M E M O R A N D U M

TO: **TOWN OF CAROLINE**
FROM: **THALER & THALER, P.C.**
RE: **TITLE TO RAILWAY BED**
DATE: **SEPTEMBER 15, 2016**

INTRODUCTION:

This matter started as a deceptively simple question about whether the Town of Caroline, working and acting jointly with other municipalities and private entities, could construct and emplace a trailway along the old railroad bed of the Ithaca & Owego Rail Road (hereinafter "I&O RR") in the Town of Caroline. The question seemed simple as the land appeared to be owned by NYSEG based upon a prior acquisition, but there was a competing deed from a Mr. Van Gaasbeck and Ms. Burrows, as well as an aggressive missive from said Mr. Van Gaasbeck, styled as a legal memorandum and analysis, that made claim to an exclusive right in title to such railway bed and threatening legal action should the trail proceed.

PRIOR REVIEW—VAN GAASBECK MEMORANDUM:

Without independently researching the full title history or the full history of the said railroad company, this author provided an analysis and breakdown of the authorities and propositions of law cited by Mr. Van Gaasbeck. That analysis identified that the author of such missive had miscited or misapplied almost all of the legal authorities relied upon, but that title would remain unclear as railroad titles are somewhat mystical, in part as they turn on small rules of common law from the 1800s that are often difficult to parse under 2016 common law standards, and as they turn upon ancient statutes that are sometimes difficult to both find and construe, including as case law or meaningful authoritative interpretations thereupon are rare. Much is therefore left to corollary and extrapolation, which is quintessentially arguable, subjective, and not definitive, reducing legal opinion to a best guess based upon such direct authority as could be found if deep research is conducted.

However, as to the Van Gaasbeck legal analysis, and in a nutshell, the following points were observed and communicated in a prior memorandum:

1. US v. Brandt was a case about the United States Railroad Act of 1875 and how to construe land patents granted by the US Government to "settle" "The West." As such, it was deemed to be of very limited use or application relative to an eastern state-granted railroad corporation chartered by NYS statute in 1828, built in 1833-34, and chartered for transportation and commerce in an already settled area. The Brant case concerned a statute that was not even legislatively adopted until over 40 years after the I&O RR was built; and even then it was by not only adopted by a different government, but by a different level of government.

2. The Ohio ex rel., Coles v. Granville case is an Ohio procedural case about forcing condemnation by a state parkland authority through a writ of mandamus—it is very specific to Ohio law; it concerns

a 99-year lease of railroad rights, not title or easements; and it concerns actual use of private land in an area where the lease had never applied. It thus did not apply to this question in any meaningful way.

3. The Preseault case arose in Vermont and had a quite tortured history, including multiple court cases and claims. This case discusses the legal distinction between abandonments and discontinuances, the effect of pre-1920 state law as controlling on land title questions, and several federal Rails-to-Trails Acts and related laws, and the concepts of "rail-banking" and the so-called "doctrine of shifting public uses." The crux of the case did involve the overlap of federal and state law, including preemption and eminent domain, but such issues are not relevant here and, in any case, construction of a Vermont Statute is not deemed relevant to the NYS title issue.

However, the issue of common law that was discussed by the Supreme Court is instructive and relevant:

> "Clearly, if the Railroad obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the Preseaults today would have no right or interest in those parcels and could have no claim related to those parcels for a taking. If, on the other hand, the Railroad acquired only easements for use, easements imposed on the property owners' underlying fee simple estates, and if those easements were limited to uses that did not include public recreational hiking and biking trails ("nature trails" as Justice Brennan referred to them), or if the easements prior to their conversion to trails had been extinguished by operation of law leaving the property owner with unfettered fee simples, the argument of the Preseaults becomes viable."

While this case helps frame the question, it just does not answer the question.

4. The original grant to the I&O RR, acquired by condemnation, read, in relevant part:

> "...all those several pieces & parcels of land situate in the Counties of Tompkins and Tioga with all & singular the buildings trees timber and other appurtenances thereunto belonging or in any wise appertaining as the same has been located laid out, marked on the ground described and shown to us by the Engineers of said Company and so much of one hundred feet and lie within fifty feet of the center and central line of said Rail Road – Do award and determine that the said several persons have sustained damages by reason of the occupation of these said lands & real estate by said Company as follows...".

