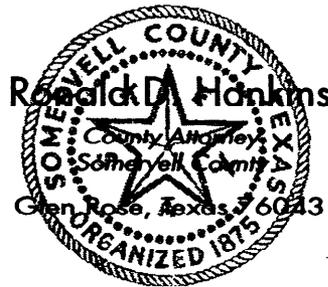


RECEIVED

FEB 18 2003

OPEN RECORDS DIVISION



P.O. Box 1335

Phone 254-897-2277

Fax 254-897-2600

RECEIVED

FEB 18 2003

OPINION COMMITTEE

February 5, 2003

RQ-0018-GA

FILE # ML-42983-03
I.D. # 042983

The Honorable Greg Abbott
Attorney General of the State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Authority of County to impose regulations with regard to heavy trucks and, alternatively, to close portion of road, and related questions.

Dear Attorney General Abbott:

Please accept this letter as a formal request for an opinion from your office concerning the authority of a County to close a portion of a County Road. The facts surrounding the situation at hand set out below.

Somervell County has received a petition from several land owners located along Somervell County Road (CR) No. 406, located in the extreme eastern portion of the County. (A copy of the petition is enclosed herewith). As you will see, the property owners are requesting, pursuant to Section 251.052 of the Transportation Code, that the County close a portion of CR 406 beginning at the Somervell/Johnson County Line. CR 406 begins at U.S. Hwy. No. 67 and proceeds South to the Somervell/Johnson County Line. There it connects with Johnson County Road No. 1234, which continues to wind back around to the North and eventually reconnects with U.S. Hwy. No. 67 approximately 1 to 1 1/2 miles East of 406. I am also including a copy of a USGS topological map which has been labeled in order for you to be able to visualize what I am attempting to describe herein.

This petition was precipitated by the establishment of a rock crushing/mining operation which produces "road base" material. A possible, and likely, route for truck traffic from this operation is along CR 406 northward to U.S. Hwy. No. 67, which is approximately 2 miles North of the mining operation's entrance. The actual location of the operation is in Johnson County. Although a portion of the property on which the mining operation is located is in Somervell County, no portion of the property abuts Somervell County Road

No. 406. The residents along CR 406 desire to have the truck traffic stopped through their petition by the closing of a portion of the roadway on the South end at the Somervell/Johnson County Line. This would require the truck traffic to use Johnson County Road No. 1234 to reach U.S. Hwy. 67.

CR 406 is a narrow road designed for normal traffic, not large trucks loaded with heavy road materials. The roadway was not constructed to withstand heavy truck traffic and will rapidly deteriorate under such wear and tear. There are several residences along this route, most of which are fairly close to the roadway. The paved portion of this road is approximately 16 to 18 feet in width and the actual right-of-way (from fence to fence) averages approximately 35 feet in width. Although I can find no record of the Commissioners Court of Somervell County having classified County Road 406, the existing dimensions of CR 406 would most likely dictate that it be classified as a "third class" road. The residents fear that the heavy truck traffic will pose safety risks and cause diminution to the value of their property. Furthermore, it is clear that this traffic will cause damage to CR 406 and create problems both for County maintenance and the convenience of the general traveling public.

Question No. 1:

Does Somervell County have any *effective* regulatory authority to limit truck traffic on CR 406 or the weight thereof? (and related questions)

Section 251.153 of the Transportation Code allows a commissioners court of a county to establish load limits for any county road or bridge. However, it appears that an overweight vehicle is exempted from county weight limit regulations if the vehicle has an overweight permit issued by the Texas Department of Transportation ("TxDot"). See §621.301(e), Transportation Code. See Also Scurlock Permian Corp. v. Brazos County, 869 SW2d 478 (Tex. App.—Houston[1st Dist.] 1993, writ denied). The penalty or recourse for damage to a road by a permittee is recovery against the security posted by the permittee for the permit with the State. See §623.016, Transportation Code. However, this is a very ineffective remedy in that the damage is likely to be cumulative. The operators of quarries generally do not operate their own trucks; rather, the trucks of independent truckers, construction companies, etc. are loaded at the quarry. Determining the truck or trucks which actually "caused" the damage and the extent of each truck's responsibility would be a nightmarish task. Does the County have any authority to regulate trucks that exceed a posted County weight limit, but have an overweight permit? Is the County's sole remedy a suit against the permittee? If this is the County's sole remedy, what is the County's burden of proof to recover damages against the permittee?

