



UNDERSTANDING PAPER STREETS

Paper streets can be a developer's nightmare and an abutter's dream. Few encumbrances have such a profound impact on the future development of real property as a paper street. In order to adequately address the concerns raised by a paper street, the conveyancer must understand the rights associated therewith. This article discusses these rights, their creation, parameters and termination.

A paper street is defined as, a "street shown on a recorded plan but never built on the ground." *Shapiro v. Burton*, 23 Mass.App.Ct. 327, 328 (1987). The first thought of most conveyancers is that a paper street can be extinguished or eliminated by modifying the recorded plan pursuant M.G.L. Chapter 41, §81W. While this is true, what the conveyancer must keep in mind is that modifying the plan will not extinguish the easement rights of others in the paper street. Plans are entitled to be modified pursuant to that statute provided that the modification does not "affect" the rights of others in the subdivision. The word "affect" as used in this statute has been interpreted to mean those modifications which impair the marketability of title of the purchasers of the lots in the subdivision. *Patelle v. Planning Board of Woburn*, 20 Mass.App. Ct. 279 (1985). The Appeals Court of Massachusetts in *Patelle*, gave the following examples of modifications which affect the marketability of title, "modifications which altered the shape or area of the lots, denied access, impeded drainage, imposed easements, or encumbered the manner and extent of use of which the lot was capable when sold." *Id.* at 282. If any of these modifications exist, the petitioner is not entitled to receive the endorsement of the planning board pursuant to §81W. Accordingly, the rule of thumb to keep in mind is that once fixed, a way cannot be altered without the consent of all parties having rights therein. *Anderson v. Devries*, 326 Mass. 127, 132 (1950).

Since in most circumstances the elimination of a paper street will either deny access or encumber the manner and extent of the use of the property, the conveyancer will be forced to deal with the rights created through the presence of a paper street. These rights consist of easements of ingress and egress, the right to lay and maintain utilities in the paper street pursuant to M.G.L. Chapter 87, §5, and the use or non-use of the street for subdivision purposes. The most troubling of these rights are the rights of ingress and egress over and upon the paper street.

Easement rights in a paper street can be established by a specific grant contained in a deed, by statute, estoppel, prescription, implication or necessity. Massachusetts General Law Chapter 183, §58, which is retroactive in its application, has been interpreted to provide that, "the title of persons who acquire land bounded by a street or way runs to the center line of the way ... and carries with it the right to use the way along its entire length." *Brennan v. DeCosta*, 24 Mass.App.Ct. 968 (1987) (emphasis added). Once thought to be a statute to aid conveyancers in interpreting title to real property abutting a way, the Massachusetts Appeals Court has given abutters to whom this statute applies a basis to claim easement or travel rights over a paper street.

The term "abutting" as used in the statute has been interpreted by the Massachusetts Supreme Judicial Court to mean, "property with frontage along the *length* of the way." *Emery v. Crowley*, 371 Mass. 489, 494 (1976) (emphasis added). In *Emery*, the Court found that a parcel of property, with frontage located only at the end of a paper street could not receive the benefit of §58. This interpretation in *Emery* was necessitated by the other language in the statute. The Court noted that in connection with the word "abutting" the statute made mention of land "on the same side" and "on the other side" of a way, and that "[t]he statutory silence with regard to real estate at the end of the way signifies that such real estate does not 'abut' the way in the traditional or statutory sense of the word." The Court also acknowledged that if the landowner at the end of the way acquired fee rights in the way there would be an overlap of rights "encroaching on the property rights ... of the abutting owners," resulting in competition for the very same fee title and essentially emasculating all the other provisions of the statute. No such limiting language

appears in M.G.L. Chapter 187, §5, which is discussed below, and indeed the statute contemplates a coextensive “use by others.”

This statute applies to paper streets provided that the street has been sufficiently designated on a recorded plan and as long as the grantor has not reserved his or her right in the fee of the roadway. *Tattan*, 32 Mass.App.Ct. 239, 240, fn 2 (1992); and *Brennan*, 24 Mass.App.Ct at 968. The conveyancer should note, however, that reference on a plan marked “reserved for a future roadway” does not constitute a sufficient reservation of rights to prevent the application of §58. *Tattan*, *supra* at 245.

