

COUNTY ROAD ISSUES

I. Recent changes in legislation

KRS 178.010 - There were several changes here.

In Section 1, the date "July 1, 1914" was taken out leaving the statute to require that all "county roads" be formally accepted on the county road system or acquired by the county under KRS 178.405 to 178.425.

Section 2 now requires that roads meet minimum standards if they are going to be taken into the county road system after July 13, 2004. The minimum standards are to be established by the fiscal court.

Section 4 now allows the county to pay up to 100% of the costs of work on streets within cities whereas before the city would have been required to bear the costs.

KRS 178.025 - Section 1 expanded to fifteen (15) years the length of time that a road must be dedicated to the public and used by the general public without restriction before it is considered a "public road."

All other sections were deleted. These deleted sections had dealt with presumptions about the width of roads and the inclusion of shoulders and ditches. Some of the deleted material is dealt with in KRS 187.040.

KRS 178.040 - Section 1 added "consolidated government" to "county containing a first class city" as it applies to special orders to change the width of roads.

Section 2 had previously said: "All county roads hereafter established shall occupy a right-of-way not less than thirty (30) feet wide...." Changes in 2004 now read: "All county roads and all public roads that are being adopted into a county road system after July 13, 2004 shall occupy a minimum of thirty (30) feet of right-of-way...." However any road that had been established prior to that date was not required to have thirty feet of right of way. Even for new roads there is an exception that allows less than thirty feet if the fiscal court finds that the topography will not allow thirty feet.

KRS 178.070 – Deals with posting notices for discontinuing county roads. The old statute required posting notices in “three (3) public places in the vicinity of the road.” Now the requirement is that “notices must be placed at three (3) prominent and visible places within one (1) mile of the road. Also language was added concerning road viewers to now say that the court shall appoint two “viewers who have **no vested interest** in the discontinuance of the road....”

KRS 178.080 – The statute deals with establishment or alteration of roads. The only significant change is that when the road viewers and county road engineer make their report concerning what route a road shall take, they “shall report to the fiscal court at a public meeting in favor of the one [route] they prefer, giving reasons for the preference.”

KRS 178.100 – Added that any civil action to protest a decision of the fiscal court must be filed in the “Circuit Court of the county where the road is located”

KRS 178.115 – The same change as in 178.100 is made in section 2 to require that civil actions be filed in the Circuit Court of the county where the road is located. The only other changes are grammatical.

KRS 178.117 – Added language to include “urban county government or consolidated local government....”

KRS 178.405 – The change here is to omit the date of February 12, 1969 and now any private road, street, or highway in an unincorporated area may be dedicated to public use.

II. Issues Concerning Public Purpose

Issues often arise concerning under what circumstances Fiscal Court may provide public monies to improve roads and bridges. The consideration must always begin with whether a county road is involved.

What are county roads?

The definition of “county road” is found at **KRS 178.010**: “County roads” are public roads which have been accepted by the fiscal court of the county as a part of the county road system OR private roads, streets, or highways which have been acquired by the county pursuant to KRS 178.405 to 178.425. “County Roads” includes necessary bridges, culverts, sluices, drains, ditches, waterways, embankments or retaining walls.

The leading case in Kentucky on “county roads” and “public roads” since 1979 is *Sarver v. County of Allen, Ky., 582 S. W. 2d 40 (1979)*. This is a Kentucky Supreme Court case which held that: “‘County roads’ are public roads which have been accepted by the fiscal court of the county as a part of the county road system.” For roads that were considered “county roads” that had existed since prior to July 1, 1914 no formal court action was required. After that date no road could be put on the county road system without formal action by the Fiscal Court. *(Note: changes in the statute in 2004 took out the date July 1, 1914 and now only those roads which have been formally accepted may be considered county roads..)*

What are public roads?

KRS 178.025 gives the definition of a “public road”: “Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for fifteen (15) consecutive years, shall conclusively be presumed to be a public road.” *(Statutory change in 2004 increased time from 5 to 15 years.)*

How are “county roads” and public roads distinguished?

In *Sarver v. County of Allen*, the Court explained the distinction this way: “...though a road may be ‘public,’ it is not necessarily a ‘county road’. The obvious reason for this particular distinction is, of course, a public policy against holding counties responsible for the upkeep of any and all highways and byways that chance to become ‘public’ through processes of dedication or prescription over which the counties have no choice or control.” Therefore even if a road is a “public road” it is not necessarily a “county road” unless it has been accepted onto the county road system by a formal act of the Fiscal Court.

