Supreme Court Case No. S265893

IN THE SUPREME COURT OF CALIFORNIA

TIBURON/BELVEDERE RESIDENTS UNITED to SUPPORT the TRAILS ("TRUST"), *Plaintiff/Appellant,*

v.

MARTHA CO., a California corporation; and DOES ONE through FIFTY, *Defendant/Respondent.*

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

Marin County Superior Court, The Honorable Roy O. Chernus
Case No. CIV 1703276

REPLY IN SUPPORT TO PETITION FOR REVIEW

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I. Introduction

This Court should grant review of the decision below to clarify that (1) local members of the community are in fact members of the public and their use of the trails counted to put the owner on notice of the risk, and eventual fact, of dedication; and, (2) that objectively ineffectual efforts cannot constitute a bona fide attempt at control over access to property to defeat a dedication. The decisions below got both of these legal questions wrong, creating uncertainty, a conflict in appellate districts related to dedications of trails, and threatening public access to trails and open spaces throughout the state.

Both courts below recognized that the Tiburon trails were used without permission for the requisite five years. Yet both refused to recognize the non-permissive use described by the witnesses at trial based upon misinterpretation and misconception of the law and the requirements of *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, *Scher v. Burke* (2017) 3 Cal.5th 136, and *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201.

The issue is whether members of the public—regardless of where they lived or whether they knew the owner—used the trails as members of the public and without permission. Because the answer was yes, notice was provided to the owners. Because there were no effective efforts to restrict access prior to 1972, the notice to the owner is sufficient to create a dedication. And because such unrestricted use was continuous for five years prior to 1972, public ownership over the trails was created.

II. Use by Neighbors Counts as Public Use under *Gion*, *Berk*, and *Scher*

The courts below concluded there was evidence of five years of non-permissive use. (See Statement of Decision at 2 [AA 237]; see Op. at pp. 3-

5.) Despite that evidence, and despite the trial judge recognizing that evidence was sufficient to deny Respondent's motion for judgment during the trial, both courts went on to conclude that the non-permissive use was insufficient to demonstrate dedication. That determination is inconsistent with *Gion* and its progeny because there is no basis to discount the evidence of use when that use is testified to by people near from within the physical neighborhood. There are five problems with that determination, each of which support this Court's review.

First, there is no basis in *Gion* to discount the experiences of local neighbors. Indeed, those are the people most likely to be impacted by the existence of public lands or trails, most likely to use those trails, and most likely to suffer when those public trails are lost.

Second, the determination gives way to a host of vague and unresolvable questions and disputes. Who is a neighbor? The adjacent property? On the same block? Within the same few blocks? Within walking distance of a site? What about someone who lives 2.5 miles away in the same town or community? Four miles? There are no clear standards provided in the opinions below to resolve these questions because there are no standards for doing so in any of this Court's precedents related to implied dedications.

Third, discounting the experience of neighbors because a landowner's conduct is assumed to involve "neighborly accommodation" requires an assumption that is irrelevant under implied dedication the law and unsupported by any evidence in this case. The courts below concluded that because the witnesses who testified (who were plainly not the only users of the trails) were local to Tiburon, the owners' decision to allow use was necessarily a "neighborly accommodation." (See Op. at p. 8.)

This analysis is unsupportable under implied dedication law because whether an implied dedication has occurred is not tied to the subjective beliefs of the owner. Thus, what the owner may have *thought* they were allowing does not matter—what is relevant is what the public actually did at the site and whether that use was sufficient for the owner to be aware of non-permissive use.

There was also no evidence to support the factual determination that the owner in fact knew the people using the site were neighbors. Indeed, that determination was contradicted by the evidence here—none of the hikers were ever asked to leave and the owner's representatives provided no testimony that when they did occasionally encounter a "trespasser" on the trails, that they knew who that person was, and let them stay (or not) based on whether they were in fact a "neighbor." According to the courts below, use by neighbors is not adverse, it is a neighborly accommodation. But there is no way to know whether the owner was providing "neighborly accommodation" based on the evidence in this case, and what the owner was thinking or trying to do is not relevant under *Gion*, *Berk*, and *Scher*.

Fourth, the decision is inconsistent with *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810 ("*Blasius*") where the Court held that use was by neighbors and those from as far as 4 miles away: "These witnesses all used the canal road themselves and also saw others using the canal road. The evidence clearly established that the use was more than just neighbors crossing neighboring land, and that the use was made by various people, young and old, families and single persons, friends, guests, visitors and strangers, coming from nearby as well as from more than four miles away." (*Blasius* ,78 Cal.App.4th at p. 819.) *Blasius'* attempt to distinguish "neighbors" from those who live "four miles" away demonstrates the

invalidity of the decisions below. By relying on the fact that witnesses were "neighbors" without any evidence of the impact of that decision or attempt to distinguish between a "neighbor" who lives next door and a "neighbor" who lives two or five miles away, the courts below misapplied the law.

