

Curing Title Exceptions: *Highways and Public Roads*

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HIGHWAYS AND PUBLIC ROADS

Achieving the right of vehicular access to highway or street is as close, in the lexicon of private property rights, to a universal objective that unites prospective purchasers as any. Conversely, preserving improvements inadvertently constructed within the abutting highway, jeopardizing their preservation, similarly concerns landowners who purchase land having buildings or improvements. The right of way line that separates the land of the private owner from the exterior lateral right of way line of the State is not always discernable without considerable research.

A. Vehicular Access, Abutter's Rights

The owner of land that abuts the right of way of a public highway ordinarily includes a right of access. Michigan State Highway Com. v. Sandberg, 383 Mich. 144, 174 N.W.2d 761 (1970). While an abutter had the right of access to an adjoining highway, such right is subject to superior interest of the state. Filler v. City of Minot, 281 N.W.2d 237 (N.D. 1979). Thus, the abutting property owner is entitled to reasonable access, but the state, in the exercise of its police power, may limit access to abutting property if reasonable access remains. Painter v. State Dept. of Roads, 177 Neb. 905, 131 N.W.2d 587 (1964).

B. Encroaching Buildings, Structures

1. Phantom streets

Ascertaining that their land does not contain any portion of a street, that is, corridor that consists of street in name only, that was dedicated but not improved requires particular diligence by prospective purchasers of adjoining land. In some localities there are tracts of land that were once thought to be prime development sites that never materialized. In such areas, subdivision plat instruments were recorded, but few buildings or street improvements were actually built. Therefore, the present day owner of such land, were they to obtain a current land survey of their holdings, would find themselves in occupation of a platted lot plus a portion of a street or alley that has been used as their building site or yard space. That the owner's occupation of the platted street was open, notorious, exclusive and adverse to the State is usually undisputed. The city or village, upon inquiry, may profess no present interest in opening or improving the strip as a street or alley. What is the legal status of a street long regarded by the private lot owner as their property?

2. Municipality's right to improve in the future

Some states have consistently regarded the title to land dedicated for street as that which the State holds, and until the time arrives when the street is needed for actual use, no mere non-user on the part of the State, however long continued, could operate as an abandonment of the public right thereto. Reilly

v. City of Racine, 51 Wis. 526, 8 N.W. 417 (1881). The invasiveness, size and scale of the private owner's structure placed on such corridors, criteria that might otherwise impress the mind of prospective purchasers, have proven to be largely irrelevant. For example, the location entirely within the right of way of a dedicated by unimproved street of a brick building used as a hotel outhouse and other proprietary uses for more than 121 years did not ripen the private owner's title in the nominal street parcel. City of Jefferson v. Eifler, 16, Wis. 2d 123, 113 N.W.2d 834 (1962). See also State v. Leaver, 62 Wis. 387, 22 N.W. 576 (1885) (barn located within right of way for more than 13 years); Childs v. Nelson, 69 Wis. 125, 33 N.W. 587 (1887); (fences and buildings located on, and four trees planted within right of way for more than 32 years).

Knowing that the street or alley, though not presently traveled or improved, could eventually be improved in the future, resulting in the removal of the landowner's buildings and improvements has potential detrimental impact upon the private landowner's property's fair market value. See e.g. Heise v. Village of Pewaukee, 92 Wis. 2d 333, 285 N.W.2d 859 (1979). The alternative to an uncertain future, and to clear the title to such street remnants, is to proceed pursuant to applicable statute to vacate the street and await the outcome.

3. Alternatives to discontinuance

Discontinuance or vacation procedures entail time requirements that do not necessarily meet the time requirements provided by purchase agreements. If the street or alley as a whole has not been improved, in some states, the parties may succeed in obtaining a resolution by which the city, village or town discontinues the street without notice or hearing. Any street or alley that has not been worked, after the expiration of a period of years from the date of the recording of the plat by which it was dedicated, may be discontinued by resolution of the city, village or town without notice or hearing. However, if the street has been improved, the resolution is not available.

