



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

April 11, 1962

Hon. D. C. Greer
State Highway Engineer
Texas Highway Department
Austin 14, Texas

Opinion No. WW-1306

Re: Whether the Highway Department has the authority to purchase, erect and maintain certain highway markers pursuant to Highway Commission Minute Order No. 50806, and related question.

Dear Mr. Greer:

You have asked this office to render an opinion as to whether or not the Highway Department has the authority to purchase, erect and maintain certain highway markers pursuant to Highway Commission Minute Order No. 50806. You have further asked whether or not Section 7a of Article VIII, Texas Constitution, would present any bar to utilizing Highway Fund moneys in carrying out the proposed program.

Relevant portions of Highway Commission Minute Order No. 50806 are set forth below:

"WHEREAS, signs marking points of interest and potential destination are an integral and necessary part of a modern highway; and

". . .

"WHEREAS, our system of roadside parks and turnouts have proven to be a factor in the reduction of accidents by providing a safe place for drivers to park, relax, stretch and otherwise avoid the effects of driver fatigue; and

"WHEREAS, the erection of the aforementioned markers in roadside parks and turnouts would discourage stopping on the shoulders of the highways near such points and would encourage more drivers to stop and relax in such parks and turnouts thereby furthering the cause of safety on our highways;

"NOW, THEREFORE, BE IT ORDERED that the State Highway Commission hereby finds and determines that such markers should be erected, that when such markers are erected they will constitute an integral part of the highway system which is necessary to provide adequate and satisfactory service to a great portion of the traveling public and that they will contribute toward safer use of the highways.
. . ."

From the foregoing it can be seen that the Texas Highway Commission has made an administrative finding of record, to the effect that the highway markers here under discussion will constitute an integral part of the highway system, and that they will contribute toward safer use of the highways.

Article 6674d, Vernon's Civil Statutes, states in part:

"All further improvement of said State Highway System with Federal aid shall be made under the exclusive and direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. . . ."

Article 6674a defines "improvement" as including "construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto."

By entry of the Minute Order, the Texas Highway Commission expressed its view that the contemplated marker program was an "improvement" to the highway system of the State of Texas, and that the markers would become an integral part of the system, contributing materially to the safety of drivers using the highways of Texas. We may not dispute that finding. The reason is amply stated by Chief Justice McClendon of the Austin Court of Civil Appeals in Johnson v. Ferguson, 55 S.W. 2d 153 (Civ.App. 1932):

"In matters of judgment touching the Highway Commissioners' functions, theirs, and not that of another, is supreme. Certainly their acts other than those of a purely ministerial nature should not be stayed at the hands of the courts, and the important functions of the department thereby impeded or impaired, except upon verified allegations of fact showing unequivocally that they are exceeding the bounds of their legal authority: Their acts in the exercise of an honest discretion must be respected when untainted by fraud . . . or such abuse of discretion as under the authorities would avoid the same."

The General Appropriation Act of the 57th Legislature, under the heading HIGHWAY DEPARTMENT, provides, in Item 13:

"For all other operating expenses involved in establishing, planning, constructing, and maintaining a system of State Highways as contemplated and set forth in Chapter I, Title 116, Revised Civil Statutes of 1925 . . ."

It is thus clear that the Legislature, in making an appropriation for the Highway Department, has not attempted to spell out the precise purposes for which the moneys may be used. This function is left for the Highway Commission. And if the Highway Commission, in its discretion, determines that a particular type of highway marker is a proper improvement to the highway system of Texas, that determination must stand, barring a proper appeal to the courts.

There is, of course, one other ground upon which the proposed expenditure may be challenged, and that is unconstitutionality. Article VIII, Section 7a, of the Texas Constitution, contains the following provisions:

"Subject to legislative appropriation, allocation and direction, all net revenues remaining after payment of all refunds allowed by law and expenses of collection derived from motor vehicle registration fees, and all taxes, except gross

production and ad valorem taxes, on motor fuels and lubricants used to propel motor vehicles over public roadways shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining and policing such public roadways, and for the administration of such laws as may be prescribed by the Legislature pertaining to the supervision of traffic, and safety on such roads."

No other Constitutional provision appears to bear upon the particular type of expenditure here under examination.

As has already been mentioned, in Minute Order No. 50806 the State Highway Commission found that such markers will constitute an integral part of the highway system which is necessary to provide adequate and satisfactory service. It is the opinion of this office that the word "integral" as used in the finding, operates to bring the proposed expenditure within the provisions of Section 7a of Article VIII, Texas Constitution. The rationale of Johnson v. Ferguson, supra, would control, regarding the force of an administrative finding by the Highway Commissioners. Neither Section 7a of Article VIII, nor any other provision of the Texas Constitution prohibits carrying out the proposed program with money in the Highway Fund.

S U M M A R Y

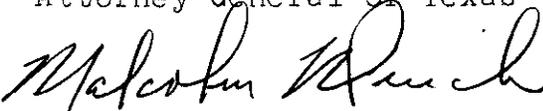
Under the findings contained in Minute Order No. 50806 of the State Highway Commission, the Commission has authority to purchase, erect and maintain certain highway markers as integral parts of the highway system of the State of Texas, out of the general appropriation for the State Highway Department. Neither Section 7a of Article VIII, nor any other provision of the Texas Cons-

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titution, would prohibit the Highway Department from carrying out the proposed program with money in the Highway Fund.

Very truly yours,

WILL WILSON
Attorney General of Texas


BY Malcolm L. Quick
Assistant

MLQ:kkc

APPROVED:
OPINION COMMITTEE
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REVIEWED FOR THE ATTORNEY GENERAL
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