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Opinion Committee

Honorable Dan Morales
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Attn: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

RR-1007

FILE # ML-39808-97
I.D. # 39808

RE: Request for Attorney General's Opinion

On January 17, 1996, the owner of a lot ("the Owner") located in the Bridge Harbor Subdivision ("the Subdivision") of the City of Freeport, Texas ("the City") applied to the Department of the Army, Corp of Engineers, Galveston District, ("the Corps") for authorization to construct a 12' by 30' boat lift, a 12' by 30' boat ramp, a sidewalk and a concrete wall ("the Project") on or in the canal adjacent to such lot ("the Premises"). The canal in question was dredged at the time the Subdivision was developed, it is more than thirty feet in width and connects with the Intracoastal Canal which, in turn, is connected to the Gulf of Mexico by virtue of the Brazos River. On February 22, 1996, the Owner was advised by the Corps that the lift and the ramp were covered by the Corps' Nationwide Permits 236, respectively and as far as the Corps was concerned, the Project could be built per the submitted plans without the need for an additional permit from the Corps. However, the Owner was advised that the proposed structures "above the mean high water line" are not within the jurisdiction of the Corps.

Under the City's Ordinance No. 1100, the Comprehensive Zoning Ordinance, as amended by Ordinance No. 1100-92-1, the Premises is zoned Waterfront Residential (W-1R). Section 7.6A of the Zoning Ordinance contains the following Special Requirements for Decks within the W-1R District Waterfront Single Family Residential area:

- "1) Decks may encroach into the required front yard area to the waters edge/or front lot line.
- "2) The area above and below decks within the required front yard shall be open or unenclosed. Eaves or roof extensions shall not exceed 2 feet into the required front yard area."

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Page 2

The Zoning Ordinance also contains the following provision regarding the front yard area:

“All blocks or lots abutting a waterway, channel or canal within the W-1R District shall establish the front building line as the property line next to the water edge.”

The Owner then applied to the Building Official of the City for a building permit and was advised that a variance would be required from the foregoing provisions of the City's Zoning Ordinance. An application was made to the Board of Adjustment for a variance to the foregoing requirements in order to permit him to construct in the front yard area of his property certain improvements which will be connected to the proposed boat lift and boat ramp. At this point Wallace Shaw was requested to review the application and he expressed the opinion that, inasmuch as the front yard area of the Premises was “above mean high tide”, the Board of Adjustments has authority to grant such a variance provided the Owner's request meets the requirements of Subsection 2c of Section 10 of the Zoning Ordinance and Section 211.009 of the Board of Adjustment is to measure a request for a variance in the provisions of the Zoning Ordinance. However, for reasons explained in the brief which accompanies this request, he advised the Board of Adjustments through the City Manager that the Board did not have jurisdiction over the structure in question “below mean high tide” because (1) the land underlying the waters of the canal in question below mean high tide was “submerged land” within the meaning of Section 33.004(11) of the Natural Resources Code and, therefore, the location of structures thereon was within the exclusive jurisdiction of the State of Texas and (2) the waters of the canal below mean high tide comprised a stream which was either “navigable in law” by virtue of Section 21.001(3) of the Natural Resources Code. The Board determined that none of the proposed structure would be located above mean high tide and dismissed the application for want of jurisdiction.

Thereafter, at the direction of the City Council, prompted by requests from persons owning other lots located in the Subdivision, the City Manager made an inquiry to Garry Mauro, Commissioner of the General Land Office, regarding whether the land under the man made canals in the Subdivision would be treated by Mr. Mauro as “submerged land” and, if so, whether a permit needed to be issued by his office for the Project. The response of Mr. Mauro, dated March 25, 1997, was in Mr. Shaw's opinion, somewhat inconclusive and ambiguous with regard to whether or not such land is “submerged land” but clearly stated that a permit would not be required for the referenced project. Apparently, Mr. Mauro looks at these things on a case by case basis.

Subsequently, on May 2, 1997, Mr. Shaw discussed these questions by telephone with Ellis J. Ortega, the City Attorney for Tiki Island, a Type B general Law Municipality located in

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Page 3

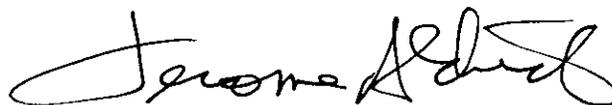
Galveston County which has an extensive system of man made canals which are connected to West Galveston Bay. He advised that Tiki Island did not have a zoning ordinance but controlled its man made canals through "police power" ordinances based on Section 31.092(a) of the Parks and Wildlife Code ("the PWC") and Sections 51.032, 51.035 and 217.022 of the Local Government Code ("the LGC"), the counter-parts for Home Rule Cities being Sections 51.072, 54.004 and 217.041 of the Local Government Code, and Section 5, Article XI of the Texas Constitution. Thereafter, relying on these last cited provisions, the City amended its Code of Ordinances to prohibit construction in the man made canals within the City.

