

Vacating Streets & Alleys Under 65 ILCS 5/11/-91-1

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Introduction

Mr. Nolan Lane walks into your law office. You represented Mr. Lane and his wife Lauren two years ago when they purchased property in a rural suburb. Now, Mr. Lane wants to build an addition to his house. However, he cannot obtain a building permit. The municipality denied his building permit request because the lot size does not conform to municipal requirements. According to the applicable municipal regulations, the lot must contain 30,000 square feet. The Lane lot is only 28,000 square feet. According to the regulations, a variance must be obtained in order to add improvements to such a non-conforming lot. The Lanes requested a variance, but the municipality denied the request.

You inspect the property in question. A 33 foot vacant strip of land adjoins the Lane property. The strip runs east and west. The Lane land lies north of the strip, and a neighbor's property lies south of the strip. The strip contains grass which is apparently mowed.

Lane asks whether he can acquire the strip, or any part of it, and thereby increase his square footage. You can only answer his question when you learn more about the strip.

Your research reveals that the strip was dedicated to the municipality as a road, pursuant to a plat of subdivision recorded in 1980. The following analysis may help you formulate your advice to the Lanes.

Street Creation

Dedication, prescriptive use, deeds, and condemnation are the mechanisms through which a municipality may obtain an interest in land.

Dedication

A road may be dedicated. There are two types of dedication: statutory and common law.

Statutory Dedication

A road donated to the public pursuant to the Illinois Plat Act, 765 ILCS 205/1, creates a statutory

dedication. The terms of the act in existence at the time of the recording or filing of the plat govern. In order to create a statutory dedication of a street or alley, the courts require strict compliance with the plat act. Failing to strictly comply with the act results in a common law dedication of the road. *Kuney v. Zoning Board of Appeals*, 162 Ill. App.3d 854, 516 N.E.2d 850 (1987). A statutory dedication of a road vests the municipality with fee title to the road. *Ryerson v. City of Chicago*, 247 Ill. 185, 93 N.E. 162 (1910). Illinois courts have rarely found strict compliance with the plat act. As a result, most title insurers decline to decide whether a dedication is a statutory dedication or a common law dedication in the absence of a court ruling.

Common Law Dedication

A road may be dedicated through a written instrument or through acts and declarations. *Hooper v. Haas*, 332 Ill. 561, 164 N.E. 23 (1928). In order to create a road pursuant to common law, the instruments or acts and declarations must exhibit the following elements: (1) an intent to donate the land to public use, and (2) public acceptance of the land within a reasonable time and before the offer is withdrawn or revoked. *Woodward v. Schultze*, 15 Ill.2d 476, 155 N.E.2d 568 (1959) (public use of a street or alley will constitute acceptance of a road).

A common law dedication of a road results in the grantor, or his successors in title, retaining title to the dedicated land, subject to an easement in favor of the municipality. *Ryerson*.

Prescription

A public road may be created through prescriptive use. Continuous use of land as a road for 15 years constitutes sufficient prescriptive use. See 605 ILCS 5/2-202, defining "highways" as:

Any public way for vehicular travel which has been . . . used by the public as a highway for 15 years . . . and which has not been vacated in pursuance of law. The term "highway" includes rights of way. . . . A highway in a municipal area may be called a "street."

In order to create a prescriptive road, the following elements must be established:

1. The public use must be under a claim of right, uninterrupted and continuous for the entire prescriptive period and
2. The owner must know of the use, but the use is without his or her consent.
Feldker v. Crook, 208 Ill. App.3d 1012, 567 N.E.2d 1115 (1991).

With a prescriptive road, the municipality obtains an easement in the land and not fee title. *Hudgens v. Dean*, 53 Ill. App.3d 126, 368 N.E.2d 944 (1977), *aff'd* 75 Ill.2d 353, 388 N.E.2d 1242 (1979). The municipality has the responsibility to maintain the road. *Zacny v. Sasyk*, 30 Ill. App.3d 93, 332 N.E.2d 568 (1975).

