OFFICE OF
THE ATTORNEY GENERAL
AUSTIN, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

June 30, 1947

Hon. Arnold W. Franklin
County Attorney
Atascosa County
Jourdanton, Texas

Opinion No. V-281

Re: Reconsideration of Opinion No. 0-6902 relating to purported designation of State highway in Atascosa County.

Dear Mr. Franklin:

Your recent request for a reconsideration by this Department of a former opinion numbered 0-6902 dated December 11, 1945, presents the following factual situation:

> In 1928, Road District No. 3-A was created in Atascosa County and bonds voted totaling $165,000.00, the proceeds of which were used in the construction of the paved road from Poteet north to the Bexar-Atascosa County line. In 1935 and 1936 a highway from Poteet to Jourdanton was constructed with county funds and W.P.A. projects. Many attempts were made to have the road from Poteet to Jourdanton designated as a part of the State Highway System of Texas, and finally, on May 20, 1940, the following resolution was entered on the minutes of the State Highway Commission:
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> "Minute No. 17306
> "May 20, 1940
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> "In BEXAR AND ATASCOSA COUNTIES, it is ordered that a highway be designated extending from a connection with the Highway System at or near Jourdanton northerly to a connection with U. S. Highway 81 near the south city limits of San Antonio passing in the vicinity of Poteet.
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> "This highway designation is made on condition that the Counties involved will agree in advance to transfer title of the existing right-of-way to the State Highway Department and on the further condition that the Counties will supply such additional right-of-way in the future when so re-

quested as may be required of widths and on location approved by the Highway Department. State maintenance of this designation will not be assumed until the Counties have placed the existing road in an acceptable state of repair.

"It is understood that the Highway Department is not in position financially to provide for the construction or reconstruction of this designated highway at any time in the near future.

"This order of the Commission will become effective at such time as it is accepted officially by appropriate resolutions passed by the governing bodies of Bexar and Atascosa Counties."

The Commissioners' Court of Atascosa County, by appropriate resolution, complied with the conditions of the designation and authorized the County Judge to execute and deliver to the State Highway Department a deed as required by the Department. Said deed was executed on June 27, 1940, and delivered to the Division Engineer in San Antonio, Texas, who in turn forwarded the same to the Department in Austin, Texas.

On April 29, 1942, the Highway Commission passed the following resolution:

"Minute No. 19374, April 29, 1942

"In Atascosa and Bexar Counties: It is ordered that Minute No. 17306 be and is hereby cancelled. It is further ordered that a Highway be designated from Jourdanton to Poteet along the route of the recently completed road and the State Highway Engineer is directed to assume maintenance thereon effective the date of this Commission order."

Bexar County did not comply with Minute No. 17306 of the Highway Commission but the Highway Commission took over the maintenance of the highway from Poteet north pursuant to the following resolution:

"Minute 21383
"August 22, 1945

"In ATASCOSA AND BEXAR COUNTIES, IT IS

> ORDERED that a State Highway be designated from the northern terminus of Highway No. 346 at Poteet in Atascosa County, extending northerly to San Antonio in Bexar County, and the State Highway Engineer is directed to assume maintenance of the existing road, which will serve as the temporary route for this highway, effective September 1st."
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> Was not that portion of the highway from Jourdanton to Poteet to the Bexar County line officially designated as part of the State Highway System at the time Atascosa County delivered its deeds to the Highway Commission and otherwise complied with the requirements of Minute No. 17306?

Because of the importance of the question, both to the people of Atascosa County and their interest in the highways for said county, the Attorney General has concluded that a further discussion of the matter is deemed necessary.

In Opinion No. 0-6902, dated December 11, 1945, it was the opinion of this Department that the portion of the highway from Jourdanton to Poteet along the route as set out in Minute No. 19374 of the State Highway Commission, dated April 29, 1942, became a part of the State Highway System of this State on April 29, 1942, and that the remainder of the county road referred to did not become a part of the State Highway System by designation until August 22, 1945, at which time the State Highway Commission, by Minute No. 21383, finally designated such route extending from Poteet in Atascosa County northerly to San Antonio in Bexar County. As a basis for reconsideration of this opinion, you state that Opinion No. 0-6902, above referred to, is in direct conflict with an opinion numbered 0-5935 heretofore rendered by this Department on April 25, 1944, said opinion holding in substance that after the Highway Commission had decided that a certain road should become a part of the State Highway System and had entered an order delegating to the Commissioners' Court the authority to acquire the necessary land, and such Court proceeds accordingly, such route or road becomes duly designated as a part of the State Highway System and subject to the exclusive jurisdiction of the State Highway Department.