5. It was thus concluded that the word "appurtenances" suggested title had transferred, such that upon abandonment of the railroad by ICC action, title remained in the railroad corporation and was validly transferred to NYSEG, such that the Town (and others) had a right to emplace a trailway. On the other hand, the use of the term "right-of-way" in the title and in subsequent titles was suggestive of the possibility of an easement, even though like state highways, which are also owned in fee by the state, a "right-of-way" in railroad vernacular was not determinative of whether actual title or an easement was what was condemned.

Given this ambiguity and the resulting potential need for eminent domain proceedings if the public amenity of a trailway was to be emplaced, and given that it appeared that no other municipality or entity had done the title and legal research necessary to answer the allegations posited by Mr. Van Gaasbeck, this firm was charged with such research and the development of an opinion in respect to the title to such old railway.

What follows is the analysis and answer to such questions.

SHORT ANSWER:

NYSEG holds valid title to the rail bed. First, the Van Gaasbeck claim to title was self-created and such owner had never actually been transferred title to the underlying land. Secondly, Chapter 21 of the New York State Laws of 1828, including specifically § 8 therein, is clear and unambiguous that the I&O RR actually took true title—fee simple absolute. Thus, while only a judge can truly decide a case like this such that this advice is not risk free, it is this author's opinion that the municipalities are free to proceed and that NYSEG is vested in title to the disputed lands.

Further, the width of NYSEG's title seems substantially greater than the width of the trail or old railway, which the complainant says is 3.6' wide. The true width of the title in this location is probably 66', though it is possibly as wide as 100'.

ANALYSIS:

The two key pieces of research, plain old digging, and analysis that had to be further addressed pertained to finding specific law in New York State, hopefully from the 19th Century, to construe the applicable act and language, so as to assist in assuring the congruence of interpretations given that the meaning of legal terms (and even plain language) changes over time. We also had to dig further into the history of title to more precisely parse and determine the competing claims. It is this latter piece that actually revealed surprising information.

So, let's start with the 1828 statute and the case law as researched and developed in furtherance of the opinions and analysis provided though this memorandum. We attach the laws of 1828 and point to Chapter 21, and § 8 specifically. We do so as, per the above noted Vermont case and the prior advice provided, railroad titles and rights vary widely based upon the exact nature of the grant, patent, permit, license, or statute that created the railroad company, the railway line, or the right-of-way itself.

Here, thankfully, the statute is unambiguous, and in relevant part § 8 reads:

> "The said corporation are hereby authorized to cause such examinations and surveys to be made by their agents, surveyors and engineers of the ground lying betwixt the Cayuga lake and Susquehannah river, as shall be necessary to determine the most advantageous route whereon to construct the said rail road…. And it shall also be lawful for the said corporation to enter upon and take possession of all such lands and real estate, as may be indispensable for the construction and maintenance of the said rail road, and the accommodations requisite and

> appertaining thereto : But all lands or real estate thus entered upon, which are not donations, shall be purchased by the said corporation…
>
> "…*[and if condemned and the price to be paid is determined by the commissioners]* then the said corporation shall be deemed to be seized and possessed of the fee simple of all such lands or real estate, as shall have been appraised by the said commissioners"

Since this land was appraised by the commissioners and title taken by such condemnation, the plain language of this statute said that the land was owned by the I&O RR in fee. Confirming such an interpretation is the 1855 cased of Brown v. Cayuga & S R. Co., 12 N.Y. 486 (1855). In this case, the Court of Appeals was called upon to determine damages upon the alleged creation of the nuisance of flooding caused by an improper railway cut through a creek bed. The Court of Appeals, in construing the title issue specifically noted that the Ithaca and Owego Railroad was incorporated in 1828 and that by virtue of proceedings had under its act of incorporation it became, as a railroad company, seized of the land upon which the excavation was made. Understand that in the legal vernacular, the term "seized" refers to the Doctrine of Seisin, which is indisputably today known as the fee or the title. Thus, the Court was stating that this statute meant that the railroad company took title and actually owned the land.

