clear whether Mark had given permission to be there) recalled being asked to leave the Property by a member of the Reed family or generally aware that they needed to avoid Edgar.[17]

(RA 707 [photo of Edgar Reed on Property, at boundary with former Harroman property, old fences, March 1973]; see also RT 844:15-881:5.)

Although these efforts were made more difficult by the Property's size (110 acres), steep slopes, and vegetation, the family's efforts were effective. The only evidence of unpermitted use prior to March 4, 1972, was limited to: (1) neighbors who lived in close proximity to the site and accessed the Property on foot, many of whom visited because the area was quiet and secluded; and (2) neighborhood children[18] who roamed the

[17] See, e.g., RT 1078:7-1079:12 ["anybody that was there, he'd yell at us to get off "]; 1097:5-25 ["kind of afraid of Edgar," "would patrol the area"]; 1116:4-14 [would turn around at fence]; 1182:17-1183:3 [chased off]; 1227:4-1229:13, 1231:18-1232:7 [knew not to go because "that was where the mean guy would come from. . . . and you didn't want to be up there when he was there"]; 1235:21-1236:20 [kicked off by Edgar "a lot"].

[18] Ten of TRUST's witnesses were born in 1954 or later, making them minors during the relevant years. (RT 158:22-23 [Knight, born December 1957]; 274:12-15 [Norman, born December 1954]; 361:2-4 [Barnes, born February 1956]; 384:24-25 [Dracott, born March 1960]; 439:12-13 [Lobedan, born 1954]; 476:08-10 [Lamott, born April 1954]; 489:11-12

broader, undeveloped portions of the Tiburon Ridge. (See, e.g., RT 570:3-6 ["It was a play area."].) Aside from these neighbors and their occasional guest, there is no evidence that the site ever was accessed by anyone from anywhere other than the Tiburon Peninsula prior to March 4, 1972.

(RA 721 [photo of old fencing and signs on Property, at end of Mountain View Road, March 1973]; see also RT 844:15-881:5.)

Throughout this timeframe, the Reeds also took a number of other steps reflecting their attention to the Property. For periods through 1973, the site was leased to neighbors for horse grazing purposes, which at one point included the construction of a shed and corral area. (RA 723 [photo of shed and corral, March1973], 741-742, 744-747, 749-753; see also RT 890:1-898:14.) These agreements reflected, among other things, neighbors' mutual understanding that the Property was private. Tellingly, one of TRUST's witnesses, Jocelyn Knight, admitted that she asked permission from Edgar in 1971 to ride her horse on the Property. (RT 168:7-14.)

[Kyle, born February 1956]; 534:11-13 [Chapman, born 1959]; 563:23-25 [Vonlackum, born 1954]; 573:9-10 [Kahn, born 1957].)

In addition, sometime in the early to mid-1960s, the Marin County Fire Department graded a fire access road across the Property's ridge area with the permission of the Reed family. (RT 967:7-975:13 [John Grbac, Tiburon Fire Protection District].) This road extended another fire road, located on the adjacent undeveloped parcel (known as the "Harroman" property), to the terminus of Ridge Road. (RT 971:16-972:10.) When completed, padlock gates were placed at both ends because the agencies did not want any vehicular traffic on it.[19] (RT 973:6-14.) Typically, the road would be re-graded every year in the spring. (RT 973:24-974:11.)

The existence of this road, and its creation by the Fire Department in the early to mid-1960s, was established by John Grbac, who worked for the Tiburon Fire Protection District at the time, oversaw the cutting of the road, and observed it actually being cut. (RT 967:7-975:13.) John Reed also testified that he observed this activity (RT 863:1-22 ["I saw the graders out there grading the road."]), and a number of other witnesses referenced the road. (RT 502:8-12 ["It wasn't a trail. It was a roadway. . . . It was fairly well graded."]; 552:10-12; 645:10-12; 1117:4; 1159:17.) It can also be seen in aerial photographs. (See, e.g., AA 112-120.)

D. In The Late 1960s And Early 1970s, Marin County And The Town Of Tiburon Took Steps To Obtain Rights To Trails, Reflecting Their Understanding That No Public Rights Existed

In the late 1960s, the County and Tiburon began planning processes with the goal of developing public trails along the Tiburon Peninsula. Over the next few years, a well-publicized process occurred, with numerous hearings held over the course of several years. (See, e.g., RA 777-796; see also RT 822:10-25, 826:8-10.) These efforts ultimately resulted in the County Planning Department's publication in May 1970 of a "Tiburon

[19] To this day, the Fire Department has a key to the gate located at the end of Ridge Road. (RT 1041:22-1042:8.)

Trails Plan, Phase 2," which depicted the areas within which trails might be *created*, including a proposed path across the Property. (RA 777.) The plan also included an "Implementation Program," through which the necessary public rights to the potential route might be obtained. (RA 789.)

Members of the Reed family actively engaged in this process. In February 1969, for instance, William Reed (Edgar's brother) wrote to the County, requesting copies of the proposed plans and explaining that a public entity does not have the right to use private property for public purposes without first obtaining the right to do so. (RA 743; RT 891:20-892:13.) Edgar Reed also was particularly outspoken in opposing these planning efforts, and he made it clear that neither public entity had any such preexisting right to the Property. (RT 827:6-828:2.)

Tiburon adopted the Trails Plan in December 1970, and the County followed in March 1972. (RA 795-796.) The Property was one of 17 parcels identified, and the Trails Plan evidenced an understanding that public rights did not exist. Instead, it found that rights either would need to be purchased from the Martha Co. or exacted along with a development approval. (RA 789 [Property is Parcel Code 2]; see also RA 783 [noting that the contemplated route would "bypass[] the primary building sites" on the Property].) Nothing in the available record suggests that anyone ever asserted the pre-existence of public rights on the Property, even though *Gion v. City of Santa Cruz* had been issued in the midst of this process.

Shortly thereafter, in 1973, the County adopted a new general plan and then, in 1974, adopted new zoning regulations severely reducing the maximum allowed density of any future development on the Property. In response, the Martha Co. filed a lawsuit in early 1975, claiming that the County's actions resulted in a taking of private property. (RA 797-805.) Following discovery and motion practice, the case ultimately was resolved by a stipulated federal court judgment in December 1976. (*Id.*) Prior to its

submission to the United States District Court on December 29, 1976, the County Board of Supervisors approved the terms by resolution. (RA 801.)

The stipulated judgment confirmed the Martha Co.'s right to develop 43 homes on the Property, finding that such use would be "consistent with the goals of the [countywide] plan" and allow "a feasible economic use" of the Property. (RA 803-804 [¶ 2].) At the time of development, the County would be granted the rights contemplated in its Trails Plan, with the Martha Co. agreeing to dedicate about 50% of the Property as public open space. (*Id.*) Consistent with the Trails Plan, the parties acknowledged that following approval of the Martha Co.'s development project, "a hiking trail will be developed by the County of Marin in the open space area." (*Id.*)

E. In 1994, The U.S. District Court Rejected A Claim Of Implied Dedication On The Adjacent Parcel Of Undeveloped Land

Following the 1976 judgment, the Martha Co. began efforts to develop the Property. (RT 188:5-10.) In 1993, shortly after the Martha Co. submitted its application to the Town of Tiburon per the County's directive, a group of neighbors brought suit claiming that the adjacent undeveloped parcel (known as the Harroman property) had been impliedly dedicated for public use.[20] (RA 806; see also RA 1134, 1224 [maps]; AA 47.) In support, the neighbors submitted deposition transcripts and approximately 86 declarations attesting to public use of the Harroman property prior to March 4, 1972. (RA 825-1087; see also RA 309-397.)

