



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

June 4, 1997

The Honorable Jerry Patterson  
Chair, Veteran Affairs and Military Installations  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711

Letter Opinion No. 97-057

Re: The authority of a city to sell land  
dedicated as a park (ID# 39482)

Dear Senator Patterson:

You have asked our opinion regarding a dispute between a city and a group of its citizens regarding the city's sale of a certain parcel of land to a private individual sometime in the fall of 1993. From the materials you have submitted, it appears that the city did not hold hearings or obtain voter approval before selling the land. The property at issue was dedicated to the city by a developer in 1981. There is some dispute regarding whether the land was dedicated to the city for use as a park and whether the city accepted the dedication on those terms. This office cannot resolve disputed questions of fact. For purposes of this opinion, we will assume that the property at issue was dedicated to the city as a park and that it was accepted by the city as a park.

Because you have not asked us to address any specific legal questions, we will generally discuss the law applicable to the authority of a city to convey park land to a private party. Section 253.001 of the Local Government Code authorizes a municipality to sell land "that the municipality owns, holds, or claims as a public . . . park,"<sup>1</sup> but also requires the governing body of the municipality to obtain the approval of the voters before doing so:

Land owned, held, or claimed as a public square or park may not be sold unless the issue of the sale is submitted to the qualified voters of the municipality at an election and is approved by a majority of the votes received at the election.

Local Gov't Code § 253.001(b). Section 253.001 also provides that a municipality must adopt an ordinance directing the mayor or manager to execute the conveyance. *Id.* § 253.001(c). These requirements apply to land that "the municipality owns, holds, or claims as a public . . . park."<sup>2</sup> We are not aware of any case law addressing whether land must be formally dedicated as a park in order to fall within this provision.

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<sup>1</sup>Local Gov't Code § 253.001(a).

<sup>2</sup>*Id.*

Section 253.001 contains various exceptions to the election requirement. The requirement does not apply to the sale of land for drainage purposes to a district, county or corporation acting on behalf of a county or district. *Id.* § 253.001(b). In addition, in the fall of 1993, subsections (e)<sup>3</sup> and (f)<sup>4</sup> provided certain exceptions to the requirements. None of these exceptions appears to apply to

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<sup>3</sup>Subsection (e) provided as follows:

Subsection (b) does not apply to a conveyance of park land that:

- (1) is owned by a home-rule municipality with a population of less than 115,000;
- (2) is one acre or less;
- (3) is part of a park that is 600 acres or less;
- (4) is conveyed as part of an exchange for property adjoining the park; and
- (5) is conveyed pursuant to an ordinance that is adopted under this section and has an effective date before November 1, 1989.

*See id.* § 253.001(e) (as enacted by Act of May 26, 1989, 71st Leg., R.S., ch. 597, § 1, 1989 Tex. Gen. Laws 1978, 1978). Subsection (e) was amended in 1995, after the transaction at issue. *See* Act of May 19, 1995, 74th Leg., R.S., ch. 344, § 1, 1995 Tex. Gen. Laws 2868, 2868.

<sup>4</sup>Subsection (f) provided:

(f) The election requirements of Subsection (b) do not apply to a conveyance of a park if:

- (1) the park is owned by a home-rule municipality with a population of more than one million;
- (2) it is a park of two acres or less;
- (3) the park is no longer usable and functional as a park;
- (4) the proceeds of the sale will be used to acquire land for park purposes;
- (5) a public hearing on the proposed conveyance is held by the governing body of the home-rule municipality and that body finds that the property is no longer usable and functional as a park; and
- (6) the park is conveyed pursuant to an ordinance adopted by the governing body of the home-rule municipality, unless within 60 days from the date of the public hearing the governing body of the home-rule municipality is presented with a petition opposing the conveyance which contains the name, address, and date of signature of no less than 1,500 registered voters residing within the city limits of the municipality; then, the governing body of the home-rule municipality shall either deny the conveyance or shall approve the conveyance subject to the election required in Subsection (b); or

(continued...)

the transaction at issue.<sup>5</sup> The ultimate resolution of their application would involve factual determinations, however, and is therefore beyond the purview of the opinion process.

