

ZONING AND LAND USE PLANNING

Establishing An Implied Easement

By
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Of all the various kinds of easements that can burden real property under New York law,¹ the determination that a parcel is subject to an “implied easement” by prior use may be the one that is most difficult to prove. That is because an implied easement, by definition, is not created by an express grant or agreement of neighboring property owners or other parties, which allows a court to discern the true intent of the parties and the nature and scope of the easement. Moreover, although courts have set forth a standard they use to examine a claim of implied easement, the party claiming the easement has the burden of asserting the existence of the facts necessary to establish the entitlement by clear and convincing evidence.² This heightened burden reflects the fact that implied easements are not favored in the law.

Reasonably Necessary

Consider the recent decision by the Appellate Division, Third Department, in *Freeman v. Walther*.³ The plaintiff and the defendants in this case owned adjacent parcels of property in the upstate New York town of Sharon. The defendants, who acquired title to their property in 1999, used a preexisting pipeline that ran across the plaintiff’s property to access water from a pond on property that was north of the plaintiff’s parcel. The pipeline was in existence since at least 1964 and had been used continuously by the defendants’ predecessors-in-interest.

The plaintiff acquired her property in 2008 and began to construct a home on it. Shortly thereafter, the defendants, claiming their right to an easement across the plaintiff’s property, accused the plaintiff of damaging the pipeline

and eventually hired a worker to replace it. In response, the plaintiff accused the defendants of trespassing and demanded that they remove the pipeline and pay for damages to the plaintiff’s property.

The plaintiff subsequently filed an action challenging any claimed right by the defendants to an easement across her property and seeking to enjoin the defendants from entering upon her property and to recover damages. The defendants answered and asserted counterclaims, including one alleging an easement by implication, and moved for summary judgment. The Supreme Court, Schoharie County, denied the motion and granted summary judgment in the plaintiff’s favor. The defendants appealed.

In its decision, the Third Department reversed the Supreme Court’s conclusion with respect to the defendants’ counterclaim alleging an easement by implication. It explained that an easement by implication based on prior existing use requires (1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary for the beneficial enjoyment of the land. Stated another way, the appellate court continued, an implied easement arises “upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate.”

The Third Department then noted that the pond, the plaintiff’s property, and the defendants’ property all had been owned by the same owner before the sales to the plaintiff and the defendants, so that the unity and separation elements had been met. It also found that the defendants had made a prima facie showing that the use of the pipeline

across the plaintiff’s property had been “continued and obvious for decades.”

The Third Department then ruled, however, that the trial court had erred when it had decided that the defendants had failed to establish the existence of any material issues of fact with respect to the necessity of the use of the easement because the defendants had not ruled out the possibility that they could access potable water from a different source. The Third Department explained that the necessity required for an implied easement based on preexisting use only was “reasonable necessity,” in contrast to the “absolute necessity” required to establish an implied easement by necessity. The Third Department added, however, that “mere convenience” was insufficient to establish reasonable necessity.

Although the Third Department agreed with the lower court that the defendants had failed to establish entitlement to summary judgment in their favor on the claim of an implied easement, it was unable to conclude that the proof submitted was sufficient to demonstrate, as a matter of law, that the easement was not reasonably necessary for the defendants’ enjoyment of their property and “more than mere convenience” in obtaining a source of water for their property. It then reversed the trial court’s order granting summary judgment to the plaintiff on the defendants’ implied easement counterclaim.

Prior Use

In another case, a cable television company seemed to persuade the Third Department that its claim of an implied easement met the “necessary” standard, but it failed to convince it that it met the rest of the test’s requirements.

*U.S. Cablevision v. Theodoreu*⁴ arose in December 1987, when Cablevision purchased one-and-one-half acres of land in the town of Monroe from Elwood and Martha Schuck for the purpose of constructing a microwave receiving antenna. The property was within

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a larger parcel owned by the Schucks and, as a result, the Schucks granted Cablevision two easements over their remaining lands. The first easement granted Cablevision a 15-foot right-of-way that included the right to construct and maintain underground cables within the property covered by the easement. The second easement granted Cablevision a 15-foot right-of-way for ingress and egress across the Schucks' property.

When the Schucks subsequently conveyed their remaining property, the second easement was contained in the chain of title, but the first was not. Accordingly, the new owners could not be charged with constructive notice of the first easement and it could not be employed against them.

Cablevision began constructing a roadway within the easement and brought an action alleging that the new owners were interfering with its use of its parcel and the easement. The trial court found that the easement held by Cablevision granted only a right of ingress and egress, and Cablevision appealed.

The Appellate Division affirmed. It first decided that the grant of the right-of-way for ingress and egress did not include the right to install underground pipes or utility lines.

