Handling Right-of-Way Problems

D. Scott Crook
Arnold & Crook PLLC
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106
www.arnoldcrook.com
scott@arnoldcrook.com
theutahemploymentlawyer.blogspot.com
Telephone: 801.326.1943
Facsimile : 801.665.1567

As the other written materials evidence, people tend to get upset when someone tries to make their property smaller. This, of course, is not the only thing that will enrage people when it comes to their property. On the top of the list of those property issues that make people angriest are issues arising out of access to and from their property. For the purposes of this seminar, these materials will discuss boundary problems that arise from these rights-of-way—the boundaries of the rights-of-way themselves and other issues involving property boundaries caused by rights-of-way.

A. Highways, Roads, and Streets

One situation that often creates boundary difficulties is when a public highway or street crosses a person's boundary. Questions that often arise are: (1) if the road is adjacent to a property boundary where does the property's boundary end in relationship to the road, or (2) how wide are the road's boundaries? In order to answer these questions correctly, a person must first understand how the roads were initially created.

1. Roads Created by Use

In Utah, a property that has been used historically as a road may become a public road by use. The statute specifically provides that such a path, road, or highway becomes "dedicated . . . to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."[1] The statute declares that such dedication "creates a right-of-way" with a scope that "is reasonable and necessary to ensure safe

[1] *Id.* § 72-5-104(1).

travel according to the facts and circumstances."[2] The interest created is merely an easement and is not a fee simple interest.

> The easement acquired by the public, however, vests in them the mere right of passage over the land, and does not divest the owner of the fee, and he may continue to make any use thereof which is not incompatible with the public easement.[3]

In situations where the road is bounded on either side by two separate parcels, if one of the parcels is transferred to another, the law presumes that the transfer was to the center line of the road. "A transfer of land bounded by a highway on a right-of-way for which the public only has an easement passes the title of the person whose estate is transferred to the middle of the highway."[4] Thus, in most instances, individuals owning property abutting a public road created by use own to the center line of the road.

The question of the width of the right-of-way is less clear however. "The width of rights-of-way for public highways shall be set as the highway authorities of the state, counties, or municipalities may determine for the highways under their respective jurisdiction."[5] This statutory provision when read in conjunction with Utah Code Ann. § 72-5-104(3), which defines the scope of the road to be that which "is reasonable and necessary to ensure safe travel according to the facts and circumstance," has been interpreted to mean that governments with jurisdiction over the roads "are not limited to such width as has been actually used," but instead are limited only to "such use as is reasonably necessary for the public easement of travel."[6] It bears noting, however, that a road established between 1898 and 1918 provided that the width of all public road was sixty-six feet.[7]

2. Public Roads Granted by Dedication in a Plat

---

[2] *Id.* § 72-5-104(2)-(3).
[3] Whitesides v. Green, 44 P. 1032, 1033 (Utah 1896).
[4] Utah Code Ann. § 72-5-103(3). This statutory provision is "declaratory of the common law." Fenton v. Cedar Lumber & Hardware Co., 17 Utah 2d 99, 404, P.2d 966, 968 (1965). The provision as written does not seem to answer the question as to whether such a transfer must first occur before the center line presumption is involved.
[5] Utah Code Ann. § 72-5-108.
[6] Hunsaker v. State, 29 Utah 2d 322, 509 P.2d 352, 354 (1973).
[7] *See id.*

Public roads may also be granted by dedication in a subdivision plat.[8] Such dedications "vest the fee of those parcels of land in the municipality [or county] for the public for the uses named or intended in those plats."[9] Although a fee is vested, it is a determinable fee "'when . . . accepted . . . pursuant to the final approval of a subdivision plat.'"[10] In such determinable fee situations, the road's boundaries and locations are set specifically by the dedicating documents. Additionally, the owners of adjacent properties have no interests in such roads unless they are vacated.[11]

3. Public Roads Held in Fee Simple Absolute

All governmental entities are authorized by statute to purchase property for roads in fee simple absolute.[12] In such cases, just as in cases where roads are dedicated, the purchasing documents specifically identify the boundaries of the road. Thus, any person owning an adjacent property would have no interest in such roads.

B. Easements

Another right-of-way doctrine that creates boundary problems similar to the boundary problems created by public roads and highways is the boundary problems created by easements. Generally speaking, an easement is the right of the owner of one piece of property (the dominant estate) to use another piece of property (the servient estate), not owned by him, for the benefit of the owner's property. For example, a farmer may use his neighbor's property for a ditch to convey water from an irrigation canal to the farmer's property to irrigate his crops. Just as with the public road problems, for the purposes of this seminar, these materials will discuss boundary problems that arise from these rights-of-way—the boundaries of the rights-of-way themselves and other issues involving property boundaries caused by rights-of-way.

Easements may be created in several ways: (1) express grant, (2) by implication, (3) by necessity, and (4) by prescription.

