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OPINION COMMITTEE

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FILE # ML-44942-

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August 9, 2006

The Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

**RQ-0521-GA**

Dear General Abbott,

The Honorable James Buzbee, Hill County Commissioner, Precinct 3, has requested my office, the Hill County Attorneys Office, to obtain an opinion regarding whether Chapter 253 of the Texas Transportation Code is the exclusive means whereby a county may improve a subdivision roadway although the public has already acquired an interest in the roads and streets. In addition, whether a public road acquired through dedication, once accepted, automatically is included into the county's road maintenance system where maintenance of such roads is mandatory, even if the Commissioners Court has expressly rejected the duty to maintain the roads. Attached to this request letter is a brief detailing the county's position on these matters. If additional information is needed please do not hesitate to contact my office.

Sincerely,

Lee Sanders  
Assistant Hill County Attorney

# **Attorney General Opinion Request**

## **Brief on behalf of Hill County**

### **Facts**

Hill County Commissioner James Buzbee states that he has been approached by several residents of Tall Timber Estates, a subdivision located in an unincorporated area of Hill County, about paving a road located in the subdivision. Tall Timber Estates plat was accepted by order of the Hill County Commissioners Court on March 28<sup>th</sup>, 1983. (see Exhibit 1) In addition, the plat dedication, setting out a public dedication of the roads and streets (see Exhibit 2), was accepted by resolution of the Hill County Commissioners Court on the same date. (see Exhibit 3) However, the resolution states that "such acceptance shall impose no duty upon the County concerning maintenance or improvement of the streets and roads shown thereon, and when completed, the roads will meet minimum county standards."(Id.) For some period of time, which we have been unable to ascertain, the roads in Tall Timber Estates were not maintained by the County. However, for at least the last ten years, the Commissioner of the precinct in which Tall Timber Estates is located has maintained the roadways, which are surfaced with rock at this time. Due to dust and other problems, the adjacent landowners of one of the roadways located within Tall Timber Estates have approached the Commissioner willing to donate the amount of money needed to pave the roadway.

### **Questions Presented**

1. Whether Chapter 253 of the Texas Transportation Code is the exclusive means whereby a County may improve a subdivision roadway although the public has already acquired an interest in the roads and streets.
2. Whether a public road acquired through dedication, once accepted, automatically is included into the county's road maintenance system where maintenance of such roads is mandatory, even if the Commissioners Court expressly rejects the duty to maintain the roads.

### **Analysis**

It is the Commissioner's position that once the Commissioners Court accepted the public dedication of the roads and streets in Tall Timber Estates by resolution the public acquired an interest in the roads and streets of Tall Timber Estates. However, the County did not accept the roads and streets into the county road maintenance system as specifically set out in the resolution. (see Exhibit 3). The roads and streets became "public roads" under Chapter 251.002 of the Texas Transportation Code thereby giving the Commissioners Court the discretion to construct and maintain them under Chapter 251.003 of the Texas Transportation Code. The County further believes that if the Commissioners Court chooses to pave the road and accept the donation under Chapter 81.032 of the Texas Local Government Code, the Commissioners Court still has the discretion to maintain the road as a "public road" in the future without bringing the road into the county maintenance system.

The first issue is whether Chapter 253 of the Texas Transportation Code is the exclusive means whereby a County may improve a subdivision roadway although the public has already acquired an interest in the roads and streets. Chapter 253 of the Texas Transportation Code states, "This chapter applies only to a subdivision, part of a subdivision, or an access road in an unincorporated area of a county." Tex. Transp. Code Ann. § 253.001 (Vernon 2005). However, under Chapter 251.003 of the Texas Transportation Code, "The commissioners court of a county may make and enforce all necessary rules and orders for the construction and maintenance of public roads;" Tall Timber Estates is a subdivision located in an unincorporated area of Hill County. The road which the landowners are seeking to have paved is within Tall Timber Estates; therefore Chapter 253 would apply to the roadway in Tall Timber Estates. In Attorney General Opinion GA-059, it states:

"If a county desires to improve a subdivision road, it must propose and approve repairs consistently with chapter 253 of the Transportation Code. Under section 253.003, a commissioners court may improve a subdivision road "to comply with county standards for roads" if the court "determines that the improvement . . . is necessary for" county residents' health, safety, or welfare. Tex. Transp. Code Ann. § 253.003(1) (Vernon Supp. 2004-05). After a public hearing on the proposed repairs, the "record owner[s] of real property in the subdivision" must vote on whether the county should improve the road. *See id.* § 253.006(a)(1). Chapter 253 indicates that all or part of the costs of the improvement may be assessed against the real property owners. *See id.* §§ 253.003(2) (Vernon Supp. 2004-05), .004 (Vernon 1999), .005 (Vernon 1999), .006(a)(1)-(b)

