

## **Roads and Highways: From Opening Streets to Dedication**

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If you are involved in real estate law in Pennsylvania, there is a great likelihood that at some point you will stumble upon a need to understand something about roads or highways. If you are representing a client buying a property that has frontage on a paper street, what rights and obligations is that client buying? What does your developer client need to do to connect the new street in the project to the state highway running along the front of the property? If you are a solicitor, how do you counsel a municipality that wants to open or vacate a street? The laws relating to roads and highways wends its way through many areas involving real estate.

While these materials cannot cover every aspect of the law concerning roads and highways in Pennsylvania, the intent is to address those areas that most frequently arise in the life of a real estate lawyer.

### **I. Opening and Vacating Streets**

A. The Legislature has given statutory authority to cities, boroughs, and townships to open and vacate streets. See Title 53 Purdon's Statutes. This authority is given under the General Municipal Law (see 53 P.S., Part I, General Municipal Law, Sections 1671 and 1672). The authority to open streets is also specifically granted under the Third Class City Code (53 P.S. Section 37915), Borough Code (53 P.S. 467211 ), First Class Township Code (53 PS Section 57005) and the Second Class Township Code (53 P.S.

Section 57304). The General Township Law, at 53 P.S. 54201, states that if any local or special law in any township which provides for the opening of roads is repealed, the “the general road law shall apply to, govern and control the said township.” The General Road Law is found at 36 P.S. Section 1781 et seq.

B. The precise procedure for opening and vacating streets is dependent upon the type of municipality and governed by the particular statute that is applicable. However, using the Second Class Township Code, at 53 P.S. Section 67304 by way of example:

1. The Board of Supervisors may open and vacate roads by ordinance.
2. A petition may be presented to the Board of Supervisors, asking the Board to open or vacate a street.
  - a. If the Board does not act on the petition within 60 days, the petitioners may present the petition to the Court of Common Pleas, which will proceed under the General Road Law (36 P.S. Section 1781 et seq.)
  - b. If the Board of Supervisors denies the petition, the Board must notify the person designated in the petition of the denial. The petitioners, or a majority of petitioners, have thirty days from the receipt of notice of denial to file a petition with the Court of Common Pleas for the appointment of viewers, and the proceedings then follow the General Road Law (36 P.S. Section 1781 et seq.).

C. The standard to be followed by a municipality when considering a petition to vacate a street is whether the public interest will be served by taking the requested action. *Bromley v. Borough of McDonald* 896 A.2d 1289 (Pa. Cmwlth. 2006).

## II. Paper Streets

A. What is a paper street? A “paper street” is a street that appears on the zoning map of a municipality, or on a publicly recorded document such as a subdivision plan, but has never been opened by the municipality or used by the public. *Tobin v. Radnor Township Board of Commissioners*, 597 A.2d 1258, 142 Pa. Cmwlth. 567 (Pa Cmwlth. 1991).

1. Under the General Road Law, a municipality has twenty-one (21) years from the date of offer of dedication to accept dedication. (36 P. S. Section 1961). If dedication is not accepted within that time period, there is no further right to open it as a public street. *Leininger v. Trapizona* , 645 A.2d 437 (Pa. Cmwlth. 1994). After the twenty-one year time period has expired, the road may only be opened with the consent of the landowner. *Rahn v. Hess*, 106 A.2d 461 (Pa. 1954). However, private easement rights of individual property owners are not extinguished. *Riek v. Binnie*, 352 Pa. Superior Ct. 246, 507 A.2d 865 (1986); *Drusedum v. Guernaccini*, 251 Pa. Superior Ct. 504, 380 A.2d 894 (1977).

B. Who has rights to a paper street, and what are those rights?

1. The grantee of a lot described as bordering a paper street acquires an easement by implication over the street. The grantee of a lot sold by reference to a plan acquires an easement by implication over the streets shown on the

plan, and the plan is incorporated by reference in the Deed. There is no difference in the rights between a lot that abuts a paper street, and a lot that does not abut the paper street but was deeded by reference to the plan showing the paper street. The non-abutting owner has the right to use all of the streets, regardless of whether they materially benefit the property or are necessary to the enjoyment of the owner's property. *Potis v. Coon*, 496 A.2d 1188, 344 Pa. Super. 443 (Pa. Super. 1985).

