



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Charles H. Theobald
County Attorney
Galveston County
Galveston, Texas

This opinion
Overrules Opinion
dated 6/18/38 to Theobald
Co. Atty, Galveston

Dear Sir:

Opinion No. O-3684

Re: Where, in order to cure defect in title to portion of lot acquired for sea wall right-of-way, title to the entire lot was purchased by the county with sea wall funds, may commissioners' court convey surplus portion of such lot under Article 1577 (R.C.S., 1925)?

This will acknowledge receipt of your letter of recent date wherein you request the opinion of this Department upon the problem summarized above.

The facts regarding this transaction as submitted by you are substantially as follows:

"Galveston County is at present the record title holder of Lot 3 in Northwest Block of Out-Lot No. 95 in the city and county of Galveston, Texas. The south part of this lot, being that part now located within the Galveston County sea wall right-of-way, was purchased by Galveston County from August Anderson and wife, by deed dated April 6, 1903.

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"This deed recites that Galveston County was purchasing, for sea wall right-of-way purposes, a strip of land across Lot 3, particularly described by metes and bounds in accordance with the map of the sea wall right-of-way adopted by the Commissioners' Court of Galveston County, Texas, August 23, 1902, and recorded in Book 194, pages 1-4, Deed Records of Galveston County, Texas. The consideration was paid out of the sea wall fund.

"The balance of said lot, being the north portion thereof, was allowed to remain, under the terms of said deed, in August Anderson and wife.

"It subsequently developed, however, that on the 14th day of February, 1900, the city of Galveston had secured a judgment against August Anderson and wife for taxes due on said Lot 3. On the 29th day of August, 1903, some five months after the purchase of the south portion of said lot for sea wall right-of-way purposes, Henry Thomas, Sheriff of Galveston County, conveyed to Charles T. Suderman, under execution of said tax judgment said Lot 3, for a consideration of \$100.00.

"Thereafter, and apparently for the purpose of curing the flaw in the title to that part of the Lot purchased by it for right-of-way purposes, Galveston County, on the 17th day of December, 1903, by deed recorded in Book 200, page 136, purchased all of said Lot 3 from Charles T. Suderman, for a consideration of \$125.00 and the assumption of taxes. This consideration was also paid out of funds set aside for sea wall purposes.

"In this last deed from Suderman to Galveston County, there appears no statement whatsoever as to the purposes for which the lot was

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being acquired and no reference to the map of the sea wall right-of-way or any other language of whatsoever nature tending to connect the lot with the sea wall.

"In due course the Galveston County sea wall was constructed upon the right-of-way as shown by the map, and ever since its completion, the north part of said Lot 3 has remained vacant and unused by anybody for any purpose. The lot now stands in the name of Galveston County."

The counties of this State derive their authority to sell county-owned real estate from the provisions of Article 1577, R.C.S., 1925. This statute governs the sale of all county real estate except lands belonging to the free school fund of the county. See *Logan v. Stephens County* (Civ. App. 1904) 81 S.W. 109 (affirmed, 83 S.W. 365, 98 Tex. 283).

Article 1577 reads as follows:

"Sale of real estate. -- The commissioners court may, by an order to be entered on its minutes, appoint a commissioner to sell and dispose of any real estate of the county at public auction. The deed of such commissioner, made in conformity to such order for and in behalf of the county, duly acknowledged and proven and recorded shall be sufficient to convey to the purchasers all the right, title and interest and estate which the county may have in and to the premises to be conveyed. Nothing contained in this article shall authorize any commissioners court to dispose of any lands given, donated or granted to such county for the purpose of education in any other manner than shall be directed by law."

You will note that this article includes within its scope "any real estate of the county" except lands acquired by the county for the purpose of education.

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Does this broad language of the statute embrace lands held in trust by the county for a particular purpose? This question arises because of the fact that the consideration for the purchase of Lot 3 was paid out of the sea wall fund. This fund constitutes a special fund held in trust by the county for the exclusive purpose of constructing, maintaining and purchasing right-of-way for sea wall and breakwaters. See Article 6838, Vernon's Annotated Statutes. In the management and handling of this fund, the commissioners' court acts in the capacity of a trustee.

Article 6838 reads as follows:

"Custodians of funds

"All funds, revenues and moneys derived from the sale of the bonds herein authorized and from the sale or rent of reclaimed or other lands acquired under this title and from additional uses of said works as herein authorized, shall be deposited with the county or city treasurer, as the case may be, and shall be held in trust exclusively for the construction and maintenance of seawalls and breakwaters, including the purchase of the right of way therefor. All moneys derived from the assessment and levy of taxes as aforesaid are declared to be a trust fund for the payment of interest and principal of bonds to be issued under this title."

It might be urged that under the provisions of this statute, the property acquired with sea wall funds became trust property, and, therefore, such property is not included in the provisions of Article 1577.

However, in view of the fact that our courts have stated that the commissioners' courts occupy in respect to all county property a trust relation, this contention becomes tenuous. See Llano County v. Knowles (Civ. App.) 29 S.W. 549; Llano County v. Johnson (Civ. App.) 29 S.W. 56.

Another question in regard to the authority of the commissioners' court to sell the unneeded portion of Lot 3 is raised by Article 6839a, which reads as follows:

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"Grant of sea wall right of way

"Any county may donate and grant to the State of Texas or to any eleemosynary institution incorporated under the laws of the State of Texas and operated without profit, but for the benefit of the public, such portions of any seawall right of way as may have been heretofore acquired by such county, and by the Commissioners' Court of such county deemed proper to be so granted, and upon any such Commissioners' Court so determining, the county judge of such county may convey such property in accordance with the order of said Commissioners' Court."

