

1995

Marden R. Kohler and Joy J. Kohler v. Stephen C. Martin : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert Felton; Attorney for Appellant.

A. Dean Jeffs; Attorney for Appellees.

Recommended Citation

Brief of Appellee, *Kohler v. Martin*, No. 950345 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6679

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
KFU

50

A10

DOCKET NO. 950345-CA

IN THE UTAH COURT OF APPEALS

MARDEN R. KOHLER and
JOY J. KOHLER,

Plaintiffs/Appellees

Case No. 950345-CA

vs.

STEPHEN C. MARTIN,

Defendant/Appellant

Argument Priority
Classification: 15
Oral argument requested

ADDENDUM OF APPELLEES

Appeal from the Judgment of the Fourth Judicial
District Court, Wasatch County, State of Utah,
The Honorable Guy Burningham, District Judge Presiding

Mr. Robert Felton
39 Exchange Place, #200
Salt Lake City, Utah 84111
Attorney for Appellant

A. DEAN JEFFS, #1653
JEFFS & JEFFS, P.C.
Attorneys for Appellees
90 North 100 East
P.O. Box 888
Provo, Utah 84603
Telephone: 373-8848
Facsimile: 373-8848

NOV 16 1995

IN THE UTAH COURT OF APPEALS

MARDEN R. KOHLER and
JOY J. KOHLER,

Plaintiffs/Appellees

Case No. 950345-CA

vs.

STEPHEN C. MARTIN,

Defendant/Appellant

Argument Priority
Classification: 15
Oral argument requested

ADDENDUM OF APPELLEES

**Appeal from the Judgment of the Fourth Judicial
District Court, Wasatch County, State of Utah,
The Honorable Guy Burningham, District Judge Presiding**

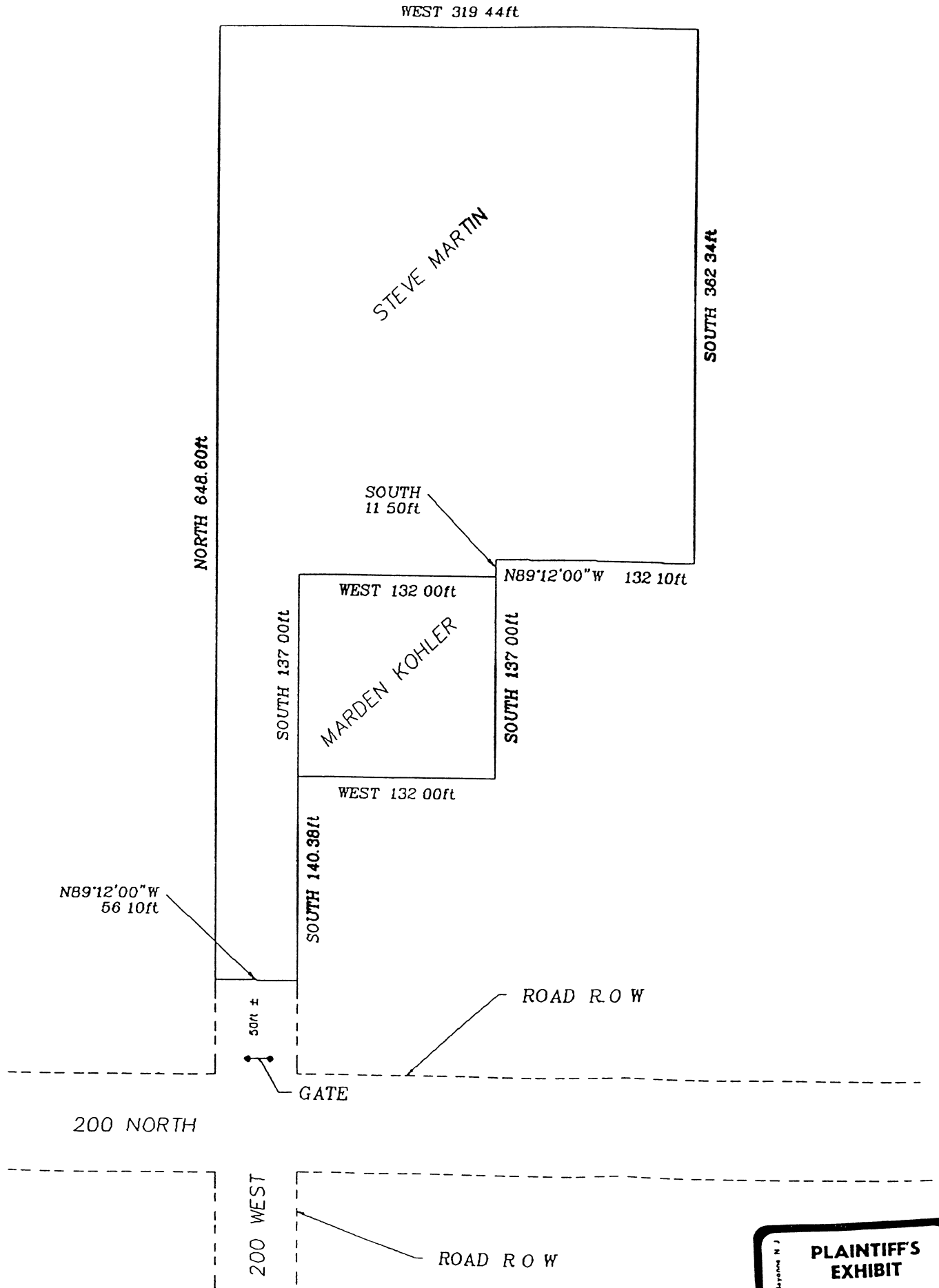
Mr. Robert Felton
39 Exchange Place, #200
Salt Lake City, Utah 84111
Attorney for Appellant