The appellate court then rejected Cablevision's argument that it was entitled to an easement by implication on the ground of necessity. It explained that Cablevision had established "unity of title" and that its desired use "arguably" was necessary for its beneficial enjoyment of the property. The Third Department, ruled, however, that there could be no easement by implication because there had been no open and obvious laying of underground cables on the servient estate prior to separation. In any event, it concluded, even assuming that Cablevision had established the elements for an implied easement by necessity, such an easement only would have provided it with a right-of-way for ingress and egress—which, the Appellate Court reiterated, did not provide it with the right to install underground cables in the right-of-way.

The Third Department reached the same conclusion two years later in *Pickett v. Whipple*.⁵ There, Marian Whipple and her deceased husband owned a large tract of land along the Hudson River in the town of Moreau, which they subdivided. John Martel purchased two lots and, in 1960, constructed a water collection and supply system on Whipple's land that drew water from a natural spring and piped it to the camp he built on his property. This system apparently was in continual use without Whipple's objection from 1960 until June 3, 1992, when she wrote Gerald Pickett, who had purchased the lots from Martel in 1974, demanding that he remove the water system.

Pickett sued and claimed an easement by implication, among other things. The trial court

denied Whipple's motion for summary judgment, and she appealed. The Third Department found that Pickett had not established an easement by implication because his claimed easement had not existed prior to division of the property. Specifically, the appellate court pointed out, the "water system was installed well after the title had been separated."

Negative Easement

Finally, the New York Court of Appeals, in *Huggins v. Castle Estates*,⁶ explored whether homeowners could impose a negative easement by implication upon adjoining land by virtue of a notation found on a plat map.

The homeowners lived in a tract known as Castle Estates in the town of New Hartford. The plat map for Section VI of the Castle Estates subdivision showed the boundaries of the lots, the streets and utilities, and the set-back lines for the houses. The map also included the land across the street from the homeowners' property, which also was owned by Castle Estates. The map explained that this property had been zoned "R-2" (residential).

As the decisions suggest, a party who seeks to establish an easement by implication may find it difficult to satisfy one or more elements of the three-part test.

After Ibbotson Motors purchased that property, it applied for a building permit to erect an automobile showroom and repair facility there. Homeowners objected, contending that a negative easement restricting the tract to residential use had been created in their favor by virtue of the residential zoning notation on the plat map. The trial court ruled against the homeowners, the Appellate Division, Fourth Department, reversed, and the dispute reached the Court of Appeals.

The court reversed the Fourth Department. In its decision, it noted that there were two lines of cases recognizing negative easements arising out of plat map notations: One, where the negative easement was apparent by the nature of the restriction and the manner in which it was indicated, and a second, where the negative easement was created by virtue of a common plan.

The court explained that the quasi-public nature of a plat map delineation "gives rise to an easement by implication." Thus, it continued, where a party conveyed realty by reference in the deed to a filed map that designated areas such as streets, parks or beaches, a negative easement "has been con-

sistently recognized." The court stated that the rationale behind this approach was that certain designations by their very nature and description imparted the existence of negative restrictions. However, the court decided, the implied negative easement that the homeowners in this case sought to impose did "not flow naturally from the notation used."

The court then examined whether an implied negative easement arose pursuant to the common plan, and decided that it did not. The court found that the language used, "R-2" zoning, was "technical shorthand" for the zoning classification and "could not reasonably be expected to apprise a prospective buyer or title searcher of the existence of a common plan." Moreover, it added, there were no posted signs or advertisements in newspapers or brochures promising or exalting the benefits of a community plan. The court concluded that, in view of the "numerous commercial enterprises" in the immediate vicinity, including two gas stations, a barn for town maintenance equipment, a structural steel business, and an Agway enterprise, all of which were visible from the homeowners' property, and the homeowners' admission that they had not seen the plat map at the time of purchase, "no common plan for development existed."

The standard for determining the existence, or not, of an implied easement is relatively straightforward to describe. As the decisions discussed here suggest, however, a party who seeks to establish an easement by implication may find it difficult to satisfy one or more elements of the test. Moreover, a legal dispute over an implied easement can be costly and may result in rights and obligations that were unintended by the parties that created the easement. To avoid such disputes, where an easement is to be created, the grantor's intentions, as well as the nature and scope of the easement, should be set forth in an express grant or agreement that is recorded in the chain of title of both the dominant and servient properties.

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1. See, e.g., *Dowd v. Ahr*, 78 N.Y.2d 469 (1991) (express easement); *Stock v. Ostrander*, 233 A.D.2d 816 (3d Dept. 1996) (easement by necessity); *Bova v. Deuel*, 184 A.D.2d 934 (3d Dept. 1992) (prescriptive easement).

2. See, e.g., *Zentner v. Fiorentino*, 52 A.D.2d 1036 (4th Dept. 1976); *85 S. Main St. v. Cannarili*, 20 Misc.3d 1107(A) (Sup. Ct., Suffolk Co. 2008).

3. 110 A.D.3d 1312 (3d Dept. 2013).

4. 192 A.D.2d 835 (3d Dept. 1993).

5. 216 A.D.2d 833 (3d Dept. 1995).

6. 36 N.Y.2d 427 (1975).