The major distinction between the use of its "police power" viz.-a-viz. its "zoning power" to regulate land use is the former must be clearly justified by "health and safety" needs which need not be grandfathered whereas the latter can be more concerned with meeting "aesthetic" needs of the City if properly grandfathered. However, based on Mr. Shaw's reading of 101A C.J.S., Zoning & Land Planning, Section 7, p. 41, and the opinion there cited, *Erbsland vs Vecchiolla*, 313 N.Y.S. 2nd 576, the zoning power of a municipality does not extend to navigable waters within the corporate limits of the municipality. Although *Erbsland vs Vecchiolla* is a New York case, the Zoning Enabling Act, now codified as Chapter 211 of the Local Government Code, is a "uniform act" and, therefore, out-of-state cases construing the terms thereof are authoritative in Texas. Section 311.028, Government Code.

Therefore, I submit to you for consideration and opinion the following questions:

1. Does the City have jurisdiction to exercise the "zoning powers" delegated to it by the Zoning Enabling Act, now codified as Chapter 211 of the LGC, below mean high tide in man made canals within the corporate limits of the City?
2. In exercising its "police powers" in man made canals within the corporate limits of the City, is the City limited to the specific activities described in Section 31.092(a) of the PWC or, being a Home Rule City, may the City rely upon Sections 51.072, 54.004 and 217.041 of the LGC, and Section 5, Article XI of the Texas Constitution to expand the scope of its regulations beyond those specifically mentioned in Section 31.092(a) of the PWC?

Sincerely yours,



JEROME ALDRICH

JA/jkb

Brief in Connection with Request for A.G. Opinion

“Navigable waters” in Texas include those streams which are “navigable in fact” under 15 USC Section 796(8) as well as streams which are “navigable in law” by virtue of Section 21.001(3) of the Natural Resources Code (The “NRC”). The former are streams which “... by themselves or their connection with other waters form or afford a continuous channel or highway for commerce among the states or with foreign countries, or which may be made available for such purpose at reasonable cost.” The latter are defined as streams which “... retain an average width of thirty feet from the mouth up: and are considered “navigable in law” even if not “navigable in fact”. *Hogue vs Glover*, 302 S.W.2nd 75 (Tex. Civ. App., Waco, 1957, writ ref’d, n.r.e.).

The significance of the statement that a stream may be “navigable in law” without being “navigable in fact” (which might otherwise appear to be merely legal sophistry) is that it permits statutorily navigable, to remain in the state in trust for the public. *Carithers vs Terramar Beach Community Improvement Association*, 645 S.W.2nd 772 (Tex., 1983, cert. den’d 464 U.S. 981). Thus, the state retains title to all streams, whether “navigable in fact” or merely “navigable in law”, in order to preserve the enjoyment and use of all such streams by the public. *Diversion Lake Club vs Heath*, 86 S.W.2nd 441 (Tex., 1935). Further, the Attorney General has ruled that this “ownership” by the state extends not only to the water but also to the bed, subsurface, minerals and aquatic wildlife of natural rivers and streams that are navigable, whether “navigable in fact” or merely “navigable in law”. *Op. Atty. Gen.*, 1971, No. M-953. Also of interest to our present discussion is the case of *Vieux Carre Property Owners, Residents & Associates, Inc. vs Brown*, 875 F.2nd 453 (5th Cir., La, cert. den’d 107 L.Ed2nd 739), which held that, where a man-made channel had changed a peninsula into an island completely surrounded by navigable water, the man-made channel became water that was navigable in fact; *Op. Atty. Gen.*, 1972, No. M-1210, where the Attorney General ruled that the water and fish in newly created canals and waterways, created by dredging from state bays into and over private property, were the property of the state by virtue of the definitions contained in what is now Section 11.021 of the Water Code and Section 1.011 of the Park and Wildlife Code; and *Op. Atty. Gen.*, 1973, No. H-68, where the Attorney General ruled that where private property is submerged as a result of the construction of a lake, a waterway, etc., in the absence of some special provision affecting title to such private property (e.g., the fee title to it is conveyed to or otherwise acquired by the state before such property is submerged), it remains private property and subject to the rules against trespass, but persons using the tidal waters above such property after it is submerged do not commit a trespass so long as they do not use the adjoining unsubmerged private property as a means of access. Thus, it seems clear to me that the canal adjacent to Premises and in which the Owner proposes to construct the Project is a “navigable stream” within the meaning given to that term by the above cited court cases and opinions of the Attorney General.

The dividing line between state ownership of submerged land and private ownership of the adjoining dry land is the line mean high tide. *City of Corpus Christi vs Davis*, 622 S.W.2nd 640 (Tex. Civ. App., Austin, 1981, writ ref’d, n.r.e.).

