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By Judon Fambrough

It is possible to own landlocked property in Texas. However, a new law effective Sept. 1, 1995, may alter this situation in some instances. Previous law helps explain the new statute and why it may be unconstitutional.

Both case law and statutory law address easements and landlocked property. While the statutory laws have vacillated, the case law has remained constant. Previous case law held the primary means of gaining access to landlocked property is under a concept known as an *implied easement by necessity*.

For an implied easement by necessity to arise, three conditions must be met. A failure of any one dooms access.

- At one time, unity of ownership (or common ownership) existed for the dominant and servient estates. (The dominant estate is the one whose owner has the right to cross the burdened or servient estate.) The common ownership, however, must have occurred after the land was patented, i.e., conveyed from the sovereign to private ownership.
- The easement must be absolutely necessary for the owner to enter and leave the property. No other routes of ingress and egress exist.
- The necessity for the easement arose when the dominant and servient estates were divided.

Without common ownership, the mere fact that a person's land is completely surrounded by others is not sufficient to create an implied easement by necessity.

The first statutory attempt to remedy landlocked property failed. The 1925 statute permitted owners of landlocked property to condemn, without compensation, an access to their land (Texas Revised Statutes, Article 1377b[2]). However, the statute did not meet the constitutional requirement of



a public use pronounced in the Texas Constitution (Article 1, Section 17). (See *Estate of Waggoner v. Gleghorn*, 378 S.W. 2d 47 [1964].)

The second statutory attempt also failed (Texas Revised Statutes, Article 6711). It authorized the commissioners court to declare and open a public highway, at public expense, across lands of nonconsenting owners. The action could be taken upon the sworn application of one or more landlocked landowners.

This statute also lacked the necessary public purpose requirement. It was declared unconstitutional in 1962 by the Texas Supreme Court (*Maher v. Lasater*, 354 S.W. 2d 923.) The high court, in reversing a prior decision, wrote, "In deciding that question (case) we assumed, but did not hold, that it is of public importance that every person *residing on land* be provided access to and from his land so that he may enjoy the privileges and discharge the duties of a citizen." The court further stated, "The legislature may not authorize that which the constitution prohibits."

The latest statutory attempt appears to mirror the 1962 statute that was declared unconstitutional. The following synopsis of the new statute only addresses access to landlocked property (Subchapter B, Chapter 251, Texas Transportation Code).

A person who owns real property having no public access may request that a road be established

to connect the person's real property to the county public road system (Section 251.053[b], entitled "Neighborhood Roads").

The request, made by a sworn application, must:

- designate the route sought,
- include the names and places of residence of the persons affected by the proposed road and
- describe why the road is necessary.

After the application is filed, the county clerk issues notice to the sheriff or constable to summon each property owner affected by the application. The summons is served and returned in the same manner as a civil action in a justice court. Property owners wishing to contest the application must appear at the next regular term of the commissioners court.

At the meeting, the commissioners may hear evidence verifying the truth of the application. If they determine that the applicant is landlocked, commissioners may issue an order declaring routes designated in the application, or other lines they determine, to be a public road. Each affected property owner is served with the order. A copy of the order is filed in the deed records of the county clerk's office.

**Note.** If an affected property owner wishes to contest the application, it is unclear on what basis to protest. Apparently, the only evidence the commissioners court will hear is whether the

applicant is landlocked and, if so, along which route the public road will be declared. Of course, the constitutionality of the statute can always be challenged.

The declared route may not be less than 15 feet or more than 30 feet on either side of the designated line. Any marked trees or other objects used to designate the lines or corners of the survey may not be removed or defaced.

The commissioners court is not required to use county employees to maintain the road. However, the court will make the road initially suitable for use as an access public road.

Until Sept. 1, 2009, affected property owners receive compensation from public funds under a process called "jury of view" (Section 251.054). Basically, the commissioners court appoints five property owners (the jury) to lay out the road to the greatest public advantage and to assess damages for the taking. The appointed jury issues a written notice to each affected property owner stating the time the determinations will be made.

Property owners may present written claims for projected damages caused by the proposed road. At the meeting, the jury assesses the damages and submits the report

to the commissioners court. If the commissioners court approves the report and orders the road opened, they must **consider** both the jury's assessment of damages along with the owners' claims. Commissioners then allocate to the property owners just damages and adequate compensation for the roadway.

An affected property owner may appeal the assessment of damages in the same manner as an appeal from a justice court. The appeal, however, is limited to the issue of damages. It cannot prevent the opening of the road.

Affected property owners have 12 months to open their property after receiving notice of the commissioners court order. Otherwise, a \$20-per-month fine may be levied if the landlocked property is 1,280 acres or more.

Effective Sept. 1, 2009, Section 251.054 of the Texas Transportation Code setting forth the "jury of view" process was repealed. This section contained the sole method for determining damages for affected landowners. Nothing was added in its place.

The only hint on how compensation will be determined lies in the prior Section, 251.053. Subsection (e) states, "Damages to property owners incident to the opening of a road under this section shall be

assessed by a jury of property owners in the manner provided for other public roads."

Apparently, this "jury of property owners" refers to the "jury of view" that was repealed effective Sept. 1, 2009. The only other avenue for compensation requires the formal condemnation of the property under Chapter 21 of the Texas Property Code. This process is beyond the scope of the Transportation Code.

Presently, the statute faces two legal challenges. First is the constitutional issue mentioned earlier. Second is the compensation issue created by repealing Section 251.054.

As yet, no constitutional challenges to the new statute have reached the Texas appellate courts. The similarity between the 1962 statute and the new law is striking. Perhaps after 30 years, the legislature feels that the courts, when again presented with the question, may find a constitutional public use by affording members of the community a way to and from their lands. ☐

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