

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1811

GREGORY SCOT HIMEL AND TODD P. GAUTREAU

VERSUS

THOMAS BOURQUE, SR., THOMAS BOURQUE, JR. AND
ASCENSION PARISH PUBLIC WORKS DEPARTMENT

Judgment Rendered: DEC 11 2015

APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 109,017, DIVISION "D"

HONORABLE JESSIE LEBLANC, JUDGE

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Prairieville, Louisiana
and
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Gregory Scot Himel and
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Department

BEFORE: PETTIGREW, McDONALD, McCLENDON, WELCH, AND THERIOT, JJ.

Theriot, J. concurs with reasons M & G
McCleendon, J. dissents in part and assigns reasons.

McDONALD, J.

This is an appeal from a judgment declaring a predial servitude to have been dedicated to public use and granting a landowner full access to his property from that predial servitude. For the following reasons, we amend the judgment in part and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1992, owners of unimproved property in Ascension Parish, Louisiana, executed an agreement to establish a forty-foot wide servitude of passage basically running north-south from Louisiana Highway 74, consisting in relevant part of "the east twenty (20) feet of Lots 1, 2, and 3[,] and the west twenty (20) feet of Tract A, and [running] to the north boundary of Tract A and [Lot 3,]" as shown on an attached survey plan (the 1992 servitude). Sometime in 1994, the then owners on either side of the servitude shared the cost to put in a gravel road, and in 1999 or 2000, at the owners' request, Ascension Parish paved the road. However, the paved portion of the servitude, now known as Hanson Road, does not extend the full length of the 1992 servitude; that is, it begins at Highway 74 and runs north, but stops short of what was described in the 1992 servitude agreement as "the north boundary of Tract A and [Lot] 3."¹

Todd Gautreau currently owns Lot 3 on the west side of the 1992 servitude, and Gregory Scot Himel currently owns the northernmost two lots of Tract A on the east side of the 1992 servitude. The Gautreau and Himel properties are bounded on the north by property owned by Thomas Bourque, Sr. As stated, Hanson Road is paved to a point just past the Gautreau and Himel driveways, but it dead ends there, and does not extend all the way to the boundary line separating the Gautreau and Himel properties from the Bourque property. The respective properties and Hanson Road are depicted on an Ascension Parish Assessor's map, Joint Exhibit J-13, an enlarged partial copy of which is attached to this opinion as Appendix A.

¹ The exact lengths of the paved and unpaved portions of the 1992 servitude are not clearly established by the record. The numerous maps submitted as joint exhibits by the parties show conflicting measurements, and a finding of the exact length of the paved and unpaved portions is not necessary for resolution of the issues in this appeal.

In December 2013, Mr. Bourque, Sr. contacted several officials in Ascension Parish regarding his desire to use the "Hanson Road servitude" to access the southern portion of his property, that part contiguous to the Gautreau and Himel properties. He explained that the southern portion of his property was isolated from the remainder of his acreage by Bayou Narcisse and that the bridge formerly used to cross the bayou had become unusable from disrepair. Mr. Bourque, Sr. was advised to submit an application to install culvert pipes in a ditch so that he could access Hanson Road, and an Ascension Parish drainage engineer later provided him the specifications for the appropriate materials to use.

In early January 2014, Messrs. Gautreau and Himel filed a petition for injunctive relief and damages against Mr. Bourque, Sr.; his son, Thomas Bourque, Jr.; and the Ascension Parish Public Works Department, seeking to prohibit the construction of Hanson Road beyond its current paved portion. In late January 2014, Messrs. Gautreau and Himel had a map drawn up for the purpose of seeking a revocation of the last forty feet of the 1992 servitude, the most northernmost portion of the servitude contiguous to the shared border among the Gautreau, Himel, and Bourque properties. Because of the pending litigation, Ascension Parish officials took no action on the revocation request.

The Bourques answered the suit and later filed a reconventional demand against Messrs. Gautreau and Himel, seeking declaratory relief regarding their rights to access the 1992 servitude and/or Hanson Road and for damages. The record contains no answer filed by the Ascension Parish Public Works Department. The matter proceeded to a bench trial, where the parties jointly introduced several exhibits, a list of established facts, and witness testimony. At trial, the parties also agreed to dismiss all claims against Thomas Bourque, Jr. and any claims for damages. At the conclusion of the trial, the trial court took the matter under advisement.

On July 18, 2014, the trial court signed a judgment in the Bourques' favor, declaring that: (1) Hanson Road is a public road; (2) the forty-foot right of way shown on a 2009 map signed by Mr. Himel was dedicated to the public; (3) the forty-foot right of way extends from Highway 74 to the northern property boundary of Gautreau and

Himel, which is contiguous with the southern property boundary of Thomas Bourque, Sr.; (4) the right of way has not lost its status as a public road by virtue of nonuse; (5) there has been no clear evidence of intent to abandon the right of way from the end of the paved portion of Hanson Road to the property line; and (6) Thomas Bourque, Sr., and all future owners of the tract at issue herein shall have free, full, and uninterrupted access to their property from Hanson Road.

