



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable B. M. Whiteacre
County Auditor
Grayson County
Sherman, Texas

Dear Sir:

Opinion Number O-1291
Re: Answering certain questions
with reference to construction
of provisions of House Bill 688,
passed by the Forty-sixth Legis-
lature, Regular Session, 1939

You have asked certain questions relating to the application of House Bill 688, and which questions we shall take up in the order in which they are presented, the first being:

"Would the commissioners' court of a county have the authority to employ technical help in an advisory capacity in analyzing the bonded indebtedness of the county and working out a schedule of refunding of the road bond debt in that particular county, and which said debt is that part of the debt which the county pays and not part of the debt which the State pays from the proceeds of the one cent gasoline tax, in order that such bonded indebtedness which must be paid from county funds might be refunded into the years when the revenues, under the terms and provisions of said House Bill 688 would be sufficient to pay such indebtedness?"

We think the foregoing question presents two subject matters, the first being -- whether or not the county has the authority to retain or employ technical help in an advisory capacity in analyzing the bonded indebtedness of the county, and working out a schedule of refunding of the road bond debt in that particular county, and second, the question

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seems to inquire as to whether or not that part of the debt which the county pays, and not that part of the debt which the State pays from the proceeds of the one-cent gasoline tax, can be separated into two types of debts, namely, eligible and ineligible.

In treating of the first subject matter raised in your question, that is, as to the authority of the county to employ technical help for the purpose stated in your question, we approach the subject by stating the well recognized rule that the commissioners' court, the governing body of the county, is a court of limited jurisdiction and has only such powers as are conferred upon it by law. The rule has been extended to empower the commissioners' court to appoint agents for the accomplishment of purposes authorized by law. A majority of the cases touching upon this question involve the employment of attorneys at law and it has often been held that an attorney may be retained in special cases for specific services but that the court would not have the power to employ an attorney on a salary basis for services neither required nor performed. See 32 S. W. 188, Grooms vs. Atascosa County; also City National Bank vs. Presidio County, 26 S. W. 775, Jones vs. Veltman, 171 S. W. 287. In the case of Russell vs. Cage, 1 S. W. 270, the Supreme Court held that an architect may be employed to prepare plans and specifications, make a draft of a contract, and make the contract itself, subject to the approval of the commissioners' court. In the case of Gulf Bitulithic Company vs. Nueces County, reported in 11 S. W. (2d) 305, the Supreme Court sustained the validity of a contract employing a supervisor of road building, and in an earlier case, Galveston County vs. Gresham, 220 S. W. 560, the court held that the commissioners' court had the power to employ an attorney to carry out its power to construct a seawall.

It must be borne in mind that all of the foregoing authorities construe to the commissioners' court the authority to employ agents only for the accomplishment of specific objectives, and that the general trend of authority denies the power to the commissioners' court to employ agents on a salary or contract basis for the performance of services that may or may not be required during the course of their employment. Quoting the court in the case of the City National Bank vs. Presidio County, 26 S. W. 775 — "We conclude for these reasons that the employment of counsel in the case of State vs. Carothers, was a legal exercise of power on the part of

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the commissioners' court done in the interest and business of the county." This case was determined in 1894 by the Court of Civil Appeals and indicates that the commissioners' court could validly exercise the power of employing agents if done in the interest and business of the county. The question as to the importance of the service to be performed must necessarily be a question of fact to be determined by the commissioners' court. We, therefore, conclude that while there is no express authorization for the employment of technical advisors for the purpose of assisting the county in the refunding of its road debt, we think the weight of authority would imply that power to the commissioners' court if the refunding was of sufficient importance to make its accomplishment vital to the interest of the county and in such a manner as to classify such service as being for a county purpose, but that in no event would the court have the authority to contract for the services of a technical expert for a fixed period at a given salary to perform duties which may or may not be required.

