

2017

SHORT ANSWERS TO COMMON QUESTIONS

TEXAS ASSOCIATION OF COUNTIES

1210 San Antonio Street Austin, Texas 78701

Honorable Joyce Hudman

Brazoria County Clerk & Association President

Gene Terry

Executive Director

Rex Hall

Assistant Executive Director

PREPARED BY ASSOCIATION LEGAL DEPARTMENT

Stan Reid

General Counsel

Jenny Gilchrist

Associate General Counsel

Katherine Howard

Associate General Counsel

Paul Miles

Associate General Counsel

Michael Pichinson

Associate General Counsel

Jamie Chandler

Paralegal

Kristi Shepperson

Paralegal



LEGAL RESEARCH


Legal Helpline: (888) 275-8224 • Toll Free: (800) 456-5974
or visit our website at www.county.org



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COMMON ROAD AND BRIDGE QUESTIONS

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The  symbol indicates sections that have been updated since the previous publication.

OPENING AND CLOSING ROADS

1. May a commissioners court open a new road on its own motion, or is a landowner petition required?

A commissioners court may open a new road on its own motion or upon application by members of the public.¹ §251.051 Tex. Transp. Code provides general authority for a commissioners court to lay out and open new roads, and §251.052 Tex. Transp. Code authorizes the commissioners court to open a new road on petition by eight landowners in a precinct and sets out what information must be included in the petition.

2. Is a unanimous vote of the commissioners court required to open a new road?

No. A unanimous vote of the commissioners court is required to close, abandon, or vacate a public road, or alter a public road, except to shorten it from end to end. A unanimous vote is not required to open or discontinue a road. Tex. Transp. Code §251.051.

¹ Whether a commissioners court had authority to open a new road on its own motion or only upon application by private citizens was settled by the Texas Supreme Court in *Robison et al. v. Whaley Farm Corporation*, 120 Tex. 633 (1931). See also, *Parkey v. Archer County*, 61 S.W.2d at 179 (Tex. App. – Fort Worth, 1933, reh'g denied).

3. Which roads may a commissioners court discontinue, close or abandon?

A commissioners court may not discontinue, close, or abandon an entire first-class or second-class road unless the road has been vacated or unused for at least three years. Tex. Transp. Code §251.051(d). There is no “wait-period” to discontinue, close, or abandon a third-class road or a portion or portions of a first-class or second-class road under the Transportation Code.

A commissioners court may not discontinue, close or abandon a road to a cemetery, unless (1) the road is a cemetery road and the landowner whose property adjoins the road has not filed notice with the county clerk that the landowner will provide access to the cemetery as provided in Section 711.041 Health & Safety Code; or (2) the fenced road is necessary to reach adjoining property.

4. If a commissioners court closes, abandons, discontinues or vacates a road, must an alternate route be provided?

It depends. “Discontinuing” a road means to cease maintaining the road. Tex. Transp. Code § 251.001(2). A commissioners court may not discontinue a road before a new road designated by the court is ready to replace it. Tex. Transp. Code §251.051(c).

There is no statutory requirement to provide a new, alternate route when a commissioners court closes, abandons, or vacates a road. *See* Tex. Att’y Gen. Op. GA-0088, discussing, in theory, the commissioners court’s ability to close, abandon, or vacate a road without providing an alternate route.

5. Can the commissioners court close, abandon, or vacate a road over the objection of abutting landowners?

No. An abutting landowner acquires a property interest in the use and access to an abutting roadway. A commissioners court may not close the road over the abutting landowners’ objection, but it may discontinue maintenance and supervision of the road. Tex. Transp. Code §251.058. *See also, Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986) (citing cases).

RIGHT-OF-WAY MAINTENANCE

1. Is there a minimum amount of maintenance that must be performed on a county road or right-of-way?

No. There is no express requirement to maintain a county road or right-of-way other than the requirement that the rights-of-way be kept free of obstructions. Tex. Transp. Code §251.008. However, if a county road becomes so degraded that its condition poses a “special defect” and the county knows about it, the county could be liable for personal injuries or death resulting from the condition of the road. A discussion of what constitutes a “special defect” is beyond the scope of this publication.

