1977

Western Gateway Storage Co. v. Fred G. Treseder And Antonia Treseder, Hls Wlfe, and the United States of America : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

* * * * * * *

WESTERN GATEWAY STORAGE CO.,

Plaintiff/Respondent,

vs.

FRED G. TRESEDER and ANTONIA TRESEDER, his wife, and THE UNITED STATES OF AMERICA,

Defendants/Appellants.

Case No. 14816

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BRIEF OF RESPONDENT

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Appeal from a judgment of the Second Judicial District in and for Weber County, the Honorable John F. Wahlquist, Judge.

* * * * * * *

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RESPONDENT'S BRIEF ON APPEAL

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NATURE OF THE CASE

This suit was filed by Western Gateway Storage Co., a Utah corporation, here called "Gateway", seeking to quiet title in itself to certain real property located in Ogden, Utah, free and clear of a claimed right of way owned by Appellants Treseder.

DISPOSITION IN LOWER COURT

Trial was held July 29 and 30, 1976 before the Honorable John F. Wahlquist sitting without a jury. Pursuant to a Memorandum Decision issued August 3, 1976, judgment was entered in favor of

Gateway and against Treseders and the United States of America on August 6, 1976. A motion for a new trial was filed and argued by Treseders and was denied September 29, 1976. In substance, the trial court held that Treseders had lost any right to the disputed area covered by the right of way.

RELIEF SOUGHT ON APPEAL

Appellants ask this court to reverse the findings and judgment of the trial court and to declare they still own a valid right of way over Gateway property.

STATEMENT OF FACTS

Gateway is a Utah corporation engaged in dry and refrigerated cold storage and warehousing. Since 1950, it has been doing business in a building it constructed in Ogden (R-150) located just west of Wall Avenue, a main north-south artery. Its building is on the north side of 28th Street, adjoining a railroad spur line. North of the Gateway property is an area approximately 240 feet wide and 130 deep, fronting on Doxey Street.

For illustrative purposes, and not drawn to scale, are 2 diagrams showing the lands. Figure 1 purports to show the properties as they were in 1949, when Gateway built its warehouse. The lands fronting Doxey had 6 nearly identical homes, all on narrow lots without driveway or garage. To the rear of each home was a coal shed (R-138, Ex. 18P). Access to the rear of the lots, for

delivery of coal, was by a two-way right of way shown on Figure 1. It is approximately 9 feet wide, goes south from Doxey (servicing the homes fronting on Wall Avenue as well), then curves to go west behind the homes, and then again north to Doxey. Doxey is a ½ block street that terminates at railroad property and services only those lands abutting on the north and south side of Doxey.

Apparently, from early days, the railroad owned at least the west 4 houses, and used them as housing for railroad employees (R-114). The coal trucks could enter one of the entrances from Doxey, get access to whichever of the 6 houses needed, and then proceed on out through the other entrance (or exit) without having to turn around or back up (R-138). Coal deliveries ended with the advent of gas heat to the neighborhood in 1956 (R-138, 48).

During the years after 1956, the 4 houses on the west were razed as they were vacated. Ex. 18-P, a 1962 aerial photo, shows all 6 houses; 19-P, 1970, shows 4 houses; 20-P, 1975, has only the Treseder and Newcomb houses left.

Figure 2 is intended to show the property as it was at time of trial. The entire area north of the original Gateway building and west of Treseder is vacant land, with no marked or improved right of way. The Newcomb and Treseder homes are marked N & T respectively. The area marked ROW is the original easement as it goes south from Doxey and west behind the 2 lots. This easement

was not challenged by the suit and is fully available to Treseder for any purpose of ingress or egress. The lined area is the balance of the original easement as it went west behind the railroad homes, and then north to Doxey. This is the area the trial court ruled upon.

In 1975, Gateway purchased from the railroad company (Ex. 16-P) all of the land north of its building to Doxey Street, except for the Treseder and Newcomb lots. The property comprising the right of way is Gateway land, in addition to the vacant lands formerly occupied by the 4 railroad homes. Gateway proposes to use all of its land west of Treseder to build additional warehouse space (R-89, 90) connected to the existing building. If Treseder has a valid right of way from his property west (lined area of Fig. 2), Gateway cannot do so.

