STREET VACATIONS AND ANCIENT RIGHTS OF WAY

by

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I. STREET VACATIONS

The first portion of this paper is designed to give the practitioner an overview of the law of street vacations and to high light areas of special interest.

1. BASIC STATUTORY AUTHORITY

All cities are governed by ch. 35.79 RCW when they vacate a street. (RCW 35A.47.020 directs code cities to follow ch. 35.79 RCW). The procedures are set forth clearly by statute which has not changed significantly since it was enacted in 1901.

2. PROCEDURE

2.1 Commencement of Street Vacation

A vacation may be commenced by a petition to the council signed by the owners of more that two thirds of the property abutting the street or alley sought to be vacated. RCW 35.79.010. No guidance is given in the statute as to how to measure two thirds of the property. Is it based on lineal front footage, square footage or assessed valuation?

A vacation may also be commenced by a resolution of the legislative body. RCW 35.79.010.

2.2 Hearing

Once a petition or resolution has been filed with the clerk, the legislative authority shall fix a time within not less than 20 days nor more than 60 days when the proposed vacation will be heard by the legislative authority or a committee thereof.

2.3 Posting the Hearing

RCW 35.79.020 requires the clerk to post a notice of the vacation hearing in three of the `most public places in the city' and `in a conspicuous place on the street or alley sought to be vacated.'

If the vacation is initiated by resolution of the legislative authority, the clerk shall also, 15 days before the hearing, give notice by to all abutting property owners or reputed owners as shown on the rolls of the county treasurer of the pending street vacation. If 50% of the owners protest the vacation in writing, the city shall be prohibited from proceeding. RCW 35.79.020

(Practice Tip: The notice to abutting owners should advise them of their rights under RCW 35.79.020 to protest the street vacation and of the form of protest which must be made.)

2.4 Standing to challenge street vacation.

Street vacation is a legislative act; only two classes of people can challenge a proposed vacation: a) abutting property owners; and b) non-abutting owners who can show special injury.

Property owners having property which abuts on a portion of the street being vacated are considered abutters. London v. Seattle, 93 Wn.2d 657, 660, 611 P.2d 781 (1980). One is an abutter if there is no intervening land between the property and the street. London v. Seattle, 93 Wn.2d at 661.

Non-abutters claiming special injury must show injury "different, in kind and not merely in degree, from that sustained by the general public." Hoskins v. Seattle, 7 Wn. App. 957, 962, 503 P. 1117 (1972). Less convenient access does not constitute special damage. Capitol Hill Methodist Church v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958); Hoskins v. Kirkland, supra. A non-abutting landowner must be landlocked or have its access "substantially impaired" to show special injury. (Note: Direct vehicular access has never been stated as the test for special damage. Is a property landlocked if it has pedestrian access?) If there is an "overriding public benefit," special injury may not be found even it the property owner is landlocked. Hoskins v. Kirkland, supra.

2.5 Grounds for Challenges to Street Vacation.

2.5.1 Effect on Vested Rights. Because street vacations are legislative, courts will not review the decision unless there is a showing of "collusion, fraud, or interference with a vested right. . . ." Fry v. O'Leary, 141 Wash. 465, 469, 252 Pac. 111 (1927).

Vested rights belong to abutting property owners on any portion of a street which is being vacated who have "a special right and a vested interest in the right to use the whole of the street for ingress and egress, light, view, and air, and if any damages are suffered by such an owner, compensation is recoverable therefor.

If a city vacates a portion of a street, e.g. the east 12 feet, that vacation may materially diminish the right of the abutter across the street to use the whole of the street for not only ingress and egress, but also light, air and view. The city may proceed with a vacation over the protest of the abutter, but will face the potential of paying compensation under Section 16, Article 1, Washington State Constitution. The value of light, air and view is often overlooked when evaluating a street vacation.

2.5.2 Presumption of Validity

Street vacation ordinances are presumed validly enacted for public use or purpose. The city may rely on that presumption in defending the case and the challenger must rebut that presumption. Hoskins v. Kirkland, supra.

"Only when there is no possible benefit to the public will the court review the legislative determination." Banchero v. City Council of Seattle, 2 Wn. App. 519, 523, 468 P.2d 724 (1970).

2.5.3 Private purposes

Street vacations are often necessitated to accommodate private development to create larger tracts of land for commercial purposes. Banchero v. City Council of Seattle, supra, established that with proper findings it will be difficult to find that a private purpose does not have a sufficient public component to meet the public purpose test. In Banchero the city vacated a street to facilitate a processing plant. The court held that a public

purpose was stated by establishing the city's need for dairy products, the increase in property taxes and the contribution of an increased payroll to the city's overall economy.