2. May the commissioners court simply divide the funds allocated for road and bridge work for the year equally among the county’s precincts?

No. While the commissioners court has broad discretion about how and when to maintain the county roads and how to budget for road maintenance expenditures,² an appeals court has ruled that a commissioners court’s order distributing road and bridge funds equally among the county’s four precincts without considering the condition of roads, traffic, or the amount of taxes collected in each precinct for road and bridge purposes was an abuse of discretion.³

3. May the commissioners court remove or order the removal of fencing that poses a hazard to public users of the road?

Yes, subject to judicial review. Tex. Transp. Code §251.008(1) requires public roads of all classes to be free of all obstructions, and Tex. Transp. Code §251.003(a)(1) authorizes the commissioners court to make and enforce all necessary rules and orders for the construction and maintenance of public roads. Based on the authority provided in the Transportation Code, the Texas Attorney General’s Office opined that a commissioners court may remove or order the removal of fencing that creates a safety hazard to the public users of the road. *See* Tex. Att’y Gen. Op. GA-0703 (2009).

² Tex. Transp. Code §251.016 states, “The commissioners court of a county may exercise general control over all roads, highways, and bridges in the county.” Tex. Transp. Code §251.003 states, “The commissioners court of a county may make and enforce all necessary rules and orders for the construction and maintenance of public roads.”

³ *Garland et al. v. Sanders et al.*, 114 S.W.2d 302 (Civ.App—Dallas, 1938).

4. May the commissioners court remove or order the removal of trees and shrubs that pose a hazard to the public's use of the county's right-of-way?

Yes, subject to judicial review. Tex. Transp. Code §251.008(1) requires public roads of all classes to be free of all obstructions, and Tex. Transp. Code §251.003(a)(1) authorizes the commissioners court to make an enforce all necessary rules and orders for the construction and maintenance of public roads. Based on the authority provided in the Transportation Code, the Texas Attorney General's Office opined that a commissioners court may remove or order the removal of trees and shrubs in the right of way that create a safety hazard to the public users of the road. *See* Tex. Att'y Gen. Op. JM-1241 (1990).

5. May the commissioners court sell or otherwise dispose of trees, shrubs, or timber cut down or removed from the right-of-way?

Yes, subject to judicial review. Tex. Transp. Code §251.008(1) requires public roads of all classes to be free of all obstructions, and Tex. Transp. Code §251.003(a)(1) authorizes the commissioners court to make an enforce all necessary rules and orders for the construction and maintenance of public roads. Based on the authority provided in the Transportation Code, the Texas Attorney General's Office opined that a commissioners court may sell or otherwise dispose of trees, shrubs, or timber growing in the public's right-of-way. *See* Tex. Att'y Gen. Op. JM-1241 (1990).

6. May the commissioners court order a private landowner to allow the county to enter upon private land to cut or trim trees or shrubs interfering with the public right-of-way?

No. There is no statutory authority authorizing the commissioners court to demand access to private land in order to maintain the public's right of way. However, the commissioners court may seek the landowner's consent to enter private property. It is advised that the landowner's consent be in writing and accompanied by a written waiver of liability.

7. May a landowner put a fence across a third class road?

Yes, conditioned on the following: Texas Transp. Code §251.010 authorizes a person, including a neighborhood association, who owns or controls real property on which a third-class road or a neighborhood road (see Question 9 below) is located for which the right-of-way was obtained without cost to the county to erect a gate across the road "when necessary" and with commissioners court approval. The

Attorney General has opined that a landowner must remove a gate across a third-class road if the commissioners court has constructed a cattle guard to replace it. Tex. Att’y Gen. Op., LO-98-120.

