S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 03-088

Private Roads

QUESTIONS

1. Whether any governmental entity has authority over private roads, such as those non-dedicated roads which exist in some subdivisions, and if so, to what extent.

2. Whether any governmental entity has authority to post speed limits and/or traffic control devices on such private roads.

3. Whether the owners of such non-dedicated roads have authority to post speed limits and/or traffic control devices on those roads.

4. Whether the posting of speed limits and/or traffic control devices by private owners of non-dedicated roads could trigger governmental tort liability for injuries or damage that occur on the private roads when those roads appear to be public.

5. When both the owner and one or more governmental entities have the authority to post speed limits and traffic control devices on such private roads, whose authority is superior?

6. Whether Title 55, Section 8 of the Tennessee Code Annotated applies to private roads.

7. Whether any governmental entity has the authority to enforce speed limits and traffic controls once posted on such private roads.

8. Whether the chief law enforcement officer of a county has authority to approve or reject proposed speed limits or traffic control devices on private roads.

9. What are the existing legal requirements and standards for equipment and training to operate equipment to measure the speed of moving vehicles?

10. Whether individuals licensed under Title 62 of the Tennessee Code Annotated as security officers have authority to enforce the motor vehicle restrictions under Tennessee Code Annotated, Title 55, Section 8 and others.

11. Whether House Bill 1594 would require owners of private roads to follow the steps specified in the bill exclusively before posting any traffic control signs on private property, or only if the owners desire to enforce traffic regulations under this section.

12. Whether a Title 62 security officer would be acting under color of state law for purposes of applicable civil rights laws if such an officer were authorized by legislation such as House Bill 1594 to enforce motor vehicle law and regulations.

OPINIONS

1. Generally, governmental entities within the state do not exercise ongoing control over private, non-dedicated roads and are prohibited from utilizing public funds and resources to build and maintain such roads. However, under certain circumstances, chancery or circuit courts, regional or municipal planning commissions and the legislative bodies of counties and municipalities may exercise some control over the establishment of private roads. In addition, under the Emergency Communications District Law, legislative bodies of counties for unincorporated areas and municipalities within their incorporated boundaries have exclusive control over the naming of both public and private streets and the assignment of property numbers in order to facilitate the quick and efficient operation of the E911 emergency system established in this state.

2. No. Governmental entities do not have authority to post speed limits and/or traffic control devices on private, non-dedicated roads.

3. Yes, private property owners may place speed limits and traffic control devices on their private properties as long as they are not in view of any highway. Private property owners are prohibited from placing any unauthorized sign, signal, marking or device which purports to be or is an imitation or resembles an official traffic control device or railroad sign or signal or attempts to direct the movement of traffic within view of any highway. However, private property owners may erect signs giving useful directional information and of a type that cannot be mistaken for official signs on private property adjacent to the highway.

4. No. The posting of speed limits and/or traffic control devices by private owners of non-dedicated roads would not trigger liability under the Governmental Tort Liability Act for injuries or damage that occur on said private roads unless the roads have become public roads by implied dedication for public use or where an adverse user has used the road as a public right-of-way for 20 years continuously thus creating a prescriptive easement.

5. Governmental entities do not have authority to post speed limits and traffic control devices on private roads. Therefore, there is no issue as to whose authority is superior.

6. No. Title 55, Section 8 does not apply to the operation of vehicles on private, non-dedicated roads.

7. No. Law enforcement officers do not have authority to enforce speed limits and traffic controls posted by private property owners on private, non-dedicated roads.

8. No. There is no statute specifically authorizing the chief of police or the sheriff to approve or reject proposed speed limits or traffic control devices to be posted on private, non-dedicated roads.

9. There are no statutorily mandated legal requirements and standards for equipment or the training required for the operation of equipment used to measure speed of moving vehicles by private individuals on private property.

10. No. Title 62 security officers do not have the authority to enforce the motor vehicle restrictions under Tennessee Code Annotated Title 55, Section 8 because the statutory rules of the road only apply to the operation of vehicles on public roads and security guards are only empowered to control, regulate or direct the flow or movements of traffic on private property.

11. No. House Bill 1594 would not require owners of private roads to follow the steps outlined in the bill exclusively before posting any traffic control signs on such private, non-dedicated roads.

12. Yes. Title 62 security officers would be acting under color of state law for purposes of applicable civil rights law if such officers were authorized by legislation such as proposed House Bill 1594 to enforce motor vehicle laws and regulations by issuing traffic citations.

ANALYSIS

1. Generally, governmental entities within this state do not exercise ongoing control over private, non-dedicated roads and are specifically prohibited from using public funds or resources for the building and maintenance of such roads. However, courts, regional or municipal planning commissions or the legislative bodies of counties and municipalities may exercise some control over the establishment and naming of private, non-dedicated roads.

