

## ROAD AND ACCESS LAW: SUCCESSFULLY HANDLING DISPUTES

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### *ABANDONING AND VACATING ROADS*

#### **I. Introduction**

Local governments can own public streets and highways outright in fee title or as a public service easement. Under California law county and city governments have the power to vacate or abandon publicly owned roads. Local legislative bodies can act on their own volition to terminate ownership or upon petition by interested citizens. While statutes specifically detail these procedures, such formal action may not always be required. Courts also have the power to terminate government ownership if it is proven that the governmental entity has demonstrated the intent to abandon the property in favor of another owner.

Privately owned roads are abandoned or vacated by common law rules of property. California has accepted the doctrine of prescriptive rights, for example, where one land owner can establish property rights by continuous use of another's private roadway. Legal counsel can assist landowners in navigating this detailed set of rules to protect or establish property rights to roads or access routes.

#### **II. Vacation of Public Roads**

The statutory authority to vacate public streets, highways, and public service easements is in the 1980 "Public Streets, Highways, and Service Easements Vacation Law."<sup>2</sup> This comprehensive statute was derived from the more general authority that counties have to abandon highways by orders of their boards of supervisors, operation of law, or by court judgment.<sup>3</sup> The "vacation law," *inter alia*, broadens the definition of counties to include city governments.

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<sup>2</sup> Sts & Hy. Code § 8300 *et seq.*, enacted 1980. Note: Section 8300 supersedes former Section 8300 (Street Vacation Act of 1941) and former Government Code Section 50430 (Public Service Easements Vacation Law).

<sup>3</sup> Sts. & Hy. Code, § 901.

## **A. When Should a Statutory Vacation Be Initiated?**

Sections 8320 and 8321, Streets & Highways Code, include a specific procedure that local governments must follow to vacate public ownership of a road. The legislative body of a local government may use a hearing procedure, or it may proceed in summary fashion to vacate a road. Alternatively, persons interested in terminating public control over a road may petition or request the hearing procedure.<sup>4</sup> If the government owns fee title to the road, and the petition process is used, at least ten persons must join in the petition, and two of them must be residents of the road district in issue. If the government only owns the road as a public service easement, the petition needs only five persons to join.<sup>5</sup>

### **1. The Hearing**

The hearing procedure vacating a roadway requires certain formalities. The legislative body must begin by posting conspicuous notices along the property adjoining the road to be vacated, and must publish notice in a local newspaper.<sup>6</sup> The hearing consists of a presentation of evidence by all interested persons.<sup>7</sup> Termination will be approved by resolution of the county board of supervisors or the city council if the road is found to be “unnecessary for present or prospective public use.”<sup>8</sup> The resolution may conditions that must be satisfied before it takes effect.<sup>9</sup> Once the resolution is recorded in the county records office, vacation of the road is complete.<sup>10</sup>

### **2. Summary Vacation**

Local governments can proceed without a hearing by “summary vacation” in certain cases. The legislative body (board of supervisors or city council) still must initiate the process with a formal resolution. But, a hearing is not required. This form of vacation is an option when the previous road has been superceded by relocation.

However, the statute requires a hearing if the vacating of the road would cut off all access to a person’s property or would terminate a public service easement that has

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<sup>4</sup> Sts. & Hy. Code, § 8320.

<sup>5</sup> Sts. & Hy. Code, § 8321.

<sup>6</sup> Sts. & Hy. Code, § 8322, 8323.

<sup>7</sup> Sts. & Hy. Code, § 8324(a).

<sup>8</sup> Sts. & Hy. Code, § 8324(b).

<sup>9</sup> *Id.*

<sup>10</sup> Sts. & Hy. Code, § 8325.

not been abandoned.<sup>11</sup> This is to protect landowners who might be harmed by a reversion to private control

In addition, special attention is given to utility companies that hold easements along public roads. A hearing is required to vacate a public road if there are in-place public utility facilities being used that the vacating would affect.<sup>12</sup> The reason for this? When a road is terminated all public utility easements are also terminated (unless specifically reserved).<sup>13</sup>

Lastly, the legislative body may proceed summarily if the road

- has been impassible for five years,
- no public funds have been expended on it during that period,
- is an “excess right of way,” or
- dead ends into another’s property.<sup>14</sup>

Once the process is initiated the board or council resolution must include certain formalities and be recorded for the vacation or abandonment to be complete.<sup>15</sup>

### **3. Vacation by Operation of Law**

Despite the fact that the law provides a specific procedure to vacate roads, the court decisions are in conflict over whether the governing body must act to abandon public ownership. Courts have given differing constructions to the term “operation of law,”<sup>16</sup> found in the statute.

