



**COUNTY JUDGES ASSOCIATION OF ARKANSAS  
2023 ROAD LAW Guidebook  
Parts I and II:**

**By: Mark Whitmore, AAC Chief Counsel**

**Norfork, Arkansas**

**May 9<sup>th</sup> and 10<sup>th</sup>, 2023**

**TABLE OF CONTENTS**  
**Part I**

**Overview: County Judge’s Powers & Restrictions to Powers..... 1**

    Constitutional Restrictions on Powers.....1

        Restrictions on County Road Funds .....2

        Limitations on Spending Powers .....5

        Equipment Restrictions.....6

**Police Power of Counties: Speed Limits, Weight Limits, and Traffic Control Devices ..... 7**

    Truck Routes/Weight Limits .....12

**What is a County Road? Public Road? Private Road?..... 14**

    Adverse Possession vs Government .....17

    Rights Derived from Easements .....18

**Declaring a Road to be a Public Road..... 18**

**Road Acceptance..... 22**

**Road Improvement Districts..... 24**

**County Judge Executive Maintenance and Authority ..... 25**

**County Judge vs. Quorum Court..... 42**

**County vs. City..... 42**

**Utilities ..... 43**

**Appendix .....46-47**

## **PART I**

### **I. OVERVIEW: County Judge's Powers & Restrictions to Powers**

**Amendment 55:** Authority and exclusive control over county roads was given to the County Judge by Amendment 55, Section 3, of to the Arkansas Constitution: "The County Judge ... shall ... operate the system of county roads ...."

**Article 7, §28:** Article 7, §28 of the Arkansas Constitution provides: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and every other case that shall be necessary to the internal improvement and local concerns of the respective counties."

**A.C.A. 14-14-1102 (b) (A):** "The county judge shall be responsible for the administrative actions affecting the conduct of a plan of public roadways and bridges throughout the unincorporated areas of the county, including the maintenance and construction of public roadways and bridges and roadway drainage designated as eligible for expenditure of county funds. This jurisdiction shall be exercised pursuant to law, and nothing in this section shall be construed as limiting a county in performing public roadway and bridge maintenance and construction services within the incorporated municipal boundaries where permitted and in the manner prescribed by law."

**Reding v. Boone County Judge Dale Wagner:** "County judges in Arkansas are given the executive power to make discretionary decisions regarding the operation of the system of county roads ... [and the County Judge's decision will not be changed by the courts where}...there is no evidence of abuse or misuse of the county judge's discretion." , 350 Ark. 322, 86 S.W. 3d 386 (2002).

**AG Opinion 88-364:** The County Judge exercises substantial *discretion* as to whether to improve a county road and apply for condemnation of the improvement. A writ of Mandamus (which is a court order compelling the performance of a non-discretionary duty) sought in an attempt to require a County Judge to condemn land to create right-of-way likely would not stand because such a remedy will not issue from the judicial branch to control the discretion of an officer in the executive branch of government, unless the discretion is abused by acting arbitrarily.

#### **I.A Constitutional Restrictions on Powers**

There are fundamental legal principles on operation of the system of county roads in Arkansas which arise from: the Constitution of the

United States, the Constitution of Arkansas, the Arkansas Code, and the body of case law precedence concerning property rights. These basic legal principles will greatly dictate the rights and extent of rights of the county in its easement for roadway purposes and the rights of adjacent landowners, utilities, cities, and the traveling public. Property Law is derived from centuries of case law in the U.S. and even the common law of England and generally is unchanging from decade to decade.

**Amendment 5 of the Constitution of the United States:** *"No person shall...be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."*

**Article 2, §22 of the Constitution of Arkansas:** *"The right of property is before and higher than any other constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation."*

**Article 16, §13 of the Constitution of Arkansas:** *"Any citizen of any county, city or town may institute a suit, in behalf of himself and all other interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatsoever"*.

#### **I.B. Restrictions on County Road Funds**

**Road Tax - Amendment 61:** Quorum Court may levy annually a county road tax not to exceed 3 mills. Revenues derived from the tax shall be used for the sole purpose of constructing and repairing public roads and bridges within the county.

**AG Opinion 96-379:** Amendment 61 is expressed in terms that are broad enough to encompass the payment of the cost of an employee in the road department, to the extent that the service of that employee is related to the purposes expressly stated in those restrictions.

**AG Opinion 96-215:** Money generated from the road tax may not be used for any other purpose than "constructing and repairing public roads and bridges within the county." Thus, building an animal shelter would not be permitted.

**AG Opinion 91-005:** Interest earned on road tax funds may only be used for the same purpose as the fund.

**AG Opinion 86-178:** The transfer of monies from the county general fund to the county road fund requires an appropriation by the quorum court.

**AG Opinion 85-2:** The erection of streetlights and subsequent monthly utility bills are acceptable expenditures of the county road fund because they are "necessary for the maintenance of safe and usable

streets.”

**AG Opinion 91-140:** Money generated from the road tax may not be used to purchase land to build a jail or a courthouse because Amendment 61 expressly provides “Revenues derived from the county road tax shall be used for the sole purposes of “constructing and repairing public roads and bridges within the county.”

**AG Opinion 2005-248:** County Road funds derived from the county road tax under Amendment 61 are to be spent on public roads and bridges. Use on public school property was deemed prohibited.

***Sanderson v. Texarkana*, 103 Ark. 529-535, 146 S. W. 105, 107.:**

Regarding splitting road tax revenues between the county and municipalities within it, the Supreme Court of Arkansas said, “The amendment [No. 5] does not specify to what jurisdiction the road tax, when collected, shall be confided. It simply provides that the tax, when collected, shall be expended upon the roads and bridges in the county... The fund is therefore by the act directed to be expended for the very purpose named in said amendment to the Constitution. In the absence of any constitutional inhibition, the Legislature has full power, not only to apportion said road tax between the county and the municipality, but also.. it has the power to direct whether the municipal council or the county court shall be the agency which shall have the jurisdiction and the right to expend the portion of the fund apportioned to the city, when collected, upon the streets of such municipality.”

In Op. Att’y Gen. No. 2014-19, the Attorney General’s office confirmed *Sanderson* is still good law in Arkansas, which means special acts which dictate a division of county road tax money different than the standard equal division are constitutional. A.C.A. § 26-79-104 states in part, “Of the amount collected from the annual three-mill road tax in any county in the state, the county courts shall apportion one-half (  $\frac{1}{2}$  ), *except when a greater amount is allowed by law*, of the amount collected upon property within the corporate limits of any city or town for use in making and repairing the streets and bridges in the respective cities or towns.” There have been many legal challenges to laws which try to divide revenues unequally on the grounds that “the General Assembly may not pass any local or special Act” (Ark. Const. amend. XIV). However, a law is not special or local, but rather general, if it operates uniformly upon every person of a designated class throughout the state.

*Kelleher v. Burlingame*, 110 S.W.2d 1065 (Ark. 1937).

However, A.C.A. § 26-79-104 has been interpreted rather strictly, as the language of the statute is clear. When asked, “Would it be permissible for the county and the cities to agree to a different distribution by Interlocal Agreement?” the Attorney General’s office in Op. No.2010-161 said no. While cities and counties may enter in agreements for “joint cooperative action” pursuant to A.C.A. § 25-20-

104, the action must be one that each party can undertake individually. So, a city could agree to turn over a portion of its road tax funds to the county if the funds were used to make improvements on city streets. "But because A.C.A. § 26-79-104 plainly states that a city must use the road tax for streets within the city, a city in my opinion lacks the necessary independent authority to arrange by Interlocal Agreement for the use of its share of the tax for county roads."

Additionally, "this provision does not condition apportionment of road tax revenues upon the city having levied a millage for maintenance and operation. Rather, it unambiguously provides for this apportionment to the cities if tax funds were collected upon property within corporate limits. Moreover, this requirement is mandatory, making use of the mandatory term 'shall.'" Op. Att'y Gen. No. 2000-125. Once a city is incorporated, it is entitled to its share of road tax revenues, but is not entitled to receive revenue collected from properties now located within the new city limits during a time period before incorporation. *Id.* This opinion is based on statutory interpretation, so in absence of case law, a judicial ruling may be necessary in order to conclusively determine the issue. Op. Att'y Gen. no. 2007-301.

In A.C.A. § 14-301-101(1) (1987), the legislature tasked the city council with the "care, supervision, and control" of the city's streets and bridges to the city council. However, the county may perform "certain work and services" regarding construction or repair of streets and bridges within a municipality if there is an agreement between the municipality and the county, which is still subject to all properly established municipal zoning and planning ordinances. See AG Opinion No. 2006-050.

See also *City of Texarkana v. Edwards*, 88 S.W. 862 (Ark. 1905) stating one fifth of the tax collected in a "city of the first class" must be expended on roads outside of the city in any portion of the county where the county judge deems necessary. This leaves fourth fifths of the tax collected in the city to be expended within city limits; no tax collected outside of the city may be expended within the city. Counties do have the authority to expend road funds on roads and bridges within a municipality, as they are still roads and bridges within the county, but there must be cooperation with the city council and all local rules must be followed.

See generally, A.C.A §§ 25-20-101 to -108 providing for interlocal agreements. See Op. Att'y Gen. No 98-012 citing *Shofner v. Dowell*, 168 Ark. 229, 269 S.W 588 (1925) (appropriation by county from county road fund to aid improvement district in construction of streets surrounding university campus not unlawful as expenditure of county funds for state purpose, where roads were part of the county's highway system).

A.C.A § 26-79-104 states "Of the amount collected from the annual three-mill road tax in any county in the state, the county courts shall apportion one-half ( ½ ), except when a greater amount is allowed by law, of the amount collected upon property within the corporate limits of any city or town for use in making and repairing the streets and bridges in the respective cities or towns." Acts of 1937, Act 153, § 1-3; Acts of 2019, Act 132, § 2, eff. July 24, 2019

**A.C.A. § 14-14-811:** The quorum court is authorized to pay a portion of the salary and related matching benefits of the county judge from the county road fund. The portion of the judge's salary paid from the county road fund shall not exceed 50%. At the discretion of the county judge, a county may pay a portion of the salary and related matching benefits of personnel of the local emergency management jurisdiction from the county road fund. The portion paid from the fund shall not exceed 50%. Acts of 1987, Act 675, § 2; Acts of 1999, Act 725, § 1, eff. July 30, 1999; Acts of 2011, Act 345, § 1, eff. July 27, 2011.

**Limitations on spending powers:**

In *Wiegel v. Pulaski County*, 32 S.W. 116 (Ark. 1895), the Court cited 1279, Sand. & H. Dig: "no county court, or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended" in finding there is no express or implied power in the county court to make contracts without an appropriation. When the levying court makes an appropriation for a contract, it signals its approval for it, and then the county judge may act upon it. Without such appropriation, the county court's jurisdiction is void.

In *Ladd v. Stubblefield*, 111 S.W.2d 555 (Ark. 1937) a county judge's acts of paying his salary and car maintenance expenses out of the general road fund was found to be improper. The car maintenance expenses were considered purely administrative and not directly related to the mandates in Amendment No. 3. However, a year later in the case *Lawhorn v. Johnson*, 120 S.W.2d 720 (Ark. 1938) the Court overturned the portion of this ruling which prohibited county judges from paying portions of their salary from the county road fund. The *Lawhorn* Court reasoned that county judges, when acting as ex officio road commissioners, are directly involved in building roads and bridges, thus satisfying the requirements for Amendment No. 61. County judges are allowed to be paid one half of their salary from the county road fund, as a result.

**Equipment Restrictions**

In *Needham v. Garner*, S.W.2d 194 (Ark. 1961), the county judge contracted with private persons for the use of county equipment for excavating and dirt moving projects involved in a U.S. Soil

Conservation Service program. The judge secured reasonable compensation for the use of the operating costs and depreciation of the machinery and remitted the profits to the county treasury. The trial court found the work to be beneficial to county improvement and the soil program. *However*, the Arkansas Supreme Court found the county's profit and county improvement value to be irrelevant in making the decision that the county judge's actions of contracting with private individuals to use county equipment were improper. The court says, "We think there can be no doubt that if a county judge is given the right, limited only by his own discretion, to use county road machinery for private purposes, it could result in the need for more tax money to repair and replace the road machinery."

See also *Pogue v. Cooper*, 679 S.W.2d 207 (Ark. 1984), opining that Amendment 55 §3, which gave the county judge custody of county property instead of the county court, "did not change the law on this subject." "Custody should not be interpreted as the power to lease county property for use on private projects. While the county judge may have the power to lease county real property, leasing county personal property (like road equipment) is an entirely different matter and is prohibited in the above context.

This prohibition extends to non-profit entities as well, such as churches, or organizations which might have public entities as members. See Op. Att'y Gen. No. 97-248 opining the use of county road equipment to remove dirt from the Economic Development Alliance's property was likely prohibited because although the EDA served county interests and had public entities as members, their property is still considered privately owned by a non-profit cooperation. See also Op. Att'y Gen. No.94-138 opining the use of county road equipment to lay asphalt on a church parking lot was also prohibited.

See also Op. Att'y Gen. Nos. 95-215, 94-138, 97-248.

**§ 14-14-810** allows counties with populations not less than 7,000 and not more than 7,500 to enact ordinances authorizing county judges to provide for the use of county road machinery, equipment, materials, supplies, and labor to make improvements to roadways serving private property that are deemed essential, under standards and procedures established by the court, to provide access to the public roads of the county in cases of bad weather or the occurrence of other events which may impair citizens of this state from obtaining reasonable and necessary access to the public roads of this state. Acts of 1981, Act 268, §§ 1, 2. **Formerly** A.S.A. 1947, §§ 17-3810, 17-3811.

See Op. Att'y Gen. No. 97-248. See also *Dudley v. Little River County*, 305 Ark. 102, 805 S.W.2d 645 (1991).

On June 11-12, 2019 former Fulton County Judge, Jim Kendrick, contracted with county employees to work on his private driveway using



county equipment. The county employees were still being paid by the county while performing the work and used one road grader and two dump trucks to perform the work. The next week Kendrick wrote a check for \$1,812 from his personal checking account for "road equipment, material, and labor used for the work on his private driveway." However, testimony from three local contracting companies estimated the cost of the former judge's project to be between \$4,800 and \$6,500. After an investigation by the Arkansas State Police, Kendrick was arrested in August 2019 and subsequently convicted of Theft of Property, a class D felony, in January 2020. Kendrick was fined \$10,000, and upon the completion of his sentence, was pardoned by Governor Hutchinson.

### **I.G. Police Power of Counties: Speed Limits, Weight Limits and Traffic Control Devices**

Until 2007, the speed limit on county roads was generally 65 unless posted otherwise. Since 2007, it is 40 mph unless posted otherwise. The power to set speed limits is within the power of the county judge. (See, generally, A.C.A. §27-67-102; Amendment 55). The power to set speed limits on county roads is vested in the county judge, not the quorum court. AG Opinion 94-343.

**27-51-216. Speed limits and traffic-control devices on county roads – Penalty.** (a) As used in this section, "county road" means a public road that is not a state highway, interstate highway, or city street within the jurisdiction of a given county. (b) (1) **Each county judge may establish speed limits on county roads within the jurisdictional boundaries of his or her county.** (2) **If a county judge has not established a speed limit on a county road within the jurisdictional boundaries of his or her county, then the speed limit shall be forty miles per hour (40 m.p.h.) on the county road.** (c) (1) A person who pleads guilty or nolo contendere to or is found guilty of a violation of a speed limit on a county road established by a county judge or as provided under this section shall be assessed a penalty as provided under § 27-50-305. (2) A person who pleads guilty or nolo contendere to or is found guilty of speeding in excess of fifteen miles per hour (15 m.p.h.) over the posted speed limit on a county road established by a county judge or as provided under this section is guilty of a Class C misdemeanor. (d) A traffic-control device that is erected on a county road shall conform to the uniform manual on traffic-control devices adopted by the State Highway Commission. **History.** Acts 2007, No. 667.

---

**A.C.A. §27-51-206: Altering prima facie speed limits—Signage.** (a) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that the prima facie speed permitted under this subchapter at any intersection is greater than is reasonable or safe under the conditions

found to exist at the intersection, then the local authority shall determine and declare a reasonable and safe prima facie speed limit, which shall be effective when appropriate signs giving notice are erected at such intersection or upon the approaches thereto if approved by the State Highway Commission.

(b) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher prima facie speeds than those stated in § 27-51-201 upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections, if signs are erected giving notice of the authorized speed, but local authorities shall not have authority to modify or alter the basic rule set forth in § 27-51-201(a) or in any event to authorize by ordinance a speed in excess of forty-five miles per hour (45 m.p.h.). History: Acts of 1937, Act 300, § 52. Formerly: Pope's Dig., § 6710; A.S.A. 1947, § 75-602.

**A.C.A. §27-52-103: Obedience to official traffic control devices required.** The driver of a motor vehicle or operator of a streetcar shall obey the instructions of any official traffic control device placed in accordance with the provisions of this chapter unless he or she is: (1) Directed by a police officer; or (2) Yielding the right-of-way to a funeral procession as required by § 27-51-1408. History: Acts of 1937, Act 300, § 31; Acts of 2017, Act 816, § 5, eff. Aug. 1, 2017. Formerly: Formerly Pope's Dig., § 6689; A.S.A. 1947, § 75-504.

**27-52-106. Local highways.** (a) (1) Local authorities in their respective jurisdictions shall place and maintain traffic control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or local traffic ordinances or to regulate, warn, or guide traffic. (2) All traffic control devices erected shall conform to the state manual and specifications. (b) Local authorities in exercising those functions referred to in subsection (a) of this section shall be subject to the direction and control of the State Highway Commission. **History.** Acts 1937, No. 300, § 30. Formerly: Pope's Dig., § 6688 A.S.A. 1947, § 75-503.

See also Op. Att'y Gen. No. 2003-081 opining counties must first seek Highway Commission's approval for the erection of traffic control devices on state highways.

**A.C.A. §27-49-106: Powers of local authorities.** Local authorities may exercise reasonable police power over streets and highways in their jurisdiction by regulating traffic by means of police officers or traffic control signals. (a) (1) No local authority shall enact or enforce any rule or regulation in conflict with the provisions of this subtitle unless expressly authorized in this subtitle.

(2) Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this subtitle.

(3) Local authorities may enact and enforce traffic rules and

regulations which are not in conflict with the provisions of this subtitle for private roadways but only after being granted express permission by the owner of the private roadway within the planned community.

(b) The provisions of this subtitle shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

(1) Regulating the standing or parking of vehicles, including the ability to establish districts for the purpose of limiting the time, place, and manner of public parking in designated areas;

(2) Regulating traffic by means of police officers or traffic control signals;

(3) Regulating or prohibiting processions or assemblages on the highways;

(4) Designating particular highways as one-way highways and requiring that all vehicles thereon be moved in one specific direction;

(5) Regulating the speed of vehicles in public parks;

(6) Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing it or designating any intersection as a stop intersection and requiring all vehicles to stop at one (1) or more entrances to the intersection;

(7) Restricting the use of highways as authorized in §§ 27-35-101 -- 27-35-111; and

(8) Regulating or prohibiting the traffic from and use of mopeds, three-wheeled vehicles, and other similar vehicles.

(c) No ordinance or regulation enacted under subdivision (b) (1), (4), (5), (6), or (7) of this section shall be effective until signs giving notice of local traffic regulations are posted upon or at the entrances to the highways or parts affected, as may be most appropriate.

(d) No provision of this subtitle, of other state traffic laws, or of any local traffic ordinance or regulation enacted under authority of subdivision (a) (3) of this section shall be effective on a private roadway of a planned community until signs giving notice of the owner's grant of permission to enforce those state and local traffic regulations are posted upon or at the entrances to the planned community's private roadways or affected parts thereof. History: Acts of 1937, Act 300, §§ 25, 26; Acts of 1983, Act 405, § 1; Acts of 1994, 2nd Ex. Sess., Act 32, § 2, eff. Aug. 25, 1994; Acts of 1999, Act 1199, § 1, eff. July 30, 1999. Formerly: Pope's Dig., §§ 6683, 6684; A.S.A. 1947, §§ 75-425, 75-426.

*Garrison v. City of Alpena*, 350 S.W.2d 690 (Ark. 1961) is an example of a case in which a city relied on its powers as a "local authority" to enforce a stoplight law passed by local ordinance. The Supreme Court of Arkansas upheld the authority of the city to pass local traffic regulations in accordance with the above statute.

## § 12-10-328. 911: Addressing authority--Data maintenance

(a) A chief executive shall designate a 911 addressing authority that shall create and maintain street centerline and address point data in a geographic information system format.

(b) The street centerline and address point data created under subsection (a) of this section shall:

(1) Be compatible with the standard database requirements and best practices developed by the Arkansas Geographic Information Systems Office as part of the Arkansas Master Address Program; and

(2) Be transmitted to the office by a method and with a frequency agreed upon by the office and the 911 addressing authority designated under subsection (a) of this section.

Acts of 2017, Act 663, § 1, eff. Aug. 1, 2017.

Outside of this law, there are not yet any formal laws or processes for the naming of county roads in Arkansas. Op. Att’y Gen. No. 96-375 opines, “In the absence of any state law procedures, it is my opinion that final authority in this regard rests, similarly, with the county judge pursuant to his constitutional power and duty to operate the system of county roads. Ark. Const. amend. 55, § 3. See also A.C.A. §§ 14-14-1101 and -1102. Thus, while implementation or administration of the 911 system may provide the initial impetus for naming or renaming a county road, it is my opinion that the county judge’s concurrence in the matter will be necessary, in recognition of his executive powers under Amendment 55. See also A.C.A. § 14-14-1102(b)(1)... The county judge cannot act arbitrarily. And his actions would have to be viewed in light of any applicable procedural requirements.”

Similarly, the AG opined in Op. Atty. Gen. No. 2001-319 that the naming of city streets is “is generally a matter for the city,” but there are no formal laws or cases governing this process either. A county may work with the city to change street names in the city in accordance with this statute, but there must be some type of interlocal agreement to do so.

### **Truck Routes/ Weight Limits**

General Rule: The State has the power to set size and weight limits on all roads in the state. County can place weight limits on roads for up to 90 days in a calendar year (by ordinance and posted). **A.C.A. §27-35-103 (b)**. County has the power to restrict routes of commercial trucks over county roads by using weight limits on roads under their control (by ordinance and posted). **A.C.A. §27-35-103 (d)**. “A local ordinance which prohibits certain types of traffic from traveling on designated streets for the purpose of preventing the deterioration of the streets is clearly within the authority granted by the [statutes].” **AG Opinion 97-417**.

**27-35-103. Effect of governing law.** (a) The maximum size and weight of vehicles specified in this chapter shall be lawful throughout this state, and local authorities shall have no power or authority to alter these

limitations, except as provided in this chapter.(b) Local authorities, with respect to highways under their jurisdiction, by ordinance or resolution, may prohibit the operation of vehicles upon any highway or impose restrictions as to the weight of vehicles to be operated upon any highway, for a total period of not to exceed ninety (90) days in any one (1) calendar year, whenever the highway, by reason of deterioration, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced.(c) (1) The local authority enacting any such ordinance or resolution shall erect, or cause to be erected and maintained, signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby.(2) The ordinance or resolution shall not be effective unless and until signs are erected and maintained.(d) (1) Local authorities, with respect to highways under their jurisdiction, by ordinance or resolution, may also prohibit the operation of trucks or other commercial vehicles or may impose limitations as to the weight thereof on designated highways.(2) The prohibitions and limitations shall be designated by appropriate signs placed on such highways.(e) (1) The State Highway Commission shall likewise have authority as granted in this section to local authorities to determine by resolution and to impose restrictions as to the weight of vehicles operated upon any highways under the jurisdiction of the commission.(2) The restrictions shall be effective when signs giving notice thereof are erected upon the highway or portion of any highway affected by such resolution. **History.** Acts 1937, No. 300, § 139; Acts 1959, No. 307, § 53; Acts 1995, No. 851, § 1. Formerly: Pope's Dig., § 6799; A.S.A. 1947, § 75-801

---

Until 2007, the county was prohibited from setting weight limits on public bridges (the law said the county was to direct the ASHC to do so and the ASHC had refrained from doing so). The 2007 law now provides violations of weight limits on bridges posted by counties to be Class C Misdemeanors.

