IN THE COURT OF APPEALS OF IOWA

No. 0-654 / 90-466

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CLERK SUPREME COURT

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CITY OF STUART, IOWA,

Appellee,

vs.

MICHAEL SLAYBAUGH and GREG SLAYBAUGH,

Appellants.

Appeal from the Iowa District Court for Guthrie County, James Brown, Judge.

The Slaybaughs appeal a district court judgment enjoining them from asserting any right of ownership or to possession of a strip of land. **AFFIRMED.**

Michael J. Manno, West Des Moines, for appellants.

Randy V. Hefner of Van Werden, Hulse & Hefner, Adel, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

The City of Stuart, Iowa, brought this action for an injunction and damages seeking to divest the defendants of any ownership or possessory rights to a portion of land which had been platted as a street. The district court enjoined the defendants from asserting a right to ownership or possession of the property. We affirm.

The property in question was originally platted in 1891 as Highland Street, a street running east and west on the north side of Block 1 of Severin's Addition to the town of Stuart. The property is 160 feet long and 40 feet wide. There is no evidence the plat was ever formally accepted. The City has never opened or improved this street in any way. The land has grass, weeds, and trees upon it. The City officially changed the name of Highland Street to North Fourth Street in 1959.

In 1957 Ollie Slaybaugh bought Lots One, Two, Three, Four, Five, Six, Seven, Eight, Nine, and Ten of Block 1 of Severin's Addition from Dale Clausen. These are all the lots in Block 1 except for the two in the northwest corner. Ollie testified the property in question was fenced in so as to be included with his property when he bought the property. There is a gate on the west end and a gate on the east end of the disputed property.

In 1980 Ollie transferred Lots One, Two, Three, Four, Five, and Six to his sons, Gregory Slaybaugh and Michael Slaybaugh, by a quit claim deed. These six lots comprise

the east half of Block 1. These lots are directly to the south of the disputed portion of North Fourth Street, and Greg and Michael are the defendants in this action. They have used the property for bee stands and to store trailers. At one time the telephone company rented the property for temporary storage.

Immediately to the east of Block 1 of Severin's Addition is a strip of land owned by Melvin Pote. Pote uses this land for mainly agricultural purposes. A creek crosses his land east to west. The only access to the north portion of his property is by North Fourth Street. It appears that previously Pote had free access through the Slaybaughs' gates. Later a dispute developed, and the Slaybaughs locked the gates. Pote then approached the City about opening North Fourth Street.

The City filed the present petition seeking to enjoin Michael and Greg from claiming an ownership interest to North Fourth Street and seeking compensatory damages. The district court found that Severin's Addition, including its streets and alleys, had been accepted by the City. The court concluded there was not sufficient evidence of abandonment or estoppel. The court issued an injunction prohibiting the Slaybaughs from continued possession of the property. The court denied the request for damages. The defendants appealed.

I. This case is in equity. Our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire

record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. We first consider defendants' claim there was no acceptance by the City of the dedication of the streets in Severin's Addition. The parties agree there was no evidence of a formal acceptance by the City. Defendants contend there was not sufficient evidence of an implied acceptance because the disputed property had never been used as a street.

Dedication is a question of fact and must be proven by the party relying upon it. Marksbury v. State, 322 N.W.2d 281, 284 (Iowa 1982). There must be an acceptance of the offer of dedication in order for it to be binding. Id. at 285. Very slight evidence is required to establish acceptance by the public. Id.

Where there is a plat on which the owner lays off lots, blocks, and streets, and adopts such plat by reference in selling, this amounts to an irrevocable dedication of the streets. Iowa Loan & Trust Co. v. Board of Supervisors, 187 Iowa 160, 163, 174 N.W. 97, 98 (1919). While the making and recording of a plat constitutes a deed of dedication to the public of the designated streets, it is well settled that such plat does not make them public

streets until the public has in some manner indicated its acceptance thereof. Kelroy v. City of Clear Lake, 232 Iowa 161, 164, 5 N.W.2d 12, 16 (1942).

Even when there is no formal acceptance of a street and public use is relied on to show acceptance, the use need only be such as the public wants and the necessities demand. Henry Walker Park Association v. Mathews, 249 Iowa 1246, 1253, 91 N.W.2d 703, 708 (1958). In the case of Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969), evidence that the city had renamed a street was used to show that the city had accepted the street.

Furthermore, the purchase of lots is a recognition of the plat and also of the streets and alleys by which the lots are bounded and intersected. Schultz v. Stringer, 168 Iowa 668, 675, 150 N.W. 1063, 1065 (1915). Such a purchaser ought not to be able to later question the legality of the plat. Id.

Thus, the Slaybaughs should not be able to question the legality of the plat for Severin's Addition since they purchased and sold lots in this plat. In any event, the 1891 plat of Severin's Addition was a dedication to the City of Stuart of the streets noted in the plat. The fact that the City later renamed the street in question shows that the City accepted North Fourth Street. We agree with the district court that the record supports a finding that the City accepted Severin's Addition, including its streets and alleys.

III. The Slaybaughs contend the property in question was abandoned by the City. They point out that this part of North Fourth Street has never been opened or improved in any way by the City.

In order to show abandonment of property, actual acts of relinquishment accompanied by an intention to abandon must be shown. Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969). The gist of abandonment by the public is an intent to abandon. Marksbury v. State, 322 N.W.2d 281, 286 (Iowa 1982). Nonuser is not enough to constitute an abandonment unless coupled with affirmative evidence of an intent to abandon. Schultz v. Stringer, 168 Iowa 668, 677, 150 N.W. 1063, 1065 (1915). The fact that a part of the street has not been improved or used is of no consequence, if it appears that it has not been heretofore needed. Gable v. City of Cedar Rapids, 150 Iowa 108, 111, 129 N.W. 737, 739 (1911).

Defendants have not presented any evidence that the City intended to abandon the property. The fact the City has not used the property up to this point in time does not mean the City has abandoned the property. We affirm the district court's decision finding the City had not abandoned the property.

IV. The Slaybaughs also contend that the City should be estopped from asserting any rights to the property in question.

The burden to prove and establish estoppel is on the party asserting it, with strict proof of all the elements a requisite. Sioux City v. Johnson, 165 N.W.2d 762, 768 (Iowa 1969). The doctrine of equitable estoppel against a municipality to open a street should be applied with caution. Id. Courts are generally somewhat reluctant to deprive a municipality of any part of its streets on the theory of an estoppel and seldom do so unless the claimant has constructed permanent and valuable improvements thereon. Kelroy v. City of Clear Lake, 232 Iowa 161, 172, 5 N.W.2d 12, 19 (1942).

The requisite elements of estoppel are continued nonuse of the area by a municipality coupled with a good-faith claim of right by private parties, who, because of improvement or other acts in reliance, would be damaged by their loss of use of the property. Marksbury v. State, 322 N.W.2d 281, 287 (Iowa 1982). The mere setting out or growing of trees, the erection of fences, or the use of a street for agricultural purposes, are not such permanent improvements as to work an estoppel. Johnson v. City of Shenandoah, 153 Iowa 493, 502, 133 N.W. 761, 764 (1911).

In this case the Slaybaughs were unable to show they placed any valuable improvements upon the property, or that they committed any other acts in reliance upon the City's nonuse of the property. The Slaybaughs' claim of equitable estoppel must fail.

We affirm the injunction issued by the district court enjoining the defendants from asserting a right to ownership or possession of the portion of North Fourth Street in question in this case.

AFFIRMED.