The Tennessee Department of Transportation and the counties and municipalities of this state have jurisdiction over and are authorized to utilize public funds for the maintenance of public roads within the state. *See* Tenn. Code Ann. §§ 54-1-105(b)(1981); 54-1-126(a)(1991); 54-5-101(1981); 54-5-140(a)(1988); 54-5-201(a)(1987); 54-7-109(1981); 54-7-202(a)(1991); 6-2-201(15)-(17)(1998); 13-3-406(2002). This office has previously opined that public funds provided by taxation may only be used for public purposes and that public equipment and other property paid for, and public officers and employees compensated by, public funds cannot properly be donated or applied to a private use. Tenn. Op. Atty. Gen. No. 84-166 (May 17, 1984). Under the County Uniform Highway Act, the chief administrative officer of the county is specifically prohibited from authorizing or knowingly permitting the use of trucks, road equipment, rock, crushed stone or any other road material for private uses. Tenn. Code Ann. § 54-7-202(a)(1999). As discussed in Tenn.

Op. Atty. Gen. No. 84-166, there are also a number of statutory provisions in Title 6 (Cities and Towns) of the Tennessee Code Annotated bearing out the lack of authority of cities or their officials to use city equipment and build roads or bridges of otherwise work on private property. *See*, Tenn. Code Ann.§§ 6-19-101(1995); 6-20-220(1989) and 6-33-101(1989); Tenn. Op. Atty. Gen. No. 84-166 (May 17, 1984).

In Tennessee, circuit and chancery courts are authorized to create private roads, and later, to authorize the widening of those roads for the purpose of extending utility lines, in instances where an individual's land is surrounded or enclosed and the owners of the surrounding property refuse to allow the landlocked person to have a private road across their properties. Tenn. Code Ann. §§ 54-14-101-102 (2000). Under Tenn. Code Ann. § 54-14-101, the trial court may appoint a jury of view to lay off and mark a private road or an easement of necessity not exceeding twenty-five (25) feet wide across private property and assess damages to be paid to the owners of the property crossed by the private road. Tenn. Code Ann. § 54-14-101(2000). The court will then grant an order to the petitioner to open the road and keep it in repair. *Id.* Tenn. Code Ann. § 54-14-101(2) authorizes the court to grant the Petitioner an additional fifteen feet of land at a later date for the purpose of extending utility lines, including, but not limited to, electrical, natural gas, water, sewage, telephone or cable television. Tenn. Code Ann. § 54-14-101(2)(2000).

Regional or municipal planning commissions have the authority to adopt regulations governing the subdivision of land which could affect private roads within a proposed subdivision. Tenn. Code Ann. §§ 13-3-101-105 outline the authority for the creation of regional planning commissions, and Tenn. Code Ann. §§ 13-3-401-411 establish their statutory parameters. All subdivision plats must be approved by the regional planning commission once a regional plan, which includes at least a major road plan, has been adopted by the regional planning commission and has been filed in the county register's office. Tenn. Code Ann. § 13-3-402(1989). Subdivision is defined statutorily as the division of any tract or parcel of land into two (2) or more parcels. Tenn. Code Ann. § 13-3-401(A)(B)(1998).

Regional planning commissions are empowered to regulate subdivision development within its jurisdiction for several reasons: (1) to provide for the harmonious development of the region and its environs; (2) for the coordination of roads within the subdivided land with other existing or planned roads or with the state or regional plan or the plans of municipalities in or near the region; (3) for adequate open spaces for traffic, light, air and recreation; (4) for the conservation of or production of adequate transportation, water, drainage and sanitary facilities; (5) for the avoidance of population congestion; and (6) for the avoidance of such scattered or premature subdivision of land as would involve danger or injury to health, safety or prosperity by reason of the lack of water supply, drainage, transportation or other public services or would necessitate an excessive expenditure of public funds for the supply of such services. Tenn. Code Ann. § 13-3-403(a)(1998).

In pursuit of these objectives, the regional planning commission may institute subdivision regulations which may specify the extent to which and the manner in which proposed roads should be graded and improved, and water, sewer or other utility mains, piping, connections or other

facilities shall be installed, as a condition precedent for approval of the plat. Tenn. Code Ann. § 13-3-403(b)(1998).

It is important to note that the approval of a plat by the regional planning commission does not constitute or effect an acceptance by any county or by the public of the dedication of any road or other ground shown upon the plat. Tenn. Code Ann. § 13-3-405. The Tennessee Supreme Court has held that this exception carved out of the act providing that plat approval is not acceptance of roads therein clearly shows the legislative intent of requiring specific and separate acceptance of roads, over and above the steps required to get plat approval. *Foley v. Hamilton,* 659 S.W.2d 356, 360 (1983). Accordingly, subdivision regulations adopted by the regional planning commission may affect the way proposed private, non-dedicated roads within the subdivision should be graded and improved.

