

A PRIMER ON RIGHT-OF-WAY DEDICATIONS AND VACATIONS

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Introduction

The law concerning right-of-way dedications and vacations is scattered throughout numerous statutes and court cases. This article will attempt to bring together and summarize the law in these areas.

The Dedication

A dedication of land for right-of-way purposes involves two *elements*—offer and *acceptance*. That is, there must be an offer to the municipality to set aside the land for public use, and there must be an acceptance of the offer. See *Village of Riverside v. MacLain*, 210 Ill. 308, 71 N.E. 408 (1904).

There are two types of dedications: *statutory and common law*. A statutory dedication is a dedication that is in strict conformity to the Plat Act. Thus, a statutory plat (a plat of subdivision that strictly conforms to the Plat Act) will create a statutory dedication of a right-of-way. See 765 ILCS 205/1 *et seq*; see especially 765 ILCS 205/3; see also *Terwelp v. Sass*, 111 Ill.App.3d 133, 443 N.E.2d 804, 66 Ill. Dec. 878 (4th Dist., 1982); *First Illinois Bank of Wilmette v. Valentine*, 250 Ill. App. 3d 1080, 619 N.E.2d 834, 189 Ill. Dec. 133 (2nd Dist., 1993). A plat that is not a statutory plat (i.e., a plat that does not conform to the Plat Act) is called a common law plat.

With a statutory plat, the fee simple ownership of any street dedicated on the plat vests in the public. With a common law plat, the public obtains only an easement interest; title to the right-of-way remains in the adjoining landowner. See *Grimming v. Ferris*, 79 Ill.App.3d 546, 399 N.E.2d 141, 35 Ill. Dec. 307 (1979); *Ingraham v. Brown*, 231 Ill. 256, 83 N.E. 156 (1907); see also 765 ILCS 205/3, which provides that,

the acknowledgment and recording of a [plat created under the Plat Act] shall be held in all courts to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public . . . and the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended.

Creating the Statutory Plat

There must be *strict* compliance in order to qualify as a statutory plat. The following cases show how difficult (if not impossible) it is for a title examiner to determine if a plat is a statutory plat or a common law plat:

- In *City of Chicago v. Rumsey*, 87 Ill. 348 (1877), the court concluded that the plat in question was a common law plat because the plat was not properly acknowledged. See also *Owen v. Village of Brookport*, 208 Ill. 35, 69 N.E.952 (1904).
- In *Thompson v. Maloney*, 199 Ill. 276, 65 N.E. 236 (1902) the plat was said to be a common law plat because it was executed by an attorney in fact.
- In *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N.E. 212 (1889), the court said that a plat was a common law plat because it was prepared by a deputy surveyor and not the county surveyor.
- In *Road King Petroleum Products, Inc. v. Village of Wood Dale*, 23 Ill.App.3d 181, 318 N.E. 2d 710 (1974), the court ruled that there was no statutory dedication of a platted fifty foot strip because the owner signed the plat before words of dedication were added by the surveyor.
- And in *Ingraham v. Brown, supra*, the court held that a plat “not made by the owner of the lands covered by said plat . . . is therefore, at most, a common law plat. . . .” 231 Ill. at 258, 83 N.E. at 157.

The Title Company Dilemma

Title companies are sometimes asked to determine the ownership of dedicated and platted rights-of-way. But the judicial decisions outlined above indicate that it is virtually impossible to conclusively determine whether a plat is a statutory plat or a common law plat. Indeed, it is likely that a large number of plats of subdivision are common law plats. For example, title examiners often review plats of subdivision that are signed by the apparent beneficiary of a title holding land trust and not the actual

land trustee. In light of the holding in *Ingraham v. Brown, supra* (and 765 ILCS 205/2, which provides that the plat must be acknowledged by the owner of the land), it would appear that all such plats are common law plats.

The method of identifying lots on the plat may also render the plat a common law plat. For example, 765 ILCS 205/1 refers to the “numbering [of] all such lots, blocks or parcels by progressive numbers. . . .” If a parcel of land in a plat of subdivision is identified as “Outlot A,” then it seems that this plat would be a common law plat, as it does not conform to the Plat Act lot numbering requirement.

