

Opinion Committee

From: **RECEIVED** Natalie C. Koehler <koehler@bosquecounty.us>
Sent: Wednesday, August 22, 2018 9:57 AM
To: **AUG 22 2018** Opinion_Committee
Cc: 'Judge Don Pool'
Subject: **OPINION COMMITTEE** Bosque County Request for Opinion
Attachments: koehlerlawScans@gmail.com_20180822_095015.pdf

FILE # ML-48409-18
I.D. # 48409

RQ-0245-KP

Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Duty of Commissioners' Court to Maintain Public Roads

Dear General Paxton:

County Judge, Don Pool, has requested that I seek an opinion regarding the Commissioners' Court's duty to maintain public roads in Bosque County.

In the way of background, County Road 3237 in Bosque County, Texas has been designated by the 220th Judicial District Court (and affirmed on appeal) to be a public, third class road. Over the years this land has been in litigation and the designation of this road as public or private has been litigated at least two times by varying landowners in this area of the county. Judgments are attached for your reference.

The current landowner, Duffy Kincheloe, has asked that the commissioners' court force Roy Ray Payne, the landowner who owns both sides of the road, to remove a gate across the road. I am attaching his lawyer's letter and an email from Mr. Kincheloe regarding this matter.

The question is, is the Commissioners' Court required to maintain this road, which includes removing the gate, as suggested by Mr. LeBas and Mr. Kincheloe?

Natalie Cobb Koehler
Bosque County Attorney
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AUG 22 2018

OPINION COMMITTEE



NAMAN HOWELL
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CMRRR #70161970000061216621

Ms. Natalie Koehler
Koehler Law Firm
Bosque County Attorney
P.O. Box 215
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Re: CR 3237 in Bosque County, Texas

Dear Ms. Koehler:

This letter follows up on our recent discussions about Mr. Payne's placement of and refusal to remove a locked gate placed across a public road despite recent findings from the District Court and our client Duffy Kincheloe's objections to this action.

Based on the Court's most recent findings that this is a public, third-class road, and for the reasons set out below, we believe the gate represents an improper obstruction and that Bosque County should take action to protect its interest and that of the public to have safe access to its roads. We contend that this gate is not in compliance with *Texas Transportation Code* § 251.010 and prevents Mr. Kincheloe from using CR 3237 to gain access to his ranch to conduct cattle and ranching operations, prevents life and safety personnel from using this public road, and prevents access by adjoining residents. As stated in detail below, we believe the facts and the law require Bosque County to order Mr. Payne to remove the lock from the gate and either remove the gate or bring it into compliance with *Texas Transportation Code* § 251.010.

The portion of the road extending beyond Mr. Payne's gate has recently been confirmed by the 220th District Court in Bosque County, Texas to be a third-class or neighborhood road. On June 14, 2017, the 220th District Court of Bosque County entered a Judgment of Contempt in Cause No. CV09065 against Roye Ray Payne. A copy of that Judgment is included with this letter. In support of that Judgment, the Court made an express finding that "the portion of County Road 3237 which extends from the gate installed by Payne to the L-shaped portion of the public road" that was found to be a public road in *Payne v. Doty*, 2011 Tex. App. LEXIS 9929, at *6 (Tex. App.—Eastland 2011, no pet.) is a third-class road.

As we read these documents, although the order of contempt contained in the Judgment was subsequently overturned by the 10th Court of Appeals, the trial court's finding that the road is a third-class road was not overturned. A subsequent order signed on January 29, 2018 correcting the prior order held that its findings and conclusions were not inconsistent with its order vacating the Order of Contempt, and its award of fees and costs were not modified as to the extent they were not inconstant with these orders and that this means that the findings that the trial court found the road was a third-class road remains in effect and has not been modified by the order of the appellate court. A copy of the corrected order is also included with this letter. This corrected order was not appealed by either party. Our position about these events is set out below.

The Portion of the Road beyond Payne's Gate on or adjacent to CR 3237 is a Public Road

A third-class road is a public road under *Texas Transportation Code* § 251.007. The fact that the road is no longer being maintained by Bosque County does not change the fact that the road is still a public road. *See Betts v. Reed*, 165 S.W.3d 862, 871 (Tex. App.—Texarkana 2005, no pet.). Whether this portion of CR 3237 is considered a “county road” by Bosque County does not change the fact that it is still a public road. *See Tex. Att’y Gen. Op. No. GA-659*.

Section 252.010 of the *Transportation Code* permits construction of a gate across a third-class road “when necessary.” 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 persons, including emergency personnel, using the road; and
- (4) constructed with a fastening to hold the gate open until a person using the gate passes through it.

Section 252.010 further provides that “[a] person may not erect a gate under this section unless the gate is approved by the commissioners court of the county.” Under section 252.008 of the *Transportation Code* “[a] public road of any class must ... be clear of all obstructions.”

“The commissioners court of a county may exercise general control over all roads, highways, and bridges in the county.” *Tex. Transp. Code* § 251.016. The commissioners court of a county may further make and *enforce* all necessary rules and orders for the construction and maintenance of public roads. *Tex. Transp. Code* § 251.003. These provision are not limited to just those roads designated for maintenance by the county, but by their express terms apply to *all* public roads. The Texas Supreme Court has said that “[b]y granting commissioners courts general control over the roads, **the Legislature imposed on them a duty to make the roadways safe for public travel.**” *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 31-32 (Tex. 2003) (emphasis added).

Ms. Natalie Koehler
June 12, 2018
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Payne's Gate is an Improper Obstruction of a Public Road

As a result, we believe that Mr. Payne's locked gate is improperly blocking a judicially determined public, third-class road. The gate constructed does not appear to have been approved by the Bosque County commissioners court as required by Section 252.010 of the Texas Transportation Code. The locks on the gate prevent public use of the public road. Even if adjacent landowners were provided keys to the locks on the gate, the design of the gate and the presence of locks on the gate still cause unnecessary delay in opening and shutting the gate to persons, including emergency personnel, using the road. The gate also does not have fastenings to hold the gate open until a person using the gate has passed through it.

Because this is a public road, Bosque County has a duty to make sure the road is safe for public travel, including the right to remove or order the removal of objects that create a safety hazard to the public. See Tex. Atty. Gen. Op. No. GA-0703, 2009 Tex. AG LEXIS 20, *3. We are once again requesting that Bosque County require Mr. Payne to remove the gate that is obstructing the public road. If the commissioners court grants approval to Mr. Payne for the construction of a gate across the public road, such approval should be conditioned upon the gate meeting the requirements of § 252.010 of the *Transportation Code*. Specifically, the gate should not be locked, should be at least 10 feet wide, should be free of obstructions above the gate, should be constructed so that opening and shutting the gate will not cause unnecessary delay to persons, including emergency personnel, using the road and constructed with a fastening to hold the gate open until a person using the gate passes through it.

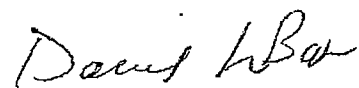
Conclusion

The District Court has entered a finding that this road is a public road. That finding has not been overturned by the appellate court and is now a final judgment. Bosque County has a legal duty to keep this roadway safe for public travel. Mr. Payne's gate and specifically his lock prevent public travel on the road and make such travel unsafe by causing unnecessary delay, particularly to emergency vehicles. We urge you and the Commissioners to order Mr. Payne to remove the gate or otherwise bring it into compliance with *Transportation Code* § 252.010.

Thank you for your attention.

Sincerely,

NAMAN HOWELL SMITH & LEE, PLLC

By: 
David L. LeBas

DLL/ko
Enclosures

Cc: Client