The Answer to When A Private Road can Become a Public Street By Prescription

By: Bruce W. Migatz

In an article entitled "When Does A Private Road Become A Public Street By Prescription" appearing in the December 2007 issue of the *Nassau Lawyer*, I wrote that there were three cases pending in Nassau County Supreme Court involving this issue. 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 and Incorporated Village of Bayville* (Nassau County Index No. 013478/06), the Incorporated Village of Bayville contended 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 contended 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.

As discussed in that article, 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, it is settled law that mere naked use by the public of a private road does not make the road a public street.

In *Diamond International Corporation v. Little Kildare, Inc.*, 22 N.Y.2d 819 (1968), the Court of Appeals stated:

> Mere usage by the public of Water Road as relocated is not sufficient to convert this private road into a public highway absent a showing that the road was kept in repair or taken in charge and adopted by public authorities for the statutory period (*Pirman v. Confer*, 273 N.Y. 357, 7 N.E.2d 262, 111 A.L.R. 216; *People v. Sutherland*, 252 N.Y. 86, 168 N.E. 838; *Speir v. Town of New Utrecht*, 121 N.Y. 420, 24 N.E. 692;

> Highway Law, Consol. Laws, c. 25, s. 189). The record does not show that there has been any exercise of public dominion over the road in question. 22 N.Y.2d 820.

The Court's use of the words, "kept in repair *or* taken in charge and adopted by public authorities (emphasis added)", has been the source of litigation. Lower court cases go both ways on the question of whether a municipality can be said to have "taken in charge" a road that it does not regularly maintain and repair (*compare American Nassau Bldg. Sys. v. Press,* 143 A.D.2d 789 (2d Dep't 1988) and *Jakobson v. Chestnut Hill Props.*, 106 Misc.2d 918 (Sup. Ct. Nassau Co. 1981) [subject roads held to be public streets even though there has been no showing that the municipality engaged in regular repair] with *Salvador v. New York State Department of Transportation,* 234 A.D.2d 741 (3d Dep't 1996) ["The courts have consistently held that this statute [Highway Law § 189] requires that two separate conditions be satisfied: first, there must be a showing that the public uses the roadway and, second, there must be a showing that the municipality has kept the road in repair for the requisite period." 234 A.D.2d 742.]

So, was this question finally answered in these three Nassau County Supreme Court cases?

Connolly v. O'Mally was settled, without answering the question.

In *The Incorporated Village of Bayville v. Viteritti*, the Village of Bayville moved for summary judgment, contending that the supplying of municipal services of snow plowing, sanding, garbage removal, maintenance of fire hydrants and water mains, and the removal of obstructions and surplus water, is sufficient to demonstrate that the private road in issue was "taken in charge" by the Village and became a public street by prescription, despite the absence of regular maintenance and repair of the road by the Village. The defendants cross-moved for summary judgment, contending that in the absence regular maintenance and repair, the road was not "taken in charge" by the Village.

In a decision written by Justice Kenneth A. Davis, the Nassau County Supreme Court agreed with the Village, but held that due to the presence of a barrier across the road for over thirty (30) years interfering with the public's use of the road, the road was not a public street by prescription. *The Incorporated Village of Bayville v. Viteritti*, 18 Misc.3d 1131(A) (Sup. Ct. Nassau Co. 2008). No appeal was taken.

In *Marchand v. New York State Department of Environmental Protection and Incorporated Village of Bayville*, the parties moved and cross-moved for summary judgment, based on the same contentions of the parties in *The Incorporated Village of Bayville v. Viteritti.* Marchand argued that, although the Court of Appeals in *Diamond International Corporation v. Little Kildare, Inc*., *supra,* used the language, "kept in repair *or* taken in charge and adopted by the public authorities (emphasis added)", the cases cited by the Court in its decision, and other decisions of the Court, establish that for a road to become a public street by prescription, it must be regularly maintained by public authorities for the statutory period.

In support of this argument, Marchand cited *Impastato v. Village of Catskill*, 55 A.D.2d 714 (3d Dep't 1967), *aff'd*, 43 N.Y.2d 888 (1978). In *Impastato*, the Third Department held that for a road to become a street by prescription, 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)." The Court of Appeals affirmed on the opinion of the Third Department.

Without addressing the holding in *Impastato,* the Supreme Court, Nassau County held that through public use of the of the road and the Village's assumption of control of the road by the provision of municipal services consisting of garbage disposal, water, snow plowing, sanding and fire protection, the road became a public street by prescription, many years before Marchand took

title to their property. However, the court denied the Village's cross-motion for summary judgment seeking to declare that the road is presently a public street by prescription, holding held that a triable issue of fact was presented if the road had been abandoned as a public street by prescription after Marchand took title to their property.

Following trial on this framed issue, the Supreme Court, Nassau County held that the road had not been abandoned and that it was a public street by prescription.

Marchand appealed to the Appellate Division, Second Department from the judgment of the Supreme Court, Nassau County granting the Village judgment following trial and from the prior Short Form Order of the Supreme Court, Nassau County, denying the motion of Marchand for summary judgment. On appeal, Marchand again argued, based on the holding in *Impastato* and the Second Department's then recent holding in *Long Pond Associates, Inc. v. Town of Carmel*, 87A.D.3d 525 (2d Dep't 2011) ["While the plaintiff submitted some evidence that the Town plowed snow from the subject roads, this evidence was insufficient to raise a triable issue of fact as to whether the Town exercised dominion and control over the roads in the absence of proof of regular maintenance and repair of the roads by the Town."], that the road was not a public street by prescription because it was not regularly maintained and repaired by the Village.

The Appellate Division, Second Department affirmed the judgment of the Supreme Court, Nassau County and the prior Short Form Order of the Supreme Court, Nassau County. *Marchand v. New York State Department of Environmental Conservation*, 84 A.D.3d 808 (2d Dep't 2008). Like the trial court, the Second Department did not address the holding in *Impastato*, or its recent holding in *Long Pond Assn., Inc.*

Leave to appeal was granted by the Court of Appeals. 17 N.Y.3d 712 (2011).

The Court of Appeals reversed the Appellate Division, Second Department, stating:

We hold that a private road cannot become a public street pursuant to Village Law § 6-626 if the street is not maintained and repaired by the village.

* * *

Lower court cases go both ways on the question of whether a public body can be said to have "taken in charge" a road that it does not maintain and repair [citations omitted]. Our cases, however, agree with the Marchands' position that a road, to be public, must be maintained and repaired by the public. In *People v. Sutherland* (252 N.Y. 86, 91 [1929]), we held that a road was not shown to be a public highway where there was no proof "that the town became responsible for its condition." And in *Impastato v. Village of Catskill* (43 N.Y.2d 888 [1978]) we adopted the Appellate Division opinion, which said: "[N]aked use by the public is not enough, as plaintiffs must further demonstrate that the Village has continuously maintained and repaired the alleged street and, thus, assumed control thereof during the period of time in question" (55 A.D.2d 714, 715, 389 N.Y.S.2d 152 [3d Dep't 1976]).

The rule we endorsed in *Sutherland* and *Impastato* is a fair one: a road is not public unless the public takes responsibility for maintaining and repairing it. We reaffirm that rule today.19 N.Y.3d 616 (June 27, 2012).

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