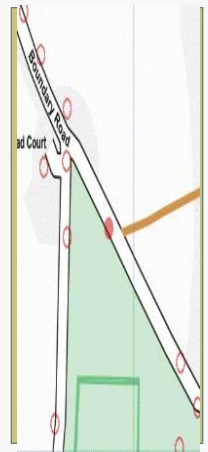


A PRIMER ON LEGAL ISSUES RELATED TO COUNTY ROADS



BOB BASS, ALLISON, BASS & MAGEE, LLP



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.— 251.003, Transportation Code.
- Lay out and open, discontinue, close, abandon or alter public roads and highways and to exercise general control over all roads, highways, ferries and bridges in their counties. -251.051, Transportation Code.

SYSTEMS OF ROAD MAINTENANCE

- I. Commissioner-Elected Commissioner Responsible for Road Maintenance- **Default system**. §251.004 Transportation Code.
- II. Ex Officio System-Does not appear to differ from Default system, but, should be adopted and reflected in the minutes. §252.001 Transportation Code
- III. Commissioner System-Appointed “commissioner” for a road “district.” More than one “commissioner” can be appointed. §252.101 Transportation Code. Rarely seen option.
- IV. Voluntary Unit System-§252.201 Transportation Code-Road Superintendent, 2 year term, unless removed for cause.
- V. Referendum Unit-§252.301 Transportation Code-Engineer/Administrator for indefinite term unless removed for cause.

ADDITIONAL COMMENTS REGARDING COMMISSIONERS COURT AUTHORITY

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

LIMITATIONS UPON 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. (Indictments often occur.)
- County may maintain city streets, but only with consent of city and Interlocal Agreement, providing fair value to County for service rendered. Chapter 791, Government Code.

PUBLIC ROADS BELONG TO STATE

- Even if full fee simple title is conveyed to County, the road actually is held in trust for the State. State v. Malone, 168 S.W.2d 292 (1943). Att. Gen. WW-870 (mineral interests are leased by the Land Commissioner, addressed by §32.2015 Tx. Nat. Res. Code)
- “Public” road does not necessarily equal “county” road.
- Public can acquire an interest in road, but county must assume responsibility for maintenance to be a county road. Maintenance by county equals “county road”.
- 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 formerly accepted by the county by minute order, or my actual assumption of maintenance.

A PUBLIC ROAD REMAINS A PUBLIC ROAD UNLESS FORMALLY ABANDONED OR VACATED

- Even if a previously maintained road is no longer maintained by county, the landowner may not “fence” the road.
- 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.

ATTORNEY GENERAL OPINION

JC-0503 MAY 15, 2002

- 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) the Comm. Ct. may make a self-determination of public status, but smaller counties may not make such a determination.
- The County may bring a suit for declaratory judgment.

LEGISLATIVE CHANGES OF 1981 (CHAPTER 281, TRANS. CODE)

- After 1981, Counties of 50,000 population or less may acquire interest in roads **only**
 - ***By purchase (contract of sale and deed)***
 - ***By condemnation (eminent domain)***
 - ***By dedication of fee owner in writing***
 - ***By final judgment of adverse possession under prior law, based on common-law doctrines in effect prior to 1981.***
- ***Negates prior common law doctrines of prescription and implied dedication to acquire right of way.***

PRESCRIPTIVE RIGHTS TO ROAD

- 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, predating 1981. Davis v. Carriker, 536 S.W. 246. See also Sec. 251.059, Texas Transportation Code.
- 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)

IMPLIED DEDICATION

- Similar to Prescription, but less demanding standard.
- Required evidence of affirmative acts of landowner (longstanding use by public, maintenance by county, fence-lines recognizing road) that would lead to implied dedication. There should be something more than mere acquiescence, i.e. request for maintenance, fencing, signage, etc.

WHY WAS CHAPTER 258 NECESSARY?

- Counties under 50,000 cannot acquire rights by prescription after 1981
- Proof necessary for establishing prescriptive rights prior to 1981 “dying” out with time.
- Cost of litigation prohibitive.
- Mechanism of establishing presumptive right of prescription necessary.

WHAT THE BILL DID-NOW EXPIRED

- Provided a method for County to establish a legal claim to long maintained roads.
- Required County to Prepare a Map of County Roads.
- Provide Notice to Land Owners affected by proceeding.
- Provide Opportunity to Protest Road Status
- Imposes a Period of Repose (2 yrs.)

LIMITATION/LITIGATION

- After the Road Map is adopted, the public right to use a road, and the right to spend public money on road is **conclusively established**. Adverse claims barred.
- Party wishing to contest inclusion of road on map must file suit in a District Court not later than the second anniversary of date road map is adopted.
- In addition, §§16.003, 16.024 and 16.026 of Civil Practice and Remedies Code establish 2, 3 and 10 year periods of limitation that may apply to road disputes. See 311.034 Government Code and *DeMagoloni v. Bexar Hospital Dist.*, 2013 WL 4829133.

TAX ABATEMENT

- Private right, title or interest, other than minerals, held by a person owning land burdened by road established by this procedure is exempt from ad valorem taxation by any taxing entity. (Must apply for exemption).
- If County ceases to maintain a road in future, exemption ceases and ad valorem taxes may be assessed after reversion of road maintenance. County must provide an Order from County stating that maintenance has ceased.

EXPRESS DEDICATION

- Person making dedication must have legal ability to do so; **fee simple title**.
- Dedication must be in **writing** and of record, better for specific distance and width.
- Dedication must serve a **public purpose**.
- County must accept the offer, usually by Order of the Commissioners Court, but at least by actually taking up maintenance. **Better practice** is a separate Order accepting Dedication and expressly assuming maintenance for specific distance and widths.