(Practice Tip: Be sure to have the council adopt findings which support the public purpose behind the street vacation.)

2.6 City Options

2.6.1 Retained Easements

A city may retain easements for construction, repair, and maintenance of public utilities.

2.6.2 Payment to City

A 1967 amendment to RCW 35.79.030 ensured that a city or town could require abutters to pay one-half of the appraised value of the area to be vacated. (Except see RCW 35.79.040 for streets abutting fresh or salt water). Full value may be required if the street was acquired at public expense instead of by dedication. Applicants should be required to submit an appraisal. Note that appraisers vary widely in their treatment of any easements to be retained.

(Practice Tip: If the appraisal seems too low, consider obtaining another at public expense. Where information conflicts, have the council make a finding as to fair market value).

Interesting appraisal issues exist where the zoning on opposite sides of the street is different and the per square foot value varies dependent upon the zoning. One side can end up paying more than the other side of the street for the vacated property.

3. TITLE TO VACATED PROPERTY

The general rule is that abutting property owners take to the center of the street on street vacation. RCW 35.79.040 provides:

> If any street or alley in any city or town is vacated by the city or town council, the property within the limits so vacated shall belong to the abutting owners, one-half to each.

Note that conveyance of land abutting a private road is also presumed to carry title to the center of the private

road. McConiga v. Riches, 40 Wn. App. 532, 700 P. 2d 331 (1985).

3.1 **Easements not vacated.**

Care must be taken in a street vacation decision to address any private or public easements within the right of way being vacated. A street vacation does not vacate utility easements. These must be relocated or preserved to provide basic utility services. Also private easements for ingress and egress, which might be superimposed on the street right of way are not extinguished by the street vacation and they must be analyzed.

3.2 **Special circumstances when the vacated right of way does not revert to the abutting owners.**

3.2.1 Ownership of the underlying fee of a vacated street is said to depend upon "particular circumstances of each case." Rowe v. James, 71 Wash. 267, 128 P. 539 (1912).

Allocation of the vacated land must be done as equally and fairly as possible.

3.2.2. 100% of the vacated street can go to the owners on one side.

In Michelson Brothers, Inc. v. Baderman, 4 Wn. App. 625, 483 P.2d 859 (1971), the street being vacated fronted on second class tidelands and there was no owner on the waterward side. Under these circumstances, the street reverted to the abutting owners. However, they did not receive the street based on an extension of their property lines to the water. That would have left a no-man's land. Instead the court approved a division of the property on a basis which was fair, but not according to the property lines.

In London v. Seattle, 93 Wn. 2d 657, 617 P.2d 781 (1980) where the street being vacated had been dedicated entirely by the property owners on one side of the street, on vacation, 100% of the street reverted to the grantor.

The above rule was modified in Christian v. Purdy, 60 Wn. App. 798, 808 P.2d 164 (1991). The owner of property had dedicated a street along the perimeter of a plat. One hundred percent of the street was within the boundary of the plat although it served property on both sides of it. When the street was

vacated, it did not revert to the side of the street which had granted the street. It was divided in the middle. The rationale of the court was that because the original dedicator had also owned the additional property served by the road on the opposite side of the street, the property would revert to the owners on both sides pursuant to statute. A special exclusion in the deed would have been necessary for the street to revert to the owners within the plat only.

4. Vacation of Subdivisions

R.C.W. 58.17.212 provides for vacation of subdivisions. If streets or roads only within the subdivision are proposed for vacation, the procedures of ch. 35.79 or ch. 36.87 R.C.W. must be followed. If the entire subdivision including the streets is proposed for vacation, then RCW 58.17.212 applies. A city may retain land within the subdivision which have been dedicated for public purposes.

5. Streets Abutting Bodies of Water.

RCW 35.79.035, enacted in 1987, prohibits the vacation of public streets which abut bodies of fresh or salt water unless the vacation will improve shoreline access and use. The City must make a finding that the street is not suitable for port, beach or water access, boat moorage, launching sites, park, public view, recreation or education before it can be vacated. A survey must be made of all such facilities in the City before vacation. It will be very difficult to vacate a street end unless it is integrated into a larger public access plan which enhances public access.

6. ADDITIONAL RESOURCES

McQuillan, THE LAW OF MUNICIPAL CORPORATIONS (3d Ed,) 30.185 et seq.

