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STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Counties - Drains and Drainage -  
Easements - Subdivisions

Unless the drainage easement has been dedicated to the county and accepted by it, the Lee County Commission cannot perform work on the drainage easement or on private property damaged by the easement, unless it is to correct damage or health problems, either of which was caused by county property, work, or equipment.

The approval of a subdivision plat by the county engineer evidences that the plat meets the county's regulations for the development of a subdivision, and the plat is due to be approved by the county commission.

The obligation and liability of a county commission for drainage easements must be decided on a case-by-case basis. Generally, a county is not responsible for a drainage structure on private property.

Dear Mr. Martin:

This opinion of the Attorney General is issued in response to your request on behalf of the Lee County Commission.

QUESTIONS 1, 2, AND 3

Does the county have a duty to maintain, in a reasonably safe condition, drainage easements dedicated to public use by developers of subdivisions in the unincorporated areas of Lee County?

Does the county have to formally accept a dedicated easement on a plat?

Does it make a difference if the drainage easement has pipe underneath the ground, rather than water simply running over the ground?

FACTS AND ANALYSIS

The following facts were presented in a letter from the county engineer:

Wyntree Subdivision is located in southeast Lee County off of Lee Road 318 in Section 20, Township 18 North, Range 30 East. It was constructed in late 1993 to early 1994 and the subdivision plat was recorded in Plat Book 16, Page 140, on February 18, 1994, at the Lee County Courthouse. On September 30, 1996, the roads/streets in Wyntree Subdivision were accepted by the county commission subject to a one-year maintenance period by the owner and a final inspection by the Highway Department. A satisfactory final inspection of Wyntree Subdivision was performed on January 29, 1999, and the county commission accepted the roads/streets for permanent maintenance on February 8, 1999.

The roads/streets in Wyntree Subdivision that were accepted for permanent maintenance by Lee County are Lee Roads 465, 467, 468, 469 and 478, which collectively total to approximately 0.74 miles. The roadways consist of twenty-foot wide asphalt pavement, four-foot wide shoulders, drainage ditches, culverts and sixty-foot wide public rights-of-way. . . .

Wyntree Subdivision was designed to utilize twenty-foot wide drainage easements to accommodate the surface water runoff. The drainage easements are located on private property throughout the subdivision and follow common boundary lot lines. The drainage easements intersect the public rights-of-way of every road/street in the subdivision with the exception of Lee Road 469.

Although Lee County does maintain within the limits of the public rights-of-way of Wyntree Subdivision, the county has never maintained any of the drainage easements located on private property. The drainage easements have been maintained by the property owners since the creation of the subdivision.

Lee County's first citizen request to maintain a portion of a drainage easement located off the right-of-way of Lee Road 465 was July 12, 2004. The request originated because the surface water runoff utilizing the drainage easement eroded the property of the owner. The county commission voted on the citizen's request to repair the eroded property, and the request was denied by majority vote of the county commission on September 13, 2004.

Counties are authorized to regulate the minimum size of lots, the planning and construction of public streets, public roads and drainage structures, and to require proper placement of public utilities in subdivisions situated outside the incorporated areas of the county. ALA. CODE § 11-24-1(b) (Supp. 2004).

Section 94 of the Constitution of Alabama, as amended by Amendment 558, prohibits the Legislature from granting to counties or cities the power to grant money or any other thing of value in aid of an individual, association, or corporation. ALA. CONST. art. IV, §94; ALA. CONST. amend. 558. This Office has concluded that these provisions are not violated by a county doing drainage work on private property if the county has an easement or right-of-way on the property and the county receives a benefit from the work performed. Opinions of the Attorney General to Honorable Robert S. Presto, Attorney, Escambia County Commission, dated November 30, 1993, A.G. No. 94-00071; to Honorable Thomas A. Snowden, Jr., Chairman, Shelby County Commission, dated June 28, 1990, A.G. No. 90-00317; and Honorable Gary C. Sherrer, County Attorney, Houston County, dated September 2, 1987, A.G. No. 87-00307. The

easement or right-of-way must be dedicated to the county and accepted by the county for the county to work on it. Opinion of the Attorney General to Honorable Bryce Scott Davis, Attorney at Law, Cullman, dated June 22, 1989, A.G. No. 89-00338.