A strict reading holds that only a formal act of a board of supervisors can terminate public ownership. This view prevailed in the 1947 decision in *San Diego County v. California Water & Tel. Co.*<sup>2</sup> where the Supreme Court found that without a

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<sup>11</sup> Sts. & Hy. Code, § 8330, 8333(a).

<sup>12</sup> Sts. & Hy. Code, § 8333, 8334.5.

<sup>13</sup> Sts. & Hy. Code, § 8350.

<sup>14</sup> Sts. & Hy. Code, § 8331, 8334.

<sup>15</sup> Sts. & Hy. Code, § 8335.

<sup>16</sup> Miller and Starr, 6 *Cal. Real Estate* § 15:80 (3d ed.), “The reference to ‘operation of law’ has created a conflict in the decisions whether an act by the governing body of the county is required for the abandonment of a county road easement.”

formal resolution a public easement had not been terminated even though a street had been relocated.<sup>17</sup>

Later decisions have given a broader reading to the statutory law to find that no formal proceeding for the termination of a road is required. The statutory law has always authorized a county to terminate its interest by order, operation of law, or judgment from a court of competent jurisdiction.<sup>18</sup>

Thus, where a developer relied on a county board's oral permission to block a public road, the court found that the county had lost its interest in the parcel.<sup>19</sup> It distinguished *California Water & Tel. Co.* by holding that the decision "did not acknowledge the dual methods of abandonment provided by the Streets and Highways Code." The *Palo Alto Investment Co.* court then used the doctrine of equitable estoppel to bar the County's claim that a formal procedure was required to terminate a County-owned road. In the court's eyes, it was sufficient that the landowner had relied on the County's statement. The result is that the courts retain their powers to give equitable relief, even though the statutory scheme favors a formal procedure.

An important limitation on decisions such as *Palo Alto Investment Co.* is that the courts still insist that the legislative body exhibit the intent to abandon a roadway or other parcel. For instance, when a private ferry operator stopped using and subsequently fenced off a public city road, the fact that the fence prevented use was insufficient to terminate the city's rights. The court found that because the operator was a private party there had been no acts exhibited by the public authorities that could constitute abandonment.<sup>20</sup> Therefore, for both public and private roads, the courts will look for nonuse coupled with an expressed intent to abandon before ruling that an owner has abandoned property in favor of another user.

## **B. Abandoned Road Bed: Who Owns It? Who Can Use It?**

Once a public road has been vacated by one of the methods described above, the effect depends on the nature of the interest relinquished by the governmental entity. If a city owned a public service easement on the property the relinquished property will revert

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<sup>17</sup> *San Diego County v. California Water & Tel. Co.* (1947) 30 Cal. 2d 817, 822. (The Court considered whether the county was estopped on the facts of the case.)

<sup>18</sup> Sts. & Hy. Code, § 901.

<sup>19</sup> *Palo Alto Inv. Co. v. Placer County* (1969) 269 Cal. App. 2d 363, 369.

<sup>20</sup> *Humboldt County v. Van Duzer* (1920) 48 Cal. App. 640, 642-644. ("To effect an abandonment of an easement or public use of property acquired by grant to the public authorities, the intention to abandon must be clearly manifest. Mere nonuser of an easement acquired by grant does not amount to an abandonment.") Followed in *The Colonies Partners, L.P. v. San Bernardino County Flood Control Dist.*, No. EO34524 (4<sup>th</sup> DCA, July 29, 2005) 2005 WL 1793908.

back to the owner of the servient estate, free from the easement.<sup>21</sup> If the road existed between two properties, there is a rebuttable presumption that each owner owns land to the center of the abandoned roadway.<sup>22</sup>

If the local government owned fee title to the vacated property, it may sell or exchange the property (if no longer needed).<sup>23</sup> The buyer pays the purchase price to the local government. The law requires that such funds are to be used for projects with the same “purposes” as the legislative body designates.<sup>24</sup> Additionally, the termination of a public road has no effect any other private right of use in, to, or over the lands that contained the prior roadway.<sup>25</sup>

### **III. How To Initiate the Abandonment Process**

The following outline recaps the discussion. By reference to the “Public Streets, Highways, and Service Easements Vacation Law,” §8300 *et seq.*, Streets & Highways Code, this overview shows the critical steps for property owners to establish rights against a public entity to a vacated roadbed.

