

COUNTY COURTHOUSE  
DIMMITT TEXAS 79027-2689

JIMMY F. DAVIS  
COUNTY-DISTRICT ATTORNEY

(806) 647-4445

COURTHOUSE FAX (806) 647-2189



ID # 14715  
MBJ

OUR FILE NUMBER:

HDS-31A  
Your No.  
ID # 13056

**CASTRO COUNTY**  
DIMMITT, TEXAS

January 16, 1992

Madeline B. Johnson  
Assistant Attorney General  
Opinion Request Committee  
P.O. Box 12548  
Capitol Station  
Austin, Texas 78711

RQ-313

RECEIVED

JAN 22 1992

Opinion Committee

Dear Ms. Johnson:

Enclosed is a copy of our letter dated July 24, 1991 which is the same as your ID # 13056. Thanks for your attention to this matter.

Yours very truly,

*Jimmy F. Davis*  
Jimmy F. Davis

JFD/gw

Enclosure

JIMMY F. DAVIS  
COUNTY-DISTRICT ATTORNEY  
(806) 647-4445  
COURTHOUSE FAX (806) 647-2189



COUNTY COURTHOUSE  
DIMMITT TEXAS 79027-2689

OUR FILE NUMBER:  
HDS-31

**CASTRO COUNTY**  
DIMMITT, TEXAS

July 24, 1991

EXPRESS MAIL No. RB407632500  
RETURN RECEIPT REQUESTED

COPY

The Honorable Dan Morales  
Office of Attorney General  
Opinion Request Committee  
P.O. Box 12548  
Capitol Station  
Austin, Texas 78711

Dear Mr. Attorney General:

One elected commissioner proposes to sell caliche and/or other improved road building material to a private citizen (or company) who in turn would donate or sell the material to the county for use in maintaining the roads of the commissioner's own precinct. The Commissioners Court has not accepted the donation nor agreed to purchase the material from anyone. The land(s) in question are either owned by the commissioner, his children or a family corporation. Some of the land will have an indebtedness to the Federal Land Bank.

The Commissioners Court of Castro County has officially adopted by resolution (January 12, 1987, and again on January 9, 1989) the optional method of organizing the commissioners court for road construction and maintenance responsibilities as provided in Article 6702-1, Subchapter A(\$3.001 - 3.004), V.T.C.S.

QUESTIONS

1. If an ex-officio county commissioner sells caliche to a citizen (or company) who in turn sells the material to the county, is the contract for sale of the material to the county void?
2. If an ex-officio county commissioner sells caliche to a citizen (or company) who in turn donates the material to the county for use in maintaining the precinct roads of the same ex-officio county commissioner, is the acceptance of the donation prohibited?

BRIEF

A. LEGALITY OF COUNTY CONTRACTS IN WHICH COUNTY COMMISSIONER IS INDIRECTLY INTERESTED

A very similar proposal was considered in 1980 by the Attorney General's office and rejected as a void contract. Op.Tex.Att'y.Gen. No. MW-124 (1980). In that opinion the county commissioner and his son owned one of the companies that sold crushed rock to the county for use in road maintenance. The Attorney General's Opinion No. MW-124 concludes that such a contract is void as involving "a contract and claim against the county in which a public official has an indirect pecuniary interest, at least, and perhaps a direct one. The arrangement is violative of Article 2340, V.T.C.S., which is designated to eliminate such conflicts of public and private interests." Article 2340 is now codified as Article 81.002 of the Texas Local Government Code and it still provides that a county judge or commissioner must swear in writing and under oath that he/she will not be interested, directly or indirectly, in a contract with, or claim against the county except a contract or claim expressly authorized by law or a warrant issued...as a fee of office. The Opinion cites an earlier opinion [Op.Tex.Att'y.Gen.No. MW-34 (1979)] for the proposition that "a contract between a public official and the public body of which he is a member is contrary to public policy and therefore void, if the official has any personal pecuniary interest in the contract."

B. REGULATION OF CONFLICTS OF INTEREST UNDER CHAPTER 171, TEXAS LOCAL GOVERNMENT CODE

On September 1, 1987, Section 171.001 et.seq. of the Texas Local Government Code replaced Article 988b, V.T.C.S. which had been enacted effective January 1, 1984. Both statutes prohibited conflicts of interest for local public officials and provided criminal penalties to the local official knowingly violating these laws.

The current Section 171.004, Texas Local Government Code now provides that the local official having "substantial interest" in a business entity or in real property (further defined in Section 171.002 as 10% or more of the voting stock or shares of the business entity or owns either 10% or more or \$5,000.00 or more of the fair market value of the business entity) may file an affidavit with the official record keeper of the governmental entity stating the nature of the interest and shall abstain from further participation in the matter. (If a majority of the governmental entity file similar affidavits on the same matter, the public official is not required to abstain from participation.)

Section 36.08, Texas Penal Code, prohibits a public servant "who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government from soliciting, accepting, or agreeing to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion."

