When Does A Private Road Become A Public Street By Prescription?

By Bruce W. Migatz

Surprisingly, there are three cases pending in Nassau County Supreme Court involving this rather esoteric question. In the cases *The Incorporated Village of Bayville v. Viteritti, et al.* (Nassau County Index No. 000239/05) and *Marchand v. New York State Department of Environmental Protection, et al.* (Nassau County Index No. 013478/06), the Incorporated Village of Bayville contends that certain private roads have become public streets by prescription, because, although the village does not maintain the roads, they are used by the public and by the village to provide municipal services. In the case *Connolly v. O'Mally, et al.* (Nassau County Index No. 021466/06), the Village of Plandome Manor contends that certain private roads have not become public streets by prescription, despite the fact that the village has performed snow plowing, street cleaning and some maintenance on the roads.

So then, when does a private road become a public street by prescription?

The controlling statutes, Highway Law §189 (applicable to towns) and Village Law §6-626 (applicable to villages), provide that all lands used by the public as a street for ten or more years continuously shall become a public street, with the same force and effect as if it had been duly laid out and recorded as such. However, as stated by the Court of Appeals in 1890, "[t]he views of judges as to the proper construction of the statutory provisions quoted [Highway Law §189 and Village Law §6-626] have not been harmonious." *Spier v. The Town of New Utrecht*, 121 N.Y. 420 (1890). Is there harmony in recent case law?

It is settled law that mere naked use by the public of a private road does not make the road a public street. As stated by the Court of Appeals as far back as 1892 in the case *In Re Mayor, Alderman and Commonalty of the City of New York,*135 N.Y. 253 (1892):

> "It has been truly said it is not the amount of travel upon a highway which distinguishes it as a public instead of a private road. A private road might have the larger amount. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway." 135 N.Y. 260

In order for a private road to become a public street by prescription, there must be *adverse* use by the general public for a period of ten years. *Hastings Petroleum Corporation v. Incorporated Village of Hastings-On-Hudson,* 9 Misc.2d 642, 165 N.Y.S.2d 912 (Sup. Ct., Westchester Co., 1957), aff'd 13 A.D.2d 963, 216 N.Y.S.2d 585 (2nd Dept., 1961), aff'd 11 N.Y.2d 850, 227 N.Y.S.2d 673 (1962). Use pursuant to an expressed grant or by permission, is not adverse use.

It is also settled law that, in addition to adverse use by the general public, the municipality must exercise some degree of control over the road. But, what amount and type of control is required? Is the use of the private road by the municipality to deliver municipal services (ie. – police, fire, garbage, etc.) sufficient? Is snow plowing and sweeping sufficient?

The Court of Appeals, in affirming a decision of the Appellate Division, Third Department, has held that the municipality must have continuously maintained and repaired the street and, thus, assumed control thereof during the ten year period. *Impastato v. Village of Catskill,* 55 A.D.2d 714, 389 N.Y.S.2d 152 (3rd Dept. 1967), aff'd 43 N.Y.2d 888, 403 N.Y.S.3d 497 (1978). In that case, the plaintiffs commenced an action against the village seeking a judgment declaring that the Grandview Avenue Extension in the village was a public road and directing the village to maintain it as such. The village had previously been maintaining the road, but then stopped.

The Appellate Division found that the evidence at trial established that the general public had been using the road for various activities. The court stated, "[m]ost significantly, this use was by people engaged in activities unrelated to the abutting landowners." 389 N.Y.S.153. Regarding the assumption of control by the village, the Appellate Division found that the evidence established that the village "maintained the Extension on a regular and continuous schedule under the direction of the Village Trustees and performed such services as snowplowing, mowing the grass, cutting weeds, grading, repairing, resurfacing and patching." 389 N.Y.S. 153-154.

The Appellate Division further held, "[o]n such a record as this, we find that plaintiffs have amply demonstrated the requisite public use and control by the Village, and, accordingly, they are entitled to a judgment declaring Grandview Avenue Extension a public road and directing the Village to maintain it as such." 389 N.Y.S.2d 154. The Court of Appeals affirmed.

However, some cases *seem* to indicate that the municipality need not maintain and repair the road, provided it otherwise assumed control of the road. The court's decision in the case *Jakobson v. Chestnut Hill Properties, Inc.,* 106 Misc.2d 918, 436 N.Y.S.2d 806 (Sup. Ct., Nassau Co., 1981) held, in dicta[1], that although the village conceded that it did not repair the street, the evidence at trial was sufficient to find that the village assumed control of the street. The court found that the "village put water mains in, established fire hydrants, regularly collected garbage and grass clippings, and provided all necessary snow removal and sanding operations during the winter months. There was also evidence that street lighting was provided for numerous years at no cost to the adjoining homeowners."

Although in its decision in *Jakobson v. Chestnut Hill Properties, Inc., supra.* the court cited the case *Impastato v. Village of Catskill, supra.,* it appears that the court did not follow its holding.

[1] The Court held that the defendant was entitled to judgment declaring that it had an easement over the street in question.

