



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

June 13, 2023

Mr. Mark Wolfe  
Executive Director  
Texas Historical Commission  
Post Office Box 12276  
Austin, Texas 78711-2276

**Opinion No. JS-0002**

Re: Questions related to the ownership of the Texas Revolution and Texas Civil War centennial markers and what state agency, if any, is responsible for the preservation and maintenance of the markers (RQ-0491-KP)

Dear Mr. Wolfe:

You ask whether two particular sets of historical markers are state-owned resources and what state agency is responsible for the preservation and maintenance of the markers.<sup>1</sup> You tell us the two types of markers at issue are: (1) “those that were installed as part of the celebration of the centennial of the Republic of Texas” (“Republic Markers”); and (2) “those that were installed as part of the commemoration of the centennial of the Civil War” (“Civil War Markers”). Request Letter at 1. You indicate that both the Republic Markers and Civil War Markers (collectively, “Markers”) were “state-owned resources” when they were installed, but in some instances were installed on private property without an identifiable agreement with the property owner.<sup>2</sup> *Id.* at 2–3.

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<sup>1</sup>See Letter from Mark Wolfe, Exec. Dir., Tex. Hist. Comm’n, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–4 (Dec. 15, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0491KP.pdf> (“Request Letter”).

<sup>2</sup>Specifically, you explain that in the 1930s, the Commission of Control, through the former State Board of Control, created and installed the Republic Markers. See Request Letter at 1–2. You further explain that the Republic Markers “were placed on state property, but also on municipal and county land, and some can be found on privately-owned property” but you are “not aware if there were agreements with property owners at the time the markers were placed.” *Id.* at 2. You tell us additional Republic Markers were installed in the 1950s–60s by the former State Building Commission. *Id.*

You explain the Civil War Markers were manufactured and installed by the State Building Commission. *Id.* at 3. You say that when those “markers were placed on private property, it appears that an agreement for the placement (continued...)

You explain that the Texas Historical Commission (“Historical Commission”) has received complaints from Texans about the poor condition of some of the Markers and about the recent destruction of a Civil War Marker located on private property.<sup>3</sup> *Id.* at 4. You assert that the Texas Facilities Commission (“Facilities Commission”), “successor to the agency that created and installed” the Markers, is responsible for their maintenance.<sup>4</sup> *Id.* at 3–4. You tell us that the Historical Commission and the Facilities Commission discussed the fact that “no state agency is properly maintaining” the Markers. *Id.* at 4. We understand that, after various meetings, the two state agencies did not reach a resolution on the matter.<sup>5</sup> You acknowledge that the Historical Commission has taken some responsibility for the Markers “through the rule-making process,” by repairing damaged Markers when resources were available, and by indicating on its website that the Historical Commission “coordinate[s] the repair or relocation of these markers when necessary.” *Id.* However, you say the Historical Commission only took these actions because it “felt that someone needed to do something and no other state agency appeared willing to accept responsibility for these markers.” *Id.*

At the outset we note that to the extent there is an agreement between the State and a private landowner regarding a particular marker it may address the issues you raise. *See id.* at 3 (explaining that when Civil War Markers “were placed on private property, it appears that an agreement for the placement was obtained from the property owner”). You do not provide any such agreement, nor do you provide information about the specific provisions of such an agreement. *See id.*; *see also* Tex. Att’y Gen. Op. No. KP-0350 (2021) at 2 (explaining “this office does not ordinarily construe contracts” in the opinion process). Thus, we will address your questions in general terms and not as to any specific marker.

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was obtained from the property owner. But those agreements were not recorded, and location information was quite vague.” *Id.*

In addition to these facts, the manner in which you frame the Historical Commission’s position—that the Markers *continue* to be state property—indicates that they were state-owned resources when they were installed. *See id.* at 3–4; *see also* Tex. Att’y Gen. Op. No. GA-0659 (2008) at 3 n.5 (“To answer a requestor’s questions of law . . . we assume that the requestor’s description of the facts is correct.”).

<sup>3</sup>There are processes through which a private property owner may seek the removal of certain landmarks and markers from their property. *See* TEX. NAT. RES. CODE § 191.097 (providing for removal of a landmark designation); 13 TEX. ADMIN. CODE §§ 21.13 (Tex. Hist. Comm’n, Removal of Markers and Monuments), 26.28 (Tex. Hist. Comm’n, Removal of Designations for Privately or Publicly Owned Landmarks).

<sup>4</sup>We take notice that the Facilities Commission’s failure to maintain the Markers may not be due to anything other than the fact that they are diligently working on maintaining the elevators in the state-owned office buildings in Austin, and as soon as they get the majority of copious number of inoperable elevators working at least a substantial portion on the business days, the Facilities Commission may find time to maintain the Markers.

<sup>5</sup>*See Minutes Quarterly Meeting*, TEX. HIST. COMM’N at 10 (Oct. 18, 2022), *available at* [https://www.thc.texas.gov/public/upload/pdf/meetings/Qtly\\_Mtg\\_Jan\\_2023.pdf](https://www.thc.texas.gov/public/upload/pdf/meetings/Qtly_Mtg_Jan_2023.pdf) (providing that Chairman Nau reported that a resolution regarding the maintenance of the Markers “had not been reached through various meetings with the” Facilities Commission).

