



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 18, 1998

The Honorable David M. Williams
County Attorney
County of San Saba
San Saba, Texas 76877

Letter Opinion No. 98-120

Re: Whether a county or a school district may
require a landowner to remove a gate that the
landowner constructed across a third-class road
(ID# 37188)

Dear Mr. Williams:

You ask whether San Saba County or the appropriate school district may require a landowner to remove a gate that the landowner placed across a third-class road. We conclude that the county commissioners court effectively may obligate the landowner to remove the gate if the county constructs a cattle guard to replace the gate. We are not aware of any similar authority vested in a school district.

You describe the road, San Saba County Road 304, as a third-class county road that traverses the landowner's property. We assume in this opinion that the landowner erected the gate for the purpose of containing livestock. But while the gate appears to solve a problem for the landowner, we understand that it presents a particular problem for a school bus that travels the road:

The gate[] necessitate[s] one of the following options for the school: (1) require that the bus driver stop to open and close the gates, leaving the school children on the bus unattended; (2) ask a school child to open and close the gates; (3) hire additional personnel for the trip simply to open and close the gates; or ([4]) take an alternate route requiring at least a ten . . . mile detour.

Assuming the gate is "necessary," we believe the landowner is authorized to erect and maintain the gate. Transportation Code section 251.010(a) allows a landowner to erect a "necessary"¹ gate across a third-class road if the landowner complies with certain conditions:

¹See Transp. Code § 251.010(a). Whether a gate is necessary for purposes of section 251.010(a) of the Transportation Code is a question of fact. The resolution of factual matters is inappropriate to the opinion process. See, e.g., Attorney General Opinions DM-98 (1992) at 3, H-56 (1973) at 3, M-187 (1968) at 3, O-2911 (1940) at 2.

A person who owns real property on which a third-class road . . . is located for which the right-of-way was obtained without cost to the county may erect a gate across the road when necessary. The person shall place a permanent hitching post and stile block on each side of the gate within 60 feet of the gate. The gate must be:

- (1) at least ten feet wide;
- (2) free of obstructions above the gate;
- (3) constructed so that opening and shutting the gate will not cause unnecessary delay to a person using the road; and
- (4) constructed with a fastening to hold the gate open until a person using the gate passes through it.

We assume that all the conditions specified in section 251.010 are satisfied. You indicate, for instance, that the county incurred no expense in obtaining the right-of-way, and we assume that the property owner has erected a permanent hitching post and stile block on each side of the gate within sixty feet of the gate, as subsection (a) quaintly requires.² Finally, we assume that the gate was “necessary” for purposes of Transportation Code section 251.010(a) to sequester livestock.

But we further conclude that the county commissioners court may effectively require the landowner to remove the gate by constructing a cattle guard to replace the gate. Transportation Code section 251.009(d) authorizes the commissioners court of a county with a population less than 60,000, such as San Saba County,³ to “construct a cattle guard on a county road of any class and . . . pay for its construction from the county road and bridge fund if the court finds that the construction of the cattle guard is in the best interest of the residents of the county.” This office has concluded that, to the extent of conflict, the substance of section 251.009 of the Transportation Code supersedes the substance of section 251.010(a).⁴ If in accordance with Transportation Code section 251.009(d), the San Saba County Commissioners Court constructs a cattle guard across San Saba County Road 304⁵ the cattle guard will serve to sequester the landowner’s livestock. In that case, the gate will no longer be “necessary” to sequester livestock under section 251.101(a), and the

²We further assume that the conditions listed in section 251.010(a)(1) through (4) are satisfied.

³See Bureau of the Census, U.S. Dep’t of Commerce, 1990 Census of Population: General Characteristics: Texas 3 (1992) (population: 5,401).

⁴Attorney General Opinion M-189 (1968) at 4; *see also* Letter Opinion No. 95-065 (1995) at 4.

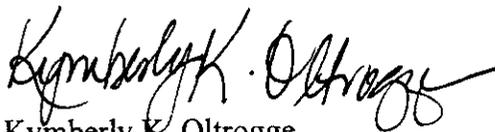
⁵We assume that a county that constructs a cattle guard has determined that the construction of the cattle guard is in the best interest of the county’s residents. *See* Transp. Code § 251.009(d).

landowner will be obliged to remove the gate. We are not aware that a school district possesses a similar power.

S U M M A R Y

A landowner must remove a gate across a third-class road if, in accordance with Transportation Code section 251.009(d), the commissioners court has constructed a cattle guard to replace the gate.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee