



# UPDATING YOUR RIGHT OF WAY ORDINANCES— STREET USE, VACATIONS, CLOSURES AND ABANDONMENT

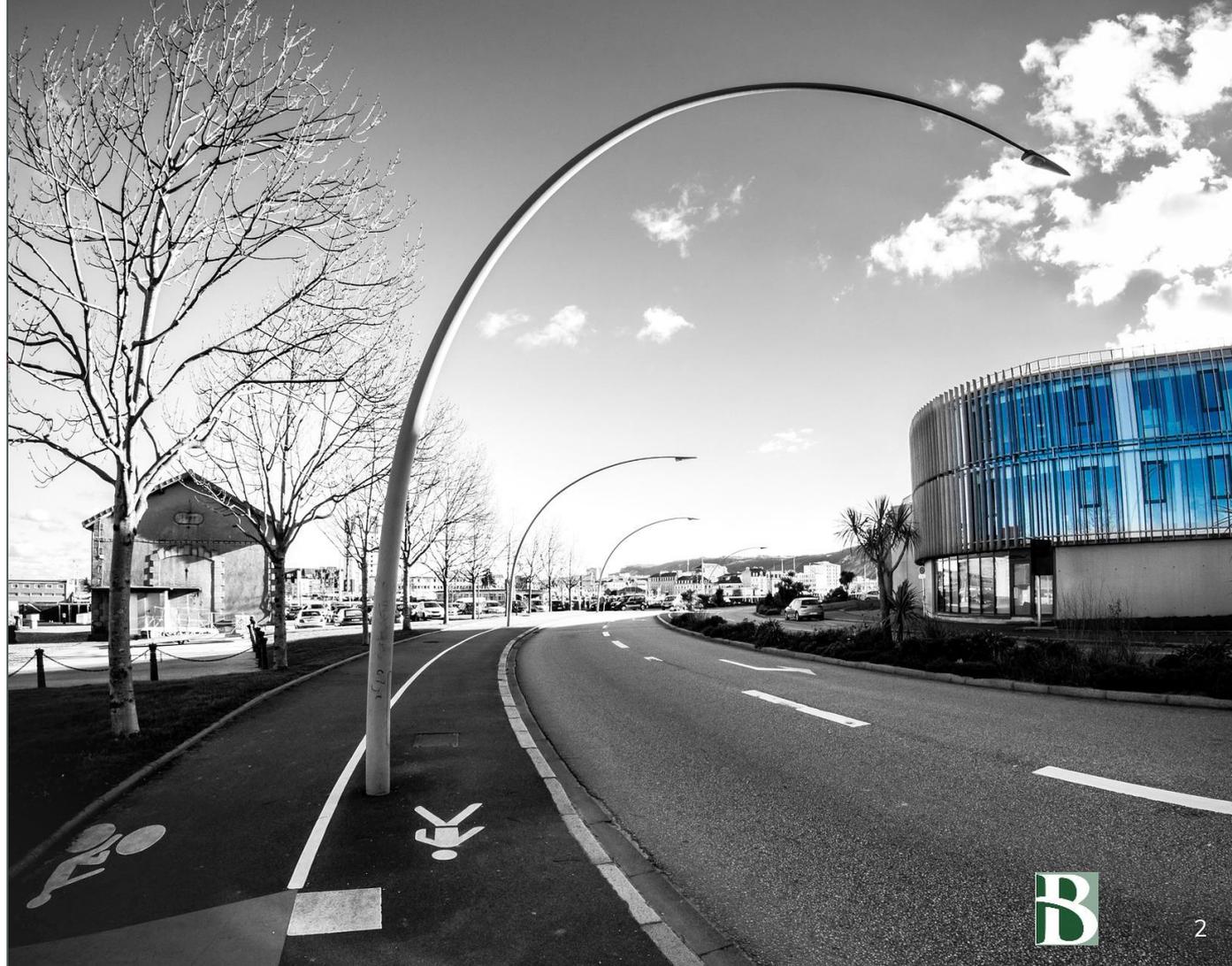
*Presented by Denise V. Cheney  
and Kelli Fuqua*

**B** Bickerstaff  
Heath Delgado Acosta LLP

© DENISE V. CHENEY 2018



# LEGAL RIGHTS REGARDING STREETS



# City Regulatory Authority

## Home Rule City

- a. has exclusive control over and under the public highways, streets, and alleys of the municipality. §311.001(a) Transp. Code
- b. may
  - 1) control, regulate, or remove an encroachment or obstruction on a public street or alley;
  - 2) open or change a public street or alley; or
  - 3) improve a public highway, street, or alley. §311.01(b) Transp. Code



c. may vacate, abandon, or close a street or alley.