The owner of the land burdened by the easement (the servient estate) retains fee title to the road and the right to use the land for any purpose as long as the use does not interfere with the proper use of the easement. *Minnie Creek Drainage Dist. v. Streeter*, 327 Ill. 236, 158 N.E. 383 (1927).

Deeds

If the municipality obtains a deed containing no restrictions on its estate in the land, the municipality owns the fee title. *See e.g., Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458 (1991) (easement only).

The abutting owners have no interest in the land. *City of Jacksonville v. Padgett*, 413 Ill. 189, 108 N.E.2d 460 (1952).

Condemnation

The sovereign state has constitutional power to take private property for public use without the consent of the owner. The acquired property, however, must be used for a public use or purpose, and the private owner must be compensated. Illinois Constitution of 1970, Article 1, Section 18. A road constitutes an appropriate public use. Therefore, land may be taken under eminent domain powers for roadway purposes.

The use of eminent domain powers is limited to those powers specifically granted by the legislature. The General Assembly may delegate the power of eminent domain to municipal corporations. *Chicago, B & W R. Co. v. Cavanagh*, 278 Ill. 609, 110 N.E. 128 (1917). In fact, the Illinois General Assembly has granted each municipality the power of eminent domain. See 65 ILCS 5/11-61-1, which provides:

The corporate authorities of each municipality may exercise the right of eminent domain by condemnation proceedings in conformity with the provisions of the constitution and statutes for the state of Illinois for the acquirement of property useful, advantageous or desirable for municipal purpose or public welfare including property in unincorporated areas outside of but adjacent and contiguous to the municipality where required for street or highway purposes by the municipality.

The legislature does not specifically define whether a municipality can obtain a fee or easement estate through condemnation. Therefore, the municipality can only take the interest in the property which is necessary for the public purpose to be served. *Miner v. Yantis*, 410 Ill. 401, 102 N.E.2d 524 (1951).

On those occasions when the private owner retains a fee interest in the condemned land, the owner may use the land in a manner that does not interfere with the use of the easement. *Horn v. City of Chicago*, 403 Ill. 549, 87 N.E.2d 642 (1949). If the municipality condemns the fee title to the property, however, the former owner retains no interest in the condemned land. Title to the condemned land vests in the municipality upon entry of the final condemnation judgment and payment of the compensation fixed in the judgment. The title thus acquired relates back to the date the petition for condemnation was filed. *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill.2d 54, 118 N.E.2d 223 (1953).

Your research reveals that the municipality in the instant case obtained its interest in the 33 foot strip of land through a dedication. Can your client obtain title to dedicated land?

Street Vacation

Municipalities have the power to vacate streets and alleys. See 65 ILCS 5/11-91-2, which provides:

Except in cases where the deed, or other instrument, dedicating a street or alley, or part thereof, has expressly provided for a specific devolution of the title thereto upon the abandonment or vacation thereof, whenever any street or alley, or part thereof, is vacated under or by virtue of any ordinance of any municipality, the title to the land included within the street or alley, or part thereof, so vacated, vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the street or alley has been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the street or alley had been acquired by the owners as a part of the land abutting on the street or alley.

Section 11-91-2 applies to streets or alleys created pursuant to statutory dedications, common law dedications, condemnations and deeds. Thus, under Section 11-91-2, it is irrelevant whether the municipality received a fee interest or only an easement interest at the time the street or alley was created. A deed of conveyance might be a better method of disposing of municipal land acquired in fee title. Nonetheless, a vacation ordinance precludes the debate as to whether an acquisition was by statutory or common law dedication. Under the general rule of Section 11-91-2, the vacation of any street or alley results in the same vesting. In the absence of any complicating factors, the owners adjoining the vacated street or alley are equally vested with fee title.

