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ZONING AND LAND USE PLANNING

Numerous Statutes Outline Street Demapping Standards

By
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Local governments, and developers and other property owners, as well as their counsel, routinely face the challenge of "demapping" or discontinuing unimproved "paper streets" contained on a subdivision map. Less often, they also must consider demapping improved streets. The reasons for demapping can be quite varied, ranging from urban renewal and construction or property development to public safety.

Numerous sections of New York law make reference to the different standards that apply to demapping streets in counties, towns, and cities. Authority for discontinuing streets is found in Highway Law §131-b(1) for counties, General City Law §§20(7) and 29 for cities, Second Class Cities Law §101 for second class cities, the Administrative Code of the City of New York §5-432(a) for New York City, Highway Law §§171(2) and 205(1) for towns, and Village Law §§6-612 and 6-614 for villages. These various statutes were enacted at different times and do not reflect uniform standards or procedures. A county may discontinue a highway, for instance, by merely determining that the "interest of the county will be promoted thereby,"[1] whereas a town may discontinue a highway only if it has become "useless"[2] or "abandoned."[3]

For villages, Village Law §6-612 simply provides that, "[t]he board of trustees may by resolution provide for laying out, altering, widening, narrowing, discontinuing or accepting the dedication of a street in the village." Village Law §6-614 requires notice to the public of any resolution under consideration for discontinuing a street.

Village Law §§6-612 and 6-614 set forth no legal standard for determining whether a village may discontinue a street. However, it has been held that the discontinuance of a village street requires a finding that the street has become "useless as a right-of-way to the general public."[4]

In one case,[5] Bass Building Corp. owned a tract of land that was under development as Wesley Hill Estates in the Village of Wesley Hills, contiguous to the Village of Pomona. A single road, Hidden Valley Drive, extended from within the Village of Pomona into the Village of Wesley Hills, where it intersected Bass Building's land at the border. After a hearing, the board of trustees of the Village of Pomona passed a resolution that the roadway on its side of the border be discontinued as it was useless to Pomona.

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A municipality is likely to succeed in demapping when an unimproved street is involved, but an unused, improved, street can be demapped under appropriate circumstances.

Bass Building brought suit, alleging that the Pomona resolution was designed to prevent the development of Wesley Hills Estates by leaving it with only one means of ingress and egress. Bass Building moved for a preliminary injunction, and the defendants moved to dismiss the complaint. The Supreme Court, Rockland County, denied both applications, and the parties appealed.

In its decision, the Appellate Division, Second Department, explained that municipalities hold fee title to streets in trust for the general public. Here, the Second Department continued, Bass Building's interest as a member of the public in the continued existence of Hidden Valley Drive was within the zone of interests to be protected.

The Second Department then held that Bass Building was entitled to a preliminary injunction because, among other things, the street on the Pomona side of the border provided a means of ingress to and egress from the Bass Building tract on the Wesley Hills side of the border. It was in this context that the appellate court held that the "useless" test governed the discontinuance of village streets under Village Law §§6-612 and 6-614, adding that Pomona had not established, and had not even attempted to establish at its public hearing, that the discontinued portion of Hidden Valley Drive had become useless as a right-of-way to the general public.

Eminent Domain

A number of years ago, a town sought advice from the New York State Attorney General on its ability to rely on eminent domain to close a town highway to enlarge its watershed area. The attorney general opined that the town could not do so, explaining that, instead, the "present statutory authority governing abandonment or discontinuance of a town or county highway or a substantial portion of a town or county highway set forth the conditions which must be met for such action."[6]

The Appellate Division, Second Department, subsequently relied on that opinion in *Matter of E&J Holding Corp.*[7] In this case, the town board of Babylon determined that closing a section of Gleam Street was necessary to join parcels of town property and create a site for the construction of a new resource recovery facility. DeMatteo Salvage Co. Inc., which operated a waste salvage business on Gleam Street, asked the Second Department to overturn the town's resolution.

The Second Department explained that, to close this portion of the highway to the public, the town was required to follow the specific statutory mandate of the Highway Law, which provides for the closing of town highways "under very limited circumstances," or obtain other clear and express legislative authorization. Because Gleam Street

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apparently was still in "active use," the Second Department granted the petition and annulled the town's resolution.

Interestingly, the Second Department also found that the "prior public use" doctrine applied in this case. That doctrine provides that property that has been taken or acquired for public use cannot be taken for another public use if such other public use would interfere with or destroy the first public use, unless the intention of the legislature that such property should be so taken is shown by express terms or necessary implication. The Second Department found that the prior public use doctrine was pertinent, "when the land sought to be condemned is a public highway." Simply put, the Second Department declared that property used for a highway "cannot be appropriated for another public use, absent specific legislative authorization."

SEQRA

A Second Department decision this past December, in *Matter of Baker v. Village of Elmsford*,[8] reinforces the rules applicable to demapping streets, while also highlighting the need to consider the state's environmental laws in these circumstances.

This case arose after the Village of Elmsford agreed to purchase property located on Vreeland Avenue for $1,550,000 from Brookfield Automotive Exporting Corp. A rider to the contract conditioned the sale upon the village demapping portions of Vreeland Avenue and River Street and transferring title to the demapped property to Brookfield in exchange for a credit to the village of $200,000 against the contract price at closing.

The village prepared Short Environmental Assessment Forms ("EAFs") for each road pursuant to the State Environmental Quality Review Act ("SEQRA"), indicating, among other things, that the proposed demapping of Vreeland Avenue and River Street would not affect the area's air quality, surface and ground water, noise levels, traffic patterns, waste disposal, erosion, drainage, or flooding problems. At the public hearing, the village heard from a variety of municipal officials, including its assessor, fire and police chiefs, and building inspector.