Next we consider the second subject matter appearing in your first question, and that is, whether or not a particular issue of bonds may be regarded as partly eligible and partly ineligible; in other words, can that part of the issue which participates in the County and Road District Highway Fund be considered apart from the balance of such issue which does not participate in such fund. We are of the opinion that no such character can be imputed to an issue under the terms of House Bill 688. Such issue must be considered as a unit and that all bonds composing same participate ratably throughout in the benefit accorded under this law. In support of this conclusion we quote from subsection (c) of Section 6 of House Bill 688, which reads, in part:

"Whenever in the case of any particular issue of obligations the proceeds thereof shall have been expended partly on designated State highways or highways heretofore constituting designated State highways, and partly on roads which never have been designated State highways, said Board shall ascertain and determine the amount of said obligations, the proceeds of which were actually expended on State highways or on roads heretofore constituting State highways, and said obligations to said amount and extent

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shall be eligible for participation in the moneys coming into the County and Road District Highway Fund, and said ascertainment and determination shall be certified to the county judge by said Board and all of the unmatured outstanding obligations of said issue shall ratably have the benefit of said participation in said money."

This same subsection states substantially that following such ascertainment by the Board, and after reasonable notice and hearing thereon, the determination shall be final and conclusive and shall not be subject to review in any other tribunal. We think this conclusion is further strengthened by the language of subsection (g) of Section 6, which, to state it briefly, requires the counties to collect taxes on the property in said respective counties and defined road districts in an amount of money equal to the difference between the amount of the requirement and the amount available for application from the gasoline tax inuring to the County and Road District Highway Fund, and that the entire proceeds of all taxes collected on any eligible issue of bonds shall be remitted by the County Treasurer of each county collecting the same to the State Treasurer to be held by the State Treasurer as ex-officio treasurer of said county or defined road district for the benefit of the county or defined road district remitting the same and be disbursed to meet the interest, principal and sinking fund requirements on the eligible obligations of such county or defined road district. When the money from the county for any particular interest or principal maturity, together with that supplied through the County and Road District Highway Fund, are used for the payment thereof on such eligible obligations, it becomes the duty of the Comptroller of Public Accounts upon receipt of said obligations and coupons, to cancel them and return same to the commissioners' court of the particular county, and which court shall cause to be duly entered a record of such cancellation. It therefore follows that this law does not contemplate a division of obligations whereby one part of which could be called eligible and the other ineligible. The law expressly confers upon the Board the right to require any issue or any part thereof to be refunded into refunding obligations, bearing such rate of interest and having such maturities as will prevent an inequitable or

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disproportionate participation in the money coming into the County and Road District Highway Fund in any particular period. This language we find in subsection (i) of Section 6 of the law, to which you are referred.

Your second question reads as follows:

"If it were shown by the county that the refunding of that part of its road bond debt which the county levies an ad valorem tax to pay could and would be retired at the dates of maturities and that the revenues under the terms and provisions of House Bill 688 were sufficient to meet such maturities, would it be necessary for such county to have the approval of the Board of County and District Road Indebtedness to effect such refunding?"

In Opinion Number 0-1293, rendered by this department in response to a request from the Board of County and District Road Indebtedness, we carefully covered the refunding duties imposed upon the Board by House Bill 688. Briefly our interpretation of that provision is to the effect that the Board's duty with respect to the refunding of bonds extends only to issues of bonds eligible to participate in the primary benefits of the gasoline tax of one cent allocated to the Board. Hereinabove we have outlined our conclusion as to what constitutes eligible obligations and, in harmony with such conclusion, we must advise that it is our opinion that any such road debt as is described in your second question which the county may seek to refund must necessarily be submitted to the Board for approval prior to effecting such refunding. As stated in Opinion Number 0-1293, above referred to, the expense of any such refunding must likewise be submitted to the Board for approval prior to incurring same.

We are enclosing herewith a copy of our Opinion Number 0-1293, in the hope that same will prove of some benefit to you and assist you in solving some of the problems arising out of House Bill 688.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *Clarence E. Crowe*
Clarence E. Crowe
Assistant

APPROVED NOV 2, 1939

Frank B. Mann

ATTORNEY GENERAL OF TEXAS

CEC-s
Encl. *cc. H.H.*