



A SELECTED READING

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Vacation of Streets

The legislative authority to vacate streets has been delegated to municipalities subject to the constitutional prohibition against taking or damaging private property without just compensation. This delegation of authority is full and complete. The proper municipal authorities are the sole judges of the use of this power but must be guided by statutory provisions, limitations and restrictions. Vacation statutes are in derogation of the common law prohibition against vacating public ways and are strictly construed. *Bownes v. Winston County*, 481 So.2d 362 (Ala. 1985). This article summarizes the various methods available to municipalities for vacating public ways.

Vacation of Streets for the Erection of Public Buildings

The authority to vacate streets for the erection of public buildings is found in Sections 11-49-100 through 11-49-106, Code of Alabama 1975. This type of vacation is initiated by the governing body by adoption of an ordinance which should be preceded by a finding that “it is in the interest of the public convenience” that a portion of a street be vacated and discontinued as a highway.

The vacated portion of the street should be used, in whole or in part, for the erection and maintenance of “any state, county or municipal public building, or railroad station or depot, or street railroad station or depot.” Section 11-49-104, Code of Alabama 1975, requires that a “sufficiently ample portion of the thoroughfare” remain open for travel and traffic and it limits the vacation to “not more than one-half of the width of such highway or thoroughfare.”

The ordinance shall be adopted only by a two-thirds vote of the council. *See*, Section 11-49-103, Code of Alabama 1975. The ordinance contemplated under these sections may not be adopted until 30 days have expired since it was first introduced and after publication in a newspaper for two successive weeks. The publication shall state the time when the governing body will consider the ordinance and when an opportunity shall be given to object to its passage. This statute also authorizes postponement of action until the next regular meeting or to subsequent regular meetings of the governing body. The cost of publication shall be borne by the proposed user of the site. *See*, Sections 11-49-101 and 11-49-102, Code of Alabama 1975.

Section 11-49-106, Code of Alabama 1975, states that the “party for whom the street may be vacated under this article shall be liable to the owners of property adjacent thereto in any action for special damages suffered by them.”

This appears to be an infrequently used procedure.

Additional Statutory Authority

Sections 23-4-1 through 23-4-6, Code of Alabama 1975, provide an additional statutory method of closing and vacating streets. Sections 23-4-2 and 23-4-5 were amended in 2004 and Sections 23-4-4 and 23-4-5 were repealed. *See*, Act 2004-3231, 2004 regular session. Prior to 2004, these provisions required a hearing and approval in probate court in order to vacate streets and provided for the compensation of objecting landowners. As such, this method of vacating streets was rarely utilized by municipalities. As amended, the governing body of a municipality holds the hearing and makes the determination as to the vacation of streets without the involvement of the probate court except for the ultimate filing of the vacation. Further, there is no longer a provision for the compensation of objecting landowners.

Section 23-4-2, Code of Alabama 1975, provides that whenever the governing body of a municipality proposes to vacate a public street, alley, highway or portion thereof, the governing body shall schedule a public hearing prior to taking final action and shall publish notice of the proposed hearing on the vacation in a newspaper of general circulation in the portion of the county where the street, alley or highway lies once a week for four consecutive weeks prior to deciding the issue at a regularly scheduled meeting of the governing body. In addition, a copy of the notice shall be posted on a bulletin board at the county courthouse and shall also be served by U.S. mail at least 30 days prior to the scheduled meeting on any abutting owner and on any entity known to have facilities or equipment such as utility lines, both aerial or buried, within the public right of way

of the street, alley or highway to be vacated. The notice shall describe the street, alley, highway or portion thereof proposed to be vacated and also give the date, time and location of the meeting of the governing body at which the proposed vacation is scheduled to be addressed. Any citizen alleging to be affected by the proposed vacation may submit a written objection to the governing body or may request an opportunity to be heard at the public hearing. Section 23-4-2, Code of Alabama 1975.