The court in *Impastato v. Village of Catskill, supra.* did not state that there must be a finding that the road has been kept in repair *or* taken in charge. But rather, the court in *Impastato v. Village of Catskill, supra.* stated, it must be demonstrated "that the village has continuously maintained *and* repaired the alleged street and, *thus*, assumed control thereof during the period of time in question (emphasis added)". A finding of assumption of control of the road is *dependent* upon a finding that the Village maintained and repaired the road. This holding is mandated by the dictates of Village Law §6-626 that provides that all village streets by prescription "shall be a street with the same force and effect as if had been duly laid out and recorded as such." A village has the duty to maintain and repair its streets duly laid out and recorded as such. Village Law §6-602; *Village of Chestnut Ridge v. Howard*, 248 A.D.2d 392, 670 N.Y.S.2d 195 (2nd Dept., 1998).

The court in *Impastato v. Village of Catskill, supra.*, having found that the village had continuously maintained and repaired the road and, *thus*, assumed control thereof during the period of time in question, held that the road had become a village street and the village must continue to maintain and repair it. The Court granted judgment to the plaintiffs, declaring Grandview Avenue Extension a public street and directing the Village to maintain it as such.

Other courts have held that a municipality can assume control of a private road without maintaining and repairing it, if the street was "taken in charge" by the municipality. However, in all these cases, the court found conduct by the municipality that related to the *condition* of the road, not merely using the road to deliver municipal services, such as fire, police, garbage, etc. For example, in *Jakobson v. Chestnut Hill Properties, Inc., supra.*, the court found that the village, in addition to using the road to deliver municipal service, also installed and maintained street lights at no cost to the homeowners.

The court in *Jakobson v. Chestnut Hill Properties, Inc., supra.* also cited the cases *Nogard v. Strand,* 38 A.D.2d 871, 329 N.Y.S.2d 25 (3rd Dept., 1972) and *DeHaan v. Broad Hollow Estates,* 3 A.D.2d 848, 161 N.Y.S.2d 706 (2nd Dept., 1957), in which the language "kept in repair or taken in charge" was used. However, both these cases predate *Impastato v. Village of Catskill, supra.* In *Nogard v. Strand, supra.,* the court found that town had not taken charge of the road. Whereas, in *DeHaan v. Broad Hollow Estates, supra.,* the court found that the town had taken charge of the road by regularly honing the road, cutting overhanging brush, filling holes and ruts, taking care of fallen trees, removing snow, and oiling part of the road. These are acts of maintenance and repair.

In *Dominici v. Lentini,* 24 Fed. Appx. 86, 2001 WL 1631322, Lexis 26919 (2nd Cir., 2001) the court quoted the case *Impastato v. Village of Catskill, supra.* for the proposition that, in order for the road in question to be a street by prescription, it must be shown that "the Village has continuously maintained and repaired the alleged street and, thus, assumed control thereof during the period of time in question." However, the court, in apparent contradictory language, thereafter stated, "Appellants here have neither alleged nor offered evidence to show that the Village, or the State before it, continuously maintained or repaired the Road *or* that the Village provided any other *services for the Road*" (emphasis added), citing *American Nassau Building Systems, LTD. v. Press,*143 A.D.789, 533 N.Y.S. 316 (2nd Dept., 1988). Although the court appeared to set two different standards, the court referred to "*services for the road"*, not just merely using the road to deliver municipal services.

In *American Nassau Building Systems, LTD. v. Press, supra.,* the court found that, in addition to using the road to deliver municipal services, the City of Long Beach also cleaned the street and installed and maintained street lights at no cost to the homeowners.

The Appellant contended, in *Addison v. Meeks*, 233 A.D.2d 843, 649 N.Y.S.2d 274 (4th Dept., 1996), that the private road had not become a public street by prescription. However, the court agreed with the Respondent Town that it had become a public street by prescription, by "public use and maintenance". The Court found that, in addition to public use, the town's maintenance included "widening, grading, raking and spreading gravel on the road; widening, deepening, and cleaning the drainage ditches; installing a culvert; and mowing the weeds, cutting overhanging tree limbs, trimming the brush, plowing the snow, and sanding the road under icy conditions."

Although the language employed in the various cases appear inconsistent as to the proper construction of the statutory provisions of Highway Law §189 and Village Law §6-626, they are actually consistent, and reconcilable, upon a close examination of the nature of the services performed by the municipality in each case. Common to all of these cases, the conduct by the municipality sufficient for an assumption of control involved services relating to the road itself, not merely using the road to deliver municipal services to homes on the road. The holdings in all of these cases are consistent with the holding of the Third Department in *Impastato v. Village of Catskill*, *supra.*, affirmed by the Court of Appeals.

Thus, careful analysis of recent case law demonstrates that the views of judges as to the proper construction of Highway Law §189 and Village Law §6-626 are harmonious. In order for a private road to become a public street by prescription, there must be a finding of adverse use by the general public, engaged in activities unrelated to the abutting landowners, and *some* degree of maintenance and repair of the road by the municipality. Further guidance as to the degree of

maintenance and repair required, should soon be forthcoming from the Nassau County Supreme Court.

Bruce W. Migatz is a partner with the Garden City law firm of Albanese & Albanese LLP. He is a former Chief Deputy Attorney for the Town of North Hempstead and former Village Attorney for the Village of Manorhaven. His practice concentrates in the areas of real estate, land use and litigation. He can be reached at (516) 248-7000 or Bmigatz@albaneselegal.com.