Approaching the problem from another perspective, does the County have the right to post CR 406 as a "No Thru Truck Traffic" road? If so, how would such a regulation interplay with Chapter 623 of the Transportation Code?

Question No. 2:

Can the County close, abandon or alter a portion of CR 406 without providing a new connecting road? (and related questions)

As stated above, CR 406 runs into Johnson County and becomes Johnson County Road No. 1234. The change sought by the petitioners is to alter or close/abandon the portion of CR 406 from the Somervell/Johnson County line to a point just short of the last driveway of the residences in the area. Section 251.051(a) of the Transportation Code gives a commissioners court authority to close, abandon, vacate or alter a public road. A unanimous vote is required to close, abandon, vacate or alter a public road except to shorten it from end-to-end. See §251.051(b), Transportation Code. Subsection (c) of §251.051 provides that a county commissioners court cannot “discontinue” a public road until a new road designated as a replacement is ready to replace it. In the situation inquired about, could a *portion* of CR 406 be closed, altered or abandoned in the manner requested by the residents without the County having to provide a new road? Does the fact that the proposed closure would be from the Somervell/Johnson County line at the request of the Somervell County residents actually affected have any effect on the answer? That is, is the connection to Johnson County Road No. 1234 considered a continuation of CR 406, or is CR 406 considered separately for purposes of §251.051(c)? Would this be a shortening of CR 406 rather than a closure of a road?

Furthermore, does the fact that the alteration or change is requested pursuant to §251.052 of the Transportation Code, which does not have a requirement similar to §251.051(c), enter into the analysis? And, finally, does §251.051(c) incorporate the definition of “discontinue” found at §251.001(2) or does it refer to something more than discontinuing maintenance?

Question No. 3:

Assuming the County is authorized to close, vacate or abandon a portion of the road without providing a new road, could this give rise to a damages claim by the quarry owner whose operations do not abut CR 406, but abut Johnson County Road No. 1234?

Section 251.058 of the Transportation Code addresses the remedies available to persons aggrieved by a road closing. The quarry does not abut the portion of the road to be closed, nor does CR 406 serve as the quarry’s only means of access. Thus, it is assumed injunctive relief would not be available. However, the statute does not preclude the recovery of damages to landowners abutting the road at another point. It is my understanding that the closure must create a material and substantial impairment to access, and that mere inconvenience or circuitry of travel will not suffice to give rise to a right of recovery. See Lethu, Inc. v. City of Houston, 23 SW3rd 482, 486 (Tex. App.—Houston [1st Dist.] 2001, pet denied). If the quarry retains its access to Highway 67 via Johnson County Road No. 1234, would the closure of the portion of CR 406 create any right to damage recovery by the quarry owner? Would the analysis consider the

particular type of traffic involved or the condition of Johnson County Road No. 1234, that is, "specialized access", or is access to one's property by vehicular travel generally sufficient? (Johnson County Road No. 1234 may not be set up for such trucks either. It also has cattle guards and curves generally not found on CR 406.)

It has always been my understanding that the right of the public at large to use a road is paramount to that of an individual. In this case, an operation's use of a road for its private business will damage or destroy the road for everyone and create safety concerns. It has been said that "No person can acquire a vested right to the use of public streets and highways in carrying on a commercial business." See 43 Tex. Jur. 3d, Highways, Etc. §124, p. 250. However, in the situation at hand, an operation not even located in Somervell County will interfere with the use of CR 406 by members of the public actually residing in Somervell County.

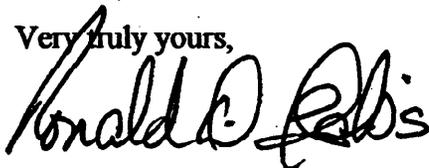
Question No. 4:

Does the County have any regulatory authority or remedy in this situation where it is assumed that the majority of the trucks will be overweight permitted by TxDot?

This is not just a problem in Somervell County. Several counties in our area are struggling with similar situations involving the use of county roads by large-haul trucks coming to and from quarries. It seems unfair that the general public should be burdened with an operation's use of county roads for its business in a manner that increases the cost to the citizens generally of providing such roads.

Thank you in advance for your attention to this matter. Please do not hesitate to contact me if additional information is needed.

Very truly yours,



Ronald D. Hankins
County Attorney
Somervell County