

When private property becomes a public nuisance

By Lance R. Pomerantz

A curious case that has been rattling around in both the state and federal courts raises serious concerns about the lengths to which a municipality may go in mandating the use to which private lands must be put without compensation. John and Marguerite Viteritti were initially rebuffed by Nassau County Supreme Court in their efforts to use their land as they saw fit.¹ In January, the U.S. District Court for the Eastern District of New York, for the second time, rebuffed their effort to obtain damages for the taking of their property without just compensation.²

The status of the property

For a case that is so controversial, the facts are surprisingly straightforward.³ The Viterittis reside in the Incorporated Village of Bayville, on the North Shore of Nassau County. They own two lots on opposite sides of a private road known as Shore Road.

In 1976, pursuant to an “easement agreement” among the owners of properties abutting Shore Road, including the Viterittis, John Viteritti erected a barricade across Shore Road. At the time the first action was commenced, the barricade consisted of “decorative boulders,” a fence, shrubs, grass, and Belgium blocks and was 29 feet long and 4 1/2 feet high.

Over the years, different village officials requested the barricade be removed, but never brought an action until 2005. Thus, the barricade had existed in the same location for 29 years before legal proceedings were commenced. During this period, vehicular traffic had been unable to use this portion of Shore Road, but every parcel in the area had vehicular access over other streets.

Shore Road was shown on a filed subdivision map that contained an irrevocable offer of dedication of the roads on the map” to the municipality having jurisdiction thereof.” Nevertheless, Nassau County Supreme Court determined that the Village never accepted the dedication. Hence, “Shore Road [had] not been dedicated to the Village of Bayville as a public street.”

Supreme Court also determined that the disputed portion of Shore Road had not become a public street pursuant to Village Law §6-626.⁴ Because there was no public

use of the disputed portion of Shore Road since 1976, “the court conclude[d] that Shore Road ha[d] not become a public street by prescription.”

Despite finding that the disputed portion of Shore Road was not a public street, the court nevertheless concluded that the barricade constituted a “public nuisance on private property.” The village was permitted to remove the barricade and charge the cost of removal to the Viterittis!⁵



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nale, the court held that the Viterittis barricade was “a substantial interference with the health and safety of residents south of the barricade because it interfered with their rights to ... emergency services. The barricade also interferes with public access to Shore Road, which would otherwise be unimpeded despite its character as a private street” (emphasis supplied).

The concept of “Public Nuisance”

“A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a *common right of the public*, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons” *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center*, 96 NY2d 280, 292, (2001) [emphasis supplied]. It is well settled that the unlawful obstruction of a *public* street creates a public nuisance, *id.* at 292-293.

If the owner of a private road permits the public to use the road, a village may impose reasonable maintenance standards to protect public safety, *D’Angelo v. Cole*, 67 NY2d 65 (1986), but there is no case that requires a private road owner to open the road to public use against his will.

How did this happen?

The court juxtaposed the public nuisance concept with the scenario presented in *Perlmutter v. Greene*, 259 NY 327 (1932). In *Perlmutter*, the State Superintendent of Public Works had wanted to construct a barrier along a portion of a state highway to obscure a distracting billboard. The billboard had been erected on private property adjoining the highway. The Court of Appeals upheld the superintendent’s actions as reasonable to protect the driving public from harm.

More important for the case at hand, *Perlmutter* did not impose an obligation on the private property owner. The state neither physically removed the billboard nor required that the owner do so.

Using the *Perlmutter* decision as a ratio-

Circular reasoning

The court’s holding relies on circular reasoning. By its own findings, the court had determined that there were no public rights in Shore Road, either by dedication or prescription. Despite these findings, the court imposed a “common right of the public” to have emergency services delivered over the disputed portion of Shore Road. The “right” of “public access” found by the court is particularly suspect. In essence, the finding says that since the public would have access to the private road if the owner *did not* prohibit access, then the owner *may not* prohibit access. Of course, this reasoning turns the concept of private property upside-down. The right to exclude others is one of the fundamental aspects of private property ownership.⁶

The aftermath

According to the Viterittis, the Village of Bayville then went beyond the removal permitted by the Supreme Court decision. In a new action filed in Supreme Court, they alleged that the village not only removed the barricade, but also removed their lawn and shrubbery irrigation system from the portion of Shore Road south of the barricade, paved Shore Road and created a “thru-street” across their property. They asserted a taking claim, a due process claim and an equal protection claim, among others. The village removed this action to Federal District Court (*Viteritti III*).