## § 311.007 Transp. Code

- 1) vacate – terminates the right of the public to use the road – note, it does not transfer fee title to the property in Texas.
- 2) abandon – not the same as non-user. Abandonment occurs when the use for which the property is dedicated becomes impossible or object of use wholly fails. *Adams v. Rowles*, 228 S.W.2d 849 (Tex. 1950)
- 3) close – discontinuing public's right to use road, with right to re-open it.



# General Law City

- a. has exclusive control over the city's highways, streets, and alleys.
- b. may
  - 1) abate or remove an encroachment or obstruction on a highway, street, or alley;
  - 2) open, change, regulate, or improve a street; or
  - 3) put a drain or sewer in a street
- c. vacate, abandon, or close a street **by ordinance IF** a petition signed by all the owners of real property abutting the street is submitted to the governing body.

§311.008 Transp. Code



# Additional Authority of Type A General Law Cities

- a. prevent an encroachment or obstruction on a sidewalk;
- b. abate an encroachment or obstruction on a bridge, culvert, sidewalk, or crossway;
- c. construct, regulate, or maintain a bridge, culvert, sidewalk, or crossway;



- d. regulate the construction of a bridge, culvert, sewer, sidewalk, or crossway;
- e. require a person to keep weeds, unclean matter, or trash from the street, sidewalk, or gutter in front of the person's premises;
- f. require the owner of land to improve the sidewalk in front of the person's land

§311.003 Transp. Code



# Right to Use Roads For Utilities

- a. Public utility providers, including a City's utility departments, can use public roads and easements for their facilities to the extent provided by statute (e.g. Ch. 181 Utilities Code, Ch. 49 Water Code)
- b. Home rule cities can require most utilities to enter into a franchise agreement and pay franchise fees in order to use public streets and easements. Art. 1175 V.A.C.S.; §311.071 Transp. Code, but see Ch. 283 Loc. Gov't Code for telecommunication providers, and Ch. 284 Loc. Gov't Code for network nodes by wireless service providers, which authorizes use of the public right of way and establishes specific payment requirements.
- c. Ch. 284, "Deployment of Network Nodes in the Public Right-of-Way" went into effect on 9-1-17. It anticipates the adoption by cities of a "public right-of-way management ordinance" to regulate the construction, operation and removal of network nodes, support poles and collocation on poles, including in residential areas and historic districts.

# Right to Use Roads For Utilities

- d. Right to use roads for utilities is subservient to use of roads for transportation. *City of San Antonio v. Bexar Metro. Water Dist.*, 309 S.W.2d 491 (Tex. Civ. App. – San Antonio 1958, writ ref'd).
- e. Texas recognizes common law rule that utilities have to pay for relocation of facilities if road is changed, unless a statute provides otherwise. *City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252 (Tex. 2018).
- f. Franchise agreements usually require utilities to pay for relocation if change in road.

# *What is city's interest in road and how was it created?*

## **a. Fee title**

- 1) voluntary grant
- 2) condemnation
- 3) adverse possession



# What is city's interest in road and how was it created?

## b. Easement

- 1) voluntary grant
- 2) condemnation
- 3) prescription
- 4) dedication by plat
- 5) implied dedication – can be accepted by public use or city's act

c. **If city has fee title, vacation terminates public use rights, but city would have to convey title by deed (e.g. quitclaim)**



# Is consent of abutting property owners required?

General law city – Yes. §311.008 Transp. Code

Home rule city – No. §311.007 Transp. Code; AG Opinion GA-0270 (2004)

But: If property owner's access is "materially and substantially impaired" owner is entitled to compensation for a taking. Impairment may arise from:

- 1) Total permanent restriction of access;
- 2) Total temporary restriction of access;
- 3) Partial restriction of access; or
- 4) Restriction of access caused by an activity that is illegal, unreasonable or unnecessary.

*City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986) and cases cited

Remedy may be lost profits.