This Office determined that a county commission cannot remove a culvert/drainage ditch located on private property where the county has no liability for its installation, and its removal would not benefit the county. Opinion of the Attorney General to Honorable Gary C. Sherrer, Attorney, Houston County Commission, dated September 29, 1999, A.G. No. 99-00290.

A county commission may, by a properly adopted resolution, perform work on private property to correct damage or health problems caused by county property, work, or equipment. Opinion to Honorable Willoughby Gaither, Chairman, Clay County Commission, dated July 11, 1994, A.G. No. 94-00221.

#### CONCLUSION

In the case at hand, unless the drainage easement has been dedicated to the county and accepted by it, the Lee County Commission cannot perform work on the drainage easement or on private property damaged by the easement, unless it is to correct damage or health problems, either of which was caused by county property, work, or equipment. It makes no difference that the drainage easement is underneath the ground, rather than water running over the ground.

#### QUESTION 4

What is the effect of the approval of the plat by the county engineer?

#### FACTS AND ANALYSIS

Section 11-24-2(b) of the Code of Alabama states as follows:

No plat shall be approved or disapproved by the county commission without its first being reviewed by the county engineer or his or her designee. Following such review, the county engineer or his or her designee shall certify to the commission whether the plat meets the county's regulations. If the proposal meets the

regulations, it shall be approved by the commission. Should the plat be determined by the county engineer to be deficient in any regard, the county engineer shall detail the deficiency to the county commission along with a recommendation that the development be disapproved.

ALA. CODE § 11-24-2(b) (Supp. 2004). If the county engineer certifies to the county commission that a subdivision plat meets the county's regulations, the county commission must approve the plat. Opinion of the Attorney General to Honorable Phillip W. Jordon, Judge of Probate, Cherokee County, dated April 9, 1998, A.G. No. 98-00127 at 6. If the county engineer finds a deficiency in the plat, he or she is to notify the county commission of the deficiency in detail and recommend that the county commission not approve the plat. ALA. CODE § 11-24-2(b) (2004).

#### CONCLUSION

The approval of a subdivision plat by the county engineer evidences that the plat meets the county's regulations for the development of a subdivision, and the plat is to be approved by the county commission.

#### QUESTION 5

Does the county have any obligation or liability regarding drainage easements?

#### FACTS, ANALYSIS, AND CONCLUSION

The potential obligation or liability of the county regarding drainage easements is dependent on the facts in each case. If the county owns the property or has obtained an easement or right-of-way on the property where the drainage easement lies, the county has the responsibility of upkeep of the drainage easement and may be liable for damage caused by failure to keep the easement in good condition. Opinion of the Attorney General to Honorable Robert S. Presto, Attorney, Escambia County Commission, dated November 30, 1993, A.G. No. 94-00071.

If the drainage easement is located on private property, the county is generally not responsible for it, unless damage is done to the easement through

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some fault of the county. See Opinion of the Attorney General to Honorable Al Kelley, Mayor, City of Millbrook, dated August 4, 1997, A.G. No. 97-00249, in which it was concluded that, when a city has never accepted the dedication of any drainage ditch easements, the city has neither the authority nor the duty to maintain the easements. *Kelley* at 2.

Although this opinion concerned a city's responsibility regarding drainage structures, the same reasoning would apply to a county. In any event, the obligation and liability of a county commission for drainage easements must be decided on a case-by-case basis.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact me.

Sincerely,

TROY KING  
Attorney General  
By:



BRENDA F. SMITH  
Chief, Opinions Division

TK/LKW

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