



5-8-2025

COMMUNICATION

To: Full City Council
From: Timothy Z. Jennings, Mayor
Chad Cole, City Manager
RE: Vacation of 9th St.

Esteemed Members of the City Council,

This communication is sent to you pursuant to Ordinance 24-03. The Mayor and City Manager determine and concur that the land petitioned for vacation in CASE VAC-25-0007 ***still has a*** municipal purpose and public use. Hundreds of cars travel this road daily and a significant percent of those travelers are unrelated to the Petitioner's business. We note that GRT for auto sales in their entirety are sent to Santa Fe, not the City of Roswell. Furthermore, the Petitioner touted financial tax gains to the City from this new construction. We are not moved by the argument because, as the Petitioner admits, improvements must occur as a condition of the property being a Ford dealership. In other words, granting Petitioner the vacation of a regularly used city street off of Roswell's largest arterial street *would simply make the project more lucrative for Petitioner*. As the leading treatise on municipal law notes, the "primary purpose of streets is use for travel by the public, and this refers not alone to adjacent property owners...but to the whole people. ***The right of the public to the use of them is paramount to that of the abutting owner, or to that of any individual or corporation, no matter what may be the use which he or it desires to make of the street.***" 11 McQuillin Mun. Corp. § 30:142 (3d ed.).

1. Background.

Petitioner, Roswell Property Management Group F2, seeks to vacate slightly less than one acre of land - 9th street between Main and Virginia, two major Roswell thoroughfares, and the ally between Main and Virginia between 10th and 8th streets. In support of their petition, Petitioner initially provided a preliminary plat, drawings produced by Smith Engineering, and letters stating no opposition from private utility providers. At the Planning and Zoning Commission a letter was presented by the City Engineer. No traffic study was provided. Petitioner, despite being informed of Ordinance 24-03, had neither contacted the Mayor and Manager's offices for a no-public use determination or produced any appraisal for the property prior to the public hearing conducted April 10, 2025. The hearing was continued at Petitioner's request. This week, Petitioner produced a traffic study and appraisal of the property. We have considered all testimony and documents provided by the Petitioner in making this determination.

2. Legal Background.

“Virtually every United States jurisdiction recognizes that “[o]nce a highway always a highway is an ancient maxim of the common law.” *Malloy v. Reyes*, 61 V.I. 163, 176–77 (2014). An existing road is “presumed to exist as a public highway until it is discontinued. Discontinuance is a fact that must be proved and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence.” *Town of Goshen v. Casagrande*, 170 N.H. 548, 551, 178 A.3d 1252, 1254 (2018). Vacations of highways are not favored, and the presumption will always be in favor of their continuance.” 11 McQuillin Mun. Corp. § 30:172 (3d ed.) “Because there was a prohibition against vacation of a public road at common law, statutes authorizing such a vacation are in derogation of the common law and therefore must be strictly construed.” *Barry v. The D.M. Drennen & Emma Houston Drennen & Drennen Mem’l Tr. of Saint Mary’s Church*, 982 So. 2d 478, 482 (Ala. 2007). *See also Albuquerque Hilton Inn v. Haley*, 1977-NMSC-051, ¶ 7, 90 N.M. 510, 512, 565 P.2d 1027, 1029 (As a general rule, statutes in derogation of the common law are to be strictly construed.) “Vacation can be effected only by a substantial observance of all mandatory legal requirements,” 11 McQuillin Mun. Corp. § 30:186 (3d ed.). “If it appears that the vacation is a mere attempt to alienate or otherwise dispose of the public right and interest for a private use the courts will protect the public right.” 11 McQuillin Mun. Corp. § 30:178 (3d ed.).

The City *may* “lay out, establish, open, vacate, alter, repair, widen, extend, grade, pave or otherwise improve streets, §3-49-1.” Additionally, per NMSA 1978, §3-12-3(A), the City of Roswell governing body has the authority to:

- (7) adopt rules and regulations necessary to effect the powers granted municipalities;
- (9) prescribe the powers and duties of those officers whose terms of office or powers and duties are not defined by law, and impose additional powers and duties upon those officers whose powers and duties are prescribed by law.

In exercising its authority under these provisions, and because of a special audit that made multiple negative finding about the City’s past real property transactions, the Governing Body enacted Ordinance 24-03. Pertinent to this case, Ord. 24-03 requires that prior to a real property transaction, the Mayor and Manager must both concur that the property in question is not essential for any municipal purpose. Ord. 24-03 § 2-201. Additionally, an appraisal is required (also required under state law) so that the governing body has a floor from which to operate in negotiations, if necessary. Ord. 24-03 §2-202. Following the approval of the transaction, “the owners of lots on the vacated plat or on the portion of the plat being vacated may enclose in equal proportions the adjoining streets and alleys which are authorized.” NMSA 1978, § 3-20-12.

Private parties may bring cases to request a vacation under §67-2-7 when a “street...is no longer needed for public purposes.” The private party may then request the “political subdivision

thereof for a formal determination of abandonment or vacation.” *Id.* Ord. 24-03 and Roswell City Code Appendix B, Article 2, §4 concurrently provide for standards and procedures for this request. “The benefit may be either in relieving the public from the charge of maintaining a street or highway ***that is no longer useful or convenient to the public***, or by laying out a new street or road in its place which will be more useful and convenient to the public in general” *Dunlap v. Tift*, 209 Ga. 201, 209, 71 S.E.2d 237, 242 (1952). “To abandon a public road, the city must find that it is no longer necessary, i.e., there is no present or future use for the road, and that the abandonment is in the public interest.” *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.*, 23 Cal. App. 4th 812, 820, 28 Cal. Rptr. 2d 451, 455 (1994). As described below, the road is still useful to the public.

3. Analysis

Per the Petitioner’s traffic study at page 4, for the portion of 9th street in question, “the average weekday 24-hr count was 251 vehicles per day (vpd), with 114 vpd traveling west-bound and 137 vpd traveling east-bound. The 24-hr average dropped to 117 vpd (two-way) over the weekend.” This was compared to a 2024 NMDOT study that found “382 vpd traveling E. 8th St. between N. Main St. and N. Virginia Ave.” This suggests that traffic on 9th street is 66% that of the 8th street. In and of itself, 9th St. being utilized one third less than 8th does not establish a lack of public use. No other minor streets were cited or analyzed in the Petitioner’s study. However, such data could have easily been included. It is in fact radially available to the public at: <https://nmdot.public.ms2soft.com/tcds/tsearch.asp?loc=Nmdot>. That the traffic study omitted any other street data is telling. This could be because 9th street’s use is simply not that far from the ordinary non-artery streets in Roswell for which we have data.

NMDOT studies are generally done for major streets, so it reasonably follows that the vast majority of roads surveyed are above 1000 vpd. Nevertheless, per NMDOT data many streets in Roswell have similar traffic to the portion of 9th street in question. For example 3rd St, between Washington and Missouri, a road only a block from Washington Elementary School, registered 291 vpd. East Alameda at Stanton was a meager 91 vpd. Lower yet, Kentucky and W. Bland registered at 86 vpd. In the south of town, we see other small numbers. The corner of E Martin and Gail Harris, a road next to Sidney Gutierrez Elementary and catty-corner to ENMU-R health services center, had 488 vpd. University Blvd, at Walker, five blocks north of ENMU-R’s admin building was 248 vpd. Taken within the broader context, the traffic that goes over 9th St. is not unusual or out of place to establish that it is no longer being reasonably used by the public. To say otherwise would be to open up perhaps a majority of minor roads in Roswell to vacation for lack of public use.

Petitioner’s study also notes that, according to numbers supplied exclusively by the petitioner, 88% of the traffic on 9th St. is attributable to their own operations. This overlooks two facts. 1. Petitioner’s employees and customers are in fact members of the public, and 2. 12% of



the use is still there. “The ‘Public use’ that must be considered is broader and more inclusive than the mere use by abutting property owners. Streets are dedicated to the public use.” *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wash. 2d 371, 375, 403 P.2d 49, 53 (1965).

Finally, we touch on one other issue. The City Engineer noted that there is a savings to be had by not maintaining this street. We simply cannot accept that logic. Carried to its rational end, it would be proper to close every street in Roswell as they all come with costs to the City. The appropriate approach would be to compare maintenance cost against use relative to similarly situated streets, but that is something that is not presented by the Petitioner or contemplated by the Engineer. Given the street numbers above and the applicant’s materials, there is no reason to think that maintenance of 9th St. is more expensive than any of the other streets that have similar or fewer vpd counts.

Based on the all the material provided by the Petitioner, we cannot in good conscience find that there is no existing municipal use. To determine otherwise would leave open a significant number of city streets to abandonment or vacation. “A street or alley cannot be vacated for a private use, i.e., for the purpose of devoting it to the exclusive use and benefit of a private person or corporation, but it may only be vacated to promote the public welfare. 11 McQuillin Mun. Corp. § 30:177 (3d ed.).