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TRANSPORTATION CODE

TITLE 6. ROADWAYS

SUBTITLE C. COUNTY ROADS AND BRIDGES

CHAPTER 255. COUNTY REGULATION OF SIGHT DISTANCES

Sec. 255.001. DEFINITION. In this chapter, "sight distance" means the unimpaired view of a motorist at or near the intersection of a road with another road or with an alley, driveway, or another way intended for vehicular traffic.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 255.002. COUNTY REGULATORY AUTHORITY. (a) The commissioners court of a county by order may regulate the sight distance for an intersection that involves a county road and that is located outside the limits of a municipality. The commissioners court may:

(1) define the appropriate sight distance;

(2) prohibit an obstruction of the sight distance by any vegetation, loose earth, or other item except a building or other structure affixed to the ground, if the obstruction is a traffic hazard; and

(3) provide for the removal and disposition of an obstruction maintained in violation of an order adopted under this section.

(b) The commissioners court may not adopt an order under this section that conflicts with an ordinance of a municipality located in the county or with a rule adopted by a state agency relating to billboards or outdoor advertising. An order adopted in violation of this subsection is void.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 255.003. NOTICE TO OWNER OF OBSTRUCTION. (a) If the commissioners court determines that an obstruction of the sight distance exists in violation of an order adopted under Section 255.002, the court shall send a written notice of that determination by registered mail, return receipt requested, to the record owner of the property on which the obstruction is located.

(b) The notice must include:

(1) a description of the obstruction and its location; and

(2) an order requiring the owner to take measures specified in the order to correct or remove the obstruction.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 255.004. HEARING ON REMOVAL ORDER. (a) A person who is aggrieved by an order issued under Section 255.003 may request a hearing on the order. The request must be made not later than the 10th day after the date the person receives notice of the obstruction.

(b) The commissioners court shall hold the hearing not later than the 10th day after the date the request for a hearing is received.

(c) After the hearing, the commissioners court shall make appropriate orders relating to the obstruction.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 255.005. ASSESSMENT. (a) If after notice and expiration of the time permitted for a hearing request under this chapter, a person does not comply with an order adopted under this chapter, the commissioners court may remove, dispose of, or correct the obstruction and assess the costs incurred by the county in doing so against the owner of the property on which the obstruction was located.

(b) Interest accrues at an annual rate of 10 percent on any unpaid part of the costs.

(c) If a person assessed costs under this section does not pay the costs within 60 days after the date of assessment, a lien in favor of the county attaches to the property from which the obstruction was removed or corrected to secure the payment of the costs and interest.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 255.006. COMPENSATION FOR LOSS OF VALUE. The commissioners court shall pay the owner of the property from which an obstruction is removed by the court or required by the court to be removed under this chapter an amount sufficient to cover the loss of value, if any, of the obstruction incurred by the owner because of the removal.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 255.007. OFFENSE FOR VIOLATION OF ORDER. (a) A person commits an offense if the person violates an order adopted under this chapter.

(b) An offense under this section is a Class C misdemeanor.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

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For additional guidance, I looked to Transportation Code section 251.007 , which provides minimum widths for county roads. It states as follows:

Sec. 251.007. CLASSIFICATION OF COUNTY ROADS. (a) The commissioners court of each county shall classify each public road in the county as a first-class, second-class, or third-class road.

(b) A county may not reduce a first-class or second-class road to a lower class.

(c) A first-class road must be not less than 40 feet wide or more than 100 feet wide. The causeway on a first-class road must be at least 16 feet wide.

(d) A second-class road and a causeway on a second-class road must meet the requirements applicable to a first-class road.

(e) A third-class road must meet the requirements applicable to a first-class road, except that:

(1) a third-class road may be less than 40 but not less than 20 feet wide; and

(2) the causeway on a third-class road may be less than 16 but not less than 12 feet wide.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

I do not know what classification has been given by the County to CR398, but it may be helpful to use the minimum widths as contained in 251.007 to further define the County's prescriptive easement rights. We made an argument to Ray Dishaw using a 40' road width in some of our correspondence to him and his attorney.

So, in conclusion, while I cannot precisely tell you the extent of the County's prescriptive easement rights, I have some recommendations, which are as follows:

1. I think it would be hard for the landowners to contend that the roadway and ROW outside their original fenceline are not burdened by a prescriptive easement. From the photos you provided, it appears the entirety of the area outside their original fenceline has been used by the County for roadway and drainage purposes. I believe the landownowners at issue, the Elsbury's would have a hard time in court seeking to limit any clearing of the road or adjacent ROW up to their fenceline (not the new fence that they constructed just in front of the county's culverts. ( I am suggesting that they be served with a demand letter that they remove the fence as an obstruction in the County's prescriptive easement, with the statement that the County will remove it should they fail to do so. One of the attached AG opinions specifically authorizes the County to remove fences constructed in County ROW).

2. I think it would be difficult for the landowners to prevail in a claim that the County cannot remove the vegetation outside their original fence (not the new fence) and in the prescriptive ROW, as the attached cases and the statutes cited above appear to support the County's right to remove vegetation and obstructions in the ROW adjacent to the road bed.

3. Should the County seek to widen the road bed or adjacent ROW to where it extends behind the original fenceline - then I believe there is a risk of a "taking" and that perhaps the Commissioners Court should seek to acquire such property through condemnation. Assuming the original fenceline (not the new fence or fences) has been in place for many years, I think it would be difficult for the County to establish that area behind that fenceline is part of the County's prescriptive easement.