A. DEAN JEFFS, #1653
JEFFS & JEFFS, P.C.
Attorneys for Appellees
90 North 100 East
P.O. Box 888
Provo, Utah 84603
Telephone: 373-8848
Facsimile: 373-8878

APPELLEES' ADDENDUM

TABLE OF CONTENTS

1.	Reproduction of Plot Plan, Plaintiff's Exhibit No. 15a . . .	1
2.	Judgment and Order of Permanent Injunction	2
3.	Amended Findings of Fact and Conclusions of Law	6
4.	Findings, Order for Security for Costs by Non-Resident Plaintiff and for Preliminary Injunction .	16
5.	Photograph, Plaintiff's Exhibit No. 4	19
6.	Photograph, Plaintiff's Exhibit No. 5	20
7.	Proposed Agreement with Notes Plaintiff's Exhibit No. 13	21
8.	Proposed Agreement with Notations Plaintiff's Exhibit No. 14	27
9.	Statutes: § 27-12-89, UTAH CODE ANN. (1953) Public use constituting dedication	29
	§ 27-12-90, UTAH CODE ANN. (1953) Highways once established continue until abandoned	29



FILED
IN THE DISTRICT COURT
WASATCH COUNTY, UTAH
1-17-94 Date
Clerk
RMB Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY
STATE OF UTAH

MARDEN R. KOHLER and JOY J. KOHLER,	:	
	:	JUDGMENT AND ORDER OF
Plaintiffs,	:	PERMANENT INJUNCTION
	:	
vs.	:	
	:	
STEPHEN C. MARTIN,	:	<i>Civil No: 7122</i>
	:	
Defendant.	:	<i>Judge: Guy R. Burningham</i>

This matter came on regularly for trial before the Honorable Guy R. Burningham, Judge of the above entitled court sitting without a jury on the 12th, 13th and 14th of October, 1994. The Court, having heard all the evidence and arguments of counsel and being fully advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law,

IT IS NOW THEREFORE, ORDERED AND ADJUDGED as follows:

1. Plaintiffs are granted judgment that the roadway on the west and adjacent to Plaintiffs' real property is a public thoroughfare extending northward from the intersection of Second North Street and Second West Street of Midway City, Utah to a line extended westerly along the north side of the asphalt driveway where it enters Plaintiffs' real property. That portion of the public thoroughfare which lies upon the land of the Defendant and to which Defendants' land is subject is described as follows:

Beginning at a point North 5.68 chains and West 17.23 chains from the Southeast corner of the Northeast Quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Base & Meridian (recorded as the point of beginning for property owned by Stephen C. Martin as recorded in Entry #144387, Book 196, Page 324 of Wasatch County Records);

Thence N 89°12'00" W a distance of 56.10 feet to Paul Wilson property line; thence North along said property line a distance of 277 feet more or less to a point at the intersection of a line extended westerly along the North side of an Asphalt driveway entering the Marden Kohler property; thence West along said extended line a distance of 56.09 feet to the West property line of Marden Kohler; thence South partially along Kohler property boundary a distance of 277 feet more or less to the point of beginning;

2. Plaintiffs are granted judgment that they are the owners of the right to the free and unobstructed permanent use of the said public thoroughfare for access and egress and vehicular travel and parking in connection with the use of Plaintiffs' residence and real property which is more particularly described as follows:

Beginning 660 feet North and 15.25 chains West of the Southeast corner of the Northeast quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Meridian; and running thence West 132 feet; thence South 137 feet; thence East 132 feet; thence North 137 feet to the point of beginning.

3. Plaintiffs rights to the use of said public thoroughfare are rights that are appurtenant to and run with their land and may be conveyed to their successors in interest.

4. Plaintiffs are granted judgment that they are the owners of a private easement and right of way acquired both by a grant of easement and by prescriptive easement over and upon the said roadway and thoroughfare and specifically that portion of Defendant's land described

in Paragraph 1 above. Said easement and right of way is for the unobstructed and permanent use for access and egress and vehicular travel and parking in connection with Plaintiffs' real property described in Paragraph 2 above. Plaintiffs' right to said easement is hereby quieted in them and is a permanent right that is appurtenant to and runs with their land and can be conveyed to their successors in interest.

5. The Defendant is hereby ordered to forthwith remove the metal gate and gateposts he caused to be installed upon the roadway and thoroughfare that is the subject of this action and is hereby permanently enjoined from in any way obstructing the free and open travel by persons and vehicles upon any portions of the roadway from Second North Street northward to the north line of the land described in Paragraph 1 above. Defendant is further permanently enjoined from interfering with, harassing or otherwise causing problems in any with the use by Plaintiffs, their successors and assigns and their tenants, guests, friends, relatives, visitors, invitees and others from the free and open use of the roadway and thoroughfare for access, egress and parking of vehicles in connection with the use of Plaintiffs' property.