**To the extent ownership of the Markers has not been lawfully transferred to another party, they remain the property of the State.**

You first seek confirmation that the Markers continue to be “state-owned resources” when located on private property.<sup>6</sup> Request Letter at 3–4. Under article III, section 51 and subsection 52(a) of the Texas Constitution, a state agency is prohibited from making an outright grant of the state’s property.<sup>7</sup> *See Rhoads Drilling Co. v. Allred*, 70 S.W.2d 576, 582 (Tex. [Comm’n Op.] 1934) (discussing, among others, section 51 of the Texas Constitution); Tex. Att’y Gen. Op. Nos. KP-0097 (2016) at 4 (explaining that article III, section 51 and subsection 52(a) prohibit the Texas Commissioner of Education from granting public property), GA-0894 (2011) at 2 (providing “[a]rticle III, sections 51 and 52 of the Texas Constitution are complementary provisions limiting the Legislature’s appropriation of public funds and resources for private purposes, either directly or by authority vested in an agency or local entity”). And even when it is otherwise constitutional, a state agency or official’s power to convey state property may be exercised only under the Legislature’s statutory authorization. *See Conley v. Daughters of the Republic*, 156 S.W. 197, 200 (Tex. 1913) (“[The Legislature] may acquire property, real or personal, by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the state in respect to its property rights is vested in the Legislature[.]”). As a result of these limitations, a court would likely conclude the placement of a state-owned historical marker on private land does not divest the marker of its public character. To the extent ownership of the Markers has not been lawfully transferred, a court would likely conclude they remain the property of the State.

Assuming the Markers continue to be state-owned resources, we next consider what state agency, if any, is responsible for the maintenance of the Markers.

**The Facilities Commission is responsible for the maintenance of the Markers.**

The Facilities Commission “is the custodian of all state personal property” and is responsible for the proper care and protection of such property “from damage, intrusion, or improper use.” TEX. GOV’T CODE § 2165.001(a)(2), (3); *see also id.* § 2165.0011 (providing the term “commission” in chapter 2165 means the Facilities Commission). Additionally, it has certain responsibilities related to monuments, memorials, and historic sites. *See id.* §§ 2166.501–.503 (subchapter K); *see also id.* § 2166.001(1-a) (providing that the term “commission” in chapter 2166 means the Facilities Commission). Relevant here, Government Code section 2166.501 provides as follows:

- (a) A monument or memorial for Texas heroes of the Confederate States of America or the Texas War for Independence or to

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<sup>6</sup>The Historical Commission’s rules provide that the Markers are property of the State of Texas. *See* 13 TEX. ADMIN. CODE §§ 21.10 (Tex. Hist. Comm’n, Ownership of Official Texas Historical Markers) (“All Official Texas Historical Markers are the property of the State of Texas . . .”), 21.3(5) (Tex. Hist. Comm’n, Definitions) (defining “Official Texas Historical Markers” to “include centennial monuments the State of Texas awarded in the 1930s; Civil War Centennial monuments from the 1960s; medallions, plaques and markers the commission’s predecessor, the Texas State Historical Survey Committee, awarded beginning in 1953”).

<sup>7</sup>Accordingly, state law provides that a person may not entrust state property to any person “if the property is not to be used for state purposes.” TEX. GOV’T CODE § 2203.004.

commemorate another event or person of historical significance to Texans and this state may be erected on land owned or acquired by the state or, if a suitable contract can be made for permanent preservation of the monument or memorial, on private property or land owned by the federal government or other states.

(b) The graves of Texans described by Subsection (a) may be located and marked.

(c) The commission shall maintain a monument or memorial erected by this state to commemorate the centenary of Texas' independence.

(d) Before the erection of a new monument or memorial, the commission must obtain the approval of the Texas Historical Commission regarding the form, dimensions, and substance of, and inscriptions or illustrations on, the monument or memorial.

*Id.* § 2166.501. And section 2166.502 provides that “[t]he commission may negotiate and contract with the Texas Historical Commission to assist and advise the commission with regard to the . . . proper monuments and memorials to be erected, repaired, or moved to new locations[.]” *Id.* § 2166.502(1).

The Legislature did not define the terms “monument or memorial” for purposes of Government Code sections 2166.501 or 2166.502 and so we consider their common meanings.<sup>8</sup> *See City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 183 (Tex. 2022) (“When determining a statutory term’s common, ordinary meaning, we typically consult dictionaries.”) “Monument” commonly means a “statue, building, or other structure erected to commemorate a famous or notable person or event” or “a statue or other structure placed by or over a grave in memory of the dead.” NEW OXFORD AMERICAN DICTIONARY 1134 (3d ed. 2010). “Memorial” commonly means “something, esp[ecially] a structure, established to remind people of a person or event.” *Id.* at 1092. You describe the Republic Markers as commemorating “the centennial of the Republic of Texas” and being either “gray granite and stand[ing] approximately 5 feet tall” or “smaller pink granite blocks” with text and bronze details. Request Letter at 1. You say some “mark the graves of Texans who played a role in the revolution . . .” *Id.* You describe the Civil War Markers as commemorating “the centennial of the Civil War” and as being “similar in size, shape and materials to the [Republic Markers], but are pink in color rather than gray.” *Id.* at 1, 3. A court would likely conclude the Markers constitute a “monument or memorial” under the common meaning of those terms as used in sections 2166.501 and 2166.502. As a result, a court would likely conclude the Facilities Commission is responsible for maintenance of the Republic Markers under the express terms of subsection 2166.501(c). *See* TEX. GOV’T CODE § 2166.501(c) (charging