2. The implied easement over the paper street gives the rights holder an “easement of access,” which is a right of ingress and egress to and from the lot owners’ property. This is a property right, which is appurtenant to the land, and may not be taken away, or impaired, unless just compensation is paid. *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co.*, 240 Pa. 519, 87 A. 968 (Pa. 1913).

C. Practice Note: How to proceed if your client is developing a property which is subject to rights in paper streets.

1. Hypothetical: Fifty years ago, a subdivision plan was recorded against a large property, showing streets and lots. One portion of the property was developed, and homes were sold with reference to the plan. The remainder of the property remained vacant and undeveloped. The streets in the community were never dedicated to the municipality, and the streets in the vacant portion were never constructed. Your client now wants to develop the

remaining vacant land (which is subject to the previously-recorded plan) and obtain a new subdivision approval under the current zoning. What issues must be considered?

- a. Design of the Development. Since all of the owners of lots in the developed portion have easement rights in the paper streets throughout the property that was subject to the original plan, the development design must keep the areas of paper streets free of obstruction. Therefore, no houses or other improvements should be proposed within the area of any paper streets. Note also that 53 P.S. Section 10405 of the Municipalities Planning Code (the “MPC”) provides that no permit shall be issued for a building within the lines of any street laid out on the official map, and that any building placed within the lines of such street shall be removed at the expense of the owner.
- b. Recorded Restrictions. To place future buyers on notice that certain areas of the lots cannot be obstructed, an appropriate note should be placed on the new subdivision plan, or a restrictive covenant should be recorded.
- c. Developer Disclosure. When homes are sold in the “new” subdivision, the buyers should be placed on notice of the easements in the paper streets, and the resulting restrictions on any new lots that contain any portion of a paper street. This can be accomplished through disclosure provisions

which are part of the Agreement of Sale. The following is one example of such a disclosure:

Paper Streets. Portions of the Property were shown on a subdivision plan recorded in the 1930s for "Gracious Estates", which showed roadways within what is now "Rainbow Acres". Those roadways (within Rainbow Acres) were never constructed, and since the roadways only "exist" on the plan, they are known as "paper streets". The time for Eastvalley Township to accept dedication of those roadways has terminated, which means that, by law, Eastvalley Township is no longer permitted to open the paper streets. The location of the paper streets within Rainbow Acres are shown on the approved plan for Rainbow Acres, and Purchaser should review the approved plan to determine if their Lot includes a portion of a paper street. Simply due to the recording of the 1930s subdivision plan, there are certain private legal interests that owners of other lots shown on the same 1930s subdivision plan may have in the paper streets. To date, to Seller's knowledge, no actions have been taken by individuals who might have a legal interest to enforce or exercise any interest in the paper streets on the Rainbow Acres property. Seller has located the improvements on the Lots so that they do not interfere with the paper streets. Purchasers of Lots within Rainbow Acres which include paper streets are hereby placed on notice that any improvements (such as fences, decks, sheds, etc.) or plantings, within the paper streets, which would impede or limit the access through the paper streets, are done at Purchaser's own risk. In the event that an individual successfully asserts a right to use and/or access the paper street, and in the event any such improvements would be required to be removed as a result, such removal and any relocation would be at Purchaser's sole cost and expense.

### **III. Road and Street Issues in Subdivisions and Land Developments**

#### **A. Road Frontage Improvements**

1. The MPC, at Section 503(2)(ii), permits a municipality's subdivision ordinance to include provisions which ensure that "streets in and bordering a subdivision or land development shall be coordinated, and be of such widths

