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OPINION COMMITTEE

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WHARTON, TEXAS 77488

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RQ-0749-GA

October 10, 2008

The Honorable Greg Abbott
Attorney General of Texas
PO Box 12548
Austin, Texas 78711-2548

FILE # 11-45853-08
ID.# 45853

RE: Request for Attorney General Opinion

Dear Attorney General Abbott:

I request your opinion on the following question:

Whether a County has the authority to remove fencing located within a county right-of-way that the Commissioners Court determines interferes with the safety and transportation of the public?

RELEVANT STATUTES

Transportation Code §251.003. Construction and Maintenance of Public Roads

(a) the Commissioners Court of a county may:

(1) make and enforce all necessary rules and orders for the construction and maintenance of public roads;

(2) hire the labor and purchase the machinery and equipment needed to construct and maintain public roads; and

(3) use any necessary material most convenient to build, repair, or maintain public roads, regardless of the location or extent of the material.

(b) The court may enter any necessary order for the use of inmates of the county jails to work on the county roads or to build bridges.

Transportation Code §251.008. General Requirements for County Roads

A public road of any class must:

- (1) be clear of all obstructions;
- (2) have all stumps over six inches in diameter cut down to not more than six inches of the surface and rounded off; and
- (3) have all stumps of six inches or less in diameter cut smooth with the ground.

Transportation Code §251.016. General County Authority Over Roads, Highways and Bridges

The Commissioners Court of a county may exercise general control over all roads, highways, and bridges in the county.

STATEMENT OF FACTS

In Wharton County there is a gravel road known as County Road 119 (a.k.a. Macek Road), which was dedicated as a 33-foot public right of way within a warranty deed executed December 30, 1974. (Attached hereto as Exhibit "A"). Furthermore, on May 27, 2007 pursuant to Chapter 258 of the Texas Transportation Code, the Commissioners Court formally adopted the Wharton County Road Map, which included County Road 119.

Before the adoption of the Map, a protest was filed in accordance with Chapter 258 by an adjoining landowner of County Road 119 challenging the validity of the County's claim as a public road. Pursuant to the procedures outlined in Chapter 258 a jury of view was appointed and a hearing was conducted. Evidence was admitted that indicated the County had maintained County Road 119 since the mid 1960's as well as the previously mentioned dedication in 1974. The jury of view determined the County's claim was valid ultimately leading to the adoption of the County Road Map. To date the landowner has not appealed.

In September of 2008 the landowner dismantled his fence, which ran parallel with the County Road 119 right-of-way. He then built a new fence approximately eleven feet closer to the road. The result is a fence located just within the twelve-foot wide gravel roadway (area of travel) running parallel with the south line of the road. The fence is over 800 feet in length. Large wood posts anchor the fence with the remainder consisting of metal "T" posts connected by barbed and electrified wire. The fence prevents the use of the shoulder but does not block the public's use of the road.

There were complaints from the public and the matter was placed on the Commissioners Court agenda. After discussion with the landowner and other county residents who use the road, the Commissioners Court determined the fence obstructed the public's ability to safely travel and ordered the fence removed from the County's right-of-way. (Attached hereto as Exhibit "B")

BRIEF

Texas Transportation Code Sections 251.003, 251.008 and 251.016 establish the general county authority relating to roads. Specific to this authority is the County's duty to keep all classes of roads free from obstructions. *Tex. Transp. Code Ann.* § 251.008 (Vernon 1999). Moreover, the Texas Supreme Court has construed the language in Section 251.016 as authorizing county actions that are related to the county's duty to protect the public's interest in transportation. *City of San Antonio v. City of Boerne*, 111 S.W. 3d 22, 30 (Tex. 2003) (citing *Canales v. Laughlin*, 214 S.W.2d 451, 456-57 (Tex. 1948)). The Supreme Court went on to state in its holding regarding the limitations of county authority "By granting commissioners courts general control over the roads, the Legislature imposed on them a duty to make the roadways safe for public travel." *Id.* at 31-32.