In *House v. City of Texarkana*, 279 S.W.2d 831 (Ark. 1955), the plaintiff operated a gas business for heavy trucks close to but outside of the city limits. He sought to challenge a city ordinance that regulated heavy truck traffic on certain streets. One of the regulated streets was the main route to his business, and he argued that the ordinance unfairly deprived him of his property and significantly hurt his business. The Court said, "There can be no doubt that cities such as Texarkana have the power, under our statutes and decisions, to pass ordinances of this nature." The Court found this type of ordinance to be reasonable and not arbitrary because it was for the purpose of protecting the streets of the city from damage.

**Op. Att'y Gen. No. 94-066:** The Attorney General's Office interpreted A.C.A. § 14-14-1102(b) (1) (A) (i) as arguably giving the county judge the power to impose load limits on county roads, given the judge complies

with all applicable legal provisions. "In Subchapter 5 of the Transportation Code, governing the protection of road surfaces, there is a provision that would appear to give the power in question to the Arkansas State Highway Commission, to be exercised under the direction of the county judge. Section 27-66-501(b) (1987) directs and authorizes the Highway Commission, under the direction of the several county judges of the state, "to make a classification of all roads with respect to the weight of loaded or unloaded vehicles which may be used thereon." The Commission's responsibilities in this area are set out in § 27-66-501(c) and (d), and both criminal and civil penalties are prescribed for violation of the load limits established by the Commission. See A.C.A. §§ 27-66-503 and -504 (1987). The county court of each county, acting through the county judge, is, however, given authority in times of emergency caused by the elements to prohibit vehicles with a net load of more than 3,500 pounds from operating on or over the county highways until the judge determines that the emergency has passed. See § 27-66-505 (1987)."

**27-66-501. Classification of roads by weight of vehicles used thereon.**

(a) Exclusive of city streets, state highways, or interstates, a county judge may post weight limits on public bridges in his or her jurisdiction in connection with federally mandated bridge inspections. (b) Posted weight limit signs shall be in accordance with state and federal law. (c) (1) **It is unlawful for a person to drive, operate, or move a motor vehicle, an object, or a contrivance or for an owner of a motor vehicle, object, or contrivance to cause or permit the motor vehicle, object, or contrivance of a size or weight exceeding the posted weight limit to be driven, operated, or moved.** (2) A person or an owner operating a motor vehicle, an object, or a contrivance under an overweight permit issued by the Arkansas Department of Transportation is exempt from penalty under subdivision (c) (1) of this section. (d) **A violation of this section is a Class C misdemeanor.** (e) Even if authorized by an overweight permit issued by the Arkansas State Highway Department of Transportation, a person or an owner operating, driving, or moving a vehicle, an object, or a contrivance upon a public bridge shall be liable for all damage that the public bridge may sustain as a result of: (1) Careless, negligent, or illegal operation, driving, or moving of a vehicle, an object, or a contrivance; or (2) Operation, driving, or moving of a vehicle, object, or contrivance of excessive width or weighing in excess of the maximum weight limits in this chapter. **History.** Acts of 1919 (2nd Ex. Sess.), Act 222, §§ 2, 3, p. 4253; Acts of 2007, Act 453, § 1, eff. July 31, 2007; Acts of 2009, Act 483, § 7, eff. July 31, 2009; Acts of 2017, Act 707, §§ 380, 381, eff. Aug. 1, 2017. **Formerly:** C. & M. Dig., §§ 5510, 5511; Pope's Dig., §§ 7152, 7153; A.S.A. 1947, §§ 76-122, 76-123.

Violation of A.C.A. §27-66-503 constitutes a misdemeanor. Does not apply as to a special trip for the movement of some particular thing or vehicle from one location to another. If guilty of misdemeanor, liable in a civil action for damages. (A.C.A. §27-66-504.

**Rough Metal Tires -License for certain tires, A.C.A. §27-66-502:** The using, driving, or operating upon any improved hard-surfaced public

highway of this state of any tractor, truck, automobile, or other vehicle having corrugated, spiked, jointed, or other rough-surfaced metal tires is prohibited without first procuring from the county judge of the county in which the road is situated a license permitting such use or operation. History: Acts of 1919 (2nd Ex. Sess.), Act 222, § 1, p. 4253. Formerly: C. & M. Dig., § 5509; Pope's Dig., § 7151; A.S.A. 1947, § 76-121.

**Heavily Loaded Vehicles During, Emergencies - A.C.A. §27-66-505:** (a) The county court of each county acting through the county judge is given the authority in times of emergency caused by unusually heavy or long-continued rainfalls or by freezes, thaws, snows, and other unusual conditions caused by the elements to prohibit vehicles having a net load of more than three thousand five hundred pounds (3,500 lbs) from operating on or over the county highways whereon such conditions exist until the time that the county judge shall determine that the emergency has passed.

(b) Whenever, in the judgment of the county judge, an emergency arises in his or her county, as described in subsection (a) of this section, he or she shall cause notice to be posted in the county courthouse to the effect that until further notice the operation of vehicles having a net load of more than three thousand five hundred pounds (3,500 lbs) over the highways described in the notice is prohibited. Notice shall also be posted in at least ten (10) of the most prominent and public places in the county and be published in a newspaper in the county if practicable. Notice may also be given by mail, telephone, or personal contact to persons operating vehicles, and notice by mail, telephone, or personal contact shall be sufficient notice for the purposes of this section.

(c) If any person, after having knowledge that the operation of vehicles over the county highways or any designated part thereof having a net load of more than three thousand five hundred pounds (3,500 lbs) has been prohibited by the county judge during an emergency as described in this section, violates this section by using the roads contrary to the order of the county judge, the person shall be guilty of a misdemeanor. Upon conviction, he or she shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200).

History:

Acts of 1949, Act 172, §§ 1 to 3. Formerly: A.S.A. 1947, §§ 76-126 to 76-128.

**"Preservation of Local Roads Act" ACA 14-16-801 et seq (801-808):** In 2009 the General Assembly adopted the "Preservation of Local Roads Act", Act 810 of 2009, codified under ACA 14-16-801 et seq (801-808). The law authorizes counties to address damages to roads from disposal hauling operations related to oil and gas by designating a local truck route for haulers to and from a disposal facility in accordance with an evaluation by the county judge and an assessment ordinance. ArDot kindly directed a project through the TSqure program and Mack-Blackwell University of Arkansas that developed a feasible means of establishing weight limits for rural paved roads in Arkansas. So, any county seeking to set weight limits on roads may want to contact ArDot Planning Division.

## II.A. What is a County Road? Public Road? Private Road?

A public road is not a county road unless acquired by county or declared a county road by the county judge. The county can maintain roads that are public rights of way, but that does not make them county roads. Maintenance alone does not designate a road as a county road. (AG Opinion 91-434). There must be an action by the county judge.

The public can acquire the right to use a roadway by prescriptive right through use as a public way for 7 years in a manner openly adverse to the owner. *Barbee v. Carpenter*, 223 Ark. 60 (1954). Adverse possession is established by continuous possession of lands for more than 7 years and the possession must be open (visible), notorious, distinct, exclusive, hostile and with the intent to hold against the true owner. A.C.A. § 18-61-101 and *Moses v. Dautartas*, 53 Ark. App. 242, 922 S.W. 2d 345 (1996). Unlike adverse possession, prescriptive use need not be exclusive for the requisite period. However, the prescriptive use must be overt and make it clear to the true owner that an adverse use and claim is being asserted. *Manitowoc Remanufacturing, Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991); *Fields v. Ginger*, 54 Ark.App. 216, 925 S.W.2d 794 (1996). In the same vein, permissive use may not ripen into an adverse claim unless the adverse claimant commits an open and obvious act that would put the true owner on notice that her use is now adverse. *Massey v. Price*, 252 Ark. 617, 480 S.W.2d 337 (1972). This overt act does not have to consist of the adverse users openly communicating their intentions to adversely possess to the true owner and may be achieved in other ways. *Gazaway v. Pugh*, 69 Ark.App. 297, 12 S.W.3d 662 (2000). When the true owner has sufficient information to lead her to a fact, she is put on inquiry notice and shall be deemed cognizant of that fact, which means true owners should never "sit on their rights" if they believe their land is being used adversely. *Diener v. Ratterree*, 57 Ark.App. 314, 945 S.W.2d 406 (1997).

True owners should not "assume that permission requested and given to a landowner is imputed to all subsequent owners of such land." *Johnson v. Jones*, 977 S.W.2d 903 (Ark. App. 1998). See *Kimmer v. Nelson*, 218 Ark. 332, 236 S.W.2d 427 (1951), where the court held the original permissive use of a passageway across the land of another may have been abandoned after forty years of successive owners and non-objection by true owners after a long passage of time.

The difference in gaining an easement by prescription and adverse possession is the right gained: right to use v. title. Once prescriptive right vests, the county has authority to maintain the road. (A.C.A. §14-296-101) An easement has generally been described by the courts in Arkansas as a right to use the land of another for a specific purpose. *Loyd v. Southwest Ark. Utilities Corp.*, 264 Ark. 818, 580 S.W. 2d 935 (1979) and a liberty, privilege or advantage which one person may have in the lands of another. *Shuman v. Stevenson*, 215 Ark. 102, 219 S.W. 2d 429 (1949). The elements to establishing an easement by prescription



are: (1) continuous and uninterrupted use. *Barbee, supra*. (2) Open and notorious use. *Patent v. State*, 50 Ark. 53 (1887). (3). Adverse or hostile use. *Brumley v. State*, 83 Ark. 236 (1907) and *Fullenwider v. Kitchens*, 223 Ark. 442 (1954). (4) By claim of right. *Birdwell v. Ark. Power & Light*, 191 Ark. 227 (1935). (5). Use for prescriptive period. *Howard v. State*, 47 Ark. 431 (1886).

Easements can also be created by express grant or conveyance. *Hatfield v. Ark. Western Gas Co.*, 5 Ark. App. 26, 632 S.W. 2d 238 (1982). Also, the county may acquire an easement for roadway purposes pursuant to A.C.A. §14-298-120. Once gained, a prescriptive easement may be abandoned by more than seven years of non-use, in which case the owner may re-enter and prevent the previous easement holder from reestablishing its prescriptive right to use. *Owners Assn. of Foxcroft Woods, Inc. v. Foxglen Associates*, 57 S.W.3d 187 (Ark. 2001),

In *Owners Assn. of Foxcroft Woods, Inc. v. Foxglen Associates*, the Court held that the seven year requisite period for a prescriptive easement on a road begins to run once vehicular traffic begins using the road. Additionally, use of a road by a large number of vehicles for a long period of time is presumed to be adverse, not permissive because the true owner cannot give each and every person permission to use the road.

On September 16<sup>th</sup>, 2019, the County and the County Court issued an order declaring Salem Cut Road a "public road" by prescriptive easement, and the Nippers owned the land through which Salem Cut Road runs. The Nippers asserted Salem Cut Road is private because it had been used by their family for many years and because it was never incorporated into the system of county roads. Additionally, there was a sign that read "County Maintenance Ends" at the start of Salem Cut Road, which had been at the beginning of the road since at least 2014. The Nippers maintained the sign signified private use and countered the County Judge's assertion that the county had performed work on the road. However, the County maintained that members of the public had, in fact, used the road since the early 1900s, thus granting the County a prescriptive easement. The Circuit Court found the "county maintenance ends" sign in addition to testimony from previous county judges that the county had not maintained the road to be conclusive that Salem Cut Road is a private road and no prescriptive easement had been attained by the county.

***Arkansas Game & Fish Comm'n v. Lindsey***  
292 Ark. 314 (1987) & 299 Ark. 249 (1989)

Landowner claimed that a county road ran through the Game & Fish's wildlife preserve. Maintenance alone does not designate a road as a county road. County roads are distinguished from public roads by prescriptive right. Public can acquire the right to use a roadway by

prescriptive right through use as a public way for 7 years in a manner openly adverse to the owner. The Court held the 3 ways to create county road are:

- {1}. Dedication of land to county. See: A.C.A. §§ 27-66-207 and -208.
- {2}. Condemnation procedures. See: A.C.A. §§ 14-298-101 to -125.
- {3}. By having the public road designated as a mail or bus route as per A.C.A. §§ 27-66-205 and -206; *Johnson v. Wylie*, 284 Ark. 76, 679 S.W.2d 198 (1984).

The Court determined that no county road had been established. The Court specifically and systematically held: **first**, there was no dedication of either the old or the new rights-of-way by the landowners or their predecessors; **second**, there was no condemnation action of said lands; and **third**, there was no order of the county judge, after notice, declaring or designating a mail route or a school bus route of the road. The court also noted: "A former County Judge testified that he thought the county owned the road because someone, in 1975, wrote a county road number on a Faulkner County road map which was kept at the county garage. Of course, such non-judicial action by someone without statutory or common law authority, was not sufficient to transfer title to Faulkner County.

**Gazaway v. Pugh, 69 Ark. App. 297 (2000)**: One asserting an easement by prescription must show by a preponderance of the evidence that his or her use has been adverse to the true owner and under a claim of right for the statutory period. *Johnson v. Jones*, [64 Ark. App. 20](#), [977 S.W.2d 903](#) (1998). The determination of whether the use of a roadway is adverse or permissive is a question of fact, and a chancellor's finding with respect to the existence of a prescriptive easement will not be reversed by this court unless it is clearly erroneous. *Id.* Where there is usage of a passageway over land, whether it be by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to this interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right. *Fullenwider v. Kitchens*, [223 Ark. 442](#), [266 S.W.2d 281](#) (1954). Moreover, the length of time and circumstances under which the roadway was opened and used are sufficient to establish an adverse use. *Zunamon v. Jones*, [271 Ark. 789](#), [610 S.W.2d 286](#) (Ark. App. 1981). We find this to be a very close case because almost all of the appellees' witnesses were personally acquainted with the Gazaway family, and their testimony about their use of the roadway was not in any way inconsistent with the scope of permission that the Gazaway family at least implicitly extended to them. We also find no significance in the fact that the county graded and graveled the road; there is no dispute that the county regularly provided

this service for private landowners.

### **Adverse Possession vs. Government**

**No adverse possession against Cities:** A.C.A. §14-301-113 provides that: (a) No title or right of possession to any alley, street, or public park, or any portion thereof, in any city or incorporated town in this state shall or can be acquired by adverse possession or adverse occupancy thereof.

**No adverse possession against Counties:** A.C.A. § 22-1-201 provides that landowners cannot adversely possess against any public thoroughfare, street, highway or property so platted. Likewise, no adverse possession lies against county property, school property or city property. A.C.A. § 22-1-204.

In *Neyland v. Hunter*, 668 S.W.2d 530 (Ark. 1984), the plaintiffs claimed they had acquired a prescriptive right to use a road crossing their neighbors' land. The requisite period for adverse possession is seven years, and while the plaintiffs had only been using this road for two, they claimed a statute about mail routes had shortened the requisite period to two years. However, the Court found the legislative intent Act 666 of 1923 to be the protection of rural roads from these types of claims. Because the plaintiffs had not adversely possessed the route for the requisite period of seven years, they did not acquire a prescriptive right. Likewise, because the county had not worked the road for the requisite period of seven years, it had not adversely possessed the route either.

Governmental authorities may assert their dominion by working a road for seven years, under which the public use is under a claim of right. *Patton v. State, supra; Merritt Mercantile Co. v. Nelms*, 168 Ark. 46, 269 S.W. 563 (1925); *Thompson v. Morris*, 218 Ark. 542, 237 S.W.2d 473 (1951). Public roads do not have to be established by a formal order of the county court; prescriptive rights-of-way may be established by the county working the road for the requisite period of seven years. *Neyland v. Hunter*, 668 S.W.2d 530 (Ark. 1984). See also Op. Att'y Gen. No. 99-254.

A public entity, like a city or county may acquire an easement by prescription through adverse use under a mistaken claim of right for the requisite period. See Op. Att'y Gen. No. 2002-197. Prescriptive right-of-way and adverse possession both require a period of seven years to pass, but prescriptive use does not require exclusive use. *Neyland v. Hunter*, 668 S.W.2d 530 (Ark. 1984).

**Op. Att'y Gen. No. 2008-136:** Generally, adverse possession is a term used for private takings. Government takings are usually in the context of eminent domain. If a county does acquire a prescriptive easement over one's property, the county does not actually hold title to the property,

so it is still taxable through typical procedures.

### **Rights Derived from Easements**

Boundary disputes comprise a large segment of disputes pertaining to easements. The location of easement boundaries is determined by a "preponderance of the evidence". *Sunray Oil v. Mahaffey & Associates*, 251 Ark. 623, 474 S.W. 2d 119 (1971). When the calls within a legal description are in conflict: (1) natural objects or landmarks control over (2) artificial monuments which control over (3) adjacent boundaries which control over (4) courses and distances. *Rice v. Whiting*, 248 Ark. 592, 452 S.W. 2d 842 (1970); and *Anderson v. Welborn*, 254 Ark. 280, 492 S.W. 2d 892 (1973). The reputation of the location of a boundary is sufficient to establish it. *Ball v. Messmore*, 226 Ark. 256, 289 S.W. 2d 183 (1956). Boundaries may be inferred by acquiescence from the landowners' conduct over the years. *Warren v. Collier*, 262 Ark. 656, 559 S.W. 2d 927 (1978); *Ward v. Adams*, 66 Ark. App. 208, 989 S.W. 2d 550 (1999). Bearings or courses are rather arbitrary. Bearings are generally used to determine the general direction intended to aid in finding monuments and other evidence. County Court Orders often use bearings and distances from the "construction centerline" or "survey centerline". Over time, the actual construction centerline of a roadway surface changes; also, road construction can be imperfect and the actual centerline opened during acquisition is modified by change order or by actual construction results. Therefore, the right of way acquired by a County Court Order may be extremely difficult to ascertain on the ground. Roadways themselves and fence lines may be considered monuments, if so intended. *Brown v. Windland*, 249 Ark. 6, 457 S.W. 2d 840 (1970). For example, where a conveyance of land is described as "along, bounded by or on" a street, under Arkansas law, this generally means that the conveyance is to the center of the roadway or street. *Crute v. Hyatt*, 220 Ark. 537, 249 S.W. 2d 116 (1952).

## **II.D. Declaring a Road to be a Public Road**

### **County Judge's Discretion to Designate Specific Roads**

Any road that is the most direct route to the courthouse for 10 or more families if that road is graded and has been used by the general public as a road for at least 2 years. A.C.A. §27-66-204. Any road that is used as a mail route if the road is designated as such by the proper postal authorities. (A.C.A. §27-66-205). Any road used as a school bus route: Must take charge of the road and maintain and repair the road the same as other county roads. (A.C.A. §27-66-206). Any street or road dedicated to the public as a public thoroughfare - provided that a bill of assurance making the dedication is properly recorded. (A.C.A. §27-66-207). Any strip of ground deeded by the owners to the county for a public thoroughfare. (A.C.A. §27-66-208).

**A.C.A. 27-66-201. Overseers appointed- Public roads.** All public roads in the several counties in this state on which the several county courts

have, from time to time, appointed overseers to work, and directed that hands should be apportioned therefor, shall be declared and deemed to be public roads, without regard to any informality of the several county courts, or either of them, by which they were ordered to be declared public roads in their several counties. History. Acts 1859, No. 158, § 1, p. 188. Formerly: C. & M. Dig., § 5223; Pope's Dig., § 6937; A.S.A. 1947, § 76-101.

**27-66-202. Designation- Additional public roads.** All roads and highways established by any of the county courts of this state since November 1, 1865, as public roads, and all public roads of this state upon which overseers have been appointed by any of the county courts of this state since November 1, 1865, are declared public roads and highways. History: Acts of 1868, Act 10, § 1, p. 34. Formerly: C. & M. Dig., § 5224; Pope's Dig., § 6938; A.S.A. 1947, § 76-102.

**27-66-203. Designation of public highways.** All roads in this state heretofore laid in pursuance of law, all roads heretofore laid out by the United States in this state and all public roads known as military roads, which have not been vacated according to law are declared public highways. History: Acts of 1871, Act 26, § 1, p. 56. Formerly: C. & M. Dig., § 5222; Pope's Dig., § 6936; A.S.A. 1947, § 76-103.

**27-66-204. Designation of county roads.** The county judge in his or her discretion may designate as a county road any road that is the most direct route to the county courthouse for ten (10) or more families if that road is graded and has been used by the general public as a road for at least two (2) years. History: Acts of 1923, Act 666, § 3; Acts of 1983, Act 165, § 1. Formerly: Pope's Dig., § 6971; A.S.A. 1947, § 76-104.

**27-66-205. Classification of mail routes.** The county judge, in his discretion, may designate as a county road any road that is used as a mail route or a free rural mail delivery route if the road is designated as a mail route by the proper postal authorities of the United States Government. History. Acts 1923, No. 666, § 4; Acts of 1983, Act 165, § 2. Formerly: Pope's Dig., § 6972; A.S.A. 1947, § 76-105.

**27-66-206. Classification- School bus routes.** (a) The county judge, in his or her discretion, may designate as county roads those roads used as school bus routes. (b) Upon declaring a road a county road pursuant to this section, the county judge shall take charge of the road and cause the road to be maintained and repaired the same as other county roads. **History.** Acts 1923, No. 461 §§ 1, 2; Acts of 1947, Act 104, § 1; Acts of 1983, Act 166, §§ 1, 2. Formerly: Pope's Dig., §§ 6969, 6970; A.S.A. 1947, § 76-106, 76-107.

**27-66-207. Streets or roads dedicated to the public.** (a) The county judge, in his discretion, may designate as a county road any street or road dedicated to the public as a public thoroughfare, provided that a

bill of assurance making the dedication is properly recorded. (b) Unless a plat clearly reflects roads are private roads, the county recorder shall not accept any plats in the unincorporated area of the county without the county court's acceptance of: (1) Roads for perpetual maintenance; and (2) Dedication of land for public purposes. **History.** Acts of 1923, Act 666, § 5; Acts of 1983, Act 463, § 1; Acts of 2005, Act 861, § 1, eff. Aug. 12, 2005; Acts of 2007, Act 827, § 239, eff. July 31, 2007. Formerly: Pope's Dig., § 6973; A.S.A. 1947, § 76-108.

**27-66-208. Discretion to designate- Deeds.** The county judge, in his discretion, may designate as a county road any strip of ground deeded by the owners to the county for a public thoroughfare. History: Acts of 1923, Act 666, § 6; Acts of 1983, Act 463, § 2. Formerly: Pope's Dig., § 6974; A.S.A. 1947, § 76-109.

**Johnson v. Wylie:** Landowner sat on his rights and watched the school bus and mail carrier use his road a road on his land for 10 years. The road was then declared to be a public road by court order. The owner sued arguing that it was a taking but admitted that he considered the road to be a county road. Court held that there was no taking here, because the owner had lost right to seek just compensation for prescriptive use. *Supra*, 284 Ark. 76 (1986).

**Frazier-Hampton v. Hon. Mike Hesterly, County Judge, CA 04-280 (Ark. App. 1-26-2005:** Frazier put up gate near his property line just past and behind his resident upon a gravel road blocking access to one homeowner at end of gravel road behind Frazier property. Threats were made to road workers attempting to work the road. The good and wise county judge executed an order, after notice and a hearing, declaring the entire road a county road based upon the findings that the entire road had been used as a mail route and maintained by the county for over 7 years. The court appeals simply could not find such a wise and correct ruling by the county judge of Ouachita County to be an abuse of discretion.

