

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION**

CITY OF OZARK, ARKANSAS, a municipal corporation	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	
	)	
	)	
UNION PACIFIC RAILROAD COMPANY, the ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT (an Agency of) The State of Arkansas, AND THE ARKANSAS STATE HIGHWAY COMMISSION	)	
	)	
	)	
Defendants,	)	

CIVIL ACTION NO:2:14-CV-02196-TLB

**PLAINTIFF, CITY OF OZARK'S, MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT I OF THE
PLAINTIFF'S AMENDED AND RESTATE COMPLAINT, REQUEST FOR
PERMANENT INJUNCTION AND WRIT OF MANDAMUS**

The Plaintiff, City of Ozark, Arkansas, a municipal corporation, respectfully requests this Honorable Court grant its Motion for Partial Summary as to Count I of the Plaintiff's Amended and Restated Complaint, Request for Permanent Injunction and Writ of Mandamus (the "Complaint") filed against the Defendant, Union Pacific Railroad Company.

I. Background.

The Plaintiff seeks a declaration that a gravel road and an at-grade crossing located approximately 100-150 feet west of the Defendant's former depot located in the Plaintiff's downtown area are both a public city street and a public at-grade crossing. The gravel road was commonly known as Oliver St., by Plaintiff's residents and on all

official maps of prepared by or for the Plaintiff show the gravel road as Oliver St. The at-grade crossing referred to as the Oliver St. Crossing by Plaintiff was characterized as a public at-grade crossing number 6406+84 in 1916 by the Defendant's predecessors in interest and continued having the classification as a public at-grade crossing by the Defendant until it was unilaterally removed in 2001 by the Defendant. Oliver St., and the Oliver St. Crossing allowed Plaintiff's residents to cross the Defendant's railroad tracks for approximately 125 years prior to its removal in 2001.

The Defendant denies that Oliver St., was a public street because the Plaintiff is unable to provide documentation showing the Plaintiff accepted the crossing by ordinance or that it was dedicated to the Plaintiff by a writing. However, Plaintiff was originally established in 1836 and Plaintiff has not ordinances or minutes from the period of 1836 through 1929, which is the earliest ordinances and minutes that the Plaintiff has in its possession. The Plaintiff has requested the elected and current City Clerk to search all records and no records for any city ordinances or minutes exist prior to 1929. A copy of Sonya Eveld's Affidavit is attached hereto as Exhibit A and incorporated herein as if set forth word for word.

Further the Plaintiff is unable to produce the original plat relating to the Plaintiff's downtown area that was produced during the period of time of 1838 through the civil war in 1865. All of the Plaintiff's downtown streets were dedicated and platted during the period of 1838 through 1865 and Ralph Johnson, who was an abstractor and owned Adams Abstract and Title Company, located in Plaintiff's downtown area, testified during his deposition that he would not be able to show any dedication or acceptance of any of the Plaintiff's downtown city streets. See Deposition of Ralph Johnson page 18, which

is attached hereto as **Exhibit B** and incorporated herein. A written dedication and acceptance is not the only way that a public street, alleyway or easement can be declared public, as a dedication by public use has been approved in Arkansas.

The Defendant further asserts and alleges that a former mayor of the Plaintiff, Todd Timmerman, requested the at-grade crossing be removed by the Defendant and since the crossing was "private," the Defendant was allowed to remove it without any ordinance from the Plaintiff's city council. The Plaintiff objects to this characterization of the crossing and that a mayor could authorized the removal of an at-grade crossing easement with an affirmative vote of the Plaintiff's city council, as Arkansas law is clear that only an affirmative vote by the city council of a city allows for that city to abandon, release or vacate a public street, alleyway or easement, including an at-grade crossing easement.

Based on the undisputed facts and evidence submitted herein by the Plaintiff, including various official and unofficial maps representing the Plaintiff's downtown area and the Defendant's maps showing the at-grade crossing known as the Oliver St. Crossing classified as a public at-grade crossing, the Plaintiff is entitled to a summary judgment as to Count I of the Complaint.

II. There was a Dedication of the Public Street Known as Oliver St.

"A dedication has been defined as the donation of land or the creation of an easement for public use. A dedication may be accomplished by express written instrument, or often by **maps** or plats. [P]lats or instruments by which dedications are made are construed as any other writing to ascertain and give effect to the intention of the dedicator. Plats should be construed fairly and reasonably, and unambiguous

language should be given its manifest meaning.” [Emphasis Added] *Town of Gilbert v. Fruehauf*, 2013 Ark. App. 17, 425 S.W.3d 816 (2013) citing *City of Cabot v. Brians*, 93 Ark. App. 77, 80-81, 216 S.W.3d 627, 629 (2005).