The Wharton County Commissioners Court believes the fence is an obstruction to the safety and transportation of the public. We understand your office has previously opined that a county Commissioners Court has the power to order the removal of an obstruction from a county road and wish to confirm that the conclusions reached in those opinions effectively address the issues in this matter. *See Tex. Att'y Gen. Op. No. M-534 (1969) at 4. See Also, Tex. Att'y Gen. Op. No. GA-430 at 2.*

I would appreciate a response to this request for an opinion at your earliest opportunity.

Respectfully,


G. A. Maffett III
County Attorney

Enclosures

Deed

Commissioners Court Order to Remove

THE STATE OF TEXAS
COUNTY OF WHARTON

KNOW ALL MEN BY THESE PRESENTS:

81947

That we, E. A. MERTEN and wife, MARION T. MERTEN of the County of Wharton, State of Texas, for and in the consideration hereinafter stated, paid and to be paid by WILLIE HUBENAK, RFD 2, Box 144, Wharton, Texas 77488, as follows:

The sum of TEN AND NO/100 (\$10.00) DOLLARS, together with other valuable considerations, the receipt and sufficiency of which is hereby fully acknowledged and confessed, and by the execution and delivery by the said WILLIE HUBENAK his one certain vendor's lien installment note in the principal amount of \$31,847.40 payable to the order of E. A. MERTEN or



MARION T. MERTEN, with interest thereon at the rate of 8% per annum as follows:

The accrued interest only shall be and become due and payable during each of the first 5 years following date hereof, that is, the interest shall be due and payable on December 30th of each of the years 1975, 1976, 1977, 1978 and 1979.

Commencing December 30, 1980, there shall be and become due and payable ten (10) equal annual installments of \$3,184.74, plus the accrued interest, in accordance with the tenor, effect and reading thereof, said note being secured by deed of trust to Robert C. Cline, Trustee and containing the usual default, acceleration, attorney's fee and collection clauses;

Have GRANTED, SOLD and CONVEYED, and by these presents do GRANT, SELL and CONVEY unto the said WILLIE HUBENAK, of the County of Wharton, State of Texas, the following described lands and premises, to-wit:

17.693 acres of land in the D. Hamilton League, Abstract No. 26, being a part of that certain called 20.08 acres tract which was conveyed by Sol Alpard to E. A. Merten by deed dated August 13, 1942, appearing of record in Volume 163,

Page 384 of the Deed Records of Wharton County Texas, and described by metes and bounds and being those lands reflected on plat with field notes attached hereto marked EXHIBIT "A".

There is excepted from this conveyance, not conveyed hereby, and specifically reserved in the Grantors, their heirs and assigns, an undivided one-half interest in and to all minerals in, on and under said lands together with the rights of ingress and egress for the purposes of mining, marketing, exploring, marketing and saving the same.

This conveyance is subject, however, to an outstanding 1/16th undivided royalty interest reserved in Sol Alpard in deed to E. A. Merten dated August 13, 1942, appearing of record in Volume 163, Page 384 of the Deed Records of Wharton County, Texas, but specifically providing that such outstanding royalty interest shall be a burden upon the undivided one-half mineral interest hereinabove reserved and excepted from this conveyance to the full extent as provided in said reservation, and same shall be a part of such mineral reservation.

This conveyance shall also be subject to the following covenants and conditions:

1. This conveyance shall be subject to the right-of-way easement South of and adjacent to the North line of the 20.08 acres parcel of land, of which this grant is a part, as reflected on survey plat attached hereto, and the grantor hereby dedicates such right-of-way easement for the public use, and the grantee, by acceptance hereof, and the recording of this instrument signifies ratification and acceptance of such right-of-way easement insofar as the same affects the portion of said lands



conveyed to him hereby.

2. Grantors herein reserve unto themselves the right of access to the Peach Creek and the privileges of fishing said stream at any and all points on or adjacent to said lands for and during the remainder of the life of the survivor of them.

375

Page 384 of the Deed Records of Wharton County Texas, and described by metes and bounds and being those lands reflected on plat with field notes attached hereto marked EXHIBIT "A".

