IN THE SUPREME COURT OF CALIFORNIA

No. S265893

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

Plaintiff/Appellant,

v.

MARTHA CO., a California corporation,

Defendant/Respondent.

Petition After a Decision by the Court of Appeal
First Appellate District, Division 5
Court of Appeal Case No. A157073

Appeal From the Marin County Superior Court
Case No. CIV 1703276
The Honorable Roy O. Chernus, Judge

ANSWER OF DEFENDANT AND RESPONDENT MARTHA CO. TO PETITION FOR REVIEW

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I. INTRODUCTION

While TRUST claims to present two issues justifying this Court's review, in reality TRUST's "issues" rely on a mischaracterization of the trial court's factual findings and conclusions of law, which were affirmed by the Court of Appeal. Throughout its Petition for Review, for example, it reiterates that these courts erroneously found neighbors to have been granted permission because representatives of the Martha Co. also lived in Tiburon. But no such finding was made. Rather, both courts recognized that "[t]he evidence from 28 individuals on behalf of TRUST was that the trails were being used without permission."

TRUST also claims that both the trial court and the Court of Appeal erroneously found that "good faith but wholly ineffectual efforts to restrict access" were sufficient to defeat an implied dedication. But again, no such finding was made. The trial court found that the Martha Co. made significant, effective, and reasonable efforts under the circumstances, even if they did not seal the property from certain limited use. The Court of Appeal affirmed that finding based on substantial evidence in the record. TRUST had contended that the Martha Co.'s efforts were ineffectual, which position was rejected by the finder of fact. TRUST's refusal to accept the findings actually made undermines its Petition for Review.

Ultimately, the courts simply applied the standard for an implied dedication set forth in *Gion v. City of Santa Cruz*, the applicability of which was never disputed. Decided in 1970, *Gion* was the landmark opinion in which this Court found two properties to have been impliedly dedicated to public use. Shortly thereafter, however, the Legislature enacted Civil Code section 1009 and prospectively abrogated *Gion*'s holding as of March 4, 1972. Thus, TRUST was required to prove that the paths on this 110-acre property (the "Property") were impliedly dedicated by March 4, 1972.

Under *Gion*, TRUST had to show persons used the Property "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 v. City of Santa Cruz* (1970) 2 Cal.3d 29, 38.) The question is whether the public engaged in "long-continued adverse use of the land sufficient to raise the conclusive and indisputable presumption of knowledge and acquiescence." (*Id.*) It also must be shown that "various groups of persons have used the land[,]" rather than "a limited and definable number of persons." (*Id.* at 39.) Evidence that users "looked to a governmental agency for maintenance of the land" is significant. (*Id.*) This is ordinarily a question of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. (*Id.* at 40-41.)

Even had TRUST shown substantial public use, implied dedication will not be found where an owner "has made a bona fide attempt to prevent public use." (*Id.* at 41.) Such attempts need not be 100% effective, 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." (*Id.*)

Here, the trial court considered the testimony of some 50 witnesses and numerous exhibits and judicially noticed documents. It then assessed credibility, weighed the evidence, resolved conflicts, and applied the legal standard set forth in *Gion*. Applying that standard, it found that the casual use only by neighbors, many of whom were young children at the time, was neither substantial, diverse, nor sufficient under *Gion*. It also found that the Martha Co. had made bona fide efforts to restrict any use. Under either of these findings, TRUST failed to prove its case. The Court of Appeal then affirmed, finding these conclusions to be supported by substantial evidence.

To the extent that TRUST now attempts to manufacture a split of authority with *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, none exists. The respective circuits arrived at different results because, as both the trial court and the Court of Appeal recognized, the two cases had markedly different factual circumstances. Nor has TRUST shown any legal error made by either the trial court or the Court of Appeal. Even if any such alleged error existed, error is not a reason for this Court's review.

