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# The "Necessity" of the Private Road Statute

By Lance R. Pomerantz

"An ancient and archaic provision of the Highway Law which is unique and rarely utilized" has resulted in a controversial decision from the County Court of Franklin County. *Matter of Preserve Assoc. LLC v. Nature Conservancy Inc.*, 2011 NY Slip Op 21417 (County. Ct., Franklin County) ("*Preserve Associates*").[1] The Highway Law provisions at issue (§§300, et seq.) are informally known as the Private Road Statute. Many practitioners believe that the Private Road Statute merely provides a mechanical framework for the opening of a road when an easement by necessity already exists as a matter of law. Others think of it as an anachronism of doubtful constitutionality. As this case demonstrates, the Private Road Statute is not only alive and well, but can play a pivotal role in high-stakes land development planning.

**The Statutory Provisions**

The Private Road Statute provides a mechanism by which a private landowner may file an application with the local highway superintendent seeking to open a road across a neighboring parcel in order to gain access to the petitioner's parcel (Highway Law §300). Once the application is filed, the highway superintendent is required to convene a jury "for the purpose of determining upon [*sic*] the necessity of such road, and to assess the damages by reason of the opening thereof."[2] The jury must be comprised of "resident freeholder[s] of the town" (Highway Law §304).

An early version of the Private Road Statute was held to be unconstitutional because the New York State Constitution in effect at that time did not provide for compensation to the aggrieved neighbor. *Taylor v. Porter & Ford*, 4 Hill 140 (1843). In response to *Taylor*,[3] the Constitution was amended to add Article 1, Section 7(c):

> "Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited."

This provision survives in the present-day State Constitution.

**The Case at Bar**

In *Preserve Associates*, the landowner was attempting to gain access to a 1282-acre parcel it owned in fee and was part of a 5800-acre waterfront parcel the landowner was seeking to develop. According to the County Court decision, "no judge presided over the trial. The parties, through counsel, stipulated to procedures to be followed during the proceedings. Witnesses testified, evidence was presented, and the jury viewed the site of the road proposed by [the applicant]." The jury determined that the private road was necessary and assessed damages of $10,000. The jury also determined that the applicant could install an underground electric line beneath the private road. The aggrieved neighbor moved the County Court to vacate or modify the jury determination, the only relief allowed under the Private Road Statute (Highway Law §312).

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The neighbor had argued to the jury at trial that a 1920 deed established a right of way for the benefit of the applicant's parcel, which made the opening of a new road unnecessary and, as a result, rendered the Private Road Statute inapplicable to the current situation. **The court determined that the mere existence of an alternate means of access did not preclude a jury determination on the question of necessity**. "The jury heard the witnesses and reviewed the documentary evidence [the 1920 deed] and determined, by a preponderance of the evidence, that [the applicant] proved its case for necessity."

With respect to the underground electric line, the court found that the statutory language only addressed the laying out of the private road. "The Court concedes that there is little case law available dealing with article XI of the Highway Law, in general, and nothing at all on this particular issue. This Court is unwilling to create and provide greater rights to [the applicant] than the legislature has, to date, deemed necessary. … As such, this Court finds that the jury lacked the authority to grant Respondent the right to lay underground electric lines beneath the private road." That portion of the verdict was vacated, but the Court confirmed "every other provision of the jury's verdict." Highway Law §314 ("For what purpose private road may be used") spells out that the road "shall be for the use of such applicant… but not to be converted to any other use or purpose than that of a road…" From the decision, it appears that the parties did not address the effect of §314 in this context.

**Common Law "Way of Necessity"**

At common law, the conveyance of a portion of the grantor's land such that either portion was rendered landlocked (i.e. had no direct access to a public highway) gives rise to an implied "easement by necessity" over the portion that retained highway access. *New York Life Insurance and Trust Company, et al., v. Milnor,* 1 Barb. Ch. 353 (1846). "A 'way of necessity' arises suddenly where there is a conveyance of a tract of land formerly in unitary title with the land from which it was severed, and where the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. Thus, an immediate need arises for a 'way' to traverse the encircling parcels. It is a firm requirement that the necessity must exist as of the time of severance of unitary title." *Willow Tex, Inc., v. Dimacopoulos,* 120 Misc.2d 8, 13 (Sup. Court, Queens Cty., 1983) (internal citations omitted), rev'd on other grounds, *Willow Tex, Inc., v. Dimacopoulos,* 68 N.Y.2d 963 (1986). There must be "an *immediate necessity* which may lie dormant but must, at the very least, exist *contemporaneously* with the severance." *Id.*

In order to claim an easement by necessity, the landlocked owner must demonstrate absolute necessity. *Wells v. Garbutt,* 132 N.Y. 430 (1892); *Smith, et al., v. New York Central Railroad Company,* 235 A.D. 262 (4th Dept., 1932). The existence of an alternative means of access, or even the

subsequent establishment of an alternative, will prevent or extinguish a way of necessity.[4] Additionally, the landlocked owner is at the mercy of the neighbor in establishing the location of the easement, unless the neighbor is "chargeable with palpable abuse." *Palmer v. Palmer,* 150 N.Y. 139, 147 (1896).

**What Does The Future Hold?**

As of this writing, it is unknown whether an appeal will be filed in *Preserve Associates.* Even if pursued, the appellants will have an uphill battle. The Private Road Statute directs that "the decision of the county court shall be final" (Highway Law §312). As a result, "an appeal does not lie on the facts ***or the law*** on the issues of necessity and damages but only on whether statutory procedures were substantially complied with and whether there was jurisdiction in County Court." *Towner v. Schoenthal et al.,* 120 A.D.2d 931 (4th Dept., 1986)(emphasis supplied).

**Conclusion**

As *Preserve Associates* demonstrates, the statutory scheme does not require a showing of absolute necessity, the parcels need not have come from a common owner, the existence of alternative access does not prevent a jury determination of "necessity" and the road can be located wherever the owner of the benefited property desires (as long as the jury agrees).

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1. Due to the lack of pagination in the Slip Opinion, obvious references to this opinion will not be individually cited in the balance of this article.

2. Highway Law §301. The filing of an application containing the matters required by statute mandates that the superintendent empanel the jury. *Matter Of John T. Siwula v. Town of Hornellsville et al.,* 867 N.Y.S.2d 832 (4th Dept., 2008).

3. Bishop, *Highways, Ways and Plank Roads, 5th ed.* (Steele, Avery & Co., 1859).

4. See *Warren's Weed New York Real Property § 40.69[2]* (Matthew Bender & Company, Inc., 2011).