**5-71-214. Obstructing a highway or other public passage.** (a) A person commits the offense of obstructing a highway or other public passage if, having no legal privilege to do so and acting alone or with another person, he or she renders any highway or other public passage impassable to pedestrian or vehicular traffic. (b) It is a defense to a prosecution under this section that: (1) The highway or other public passage was rendered impassable solely because of a gathering of persons to hear the defendant speak or otherwise communicate; (2) The defendant was a member of a gathering contemplated by subdivision (b) (1) of this section; or (3) The highway or public passage obstructed has not been established as a city street, county road, or state or federal highway under the laws of this state and no civil court has established a right of passage by prescription for the highway or public passage. (c) Obstructing a highway or other public passage is a Class €\* (see below) misdemeanor. **History.** Acts of 1975, Act 280, § 2915; Acts of 1999, Act 1105, § 1, eff. July 30, 1999. Formerly: A.S.A. 1947, § 41-2915.

\*Note: A.C.A § 5-71-214 was amended by the 2021 Arkansas Laws Act (Act 1014) to read "Obstructing a highway or other public passage is a class A misdemeanor."

**27-66-404. Penalty for obstructing.** (a) If any person obstructs a road established under the laws of this state by felling any trees across it or by placing an obstruction on the road, he or she shall be guilty of a Class C misdemeanor. (b) The person also shall forfeit one hundred dollars (\$100) for every day he or she allows the obstruction to remain after he or she has been notified to remove it. **History.** Acts of 1897, Act 17, § 3, p. 24; Acts of 2009, Act 747, § 1, eff. July 31, 2009. Formerly C. & M. Dig., § 5505; Pope's Dig., § 7147; A.S.A. 1947, § 76-112.

Disputes between landowners to whether a road is currently a public road or private road and/or to cease and desist obstructing is often a matter between parties for the jurisdiction of the circuit courts. However, a county judge may deem a road to be a public road as per *Hesterly* case above. Also, a sheriff can cite a person for violating ACA 5-71-214 and have that issue adjudicated in district court as a criminal case. After an adjudication and 30 days expiration of the appeal time, will give the county judge extra cover to conduct self-help removal. See: *Townsend v. ASHC*, 317 Ark. 581; 322 Ark. 122; 326 Ark. 731 (1996). Several counties have ordinances prohibiting encroachments. If the cards are strong, a smart move is to have the sheriff cite for violating ACA 5-71-214 or the county ordinance, if any, and the criminal proceeding adjudicate whether the road is public or private and if not appealed use self-help. Otherwise, going to courts should best be pursued by private parties can take years (note *Townsend* went to the Arkansas Supreme Court 3 times!).

**A.C.A. § 18-61-101(2):**

(2) The public's right to use an unpaved road established by an easement is abandoned if:

(A) Access is denied by a gate across the road; and

**(B) The gate is closed and locked continuously, other than briefly to allow access by the owner or others with the owner's express permission, for one (1) year.**

(3) An action to assert the public's right to use an unpaved road established by an easement is barred after the easement is abandoned under subdivision (e)(2) of this section.

**(4) This subsection does not apply to:**

(A) A road or highway maintained by the State of Arkansas;

(B) A road maintained or accepted for perpetual maintenance by a county;

(C) A road maintained by an improvement district;

(D) A road within the jurisdictional limits of a city of the first class or city of the second class; or

(E) The claim or right of any person, his or her heirs, successors, assigns, or tenants who use the unpaved road as a means of ingress and egress to lands owned or leased by that person, his or her heirs, successors, assigns, or tenants.

Acts of 1851, § 2, p. 145; Acts of 1919, Act 100, § 1; Acts of 1945, Act 82, § 1; Acts of 2015, Act 1006, § 1, eff. July 22, 2015.

**Formerly** C. & M. Dig., § 6942; Pope's Dig., § 8918; A.S.A. 1947, § 37-101.

## II.E. ROAD ACCEPTANCE

In 2005 the CJAA supported Acts 861 and 862 of 2005 which required plats and subdivisions of land to clearly reflect which roads are private or have approval of the county judge's acceptance for perpetual maintenance.

**27-66-207. Streets or roads dedicated to the public.** (a) The county judge, in his discretion, may designate as a county road any street or road dedicated to the public as a public thoroughfare, provided that a bill of assurance making the dedication is properly recorded. (b) Unless a plat clearly reflects roads are private roads, the county recorder shall not accept any plats in the unincorporated area of the county without the county court's acceptance of: (1) Roads for perpetual maintenance; and (2) Dedication of land for public purposes. History. Acts 1923, No. 666, § 5; Act 861 of 2005. Formerly Pope's Dig., § 6973; A.S.A. 1947, § 76-108.

**14-17-208. Subdivision, setback, and entry control ordinances.** (a) The county planning board may prepare and, after approval by the county quorum court, shall administer the ordinance controlling the development of land. The development of land includes, but is not limited to, the provision of access to lots and parcels, the provision of utilities, the subdividing of land into lots and blocks, and the parceling of land resulting in the need for access and utilities. (b) The ordinance controlling the development of land may establish or provide for minimum requirements as to:

(1) Information to be included on the plat filed for record;

(2) The design and layout of the subdivision, including standards for lots and blocks, streets, public rights-of-way, easements, utilities, consideration of school district boundaries, and other similar items; and (3) The standards for improvements to be installed by the developer at his or her expense, such as street grading and paving, curbs, gutters, and sidewalks, water, storm, and sewer mains, street lighting, and other



amenities. (c) The ordinance shall require that all plats of two (2) or more parcels be submitted to the county planning board for its approval and certification. (d) The ordinance may require the installation or assurance of installation of required improvements before plat approval. Further, the regulations may provide for the dedication of all rights-of-way to the public. (e) Neither the county planning board nor the court shall restrict nor limit the right of any person to file a deed or other instrument of transfer of property with the county recorder to be filed of record. (f) The ordinance shall establish the procedure to be followed to secure plat approval by the county planning board. (g) The ordinance shall require the development to conform to the official plan currently in effect. The ordinance may require the reservation or reasonable equivalent contribution of cash, other land, or considerations as approved by the county planning board for future public acquisition of land for community or public facilities indicated in the official plan. The reservation may extend over a period of not more than one (1) year from the date of recording the final plat with the county recorder. (h) Adoption of a county subdivision ordinance shall be preceded by: (1) The adoption of an official road plan for the unincorporated areas of the county. The plan shall include, as a minimum, designation of the general location, characteristics, and functions of roads, and the general location of roads to be reserved for future public acquisition. The plan may also recommend, among other things, the removal, relocation, widening, narrowing, vacating, abandonment, change of use, or extension of any public ways; and (2) Notification by first class mail of the board of directors of each school district affected by a proposed county subdivision ordinance sufficiently in advance to allow representatives of all affected school districts a reasonable opportunity to submit comments on any proposed county subdivision ordinance. (i) In unincorporated areas adjoining the corporate limits of a municipality in which the authority to control the subdivision of land is vested and is being exercised in accordance with and under the provisions of §§ 14-56-401--14-56-408 and 14-56-410--14-56-425, or any amendments thereto or thereof, or other acts of a similar nature enacted by the General Assembly, the municipal authority shall have subdivision jurisdiction, but shall transmit copies of proposed plats for the areas to the county planning board and the board of directors of each affected school district for review and comment, which shall be made to the municipal authority within sixty (60) days from the time it is received by the county planning board and the board of directors of each affected school district unless further time is allowed by the municipal authority. (j) When an official road plan has been adopted and filed as provided for in § 14-17-207, the court, upon recommendation of the county planning board, may enact ordinances establishing setback lines on the major streets and highways as are designated by the plan and may prohibit the establishment of any structure or other improvements within the setback lines. (k) When an official road plan has been adopted and filed as provided for in § 14-17-207, the court, upon recommendation of the county planning board, may enact ordinances providing for the control of entry into any of the roads shown in the official plan. (l) (1) Following the adoption of any subdivision, setback, or entry control ordinances by the court, the

county recorder shall not accept any plat in the unincorporated area of the county not within the exercised extraterritorial jurisdiction of a municipality for record without the approval of the county planning board. (2) The county recorder shall not accept any plats in the unincorporated area of the county without the county court's acceptance of: (A) Roads for perpetual maintenance; and (B) Any dedication of land for public purposes. **History.** Acts 1977, No. 422, § 6.0; 1981, No. 532, § 1; 1981, No. 691, § 1; Acts 2005, No. 862, § 1; 2005, No. 2144, § 3.A.S.A. 1947, § 17-1112. Formerly A.S.A. 1947, § 17-1112.

See: *THE COUNTY ROAD QUAGMIRE: HOW TO ESTABLISH THE EXISTENCE OF A COUNTY ROAD AND OTHER INGRESS, EGRESS CONUNDRUMS.* Arkansas Law Notes, 2008 ARLN 33, By Sharon E. Foster, University of Arkansas

## II.H. Road Improvement Districts

**A.C.A. §14-317-103:** To create a road improvement district, two-thirds majority in value, acreage or number of landowners within a proposed road improvement district shall petition the county court to establish such a district. Upon filing the petition: County clerk gives notice of filing, Describes territory affected, Calls upon anyone who wishes to be heard to appear before the county court on a day fixed in the notice. Notice published once a week for 2 weeks in a paper having circulation in the county. Acts of 1955, Act 367, §1; Acts of 1963, Act 534, § 1; Acts of 1971. Act 336, § 1. Formerly A.S.A 1947, § 20-1201

**Hearing on Petition, A.C.A. §14-317-106:** County court shall meet on day named in notice and hear petition and ascertain whether those signing the petition constitute a two-thirds majority in value, acreage or number of landowners within the proposed district. If the county court determines that two-thirds majority have not petitioned, enter order denying improvement district. Acts of 1955, Act 367. § 2; Acts of 1963, Act 534, § 2. Formerly A.S.A 1947, § 20-1202

Taxes levied by road improvement districts are payable between the first Monday in January and April 10 of each year. (A.C.A. §14-316-101). Acts of 1921, Act 223, § 1. Formerly Pope's Dig., § 13825; A.S.A 1947, § 76-1218.

County court is authorized to: Turn over a proportion of the road tax or automobile or gasoline tax turnback funds as may be just and equitable; and Contribute the funds in money or scrip to the expense of the improvement from the general revenue of the county as it may deem appropriate. A.C.A. §14-317-133. Acts of 1955, Act 367, § 25; Acts of 2017, Act 707, § 29, eff. Aug. 1, 2017. Formerly A.S.A 1947, § 20-1224.

**Op. Att’y Gen. No 2003-131:** The question asked in this opinion was, “Does the [improvement district] have the authority to control the use of the roads, e.g., setting speed limits, regulating parking, and use of our roads by airplanes for our airstrip?” The Attorney General’s Office answered by first generally stating that any “control” over the use of the roads in the District would have to first be consistent with state law and would have to relate to the purpose(s) for which the District was formed. Specifically, the Office opined that matter such as setting speed limits, regulating parking, and use of the road by airplanes would probably not be within the authority of the District. The county quorum court is deemed the “local authority” under the Uniform Act Regulating Traffic on Highways of Arkansas (Ark. Code Ann. § 27-49-101) and therefore has the authority for deciding these safety matters. “In my opinion, the District's authority conceivably extends to controlling the use of the roads incident to the operation and maintenance of these improvements, but only insofar as necessary or useful to carry out the District's purposes. See generally A.C.A. § 14-92-220. The particular exercise of “control” must therefore be considered.. In conclusion, therefore, it is my opinion that only a “local authority” may set speed limits and regulate parking on the roads in the District, under the assumption that the roads are “streets or highways” under the Uniform Act.”

Additionally, the Office asserted, “I suspect that if faced with the question a court would conclude that the legislature's authorization of public funding for the roads in a road or street improvement district reflects the view that the roads are indeed open to the use of the public as a matter of right.”

#### **I.C. County Judge Executive & Maintenance Authority**

**A.C.A. 14-14-1102 (b) (A):** “The county judge shall be responsible for the administrative actions affecting the conduct of a plan of public roadways and bridges throughout the unincorporated areas of the county, including the maintenance and construction of public roadways and bridges and roadway drainage designated as eligible for expenditure of county funds. This jurisdiction shall be exercised pursuant to law, and nothing in this section shall be construed as limiting a county in performing public roadway and bridge maintenance and construction services within the incorporated municipal boundaries where permitted and in the manner prescribed by law.” History. Acts of 1977, Act 742, § 78; Acts of 1979, Act 98, § 1; Acts of 1979, Act 413, §§ 16, 17; Acts of 1981, Act 994, § 1; Acts of 1983, Act 183, § 1; Acts of 1983, Act 232, § 1; Acts of 1997, Act 387, § 1; Acts of 2009, Act 410, §§ 1, 2, eff. July 31, 2009; Acts of 2011, Act 837, § 4, eff. July 27, 2011. **Formerly** A.S.A. 1947, § 17-3901.

**ATTORNEY GENERAL OPINION NO. 2014-021:** The Attorney General tackled an

array of complex legal questions that commonly arise concerning the authority of county judges under the Constitution and laws of Arkansas over county roads. The AG explained the rulings of the Arkansas Supreme Court on the ways to establish a county road by virtue of: dedication and acceptance; condemnation; and declaration of a public road (mail route, bus route or worked road) as a county road. The AG explained that the acceptance of a road dedicated to the public as a county road is considered an executive and discretionary authority of the county judge; and neither the quorum court nor a circuit court may interfere with this authority or the exercise of discretion. Likewise, the authority to exercise eminent domain or to declare an existing public road (a mail route, bus route, or worked road) as a county road is under the discretion of the county judge and not subject to challenge by the quorum court or a circuit court mandamus. The AG further explained the differences in county roads, public roads and private roads; and the restrictions on allocating dedicated road revenues to private property or private roads. The AG explained the role of the quorum court in adopting road standards or master street plans by ordinance and the power of the quorum court to appropriate dedicated and general revenues for public roads and bridges. This opinion will greatly assist county judges in applying the law and in conveying the law of Arkansas to the citizens.

**Full Text of Attorney General Opinion No. 2014-021**

July 7, 2014

The Honorable James McLean  
State Representative  
Post Office Box 2001  
Batesville, Arkansas 72503-2001

Dear Representative McLean:

I am writing in response to your request for my opinion on a series of questions you characterize as designed "to ascertain the [sic] whether under Arkansas law and Article 7, § 28 and Amendment 55 of the Arkansas Constitution the exercise of the authority granted the county judge, as an executive or by county court action, is a matter of discretion confided in the county judge or a matter subject to control by another branch of government such as the Quorum Court or the state judiciary." You have further captioned your letter with the following subject designation:

Re: Authority of County Judges over county roads  
Arkansas Constitution: Amendment 55  
ACA 14-14-1101 and 1102

Your itemized questions are as follows:

Is the law as pronounced in *AGFC v. Lindsey*, 292 Ark. 314 (1987) still

the law in Arkansas? {The ways to designate a road to a be a county road: (1). Dedication of a land, a right of way or easement to county and acceptance by the county judge in accordance with A.C.A. §§ 27-66-207 and -208; (2). Condemnation by the county judge in accordance with A.C.A. § 14-298-101 to -125; or (3). By having the public road designated by the county judge as a mail or bus route to be accepted for maintenance by the county in accordance with A.C.A. §§ 27-66-205 and 206.}

Is the acceptance by a county judge of a dedication of land, right of way, or an easement an executive or judicial function? An exclusive and discretionary exercise of power of the county judge under Arkansas Law? Subject to control by the Quorum Court? Subject to control by the state judiciary by writ of mandamus?

Is a condemnation by the county judge in accordance with A.C.A. §§ 14-298-101 to -125 an exclusive and discretionary exercise of the power of the county judge by Arkansas Law? Subject to control by the Quorum Court? Subject to control by the state judiciary by writ of mandamus?

Is the authority to designate a road by the county judge as a mail or bus route in accordance with A.C.A. §§ 27-66-205 and -206 an executive or judicial function following adoption of Amend. 55? Is this authority an exclusive and discretionary exercise of the power of the county judge under Arkansas Law? Subject to control by the Quorum Court? Subject to control by the state judiciary by writ of mandamus?

Would an ordinance by the Quorum Court directing or purporting to direct a county judge to operate, maintain, improve or repair county road(s) or bridge(s) be in violation of Amendment 55? A violation of the provisions of Art. 7, 28 of the Arkansas Constitution?

Is the exclusive authority and discretion of the county judge under Amendment 55 to operate, maintain, improve or repair a county road(s) and bridge(s) be [sic] subject to control of the state judiciary by writ of mandamus? A violation of Article 7, § 28 of the Arkansas Constitution confiding in the county judge authority over the disbursement of money for county purposes, such as road or bridge repairs or maintenance?

What is the difference between a private road, a public road and a county road (as identified in Lindsey above and Amendment 55)? May a county judge exercise his discretion to direct road funds, road crews or road equipment to improve, repair or maintain a private road? May a county judge exercise his discretion to direct road funds, road crews or road equipment to improve, repair or maintain a public road or county road? May a county judge by policy or otherwise decline to do so?

May a county judge adopt minimum road standards for consideration of

acceptance of a road by a county into the county road system (such as minimum dedicated right of way, roadway and drainage standards)? Is a county judge to accept a road as a county road into the county road system if it meets the county road standards? May a county judge decline to exercise his discretion to accept a road into the county road system for reasons that the county has finite road revenues and resources and the county cannot afford to maintain the subject road or roads?

RESPONSE

Considered together, your questions reflect a common concern regarding the respective control over county roads by the county judge and the quorum court. You focus in particular upon the interplay among Ark. Const. art. 7, § 28, Ark. Const. amend. 55 and the implementing legislation bearing on the controlling constitutional provisions.

I am unable to determine precisely what dispute, if any, prompted your questions. Consequently, my responses to your questions will of necessity focus on what I suspect will be controlling principles of law. Without knowing the context of your questions, I can only opine generally regarding what actions are "executive or judicial," "purely discretionary," and "subject to the control" of other branches of government. Similarly, I am unable to declare in the abstract whether an action by a county official might warrant judicial relief by writ of mandamus, or whether a quorum court ordinance relating to roads or bridges might be constitutionally offensive. Assuming your questions arise from some specific dispute(s) regarding the respective authority of a county judge and a quorum court, your inquiry would be better directed to the county attorney, who could presumably address the issues with full knowledge of the pertinent circumstances. I am neither authorized nor situated to conduct any such inquiry in a formal opinion.

Question 1: Is the law as pronounced in *AGFC v. Lindsey*, 292 Ark. 314 (1987) still the law in Arkansas? {The ways to designate a road to be a county road: (1). Dedication of a land, a right of way or easement to county and acceptance by the county judge in accordance with A.C.A. §§ 27-66-207 and -208; (2). Condemnation by the county judge in accordance with A.C.A. § 14-298-101 to -125; or (3). By having the public road designated by the county judge as a mail or bus route to be accepted for maintenance by the county in accordance with A.C.A. §§ 27-66-205 and 206.} Yes. [\[1\]](#)

Question 2: Is the acceptance by a county judge of a dedication of land, right of way, or an easement an executive or judicial function? An exclusive and discretionary exercise of power of the county judge under Arkansas Law? Subject to control by the Quorum Court? Subject to control by the state judiciary by writ of mandamus?

The first part of your question invites some discussion regarding the

relationship between, on the one hand, accepting a dedication of property for public use and, on the other, designating a thoroughfare as a county road. The Arkansas Code appears to distinguish these two actions in the following:

(a) The county judge in his or her discretion may designate as a county road any street or road dedicated to the public as a public thoroughfare, provided that a bill of assurance making the dedication is properly recorded.

(b) Unless a plat clearly reflects roads that are private, the county recorder shall not accept any plats in the unincorporated area of the county without the county court's acceptance of:

- (1) Roads for perpetual maintenance; and
- (2) Dedication of land for public purposes. [\[2\]](#)

This statute identifies the county judge as the agent designating a county road as such and the county court as the agent accepting a road for "perpetual maintenance" and land in general "for public purposes." The question arises, then, whether the "county judge," acting in his executive capacity, indeed "accepts" a dedication, as your question suggests, or, alternatively, whether the "county court" does so in a judicial capacity. [\[3\]](#)

In my opinion, notwithstanding the statute's contrary suggestion, a reviewing court would most likely characterize this "acceptance" as an executive action properly undertaken by the county judge. My inquiries suggest that the process described in the above quoted statute in practice involves only the county judge's determining prior to the filing of a plat by the recorder that the issue of road maintenance has been properly addressed. The county judge reportedly bases his approval either upon a private developer's commitment to maintain roads in a development or upon the county's judge's own commitment, normally reflected by a seal of acceptance on the documents to be filed, reflecting the county's acceptance of the roads. No process that could even remotely be characterized as "judicial" obtains at any stage of such "acceptance." [\[4\]](#)

As suggested above, the ultimate source of a county judge's executive authority arises from Amendment 55, § 3, which provides in pertinent part:

The County Judge, in addition to other powers and duties provided for by the Constitution and by law, shall . . . operate the system of county roads.

Implementing this provision, the statute referenced in the subject line of your factual statement provides in pertinent part:

Arkansas Constitution, Amendment 55, § 3, established the following executive powers to be administered by the county judge:

\* \* \*

(2) To authorize and approve disbursement of appropriated county funds;

(3) To operate the system of county roads[.][\[5\]](#)

The county judge is further charged with responsibility over the following:

. . . the administrative actions affecting the conduct of a plan of public roadways and bridges through the unincorporated areas of the county, including the maintenance and construction of public roadways and bridges and roadway drainage designated as eligible for expenditure of county funds.[\[6\]](#)

The county judge has further been generally charged with "custody of county property" pursuant to Amendment 55, § 3.[\[7\]](#)

With respect generally to grants of property and rights therein to the county, the Arkansas Code provides as follows:

The county judge, as the chief executive officer, is authorized to accept, in behalf of the county, gifts, grants, and donations of real or personal property for use of the county. He or she may apply for, enter into necessary contracts, receive, and administer for and in behalf of the county, subject to such appropriation controls that the quorum court may elect to adopt by ordinance, funds from the federal government, from other public agencies, or from private sources.[\[8\]](#)

The county judge's administrative authority necessarily involves an exercise of discretion,[\[9\]](#) subject to the control over appropriations invested in the quorum court and the quorum court's general authority to adopt an official county road plan governing subdivision, setback and entry control ordinances.[\[10\]](#)

With regard to the executive nature of the county judge's authority, the enabling legislation to Amendment 55, Act 742 of 1977, declared as follows:

The General Assembly determines that the executive powers of the county judge as enumerated in Arkansas Constitution, Amendment 55, § 3 are to be performed by him in an executive capacity and not by order of the county court.[\[11\]](#)

My predecessor elaborated on these provisions in the attached Ark. Op. Att'y Gen. No. 97-181, with which I fully concur. I need not repeat that analysis here.



With respect to what you refer to as "control by the Quorum Court," a quorum court is constitutionally authorized to exercise "local legislative authority not denied by the Constitution or by law." [12] By statute, moreover, a quorum court may provide through ordinance for "roads and bridges." [13] The Code further charges the quorum court with adopting an "official road plan for the unincorporated areas of the county," [14] containing at least the following:

The plan shall include, as a minimum, designation of the general location, characteristics, and functions of roads, and the general location of roads to be reserved for future public acquisition. The plan may also recommend, [15] among other things, the removal, relocation, widening, narrowing, vacating, abandonment, change of use, or extension of any public ways. [16]

Upon recommendation of the county planning board, the quorum court may further establish setback lines and control entry to specified streets and highways designated in the plan. [17] Although the quorum court may authorize, say, a "road" as a "service . . . not expressly prohibited by the Arkansas Constitution or by law," [18] it cannot compromise the constitutional and statutory powers located in the county judge/county court under the authority discussed above and in Opinion 97-181.

