# Public Roads and Private Lands

*How Public Access Rights are Created, Used, and Abandoned in Utah*

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Under Utah law, property owners have the **right to mediate or arbitrate disputes** involving protected property rights, such as may be raised where roads and access rights exist across private property. Citizens also have the opportunity to consult with the Office of the Property Rights Ombudsman about property rights. The office is a neutral non- partisan, state office. The office and attorneys are hired by the State of Utah as an independent source of information and assistance for property owners and others involved in public roads, highways, and access issues. There is no charge for their services. The office can be contacted at 1-801-530-6391 or at propertyrights@utah.gov. The web page is at propertyrights.utah.gov.

# Public Roads and Private Lands:

*How Public Access Rights are Created, Used, and Abandoned in Utah*

## Introduction

This summary is meant to provide a broad overview of the case law related to various kinds of public rights of way -- distinguished by how they have been created, and indicating how different kinds of rights of way may be treated differently when changes are proposed. Issues such as intensification of use, expansion, or abandonment may be handled differently, depending on how the right-of-way was created and used over time.

**Note to the non-lawyer:** For reasons that have not completely become apparent to me after ten years as the property rights ombudsman and five years of private law practice following that service, disagreements over roads, access, and rights of way seem to be even more contentious than those involving water rights in Utah. Because of this, property owners and public officials usually want chapter and verse quoted exactly before they believe what the law is. So I have heavily cited case law, probably to a fault, in these materials. If you want more detail on an issue, don't hesitate to read these cases. They are fascinating, and there are lots of specifics in a given case that will help you guess how a court or arbitrator might apply a precedent to the issue you are concerned about.

The complete text of recent Utah appellate court opinions are available free of charge on the internet at www.utcourts.gov/opinions. Another site with a lot of case law for some years back is found at scholar.google.com, which allows free access, or www.findlaw.com, though this site will charge some money for each opinion accessed. We have several excellent public law libraries in the state where every case cited here would be found, including the Utah Supreme Court Library at the Matheson Court House in Salt Lake City, the University of Utah Law School and the BYU Law School in Provo. A few minutes spent with a law librarian will unlock the key to those strange numbers that follow the name of each case you see cited here. Soon you will be able to easily access whatever you want to read from the shelf or the internet.

**A word about interpretation of case law:** Many reading a legal summary for the first time will find a random quote from a single case and think they have found the "silver bullet" that will absolutely convince all who are concerned that their opinion of the matter is the only correct one. Case law needs to be read with a little more distance, as it is a rare case that stands like a colossus over the landscape and settles all the questions. Step back from the single case that is closest to your issue and consider others that cover some of the nearby legal landscape, thinking how a neutral decision maker, with no dog in your fight, might view the entire body of the law in addition to the one case that appears to answer all of your questions. The outcome of a specific case, even in a courtroom, may be molded in an atmosphere of compromise and moderation rather than spring from a strict enforcement of hard and fast rules.

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## I - Types of Roads - How Created

For purposes of this discussion only, eight categories of roads have been identified in this summary, each based on how a given road came to be and its legal status with regard to the adjacent or underlying land owners. These categories and their classification are completely the fabrication of the author, and do not exist in case or statutory law. They are only created in an effort to simplify the following analysis. This is helpful because generally, much of the discussion about how a road is used, expanded, abandoned or otherwise treated by the law depends on how it came to be a road in the first place.

**1. Purchased Roads.** Purchased roads exist on deeded public land, and were acquired in exchange for compensation to the underlying landowner or gifted to government by a third party independent of the then neighboring land owners. Some purchased roads were created by condemnation of the right-of-way, so payment was made and a specific legal description of the right of way has been recorded officially at the county recorder's office. For our purposes in this analysis, the term "purchased roads" also includes roads that are shown on the original city and town plats created before Utah's statehood, when the federal government deeded lands within city plats to private property owners and created city streets that were simultaneously vested in the local municipality. Roads created by federal grant are treated as purchased roads and not as dedicated roads. The interest of the local government in the road is not a "defeasible fee", and is free of any reversionary interest in favor of adjoining landowners. Since both the neighboring private property owners and the local municipality received their interests in the town plat from an independent third party (a trustee acting for the federal government), the roads are treated as if they were purchased by the municipality. *Nelson v. Provo City***,** 2000 UT App 204, 6 P.3d 567.

**2. Dedicated Roads.** These roads were conveyed to the public by an adjoining landowner or landowners by deed or dedication, and without payment. They are usually created by the landowner because of benefits created by the existence of a public road on or near their property. The rights-of-way are shown on official plats at the county recorder's office. They have the effect of vesting the “fee” interest in the roadway in the public. See Utah Code Annotated (U.C.A) Sections 10-9a-807 (municipalities) and 17-27a-807 (counties). This fee interest owned by the public is different from that obtained from the purchase of a right-of-way, in that it is a "defeasible fee," which is one that can be annulled or terminated. *Falula Farms, Inc. v. Ludlow*, 866 P.2d 569 (Utah Ct. App. 1993). See, for example, the discussion below in section "**VI - Abandonment.**"

It is to be noted that the above definition is narrow, and limited to road dedications by the owners of adjacent lands whose purpose in dedicating the road is to afford access to their private lands. As stated above, if the source of the dedication is the gift or grant from an independent third party, such as the federal government, and not the owner of adjacent lands, the road created is treated like a **Category 1 Purchased Road** under the law. This clarification was made by the Utah Court of Appeals in *Nelson*, 2000 UT App 204. See an extended discussion of this case under "**VI Abandonment - Category 1- Purchased Roads**" below.

**3. Officially Mapped Roads.** These roads are shown on the records of county recorder, but have not been deeded, purchased or dedicated officially by a previous or present owner of the

underlying land. They were not created by the recording of original town plats in early Utah history, but are shown on recorded plats that were drawn after the roads were created. For our purposes in this analysis, "officially mapped roads" show up on the county plats because some person wished to indicate the location or configuration of existing roads, but no written deed, easement, or other documentation exists for the road outside of the drawing on the plat. There is no document transferring an easement or right of way from the underlying landowner to the public.

County Surveyors or other surveyors may have historically drawn and recorded maps of roads with no written easement or deeded right-of-way. The purpose of the map may have been to simply document the presence of a public road that clearly existed and was obvious to all so that it was easier to describe the boundaries of the properties that adjoin it. The lack of any signature on the map by affected landowners, however, makes it of limited value in defining the rights of those landowners, even when recorded. *First American Title Insurance. Co. v. J. B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998) (See, in particular, footnote 2 to this case, where the court refused to hold that even a recorded map imparted constructive notice of the existence of a road created by use). But See *Haynes Land v. Jacob Family Chalk Creek,* 2010 Ut App 112, 233 P.3d 529, at ¶¶15-16, where maps were used as part of the evidence appropriately relied upon to establish the existence of a public road across private lands.)

**4. Purchased Easement Roads.** These roads are created by the purchase of the right to use the surface of the land for a road without acquiring the underlying real estate in fee. A right of way easement is duly recorded on the public records with a specific legal description. The easement therefore burdens lands owned by some landowner. The landowner retains the title to the fee interest in land under road, but that ownership is subject to the road easement and the public use provided for in the easement document.