How can a road be “discontinued” as a county road and taken off county maintenance?

Three sections of KRS deal with the discontinuance of county roads:

KRS 178.070 says: “The fiscal court may direct any county road to be discontinued....” Notice must be published, according to the provisions of KRS 178.050, and in addition notices must be placed at three (3) prominent and visible public places within one mile of the road. After the posting of notices as aforesaid, the fiscal court shall appoint two (2) viewers who have no vested interest in the discontinuance, who together with the county road engineer, shall view the road and report in writing at the hearing what inconvenience would result from the discontinuance. Upon such report and other evidence, if any, the court may discontinue the road.

In addition to posting the notice in three public places within a mile of the road, notice of the intention to discontinue the road must be published in a newspaper of general circulation. This notice must be not less than seven (7) nor more than twenty-one (21) days before the hearing to consider the discontinuance.

It seems clear from a reading of all the statutes together that the report of the road viewers must describe with specificity exactly what portion of the road is to be discontinued. If the entire road is to be discontinued, then this must be clear in the report.

KRS 178.116 reads: “Any county road, or road formerly maintained by the county or state, shall be 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 exist: (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 with a three (3) year period. The terms of this section would not prohibit a fiscal court from taken the necessary steps under KRS 178.070 to discontinue a road.

KRS 178.155 reads: "Any road, except any road accepted as a part of the county road system after July 1, 1914, which according to county records has not been maintained with county funds on a continuous basis for fifteen (15) years shall not be considered a part of the county road system. Such roads shall not be maintained or improved with county funds thereafter unless the fiscal court has complied with the provisions of KRS 178.115."

The provisions of KRS 178.070 are fairly familiar and are most frequently used to discontinue roads. The provisions of KRS 178.116 are seldom used in my experience. The provisions of KRS 178.155 are even less familiar. It requires that any road that has not been maintained shall not be maintained with public funds if there has been no maintenance for 15 years. By the wording of the statute, this would only seem to apply to roads that were adopted prior to July 1, 1914, because those roads that have been formally put on the system after that date are not covered in this statute. A major problem in some counties may be that records of county road acceptance or deeded rights of way are so hard to find, that it is very difficult to prove what roads were adopted formally. *see Hintz v. Snyder 866 SW2d 124 (Ky)*

What are the rights of adjoining property owners if the Court "discontinues" a road?

Persons who own property adjoining a county road can never be denied access to their land over the county road. Even if the Fiscal Court properly takes formal action to discontinue a county road, the adjoining property owners must be allowed continued access to their property over the road. This is true even if they have other access. What creates some confusion is that the Fiscal Court often uses the language that they are going to "close" the road. This gives some people the idea that they can then block the road,

denying others the right to access. Attempts to bar the access of other adjoining land owners should be opposed.

What determines criteria for whether the Fiscal Court may establish a “county road”?

KRS 178.080 deals with the establishment and alteration of public roads, bridges and landings upon petition. Section (3) of that statute reads: “If it appears to the fiscal court that the interests of the general public may be furthered thereby, the fiscal court shall personally examine the proposed work.”

KRS 178.115 relates to the power of fiscal court to open, establish or alter a road. It says: “Whenever the fiscal court of any county deems it to be in the best interest of such county to open, establish, or alter the location of any public road, street, alley, ditch, culvert, bridge or similar public way or structure in such county, said fiscal court shall adopt a resolution setting forth the necessity for such public road or structure, and thereupon such public road or structure shall be deemed opened, established or altered as the case may be on behalf of the county.”

The key here is that there must be a finding that the road or bridge is “in the best interest of the county”. The Fiscal Court must set forth the necessity for which the work is to be done. In OAG 82-445 this very issue was considered. The opinion was that a fiscal court is permitted to establish a county road if “it appears to the fiscal court that the interests of the general public may be furthered thereby.” The opinion went further to say that the fiscal court must establish the “necessity for such public road.”

Can the Fiscal Court spend money on a road when there is no conclusive evidence that the road was ever accepted on the county system?