#### ***“A Checklist for Abandonment”***

##### **A. Does City or County Own a Public Service Easement?**

1. If not, go to 2 below

2. Petition checklist

\_\_\_ Five or more freeholders, one is resident of township (§8321)

3. Procedure checklist:

\_\_\_ Notice containing description published for two weeks (§8322)

\_\_\_ Notice for two weeks along street to be vacated (§8323)

\_\_\_ No hearing required if:

- Not used for purposes for 5 years (§8333)

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<sup>21</sup> Sts. & Hy. Code, § 8351; The servient estate holder is the title owner to the property who previously had his or her land burdened by the easement to the city or county government.

<sup>22</sup> Cal. Civ. Code, § 831.

<sup>23</sup> Sts. & Hy. Code, § 8355.

<sup>24</sup> Sts. & Hy. Code, § 8357.

<sup>25</sup> Sts. & Hy. Code, § 8352(a).

- Acquired less than 5 yrs and more than 1 year ago and not used continuously (§8333)
- Superseded by relocation and no other public facilities within easement (§8333)

\_\_\_\_ Hearing with evidence from interested persons (§8324)

\_\_\_\_ If street is “unnecessary” it will be terminated (§8324)

4. Effect:

\_\_\_\_ Servient tenement holder obtains title upon recording of resolution (§8351)

**B. City or County Owns Road By Title?**

1. Petition:

\_\_\_\_ Ten or more freeholders, two residents of road district (§8321(b))

2. Procedure:

\_\_\_\_ Same notice and hearing requirements as above (§8320-§8324)

\_\_\_\_ No hearing required if:

- Street is superseded by relocation and termination will not cut off all access to a landowner (§8330)
- Street impassable for 5 years and no public money spent (§8331)
- Excess Right of Way (§8334)
- Dead End (§8334)

3. Effect:

\_\_\_\_ Legislative body may sell or exchange property (§8355)

**IV. Termination of Private Easements**

An easement to a roadbed may also be held by a private individual. Ownership of an easement does not mean indefinite rights to a parcel of property. As with any private property, a person may lose his or her interest through a variety of legal mechanisms. Some landowners may seek termination of private easements in order to restore value to

their property. Additionally, adverse possession may establish or terminate easements on private property. Property owners must take extreme care to ensure the protection of their property against other parties, even if invited.

It is common for landowners to agree casually (nonbinding “gentlemen’s agreements”) about the use of an access road and then suffer the loss of their exclusive rights to their property.

### **A. The Test of a Common Law Abandonment**

The common law test for abandonment focuses on the intent of the easement holder. If a court finds that he had no intention to continue the use of the easement, the interest in the property will revert to the owner of the servient estate. Nonuse alone does not constitute abandonment in California. Under California law, abandonment requires non-use accompanied by unequivocal and decisive acts showing the intent to abandon.<sup>26</sup>

Abandonment of easements commonly occurs when they are not maintained. In the case of a water pipeline, a court held that the owner had abandoned it when he obtained another source and failed to fix the old pipe for 16 years. The owner thereafter sold the dominant tenement without reserving the easement, and the new owner proved the lack of maintenance evidenced the intent to abandon.<sup>27</sup>

Similarly, easements for roadways should always be maintained to protect the owner from losing his rights. In one case, the owners of the servient and dominant tenements who both used the road had a quarrel. Each built a fence cutting the right of way. The dominant tenement owner built another road for access to his property. A flood then destroyed the old road at both ends. Neither of the parties used the road for more than a decade. The court held that the easement had been abandoned.<sup>28</sup>

In the case of abandoned railroad beds, the California courts have loosened the intent requirement when the extent of nonuse and disrepair is obvious. So, in one case the court terminated an easement because tracks had been removed and not subsequently built on for 50 years.<sup>29</sup>

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<sup>26</sup> *Pacific Gas & Elec. Co. v. Zuckerman* (1987)189 Cal. App. 3d 1113, 1145, cited in *United States v. Crawford* (9<sup>th</sup> Cir. 2003) 323 F.3d. 700.

<sup>27</sup> *Flanagan v. San Marcos Silk Co.* (1951) 106 Cal.App.2d 458, 460-463, 464, cited as to proof in *Vandeweghe v. Midpeninsula Regional Open Space Dist.*, No. HO28408 (3d DCA Feb. 7, 2006), 2006 WL 290481.

<sup>28</sup> *McCormick v. McNally* (1950) 98 Cal.App.2d 602, 604.

<sup>29</sup> *Johnson v. Ocean Shore Railroad Co.* (1971)16 Cal.App.3d 429, 432, 433. See also *Home Real Estate Co. v. Los Angeles Pac. Co.* (1912) 163 Cal. 710, 715, 716; *Lake Merced Golf and Country Club v. Ocean Shore Railroad Co.* (1962) 206 Cal.App.2d 421, 438.