Further, the court parsed other language in the act and noted that the obligation to restore the road, highway, stream of water, or watercourse thus intersected to its former state, or in a sufficient manner not to have impaired its usefulness or value to the owner, referred not to the reversion of title or any obligation to restore ownership of the land to the adjacent owners when the railway ceased operations, but it instead referred to the obligation to restore lands disturbed by construction so that their utility as roads and streams was not impaired. Accord, Lake Superior & M. R. Co. v. United States, 93 U.S. 442 (1876). This is, in fact, a very common construction given in respect of such language.

Thus, this question has turned out a rather unique result given the common result of researching railroad titles—we have here both unambiguous prior statute from the 1800s, and a timely case from the highest court in NYS confirming that the natural language in such law meant precisely what it purports to say.

It is also worth noting that the power of NYS to imbue railroad companies with eminent domain powers had been challenged throughout the 1800s, and for many matters arising from 1799 through 1847, the Court of Appeals had ruled that it is within the constitutional power of the NYS legislature to authorize the taking of private property for the purpose of making railroads or other public improvements of like nature, paying the owners of such property a full compensation therefor, whether the improvements be made by the state itself or through the medium of a corporation or joint stock company. See Bloodgood v. Mohawk & Hudson R.R. Co, 1 Lock. Rev. Cas. 118.

Further, the land and title rights of other railroads of that era and in Tompkins County were interpreted similarly, such as the Cayuga Lake Railroad Company (later known as the Lehigh Valley Railroad). See, e.g., Corning v. Lehigh V. R. Co., 14 A.D.2d 156 (4th Dept. 1961). This case also bridges the laws of the 1800s with the 20th Century, as it makes several points here relevant that support answer provided.

First, concurring with the Vermont case and the US Supreme Court, the court recognized that the interest of the railroad company "depends upon what the grant says and, if the grant is a grant in fee simple without condition or limitation, the railroad takes a fee simple absolute." Id., at 161. This case not only is replete with language that supports the opinion proffered by this Memorandum, but it is interpreting a fact situation where, through error or inadvertence, there was never a deed to the railroad company (unlike the present case). None-the-less, the court had little difficulty finding that the railroad still possessed title and was the owner of the land in question.

Other relevant points of this case include the legal point that, even if a recitation of a dollar of consideration is noted, that is indicative of either a gift to the railroad (as, of course, railways were very desirable structures to have crossing one's lands in the 1800s, including as the land values increased) or a purchase by the railroad (as happened here); in either case and none-the-less vesting title in the railroad company. See Id., at 160-161 (citing cases). Any claim that the taking was only valid so long as used for railway purposes was also disposed of by this case. See Id., at 162.

Finally, and compellingly, the court noted that use of the term "right-of-way" was not relevant, determinative, or suggestive of an easement, as opposed to the railroad having fee title, as:

> "The words "right of way" as applied to the land occupied by a railroad line do not necessarily signify that the railroad only has a railroad easement. The term "right of way" has a special significance with respect to railroads very different from the meaning of the term as generally used in real property law. In the latter case, the term "right of way" means an easement giving one the right to make a transitory crossing over the land of another. Obviously, this is not applicable to a railroad with a permanently fixed line of track. A railroad "right of way" means the land occupied by the railroad tracks and the strips of land immediately adjacent to the tracks on each side. The nature of the railroad company's interest in the right of way depends upon the terms of the conveyance by which it was acquired (74 C. J. S., Railroads, § 83). The railroad's interest may be merely a railroad easement if, in the particular case, the agreement or deed expressly or by implication limited the railroad's interest to an easement. On the other hand, the railroad's interest in its right of way may be a fee simple absolute, a fee on special limitation or a fee on condition subsequent, depending upon the terms of the grant under which the railroad acquired the right of way and the intention of the grantor, expressed or implied. The use of the term "right of way" to describe a right of way owned by a railroad in fee is quite common (see 51 C. J., Railroads, § 201, p. 537; 74 C. J. S., Railroads, § 84). See, also, as illustrating the statutory use of the term, the definition of "right of way" in subdivision 10 of section 63 of the Conservation Law. A right of way is there defined as "the land adjacent to the tracks of a railroad * * * owned by them [the railroad company]."

Here, of course, we have a deed vesting title in the railroad company and a NYS Statute that clearly states that fee title is vested in the railroad upon the determination of the commissioners. Therefore, for all of the foregoing reasons, the Laws of 1828, the rights of the I&O RR, and the cases construing what those terms meant then and now all concur that the I&O RR owned the land.