Ch. 36.87 RCW Vacation of county roads

II. Ancient Right Of Ways
(Vacation By Operation Of Law)

This portion of the paper is about the "Non-User" Statute and how it relates to unopened streets which were dedicated in plats. In 1890, the legislature passed the following statute:

> Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopen for public use for a space of five years after the order is made or authority granted for opening the same, shall be, and the same is hereby vacated, and the authority for building the same barred by lapse of time. Laws of 1889-90, Chapter 19, Section 32.

The following significant proviso was added to the above statute effective March 12, 1909:

> Provided, however, That the provisions of this section shall not apply to any highway, street, alley or other public place dedicated as such in any plat, whether the land included in said plat be within or without the limits of any incorporated city or town, nor to any land conveyed by deed to the state or to any town, city or county for roads, streets, alleys or other public places.[1]

PRESENT EFFECT

The substantially similar codified version is at RCW 36.87.090. An example of the effect of these provisions follows. Streets were dedicated in a plat which was recorded in 1890. At the time, the affected property was in an unincorporated part of the county. This area became a part of your city upon incorporation in 1905. No public use of the platted street had occurred prior to 1905. The platted street would have been vacated by operation of law prior to 1896.

Keep in mind that the Non-User Statute would not apply

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1 The proviso was added by laws of 1909, Chapter 90, Section 1 which contained an emergency clause and therefore became effective on March 12, 1909, the date on which it was approved by the governor. The operation of the non-user statute has been referred to as a Ballinger Code Vacation.

in any instance where:

1. The plat was recorded after March 11, 1904[2]; or

2. The platted street was annexed or incorporated into a city or town within five (5) years after the date of dedication.

The significance of the year 1904 is due to the case of Gillis v. King County, 42 Wn.2d 373 (1953). The Court in Gillis would not give the 1909 proviso retroactive effect due to vested rights. However, the Court held that no right was created unless the street remained unopened for the full five year period before the effectiveness of the 1909 proviso. The Gillis case does not shed much light on the overall purpose behind the non-user statute[3].

The effect of the non-user statute upon streets platted on tidelands should be carefully analyzed. Streets platted on first-class tidelands (i.e. tidelands within two (2) miles of the corporate limits of any city), are not "county roads" within the meaning of this 1889-90 statute, and are not vacated if they are not developed within five (5) years. The legislative intent expressed in Laws of 1895, Chapter 178, Sections 52 and 54 and Chapter 179, Section 1, is that the public ways platted on tidelands of the first-class should be subject to the control of the city to which they are adjacent, whether or not they lie within the corporate

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2 If dates become critical to you, note that the statutory language is "... dedicated as such in any plat...,". You could focus on the date of the dedicator's signature, rather than the date of recording.

3 In Miller v. King County, 59 Wn.2d 601 (1962), the court explained that the 1889-90 Act provided an incentive to land owners to grant areas for public roads, with the assurance that, if the purpose of the grant was not accomplished within five years, a reversion of the authority to construct a road would result. This interpretation was considered consistent with the Code of 1881, Chapter 173, Section 2329 (RCW 58.08.015). Through the 1881 statute, the legislature had provided that a grant to the public made by plat would function as a quit claim deed. In Miller, the Court describes this grant as requiring the performance of a condition before the grant becomes operative, that is, the opening of the street as a condition to acceptance of its dedication. In 1962, the Court does not discuss the meaning of the 1909 proviso or mention its 1953 analysis. As far as plats are concerned, the stated legislative intent could have been served by vacating the entire plat rather than just the streets within.

limits of the city.[4]

HOW IT FUNCTIONS

The non-user statute is said to vacate streets by operation of law and to be self-executing. However, a judicial determination is necessary to free the land from the apparent record easement. Lewis v. Seattle, 174 Wash. 219, 224 (1933). King County advises that it does not begin taxing the private owner for the former right-of-way until the year after it receives a court order or other formal evidence of vesting. Still, the failure to obtain an adjudication is not viewed as restoring to the public any interest which it lost through non-user. Van Sant v. City of Seattle, 47 Wn.2d 196 (1955).

Title to streets vacated pursuant to the non-user statute continues to be subject to private easements. In other words, if the non-user statute operated to terminate all public interest in platted streets as of 1906, for example, it did not affect private easements over such land by those who had obtained their easement with reference to a plat and in reliance thereon. Brown v. Olmstead, 49 Wn.2d 210 (1956).

In a non-user statute situation, cities will want to consider a claim of prescriptive easement. See RCW 4.16.020. Even if the non-user statute vacated the street long ago, public use may have subsequently established a street easement by prescription based on a more recent claim of use.