One of my predecessors offered the following summation of the relationship between the quorum court and the county judge with respect to control over county roads:

As a general proposition of law, neither a quorum court nor a city council possesses authority to pass an ordinance that would interfere with the exclusive original jurisdiction of the county court under Article 7, Section 28 of the Arkansas Constitution, [19] or with the county judge's operation of the system of county roads under Section 3 of Amendment 55 to the Arkansas Constitution, or with the constitutional or statutory authority of the county judge which existed at the time of the adoption of amend. 55, § 3. [20]

My predecessor further paraphrased as follows the conclusion regarding this issue set forth in the attached Opinion 97-181:

[I]t is apparent from a reading of that opinion that a local (county or city) ordinance regarding roads could be unconstitutional if it interfered with the constitutional and statutory power of the county judge or county court over county roads. Whether such "jurisdictional encroachment" occurs will depend upon the particular ordinance in question. [21] I cannot, in the limited format of an opinion from this office, speculate as to the constitutionality of any number of hypothetical ordinances. This will be a matter for the county or city attorney to address when considering specific proposed ordinances, bearing in mind the principles enunciated in the Arkansas Supreme Court cases and the Attorney General opinions cited in your

correspondence. [\[22\]](#)

As this passage suggests, determining precisely when a quorum court's exercise of its assigned authority clashes with the county judge's control over roads is a fact-intensive enterprise that lies beyond the scope of an official Attorney General opinion.

Specifically with respect to authority over the designation of county roads, my predecessor in Opinion 97-181 further offered the following accurate summary regarding control over roads:

It has been held at various times that the county court or the county judge have [sic] authority to designate and open county roads. See, e.g., *Prewitt v. Warfield, County Judge*, 203 Ark. 137, 1566 S.W.2d 238 (1941) (county court has authority to lay out county road under what is now A.C.A. § 14-298-121); [Lindsey] (county judge has authority to enter an order declaring a mail route or a school bus route a county road under A.C.A. § 27-66-205 and -206); and *Johnson v. Wylie*, 284 Ark. 76, 679 S.W.2d 198 (1984) (county judge has authority to declare a school bus route a county road under A.C.A. § 27-66-206). In my opinion the quorum court, through the exercise of its legislative authority, may not interfere with the ultimate authority of the county judge or county court in this regard. See, e.g., A.C.A. § 14-14-502 (providing for separation of powers between the departments of county government). See also Op. Att'y Gen. 92-081 (concluding that the county judge has authority to accept private roads into the county road system, at least under A.C.A. §§ 27-66-204, -205, -206, -207 and -208, without the approval of the quorum court).

Some uncertainty may nevertheless exist regarding the scope of a county judge's constitutional control over roads and bridges, as distinct from the control the legislature has assigned the quorum court pursuant to the statutes discussed above. [\[23\]](#) As my immediate predecessor has noted in this regard: "It is unclear what result a court would reach in addressing such a conflict, should one exist," adding that one reason for this lack of clarity is the absence in the Code or case law of "anything stating exactly what it means for the county judge to 'operate the system of county roads' under amendment 55, § 3." [\[24\]](#)

Whatever confusion may exist on this score, I consider it significant that the authority of the quorum court to adopt an official road plan has never been the subject of any constitutional challenge. To be sure, there may be debate regarding precisely what degree of control the legislature intended to or was authorized to impose in declaring, in A.C.A. § 14-14-802(b), that the quorum court "shall provide . . . for . . . necessary services" that include "roads" and "bridges." This directive might be read either as affording direct quorum-court control over such issues as road or bridge location or, alternatively, as mandating no more than that such "necessary services" be adequately funded. Without attempting to resolve this debate, I will venture only

that this statutory grant cannot be read as affording the quorum court authority that would impinge on the county judge's constitutional right to "operate the system of county roads." [25] I cannot predict how a court would balance these interests in any particular case.

With regard to the third part of your question, I assume you are concerned to know whether, for instance, a county judge's decision to accept property for use as a county road would warrant relief by mandamus under the following standard:

A writ of mandamus is appropriate if three factors are established: (1) the duty to be compelled is ministerial and not discretionary; (2) the petitioner has shown a clear and certain right to the relief sought; and (3) the absence of any other adequate remedy. [26]

In my opinion, because a county judge's acceptance of property is "discretionary," it is unsusceptible of challenge by petition for writ of mandamus under this standard. [27]

Question 3: Is a condemnation by the county judge in accordance with A.C.A. §§ 14-298-101 to -125 an exclusive and discretionary exercise of the power of the county judge by Arkansas Law? Subject to control by the Quorum Court? Subject to control by the state judiciary by writ of mandamus?

As acknowledged in Lindsey, [28] a county may create a county road by a process of condemnation under the statutory scheme referenced in your question. With respect to the nature of the authority attending this process, the opening section of the subchapter recited in your question provides as follows:

All public roads and highways shall be laid out, opened, and repaired agreeably to the provisions of this chapter. The county court of each county in this state shall have full power and authority to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof. [29]

As this office has previously pointed out, the references in this subchapter to the county court are dated and should properly be read, in the wake of the adoption of Amendment 55, as referring to the county judge. [30] I will not here repeat the analysis supporting this conclusion, simply noting instead that the "full power and authority" referenced in this statute is discretionary both on its face and for reasons discussed above.

I have further reviewed above the nature of legislative authority over roads and the unavailability of mandamus as an avenue for judicial relief from discretionary acts.

Question 4: Is the authority to designate a road by the county judge

as a mail or bus route in accordance with A.C.A. §§ 27-66-205 and -206 an executive or judicial function following adoption of Amend. 55? Is this authority an exclusive and discretionary exercise of the power of the county judge under Arkansas Law? Subject to control by the Quorum Court? Subject to control by the state judiciary by writ of mandamus?

I must note initially that your opening sentence misstates the substance of A.C.A. § 27-66-205 and -206 (Repl. 2010). These statutes deal not with the authority of a county judge "to designate a road . . . as a mail or bus route"; rather, they authorize a county judge "in his or her discretion" to declare any road already used for either of these purposes to be a county road. [\[31\]](#)

In my opinion, these statutes facially declare the county judge's action to be a discretionary function, which is further clearly executive and, in all likelihood, exclusive for reasons discussed in my response to question 2.

I have discussed the extent of quorum court control over roads and the unavailability of mandamus as a remedy for discretionary acts in my response to question 2.

Question 5: Would an ordinance by the Quorum Court directing or purporting to direct a county judge to operate, maintain, improve or repair county road(s) or bridge(s) be in violation of Amendment 55? A violation of the provisions of Art. 7, 28 of the Arkansas Constitution?

Only a finder of fact could answer this question after reviewing in detail precisely what the challenged ordinance purported to direct the county judge to do. I have discussed in my response to question 2 the general relationship between the county judge and the quorum court with respect to the planning and operation of county roads. I have further discussed above, as has my predecessor in Opinion 97-181, the expanded role of the county judge, and the correspondingly diminished role of the county court, with respect to the operation of the road system in the wake of Amendment 55's adoption. I need not reproduce those discussions here. I can only note that the contents of any particular ordinance may be subject to challenge under the standard set forth above. Any such challenge would be based upon the principle expressed as follows by the Arkansas Supreme Court:

[T]he county court [now likely the county judge] must have the power, and, therefore, has the duty to plan, construct, maintain, alter, relocate, and abandon county roads. [\[32\]](#)

The county attorney in the first instance - and, ultimately, the courts - are better suited than this office to review quorum court action in any particular instance.

Question 6: Is the exclusive authority and discretion of the county

judge under Amendment 55 to operate, maintain, improve or repair a county road(s) and bridge(s) be [sic] subject to control of the state judiciary by writ of mandamus? A violation of Article 7, § 28 of the Arkansas Constitution confiding in the county judge authority over the disbursement of money for county purposes, such as road or bridge repairs or maintenance?

In my opinion, for reasons set forth above, a county judge's operation of the county system of roads and bridges is discretionary in nature and hence not subject to control by writ of mandamus.

Moreover, a county judge's fulfillment of his obligation to operate the system of roads and bridges pursuant to Amendment 55, which superseded any contrary then existing constitutional provision, of necessity could not violate Article 7, § 28.

Finally, I question your suggestion that Article 7, § 28 locates "in the county judge authority over the disbursement of money for county purposes." Section 3 of Amendment 55 expressly directs the county judge to "authorize and approve disbursement of appropriated county funds."

Question 7: What is the difference between a private road, a public road and a county road (as identified in Lindsey above and Amendment 55)? May a county judge exercise his discretion to direct road funds, road crews or road equipment to improve, repair or maintain a private road? May a county judge exercise his discretion to direct road funds, road crews or road equipment to improve, repair or maintain a public road or county road? May a county judge by policy or otherwise decline to do so?

With respect to the first part of this question, as discussed above, a thoroughfare can be designated a "county road" subject to county maintenance in the ways summarized in your first question and specified in Lindsey. [\[33\]](#) As the name suggests, a "public road" is one to which the public has general access, without necessarily qualifying as a "county road." [\[34\]](#) The mere fact that the county maintains a public road does not in itself render it a "county road." [\[35\]](#) As the name likewise suggests, a "private road" is just that - privately owned and not subject to public access, hence rendering it subject to access restrictions of the owner's choosing.

With respect to the second part of your question, as a general proposition, a county judge lacks the discretion to devote county resources to the improvement, repair or maintenance of a private road. [\[36\]](#) As noted by one of my predecessors:

It is generally held that county labor and equipment cannot be used to make improvements to private property. See *Pogue v. Cooper*, 284 Ark. 105, 679 S.W.2d 207 (1984); *Cunningham v. Stockton*, 235 Ark. 345, 359 S.W.2d 808 (1962); *Needham v. Garner*, 233 Ark. 1006, 350 S.W.2d 194

(1961); see also Ops. Att'y Gen. 97-248, 95-215, and 94-138. I have opined that this prohibition has been applied notwithstanding the fact that the county received compensation for the work performed. See Ops. Att'y Gen. 97-248, 95-215, and 94-138. In holding that contracting with private concerns for work on private property was not allowed, the court reasoned in *Needham*, *supra*, as cited in *Pogue*, 284 Ark. at 106, that illegal exactions (Ark. Const. art. 16, § 13) were likely to occur because such use of county property could result in the need for more tax money to repair and replace the equipment, even if the contract produced a profit. 233 Ark. at 1010. In Opinion 94-138, I opined that as a general matter, the use of county employees and county equipment to lay asphalt on a church parking lot would be unlawful. [\[37\]](#)

As my predecessors further pointed out, any such purely private use of public property would offend Article 12, § 5 of the Constitution, which provides in pertinent part: "No county . . . shall . . . obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual." [\[38\]](#) Maintenance and repair that only incidentally benefits private property, however, may be permissible. [\[39\]](#) Only a finder of fact would be in a position to judge the propriety of expenditures directly benefiting private parties.

With respect to the final two parts of this question, again, the county judge has discretion under Amendment 55 to administer the system of county roads - i.e., public roads that the county has committed to maintain in one of the manners discussed above - presumably in a manner consistent with the official road plan adopted by the quorum court. In theory, such administration will on occasion prompt the county judge as a matter of what you term "policy" to decline to devote county resources to maintenance of roads. Determining the propriety of any such decision will in every instance be fact intensive and hence properly subject to review by a court.

Question 8: May a county judge adopt minimum road standards for consideration of acceptance of a road by a county into the county road system (such as minimum dedicated right of way, roadway and drainage standards)? Is a county judge to accept a road as a county road into the county road system if it meets the county road standards? May a county judge decline to exercise his discretion to accept a road into the county road system for reasons that the county has finite road revenues and resources and the county cannot afford to maintain the subject road or roads?

I must note at the outset that this question, like various of your others, is posed without any reference to a factual context giving rise to your concern. It is consequently difficult for me to venture any definitive answer that might prove of immediate benefit in addressing a particular issue.

I have discussed in my response to your second question the role of

the quorum court in adopting the official road plan and in appropriating funds for the construction and maintenance of county roads. As the individual charged with executive authority to administer county roads, the county judge has discretion to make decisions, including such matters as design specifications and enforcement, consistent with this plan and available funding. [40] To the extent he adopts "minimum road standards" in compliance with these conditions, I believe the answer to the first part of your question is "yes." With respect to the second part of this question, in my opinion, a county judge has the discretion to accept or reject a county road within the parameters just stated. In my opinion, the answer to your third question is "yes," so long as the county judge does not abuse his discretion.

Having offered these statements of general principle, I again encourage you to address particular issues to the county attorney for analysis in light of the foregoing.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh

Enclosure

[1]See Ops. Att'y Gen. 96-272 and 91-434 (acknowledging the continued validity of this case).

[2]A.C.A. § 27-66-207 (Repl. 2010) (emphases added).

[3]For a discussion of this distinction between executive and judicial functions, see the attached Opinion 97-181, which describes as follows the status of the county judge in relation to the county court in the wake of Amendment 55: The "county court" strictly speaking, is neither the "county judge" nor the quorum court. It is, however, presided over by one judge, the "county judge," who, when so presiding, acts in a judicial, rather than an executive capacity. See Arkansas Constitution, art. 7, § 28 and A.C.A. § 14-14-1105(a). It has been stated that: "[a]lthough the Arkansas Supreme Court has meticulously separated the judicial and executive functions of the county judge on a case-by-case basis, there is still great confusion in Arkansas with respect to what the county court is." Comment, County Government Reorganization in Arkansas, 28 Ark. L. Rev. 226, 235 (1974). It was stated, prior to the adoption of Amendment 55, that: "In each county there is a court, presided over by a county judge, known as the county court. . . . The county court is the principal instrument of county



government and performs a mixture of executive and legislative as well as judicial tasks." Greenebaum, *Arkansas' Judiciary: It's [sic] History and Structure*, 18 Ark. L. Rev. 152 (1964). Since the adoption of Amendment 55, the county court exercises fewer powers (former powers now being exercised either by the quorum court, or by the county judge in an executive capacity), but it clearly still exists, and consists of the county judge, wearing a judicial hat. See again, A.C.A. § 14-14-1105. It is my opinion that the references to the "county court" in A.C.A. §§ 14-298-101 to -116, enacted in 1871, refer to this "court." For further discussion of the relationship between the county judge and the county court, see Op. Att'y Gen. 2007-009. Subsection 14-14-1105(b) of the Code (Repl. 1998) sets forth the matters over which the county court "shall have original jurisdiction."

[4]Support for reading the above statute to refer to the county judge, rather than the county court, perhaps exists in *Reding v. Wagner*, 350 Ark. 322, 327, 86 S.W.3d 386 (2002), which affirmed the authority, in the wake of Amendment 55's adoption, of a county judge's discretionary power to change, alter, or relocate county roads, notwithstanding the fact that the statute at issue - currently codified at A.C.A. § 14-298-120 (Supp. 2013) - assigns that authority to the county court. Specifically invoking "[a] county judge's executive authority" under Amendment 55 and the statute itself, the court concluded: "In short, county judges in Arkansas are given the executive power to make discretionary decisions regarding the operation of the system of county roads." 35 Ark. at 327. Accord Ops. Att'y Gen. 2006-050 and 88-364.

[5]A.C.A. § 14-14-1101(a) (Repl. 1998); accord A.C.A. § 14-14-1102(a) (Supp. 2013) and Op. Att'y Gen. 2001-319.

[6]A.C.A. § 14-14-1102(b) (1) (A) (i) (Supp. 2013).

[7]Accord A.C.A. § 14-14-1101(a) (5).

[8]A.C.A. § 14-14-1102(a) (b) (7) (A) (Supp. 2013).

[9] See, e.g., *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002) (upholding the discretionary power of the county judge to change, alter, or relocate county roads, citing his executive authority under both Amendment 55, § 3 and A.C.A. § 14-298-120).

[10]See A.C.A. § 14-14-802(b) (2) (G) (i) (Repl. 1998) and Ops. Att'y Gen. 2006-050 and 96-375 (discussing the interrelationship between county-judge and quorum-court authority).

[11] A.C.A. § 14-14-1102(a) (Supp. 2013). See also Op. Att'y Gen. 88-364 (discussing the county judge's "executive authority to order improvement of [a county] road").

[12] Ark. Const. amend. 55, § 1(a).

[13]A.C.A. § 14-14-802(b) (2) (G) (i) (Repl. 1998).

[14]A.C.A. § 14-17-208(h) (1).

[15]I have highlighted this term in order to underscore the fact that the legislature apparently did not intend this statute to invest the quorum court with dispositive control over the listed decisions.

[16]Id. (emphasis added).

[17]Id. at subsections (j) and (k).

[18]Id. at subsection (b) (1).



[19] Ark. Const. art. 7, § 28 grants the county court, among other things, "exclusive original jurisdiction in all matters relating to . . . roads [and] bridges."

[20] Op. Att'y Gen. 2001-038.

[21] Quoting *Butler v. City of Little Rock*, 231 Ark. 834, 839, 844 S.W.2d 812 (1960).

[22] Op. Att'y Gen. 2001-038.

[23] See notes 12 through 18, *supra*, and accompanying text.

[24] Op. Att'y Gen. 2006-050.

[25] As my predecessor observed in Opinion 97-181, this authorization extends even to the point of enabling a county judge to designate as a county road a thoroughfare that does not meet standards purportedly mandated in a quorum court ordinance. See also Ops. Att'y Gen. 2001-038 (quorum court may not pass an ordinance abridging the county judge's and the county court's constitutional control over county roads); 96-375 (county judge may name county roads without quorum court approval); 92-081 (county judge has authority to designate and to improve county roads without quorum court approval).

[26] *Russell v. Webb*, 2011 Ark. 307, \*4, citing *Parker v. Crow*, 2010 Ark. 371, \_\_\_ S.W.3d \_\_\_.

[27] See, e.g., *State ex Rel. Richardson v. Mack*, 191 Ark. 350, 86 S.W.2d 11 (1935) (holding that statute did not abridge county judge's discretion to order prisoners to work county roads, and that petition for writ of mandamus was consequently inappropriate); Ark. Op. Att'y Gen. No. 88-364 (opining that "the remedy of mandamus cannot control the discretion of an officer in the executive branch of government," citing *Mears, County Judge v. Hall*, 263 Ark. 827, 569 S.W.2d 91 (1978)).

[28] 291 Ark. at 321.

[29] A.C.A. § 14-298-101 (1987).

[30] See, e.g., Op. Att'y Gen. Nos. 2006-050 and 88-364. As my predecessor noted by footnote in the former of these opinions, however, there are certain limited instances in which the county court retains control: The county court, distinct from the county judge, retains certain constitutional and statutorily delegated judicial jurisdiction over roads and bridges within a county . . . . See *Yates v. Sturgis*, 311 Ark. 618, 846 S.W.2d 633 (1993) (affirming the county court's jurisdiction to enter an order creating a private street through eminent domain to allow access to a landlocked parcel within city limits relying on the "narrow" situation where there is specific statutory authorization for the county court to use eminent domain in this manner and the lack of any alternate redress for the owner of a landlocked parcel within city limits); and Op. Att'y Gen. 2001-319 (differentiating the executive regulatory authority of a county judge over county roads from the jurisdiction of the county court over roads and bridges within a county in specific situations). General supervision of the construction and operation of the county roads is an executive power as discussed above, and not an exercise of judicial power by the county court. Accordingly, as provided by A.C.A. § 14-14-1105 (Repl. 1998), the county court did not retain the powers that vested in the county judge as executive powers pursuant to Amendment

55, § 3. My predecessor concluded that a county court has "no inherent general regulatory authority" over streets and bridges, whereas a county judge does have such authority, "acting in an executive capacity," over the unincorporated areas of the county.

[31] Compare A.C.A. § 27-66-207(a) (giving the county judge the authority to designate any street or road dedicated to the public as a public thoroughfare as a county road, provided that a bill of assurance making the dedication is properly recorded); see also *Barber v. Wolf*, 2009 Ark. App. 460, \*5, \_\_\_ S.W.3d \_\_\_, 2009 WL 1553639 (discussing the county judge's discretionary authority to designate mail routes as county roads).

[32] *Butler v. City of Little Rock*, 231 Ark. 834, 841, 332 S.W.2d 812 (1960). This pre-Amendment 55 pronouncement remains accurate subject to the qualifications discussed above - namely, the quorum court's limited continuing role in "planning," subject to the county judge's "operational" executive control, and the county court's extremely restricted remaining "judicial" authority.

[33] With regard to the requirement of county maintenance in the wake of such designation, see discussion in *Ops. Att'y Gen. 2007-029* and 89-135.

[34] See, e.g., *Lindsey*, 293 Ark. at 321 (distinguishing between "county roads" and "public roads by prescriptive right"); *Op. Att'y Gen. 89-135* (pointing out that a road may be dedicated to public use without having been designated a county road, and that acceptance of the dedication is required under A.C.A. § 27-66-207 before the clerk may record a bill of assurance).

[35] See *Op. Att'y Gen. 91-434* (county maintenance alone does not qualify a road as a "county road").

[36] See *Op. Att'y Gen. 92-081* (opining that truly private roads in private developments may not be maintained using county resources).

[37] *Op. Att'y Gen. 98-163*, quoted in *Op. Att'y Gen. 2000-243*.

[38] See *Op. Att'y Gen. 88-052* (reaching the same conclusion with respect to a county's providing a private company free gravel to construct a temporary parking lot).

[39] See *Op. Att'y Gen. 2004-319* (stating that "[a]n authorized use for a public purpose is not . . . invalid even though it involves an incidental private benefit") (quoting *Op. Att'y Gen. 93-343* and citing 64 C.J.S. *Municipal Corporations* § 1725 (1950)); accord *Op. Att'y Gen. 95-038*. In this regard, this office has noted with approval the following formulation by the California Court of Appeal: "'So long as a public interest is served, there is no unlawful expenditure of public funds even though there may be incidental benefits to private persons.'" *Op. Att'y Gen. 2000-243*, quoting *League of Women Voters of California v. Countywide Criminal Justice Coordination Committee*, 203 Cal.App.3d 529, 554, 250 Cal.Rptr. 151 (1988).

[40] This issue is discussed in further detail in the attached *Op. Att'y Gen. 97-181*.

**Op. Att'y Gen. No. 94-400:** This opinion addresses who has the authority to maintain roads which have been designated as county roads but fall within a National Park. The fact that a state or county owns or

maintains a road within a national park is irrelevant; the National Park Service has been given a clear grant of power by Congress to regulate the traffic on roads within national park boundaries. The authority of the National Park Service supersedes local authority and law. *Free Enterprise Canoe Renters Ass'n. v. Watt*, 711 F.2d 852 (8th Cir. 1983); U.S. Const. Art IV, § 3, cl. 2 (Property Clause).

**Volunteer Fire Dept. A.C.A. §14-284-409:** The county judge of any county is hereby authorized and empowered, in its discretion, to grade, gravel, pave, and maintain real property of a rural volunteer fire department, including roads or driveways thereof, as necessary for the effective and safe operation of such rural volunteer fire department. History: Acts of 1991, Act 833, § 7; Acts of 2003, Act 102, § 1, eff. July 16, 2003.

**Emergencies, A.C.A. §14-14-1107:** In any county in which a natural disaster, including but not limited to a tornado or flood, results in the county being declared a disaster area by the Governor, an appropriate official of the United States Government, or the county judge of the county, the county judge is authorized to use county labor and equipment on private property to provide services which are required as a result of the natural disaster. History: Acts of 1997, Act 394, § 1, eff. March 6, 1997.

**Cemetery Access Roads A.C.A. §14-14-812:** A "cemetery", as used in this section, means any burying place for the dead, a burial plot, a graveyard, or any land, public or private, dedicated and used for the interment of human remains which includes at least six (6) grave markers. (1) The county judges of the several county governments in Arkansas shall be authorized to improve and maintain any roads across public or private lands used or to be used for access to a cemetery. (2) The cemetery access roads shall be constructed to a standard and nature to permit their use by automobiles. History: Acts of 1995, Act 1317, § 2; Acts of 1997, Act 1286, § 2.

In *Hinchey v. Taylor*, 2015 Ark. App. 207 (2015), county judge unlawfully removed a cattle guard on the property of a landowner (a former county judge) in order to build a cemetery access road across the lands (of the former county judge). The court issued a mandatory injunction directing the county judge to replace the cattle guard and ruled that the construction of a new road on the lands constituted a taking without just compensation (but there was no claim for taking without just compensation). A monetary claim for taking without just compensation in a road case has original and exclusive jurisdiction before county court, as per *Chamberlin v. Newton County*, 266 Ark. 516 (1979). The Supreme Court noted that in *Passmore v. Hinchey*, 2010 Ark. App. 581 (2010) the court had previously held that circuit court has jurisdiction to enjoin the county judge to refrain from trespass of private property and taking of private property. The argument that the public road had become a county road by virtue of a general county ordinance in 1983 (for any roads that were maintained by the county as of 1982) was unpersuasive. The court concluded that the county judge without right construction of a new road across the private pasture of the landowners and removed their

cattle guard.

