Ancient Streets: Creation of the Implied Easement

By Kristen M. Motel

The ancient streets doctrine, a seldom cited legal principle, has unexpected relevance in modern property law. At first look, this doctrine provides access rights that are somewhat of an anomaly. Indeed, the rights established under the ancient streets doctrine are not commonly discovered by a title report. Further study of this enigmatic area of case law reveals that the doctrine creates the right to an implied easement—a property right more durable than the typical easement. While there are a number of circumstances under which these rights could arise, the most common scenarios involve land situated in an incomplete subdivision or abutting a private road or abandoned public right-of-way.

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The ancient streets doctrine prescribes that lots abutting a street are entitled to have the street remain a street forever. The doctrine "grants to an abutting owner a private easement in the bed of a street if both the lot and street were owned and laid out by a common grantor, and the lot is then sold with reference to the street."[1] Interestingly, recovery under the doctrine "rests not upon the age of the street but upon the existence of private easements by grant."[2]

There are three factors required to establish an easement under the ancient streets doctrine. First, there must be a common grantor that has "by deed dedicated the street to the use of all grantees, thus 'creating private easements, in the street, which cannot be taken away without compensation.'"[3] This common grantor once owned a large tract of land, including the street, and then subdivided it, selling the lots to separate parties. The common grantor can be identified as the last grantor to appear in all parties' chain of title. Simply identifying a common grantor does not bring a case within the doctrine of ancient streets; the other two factors also must be satisfied.[4]

The second factor is that the common grantor must subdivide the land in accordance with a common scheme or plan.[5] The sequence in which the parcels were conveyed by the common grantor is not material.[6] The intent of the parties at the time of the original conveyance is *all* that can be considered when determining whether a common plan existed. A common grantor's subdivision of land in accordance with a map is typically evidence of a common scheme or plan. Since the intent of subsequent grantors has no bearing on this determination, the parcels can later transfer ownership several times and still be considered part of a common scheme. Subsequent abandonment of a street, by the common grantor, a municipality, or other entity, does not extinguish implied easements created under the ancient streets doctrine.[7]

Kristen M. Motel

The third factor required to create an implied easement under the ancient streets doctrine is that the lots must be sold in reference to the street. This reference caused the purchaser to rely upon the existence of the street. This factor is met if the language of the deed bounds the parcel by the street or if the deed references a map that depicts the lot as being bound by a street. The map used to divide the property does not need to be filed at the time of the initial grants. The fact that the grantor does not expressly convey the easement to utilize the street is irrelevant if the deed and/or map show the lot as bounded by the street.[8] When reviewing deeds, any ambiguity in language is to be construed in favor of the grantee. [9]

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The ancient streets doctrine is best illustrated by example. In *Ranscht v. Wright*, a seminal case on the matter, the court addressed whether a grant of land made to the plaintiff resulted in an implied easement in a private right-of-way.[10] In that case, it was undisputed that the land was established by a common grantor as a private right-of-way for himself and was continuously used by the common grantor when the plaintiff acquired his interest in the land. The plaintiff's deed described his property as being bound along the road. The court noted that

> where the grantor is the owner of a way then in use, in connection with the premises granted, and grants the land

> bounding thereon, by reference to such way as a boundary, in the grant, and the beneficial use of the land conveyed may require the use of the way, although not in the sense of being a necessity, that an easement in such way passes under the grant, which neither the grantor nor subsequent grantees of the premises can defeat. If the alley was to be abandoned, and no longer exist, it would hardly be made a part of the description of the land, to aid in identifying it, not merely at the time of giving the deed, but in the future…This rule is in harmony with that laid down by Mr. Justice Storey[11]…that every grant of a thing necessarily imparts a grant of it as it actually exists, unless it be otherwise provided.[12]

Overall, the court decided that "[i]t is the better rule to hold that, to exclude a grantee from the perpetual beneficial use of the open way in front of the premises granted to him, the language of the deed should clearly express such an intention."[13] In accordance with this principle, a right to utilize the ancient street does not need to arise out of necessity.[14] Therefore, a parcel can abut both a public right of way and an ancient street and still have an implied easement over the ancient street.

The subsequent law stemming from the *Ranscht* case upholds this principle. More recently, in *Clegg v. Grasso*, a leading case on easements by implication, a subdivision owner sought a declaratory judgment that he had an implied easement over private roads.[15] The parties' common grantor prepared a subdivision map showing the lots in question and two roadways. The map was not filed until almost 40 years after the parcels were sold by separate deed and subsequently transferred ownership several times. These parcels were sold abutting a private street, in accordance with the subdivision map.

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The *Clegg* court concluded that "[i]t is the well-established rule that an easement of access in the private streets appurtenant to the property generally passes with the grant when the conveyance describes the property conveyed by referring to a subdivision map which shows streets abutting the lot or lots conveyed."[16] The fact that the deed made no reference to the private street or subdivision map was immaterial, as was the fact that the subdivision map was not filed until after plaintiff's acquisition of the property. "Whether an easement by implication has been created depends on the intention of the parties at the time of the original conveyance, with the most important indicators of the grantor's intent being the appearance of the subdivision map and the language of the original deeds."[17]

In keeping with the principle laid down in *Ranscht*, the *Clegg* court noted there was no evidence suggesting that the plaintiff's deed did *not* convey to him the entire interest in the lot that was created when the common grantor conveyed the property.[18] The court found that an implied easement by grant over the private streets shown on the subdivision map was created in favor of the abutting lots conveyed by the parties' common grantor.