In the end, TRUST lost on multiple grounds; it could not meet the standard of showing substantial, diverse, and sufficient use under *Gion*, and it could not undo the Martha Co.'s successful showing of efforts to restrict use to the extent it occurred. These conclusions were based on the specific facts of the case, something the trial court was particularly suited to assess. The Court of Appeal in turn confirmed that the decision was supported by substantial evidence. TRUST has presented no reason for this Court to wade into such a fact-specific inquiry. Given the decades that have elapsed since Civil Code section 1009 abrogated *Gion* prospectively, the need for further guidance in this area also is quickly fading.

II. FACTUAL BACKGROUND

A. The Martha Co. Property

The Property is a 110-acre parcel located on the southeastern tip of the Tiburon Peninsula, wholly within an unincorporated area of Marin County, in the Bay Area.[1] The parcel is adjacent to the Town of Tiburon and is the largest undeveloped private property in the area, although prior to 1972 it was one of several undeveloped tracts. The site has steep slopes and is heavily vegetated. Given the topography, the entire site cannot be

[1] 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.

viewed from one place. The site also includes over a mile of frontage along Paradise Drive, much of which is shrouded in vegetation.

B. The Property Was Historically Used For Cattle Grazing

Through 1959, the Property was used for cattle grazing and was enclosed by fencing. There is no evidence that the Property was accessed with any regularity by anyone other than ranchers and the Reed family members during these years. Only one witness testified to use during this time, and he recalled the area was fenced and that he went to "seek solitude." The Reed family, who owned property across the street on Paradise Drive, regularly visited the Property to, among other things, hike and post no trespassing signs.

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

After grazing activities ceased, surrounding land was slowly developed with new homes. Roads within the adjacent Hill Haven subdivision were graded sometime in the early to mid-1950s. By the mid-1960s, a number of homes in Hill Haven appear to have been developed, and this general trend appears to have continued through the late 1960s and into the 1970s. Development within other nearby residential subdivisions appears to have proceeded in similar fashion. Consistent with these patterns, 12 of TRUST's witnesses moved into these newly developed areas in 1965 or later, including 10 who did not arrive until 1968 or later (that is, less than the minimum five-years needed to establish implied dedication). Martha Co.'s witnesses were in accord.

(Photo of Edgar Reed on Property, near Paradise Drive, with longstanding fence and years of "no trespassing" signs, March 1973.)[2]

Edgar Reed, who was the primary caretaker for the site during the relevant years, along with his wife Eileen and their three children moved in across the street from the Property in 1956. Having moved so close, their time on the Property increased. Edgar's children basically grew up on the Property and used it extensively for, among other things, hiking, mini-biking, cardboard sledding, and camping. Members of the large extended Reed family also visited in the summers and accessed the Property. Friends of the Reed children also spent significant time on site and would camp during the weekends. Others were given permission.

Between 1967 and 1972 (i.e., the years upon which TRUST focused at trial), the Reed children and about 30 neighborhood friends accessed the

[2] This photo was included in Respondent's Appendix at p. 736.

Property on a nearly constant basis to ride mini-bikes. Compared to other activities, mini-biking caused considerable disturbance. It was very noisy. It also was hard on the Property and created various scars and deep tracks due to skidding. The mini-bikers also created race tracks on the Property, some of which were visible in aerial images introduced at trial.

(Mark Reed and friend on mini-bike on Property, on fire road, behind fence and "no trespassing" signs, circa 1970.)[3]

Although surrounding populations began to increase into the early 1970s, few people accessed the Property. Throughout this time, the Reeds continued to post "no trespassing" signs at regular intervals. With the end of grazing, they also maintained the fencing surrounding the site. When "no trespassing" signs were removed, they would be replaced, and when the fencing was damaged by neighbors, it would be fixed. Photographs of the site taken prior to March 4, 1972, depict signs being posted and the site

[3] This photo was included in Respondent's Appendix at p. 649.

being fenced. Photographs taken in March 1973 to document historical efforts likewise reflect fencing and signs during the relevant years.

