



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 22, 2019

The Honorable Natalie Cobb Koehler  
Bosque County Attorney  
Post Office Box 215  
Meridian, Texas 76665

Opinion No. KP-0240

Re: Whether a commissioners court has a  
duty to maintain public roads (RQ-0245-KP)

Dear Ms. Koehler:

You ask whether the commissioners court of Bosque County (the “County”) has a duty to maintain a road you characterize as a “public road” and remove a gate from that road.<sup>1</sup> Your question arises out of a long-running dispute between private landowners over gates located on a road that traverses the property of one of the owners. Request Letter at 1; Supplemental Letter at 1. You refer to court judgments from 2010 and 2017 rendered in litigation between landowners that make fact findings about the road and two gates.<sup>2</sup> The landowners strongly dispute the facts concerning the road, including whether all parts of the road are public or private, what portions of the road are subject to the different judgments, and the character of the road at the location of the current disputed gate.<sup>3</sup> You state that the road “is not on [the County’s] list of approved county roads and it has not been maintained by the county. It was basically just a well-used trail for livestock.” Supplemental Letter at 1. The attorney general opinion process does not resolve disputed fact questions or settle private disputes. *See* Tex. Att’y Gen. Op. No. KP-0205 (2018) at 1 (“This office does not resolve disputed questions of fact through the opinion process.”); Tex. Att’y Gen. LO-89-34, at 2 (“The settlement of private disputes is reserved for the courts.”). Therefore, we will address only general legal principles that may be pertinent to the County’s question.

As a preliminary matter, while statutes and opinions occasionally use the terms “public road” and “county road” interchangeably, keeping the meaning of these terms distinct helps to

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<sup>1</sup>*See* Letter and attachments from Honorable Natalie Cobb Koehler, Bosque Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 22, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> (“Request Letter”); Supplemental Letter and attachments from Honorable Natalie Cobb Koehler at 1 (Aug. 28, 2018) (“Supplemental Letter”) (Supplemental Letter and attachments to both letters on file with the Op. Comm.).

<sup>2</sup>*See* Supplemental Letter at 1 and attached Judgment, *Doty v. Payne*, No. 09-04-06509-BCCV (220th Dist. Ct., Bosque Cty., Tex. May 4, 2010); Request Letter at 1 and attached Judgment of Contempt, *Doty v. Payne*, No. CV09065 (220th Dist. Ct., Bosque Cty., Tex. June 14, 2017), *vacated*, Order Correcting Prior Order, *Doty v. Payne*, No. CV09065 (220th Dist. Ct., Bosque Cty., Tex. Jan. 29, 2018).

<sup>3</sup>*See* Brief from C. Alfred Mackenzie, on behalf of Roye Ray Payne at 2–10 (Sept. 17, 2018); Brief from David L. LeBas, Naman Howell Smith & Lee, PLLC, on behalf of Richard P. Kincheloe at 2–6 (Sept. 24, 2018).

understand Texas road law. As the Texas Supreme Court long ago explained, the term public road may have two meanings:

All roads which have been laid out and established by authority of the commissioners' courts are public roads. A road not originally established under the statute may become public by long-continued use and adoption as such by the county commissioners with the assent of the owner or by prescription. *A road may also become public, in the sense that the public have the right to use it, by dedication.*

*Worthington v. Wade*, 17 S.W. 520, 520–21 (Tex. 1891) (emphasis added) (citations omitted). In its broadest sense, a public road is any road open to the public to use as a matter of right, whether due to government action or other means such as dedication. *Id.* at 521; *see Bradford v. Moseley*, 223 S.W. 171, 174 (Tex. Comm'n App. 1920, judgment approved) (“A road open to the public is a public road . . .”). By contrast, a “county road is a public road that the commissioners court has accepted into the county’s system of roads.” Tex. Att’y Gen. Op. No. KP-0075 (2016) at 2. “While all roads in a county’s system of roads are ‘public roads,’ not all public roads are part of the system of roads maintained by the county.” Tex. Att’y Gen. Op. No. GA-0659 (2008) at 2–3; *see also Buffington v. DeLeon*, 177 S.W.3d 205, 210–12 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that a road was public by dedication even though it was not part of the county system of roads maintained by the county); *City of Houston v. Hughes*, 284 S.W.2d 249, 252–53 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.) (holding that “[t]he laying out or maintenance of a road by public authority is not essential to its being a public road”); Tex. Att’y Gen. Op. No. GA-0359 (2005) at 1–2 (stating that “[a] public road is not necessarily part of the county road system”). Generally, a county has the option to decide which roads it will bring into the county road system for maintenance. Tex. Att’y Gen. LO-95-078, at 4 (citing 36 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY & SPECIAL DISTRICT LAW § 40.6 (1989)); *see also* Tex. Att’y Gen. Op. No. JC-0503 (2002) at 1, 9 (determining that a county did not have a duty to maintain a road dedicated to the public unless the county accepted the road into the county system). And a county does not have a duty to order the removal of obstacles from a road that is not a county road. Tex. Att’y Gen. Op. No. GA-0139 (2004) at 4.

