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WHAT'S UP WITH YOUR RIGHT-OF-WAY?

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I. Scope of this Paper

This paper focuses on roads, streets, alleys, and other “ways” that are commonly called “rights-of-way,” or “ROWs.” While ROWs exist in all parts and jurisdictions in Texas, the principal emphasis herein will be on those located in municipalities, with limited references to counties and the state as they affect city ROWs. Such ROWs are “your rights of way” because they belong to the public, for which the city serves as trustee. The topics covered are certainly not intended to be exhaustive of the myriad of subjects that lawyers, city officials, and laymen may encounter with regard to ROWs, and is intended instead as a basic primer regarding the most common of those topics.

II. Background: The Road to Here and Now

Under the theory that in order to understand where we are we need to understand how we got here, there follows a brief history of how public rights-of-way in Texas became public rights-of-way in Texas.

Prior to 1493, God apparently had not given much thought to which humans should own streets, alleys, and roads in Texas, but that year, acting through Pope Alexander VI, She issued a Papal Bull declaring that such property, along with all other real estate in the New World, belonged to the “kings of Castile and Leon.”¹

Owning everything, the Spanish kings thereafter doled out thousands of land grants in the New World to individuals, but kept the lands and waters needed by everyone—common property—for themselves, to be used by the public .² As the New World was settled, “pueblos” were established, being villages, cities, and towns, each of which contained roads, streets, plazas, and various other common lands that continued to belong to the king but which continued to be available for use by the public. In Texas, those pueblos included Laredo, San Antonio, Nacogdoches, and a few others. After Mexico gained her independence from Spain in 1821, the basic laws related to public property—the Civil Law of Spain—did not change, although the king was replaced by the central government with regard to who owned those lands. More pueblos, ciudades, and presidios also sprang up in the Mexican colony of Coahuila y Tejas, including San Felipe, Gonzales, Bastrop, Refugio, and La Bahia.

Fast forward through 1836 to Texas independence and the Republic of Texas to January 20, 1840, when the Texian Congress decided that the law of the land was no longer the Civil Law of Spain, but the Common Law of England. This was a significant change.³ Property laws in England followed a different course than those in Spain, and included subinfeudation, *Quia Emptores*, livery and maintenance, land tenure, and other practices we wouldn't recognize today, but many of the basic tenets were still similar. Kings and nobles were in charge. They decided who owned lands, controlled estates, and collected rents. They also allowed streets, rights-of-way, and other common places to be used by the public.

When Texas was annexed into the United States in 1845, it retained its private lands and was the only state to do so,⁴ although that fact did not particularly impact the use of ROWs. Counties, cities and towns in the Republic were or became creatures of the state, and the state's early laws are replete with acts recognizing, validating, and establishing, the legal existence of counties or towns. In other words, during the period 1845-1858, municipalities were created or validated solely by the legislature. The basis for incorporating municipalities by election of their inhabitants was established in what is often called "the Act of 1858," but which was only one law enacted by the 7th Legislature. It provided that a "village" containing at least 300 "free white inhabitants" could call an election for the purpose of seeking voter approval to incorporate as a "town" governed by a mayor and board aldermen, which could thereafter reorganize into a "city" upon reaching 1500 inhabitants. With regard to ROWs, it provided that "[t]he Board of Aldermen shall have and exercise control over the streets and other public places"⁵

Various legislative and a few constitutional changes occurred thereafter that affected ROWs, but the groundwork was laid for our current situation.

III. How Rights of Way are Created

There is more than one way by which a ROW may be created, to wit:

1. Acquisition of the property by a city or county, either by purchase or exercise of eminent domain;
2. By prescription or adverse possession: Each of these terms refers to long-time use of a road, street, or other ROW by the public for such a lengthy period of time that it legally becomes a public ROW. The elements of each are slightly different, depending on the facts, period of usage, party asserting the claim, and the existence or non-existence of deeds or other documentation. Sample cases are cited in the endnotes.⁶
3. Implied dedication: Similar to prescription and adverse possession, in that public use or city action indicates treatment of a platted ROW as a public ROW.
4. By dedication on a plat: This is the most common method, and will be discussed further.

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