M.P. "Dexter" Eaves

CRIMINAL DISTRICT ATTORNEY

210 W. CONSTITUTION
VICTORIA, TEXAS 77901
Phone: (361) 575-0468
Fax: (361) 576-4139

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The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

RQ-0487-JC

2596

FILE # ML-42354-02
ID # 42354

Re: Transportation Code Section 623.11

Dear General Cornyn,

The Commissioners Court of Victoria County, Texas, is considering the traffic of heavy trucks on its county roads and load limit bridges. Heretofore vehicles permitted under Vernon's 6701-d-11 5B(a) to (e) have been immune from further permit requirements of individual counties. We therefore have had the difficulty of the State of Texas through TXDOT permitting excess loads upon our County Roads which are not built to withstand such weight much less our load limit bridges.

Recent changes in the law with the codification of Section 623.011 Texas Transportation Code prompt our question to you. The previous law under 6701-d-11 Section 5B(a) to (e) was changed by the Legislature in the codification of the Transportation Code. Where heretofore the law read "...(a) The department SHALL issue a permit....." has now been changed in the codification at 623.011 to read "(a) The department MAY issue a permit....." (Emphasis ours)

Therefore our question is:

DID THE LEGISLATURE IN THE ADOPTION OF THE TRANSPORTATION CODE

AND THE CHANGE OF THE LANGUAGE FROM "SHALL" TO "MAY" GRANT

DISCRETIONARY AUTHORITY TO TXDOT IN THE ISSUANCE OF SUCH PERMITS?

It is our affirmative position that such discretion was indeed conveyed to TXDOT. The clear statement of the Legislation of the term "MAY" in codification of laws involving Transportation into the Transportation Code indicates that TXDOT need not permit in all cases. Ergo TXDOT has the discretion and rule making authority granted by the Legislature to make requirements precatory to its permits. Such requirements of notice, liability insurance, bonding, permitting by the County under 623.018 of the Transportation Code to suggest a few.. In general to give the Counties an ability to protect or be recompensed for the damages to its roads and load limit bridges wrought by these excessive loads.

The clear meaning of the code and the fact that this is a codification of the laws which were repealed by the 74th Legislature in 1995 make the statement that this is now the law. TXDOT "may" issue permits pursuant to Section 623.011 of the Code. The use of the verbiage "may" has undone in the law the absurd situation of the State authorizing excessive loads over roads and load limit bridges that the State does not own and does not have to repair!

The Supreme Court of the State of Texas on December 9, 1999 decided the case cited as Fleming Foods Of Texas, INC. V. Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas and John Cornyn, Attorney General of the State of Texas, 6 S.W. 3d 278(Texas 1999). This case involved codification of the Tax Code.

The Court in Fleming noted that the "codification of former article 1.11A was part of the legislature's ongoing codification of our statutes. The 1981 enactment that resulted in section 111.104 stated that this Act is intended as a recodification only, and no substantive change in the law is intended by this act." Id. 281. Chapter 165 Section 1 of the 74 Legislature (Transportation Code) similarly states of the ongoing codification of the statutes but makes no reference to "no substantive change in the law is intended".All the more clearly then is the statement of Section 623.011 that TXDOT "may" issue permits.

Further, the Court in Fleming wrote:

> "It is a cardinal rule of statutory construction that we are to give effect to the intent of the legislature....but general statements by the Legislature in enacting the Tax Code that "no substantive change in the law is intended" must be considered in the clear, specific language used..... To the extent that these latter sections of the Tax Code do change prior law, the specific import of the their words as written must be given effect. These specific, unambiguous statutes are the current law and should not be construed by a court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word.....or application of the literal language of a legislative enactment would produce and absurd result, ..." Id. 284.

The Court went on to cite American Indemnity Co. V. City of Austin, 246 S.W. 1019

(Texas 1922) observing that the new law not the old law governs:

> "The general rule... is that such Codes are not mere compilations of laws previously existing, but bodies of laws so enacted that laws previously existing and omitted therefrom cease to exist and such additions as appear therein are the law from the approval of the act adopting the Code." Id. 1024

Victoria County requests your opinion on this change in the language of the law.

RESPECTFULLY SUBMITTED
M.P. "DEXTER" EAVES
CRIMINAL DISTRICT ATTORNEY

By _____

Michael M. Kelly, Assistant
Criminal District Attorney
210 W. Constitution St.
Victoria, Texas 77901
361 575 0468
361 576 4139 Fax
SBN 11227000