**5. Dedicated Easement Roads.** These roads are built within an easement given to the public by a landowner who owned lands adjacent to the easement at the time of the conveyance. They are duly recorded on the public records, *but not created by condemnation or purchased by the public*. As with **Category 2 Dedicated Roads**, the motivation for the easement is typically some advantage to the landowner in having a public right of way on the property.

**6. Public Use Roads** (Automatic Dedication). These roads are created by public use over time without the permission of the landowner or any written easement in the same manner that any "prescriptive" easement is acquired. No deed or easement document signed by the landowner would exist on the county records. Utah has a statute that acts to make such roads permanent after ten years use. See U.C.A. 72-5-104 and *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997) and *AWINC v. Simonsen*, 2005 UT App 168, 112 P.3d 1228. Some landowner owns the land under the road, which is burdened by the road easement. It is often difficult to determine the exact width and location of the road, since there is no written description. Some public use roads are also officially mapped roads, but no deed or easement creating the road was ever conveyed by the owner of the land where the road is located. Public Use Roads are not created by use across government lands, except as noted bleow for **Category 8 RS 2477 Roads**, which occur across federal lands.

**How Created:** "For a road to become a public highway . . . there must be (i) continuous use (ii) as a public thoroughfare (iii) for a period of ten years." *Simpson*, 942 P.2d 307 quoted in *Chapman v. Uintah County,* 2003 UT App 383, 81 P.3d 761, ¶20. *Utah County v. Butler*, 2008 UT 12 ¶1, 179 P.3d 775.

"The Utah Supreme Court has determined that continuous use of a road exists when 'the public, even though not consisting of a great many persons, made a continuous and uninterrupted use' not necessarily every day, but 'as often as they found it convenient or necessary'" *AWINC,* 2005 UT App 168, quoting *Boyer v. Clark,* 326 P.2d 107 (Utah 1958). "The mere fact that members of the public may use a private driveway or alley without interference will not necessarily establish it as a public way. Nor will the fact it was shown on the public records to be a public street; nor even that it had been paved and sign-posted as a public street by the City . . . each of these various facts, if considered separately, could be rationalized as not proving a public street. But all of the facts should be considered together. . ." *Bonner v. Sudbury,* 417 P.2d 646 (Utah 1966).

The use may be continuous though not constant . . . provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption. *Richards v. Pines Ranch, Inc.*, 559 P.2d 948 (Utah 1977). The use must be by the public, and not just adjoining property owners. *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981); *Petersen v. Combe,* 438 P.2d 545 (Utah 1968); *Jennings Investment v. Dixie Riding Club,* 2009 UT App 119, 208 P.3d 1077. The intent of the owner to purposefully create the road need not be proven. *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches,* 639 P.2d 211 (Utah 1981); *Thurman v. Byram,* 626 P.2d 447 (Utah 1981). No dedication occurs when, although an alleyway had been used by the public more or less at will for a number of years, it had been closed by the abutting owners from time to time and they had at all times exercised control over it. *Culmer v. Salt Lake City,* 75 P 620 (Utah 1904).

The presence of gates across a disputed roadway has not been held to conclusively prove that use by the public was not continuous. Jury instructions about the effect of gates across public roads were discussed by the Court in *Chapman,* but the issue was not properly before the Court and therefore not resolved. 2003 UT App 383. Even though gates are present, if the intent for constructing and maintaining the gate is not to control public access but for some other purpose (such as to control livestock) then no interruption of the public use has occurred. *Butler,* 2008 UT 12 at ¶16. In *Campbell v. Box Elder County*, 962 P.2d 806 (Utah Ct. App. 1998), however, the presence of locked gates was held to constitute an adequate interruption to defeat the creation of a public road.

According to a 2008 Utah Supreme Court decision, roadblocks need not occur when the public is present so long as the intent of the property owner was to interrupt the use and the public's use would have been physically interrupted if the public had encountered the roadblock. *Leeds v. Prisbrey,* 2008 UT 11, ¶11, 179 P.3d 757; *Wasatch County v. Okelberry*, (Okelberry III), 2010 UT App 13; 226 P.3d 737 (2010). (*But see* discussion of the 2011 legislation, below, which requires that any roadblock actually interrupt the public use. The legislation seems to contradict the *Prisbrey/Okelberry* III holdings by requiring both the intent to create the interruption as well as a physical occurrence where the public encounters the interruption.)

In another recent case locked gates did not defeat the creation of a public road because the gates were locked after a ten year period of public use had already passed. See *AWINC*, 2005 UT App 168.

Notices and obstacles short of obstructions have been held to not interrupt the public use. In the *AWINC* case, rocks with "no trespassing" signs on them and tires had been placed beside the road, but the court reasoned that these may have conveyed the message that travelers should stay off the private lands along the road rather than the message that the public must stay off the road itself. See *AWINC*, 2005 UT App 168 at ¶15. See also *Butler*, 2008 UT 12 at ¶17.

Floods, snow, and other natural occurrences do not constitute an interruption of public use. *Butler,* 2008 UT 12 at ¶¶ 14-16.

**Other factors in an analysis:** The law does not lightly allow the transfer from private to public use. The public's "taking" of property requires proof of dedication by clear and convincing evidence. A higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect. *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (Utah 1995), citing *Thomson v. Condas*, 493 P.2d 639, 639 (Utah 1972); *Petersen v. Combe*, 438 P.2d 545 (1968). See also *Wasatch County v. Okelberry*, (Okelberry II), 2008 UT 10, ¶9, 179 P.3d 768. A clear and convincing quantum and quality of proof is required for the establishment of a public thoroughfare or taking of another's property. *Thomson*, 493 P.2d 639.

"The presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it." *Leo M. Bertagnole,* 639 P.2d at 213 quoting *Bonner*,417 P.2d at 648.

On the other hand, where the evidence is substantial and credible, the finding by a trial court that a public road exists will not be overturned. *AWINC*, 2005 UT App 168.

A court can find public use where there is sufficient evidence to support that finding, even where there may be more evidence to the contrary. Numerical disparity between the volume of evidence that supports public use and that which contradicts public use is not dispositive. If the evidence of public use is competent, then a finding of public use may be found. *State of Utah v. Six Mile Ranch,* 2006 UT App 104, ¶28, 132 P.3d 687.

**County Maps:** Posting a map of county roads at the county clerk's office does not create those roads as public roads. Section U.C.A. 72-5-104 provides that public roads can be created by use, not by legislation, notice, or map. Such a map may not even provide sufficient constructive notice to warn landowners of the existence of such roads, much less establish them by that notice. See *First American Title,* 966 P.2d 834. However, in *Haynes*, the Court held that the presence of the roads on "historical maps" by a county surveyor could be considered along with other evidence to establish the presence of a public road long before the private ownership of any of the property involved in the dispute came into being. 2010 UT App 112, at ¶12.

