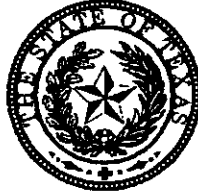


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OPINION COMMITTEE

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July 30, 2004

Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43867-04
I.D. # 43867

Re: Request for Attorney General's Opinion

Dear General Abbott:

On behalf of the Commissioners Court of Denton County, we would like to request an opinion from your office concerning the ex officio commissioner system of road and bridge administration in the State of Texas and, in particular, the system as it has been adopted in Denton County. It is our intent to provide you with all the material facts concerning the adoption of the ex officio commissioner system in Denton County upon which your opinion is requested. While the Court certainly recognizes the importance of our request and the time that may be involved in formulating your opinion, we would like to request, if at all possible, an expedited consideration of our request.

FACTS

For some time prior to October 1, 2003, the system of road and bridge administration in Denton County was the single, county-wide road superintendent system under Sections 252.201-252.216, Texas Transportation Code, although the system was referred to as "Centralized Road and Bridge." One of the engineers employed by the County was the road superintendent whose office was in the City of Denton. The operations of the system were conducted and the road and bridge crew, while considered one unit, were stationed at and dispatched out of two facilities, one in Argyle and one in Aubrey. There was a closed road and bridge facility in Krum which was used by the County as an emissions testing facility but no road and bridge personnel were stationed at that facility. In addition, there was a materials storage area on Masch Branch Road

between Denton and Krum but no personnel were stationed at that location but did pick up and deliver materials to and from that location. No work crew was assigned to individual County Commissioner precincts. All requests for work were made to the road superintendent. The response to work requests was determined by and controlled by the road superintendent, subject to the direction of the Commissioners Court.

Having become dissatisfied with the road superintendent system, the Commissioners Court, on May 25, 2003, by a 4 to 1 vote, adopted the ex officio commissioner system of road and bridge administration effective October 1, 2003. For the next four and one-half months, there was considerable discussion and debate among the members of the Commissioners Court concerning the new system with numerous proposals being considered, adopted, modified or rejected relating to the new system, the rules to be adopted, allocation of road crews, allocation of road and bridge funds, and the statutorily required bonds of the ex officio road commissioners.

According to the records of the then road superintendent, the immediate past five year history of work actually performed on the county roads and the mileage of roads within the respective precincts at the time of the decisions ultimately made by the Court was as follows:

Hours charged to County Roads from FY1999-FY2003:

Precinct One	173,607	56.03%
Precinct Two	3,002	.97%
Precinct Three	2,485	.80%
Precinct Four	<u>130,741.5</u>	<u>42.20%</u>
	309,835.5	100.00%

Materials costs per precinct from FY1999-FY2003:

Precinct One	\$4,701,827.66	53.01%
Precinct Two	35,197.50	.40%
Precinct Three	60,936.80	.69%
Precinct Four	<u>4,071,168.91</u>	<u>45.90%</u>
	\$8,869,130.87	100.00%

Miles of county roads per precinct:

Precinct One	394.800	Miles	60.53%
Precinct Two	3.370	Miles	.52%
Precinct Three	.075	Miles	.01%
Precinct Four	<u>254.000</u>	<u>Miles</u>	<u>38.94%</u>
	652.245	Miles	100.00%

Hours charged to Interlocal Cooperation Agreements for FY 1999-FY2003 were:

Precinct One	4,278.0	55.97%
Precinct Two	1,496.5	19.58%
Precinct Three	0.0	0.00%
Precinct Four	<u>1,868.5</u>	<u>24.45%</u>
	7,643.0	100.00%

County roads as used here excludes the mileage of Interstate highways, state highways, farm to market roads, and city streets and roads and includes only county roads in the unincorporated areas of Denton County.

With the adoption of the ex officio road commissioner system, the "centralized" road and bridge crew was divided into two groups with one group being assigned to the Argyle facility in Precinct 4 and the second crew being assigned to the Aubrey facility in Precinct 1. No road crews were assigned to be stationed in either Precinct 2 or Precinct 3 but the ex officio road commissioner of Precinct 2 was to have work in her precinct performed, as needed, by the road crew assigned to the Aubrey facility and the ex officio road commissioner of Precinct 3 was to have work in her precinct performed, as needed, by the road crew assigned to the Argyle facility.