The Eastern District dismissed the taking claim as unripe. The Viterittis had not alleged that they had attempted to recover just compensation pursuant to either the New York State Eminent Domain Procedure Law or Article I, Section 7 of the New York State

Constitution. Accordingly, the court found that the taking claim was not ripe for adjudication in federal court and dismissed it. Similarly, the court found that the Fifth Amendment due process claim was not properly pleaded because it failed to allege a violation by the federal government.

The equal protection claim rested on a “class of one” theory. In order to proceed on this basis, the Viterittis needed to allege that the Village unfairly singled them out for enforcement when other similarly situated persons (called “comparators”) were not. Here is where things get interesting.

The Viterittis alleged that:

“(1) there are not less than seven private streets in Bayville that have the same or similar barricades maintained by private property owners as that maintained by plaintiffs herein, (2) [the Village] has not taken actions against these similarly situated property owners and has singled out plaintiffs for disparate treatment, and (3) [t]here is no rational basis for treating plaintiffs differently than the rest of the class of property owners similarly situated to plaintiffs herein.” *Viteritti III*, at 594 (internal quotations omitted).

The court found that these allegations insufficiently alleged “the existence of comparators to whom they were ‘prima facie identical,’” because none of the other barricades were alleged to have been “judicially declared to be a public nuisance....” The complaint was dis-

missed in its entirety, although the court did afford the Viterittis the opportunity to seek leave to file an amended complaint, and they filed a motion to amend.

The most recent chapter

The court recently decided the motion to file an amended complaint (*Viteritti IV*). The newly pleaded cause of action asserted a procedural due process claim. The Viterittis contended that they were entitled to notice and a hearing *prior* to the village’s creation of the through street over Shore Road, pursuant to Chapter 64 of the Code of the Village of Bayville. The village contended that the availability of an Article 78 proceeding was sufficient post-deprivation process. The court held that the village’s conduct in paving the road and opening the through street was “random and unauthorized conduct” for which an Article 78 proceeding was adequate due process to pursue redress.

The Viterittis also re-asserted their class-of-one equal protection claim, but the court reiterated that they “failed to articulate how their property could be viewed by a reasonably prudent person as being roughly equivalent to the comparator properties...”

Accordingly, the court held that the proposed amendment was “futile” and denied the motion to amend. As of this writing, an appeal to the Second Circuit had not yet been sought.

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tioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title newsletter Constructive Notice. For more information, please visit www.LandTitleLaw.com.

1. *Incorporated Village of Bayville v. Viteritti, et al.*, 18 Misc. 3d 1131A (Sup. Ct., Nassau Cty., 2008) [hereinafter referred to as: “*Viteritti I*”] (*motion for rearg. partially granted*, 2008 NY Slip Op 31533U (Sup. Ct., Nassau Cty., 2008) [hereinafter referred to as “*Viteritti II*”]).

2. *Viteritti v. Incorporated Village of Bayville*, 831 F.Supp.2d 583 (E.D.N.Y., 2011) [hereinafter referred to as: “*Viteritti III*”] (*motion to amend complaint denied and case closed* by Memorandum and Order entered January 4, 2013 in case #10-CV-3283) [hereinafter referred to as: “*Viteritti IV*”].

3. The presentation of facts in this article is a composite drawn from each of the *Viteritti* decisions, so individual citations are omitted. None of the facts were ever seriously disputed by the parties.

4. “All lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such.”

5. The rationale for imposing the entire cost on the Viterittis is explained in *Viteritti II*.

6. For reasons that are unclear, the Viterittis did not pursue an appeal of the Supreme Court’s decision. See *Order Dismissing Appeal*, 2009 NY Slip Op 73373(U) (2nd Dept., 2009).