



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

May 20, 1970

Honorable Harvey Davis
Executive Director
Texas State Soil and
Water Conservation Board
1018 First National Building
Temple, Texas 76501

Opinion No. M-633

Re: Authority of County
Commissioners to authorize
flooding of public roads,
and related questions.

Dear Mr. Davis:

In your recent letter you have described briefly the role of the Board in implementing the construction, with federal aid, of small flood control projects, and have advised us as follows:

"There are occasions when it is desirable to construct flood control structures in locations which will temporarily inundate a road or highway during periods of heavy rainfall. It has been customary for counties to grant permission for county roads to be temporarily inundated where alternate roads are available and where flooding is rare. This seems to be the practical situation in many cases rather than permanently closing a road or raising a road.

"The Office of the General Counsel of the United States Department of Agriculture has raised a question as to the authority of the Commissioners Courts to temporarily close a road or to give permission to some other political subdivisions sponsoring flood control programs to inundate roads which by necessity would temporarily close the road. Therefore, we request an opinion from your office of the following questions:

"1. Do the County Commissioners have the authority under the laws of the State of Texas to grant either to the County or other political subdivisions of the State the right

Hon. Harvey Davis, page 2 (M-633)

or permission to flood a road within their jurisdiction thereby temporarily closing the road.

"2. If your answer to question No. 1 is affirmative, what is the proper procedure for the County Commissioners to grant such right or permission to flood a road?"

Canales v. Laughlin, 147 Tex. 169, 214 S.W.2d, 451, 453 (1948) is authority for the holding that the commissioners courts have a broad discretion in exercising constitutionally or statutorily conferred powers and the question to be considered is whether a particular power is conferred upon such courts either "expressly or by necessary implication."

In accord, Rowan v. Pickett, 237 S.W.2d 734 (Tex.Civ. App. 1951, no writ); Prichard & Abbott v. McKenna, 350 S.W.2d 333, 334 (Tex.Sup. 1961); Attorney General Opinion No. M-605 (1970).

In Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084 (1941), the Supreme Court held that:

"Where a right is conferred or obligation imposed on said court, it has implied authority to exercise a broad discretion to accomplish the purposes intended."

The Court said in Stoval v. Shivers, 129 Tex. 256, 103 S.W.2d 363 (1937) that:

"The duty of the commissioners court is to transact the business, protect the interest, and promote the welfare of the county as a whole."

In Parkey v. Archer County, 61 S.W.2d 175 (Tex.Civ. App. 1933, error refused), the Court said that the commissioners court may,

"upon their initiative, order the laying out and opening of public roads when necessary and discontinue all or any roads when it shall be deemed expedient," citing authorities. (Emphasis added.)

Hon. Harvey Davis, page 3 (M-633)

In 40 C.J.S. 213, Highways, Section 218, we find the following statement of the general rule:

"Not every obstruction to the use of a highway is illegal. Public highways are subject to such incidental or partial obstructions as necessity requires provided they do not unreasonably interfere with the rights of the public and are not unduly prolonged."

The cases cited for this statement dealt with obstructions brought about by non-governmental entities, but the same reasoning should equally apply to an obstruction by a governmental entity clothed with general authority to discontinue highways and with general control over them.

The reply to your question then turns on whether statutory authority, properly construed, permits the commissioners court to allow the occasional flooding of a county road in such a manner as to render it temporarily impassable.

Article 2351, paragraph 3, Vernon's Civil Statutes, is a general grant of authority and authorizes the commissioners court to

"Lay out and establish, change and discontinue public roads and highways;"

and under paragraph 6 of the same article the court is empowered to

"Exercise general control over all roads, highways, ferries and bridges in their counties."

Article 6703, Vernon's Civil Statutes, reads, in part, as follows:

"The commissioners court shall order the laying out and opening of public roads when necessary, and discontinue or alter any road whenever it shall be deemed expedient. No public roads shall be altered or changed except to shorten the distance from end to end, unless the court upon a full investigation of the proposed change finds that the public interest will be better served by making the change; and said

change shall be by unanimous consent of all the commissioners elected. No part of a public road shall be discontinued until a new road is first built connecting the parts not discontinued; and no entire first or second class road shall be discontinued except upon vacation or non-use for a period of three years." (Emphasis added.)

We are of the opinion that in the light of the cases and statutes herein discussed there is statutory authority for the commissioners court to discontinue temporarily part of a public road, provided the applicable requirements of Article 6703 are met, and that the court's discretionary power under said cases and statutes is broad enough that the court may, by unanimous consent, elect to allow the temporary flooding of a county road and the resultant temporary discontinuance of that road if, but only if, the court finds that the public interest will be better served, and only if the court provides and maintains a suitable alternate road. Otherwise, the county commissioners would have no authority to flood a road within their jurisdiction, temporarily closing the road without providing an alternative road.

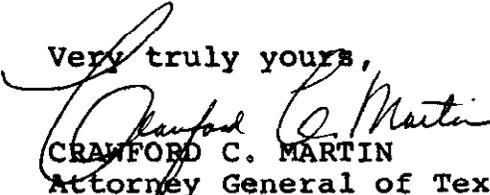
Your second question inquires about the procedure to be followed in granting authority for the temporary flooding. In answer thereto, you are advised that the entry of the commissioners court order, granting such authority, in the Minutes of the Court, should suffice.

Your third and fourth questions concern purely hypothetical questions on which this office normally expresses no opinion.

S U M M A R Y

The commissioners court may, by unanimous consent, elect to allow the temporary flooding of a county road and the resultant temporary discontinuance of that road if the court follows the applicable provisions of Article 6703 and finds that the public interest will be better served thereby and provides and maintains a suitable alternate road.

Very truly yours,


CRAWFORD C. MARTIN

Attorney General of Texas

Hon. Harvey Davis, page 5 (M-633)

Prepared by James S. Swearingen
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Kerns Taylor, Chairman
W. E. Allen, Acting Co-Chairman
Sam Jones
Austin Bray
Gordon Cass
Dyer Moore

MEADE F. GRIFFIN
Staff Legal Assistant

ALFRED WALKER
Executive Assistant

NOLA WHITE
First Assistant