- and grades and in such locations as deemed necessary to accommodate prospective traffic, and facilitate fire protection."
2. A municipality may condition approval of a subdivision plan upon improvements to road frontage required to meet the standards of the subdivision ordinance. *Pitcher v. Heidelberg Twp. Board of Supervisors*, 637 A.2d 715 (Pa. Cmwlth. 1993); *Tobin v. Radnor Township Board of Commissioners*, 597 A.2d 1258, 142 Pa. Cmwlth. 567 (Pa Cmwlth. 1991).
  3. While a municipality's subdivision ordinance may mandate a minimum road width, approval of a subdivision plan may not be conditioned on a requirement that land be dedicated to widen the road frontage, when the subdivision or development does not create a burden which would provide police power justification for the uncompensated dedication. *Board of Supervisors of West Marlborough Twp. v. Fiechter*, 566 A.2d 370, 129 Pa. Cmwlth. 527 (Pa. Cmwlth. 1989). When there was an existing dangerous condition along a private drive, and new dwellings would add traffic to the private drive, the Commonwealth Court held that additional widening could be required due to public health, safety and welfare concerns, distinguishing the situation from *Fiechter* in which no such concerns existed. *Pitcher v. Heidelberg Township Board of Supervisors*, 637 A.2d 715, 161 Pa. Cmwlth. 505 (Pa. Cmwlth. 1994). A municipality also may not require a landowner to designate a right-of-way as a condition of plan approval, as that is equivalent to requiring

dedication. *Meixsell v. Ross Township Board of Supervisors*, 623 A.2d 429, 154 Pa. Cmwlth. 226 (Pa. Cmwlth. 1993).

## B. Internal Roadway Requirements

1. Section 503 (3) of the MPC permits a municipality's subdivision ordinance to include "provisions governing the standards by which streets shall be designed, graded and improved... the standards shall ensure that the streets be improved to such a condition that the streets are passable for vehicles which are intended to use that street."
2. Under Section 508(6) of the MPC , if a plan requires access to a highway under the jurisdiction of PaDOT, the plan cannot be finally approved unless the plan contains a notice that a Highway Occupancy Permit is required under the State Highway Law.
  - a. Section 508(6) of the MPC further provides that an HOP will be deemed to be issued if PaDOT does not, within 60 days of the date of receipt of an HOP Application, either approve the HOP, deny the HOP, return the application for additional information or correction, or determine that no HOP is required.

## C. Highway Occupancy Permits

1. The State Highway Law, found at 36 P.S. Section 670-101 et seq., at Section 670-420 authorizes the Secretary of Transportation to issue "permits for the opening of streets and driveways onto State highways and for the opening of

- the surface and occupancy of State highways on terms and conditions established in department regulations.”
2. Highway Occupancy Permits govern access to and occupancy of State Highways.
    - a. Title 67 Pa. Code Chapter 441 governs access to and occupancy of State Highways by Driveways and Local Road
    - b. Title 67 Pa. Code Chapter 459 governs occupancy of State Highways by Utilities.
  3. Permit Application Procedure under 67 Pa. Code Section 441.3 for occupancy of State Highways by driveways, local roads, or drainage facilities or structures within a State Highway right-of-way is as follows:
    - a. The Highway Occupancy Permit (“HOP”) must be obtained before the driveway, local road or drainage facility or structure is constructed or altered within the State Highway right-of-way, or before altering or connecting to a drainage facility of the Pennsylvania Department of Transportation (“PaDOT”).
    - b. Applications must be submitted in the name of, and signed by, the property owner.
    - c. HOP applications must be submitted to either the district or county office having jurisdiction over the county in which the proposed work will be performed. PaDOT has a new ePermitting System which allows HOP

applications to be submitted online. The website for the ePermitting System is <https://www.dot14.state.pa.us/EPS/home/home.jsp> . An ePermitting authorized user account must be established before the ePermitting System can be used.