The right of way under attack is limited to that portion west of Treseder. It is appurtenant to both the Newcomb and Treseder property, but none other. Newcomb did not contest vacation of the right of way, so the sole issue here presented is whether Treseder, the dominant estate, has lost the right to maintain and use the lands to the west (lined area in Figure 2) for right of way purposes.

The United States was joined as a co-defendant because of its mortgage on the Treseder lands, including the appurtenant

right of way. It appeared and participated at trial, but has not pursued appeal.

The trial court found this right of way abandoned; also the changed conditions made it unjust and inequitable to require Gateway to keep the right of way open. Additional facts will be set out in the arguments.

POINT ONE

THE TRIAL COURT CORRECTLY FOUND THE EASEMENT ABANDONED

Appellants' Brief, Pages 4 and 6, cited testimony as to use of the easement offered by Appellants' witnesses, and most favorable to his side. There was substantial opposing testimony favorable to Gateway that is not referred to in that brief. As the trial court resolved the facts in Gateway's favor, it is entitled to have the evidence reviewed in the light most favorable to Gateway. Howarth v. Ostengard, 30 U. 2d 183, 515 P. 2d 444, (1973) Del Porto v. Nicolo, 27 U. 2d 286, 495 P. 2d 811 (1972).

James DeVine, President of Gateway, testified he had been familiar with the property since 1949 when the building was erected. He also said storage regulations required a weekly perimeter inspection, and so on a weekly basis, he had looked at the area adjoining Gateway's building on the north, the right of way (R-82). He stated he never saw it used for access to the Treseder or other houses (R-82) and it never bore evidence of use. No one maintained it as

a right of way, and for may years it was incapable of use because of telephone poles erected in the described easement (R-78); piles of junk and debris, growing trees in the easement, and an abandoned car that was left in it for over a year (Exhibits 1P through 15P; R-80, 81). DeVine also stated he had never had a complaint from Treseder about the impassable condition of the right of way, and in fact, DeVine was unaware there was a right of way until after Gateway purchased the land (R-14). (Of course, Gateway had constructive notice by reason of the record title of Treseder).

DeVine's testimony was corroborated and supported by several pictures taken of the area before it was cleaned up by Gateway, showing the impassable condition in detail. It was also supported by the testimony of George W. Carver, Dale P. Nay and Bill Perry, all of whom were familiar with the area on a daily basis for varying, but lengthy periods of time: Carver, 1949-1969; Nay 1972-present, and basic familiarity with the area from 1949-1972; Perry 1949-1968. None of these witnesses could recall seeing the right of way used since the era of coal deliveries. Nay estimated the Chinese Elm trees growing in the disputed area to be 5 to 8 years old, and up to 10 feet high (R-105, 107). The telephone poles blocking the right of way in the east-west portion have been there at least 7 years

(R-115, 84).

The trial court made findings regarding use of the disputed area in a Memorandum Decision as follows (R-38 and 39):

> 10. The sole use of the easement since 1956 by the defendants has been to occasionally take down a board fence and haul building supplies or large trash accumulations away. The fence bordering the easement has no gate, but there is a section which is approximately 6 feet high and 13 feet wide made of solid board, with three braces, that can be unnailed and lifted around to form an entrance way. This has been done only on limited occasions since 1956. It was done the last time the house was remodeled, once to bring in building supplies and once to take them away. It was also done once when a tenant moved out and a new one moved in to haul away a large accumulation of trash. The Court does not believe that the easement has been used with a frequency of more than once every several years because of the great difficulty in opening the rear fence and then renailing it.
>
> 14. The closing of the easement to the west will cause the defendants very slight inconvenience. The use of this easement has been only on a basis of once every few years and could be made from either direction so long as the right-of-way is kept clear of cumulative trash or other blockages such as old cars, etc. The Court believes that a study of the photographs in question and the growth of the foliage indicate that the easement has not been used for through traffic, that is all away around the "U", since it was used as a coal delivery passage. Some of the trees growing in the right-of-way are four inches in diameter, and there is no record of any snow having been removed from the right-of-way.

These findings were fully supported, indeed compelled

by the evidence before the court. They also fully justify the holding of abandonment entered by the court.

