



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 15, 1994

Honorable Jim Mapel  
Criminal District Attorney  
Brazoria County  
329 North Arcola  
Angleton, Texas 77515-4649

Letter Opinion No. 94-053

Re: Whether, pursuant to V.T.C.S. article 6702-1, section 2.002(e), title to a public road that the elected members of the county commissioners court unanimously has voted to abandon automatically vests in the abutting property owners and related questions (ID# 24109)

Dear Mr. Mapel:

You have asked us the following questions:

- (1) Is a county obligated to sell road right-of-way upon discontinuance and abandonment of a county road right-of-way or does title to the right-of-way automatically vest by operation of law in the abutting property owner(s) pursuant to Art. 6702-1, Section 2.002(e), without any right of compensation to the county?
- (2) If a county has general discretion (rather than an obligation) to sell county right-of-way does county road right-of-way nevertheless automatically vest by operation of law in the abutting property owner(s) pursuant to Art. 6702-1, Section 2.002(e), without any right of compensation to the County?
- (3) Do the provisions of Art. 6702-1, Section 2.002(e), provide for the automatic vesting in abutting property owners of both legal fee and easement title to road right-of-way upon discontinuance and abandonment of a county road?
- (4) If the answer to (3) above is affirmative, are the provisions of Art. 6702-1, Sec. 2.002(e) constitutional insofar as they allow an easement held by a county to be transferred to abutting property owners without consideration?

Your questions arise out of the following situation:

Countryplace subdivision in the northern part of Brazoria County is accessible only by means of Countryplace Blvd., a County Road. All the streets in the subdivision are part of the County Road

system as well. The underlying fee belongs to the abutting property owners, with only the surface constituting the right-of-way for the roads being dedicated to the County. For security reasons, the residents of the subdivision wish to erect a gate and guardhouse on Countryplace Blvd. at the entrance to the subdivision. My office has explained to the subdivision residents that such action would constitute an impermissible obstruction of the road. The residents of the subdivision now wish, in order to erect a guardhouse and gate, to remove the streets of their subdivision, as well as that portion of Countryplace Blvd. between the subdivision and the proposed site of the guardhouse and gate, from the County Road system. This would be acceptable to Brazoria County.

We note initially that a county commissioners court is a court of limited jurisdiction; it can exercise only those powers that the state constitution and statutes confer upon it, either explicitly or implicitly. Attorney General Opinion V-1162 (1951) at 2 (and sources cited therein); *see* Attorney General Opinion MW-473 (1982) at 1 (and sources cited therein).

Under the County Road and Bridge Act, V.T.C.S. article 6702-1, a county commissioners court must "order that public roads be laid out, opened, discontinued, closed, abandoned, vacated, or altered, except that" the commissioners court may not (A) discontinue a public road until the commissioners court has designated a new road to replace it; (B) close, abandon, and vacate a public road unless all elected members of the court unanimously vote to do so; and (C) discontinue, close, or abandon an entire first-class or second-class road<sup>1</sup> except on vacation or nonuse for a period of three years. V.T.C.S. art. 6702-1, § 2.002(a)(1). Section 2.002(f)(1) defines "discontinue" to indicate that a county has stopped maintaining a public road. To "abandon" means "to relinquish the public's right of way in and use of a public road." *Id.* § 2.002(f)(2). A county commissioners court "vacates" a public road by directly acting to terminate its existence. *Id.* § 2.002(f)(3). You do not ask about vacating a road.

Section 2.002(e), about which you specifically ask, further provides that when

a commissioners court, acting either upon the request of one or more parties or on its own initiative, by order closes, abandons, and vacates a public road or part thereof, . . . [t]itle to the public road or

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<sup>1</sup>Article 6702-1, section 2.007(a), V.T.C.S., requires the commissioners court to classify all public roads in the county. A road is classified as first class if it is

clear of all obstructions and not less than 40 feet nor more than 100 feet wide; all stumps over six inches in diameter shall be cut down to six inches of the surface and rounded off, all stumps six inches in diameter and under cut smooth with the ground, and all causeways made at least 16 feet wide.

*Id.* § 2.007(a)(1). A road is classified as second class if it conforms to the requirements of first-class roads except that it is not less than forty feet wide. *Id.* § 2.007(a)(2).

part thereof that is closed, abandoned, and vacated and that abuts an owner's property, to the center line of the road, vests, on the date the order is signed by the county judge, in such abutting property owner.<sup>2</sup> [Footnote added.]