**On Government Lands.** Prescriptive rights are not created across public lands, but access easements both temporary and permanent, and both private and public, can come into being if the relevant government entity gives permission for the easements by statute or ordinance. See U.C.A. 72-5-201. A government landowner can stop the use of roads across public property at any time *if such an action is taken in compliance with relevant statutes.* Some statutes provide for the creation and permanent use of access roads (Such as **Category 8 RS 2477** roads, described below)**.**

**Use by Members of the Public.** While the continuous use required to establish a public road must be by members of the public, it is not fatal to such a claim that some of those using the road also own property in the area, where those using the road do not have documentary or prescriptive rights to cross private land. *Jennings Investment,* 2009 UT App 119. This recent case must be reconciled with previous holdings that "individuals with a private right to use a road, such as adjoining property owners who may have documentary or prescriptive rights to use the road, are not members of the public." *Butler,* 2008 UT 12 at ¶19.

**Permissive Use.** The public use needed to establish a public use road must be adverse, and permissive use does not create a public road. *Simpson*, 942 p.2d at 311. Where a road was used occasionally by those invited to use it for events, however, this intermittent permissive use does not supersede the property owner's failure to dispute the almost daily use of the road by the public. *Jennings Investment,* 2009 UT App 119 at ¶¶19-20.

**How to Avoid the Creation of a Public Use Road:** In 2008, the Utah Supreme Court set forth a bright light rule for the dedication of roads.

> "An overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required then-year period under the Dedication Statute."

*Wasatch County v. Okelberry*, (*Okelberry II*), 2008 UT 10, 179 P.3d 768,¶15, overruling *Wasatch County v. Okelberry*, (*Okelberry I*), 2006 UT App 473, 153 P.3d 745. In *Okelberry I*, the Court of Appeals held that the determination of public use involved a duty to "weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that the public use of the road was continuous." In *Okelberry II*, the Supreme Court held that such an approach is "problematic" and articulated the clear standard quoted above. Were the *Okelberry I* standard used, the Court reasoned, predictability would be lost and the very definition of "continuous" ignored.

**Legislative Changes.** In 2011, the Utah Legislature amended U.C.A. 72-5-104 by adopting HB173, which was intended to clarify the legislative intent relied upon in the Supreme Court's interpretation of the statute in *Okelberry II, Prisbrey,* and *Butler*. The three cases are specifically named in the statute, the text of which is provided at the end of these materials on page 24. The statute now provides that continuous use occurs as frequently as the public finds access "convenient or necessary". Two options to interrupt public use or access are given: One, the

obstacle must actually interrupt the use and put the public on notice; or Two, with a more predictable "safe harbor" result, a manned barricade is maintained for at least 24 hours *after* 72 hour prior notice is given to the highway authority having jurisdiction over the road. (The highway authority would be the city, within city limits, or the county, for unincorporated areas and the State of Utah, which has a shared interest in all roads within the State as provided in U.C.A. 72-3-103 through 105)

Under Option Two, however, if the jurisdictional authority demands the barricade be removed and the property owner "accedes" to the demand, the interruption did not occur. The statute also provides that the installation of gates and signs are only forms of evidence and are not dispositive that an interruption actually occurred. It is to be noted that in passing HB 173, the Legislature included language in the statute stating that the change "does not enlarge, eliminate, or destroy vested rights" and is only to clarify "legislative intent" in light of the *Okelberry II, Prisbrey,* and *Butler* cases. See U.C.A. 72-5-104.

**Practical Considerations.** (Author's editorial commentary) One may think that these issues are benign and matter little to most people, but to the extent that ever was the case, it no longer is. Recreational enthusiasts want miles and miles of new public trails. Four wheel devotees are out in the wide open spaces every weekend, and while most are respectful of property rights, some others are blazing trails and driving rural property owners crazy. Access that used to be considered a courtesy by landowners for seasonal hunting is now being used in the winter for snowmobiles and summer for ATV's. These topics are both timely and emotional, and constituents of county commissioners and city council members are demanding that those officials enforce public access to roads that clearly exist, but have no written easements or documentation to conclusively establish public access rights.

In the face of the renewed pressure, the 2011 legislation raises questions that are not readily resolved. For example, if the installation of a gate and posting of no trespassing signs do not "reasonably put the traveling public on notice" that a road is private, then precisely what actions taken by the underlying land owner would put the public on notice? If "installation of gates and posting of no trespassing signs are relevant forms of evidence, but are not solely determinative of whether an interruption has occurred", then what would be determinative? Suppose Joe Farmer sets up a barricade to interrupt public use and an off-roader calls the sheriff out. If the sheriff demands a barricade be removed, how does the property owner "accede to the demand" and how does he not? Does Joe refuse to remove the barrier and make the Sheriff remove it? Does Joe refuse by accepting a citation? If Joe does not come back and replace the barrier after the Sheriff removes it, does he "accede"? Would anything short of civil disobedience constitute assent?

It would seem to place great responsibility on local officials to summarily determine if there is or is not a valid public right at on the cusp of what could be an emotional confrontation (within 72 hours or less). Likewise, the property owner must either stand up to the road authority (which normally has a police force) at the barricade and risk an immediate penalty for doing so or, in the alternative, conclusively lose the chance to interrupt the public use. What if the owner is wrong and the road is later deemed to be public? The downside to that looming determination is pretty severe when criminal penalties might be imposed. Why would an owner take these risks?

The difficulty here is that if a road is not yet public, but the "road authority" involved wants it to be or thinks it already is, then over time it certainly will be because the owner who tries to resist that conclusion is subject to arrest. One of the few property rights that the Courts have held inviolate is the right to exclude others from your property. (See *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994).) In what other constitutional context has the defense of a basic aspect of personal freedom, embraced by the Bill of Rights, been made so difficult to assert? What if the property owner was right and no public road existed at the time he "acceded" and removed the barricade, but it took him past the ten year mark to prove it? Is the answer "Too bad"? That the time ran out and he did not interrupt the use before the ten years ran?

The legal standard for the creation of a road by public use is stated in *Okelberry II* at ¶ 9 ("In light of the *constitutional protection* accorded private property, we have held that a party seeking to establish dedication and abandonment under this statute bears the burden of doing so by *clear and convincing evidence*."). (emphasis added) The revised statute seems to accomplish the opposite, and put property owners at clear disadvantage in trying to avoid the establishment of public roads across private lands. These and other issues may need to be settled by more work at the legislature as well as in the courts.

**7. Private Roads.** These roads are not owned by the public but may be used by the public with the revocable permission of the underlying landowner. They include roads used by the public without the permission of the landowner, but for a term of less than ten continuous years. In that case no permanent public right has yet been established, though the passage of time will accomplish the creation of a **Category 6 Public Use Road** if the landowner allows the uninterrupted use without permission for a long enough period of time.

**8. RS 2477 Roads.** These roads are created across federal lands during the existence of a permissive federal statute, whether or not the road fits one of the other categories above as well. These roads were created or preserved under authority of the Act of July 26, 1866, 14 Stat.253, formerly Sec 2477 of the Revised Statutes of the United States, repealed by Federal Land Policy Management Act of 1976, Sec. 706(a), Pub.L.No. 94-579, 90 Stat.2793. The repeal effected a change in the policy that allows new RS2477 roads to be created, but preserved the roads that existed as of the date of the repeal as public roads. There continues to be a raging debate in Utah about which roads across federal lands qualify as RS 2477 roads. At least one Federal Court has adopted the standard of clear and convincing evidence to describe the burden of proof on the party seeking to establish the existence of a RS 2477 road in a memorandum opinion issued in 2011. *San Juan County v. US, Dist. Court*, D. Utah 2011.