4. If there exist "behind the fence" obstructions (trees/vegetation, etc) that interfere with sight distances, then I suggest the Commissioners utilize the procedures in Transportation Code chapter 255 to address the sight distance issues.

5. I understand the landowners have stated that they desire no communications with the County regarding these matters. Given their hostile nature, and the propensity for potential litigation, I suggest the County provide written notice of each step it intends to take in connection with the proposed improvements, with an offer to meet and consult as necessary. Such letters could be very important in convincing a judge or jury in the event of litigation that the County's actions were taken with aforethought and notice, rather than through haste or without consideration of the landowner's private property rights.

6. Lastly, I suggest that you may want to consider presenting proof of the obstructions to be removed to the Commissioners Court and obtain a Commissioners Court order with findings that the obstructions are within the prescriptive easement and should be removed for safety purposes. Such findings in a Commissioners Court order are generally upheld by reviewing courts absent a finding of arbitrariness or patent unreasonableness. I note that the AG opinion authorizing removal of a fence in a County ROW (copy attached) referenced findings of the Commissioners Court.

Jon, I hope this gives you some guidance. As you know, I am happy to discuss these matters with you and assist with any notifications to the affected landowners. I know you are looking out for the public.

Greg

Greg Hudson
Hudson & O'Leary LLP
1010 Mopac Circle
Suite 201

2 of 4 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

Opinion No. GA-0703

2009 Tex. AG LEXIS 20

April 7, 2009

**SYLLABUS:**

[*1]

Authority of a commissioners court to remove fencing located within a county right-of-way (RQ-0749-GA)

**REQUESTBY:**

The Honorable G.A. Maffett, III
Wharton County Attorney
309 East Milam, Suite 500
Wharton, Texas 77488

**OPINIONBY:**

GREG ABBOTT, Attorney General of Texas; ANDREW WEBER, First Assistant Attorney General; JONATHAN K. FRELS, Deputy Attorney General for Legal Counsel; NANCY S. FULLER, Chair, Opinion Committee; Charlotte M. Harper, Assistant Attorney General, Opinion Committee

**OPINION:**

You ask whether a county has the "authority to remove fencing located within a county road right-of-way that the Commissioners Court determines interferes with the safety and transportation of the public[.]" n1 You describe the nature of the fence at issue as dangerous and tell us that the "Commissioners Court determined the fence obstructed the public's ability to safely travel and ordered the fence removed ...." Request Letter at 3; *see id.* (attached Order, finding that "fence is a hazard and constitutes an obstruction to the public's safety, use and transportation" of the county road).

n1 *See* Request Letter at 1 (*available at* www.texasattorneygeneral.gov).

[*2]

The Legislature has granted commissioners courts authority to "exercise general control over all roads, highways, and bridges in the county." TEX. TRANSP. CODE ANN. § 251.016 (Vernon Supp. 2008). In addition, section 251.003 of the Transportation Code authorizes a commissioners court to "make and enforce all necessary rules and orders for the ... maintenance of public roads." *Id.* § 251.003(a)(1) (Vernon 1999). With respect to this general authority, the Texas Supreme Court has stated that the "Legislature imposed on [county commissioners courts] a duty to make the roadways safe for public travel." *City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 31-32 (Tex. 2003) (construing statutory predecessor to section 251.016). The Transportation Code further provides that a public road of all classes must "be clear of all obstructions." *Id.* § 251.008(1).

Based on the authority found in the Transportation Code, this office has previously concluded that a county commissioners court may remove or order the removal from a county road right-of-way objects that create [*3] a safety hazard to the public. *See* Tex. Att'y Gen. Op. Nos. GA-0430 (2006) at 3-4 (abandoned mobile home); JM-1241 (1990) at 2 (trees or shrubs); M-534 (1969) at 4 (obstruction). The determination of whether a particular item creates a public safety hazard is a fact determination for the commissioners court to make in the first instance, subject to judicial review. *See* Tex. Att'y Gen. Op. No. GA-0693 (2009) at 1 (concluding question whether mailboxes create a public safety hazard is a fact question not appropriate for the opinion process); Request Letter (attached Order, finding that "fence is a hazard and constitutes an obstruction to the public's safety, use and transportation" of the county road).

**SUMMARY**

A county commissioners court has authority, subject to judicial review, to remove from a county road right-of-way objects that create a safety hazard to the public.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt PersonnelGovernmentsLocal GovernmentsDuties & PowersGovernmentsPublic ImprovementsBridges & Roads [*4]

LEXSEE 175 S.W.2D 427

# HOLCOMB v. CITY OF FORT WORTH.

**No. 14562**

**Court of Civil Appeals of Texas, Fort Worth**

***175 S.W.2d 427*; *1943 Tex. App. LEXIS 620***

**Oct. 22, 1943, Decided**

**COUNSEL:** [**1] R. M. Rowland, of Fort Worth, for appellant.

R. E. Rouer and Heard L. Floore, both of Fort Worth, for appellee.

**JUDGES:** SPEER, Justice.

**OPINION BY:** SPEER

**OPINION**

[*428] Plaintiff E. H. Holcomb instituted this suit to recover damages from defendant City of Fort Worth, a municipal corporation, growing out of the alleged wrongful destruction of his trees, shrubs, grass, etc., in the parkway situated between his property line and the paved portion of Hemphill Street in said City.