Once a private easement is terminated, the original fee owner of the property regains all his rights to the property. Of course, a potential issue for the owner is that the easement will still appear in the public record. So, even if it is clear that an easement has been abandoned, the owner should take steps to ensure the marketability of his or her title. The common way this is done is through an action to quiet title in the owner of the servient tenement against the abandoning party.

### **B. What Must Be in Place for Adverse Possession and Use to Occur?**

California courts have long adhered to the common law test for adverse possession. Like any other interest in property, an easement can be terminated if the servient tenement owner proves:

- (1) actual possession;
- (2) open and notorious use;
- (3) continuous and uninterrupted use for five years;
- (4) use and possession hostile and adverse to the true owner's title;
- (5) under color of title or claim of right; and
- (6) payment of taxes.<sup>30</sup>

Courts in California commonly deny claims for adverse possession if the retaking is merely permissive.<sup>31</sup> Hostile possession requires that the owner be adverse to the rights of the person with the "true right." This was clear for example, when a landowner physically prevented entrance to an easement road by constructing a gate.<sup>32</sup>

Additionally, a successful claim for adverse possession requires interference with its practical use. One California court found that giving permission to tenants to park in the easement of another was insufficient. It reasoned that the time, place, and manner of the parking did not interfere substantially with its ordinary use.<sup>33</sup>

Just as an easement can be terminated by the owner of the servient property, it can be established on a property previously free from such encumbrance. This is what is

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<sup>30</sup> *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal. App.4th 1798, 1803; California courts may sometimes relax these requirements to accomplish the purpose of the rule. The payment of taxes may not be required, for instance, if the adverse owner can prove that they maintained possession of the land, improved it, and the record owner did not object to the adverse owner's improvements or possession. *Drew v. Mumford* (1958) 160 Cal.App.2d 271.

<sup>31</sup> See, e.g., *Clark v. Redlich* (1957) 147 Cal.App.2d 500, 507, 508.

<sup>32</sup> *Sevier v. Locher* (1990) 222 Cal.App.3d 1082; *Popovich v. O'Neal* (1963) 219 Cal.App.2d 553, 556.

<sup>33</sup> *Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 435-437.

known as a “prescriptive easement.” This interest is established in the same manner as described above, but can be accomplished by any party.

In 1965 California enacted a law which provided a method for property owners to protect against others establishing prescriptive rights to use their land. Section 1008 of the Civil Code states:

“No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows:

*‘Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.’<sup>34</sup>*

Posting such signs can be a nearly sure proof way to protect against prescriptive claims. Owners of property must follow the instructions explicitly, however. One appeals court found that the property owner had not done enough to bar prescriptive claims because its tenant posted the Section 1008 signs.<sup>35</sup> The statute requires the owner of the property to post the signs.

One should keep in mind that an individual cannot obtain an easement by prescription against the public. If an individual does succeed in blocking public use to a street, however, the individual may acquire a greater right of use with respect to other private rights in the street.<sup>36</sup>

The California Civil Code follows common law in providing several ways for a landowner to prove the extinguishment of an easement.<sup>37</sup> First, an easement is terminated if there is a merger of the servient and dominant estates. An example is where an access road through one property serves another property, and one of the property owners buys the other’s property. Termination can also occur if the servient tenement is destroyed, if the easement condemned, or by estoppel if one party relies on the other’s assurances that the easement has been terminated. Another way for extinguishment to occur is when the owner of the easement acts in a manner incompatible with the nature of the easement.

Lastly, the origins of the easement may be relevant. Easements can be created by express grant or by implication. For example, an implied easement can be found to exist by necessity. If, for example, a property owner has no means of accessing a home

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<sup>34</sup> Civ. Code, § 1008.

<sup>35</sup> *Aaron v. Dunham* (2006) 137 Cal.App.4th 1244.

<sup>36</sup> *Abar v. Rogers* (1972) 23 Cal.App.3d 506, 511-513.

<sup>37</sup> Civ. Code, § 811.

without making use of another's property, an easement may be created. This type of easement will be terminated by statute if the reason for that necessity ceases.

## **V. Conclusion**

The issue of ownership over public and private roads plays an increasingly important role in the continuing development of California. Rapidly changing land use patterns often can overwhelm local legislative bodies and private landowners. Understanding the mechanisms for terminating ownership can be useful to ensure the marketability of title to one's property and ensure continued access for future owners.