Section 39.01, Texas Penal Code, prohibits a public servant from intentionally violating a law relating to his office or employment with intent to obtain a benefit. Either offense is a Class A misdemeanor punishable by a fine not to exceed \$2,000.00 or confinement in jail for a term not to exceed one year or both such fine and imprisonment. In addition to criminal penalties, the conviction of a county officer by a petit jury for any felony or misdemeanor involving official misconduct operates as an immediate removal from office of that officer. (emphasis supplied) Section 87.031, Texas Local Government Code.

C. PROHIBITED CONTRACTS WITH RELATIVES OF COMMISSIONERS

In Opinion No. JM-492 a commissioner transferred a fence business to his son and the son successfully secured a bid from the county with the father participating as a commissioner in the final vote to award the contract. This action violated Article 988b on the part of the father, but not on the part of the other commissioners. The same opinion states that "prohibited contracts with relatives of commissioners are not automatically void, and avoiding such a contract does not relieve public officials of criminal and civil liability for such violations."

Article 988b has since been recodified into Chapter 171 of the Texas Local Government Code. Section 171.002(c) triggers the "substantial interest in business entity" mechanism described above since sons are related to their fathers in the first degree of consanguinity. Op.Tex.Att'y.Gen. No JM-492 (1986).

D. ACTION OF DONATING ROAD MATERIAL AS VIOLATIVE OF DEED OF TRUST BETWEEN MORTGAGOR AND MORTGAGEE

Ordinarily, the nature and extent of a mortgagor's right to use the property... may be determined by the mortgage or trust deed. 30 Tex.Jur.3d Deeds of Trust and Mortgages, § 92 (1983). In this case, Castro County will review any Deed of Trust, applicable to the land in question and secure written consent of any mortgagee prior to accepting any proposed donation of road material.

E. OTHER ATTORNEY GENERAL OPINIONS

Another opinion for the Castro County Commissioner's Court holds that acceptance of donations of material to aid in maintaining county roads must be approved by action of the commissioners court. Op.Tex.Att'y.Gen. No. JM-1155 (1990). The opinion also holds that an ex-officio road commissioner may not donate material from his own separate property to aid in maintaining roads in his own precinct without approval of the commissioners court.

Another Attorney General Opinion which may be instructive on these issues is an opinion finding it illegal for county employees to make purchases for the county and with county funds, from a store owned by a county commissioner. Op.Tex.Att'y.Gen. No. M-1140 (1972). Still another opinion discusses several of these same policy considerations in finding a contract invalid which paid money to a former county judge for services rendered under a contract with the county entered into while the judge still held office. Op.Tex.Att'y.Gen. No. MW-34 (1979).

References to other Attorney General Opinions on these same topics are found in the footnotes to 35 Brooks, County and Special District Law § 18.38 and § 18.45 (Texas Practice, 1989). Among these opinions are Op.Tex.Att'y.Gen. Nos. WW-1406 (1962) holding that a commissioner may not sell right-of-way; No. 0-3567 (1941) county may not pay commissioner for easement; No. 0-3307 (1941) commissioner may not sell right-of-way; No. MW-155 (1980) a city may not pay users fees to councilman operating county dump; H-638 (1975) city councilman may not continue to purchase water from city under contract upon assuming office; and No. M-1236 (1972) school district may not buy from nor sell to trustee.

#### CONCLUSION

An ex-officio road commissioner may not donate material from his property or accept donations of materials to aid in maintaining county roads without approval of the commissioners court. Opinion No. JM-1155 (1990). Sale of caliche to a third party who sells the material to the county would be void as involving a contract and claim against the county in which a public official has an indirect pecuniary interest, at least, and perhaps a direct one. Opinion No. MW-124 (1980). The county commissioners must carefully scrutinize any prospective road material donation from a third party to determine whether or not any ex-officio commissioner has a direct or indirect pecuniary interest in the transaction or whether the donation has possibly been solicited or accepted in violation of Section 36.08 Texas Penal Code or Article 61.002 of the Texas Local Government Code.

The opinion of the Attorney General's office will be helpful in the proper operation of the commissioners court. No litigation has been filed or is contemplated to my knowledge. I will be looking forward to hearing from you.

Yours very truly,

Jimmy F. Davis

JFD/gw

xc: Mrs. M. L. Simpson, Jr.  
County Judge  
Castro County Courthouse  
Dimmitt, Texas 79027

Mr. Harold Smith, Commissioner  
Precinct No. 1  
P.O. Box 467  
Hart, Texas 79043

Mr. Dale Winders, Commissioner  
Precinct No. 2  
HCR 4  
Dimmitt, Texas 79027

July 24, 1991

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xc: Mr. Jeff Robertson  
Commissioner, Precinct No. 3  
615 N.W. 7th  
Dimmitt, Texas 79027

Mr. Vincent Guggemos, Commissioner  
Precinct No. 4  
HCR 1, Box 78  
Nazareth, Texas 79063