By plaintiff's petition it is disclosed that said Hemphill Street was originally laid out and dedicated as being 80 feet wide; that residence lots were platted and sold fronting thereon; that plaintiff, through his predecessors in title, is the owner of a lot facing Hemphill Street; that upon that lot is situated his homestead, consisting of an eight-room house and other valuable improvements; that prior to 1902, defendant had paved a trafficway in said street 40 to 45 feet wide and ordered property owners to erect suitable curbs between said paved portion and the remainder of said footage lying between the pavement and the property lines and that said space should be filled with soil and beautified. That in 1904, [**2] another ordinance was passed apparently widening said trafficway; that plaintiff's predecessors in title complied with the order of the defendant and planted five shade trees, shrubs, grass and ornamental flowers in said parkway; that all said trees, grass and shrubs materially benefited plaintiff's home and enhanced its value.

Further allegations are made that on or about November 25, 1941, the defendant began the widening and repaving of Hemphill Street, so that the part used for vehicular traffic would be 54 feet wide, and in completing said project defendant took away from plaintiff approximately seven feet of land out of that part of the strip theretofore lying between plaintiff's original property line and the curb, as previously erected by plaintiff at the request of defendant; that in taking said seven feet of land, defendant also took and destroyed five beautiful shade trees, shrubbery and grass, theretofore planted and grown by plaintiff; that all said acts of defendant were without the consent and over the protest of plaintiff; and that defendant has failed and refused to compensate plaintiff for the damages thus sustained by him.

There are other allegations concerning [**3] the destruction by defendant of the concrete curbing and driveways built by plaintiff, but as we understand from the parties, these were rebuilt by defendant at the points where the widened street required same to be. Therefore, we think we need not further notice these items.

Defendant specially excepted to plaintiff's petition, substantially, because: (1) The petition showed upon its face that Hemphill Street was, under the dedication, 80 feet wide; that defendant has not appropriated any part of plaintiff's property, the only change made being to widen the vehicular traffic part to 54 feet, instead of from 40 to 45 feet (the former width of pavement varying at different points). (2) Because the petition nowhere alleges that any portion of said street was dedicated to any other purpose than that to be used for street purposes, nor that defendant had abandoned any of its rights and privileges under the law to use the whole of said street for such

public purposes as were required under all changing circumstances.

The special exceptions were sustained and the case dismissed. Plaintiff duly excepted, gave notice of and has perfected this appeal.

As we understand the contentions [**4] of plaintiff, they are: That since his fee title extended to the center of Hemphill Street, subject only to the easement for street purposes held by defendant, which easement included 40 feet, or one-half the width of the dedicated street of 80 feet, and since the ordinances of 1902 and 1904 required him to construct his curb at the edge of the then paved portion of the street and beautify that portion lying between his land line and the curb, and having done so by planting his trees and shrubs thereon, he acquired a property right in that portion of the ground, of such nature as entitled him to place his valuable improvements thereon and that defendant could not legally destroy his said improvements without compensating him therefor.

One phase of the situation out of which this suit grows has been before this court in *Gilliland et al. v. City of Fort Worth et al., Tex. Civ. App., 162 S.W.2d 1000.* Plaintiff in this case was one of the relators in the Gilliland case. Injunctive relief [*429] was sought in that case to restrain the City from doing the things it now is charged with having done, viz., widening the paved part of the street and thus destroying plaintiff's trees, [**5] shrubs and grass. In the Gilliland case, supra, all members of this court agreed that the trial court properly sustained the special exceptions to the petition; but that because of the prayer for general and special relief and under the circumstances which existed at the time the matter was before us, the majority held that the cause should be remanded to enable relators to amend and seek the damages they had apparently sustained. Chief Justice McDonald dissented from the majority opinion remanding the case, substantially upon the ground that the matter of damages sustained, if any, was not before us.

In the trial court the Gilliland case was determined upon the special exceptions to the petition; the exceptions were sustained and relators were denied the right to amend; just what their proposed amendment would have been was not disclosed; but the trial court held that they had an adequate remedy at law. It may fairly be inferred from both the trial court judgment and the majority opinion by us that it was believed that under all the alleged facts and circumstances, relators had acquired such a property right in that portion of the originally dedicated 80 feet in the street not [**6] occupied by the pavement and upon which their trees and shrubs stood, defendant City could not take and appropriate said improvements placed thereon without compensation to relators. The majority opinion does not reflect all of the matters that were apparent to this court when the appeal was presented; some matters were disclosed by oral argument of the parties. In plaintiff's brief in the instant case, he comments upon the holding of the majority in this language: "On appeal (of the Gilliland case) the majority of the Court of Civil Appeals thought that the case should be reversed and remanded with instructions to the district judge to reinstate the case on his docket and allow the plaintiffs to amend and claim their damages, the threatened injury having become an actual injury while the appeal was pending."

Upon application by the City a writ of error was granted to this court and upon a hearing the Supreme Court reversed the judgment of the majority opinion by this court and affirmed the judgment of the trial court. *City of Fort Worth v. Gilliland et al., 140 Tex. 616, 169 S.W.2d 149, 150.* The relators (plaintiff here being one of them) sought injunctive relief upon substantially [**7] the same alleged facts as those upon which plaintiff now seeks to recover damages or affirmative relief, since the alleged threatened wrongs have been executed.

In the opinion of the Supreme Court in the Gilliland case, the court said: "It is clear to us that the foregoing facts do not disclose a private right invested in any of the plaintiffs including plaintiff here, in relation to the street or to any of the improvements in the street. Whatever right any of them has in this respect is a public right which is common to every member of the general public. No use of the street by any of the plaintiffs, can ripen into a private right by lapse of time, or by reason of the fact that they contributed as they did to the making of improvements in the street." (Citing authorities.) The court concluded that there was no error in sustaining the exceptions to plaintiffs' petition. Commenting further the court said: "The averments of said first amended petition, as we have heretofore shown, affirmatively disclose that no private right of any of the plaintiffs is in jeopardy."

