

OAG 16-005

July 13, 2016

Subject: Whether a county must maintain a county road that only serves one or two landowners

Requested by: Dan Mosley
Harlan County Judge/Executive

Written by: Matt James

Syllabus: Maintenance of a county road that serves only one or two landowners does not constitute a public purpose, and the road should be discontinued as a county road. The landowners are entitled to compensation for any depreciation in value of the property as a result of loss of reasonable access, but not for mere travel inconvenience.

Constitutional Provisions Construed: KY. CONST. § 3; KY. CONST. § 171

Statutes construed: KRS 178.070; KRS 178.116

OAGs cited: OAG 95-2; OAG 93-10; OAG 92-74; OAG 84-358

Opinion of the Attorney General

Dan Mosley, Harlan County Judge/Executive, has requested an opinion of this office on whether a county is obligated to maintain a county road that serves only one or two landowners. We advise that maintenance of a county road that serves only one or two landowners does not constitute a public purpose, and the road should be discontinued as a county road. The landowners are entitled to compensation for any depreciation in value of the property as a result of loss of reasonable access, but not for mere travel inconvenience.

Judge Mosley informs us that a landowner lives on a property that is only accessible by a bridge. The bridge is part of the county road system, and is in a serious state of disrepair. Currently the landowner is the only person served by the bridge, although the landowner's brother also intends to build a property there. At issue is whether the county is obligated to maintain the bridge.

KY. CONST. § 3 provides that "no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services," and KY. CONST. § 171 provides that "taxes shall be levied and collected for public purposes only." In *Walker v. Lyon Cnty. Fiscal Court*, 425 S.W.2d 730 (Ky. 1968), a fiscal court refused to close a road that served only one person. The court gave the standard by which a road may be established or discontinued:

'The public convenience must be consulted. And the common will, represented by the county court, must prevail over individual advantages and wishes. The advantages which any one derives from a highway, are adventitious. The duration of their enjoyment depends on the continuance or discontinuance of the road, and this depends not on the will or interest of an individual, but on the common good, and public sentiment.'

Id. at 731. The court concluded that "in the absence of a public need, a showing of individual inconvenience is insufficient to keep the road open. It should have been ordered closed." *Id.* The *Walker* court held that the standard for when a public road should be discontinued depends on the public convenience, and an individual inconvenience is insufficient to maintain a public road.

Similarly, in *Sarver v. Allen Cnty., By and Through Its Fiscal Court*, 582 S.W.2d 40 (Ky. 1979), the court reviewed a fiscal court order incorporating a county road which "has been used only to reach the Wyatt Sarver farm, where it now ends, and the R. M. Lyles farm." *Id.* at 41. The court set aside the fiscal court order on the grounds that "the road has had no purpose for which it could have been put to a legitimate use by the public. Its only possible use was to serve the private convenience of the owners or occupants of the Lyles and Wyatt Sarver

tracts." *Id.* at 43 (citations omitted). *Sarver* held that a road which serves only two properties is still not a sufficient public purpose to make the road a county road.

In OAG 92-74, we addressed a situation similar to this case, in which "at one time the bridge was part of the route of a county road, but the road was rerouted, bypassing the bridge and leaving it to serve one residence. The old roadway and bridge were never officially closed by the county." Following *Walker*, we advised that "the county is not responsible for repairing a bridge which, though in the county road system, now serves one private residence." The bridge you have asked about, providing as it does access to a single private residence, does not serve a public purpose." *Id.* We concluded that "when a county road is altered in such a way that a portion of it is relegated to a private purpose, we believe a duty arises on the part of a fiscal court to discontinue as a county road, that portion of the road which no longer serves a public purpose." *Id.*¹ Also, in OAG 93-10, we addressed whether a county could repair a county road that served only one landowner which had been washed out by flooding. We discussed *Cummings v. Fleming Cnty. Sportsmen's Club, Inc.*, 477 S.W.2d 163 (Ky. 1972), which held that a road that went to only one landowner's residence "is and always was a private passway." *Id.* at 165. Relying on *Cummings* and *Sarver*, we advised that "the principal use of the road is for private access to private property, rather than for a public purpose. Accordingly, the . . . Fiscal Court should discontinue it as a county road." OAG 93-10. *See also* OAG 95-2 ("Any portion of the road or passway in question that does not serve a public purpose should be removed from the county road system in accordance with statutory procedures."). Our prior opinions and case law are clear that a county road or bridge which serves only one or two landowners does not serve a public purpose, and should be discontinued as a county road. KRS 178.070 provides that "the fiscal court may direct any county road to be discontinued," and specifies the required procedures.²

¹ We further noted that "statutory provisions that generally operate to require a fiscal court to maintain a county road . . . will not supercede constitutional provisions limiting governmental expenditures to public purposes." OAG 92-74.

² KRS 178.116 provides the conditions for discontinuance of a road as a matter of law. KRS 178.116(1) provides that:

Any county road, or road formerly maintained by the county or state, shall be

However, “the landowner along a county road has a property right of reasonable access to the public highway system.” *Dep’t of Highways v. Jackson*, 302 S.W.2d 373, 374 (Ky. 1957). “If the closing of the road will deprive the owner of ‘reasonable access’ to his land, or of reasonably ‘convenient ingress and egress,’ he is entitled to damages. . . . Damages resulting from the deprivation of such property right are to be measured by the depreciation in the value of the land.” *Id.* at 374-75. *See also Commonwealth, Dep’t of Highways v. Dotson*, 405 S.W.2d 30, 31-32 (Ky. 1966) (“A landowner cannot be deprived of reasonable access without just compensation. If the facts show he is not left with reasonable access he is entitled to be compensated for the diminution in value resulting to his property.”); OAG 93-10 (The county “would be liable . . . for the amount by which his property is devalued as a result of the deprivation of access to his property from the public highway system.”). In order to be actionable, the denial must be an “unreasonable interference with ingress and egress Where there is only a diversion of traffic or a circuitous route of travel suffered by the property owner, there is to be no compensation.” *Commonwealth Transp. Cabinet, Dep’t of Highways v. Comer*, 824 S.W.2d 881, 883 (Ky. Ct. App. 1991). *See generally DeRossette v. Jefferson Cnty.*, 156 S.W.2d 165 (Ky. 1941). The county is thus liable to the landowner for any diminution in property values caused by the discontinuance of the county bridge if the discontinuance eliminates any reasonable access to the property, but the county is not liable if there is only a circuitous route of travel.

deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged unless at least one (1) of the following conditions exists:

- (a) A public need is served by the road;
- (b) The road provides a necessary access for a private person;
- (c) The road has been maintained and policed by the county or state within a three (3) year period.

In this case, the bridge provides necessary access for a private person, so the bridge has not been discontinued as a county road as a matter of law.

However, even though the bridge has not been discontinued as a matter of law, it may still be formally closed by the Fiscal Court. “KRS 178.070 involves the formal closing of a county road. However, KRS 178.116 requires no formal action of the fiscal court, since the General Assembly has made discontinuance automatic except for the existence of at least one (1) of the described conditions. The statute works by operation of law, not by acts of the fiscal court.” OAG 84-358.

In summary, a county is required to discontinue a bridge as a county road if the bridge only serves one or two landowners, as the bridge would not serve a public purpose. The county is liable to the landowners for the diminution in value based on denial of reasonable access, if any, but is not liable for mere travel inconveniences.

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