(Photo of Reed boy on mini-bike on Property, fence and signs, circa 1970.)[4]

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 for the rest of his life. From the time that he retired in about 1960 to the time of his death in 1989, one of Edgar's primary activities was to monitor and maintain the Property. He was assisted in these activities by family and friends, who joined him in limiting access, fixing fences, and posting signs. A number of witnesses recalled either having been asked to leave the site by the Reeds or being generally aware that they needed to avoid Edgar.

Although these efforts were made more difficult by the Property's size (110 acres), steep slopes, and vegetation, the 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

[4] This photo was included in Respondent's Appendix at p. 769.

secluded; and (2) neighborhood children who roamed the undeveloped portions of the Tiburon Ridge. Aside from these neighbors and 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.

The Reeds also took various other steps reflecting their attention to the Property. For periods through 1973, the site was leased to neighbors for horse grazing purposes, including the construction of a shed and corral area. Sometime in the early to mid-1960s, the Fire Department graded a fire access road across the ridge area of the Property with the permission of the Reed family. When completed, padlock gates were placed at both ends. Typically, the road was re-graded every year. These types of further reflected, among other things, the Reeds' attention to the Property and the understanding in the community that the site was private.

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

In the decades since, the Martha Co. has endeavored to develop the Property with 43 single-family residential homes.[5] In September 2017, however, with a proposed development project finally nearing approval, TRUST filed this lawsuit in opposition to the project. Given the extreme passage of time, TRUST focused at trial on 1967 through 1972 (i.e., the final five years within which an implied dedication can be shown). TRUST only called witnesses who had lived in Tiburon, nearly all of whom lived within walking distance and made light use of the site during some of those

[5] In 1993, in the midst of the Martha Co.'s development efforts, a group of neighbors brought suit claiming that the adjacent undeveloped parcel had been impliedly dedicated for public use. These efforts were rejected by the U.S. District Court in 1994. Unsurprisingly, the trail use now alleged by TRUST is largely the same as what was claimed in the *Harroman* litigation. Many people involved in this case, including TRUST's own counsel, also were involved in *Harroman*. They then waited another 23 years before making the same claim on this Property, during which time many key Martha Co. witnesses passed away.

years. Many were children at the time and roamed the undeveloped areas of Tiburon. There was no evidence that anyone other than neighbors and their occasional guest accessed the site prior to March 4, 1972.

There also was no evidence that any governmental entity ever took steps to maintain the Property or took the position that the site was public. To the contrary, during the relevant years both Marin County and the Town of Tiburon had taken actions that would be inconsistent with any claim of implied dedication. In addition, there was evidence that the Martha Co. had made ongoing and substantial efforts to restrict access to the site, including, among other things, patrolling the site, repairing fences, and posting signs. In March 2019, the trial court entered judgment in favor of the Martha Co.

E. The Court of Appeal Affirms the Trial Court's Judgment

TRUST then appealed. On October 23, 2020, the Court of Appeal, First Appellate District, issued its Opinion affirming the trial court's judgment in all respects. Regarding the level of use, the Court of Appeal found that substantial evidence supported the trial court's finding that any use was insufficient to prove an implied dedication. Among other things, it found that substantial evidence suggests there was never more than a few people on the trails at any given time, that users were not diverse members of the public because they were primarily neighbors and their children, and that use by these neighbors was insufficient to put the Martha Co. on notice it was at risk of losing its property to an implied dedication. There also were no actions by local governments to facilitate public use.

Even assuming sufficient use had been shown, the Court of Appeal also found that substantial evidence supported the trial court's finding that the Martha Co. made bona fide efforts to prevent public use. In so doing, it deferred to the trial court's weighing of evidence and found the conclusions to be supported by the evidence. While the Court of Appeal agreed that the Martha Co.'s efforts were not perfect, it noted that an owner's efforts to

prevent public access need not be wholly effective, particularly if the area is undeveloped and public use is light. Because TRUST had failed to meet its burden to show an implied dedication, and because in any event the Martha Co. had made bona fide efforts to restrict use, the Court of Appeal affirmed.

