

THE American Surveyor

A FOOT IN THE PAST... AN EYE TO THE FUTURE

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How wide is the right of way *on a county road?*

When I was newly elected as the County Surveyor, the road department seemed to get a kick out of frequently referring calls to me concerning the right of way width of the county's roads. It was impossible to provide on the spot answers, since many county roads in Mississippi often began life as a wagon trail. For instance, the Natchez Trace, once just an Indian foot path, is now a major national park. Therefore, my standard response to these calls was a question. "What does the deed say?"

Counties have a variety of interests in the roads they maintain, from "permissive use" all the way to "fee simple" ownership. Being on the official county road list (a relatively recent recognition), does not bestow a certain right of way width, only that it is maintained by the county and available for improvement funding. Often a county will set a minimum standard width and some have even made a declaration that "all their roads" have a set right of way. (This varies, but is often 50 or 60 feet.) Such a declaration, or even a set of State Aid road plans does not convey

any rights to the county. It only provides a guide for roads built from that date forward, and does not apply to existing roads. The key lies with the deed, and if the deed says "to the road," in Mississippi, that means the center of the road.

Recently, a landowner was aware enough to read her deed when the County School System decided to widen a county road to accommodate a new school. Mrs. Florence Jermyn, at the time an employee of the School System, was shocked when a construction company began taking out trees and widening the road access to a new school beyond the right of way previously conveyed by Mrs. Jermyn's mother. Mrs. Jermyn notified the School System and pointed out the problem. Eventually, the School System made an offer for the half acre involved, at the appraised value of slightly under \$1 per square foot. Mrs. Jermyn declined, considering the offer too low, as compared to her earlier sale of a small easement to a utility and the use of comparables some distance from the property (one was even in another county.)

The County Board of Supervisors, through its attorney, notified the School District that the "...County will not accept the expanded portion of...Road as it is not a legal road since no

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Church Road, Madison County, Mississippi.
Photo by Richard Tolbert



Photo 2, provided by Mrs. Jermyn

right-of-ways were procured by the district prior to construction.”

Time passed. Mrs. Jermyn, upon retiring, and receiving no satisfaction of the matter, decided to take action. She began parking on her property and protesting (See Photo 2). The fact that her property was now a paved section of the new roadway did not deter her. After months, and on a regular basis, Mrs. Jermyn continued to be a part of the landscape. Support increased for her plight, with every day of her cheerful waving at passing cars and buses, so that even some students, once informed of the injustice, participated in the protest.

Several days they jumped out of their cars and helped her “wave.” They said, “We did our research, we know the issue, and we want to protest because this isn’t right.” (See Photo 3)

Eventually, the news media became aware of the situation and newspaper articles and television interviews followed.

Mrs. Jermyn and the School Board have resolved the problem through mediation, and being bound by the agreement she cannot disclose the amount of the final payment, but she did recover her legal fees and seemed happy the matter would soon be behind her. The following week, she flew to Romania to be a Peace Corps volunteer teaching English. How proud we should be of this landowner, who stood her ground courageously in the face of her employer: I personally, was able to congratulate her.

But the big question is “How did it get this far?” How could hundreds of thousands of taxpayer dollars be spent, with bulldozers knocking down Mrs. Jermyn’s timber and clearing her land, without having the legal right to do so?



Photo 3, provided by Mrs. Jermyn

Obviously, someone made a mistake. The purpose of my writing this is to keep another from being made. It is my job as a surveyor to help determine the property interests of my clients, be it the landowner, or a County, City, or State authority.

So how wide is the right of way on a county road? Historically, landowners were pleased when the county began maintenance of what might have been a dirt road, then graveled it, and maybe even paved it. This usually improved their access and increased the value of their property. Seldom in the past did landowners complain, and in most instances they encouraged such activity, or at the least, remained silent. Thus the road, and the public use of it, fell under what might be called “permissive use” or “permissive easement”. Such use, since it is often not outlined in a written document, will not surface in a title search at the court house, but should be obvious upon visiting the property.

