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MEMORANDUM State of Alaska

TO: John F. Bennett, RLS
Right-of-Way Engineering
Northern Region

DATE: December 29, 1987

FILE NO:

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CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

THRU:

SUBJECT: Badger Road Right-of-Way Project No. RS-0620(6)

FROM: Paul R. Lyle
Assistant Attorney General

You have requested my advice concerning the applicability of the doctrines of "boundary by acquiescence" and "implied dedication" to a right-of-way boundary incorrectly set on portions of Badger Road. The right-of-way boundary was apparently incorrectly set on a 2.4 mile stretch of Badger Road when monuments, placed by DOT/PF in 1962 or 1963, were placed on a 5-foot offset (as-built) centerline rather than the actual surveyed centerline of Badger Road.

In my opinion, neither the doctrine of boundary by acquiescence or implied dedication are applicable to the problem you present. Condemnees, who will have to be advised how DOT/PF calculated its "takes," will likely challenge the "takes" based on the application of either doctrine. Our chances of success if we pursued either theory in court would be marginal.

The following facts are taken from your memoranda dated October 23, 1987 and November 12, 1987.

The last major Badger Road right-of-way project was produced in 1960-61. For the most part the right-of-way acquisition was to be 50 feet on each side of the centerline. However, during construction two segments of road totalling approximately 2.4 miles in length were shifted 5 feet to the right of the planned centerline. This new alignment called the "zero" line was then monumented at PC's and PT's as was the remainder of the unchanged original alignment.

The majority of the subdivisions along this 2.4 mile section were developed subsequent to the 1961 construction project. The Badger Road right-of-way for most of those subdivisions was established as 50 feet on each side of the "monumented" centerline. The right-of-way should have been established at 55 feet left and 45 feet right of centerline. DOT/PF was responsible for placing the centerline monuments.

Your review of conveyance documents indicates that all of the conveyance documents are written in relation to the centerline except for two conveyances which were revised due to the major realignment during construction. These two conveyances describe the take as being 50 feet each side of the "0_1" line which was the 5-foot offset line.

The recorded right-of-way plat maps of the 1961 project show only the actual centerline, not the as-built centerline. It was on the basis of these recorded plat maps that subdividers prepared their subdivision plat maps. Many of the conveyances to present landowners make reference to a block and lot number as shown on the recorded plat of the subdivision.

Therefore, the conveyance documents give us three cases to evaluate to establish the boundary of the right-of-way:

Case 1
Conveyance related to original centerline. Original centerline monumented. Therefore, the right-of-way is 50 feet each side of the monumented centerline.

Case 2
Conveyance related to original centerline. Five-foot offset line monumented. Therefore, right-of-way should be 55 feet left and 45 feet right of the monumented centerline. However, the documents state that the right-of-way is 50 feet on either side of the centerline.

Case 3
Conveyance related to 5-foot offset centerline. Five-foot offset centerline monumented. Therefore, right-of-way 50 feet each side of the 5-foot offset centerline is established.

In case no. 1 we should have no problem establishing the boundaries of the right-of-way since the conveyance documents correctly describe the centerline. The recorded DOT/PF plats correctly identify the centerline, and the centerline is property monumented on the ground. In case no. 2, for property lying generally north of Badger Road, there is a 5-foot gap between the right-of-way established on subdivision plats and the true 1960 right-of-way boundary. For property lying generally south of Badger Road the right-of-way boundary established on subdivision plats extends 5 feet beyond the true 1960 right-of-way boundary.

In case no. 3 whether there is a problem depends upon whether the subdivision plats were prepared off the conveyance or off the recorded DOT/PF right-of-way plats. In the former case I would treat case nos. 1 and 3 equally. In the latter case, the no. 3 situation should be treated the same as case no. 2.

