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TEXAS HISTORICAL COMMISSION

P.O. BOX 12276

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January 18, 1991

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The Honorable Dan Morales
Attorney General of Texas
7th Floor, Supreme Court Building
14th and Colorado
Austin, TX 78701

Opinion Committee
ATTORNEY GENERAL'S OFFICE
GENERAL LITIGATION DIVISION

Re: Opinion Request

Dear Mr. Morales:

The Texas Historical Commission's (hereinafter "Commission") enabling act gives the Commission the authority to "accept a gift, grant, devise, or bequest of money, securities, or property to carry out" the Commission's purposes. See TEX. GOVT. CODE ANN. 442.005(p). From time to time and pursuant to such express authorization, the Commission has received certain real property by devise. In that light, my question to you concerns the Commission's authority to decline such a devise of real property.

The particular problem I have identified concerns 37A of the Probate Code. That Code section requires:

A written memorandum of disclaimer disclaiming a present interest shall be filed not later than nine months after the death of the decedent and a written memorandum of disclaimer disclaiming a future interest may be filed not later than nine months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested.

Probate Code 37A(a).

Additionally, it should also be noted that Code section goes on to state:

(b) **Notice of Disclaimer.** Copies of any written memorandum of disclaimer shall be delivered in person to, or shall be mailed by registered or certified mail to and received by, the legal representative of the transferor of the interest or the holder of legal title to the property to which the

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disclaimer relates not later than nine months after the date on which the transfer creating the interest in the disclaiming person is made.

Further, it should be noted that this Probate Code section also expressly sets out the consequences of failing to comply with the strictures of the foregoing Code provisions. Specifically,

Failure to comply with the provisions hereof shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent.
Probate Code 37A

Given all of the foregoing, it would appear that the effect of 37A would be particularly severe as applied to a state agency like the commission. This is so because TEX. CONST. art. III, 51 states:

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever. . . .

Accordingly, it would appear that if the Commission fails to disclaim an interest in real property within nine months of the death of the decedent (or within nine months of the vesting of a future interest), as provided in Probate Code 37A, the Commission may not thereafter attempt to disclaim the property because in that case the disclaimer would function as an assignment prohibited by the TEX.CONST. art. III, 51. Is such a reading correct?

Additionally, I am also interested in determining whether the Commission may sell real property that comes into its possession pursuant to TEX. GOVT. CODE ANN. 442.005(p), and if so, how such a sale could be conducted. In that regard, I see two possible ways such a sale could be conducted.

First, the Texas Preservation Trust Fund may enable the Commission to sell real property. The relevant provision establishing this fund reads:

The fund consists of transfers made to the fund, loan repayments, grants, and donations made for the purposes of this program, proceeds of sales, income earned on money in the fund, and any other money received under this section. TEX. GOVT. CODE ANN. 442.0071(a). The reference to "proceeds of sales" would seem to suggest that the Commission has the authority to conduct sales.

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Second, the Natural Resources Code provides the General Land Office with the authority to sell state property, "if the legislature authorizes a real estate transaction involving real property owned by the state, the division shall take possession and control of the property and shall complete the transaction on behalf of the state". Natural Resources Code 31.158(a). Accordingly, if the legislature passed a bill allowing for a specific property owned by the Commission to be sold, this section appears to detail how such a sale should be carried out.

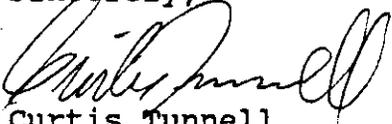
My questions to you are:

1. Does Probate Code 37A apply to the Commission?
2. Would the answer to question 1 change if the earlier versions of 37A were applicable?
3. If 37A does apply to the Commission, would a disclaimer made after nine months from the decedent's death or the vesting of a future interest be barred by TEX. CONST. art. III, 51 as a grant to an individual association, or corporation?
4. If the Commission is not aware that a devise has been made until after nine months has passed since the death of the decedent or the vesting of a future interest, may the Commission disclaim the bequest and not have the disclaimer function as an assignment of the property to those who would have received same had the person attempting the disclaimer died prior to the decedent?
5. Does the Commission have authority to sell real property it receives pursuant to TEX. GOVT. CODE ANN. 442.005(p) under TEX. GOVT. CODE ANN. 442.0071(a) or any other applicable law?
6. If the Commission is given legislative authorization to sell a particular parcel of real property must the sale be conducted by the General Land Office pursuant to 31.158 Natural Resources Code.
7. If 31.158 does not apply to such a sale, is there any other law that details how such a sale is to be made?

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I would appreciate your attention to these matters. As always,
thank you very much.

Sincerely,

A handwritten signature in cursive script, appearing to read "Curtis Tunnell".

Curtis Tunnell
Executive Director