1. Express Grant

[8] *See, e.g.*, Utah Code Ann. §§ 10-9a-607, 17-27a-607.
[9] *Id.* §§ 10-9a-607(1); 17-27a-607(1).
[10] Nelson v. Provo City, 2000 UT App 204, ¶12, 6 P.3d 567 (quoting Nelson v. Provo City, 872 P.2d 35, 38 n.3 (Utah Ct. App. 1994); *see also* Utah Code Ann. § 10-9a-609.5(3) (stating that vacature "shall operate . . . as a revocation of the acceptance [of the dedication] and the relinquishment of the city's fee therein"); *accord id.* § 17-27a-609.5(3).
[11] *See infra* page ___.
[12] *See* Utah Code Ann. §§ 10-8-2(a)(iii); 17-50-302(2)(a)(ii); 72-5-103(1)-(2).

In order for an easement to be created by express grant, it must specifically identify the boundaries and location of the easement. Generally speaking, a well-crafted easement will not have boundary problems. However, just as in general deed cases, an easement will occasionally be ambiguous or imprecise. In such cases, Utah courts have declared that parties may correct the boundary problem.

Evans v. Board of County Commissioners of Utah County, 2004 UT App 256, 97 P.3d 697, for example, turned on the validity of a reserved easement the location of which was not described in the original reservation. The trial court had ruled the easement invalid, but the Utah Court of Appeals reversed, explaining that "[t]he failure of an easement description to specify details, such as the exact location … does not render the easement excessively vague or unenforceable."[13]

The Utah Supreme Court affirmed the decision.[14] The Supreme Court characterized the judicial function in unfixed easement cases as an exercise similar to contractual "gap-filling."[15] Ultimately, after considering the necessity of ensuring that judicial gap-filling does not alter the scope of the servitude bargained for,[16] the Supreme Court adopted an approach that places the power to locate an unfixed servitude in the owner of the servient estate.[17] Under this "practical approach to the problem," the Supreme Court observed,

> the owner of the servient estate is entitled to designate a reasonable location for the easement. If the servient owner fails to make such a designation within a reasonable period, the easement holder may select a reasonable route. If the parties are unable to reach an agreement, a court may specify a location for the easement.[18]

This arrangement for the placement of an unfixed servitude, the Court concluded, "removes the issue of whether location selection is an essential term from the field of battle with neither side sustaining injury."[19]

2. Easements by Implication

[13] 2004 UT App 256, ¶ 10 (quoting Egidi v. Libertyville, 621 N.E.2d 615, 622 (Ill. App. Ct. 1993)).
[14] *See* Evans v. Board of County Commissioners of Utah County, 2005 UT 74, 123 P.3d 432.
[15] *Id.* (citing Corbin on Contracts, § 4.1 (rev. ed. 1993)).
[16] *Id.* at ¶ 19.
[17] *Id.* at ¶20
[18] *Id.* at ¶21 (quoting Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, ¶ 7.02[2][a] (rev. ed. 2000)).
[19] *Id.* at 19.

An easement by implication is granted when (1) two properties originally were part of the same piece of property; (2) one property apparently, obviously, and visibly served the other property before the properties were split; (3) the service given by the servient estate to the dominant estate was reasonably necessary to the enjoyment of the dominant estate; and (4) the use of the easement by the dominant estate must have been continuous.[20] In describing the scope of easements generally, the Utah Supreme Court long ago stated that "[t]he substance of the easement is shown by usage; but the form . . . is a question of reasonable necessity. And in determining that question, the rights of the [owner of the land] are to be considered, as well as the rights of the owners of the easement."[21] Thus, the boundary description and location of such an easement is set by the use implied and is very fact dependent.

3. Easement by Necessity

An easement by necessity is granted when (1) two properties originally were part of the same piece of property, (2) the property is split in two, (3) an easement is reasonably necessary to the enjoyment of one of the pieces of property.[22] Although the Utah courts have not specifically addressed identifying the location of an easement by necessity, the Utah Supreme Court accepted the methodology of allowing the dominant estate holder to first choose the location in the case of an ambiguous location of an express easement.[23] In doing so, it used broad language generally accepting the method as a fair method to be used in circumstances where parties have failed to identify the location of an easement.[24] Accordingly, the court would likely take a similar approach in an easement by necessity case.

4. Prescriptive Easement

An easement may also be established by prescription. "A prescriptive easement is created when the party claiming the prescriptive easement can prove that 'use of another's

[20] Ovard v. Cannon, 600 P.2d 1246, 1247 (Utah 1979)
[21] Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 213, 233, 174 P.2d 148 (1946) (quotations omitted).
[22] Tschaggeny v. Union Pacific Land Resources Corp., 55 P.2d 277 (Utah 1976).
[23] *Id.* at ¶21 (quoting Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, ¶ 7.02[2][a] (rev. ed. 2000)).
[24] *Id.* ¶¶17-21.

land was open, continuous, and adverse under a claim of right for a period of twenty years."[25]

Generally, the location and extent of the boundaries of an easement are established and limited to the use during the prescriptive period.[26] Additionally, permissive use of such an easement to establish a common boundary throughout the prescriptive period is presumed to be adverse.

