

California Road, Trail and Beach Access Law

Summary for Activists

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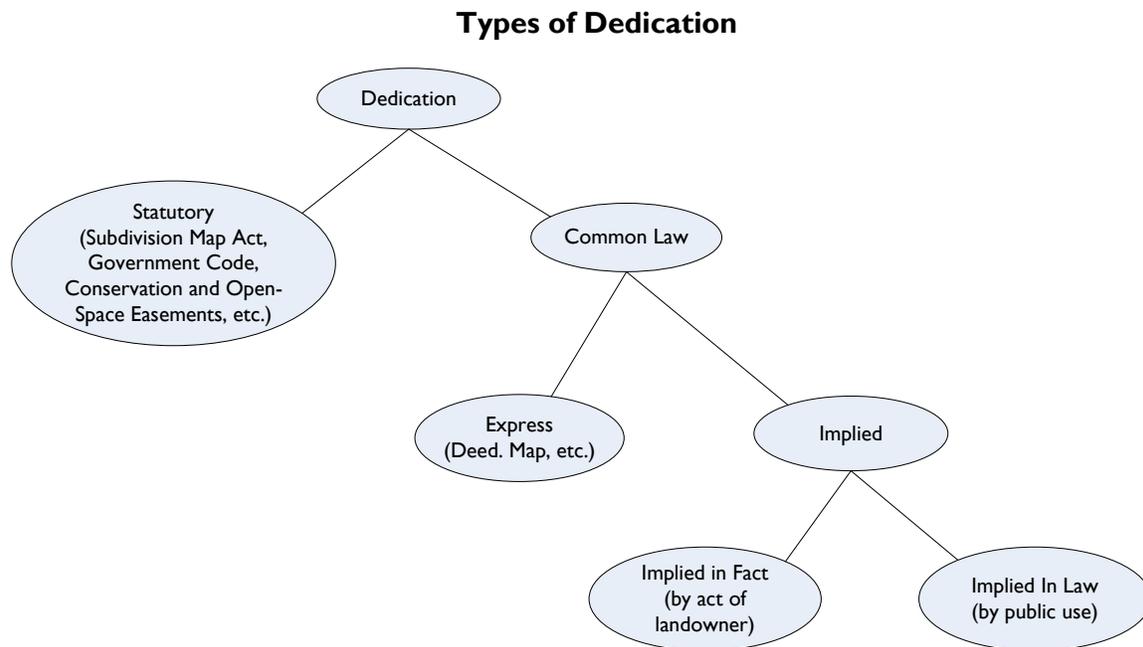
I. Introduction

Private landowners continue to block trails and roads throughout the state, and to block access to beaches and other coastal resources. In many cases the public has had access for decades and suddenly finds it cut off.

The three prongs of activism are grassroots, political and legal, and of course they're interconnected. For many issues grassroots activism with a political target is the preferred tool, but in this case the law provides for relatively efficient access to good remedies. The purpose of this document is to discuss how we activists can use the law to re-open our access to recreational land.

A. Terminology

The following taxonomy of dedication comes from a comprehensive article on the subject in *California Jurisprudence*.¹



This terminology is used fairly consistently throughout the legal literature and case law, except for “common law dedication,” which is sometimes used to mean an implied-in-fact dedication.² For this reason it's best to define this term before using it, or avoid it.

¹ 26 Cal Jur 3d 237

² See *Hanshaw v. Long Valley Road Assn.*, 116 Cal.App 4th 471, 477 (3rd Dist. 2004), *Union Transp. Co. v. Sacramento County*, 42 Cal 2d 235, 240 (1954)

A **dedication** of land occurs when the landowner offers the land for public use and the offer is accepted by a public entity or by the public. Outright ownership may be offered, or just an easement for the public to use the land for specific purposes.

Statutory dedications are those that are primarily governed by laws enacted by the California Legislature, such as the Subdivision Map Act.³ In the normal process of subdividing land for housing or other purposes the developer files a subdivision map with a local agency. The map may show roads, highways, trails, parks or other land areas that are to be dedicated to public use. This constitutes an offer to dedicate which, if accepted by a legislative or other local agency as described in the statute, becomes a public dedication.

