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The Honorable Dan Morales
Attorney General of the State of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

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Opinion Committee

Attention: Opinions Committee

Dear General Morales:

A question has arisen about the authority of the State of Texas to enforce and regulate private waterways under the **Water Safety Act, Title 4, Chapter 21, Parks and Wildlife Code, Vernon's Texas Code Annotated**. This issue has been raised in the City of Corpus Christi by certain coastal residents requesting enforcement and enactment of regulations affecting activities on the waterways within their private subdivision. Given the important policy implications associated with this issue, your opinion is, hereby, requested.

Although there have been previous interpretations which pertain to this issue, there remains uncertainty as to their application to the following facts:

1. A number of exclusive residential subdivisions have been constructed with a series of canals and waterways designed for the exclusive use of the residents.
2. All boat ramps within the subdivision which provide access to the waterways are for the exclusive use of the residents and their guests and have not been dedicated to public use. The Property Owner's Association (POA) conspicuously marks all common areas (i.e. bulkheads, boat ramps) with No Trespassing notices.
3. The plats filed of record except from the dedication to the public all waterways with the following language : "canals and waterways are specifically not dedicated to the use of the public and are not subject to maintenance by the county."

4. All portions of the bed of each canal or waterway are described as under private ownership with portions constituting "water building area" for the benefit of adjacent lot owners and the remaining portions subject to canal easements or held as common areas by the POA.
5. All lots within the subdivision are subject to deed covenants which specifically provide that "No commercial, trade or business activity of any nature shall be carried upon any lot..."
6. No portion of the waterways constitute a part of any previously existing public river, lagoon, bayou, lake, creek, bay, or inlet which may have been considered property of the State of Texas.
7. The waterways have as their only source of water the public water of the State of Texas of the Gulf of Mexico through interconnections with the Laguna Madre.

I draw your attention to **Opinion No. M-1210**, which found that newly created canals or waterways that are affected by the ebb and flow of the tides, and are continuously connected with the tidal waters on the Coast of Texas, are under the jurisdiction, regulation and control of the Parks and Wildlife Department. The question raised by the present case is whether private canals and waterways, especially restricted for the noncommercial use of the neighborhood residents, and specially designated as not dedicated to the public in the plat approval process, continue to be subject to the Water Safety Act. In fact, the county and city have expressly refused to accept such waterways as public right-of-ways. All costs or maintenance for the waterways are absorbed by the POA and payable from funds collected through monthly assessments on each lot. The assessments are established by covenants running with the land and filed in the deed records.

It should be noted that in a previous AG's opinion, the Water Safety Act was construed to apply to a lake on private land that was leased to a city for recreational purposes. **Attorney General Opinion JM-572** holds that "during the duration of the lease to the city and the city's use of the lake as a municipal park, the lake is not privately owned water within the meaning of the Water Safety Act." This infers that upon expiration of the lease and discontinuation of the municipal park, the lake would no longer be subject to the Water Safety Act.

The two leading court holdings on this issue also require some interpretation in their application to these circumstances. In Diversion Lake Club v. Heath, 86 S.W.2d 441 (Tex. Sup. 1935), the premise was established that all "statutory navigable streams in Texas are public streams, and that their beds and waters are owned by the State in trust for the benefit and best interests of all the people, and subject to use by the public for navigation, fishing, and other lawful purposes, as fully and to the same extent that the beds and waters of streams navigable in fact are so owned and so held in trust and subject to such use." Id. at p.445. In that case, the public was held to have the right to fish not only in the water above the original river bed but in the part held under private ownership. This case was further distinguished in Taylor Fishing Club v. Hammet, 88 S.W.2d 127 (Tex. Civ. App. - Waco 1935, writ dismiss'd).

In Taylor Fishing Club v. Hammet, Stammire Lake was used for fishing, camping, and as a general pleasure resort, and for boating with small motorboats. The court held that a lake useful for fishing and as a general pleasure resort by boats of small size is not navigable. Id. at p.130. To be navigable, a lake or pond that has a capacity to float a boat is not necessarily navigable. On the contrary, "it must be of such size and so situated as to be generally and commonly useful as a highway for transportation of goods or passengers between the points connected thereby. It must either alone or in connection with other bodies of water connect points between which it is practical to transport commerce by water." Id. at p.129. Currently, the canals and waterways clearly prohibit any commerce activity and do not connect points which induce transportation of commerce by water.

In addition, where the land is owned by abutting property owners and the land lines are capable of being marked, the court held:

"[W]e think it a sound proposition that an abutting property owner whose field notes cross a nonnavigable lake and who, by virtue thereof, holds title to a specific portion of the bed of the lake, has a right to control that part of the surface of the lake above his and, including the right to fish in or boat upon the water, and that any use or interference therewith by another constitutes an infringement on his rights as such owner." Id. at p.136. See also Reed V. State, 175 S.W.2d 473 (Tex. Civ. App. - Eastland 1943, no writ).

The consequent questions are presented for your opinion:

1. Do the private property owners individually (or the POA for the common areas) have the right to control boating and fishing in the waterways within their subdivision?
2. Regardless of whether the private property owners can control boating and fishing, does the Water Safety Act apply to the waterways?
3. If the Water Safety Act applies, does the City of Corpus Christi have the authority to enact a no-wake ordinance or speed limit on the waterways and canals?

Your prompt consideration of the preceding questions would be greatly appreciated. Please, do not hesitate to call me or my administrative aide, Zandra Zuniga, at (512) 853-4953, if further information is required.

Respectfully submitted,



EDDIE CAVAZOS

Chairman,

House Committee on Insurance