



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 8, 1995

**The Honorable William R. Ratliff
Chair, Committee on Education
Texas State Senate
P.O. Box 12068
Austin, Texas 78711**

Letter Opinion No. 95-078

**Re: Whether and how a private road
may become a part of the public domain
after long and continuous use by the
public (RQ-679)**

Dear Senator Ratliff:

You ask whether and how a private road may become a part of the public domain after long and continuous usage by the public. We interpret your request as inquiring about how the public's use of a private road may ripen into a public easement by prescription. You are particularly interested in the following facts, as stated in your letter of request:

During the oil boom in East Texas, oil companies built many oilfield roads. As the years went by, the citizens built homes whose only access was by virtue of these roads. These citizens now expect local governments (city or county) to use their tax dollars to maintain these roadways.

You inform us that the roads in question have not been dedicated, either expressly or by implication, as public easements. We understand that the citizens do have access to their lands by public roads but that their dwellings have been located within their lands, away from the public roads and alongside or at the ends of the oil field roads, which run across or extend into the citizens' lands.

These facts do not suggest the doctrine of public easement by prescription, for they do not include any use of the oil field roads by the general public, that is, by persons other than the home owners. In answer to your question, however, the following is a general statement of the doctrine of public easement by prescription:

An easement [by prescription] is acquired . . . by a use that is open and notorious, or with knowledge and acquiescence on the part of the owners of the servient tenement, and that is adverse, exclusive, uninterrupted, and continuous for the requisite period of time. . . .

[A] right to use private property as a public way may be acquired by prescription or by adverse possession. . .

Although a prescriptive easement is not defeated because the principal benefit of the road is to the plaintiff claiming it on behalf of the public, for the acquisition of a highway easement some public use in fact is essential. It is a question of fact for the jury to determine whether the use is by the public or whether it has been restricted to certain persons in the capacity of owners of the land served by the way.

31A TEX. JUR. 3D *Easements and Licenses in Real Property* §§ 44-45, at 93-94 (1994) (footnotes omitted).¹

You also ask what length of time is required for a roadway to become part of the public domain by prescription.

The general rule is that, before a highway can be established by prescription, it must appear that the general public, under a claim of right, and not by mere permission of the owner, used some defined way, without interruption or substantial change, for at least the longest period of limitation prescribed by statute in an action involving the title to land.

Robison v. Whaley Farm Corp., 37 S.W.2d 714, 716-17 (Tex. 1931). In this state the period of continuous use necessary for the creation of a public easement by prescription is ten years. *E.g.*, *Gooding v. Sulphur Springs Country Club*, 422 S.W.2d 522, 525 (Tex. Civ. App.--Tyler 1967, writ dismissed); *Evans v. Scott*, 83 S.W. 874, 878 (Tex. Civ. App.

¹Public use of a road also may constitute public reliance in support of an implied dedication of the road to public use:

The essential elements of implied dedication are: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) he was competent to do so; (3) the public relied on these acts and will be served by the dedication; and, (4) there was an offer and acceptance of the dedication.

Las Vegas Pecan & Cattle Co. v. Zavala County, 682 S.W.2d 254, 256 (Tex. 1984). Transportation Code section 281.003, a nonsubstantive recodification of a portion of former V.T.C.S. article 6812h, *see* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 1 (recodifying V.T.C.S. art. 6812h as Transp. Code ch. 281), 24 (repealing V.T.C.S. art. 6812h), 25 (stating that act is nonsubstantive recodification only), 1995 Tex. Sess. Law Serv. 1025, 1195-96, 1870-71, abrogates the doctrine of implied dedication as it would apply to roads in counties of 50,000 or fewer persons, but that statute applies only prospectively from August 31, 1981, the effective date of former article 6812h. *Las Vegas Pecan & Cattle Co.*, 682 S.W.2d at 256; *Breithaupt v. Navarro County*, 675 S.W.2d 335, 338 (Tex. App.--Waco 1984, writ refused n.r.e.) (holding that former V.T.C.S. art. 6812h does not operate retroactively) Any implied dedication before that date would not be affected by the statute. *E.g.*, *Lindner v. Hill*, 691 S.W.2d 590, 592 (Tex. 1985).

1904, no writ); *see* Civ. Prac. & Rem. Code § 16.026 (ten-year statute of limitation for adverse possession of real property).

As we noted above, the citizens about whom you inquire do have access to their lands by public roads; but their dwellings have been located within their lands, away from the public roads and alongside or at the ends of the oil field roads. Thus, we interpret the statement that these citizens have no access to their homes except by way of the oil field roads to mean that the oil field roads are the only roads to their homes, but not that the citizens cannot reach their property without crossing land owned by other persons. If the citizens were unable to reach their property without crossing land owned by other persons, then these facts might invoke the doctrine of easement by necessity. This doctrine may be stated as follows:

[I]f a tract of land conveyed is surrounded by the land of the grantor or by grantor's land and that of a third person, only through which the grantee can have access or egress to the conveyed land, the grantee has a right-of-way by necessity over the remaining lands of the grantor. Moreover, the right exists in the tenants and assigns of the vendee as against the tenants and assigns of the vendor.

