

What the Heck is the County Road Right of Way? And how do you define it?

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- **ROBERT T. (BOB) BASS** was born in Hale Center, Texas, on September 3, 1949. Bob received his Bachelor's Degree in 1973 from Baylor University in history and education with a minor in political science. Bob worked as a legislative aide to a State Senator during the 63rd Legislative session, then resumed studies at Baylor School of Law, where he received his Doctor of Jurisprudence Degree in 1976. Bob served as Assistant District Attorney in Tarrant County before returning home to Hale County to assume the position of County Attorney in 1977. In 1980 Bob entered the private practice of law with the firm White, Self & Bass, P.C. in Plainview where Bob continued representation of counties, school districts and cities in the Texas Panhandle. He is licensed to appear in state courts, all federal district courts in Texas, the Fifth Circuit Court of Appeals, and the United States Supreme Court. Bob joined Allison & Associates in February 1990, and was named a partner of the present firm, Allison, Bass & Magee, L.L.P. in January 1997. He is responsible for supervision of firm litigation. A frequent lecturer on topics of interest to local government officials, Bob is a member of the State Bar of Texas and a licensed pilot. Bob has been married to Robin Webster Bass, originally from Lubbock, for 38 years. Bob and Robin have three children, Carah-Beth is 32 and a lawyer with the firm. Janson, 30 teaches school in the Hays ISD, and Trent is an executive with Uber-Eats in New York City.

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 251.003, 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 251.051, Transportation Code.

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). WW-870 (mineral interests are leased by the Land Commissioner, addressed by recent legislation, HB 2521)
- “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 by actual assumption of maintenance.

Attorney General Opinion

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- 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)

- Counties of 50,000 population or less under law
- **After 1981**, these “small” counties 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)

What is included in the Prescriptive ROW?

When a road is established by prescription, the right is not limited only to the traveled portion of the road, or what is referred to in early cases as the “beaten path”, but the road easement also includes sufficient land, where reasonably available, for drainage ditches, repairs, and the convenience of the public. Robinson Water Co. v. Seay, 545 S.W.2d 253, 260 (Tex.Civ.App. Waco 1976, no writ); Nonken v. Bexar County, 221 S.W.2d 370, 374 (Tex.Civ.App. Eastland 1949, writ. ref'd n. r. e.); Haby v. Hicks, 61 S.W.2d 871 (Tex.Civ.App. San Antonio 1933, writ. *dism'd*). The county's easement includes only such land as necessary for drainage, maintenance of the road, and convenience of the public. The area set aside for the public convenience may be utilized by public utilities for laying their utility lines, cables, pipelines, etc.

Implied Dedication

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

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.
 - **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.
 - 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, etc.
- All lots are sold to veterans.

Subdivision Regulations

- Chapter 232 only establishes bare minimums.
- County may require standards for roads and drainage.
- 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.

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 appeal able, 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)

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 require. 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)**
- 2nd: Obtain legal counsel
- 3rd: Formally Deny claim, with a copy of §251.156 Local Government Code and photos of insufficient installation provided to utility.
- Legislation will be proposed again next session to address this problem, but we need your help.

How wide is the County “Right-of-Way”?

- If ROW acquired by express dedication, by the terms of the dedication.
- If ROW acquired by prescription (longstanding use and maintenance), by the physical area actually “occupied by the use”. Requires some visible evidence of actual maintenance.
- The “Class” of road does not matter if the allowed width never actually used by county.
- If evidence establishes only 30 feet, you can’t “take” more if needed without consent of landowner.

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

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