III. THERE ARE NO GROUNDS FOR REVIEW

A. Error Is Not Grounds For Review

Supreme Court review is discretionary, and the grounds for review are exclusively provided for in California Rule of Court 8.500(b). One such ground is "[w]hen necessary to secure uniformity of decision." While TRUST makes one attempt to meet this standard, the vast majority of its Petition simply re-characterizes facts of the case and makes various claims of legal error. For the most part, however, it repeats arguments that already were raised and rejected by the trial court and the Court of Appeal. Even if any such error existed, which it does not, error is not grounds for review.

Moreover, if TRUST had believed that the Court of Appeal made a factual misstatement or legal error in its decision, a petition for rehearing was available. Indeed, if a party believes that a Court of Appeal misstated facts, it first needs to raise such issue in a petition for rehearing. (Rule of Court 8.500(c)(2); see, e.g., *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2 [noting that complaints regarding facts as stated by Court of Appeal not considered on review where party did not petition for rehearing].) No such petition for rehearing was sought, however, and TRUST has not otherwise presented a valid reason for review.

B. Use Was Not Substantial, Diverse, And Sufficient, Considering the Circumstances, To Raise "The Conclusive And Indisputable Presumption Of Knowledge And Acquiescence"

1. The Opinion Does Not Conflict With *Blasius*

TRUST claims that this case conflicts with *Friends of the Trails v. Blasius*. TRUST fails to demonstrate any actual conflict between the

decisions. Contrary to TRUST's assertion the Court of Appeal did not find that "neighborhood hiking" implies consensual use and cannot be used to show an implied dedication. Nor did *Blasius* somehow hold that "neighborhood hiking" alone establishes an implied dedication—those were not even the facts presented in *Blasius*, let alone the court's holding. Ultimately, both courts did what is required under *Gion*: they considered the totality of the circumstances and determined whether the alleged use was substantial, diverse, and sufficient to prove an implied dedication. The fact that both cases involved at least some use by neighbors does not create a conflict—the courts simply arrived at different results based on different facts. TRUST's attempt to now manufacture a circuit split, when in fact it simply disagrees with the outcome in its case, lacks merit.

Indeed, as both the trial court and the Court of Appeal observed, the circumstances presented in *Blasius* were markedly different from those of this case. In *Blasius*, for instance, "[t]he evidence clearly established that the use was *more than just neighbors crossing neighboring land*." (*Blasius*, 78 Cal.App.4th at 819 [emphasis added].) Here, by contrast, there was no dispute that any unauthorized use was "just neighbors," almost all of whom lived within walking distance to the site, many of whom were children, and many of whom treated the Property as an extension of their own backyard. There was no evidence at trial that anyone other than these neighbors and their occasional guest *ever* accessed the site prior to March 1972.[6]

[6] TRUST's references to use of the Property as being "long and historic," and the site itself being "an emersion in history," should be ignored. None of this was shown at trial. Footnote 1 likewise should be disregarded. It is improper for TRUST to present new information at this stage, much less via a website that has nothing to do with this case. Its assertion that ferries transported "thousands of San Franciscans" to the Property for some 140 years has no basis in reality. The website certainly does not state as much, and there was no such evidence presented at trial.