It is earnestly contended by plaintiff in the instant case that the above expressions quoted from the Supreme Court's [**8] opinion is dictum and not at all necessary to a disposition of the question before it. In this we do not concur. This court had reversed the judgment of the trial court, indicating that relators should have their case reinstated and be permitted to amend and seek recovery of the damages sustained, as we then understood the facts and circumstances--the alleged threatened injuries had been done and performed by the City and that to enjoin the City from doing something it had already done would be futile. The Supreme Court was considering the majority opinion of the Court of Civil Appeals and it appears to us that the quoted portion of the opinion of the Supreme Court is a direct reply to our holding and is the court's reason for having reversed the majority opinion.

We believe the Supreme Court had the entire picture in mind when it spoke thus, so plainly. It is our duty to follow the decisions of our court of last resort.

[*430] In support of his right of recovery in this case, plaintiff cites and relies upon such authorities as *Blair v. Waldo, Tex. Civ. App., 245 S.W. 986*, *City of San Angelo v. Neilon, Tex. Civ. App., 104 S.W.2d 895*, *Southwestern Telegraph & Telephone Co. v.* [**9] *Smithdeal, Tex. Civ. App., 103 Tex. 128, 124 S.W. 627*; *Id., 104 Tex. 258, 136 S.W. 1049* (both by Supreme Court), and *Texas Constitution, Art. 1, sect. 17*, Vernon's Ann. St. The first two cited cases were by our Courts of Civil Appeals and apparently were based upon the holding in Smithdeal case, supra, by the Supreme Court. It will be observed that in reaching the conclusions expressed in the majority opinion in the Gilliland case ( Tex. Civ. App., 162 S.W.2d 1000-1002) we cited in support of our decision the Smithdeal case, supra. It is obvious to us that the Supreme Court had those authorities before it and considered them in reversing the majority opinion, for the reasons stated by the court and quoted by us above from that opinion, *140 Tex. 616, 169 S.W.2d 149*. It must follow that if, as stated by the Supreme Court in the last-cited case, plaintiff had no property rights in the grounds and improvements placed thereon by him, there was no unlawful taking without compensation by the City, in violation of the cited constitutional provision.

In view of what we have said, we overrule the point of error complaining of the action of the trial court in sustaining the special exceptions [**10] to plaintiff's petition, and order that the judgment below be affirmed. This will be done.

Affirmed.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2009

The Honorable Robert F. Vititow
Rains County Attorney
220 West Quitman
Post Office Box 1075
Emory, Texas 75440

Opinion No. GA-0693

Re: Authority of a commissioners court to remove from county right-of-way structures it deems to be a safety hazard (RQ-0729-GA)

Dear Mr. Vititow:

You inform us that in Rains County, individuals have erected mailboxes "constructed of various materials including, stone, brick, concrete and sometimes large metal posts" and that, in some instances, these mailboxes are "adjacent to the paved county roadway or within a few feet of the paved roadway." (1) You state that the "commissioners perceive these mailboxes to be a safety hazard to the general public," and you request an opinion relating to the authority of a commissioners court to require landowners to remove hazardous mailboxes from the county road right-of-way and replace them with others that are easily knocked down when struck by a vehicle. Request Letter at 1-2.

The Legislature has granted commissioners courts authority to "exercise general control over all roads, highways, and bridges in the county." Tex. Transp. Code Ann. § 251.016 (Vernon Supp. 2008). Section 251.003 more specifically authorizes commissioners courts to "make and enforce all necessary rules and orders for the construction and maintenance of public roads." *Id.* § 251.003(a)(1) (Vernon 1999). "By granting commissioners courts general control over the roads, the Legislature imposed on them a duty to make the roadways safe for public travel." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 31-32 (Tex. 2003).

Pursuant to this authority, we have previously concluded that a commissioners court may remove or order the removal of objects in the county road right-of-way that create a safety hazard to the public. *See* Tex. Att'y Gen. Op. No. GA-0430 (2006) at 3-4 (allowing commissioners court to remove abandoned mobile homes in the right-of-way); Tex. Att'y Gen. Op. No. JM-1241 (1990) at 2 (allowing commissioners court to require the removal of trees or shrubs that interfere with the right-of-way). However, whether and to what extent the mailboxes at issue create a hazard to the public is a fact question not appropriate for the opinion process. Tex. Att'y Gen. Op. No. GA-0620 (2008) at 5. Thus, we are unable to answer whether the commissioners court is authorized to remove or order the removal of the specific mailboxes at issue.

You also ask about the perimeters of a county's right-of-way on a road established by implied dedication or prescription. *See* Request Letter at 2. When a road is established by prescription or

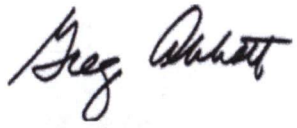
dedication, "the right is not limited to the beaten path used, but includes sufficient land, where reasonably available, for drainage ditches, repairs, and the convenience of the traveling public." *Allen v. Keeling*, 613 S.W.2d 253, 254-55 (Tex. 1981) (holding county's prescriptive rights to a road "extend . . . into the eighteen to twenty foot wide bar ditches"). Thus, to the extent that land is "reasonably available," a county's right-of-way will extend beyond the area traveled. However, whether and to what extent a public right-of-way has been acquired by dedication or prescription on a given road is a fact question that cannot be resolved by an opinion. *See Linder v. Hill*, 691 S.W.2d 590, 591 (Tex. 1985); Tex. Att'y Gen. Op. No. GA-0620 (2008) at 5.