The Local Government Code does not provide any express means to challenge a municipality's failure to adhere to the section 253.001(b) election requirement. We are aware of at least one case, however, in which a court voided the conveyance of an interest in a city park to a private individual where the city had failed to hold an election required by the statutory predecessor to this provision. See *Zachry v. City of San Antonio*, 305 S.W.2d 558 (Tex. 1957). The action to cancel and set aside the lease contract as void was brought by the City of San Antonio almost two years after the lease was executed. See *Zachry v. City of San Antonio*, 296 S.W.2d 299, 305 (Tex. Civ. App.—San Antonio, writ granted), *aff'd*, 305 S.W.2d 558 (Tex. 1957).

In addition, a court has held that a taxpayer has standing to bring suit against a city for failure to hold an election prior to conveying a park under V.T.C.S. article 1015c, section 4. See *McCoy v. Williams*, 500 S.W.2d 178, 180-81 (Tex. App.—El Paso 1973, writ ref'd n.r.e.). Article 1015c, which authorizes a city to purchase, mortgage and encumber various kinds of projects including parks, V.T.C.S. art. 1015c, § 1, provides that no project under section 1 of the article "shall ever be sold until such sale is authorized by a majority vote of the qualified voters of such city or town," *id.* § 2, and that "any taxpayer residing within such city or town . . . shall have the right, by appropriate civil action in the District Court of the county in which such city or town is located, to enforce the provisions of this Act," *id.* § 4. *McCoy v. Williams*, 500 S.W.2d at 180-81, suggests that this cause of action applies to any city park, not just one created under section 1 of article 1015c: "Appellees urge that Article 1015c is not applicable since there is no allegation that the park was created under that statute or that the land in question was encumbered under the provisions of the Act. We find no restriction in Section 2 requiring an election, which would limit the requirement for an election to only parks, encumbered under this Act." *Id.*

Parks and Wildlife Code section 26.001 also contains certain procedural requirements a city must satisfy before selling a park. It requires a city to provide public notice and a hearing before "approv[ing] any program or project that requires the use or taking of any public land designated and used prior to the arrangement of the program or project as a park." Parks & Wild. Code § 26.001(a).

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<sup>4</sup>(...continued)

(7) the conveyance involves an exchange of two existing parks, situated within a home-rule municipality with a population of more than one million, that together total 1.5 acres or less in size, that are located within 1,000 feet of each other, that are located in an industrial area, that have been found in a public hearing to no longer be usable and functional as parks, and that are conveyed pursuant to an ordinance, adopted by the governing body of that municipality, that has an effective date before December 1, 1993.

See Act of May 5, 1993, 73d Leg., R.S., ch. 179, § 1, 1993 Tex. Gen. Laws 344, 344.

<sup>5</sup>The Seventy-fifth Legislature enacted an additional exception to the section 253.001(b) election requirement. See S.B. 544, Acts 1997, 75th Leg., R.S. (eff. Sept. 1, 1997). It does not appear to apply to the park land at issue.

If the parcel of land at issue was designated and used a park prior to the sale, then the city was required to comply with this provision. Significantly, however, chapter 26 of the Parks and Wildlife Code contains a bar to judicial review: “[A] petition for judicial review of the approval or disapproval of a program or project under this provision must be filed within 30 days after the approval or disapproval is announced, or the review is barred.” *Id.* § 26.003. Although this bar clearly applies when a city has adhered to the section 26.001 notice and hearing requirements,<sup>6</sup> we are unaware of any authority addressing whether this bar would apply in a case where the governmental body at issue failed to adhere to the requirements altogether. Chapter 26 does not specifically grant standing to a member of the public to challenge a city’s action for failure to adhere to its requirements; thus, a litigant must show that he or she has been damaged or injured as a result of the city’s actions other than as a member of the general public in order to have standing to challenge a city action on this basis.<sup>7</sup>

We have not been provided with any information regarding the procedures used by the city to arrive at a purchase price to sell the land at issue. Subsection (a) of section 272.001 of the Local Government Code generally requires cities to sell land by a sealed bid procedure after public notice. *See* Local Gov’t Code § 272.001(a). In the alternative, a municipality may sell such land by public auction. *See id.* § 253.008.<sup>8</sup> The effect of a city’s failure to comply with these requirements renders the transaction void. *Bowling v. City of El Paso*, 525 S.W.2d 539 (Tex. Civ. App.—El Paso 1975, writ ref’d n.r.e.) (addressing statutory predecessor to Local Gov’t Code § 272.001, former V.T.C.S. art. 5421c-12) (action brought by City of El Paso to void and rescind conveyance). Although none of the exceptions to the requirement that a city sell land by sealed bid or public auction listed in subsections (b), (g), (h) or (i) of section 272.001, as they existed in the fall of 1993, would appear to apply to the sale at issue, ultimate resolution of their application would involve factual determinations and is therefore beyond the purview of the opinion process.

