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OPINION COMMITTEE

CHAIR
JIM KEFFER

State of Texas
House of Representatives
Committee on Natural Resources

VICE CHAIR
TRENT ASHBY

RQ-0061-KP

October 21, 2015

FILE # 92-47845-15

I.D. # 47845

Attorney General Ken Paxton
Post Office Box 12548
Austin, TX 78711-2548

RE: Request for an Opinion

Dear General Paxton:

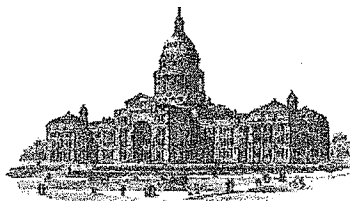
As Chairman of the House Natural Resources Committee and pursuant to the requirements of section 402.042(c)(2) of the Texas Government Code, I request you issue a formal written opinion on the question of: **if a county has accepted the public dedication of a right-of-way that includes the sidewalks does the county's maintenance obligation of a subdivision's rights-of-way extend to the adjacent sidewalks and if so can the county at a later date divest itself of the obligation to maintain the sidewalks?** I believe this question is one affecting the public interest and falls within the jurisdiction of official duties of the House Natural Resources Committee.

As supporting information, please see the attached background material and supporting documentation of the statutes, case law and previous Attorney General Opinions. Should you need more information, please do not hesitate to contact Adam Haynes in my office. The phone number is 512.463-0656 or his email is adam.haynes@house.state.tx.us.

I thank you in advance for your timely attention to this matter and your service to our State.

Sincerely,

Chairman Jim Keffer



MEMBERS - DENNIS BONNEN DEWAYNE BURNS JAMES B. FRANK KYLE KACAL TRACY O. KING
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October 15, 2015

Via first class mail

The Honorable Jim Keffer
Chairman, House Committee on Natural Resources
P.O. Box 2910
Austin, Texas 78768-2910

Re: Request for Attorney General Opinion

Dear Chairman Keffer:

This law firm seeks an opinion from the Attorney General for the State of Texas—and respectfully asks that you, in your capacity as Chair of the House Committee on Natural Resources, forward this request to the Attorney General seeking his opinion—addressing the following questions:

If a county has accepted a public dedication of a subdivision right-of-way that includes sidewalks, does the county's maintenance obligation include the sidewalks, and if so can the county later divest itself of the obligation to maintain the sidewalks?

A. Facts.

This law firm represents North Austin Municipal Utility District No. 1, Wells Branch Municipal Utility District, and Block House Municipal Utility District, which are municipal utility districts created and operating under Chapters 49 and 54 of the Texas Water Code that provide water, sewage, drainage and other services to residents in unincorporated areas within their respective boundaries, most of which are located in Williamson County (the "County"). These districts are similarly situated in that they contain residential subdivisions with sidewalks along public roads that have been historically maintained by the County.

By way of example, one such subdivision is Milwood, located within North Austin Municipal Utility District No. 1 ("North Austin"). The homes in Milwood are accessed by several public roads, including Dallas Drive, a major thoroughfare. Dallas Drive includes sidewalks that are located within the right-of-way and frequently used for pedestrian traffic. Following the

developer's construction of the rights-of-way and other infrastructure in Milwood, the County accepted the dedicated rights-of-way through its maintenance of Dallas Drive and other rights-of-way in the subdivision.

In 2013, the County enacted a Williamson County Sidewalk Maintenance and Repair Policy ("Sidewalk Policy") to address its maintenance and repair of sidewalks throughout the County. The Sidewalk Policy lists seven specific sidewalks originally constructed by the County which the County will continue to maintain and repair. Beyond those sidewalks, the Sidewalk Policy proclaims—

All sidewalks which are not specifically described above and which are located in the unincorporated areas of Williamson County must be maintained and repaired by the owner of the property whereupon the sidewalk is either situated or adjacent to unless the responsibility for maintenance and repair of a particular sidewalk is otherwise the responsibility and obligation of a Homeowners Association, Municipal Utility District or some other entity that the property is subject to.¹

Dallas Drive was not listed among the seven sidewalks subject to the County's continued maintenance. It is located in an unincorporated area of the County. The Milwood subdivision is not subject to a mandatory homeowners association with the ability to levy assessments for maintenance of rights-of-way and other infrastructure, including Dallas Drive. In addition, North Austin has never assumed the responsibility or obligation for maintaining public rights-of-way, including sidewalks. As a result, the effect of the County's attempt to disclaim maintenance of public sidewalks is to impose that burden on each individual who owns property adjacent to a sidewalk. As set forth below, North Austin and the other districts contend that the County's attempt to disclaim its obligation to maintain sidewalks within public rights-of-way, such as Dallas Drive, is contrary to Texas law.