In addition, both "the amount and variety of public use in this case was significantly less than that involved in *Gion* or *Blasius*." (Opinion, p. 13.) The road at issue in *Blasius* had been used for *over 30 years* at a level "sufficient to afford unequivocal notice of public use to the owners of the land." (*Blasius*, 78 Cal.App.4th at 818-819, 825.) Here, any use was casual and light. Many witnesses in fact testified that they sought to access the site *because* it was quiet and secluded. Even disregarding various credibility issues associated with much of their testimony, the number of neighbors who claimed to have accessed the site was far less and for a far shorter period of time than in either *Blasius* or any case in which implied dedication has been found.[7]

All of this witness testimony was consistent with various historical photos showing that the area was still largely unpopulated and undeveloped through March 1972. There simply were not enough people to constitute substantial use through access by a small subset of neighbors alone. Many of TRUST's witnesses also did not move into their homes near the site until the late 1960s. Ten of them arrived in 1968 or later and therefore could not establish the minimum five-year period necessary to make even the barest showing of use between March 4, 1967, and March 4, 1972.

Ten of TRUST's witnesses also were born in 1954 or after, making them minors through March 4, 1972. Many of these children roamed the undeveloped areas of the Tiburon Ridge without regard to site boundaries. Others played on the Property because it was behind their home and was essentially an extension of their backyard. Unlike the facts of *Blasius*, it

[7] See, e.g., *Gion*, 2 Cal.3d at 36-37 [public used land for at least 100 years; as many as 100 people were on beach at one time]; *City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 975 [public made use of properties for 60 years; between 250 and 300 people a day used the beach for 12-year period]; *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 210 [thousands of people used property annually].

could hardly be said that the occasional presence of neighborhood children roaming the Property would have clearly indicated to the Martha Co. that a specific set of trails was in danger of being publicly dedicated.

Perhaps the most notable distinction from *Blasius*, however, is that one of the owners in *Blasius* had *openly allowed the public to use the canal road* for many years. (*Id.* at 818, 825.) Until there was a change in ownership, with the new owner trying to restrict use, the longtime landowner did not attempt to limit or even object to the public's use of the road. Use had been freely allowed. (*Id.*) In stark contrast to *Blasius*, the Martha Co. not only did not encourage the public to use the site, it made ongoing efforts to restrict any such use.

Ultimately, the trial court heard the testimony of some 50 witnesses, weighed the evidence including various exhibits, resolved any conflicts, and found that any use was neither substantial, diverse, nor sufficient so as to raise "the conclusive and indisputable presumption of knowledge and acquiescence." It also found the Martha Co. had made bona fide efforts to restrict use. Based on the considerable evidence supporting the trial court's conclusions, the Court of Appeal in turn affirmed. There is no conflict with *Blasius*. TRUST simply disagrees with the outcome of this case.

2. There Is No Separate "Wilderness" Standard

Apparently conceding that use was minimal, TRUST contends the trails should have been considered in a "wilderness setting." Although it is unclear what this means, the site is not "wilderness" under any reasonable definition. It is on the Tiburon Peninsula, which protrudes into the San Francisco Bay, in the Bay Area. While it is raw, largely undeveloped land, it is not some sort of remote enclave. It is next to the Town of Tiburon, and a portion of the site is adjacent to a residential subdivision. Other portions abut Paradise Drive, which surrounds the peninsula. In the late 1960s, most of the greater Tiburon Ridge was undeveloped, and nearby populations

were concentrated at lower elevations closer to the coast, but that does not convert this former cattle ranch to a "wilderness setting."

Regardless, the law does not provide for some distinct "urban" and "wilderness" standards. Tellingly, TRUST has never disputed that *Gion*—which does not draw such distinction—sets forth the legal test. TRUST had the burden to show use that was substantial, diverse, and sufficient, considering all the circumstances, to "raise the conclusive and indisputable presumption of knowledge and acquiescence." (*Gion*, 2 Cal.3d at 38; see also *Blasius*, 78 Cal.App.4th at 826, fn. 7 [use must be "substantial, diverse, and sufficient"); *County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 565 [use must "clearly indicate" property is in danger of dedication].) This is a factual determination to be made by the trier of fact. (*Gion*, 2 Cal.3d at 40 [issue is "ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom"].)