If the governing body elects to vacate, it must adopt a resolution describing with accuracy the street, alley, highway or portion thereof, to be vacated and give the names of the owner or owners of the abutting lots or parcels of land and also the owner or owners of such other lots or parcels of land, if any, which will be cut off from access thereby over some other reasonable and convenient way. The resolution must further set forth that it is in the interest of the public that such street, alley, highway or portion thereof, be vacated and must be filed in the probate court of the county where the public way is located. The vacation does not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property and if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated. The resolution consenting to the vacation must be clear and unequivocal or the vacation is invalid. *Fordham v. Cleburne County Commission*, 580 So.2d 567 (Ala. 1991).

The filing of the resolution operates as a declaration of the governing body's vacation and divests all public rights and liabilities, including any rights which may have been acquired by prescription, in that part of the public street, alley or highway vacated. Generally, title and all public rights, including the right to close the street, alley or highway vacated, vests in the abutting landowners. However, the Alabama Court of Civil Appeals has held that Section 23-4-2(b) of the Code of Alabama, indicating that, upon vacation of a public right-of-way, title and all public rights "shall vest in the abutting landowners," does not alter the common law so as to require that every abutting landowner is entitled to a share of a vacated right-of-way. The common law would apply to permit the landowner abutting the vacated right-of-way, whose predecessor in interest contributed all the property for the right-of-way, to retake full ownership of the vacated right of way in fee simple. *Keeton v. Kelly Co., LLC*, 47 So.3d 1262 (Ala.Civ.App.2010). Further, entities with utility lines, equipment or facilities in place at the time of vacation, have the right to continue to maintain, extend and enlarge their lines, equipment, and facilities to the same extent as if the vacation had not occurred. Notice of the governing body's action shall be published once in a newspaper in the county no later than 14 days after its adoption.

Section 23-4-5, Code of Alabama 1975, provides that any party affected by the vacation of a street, alley or highway pursuant to Section 23-4-2 may appeal within 30 days of the decision of the governing body vacating the street to the circuit court of the county in which the lands are situated and upon such appeal, the proceeding shall be tried de novo, either party having the right to demand trial by jury when and as demand is authorized in civil actions. The appeal does not suspend the effect of the decision of the governing body unless the appealing party gives bond, with sureties, in an amount to be determined by the circuit judge. From the judgment of the circuit court, an appeal may be taken within 42 days by either party to the Court of Civil Appeals or the Supreme Court in accordance with the Alabama Rules of Appellate Procedure."

As stated earlier, prior to 2004, these statutes were not utilized often by municipalities in Alabama, perhaps because of the probability of the assessment of damages and the cumbersome process of going through the probate court. These statutes are cited in *Talley v. Wallace*, 39 So.2d 672 (Ala. 1949); *Purvis v. Busby*, 71 So.2d 18 (Ala. 1954); and *Lybrand v. Pell City*, 71 So.2d 797 (Ala. 1954).

Vacation of Streets by Circuit Courts

Sections 35-2-58 through 35-2-62, Code of Alabama 1975, authorize the circuit courts to vacate and annul maps, plats, streets, alleys, avenues and roads pursuant to a civil action filed by any person owning land abutting the street, road or alley sought to be vacated or annulled. Unless all abutting owners join as plaintiffs, the owners not consenting shall be joined as party defendants along with the municipality.

The proceedings shall be conducted as equity suits and the court may grant the relief sought in whole or in part or it may deny relief in whole or in part. Appeals may be perfected to the Alabama Supreme Court which may affirm, reverse or render such judgment, decree or order as the trial court should have rendered. Section 35-2-59, Code of Alabama 1975. If the final judgment or order of the court states that any street, road or alley shall be vacated or annulled, the petition and final order shall be recorded at the expense of the person filing the proceedings. Section 35-2-60 and 35-2-61, Code of Alabama 1975.

This is the statute which the Supreme Court said was misconstrued in *Talley*, supra. It should be noted that there is no provision for compensating an objecting landowner under these sections. See, *Thetford v. Cloverdale*, 115 So. 165 (Ala. 1927). Courts have held that a circuit court cannot vacate property under these sections unless the consent of all abutting property is first obtained. *Turner v. Hoehn*, 494 So.2d 28 (Ala. 1986), *Hammond v. Phillips*, 516 So.2d 707 (Ala. Civ. App. 1987), and *Hoover v. Kanellis*, 574 So.2d 850 (Ala. Civ. App. 1990).