Common-law dedications (as we will use the term in this document) are dedications where either the offer or the acceptance of dedication do not follow the rules laid out in a statute. They are based on common-law principles and California case law.

Express dedications (as we will use the term here) are similar to statutory dedications in that both the offer and the acceptance are evidenced by documents, for example a recorded deed offering the dedication and an acceptance of the dedication by the city council, embodied in an ordinance.

Implied dedications are those where either the offer or acceptance of dedication is made by acts other than those which would constitute an express or statutory dedication. In practice, the acceptance of an implied dedication is almost always via public use. In **implied-in-fact** dedications the offer is made by an explicit act of the landowner such as recording a tract map showing streets or trails to be dedicated to public use.⁴ The key is proof of the owner's intent to dedicate. In **implied-in-law** dedications the offer is made by an act or circumstance, such as long-term public use known to the property owner, which implies the owner's intent to dedicate.

B. Scope

This document focuses on public access to trails, but the same body of law is applicable, by and large, to roads, beaches and parks.

There is an overlapping body of law dealing with prescriptive rights that may be obtained by private parties based on use of the property for a sufficient period of time. We will be concerned here with rights that may be obtained by the public at large.

II. Public Access to Statutorily or Expressly Dedicated Land

In most cases, when a dedication has been statutory or express (i.e. there has been a written offer which has been formally accepted by an appropriate public entity), there will be little difficulty proving the public's right of access.

³ Cal. Gov. Code § 66475 et seq.

⁴ Or by the owner's acquiescence in public use, which is difficult to distinguish from implied-in-law dedication: "Dedication by adverse user has been characterized as one implied by law; one inferred from the acts of the owner or from his acquiescence in public user may be termed a dedication implied in fact." *Union Transp. Co. v. Sacramento County*, *supra*, 241

A. Attorneys' Fees Mandatory for Access Suits on Statutorily or Expressly Dedicated Trails

California law gives any user or potential user of a statutorily or expressly dedicated trail standing to sue and the right to recover attorney's fees for such an action:

Whenever any person unlawfully closes any public trail, any person who uses such trail or would use such trail, and any association, corporation or other entity whose membership as a whole is adversely affected by such closure may bring an action to enjoin such closure.

The prevailing party in such action shall be entitled to recover reasonable attorney's fees, in addition to court costs.

As used in this section, a public trail is any trail to which the public in general has a right of access, which right is established pursuant to a recorded document conveying to a political corporation or governmental agency, specifying the nature of such public trail, specifically describing the location thereof, and naming the record owners of the real property over which such trail exists if created by a license, permit or easement. It includes, but is not limited to, pedestrian, equestrian, and boating trails, but does not include any public street, road, or highway.⁵

This states that the offer of dedication must be via a recorded document, but doesn't explicitly require a formal acceptance of the offer by the city council or other public body. It leaves the door open for your lawyer to argue that attorneys' fees are mandatory even when acceptance of the offer to dedicate has resulted from public use. Note that it requires the trail to be mentioned or depicted explicitly on the conveying document, even when that document conveys fee-simple (full) title to the land.

III. Implied Public Dedication

A. Offer

An offer to dedicate is implied in law when it is inferred from prolonged public use known to the landowner. An offer to dedicate is implied in fact when it results from a document submitted to a public entity or recorded by the landowner.

There is another type of implied-in-fact dedication based on "acquiescence in public use," very similar to implication in law, except that consent of the landowner must be clearly proved and the period of public use may be shorter than 5 years.

If a dedication is sought to be established by a use which has continued a short time – not long enough to perfect the rights of the public under the

⁵ Cal. Code Civ. Proc. § 731.5

rules of prescription – then truly the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved and none would be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because the offer to dedicate, and the acceptance by use, both being shown, the rights of the public have immediately vested.⁶

1. Offer Implied in Law

In 1970, the California Supreme Court, in *Gion-Dietz*,⁷ decided that two beach properties and a road leading to one of them, though privately owned, had been implicitly dedicated to public use because they were used for a period of more than 5 years by the public as if they were publicly owned, without significant objection from the property owner. This decision was something of a bombshell, causing a lot of controversy, even though the California Supreme Court later commented that it was applying existing law: "...*Gion-Dietz*, far from signaling the momentous 'redefinition of property rights' which defendant would depict, simply represents a restatement and clarification of well-established former law and an application of that law, as so restated and clarified, to a unique pattern of factual circumstances."⁸ Gallagher et al., *Implied Dedication: The Imaginary Waves of Gion-Dietz*⁹ reviews the history of implied public dedication in California from 1854 on, showing that *Gion-Dietz* was in fact applying well-settled law.