The Super Dedication

Recent legislation may have blurred the line between statutory and common law dedications. In *Klose v. Mende*, 329 Ill. App.3d 543, 771 N.E.2d 960, 265 Ill.Dec. 1 (3rd Dist. 2001), the plaintiffs claimed that they owned fee simple title to some roadways in LaSalle County. The defendant, who was the Commissioner of Highways, produced a ledger that indicated that the two roads had been dedicated to Meriden Township in 1856. The plaintiffs, however, maintained that the dedications were invalid in that they failed to conform to the statute (1851 Ill. Laws 35).

The appellate court agreed with the plaintiffs, stating that,

In this case the 1856 dedications cannot be shown to be valid. While the absence of the record of a personal examination by the town commissioner is an excusable error, the dedications fail to meet even the most basic requirements of the Act. Since there was no order or petition in the town clerk’s records, there was no valid evidence that could support the bare ledger entry and, therefore, establish the dedication of the two roads as public highways. Defendant’s proffered ledger entry does not, without more, satisfy [the statute’s] requirements. Accordingly, we cannot find that the 1856 dedications were valid. 329 Ill. App.3d at 547, 771 N.E.2d at 964, 265 Ill.Dec. at 5.

The court went on to indicate that the defendant had acquired an easement by prescription over the road then currently in use.

Public Act 93-183, effective July 11, 2003, is intended to counteract the holding in *Klose*. The act changes the means of proving that land has been dedicated to the public for highway purposes. This act amends Section 6-315 of the Illinois Highway Code (605 ILCS 5/6-315) to read as follows:

An entry in the records, ledger, or official minute book of the district clerk, stating that there has been a dedication of a public highway according to

statutory requirements shall be prima facie evidence in all cases that there was a dedication of a public highway *and that the dedication complied with all statutory requirements*, regardless of whether supporting records or documentation of the dedication is available. (Emphasis added)

Section 6/315 of the Illinois Highway Code is applicable to township rights-of-way and road district rights-of-way.

It appears that a possible unintended consequence of Public Act 93-183 is a tremendous broadening of the definition of a statutory dedication. As previously mentioned, a statutory plat is a plat that has been drafted in conformity with the Plat Act. Public Act 93-183, however, now leap frogs over the common law dedications in *City of Chicago v. Rumsey*, *Owen v. Village of Brookport*, and the other cases noted above by creating a new super statutory dedication for township and road district rights-of-way. The plats described in *Rumsey* and the above court cases were recorded plats, but they were still only common law plats. Under a strict interpretation of 605 ILCS 5/6-315, the mere entry in a ledger book can create a statutory dedication; indeed, the statute suggests that one can have a statutory dedication without even having a recorded document!

Right-of-Way Statutes

There are many statutes that concern right-of-way issues. Those of particular interest to the real estate attorney include the following:

- 65 ILCS 5/11-135-7 allows for the construction of water mains along, upon, under, and across rights-of-way.
- 605 ILCS 5/2-202; Any road that has been used by the public for fifteen years as a highway becomes a public highway.
- 605 ILCS 5/4-501; 65 ILCS 5/11-61-1; Roads can be created by purchase or by eminent domain.
- 605 ILCS 5/9-113; A public utility has the right, with limitations, to install underground utilities in a statutory dedicated road. Note that Public Act 93-357, effective January 1, 2004, adds new subsection (h-1) to 605 ILCS 5/9-113 and drastically amends subsection (l).
- 765 ILCS 205/1 *et seq.*; The Plat Act

Right-of-Way Vacations

Generally speaking, when a street or road is vacated, ownership of the vacated parcel splits equally to the adjoining landowners. See 65 ILCS 5/11-91-2; see also *Piper v. Reder*, 44 Ill. App.2d 431, 195 N.E.2d 224 (1963); *Prall v. Burckhardt*, 299 Ill. 19, 132 N.E. 280 (1921).

