



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Joe Nelson
Chief Accountant
Board of County and District
Road Indebtedness
Austin, Texas

Dear Sir:

Opinion Number O-5262

Re: Should Liberty County be re-imbursed for the payments made by it on the principal and interest of the bonded debt created by the construction of Highway No. 321, between the towns of Dayton and Cleveland?

We are in receipt of your request for an opinion whether Liberty County should be reimbursed for the principal and interest made by the county on certain road bonds for the period from January 1, 1933 to the date that the road was taken over for maintenance by the State Highway Commission.

You have furnished us with a brief supplied by the county in support of its contention that it is entitled to reimbursement, which we have considered in connection with your request for an opinion.

The facts, briefly stated, are as follows:

In 1929 bonds were voted to construct two roads in Liberty County, one of which was the Dayton-Cleveland road. On August 3, 1932, this road was designated as Highway No. 146

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and on September 22, 1932 this designation was cancelled and changed to the road from Liberty to Livingston. According to a statement by Judge W. R. Ely and D. K. Martin, who comprised a majority of the Highway Commission in 1932, the Commission did not have sufficient funds to build both the roads "it was proposed that the designation from Dayton to Cleveland be cancelled and that the county construct this road with bond money, with the understanding that the road would be redesignated after construction was completed. Accordingly, in November 1932, the designation from Dayton to Cleveland was cancelled and changed to the road from Liberty to Livingston. At the time of this cancellation, it was the expressed intention of the majority of the Highway Commission to redesignate the road as a State highway after the County completed construction thereon."

During the years 1935 through 1939 Liberty County issued its bonds and spent the money on the construction of an 18-foot concrete highway between the towns of Dayton and Cleveland. After completion of the road, the Highway Commission conditionally designated this road as Highway No. 321, but the conditions imposed in the designation were not met until October, 1942 and at that time the State assumed maintenance of the road. The Board of County and District Road Indebtedness then granted Liberty County participation on the bonds that were outstanding at the time the road was taken over by the Highway Commission for maintenance purposes, in accordance with our Opinion No. O-1942.

The county now requests that it be reimbursed for all principal and interest paid by the county from 1933 to the date the road was taken over for maintenance, and bases this contention on the fact that the road was a designated highway on September 17, 1932, and the further fact that the road was a designated highway when our Opinion No. O-1334 was approved in Committee. We do not agree with these contentions.

Opinion O-1334 contains the following paragraphs:

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"The facts which give rise to our first question are, briefly, as follows: In 1932 the Dayton-Cleveland Road in Liberty County was a part of the State Highway System and was designated as State Highway #146, and later this designation was lifted or abandoned and said designation applied to another road. Subsequently, that is, between September 27, 1932 and prior to January 2, 1939, Liberty County constructed the Dayton-Cleveland Road with bond funds. To summarize, it must be noted that such designation was abandoned and the State Highway number which had been applied to the Dayton-Cleveland Road was applied to another road, namely, the Liberty-Livingston Road. Further, it is admitted that there was no debt existing at the time said road was abandoned as a part of the State Highway System, which, in our opinion, excludes from participation in the one-cent gas tax the obligations subsequently created for the construction of such roads, except in such proportion as the obligations may participate in any funds accruing to the county through the 'Lateral Road Account.'

"Our construction of paragraph 3, Section 2, is that only such roads as had formerly constituted a part of the State Highway System and whose status had been lost through change, relocation or abandonment, that had been constructed with bond funds and the obligations issued to secure such funds were outstanding at the time the road was a part of the System, and which bonds or obligations had not been discharged or retired at the time such road lost its designation either through change, relocation or abandonment, can participate as an 'eligible issue' under the terms and provisions of House Bill #688. We cannot conceive that the Legislature intended to permit bonds, the proceeds of which are to be expended on a road formerly constituting a part of the State Highway System, to participate in the primary benefits of the one-cent gasoline tax if such bonds are issued subsequent to the abandonment of such road as a part

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of the State Highway System. Further, there being no evident intention by the Highway Commission of redesignating such road as a part of the Highway System, we think the exception provided in subsection (a) of Section 6, paragraph 2, inapplicable to this issue of bonds."

We have not been furnished with any facts which would authorize a modification of Opinion O-1334, except that the road has been redesignated and the bonds which were outstanding at the time the State assumed maintenance have been granted participation in the one-cent (1¢) gasoline tax.

When the Dayton-Cleveland road was designated as a State Highway in 1932 there were no outstanding obligations. Bonds had been voted in 1929 but they had not been sold, hence did not constitute "outstanding obligations." Subsection (a) of Section 6 of the "Bond Assumption Act" provides that "all bonds, warrants or other evidences of indebtedness heretofore issued by counties or defined road districts of this State, which mature on or after January 1, 1933, insofar as amounts of same were issued for and the proceeds actually expended in the construction of roads that constituted and comprised a part of the system of designated State Highways on September 17, 1932 * * *." No bonds were issued and outstanding, nor had the proceeds of any bonds been actually expended on this road at the time of the 1932 designation. In our opinion "eligible bonds" are bonds which were outstanding at the time the road was a part of the designated State Highway System.

The county submits a list of bonds which were made eligible by certain "nunc pro tunc" orders and asserts that their claims are not as strong as that of Liberty County. It is not shown that any of these bonds were not outstanding obligations on the respective dates of designation as a part of the Highway System.

In our Opinion No. O-1942 we said:

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"It seems that this is the only construction that can be placed upon the statutes and we are, accordingly, of the opinion that the public road of a county does not become a part of the designated State Highway System until it has been officially taken over by the Highway Commission for maintenance purposes. The minutes of the Highway Commission reveal contingent, temporary and conditional designations but we think it not unreasonable to conclude that such roads cannot become a part of the State Highway System until the terms and conditions laid down in such minutes have been complied with and that following such time as a compliance has been proven to the Highway Engineer, and the Highway Commission officially designates such road as a part of the State Highway System, and bond or other obligation issued, the proceeds of which were expended in the construction or purchase of right-of-way therefor can participate in the County and District Highway Fund as provided in H. B. 688. We think this is true irrespective of the apparent exception existing in Paragraph 2 of Section 6a of such law, which reads as follows:

"In the event the State Highway Commission has on a date prior to January 2, 1939, indicated its intention of designating as State Highways the public roads of any county or defined road district in this State and has evidenced such intention in its official records or files then the provisions of this Act shall apply as if the road had actually been designated prior to January 2, 1939."

We adhere to the conclusions expressed in the former opinions hereinabove cited - holding that only such bonds as were outstanding at the time the roads become a part of the State System are eligible for participation in the one-cent

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gasoline tax, and that roads do not constitute a part of the system of State Highways until the Highway Department takes them over for maintenance.

You are, therefore, advised that in our opinion Liberty County is not entitled to be reimbursed for principal and interest payments made by the County prior to the date that the road was taken over for maintenance by the State Highway Commission.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *C. F. Gibson*
C. F. Gibson
Assistant



CFG-s

E.P.P.

APPROVED MAY 10, 1943

Gerard C. Mann
ATTORNEY GENERAL OF TEXAS