

## MESSAGE FROM THE PRESIDENT...

By: John M. Redlingshafer

Friends:

Welcome to our revamped newsletter! Our new look is a credit to the newsletter's new editor, James Kelly of Crystal Lake, who graciously agreed to serve our Association in that capacity. You may have already seen a letter from Jim asking you to consider submitting an article for future editions of the newsletter, and I would like to thank our contributors for this edition whom have already heeded that call. I want to reiterate Jim's thoughts in that we need and welcome contributions from all of our members. This newsletter is your newsletter, just as this organization is your organization, so I hope you take full advantage of the opportunity to share your insight or thoughts about something that relates to our unique practice area. I look forward to an exciting 2011 edition of the newsletter and hope that we get to see you all at our upcoming May seminar.

Warmest Regards,

*John*

## THE FILLING OF A TOWNSHIP VACANCY

By: Van A. Schwab

General election law for the State of Illinois governs township elections as well as the manner for filling vacancies. 60 ILCS 1/50-5 (1994). The general election law provides for things such as the 4-year term limit and the manner of elections. *Id.*

If a vacancy arises, Section 60-5 of the Illinois Compiled statutes provides that the vacancy must be filled by appointment from the township board, with the appointee holding the office for the remainder of the unexpired term. 60 ILCS 1/60-5 (1998). At the end of the unexpired term, the seat will be filled by general election. *Id.*

A vacancy is created by death or voluntary resignation. *Gates v. Town of East Eldorado*, 54 Ill.App.3d 293 (1977). Violation of the officer's oath, such as conspiracy to commit fraud against the township, also creates a vacancy. *People ex rel. Ward v. Tomek*, 54 Ill.App.2d

197 (1964). Once a vacancy is created, it is the township board's duty to appoint a successor for the remainder of the term. *People ex rel. German Ins. Co. of Freeport v. Getzendaner*, 34 N.E. 297, 137 Ill. 234 (1891). Failure to do so requires a special election. *Id.*

If the vacancy is not filled within 60 days of the vacancy becoming official, then a special township meeting must be called to elect a successor. *Id.* The requirement of a special meeting is firm; the annual town meeting is not an adequate substitute. *People v. Pillman*, 1 N.E.2d 788, 284 Ill. App. 287 (1936).

A special township meeting is called when the township board issues a written statement to the township clerk explaining why the election is necessary for the best interests of the township. 60 ILCS 1/35-5. The written statement must also provide the objectives of the meeting. *Id.*

The special meeting can only address the stated objectives of the meeting. *Smith v. Town of Proviso*, 301 N.E.2d 145 (1973). After filing the written statement, the special township meeting must take place within 14-45 days. 60 ILCS 1/35-5. Further, the special township meeting cannot take place before 6pm. *Id.* At the meeting, the person selected may be elected by voice vote, with the majority ruling. 60 ILCS 1/35-35. Those who can vote in the meeting may be limited to only qualified electors by the township board, as long as the regulations are consistent with Constitutional protections under the equal protection clause of the 14<sup>th</sup> Amendment. *Smith v. Town of Proviso*, 301 N.E.2d 145 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Law Offices of Van A. Schwab  
221 N. LaSalle St., Suite 3315  
Chicago, IL 60601  
Phone: (312) 372-4569  
Fax: (312) 372-4010



### Inside this issue:

Message From the President	1
Editor's Note	1
The Filling of a Township Vacancy	1
Township Roads Who Owns Them?	2-3
How do you get rid of them?	
Sixth Annual Combined Attorneys/Officials Seminar - May 6, 2011	4

## EDITOR'S NOTE

By: James P. Kelly

JPKelly@mkm-law.com

I would like to thank the members who contributed articles to the Spring 2011 ITAA Newsletter. We would like to publish the next newsletter in July, therefore I would ask that articles for the next edition be sent to my email address as soon as possible. Articles should be no more than five pages long, doublespaced. I would also ask that you send me your email addresses which will allow the future distribution by email. THANKS



### REGISTER TODAY!

for the Sixth Annual Combined Attorneys/Officials Seminar

For more information check out the back page of this Newsletter

## TOWNSHIP ROADS: WHO OWNS THEM? / HOW DO YOU GET RID OF THEM?

By: Robert F. Russell

### What is a Highway?

#### A. Common definitions:

"An easement acquired by the public in the use of a road or way for thoroughfare ... A free and public roadway, or street; one which every person has the right to use ... Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other." Black's Law Dictionary, revised Fourth Edition, 1968.

"A public way." Merriam Webster's Collegiate Dictionary, Eleventh Edition, 2005.

