



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 10, 2019

The Honorable B. D. Griffin  
Montgomery County Attorney  
501 North Thompson, Suite 300  
Conroe, Texas 77301

Opinion No. KP-0256

Re: Use of funds collected from claims on subdivision road and drainage bonds required under Local Government Code subsection 232.003(7) (RQ-0260-KP)

Dear Mr. Griffin:

Your predecessor asked about a county's use of funds from subdivision road and drainage bonds that a county may require under Local Government Code subsection 232.003(7).<sup>1</sup> Chapter 232 governs a county's regulation of subdivisions. *See* TEX. LOC. GOV'T CODE §§ 232.001–.109. Subchapter A of that chapter generally authorizes counties to adopt subdivision platting requirements. *Id.* §§ 232.001–.011. Section 232.003 expressly authorizes a county to adopt requirements for streets, roads, and rights-of-way, and specifications for construction of streets and roads. *Id.* § 232.003(1)–(4). The statute also authorizes a county to adopt certain drainage specifications. *Id.* § 232.003(5), (8). Relevant to the questions asked, subsection 232.003(7) authorizes a county to “require that the owner of the tract to be subdivided execute a good and sufficient bond in the manner provided by Section 232.004.” *Id.* § 232.003(7). When a county requires a bond,

[t]he bond must:

- (1) be payable to the county judge of the county in which the subdivision will be located or to the judge's successors in office;
- (2) be in an amount determined by the commissioners court to be adequate to ensure proper construction of the roads and streets in and drainage requirements for the subdivision, but not to exceed the estimated cost of construction of the roads, streets, and drainage requirements;

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<sup>1</sup>*See* Letter from Honorable J. D. Lambright, Montgomery Cty. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1, 3 (Dec. 14, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

(5) be conditioned that the roads and streets and the drainage requirements for the subdivision will be constructed:

(A) in accordance with the specifications adopted by the court . . . .

*Id.* § 232.004. Your predecessor stated that Montgomery County (the “County”) adopted this bond requirement, which he said “provides security for the subdivision developer’s obligations to comply with the Subdivision Rules and compensation/damages to the County to facilitate completion or repair of the roads and drainage shown on the plat and in the plans,” in the event the developer fails to properly complete the roads or drainage. Request Letter at 1, 3. Failure of the developer to complete the roads or drainage “typically results in the County collecting funds by recourse against the letter of credit, by a lawsuit settlement, or by judgment,” which funds are designated for use by the appropriate commissioner. *Id.* at 3.

The County requires the bond for all subdivision plats providing new roads, whether dedicated public roads or private roads. *Id.* Your predecessor explained that in some cases the County accepts the previously publicly dedicated subdivision roads into the county road system and expends the bond proceeds to complete or make repairs to the roads in the subdivision. *Id.* However, in other instances the County does not accept the roads into the county road system to avoid any obligation for continuing maintenance. *Id.* at 3–4. Your predecessor also informed us that some roads are located in a private, gated subdivision. *Id.* at 4. Given the latter two scenarios, your predecessor first asked whether the County may expend the bond proceeds on a public road that has not been accepted into the county’s system of roads or on a private road. *Id.* at 2–4.

A commissioners court has only those powers expressly conferred or those powers necessarily implied from express grants of power. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003); *see also Guynes v. Galveston Cty.*, 861 S.W.2d 861, 863 (Tex. 1993) (stating that a county commissioners court’s powers must be ultimately grounded in the Constitution or statutes). While the statute requires the bond be payable to the county judge, no statute in chapter 232 directly addresses how bond proceeds may be used thereafter. However, a commissioners court’s express statutory power or duty carries with it “broad implied powers to accomplish its legitimate directives.” *Guynes*, 861 S.W.2d at 863. By expressly stating the purpose of the bond, section 232.004 necessarily authorizes the use of bond proceeds to accomplish the statute’s purposes. *See* TEX. LOC. GOV’T CODE § 232.004. Section 232.003 authorizes counties to adopt reasonable standards for roads, streets, and specified drainage in a subdivision, without limiting the standards to county roads. *Id.* § 232.003(4), (5), (8). Section 232.0031 recognizes that the county may adopt standards for noncounty subdivision roads, such as private roads or public roads not accepted as a county road. *See id.* § 232.0031 (prohibiting a higher standard for subdivision streets and roads “than [what] the county imposes on itself”). Thus, sections 232.003, 232.0031, and 232.004 impliedly authorize the use of subdivision bond proceeds received by the county judge to construct subdivision roads in accordance with county specifications, whether the roads are county roads, private roads, or public roads that the county has not accepted as county roads. *Id.* §§ 232.003, .0031, .004.