For the Lanes, then, if the strip of land is vacated under the general rule of Section 11-91-2, and provided no devolution of title is expressly stated in the original subdivision plat, then the Lanes will acquire the north half of the vacated 33 foot strip. The neighbor will acquire the south half of the vacated 33 foot strip. However, adding only 16.5 feet to Lane's existing lot will not produce a conforming square footage. Acquisition of the entire 33 foot strip, on the other hand, would increase Lane's square footage to the required 30,000 square feet. With the entire vacated strip added, Lane's property would be a conforming zoning lot and no variance would be required in order to build the addition.

Can The Lanes Obtain Title To The Entire 33 Foot Strip Of Land?

After a vacation under the general rule of Section 11-91-2, the Lanes could purchase the south half of the vacated strip from the neighbor. However, you advise the Lanes of an alternative route to title to the entire strip.

Under 65 ILCS 5/11-91-1:

The [vacation] ordinance may provide that it shall not become effective until the owners of all property or the owner or owners of a particular parcel or parcels of property abutting upon the street or alley, or part thereof so vacated, shall pay compensation. . . . If the ordinance provides that only the owner or owners of one particular parcel of abutting property shall make payment, then the owner or owners of the particular parcel shall acquire title to the entire vacated street or alley, or the part thereof vacated.

Under this provision, it is possible, under appropriate circumstances, for one adjoining owner to obtain title to the entire vacated street or alley.

In the recent case of *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137 (1999), the Illinois Supreme Court confirmed a municipality's authority to vest title to an entire vacated street in one adjoining owner to the exclusion of another adjoining owner. The court approved an ordinance enacted pursuant to Section 11-91-1 which collected compensation from one adjoining owner and vested title in that one owner to the entire vacated street.

Thus, you may advise the Lanes that you will submit a proposal to the legislative body of the municipality to vacate the 33 foot strip of land in strict accord with Section 11-91-1 and the opinion in *Chavda*. The vacation ordinance will have to specify that, upon payment by the Lanes (with no payment from the neighbor) of compensation to the municipality, title to the entire 33 foot strip will vest in the Lanes, to the exclusion of any other adjoining owner. Upon passage of the ordinance and appropriate payment by the Lanes, you will request a title insurer to issue an owner's policy insuring that title to the entire 33 foot strip is vested in the Lanes.

Is Tth *Chavda* Vacation Insurable?

What about the neighbor who owns land south and adjoining the strip? If the 33 foot strip had been dedicated by a statutory dedication, the neighbor might not have any expectation of acquiring title to any part of the strip upon its vacation. As stated earlier, an adjoining owner retains no property interest in a statutorily dedicated street or alley. On the other hand, if the 33 foot strip had been dedicated by a common law dedication, the neighbor might have a reasonable expectation of acquiring title to a portion of the strip upon its vacation. As stated above, the adjoining owner retains fee title under a common law dedication, subject to the municipal easement, and should expect to acquire a portion of the strip under the general rules of vacation under Section 11-91-2. The proposed *Chavda* vacation ordinance under Section 11-91-1, however, will deprive the neighbor of any share of the vacated strip. The neighbor may have concerns about this proposal, some of which may even rise to the level of constitutional issues. Unfortunately, the *Chavda* case does not address these concerns. The following discussion offers some suggestions for dealing with these concerns.

Notice And Hearing

A proposed *Chavda* vacation ordinance is a political question. The local legislative body is the

appropriate forum in which the neighbor may raise his or her concerns. Due process requires that every person have notice and an opportunity to be heard. Will the neighbor have notice of the proposed *Chavda* ordinance and an opportunity to be heard on the matter? Section 11-91-1 provides for notice only if the street or alley to be vacated is within the municipality's jurisdiction and physically located in an unincorporated area adjoining the municipality. The Section has no specific notice provisions if the street or alley to be vacated is wholly within municipal boundaries. In this latter, and most common, situation, the only notice provisions are to be found in the Illinois Open Meetings Act. 5 ILCS 120/1 et seq. Section 2.02 of this Act provides for notice of all meetings of local legislative bodies. Public notice for regular meetings must be given at the beginning of each calendar year or fiscal year, and an agenda for each regular meeting must be posted at the principal office of the public body and at the location where the meeting is to be held, at least 48 hours in advance of the regular meeting. Section 2.02 provides, however, that "the requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda."

