EASEMENT LAW
in
NEW YORK

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Introduction

- Definition of EASEMENT:
  - Interest in Real Property
    - Must be in writing: General Obligations Law 5-703
    - Must be recorded: Real Property Law §291
  - Comprised of 2 Tenements:
    - one Dominant and
    - one Servient
  - They can be Public or Private, Express or Implied
  - They are a property right less than fee ownership
  - They are not a possessory interest in real property

Introduction

- “An easement is a permanent right conferred by grant or prescription, authorizing one landowner to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden on the land of the latter, is not inconsistent with general ownership.”
- *Trustees of Freehold and Commonalty v. Jessup,* 162 NY 122 (1900)

Introduction

- “One does not, however, possess or occupy an easement or any other incorporeal right. An easement derives from use, [rather than possession] and its owner gains merely ‘a limited use or enjoyment of the servient land’. [rather than title or ownership]
- *Di Leo v. Pecksto Holding Corp.,* 304 NY 505 (1952)
- Comparing Adverse Possession and Prescriptive Easements

COMPARED to other rights

- **<u>License</u>**
  - not an interest in real property,
  - personal to the holder,
  - not assignable and
  - are of limited duration
  - **nothing more than an excuse for the act, which would otherwise be a trespass**
  - Franchises are licenses

COMPARED to other rights

- **<u>License</u>**
- "A License is a personal, revocable and non-assignable privilege, given by writing or parol to one, without interest in the lands of another to do one or more acts of a temporary nature upon such lands. (internal citations omitted) "Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licenses."
- *Trustees of Freeholders & Commonalty v. Jessup*, Supra

COMPARED to other rights

- **Franchise**
- "A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to an act, or series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved." (internal citations omitted).
- *Trustees of Freeholders & Commonalty v. Jessup*, Supra

Compared to other rights

- **Lease**
- “A document is a lease "if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land”… It is the conveyance of "absolute control and possession of property at an agreed rental which differentiates a lease from other arrangements dealing with property rights"
- *Union Sq. Park Community Coalition, Inc. v. New York City Dept. of Parks & Recreation*, 22 N.Y.3d 648 (2014)

Compared to other rights

- *Kampfer v. DaCorsi,* 126 A.D.3d 1067 (N.Y. App. Div. 3d Dep't 2015)
- the plaintiff's right to use the defendant's land for the purpose of agriculture during the repayment period of a loan to defendant was considered a license, not an easement.

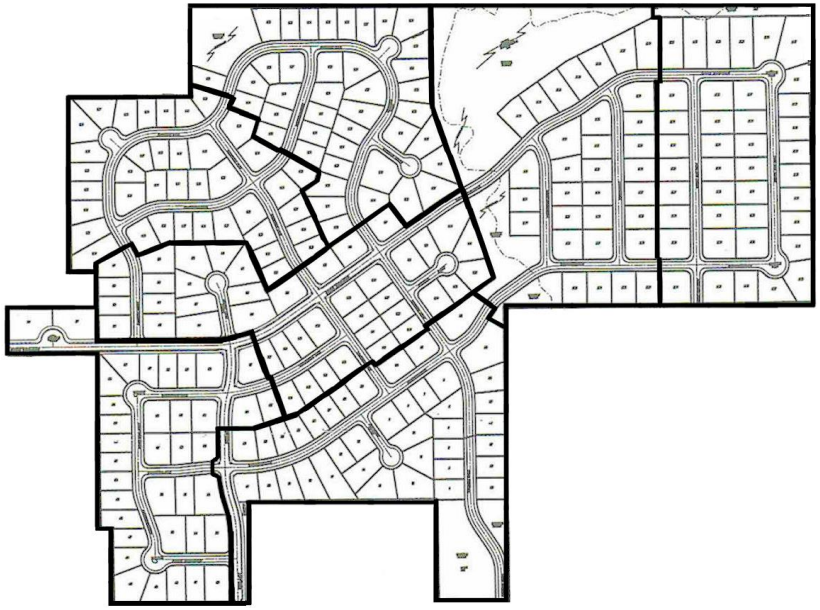
Compared to other rights

- **Covenants:**
- An agreement or promise to do or not to do something
- They can be personal or can run with the land

- **Negative Easements:**
  - Another term for Restrictive Covenants
  - They restrain landowners from making otherwise lawful uses of their property

Compared to other rights

- **<u>Covenants con't</u>**
- Enforceable between:
  - Grantor and Grantee
  - Grantee and Grantee (where there are mutual covenants)
  - Adjoining land owners who have mutual reciprocal covenants



COMPARED to other rights

- **<u>Covenant Examples</u>**: (private zoning)
  - Limiting further subdivision
    - Limiting division
    - Setting Minimum lot sizes
  - Limiting future uses
    - Residential only
    - No saloons/junkyards other unsavory uses
    - No mobile homes
    - No blocking the view

Compared to Other Rights

- Gas and Oil Leases: Organic Substances
- NY General Construction Law §39. Property, personal
- …Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

Compared to other rights

- **<u>Profits:</u>**
- the right to take a product from the land
- A profit may also constitute an appurtenant easement where there is a dominant and servient estate.

Compared to other Rights

- **<u>Lateral Support</u>**
- "As between the proprietors of adjacent lands, neither proprietor may excavate his own soil, so as to cause that of his neighbor to loosen and fall into the excavation. **The right to lateral support is not so much an easement, as it is a right incident to the ownership of the respective lands.**" *Village of Haverstraw v. Eckerson,* 192 N.Y. 54 (1908).
- "The natural right of support, as between the owners of contiguous lands, exists in respect of lands only, and not in respect of buildings or erections thereon." *Dorrity v. Rapp*, 72 N.Y. 307 (1878).

Compared to other Rights

- **<u>Lateral Support</u>**

- In NYC the Admin. Code changes the common law and requires that Lateral Support be given to adjacent buildings by the excavator
- See NYC Admin Code Section 3309: Protection of adjoining property

Compared to other Rights

- Air Space or Air Rights:
- "An owner of real property possesses the right to utilize all of its **air** space." *1380 Madison Ave. v. 17 E. Owner's Corp*, 2003 NY Slip Op. 51309(U). [air conditioner case]

- To whomsoever the soil belongs, he owns to the sky and to the depths.
- *Macmillan v. C.F. Lex Associates*, 56 N.Y.2d 386 (1982)

Compared to other Rights

Mineral Estate or Mineral Rights: Inorganic Substances

> Defendants established that, "they reserved to themselves and their heirs title to all of the subsurface minerals, including oil and gas. That reservation of title constitutes a fee simple interest in the subsurface minerals, which includes both title to the minerals and the right to use any reasonable means to extract them."

Frank v. Fortuna Energy, Inc., 49 A.D.3d 1294 (4th Dept 2008).

Compared to other Rights

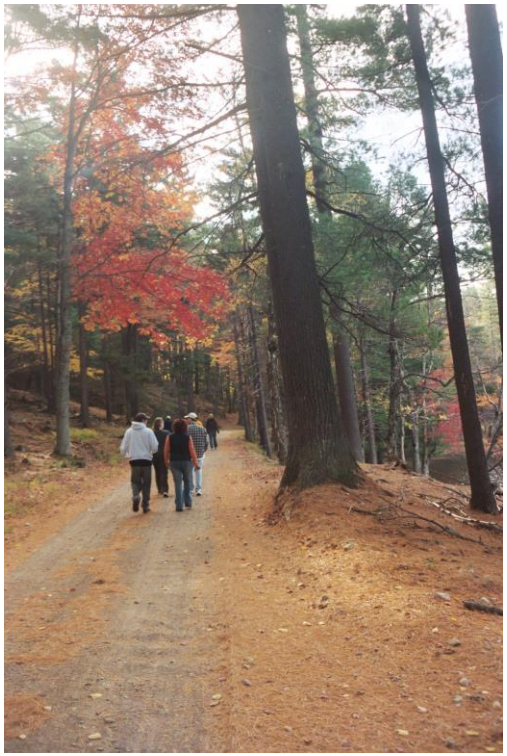
- Riparian and Littoral Rights
- While "[a] true riparian owner owns land along a river" (citations omitted) , and the owner of property along a lake is more accurately described as a littoral owner (citation omitted), the distinction between these terms is outdated (citation omitted).
- Ford v. Rifenberg, 94 AD3d 1285 (3d Dept 2012) footnote 2

Types of Easements

Types of Easements

- Public
- Acquired for the benefit of the public

- Private
- Acquired for the benefit of private land owners

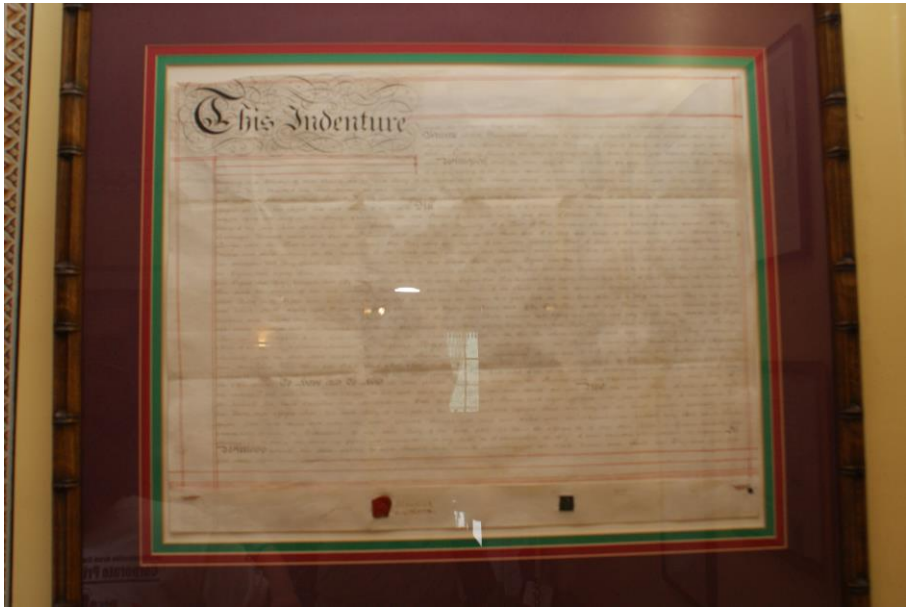


Types of Easements

Express

- Some writing evinces the existence of the easement

- Implied
  - Implied easements are inferred from the circumstances



Types of Easements

- Appurtenant
  - A benefit attached to the property
  - Inseparable from the land and a grant of the land carries with it the grant of the easement
  - *Will v. Gates,* 89 NY2d 778 (1997)
  - “run with the land”

Types of Easements

- Easements in Gross:
  - are licenses,
  - personal,
  - non-assignable,
  - non-inheritable,
  - expire upon the death of the holder,
  - sometimes called “Personal Easements”.
- There is no dominant estate, the “dominant estate” is a person
- Stranger to the Deed Rule
  - Often see a personal right conveyed to a third party in a deed between A and B.

Types of Easements: In Gross

- *Tuscarora Club of Millbrook v. Brown*, 215 N.Y. 543 (1915)
- Deed: Sarah Brown to Margaret Carroll
- "Reserving the right to William H. Brown., Jr. to fish in the said Mill Brook Stream."

Types of Easements: Purposes

- Right of Way (ROW)
- an easement that grants the right to pass over the surface of the land of another for a particular purpose, usually to access something
- Common Terms that indicate a ROW:
  - Ingress: a right to enter
  - Egress: a right to exit
  - Regress: a right to re-enter or go back

Types of Easements: Purpose

- Highways/Streets
  - May be fee owned or easements for highway purposes
  - Depends on the manner of creation
  - Presumption of an easement unless fee can be show to have been acquired

Types of Easements: Purpose

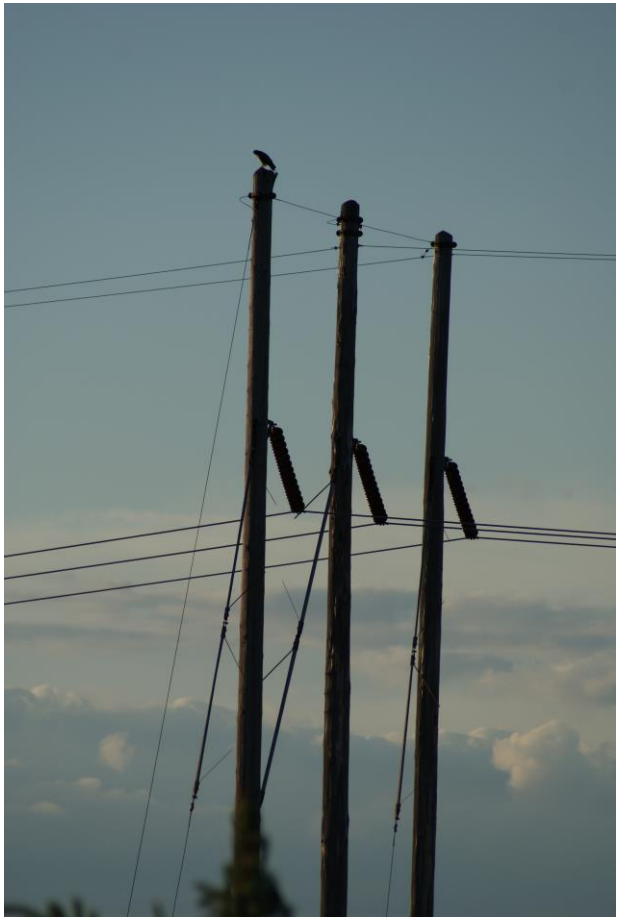
- Shared Driveway
  - Cross easement or reciprocal easement by which each owner of a portion of a driveway grants the other an easement over their respective portion
  - Beware the prohibition of granting yourself an easement over your own lands

Types of Easements: Purpose

- Water Rights
  - Draw water
  - Access a body of water
  - Lay pipes
  - Use a well

Types of Easement: Purpose

- Utilities
  - Storm drains
  - Sewer pipes
  - Electrical and transmission lines
  - Telephone and cable
  - Gas lines



Types of Easements: Purpose

- Light and Air
  - Easement that perpetually allows light and air to enter the windows of a building from an adjoining lot
  - Express easements only
  - Exceptions:
    - Property bounded on street
    - Strictly necessary and was the intent of the parties

Types of Easements: Purposes

- Party Walls
  - Easement of the owner of either building extends only over so much of his neighbor's lands as the party wall stands upon,
  - Easement right of support of the wall and presence of the flues
- Aviation
  - Easement for Avigation purposes of the airspace over certain properties
  - Usually defined as a plane with a rise and a run
  - *Kupster Realty Corp v. State of New York*, 93 Misc 2d 843 (Ct of Claims, 1978) [for the Republic Airport in Farmingdale, NY]

Types of Easements: Purposes

- <u>Burial Plots</u>
  - A “property right”
  - Yet no dominant & servient estates
  - Easement for burial purposes
  - Privilege of
    - Erecting tombstones and monuments
    - Protecting them from injury or spoilation (injunction)

Types of Easements: Purposes

- Conservation Easements:
  - No dominant and servient estates
  - "Conservation easement" means an easement, covenant, restriction or other interest in real property…which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property

Types of Easements: Purposes

- Conservation Easement con't.
- It is not a defense in any action to enforce a conservation easement that:
  - (a) **It is not appurtenant to an interest in real property;**
  - (b) It can be or has been assigned to another holder;
  - (c) It is not of a character that has been recognized traditionally at common law;
  - (d) It imposes a negative burden;
  - (e) It imposes affirmative obligations upon the owner of any interest in the burdened property, or upon the holder;
  - (f) The benefit does not touch or concern real property; or
  - (g) There is no privity of estate or of contract.ECL § 49-0305

Types of Easements: Purposes

- Conservation Easement con't.
- "Conservation easements are of a character wholly distinct from the easements traditionally recognized at common law and are excepted from many of the defenses that would defeat a common-law easement" *Argyle Farm & Props., LLC v Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, 2016 N.Y. App. Div. LEXIS 562 (N.Y. App. Div. 3d Dep't Jan. 28, 2016)

Conservation Easement con’t.