Messrs. Gautreau and Himel appeal from the adverse judgment, generally challenging the trial court's determinations regarding the proper characterization of the 1992 servitude and/or Hanson Road as public rights of way. Although we do not address each assignment of error individually, this opinion adequately disposes of all issues raised. See **Pike v. National Union Fire Insurance Company**, 00-1235 (La. App. 1 Cir. 6/22/01), 796 So.2d 696, 698 n.6.

DISCUSSION

The dedication of property for public use may be accomplished in four ways: statutory dedication, formal dedication, implied dedication, and tacit dedication. See **Stonegate Homeowners Civic Ass'n. v. City of Baton Rouge/Parish of East Baton Rouge**, 01-2883 (La. App. 1 Cir. 12/20/02), 836 So.2d 440, 443, writ denied, 03-0786 (La. 5/9/03), 843 So.2d 407-08; **Melancon v. Giglio**, 96-2507 (La. App. 1 Cir. 3/13/98), 712 So.2d 535, 539. The trial court determined that the entirety of the 1992 servitude was statutorily dedicated. We conclude the trial court erred in making this classification, and we instead conclude that the entirety of the 1992 servitude has been tacitly dedicated as a public road. This distinction is noteworthy because the classification of a dedicated road determines its ownership – that is, generally, a statutory dedication vests ownership of the land under the streets in the public, whereas a tacit dedication creates a servitude of passage in favor of the public, but the ownership of the land remains with the adjoining landowners. See generally, A.N. Yiannopoulos, 2 Louisiana Civil Law Treatise, Property, Ch. 6. Dedication to Public Use: Highways, Roads, and Streets (4th ed. Oct 2014). We dispose of the statutory dedication issue first.

A statutory dedication requires compliance with LSA-R.S. 33:5051, which imposes on subdividers of land certain duties, including the filing of plats and the recordation of a formal dedication of all the streets to public use. **Melancon**, 712 So.2d at 539. A statutory dedication vests ownership of the land under the streets in the public, unless the subdivider indicates otherwise. **Id.** The intent to dedicate a street is generally presumed from the act of filing a subdivision plat containing public dedication language. **Cavaness v. Norton**, 96-1411 (La. App. 1 Cir. 5/9/97), 694 So.2d 1174, 1178. However, the plat must be given a rational construction. **6444 Associates, L.L.C. v. City of Baton Rouge**, 02-1779 (La. App. 1 Cir. 5/9/03), 851 So.2d 1169, 1172, writ denied, 03-2681 (La. 12/12/03), 860 So.2d 1164. When a rational construction negates the intent of the subdividing landowner, the fact that a reference to a street appears on a map does not, of itself, effect a dedication of that street to public use. **Id.**

The trial court determined the entire length of the 1992 servitude was statutorily dedicated by Mr. Himel in 2009 when he purchased a tract of land from Mark Gonzales adjacent to his existing lots on Hanson Road. At the time of the 2009 purchase, a map signed by Messrs. Himel and Gonzales was submitted to Ascension Parish authorities for approval. The map clearly showed the north end of the servitude for Hanson Road extending all the way to the northern boundary line of the Gautreau and Himel properties. The map also included public dedication language stating, “[t]he street[s] and rights of way shown hereon, if not previously dedicated are hereby dedicated to the perpetual use of the public for proper purposes.”

However, the evidence indicates that Mr. Gonzales was not developing a subdivision when he sold the tract of land to Mr. Himel. The 2009 map was prepared for the limited purpose of the sale between Messrs. Himel and Gonzales for land that did not border Hanson Road nor the 1992 servitude. The statutory requirement that a landowner dedicate all streets or alleys between the lots he sells does not necessarily contemplate that a bordering, existing right of way or street is part of that dedication. See **Pioneer Production Corporation v. Segraves**, 340 So.2d 270, 274 (La. 1976). Further, the 2009 map does not show the entire length of Hanson Road, nor does it

contain Mr. Gautreau's signature, a part owner of property underlying the 1992 servitude, nor the signatures of any of the other residents whose property bordered Hanson Road. Also, the dedication statement on the 2009 map applies only to streets or rights of way "not previously dedicated." The 1992 servitude was "previously dedicated" by virtue of the 1992 servitude agreement. The fact that the property at issue was the subject of the 1992 pre-existing conventional servitude is an indication that the 2009 map did not effect a statutory dedication of that property. See **Pioneer Production Corporation**, 340 So.2d at 276; **6444 Associates, L.L.C.**, 851 So.2d at 1172.

