

November 29, 1950  
Op. No. 50-260

Mr. Carl D. Hammond  
Mohave County Attorney  
Kingman, Arizona

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**ARIZONA ATTORNEY GENERAL**

Dear Mr. Hammond:

We refer to our opinion of August 26, 1950, being Opinion No. 50-316, relative to the abandonment of a portion of Pine Street in Kingman, Arizona.

Since we mailed this opinion to you we have had some letters from Mr. Carl G. Krook and some inquiries from other persons with regard to the above mentioned opinion. These inquiries have caused us to reconsider the opinion above mentioned, and we are writing you to point out the particulars wherein we believe that our former opinion was wrong.

From a review of your request, it appears that the principal question which you asked was relative to the power of the board of supervisors to vacate or abandon a portion only of a street. We answered that we did not believe this was within their delegated powers. At this time we believe that we were wrong in this regard, and that the board of supervisors in a proper case may abandon a portion of a street. In our previous opinion we also stated that because no grounds for vacation or abandonment were set forth in the statute, it was necessary for the board to find that a common-law abandonment of the street by the public had occurred. We also believe that we were wrong in this respect, and that the board of supervisors can properly and legally vacate a street or a portion thereof without necessarily determining that a common-law abandonment by the public has occurred.

The following authorities,

39 C.J.S., Highways, Sections 115, 116 and 121

29 C.J., Highways, Section 232,

seem to indicate that generally local boards such as our boards of supervisors can vacate or abandon a street if, after hearing, the board finds that such street is useless, inconvenient or unduly burdensome to the public. It can be readily seen that a street or a portion of a street could meet all of these requirements and still not have been abandoned, according to the common-law definition, by the public.

As to the vacation or abandonment by the board of a part of a street or roadway, we believe that in the abstract we

properly stated the rule in our first opinion, that the board of supervisors has only those powers expressly conferred and has no implied powers. However, we failed to recognize a well known exception to this rule, that a board of supervisors or other inferior body or tribunal has implied powers if those powers are claimed or asserted to be a clear and necessary implication from some express power that has been granted. We are inclined to believe that if the board can vacate or abandon a whole road, then it can vacate or abandon a part of the same road if the reasons ordinarily present for the vacation of all of the road are present as to a part of the same. The following authorities seem to clearly indicate that this may be done.

39 C.J.S., Sec. 115 D., p. 1051

29 C.J., Sec. 230, p. 520

25 Am. Jur., Highways, Sec. 118

46 Am. St. Rep. 494, to Ann. Cas. 88

Some of the cases cited in the above tests and authorities do not support the point as the editors would want them to. However, there is no question that this is the rule.

A review of the authorities at this time and at the time we wrote our original opinion leaves no doubt in our minds that public ways may be both useful and convenient to the public even though they are not physically traveled upon, and that this is but one of the elements to be considered in determining public utility and convenience. We can readily see that it would be impossible for a person to stay on the south fifty feet of Pine Street and proceed east or west thereon without running directly into the Mohave County Courthouse, but this fact, in and of itself, would not necessarily mean that the south fifty feet of Pine Street was useless, inconvenient or burdensome to the public. The case and text authorities which we have checked also seem to indicate that it must be the convenience, utility and burden upon the public that must be considered, and not the convenience, utility and burden of individuals.

In conclusion, we state that it is our opinion that the Mohave County Board of Supervisors, under Sections 59-601 and 59-502, has the authority to vacate a portion of Pine Street. We also believe that it is not necessary for the board to find

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a common-law abandonment before doing this. However, before the board can declare abandonment, it must find that the portion of Pine Street sought to be abandoned is an undue burden on the public, or is useless to the public or is inconvenient to the public. Of course, if a common-law abandonment of this portion of the roadway, not only as to actual travel, but also as to the other uses to which roadways are put, could be shown, then there would be no question but that the board could abandon this portion of Pine Street.

The appeal provisions contained in Section 59-601 are rather ambiguous. If they do not afford both the proponents of the vacation or abandonment of Pine Street and the contestants of the same an opportunity to have the action of the board of supervisors reviewed, then certainly these parties could have the board's action reviewed by certiorari.

We regret that our first opinion was in error in these respects, and hope that the same did not cause you any inconvenience.

Very truly yours,

FRED O. WILSON  
Attorney General

CALVIN H. UDALL  
Assistant Attorney General

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