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via email to: [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)

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I.D. # 48468

The Honorable Ken Paxton  
Attorney General, State of Texas  
Attention: Opinion Committee  
P.O. Box 12548  
Austin, TX 78711-2548

**RE: County's use of proceeds of collections against subdivision road maintenance bonds provided pursuant to Tex. Local Gov. Code §232.003(7) for repairs to non-county maintained roads and/or non-ROW drainage facilities**

Dear General Paxton:

J D Lambright, County Attorney of Montgomery County, Texas respectfully requests an opinion on the use of county funds collected from claims on subdivision road maintenance bonds. Specifically, an opinion is sought as to whether the funds may lawfully be used for repairs or improvements to (1) roads dedicated to the public but not accepted by the County in the subdivision for which the road maintenance bonds were provided, and/or (2) private roads in the subdivision for which the road maintenance bonds were provided.

Additionally, your opinion is requested on whether such county funds may be expended for drainage facilities located on private property within such subdivisions when the drainage facilities are not part of a road right-of-way, i.e. non-ROW drainage facilities if (1) the roads within the subdivision have been accepted into the county maintenance system, or (2) the roads within the subdivision have not been accepted into the county maintenance system.

*Background Facts:*

The issues arise from the collection of funds from the security provided by a subdivision developer's road maintenance bond required by the county subdivision regulations pursuant to Tex. Local Gov. Code §232.003(7). A person subdividing property by a plat in Montgomery County which provides for new roads is required to provide security for the proper completion of the roads and the drainage in the proposed subdivision before the plat will be approved by the Montgomery County Commissioners Court. The security is provided by either a bond with corporate surety or a bond secured by a letter of credit (hereinafter "Road Maintenance Bond" regardless of the form of security). The Road Maintenance Bond is required for all subdivision plats which provide for new roads regardless of whether the roads are dedicated to the public or the roads are to be maintained as private roads. The Road Maintenance Bond includes the obligations of the subdivision developer to properly construct the roads and the non-ROW drainage facilities.

On several occasions, the subdivision developer has failed to build or complete the roads and drainage in the subdivision in accordance with the County subdivision rules, and/or the plans approved by the County. The County seeks payment for the costs (i.e. damages) for the deficient roads from the developer and from the surety on the bond or from the issuer of the letter of credit. Any funds recovered from the developer, the surety or the letter of credit ("Maintenance Bond Proceeds") are deposited in the general funds of the county.

The County does not accept the roads into the county maintenance system prior to receiving the Maintenance Bond Proceeds. On some occasions, the County does not accept the roads into the County Maintenance System after recovering Maintenance Bond Proceeds. At other times, the County has recovered Maintenance Bond Proceeds related to a gated subdivision with privately maintained roads.

The property owners association and/or the residents in the platted subdivision for which the Road Maintenance Bond was submitted request the County to expend all or part of the Maintenance Bond Proceeds on the roads and/or drainage in the subdivision. The plats of subdivisions either (1) dedicate the streets to the public, or (2) provide that the streets are private and not dedicated to the public. Montgomery County has a population in excess of 400,000.

*Questions:*

Specifically, the Montgomery County Attorney submits the following questions:

- 1) May the County expend Maintenance Bond Proceeds for work on a road dedicated to the public but not accepted into the County Maintenance System?

- 2) If the County expends Maintenance Bond Proceeds for work on a road dedicated to the public but not accepted into the County Maintenance System, is the county obligated to accept that road into the County Maintenance System or is the road deemed accepted into the County Maintenance System?
- 3) May the County expend Maintenance Bond Proceeds for work on a road or drainage facilities in a "private subdivision", i.e. a subdivision which roads are (a) not dedicated to the public, (b) provide that the streets will be private, and/or (c) are not mandated open and available for public travel??
- 4) May the County expend Maintenance Bond Proceeds on drainage facilities (such as detention ponds) located on private property within subdivisions when the drainage facilities are not part of a road right-of-way, i.e. non-ROW drainage facilities?

*Discussion:*

Montgomery County has adopted rules and regulations for the approval and acceptance of subdivision plats and improvements ("Subdivision Rules"). The Subdivision Rules require a person subdividing property ("developer") to submit a bond with corporate surety or bond secured by an irrevocable letter of credit ("Road Maintenance Bond") as permitted by statute as part of a plat application. See, Tex. Local Gov. Code §232.003(7) (1999).<sup>1</sup> The Road Maintenance Bond is required for all subdivision plats which provide for new roads regardless of whether the roads are dedicated to the public or the roads are to be maintained as private roads.

The requirement of a Road Maintenance Bond encourages completion of the roads in accordance with the Subdivision Rules, the construction plans submitted in connection with the plat and the plat itself. Failure to properly complete the roads or drainage will subject the principal and surety to a claim against the bond and collection of funds from the surety or letter of credit. The Road Maintenance Bond provides security for the subdivision developer's obligations to comply with the Subdivision Rules and compensation/damages to the County to facilitate completion or repair of the roads and drainage shown on the plat and in the plans in the event the County prosecutes a claim against the developer and/or the Road Maintenance Bond surety or security.