Municipal planning commissions have powers similar to those of the regional planning commissions. Under Tenn. Code Ann. § 13-4-101(a), the chief legislative body of any municipality is empowered to create and establish a municipal planning commission. Tenn. Code Ann. § 13-4-101(a)(2002). Once the municipal planning commission has adopted a master plan which includes at least a major street plan, all subdivision plats dividing a tract into more than two lots must be approved by the municipal planning commission before a county register can file or record the plat. Tenn. Code Ann. §13-4-302(a), (c)(1)(2002). Municipal planning commissions are also authorized to adopt regulations governing the subdivision of land which may include requirements of the extent to which and the manner in which streets shall be graded and improved as a condition precedent to approval of the plat. Tenn. Code Ann. § 13-4-303(2002). The approval of a plat by the municipal planning commission shall not be deemed to constitute or effect an acceptance by the municipality, county or public of the dedication of any street or other ground shown upon the plat. Tenn. Code Ann. § 13-4-305(2002). As a result, subdivision regulations adopted by the municipal planning commission may apply to private, non-dedicated roads within the proposed subdivision.

County and municipal legislative bodies have the power to override decisions relating to the approval and acceptance of a road made by the regional or municipal planning commissions respectively. *See* Tenn. Code Ann. § 13-3-406(2002); Tenn. Code Ann. § 13-4-307(2002).

This opinion does not deal with any specific county or region. Tenn. Code Ann. § 13-3-409 provides that this section does not repeal or impair any provision of any private act relating to the approval or regulation by the municipal authorities of the cities specified of the subdivision of land or the filing of plans, plots or replots for land lying within the boundaries of any city's authority specified in any private act in place in 1935. Tenn. Code Ann. § 13-3-409(2002). Similarly, Tenn. Code Ann. § 13-4-105 provides that nothing in this chapter shall be deemed to modify or supplant any provision of any special or private statute providing for a municipal planning commission and all provisions of any such special or private statutes remain in full effect. Tenn. Code Ann. § 13-4-105(2002). Accordingly, provisions of special or private statutes or acts may apply depending on the location of the property.

Additionally, in an effort to facilitate the quick and efficient operation of the E911 emergency system, the General Assembly has enacted the Emergency Communication District Law, which gives legislative bodies of counties in unincorporated areas, and municipalities within their incorporated boundaries, exclusive authority to name public and private roads and streets, including roads and streets within residential developments, and to assign property numbers relating thereto unless expressly provided otherwise by law. Tenn. Code Ann. §§ 7-86-102(a)(1998); 7-86-127(a)(1997). If the legislative body has created an emergency communications district, the legislative body may delegate the authority to name public or private roads and streets to that district. Tenn. Code Ann. § 7-86-127(b)(1997).

2. The Department of Transportation and the counties and municipalities in Tennessee are only authorized to post speed limits and traffic control devices on public streets within their jurisdiction, not on private, non-dedicated roads. The Department of Transportation has the authority to set speed limits on access-controlled roadways designated as being on the state system of highways and on roadways designated as being on the state system of interstate highways and establish such special speed limits at school entrances and exits to and from controlled access highways on the system of state highways. Tenn. Code Ann. §§ 55-8-152(C); 55-8-152(h)(2002). Counties and municipalities of this state are only authorized to set speed limits on public roads within their jurisdiction that are not a part of the interstate or national defense highway system nor any controlled access highway. Tenn. Code Ann. § 55-8-152(f)(1)(C)(2002).

However, local governing bodies may establish traffic laws pertaining to privately owned streets that have been dedicated as rights-of-way for the public under very limited circumstances. Under Title 55, there is a clear distinction between private streets and private roads. Tenn. Code Ann. §§ 55-8-101(44) and (62)(2002). Streets are open to the public for purposes of vehicular travel while private roads are not. Tenn. Code Ann. § 55-8-101(44) defines a "private road or driveway" as every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons. Tenn. Code Ann. § 55-8-101(44)(2002). Whereas a "street" is defined as the entire width between boundary lines of every way when any part thereof is open to use of the public for purposes of vehicular traffic. Tenn. Code Ann. § 55-8-101(62)(2002).

Tenn. Code Ann. § 55-10-317 authorizes the local governing body to establish traffic laws for privately owned streets that are dedicated as rights-of-way for traffic and are located within a residential development having a combination of single family dwellings and multi-family dwellings only if a majority of the residents in that development have submitted a written petition to the appropriate local governing body requesting the enforcement of traffic laws on such private streets. Tenn. Code Ann. § 55-10-317(1995). If the local governing body approves the petition, then the governing body shall establish the traffic laws in such development in the same manner as it does for public streets within its jurisdiction. *Id.* There is no statute authorizing local governing bodies to establish traffic laws for private roads.

The Department of Transportation as well as the counties and municipalities of this state can

only erect official traffic control devices on public roads, over which they have jurisdiction. Pursuant to Tenn. Code Ann § 55-8-101(35) "official traffic control devices" are all signs, markings and devices placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning or guarding traffic. Tenn. Code Ann. § 55-8-101(35)(2002). The installation and maintenance of traffic control devices on private, non-dedicated roads would require the use of governmental employees, equipment and material for private purposes. As discussed under Number 1, governmental entities are prohibited from using public funds provided for taxation for private purposes. Consistent with this principle, it is the opinion of this office that the use of public funds or any other resources, including personnel and equipment, for the installation and maintenance of speed limit signs and other traffic control devices on private, non-dedicated roads would be a misapplication of public funds and resources.