# Dedication by plat – special considerations

- a. If a recorded plat dedicates streets to the public, the plat is an offer of dedication, but city is not obligated to accept streets, or pave and maintain them, unless it takes action to accept. *Adams v. Rowles*, supra; *Dykes v. City of Houston*, 406 S.W.2d 176 (Tex. 1966)



# Dedication by plat – special considerations

- b. If a lot is sold by reference to a recorded plat which dedicates streets to public:
  - 1) Seller cannot undedicate the streets without consent of lot owners; *Adams v. Rowles*, supra.; *McLennan County v. Taylor*, 96 S.W.2d 997 (Tex. Civ. App. – Waco 1936, writ dism'd).
  - 2) City can accept streets whenever the need arises – even years after dedication Id.;
  - 3) Buyer has private easement in the streets.; *Dykes*, supra; *Horne v. Ross*, 777 S.W.2d 755 (Tex. App. – San Antonio 1989, no writ).  
This may be true even if plat is not recorded. *Id.*
- c. If city has not accepted street for public maintenance, change in road should be accomplished through plat amendment.



# Requirements for sale of city's interest in road

- a. Normally, city must get appraised value or auction price for the sale of its fee or easement rights in road, unless sale or exchange is with one or more abutting property owners who own the underlying fee. §272.001 (a) and (b) Local Gov't Code
- b. Sale of road is usually exempt from public sale process, but appraised value or auction price is required except as provided by Ch. 253 or §272.001 Local Gov't Code, or other statute (e.g. Ch. 2267 Gov't Code, public private partnerships and §311.008(b)(2) and (c), Tax Code, property within TIRZ)



# Requirements for sale of city's interest in road

- c. The land or interests may be sold to:
  - 1) abutting property owners in the same subdivision if the land has been subdivided; or
  - 2) abutting property owners in proportion to their abutting ownership, and the division between owners must be made in an equitable manner. §272.001(c) Local Gov't Code



# Condemnation – special considerations

- a. A landowner whose property was acquired through condemnation, and his heirs, successors and assigns, have the right to repurchase the condemned property, for the amount paid, if:
  - 1) the public use for which it was acquired was canceled before the property is used;
  - 2) No actual progress is made toward the public use within 10 years after the date of its acquisition; or
  - 3) The property becomes unnecessary for the public use for which it was acquired, or a similar use, within 10 years after its acquisition.

§21.101 Property Code.
- b. City is required to provide notice to landowner or its heirs, successors or assigns of the repurchase right, within 180 days after the date the city determines that the repurchase right exists. *Id.*



A photograph of a city street at night, viewed from a low angle looking down the road. The street has tram tracks in the center. On the left, there are signs for 'LANE' and 'TDC'. On the right, there is a sign for 'FLOWERS'. The scene is dimly lit by streetlights, and the overall image has a green tint. The text 'Processing a Request for Vacation – Checklist and Considerations' is overlaid in white, bold font in the center of the image.

# Processing a Request for Vacation – Checklist and Considerations

# What is the process for vacation?

- a. General law city – petition and ordinance (and deed/quitclaim, if fee title is conveyed)
- b. Home rule city – ordinance and deed/quitclaim, if fee title is conveyed

Some cities use quitclaim deeds even when city only has an easement. This provides a document evidencing the vacation that is easily recordable in the real property records.



# Rights of Abutting Landowners

## a. *Who are they?*

- 1) Get the names and contact information for all abutting owners.
- 2) Get a survey sketch, aerial or other depiction of street or area to be vacated showing abutting properties
- 3) Determine effect of proposed vacation on their properties.
- 4) Will proposed action materially and substantially impair owner's access?



**b. Do they own fee title to the road?**

- 1) If so, how much of the road do they own?
- 2) Presumption that landowners on each side own to the middle of road is OK for most platted subdivisions
- 3) If road was acquired out of acreage tracts, will need documents to determine actual amount acquired from each owner
- 4) Ownership interest will determine pro-rata cost for vacation.

**c. Does the City own the road in fee?**

- 1) If so, what amount of the road was acquired from each landowner?
- 2) Ownership interest will be used to determine pro-rata portion of purchase price, and for describing tract conveyed to each owner.



**d. Do owners have private easement rights in the road?**

- 1) These will not be released by the City's vacation process.
- 2) City will have additional concern regarding a taking. See Dykes, supra. (City could not block dedicated street if it prevented access by owner with private easement.)

**e. Do owners have a right to repurchase condemned property?**

- 1) City must provide required notification
- 2) Purchase price is based on payment for condemned property



# Utilities in the road – Policies and Procedures

## ***What policies and procedures does the city want to use?***

- a. Will city notify the utilities or franchisees of the request?
- b. Will city require the franchisee's consent to the vacation?
- c. Will city require the owner to convey a public utility easement or resolve any relocation issues with the utility as a condition to the vacation?



- d. Does the city have utilities in the road? If the utilities will remain in place, will the city retain an easement or require the landowner to grant one?
- 1) If the City only has a road easement, not clear that it can retain a private or public utility easement.
  - 2) Better practice is to require that landowner grant a utility easement.