You have asked whether the state can rely upon the 1960 right-of-way boundary in computing the "takes" for this project along the offset centerline portion of Badger Road even though the recorded plats and conveyances establish the boundary elsewhere. You have suggested the use of either the theory of boundary by acquiescence or implied dedication.

a. Doctrine of Boundary by Acquiescence

This theory is closely related to the theory of establishing a boundary by parol agreement. The two theories are often confused by the courts. As one court has stated:

> One need only make a cursory examination of extensive annotations...to realize that the doctrine of acquiescence...is a morass of uncertainty and confusion supporting one commentator's observation that:
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> > Vagueness of theory has led in turn to vagueness and disagreement on the facts which will merit judicial recognition. The result has been the growth of a gnarled and hoary knot upon this branch of the law of property. Houplin v. Stoen, 4th 31 P.2d 998, 1001 (Wash. 1967), citing Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487, 489 (1958) (emphasis in original). See also Annot., 7 A.L.R. 4th 53, 59. (1981).

There are no Alaska cases on either boundary by parol agreement or acquiescence. One case mentions the doctrine of "agreed boundaries" in dicta but, without discussing the doctrine, finds the trial courts' ruling based upon this theory unsupported by the evidence. Curran v. Mount, 657 P.2d 389, 392 (Alaska 1982).

Generally speaking the difference between boundary by parol agreement and boundary by acquiescence is stated as follows:

> When there is a doubt or uncertainty, or a dispute has arisen, as to the true location of the boundary line, the adjoining owners may by parol agreement establish a division line; and, where the agreement is executed and actual possession is taken under such agreement, it is conclusive against the owners and those claiming under them.
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> A related, but theoretically separate, doctrine governing establishment of a boundary line is that of boundary by acquiescence. Thus, it is well recognized that if adjoining landowners occupy their premises up to a certain line which they mutually recognize and acquiesce in for a long period of time, usually the time prescribed by the statute of limitations, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one. Annot., 7 A.L.R. 4th at 58-59 (footnotes omitted).

A good discussion of the difference between the theories can be found in Rabjohn v. Ashcraft, 480 S.W.2d 138, 141 (Ark. 1972).

Over the years the doctrines of boundary by parol agreement and by acquiescence have been intermingled. Some courts have stated that a parol agreement followed by acquiescence for the statutory period for adverse possession will give rise to the application of the doctrine. Other courts have held that long acquiescence is simply evidence of a past parol agreement when no actual parol agreement can be proven. Annot., 7 A.L.R. 4th at 59; Herrmann v. Woodell, 693 P.2d 1118, 1122 (Id. App. 1980).

This intermingling of terminology has lead to an intermingling of the doctrines. As a result, many courts now seem to require evidence of a dispute or uncertainty as to the location of the true boundary line before they will apply the doctrine of boundary by acquiescence. See Annot., 7 A.L.R. 4th

at 59; Annot., 69 A.L.R. 1430, 1501-04 (1930); 113 A.L.R. 421, 436 (1938). 1/

In the instant case the state would be unable to present any evidence of a disputed boundary line. The true boundary is still known to the state. The state's incorrect monumentation of the known boundary line has caused the problem. Since we have no Alaska cases on this issue it is difficult to determine what view the Alaska Supreme Court would take if the state attempted to utilize the doctrine.

However, under the theory of boundary by acquiescence courts require establishment of two additional facts: (1) mutual knowledge that a boundary different from the true boundary is being asserted, and (2) a definite marking of that new boundary on the ground with possession by both parties up to the established line.

1/ The following cases either explicitly require a dispute or uncertainty to be present before applying the doctrine of boundary by acquiescence or recite facts clearly demonstrating that a dispute or uncertainty existed at some time in the distant past. Gameson v. Remer, 537 P.2d 631, 633 (Id. 1975); Sceirine v. Densmore, 479 P.2d 779, 780 (Nv. 1971); Hopson v. Panguitch Lake Corp., 530 P.2d 792, 794 (Ut. 1975) citing, Brown v. Milliner, 232 P.2d 202 (Ut. 1951) (holding that uncertainty as an element of acquiescence has been long recognized in the law); McDonald v. Givens, 509 So.2d 992, 993 (Fla. App. 1987); Mello v. Weaver, 224 P.2d 691, 693 (Ca. 1950); Blaisdell v. Nelsen, 674 P.2d 1208, 1210 (Or. App. 1984); Hartley v. Ruybal, 414 P.2d 114, 116 (Colo. 1966); Fritzler v. Dumler, 495 P.2d, 1027, 1033 (Ks. 1972). In addition to the states cited in this footnote the annotations cited above report cases from New Jersey, Georgia, Wyoming, Michigan, Wisconsin, and Iowa as supporting this view.