B. Analysis.

A public right-of-way includes not only a street or roadway, but also sidewalks located within the right-of-way. As the Texas Supreme Court has stated, "a street includes the whole width of the public right-of-way. It includes sidewalks and parkways which 'are part of the street itself.'" *State v. NICO-WFI, LLC*, 384 S.W.3d 818, 821 (Tex. 2012) (quoting *City of San Antonio v. Wildenstein*, 109 S.W. 231, 233 (Tex. Civ. App.—San Antonio 1908, writ ref'd)). The court in *NICO-WFI* further noted provisions of the Texas Transportation Code that define a street "as more than a mere roadway for vehicular traffic," which specifically includes sidewalks. *Id.* at 821 n.1 (citing TEX. TRANSP. CODE §§ 316.001(1), 316.001(3), 541.302(16)).

In addition, Texas courts have recognized a municipality's obligation to maintain public sidewalks in assessing liability under the Texas Tort Claims Act ("TTCA"). *See, e.g., City of Austin v. Rangel*, 184 S.W.3d 377, 383-84 (Tex. App.—Austin 2006, no pet.) (holding uncovered meter box located on sidewalk was a special defect for plaintiff's claim under TTCA, but holding city's immunity for claim was not waived because there was no evidence that city knew or should

¹ A copy of the Sidewalk Policy is attached as Exhibit "A."

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have known of defect); *City of El Paso v. Chacon*, 148 S.W.3d 417, 422-23 (Tex. App.—El Paso 2004, pet. denied) (holding plaintiff stated claim under TTCA for injuries caused by stepping into a hole on a public sidewalk because such defect “relates to a highway, roadway, or street.”) (citing TEX. CIV. PRAC. & REM. CODE § 101.022(b)).

As several Texas Attorney General opinions have confirmed, a county that has accepted a publicly-dedicated road must maintain the road. *See, e.g.*, Op. Tex. Att’y Gen. No. GA-0659 (2008); Op. Tex. Att’y Gen. No. GA-0513 (2007); Op. Tex. Att’y Gen. No. GA-0359 (2005); Op. Tex. Att’y Gen. No. GA-0128 (2003). While we have not located any Attorney General opinions or Texas cases that specifically address whether that maintenance obligation includes sidewalks, given the recognition by Texas law that a public right-of-way includes both streets and adjacent sidewalks, a county’s obligation to maintain public rights-of-way should include the obligation to maintain the sidewalks. The Attorney General has further recognized that once a county has accepted a road, it may not discontinue maintenance of the road except through a specific statutory procedure under the Transportation Code, which includes designating a new road to replace the discontinued road. *See* Op. Tex. Att’y Gen. GA-0128 (2003) (citing TEX. TRANSP. CODE §§ 251.001(2), 251.051(a), (c)). Likewise, that limitation on a county’s ability to discontinue maintenance of a road should apply equally to sidewalks within the right-of-way.

In this instance, the County approved plats in 1984 and 1985 for the Milwood subdivision that dedicated rights-of-way to the County, including Dallas Drive.² While the County recognized in the plat approval that the developer had the sole obligation to construct all streets and other public thoroughfares, it further stated—

It is further understood that upon completion of the aforesaid obligations of the developer and 60% occupancy of the lots along the roadways and streets in the subdivision has been achieved and all driveway drainpipes have been installed on written permission from the county commissioner’s court, [sic] assumes full responsibility for maintenance of said streets and roads.