**SUMMARY**

Pursuant to its general control over all roads, highways, and bridges in the county, as provided for in section 251.016 of the Transportation Code, a commissioners court may remove or order the removal of objects in the county road right-of-way that create a safety hazard to the public. Whether the mailboxes at issue are hazardous to the public, and can therefore be removed by the commissioners court, is a fact question not appropriate for the opinion process.

Generally, when a road is established by prescription or dedication, the right is not limited to the area traveled, but includes sufficient land, where reasonably available, for drainage ditches, repairs, and the convenience of the traveling public. However, whether and to what extent a public right-of-way has been acquired by dedication or prescription is a question of fact that cannot be decided through the opinion process.

Very truly yours,



GREG ABBOTT
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Assistant Attorney General, Opinion Committee

## Footnotes

1. *See* Request Letter at 2 (*available at* www.texasattorneygeneral.gov).

1 of 32 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

Opinion No. GA-0703

*2009 Tex. AG LEXIS 20*

April 7, 2009

**SYLLABUS:**

[*1]

Authority of a commissioners court to remove fencing located within a county right-of-way (RQ-0749-GA)

**REQUESTBY:**

The Honorable G.A. Maffett, III
Wharton County Attorney
309 East Milam, Suite 500
Wharton, Texas 77488

**OPINIONBY:**

GREG ABBOTT, Attorney General of Texas; ANDREW WEBER, First Assistant Attorney General; JONATHAN K. FRELS, Deputy Attorney General for Legal Counsel; NANCY S. FULLER, Chair, Opinion Committee; Charlotte M. Harper, Assistant Attorney General, Opinion Committee

**OPINION:**

You ask whether a county has the "authority to remove fencing located within a county road right-of-way that the Commissioners Court determines interferes with the safety and transportation of the public[.]" n1 You describe the nature of the fence at issue as dangerous and tell us that the "Commissioners Court determined the fence obstructed the public's ability to safely travel and ordered the fence removed ...." Request Letter at 3; *see id.* (attached Order, finding that "fence is a hazard and constitutes an obstruction to the public's safety, use and transportation" of the county road).

n1 *See* Request Letter at 1 (*available at* www.texasattorneygeneral.gov).

[*2]

The Legislature has granted commissioners courts authority to "exercise general control over all roads, highways, and bridges in the county." *TEX. TRANSP. CODE ANN. § 251.016* (Vernon Supp. 2008). In addition, *section 251.003 of the Transportation Code* authorizes a commissioners court to "make and enforce all necessary rules and orders for the ... maintenance of public roads." *Id.* § 251.003(a)(1) (Vernon 1999). With respect to this general authority, the Texas Supreme Court has stated that the "Legislature imposed on [county commissioners courts] a duty to make the roadways safe for public travel." *City of San Antonio v. City of Boerne, 111 S.W.3d 22, 31-32 (Tex. 2003)* (construing statutory predecessor to section 251.016). The Transportation Code further provides that a public road of all classes must "be clear of all obstructions." *Id.* § 251.008(1).

Based on the authority found in the Transportation Code, this office has previously concluded that a county commissioners court may remove or order the removal from a county road right-of-way objects that create [*3] a safety

hazard to the public. *See* Tex. Att'y Gen. Op. Nos. GA-0430 (2006) at 3-4 (abandoned mobile home); JM-1241 (1990) at 2 (trees or shrubs); M-534 (1969) at 4 (obstruction). The determination of whether a particular item creates a public safety hazard is a fact determination for the commissioners court to make in the first instance, subject to judicial review. *See* Tex. Att'y Gen. Op. No. GA-0693 (2009) at 1 (concluding question whether mailboxes create a public safety hazard is a fact question not appropriate for the opinion process); Request Letter (attached Order, finding that "fence is a hazard and constitutes an obstruction to the public's safety, use and transportation" of the county road).

**SUMMARY**

A county commissioners court has authority, subject to judicial review, to remove from a county road right-of-way objects that create a safety hazard to the public.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt PersonnelGovernmentsLocal GovernmentsDuties & PowersGovernmentsPublic Improvements Bridges & Roads

1 of 1 DOCUMENT

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

Opinion No. JM-1241

1990 Tex. AG LEXIS 136

November 8, 1990

**SYLLABUS:**

[*1]

Re: Authority of a county to trim, remove, or sell trees from county road rights-of-way (RQ-1970)

**REQUESTBY:**

JIM MATTOX, Attorney General of Texas

**OPINION:**

Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

You ask three questions regarding Harris County's authority with respect to trees and shrubs growing within the rights-of-way of county roads. Your first question is:

To what extent can the county trim, remove, sell or otherwise dispose of trees or shrubs from the right-of-way of county roads or prevent the planting of such trees and shrubs without being required to compensate owners of the fee upon which the right-of-way exists?

Counties under their authority to open and lay out roads may acquire the rights-of-way for such roads by dedication, purchase, condemnation, or prescriptive easement. See V.T.C.S. art. 6702-1, subch. A (the County Road and Bridge Act); 36 D. Brooks, County and Special District Law, §§ 40.7, 40.25 (Texas Practice 1989). Your question and brief indicate that you are concerned about the situation where the property interest the county has acquired in the right-of-way is in the nature of an easement, the fee interest being [*2] retained by the owner of the property abutting the right-of-way. See 43 Tex. Jur. 3d Highways § 116 (1985).

We caution at the outset that resolution of the issues presented in your first question might ultimately depend on the facts of the particular case -- e.g., the provisions of the conveyance, condemnation proceeding judgment, or dedication under which the county acquired the particular right-of-way in question. We cannot anticipate every factual situation that might arise. The following discussion of pertinent legal authority is offered for your guidance.

