

MEMORANDUM

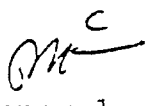
State of Alaska

TO: James E. Sandberg
Chief, Right-of-Way
Department of Transportation
and Public Facilities

DATE: January 11, 1983

FILE NO: 166-426-83

TELEPHONE NO:

FROM: Donald W. McClintock 
Assistant Attorney General
Department of Law-Anchorage
Transportation Section

SUBJECT: Proj. RS-0558(1)
Eagle River Urban
relinquishment

By memorandum of December 13, 1982, you have requested an opinion as to the ramifications of the vacation of excess right-of-way along the Glenn Highway passing through the Debora Subdivision. You have also inquired as to the most expeditious manner for the state to dispose of the excess right-of-way.

Questions Presented

1. What legal interests does the state possess in the dedicated right-of-way which it can vacate?
2. Should the department vacate its excess right-of-way, would title to the vacated area go to the abutting landowners or revert back to the original dedicator?

Short Answer

The dedication, if it exists, probably creates an easement. However, the same rights the public has to the right-of-way are shared in a private capacity by the abutting lot owners. Thus, the vacation of the public easement would not terminate their private rights; i.e., if the original dedicator reappeared to claim the excess right-of-way unencumbered by the public easement, he would still be estopped from denying private access to the abutters.

A solution, then, would be to quit claim our interest, whatever that may be, and allow the abutters to perfect their title adversely, if need be, against the original dedicator.

Facts

The facts available are relatively few. We know that PLO 601 of August 10, 1949, withdrew from appropriation 300 feet along the Glenn Highway that by PLO 1613 of April 7, 1956, and S.O. 2665 of October 16, 1951, was established as an easement for highway purposes. It is not clear, however, when patent to Debora Subdivision was granted; it is assumed for the purposes of this discussion that the PLO 601 withdrawal was effective.

James E. Sandberg
Dept. of Transp./Public Fac.
166-426-83

January 11, 1983
Page 2

The plat you have shown me shows that on August 17, 1953, Ermine Hett recorded the plat of Debora Subdivision. The plat does not contain any language of intent to dedicate, nor was it ever approved or accepted for dedication. Other than the sketch showing lots, the Glenn Highway, Eleanora Street, and Juanita Street, the plat is bare with the exception of references to utility easements and two 25-foot road easements. As we have discussed, the dimensions platted for the Glenn Highway coincide with the PLO 601 easement -- 105 feet of each side of the centerline.

Analysis

Because so many of the questions raised herein turn on the facts, and our grasp of the relevant facts is impaired by the passage of time, this analysis is more of an outline of relevant law than any firm opinion.

Authority to vacate land is provided by AS 19.05.070:

Vacating and disposing of land and rights in land.

(a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out by him in the deed.

(b) If the department determines that land or rights in land acquired by the department are no longer necessary for highway purposes the department may:

(1) transfer the land or rights in land to the Department of Natural Resources for disposal, or

(2) sell, contract or sell, lease, or exchange land or rights in land according to terms, standards and conditions established by the commissioner.

(c) Proceeds received from disposal of land or rights in land as authorized by this section shall be credited to the funds from which the purchase of the land was made originally.

The initial question is what interest in land will the department vacate and convey to abutting landowners. The hornbook rule is that dedications accomplished by statute generally convey a fee simple to the public, whereas a common-law dedication conveys an easement with the fee left to the dedicator. 6A R. Powell, Law of Real Property, ¶ 926[3] at 84-101-102 (1982). Neither the Alaska Supreme Court nor our statutes have directly addressed this question.

At the time the Debora Subdivision plat was filed, ch. 115, SLA 1953 was in effect (see generally AS 40.15.040-.190). That Act provided for a statutory method of dedication while subdividing property. Although the Act did not specify the interest conveyed by a dedication, i.e., fee versus easement, it did provide that upon vacation the land inured to the abutting landowners of a vacated street, inferring that a fee had been dedicated. AS 40.15.140-.180, dealing with vacation of dedicated streets, was repealed by sec. 1, ch. 118, SLA 1972. That Act in turn enacted AS 29.33.240, which again gave title to vacated streets to abutting landowners in equal proportions in a platted subdivision.

The foregoing provides some support for the argument that the intent of the legislature was that a dedication of a street convey a fee interest; otherwise, its provision for conveyance of title to abutting landowners upon vacation would be problematic given that the fee encumbered by the easement would still be owned by the dedicator.

