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Opinion Committee

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November 3, 1999

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RQ-0143-JC

Honorable John Cornyn
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-41096-99
I.D. # 41096

Re: Opinion Concerning the Authority and Power of the Port of Bay City Authority of Matagorda County, Texas to Release and/or Convey Easements to Adjoining Landowners

Dear Opinions Chairman:

An opinion is requested on behalf of The Port of Bay City Authority of Matagorda County, Texas, hereinafter "Port of Bay City" or "Port Authority," concerning the authority and the procedures to release and/or convey easements along the Colorado River.

The Port of Bay City is an Article XVI, section 59, Navigation District in Matagorda County, Texas. It presently operates as a self-liquidating district under Chapter 63 of the *Texas Water Code*. In the early 1960s Matagorda County acquired and later transferred to the United States acting through the Army Corps of Engineers, four (4) perpetual right of way "easements," hereinafter called the "easements," along the east bank of the Colorado River several miles north of the Gulf Intercoastal Waterway. The easements allow the United States of America through the Army Corps of Engineers to construct, maintain or improve the Colorado River channel of the Gulf Intercoastal Waterway and gives to the United States of America the right to enter upon, dig or cut away and remove all or a portion of the east bank of the Colorado River for the purpose of deepening and widening the river channel for navigation.

After Matagorda County acquired the easements, the fee interest in the real estate along the east bank of the Colorado River where the easements exist was subdivided and lots sold. Many residences and improvements now exist on the subdivided lots where the easements are located. The easements are of various depths and affect the lots differently depending on the location. Some of the easements touch some lots by only several feet and some of the easements extend for almost 100 feet from the river on other lots. There are as many as 180 property owners whose fee interest is encumbered with the easements. The lot owners whose property is affected by the easements have requested a release and/or conveyance of the easements.

The Corps of Engineers is currently studying whether it will agree to the property owners' request. The Corps of Engineers has indicated if it does not foresee the need for the easements in the future, the

Corps will convey the easements to the Port of Bay City for disposition. Assuming the easements will be conveyed to the Port of Bay City by the Corps of Engineers, the Port Authority questions its legal authority and the procedures which should be used for the conveyance of the easements. The Port Authority asks the following questions:

1. Does the Port Authority have the authority to accept the conveyances from the Corps of Engineers?
2. Under what authority may the Port Authority convey an interest in land?
3. Are the easements such a "property interest" or "thing of value" that require the Port Authority to obtain consideration for the release or conveyance of the easements?
4. Does § 272.001 of the *Texas Local Government Code*, which sets forth the procedures and requirements for sale of land by political subdivisions, apply to the proposed conveyances?
 - a. If the Port Authority acts under § 272.001 of the *Texas Local Government Code*, must the Port Authority advertise and solicit public bids for the proposed sale of the easements?
 - b. Asking in the alternative, and conditioned on there being no exemption under § 272.001(b)(1), must the Port Authority obtain an appraisal of the value of the easements as a whole or as to each lot that is affected by the easements or is an appraisal not required if property is sold to abutting property owners?
 - c. Asking in the alternative, and conditioned on there being no exemption under § 272.001(b)(1) and appraisals are required, can the Port Authority pass the costs of the appraisals and administrative expenses, including the costs of a deed, on to the property owners and/or property owners association as a part of the expense of the conveyance and/or releases?

Legal Authorities and Arguments

Restated Question 1. Does the Port Authority have the authority to accept the conveyances from the Corps of Engineers?

The Port Authority is governed by several provisions of constitutional and statutory law: Article XVI, section 59 of the Texas Constitution; applicable general law provisions in the Texas Water Code; and the special acts enabling the authority. Except for those subchapters that expressly limit their application to navigation districts of a particular functional or population description, Chapter 60 of the Water Code applies to all navigation districts and Chapter 62 of the *Texas Water Code* applies to navigation districts created under Article XVI, section 59 of the *Texas Constitution*. Chapter 63 of the Water Code applies to self-liquidating navigation districts, which includes all districts operating under article XVI, § 59 of the

constitution that have "voted bonds but have not issued or disposed of the bonds." Tex. Att'y Gen. LA-92-49 (1992)(citations omitted).

The Port Authority derives its powers at large from the constitution and specifically from the statutes governing the discharge of its duties. Op. Tex. Att'y Gen. Nos. JM-742 (1987); JM-258 (1984); M-171 (1967). The authority may exercise either those powers which are expressly delegated to it or are clearly implied from the express powers. *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Manor*, 142 S.W.2d 945, 946 (Tex. 1940). Implied powers are those that are "indispensable to the accomplishment of the purpose" for which the political subdivision was created; powers "merely convenient" or "useful" cannot be implied and may not be assumed by the subdivision. *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Manor, supra* at 946.