A claim by the county for payment on a Road Maintenance Bond typically results in the County collecting funds by recourse against the letter of credit, by a lawsuit settlement or by judgment. The collected funds ("Maintenance Bond Proceeds") are deposited in the County's general fund and designated for use by the respective commissioner. In many cases, the County will thereafter accept the previously publicly dedicated subdivision roads into the County Maintenance System and expend the Maintenance Bond Proceeds to complete roads in the subdivision or make repairs to the roads in the subdivision. In some cases, the County does not

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<sup>1</sup> The commissioners court has the authority to refuse to approve a subdivision plat for failing to meet the specific requirements of section 232.003. Tex. Local Gov't Code § 232.002. A subdivision plat must be approved by the county before it can be filed and recorded by the county clerk. Tex. Prop. Code § 12.002; Tex. Att'y Gen. Op. No. JM-508 (1986); see also, Tex. Att'y Gen. Op. No. JM-365 (1985).

wish to accept the roads into the County Maintenance System. In some cases, the roads are in a private, gated subdivision. The latter two (2) instances prompt this opinion request.

A county is limited to expending public road funds on public roads. Tex. Att'y Gen. Op. No. JC-0503 (2002); *see also*, Tex. Att'y Gen. Op. No. JC-0172 (2000) at 2 (“[C]ounties are not constitutionally or statutorily authorized to construct or maintain private roads.”); *see generally*, *Ex parte Conger*, 357 S.W.2d 740 (Tex. 1962). The restriction to use county funds solely on public roads arises from the Texas constitution’s prohibition against giving its money or property without an adequate *quid pro quo*. Tex. Const. Art. III, §52(a). In a county over 50,000 in population, a road may become public in four (4) ways: (1) statutory procedures, e.g. Chapt. 251 of the Transportation Code; (2) eminent domain; (3) dedication; or (4) easement prescription. *See*, Tex. Att’y Gen. Op. No. JC-0503.

When a subdivision is platted, the roads may be dedicated to the public, i.e. a public dedication, or may be identified as private roads. In answering whether a commissioners court may accept and maintain roads in a gated subdivision, the Attorney General responded that Bastrop County could not maintain the roads within a gated subdivision so long as the roads remained private roads. Tex. Att’y Gen. Op. No. JC-0172. The commissioners court could “accept a dedication of private roads to the county” but after acceptance the roads would no longer be private roads and could not be gated.<sup>2</sup> *Ibid*. The inquiry is whether requiring a Road Maintenance Bond to be supplied for a private road subdivision allows the County to expend the Maintenance Bond Proceeds on the private roads without requiring the roads to become public roads.

Regardless of whether the subdivision roads are private or public, there is a public expectation that the Maintenance Bond Proceeds will be used for the benefit of the subdivision for which the Road Maintenance Bonds were supplied. Benefits to the general public such as increased safety and ease of travel to, through and from the subdivision are apparent with regard to improving the condition of the road and with regard to improving the non-ROW drainage facilities in subdivisions with public roads and in subdivisions with private roads.

The County is authorized, though not required, to accept into county maintenance public roads regardless of the manner in which the roads became public. Factors such as limited Maintenance Bond Proceeds, roadway conditions, degree of completeness of roads and ditches, traffic patterns, etc... may cause the commissioners court to hesitate accepting all the roads in a subdivision for which the Road Maintenance Bond were supplied. In such an instance, the County may want to repair the public roads to the extent of the available Maintenance Bond Proceeds but not (a) create the future obligation for continued county maintenance, or (b) accept all the roads in the subdivision into the County Maintenance System.

Similarly, a county could reasonably want to repair or upgrade to county standards the non-ROW drainage facilities to the extent of the available Maintenance Bond Proceeds but not

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<sup>2</sup> The subdivision plat discussed in JC-0172 had not been approved by the commissioners court. The inquiry was “... whether the commissioners court may accept a dedication of roads in the gated subdivision and thereafter maintain them.” Tex. Att’y. Gen. Op. No. JC-0172, p. 1. Montgomery County provides for a “private dedication” in gated subdivisions whereby the streets and roads are expressly not dedicated to the public.

create the future obligation for continued county maintenance. These non-ROW drainage facilities (such as detention ponds) are not located within the road right-of-way and are therefore located on private property. The non-ROW drainage facilities are required by the County as part of the Subdivision Rules plat approval process and the County's drainage design criteria. The non-ROW drainage facilities are designed for the benefit of the subdivision, the adjoining properties and to facilitate the drainage of the subdivision roads. Oftentimes, the subdivision roads ultimately drain into these non-ROW drainage facilities before the surface water leaves the subdivision. The issue is whether by including costs for non-ROW drainage facilities in the amount of Road Maintenance Bond the County is allowed to expend the Maintenance Bond Proceeds on such non-ROW drainage facilities on private property without (a) acquiring ownership of the non-ROW drainage facilities or (b) creating the obligation for continued county maintenance of the non-ROW drainage facilities.

The issues presented here and upon which the Montgomery County Attorney requests an opinion are important issues to the community and are arising more frequently. Your opinion on this matter will greatly aid Montgomery County.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions or if in need of additional information.

Respectfully,

J D Lambright,  
County Attorney of Montgomery County, Texas

By: 

B. D. Griffin,  
Assistant County Attorney