We think it is clear that the Harris County Commissioners Court in exercising a right-of-way easement generally has authority to prevent the planting of trees and shrubs within the right-of-way and to remove or cause to be removed trees or shrubs growing there, when the court makes a reasonable finding that the trees or shrubs would interfere with the right-of-way purposes for which the easement was obtained. See Harris County Road Law, §§ 1, 16, Special Laws, Acts 1913, 33d Leg., ch. 17, at 64 (Harris County Commissioners Court to have control of all roads laid out or constructed by the county and of all [*3] matters in connection with the construction or maintenance of such roads); id. § 12 (condemnation authority); id. § 33 (Harris County Road Law cumulative of other laws); V.T.C.S. art. 6702-1, § 2.002(b)(1) (under the County Road and Bridge Act, commissioners court may make and enforce all reasonable and necessary rules for the construction and maintenance of county roads except as prohibited by law); id. § 2.004 (condemnation authority). We note, too, that where the trees or shrubs are determined to impair visibility for motorists using the county road in question, Harris County as one with a population of 950,000 or more has authority under sub-

chapter F of article 6702-1, through its commissioners court, to define sight distances at intersections and to prohibit and provide for the removal of trees and shrubs obstructing such sight distances (presumably both within and without the area of the right-of-way). In the absence of a showing of fraud or gross abuse of discretion, the commissioners court's determinations as to the need for removal of trees and shrubs in the right-of-way for right-of-way purposes would be conclusive. See, e.g., West Prod. Co. v. Penn, [*4] 131 S.W.2d 131 (Tex. Civ. App. - San Antonio 1939, writ ref'd).

As to whether the owner of the underlying fee in the right-of-way is entitled to compensation for removal of trees or shrubs from the right-of-way, though we note some possible inconsistencies among the Texas cases, we think that the cases dealing most directly with this question indicate that the fee owner generally has no right to compensation. n1

n1 Section 2.418 of article 6702-1 provides that the commissioners court "shall pay the owner an amount sufficient to cover the loss of the value of the obstruction, if any, incurred by the owner by reason of the removal" of obstructions to sight distances under subchapter F. As the commissioners court's authority under subchapter F is not limited to the area within the right-of-way but also extends to land held in fee outside the right-of-way easement, we do not think that section 2.418 in itself requires payment for removal of trees and shrubs within the right-of-way easement.

In a decision approved [*5] by the supreme court, the Commission of Appeals in City of Fort Worth v. Gilliland, 169 S.W.2d 149 (Tex. Comm'n App. 1943, opinion adopted), ruled that fee owners could not enjoin the city's destruction of curbs, sidewalks, trees, or shrubs in the street right-of-way, even where those improvements had been installed by the fee owners in compliance with a city ordinance, when the city, the right-of-way easement holder, later widened the street. The court stated that the facts of the case did "not disclose a private right invested in any of the plaintiffs in relation to the street or to any of the improvements in the street." Id. at 150.

Subsequently, in Holcomb v. City of Fort Worth, 175 S.W.2d 427 (Tex. Civ. App. - Fort Worth 1943, writ ref'd) one of the unsuccessful Gilliland plaintiffs sued the city for damages occasioned by the city's removal of the trees and shrubs. The Holcomb court, citing Gilliland, ruled that "the plaintiff had no property rights in the grounds and improvements placed thereon by him." Id. at 430. It affirmed the trial court's sustaining of the defendant city's position that there had been no showing that the city "had abandoned [*6] any of its rights and privileges under the law to use the whole of said street for such public purposes as were required under all changing circumstances." Id. at 428.

Where a right-of-way easement is acquired, by condemnation at least, the fee owner is presumed to have been fully compensated at such time for the damages to his property, including appurtenances such as trees, which will arise from the proper use of the easement. City of La Grange v. Pieratt, 175 S.W.2d 243 (Tex. 1943). Authorities even acknowledge that as the taking of an easement for road purposes by condemnation generally leaves the condemnee with little or no use of the right-of-way area, he is often entitled to damages equivalent to those he could have for the taking of the whole fee. See Thompson v. Janes, 251 S.W.2d 953 (Tex. 1952). While the fee owner may have a right to use portions of the right-of-way for growing trees or crops, his right extends only so far as it does not interfere with the paramount rights of the easement holder to use the right-of-way for road purposes. See 43 Tex. Jur. 3d Highways § 117, and authorities cited there. J. Sackman, Nichols Law of Eminent Domain, [*7] at 5.45(3), states the law thusly:

The trees and herbage in a public highway are the property of the owner of the fee. He has the right to use any portion of the way not needed for public travel, for growing grass, crops, or trees, either for their produce or for improving the appearance and enhancing the comfort of his premises. For any injury to the trees and herbage that is not the result of the proper exercise of the highway easement he is entitled to compensation as fully as if the highway did not exist. The owner's rights in the trees and herbage are, however, like all his rights within the limits of the way, subordinate to the rights of the public. When the trees or herbage interfere with the proper exercise of the highway easement they must give way. For this reason trees may be cut down or trimmed in order to widen the wrought portion of the highway, or to accommodate rails and wires laid by public service corporations in the highway, for any purpose which is classed as within the highway easement, without compensation to the owner of the fee.