Thus, the inclusion on the 2009 map of the dedication language, as required by LSA-R.S. 33:5051, does not persuade us that the 1992 servitude or the paved portion of Hanson Road was a part of the dedicated property. Rationally construing the 2009 map, we conclude the partial appearance of the 1992 servitude and Hanson Road on that map, as merely a bordering, existing road, which was not the subject of the Gonzales/Himel sale, did not effect a statutory dedication of either. The trial court erred in concluding otherwise.

However, our inquiry does not end with a finding that no statutory dedication occurred. The formation of a public road may occur via tacit dedication under LSA-R.S. 48:491, which provides, in pertinent part:

(B)(1)(a) All roads and streets in this state which have been or hereafter are kept up, maintained, or worked for a period of three years by the authority of a parish governing authority within its parish ... shall be public roads or streets, as the case may be, if there is actual or constructive knowledge of such work by adjoining landowners exercising reasonable concern over their property.

A two-pronged burden of proof exists under LSA-R.S. 48:491. First, it must be shown that there has been sufficient maintenance; second, it must be shown that the landowner had knowledge of or acquiesced in the public maintenance. **Moret v. Williams**, 582 So.2d 975, 977 (La. App. 1 Cir. 1991). Tacit dedication does not require intent of the landowner to dedicate the property when there has been sufficient maintenance without protest. **Lincoln Parish Police Jury v. Davis**, 21,392, 21,393 (La. App. 2 Cir. 1990), 559 So.2d 935, 939. The underlying rationale of LSA-R.S. 48:491

is protection of the public fisc, guarding against the use of public monies for the benefit of private landowners. **Moret**, 582 So.2d at 977. Thus, if landowners accept public maintenance of the road upon which they live without protest, then they cannot protest the characterization of that road as public.

It is undisputed that, when the ancestors in title to Messrs. Gautreau and Himel created the 1992 servitude, they intended that it extend all the way to the Bourque property line, as is shown on the map attached to the 1992 agreement.² And, in 1993, when a part of Tract A was sold, the map attached to that act of sale also showed the servitude extending all the way to the Bourque property line.³ However, when Mr. Gautreau bought his property in 1994, there was no road yet built on the 1992 servitude. He and the other owners on either side of the 1992 servitude shared the cost to put down the gravel road that stops short of the north end of the 1992 servitude. In May of 1999, pursuant to the landowners' request, Ascension Parish accepted "Hanson Road" into its parish road maintenance system as Road Number 4820.⁴ And, in 1999 or 2000, Ascension Parish paved the gravel road with asphalt. So, not only did the property owners acquiesce in the public maintenance of Hanson Road, they actually requested it.

Regarding the extent of Ascension Parish's maintenance of Hanson Road, the evidence shows that such did occur in excess of the three-year period required by LSA-R.S. 48:491. For example, as early as 1993 and 1994, Ascension Parish maintenance records show it set or moved culverts along Hanson Road on more than one occasion; in 1998 and 1999, Ascension Parish removed a tree and cut a "cross ditch" at Mr. Gautreau's request; as earlier stated, in 1999 or 2000, Ascension Parish paved Hanson Road; in 2000, Ascension Parish installed signage on Hanson Road; and, in 2001,

² The 1992 servitude is a conventional predial servitude of passage. LSA-C.C. arts. 654, 699, 705. The use and extent of such servitudes are regulated by the title by which they are created. LSA-C.C. art. 697.

³ Also, Joint Exhibit J-33, a quitclaim deed executed in 1998 for a lot on the right side of Hanson Road, includes a 1993 map showing Hanson Road extending all the way to the Gautreau/Himel property lines. Joint Exhibits J-5, a 2005 map made for the purpose of subdividing Lot 2 on the left side of the 1992 servitude, also shows Hanson Road extending to the northern boundary of Mr. Gautreau's property line.

⁴ Handwritten notes on the meeting minutes at which the acceptance was made indicate Hanson Road was 1150 feet long, whereas a parish road list and a road inventory also admitted into evidence indicates Hanson Road is 1143 feet long. And, in discovery responses, Ascension Parish stated that it "has accepted the black top portion of Hanson Road into [its] maintenance system."

Ascension Parish approved a culvert installation permit for the property owned by Randy Walker and located at 13074 Hanson Road.