6. The Plaintiffs are hereby restrained from harassing, belittling or causing problems with Defendant's use of the roadway and his land so long as that use does not interfere with their rights. Plaintiffs are further ordered to strive to exercise what influence they can to prevent any such actions by their tenants and family members.

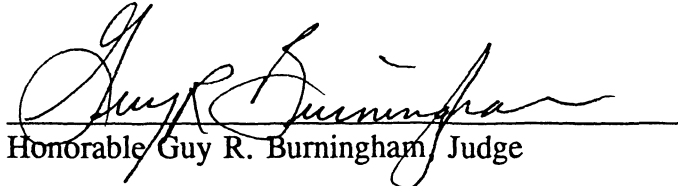
7. It is ordered in relation to the care, maintenance and repairs of the improvements in the roadway and thoroughfare for the area described in Paragraph 1 above the parties shall

continue the practice of sharing in such work, such that Plaintiff will do the care, mowing watering and maintenance on the east side of the asphalt surfacing and Defendant shall do it on the west side. As to repair or maintenance of the asphalt surfacing, when Defendant determines there is such a need, he shall set a reasonable time frame and obtain a bid for the work and submit it to Plaintiffs for their approval a reasonable time before the proposed work is to begin. If Plaintiffs do not approve of the bid or timing for the work or if Defendant fails to obtain a bid for work Plaintiffs deem is necessary, Plaintiffs shall obtain a bid and submit it to Defendant. The work shall be let to the lowest responsible bidder and the parties shall share equally in the cost.

8. Plaintiffs are granted their costs in this action.

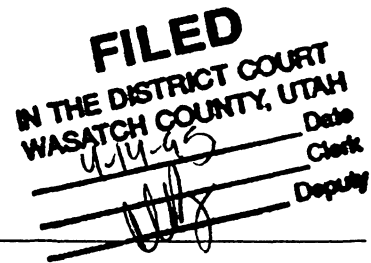
9. The Court reserves for later determination in this action the issues raised by the Order to Show Cause for Contempt of Court heretofore entered in this action as well as the question of the award of attorney fees in connection therewith.

DATED and signed this 9 day of ~~November~~ ^{January}, 1995


Honorable Guy R. Burningham Judge

Approved as to form:

Robert Felton



IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

MARDEN R. KOHLER and JOY J.
KOHLER,

Plaintiffs,

vs.

STEPHEN C. MARTIN,

Defendant.

:

:AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

:

:

:

:

Civil No: 7122

Judge: Guy R. Burningham

This matter came on regularly for trial before the Honorable Guy R. Burningham, Judge in the above entitled court sitting without a jury on the 12th, 13th and 14th of October, 1994. The Court, having heard all the evidence and arguments of counsel and being fully advised in the premises, now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiffs are the owners of a residence and real property in Midway City, Wasatch County, State of Utah, more particularly described as follows:

Beginning 660 feet North and 15.25 chains West of the Southeast corner of the Northeast quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Meridian; and running thence West 132 feet; thence South 137 feet; thence East 132 feet; thence North 137 feet to the point of beginning.

2. The Defendant is a resident of Midway City, Wasatch County, State of Utah, and the owner of a residence and real property therein, more particularly described as follows:

Beginning at a point North 5.68 chains and West 17.25 chains from the Southeast corner of the Northeast quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Base and Meridian; thence North 89 degrees 12 minutes West 56.1 feet; thence North 648.6 feet to the South line of the Eugene Probst property; thence Easterly 319.44 feet to a point 362.34 feet North of the Northeast corner of Harold Fabian's property; thence South 362.34 feet; thence North 89 degrees 12 minutes West 132.1 feet, thence South 11.5 feet; thence West 132 feet; thence South to the point of beginning.

3. The real property of the Plaintiffs and that of the Defendant are adjacent to each other and abut along the West and North boundaries of the Plaintiffs' land. Defendant's deed includes title to a substantial portion of a roadway lying to the West and extending Southward from the Plaintiffs' land which connects with Second North Street. The relationship of Plaintiffs' and Defendant's properties and the roadway are illustrated by Plaintiffs' Exhibit 15(A), a copy of which is attached hereto marked "Exhibit A" and made a part hereof by reference.

4. The Court finds from clear and convincing evidence that the roadway adjacent to Plaintiffs' real property and extending northward from the intersection of Second North Street and Second West Street of Midway City to a line extended westerly from the north side of Plaintiffs' asphalt driveway where it enters the Plaintiffs' property was historically and continuously used by the general public as a public thoroughfare for far in excess of a 10 year period of time. The width of the thoroughfare area extended from fences along its west side and east side which are still in their historic locations. The entire thoroughfare area was used by the general public both for passage of people and animals and for the travel and parking of vehicles.

The use of the thoroughfare by the public was not only in connection with the use of the land now owned by the Plaintiffs, but also for access by the public to the lands north of the properties of these parties. The thoroughfare area was always open for the free and unobstructed passage of people and vehicles from its south end northward past the Plaintiffs' land from before 1922 to at least 1948. The said thoroughfare area is now used and claimed by Plaintiffs for access to and the use of their property.

