



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 2, 1998

The Honorable Jerome Aldrich
Criminal District Attorney
Brazoria County
111 East Locust, Room 408A
Angleton, Texas 77515

Letter Opinion No. 98-114

Re: Whether a municipality may exercise zoning, or other, police powers over privately owned land below mean high water of a man-made canal within the municipal limits (RQ-1007)

Dear Mr. Aldrich:

You ask generally whether the City of Freeport ("city") may exercise its police powers by, for example, enforcing zoning regulations on privately owned land under the waters of a man-made canal located within the city limits. We conclude that the city may, although the regulations may not interfere with the public's right to use the water.

Your questions concern the bed of a man-made canal adjacent to the city's Bridge Harbor subdivision. According to your letter to this office, the canal "was dredged at the time the subdivision was developed, . . . is more than thirty feet [wide,] and connects with the Intracoastal Canal[,] which, in turn, is connected to the Gulf of Mexico by virtue of the Brazos River." You relate that a property owner in that subdivision, whose property abuts the canal, desires to construct a boat lift, boat ramp, sidewalk, and a concrete wall "on or in the canal." The property owner has received permission from the Army Corps of Engineers (the "corps") to construct the lift and the ramp, but the corps advised that structures above mean high water are beyond the corps' jurisdiction.¹

At this point, you indicate that the city became involved. The property owner sought a zoning variance from the city to permit him or her to construct the project, but the city apparently advised the property owner that the city's zoning jurisdiction extended over only those projects to be constructed above mean high water. We gather that the city determined it lacked zoning jurisdiction over projects to be constructed below mean high water. Subsequently, the city inquired of the General Land Office whether the canal bed is state-owned submerged land under Natural Resources Code section 33.004(11)² and, if so, whether the General Land Office must approve the

¹You do not ask whether permission from the corps preempts city jurisdiction over a privately owned canal bed.

²Natural Resources Code section 33.004(11) defines "submerged land" as "any land extending from the boundary between the land of the state and the littoral owners seaward to the low-water mark on any saltwater lake, bay, (continued...)"

plan to construct the proposed structures.³ You indicate that the General Land Office's response "was somewhat inconclusive and ambiguous with regard to whether . . . [the] land is 'submerged land' but clearly stated that a permit would not be required"⁴

You now ask two questions. First, you ask whether the city has jurisdiction to exercise its zoning powers, "delegated to it by the Zoning Enabling Act, [Local Government Code chapter 211]" below mean high water in man-made canals within the city limits. You thus appear to question the city's previous determination that it lacks the power to zone privately owned land below mean high water. Second, you ask whether, in exercising police powers other than zoning powers, the city is "limited to the specific activities described in [Parks and Wildlife Code section 31.092(a)], or, being a Home Rule City, may the [c]ity rely upon [Local Government Code sections 51.072, 54.004, and 217.041] and [Texas Constitution article XI, section 5] to expand the scope of its regulations beyond those" specifically permitted by Parks and Wildlife Code section 31.092(a). We understand this question to seek to know what police powers, other than the power to regulate zoning, the city may exercise on privately owned land below mean high water.

Before we consider the questions you ask, we note two assumptions that we do not question here. First, you assume the proper dividing line between the waterfront property in this case, which is unquestionably privately owned, and the canal bed, which may be publicly or privately owned, is mean high water.⁵ Second, the state is not asserting jurisdiction over the land in this case, and we therefore assume that the land is privately owned.⁶

In response to your first question, we conclude that the city may zone a privately owned canal bed,⁷ although the city may not enforce its zoning regulations so as to interfere with the public's use

²(...continued)

inlet, estuary, or inland water within the tidewater limits, and any land lying beneath the body of water"

³The School Land Board, with the assistance of the General Land Office, manages coastal public land, which includes "all or any portion of state-owned submerged land." See Nat. Res. Code §§ 33.004(1), (3), (6) (defining "land office," "Board," and "coastal public land"), .011 (requiring School Land Board to administer Natural Resources Code ch. 33), .012 (requiring General Land Office to assist School Land Board). Any owner of adjacent littoral land who desires to acquire an easement in the surface estate in coastal public land must obtain a permit from the School Land Board. See *id.* §§ 33.101, .103, .111(a), .112.

⁴In fact, the letter from the General Land Office to the city states that a permit from that office is unnecessary because the "project will not affect state-owned land." Letter from Garry Mauro, Commissioner, General Land Office, to Gary E. Stone, City Manager, City of Freeport (Mar. 25, 1997) (on file with Opinion Committee).

⁵*Cf. Generally Luttet v. State*, 324 S.W.2d 167 (Tex. 1958).

⁶The General Land Office's preliminary finding and our assumption here are not equivalent in any sense to a final or binding conclusion that the land is privately owned.