### I.D. County Judge vs. Quorum Court

**AG Opinion 2001-038:** Quorum Court does not possess authority to pass an ordinance that would interfere with the exclusive original jurisdiction of the county court under Article 7, Section 28 of the Arkansas Constitution or with the County Judge's operation of the system of county roads under Section 3 of Amendment 55.

**AG Opinion 92-081:** County Judge has authority to designate county roads without approval of the quorum court; and authority to expend county funds to improve roads in his or her discretion, without approval of the Quorum Court.

**AG Opinion 96-375:** County Judge has authority and responsibility to name county roads, without approval of the Quorum Court.

**AG Opinion 97-181:** QC does not have authority to impose conditions upon the opening of roads in a manner that would restrict the county court's exercise of its constitutionally and statutorily granted discretion over county roads.

**A.C.A. §14-14-801(b) (3):** Quorum court does have authority to exercise powers necessary for effective administration of authorized services and functions. Acts of 1977, Act 742, § 69. **Formerly** A.S.A. 1947, § 17-3801.

**A.C.A. §14-14-802(b) (2) (G) (i):** states that the Quorum Court may provide through ordinance for "roads and bridges." History. Acts of 1977, Act 742, § 70; Acts of 2017, Act 452, § 1, eff. Aug. 1, 2017. **Formerly** A.S.A. 1947, § 17-3802.

**AG Opinion 92-121:** an ordinance requiring stringent standards of inventory over road equipment would not conflict with the County Judge's authority over county roads.

### I.E. County vs. City

The city's power to control development in its development radius must yield to the county judge's power over roads and internal improvements. County judge's jurisdiction over roads within his/her county *includes* city streets.

**Butler v. City of Little Rock, 231 Ark. 834 (1960):** Court held that any attempt by a municipality to affect a road in its extra jurisdictional territory (~~5-mile~~ planning jurisdiction) would have to yield to the

county's right to regulate.

**Yates v. Sturgis**, 311 Ark. 618 (1993): A county judge can open roads within the city limits of an incorporated municipality without permission or involvement of the city.

**AG Opinions 99-274 & 98-009:** County Judge has exclusive control over county roads and if a conflict between the county judge's jurisdiction and a city's subdivision jurisdiction arises, the city (whose rights are statutory) would have to yield to the county (whose rights are constitutional). However, more recently the AG indicated that the counties jurisdiction is not unilateral (**See AG Opinion No. 2006-050**).

### I.F Utilities

**Several Counties have an ordinance and permit process which requires the utility to agree to: relocate at their costs, to comply with the MUTCD and to locate in accordance with ordinance regulations. See Appendix & AHTD Utility Accommodation Policy. Below is the reason your county should have some ordinance and permit process for utilities.**

**AG Opinion 99-181: *S.W. Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630 (1980):** General common law rule: The utility must bear the cost of relocation. There can be exceptions to the common law rule, such as specific legislation (none applicable to county roads) or case law. Improvement funded by federal aid that contemplates reimbursement. Complete ouster of utility facilities from right-of-way. Local ordinances must also be looked at and may negate the common law.

**AG Opinion 2001-239:** Any ordinance or adjudicative determination by a county requiring that a developer grant utility and road easements as a condition of development is susceptible to an analysis under the taking clause of the Fifth Amendment to the U.S. Constitution.

**AG Opinion 1999-365:** A developer can dedicate a public utility easement for use, even if the easement does not run along a dedicated street or alley and is not defined on the plat. See also *Harvey v. Bell*, 292 Ark. 657, 732 S.W.2d 138 (1987).

**A.C.A. §14-17-208:** Counties are authorized, through their planning boards, to require subdivision developers to provide utility and road easements. History. Acts of 2005, Act 2144, § 3, eff. Aug. 12, 2005; Acts of 2005, Act 862, § 1, eff. Aug. 12, 2005. **Formerly** A.S.A. 1947, § 17-1112.

***Craighead Electric v. Craighead County*, 352 Ark 76 (2003):** Did the Cooperative acquire a prescriptive right in the property where the poles and power lines were located? That right is against the landowner as a

new servitude on the land. The landowner still holds the fee. The cases distinguish the erection of utilities as distinct and not subservient to any right-of-way or easement the County may have for construction of a road. The County, however, notes that under Ark. Code Ann. § **18-15-803** (Supp. 2001), the Cooperative may construct its poles and power lines along a public highway. The County goes on to note that Ark. Code Ann. § **18-15-503** does not require that the Cooperative pay for a right-of-way and also does not require that the Cooperative be compensated when it must relocate its poles. This statute sets out the right to acquire a right-of-way. *Loyd, supra*. However, a right-of-way is not granted by the statute. The Cooperative is claiming the right-of-way by adverse possession as against the landowners. If the Cooperative has a property interest in the land where the poles and power lines were standing before the subject four roads were widened, then forcing the movement of the poles and power lines may constitute a taking that requires compensation. The common-law rule is not that a utility is required to bear the costs of its own relocation where the county widens a road, but rather the common-law rule is that a utility must bear the costs of its own relocation when relocation of that equipment is required by a public necessity. *Southwestern Bell Tel. Co., supra*.

ACA § **18-15-503**: (a) (1) (A) Any electric utility organized or domesticated under the laws of this state for the purpose of generating, transmitting, distributing, or supplying electricity to or for the public for compensation or for public use may construct, operate, and maintain such lines of wire, cables, poles, or other structures necessary for the transmission or distribution of electricity and broadband services: (i) Along and over the public highways and the streets of the cities and towns of the state; (ii) Across or under the waters of the state; (iii) Over any lands or public works belonging to the state; (iv) On and over the lands of private individuals or other persons; (v) Upon, along, and parallel to any railroad or turnpike of the state; and (vi) On and over the bridges, trestles, and structures of railroads. (B) In constructing such dams as the electric utility may be authorized to construct for the purpose of generating electricity by water power, the electric utility may flow the lands above the dams with backwater resulting from construction. (2) (A) However, the ordinary use of the public highways, streets, works, railroads, bridges, trestles, or structures and turnpikes shall not be obstructed, nor the navigation of the waters impeded, and just damages shall be paid to the owners of such lands, railroads, and turnpikes. (B) The permission of the proper municipal authorities shall be obtained for the use of the streets. (b) (1) In the event that an electric utility, upon application to the individual, railroad, turnpike company, or other persons, should fail to secure by consent, contract, or agreement, a right-of-way for the purposes enumerated in subsection (a) of this section, then the electric utility shall have the right to proceed to procure the condemnation of the property, lands, rights, privileges, and easements in the manner prescribed in this subchapter. (2) However, no electric utility shall be required to secure by consent, contract, or agreement or to procure by condemnation the right to provide broadband services over its own lines

of wire, cables, poles, or other structures that are in service at the time that the electric utility provides broadband services over the lines of wire, cables, poles, or other structures.(c) Whenever an electric utility desires to construct its line on or along the lands of individuals or other persons or on the right-of-way and the structures of any railroad or upon and along any turnpike, the electric utility, by its agent, shall have the right to enter peacefully upon the lands, structures, or right-of-way and survey, locate, and lay out its line thereon, being liable, however, for any damage that may result of the acts.

History. Acts of 1907, Act 120, §§ 1 to 3, p. 303; Acts of 2001, Act 1291, § 3, eff. Aug. 13, 2001; Acts of 2007, Act 739, § 3, eff. July 31, 2007; Acts of 2013, Act 1130, § 3, eff. Aug. 16, 2013. **Formerly** C. & M. Dig., §§ 4043 to 4045; Pope's Dig., §§ 5045 to 5047; A.S.A. 1947, §§ 35-301 to 35-303.

**27-67-304. Use of right-of-way.** (a) The rights-of-way provided for all state highways shall be held inviolate for state highway purposes, except as provided in subsections (b) and (c) of this section. No physical or functional encroachments, installations, signs other than traffic signs or signals, posters, billboards, roadside stands, gasoline pumps, or other structures or uses shall be permitted within the right-of-way limits of state highways.(b) Political subdivisions, rural electric cooperatives, rural telephone cooperatives, private television cables, and public utilities of the state may use any right-of-way or land, property, or interest therein, the property of the State Highway Commission, for the purpose of laying or erecting pipelines, sewers, wires, poles, ditches, railways, or any other purpose, under existing agreements or permits or such agreements or permits hereinafter made by the commission or under existing laws, provided that such use does not interfere with the public use of the property for highway purposes.(c) No private television cable shall be placed upon the right-of-way limit of any state highway until such person, firm, association, partnership, or corporation first executes a bond payable to the commission in an amount to be determined by the district engineer located in the district in which such cable is to be located. History. Acts of 1953, Act 419, § 5; Acts of 1975, Act 654, § 1. **Formerly** A.S.A. 1947, § 76-544.

**AG Opinion No. 2013-038:** A utility company may not use adverse possession or a prescriptive easement to acquire rights-of-way on levee rights-of-way, as it is outright banned by A.C.A § 22-1-206 (Repl. 2004)



Appendix of Road Documents Part I

Encroachment Ordinances

Orders Declaring Public Roads

Orders Accepting Roads for Perpetual Maintenance

Ordinances Establishing Minimum Standards

Heavy Haul Permits

Ordinances on Weight Limits

Driveway Permits

Utility Permits





Appendix of Road Documents Part I (continued)

Heavy Haul Permits

Ordinances on Weight Limits

Driveway Permits

Utility Permits



**COUNTY JUDGES ASSOCIATION OF ARKANSAS  
2023 ROAD LAW GUIDEBOOK PART II  
JUDICIAL ETHICS,  
LANDLOCKED CASES AND EMINENT DOMAIN:**

**By: Mark Whitmore, AAC Chief Counsel**

**Norfolk, Arkansas**

**May 9<sup>th</sup> and 10<sup>th</sup>, 2023**

**TABLE OF CONTENTS**  
**Part II**

I. Judicial Canons of Ethics..... 1

II. Judicial Powers/Restrictions..... 2

III. Landlock Statutes and Cases..... 3

IV. Petition to Vacate Roads: 14-298-117 ..... 10

V. Petition to Vacate Platted Roads and Reduce Lots  
to Acreage ..... 14

VI. Petition to Alter Roads 14-298-124 ..... 19

VII. Petition to Open or Condemn Roads ..... 22

**JUDICIAL CONDUCT/CANONS OF ETHICS**  
**See: "Arkansas.gov/jddc" {55 PAGES}**

**CANON ONE: A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.** An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that integrity and independence of the judiciary will be preserved.

**CANON TWO: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.**

**CANON THREE: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.** The judicial duties of a judge shall take precedence over the judge's other activities. The judge's judicial duties shall include the duties of the judge's office prescribed by law. The judge has adjudicative responsibilities to: hear and decide cases except when disqualification is required. A judge shall be faithful to the law and maintain professional competence. A judge shall not be swayed by public interests, fear, criticism or partisanship. A judge shall require order and decorum. A judge that manifests any bias impairs the fairness of the proceedings. A judge should avoid prejudicial behavior. A judge shall provide persons with rights the opportunity to be heard. Ex parte communications are prohibited, except non-substantive matters such as scheduling, etc. A judge may obtain the advice of a disinterested expert.

**CANON FOUR: A JUDGE SHALL CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES SO AS TO MINIMIZE THE RISK OF CONFLICT WITH THE JUDICIAL OPERATIONS.** A judge should avoid conducting extra-judicial activities so they avoid casting doubt upon impartiality; demean the judicial office; or interfere with judicial duties.

**CANON FIVE: A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.**

In *Ferguson v. State*, 2016 Ark. 319, 498 S.W.3d 733 (Ark. 2016) the court explains that under canon 2, when a judge excuses himself or herself from a bench trial and orders a jury trial because a party does not believe he or she can be impartial, the the party's questioning of impartiality is reasonable and the judge should recuse himself or herself from the case. In *Arkansas Judicial Discipline and Disability Commission v.*

*Proctor*, 360 S.W.3d 61 (Ark. 2010) the court explained that a judge's continuous and inappropriate involvement in rehabilitating probationers inside and outside the courtroom is a violation of canon 4, showing the judge is putting his personal beliefs of rehabilitation above his judicial duties. A judge's involvement in extrajudicial activities violates canon 4 when he or she spends outside time with probationers, talks with them, and teaches classes to them because these probationers are typically defendants in cases the judge presides over.

## **I. Judicial Powers and Restrictions: Overview**

County judges in Arkansas have the duty to act in a judicial capacity over the following types of disputes, including: road matters, tax disputes, annexation, eminent domain, claims against the county (disbursement of appropriated county funds); and other special matters assigned by law. County judges in Arkansas receive no formal legal training and frequently lack access to legal counsel to assist. Many counties have only legal counsel assigned to the Quorum Court under Ark. Code § 14-14-903(b)(3): "The legal counsel of the quorum court shall: attend all regular and special meetings of the quorum court; perform all duties prescribed by this chapter; and perform all other duties as may be required by a quorum court".

County judges are under mandate of the Arkansas Constitution under Article 7, § 28 to hear cases and to afford parties procedural due process, yet they are provided little means to accomplish those tasks. The purpose of this material is to assist the county judges in their judicial obligations.

**Amendment 5 of the Constitution of the United States:** "*No person shall...be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.*"

**Article 2, §22 of the Constitution of Arkansas:** "*The right of property is before and higher than any other constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation.*"

**Amendment 55:** Authority and exclusive control over county roads was given to the County Judge by Amendment 55, Section 3, of to the Arkansas Constitution: "The County Judge ... shall ... operate the system of county roads ...."

**Article 7, §28:** Article 7, §28 of the Arkansas Constitution provides: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and every other case that shall be necessary to the internal improvement and local concerns of the respective counties."

II.

**PETITION FOR "LANDLOCKED" EASEMENT  
UNDER ARK. CODE § 27-66-401 et. seq.**

The right of a person for a road to landlocked property was adopted by the General Assembly in 1871. In years past the county judges being mindful of due process have each fashioned some type of procedure.

Amendment 5 of the U.S. Constitution provides: "No person shall be...deprived of life, liberty or property without due process of law". {Procedural Due Process} "nor shall any private property be taken for public use, without just compensation". {Substantive Due Process}. Ark. Code § 27-66-401 et. seq. provides:

- Burdens upon the petitioner (i.e., that is to not assume that the petitioner is legally "landlocked". Require some demonstration on the threshold issue that the lands are landlocked--before appointing viewers, assuming jurisdiction and entertaining the merits of the case);
- ascertain which cases should be heard in county court vs. circuit court;
- explicitly provide for the use of a court ordered stay or dismissal without prejudice;
- provide for a fair and expeditious manner for assuring the payment of viewers;
- provide for a fair and ethical means for affixing the initial and ultimate deposits; and
- provide for sufficient description of the easement in the viewers' report and the order (to protect order for appeal and future enforceability).

**Arkansas Code §§ 27-66-401, 402 and 403.**

**27-66-401. Establishment.** (a) (1) When the lands, dwelling house, or plantation of any owner is so situated as to render it necessary to have a road from such lands, dwelling house, or plantation to any public road or navigable watercourse over the lands of any other person and the other person refuses to allow that owner the road, the owner may petition the county court to appoint viewers to lay off the road, provided the owner gives written notice to the person twenty (20) days before application to the court and attaches the written notice to the petition. (2) The written notice shall include the amount of payment the owner offers for the road. (b) The petition for an easement for ingress and egress to and from the petitioner's lands over, through, and across the respondent's lands to any public road or navigable watercourse shall be filed with the clerk of the county court and shall allege with particularity facts demonstrating that: (1) The written notice was provided by the petitioner to the respondent twenty (20) days before application to the court; (2) The respondent refused to convey to the petitioner the requested access easement; and (3) The petitioner lacked the legal right of ingress and egress to and from his or her lands across the respondent's lands or otherwise to a public road. (c) Copies of abstracts, deeds, or plats referenced in the petition shall be attached to the petition. (d) After the petition is filed, the county court shall issue a notice setting the time, date, and location of a preliminary hearing, and the hearing shall not be any earlier than sixty (60) days from the date of the petition filing. (e) (1) In accordance with the Arkansas Rules of Civil Procedure, the petitioner shall serve the resident or nonresident respondent with a: (A) Summons; (B) Copy of the petition and any exhibits; and (C) Copy of the court notice of the preliminary hearing. (2) If service is not obtained, the notice shall be published one (1) time per week for two (2) consecutive weeks in a newspaper of general circulation in the county at the petitioner's expense. If there is no newspaper of general circulation in the county, the notice shall be posted at the county courthouse. (f) (1) The court may dismiss the case without prejudice and allow the petition to be refiled within one (1) year from dismissal if the court determines at the preliminary hearing that: (A) Required notices and service have not been provided to the respondent; or (B) The petition fails to sufficiently demonstrate the requirements of subsection (b) of this section. (2) (A) If the court determines at the preliminary hearing that required notices and service have been provided to the respondent and the petition sufficiently demonstrates the requirements of subsection (b) of this section, the court shall

appoint viewers as provided by this section. ii. The court shall give each party at least ten (10) business days to submit up to three (3) potential viewers. (iii) The Court shall give due consideration to all potential viewers that were submitted by the parties and shall select one (1) of the potential viewers submitted from each party and one (1) or more viewers selected by the court for a total of three (3) viewers. (B) If viewers are appointed by the court, the court shall: (i) Issue a preliminary order directing the landlocked petitioner to deposit into the registry of the court an estimated sum sufficient for payment of damages and for payment of the costs and expenses accruing on account of:

(a) Viewer's fees and expenses;

(b) Survey costs;

(c) Damages related to the adjoining landowners property, including without limitation an estimate of:

(1) The loss of property value for the area of the acquisition;

(2) The loss of exclusive use of the adjoining owner will realize; and

(3) Damages to the owner's remaining property; and

(d) Notice and publication costs, if any;

(ii) Set the time, date, and location of the evidentiary hearing.

(iii) Require the funds deposited to be used exclusively for the purposes stated under this subsection.

(C) Either party may file with the court legal instruments, plats, surveys, or other documentary evidence to be reviewed by the viewers. (D) The parties shall immediately open their property to inspection by the viewers and surveyors.

**History.** Acts of 1871, Act 26, § 60, p. 56; Acts of 2009, Act 747, § 1, eff. July 31, 2009; Acts of 2013, Act 1083, §§ 1, 2, eff. Aug. 16, 2013.

**27-66-402. Duty of viewers.** (a) Viewers shall take the same oath and shall be governed in all respects as viewers appointed to public roads are governed under this act. (b) They shall examine the route proposed for the road and any other route which they may deem proper. (c) If a majority of the viewers state under oath that an access easement is necessary and proper, as prayed in the petition, the viewers shall lay out and describe the access easement in a manner that produces the least inconvenience, damage, and devaluation of the property to the adjoining owners. (d) (1) (A) The viewers shall make a written report to the county court, describing the route of the road and the land through which it shall pass to allow location and identification of the access easement by land records, naming the owner, if known, and by



decision of a majority of the viewers the damages sustained by each owner of lands through which the road passes. The damages shall include the value of each owner's land sought to be appropriated. (B) The parties shall stipulate to or dispute the report of the viewers. (ii) Each party shall be given at least ten (10) business days to respond in writing to the viewers' report. (2) The measure of damages shall be the difference in the fair market value of the lands immediately before the access easement is ordered and the fair market value of the lands after the access easement is ordered. (e) The report shall be filed with the county clerk for the records of the county court. (f) (1) A person who renders services under this subchapter as a viewer or reviewer, chain carrier, marker, or surveyor shall be paid reasonable costs and expenses based upon the current market rate for each day necessarily employed. (2) Payments are to be charged as costs and expenses against the funds deposited by the petitioner. (3) The amount due each person and the number of days employed shall be certified under oath by the viewers. (4) The court by order may direct the county clerk to receipt payment by the petitioner of the directed sum into the registry of the court and to issue payment.

**History.** Acts of 1871, Act 26, § 60, p. 56; Acts of 2009, Act 747, § 1, eff. July 31, 2009; Acts of 2013, Act 1083, §§ 3, 4, eff. Aug. 16, 2013.

Formerly C. & M. Dig., § 5250; Pope's Dig., § 6976; A.S.A. 1947, § 76-110.

**27-66-403. Court order.** (a) (1) If the petitioner has not complied with the court's order under § 27-66-401 and paid into the registry of the county court the estimated sum, the court may dismiss the case without prejudice and provide that the matter may be refiled within one (1) year from dismissal in accordance with the Arkansas Rules of Civil Procedure. (2) If during the pendency of the proceedings the county court determines that the circuit court has jurisdiction over the matter, the county court may stay the proceedings or dismiss the case without prejudice and provide that the matter may be refiled within one (1) year from dismissal in accordance with the Arkansas Rules of Civil Procedure. (3) (A) The evidentiary hearing may be held. **If:**

- (a) At least sixty (60) days passed since the initial petition was filed;
- (b) The landlocked petitioner has complied with the court's order under aca 27-66-401; and
- (c) The landlocked petitioner has deposited the estimated sum under aca 27-66-401.

(ii) At the evidentiary hearing, all parties shall have the opportunity to present evidence and cross-examine witnesses.

(B) (i) If after considering the report of the viewers, the evidence, the law, and all other proper and sufficient matters the court is of the opinion that it is necessary for the petitioner to have the road from his or her lands, dwelling house, or plantation to the public road or navigable watercourse, an order is to be made establishing the road not to exceed fifty feet (50') in width and determining the damages sustained by each owner of lands through which the access easement passes. (ii) (a) The access easement of ingress and egress to and from the petitioner's lands to, through, over, and across the respondent's lands shall be described in the final order or judgment of the court and shall be appurtenant to the petitioner's lands. (b) (1) The order shall direct return of excess funds, if any, to the petitioner and any further deposits necessary to be made by the petitioners for the payment of all costs and expenses, including reasonable attorney's fees and costs, accruing and remaining unpaid on account of the petition for the road, and all things relating thereto and following therefrom, including the view and survey of the road and damages sustained by each owner of the lands over which the road passes. (2) (A) If the respondent substantially prevails on the disputed issues in the case, the court shall award reasonable attorney's fees and costs to the respondent. (B) In determining whether the respondent substantially prevails on the disputed issues, the court shall consider the respondent's success on the merits regarding the: (i) Necessity of the road; (ii) Route of the road; (iii) Width of the road; and (iv) Damages to the lands over which the road passes. (c) The order shall state that: (1) The respondent retains title to the lands over which the road passes; and (2) The road is for an access easement only and is not an easement for any other purpose, including a public utility. (iii) The petitioner shall be solely responsible for the maintenance of the road established under this subchapter. (iv) The respondent shall have no responsibility for the maintenance of the road established under this subchapter. (v) A user of the road does so at his or her own risk and peril and does not have the right to file a cause of action against the petitioner or respondent for any injury to the user or the user's property. (b) Either party may appeal to the circuit court from the final order or judgment of the county court within thirty (30) days from the entry of the order and not thereafter. (2) The review by the circuit court shall be de novo and for strict compliance with this subchapter and any additional violations of the due process rights of the parties. **History.** Acts of 1871, Act 26, § 61, p. 56; Acts of 1927, Act 216, § 1; Acts of 1955, Act 125, § 1; Acts of 2009, Act 747, § 1, eff. July 31, 2009; Acts of 2013, Act 1083, §§ 5, 6, eff.

Aug. 16, 2013. Formerly C. & M. Dig., § 5251; Pope's Dig., § 6977; A.S.A. 1947, § 76-111.

### **Arkansas Cases and Attorney General Opinions:**

In *Yates v. Sturgis*, 311 Ark. 618, 846 S.W.2d 633 (Ark. 1993) the court explains the county court has the power of eminent domain to allow access to landlocked parcels.