3. Tennessee statutes do not specifically prohibit private property owners from posting speed limits and traffic control devices on their private property as long as those signs and devices cannot be viewed from any public right-of-way. Private property owners are prohibited from posting speed limits and traffic control devices on their private property in view of any highway. A highway is the entire width between the boundary lines of every way when any part thereto is open to the use of the public for purposes of vehicular travel. Tenn. Code Ann. § 55-8-101(22)(2002).

Tenn. Code Ann. § 55-8-113(f) makes it a Class C misdemeanor for anyone to:

> place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be an imitation of or resembles an official traffic control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official control device or any railroad sign or signal.

Tenn. Code Ann. § 55-8-113(a) & (f)(1989). Every prohibited sign, signal or marking is designated as a public nuisance and the authority having jurisdiction over the highway is empowered to remove the same or cause it to be removed without notice. Tenn. Code Ann. § 55-8-113(f)(1989).

Nevertheless, this statute permits private property owners to erect signs giving useful directional information and of a type that cannot be mistaken for official signs on private property adjacent to highways. Tenn. Code Ann. § 55-8-113(d).

4. Generally, the Governmental Tort Liability Act only applies to the actions and omissions of governmental entities, public officials or governmental employees, not private individuals. Accordingly, unless a private road has become a public road by implied dedication or adverse possession, the governmental tort liability act does not apply.

Under Tennessee law, private property owners maintain control over and are responsible for

the maintenance of private, non-dedicated roads. Pursuant to Tenn. Code Ann. 55-8-101(44), a private road is every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons. Tenn. Code Ann. § 55-8-101(44)(2002). A private road belongs to the owners of the lands benefitted by the road and the easement or right-of-way continues for as long as the road is used and maintained by the landowners. Tenn. Code Ann § 54-14-117(2002). Conversely, a public road has generally been defined to be a way open to all people, without distinction, for passage and repassage at their pleasure. *Cole v. Dych,* 535 S.W.2d 315, 318 (Tenn. 1976)(citing *Sumner County v. Interurban Transp. Co.*, 141 Tenn. 493, 213 S.W. 412 (Tenn. 1918)). As discussed above governmental entities are only authorized to lay out, maintain and repair public roads within their jurisdiction.

A public road may be created by: (1) an act of the public authority; (2) express dedication by the owner; (3) implied dedication by use of the public and acceptance by them with the intention of the owner that the use become public; or (4) adverse use for a period of 20 years continuously creating a prescriptive right. *Standard Life Ins. Co. v. Hughes,* 203 Tenn. 636, 315 S.W. 239, 242 (Tenn. 1958). For the Governmental Tort Liability Act to come into play on a private, non-dedicated road, there would have to be sufficient factual evidence to support a finding that the private road had been converted to a public road by implied dedication or by creation of a prescriptive right by an adverse user.

Dedication or the appropriation or gift by the owner of land, or an easement therein, for the use of the public, may be express, where the landowner formally declared dedication or by implication arising by the operation of law from the conduct of the owner and the facts and circumstances of the case. *McKinney v. Duncan,* 121 Tenn. 265, 118 S.W. 683, 684 (Tenn. 1908). To establish dedication by implication there must be proof of facts from which it positively and unequivocally appears that the owner intended to permanently part with his property and vest it in the public and that there can be no other reasonable explanation for his conduct. *Id.* The controlling criterion for determining whether private property has been impliedly dedicated is the intention of the landowner to dedicate. *Cole v. Dych*, 535 S.W.2d 315, 319 (Tenn. 1976).

Some of the factors Tennessee courts have taken into consideration in evaluating the landowner's intention are: (1) the landowner opens a road to public travel, *Johnson City v. Wolfe*, 103 Tenn. 277, 52 S.W. 991 (1899); (2) acquiescence in the use of the road as a public road, *Nicely v. Nicely,* 33 Tenn. App. 589, 232 S.W.2d 421(1949); (3) long, continued and adverse use by the public without objection from the owner, *McCord v. Hays,* 202 Tenn. 46, 302 S.W.2d 331,334-335 (1957); (4) the roadway is repaired and maintained by the public, *Burkitt v. Battle*, 59 S.W. 429 (Tenn. Ct. App. 1900). This office has previously opined that once the intention to dedicate has been proven there must also be acceptance of the road by the public. Tenn. Op. Atty. Gen. No. 80-4 (January 1980).

Under Tennessee law, the elements required to create a prescriptive easement are as follows: the use and enjoyment of the property must be adverse, under a claim of right, continuous, uninterrupted, open, visible, exclusive, with the knowledge and acquiescence of the owner of the

servient tenement and must continue for the full prescriptive period. *Sanders v. Mansfield*, No. 01-A-01-9705-CH00222, 1998 WL 57532 at *3 (Tenn. Ct. App. February 13, 1998)(citing *Peaver v. Hunt*, 924 S.W.2d 114, 116(Tenn. App. 1996). Twenty years of adverse use is the prescriptive period required to establish a right-of-way in either the public or in private persons. *Id.* (Citing *German v. Graham*, 497 S.W.2d 245 (Tenn. App. 1972); *Town of Benton v. People's Bank*, 904 S.W.2d 598 (Tenn. App. 1995).