Common law principles have also created easement rights in paper streets. One such principle, easement by estoppel, is described as follows: “... when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such street or way, and the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed.” *Casella v. Sneirson*, 325 Mass. 85, 89 (1949). Therefore, in order for the principle of easement by estoppel to apply: (a) a property description must either contain a course bounding on a way or must refer to a plan showing that the property bounds on a way; (b) the way must be laid out or clearly indicated on a plan; (c) the chain of title must be out of the same grantor; and (d) rights in the way must not be reserved by the grantor.

In order for the grantor or his or her predecessor in title to be estopped from denying the existence of the way, the legal description must be specific and the way must be sufficiently designated on a plan. A property description, which describes the property bounding along, “other land of the grantor” when such “other land” is a paper street, is not a sufficient course description to invoke the principle of easement by estoppel. *Emery*, *supra* at 495. Although most cases of easement by estoppel arise out of situations where the way is actually staked out, this principle applies to paper streets as long as they are laid out and designated on a plan. *Canton Highlands, Inc. v. Searle*, 9 Mass.App.Ct. 48, 55 (1980); see also, *Casella*, *supra* at 90. It also applies if the way is obstructed, over grown and impassable and “even if there are other ways public or private leading to the land”. *Id.*, citing *Murphy v. Mart Realty of Brockton*, 348 Mass. 675, 677-678 (1965) and *Canton Highlands, Inc.*, *supra*. The court, however, in determining the extent of the easement will consider the extent of the roadway necessary for the enjoyment of the property to which the easement is appurtenant and whether it connects with a public road or highway. *Casella*, *supra.*; and *Wellwood v. Havrah Mishna Anshi Sphard Cemetary Corp.*, 254 Mass. 350, 355 (1926).

If title to the burdened property and the benefited property are not related, i.e., derived from a common owner, then easement rights by estoppel cannot exist. In this regard query whether the decision in the controversial *Nylander v. Potter*, 423 Mass. 158 (1995) case would have had a different result if title to the plaintiff’s and defendant’s property had derived from the same grantor.

Another common law principle that the conveyancer must consider is the creation of an easement by implication. In the absence of an express reservation of rights in way, an easement of access created by implication arises out a reference in the deed to a plan which shows the property bounding on a way. *Boudreau v. Coleman*, 29 Mass.App Ct. 621, 628 (1990). This applies to paper streets as well. *Olson v. Arruda*, 328 Mass. 363 (1952). A mere reference in a deed to a plan and a lot number which bounds on a street or roadway does not give the grantee an easement in all ways shown on the plan. *Walter Kassuba Realty Corp. v. Akeson*, 359 Mass. 725, 727 (1971). Nor does it prevent the grantor of the property from utilizing his or her property or making changes as long as such use or changes are not inconsistent with the rights of the easement holders. *Id.*

An easement by implication is determined by the intent of the parties to the instrument giving rise to the easement. *Boudreau v. Coleman*, *supra*. The intent of the parties is shown through: (a) the language of the instrument, “when read in light of the circumstances attending” the execution of the instrument; (b) the physical condition of the premises; (c) knowledge of the parties; (d) reasonable necessity of the easement; and (e) whether there existed open and obvious use of the street prior to conveyance. *Id.*; see, also *Murphy v. Donovan*, 4 Mass.App.Ct. 519, 527 (1976).

Other items to be considered in determining if an easement by implication exists are whether the road is constructed or staked or shown on paper and whether the ways used are appurtenant to the premises or remote or in close proximity. *Walter Kassuba Realty Corp. v. Akeson, supra*. Where a party has adequate and convenient access to a public way and the use of the paper street is not necessary for the enjoyment of the property an easement by implication is generally not created. *Id.* In order for the easement to be over the full length of the way the plan giving rise to the easement by implication must show the full length of the way. *Id.*

Another common law principle, easement by estoppel, arises where a grantor conveys a portion of his or her property which in turn deprives that grantor from access to his or her property except through access over the land conveyed. In such a circumstance, “[t]he law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way.” *Davis v. Sikes*, 254 Mass. 540, 544-546 (1926); citing *New York & New England Railroad v. Railroad Commissioners*, 162 Mass. 81, 83 (1894). An easement over a way need not be an “absolute physical necessity” but only a “reasonably necessary” and if a way can be constructed over the grantor’s own land an easement by necessity will not exist. *Davis, supra*.