(Vernon Supp. 2004-05), .007(b) (Vernon 1999), .008 (Vernon 1999). Any assessment should take into account the value of the donated road material. And once a county improves a subdivision road, it becomes a county road, and the county must maintain it "according to county road standards." *Id.* § 253.011 (Vernon 1999) (stating that "[a] road improved under this chapter is a county road" and the county must maintain it "according to county road standards"); *see id.* § 253.002 (defining "improvement" to mean "construction or repair")."

This opinion would seem to make Chapter 253 the sole means by which a county may improve a road located in a subdivision. If so, the county must assess the real property owners instead of accepting a donation under Chapter 81 of the Texas Local Government Code. It would also remove the discretion given to the Commissioners Court under Chapter 251 of the Texas Transportation Code to maintain public roads.

However, in Attorney General Opinion GA-0345, dealing with donation of money to improve a private subdivision road, it states, "The Waller County Commissioners Court may accept donations for maintaining a road under Transportation Code section 252.214 or Local Government Code section 81.032 only after the road has become a part of the county road system either through a donation of the private road by dedication under Transportation Code chapter 281 or after the county improves the private road under Transportation Code chapter 253." This opinion indicates that Chapter 253 of the Texas Transportation Code is not the sole means by which a subdivision road may be improved.

In addition, Chapter 253 of the Texas Transportation Code is more specific than Chapter 251. If the conflict between a general provision and the special provision is irreconcilable, the special provision prevails as an exception to the general provision. Tex. Gov't Code Ann. §311.026 (Vernon 2005). In this instance, Chapter 253 of the Texas Transportation Code is specifically applicable to roads in subdivisions located in an unincorporated area of the county, while Chapter 251 is applicable to all public roads. Therefore, chapter 253 would be an exception to chapter 251. However, if a general provision conflicts with a special provision, the provisions shall be construed, if possible, so that effect is given to both. Tex. Gov't Code Ann. §311.026 (Vernon 2005). In Texas Attorney General Opinion GA-0139, it states, "according to a bill analysis, the substance of chapter 253 is designed to remedy the situation "[w]hen roads in unincorporated subdivisions need repair, [but] the developers who originally built the roadways [are]

unavailable to do the work.” Senate Comm. On Intergovernmental Relations, Bill Analysis, Tex. S.B. 314, 71<sup>st</sup> Leg., R.S. (1989).” The legislative intent is clearly to allow the county to remedy the situation, something it would already be able to do under Chapter 251 of the Texas Transportation Code if the roads were already public roads. Therefore, to give both provisions effect, Chapter 253 of the Texas Transportation Code should be construed as applying to private subdivision roads. With regards to Tall Timber Estates, the dedication was accepted according to Chapter 281 of the Texas Transportation Code, therefore the Hill County Commissioners Court can accept a donation under Local Government Code section 81.032 to pave the road and need not follow Chapter 253 of the Texas Transportation Code.

The second issue is whether a public road acquired through dedication, once accepted, automatically is included into the county’s road maintenance system where maintenance of such roads is mandatory, even if the Commissioners Court expressly rejects the duty to maintain the roads. In Attorney General Opinion GA-0359, dealing with the maintenance and repair of public roads, it states, “If a neighborhood road has been accepted into the county road system under chapter 232 of the Local Government Code, the county must maintain the road.” However, no authority for this is cited in the opinion. In addition, nothing in Chapter 232 of the Local Government Code expressly imposes a duty upon the Commissioners Court to accept the maintenance of the roads or streets dedicated. In the same opinion, it does state, however, that, “A public road is not necessarily part of the county road system...” citing *Comm’rs Court v. Frank Jester Dev. Co.*, 199 S.W.2d 1004, 1007 (Tex. Civ. App.-Dallas 1947, writ ref’d n.r.e.) and Tex. Att’y Gen. Op. No. Ga-0139 (2004) at 4. In GA-0139 it states, “Dedication of streets and roads by a particular plat does not make them county roads, such that the county has an obligation to maintain them, unless the county accepts the dedication,” citing *Comm’rs Court v. Frank Jester Dev. Co.* and Tex Att’y Gen. LO-95-064, at 1. Texas Attorney General Opinion LO-95-064 states;

“A road does not become part of the county road system merely by virtue of a dedication of the road to the public in a subdivision plat. The dedication must be accepted by the county. Attorney General Opinion JM-200, in responding to the question whether a county was authorized to maintain subdivision streets dedicated to the public in a filed subdivision plat, stated: “[T]he filing

of a subdivision plat alone is insufficient to authorize a county to maintain roads in rural subdivisions, since the dedication is a mere offer." Attorney General Opinion JM-200 (1984) at 4. "the Mere filing and approval of a subdivision plat showing streets to be dedicated does not constitute an acceptance." Id. (citing *Commissioners Court v. Frank Jester Dev. Co.*, 199 S.W.2d 1004 (Tex. Civ. App.-Dallas 1947, writ ref'd n.r.e.)."

In each of the opinions cited and those that were relied on, the issue dealt with there being a dedication and acceptance, not the effect of the acceptance. Each Attorney General Opinion is based on the decision of *Comm'rs Court v. Frank Jester Dev. Co.*, which addressed the acceptance of the dedication and not mandatory inclusion of roads and streets into the county road system upon acceptance of the dedication. The Court in *Comm'rs Court v. Frank Jester Dev. Co.* did not address the issue at all because there was nothing more than a mere offer of dedication. However, from this opinion the Attorney General's opinions citing it have evolved a non-issue in the case into an assumption that there mandatory maintenance of roads and streets upon acceptance of a dedication by the County is required.

It is the Commissioner's position that the County retains the discretion to maintain or improve roads and streets dedicated to and accepted by the Hill County Commissioners Court that have not been expressly adopted into the county road system and may maintain or improve them as they deem fit. While the commissioner's court has only that authority specifically conferred by the constitution and statutes, where a right is conferred upon it, the court has implied authority to exercise broad discretion to accomplish the purposes intended. *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948); *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941). In this instance, the right to maintain public roads is vested in the court by section 251.003 of the Texas Transportation Code, which states, "the commissioners court of a county may make and enforce all necessary rules and orders for the construction and maintenance of public roads." Therefore the commissioners' court has the authority to exercise discretion over which public roads it deems necessary to maintain and the manner and means of maintaining them.

Therefore, the Hill County Commissioners Court may accept a donation in compliance with section 81.032 of the Texas Local Government Code funds for the paving of a road in Tall Timber Estates in which it has acquired a public interest in, but has not been under a duty to maintain or improve such roads. In addition, the Hill County Commissioners Court has the discretion to maintain or improve the roads and streets located within Tall Timber Estates in the future.





may be made by reference to the lot numbers on said plat, which shall hereafter be inco dedd for all legal purposes whatsoever by r

SAVE AND EXCEPT, however, utility unto LAKE WHITNEY ENTERPRISES, INC. in the and along and within five (5') feet of the side lines of all lots in this subdivision and perpetual maintenance of conduits, pole and other transporting agencies and fixtures telephones, water, sanitary and storm sewer and other public and quasi-public utilities, right of ingress to and egress from and across said specified and reserved easements shall

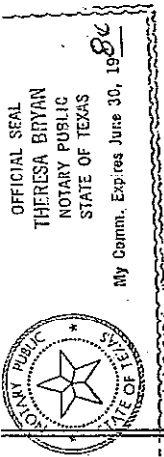
LAW OFFICES OF  
EASTLAND & CROW  
POST OFFICE BOX 340  
HILLSBORO, TEXAS 75645  
TELEPHONE (817) 582-2236

TEXAS.

My Commission Expires: 6-30-84

THERESA BRYAN

(TYPED OR PRINTED NAME OF NOTARY)



LAW OFFICES OF  
**EASTLAND & CROW**  
 POST OFFICE BOX 840  
 HILLSBORO, TEXAS 76645  
 TELEPHONE (817) 582-2236

LARRY WRIGHT COUNTY  
TEXAS.

ATTEST:

*Ruth Pelham*  
RUTH PELHAM COUNTY CLERK OF HILL  
COUNTY, TEXAS.

STATE OF TEXAS X

COUNTY OF HILL X

This instrument was acknowledged befor  
1983. by LARRY WRIGHT, COUNTY JUDGE OF HILL

*Mike Wynn*  
NOTARY PUBLIC IN AN  
TEXAS.  
My Commission Expires

(TYPED OR PRINTED NAME)  
MIKE WYNN

LAW OFFICES OF  
EASTLAND & CROW  
POST OFFICE BOX 840  
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