

Erasing the Paper Street

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Access is essential to the development and use of real property and it is a fundamental concern when examining title. Considerable effort by the closing attorney is often necessary to establish record access in order to market property. On occasion, however, the closing attorney is faced with the prospect of terminating existing rights of way because they interfere with the intended use or development of the property. The termination of record access can be as critical an issue in the completion of a closing as the establishment of access in the more typical transaction.

There are three statutory procedures available to the closing attorney which provide a mechanism to terminate access rights of way which have been previously established on the public record. Usually, the rights of way have never existed in fact, but are disclosed only in the record title by deed, easement or plat. They exist on paper only.

The termination of "paper streets" usually has two objectives. First, there is the termination of the rights of others to utilize the easements as rights of way. Second, is the resolution of the question of fee ownership of the land over which the easement was established.

Closure by Private Action

N.C. Gen. Stat. § 136-96 provides the attorney a procedure by which, under appropriate circumstances, rights of way can be withdrawn by private action of interested parties. The statute applies to "[e]very strip, piece or parcel of land" which has been dedicated to public use "as a road, highway, street, avenue, or for any other purpose" and which has not been opened and used within 15 years from and after the dedication.

In such circumstances, the "dedication" is conclusively presumed to have been abandoned by the public. Upon the filing of a declaration of withdrawal in the Office of the Register of Deeds by the dedicator or "some one or more of those claiming under him," all claims of public and private rights in the withdrawn area are effectively terminated. It must be noted that with respect to the private rights of individuals, the statute does not apply where the "continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway."

The primary purpose of the statute is the withdrawal of easement rights. The filing of a declaration under the statute does not affect the fee ownership of the underlying land within the dedicated area except in the single instance where the original dedicator was a corporation which at the time of withdrawal no longer exists. In such case, the title to the land within the right of way is "conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent thereto."

Governmental Closings

Two additional statutes provide procedures for the closing of streets and rights of way by governmental action. N.C. Gen. Stat. § 160A-299 applies to streets within municipalities and their extra territorial jurisdiction and N.C. Gen. Stat. § 153A-241 deals with roads within counties. These are essentially companion statutes with similar requirements and results.

Under N.C. Gen. Stat. § 160A-299, a city council may permanently close any street or public alley which has been irrevocably dedicated to public use, including streets which have not actually been opened. The statute requires the council to adopt a resolution of intent to close the designated street. The resolution and notice of public hearing must be published for four weeks prior to the hearing. Additionally, the notice must be sent by registered or certified mail to all property owners adjoining the right of way and posted in at least two places along the affected street.

After public hearing, during which interested parties may be heard, the council may determine that the public interest is served by the closing and an order to that effect issued. The order must then be recorded in the Office of the Register of Deeds. Any aggrieved party may appeal the entry of the order pursuant to the statute within thirty (30) days of its adoption.

Once entered, and subject to any appeal, the order has the effect of vacating public rights within the street and vesting title in adjoining lot owners to the centerline of the closed street. It should be noted that the closing of any street maintained and controlled by the Department of Transportation is not complete unless and until that department consents. Also, any utilities either public or franchised private concerns may be reserved by the city. Any such reservation shall be set forth in the order vacating the street.

County governments are afforded comparable authority to close "paper streets" in their jurisdiction through N.C. Gen. Stat. § 153A-241, which enables a county via the board of commissioners to permanently close any public road located within the county which is not under the control of the Department of Transportation or a municipality in its extra-territorial jurisdiction. The procedure outlined by the statute is similar to that of N.C. Gen. Stat. § 160A-299 and includes the following steps:

1. Adoption of a resolution of intent to close street and setting of a public hearing;
2. Publication of the resolution for each of four successive weeks;
3. Notice to all adjoining property owners via registered or certified mail; and
4. Posting of the resolution in at least two places along the subject street.

Upon hearing, the commissioners may adopt an order closing the street which shall be filed with the register of deeds and is subject to appeal for a period of thirty (30) days. Tracking the result of N.C. Gen. Stat. § 160A-299, the effect of such an order is to vest title in adjoining property owners to the center line of the closed street subject to any easements for utilities existing prior to the closing.

Comparison of the Statutes

The procedures outlined by each statute are straightforward but additional attention should be directed to the application and result of those procedures, since a determination of which statute applies in a given situation will effect different results as to the fee title. N.C. Gen. Stat. § 136-96 refers to streets which have been "at any time dedicated to public use" while § 160A-299 by its terms applies to any street which has been "irrevocably dedicated to the public, without regard to whether it has actually been opened." Section 153A-241 simply references any public road or easement.

The use of the term "dedication" in § 136-96 may be misplaced. The most technical use of the term indicates both an offer of dedication to the public at large and acceptance of that offer by recognizable act. This is clearly not the situation that the statute is designed to address. By its terms the statute deals with streets and easements which have not actually been opened, and therefore have never been accepted.

The cases construing § 136-96 make it clear that the statute does not apply when there has been an actual use (acceptance) by the public. *Russell v. Coggin*, 232 N.C. 674, 62 S.E.2d 70 (1950); *Janicki v. Lorek*, 255 N.C. 53, 120 S.E.2d 413 (1961). Under § 136-96, the use of the term dedication implies an offer of declaration only. Conversely, the authorities construing N.C. Gen. Stat. § 160A-299 and N.C. Gen. Stat. § 153A-241 indicate that actual public use or acceptance is a prerequisite to the application of the statutes. *In re Easement of Right of Way*, 90 N.C. App. 303, 368 S.E.2d 639 (1988).

As previously mentioned, withdrawal under N.C. Gen. Stat. § 136-96 serves only to terminate easement rights and leaves the underlying fee in the original dedicator, his heirs or assigns, save only the cases involving now defunct corporations. Sections 160A-299 and 153A-241 establish presumptions of ownership in adjoining property owners whether corporate or individuals. But for the provisions of § 160A-299 relating to unopened streets, the distinguishing factor appears to be the creation of public rights in streets which are thereafter vacated. Although the city or county never acquires fee title via dedication, the logical extension of these two statutes is that acceptance and use by the public serves to terminate private ownership in the underlying fee. Nevertheless, it is difficult to reconcile § 160A-299(d).

None of these statutes discussed is a "cure all." While each can be extremely useful in the appropriate situation, the closing attorney must carefully examine and analyze the nature of the streets or rights of way he is attempting to terminate and then carefully adhere to the statutory procedures.

For a more in depth and scholarly treatment of N.C. Gen. Stat. § 160A-299 and other issues relating to municipal rights of way, the author highly recommends *Property Interests in North Carolina City Streets* by David M. Lawrence, Institute of Government, The University of North Carolina, Chapel Hill, 1985.