Tenn. Code Ann. § 29-20-203 removes immunity from suit of a governmental entity for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. Tenn. Code Ann. § 29-20-203 (1973). Liability of a governmental entity under Tenn. Code Ann. § 29-20-203 may be predicated on street signs or traffic control devices that cause or contribute to the defective, unsafe or dangerous condition. *Burgess v. Harley*, 934 S.W. 2d 58, 63 (Tenn. Ct. App. 1996).

Under Tennessee's Governmental Tort Liability Act, a governmental entity is:

> Any political subdivision of the State of Tennessee including, but not limited to, any municipality, metropolitan government, county, utility district, school district, non-profit volunteer fire departments receiving funds appropriated by a county legislative body or a legislative body of a municipality, human resource agency, public building authority, and development district created and existing pursuant to the Constitution and laws of Tennessee or any instrumentality of government created by any one (1) or more of the herein named local governmental entities or by act of the General Assembly.

Tenn. Code Ann. § 29-20-102(3)(1998).

Suits brought pursuant to Tenn. Code Ann. § 29-20-203(a) must have three essential ingredients: (1) the local government must own and control the location or instrumentality alleged to have caused the injury; (2) the location or instrumentality must be defective, unsafe or dangerous; and (3) the local government must have constructive and/or actual notice of the defective, unsafe, or dangerous condition. *Burgess v. Harley*, 934 S.W.2d 58, 63 (Tenn. Ct. App. 1996). Accordingly, it is the opinion of this office that, unless a party can establish that a public road has been created by either implied dedication or establishment of a prescriptive right or easement or that a local government entity owned and controlled the location or instrumentality alleged to have caused the injury, the Governmental Tort Liability Act would not apply.

A private citizen or security guard/officer does not fall within the ambit of the Governmental Tort Liability Act. Tenn. Code Ann. § 29-20-205 removes immunity from suit of injury proximately caused by the negligent act or omission of any governmental employee within the scope of his employment except in certain enumerated circumstances. Tenn. Code Ann. § 29-20-205(1999).

Under the general provisions of the Governmental Tort Liability Act employee means and

includes:

> any official whether elected or appointed, officer, employee or servant or any member of any board, agency or commission (whether compensated or not), or any officer, employee or servant thereof, of a governmental entity, including the sheriff and the sheriff's employees and further including regular members of voluntary or auxiliary firefighting, police or emergency assistance organizations.

Tenn. Code Ann. § 29-20-102 (1998).

By definition, a security guard/officer is an individual employed by a contract security company or a proprietary security organization whose primary duty is to perform any function of a security or patrol service. Tenn. Code Ann. § 62-35-102(15)(1997). This office has previously opined that private security officers who are working for, under the supervision of and paid by a contract security company are independent contractors, not employees of the local, state or federal government, even when they are contracted by a governmental entity to provide security services. *See* Op. Tenn. Atty. Gen. 03-022 (February 25, 2003). Therefore, it is the opinion of this office that negligent actions or omissions by private security guards and other private citizens would not trigger liability under the Governmental Tort Liability Act.

5. As discussed under Number 2, governmental entities are only authorized to post speed limits and traffic control devices on roads that are within their jurisdiction. Therefore, there is no issue as to whose authority is superior when it comes to the posting of speed limits and traffic controls on private, non-dedicated roads that do not fall within the jurisdiction of a governmental entity.

6. Tennessee Code Annotated Title 55 § 8 does not apply to the operation of vehicles on private, non-dedicated roads. Tenn. Code Ann. § 55-8-102(a) provides that the provisions of Chapters 8, "Operation of Vehicles-Rules of the Road" refer to the operation of vehicles on highways, except where a different place is specifically referred to in a given section. Tenn. Code Ann. § 55-8-102 (a)(1988).

According to Tenn. Code Ann. § 55-8-101 (22), a highway is the entire width between the boundary lines of every way when any part thereto is open to the public for purposes of vehicular traffic. Tenn. Code Ann. § 55-8-101 (22) (2002). By contrast, a private road is defined as every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not other persons. Tenn. Code Ann. § 55-8-101(44)(2002).

7. Law enforcement personnel are not authorized to enforce traffic regulations and traffic control devices created and posted by private landowners on private, non-dedicated roads. However, law enforcement officers have limited powers to enforce traffic laws established by an appropriate local governing body on privately owned streets in residential areas that have been

dedicated as rights-of-way for traffic where a majority of the residents in the development submitted a written petition to the appropriate local governing body requesting the enforcement of traffic laws on the private street.