One witness at the public hearing advised that during episodes of flooding, Vreeland Avenue and River Street were used as an egress to Routes 9A and 119. A demapping of the roads, he argued, would landlock property owners and tenants and "negate access that ha[d] been used continuously." This witness' counsel took issue with the portion of the EAFs and the representations of municipal officials that the roads had never been improved or traveled, noting that improvements had been made to the roads as conditions of an earlier building permit and a certificate of occupancy. At the conclusion of the hearing, the board adopted two resolutions that discontinued portions of Vreeland Avenue and River Street.

William and Ronald Baker sought review of the resolutions. The Bakers owned two properties contiguous to the streets the village intended to demap. The Bakers alleged that Vreeland Avenue had always been open and accessible to public traffic and for parking, and that both Vreeland Avenue and River Street had been specifically used for vehicular access and parking by their buildings' tenants and their employees. They contended that the roadways were not useless, and that the village had failed to take the requisite "hard look" at the environmental impact of the discontinuances as required by SEQRA. The Bakers argued that the demapped roads were used during flooding, which occurred at least six times per year, as the sole means of ingress to and egress from the area when an alternate route via Havens Avenue was flooded.

The Supreme Court, Westchester County, held that the village had acted within its authority, had a rational basis for the demapping, and had complied with the "hard look" requirements of SEQRA. The Bakers appealed, and the Second Department reversed.

In its decision, the appellate court observed that once a street was established, its continued existence was presumed, and that municipalities may close a street only if acting under proper statutory authority in doing so. It noted that under the "useless" test, if a street afforded a means of ingress or egress and was used as such to any degree more than a mere token use, the street was not useless.

The law is, perhaps surprisingly, rather extensive in this area, and practitioners should be familiar with it when advising their clients about this subject.

The Second Department ex-plained that the village had compiled significant information at the public hearing that the discontinuance of portions of Vreeland Avenue and River Street would have no negative effect on the area's market values, fire protection, law enforcement, water, sanitation, and other environmental factors. On this basis, the village passed resolutions that the relevant portions of Vreeland Avenue and River Street no longer served any public use and therefore were no longer needed as a thoroughfare for public vehicular or pedestrian traffic or access, i.e., the streets had become useless. However, the Second Department pointed out, in passing its resolutions, the village "wholly ignored" information that the streets had previously been improved at the village's insistence as conditions of a building permit and a certificate of occupancy, and that the streets were actively used by area building owners, tenants, and employees at various times each year as a means of ingress and egress during recurrent flooding.

The Second Department then ruled that the village's determination that portions of Vreeland Avenue and River Street had become useless as a thoroughfare was arbitrary and irrational given that the streets had undergone improvements at the insistence of the village and were repeatedly used for vehicular travel during times of periodic floods. The roads were not, in fact, useless, but served "a highly useful, though perhaps sporadic, emergent purpose."

In addition, the Second Department rejected the village's argument that the Bakers had no need for the discontinued portions of Vreeland Avenue or River Street, even in times of flooding, as a paved driveway through the premises at 17 Hayes Ave. connects the Bakers' properties to Hayes Avenue. The appellate court ruled that even if access from a private driveway was possible, the fact remained that the demapped portions of Vreeland Avenue and River Street had been used, and remain useful, as a thoroughfare to members of the public. "The private driveway of 17 Hayes Avenue is not a public means of access to or from the Bakers' premises at 12 River Street," and if the 17 Hayes Ave. was sold and its new owner were to deny through access to or from River Street, the discontinuance of Vreeland Avenue and the flooding of the alternative Hayes Avenue route "would choke off all ingress to or egress from 12 River Street."[9]

The Second Department also agreed with the Bakers that the village had not complied with SEQRA. It noted that the EAFs stated that the road discontinuances would not cause any adverse effects associated with, among other things, existing traffic patterns or flooding. However, the Second Department stated, the "Reasons Supporting This Determination" sections of the negative declaration pages of the EAFs contained an attachment "that merely restated that there would be no adverse effects related to traffic or flooding." The central basis for questioning the discontinuance of the streets, relating to their use during times of periodic flooding, "was apparently not considered when the Short Form EAFs were prepared," and the Second Department ruled that the negative declarations were "merely conclusory." Under these circumstances, the Second Department held, the village's look at the potential adverse effect of the discontinuances upon local traffic and safety did not represent the "hard look" with "reasoned elaboration" mandated by SEQRA. Accordingly, it reversed the Supreme Court's judgment, granted the Bakers' petition, and annulled the resolutions.

Conclusion

Demapping raises a host of other issues, including whether a party may be entitled to damages from the closing of a street.[10] A municipality is more likely to succeed in demapping when an unimproved street is involved, but an unused, improved street can be demapped under appropriate circumstances. The law is, perhaps surprisingly, rather extensive in this area, and practitioners should be familiar with it when advising their clients about this subject.

1. Highway Law §131-b(1).
2. Highway Law §171(2).
3. Highway Law §205(1).
4. *Bass Bldg. Corp. v. Village of Pomona*, 142 A.D.2d 657 (2d Dep't 1988).
5. Id.
6. 1968 Opns Atty Gen 93.
7. 126 A.D.2d 641 (2d Dep't 1987).
8. 2009 N.Y. Slip Op. 9220 (2d Dep't 2009).
9. The Second Department distinguished cases relied upon by the village to the effect that a public road may be discontinued when there is an alternative means of access, noting that the alternatives in those cases consisted of, or directly accessed, public rights-of-way rather than private driveways. See, e.g., *Reis v. City of New York*, 113 A.D. 464, aff'd 188 N.Y. 58 (1907).
10. See, e.g., *Gengarelly v. Glen Cove Urban Renewal Agency*, 69 A.D.2d 524 (2d Dep't 1979).