This simply illustrates the concept set forth earlier. In a common law plat, the owners of the lots own to the center of the street, but subject to an easement in favor of the public. Thus, once the street is vacated, said lot owner still owns to the center of the street, but now in fee simple, as the easement no longer exists. It is virtually lifted away, leaving the lots still owned by them, but now no longer subject to the easement. (See Figure 1)

The vacation of a right-of-way within a statutory plat would have the same result. 65 ILCS 5/11-91-2 provides that upon vacation, the roadway “vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the street or alley has been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the street or alley had been acquired by the owners as a part of the land abutting on the street or alley.”

But there are exceptions to this rule. For example, if a street runs between two lots in two different subdivisions, and only one subdivision created the street, then upon vacation, the entire street vacates in favor of the lot in the subdivision that created the street. Although there is no basis in statutory law, many title insurance professionals feel that if a subdivided lot is on one side of a street, and on the other side there is no subdivision, but instead there is a creek, river, or railroad lines, then upon vacation, the entire street would vacate in favor of the subdivision; none of the street would inure to the creek, the river, or the railroad tracks. Indeed, this conclusion is suggested in 605 ILCS 5/6-302.

Chavda v. Wolak

In 1997 Public Act 90-179 amended the Illinois Municipal Code (65 ILCS 5/11-91-1). It provided that if only one abutting landowner makes payment in consideration for the vacation of a street or alley, then the *entire width* of the street or alley inures to the benefit of that one landowner. This amendment is contrary to years of common law and statutory law, which, as noted above, provides that in the event of such a vacation, title would, generally speaking, split down the middle between abutting landowners.

Consequently, when this amendment became law, title companies refused to follow it, arguing that it was probably unconstitutional under the 5th and 14th amendments, in that it amounted to a taking of land without just compensation and without due process. But in 1999 the Illinois Supreme Court in *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137, 242 Ill. Dec. 606 (1999), ruled that the statute was constitutional. As a result,

title companies now insure such right-of-way vacations. Title companies will closely review the vacation ordinance to make sure that it conforms to the statute, as amended. For example, the title company will request evidence that any required compensation has been paid. As the vesting of the vacated right-of-way depends on the nature of this compensation, it will make sure that this compensation is consistent with the devolution of title. If the vacation ordinance provides that compensation is to be paid by only one abutting owner, then title to the vacated street or alley must vest fully in that one abutting owner. If the vacation ordinance provides that compensation is to be paid by more than one but less than all abutting owners, then title to the vacated street or alley must vest fully in these abutting owners. If the vacation ordinance provides that compensation is to be paid by all abutting owners, then title to the vacated street or alley must vest fully in all these adjoining owners. If the vacation ordinance provides that no compensation is required, then title to the vacated street or alley must vest fully in all abutting owners.

Vacation Statutes

There are many statutes that address right-of-way vacations. These may be of particular interest to the real estate attorney:

- 55 ILCS 5/5-1036; Vacation of town plats
- 65 ILCS 5/11-61-2; 65 ILCS 5/11-91-1; 65 ILCS 5-11-91-2; Municipal vacations
- 605 ILCS 5/5-109; 605 ILCS 5/5-110; County right-of-way vacation
- 605 ILCS 5/6-301 *et. seq.*; Township or district road vacation
- 70 ILCS 805/6; Forest Preserve right-of-way vacations
- 605 ILCS 5/9-127; Highway vacations
- 765 ILCS 5/7a; Legal description of land appurtenant to vacated right-of-way
- 765 ILCS 205/6; 765 ILCS 205/7; Plat vacations

Vacating "Future" Streets

A plat may contain language indicating that one or more strips of land are a "future street" or "future alley." In such instances an ordinance of vacation would be a rejection of an offer to dedicate. Under the strict letter of the law, title to the strip after such a purported vacation would remain in the developer's name unless the strip was expressly conveyed by the developer to the adjoining lot owner or owners. However, it

is possible that a title company would insure that the adjoining neighbor or neighbors own the strip after the vacation without requesting a deed from the developer or his or her heirs, especially if the plat had been prepared many years before the vacation and no intervening documents affecting the “future” right-of-way had been recorded since the plat was recorded.