> [I]t is our opinion that the reasonable conclusion to be drawn from the facts here shown, where the parties (predecessors) jointly established and used a driveway on what they thought their common boundary, is that the use meets the requirements of being open, notorious, continuous and adverse for more than 20 years and therefore has established a prescriptive right to continue to use it.[27]

"To further that end [of assuring the peace and good order of society], [courts] presume[] that the once mutually permissive [use] should be deemed adverse for purposes of the adverseness requirement."[28]

C. Prescriptive Rights

1. Prescriptive Easement

As discussed in part B.4 above, a right-of-way may be granted by prescription.

2. Equitable Estoppel

Another doctrine that is similar to a prescriptive grant of an easement is the offensive use of the doctrine of equitable estoppel. "The elements of equitable estoppel are '(i) a . . . failure to act [that is] inconsistent with a claim later asserted; (ii) reasonable action . . . taken . . . on the basis of the . . . failure to act; and (iii) injury . . . would result from allowing [a repudiation of] such . . . failure to act.'"[29]

In certain circumstances, this doctrine could be used to create an easement. For instance, if a landowner, Mr. Spite, knowing that his neighbor, Ms. Bliss, is building a covered pool on a portion of Mr. Spite's property that Mr. Spite knows Ms. Bliss believes

[25] Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998).
[26] Jane Stevens Co. v. First Nat'l Bldg. Co., 89 Utah 456, 57 P.2d 1099 (Utah 1936); Robins v. Roberts, 80 Utah 409, 15 P.2d 340 (1932); Salisbury v. Rockport Irr. Co., 79 Utah 398, 7 P.2d 291.
[27] *Id.* at 1259.
[28] *Id.*
[29] Dahl Investment Co. v. Hughes, 2004 UT App. 391, ¶14, 101 P.3d 830.

is on her property, says nothing, he may be equitably estopped from asserting a claim against Ms. Bliss that her use of the pool trespassed on his property.[30]

3. Adverse Possession

Another way to establish a right-of-way by prescription would be the doctrine of adverse possession.

> In Utah, a person without legal title is deemed "to have been under and in subordination to" the owner with legal title unless that person has adversely possessed the property. When an occupant has entered into possession of property under a claim of title, the occupant may establish adverse possession by demonstrating that (1) the property was "occupied and claimed for the period of seven years continuously," (2) the party, his predecessors and grantors have paid all taxes which have been levied and assessed [on the property]," and (3) the property was, in pertinent part, "usually cultivated or improved," protected by a substantial inclosure[,] or "used . . . for the ordinary use of the occupant."[31]

Given the requirement that parties pay the taxes on a parcel of property for the period of occupancy, the doctrine of adverse possession has limited usefulness.

D. Condemnation

A right-of-way can also be obtained through the condemnation process. Obviously, governmental agencies, if given the authority, may take property for the purposes of building roads.[32] Under the general power of condemnation, private entities such as mines and water users have used the condemnation power to obtain property and are specifically authorized to do so.[33]

E. Control, Supervision, and Management

The control, supervision, and management of rights-of-way are largely dependent upon the type of right-of-way that is at issue. Obviously, if the right-of-way is created

[30] *See id.* ¶15 ("Dahl Investment failed to notify the Hugheses of its claim and . . . requiring the Hugheses to abandon or remove the driveway would constitute an injury" sufficient to equitably estop Dahl Investment from making a claim that the driveway encroached on Dahl Investment property.)
[31] Salt Lake County v. Metro West Ready Mix, Inc., 2004 UT 23, ¶22, 89 P.3d 155 (citations omitted). *See also* Massey v. Griffiths, 2007 UT 10, 152 P.3d 312.
[32] Utah Code Ann. §§ 72-5-103(2).
[33] Utah Code Ann. §§ 73-1-6; 78B-6-501(5)-(7); Jacobsen v. Memmott, 354 P.2d 569 (1960); Highland Boy Gold Mining Co. v. Strickley, 78 P. 296 (1904), *affirmed* 200 U.S. 527 (1905).

and under the jurisdiction of a particular governmental agency or political subdivision, the particular governmental unit will have control, supervision, and management of the right-of-way. On the other hand, if the right-of-way has been privately created then the particular factual circumstances will dictate the control. For instance, if the easement was given by express grant than it is likely the granting document will include provisions on maintenance and control. Absent such an express provision, the law provides that the dominant estate holder has the burden of maintenance.

