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MEMORANDUM

TO: Wayne Belmont, County Counsel
Jim Buisman, Public Works Director

FROM: Rob Bovett, Assistant County Counsel

DATE: February 12, 1997

SUBJECT: Legal Status of South 804

You have asked me to provide you with my opinion as to the legal status of a portion of County Road 804 that is being commonly referred to as “South 804” (the portion of 804 right-of-way that flows through the Ocean Crest Subdivision in Yachats).¹

Based upon my review of the public record relating to County Road 804, and legal precedent relating to the issues raised by that public record, I conclude that:

(1) County Road 804 was properly established in the 1890’s, including the portion known as South 804.²

¹ “South 804,” as used in this memorandum, refers to the portion of County Road 804 right-of-way that is located along or near the ocean bluff line through the City of Yachats, from the south end of the portion of 804 that was vacated in 1974 (in the Aqua Vista Subdivision; see BOC Order dated 7-16-74), abutting the property commonly known as tax lot 5800 as depicted on Lincoln County Assessor’s Map 14-12-27-AA, southerly to its intersection with Highway 101. County Road 804 continues easterly from this point along the Yachats River.

“North 804” is a term that is being commonly used to describe the portion of 804 right-of-way from the north end of the 1974 vacation, abutting the property commonly known as tax lot 200 as depicted on Lincoln County Assessor’s Map 14-12-22-DD, northerly to its intersection with the beach between the properties commonly known as tax lots 4301 and 2700 as depicted on Lincoln County Assessor’s Map 14-12-23-BC. In 1974, the Board of Commissioners denied a petition to vacate North 804. BOC Order dated 11-26-74. Property owners along North 804 then sued Lincoln County for declaratory relief that North 804 does not exist as public road right-of-way. The trial court concluded that 804 was properly established in the 1890’s, and that North 804 had not been vacated or otherwise abandoned. *Rendler v Lincoln County*, Lincoln County Circuit Court case # 41260 (1983). The Court of Appeals and the Oregon Supreme Court affirmed the trial court’s decision. *Rendler v Lincoln County*, 76 Or App 339, 709 P2d 721 (1985), 302 Or 177, 728 P2d 21 (1986). In 1990, Lincoln County transferred North 804 to the State Parks and Recreation Department for establishment and maintenance of a walking trail. BOC Order # 1-90-21.

² *Rendler v Lincoln County*, Lincoln County Circuit Court case # 41260 (1983), 76 Or App 339, 709 P2d 721 (1985), 302 Or 177, 728 P2d 21 (1986).

- (2) South 804 has not been vacated by statutory vacation.³
- (3) South 804 has not been vacated by statutory abandonment by non-use.⁴
- (4) South 804 has not been abandoned by common law abandonment by non-use.⁵
- (5) South 804 has not been vacated by statutory realignment.⁶
- (6) South 804 has not been abandoned by common law realignment.⁷

³ Oregon law has long empowered counties to vacate county road right-of-way. ORS 368.326, *et seq*; ORS 368.565, *et seq* (repealed 1981); OCLA § 100-1231, *et seq* (1940); OCA § 44-1328, *et seq* (1930); OL § 4564, *et seq* (1920). I have been unable to locate any vacation proceeding involving South 804.

⁴ In 1860, the Oregon legislature enacted a law that provided for automatic vacation of county roads that were not opened within two years after establishment of the right-of-way (later amended to four years after establishment); that law was repealed in 1903. 1903 Or Laws page 262; *see also Hilsop v Lincoln County*, 249 Or 259, 437 P2d 847 (1968) (vacation is automatic upon non-use for the statutory period, and does not require county action to vacate). The record appears to indicate that 804 was opened and used continuously from its establishment to well past 1903. *Rendler v Lincoln County*, Lincoln County Circuit Court case # 41260 (1983), 76 Or App 339, 709 P2d 721 (1985), 302 Or 177, 728 P2d 21 (1986).

⁵ Oregon does not recognize the common law doctrine of abandonment by non-use. *Sweet v Irrigation Canal Company*, 198 Or 166, 254 P2d 700, 256 P2d 252 (1953); *Wilkins v Lane County*, 65 Or App 494, 671 P2d 1178 (1983), *rev den* 296 Or 253, 675 P2d 491 (1984); *Martin v Klamath County*, 39 Or App 455, 592 P2d 1037, *rev den* 287 Or 45 (1979).

⁶ Until 1981, Oregon law provided that “[w]hensoever any proceeding is instituted in any county court, by petition, resolution or otherwise as provided by law, having for its object the relocation or alteration of any existing county road or highway within the county, the proceedings are carried to a conclusion and a final order entered establishing a new road following the general alignment of the old road, the final order shall vacate all parts of the old road or highway not included within the limits of the new road, without any other proceedings, but the county court may expressly provide that any portion of the old road shall not be vacated. Whenever the whole or any part of a road so vacated shall be supplied by another, the same shall not be shut up or obstructed until the road laid out to supply the place thereof is actually opened to travel.” Former ORS 368.126, formerly ORS 368.540. In 1981, the statute was amended in a number of ways that are not relevant to this matter. 1981 Oregon Laws, chapter 153, § 67. Even assuming that a subdivision application in 1953 constituted a “proceeding” within the meaning of this statute, I have been unable to locate any BOC “order” relating to the Ocean Crest Subdivision. *See also Colombo v Hewitt*, 221 Or 121, 350 P2d 893 (1960) (order must be entered at the time of the relocation or alteration, and cannot be entered after the fact); *Verzeano v Carpenter*, 108 Or App 258, 815 P2d 1275 (1991), *rev den* 312 Or 589 (1992) (order establishing new road location was effective to vacate old road location).