Affirmative & Negative Easements

- Also known as Affirmative and Negative Restrictions or Covenants

Little boxes on the hillside, Little boxes made of ticky tacky, Little boxes on the hillside, Little boxes all the same. There's a green one and a pink one And a blue one and a yellow one, And they're all made out of ticky tacky And they all look just the same.

Little Boxes by Malvina Reynolds

Affirmative & Negative Easements

- Negative easement is one which restrains a landowner from making certain use of his land which he might otherwise have lawfully done but for that restriction
- Runs with the land

- Affirmative Easement:
- a covenant to do an affirmative act, as distinguished from [one] merely negative in effect,
- does not run with the land so as to charge the burden of performance on a subsequent grantee

Affirmative & Negative Easements

- Affirmative Easements do not run with the land
- Exception to the rule:
  - “The burden of affirmative covenants may be enforced against subsequent holders of the originally burdened land whenever it appears that
  - (1) the original covenantor and covenantee intended such a result,
  - (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened and
  - (3) the covenant touches or concerns the land to a substantial degree.”

Affirmative & Negative Easements

- Example:
- To furnish steam heat to the neighboring building touched and concerned the land and was enforceable against subsequent grantee

- Example:
- To construct a shaft (from a mill wheel) to provide a good connection to the neighboring property was an obligation of the grantor that he could not pass to his grantee to perform upon conveyance of the property

Express easements

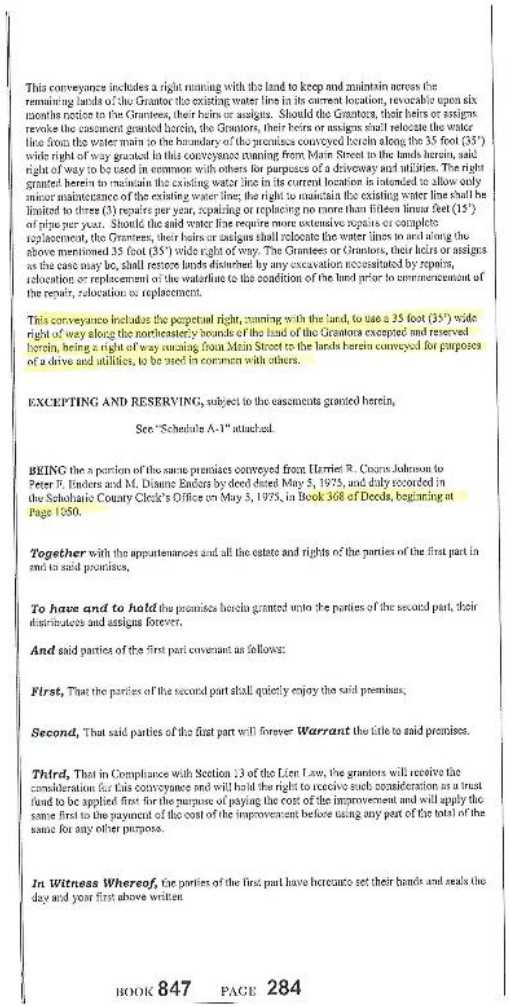
Creation and Existence of Easements

Express easements

- occurs when the **easement** is (1) **conveyed** in writing, (2) subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate
- The **easement** passes to subsequent owners of the dominant estate through **appurtenance** clauses, even if it is not specifically mentioned in the deed

Express Easement

Example: 35 foot wide easement for a drive and utilities



This conveyance includes a right running with the land to keep and maintain across the remaining lands of the Grantor the existing water line in its current location, revocable upon six months notice to the Grantees, their heirs or assigns. Should the Grantors, their heirs or assigns revoke the easement granted herein, the Grantors, their heirs or assigns shall relocate the water line from the water main to the boundary of the premises conveyed herein along the 35 foot (35') wide right of way granted in this conveyance running from Main Street to the lands herein, said right of way to be used in common with others for purposes of a driveway and utilities. The right granted herein to maintain the existing water line in its current location is intended to allow only minor maintenance of the existing water line; the right to maintain the existing water line shall be limited to three (3) repairs per year, repairing or replacing no more than fifteen linear feet (15') of pipe per year. Should the said water line require more extensive repairs or complete replacement, the Grantees, their heirs or assigns shall relocate the water lines to and along the above mentioned 35 foot (35') wide right of way. The Grantees or Grantors, their heirs or assigns as the case may be, shall restore lands disturbed by any excavation necessitated by repairs, relocation or replacement of the waterline to the condition of the land prior to commencement of the repair, relocation or replacement.

This conveyance includes the perpetual right, running with the land, to use a 35 foot (35') wide right of way along the northeasterly bounds of the land of the Grantors excepted and reserved herein, being a right of way running from Main Street to the lands herein conveyed for purposes of a drive and utilities, to be used in common with others.

EXCEPTING AND RESERVING, subject to the easements granted herein,

See "Schedule A-1" attached.

BEING the a portion of the same premises conveyed from Harriet R. Coons Johnson to Peter F. Enders and M. Dianne Enders by deed dated May 5, 1975, and duly recorded in the Schoharie County Clerk's Office on May 5, 1975, in Book 368 of Deeds, beginning at Page 1050.

Together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises,

To have and to hold the premises herein granted unto the parties of the second part, their distributees and assigns forever.

And said parties of the first part covenant as follows:

First, That the parties of the second part shall quietly enjoy the said premises;

Second, That said parties of the first part will forever ***Warrant*** the title to said premises.

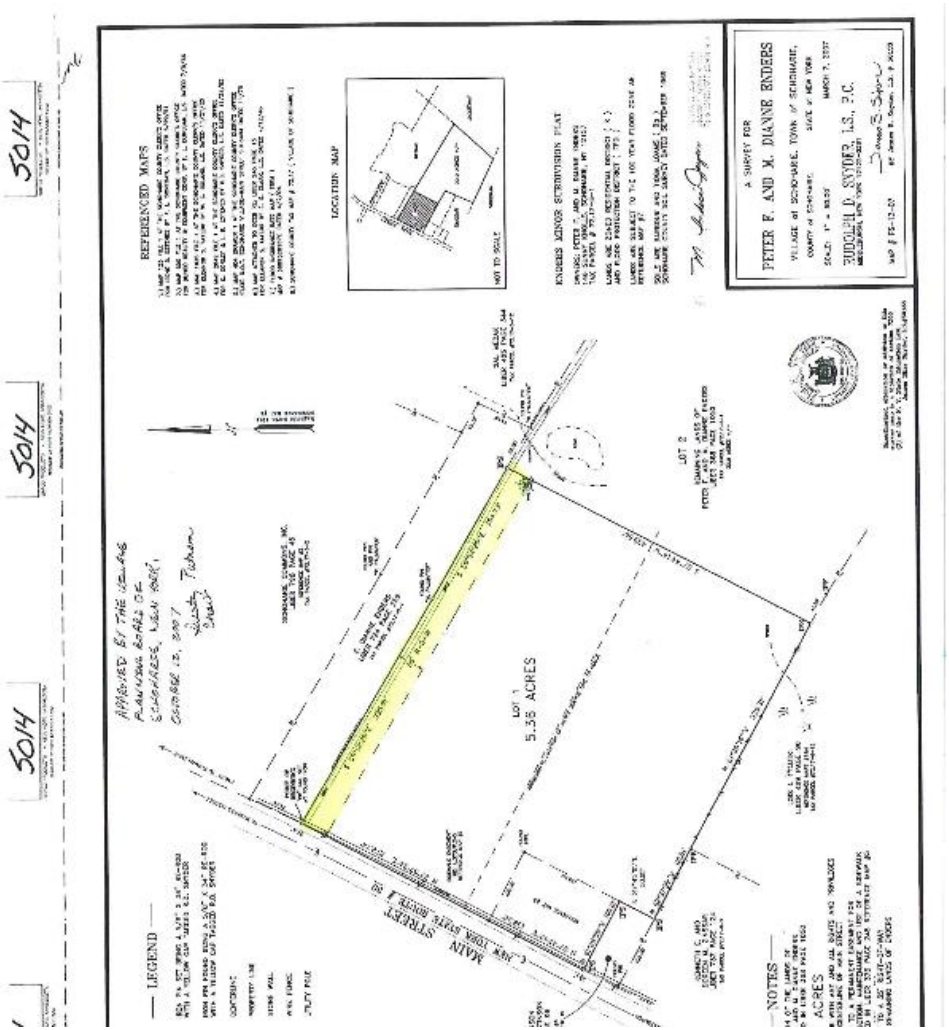
Third, That in Compliance with Section 13 of the Lien Law, the grantors will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written

BOOK 847 PAGE 284

Express Easement

When lot 1 was sold by Grantor, this filed map was recorded and Grantor made the conveyance of Lot 2 subject to the ROW shown on this referenced map



Express easements

General Obligations Law § 5-703. Conveyances and contracts concerning real property required to be in writing

- 1. **An estate or interest in real property**, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, **cannot be created**, granted, assigned, surrendered or declared, **unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating**, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing….

Express easements

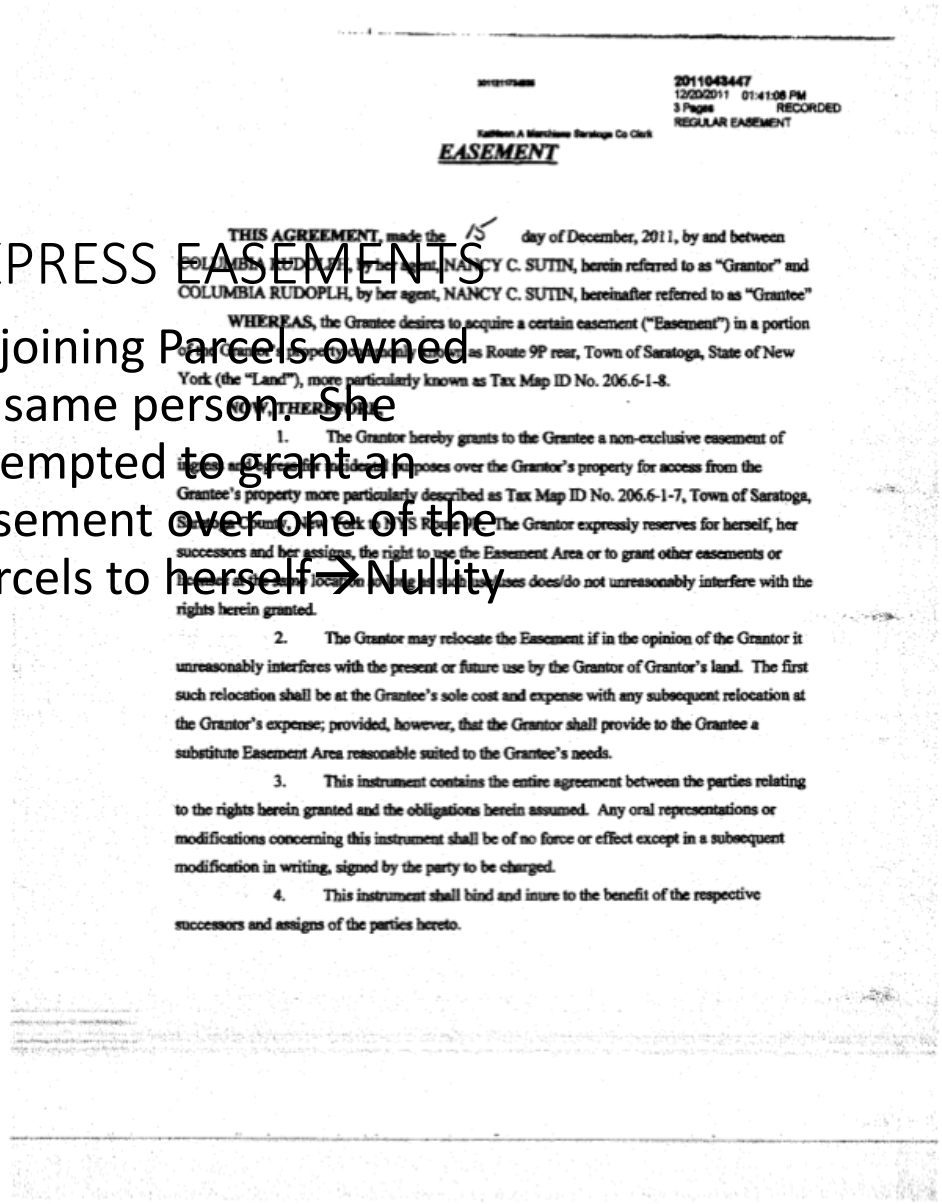
- Document conveying an interest in real property must have:
  - Grantor
  - Grantee
  - Proper designation of the property
  - Recite the consideration
  - Contain operative words
  - Be acknowledged before delivery
  - Execution and delivery attested to by a subscribing witness
- Types of Documents capable of conveying a real property interest:
  - Map filed in EDPL Proceeding
  - Will
  - Agreement
  - Deed
    - Grants
    - Reservations

Express easements

- Limitations from the common law (things you can’t do):
  - Convey an easement to yourself over your own lands even if they are separate parcels
  - Create or grant an easement over another persons lands
  - Create or grant an easement to a third party in a deed between A&B
  - Piggy-back easements

EXPRESS EASEMENTS

Adjoining Parcels owned by same person. She attempted to grant an easement over one of the parcels to herself → Nullity



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REGULAR EASEMENT

Kathleen A Marchione Saratoga Co Clerk

EASEMENT

THIS AGREEMENT, made the 15 day of December, 2011, by and between COLUMBIA RUDOPLH, by her agent, NANCY C. SUTIN, herein referred to as "Grantor" and COLUMBIA RUDOPLH, by her agent, NANCY C. SUTIN, hereinafter referred to as "Grantee"

WHEREAS, the Grantee desires to acquire a certain easement ("Easement") in a portion of Grantor's property known as Route 9P rear, Town of Saratoga, State of New York (the "Land"), more particularly known as Tax Map ID No. 206.6-1-8.

NOW, THEREFORE, it is

1. The Grantor hereby grants to the Grantee a non-exclusive easement of [illegible] purposes over the Grantor's property for access from the Grantee's property more particularly described as Tax Map ID No. 206.6-1-7, Town of Saratoga, [illegible] Route 9P. The Grantor expressly reserves for herself, her successors and her assigns, the right to use the Easement Area or to grant other easements or [illegible] location [illegible] uses does/do not unreasonably interfere with the rights herein granted.

2. The Grantor may relocate the Easement if in the opinion of the Grantor it unreasonably interferes with the present or future use by the Grantor of Grantor's land. The first such relocation shall be at the Grantee's sole cost and expense with any subsequent relocation at the Grantor's expense; provided, however, that the Grantor shall provide to the Grantee a substitute Easement Area reasonable suited to the Grantee's needs.