> "One acquiring an easement and right to travel over the lands of another not only assumes the burden of maintenance of said right of way, but all other burdens incident to the use." . . . It is likewise very well established that the owner of an estate over which there exists an easement is under no obligation to maintain the easement in a condition fit for use."[34]

Of course, this right is limited by the dominant estate holder's obligations to refrain from interfering with the servient owner's fee estate.[35]

F. Abandonment, Discontinuance, and Vacation

1. Vacation of Public Roads

a. When a Statutory Vacation Should Be Initiated

In Utah, once a road (or street or highway) has been established as a public road, the road retains its status as a public road unless vacated or abandoned by an order, statute, or ordinance passed or enacted by the Utah State Legislature, the county, or a city.[36] Utah law does allow for a private party to use the doctrine of equitable estoppel in very rare instances but success under such a theory is nearly impossible.[37] With respect to such a claim, the Utah Court of Appeals recently stated:

---

[34] Nielson v. Sandberg, 105 Utah 93, 141 P.2d 696, 702-03 (Utah 1943) (quoting Kirk v. Schultz, 119 P.2d 266, 270 (Idaho 1941) & Carson v. Jackson Land & Min. Co., 111 S.E. 846 (W. Va. 1922)).

[35] *See* Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 213, 232, 174 P.2d 148 (Utah 1946) ("The rights of the dominant owner are limited by the rights of servient owner. Each owner must exercise his rights so as not unreasonably to interfere with the other.")

[36] *See* Utah Code Ann. § 72-5-105 ("All public highways, street, or roads once established shall continue to be highways, streets or roads until abandoned or vacated by order of a highway authority having jurisdiction or by other competent authority.").

[37] *See* Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987); Wasatch County v. Okelberry, 2006 UT App 473, ¶¶ 26-32, 153 P.3d 745.

> [U]nder the modern statutes and case law, a private property owner [is] no longer . . . able to reasonably rely on the government's acquiescence in private control to establish a claim of estoppel. *See Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1378 (Utah 1987) ("[E]stoppel should not be available to circumvent the statutory process."). Instead, a property owner can only claim reasonable reliance where the governmental entity has made some affirmative representation that it intended to abandon or vacate the road in compliance with the statutory procedure. To hold otherwise would come dangerously close to recognizing a form of adverse possession against the government whereby a private party could obtain equitable rights in a public road merely by exercising adverse control for a period of time. Utah law expressly prohibits any person from acquiring rights in a public road by adverse possession. *See* Utah Code Ann. § 78-12-13 (2002).[38]

Thus, in almost every instance where a party wishes to abandon a road, the party must use the statutory process.

The process for vacating a road depends on the jurisdiction having authority over the road.[39] A county road, for instance, is vacated or abandoned in a different manner from a road created by a city.

i. Abandonment of City or Town Roads

Prior to the enactment of the Local Land Use, Development, and Management Amendment (LUDMA) of 2005, the procedures governing the vacature or abandonment of a road were found within Article 1 of Chapter 8 of the Utah Municipal Code identifying the general powers of cities.[40] Although LUDMA did not alter or amend the section that empowered cities and towns to vacate "streets, alleys, avenues, [and] boulevards,"[41] the procedures governing the vacature or abandonment of a public road were moved to the Municipal Land Use, Development, and Management Chapter of the Utah Municipal Code, Chapter 9a. The notice requirements for the vacature and abandonment of a public street or right-of-way are now found in Utah Code Ann. § 10-9a-208 and other procedural requirements for the vacature or abandonment of a street

[38] Wasatch County v. Okelberry, 2006 UT App 473, ¶ 31, 153 P.3d 745.
[39] *See id.*
[40] *See* Utah Code Ann. § 10-8-8 to 8.5 (2003).
[41] Utah Code Ann. § 10-8-8.

found within a subdivision plat are found in Utah Code Ann. §§ 10-9a-608[42] and 10-9a-609.5.[43]

The statutes provide that in order to vacate or abandon any public street or right-of-way a city or town must do so only after holding a public hearing that has been publicly noticed

- by mailing to each affected entity and record owner of particular parcels located near the street or right a notice of the date, time, and place of the hearing at least three days before the hearing, and
- by publishing notice for four consecutive weeks in a newspaper of general circulation in the city or town in which the street or right of way is located, or if there is no such newspaper, posting notice on the property and in three public places for four weeks before the hearing.[44]

If the street or right-of-way is found within a subdivision, the city or town must not only comply with the notice provisions described above, its planning commission or other "land use authority" must find that "neither the public interest nor any person will be materially injured by the vacation"[45] and that "good cause exists for the vacation or alteration."[46] Further, the city or town must assure that the plat is amended to show the amendment or vacature and that the plat is then properly recorded with the county recorder.[47]

[42] Section 10-9a-608 is the more general provision dealing with any attempt to vacate or change a subdivision plat, even if that change does not involve a street or right-of-way. However, section 608 is very clear to state that its provisions apply to petitions to vacate or alter streets and rights-of-way as well. *See id.* § 10-9a-608(4) ("Each request to vacate or alter a street or alley, contained in a petition to vacate, alter, or amend a subdivision plat, is also subject to Section 10-9a-609.5").