It is clear an easement, whether deeded or prescriptive, can be abandoned by the holder. Brown v. Oregon Short Line, 36 U. 257, 102 P. 740 (1909); Anno. 25 A.L.R. 2d 1265. No particular length of time is essential to constitute abandonment, and non-user in itself does not constitute abandonment, but is persuasive evidence on the question of intention to abandon. Perry v. Carey, Ind. 1918, 119 N.E. 1010; Restatement, Property § 504 (d). In addition to non-use, other facts consistent with intent to abandon and useful in determination thereof are allowing the road to be blocked, Hatcher v. Chesner, (Pa. 1966), 221 A. 2d 305; closing off access to the right of way from the dominant tenement, Dahnken v. George Romney & Sons, U. 1947, 111 U. 471, 184 P. 2d 211; allowing the easement to become in a state of disrepair and unusable, Flanagan v. San Marcos Silk Co., (Col. 1951 235 P. 2d 107; and change of conditions that eliminate the need for use of the easement, Brown v. Oregon Short Line, supra.

All of these are present in our case. The way has, since 1956, not been used or maintained. A heavy board fence without a gate in it was erected by Treseder many years ago, making access to the way difficult but not impossible (R-127, 128). The pictorial evidence and testimony portray the right of way

largely impassable for the last several years. Treseder never complained to the power company about its poles in his easement prior to 1976 (R-132) nor to anyone else about its condition (R-134).

The issue of abandonment is factual, not legal. 25 Am. Jur. 2d Easements, S 103. The court will determine intention by all of the relevant evidence, and if there is evidence to support it, the trial court, as finder of the facts, will be upheld. Jensen v. Brooks, Nev. 1973, 503 P. 2d 1224; Flanagan v. San Marcos, supra.

An easement, because of its very nature as a burden upon land, is subject to abandonment more than any other interest in property, Restatement, Property, § 504 (a):

> Rationale. This Section indicates that easements may be abandoned more readily than can most interests in land. That there is an ownership ready to take the benefit resulting from an abandonment of an easement is the probable explanation of the tolerance of the law toward the abandonment of such interests. In many cases, of which the ownership of land in fee is an example, an abandonment, if permitted, would result in a void in the ownership of the affected thing, the filling of which would be largely a question of chance and would probably produce grave uncertainty of title. In such cases, abandonment, if permitted at all, is permitted only under rules stricter than those which prevail in the case of the abandonment of easements. Moreover, the abandonment of an easement, if it produces an extinguishment, will not infrequently result in an increased total use

> of the servient tenement since the uses prevented by the easement may be greater or more productive than any which can be made under it.

Ex. 15-P is a close photograph of the board fence built by Treseder in 1964, some 8 years after the end of coal deliveries. It is seen to be a heavy, sturdy fence indeed, with no gate. The testimony is that a 13 foot long by 6 foot high segment of it can be removed by pulling out the nails attaching it to the posts, and physically carrying it away. It is apparently possible, but difficult for one man to do it. Gateway witnesses had never seen the fence other than intact.

The significance of such evidence is noted in Dahnken v. George Romney & Sons, supra, in a somewhat similar factual setting:

> Under the circumstances of this case Romney's construction or approval of the construction of the Arthur Frank 1941 addition which has no door in the west wall opening on segment "A" is strong evidence of abandonment of segment "A" as an easement appurtenant to the Romney property. (Underlining added).

The Supreme Court noted a door in the south wall however, giving access to segment "A", and as there was no other evidence of abandonment, upheld the trial court finding against abandonment. The Supreme Court went on to say:

> However, there are in this case no equitable issues; therefore, it must be considered as an action at law. Babcock v. Dangerfield, 98 Utah 10, P. 2d 862; Norback v. Board of

Directors, 84 Utah 506, 37 P. 2d 339. Our review in law cases is limited to the determination of whether or not there is competent evidence to support the judgment of the trial court.

Despite Treseder's claim he had no intent to abandon, the evidence of non-use, together with other evidence inconsistent with continued use and ownership of the easement, fully supports the trial court holding of abandonment.

POINT TWO

THE CHANGE OF CONDITIONS SINCE CREATION OF THE EASEMENT SUPPORT THE TRIAL COURT'S JUDGMENT.

