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STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Counties – Roads, Highways, and Bridges  
– Vacation – Crenshaw County

The determination of whether a road became a public road by virtue of the use of the road by certain landowners and citizens is a question of fact that must be made by county officials depending on the particular facts available.

County maintenance is not essential to the status of a public road.

Whether a road remains in the public domain or whether a road is declared abandoned and vacated is a determination to be made by the county commission.

Dear Mr. Blackmon:

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

QUESTION 1

Does the fact that landowners and other citizens have used the road in question regularly in the past constitute “public use,” therefore, nonuse of a public road not being a consideration factor?

FACTS AND ANALYSIS

Your request states as follows:

There is an unnamed dirt road in Crenshaw County, just off Turkey Creek Road, that has not been serviced by the county highway department in about 25 years. The road joins five landowners, and only a portion of the road is passable. The landowner farthest off the highway desires the road to be declared vacated or abandoned and has placed a chain across the road to prevent through traffic. Other landowners, however, want to continue to use the road as means of ingress and egress to their properties, as they have done in the past, and request that the road remain in the public domain.

A public road may be established by common-law dedication, statutory proceeding, or prescription. *Osborn v. Champion Int'l Corp.*, 892 So. 2d 882, 885, quoting *Ford v. Ala. By-Products Corp.* 392 So. 2d 217, 218-19 (Ala. 1980). The facts presented do not show if the dirt road in question was established as a public road by dedication and acceptance by the county into the county road system or by statutory proceeding. An open, defined roadway, through reclaimed land, 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. *Id.* at 3.

It is common knowledge that roads in the county are frequently used as a matter of convenience without any intention on the part of landowners to dedicate or give up their lands for public use. *Wallace v. Putman*, 495 So. 2d 1072, 1074 (Ala. 1986). For example, this Office has determined that a private driveway is not considered a public road simply because it is used by a school bus or mail carrier. Opinion of the Attorney General to Honorable Nell G. McMillan, County Administrator, Hale County Commission, dated May 15, 1996, A.G. No. 96-00214. On the other hand, a road used by several families as access to their homes can meet the public-use requirement enabling a county to condemn and take over maintenance of a private road, thus making the road a county-maintained road. Opinion of the Attorney General to Honorable J. E. Turner, Member, House of Representatives, dated July 25, 2001, A.G. No. 2001-230.

The Attorney General, by statute, issues opinions on questions of law. ALA. CODE § 36-15-1(1)a & b (2001). The determination of whether a road

became a public road by virtue of the use of the road by certain landowners and citizens is a question of fact that must be made by county officials depending on the particular facts available. *Davis v. Linden*, 340 So. 2d 775, 776 (Ala. 1976); Opinion of the Attorney General to Honorable Bill English, Lee County Probate Judge, dated February 25, 2002, A.G. No. 2002-146. Some factors to consider are: (1) it is the character of the use, rather than the amount of the use, of a road that controls; (2) a road in a bad state of repair due to infrequent use may still be a road for public use; and (3) whether an erected barrier that impedes access to the road has been in place for twenty years. See *Smith v. Smith*, 482 So. 2d 1172, 1174-75 (Ala. 1985). There should also be a determination by the county as to whether the road has been established as a public county road by dedication and acceptance into the county road system by condemnation or prescription.

### CONCLUSION

The determination of whether a road became a public road by virtue of the use of the road by certain landowners and citizens is a question of fact that must be made by county officials depending on the particular facts available.

### QUESTION 2

Does the fact that the county highway department has not worked this road in the past 25 years have bearing on the situation?

### FACTS, ANALYSIS, AND CONCLUSION

County maintenance is not essential to the status of a public road, although it is strong evidence that the road in question is a public road. *Davis* at 777; *English* at 5. On the other hand, the lack of work on a road by the county could suggest that the county has not considered the road as a public road.

### QUESTION 3

Should the county declare that the road remain in the public domain and require that the chain be removed based on the rights of other landowners and

citizens, or should the county declare the road abandoned with property reverting back to adjoining property owners?

### FACTS AND ANALYSIS

As stated under Question 1, the determination of whether a road became a public road by virtue of the use of the road by certain landowners and citizens is a question of fact that must be made by county officials depending on the particular facts available. If the county determines that the road is a public road, whether the road remains in the public domain or whether it is declared abandoned and vacated is a determination to be made by the county commission. Under section 23-1-80 of the Code of Alabama, a county commission has general superintendence over the public roads in the county. ALA. CODE § 23-1-80 (2000). Pursuant to section 11-3-10 of the Code of Alabama, “[t]he county commission shall possess authority in relation to the establishment, change, or discontinuance of roads, bridges, causeways and ferries within the county, except where otherwise provided by law. . . .” ALA. CODE § 11-3-10 (1989).

If the county commission decides that the dirt road is a public road, and there is no record of it being in the county road system, steps should be taken to establish it as a public county road by condemnation or dedication of the road by the landowners and acceptance by the county. *See* opinions of the Attorney General to Honorable Bryce Scott Davis, Attorney at Law, Cullman, dated June 22, 1989, A.G. No. 89-00338, and to Honorable Elisha C. Poole, Attorney for Butler County Commission, dated December 8, 1995, A.G. No. 96-00061. One of the facts to be determined is who actually holds title to the land on which the road lies.

If the county commission decides to abandon any claim that the county or public has to the road in question, the county commission should take the proper steps to abandon and vacate the road by the procedures set out at section 23-4-2 (procedure of county or municipal governing body for vacating a public road or street) and/or section 23-4-20 of the Code of Alabama (vacation by abutting landowners). ALA. CODE §§ 23-4-2, 23-4-20 (Supp. 2004). *See* opinion of the Attorney General to Honorable David Moore, Chairman, Fayette County Commission, dated June 19, 1996, A.G. No. 96-00246. Section 23-4-20 and section 23-4-2(b) of the Code require that a vacation shall not deprive other property owners of any right that they may have to convenient and reasonable means of ingress and egress to and from their property, and if that right is not afforded by

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the remaining streets and alleys, another street or alley affording that right must be dedicated.

CONCLUSION

Whether a road remains in the public domain or whether a road is declared abandoned and vacated is a determination to be made by the county commission. If the county commission determines that the dirt road is a public road, steps should be taken to establish it as a public county road. If the county commission decides to abandon any claim to the road as a public road, the county commission should take the proper statutory steps to abandon and vacate the road.

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

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