## II. Width of Right-of-Way

**1. Purchased Road.** The width of a purchased road is defined by the legal description in the deed or other document that created the road.

**2. Dedicated Road.** The width of a dedicated road is defined by the legal description of the dedication, whether by deed, subdivision plat or other conveyance.

**3. Officially Mapped Road** A recorded map or plat creates a presumption that the recording was correct about the location and width of the road unless proven otherwise. This presumption would be markedly stronger when used to defeat the claims of those who purchased adjoining or underlying properties after the date of the recording of the mapped road at the county recorders office. Future owners may be considered as having constructive notice of the existence of the road that was shown on the recorded map, whether they had seen actually seen the map at the recorder's office or not. See U.C.A. 57-3-102 and *First American Title Insurance*, 966 P.2d 834.

Evidence that could prove to be more important than the recorded map may include fences and accepted boundaries and legal descriptions that contradict the map. If other evidence is more credible than the recorded map, the existence, location, width and other aspects of the roadway could be determined in contradiction to the map. *Gibbons v. Salt Lake City Corp.*, 310 P.2d 513 (Utah 1957) (Court rejected city's claim of land that for more than 20 years had been enclosed within property owner's fence and treated as private property, but was shown on recorded county plat).

If the plat or map is not recorded at the recorder's office, it's just another piece of evidence to be weighed without presumption. *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981) (Old map did not establish 66 foot wide width of street because of lack of evidence as to who drew it or why. Court held width of the paved road to be 20 foot only, and that road was established by use, not by map).

A government entity may also, by sufficient affirmative acts, be estopped from claiming land as part of a street. If the prior conduct of the government entity, its agents and officials, seemed to show that they did not consider the land to be part of the street, then it may be difficult for the city or county to later claim the land was part of the street all along. *Wall v. Salt Lake City*, 168 P. 766 (Utah 1917).

**4. Purchased Easement Road** The exact width of the road easement is usually specifically defined in the recorded easement document. The wording of the easement controls the width of the road, and the public may only enjoy the width of use provided for in the easement.

**5. Dedicated Easement Road.** The width of a dedicated easement road would be determined by the recorded subdivision plat or other easement document, the same as for **Category 4 Purchased Easement Roads**.

**6. Public Use Road.** Where the evidence establishes dedication of a roadway after ten years of non-permissive use, the width of such roadway is often difficult to determine. The width is not to be measured by the boundaries of the beaten track. Instead it is proper and necessary for a court to determine the width according to what was ***reasonable and necessary,*** under all the facts and circumstances, for the uses which were made of the road. *Jeremy v. Bertagnole*, 116 P.2d 420, 423 (Utah 1941) (emphasis added); *Butler v. Pinecrest Pipeline***,** 277 Utah Adv. Rep. 51, 909 P.2d 225 (Utah 1995). Also see, U.C.A. 72-5-104(3).The width of the easement is the width "reasonable and necessary for the type of use to which the road has been put" *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988), citing *Lindsay Land and Live Stock Co. v. Churnos*, 285 P. 646, 649 (Utah 1929). It is the width reasonable and necessary under all the

facts and circumstances to accommodate the public use. *Memmott v. Anderson***,** 642 P.2d 750, 754 (Utah 1982).

Some have pointed to the statutory language for roads created by use, that "The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances" U.C.A. 72-5-104(8), and contrasted that language with the common law statements (above) that the width of a road created by use is based on its historical use, as would be the case for any prescriptive easement. The issue is whether the width of a road created under statute (a Public Use Road) might be influenced by present needs and considerations rather than limited to its historical use using common-law prescriptive easement standards. The distinction may be too subtle to consider in most instances, but loom large in a few.

The determination of the necessary and reasonable width of a road depends on the full adjudication of the relevant facts that would be unearthed at trial. *Estate of Bernardo*, 888 P.2d 1097**.** It is the District Court, and not the city, county, or state road authority, that is to determine the width of a public use road. *Haynes*, 2010 UT App 112 at ¶24. According to *Haynes,* if the road width is to be determined at all "it needed to be determined by the district court according to what was reasonable and necessary under all the facts and circumstances. *Haynes* at ¶ 24. This case specifically held that U.C.A. 72-5-108 which provides that "The width of rights-of-way for public highways shall be set as the highway authorities of the state, counties, or municipalities may determine for the highways under their respective jurisdiction" does not apply to the dedication statute and public use roads.

In the case of *North Ogden City v. Hansen***,** Judge Stanton M. Taylor also ruled that U.C.A 72-5-108 did not give the city public works director an unfettered power to determine the width of roads:

> "Taken to an extreme, this reading of the statute (to give a city official the unlimited right to set road widths) would allow highway authorities to convert an established two lane road to an eight lane highway without any compensation to abutting landowners and without any judicial review. Such an interpretation flies in the face of constitutional protections and the general law of rights-of-way and easements. . . the width of a public right-of-way is not limited to the width that has actually been used, but . . . there must be some limitation on a city's expansion of its rights-of-way in order to make (Section 72-5-108) constitutional. This limitation is well established in Utah cases decided before and after the passage of (Section 72-5-108); the width of a public highway is that which is reasonable and necessary for the type of use to which the road has been put. (References *Hunsaker v. State*, 509 P.2d 352 (Utah 1973). This is a determination to be made by the trier of fact. Summary judgment on the width of the public rights-of-way is therefore inappropriate."

(Unpublished memorandum decision in the Second Judicial District of Weber County, Ogden Department, Case No. 970900282, June 3, 1998) (The two-lane to eight-lane expansion as an example of a case where compensation must be paid is also part of the analysis in the *Sierra Club* case cited elsewhere in this summary. 848 F.2d 1068.)

**Local Ordinance.** An ordinance or statute designating the width of roads created by use would be considered persuasive, but not conclusive. (See *First American Title Insurance*, 966 P.2d 834, where Grand County adopted official maps and posted them at the county clerk's offices). Such an ordinance or statute may indicate what could be considered to be reasonable and necessary for the convenience of the public in a community, for example. *Meservey v. Guilliford*, 93 P. 780 (Idaho 1908). The standards do not, however, conclusively establish by ordinance the width of existing roads. *Schaer v. State ex rel Dept. of Transp.*, 675 P.2d 1337 (Utah 1983).

**A narrow exception, where width was established by statute:** Utah had a statute in place from 1898 until 1918 that provided: "The width of all public highways, except bridges, alleys, lanes, and trails, shall be at least sixty-six feet . . . provided, that nothing in this title shall be so construed as to increase or diminish the width of either kind of highway already established or used as such." This statute would apply to all roads created between 1898 and 1918, unless abandoned for at least five years before 1911, according to *Hunsaker v. State*, 509 P.2d 352, 354 (Utah 1973). The statute may not apply to roads created prior to 1898, and would not apply to roads created after 1918. *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987) (Footnote 1 indicates that sufficient facts can be presented in a given case to rebut any presumption created by the statute, if the statute would otherwise apply).