- d. HOP applications must be submitted before the building being served by the driveway or facility is constructed.
- e. HOP Applications must:
  - i. Be completed on PaDOT Form M-945A.
  - ii. Be signed by the applicant.
  - iii. Include five (5) sets of plans, detailing the location and pertinent dimensions of the proposed installation and related highway features, of a quality sufficient for microfilming (ePermitting System applications may allow for attachment of plans in digital format).
  - iv. Be accompanied by the appropriate permit fee under 67 Pa.Code Section 441.4.
  - v. Be submitted to PaDOT at least 30 days prior to the anticipated start date of the work.
  - vi. Contain proof of ownership.
- f. Traffic Control Plan – A traffic control plan meeting the requirements of 67 Pa. Code Section 441.3 must be submitted with the HOP Application if:

- i. The applicant expects that closure of a portion of a lane to vehicular traffic will be necessary to perform the permitted work; or
  - ii. PaDOT expects that a potential hazard or interference to vehicular or pedestrian traffic will result from the performance of the work.
- g. Drainage control plans and drainage release for other than minimum use driveways – if it is reasonably expected that the work will result in an increase in the flow of water onto the highway or into highway drainage facilities, or an increase in the flow of water onto the property of another as a result of action authorized by the permit, a drainage control plan meeting the requirements of 67 Pa. Code Section 441.3 must be submitted with the HOP Application. In the case of an increase in flow of water onto the property of another, a drainage release using PaDOT Form L-15 or Form CC-15 will be required to be obtained by the applicant from all affected property owners.
- h. Review by municipalities and other bodies – The PaDOT district offices maintain lists of municipalities, planning commissions and zoning boards within their jurisdiction area that wish to review HOP applications. Each HOP application for an access driveway within one of these jurisdictions must include evidence that the location and type of access have been reviewed by the municipality or agency. PaDOT will consider comments or recommendations resulting from this review.

4. Permit Application Procedure under 67 Pa. Code Section 459.3, to allow for the location and construction of utility facilities and other structures within a State Highway right-of-way, is as follows:
  - a. With certain exceptions, an HOP must be obtained before any work involving the placement of utility facilities or other structures, or opening the surface, is performed within the right-of-way. All work within the right-of-way must conform to 67 Pa. Code Chapter 203, relating to work zone traffic control.
  - b. The HOP application must be signed by the owner or operator of the facility if such owner or operator is in the business of providing utility services; if the facility owner is not in the business of providing utility services, the HOP application must be signed by the owner of the facility at the time of construction, and the owner must indemnify and hold PaDOT harmless from claims by anyone claiming residual property interests in the permitted area.
  - c. The applicant must provide satisfactory evidence of the applicant's ability to completely discharge its duties, which may require security from the applicant.
  - d. HOP applications must be submitted to either the district or county office having jurisdiction over the county in which the proposed work will be

performed, or to the municipality if the municipality has entered into a municipal permit issuance agreement with PaDOT. PaDOT has a new ePermitting System which allows HOP applications to be submitted online. The website for the ePermitting System is

<https://www.dot14.state.pa.us/EPS/home/home.jsp> . An ePermitting authorized user account must be established before the ePermitting System can be used.

- e. HOP Applications must:
  - i. Be completed on PaDOT Form M-945A.
  - ii. Be signed by the applicant.
  - iii. Include four (4) sets of plans, detailing the location and pertinent dimensions of the opening, the proposed utility installation and related highway features, of a quality sufficient for microfilming (ePermitting System applications may allow for attachment of plans in digital format).
  - iv. Be accompanied by the appropriate permit fee under 67 Pa.Code Section 459.4, unless the applicant participates in the permit monthly billing system.
  - v. Be submitted to PaDOT at least 30 days prior to the anticipated start date of the work. However, if the permitted work will be performed by

a contractor, the application shall, if possible, be submitted to PaDOT at least 60 days prior to soliciting bids.

vi. Identify consulting engineers performing work related to the application – the consulting engineer must also sign the application.

- f. Traffic Control Plan – A traffic control plan meeting the requirements of 67 Pa. Code Section 459.3 must be submitted with the HOP Application if:
- i. The work will be performed on a limited access highway; or
  - ii. It is necessary to close a highway to perform the permitted work; or
  - iii. Whenever it will be necessary to close a portion of a travel lane during the hours of darkness, without work in active progress.

#### D. Transportation Impact Fees

1. Article V-A of the MPC, 53 P.S. Section 10501-A et seq., provides authorization for municipalities to adopt ordinances which allow impact fees, including transportation impact fees, to be assessed against developers. The payment of such impact fees can be required as a condition of final plan approval under the subdivision and land development ordinance. See MPC Section 503-A.
2. Before the enactment of an impact fee ordinance, the municipality must prepare and adopt a transportation capital improvements plan in accordance with the requirements of Section 504-A of the MPC.

