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MEMORANDUM

TO: City Council
FROM: Paul Roberts, Deputy City Attorney
DATE: February 25, 2015

RE: Capturing value when vacating streets

During a December 2014 Council meeting addressing vacation, a Councilperson requested information from staff on the practice of capturing value during the process of granting a street vacation. In such cases, if an abutting property owner petitions the local authority to vacate a portion of street fronting the property, the petitioner would be required to pay value for the portion of the street to be vacated.

EXECUTIVE SUMMARY

In cases where the City owns a street in fee simple, the law suggests that selling the street would be an appropriate method to capture the value of the City's investment. In cases where the City owns the street in fee simple determinable, as in cases of private dedication, there appears to be sufficient latitude in the law for the City to require payment for the transfer of that interest, but care must be taken to ensure that procedures are in place to protect abutting property owners and for the value to be captured prior to the act of recording the vacation ordinance with the County.

ANALYSIS

Streets generally come into the possession of the City in two ways: (1) through dedication; and (2) through purchase or gift. Traditionally, local governments require the dedication of streets when a neighborhood is platted. Requiring the dedication of streets is a constitutional exaction by the government, as roads are necessary in order to deliver municipal services and utilities to those properties, and those streets will chiefly be used by the occupants of the developed property. However, as time goes by and land uses change, the utility of a street can decrease. In some cases, adjacent property owners seek the vacation of streets by the state or local government.

Common Law

Traditionally, streets which are held for the public have been considered as held in trust for the public's benefit.¹ "Unless abandoned or vacated, streets are held in trust for the public, and, without legislative authority, cannot be alienated or otherwise disposed of."² In some states, for instance, courts have invalidated property transfers or sales of public rights-of-way because the local government had no authority to do so.³ Other states have expressly permitted the sale of public streets.⁴

¹ One treatise explained the concept in this way:

According to a well-established principle, said to be derived from the Roman Law, the title to streets and public ways, whether in the people or a municipality, or in fee or in easement, is held in trust for the public use, both for the purpose of public travel and as a means of access to and egress from abutting property. This principle governs all the public ways within the municipality, throughout their length and breadth, and including all of their parts. Accordingly, the municipality cannot divert a street from this public use by alienating or conveying it, or by converting it to another use, or by otherwise destroying or suffering its destruction as a thoroughfare for the public, except where the municipality is permitted or required so to do by express provisions of the statutes, or by the laws of the land.

McQuillan, *The Law of Municipal Corporations*, § 30:35 (3rd Ed.) (2009 rev.) [hereinafter McQuillan].

² *Id.*, § 28.38.

³ See e.g., *Moore's Ferry Dev. Corp. v. City of Hickory*, 601 S.E.2d 900 (N.C. Ct. App. 2004) (holding that city was not authorized to permit private booth in right-of-way); *Duckworth v. Robertsedale*, 28 So.2d 182 (Ala. 1946) (summarily declaring that attempt by Mayor to deed a portion of a public street to a private party was ultra vires and void); *Cernauskas v. Fletcher*, 201 S.W.2d 999 (Ark. 1947) (holding that city had no authority to sell or give away

As statutes have been passed in various states, there has been less uniformity when it comes to ownership of public streets. Even as it relates to the rule which vests ownership in fee to property owners with land adjacent to the public street, there is no consistent answer throughout the United States:

[T]he law is not uniform on this subject; the decisions exhibit inconsistencies and even conflicts, and they are characterized by disagreement as to all aspects of the rules as stated above. In some instances, municipalities, rather than the adjacent property owners, own the fee to the streets.⁵

As a result of this disparity, there are few cases outside of Utah of persuasive value.⁶ However, there are some Utah cases and statutes which shed light on the issue.

