

BACKGROUND

This Memorandum is a discussion of the existence of an implied right of the public to access over and across the St. Anthony's Seminary property for recreational purposes and access to and from the upper east neighborhoods and Mission Creek and the Natural History Museum. The question is what is the nature of the right which has accrued by the public's use of the St. Anthony's Seminary property over a period of many decades and under what legal theories has that right arisen?

A pattern of use was established early in the twentieth century under which the Franciscans acquiesced in public use of the property in the form of access on and through the property for general ingress and egress, formal and informal recreational activities, athletic events and other personal enjoyment. The public has enjoyed such use of the property for many, many decades despite the lack of express permission or a formal dedication from the Franciscans. In essence, the public has historically used the St. Anthony's property openly and with a claim of entitlement or ownership as though it was a municipal park. Under these facts and circumstances, established California law provides that the public has acquired a vested right to continue to use the St. Anthony's Seminary property for all of the historic uses.

A discussion of the relevant areas of law applicable to this factual situation follows.

DEDICATION

In California, a common-law dedication is a voluntary transfer of an interest in land by a private owner to the use of the public. Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235, 240, 267, P.2d 10, (1954). Essential to a dedication, which has characteristics of both a grant and a gift are: 1. an offer by the owner of the land, clearly and unequivocally indicated by the owner's words or acts, to dedicate the land to a public use, and 2. an acceptance by the public of the offer. Id., Sacramento v. Jensen, 146 Cal. App. 2d 114, 118, 303 P.2d 549, (1956).

When property is dedicated, in some cases the title to it remains in the original owner, subject to the public use. Harter v. San Jose, 141 Cal. 659, 661, 75 P. 344, (1904). In other cases, the state or local government takes the property in trust and for the public purpose for which the property was dedicated. Hoadley v. San Francisco, 50 Cal. 265, 275, (1975). The property cannot be diverted to a different purpose not connected with the original dedication. Harter, 141 Cal. 659, 661, (1904). For example, after a street has been legally dedicated, the municipal government acquires a right of entry as agent of the public, clothed with the trust and duty of protecting the public use. Visalia v. Jacob, 65 Cal. 434, 436, 4 P. 433, (1884). The right of possession is held for the benefit of the public and this right cannot be conveyed to any private person. Id.

EXPRESS AND IMPLIED DEDICATION

A dedication may be express or implied. People v. Marin County, 103 Cal. 223, 227, 37 P. 203, (1894). The difference exists only in the way of proving an offer of dedication by a landowner and an acceptance of the offer by the public. Yuaipa Water Co. No. 1 v. Public Utilities Comm'n, 54 Cal. 2d 823, 827-828, 9 Cal. Rptr. 239, 357 P.2d 295, (1960). An example of an express dedication is a grant to the public. People v. Myring, 144 Cal. 351, 354, 77 P. 975, (1904). An implied dedication is one inferred from the acts of the owner or from his acquiescence to the public use of property. Union Transp. Co., Cal. 2d 235, 240, 267, (1954).

USE OF DEDICATED PROPERTY

The principal uses to which lands may be applied for public purposes, and to which the doctrine of dedication is applicable are for roads, streets, alleys, squares, and parks. Kittle v. Pfeiffer, 22 Cal. 484, 489 (1863). Other uses include dedications of property for use as a canal for drainage or navigation, as a cemetery, as levees, as a ferry crossing, as a school, and as an athletic field. People v. Williams, 64 Cal. 498, 2 P. 393, (1884), Hollywood Cemetery Ass'n v. Powell, 210 Cal. 121, 291 P. 397, (1930), Napa v. Howland, 87 Cal. 84, 25 P. 247, (1890), Humboldt County v. Van Duzer, 48 Cal. App. 640, 192 P. 192, (1920), Board of Education v. Martin, 92 Cal. 209, 28 P. 799, (1891), Morse v. Miller, 128 Cal. App. 2d 237, 275 P.2d 545, (1924).

OFFER OF DEDICATION

Although the offer to dedicate the land must be clear and unequivocal, these requisites can be proved by the acquiescence on the part of the owner to an adverse use if the use occurred before March 4, 1972. If the use occurred after March 4, 1972, the offer must be in writing. Civ. Code § 1009, (effective March 4, 1972, 91 days after enactment).

The California Supreme Court held that adverse public use of property for more than five years gave rise to an implied dedication of a public easement in the property. Gion, 2 Cal 3d 29, (1970). In response to Gion, the Legislature enacted new rules, effective March 4, 1972. The general effect of the new rules was to limit the effect of Gion to uses of property before March 4, 1972, and to require written irrevocable offers of dedication of private property for public use after March 4, 1972. Civ. Code § 1009(b). Thus, under those rules, no use of property by the public after March 4, 1972 shall ever ripen to confer on the public or any governmental body or unit a vested right to continue to make this use permanently in the absence of an express written irrevocable offer of dedication of the property to the use. To be effective, the written offer must be accepted by the county, city, or other public body to which it was made. Civ. Code § 1009(b). This prohibition applies whether or not the property owner has recorded a notice of consent to use of any particular property pursuant to Civ. Code § 813 or has posted signs on the property pursuant to Civ. Code § 1008.

An irrevocable offer of dedication may be made in any procedure authorized by law or in the manner prescribed in Gov. Code § 7050. Civ. Code § 1009(c).

Acquiescence in Public Use

The public use of private property can result in a common law dedication by acquiescence of the owner in the use of the land in circumstances negating a conclusion that the use is under a license. Gion, 2 Cal. 3d 29, p. 38, (1970). This type of dedication is implied in fact and called dedication by acquiescence in public use. Union Transp. Co., 42 Cal. 2d 235, p. 241, (1954).

