

August 22, 1961  
Opinion No. 61-59

REQUESTED BY: Honorable Harry Ackerman  
Pima County Attorney

OPINION BY: Robert W. Pickrell  
The Attorney General

QUESTIONS: 1. In construing the provisions of Section 18-207 which grant to the Board of Supervisors the power to expend public funds for the maintenance of public roads and streets located without the limits of an incorporated city or town other than legally designated streets and county highways, and providing further that such roads or streets to qualify for maintenance under this section must be LAI D O U T, O P E N E D A N D C O N S T R U C T E D without cost to the county before the county can expend public funds for their maintenance; what is the meaning of the terms LAI D O U T, O P E N E D A N D constructed? (Emphasis supplied)

2. Can the county require that these streets meet reasonable standards for the right-of-way widths, grade and design as a prerequisite to extending county maintenance to such streets under the provisions of Sec. 18-207?

CONCLUSIONS: 1. See Body of Opinion.  
2. See Body of Opinion.

1. The words "laid out, opened, and constructed" mean that the road must be properly dedicated to the public, either by statute or common law dedication and that the roadway must be sufficiently usable and free from obstacles to be capable of sufficient use by the public so as to constitute an acceptance thereof by user or to permit use without expending county funds thereon. It is a question of fact for the discretion of the County Board as to whether or not the road is in general public use and is sufficiently open and constructed to justify the County in expending maintenance funds thereon.

2. The County may not establish any standards for the right of way widths, grade and design as a prerequisite to extending maintenance to these roads. These are matters affecting establishment of these roads. Within the scope of the budget law, the County must maintain the public roads that

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have been established and meet the test of "open, laid out and constructed" without reference to right of way, width, or grade. This does not affect the right of the County to establish standards for future dedications to meet before the County would include maintenance costs in its budget.

This opinion deals only with the public roads, not State or County highways and which have been established outside the limits of incorporated cities or towns.

To construe the meaning of the words "laid out, opened, and constructed" it is necessary to first establish what constitutes the Public Roads treated by this statute, and determine the power of the County Board of Supervisors over these roads. We conclude that the only roads this statute could affect are those public roads that have been established by dedication and that this is an area where no statutory or common law power has been given to the County Board of Supervisors, except indirectly under the Budget Law. (A. R. S. §42-301, et seq. 1956). Our reasoning follows:

A line of cases beginning with Territory v. Richardson, 8 Ariz. 336, 76 Pac. 456, developed holding in effect that no public highway could exist that was not established by statutory method. The Courts recognized that roads existed that were public roads, not legal highways, not private ways, and did not discuss dedicated roads. The terms "public highways" and "public roads" were used interchangeably. Champie v. Castle Hot Spring Co., (1925) 27 Ariz. 463, 233 Pac. 1107.

County Board of Supervisors, Apache County vs. Udall, (1931), 38 Ariz. 497, 1 P. 2nd 343, held that Section 774(4) R. C. 1928, (formerly Section 11-251 (4),) giving general power to the County Boards to "lay out and maintain public roads in their county" was a limited grant of power authorizing the Board to expend public funds only to maintain county highways, not county public roads generally, and then only within the limits of the budget law. The language was confirmed in Graham County vs. Dowell, (1937), 50 Ariz. 221, 71 P. 2nd 1019, and the term "lay out" was defined as "being comprehensive and including all steps necessary to establish a highway for public use, including . . . the dedication to the public in the manner provided by law." (50 Ariz. 224). The Court further said (50 Ariz. 226):

"It is hardly necessary to state that neither the county nor the state may expend money upon what, as a matter of law, is merely a private right of way and not a public highway. Section 7, article 9, Constitution of Arizona; Champie v. Castle Hot Springs Co., 27 Ariz. 463, 233 Pac. 1107. We held in the case just cited that from 1901 to 1925 there was but one legal way for establishing a public road within the State of Arizona, which was carefully set forth in the Codes of 1901 and 1913, and that a public highway by user and prescription did not

and could not exist within this state. The legislature later provided two methods for the establishment of public roads, one for a county highway and the other for a state highway. But in both cases the highway had to be established by a very formal and definite procedure under the general law, and not by user, prescription, or special act. Apache County v. Udall, 38 Ariz. 488, 1 Pac. (2nd) 340. Since it is alleged, and not denied, that the road referred to in chapter 26, supra, was never legally established as a state or county highway in the manner prescribed by law, and since the legislature may not establish a highway by a special act, such road is not, within the meaning of the law, a public highway, and that portion of the act directing the expenditure of state money thereon cannot stand."

These cases and the statements last quoted did not consider nor mention a parallel line of cases establishing in Arizona that County public roads could be and were being created, opened, and used by the joint acts of private land owners and the public through common law and statutory dedication. Statements by the Court in the cases cited limiting the power of the Board in "maintaining" public roads and expending public funds thereon to County highways left a large class of public roads established by statutory or common law dedications and opened and accepted by public user in existence and with no specific power delegated by the legislature to any agency to maintain them.