After extensive discussion, rules and regulations for the ex officio road commissioner system of road and bridge administration were finally adopted. The principal and final debate concerned the allocation of road and bridge funds. The Denton County road and bridge fund is made of up 95% of motor vehicle registration fees with the remaining 5% made up of the lateral road fund, farm to market road tax, flood control tax, and interest accounts. As reflected by the records of the Commissioners Court, some members of the Court wanted to allocate the road and bridge funds more in accordance with the past five year road and bridge work history and the miles of county roads in each precinct with a 95% allocation to Precincts 1 and 4 and a 5% going to Precincts 2 and 3. Other members felt that the allocation of the 95%-5% division of funds should apply only to road materials and all other road and bridge funds should be divided equally between the four precincts with each ex officio road commissioner receiving a budget of 25% of all funds other than road material funds. Other factors that may have been considered by any of the commissioners in determining the allocation of the road and bridge funds are not a matter of record. Finally, with the deadline for the ex officio road commissioner system to go into effect and the deadline for adoption of the County budget both fast approaching, the Court, by a 3-2 vote, approved allocation of the road and bridge funds by distributing 95% of all road material funds to Precincts 1 and 4 with Precincts 3 and 4 receiving 5% of such material funds and distributing all other road and bridge funds equally between with each precinct receiving 25% of the remaining funds.

With the filing of each of the ex officio road commissioners' bonds, the ex officio road commissioner system of road and bridge administration actually became effective in Denton County on October 4, 2003.

In the ensuing months, the ex officio road commissioner system has been a source of constant discussion, controversy, and debate. On June 1, 2004, the Commissioners

Court approved an order by a 3-2 vote to allocate all road and bridge funds effective October 1, 2004 based on the mileage and historical expenditures from the past five years. The allocation for Fiscal Year 2004-2005 is as follows:

Precinct One	54%
Precinct Two	2%
Precinct Three	1%
Precinct Four	43%

This allocation makes no distinction between materials cost and other budget items but applies to all funds. The order also provides that the funds for Precincts 2 and 3 shall be deposited in "contract labor, road work." Although it was not explained at the time the motion was made or the order was approved, the probable interpretation of the use of the phrase "contract labor, road work" is that the ex officio road commissioners for Precincts 2 and 3 will not have the use of the road and bridge crews and will have to contract with private sources for any road work that either seeks to do during the next fiscal year.

QUESTIONS

- 1. Is the ex officio road commissioner system as adopted and functioning in Denton County in accordance with legal requirements and within the discretion of the Commissioners Court?**
- 2. Was the allocation of road and bridge funds for Fiscal Year 2004 in accordance with legal requirements and within the discretion of the Commissioners Court?**
- 3. Is the proposed allocation of road and bridge funds for Fiscal Year 2005 in accordance with legal requirements and within the discretion of the Commissioners Court?**
- 4. Does the ex officio road commissioner of Precinct 2 have joint authority with the ex officio road commissioner of Precinct 1 to hire the road and bridge crew to perform work in Precincts 1 and 2?**
- 5. What authority, if any, does one Denton County ex officio road commissioner who shares a road crew with another ex officio road commissioner have over the road crew while it is performing work in the other commissioner's precinct?**
- 6. What authority does the Commissioners Court acting as a unit have over the individual ex officio road commissioner?**
- 7. If not answered in Question 6, what authority does the Commissioners Court acting as a unit have over the budget allocated to an individual ex**

officio road commissioner during the fiscal year other than its annual budgeting authority?

- 8. May an ex officio road commissioner system continue to be used in a County in which there are no longer any county roads in one of the commissioner precincts?**

BRIEF

Question No 1: Is the ex officio road commissioner system as adopted and functioning in Denton County in accordance with legal requirements and within the discretion of the Commissioners Court?

The ex officio road commissioner system of road and bridge administration is one of several optional systems authorized by the Texas Transportation Code to be selected by a county commissioners court acting within its discretion to govern county road and bridge matters. It appears clear that the ex officio road commissioner system of road and bridge administration authorized by Sections 252.001-252.006, Texas Transportation Code, contemplates but does not specifically require that a separate work crew will be established and stationed in each of the ex officio road commissioners' precincts subject to the day to day operational control of the respective ex officio road commissioner. Under the Denton County system, there are only two work crews which are shared, as needed, by two ex officio road commissioners----Precincts 1 and 2 sharing the Aubrey crew and Precincts 3 and 4 sharing the Argyle crew. While this system creates shared responsibilities such as hiring of personnel and causes problems that would not exist if each ex officio road commissioner had his/her own work crew, do such problems or the fact that there is no separate, distinct road crew for each precinct make the system invalid? Considering the considerable discretion that a commissioners court may exercise in these matters, we do not think so, at least as far as the ex officio road commissioner system for Fiscal Year 2003-2004 is concerned.

