



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 30, 1998

The Honorable Mark F. Pratt
Hill County Attorney
P.O. Box 253
Hillsboro, Texas 76645

Letter Opinion No. 98-087

Re: Allocation of road and bridge fund among
precincts in Hill County (RQ-1055)

Dear Mr. Pratt:

You ask about the proper division of revenue in the road and bridge fund among the four precincts in Hill County. The county road and bridge fund, established by article VIII, section 9 of the Texas Constitution, includes a portion of the county's ad valorem tax collections and the amount of motor vehicle registration fees designated by section 502.102 of the Transportation Code.¹ Money in the road and bridge fund is to be used "only for working public roads or building bridges, except as otherwise provided by law."² It is to be spent only by order of the commissioners court.³

You state that Hill County has never adopted any of the optional systems of county road administration under chapter 252 of the Transportation Code.⁴ Hill County is therefore subject to chapter 251 of the Transportation Code, which sets out the general county authority relating to roads and bridges, as well as other generally applicable provisions on the power and duties of commissioners courts with respect to roads and bridges.⁵ In addition, a special road law applicable

¹Article VIII, section 9 of the constitution limits the amount of ad valorem tax that the county may levy for the four constitutional purposes--a general fund, permanent improvement fund, road and bridge fund, and jury fund. A county may consolidate the four constitutional funds and place all tax money in a single general fund.

²Transp. Code § 256.001(a).

³*Id.* § 256.001(b).

⁴Subchapter A of chapter 252 of the Transportation Code authorizes a commissioners court to adopt a system, whereby each county commissioner is the ex officio road commissioner for his or her precinct. Under subchapter D a county may hold an election to adopt a countywide road system, in which the administration of the county road department is to be based on the county as a whole without regard to commissioners' precincts. Subchapters B and C of chapter 252, which provide respectively for road commissioners and a road superintendent, do not apply to Hill County. Transp. Code §§ 252.101, .201.

⁵*See also* Local Gov't Code § 81.028 (powers of commissioners court to exercise general control over all roads in their counties); Transp. Code chs. 253 (county improvement of subdivision roads), 254 (drainage on public roads), 256 (funds and taxes for county roads).

to Hill County was adopted in 1919,⁶ providing that each member of the commissioners court would be ex officio road commissioner of his respective district, subject to specified supervision and direction of the of the commissioners court.⁷

You also state that the Hill County Commissioners Court adopted a budget for the 1997-98 fiscal year that divided the estimated revenue from the road and bridge fund as follows: Precinct 1: 23.9%, Precinct 2: 23.6%, Precinct 3: 30.5%, and Precinct 4: 22%.

The road and bridge fund has been divided according to these percentages ever since 1983. These percentages were established in 1983 in the settlement of a lawsuit over the allocation of the road and bridge fund among the four precincts.⁸ The judgment states in part:

[I]t appearing to the Court that an agreement has been reached by all parties and that the percentages of the Road and Bridge Fund are perpetrated⁹ upon all aspects of the law, including tax rolls, conditions of roads, size of the precincts, and all other requirements necessary to conform to the State law, and that all parties to this suit are satisfied that the percentages to be listed hereinafter are in conformity with said law.¹⁰

⁶Act approved March 4, 1919, 36th Leg., R.S., ch. 33, 1919 Tex. Special Laws 105, 105, *amended by* Act approved July 11, 1919, 36th Leg., 2d C.S., ch. 7, 1919 Tex. Local & Special Laws 15, 15 *and* Act of March 10, 1939, 46th Leg., R.S., ch. 10, 1939 Tex. Special Laws 872, 872; *see Tinner v. Crow*, 78 S.W.2d 588 (Tex. 1935) (construing Hill County Special Road Law).

⁷Act approved March 4, 1919, 36th Leg., R.S., ch. 33, § 17, 1919 Tex. Special Laws 105, 109.

⁸*Eubank v. Gatlin*, No. 27,196 (66th Dist. Ct., Hill County, Tex. Jan. 21, 1983). Commissioner Eubank and three other residents of Hill County sued the county judge and the other three county commissioners, claiming that the defendants' apportionment of the road fund for the 1983 budget had not complied with the law and that Commissioner Eubank lacked the funds and equipment necessary to maintain the roads in his precinct. *Id.*, Plaintiffs' First Amended Original Petition (Sept. 16, 1982).

⁹"Perpetrate" is defined as "to bring about or carry out." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 877 (1983).

¹⁰*Eubank v. Gatlin*, No. 27,196 (66th Dist. Ct., Hill County, Tex. Jan. 21, 1983). The brief submitted with this request gives a different account of the information considered in the 1983 decision about allocating the road and bridge fund among the four precincts. The brief states that the number of miles of rural road, feet of bridges, and miles of city streets and subdivision streets in each precinct were considered, and that no consideration was given to the respective tax base of each precinct.