Until 1981, Oregon law also permitted a property owner to formally petition the county for relocation of a county road through the property of the petitioner. ORS 368.615 (repealed 1981); OCLA § 100-1711 (1940); OCA § 44-2113 (1930); OL § 4604 (1920). I have been unable to locate any relocation proceeding involving South 804.

⁷ When a road is intentionally realigned without any formal realignment proceeding, the act of realignment abandons the old alignment (this is also referred to as vacation by implication). *Bitney v Grim*, 73 Or 257, 144 P 490 (1914). Vacation by implication does not occur where there is no actual realignment (vacation without substitute), *Martin v Klamath County*, 39 Or App 455, 592 P2d 1037, *rev den* 287 Or 45 (1979), or where a realignment does not tie back into the old alignment, *Vedder v Marion County*, 28 Or 77, 36 P 535, 41 P 3 (1895).

In this case, it might be argued that Ocean View Drive in the Ocean Crest Subdivision, Third Addition to Yachats, and other subdivisions, operated as a realignment of South 804. However, the record fails to disclose any such intent. In addition, within the Ocean Crest Subdivision, Ocean View Drive (County Road 813) turns into Marine Drive (County Road 814), which then ties back into Highway 101, not 804. There is a narrow 20 foot strip of dedicated public right-of-way that extends north from the corner of Ocean View Drive and Marine Drive. However, that right-of-way also fails to tie back into 804 (the portion that was later was vacated in 1974), appears to merely be a driveway access for lots 29 and 30 of Block 4 of the Ocean Crest Subdivision (tax lot 5800 as depicted on Lincoln County Assessor’s Map 14-12-27-AA), and fails to meet the statutory minimum 50 foot width for county roads that

- (7) South 804 has not been vacated by legalization.⁸
- (8) South 804 has not been lost by prescription.⁹
- (9) Equitable estoppel does not bar Lincoln County's claims to South 804.¹⁰

As you know, the 1953 Ocean Crest Subdivision failed to disclose the existence of 804. It is my belief that this failure is simply the result of what I call "overplating," either because there was some thought that the subdivision effectively vacated South 804, realigned South 804 to Ocean View Drive, or because there was no thought placed into the matter at all.

In any event, as a result of the foregoing, it is my opinion that South 804 is presently a county road right-of-way.

existed at the time of dedication in 1953, and continues to exist today. ORS 368.041, formerly ORS 368.415, formerly OCLA 100-1205.

⁸ Oregon law has long empowered counties to legalize county road right-of-way (conform surveyed or platted right-of-way to reality). ORS 368.201, *et seq*; ORS 368.585, *et seq* (repealed 1981); OCLA § 100-1235, *et seq* (1940); OCA § 44-1332, *et seq* (1930); OL § 4568, *et seq* (1920). I have been unable to locate any legalization proceeding involving South 804.

⁹ It is my opinion that adverse possession cannot operate against county road right-of-way. ORS 12.250 and 275.027; ORS 368.620 (repealed 1981); OCLA § 100-3102 (1940); OCA § 44-3502 (1930); OL § 4705 (1920).

Until 1981, state law specifically precluded adverse possession against public road right-of-way. ORS 368.620 (repealed 1981). In 1981, the legislature reenacted the law to provide for broad application to all "public lands." 1981 Oregon Laws, chapter 153, § 51, codified as ORS 275.027. It might be argued that county road right-of-way (which is basically a glorified easement) is not "land" within the meaning of the statute. However, even if that argument were to survive statutory construction (which I believe it would not after applying the statutory construction method prescribed in *PGE v BOLI*, 317 Or 606, 859 P2d 1143 (1993)), adverse possession operates to prevent a person, by means of statute of limitation, from maintaining an action asserting a property right after the prescriptive period of 10 years has run and the necessary adverse possession elements have occurred (actual, open, notorious, exclusive, hostile and continuous possession, under claim of right). ORS 12.050; 105.605; 105.620; *Coos County v State of Oregon*, 303 Or 173, 734 P2d 1438 (1987). Even assuming that ORS 275.027 does not apply to county road right-of-way, the statute of limitations (ORS 12.050) does not run against the county by operation of ORS 12.250.

¹⁰ Equitable estoppel does not operate against a government for failure to eject or abate trespass upon public road right-of-way, even if the trespass is for extensive periods of time. *City of Molalla v Coover*, 192 Or 233, 235 P2d 142 (1951).