Consequently, if all elected county commissioners vote to abandon a public road or portion of a road and the county judge signs an order to that effect, title to the abandoned road automatically vests in abutting property owners, as provided in section 2.002(e), on the date the county judge signs the order. See 36 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 40.11, at 123-24 (Texas Practice Supp. 1993); Letter Opinion No. 93-47 (1993) at 5 (discussing meaning of "abutting" landowner).

In your questions, you ask whether a county may discontinue and abandon a county road.<sup>3</sup> You also specifically cite section 2.002(e), V.T.C.S. article 6702-1, which does not apply to the discontinuance of a public road. We therefore need not consider whether the county may discontinue the public roads in the Countryplace subdivision pursuant to section 2.002(a)(1)(A). Furthermore, we assume that, because these roads serve an existing subdivision, they have not been vacated and have been used during the past three years. Accordingly, we need not consider whether the county may abandon the public roads in the Countryplace subdivision pursuant to section 2.002(a)(1)(C).

Apparently, the county proposes to abandon the roads in the Countryplace subdivision in accordance with subsection (1)(B). Thus, the elected members of the county commissioners court unanimously must vote to abandon the roads. Of course, pursuant to section 2.002(e), once they do so, and on the date that the county judge signs

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<sup>2</sup>The legislature amended section 2.002 in 1989 to clarify that a commissioners court could close, abandon, and vacate a public road, to define those terms, and to provide remedies for property owners damaged by a county's decision to close, abandon, and vacate a public road or portion of a public road. House Comm. on Transportation, Bill Analysis, H.B. 1659, 71st Leg. (1989); Senate Comm. on Intergovernmental Relations, Bill Analysis, H.B. 1659, 71st Leg. (1989); Hearings on H.B. 1659 Before the House Comm. on Transportation, 71st Leg. (Apr. 11, 1989) (testimony of Representative Russell, author) (tape available from House Video/Audio Services Office); Hearings on H.B. 1659 Before the Senate Comm. on Intergovernmental Relations, 71st Leg. (May 16, 1989) (statement of Senator Ratliff, sponsor) (tape available from Senate Staff Services Office). The amendments were in response to the Texas Supreme Court's opinion in *Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986), in which the Court held that a commissioners court may close a public road or a portion of a public road unless an owner of land abutting the closed portion of the road protests the decision. *Id.* at 3 (citing *Moore v. Commissioners Court*, 239 S.W.2d 119 (Tex. Civ. App.—Austin 1951, writ ref'd)). However, according to the Court, the commissioners court may withdraw its maintenance and control of such a road. *Id.* (citing *Meyer v. Galveston, H. & S. A. Ry.*, 50 S.W.2d 268 (Tex. Comm'n App. 1932, holding approved)). The Court also concluded that a property owner damaged by a commissioners court's decision to close a road may file a cause of action against the county for depreciation. *Id.* See generally 36 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 40.11, at 123-24 (Texas Practice Supp. 1993).

<sup>3</sup>You do not ask about all of the relevant statutory provisions. We assume, therefore, that the commissioners court will adhere to the relevant statutory and constitutional requirements, including article III, section 52 of the Texas Constitution. See Attorney General Opinion DM-268 (1993) at 2-3.

the order declaring the roads abandoned, title to the portion of the road that abuts an owner's property, to the center line of the road, automatically vests in that owner. Nothing in the County Road and Bridge Act provides the county with any right of compensation for its interest in the abandoned road. You question whether chapter 263 or chapter 272 of the Local Government Code provides the county with a right of compensation in such a situation. We believe that neither chapter does.

Chapter 263 of the Local Government Code provides for a county's sale or lease of property. Chapter 272 is of broader applicability; it provides a means by which municipalities, counties, and certain other local governments may sell or lease property. Neither applies to the situation you present because article 6702-1, section 2.002(e), V.T.C.S., does not authorize a county to sell its interest in an abandoned road to an abutting land owner.<sup>4</sup> In answer to your first and second questions, therefore, we conclude 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 section 2.002(e) does not provide the county with a right to be compensated for its interest.<sup>5</sup>

You next ask whether article 6702-1, section 2.002(e), V.T.C.S., provides that both legal fee title and easement title to the county's interest in the abandoned road vest in the abutting property owner. You suggest that the county has only an easement in the road; the abutting property owner has fee simple title to the center of the road, subject to the county's easement. Your understanding is consistent with section 2.002(e), which vests title to the abandoned road "to the center line of the road" in the abutting property

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<sup>4</sup>Section 263.002 of the Local Government Code 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.