I have found only four jurisdictions which have specifically held uncertainty or dispute as immaterial to the application of the doctrine of boundary by acquiescence. See Lamm v. McTighe, 434 P.2d 565, 569 (Wash. 1967); Platt v. Martinez, 563 P.2d 586 (N.M. 1977); Hausner v. Mela, 326 N.W.2d 31 (Neb. 1982); Rabjohn v. Ashcraft, 480 S.W.2d 138 (Ark. 1982). In addition the annotations cited above identify New York and Illinois as supporting this view.

The "knowledge" requirement is derived from the definition of the term "acquiescence":

> Acquiescence and waiver are always questions of fact. ... There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. ... There must be knowledge of facts which will enable the party to take effectual action. Houplin, 431 P.2d at 1001 citing Pence v. Langdon, 99 U.S. 578, 581 (1878). 2/

The second element, a definite boundary line physically designated on the ground and possessed up to that line, appears to be universally required. 3/ This requirement is just common sense. If parties are acquiescing in a boundary line different than the actual line they must know where that line is located on the ground. This element flows from the fact that the doctrine of boundary by acquiescence is a hybrid lying somewhere between adverse possession (which requires adverse user) and estoppel which, in the context of a boundary dispute, is usually used to preclude someone who has possessed up to a definite line physically designated on the ground from trying to gain additional property past that line.

2/ See also Riter v. Cayias, 431 P.2d 788, 789 (Ut. 1967); Platt, 563 P.2d at 587-88; Hausner, 326 N.W.2d at 36; Fritzler, 495 P.2d at 1033; Rabjohn, 480 S.W.2d at 141. Wyoming, Colorado, Oregon, Vermont and New York also apparently require some level of "mutuality" before applying the doctrine of boundary by acquiescence. See Annot. 113 A.L.R. at 436; Annot., 60 A.L.R. at 1506. While these cases vary in holding proof of dispute or uncertainty as a prerequisite to the application of the theory of boundary by acquiescence, they all require some knowledge on the part of all parties that the new boundary is asserted as a boundary by one of the parties. At an absolute minimum the courts require at least knowledge that a fence or other physical barrier is in existence.

3/ Lamm, 434 P.2d at 569; Rabjohn, 430 S.W.2d at 141; Riter, 431 P.2d at 789; Platt, 563 P.2d at 586; and cases cited at Annot., 69 A.L.R. at 1504-06; Annot., 113 A.L.R. at 436.

Under the facts presented DOT/PF could not establish a boundary line other than the one described in the condemnees' deeds because (1) there has never been a dispute or uncertainty as to where the line lies until just recently, 4/ (2) the state could not show mutuality or knowledge of a new line on the part of the condemnees, 5/ (3) there are no physical barriers on the right-of-way boundary DOT/PF is seeking to establish delineating the actual location of that boundary and, (4) as a result, there is no showing of possession up to the physically marked boundary.

b. Implied Dedication

The Alaska Supreme Court has set forth the elements of implied dedication in Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska 1985):

> A common law dedication occurs "when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose." Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); see also State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981); Olson v. McRae, 389 P.2d 576 (Alaska 1964). There are two essential elements of a common law dedication: (1) an owner's offer of dedication to the public and (2) acceptance by the public. 6A R. Powell & P. Rohan, The Law of Real Property, ¶926[1](1980). The crux of the offer requirement is that the owner must somehow objectively manifest his intent to set aside property for the public's use. The existence of an intent to dedicate is a factual issue which the claimant must clearly prove. "Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive

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4/ Most courts require the "acquiescence" continue for at least the period of time required for adverse possession.

5/ In case no. 2 deeds, there is nothing to put the condemnees on notice that the centerline forming the basis of the right-of-way in the subdivision plats was incorrectly monumented.

