

RECEIVED
FEB 15 2013
OPINION COMMITTEE

OFFICE OF THE COUNTY ATTORNEY,
HOWARD COUNTY, TEXAS
P.O. Box 2096
Big Spring, Texas 79721-2096

FILE # ML-47223-13
I.D. # 47223

JOSHUA HAMBY
COUNTY ATTORNEY

TELEPHONE: (432) 264-2205

HOT CHECK DEPT: (432) 264-2207

FAX: (432) 264-2206

February 13, 2013

Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548
Certified Mail: 7010187000092548194

RQ-1110-GA

To the Honorable Greg Abbott:

I hereby request an opinion regarding the following:

Can the Howard County Commissioner's Court require individuals and entities in the oil and gas industry to obtain a permit for constructing or installing an access to a county road to offset the damage caused to the county road?

Background:

For purposes of this request for an opinion, the term "Access Points" refers to private roads that intersect county roads and are constructed for ingress and egress from a county road to a private road, or vice versa. Howard County is in the middle of an oil boom. Our county roads are busy with oilfield traffic. The excess traffic is causing severe damage to our roads and increasing the costs of the maintenance and repair to said roads. The volume of traffic and the weight of the vehicles are particularly harsh on the roads at these access points.

The Commissioners desire to compensate for this increased damage by use of a permit. The Commissioners want to require that any new access points constructed for oil and gas purposes be permitted. Although this increased oilfield traffic has damaged other portions of our county roads, it is not as easy to identify the person or entity causing such other damage. With the access points, it is known who is causing the damage. In addition, our County Road Supervisor desires to have specifications implemented in regards to the construction of these access points. For instance, he wants a particular size of corrugated pipe used in the bar ditches to prevent flooding. By using a permit process, the county is able to enforce the implementation of those specifications.

The Commissioners desire to charge a fee of \$4500.00 for each new access point constructed. The permit would only have to be obtained by oil and gas companies or individuals that are installing the access for oil and gas operations. Because of some questions regarding the legality of such requirement, the Commissioners have asked for the Attorney General's opinion.

Brief:

In Article V, Section 18 (b) of the Texas Constitution, it states "The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all County business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed". This section implies that the County Commissioners may only act or regulate when allowed by law. In §251.016 of the Texas Transportation Code, the Commissioners Court of a County may exercise general control over all roads, highways, and bridges in the county. Likewise, in Section §251.003 of the Texas Transportation Code it states in part, "The Commissioners Court of a County may make and enforce all necessary rules and orders for the construction and maintenance of public roads".

It appears that the Transportation Code allows Counties to make rules and orders concerning county roads, however, it is unclear whether they may permit or set a fee for such. In §251.017 it states that a County may set a reasonable fee for the County's issuance of a permit authorized by this chapter for which a fee is not specifically prescribed. Since no portion of the subchapter addresses setting a fee for an access point permit, it is unclear whether the County may do so.

In §251.0165 of the Texas Transportation Code, it does address the power of County with a population of 3.3 million or more, or adjacent thereto, to deny controlled access to a county road or state highway. This raises the issue as to whether a County, like Howard County, with a population of less than 3.3 million may permit access points for county roads. A related issue to this point is whether the onetime payment of \$4500.00 per permit is reasonable. However, I understand that without more data concerning the amount of damage to the access points, it is impossible for the Attorney General's Office to give an opinion in regards to the reasonableness of the fee.

A second issue is the cause of damage at these access points. The damage is caused by several factors, including the amount of traffic and the weight of the vehicles. There are numerous Attorney General opinions that address the issue as to whether the County can permit an overweight vehicle if the vehicle already has a state permit. It seems that these opinions all provide that the County may not require a permit. Therefore, if the County requires a permit for an access point which is in part due to the damage caused by the weight of the vehicles entering and exiting County roads onto private roads, is the County actually permitting for weight?

Finally, the Commissioners desire only to permit only those access points that are constructed in furthering of oil and gas operations. Every time a new well is drilled in Howard County, a new access point is constructed prior to the drilling if there is not an existing access point. It is very rare for an access point to be constructed for other purposes, such as agriculture, because those access points are established and new ones are rarely constructed. Occasionally, someone will build a new house and will construct an access point to have access to the home. Except for some large tractors and implements, these access points do not have the vehicle traffic and weight problems like the oilfield. However, it seems unjust to require permitting of only one commercial industry.

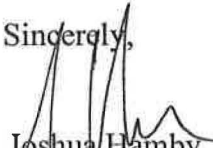
The Commissioners are fully aware of Section §251.160 of the Texas Transportation Code, which allows the County to file suit against a person whom causes damage to a county road. However, unless the damage was caused by an accident or other large event, that can be verified, it is almost impossible to determine liability of sustained increased damage to access points. The requirement of the permit is a mechanism that the County can use to be reimbursed for this increased damage without having to determine which particular vendor or contractor caused the damage.

Summary:

The main issue is whether the County Commissioners may require a permit and charge a fee for installing access points, and if so, whether they may only require the oil and gas industry to obtain the permit.

Thank you for your attention to this matter. If you require any further information, please do not hesitate to contact me.

Sincerely,



Joshua Hamby
County Attorney

JH/ag

Cc:

Mark J. Barr County Judge
600 Mathews Avenue
Big Spring, Texas 79720

Oscar Garcia PCT. 1
2501 Albrook
Big Spring, Texas 79720

Donnie Baker PCT. 2
2303 Cindy Lane
Big Spring, Texas 79720

Jimmie Long PCT. 3
2 Craigmont Court
Big Spring, Texas 79720

John Cline PCT. 4
P.O. Box 2649
Big Spring, Texas 79721