31A TEX. JUR. 3D *Easements and Licenses in Real Property* § 35, at 79-80 (footnotes omitted).

Even if the citizens had easements by necessity, however, their use would not be adverse and therefore could not ripen into easements by prescription. Necessity establishes an implied grant of an easement over the remaining lands of the grantor, which grant "exists from the very necessity that created it, and . . . the same will cease immediately upon the termination of said necessity." *Sassman v. Collins*, 115 S.W. 337, 339 (Tex. Civ. App. 1908, writ ref'd). Therefore, the grantee's continued use of a right of way by necessity is not adverse and cannot ripen into a prescriptive easement. *Id.*

Finally, you ask what procedure a local government should "go through to declare such a roadway a public right-of-way so that public funds may legally be spent in the maintenance of such roadways." Generally, the public's prescriptive acquisition of the right of highway in a road is not dependent on the county's recognition of the road as a public highway. *See Porter v. Johnson*, 151 S.W. 599, 601 (Tex. Civ. App.—Dallas 1912, no writ). Nor, generally, must there be a judicial declaration that a road has become public by adverse possession before a county may spend public funds to maintain a road that in fact has become a public highway by adverse possession. "A pattern of continued county maintenance of a road is also relevant to the issue of whether a prescriptive easement has been established." 36 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 40.7, at 402 (Texas Practice 1989) (citing *Love v. Olguin*, 572 S.W.2d 17 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.)).

In a county of 50,000 or fewer persons, however, Transportation Code chapter 281 restricts the possible modes of creation of public roads. *See* Act of May 1, 1995, 74th

Leg., R.S., ch. 165, § 1, 1995 Tex. Sess. Law Serv. 1025, 1195-96 (to be codified at Transp. Code ch. 281). Such a

county may acquire a public interest in a private road only by:

- (1) purchase;
- (2) condemnation;
- (3) dedication; or
- (4) a court's *final judgment of adverse possession*.

Id. at 1196 (to be codified at Transp. Code § 281.002) (emphasis added). Thus, in such a county, a public roadway easement by prescription may not arise until it is declared in a final judgment. Chapter 281 does not apply to a roadway easement by prescription that ripened before August 31, 1981, the effective date of former V.T.C.S. article 6812h, the statutory predecessor to chapter 281. See Act of June 1, 1981, 67th Leg., R.S., ch. 613, 1981 Tex. Gen. Laws 2412 (enacting former V.T.C.S. art. 6812h), *repealed by* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 24, 1995 Tex. Sess. Law Serv. 1025, 1870-71; *Breithaupt v. Navarro County*, 675 S.W.2d 335, 338 (Tex. App.--Waco 1984, writ ref'd n.r.e.) (holding that former V.T.C.S. art. 6812h does not operate retroactively); see also Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 1 (recodifying V.T.C.S. art. 6812h as Transp. Code ch. 281), 25 (stating that act is nonsubstantive recodification only), 1995 Tex. Sess. Law Serv. 1025, 1195-96, 1870-71.

Although you do not ask whether a county must maintain a public road acquired by prescription, we note that the maintenance obligation is not necessarily coincidental with the acquisition:

The county has the option of determining which roads it wants to bring into the county road system for maintenance, although this is not made clear in the statutes. A road may achieve the status of being public—that is, the public has a right to use it—either through common law dedication or prescription, but without county responsibility for maintenance. This simply means that the owner of land over which a public road runs cannot close that road to the public; however, the county is not necessarily responsible for its maintenance.

36 BROOKS, *supra*, § 40.6, at 400 (Texas Practice 1989).

Furthermore, we caution that the constitution generally would prohibit the spending of public funds to maintain a private road unless the expenditure would serve a public purpose. See Tex. Const. art. III, § 52. The facts you describe do not show that county maintenance of the oil field roads would serve a public purpose. If, therefore, your concern is whether a county is in any way obligated to maintain a private road that lies

wholly on private property for the benefit of the owner of such property, we would answer that under these facts the county has neither the obligation nor, under article III, section 52, the authority to maintain such a road.

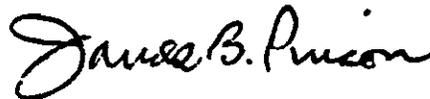
S U M M A R Y

A private road may become a part of the public domain after long and continuous usage by the public. The public's right of highway by prescriptive easement ripens after ten years of continuous and uninterrupted public use that is adverse and exclusive and that is open and notorious or known to the owner of the servient tenement and acquiesced in by him or her.

An easement by necessity is an easement by implied grant and thus is not adverse and cannot ripen into a prescriptive easement even after continuous use of such an easement for more than ten years.

Since August 31, 1981, the effective date of former V.T.C.S. article 6812h, now nonsubstantively recodified as Transportation Code chapter 281, a public roadway easement by prescription may not arise in a county of 50,000 or fewer persons until it is declared in a final judgment in a court of competent jurisdiction. For an easement ripening before that date, there is no legal requirement that any county obtain a judicial declaration of a public road by adverse possession before the county may spend public funds to maintain the roadway, and the public's right of highway based on prescription before that date is not dependent on the county's recognition of the road as a public highway.

Yours very truly,



James B. Pinson
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Opinion Committee