8. May a commissioners court accept private donations for road maintenance and repair?

Yes. Counties are statutorily authorized to accept donations for the purpose of road maintenance and repairs. Counties operating under the road commissioner or superintendent systems may accept donations of labor, money, or other property to aid in building or maintaining county roads under Tex. Transp. Code §§252.109 and 252.214. Under §81.032 of the Local Government Code, counties operating under the ex officio road system may accept gifts, grants or donations for the purpose of performing a function conferred by law on the county – in this case, road construction and maintenance. There is no specific statute authorizing counties under the unit system to accept donations for road maintenance and repair, but donations for road maintenance and repair in a unit system county can be accepted under the general grant of authority in §81.032 of the Local Government Code.

9. How wide is the county’s easement or right-of-way?

While Tex. Transp. Code §251.007 lists the minimum and maximum widths for first and second-class roads and the minimum width for third-class roads, there is no statute that defines the width of an easement. The width of an easement will depend on what was dedicated, condemned, purchased, or acquired by prescription. Reference to maps, plats, deeds, surveys, or commissioners court minutes may indicate the width of an easement.

10. May a county perform maintenance work on private property?

Generally, a county may not repair or maintain a private road or property, subject to a few exceptions:

Counties with a population under 7,500

A constitutional amendment authorizes counties with a population of 7,500 or less to construct or repair private roads if the county charges a reasonable amount for the work. Revenue received from private road work may be used only for the construction, including right-of-way acquisition, or maintenance of public roads.⁴

⁴ Tex. Const. Article III, section 52f

Neighborhood Roads

Chapter 253 of the Transportation Code authorizes a procedure for improving private subdivision roads “to comply with county standards for roads” where the condition of the roads impacts the public’s health, safety or welfare. If the commissioners court determines that improvement of a road in a subdivision or of an access road to a subdivision is necessary for the public health, safety, or welfare of the residents of the county, the commissioners court may propose to (1) improve the road to comply with county standards for roads; and (2) assess all or part of the costs of the improvement pro rata against the record owners of the property.⁵

The commissioners court must publish notice of the proposed improvement and assessment at least twice in a newspaper of general circulation in the county, and the notice must state the date the commissioners court will hold a public hearing to consider the proposed improvement and assessment.⁶ The commissioners court must hold a public hearing on the proposed improvement and assessment on or after the 31st day after the first required notice is published.⁷ Within 10 days of the public hearing, the commissioners court must send a ballot and an addressed stamped envelope via certified mail to each record owner of real property in the subdivision or part of the subdivision to be assessed.⁸ The ballot must state the maximum assessment that could be made against each property.

Not later than the 30th day after the date of the public hearing, the county clerk shall tally the returned ballots and declare the results to the commissioners court. If a majority of ballots are in favor of the improvement and assessment, the commissioners court shall order the improvements and assess the costs of the improvements against the real property owners of the of the subdivision.⁹

A private subdivision road improved under Chapter 253 becomes a county road.¹⁰

Driveways and Culverts

There is limited authority to clear drainage ditches and culverts on private property in counties with a population of less than 100,000 that have established a drainage system under Chapter 254 of the Transportation Code. The private ditch or culvert

⁵ Tex. Transp. Code §253.003

⁶ Tex. Transp. Code §253.004

⁷ Tex. Transp. Code §253.005

⁸⁸ Tex. Transp. Code §253.006

⁹ Tex. Transp. Code §253.007

¹⁰ Tex. Transp. Code §253.011

must connect with a drainage ditch constructed or maintained by the county. Before removing blockage in a private ditch, the commissioners court must provide 20 days notice by certified mail to the record owners of the property that they are in violation of an order adopted under Chapter 254 of the Transportation Code.¹¹

11. May the commissioners court charge a fee for cutting a road for cable installation, utilities, or other purposes?

To provide funds for the future inspection, repair, and maintenance of a cut road, a county may impose a fee for each cut of a county road during or as an incident to the installation, maintenance, or repair of any facilities or properties of the person or entity.¹² The fee may not exceed \$500, may be imposed either before or after the cutting of the road; and is in addition to any other charge the county is authorized to impose to repair damage to the road because of the cut.

