



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 30, 1995

The Honorable Todd L. Alvey
Gray County Attorney
P.O. Box 697
Pampa, Texas 79066-0697

Letter Opinion No. 95-065

Re: Whether a property owner may erect a gate across a third-class road if the county has constructed cattle guards on the road, and a related question (ID# 25770)

Dear Mr. Alvey:

You ask whether the owner of property on both sides of a third-class road in Gray County may erect a gate across the road if the county has already constructed cattle guards thereon. We understand that Gray County has a population of fewer than 60,000 persons, that the landowner believes the gate to be necessary to discourage the illegal dumping of trash on his property, and that the county acquired the road without cost.

Although section 251.010(a)¹ of the Transportation Code, Act of May 1, 1995, 74th Leg., R.S., ch. 165, sec. 1, § 251.010(a), 1995 Tex. Sess. Law Serv. 1025, 1153, generally would permit a landowner to erect a necessary gate on a third-class road that the county acquired without cost, subsection (a) of section 251.009 permits the

¹Section 251.010(a) provides:

(a) A person who owns real property on which a third-class road or a neighborhood road established under Section 251.053 is located for which the right-of-way was obtained without cost to the county may erect a gate across the road when necessary. The person shall place a permanent hitching post and stile block on each side of the gate within 60 feet of the gate. The gate must be:

- (1) at least 10 feet wide;
- (2) free of obstructions above the gate;
- (3) constructed so that opening and shutting the gate will not cause unnecessary delay to a person using the road; and
- (4) constructed with a fastening to hold the gate open until a person using the gate passes through it.

Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Sess. Law Serv. 1025, 1153 (to be codified at Transp. Code § 251.010(a)).

commissioners court of a county of fewer than 60,000 persons to "authorize the construction of cattle guards on a county road of any class"² and subsection (d) permits the commissioners court to construct cattle guards on county roads if such construction is in the best interest of the county.³ As you point out, this office concluded in Attorney General Opinion M-189 that the statutory predecessor to section 251.009(a) and (d) controlled over the statutory predecessor to section 251.010(a) to the extent of their conflict and thus that the determination of a commissioners court to construct cattle guards on a third-class road superseded a landowner's authority to erect gates thereon. Attorney General Opinion M-189 (1968) at 3-4.⁴

You question the continuing validity of the rule of supersession announced in Attorney General Opinion M-189. You point out that now the two formerly separate statutes addressed in that opinion were later combined into the same section, that is, section 2.007, of former article 6702-1 and that neither provision mentions any restriction on the placement of gates on third-class roads when cattle guards already have been constructed on them.⁵ You contend that the legislature must have intended to overrule

²Section 251.009(a) provides:

(a) The commissioners court of a county with a population of less than 60,000 may authorize the construction of cattle guards on a county road of any class. A cattle guard authorized under this section is not an obstruction of the road.

Id. (to be codified at Transp. Code § 251.009(a)).

³Section 251.009(d) provides:

(d) The commissioners court may construct a cattle guard on a county road of any class and may pay for its construction from the county road and bridge fund if the court finds that the construction of the cattle guard is in the best interest of the residents of the county.

Id. (to be codified at Transp. Code § 251.009(d)).

⁴*See id.* sec. 1, §§ 251.009 (derived from V.T.C.S. art. 6702-1, § 2.007(b), (d)-(e)), 251.010(a) (derived from V.T.C.S. art. 6702-1, § 2.007(f), (g)), at 1153-54; Act of May 20, 1983, 68th Leg., R.S., ch. 288, sec. 1, § 2.007 (derived from V.T.C.S. arts. 6704, 6712, 6712a), 1983 Tex. Gen. Laws 1431, 1437-39, *repealed by* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 24, 1995 Tex. Sess. Law Serv. 1025, 1870-71; V.T.C.S. arts. 6704, 6712, *repealed by* Act of May 20, 1983, 68th Leg., R.S., ch. 288, § 2, 1983 Tex. Gen. Laws 1431, 1526.

⁵Former article 6702-1, section 2.007, provided in pertinent part:

(b) Any county in this state containing a population of less than 60,000 inhabitants according to the most recent federal census may by a majority vote of the commissioners court authorize the construction of cattle guards across any or all of the first-class, second-class, or third-class roads in said county, and the cattle guards may not be classed or considered as obstructions on the roads.

....

Attorney General Opinion M-189 because it did not insert language stating that gates might be erected only if no cattle guards had been installed on the road. We disagree.