This statute enacted as Ch. 144, Acts 1929, 41st Leg. p. 308, is the only provision appearing in Title 118 which deals with sea walls, and the question presents itself as to whether it was the legislative intent that this be the only method of disposing of unneeded sea wall right of way property.

Counties being component parts of the state, have no powers or duties except those which are clearly set forth and defined in the constitution and statutes. *Edwards County v. Jennings* (Civ. App., 1895) 33 S.W. 585; 11 Tex. Jur. 563. Commissioners' courts have only such powers as are expressly or impliedly conferred upon them by law. *Commissioners' Court v. Wallace*, 118 Tex. 279, 15 S.W. 535; *Seward v. Falls County* (Civ. App., Austin, 1922) 246 S.W. 728.

You will note, however, that Art. 6839a is permissive in its terms. It confides in the commissioners' court an additional power in regard to the disposition of sea wall right of way; that is the power to donate it to the State or certain types of eleemosynary institutions. The power to sell land, which counties have under the provisions of Article 1577, does not include or imply the authority to give it away. *Rogers v. Tompkins*, (Civ. App. 1905) 87 S.W. 379, error refused; *Llano County v. Knowles* (Civ. App., 1895) 29 S.W. 549.

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The emergency clause which appears in the original enactment as Chapter 144, Acts 1929, unmistakably reveals the legislative intent to grant the additional power to donate such land. We quote the following therefrom:

"The fact that there exists property heretofore acquired by counties for sea wall purposes and not now needed for such purposes but required by the State of Texas and by eleemosynary corporations created by the laws of the State of Texas for the benefit of the public, without profit, and in furtherance of charitable work, and the use of said properties for such purposes is questioned, an emergency exists." etc.

Another legislative provision which is pertinent to the question raised by you, is Chapter 42, Acts of the 29th Legislature, Regular Session.

Section 1 of this act reads as follows:

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: That no corporation, person or association of persons, shall be granted or exercise any rights, privileges or franchises for the construction or operation of any railway, whether by steam, electric, cable, horse or other power, nor shall any corporation, person or association of persons be granted any right, leasehold, privilege or franchise for any purpose, or purposes other than a public walk, public driveway or public park, along or upon or across any part of that tract of land situate in the city and county of Galveston, in this State, which was acquired by said county or commissioners' court thereof for seawall purposes under the authority of an Act passed at the first called session of the twenty-seventh Legislature of the State of Texas and approved by the Governor September 7th, 1901, entitled 'An act to give effect to Section VII, Article XI, of the Constitution, authorizing all counties and cities bordering on the coast of the Gulf of Mexico to construct seawalls and

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breakwaters, to issue bonds therefor, and levy a tax for the payment thereof; and to further provide for the construction and maintenance of said works, and payment of said bonds by sale or rent of lands reclaimed from the sea, or otherwise acquired for breakwater purposes,' and it shall also be unlawful to allow the possession, use or occupancy in any manner whatever of any part of said tract of land for any purpose whatever other than a public walk, public driveway or public park, and any action upon the part of the county commissioners' court of Galveston County, or any other court or body, or official or officials, in attempted contravention of this Act shall be void and of no effect."

Under the facts submitted by you, the north portion of Lot 3 was not acquired for sea wall purposes. By its own terms this act is restricted to lands acquired for sea wall purposes, and would not, therefore, apply to any land not acquired for such purposes, unless we are prepared to declare that all land acquired with Seawall Funds must necessarily assume that status.

Article 90 of the Penal Code provides that moneys realized from the sale of land acquired for sea wall purposes shall be deposited in the sea wall fund, thus inferentially lending support to our construction of Chapter 42, Acts 1929 and of Article 6839a. This provision of the Penal Code reads:

"Art. 90. DIVERSION OF SEAWALL MONEY.
All funds, revenues and moneys derived from the sale of the bonds authorized by law to pay the indebtedness incurred in establishing, locating, erecting, constructing, extending, strengthening, maintaining or keeping in repair or otherwise improving any seawall or breakwater, and to improve, maintain and beautify any boulevard erected in

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connection therewith, and all funds, revenues and moneys derived from the sale or rent of reclaimed or other lands acquired by law and from additional uses of such works as authorized by law, shall be deposited with the county or city treasurer, as the case may be, and shall be held in trust exclusively for the construction and maintenance of seawalls and breakwaters including the purchase of the right-of-way therefor; and all moneys derived from the assessment and levy of taxes as aforesaid are declared to be a trust fund for the payment of interest and principal of such bonds, and the use or diversion of such moneys for any other purpose whatever is hereby prohibited and a violation of this Article shall constitute a misapplication of public money, and the person so offending shall be punished as provided in Article 86."
(Emphasis supplied.)

It is therefore the opinion of this Department and, you are so advised, that the commissioners' court of Galveston County has authority to dispose of the excess portion of Lot 3, being the north portion thereof, by sale under the provisions of Article 1577 (R.C.S. 1925).

A contrary view of this question was taken in an opinion written by R. E. Gray, Assistant Attorney General, dated June 8, 1938. Mr. Gray held that the Article 6829a, supra, sets out the only method of disposition of excess sea wall right of way and that, therefore, the commissioners' court may not sell such land by complying with Article 1577. Mr. Gray's opinion, insofar as it is in conflict with this opinion, is hereby expressly over-ruled.

Trusting that we have fully answered your inquiry,
we are

APPROVED JUL 28, 1941

Chas. H. Theobald
FIRST ASSISTANT
ATTORNEY GENERAL

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Peter Maniscalco*
Peter Maniscalco
Assistant

PM:ff

cc
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