Largely in reaction to this case, the California Legislature passed a statute that became Section 1009 of the California Civil Code, stating that, starting with the effective date of the statute (March 4, 1972), such public use would no longer constitute a public dedication of the land. It declared that dedications of land to public use could only be made explicitly in writing by the landowner.

In *Friends of the Trails v. Blasius*,¹⁰ the California Court of Appeal (3rd district) affirmed that § 1009 applies only prospectively (i.e. only to the period starting when the statute went into effect), so five years of continuous public use prior to Mar. 4, 1972 still constitutes an implied public dedication.

Substantial public use is required for an implied-in-law public dedication. In *County of Orange v. Chandler-Sherman Corp.*,¹¹ which ruled that the use of the beach in question was not sufficient to create an implied public dedication, the Court of Appeals held that

it is obvious that one person using another person's private beach once a year for five years cannot create an implied dedication. Just as obviously, the daily unrestricted use of that same beach for five years by thousands of sun worshippers and swimmers together with public maintenance of that beach will,

⁶ *Schwedtle v. County of Placer*, 108 Cal 589, 592 (1895)

⁷ *Gion v. City of Santa Cruz* consolidated with *Dietz v. King*, 2 Cal.3d 29 (1970)

⁸ *County of Los Angeles v. Berk*, 26 Cal.3d 201, 213 (1980)

⁹ 5 Sw. U. L. Rev. 48 (1973)

¹⁰ 78 Cal.App.4th 810 (3rd Dist. 2000)

¹¹ 54 Cal.App.3d 561 (4th Dist. 1976)

under *Gion-Dietz*, amount to a dedication. Between these two extremes are presented questions of fact as to just how much use is necessary to indicate to an owner that his property is being dedicated.¹²

The court found that, “while the beach was used for surfing, fishing, swimming, picnicking, and sun bathing, the use was by small numbers rarely exceeding 12 to 15 people on the beach at any one time,”¹³ and, therefore, this use wasn’t sufficient to create an implied dedication.

a) Coastal Zone

The term “coastal property” is used here to mean the area defined in *Cal. Civil Code § 1009*: “coastal property which lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean...or between the mean high tide line and the nearest public road or highway, whichever distance is less.”

Both of the cases in *Gion-Dietz* involved beach property; the issue was whether use by the public over more than 5 years constituted an implied public dedication of the beach, and the court decided that it did. Implied public dedication is not limited to trails and roads.

The portion of *Cal. Civ. Code § 1009* that declares that public use after Mar. 1972 will no longer constitute public dedication does not apply to coastal property, so public use after 1972 can still constitute an implied dedication there. The section does provide property owners with ways to notify the public that public use is by permissive (and hence doesn’t lead to an implied dedication):

1. Posting signs every 200 feet along the property boundary saying “Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code,” and renewing them at least annually if they are removed;
2. Publishing the above notice annually in a general-circulation newspaper;
3. Recording a notice with the County Recorder saying “The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: Section 813, Civil Code.”;
4. Entering into a written agreement with any federal, state, or local agency providing for the public use of such land.

Methods 1 and 3 are applicable to all property, not just coastal property, per the referenced code sections. Methods 2 and 4 are statutorily effective only for the coastal zone, though they may allow a property owner to successfully argue in court that public use of the property is by permission. If the owner of a coastal property does not take one of these actions, then public use after 1972 of the sort described above can constitute an implied public dedication.

¹² *County of Orange v. Chandler-Sherman Corp, supra*, 565

¹³ *Id.* 566

b) Non-Recreational Use

Activists might be interested in continuing to use a road for non-recreational use such as motorized use by the general public, e.g. to be able to drive to a trailhead, lake or other destination.