In *Bean v. Nelson*, 307 Ark. 24, 817 S.W.2d 415 (Ark. 1991) the court found the private road was necessary despite there being alternative routes because such alternative route would be costly to the other party. But see *Armstrong v. Harrell*, 648 S.W.2d 450 (Ark. 1983), the Supreme Court of Arkansas upheld the denial of plaintiffs' petition to establish a road across the property of a school even though the only other alternate route across their land would be expensive. The proposed route across the school district's land would have been much cheaper and yet the court still denied the proposed road because it would inconvenience the school district and would pose a threat to the school children.

See also: **Ark. Op. Att'y Gen. No. 93-115**: explaining property which is already being used for a public purpose is generally not subject to eminent domain but may be under certain circumstances when the proposed public use is balanced with the old one. Additionally, when determining whether property already in public use is subject to eminent domain, the primary question is the position of the condemner and its proposed use of the land in question. If the condemner is seeking to destroy the existing public use or interfere with it to the extent that it would be practically destroyed, eminent domain may not be exercised unless specifically authorized by the legislature. If the uses may co-exist, then eminent domain may be exercised without a specific grant of power from the legislature. If the proposed use is substantially the same as the existing public use, then eminent domain may not be exercised because it would be equivalent to a transferring of the property without public benefit.

In *Attaway v. Davis*, 288 Ark. 478, 707 S.W.2d 302 (Ark. 1986), the circuit judge ruled that when the appellee's right to obtain access arises from her status as a landlocked owner and is of a continuing nature, no statute of limitations is applicable.

In *Dowling v. Erickson*, 278 Ark. 142, 644 S.W.2d 264 (Ark. 1983), plaintiff challenged the county court's grant of a petition to build a road across his land in order to provide access to a neighboring landowner's landlocked parcel. plaintiff claimed the county could not use eminent domain to establish a road across his

land because it was not for public use. However, the Supreme Court of Arkansas has consistently held that a county court may establish a road for private use when a landowner has no other means of access to his parcel and where anyone having the occasion to use the road established under this statute may do so. In other words, if the general public has access to use the road, it is not truly private and cannot be said that it is not for public use, even if it only benefits one plaintiff. Furthermore, the court in *Pippin v. May*, 78 Ark. 18, 93 S.W. 647 (1906), defined the distinction between public and private use: "*The character of a road, whether public or private is not determined by its length or the places to which it leads, nor by the number of persons using it. If it is free and common to all citizens, it is a public road eventhough but few people travel upon it.*"

In *Smith v. Arkansas Midstream Gas Services Corp.*, 210 Ark. 256, 377 S.W.3d 199 (Ark. 2010), the Supreme Court of Arkansas held that whether private property is taken for public or private use is a judicial question. Though eminent domain statutes are strictly construed in favor of the land owner, the owner still bears a heavy burden of proving that the taking was not for a public use. As discussed above, if the road is available for all members of the public to use, the court will probably consider its use public. In this case, the plaintiffs challenged the gas company's ability to apply for a petition to create a right of way across their land for the purposes of constructing a natural gas pipeline which would transmit gas to certain parts of White County. The plaintiffs alleged the gas company could not practice eminent domain as a private company seeking the petition for a private purpose. The plaintiffs considered the pipeline to be private because it served a population less than the general public and it was not open for the public to use, but the court rejected this argument, relying on the decision in *Linder v. Arkansas Midstream Gas Services Corp.*, 210 Ark. 117, 362 S.W.3d 889 (Ark. 2010).

In *Burton v. Hankins*, 98 Ark. App. 51, 250 S.W. 3d 255, the Court of Appeals of Arkansas rejected appellants' argument that they should be entitled to a road across appellee's land because they could not travel from the east side of their parcel to the west side due to swampy conditions. The test set forth for necessity in Ark. Code Ann. §§ 27-66-401 to 404 is not whether a landowner can travel across every part of his or her property, but rather the statute provides that a road may be opened if a landowner has no access from his property to a public road.

**Ark. Op. Att'y Gen. No. 2008-062:** The Attorney general says that the question of necessity is one for the county court to decide, after applying the appropriate analysis set by the AR Supreme Court. The county court's discretion is not absolute, but it does allow the county court the power of eminent domain to allow access to landlocked tracts.

---

### III. PETITION TO VACATE ROAD UNDER ARK CODE § 14-298-117

**Vacating a Road:** When 10 citizens residing in that portion of the county consider a road **useless**, they may petition the county court to vacate the road. The petition must state why the road needs to be vacated. The petition must be publicly read at a regular session of the county court, with proof that proper notice was given. If no objections are made, then the county court can order the road be vacated at the next regular session of court. If objections are made in writing, the court must appoint 3 viewers (same procedures followed). If viewers are in favor of vacating, the court may order the road be vacated. The costs thereof and expenses incident thereto shall be paid by the petitioners unless the county court shall order the costs and expenses paid out of the county treasury. **History.** Acts of 1871, Act 26, § 58, p. 56; Acts of 2005, Act 1200, § 10, eff. Aug. 12, 2005. **Formerly** C. & M. Dig., § 5247; Pope's Dig., § 6966; A.S.A. 1947, § 76-918.

**14-298-101. County court's authority.** All public roads and highways shall be laid out, opened, and repaired agreeably to the provisions of this chapter. The county court of each county in this state shall have full power and authority to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof. **History.** Acts of 1871, Act 26, § 2, p. 56. **Formerly** C. & M. Dig., § 5226; Pope's Dig., § 6941; A.S.A. 1947, § 76-901.

**14-298-102. Notice prerequisite to petition for county road.** (a) Previous to any petition being presented for a county road, or for the alteration or vacation of a county road, notice thereof shall be given by publication in some newspaper, published in the county, if one exists. (b) If there is no newspaper published in the county, then notice shall be given by advertisements set up in three (3) public places in each township through or into which any part of the road is designed to be laid out, altered, or vacated, stating the time when the petition is to be presented and the substance thereof. Notice shall be duly authenticated and presented with the

petition to the county court. **History.** Acts of 1871, Act 26, § 45, p. 56. **Formerly** C. & M. Dig., § 5230; Pope's Dig., § 6945; A.S.A. 1947, § 76-904.

**14-298-103. Application petitions--Bond requirement.** (a) All applications for laying out, viewing, reviewing, altering, or vacating any county road shall be by petition to the county court, signed by at least ten (10) freeholders of the county. (b) One (1) or more of the signers to the petition shall enter into bond, with sufficient security, payable to the State of Arkansas for the use of the county. This bond shall be conditioned that the persons making the application for a view, review, alteration, or vacation of any road shall pay into the treasury of the county the amount of all costs and expenses accruing on the view, review, alteration, or vacation. In case the prayer of the petitioners shall not be granted, or when the proceedings had in pursuance thereof shall not be finally confirmed and established, and, on neglect or refusal of the persons so bound, after a liability shall have accrued, to pay into the treasury, according to the tenor of the bond, all costs and expenses that shall have accrued, the county clerk shall deliver the bond to the prosecuting attorney of the circuit, whose duty it shall be to collect and pay over the bond to the county treasury.

(c) In all cases of contest, the court having jurisdiction of the case shall have power to render judgment for costs, according to justice, between the parties.

**History.** Acts of 1871, Act 26, § 43, p. 56. **Formerly** C. & M. Dig., § 5228; Pope's Dig., § 6943; A.S.A. 1947, § 76-902.

**Ark. Code § 14-298-117. Vacation of road.** (a)(1) When any county road or any part of any county road is considered "**useless**", any ten (10) citizens residing in that portion of the county may make application by petition agreeable to § [14-298-124](#) to the county court to vacate the road, setting forth in the petition the reason why the road ought to be vacated. (2) The petition shall be publicly read by the county court at the hearing on the petition, with the proof of notice and publication required by this chapter. (b) **If no objections are made and filed**, the county court **may** declare the road vacated, or any part thereof that it may deem necessary.

(c) If objection is made in writing, the county court **shall** appoint three (3) viewers to view the road who shall proceed, after taking the oath or affirmation required by this chapter, to view the road as aforesaid and make written report of their opinion thereon, and their reason for the opinion, to the county court. If the viewers shall report in favor of vacating the road, or any part thereof,

the court, if it deems the report reasonable and just, **may** declare the road, or any part thereof, vacated, **agreeable** to the report of the viewers. (d) The costs thereof and expenses incident thereto shall be paid by the petitioners unless the county court shall order the costs and expenses paid out of the county treasury.

**History.** Acts of 1871, Act 26, § 58, p. 56; Acts of 2005, Act 1200, § 10, eff. Aug. 12, 2005. **Formerly** C. & M. Dig., § 5247; Pope's Dig., § 6966; A.S.A. 1947, § 76-918.

#### **Some Potential Legal Issues in Vacating the Road...include:**

- Notice; Compliance with the procedure prescribed by law;
- Affording the parties a meaningful opportunity to be heard;
- Will vacating the road result in the termination of ingress/egress to a party?;
- Will vacating the road result in the taking of a property right, i.e., the taking an easement of a party to and from the county road?

#### **Arkansas Cases:**

In *Perry v. Lee County*, 71 Ark. App. 47 (2000), the court held that the petition of 6 freeholders did not comply with the explicit requirements of the law of a petition by (10) ten freeholders. Where only (6) six freeholders signed the petition to vacate a county road, rather than the (10) ten required by statute, the county court did not have jurisdiction to vacate the road and therefore, the judgment was reversed.

**Questions:** Are there ten (10) citizens? Do the ten (10) or more petitioners reside in that portion of the county? Was proper or adequate notice provided?

Is the road useless? Is there a taking of an easement from lands to the subject county road? What costs shall the petitioners pay? What costs, if any, shall the county pay?

In *Myers v. Bogner*, 2011 Ark. App. 98 (2011), the Court of Appeals ruled that the petitioners and county judge applied the wrong statute. The county judge's order was void, the county court should have followed the procedures under Ark. Code § 14-298-101 through 14-298-125 for closing county roads. Instead, the petitioner and county court applied Ark Code § 14-18-101 thorough

14-18-106 for vacating roads in platted subdivisions outside of municipalities. Further, the petitioner failed to comply with the notice requirements under ARCP Rule 4 on warning orders. The Court did not have subject matter jurisdiction or jurisdiction over the party defendants.

In *Reding v. Wagner*, 350 Ark. 322 (2002), the road in question was clearly not "vacated" or closed in this case. The county judge's order makes clear that it was "changed," thereby invoking § [14-298-120](#), not § [14-298-117](#). A county judge's executive authority, under Amendment 55, Section 3, and under Ark. Code Ann. § [14-298-120](#), to make changes in the routes of old county roads is not negated by Ark. Code Ann. § [14-298-117](#). Section [14-298-117](#) is merely a procedure whereby any ten citizens may make application by petition asking the county judge to vacate a road, and it in no way conflicts with Ark. Code Ann. § [14-298-120](#) (this law is for purposes of opening new roads, making changes in old roads the county judge deemed necessary and proper, and classifying roads and bridges, etc. In short, county judges in Arkansas are given the executive power to make discretionary decisions regarding the operation of the system of county roads. We, therefore, hold that the trial court did not err when finding that there was no evidence of abuse or misuse of the county judge's discretion in this case wherein the county judge ordered that the road in question be "changed, altered and relocated." The county judge changed, altered and relocated a section of the road to better serve the public in both safety and maintenance costs, etc. We affirm.

In *Brown v. Hicks*, 2011 Ark 41 (2011), the Supreme Court of Arkansas explained that Ark Code § 14-298-117 does not require the citizens objecting to the vacation of a county road to be citizens of the county where the segment of the county road is located. Ark Code § 14-298-117 only requires that the persons signing the petition be citizens of the county and residing in that portion of the county. There is no county citizenship requirement that the objecting parties reside in the county where the subject segment of county road is located.

In *Gillam v. Wyrick*, 2005 WL 238147 (2005) the Arkansas Court of Appeals declared the county court order void for lack of subject matter jurisdiction. Ark Code § 14-298-103(a) requires that: "All applications for laying out, viewing, reviewing, altering, or vacating any county road shall be by petition to the county court, signed by at least ten (10) freeholders of the county." These requirements are reflected again under Ark Code § 14-298-117. There was only one petitioner to sign the petition in the subject county court case to vacate the subject road. The county court,



circuit court and courts on appeal all lack jurisdiction in the absence of compliance with the law.

#### IV. PETITION TO VACATE PLATTED ROADS: ARK CODE § 14-18-105

**14-18-105. Authority to vacate street, alley, or roadway.** In all cases where the owner of lands situated in a county and outside of a city of the first or second class or incorporated town has dedicated a portion of the lands as streets, alleys, or roadways by platting the lands into additions or subdivisions and causing the plat to be filed for record in the county and any street, alley, or roadway, or portion thereof shown on the plat so filed shall not have been opened or actually used as a street, alley, or roadway for a period of five (5) years, or where any strip over the platted lands, although not dedicated as a street, has been used as a roadway, the county court shall have power and authority to vacate and abandon the street, alley, or roadway, or a portion thereof, by proceeding under the conditions and the manner provided in this chapter. **History.** Acts 1945, No. 164, § 1; 1965, No. 129.

**14-18-106. Petition to vacate street, etc.** (a) (1) The owners of all lots and blocks abutting upon any street, alley, or roadway, or portion thereof, desired to be vacated shall file a petition in the County court requesting the court to vacate it. (2) The petition shall clearly designate or describe the street, alley, or roadway, or portion thereof, to be vacated, give the name of the addition in which they are located and the date the plat was filed, and attach as an exhibit a certified copy of the plat. (b) (1) Upon the filing of the petition, the county clerk shall promptly give notice, by publication once a week for two (2) consecutive weeks in some newspaper published in the county and having a general circulation therein, that the petition has been filed and that on a certain day therein named the county court will hear all persons desiring to be heard on the question of whether the street, alley, or roadway, or portion thereof, shall be vacated. (2) The notice shall give the names of property owners signing the petition, clearly describe the street, alley, or roadway, or portion thereof, to be vacated, and give the name of the addition in which they are located. **History.** Acts 1945, No. 164, § 2

**14-18-107. Determination on vacation of street, etc.** (a) At the time named in the notice, the parties signing the petition and any other parties owning lots or blocks in the platted lands not abutting on the streets, alleys, or roadways, or portions thereof, to be vacated or otherwise affected by the vacation shall be heard; and the court shall determine whether the

streets, alleys, roadways, or portion thereof, should be vacated as proposed in the petition. (b) No street, alley, or roadway, or portion thereof, shall be vacated if the court finds that it would be against the interest of the public or that no means of ingress and egress would be left to any lots in the addition not abutting on them, unless the owners of the lots file their written consent to the vacation with the court.

**History.** Acts 1945, No. 164, § 3.

**14-18-108. Order vacating streets, etc.** (a) If the county court shall find that the petition should be granted, either in whole or in part, it shall enter an order vacating the streets, alleys, roadways, or portions thereof. (b) (1) The finding and order of the county court shall be conclusive on all parties having or claiming any rights or interest in the streets, alleys, roadways, or portions thereof, vacated. However, an appeal may be taken to the circuit court and perfected within thirty (30) days from the entry of the order, and an appeal may be taken from the circuit court to the Arkansas Supreme Court and perfected within thirty (30) days from the entry of the order of the circuit court.

(2) A certified copy of the order shall be filed in the office of the recorder of the county and recorded in the deed records of the county. (c) (1) The costs of the publication of the notice, the recording of the order, and the court costs shall be paid by the petitioners. (2) The court costs shall be paid by parties who unsuccessfully contest the petition.

**History.** Acts 1945, No. 164, § 4.

**14-18-109. Abutting lots reduced to acreage.** (a) The owners of all lots abutting on the streets, alleys, or roadways, or portions thereof, vacated by an order of the county court, as provided for in § [14-18-108](#), shall have the right to have reduced to acreage such lots and the streets or alleys so vacated by petition to the county court where the property is situated. (b) The county court shall promptly hear the petition and, upon proper showing that it is signed by all of the owners, shall order that the lots and streets, alleys, or roadways be reduced to acreage, and they shall thereafter be assessed as acreage for taxation of all kinds. (c) The petition may be included in the petition for the vacation of the streets, alleys, or roadways, and the order may be included in the order vacating it, or the petition may be filed and the order entered separately. **History.** Acts 1945, No. 164, § 5. **Formerly** A.S.A. 1947, § 17-1209.

**14-18-110. Validating return of platted land to acreage.** (a) In all cases where land theretofore platted into lots and blocks has been returned to acreage under the order of the county court in which the land lies and where the return to acreage did not involve the closing of any public road or thoroughfare, the action of the court in ordering the land returned to acreage and in cancelling or annulling the platting of the lands into lots and blocks is validated and affirmed. (b) The provisions of this section shall not apply to any lands lying within the corporate limits of any town or city, nor shall it affect the title to any lands but shall merely validate the conversion of the lands from lots and blocks into acreage. **History.** Acts 1943, No. 259, §§ 1, 2.

*In Meyers v. Bogner, 2011 Ark. App. 98 (2011), the court affirmed the circuit court ruling that the county court order be set aside for failure to provide notice to the landowners as provided by law.*

*The Court held failure to give notice was fatal to the case and was not afforded to the landowners as per rule 4(f) of the Arkansas Rules of Civil Procedure.*

*In Hummerickhouse v. Johnson, 199 WL 68302 (1999) the Arkansas Court of Appeals affirmed the lower court ruling that the closing of a platted road was not against the public interests. The Court explained that there it is sufficient that the road had not been opened or used as a roadway in 5 years (the failure of the road to be formally accepted was not a requirement of the statute). Neither is there a requirement that the subdivision owners have lake access. Objections by a few lot owners was not sufficient and not determinative as to the best interests of the public, many lot owners signed the petition. An assertion of loss of value was not substantiated by a particular sum in loss of fair market value of the lots and not clearly erroneous. Close of the platted road was not against the best interest of the public.*

*In Perry v. Lee, 71 Ark. App. 47 (2000), the Arkansas Court of Appeals, made clear that a petition to vacate a county road that is platted is governed by Ark Code 14-18-105 through 109, inclusive. A petition to vacate a county road that is not part of a platted subdivision is governed by Ark Code 14-298-103 and 117, and requires the signatures of (10) ten freeholders and the notice requirements. The County Court, Circuit Court, and appeals to the Court of Appeals or Arkansas Supreme Court are without jurisdiction of the case or parties due to the failure to comply with Ark Code*

14-298-103 and 117 on vacating the county road (which was not a platted county road).

*In Anderson v. South Mountain Estates POA, 2018 Ark. App. 530 (2018), all of the property owners of a POA filed a petition to close a road maintained by the POA, that had been almost exclusively used by the subdivision owners, and the court closed the road. The Court Appeals affirmed and concluded that use by the public was absent, that a gate had existed for over (7) seven years, and that to the extent the public had used a few times prior to the (7) seven years meant that they had abandoned any right to use the road. The requirements of Ark Code 14-18-105 through 109 were met.*

*In Weisenbach v. Kirk, 104 Ark. App. 245 (2009), The Arkansas Court of Appeals affirmed the lower court holding that a party that owns lands "abutting" the subject road or subdivision means roads and lands within the subdivision. Appellant was not an abutting landowner within the meaning of the statute. A party that owns lands outside and abutting a segment of a road outside the subject subdivision is not required to be a party or to receive notice. At most such a party may voice their opinion and present evidence just as any member of the public. However, the vacation of a platted subdivision road that has not been constructed or used by the public can be deemed in the best interest to vacate. The statutory scheme is focused on lands and streets located in the platted subdivision and not lands and streets outside the platted subdivision.*

**14-41-302. Authorization.** The owner of any addition or division to any city or incorporated town in this state where no lots or blocks, or any part thereof, have been sold and the streets and alleys have not been used by the public for the last seven (7) years prior to the filing of the petition shall have the right to reduce the addition or division to acreage by petition to the county court where the property is situated.

**History.** Acts of 1929, Act 91, § 1.

**Formerly** Pope's Dig., § 9514; A.S.A. 1947, § 19-407.

**14-41-303. Petition Requirement.** If at any time one (1) person owns, or two (2) or more persons own jointly or as tenants in common, or a corporation owns all the lots and blocks in any addition or division to any city or incorporated town in this state, the streets and alleys of which have not been used by the public for the last seven (7) years prior to the filing of the petition, then the person, persons, or corporation may have the

addition or division reduced to acreage by proper petition to the county court. **History.** Acts of 1929, Act 91, § 2.

**14-41-304. Partial owners.** The owners of any part of an addition or division shall have the right to have it reduced to acreage, as in the cases provided in §§ [14-41-302](#) and [14-41-303](#). However, the lots and blocks shall be contiguous. No streets and alleys shall be included in the order reducing the parts of additions or divisions to acreage unless the owners shall have the legal title and be in the actual possession of all the lots and blocks surrounding the streets and alleys.

**History.** Acts of 1929, Act 91, § 3.

**14-41-305. Notice of petition.** This section has been amended by [Act 14 of 2007](#) Upon the filing of a petition, the county court shall immediately cause notice to be published for two (2) consecutive weeks by at least two (2) insertions in some newspaper published in the county having a bona fide circulation therein, stating the substance contained in the petition. (b) The county court shall immediately provide the filed petition to the city clerk of the city or incorporated town in which the property is located. **History.** Acts of 1929, Act 91, § 5; Acts of 2007, Act 14, § 1, eff. July 31, 2007.

---

**14-41-306. Hearing and order. \*\*Update Notice:** This section has been amended by [Act 14 of 2007](#) (a) The county court shall hear the petition at the first day of the court held after publication of the notice filed under § 14-41-305 if not continued for cause and upon proper showing shall order that the addition or division, or part thereof, be reduced to acreage. (b) If the county court issues an order pursuant to subsection (a) of this section that the addition or division be reduced to acreage, then the addition or division shall thereafter be assessed as acreage for taxation of all kinds. (c) The county court shall immediately provide the filed order to the city clerk of the city or incorporated town in which the property is located.

**History.** Acts of 1929, Act 91, § 6; Acts of 2007, Act 14, § 2, eff. July 31, 2007.

**14-41-307. Appeals.** Any person aggrieved by an order under § [14-41-306](#) may appeal to the circuit court in the manner provided by law for appeals from the county court.

**History.** Acts of 1929, Act 91, § 7.

**V. PETITION TO ALTER ROAD UNDER ARK CODE § 14-298-124:**

**Ark. Code § 14-298-124. Altering public roads on private land.**

(a) (1) If any person through whose land a public road is or may be established shall be desirous of turning the road through any other part of his or her land, that person shall apply by petition to the county court to permit him or her to turn the road through any other part of his or her land on as good ground and without increasing the distance to the injury of the public. (2) Upon presentation of the petition, the person shall present a supporting affidavit to the effect that the proposed change will not materially increase the distance to the injury of the public, together with opinions by supporting affidavits in writing as to the utility or practicability of the alteration. (b) **The court shall declare the new road a public highway if:** (1) The court finds that the prayer of the petition is reasonable and the alteration will not place the road on worse ground or increase the distance to the injury of the public; (2) The court is satisfied that the new road will be opened by the petitioner a legal width and in all respects made as good as the old road was for the convenience of travelers; and (3) In the opinion of the court, the petition shall be just and reasonable. (c) A person desiring the alteration provided in this section shall pay all the cost incident to the proceedings, and no damages shall be allowed to any petitioner under the provisions of this section by reason of any such change to any petitioner.

**History.** Acts 1871, No. 26, § 57, p. 56; Acts of 1907, Act 427, § 1, p. 1147; Acts [2005, No. 1200](#), § 15. A.S.A. 1947, § 76-916.

**Ark Code § 14-298-102. Notice prerequisite to petition for county road.**

(a) Previous to any petition being presented for a county road, **or for the alteration or vacation of a county road, notice** thereof shall be given by publication in some newspaper, published in the county, if one exists. (b) If there is no newspaper published in the county, then notice shall be given by advertisements set up in three (3) public places in each township through or into which any part of the road is designed to be laid out, altered, or vacated, stating the time when the petition is to be presented and the substance thereof. Notice shall be duly authenticated and presented with the petition to the county court.