Therefore, because 65 ILCS 5/11-91-1 has no notice provision when a street or alley to be vacated lies wholly within municipal boundaries, the only required notice to the neighbor appears to be a posted meeting agenda. Moreover, the posted agenda may not even include the *Chavda* vacation proposal as an item. The proposal may be added to the agenda at the meeting. Without notice of the proposal, the neighbor may be unable to express his concerns in the political arena.

Obviously, the petitioners know of the *Chavda* vacation proposal; they initiated it. Do the neighbors know? Should due process require the municipality to provide actual notice to all owners adjoining the street or alley to be vacated? The *Chavda* case does not address this question. Another case, *Valdez v. City of Ottawa*, 105 Ill. App.3d 972, 434 N.E.2d 1192 (1982), may be instructive. In *Valdez*, the city seized plaintiff's automobile. The court found that the car was registered, the plaintiff's address was easily ascertainable, and that the only notice plaintiff received was the tow sticker attached to his car. The car was towed after one week. Under these circumstances, the court ruled that "the city must not rely on fortuitous or constructive notice to satisfy the due process clause. . . . At a minimum, notice by registered or certified mail would have been appropriate in the instant case."

In order to determine the quality of the notice due process requires under the circumstances, the nature of the governmental function must be weighted against the private interest affected by the governmental action. *Morrissey v. Brewer*, 408 U.S. 471 (1972). In our vacation case, consider the competing interests. Once the road is vacated, the municipality will receive payment of compensation, tax revenue that the vacated land will presumably generate, and a termination of liability and of maintenance requirements. On the other hand, the neighbor may assert that the *Chavda* vacation ordinance will impact a valuable and protected property right—the expectation of acquiring title to half of the 33 foot strip under general rules of vacation. On balance, it would seem that requiring a simple notice to all property owners adjoining the street or alley to be vacated would not unreasonably interfere with the benefits flowing to the municipality from the vacation. Merely posting an agenda at the village hall or at the meeting hall may be insufficient. This may not constitute notice reasonably calculated to convey the necessary information to interested parties within a reasonable time to prepare for the hearing. As in the *Valdez* case, all interested parties are identifiable, and their addresses are readily ascertainable. Therefore, it is

suggested that any proposal for a *Chavda* vacation, one in which title to the entire vacated street or alley is to be vested in one or more adjoining owners to the exclusion of other adjoining owners, should include registered or certified mail notice to all adjoining owners. The neighbor should receive notice that a *Chavda* proposal has been placed before the municipality's legislative body. The political process can take over from there.

Equal Protection

In *Chavda v. Wolak*, the Village of Lombard enacted a vacation ordinance under 65 ILCS 5/11-91-1, which directed that title to the entire vacated street vest in plaintiff, one of two abutting owners, to the exclusion of defendant, the other abutting owner. Plaintiff then sought a declaratory judgment that, upon payment of compensation to the village as required in the ordinance, plaintiff would be vested with title to the entire vacated street. Defendant raised constitutional challenges to the validity of Section 11-91-1, and the trial court ruled in defendant's favor. On appeal, the Illinois Supreme Court held that Section 11-91-1 is constitutional.

The Supreme Court noted that equal protection and special legislation principles prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis. The court ruled, however, that as to Section 11-91-1,

the defendants do not identify, and we cannot discern, *any* classification that discriminates in favor of a select group, let alone one that does so arbitrarily or without a sound, reasonable basis. Section 11-91-1, as amended, simply authorizes a municipality, in its discretion, to award title to one of several abutting property owners when the public interest so requires. Defendant might have a[n equal protection] claim if, for example, section 11-91-1 dictated that title always be awarded to the owner of the property that abuts the vacated street or alley on the east, or that title always be awarded to the abutting property owner whose last name contains the fewest letters. But this is not the case.
188 Ill.2d 400-401 (emphasis in the original)

The court ruled that Section 11-91-1 contains no legislative classifications and survives an equal protection challenge.