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.
- Metes and bounds not required, but is good practice.
- A GPS “centerline” with distance and width on either side is good option.

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 by lien on property.
 - **But**, County thereafter responsible for road maintenance.

SUBDIVISION REGULATION

- Chapter 232 Local Government Code.
- Mere platting of a “public road” **does not** obligate County to maintain road.
- Acceptance of Plat does not mean acceptance of roads dedicated in plat.
- Separate “acceptance” necessary, and that acceptance should be very specific.

CHAPTER 232, LOCAL GOVERNMENT CODE

- 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.~~
232.0015 Tex.Local Gov't Code, 2023. Significant issues raised by this amendment.
 - Plat must be filed of record in accord with law.

EXCEPTIONS TO PLAT REQUIREMENTS

- Land does not provide for streets or other common areas.
- Land use for agricultural purposes as defined by Article VIII, Section 1-d, Texas Constitution.
- Land is sold to family members.
- Land contains more than ten (10) acres, and contains **no streets dedicated to public use**, etc.
- All lots are sold to veterans.

SUBDIVISION REGULATIONS

- Chapter 232 only establishes bare minimums.
- County may require standards for roads and drainage, but must have a regulation adopted.
- May require a bond to insure compliance.
- May not require a higher standard than standards county imposes upon itself in the “construction” of new roads.
- May require groundwater standards if ordinance is already in place.
- Chapter 16 of Texas Water Code has “model rules” but has little application for road standards, etc.

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 still required of landowner 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.
- Must be built to subdivision regulations if applicable

251.054 REPEALED, MUST NOW USE EMINENT DOMAIN CONDEMNATION PROCEDURES

- Section 251.054-Neighborhood Road statute, has been repealed.
- Chapter 21, Property Code Procedures followed after receipt of Petition
 - Disclosure of planned use to owner
 - Owner may disclose prior appraisals
 - Bill of Rights Statement
 - County Court at Law or District Court venue
 - Special Commissioners appointed by Court to determine damages

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.
 - Award of Damages appealable, but opening of road is not.
- Therefore, when condemning land for road, try to avoid dividing land, i.e. use the perimeter of property, even if longer.

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.

ABANDONMENT 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 “discontinuation” of a road. (vacated or unused for three years, alternative route, etc.)

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.
- 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.

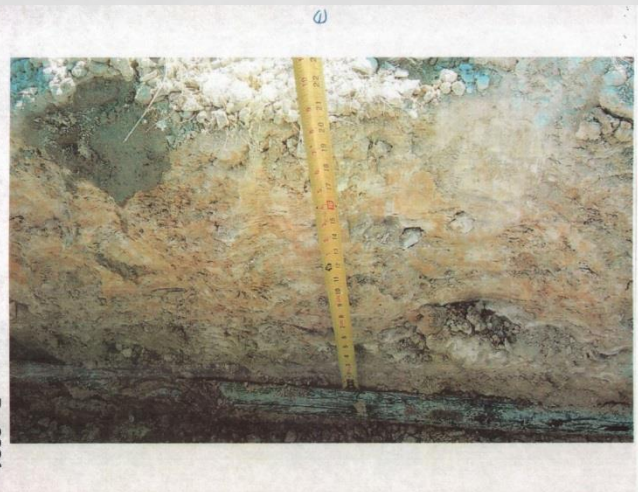
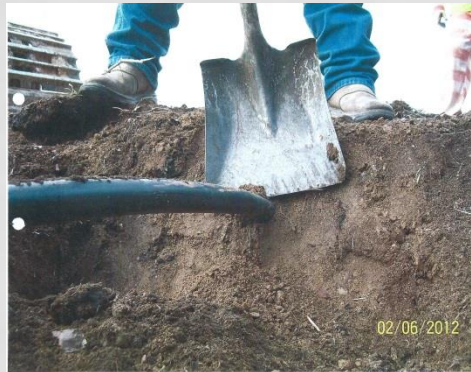
UTILITIES AND THE COUNTY RIGHT OF WAY

- ❖ 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)
- ❖ Saltwater lines may have a lease (§91.901 et seq. Tx.Nat.Res.Code.

COUNTY CANNOT DENY USE OF RIGHT OF WAY TO PUBLIC UTILITY

- Authority to designate location of utility (not telephone).
- If County required to relocate a Utility, prior notice to the Utility is required. Timelines differ by Utility.
- Dig Statute (§251.156 Utilities Code) permits routine maintenance that does not exceed 24 inches depth. Replacing culverts, etc. may be routine, but it is recommended that any “deep” maintenance follow notice to State Notification Center.
- Failed legislative effort to revise statute.

EXAMPLES OF SUB-STANDARD UTILITY INSTALLATION



STEPS IF DEMAND FOR DAMAGES MADE

- 1st: Carefully document the location: Photos with a frame of reference. (Yard Stick) to show depth of buried line.
- 2nd: Obtain legal counsel. **Very Important.**
- 3rd: Formally Deny claim, with a copy of §251.156 Local Government Code and photos of insufficient installation provided to utility.

WHERE TO GET MORE INFORMATION

- Attorney General's Office-
 - 1-800-252-5476
- Brooks, Vol. 35-36, Texas Practice Series
- Texas Association of Counties
512/478-8753

OR CALL ALLISON, BASS & MAGEE, LLP-AUSTIN, TX

- Contact: Allison, Bass & Magee, LLP
 - 512-482-0701 or
1-800-733-0699 Voice
512/480-0902 Fax

Law@Allison-Bass.com