The Vacation of Roads Adjoining Irregularly-Shaped Parcels

There does not appear to be a statute or court decision in Illinois that offers a definite rule for determining how *all* shapes and sizes of vacated streets are apportioned to their adjacent lands. The only statute that is of any help is 65 ILCS 5/11-91-2, which provides, as indicated above, that upon vacation the roadway “vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the street or alley has been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the street or alley had been acquired by the owners as a part of the land abutting on the street or alley.” (Similar wording is contained in 605 ILCS 5/9-127)

Tracy v. City of Chicago, 24 Ill. 500 (1860) concerns the vacation of a right-of-way near the Chicago River and how the vacated land should be apportioned to the adjoining irregularly-shaped lots. The court determined that the lot lines should be extended along said lines and not run at right angles to the river. However, this decision was based on the court’s perceived intent of Chicago’s common council in passing the vacation ordinances, as gleaned from a parsing of the ordinances, and not on some general principle.

The rule set forth in 65 ILCS 5/11-91-2 is easy to apply when the lots are square or rectangular. See Figure 1. But problems arise when the adjoining lots are not square or rectangular and when the sidelines are not parallel to each other.

Figure 2 and Figure 3 demonstrate differing ways of apportionment where lot lines are not parallel and the sidelines intersect the street lines at sharp angles.

Figure 2 shows apportionment by extending the lot lines in their own direction. (This is similar to the holding in *Tracy v. City of Chicago*, *supra*.) However, this may give adjacent lot owners a greater or lesser share of the vacated street than their frontage would justify.

In Figure 3, the lot lines are extended perpendicular to the sidelines of the street, as opposed to extending the sidelines of the lot in their own direction.

An entirely different problem develops when the lots abut a curved street that is vacated. In such a case, the sidelines of the vacated parcels might be determined by

extending the sidelines radially to the center of the curved street. The sidelines are the radii of the curve of the street extended from the center of the curve to the center of the vacated street. See Figure 4; see also Curtis M. Brown, Walter G. Robillard, and Donald A. Wilson, *Boundary Control and Legal Principles*, 3rd ed. (New York: John Wiley and Sons, 1986), pp. 189-96.

Because of the problems inherent in the vacation of irregular lots, the title company may refuse to insure title to the vacated street in the owner of an adjacent irregular lot, unless the boundaries of the vacated street have been adjusted between the various lot owners by a private agreement or by court order. If surveyors are asked to prepare a plat of vacation of an irregularly shaped parcel, they should consult with the municipality as to how the parcel is to be divided.

Utilities in Vacated Rights-of-Way

When insuring vacated roads and streets, title insurance companies have traditionally wrestled with the problem of determining whether utility facilities remain in said rights-of-way. Unless the municipality and the various utility companies provide the title company with information about the possible existence of utility facilities within the vacated street, road, or alley, the title company would historically raise a title policy exception for possible unrecorded utilities falling in the vacated area. Does a relatively recent statutory amendment provide the impetus for a modification of title company procedure?

Effective July 9, 2004, 65 ILCS 5/11-91-1 was amended to change an operative word from "may" to "shall":

[A]nd if there are any public service facilities in such street or alley, or part thereof, the ordinance *shall* (formerly "may") also reserve to the municipality or to the public utility, as the case may be, owning such facilities, such property, rights of way and easements as, in the judgment of the corporate authorities, are necessary or desirable for continuing public service by means of those facilities and for the maintenance, renewal and reconstruction thereof. (See also 605 ILCS 5/9-127(a).)

Thus, if the vacation ordinance was enacted after July 9, 2004, and did not reserve any utility easements in the land in question, will the title company choose to rely on the statute and assume that there are no operating utilities remaining in the right-of-way? That is, is it possible that the title company would be willing to insure the vacated street, road, or alley without raising a title policy exception for possible utilities falling within the vacated right-of-way? This is a fairly risky proposition and should be discussed with the title company, who will probably decide this issue on a case-by-case

basis. Factors it would consider include whether the ordinance specifically states that there are no utilities within the right-of-way.