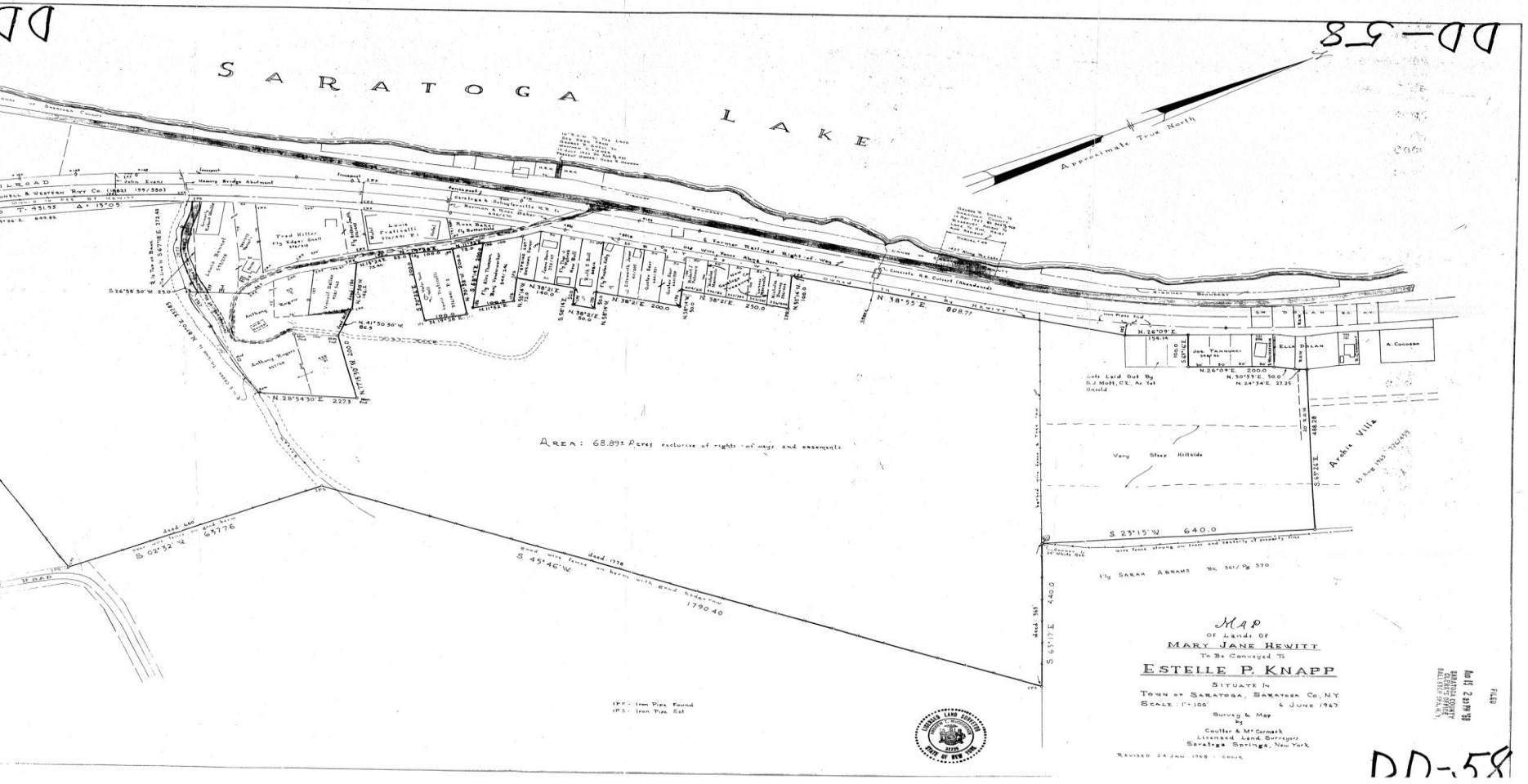
3. This instrument contains the entire agreement between the parties relating to the rights herein granted and the obligations herein assumed. Any oral representations or modifications concerning this instrument shall be of no force or effect except in a subsequent modification in writing, signed by the party to be charged.

4. This instrument shall bind and inure to the benefit of the respective successors and assigns of the parties hereto.

EXPRESS EASEMENTS

- An individual cannot grant or have an easement over land they own "because all the uses of an easement are fully comprehended in the general right of ownership." *Will v. Gates,* 89 NY2d 778 (1997). There is no servient or dominant estate, they have merged by the unity of title in a common owner. *Id.* at 784.
- RESULT: LEGAL NULLITY

Express Easements



Express easements: Limitations

- Fatal Errors of Law:
  - Grants an easement over her own lands to herself
  - Grants to Parcel B, Parcel A's easement of necessity over the lands of others
    - Grants an easement over lands she doesn't own and can't burden
    - Attempts to "Piggy-back" the easement for Parcel A to benefit Parcel B as well

Express Easements: Limitations

- *Hunt v. Pole Bridge Hunting Club, Inc.* 219 A.D.2d 618 (2d Dept, 1995) (Orange County, NY)
- Hunt had a ROW for his 21.7 Acre parcel
- Hunt and friend acquired an adjacent 529 Acre parcel
- Hunt and friend used the ROW for Hunt's 21.7 Acre parcel to reach their 529 Acre parcel

Express Easements: Limitations

- The Court citing *Williams v. James,* L.R. 2 C.P. 577 and *Mancini v. Bard,* 42 N.Y.2d 28, held:
- “the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is not appurtenant”
- NO PIGGY-BACKING

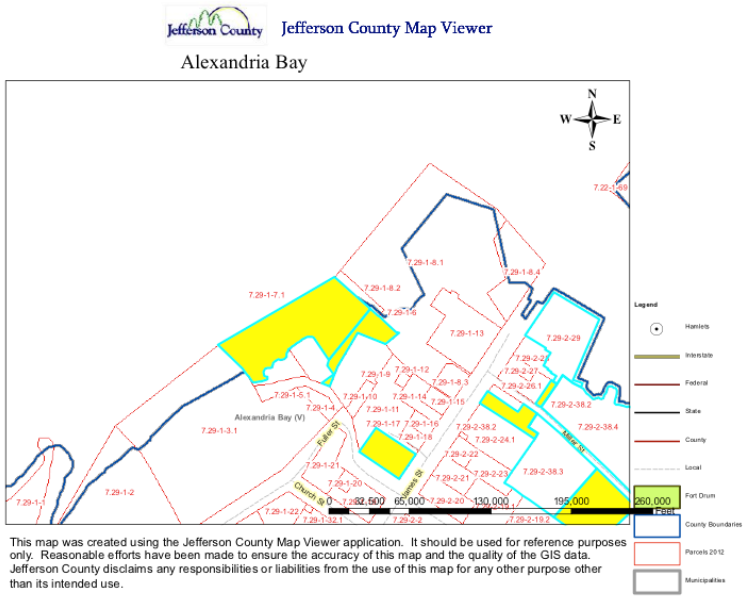
Express Easements: Limitations

Matter of Thompson v. Wade, 69 NY2d 570 (1987)

- Grantor (G) owned property on the St. Lawrence River in the Village of Alexandria Bay
- G subdivided and conveyed out the parcel along the River to Plaintiff (P) and retained the parcel along the public highway.
- G did not grant P a ROW to reach the Public Highway
- G then conveyed his retained lands to Defendant (D) and reserved to himself and P a ROW to reach P's land from the Public Highway
- P is a stranger to the Deed
- G has an easement in gross because he no longer owns lands appurtenant
- P's successor builds a hotel on its parcel
- D blocks access
- P then tried to acquire G's easement BUT it was not transferable because it was in gross.

Express Easements: Lands of Thomson

Thomson Motor Lodge: Vacant Commercial Property



Express Easements: Lands of Thompson

- Alternative 1:
- Within the deed to P, Grantor could have granted a ROW to P over his retained lands
- When Grantor conveyed to D all he had to say was that the conveyance was subject to the ROW granted to P

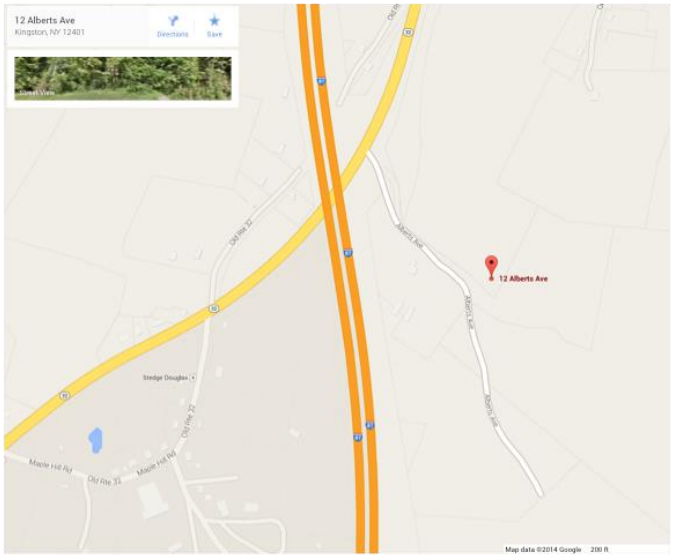
- Alternative 2:
- Grantor conveys property to P without a ROW.
- P and Grantor could have subsequently entered into an Easement agreement and recorded it before Grantor conveyed remaining lands to D

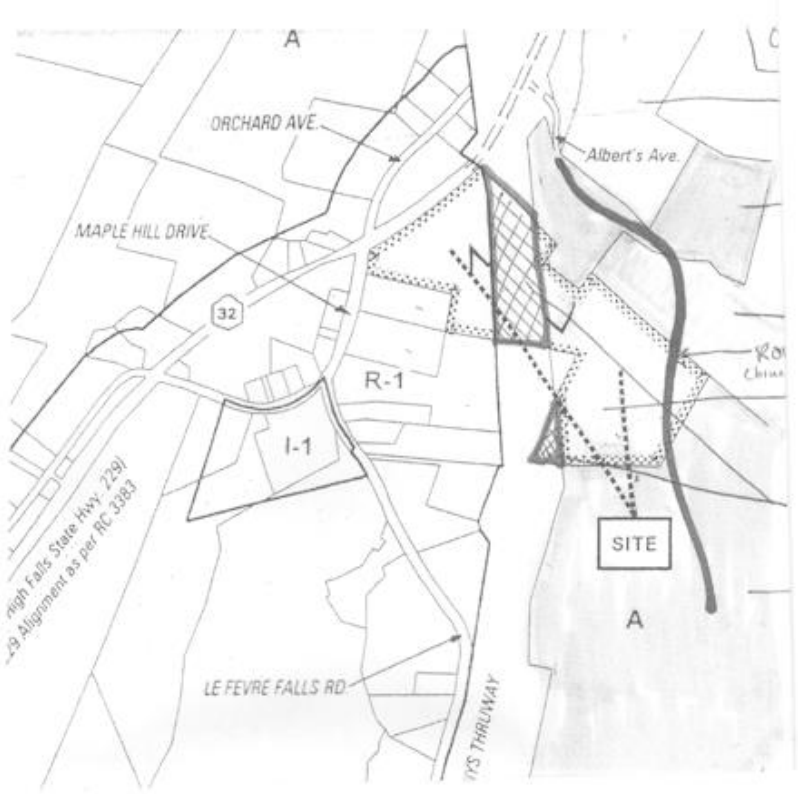
Express Easements: Limitations

- McColgan v. Brewer, 84 A.D.3d 1573 (3d Dept 2011).

- “ A party cannot reserve an easement over another's property in favor of a third party who is not a party to the agreement”
- STRANGER TO THE DEED

McColgan v. Brewer





Express Easements: Limitations

- “Kirschner's reliance on the language in the agreements providing that the rights-of-way granted therein are "for the use and benefit of the properties owned by the parties [thereto], as well as other parties " (emphasis added) is misplaced. Such commonly used language is merely an indication that the right-of-way is not for the exclusive use of the grantee insofar as the grantor has either already conveyed rights-of-way over the same lands by some other instrument or is reserving the right to do so in the future.” McColgan, Supra.

Express Easements: Public

- Public Easements acquired pursuant to the Eminent Domain Procedure Law (EDPL) and its predecessor statutes Vest title upon filing of the Acquisition Map.
- EDPL §402 (A)(3) file a certified copy of such acquisition map in the office of the county clerk or register of each county in which such property or any portion thereof is situated, and thereupon, the acquisition of the property by the state, described in such map shall be deemed complete and title to such property shall be vested in the state.

Express Easements

- Typically the Condemnor obtains the fee, but sometimes they acquire something less, such as a permanent easement.
- In the absence of clear language that the fee was acquired only the interest necessary to fulfill the purpose will be presumed to have been taken→Easement in unless it says Fee or indicates by other language such as “All Right, Title and Interest”

Express Easements: Public

NYS DOT Template Acquisition Map Page 3

CHOICES FOR A

Permanent Easement for

A permanent easement to be exercised in, on and over the property above delineated for the purpose of constructing, reconstructing and maintaining thereon .... (describe structure as per inserts) in and to all that (those) piece (s) or parcel (s) of property designated as Parcel No.(s) _____, as shown on the accompanying map.

reserving, however, to the owner of any right, title or interest in and to the property above delineated, and such owner's successors or assigns, the right of using said property and such use shall not be further limited or restricted under this easement beyond that which is necessary to effectuate its purposes for, and as established by, the construction or reconstruction and as so constructed or reconstructed, the maintenance, of the herein identified project.

Temporary Easement for

A temporary easement and right of way for the purpose of ... (insert purpose) ... for use and occupation in connection with the construction of the highway, commencing upon the approval of the completed work, unless sooner terminated if deemed no longer necessary for highway purposes and released by the commissioner of transportation or other authorized representative acting for the people of the State of New York, or its assigns, such easement shall be exercised in and to all that (those) piece(s) or parcel(s) of property designated as Parcel No.(s) _____, as shown on the accompanying map (and described as follows, to be included when using a full description)

reserving, however, to the owner of any right, title or interest in and to the property above delineated, and such owner's successors or assigns, the right of using said property and such use shall not be further limited or restricted under this easement beyond that which is necessary to effectuate its purposes for, and as established by, the construction or reconstruction and as so constructed or reconstructed, the maintenance, of the herein identified project.

CHOICES FOR B

I hereby certify to the Commissioner of the New York State Department of Transportation that the property mapped above is necessary for this project, and the acquisition thereof is recommended.

Date _____ 20__

_____
PE

I hereby certify that the property mapped above is necessary for this project, and the acquisition thereof is recommended.

Date _____ 20__

_____
Regional Design Engineer
for the Regional Director of
Transportation Region No.

CHOICES FOR E

2 0 2 4 6 8 10 m
SCALE 1:200
ONE METER EQUALS 3.280833333333 FEET.
ONE SQUARE METER EQUALS 10.763867361 1 SQUARE FEET.

5 0 5 10 15 20 25
SCALE 1:500
ONE METER EQUALS 3.280833333333 FEET.
ONE SQUARE METER EQUALS 10.763867361 1 SQUARE FEET.

10 0 10 20 30 40 50
SCALE 1:1000
ONE METER EQUALS 3.280833333333 FEET.
ONE SQUARE METER EQUALS 10.763867361 1 SQUARE FEET.

MISC.