Although Messrs. Himel and Gautreau concede that the paved portion of Hanson Road is a public road, they argue that the unpaved portion is not. Mr. Gautreau, Mr. Himel, Mrs. Tracy Himel, and Pamela Ray, a resident at the southern end of Hanson Road, deny ever seeing anyone use the unpaved portion of the servitude. On the other hand, the record contains admissions by Ascension Parish showing that it has used "the unimproved portion of Hanson Road" to access and clean a drainage servitude located between the Bourque property and the Gautreau/Himel property, and that Ascension Parish crews have crossed "the several hundred feet of property that lies between the end of the paved portion of Hanson Road and the [s]outhern boundary of Mr. Bourque's property" to access that drainage servitude at least since 2004. As corroboration, Mr. Thomas Bourque, Jr. testified that he has personally seen Ascension Parish personnel drive beyond the paved portion of Hanson Road down to the drainage ditch. Further, Mr. Bourque, Sr., as well as his two sons, Thomas, Jr. and Travis, testified that, ever since Hanson Road was only a gravel road (before 1999 or 2000), and until access to the unpaved portion was roped off in 2013 or 2014, they had regularly driven onto the unimproved portion of the servitude, "up to the ditch," to check the southern boundary of Mr. Bourque Sr.'s property.

And, notwithstanding use of the *unpaved* portion, use of the *paved* portion of Hanson Road is sufficient to preserve the entire 1992 servitude. A tacit dedication of a road creates a predial servitude of passage in favor of the public. See Melancon, 712 So.2d at 539, citing A.N. Yiannopoulos, 2 Louisiana Civil Law Treatise, Property, §100 at 220 (3rd ed. 1991). A partial use of a servitude constitutes use of the whole. LSA-C.C. art. 759. Thus, the fact that the Gautreaus and Himels, as well as other Hanson Road residents, regularly use the road to access their respective properties is alone sufficient to preserve the entire 1992 servitude. See Lincoln Parish Police Jury, 559 So.2d at 940 (the public status of a road is not lost by prescription when parties to the suit use the road for access to their property).

Based on our de novo review of the record, we conclude that the above evidence

proves that there has been sufficient maintenance of Hanson Road by Ascension Parish for a period of at least three years and that the adjoining landowners had direct knowledge of and acquiesced to this public maintenance without protest. Such evidence fulfills the requirements of LSA-R.S. 48:491 and supports the conclusion that a tacit dedication of Hanson Road has occurred. Thus, by virtue of this tacit dedication, a servitude of passage and utility has been created in favor of the public over Hanson Road. Further, because the servitude of passage is a predial servitude, and because partial use of a servitude constitutes use of the whole, we find the evidence also proves that the tacit dedication includes the entire servitude of passage originally created in the 1992 servitude, that being a forty-foot wide servitude running from Highway 74 all the way to the northern property boundaries of Messrs. Gautreau and Himel, which boundary separates their properties from that property to the north owned by Mr. Bourque, Sr.⁵

CONCLUSION

For the foregoing reasons, we amend the July 18, 2014 judgment to read:

IT IS ORDERED, ADJUDGED AND DECREED that Hanson Road is a public road that extends from Highway 74 to the northernmost boundaries of the properties currently owned by Todd Gautreau and Gregory Scot Himel, by virtue of a tacit dedication under LSA-R.S. 48:491. This tacit dedication created a servitude of passage in favor of the public, which affects the forty-foot strip of property as originally described in the October 10, 1992 Servitude of Passage, known to the parties as Joint Exhibit J-1, and attached to this opinion as Appendix B.

In all other respects, the July 18, 2014 judgment is affirmed. Costs of this appeal are assessed to Todd Gautreau and Gregory Scot Himel.

AMENDED, AND AS AMENDED, AFFIRMED.

⁵ Because we conclude that the entirety of the 1992 servitude was tacitly dedicated to public use, we pretermit consideration of whether Mr. Bourque's property is an "enclosed estate" entitled to a right of passage under LSA-C.C. art. 689.

APPENDIX B

FILED IN EVIDENCE
JUL 1 2014
BY: *[Signature]*
CLERK OF COURT
ASCENSION PARISH

RECEIVED AND FILED
KERMIT H. BOURQUIN
CLERK OF COURT

2014 JAN -3 AM 9:18 09127

BY: *[Signature]* Original Signed by
D.Y. CLERK & SHERIFF
ASCENSION PARISH, LA

SERVITUDE OF PASSAGE

OCT 23 19 22 '92

STATE OF LOUISIANA
PARISH OF ASCENSION

KNOW ALL MEN BY THESE PRESENTS That:

ANGELA ELIZABETH LEBLANC CAUTREAU, born LeBlanc, who declared that she has been married one time and then to Troy Cautreau, with whom she is living and residing in the Parish of Ascension, whose permanent mailing address is declared to be 40337 Lelia Road, Gonzales, Louisiana 70737

LISA MARIE LEBLANC DUPLESSIS, born LaBlanc, who declared that she has been married one time and then to Clark J. Duplessis, with whom she is living and residing in the Parish of Ascension, whose permanent mailing address is declared to be 41245 Cannon Road, Gonzales, Louisiana 70737

SHARON LEBLANC LAYMAN, born LaBlanc, who declared that she has been married one time and then to William Layman, with whom she is living and residing in the Parish of Jefferson, whose permanent mailing address is declared to be 163 Moss Lane, River Ridge, Louisiana 70123