**Factors that indicate width of a road created by use**: The presence of pavement, maintenance of shoulders, placing of gravel for lateral support, piling of snow, placement of signs, the use of a fence line to define the boundary between the private activities and the public activities, fence lines established by neighboring lands nearby, the normal width of highways in the area, the width of highways in the system of highways of which the subject highway is a part, presence of sidewalks, utility lines and poles, underground utilities, highway drainage facilities, shoulders adjacent to the right-of-way, and the course of conduct between the public at large and the landowner, or between public officials and the landowner, can all be factors in determining the width of the easement. This is a question of fact for a jury or other trier of fact to determine. *Hunsaker*, 509 P.2d 352.

The use of a wider roadway for even infrequent uses, such as the driving of cattle or sheep has been held to create a public use easement with a width of as much as 100 feet. *Deseret Livestock Co. v. Sharp,* 259 P.2d 607 (Utah 1953).

A bridle path abandoned to the public cannot be expanded, by court decree, into a boulevard. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic. *Leo M. Bertagnole, Inc.*, 639 P.2d 211.

The testimony of old-timers who remember traditional width of road can help determine the width of the road. *Clark v. Erekson*, 341 P.2d 424 (Utah 1959).

**Factors that *do not* indicate the width of a public use road:**

Private parking on the easement area would not defeat the public ownership. *Hunsaker*, 509 P.2d 352.

Possession and use of roadside may still not indicate private ownership. *Burrows v. Guest*, 12 P.847 (Utah 1886). Quoted in *Hunsaker*, 509 P.2d at 354.

Erection of buildings, fences, trees and shrubberies within the easement after the original width of the easement is established do not undo the original public right-of-way. *Clark v. Erekson*, 341 P.2d 424 (Utah 1959).

The decision by the trial court that the road "extended the full width of the land between the east and west fences" was held to be error in the absence of a finding that such a width was "reasonable and necessary under the circumstances." Kohler v. Martin, 916 P.2d 910 (Utah App. 1996).

**A Narrower Width?** *But see Farnsworth v, Soter's Inc.*, 468 P.2d 372 (Utah 1970) where the road easement is limited to the pavement, and did not include the shoulder of the roadway and the area between the roadway and a fence line. The Court said the roadway was to be determined by measuring "the old oiled surface." *This case is against the clear majority of cases which hold the exact opposite.* (The only consistency that can be found in comparing Farnsworth to the other cases is that there is a consistent bias in favor of the government's interest. In Farnsworth, there was a reversal of the usual roles. The government claimed the road to be narrow. The property owner argued for a wider road so that he could have access to it from lands in the near vicinity, but not abutting, the pavement.)

**Effect of unofficial pronouncements**:

Pronouncements, however old or formal, that are not recorded by the County Recorder on the title to the property would not be conclusive on issues of the existence or width of a public road easement. *First American Title Insurance*, 966 P.2d 834.

Evidence of an ordinance by a county board or even the legislature could be *presumptive* in determining what the assumptions of the landowner and the public entity might have been over time. These would not, however, be *conclusive* in the face of contrary evidence, such as a fence line that had been long-accepted as the boundary of the road. *Hunsaker*, 509 P.2d 352.

Pronouncements by previous property owners would also be persuasive, perhaps conclusive, as to the traditionally accepted width or intensity of uses of the road. A key issue will be the extent to which the current owners could have had notice of the width or intensity at the time they purchased the property and how they might be prejudiced by evidence that is not obvious upon an inspection of the property or discernable in a title search. *Salt Lake, Garfield & Western Rwy. v. Allied Materials Co.*, 291 P.2d 883 (Utah 1955).

**7. Private Roads.** The width of a private road would depend on boundaries determined by deed, conduct or other agreement among the adjoining landowners. It would typically not matter to the public how wide a private road is. If those with private rights across the road were involved in a dispute over the width of the private road, perhaps the guidelines established for public use roads would be used by a finder of fact to determine how wide a private road is as well.

**8. RS 2477 Roads.** The width RS 2477 roads is controlled by state law according to the 10th Circuit Court of Appeals in its analysis of the width of the Burr Trail in the *Sierra Club* case. 848 F.2d 1068. The Utah Legislature by statute has declared the formula to determine the width of RS 2477 roads. See U.C.A. 72-5-302(b).

## III. Intensity of Use

**Generally - all roads:** Once a road is created, it is presumed that no limit on intensity exists. The burden is on an adjoining landowner to show that any intensification of the use interferes with his fundamental property rights, such as to air, light and view or access. Such an interference by the addition of utilities or intensity would be rare and difficult to prove. For an example of such an inappropriate intensification, see *Dooly Block v. Salt Lake Rapid Transit Co.*, 33 P. 229, 231-32 (Utah 1893).

More intensive use of the right-of-way for utilities is not considered an additional burden. "A dedication of land for highway purposes when made is deemed to comprehend not only specific uses in the minds of the parties at the time, but also those developed and invented, which fall into the category of transportation in the future." *Pickett v. California Pac. Utils.,* 619 P.2d 325 (Utah 1980) citing *Fox v. Ohio Valley Gas Corporation,* 235 N.E.2d 168, 172-173 (Ind. 1968)**.** See also**,** *Oregon Short Line R.R. v. Murray City*, 277 P.2d 798 (Utah 1954) and *White v. Salt Lake City*, 239 P.2d 210 (Utah 1952).

**1. Purchased Roads:** Follow the general rule above.

**2. Dedicated Roads:** Follow the general rule above.

**3. Officially Mapped Roads:** Follow the general rule above, unless the person objecting to the intensification can defeat the presumption usually afforded the recorded map. If the road is considered a **Category 6 Public Use Road**, then an intensification that necessitates the expansion of the width of the road could be challenged as described below.

**4. Purchased Easement Roads:** Defined by the terms of the written easement. If the easement document is silent, then such a road would be treated under the general rule above. If the use of the easement has been at a level of intensity that violates the terms of the easement for ten years, a prescriptive intensification of the easement could have occurred under U.C.A. 72-5-104.

Use of the easement for a road is considered to be among the most intensive burdens that can be placed on land. If the holder of the easement allows overhead or underground utilities to be run

within the road easement, or other similar additional and less intensive uses to be made of the road easement area, no additional compensation is due to the owner of the underlying land. The owner of the underlying land would, therefore, have no right to prevent those additional uses unless the easement documents otherwise provide for such rights. *Broadbent Land Co. v. Town of Manila,* 842 P.2d 907 (Utah 1992). See also, *White*, 239 P.2d 210, and Pickett, 619 P.2d 325.

If a use or structure that is dramatically more burdensome than the original road use contemplated, such as a tall sound wall placed on the road easement, then a new issue of compensation to the landowner may arise. 2A Nichols on Eminent Domain (3rd Ed.) Sec. 6.06(3), pp. 6-110 - 6-111. *Utah State Road Comm'n v. Miya*, 526 P.2d 926 (Utah 1974). See also, *Dooly Block*, 33 P. 229.

More intensive use of a road easement corridor for utilities is not considered an additional burden. "A dedication of land for highway purposes when made is deemed to comprehend not only specific uses in the minds of the parties at the time, but also those developed and invented, which fall into the category of transportation in the future." *Fox*, 235 N.E. 2d 168*; Oregon Short Line R.R.* 277 P.2d 798.

**5. Dedicated Easement Roads:** Generally the same as **Category 4, Purchased Easement Roads.**

**6. Public Use Roads:** Since no easement document exists, every aspect of the public right of use is defined by the activities that have been conducted continuously on the easement area for at least ten years. It is to be noted, however, that compensation for intensification in use has been limited by Utah courts to situations where the width of the easement has been expanded. Once a public road is established, an increase in traffic along the same beaten path is apparently not compensable.