Selling or Conveying the Vacated Right-of-Way

Public Act 94-476, effective August 4, 2005, amends section 9-127 of the Illinois Highway Code; see 605 ILCS 5/9-127(d). The statute, as amended, provides that when a highway authority vacates a highway or part thereof, it may sell the vacated land to any third party at fair market value if the authority has a fee simple interest and if a right of first refusal at a fair market value has been given to the adjoining landowners.

But how does one determine that the highway authority has a fee simple interest in the land? This might be a simple matter if the authority were deeded the property. But what if the land in question were dedicated to the authority in a plat of subdivision? As discussed above, in the absence of a judicial finding, it is difficult, if not impossible, to conclusively determine that a plat of subdivision is a statutory plat. Also, insuring "around" a right of first refusal is always a risky proposition for the title company. How many days notice should be given the adjoining landowners? What if these land owners refuse to execute a release of their rights of first refusal? The court in *Crestview Builders, Inc. v. Noggle Family Ltd. Partnership*, 352 Ill.App.3d 1182, 816 N.E.2d 1132, 287 Ill. Dec. 921 (2d Dist., 2004) ruled that a right of first refusal that did not specify either a price or a method by which the price could be determined was unenforceable. Does that mean that a right of first refusal that does not meet this threshold test is not an effective right of first refusal under this statute?

When insuring the conveyance of a lot and its appurtenant portion of a vacated right-of-way, the title company will probably request that the deed include the legal descriptions of both parcels. However, since October 3, 1969, when a street or alley is vacated, and when the lot adjacent to this vacated parcel is conveyed, the vacated parcel does not have to be specifically included in the deed in order for it to be conveyed. As long as the deed does not specifically *exclude* the vacated parcel, the deed conveys the vacated parcel as well. See 765 ILCS 5/7a.

Conclusion

It is clear that the area of right-of-way dedications and vacations is replete with many issues and potential concerns. It is hoped that this article will be useful to the real estate practitioner when he or she has to analyze a right-of-way dedication or vacation problem.

Acknowledgments: All illustrations are courtesy of Michael Filipski of Compass Land Surveying Ltd., Aurora, Illinois.