While adopting a system which contemplates having a separate, distinct work crew for each of the ex officio road commissioner precincts does not seem to fit a county such as Denton County where only two work crews exist, whether or not the adoption of the ex officio road commissioner system was a wise or an unwise choice was for the Commissioners Court to determine in accordance with the considerable discretion given to it in its choice of a system of road and bridge administration. There is no express statutory requirement that four separate work crews must be established nor is there a statutory prohibition against adoption of a shared road crew system in Denton County or any other county. There is, in fact, very little guidance in the statutes, case law, or Attorney General Opinions on this subject.

As pointed out above, the ex officio road commissioner system of road and bridge administration in a Texas county is specifically authorized by statute. Sections 252.001-252.006, Transportation Code. The order adopting the ex officio road commissioner system was properly approved by the Denton County Commissioners Court. Rules and

regulations were debated and approved by the Court. The appropriate bonds were filed by each ex officio commissioner. In other words, all statutory requirements were met. It appears that only if it could be said that four separate work crews are a statutory requirement of an ex officio road commissioner system could the present system be declared to be invalid. Given the considerable discretion vested in a commissioners court and the lack of any express statutory requirement, we have been unable to reach this conclusion.

The system as adopted in Denton County is in sharp contrast to attempts in other counties to adopt systems or offices that were not authorized by statute or that were not established in compliance with statutory requirements and were properly held to be invalid in the cases of *Starr County, Texas v. Guerra*, 297 S.W.2d 379 (Tex. Civ. App. San Antonio 1956, no writ hist.); *Guerra v. Rodriguez*, 239 S.W.2d 915 (Tex. Civ. App. Austin 1951, no writ hist.); and *Canales v. Laughlin*, 214 S.W. 2d 451 (Texas 1948).

In *Canales v. Laughlin*, a resolution adopted by the Commissioners Court of Jim Wells County created the position of "County Road Unit Administrative Officer" and gave that office supervision of all road building and maintenance in the County with power to hire and discharge all county road employees. The Supreme Court reviewed the employment of the Unit Administrative Officer as to whether it could be sustained under one of the optional statutory methods of road and bridge administration but found that none of the other statutory requirements had been followed. In voiding the portion of the order of the Commissioners Court creating the position of County Road Unit Administrative Officer and employing a person for that office, the Supreme Court held:

"....we believe that it must be concluded that since the legislature has expressly provided that the commissioners courts may employ persons to superintend or supervise the county road system and has placed certain restrictions on the exercise of this power, these conditions and restrictions must be observed if the authority is to be exercised. Since the statutory requirements have not been observed in this case, the action of the commissioners court cannot be upheld."

In *Guerra v. Rodriguez*, a county commissioner filed a declaratory judgment action seeking to have himself declared the ex officio road superintendent in his precinct because of the actions of the Starr County Commissioners Court in permitting an individual to run county road and bridge operations in the commissioner's precinct without being appointed to perform those services, without posting a bond, and without being required to account for his actions. The trial court denied entry of the declaratory judgment and Guerra appealed that decision. The Court of Appeals denied relief stating that the position of

".....ex-officio superintendent....does not exist until one is created by statute. None having been created, it does not exist."

In *Starr County, Texas v. Guerra*, the Commissioners Court adopted an order designating the entire county as Road Commissioner District Number One and authorized

the employment of a road commissioner at a salary as provided by law. The Court then appointed one of the county commissioners as the road commissioner for the district. The auditor refused to sign the salary warrants contending that the appointment of a county commissioner as road commissioner was invalid. Starr County then sought to compel the auditor to sign the warrants. The trial court denied the County's request and the County appealed that denial. The Court of Appeals cited the holding in *Canales v. Laughlin* with approval and further held

".....We find only two statutes which authorize road commissioners. They are Articles 6737 and 6762, Vernon's Ann.Civ.Stats. Unless Duran falls within the terms of one of them, he was not properly appointed road commissioner and was not entitled to receive the funds provided by Article 2350(6).

Article 6737 empowers the Commissioners' Court to employ not more than four road commissioners. The statute also fixes the compensation for the road commissioners. Duran can not avail himself of employment by force of that statute. The Commissioners Court may employ road commissioners, but they may not employ any of the members of the Court. To do so is contrary to the policy of the law and the oath each commissioner must take.....

Article 6762 designates the members of the Commissioners' Court as ex-officio road commissioners in counties having as many as forty thousand inhabitants. Duran can not bring himself with that article and qualify as an ex-officio road commissioner, since Starr County falls below the statutory population bracket. It follows, therefore, that Duran has not been lawfully employed as Road Commissioner and is not entitled to receive the salary provided for that employment...."

We respectfully submit that the ex officio road commissioner system adopted in Denton County is in substantial statutory compliance, unlike the systems or offices created without statutory authorization by the commissioners courts in *Canales v. Laughlin*, *Guerra v. Rodriguez*, and *Starr County, Texas v. Guerra*. Whether individuals do not like the system as it exists in Denton County or think that the Commissioners Court was unwise in adopting such a system does not control whether it was properly established within the statutory requirements and within the discretion of the Commissioners Court. Only if it could be said that the ex officio road commissioner system can not exist where a road and bridge crew is not set aside for each precinct could the system be declared invalid. We have found no such authority for this position.

The question of the validity of the motion and order for the allocation of funds for Fiscal Year 2004-2005 is more troublesome but will be discussed later.

Question No. 2: Was the allocation of road and bridge funds for Fiscal Year 2004 in accordance with legal requirements and within the discretion of the Commissioners Court?

As set forth previously, 95% of the road and bridge fund in Denton County is generated by motor vehicle registration fees. The remaining 5% of the Denton County road and bridge fund comes from the lateral road tax, farm to market road tax, and flood control tax, and interest accounts. It is important to remember that, while the use of funds derived from motor vehicle registration fees is restricted to county roads and bridges, there is no formula or restriction on the allocation of such funds in Sections 502.103, 502.108, and 502.172, Transportation Code, such as contained in former Article 6740, particularly since the principal cases dealing with allocation of road and bridge funds focus on Article 6740 and deal completely or substantially with that statute. See also Tex. Atty. Gen. Op. No. JC-0250 (2000).

In *Stovall v. Shivers*, 103 S.W.2d 363 (Tex. 1937), the Supreme Court considered the allocation by a commissioners court of road and bridge funds which consisted principally of road tax funds rather than motor vehicle registration fees. Former Article 6740 required that the road and bridge funds be judiciously and equitably expended on the roads and bridges of the county, and that, as nearly as the condition and necessity of the roads and bridges would permit, the funds be expended in each commissioner's precinct in proportion to the amount collected in each precinct. In this case, the commissioners court had considered in 1931 whether to allocate the road and bridge funds in accordance with the need of the county's road and bridges or to allocate according to the amount of taxes collected in each precinct but eventually determined that the funds would be divided equally between the precincts with each precinct receiving 25% of the funds. This allocation was automatically continued for several years thereafter. The county commissioner and other citizens of Precinct 1 sought to enjoin distribution of the funds because 73 % of the taxes comprising the road and bridge fund had been collected in Precinct 1.

In *Stovall*, the Court pointed out that a commissioners court is manifestly a unit and is the agency of the whole county stating:

....."The respective members of the commissioners' court are therefore primarily representatives of the whole county, and not merely representatives of their respective precincts. The duty of the commissioners' court is to transact the business, protect the interests, and promote the welfare of the county as a whole.....the commissioners' court of each county shall regard the roads and highways of the county as a system, to be laid out, changed, repaired, improved and maintained, as far as practical, as a whole to the best interests and welfare of all the people of the county. It is clearly contemplated that all roads and bridges of the county shall be maintained, repaired and improved when necessary, as the conditions may require, regardless of the precinct in which same may be located, so far as the funds will equitably justify. This being true, we think that a commissioners' court can not voluntarily disable itself from performance of this general obligation by arbitrarily dividing the road and bridge fund according to some fixed standard, and apportioning same to be expended in a particular precinct, to the detriment of roads and bridges in other precincts."

The Court then turned to consideration of the statute and said that Article 6740 must be given effect except when the necessities of the roads and bridges require a departure from it. Concerning the statute, the Court opined:

“The dominant purpose of this statute seems to be to require that the road and bridge fund shall be expended in each commissioner’s precinct in proportion to the amount collected thereon. In this regard the statute means that each precinct shall prima facie be entitled to its own funds, and in the absence of any reasons to the contrary they should be so divided and expended. However, the duty to expend funds in the proportion above mentioned is not an absolutely inflexible one. This is evidenced from the fact that the dominant purpose of the statute is qualified to the extent that the court by clear implication is given the right to expend the road and bridge fund in a proportion rather than in the proportion in which they are collected when the conditions of the roads in the respective precincts creates a necessity so to do. We think, however, that the requirement to expend the fund in the proportion mentioned can not be avoided except in cases or condition of necessity. Of course, the commissioners’ court has the right to exercise its sound judgment in determining the necessity, but it can not act arbitrarily in regard to such matter.”