The law is less clear concerning whether non-recreational public use during a period of five years even after 1972 can constitute an implied public dedication. In *Hanshaw v. Long Valley Road Assn.*,¹⁴ the Court of Appeal makes pretty clear its position that Civil Code § 1009 applies only to recreational use and does not prevent non-recreational use after 1972 from ripening into a public dedication. However this is inconsistent with the majority of case law. Your lawyer can find support in *Hanshaw* if your case involves non-recreational public use after 1972, especially if you're within the jurisdiction of the Third District Court of Appeal.

c) Public Property

Property owned by the state or a public entity, or property that is owned by a public utility and dedicated to a public use is not subject to implied-in-law public dedication.¹⁵

d) Dedication in Favor of a Public Entity

"A government entity using private lands by an expenditure of public funds on visible improvements... in such a manner so that the owner knows or should know that the public is making such use of his land...shall after five years ripen to confer upon the governmental entity a vested right to continue such use."¹⁶

2. Offer Implied in Fact

An implied-in-fact offer to dedicate will sometimes be an express offer based on a written document such as a map or a deed. It need not meet statutory dedication requirements but it must clearly demonstrate the landowner's intent to dedicate the property for the particular purpose (road, trail, park, etc.). "The 'intent' thus found is obviously highly artificial."¹⁷ Informal maps used to sell nearby parcels or wording in deeds conveying those parcels may indicate an intent to dedicate, as may an oral statement of the landowner.¹⁸

To find documents that may imply dedication, review documents recorded against the property by the County Recorder, and review any tract maps filed with a city or county agency (e.g. City Planning). Review deeds and other title information for adjacent parcels. Review any available sales maps and literature drawn up by the property owner.

¹⁴ *supra*, 484

¹⁵ *Cal Civ. Code* § 1007

¹⁶ *Cal Civ. Code* § 1009

¹⁷ Stoebuch and Whitman, *The Law of Property* § 11.6 848 (3d ed., West 2000)

¹⁸ "A common law dedication does not require a writing, nor must the formalities of any statute, such as the statute of frauds, be satisfied." *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.*, 30 Cal.App.3d 579 584 (5th district 1973)

Civil Code § 1009 clearly does not apply to implied-in-fact offers to dedicate, so it doesn't destroy the effectiveness of implied-in-fact offers made after 1972 as it does for implied-in-law offers.

B. Acceptance of Offer

Offers to dedicate must be accepted by the public to effect the dedication. In principle, either an express and implied offer could be accepted either expressly or by implication, but in practice implied offers to dedicate are not expressly accepted.

1. Express Acceptance

A formal resolution of a legislative body such as the city council accepting an express offer to dedicate (e.g. on a tract map) will conclusively demonstrate public dedication.

2. Implied Acceptance

Public use is the most common form of implied acceptance of an offer to dedicate, and may be used to accept any type of offer to dedicate. The use need not "be for the five-year prescriptive period. It may, indeed, be but a short time, 'because the offer to dedicate, and the acceptance by use, both being shown, the rights of the public have immediately vested.'"¹⁹

IV. Your Case

A. What You Need to Prove to Make Your Case

Usually you will want to prove as much as you can, using both the implied-in-law and implied-in-fact theories for the offer, and public use for the acceptance.

1. Elements of an Implied-in-Law Dedication

The general rule is: **Five years of continuous, substantial use of a trail or road by various public groups for recreational purposes prior to 1972 with knowledge of the property owner constitutes an implied public dedication.** In the coastal zone, as discussed above, the use does not need to be prior to 1972.

You will need to prove the following:

- "Various groups" of the public, not just "a limited and definable number of persons"²⁰ used the road or trail continuously for recreational purposes over a period of 5 years prior to March 4, 1972.
- The public's use of the property was substantial.
- The public used the property as if it were public property, believing that they had the right to do so.

¹⁹ *Gunn v. Fontes* 148 Cal.App.2d 351, 355-356 (1st district, 1957)

²⁰ *Gion-Dietz, supra*, 39

“Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public...”²¹

Paul Ayers argues, in *Save the Altadena Trails v. La Vina Homeowners Assoc.*²² that native-american use of a trail, if it can be proved for any 5-year period prior to 1972 (e.g. 1492-1496) can establish an implied dedication.