While geography and physical setting may be relevant factors, (as both the trial court and Court of Appeal recognized), a plaintiff seeking to prove an implied dedication still must meet the standard set forth in *Gion*. This requires a showing of substantial use, regardless of the setting. (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."].) TRUST's claim that it should be held to a lower standard because the area was relatively undeveloped—and therefore use was minimal—is effectively a concession that it cannot meet the well-established legal standard imposed by this Court in *Gion*.

Moreover, the only support cited by TRUST is a footnote in *Blasius*, which cautioned that "an occasional hiker on isolated property should not be construed as suggesting that any instance of recurrent 'public' passage over private property could qualify as adverse use for purposes of implied dedication." (*Blasius*, 78 Cal.App.4th at 825, fn. 7.) While the court also

observed that a long history of continued use by a diverse group of hikers *might* suffice, it reiterated that any use "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." (*Id.*) This is the exact test that was applied by the trial court and the Court of Appeal, and it is exactly what is required under *Gion*.

3. Use By Neighbors Was Not Diverse

TRUST maintains the trial court and Court of Appeal erroneously assumed that neighbors had implied permission to access the site.[8] Neither court did any such thing. The courts focused on neighbors because that was the *only* use of the site that was alleged to have occurred. Both found that such use lacked the requisite diversity under *Gion* and, in light of other surrounding circumstances, would not have put the Martha Co. on notice that it was at risk of implied dedication. (Opinion, pp. 7-9; see also *Gion*, 2 Cal.3d at 38.) Nothing about this analysis assumed permission had been impliedly granted, nor was the testimony of neighbors excluded because representatives of the Martha Co. lived in the community. Both the trial court and the Court of Appeal simply applied the test set forth in *Gion* and, based on all circumstances, found that TRUST had not met its burden.

Under *Gion*, any unauthorized use must be "diverse." (*Gion*, 2 Cal.3d 29, 39 [requiring that "various groups of persons have used the land[,]" rather than "a limited and definable number of persons"]; see also *id.* at 41 [referencing use by the "general public".) Although *Gion* did not explicitly define what it means to be "diverse" for purposes of an implied

[8] TRUST also claims it was error to consider the fact that no governmental entity has maintained the Property or taken the position that the Property is public. But such consideration is plainly permissible under *Gion*, which 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." (*Gion*, 2 Cal.3d at 39 [emphasis added].)

dedication, numerous courts have found that both the identity and location of any unauthorized user are a relevant factor in this analysis. In *Friends of the Trails v. Blasius*, for instance, the court noted that public use was not limited to neighbors, and that it consisted of "more than just neighbors crossing neighboring land." (*Blasius*, 78 Cal.App.4th at 819.)

Other appellate opinions also have noted that users came from both near and far. (See, e.g., *Gion*, 2 Cal.3d at 36 [noting people came from nearby and other places]; *Brumbaugh v. County of Imperial* (1982) 134 Cal.App.3d 557, 561 [noting use by both "area residents and the public"].) Although some cases do not reference where individuals came from (and refer generally to the "public"), the facts demonstrate that use must have encompassed more than just neighbors given the sheer numbers of people involved. (See, e.g., *City of Long Beach*, 75 Cal.App.3d at 975 [250 to 300 people daily]; *County of Los Angeles*, 26 Cal.3d at 210 ["substantial diversity" of use by the "multitudes," "thousands of persons annually"].)

Here, as both the trial court and Court of Appeal found, it was undisputed that any use of the site was limited to: (1) neighbors, many of whom were children at the time, and almost all of whom lived within close walking distance of the Property; and (2) the occasional guests of those neighbors, who knew of the site only because they had been invited by the neighbors. Nothing in the record suggested that any member of the broader public knew of the site, much less accessed it prior to March 1972. The trial court's finding that any use of the site lacked the requisite diversity under *Gion*, therefore, was well supported in the record.[9]

Contrary to TRUST's assertion, neither court "held that permission was implied by the fact that the owner resided in the neighborhood of the