Section 9-1141, A. R. S. (1956) and 9-254, A. R. S. (1956) have been in substantially the same wording and have been the law of Arizona since at least 1901. (Section 4098-4103 and 611, Revised Statutes of 1901). Section 4103 reads in part, as follows:

"Nothing in this title should be construed as to invalidate the dedication of avenues, streets, alleys, parks, . . . . of all or any plats heretofore filed and not recorded; . . . ."

Evans v. Blankenship, 1895, 4 Ariz. 307, 39 P. 812 reads that the Act by the landowner of surveying land into lots, streets and squares and the subsequent sale of land with reference to such plat, recorded or not, would amount to an immediate dedication. No formal ceremony is required and the dedication and acceptance so as to vest title to roads and streets in the public was complete without any act of any governmental agency. Collins v. Wayland, (1942), 59 Ariz. 340, 344, 127 Pac. 2d 716, sustained the doctrine as to public alleys and streets. Allied Investment Company v. Pettit, (1947) 65 Ariz. 283, 179 P. 2d 437, established the rule that a dedication was effective without any affirmative action by the County. Subdividing followed by sale of lots and public use thereof is an effective dedication. The dedication was made as to land in the County and was not within any city or town

and was done by a private owner who dedicated by words the streets and alleys but made no reference to the land in question, a park. Although the County did not make an acceptance of the park, the Court held the dedication good. In fact, the County continued to tax the land as privately owned.

"The making and recordation of the plat coupled with sales of lots therein constituted the dedication. Evans v. Blankenship, supra. The use by the purchasers of lots and the general public constituted sufficient acceptance. Collins v. City of Phoenix, 9 Cir., 54 F. 2d 770. By the statutes in effect at the time that the dedication was made, the fee in the dedicated property passed to the county in trust for the public and for the uses described. In this respect the dedication was different from a dedication at common law where the effect was that the public simply acquired the use for the purposes for which it was dedicated, and the fee remained with the dedicator. See Vol. 4, § 1725, McQuillin, Municipal Corporations (2nd Ed.); Thorpe v. Clanton, 10 Ariz. 94, 85 P. 1061." (Emphasis Supplied)

Drane v. Avery, (1951) 72 Ariz. 100, 231 Pac. 2d 444 held that a dedication was effective as to a public street at time it was subdivided and that dedication was continuous despite the fact that no road was actually opened and the roadway was obstructed. A street 66 feet in width having been dedicated by the plat, a limited use did not affect the right of the public to full use at a later time and the fee to the entire 66 feet vested in the County under the statute and could not be lost by non-user. The fact that a subdivision and the plat thereof is not contiguous to a city or town does not affect the dedication and roads and streets once dedicated to the public use and accepted by the public remain vested in the public or the County in trust for the public under the appropriate sections 9-251-4, A. R. S., (1956) or 9-1141, A. R. S. (1956) as is applicable. In both cases the public right is complete and neither non-use nor non-improvement will effect any abandonment thereof. County of Yuma v. Leidendeker (1956) 81 Ariz. 208, 303 P. 2d 531. There is no condition imposed upon the public to make use of the dedicated land until it so desires. Since the dedication is by act of the landowner, the public acquires title only to the specific land dedicated. The county could not, except by condemnation or other statutory procedure, change the width or alter the right of way, Drane v. Avery, cited above. Except as it may relate to giving approval and a plat of a subdivision, the County Board of Supervisors does not participate in the act of either dedication or acceptance.

Public roads in Arizona cannot be created by prescription and there are now no public roads in Arizona except those state and county highways as are established by statute and those county public roads created by dedication. Drayton 2736, Revised Statutes of 1888, Territory v. Richardson, cited above; Tucson Consolidated Copper Co. v. Reese, (1909), 12 Ariz. 226, 100 Pac. 777; Champie v. Castle Hot Springs Co., cited above.

The Board of Supervisors may now create public roads only by statutory means under Sec. 18-201, et seq. (petition and resolution) or under 12-1111 to 12-1128, Eminent Domain. When doing this they have the power to lay out, which includes taking all steps necessary to acquire right of way. These methods are exclusive as to creation of public roads by the County Boards of Supervisors. County of Maricopa v. Anderson, (1957) 81 Ariz. 339, 306 P. 2d 268. Neither state nor county can by special okay, lay out, open, alter or vacate roads, plots, streets, alleys. Art. 4 Section 19, Part 2 (8), Arizona Constitution; Graham Co. v. Dowell, cited above.

We, therefore, conclude that the only public roads other than state and county highways in existence are those roads dedicated by plat or by subdivision and which were or since have been accepted by the public by use thereof. The Board has nothing to do with the establishment of this class of roads and it is only these roads upon which Section 18-207 is operative. This Section reads as follows:

"§18-207. Maintenance of public roads and streets not within city or town

A. The board of supervisors may expend public funds for maintenance of public roads and streets other than legally designated state and county highways located without the limits of an incorporated city or town. Before expending public funds thereon, such roads or streets shall be laid out, opened and constructed without cost to the county.

