

SUBJECT: Procedures by smaller counties to designate public roads

COMMITTEE: Transportation — committee substitute recommended

VOTE: 6 ayes — Krusee, Phillips, Garza, Harper-Brown, Hill, Mercer

1 nay — Laney

2 absent — Hamric, Edwards

WITNESSES: For — Jim Allison, County Judges and Commissioners Association; Jim Farrar; Billy Howe, Texas Farm Bureau; Brad Stephenson, Eastland County Commissioners Court.

Against — David K. Langford, Texas Wildlife Association; Rayford Price; Ed Small, Texas and Southwestern Cattle Raisers Association.

BACKGROUND: In 1981, the Legislature enacted Art. 681h, V.A.C.S. (now Transportation Code, sec. 281.002) allowing a county with a population of 50,000 or fewer to acquire a public interest in a private road only by purchase, condemnation, dedication, or a court's final judgment of adverse possession. The law abolished the doctrine of common-law dedication of roads.

Two Texas Supreme Court cases held that this statute “contains no provision which would make it retroactive and, without such a provision, the statute can be given only prospective application” after its effective date of August 31, 1981, (*Linder v. Hill*, 691 S.W. 2d 590, 592 (Tex. 1985)) and *Las Vegas Pecan & Cattle Co., Inc. v. Zavala County*, 682 S.W. 2d 254, 256 (Tex. 1984)). A 1985 attorney general's opinion, JM-842, also determined that a 1985 legislative amendment to the statute did not require the retroactive application of the statute to counties that had acquired a public interest in a private road before August 31, 1981.

While the Supreme Court cases and the attorney general opinion required counties to follow the new procedures to acquire roads after September 1, 1981, the legal status of roads acquired before then remained unclear. Some of these roads were used by the public and maintained by the county for

several years, and many lacked documentation showing the existence of a dedication before August 31, 1981.

According to the 2000 census, Texas has about 200 counties with populations of 50,000 or fewer.

DIGEST:

CSHB 1117 would allow a county with a population of 50,000 or fewer to publish a road map showing its claim of public interest in county roads and provide for a review and appeals process for landowners disputing the county's claim. It also would allow a landowner to transfer interest in a road to the county.

The bill also would require a county to validate its claim to the road by providing written records or other information documenting "continuous maintenance" — defined as grading or other routine maintenance — beginning before September 1, 1981. Counties would have six years in which to publish their road maps and assert their claims as the authority granted under CSHB 1117 would expire on September 1, 2009.

A county commissioners court could propose a county road map showing roads acquired by purchase, condemnation, dedication, or a court's final judgment of adverse condemnation under Transportation Code, sec. 281.002, or roads claimed as public roads because of continuous maintenance with public funds beginning before September 1, 1981. The commissioners court would have to hold a public hearing on the proposal and publish notices of the hearing at least once a week for four consecutive weeks in a newspaper of general circulation in the county. The commissioners also would have to display a proposed map showing the roads to be claimed for at least four weeks before the hearing. The map would have to be on a scale of 1 inch to 2,000 feet.

The commissioners court could formally adopt the map, as revised by public comment, only at a public meeting held within 90 days following the hearing. The county clerk would have to keep the map in a place accessible to the public. The omission of a road in which the county had acquired an interest through purchase, condemnation, or dedication would not affect the status of the omitted road. The map would be considered conclusive evidence of the

public's right of access over a road and the county's authority to use public money to maintain it.

A person asserting a private right, title, or interest in a road on the county road map could file a written protest with the county judge before the public hearing. The commissioners would have to appoint a jury of five property owners, who would have no interest in the outcome of the protest, to consider the claim and rule on it by majority vote. The jury's decision would be binding on the commissioners court. A landowner also could contest inclusion of a road on the county road map by filing a suit in district court within two years of adoption of the map.

The commissioners court would have to include a notice of its intention to adopt a county road map with ad valorem tax statements for the year before the map was considered for adoption. The notice would have to include a list of roads to be claimed as county roads, the date of the adoption of the county road map, and the statute of limitation that would bar a landowner from filing a suit in district court to dispute the county's claim. A property owner could tender a warranty deed for any property included the county right-of-way on which the property owner was paying taxes, and the commissioners court would have to accept and file the warranty deed.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 1117 would provide a fair and orderly process to clarify the ambiguous legal status of county roads that existed before 1981. In many cases, the public has had access to these roads, and county tax money has been used to maintain these roads for many years. The bill would provide a mechanism to establish the public's right to these roads.