There is excepted from this conveyance, not conveyed hereby, and specifically reserved in the Grantors, their heirs and assigns, an undivided one-half interest in and to all minerals in, on and under said lands together with the rights of ingress and egress for the purposes of mining, marketing, exploring, marketing and saving the same.

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This conveyance shall also be subject to the following covenants and conditions:

1. This conveyance shall be subject to the right-of-way easement South of and adjacent to the North line of the 20.08 acres parcel of land, of which this grant is a part, as reflected on survey plat attached hereto, and the grantor hereby dedicates such right-of-way easement for the public use, and the grantee, by acceptance hereof, and the recording of this instrument signifies ratification and acceptance of such right-of-way easement insofar as the same affects the portion of said lands conveyed to him hereby.

2. Grantors herein reserve unto themselves the right of access to the Peach Creek and the privileges of fishing said stream at any and all points on or adjacent to said lands for and during the remainder of the life of the survivor of them.

3. Grantee herein shall have the right to prepay the deferred payment obligation without penalty interest at any time after the 5th anniversary of such note, debt and lien.

4. The contemplated conveyance shall be subject to outstanding pasture lease which will remain in existence until January 1, 1975, all rents accruing from said lease shall be payable to the Grantee from and after January 1, 1975.

5. For a term of 10 years from and after the date hereof, in the event of any contemplated sale or conveyance of the



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Sandra K. Sanders, County Clerk
Wharton County, Texas
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acreage designated as 2.438 acres of land showing on said plat and a part of said called 20.08 acres tract, then and in that event the grantee herein Willie Hubenak shall have a prior right to purchase said lands at any bona fide price offering and the grantors agree that such land will not be sold to any other persons, firms or corporations unless and until Willie Hubenak, the grantee herein shall have indicated his refusal to purchase said property at and upon the proposed terms and conditions of any bona fide offering.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said WILLIE HUBENAK, his heirs and assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said WILLIE HUBENAK, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, subject only to the conditions, exceptions and reservations hereinabove stated and referred to.

WITNESS OUR HANDS at Wharton, Texas, as of December 30th, A.D. 1974.

E. A. Merten
E. A. MERTEN
Marion T. Merten
MARION T. MERTEN

THE STATE OF TEXAS §
 §
COUNTY OF WHARTON §

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared E. A. MERTEN and wife, MARION T. MERTEN, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

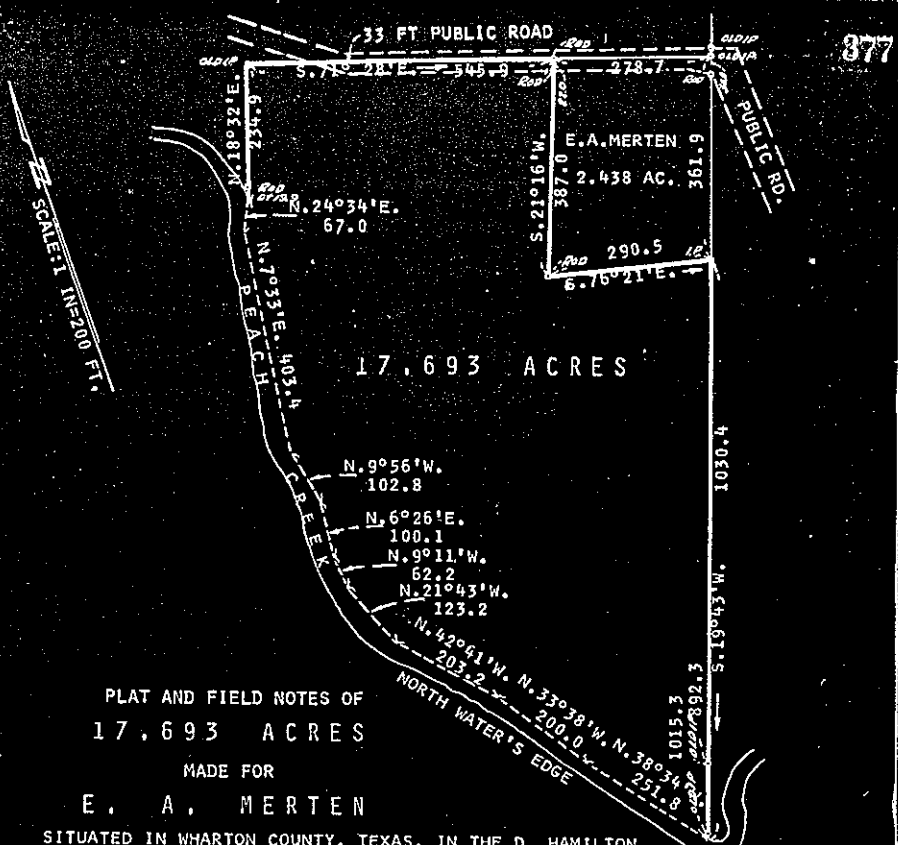
GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 9th day of January, 19 75.