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<sup>8</sup>Government Code section 2166.5011 defines “monument or memorial” but only for purposes of that section. *See* TEX. GOV’T CODE § 2166.5011 (providing for the removal, relocation, or alteration of a monument or memorial and defining those terms to mean “a permanent monument, memorial, or other designation, including a statue, portrait, plaque, seal, symbol, building name, or street name, that” is on state property and honors a Texas citizen for military or war-related service).

the Facilities Commission with maintaining “a monument or memorial erected by this state to commemorate the centenary of Texas’ independence”).

The Legislature did not expressly require the Facilities Commission to maintain the Civil War Markers as it did with the Republic Markers in Government Code subsection 2166.501(c). *See id.* But subsection 2166.501(a) includes within the Facilities Commission’s general authority monuments and memorials for “Texas heroes of the Confederate States of America” and any “event or person of historical significance to Texans and this state . . .” *Id.* § 2166.501(a). Such authority likely includes the Civil War Markers. And the Legislature specified that the Historical Commission’s role in relation to the repair of those monuments and memorials is to assist and advise the Facilities Commission. *See id.* § 2166.502(1) (authorizing the Facilities Commission to “negotiate and contract with the Texas Historical Commission to assist and advise the commission with regard to the . . . proper monuments and memorials to be erected, repaired, or moved to new locations”); *see also id.* § 2166.501(d) (providing that the Historical Commission must approve “the form, dimensions, and substance of, and inscriptions or illustrations on, the monument or memorial”); *Bacon v. Tex. Hist. Comm’n*, 411 S.W.3d 161, 164 n.6 (Tex. App.—Austin 2013, no pet.) (discussing the relationship between the Historical Commission and Facilities Commission). That the Facilities Commission is authorized to go to another state agency for assistance and advice in relation to repairs indicates that it is also responsible for repairs to the Civil War Markers.

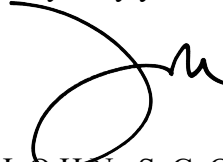
Yet you tell us the Historical Commission has assumed some responsibility for the maintenance of the Markers. *See* Request Letter at 4. We do not doubt that a court would conclude the Historical Commission has authority to undertake that task. For instance, the Historical Commission must “provide leadership and coordinate services in the field of archeological and historic preservation.” TEX. GOV’T CODE § 442.003. In addition, the Historical Commission is authorized to designate a marker as an official State historical marker and has, in fact, designated the Markers as such. *Id.* § 442.006(c) (“The commission shall designate an approved marker as an Official Texas Historical Marker.”); 13 TEX. ADMIN. CODE § 21.3(5) (Tex. Hist. Comm’n, Definitions). And, as noted above, the Historical Commission is authorized to assist the Facilities Commission with regard to the repair of monuments and memorials. *See* TEX. GOV’T CODE § 2166.502. That a court would likely find that the Historical Commission has authority to undertake maintenance of the Markers does not mean the Historical Commission is tasked with that responsibility in the first instance. Rather, the Legislature charged the Facilities Commission with maintaining the Markers by assigning it the role of custodian of state property, giving it express responsibilities as to the Republic Markers, and authorizing it to repair monuments and memorials. *See id.* §§ 2165.001(a)(2), (3) (making the Facilities Commission “the custodian of all state personal property” and responsible for the proper care and protection of such property “from damage, intrusion, or improper use”), 2166.501(c) (providing the Facilities Commission “shall maintain a monument or memorial erected by this state to commemorate the centenary of Texas’ independence”), 2166.502(1) (authorizing the Facilities Commission to “negotiate and contract with the Texas Historical Commission to assist and advise the commission with regard to the . . . proper monuments and memorials to be erected, repaired, or moved to new locations”).

**S U M M A R Y**

Article III, sections 51 and 52 of the Texas Constitution prohibits a state agency from making an outright grant of state property. A state agency's conveyance of state property must be authorized by the Legislature. To the extent ownership of the historical markers commemorating the centennial of the Republic of Texas and the Civil War has not been lawfully transferred to another party, the markers remain the property of the State of Texas.

Pursuant to Government Code section 2165.001, the Texas Facilities Commission is the custodian of state property and responsible for the proper care and protection of such property. And under Government Code sections 2166.501 and 2166.502, the Facilities Commission has responsibility for certain monuments and memorials. As a result of those duties, a court would likely conclude the Texas Facilities Commission is charged with maintaining the historical markers commemorating the centennial of the Republic of Texas and the Civil War.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Scott", with a large, stylized loop at the beginning and a flourish at the end.

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