[43] No special procedures for public roads not found within a subdivision are included within the act.

[44] Utah Code Ann. §§ 10-9a-207(1)(a), (3), -208, -608(6).

[45] *Id.* § 10-9a-609(1). It bears noting that this required finding is only included within section 10-9a-609, which applies to all petitions to vacate. The required finding is not included within section 10-9a-609.5, which applies specifically to vacating or altering a street or alley. However, because section 10-9a-608(4) is very clear that the vacation of a street or right-of-way must follow the procedure for a general vacature as well as for a road vacature, it is better to assume that the city or town must make this finding as well to vacate a road.

[46] *Id.* § 10-9a-609.5(1)(a).

[47] *Id.* § 10-9a-609.5(2).

A city or town may vacate a road without a petition from any land owner.[48] Additionally, any "fee owner" within a subdivision may petition to have a street found within the subdivision vacated.[49]

ii. Abandonment or Vacature of County Roads

Counties are given the general power to abandon or vacate roads.[50] In almost all respects, the procedures for abandoning public roads located in counties are identical to the procedures for abandoning public road located in cities and towns. The notice requirements for the vacature and abandonment of a public street or right-of-way are found in Utah Code Ann. § 17-27a-208 and other procedural requirements for the vacature or abandonment of a street found within a subdivision plat are found in Utah Code Ann. §§ 17-27-608[51] and 17-27a-609.5.[52]

The statutes provide that in order to vacate or abandon any public street or right-of-way a county must do so only after holding a public hearing that has been publicly noticed

- by mailing to each affected entity and record owner of particular parcels located near the street or right a notice of the date, time, and place of the hearing at least three days before the hearing, and
- by publishing notice for four consecutive weeks in a newspaper of general circulation in the city or town in which the street or right of way is located, or if there is no such newspaper, posting notice on the property and in three public places for four weeks before the hearing.[53]

In addition to these requirements, a county must also send notice to the Utah Department of Transportation (UDOT).[54]

---

[48] *Id.* §§ 10-8-8; 10-9a-608(a).
[49] *Id.* § 10-9a-608(5).
[50] *Id.* § 17-50-305(1)(d). Although counties are permitted to vacate or abandon roads, the state prohibits counties from abandoning or vacating "public safety interest highways." *Id.* § 72-3-301(4)(b).
[51] Section 17-27a-608 is the more general provision dealing with any attempt to vacate or change a subdivision plat, even if that change does not involve a street or right-of-way. However, section 608 is very clear to state that its provisions apply to petitions to vacate or alter streets and rights-of-way as well. *See id.* § 17-27a-608(4) ("Each request to vacate or alter a street or alley, contained in a petition to vacate, alter, or amend a subdivision plat, is also subject to Section 17-27a-609.5").
[52] No special procedures for public roads not found within a subdivision are included within the act.
[53] Utah Code Ann. §§ 17-27a-207(1)(a), (3), -208.
[54] *Id.* § 72-3-108(c).

If the street or right-of-way is found within a subdivision, the county must not only comply with the notice provisions described above, its planning commission or other "land use authority" must find that "neither the public interest nor any person will be materially injured by the vacation"[55] and that "good cause exists for the vacation or alteration."[56] Further, the county must assure that the plat is amended to show the amendment or vacature and that the plat is then properly recorded with the county recorder.[57]

A county may vacate a road without a petition from any land owner.[58] Additionally, any "fee owner" within a subdivision may petition to have a street found within the subdivision vacated.[59]

iii. State Highways

Although UDOT may abandon, vacate, or "delete" a highway from the state highway system between general sessions of the Utah Legislature and only until the Legislature has had an opportunity to ratify the decision,[60] a state highway may only be abandoned by the Utah Legislature.[61] Although there is nothing in the statute that requires the Legislature to make a decision to delete a highway only after receiving a recommendation from UDOT,[62] UDOT is required by the statute to annually submit to the Legislature a list of highways or sections of highway to be deleted from the state highway system.[63] The statute requires UDOT to base those recommendations on certain criteria and only after a public process.[64] Once deleted from the system, the highway is not necessarily considered abandoned or vacated. UDOT may either return the highway

[55] *Id.* § 17-27a-609(1). It bears noting that this required finding is only included within section 17-27a-609, which applies to all petitions to vacate. The required finding is not included within section 17-27a-609.5, which applies specifically to vacating or altering a street or alley.
[56] *Id.* § 17-27a-609.5(1)(a).
[57] *Id.* § 17-27a-609.5(2).
[58] *Id.* §§ 17-50-305(1)(d); 17-27a-608(a).
[59] *Id.* § 17-27a-608(5).
[60] *Id.* § 72-4-102(2). This interim deletion may be accomplished only by following certain procedural steps. *See id.*
[61] *Id.* § 72-4-102(1)(a).
[62] *See id.*
[63] *Id.* § 72-4-102(1)(b).
[64] *Id.* §§ 72-4-102(1)(c), (3)-(5); -102.5.