This fee does not apply in relation to a person or other entity that has entered into an agreement with the county that provides for fees to be paid by the person or entity for the use of the county roads; or is a utility that is not required under Chapter 181, Utilities Code, to provide notice to a commissioners court of a county.

A county may impose the §240.907 fee for the activities of excavating or cutting the surface of a county road, but not for activities that bore or tunnel under a county road without cutting the road surface.¹³

12. Can a county deny the installation of public utilities in the right of way?

The county has no authority to deny the excavation of the right-of-way for installation of a public utility. However, the county has the ability to designate the location of the placement of some public utility lines within the right-of-way.¹⁴

¹¹ Tex. Transp. Code §254.008

¹² Loc. Gov't Code §240.907

¹³ Tex. Att'y Gen. No. GA-0722 (2009)

¹⁴ See Tex. Utilities Code §§181.024, 181.044

TRAFFIC CONTROL

1. May a commissioners court limit truck traffic on a county road?

The Attorney General has opined that a commissioners court may forbid all truck traffic on a county road by posting a “No Thru Truck Traffic” on a road.¹⁵

2. May the commissioner court set speed limits on county roads?

The commissioners court of a county, by order entered on the minutes of the court, may determine and set a maximum reasonable and prudent speed for a vehicle travelling on any segment of a county road. In determining the maximum reasonable and prudent speed, the commissioners court shall consider all circumstances on the affected segment of the road, including the width and condition of the road surface and the usual traffic on the road.

A speed limit set by the commissioners court is effective when appropriate signs giving notice of the speed limit are installed on the affected segment of the county road.¹⁶

3. May the commissioners court adjust the speed limit on a county road?

The commissioners court may modify a speed limit by an order entered on its records.

The commissioners court has authority to **increase speed limits** based on the results of an engineering and traffic investigation.¹⁷ The commissioners court may not establish a speed limit of more than 70 miles per hour.¹⁸

The commissioners court of a county may declare a **lower speed limit** of not less than 30 miles per hour on a county road or highway if the commissioners court determines that the speed limit is unreasonable or unsafe, or 20 miles per hour in a residence district, unless the roadway has been designated as a major thoroughfare by a city planning commission. An engineering and traffic investigation is not required if a commissioners court is lowering a speed limit to 30 miles per hour on a

¹⁵ Tex. Att’y Gen. No. GA-0088 (2003)

¹⁶ Tex. Transp. Code §251.154

¹⁷ Transp. Code §545.355(a)

¹⁸ Transp. Code §545.355(c)

county road or highway or 20 miles per hour on a county road within a residence district.¹⁹

The commissioners court of a county with a population of more than 2.8 million may establish, based on the results of an engineering and traffic investigation, a speed limit of not more than 75 miles per hour on any part of a highway of that county that is a limited-access or controlled-access highway, regardless of the location of the part of the highway.²⁰

4. What traffic-control devices can a county install on their roads?

The commissioners court of a county may adopt regulations establishing a system of traffic control devices in restricted traffic zones on a county road. A system of traffic control devices must conform to the Texas Department of Transportation's Manual on Uniform Traffic Control Devices for Streets and Highways. The commissioners court by order entered on its minutes may install and maintain any traffic signal light, stop sign, or no-parking sign that the court considers necessary for public safety.²¹

The Attorney General has opined that center stripes and speed bumps, if they are used to regulate, warn, or guide traffic, are traffic-control devices that a county may install. Center stripes must conform to standards set out in the Manual. A county may install a speed bump on a county road only if it has received permission to do so from the Texas Department of Transportation.²²

5. May a county extend traffic rules to roads in a private subdivision?

A county commissioners court may extend all or some of the traffic rules applicable to county roads to roads in a private subdivision under certain conditions²³:

- The subdivision must be located in the unincorporated area of a county with a population of 500,000 or less.
- On petition of 25 percent of the property owners residing in a subdivision in which the roads are privately maintained or on the request of the governing

¹⁹ Tex. Att'y Gen. Op. JC-0079 (1999)

²⁰ Transp. Code 545.355(e)

²¹ Tex. Transp. Code §251.155

²² Tex. Att'y Gen. No. JC-0175 (2000)

²³ Tex. Transp. Code §542.007(b)

body of the entity that maintains those roads, the commissioners court of the county by order may extend any traffic rules that apply to a county road to the roads of the subdivision if the commissioners court finds the order in the interest of the county generally.

- The petition must specify the traffic rules that are sought to be extended. The court order may extend any or all of the requested traffic rules.

REGULATION OF OVERWEIGHT AND OVERSIZE VEHICLES

1. May a commissioners court establish load limits on a county road or bridge?

Yes. Tex. Transp. Code §251.153 authorizes a commissioners court to establish load limits for any road or bridge in the manner prescribed by §621.301 of the Transportation Code. Concurrence from the Texas Department of Transportation (TxDOT) is required. A load limit is deemed concurred with by TxDOT 30 days after the county submits the load limit accompanied by supporting documentation and calculations reviewed and sealed by an engineer licensed in Texas. However, TxDOT may withdraw concurrence any time after the 30-day period. Counties petition TxDOT for concurrence by submitting a request to the TxDOT district engineer.

2. May a commissioners court require a permit for an overweight vehicle?

Yes, subject to limitations. Tex. Transp. Code §623.018(a) authorizes the county judge to issue a temporary permit for 90 days for the transportation of an overweight, oversize, or overlength commodity that cannot be reasonably dismantled on county roads that are not part of the state highway system. The commissioners court (and not the county judge) may require bond sufficient to compensate the county for damage to the road.

However, if a vehicle has been permitted to operate in the county by the State under §623.011, the county may not impose an additional fee, bond or permit requirement.

3. Does a county have the authority to enforce weight limits?

Yes. A commissioners court may authorize a county traffic officer to enforce weight limits. Tex. Transp. Code 251.153(b).

A sheriff and deputy sheriffs may enforce weight limits. Tex. Transp. Code §621.401(3).

A constable and deputy constables in certain counties described in Tex. Transp. Code §621.4015 may enforce weight limits.

4. May a county prohibit use of a road?

Yes, subject to limitations and right of appeal to the county judge. Tex. Transp. Code § 251.157 authorizes a “road supervisor” to prohibit or restrict use of a road if a road or bridge is unsafe, or if, because of wet weather or recent construction, the road cannot be used without probable serious damage to the road after posting notice of the terms and duration of the prohibition and providing a detour. A vehicle owner or operator may appeal to the road use prohibition to the county judge, whose decision to revoke, sustain, or modify the road supervisor’s decision on the prohibition or restriction is final.

Tex. Transp. Code §251.1575 was added by the Legislature in 2013 and authorizes counties to designate an alternate route for heavy vehicles exceeding 60,000 pounds. Notice must be posted at locations that enable drivers to detour to avoid the restricted road.

5. What is the maximum weight for a vehicle or load in Texas?

Generally, 80,000 pounds is the maximum weight for a vehicle load in Texas. However, there are many exceptions, and the State grants overweight permits. New legislation, S.B. 1383, effective January 1, 2018, and H.B. 2319, effective September 1, 2017 authorize overweight milk trucks up to 90,000 pounds, natural gas powered vehicles up to 82,000 pounds, and vehicles transporting “intermodal shipping containers” up to 93,000 pounds in certain counties. These new overweight permits are in addition to the long list of vehicles and products excepted from the 80,000 pound limit under existing state law.

6. Can a county require a permit and fee for installing an access point to a county road?

Yes. The commissioners court, under its general authority to make and enforce all necessary rules and orders for the construction and maintenance of public roads and to exercise general control over the roads, may require a permit for the construction of an access point to a county road. Under the specific authority in Tex. Transp.

Code §251.017, the commissioners court may set a reasonable fee related to the impact the access points will have on county roads. Tex. Att'y Gen. Op. GA-1013 (2013).