A navigation district has authority within its territorial jurisdiction to develop and maintain waterways and port facilities in aid of navigation. Buchanan, *Texas Navigation Districts and Regional Planning in the Texas Gulf Coast Area*, 10 Hous. L. Rev. 533, (1973) at 556. In this broad grant of authority given a navigation district are express powers to purchase land and any type of structure or other facility "incidental to or useful in the operation or development of the district's ports and waterways or in aid of navigation and navigation-related commerce in the ports and on the waterways." TEX. WATER CODE ANN. § 60.101(a); see also TEX. WATER CODE ANN. §§ 62.107(a), 63.153(3), 63.166; see also Tex. Att'y Gen. LA- 92-49 (1992).

Section 63.155 of the Water Code authorizes a Port Authority to acquire property which is necessary for rights of way and necessary for improvements contemplated by Chapter 63, *Texas Water Code*. Whether the property, i.e. the easements, are being acquired for improvements contemplated by the district is a fact question which is not resolved in the attorney general process. The Port Authority can make the determination of whether the property is being acquired for improvements contemplated by Chapters 60, 62, and/or 63 of the *Water Code*. If the property is not being acquired for improvements contemplated by Chapters 60, 62, and/or 63 of the *Water Code*, the Port Authority does not have the right to acquire the property.

Restated Question 2. Under what authority may the Port Authority convey an interest in land?

The only specific grant of authority enabling a self-liquidating Navigation District to sell property is found in Chapter 60, subchapter C, section 60.038 of the Water Code. Subchapter C only applies to a district not participating with the United States in a navigation project. In the past, the Port Authority participated with the United States in the Mouth of the Colorado River Project. This federal project which included local participation was completed in the late 1980's and early 1990's.

Whether the Port Authority is currently participating in a navigation project with the United States is a fact questions which is not resolved in the attorney general process. The Port Authority can make the determination of whether or not it is currently participating in a navigation project with the United States.

If no project with the United States is pending, subchapter C of the Water Code is applicable and sets forth the procedures the Port Authority must follow in selling or leasing surplus land.

If the Port Authority determines it is currently participating with the United States in a navigation project, does any other authority exist which allows the Port Authority to sell its interest in land? Specifically, does § 272.001 of the *Texas Local Government Code*, which sets forth the procedures and requirements for the sale of land by political subdivisions, grant the Port Authority the power to sell its interest in real property or merely establish guidelines to be used in the sale of land?

Restated Question 3. Are the easements such a "property interest" or "thing of value" that would require the Port Authority to obtain consideration for the release or conveyance of the easements?

It would appear that an "easement" is a true property interest that requires consideration for its release or conveyance. *Black's Law Dictionary*, Revised Fourth Edition, defines an easement as "a liberty, privilege, or advantage without profit, which the owner of one parcel of land may have in the lands of another."

An easement is defined in 30 *Tex. Jur. 3rd Deed* § 2 as an interest in land which encompasses certain rights in the land but which does not carry with it title to the estate subject to the easement.

Easements have been recognized as having value and in condemnations suits, damages are awarded for the value of the easements condemned. See *Texas Pipe Line Co. v. Hunt*, 149 Tex. 33, 228 S.W.2d 151 (Tex. 1950); *White v. Natural Gas Pipeline Co.*, 444 S.W.2d 298 (Tex. 1969); 32 *Tex Jur 3rd*, Eminent Domain § 99 fn. Whether an item is a 'thing of value' is a question of fact. See Op. Tex. Att'y Gen. No. DM-268 (1990) and Tex. Att'y Gen. ORD-660 (1999). See also *Kay v. Commissioners Court of Marion County*, 727 S.W.2d 667 (Tex. App. – Texarkana 1987, no writ).

If the easements in question have value, then should consideration be paid for the easement release and/or conveyance? The answer to this question depends upon the construction of article III, section 52(a) of the *Texas Constitution* which provides as follows:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town, or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in and of, or to any individual, association, or corporation whatsoever ..."

Article III, section 52(a) prohibits the giving or granting anything of value to any individual, association, or corporation. Since this section prohibits gifts by governmental entities, such as a navigation district, it would appear that if the easements are "a thing of value" or have value, then consideration will have to be paid or given by the various property owners seeking a conveyance or release of the easements.

Article III, section 52(a) of the *Texas Constitution* appears to prohibit any direct conveyance without consideration to any individual or individual corporation or association whatsoever.

Therefore, question three (3) should be answered that an easement is a "real property interest" or "thing of value" which requires consideration to be paid for the release or conveyance of the easement.