Utah Code & Case Law

The dedication of streets to a city is governed by the Utah Municipal Code. When a subdivision plat is presented to the City for approval, the developer is required to specify which areas are to be dedicated to public use, as well as easements for underground utilities.⁷ Once the plat has undergone the approval process, it is filed with the County Recorder.⁸ Pursuant to Utah law, and unlike the common law which preceded it, when the plat is recorded, it operates as “a

streets, but could only abandon them); *Cotrone v. New York*, 237 N.Y.S.2d 487 (N.Y. Sup. Ct. 1962) (city has no proprietary rights in streets, but holds them in trust for public); *see also City of Little Falls v. State*, 52 N.E.2d 963 (N.Y. Ct. App. 1943) (holding that New York could take an abandoned street for canal purposes, as city only held property in a proprietary capacity).

⁴ *E.g., Harman v. City and County of San Francisco*, 496 P.2d 1248 (Cal. 1972) (considering citizen challenge to city’s practice of discounting appraised value, in cases of easement sales).

⁵ McQuillan, § 30:32.

⁶ *But see Ferreira v. City of Ashbury Park*, 567 A.2d 233 (N.J. Super. 1989) (upholding city sale of parcels of land, including right-of-way to private developer, and holding that restrictions on deeds cannot force city to forever maintain a road); *Menk Corp. v. Township Committee of Barnegat*, 912 A.2d 749 (N.J. Super. 2006) (court required city to vacate road to accommodate request of developer of affordable housing, after Township asserted it wanted to be compensated for the vacation); *S. Easton Neighborhood Ass’n v. Town of Easton*, 876 A.2d 58 (Md. Ct. App. 2004) (upholding street closure by Town Council to make more room for hospital expansion, and holding that public use of street to be closed does not prevent closure).

⁷ Utah Code Ann. § 10-9a-603(1)(b), (d).

⁸ *Id.* § 10-9a-604.

dedication of all streets and other public places, and vests the fee of those parcels in the municipality for the public for the uses named or intended in the plat.”⁹

Therefore, under Utah law, since the fee¹⁰ is transferred to the City by a dedication, the abutting property owners do not have any ownership interest in the streets, and the City owns the land. However, establishing that the City owns its streets is insufficient to establish its authority to sell that interest.¹¹ Utah law generally holds that “the interest a municipal body acquires in the streets in a platted subdivision is a determinable fee. Upon vacation by the governing authorities, the fee reverts to the abutting property owner.”¹² “A fee simple determinable expires automatically on the occurrence of a stated event. Thus, where a municipality has a determinable fee in a roadway, common law provides that the limited fee ends when the roadway is vacated.”¹³ This has been specifically held to be the case when the roadways are accepted “pursuant to the final approval of a subdivision plat.”¹⁴

In other words, the City’s interest in streets which were dedicated to the City through the platting process are owned by the City in fee simple determinable, and when they are vacated, all ownership interest in the streets reverts to the abutting property owners. This procedure has also been codified in section 72-5-105.¹⁵

Fee Simple vs. Fee Simple Determinable

⁹ *Id.* § 10-9a-607(1).

¹⁰ An interest in “fee” represents an ownership interest in the land, as opposed to an easement or license, which only grants access to the land for limited purposes, and which may be limited in time or uses.

¹¹ For instance, abutting property owners could have prescriptive easement rights to access their property from a right-of-way, particularly if that parcel would otherwise be landlocked.

¹² *Sears v. Ogden City*, 572 P.2d 1359, 1363 (Utah 1977).

¹³ *Nelson v. Provo City*, 872 P.2d 35, 38 n.3 (Utah Ct. App. 1994).

¹⁴ *Id.*

¹⁵ Utah Code Ann. §72-5-105(2)(a) (“title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with one-half of the width of the highway, street, or road assessed to each of the adjoining owners”) (citation omitted).

It should not be presumed that all roads in the State of Utah were dedicated to municipalities through a platting process, however. There are two examples of roads for which the City would have a fee simple interest: (1) those for which the City has paid, and (2) those which were deeded to the city prior to any occupation of the land surrounding it. In cases where the City acquired land in order to build roads, such as through eminent domain or by purchasing a large parcel, the fee would not be determinable. For instance, if the City acquired a large parcel of land for redevelopment purposes, and then bisected it with a public road, then the City would retain fee simple interest in the road, unless that ownership was transferred to another party.