Arbitrary Ordinances

The statute is constitutional. But, what about the municipal ordinance? In a footnote, the *Chavda* court suggests that a municipal ordinance enacted pursuant to Section 11-91-1 might create an arbitrary legislative classification that discriminates in favor of a select group without a sound, reasonable basis. In fact, the Supreme Court remanded the *Chavda* case to the trial court for, among other matters, a determination as to whether Lombard's ordinance was arbitrary, capricious, or contrary to public interest.

Consider several scenarios a municipality might face when dealing with a request for a *Chavda* vacation

ordinance.

1. A property owner presents a petition to vacate a street adjoining his land. The corporate authorities provide notice pursuant to Section 11-91-1, if required, pursuant to the Open Meetings Act, and also by certified mail to all owners adjoining the street to be vacated. The municipality holds a hearing. The petitioner appears at the hearing. No other adjoining owner appears or presents any comments. The petitioner is willing to pay consideration for the vacation of the street.
2. Same facts as above, except that at the hearing, the petitioner and one or more adjoining owners appear and comment. The petitioner and one or more adjoining owners (but not all adjoining owners) are willing to pay consideration for the vacation of the street.
3. Same facts as above, except that at the hearing, the petitioner and one or more of the adjoining owners appear and comment. Only the petitioner is willing to pay consideration for the vacation of the street, even though at least one of the other adjoining owners indicated an interest in taking title to a portion of the vacated street.

Under any of these scenarios, would an ordinance vesting title to the entire vacated street in petitioner alone be arbitrary, capricious, or contrary to public policy? The *Chavda* court offers little help in answering this question. The court did, however, cite several principles that support the validity of such an ordinance. In particular, the court stated that an ordinance enacted under Section 11-91-1 is presumed valid. Further,

[a] party challenging such an ordinance may invalidate it only by presenting clear and convincing evidence that the ordinance is arbitrary, capricious, or unreasonable; that there is no permissible interpretation of the ordinance that justifies its adoption; or that the ordinance will not promote the safety and general welfare of the public.
188 Ill.2d at 399.

It would appear, then, that the mere presence of alternative solutions will not invalidate a *Chavda* ordinance. Nonetheless, the *Chavda* ordinance should be drafted carefully and in compliance with Section 11-91-1 and the *Chavda* opinion in order to reduce the risk of a challenge.

Just Compensation

Could the neighbor claim that the municipality is taking his property interest in the 33 foot strip without just compensation? Could the neighbor claim that the consideration to be paid by the Lanes should go to him rather than to the municipality? The *Chavda* court did not consider this constitutional issue. Nonetheless, it ruled that Section 11-91-1 is a constitutional statute. Perhaps, the principle of res judicata will preclude future challenges to *Chavda* vacation ordinances on "just compensation" grounds.

Conclusion

The Lanes may petition the municipality for a vacation ordinance that vests title to the entire 33 foot strip in them, to the exclusion of the neighbor. The process of obtaining title, however, contains some difficulties. The ordinance should be carefully drafted to meet the requirements of 65 ILCS 5/11-91-1; it should specifically state the amount of consideration to be paid for the vacation; it should state specifically how title will vest upon vacation. It is further suggested that notice, not specifically required by the statute, should be furnished to all adjoining owners. Complications may set in. Some complications may include:

- Whether the street to be vacated is located at the edge of a subdivision or is bounded by a railroad right of way, stream, or other barrier;
- Whether the street to be vacated was created by a method other than dedication on a plat of subdivision;
- Whether the municipality includes conditions on use of the land in the vacation ordinance;
- Whether the municipality reserves easements for utilities in the vacated street;
- Whether the petitioner has taken possession of the vacated street; or
- Whether the municipality does not require compensation for the vacation.

A title insurer may issue an owner's policy insuring that title to the entire vacated street is vested in the petitioner. The title insurer will carefully examine the text of the ordinance, notices mailed and posted, minutes of the public meetings, the geography of the case, and other documents or items that may help the title insurer make an appropriate assessment of risk.

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