Wm. F. ...
NOTARY PUBLIC IN AND FOR
WHARTON COUNTY, TEXAS

Wm. F. ...
Notary Public in and for
Wharton County, Texas



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Sandra K. Sanders, County Clerk
Wharton County, Texas
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PLAT AND FIELD NOTES OF
17.693 ACRES
MADE FOR
E. A. MERTEN

SITUATED IN WHARTON COUNTY, TEXAS, IN THE D. HAMILTON LEAGUE, ABSTRACT NO. 26, AND BEING A PART OF THAT CERTAIN CALLED 20.08 ACRES TRACT WHICH WAS CONVEYED BY SOL ALPARD TO E. A. MERTEN BY DEED DATED AUGUST 13, 1942, AND RECORDED IN VOLUME 163 ON PAGE 384 OF THE WHARTON COUNTY DEED RECORDS AND IS DESCRIBED BY METES AND BOUNDS, AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF THE CALLED 20.08 ACRES (ACTUALLY 20.131 ACRES) TRACT, A POINT IN THE NORTH WATER'S EDGE OF PEACH CREEK;

THENCE N. 18° 32' E. (true bearing), with the West line of said 20.131 acres tract, at 19.9 feet set an iron rod on the lower bank of Peach Creek and in all 234.9 feet to an old iron pipe found marking the Northwest corner of said 20.131 acres tract;

THENCE S. 71° 28' E., with the North line of said 21.131 acres tract, in a 33 ft wide lane, 545.9 feet to an iron rod set for the Northwest corner of the E. A. Merten 2.438 acres tract;

THENCE S. 21° 16' W., with the West line of said 2.438 acres tract, at 22.0 feet set an iron rod in the South line of 33 ft road, and in all 387.0 feet to an iron rod set for corner;

THENCE S. 76° 21' E., with the South line of said 2.438 acres tract, 290.5 feet to an iron pipe set in the East line of said 20.131 acres tract, and being S. 19° 43' W. 361.9 feet from an old iron pipe marking the Northeast corner of said 20.131 acres tract;

THENCE S. 19° 43' W., with the East line of said 20.131 acres tract, at 892.3 feet pass an old iron pipe on the top bank of Peach Creek, at 1015.3 feet pass an old iron pipe on the lower bank and in all 1030.4 feet to the North water's edge of Peach Creek;

THENCE NORTHWESTERLY, upstream, with the meanders of the North water's edge of Peach Creek, at normal level, as follows: N. 38° 34' W. 251.8 feet; N. 33° 38' W. 200.0 feet; N. 42° 41' W. 203.2 feet; N. 21° 43' W. 123.2 feet; N. 9° 11' W. 62.2 feet; N. 5° 26' E. 100.1 feet; N. 9° 56' W. 102.8 feet; N. 7° 33' E. 403.4 feet and N. 24° 34' E. 67.0 feet to the place of beginning and containing 17.693 acres.

SURVEYED: DECEMBER 12, 1974.