5. The public thoroughfare which lies upon the land of Defendant is described as follows:

Beginning at a point North 5.68 chains and West 17.23 chains from the Southeast corner of the Northeast Quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Base & Meridian (recorded as the point of beginning for property owned by Stephen C. Martin as recorded in Entry #144387, Book 196, Page 324 of Wasatch County Records);

Thence N 89°12'00" W a distance of 56.10 feet to Paul Wilson property line; thence North along said property line a distance of 277 feet more or less to a point at the intersection of a line extended westerly along the North side of an Asphalt driveway entering the Marden Kohler property; thence West along said extended line a distance of 56.09 feet to the West property line of Marden Kohler; thence South partially along Kohler property boundary a distance of 277 feet more or less to the point of beginning.

6. The roadway thoroughfare established by public usage has never been abandoned or vacated by order of any highway authorities having jurisdiction over the roadway, or by other competent authority.

7. The Court finds by clear and convincing evidence that the Plaintiffs predecessors in title, the Buhler family, operated a commercial swimming facility with two pools and a store

upon the land now owned and occupied by the Plaintiffs' residence. The Buhler's facilities were known as the Buhler's Hot Pots, and although they never owned the land upon which the roadway is located, the roadway was used for many years, far in excess of 10 years, by the general public as a thoroughfare for access and egress and parking of vehicles going to the Buhler facilities and also for access to the land north of those facilities which was a popular geologic and thermal spring area known as the "Mound". The entire roadway was used for such purposes and is the same roadway as is now used by the Plaintiffs for access to their property. The roadway has been regularly used by Plaintiffs' and their parents, Reed and Elda Kohler for access to their property since the summer of 1966. The roadway was always open without obstruction to the free passage of the public and vehicles.

8. The Court finds by a preponderance of evidence that in the summer of 1966, prior to purchasing the land where they built their home, Plaintiffs' parents, Reed and Elda Kohler approached William Ferrin Whitaker and Martha B. Whitaker (who were then the owners of the land now owned by Defendant) and sought their permission to use the roadway for access to what is now Plaintiff's land if they were to buy it and build their home there. That land formerly occupied by Buhler's Hot Pots, would otherwise have been landlocked. The Whitakers were aware of all the material facts and agreed and gave their permission intending it to be permanent and without restriction or limitation. Reed and Elda Kohler then bought the land in August 1966 and immediately thereafter built their home on it in reasonable reliance upon the permission and easement that had been granted by the Whitakers. The Kohlers had the continuous, regular and uninterrupted use of the roadway from the summer of 1966 until July 29, 1992, when Defendant put a padlock on a gate he had recently installed near the South end of the roadway. Until Defendant locked the gate there had been no effort by Defendant or any of his predecessors in title to withdraw permission for use of the roadway. Defendant's action in installing and locking the gate, caused significant detriment to Plaintiffs and if allowed to resume or continue, would cause Plaintiffs and their tenants irreparable harm, including harm

to health and safety and this court entered a preliminary injunction in this action on September 21, 1992 requiring Defendant to unlock the gate and cease interfering with Plaintiffs' and their tenants use of the roadway.

9. The Whitakers had asphalted and improved the road before granting Kohlers permission to use it. After the Kohlers had built and were occupying their home, the Whitakers first communicated to Reed Kohler a demand that he pay the Whitakers for a percentage of the value of the land in the roadway, a percentage of the cost of the improvements the Whitakers had installed, and to share in the future maintenance. Elda Kohler was not a party to that conversation and never agreed to make the payment demanded. Reed Kohler never made payment and died on June 9, 1969. The Whitakers thereafter continued to repeatedly make demands upon Elda Kohler for payment for the land and improvements, thereby manifesting that her continued use of the roadway was adverse to their interests.

10. In April of 1972 the Whitakers presented to Elda Kohler a formal written proposal for an agreement for payment for and use of the roadway. Elda Kohler never agreed to the proposal but continued the regular use of the roadway. The Whitakers never interrupted or objected to her use of the roadway although they continued to demand payment during the entire time they owned the land now owned by Defendant. Elda Kohler's use of the roadway was open, notorious, adverse, continuous and uninterrupted from April of 1972. The Whitakers failure to pursue their claim for payment effectively waived any rights they may have had to collect payment for the land and improvements.

11. On December 9, 1980, the Whitakers deeded their land to their brother and sister-in-law Richard Fred Bassett and Karen E. Bassett, who had knowledge of the use of the roadway and easement by the Kohlers. The lay of the land, the asphalt surfacing and improvements made it apparent that the roadway was the means of access to the Kohler residence and had been used over a long number of years. The location of the Kohlers attached garage facing onto the roadway and the asphalt driveways extending from the asphalt of the roadway to the Kohler

garage contributed to make the Kohler use open, visible, notorious and adverse. Their use was regular, continuous, unobstructed and uninterrupted during the ownership of the land by Bassetts. The Bassetts never gave permission for the use of the roadway by Elda Kohler or the Plaintiffs which use was clearly adverse as to the Bassetts.

12. On April 10, 1980, Elda Kohler deeded her land and residence to the Plaintiffs although she continued to live in the home and use the roadway until 1992. Elda Kohler and Plaintiffs continued to have the uninterrupted and unobstructed regular and continuous use of the roadway thereafter.