The ancient streets doctrine proves useful in cases where access over the ancient street is preferred to an alternative means of access, for topographic, privacy, or convenience reasons. The doctrine is also useful when assessing adequate frontage when assessing compliance with Zoning Code provisions and in obtaining site plan approval. A lot may have inadequate frontage along a public right of way but adequate frontage along an ancient street.

The philosophy behind the ancient streets doctrine is also reflected in related areas of property law, such as cases on street abandonment, which are guided by the theory that "[o]nce a road becomes a public highway, it remains such until the contrary is shown."[19] Similarly, the ancient streets doctrine also shares the underlying principle, and often intersects, with the doctrine of adjacency. This doctrine creates the right to access a road when the land is described in the deed as being bounded by the street.[20]

Given the durable property right created by the ancient streets doctrine, it is worth assessing the applicability of this principle when faced with a situation where the primary or alternative means of access to a parcel are not evident from the title search or other documentation.

Endnotes

1. *Low v. Humble Oil & Ref. Co.*, 31 A.D.2d 676, 677, 295 N.Y.S. 2d 859, 861 (3d Dep't 1968), *appeal denied*, 250 N.E.2d 256 (N.Y. 1969).
2. *In re East 5th Street Borough of Manhattan*, 1 Misc. 2d 977, 986, 146 N.Y.S. 2d 794, 805 (Sup. Ct., N.Y. Co. 1955) (citing *Dwornick v. State*, 251 A.D. 675, 676, 297 N.Y.S. 409, 411 (4th Dep't 1937), *aff'd*, 283 N.Y. 597, 28 N.E.2d 21 (N.Y. 1940)).
3. *In re East 5th Street Borough of Manhattan*, 1 Misc. 2d 977, 986, 146 N.Y.S. 2d 794, 804 (Sup. Ct., N.Y. Co. 1955) (citing *Dwornick v. State*, 251 A.D. 675, 676, 297 N.Y.S. 409, 411 (4th Dep't 1937), *aff'd*, 283 N.Y. 597, 28 N.E.2d 21 (N.Y. 1940)).

4. *Stupnicki v. Southern NY Fish & Game Ass'n*, 41 Misc. 2d 266, 271, 244 N.Y.S.2d 558, 563-64 (Sup. Ct, Columbia Co. 1962).
5. *Id.*
6. *Heim v. Conroy*, 211 A.D.2d 868, 870, 621 N.Y.S.2d 210, 212 (3d Dep't 1995). *See also Collins v. Barker*, 286 A.D. 349, 356, 143 N.Y.S.2d 173, 177-78 (3d Dep't 1955).
7. *Seven Springs, LLC v. Nature Conservancy*, 48 A.D.3d 545, 546, 855 N.Y.S.2d 547, 546 (2d Dep't 2008) (emphasis added) (citing *Holloway v. Southmayd*, 139 N.Y. 390, 401–07 (N.Y. 1893); *see also Glennon v. Mayo*, 221 A.D.2d 504, 505, 633 N.Y.S. 2d 400, 400 (2d Dep't 1995)).
8. *Fischer v. Liebman*, 137 A.D.2d 485, 487-88, 524 N.Y.S.2d 720, 722 (2d Dep't 1988).
9. *Heim v. Conroy*, 211 A.D.2d 868, 870. *See also Collins v. Barker*, 286 A.D. 349, 356, 143 N.Y.S.2d 173, 177-78 (3d Dep't 1955).
10. 9 A.D. 108 (2d Dep't 1896).
11. *Ranscht v. Wright*, 9 A.D. 108, 112, 41 N.Y.S. 108, 111 (2d Dep't 1896) (citing *U.S. v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463 (Circ. Ct. D. Mass. 1833)).
12. *Id*. (citing *Huttemeier v. Albro*, 18 N.Y. 48, 51-52 (1858)).
13. *Holloway vs. Southmayd*, 139 N.Y. 390 at 407.
14. *Clegg v. Grasso*, 186 A.D.2d 909, 911, 588 N.Y.S.2d 948, 950 (3d Dep't 1992); *Fischer*, 524 N.Y.S.2d 720 at 722; *Ranscht*, 9 A.D. 108 at 112.
15. 186 A.D.2d 909, 588 N.Y.S.2d 948 (3d Dep't 1992).
16. *Clegg*, 186 A.D.2d 909 at 910.
17. *Id.* at 910-11.
18. *Id.* at 911.
19. *In the Matter of Flacke v. Strack*, 98 A.D.2d 881, 882, 470 N.Y.S.2d 863, 863 (3d Dep't 1983).
20. "A deed describing the land being conveyed as bounded by a road owned by the grantor also impliedly grants an easement in such road or way unless the intention of the parties is to the contrary." *Cashman v. Shutter*, 226 A.D.2d 961, 962, 640 N.Y.S.2d 930, 931-32 (3d Dep't 1996). See also *Glennon*, 221 A.D.2d at 505 (plaintiffs were owners of contiguous parcels sharing a border along a private road that connected to a public street and sought a declaration of their entitlement to easements over the private road. The court found that the plaintiffs "established an implied easement by virtue of reference to the private road as a boundary in the deed which created their parcel, and the surrounding circumstances."). *Geasor v. Gerety*, 46 Misc.3d 1214(A), 2014 N.Y. Slip Op. 51919(U) (Sup. Ct., Westchester Co. 2014) (citing *Cashman*, 226 A.D.2d at 961); *Iovine v. Caldwell*, 256 A.D.2d 974, 977, 682 N.Y.S.2d 288, 290 (3d Dep't 1998). After conveying this land bounded by a street, the grantor and "those claiming under him are estopped to deny the existence of such street or way." *Collins*, 286 A.D. at 355.

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