When dedication by acquiescence for a period less than five years is claimed, the owner's actual consent to the dedication must be shown. Gion, 2 Cal. 3d 29, p. 38, (1970).

Adverse Public Use

Alternatively, the public use of private property can result in a common law dedication by open and continuous use of the land by the public for five years. Id. This type of dedication is implied in law and termed dedication by adverse user. Union Transp. Co., 42 Cal. 2d 235, p. 241, (1954).

When a litigant seeks to prove dedication by adverse use, the inquiry shifted from the intent and activities of the owner to those of the public. The question is whether the public used the land for more than five years with the owner's full knowledge, without asking or receiving permission to do so and without objection being made by anyone.

These rules presumably still apply to uses prior to March 4, 1972.

ACCEPTANCE

A dedication, like a contract, consists of an offer and an acceptance, and a dedication is not binding until acceptance, proof of which must be unequivocal. Santa Clara v. Ivancovich, 47 Cal. App. 2d 502, 508, 118 P.2d 303, (1941). The acceptance may be actual or implied. It is actual when formal acceptance is made by the proper authorities and implied when a use has been made of the property by the public for a length of time that evidences an intention to accept the dedication. Id.

An offer of dedication can be accepted by public use of the property in much the same way that an offer of dedication can be implied from public use. Diamond Match v. Savercool, 218 Cal. 665, 670, 24 P.2d 783, (1933). However, the use necessary to establish an acceptance need not be as extensive in duration or of the same character as the use required to show an offer. Gunn v. Fontes, 148 Cal. App. 2d 351, 355, 306 P.2d 928, (1957). Public use does not have to be for the five-year prescriptive period. Id. It may be for a shorter time, because once the offer to dedicate and the acceptance by use are shown, the rights of the public immediately vest. McKinney v. Ruderman, 203 Cal. App. 2d 109, 115, 21 Cal. Rptr. 263, (1962).

Until accepted, dedication, whether made by deed or otherwise, may be revoked by the owner of land. People v. Reed, 81 Cal. 70, 80, 22 P. 474, (1889). But on acceptance by the public of dedicated property, the dedication becomes complete and the power of revocation no longer exists. Fitzgerald v. Smith, 94 Cal. App. 480, 483, 271 P. 507, (1928).

DISTICTION FROM ADVERSE POSSESION

The question in relation to dedication is whether the public has used the land for a period of more than 5 years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone. Gion, 2 Cal. 3d 29, 39, (1970). With dedication there is no need to show a personal claim of right, and the public use does not have to be adverse to the interests of the owner in the sense that "adverse" is used in the adverse possession cases. Id.

TITLE TO DEDICATED PROPERTY

When land is dedicated for use as a street or highway, the public ordinarily acquires only an easement for the right of way for purposes of travel, with any incidents that are appurtenant or necessary for reasonable enjoyment, construction, or maintenance. Title to the underlying fee remains in the original owner and, in absence of a clear expression to the contrary in the deed, passes to the successors in ownership of the abutting land. Safwenberg v. Marquez, 50 Cal. App. 3d 301, 307, 308, 123 Cal. Rptr. 405, (1975).

When land is dedicated for use as a park, the public generally acquires a fee simple. Morse v. E.A. Robey & Co., 214 Cal. App. 2d 464, 469, 29 Cal. Rptr. 734 (1963). And the conveyance for park use not only carries all oil and mineral rights, but also the right to develop the park in any manner not inconsistent with the use of the surface of the land for park purposes. Id. Questions as to whether land has been dedicated to the public use and questions regarding the extent of the interest acquired by the public are generally litigated in actions to quiet title to the real property. See, Safwenberg, 50 Cal. App. 3d 301, P. 304, (1975) (quiet title action to determine title to portion of abandoned street); Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist., 30 Cal. App. 3d 579, 582, 584-586, 106 Cal. Rptr. 467, (1973) (quiet title action to determine title to property used for school purposes).

If a dedicator retains the ownership of the underlying fee to the dedicated property, he retains his right to use the property for all purposes which are consistent with the full enjoyment of the easement acquired by the public. Wright v. Austin, 143 Cal. 236, 239, 76 P. 1023, (1904).

CONCLUSION

Under the facts recited at the beginning and the law cited above, it is clear that an implied dedication of the open lands at St. Anthony's Seminary for public use ripened many years ago. It can be argued that an implied dedication by acquiescence, and alternatively, also an implied dedication by adverse use, have been in existence for decades. It seems that implied dedication by adverse use would be easier to prove because you do not need to show the owner's implied

intent to dedicate the land; as stated above, once all the elements are satisfied, implied dedication by adverse use is implied by law, rather than by facts. Implied dedication by adverse use can successfully be argued because under the facts:

1. The public used the land at St. Anthony's Seminary for more than five years (prior to March 4, 1972),
2. with the owner's full knowledge,
3. without asking or receiving permission to do so and
4. without objection being made by anyone,

Satisfying all of the elements in Gion, (1970).

The existence of an implied dedication by acquiescence can be argued by bringing forth facts that imply the Franciscans intended to dedicate that land for public use. Strong evidence of that intent is the enormous amount of time the open lands at St. Anthony's Seminary have been open and accessible to the public.

Implied public dedication exists whether or not it has been formally acknowledged by any proceeding, and it could be confirmed by an appropriate legal action, such as a quiet title action, brought by any interested person or a cognizant public agency, such as the City of Santa Barbara.