The language of sections 251.009(a) and (d) and 251.010(a)--which, before its nonsubstantive recodification into the Transportation Code, *see* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 25 (legislative intent of no substantive change in the law), 1995 Tex. Sess. Law Serv. 1025, 1871, was found in V.T.C.S. article 6702-1, section 2.007(b), (e), and (f)--is not substantially different from the language of the former statutes analyzed in Attorney General Opinion M-189.⁶ The proper rule of construction, then, is that the

(footnote continued)

(f) The owners of land across which a third-class or neighborhood road may run, when the right-of-way for the road has been acquired without cost to the county, may erect gates across the road when necessary, the gates to be not less than 10 feet wide and free of obstructions at the top.

Act of May 20, 1983, 68th Leg., R.S., ch. 288, sec. 1, § 2.007, 1983 Tex. Gen. Laws 1431, 1437-38, repealed by Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 24, 1995 Tex. Sess. Law Serv. 1025, 1870-71.

⁶V.T.C.S. article 6704, section 4, the predecessor to subsections (a) and (d) of section 251.009 and former V.T.C.S. article 6702-1, section 2.007(b), provided in pertinent part:

4. Any county in this State containing a population of less than ten thousand (10,000) inhabitants, or any county with a population of not less than twenty-one thousand, two hundred and sixty-five (21,265) nor more than twenty-one thousand, seven hundred and eighty-five (21,785), according to the last preceding Federal Census, may by a majority vote of the Commissioners Court thereof authorize the construction of cattle guards across any or all of the first class, second class, or third class roads in said county, and such cattle guards shall not be classed or considered as obstructions on said roads.

....

The Commissioners Court of any county coming under the provisions of this Act is hereby authorized and empowered to construct cattle guards on the first class, second class, and third class roads of said county and pay for same out of the Road and Bridge Funds of said county when in their judgment they believe the construction of such cattle guards to be to the best interest of the citizens of said county.

V.T.C.S. art. 6704, § 4 (as amended by Act of May 27, 1965, 59th Leg., R.S., ch. 650, § 1, 1965 Tex. Gen. Laws 1499, 1499-500), repealed by Act of 1983, 68th Leg., R.S., ch. 288, § 2, Tex. Gen. Laws 1431, 1526, quoted in Attorney General Opinion M-189 (1968) at 1-2; *cf. supra* notes 2 and 3 (quoting Transp. Code § 251.009(a), (d)); *cf. also supra* note 5 (quoting former V.T.C.S. art. 6702-1, § 2.007(a)).

V.T.C.S. article 6712, the predecessor to section 251.010(a) and former V.T.C.S. article 6702-1, section 2.007(f), provided:

The owners of land across which a third class or neighborhood road may be run, when the right of way therefor has been acquired without cost to the county, may erect gates across said road when necessary, said gates to be not less than ten feet wide and free of obstructions at the top.

legislature is presumed to have acquiesced in the attorney general's construction of statutory language of doubtful meaning where it has amended or re-enacted the statute without changing the language so construed. *E.g., Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 52 S.W.2d 56, 62 (Tex. 1932). We therefore conclude that the rule of Attorney General Opinion M-189, that a landowner may not erect gates on a third-class road on which the county has constructed cattle guards, was incorporated into section 2.007 of former V.T.C.S. article 6702-1 and, consequently, into sections 251.009(a) and (d) and 251.010(a) of the Transportation Code.

You also ask whether a landowner who has erected a gate on a third-class road on which the county has constructed cattle guards may raise section 251.010(a) as a defense in a prosecution for obstructing a road under Penal Code section 42.03. That section provides in pertinent part:

A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly:

(1) obstructs a highway . . . to which the public . . . has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others

As we concluded above, a landowner has no authority under section 251.010(a) to erect a gate on a third-class road where the county has already installed cattle guards. Therefore, in these circumstances, section 251.010(a) would not provide a defense in a prosecution for obstructing the road under section 42.03 of the Penal Code.

(footnote continued)

V.T.C.S. art. 6712, *quoted in* Attorney General Opinion M-189 (1968) at 1, *repealed by* May 20, 1983, 68th Leg., R.S., ch. 288, sec. 2, 1983 Tex. Gen. Laws 1431, 1526; *cf. supra* note 1 (quoting Transp. Code § 251.010(a)); *cf. also supra* note 5 (quoting former V.T.C.S. art. 6702-1, § 2.007(f)).

S U M M A R Y

A landowner has no authority under Transportation Code section 251.010(a) to erect a gate on a third-class road in Gray County if the county has already installed cattle guards on the road. In these circumstances section 251.010(a) would not provide a defense, as "legal privilege or authority" to erect a gate, in a prosecution for obstructing the road under section 42.03 of the Penal Code.

Yours very truly,



James B. Pinson
Assistant Attorney General
Opinion Committee