There are two (2) required elements for a valid dedication, the owner must appropriate the property specifically to its intended use, and **the public must accept the land**. [Emphasis Added] *Id.* at 817 citing *City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993). If the intent on the part of the owner to dedicate cannot be found in the facts and circumstances of the particular case, no dedication can exist. *Id.* at 818 citing *Ayers v. State*, 59 Ark. 26, 26 S.W. 19 (1894). The failure of a map or plan to name a street will not defeat dedication, as this can lead to implied dedication. *Id.* at 818 citing *City of Cabot v. Brians*, *supra*.

In *Fruenthal v. Slaten*, 91 Ark. 350, 121 S.W. 395 (1909), the Arkansas Supreme Court addressed the idea of an implied dedication and stated “a dedication by this made [method] falls within the class of implied dedication, and, as stated by a learned author on the subject, is based on the doctrine of estoppel.” *Fruenthal* *supra*, citing 1 Elliott on Roads and Streets § 137. “In order to make a dedication complete on the part of the public as well as the owner,” says the same author in section 165, “there must be an acceptance by the public or the proper local authorities. The owner may, as a rule, recall a dedication at any time before it has been accepted. . . . The acceptance must generally be made by representatives of the public having authority over highways **or by the public by general user of the way**. . . .” *Id.*

In 1876, it is undisputed that residents of the Plaintiff resided South of the Defendant's railroad tracks in a community of houses that ranged from two (2) houses

in the earliest of records up to five (5) houses in March 1962. This community of individuals or their successors continued to reside on the real property they owned or leased located South of the Defendant's railroad tracks from the year 1876 until the year 1968 (approximately 92 years) when the U.S. Army Corps of Engineers ("Corps") purchased the land from them. The all members of this community, who were members of the Plaintiff's residents, utilized the dirt and gravel road known as Oliver St., and the at-grade crossing known as the Oliver St. Crossing to access this property and their residences, as there was no other crossing location to obtain this access.

In approximately 1940, the Plaintiff established a public city dump, which was open to any of the Plaintiff's residents and members of the surrounding communities who desired to utilize the Plaintiff's city dump to discard trash and garbage. The city dump was located on the gravel road known as Oliver St., on real property South of the Defendant's railroad tracks and on the North shore of the Arkansas River that was leased by the Plaintiff from Nelsie Oliver. This use of Oliver St. and the Oliver St. Crossing by Plaintiff's residents and members of the surrounding communities to access Plaintiff's city dump continued unobstructed for at least 28 years until the city dump was moved when the land was purchased by the Corps. The residents who resided on Oliver St., and the Plaintiff's residents traveling to the city dump were not required to ask permission from anyone to utilize the gravel road known as Oliver St., or the at-grade crossing known as the Oliver St. Crossing as it was a public road and a public at-grade railroad crossing.

In addition to the residences and the city dump, businesses were also located South of the Defendant's railroad tracks and the gravel road known as Oliver St. and the

Oliver St. Crossing were utilized by the employees and visitors to these various businesses (i.e., the 1941-1944 sawmill, the 1952-1965 pallet plant, and the 1955-2001 gas company). Beginning at least as early as 1942 and continuing until at least the 1980s, the Plaintiff designated on all city maps Oliver St., as a public city street. In addition, the Defendant beginning in 1916 and continuing until at least 2000 designated the Oliver St. Crossing as a public crossing on all of the Defendant's maps for the Plaintiff's downtown area.

There was clearly an undisputed acceptance by the public of both the gravel road known as Oliver St., and the at-grade crossing known as the Oliver St. Crossing as Plaintiff's residents utilized both to access the residences that were located South of the Defendant's railroad tracks, the city dump and the various businesses. In addition, the Plaintiff's residents utilized Oliver St. and the Oliver St. Crossing to access: (1) the Arkansas River to fish and shoot turtles and gar; (2) the land South of the Defendant's railroad tracks to hunt rabbits and other small game; (3) the land to ride horses; (4) shoot skeet; and (5) the Arkansas River, Gar Creek, and the land to participate in other various public activities. The only access to Gar Creek, the Arkansas River and the real property located South of the Defendant's railroad tracks was obtained by using Oliver St. and the Oliver St. Crossing. Further, there is undisputed evidence that at least one employee of the Plaintiff, Bull Southerland, used the Plaintiff's 8N Ford Tractor with a box blade to grade and maintain the portion of Oliver St. that was located South of the Defendant's railroad tracks and also brush hogged the grass around Peach Valley Gas Company's tanks located South of the Defendant's railroad tracks from 1970 until 1991.

In the instant case, there has been a dedication both expressly by the Plaintiff when it placed the Oliver St. and the Oliver St. Crossing on all maps created for the Plaintiff beginning in 1942 and continuing until at least 1980. In addition, there has been an implied dedication as the Plaintiff's residents utilized both Oliver St. and the Oliver St. Crossing from approximately 1876 until it was removed in 2001 for various public activities. Plaintiff seeks to reestablish the illegally removed crossing to allow its residents to utilize the leased property located South of the Defendant's railroad tracks for additional public activities, including the development of a walking trail and park.

III. There was No Abandonment of Oliver St. and Oliver St. Crossing after 1970.

The Defendant also argues that the Plaintiff abandoned Oliver St., and the Oliver St. Crossing after 1975, as the Plaintiff no longer expended money on upkeep on the portion of Oliver St. located South of the Defendant's railroad tracks. This argument is contrary to established case law, Arkansas statutory law and the facts.

The Arkansas Supreme Court has held in *Bushmiae v. City of Little Rock*, 231 Ark. 848, 333 S.W.2d 236 (1960) that a city of the first class does not abandon a publicly dedicated easement by non-use. In other words, an easement has become irrevocable and the city can choose to accept it at anytime. *Id.*

Further, the Arkansas General Assembly has set out the procedure for vacating or abandoning a public street, alleyway, and easement. See Ark. Code Ann. § 14-301-301. That procedure is binding on the Defendant. Absent compliance with that special procedure, whereby the town council vacates or abandons the street, alleyway and/or easement, any abandonment or closure is not valid. *Id.*

Finally, it is undisputed that the Corps purchased all property located South of the Defendant's railroad tracks and railroad right of way; however, all real property transfers were made subject to all existing easements for public roads and highways, public utilities, railroads and pipelines. Therefore, Oliver St., continued to exist on the Corps' real property and the Oliver St. Crossing remained in existence as well, as the employees of Peach Valley Gas Company (and its successors in interest) continued to utilize the Oliver St. Crossing and Oliver St. for the period of 1970 through 2001. Further, residents of the Plaintiff continued to use the Oliver St. Crossing and Oliver St., for various public activities.

According to Ark. Code Ann. § 14-301-301 *et. seq.*, cities of the first and second class and incorporated towns have the authority to vacate public streets, alleys and easements when it has not been used by the public as a street, alley and/or easement for a period of five (5) years. There is a specific procedure that the Arkansas Assembly has provided that must be followed in order for such action to be valid. The undisputed facts show the Plaintiff's city council did not discuss or vote on the removal of the Oliver St. Crossing during any public meeting and did not pass an ordinance as required by Ark. Code Ann. § 14-301-304. Therefore, the Plaintiff did not abandon or vacate Oliver St., or the Oliver St. Crossing as erroneously asserted by the Defendant.

IV. Actions of Todd Timmerman and Reliance by the Defendant Do Not Bind the Plaintiff.

The Defendant also asserts that it removed the Oliver St. Crossing at the request of Plaintiff's former mayor, Todd Timmerman. There is a dispute regarding the existence of a potential letter that was sent to Mr. Timmerman regarding the removal of the Oliver St. Crossing that Mr. Timmerman may or may not have read to the members

of the Plaintiff's city council after the close of a city council meeting in 2001, it is irrelevant whether this letter exists or whether Mr. Timmerman requested the Defendant to remove the Oliver St. Crossing. As stated above, Ark. Code Ann. § 14-301-301 *et seq.*, provides the sole and absolute procedure for a city of the first or second class and incorporated towns to abandon or vacate a public street, alley or easement.

Further, Arkansas law is well established that “. . . a public officer cannot bind the State or its subdivisions beyond the extent of his actual authority. All who deal with a public agent must at their peril inquire into his real power to bind his principal.” *Bushmiae* supra. Arkansas General Assembly has adopted the specific and special procedure set forth in Ark. Code Ann. § 14-301-301 *et seq.*, that requires the affirmative vote of the city council of a city and the adoption of a city ordinance that abandons or vacates a public city street, alley or easement. It is undisputed that Plaintiff's city council never voted on an ordinance to remove the Oliver St. Crossing; therefore the removal of the public at-grade Oliver St. Crossing easement by the Defendant was illegal, invalid and void.

V. Conclusion

Based on all of the facts and circumstances, it is clear that the undisputed facts prove as a matter of law that Plaintiff's gravel road known as Oliver St., was a public city street utilized by the Plaintiff's residents and dedicated by the Plaintiff by placing the Oliver St. road on all official maps of the Plaintiff's downtown area. Further, the undisputed facts show as a matter of law, the Plaintiff and the Plaintiff's residents utilized the Oliver St. Crossing as a public at-grade crossing easement and the Defendant classified the Oliver St. Crossing location as a public at-grade crossing on all

of the Defendant's maps from 1916 through at least 2000. Therefore, the Defendant's removal of the Oliver St. Crossing, whether on its own decision or at the request for Mr. Timmerman, was an illegal and void action under Arkansas law.

As such, the Defendant should be required to immediately replace the Oliver St. Crossing, replace the Plaintiff's Oliver St and be permanently enjoined from any further interference of the Plaintiff's rights to utilize the Oliver St. Crossing to access the Plaintiff's leased property located South of the Defendant's railroad tracks. For the various reasons set forth hereinabove, the Plaintiff's Motion for Partial Summary Judgment should be granted.

Respectfully submitted:

By: /s/ Christopher D. Brockett
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ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I, Christopher D. Brockett, hereby certify that a copy of the foregoing Amended Complaint has this date been served by U.S. Mail on the following:

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Done at Ozark, Arkansas, this 30th day of April 2015.

/s/ Christopher D. Brockett
Christopher D. Brockett

EXHIBIT A

AFFIDAVIT OF SONYA EVELD

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION**

CITY OF OZARK, ARKANSAS, a municipal corporation)
)

Plaintiff,)
)

vs.)
)

UNION PACIFIC RAILROAD COMPANY,)
the ARKANSAS STATE HIGHWAY)
& TRANSPORTATION DEPARTMENT)
(an Agency of) The State of Arkansas,)
AND THE ARKANSAS STATE HIGHWAY)
COMMISSION)

Defendants,)
)

CIVIL ACTION NO:2:14-CV-02196-TLB

AFFIDAVIT OF SONYA EVELD

I, Sonya Eveld, having first been duly sworn, state:

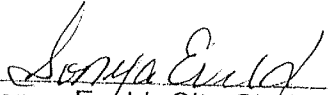
1. I am a resident of the State of Arkansas. I am more than 21 years of age. I have lived in Arkansas for all of my life approximately 52 years. I am making this affidavit with my own personal knowledge.

2. I am the current elected City Clerk for the City of Ozark, Arkansas and in that capacity I am the custodian of the City records, including minutes and city ordinances.

3. I was asked to review the minutes and ordinances from of the City of Ozark records for any documentation for acceptance or dedications of public streets for the downtown area of Ozark during the period of 1836 through approximately 1916.

4. Based on my review of the records of the City of Ozark, it is my belief that the City of Ozark has no records prior to 1929, as that was the earliest date that I could locate any minutes or ordinances for the City of Ozark.

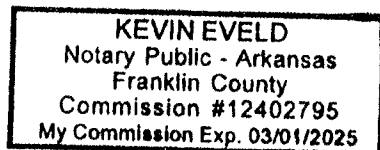
Further Affiant sayeth not.


Sonya Eyeld, City Clerk

Date: 4-28-15

STATE OF ARKANSAS)
)
COUNTY OF FRANKLIN)

SUBSCRIBED AND SWORN to before me on this 28th day of April, 2015.



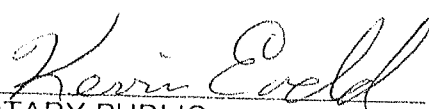

NOTARY PUBLIC

EXHIBIT B

DEPOSITION OF RALPH JOHNSON, PAGE 18

Page 18

1 MR. BROCKETT: I think that'll be it.

2 EXAMINATION

3 BY MS. JONES:

4 Q. I have just a few questions of follow-up.

5 Mr. Brockett asked you about the downtown Ozark plat.

6 Can you say whether or not the plat you are referring
7 to had a street that went across, the street that
8 we've been talking about that went across the
9 crossing on that plat?

10 A. I don't remember it, but everybody says there
11 is one.

12 Q. Okay. But you can't speak to saying that
13 you've ever seen a plat with it on it?

14 A. No, I cannot.

15 Q. Okay.

16 A. Not to remember anyway.

17 Q. Okay. And you can't point to any written
18 documentation that shows the street we've been
19 talking about as dedicated as a city street?

20 A. I can't show you where any of the streets in
21 Ozark were dedicated.

22 MS. JONES: Okay, okay. All right.

23 Thank you so much.

24 THE VIDEOGRAPHER: This concludes the
25 deposition we're off the record at 2:55