In OAG 88-59 the Attorney General’s office said: “As a basic rule, where the fiscal court has not by formal action accepted a particular road segment into the county road system, it has no authority to spend county money on it or maintain or improve it in any way.” That same opinion went on to say: “The fiscal court may act in what it perceives to be the best interests of the county by designating a road as a county road. It may then maintain the road. Otherwise, we do not believe it is sound public policy to

allow the fiscal court to maintain a road which is not a county road.” The changes in the law that omitted roads that may have been maintained prior to July 1, 1914 would seem to reinforce this OAG because now only roads formally taken into the county road system may be considered county roads.

If the Fiscal Court has been maintaining a “public road” that is not a “county road,” what obligation does the Fiscal Court have to continue to maintain that road and what has to be done to discontinue maintenance?

Again the Attorney General’s office addressed this question in 1984 when they were asked by the Grayson County Judge/Executive this question: “If a public roadway, under KRS 178.025, has been out of use for over 15 years, would the property where the public roadway formerly existed, revert to the owner of the property or should the County Fiscal Court discontinue the roadway?” The opinion in OAG 84-358 was that KRS 178.025 related to “public roads” not “county roads”. The opinion went on to say: “Thus, if the road is merely a public road, and is not a county road, the fiscal court has no responsibility for its upkeep or discontinuance. A public road that is not a county road can be abandoned without formal action by the fiscal court”

May the County continue to maintain a road that has not been officially accepted into the county road system?

This question was asked by the Green County Attorney of the Attorney General’s office in 1988. The opinion (OAG 88-59) first referred to OAG 82-136 which had said: “as a basic rule, where the fiscal court has not by formal action accepted a particular road segment into the county road system, it has no authority to spend county money on it or to maintain or improve it in any way.” OAG 88-59 then discussed some exceptions to this rule that related to sidewalks and bus turn-arounds. Then an even older AG opinion, OAG 80-489, was discussed. That older opinion had said that the county could continue to maintain a road which was not a county road if the public has acquired the free use of the road by prescriptive easement and the traveling public requests the fiscal court to

maintain the road. But the newer opinion, OAG 88-59, reversed this and said that such a situation was not a valid exception to the general rule. The AG's office took the position that public monies cannot be spent on maintenance of a road that has not been accepted in the county road system, whether or not the public has obtained a prescriptive right to use the road and whether or not the public has asked for the road to be maintained.

To what extent can the County provide public funds to provide access for private individuals from their property to public roads and highways?

The answer seems very clear from many sources in the law. That answer is very simply that the County cannot use public funds at all to provide access for private individuals. In OAG 83-267 the Attorney General answered a question about the fiscal court of Leslie County providing money to construct and maintain swinging foot bridges. It was recognized that, at that time, in the rural, mountain areas swinging foot bridges were a way of life and the only way for people to get from their homes to the public or county roads. It was even said that they were "necessary as a public service for school children, families and others of the public for access to bus stops and roads." Nonetheless the Attorney General gave the opinion that the County could not expend money for the foot bridges because they could not in any way be considered a part of the "county road system."

The same opinion, OAG 83-267, considered questions about the expenditure of public monies for vehicular bridges. Some of the questions were: (1) What right-of-way deeds are required? (2) Is there a minimum number of homes, people, and so forth, that must reside on the property to which the bridge may be built? (3) Can a bridge be built from a county road across a stream to private property where one house is located if the property owner requests the bridge? (4) Can a bridge be built under the same circumstances if two houses are located on the property? (5) Does the number of houses have any bearing on the legality of building a bridge? (6) Must there be a county road on both sides of the stream?

The AG's office first said that the construction of a bridge as a part of the county road system did not require any specific number of affected homes, people, etc. The

fiscal court has to consider all the surrounding circumstances in determining whether the proposed road or bridge is in the interest of the traveling public and the county taxpayers. OAG 83-267 goes on to quote from the case of Walker v. Lyon County Fiscal Court, Ky., 425 S. W. 2d 730 (1968). That case emphasized, in the context of county road construction or improvement, the showing of convenience to the public, that is, public necessity. The Court went on to talk about standards in determining the propriety of a fiscal court's construction of a road or bridge: "The standard by which a road may be established or discontinued is better stated in the words of Robertson, Judge in Cole v. Shannon, 24 Ky 218 as follows: '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 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.'"

In the Walker case (cited immediately above) the Kentucky Court of Appeals also referred to the reference book, American Jurisprudence (39 Am Jur 2d Highways, Streets and Bridges, Sec. 66, pages 453-454): "Improvements in a highway or street must be required by a public convenience and necessity, and cannot be made solely for the benefit of a private individual or corporation."