13. At the end of 1987, the Bassetts deeded the land and roadway to the Defendant, Stephen C. Martin, who likewise had knowledge of the use of the roadway and easement by the Kohlers. The circumstances were unchanged from what they were during the ownership by the Bassetts. Defendant never gave permission for use by the Plaintiffs. The Plaintiffs use of the roadway continued regularly, continuously and uninterrupted and unobstructed and was also open, visible, notorious and adverse to the Defendant until he locked the gate on July 29, 1992.

14. Plaintiffs and their parents had the open and unrestricted use of the roadway adversely to Defendant and his predecessors in title for over 20 years (from April 1972 when Whitakers first demanded payment for the land and improvements until July 29, 1992 when Defendant locked the metal gate he installed near the south end of the roadway). Defendant installed the gate in April 1992, but the Kohlers and their tenants continued unrestricted use of the roadway until Defendant locked it with a padlock on July 29, 1992.

15. The Court finds that Defendant has harassed the Plaintiffs and their tenants and invitees in the use of the roadway and thoroughfare, that his actions in installing and locking the metal gate causing the necessity for the Preliminary Injunction to be entered in this action was in violation of Plaintiff's rights and give rise to the necessity that this Court enter its order and a permanent injunction requiring that Defendant forthwith remove the gate and its metal posts, from in any way obstructing the free and open usage by persons and vehicles of the roadway as

described herein and from interfering in any way with the use by Plaintiffs, their successors and assigns and their tenants, guests, friends, relatives, visitors, invitees and others from the free and open use of the roadway for access, egress and parking in connection with the use of Plaintiffs' property and this Court should enter its order to restore them to their free and open usage of the roadway and thoroughfare. Defendant should likewise be restrained from harassing in any way or causing problems for Plaintiffs and such other persons in the use of the roadway and thoroughfare.

16. There have been feelings generated between the parties such that the Plaintiffs should also be restrained from harassing, belittling or causing problems with the Defendants' use of his land so long as his use does not interfere with their rights and Plaintiffs should exercise their influence to prevent any such actions by their tenants and family members.

17. The parties have in the past shared in the care and maintenance of the portion of the roadway from its north boundary described in paragraph 5 of these findings down to the north boundary of Second North Street of Midway City. The Plaintiffs and their predecessors have in the past done the care by way of mowing and watering on the east side of the asphalt surfacing and the Defendant has done it on the West side. There is a need that the parties should continue to share in the care and maintenance in that way. As to any need for maintenance or repair of the asphalt surfacing, when Defendant determines there is such a need, he should be ordered to determine a time frame for the work and obtain a bid and submit it to Plaintiffs for approval a reasonable time before the proposed work is to begin. If Plaintiffs do not approve of the bid or if Defendant fails to obtain a bid for work Plaintiffs deem necessary, Plaintiffs shall obtain a bid and submit it to Defendant. The work shall be let to the lowest responsible bidder and the parties shall share equally in the cost.

18. The Court does not find that Defendant's defense of this action was without merit and entered in bad faith as to the substance of the case, however, the Court should reserve for later determination the issues raised in the Order to Show Cause for Contempt of Court

heretofore entered in this action as well as the question of the award of attorney fees in connection therewith.

CONCLUSIONS OF LAW

1. The roadway which is the subject of this action and that portion of Defendant's land as described in paragraph 5 of the Court's Findings of Fact in this action became and still is a public thoroughfare under the provisions of Section 27-12-89, Utah Code Annotated, 1953 as amended; and as such the Plaintiffs, and their successors in interest in their land are entitled to the free and unobstructed permanent use of the roadway for access and egress and vehicular travel and parking in connection with the use of Plaintiffs' residence and real property which land is more particularly described in Paragraph 1 of the Findings of Fact.

2. Plaintiffs are the owners of an easement and right of way over and upon the roadway described in paragraph 5 of the Court's Findings of Fact. William Ferrin Whitaker and Martha B. Whitaker, the then owners of the fee title to the roadway granted the easement, by oral agreement which was acted and relied upon by Reed and Elda Kohler and established a permanent and unrestricted easement for use of the roadway. The Kohlers reliance upon that grant of easement by their use of the roadway and constructing their substantial home made that grant of easement irrevocable. They and the Plaintiffs have continued to use the roadway for over 27 years in reliance upon that grant of easement. The Kohler land is the dominant estate and the Defendant's land the servient estate in relation to that easement. Plaintiffs and their successors have the right to that permanent easement which is a right which runs with their land for the continued permanent use of the easement and roadway.

3. The Court also concludes as a matter of law that the doctrines of promissory estoppel and equity apply to the facts of this case to prevent Defendant from withdrawal of the promise and agreement of his predecessors, the Whitakers, granting the Kohlers the permanent use of the roadway by reason of the following elements:

a. The promise and agreement was reasonable expected to induce reliance by the Kohlers.

b. The Kohlers reasonably relied upon and took action in reliance upon the promise and agreement by buying their land, building their home and using the roadway.

c. There would be significant and substantial detriment to the Plaintiffs for the Defendant to be allowed to withdraw the permission and agreement.