> in character." Hamerly, 359 P.2d at 125...; 6A R. Powell & P. Rohan, supra, ¶926[2]. (Footnotes omitted) (Emphasis in original)

It is questionable whether any of the present landowners on Badger Road even know of the 5-foot offset centerline. There is absolutely no evidence of an intent to dedicate the actual right-of-way for a public purpose. In addition, the part of the right-of-way you are seeking is not the portion of the road actually travelled but some portion on either side of the travelled way. Finally, DOT/PF would have the burden of proving the dedication by "proof that is clear and unequivocal." Hamerly, 359 P.2d at 125. This is a heavy burden which I doubt the state could meet. There is simply no activity on the part of landowners from which a jury could objectively find an intent to dedicate any right-of-way boundary other than the 1960 boundary.

c. Conclusion

You have asked for guidance on how to calculate the area of each "take" along the Badger loop if these doctrines cannot be used. I recommend computing the "take" based upon the legal descriptions of the right-of-way in each condemnees' deed. DOT/PF should take as much property as necessary to establish straight right-of-way lines if that is important for the project. This will require you to accept the right-of-way boundary as shown on the plat recorded by the developers. These plats were prepared using the incorrectly monumented as-built centerline to set the right-of-way boundaries.

However, rigid adherence to this approach will create some difficulties. For the property lying generally south of Badger Road using the platted boundary will actually give the state 5 feet more land than it actually acquired in 1960. The state cannot take property without paying just compensation. We will have to advise the property owner of the 1960 mistake and pay for the additional 5 feet of land between the actual 1960 right-of-way boundary and the platted right-of-way boundary.

For the property lying generally north of Badger Road using the platted boundary will actually give the state 5 feet less land than it actually acquired in 1960. If we pay for all of the land lying generally north of the platted right-of-way boundary, we will be paying for a 5-foot strip of land we paid for in 1960. This presents a more difficult problem for the state than does the south lying property. We could argue that we

should not be required to reacquire a strip of land we paid for twenty-seven years ago. The landowners certainly could not claim adverse possession against the state. However, if DOT/PF insists on the 1960 boundary, it would possibly face claims from condemnees that the state should be estopped from asserting the 1960 boundary. It is hard to assess whether this argument would be successful. In State v. Simpson, 397 P.2d 288, 291 (Alaska 1964) the court stated:

> The failure of municipal and other governmental officers to affirmatively assert governmental rights where the dedicated but as yet unused street was being occupied by appellee and his predecessors cannot serve as a basis for equitable estoppel.
>
> Appellee and his predecessors had constructive notice of the fact that the seaward side of the Tongess Avenue right-of-way extended 25 feet beyond what appeared to be the front property line, since the original conveyance in their chain of title referred to and incorporated into its property description the recorded subdivisional survey and plat.

Although the landowners would have to prove the estoppel by clearly convincing evidence, DOT/PF did take affirmative action to put the public on notice as to where the right-of-way boundary was located. DOT/PF recorded plats and monumented the centerline. The only problem is the plats were mistakenly based on the wrong centerline and the monumentation was mistakenly placed on the ground. The problem with relying upon Simpson is that there was no doubt as to where the actual street lay in that case. In the present case, the state is trying to shift the right-of-way boundary as a result of the state's action in improperly monumenting a portion of the road. In addition, in Simpson the street was platted but not constructed. Badger Road is well traveled and fully constructed. Given the relatively small amount of money involved in reacquiring land on this side of Badger Road ($30,000-$50,000), I doubt it would be economically viable to test an estoppel theory in the courts.

Therefore, in case no. 2 situations I recommend you use the platted boundary to compute the "takes" for property lying generally north of Badger Road and the 1960 boundary to compute the "takes" for property lying generally south of Badger Road.

Case no. 3 situations should be treated the same as case no. 1 or case no. 2 situations depending upon the circumstances described earlier in this opinion.

If you have any questions concerning this opinion, or you need further advice or clarification, please do not hesitate to contact me.

PRL/jh