When the easement was created, it was to service the rear of the 6 lots and houses, particularly by coal delivery to the storage sheds in the rear. The 2 entrances, and U-shape of the easement provided convenient access for this purpose up until the advent of natural gas in about 1956 (R-138). With the change, usage of the way became infrequent and irregular (R-49). This is accented by Tresederś' act in putting up the high, heavy fence that makes the property almost inaccessible from the way (R-38). With the removal of the 4 railroad houses, there is no reason for Treseder to ever use the way to the west of his property. His access to Doxey is closer and more convenient to the east - which way is unimpaired by the court's ruling.

The trial court found the abandoned portion of the

easement had no economic value to Treseder other than to force Gateway to pay an excessive price to be able to use property it now owns (R-39).

We do not propose to this court adoption of a private form of eminent domain whereby one landowner can obtain property rights held by others simply on the basis he needs the property more or will put it to better use. That is, of course, the function of the market place, and in the market place, there is no rule of law that says a seller of land or property rights must be reasonable.

However, there is a strong body of cases recognizing property rights can be changed, or lost, by reason of changed conditions. This is called the "cessation of purpose" doctrine, and is perhaps best set out in Hudson v. American Oil Co., 152 F. Supp. 757, D.C. Va. 1957; affd. 253 F. 2d 27, 4th Cir. 1957. There a deeded easement was held by several homeowners over Defendant's lands. The easement led from the homes to a public highway. The highway was thereafter vacated, resulting in the easement still existing but leading nowhere, just ending where the public road used to be. The homeowners had alternate routes to use to get where they wanted to go, but as here, sought to prohibit commercial use of the property, asserting the right of way still valid. The court rejected their position, and

declared the deeded easement lost:

> Minor on real property has long been recognized as an authority in Virginia for land problems. In the Second Edition, 1928, Vol. 1, § 106-107, pp. 145-146, the seven methods of extinguishing an easement are referred to and as to the first named method, it is said:
>
> > Easements once created may be extinguished in the following ways:
> > (1) By a cessation of the purposes for which the easement was created;
> > * * *
> >
> > If the particular purpose for which the easement is granted isfulfilled or otherwise ceases to exist, the easement also falls to the ground.
> >
> > In determining questions of this sort, the terms of the grant, or, if it be implied, the circumstances for which the implication arises, are to be looked to in order to ascertain the scope and extent of the easement* * *

Such is the rule set forth in 17 Am. Jur. Easements § 137, p. 1023, and 28 C.J.S. Easements § 54 a, p. 718. Cases from other states similarly support this view. Holden v. Palitz, 2 Misc. 2d 433, 154 N.Y.S. 2d 302 (involving the extinguishment of an easement by reason of the abandonment and relocation of a street); McGiffin v. City of Gatlinburg, 195 Tenn. 396, 260 S.W. 2d 152; Makepeace Bros., Inc. v. Town of Barnstable, 292 Mass. 518, 198 N.E. 922; Central Wharf & Wet Dock Corp. v. Proprietors of India Wharf, 123 Mass. 567; Hancock v. Wentworth, 5 Metc., Mass. 446; Town of Freedom v. Norris, 128 Ind. 377, 27 N.E. 869; Beim v. Carlson, 209 Iowa, 227 N.W. 421. Indeed, in complainants' brief no authorities are cited to the contrary.

It is elementary that an easement is one of the rights

which may be extinguished or destroyed by act of God, operation of law, or act of the party. Washburn on Easements and Servitudes, 4 Ed., pp. 699-703. As is said in Tiffany on Real Property, 3rd Ed., Vol 3, § 817, pp. 368-369:

> It has been said that when an easement is created for a particular purpose, it comes to an end upon a cessation of that purpose, which means, apparently, that an easement which is created to endure only so long as a particular purpose is subserved by its exercise, comes to an end which it can no longer subserve such purpose. The question then is, in each case, what is the particular purpose to be subserved by the easement, and this, in the case of an easement created by grant, is a question of intention.

The Virginia Supreme Court, in the identical fact situation, reached the same conclusion, American Oil Co., v. Leamon, (Va. 1958) 101 S.E. 2d 540.

Siferd v. Stambor, 214 N.E.2 106, Ohio 1966, approved this same doctrine on a party-wall easement:

> If it is unreasonable to confer upon either party the right to arbitrarily terminate it at any time, it is equally unreasonable to permit either, from sheer obstinacy or mere caprice, to insist upon its continuance under a material change of the circumstances.

Also see 25 Am. Jur. 2d, Easements, § 106.