Figure 1

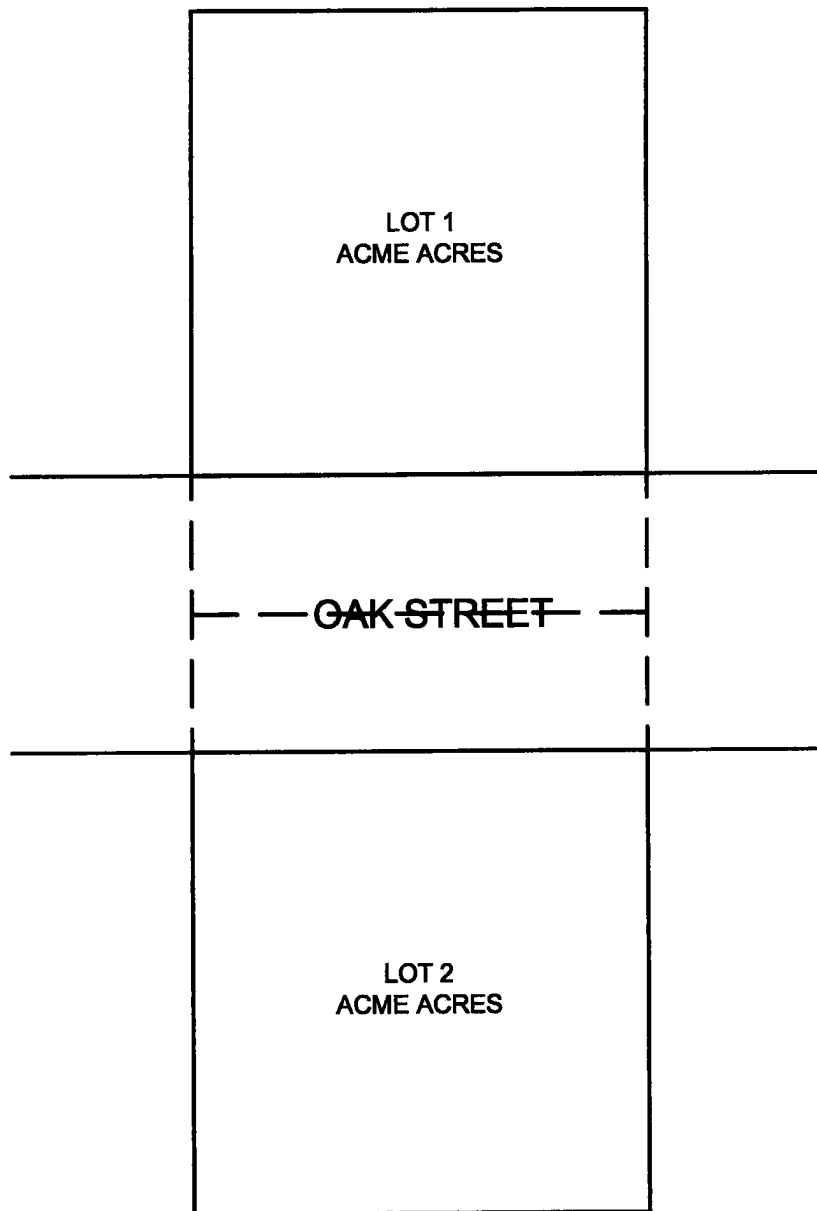


Figure 2

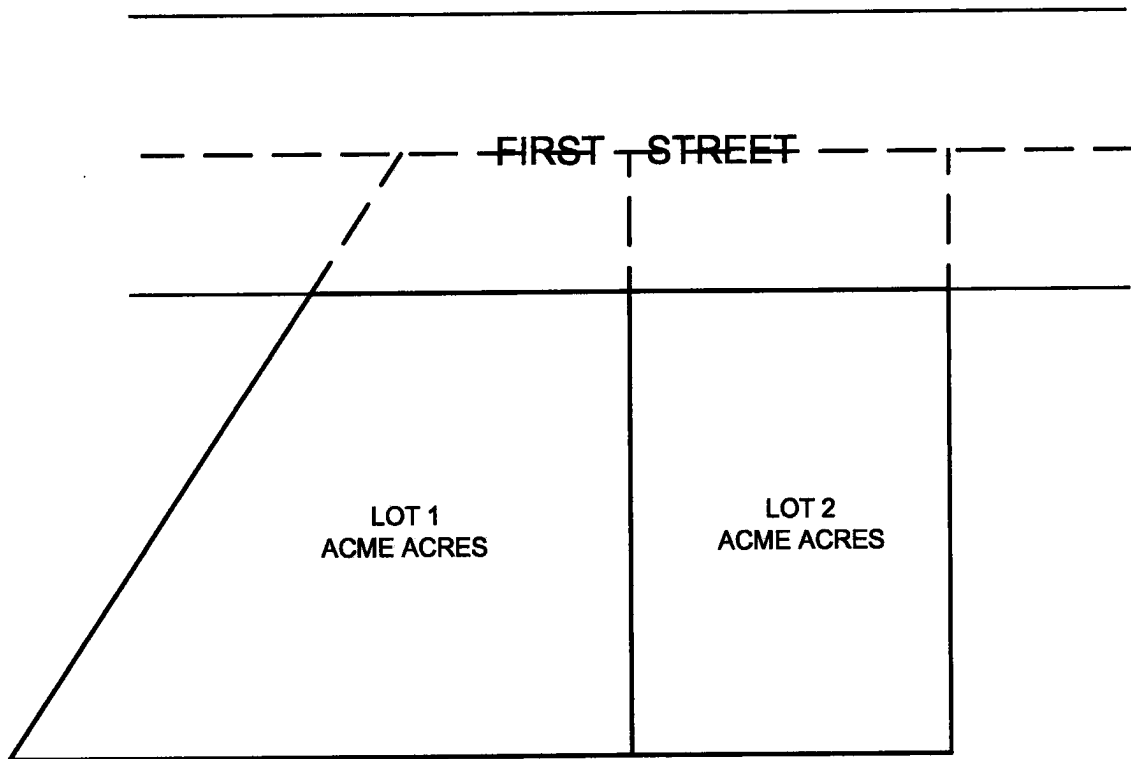