to a county or municipality or abandon it "if it no longer serves the purpose of a highway."[65]

2. Abandoned Road Bed: Who Owns It? Who Can Use It?

When a road is abandoned or vacated, the question often arises about who owns the property. As with almost any legal question, the answer is dependent on key facts. Those facts include how the road was created, i.e., by public use or grant, and the statutes governing the creation of the road at the time.

a. Roads Created by Use

As has been discussed elsewhere in these materials, a public road may be "dedicated . . . to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."[66] The statue declares that such dedication "creates a right-of-way" with a scope that "is reasonable and necessary to ensure safe travel according to the facts and circumstances."[67] The interest created is merely an easement and is not a fee simple interest.

> The easement acquired by the public, however, vests in them the mere right of passage over the land, and does not divest the owner of the fee, and he may continue to make any use thereof which is not incompatible with the public easement.[68]

Obviously, if such an easement is abandoned where the easement intersect only one fee owner's property, the easement reverts to the person holding that fee interest. However, where a person is transferred land "bounded by a highway on a right-of-way for which the public only has an easement passes the title of the person whose estate is transferred to the middle of the highway."[69]

It bears noting, however, that even if such a public easement reverts back to the owner of the fee estate, (1) "landowners whose property abuts public streets, alleys, and public ways that appear on a plat map are entitled to a private easement over those public

[65] *Id.* § 72-4-103.
[66] *Id.* § 72-5-104(1).
[67] *Id.* § 72-5-104(2)-(3).
[68] Whitesides v. Green, 44 P. 1032, 1033 (Utah 1896).
[69] Utah Code Ann. § 72-5-103(3).

ways,"[70] and (2) "'a landowner whose property abuts a public road possesses, by operation of law, a private easement of access to that property across the public road.'"[71]

b. Public Roads Granted by Dedication in a Plat

As discussed elsewhere in these materials, public roads may also be granted by dedication in a subdivision plat.[72] Such dedications "vest the fee of those parcels of land in the municipality [or county] for the public for the uses named or intended in those plats."[73] Although a fee is vested, it is a determinable fee "'when . . . accepted . . . pursuant to the final approval of a subdivision plat.'"[74] In such determinable fee situations, "the vacating of the roadway results in the fee reverting to the abutting landowners."[75]

c. Public Roads Held in Fee Simple Absolute

All governmental entities are authorized by statute to purchase property for roads in fee simple absolute.[76] In such cases, when such a road is vacated, it "would not change the municipality's right to the underlying fee."[77] Although this seems to be the natural outcome of such a situation, Utah Code Ann. § 72-5-105(2)(a) creates some ambiguity. It states in relevant part that "[f]or purposes of assessment, upon the recordation of an order executed by the proper authority with the court recorder's office, title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with ½ of the width of the highway, street, or road assessed to each of the adjoining owners."[78] This could suggest that even if title were in fee simple, the title would vest in abutting landowners. However, given the reference to assessments, one could assume that this

[70] Carrier v. Lindquist, 2001 UT 105, ¶12, 37 P.3d 1112.
[71] *Id.* at ¶16 (quoting Gillmore v. Wright, 850 P.2d 431, 437 (Utah 1993)).
[72] *See, e.g.*, Utah Code Ann. §§ 10-9a-607, 17-27a-607.
[73] *Id.* §§ 10-9a-607(1); 17-27a-607(1).
[74] Nelson v. Provo City, 2000 UT App 204, ¶12, 6 P.3d 567 (quoting Nelson v. Provo City, 872 P.2d 35, 38 n.3 (Utah Ct. App. 1994); *see also* Utah Code Ann. § 10-9a-609.5(3) (stating that vacature "shall operate . . . as a revocation of the acceptance [of the dedication] and the relinquishment of the city's fee therein"); *accord id.* § 17-27a-609.5(3).
[75] Nelson, 872 P.2d at 38; *accord* Nelson 2000 UT App 204, ¶¶10-17 (citing Falula Farms, Inc. v. Ludlow, 866 P.2d 569 (Utah Ct. App. 1993); Sears v. Ogden, 572 P.2d 1359 (Utah 1977); Fenton v. Cedar Lumber & Hardware Co., 17 Utah 2d 99, 404 P.2d 966 (1965); Sowadzki v. Salt Lake County, 36 Utah 127, 104 P. 111 (1909).
[76] *See* Utah Code Ann. §§ 10-8-2(a)(iii); 17-50-302(2)(a)(ii); 72-5-103(1)-(2).
[77] Nelson, 872 P.2d at 38; *accord* Nelson 2000 UT App 204, at ¶18.
[78] Utah Code Ann. § 72-5-105(2)(a). It also provides for a different outcome if the legal description of an owner of record extends into the abandoned highway or road. *Id.* § 72-5-105(2)(b).

only is referring to tax assessment. But in such a circumstance, it would seem problematic that a person would be assessed tax for property he or she did not own.