"We believe the 'reasonable and necessary' standard must be read in the light of traditional uses to which the right-of-way was put. Surely no Utah case would hold that a road which had always been two-lane with marked and established fence lines, could be widened to accommodate eight lanes of traffic without compensating the owners of property that would be destroyed to accommodate the increased road width. Rights-of-way are a species of easements and are subject to the principles that govern the scope of easements. . . Utah adheres to the general rule that the owners of the dominant and servient estates 'must exercise their rights so as not unreasonably to interfere with the other.' *Big Cottonwood Tanner Ditch Co. V. Moyle*, 174 P.2d 148, 158 (Utah 1946). See also, *Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943) (an easement is limited to the original use for which it was acquired)." *Sierra Club*, 848 F. 2d 1068 at 1083.

The "reasonable and necessary" standard goes beyond "actual construction." In the *Sierra Club* case, which involved southern Utah's Burr Trail, the court found that Utah law would allow such enlargements as would be reasonable and necessary to ensure safe travel for the uses established, including improving the road to two lanes so travelers could pass each other. It further found that "adjoining culverts and ditches" would be reasonable and necessary to assure "safe travel" and thus also allowed without legally exceeding the established public use road easement.

"While the owner of the dominant estate (the easement) may enjoy to the fullest extent the rights conferred by his easement, he may not alter its character so as to further burden or increase the restriction upon the servient estate." *McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978)**.** Any widening of the easement, if objected to, would require compensation to the landowner for the loss of value to the underlying or adjoining property that occurs because of the intensification. *Harvey v. Haights Bench Irrigation Co.*, 318 P.2d 343 (Utah 1957). The compensation would be defined by traditional principles of eminent domain statutes and case law, including a duty to pay severance and consequential damages, if applicable. (This gets a little technical. For more information about just compensation and eminent domain, see the ombudsman's booklet entitled "Your Right to Just Compensation" which is also available at the ombudsman's site on the internet, propertyrights.utah.gov.)

"The general rule is that while an easement holder may not increase the servitude upon the grantor's property by enlarging the easement itself, it is entitled to do what is reasonably necessary for full and proper enjoyment of the rights granted under the easement in the normal development of the use of the dominant tenement," *United States v. 3.08 Acres of Land*, 209 F.Supp. 652 (D. Utah 1962). See also, *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

Slight changes in the course of a highway or its location that do not materially change or affect the general course of the highway or affect its location or change the continuity of travel or use, do not constitute abandonment or affect the public nature of the highway. *Sullivan v. Condas*, 290 P. 954 (Utah 1930).

To add "reasonable and necessary improved structures (not taking more or different land)" in order to further the purposes of the easement is not prohibited. *Valcarce*, 961 P.2d 305.

**Additional Utilities:** If utilities are laid within the area determined to be "reasonable and necessary" to the public use road, then no compensation would be due to the landowner. *Broadbent Land Co*, 842 P.2d 907. If utilities were added outside the width needed for the road use, then an intensification would have occurred and compensation would be due. The owner of land under a public use road is burdened just as completely as the owner of land under a purchased right-of-way easement, within the width determined to be within the easement area.

**7. Private Roads.** If a road is private, there is no issue of whether intensive public uses are allowed. The owner of the private road may close it and stop all use at will, or limit its use to whatever intensity the owner defines as appropriate. *Estate of Bernardo*, 888 P.2d 1097. If a private party has a right to use a private road that exists on lands of another private party, the intensity of use allowed on that private road is much more severely limited than it would be on a public right-of-way. The private use is limited to the intensity established in a written easement agreement, if one exists. Absent a written agreement, the intensity would be limited to the intensity maintained adversely for 20 years or more, since it requires 20 years to acquire a private easement across private property, *Orton v. Carter,* 970 P.2d 1254 (Utah 1998) even though it only takes ten years to acquire a public easement. *Gillmor v. Carter*, 391 P.2d 426 (Utah 1964).

**8. RS 2477 Roads.** Intensity would be determined by the law related to **Category 6 Public Use Roads**. See *Sierra Club*, 848 F.2d 1068**.**

## IV. Adverse Possession

**General Rule:** Adverse possession and boundary by acquiescence do not run against public interest. No action by owners of adjacent property to encroach into right-of-way or otherwise act as owners of lands within the right-of-way will change the right of the public to use the right-of-way in total at whatever time the public chooses to. This rule of law was upheld in a case where adjoining property owners had fenced off a street shown on a township plat for more than seventy years before the city decided to open the street. The court held that the right to use the street had not been lost, even after seventy-five years of non-use, and that the street could be opened without payment of any compensation to those who had used the street for seventy-five years. *Hall v. North Ogden City*, 166 P.2d 221 (Utah 1946) See also, *Provo City v. Denver & R.G.W.R. Co.,* 156 F.2d 710 (10th Cir. 1946); *State v. Harvey Real Estate,* 2002 UT 107, 57 P.3d 1088.

**U.C.A. 78-12-13** provides that adverse possession shall not act to vest any person in any right or title in any lands held by a town, city or county held for a public purpose. According to the statute, the only instance in which adverse title may be acquired is when the government entity first conveys property to the possessor for adequate consideration. It is unclear how someone's possession is adverse if he paid adequate consideration for the land before he occupied it, but that's what the statute says.

**1. Purchased Roads.** Follow the general rule above.

**2. Dedicated Roads.** Follow the general rule above.

**3. Officially mapped roads:** Although adverse possession does not run against the government's interest, a landowner will prevail by showing that the government has no semblance of title, possession, or right of use. In such a case, the court held that a city's destruction of a fence, making a survey, and verbally asserting ownership were not sufficient to establish government ownership to a street that was shown on a plat but never actually acquired by the government. *Gibbons*, 310 P.2d 513.

A government entity may also, by sufficient affirmative acts, be estopped from claiming land as part of a street. *Wall*, 168 P. 766.
Otherwise, follow the general rule above.

**4. Purchased Easement Roads:** Same as for **Category 1 Purchased Roads.** No action by owner of underlying land will terminate the easement, although the government may take some affirmative acts that may, under the doctrine of estoppel, call the continuing validity of the easement into question. *Wall*, 168 P. 766.

**5. Dedicated Easement Roads:** Follow the general rule above.

**6. Public Use Roads:** Follow the general rule above. Public Use Roads, once established, are considered equal to **Category 1 Purchased Roads** as if built on formal easements. *Clark*, 341 P.2d 424.

Continued use of land within a public use road easement area by the property owner is not, as a matter of law, inconsistent with the easement created since the owner of the property has the right to use the land in any way that is not inconsistent with the requirements of the public. *Hunsaker*, 509 P.2d 352.

**7. Private Roads:** Issues of adverse possession would be resolved the same as with any private property. See U.C.A. 78-12-12 and *Jacobs v. Hafen*, 917 P.2d 1078 (Utah 1996). No permanent public rights have been established. The owner of the underlying land can terminate all use by the public without notice or obligation to the public. If he chooses to terminate public use, the public use can only be restored through the payment of just compensation to the property owner. *Automotive Products Corp. v. Provo City Corp.*, 502 P.2d 568 (Utah 1972).

