

**- OPENING, CLOSING,
ABANDONING, DISCONTINUING
AND MAINTAINING
COUNTY ROADS-**

By

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**Authority of
Commissioners Court**

- Make and enforce all reasonable and necessary rules and orders for the construction and maintenance of public roads except as prohibited by law.— Chapter 251, Transportation Code.
- Lay out and establish, change and discontinue public roads and highways and to exercise general control over all roads, highways, ferries and bridges in their counties. .—Chapter 251, Transportation Code.

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Powers over County Road

- Open Road
 - Maintain Road
- Discontinue Road
 - Maintenance Only
- Close Road to Public Use
 - Remains available for private use
- Vacate Road Entirely
 - Abandonment of all interest to centerline

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Limitations Upon Commissioners Court Authority

- County cannot maintain a private road.
 - *Godley v. Duval County*, 361 S.W.2d 629 (Tex.App.—San Antonio, 1962).
- County labor, materials and equipment cannot be used on private property.
 - Op. Atty. Gen. JM-200.
- Vital to have **clear authority** for maintenance on all roads in County inventory.

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Additional Comments Regarding Commissioners Court Authority

- Individual Commissioner has no authority to establish a county road-**but often has in past**.
- Roads should be classified as 1st, 2nd or 3rd Class Road. (Sec. 251.007 Transportation Code)-**but rarely are**, or Classification is at odds with facts on ground.
- Court may establish or change status of county road-within statutory limitations. (**only up**)
- Platting duties do not require acceptance of dedicated roads in subdivision-**common error**.

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Legislative Changes of 1981 (Chapter 281, Trans. Code)

- Counties of 50,000 or less under law
- After 1981, these "small" counties may acquire interest in roads **only**
 - **By purchase (contract of sale)**
 - **By condemnation (eminent domain)**
 - **By dedication of landowner in writing**
 - **By final judgment of adverse possession under prior law, based on common-law in effect prior to 1981.**
 - **After 9/1/81, no other means available.**

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Public Roads Belong to State

- Even if title is given to County, the road actually is held in trust for the State. *State v. Malone*, 168 S.W.2d 292 (1943)
- "Public" road does not necessarily equal "county" road.
- County must actually assume responsibility for maintenance of a public road for that road to be a county road. **Maintenance by county equals "county road". Maintenance by specific Order or by actual Conduct of maintenance over time.**
- County is not required to maintain any road, and can refrain from the assumption of maintenance.
- Mere dedication does not require maintenance, but is merely an offer until accepted by the county.

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A Public Road/But Might Not be a County Road

- ❖ A previously County maintained road that has not been actually maintained for years, or a dedicated public road that has not been accepted for maintenance by county, may not be "fenced" by the landowner, but this right is enforced by the affected parties.
- ❖ The landowner has no duty to maintain the "public road" however.
- ❖ Traffic hazards due to poor maintenance may threaten safety, but County has no obligation to repair road.
- ❖ Mere use by school bus is not enough.

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Attorney General Opinion JC-0503 May 15, 2002

- ❖ The County may bring a suit for declaratory judgment.
- ❖ Absent clear basis for determination of public status, a county commissioners court may not maintain a road that has not been officially established as a public road.
- ❖ Large counties (over 50,000) may make a self determination of public status, but smaller counties may not make such a determination.

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Prescriptive Rights

- To establish easement by prescription claimant must show that use of alleged servient estate was open, notorious, hostile, adverse, uninterrupted, **exclusive** and continuous for period of more than ten years. *Davis v. Carriker*, 536 S.W. 2d 246. See also Sec. 251.059, Texas Transportation Code. (30 Years use, 10 of 20 yrs. Public funds)
- Maintenance by County is some evidence of public use, but must be established by clear evidence of **uninterrupted** use prior to 1981.
- Prescriptive right applies to "beaten path" of road as well as sufficient land to maintain the road, i.e. maintenance easement. *Allen v. Keeling*, 613 S.W.2d (Tex. 1981)

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Implied Dedication

- Similar to Prescription, but slightly less demanding standard, in that it may be based upon:
 - **acts of landowner (longstanding use by public, maintenance by county) that would lead to implied dedication.**
 - There should be something more than mere passive acquiescence, i.e. request for maintenance, evidence of county funded fencing, county signage, statements of intention, etc.

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Express Dedication

- Person making dedication must have legal ability to do so; fee simple title.
- Dedication must **serve a public purpose.**
- **Owner must make an express offer of dedication, in writing, filed of record.**
- Dedication should identify land burdened, and specific route, length, width of road. Survey not mandatory, but recommended.

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Acceptance of Dedication

- Mere dedication imposes no duty to maintain upon County.
 - Langford v. Kraft, 498 S.W.2d 42, (Tex.App.—Ft. Worth, 1973), Comm. Ct. v. Jester, 199 S.W.2d 1004 (Tex.App.-Dallas, 1948).
- Acceptance should be reflected in an Order which specifically describes the road to be accepted for public maintenance.

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Purchase or Condemnation

- If need for a road is sufficient, the County may acquire the right of way by purchase. Property may be acquired without competitive bidding if a specific sole source.
- If negotiation for purchase fails, the right-of-way may be condemned by eminent domain. (Ch. 21, Property Code)

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Chapter 232, Local Government Code-Subdivisions

- Plat required if:
 - Land is outside of municipality.
 - Divided into two or more parts.
 - If a subdivision of the tract or lots provides for streets, alleys, squares, parks, or other parts of the tract intended to be used by the public, **or for the use of purchasers of the lots. (Omitted by 88th Legislature)**
 - Plat must be filed of record in accord with law.