MF_P
MET_P
MEP_P

CHOICES FOR D

TRUE NORTH AT THE 78°35' MERIDIAN OF WEST LONGITUDE
TRUE NORTH AT THE 78°35' MERIDIAN OF WEST LONGITUDE
TRUE NORTH AT THE 75°35' MERIDIAN OF WEST LONGITUDE
TRUE NORTH AT THE 74°30' MERIDIAN OF WEST LONGITUDE
TRUE NORTH AT THE 74°00' MERIDIAN OF WEST LONGITUDE
TRUE NORTH AT THE ° ' MERIDIAN OF WEST LONGITUDE
TRUE NORTH AT THE ° ' MERIDIAN OF WEST LONGITUDE

Express easements

- The Appurtenance Clause:
  - Example: “Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises…”
  - Boilerplate language
  - “The purchaser will take the estate, with all the incidents and appurtenances which appear to belong to it at the time of the grant, as between it and the portion retained, though not then in actual use, providing the grantor has knowledge of their existence, and they are open and visible” *Spencer v. Kilmer* 151 NY 390 (1897)

Express Easements

- *Spencer v. Kilmer*
  - 1866 Defendant purchased large vacant lot in Saratoga
  - Bounded on the south by Congress Street, north by Spring Street, east by Circular Street and west by “Wall Brook”
  - It included 2 fish ponds which were supplied with water from the springs.
  - 1870 Defendant sold portion to John Morrissey upon which he built his Clubhouse (aka Casino)

Express easements

- In 1870 Morrissey rented a portion of the property with the fish ponds (dominant estate) and eventually bought that portion of the property
- Spencer then acquired the rest of the property (servient estate) and ripped out all the pipes and sluices providing water to the ponds

Congress Park

Express easements

- Result: Spencer owed damages

Implied easements

Creation and Existence of Easements

Implied Easements: Generally

- Not expressed in writing, but implied from the circumstances of severance of title
- All types require a showing that there was unity of title in a common grantor as a prerequisite to implying the grant of an easement
- **Common Grantor**: both the purported servient estate and dominant estate were owned by the same person/entity

Implied Easements: TYPES

- Courts sometimes blend the elements of these four distinct easements
  - Implied easement in the bed of a former public hwy
  - Implied easement from pre-exiting use
  - Easement of Necessity
  - Paper Street Easement

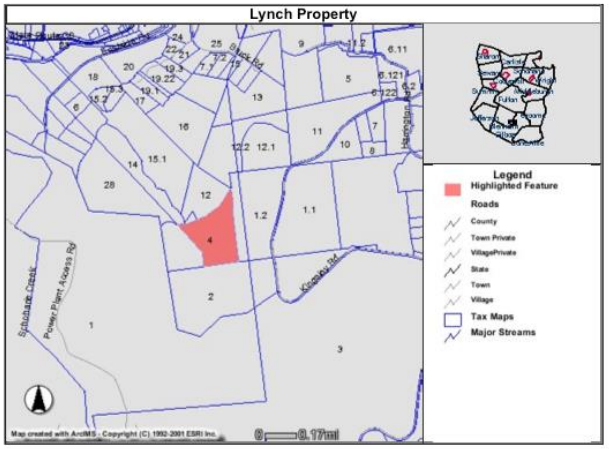
Implied Easements: Former Hwy

- Implied Easement in the bed of a former Hwy
  - A Common Grantor owned dominant and servient estate in unity of title
  - Divided the property along the lines of the existing public highway to which s/he owned the underlying fee (the hwy was an easement hwy vs. fee hwy)
  - Highway is abandoned by 6 years of non-use and non-maintenance by the public (NY High Law 205)
  - Land no longer has access, is landlocked
  - Law will imply an easement in the abandoned hwy

Implied Easement: Former Hwy

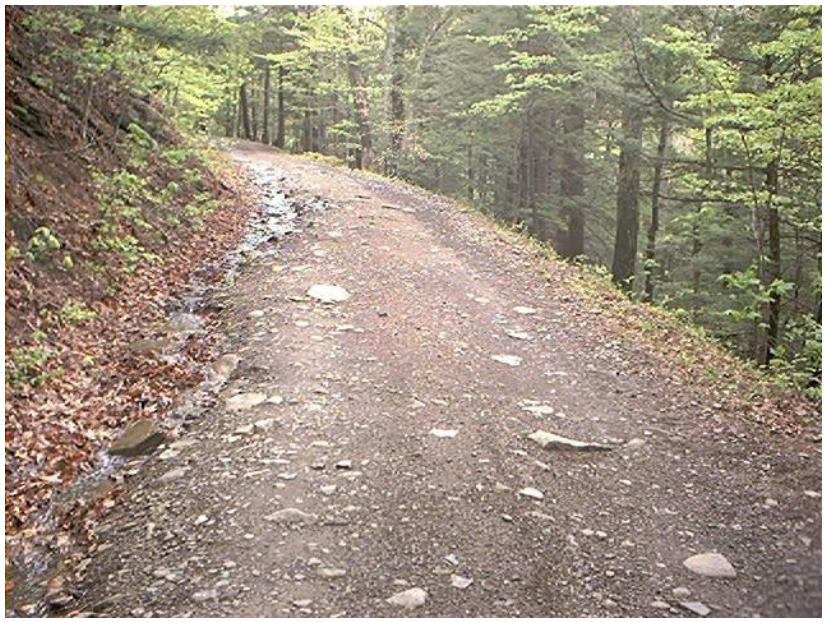
- "private easement of access arises in order to insure that a grantee or his successors in title are not deprived of the use of the right of way existing at the time title (to the lot) was acquired." *Kent v. Dutton,* 122 AD2d 558 (4th Dept. 1986)

Implied Easement: Former Hwy



Implied Easement: Former Hwy

- Ciarelli v. Lynch et al., 69 A.D.3d 1008 (3d Dept 2010)
- "As the evidence established that the road was a public highway, we need not reach the various arguments advanced by the parties regarding the existence of a private easement over it."



Implied Easement: PRE-EXISTING use

- Unity and then separation of title
- the claimed easement must have, prior to separation, been so long continued and obvious as to show it was intended to be permanent, and
- the use must have been necessary to the beneficial enjoyment of the dominant estate at the time of the conveyance.

Implied easements: pre-existing use

- Necessary means in this context of an easement based on pre-exiting use:
- "only reasonable necessity, in contrast to the absolute necessity required to establish an implied easement by necessity." *Four S. Realty Co. v. Dynko,* 210 A.D.2d 622 (3d Dept 1994).
-

Implied easements: Pre-existing use

- Courts have used the reasonable necessity standard vs. absolute necessity standard to imply easements by necessity (Rudolph v. Ferguson; Simone v. Heidelberg)
- Have also said that terrain making access to a public highway impossible except over remaining lands of the common grantor allowed the implication of an easement by necessity (Stock v. Ostrander)

IMPLIED EASEMENT: NECESSITY

- Unity and separation of title
- At the time of severance of title,
- the way is ABSOLUTELY necessary for the landlocked parcel
- Significantly, “the necessity must exist in fact and not as a mere convenience” and must be indispensable to the reasonable use for the adjacent property. *Simone v. Heidelberg,* 9 NY 3d 177 (2009)

Implied Easements: necessity

- The necessity must arise upon severance of title, not at some later date
- there “must be shown a severance of unitary title which gives rise to an *immediate* ***necessity*** which may lie dormant but must, at the very least, exist *contemporaneously* with the severance.” *Willow Tex, Inc. v. Dimacopoulos,* 120 Misc.2d 8 (Sup. Ct. Queens Co., 1983)

Implied Easements: Paper Streets

- Common Grantor or sub-divider
  - Reference in deed or conveyance to the filed subdivision Map
  - Map shows streets abutting the lot
- Implied easement in the “streets” shown on the map for the lot, whether the streets have been built out or not

Implied Easements: Paper Streets

- the most important indicators of the grantor's intent are:
  - the appearance of the subdivision map and
  - the language of the original deeds.

Implied Easements: Paper Streets

- “While courts in other jurisdictions have held that such an easement extends to all streets delineated on a subdivision map or plat (citations omitted), the prevailing and most current view in this State appears to be that a grantee acquires an easement by implication only over the street on which his property abuts, to the next intersecting streets, i.e., an easement of access.” *De Ruscio v. Jackson*, 164 A.D.2d 684 (3d Dept 1991)

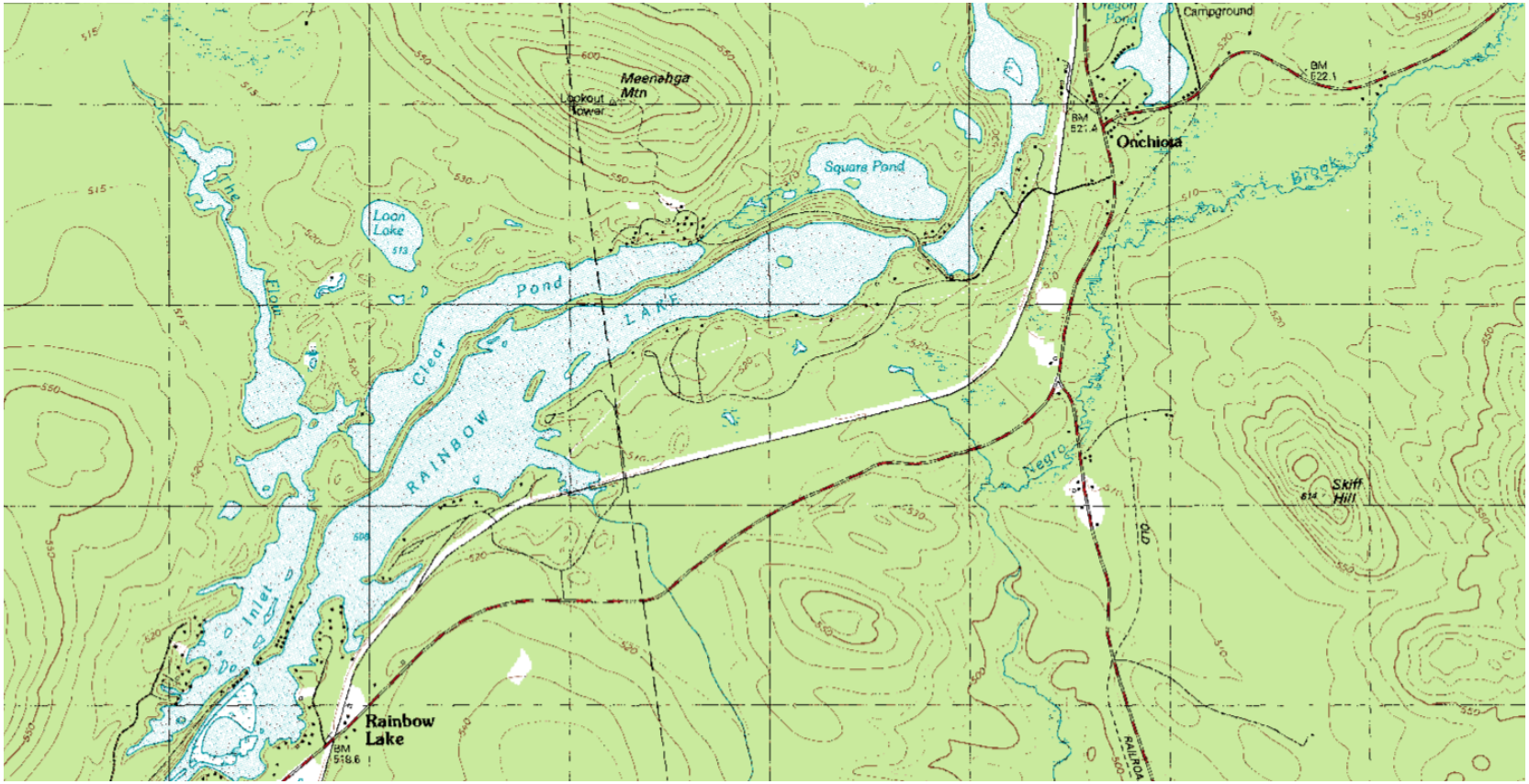
Implied Easements: Paper Streets

- Case Study: *Shaw v. VanArsdale* 138 AD3d 1411 (4th Dept 2016)
- Defendant claimed an implied paper street easement in Elmwood Ave. which terminated at Lake Chautauqua
- Defendant installed a dock and was storing his personal property including chairs, hammocks, torches and paddleboats on the area designated on the filed subdivision map as Elmwood Ave.

Implied Easements: Paper Streets

- Case Study: *Shaw v. VanArsdale* 138 AD3d 1411 (4th Dept 2016)
- The court held that the paper street doctrine does not create a right of way over all the lands which are shown as paper streets on a map, they must be contiguous to the lot sold and there must be some point of limitation.
- The parties didn't raise the issue of whether D had a right of access to the lake so the Court didn't address it
- However the Appellate Division upheld the Trial court's decision that D could not install a dock or store his personal property at the lakeshore.

Implied Easements: Paper Streets



Busch v. Harrington

Implied Easements: Paper Streets

- Don Busch owned cottage lots 101-107 plus an adjoining 73 Acre woodlot
- In 1980 Tebbutt Road was built to the west along Busch's boundary line
- Don Busch created a driveway off Tebbutt Road, in nearly the exact location as the paper street shown on the map
- In 2003 Harrington purchased lots 110&111 and began using Mr. Busch's driveway to access his property from the west

Implied easements: Paper streets

- Specifically, since 1929, owners of lot 108 and all lots to its east accessed their properties by way of a dirt road (referred to as either “the road to Onchiota” or “the as-built road”) which begins at lot 107 and generally runs in an easterly direction. This road connects with another dirt road (referred to as “the road from Onchiota to the dam at the foot of Rainbow Lake” or Adirondack-Florida School Road or Meenahga Mountain Road). This latter road, in turn, connects with a main road (formerly known as County Route 30/Gabriels-Onchiota Road and now known as County Route 60/Gabriels-Onchiota Road

Implied Easement: Paper Street

- “The record demonstrates that the intent of the parties' common grantor was to provide a right of passage from the subject lots to the *east* (ultimately leading to a main road) with no intent, express or implied, to provide a right of passage along the paper road to the *west. Busch v. Harrington,* 63 A.D.3d 1333 (3d Dept., 2009).

Implied Easement: Paper Street

- Centerline Presumption and Paper Streets
- General Rule: Where a conveyance describes the property as abutting a street, the conveyance runs to the centerline of the street. *Bashaw v. Clark,* 267 A.D.2d. 681 at 687 (3d Dept, 1999).
- Presumption can be rebutted by proof that the grantor intended to exclude the street from the conveyance of the lot.
- An intention to exclude a street from the conveyance is demonstrated when the grant is limited to the side of the street by either the language in the deeds, their depictions on a map or both. See *Town of Lake George v. Landry,* 96 A.D.3d 1220 at 1222-1223 (3d Dept 2012); *City of Albany v. State of New York,* 28 NY2d 352 at 356 (1971); and *Environmental Properties, Inc. v. SPM Tech. Inc*., 48 AD3d 408 (2d Dept. 2008).