B. Maintenance on other than legally designated state and county highways shall not be construed to include purchasing or laying rock products, cement or petroleum product materials. (Emphasis Supplied)

It was passed at the First Special Session of the 17th Legislature (1945) called to deal with emergencies created by the end of World War II. By its terms it grants power to the Board to expend public funds to maintain only such public roads, not highways, as were then or now are laid out, opened, and constructed. The Board may determine which of the many dedicated roads are open and constructed sufficiently to be maintained and this it must do if it is to meet the requirements of the Budget Law.

This duty can be determined from the pertinent parts of Section 42-302, Arizona Revised Statutes (1956) which are as follows:

"(A) The governing Board of each county, . . . shall prepare . . . an estimate of the different amounts, . . . required to meet the public expense, . . . for the current fiscal year. The estimate shall include 'amount', . . . required for each item of expenditure necessary for county, . . . purposes, . . . ."

"(B) The estimate, . . . shall be fully itemized. . . showing under separate heads the following:

(2) The separate amounts proposed for construction, maintenance. . . . of public highways, roads, streets. . . ."  
(Emphasis supplied)

"42-303(D) No expenditures shall be made for a purpose not included in such budget. . . . ."

The County Supervisors' highway expenditures are controlled by the budget law. Board of Supervisors of Apache County v. Udall, cited above, and there is no distinction that would relieve maintenance of public roads not highways from the operation thereof. The statute (18-207) was passed to clarify the power of the Board in expending local funds to maintain existing public roads, not highways, and has overcome the problems created by the Board of Supervisors v. Udall case, cited above.

The statute permits no construction of roads and no laying out. To maintain and repair means to preserve or remedy the original condition, not to improve or construct or alter the status quo.

Thompson v. Bracken County, Ky., 294 SW 2d 943, 946.

Section 18-207 therefore relates only to existing public roads and the words "laid out, opened" can only refer to a road that has been previously dedicated to the public use and is in actual use by the public to the extent of the substantial use of the dedicated way. "Opened and constructed without cost to the County" further means that the way is sufficiently full of obstacles to permit the public to use the road without necessity of expending county funds to make the way possible. Therefore, if the road is sufficiently opened so that it is in use by the public, it meets the requirements of opened and constructed. Section B of the statute reinforces our conclusion by prohibiting use of the common surfacing materials on the road at public expense. Whether or not the road is open sufficiently to meet the requirements of public use is a question of fact and is to this extent subject to the discretion of the Board.

The County may not, however, establish standards for right of way widths, grade, and design as a pre-requisite to extending maintenance. The roads to be maintained are public roads already in existence. Right of way width, grade and design are matters pertinent to the creation of the road and are established between the dedicators and the public.

The County can only, therefore, maintain the status quo as to those public roads, not highways, that were dedicated and in public use at the

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time of the passing of the statute (September 29, 1945) (Chapter 5, 1st Special Session, 17th Legislature), and as to those roads in the county since dedicated and accepted by the public and also in public use. They could not select certain of these roads to be maintained on the basis of meeting certain standards of grade, width or design in the absence of special statutory authority, since these items pertain to the creation of new roads and not to maintenance of existing roads. They may expend public money and maintain existing roads under the statute, but the roads must be opened and constructed to the minimum use of the public. They may not select and choose which road to maintain on the basis of these standards. This would be, in effect, a laying out, opening or altering a plot or plots by special act. They can only create, vacate or abandon in accordance with statute. They may, of course, designate which of the public roads they will maintain as an incident to adopting the budget.

The County exercises no sovereign power except as the agent of the State and has only those powers expressly granted or necessarily implied. Associated Dairy Products Co. v. Page, (1949), 68 Ariz. 393, 206 P. 2d. 1041. There is no express statutory grant of power allowing the County to establish the standards for dedicated roads as to width, grade, and design, except under the circumstances set forth in Section 9-474 and 9-475 and there the establishment of width, grade and design is set by reference to existing city streets and not by the Rules of the Board and has been delegated to municipal authority under certain specific standards set forth therein.

If the Board wishes to relieve the County of the undue expenses of maintaining a public road not of suitable grade or width, it must exercise its right to statutory abandonment (Section 18-210, A. R. S. (1956) ) but so long as the road is public and is in open public use the Board must, within limits imposed by the Budget Law, maintain the roads without reference to their particular grade, width of right of way or design. The Board can, of course, refuse to include in its budget for maintenance monies to maintain roads and streets that would constitute a burden and could by appropriate regulation put dedicators on notice as to what requirements would have to be met in the future before the Board would maintain the road to be dedicated. We doubt that such a rule could be given a retroactive effect without proper legislation.

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