An easement by necessity is not without limitations. If the way is undefined, the owner of the servient estate has the right to locate the way, subject to the requirement of reasonable convenience and suitability, and if such owner fails to do so, the owner of the easement may locate it. *Id.*; citing *McKenney v. McKenney*, 216 Mass. 248 (1913). If an existing way adequately services the appurtenant property the court will generally designate such way as the location and dimension of the easement.

An easement in a paper street or a roadway may also be obtained by prescription. Generally, rules applicable to adverse possession will apply in the case of a prescriptive easement. In order for such an easement to exist the holder of such rights must openly, notoriously and adversely use the property in an uninterrupted manner for a period of twenty years. *Brennan, supra*. A prescriptive easement for a particular use can also be acquired. *Carson v. Brady*, 329 Mass. 36 (1952).

Once determined, the conveyancer may have various options in which to terminate these easement rights. An easement of travel in a paper street may only be extinguished or terminated by abandonment, prescription, release or grant, merger, frustration of purpose, mortgage foreclosure, eminent domain or a decree of the Land Court. The following is a brief discussion of these options.

Abandonment is a question of intention by the easement holder never to make use of the easement again. *Sindler v. Bailey*, 348 Mass. 589, 592 (1965). In order to apply there must be, “acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence.” *Dubinsky v. Cama*, 261 Mass. 47 (1927).

Nonuse, ignorance or disregard of an easement will not result in the abandonment of an easement. *Brennan v. Decosta*, 24 Mass.App.Ct. 968 (1987); and *Dubinsky v. Cama, supra*. For example, in *Desotell v. Szczygiel*, 338 Mass. 153, 159-160 (1958), the fact that the easement area was not cleared from trees or brush and the fact that a garbage dump existed over the way was not enough to show the easement had been abandoned. Although indicia of abandonment may exist, where an owner is asked to release easement rights but refuses to do so, common law indicates that there can be no abandonment of the easement. *Lassell College v. Leonard*, 32 Mass.App.Ct. 383 (1992). Accordingly, it appears that there must be affirmative acts of abandonment by the easement holder in order for the courts to recognize the relinquishment or abandonment of easement rights in a way.

Unlike a termination of easement by prescription, the conveyancer should note that an easement in registered land can be extinguished by abandonment. *Lassell College, supra* at 390. Prescriptive rights will also extinguish an easement of travel. In order for an easement in a paper street to be extinguished by prescription, use of the paper street must be, “actual and open, notorious and adverse for a continuous period of twenty years and asserted as a claim of right.” *Shaw v. Solari*, 8 Mass.App.Ct. 151, 155-156

(1979). The determinative factor of adverse use is the degree of control exercised by the possessors. *Id.* In *Shaw*, Mass.App.Ct. at 155-156, the Appeals Court of Massachusetts, quoting 3 *Am. Law of Property*, §15.3 at 765-766 (1974) described the establishment of adverse possession as follows: “The actual use and enjoyment of the property as the average owner of similar property would use and enjoy it, so that people residing in the neighborhood would be justified in regarding the possessor as exercising the exclusive dominion and control incident to ownership, establishes adverse possession in the absence of evidence that his possession is under a license or tenancy.” In addition, in order for an easement to be extinguished by adverse use there must exist a use, “in a manner so inconsistent with the easement that it [is] extinguished[ed] . . . after the lapse of twenty years.” *Shapiro v. Burton*, 23 Mass.App.Ct. 327, 330 (1987); quoting *Lemieux v. Rex Leather Finishing Corp.*, 7 Mass.App.Ct. 417, 422 (1979). However, continuous use of every segment of a paper street is not necessary. *Shaw*, *supra* at 156.