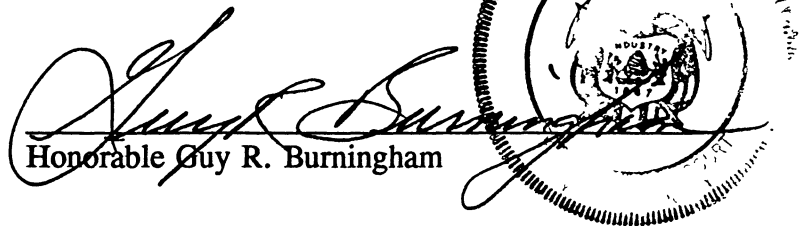
d. The promissors, the Whitakers, were aware of all material facts.

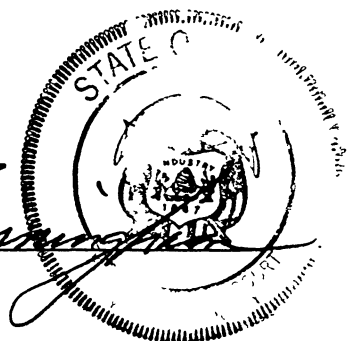
4. The Court further finds as a matter of law that Plaintiffs have established that they also own a prescriptive easement for the permanent and unrestricted use of that portion of the roadway upon Defendant's land as described in Paragraph 5 of the Findings of Fact for the continued use for access and egress and vehicular travel and parking in connection with the use of their residence and real property which perscriptive easement is a right which runs with the land.

5. The Court should enter its permanent restraining order and order for the care and maintenance for the roadway and thoroughfare as set forth in paragraphs 15, 16 and 17 of the Findings of Fact.

DATED and signed this 12 day of April, 1995.

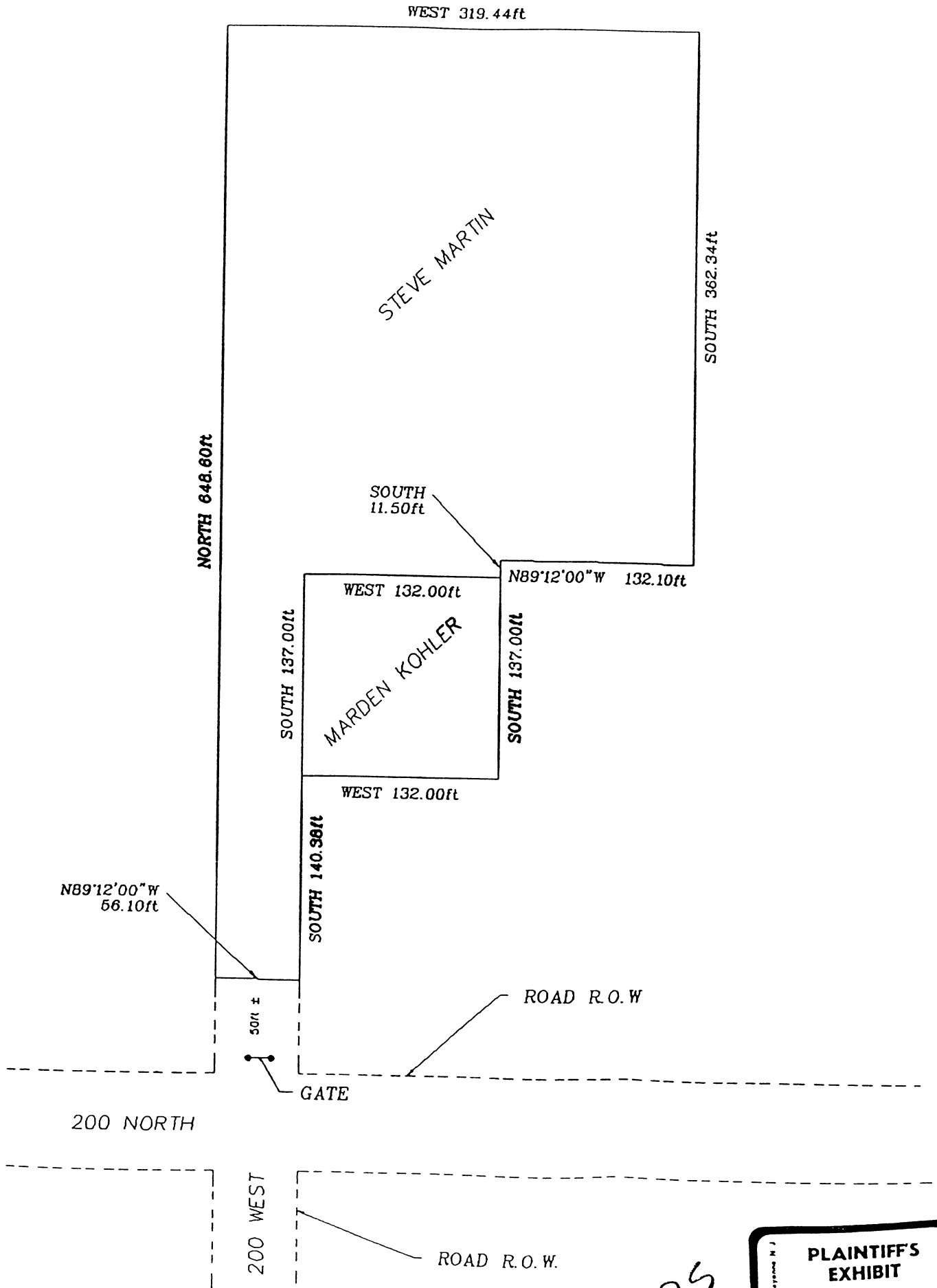
BY THE COURT:


