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The Case Of The Disappearing Public Highway

Unusual zoning case thwarted developer seeking to subdivide land

By EVAN SEEMAN

When is a right-of-way not a right-of-way? The Connecticut Appellate Court has recently tried to answer that imponderable question in the context of a land subdivision and the result is a cautionary tale.

In *KJC Real Estate Developers LLC v. Zoning Board of Appeals of the Town of Wilton*, the plaintiff sought to divide its parcel, consisting of 4.283 acres, into two lots, both with frontage on Old Huckleberry Hill Road.

Now, four facts of importance.

First, when dividing property, the "first cut" is free under Connecticut General Statute §8-18. That is, developers don't need any approval the first time they divide a single parcel into two lots so long as the first cut is taken from a single parcel that existed when that particular town's regulations were enacted. Any cut after the first, however, requires subdivision approval by the planning commission. The policy reasoning is that the division of a single parcel into two lots rarely causes public safety concerns, nor does it generally require additional construction of a road.

Second, in 1968, the town legally discontinued Old Huckleberry Hill Road, which until then had been a public highway, pursuant to C.G.S. § 13a-49. That statute enables municipalities, by majority vote at a town meeting, to discontinue public highways.

Third, maybe the discontinuance should not be a problem because state law protects landowners whose property abuts a public highway discontinued by a municipality pursuant to § 13a-49. Under C.G.S. § 13a-55 those landowners retain a right-of-way over the discontinued highway to the nearest or most accessible highway "for all purposes for which a public highway may be now or hereafter used." They assume the obligations of maintenance. Prior to the enactment of that statute in 1959, once a public highway was discontinued, neither a public nor a private right-of-way remained.

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Fourth, and here comes the bear trap, Wilton's zoning regulations say that: "No permit shall be issued for any building unless the lot upon which such building is to be built shall have the frontage required by these [r]egulations on a street as defined herein." Under those regulations, "frontage" is defined as "the length measured along that side or sides of a lot abutting on a public street;" "public" is defined as "belonging, or available, to all the people;" and "street" is defined as "an existing state or town highway, or a way shown upon a subdivision plan approved by the Planning and Zoning Commission, as provided by law, or a way shown on a plat duly filed and recorded in the office of the Town Clerk prior to July 6, 1951, but not including private driveways or rights-of-way."

Zoning Denial

With this background, the town's zoning enforcement officer denied KJC's requests that he recognize that (1) because division of the parcel into two lots constituted a "first cut," it did not require subdivision approval under C.G.S. § 8-18; and (2) the lots complied with the zoning regulations. The zoning enforcement officer's decision was affirmed by both the town's zoning board of appeals and the Superior Court.

The Appellate Court affirmed the decision of the Superior Court, concluding that, according to the zoning regulations, the lots must abut a public street for a permit to be issued. The court also held that C.G.S. § 13a-55, which grants a right-of-way to landowners whose property abuts a discontinued highway, did not relieve KJC of the requirement that the lots abut a public street.

Could KJC have constructed a road, dedicated it to public use to comply with the regulations and obtained a permit? There are two essential elements to a valid dedication: (1) a manifested intent by the owner to dedicate the land for public use; and (2) an acceptance by the proper authorities or by the general public. Aside from the great expense of time and money involved here, the chances of that happening were likely

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remote given that the town had discontinued the road in 1968.

Another alternative might have been to file a plat showing the right-of-way as a way within the meaning of the regulation and record a declaration opening it to the public. It would seem to fit within the four corners of the regulation, meeting the letter, if not the spirit, of it.

Also, the regulation seems to allow use of a private way if it is on an approved plan. Could KJC have submitted a two-lot subdivision plan with frontage on a private way for Planning Commission approval?

Finally, how about an amendment to the regulations to address this problem and allow the free cut? Insert the language "or a way created by C.G.S. § 13a-55" and KJC should have been home free.

The decision illustrates the controlling importance of definitions. That is where most land use due diligence should start, as too often buried deep within those uniquely local definitions are rules that determine outcomes. Courts conduct plenary review of all such local zoning and subdivision regulations.

You could go too far in searching for deeper meanings, but consider the name of the street, Old Huckleberry Hill Road. An archaic definition of "huckleberry," according to urbandictionary.com, is "the exact kind of man needed for a particular purpose." A fine example of that specific meaning appears in the 1993 classic western film "Tombstone," when bad guy Johnny Ringo, played by Michael Biehn looking for a fight, asks, "Wretched slugs, don't any of you have the guts to play for blood?"

Doc Holliday, played by Val Kilmer, responds: "I'm your huckleberry."

It is not clear that even the most gifted huckleberry could have avoided the controversy in this case, though there may have been other paths to a successful result. ■