Prescriptive Easements

Creation and Existence of Easements

Prescription (Private)

- Open and Notorious,
- Continuous and Uninterupted
- Hostile or Adverse (presumed)
- For the statutory period (10 years)
- (exclusive → sometimes an element, but it means a unique use that is adverse to the true owner)

Prescription (Private)

- Results in an easement by prescription
- Seasonal use is enough
- Compare with Adverse possession:
  - Possession of another's land results in Title/ownership
  - Use of another's land results in an Easement/right to continue to use

Prescription (Private)

- Once the elements are demonstrated, the purported servient estate holder must show the use was with permission or by license to defeat a finding of easement.
- Use in common with the general public will not result in an easement by prescription (Pirman v. Confer, 273 N.Y. 35 (1937)
- Use in common with neighbors and the servient estate holder is not “adverse”

Prescription (Private)

- Case Studies: *Bova v. Vinciguerra,* 184 A.D.2d 934 (3d Dept 1992)
- Plaintiffs walked across Defendant's lands to reach Saratoga Lake
- All of the Plaintiffs' but one owned land and acquired for their land an appurtenant right to access the lake over Defendant's property
- However Plaintiff Deuel walked on the path for over 40 years, undisputedly did not own any land during that period: accordingly she was entitled to a **PRESCRIPTIVE EASEMENT IN GROSS**

Prescription (Private)

- Case Studies: *Rundberg v. Rundberg,* 140 AD3d 1461 (3d Dept 2016)
- Ma Rundberg divided her property for her two sons, Ed and Ken.
- Ken got the property in back, he installed a sewer line across Ed's property to the public sewer
- Ed asked Ken to remove the sewer line multiple times in 1996-1997, Ken refused, Action for trespass commenced in 2012 by Ed.
- **PRESCRIPTIVE EASEMENT FOR SEWER LINES**

Prescription (Private)

- Case Studies: *Rundberg v. Rundberg,* 140 AD3d 1461 (3d Dept 2016)
- **“**Although in certain instances hostility is presumed upon proof of other elements, that is not the case, where, as here, the user and the landowner are related by blood”
- Here the record established that Ed’s requests to remove the sewer line were refused 3x by Ken, and that was enough to notify Ed of a hostile claim, notwithstanding the fact they were brothers.

Prescription (Private)

- Case Studies: *Taverni v. Broderick,* 111 AD3d 1197 (3rd Dept 2013)
- Long time amicable relationship between the parties began to deteriorate in 2004-2005 when the Plaintiffs began to live at their property full time
- Plaintiffs' built a fence
- Interfered with express ingress and egress easement over the driveway and claimed pedestrian easements and claimed prescriptive easement to park in the driveway

Prescription (Private)

- Case Studies: *Taverni v. Broderick,* 111 AD3d 1197 (3rd Dept 2013)
- "hostile use, which does not arise when the use is permissive, and "permission can be inferred where the relationship between the parties is one of neighborly cooperation and accommodation." (citations omitted)
- "The trespass having been established, but no damages proven, we find that the defendants should have been awarded one dollar." at 1200.
- **NEIGHBORLY ACCOMMODATION DEFEATS PRESCRIPTIVE EASEMENT CLAIMS**

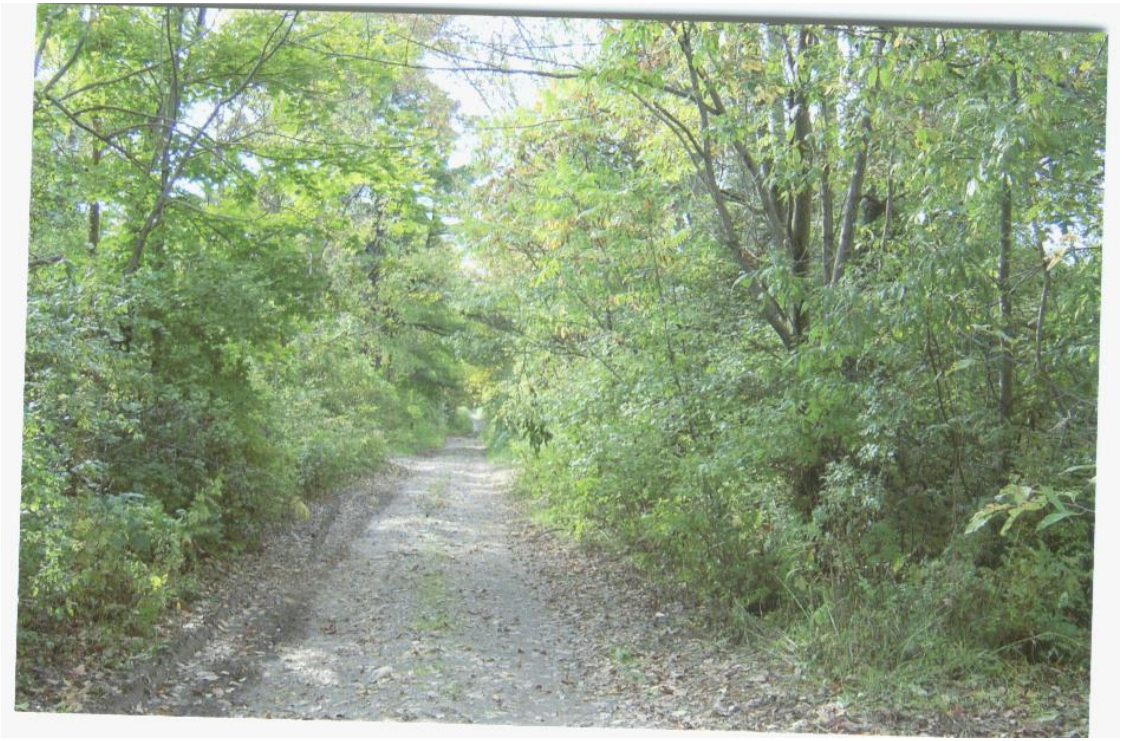
Prescription (Private)

- Case Studies: *130 Madison Ave. LLC v. 17 E. Owners Corp.,* 2003 NY Slip Op 51309(U) (Sup Ct. NY Co, 2003)
- The law is that an easement for light and air cannot be acquired by prescription
- "As noted above, even though 12 air conditioners allegedly encroached upon 1380 Madison's air space for over 10 years, there is no evidence, or credible claim, that the use of the air conditioners was hostile or adverse to plaintiff's use of its property for that period of time."

- **NO PRESCRIPTIVE EASEMENTS FOR USE OF AIRSPACE**

Prescription (Public): Highways

- Use and Maintenance by the public for the statutory period results in a public easement for highway purposes



West Galway Road, Saratoga County NY

Prescriptive or User Highways

§ 189. Highways by use

- All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway…..

Prescription or User Highway

- The Statutory Period is 10 years
- Between 1959 and 1963 it was 15 years
- Prior to 1959 it was 20 years.

Curtis v Town of Galway, 50 AD3d 1370 [2008].

Prescription or User Highways

- Village Law §6-626-Streets by prescription
- All lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such.
- No analogous statute in the City Law. See *City of NY v. Gounden,* 2013 N.Y. Misc. LEXIS 689 (Queens Co. Jan. 22, 2013)

Prescription: Public Use

- “used by the public as a highway” Highway Law 189
- “used by the public as a street” Village Law 6-626

- What does that mean?
- “naked use” by the public does not convert the roadway into a public highway. See *Pirman v. Confer,* 273 N.Y. 35 (1937).

Prescription: Public Use

- A public highway can be created "By prescription, or where land is used by the public for a highway for 20 years, with the knowledge, but without the consent, of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public." *Cohoes v. D&H Canal Co.* 134 N.Y. 397 (1892)

Prescription: Public Use

- New York Courts as late as 1913 recognized two methods to acquire a public highway by use:

- 1) Public use that was hostile and without the consent of the landowner and

- 2) Public use coupled with public maintenance.

Prescription: Public Maintenance

- "The words 'used by the public as a highway' mean that there must be an assumption of control, of maintenance, of repair in a continuing way, a taking charge by the public authorities, a treating of the road as a public highway like other town highways generally so that the town becomes responsible for its condition" *Goldrich v. Franklin Gardens Corp* 115 NYS 2d 72 (Sup. Ct. Nassau Co, 1952). Rev'd on other grounds, 282 A.D. 698 (2d Dep't 1953) citing, *People v. Sutherland,* 252 N.Y. 86, at page 91.

Prescriptive Streets

- Courts interpreting the Village Law have applied the same test to find a Village Street created by prescription: public use coupled with public maintenance for the statutory period
  - *Marchand v. NYS DEC*, 19 NY3d 616 (2012)
  - *Impastato v. Village of Catskill,* 43 NY2d 888, (1978)

General Rule

"The general rule is that when the language of the statute will bear a construction which will leave the fee in the landowner, that construction will be preferred. If the title to land in the bed of a highway depends upon presumptions, the general rule seems applicable that only an easement was taken."

- *Mott v. Eno*, 181 NY 346 (1905).

Limitations on Prescriptive Easements

- **Real Property Law §261 Maintenance of telegraph or other electric wires raises no presumption of grant.**
- Whenever any wire or cable used for any telegraph, telephone, electric light or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to, such attachment or extension.

Equitable Easements

Creation and Existence of Easements

Equitable Easement

- "…a grant of an easement by an instrument which is unacknowledged and unattested may nevertheless support equitable rights and interests in property which, when established by possession and improvements, are effective against a subsequent purchaser of the servient estate who takes with actual knowledge of the possession and improvements." *Kienz v. Niagara Mohawk Power Corp*., 41 A.D.2d 431 (4th Dept 1973)
- See also*: Loughran v. Orange and Rockland Utilities, Inc.*, 209 A.D.2d 917 (3d Dept 1994)

Eminent Domain: Private Road

Kildare Road in Tupper Lake, Franklin County
Iron Mountain Forestry, Inc. v. Friedman, 33 Misc. 3d 1227A (1998)

Highway Law Section 300 et seq.

- § 300. Private road
- An application for a private road shall be made in writing to the town superintendent of the town in which it is to be located, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which it is proposed to be laid out.

Eminent Domain: Private Rd.

- “The taking of private property for the construction of private roads was permitted under the Colony of New York's statutes, and this provision was retained by the State of New York until 1843. In 1843 the New York Supreme Court… held that the statute was unconstitutional.” *Pratt v. Allen,* 116 Misc 2d 244 (Sup. Ct. Chemung Co., 1982)
- New York State’s Constitution was thereafter amended to allow private condemnation

Eminent Domain: Private Rd.

- Article 1 Section 7(c) of the NYS Constitution now states:
- Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

Eminent Domain: Private Road

- Highway Laws § § 300-307 set forth the procedure
- It is now well established that "Public Purpose" or "Public Benefit" are not limited to sole occupancy or use by the public and includes opening up otherwise landlocked private properties for use and development (and taxation). *Pratt* Supra.

Eminent Domain: Private Road

- § 301. Jury to determine necessity and assess damages
- § 302. Copy application and notice delivered to applicant
- § 303. Copy and notice to be served
- § § 304-306 Relate to selecting and paying the jurors.
- § 307. Their verdict

Eminent Domain: Private Road

- "The Legislature evidently considered this method of laying out private roads the work of laymen rather than lawyers." *In Re Bell,* 131 Misc. 734 (Sup. Ct. St. Lawrence Co., 1928)

- "[A]n ancient and archaic provision of the Highway Law which is unique and rarely utilized." *Preserve Assoc. v. Nature Conservancy, Inc.* 934 N.Y.S.2d 678 (Sup. Ct. Franklin Co., 2011). November 28, 2011

Eminent Domain: Private Road

- Section 300 of the Highway Law cannot be used for:
- Condemning public property for a private easement
    - *Leonard v. Masterson*, 70 A.D.3d 697 (2d Dept 2010).
- Installation of Utilities
    - *Preserve Associates, LLC v. The Nature Conservancy, Inc.*, 934 N.Y.S.2d 678 (Sup. Ct. Franklin Co., 2011).

Location and Width

LOCATION by AGREEMENT/DEED

- Easement is defined in the writing as to location and width
- When the easement is stated as over a certain width:
  - whether the reference is to the width of the way or is merely descriptive of the property over which the grantee must have such a way as may be reasonably necessary depends on the circumstances of the case

Location by agreement/deed

- Examples:
- that plaintiff holds "a right of way two rods (33 feet) wide along the shore of the aforesaid swamp to the highway"…. Upon our review, we find that the presently constituted driveway, measuring 12 feet at its widest and 9 feet 8 inches at its narrowest point, has provided and continues to provide a reasonable and convenient means of ingress and egress, fulfilling the purpose for which it was created." *Serbalik v. Grey,* 268 A.D.2d 926 (3d Dept. 2000).

Location by agreement/deed

- ✖ A 30 foot wide ROW granted in deed, established roadway was a 12 foot paved width, court held that the easement be limited to the 12 foot paved width. *Minogue v. Kaufman,* 124 A.D. 2d 791 (2d Dept. 1986).
- Where the easement granted a right to travel over a 20 foot strip of land or street at all times, the court found the entire 20 foot width that was in use was necessary for traveling purposes. *Mandia v. King Lumber and Plywood Co.,Inc.* 179 AD2d 150 (2d Dept. 1992)

Practical location or existing way

Location and Width of Easements

Practical Location or existing way

- Once definitively located, by agreement or use, an easement cannot be moved unilaterally by one party
  - Definitively located = metes and bounds description
- Undefined location: the courts may exercise their equitable powers to locate an easement when the parties have failed to designate the route.

Practical Location or existing way

- If the location is not definitively fixed the easement can be moved by the servient estate holder,
- Example a grant of easement “over the driveway in a south-westernly direction” is not a definitively fixed easement

Practical Location or existing way

- Easements by necessity are usually located upon the existing ways
- “their parcel became landlocked by other properties with no access to a public highway due to the nature of the surrounding terrain, except via the dirt road across the lands owned by Ostrander, defendant's predecessor in title” *Stock v. Ostrander* **233 A.D.2d 816** (3d Dept 1996)

Practical location or existing way

- Easements by prescription are located where the use occurred.
- Implied easements from pre-existing use and in a former public highway are located where the existing way was/is located.
- Paper street easements are where they are shown on the map

Width of easements

Location and Width of Easements

Width of easements

- Width used
- Width described
- Width reasonably necessary to fulfill the grant/purpose

Width or scope of easements

- Prescriptive Easements:
- The right acquired is measured by the extent of the use, *Mandia King Lbr & Plywood Co.* 179 AD2d 150, 156, [1992]
- "'[t]he right acquired by prescription is commensurate with the right enjoyed'" *Thury v Britannia Acquisition Corp*., 19 AD3d 586, 587, [2005] , quoting *Prentice v Geiger*, 74 NY 341, 347 [1878] ;

Width or scope of easements

- <u>Prescriptive Easements:</u>
- Where Plaintiff only established they used the road for ingress and egress, such use did not include the right to "any necessary and/or incidental improvements thereto, including the placement of utility services such as electric, telephone, gas, cable, water, sewer, and other utility service; and making the required excavations and construction therefore upon, over, across or below the land ." *Dermody v. Tilton,* 85 A.D.3d 1682 (4th Dept 2011).

