



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

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April 4, 1975

The Honorable E. L. Short, Chairman
Intergovernmental Affairs Committee
House of Representatives
State Capitol Building
Austin, Texas

Letter Advisory No. 92

Re: Constitutionality of proposed
House Bill 470 permitting
counties to do private road
work and earthmoving work
for a price.

Dear Representative Short:

On behalf of the Intergovernmental Affairs Committee you have asked our opinion about the constitutionality of House Bill 470. In pertinent part the Bill provides:

**A BILL TO BE ENTITLED
AN ACT**

relating to the use of county employees and equipment for construction and maintenance of private roads and for private earthmoving work; and declaring an emergency.

**BE IT ENACTED BY THE LEGISLATURE OF THE
STATE OF TEXAS:**

Section 1. The commissioners court of any county by order may authorize a county commissioner to direct the use of county employees and equipment to construct or maintain private roads or to do earthmoving work in his precinct when requested to do so by a person owning an interest in the private road or property on which the work is to be done. The commissioners court shall expressly state in the order that no commissioner may undertake a single project for which the charges will exceed an amount specified in the order. An order adopted under this section must apply uniformly with respect to all four commissioners' precincts.

Sec. 2. A commissioner who directs the use of county employees and equipment under an order adopted under Section 1 of this Act shall, on behalf of the county, charge for the work done an amount equal to the prevailing charge for similar work in the same area. Funds collected under this section shall be paid to the county treasurer and credited to the county road and bridge fund to be used in the precinct in which the work is done.

Article 8, section 3 of the Texas Constitution provides:

Taxes shall be levied and collected by general laws and for public purposes only. (Emphasis added)

Article 5, section 18 of the Texas Constitution provides in part:

The County Commissioners . . . with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and laws of the State, or as may be hereafter prescribed. (Emphasis added)

It has been held many times that the powers of counties are limited to those conferred upon them by the Constitution itself or by the laws of the State, either expressly or by necessary implication, but when powers have been conferred, the Commissioners Court possesses broad discretion in their exercise. Anderson v. Wood, 152 S. W. 2d 1084 (Tex. Sup. 1941); Rowan v. Pickett, 237 S. W. 2d 734 (Tex. Civ. App. --San Antonio 1951, no writ). If this bill becomes law, it will furnish such a conferral of power unless it is unconstitutional.

Rowan v. Pickett, supra, upheld a statute which is similar in some respects to the bill considered here. But there are significant differences. The Rowan court considered article 2372c, V. T. C. S., which allows counties to use or to permit landowners and taxpayers to use, under a written contract, county owned equipment and machinery to prevent soil erosion upon a commissioners court determination that the machinery is not needed to build or maintain county roads, and upon the payment of equitable and proper compensation by the private persons to be benefited. The first two sections of that statute

brand soil erosion as a grave menace vitally affecting the well-being of the people and the conservation of resources essential to the public welfare. Another section provides that the county shall not be required to do such work unless the commissioners court determines that the work is of some public benefit and elects to do it.

The bill you have furnished us leaves purely to conjecture the public purpose to be served, if any, in allowing counties to engage in road building and maintenance work for private persons. While the receipt of adequate compensation in exchange for the work may take the arrangement out of the prohibitions of article 3, section 52 of the Constitution against counties lending credit or granting public money on things of value to individuals or private entities, that circumstance alone will not bring the activity within the term "county business" as used in article 5, section 18 or within the article 8, section 3 scope of "public purposes only."

Admittedly, "county business" may embrace "proprietary" functions if incident to the accomplishment of a public purpose. County of Cameron v. Wilson, 326 S.W.2d 162 (Tex. Sup. 1959). But in Ex parte Conger, 357 S.W.2d 740, 742 (Tex. Sup. 1962) the Supreme Court, in considering the use of county equipment observed:

Work performed on privately owned property to furnish parking facilities for the use of members in attending services at their church is not for a public use or purpose, whether that work consists in scraping off weeds or paving the lot or excavating for a foundation. The matter does not turn on the extent of [sic] character of the work, but rather for whose benefit it was performed . . . To constitute 'public use' all persons must have an equal right in respect to the property and it must be in common and on the same terms no matter that only a few in number may avail themselves of it.

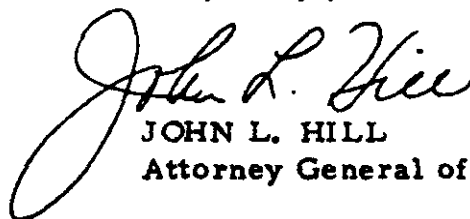
In Godley v. Duval County, 361 S.W.2d 629 (Tex. Civ. App. --San Antonio 1962, no writ) it was held that a county taxpayer had standing to enjoin the improper use of county labor, equipment or materials. The Court said:

The County Commissioners are not authorized to permit the use of county labor, materials, or equipment for other than public use. Ex parte Conger . . . Rowan v. Pickett . . . This same rule applies to county employees regardless of the motives or whether a profit is made.

Also see Panola County Commissioners Court v. Bagley, 380 S. W. 2d 878 (Tex. Civ. App. --Texarkana 1964, writ ref'd., n. r. e.), and Owen v. Fleming-Stitzer Road Building Co., 250 S. W. 1038 (Tex. Civ. App. --Ft. Worth 1923, writ ref'd.).

Upon the foregoing authority, we believe House Bill 470 would be held unconstitutional by the courts of Texas if enacted in its present form. And see Attorney General Opinions O-2034 (1940), O-3073 (1941), O-3228 (1941), V-1348(1951), WW-192 (1957), WW-1096 (1961), WW-1401 (1962), C-342 (1964), C-772 (1966), C-779 (1966), M-799 (1971), H-45 (1973), H-139 (1973), H-403 (1974), H-527 (1975).

Very truly yours,



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APPROVED:



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