



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

August 31, 2020

William C. Purdie, Esq.
City Attorney, City of Clinton
Post Office Box 156
Clinton, Mississippi 39060

Re: Vacating Municipal Street

Dear Mr. Purdie:

The Office of the Attorney General is in receipt of your request for the issuance of an official opinion.

Question Presented

When a municipality, by ordinance, closes and vacates a public right-of-way, does title to the real property underlying the right-of-way revert to the adjoining property owners, or must the city dispose of the property pursuant to Mississippi Code Annotated Section 21-17-1?

Background

The City of Clinton Board of Aldermen (the “Board”) passed an ordinance closing and vacating, pursuant to Mississippi Code Annotated Section 21-37-7, a former right-of-way commonly known as Livingston Road. The Board determined the road, depicted by the “Todd’s Addition” plat map of 1908, was no longer in use as a public right-of-way, as the roadbed and other supporting infrastructure no longer existed. The Board further found that no public or private property would be detrimentally affected or impacted by the proposed closure and vacation of the right-of-way.

The City contends that it acquired Livingston Road by a common law dedication.

Brief Response

Pursuant to Mississippi Code Annotated Section 7-5-25, the Office of the Attorney General cannot make a factual determination by official opinion. Thus, this opinion relies upon the City of Clinton’s determination, as stated within its request, that Livingston Road was acquired by dedication and acceptance under common law. As the City did not acquire a fee interest in the

real property, but only an easement, the title to the property underlying Livingston Road is vested in the abutting property owner(s).

Applicable Law and Discussion

The Mississippi Supreme Court has defined “dedication” as “the setting aside of land for public use.” *McBroom v. Jackson Cnty.*, 154 So. 3d 827, 831 (Miss. 2014) (quoting *Nettleton Church of Christ v. Conwill*, 707 So. 2d 1075, 1076 (Miss. 1997)). Private land may be dedicated to public use in two ways, pursuant to statute and under the common law. *McBroom*, 154 So. 3d at 831 (citing *Conwill*, 707 So. 2d at 1076); *see also* *Kiely v. Graves*, 271 P. 3d 926, 932 (Wash. 2012) (common law dedications are controlled by common law principles while statutory dedications are governed by specific statutes).

On these two forms of dedication, the Mississippi Supreme Court has found:

Two distinctions separate the different types of dedication. First, the common law dedication operates by way of an equitable estoppel, whereas a statutory dedication operates by way of grant. Second, a common law dedication usually creates a mere easement, whereas in a statutory dedication the fee of the property is in the public.

McBroom, 154 So. 3d at 831 (internal citations and punctuation omitted) (citing *Conwill*, 707 So. 2d at 1076).

In Mississippi, a statutory dedication is governed by Mississippi Code Annotated Section 21-19-63 (Rev. 2009)¹, which states as follows:

The governing authorities of municipalities may provide that any person desiring to subdivide a tract of land within the corporate limits shall submit a map and plat of such subdivision, and a correct abstract of title of the land platted, to said governing authorities, to be approved by them before the same shall be filed for record in the land records of the county. Where the municipality has adopted an ordinance so providing, no such map or plat of any such subdivision shall be recorded by the chancery clerk unless same has been approved by said governing authorities. ***In all cases where a map or plat of the subdivision is submitted to the governing authorities of a municipality, and is by them approved, all streets, roads, alleys and other public ways set forth and shown on said map or plat shall be thereby dedicated to the public use, and shall not be used otherwise unless and until said map or plat is vacated in the manner provided by law***, notwithstanding that said streets, roads, alleys or other public ways have not been actually opened for the use of the public. If any easement dedicated pursuant to the provisions of this section for a street, road, alley or other public purpose is determined to be not needed for the public purpose, the easement may be declared abandoned, and ownership of the fee underlying the easement shall revert, regardless of the date of

¹ Section 21-19-63 was amended in 2008 (Laws 2008, Chapter 339) and 2009 (Laws 2009, Chapter 531).

dedication, to the adjoining property owner or owners at the time of abandonment. Ownership of the easement shall extend to the centerline of said abandoned street, road or public way. Such abandonment and reversion shall not affect any private easements which might exist.

Here, the City of Clinton has determined that Livingston Road was acquired by common law dedication and acceptance. It is well-settled law in Mississippi that land sold according to a plat or map will dedicate the streets, alleys, squares, and other public ways marked on the map or plat to the public for public use. *Conwill*, 707 So. 2d at 1076 (collecting cases). For a street to be considered a public road through dedication, it must also be accepted by the public entity. Acceptance may occur by an order issued by the governing authorities of the public entity or by the construction and maintenance of the road with public funds. MS AG Op., *Cooke* at *1 (Mar. 15, 1995) (citing *Coleman v. Shipp*, 78 So. 2d 778, 784 (Miss. 1955)). Based on the City of Clinton's opinion, as stated in its request, we assume for the purposes of this opinion that Livingston Road was dedicated and accepted by the City.

Municipal governing authorities are empowered to close and vacate any street, alley or portion thereof, by either adopting an ordinance or entering an order in the minutes, based upon a finding that such closure or vacation is in the public interest.² Miss. Code Ann. § 21-37-7; *see also* MS AG Op., *Bryant* at *2 (Aug. 28, 1979). By Ordinance dated April 7, 2020, the City of Clinton closed and vacated Livingston Road based upon the Board's factual determination that "the right-of-way to be vacated serves no present or projected public use and that the proposed closure and vacation is in the public interest."

The statute requires due compensation must be paid to abutting landowners when damages are sustained. MS AG Op., *Cooke* at *2 (Mar. 15, 1995). By its Ordinance, the City of Clinton found "no adjoining property owners will suffer damages from the closure of Livingston Road." If there are no damages, then no compensation is due to abutting landowners.

Given the satisfaction of Section 21-37-7's requirements for closing or vacating Livingston Road, the property thereafter reverts to the owners of the underlying fee, which in this case are the successors in interest of the original grantor of the easement. *See* MS AG Op., *White* at *2-3 (Apr. 14, 2011) ("[W]here a mere easement is taken for a public highway, the soil and freehold remains in the owner of the land, encumbered only with the easement, and that, upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (quoting *Harris v. Elliott*, 35 U.S. 25, 26, 9 L. Ed. 333 (1836))). As a common law dedication creates a mere easement, the easement ceased to exist when the City of Clinton determined Livingston Road no longer served a present or projected public use. *See Conwill*, 707 So. 2d at 1076.

Since the City of Clinton acquired a mere easement, having acquired Livingston Road by common law dedication and acceptance, the fee title remaining in the landowner was no longer burdened by the easement. It is, therefore, the opinion of this office that, by the closure and vacation of

² A landowner may challenge a factual determination by the governing authorities in a court of competent jurisdiction. MS AG Op., *Cooke* at *2 (March 15, 1995).

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Livingston Road, pursuant to Section 21-37-7, the property reverts to the owners of the underlying fee.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Kim P. Turner*

Kim P. Turner
Assistant Attorney General

OFFICIAL OPINION