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TARRANT COUNTY

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JUSTICE CENTER
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March 6, 2006

OPINION COMMITTEE

RQ-0462-GA

Honorable Greg Abbott
Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

C.M.R.R.R. # 7004 0750 0000 7796 3683 and
FACSIMILE: (512) 463-2092

Re: *Request for Opinion Reconciling the Applications of Chapter 251 of the Transportation Code and Chapter 263 and Chapter 272 of the Local Government Code*

Dear General Abbott:

I respectfully request an opinion from your office concerning the proper means of abandoning certain real property interests owned by a county. In 1994 your office issued Letter Opinion No. 053, wherein Attorney General Dan Morales concluded that:

a county is not obligated, nor does it have discretion, to sell to an abutting property owner the county's interest in a road that the members of the county commissioners court unanimously have voted to abandon. Title to the county's interest in the abandoned road, to the center line, *vests automatically in the abutting property owner*, and [article 6702-1] section 2.002 (e) does not provide the county with a right to be compensated for its interest.

Tex. Att'y Gen. LA-053 (1994), p. 4 (emphasis added). The clarity of this conclusion is undisputed, but its application is seemingly limited to the abandonment of easements in "public roads," such as roads in a subdivision.

Tarrant County seeks to abandon the following described interests in the following described situations, and it is uncertain whether the foregoing opinion controls in these situations, or whether the County must follow either the requirements of Chapter 263 or Chapter 272 of the Local Government Code. Accordingly, I respectfully request your opinion on the following matters:

(1) When a county no longer needs a drainage easement, and the owner of the property underlying the drainage easement desires the county to issue a release of easement to clear title, is the drainage easement considered a "portion of a public road" within the meaning of section 251.058 (b) of the Texas Transportation Code, such that title automatically vests in the underlying fee owner upon the date the order of abandonment is

signed by the county judge?

(2) If the drainage easement is not considered a "portion of a public road" within the meaning of section 251.058 (b), then must the county sell the interest in addition to formally abandoning it in order for title to pass to the underlying fee owner? If so, may the county sell the interest for less than fair market value to the underlying fee owner pursuant to section 272.001 (b) of the Local Government Code, or must the county follow the notice, appraisal, and fair market value requirements of section 263.002 (c) of the Local Government Code?

(3) If a county desires to abandon a right-of-way to which it owns an easement interest in, when must the county follow the notice, appraisal, and fair market value requirements of section 263.002 of the Local Government Code in order for title to pass rather than title passing automatically pursuant to section 251.058 of the Texas Transportation Code?

Please see the Brief below which outlines the law and possible applications in these situations.

BRIEF AND AUTHORITIES

Three statutes potentially govern these issues: Section 251.058 of the Texas Transportation Code; Section 263.002 of the Texas Local Government Code; and Section 272.001 of the Texas Local Government Code. An examination of each statute follows.

STATUTES UNDER CONSIDERATION

Texas Transportation Code Provisions:

Chapter 251 of the Texas Transportation Code deals with general county authority relating to roads and bridges. Section 251.058, styled "Closing, Abandoning, and Vacating Public Road," provides the following:

Title to a public road or portion of a public road that is closed, abandoned, and vacated to the center line of the road vests on the date the order is signed by the county judge in the owner of the property that abuts the portion of the road being closed, abandoned, and vacated. A copy of the order shall be filed in the deed records of the county and serves as the official instrument of conveyance from the county to the owner of the abutting property.

TEX. TRANSP. CODE ANN. § 251.058(b) (Vernon 1999) (emphasis added).

In Letter Opinion No. 053 (1994), the Attorney General considered the application of the identical forerunner of this statute—article 6702-1. See Tex. Att'y Gen. LA-053 (1994). Attorney

General Dan Morales concluded that:

a county is not obligated, nor does it have discretion, to sell to an abutting property owner the county's interest in a road that the members of the county commissioners court unanimously have voted to abandon. Title to the county's interest in the abandoned road, to the center line, *vests automatically in the abutting property owner*, and [article 6702-1] section 2.002 (e) does not provide the county with a right to be compensated for its interest.

Tex. Att'y Gen. LA-053 (1994), p. 4 (emphasis added).

Local Government Code Provisions:

There are two Local Government Code chapters that address divestiture of county assets: Chapter 263, dealing with the sale or lease of property by "counties;" and Chapter 272, dealing with the sale or lease of property by "municipalities, counties, and certain other local governments."

• **Chapter 263 Provisions**

Section 263.002 (a) of the Texas Local Government Code provides as follows:

If *abandoned* seawall or *highway right-of-way property* is no longer needed for such purposes, the county *may* sell or lease the property only according to the following priorities:

- (1) to an abutting or adjoining landowner;
- (2) to the person who originally granted the right-of-way to the county or the grantor's heirs or assigns;
- (3) exclusively for public use to the United States, this state, or a municipality within the municipal boundaries of which the property is located; or
- (4) at public auction in accordance with Section 263.001.