The resolution passed by the State Highway Commission made the designation of the proposed highway dependent upon both the counties of Atascosa and Bexar agreeing in advance to transfer title for the right-of-way to the State Highway Department. Atascosa County complied in every respect with the order of the Commission, conveying title to said right-of-way on June 27, 1940; but Bexar County failed to comply. The order entered by the State

Highway Commission was a conditional one. Therefore, it is believed that Opinion No. 0-6902 may be distinguished from Opinion No. 0-5935 in that the factual situation is different. The designation in Harris County (Opinion No. 0-5935) was a definite one, whereas the one in Atascosa County (Opinion No. 0-6902) was a conditional one. The claim of Atascosa County is a meritorious one; but aside from the question of the conditional limitation placed upon such designation by the Highway Department, the prevailing rule applicable to such cases appears to be that the actions of the State Highway Department in control of roads must be respected when untainted by fraud and unassailed by accident, mistake, or abuse of discretion. This rule was announced in Nairn, et al v. Bean, et al (Com. App.) 48 S. W. (2d) 584, wherein Judge Ryan, speaking for the Court, stated:

> "The effect of the present statute (Vernon's Ann. Civ. St. art. 6663 et seq.) on the subject is to vest administrative control of all public roads which might be a part of the state highway system in the state highway department, with respect to the designation, location, relocation, improvement, construction, abandonment, or discontinuance thereof. Whatever said department may do in the premises, in the exercise of an honest discretion, must be respected when untainted by fraud and unassailed on account of accident or mistake occurring in their performance, or such abuse of discretion as under the authorities would avoid the same. Heathman v. Singletary (Tex. Com. App.) 12 S. W. (2d) 150; Porter v. Johnson (Tex. Civ. App.) 140 S. W. 469; Smith v. Ernest, 46 Tex. Civ. App. 247, 102 S. W. 129.
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> "It is well settled that no governmental agency can, by contract or otherwise, suspend or surrender its functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication thereof. Bowers v. City of Taylor (Tex. Com. App.) 16 S. W. (2d) 520 and cases cited."

An analogous situation to yours is presented in the above cited case. There the landowners had complied with the recommendation of the Commissioners' Court and Highway Commission in removing their fences and improvements at considerable expense and rearranging their respective properties so as to conform thereto. They made additional and permanent improvements on their property. They did this on the faith of the proceedings and on the representation that it was a permanent location of a State highway. Nevertheless, the Court was of the opinion that no

governmental agency can, by contract or otherwise, suspend its governmental function.

Your request reflects the fact that the Highway Commission entered its Minute No. 17306 conditioned that both Atascosa and Bexar Counties would transfer title to the right-of-way and officially accept the order of the Commission by appropriate resolution. This Atascosa County did in every respect, but Bexar County refused to accept. The offer of the Commission was of such nature as to require an acceptance, and it is not believed that a partial acceptance will suffice. By virtue of the partial acceptance and the further fact that no governmental agency can suspend its governmental functions, it is the opinion of this Department that the result reached in our former opinion is correct and that the portion of the highway referred to in your request was not designated as a part of the highway system of this State at the time of the delivery of the deed by Atascosa County. Further, it is the opinion of this Department that there is no existing conflict between Opinions Nos. 0-6902 and 0-5935 heretofore rendered by this Department for the reasons above stated.

SUMMARY

The portion of the highway from Jourdanton through Poteet in Atascosa County to the Bexar County line was not officially designated as a part of the State Highway System of Texas at the time of the delivery of the title to the right-of-way requested by such Commission, there having been a conditional designation applying to two counties and actually met only by one of them. No governmental agency can by contract or otherwise suspend its governmental function. (Nairn, et al v. Bean, et al, 48 S. W. (2d) 584).

Very truly yours,

APPROVED:

Price Daniel

ATTORNEY GENERAL

ATTORNEY GENERAL OF TEXAS

By Burnell Waldrep

Burnell Waldrep
Assistant

BW:djm:sl