B. *Illinois Statutory Definition of "Highway"*: Any public way for vehicular travel which has been laid out in pursuance of any law of this State, or of the Territory of Illinois, or which has been established by dedication, or used by the public as a highway for 15 years, or which has been or may be laid out and connect a subdivision or platted land with a public highway and which has been dedicated for the use of the owners of the land included in the subdivision or platted land where there has been an acceptance and use under such dedication by such owners, and which has not been vacated in pursuance of law. The term "highway" includes rights of way, bridges, drainage structures, signs, guard rails, protective structures and all other structures and appurtenances necessary or convenient for vehicular traffic. A highway in a rural area may be called a "road", while a highway in a municipal area may be called a "street". 605 ILCS 5/2-202

#### How to Create a Highway.

A public highway can be established by any of three methods: by statute; by dedication; or by prescription.

City of DesPlaines v. Redella, 301 Ill.Dec. 722, at 726, 847 NE2d 731, at 736 (1st D, 2006)

A. By statute ("... laid out in pursuance of any law of this State...")

The Roads and Bridges Act (the "Act") (605 ILCS 5/1-101, et seq.) provides the statutory mechanism for establishing highways for each different type of governmental unit. The procedure for establishing township highways is found in Article 6 of the Act, Administration of Township and District Roads, Division 3. Laying Out, Widening, Altering or Vacating Township and District Roads. With one notable exception, no township road may be laid out, widened, altered or vacated unless the highway commissioner finds that such action is in the public interest and that any person residing or owning land within two miles of any portion of the road to be altered or vacated shall still have reasonable access to the farm land he owns or operates and to local communities. (605 ILCS 5/6-305)

Division 3 of Article 6 provides a statutory framework to follow when laying out, altering or widening a township road, but the basic requirements include a petition by the electors, a certificate by the highway commissioner, or a certificate by the Illinois Department of Transportation to be filed which describes the activity desired, hearings to be held, surveys to be made, damages to be determined and final orders by the highway commissioner deciding what the final activity will be. This article is primarily concerned with determining the ownership of township roads and how to get rid of or vacate roads, so the discussion of laying out, altering, or widening township roads is beyond the scope of discussion.

One exception to the petition and hearing process mentioned above is contained in Section 6-325 of the Act which provides a procedure whereby roads within a subdivision that conform to the rules and specifications established by the county board may be incorporated into the township road system by order of the

highway commissioner without first proceeding with the process requiring a petition, hearing, etc.

B. "...Established by dedication..."

In real estate law, "Dedication" means "An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public." Black's Law Dictionary, revised Fourth Edition, 1968. (emphasis added)

From the earliest days of Illinois, the establishment of a highway by dedication was expressly provided for in the law, and a distinct difference was recognized between "statutory dedication" and common-law "dedication".

1. *Statutory Dedication*. A statutory dedication occurs when the owner of property files or records a plat which marks or notes on the plat portions of the premises, highways or streets, as donated to the public, and the public entity accepts the dedicated highways or streets. *Emalfarb v. Krater*, 203 Ill.Dec. 666, 640 NE2d 325, 266 Ill.App.3d 243 (2nd D, 1994).

A statutory dedication occurs only when there is strict and full compliance with the requirements of the Illinois Plat Act (765 ILCS 205/0.01 et seq.) and a clear indication on the plat of the donation to the public. "A plat which does not strictly comply with its provisions is not a statutory plat." *Lambach v. Town of Mason* (1944) 386 Ill. 41, 47.

Section 9 of the Plat Act (765 ILCS 205/9) provides in part as follows:

Whenever any highway, road, street, alley, public ground, toll-road, railroad, reservoir or canal is laid out, located, opened, widened or extended, or its location altered, it is the duty of the...officers...to make a plat, showing its width, courses and extent, and making reference to known and established corners or monuments...When the location of a...highway, road, street...is known either by established corners or adequate, existing records, the monument or monuments shall be located and referenced either by or under the direction of a Registered Land Surveyor...suitable permanent monuments shall be reset in the surface of new construction or permanent witness monuments set to perpetuate their location and certified as correct

by a Registered Land Surveyor. The plat shall be recorded in the office of the Recorder of the county in which the premises are taken or used, or any part thereof are situated...and when any highway, road, street, alley, public ground, toll-road, railroad, reservoir or canal is vacated, the order...of vacation must be in like manner recorded or filed.

The significance of dedicating a road in conformance with the statutory requirements of the Plat Act is that once the dedication is accepted by the township and the plat is recorded, the fee or title to the tract so conveyed is vested in the public. A statutory dedication transfers the fee.

2. *Common-law Dedication*. When the technical requirements of a statutory dedication are not met in a particular case, the facts may still disclose a common-law dedication. "The requisites of a common law dedication are:

- 1) An intent on the part of the owner to donate the land to public use;
- 2) Acceptance by the public;
- 3) Clear, satisfactory and unequivocal proof of these facts. *McCue v. Berge*, (1944) 385 Ill. 292, 299.