[9] The fact that use was limited to neighbors also was relevant for other reasons. For example, the fact that members of the general public did not access the site shows the effectiveness of efforts to restrict use.

trails and thus neighborly accommodation was implied." Nor did either court make some unspecified "inference of permissive use" or otherwise "concentrate[] on the assumed state of mind of the landowner." Nor did they find that all witnesses "were friends and acquaintances of the owner Reeds." Tellingly, nowhere in its Petition does TRUST cite to any portion of either the trial court's Statement of Decision or the Court of Appeal Opinion in which any of these supposed errors occurred. Nor did it even raise this issue before the Court of Appeal. In fact, both courts recognized that "[t]he evidence from 28 individuals on behalf of TRUST was that the trails were being used without permission."[10] (Opinion, p. 6.)

While neither found that the Martha Co. had impliedly consented to use, however, the Reed family's presence in Tiburon was highly relevant. Edgar Reed (the main caretaker for the Property during the relevant years) and his family lived across the street and constantly accessed the site. They recreated on the site. Edgar's two son's rode mini-bikes all over the site with their friends during the pre-1972 period. They patrolled the site and restricted access. There was evidence that they knew some of TRUST's witnesses, and some of the Reed children had gone to school with some of TRUST's witnesses. When asked, the Martha Co. also gave permission for certain uses. The Reed family was a constant presence in the community throughout the relevant time, and this was a central part of the case.

Ultimately, the trial court assessed the totality of the circumstances and concluded that TRUST had failed to carry its burden to show use that raised the "the conclusive and indisputable presumption of knowledge and acquiescence." (*Gion*, 2 Cal.3d at 38; see also *id.* at 40 [noting "the issue is

[10] The Court of Appeal refers to "neighborly accommodation" once when referencing *Gion*, noting that "[w]hen the predominant users are neighbors, the landowner may have simply tolerated their use as a neighborly accommodation." (Opinion, p. 8.) No further reference is made.

ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom"]; *Blasius*, 78 Cal.App.4th at 826, fn. 7 [stating use must be "substantial, diverse, and sufficient, considering all the circumstances"); *County of Orange*, 54 Cal.App.3d at 565 [use must "clearly indicate to the owner" that property is in danger of dedication].) On appeal, the Court of Appeal found these conclusions were supported by substantial evidence. The courts did exactly what is required under *Gion*.

C. The Martha Co. Made Bona Fide Efforts To Restrict Use

TRUST claims it was error to find that "ineffectual, yet good faith efforts, were sufficient to defeat a dedication." But neither the trial court nor the Court of Appeal made any such finding—each found that the Martha Co.'s efforts to restrict use were significant and reasonable under the circumstances, and that such efforts would have defeated any claim of implied dedication even had substantial use been shown. (Opinion, pp. 11-14.) Again, there was no legal error. TRUST simply disagrees with the facts the trial court found. TRUST's abiding disagreement does not negate the substantiality of evidence presented to the trial court.

Under *Gion*, an owner can defeat a claim of implied dedication if the owner "has made a bona fide attempt to prevent public use." (*Gion*, 2 Cal.3d at 41.) This rule applies even where substantial public use has been shown. Attempts to prevent public use, therefore, need not have been 100% effective—they only need to have been reasonable "in relation to the character of the property and the extent of public use." (*Id.*) Thus, if the owner proves that "more than minimal and ineffectual efforts to exclude the public" have been made, then the trier of fact must decide whether those efforts were adequate under the circumstances. (*Id.*; see also *County of Orange*, 54 Cal.App.3d at 567 [finding that adequacy of efforts turns on means used in relation to character of property and extent of public use].)

Here, the trial court found 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 it noted that "one person patrolling 110 undeveloped acres could not effectively encounter every trespasser," the court deemed these efforts sufficient, finding the Martha Co. "should not be reasonably expected to take greater actions . . . to avoid the presumption of public dedication." (Opinion, p. 6.)