In upholding the judgment of the Court of Civil Appeals granting the plaintiff taxpayer’s motion for injunction and a determination of the validity of the distribution of tax funds, the Court held:

“From the foregoing it appears that the order of April, 1931, establishing a fixed policy of mechanically dividing the road and bridge fund into four equal parts and allotting same year after year to the four precincts, regardless of the amount of taxes collected in said precincts, or the condition and needs of the roads was not authorized by Article 6740 or any other statute. It further appears that such practice necessarily resulted, in light of the other facts alleged, in preventing the court from judiciously and equitably expending said funds upon the roads and bridges of the county as a whole. The petition also alleges facts which clearly raised an issue of discrimination against precinct No. 1 in the expenditure of the road and bridge funds. The district court is of course without power to determine how the road and bridge fund shall be expended, and if the action of the court complained of could reasonably be said to be based upon an exercise of discretion, after due consideration of the conditions and necessities of the roads of the county, an entirely situation would be presented. We think, however, the allegations of the petition exclude the idea of the exercise of any discretion based upon a consideration of the question of the necessity and conditions of the roads and bridges. The petition negatives the idea of a bona fide effort to comply with Article 6740 and instead shows a studied effort to disregard it.”

Finally, and highly important to the situation in Denton County, the Court recognized and held that road and bridge funds derived from automobile registration fees were not subject to the requirements of Article 6740 by stating:

"As to that portion of automobile registration fees retained by Van Zandt County, Article 6675a-10 expressly provides how same shall be expended, and for that reason it is obvious that Article 6740 has no application to same."
(Emphasis added)

See also Tex. Atty. Gen. Op No. O-3358 (1941); Tex. Atty. Gen. Op. No. O-1091(1939).

After the decision in *Stovall v. Shivers*, the Van Zandt County Commissioners Court abrogated its previous policy on allocation of road and bridge funds and adopted a resolution calling for monthly meetings to assess the needs and necessities of the roads of the county. At the monthly meetings, the Commissioners Court maintained that it discussed and determined the needs and necessities of the county roads; took into consideration the requirements of former Article 6740; and did not attempt to allocate the road and bridge funds according to a set mathematical formula or calculation. The amounts allocated to the several precincts varied somewhat but not materially. Interested taxpayers again attempted to obtain an injunction to restrain what they considered to be basically a continuation of the old policy and a subterfuge to get around the holding in *Stovall v. Shivers* but were unsuccessful.

In denying the appeal, the Court of Civil Appeals in *Garland v. Sanders*, 114 S.W.2d 302 (Tex. Civ. App. Dallas 1938, writ dismissed) found that the record supported the contentions of the Commissioners Court that it had conducted meetings to assess the needs and necessities of the roads of the county and stated:

"No particular procedure is prescribed for the commissioners' court to follow in ascertaining the condition and necessities of the roads and bridges in the county. They are at liberty to pursue their own method, and it is entirely beyond the province of the courts to control their discretion in this respect, or to determine how the road and bridge fund shall be expended; this, too, being a matter within the peculiar province of the commissioners' court, free from interference by the courts so long as the action of the commissioners' court is not arbitrary, or taken without having given due consideration to the conditions and necessities of the roads of the county." (Emphasis added).

There are two additional important cases regarding the allocation of road and bridge funds, *Janes v. Morton*, 385 S.W.2d 702 (Tex. Civ. App. Amarillo 1964, no writ hist.) and *Alley v. Jones*, 311 S.W.2d 717 (Tex. Civ. App.-Beaumont 1958, writ refused, n.r.e.).

Alley v. Jones was a suit to enjoin an order of the Montgomery County Commissioners Court allocating road and bridge funds which were made up of lateral road funds, National Forest receipts, farm to market road funds and automobile

registration fees for the year 1957. After a four day hearing, the Commissioners Court entered an order reciting that it

“....had studied and taken into consideration all the evidence that had been offered, together with the knowledge that it had of the condition and needs of the roads in respect to building and repair in each of the four precincts, taking into consideration the mileage of the roads in each precinct, the amount and type of traffic over roads in each precinct, the taxable values in each precinct for road and bridge purposes, the population in each precinct, the number of streams traversing each precinct, the number and type of bridges and their condition, the square miles contained in each precinct, the industries located in each precinct, the federal and state roads serving each precinct, information furnished by the County Auditor and from the Tax Assessor & Collector’s office in the light of the most urgent needs of each precinct, and considering all relevant fact and circumstances and in the exercise of its sound judgment and discretion, allocated the funds as therein set forth.”

The Court in *Alley v. Jones* recognized, as had the courts in *Stovall v. Shivers* and *Garland v. Sanders*, that there was no set procedure for a commissioners court to follow in the allocation of road and bridge funds and that the commissioners court was to exercise its sound judgment and discretion in determining the needs of the county roads and bridges. In upholding the trial court’s refusal to grant an injunction, the Court said:

“.....It cannot be saidthat the action of the Commissioners Court was not supported by substantial evidence. We think it is apparent that on its face the order did not attempt arbitrarily to apportion the road and bridge funds strictly on a basis of the proportion of taxes collected in the various precincts. If that had been done here the percentage allotted to Precinct No. 4 would have been a great deal smaller than the 21 percent allotted in the order. Since the 21 percent allotted to Precinct No. 4 was so much greater than its percentage of the taxes assessed and collected in its precinct, the order made such an allotment in consideration of all the factors which the order itself recites as having been considered.”