# USE OF CITY STREETS AND SIDEWALKS FOR PUBLIC CONVENIENCE AND AMENITIES

Chapter 316,  
Subchapter A,  
Transp. Code



The governing body of a city may permit a person who owns fee title to the streets, or a tenant or person who has permission from the fee title owner, to use the street for:

- a. Trees or decorative landscaping,
- b. an open air sidewalk café with removable tables, chairs and other improvements, contiguous to the restaurant from which the food is served;



- c. an ornamental gate for a neighborhood or subdivision;
- d. a supportive or decorative column or other structural or decorative feature of a building that is:
  - 1) of historical value or architecturally significant, and
  - 2) at least 50 years old when the permit application is made; and
- e. an amenity for the public using the street, such as a transit bus shelter, drinking fountain or bench.

In order to authorize one of these uses, the governing body or authorized official must find that:

- a. the improvement or facility will not be located on, extend onto, or intrude on:
  - 1) the roadway; or
  - 2) a part of the sidewalk needed for pedestrian use
- b. the improvement or facility will not create a hazardous condition or obstruct vehicular or pedestrian travel; and

c. the design and location of the improvement or facility includes all reasonable planning to minimize potential injury or interference to the public in the use of the municipal street. §316.003 Transp. Code

“Roadway” is the portion of the street that is improved, designed or ordinarily used for vehicular travel, but not the curb, berm or shoulder. §316.001(2) Transp. Code



**A City may establish a permit program by ordinance, which must include:**

- a. provisions to protect the public, utility companies and any person who has the right to use the streets;
- b. provisions that require:
  - 1. clearance between the facility and utility lines established by a nationally recognized building code;
  - 2. the permit holder to provide security to cover the costs for the city or a public utility to remove the permit holder's facility;
  - 3. the permit holder to pay the costs to relocate the city or public utility's facility in which the permit holder's facility is installed.



- c. a provision authorizing the city or a public utility to remove without liability any part of the permit holder's facility if there is a lawful need for the site or access to the site. §316.004(a) and (b) Transp. Code

I suggest that the ordinance require that the use comply with ADA requirements, either those that would be applicable to the city (Title II) or Public Accommodations (Title III).



## The governing body may include in the ordinance:

- a. construction, maintenance, operation and inspection requirements;
- b. public liability insurance requirements;
- c. requirement that the utility holder pay for traffic and safety studies;
- d. provisions for conducting a public hearing on the issuance, renewal or revocation of a permit;
- e. a requirement for indemnity agreements by abutting fee title landowners in the form of covenants that will run with the abutting land; or
- f. a provision that authorizes the governing body, at its discretion to terminate the permit without notice.

§316.004 Transp. Code



A city can establish or maintain a facility authorized by §316.002 in the public right of way without a permit, regardless of whether the city has a permitting program. §316.007 Transp. Code

The following actions of a city are (i) public and governmental actions and functions, (ii) exercised for a public purpose, and (iii) are matters of public necessity:

- 1) granting a permit as described above (Subch. A);
- 2) permitting the use of a city street for a purpose authorized by §316.002 under a permit authorized by Subch. A; and
- 3) establishing or maintaining, with municipal money, material, equipment, or personnel, trees or landscaping or a public amenity, such as benches, transit bus shelters, drinking fountains.

§316.008 Transp. Code



# USE OF STREETS AND SIDEWALKS FOR PRIVATE PURPOSE

Chapter 316,  
Subchapter B,  
Transp. Code



1. A city may permit the use of a portion of a city street or sidewalk for a private purpose, if the use does not:
  - a. interfere with the public use of the street or sidewalk; or
  - b. create a dangerous condition on the street or sidewalk.
2. The city may prescribe the consideration and terms for the use.

### §316.021 Transp. Code

3. Note that the provisions of §316.008 described above, with regard to permitting being a public and governmental function, do not apply to the city's acts in permitting the use of a street for a private purpose.



# Other Resources

1. “Vacating Streets and Public Access Easements” by Reid Wilson (Title Insurance Perspective)
2. “How to Close a Street Called Desire” by Susan C. Rocha and Mindy Ward (City Perspective)

# ***Thank you for your time***

If you have any questions about this topic, please don't hesitate to contact us at:

- [www.bickerstaff.com](http://www.bickerstaff.com)
- [dcheney@bickerstaff.com](mailto:dcheney@bickerstaff.com)
- [kfuqua@bickerstaff.com](mailto:kfuqua@bickerstaff.com)