The approved plats include 70-foot-wide rights-of-way for Dallas Drive, and the engineered drawings specifically show that sidewalks are located within the 70-foot-wide right-of-way, and outside of the adjacent private residential lots. Following approval of the Milwood plats, the developer constructed Dallas Drive and the other infrastructure provided in the plats, and the subdivision eventually exceeded the 60% lot occupancy stated in the plats for the County’s assumption of maintenance obligations for streets and roads. And since then, the County has performed periodic maintenance of Dallas Drive.³ Years later, pursuant to its Sidewalk Policy, the County has attempted to disclaim any further maintenance obligation for sidewalks along Dallas Drive and other public rights-of-way in residential subdivisions throughout the County.

Given the Texas courts’ inclusion of sidewalks within public roads and a county’s maintenance obligations for such roads, there is no authority that supports a county decision to continue its maintenance obligation for one part of the right-of-way—*i.e.*, the street used for vehicular travel—but discontinue that obligation for another portion—*i.e.*, the adjacent sidewalk

² Examples of such plats, along with engineered street drawings depicting the sidewalks within the Dallas Drive right-of-way, are attached as Exhibit “B.”

³ Examples of Dallas Drive sidewalk maintenance records are attached hereto at Exhibit “C.”

used for pedestrian travel. The County, therefore, cannot divest itself of the obligation to maintain the sidewalks in Dallas Drive and other sidewalks located in public rights-of-way dedicated to and accepted by the County.

In addition, the County cannot disclaim its obligation to maintain the public sidewalks simply by suggesting that a municipal utility district or private landowner bear that responsibility. Under the Water Code, a municipal utility district has the power—but no obligation—to purchase and maintain “recreational facilities,” which are defined to include sidewalks. TEX. WATER CODE §§ 49.464 (permitting districts to acquire, develop and maintain “recreational facilities”), 49.462 (1) (defining “recreational facilities” to include sidewalks). However, a district can only do so through the issuance of bonds, and if it cannot fund the bonds through available revenue, it must obtain voter approval to fund through ad valorem taxes. *Id.* at §§ 49.464(d) (permitting district to issue bonds payable solely from revenues for acquisition and maintenance of sidewalks without election); 49.4645 (requiring election to issue bonds payable through ad valorem taxes for acquisition and maintenance of recreational facilities for districts in the County and other specific counties). However, simply because a district might have a contingent funding mechanism to pay for sidewalk maintenance does not negate a county’s obligation to maintain sidewalks along with other areas in a public right-of-way.

Moreover, contrary to the County’s Sidewalk Policy, a private landowner abutting a right-of-way does not have the duty to maintain the sidewalk located in the right-of-way. *See Grapotte v. Adams*, 111 S.W.2d 690, 590 (Tex. 1938) (recognizing “the well-established rule of law that a sidewalk is a part of the street and the duty to exercise ordinary care to maintain such sidewalk in a reasonably safe condition for the use of the public rests upon the city, and not upon the abutting property owner.”); *Parra v. R.W. Woolworth Co.*, 545 S.W.2d 596, 598 (Tex. Civ. App.—El Paso 1977, no writ) (“It is the general rule, in the absence of a valid statute or ordinance to the contrary, that the owner or occupant of land abutting on a public sidewalk does not, solely by being an abutter, owe to the public a duty to keep the sidewalk in a safe condition.”). The County, therefore, cannot impose the obligation to maintain the Dallas Drive sidewalks and other similarly-situated sidewalks on private landowners, either individually or through a homeowners association.

C. Conclusion.

Based on Texas law, as reflected in cases, statutes and prior opinions from the Attorney General’s office, sidewalks located within a publicly dedicated right-of-way fall within a county’s road maintenance obligations once the county accepts the right-of-way. A county cannot divest itself of the obligation to maintain such sidewalks without the statutory process for discontinuing a road under Section 251.051(c) of the Transportation Code. Accordingly, when a county has accepted and maintained a publicly dedicated right-of-way, including sidewalks located within the right-of-way, and has not discontinued maintenance of that right-of-way pursuant the Transportation Code, the county still has the obligation to maintain those sidewalks. With respect to the specific example discussed above, because the County has accepted and maintained Dallas Drive, including the sidewalks located within that right-of-way, and because it has not discontinued maintenance of the right-of-way in the manner prescribed by the Transportation Code, the County still has the obligation to maintain those sidewalks.

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Sincerely,

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Kevin M. Flahive

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