As to the first requirement, "donative intent may be shown by any acts or words on the part of the owner evincing a present, fixed, unequivocal purpose to dedicate to the public. *Reiman v. Kale* 8 Ill.App3d 773, at 777, 38 Ill.Dec. 671 (1980).

As to the second requirement, "The acceptance of a dedication by public authorities may be implied from their acts such as repairing, improving, lighting and other such evidence of assumption of control...an acceptance may be implied from slight circumstance. *City of Greenville, Bond County v. File*, 265 NE2d 518, at 522 (5D, 1970).

The significance of a common law dedication of a highway, is that the fee or title to the highway remains in the adjoining owner and the grant is that of an easement only in the land. *Ryerson v. City of Chicago*(1910) 247 Ill. 185. The ownership of the land is subject to the rights of the public in the easement, but the fee or title passes to subsequent owners of the adjoining real estate. *Lambach v.*

Town of Mason (1944) 386 Ill. 41.

"The public has but an easement in a public highway. The fee remains in the owner, who may exercise every right of ownership not inconsistent with the easement of the public." Minnie Creek Drainage District v. Streeter (1927) 327 Ill. 236, 245.

3. The words in the deed or grant conveying and transferring the land which is to be a part of the highway also have a significant bearing upon whether the fee or title to the land has been conveyed, or whether an easement in the land has been transferred. "Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed." Waller v. Hildebrecht, (1920) 295 Ill. 116.

In Magnolia Petroleum Co. v. West, (1940) 374 Ill. 516 the deed recited that the grantor "... did convey and warrant the following described real estate ... to be used for road purposes." (id. at pp. 518-9) The court went on to hold in pages 523-4 that: The words of limitation in the deed from [grantor to grantee] ... discloses an intention to grant merely a right of way, and the words "convey" and "warrant" are as compatible with this intention as with the conveyance of a fee. The language of limitation, "to be used for road purpose," is ambiguous. Surrounding circumstances and the objects of the parties fortify the construction that an easement was intended ... the language of the deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties clearly disclose an intention to grant no more than an easement.

The use of the words "grant, convey and dedicate...for the purpose of a public highway..." grant no more than an easement, regardless of whether the accompanying plat meets all the requirements of the Plat Act.

C. *Established by Prescription.* A highway that is established by prescription is typically a road for which no plat was originally prepared, and which the owner of the land over which the

road traverses did not, at least initially, have the requisite donative intent that is an element of a common-law dedication. Establishing a road by prescription is very similar to establishing ownership in real estate by adverse possession. The evidence must establish a well-defined route of travel for a period of at least 15 years (605 ILCS 5/2-202), and the public's use must be adverse, under a claim of right, continuous and uninterrupted, with the knowledge of the owner but without the owner's consent. Town of Deer Creek Road District v. Hancock, 144 Ill.Dec. 628, 629, 555 NE2d 1147, 1148 (3rd D, 1990).

The test in determining whether a road has become a highway by use is whether or not the public, generally, had the free and unrestricted right in common, to use the road. Where a road has been shown to have been openly and notoriously used as an open public highway in common by all the people for the statutory period, it will be considered a public highway. Lee v. Dickman (1925) 316 Ill. 529, 530.

1. *Use by public.* Whether the use of the road by the public has been sufficient to satisfy the first element of prescriptive use is a question of fact for the courts to determine. Where a road has been open and notoriously used as an open and public highway by the public continuously for the statutory period of 15 years, the statute presumes the grant of a road by prescription.

However, where the use is by permission of the owner and the use by the public is not clearly hostile or under claim of right, the use of the road does not create a public highway. Koch v. Mraz (1929) 334 Ill. 67, 76. Maintenance of the road by the owner is a further indication of a private road rather than a public road. Koch, 76.

"The infrequent, casual use by the public, whether to hunt, fish, or purchase liquor from illegal stills, would not convert it into a public highway." Zacny v. Sasyk, 30 Ill.App.3d 93, 332 NE2d 568, 572 (5D, 1975).

2. *Maintenance of a road by a government entity tends to indicate an acceptance by the public of the road*

as a public highway, Verh v. Morris (1951) 410 Ill. 206, 101 NE2d 566.

For example, the evidence that a township highway commissioner installed one culvert on the road in question, did occasional patching on the road surface, and did do some snow plowing was held by the Second District Appellate Court in Porten v. Geske not to be sufficient acts ("infrequent and minor") to sustain a finding that the road was a public roadway. 119 Ill.App.2d 152, 255 NE2d 753 (2 D, 1970).

On the other hand, a narrow, one lane, dead end road was found to be a public highway by prescription in Town of Deer Creek Road District v. Hancock.

...once a roadway is shown to have been used and enjoyed by the public for the time required by the statute [15 years], a presumption arises that such grant or use was prescriptive...