3. Section 505-A of the MPC sets forth the basis for determining the impact fee for transportation capital improvements, and the administration of impact fees.
  - a. Transportation impact fees are payable at the time building permits are issued, and the municipality may not require the posting of any financial security to guarantee the payment of transportation impact fees.
4. An appeal relating to the imposition of an impact fee is taken to the Court of Common Pleas under MPC Section 506-A.

E. Dedication - Dedication of streets is the procedure by which streets constructed by a private party are conveyed to a governmental entity.

1. Notice of completion of improvements - 53 P.S. Section 10510 - Municipalities Planning Code ("MPC") Section 510.
  - a. Certified or registered letter to municipality with copy to municipal engineer - 510(a)
    - i. Letter gives notice that the "developer has completed all of the necessary and appropriate improvements."
  - b. Within 10 days of receipt of notice, the municipal governing body must direct and authorize the engineer to inspect the improvements.
  - c. Following inspection, the engineer must file a written report with the municipal governing body, and shall "promptly" mail a copy to the developer by certified or registered mail.

- i. The report shall be mailed and made within 30 days after the engineer's receipt of authorization from the municipal governing body.
- ii. The report must be detailed and must indicate approval or rejection of the improvements, in whole or in part, and if any part is not accepted or is rejected, the report shall contain a statement of reasons for not approving or rejecting the improvements.
  - (a) This is usually called the engineer's "punch list."
- d. Within 15 days of receipt of the engineer's report, the municipal governing body must give written notice to the developer by certified or registered mail of the action of the governing body. MPC Section 510(b).
- e. If the governing body or the municipal engineer do not comply with the time requirements, the improvements are deemed approved, and the developer is released from liability. MPC Section 510(c).
- f. If any portion of the improvements are not approved or are rejected, the developer shall complete those improvements, and upon completion the notification process set forth above shall be followed. MPC Section 510(d).
- g. The municipality has the right to require the applicant to reimburse the municipality for the "reasonable and necessary expense incurred for the inspection of improvements," although the reimbursement must be based upon a schedule established by ordinance or resolution. MPC Section

510(g). Section 510(g) of the MPC sets forth the procedures to be followed if an applicant disputes the amount of an expense being charged by the municipality.

2. Other requirements for dedication - the municipality typically requires the following, in addition to the engineer's certification that the improvements are complete, as conditions for accepting dedication of roadways and other improvements:
  - a. Maintenance security - MPC Section 509(k) permits a municipality to require financial security to be posted by the developer to secure the structural integrity of the improvements, and the functioning of the improvements in accordance with the design and specifications. The maintenance security may be letters of credit and restrictive or escrow accounts of a Federal or Commonwealth chartered lending institution, or a bond issued by a bonding company authorized to conduct business within the Commonwealth of Pennsylvania (See MPC Section 509(c) and (d)).
    - i. The maintenance security required may not exceed 15% of the actual cost of installation of the improvements, and a term of 18 months.  
MPC Section 509(k).
    - ii. The proposed maintenance security amount should be submitted to the municipal engineer and Solicitor for review and approval.

- iii. If the form of maintenance security is something other than an escrow account, the form of the bond or letter of credit should be submitted to the Solicitor for review and approval prior to final issuance.
- b. Deeds of Dedication and legal descriptions - In some municipalities, the Solicitor prepares the Deeds of Dedication; in others, the developer's attorney prepares the Deeds and submits them to the Solicitor for review and approval. The legal descriptions for the areas being dedicated will be exhibits to the Deeds of Dedication; the legal descriptions should be prepared by the developer's engineer and submitted to the municipal engineer for review and approval.
- c. Title commitment - The municipality will want to ensure that the improvements being dedicated are not subject to any liens or encumbrances, and that the Grantor in the Deed of Dedication is consistent with the record owner. After the legal descriptions for the improvements being dedicated have been approved by the municipal engineer, the legal description should be provided to the developer's title company for issuance of a title commitment to the benefit of the municipality. The title commitment should be submitted to the Solicitor for review and approval.