2. Termination of Private Easements

Although public roads may not be vacated or abandoned without an official act, private easements, roads, or rights-of-way may be terminated by conduct or lack thereof. Theories that might permit the termination of an easement or right-of-way include abandonment and adverse possession or user.

a. The Test of Common Law Abandonment

It is a well-settled principle of law that private easements or rights-of-way may be abandoned.[79] In the seminal case of *Brown v. Oregon Short Line Company*, 36 Utah 257, 102 P. 740, 742-43 (1909), the Court explained the doctrine of abandonment:

> The mere nonuser of an easement created by deed, however long continued, is not of itself an abandonment of it, but, at most, in connection with other facts, may be evidence of an intention to abandon or of actual abandonment. But an easement may nevertheless be lost or extinguished. The law with regard to this subject is stated in 14 Cyc. 1192, in the following words: "An easement may be extinguished by an act of the owner of the easement which is incompatible with the existence of the right claimed. If the owner of the easement himself obstructs it in a manner inconsistent with its further enjoyment, or permits the owner of the servient estate to do so, the easement will be considered abandoned." This text is sustained and illustrated in the following well-considered cases, namely: Corning v. Gould, 16 Wend. (N. Y.) 531; Steere v. Tiffany, 13 R. I. 669; Taylor v. Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710; Stenz v. Mahoney, 114 Wis. 117, 89 N. W. 819; Monoghan v. Memphis Fair, etc., Co., 95 Tenn. 108, 31 S. W. 497. The principle is also, inferentially at least, recognized in Whitesides v. Green, 13 Utah, 341, 44 Pac. 1032, 57 Am. St. Rep. 740. In Taylor v. Hampton, supra, there is a convincing discussion of the question, in which the court, at page 106 of 4 McCord (17 Am. Dec. 710), states the doctrine in the following language: "(1) That a servitude [easement] is extinguished by any obstruction of a permanent nature by the party himself to whom the servitude is due (or by his consent), or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it; and (2) that being once lost it is gone forever, and can never be revived but by a new grant."

As can be seen from the above description, to establish a claim for abandonment a

[79] W. Gateway Storage Co. v. Treseder, 567 P.2d 181, 182 (Utah 1977).

party must show (1) non-use of an easement or right-of-way for a sufficient period, and (2) actions that are inconsistent with the easement owner's desire to continue to use the easement. In other words, a party must establish evidence that a person "ceased to use this easement . . . with the intention to make no further use of it."[80] Additionally, a party must establish these facts by clear and convincing evidence.[81] The Utah Supreme Court has also stated that whether the easement was created by prescription or grant may factor into a determination of abandonment.[82] However, it has never identified what exactly it would consider significant about the method of the creation of the easement.[83]

b. What Must Be in Place for Adverse Possession and User to Occur

As has been discussed elsewhere, private roads or easements can be created by prescription. It is equally true that private roads may be terminated or extinguished by prescription.[84] Such extinguishment requires a party to establish the same elements as would be required to establish an easement by prescription.[85] In Utah, "[a] prescriptive easement is created when the party claiming the prescriptive easement can prove that 'use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years."[86]

Although the elements are the same to meet the test of these prescriptive theories, the policy considerations are different. As the Supreme Court of Connecticut recently explained:

> [A] party attempting to acquire an easement by prescription generally has no ownership rights in the land in question and, therefore, no right to use it in any fashion. Thus, that party's open and visible use of the land, under a claim of right and absent permission from the fee owner, is sufficient to start the running of the prescriptive period.

[80] Harmon v. Rasmussen, 13 Utah 2d 422, 426, 375 P.2d 762, 765 (1962).
[81] *See id.*
[82] Treseder, 567 P.2d at 182.
[83] *See id.*
[84] *See* Smith v. Muellner, 2007 WL 2229375, at *3 (Conn. August 14, 2007).
[85] *Id.*
[86] Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998).

In contrast, in the context of extinguishment, the adverse actor typically is the fee owner of the land subject to the easement and, therefore, is entirely justified in using that land in any way not inconsistent with the existence of the easement. Accordingly, the acts of a servient owner necessary to extinguish an easement must be distinctly adverse to the existence of the easement and not merely acts showing dominion over the servient estate. "Because the servient [owner], as long as he or she does not interfere with the right of user, may use his or her land in any manner desired, an act that serves to start the prescription period in the servient [owner's] favor must be one clearly wrongful as to the owner of the easement," for example, "the erection of permanent structures, such as ... building[s] ... or other obstructions seriously interfering with the right of use ...." (Emphasis added.) Public policy favors productive land use, and the foregoing rule "maximizes the aggregate utility of the [easement] and the servient estate."