EARL J. LEBLANC, married to and living with Lenora West LeBlanc, born West, a resident of the Parish of Ascension, whose permanent mailing address is declared to be 39508 Hwy. 74, Gonzales, Louisiana 70737

KENNY JOHN LEBLANC, formerly married to Angela Schexnayder, from whom he is divorced; a resident of the Parish of Ascension, whose permanent mailing address is declared to be 39089 Hwy. 74, Gonzales, Louisiana 70737

WITNESSETH:

WHEREAS, the first three-named appearers are the owners of the properties designated as Lots 1, 2 and 3 on the plan of survey prepared by John P. Earles, III, Registered Civil Engineer, dated May 9, 1988, and revised May 18, 1992, a copy of which is annexed hereto and made part hereof, and which plan of survey shows a twenty-foot servitude of passage lying on the east side of said Lots 1, 2 and 3, and

WHEREAS, Kenny John LeBlanc is the owner of Tract D, as shown on said plan of survey, which shows a servitude of passage of forty feet at the southeast corner of said Lot D and going in a northerly direction to curve into Lot 1 referred to above and as shown on said plan of survey, and

WHEREAS, Earl J. LeBlanc is the owner of Tract A as shown on said plan of survey showing a twenty-foot servitude of passage on the west side of said Lot A, and also a servitude of passage over the northwest corner of Tract C as shown on said plan of survey, and

WHEREAS, the parties desire to establish a servitude of passage from Louisiana Highway 74 to establish access to Lots 1, 2, and 3 from the public road, and

EXHIBIT
J-1
Shimberg No. 518

Scanned Rec 1 13 Nov, 2000

WHEREAS, the survey demonstrates the wishes of appearers,

NOW, THEN, the said parties do hereby create a servitude of passage over the properties of the appearers as shown on the plan of survey and more particularly described as follows:

A certain strip of land situated in the Parish of Ascension, in the Southeast Quarter of the Southeast Quarter of Section 11, Township 9 South, Range 3 East, Southeastern District of Louisiana, and more particularly described as commencing at the southeast corner of Tract D as shown on said plan of survey, then measures west a distance of forty (40) feet, then North to the north boundary of Tract D, curving to the East to continue the forty-foot servitude entering Lot 1 referred to above and the northwest corner of Tract C referred to above, and continuing on a forty-foot servitude consisting of the east twenty (20) feet of Lots 1, 2 and 3 and the west twenty (20) feet of Tract A to the north boundary of Tract A and Tract 3 as shown on said plan of survey.

IT IS AGREED by the appearers herein that the properties acquired by them referred to in this act are those properties acquired in the Act of Partition among Earl J. LeBlanc et al recorded May 4, 1976 in C.O.D. 276, file #141670 and in the Act of Exchange among Mrs. Magdalen Templet LeBlanc et als and Kenny John LeBlanc recorded October 6, 1983 in C.O.D. 364, file #105525, which acts are incorporated herein by reference, as well as the plan of survey prepared by Hollis B. Rushing, Registered Land Surveyor dated April 3, 1976, a copy of which is annexed to the Act of Partition recorded in C.O.D. 276, file #141670.

The parties further declare that the servitude of passage created herein for the respective use of the properties hereinabove described is predial in nature and binding upon their heirs, successors and assigns.

IN WITNESS WHEREOF Angela Elizabeth LeBlanc Gautreau has affixed her signature on the 10th day of October, 1992; Lisa Marie LeBlanc Duplessis has affixed her signature on the 10th day of October, 1992; Sharon LeBlanc Layman has affixed her signature on the 10th day of October, 1992; Earl J. LeBlanc has affixed his signature on the 10th day of October, 1992, and Kenny John LeBlanc has affixed his signature on the 10th day of October, 1992, in the presence of the undersigned competent witnesses.

Witnesses:

Clark J. Duplessis
Clark J. Duplessis

Angela Elizabeth LeBlanc Gautreau
Angela Elizabeth LeBlanc Gautreau

Troy J. Gautreau, Sr.
Troy J. Gautreau, Sr.

Witnesses:

Clark J. Duplessis
Clark J. Duplessis

Lisa Marie LeBlanc Duplessis
Lisa Marie LeBlanc Duplessis

Troy J. Gautreau, Sr.
Troy J. Gautreau, Sr.

Witnesses:

Clark J. Duplessis
Clark J. Duplessis

Sharon LeBlanc Layman
Sharon LeBlanc Layman

Troy J. Gautreau, Sr.
Troy J. Gautreau, Sr.

Witnesses:

Clark J. Duplessis
Clark J. Duplessis

Earl J. LeBlanc
Earl J. LeBlanc

Troy J. Gautreau, Sr.
Troy J. Gautreau, Sr.