The court then ordered that the four precincts be awarded the percentages stated above, and “[t]hat all costs of suit are taxed against the Defendants, and that such percentages are in conformity with the requirements of the law in setting the same.”¹¹

An attorney general opinion cannot overrule a judicial decision.¹² If the court order bound the present commissioners court to allocate the fund according to the stated percentages, we could do no more than advise you of that fact. A new court order would be required to change the allocations. However, neither Hill County nor the Hill County Commissioners Court is named as a party to the lawsuit. More important, because a district court has no power to determine how the road and bridge fund shall be spent,¹³ the court’s order approving the settlement could not establish road fund allocations for the future. All it could do was determine that the allocations for the 1983 budget year complied with the law.

You ask the following three specific questions about the allocation of the road and bridge fund:

1. Whether Hill County has, for fiscal year 1997-98, divided the road and bridge fund legally?
2. Should Hill County divide the road and bridge fund as nearly as practicable in relation to the tax base of each precinct?
3. If Hill County should consider the length of roads and bridges in each precinct in dividing the road and bridge fund, what types of roads and bridges should be included in the formula?

We cannot provide the specific answers that these questions call for. As this opinion will show, a commissioners court has broad discretion to decide how to allocate the road and bridge fund among the precincts, subject to judicial invalidation for abuse of discretion. We cannot, in an attorney general opinion, determine whether or not the matters you inquire about are within the court’s discretion.

Your research indicates that no statute expressly governs the allocation of the road and bridge fund in Hill County. The Special Road Law for Hill County does not allocate the road and bridge fund,¹⁴ and we have been unable to find any provision applicable to Hill County that does so.

¹¹*Id.*

¹²Attorney General Opinions JM-1116 (1989), JM-623 (1987), H-373 (1974); Open Records Decision No. 415 (1984) (order of dismissal following settlement of case).

¹³*Stovall v. Shivers*, 103 S.W.2d 363, 367 (Tex. 1937).

¹⁴The special road law for Hill County permits a special road tax to be levied within a commissioner’s precinct,
(continued...)

A provision allocating the road and bridge fund of counties that have adopted chapter 252 of the Transportation Code is found in section 252.108 of the Transportation Code. It provides that:

In a county that employs road commissioners under this subchapter, the commissioners court shall ensure that the county road and bridge fund is judiciously and equitably spent on the roads and bridges in the county. As nearly as the condition and necessity of the roads permit, the fund shall be spent in each county commissioner's precinct in proportion to the amount of money in the fund collected in the precinct.¹⁵

Even though section 252.108 does not apply to Hill County, judicial decisions on its predecessor, former article 6740, V.T.C.S. (1925),¹⁶ are instructive about the courts's approach to reviewing a commissioners court's decision on allocating road and bridge moneys. *Stovall v. Shivers*, 103 S.W.2d 363 (Tex. 1937), arose from an allegation that the commissioners court of Van Zandt County had divided the road and bridge fund among the four commissioners precincts without considering the mileage of roads, condition of roads, amount of traffic, or amount of taxes collected in each precinct.¹⁷

The court stated that if, in the passage of the order dividing the fund in this way,

the commissioners court acted arbitrarily without the exercise of any discretion, or clearly abused its discretion, the district court in the exercise of its equitable powers can review and abrogate such action; and especially if the action of the court involves a failure to perform a duty affecting the public welfare.¹⁸

The court concluded that the order of the commissioners court, establishing a fixed policy of mechanically dividing the road and bridge fund into four parts, and allotting the same year after year to the four precincts, regardless of the amount of taxes collected in each precinct or the

¹⁴(...continued)

and this special tax is allocated to the precinct where collected. Act approved March 4, 1919, 36th Leg., R.S., ch. 33, §§ 1, 6, 1919 Tex. Special Laws 105, 107.

¹⁵Section 252.108 further provides that money used in building permanent roads must first be used on first-class or second-class roads, and certain other roads for which right-of-way has been furnished free of cost.

¹⁶Act approved April 6, 1889, 21st Leg., R.S., ch. 111, § 6, 1889 Tex. Gen. Laws 134, 135, *reprinted in* 9 H.P.N. GAMMEL, LAWS OF TEXAS 1162, 1163 (1898).

¹⁷*Stovall*, 103 S.W.2d at 364.