The second example was addressed in *Nelson I*¹⁶ and *Nelson II*,¹⁷ which involved the sale of a portion of 900 South in Provo to a commercial developer. That case required the Court to consider a federal conveyance of land to Provo which occurred in 1869. In short, 900 South was established upon a public thoroughfare which existed at that time, through a deed from the federal government, and then the abutting parcels were deeded to various parties.¹⁸ The court in *Nelson I* held that:

[W]here a municipality has but a determinable fee and does not own the underlying fee simple, the vacating of the roadway results in the fee reverting to the abutting landowners. Conversely, where a municipality owns the underlying fee to a roadway, proper vacation of such would not change the municipality's right to the underlying fee.¹⁹

¹⁶ 872 P.2d 35 (Utah Ct. App. 1994);

¹⁷ *Nelson v. Provo City*, 2000 UT App 204, 6 P.3d 567.

¹⁸ *Nelson I*, at 35-36.

¹⁹ *Id.*, at 38 (citations omitted).

The court ultimately held that Provo City was the owner of the property in trust for the citizens of Provo, and remanded for the lower court for further consideration of whether the road was properly vacated, and a determination of the ownership interest held by the city.²⁰

The lower court ruled that street vacation was unnecessary and quieted title to Provo City because if any easement was created by the establishment of the street, it would have merged with the fee ownership of the land.²¹ Thus, the abutting property owners could not demonstrate that they had an ownership interest in the street. On its second appeal, the Court directly considered whether the ownership was a determinable fee. The Court of Appeals noted that the abutting property owners were not challenging the propriety of selling the roads; they only sought to establish their interest in the land to the halfway mark in the road.²² The court held that because the street was “dedicated to public use before the abutting lots were occupied,” and because the grantor was a public entity, rather than a private one, Provo City’s interest in the land was not a determinable fee, but a simple fee.²³

The determination of whether the City’s interest in streets is determinable or simple would require research into the means by which it was dedicated to the public use. In some cases, this will be a simple endeavor. However, experience has taught us that the further back the research needs to go into land use issues, the more difficult it is to locate records for those matters.

Sale of City’s Interest

As a general rule, “[w]hen a street is vacated and the municipality does not own the underlying fee, the municipality has no proprietary interest in the property and is not entitled to

²⁰ *Id.*

²¹ *Nelson II*, at ¶ 6.

²² *Id.* at ¶¶ 8, 18.

²³ *Id.* at ¶¶ 16-17.

compensation.”²⁴ Thus, if the City’s interest in the vacated street was simply a determinable fee, the property automatically transfers to the abutting property owners. If, on the other hand, it is a simple fee, then vacating the street does not necessarily vest in the abutting owners.²⁵ Indeed, the cases support the ability to sell streets for which the City holds non-determinable fee simple title. In most cases, the fee simple title would have been acquired by the City as a result of its purchase of the land. Thus, it is reasonable that the City should capture value when tax dollars were paid to acquire the property in fee simple in the first place.

Whether the City may require payment by adjoining property owners for the relinquishment of its fee determinable interest – and for which the City did not provide payment – is more complicated. The fundamental difference between these streets and those which the City owns in fee simple is that the City did not pay for the ownership interest which it was granted. Dedication of public rights-of-way for utilities, public services and transportation is a requirement for any subdivision plat. While it may be argued that this constitutes a voluntary donation, there is an element of compulsion because without the dedication the city will withhold plat approval, and the land cannot be subdivided.

On the other hand, when a street is vacated at the request of adjoining property owners, the City is surrendering an ownership interest in which it has invested over the years. The cost of street installation and maintenance is substantial. And the closure will affect citizens and businesses in the surrounding area. It may be reasonable to expect either compensation for the lost amenity, or to require some aesthetic or other investments by the recipients of the land. Moreover, state law provides that the City may dispose of its real property for the benefit of the

²⁴ *Sears*, 572 P.2d at 1363.

²⁵ It is unclear whether section 72-5-105 would dictate the automatic transfer of title to abutting owners, if the city owned the fee simple title to the street. That provision was first added to the code in 2002, and thus post-dates the *Nelson* cases. 2002 Utah Laws ch. 291 (S.B. 65).

municipality, so long as the action is in the public interest and complies with other laws.²⁶ There is no general prohibition²⁷ against a local government requiring compensation for the decision to vacate its determinable interest in the road.

Salt Lake City Ordinance – Closure vs. Vacation

Salt Lake City’s practice related to capturing value is codified in section 14.52.040 of the Salt Lake City Code. After a petition to vacate has been granted, but before actual street vacation occurs, the City requires payment of fair market value in some cases. The code provides:

If the city council grants the petition, the city owned alley property will be disposed of as follows:

- A. Low Density Residential Areas: If the alley property abuts properties which are zoned for low density residential use, the alley will merely be vacated. For the purposes of this section, “low density residential use” shall mean properties which are zoned for single-family, duplex or twin home residential uses.
- B. High Density Residential Properties And Other Nonresidential Properties: If the alley abuts properties which are zoned for high density residential use or other nonresidential uses, the alley will be closed and abandoned, subject to payment to the city of the fair market value of that alley property, based upon the value added to the abutting properties.
- C. Mixed Zoning: If an alley abuts both low density residential properties and either high density residential properties or nonresidential properties, those portions which abut the low density residential properties shall be vacated, and the remainder shall be closed, abandoned and sold for fair market value.

SLC Code § 14.52.040. Pursuant to Salt Lake City Code, only non-residential or high-density residential abutting property owners are required to pay fair market value. Rather than calling the action a vacation, the ordinance identifies the action in those cases as closure and

²⁶ Utah Code Ann. §10-8-2(1)(a)(iii).

²⁷ Pursuant to *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980), cities have broad discretion to advance the general welfare of their citizens, so long as the city’s actions do not conflict with state laws.

abandonment.²⁸ Once Council approval is obtained, staff await payment from the property owners, and thereafter file the vacation ordinance with the County. Since vacation does not occur until the ordinance or plat is filed with the County,²⁹ the fee does not vest in the abutting property owners upon approval of the vacation by the Council.³⁰ Thus, the City would retain its property interest while it awaits payment for the transfer.

The use of the terms “closed and abandoned,” instead of vacated, is not likely to have any impact on the validity of the Council’s action. The Utah Supreme Court in 2001 struck down an action by Salt Lake County in which it vacated portions of a road, and closed other portions, to make way for a development. In *Culbertson v. Board of County Commissioners*, the County adopted an ordinance which determined that the right of way at issue was no longer needed as a public highway or public right of way, but treated portions of the road differently.³¹ Some portions of the road were vacated, while others were “closed rather than vacated” by the ordinance.³² The Utah Supreme Court rejected the County’s assertion that the portions which were closed were no longer public highways: “Although a public road may be closed temporarily, defendants offer no authority for the proposition that a public road can lose its legal status as a public road by being permanently closed rather than vacated.”³³ It therefore required

²⁸ In a high profile instance, Salt Lake City sold a block of downtown Main Street to the LDS Church in 1999 and 2003, in exchange for approximately \$13 million in cash and property exchanges. Although legal battles commenced, they generally focused upon the First and Fourteenth Amendments, rather than the propriety of selling the City’s interest in Main Street. See e.g., *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201 (D. Utah 2004).

²⁹ Utah Code Ann. § 10-9a-609.5(5)(a).

³⁰ That same section also requires the legislative body to ensure that the plat or ordinance is recorded, once approved. *Id.* § 10-9a-609.5(4). In order for a property owner to test the ability of a city to require payment prior to street vacation, that property owner would be required to submit the application, go through the public process, obtain the council’s approval, and then refuse to pay the compensation. The party could ask for a court to require the Council to have the ordinance recorded pursuant to section 10-9a-609.5(4). It is uncertain whether a court would enforce the Council’s vacation decision, when one condition of the vacation is the payment of value by the applicant.

³¹ 2001 UT 108, ¶¶ 39-41, 44 P.3d 642.

³² *Id.* ¶ 41.

³³ *Id.* (citation omitted).

the County to comply with county zoning and roadway ordinances with respect to those portions which were not lawfully vacated. Under *Culbertson*, the City may not avoid section 72-5-105 by simply calling the action a closure.

Similarly, using the term “abandoned” rather than “vacate” will not avoid the effects of section 72-5-105, which provides that fee simple ownership in the street is split to the half-way point in the street when the street is either “abandoned or vacated.”³⁴

Rather than attempting to call a street vacation by another name, it is recommended that if the Council wishes to capture value for street vacations from privately-dedicated right of way, it do so by stating that the City is selling its fee determinable interest in the street and then vacating the street as part of the property sale.

In light of *Sears*, the value for the vacated streets must be captured before the vacation becomes effective. If the Council wishes to capture value for its fee determinable interest in the public road, then it will need to determine when to capture that value; either prior to the decision to vacate, or between the Council’s decision and staff’s filing of the ordinance with the County.

Determination of value

If the City begins to require compensation for the vacation of its fee determinable interest in the streets, there will also remain the question of the value of the land acquired. An ordinance could require payment of fair market value, as determined by an assessor. The value of a fee determinable interest will be substantially less valuable than a fee simple interest. Thus, as part of the assessment process, the nature of the City’s interest must be established. Alternatively, ordinance could require the petitioning property owner to produce the value added to their own property or properties, as in Salt Lake City’s ordinance. Under this method, an assessor would

³⁴ Thus, in cases where the city vacated or abandoned a street, it would be inappropriate to convey more than one-half of the roadway to a property owner who abuts only one side of the street, even if that property owner conveyed value for the entire width.

consider the value of the petitioner's property, and then produce a new calculation with the added value of the land being transferred to the property owner (prior to the construction of any improvements).

When determining value, the City could also consider the improvements which a petitioner may make to the vacated street which benefit the neighborhood generally, such as aesthetic improvements, investment in the community, added economic value to the City, or amenities which will be provided to the public.

Varying treatment based upon circumstances

If the Council wishes to adopt a policy of selling its property interests, rather than vacating them, then it would need to establish policies and procedures which take into account the various types of properties which would be petitioning the court for vacation, and the reasons for those vacation requests. The Council would have relatively wide latitude to vary the circumstances under which it would sell its interests. For instance, it could limit the sale of roads to those roads for which the City possesses a non-determinable fee simple interest. Or, like Salt Lake City, it could limit the sale of street property to properties other than low-density residential lots. It could also provide a mechanism whereby the Redevelopment Agency petitioned the City Council for vacation for economic development purposes, thus avoiding the sale requirement if the closure would ultimately provide economic value to the city through increased property or sales taxes. In cases where the City, rather than the property owner, initiates the street vacation, there would need to be an exemption, as there would be no willing buyer, and the City would not presume to force a property owner to buy the interest in the street.

In short, if the Council wishes to provide this policy direction, then there will be several additional points in the new laws and procedures for which we would need additional policy direction.

CONCLUSION

In cases where the City owns a street in fee simple, there is strong support for an attempt by the City to capture value for the street when it is vacated. In cases where the land was dedicated to the City by a private developer, and the City's interest is merely a fee determinable one, there appears to be sufficient latitude in the case law and statutes that it could require payment in consideration for the sale of its fee determinable interest in the public road. However, such a vacation must comply with section 72-5-105, and the vacation must vest title to the abutting property owners to the half-way point in the street; it cannot be sold exclusively to a property owner on one side of the street.

If the Council wishes to implement this policy, then a more comprehensive discussion considering the costs, procedures, effects and viability of such a direction will be appropriate.