TEX. LOCAL GOV'T CODE ANN. § 263.002 (a) (Vernon 2005) (emphasis added). In addition to following this priority list of purchasers, certain steps must be taken before the commissioners court may sell or lease the property to an abutting or adjoining landowner or to the original grantor or the grantor's heirs and assigns. Notice must be published and an appointed appraiser must determine the fair market value of the property to be sold. *Id.* § 263.002 (c). The property cannot be sold for an amount that is less than the reported fair market value. *Id.* The purchaser of the abandoned highway right-of-way property must pay both the sales price and all costs of conducting the sale, including the appraisal fee. *Id.* at § 263.002 (e).

- **Chapter 272 Provisions**

Similar to Chapter 263 but codified under Chapter 272 are provisions for notice of sale or exchange of land by a political subdivision. Section 272.001 (b) addresses the sales price, providing that:

the land and those interests described by this subsection may not be conveyed, sold, or exchanged for less than the fair market value of the land or interest *unless* the conveyance, sale, or exchange is with one or more abutting property owners who own the underlying fee simple. The fair market value is determined by an appraisal obtained by the political subdivision that owns the land or interest. . . .

TEX. LOCAL GOV'T CODE ANN. § 272.001 (b) (Vernon 2005) (emphasis added).

With respect to (1) narrow strips of land, or land that because of its shape, lack of access to public roads, or small area cannot be used independently under its current zoning or under applicable subdivision or other development control ordinances; or (2) streets or alleys, owned in fee or used by easement, the interests may be sold to: “(1) abutting property owners in the same subdivision if the land has been subdivided; or (2) abutting property owners in proportion to their abutting ownership, and the division between owners must be made in an equitable manner.” *Id.* at § 272.001 (c).

APPLICATION OF STATUTES

All three statutes potentially impact the proper manner for a county to abandon a drainage easement and road right-of-way. Reconciling these statutes is problematic.

Regarding Abandonment of Drainage Easements:

It is uncertain which statute governs when a county desires to abandon a drainage easement. Neither Section 251.058 of the Texas Transportation Code nor Section 263.002 of the Local Government Code mentions the phrase “drainage easement.” Section 251.058 (b) applies to “a public road or a portion of a public road,” whereas Section 263.002 applies to the abandonment of a seawall or highway right-of-way property. *See* TEX. TRANSP. CODE ANN. § 251.058 (b) (Vernon 1999); TEX. LOC. GOV'T CODE ANN. § 263.002 (a) (Vernon 2005). In order for either to apply one must argue that a drainage easement is encompassed within the meaning of a “portion of a public road” or a “highway right-of-way property.”

The statutory definition of “public road” offers little guidance: “A public road or highway that has been laid out and established according to law and that has not been discontinued is a public road.” TEX. TRANSP. CODE ANN. § 251.002 (Vernon 1999). Arguably a drainage easement that is appurtenant to a “public road” would be encompassed within the meaning of a “public road”—the easement provides a means of drainage for the roadway and is presumably “laid out and established according to law” just as the actual roadway was laid out and established. The drainage easement

could be considered “a portion of a public road.” It follows, then, that Section 251.058 (b) of the Transportation Code would govern the disposal of abandoned drainage easements.

There is still some uncertainty, however, whether Section 251.058 (b) solely applies because of the third statutory option—Section 272.001 (b) of the Local Government Code. Like the other two statutes, this section does not mention “drainage easements,” but the language contained in Section 272.001 (b) (5) is broad in its scope: “a *real property interest* conveyed to a governmental entity that has the power of eminent domain.” *Id.* (emphasis added). A drainage easement is arguable a “real property interest” that is conveyed to a county under the threat of condemnation or that a county acquires through the power of eminent domain. Consequently, Section 272.001 may be the governing statute when a county desires to abandon a drainage easement. If so, the County could not simply abandon the easement with title vesting in the abutting property owner. Instead, the County would be required to convey, sell or exchange the easement for market value or convey, sell or exchange it for less than fair market value if the conveyance, sale, or exchange is with one or more abutting property owners who own the underlying fee simple. TEX. LOCAL GOV'T CODE ANN. § 272.001 (b) (Vernon 2005).

Which statute applies? Although one could argue that Section 272.001 (b) (5) of the Local Government Code is the provision that most encompasses a drainage easement, this statute offers no guidance as to whether it must be followed in every situation. One could argue that Section 272.001 simply sets forth the scheme that must be followed when a county *chooses* to sell or exchange a property interest, but that the statute has no bearing on what happens when a county *abandons* a drainage easement or any other interest in real property. In the instance of abandonment of a drainage easement appurtenant to a public road, Section 251.058 (b) of the Texas Transportation Code is arguably the better choice. A final determination is needed, however.