Unfortunately, this plat does not meet the requirements of AS 40.15 to effect a statutory dedication. The plat lacks the statutory magic words showing intent to dedicate, an offer to the appropriate governmental entity of the dedication, and its acceptance thereof. These deficiencies are fatal to a finding of a statutory dedication. State of Alaska v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981).

James E. Sandberg
Dept. of Transp./Public Fac.
166-426-83

January 11, 1983
Page 4

Common-law dedication requires only an objectively manifested offer to dedicate and a valid acceptance by the public. Acceptance can be shown through formal official action or by public use consistent with the offer of dedication or by substantial reliance on the offer of dedication that would create an estoppel. Fairbanks Lodge, 633 P.2d at 1380.

An initial problem with finding the appropriate intent to dedicate is the coincidence that the Glenn Highway was platted to the same width as the PLO 601 easement. It is factually possible for Mr. Hett to claim he was only allowing for the PLO 601 easement and had no intent to dedicate the land.

However, an offer to dedicate can also be established by the filing of a subdivision plat followed by the selling of lots with reference thereto. The sale of lots with reference to the plat is sufficient to establish an offer to dedicate. R. Powell, supra, ¶ 926[2] at 84-90-92.

An acceptance by a governmental entity can be proved by conduct such as maintenance or improvement of the Glenn Highway. Thus, the history of improvement of the Glenn Highway could determine whether there was an acceptance of the public dedication. Any formal pronouncement by the state of its rights to the right-of-way could also establish an acceptance of the offer.

Where only part of a dedicated right-of-way is used and maintained, there is a split in jurisdictions whether the entire dedication is effective or only that portion which is used. Compare Corbin v. Cherokee Realty Co., 91 S.E.2d 542 (S.C. 1956); May v. Whitlow, 111 S.E.2d 804 (Va. 1960) with Stringer v. Willingham, 71 S.E.2d 258 (Ga. App. 1952); City of Eugene v. Garrett, 169 P. 649 (Or. 1918). In light of my conclusion, I see no need to further explore this.

Assuming there was a dedication, it is a common-law dedication and the question becomes whether only an easement was conveyed. I cannot predict how the Alaska Supreme Court will determine the question. Very tenuous dicta in some Alaska cases suggest that it is an easement. Anderson v. Edwards, 625 P.2d 282, 284 n.1 (Alaska 1981) (AS 19.10.010 section line easements); Olson v. McRae, 389 P.2d 576 (Alaska 1964) (dedicated a right-of-way; a right-of-way has been held in Wessells v. State, 562 P.2d 1042, 1046 n.5 (Alaska 1977), to be an easement); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) ("privilege of use").

On the other hand, the court could decide that it is a question for the jury whether the intent behind the dedication was to convey a fee or an easement.

One positive point is that a vacation should not affect any private rights of access. A subdivision lot owner obtains a private easement to streets shown on the plat -- their rights are not affected by a vacation. Petition of Englehardt, 118 N.W.2d 242 (Mich. 1969); Highway Holding Co. v. Yara Engineering Corp., 123 A.2d 511 (N.J. 1956); R. Powell, supra, ¶ 926[2] at 84-91.

Conclusion

What the foregoing demonstrates is that the nature of the interest in the excess Glenn Highway right-of-way is subject to great uncertainty both due to insufficient facts and a lack of controlling Alaska law.

I suggest one possible practical solution for your consideration. The state should, under AS 19.05.070, vacate the excess land to the abutting landowners. The commissioners' deed must be a quitclaim deed as we can make no representations as to title. The grantees then may start their open and hostile use, which will allow them to perfect their title by adverse possession. The abutting landowners also must be advised about the questionable status of their title to the vacated right-of-way.

Another alternative, but more expensive, is a quiet title action. I will require a title search and a legal description plus the assistance of one of your staff to investigate facts to file the complaint should you choose this alternative.

You probably should require the abutting landowner to replat the subdivision. See AS 29.33.200-.240 for the procedures to be followed in a petition by the majority of the landowners affected by the replat. I also suggest that the land be vacated in equal proportions to the lots so that the vacation is in technical compliance with AS 29.33.240 in the event that we may be able to use that section for authority for the disposition of vacated rights-of-way.

James E. Sandberg
Dept. of Transp./Public Fac.
166-426-83

January 11, 1983
Page 6

Finally, you need to give public notice of the vacation. Alaska Constitution article VIII, section 10, requires public notice of any disposal of state lands or interest therein.

Please call so we can discuss this further.

DWM/sls/vrb