According to Tenn. Code Ann. § 55-5-101(49) right-of-way means the privilege of the immediate use of property. Tenn. Code Ann. § 55-8-101(49)(2002). As discussed under Number 2, private streets are open to the general public for vehicular traffic while private, non-dedicated roads are not. Tenn. Code Ann. §§ 55-8-101(44) & (62)(2002). Tenn. Code Ann. § 55-10-317 provides that:

> Notwithstanding any other provision of the law to the contrary an officer of any state, county, or municipal law enforcement agency that is charged with the responsibility of enforcing traffic laws may also enforce traffic laws, issue citations for violations thereof and impose fines in accordance with the provisions of state law or county or municipal ordinance, as appropriate, on privately owned streets *that are dedicated as rights-of-way for traffic* and are located within a residential development having a combination of single family and multi-family dwellings. Such enforcement of traffic laws within a private residential development shall be initiated only after the majority of residents in that development have submitted a written report to the appropriate local governing body requesting the enforcement of traffic laws on such private street. If such local governing body approves the petition, such governing body shall establish the traffic laws in such development in the same manner as it does for public streets within its jurisdiction.

Tenn. Code Ann. § 55-10-317(1995) (Emphasis added).

Accordingly, it is the opinion of this office that law enforcement officers are not authorized to enforce speed limits and traffic controls on private, non-dedicated roads.

8. There is no statute authorizing the chief law enforcement officer to approve or reject proposed speed limits or traffic control devices on private roads.

9. Private security officers are not specifically prohibited from using radar or other equipment to measure the speed of moving vehicles under Tenn. Code. Ann. § 62-35-134(1996), the statutory provision which outlines prohibited practices for private security guards. Tenn. Code Ann. § 62-35-134 (1996). There are no statutes specifically outlining legal requirements and standards for equipment and training required to operate equipment to measure speed of moving vehicles. However, the Tennessee Supreme Court has held that in prosecution for violating speed limits on the highway, the radar speedometer is an accurate device for checking speed when the same is calibrated or tested and checked for accuracy from time to time and when the operator is properly trained and knows how to use the equipment. *Hardaway v. State*, 202 Tenn. 94, 302 S.W.2d 351, 352-353 (Tenn. 1957). It stands to reason that if private citizens, including security guards, choose

to use radar or other equipment to measure speed on private roads they would need to test the equipment regularly for accuracy and that the operators would need to be properly trained in order to meet a common law reasonable standard of care.

Additionally, if private security guards utilize speed monitoring equipment, that equipment cannot appear to belong to public law enforcement entities. Tenn. Code Ann. § 62-35-127 specifically prohibits security guards or patrol service personnel from utilizing any vehicle or equipment which displays the word, police, law enforcement officer or the equivalent thereof or has any sign, shield, accessory or insignia that may indicate that such vehicle or equipment belongs to a public law enforcement agency. Tenn. Code Ann. § 62-35-127(1987).

10. Private security guards licensed under Title 62 of the Tennessee Code Annotated do not have authority to enforce the motor vehicle restrictions under Title 55, Section 8 because, as discussed under question 6, Title 55 § 8 only applies to the operation of vehicles on public roads and private security guards are only authorized to control, direct or regulate traffic on private roads. According to Tenn. Code Ann. § 62-35-102(15) a security guard or officer is an individual employed by a contract security company or a proprietary organization whose primary duty is to perform any function of a security guard and patrol service. Tenn. Code Ann. § 62-35-102(15) (1997).

Under Tenn. Code Ann. § 62-35-102(16) the terms "security guard and patrol service" are further defined as protection of persons and/or property from criminal activities including, but not limited to:

(A) Prevention and/or detection of intrusion, unauthorized entry, larceny, vandalism, abuse, fire or trespass on private property;
(B) Prevention, observation or detection of any unauthorized activity on private property;
(C) Enforce rules, regulations or state and local laws on private property;
(D) Control, regulation or direction of the flow or movements of the public, whether by vehicle or otherwise on private property;
(E) Street patrol service;

Tenn. Code Ann. § 62-35-102(16) (1997). In Tenn. Code Ann. § 65-35-102 (17), "street patrol service" is defined as the utilization of foot patrols or any other means of transportation in public areas or on public thoroughfares in order to service multiple customers or facilities. "Street patrol" does not apply to a security guard/officer traveling from one (1) facility to another to serve the same customer with multiple facilities. All these activities, except (E) take place on private property.

Accordingly, since private security guards may only direct traffic on private property, they are only empowered to enforce traffic laws and regulations that apply to the operation of motor vehicles on such private property.

11. No. House Bill 1594 would not require owners of private, non-dedicated roads to follow the steps specified in the bill exclusively before posting any speed limits or traffic control signs. The proposed bill specifies that its provisions would only apply to those property owners who

file a written consent indicating that the owner consents to application of the provisions of Title 55, Chapter 8. Further, the statute specifies that such consent would not constitute a dedication to the public of such roads nor permission by the owner for the public to use such roads.

A property owner's right to own, use and enjoy private property is fundamental. *Barnett v. Behringer,* 2003 WL 21212671, at *3 (Tenn. Ct. App. May 27, 2003)(citing *Nollan v. California Costal Comm'r.,* 483 U.S. 825, 831, 107 S.Ct. 3141, 3145 (1987). The Tennessee Supreme Court has held that:

> Every landowner, where not restrained by covenant or custom, has the entire dominion of the soil and the space above and below to any extent he may choose to occupy it, and in this occupation he may use his land according to his own judgment, without being answerable for the consequences to an adjoining owners, unless by such occupation he either intentionally or for want of reasonable care and diligence inflicts upon him injury.

Humes v. Mayor of Knoxville, 20 Tenn 403, 1839 WL 1313, at *3 (Tenn. 1839).

Accordingly, absent any restraints such as restrictive covenants, each owner of a private, non-dedicated road has the right to place speed limits and traffic control devises on his/her property as long as they cannot be seen from a public road, as discussed under Number 3, and do not violate any other laws or regulations. However, if these private, non-dedicated roads are located in a subdivision or in common areas shared by a number of individual owners who plan to hire private security guards to direct traffic and enforce traffic regulations on their properties it would stand to reason that a majority of the property owners would need to agree to and approve any proposed speed limits and traffic control devices for the sake of uniformity and to effectively advance their shared interests in safety on these private roads.

12. The Civil Rights Statute, 42 U.S.C. § 1983, provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia subjects or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (1996). Accordingly, a claim under 42 U.S.C. § 1983 contains two essential elements: (1) a violation of a right secured by the Constitution or laws of the United States; and (2) a defendant must have violated this right under color of state law. *Doe v. City of Chicago,* 39 F.Supp.2d 1106, 1110 (1999).

The statute does not designate what constitutes "under color of any statute, ordinance,

regulation, custom or usage, of any State" or what persons are susceptible to prosecution under the Civil Rights Act. Courts generally employ one of four tests in determining whether a private citizen acted under color of state law: (1) under the state compulsion test a private citizen may be liable under § 1983 when the state has so implicated itself in the defendant's action that the state has in effect compelled the action; (2) under the public function test the actions of a private individual may be attributed to the state when the private party is engaging in an activity that is traditionally the exclusive prerogative of the state; (3) under the joint action test a private defendant may be said to be acting under color of state law if that defendant and the state official had a meeting of the minds and thus reached an understanding that the plaintiff be denied a constitutional right; and (4) under the nexus test a private citizen may be found to be a state actor if the state has so far insinuated itself in the private party's actions as to create an interdependence between the state and the individual. *Doe v. City of Chicago*, 39 F.Supp.2d 1106, 1110 (N.D. Ill. 1999).

Applying the different tests is a "necessarily fact-bound inquiry." *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S. 922, 938 (1982). Therefore, each case must depend on its background, facts and circumstances in applying the Act. *Decarlo v. Joseph Horne and Company*, 251 F. Supp. 935, 936 (1966). *See also, Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S. Ct. 860 (1961)(holding that only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance).

At issue is whether House Bill 1594 would empower private security officers in Tennessee to engage in an activity that is traditionally the exclusive prerogative of the state by granting them the authority and power to issue traffic citations to any person violating or charged with violating the speeding statutes on private roads. While the United States Supreme Court has never determined whether a private security guard who is cloaked with the authority of a police officer is a state actor performing a public function that is traditionally reserved to the state, a number of federal courts have held that a private security guard is a state actor when he or she is vested with the authority of a police officer. *Romanski v. Detroit Entertainment, L.L.C.*, 2003 WL 21296293, at *6 (E.D. Michigan May 28, 2003). A private individual who is vested with the powers of a police officer, which are powers that are only vested in the State, and those private individuals to whom the State has given such powers are state actors, acting under color of state law for purposes of § 1983. *Id.* at 7. Conversely, a private security guard who is merely exercising common law rights that may resemble police authority, such as detaining an individual who is suspected of theft, is not a state actor. *Id.* at 7, 8. *See, e.g., Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 82 F.Supp.2d 901 (N.D. Ill. 2000) (holding that private security personnel could be held as state actors under § 1983 because of their status as special Chicago police officers pursuant to a Chicago ordinance under which no legal difference existed between privately employed special officers and a regular Chicago Police Officer); *Wade v. Byles*, 83 F.3d 902 (Ill. 1996), *cert. denied* 519 U.S. 935 (holding that private security guard at city housing authority building was not performing exclusive state function when he shot plaintiff; therefore, plaintiff could not maintain § 1983 action against guard and private security company; guard's function as a lobby security guard with limited powers was not traditionally exclusive function of state and contracted security guards were not part of statutorily authorized police force); *Allen v. Columbia Mall, Inc.*, 47 F. Supp.2d 605 (D. Maryland 1999)

(holding that shopping mall's private security guards were not acting under color of state law as required to support a § 1983 claim because they only had "citizen arrest" powers); *El Fundi v. Deroche*, C.A.8 (Minn.) 1980, 625 F.2d 195 (8th Cir. 1980) (holding that state action is present when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments, particularly when a state statute authorizes merchants to detain suspected shoplifters); *Brooks v. Santiago*, No. 93 Civ.206(HB), 1998 WL 107110, at *3-4 (S.D.N.Y. March 10, 1998) (holding that private security guards acted under color of state law and were found to have acted in concert with local police because the police searched and arrested suspected shoplifter solely based on the security guard's allegations without conducting an investigation to generate probable cause); *McFadden v. Grand Union*, 154 F.R.D. 61 (S.D.N.Y. 1994) (holding no state action would exist based on private security guard's arrest of retail customer for misconduct at store, absent police personnel or department involvement; however, state action potentially established because the same security guard later processed customer's arrest at the police department minutes later).