- d. Payment of Fees - If the developer has any fees outstanding with the municipality, these are usually required to be satisfied before dedication will be accepted.
3. Acceptance of Dedication
    - a. While the precise procedures may differ by municipality, typically all conditions of dedication (certification of completion by the municipal engineer; submission of executed Deeds of Dedication, maintenance security and title commitment; and payment of any fees) must be satisfied before dedication is placed on the agenda of the governing body for action.
    - b. Significance of acceptance of dedication – The procedure outlined above presumes that the streets have been constructed at the time of acceptance of dedication. Be aware that even if a municipality accepts dedication of a street, it is not a “public street” unless it has been opened (that is, graded and constructed) or used by the general public within twenty-one years; otherwise, the land reverts to the abutting property owners. See *Borough of Lehighton v. Katz*, 462 A.2d 889, 75 Pa. Commonwealth Ct. 388 (Pa. Cmwlth. 1983); *Pawlowski v. Borough of Barnesboro*, 545 A.2d 965, 118 Pa. Commonwealth Co. 375 (Pa. Cmwlth. 1988); *Lillo v. Moore*, 704 A.2d 149 (Pa. Super., 1997).

4. No statutory obligation of a municipality to accept dedication – With respect to Second Class Townships, the Commonwealth Court has held that even if a developer constructs a road to public road standards under the subdivision ordinance, and meets the other requirements for dedication, the Township is not obligated to accept dedication, as that is a discretionary act. The Court found that nothing in the Second Class Township Code or the MPC requires a township to accept dedication of a road. The Court also held that there is an adequate remedy at law through a petition to the Township to open the street under Section 2304 of the Second Class Township Code. *Hanscom v. Bitler*, 883 A.2d 1111 (Pa. Cmwlth. 2005).

#### **IV. Legislation and Case Law – 2012 in Review**

##### **A. Legislation**

1. Borough Code – Reenactment and Omnibus Amendments – HB 1702 – May 17, 2012 effective 60 days
  - a. Reenacting and amending the act of February 1, 1966 (1965 P.L. 1656, No. 581), entitled “An act concerning boroughs, and revising, amending and consolidating the law relating to boroughs.”
  - b. See Article XVII – Streets
    - i. Section 1721.1 – Power to Lay Out, Open, Etc.
    - ii. Section 1721.2 – Laying Out Streets; Procedure
    - iii. Section 1724. Effect of Laying Out Street

- iv. Section 1731. Authority to Open and Vacate Streets; Procedure.
- v. Section 1732. Petition for Opening or Vacating Street; Action Thereon.
- vi. Section 1733. Action for Damages and Benefits; Award.
- vii. Section 1734. Acceptance and Dedication of Streets.
- viii. Section 1735. Streets Not to Be Constructed, or Dedicated or  
Opened to Travel Without the Approval of Council.

2. Transportation – Public Private Transportation Partnerships – HB 3 – July 5,  
2012 effective immediately

- a. Amending Title 74 (Transportation) of the Pennsylvania Consolidated Statutes, providing for public-private transportation partnerships; and making a related repeal.
- b. Adds Part V, Chapter 91 to Title 74 entitled “Public-Private Transportation Partnership.”
- c. Allows for a contract for a transportation project which transfers the rights of use and control, in whole or in part, of a transportation facility such as a road, bridge, tunnel, etc. to a development entity for a definite term, during which the development entity will provide the project to the public in return for the right to receive all or a part of the revenue generated from the use of the transportation facility.

B. Case Law

1. Schantz v. Bahry, No. 1192 C.D. 2011 (Pa. Commwlth. 2012) – Holding that a public road which is vacated in accordance with the Second Class Township Code has a width of twenty-five feet, pursuant to Section 2781 of the Second Class Township Code.
2. In re: Laying out and Opening of Private Road in Hazle Township, 41 A.3d 163 (Pa. Commwlth. 2012) – Holding that because the private road requested by the petitioner may not be strictly necessary, the Board of Viewers did not err in denying the petition.