As earlier noted, this court in Brown v. Oregon Short Line, supra, recognized the importance of changing conditions on the issue of abandonment. There, as here, the houses served

by the easement had been razed, and industrial usage was made of the area formerly used for access to the homes.

The trial court found, after full argument and briefing on the motion for new trial, (R-55, 56, 57):

(1) The trial findings were supported by the evidence.

(2) The easement was for delivery of coal and has not been used for that purpose since the 1950's.

(3) The easement has no present value or useful purpose to Treseder.

(4) Treseder has full access for all necessary or useful purposes with the remaining easement.

CONCLUSION

We respectfully submit the trial court correctly ruled upon the evidence and the law. An easement is a burden upon lands; it should not be perpetuated for all time without attending some beneficial or useful purpose to the dominant owner. This area of easement lost its purpose, became abandoned by the owners, and should not continue to burden the property to the west.

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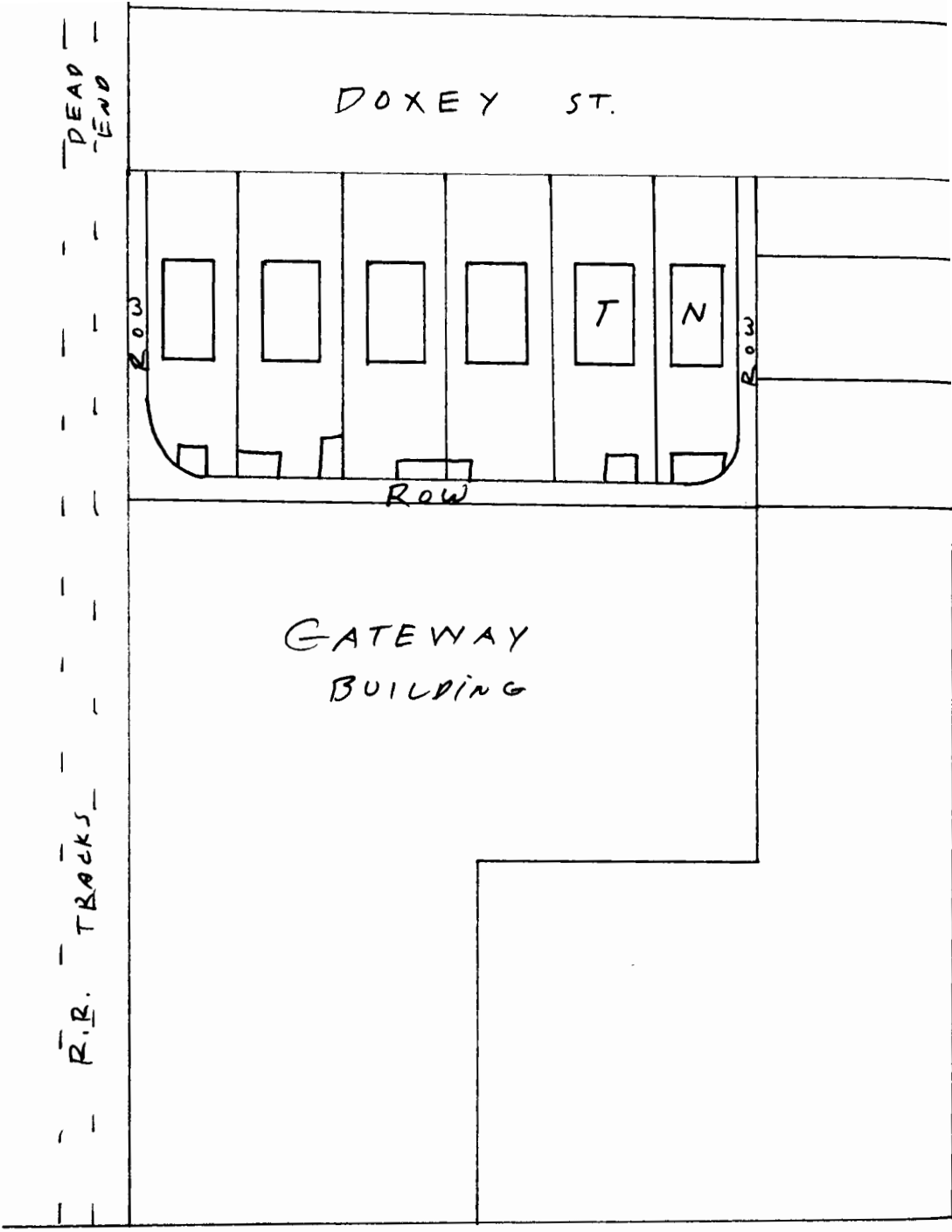

Fig.