Fifth, refusing to apply *Gion* or *Berk* to the trails here because of the allegedly limited use also stems from the courts' cramped understanding of the portion of the public that qualifies as using the trails in an adverse manner. Respondent also argues the use of the trails was too limited (and too neighborly) to allow for an inference of adverse use. Yet the math and the intensity of use in other cases demonstrate the errors below. In opposition, Respondent says that the use here is not comparable to the use in other cases finding dedications, relying in part on *Berk*. (See Resp. Ans. at p. 15, fn. 7.) But as Respondent and the Court in *Berk* noted, extensive use in *Berk* was "thousands of people" annually. (*Berk, supra,* 26 Cal.3d at p. 210.)

But 1,000 people in a year is three per day. And just six per day makes "thousands" annually. On a 110 acre parcel with two miles of trails, three, six, or even ten people per day would not be crowded, would still allow for the quiet and privacy some witnesses sought through use of the trails, and would amount to the thousands of users per year this Court held sufficient to show a dedication in *Berk*. This is enough to put the owner on notice and to demonstrate adverse and substantial use by the public.

Ultimately, the courts below relied on an illusory designation of the hikers as neighborly and held as a matter of law that neighborly use is not hostile enough to create a public trail. This creates a higher standard of dedication, especially in an urban area where there are necessarily more potential "neighbors," without any definition of who counts as a neighbor

or how this new standard it is to be applied. There is no reason that trails in an urban setting should be treated differently than trails in a wilderness area.

Both the trial and appellate courts recognized that the Tiburon trails were used without the owner's permission for the requisite five years.[1] Nonetheless, they both refused to recognize the use as qualifying because the foot traffic was too local, suggesting that there was an assumption of permissive use by neighborly accommodation or permission. But it makes no difference whether the use was by local or distant hikers. The principles of pubic use apply regardless of where the hikers live or reside. Thus, the decisions below should be reviewed to ensure consistency in implied dedication law and to resolve the conflict that exists between the decision here and *Blasius*.

III. The Conclusion that Admittedly Ineffective Attempts at Restriction would Defeat a Dedication Misapplied the Law and Should be Reviewed

The appellate court affirmed the holding of the trial court stating that "substantial evidence supports the trial court's finding that Martha's attempts to deter trespassers showed it did not acquiesce to pubic dedication." (Op. at 14.) This misstated the question under *Gion* and its progeny. The question is not whether the efforts were sufficient to demonstrate the lack of acquiescence. Instead, it is whether the attempts

[1] The amendment of Civ. Code Section 1009 in April of 1972 effectively eliminated the application of *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 and *County of Los Angeles v. Berk* (1980) 26 Cal3d 201. Hence, plaintiff was compelled to show substantial use of the trails for the five years *immediately preceding* April of 1972. Hence the 28 hiking witnesses testified to substantial use of the trails prior to April of 1972.

were "more than minimal and ineffectual." (*Gion, supra*, 2 Cal. 3d at p. 41.) Only then does the trier of fact consider whether they were "adequate." (*Ibid.*) This demonstrates that an "adequate" effort to defeat a dedication *must be more than* "ineffectual." (*Ibid.*) *Gion* sets a minimum standard for an owner to meet: such uses must be "more than minimal and ineffectual" before determining whether they are in fact adequate. The courts below ignored this reality.

They acknowledged that the owners did not effectively patrol the property—indeed the owners representatives testified as much at trial—yet found that the admittedly ineffective efforts were a sufficiently good faith attempt to overcome a dedication. This is inconsistent with *Gion* and its progeny and the law of implied dedication. *Not one of the 28 hiking witnesses* encountered any of the ethereal "attempts" claimed by the owners—evidence the efforts were not effective and were minimal.

IV. Conclusion

The Supreme Court should review the decisions of the lower courts and clarify that the principles that it has set forth in *Gion* and *Berk* apply to the trails on the Tiburon peninsula which are the subject of this case.

Respectfully submitted,

Dated: December 31, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 1,745 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: December 31, 2020

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CERTIFICATE OF SERVICE

I, Jennifer Tung, declare:

I am employed in the County of San Mateo, State of California. I am a citizen of the United States, over the age of 18 years and not a party to the within cause. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, San Francisco Airport Office Center, 840 Malcolm Road, Suite 200, Burlingame, California, 94010. On this day, I served the following document(s) in the manner described below:

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✓ **BY MAIL:** I am readily familiar with this firm's practice for collection and processing of correspondence for mailing. Following that practice, I placed a true copy of the aforementioned document(s) in a sealed envelope, addressed to each addressee, respectively, as specified below. The envelope was placed in the mail at my business address, with postage

thereon fully prepaid, for deposit with the United States Postal Service on that same day in the ordinary course of business.

Judge Roy O. Chernus, Dept. 6 Marin County Superior Court P.O. Box 4988 San Rafael, CA 94913	**SUPERIOR COURT**
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, CA 94102	**COURT OF APPEAL**

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Burlingame, California, on December 31, 2020.

JENNIFER TUNG