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Pig Trail or Private Road? Establishing the Existence of County Roads, Public Roads, and Private Roads in Arkansas.

Private landowners are frequently challenged with excluding the general public from their property, or opening easy access to adjoining tracts. Landowners without the benefit of an easement who are needing to access to an adjoining tract may find relief by having the court declare that a road running through the tract is a “lost” county road or a public road. Alternatively a landowner wanting to keep the property private may find relief by showing a court that the county records lack any official documentation establishing the road as a country road, and showing that their locked gate has been sufficiently maintained long enough to preclude anyone from claiming that the road is a public road.

Aside from major federal and state highways the State of Arkansas recognizes two types of local roads that the public may use in rural areas, “county roads” and “public roads.” The legal status of these roads is not always as clear as it may first appear. “County roads,” as distinguished from “public roads” by prescriptive right, may only be created by one of three ways:

- (1) Voluntary dedication by the landowner;
- (2) Condemnation in accordance with the Arkansas Constitution and statutes; or
- (3) The county judge may enter an order declaring a mail route or a school bus route a county road.

Arkansas Game & Fish Comm’n v. Lindsey, 292 Ark. 314, 321 (1987). On July 7, 2014 the Arkansas Attorney General’s office opined that the holding in *Lindsey* is still good law. Ark. Op. Att’y Gen. No. 2014-021 (July 7, 2014).

County judges in Arkansas, whose duty it is to maintain the roads within a county, often assign addresses and road names regardless of the road’s legal status to implement the county’s 9-1-1 system, and for other purposes. Counties will often place road signs on non-county roads too. Such non-judicial actions by county employees do not convert a private road into a county road. *Arkansas Game & Fish*, 292 Ark. at, 321 (1987). Even sporadic maintenance of a private road paid for by the county does not create a county road. *Brooks v. Reedy*, 241 Ark. 271, 275 (1966).

Each of the three ways of creating a county road requires some documentation in the county records evidencing the existence of the road. Likewise, a county road may only be vacated by the county judge entering an Order vacating the road regardless of the road’s condition. I will examine each of the three above mentioned methods for creating a county road in turn.

Voluntary Dedication

In order to have a valid dedication of a road in Arkansas there must be (1) intent on the part of the landowner to dedicate, and (2) acceptance by the public. There can be no dedication without these two elements.

The law provides that a county judge in his or her discretion may designate as a county road any street or road dedicated to the public as a public thoroughfare, provided that a bill of assurance making the dedication is properly recorded. A.C.A. § 27-66-207. A common example is this is when a property developer dedicates a street or plat.

No specific length of possession is necessary to constitute a valid dedication, but an intent on the

part of the landowner to dedicate is absolutely essential, and unless such intent can be found in the facts and circumstances of the particular case, no dedication exists. Acceptance by the public is required for a valid dedication. *Ayers v. State*, 59 Ark. 26 (1894).

Condemnation

The county may condemn property pursuant to the statutory method set out in A.C.A. § 14-298-101 *et seq.* The condemnation procedure is initiated by petition of ten or more freehold members of the county, with one signor posting a bond and a notice must be posted. *Id.* As with all eminent domain proceedings, due process requires that the condemning authority compensate the landowner for the property taken by the sovereign. *Id.*

Mail and School Bus Routes as County Roads

A county judge may declare an existing mail or school bus route a county road pursuant to A.C.A. § 27-66-205 & 206. It is important to note that statute does not authorize a county judge to create a mail or school bus route. Rather, the statute authorizes a county judge to declare any road already used for either purpose to be a county road.

Public Road by Prescription

If the county records do not contain an Order creating a county road, then you must examine the road itself to determine whether or not it is a public road.

The Arkansas Supreme Court distinguishes a “public road” from a “county road.” A public road is created by prescription. *Arkansas Game & Fish*, 292 Ark. at 321 (1987). Unlike a county road, there is no need for the county judge to enter an Order or other official documentation to create a public road. *Id.* The public acquires an easement by prescription when a road is used by the public for a period of more than seven years, openly, continuously, and adversely to the private landowner. *Id.* Also unlike a county road, a public

road may be abandoned by the public after seven years of nonuse. *Id.*

The Arkansas Supreme Court has held that a private road can become a public road by prescription when the governmental authorities maintain a road for more than seven years. *Neyland v. Hunter*, 282 Ark. 323, 325 (1984). However, the court has also held that infrequent maintenance of a private road *per se* does not convert the road into a public road. *Barber v. Wolf*, 2009 Ark. App. 460 (2009) & *Brooks v. Reedy*, 241 Ark. 271, 275 (1966)(citing *Craig v. O'Bryan*, 227 Ark. 681, 684, (1957)). It is important to examine who maintains the road, and if the county maintains the road, how often.

Establishing a public road, or lack thereof, will likely include taking testimony from witnesses with historical knowledge of the road, and from individuals who frequently use the road. You will want to examine the condition of the road. Obviously you have a better argument for a public road if it is well maintained and frequently used as opposed to an overgrown road that is difficult to travel.

You should talk to individuals who may have used the road for recreational purposes, and ask them about the condition of the road. Interview the sheriff and local game warden. Ask how often they patrol the road, and if they have always been able to drive their vehicles down the road. Did they ever write tickets on the road? If so, for what? Was it for speeding or illegal deer hunting? Although the placement of county-installed road signs and county-designated street names does not create a county road *per se*, those are factors to consider when arguing for a public road.

The testimony of the county judge, his predecessors, and his employees should also be included. The county judge is in the best position to testify as to any maintenance of the road, his understanding as to the road’s status and usage, and to the existence of any verbal agreements between the county and the landowner.

Even if you establish that the road was at one time a public road, the public loses all rights to the road if the landowner gated the road and maintained the gate for a period of seven years. *Brooks*, 241 Ark. at 276.

Determining the status of a road affecting your property is a fact-intensive process. Establishing a county road can be a daunting task depending on how well the county's records are maintained and indexed. Likewise, establishing a public road by prescription requires taking testimony from a parade of witnesses having local knowledge of the road, possibly going back decades.

If you succeed in establishing that your road is a county road or a public road, not only will you gain access to the road, you may also be eligible to have the county maintain the road at no expense.

On the other hand if you are wanting to keep your property private, then you would be well advised to maintain a locked gate across any roads, and resist the temptation of allowing the county to regularly maintain your roads. By not doing so you are running the risk of granting the general public the right to travel your roads.

The AADC wishes to thank Chase Carmichael for writing this article.



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