Moreover, such ownership was stated to be up to 100′ wide, 50′ on either side of the tracks, in the original deed taking title by condemnation against Mr. Van Gaasbeck's predecessors in title:

> "…all those several pieces & parcels of land situate in the Counties of Tompkins and Tioga with all & singular the buildings trees timber and other appurtenances thereunto belonging or in any wise appertaining as the same has been located laid out, marked on the ground described and shown to us by the Engineers of said Company and so much of one hundred feet and lie within fifty feet of the center and central line of said Rail Road." *(underlining added)*

Though in this particular area, and upon Mr. Van Gaasbeck's land in particular, prior surveys show title to be 66′ wide—but we get ahead of ourselves. The point here is that the statutory law and the case law show that NYSEG holds title to the land, and thus the easements and other rights granted to the Town of Caroline and others for trail purposes seems valid.

The more interesting part of this research concerns phase two of the research—more specifically abstracting and examining Mr. Van Gaasbeck's title. This produced some surprising results. So let's take a chronologically closer look to full understand what here occurred, as it has legal import, but of a far different nature than as here previously alleged. The owner claims title by deeds filed after "this issue" was "resolved" in his favor, of course begging the question of resolved how and by whom? The actuality here is that these are not "traditional" deeds in that they were deeds from the owners to themselves. The deeds from Burrows to Van Gaasbeck and Mangor dated February 28, 2011 filed as Instrument Number 571958-002, and a later deed from Mangor and Van Gaasbeck to Van Gaasbeck dated June 27, 2012, filed as Instrument Number 593496-001, suddenly create a conveyance and claim of title that the respective grantors never had, reciting as follows:

> "TOGETHER WITH all right, title, and interest in that portion of the DL&W railroad right of way bounded by the above tract and the lands of Virginia Miller on the north, Middaugh Road on the east, the above tract on the south, and the boundary line between the Town of Danby and the Town of Caroline on the west, as described in Book 64 of Deeds at page 376."

Both of these deeds purport to be warranty deeds, but this parcel was never transferred into this chain of title. There is no recitation as to the basis or authority for a claim to land never owned or conveyed, and it thus appears to be wholly self-serving, perhaps in the belief that staking a claim may start a statute of limitations or repose running (which generally does not work against railroads, utilities, or governments). This self-serving declaration of title may most accurately constitute an actionable disparagement of title, but that claim would belong to NYSEG so I will not research further on the liability that may have here been so created.

To fully understand this sudden appearance of a self-created property right, you have to understand what the prior deeds and surveying maps in the Van Gaasbeck chain of title actually recited. So, and merely staying in the 20th and 21st Centuries (having largely covered the 1800s above with the legal and statutory analyses), we start with the 1952 deed from Margaret Ott Bates to Alex C. Slater and Esther T. Slater, predecessors in title. This deed is dated October 23, 1952 and is recorded in Liber 354 of Deeds at Page 222. It transfers lands of the Bates Estate and notably stops at the old railroad fence in the "northeasterly boundary of the right of way of the D. L. & W. Railroad; then *[continues]* southwesterly

along the railroad fence marking said right of way 1654 feet to a point…." Remember, of course, that like highway rights of way in State Route 96, such term "right of way" is here denoting ownership, and not a mere easement.

More simply put, the Grantees Slater were never transferred title to the railroad bed, and this is made even clearer as such deed recited as follows:

> "Excepting and reserving therefrom a right of way for the D. L. & W. Railroad and all existing public highway rights within the boundary of the above described premises"

Referenced further in this deed is a map drawn by Surveyor Carl Crandall dated September 23, 1952, as filed with this deed, and such map clearly shows the exception to the transfer, and the land descriptions as drawn around the railroad bed. This survey map also shows the railroad title as being 4 rods wide—being 66' (one rod is 16.5').

So, Bates and the Bates Estate never understood or believed that they owned the railroad bed, and thus they never transferred such 66' wide swath of land to the buyers Slater. The Slaters also understood they did not own this land. When they transferred the land in 1963 to Frank Rosenblatt, the deed made the same recitation of turning along the old railroad fence line and noted the same exception. It also noted reliance upon the same survey of the Bates Estate Farm. This deed from Slater to Rosenblatt was dated September 9, 1963 and is filed at Liber 446 of deeds at page 1064.