⁷See *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982) (stating that zoning regulation is recognized tool of community planning, allowing municipality to restrict use

(continued...)

of the water.⁸ Local Government Code section 211.003(a) authorizes a municipal governing body to reasonably regulate, for example, the size of buildings and other structures; the percentage of a lot that may be occupied; and the location and use of structures and land.⁹ The city's zoning regulations must, however, be adopted in accordance with the city's comprehensive plan¹⁰ and must be designed to accomplish one of the purposes listed in section 211.004(a), such as providing adequate light and air; facilitating the adequate provision of public requirements; or promoting the general welfare. Aesthetic considerations may enter into an analysis of the "general welfare."¹¹

Likewise, in response to your second question, we conclude that the city may exercise other, nonzoning police powers against a privately owned canal bed. Of course, as we suggested above, the city may not exercise its powers so as to interfere with the public's right to use the water.¹² You indicate that the city is a home-rule city. The city therefore has "full power of local self-government,"¹³ limited only by the city's charters, the state and federal constitutions, or general law.¹⁴ Moreover, the city may enforce its ordinances "to protect health, life, and property and to preserve the good . . . order, and security of the municipality and its inhabitants."¹⁵ Additionally,

⁷(...continued)

of private property). If the land below mean high water is, in fact, state-owned, the city may not enforce its police power regulations against the state. See Attorney General Opinion JM-117 (1983) at 2-3; see also *Port Arthur Indep. Sch. Dist. v. City of Groves*, 376 S.W.2d 330, 332 (Tex. 1964) (concluding from examination of out-of-state precedents that municipal police powers are not enforceable to regulate state or state's property). We are not aware of any statutory provision explicitly directing that state land is subject to municipal police power regulations, either in Local Government Code chapter 211, which authorizes a municipality to regulate zoning, see Local Gov't Code §§ 211.001, .003., or elsewhere. By contrast, nothing forbids the state from complying with municipal regulations if the state chooses to do so.

⁸See *Diversion Lake Club v. Heath*, 86 S.W.2d 441, 446 (Tex. 1935). Nor, we think, may the private landowner use his or her canal bed in such a way to interfere with public use of the water. See *id.*

⁹See *Bell v. City of Waco*, 835 S.W.2d 211, 214 (Tex. App.--Waco 1992, writ denied) (stating that person seeking to invalidate zoning ordinance must show that ordinance does not substantially relate to community health, safety, morals, or general welfare). We express no opinion here as to the validity of any particular city zoning regulation.

¹⁰See *City of Waxahachie v. Watkins*, 265 S.W.2d 843, 845 (Tex. Civ. App.--Waco 1954), *rev'd on other grounds*, 275 S.W.2d 477 (Tex. 1955) (defining "comprehensive zoning" and stating that comprehensive zoning is necessary prerequisite to original and amendatory zoning ordinances).

¹¹See *Connor v. City of Univ. Park*, 142 S.W.2d 706, 712 (Tex. Civ. App.--Dallas 1940, writ ref'd).

¹²See *supra* note 7 and accompanying text.

¹³Local Gov't Code § 51.072(a).

¹⁴See *International Ass'n of Fire Fighters v. City of Baytown*, 837 S.W.2d 783, 788 (Tex. App.--Houston [1st Dist.] 1992, writ denied).

¹⁵Local Gov't Code § 54.004.

the city may define and prohibit nuisances within the city limits and may act to prevent or remove nuisances.¹⁶

Parks and Wildlife Code section 31.092(a) does not limit the city's authority to exercise its police powers, including the power to regulate zoning or nuisances, over a privately owned canal bed. Rather, that section authorizes the city to regulate, in a specified way, the use of public water within the city limits. The city's authority to regulate the use of the public water differs from the city's authority to regulate the use of privately owned land under the public water. Courts have distinguished ownership of a body of water from ownership of the soil underneath the water.¹⁷ Furthermore, a Texas court has explained that a canal built "on private property, constructed and maintained with private funds" may have public waters flowing through it.¹⁸ You indicate that the water in the canal is connected, via the Intracoastal Canal, to the Gulf of Mexico and is subject to the ebb and flow of Gulf waters. As this office previously has stated, a waterway connected to and subject to the ebb and flow of the tides of the Gulf of Mexico is public water.¹⁹

S U M M A R Y

A municipality may exercise zoning or other police powers over a privately owned canal bed, although the municipality may not interfere with the public's use of the public waters.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

¹⁶See *id.* § 217.042.

¹⁷See *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 63 (Tex. App.--Corpus Christi 1993, writ denied) (and cases cited therein); Attorney General Opinion M-1210 (1972) at 3.

¹⁸See *Natland Corp.*, 865 S.W.2d at 64 ("[T]here is some out-of-state authority to suggest that a canal on private property, constructed and maintained with private funds and used for private purposes, is a private canal subject to private control. . . . However, the rationale of *Diversion Lake Club* suggests that such a canal in Texas would not be subject to exclusive private use so long as public waters flowed through it.").

¹⁹See Attorney General Opinions DM-169 (1992) at 2, M-1210 (1972) at 3.