In 1963 the Hockley County Commissioners Court in *Janes v. Morton*, 385 S.W.2d 702 (Tex. Civ. App. Amarillo 1964, no writ hist.) issued an order allocating the road and bridge fund with Precinct 1 receiving 27%; Precinct 2 receiving 19%; Precinct 3 receiving 25% and Precinct 4 receiving 29% of the total funds. The road and bridge fund consisted of ad valorem tax money, “highway tax money” (apparently automobile registration fees and gasoline taxes); and “lateral road money”. Each precinct was allocated 25% of the ad valorem taxes but varying percentages were allocated to each precinct for the “highway tax money” and the “lateral road money” resulting in the final percent by total funds received by each precinct.

An injunction was sought by unhappy citizens in *Janes v. Morton* complaining that the commissioners court order was arbitrary by allocating each precinct twenty-five per cent of the ad valorem tax money; that the Court used no discretion in allocating funds received from automobile registration and gasoline tax funds, and that the allocations of the latter two funds were based solely on percentage of roads within each precinct. The Court rejected this complaint stating:

“.....As we understand it appellants urge that notwithstanding the August 2, 1963 order recited a number of factors which were considered in making the allocations, the majority of the commissioners court in fact did not consider these factors but decided upon a mathematical formula and allocated the funds to fit such a formula. Appellants seem to take the position a commissioners court must study and deliberate the material factors in open sessions before making an order distributing the road and bridge fund. We know of no such rule of law making such a requirement.” (Emphasis added)

The allocation of road and bridge funds in Denton County for Fiscal Year 2003-2004 is obviously closely similar to the allocation of funds in *Janes v. Morton* and is likewise an appropriate exercise of discretion in the division of those funds by the Commissioners Court.

Question No. 3: Is the proposed allocation of road and bridge funds for Fiscal Year 2005 in accordance with legal requirements and within the discretion of the Commissioners Court?

As indicated earlier, we find the allocation order for Fiscal Year 2005 to be more troublesome. The troublesome part of the order, at least from our viewpoint, is not the percentage allocation of road and bridge funds to the respective precincts but the restriction of the use of those funds to “contract labor, road work.” The allocation of funds based upon the County’s recent road work history and other factors is, we believe, within the discretion of the Commissioners Court as discussed in Question 2. If, however, the effect of the “contract labor, road work” portion of this order is to prevent or prohibit the ex officio road commissioners of Precinct 2 and Precinct 3 from using the road and bridge crews, even on a limited, shared basis with the other ex officio commissioner with whom they are paired, and restricts them to using the allocated funds only to hire contract labor to perform road and bridge work within their respective precincts, we believe the order to be an abuse of discretion which can not be sustained. The effect would be to take away a road and bridge crew from each of the ex officio road commissioners and establish a “contract” system of road and bridge administration for Precincts 2 and 3 while giving total control over road and bridge crews to the ex officio road commissioners of Precincts 1 and 4.

We believe that the “contract labor, road work” order would establish a system that is not one of the systems of road and bridge administration established by the statutes and, much like the systems established in *Canales v. Laughlin*, *Guerra v. Rodriguez*, and

Starr County, Texas v. Guerra, could not be sustained since no statute provides for such a system and it is not within the discretion of a commissioners court to create a non-statutory system.

Question No. 4: Does the ex officio road commissioner of Precinct 2 have joint authority with the ex officio road commissioner of Precinct 1 to hire the road and bridge crew to perform work in Precincts 1 and 2?

Section 252.004, Transportation Code, gives an ex officio road commissioner the authority to hire personnel in his/her precinct once that position has been approved by the commissioners court. Because two ex officio commissioners share the same work crew in Denton County, it is our position that the two commissioners have joint hiring authority and must agree on the individual to be hired for the approved position. If the two ex officio road commissioners are unable to agree on the person to be hired, that decision could then be made by the commissioners court. However, in view of the fact that an ex officio commissioner has the authority to fire any person paid from road and bridge funds while performing work in his/her precinct which might well be the action of the commissioner who did not want the individual hired in the first place, it would appear that the better practice would be to simply not hire an individual unless both ex officio road commissioners are in agreement.

Question No. 5: What authority, if any, does one Denton County ex officio road commissioner who shares a road crew with another ex officio road commissioner have over the road crew while it is performing work in the other commissioner's precinct?