H. Chas. Koehl, Jr.
H. CHAS. KOEHL, JR.
REGISTERED PUBLIC SURVEYOR

EXHIBIT "A"

Filed for record on the 9th day of January A.D. 1975 at 11:00 o'clock A.M.
Duly recorded this the 10th day of January A.D. 1975 at 3:00 O'clock P.M.
Instrument No. 61947 Delvin Marek, County Clerk
Wharton County, Texas
By: *Lillian Bunde*, Deputy



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Sandra K. Sanders, County Clerk
Wharton County, Texas
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I, SANDRA K. SANDERS, County Clerk, Wharton County, Texas, do hereby certify that this is a true and correct copy as the same appears of record in my office. Witness my hand and Seal of Office on 10-10-08
Sandra K. Sanders
Sandra K. Sanders, County Clerk
Deputy
Bernice Koclan

THE STATE OF TEXAS
COUNTY OF WHARTON

§
§
§

**ORDER TO REMOVE OBSTRUCTIONS IN COUNTY ROAD 119 PURSUANT
TO TEXAS TRANSPORTATION CODE SECTION 251.003, 251.008 AND 251.016**

On this the 6 day of October, 2008, the Commissioners Court
of Wharton County, Texas, upon motion of Commissioner Raywald,
seconded by Commissioner King, duly put and carried;

WHEREAS, there is a gravel road known as County Road 119, which was dedicated as a
33-foot public right of way in warranty deed executed December 30, 1974 recorded in
Volume 450, Page 373 of the Wharton County Deed Records;

WHEREAS, furthermore pursuant to Chapter 258 of the Texas Transportation
Code, a jury-of-view was convened to determine the validity of the public's right to use
County Road 119. After a hearing, the jury-of-view determined County Road 119 was a
public road whereby the Wharton County Commissioners Court formally adopted the
Wharton County Road Map, included within said Map, County Road 119;

WHEREAS, in September 2008, an adjoining landowner dismantled his fence
which ran parallel with the County Road 119 right-of-way. He then built a new fence
approximately 10 to 12 feet closer to the roadway. The result is a fence located just
within the actual roadway running parallel with the south line of the road. The fence is
over 800 feet in length. Large wood posts anchor the fence with the remainder consisting
of metal "T" posts connected by barbed and electrified wire;



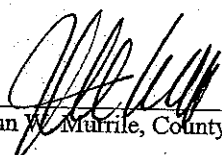
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Wharton County, Texas
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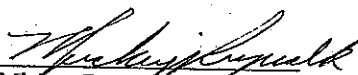
WHEREAS, said fence is a hazard and constitutes an obstruction to the public's safety, use and transportation of County Road 119;

WHEREAS, through the Commissioners Court general control over county roads and its duty to keep all classes of county roads free of obstructions pursuant to Texas Transportation Code Sections 251.003, 251.008 and 251.016, the Wharton County Commissioners Court has the authority to remove obstructions from county road right-of-ways.

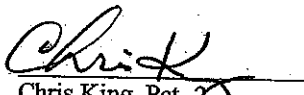
NOW THEREFORE, IT IS ORDERED that in accordance with Texas Transportation Code Sections 251.003, 251.008 and 251.016, the Commissioners Court of Wharton County orders the removal of said fence described above.

SIGNED ON October 6, 2008.


John W. Murrile, County Judge

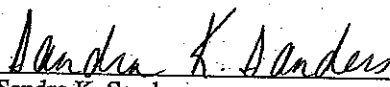

Mickey Reynolds, Pct. 1

ABSENT
Philip Miller, Pct. 3


Chris King, Pct. 2


Jimmy Kasper, Pct. 4

Attested by:


Sandra K. Sanders
County Clerk, Wharton County



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Sandra K. Sanders, County Clerk
Wharton County, Texas
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I, SANDRA K. SANDERS, County Clerk, Wharton County, Texas, do hereby certify that this is a true and correct copy as the same appears of record in my office. Witness my hand and Seal of Office on October 10, 2008



Sandra K. Sanders, County Clerk

By 
TRACY KIMPLE
DEPUTY