Statutes that grant the power to remove characterize, but do not classify the wide spectrum of, items that might conceivably be placed within streets that interfere with public travel as obstructions, encroachments or both. Cities, villages and towns are granted general statutory power to authorize "privileges," but not necessarily easements or permits. Civil and criminal liability attach to the abutting party's improvement, depending upon whether it constitutes an obstruction or an encroachment. Additionally, removal procedures differ for obstructions and encroachments, with that pertaining to obstructions summary, and that pertaining to encroachments requiring notice. Thus, to evaluate the risks associated with street improvements by abutting landowners, an initial determination is required to be made by the city, village or town concerning whether the item contemplated, if constructed, will

constitute an obstruction. Anyone causing an obstruction or excavation without first obtaining a special privilege shall be liable to a fine or to imprisonment.

4. Contracts and conveyances

Problematic to abutting landowners seeking an express grant of rights in existing street right of way is the well-established principal that, in contrast to real estate titled in them in a proprietary capacity, municipalities and other units of local government are typically without power to sell street. A fee simple estate in abutting landowners in street right of way can vest only if the street is vacated or discontinued pursuant to proceedings mandated by statute, not by circumvention of the statute as by contract or sale. Thus, though authorized by vote of the city's council, a deed in which the city was the grantee and by which the title to a strip of land intended by its common council for street was void. Trester v. City of Sheboygan, 87 Wis. 496, 58 N.W. 747, 749 (1894). Generally, a municipality cannot, by resolution, ordinance or other act, exceed its delegated powers conferred by statute. Therefore, where a state act fully covers a subject or manifests a purpose to establish a uniform state rule pertaining to it, conflicting local ordinances on the same subject are invalid to the extent of the conflict. Volunteers of America v. Village of Brown Deer, 97 Wis. 2d 619, 294 N.W.2d 44 (1980).

5. Utilities

Certain utilities have a special status to construct improvements within highway right of way, subject to the consent of the highway authority. Poles installed by utilities are subject, however, to removal if they interfere with the use of the highway. Druska v. Western Wis. Tel. Co., 177 Wis. 621, 189 N.W. 152 (1922).

6. Overhead uses

Street right of way includes not only the surface of the street but also the airspace over the street. Passenger vehicles and commercial motor carriers are of relatively uniform, finite dimensions. How much airspace above the surface is accorded the State in trust for the public? In some states, the State holds the title to streets and highways in fee, but others an easement only. As to fee simple estates in land generally, under the ad coelum doctrine at common law, whose is the soil, his is to the sky or high heavens, implying that the fee holder has an exclusive right to all of the airspace over the land. Common law predates modern commercial air travel, urban center skywalks and cell telephone towers. Do utilities have a right to construct towers and poles at a height well in excess of the airspace utilized by vehicular traffic?

7. Subsurface uses and improvements

Public utilities are authorized by statute to use highway right of way for the installation and maintenance of certain improvements, as discussed above. In Michigan the public easement of cities and villages in streets does not extend to a proprietary right to extract oil and gas. Village of Kalkaska v. Shell Oil Co., 433 Mich. 348, 446 N.W.2d 91 (1989).

Below grade vaults that serve commercial buildings and allow the delivery of essential supplies are commonplace in many older business districts. Underground parking ramps serve an integral purpose for office buildings, hotels and apartment buildings. Vaults and underground parking structures are by definition more likely than other private structures to encroach upon street right of way. Underground septic drain fields, private sewer lines and farm drain tiles underneath highways or within right of way serve a wide range of properties. Does the State have a right to relinquish the subterranean space to the abutting landowner by express grant? Are there any limitations on the type of uses permitted?

The lack of an express grant for the right to construct underground structures below the street's surface by cities, villages and towns can be problematic for the developers of urban center buildings, the feasibility of which may sometimes depend upon the availability of subterranean enhancements for storage and parking. Developers must carefully review the building permit for any conditions upon underground improvements, which could effectively concede, in the event permission by the city is expressly granted, title by adverse possession or easements to areas under the street.

C. Trees, Vegetation

1. Trees and vegetation

Who owns or has rights to the trees that grow within the right of way of streets? Does a private owner enjoy a right to maintain trees as against a contrary demand on the part of the State to remove the trees? Can a prescriptive easement to maintain a line of trees or hedge within highway right of way exist as against the State, or an express easement to assure their continuation be granted by the State?

2. Changing public and private attitudes toward roadside vegetation

Viewpoints concerning the value of roadside trees and vegetation, since they involve aesthetics, vary widely. Martin R. Jenkins, Trees and the Law in New Hampshire, 25 New Hampshire B. J. 1 (1983); Arthur D. Peterson, Arboreal Law in Iowa, 44 Iowa L. Rev. 680 (1959). Increasingly, rural residential land values are enhanced as the result of rustic appearance offered by close growing vegetation in the vicinity of roads. Removal of roadside trees by local

government and utilities, that exposes hidden building sites, threatens the value of such sites. Landowners who value roadside trees and shrubs as aesthetic additions to their land may be entitled to additional damages for their loss when by cutting trees along the roadside, the town commits a trespass. Threlfall v. Town of Muscoda, 190 Wis. 2d 121, 527 N.W.2d 367 (Ct. App. 1994). Assuming the trees or shrubs do not interfere with public safety of travelers, do standards exist that private landowners can require local government and utilities to follow to make sure these trees and vegetative barriers are preserved?

a. Trees.

Historically, under frontier conditions, trees that grew within highway right of way were valued chiefly as commercial timber or fuel wood, not as ornamental or shade trees. Laws pertaining to trees within right of way are state-specific. Thus, in one state, all trees on land over which a highway is laid out were and continue to be for the exclusive use of the abutting landowner, except trees that have been acquired by the public in acquisition of the highway right of way. §86.03, Wis. Stats. In more recent times, private landowners, rather than harvesting trees and denuding landscape, frequently seek to maintain trees and shrubs to enhance their property's value. Thus, in Wisconsin, abutting landowners may, with the approval of the highway authority, plant, cultivate and maintain trees, shrubs or hedges within the highway right of way if within 10 feet of that person's land. Planted or maintained trees growing within the right of way may be cut or removed exclusively by the abutting owner or by the highway authority. §86.03(3), Wis. Stats. However, it is unlawful for the abutting landowner to injure, mutilate, cut down or destroy any shade tree growing on or within any street or highway in any village, unless permission is first granted by the village board of trustees. Statutes may distinguish between volunteer trees from those maintained as street shade or ornamental trees.

It is not always the abutting owner who strives to remove or trim trees within right of way. Can the abutting landowner secure a continuing right to keep the trees he has maintained as against the demand of the highway authority that they be removed. As between the highway authority and a private landowner, a line of trees along the side of the highway that is located within the highway right of way cannot give rise to a title by adverse possession as against the State, which has broad authority over highways by comparison with lands that it holds in a proprietary capacity. Klinkert v. City of Racine, 177 Wis. 200, 188 N.W. 72 (1922). Whether the trees are obstructions to travel, and ought to be removed in order to make sidewalk safe for travel is a matter within the broad quasi-legislative discretion conferred on the common council by city charter. Chase v. City of Oshkosh, 81 Wis. 313, 51 N.W. 560 (1892). Tree trimming by utilities

with facilities within and outside of highway right of way may be restricted by status.

b. Herbage

At common law, the abutting landowner enjoyed the exclusive use of grass and herbage other than trees within road or highway right of way. McQuillan, Municipal Corporations, §30.69. See e. g. People v. Foss, 80 Mich. 559, 45 N.W. 480 (1890), affirming an exclusive right to pasture abutting landowner's farm animals. In the absence of an ordinance that permitted members of the public to graze animals in the right of way, such grazing constituted a trespass on the land of the abutting owner. Harrison v. Brown, 2 Wis. 27 (1856). Though a right to harvest natural vegetation, such as native asparagus, berries, mushrooms and wild flowers, is an exclusive right of the abutting landowner, does the landowner also have a right to plant and cultivate vegetation within the right of way, or to create artistic expressions, such as effigy mounds, with vegetation? In rural areas, roadside weed control by highway authorities often includes chemical herbicides, which largely precludes the harvest of all herbage for food. Does the private landowner's common law and statutory rights to herbage limit the highway authority's right to apply herbicides?

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