Witnesses:

Clark J. Duplessis
Clark J. Duplessis

Kenny John LeBlanc
Kenny John LeBlanc

Troy J. Gautreau, Sr.
Troy J. Gautreau, Sr.

SCANNED REC 1 13 NOV. 2000

STATE OF LOUISIANA
PARISH OF ASCENSION

BEFORE ME, the undersigned authority, personally came and appeared:

CLARK J. DUPLESSIS, to me personally known to be the identical person whose name is subscribed to the foregoing instrument as an attesting witness, who being first duly sworn on his oath says: That he subscribed his name to the foregoing instrument as a witness, and that he knows the appearers who have signed said instrument to be the identical persons who executed the same and saw them sign the same as their voluntary acts and deeds, and that he, the said Clark J. Duplessis, subscribed his name to the same at the time as an attesting witness.

Clark J. Duplessis

Sworn to and subscribed before me,
this 12th day of October, 1992.

Miriam P. Cottage
Notary Public

State of Louisiana, Parish of Ascension
I do hereby certify that the above instrument was received, filed and recorded in Book of CDB
No. 499 Page No. 694
this 12th day of Oct 1992

Kermit Hart Bourque
Clerk

RECORDED FROM THE ORIGINAL ON FILE THIS 28th DAY OF OCTOBER 1992
Kermit Hart Bourque
KERMIT HART BOURQUE CLERK OF ASCENSION

697

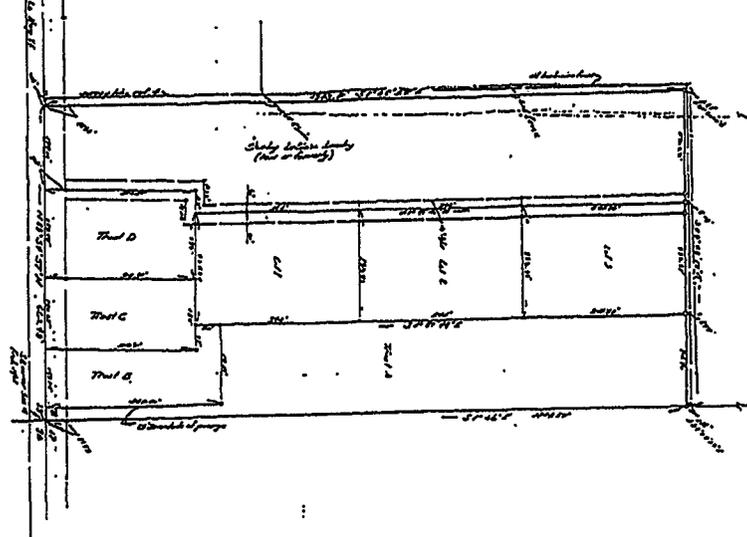
A TRUE COPY
Claude Duplessis 1/2/B
Deputy Clerk & Recorder
ASCENSION PARISH

As shown on this plan, the lot is 100.00' wide by 100.00' deep. The lot is located in the City of Gonzales, Louisiana. The lot is bounded by the following streets: North by the Gulf Coast Highway, East by the Highway 101, South by the Highway 101, and West by the Highway 101.

100.00' 100.00'

126123

Examination



I certify that this plan represents an actual ground survey.

Paul H. H. H.