Following trial in mid-1994, the United States District Court found that plaintiffs had not shown substantial use of the parcel. (RA 1147-1148 [at pp. 8:24-9:2].) Although it noted that there were more visitors between 1960 and 1972 than before 1960, the court found that "between 1960 and 1972, no more than an average of ten or fifteen people per day used the

[20] The Harroman property was later *purchased* as public open space and is now part of the Old St. Hilary's Open Space Preserve.

[Harroman] property." (RA 1145 [at p. 6:6-10]; see generally RA 1141-1145.) This level of use, the court concluded, was "not in the numbers needed to establish substantial public use."[21] (RA 1149 [at p. 10:9-19].)

Critically, many of the "trails" now alleged to exist by TRUST are the continuation of trails located on the Harroman parcel that already were adjudicated to be private. (See RA 825-1087) Many of the neighbors who submitted declarations in Harroman also participated in this case (including TRUST's counsel) or appear to be related to individuals who testified. (RA 1084 [Atchley, Kirchhoff, VonLackum, Knight, Lukens].) Unsurprisingly, many people testified to largely undifferentiated use of the parcels along adjoining ridge areas. (See RA 825-1087; see also RA 309-397.)

After losing the Harroman case, however, the neighbors did not pursue a similar claim against the Property. Instead, they waited decades to bring this case, after many of the Martha Co.'s witnesses had passed away and the Martha Co. had spent millions seeking to develop the site. As a result, many individuals who would have served as key witnesses for the Martha Co., have passed away and could not testify. (See, supra. fn. 14.)

F. Since 1976, The Martha Co. Has Invested Decades Of Time And Millions Of Dollars Pursuing Development Of The Property

Tiburon released a Draft EIR for the proposed project in 1996. (RA 1218.) When it became clear that its pursuit would go nowhere, the Martha Co. revised the project, and Tiburon released another Draft EIR in 2001. (RA 1276.) In 2005, after it became clear that Tiburon would not approve anything, the Martha Co. returned to the County to process its application consistent with the 1976 judgment. The County, however, refused.

Instead, the County filed suit to invalidate the 1976 judgment itself. The County also joined six local Tiburon residents opposed to the project as

[21] Members of the Reed family also submitted declarations in support of the owner, explaining lack of public use. (RA 1101, 1129.)

well as the Town of Tiburon.[22] (RA 1295.) Following motion practice, the United States District Court dismissed both the County's complaint and the residents' counterclaims. (RA 1302.) In November 2007, to resolve the litigation, another judgment was entered, the purpose of which was to affirm the ongoing applicability of the 1976 judgment and create a timeline and procedures for enforcing it. (RA 1321.)

Following entry of that second judgment, the Martha Co. submitted an application (the "2008 Easton Point Residential Development Project"), which it subsequently modified in 2017, proposing to develop 43 homes on the Property. (AA 139; RA 1335 [approved master plan].) The County prepared an EIR and, in October 2017, certified the EIR and conditionally approved the modified master plan. (*Id.*) At no point during these years of public process did anyone ever claim the existence of public trails on the Property. Certainly no lawsuit ever was brought. Instead, TRUST and its members sat back as the Martha Co. pursued its proposed development.

G. TRUST Files Suit in an Effort to Halt the Proposed Project

In September 2017, with the project nearing approval, TRUST filed this lawsuit. The timing, of course, says everything: TRUST, like many of the neighbors who testified, opposes the Martha Co.'s development. Aware that the timing of its lawsuit reveals its tactical efforts, TRUST fashioned a story that its timing had nothing to do with the Project, but rather was compelled by the Martha Co.'s sudden efforts to "close" the trails in 2016. The evidence does not support TRUST's defensive assertion.

First, if TRUST in fact filed to preserve access as a result of actions taken in 2016, it is unclear why it waited until late 2017 to bring suit, with the project then on the verge of approval. It is also unclear why TRUST's president (Richard Wodehouse) and its counsel (William Lukens) appeared

[22] One of those individuals, Marilyn Knight, testified in this case.

at a September 2017 County Board of Supervisors hearing to speak in opposition to the project. (RT 318:10-320:22.) During his public comments, Mr. Lukens in particular explained TRUST's position that the proposed development would "nullify" the trails. (RT 319:12-22.)

Second, Mark Reed testified at length that his actions to protect the Property were consistent with actions taken by the Martha Co. for decades. The cyclone fence located at the end of Ridge Road, for instance, has been there since the early 1980s. (RT 1039:11-1044:13.) At the end of Spanish Trail Road, the Martha Co. has put up a number of fences over the years, each generally stronger than the last, all of which have been vandalized and ultimately cut down. (RT 1044:14-1045:19.) There is no explanation as to why these previous efforts did not similarly compel TRUST to bring suit.[23]

Third, and most telling, the fence that TRUST claims forced it to bring this lawsuit (see AA 50) was in place for no more than three to six weeks before it was vandalized and removed in late 2016. (RT 1048:22-1052:17.) Quite literally, the barrier that TRUST claims "closed" the trails and requires it to maintain this action (a picture of which still remains in TRUST's opening brief) was removed more than three years ago. (*Id.*)

H. Procedural History

This case was tried in the Marin County Superior Court, the Honorable Roy O. Chernus presiding, in late September 2018. At trial, TRUST focused primarily on the final five-year period within which an implied dedication claim can exist, that is, March 1967 through March 1972. In support of its claim, TRUST only called witnesses who had lived in Tiburon, nearly all of whom lived within close walking distance and made light use of the Property during some of the relevant years. There

[23] It is also unclear why newspaper corrections published in 1974 and 1992, each of which clarified that the Property was closed to the general public, likewise did not compel TRUST to file suit. (RA 754-766.)

was no evidence that anyone other than neighbors and their occasional guest accessed the site prior to March 4, 1972.

Given the insufficiency of the evidence, the Martha Co. moved for judgment upon the close of TRUST's case in chief. (RT 1060:2-1067:20.) Without indicating what its final decision would be, the trial court denied that motion and noted that it wanted to hear all of the evidence from both sides. (RT 1066:3-8.) The Martha Co. then put on its case, calling 20 witnesses demonstrating, among other things, the substantial efforts made by the Reed family over the years to restrict access to the Property.

The trial court issued a Statement of Decision in early 2019, denying TRUST's claim. (AA 245.) Following various objections filed by TRUST, the trial court entered final judgment in March 2019, granting judgment in favor of the Martha Co. and against TRUST on all causes of action. (AA 242.) This appeal then followed. (AA 250.)

III. STANDARD OF REVIEW

"A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The trial court's ruling "is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than [an appellate] standard of review under the substantial evidence test." (*Westphal*, 68 Cal.App.4th at 1078.)

Thus, an appellate court is "bound by the rule that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." (*Whiteley v.*

Philip Morris Inc. (2004) 117 Cal.App.4th 645, 678 [internal quotation marks omitted]; see also *id.* ["Defendants raising a claim of insufficiency of the evidence assume a daunting burden."].)