2. Elements of an Implied-in-Fact Dedication

You will want to find the strongest evidence you can of the owner’s “intent” to dedicate. This can be one or more of the following:

- A deed for the property in question mentioning the road, trail or beach, somehow indicating or implying its public use
- A map showing the road, trail or beach, prepared or referenced by the property owner, somehow indicating or implying its public use
- Evidence of an oral declaration of the property owner of (or implying) intent to dedicate.

B. What the Landowner Needs to Prove to Counter Your Claim

If the property owner can prove one of the following it may defeat your case:

1. Permission

If the property owner can prove that public use of her property was by permission, this will counter your implied-in-law (but not implied-in-fact) dedication theory. Here are two ways for the landowner to conclusively prove that use of the property was permissive:

- “[I]f the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: ‘Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.’”²³
- The property owner may record a document in the County Recorder’s office stating that the public’s use of his land is by permission.²⁴

There are, of course, other ways for the owner to prove use was by permission.

2. A Bona Fide Attempt to Prevent Public Use

“Whether an owner’s efforts to halt public use are adequate in a particular case will turn on the means the owner uses in relation to the character of the property and the extent of public use. Although ‘No Trespassing’ signs may be sufficient when only an occasional

²¹ *Id.* 39

²² Pl. Jt. Opposition to Mot. For S.J., *Save the Altadena Trails v. La Vina Homeowners Assoc., County of Los Angeles, et. al.* (2007)

²³ Cal. Civ. Code § 1008

²⁴ Cal. Civ. Code § 813

hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner's activities have been adequate."²⁵

3. No Intent to Dedicate

"Competent proof tending to show lack of an intention to dedicate or to offer to dedicate to public use, or to show lack of acquiescence in adverse public user, includes the landowner's conveyance to a private grantee of the property claimed to have been dedicated; proceedings instituted by the landowner seeking compensation for land appropriated by the public; the filing of an answer in a condemnation proceeding, subsequently dismissed, seeking compensation for the taking of the land in question; failure to mention certain land in a corporate resolution, where the resolution is relied on to establish the dedication of other land; prior litigation tending to show an intent by the owner inconsistent with dedication; and the payment of taxes."²⁶

4. Revocation of the Offer to Dedicate

A property owner may revoke an offer to dedicate before it is accepted by the public. The revocation may be effected in a variety of ways such as using the property in a way that is inconsistent with public dedication, filing a map delineating the land as private property. The existence of such a revocation will depend on the overall facts and circumstances in the case.²⁷

C. Steps to Take

The best way to prove your case will be with as many witnesses and as much documentation as possible testifying to the elements listed above. Ideally witnesses for an implied-in-law case should be affiliated with different groups. Successful cases have had as many as 19 witnesses,²⁸ and as few as 3.²⁹

The steps to go through to pursue one of these cases are:

- Document the facts. Find witnesses to appropriate public use and document what they can testify to.
- Hire a lawyer, preferably one specializing in land-use issues.
- Negotiate with the landowner. Perhaps you can get her to record an easement over the trail or road in favor of the public.
- If negotiations fail, file a lawsuit.

²⁵ *Gion-Dietz, supra* 41

²⁶ 26 Cal. Jur. 3d § 68 357-358

²⁷ *Id.* § 36 304-305

²⁸ *Friends of the Trails v. Blasius, supra*

²⁹ *Burch v. Gombos* 82 Cal.App.4th 352 (6th Dist. 2000)

D. Attorneys' Fees Should be Awarded in Public-Access Cases

Section 1021.5 of the California Code of Civil Procedure provides that attorneys' fees may be awarded to successful parties in an action that has resulted in significant public benefit.

Attorneys' fees were an issue in *Friends of the Trails v. Blasius*. The Court of Appeal found that "the right to public ownership of public property, the easement in issue" was an "important right," thus satisfying one of the requirements for awarding fees. The court also decided that the Legislature's adoption of Civil Code § 1008 did not indicate that implied public dedication was against the public interest, which would bar the award of attorneys' fees.³⁰

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³⁰ *Friends of the Trails v. Blasius, supra*, at 833-835