

# OFFICE OF THE ATTORNEY GENERAL



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Honorable Hinton Mitchem  
Member, Alabama State Senate  
412 1/2 Gunter Avenue  
Guntersville, AL 35976

Counties - Roads, Highways  
and Bridges - Vacation

Whether the road in question  
is a public road by prescrip-  
tion is a factual determina-  
tion to be made by county  
authorities.

If it is determined that the  
road in question is a public  
road by prescription, it is  
not necessary that the road  
meet certain subdivision  
specifications in order to be  
included in the county road  
system.

Dear Senator Mitchem:

This opinion is issued in response to your request for  
an opinion from the Attorney General.

## QUESTIONS

If a road has been a public road at  
any time in the past, and if the county  
commission never officially abandoned that  
road, then would it remain a county road,  
regardless of the county's negligence in

maintaining it? Would it not be exempt from minimum specifications set forth by the county for accepting future roads?

FACTS, LAW AND ANALYSIS

The following facts were set out in your request:

Five families live on a road in Marshall County which has, in previous years, been worked as a public road. For the past few years the county has failed to work the road in question. The road is a county school bus route and is becoming nearly impassable during periods of heavy rain and during the winter months. When the residents approached the Marshall County Commission and requested that they work the road, the county responded that the county could not take over any road that did not meet their subdivision specifications.

Accompanying your request were affidavits from certain county workers and commissioners indicating that the county had worked the road in question for periods from 1947 to 1991. It was also indicated that 1,550 feet of the road is paved, and the residents are requesting the county to work the remaining mile or so, which is chert.

A public road of a county is established by: (1) a regular proceeding for that purpose, (2) the dedication of the road by the owner of the land which it crosses and subsequent acceptance by the county, or (3) use by the public for 20 years. Auerbach v. Parker, 544 So.2d 943 (Ala. 1989).

A county commission is given the authority at Code of Alabama 1975, § 11-3-10 to establish, change or discontinue a road. According to Code, § 23-1-80 the county commissions in this state have general superintendence over the public roads in their respective counties so as to render travel over the same safe and convenient.

An open, defined roadway in continuous use by the public as a highway without let or hindrance for a period of twenty

years becomes a public road by prescription. When such circumstances are shown, a presumption of dedication or other appropriation to a public use arises. Ford v. Alabama By-Products Corporation, 392 So.2d 217 (Ala. 1980).

Whether a road has become a public road by prescription is a factual determination to be made by county authorities. The Attorney General is to issue opinions determining questions of law. Code of Alabama 1975, § 36-15-18. He does not make determinations of questions of fact. Therefore, county authorities must determine if the road in question has become a public road by prescription using such facts as use of the road by the public and as a mail and school bus route, work done by the county on the road, and the length of time the public has used the road.

The failure of county authorities to keep a road in repair or the fact that part of a public highway is unsafe for travel is not sufficient to show that it has been abandoned. Auerbach v. Parker, supra.

If it is determined that the road in question is a public road by prescription, it is not necessary that the road meet certain subdivision specifications in order to be included in the county road system.

Furthermore, a county may be liable to individuals injured because of its negligence in maintaining its roads. Jefferson County v. Sulzby, 468 So.2d 112 (Ala. 1985).

#### CONCLUSION

County authorities must determine if the road in question has become a public road by prescription using such facts as use of the road by the public and as a mail and school bus route, work done by the county on the road, and the length of time the public has used the road.

If it is determined that the road in question is a public road by prescription, it is not necessary that the road meet certain subdivision specifications in order to be included in the county road system.

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I hope this sufficiently answers your questions. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS  
Attorney General

By:

A handwritten signature in cursive script, appearing to read "James R. Solomon, Jr.", written in black ink.

JAMES R. SOLOMON, JR.  
Chief, Opinions Division

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