

**CITY OF BETHLEHEM
OFFICE OF THE CITY SOLICITOR**

SUBJECT: Tenth Avenue – Nitschmann Middle School

TO: Cynthia H. Biedenkopf, City Clerk

FROM: Matthew J. Kloiber, Assistant City Solicitor

DATE: August 27, 2014

The Law Bureau has reviewed the materials forwarded to it by the City Clerk that were submitted in support of the Bethlehem Area School District's Petition to Vacate a Portion of Tenth Avenue. Vacating the portion of Tenth Avenue on the grounds of Nitschmann Middle School is considered necessary to the project involving renovation of the School.

The Nitschmann Project (Project) was recently brought before the Bethlehem Planning Commission (Commission) at its August 14th, 2014 meeting. The District apprised the Commission that, as part of this project, it would be seeking the vacation of a portion of Tenth Avenue and, separately, a portion of Ninth Avenue, at the next Bethlehem City Council (Council) Meeting. The District's vacation request for Ninth Avenue was placed on the Council's Agenda for its August 19th, 2014 session; there it was referred to the Commission. The next Commission meeting is on September 11th, 2014. The Tenth Avenue vacation request was withheld from the Council agenda for further review of a question submitted by the Council Clerk.

The City Clerk inquired to the Law Bureau whether the twenty-one year rule¹ applies to the vacation of the portion of Tenth Avenue right of way that the Bethlehem Area School District is seeking. As noted by Attorney Faul in his letter to the City Clerk,

¹ The twenty-one year rule provides that:

Any street, lane or alley, laid out by any person or persons in any village or town plot or plan of lots, on lands owned by such person or persons in case the same has not been opened to, or used by, the public for twenty-one years next after the laying out of the same, shall be and have no force and effect and shall not be opened, without the consent of the owner or owners of the land on which the same has been, or shall be, laid out.

Section 1 of the Act of May 9, 1889, P.L. 173, No. 192, *as amended*, 36 P.S. § 1961. Under this rule, when a City does not open the street within twenty-one years, "the abutting lot owners acquire the fee in the street to the center line." Leininger v. Trapizona, 645 A.2d 437, 440 (Pa. Cmwlth. 1994). This provision does not eliminate private rights that may exist. Id.; see generally, Estojak v Mazsa, 522 Pa. 353, 562 A.2d 271 (1989) (discussing Section 1961 in a Bethlehem case and noting that private easement rights may remain even if the city fails to open the street). In addition to Section 1961, "[W]hen a municipality vacates a street, the public's right to use it is terminated, and the property automatically reverts to the abutting landowners." Pennsylvania Venture Capital, Inc. v Planning Commission of the City of Bethlehem, 1199 CD 2012 (Pa. Cmwlth 1/23/2013) (persuasive authority discussing Section 1961 and street vacating process under the Bethlehem Subdivision and Land Development Ordinance). "Thus, whether by the passage of 21 years or [by the City's formal] vacation of the paper streets" through the Commission, the public rights to these paper streets (unopened streets) is foreclosed. Id.

the proposed Nitschmann Middle School “will be built on a portion of this section of Tenth Avenue that is being vacated, so that vacation of the road is necessary for this reason.” Letter of Terrence Faul Esq. to City Clerk Cynthia H. Biedenkopf, dated August 14, 2014 (Letter). While the twenty-one year rule would apply² to prevent the City from opening the street and it would support grounds to vacate the street, it does not provide cause to deny action on BASD’s petition.

Additionally, we inquired to City Streets Department and City Engineer in relation to this request. They replied indicating no basis for objection to this request.

Therefore, the Law Bureau recommends the Tenth Avenue vacation request be placed on Council’s agenda for September 2nd, 2014, and, at that meeting, that it be referred to the Planning Commission for addition to its September 11th, 2014 meeting agenda. The Commission can then consider the request at its September 11th, 2014 meeting with the companion petition to vacate Ninth Avenue.

This recommendation is responsive to the request of District Engineer M. Arif Fazil to City Solicitor William P. Leeson, dated August 22nd, 2014, in which he asks for an expedited review of the street vacations; his letter is attached to this memorandum.

Copies To: Mayor Donchez
City Council Members
Council Solicitor Spirk

By: 

² It appears the property at issue was dedicated and accepted by the City by Ordinance 428, adopted by Bethlehem City Council on June 16, 1924. However, as averred by Attorney Faul, this stretch of Tenth Avenue “has never been opened.” (Letter.) “Even where formal acceptance is shown to have been effected, such acceptance, in the absence of an actual opening or use, is not ordinarily sufficient to forestall the operation of” Section 1961. Appeal of Gaus, 531 Pa. 133, 137, 611 A.2d 696, 698 (1992).



August 22, 2014

William Leeson
City of Bethlehem Solicitor
P.O. Box 1426
Bethlehem PA 18016-1426

RE: Nitschmann Middle School
Land Development Approval
DEI Project No. 13470

Dear Mr. Leeson:

As part of the land development approval for the new Nitschmann Middle School project, the City staff and planning commission noted that the unused portion of 10th Avenue that splits the district property was never vacated and this should be done as part of the land development approval process. We have prepared and submitted the necessary plans for this and the School District's Attorney, Mr. Terry Faul, along with Terraform Engineering, have been following up on this with the City. I also understand that the vacating of 10th Avenue has been referred and forwarded to your office for processing and direction.

The School District would need to have the plans approved by the City with all conditions satisfied by November, 30, 2014 for compliance with the Pennsylvania Department of Education PlanCon process. Therefore, on behalf of the Bethlehem Area School District we respectfully request your, the City staff, and City Council's assistance in expediting the processing of this request.

If you require anything please do not hesitate to contact me. Thank you in advance for your help.

Sincerely,

M. Arif Fazil, P.E., CCS, CCCA, LEED AP, CEM
Principal

CC: Dr. Joseph Roy
Terry Faul
Mayor Donchez
Darlene Heller
Matt Dorner
Mark Stein
Robin Breslin
Terry DeGroot