Finally, material you have provided suggests that the 1993 sale is validated by article 974d-44, a provision applicable to both general-law and home-rule municipalities. *See* V.T.C.S. art. 974d-44, § 1. Section 1 of article 974d-44 provides that the article “validates governmental acts or proceedings which may otherwise be invalid or void because of procedural defects in the manner of enactment.” Section 2(b) provides that all governmental acts and proceedings of a home-rule municipality since the “adoption or attempted adoption or amendment of the charter are validated

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<sup>6</sup>*See, e.g., Persons v. City of Fort Worth*, 790 S.W.2d 865 (Tex. App.—Fort Worth 1990, no writ) (noting that where city published notice and held public hearings regarding park activities, action under chapter 26 barred for failure to timely file).

<sup>7</sup>*See id.* at 870. As a general matter, “[u]nless standing is conferred by statute, the common-law rule in Texas is that a person seeking to enjoin the actions of a governmental body must plead and prove that he has suffered ‘special injury,’ *i.e.*, he must allege and show how he has been damaged or injured other than as a member of the general public.” *Id.* at 868 (citing *Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966)).

<sup>8</sup>This provision was enacted in 1993, prior to the transaction at issue. *See* Act of May 12, 1993, 73d Leg., R.S., ch. 206, § 1, 1993 Tex. Gen. Laws 394, 394.

as of the dates on which they occurred." Section 6 provides that the article applies to "governmental acts and proceedings of cities and towns that occurred before March 1, 1995."

Despite the broad wording of sections 1, 2(b), and 6, it is not clear that article 974d-44 applies to the governmental act at issue here. Sections 2(a), 3, 4, 8, and 9 of the article describe particular kinds of governmental acts or proceedings -- governmental acts and proceedings relating to the adoption or amendment of a home-rule charter,<sup>9</sup> incorporation,<sup>10</sup> annexation,<sup>11</sup> industrial development sales tax elections,<sup>12</sup> and the organization of certain corporations.<sup>13</sup> None of the governmental acts or proceedings described in these subsections would appear to include the sale of real property in violation of the statutory requirements discussed above. We do not know whether a court would hold that article 974d-44 applies *all* governmental acts and proceedings of any sort or whether a court would conclude that the legislature did not intend article 974d-44 to validate those acts or proceedings not relating to the general categories specifically described in sections 2(a), 3, 4, 8, and 9. We have not found a case applying a validating statute to the sale of real property by a city in violation of any of the requirements set forth in the statutory provisions discussed above.<sup>14</sup> On the other hand, it is a well-established rule of statutory construction that validating acts are to be liberally construed.<sup>15</sup> Because the effect of a validating statute of this kind on a city's failure adhere to these statutory requirements prior to selling park land appears to be a question of first impression that has not yet been considered by the courts, we are unable to provide a definitive answer to this question.

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<sup>9</sup>V.T.C.S. art. 974d-44, § 2.

<sup>10</sup>*Id.* § 3.

<sup>11</sup>*Id.* § 4.

<sup>12</sup>*Id.* § 8.

<sup>13</sup>*Id.* § 9.

<sup>14</sup>*Bowling v. City of El Paso*, 525 S.W.2d 539, 541-42 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.), suggests but does not expressly hold that a sale of real property was a "governmental proceeding" within the meaning of a similar validation statute.

<sup>15</sup>*See, e.g., Perkins v. State*, 367 S.W.2d 140 (Tex. 1963); *City of Mason v. West Tex. Util. Co.*, 237 S.W.2d 273 (Tex. 1951).

**S U M M A R Y**

If a city owns, holds, or claims real property as a public park, the city must adhere to Local Government Code section 253.001 before conveying the property to a private individual. In addition, Parks and Wildlife Code chapter 26 requires a city to provide public notice and a hearing before "approv[ing] any program or project that requires the use or taking of any public land designated and used prior to the arrangement of the program or project as a park." Parks & Wild. Code § 26.001(a). If city real property is designated and used as a park, then the city must also comply with these requirements prior to selling it.

Yours very truly,



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Opinion Committee