Having annexed the area which includes the Subdivision, all of such area (except the canals below mean high tide) clearly became subject to the Comprehensive Zoning Ordinance of the City. *Huguley vs Board of Adjustment.*, 341 S.W.2nd 212 (Tex. Civ. App., Dallas, 1960). However, unlike the rights-of-ways of public streets and roadways on the "dry land" which, within the limits of incorporated cities, are held in trust for the benefit of the public by the city viz.-a-viz., the state, (See Section 311.011, land regardless of its location. See *City of Galveston vs Mann*, 143 S.W.2nd 1028 (Tex., 1940), and *City of Corpus Christi vs Davis*, supra. The state exercises its ownership of "coastal public land" through the provisions of Chapter 33 of the NRC and the administrative decisions of the School Land Board adopted pursuant thereto. See Section 33.011 of the NRC.

Of importance to our discussion are the following definitions found in Section 33.004 of the NRC:

- "(5) 'Coastal public land' means the geographic area comprising all the counties in Texas which have any tidewater shoreline, including that portion of the bed and water of the Gulf of Mexico within the jurisdiction of the State of Texas.
- "(6) 'Coastal public land' means all of any portion of state-owned submerged land, the water overlying that land, and all state-owned islands or portions of islands in the coastal area.
- "(7) 'Island' means any body of land surrounded by the water of a saltwater lake, bay, inlet estuary, or inland body of water with the tidewater limits of this state and shall include man-made islands resulting from dredging or other operations.
- "(8) 'Seaward' means the direction away from the shore and toward the body of water bounded by the shore.
- "(9) 'Structure' means any structure, work or improvement constructed on, affixed to, or worked on coastal public land, including fixed or floating piers, wharves, docks, jetties, groins, breakwaters, artificial reefs, fences, posts, retaining walls, levees, ramps, cabins, houses, shelters, landfills, excavations, land canals, channels, and roads.
- "(10) 'Submerged land' means 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, inlet, estuary, or island water within the tidewater limits, and any land lying beneath the body of water, but for the purposes of this chapter only, shall exclude beaches bordering on and the water of the open Gulf of Mexico and the land lying beneath this water.

"(11) 'Littoral owner', in this chapter only, means the owner of any public or private upland bordered by or contiguous to coastal public land."

The City was authorized by what is now Section 43.021 of the Local Government Code ("the LGC") and Section 1.03 of its Home Rule Charter to annex the territory which includes the Subdivision and did in fact annex such territory by Ordinance No. 1474, read, passed and adopted on October 20, 1980. The area became part of and subject to the jurisdiction of the City on that date. *Id.* However, while through annexation the general police power of replace the power of the state to control the construction of structures on such land. See *City of Galveston vs Mann*, *supra*. Further, Chapter 33 of the NRC and the administrative regulations of structures, as defined above, upon submerged land, as defined above. Thus, it is clear that the Legislature does not intend for a municipality to participate in the making of decisions regarding the placement of structures on submerged land. By virtue of Article I, Section 8, clause 3 (the "commerce clause") of the U.S. Constitution, the federal government's exercise of its power over waters that are "navigable in fact" within the meaning of 15 USC Section 796(8) preempts state action unless federal consent is obtained by law. *Union Water Supply Corp. of Garciasville vs Vaughn*, 355 F.Supp. 211 (D.C., 1972); *Op. Atty. Gen.*, 1970, No. M-735. Thus, it would appear that the Owner needs a permit from the State of Texas in addition to his permit from the Corps to construct the Project in the canal, which is "submerged land" and that the City is preempted from exercising its "zoning powers" therein because of the comprehensive regulation of "submerged land" by the State of Texas pursuant to Chapter 33 of the NRC.

The City may control water safety aspects of the man made canals in the Subdivision through "police power" ordinances based on Section 31.092(a) of the Parks and Wildlife Code ("PWC"). While the Legislature has preempted the water safety area, by Section 31.092(a) of the PWC it has specifically delegated to municipalities a the power to regulate certain aspects of that subject. Likewise, the Legislature has preempted zoning by the enactment of the Zoning Enabling Act, now codified as Chapter 211 of the LGC, but allows municipalities to participate to the extent its actions are specifically delegated therein. This seems to be the basis upon which *Erbsland vs Vecchiolla*, 313 N.Y.S. 2nd 576 was decided. The appellate court ruled that the State power to adopt zoning regulation for navigable waters within its corporate limits and, therefore, the City of Rye had no jurisdiction to regulate such waters by means of the exercise of its zoning powers. In the absence of decisions from the appellate courts of Texas, the Zoning Enabling Act being a "uniform act", *Erbsland vs Vecchiolla* should be followed in the State of Texas. Section 311.029 of the Government Code; *Hunter vs. Whiteaker & Washington*, 230 S.W. 1096 (Tex. Civ. App., 1921), writ ref'd; *Clem vs Chapman*, 262 S.W. 168 (Tex. Civ. App., 1924) writ ref'd, 114 Tex. 582, 278 S.W. 114; *Southwestern Investment Co. vs American National Bank*, 374 S.W.2nd 318 (Tex. Civ. App., Amarillo, 1963) writ ref'd, n.r.e.; and *In Re Estate of Corrigan*, 517 S.W.2nd 817 (Tex. Civ. App., Tyler, 1974).