The Attorney General's office in OAG 83-267 goes on to say that the fiscal court may properly consider several factors in determining the county's or general public interest: (1) the number of families living in the immediate area; (2) the availability of proper funding; (3) the potential traffic in the area; (4) the public convenience in terms of social and economic preservation; (5) the potential benefit of the project to the public in general; (6) the question of whether the project is essentially public in nature. It must be seen that a particular road or bridge could involve the public good or interest, although the enjoyment and advantages to be derived from their maintenance is not distributed equally, even between members of the public who are situated alike or in the same class. The Court said in Carman v. Hickman County, Ky., 215 S. W. 2d 408, (1914): "It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to maintain it."

Finally OAG 83-267 addressed the issue of whether there must be a county road on both sides of the stream and bridge. The answer was that the AG believed that there must be a county right of way on both sides of the bridge to be constructed over the stream. "We can envision no public interest where the bridge dead-ends on one piece of private property."

In OAG 82-180 the same basic issue was addressed, that is, whether the county could construct a bridge linking a public highway to a private drive? The conclusion was that the fiscal court had no authority to construct a bridge linking a county road to a private drive.

In reaching this conclusion the AG's office cited a number of Kentucky cases. In an ancient case, *Fletcher's Heirs v. Fugate*, 26 Ky. Rep., 631 (1830), the holding was that a county road cannot be established for the convenience of one individual.

In *Prather v. Fulton County, Ky.*, 336 S. W. 2d 339 (1960) the Court held that the specific requirements of KRS 178.115 must be followed, that is, that the fiscal court must declare that the project is in the best interests of the county.

In *Carman v. Hickman County, Ky.*, 215 S. W. 408, (1914), the Court said: "It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to sustain it."

The Attorney General also considered Section 171 of the Kentucky Constitution in determining whether tax money could be expended for private purposes. That section of the Constitution reads in part: "Taxes shall be levied and collected for public purposes only...." Regardless of whether the money to be spent on county roads and bridges is a county tax levy, a portion of the rural secondary road program or a grant from the state or federal government, all of these monies originate with a tax of some sort. The government does not simply print money, they obtain it from the taxpayers in one form or another. And the Kentucky Constitution will not allow any form of tax to be spent for other than public purposes.

How should the Fiscal Court determine the priority of work on county roads?

There does not seem to be any specific statutory guide on this question. However the Department of Local Government has advised me that there should be an annual meeting, open to the public where the fiscal court, should establish a list of work to be done on county roads and bridges and the priority for the work. The work list should not be changed except in an emergency situation, such as a bridge washed out in a flood or a road that caves in. These priorities should be decided for the county as a whole and individual magistrates should not be allowed to have ultimate authority for the work to be done in their own districts. It is known that this procedure is not followed everywhere. For instance, in Trimble County, there is no such public meeting or annual work list. The total amount of money budgeted for road work is divided by four, representing the four magisterial districts, and each magistrate decides for himself what work is to be done.

What is the role of the County Attorney with regard to the expenditure of public monies and the opening, maintenance of and closing of roads?

The duties of the County Attorney are set out in KRS 69.210. Section 3 of that statute says: "The county attorney shall give legal advice to the fiscal court and the several county officers in all matters concerning any county business within their jurisdiction. The County Attorney **shall oppose all unjust or illegally presented claims.** In some circumstances this would require the county attorney to file suit against fiscal court members, including the County Judge/Executive if the fiscal court has determined to spend money illegally. This issue was decided in *Estill County v. Noland*, 191 S.W. 2d 223 (1945) in which the Court of Appeals ruled that the county attorney had the authority to institute action in court against the county judge (now county judge/executive) to recover sums paid to a county judge under a void order of the fiscal court purporting to allow the judge a monthly sum for travel expenses.

KRS 69.230 says: "The county attorney shall oppose the wrongful opening, alteration or discontinuance of any public road." In OAG 93-60 it was said: "... a county attorney would have a duty, pursuant to this section, to oppose the wrongful opening, alteration or discontinuance of a public road...." From this statute and the

AG's opinions that have been rendered, the county attorney has no choice, he has a public duty to oppose the wrongful expenditure of public funds and the public duty to oppose the wrongful opening, maintenance or discontinuance of a public road.