Professional Engineer
No. 12345
State of Louisiana

287207



the consulting engineering office of
EARLES & ASSOCIATES
 Gonzales, Louisiana

Case #

RECEIVED AND FILED
KERMIT HART COURSE
CLERK OF COURT

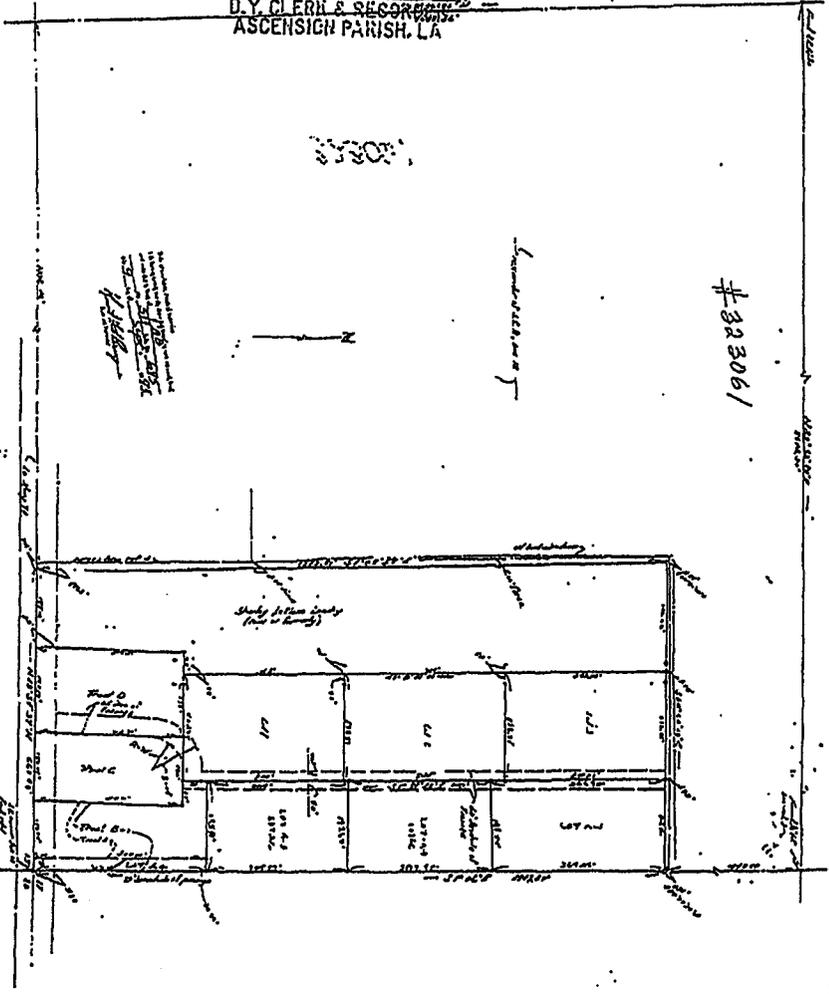
2014 JAN -3 Original Signed by
June Julien

BY
D. Y. CLERMONT & RECORDERS
ASCENSIGN PARISH, LA

1. This plat is subject to the provisions of the Louisiana Subdivision Act, Act No. 151 of the Acts of 1909, as amended, and the provisions of the Louisiana Plat Act, Act No. 152 of the Acts of 1909, as amended.

2. This plat is subject to the provisions of the Louisiana Subdivision Act, Act No. 151 of the Acts of 1909, as amended, and the provisions of the Louisiana Plat Act, Act No. 152 of the Acts of 1909, as amended.

3. The plat is subject to the provisions of the Louisiana Subdivision Act, Act No. 151 of the Acts of 1909, as amended, and the provisions of the Louisiana Plat Act, Act No. 152 of the Acts of 1909, as amended.



4. The plat is subject to the provisions of the Louisiana Subdivision Act, Act No. 151 of the Acts of 1909, as amended, and the provisions of the Louisiana Plat Act, Act No. 152 of the Acts of 1909, as amended.

THE CONSULTING ENGINEERING DIVISION OF
EARLES & ASSOCIATES
MONROE, LOUISIANA

A TRUE COPY
Dudaeu... 1/2/14
Deputy Clerk & Recorder
ASCENSIGN PARISH



STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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ASCENSION PARISH PUBLIC WORKS DEPARTMENT



McClendon, J., dissenting in part.

I respectfully dissent to the extent the majority concludes that "use of the paved portion of Hanson Road is sufficient to preserve the entire 1992 servitude." I agree that there was no statutory dedication of Hanson Road, and I also agree that the blacktop portion of Hanson Road was tacitly dedicated by maintenance. However, the tacit dedication only included the blacktop portion of the roadway and did not include the unimproved portion that extended to Mr. Bourque's property.

Specifically, tacit dedication requires that the road be "kept up, maintained, or worked" by the Parish for a period of three years. LSA-R.S. 48:491(B)(1)(a). While the Parish clearly kept up, maintained, and worked on the blacktop portion, there is insufficient evidence in the record to conclude that it did the same to the unpaved portion.

In support of their position, the majority cites **Lincoln Parish Police Jury v. Davis**, 559 So.2d 935, 939 (La.App. 2 Cir. 1990), where it was undisputed that the Parish maintained a roadway, but issues remained regarding "whether the last 30 to 50 feet ... was sufficiently maintained as a public road continuously for a period of at least three years, thereby causing a tacit dedication." The appellate court, noting that the determination was a factual one, concluded that there was no manifest error in the trial court's determination that the disputed portion had been maintained such that the trial court was correct in finding a tacit dedication of the disputed portion. **Id.** at 940. Specifically, the evidence reflected that Parish maintained the roadway "by grading

several times per year, and each time, that the *grading and maintenance included the disputed portion of the road.*" **Id.** (Emphasis added.) Moreover, the maintenance occurred from approximately 1971 through 1976, and there was "little difference between the appearance of the undisputed portion of the roadway and [the disputed portion]." **Id.**

By contrast, there is no evidence in the record before us to establish that the Parish "kept up, maintained, and worked on" the unpaved portion of the roadway at issue. Rather, the majority references the Parish's use of the roadway to perform other maintenance, including access to clean a drainage servitude. However, accessing the disputed portion is not keeping up, maintaining, or working on the roadway itself and is not sufficient for a tacit dedication under the plain language of LSA-R.S. 48:491(B)(1)(a).

Accordingly, although use of part of a servitude can preserve an entire servitude, it can only preserve that which has been dedicated. Because the unpaved portion of the roadway at issue was never dedicated (either statutorily or tacitly), use of the paved portion cannot alter its status. The majority legally errs in concluding that the 1992 servitude, although not sufficient for a statutory dedication, can somehow be used to tacitly dedicate the unimproved portion. Therefore, I respectfully dissent in part.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1811

GREGORY SCOT HIMEL AND TODD P. GAUTREAU

VERSUS

THOMAS BOURQUE, SR., THOMAS BOURQUE, JR. AND
ASCENSION PARISH PUBLIC WORKS DEPARTMENT

Ant.
THERIOT, J., concurring with reasons.

I am in substantial agreement with the majority's opinion, but disagree with the majority's analysis of the relevance of the pre-existing conventional servitude and its preclusive effect upon a finding of statutory dedication.

The majority cites two cases – **Pioneer Production Corp. v. Segraves**, 340 So.2d 270 (La. 1976), and **6444 Associates, L.L.C. v. City of Baton Rouge**, 2002-1779 (La. App. 1 Cir. 5/9/03) 851 So.2d 1169 – in support of its finding that the existence of property subject to a pre-existing conventional servitude in the 2009 map filed with Ascension Parish indicates that the map did not effect a statutory dedication of the property subject to the servitude. I find neither of the cases that the majority cites stands for such a broad proposition. Rather, it is clear that the existence of a pre-existing servitude forestalls a finding of statutory dedication *only if the servitude grants the public rights in the subject property*.

In **Pioneer Production Corp.**, the Louisiana Supreme Court found the inclusion of a pre-existing servitude on a map filed with a dedication statement did not effect a statutory dedication of the property subject to the servitude where the pre-existing servitude had been conveyed “to the state[.]” 340 So.2d at 271. The court reasoned that the road subject to the pre-existing servitude was not statutorily dedicated, despite the inclusion of a dedication statement in the filing, because, “[o]nce the public has gained a conventional servitude of use over a highway ... policy requirements are fulfilled, and there is really no need for the public to own the land beneath the right of way and/or highway.” **Pioneer Production Corp.**, 340 So.2d at 274.

Similarly, in **6444 Associates, L.L.C.**, this court found that the City of Baton Rouge, Parish of East Baton Rouge did not gain ownership of a section of property subject to a pre-existing servitude. Once again, the pre-existing servitude in that case had been granted in favor of the public. The pre-existing servitude had been granted in favor of the public body, the “City-Parish,” for drainage and maintenance purposes. **6444 Associates, L.L.C.**, 851 So.2d at 1170. The court reasoned:

The dedicatory language contained in the ... map applies only to those right-of-ways “not previously dedicated.” The [servitude] was “previously dedicated” by virtue of the [servitude] [a]greement. Because it was “previously dedicated,” the subsequent subdivision of the property did not effect the [servitude]. Therefore, the City-Parish did not gain a fee interest in the right-of-way by the subdivision of the [s]ubject [p]roperty in 1996.

6444 Associates, L.L.C., 851 So.2d at 1172.

In the case at bar, the inclusion of property subject to a pre-existing conventional servitude on the 2009 map submitted to Ascension Parish authorities does not influence my decision regarding whether the filing effected a statutory dedication. As in **6444 Associates, L.L.C.** and **Pioneer Production Corp.**, the 2009 map included a dedication statement, stating: “The street[s] and rights of way shown hereon, if not previously dedicated are hereby dedicated to the perpetual use of the public for public purposes.” Unlike the prior cases, however, the servitude at issue here had not been “previously dedicated” to the public. Rather, it is a pre-existing predial servitude that grants a right of passage over subject property in favor of a limited number of dominant estates; it does not inure to the benefit of the general public or the public body, nor has it been otherwise previously dedicated to the public. As the determinative policy considerations in the cited cases are not present and as the circumstances of the pre-existing conventional servitudes are distinct, I must respectfully disagree with the majority’s discussion of the relevance of the pre-existing 1992 conventional servitude.

Nevertheless, I agree with the majority’s conclusion that the 2009 filing did not effect a statutory dedication. In pertinent part, the majority correctly notes that plats must be given a “rational construction” and that such a construction may negate the intent of a subdividing landowner to statutorily dedicate a street to public use. See **6444 Associates, L.L.C.**, 851 So.2d at 1172. Here, the filing did

not show the entirety of the road subject to the servitude, was completed in contemplation of the sale of property not abutting the servitude, and, most importantly, was not signed by all owners of the property underlying the 1992 servitude. These seminal factors persuade me that the trial court erred by finding that the entirety of the road subject to the 1992 servitude was statutorily dedicated by the submission of the 2009 map.

For the foregoing reasons, I respectfully concur.