Additional considerations apply when an easement is not being actively used by the dominant owner. In the case of such nonuse, the servient owner may use his land quite freely without interfering with the dominant owner's interests. "Where the dominant owner abstains from use of the easement, the servient owner, in the exercise of the privilege to use his or her own land in any manner desired not interfering with the exercise of the easement, has an enlarged scope of privileged action. It is, therefore, under these circumstances more difficult for the servient owner to establish the adverse character of behavior." In the case of an improvement not interfering with current uses of an easement, "[w]hether the improvement is an unreasonable interference with the servitude depends on the character of the improvement and the likelihood that it will make future development of the easement difficult. If the improvement is temporary and easily removed, it is generally not unreasonable. The more expensive the improvement or the more difficult its removal is likely to be, the more likely is the conclusion that the improvement is an unreasonable interference with the easement or profit." Finally, it often is said that the acts effective to extinguish an easement by prescription are those that would give rise to an action by the easement owner to enjoin their continuance. "It is essential, in order that the user be adverse, that it be such as would give rise to a right of action to the dominant owner, since otherwise he might be deprived of the right without the power to prevent it. The accrual of the right of action or other legal redress is the starting point of a title by prescription."[87]

[87] Muellner, 2007 WL 2229375, at *4 (citations omitted).

Given this description of the law, it is easy to see why it is often very difficult to establish extinguishment of an easement by prescription.[88]

There is one additional theory that could be of some use to extinguish an easement---equitable estoppel. "The elements of equitable estoppel are '(i) a . . . failure to act [that is] inconsistent with a claim later asserted; (ii) reasonable action . . . taken . . . on the basis of the . . . failure to act; and (iii) injury . . . would result from allowing [a repudiation of] such . . . failure to act.'"[89] A servient estate owner could claim that, despite the knowledge of the dominant estate holder, that because the dominant estate holder failed to act to kept the servient estate owner from erecting structures in the easement or right-of-way, he or she should be estopped from later claiming the continuation of the easement.[90]

3. How to Initiate the Abandonment Process

As described above, if a party wishes to abandon a road that is a county or city road, he or she can petition the local government entity to abandon the road.[91] With respect to the vacation of a private road, the proper method of extinguishing title would probably be to file a declaratory judgment action[92] or quiet title action.[93]

---

[88] *See, e.g.*, Sabino Town & Country Estates Assn. v. Carr, 186 Ariz. 146, 150-51,920 P.2d 26 (1996) (servient owner's blocking of easement with split rail, barbed wire fences did not extinguish easement for motor vehicle access where dominant ownerhad no need for such access); Kolouch v. Kramer, 120 Idaho 65, 67-69, 813 P.2d 876 (1991) (servient owner's acts of planting trees, erecting fence and constructing concrete irrigation diversion not adverse when undertaken before dominant owner's need to use easement arose); Castle Associates v. Schwartz, 63 App. Div.2d 481, 490, 407 N.Y.S.2d 717 (1978) (fencing of property by servient owner, prior to request to open, did not extinguish right-of-way); Edmonds v. Williams, 54 Wash.App. 632, 637, 774 P.2d 1241(1989) (fence blocking unused easement insufficiently adverse to extinguish it).

[89] Dahl Investment Co. v. Hughes, 2004 UT App. 391, ¶14, 101 P.3d 830.

[90] *See id.* ¶15 ("Dahl Investment failed to notify the Hugheses of its claim and . . . requiring the Hugheses to abandon or remove the driveway would constitute an injury" sufficient to equitably estop Dahl Investment from making a claim that the driveway encroached on Dahl Investment property.)

[91] Utah Code Ann. §§ 10-9a-608(5); 17-27a-608(5).

[92] *See id.* §§ 78-33-1 to -13.

[93] *See id.* §§ 78-40-1 to -13.

D. Scott Crook
Arnold & Crook PLLC
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106
www.arnoldcrook.com
scott@arnoldcrook.com
Telephone: 801.326.1943
Facsimile : 801.665.1567

D. Scott Crook has more than fifteen years of experience as a lawyer, concentrating his practice in the areas of employment and labor, commercial litigation, appellate practice, land use, and water. He is a member of both the Utah and Idaho bars and has extensive experience in both states. He has spoken on or written articles about employment issues, jury selection, boundary law, road and access law, law firm management, and appellate practice. He is the former chair of the Appellate Section of the Utah State Bar.

Mr. Crook received his juris doctor degree from Brigham Young University in 1996, graduating magna cum laude in the top 10% of his class, and was elected a member of the Order of the Coif. While attending law school, he received several awards and distinctions, including the Foundation Press Award for excellence in constitutional law and the Scholarly Writing Award. He obtained his Bachelor of Arts Degree in political science with a minor in Asian studies from Weber State (1993), graduating summa cum laude. He is a former editor of the Brigham Young University Law Review and the B.Y.U. Journal of Public Law. Additionally, Mr. Crook was a law clerk to Judge Norman H. Jackson, Utah Court of Appeals and to Judge William H. Woodland, Idaho Sixth Judicial District Court, in Pocatello, Idaho.