Travel rights in a paper street can also be extinguished by a recorded or registered grant or release by the holder of such rights. In the case of a recorded subdivision plan, releases should be obtained from all owners in the subdivision. Releases should also be obtained from the mortgagees of such owners to avoid termination of the release or grant, through a foreclosure of a previously recorded mortgage.

Where title to the dominant and servient estate merge, an easement may be extinguished unless intervening rights or interests appear prior to the merger. Eno and Hovey, Massachusetts Practice, *Real Estate Law*, West Publishing Company (1995), § 8.34. This is due to the fact that an owner of real property cannot have an easement in his or her own property. *Cheever v. Graves*, 32 Mass.App.Ct. 601 (1992). In order for merger to occur one person must hold a permanent, indefeasible fee title to both parcels of property. *Mt. Holyoke Realty Corp. v. Holyoke Realty Corp.*, 284 Mass. 100, 107 (1933). Unity of title will not occur if one of several owners of the benefited parcel acquires only a fractional interest of the burdened parcel. *Cheever*, *supra* at 606. The conveyancer should note that when an easement is extinguished through merger, it is not reconstituted by severing the benefited and the burdened parcel. *Id.* It must be recreated by grant, reservation or implication. *Id.*

An easement of travel may also be extinguished through the frustration of the purpose of the easement and by an eminent domain taking. When the purpose for which the easement was created is no longer applicable, an easement may be considered extinguished. In *Makepeace Bros. v. Town of Barnstable*, 292 Mass. 518 (1935), the Massachusetts Supreme Judicial Court stated, “[w]hen a right in the nature of an easement is incapable of being exercised for the purpose for which it is created the right is considered extinguished.” In *Makepeace*, the Court found that an eighteenth century easement for ingress and egress used in conjunction with the whaling industry was extinguished due to the disappearance of the whaling industry in the area.

The power of eminent domain under M.G.L.Chapter 79 includes the right to take easements as well as property. When the taking authority acquires the servient estate for a purpose which conflicts with purpose of the easement, the easement is extinguished. Bruce and Ely, *The Law of Easements and Licenses in Land*, Warren, Gorham & Lamont (1988), §9.13. If the above termination options are available to the conveyancer, he or she may bring an action in Land Court to terminate the easement pursuant to M.G.L. Chapter 240, §6-10.

Despite the various problems it creates, in certain circumstances a paper street may be beneficial. One such benefit is derived under Massachusetts General Laws Chapter 187, §5. This statute, which is retroactive in its application, provides in pertinent part as follows, “The owner or owners of real estate *abutting* on a *private way* who have *by deed* existing rights of ingress and egress upon such way or other private ways shall have the right by implication to place, install or construct in, on, along, under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer...”. (emphasis added). In order for this statute to apply: (1) the rights of ingress and egress must be created “by deed”; (2) the way must be a “private way”; and (3) the property must be “abutting” the private way.

For purposes of M.G.L.c 187, §5, the rights of ingress and egress must be specifically referred to in a deed or other recorded instrument and cannot arise by prescription. *Cumbe v. Goldsmith*, 387 Mass. 409, 410-111, fn.8 (1982). Reservation of an easement, including a driveway easement, in a deed is sufficient to invoke the coverage of this statute. *Barlow v. Chongris*, 38 Mass.App.Ct. 297, 299 (1995).

The term “private way” has been defined as a way, “for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership, either by reason of the ownership of land upon which they are laid out by the owner thereof or by reason of ownership of easements of way over land of another person”. *Id.*; quoting *Opinion of the Justices*, 313 Mass.779, 782-783. Generally, private ways are of two categories: (1) a statutory private way created pursuant to M.G.L. Chapter 82, §§21 through 24; and (2) a way laid out on a recorded plan pursuant to M.G.L. Chapter 41, §§81K-GG. A statutory private way is laid out by a city or town for use by inhabitants of the city or town. Paper streets typically are created by the second category. According to the language of *Barlow*, it would appear that Section 5 would not apply to statutory private ways since they are laid out by a public authority.

