

PUBLIC ROADS: A public road which has not been used by the public for a period of five years continuously becomes abandoned and ceases to have a legal existence.



June 23, 1954

Honorable J. S. Lincoln
Representative
Harrison County
Cainsville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Several months ago a farmer, Mr. Olaf Anderson, of near Ridgeway, Mo., came to me and talked to me about a road which had been closed for years and reopened without consulting him, - this road joining his farm on the North. Today he called on me again and advised me that he had been advised to write you and he asked me if I would write you for him.

"It seems that this road has been closed for 25 or thirty years; in fact I have been told that it had not been used since 1916. When Mr. Anderson bought this farm seven years ago, his North fence ran down the center of what had been this public road, which had been abandoned all these years. While Mr. Anderson and wife were in Iowa, the Township Board, at the insistence of Mr. Dean Johnson, who owns land East of the Anderson land, tore down the fence and made a road to give access to the Johnson land from the West. This abandoned road when a public road, had extended one half mile East, along the North edge of what is now the Anderson land, then one quarter mile South, then one half mile East where it continued on East and, at the end of this last half mile East, also connected with a public road running South. As it now is, only the first

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half mile, from the West, along the North edge of the Anderson land was opened; it does not connect with any public road and is for the sole purpose of gaining access to the Johnson land. Mr. Anderson was not consulted before the road was opened, does not want to give any land for this private road and wants to know what his recourse is. The Johnsons already have access to their land via public roads, aside from this private road which they have had opened.

"I recall a bill passed this session of the Legislature which provides that where a road has been abandoned five years or longer, it ceases to be a public road."

You state that the road in question "has been closed for 25 or thirty years" prior to its recent opening. Assuming this statement to be correct, it is our opinion that non-use of this road for this period of time constituted an abandonment; that the road ceased to have a legal existence; and therefore could not be "reopened" because no road existed to reopen.

In this regard we direct your attention to Section 228.190, RSMo, Cum. Supp., 1953, which reads as follows:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and non-user by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same."

Prior to 1953 the time required to effect an abandonment was ten years instead of five, as it now is.

There are many Missouri cases construing the above statute. We select at random one such case containing a clear discussion of this law. In the case of *Oetting v. Pollock*, 189 Mo. App. 263, at l.c. 270, et seq., the court stated:

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"There may be a vacation of a public highway by proceedings under the statute, as we have shown, or the vacation may occur by abandonment under section 10446, Revised Statutes 1909 - from nonuser by the public for a period of ten years continuously. That is to say, 'a highway may cease to exist either by abandonment or by vacation according to law.' (2 Elliott on Roads and Streets (3 Ed.), sec. 1172.) The same authority (Sec. 1173) holds that the burden of showing an abandonment is upon the party who asserts it. The court in our case, in its finding of facts, stated that this road has been regarded by most of the people living in the neighborhood of it as an abandoned road. We do not believe this is sufficient to constitute abandonment. If no other way existed of vacating highways, it might be argued with good reason that what most of the people thought who were entitled to use a highway would be a controlling factor. In the case of O'Dea v. State (Neb.), 20 N. W. 299, 300, the rule is thus declared: 'In order to vacate a road by nonuser, there must be a clear and entire abandonment of the road by the public for the statutory period..... Officers and courts cannot inquire into the extent of the use whether used much or little by the public. If used at all, the road will not "be" deemed vacated.' * * *

In the instant case it appears that there was no use whatever of this road for a period of time much greater than is required by statute to constitute an abandonment, and that therefore the road ceased to have a legal existence and, since it did not exist, could not be reopened.

We note that you inquire of us what recourse may be taken by an owner of land abutting upon this passageway which has been opened, which opening takes and turns into roadway a portion of land claimed by the abutting landowner. We feel that an action which might be instituted in this matter would be a private action which would have to be brought by the landowner through a private attorney, and that it is therefore a matter which is not within the jurisdiction of this department. For this reason we do not discuss this phase of your opinion request.

CONCLUSION

It is the opinion of this department that a public road which has not been used by the public for a period of five years continu-

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ously becomes abandoned and ceases to have a legal existence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General