Then Frank Rosenblatt dies and his son Maurice Rosenblatt becomes administrator of his estate and transfers lands out of the estate, including to Van Gaasbeck and Burrows in 2001. Meanwhile other interests in the estate take title, one being Bernice Evans (see, e.g., inheritance declaration in Deed at CD2501, Page 5218). Bernice Evans then transfers her interest into a trust, and the trust and the executor Rosenblatt then transfer two parcels to Van Gaasbeck and Burrows as part of that November 29, 2001, transfer, memorialized by a deed filed at Liber CD2501, Page 639. Both the executor and the trustees understood they did not own title to the railroad bed. This is shown by the deed as it recites a transfer to the "easterly line of the former DL&W Railroad right of way, now premises of New York State Electric & Gas (NYSEG) (429/215)" for parcel 1. It also references the railway title in NYSEG in its Parcel 2 recitations.

Further, as recited in the deed from Bernice Evans to her Trust, the same turn at the railroad fence/ROW occurs and the exceptions on such parcels read as follows:

> "EXCEPTING FROM the foregoing, the former D.L. & W. railroad right way (now owned by New York State Electric & Gas Corporation) crossing the southwest corner of the above described parcel."

and

> "EXCEPTING THEREFROM that portion of the former D.L. & W. railroad right of way (now of New York State Electric & Gas Corporation) within the bounds of the above described premises."

And again, the same reference to the Bates Estate Farm survey map is noted, such map being filed on November 21, 1952, in Book of Maps A-1, Page 22.

Moreover, in the deed from Rosenblatt and the trust to Van Gaasbeck and Burrows, reference is made to a modernized and updated map drawn by TG Miller, dated November 16, 2001, filed concurrently with the deed and filed at Map Drawer QQ, Page 59 (being also filed at Liber CD2501, Page 829). This map also shows separate title and boundaries for the old railroad bed, and confirms it at 66' wide (per scale), and notes title in NYSEG.

Thus, those now claiming ownership adverse to NYSEG were *never* vested in title. In fact, such lands were expressly *not* transferred to them and were excepted. Therefore, these claimants have no valid color or claim of right by which to recite an ownership interest. All the deeds in the chain of title expressly *exclude* the transfer of any interest in and to the old railroad bed.

It is also noted that the original 1928 conveyance recites that the railroad right of way in fee was up to 100' wide, but surveying in this particular area shows a 66' wide swath of land owned first by the railroad and later by NYSEG. Thus, it may be safest to stick to the 66', but investing in more historical research (such as Corps of Engineers files) could establish an actual wider right of ownership (again, that seems a job more aligned with NYSEG's interests, so I went no further). Finally, it is also noted that another of the seemingly incongruous allegations is that the right of way was only 3.6' wide. This seems quite inaccurate and is further belied by references in the Dewitt Historical Society records referencing a survey by Lieutenant W. H. Swift of the U. S Corps of Engineers and noting a track width of 4' 8½" (standard gage). When that railway line was taken over by D. L. & W. the track was re-laid in broad gage and remained even wider, at least up until 1878. (see, e.g., https://ecommons.cornell.edu/bitstream/handle/1813/11518/A History of Railroads in Tompkins County.pdf).

CONCLUSION:

Since these alleged claiming owners were never granted or transferred title, and since the statute and case law verify that the railroad owned the title, the gravamen of the claimants' arguments fail. As previously noted, the legal precedents claimants cite do not apply or do not support the legal assertions juxtaposed thereunder. Further, even if there were an ambiguity the law generally relies upon what those closer in time and space to the confusion believed. Thus, what prior owners actually did is deemed strong proof of what the understanding and intent of such prior grantors was. As demonstrated throughout this chain of title not a single grantor or grantee, prior to the complainants' self-serving grant of title to themselves of lands not possessed, believed that they owned any interest in and to the railroad right of way. For over 180 years all relevant landowners believed that railroad companies, and then NYSEG, owned this land.

Thus, it is the conclusion of this Memorandum and the legal opinion of this author that NYSEG is vested with title and authority to grant unto the municipalities and others an easement for a trail system.