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Subdivision Regulation

- Mere platting of a "public road" and approval by Commissioners Curt **does not** obligate County to maintain road.
- Approval of Plat does not mean acceptance of roads dedicated in plat.
- Separate "acceptance" necessary, and that acceptance should be very specific.
- Use of term "approval" **rather than** "acceptance" of plat is recommended.

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Subdivision Regulations

- County may require standards for roads and drainage, but requires hearings and notice.
- County may require a bond to insure compliance.
- County may require groundwater standards if proper ordinance is already in place.

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Sub-Standard Subdivision Roads

- Chapter 253 of Transportation Code provides for County authority to improve roads in sub-division.
 - Election of Property Owners required.
 - Owners can be assessed for initial costs.
 - **But**, County thereafter responsible for road maintenance.

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Opening a New Road

- Residents of a precinct may apply for a new road, or a change in an existing road by petition:
 - Eight property owners required for new road.
 - One property owner may request a change of route.
 - **Dedication of ground for road still required from landowner(s) burdened by road.**
- Petition should specify beginning and ending points of road.
- Notice of Intent required before filing petition with Commissioners Court.
 - 251.052, Transportation Code.

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251.054 Laying out road by Jury of View- Repealed

- If voluntary purchase not available, Chapter 21, Property Code Procedures now must be followed after receipt of Petition: (Eminent Domain)
 - Disclosure of planned use to owner
 - Owner may disclose prior appraisals
 - Bill of Rights Statement by County
 - **County Court at Law or District Court venue**
 - Special Commissioners appointed by **Trial Court** to determine damages

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A Petition Alone Insufficient

- Must have **right-of-way**.
 - **Dedication by all affected landowners the road will burden, in writing, filed of record.**
 - If sufficient need, the county may purchase the right of way. May use condemnation if necessary.
- Petitioners may be required to improve right-of-way to a minimal standard.
- Different roads may be of different standards. (Sub-division standards Not Required but recommended.)

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Condemnation Award

- Property owner is entitled to compensation for:
 - Value of land taken by road, plus.
 - Decrease in value to "remainder" of land bisected by road.
 - Care to use least invasive means possible.
 - Award of Damages appealable, but opening of road is not.

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Discontinuance of Maintenance

- Commissioners Court may, by Order, cease public maintenance of road.
- No statutory requirements for notice and hearing, but recommended.
- See Section 251.051 Transportation Code for conditions applicable to "discontinuance" of an "entire" road. (vacated or unused for three years).
- "Replacement road" language untested by court cases.

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Discontinuance-Continued

- Discontinuance of part of a road is permitted (the back end of a road now enclosed by single landowner, for example). (Compton v. Thacker, 474 S.W.2d 570)
- No particular "procedure" required, but notice is recommended.
- Road remains open to public, but road no longer maintained by county. Remove road signage, some risk.

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Closing Public Road

- A road established by jury of view must be closed by notice and hearing. Other types may be closed without notice and hearing. **(Notice and Hearing recommended)**
- A property owner may not enjoin closure unless:
 - He owns property which abuts the road, or,
 - Road being closed provides the "only" access to his property.
- Others may seek damages arising from closure, but not injunction.
 - 251.058 Transportation Code.

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Closing, Continued

- Closing excludes only the public, not private interests.
- Road remains on the ground, but the public is precluded from use, and the road may be gated from public after closing.

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Abandonment of Road, per se

- Abandoned by law when use so infrequent that property owner encloses road under "fence" for 20 years. (May not include a gate)
 - Does not include road to cemetery.
 - Access road necessary to reach adjoining property.

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Abandonment by Formal Action

- No procedural guidance by Sec. 251.058, but extensive provisions for post closure. **Review this section CAREFULLY!**
 - May be requested by a single person, or by petition of many.
 - No injunction may issue to stop abandonment, unless by an adjoining landowner who will lose their only access to land.
- Note: **others whose property abuts the road may have damages for loss of value or "impairment" of access.**

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Utilities and the County Right of Way

- ❖ Utilities Code provides authority to use public right of way for gas (§181.005), electric (§181.041), telephone (§181.082) and cable television (§181.101) lines.
- ❖ Water Code provides authority for public and private water supply corporations to use right of way. (§49.220)
- ❖ County may require relocation if road is to be widened, or utilities interfere with public use as a roadway.
- ❖ **Remember that §251.151 of Utilities Code requires notice for any excavation by county deeper than 24", but §251.156 (B)(7) Texas Utilities Code gives County absolute use of first 24" of surface for "routine maintenance". If an incident occurs, it is critical to fully document by photos, etc., all details.**

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County Cannot Deny Use of Right of Way to Public Utility

- ❖ County has implied authority to designate location of utility so as to preserve primary use of right-of-way for road use. If you discover a utility that interferes with your maintenance, fully document location of utility line in place, with photographs and measurements.
- ❖ If County requires Utility to relocate, prior notice to the Utility is required. Timelines differ by Utility.
- ❖ Saltwater "outflow lines" and freshwater "inflow" given status as utility. (Chap. 91, Natural Resources Code)

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Cattleguards and Gates

- May authorize cattleguards and gates.
- Must have established plans and specifications.
- May remove non-conforming gates/guards.
- See Sec. 251.009-251.010 Transportation Code.

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Where to Get More Information

- Brooks, Vol. 35-36, Texas Practice Series
- Texas Association of Counties
512/478-8753

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Or Call Allison, Bass & Associates, LLP-Austin, Tx

- Contact: Allison, Bass & Magee, LLP
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