Honorable Guy R. Burningham



Approved as to form:

Robert Felton



1125



A. Dean Jeffs, No. 1653
JEFFS AND JEFFS
Attorneys at Law
Attorneys for Plaintiffs
90 North 100 East
P. O. Box 888
Provo, Utah 84603
Telephone: (801) 373-8848

FILED
IN THE DISTRICT COURT
WASATCH COUNTY, UTAH
9-23-92 Date
Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

MARDEN R. KOHLER AND	:	FINDINGS, ORDER FOR SECURITY
JOY J. KOHLER,	:	FOR COSTS BY NON-RESIDENT
	:	PLAINTIFF AND FOR
Plaintiffs,	:	PRELIMINARY INJUNCTION
	:	
vs.	:	
	:	
STEPHEN C. MARTIN,	:	Civil No. 7122
	:	Judge Cullen Y. Christensen
Defendant.	:	
	:	

The above-entitled matter came on for a regularly scheduled hearing on Plaintiffs' Motion For Preliminary Injunction on the 4th day of September, 1992, before the Honorable Lynn W. Davis, Fourth Judicial District Court Judge. The Plaintiff, Marden R. Kohler was present and represented by his counsel, A. Dean Jeffs of the firm of Jeffs and Jeffs. The Defendant, Stephen C. Marten was present and represented by his counsel, Barney R. Saunders of the firm of Saunders & Saunders. Witnesses were sworn and testified and photographs and documentary evidence was introduced.

The Court having heard the evidence presented in support of the preliminary injunction

and having heard the evidence presented by Defendant herein and the Court being fully advised in the premises, now makes and enters the following:

1. The Plaintiffs have shown that they and the tenants of their residence located at 226 North 2nd West, Midway, Utah, will suffer irreparable harm if Defendant continues to lock the gate to the roadway which is the subject of this action, including harm to health and safety unless this Court issues an injunction enjoining Defendant and anyone acting on his behalf from locking the said gate and from interfering with the use of said roadway by Plaintiffs and their tenants for access to the residence of the Plaintiffs and which Plaintiffs and their predecessors in title have used for access to the residence for in excess of 20 years.

2. The threatened injury to the Plaintiffs outweighs whatever damage the injunction may cause the Defendant. No evidence of any damages Defendant might sustain by reason of the injunction was presented.

3. The injunction would not be adverse to the public interest but would be in the public interest by reason of health and safety.

4. This case presents serious issues on the merits which should be the subject of further litigation in this action.

ORDER

The Court orders the Plaintiffs to furnish an undertaking in the amount of \$300.00 as security for costs of non-resident Plaintiff and dispenses with the requirement of further security as Defendant did not introduce evidence in support thereof.

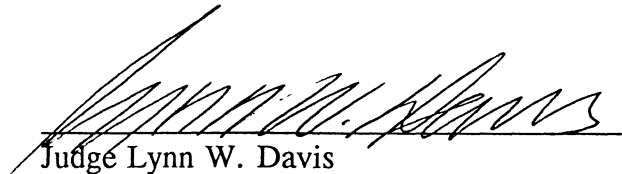
PRELIMINARY INJUNCTION

Defendant is ordered to remove the lock from the gate and the parked vehicles from the roadway which is the subject of this action.

During the pendency of this action, or until further order of the Court, Defendant is enjoined from locking the gate on the roadway which is the subject of this action and from parking vehicles in the traveled portions of said roadway and from otherwise interfering with the use by Plaintiffs and their tenants of the said roadway in any area south of an imaginary line extending west from the northernmost hard road surfacing of the driveway that provides access to the north bay of Plaintiffs' garage southward to Second North Street, Midway, Utah.

DATED and signed this 21 day of September, 1992.

BY THE COURT:



Judge Lynn W. Davis





Delete first "Whereas". The kohlers did not buy their property from us but have to use our lane for access to their property.

Add a last paragraph to the effect that both parties will share equally from this date forward in the cost of upkeep and maintenance of the lane and that this will be binding on any future owner.

This was not signed for Lane
The Lane has been used to { Eida
Hot pots all time the years)
No Agreements.
Signed.

A G R E E M E N T

This Agreement made and entered into this _ _ _ day of April, 1972, by and between W. FERRIN WHITAKER and MARTHA B. WHITAKER, his wife here and after called the First Party and Elda Kohler, here and after called the Second Party, all of Midway, Utah:

W I T N E S S E T H :

WHEREAS, the First Party did sell to the Second Party and her husband a building site adjacent to the home of the First Party, and

WHEREAS, a private lane is used to reach the residence of both Parties, and

WHEREAS, the private lane to the residence of both Parties is the property of the First Party, and

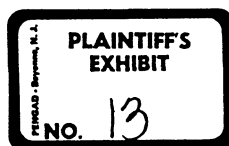
WHEREAS, the first party has spent considerable money fixing, repairing and maintaining said lane, and

WHEREAS, one-half of the total cost of said lane is Nine Hundred Thirty Three and 44/100 (\$933.44) Dollars.