Your predecessor was concerned, however, that by expending the bond proceeds on a noncounty public road or a private road, the county may obligate itself to accept the road into the county road system for ongoing maintenance purposes. Request Letter at 3–4. A county has discretion about which roads it will accept into the county road system. *See* Tex. Att’y Gen. Op. No. KP-0240 (2019) at 2. Generally, a county road may be established by commissioners court order, dedication and acceptance, or prescription. *See Stein v. Killough*, 53 S.W.3d 36, 43 (Tex. App.—San Antonio 2001, no pet.); Tex. Att’y Gen. Op. No. JC-0503 (2002) at 1–3. In some circumstances, county maintenance may be relevant to show whether the county has accepted a particular road into its system. For example, a subdivision road constructed or maintained pursuant to a county order and election under chapter 253 of the Transportation Code is a county road. *See* TEX. TRANSP. CODE §§ 253.003, .011. Continuous maintenance using public funds may establish a county road in a contest under chapter 258. *Id.* § 258.002(a)(2). And as an evidentiary matter, county maintenance may establish implied dedication and acceptance. *See Coryell Cty. v. Harrell*, 379 S.W.3d 345, 351 (Tex. App.—Waco 2011, no pet.); Tex. Att’y Gen. Op. Nos. GA-0128 (2003) at 1–2; JC-0503 (2002) at 4. If a county has accepted a road into the county system, the county has a general duty to maintain the road. *See* Tex. Att’y Gen. Op. Nos. KP-0075 (2016) at 2, GA-0659 (2008) at 3, GA-0594 (2008) at 3.

Counties do not possess general authority to construct or maintain private roads. *See La.-Pac. Corp. v. Newton Cty.*, 149 S.W.3d 262, 264 (Tex. App.—Eastland 2004, no pet.); Tex. Att’y Gen. Op. No. JC-0172 (2000) at 2. Thus, a county may construct or maintain a private road only as the Constitution or a statute authorizes. *See* TEX. CONST. art. III, § 52f (authorizing a county with a population of 7,500 or less to construct and maintain private roads if it imposes a reasonable charge for the work); Tex. Att’y Gen. Op. No. JM-334 (1985) at 2 (stating that county authority to maintain a private road must “be found in a [constitutional or statutory] provision authorizing county maintenance of a private road under specified circumstances”). Moreover, the Constitution prohibits a county from using public funds to improve a private road when the prominent purpose is to benefit private interests. Tex. Att’y Gen. Op. Nos. GA-0359 (2005) at 4 (citing TEX. CONST. art. III, § 52(a)); JC-0288 (2000) at 3 (determining that use of county resources for the benefit of a private property owners’ association did not serve a county purpose). But a county may expend public funds that incidentally benefit private interests when the predominant purpose of the expenditure is to directly accomplish a county public purpose. *See* Tex. Att’y Gen. Op. No. KP-0116 (2016) at 4–5.

Chapter 232 impliedly authorizes the expenditure of bond proceeds in support of the county’s authority to adopt construction requirements and specifications for subdivision roads of any kind. *See* TEX. LOC. GOV’T CODE §§ 232.003, .0031, .004. These construction requirements and specifications may serve a county public purpose distinct from the county’s general duty to provide for a county road system. *See, e.g., id.* § 232.0034 (authorizing additional requirements for access by emergency vehicles). Chapter 232 does not expressly or impliedly require a county to accept the subdivision roads into the county’s system of roads or otherwise obligate the county to assume ongoing maintenance. Thus, a court would likely conclude that a county’s expenditure of subdivision bond proceeds to ensure proper construction of roads in accordance with the

county's subdivision requirements, without more, does not constitute acceptance of the roads into the county's system of roads or otherwise obligate the county to maintain the roads.<sup>2</sup>

Your predecessor also asked whether the County may expend subdivision bond proceeds "on drainage facilities (such as detention ponds) located on private property within subdivisions when the drainage facilities are not part of a road right-of-way." Request Letter at 3. Subsection 232.003(5) addresses subdivision road drainage, authorizing a county to "adopt reasonable specifications to provide adequate drainage for each street or road in a subdivision in accordance with standard engineering practices." TEX. LOC. GOV'T CODE § 232.003(5). But subsection 232.003(8) separately authorizes a county to "adopt reasonable specifications that provide for drainage in the subdivision to:

(A) efficiently manage the flow of stormwater runoff in the subdivision; and

(B) coordinate subdivision drainage with the general storm drainage pattern for the area[.]

*Id.* § 232.003(8); *see also id.* § 232.004(2), (5) (addressing bond aspects relating to "drainage requirements for the subdivision"). Thus, a county may expend the bond proceeds on subdivision drainage facilities that are not part of a road right-of-way, provided that the facilities are for stormwater runoff management or storm drainage coordination as authorized under subsection 232.003(8).

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<sup>2</sup>Your predecessor characterized the bonds as "road maintenance bonds" but while the statute requires a bond conditioned on the completion of construction to county standards, it is silent about maintenance. Request Letter at 1; TEX. LOC. GOV'T CODE § 232.004.

S U M M A R Y

Sections 232.003, 232.0031, and 232.004 of the Local Government Code authorize a county to use proceeds from a subdivision bond required by section 232.003 to ensure a public or private road is constructed to standards adopted by the county for subdivision roads. A court would likely conclude that a county's expenditure of such bond proceeds, without more, does not constitute acceptance of the roads into the county's system of roads or otherwise obligate the county to maintain the roads.

A county may expend construction bond proceeds on subdivision drainage facilities that are not part of a road right-of-way, provided that the facilities are for stormwater runoff management or storm drainage coordination as authorized under Local Government Code subsection 232.003(8).

Very truly yours,



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