We often hear the phrase “prescriptive easement” in describing the county’s right of way. More often than not, what is a “permissive use” is misinterpreted as a “prescriptive easement.” A prescriptive easement, in Mississippi, is the result of an adverse possession action by an entity or individual against a landowner. An adverse possession action has to be proven “hostile” (see reference #1), so if the landowner has long permitted the use of his property by the public, the “hostility” is a difficult circumstance to

prove. To quote a recent case (*Evanna Plantation, Inc., v. Thomas*, 999 So. 2d 442 (Miss. Ct. App. 2009)): “A party claiming a prescriptive easement must satisfy the same burden as that required for proving adverse possession. Among other factors, the claiming party’s use of the property must be hostile and exclusive...The Court restated the rather obvious principle that permissive use cannot constitute hostility.”

Lacking a judgment, a prescriptive easement cannot exist.

What has been determined to be the width required to maintain the existing roadbed is the county’s “permissive use area,” and this has generally been determined to be from “back of ditch to back of ditch” if that use has existed for over ten years, the length of time required for adverse possession. The county cannot widen the roadbed without trespassing on the landowner, though in real life just about every load of gravel and motor grader run has the potential to do so.

Sometimes a surveyor will write a deed “to the right of way” or to the “apparent right of way,” where none previously existed, and create a new property line, usually at the county’s minimum right of way declaration mentioned above. This defines a new property line, but it has not eliminated the fee owner’s interest. The original landowner still owns the property, subject to the county’s permissive use in the road, though now maybe better defined with a set width. He may have



Motor grader working a county road. Timber on the slope belongs to the adjacent landowners if the county has no right-of-way.

also signaled his intent for the county to use this strip of land, depending on the language in the conveyance, at least along the frontage of the conveyance.

He still owns the mineral rights and in certain parts of the state, oil and gas royalties can be very profitable; and still has right to convey to (or refuse) utility companies the right to use the county's permissive use area, above and below ground. He has only given the county the right to maintain a road, and unless otherwise specified, that is all. (The surveyor must clearly explain this to the landowner, else he may become liable for rendering a strip of the land unusable between the new property line and the original property line.) If the road is abandoned it would revert back to the underlying fee owner and not the adjoining owners.

The county may grant a "permit" for the placement of the utilities on its interests, but that does not relieve the utility from gaining permission from the underlying "fee" landowner. They often just build their line and hope they don't get caught! Have you ever seen a new fiber optic line dug up and removed? I have!

What about the tax maps? They scale a certain right of way width, why can't I use that? Roads, sandbars and

other properties that are deemed in the public use or non-usable for productive purposes are not taxed. When the tax maps were prepared it was convenient for the draftsmen to have a set road width, thus many roads have a uniform width, irrelevant of their true dimensions.

What about State Aid and other county road plans? Can't we depend on them? No. They show what was determined to be the required right of way needed to build and maintain the road. Their mere existence does not mean that the right of way was ever acquired. The road could have been improved anyway, the deeds might not have been signed, or lost, or never recorded, or the road may not have been built according to plan. In the county where I live, great effort was spent surveying, platting, appraising and buying right of way for a road. However, when the county decided not to bid the project, improving it themselves using the old alignment, rather than that shown on the plans, rendering a fine looking set of plans irrelevant as the present centerline is far from the "official" planned one.

In Photo 1, note that the large tree, which is 6 feet from the white line, rests on the back of the ditch bank. This is a very heavily traveled county road that

my family uses daily and it runs very close to several homes. These trees shade several front yards and are dearly loved by their owners. It is a fine example of this discussion. Considering the damage that might occur should a vehicle leave the road at a dangerous speed, it is obvious that improvements should be made.

So what should you as a surveyor do?

Read the deed. If your client's property goes "to the road," survey to the centerline (at the time of the creation of the deed), determine that part of the property being used, by whom, and for what purpose, and denote it on your plat. A surveyor can only report the facts as he finds them. Assuming that a right of way or prescriptive easement exists without proper documentation, opens you up to liability. Explain the circumstances to your client and ask for his direction and of course determine the area of the county's encroachment.

The facts involved in individual properties vary greatly, but above all, when dealing with road easements and right of ways, or the lack thereof, be sure to ask, "What does the deed say?"

Richard Tolbert graduated from Mississippi State University with a B.S. in Surveying in 1981. He has since served in a range of positions, including Hinds County Surveyor (MS), State Surveyor for the Mississippi Department of Transportation and was recently re-elected to serve a second term as Madison County Surveyor (MS).

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