In addition to the general public's use of the road, Deer Creek also presented substantial evidence of public maintenance of the road. It is well settled that maintenance of a road by public authorities is a strong indication that the road is a public highway. 144 Ill.Dec. 628, 620, 555 NE2d 1147, 1149 (3 D, 1990)

3. The public's interest in a road established by prescription is that of an easement.

#### D. *Width of Township Roads.*

Section 6-301 of the Act requires that all township roads be not less than 40 feet in width. This requirement is specifically restricted to the roads established under Division 3 of Article 6 of the Act. This requirement does not govern the establishment of public highways established by prescriptive easements. Semmerling v. Hajek, 258 Ill.App.3d 180, 630 NE2d 496, 196 Ill.Dec. 561 (2nd D, 1994).

Where a road is established by prescriptive easement, the location of the limits of that road is a question of fact, to be determined by the evidence bearing upon that question. City of Highland Park v. Driscoll (1962) 24 Ill.2d 281, 283, 181 NE2d 93, 94.

#### Use of the Right of Way.

When the fee or title to the road and its right of way is held by the township, the township is free to exercise its sole discretion as to the use of the right of way.

However, when the township has only an easement for highway purposes, the adjoining land owner must be made a party to most decisions concerning the use of the right of way.

Included in the easement for highway purposes are uses that are incident to the use and maintenance of the highway, including such acts as: entering upon the right of way to perform maintenance; drainage or ditch work; installing culverts and tiles; trimming or eliminating trees or brush in the right of way; reshaping the slope of the right of way or adding or removing dirt or fill.

In the city, such highway uses may include the installation of water lines, sewers, electrical service and natural gas. But in rural areas, these installations are not typically considered to be a part of the highway easement. Chicago Title and Trust Company v. Village of Burr Ridge, 41 Ill.App.3d 112, 254 NE2d 61.

Section 9-113(a) of the Roads & Bridges Act provides:

Sec. 9-113. (a) No ditches, drains, track, rails, poles, wires, pipe line or other equipment of any public utility company, municipal corporation or other public or private corporation, association or person shall be located, placed or constructed upon, under or along any highway, or upon any township or district road, without first obtaining the written consent of the appropriate highway authority as hereinafter provided for in this Section.

Robert F. Russell  
RUSSELL, ENGLISH  
SCOMA & BENEKE, P.C.  
Ten Park Ave. West  
Princeton, Illinois 61356  
Phone: (815) 875-4555  
tenpark@theramp.net

c/o James P. Kelly, Newsletter Editor  
Matuszewich, Kelly & McKeever  
453 Coventry Lane, Suite 104  
Crystal Lake, Illinois 60014

Phone: (815) 459-3120  
Fax: (815) 459-3123  
Email: JPKelly@mkm-law.com

**2011 OFFICERS**

President: *John M. Redlingshafer*  
Vice President: *Robert F. Russell*  
Secretary: *Dwight H. O'Keefe, III*  
Treasurer: *John W. Foltz*

**We're on the Web!!**  
[www.IllinoisTownshipAttorneys.com](http://www.IllinoisTownshipAttorneys.com)

**Seminar Registration Fees ▶▶**

**\$150 for first official and \$50 per official from the same township. ▼**

Cancellations will be accepted until April 19, 2011 with no cancellation fees; from April 19, 2011 - May 1, 2011 a \$20.00 cancellation fee applies; after May 1, 2011 cancellations not accepted

**SIXTH ANNUAL COMBINED  
ATTORNEYS/OFFICIALS SEMINAR**

May 6, 2011: Double Tree Hotel  
10 Brickyard Drive, Bloomington, Illinois  
For Hotel Accommodations - call (309) 664-6446

Coffee and rolls, workshop materials, and lunch included in registration fees. Topics to be covered include: Legislative Update, Case Law Update, New Cemetery Care Act, Financing/Purchasing/Sale of Assets, FOIA and Open Meetings Act-1 year later, Handling Employee Matters, Roads-Enforcement of Ordinances and a Round Table Discussion.

Complete form and mail with a check payable to Illinois Township Attorneys Association to:

John W. Foltz, Treasurer  
Illinois Township Attorneys Association  
114 East Washington Street, P.O. Box 588  
Monticello, Illinois 61856-0588

Please reserve \_\_\_\_\_ places for the seminar in **Bloomington, IL** on **May 6, 2011**

Township \_\_\_\_\_ County \_\_\_\_\_

Address \_\_\_\_\_

(Street)

(City)

(Zip)

Daytime phone for township contact person: \_\_\_\_\_

Supervisor \_\_\_\_\_ Assessor \_\_\_\_\_

Clerk \_\_\_\_\_ Hwy. Comm. \_\_\_\_\_

Trustee \_\_\_\_\_ Trustee \_\_\_\_\_

Trustee \_\_\_\_\_ Trustee \_\_\_\_\_