While a road may become a county road by various means, counties such as Bosque County that have a population of 50,000 or fewer persons may acquire a public interest in a private road only by purchase, condemnation, express dedication, or a court’s final judgment of adverse possession in favor of the county. *See* TEX. TRANSP. CODE §§ 281.001–.002.<sup>4</sup> To establish a county interest by express dedication, the declaration must be “an explicit voluntary grant . . . communicated in writing to the commissioners court,” and a county has no duty to maintain the road unless the commissioners court accepts the dedication. *Id.* § 281.003; Tex. Att’y Gen. Op. No. JC-0503 (2002) at 4–5. The public’s use of a private road with the owner’s consent and public maintenance of the road by the county do not establish a county interest by adverse possession. *See* TEX. TRANSP. CODE § 281.004. To obtain a public interest under this chapter, the

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<sup>4</sup>As of the 2010 census, Bosque County had a population of 18,212. U.S. CENSUS BUREAU, DEP’T OF COMMERCE, <https://www.census.gov/quickfacts/fact/table/bosquecountytexas/PST045217>.

commissioners court must record the interest by resolution in the records of the court. *Id.* § 281.005. Also, chapter 258 authorizes a county to clarify the existence of a county public interest by publishing a map reflecting that interest after conducting specified proceedings. *Id.* §§ 258.001, .002.

Chapter 251 of the Transportation Code provides general county authority over roads. *See id.* §§ 251.001–.161. The chapter authorizes counties to maintain “public roads.” *Id.* § 251.003. While the chapter does not directly address the *duty* of a county to maintain county roads, it requires a county to keep roads subject to chapter 251 clear of obstructions. *Id.* § 251.008. Section 251.010 allows the erection of gates on county roads of a certain size—a “third-class road”—but only if the gate meets specified requirements. *Id.* § 251.010(a).<sup>5</sup> However, not all public roads are subject to chapter 251. The chapter defines a public road for purposes of chapter 251 as a “public road or highway that has been laid out and established according to law and that has not been discontinued.” *Id.* § 251.002. A public road is “discontinued” if the county has discontinued the maintenance of the road. *Id.* § 251.001(2). Thus, a court would likely determine that a county has a duty to maintain a road, remove obstacles, and regulate gates only if the road has been laid out as a county road by law and has not been discontinued.

Finally, we consider your concern that findings of fact in a judgment rendered in litigation between private parties might establish a county duty to maintain a road. *See* Request Letter at 1; Supplemental Letter at 1. You refer to judgments that recite as findings of fact that a certain road is a “public roadway” or a “public, third class road,” but the judgments on their face do not reflect that the County was a party to the litigation.<sup>6</sup> Without addressing the substantive issues concerning these judgments, we advise that generally persons or entities are not bound by a judgment in a suit to which they were not parties or in privity with a party. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). Thus, a court would likely conclude that when a county is not a party to litigation between landowners, fact findings recited in the judgment rendered in that litigation may affect private rights but do not establish a county duty to maintain a road or remove a gate from the litigated road.

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<sup>5</sup>The gate requirements in section 251.010 also apply to gates on a neighborhood road established under section 251.053 procedures, but only if a county obtained a right-of-way for the neighborhood road at no cost. TEX. TRANSP. CODE § 251.010(a). Section 251.053 specifies that a county does not have an ongoing obligation to maintain a neighborhood road. *Id.* § 251.053(f).

<sup>6</sup>*See* Supplemental Letter at 1 and attached Judgment, *Doty v. Payne*, No. 09-04-06509-BCCV (220th Dist. Ct., Bosque Cty., Tex. May 4, 2010); Request Letter at 1 and attached Judgment of Contempt, *Doty v. Payne*, No. CV09065 (220th Dist. Ct., Bosque Cty., Tex. June 14, 2017), *vacated*, Order Correcting Prior Order, *Doty v. Payne*, No. CV09065 (220th Dist. Ct., Bosque Cty., Tex. Jan. 29, 2018).

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Very truly yours,



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