Providing unfettered access to roads recognized as public thoroughfares protects the property rights of those landowners who would be isolated if that land were deemed to be privately owned. Sales and subdivision of farm and ranch land would produce more potentially landlocked parcels and holdings. Clearly defining public roads in county legal records rather than through less formal processes would help ensure protection of everyone's property rights.

CSHB 1117 would require counties to meet a substantial burden to prove that roads were continuously maintained with taxpayer money and should be considered public roads. The bill would require counties to provide written records to verify actions that occurred more than 20 years ago. CSHB 1117 also properly would set a deadline of six years to resolve these issues rather than allow an open-ended process.

CSHB 1117 could forestall legal disputes over road ownership. In Eastland County, for example, commissioners told the sheriff to cut a fence across a disputed road, and the sheriff ultimately was sued and defeated for re-election. One road in Edwards County has been subject to three lawsuits over ownership, and similar legal battles are ongoing elsewhere in the state.

Property owners would receive adequate notice of the proposed county road map through multiple notices in a countywide newspaper and by having the map available for inspection at the courthouse before the hearing. In smaller counties, the “grapevine” and courthouse square conversations would provide even more adequate notice. Absentee landowners would be notified by information included in their yearly tax statements.

The bill would respect rural Texans’ commitment to defending their property rights while allowing a fair but final determination of which county roads would be considered public roads. It would offer a way to determine road ownership without complex and costly litigation. Landowners would have an opportunity to object at the public hearing or to submit written objections. Any dispute would be submitted to an impartial panel of five other landowners, whose decision would be binding. A landowner unsatisfied by the panel’s decision would have legal redress through the courts.

The nature of smaller counties also would ensure that the process of determining a county road map was fair and accessible to all. Citizens would keep the commissioners accountable through the ballot box. Informal social controls, such as interaction at the local Dairy Queen, also would serve as a check on commissioners’ decisions on a proposed county road map.

CSHB 1117 would apply only to old roads. Roads built since 1981 would have to be dedicated or acquired formally. In many cases, because of the lack of county maintenance records, the determination of public use depends

on the fading memories of older residents and county road hands. Small counties need to resolve the legal status of pre-1981 roads before access to these memories is lost forever.

The bill also would allow property owners who have been paying taxes on what is, in effect, a county road to deed the property to the county.

**OPPONENTS
SAY:**

CSHB 1117 represents a serious threat to protection of property rights in private roads. It would shift the burden to property owners to demonstrate that a particular road belonged to them. If counties want to claim property as a public road, they should survey, condemn, and compensate the landowner. Many counties cannot afford to provide the full due process required by the U.S. Constitution's Fifth Amendment, but CSHB 1117 should not be used as a way to circumvent property owners' rights.

The bill still might not provide relief to property owners who were landlocked and without access to a public road. Poor written records might handicap the county in meeting their burden of proof that the road had been continuously maintained by the taxpayers, and the interior landowners would still have to make other arrangements to guarantee easements.

The bill would create an unwieldy and complex procedure for landowners to assert their basic rights. Individual citizens could be overwhelmed by the commissioners at the public hearing. There would be no guarantee that the five property owners selected for the review panel would be impartial.

CSHB 1117 would not provide adequate notice to absentee or out-of-county landowners. The required notice in the tax statement could be lost or discarded, or the statement could be sent to a mortgage company or an agent, rather than to the property owner. Elderly landowners who actually received the tax statements might be confused by the notices and discard them. Out-of-county landowners could return to find that the county had confiscated portions of their property through the county road map process.

The bill's definition of a road having been "continuously maintained" with public funds as a criterion for public interest would represent too vague a standard. Would running a road grader across the caliche once a year for two

decades qualify as being continuously maintained? The bill would leave such issues unresolved.

**OTHER
OPPONENTS
SAY:**

Counties should be more aggressive in their attempts to notify property owners. Notices regarding the county road map and the legal proceedings should be included in the tax appraisal notice, rather than the tax statement. All those with a property interest in the real estate would be more likely to receive the appraisal notice, detailing the value of the land and improvements, than a tax bill that typically goes to the mortgage company or one of several property owners. In addition, this information should be sent by certified mail or registered mail or the property owner should be served in person to ensure proper notification. Counties must follow these procedures in acquiring public interest in roads under four other sections of the Transportation Code.

NOTES:

The committee substitute differs from HB 1117 as introduced by requiring that a notice sent with the tax statement include a list of roads claimed as public by the county, the date of the hearing, and information about the property owner's right to protest. The committee substitute also added the provision that would repeal the statute in 2009.

During the 77th Legislature, the House approved HB 340 by J. Keffer allowing counties to adopt a road map to designate public roads, but the bill died in the Senate Intergovernmental Relations Committee.