Restated Question 4. Does § 272.001 of the *Texas Local Government Code*, which sets forth the procedures and requirements for sale of land by political subdivisions, apply to the proposed conveyance?

If the Port Authority acts under § 272.001 of the *Texas Local Government Code*, must the Port Authority advertise and solicit public bids for the proposed sale of the easements?

Section 272.001 of the *Local Government Code* Subsection (a) states that unless an exception exists, notice of the offer of the land for sale or exchange must be given to the general public. The notice must also include the procedure by which sealed bids to purchase or exchange may be submitted. Subsection (b) of § 272.001 identifies several exceptions which override the requirement of Subsection (a). Those exceptions are set forth under Subsection (b) as follows:

- (1) narrow strips of land, or land that because of its shape, lack of access to public roads, or small area cannot be used independently under its current zoning or under applicable subdivision or other development control ordinances;
- (2) streets or alleys, owned in fee or used by easement;
- (3) land or a real property interest originally acquired for streets, rights-of-way, or easements that the political subdivision chooses to exchange for other land to be used for streets, rights-of-way, easements, or other public purposes, including transactions partly for cash;
- (4) land that the political subdivision wants to have developed by contract with an independent foundation;
- (5) a real property interest conveyed to a governmental entity that has the power of eminent domain; or
- (6) a municipality's land that is located in a reinvestment zone designated as provided by law and that the municipality desires to have developed under a project plan adopted by the municipality for the zone.

Only § 272.001 (b)(1) arguably applies to the current facts. Paragraph (b)(1) is conditioned upon the land not being independently usable under the current subdivision ordinances or zoning restrictions. The easements in issue could not be sold to third parties and used independently because the current subdivision restrictions affecting the property state that "no dwelling shall be erected or placed on any parcel less than one full lot." Thus, the easements are not usable independently. Determining whether the easements constitute "land that cannot be used independently under its current zoning or under applicable subdivision or other development control ordinances" is a fact question which cannot be answered through the attorney

Honorable John Cornyn

November 3, 1999

Page 6 of 7

general opinion process. However, based on the information provided, there appears to be a basis for the Port Authority to make such a finding under § 272.001 (b)(1).

If § 272.001 applies to the proposed conveyances, then subsection (b)(1) would exempt the Port Authority from the notice and bidding requirements of subsection (a) and that the property could be sold to abutting property that is affected by the easements.

Restated Question 4b. Asking in the alternative, and conditioned on there being no exemption under § 272.001(b)(1), must the Port Authority obtain an appraisal of the value of the easements as a whole or as to each property that is affected by the easements?

Because the easements to be conveyed or released by the Port Authority are different depths and affect the various lots differently, it is logical that the value of the easements are different depending on the depth and width of each easement as applied to each subdivided lot. There does not appear to be any provision in the *Texas Water Code* that would require an appraisal. Section 272.001 of the *Texas Local Government Code*, seems to require an appraisal as a means of determining value, unless the property is sold at a public auction which would conclusively establish the value. Section 272.001(b)(1) also indicates that if the property is sold to abutting property owners, then the property does not have to be sold for fair market value. This would seem to eliminate the requirement of an appraisal altogether. However, if an appraisal is required because the value of each easement is different, Section 272.001 may require a separate appraisal on each easement to determine "fair market value."

Restated Question 4c. Asking in the alternative, and conditioned on there being no exemption under § 272.001(b)(1) and appraisals are required, can the Port Authority pass the costs of the appraisals and administrative expenses including the costs of a deed to the property owners and/or property owners association as a part of the expense of the conveyance and/or releases?

There does not appear to be any legal authority that would prevent the Port Authority from charging an administrative fee and/or passing the cost of an appraisal for the value of the easements through to the ultimate purchaser of the easements. It would seem logical that if the cost of the appraisal, legal, and administrative expenses for the obtaining and preparation of various conveyance documents were to be paid by the Port Authority then the Port Authority would be entitled to a reimbursement from the ultimate purchaser of the easements. No legal authority could be found that would prohibit these expenses being passed through to the persons or entities who acquire the easements.

The Port Authority is seeking the Attorney General's opinion setting out the procedures it should following regarding the conveyance and/or release of these easements. If you have any questions or need any additional information, you may contact me at (409) 244-7645 or you may contact the Port Authority's attorney, Mr. B. Allen Cumbie. His address is 1514 Seventh Street, Bay City, Texas 77414. His telephone number is (409)245-1623, his fax number is (409)245-1146, and his e-mail address is bacumbie@sat.net.

Honorable John Cornyn
November 3, 1999
Page 7 of 7

Thank you for your consideration of these questions.

Very truly yours,



Jill Cornelius, County Attorney
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JC:jlb

cc: Mr. B. Allen Cumbie
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