Regarding Abandonment of Rights-of-Way:

In Letter Opinion No. 053, Attorney General Dan Morales considered which section applied in the abandonment of road rights-of-way by a county in a residential subdivision—article 6702-1 of the Texas Revised Civil Statutes (now Section 251.058 of the Texas Transportation Code), or Section 263.002 of the Local Government Code. The Attorney General concluded that former applied and that Section 263.002 did not because “Section 263.002 . . . specifically provides for the sale of *highway right-of-way property* that is no longer needed for right-of-way purposes. We do not understand that any of the roads at issue here are *highways* for purposes of section 263.002.” Tex. Att’y Gen. LA-053 (1994), p. 4, footnote 4 (emphasis added). By this statement the attorney general implies that had the roads in question been “highways” as opposed to “roads” in a subdivision, then it would have been necessary for the county to meet the notice, appraisal, and purchase requirements of Section 263.002. Presumably the distinction results from the fact that former Section 2.002 (e) of article 6702-1, like the current Section 251.058 (b) of the Transportation Code, addressed abandonment of a “public road,” whereas Section 263.002 of the Local Government Code speaks of abandoned “highway right-of-way property” that is no longer needed for such a purpose.

It is uncertain, however, whether the Attorney General actually concluded that abandoned "highway" right-of-way should be treated differently from abandoned roads within a neighborhood subdivision. Both "types" of roads fall within the definition of public road—the term employed by Section 251.058 of the Texas Transportation Code.¹ Admittedly one could argue that a "highway right-of-way" is treated differently from all other public roads because Section 263.002 specifically mentions "highway right-of-way." See TEX. TRANSP. CODE ANN. § 263.002 (a) (Vernon 1999). But there is no statutory guidance indicating what factors make a road a "highway right-of-way" such that Section 263.002 would apply.

Even if there were some kind of objective criteria for determining whether a road lies within a "highway right-of-way," the language of the statute itself suggests that its provisions are discretionary rather than mandatory: "If abandoned . . . highway right-of-way property is no longer needed for such a purpose, the county *may* sell . . . the property. . . ." *Id.* (emphasis added). In other words, this language suggests that if a county *chooses* to sell the asset, then Section 263.002 provides the manner to do so. Otherwise, a county may choose not to sell it but simply abandon the highway right-of-way, resulting in title vesting in the abutting property owners. But the 1994 letter opinion does not substantiate this interpretation.

Perhaps Section 251.058 of the Transportation Code and Section 263.002 of the Local Government Code could be reconciled in the following way: if the asset to be abandoned is an easement in a public road, *which includes a highway right-of-way*, then Section 251.058 applies and title vests automatically in the abutting owners. If the highway right-of-way is an asset that is held in fee simple by a county and the county abandons the asset, then title cannot automatically vest in the abutting property owners because title to a fee simple estate does not vest in a party by abandonment. Instead, the county may choose to sell the abandoned asset in accordance with Section 263.002. In any event, further guidance is needed to determine what is a "highway right-of-way" and how these statutes should be reconciled when abandonment includes a "highway right-of-way."

CONCLUSION

An opinion from the Office of the Attorney General is needed to fully reconcile the applications of Section 251.058 of the Texas Transportation Code and Sections 263.002 and 272.001 of the Local Government Code. None of these statutes clearly address the process a county must follow in abandoning a drainage easement. Furthermore, authority is lacking to fully explain which statute takes precedence when a county desires to abandon a real property interest in a road right-of-

¹ As mentioned earlier, the statutory definition of "public road" offers little guidance: "A public road or highway that has been laid out and established according to law and that has not been discontinued is a public road." TEX. TRANSP. CODE ANN. § 251.002 (Vernon 1999). There does not appear to be any other statutory definition of "highway." Furthermore, the common law definition is broad in its scope: "[G]enerally the term is held to mean 'a way open to all the people without distinction for passage and repassage at their pleasure.'" *Southwestern Greyhound Lines v. Railroad Commission*, 147 S.W.2d 318, 364 (Tex. Civ. App. — 1940) *affirmed* 138 Tex. 124, 157 S.W.2d 354 (1941). Therefore, when Section 251.058 (b) speaks of "title to a *public road* or a portion of a *public road*" vesting on the date the order is signed by the county judge abandoning, closing, and vacating such road in the owner of the property abutting that road, it logically encompass all roads in a county road system, including highways. See *id.*

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way. Consequently, any policy developed by Tarrant County for the disposal of unneeded drainage easements and road rights-of-way will operate under a cloud of uncertainty.

I appreciate your assistance in resolving these issues. If you should have any questions or need further information, please feel free to contact me at (817) 884-1400.

Sincerely,



TIM CURRY
Criminal District Attorney
Tarrant County, Texas

TC/wh