We believe that an ex officio road commissioner who shares a road crew with another ex officio road commissioner has no authority over the road crew while it is actually working in the other commissioner's precinct. Each ex officio road commissioner by statute has authority over the road crew while performing work in his/her precinct. Section 252.006, Transportation Code. The fact that in Denton County the road crews are shared by two ex officio road commissioners does not, in our opinion, give either ex officio road commissioner any authority over the road crew while it is performing work in the other ex officio road commissioner's precinct.

Question No. 6: What authority does the Commissioners Court acting as a unit have over the individual ex officio road commissioner?

Absent specific statutory grant of authority to an ex officio road commissioner or statutory authority for a commissioners court to delegate authority and duties to an ex officio road commissioner, a road commissioner, a road superintendent, a road supervisor, or a County Engineer, all authority for road and bridge administration resides with the commissioners courts. Under Chapter 252, Transportation Code, a commissioners court is authorized to delegate substantial portions of its authority for road and bridge administration. An ex officio road commissioner system can not be created under present statutes, except by action of a commissioners court. A commissioners

court establishes the rules and regulations which govern the scope of authority granted to an ex officio road commissioner and always retains some supervisory authority over an ex officio road commissioner. If the commissioners court has transferred property and equipment, established a budget, and approved the personnel positions for individual precincts, the ex officio commissioner for the precinct is responsible for the day to day operations of the road and bridge crews in each precinct. However, in matters such as purchasing equipment, creating new positions, establishing budgets, and contracting authority, the commissioners court as a unit has exclusive authority which can not be delegated. Tex. Atty. Gen. Op. No. JC-0100 (1999).

One area that an ex officio road commissioner has exclusive authority in is the ability to fire an employee paid from road and bridge funds while that employee is working in the commissioner's precinct. Tex. Atty. Gen. Op. No. DM-158 (1992); Tex. Atty. Gen. Op. No. JM-892 (1988); Tex. Atty. Gen. Op. No. MW-362 (1981). There is no appeal to the Commissioner Court from the firing decision although one of the other ex officio road commissioners may hire the person fired by the first ex officio road commissioner if the hiring commissioner has a position authorized by the commissioners court. Tex. Atty. Gen. Op. No. DM-158 (1992).

Question No. 7: If not answered in Question 6, what authority does the Commissioners Court acting as a unit have over the budget allocated to an individual ex officio road commissioner during the fiscal year other than annual budgeting authority?

We have found very little authority on this question. One Attorney General Opinion states that the Court may move funds from a firing commissioner's budget to another commissioner's budget if a fired employee is rehired by the second commissioner. Tex. Atty. Gen. Op. No. JC-0100 (1999). Another opinion states that the commissioners court may, at budget time, make transfers of monies between commissioner precincts if surpluses exist. Tex. Atty. Gen. Op. No. JM-784 (1987) (See also the extended discussion of budget amendments and the necessity for declaration of an emergency in this opinion). Except as pointed out below, we have not found any authority for making other budget transfers during the fiscal year. If such is done, it would probably require the declaration of an emergency which will probably not be a real "emergency" in most instances.

In a recent Denton County Commissioners Court meeting, an issue arose concerning whether the court could, by majority vote, compel one of its members to expend funds allotted and budgeted to her as an ex officio road commissioner to post warning signs and/or barricades at low water crossings in her precinct during flooding conditions. Due to the uncertainty of the attorney general opinions and questions concerning what was considered to be the equivalent of or essentially the same as a forced mid-year budget amendment, the Court was advised that such an order would not be valid. A copy of the court reporter's notes will be forwarded to you if you desire to review the discussion. Only several weeks after this discussion was it learned that one of the commissioners thought we were saying that it was only because of the ex officio

system that we were of the opinion that the majority of the Court could not compel the dissenting member to use her funds on a "safety" concern. We were actually more concerned about the question of mid-year budget amendment but the commissioner's concern does raise the issue of budget control by a commissioners court of the systems of road and bridge administration, particularly the ex officio road commissioner system.

In preparing this opinion request, we have found Tex. Atty. Gen. Op. No. V-1424 (1952) which opined that the commissioners' court has authority to charge to the allotment of the road and bridge fund of one precinct money expended on roads situated in that precinct by a commissioner of another precinct proved such expenditure was approved by the commissioners court. The opinion does not disclose whether the ex officio road commissioner system existed in Wheeler County at the time the opinion was issued. The opinion also does not disclose the nature of the road and bridge work involved other than "repairs" and there may be some question whether it would apply to our low water crossing situation. In view of the age of this opinion; the numerous amendments to both the road and bridge law and to the budget law; and the two Attorney General opinions cited above, we believe opinion to be of questionable value but it does cast some doubt on our earlier opinion to the Commissioners Court. We request your clarification on this issue.