<sup>5</sup>Attorney General Opinion JM-332 (1985), which discussed the circumstances under which a county could dispose of abandoned rights-of-way, is not to the contrary. The opinion noted that the statutory predecessor to sections 263.001-006 of the Local Government Code, V.T.C.S. article 1577, specifically authorized a commissioners court to dispose of abandoned "highway right-of-way property" and that any conveyance or disposition of county land that does not comply with the statute was void. Attorney General Opinion JM-332 (1985) at 1. The commissioners court lacked the authority to donate county property to private individuals, and (at that time) the owners of property abutting the highway right-of-way property could claim title only by adversely possessing the abandoned property in accordance with article 6702-1, section 2.008, V.T.C.S. See *id.* at 1-2. The opinion concluded that the commissioners court may have disposed of the abandoned roads or rights-of-way only pursuant to article 1577, V.T.C.S. Since this office issued Attorney General Opinion JM-332, the legislature has added section 2.002(e) to V.T.C.S. article 6702-1. See *supra* note 2. Like section 2.008 of article 6702-1, cited in Attorney General Opinion JM-332 as a means by which abutting property owners could gain title to the county's interest in an abandoned highway without complying with article 1577, section 2.002(e) provides a means by which abutting property owners may claim title to the county's interest in an abandoned road without purchasing the property pursuant to chapter 263 of the Local Government Code.

owner. Different persons must hold an easement and the fee simple estate servient to the easement. 31 TEX. JUR. 3D *Easements and Licenses in Real Property* § 53, at 676-77 (1984). If the owner of the servient estate acquires title to the easement, the two property interests merge, and the easement is extinguished. See *Howell v. Estes*, 12 S.W. 62, 62 (Tex. 1888); *Parker v. Bains*, 194 S.W.2d 569, 574 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.); see also 31 TEX. JUR. 3D, *supra*, § 53, at 677. Thus, on the date that the county judge signs the order declaring the road abandoned, title to the easement vests in the abutting fee simple property owner, and the easement is immediately extinguished.

Finally, you ask whether section 2.002(e) unconstitutionally authorizes a county to transfer its interest in an abandoned road without a right of compensation. You specifically point to article III, sections 51 and 52 of the Texas Constitution. We believe that section 2.002(e) is constitutional in a situation in which the county has an easement interest in the land underlying the road.

Section 51 prohibits the legislature from making or authorizing the making of any grant of public assets to any individual, association, or corporation. Section 52 prohibits a county, municipality, or other political subdivision from granting public money or any thing of value to any individual, association, or corporation. In our opinion, once a county that has acquired only an easement interest in the land underlying a county road discontinues or abandons that road, it has no public property to grant.

Under the common law, when a county discontinues or abandons its easement interest in a public road, the easement reverts to the owner of the abutting fee. See *International & Great N. Ry.*, 161 S.W. 914, 915 (Tex. Civ. App.—Austin 1913, writ ref'd); see also *Wilks v. Harris*, 727 S.W.2d 318, 320 (Tex. App.—Waco 1987, no writ). Upon reversion, as we indicated above, the two property interests merge. See *supra*.

Thus, the abutting property owner owns the reversion of the easement, and the landowner need not compensate the county for the reversion when the county discontinues or abandons the road. In our opinion, article 6702-1, section 2.002(e), V.T.C.S., merely codifies this common-law rule. You have stated that Brazoria County owns an easement in the land underlying the roads; we need not, therefore, consider whether section 2.002(e) may be applied unconstitutionally if the county discontinues or abandons a road that it owns in fee.

## S U M M A R Y

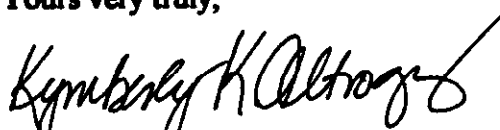
Article 6702-1, section 2.002(e), V.T.C.S., mandates that, on the same date that the county judge signs an order declaring a county road to be abandoned, title to the county's interest in the abandoned road vests in the abutting property owners. Section 2.002(e) does not authorize a county to sell to an abutting property owner the county's interest in the road. The procedures for sale of a county's property in chapters 263 and 272 of the Local Government Code do

not apply because article 6702-1, section 2.002(e) does not authorize the county to sell its interest.

At the point in time that title to the county's easement interest in the abandoned road, to the center line of the road, vests in the abutting property owner, the easement and the servient fee simple estate immediately merge. Consequently, the easement is extinguished.

In a situation in which a county has acquired only an easement interest in the land underlying the road that the county now desires to discontinue or abandon, article 6702-1, section 2.002(e), V.T.C.S., does not violate article III, sections 51 or 52 of the Texas Constitution. Under the common law, the easement reverts to the owner of the land underlying the road upon discontinuance or abandonment of the road. Thus, the landowner need not compensate the county upon discontinuance or abandonment of the road.

Yours very truly,



Kimberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee