



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

September 2, 1948

Hon. Otto P. Moore, Sr.
County Attorney
Colorado County
Columbus, Texas

Opinion No. V-675

Re: The authority of the
Commissioners' Court
to condemn an ease-
ment over private pro-
perty to enable fish-
ermen to have access
to a river.

Dear Sir:

Reference is made to your recent request which reads, in part, as follows:

"1. Does a number of private citizens, who call themselves the general public, have a legal right to force a land owner whose land abuts Colorado river in Colorado County, Texas, to give or provide an easement or roadway over and across his private property in order that they or the general public may have a passageway to and from said river to fish therein?

"2. Does the Commissioners Court of Colorado County have the legal right to condemn lands for an easement or public road over private property in order for the fishing public to get to the river to fish?

"The facts are as follows:

"From where U.S. Highway No.90 crosses Colorado River at Columbus, Texas, there is a distance of about four or five miles along said river there is no way to get to the said river except over private property of the abutting land owners unless they follow the meanders of the river along its banks. From time to time during the past the public have been given permission to go

across the said private property to get to the river to fish, but from time to time the land owners have suffered damages and had trouble because of the wrongful acts of some of the ones going across said private property. Therefore the land owners gave notice that the public would not be allowed to go over their property. Since then a number of citizen appeared before the Commissioners Court and asked that an easement or public road be made across said property in order that the fishing public might have a passage way to and from said river in order that they might fish therein without having to go around the river banks to get there, claiming that gates and a passage way had to be provided at a distance of each mile along said inclosures.

The question then arose as to whether or not Colorado County, acting through its Commissioners Court could legally condemn private property for an easement or a roadway to said river, to be used by the fishing public to get to the said river to fish therein, without having to follow the banks and meanders of the said stream."

Inasmuch as your first question involves private rights, we are not permitted by law to answer same. Therefore, we shall confine our remarks to question No. 2 of your request.

Article 2351, V. C. S., provides, in part, that:

"Each commissioners court shall: . . .

"3. Lay out and establish, change and discontinue public roads and highways. . . ."

Article 6703, V. C. S., provides, in part, as follows:

"The commissioners court shall order the laying out and opening of public roads when necessary,"

In the case of Havenbekken v. Coryell County,

112 Tex. 422, 247 S.W. 1086, the court said:

"Commissioners' courts are created by the Constitution, and are given by its express terms such powers and jurisdiction over all county business as are conferred by the provisions thereof, or by the laws of the state. The statutes confer upon such courts full power and jurisdiction to locate, establish, and open public roads and to condemn the land necessary therefor. In the exercise of these powers they are courts of general jurisdiction, and the validity of their proceedings is to be determined by the rules applicable to such courts. Having acquired jurisdiction of the subject-matter and of the party or parties, they may, except as restrained or prohibited by law, exercise such powers according to their discretion."

In the case of Bradford v. Moseley, 223 S.W. 171, the court said:

"What is a public road is in a measure dependent on the facts of each particular case, but the character of a road does not depend on its length, nor upon the place to which it leads, nor is its character determined by the number of people who actually travel upon it. Decker v. Menard (Civ. App.) 25 S.W. 728; Elliott on Roads, Secs. 1 to 7. A road may be established which is a cul-de-sac. Id. A road open to the public is a public road, though one person may be most benefited by it."

In Vol. 1, paragraph 9, 4th Ed., Elliott on Roads and Streets, page 11, it is stated, in part:

"Public roads are such as are open to the public and are under the control of the state or its governmental instrumentalities, as counties, townships, road districts and local subdivisions of a similar character. Such roads are set apart to the public and are maintained at the public expense."

Also in the same Vol. paragraph 215, page 260, we find:

"Roads and streets used by the public, with a right in all the public to use them, are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many persons do actually use them, but, how many have a free and unrestricted right in common to use them; for, if the public generally are excluded, the way must be regarded as a private one; if the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. If it is a public road, open to all who may desire to use it, the fact that it accommodates but a limited portion of the public, even where it is ordinarily used by only a single family, has been held to make no difference. . . ."

In the case of Bradford v. Mosely, supra, the court in passing upon the question of necessity of a public road said:

". . . It is obvious from the statement of the case that the whole controversy resolves itself into one question: Did the commissioners' court of Palo Pinto county abuse the discretion vested in it by law in opening the road?

"This is true because it is a part of the statement of facts that evidence of all the statutory requirements precedent to the opening of the road was offered, and that all were in due and legal form, and the trial court found that the commissioners' court determined that a necessity for the road existed, and that due notice was given. Such finding was as binding as would have been the verdict of a jury." (Emphasis added)

In the same case reported in 190 S.W. 824, and reversed on other grounds, the Court of Civil Appeals held:

"The inference therefrom is that the Legislature intended that the action of the commissioners' court as to the necessity of the road, its proper location, the form of the petition, the qualification of its signers, and all other issues save that relating to the damages, should be conclusive." (Emphasis added)

Also the Supreme Court in this case further said in 223 S.W. at page 173:

"Latitude and discretion is allowed commissioners' courts in the matter of opening roads, and, it being their duty to open road 'when necessary,' they may act upon their own motion. Huggins v. Hurt, 23 Tex. Civ. App. 404, 56 S.W. 944; Allen v. Parker, 23 Tex. Civ. App. 536, 57 S.W. 703, writ of error denied.

"The language of the statute (subdivision 7, art. 2241) as to 'the power and duty of the commissioners' court as to courthouses and jails' is exactly the same as is subdivision 3, relating to roads, and it has been expressly held that the exercise of that power is left to the discretion of the commissioners' court. . . ."

The answer to your second inquiry depends entirely upon a fact finding by the Commissioners' Court that the proposed road is necessary for public use. Its discretion is final unless clearly abused. If all of the statutes are complied with, and the Commissioners' Court finds that such public road is a necessity, then in view of the foregoing, it is our opinion that the Commissioners' Court may condemn private property for such a road.

SUMMARY

Whether a public road is a necessity is a fact question to be ascertained by the Commissioners' Court. If the statutes are complied with and the Commissioners' Court

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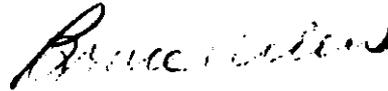
finds that a public road is a necessity,
it may condemn private property for such
a road. Bradford v. Moseley, 223 S.W.
171; Articles 2351 and 6793, V. C. S.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

BA:mv

By



Bruce Allen
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APPROVED:



ATTORNEY GENERAL