**8. RS 2477 Roads.** Follow the general rule above.

## V. Encroachments

**General Rule:** If private encroachments exist in the right-of-way, they may be removed by the public body which owns the right-of-way with no compensation due to the adjacent landowner making the encroachment. This means no compensation for loss of the improve-ments that encroach nor severance or consequential damages for the loss of the encroachment.

> "While the persons who erected the improvements may be the owners of such improvements, they are not the owners of the lands upon which they are erected, and the municipality has the right to terminate such permissive use and require the removal of such improvements or to compensate such owners of improvements if such improvements are taken for public use. The plaintiffs, however, cannot restrain the public authorities from opening up such streets, nor prevent the improvements of such streets, since plaintiffs do not have title to such streets." *Hall,* 166 P.2d 221. See also, *Clark*, 341 P.2d 424.

**1. Purchased Roads:** Follow the general rule above.

**2. Dedicated Roads:** Follow the general rule above.

**3. Officially mapped roads:** Follow the general rule above once the mapped road is established as a public right of way.

**4. Public Use Roads:** Follow the general rule above. If private encroachments, contrary to the terms of the easement, exist in the easement area, they may be removed by the public body which owns the easement with no compensation due to the landowner making the encroachment. This means no compensation for loss of the improvements that encroach nor severance or

consequential damages for the loss of the encroachment. 2A Nichols on Eminent Domain (3rd Ed.) Sec. 5.07(2)(e) at 5-489.

**5. Dedicated Easement Roads:** Follow the general rule above.

**6. Public Use Roads:** Follow the general rule above.

**7. Private Roads:** Issues of encroachment would be resolved as those for adverse possession, above. Follow the general rule above.

**8. RS 2477 Roads:** Follow the general rule above.

## VI. Abandonment

**General Rule:** Rights-of-way cannot be extinguished by non-use, but only by a legally appropriate abandonment, transfer or sale duly adopted as an ordinance by the appropriate public body empowered to release it. U.C.A. 72-5-105; *Harvey Real Estate*, 2002 UT 107; Henderson v. Osguthorpe, 657 P.2d 1268 (Utah 1982); *Ercanbrack v. Judd*, 524 P.2d 595 (Utah 1974). The process of abandonment must comply in specificity with statutory abandonment requirements or it will have no effect. *State ex. rel. Div. of Forestry v. Tooele County*, 2002 UT 8, 44 P.3d 680. See also, *Henderson*, 675 P.2d 1268, *Hall*, 166 P.2d 221, and *Provo City*, 156 F.2d 710**.** 2011 amendments to the statutes clarify that the erection of a barrier or sign is not an abandonment, and an interruption of the public's continuous use is not an abandonment even if the interruption is allowed to continue unabated. U.C.A. 72-5-105(3)(b).

A case decided in 2002 involved an old easement that the State Department of Transportation had fenced off and separated from the highway. The adjoining property owner (from whose predecessor in interest the easement was obtained originally) used it for pasture, and there had been no road use for almost 50 years. Despite this lack of use, the Utah Supreme Court held that there had never been an official, formal abandonment and therefore UDOT did not need to pay any compensation for the easement area when the road was widened again over the old easement area. *Harvey Real Estate*, 2002 UT 107.

In the 2002 General Session of the Utah Legislature, 2nd Substitute Senate Bill 65 was passed that may affect the ability to sell land that has ever been used as a public road. The text of the bill amended the language of U.C.A. 72-5-105 as follows:

> **72-5-105. Highways, streets, or roads once established continue until abandoned.**(1) All public highways, streets, or roads once established shall continue to be highways, streets, or roads until abandoned or vacated by order of the highway authorities having jurisdiction [] or by other competent authority.
>
> (2) For purposes of assessment, upon the recordation of an order executed by the proper authority with the county recorder's office, title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with

> 1/2 of the width of the highway, street, or road assessed to each of the adjoining owners. Provided, however, that should a description of an owner of record extend into the vacated or abandoned highway, street, or road that portion of the vacated or abandoned highway, street, or road shall vest in the record owner, with the remainder of the highway, street, or road vested as otherwise provided in this Subsection (2).

The effect of this wording may not be clear, but a court could determine that this amendment has the effect of creating in neighboring property owners a reversionary interest in rights of way, and that no roadway can be sold if abandoned, but only conveyed to the neighboring property owners in equal amounts. The bill became law in May of 2002. This change may have overturned the common law rule described below under **Category I Purchased Roads.**

While a road or street may be abandoned or vacated insofar as it affects the rights of the public, such an abandonment will not affect the rights of abutting landowners with respect to an established use of the right-of-way for access to and from his premises. *Hague v. Juab County Mill & Elevator Co.*, 107 P. 249 (Utah 1910). See also, *Boskovitch v. Midvale City Corp*., 243 P.2d 435 (Utah 1952). That right of access is a general right, however, and a specific means of access can be replaced by another means of access if the change is reasonable. *Wynia V. City of Great Falls*, 600 P.2d 802 (Mont. 1979). See, *Adney v. State Road Comm'n*, 248 P. 811 (Utah 1926), where no reasonable access to private property was left after the road was rerouted and a right of private property owners was therefore violated. For a general discussion, see *Mason v. State***,** 656 P.2d 465 (Utah 1982). Also see, U.C.A. 72-3-108 (Counties) and 10-8-8.5 (Cities).

In a recent case, the Utah Supreme Court held that "reasonable access" for a private easement that survived the abandonment of an old alleyway meant the full original width of the alleyway. *Carrier v. Lindquist***,** 2001 UT 105, 37 P.3d 1112. The Utah Supreme Court also held in 2001 that when Salt Lake County allowed a retail store to be built in what was a former county street, it unreasonably interfered with access to neighboring residences and violated due process and other property rights. *Culbertson v. Bd. of County Comm'rs***,** 2001 UT 108, 44 P.3d 642. The Court held that the county had defined a standard for a city street in its ordinances, and could not disregard those standards and claim that a lesser width was adequate for street purposes.

The abutting owner's right of access is not a prescriptive easement. A prescriptive easement cannot arise over land while it is subject to public use. The private owner's access exists in common with the general public, and is therefore regarded as permissive. *Thurman*, 626 P.2d 447; *Martin*, 916 P.2d 910.

**1. Purchased Roads.** Follow the general rule above, except as to the old common law rule related to the disposition of the title to land that was formerly a road. If a road was acquired by purchase, public body cannot vacate or abandon property to adjoining landowners. The fee interest in a roadway can only be sold for adequate consideration. *Sears v. Ogden City*, 533 P.2d 118 (Utah 1975). *(But see note under the general rule above related to 2SSB65 adopted by the Utah Legislature in the 2002 Session.)*

Roads acquired by separate deed or gift, where the person giving the road right of way to the public entity was not the owner of adjoining property at the time, are treated as purchased roads. This clarification was made by the Utah Court of Appeals in the year 2000 *Nelson* case. 2000 UT App 204, 6 P.2d 567. In this case, the City of Provo was challenged for attempting to abandon the right of way for 900 South Street and selling it to a private developer. An adjoining property owner claimed that the city had nothing to sell, because the abandonment automatically vested in him half the street width since he had a claim in half the width of a street created by dedication. The Court noted, however, that both the City and the original private property owners had acquired title from the federal government in the same way - from the1871 transactions which vested title in properties in the Provo Town Plat. Since Provo had received the street from the 1871 trustee, and not from a neighboring landowner, the City's interest in the road was not released to the neighboring landowners when the street was abandoned. Even though Provo had not paid consideration for the roadway, it had not received the land from a predecessor in interest to the present neighbors, so Provo could abandon the road and sell it to someone, free of any claims by the neighboring landowners.