As changing road and traffic conditions require, the public right-of-way easement holder may, by widening the paved portion [*8] of the roadway or clearing a greater part of the unpaved portion, make fuller utilization of its easement rights. McCraw v. Dallas, 420 S.W.2d 793 (Tex. Civ. App. - 1967, writ ref'd n.r.e.). n2 In such cases, we think, activities by the fee holder in the right-of-way which had not previously been inconsistent with the public's use of it for right-of-way purposes may over time come to interfere with the paramount public use and have to give way. See Gilli-

land and Holcomb, supra; see also Galveston H. & S.A. Ry. Co. v. City of Eagle Pass, 249 S.W. 268 (Tex. Civ. App.-San Antonio 1923), rev'd on other grounds, 260 S.W. 841 (Tex. Comm'n App. 1924, judgm't adopted) (plaintiff on notice that city could, when need arose, have improvements plaintiff had erected in public right-of-way removed, and he could not recover therefor).

n2 The point at which changing public utilization of the right-of-way imposes burdens on the servient fee estate in excess of the easement rights, thus entitling the fee owner to additional compensation, would depend on the terms of the particular easement, the nature of the change in use, and local conditions. See, e.g., 31 Tex. Jur. 3d Easements and Licenses in Real Property § 43, et seq.; see also Texas Power & Light Co. v. Casey, 138 S.W.2d 594 (Tex. Civ. App. -- Fort Worth 1940, writ dism'd judgm't cor.) (easement holder's liability for negligent cutting of trees not necessary for easement purposes).

[*9]

Your brief indicates a concern that even if the commissioners court may have trees and shrubs in the right-of-way removed, there would remain a legal question, for purposes of the disposal, by sale or otherwise, of those materials, as to where title in them lay -- i.e., whether the county's disposal of the materials might constitute a conversion, and thus a taking, of private property for public purposes without compensation in violation of article I, section 17, of the Texas Constitution.

Holcomb, supra, specifically held that the destruction of trees and shrubs in the right-of-way there involved no unlawful taking under the constitution. Id. at 430. If the public easement holder may, without compensating the fee owner, destroy trees and shrubs in the right-of-way for right-of-way purposes, we see no reason why it may not otherwise dispose of trees and shrubs that are removed because they interfere with use of the right-of-way, even by sale, without compensation. Though the fee owner may "own" the trees and shrubs in the right-of-way, and presumably himself have the right to transplant or cut them, if not in violation of applicable ordinances or laws, n3 his [*10] ownership interest must give way when the trees or shrubs come to constitute an impairment of the public authority's proper utilization of its right-of-way easement. See Sackman, supra. He plants and grows trees or shrubs in the right-of-way with notice that the public easement holder may remove them when they come to constitute an impairment of the easement.

n3 We note that section 2.006 of article 6702-1 authorizes the commissioners court to lay out "neighborhood roads" and provides for the payment of damages to the fee owners for the takings. The section further authorizes the commissioners court to direct that the fee owners clear obstructions from the right-of-way "for a space of not less than 15 feet or more than 30 feet on each side of a designated line" except that "the marked trees and other objects used to designate the line shall not be removed or defaced." We think this provision reflects the commissioners court's control over trees in the right-of-way (though we do not take the provision to indicate that if the commissioners court fails to order the clearance and later itself has it done, or later has a greater portion of the right-of-way cleared, the fee owner is entitled to any further compensation).

[*11]

It appears that some other jurisdictions have followed a different rule. See Rummell v. Ohio Dep't of Pub. Transp., 443 N.E.2d 1032 (Ohio Ct. App. 1981) (statute authorizing director of transportation to "remove" trees within right-of-way did not authorize director to "take" such trees without compensation to fee owner). Sackman, supra, in section 5.45(3) notes that "[i]at is held in some jurisdictions that the public authorities may use the vegetable growth for the purpose of repairing the way . . . but when the vegetation is cut for any other purpose it belongs to the owner of the fee. If he fails to remove it within a reasonable time he may be held to have abandoned it."

We do find Texas cases which suggest that a public authority may use soil or gravel from a right-of-way easement only for improving that or other roadways. See, e.g., City of La Grange v. Brown, 161 S.W. 8 (Tex. Civ. App. -- Austin 1913, writ ref'd) (city may use soil excavated from a street easement for improvement of other roads). In dicta, the court in City of San Antonio v. Mullally, 33 S.W. 256 (Tex. Civ. App. -- San Antonio 1895, no writ) noted that "if the city does not remove [*12] the soil for the purpose of filling in other streets, and the adjoining owner does not remove it, the city may sell and dispose of it in any way it may deem proper." (Emphasis added.)

We think the later Gilliland and Holcomb decisions, however, indicate that a public authority may, in exercising a right-of-way easement, remove trees and shrubs for road purposes and dispose of them without compensation to the fee

owner. The supreme court expressly approved Gilliland, and refused writ of error in Holcomb. We find no Texas cases subsequent to the now almost 50-year-old Gilliland and Holcomb cases which follow a different rule with regard to compensation for removal of trees and shrubs from a public right-of-way.

Your second question is:

If the county can sell trees from the right-of-way, what procedure must be followed in doing so?

Your brief indicates that your second question reflects a concern as to whether the county's sale of trees would be governed by subchapter A of chapter 263 of the Local Government Code, providing for the county's sale or lease of real property, or rather by subchapter D providing for the disposition of personal property falling [*13] within the definitions of "salvage" or "surplus" property in section 263.151. Though trees, while growing and unsevered are generally considered "part of the land" -- see, e.g., Rogers v. Fort Worth Poultry & Egg Co., 185 S.W.2d 165 (Tex. Civ. App. -- Fort Worth 1944, no writ) -- cut trees, or trees "constructively severed" by selling them in the contemplation that they will be cut and removed, are considered personal property. See Davis v. Conn, 161 S.W. 39 (Tex. Civ. App. -- Texarkana 1913, writ dism'd); Downey v. Dowell, 207 S.W. 585 (Tex. Civ. App. -- Texarkana 1918, writ dism'd).

