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OPINION COMMITTEE

RQ-0183-JC

January 25, 2000

Honorable John Cornyn  
Texas Attorney General  
Attn: Elizabeth Robinson  
Chair, Opinions Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-41263-00  
I.D. # 41263

Dear Attorney General Cornyn:

On behalf of Webb County, I request an opinion regarding the authority of the commissioners court to authorize and to replace at county expense a previously-existing cattle guard that was removed from a county road. The county does not know who removed the cattle guard or when it was removed. The county knows that the cattle guard had existed on the county road for many years. The county has a population of more than 60,000. Some questions presented include:

1. In light of the amendments to V.T.C.S. Article 6702-1, Section 2.007(a)-(e) and subsequent re-codification in Transportation Code, Chapter 251, Section 251.009(a)-(d) by Acts 1995, 74<sup>th</sup> Leg., ch. 165, § 1, eff. Sept. 1, 1995, did the legislature, in subsection 251.009(d), create an exception to the population restriction in subsection 251.009(a) and confer upon all counties, regardless of population, the statutory authority to construct cattle guards on county roads?
2. Is the population restriction found in Section 251.009(a) applicable to all subsections under Section 251.009, including subsection 251.009(d)?

In Attorney General Letter Opinion No. 89-065, which was issued on August 17, 1989, the attorney general concluded that a county does not have the authority to construct cattle guards across county roads. However, the attorney general was asked about the authority of the commissioners court to construct a cattle guard on a county road in Webb County pursuant to V.T.C.S. Article 6702-1, Section 2.007(a)-(e) (Act of May 20, 1983 repealed by Act of May 1, 1995) which provided:

*The commissioners court of any county coming under the provisions of this section may construct cattle guards on the first-class, second-class, and third-class roads of the county and may pay for the construction out of the road and bridge funds of the county when in its judgment it believes the construction of the cattle guards to be in the best interest of the citizens of the county.*

The predecessor to V.T.C.S. article 6702-1, Section 2.007 (a)-(e) is V.T.C.S. article 6704, section 4 (as amended by Act of May 27, 1965, repealed by Act of 1983) also provided:

*The Commissioners Court of any county coming under the provisions of this Act is hereby authorized and empowered to construct cattle guards on the first class, second class, and third class roads of said county and pay for same out of the Road and Bridge Funds of said county when in their judgment they believe the construction of such cattle guards to be to the best interest of the citizens of said county.*

Both predecessors to the current statute's subsection 251.009(d) contain language restricting said subsection's applicability to commissioners courts of counties "coming under the provisions of this Act" and to commissioners courts of counties "coming under the provisions of this section". Notably, however, this language was deleted from the current subsection 251.009(d) which reads:

*The commissioners court may construct a cattle guard on a county road of any class and may 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.*

One could argue that the deletion of the above bold-faced language found in the predecessors to subsection 251.009(d) reflects an intent by the legislature to create an exception to the population requirement in subsection 251.009(a). This is not clear.

However, not only was the above bold-faced language deleted from the current subsection 251.009(d), but it was also deleted from subsection 251.009(b). Curiously, the deletion of this language is not even mentioned in the "Revisor's Note" to Section 251.009. One could also argue that the legislature felt that the language was superfluous, and therefore should be deleted because it is understood that subsections (b), (c), and (d) are applicable to counties of less than 60,000 inhabitants. This too is not clear.

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In light of the above, does Transportation Code subsection 251.009(d) grant the commissioners court of Webb County, a county with a population over 60,000, the statutory authority to authorize and to replace at county expense a previously-existing cattle guard that was removed from a county road?

Thank you for your kind and courteous attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Homero Ramirez", with a large, sweeping flourish above the name.

HOMERO RAMIREZ  
Webb County Attorney

By Jacinto P. Juarez, Jr.  
Assistant County Attorney

Enclosures