



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

June 27, 1962

Hon. Steve Hurt
County Attorney
Hale County
Plainview, Texas

Opinion No. WW-1368

Re: Does a Commissioners Court have the authority to establish a public road under Article 6711, V.C.S., if the applicant for said road resides on the land into which there is now no public road or public access?

Dear Mr. Hurt:

You have asked for the opinion of this office as to whether or not the Commissioners Court of Hale County has authority to establish a public road under Article 6711, V.C.S., if the applicant for said road resides on the land to which there is now no public road or public access.

A portion of Article 6711 is quoted:

"Any lines between different persons or owners of lands, any section line, or any practicable route, practicable route as used herein, shall mean a route which will not unduly inconvenience the owners or persons occupying the land through which such route shall be declared, that the Commissioners Court may agree on in order to avoid hills, mountains or streams through any and all enclosures, shall be declared a public highway on the following conditions:

". . .

"3. At a regular term of the court, after due service of such notice, the court may hear evidence as to the truth of such application, and if it appears that the said applicants have no means of access to their lands and premises, it may issue an order declaring the lines designated in the application, or such lines as may be fixed by the Commissioners Court, to be a public highway, and direct the same to be opened by the owners

thereof. . . ."

Prior to its amendment in 1953, Article 6711 authorized the Commissioners Court to act thereunder "if the Commissioners Court deems said road of sufficient public importance." In a case that grew out of an order of a Commissioners Court entered under authority of this Article before the above quoted provision was deleted, this Article was held to be constitutional. Phillips v. Stockton, 270 S.W.2d 266 (Civ.App. 1954), reversed on other grounds 154 Tex. 153, 275 S.W.2d 464.

In the case of Maheer v. Lassiter, _____ Tex. _____, 354 S.W.2d 923 (1962), it was held that in so far as this Article purports to authorize the taking of private property for private use it is unconstitutional. The fact situation which is the basis for this opinion request differs from that of Maheer only in that the present petitioner resides with his family upon the land to which access is being denied. We must therefore examine Maheer in an attempt to determine the precise effect of that decision.

In writing the Maheer opinion, at page 925, Chief Justice Calvert stated:

"Prior to amendment by the Legislature in 1953, Article 6711 authorized Commissioners Courts to declare a roadway to be a public highway only if they deemed 'the road of sufficient public importance.' As so written the statute conditioned the taking of property upon a finding that it would be dedicated to a public use. By Acts 53rd Leg., p. 1054, ch. 438, the requirement for a finding that the road was of public importance was eliminated, and Commissioners Court are now authorized to declare a private roadway to be a public highway if applicants therefor wish it to be done and 'have no means of access to their lands and premises.' In so far as the amendment seeks to authorize the taking of private property for private use, it is unconstitutional and void."

Further, at page 925, Chief Justice Calvert discussed the Phillips case supra, and stated:

"We held that the evidence established that Naumann had access to his land over another road and that there was no necessity for the established road. In deciding that question we

assumed, but did not hold, that it is of public importance that every person residing on land be provided access to and from his land so that he may enjoy the privileges and discharge the duties of a citizen." [Sic]

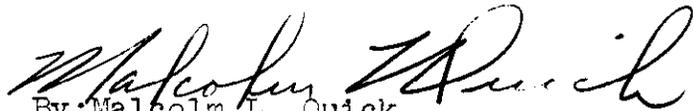
We now have two primary cases dealing with the constitutionality of Article 6711: The Phillips case, which held that the statute was constitutional, in its pre-1953 form, and the Maher case, which says that the statute after 1953 is unconstitutional in so far as the amendment seeks to authorize the taking of private property for private use. Both of these cases dealt with situations wherein the landowner did not reside on his land. In our present problem, the landowner does so reside. We must also note that the Court, in Maher, specifically avoided declaring the entire Article unconstitutional; rather, the Court's language served to limit the scope of Article 6711 by re-establishing the pre-1953 requirement that "the road be of sufficient public importance." The court then proceeded to indicate, in strong dicta, that it is of public importance that every person residing on land be provided access to and from his land so that he may enjoy the privileges and discharge the duties of a citizen.

In view of the foregoing, it is the opinion of this office that the powers granted the Commissioners Court by Article 6711, V.C.S., may be constitutionally exercised in the situation outlined only if the said Commissioners Court makes a finding that the road to be established would be of sufficient public importance to warrant the taking of the land involved.

S U M M A R Y

The Commissioners Court has the authority to establish a public road under Article 6711, V.C.S., if the said Commissioners Court makes a finding based upon proper facts, that the road to be established would be of sufficient public importance to warrant the taking of the land involved.

WILL WILSON
Attorney General of Texas


By: Malcolm L. Quick
Assistant

Hon. Steve Hurt, page 4 (WW-1368)

APPROVED:
OPINION COMMITTEE

W. V. Geppert, Chairman
Pat Bailey
Arthur Sandlin
Bill Allen

REVIEWED FOR THE ATTORNEY GENERAL
BY: Leonard Passmore