**History.** Acts 1871, No. 26, § 45, p. 56;

**Ark Code § 14-298-103. Application petitions – Bond Requirement.**

(a) All applications for **laying out, viewing, reviewing, altering,**

**or vacating** any county road shall be by petition to the county court, signed by at least ten (10) freeholders of the county. (b) One (1) or more of the signers to the petition shall enter into bond, with sufficient security, payable to the State of Arkansas for the use of the county. This bond shall be conditioned that the persons making the application for a view, review, alteration, or vacation of any road shall pay into the treasury of the county the amount of all costs and expenses accruing on the view, review, alteration, or vacation. In case the prayer of the petitioners shall not be granted, or when the proceedings had in pursuance thereof shall not be finally confirmed and established, and, on neglect or refusal of the persons so bound, after a liability shall have accrued, to pay into the treasury, according to the tenor of the bond, all costs and expenses that shall have accrued, the county clerk shall deliver the bond to the prosecuting attorney of the circuit, whose duty it shall be to collect and pay over the bond to the county treasury. (c) In all cases of contest, the court having jurisdiction of the case shall have power to render judgment for costs, according to justice, between the parties.

**History.** Acts of 1871, Act 26, § 43, p. 56.

**Formerly** C. & M. Dig., § 5228; Pope's Dig., § 6943; A.S.A. 1947, § 76-902.

**Ark Code § 14-298-104. Items specified in petition.** All petitions for **laying out, altering, or vacating** any county road shall specify the place of beginning, the intermediate points, if any, and the place of termination of the road.

**History.** Acts 1871, No. 26, § 44, p. 56;

**Formerly** A.S.A. 1947, § 76-903.

### **Arkansas Cases and Attorney General Opinions:**

In *Myers v. Bogner*, 2011 Ark. App. 98 (2011), the court found that holding a hearing 12 days after publishing notice in a local newspaper violates § 14-298-102 because the statute requires strict compliance of publishing notice for two consecutive weeks before having a hearing. The court also found the notice was not met because the notice was published in a newspaper in another county despite there being a circulating newspaper in the county.

In *Wallace v. Desha County*, 351 Ark. 387 (2003) the court explained that the court may vary or change the location and description of the road to be established based to avoid unnecessary inconvenience, unreasonable costs, or "other justifiable reasons".

If only part of the road is proper then only that part shall be established. In any event, the description should not be vague.

In *Arkansas Game & Fish Commission v. Lindsey*, 299 Ark. 249 (1989), the court explained that an exception to the prohibition against a suit against the State exists where the act sought to be enjoined is illegal or is causing irreparable injury. It also explains how the road in this case is not a county road because there was no dedication of the right-of-way to the county by the landowners and non-judicial action by someone without statutory or common law authority cannot transfer title to the County. The court established the ways to designate a road to be a county road: (1) Dedication of a land, a right of way or easement to county and acceptance by the county judge in accordance with A.C.A. 27-66-207 and -208; (2) Condemnation by the county judge in accordance with A.C.A. 14-298-101 to -125; or (3) By having the public road designated by the county judge as a mail or bus route to be accepted for maintenance by the county in accordance with A.C.A. 27-66-205 and 206.

**Ark. Op. Att'y Gen. No. 2014-021:** Confirms the *AGFC v. Lindsey* case is the law Arkansas follows. The county judge is the agent designating a county road as such and the county court is the agent accepting a road for "perpetual maintenance" and land in general "for public purposes" because a county judge's acceptance of property is "discretionary," it is insusceptible of challenge by petition for writ of mandamus under this standard.

**Ark. Op. Att'y Gen. No. 97-181:** The procedures under A.C.A. §§ 14-298-101 to -116 need not be complied with prior to the county judge's exercise of authority under A.C.A. § 27-66-204. The two statutory schemes are independent of each other. The quorum court has some authority to legislate regarding county roads but may not exercise this authority in such a way to deny the county judge or county court its independent constitutional or statutory authority over county roads.

In *McKibbin v. State*, 1883 WL 1172 (Ark. 1883) the court explained that the law makes no exception for those who obstruct a public highway at one point and offer an equally good passage as another.

In *First Pyramid Life Insurance Co. of America v. Reed*, 247 Ark. 1003, 449 S.W.2d 178 (Ark. 1970) the court explained that the county can only acquire jurisdiction of a proceeding under ACA § 14-298-103 when there is strict compliance with the requirements of the Act pertaining to the signing of the petition.



See Also: Arkansas Law Notes, 2008 ARLN 33  
By Sharon E. Foster, University of Arkansas

**VI. PETITION TO OPEN OR CONDEMN PUBLIC ROADS**  
**ARK CODE § 14-298-101, et seq.**

A petition to condemn lands to a county road may be commenced and filed by (5) five or more interested landowners or the county acting *sua sponte*.

**Opening or Altering a Road without Petition:** The county court has power to open new roads and make changes in old roads as it deems necessary and proper, (A.C.A. §14-298-120). When changes are made or a new road opened, the road shall be located on section lines if possible, taking into consideration the conveniences of the public travel, contour of the country, etc. First class roads established or opened may not be less than 50 feet wide. Once the county court decides to open or alter a road, the appropriate order shall be made and entered in the record.

**Ark Code § 14-298-101. Powers of county court.** All public roads and highways shall be laid out, opened, and repaired agreeably to the provisions of this chapter. The county court of each county in this state shall have full power and authority to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof. **History.** Acts 1871, No. 26, § 2, p. 56; C. & M. Dig., §5226; Pope's Dig., § 6941. A.S.A. 1947, § 76-901.

**Ark Code § 27-67-212.** Provides for the ASHC to "call upon" the county court to condemn land for the construction of a state highway. **Ark Code § 27-67-320** provides that in the event the county refuses, one half of the costs of procuring the right of way shall be deducted from the State Highway Fund or the state revenue from the motor fuels and special licenses fees. In *ASHC v. Dotson*, 781 S.W.2d 459 (Ark. 1989) the court held that under **Ark Code § 14-298-120** five (5) or more interested landowners may petition the county to open a road as a public road or the court may on its own motion, *sua sponte*. However, **Ark Code § 14-298-120** does not give the ASHC the right to petition the county court. In these actions, the county is the condemning party and the ASHC is not a party. This is despite the fact that the ASHC drafted the petition and the order. The petition in *Dotson* was defective and no lawful petition was filed, because it misled the Dotsons into believing

the ASHC was the petitioner. See also: *ASHC v. Croom*, 280 S.W.2d 887 (Ark. 1955).

**27-67-212. Changing or widening roads – Role of county court.** (a) The State Highway Commission may call upon the county court to change or widen, in the manner provided by § [14-298-121](#), any state highway in the county where the state highway engineer deems it necessary for the purpose of constructing, improving, or maintaining the road. (b) In the event the county court should refuse to widen the road as requested, the commission may refuse to construct, improve, or maintain that portion of the road until a suitable right-of-way is provided. (c) This section and § [14-298-120](#) shall be cumulative to all existing laws and parts of laws and shall not be construed as to repeal any existing laws or part of laws unless they are in conflict herewith, and then only to the extent of the conflict. **History.** Acts 1965, No. 387, §§ 3, 4. A.S.A. 1947, §§ 76-928, 76-928n.

Historically, the notice to landowners of orders condemning their lands was lacking. The General Assembly cured the defects in notice under **Ark Code § 14-298-122** which provides: **Notice by actions.** (a) The purpose of this section is to establish a rule defining what actions have supplied the requisite notice to affected landowners of the condemnation of their property by county court orders effected pursuant to § [14-298-121](#). (b) Entry and notice shall mean: (1) Any construction work performed on a road, street, or highway where the right-of-way thereof condemned by the county court is on a new location was entry and was notice of the existence of the condemnation order, from the date of performance of the work, to the person owning, prior to the court order, the property entered upon; (2) Where the right-of-way condemned by a county court order included an existing road, street, or highway, construction work on the right-of-way which was more than the mere resurfacing or reconditioning of the existing road, street, or highway, was entry and was notice of the existence of the condemnation order to the person owning, prior to the court order, the property entered upon. **History.** Acts 1963, No. 185, §§ 1, 2. See: *ASHC v. Tripplet*, 389 S.W.2d 439 (Ark. 1965).

In *Oliver v. Washington County*, 328 Ark. 61 (1997) the appellants alleged that the appeal-bond requirement violated their constitutional rights to due process, that the County failed to follow the condemnation procedures contained in Ark. Code Ann. §§ 14-298-101 to 116 (1987), and that the condemnation procedures in Ark. Code Ann. §§ 14-298-101 to 116 (1987) violate the separation-of-powers doctrine. The appellants' complaint,

however, is not included in the abstract. The appellants' also contended at a later hearing that the condemnation procedures set forth in Ark. Code Ann. §§ 14-298-120 to 121 (1987) violate the separation-of-powers doctrine. The trial court found that the County Court condemned the property pursuant to the procedures mandated by Ark. Code Ann. §§ 14-298-120 to 122, and thus the court declined to address the Oliver's arguments regarding sections 14-298-101 to 116. Moreover, the trial court ruled that the appellants failed to demonstrate how the county judge's dual roles caused him to be unduly influenced in the condemnation proceeding. Finally, the trial court acknowledged that the appellants failed to notify the Attorney General's Office, as required by Ark. Code Ann. § 16-111-106(b) (Repl. 1994), of their constitutional challenge to sections 120 to 122. For these reasons, the court denied the appellants' motion for summary judgment. Appellants failed to properly abstract the record for appeal, so the Supreme Court declined to address those matters on appeal. The county used entry as notice of the widening and the court order under the law as it existed in 1997.

**14-298-119. Limitation on damages for land taken.** No part of this chapter shall be so construed as to entitle any person whose lands, or any part thereof, may be appropriated under this chapter to a public highway to any further compensation and damages than the value of property appropriated and damages sustained by the owner thereof by reason of a road being established on and over the property, over and above such value. **History.** Acts 1871, No. 26, § 71, p. 56; C. & M. Dig., § 5244; Pope's Dig., § 6959. A.S.A. 1947, § 76-923. {Note: perhaps, there are benefits to the lands}

**14-298-120. Opening, changing, and classifying roads by order of county court.** (a) (1) The county courts shall have power to: (A) Open new roads; (B) Make changes in old roads, as they deem necessary and proper; and (C) Classify the roads and bridges in their respective counties for the purposes of this section and § [27-67-212](#). (2) (A) When the change shall be made or any new road opened, the road shall be located on section lines as nearly as may be, taking into consideration the conveniences of the public travel, contour of the country, etc. (B) Roads hereafter established or opened as public roads shall not be less than fifty feet (50') wide, providing a minimum of twenty-five feet (25') of right of way on either side of the center line. (3) An appropriate order of the county court shall be made and entered of record therefor. (b) (1) Any five (5) or more interested landowners may petition the county court for the opening of any road as a public

road. (2) The petition shall give the starting point and terminus of the road, as well as intermediate points, and such other description or plat as will permit the location of the road by the county surveyor. (c) (1) (A) The petition shall be accompanied by a bond signed by at least one (1) of the petitioners and by other good and sufficient sureties. (B) The bond shall provide for reimbursing the county for any claims that may be sustained against the county for lands taken by opening of the road. (2) The petitioners shall cause notice to be served upon the landowners as provided by the Arkansas Rules of Civil Procedure. (d) (1) On filing the petition, the county court shall set a date for the hearing. (2) If service is not obtained, then by one (1) insertion for two (2) weeks at least thirty (30) days before the hearing in some newspaper having a general circulation in the county, the county clerk shall publish a notice as to the filing of the petition, naming the day on which the county court will hear the parties and those for and those against the opening of the road. (e) On the day named, the county court shall hear those for and against the opening of the petitioned road and shall grant or deny the prayer of the petitioners as may be deemed wise and expedient by the court and shall make and cause to be entered an appropriate court order either laying out or changing the road or denying the petition. (f) Upon the entry of the foregoing order of the county court, the clerk of the court within ten (10) days shall cause a copy of the order to be served upon each of the owners of record of any lands affected by the order. The service shall be in the form and manner provided by law for service in civil actions. (g) Upon return to be made by the sheriff showing service of the order upon any landowner, the clerk shall note in the records of the county court the record of the service, showing the date thereof and the person served, which shall be and become a part of the permanent records of the court. (h) Upon the entry of the order by the county court, the records shall constitute valid constructive notice to all subsequent purchasers of the lands and all other persons acquiring or holding the lands by or through the landowners affected. (i) If the owner of the land over which any road shall hereafter be so laid out by the court shall refuse to give a right of way therefor, then the owner shall have the right to present his or her verified claim to the county court for damages the owner may claim by reason of the road's being laid out on his or her land. (j) If the owner is not satisfied with the amount allowed by the court, he or she shall have the right to appeal, as now provided by law from judgments of the county court. (k) However, no claim shall be presented for such damages after twelve (12) months from the date of the service of the order as provided in this section. When the order is made and entered of record laying out or changing any road, the county court or judge

thereof shall have the right to enter upon the lands of the owner and proceed with the construction of the road. All damages allowed under this section shall be paid out of any funds appropriated for roads and bridges, and if no funds are so appropriated, then damages shall be paid out of the general revenue fund of the county. (1) This section and § [27-67-212](#) shall be cumulative to all existing laws and parts of laws, and shall not be construed as to repeal any existing laws or parts of laws, unless they are in conflict herewith, and then only to the extent of the conflict. **History.** Acts 1965, No. 387, §§ 1, 2, 4; Acts [2005, No. 1200](#), § 12.A.S.A. 1947, §§ 76-926.

### **Arkansas Cases and Attorney General Opinions:**

In *Burley v. Bradley*, 2021 Ark. App. 105 (2021), the court held a county road may be created in one of three ways: (1) a voluntary dedication by the landowner and acceptance by the county; (2) county condemnation; or (3) the county judge may enter an order declaring a mail route or a school-bus route a county road.

In *Hempstead County v. Huddleston*, 182 Ark. 276, 31 S.W.2d 300 (1930) the plaintiff sought damages based on the county court's decision to lay a new highway through his land which changed the location of the old road, which ran near his residence, to a different location further away from it. The court held that the relocation of the road could not be considered as a factor for damages because "no person has a vested right in the maintenance of a public highway in any particular place." The state or a county judge may relocate a road at any time if it is in the public's interest. See also *Arkansas State Highway Commission v. Bingham* 231 Ark. 934 (1960) holding the right of ingress and egress is a property right which is compensable. However, where this right is not completely destroyed but diverted in a way which might make access more difficult, landowners may not be compensated for mere inconvenience, including diverted traffic flow from a commercial business.

In *Tuggle v. Tribble*, 177 Ark. 296, 6 S.W.2d 312,314 (1928), the plaintiff lived on a designated public road. When the county court ordered a relocation (56) fifty-six feet from his residence, he sought to enjoin the county based on the argument that he relied on the location of the road always being public when he bought the property. This argument was unsuccessful because the court reasoned that if this were true, there could never be any changes to public roads. The court recognized that any change in a public

road is sure to cause some private inconvenience because people are accustomed to the location of roads, but found mere inconvenience to hold no weight compared to the discretion of the county court to relocate roads in the best public interest.

*Mohr v. Mayberry*, 192 Ark. 324, 90 S.W.2d 963 (1936), is an example of the court's consideration of the level of inconvenience a landowner may suffer as a result of the unique character of his or her land or its particular use. In this case, the Supreme Court of Arkansas, vacated an order establishing a new road because the private road would split appellant's farm in half, causing him to have to maintain his fences and divert his cattle across the road to reach water, effectively destroying any convenient use of his farm. In this case, the creation of a private road along that route would burden the landowner far more than it would benefit the appellant.

Question: Has the road been vacated or merely changed?

In *Reding v. Wagner*, 350 Ark. 322 (2002), the court held a county judge does have the authority to alter the course of a county road. Section 3 of Amendment 55 to the Arkansas Constitution vests executive power in county judges to make discretionary decisions regarding the operation of the system of county roads, including the power to make changes in old roads, open new roads, and classify roads and bridges as the county judge deems necessary and proper. Ark.Code Ann. § 14-298-117, on the other hand, is merely a process by which citizens may petition the county judge to vacate a county road, which the court made clear is distinct from changing or altering an existing road. The provision in section 14-298-117 in no way conflicts with county judges' authority to make changes to county roads as outlined in Ark.Code Ann. § 14-298-120.

**Ark. Op. Att'y Gen. No. 97-181**: references Section 3 of Amendment 55 to the Arkansas Constitution, which empowers county judges to "operate the system of county roads" in an "executive capacity" and not by order of the county court. This amendment grants county judges broad discretion in engaging in administrative actions pertaining to the "operation" of the system of county roads, which does not need to be exercised through the county court. See, e.g., *Prewitt v. Warfield*, County Judge, 203 Ark. 137, 156 S.W.2d 238 (1941) (county court has authority to lay out county road under A.C.A. § 14-298-121. See also Op. Att'y Gen. 92-081 (concluding that the county judge has authority to accept private roads into the county road system,

at least under A.C.A. §§ 27-66-204, -205, -206, -207 and -208, without the approval of the quorum court).

Furthermore, the procedures set out in A.C.A §§ 14-298-101 to -116, which prescribe a procedure for petitioning for the opening, altering or vacation of a county road, need not be complied with prior to the county judge's exercise of authority when creating new roads. See also Ark. Op. Att'y Gen. No. 92-081.

#### **A.C.A. §14-298-122 Entry and Notice**

The right of condemnation by county court order granted in subsection 121 above in 1899, was found to have constitutional infirmities due to inability to prove notice of right of way based upon county court orders. The courts established by long-standing precedence definitions of entry and notice. In 1963, the Legislature adopted this body of long-standing court precedence and provided an additional and modest dose of certainty to right of way founded upon court orders by virtue of A.C.A. §14-298-122 which provides that entry and adequate notice shall mean: road work within court order on new location or road work within court order beyond resurfacing existing roadway. The Supreme Court of Arkansas has embraced this cure to defects in county court order right of way, *A.S.H.C. v. Cordes Motors*, 315 Ark. 285, 867 S.W. 2d 178 (1993). However, the condemner has the burden of proof to prove notice. *A.S.H.C. v. Montgomery*, 237 Ark. 857, 376 S.W. 2d 662 (1964). Notice given shall be considered notice to all subsequent landowners. *A.S.H.C. v. Jerry*, 241 Ark. 591, 408 S.W. 864 (1966). Entry that is a physical and visible invasion of property alerts a landowner that the government is exercising dominion over his or her property. See: *A.S.H.C. v. French*, 246 Ark. 665, 439 S.W. 2d 276 (1969); and *A.S.H.C. v. Holden*, 217 Ark. 466, 231 S.W. 2d 113 (1950).

**14-298-122. Opening or altering roads in counties voting for road tax – Notice by actions.** (a) The purpose of this section is to establish a rule defining what actions have supplied the requisite notice to affected landowners of the condemnation of their property by county court orders effected pursuant to § [14-298-121](#). (b) Entry and notice shall mean:

(1) Any construction work performed on a road, street, or highway where the right-of-way thereof condemned by the county court is on a new location was entry and was notice of the existence of the condemnation order, from the date of performance of the work, to

the person owning, prior to the court order, the property entered upon; (2) Where the right-of-way condemned by a county court order included an existing road, street, or highway, construction work on the right-of-way which was more than the mere resurfacing or reconditioning of the existing road, street, or highway, was entry and was notice of the existence of the condemnation order to the person owning, prior to the court order, the property entered upon. **History.** Acts 1963, No. 185, §§ 1, 2.

**PROCEDURE IN INSTANCES WHERE VIEWERS ARE APPOINTED FOR  
CONDEMNATION PROCEEDINGS**

**Opening a Road  
A.C.A. §14-298-120**

- 5 or more interested landowners may file petition.
- Petition must give starting point and termination of the road, as well as intermediate points and any other descriptions.
- Petition accompanied by a bond to cover expenses.
- County court shall set a date for the hearing not more than 30 days from the filing of the petition.
- County clerk shall publish the filing of the petition and the hearing date once in a newspaper having circulation in the county at least 10 days before the hearing date.
- On the hearing date, the court shall hear from those for and against the opening of the road and shall grant or deny the request and enter a court order.
- Within 10 days after entry of the order, the clerk of the court shall have a copy of the order served (as provided for in civil actions) on all owners of record of any lands affected by the order.
- Upon return of service by the sheriff, the clerk shall note in the records of the county court the dates of service.
- Upon entry of the order, the records shall constitute valid constructive notice to all subsequent purchasers of the lands and all other persons acquiring or holding the lands by or through the landowners affected.
- If the owner of any land refuses to give a right-of-way, then the owner has the right to present verified claims to the county court for damages from the road being laid out on his land.
- The owner may appeal the decision.
- No claim shall be presented 12 months after the date of service of the order. Claim shall be paid from monies appropriated and then from general revenue.



## **Arkansas Cases:**

In *ASHC v. Dotson*, 301 Ark. 54 (1989), the court found that the petition naming ASHC as a party was incorrect in doing so because §14-298-120 does not give the ASHC the right to petition the county court. In these actions, the county is the condemning party and the ASHC is not a party. Therefore, when ASHC moved to dismiss the case, it should have been granted since they were wrongly named in this suit. In these types of proceedings, the county court must be named as a party.

In *Carter v. Bates*, 142 Ark. 417 (1920), the Supreme Court of Arkansas set aside an order establishing a new road because it extended over valuable lands which would be injured by the proposed road and because an alternate road could have been established on the petitioner's own land which was longer and more expensive but not prohibitive.

### Viewers duties and responsibilities:

- Be a jury to assess and determine the compensation to be paid in money for the property sought to be appropriated; and to
- Assess and determine damages each owner of the lands over which the road is to run shall suffer by the opening and construction of the road. (A.C.A. §14-298-105)
- Meet at time & place specified in order, but no later than 5 days after
- Take oath or affirmation to faithfully and impartially discharge the duties
- Take 2 people to serve as chain carriers and 1 person as a marker. (A.C.A. §14-298-109)

Viewers must give their opinion as to if a good road can be made with reasonable expense, taking into consideration the ground, convenience, inconvenience and expense, which will result to individuals as well as to the public if the road is established or altered as requested. (A.C.A. §14-298-109)

When laying out, altering or establishing public highways, the highways must be located as near as practicable on section and subdivision lines. (A.C.A. §14-298-109). Viewers also need to report what width the road should be to promote public convenience, but this decision ultimately rests with the county court. (A.C.A. §14-298-110).

### **Report of Viewers**

The viewers must make and sign a report in writing stating:

- Their opinion for or against the establishment, alteration or vacation of the road along with their reasons;
- The commencement and termination, courses, and distances of the road, so that the road can be readily formed and located;
- The value of the property;
- The amount of damages, if any, and to whom, which by them have been assessed and which would accrue by the establishing and opening of the road. (A.C.A. §27-298-112)

After Report is Received

The county court must read the report publicly during session. If the court is satisfied with the report and there are no objections, the court can order that damages be paid and the road declared public. If the court does not think the road is worth paying the damages or petitioners do not want to pay the damages or if the viewers recommend against the petition, the court can order that the petition not be granted. (A.C.A. §14-298-113).

**14-298-105. Appointment of viewers – Duties.** (a) On presentation of the petition and proof of notice of publication as set out in § [14-298-102](#) and if the county court is satisfied that proper notice has been given in accordance with the provisions of this chapter, the court shall appoint three (3) disinterested citizens of the county as viewers, who shall also: (1) Be a jury to assess and determine the compensation to be paid in money for the property sought to be appropriated, without deduction for benefits to any property of the owners; and(2) Assess and determine what damages each owner of the lands over which the road is to run shall suffer by the opening and construction of the road. (b) The county court shall issue its order directing the viewers to proceed on a day to be named in the order to view, survey, and lay out or alter the road and also determine whether the public convenience requires that the road, or any part thereof, shall be established. **History.** Acts 1871, No. 26, §§ 46, 48, p. 56;; Pope's Dig., §§ 6946, 6948; Acts [2005, No. 1200](#), § 1. A.S.A. 1947, §§ 76-905, 76-907.