The term “abutting” as used in the statute has been defined to mean, “to touch at the end; ... terminate on; end at; ...reach or touch with an end.” *Barlow, supra*; quoting *Black’s law Dictionary* 11 (6th ed. 1990). Compare, M.G.L. Chapter 183, §5 and *Emery v. Crowley, supra*, where the term “abutting” property means property abutting along the length of the way.

Accordingly, if an abutter to a paper street which is definitively laid out on a recorded plan is granted easement rights over such way in a deed then such abutter has the authority to install utilities in such way pursuant to Section 5, provided that such utilities do not unreasonably obstruct or interfere with the way or are not inconsistent with the use thereof.

Paper streets may also be used for subdivision purposes, subject to certain qualifications. Generally, a subdivided lot with frontage on a paper street, which is laid out as a public way may be entitled to an ANR endorsement under M.G.L. Chapter 41, §81P. *Corrigan v. Board of Appeals of Brewster*, 35 Mass.App.Ct. 514 (1993). Compare, however, *Coolidge Construction Co., Inc. v. Planning Board of the Town of Andover*, Land Court, Miscellaneous Case No. 23819, where the Court found that a paper street in existence before the subdivision control law was adopted was inadequate for purposes of supporting an ANR plan. However, the paper street must provide adequate access for fire trucks and emergency vehicles. *Jaxtimer v. Planning Board of Nantucket*, 38 Mass.App.Ct. 23, 24 (1995). In *Jaxtimer*, the Appeals Court of Massachusetts, in reversing a decision of the Land Court annulling a planning board decision, stated that a genuine issue of material fact existed whether a paper street provided adequate access to the proposed lot and therefore summary judgment should not have been granted by the Land Court. The Court, in quoting *Shea v. Board of Appeals of Lexington*, 35 Mass.App.Ct. 519, 523 stated, “the exclusion of the lots from the subdivision control law also requires that here be an *actual* street with ‘adequate access for fire trucks and emergency vehicles’.” *Jaxtimer, supra* at 24 (emphasis added). It is unclear whether the term “actual” encompasses a paper street.

Pursuant to M.G.L. Chapter 183, §58, a portion of a paper street belonging to an abutter may be considered in determining frontage for subdivision purposes. *Silva v. Planning Board of Somerset*, 34 Mass.App.Ct. 339 (1993). In *Silva*, the Appeals Court of Massachusetts, in reversing a judgment by the Superior Court affirming the planning board’s approval of the plan, found that an abutter had an ownership interest in the paper street and therefore was an owner of the premises subdivided and accordingly needed to join in the subdivision application. *Id.* Accordingly, conveyancers should determine the rights of individuals in a paper street prior to submitting a subdivision plan for property abutting a paper street.

A recent case in the area of easements and paper streets is *M.P.M. Builders, LLC v. Dwyer*, 42 Mass. 87 (2004): This case forges new law in Massachusetts. An easement cut across and interfered with the construction on three of the lots. M.P.M. offered to build two new access ways for the defendant, who refused to accept the right of ways preferring to maintain the original right of way. The question posed to the Supreme Judicial Court was whether an owner of land burdened by an easement may relocate such easement without the consent of the easement holder. The Court upended the common law principle in

Massachusetts that the owner of a servient estate in Massachusetts may not unilaterally alter or move a dominant owner's easement once the location of the easement has been fixed on the ground by accepting the modern rule as proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) §4.8 (3) (2000):

"Unless expressly denied by the terms of an easement, as defined in §1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created."

Since the easement in this matter did not prohibit its relocation, the Court held that the servient party may relocate the easement at its own expense if the requirements of the Restatement are met. It appears that this case is retroactive in its application and would apply to all easements, which do not contain language preventing their relocation.

As this article indicates, paper streets can present various problems and in certain circumstances opportunities for the conveyancer. In order to understand the impact a paper street can have on the future development of the property the conveyancer must understand the inherent rights which spring from its creation. The purpose of this article is to give the conveyancer an overview of these rights and the availability of certain options for their termination. We hope this article sheds some light on this often misunderstood area of the law.