NOW, THEREFORE, in consideration of the premises and mutual agreements between the parties it is respectfully agreed as follows:

1. That the First Party hereby grants to the Second Party the unrestricted right to use said lane as a road to and from her residence.

2. The Second Party agrees that if she should sell the home to a third party or in the event of her death that the third party or the Second Party's estate shall pay to the First Party one-half the cost of fixing, repairing and maintaining said lane which is the sum of Nine Hundred Thirty Three and 44/100 (\$933.44) Dollars.



3. It is further agreed between the parties that so long as the Second Party uses her home as her residence and lives there that she is to pay nothing for the use of said lane but is to have complete free use of the road for her private use and the use of those who would visit her premises.

FIRST PARTY

SECOND PARTY

Land	1/6	966.00	484.00
Black top drive	1/3	510.00	255.00
Fence, gate & bridge		229.32	114.66
^{it} Landscaping		159.55	<u>79.78</u>

933.44

*Include description & record this agreement with recorder.

A G R E E M E N T

This Agreement made and entered into this _____ day of April, 1972, by and between W. FERRIN WHITAKER and MARTHA B. WHITAKER, his wife here and after called the First Party and Elda Kohler, here and after called the Second Party, all of Midway, Utah:

W I T N E S S E T H :

XWHEREAS, the First Party did sell to the Second Party and her husband a building site adjacent to the home of the First Party, and

WHEREAS, a private lane is used to reach the residence of both Parties, and

WHEREAS, the private lane to the residence of both Parties is the property of the First Party, and

WHEREAS, the first party has spent considerable money fixing, repairing and maintaining said lane, and

WHEREAS, one-half of the total cost of said lane is Nine Hundred Thirty Three and 44/100 (\$933.44) Dollars.

NOW, THEREFORE, in consideration of the premises and mutual agreements between the parties it is respectfully agreed as follows:

1. That the First Party hereby grants to the Second Party the unrestricted right to use said lane as a road to and from her residence.

2. The Second Party agrees that if she should sell the home to a third party or in the event of her death that the third party or the Second Party's estate shall pay to the First Party one-half the cost of fixing, repairing and maintaining said lane which is the sum of Nine Hundred Thirty Three and 44/100 (\$933.44) Dollars.

3. It is further agreed between the parties that so long as the Second Party uses her home as her residence and lives there that she is to pay nothing for the use of said lane but is to have complete free use of the road for her private use and the use of those who would visit her premises.

FIRST PARTY

SECOND PARTY



Oct. 1, 1985

Because it is to the mutual advantage of myself and the owner of the home to the north of me to enhance the value of our properties by keeping the private entry lane green and attractive I hereby agree as my share of the use by myself, family, friends and heirs of the said lane to water at my expense the lawn on the entire east side of the lane from the street to the north side of the driveway of my home which is adjacent to the above lane in Midway, Utah. The lane is presently owned by W. F. Whitaker and is a continuation to the north of Second West beyond Second North in Midway.

Oct 29.87 This agreement will be binding on my heirs.

I accident sign this as there has been a roader to Bucklew has paid all thru the years and I have watered on the front years with hose & sprinkler both sides up until recently. The last 2 years I have watered my side during the summer mo's. It was costly for extra water by the gallon. Ken & I put in sprinkler side on the west. I have paid for fence that came up the Lane. Last summer we put in the present sprinkler for 1 side. Marleen & I put in orange pipe on the other

paid for it.

I paid \$100 for Roto Rea to go under Black ^{clean}
in pipe that tree has all bulged out.
If wages could be counted I ^{or} paid plenty for
one side.

I kept sprinkler that were run over & mis-
used all thru the years. put back in place
past 3 years each time I pay to have it
mowed. It ^{is} \$7. I hasent been a cheap
keep up over the years. The County
Map shows the road as a passage way
beyond whitaker.

yes I kept it nice ~~but~~ dont wast for
her to still pay on.

Elda Kohler

ARTICLE 6
ACQUISITION OF PROPERTY FOR HIGHWAY
PURPOSES

27-12-89. Public use constituting dedication.

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

319

27-12-90. Highways once established continue until abandoned.

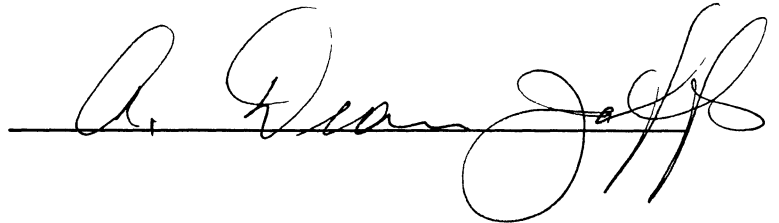
All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any such highway, or by other competent authority.

History: L. 1963, ch. 39, § 90.

CERTIFICATE OF HAND-DELIVERY AND MAILING

I hereby certify that the original and seven (7) copies of Addendum of Appellees were hand-delivered to the Clerk of the Court, in the Utah Court of Appeals, and two (2) copies were sent to the below named party by placing the same in the United States mail, postage prepaid, this 16th day of November, 1995, addressed as follows:

Robert Felton, Esq.
Attorney at Law
39 Exchange Place, #200
Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to read "R. Felton", is written over a horizontal line. The signature is stylized with large, flowing loops.