**14-298-106. Surveyors.** (a) The viewers may call to their assistance a competent surveyor to assist them in laying out and surveying or altering any road they may be ordered by the county court to view, survey, and lay out or alter. (b) It shall be the duty of every surveyor, when called on by any viewer or reviewers, to survey any road they may be required to view or review, lay out, establish, or alter and to furnish all courses, bearings, distances, plats, and surveys of roads required by them to be laid out, established, or altered, as viewers or reviewers, when demanded by them. **History.** Acts 1871, No. 26, §§ 47, 63, p. 56; A.S.A. 1947, §§ 76-906, 76-920.

**14-298-108. Notices to landowners and viewers.** (a) It shall be the duty of one (1) of the petitioners to give at least thirty (30) days' notice in writing to:(1) The owner or his or her agents, if residing within the county, or if the owner is an incapacitated person as defined by § 28-65-104, then to the guardian of that person, if a resident of the county, through whose land the road is proposed to be laid out and established; and(2) The viewers named in the order of the county court of the time and place of meeting as specified in the order.(b) (1) (A) It is further made the duty of the principal petitioner, if the road is proposed to be laid out on or through any land owned by nonresidents of the county, to cause notice to the nonresidents of the county to be served as provided by the Arkansas Rules of Civil Procedure, and if service is not obtained, then the notice shall be published one (1) time per week for two (2) consecutive weeks in some newspaper of general circulation published in the county.(B) If there is no newspaper published in the county, then notice shall be given to the nonresident by posting a notice of the time and place of meeting of the viewers as specified in the order of the county court.(2) The substance of the petition for the road shall also be posted upon the door of the office of the clerk of the county court for at least two (2) weeks before the time fixed for the meeting of the viewers. **History.** Acts 1871, No. 26, § 49, p. 56; 9; Acts 2005, No. 1200, § 3.A.S.A. 1947, § 76-908.

---

**14-298-109. Viewing, surveying, and laying out road.** It shall be the duty of the viewers to meet at the time and place specified in the order. After taking an oath or affirmation to faithfully and impartially discharge the duties of their appointments, respectively, they shall take to their assistance two (2) suitable persons as chain carriers and one (1) person as marker and proceed to view, survey, and lay out or alter the roads as prayed for in the petition, or as near the same as in their opinion a good road can be made with reasonable expense, taking into consideration the ground, convenience, and inconvenience and expense which will result to individuals as well as to the public if the road is established, or any part thereof, or altered as prayed for. In laying out or altering or establishing public highways, the highways shall be located as near as practicable on section and subdivision lines. **History.** Acts of 1871, No. 26 §50, p. 56; Acts of 1899 No. 202 §4; C. &M. Dig., §5235; Pope's Dig., §6950; A.S.A 1947, §76-909.

**14-298-110. Determination of road width.** (a) (1) The viewers shall report what width the road should be to promote public convenience.

(2) However, the county courts shall have power to determine what shall be the width of each road in their respective counties. (b) The presumed width of a public road shall be fifty feet (50'), providing a minimum of twenty-five feet (25') of right-of-way on either side of the center line. **History.** Acts 1871, No. 26, § 48, p. 56; C. & M. Dig., § 5233; Pope's Dig., § 6948; Acts [2005, No. 1200](#), § 5. A.S.A. 1947, § 76-907.

**14-298-111. Assessment of damages.** The viewers shall assess and determine the damages sustained by any person through whose premises the road is proposed to be established, mentioning the damages to each tract separately. **History.** Acts 1871, No. 26, § 51, p. 56; C. & M. Dig., § 5236; Pope's Dig., § 6951. A.S.A. 1947, § 76-910.

**14-298-112. Report of viewers – Contents.** Viewers shall make and sign a report in writing, stating: (1) Their opinion in favor of or against the establishment, alteration, or vacation of a road, or any part thereof, and set forth the reason for their opinion; (2) The commencement and termination, courses, and distances of the road, so that the road can be readily formed and located; (3) The value of the property sought to be appropriated for the establishment of the road; and (4) The amount of damages, if any, and to whom, which by them have been assessed and which would accrue by the establishing and opening of the road. **History.** Acts 1871, No. 26, § 52, p. 56; C. & M. Dig., § 5237; Pope's Dig., § 6952. A.S.A. 1947, § 76-911.

**14-298-113. Proceedings on report – Compensation and damages.** (a) The county court, on receiving the reports of the viewers as set out in § [14-298-112](#), shall cause the report to be available to all parties and shall cause a hearing to be held in which the report is read publicly. (b) If no legal objection is made to the reports by the parties and the court is satisfied that the road, or any part thereof, will be of sufficient importance to the public to cause the damages and the compensation that have been assessed as set out in § [14-298-111](#) to be paid by the county, and that the amount so assessed is reasonable and just, and the report of the viewers being favorable thereto, the court shall order the damages to be paid to the persons entitled thereto from the county treasury, and thenceforth the road shall be considered a public road. (c) If the court is of the opinion that the road is not of sufficient public utility for the county to pay the compensation and damages assessed as set out in § [14-298-111](#) and the petitioners refuse to pay the compensation and damages, then the road shall

not be declared a public highway or road and the costs accruing by reason of the application shall be paid by the petitioners, as provided in § [14-298-103](#). If the report of the viewers is against the proposed road or alteration, or if the road is not of sufficient public utility, in the opinion of the court, then no further proceedings shall be had thereon and the obligors in the bond securing costs and expenses shall be liable for the full amount of the costs and expenses. **History.** Acts 1871, No. 26, § 53; C. & M. Dig., § 5238; Pope's Dig., § 6953; Acts [2005, No. 1200](#), § 6. A.S.A. 1947, § 76-912.

**Review:** After the viewers have returned their opinion in favor of the road, but before a road is established, any citizen of the county whose lands are affected by the road may apply to the county court by petition for a review of the road. It is within the discretion of the county court to grant a review. If the court grants a review, it shall appoint 3 different disinterested freeholders of the county to review and report their findings. If reviewers are in favor of the road, it shall be established. If reviewers are not in favor of the road, it shall not be established. (A.C.A. §14-298-115)

**Appeal:** Any party not satisfied with the decision of the county court may appeal the decision to the circuit court within 10 days of the decision. (A.C.A. §14-298-116). Below, is the law and procedure regarding the appointment of viewers not herein and above, including, 14-298-105, 106, 109, 110, 113, 114 and 115 etc.

**14-298-114. Order opening road.** After any road has been established and declared a public road, the county court shall issue an order declaring the road to be opened and the order shall be filed of record with the county clerk. **History.** Acts 1871, No. 26, § 54, p. 56; C. & M. Dig., § 5239; Pope's Dig., § 6954; Acts [2005, No. 1200](#), § 7. A.S.A. 1947, § 76-913.

**14-298-115. Review.** (a) After the viewers of any county road shall have made return in favor of the road and before the road has been established, any citizen of the county whose lands are affected by the road may apply by petition to the county court for a review of the road, as provided in § [14-298-103](#). (b) The court, on being satisfied from the petition that a review should be granted, shall appoint three (3) disinterested freeholders of the county to review the road and issue their order to the reviewers directing them to meet at a time and place therein specified. After taking the oath required of viewers, they shall proceed to examine the route surveyed for the road by the former viewers and make a report in writing to the court stating their opinion in favor of or against

the establishment of the road, or any part thereof, and their reasons therefor. (c) The petitioners for review shall give at least thirty (30) days' notice to the principal petitioner for the road of the time and place of meeting of the reviewers. (d) If a review is granted, then no further proceedings shall be had until the reviewers have reported their action to the court. (e) (1) If the report of the reviewers is in favor of the road, the road shall be established, recorded, and opened, and the persons bound for the review shall pay into the county treasury the amount of the costs of the review. (2) If the report is against the establishment of the road, no further proceedings shall be had about the road before the court, and the persons executing the first bond shall pay into the county treasury the costs and expenses of the views, survey, and review of the road. **History.** Acts 1871, No. 26, § 55, p. 56; C. & M. Dig., § 5240; Pope's Dig., § 6955; Acts [2005, No. 1200](#), § 8. A.S.A. 1947, § 76-914.

In *Independence County v. Sowell*, 104 Ark. 371 (1912) the court explains the county court will appoint viewers to assess the damages, and the county clerk will order the damages to be paid. The county court will only have the authority to pass upon the reasonableness of the amount of damages assessed.

In *Beck v. Biggers*, 66 Ark. 292 (1899) the court explains that not being properly notified of an assessment, as a viewer, is immaterial if you are notified the day of the meeting and appear. A disinterested viewer cannot be one that is familial related to the landowner. The court also explains how the viewers' report is insufficient to meet the requirements of the statute when it is so indefinite that a stranger, even with a compass and chain, could with difficulty, if at all, determine the true location.

In *Nevius v. Reed*, 176 Ark. 903 (1928) the court explained that because the plaintiff did not have notice of the meeting of the viewers and took no part in the proceedings to lay the road over his land, the county court could not approve of the viewer's actions of laying road over Nevius's land without his consent.

In *Lonoke County v. Lee*, 98 Ark. 345(1911) and *Polk v. Road Improvement District No. 2 of Lincoln County*, 185 S.W. 453 (Ark. 1916), both courts explain that although there was no notice of the meeting of the viewers for the assessment of damages, this will not void the judgment and does not affect jurisdiction of the court.

In *Nemeier v. Bramlett*, 103 Ark. 209 (1912) the court ruled that the viewers' assessment of damages is reviewable and not binding until the judgment of the county court is entered.

In *St. Louis Southwestern Ry. Co. v. Royall*, 75 Ark. 530 (1905) the court explained that the viewers erred in not assessing the railroad company's Damages they would suffer by a county road crossing their tracks. Viewers must assess whether there is damage and the amount of such damage.

Question: Can enhancement be equated with just compensation?

The Supreme Court of Arkansas has repeatedly held enhancement may be equated with just compensation where a portion of the person's land taken for public use enhances the value of the rest of his or her land so as to make it of greater value than the whole before the taking. In this case, the landowner has received just compensation in the form of benefits. See *Cullum v. Van Buren County*, 223 Ark. 525. However, in *Cate v. Crawford County*, 176 Ark. 873, and *McMahan v. Carroll County*, 283 Ark. 812, the court clarified that such benefits must be special to the owner's land and must be "local" and "peculiar" in nature. See also *Lazenby v. Arkansas State Highway Commission*, 231 Ark. 601.

In *Howard v. State*, 47 Ark. 431, (1886) the court held "The landowner cannot be said to be deprived of his rights to be heard by the want of notice of the viewers' meeting. The assessment of damages by the viewers is not of itself binding upon him. It requires the judgment of the county court to give it any force or validity. It is made the duty of the court to see that the award of damages is just to the public and the individual, and the landowner, who is a party by virtue of the publication, is thus afforded his day in court, regardless of the report of the viewers." The county court's jurisdiction is not dependent on sufficient notice to the landowner. See also *Lonoke County v. Lee* 98 Ark. 345 (1911) holding notice by publication is sufficient; the plaintiff's due process was not violated when the viewers met one day before the scheduled meeting without notice to plaintiff. But see *Beck v. Biggers*, 66 Ark. 292, 50 S.W. 514; *Nevius v. Reed*, 176 Ark. 903 (1928) holding where landowners receive no notice of the meeting of the viewers, the county court's jurisdiction is nullified. Failure to give notice constitutes error and a reversal of the county court's decision to establish a new road.

In *Castleman v. Dumas*, 279 Ark. 463 (1983), the court awarded the appellant costs to her appeal even though they ruled in favor of

the appellee because it would be most unfair to take one's land and require her to pay the costs of that proceeding.

In *Brown v. Henderson*, 66 Ark. 302 (1899), after Brown asked the county court to order the construction of a ditch, the court followed the procedures for appointing viewers, who returned a decision in favor of construction of said ditch. However, upon complaint by another citizen, the court followed the procedure for appointing reviewers, who concluded the ditch would not be of public benefit and utility and decided against its construction. Despite Brown's appeal of this decision, the Supreme Court of Arkansas ultimately upheld the decision of the reviewers. When a report by reviewers has been made, the county court must enforce the reviewers' decision and if the reviewers decide against construction, tax the costs of desired construction against the petitioner (the construction of the ditch in this case). See also *Cribbs v. Benedict*, 64 Ark. 555 (1897), holding that construction of a ditch approved by the viewers "must substantially come within the general description of the route required by the act to be set forth in the petition" and may not substantially deviate from what the viewers' report.

See *Pippin v. May*, 78 Ark. 18 (1906), "In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not." The test is not absolutely necessity, or that petitioner has no other means of access to a public highway, but rather that the existing road is at times difficult to travel and expensive to maintain and that the new road is better located and may be established without significant injury to the other person.

Furthermore, in *Burton v. Hankins*, 98 Ark. App. 51 (2007) the Court of Appeals of Arkansas rejected appellants' petition for a road of necessity across their property because they did not follow the statutory scheme laid out in Ark. Code Ann. §§ 27-66-401 to 402 to establish one. The statutes allow viewers to consider not only the route proposed by the landowner but also any other route the viewers may deem proper. However, in order for viewers to consider alternate routes across neighboring property owners' land, the owners must have notice or be made parties to the actions at hand. Because the appellant's proposed road was rejected by the viewers and appellants did not give notice to any other surrounding



landowners, alternative routes could not be considered and their petition was ultimately rejected. Consequently, the court could not open a road across the land of the nonparties without notice, even if it was the best route to grant appellants access.

In *Nation v. Ayres*, 340 Ark. 270(2000), the Supreme Court of Arkansas upheld the decision to locate a county road based on the recommendation of the viewers. In its reasoning, the circuit court gave more weight to the viewers' opinion than a private contractor's opinion about the placement of a road after the plaintiff challenged the viewers' decision.

**Best Practices:** In cases where there are viewers the manner in which to conduct the evidentiary hearing you might consider the following as a possible best practice.

**EVIDENTIARY HEARING (with Viewers):**

STEP 1: The Court should swear in all of the witnesses:

"Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth"?

STEP 2: The procedure for an evidentiary hearing can vary. Again, the goal is to provide due process, a meaningful hearing and a presentation of substantial evidence from which the court can make and support its ultimate ruling.

**One manner** is as follows: the court may desire to commence the presentation of evidence by the court directing a viewer to testify (under oath on his opinion-also representing the majority opinion) and present the majority report. This may lend some order to the proceedings. The court can simply ask the viewer to testify: as to the various work done by the viewers, the observations of the viewers, describe the characteristics of the subject lands, submit photographs, maps and plats, and to **cover of the opinions of the majority of the viewers and the basis or evidence that supports those opinions.** {This is somewhat based up the viewer acting as an objective officer of the court and an objective witness. This may enhance order to the proceedings, demonstrate the control of the court over the proceedings and get to the heart of the matter. As noted above and in Ark Code § 14-298-109, 110, 111, 112, and 113: the substance of the viewers' opinions are within their **DIRECTIONS.** They are directed to determine and their report should reflect: "**the ground, the convenience, inconvenience and expense**" to the individual landowners and the public from the establishment of the public road as prayed for or as altered. Whether the road

should come into existence, the **width, location** of the road are all to be determined by the court and should be included in the viewers' reports and testimony. Likewise, the determination of the **damages** and the **responsible party** for payment of the **sum of just compensation**, i.e., the petitioners or the county should be in the report and the testimony. Again, the evidence presented should cover these matters; and the **report of the viewers** may be offered (and if without objection—marked and received into evidence). Note: in any event **the report of the viewers shall be filed with the county clerk {14-298-114}**. {Also, the viewer(s) should also testify and submit their **invoice** for services rendered, perhaps as a part of the report, including provision for time and travel to and from the courthouse for the hearings, etc.}

STEP 3: In any event, the court should allow the respective parties (and the court) to cross-examine the viewers and witnesses for the county. The landowners and then Petitioner shall be given opportunity to ask questions or cross-examine the viewers.

Step 4: The landowner should be allowed to call witnesses, and county cross-examine;

STEP 5: **APPEAL:** Again, an aggrieved landowner or party has the right to appeal a final order from county court to circuit court. The appeal period is generally (30) thirty days from entry. See: 14-298-116; 14-298-122 which cures defects in actual notice by constructive notice of a duly filed order. Finally, see also: The Rules 1 & 9 of the "District Court Rules" (formerly "Inferior Court Rules" generally provide for (30) thirty days from entry of a final order. The appeal to circuit court is an appeal *de novo* which means: "Anew; fresh; a second time". See: *McGhee v. Glenn, County Judge*, 428 S.W.2d 258 (Ark. 1968); and *Oliver v. Washington County*, 940 S.W.2d 884 (Ark. 1997). A trial *de novo* is trying a matter a second time as if it had not been heard before.

**FUNDAMENTAL JUDICIAL PROCESS (STATE LAW-ASHC one best practice):**  
**(distinct from relocation or federal acquisition procedures):**

**NOTICE TO LANDOWNER:** Notice to landowner under Arkansas Rules of Civil Procedure, Rule 4, by summons is necessarily sufficient. Also, notice may be evidenced by signing petition under pure donation or signing petition with acceptance of just compensation; serve with copy of the order; appearance at hearing made of record; publication *may* constitute notice as per statute; serve with copy of order and notice of hearing; entry during the construction of the road on new location or widening may constitute notice of court order filed with county clerk.

**PROPER PETITION:** Petition signed by (5) five or more interested landowners; The petition shall give the starting point and terminus of the road, as well as intermediate points, and such other description or plat as will permit the location of the road by the county surveyor; and width of no less than fifty feet (sixty feet for state aid). If petitioners seek a road, no county must post sufficient bond to provide for reimbursing the county for claims for lands taken.

**HEARING (on whether to grant the petition):** The court shall hear those for or against the petition and either grant or deny the petition (this may technically not transpire in acquisition by county on behalf of the ASHC).

**ORDER:** If court grants the petition, the court may enter an Order laying out or widening or changing the road. The Order shall generally provide the point of beginning and terminus (centerline or legal description); and width of no less than fifty feet (sixty feet for state aid). The location shall be located at or near section lines, taking into account the conveniences of the traveling public and contour of the country, etc. The court order must be filed of record with the county clerk under 14-298-114.

**ACTION BY THE COUNTY CLERK:** (f) Upon the entry of the foregoing order of the county court, the clerk of the court within ten (10) days shall cause a copy of the order to be served upon each of the owners of record of any lands affected by the order. The service shall be in the form and manner provided by law for service in civil actions. (g) Upon return to be made by the sheriff showing service of the order upon any landowner, the clerk shall note in the records of the county court the record of the service, showing the date thereof and the person served, which shall be and become a part of the permanent records of the court.

**CLAIMS FOR DAMAGES:** (i) If the owner of the land over which any road shall hereafter be so laid out by the court shall refuse to give a right of way therefor, then the owner shall have the right to present his or her verified claim to the county court for damages the owner may claim by reason of the road's being laid out on his or her land. (j) If the owner is not satisfied with the amount allowed by the court, he or she shall have the right to appeal, as now provided by law from judgments of the county court. (k) However, no claim shall be presented for such damages after twelve (12) months from the date of the service of the order as provided in this section. Hearing(s) may commence on the damages to be awarded to the landowners.

## **ONE BEST PRACTICE ON HEARING PROCEDURES ON CLAIMS BY LANDOWNERS:**

The procedure for an evidentiary hearing can vary. The goal is to provide due process, a meaningful hearing and a presentation of substantial evidence from which the court can make and support its ultimate ruling.

STEP 1: The Court should swear in all of the witnesses to the effect of: "Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth"?

STEP 2: The parties should be allowed to have their own legal representation.

STEP 3: One manner is as follows: allow the landowner to proceed to present his claim for just compensation. The court *may* direct the presentation of evidence by the court directing the landowners to proceed first. Afford the landowners to testify and call witnesses, including themselves, appraiser or whomever to testify (under oath as to their opinions of just value and the characteristics of the subject lands). The landowner has the burden of proof to prove his claim for just compensation.

**APPEAL:** An aggrieved landowner has the right to appeal a final order from county court to circuit court. The appeal period is generally (30) thirty days from entry of the final order. See: 14-298-116, 14-298-120. See also: 14-298-122 which cures defects in actual notice by constructive notice of a duly filed order. Finally, see also: The Rules 1 & 9 of the "District Court Rules" (formerly "Inferior Court Rules"). {RULE 1: include district court and "county court"; Rule 9 also generally provides for (30) thirty days from entry of a final order. The appeal to circuit court is an appeal *de novo* which means: "Anew; fresh; a second time". See: *McGhee v. Glenn, County Judge*, 428 S.W.2d 258 (Ark. 1968); and *Oliver v. Washington County*, 940 S.W.2d 884 (Ark. 1997). A trial *de novo* is trying a matter a second time as if it had not been heard before.

Generally, the sole issue in a condemnation case is just compensation; and in Arkansas the landowner has the burden of proof of just compensation. *Property Owners Improv. Dist. V. Williford*, 40 Ark. App. 172 (1992); and *Baumeister v. City of Fort Smith*, 23 Ark. App. 102 (1988).

It is sufficient that the county acting as condemning party submit an estimate of just compensation.

**Replacement of Washed-Out Road: A.C.A. §14-298-123:** (a) When a county road is injured or destroyed by washing of any lake, river or creek, it is the duty of the overseer of the road district to immediately notify the judge in writing of the nature and extent of the damage. (b) If the judge shall be satisfied that the road has been injured or destroyed to such extent as to inconvenience the traveling public, the judge shall appoint three (3) viewers. They may, if in their judgment it is necessary, take with them a competent surveyor and proceed to view and survey a new road upon such ground as will accommodate the traveling public. (c) The viewers shall determine the compensation to be allowed the owners of the property sought to be appropriated, at its true value, and the damages occasioned by the new road and shall make a report of their doings in the manner pointed out in this chapter as the duties of viewers of new roads. (d) Appeals may be taken from the appointment and orders of the judge and from the assessment allowed by the viewers as a jury to the owners of the property, in the manner provided by this chapter, within the time allowed by law, after the first regular term of the court thereafter held. (e) The appointment of viewers and order of the judge provided in this chapter shall be recorded in the records of the court. (f) The county court shall be governed in the reception, approving, and recording of the report of viewers, in all respects, as is prescribed in the case of new roads, except no notice of the destruction or injury to the road shall be required except as required by this section. (g) All costs, damages, and expenses arising under the provisions of this section shall be paid out of the county treasury on the warrant of the county clerk.

**History.** Acts of 1871, Act 26, § 59, p. 56; Acts of 2005, Act 1200, § 14, eff. Aug. 12, 2005.

**Flood Control Improvements: A.C.A. §14-16-112:** Counties are authorized to enter, take and hold any lands, interest, easement, etc. whether by purchase, grant, donation, etc. that may be necessary and proper for locating, constructing, operating, repairing or maintaining any floodway, reservoir, spillway, levee or diversion, or other flood control improvements. County has power to condemn for these purposes. (b) Nothing in this section shall ever be so construed or applied as to relieve the federal government of any liability or responsibility which it has assumed by the passage of the Flood Control Act of May 15, 1928,<sup>1</sup> or the Flood Control Act of June 15, 1936,<sup>2</sup> or any other existing law, or any law that may hereafter be passed by the United States Congress.

**History.** Acts of 1955, Act 73, § 1.

**Formerly** A.S.A. 1947, § 17-315.

In *Craig v. Greenwood District of Sebastian County*, 91 Ark. 274 (1909) the court explains that an unauthorized use of another's land by the public cannot become a basis for a claim against the county for compensation.



## Appendix of Road Documents Part I

ORDERS LANDLOCKED Ark. Code § 27-66-401

ORDERS VACATING COUNTY ROADS Ark. Code § 14-298-117

ORDERS VACATING PLATTED ROADS Ark. Code § 14-18-105

ORDERS RETURNING LOTS TO ACREAGE Ark. Code §14-41-302

ORDERS ALTERING COUNTY ROADS Ark. Code §14-298-124

ORDERS EMINENT DOMAIN Ark. Code §14-298-120