So long as any substantial evidence supports the finding, a court must affirm, even if the justices would have ruled differently had they served as trial judge. (*Rupf*, 85 Cal.App.4th at 429, fn. 5; see also *In re Michael G.* (2012) 203 Cal.App.4th 580, 589 [substantial evidence standard is "the most difficult to meet, as it should be, because it is not the function of the reviewing court to determine the facts"].) All issues of credibility are for the trier of fact and all factual matters must be viewed most favorably to the prevailing party and in support of the final judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

IV. ARGUMENT

A. Implied in Law Dedications

1. Implied in Law Dedication Requires a High Level of Usage "Clearly Indicating" To an Owner That Property is in Danger of Being Dedicated to Public Use

A dedication is an uncompensated transfer of private property to the public and may occur pursuant to statute or the common law. (*Friends of the Hastain Trail v. Coldwater Development LLC* (2016) 1 Cal.App.5th at 1027.) It has been defined as "an appropriation of land for some public use, made by the fee owner, and accepted by the public. By virtue of this offer which the fee owner has made, he is precluded from reasserting an exclusive right over the land now used for public purposes." (*Id.*)

Common law dedications can be express or implied. (*Id.*) Express dedication arises where an owner's intent is manifested in overt acts. (*Id.*) Implied dedication arises when the evidence supports an attribution of intent to dedicate without such acts. (*Id.*) A dedication is implied in fact when the period of public use is less than the prescriptive period and the

acts or omissions of the owner afford an implication of actual consent to dedication. (*Friends of the Trails*, 78 Cal.App.4th at 821.) A dedication is implied in law when the public has engaged in "long-continued adverse use of the land sufficient to raise the conclusive and indisputable presumption of knowledge and acquiescence." (*Gion*, 2 Cal.3d at 38.)

Regardless of the type of dedication, the question of intent is paramount. "It is not a trivial thing to hold that private property has been dedicated to public use." (*Hays v. Vanek* (1989) 217 Cal.App.3d 271, 281; see also *Harding & Loftin v. Jasper* (1860) 14 Cal. 642, 648 ["[T]he bare fact that a farmer opens a lane through his farm, and allows the public to use it for fifteen years, does not authorize the inference of a dedication to the public. The intent to dedicate must be obvious."]; *Harding & Loftin*, 14 Cal. at 649 ["Our title to our lands is too important to be lightly lost, upon slight presumptions."]; *City of Los Angeles v. Venice Peninsula Properties* (1988) 205 Cal.App.3d ["In the absence of an express dedication to public use, it must be presumed that no property owner in fact desires, without compensation, to dedicate his property to public use to the extent that he would lose, for all times, his right to make private use thereof."].)

Thus, any unauthorized use by the public must "clearly indicate to the owner that his property is in danger of being dedicated." (*County of Orange*, 54 Cal.App.3d at 565; see also *Lyons v. Schwartz* (1940) 40 Cal.App.2d 60, 65 ["[T]he intention to dedicate to the public land or a roadway must be proven clearly and unequivocally."].) This requires a high level of use, which must be "substantial, diverse, and sufficient, considering all the circumstances, to convey to the owner notice that the public is using the passage as if it had a right to do so." (*Friends of the Trails*, 78 Cal.App.4th at 826, fn. 7.) This standard is "to avoid potential detriment to persons who, through inattention to legal detail or motivated

by decency permit others to use their land." (*Friends of the Hastain Trail*, 1 Cal.App.5th at 1032 [quoting *Hays*, 217 Cal.App.3d at 281-282].)

2. *Gion v. City of Santa Cruz* Sets the Undisputed Legal Standard for an Implied in Law Dedication

Decided in 1970, the California Supreme Court's decision in *Gion v. City of Santa Cruz* was a landmark opinion in which the Court found two properties to have been impliedly dedicated to public use.[24] (*Gion*, 2 Cal.3d at 43.) *Gion* was met with substantial critique. Within two years, the California Legislature prospectively abrogated *Gion*'s holding. Civil Code section 1009 took effect on March 4, 1972, and provides that "no use of [private property] by the public after the effective date of this section shall ever ripen to confer upon the public . . . a vested right to continue to make such use permanently" without an express dedication by the owner.

While section 1009 abrogated *Gion*, it did so only prospectively, affecting no rights that vested prior to its enactment. (*Friends of the Hastain Trail*, 1 Cal.App.5th at 1028.) Thus, TRUST sought to prove an implied in law dedication prior to March 4, 1972. *Gion* remains the seminal case for any implied dedication that vested by that time, and case law applying its holding has continued to require a high level of usage to prove that real property was impliedly dedicated to public use.

Under *Gion*, a plaintiff must show that persons have used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone." (*Gion*, 2 Cal.3d at 38.) The question is whether the public has engaged in "long-continued adverse use of the land sufficient to raise the conclusive and indisputable presumption of knowledge and acquiescence." (*Id.*) A plaintiff must show that "various groups of persons

[24] As TRUST recites, principles of implied dedication pre-dated *Gion*. But there was no dispute at trial that *Gion* and its progeny set forth the test.

have used the land[,]" rather than "a limited and definable number of persons." (*Id.* at 39) "Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public." (*Id.*) "[T]he issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom." (*Gion*, 2 Cal.3d at 40-41.)

In addition, the use must be "substantial, diverse, and sufficient, considering all the circumstances" (*Friends of the Trails*, 78 Cal.App.4th at 826, fn. 7), and must "clearly indicate to the owner that his property is in danger of being dedicated." (*County of Orange*, 54 Cal.App.3d at 565.) "[M]uch stronger evidence" must be presented when a property is in a less developed setting. (*Lyons*, 40 Cal.App.2d at 65.) Other factors include the nature of the property, its physical condition, the owner's knowledge of use, and the frequency and nature of the use. (See *Union Transportation Co. v. Sacramento County* (1954) 42 Cal.2d 235, 241.)

An implied dedication also will not be found where an owner "has made a bona fide attempt to prevent public use." (Gion, 2 Cal.3d at 41.) Such attempts need not be 100% effective. (See *County of Orange*, 54 Cal.App.3d at 567.) They only need be reasonable "in relation to the character of the property and the extent of public use. . . . If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner's activities have been adequate." (*Gion*, 2 Cal.3d at 41) Where a property is rural and undeveloped, as is the case here, only a minimum effort to restrict access is necessary. (See *County of Orange*, 54 Cal.App.3d at 567.)

3. Case Law Reflects the High Level of Usage Necessary to Prove an Implied in Law Dedication

Consistent with the above, case law reflects the high level of usage that must be shown. In *Gion*, for example, there had been extensive public

use of a beach and parking area for nearly 70 years. (*Gion*, 2 Cal.3d at 34.) These activities had proceeded without objection by the owners. (*Id.*) The City of Santa Cruz also had maintained the property for decades by, among other things: paving a portion of the property for parking; maintaining trash receptacles; taking measures to counter coastal erosion; posting signs to warn the public of eroding cliffs; installing an emergency alarm system; and spending approximately $500,000 to prevent erosion. (*Id.* at 35.)