8. May an ex officio road commissioner system continue to be used in a County in which there are no longer any county roads in one of the commissioner precincts?

At the time the present ex officio road commissioner system was adopted in Denton County, there were only .075 miles of county roads in Precinct 3. There is a very real possibility that there are either presently no county roads in Precinct 3 or that there will be no county roads in Precinct 3 in the almost immediate future. If, whether now or in the future, it is demonstrated that there are, in fact, no county roads in Precinct 3 or, for that matter, in any precinct, may the ex officio road commissioner system continue to be used in Denton County?

Once again, we have found very little guidance on this issue but we conclude that the ex officio road commissioner system could not be validly used if no county roads exist in one or more of the precincts of a county. If there are no county roads in a precinct, there is no reason for the existence of an ex officio road commissioner. To establish or continue with the ex officio road commissioner system where there are no county roads in one or more precincts would, in our opinion, create a system that is not authorized by statute and invalid under *Canales v. Laughlin*, *Guerra v. Rodriguez*, and *Starr County, Texas v. Guerra*. In a county where there are no county roads in one or more precincts, the viability of a road commissioner system and the system of road superintendents for each precinct may be uncertain although the statutes governing the road commissioner system states that "not more than four" road commissioners may be employed which implies that perhaps less than four road commissioners might be employed. Section 252.103 (a), Transportation Code. Section 252.203 (a), Transportation

Code, provides that either a county-wide road superintendent or a road superintendent for each county commissioner's precinct may be employed. Does this mean that only such individual road superintendents as necessary may be employed or does it mean that the individual road superintendent system applies only if one is hired for each commissioner's precinct? It appears that only the county-wide road superintendent system or the County Engineer system would unquestionably be valid optional systems of road and bridge administration in a county having no county roads in one or more precincts and that the availability of the road commissioner system or the individual road superintendent system are at best questionable. Presumably the "default" system of road supervisors would, of necessity, be valid in such a county but even that is not free of doubt. Your opinion on these areas is also requested.

CONCLUSIONS

We reach the following conclusions:

1. The ex officio road commissioner system adopted in Denton County and the allocation of the road and bridge funds for Fiscal Year 2003-2004 are in substantial compliance with statutory requirements and within the discretion of the Denton County Commissioners Court.
2. The allocation of road and bridge funds for Fiscal Year 2004-2005 except for the restriction of those funds allotted to the ex officio road commissioners for Precinct 2 and 3 to "contract labor, road work" is in substantial compliance with statutory requirements and within the discretion of the Denton County Commissioners Court.
3. The ex officio road commissioners who share a road crew in Denton County have joint hiring authority once the commissioners court has authorized the position.
4. Neither of the ex officio road commissioners who share a road crew have any authority over the crew when it is working in the other commissioner's precinct.
5. An ex officio road commissioner may fire an employee paid from road and bridge funds while that employee is working in the commissioner's precinct and there is no recourse or appeal to the commissioners court from that decision.
6. A commissioners court retains supervision of the county road and bridge system except to the extent an individual ex officio road commissioner has been given specific

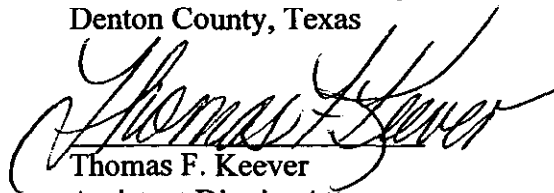
authority by statute or the commissioners court has, pursuant to statutory authority, delegated that authority to the individual ex officio road commissioners by its orders and rules and regulations promulgated for the ex officio road commissioner system.

7. A commissioners court may only transfer funds allocated to an ex officio road commissioner to another commissioner a) to compensate an employee fired by the first commissioner and subsequently hired by the second commissioner or b) to adjust balance surpluses as a part of the annual budgeting process.
8. The restriction of the use of road and bridge funds by the ex officio road commissioners of Precinct 2 and Precinct 3 for "contract labor, road crew" for Fiscal Year 2004-2005 deprives those commissioners of even the shared use of a road crew, is not in compliance with statutory requirements, and is invalid as an abuse of discretion in the allocation of those funds.
9. The ex officio road commissioner system may not be created or continue to be used if a commissioner has no county roads in his/her precinct.

While these are our conclusions, we request your opinion on all the issues discussed in this request because of the lack of specific guidance from the statutes, case law, and Attorney General Opinions in this gray, murky, and uncertain area of road and bridge law in the State of Texas.

The Commissioners Court of Denton County and this office sincerely appreciate your consideration and opinion on these issues. Again, if at all possible, we request an expedited consideration of our request so that, hopefully, these issues will be resolved before the beginning of Fiscal Year 2005. Thank you.

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