**2. Dedicated Roads:** These roads were not acquired by purchase, but gifted to the public entity by neighboring landowners. If a public body decides to abandon the road, therefore, the property *automatically* passes to the current adjoining landowners without payment of compensation to the public body. Adjoining landowners on each side of the roadway would each receive half of the roadway, with the new common boundary between their properties running down the middle of the former roadway. The public body has no choice in the matter of who owns the roadway after abandonment. *Falula Farms Inc. v. Ludlow*, 866 P.2d 569 (UT App. 1993), citing *Mason v. State*, 656 P.2d 465 (Utah 1982) and *Siegenthaler v. North Tillamook County Sanitation Auth.*, 553 P.2d 1067, 1069 (Or. Ct. App. 1976). See also, *Fenton v. Cedar Lumber & Hardware Co.*, 404 P.2d 966 (Utah 1965), and *Sowadzkie v. Salt Lake County*, 104 P. 111 (Utah 1909). See also, U.C.A. 10-8-8.5.

A narrow exception allowing abandonment for non use exists for roads which were on easements or by dedication and not by a purchased and deeded right-of-way, created prior to 1907, and abandoned before 1911, when a statute allowing for abandonment of public roads after five years of non-use was repealed. *Mallory v. Taggart*, 470 P.2d 254 (Utah 1970); *North Temple Inv. Corp. v. Salt Lake City Corp.*, 489 P.2d 106 (Utah 1971); *Henderson***,** 657 P.2d 1268. This old statute does not apply to roads created by plat or deeded right-of-way. *Hall*, 166 P.2d 221.

**3. Officially Mapped Roads:** Same as **Category 2 Dedicated Roads.**

**4. Purchased Easement Roads:** Same as **Category 1 Purchased Roads**.

**5. Dedicated Easement Roads:** The easement can be released to the underlying landowner(s) without compensation, but must still be accomplished by formal action. Same as **Category 2 Dedicated Roads.**

**6. Public Use Roads:** Same as for **Category 5, Dedicated Easement Roads** because no consideration was paid in the creation of the road. 2011 amendments to the statutes clarify that the erection of a barrier or sign is not an abandonment, and an interruption of the public's

continuous use is not an abandonment even if the interruption is allowed to continue unabated. U.C.A. 72-5-105(3)(b).

**7. Private Roads** - No permanent rights have been established. The owner of the underlying land can terminate all use by the public without notice or obligation to the public. If he chooses to terminate public use, it can only be restored through payment of just compensation. *Automotive Products Corp*, 502 P.2d 568.

**8. RS 2477 Roads.** Even if abandoned by a local government entity, RS 2477 roads are still public roads until abandoned by the State Department of Transportation. See, U.C.A. 72-5-305**.** This is unique to state law and makes it impossible for cities and counties to completely vacate roads created on federal lands before statehood. When an attempt is made to abandon them locally, the public interest is vested entirely in the state, not in the underlying landowner.

## VII. Right to Use the Road

**General Rule - All Roads Except Category 7 Private Roads:** Any member of the public can use a public right-of-way for access and transportation purposes, but no person can force a public entity to assert a public entity's claim to the right-of-way. If the use of a public right-of-way is challenged by an adjacent or underlying land owner, the party wishing to assert the public right must take the initiative to resolve any adverse claims and enforce the use if the municipality or county involved declines to pursue the matter.

Generally speaking, while public entities have the right to represent the public interest in defending a public right-of-way, they have no duty to do so. A public entity cannot normally be forced to open and improve a public right-of-way that is not open. It cannot be forced to defend a public use road on behalf of the public nor to challenge the closing of such a road.

Private landowners adjoining an undeveloped city street can waive their right to eventual access through the undeveloped street by encouraging or by not protesting a government entity's use of the undeveloped street area for other public purposes. *Premium Oil Co. v. Cedar City*, 187 P.2d 199 (Utah 1947).

## VIII. Value of Land

**General Rule - All Easement Roads:** Land under a road easement has little or no value to the owner, and can be acquired in fee with the payment of nominal compensation. 2A Nichols on Eminent Domain (3rd Ed.) Sec. 5.07(2)(g) at 5-491.

## Dispute Resolution

Disputes as to the location, width, use and expansion of roads across private property or adjoining private property can involve constitutional property rights. Property owners involved in such disputes have the opportunity to contact the Property Rights Ombudsman for information

and mediation or arbitration services. Through the ombudsman, the property owner can attempt to resolve the matter without having to go to court. See, U.C.A. 63-34-13. He also has the statutory authority to resolve disputes about the existence of public use roads through arbitration. *Selman v. Box Elder County*, 2011 UT 18.

## Table of Cases and Authorities

### Cases



 

## Statutes



## Other Authorities

# Public Use Road Dedication Statute

**Utah Code Ann. 72-5-104. Public use constituting dedication -- Scope.**

(1) (a) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of 10 years.
(b) Dedication to the use of the public under Subsection (1) does not require an act of dedication or implied dedication by the property owner.
(2) The requirement of continuous use under Subsection (1) is satisfied if the use is as frequent as the public finds convenient or necessary and may be seasonal or follow some other pattern.
(3) Continuous use as a public thoroughfare under Subsection (1) is interrupted only when:
(a) the regularly established pattern and frequency of public use for the given road has actually been interrupted to a degree that reasonably puts the traveling public on notice; or
(b) for interruptions by use of a manned barricade on or after May 10, 2011:
(i) the person or entity interrupting the continuous use gives not less than 72 hours advance written notice of the interruption to the highway authority having jurisdiction of the highway, street, or road; and
(ii) the manned barricade is maintained for at least 24 consecutive hours.
(4) Installation of gates and posting of no trespassing signs are relevant forms of evidence but are not solely determinative of whether an interruption has occurred.
(5) If the highway authority having jurisdiction of the highway, street, or road demands that an interruption cease or that a barrier or barricade blocking public access be removed and the property owner accedes to the demand, the attempted interruption does not constitute an interruption under Subsection (3).
(6) (a) The burden of proving dedication under Subsection (1) is on the party asserting the dedication.
(b) The burden of proving interruption under Subsection (3) is on the party asserting the interruption.
(7) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.
(8) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.
(9) (a) The provisions of this section apply to any claim under this section for which a court of competent jurisdiction has not issued a final unappealable judgment or order.
(b) The legislature finds that the application of this section:
(i) does not enlarge, eliminate, or destroy vested rights; and
(ii) clarifies legislative intent in light of Utah Supreme Court rulings in Wasatch County v. Okelberry, 179 P.3d 768 (Utah 2008), Town of Leeds v. Prisbrey, 179 P.3d 757 (Utah 2008), and Utah County v. Butler, 179 P.3d 775 (Utah 2008).