A public road can be established by prescription when the use has been such as to clearly convey to the owner that a claim is made in hostility to his title. Watson v. County Comm'rs, 38 Wash. 662, 665 (1905).[5] Even if the only evidence is of a foot path, that is sufficient to establish a public road. Hamp v. Pend Oreille County, 102 Wash. 184 (1918). The claim of prescription can be for the width of a roadway based on reasonable necessity under present circumstances. Primark v. Burien Gardens Assoc., 63 Wash.App. 900 (1992).

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4 This paragraph is taken, nearly verbatim, from the MRSC Report, "Surveys, Subdivision and Platting, and Boundaries" (May, 1987 Edition). Unfortunately, this marvelous resource is out of print. Actually, most of the background information provided about the non-user statute comes from that 1987 report or its 1958 predecessor or from Ralph Thomas.

5 This useful point and the two that follow are from a Pam James Summary Judgment memorandum, shared by her.

Where a dedicated street has been vacated by operation of law but there is nothing in the records to show the vacation, a conveyance by lot or block carries with it the fee to the center of the street unless the street is expressly excluded. Turner v. Davisson, 47 Wn.2d 375 (1955). It appears that a city may, but is not obliged to, recognize that the abutting property owner also owns the platted street falling within the operation of the non-user statute when there is no formal instrument recognizing the vacation. Cities will want to address this when considering lot line adjustments or plats.

WHAT IS UNOPENED

A party asserting vacation of a dedicated roadway under the non-user statute has the burden of showing that the street was unopened for the required five-year period. Adams v. Skagit, 18 Wash.App. 146 (1977). If no public money was ever spent on improving the relevant street, focus on the absence of anything to prevent public use and the lack of possession by someone else. Argue that the test is whether the street was actually physically open for public use, unobstructed and unenclosed. Brokaw v. Stanwood, 79 Wash. 322 (1914).[6]

Some court cases have, instead, looked at what is not "opening". The non-user statute was held to have operated where no public use was ever made of an alley and only a portion thereof had ever been opened for use as a private driveway. Burkhard v. Bowen, 32 Wn.2d 613 (1949). Intermittent use by the public which was not systematic during the relevant five years was also not "opening". Turner v. Davisson, supra.

Presumably, evidence of an early period of public use, even if by foot, is best. A street "used only by pedestrians is nevertheless a public . . . street within the legal meaning of that term." Albee v. Town of Yarrow Point, 74 Wash.2d 453, 458 (1968). There should be no need for use to have been exclusive or for it to have continued after opening had occurred. It would appear that "opening" is also satisfied by the filing of a resolution or other record establishing the road in the office of the county engineer. Ellingsen v. Franklin County, 55 Wn.App. 532 (1989). In such event, no physical entry would be needed. However, in King County at least, such information is seldom discovered and most likely would require a search through unindexed minutes.

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6 The foregoing analysis is again from the Pam James memorandum.

WHY NOW?

In the last several years, the non-user statute has been raised much more often in the City of Kirkland than in the preceding years. There may be widespread interest in it as in-filling becomes a hot topic. It may be useful to hear what developers are being told about the non-user statute. The following rather misleading information was provided as part of a 1993 seminar about survey issues:

> "The developers of land which was platted before 1909 are cautioned to examine what is often referred to as Barringer's Rule [sic], which provides that platted streets which remained unopened for five years after the order granting authority to open them are thereafter vacated. A revision to the law in 1909 excepted streets or other public places dedicated as such from vacation."

PRACTICAL CONSIDERATIONS

Now that we have covered the background issues, we will look at how to respond to a non-user statute claim, rather than a legal analysis of the claim. Immediately after receipt by your city of a non-user statute claim, if not sooner, your city should decide whether it will consider voluntary recognition of the operation of the non-user statute, or whether a claimant would have to file a quiet title action in every instance.

In several instances, Kirkland has passed a resolution, after review, acknowledging the operation of the non-user statute. In such instances, it is not advisable to agree to the city signing a deed. This is because the city does not want to take a stand as to in whom title to the vacated street would vest. However, there may be situations where there is sufficient reason for the city to sign a quit claim deed. Note that a city resolution is not equivalent to an adjudication of title. However, the resolution is likely to cause a title company to state that title to the former platted street is vested in the abutter. For many owners, this would be enough external recognition.