In *Dietz v. King*, which was consolidated with *Gion*, the public had used a beach and access road in substantial numbers for over 100 years. (*Id.* at 36.) Five cottages had been built on the beach, and a cemetery plot containing the remains of shipwrecked sailors and Native Americans also had been built. (*Id.*) Large groups of Native Americans, in groups of 50 to 75 and from as far away as Ukiah, camped on the beach for weeks at a time. (*Id.* at 36-37.) More recently, the public's use had increased until as many as 100 persons were on the beach at a single time. (*Id.* at 37.) In fact, previous owners had "encouraged the public to use the beach." (*Id.*)

Similarly, in *City of Long Beach v. Daugherty*, the public had made continuous use of two beach properties for 60 years. (*City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 975.) Between 250 and 300 people a day used the beach from 1924 to 1935. (*Id.*) The City of Long Beach also played an active role in facilitating use by, among other things, installing a restroom near the beach and providing lifeguards. (*Id.*) Beginning in 1924, with the owners' knowledge, it also maintained the beach by cleaning and grading, including maintaining the area in front of and beside the houses on the properties. (*Id.*) In 1954, the city began to make sand fills to alleviate erosion and spent more than $2 million to stabilize the beach. (*Id.*)

Finally, in *County of Los Angeles v. Berk*, two acres of shoreline were subject to public use of substantial diversity and scope for decades, excluding between 1928 and 1958. (*County of Los Angeles v. Berk* (1980)

26 Cal.3d 201, 210.) Beach portions of the property had been used by thousands of persons annually, and an area containing stairs had been used to access the beach. (*Id.*) Bluff portions of the property had been used by the public for both recreation and parking. (*Id.*) Minimal efforts to restrict use prior to 1928 had done little to prevent what one witness characterized as "the multitudes," and no efforts were made after 1958. (*Id.*) For at least 25 years, the County of Los Angeles maintained the property as though it were public, cleaning it of debris and providing lifeguards. (*Id.*)

B. Substantial Evidence Supports The Trial Court's Finding That The Property Was Not Impliedly Dedicated To The Public

At trial, TRUST bore the burden to prove use that was "substantial, diverse, and sufficient, considering all of the circumstances," such that it would have "clearly indicate[d]" to the Martha Co. that the Property was in danger of dedication. (*Friends of the Trails*, 78 Cal.App.4th at 826, fn. 7; *County of Orange*, 54 Cal.App.3d at 565.) Even had it shown such use, the Martha Co. could have defeated such claim by showing it made a "bona fide attempt to prevent public use." (*Gion*, 2 Cal.3d at 41.) Ultimately, the trial court found that TRUST had failed to carry its burden as to the level of use, and that the Martha Co. carried its burden as to efforts made to restrict any use. (AR 245.) Substantial evidence supports each of the trial court's findings, either of which is sufficient to affirm the judgment.

1. Substantial Evidence Supports the Trial Court's Finding That Use of the Property Was Not Substantial, Diverse, and Sufficient, Considering All of the Circumstances

Applying the legal standard of *Gion*, the trial court found that there was "an insufficient showing that the public's use of this private property was so great that the trails became dedicated to the public." It also noted, among other things, that "most of the witnesses were nearby neighbors to the property and many were children at the time," and that much of the use, including but not limited to the riding of mini-bikes by the Reed children

and their friends, was by permission. (AA 245-246.) All of the trial court's findings were supported by substantial evidence.

Indeed, the only evidence of unpermitted use prior to March 4, 1972, was limited to neighbors who lived near the Property and their occasional guest. There was no evidence that anyone else ever accessed the Property during the relevant years. (See *Gion*, 2 Cal.3d at 39 [requiring that "various groups of persons have used the land[,]" rather than "a limited and definable number of persons"]; *Friends of the Trails*, 78 Cal.App.4th at 819 [finding that "use was more than just neighbors crossing neighboring land" and included people from "more than four miles away"]; cf. *Stallard v. Cushing* (1888) 76 Cal. 472 [use of alley by adjoining parcels did not constitute public use].) Nor was there infrastructure (e.g., parking or restrooms) that would have facilitated use by anyone other than neighbors.

Use by neighbors was casual, involving only a few individuals at a time.[25] All of them lived on the Tiburon peninsula, and almost all of them lived within close walking distance of the Property.[26] For many, it was an extension of their backyard.[27] Most testified to relatively light use of both the site as well as the surrounding open space areas, including the adjacent Harroman property. Many people accessed the Property either early in the

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[25] Notably, the use alleged by TRUST does not approach the level of use found in the Harroman litigation, which rejected a claim of implied dedication on the adjacent parcel. (RA 1140; see also *County of Orange*, 54 Cal.App.3d at 566 [use that rarely exceeded 10 to 15 people at one time was neither major nor substantial for purposes of implied dedication].)

[26] The only two exceptions were a motorcyclist and a horse rider from a few miles away, both of whom rode all over the open Tiburon hills.

[27] See, e.g., RT 165:25-166:3; 232:18 ["so close to our home"]; 249:14-19; 336:8-20; 386:3-20; 400:16-401:16; 440:1-22 ["my backyard"]; 449:1-5 [would "walk out my driveway"]; 467:20-21 ["could walk out my front door and walk right up there"]; 479:8-10 [lived "right there below the trail"]; 536:6-7 ["it was our backyard"]; 549:21; 577:8-18; 597:5-9 ["we were the last house on Ridge Road"].

morning or around sunset, when it would have been harder to detect their presence.[28] Some of them even ran through the Property, evading detection or ignoring efforts to restrict use.[29] For almost all of them, they sought to access the site *because* it was quiet and secluded.[30]

All of this testimony was consistent with historical photos reflecting that the area was still largely rural, unpopulated, and undeveloped in the late-1960s. (See, e.g., AA 100, 104, 108, 112; RT 478:19-479:4 ["very, very rural," "very little development," and "very unpopulated"].) There simply were not enough people to constitute substantial use.[31] Moreover, many of TRUST's witnesses did not even move into their homes near the Property until the late 1960s.[32] Many of them could not establish the minimum five-year period necessary to make even the barest showing of an implied dedication between March 4, 1967, and March 4, 1972.

Many of TRUST's witnesses also were born in 1954 or after, making them minors through March 4, 1972.[33] Some of them roamed the

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[28] See, e.g., RT 271:24-272:10 ["early in the morning"]; 338:14 ["in the morning"]; 357:1-6 ["dusk "]; 390:13-14 ["really early in the morning"]; 474:20-21 ["first light of day"]; 566:5-6 ["early in the mornings"].
[29] See, e.g., RT 191:4-192:2; 265:25; 655:4.
[30] See, e.g, RT 232:23-24 [to "be alone"]; 243:7-244:6 ["a private little neighborhood trail"]; 252:24-253:6 ["not a lot" of people]; 478:19 ["very, very rural"]; 562:10-18 [to "find solitude" and "get away from everyone else"]. Martha Co.'s witnesses echoed that few people accessed the site. (See, supra, fn. 9.) Some witnesses also testified to use that only would have been done if nobody was around, for instance shooting guns. (See, RT 553:14-16.) This was also true for mini-bikes. (See RT 432:5-16.)
[31] Before the trial court, TRUST also argued that because the area was not highly populated, it need not show a high level of use. An almost identical argument has been rejected in both the Harroman litigation (RA 1153) and the case law. (See *County of Orange*, 54 Cal.App.3d at 769 ["Even though a beach is secluded and isolated, there still must be substantial use by the public as a public recreational area rather than casual use."].)
[32] See, supra, fn. 4.
[33] See, supra, fn. 18.

broader, undeveloped areas of the Tiburon Ridge, including the Harroman property, without regard to property boundaries.[34] It was no surprise that many did not recall seeing fencing or "no trespassing" signs. Others played on the site because it was immediately behind their own home.[35] In any event, it could hardly be said that the occasional presence of neighborhood children roaming the Property would have indicated to the Martha Co. that a specific set of trails was in danger of being dedicated to the public.