Figure 3

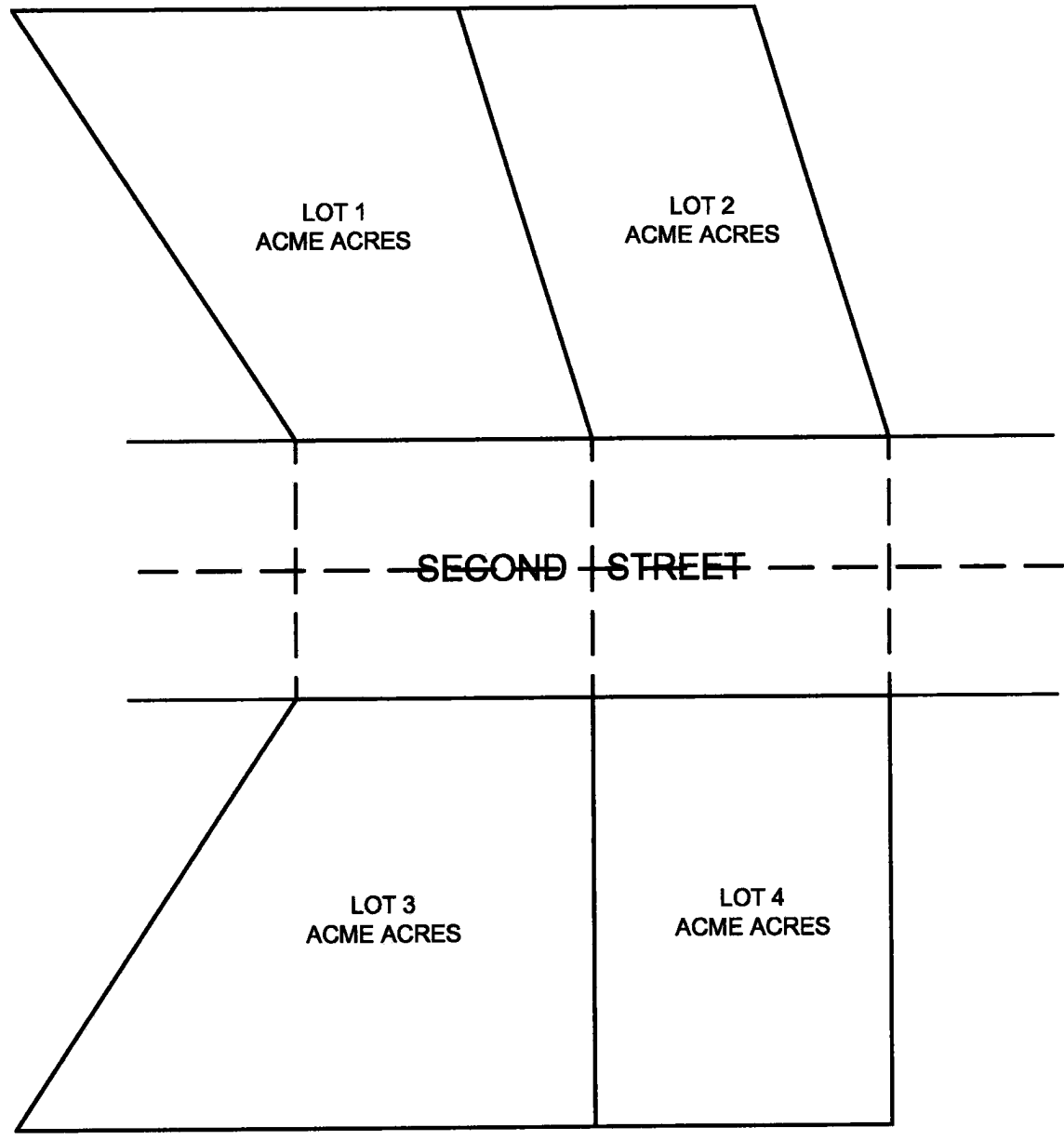