The Court of Appeal in turn affirmed. In particular, it found that the trial court's findings were adequately supported, among other things, "by evidence that members of the Reed family repaired gates or fences to block access to the trails at the property line, posted no-trespassing signs, and ejected some (but certainly not all) trespassers during the relevant period." Itt also noted that contemporaneous photographs corroborated the Martha Co.'s testimony. (Opinion, p. 12.) While it found that these efforts were not perfect, as fencing would be cut and "no trespassing" signs removed, the Court of Appeal deemed them "significant," particularly in light of the size of the site, topographic challenges, the rural environment, and the little amount of unauthorized use that occurred. (*Id.* at pp. 13-14.)

To the extent TRUST maintains that the Martha Co.'s efforts were insufficient as a matter of law because some neighbors accessed the site, its position is unsupported in the law. *Gion* is not so inflexible that an implied dedication is compelled because a few neighbors and children managed to access the Property at irregular intervals. (*Gion*, 2 Cal.3d at 41.) Other decisions are in accord. (See, *e.g., County of Orange*, 54 Cal.App.3d at 566-567 [affirming finding of no implied dedication where owner "took reasonable and significant, although not necessarily effective, measures to

control use"]; *City of Los Angeles v. Venice Peninsula Properties* (1988) 205 Cal.App.3d 1522, 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"]; *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].)

The trial court was in the best position to assess the evidence regarding the Martha Co.'s efforts to restrict use and determine whether those efforts were reasonable under the totality of the circumstances. The Court of Appeal then reviewed the trial court conclusion and found it to be supported by substantial evidence. Having lost on this factual finding, and having failed to pursue a petition for rehearing, TRUST cannot now seek to relitigate these factual claims in a Petition for Review.

IV. CONCLUSION

Based on the foregoing, the Martha Co. respectfully requests that this Court deny TRUST's Petition for Review.

DATED: December 22, 2020 COX, CASTLE & NICHOLSON LLP

By: */s/ Andrew B. Sabey*
Andrew B. Sabey
Attorneys for Respondent
Martha Co.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d)(1), I certify that the text of this brief, including footnotes, contains 6,088 words as counted by the computer program used to prepare this brief.

DATED: December 22, 2020 COX, CASTLE & NICHOLSON LLP

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

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PROOF OF SERVICE AND CERTIFICATION

CASE NAME:	***Tiburon/Belvedere Residents United to Support the Trails ("TRUST"), an unincorporated association v. Martha Co., a California corporation***
CASE NO:	**Supreme Court of California – Case No. S265893**
APPELLATE:	**First Appellate District, Division 5 – Case No. A157073**
TRIAL COURT:	**Superior Court – Marin County Case No. 1703276**

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, and my email address is psanchez@coxcastle.com.

On December 22, 2020, I served the foregoing documents described as:

1) **ANSWER OF DEFENDANT AND RESPONDENT MARTHA CO. TO PETITION FOR REVIEW**

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

Attorneys for Plaintiff/Appellant Tiburon/Belvedere Residents United to Support the Trails ("Trust") 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 Plaintiff/Appellant Tiburon/Belvedere Residents United to Support the Trails ("Trust")** 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
Associate Justice Mark B. Simons Associate Justice Henry E. Needham, Jr. Associate Justice Gordon B. Burns Court of Appeal First Appellate District 350 McAllister Street San Francisco California 94102 ***Courtesy copy via U.S. Mail***	Judge Roy O. Chernus Marin County Superior Court Clerk's Office 3501 Civic Center Dr. San Rafael, California 94903 ***Courtesy copy via U.S. Mail***

BY ELECTRONIC TRANSMISSION: I caused the aforementioned document to be electronically served to the e-mail addressees specified above by using the electronic service provider **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 declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on December 22, 2020, at San Francisco, California.

/s/ Peggy Sanchez
Peggy Sanchez