TRUST's claims of more substantial use also were undermined by the fact that its witnesses disavowed the presence of fencing and signs on the Property, not only during the relevant years but also post-March 4, 1972.[36] Contemporaneous photos, however, depict the Property being fenced and posted with signs during the relevant years. (RA 649, 769.) A collection of photos taken in 1973 to memorialize historical efforts to secure the Property similarly depict the Property being fenced and posted with a variety of "no trespassing" signs, both old and new. (RA 704-738; see also RT 844:15-881:5.) To the extent the trial court had to resolve conflicts in the testimony, therefore, it could have discounted the vague, decades-old memories of neighbors in favor of these photographs, which were further corroborated by the testimony of numerous witnesses.[37]

TRUST's claims were further undermined by the fact that witnesses did not recall the use of mini-bikes by the Reeds and their friends in the late 1960s and early 1970s. (See, e.g., RT 383:9-11; 473:11-22.) Yet the consistent presence of mini-bikes, which were loud and offensive enough

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[34] See, e.g., RT 496:3-5 ["the whole ridge was open"]; 497:12 [hiked and played all over the hills]; 549:12-15 ["hiking in the hills"].
[35] See, supra, fn. 27.
[36] A few of TRUST's witnesses acknowledged that they would need to step over a chain or fencing to access the property. (See, e.g., RT 174:10-11.) Such conduct hardly evidences use of the site as though it was public.
[37] See, supra, pp. 16-19.

for the sheriff to visit (see, e.g., RT 1160:5-25; RT 1177:14-18), was well substantiated by, among other things, photographs of riders on the site.[38] These riders were on all the "trails" people claimed to have used, during the precise period of time TRUST claimed regular use, and they did not worry about encountering others. (See, e.g. RT 432:5-16 ["[W]e would go over those camel backs pretty fast . . . it's not like we were thinking, oh, there's people out here because there just weren't."].) Again, the trial court could have discounted the vague testimony of those who claimed "regular" use for some 50 years. Given the passage of years, witnesses likely conflated their recollection of the time during which any use occurred.

Even taken at their word, the number of neighbors who claim to have accessed the Property was far less and their use was for a far shorter period of time than in any case in which implied dedication has been found. (See, e.g., supra, pp. 31-33.) The trial court appropriately weighed the evidence, resolved any conflicts, and concluded that the alleged use was neither substantial, diverse, nor sufficient so as to raise "the conclusive and indisputable presumption of knowledge and acquiescence." This decision was supported by substantial evidence and should be affirmed.

2. Substantial Evidence Supports the Trial Court's Finding That Neither the County nor Tiburon Maintained the Property, Facilitated the Public's Use of the Property, or Otherwise Claimed That Public Rights Existed

The trial court also found that actions by the County and Tiburon were inconsistent with a claim of implied dedication. (AA 246.) In particular, it focused on: (1) the County's and Tiburon's trails planning

[38] This was corroborated by contemporaneous photos of mini-bikes on the Property and aerial photographs depicting mini-bike race tracks along the fire road. (RA 649, 769; AA 90-92, 94-95.) The precise period of use also was verified by the ages of the witnesses, who had specific recollections of when they road mini-bikes on the site because they had to have been old enough to ride, but not yet 16, when they obtained driver's licenses.

efforts in the late 1960s and early 1970s; (2) the later stipulated judgments between the County and the Martha Co; and (3) the long planning processes involving the proposed development of the site. (*Id.*) The trial court's consideration of these actions was proper and its conclusions were supported by substantial evidence. Indeed, *Gion* itself emphasized that "[e]vidence that the users looked to a governmental agency for maintenance of the land is *significant* in establishing an implied dedication to the public."[39] (*Gion*, 2 Cal.3d at 39 [emphasis added].)

Here, however, neither the County nor Tiburon has *ever* maintained the Property or otherwise facilitated public access, and certainly not prior to March 4, 1972.[40] To the contrary, in the late 1960s and early 1970s, the County and Tiburon were actively involved in the creation of a "Tiburon Trails Plan," the goal of which was to create an interconnected trail corridor along the Tiburon Peninsula. (See RA 777-796.) Over the course of a long and well-publicized public process, neither agency (nor any member of the public) ever took the position that public rights on the site already existed, even though *Gion* was issued in the midst of this process. Instead, they concluded that public rights did not exist and would need to be purchased from the Martha Co. or exacted in connection with development. (RA 789 [Property is Parcel Code 2]; see also RA 783 [noting that the contemplated route would "bypass[] the primary building sites" on the Property].)

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[39] Subsequent case law is in accord. (See, supra, pp. 31-33 [describing governmental actions]; see also *Bess v. County of Humboldt* (1992) 3 Cal.App.4th 1544, 1550-1551 [county maintained road]; *Brumbaugh v. County of Imperial* (1982) 134 Cal.App.3d 557, 563 [same].)

[40] Although the Marin County Fire Department created a fire road sometime in the early to mid-1960s, this action was not intended to facilitate public access to the Property; it was done to ensure that the site could be reached in the event of a fire, and a gate was put up at the entry to prevent public access. (See, supra, p. 21.)

The County later maintained this position in litigation between it and the Martha Co., which began in early 1975. (RA 803.) Ultimately, the County obtained precisely what it sought: the 1976 judgment requires that, upon development of up to 43 homes, the Martha Co. must dedicate about 50% of the Property as open space and allow the County to build a hiking trail within that area. (RA 804-805 [¶¶ 6-7].) The later 2007 stipulated judgment continues to reflect the County's position that public rights on the Property do not exist and need to be obtained. (RA 1321.) The multiple CEQA documents prepared by Tiburon and the County also reflect this understanding, as they all depict a project layout that would be inconsistent with TRUST's claim of public trails. (See, e.g., RA 1232 [1996 Draft EIR], RA 1286 [2001 Draft EIR]; RA 1336 [approved master plan].)

Thus, it is not simply that multiple public agencies never, for example, installed and maintained trash receptacles or restrooms, cleaned the site, or paved parking areas. (Cf. *Gion*, 2 Cal.3d at 39; *City of Long Beach*, 75 Cal.App.3d at 975; *County of Los Angeles*, 26 Cal.3d at 210.) The actions taken by the County and Tiburon over many years, beginning well before March 4, 1972, directly refute TRUST's claim of implied dedication. Substantial evidence supports this conclusion.