The Tennessee Supreme Court has held that "under color of law" within the meaning of 42 U.S.C. § 1983 refers to a misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *Home Insurance Co. v. Leinart*, 698 S.W.2d 335, 336 (Tenn. 1985) (citing *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961)). Conversely, acts of a private or proprietary nature, of officials of state, county or municipal governments, as opposed to acts of a governmental nature, have been held, in the absence of specific legislation, to not be subject to 42 U.S.C. § 1983. *Id.* Under 42 U.S.C. § 1983, "conduct is engaged in under color of state law if the actor was clothed with the authority of the state and was purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed even if it was proscribed by state law." *Id.* (citing *Cohen v. Norris*, 300 F.2 24 (9th Cir. 1962)).

Under Tennessee law, only peace officers are authorized to issue citations. Tenn. Code Ann. § 40-7-118(a)(1) provides that a citation means a written order issued by a peace officer requiring a person accused of violating the law to appear in a designated court or government office at a specified date and time. Tenn. Code Ann. § 40-7-118(a)(1)(2002). A peace officer means an officer, employee or agent of government who has a duty imposed by law to: (i) maintain public order; (ii) make arrests for offenses; (iii) investigate the commission or suspected commission of offenses. Tenn. Code Ann. § 40-7-118(a)(3)(A)(2002). Tenn. Code Ann. § 55-8-104(a) mandates obedience to police officers invested with the power to direct and control traffic on public streets. Tenn. Code Ann. § 55-8-104(a)(1989). Tenn Code Ann. § 55-10-207 authorizes law enforcement officers to issue citations in lieu of arrest for violations of the rules of the road punishable as misdemeanors. Tenn. Code Ann. § 55-10-207(a)(1)(2002). Additionally, Tenn. Code Ann. § 7-63-101 provides that:

> When any person violates any traffic, or other ordinance, law or regulation of any municipal, metropolitan or city government in the presence of a:
>
> (1) Law enforcement officer of such government;

> (2) Member of the fire department or building department who is designated as a special officer of the municipality; or
>
> (3) Transit inspector employed by a public transportation system or transit authority organized pursuant to chapter 56, part 1 of this title;
>
> such officer or inspector may issue, in lieu of arresting the offender and having a warrant issued for the offence, a citation or complaint for such offense.

Tenn. Code Ann. § 7-63-101 (1993).

Under Tennessee law, private security guards are not law enforcement officers or peace officers. The General Assembly makes a clear distinction between security officers and law enforcement officers and prohibits private security officers from even giving the impression that they are sworn peace officers or governmental officials. Tenn. Code Ann. § 62-35-134(c)(5) makes it unlawful for a private security officer to make any statement which would reasonably cause another person to believe that such security officer functions as a sworn peace officer or other governmental official. Tenn. Code Ann. § 62-35-134(c)(5)(1996).

Further, it is unlawful for any person performing any function of a security guard and patrol service to:

> (1) Wear or display any badge, insignia, shield, patch or pattern which:
>
> (A) Indicates or tends to indicate that such person is a sworn peace officer;
>
> (B) Contains or includes the word "police" or the equivalent thereof; or
>
> (C) Is similar in wording to any law enforcement agency in this state; or
>
> (2) Have or utilize any vehicle or equipment which:
>
> (A) Displays the words "police," "law enforcement officer," or the equivalent thereof; or
>
> (B) Has any sign, shield, accessory or insignia that may indicate that such vehicle or equipment belongs to a public law enforcement agency.

Tenn. Code Ann. § 62-35-127 (1987).

In addition, Tenn. Code Ann. § 62-35-128 prohibits security guards/officers from wearing any military or police-style uniform, except for rainwear or other foul weather clothing, unless such

uniform has:

(1) Affixed over the left breast pocket on the outermost garment and on any cap a badge or insignia distinct in design from that utilized by any law enforcement agency in this state, unless the licensed security officer is in plain clothes;

(2) Affixed over the right breast pocket on the outermost garment a name plate or tape with the name of the security guard/officer on it, unless the licensed security officer is in plain clothes.

Tenn. Code Ann. § 62-35-128 (1996).

Under the laws of this state, private citizens such as a private security guards employed by a private security company, may arrest another for public offenses committed in their presence or when a felony has been committed and the arresting person has reasonable cause to believe that the person arrested committed it. Tenn. Code Ann. § 40-7-109(a)(2002). However, there is no statute authorizing private citizens to issue citations for traffic violations. Only law enforcement officers are empowered to issue traffic citations in lieu of arrest. House Bill 1594 would empower private security guards to issue traffic citations, a police function vested in the state alone that could not otherwise be exercised by a private citizen, thus cloaking them with the authority of the state. Therefore, any abuse of that power would constitute an action under color of state law.

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