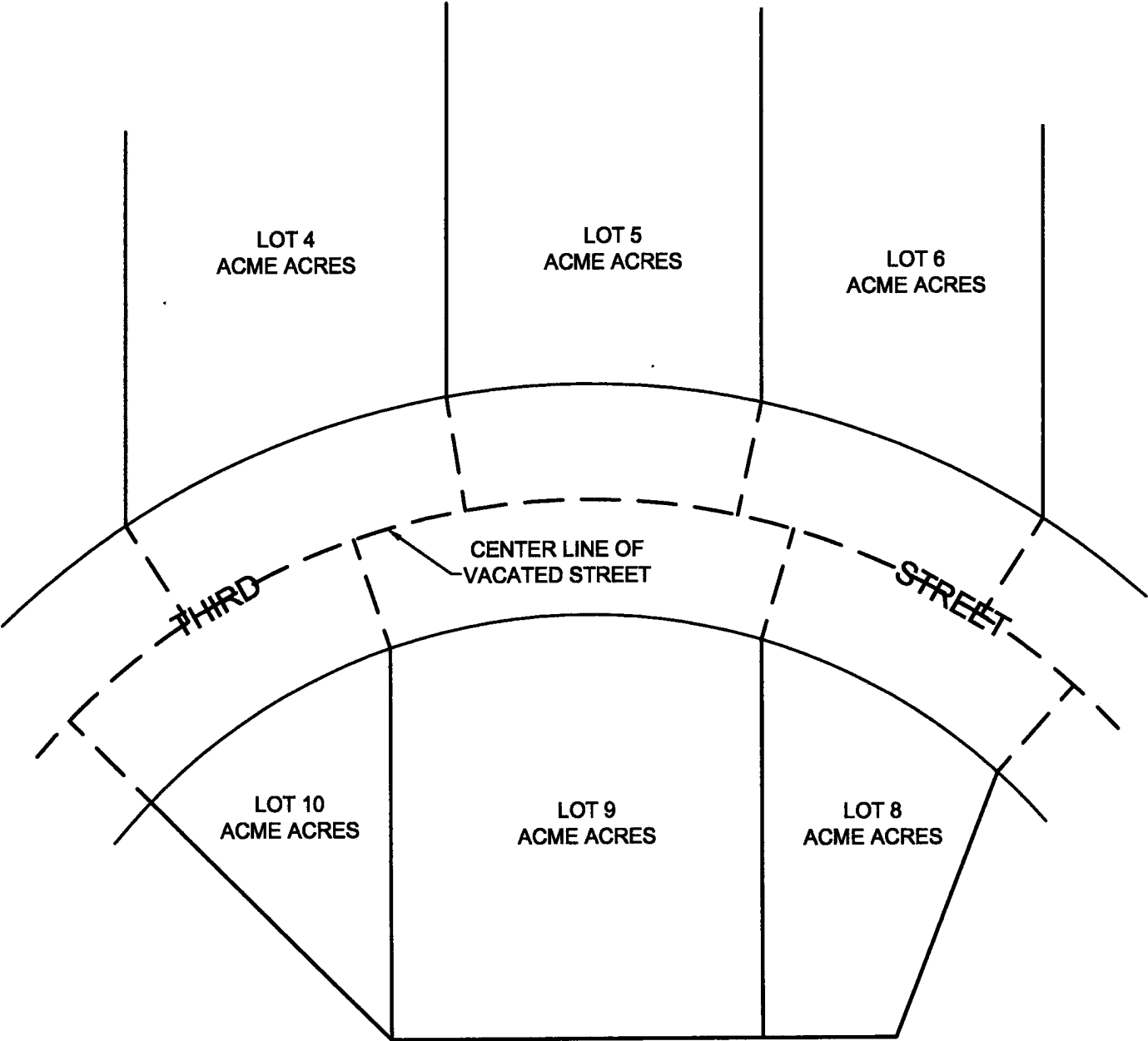


Figure 4



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