REAL LIFE EXAMPLES

1. One non-user experience for the City of Kirkland concerned a project development application. Initially, the developer was seeking both a discretionary zoning permit and a street vacation. Public Works agreed that the proposed new street plan was satisfactory. Next, the developer requested that the City deed over the old platted rights-of-way due to the non-user statute. The request was for both the interior old platted streets and a portion of old platted right-of-way which extended into a present arterial.

The City's concerns included setting a precedent of giving up rights-of-way and possible need for sewer line easement in the future. The developer presented excellent background information including a consultant's historical analysis, a title company's history of deeds, copies of historical maps, a copy of a 1936 aerial photograph and written recollections from early residents. Research for the City turned up a file at the county engineers office on the establishment of a road which became the present arterial, including references to survey work back to 1906.

It was reasonable to conclude that there had been no public use of the interior platted streets. As to the portion next to the present arterial, there appeared to be a legal issue. Would the opening of a street in one portion of the plat constitute opening of the same street as to other blocks in the plat? The aerial photograph also suggested early presence of a road or a wagon path which may have served more than one resident and which ran near to a relevant block.

An agreement was reached under which the City passed a resolution relinquishing any interest in specified portions of platted rights-of-way, the owner granted the City a sewer easement, the developer revised a landscaping plan as preferred by the City, and the developer made a contribution to the City park and open space fund. Somewhat reluctantly, the City included in the resolution an acknowledgment that title to the said portions of rights-of-way "should be quieted in the abutting property owner, the owner of blocks 3 and 6 of said plat."

2. A second non-user statute circumstance for Kirkland was raised by opponents of a development. These opponents did not have an interest in land adjacent to the subject property or the platted right-of-way in question. Their stated objection was that the proposed access to the development utilized a portion of an old, unopened, platted right-of-way. If the non-user statute had operated as to that right-of-way, ownership of it would have vested in an absentee owner.

The opponents argued that the proposed plat could not be approved since the absentee owner had an ownership interest in the subject property and had not signed on the plat. The planning department took the position that the opponents did not have standing to raise this issue. The opponents' other argument for disapproval of the plat was based on the general public's interest in the adequacy of access to the plat. They argued that if the plat was approved, the absentee owner might disrupt that access after trees on the site had been cut down. The planning department took the position that there was no more reason

to speculate about the possibility of an affirmative action by the absentee owner than that other circumstances might lead to abandonment of the development after site work had started.

3. The third non-user statute instance to be discussed is of the greatest concern to the City of Kirkland. The old unopened rights-of-way at issue are ones which the City would like to have available for possible future street connections. The present abutting owner had heard that the City would probably recommend against vacation in the context of a street vacation petition. The non-user statute was first referenced in a summons and complaint. There is no pending nor anticipated interest by the owner in any discretionary approvals.

The City's review included a title company property history report, a site visit, and a check of the county engineer's records. There is no indication of any opening of the portions of the platted right-of-way which abut the subject property.

One theory of interest to the City is that an owner, in effect, re-dedicates right-of-way by treating the old platted right-of-way as right-of-way in a new building permit application. The presentation of this theory is hampered by the City's non-retention of single family residence building permit files. The City may explore a possible defense based on the history of the non-user statute. This would be to argue that a new claim would be subject to the exclusion for streets dedicated in plats.[7]

Another possibility is to explore the "practical location doctrines" for a theoretical approach. For example, perhaps boundaries which would preserve a right-of-way should be re-established through the doctrine of location by a common grantor. See Winans v. Ross, 35 Wn.App. 238, 241 (1983). The act of platting should constitute establishment of an agreed boundary. In this case, the pattern of development of the plat did treat the old platted right-of-way as a functional boundary. There is a correlation between the circumstance that development followed the pattern of the plat and the City's concern that the old platted street remain available for opening.

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7 The basis of this argument is that the laws of 1937, Chapter 187, Section 70 repealed the Laws of 1909, Chapter 90. The non-user statute was reenacted by the Laws of 1937, Chapter 187, Section 52, substantially as it had been after 1909 (only a couple of insignificant word changes). The argument would be that, by now, a new claimant could not rely on the original non-user statute without the proviso being effective.

The City of Kirkland would appreciate your suggestions.

CONCLUSION

Cities where land was platted before 1905 should be concerned about the non-user statute. Development proposals which involve replatting or discretionary approvals present opportunities for avoiding non-user statute litigation. However, there may be no easy defense to a pure non-user statute claim. Unless other solutions are found, it may be advisable to develop procedures whereby abutting owners must re-dedicate old unopened rights-of-way as part of obtaining building permits or other approvals.

KNOW ANY GOOD TRICKS?

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