Section 263.151 of subchapter D of chapter 263, Local Government Code, providing for the county's sale of "salvage" or "surplus" property, defines such property as follows:

(1) 'Salvage property' means personal property, other than items routinely discarded as waste, that because of use, time, accident, or any other cause is so worn, damaged, or obsolete that it has no value for the purpose for which it was originally intended.

(2) 'Surplus property' means personal property that:

(A) is not salvage property or items routinely discarded as waste;

(B) is not currently needed by its owner; [*14]

(C) is not required for the owner's foreseeable needs; and

(D) possesses some usefulness for the purpose for which it was intended.

We think that in the usual case, where trees or shrubs originally intended for beautification, shade, or soil conservation purposes are removed, or are to be removed, by the county for right-of-way purposes, the trees or shrubs would fall within the definitions of "salvage" or "surplus" property in section 263.151, and the county's disposition of them by sale would be governed by subchapter D.

Your third question is:

Can the County refuse to approve subdivision plats that have existing shrubs and trees in the right of way, and/or plans to landscape rights-of-way by planting shrubs and trees or where an attempt has been made to reserve rights to maintain such trees and shrubs in the right-of-way?

You argue that certain provisions of the Harris County Road Law, supra, would in effect permit the Harris County Commissioners Court to refuse to approve a subdivision plat purporting to reserve rights to maintain trees or shrubs in a right-of-way dedicated therein. We agree. Section 1 of the Harris County Road Law provides:

Section 31-C. [*15] In acquiring rights-of-way for roads in Harris County, the Commissioners Court shall determine the width of the right-of-way required, and establish the lines and alignment of the road. All of the field notes of roads so established and determined shall be filed with the Commissioners Court and be recorded on the Road Log of Harris County, and no expenditures shall be made by the Commissioners Court upon any road not carried on the Road Log. The Commissioners Court may adopt a system for carrying roads on the Road Log with the required width of the right-of-way to be established by the Court. Provided, however, no road shall be carried on the Road Log or maintained by the county on a right-of-way less than twenty (20) feet nor more than 600 feet in width unless the right-of-way was laid out or established on or after January 1, 1963. No subdivision or plat of lands in Harris County outside of incorporated cities shall be filed for record by the County Clerk of Harris County, Texas, until such plat or subdivision bears the signature of the County Engineer to the effect that the roads, as indicated on the plat, have met the requirements of the system adopted by the Commissioners [*16] Court pursuant to this Section as to the width of the right-of-way and have a base and surface of at least twenty (20) feet in width with the base and surface meeting the minimum require-

ments prescribed by the Commissioners Court by order duly entered in the minutes of said court, and that all requirements of Harris County and the Harris County Flood Control District as to drainage have been complied with. (Emphasis added.)

Special Law, Acts 1913, 33d Leg., ch. 17, amended by Acts 1963, 58th Leg., ch. 369, amended by Acts 1973, 63rd Leg., Ch. 614.

We find no provision of Texas law specifically authorizing the Harris County Commissioners Court to require that rights-of-way be dedicated without reservation as to trees and shrubs in the right-of-way. However, could it not require that dedicated rights-of-way be unencumbered by reservations with respect to trees and shrubs or other obstructions, the county's authority under the Harris County Road Law to require that dedicated rights-of-way be of a certain width would be rendered nugatory -- particularly as the county's authority to refuse to approve subdivision plats is otherwise quite limited. We find no provisions [*17] other than the width requirement provisions which would appear to authorize the commissioners court to require that dedicated rights-of-way be free of reservations which might impair the use of the full width of the dedicated right-of-way for right-of-way purposes. See Local Gov't Code §§ 232.002 ("commissioners court . . . must approve plat" meeting requirements prescribed under chapter 232), 232.003, 232.006 (providing respectively that commissioners courts generally, and in counties of over 2.2 million population, may require that rights-of-way be of stated widths, but making no provision with respect to trees and shrubs or other potential obstructions in the rights-of-way or purported reservations with respect thereto); see also Attorney General Opinion JM-789 (1987) (limitations on commissioners court's authority to refuse to approve subdivision plats).

We think that section 31-C of the Harris County Road Law not only specifically authorizes the commissioners court to require that a dedicated right-of-way be of a certain width, but also implicitly authorizes the court to require that the right-of-way dedicated be unencumbered by reservations of the right to maintain [*18] trees or shrubs in the right-of-way which might impair its full utilization. As we have determined that the Harris County Commissioners Court possesses such authority under section 31-C of the Harris County Road Law, we do not think it necessary to determine here whether the above-cited provisions of chapter 232, Local Government Code, would also confer such authority.

SUMMARY

Subject to the terms of the conveyance, dedication, condemnation judgment, etc. under which the right-of-way was acquired, the Harris County Commissioners Court generally has authority, for right-of-way purposes, to remove and dispose of trees or shrubs from the public right-of-way easement of a county road or prevent their planting without compensation to the fee owner.

Cut trees, or trees "constructively severed" by having been sold in the anticipation that they will be cut and removed from the land where they were growing, are personal rather than real property.

The Harris County Commissioners Court may, under the Harris County Road Law, require that rights-of-way dedicated in subdivision plats be of certain widths, and unencumbered by reservations of the right to maintain trees or shrubs within [*19] the right-of-way area.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt PersonnelReal Property LawLimited Use RightsEasementsCreationEasements Through Eminent DomainReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure