

To: Amy Manzelli
From: David Scott
Re: Paper Streets Created By Dedication and Acceptance
Date: July 21, 2014

Question Presented

Does the City of Concord have any real property interest in the Phase III extension of Locke Road?

Short Answer

Although Phases I and II of Locke Road were previously dedicated and accepted, Phase III appears to have only been dedicated to the City of Concord. It is likely that prior subdivision plans depicting Locke Road extending onto 52 Locke Road resulted in the dedication of Phase III of Locke Road to the City of Concord. The City of Concord's implied or expressed actions however, do not seem to have ever created an acceptance of Phase III of Locke Road. Therefore, a Petition to Release from Public Servitude may be necessary to release any rights that accrued to the City of Concord by virtue of the "paper" street currently encumbering 52 Locke Road.

Facts

BCM Environmental & Land Law, PLLC represents Fournier Foods in their interests on property located at the address of 52 Locke Road Concord, NH 03301, also known as Tax Map 121, Block 1, Lot 17 (the "Lot") (formerly known as Tract No. 8207, Lot No. 2). The Lot is at the end of Locke Road, a dead-end road. Locke Road has been proposed in three phases, of which Phases I and II have been constructed. However, Phase III remains unconstructed, appearing only in paper on subdivision plans.

Phase I of Locke Road's limits begin at the northerly right-of-way of West Locke Road and are described within an Easement Deed located in the Merrimack County Registry of Deeds at Book 1386, Pages 1057–58. Phase II of Locke Road's limits extends from Phase I and are described within an Easement Deed located in the Merrimack County Registry of Deeds at Book 1837, Pages 1464–66. In Phase II's easement, it specifically states that the City of Concord accepted Phase I of Locke Road for maintenance. Although there is no easement referencing Phase III of Locke Road, several subdivision plans depict Locke Road extending from Phase II across the Lot including: Merrimack County Registry of Deeds #10570, recorded 8/30/1988; and

Merrimack County Registry of Deeds # 11807, recorded on 9/24/1990. However, Phase III of Locke Road remains not constructed, not developed, not maintained, and not traveled.

Analysis

A public highway is created by one of four methods: “(1) through the taking of land by eminent domain and the laying out of a highway by some governmental authority; (2) through the construction of a road on public land; (3) through twenty years of use by the public before 1968; or (4) by dedication and acceptance.”¹ This memorandum deals solely with dedication and acceptance.

To create a public highway by dedication and acceptance, a landowner must dedicate his or her property to a municipality, and the municipality must accept the dedication.² A dedication is “the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use.”³ A landowner may dedicate a highway for the public’s use either by expressed or implied actions.⁴ Regardless of how a landowner dedicates a public highway, the intent “must be clearly and unequivocally manifested.”⁵

A landowner may dedicate a public highway by expressly “conveying lots by reference to a recorded plan that shows the . . . proposed streets,” by “dedicating by deed,” and by “recording a plat and selling lots with reference to a plat.”⁶ A landowner’s clear conduct intending to devote land to a public use may also result in an implied dedication.⁷

Following a dedication, a municipality must accept a dedication. A municipality’s acceptance has “broad legal implications” because it “turns the street into a public highway, and thereby renders the accepting city or town liable for its construction and maintenance, or for accidents happening upon it.”⁸ A municipality’s acceptance is necessary because “if acceptance were not required, ‘it would be a great hardship upon towns if an individual could lay out a way upon his own land, throw it open to the public,

¹ *Hersh v. Plonski*, 156 N.H. 511, 514–15 (2007) (citing *Polizzo v. Town of Hampton*, 126 N.H. 398, 401 (1985)); See RSA 229:1.

² *Hersh*, 156 N.H. at 515.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 516.

⁸ *Id.* (quoting *Polizzo*, 126, N.H. at 401–02).

and then oblige the town to charge themselves with the maintenance and repairs of it.”⁹ Furthermore, a municipality’s acceptance “generally protects the public from having an undesirable dedication thrust upon it, as where the concomitant burdens of maintaining a street, park, or other public service outweighs the public benefits.”¹⁰

Like a landowner’s dedication, a municipality may accept a dedication by expressed or implied acts.¹¹ A municipality may expressly accept an offer of dedication by ordinance or by formal resolution.¹² Acceptance can also be “implied by acts such as opening up or improving a street, repairing it, removing snow from it, or assigning police patrols to it.”¹³ Similar to a landowner’s dedication, a municipality’s acceptance “must be unequivocal, clear and satisfactory, and inconsistent with any other construction.”¹⁴

Both Phases I and II of Locke Road appear to have been dedicated and accepted. Previous landowners’ express actions demonstrate a clear intent to devote land to the City of Concord by dedicating Phases I and II by Easement Deed. Furthermore, the City of Concord’s acceptance of Phases I and II can be implied because the City of Concord maintains these portions of Locke Road. Thus, by both Phase I and Phase II being dedicated and accepted, the public has a right to use these portions of Locke Road.

Although the status of Phases I and II of Locke Road appear clear, Phase III is more complicated. Unlike Phases I and II, Phase III was never dedicated by an easement. Because several subdivision plans depict Locke Road extending onto 52 Locke Road, it is likely that these subdivision plans “clearly and unequivocally manifest” an intention to dedicate this portion of Locke Road to public use.¹⁵ Therefore, Phase III of Locke Road was likely dedicated to the City of Concord. However, it does not appear that the City of Concord expressly accepted this portion of Locke Road by ordinance or by formal resolution. In addition, the City of Concord’s action did not create an implied acceptance as Phase III of Locke Road was never constructed, developed, maintained, or traveled. Therefore, the City of Concord never demonstrated a clear intention to maintain Phase III of Locke Road for public use.

Because it is likely that Phase III of Locke Road was dedicated but never accepted, it is in the interests of both Fournier Foods and the City of Concord to clarify

⁹ *Id.* (quoting *State v. Atherton*, 16 N.H. 203, 210–11 (1844)).

¹⁰ *Id.* (citing 77 Am. Jur. Proof of Facts 3d § 13, at 37 (2004)).

¹¹ *Id.* at 515.

¹² *Id.* at 516.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 515.

the status of Phase III of Locke Road by a Petition to Release from Public Servitude.¹⁶ This would free Fourier Foods from the encumbrance on their land, and would free the City of Concord from liability for construction and maintenance of Phase III of Locke Road. However if the City of Concord took actions that may not have been previously discovered, it would be in the best interest of both parties to Petition to Discontinue Phase III of Locke Road. These petitions would remove the encumbrance on the Lot and would eliminate any responsibilities the City of Concord has for Phase III of Locke Road.¹⁷

¹⁶ RSA 231:52.

¹⁷ *Hersh*, 156 N.H. at 516.