3. Substantial Evidence Supports the Trial Court's Finding That the Martha Co. Made Bona Fide Efforts to Restrict Public Use of the Property

The trial court also found that there was credible evidence showing the Martha Co.'s bona fide efforts to restrict use. (AA 245; see also *Gion*, 2 Cal.3d at 41; *County of Orange*, 54 Cal.App.3d at 567 [adequacy of efforts turns on means used in relation to character of property and extent of public use].) These findings likewise were supported by substantial evidence.

In particular, the trial court found credible evidence that the Martha Co. "regularly repaired the fences surrounding the property and repeatedly

posted 'No Trespassing' signs (many of which were apparently removed by trespassers). There was also evidence that the owners asked unpermitted trespassers to leave. In addition, there was evidence that the one person responsible for this property during the relevant period regularly patrolled it." While the trial court noted that "one person patrolling 110 undeveloped acres could not effectively encounter every trespasser," it deemed these efforts sufficient under the circumstances, and concluded that the Martha Co. "should not be reasonably expected to take greater actions in order to avoid the presumption of public dedication." (AA 245-246.)

Among other things, these findings were supported by testimony that: few people accessed the site during the relevant years; fencing was regularly repaired; "no trespassing" signs were replaced; Edgar regularly patrolled the Property; and both family and friends assisted in these activities. (See, supra, pp. 16-19.) Indeed, photographs taken prior to March 4, 1972, depict signs being posted and the site being fenced. (RA 649, 769.) Photographs taken in March 1973 to document these efforts also reflect the site having been fenced and posted during the relevant years. (RA 704-738; see also RT 844:15-881:5.) Witnesses also recalled being asked to leave or aware they needed to avoid Edgar. (See, supra, fn. 17.)

Given the size of the parcel, steep slopes, and vegetation, these efforts were reasonable given the minimal amount of use. There was no reason it needed to do anything more. It was the 1960s and Edgar was raising a family while, together with his extended family, looking after the site. TRUST's claim that he needed to erect a wall and hire security is absurd (and almost certainly would have been financially infeasible). (See *City of Los Angeles*, 205 Cal.App.3d at 1534 [owners "should not now be penalized simply because they did not erect an unsightly and forbidding fence manifesting a continuing hostility to even sporadic and limited public use"].) The trial court weighed the evidence given the character of the site

and nature of use and deemed these efforts sufficient. This was supported by substantial evidence and should be affirmed.

C. The Trial Court Committed No Legal Error

TRUST attempts to characterize a number of its arguments as legal issues. In reality, the alleged deficiencies simply reflect its disagreement with the trial court's resolution of factual issues. There was no legal error.

1. The Trial Court Properly Considered That Any Use of the Property Was by Neighbors and Their Occasional Guests

TRUST contends that the trial court improperly discounted the testimony of TRUST's witnesses because every individual who testified to use was a neighbor who lived within close walking distance of the site. The fact that any unauthorized use of the Property was limited to neighbors and their occasional guests, however, is relevant for a number of reasons.

First, case law is clear that any use must be "diverse." (*Friends of the Trails*, 78 Cal.App.4th at 826, fn. 7; see also *Gion*, 2 Cal.3d at 39 [requiring that "various groups of persons have used the land[,]" rather than "a limited and definable number of persons"].) Applying this standard, courts have found that the use must be "more than just neighbors crossing neighboring land." (See *Friends of the Trails*, 78 Cal.App.4th at 819 [noting also that use included people living "more than four miles away"]; cf. *Stallard*, 76 Cal. at 472 [use of alley by adjoining parcels was not public use].) The fact that any unauthorized use of the Property was limited to neighbors and their occasional guests, therefore, supports the trial court's factual conclusion that TRUST failed to prove its case.[41]

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[41] TRUST references the testimony of Max Korten, Director and General Manager of Marin County Parks and Open Space, for the proposition that "neighborhood" use constitutes "public" use. But the fact that today many Marin County parks serve neighborhoods has nothing to do with the *legal issue* of what constituted "diverse" public use prior to March 4, 1972, under the case law for the purpose of establishing an implied in law dedication.

Second, use by neighbors within close walking distance further shows that any use was casual and would not have "clearly indicated" that the Property was at risk of public dedication. (See *County of Orange*, 54 Cal.App.3d at 565.) Third, because residential development of the area was only beginning by the mid- to late-1960s, use by neighbors underscores that, at the most, TRUST could barely demonstrate use over a five-year period prior to March 4, 1972. Fourth, given the issues associated with restricting use by persons who were familiar with the area and could access the site on foot at varying times of day, neighborhood use reinforces the reasonableness of the Martha Co.'s efforts to restrict access. For any of these reasons, the trial court's factual conclusions support the judgment.

2. The Trial Court Properly Considered That Many Witnesses Were Minors During the Relevant Years

TRUST claims the trial court disregarded the testimony of witnesses who were minors during the relevant years. But the court did no such thing. While it noted that many of TRUST's witnesses were children at the time, it did not disregard their testimony. Nor could it have done so; both TRUST and the Martha Co. placed significant emphasis on the testimony of individuals who were born in 1954 or later (and thus were minors during the relevant years). While the trial court did not disregard this testimony, it did account for the fact that so many of TRUST's witnesses were children at the time. This was important for at least two reasons, neither of which has anything to do with competency to testify.

First, the fact that many witnesses were children underscores the decades that have passed. Memories have undoubtedly faded. This was perhaps best illustrated by the fact that TRUST's witnesses did not recall the use of mini-bikes on the Property during the relevant years. (See, supra, pp. 36-37.) Likewise, it is not surprising that children who roamed undeveloped areas of Tiburon, without attention to property boundaries,

would not recall fences and signs, as they almost certainly would have ignored them. Children also would have been unlikely to know if the Reeds permitted their use of the Property. Ms. Lamott's brother, for example, was close friends with Richard Reed, and it would not have been surprising for the Reeds to permit use by Ms. Lamott and other children. (RT 484:21-23; 486:21-22 ["you knew everyone"]; 505:3-4 [parents were friends with Reeds]; 543:8-20 [parents knew the Reeds].) Many also knew Mark Reed. (See, e.g., RT 376:16-17; 571:8; 505:1-3; 543:11-16.) Given TRUST's delay, however, Edgar could not testify to any such issue.

Second, the fact that many witnesses were children underscores that use was neither substantial nor diverse, and that such use would not have "clearly indicated" that the site was at risk of dedication. At least one appellate justice, in a concurring opinion, has adopted a similar view. (See *Friends of the Hastain Trail*, 1 Cal.App.5th at 1041 [conc. opn. of Chaney, J.] [children "are born trespassers" and use by them "neither demonstrates the public's reasonable belief that it has a right to use the property nor affords notice to the owner that the property is subject to dedication to the public"].) That reasoning could have equally applied here. (See RT 570:1-6 ["Too young, I think to consider whether I should ask permission."].) In any event, the trial court did not disregard testimony by minors, and a *factual* finding based on the nature of such use is not *legal* error.

3. The Trial Court Properly Recognized the Limitations of TRUST's Expert Witness Testimony

TRUST claims the trial court improperly rejected the testimony of its expert, David Ruiz. As it recognized, however, Mr. Ruiz only testified as to the *existence* of trails during the relevant years, and the mere existence of trails is not sufficient to prove an implied dedication. (AA 246.) Indeed, case law has rejected similar claims. (See *Friends of the Hastain Trail*, 1 Cal.App.5th at 1036 [rejecting finding of substantial use where trails

existed because "[t]he issue is not whether the trail was used enough to retain its character as a trail, but whether the use was substantial enough to indicate to the owner that his property was in danger of being dedicated"].)

