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RQ-1017-6A

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November 8, 2011

FILE # M1-46875-11
I.D. # 46875

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: **Request for Opinion:** Operation of Recreational Off-highway and All-terrain Vehicles on the Beach

Dear General Abbott:

I write to request an opinion from your office to resolve an apparent statutory conflict as to whether recreational off-highway vehicles and all-terrain vehicles (collectively, "OHV's")¹ may be legally operated on a public beach and whether a county has the authority to register these types of vehicles for operation on the beach.

This issue arose after Galveston County announced that it would begin enforcing laws banning the operation of OHV's on the beaches along the Bolivar Peninsula. It has been suggested by a State Representative and the General Land Office that counties have the authority – if they choose to do so – to register OHV's for use on public beaches.

The general rule in the State of Texas is that a motor vehicle cannot be operated on a public roadway unless it is legally registered for such a purpose.² The use of OHV's on a public street,

¹ All-terrain vehicles are distinguished from recreational off-highway vehicles by having three or more wheels and a saddle, while recreational off-highway vehicles have four or more wheels with a non-straddle seat. TEX. TRANSP. CODE ANN. §§502.001(1) & 502.001(19-a) (Vernon Supp. 2010).

² A person commits an offense punishable by a fine not to exceed \$200 if he either operates an unregistered vehicle on a public highway or operates a vehicle which is registered in a class other than that to which it belongs. TEX. TRANSP. CODE ANN. §§502.402-502.403 (Vernon 2007).

road or highway is prohibited except for a few limited exceptions. TEX. TRANSP. CODE ANN. §663.037 (Vernon 2011). The exceptions center on the use of the OHV in connection with specified activities in the agricultural industry or utility work performed by a utility. §663.037(d). The section also expressly provides that portions of the statute prohibiting the operation of OHV's on roads do not apply to OHV's owned by the state, a county, or a municipality. §663.037(f).

Beaches have traditionally been treated as public roadways for purposes of the operation of motorized vehicles. A "public highway" includes a road, street, way, thoroughfare, or bridge that is in the state, that is for the use of vehicles, that is not privately controlled or owned, and over which the state has legislative jurisdiction under its police power. TEX. TRANSP. CODE ANN. §502.001(18) (Vernon Supp. 2010). The terms "highway" and "public road" are merely terms to differentiate the same from private roads. *King v. State*, 732 S.W.2d 796, 800 (Tex. App. – Fort Worth 1987). Further, the Court of Criminal Appeals found – in a Galveston County case – that driving while intoxicated on a beach was sufficient to support a jury's finding that a motor vehicle was driven on a public road. *Brown v. State*, 289 S.W.2d 942 (Tex. Crim. App. 1956). Therefore, the term "highway" – as used in §502.006 prohibiting registration of an OHV for operation on a public highway – necessarily includes a beach.

Section 502.006, addressing the operation and registration of OHV's, reads as follows:

- (a) Except as provided by Subsection (b), a person may not register an all terrain vehicle or a recreational off-highway vehicle, with or without design alterations, for operation on a public highway.
- (b) The state, a county, or a municipality may register an all-terrain vehicle or a recreational off-highway vehicle for operation on a public beach or highway to maintain public safety and welfare.
- (c) A recreational off-highway vehicle registered as provided by Subsection (b) may be operated on a public or private beach in the same manner as a golf cart may be operated on a public or private beach under section 502.0071. The operator must hold and have in the operator's possession a driver's license issued under Chapter 521 or a commercial driver's license issued under Chapter 522.
- (d) Chapter 502.172 does not apply to an all terrain vehicle or a recreational off-highway vehicle.

TEX. TRANSP. CODE § 502.006.

The problem arises in the interpretation of subsection (b). It may be read to allow only the state, a county, or a municipality to register an OHV as the owner/operator for operation on a public beach or highway to maintain public safety and welfare. Alternatively, §502.006 may be read to allow an individual to register an OHV with one of the specified governmental entities. The statutory history supports the former interpretation.

Prior to the codification of this statute, article 6675a-3 addressed, in part, exemptions from registration fees. As noted by the Texas Attorney General in 1993, “[s]ubsection (i) exempts from the registration fee all-terrain vehicles owned by the state or a local government and operated solely for public safety and welfare purposes.” Op. Tex. Att’y Gen. No. LO-93-72 (1993). This position is further supported by a comment in a recent legislative committee report: the Committee Report (Substituted) for 81 (R) H.B. 2553 noted that “[t]he substitute [bill] adds provisions not in the original to prohibit, with the exception of the state, a county, or a municipality, a person from registering a recreational off-highway vehicle for operation on a public highway.” This implies that only the named governmental entities – and *not* private individuals – are allowed to register OHV’s for use on a public highway or beach.

Further, it is settled law that a county has only those powers specifically conferred by the constitution or by statute. See *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948). Unless a county has been specifically granted the power by statute to register privately-owned OHV’s for use on the beach, it may not do so. Additionally, the county is expressly prevented from requiring the owner of a motor vehicle to register a vehicle or pay a motor vehicle registration fee. TEX. TRANSP. CODE ANN. §502.003(2) (Vernon 2007). Consequently, I do not believe that a county has the authority to register privately-owned OHV’s for beach use.

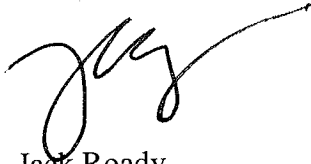
Some of the confusion appears to have been introduced by the 2009 version of TEX. TRANSP. CODE §502.006(c). In 2007, the legislature repealed sections (c) and (d) of §502.006 and made changes to Ch. 29, Parks and Wildlife Code, to address the operation of OHV’s on public park lands. Act of June 15, 2007, 80th Leg., R.S. Ch. 1280, 2007 Tex. Gen. Laws 4270. Then in 2009, the legislature amended §502.006 to include additional types of OHV’s and added subsections (c) and (d): subsection (c) allowed an OHV registered under subsection (b) to be operated the same as a golf cart on a public or private beach under §502.0071. (In 2009, §502.0071 was repealed and recodified under TEX. TRANSP. CODE §551.403.) However, subsection (b) had never allowed for the registration of OHV’s owned by persons other than the state, county or municipality.

Some compare the use of OHV’s on the beach to that of golf carts. A golf cart is defined as a “motor vehicle designed by the manufacturer primarily for transporting persons on a golf course.” TEX. TRANSP. CODE §502.001(7) (Vernon Supp. 2010). A golf cart is not required to be registered but it may still be operated on a public or private beach. §551.403(a)(2). However, OHV’s are not the same as golf carts under the statute because they are not primarily designed for transporting persons on a golf course. Therefore, OHV’s are not classified as golf carts for use on the beach under the current statutory provisions.

Conclusion

Under the current statutes, it appears that the law prohibits the operation of an OHV on the beach and does not give a county the authority to register privately-owned OHV's for use on the beach. However, these statutes also appear to be subject to conflicting interpretations. Therefore, I would appreciate your opinion as to the correct interpretation. Please let me know if you need any further information.

Respectfully,



Jack Roady
Galveston County Criminal District Attorney