CONCLUSION

The law in Kentucky is very clear with regard to "county roads" and maintenance of "public roads". There is very little, if any, wiggle room. Public money can only be spent for public purposes. No money can be spent on a road or bridge, culvert or ditch that is not a part of the county road system. No road can be put on the county road system unless the Fiscal Court in a public hearing has made a determination that "the interests of the general public will be furthered" (KRS 178.080[3]). The case law and Attorney General's opinions for many years have made it clear that road money cannot be spent to serve an individual purpose nor to connect a private drive with a public road. It is also quite clear that the county attorney has a statutory duty to oppose the improper expenditure of public monies and to oppose wrongful opening, maintenance or closing of public roads.

In Trimble County we had a particular matter that brought this to the attention of the fiscal court and county attorney. A gentleman requested the Court to build a bridge across Miller's Branch Creek to access his family's property. There is no road on the far side of the creek. There once was a road and it was contended that the road was a county road and that it went all the way to Kings Ridge Road, an existing county road. If that ever was the case, it certainly is not the case now. The records do not reflect that this "road" was ever formally accepted into the county road system after 1914.

That being the case we were governed by KRS 178.155. That says: "Any road, except any road accepted as part of the county road system after July 1, 1914, which according to county records has not been maintained with county funds on a continuous basis for fifteen (15) years shall not be considered part of the county road system. Such roads shall not be maintained or improved with county funds thereafter unless the fiscal court has complied with the provisions of KRS 178.115." It was quite apparent that the County had not maintained the "road" on the far side of the creek for far longer than

fifteen years. I had gone down there, and there was no "road", just a worn area through the fields.

One of the matters that had to be considered in 2001, when this issue came up, was whether there may have been a county road there prior to July 1, 1914. The change in law in 2004 eliminates this problem, because now only those roads that have been formally accepted on the county maintenance system may be considered.

The case law and AG opinions make it very clear that the County could not spend public monies to connect this private property to the county road system and that no money could be spent on roads or bridges unless there was some public purpose to be served. The Fiscal Court of Trimble County for many, many years has been in the bad habit of putting roads on the county system that cannot be seen as serving any public purpose, but serve only one family. I can identify a number of "roads" that were on the county maintenance system that clearly did not serve any public purpose. This practice is illegal and must be stopped.

As County Attorney I had no choice but to oppose the construction of any bridge over Miller's Branch to serve the property. The amount of the cost is not what is important. In the simplest terms, not one red cent can be spent on this private endeavor. If I had failed to oppose this, I would have been derelict in my duty and subject to impeachment by the Grand Jury for misfeasance or malfeasance in office. I will not place myself in that position and told the Fiscal Court that I would oppose the expenditure of any monies on this project on Miller's Branch, even to the point of filing for an injunction in Circuit Court, if necessary.

Since that time there has been a noticeable lack of discussion of road projects in Fiscal Court. It seems apparent that work is being done that is not being discussed in Fiscal Court meetings. I have not been approached by any citizen to act in this regard and I am not aware of any specific violations of law by the Court, but I suspect that what I taught them was just not to bring the subject up in Fiscal Court meetings.

LIST OF AUTHORITIES:

Statutes:

Kentucky Constitution Section 171

KRS 178.010

KRS 178.025

KRS 178.070

KRS 178.116

KRS 178.155

KRS 178.080

KRS 178.115

KRS 69.210

KRS 69.230

Attorney General's Opinions

OAG 82-445

OAG 88-59

OAG 80-489

OAG 84-358

OAG 83-267

OAG 82-180

OAG 93-60

Kentucky Case Law

Sarver v. County of Allen, Ky., 582 S. W. 2d 40 (1979)

Walker v. Lyon County Fiscal Court, 425 S. W. 2d 730 (1968)

Cole v. Shannon, 24 Ky 218

Fletcher's Heirs v. Fugate, 26 Ky. Rep., 631 (1830)

Prather v. Fulton County, Ky., 336 S. W. 2d 339 (1960)

Carman v. Hickman County, Ky., 215 S. W. 2d 408 (1914)

Estill County v. Noland, Ky., 191 S. W. 2d 223 (1945)

Legal Reference Sources:

American Jurisprudence (39 Am Jur 2d, Highways, Streets and Bridges, Section 66, pages 453-454)

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