Width or scope of easements

- Prescriptive Easements:
- Plaintiffs established they had acquired a prescriptive easement for access to their property
- "However, the record further establishes, as the trial court found, that the plaintiffs impermissibly expanded the dimensions of the easement beyond the 10-foot width that existed in 2001 and erected a gate and a fence on the defendants' property. Therefore, the plaintiffs must remove the gate and the fence, and they must further restore the area beyond the 10-foot width of the easement to its original condition."
- *Vitiello v. Merwin,* 87 A.D.3d 632 (2nd Dept 2011)

Width or scope of easements

- Public Prescriptive Easements in Highways:
- "…use by the public and width of improvement refers only to the traveled portion of the road together with the ditches and shoulders but not to shade trees along its sides."
- *VanAllen v. Kinderhook,* 47 Misc 2d 955 (Columbia Co. Sup. Ct. 1965)

REASONABLE USE

- Express Easements: *Ribellino v. 110 Fifth Street Private, LLC,* 112 A.D.3d 807 (2nd Dept 2013)
- Express easement for access to and reasonable use of an adjacent road known as Fifth Street
- “plaintiff and his tenants continued to use the easement for parking for more than 20 years, without evidence of objection, such long-time use of the easement was compelling evidence of the scope and purpose of the easement substantiating the plaintiff's position” Citing to DiLeo v. Peskto Holding Corp. which is the leading case on prescription

RIGHTS OF THE PARTIES

Introduction

- Definitions:
- Servient Estate Holder: Owner of the land burdened sometimes referred to as the Landowner
- Dominant Estate Holder: Owner of the benefited or Dominant Parcel sometimes referred to as the Easement Holder

Use of Easements: Rights of the Parties

- Landowners generally owe a duty to people on their property
- that their property is in a reasonably safe condition
- considering all of the circumstances including the purpose of the person's presence and the likelihood of injury

Use of Easements: Rights of the Parties

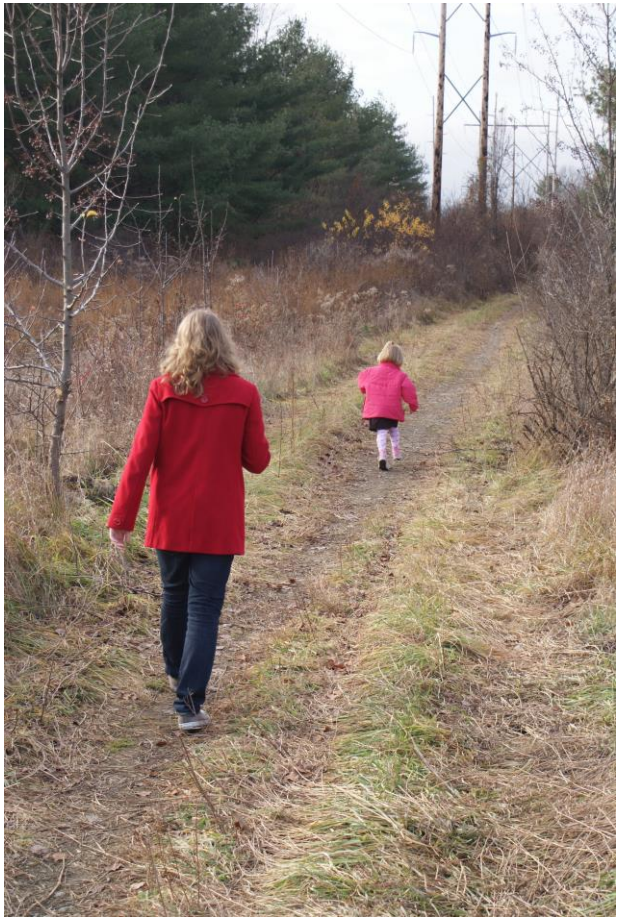
- Landowners who are burdened by an easement:
- Have a PASSIVE DUTY to refrain from interfering with the rights of the Dominant Estate holder
- Have NO DUTY to maintain the easement for the Dominant Estate holder unless by agreement/arrangement

Use of Easements: Rights of the Parties

- Landowners with respect to an easement on their land have the right:
- "to have the natural condition of the terrain preserved, as nearly as possible” and
- "to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change." *Lopez v. Adams*, 69 A.D.3d 1162 (3d Dept 2010).

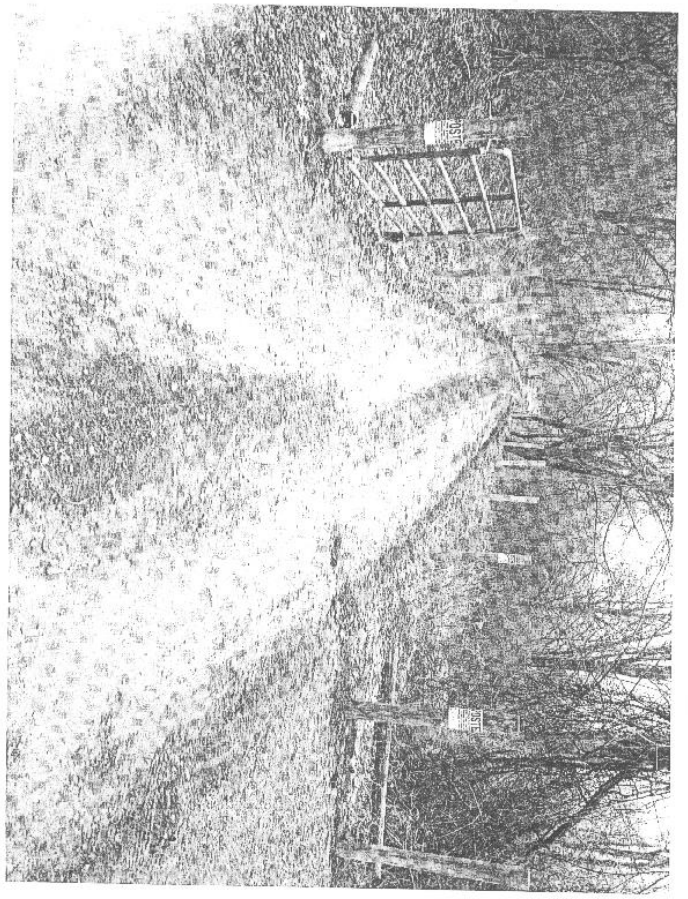
Use of Easements: Rights of the Parties

- Landowners can use their property, even that part burdened by the easement, in any way they deem fit so long as it does not interfere with the use of the easement by the Dominant Estate holder



Use of Easements: Rights of the Parties

- Landowners can:
  - Narrow the easement
  - Cover the easement
  - Gate the easement
  - Fence the easement
  - And sometimes, relocate the easement



Use of Easements: Rights of the Parties

- Landowner may unilaterally Relocate an easement when:
  - the landowner bears the expense of the relocation, and
  - the change does not frustrate the parties' intent or object in creating the right of way,
  - does not increase the burden on the easement holder, and
  - does not significantly lessen the utility of the right of way

Use of Easements: Rights of the Parties

- Easement Holder:
- “One does not possess or occupy an easement or any other incorporeal right.”
  - Owning an easement ≠ Owning the land where the easement is located nor does it give a right of exclusive possession of the land where the easement exists
- “An easement derives from use, and its owner gains merely a limited use or enjoyment of the servient land.”
- *Di Leo v. Pecksto Holding Corp*., 304 NY 505 (1952)

Use of Easements: Rights of the Parties

- Easement Holder has the right to:
- Maintain their easement
- Use the easement without interference

Use of Easements: Rights of the Parties

- Easement holder cannot:
  - Improve the easement (Widen, pave, install ditches)
  - Materially increase the burden on the servient estate (frequency of use)
  - Impose new or additional burdens on the easement (add utilities to a right of ingress and egress)
  - Use the easement to benefit another parcel not appurtenant (no piggy-backing)

Use of Easements: Rights of the Parties

- Easements “in common with others”
- Easement holders of these types of easements cannot:
  - Cut down the grade or impair the easement to the detriment of the other easement holders
  - interfere with the reasonable use of the easement by his or her co-owners, or
  - make alterations that will render the easement appreciably less convenient and useful to any one of the cotenants

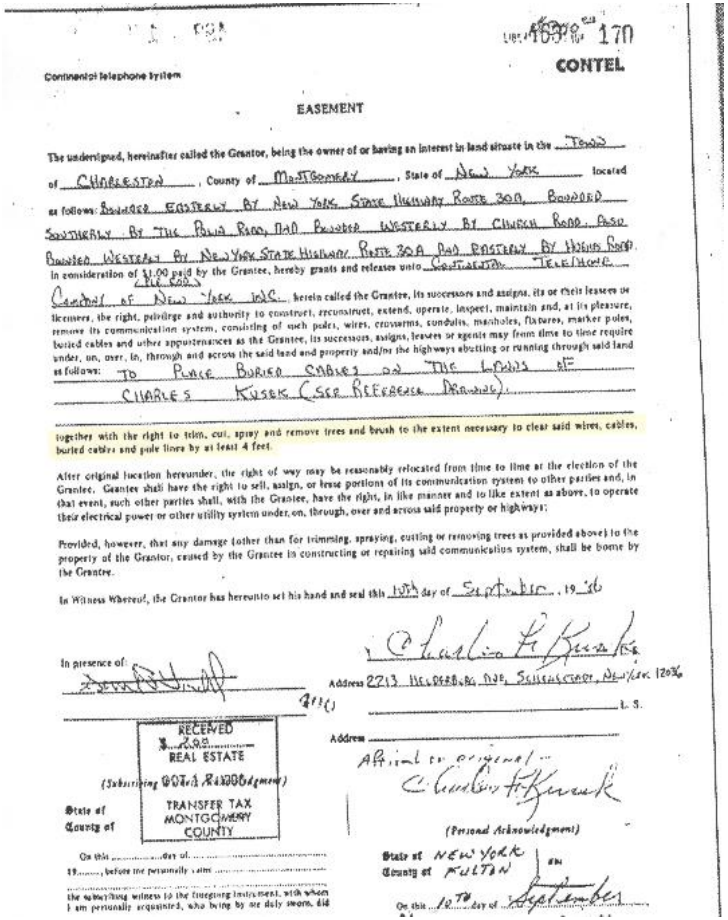
Use of Easements: Rights of the Parties

- Liability for Injuries on the Easement:
- Landowner owes a duty, but
  - If an injury results not from any unsafe condition the landowner left uncorrected on his land, but as a direct result of the course the easement holder takes in attempting to maintain the easement, then the easement holder is liable

Use of Easements: Maintenance Duty

- As the dominant owners, Easement Holders are responsible for maintaining and repairing the roadway
- in the absence of an agreement to do so, landowners are not obligated to make repairs or contribute to the cost of maintaining a roadway for the benefit of the Easement Holder
- Public Utility Easements often set forth their right to maintain the easement within the easement agreement itself → greater clarity between the parties

Use of Easements: Maintenance Duty



Continental Telephone System

CONTEL

EASEMENT

The undersigned, hereinafter called the Grantor, being the owner of or having an interest in land situate in the TOWN of CHARLESTON, County of MONTGOMERY, State of NEW YORK located as follows: BOUNDED EASTERLY BY NEW YORK STATE HIGHWAY ROUTE 30A, BOUNDED SOUTHERLY BY THE PLANK ROAD, AND BOUNDED WESTERLY BY CHURCH ROAD, ALSO BOUNDED WESTERLY BY NEW YORK STATE HIGHWAY ROUTE 30A AND EASTERLY BY HOSMER ROAD.

In consideration of $1.00 paid by the Grantee, hereby grants and releases unto CONTINENTAL TELEPHONE (THE CORP.) COMPANY OF NEW YORK, INC. herein called the Grantee, its successors and assigns, its or their lessees or licensees, the right, privilege and authority to construct, reconstruct, extend, operate, inspect, maintain and, at its pleasure, remove its communication system, consisting of such poles, wires, crossarms, conduits, manholes, fixtures, marker poles, buried cables and other appurtenances as the Grantee, its successors, assigns, lessees or agents may from time to time require under, on, over, in, through and across the said land and property and/or the highways abutting or running through said land as follows: TO PLACE BURIED CABLES ON THE LANDS OF CHARLES KUSEK (SEE REFERENCE DRAWING).

together with the right to trim, cut, spray and remove trees and brush to the extent necessary to clear said wires, cables, buried cables and pole lines by at least 4 feet.

After original location hereunder, the right of way may be reasonably relocated from time to time at the election of the Grantee. Grantee shall have the right to sell, assign, or lease portions of its communication system to other parties and, in that event, such other parties shall, with the Grantee, have the right, in like manner and to like extent as above, to operate their electrical power or other utility system under, on, through, over and across said property or highways;

Provided, however, that any damage (other than for trimming, spraying, cutting or removing trees as provided above) to the property of the Grantor, caused by the Grantee in constructing or repairing said communication system, shall be borne by the Grantee.

In Witness Whereof, the Grantor has hereunto set his hand and seal this 10TH day of September, 19 86

In presence of:

Address 2213 HELDERBERG AVE, SCHENECTADY, NEW YORK 12306 L. S.

Address

RECEIVED
$ 2.00
REAL ESTATE
TRANSFER TAX
MONTGOMERY
COUNTY

(Subscribing Witness Acknowledgment)

State of
County of

On this ..... day of .....
19....., before me personally came .....
the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who being by me duly sworn, did

Affixed to original

(Personal Acknowledgment)

State of NEW YORK
County of FULTON ss:

On this 10TH day of September

- "Together with the right to trim, cut, spray, and remove trees and brush to the extent necessary to clear said wires, cables and pole lines by at least 4 feet."

Use of Easements: No Improvements

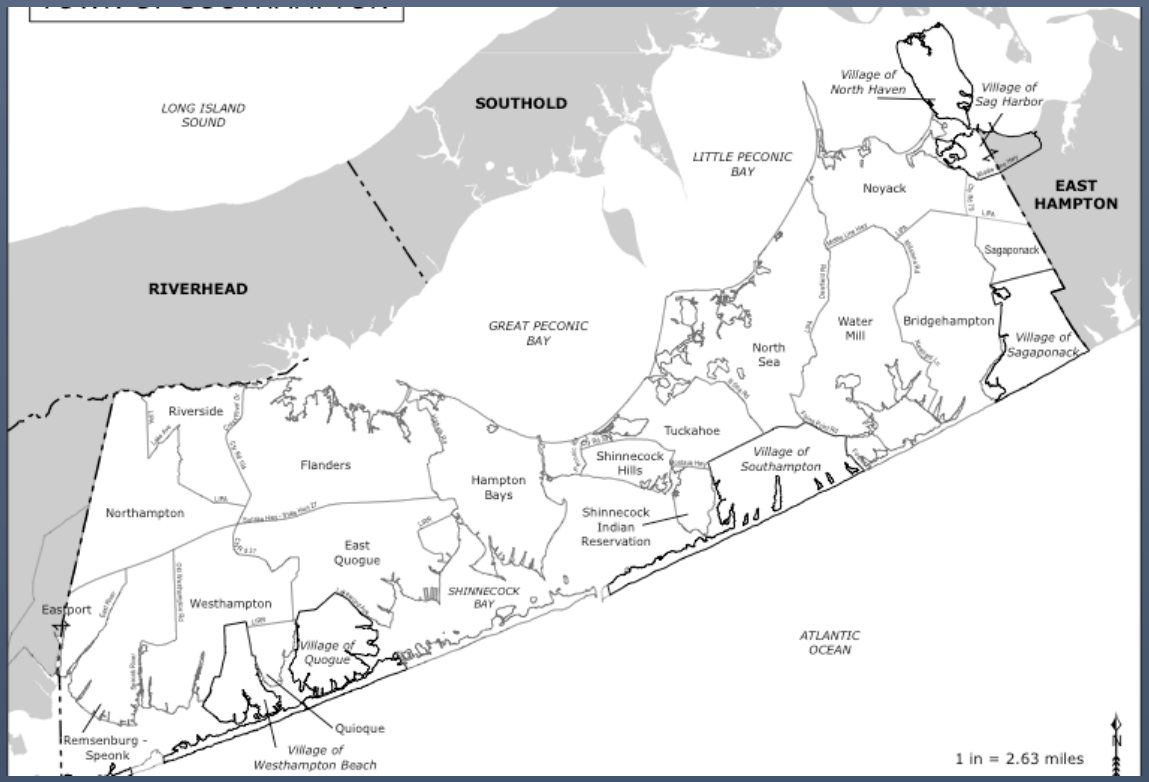
- Once fixed in character an easement cannot be improved

- The servient landowner has the right: "to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change." *Lopez v. Adams*, 69 A.D.3d 1162 (3d Dept 2010).

- Once a gravel right of way, Always a gravel right of way.

Relocating Easements: *Lewis v. Young*

92 N.Y.2d 443 (1998)



Lewis v. Young

Southampton, New York

Lewis v. Young

- Original Lot divided into 3 Lots
- Back 2 lots given access over the front lot retained by grantors (the Browns) to reach South Ferry Road
- it provided for "*the perpetual use, in common with others, of the [Browns'] main driveway, running in a generally southwesterly direction between South Ferry Road and the [Browns'] residence premises.*"

Lewis v. Young

- The Youngs purchased the property (from the Browns) with the intention of substantially improving it by razing the then-existing small cottage and replacing it with a large new residence, adding an in-ground swimming pool and building a tennis court.

Halsey House, Southampton NY by Kforce at en.wikipedia

Lewis v. Young

- the renovations, included relocating the existing driveway in order to make room for the tennis court
- The new driveway, still “running in a generally southwesterly direction between South Ferry Road and the [Youngs'] residence premises,” actually overlapped at some points with the original driveway.
- At its point of greatest deviation, the relocated driveway was 50 feet from the original driveway.

Lewis v. Young

- As a rule, where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder
- Mere use of a particular path in accordance with an explicit right to do so is neither hostile nor adverse.
- continued usage of the same path does not in and of itself fix an otherwise undefined location so as to enlarge the interest of the easement holder or reduce the interest of the landowner.

Lewis v. Young

- the indefinite description of the right of way suggests… that the parties intended to allow for relocation by the landowner. Notably, the parties themselves in the same deed described two additional easements by explicit reference to metes and bounds. Had they intended the right of way to be forever fixed in its location, presumably they would have delineated it in similar fashion.
- The provision manifests an intention to grant a right of passage over the driveway-wherever located-so long as it meets the general directional sweep of the existing driveway

Lewis v. Young

- Balancing Test:

- “In the absence of a demonstrated intent to provide otherwise, a landowner, consonant with the beneficial use and development of its property, can move that right of way, so long as the landowner bears the expense of the relocation, and so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way”.

Lewis v. Young con’t

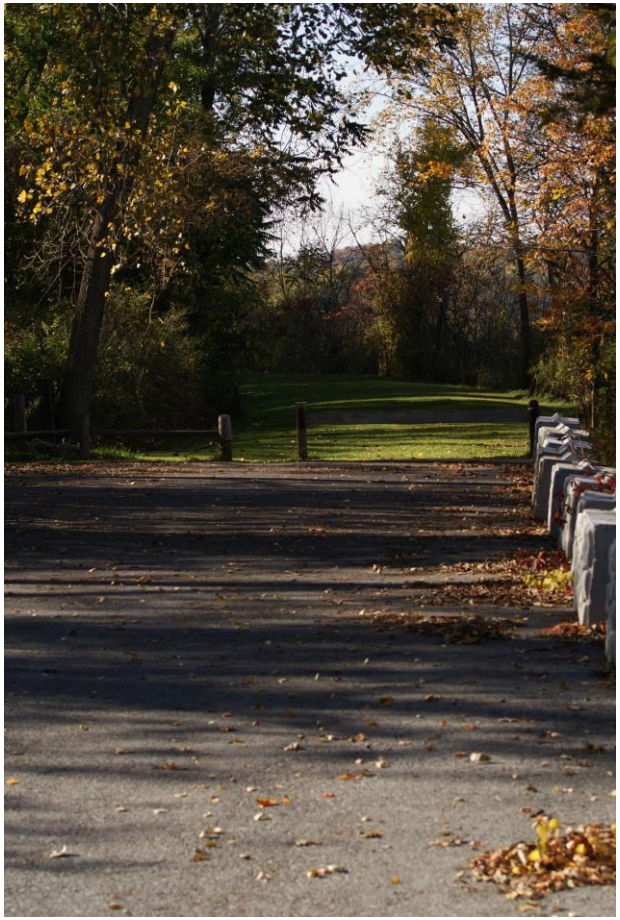
- “a landowner, consonant with the beneficial use and development of its property, can move that right of way, so long as the landowner
  - bears the expense of the relocation, and
  - so long as the change
    - does not frustrate the parties' intent or object in creating the right of way,
    - does not increase the burden on the easement holder, and
    - does not significantly lessen the utility of the right of way”

Altering Easements

Route 30 pull off near Indian Lake

Altering Easements

- Narrowing,
- Gating,
- Fencing,
- Covering
- an easement are all permitted alterations to an undefined easement ingress and egress so long as the right of passing to and fro was not impaired.



Altering Easements

- As a matter of policy, affording the landowner this unilateral, but limited, authority to alter a right of way strikes a balance between the landowner's right to use and enjoy the property and the easement holder's right of ingress and egress. *Lewis v. Young, Supra*

Altering Easements

- Case Study: *Sambrook v. Sierocki*, 53 A.D.3d 817 (3rd Dept 2008)
- The express easement was defined as being 25.5 feet wide and 138.02 feet long for purposes of a common driveway for ingress and egress.
- A twelve foot wide common driveway was established within the easement area. *Id.*

Altering Easements

- Case Study: *Sambrook v. Sierocki*, 53 A.D.3d 817 (3rd Dept 2008)
- Thereafter the easement holder began parking along the common driveway. *Id* at 818.
- In response, the landowner put up a stockade type fence, "No Parking" signs and landscaping along the western side of the common driveway to prevent parking. *Id.*
- The court held notwithstanding the detailed dimensional specifications of the easement, the landowner was entitled to maintain a fence along side of the driveway within the 25.5 foot wide easement area so long as the right of passage over the driveway was not impaired. *Id* at 818-819.

Altering Easements

- Case Study: *Boice v. Hirschbhil*, 128 AD3d 1215 (3rd Dept 2015)
- Co-easement holder began installing landscaping, fencing and retaining walls along the shared driveway, including a gate and balustrade across the driveway
- Plaintiff sued for interference with easement among other things
- Court held that Defendants' alterations to the passageway did not interfere with ingress and egress, and were, therefore, permissible.

Interference with Easements

Obstructions and Encroachments

- Threshold Question: Whether the obstruction or encroachment frustrates the purpose of the easement
- the erection of a portico, which extended a short distance into the road, so as to reduce it at that point to somewhat less than forty feet, did not lessen the enjoyment of the right of way. *Grafton v. Moir,* 130 N.Y. 465 (1892).

Obstructions and Encroachments

- “It follows that the act of the defendant in destroying or removing them (water pipes) was unlawful, and that the plaintiff was entitled to recover his damages, and to have the equitable remedies awarded by the judgment.” *Spencer v. Kilmer* 151 N.Y. 390 (1897)

Gates and Fences

- By its language the grantee is entitled, not only to a right of way, but one which carries with it a free and unobstructed use of the described land for passage of horses and vehicles of every kind and 'for all other lawful purposes' in common with the owners of other abutting lands.
- here the use granted is free and unobstructed. The erection of a gate, even if kept unlocked, to some extent interferes with and obstructs defendant's right of passage, and is inconsistent with the grant. *Missionary Society of Salesian Congregation v. Evrotas,* 256 N.Y.86 (1931)

Gates and Fences

- Before Lewis v. Young:
- the general rule was that '* * * whether or not the servient owner may (erect fences on or gates or bars across the right of way) depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the way has been used and occupied. Such is a question of fact and is to be determined as such.' *Sprogis v. Silleck*, 223 N.Y.S.2d 979 (Sup. Ct. Putnam Co., 1961)

Gates and Fences

- “In the rural past, when the most common forms of travel were by foot and horse, and when the user of a right of way through agricultural or pasture land was not discommoded to any great degree by the erection of movable fences or gates, the Courts did not consider that such obstructions were unlawful where the reasonableness of their maintenance was shown by establishing long uses or necessity.” *Sprogis Supra.*

Gates and Fences

- Later decisions too, recognize the right of an owner to maintain gates or fences across a right of way where there appears a reasonable basis for their existence and the user of the right of way is not substantially inconvenienced thereby.

Gates and Fences

- In *Sprogis* the Defendant had fenced in the ROW and pastured his animals in the roadway, despite having 20 other Acres of land he could have used for pasture
  - “The plight of these plaintiffs, confronted by gates which must be opened and closed upon entering or leaving Peekskill Hollow Road, together with the additional burden of walking or driving through the lot populated by defendant's animals, with the responsibility of preventing the straying of those animals on to a heavily travelled public highway when the gates are opened, is readily seen.” *Id.*

Gates and Fences

- Implied Easements can be fenced and gated
  - “It has been held that, in the case of express grants of easements in existing ways which are obstructed by fences and gates, then physically present upon the ground, the enjoyment of the easement granted is made subject to the right of the grantor reasonably to limit access and egress by maintaining the obstructions…
  - If this be the correct doctrine in reference to easements expressly granted, its correctness in the case of easements resting in implication must be all the more apparent.” *Erit Realty Corp. v. Sea Gate Ass’n*., 249 N.Y. 52 (1928) [paper street was fenced and gated at time of conveyance]

Damages for Interference

- Compensatory:
  - Taxes paid while could not use easement
  - Lost value to property due to destruction of easement
  - Taxes, insurance and upkeep
- Punitive:
  - conduct was found to be malicious, vindictive, morally culpable, wanton or reckless
- Attorneys Fees: only in limited instances
- Liquidated Damages: By agreement only

Transfer of Easements

Transfer of Easements

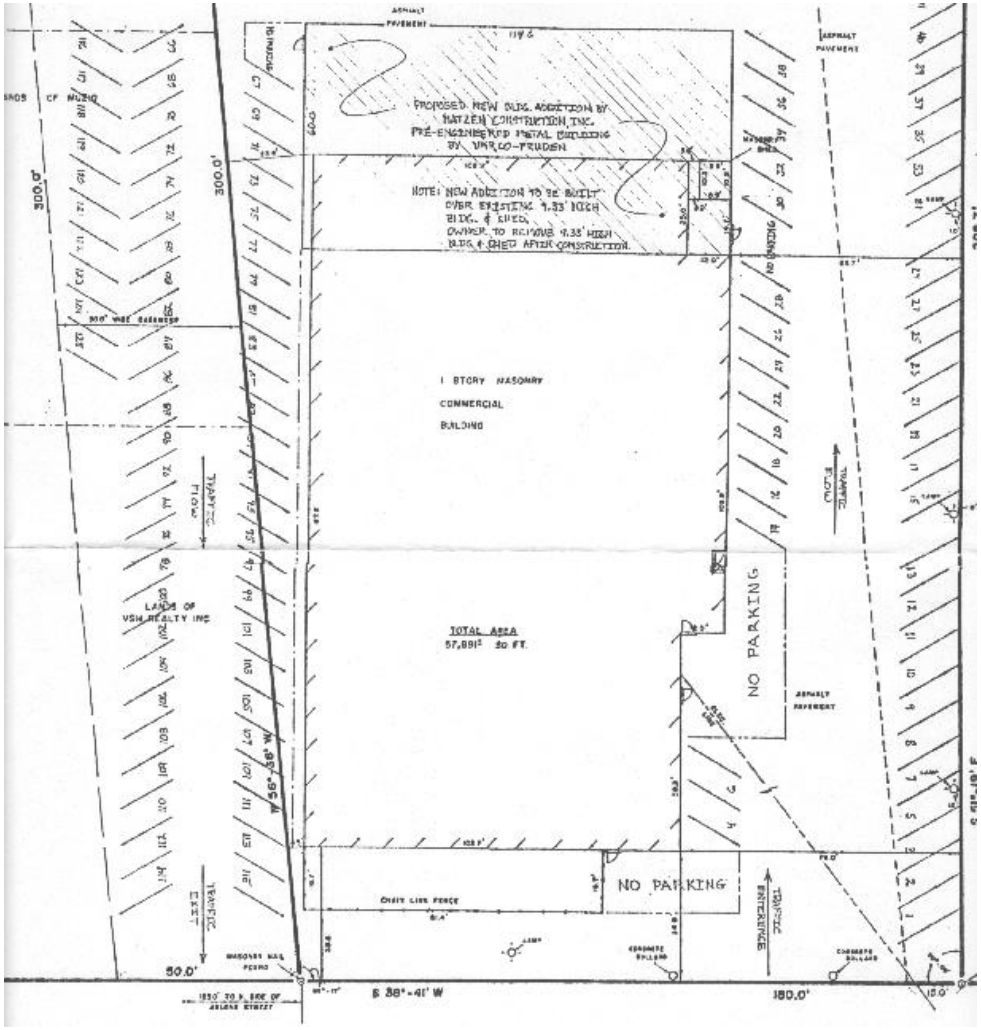
- Easements in Gross:
  - Cannot be transferred
  - Personal to the individual
  - Extinguish when the individual dies

Sylvan Beach on Oneida Lake

Transfer of Easements

- Transfer of the Dominant Estate (the property benefited by the easement)
- If the common grantor conveys both the dominant and servient properties, the easement must be provided for in the deed to the dominant property and in the deed conveying the servient property
- Often the Dominant Estate will be transferred “together with an easement” but the Servient Estate will not be transferred “subject to” the easement
- → Problem

Transfer of Easements



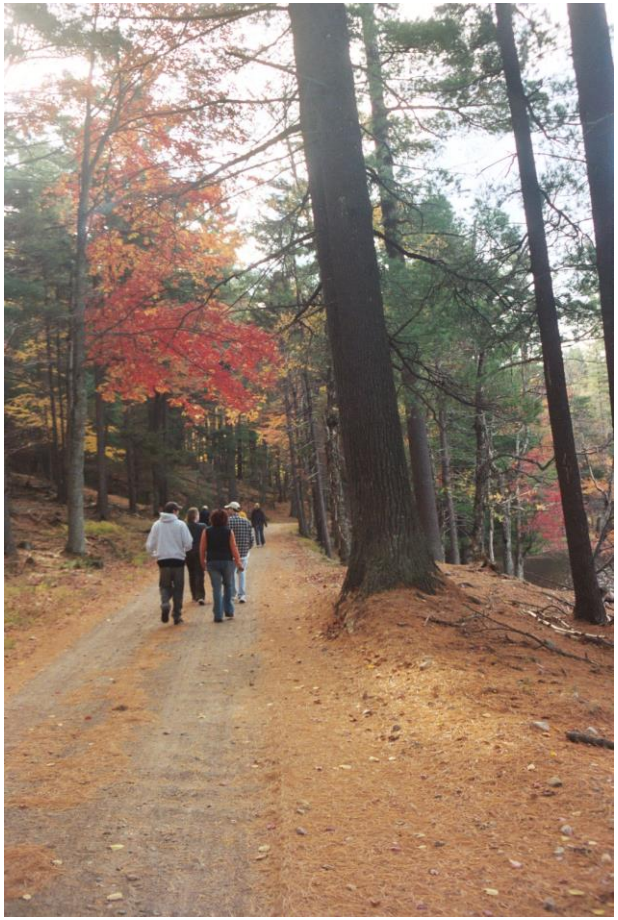
Transfer of Easements

Transfer of Easements

- Division of the Dominant Estate
- A has an Easement over B
- A divides their land into A1, A2, and A3.
- All new lots, A1, A2 and A3 have the same easement rights over B so long as they don’t overburden B
- Since further division of the property is deemed a future possibility contemplated by the original parties, B usually cannot complain

Transfer of Easements

- Reserved Easements:
- Reserved easements create a dominant parcel in those lands retained by the Common Grantor over the lands conveyed to the grantee
- Grantor may also reserve an easement in gross



Transfer of Easements

- Reservation
- is something taken back from what has been granted
- “A reservation is a clause in a deed, whereby the grantor doth reserve some *new thing to himself out of that* which he granted before.”