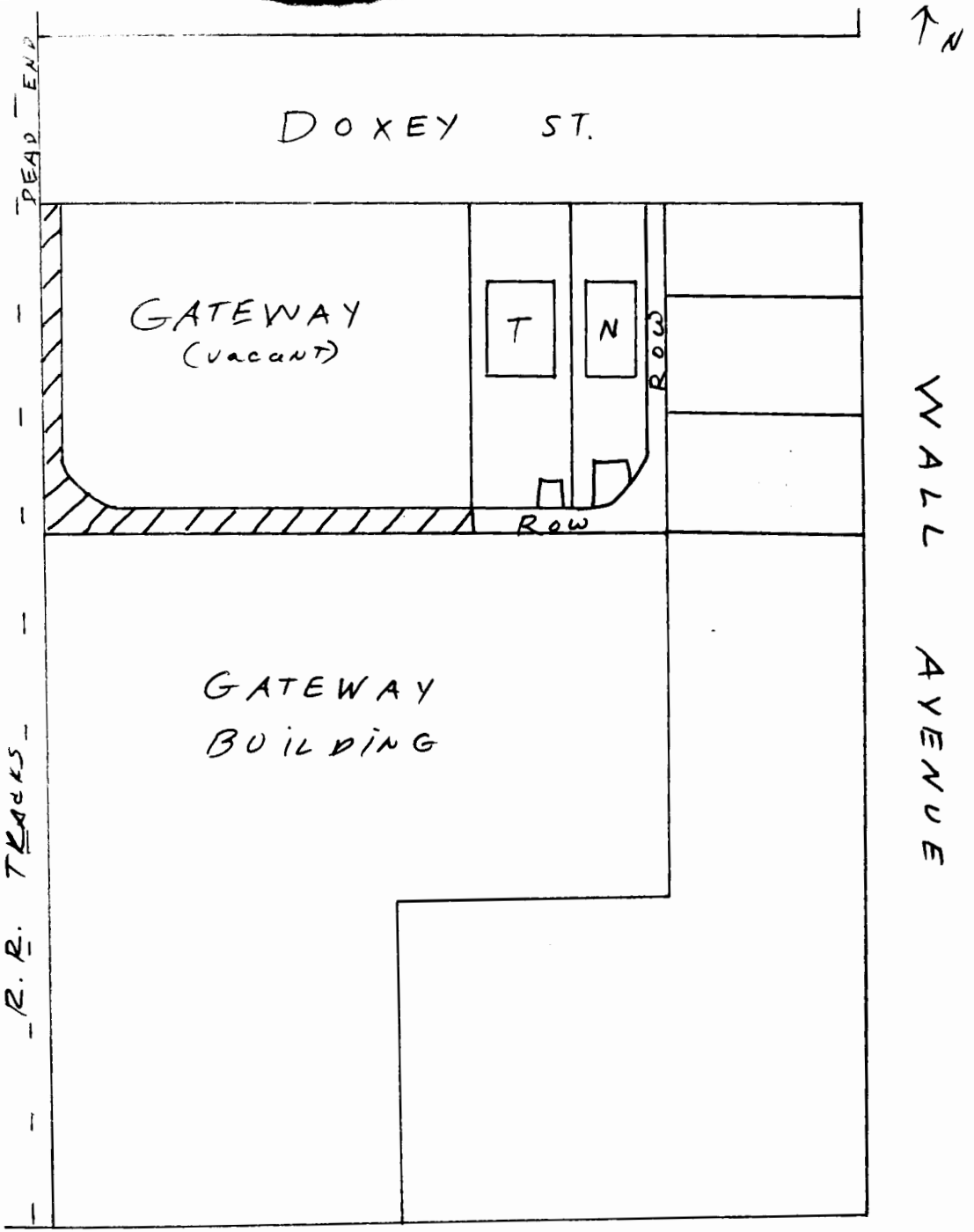

Fig. 2