Road and Access Law: Vacature and Abandonment

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

A. Vacation of Public Roads

1. 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.[1] 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.[2] With respect to such a claim, the Utah Court of Appeals recently stated:

> [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

[1] *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.").
[2] *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.

> 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).[3]

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.[4] A county road, for instance, is vacated or abandoned in a different manner from a road created by a city.

a. 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.[5] Although LUDMA did not alter or amend the section that empowered cities and towns to vacate "streets, alleys, avenues, [and] boulevards,"[6] 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 found within a subdivision plat are found in Utah Code Ann. §§ 10-9a-608[7] and 10-9a-609.5.[8]

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

---

[3] Wasatch County v. Okelberry, 2006 UT App 473, ¶ 31, 153 P.3d 745.
[4] *See id.*
[5] *See* Utah Code Ann. § 10-8-8 to 8.5 (2003).
[6] Utah Code Ann. § 10-8-8.
[7] 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").
[8] No special procedures for public roads not found within a subdivision are included within the act.

- 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.[9]

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"[10] and that "good cause exists for the vacation or alteration."[11] 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.[12]

A city or town may vacate a road without a petition from any land owner.[13] Additionally, any "fee owner" within a subdivision may petition to have a street found within the subdivision vacated.[14]

b. Abandonment or Vacature of County Roads

Counties are given the general power to abandon or vacate roads.[15] 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

[9] Utah Code Ann. §§ 10-9a-207(1)(a), (3), -208, -608(6).
[10] *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.
[11] *Id.* § 10-9a-609.5(1)(a).
[12] *Id.* § 10-9a-609.5(2).
[13] *Id.* §§ 10-8-8; 10-9a-608(a).
[14] *Id.* § 10-9a-608(5).
[15] *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).

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[16] and 17-27a-609.5.[17]

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.[18]

In addition to these requirements, a county must also send notice to the Utah Department of Transportation (UDOT).[19]

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"[20] and that "good cause exists for the vacation or alteration."[21] Further, the county must assure that the plat is amended to show the

[16] 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").
[17] No special procedures for public roads not found within a subdivision are included within the act.
[18] Utah Code Ann. §§ 17-27a-207(1)(a), (3), -208.
[19] *Id.* § 72-3-108(c).
[20] *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.
[21] *Id.* § 17-27a-609.5(1)(a).

amendment or vacature and that the plat is then properly recorded with the county recorder.[22]

A county may vacate a road without a petition from any land owner.[23] Additionally, any "fee owner" within a subdivision may petition to have a street found within the subdivision vacated.[24]

c. 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,[25] a state highway may only be abandoned by the Utah Legislature.[26] 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,[27] 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.[28] The statute requires UDOT to base those recommendations on certain criteria and only after a public process.[29] Once deleted from the system, the highway is not necessarily considered abandoned or vacated. UDOT may either return the highway to a county or municipality or abandon it "if it no longer serves the purpose of a highway."[30]

B. 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.

---

[22] *Id.* § 17-27a-609.5(2).
[23] *Id.* §§ 17-50-305(1)(d); 17-27a-608(a).
[24] *Id.* § 17-27a-608(5).
[25] *Id.* § 72-4-102(2). This interim deletion may be accomplished only by following certain procedural steps. *See id.*
[26] *Id.* § 72-4-102(1)(a).
[27] *See id.*
[28] *Id.* § 72-4-102(1)(b).
[29] *Id.* §§ 72-4-102(1)(c), (3)-(5); -102.5.
[30] *Id.* § 72-4-103.

1. 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."[31] 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."[32] 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.[33]

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."[34]

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 ways,"[35] 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.'"[36]

2. 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.[37] 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

---

[31] *Id.* § 72-5-104(1).
[32] *Id.* § 72-5-104(2)-(3).
[33] Whitesides v. Green, 44 P. 1032, 1033 (Utah 1896).
[34] Utah Code Ann. § 72-5-103(3).
[35] Carrier v. Lindquist, 2001 UT 105, ¶12, 37 P.3d 1112.
[36] *Id.* at ¶16 (quoting Gillmore v. Wright, 850 P.2d 431, 437 (Utah 1993)).
[37] *See, e.g.,* Utah Code Ann. §§ 10-9a-607, 17-27a-607.

plats."[38] Although a fee is vested, it is a determinable fee "'when . . . accepted . . . pursuant to the final approval of a subdivision plat.'"[39] In such determinable fee situations, "the vacating of the roadway results in the fee reverting to the abutting landowners."[40]

3. Public Roads Held in Fee Simple Absolute

All governmental entities are authorized by statute to purchase property for roads in fee simple absolute.[41] In such cases, when such a road is vacated, it "would not change the municipality's right to the underlying fee."[42] 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."[43] 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 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.

B. 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.

---

[38] *Id.* §§ 10-9a-607(1); 17-27a-607(1).
[39] 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).
[40] 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).
[41] *See* Utah Code Ann. §§ 10-8-2(a)(iii); 17-50-302(2)(a)(ii); 72-5-103(1)-(2).
[42] Nelson, 872 P.2d at 38; *accord* Nelson 2000 UT App 204, at ¶18.
[43] 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).

1. The Test of Common Law Abandonment

It is a well-settled principle of law that private easements or rights-of-way may be abandoned.[44] 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 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."[45] Additionally, a party

[44] W. Gateway Storage Co. v. Treseder, 567 P.2d 181, 182 (Utah 1977).
[45] Harmon v. Rasmussen, 13 Utah 2d 422, 426, 375 P.2d 762, 765 (1962).

must establish these facts by clear and convincing evidence.[46] The Utah Supreme Court has also stated that whether the easement was created by prescription or grant may factor into a determination of abandonment.[47] However, it has never identified what exactly it would consider significant about the method of the creation of the easement.[48]

2. 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.[49] Such extinguishment requires a party to establish the same elements as would be required to establish an easement by prescription.[50] 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."[51]

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.
>
> 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

[46] *See id.*
[47] Treseder, 567 P.2d at 182.
[48] *See id.*
[49] *See* Smith v. Muellner, 2007 WL 2229375, at *3 (Conn. August 14, 2007).
[50] *Id.*
[51] Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998).

> 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."[52]

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.[53]

---

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

[53] *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

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.'"[54] 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.[55]

C. 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.[56] With respect to the vacation of a private road, the proper method of extinguishing title would probably be to file a declaratory judgment action[57] or quiet title action.[58]

---

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).

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

[55] *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.)

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

[57] *See id.* §§ 78-33-1 to -13.

[58] *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, the owner and founder of Arnold & Crook PLLC, 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.