The relevant question, as the trial court recognized, is whether the *nature* of the use raised the "conclusive and indisputable presumption of knowledge and acquiescence." (AA 246.) On that issue, Mr. Ruiz was of very limited value. While he claimed that he could describe on-the-ground activity by looking at aerial images, in fact he could not tell whether marks were created by, among other things, fire authorities, foot traffic, mini-bikes, wildlife, horses, or anything else. The clearest reflection of this limitation was his opinion that the "trail" leading from Ridge Road to the adjacent Harroman property was created by foot traffic alone. This opinion was undermined by John Grbac, who oversaw the creation of the fire road along that route by the Marin County Fire Department in the 1960s. (RT 967:7-975:13; see, supra, p. 21.) On this fact and others, the trial court had ample evidence to discount Mr. Ruiz's testimony.

Even if he could have isolated the degree to which foot traffic alone created the "trails," Mr. Ruiz could not establish what portion of traffic was authorized by the Reeds, their invitees, or neighbors whose use they did not protest. As the Martha Co.'s forensic photography expert, Keith Rosenthal, testified, no one could make those determinations from images alone."[42]

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[42] TRUST questioned the credibility of Mr. Rosenthal's opinion based on his lack of training in, for example, aerial photogrammetry (i.e., the ability to make measurements from photographs) and aerial mapping missions. But Mr. Rosenthal was not offered for any these purposes—he was offered in the area of forensic photography to opine on the extent to which photos can be used to interpret what uses might have created the "trails," including any limitations inherent in such analysis. (RT 1315:3-1325:14.) As the trial court found, that was an issue upon which Mr. Rosenthal was well qualified to testify. (See RT 1301:2-1314:7.) Mr. Ruiz's testimony likewise was limited to the interpretation of historical photographs.

(RT 1315:3-1325:14.) Nor did Mr. Ruiz have any expertise in botany, biology, soil science, or some other discipline that would have allowed him to opine on the intensity of use necessary to create scarring on certain portions of the Property. He was not qualified to offer anything more than the authenticated aerial photographs, which speak for themselves, but which alone cannot prove TRUST's case. The trial court's recognition of these limitations was appropriate and presented no legal error.

4. The Trial Court Did Not Hold TRUST to a Higher Burden of Proof

TRUST claims the trial court required a higher burden of proof. Yet TRUST cannot articulate what supposedly higher burden was applied, and at no point did the trial court indicate it would apply anything other than the "preponderance of the evidence." In fact, the trial court explicitly noted during trial that TRUST was *not* required to prove its case by "clear and convincing" evidence. (RT 1067:11-13.)

While *Gion* does not require a higher standard *of proof*, it does require a high standard *of use* that is "sufficient to raise the conclusive and indisputable presumption of knowledge and acquiescence." (*Gion*, 2 Cal.3d at 38.) TRUST tries to disavow its obligation to make this showing, but this standard of use is well reflected in the case law. (See, supra, pp. 28-33.) The trial court's recognition that "[i]t is a high standard to take away a party's land in favor of public dedication" was correct.[43]

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[43] The trial court's characterization also was not without precedent. (See *Hanshaw v. Long Valley Road Association* (2004) 116 Cal.App.4th 471, 482, disapproved on other grounds in *Scher v. Burke* (2017) 3 Cal.5th 136 [noting that "the caselaw requires a high standard of usage, lest private property rights be too easily diminished"]; see also *Friends of the Hastain Trail*, 1 Cal.App.5th at 1039 [conc. opn. of Chaney, J.] [same]; see also *Hays*, 217 Cal.App.3d at 281 ["It is not a trivial thing to hold that private property has been dedicated to public use."].)

5. The Trial Court's Finding Regarding the Adequacy of Efforts to Restrict Access Was Consistent with the Case Law

TRUST claims that the trial court's finding as to the sufficiency of the Martha Co.'s efforts to restrict use was wrong as a matter of law. But the sufficiency of efforts, given the character of the site and the extent of use, was a factual matter for resolution by the trial court. Nor has any case required an owner to barricade property to avoid an implied dedication.

County of Orange v. Chandler-Sherman Corporation is instructive. There, the public made unrestricted use of a beach through sometime in the 1930s, and then again after World War II until 1956. (*County of Orange*, 54 Cal.App.3d at 563, 565-567.) At some point, the owner employed some guards and posted signs, albeit "neither very effectively." (*Id.*) Access was in "small numbers rarely exceeding twelve to fifteen people on the beach at any one time." (*Id.*) While the court found it "clear that through the years the beach was used by individuals and groups," it deemed the owner's efforts reasonable under the circumstances. (*Id.*) While "these efforts had not been particularly effective," it noted, "it should be remembered that during this period of time the area was largely in the state of nature and only a minimum effort to control was necessary. Therefore, so long as the property was not being damaged and no public nuisance was being created, it was unnecessary for the owner to install chain link fences or hire armed guards to protect his beach from the onslaught of the public." (*Id.*)

Other cases are in accord. (*City of Los Angeles*, 205 Cal.App.3d 1534 [finding owners "should not now be penalized simply because they did not erect an unsightly and forbidding fence manifesting a continuing hostility to even sporadic and limited public use"]; *City of Laguna Beach v. Consolidated Mortgage Co.* (1945) 68 Cal.App.2d 38, 46-47 [finding even occasional signage claiming private property was sufficient evidence to

support finding of no dedication, even though signs had been removed by the public and use made of the property].) By contrast, TRUST's reliance on cases such as *County of Los Angeles v. Berk* involved far greater use (thousands of people) over much longer periods of time (decades), with less restrictive efforts to limit use, and in some cases no efforts made at all. (*County of Los Angeles*, 26 Cal.3d at 210-211.)

In short, the trial court was within its discretion to conclude that efforts made by the Martha Co. to restrict access to the Property, even if not 100% effective at preventing some use by neighbors, were sufficient. The trial court appropriately weighed these efforts, considered the character of the site and the extent of public use, and made a fact-based conclusion supported by substantial evidence. There was no legal error.

6. The Trial Court Did Not Evidence Any "Misgivings" About TRUST's Implied Dedication Claim

TRUST claims the trial court was "biased" and had "misgivings" about its case. Specifically, it claims that the trial court: (1) expressed concern about a lack of "just compensation" to the Martha Co. in the event an implied dedication was found; (2) expressed support for a laches defense given TRUST's decades-long delay in filing its lawsuit; and (3) evidenced a certain disdain toward TRUST in distinguishing *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810. None of these claims has merit.

First, nowhere in its Statement of Decision does the trial court even reference "just compensation," let alone evidence any bias in connection with such concern. (See AA 244-247.) There is no indication whatsoever that it had any bearing on the trial court's decision. (*Id.*) Unsurprisingly, the trial court did acknowledge that it understood the *implications* of its decision, that is, that a finding in favor of TRUST would result in the trails belonging to the public without any compensation to the Martha Co. (RT 1067:14-20.) But understanding implications is altogether different from

exhibiting bias. Indeed, at the same time, the trial court noted the import of its decision and stated that it wanted "to hear every single bit of evidence that [it could] from both sides." (*Id.*) That is hardly reflective of bias.