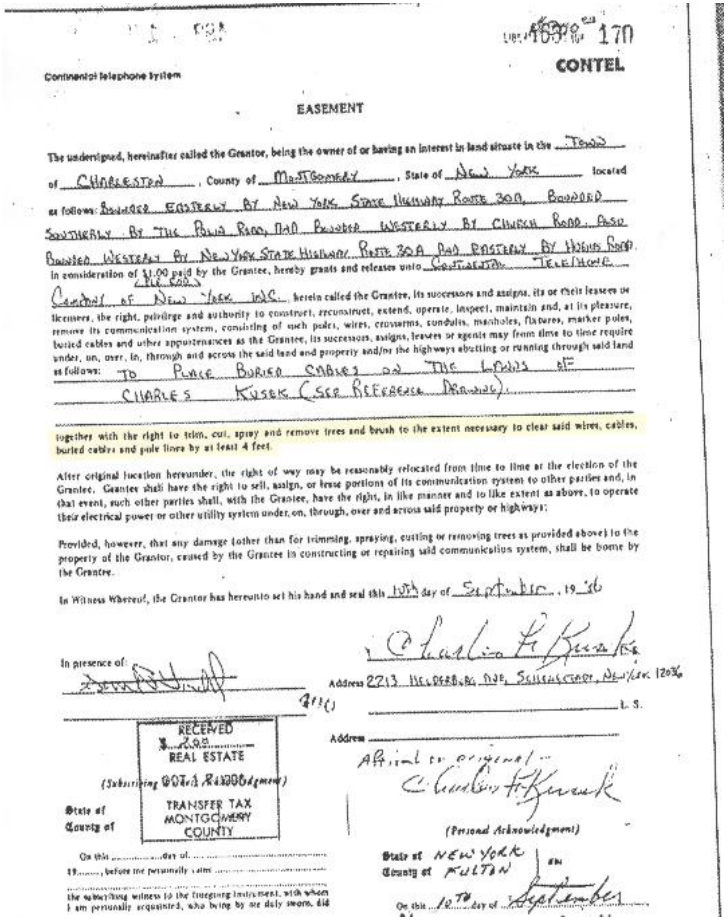
- Exception
- that which is excepted is not granted at all
- “an exception is of some part of the estate not granted at all."

Transfer of Easements

- Transfer of the Servient Estate
- Deed must state the property is “subject to” or otherwise burdened by an easement in favor of the dominant parcel
- The easement must be recorded somewhere in the servient estate’s chain of title
- “a deed conveyed by a common grantor to a dominant landowner does *not* form part of the chain of title to the servient land retained by the common grantor” *Witter v. Taggart,* 78 N.Y.2d 234 (1991).

Transfer of Easements

- RECORD NOTICE:
- A servient estate holder is bound by what is recorded as an encumbrance against their property when that encumbrance is in their direct chain of title
- Map, deed, easement, mortgage, lien.



Continental Telephone System

CONTEL

EASEMENT

The undersigned, hereinafter called the Grantor, being the owner of or having an interest in land situate in the Town of CHARLESTOWN, County of MONTGOMERY, State of NEW YORK located as follows: BOUNDED EASTERLY BY NEW YORK STATE HIGHWAY ROUTE 30A, BOUNDED SOUTHERLY BY THE PLANK ROAD, AND BOUNDED WESTERLY BY CHURCH ROAD, ALSO BOUNDED WESTERLY BY NEW YORK STATE HIGHWAY ROUTE 30A AND EASTERLY BY HOSKINS ROAD

In consideration of $1.00 paid by the Grantee, hereby grants and releases unto CONTINENTAL TELEPHONE COMPANY OF NEW YORK, INC. herein called the Grantee, its successors and assigns, its or their lessees or licensees, the right, privilege and authority to construct, reconstruct, extend, operate, inspect, maintain and, at its pleasure, remove its communication system, consisting of such poles, wires, crossarms, conduits, manholes, fixtures, marker poles, buried cables and other appurtenances as the Grantee, its successors, assigns, lessees or agents may from time to time require under, on, over, in, through and across the said land and property and/or the highways abutting or running through said land as follows: TO PLACE BURIED CABLES ON THE LANDS OF CHARLES KUSEK (SEE REFERENCE DRAWING)

together with the right to trim, cut, spray and remove trees and brush to the extent necessary to clear said wires, cables, buried cables and pole lines by at least 4 feet.

After original location hereunder, the right of way may be reasonably relocated from time to time at the election of the Grantee. Grantee shall have the right to sell, assign, or lease portions of its communication system to other parties and, in that event, such other parties shall, with the Grantee, have the right, in like manner and to like extent as above, to operate their electrical power or other utility system under, on, through, over and across said property or highways;

Provided, however, that any damage (other than for trimming, spraying, cutting or removing trees as provided above) to the property of the Grantor, caused by the Grantee in constructing or repairing said communication system, shall be borne by the Grantee.

In Witness Whereof, the Grantor has hereunto set his hand and seal this 10th day of September, 19 96

In presence of:

Address 2213 HELDERBERG RD, SCHUYLERVILLE, NEW YORK 12871

L. S.

Address

RECEIVED
2.00
REAL ESTATE
TRANSFER TAX
MONTGOMERY
COUNTY

(Subscribing Witness Acknowledgment)

State of
County of

On this ..... day of .....
19....., before me personally came .....
the subscribing witness to the foregoing instrument, with whom
I am personally acquainted, who being by me duly sworn, did

Affixed to original

(Personal Acknowledgment)

State of NEW YORK
County of FULTON

On this 10TH day of September

Transfer of Easements

- CONSTRUCTIVE or INQUIRY NOTICE
- Something in the chain of title that makes you question whether there is an encumbrance against your property

  - "If there is sufficient contained in any deed or record which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained." *The Cambridge Valley Bank v. Delano,* 48 N.Y. 326 (1872) [regarding a mortgage]

Transfer of Easements: Inquiry Notice

SCHEDULE A

LIBER 2579 PAGE 673

ALL THAT TRACT OR PARCEL OF LAND, situate, lying and being in the Town of Berne, County of Albany, State of New York, known as Lot 1 as set forth on survey and map of lands entitled "Subdivision and Map of Lands of Michaels Associates" prepared by Santo Associates, P.C., dated February 23, 1995 and last revised on January 31, 1997 which map is on file in the Albany County Clerk's Office on May ____, 1997 as Map _____. Lot 1 contains 11.454 acres.

GRANTING to the grantees herein, their heirs, successors and assigns all of the grantor's right, title and interest in and to any portion of the above described lot as may lie within the bounds of County Route 6, subject to the rights of the traveling public and further subject to New York State Highway Law Section 189 as it establishes the maintenance jurisdiction line of County Route 6, being 24.75 feet from the centerline thereof.

SUBJECT TO the restrictions that shall be covenants running with the land and shall be binding upon the Grantee(s), their heirs, successors and/or assigns: 1. No single wide mobile home shall be placed, either as a temporary or permanent residence on any lot, nor shall the same be stored or parked within the limits of the subdivision. This shall not include the type of vehicle known as a travel trailer or tent trailer, fabric covered or "solid state", which is designed primarily and/or sold for the purpose of temporary accommodations away from a permanent home or domicile (provided the same shall not violate any local law, ordinance, rule or regulation); nor shall it include homes defined as double wide mobile homes or modular houses. 2. Abandoned, disabled junk automobiles, trucks, heavy equipment or other motorized vehicles shall not be stored on any lot within this subdivision. A motor vehicle shall be considered abandoned, disable or junked if it can not be moved under its own power. Nor may any lot be used as a junkyard. 3. The above described lot can not be further subdivided without prior Planning Board Approval.

SUBJECT to any and all utility easements of record, if any, affecting the above described lot.

SUBJECT to an easement as set forth on the aforementioned survey of Santo Associates, Inc., P.C. dated February 23, 1995 and last revised on January 31, 1997 and filed in the Albany County Clerk's Office on May ____, 1997, including the rights of Francis X. and Theresa M. Gallager of ingress and egress over a portion of the aforementioned easement.

The above described lot does not constitute all or substantially all of the assets of W.M.P., INC., and the disposition of the above lot is made in the usual or regular course of business of W.M.P., INC.

BEING the same premises conveyed by LANDS EDGE, INC. to W.M.P., INC. by Warranty Deed dated May 12, 1997 and recorded in the Albany County Clerk's Office on May ____, 1997 in Book _____ of Deeds, at Page _____.

Transfer of Easements

- ACTUAL NOTICE
- Upon inspection of the property pre-purchase you observe an encumbrance physically on the property
- held to having actual knowledge and are thus burdened with the encumbrance

Transfer of Easements

- COMMON PLAN or SCHEME
- Purchaser will be bound by community restrictions when they had actual or constructive notice of a common plan or scheme of development by a common grantor

Extinguishment of Easements

Rule:

• An easement acquired by grant "remains as inviolate as the fee favored by the grant, unless conveyed, abandoned, condemned or lost through prescription" *Gerbig v. Zumpano,* 7 N.Y.2d 327 (1960).

• Remember:
  • Implied Easements are Impliedly Granted and
  • Easements by Prescription are premised upon a "lost grant"
    →this rule applies to all easements

by Adverse Possession

- the party seeking to extinguish the easement must establish that the use of the easement has been
- 1) adverse to the owner of the easement,
- 2) under a claim of right,
- 3) open and notorious,
- 4) exclusive and continuous
- 5) for a period of 10 years."
- *Spiegel v. Ferraro,* 73 N.Y.2d 622 (1989)

By Adverse Possession

- Hostility/Adversity is NOT presumed as in typical AP situations
- The servient landowner must INTERFERE with to the point of EXCLUDING the easement holder from using the easement for the statutory period
- Because uses of the servient land by the landowner are not adverse to the easement holder's easement until they interfere with the easement holder's ability to use the easement for the purpose for which it was granted

By Adverse Possession

- Servient Landowner:
- used the easement to hike, take nature walks and cross-country ski, and while they also planted and mowed near it, such uses were not inconsistent with the easement itself or adverse to the easement holder

PAPER STREET Exception

- Adverse Possession cannot extinguish a paper street easement or one that has yet to be located
- Rational: because the owner of the easement has had no occasion to assert the right of way during part of the prescriptive period.
- "paper" easements may not be extinguished by adverse possession absent a demand by the owner that the easement be opened and a refusal by the party in adverse possession. *Spiegel Supra.*

By Abandonment

- Public Highway Easement:
- Abandonment by operation of law:
  - Non-use by the public
  - Non-maintenance by the public authority
  - For six years
  - NY High §205

By Abandonment

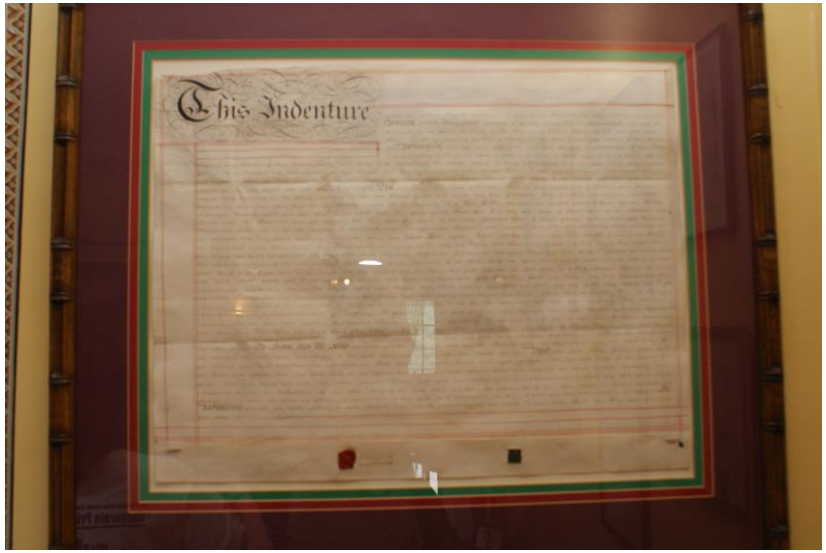
- Private Easement:
- Intent to Abandon the Easement
- Overt Act(s) demonstrating the intention to Abandon the Easement
- Heavy burden to prove/difficult

By Abandonment

- NONUSE, no matter how long continued does not extinguish a private easement, whereas NONUSE is an element for the abandonment of a public hwy.
- EXAMPLES:
  - Alternate access to a public hwy + blocked easement + built garden partially in the easement=abandoned
  - Alternate access to a public hwy + unchecked growth of trees obstructing the easement →perhaps showed abandonment

By Conveyance

- Merger of Title
- Agreement of all the Parties
- Conveyance to a Bona Fide Purchaser (BFP) for Value who has no actual or constructive notice of the easement



By Conveyance: Merger

- Merger Doctrine: An easement is extinguished when the Dominant and Servient Estates become vested in (owned by) the same person
- “At that point, the easement no longer serves a purpose and the owner may freely use the servient estate as its owner .” *Will v. Gates,* 89 N.Y.2d 778 (1997).

By Conveyance: Merger

- "Once extinguished, an easement is gone forever and cannot be revived"
  - *Sam Development LLC v. Dean* 292 AD2d 585 (2nd Dept, 2002) quoting (*Stilbell Realty Corp. v Cullen, 43 AD2d 966, 967)*.
- If the property is split back up again, the easements must be re-created.

By Conveyance: Agreement

- All parties benefited by the easement can agree to extinguish the easement
- Release of Easement
- Paper Streets: All property owners on the subdivision map which shows the paper street have to sign agreements releasing their easement rights

By Conveyance: BFP without Notice

- “A grantor may effectively extinguish or terminate a covenant when, as here, the grantor conveys retained servient land to a bona fide purchaser who takes title without actual or constructive notice of the covenant because the grantor and dominant owner failed to record the covenant in the servient land's chain of title.” *Witter v. Taggart* 78 N.Y.2d 234 (1991).
- “..a narrow exception to this rule has been carved out in counties where a “block and lot” indexing system is used.” *Terwilliger v. VanSteenburg,* 33 A.D.3d 1111 (3d Dept 2006).

Cessation of Purpose/Demolition

- Express easement of Ingress and Egress “to the garage” was extinguished when garage was demolished.
- See *Mitkowski v Marceda,* 133 A.D.3d 574 (N.Y. App. Div. 2d Dep't 2015)
- Compare to *Niceforo v. Haeussler,* 276 A.D.2d. 949 (3d Dept. 2000).
- reference to the back of the house (which had been demolished) indicated location of the easement, not the purpose of easement.

Cessation of Purpose/Demolition

- Party Wall Easement was extinguished by the demolition of the building and the lack of necessity for the continuation of the easement.
- See *357 East Seventy-Sixth Street Corp. v. Knickerbocker Ice Co.*, 263 N.Y. 63 (N.Y. 1933)

By Condemnation

- Eminent Domain
- "When defendant (New York State) takes property through eminent domain, it takes in fee simple absolute and extinguishes all easements." *Thomas Gang Inc. v. State*, 19 A.D.3d. 861 (3d Dept 2005).

By Condemnation

- Tax foreclosures do not extinguish easements or other restrictive covenants. *O'Mara v. Wappinger,* 9 N.Y.3d 303 (2007)[open space restriction]
- "When Absolute acquired title at the tax sale, a description of the property was limited to its tax grid number….. In order to determine the boundaries of its holdings, Absolute should have searched the County Clerk's property records until it found the subdivision plat that created its parcel. Had Absolute examined the plat, it would have discovered the open space restriction." *Id.*

The End.

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