¹⁸*Id.* at 365-66.

condition of the roads, did not comply with former article 6740, V.T.C.S. “The district court is, of course, without power to determine how the road and bridge fund shall be expended.”¹⁹

The *Stovall* court also emphasized that the commissioners court was a unit and an agency of the whole county. The members of the commissioners court were therefore primarily representatives of the whole county and not merely of their respective precincts.²⁰ Nonetheless, the commissioners court had to give effect to former article 6740, V.T.C.S., by spending the road and bridge fund “in each county commissioner’s precinct in proportion to the amount of money in the fund collected in the precinct,” as nearly as the condition and necessity of the roads permitted.²¹

Later cases addressing former article 6740, V.T.C.S., relied on *Stovall* to uphold a commissioners court’s order allocating the road and bridge fund to the county’s precincts. In *Alley v. Jones*, 311 S.W.2d 717 (Tex. Civ. App.--Beaumont 1958, writ ref’d n.r.e.), the county commissioner of precinct four of Montgomery County claimed that his precinct was deprived of its proper share of the road and bridge fund. He and some taxpayers of the precinct sought to have the district court re-allocate the fund to the precincts, giving a higher percentage to precinct four. The court reviewed the evidence, which included property valuations for each precinct, the proportion of industries, road mileage, residences, and population in each precinct, the heavy loads carried by traffic in two precincts,²² and the miles of roads in each precinct. It concluded that the order of the commissioners court was supported by substantial evidence, was not arbitrary, and was valid, and reiterated the rule from *Stovall* that the district court had no power to allocate the road and bridge fund.²³ See also *Janes v. Morton*, 385 S.W.2d 702 (Tex. Civ. App.--Amarillo 1964, writ ref’d n.r.e.).

The commissioners court’s decisions on allocating the road and bridge fund are subject to the general rule that a district court may reverse a commissioners court order “only if the latter has acted arbitrarily, capriciously, collusively, fraudulently, or otherwise in abuse of its discretion.”²⁴ “The rule is easy to state, but because of the broad discretion vested in the commissioners court, it can be applied only on a case-by-case basis.”²⁵ Since our research has shown no statutory standard for allocating the road and bridge fund in Hill County, we look for a standard in the general

¹⁹*Id.* at 367.

²⁰*Id.* at 366.

²¹*Id.* at 366-67.

²²Precincts 2 and 3, where there were oil fields, had much traffic bearing heavy loads, all of which required roads built of heavy and better materials. *Alley v. Jones*, 311 S.W.2d 717, 722 (Tex. Civ. App.--Beaumont 1958, writ ref’d n.r.e.).

²³*Alley*, 311 S.W.2d at 722.

²⁴*Hooten v. Enriquez*, 863 S.W.2d 522, 528 (Tex. App.--El Paso 1993, no writ).

²⁵*Id.*

provisions on building and maintaining county roads. Section 251.003 of the Transportation Code provides that the commissioners court of a county may “make and enforce all necessary rules and orders for the construction and maintenance of public roads.” Section 81.028 of the Local Government Code authorized the commissioners court to exercise general control over all roads in the county.²⁶ These provisions are very general, but they do indicate that the commissioners court acts as a unit and as agency of the whole county and not merely as representatives of their respective precincts in making decisions about the roads, including the allocation of the road and bridge fund.²⁷ Hill County has broad discretion to allocate the road and bridge fund among the county’s precincts, keeping in mind its responsibility to act for the county as a whole. If the commissioners court acted arbitrarily, without the exercise of any discretion, or abused its discretion, the district court may find the order invalid.²⁸ Whether the commissioners court acted arbitrarily, without an exercise of discretion, or abused its discretion must be determined on a case-by-case basis, in light of the evidence. We cannot make this determination in an attorney general opinion.

We note, however, that the *Stovall* court found that the commissioners court of Van Zandt County had established “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,” and that this 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.”²⁹ This practice also indicated that the commissioners court had failed to exercise its discretion at all.³⁰ The commissioners court of Hill County has, since 1983, divided the road and bridge fund among the precincts according to a formula established in that year. In view of the *Stovall* case, we suggest that the Hill County Commissioners Court re-evaluate this formula to decide whether it still reflects the county’s needs for building and maintaining roads and bridges.

²⁶*Stovall*, 103 S.W.2d at 366.

²⁷*Id.* at 366.

²⁸*Id.* at 365-66.

²⁹*Id.* at 367.

³⁰*Id.*

S U M M A R Y

The county road and bridge fund, established by article VIII, section 9 of the Texas Constitution, is to be spent only by order of the commissioners court. No statute expressly governs the allocation of the road and bridge fund in Hill County. The Hill County Commissioners Court has broad discretion to allocate the road and bridge fund among the county's precincts, keeping in mind its responsibility to act for the county as a whole, subject to judicial review. A district court has no power to allocate the road and bridge fund.

Yours very truly,

A handwritten signature in black ink that reads "Susan Garrison". The signature is written in a cursive style with a large initial "S" and "G".

Susan Garrison
Assistant Attorney General
Opinion Committee