Second, whether or not the trial court may have supported a laches defense, it did not reach the issue. (AA 247.) Certainly, as the trial court observed, the case would have been "significantly different"—for *both* sides—had TRUST not waited for almost half a century before asserting public rights.[44] (*Id.*) "Both sides," the court noted, "were affected by the delay of more than 45 years in filing this action. Important witnesses have died or moved out of the area. Thus, there would have likely been more percipient witnesses on both sides."[45] (*Id.*) Such concern, however, does not reflect bias toward TRUST or implied dedication claims generally.

Third, the trial court's factual distinctions from *Friends of the Trails v. Blasius* were proper and in no way misapplied *Gion*. As the trial court observed, use of the road—a 240-foot segment of a canal road traversing the foothills for many miles—in *Friends of the Trails* was "by a far greater number of people." (AA 246.) The public had in fact used the road for

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[44] TRUST reiterates its claim that laches would not apply because the Martha Co.'s actions in 2016 forced it to bring this lawsuit. While this is irrelevant because the trial court did not reach the issue of laches, TRUST's claim is at odds with the law and the evidence.

[45] TRUST's suggestion that Edgar Reed's testimony—had he been alive to testify—would have been irrelevant is simply wrong. The testimony was undisputed that Edgar was the primary caretaker of the Property. He would have known, among numerous things, how he maintained the fencing, how often he replaced signs, how often he was on site, what he observed during his patrols, who he gave permission to, who he asked to leave, his practice toward neighbors, and who he knew in the community. He could have faced TRUST's witnesses and reminded them that he had confronted them on site or, alternatively, that he had given their family permission. He also was the spokesperson before the County and Tiburon. The prejudice associated with the loss of Edgar Reed, as the trial court observed, could not be disputed. (RT 1066:22-24.)

over 30 years at a level "sufficient to afford unequivocal notice of public use to the owners of the land." (*Friends of the Trails*, 78 Cal.App.4th at 818-819, 825.) Here, by contrast, any unauthorized use alleged by TRUST was relatively light and barely covered—if at all—the minimum five-year period required to prove an implied in law dedication.

The trial court also noted that use of the road was by people "who were from not just the area surrounding it." (AA 246.) The court in fact noted that "[t]he evidence clearly established that the use was more than just neighbors crossing neighboring land." (*Friends of the Trails*, 78 Cal.App.4th at 819.) Here, by contrast, any use was limited to neighbors and their occasional guest. In addition, a previous owner in *Friends of the Trails* had openly allowed the public to use the canal road. (*Id.* at 818, 825.) At no point prior, therefore, did the owner object or otherwise attempt to limit the public's use of the road. (*Id.*) In short, the distinctions drawn by the trial court were justified by the facts.

7. The Trial Court's Decision Was Consistent With Earlier Rulings and Properly Referenced Other Proceedings

Finally, TRUST claims that the trial court contradicted its ruling on the Martha Co.'s motion for judgment under Code of Civil Procedure section 631.8. But the court never indicated that TRUST had satisfied its burden of proof. It simply noted that there was "evidence of use for more than five years," which says nothing about whether the use was substantial, diverse, and sufficient, considering the circumstances, to "clearly indicate" to the Martha Co. that the Property was at risk. (RT 1066:3-1067:20.) Nor did the ruling preclude the Martha Co. from putting on its defense, which, among other things, set forth the efforts made to restrict unauthorized use and called into question the memory of TRUST's witnesses. (*Id.*) The trial court was well within its discretion to find against TRUST.

The trial court also properly referenced the Harroman case, even though it denied the Martha Co.'s motion for summary judgment. Indeed, the Harroman case (see, supra, pp. 23-24), which involved an adjacent property, could not be more relevant. As the court recognized, a finding that implied dedication occurred on the Property but not on the adjacent parcel—which involved the same type of use by neighbors on many of the same trails, with little corresponding efforts to restrict such use—would produce an anomalous and inequitable result. (AA 246.) Regardless, the trial court was clear that it denied TRUST's claim on the facts presented in *this* case, finding that the use alleged was insufficient. (AA 245-246.)

The court also appropriately considered the federal court litigation between Marin County and the Martha Co. (*Id.*) Indeed, *Gion* makes it clear that the actions of public agencies are "significant in establishing an implied dedication to the public." (*Gion*, 2 Cal.3d at 39.) The evidence was undisputed that no governmental agency has *ever* taken the position that trails were impliedly dedicated on the Property (see, supra, pp. 37-39), and the trial court's consideration of these proceedings was appropriate.

V. CONCLUSION

Based on the foregoing, the Martha Co. respectfully requests that this Court affirm the trial court's judgment in favor of the Martha Co.

DATED: February 13, 2020

COX, CASTLE & NICHOLSON LLP

By: */s/ Andrew B. Sabey*
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I certify that the text of this brief, including footnotes, contains 13,991 words as counted by the computer program used to prepare this brief.

DATED: February 13, 2020 COX, CASTLE & NICHOLSON LLP

By: */s/ Andrew B. Sabey*
Andrew B. Sabey
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Martha Co.

PROOF OF SERVICE AND CERTIFICATION

CASE NAME: ***Tiburon/Belvedere Residents United to Support the Trails v. Martha Co.***
CASE NUMBER: First Appellate District, Division 5 – Case No. A157073
TRIAL COURT: Superior Court – Marin County Case No. CIV1703276

I am employed in the County of San Francisco, State of California. I am over the age of 18. My business address is 50 California Street, Suite 3200, San Francisco, California 94111, and my email address is psanchez@coxcastle.com.

On February 13, 2020, I served the foregoing documents described as:

1) **RESPONDENT'S OPENING BRIEF**
2) **RESPONDENT'S APPENDIX (5 Volumes)**

in this action by sending a true copy thereof to the following:

Marin Superior Court Clerk's Office 3501 Civic Center Dr. San Rafael, California 94903 ***Courtesy copy via U.S. Mail***	**Attorneys for Appellant Tiburon/Belvedere Residents United <u>to Support the Trails ("Trust")</u>** William M. Lukens Lukens Law Group 1550 Tiburon Boulevard, Suite A Belvedere/Tiburon, California 94920 *Telephone: 415-433-3000* *Email:* wlukens@lukenslaw.com
Attorneys for Appellant Tiburon/Belvedere Residents United <u>to Support the Trails ("Trust")</u> Joseph Winters Cotchett, Jr. Eric J. Buescher / Alison E. Cordova Cotchett Pitre & McCarthy LLP 840 Malcolm Road, Suite 200 Burlingame, California 94010 *Telephone: 650-697-6000* *Email:* jcotchett@cpmlegal.com ebuescher@cpmlegal.com acordova@cpmlegal.com	

<u>BY ELECTRONIC TRANSMISSION:</u> I personally electronically served all parties the foregoing documents described above through **TrueFiling**. Upon completion of the electronic file transmission, an electronic filing receipt page was issued as confirmation that the documents were received, and filed and served. [CCP §1010.6; CRC §2.251, et seq.]

I hereby certify that the above document was prepared and printed on recycled paper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2020, at San Francisco, California.

/s/ Peggy Sanchez
Peggy Sanchez

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