Vacation by Abutting Landowners

The most common procedure for vacating streets and alleys is found in Section 23-4-20, Code of Alabama 1975, which was amended in 2014 by Act 2014-333. This section provides that any street or alley may be vacated, in whole or in part, by the owner or owners of the land abutting the street or alley or abutting that portion of the street or alley desired to be vacated. The owner or owners of the land abutting the street or alley to be vacated must join in a written petition requesting that the street or alley be vacated and must file the petition with the governing body with jurisdiction over the street or alley or portion thereof, requesting the governing body's approval of the vacation. The governing body must set the request for vacation for public hearing within 100 days from the date the petition is received and notice of the hearing shall be provided as set out in Section 36-25A-3 for notice of meetings of the governing body and shall describe the street or alley, or portion thereof, requested to be vacated. A copy of the notice shall also be served by U.S. mail at least 30 days prior to the scheduled meeting on any abutting owner and on any entity known to have facilities or equipment such as utility lines, both above ground or buried, within the public right-of-way of the street or alley, or portion thereof, to be vacated. If the municipal governing body elects to act on the petition, the governing body shall follow the procedures in Section 23-4-2(b) for taking the action. Any appeal of the decision of the governing body to vacate the street or alley, or portion thereof shall be as provided in Section 23-4-5. If the governing body approves the vacation, it has the same effect, including that the vacation must not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property and if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated.

Section 35-2-54, Code of Alabama 1975, is similar in procedure in that it allows abutting property owners to vacate property by joining in a written instrument declaring the vacation of a street or alley. It is essential that the written instrument be executed, acknowledged and recorded as are conveyances of land. When the declaration has been recorded, it shall operate to destroy the force and effect of the dedication of the street or alley vacated and the public rights in the street or alley will be divested. Like Section 23-4-20, when a street or alley sought to be vacated lies within the limits of a municipality, the governing body of the municipality must assent to the vacation. Assent is evidenced by a resolution adopted by the governing body, certified by the clerk and filed and recorded with the written declaration of vacation. The county governing body must assent if the street or alley is not within the limits of any municipality. Act 2014-333 also added provisions relating to vacation of streets and alleys by the county commission when family members petition to vacate a street or alley within the county. These provisions do not apply to municipalities. Section 23-4-20, Code of Alabama 1975.

The court, in *Stack v. Tennessee Land Co.*, 96 So. 355 (Ala. 1923), held that what is now Section 35-2-54, Code of Alabama 1975, was applicable only to streets which had been the subject of statutory dedication. *Chichester v. Kroman*, 128 So. 166 (Ala. 1930), held that the Legislature may vacate a street and may delegate this power to municipal authorities. This case also stated that "It is not every lot owner on said street whose rights are thus protected. But only those whose lots abut the portion of the street vacated, not including one whose lot only corners it, unless his property has by said vacation been cut off without some convenient and reasonable way of travel from the outside."

"A conveyance of lots embodied in such a plan [legal dedication] passes to the grantee the fee to medium line of the street encumbered by the easement in favor of the public ... Said fee is not subject to vacation by legislative action without just compensation being made or provided." [court's emphasis.] *Lybrand v. Pell City*, 71 So.2d 797, 801 (Ala. 1954). This rule was repeated in the *Bragg Apartments Inv. v. Montgomery*, 201 So.2d 510 (Ala. 1967). *Bragg* also held that the owner was entitled to compensation under the authority of Section 235 of the Constitution on the facts of the case. *Id.* at 513.

The Alabama Supreme Court, in *Gwin v. Bristol Steel and Iron Works, Inc.*, 366 So.2d 692 (1978), held that statutes in derogation of the common-law prohibition against the vacation of public ways will be interpreted to protect the property interests of non-consenting property owners affected by the proposed closing, subject only to the rule of remoteness. The court held that not only is this a rule of reason, but it is mandated by the most basic application of constitutional due process. *See also, Booth v. Montrose Cemetery Ass'n.*, 387 So.2d 774 (Ala. 1980); *Jackson v. Moody*, 431 So.2d 509 (Ala. 1983).

Suggestion

A request for a street vacation by abutting owners is usually proposed because of the resulting benefit to the petitioners. Often the petitioners do not consult counsel before making the proposal and therefore are usually not informed of the legal requirements necessary to affect the vacation.

The city of Montgomery has prepared a guide for petitioners/owners. This guide sheet is given to persons applying for a vacation of property. The guide cites the statutes, outlines legal requirements and states that the governing body may or may not assent to the proposal. In practice, all proposals are checked by the city attorney and the city engineer before action is taken by the governing body. All public utility easements should be protected before final approval is given at the expense,

if any, of the petitioners. Easements, if required in the vacated street, should be granted simultaneously with the giving of assent and should be recorded along with the other documents.

Suggested Form A

STATE OF ALABAMA

_____ COUNTY

DECLARATION OF VACATION OF _____ STREET

WHEREAS, we, the undersigned _____, an unmarried man; _____, a widow; and _____ and _____ husband and wife; separately and severally, are the owners of all property abutting _____ Street as same appears on the Plat of _____, which plat is recorded in Plat Book _____, at page _____, in the probate court of _____ County, Alabama, and, also, as same appears on the _____ Plat, as recorded in Plat Book _____ at page _____, in the Probate Court of _____ County, Alabama; a map of which street is attached hereto and made a part hereof, and

WHEREAS, we the said _____, an unmarried man; and _____, a widow; and _____ and _____, husband and wife, are desirous of vacating said _____ Street, as same appears on each of said plats;

NOW, THEREFORE, we the undersigned _____, an unmarried man; _____, a widow; and _____ and _____, husband and wife, owners of each of said plats embraced within the boundaries of said _____ Street, as same appears of record on each of said plats to be vacated, and same is hereby requested to be vacated.

We, the said _____, an unmarried man; _____, a widow; and _____ and _____, husband and wife, do hereby, pursuant to and in accordance with the provisions of Section 23-4-20 of the Alabama Code of 1975, join in the execution of this written request for vacation of said street and same being within the limits of the city of _____, a municipality, do hereby pray and request the assent of the municipal council of the city of _____, Alabama, to said vacation of said street and its approval of same.

Such vacation will not deprive other property owners of a convenient and reasonable means of ingress and egress to their property.

IN WITNESS WHEREOF, we the said _____, an unmarried man; _____, a widow; and _____ and _____, husband and wife, have hereunto set our hands and seals on this the ___ day of _____, 20__.

_____ (L.S.)

_____ (L.S.)

_____ (L.S.)

_____ (L.S.)

STATE OF ALABAMA

_____, COUNTY

I, _____, a notary public in and for said county in said state, hereby certify that _____, _____, _____ and _____, whose names are signed to the foregoing instrument, and who are known to me, acknowledged before me on this day that being informed of the contents of said instrument they executed the same voluntarily on the day the same bears date.

Given under my hand and seal this the ___ day of _____, 20__.

(SEAL)

My Commission Expires:

Notary Public

_____ County, Ala.

Suggested Form B

STATE OF ALABAMA

_____ COUNTY

WHEREAS, a petition signed by the owners of all of the lands abutting the following described street, situated in the city of _____, county of _____, state of Alabama, requesting the vacation of said street, has been duly presented to the _____ of the city of _____, Alabama, for the assent and approval of said governing body, said petition with map attached being hereto affixed, marked Exhibit A and made a part hereof, and

WHEREAS, pursuant to Section 23-4-2 of the Code of Alabama 1975 notice of said request for vacation was published and a hearing was held on the ___ day of _____, 20__, and

WHEREAS, the street above referred to is more particularly described as follows:

[Legal description of street to be vacated and to coincide with the description used in the declaration] and

WHEREAS, it appears to the _____ of the city of _____, Alabama, that the vacation of said street is in order and that convenient and reasonable means of ingress and egress is afforded to all other property owners owning properties in the tract of land embraced in said Plat of _____ and in the said _____ Plat:

NOW, THEREFORE, BE IT RESOLVED, by the _____ of the city of _____, Alabama, that the vacation of the hereinabove described street is assented to and approved and same is hereby vacated pursuant to the provisions of Section 23-4-20 of the Alabama Code of 1975.

STATE OF ALABAMA

_____ COUNTY

I, _____, city clerk of the city of _____, Alabama, do hereby certify that the above is a true, correct and exact copy of a resolution duly and legally adopted by the _____ of the city of _____, Alabama, at a meeting thereof on the ___ day of _____, 20___, as taken from the minutes of said meeting.

Witness my hand and official seal on this the ___ day of _____, 20___.

City Clerk of the City of _____, Alabama

(OFFICIAL SEAL)

Note that the above form is in writing, purports to be signed by all abutting owners of the street, is properly executed and acknowledged and asserts that the vacation will not deprive other property owners of rights of ingress and egress to their property. The resolution states that all abutting owners have signed the declaration, gives a legal description of the street, finds that the vacation does not affect rights of ingress and egress of other property owners and manifests the assent of the city to the proposal. The clerk's certificate is essential.

Those instruments should be recorded in the appropriate probate court at the expense of the landowners.

Note: These forms should be considered only as samples and guides since nearly every proposal will require slight changes. Care should be exercised in all vacations as title to real estate is affected by the recording of the instruments in the probate court.

Fee Can Be Required of Abutting Landowners

Prior to a municipality exercising its power to vacate a public right of way for a road, street, alley or other dedicated public way, open or unopen, as a condition of the exercise of such power to vacate, the governing body may require abutting landowners who will directly benefit from such vacation to pay to the municipality a vacation right of way fee equal to the fair market value of the land which will be added to the holdings of such abutting landowners. Procedures for determining the amount of the fee are set out in Section 11-49-6, Code of Alabama 1975, as amended.

Railroad Crossings

The Alabama Department of Transportation has authority to abandon or discontinue a grade crossing of a railroad on any portion of a state highway or a street on a state highway route. This law was amended in 1994 to give the Alabama Department of Transportation the authority to abandon, close, or discontinue a grade crossing of a railroad on a private, municipal, or county highway, street, or right of way. The procedures are set out at Section 37-2-84, Code of Alabama 1975.

Attorney General's Opinions and Court Opinions

- A town may not vacate a dedicated street if such vacation will result in denial of both public and private access to a public body of water by the currently-used route. AGO 1983-334 (to Hon. Thomas B. Norton, May 30, 1983).
- The vacation of a street or alley abutting a public body of water requires the consent of the public entity owning the land under that public body of water. AGO 1983-445 (to Hon. Thomas B. Norton, August 24, 1983).
- A city may not vacate a street without the consent of all abutting property owners, although there are other statutory methods available which do not require the consent of abutting landowners. AGO 1992-253.
- A city may, at the request of a property owner, in its discretion vacate a street, avenue and alley surrounded by a property owner's property provided the requirements of Section 35-2-54, Code of Alabama 1975, are satisfied. AGO 1994-092.
- There is no authority for a public agency to rescind the vacation of a public road. The road must be re-dedicated and accepted. AGO 1994-195.
- Where a street is vacated by abutting property owners pursuant to Section 23-4-20, Code of Alabama 1975, the procedures spelled out in Section 23-4-2 must be followed. AGO 1997-048.
- In *Elmore County Commission and Elmore County v. Smith et al.*, 786 So.2d 449 (2000), the Alabama Supreme Court

held that the procedures for vacating a public roadway in Section 23-4-2, Alabama Code 1975, *do not* apply to vacation under Section 23-4-20. **Note:** With the amendment of Section 23-4-20, Code of Alabama 1975, this case is no longer good law. Section 23-4-20 requires that the procedures in Section 23-4-2 be followed.

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